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Native title funds and the public interest

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As the preamble to the Native Title Act makes clear the Act is a special measure for the advancement and protection of Aboriginal peoples and Torres Strait Islanders, that is intended to enhance the process of reconciliation and to rectify the consequences of past injustice (NTA 1993: preamble). As such it has the intention of beneficial legislation while at the same time facilitating the recognition of a property right. These two do not sit together comfortably.

Like the notion of a treaty or treaties the idea of beneficial legislation raises a question not often asked in public as to what benefit non-Indigenous people will get from such legislation or agreement(s): 'What's in it for us non-Indigenous Australians?'. I don't think that the answer is difficult to arrive at. In its ideal form it would be, 'all is forgiven', erasing the past as the basis for Aboriginal claims against the majority in the future. While this is easily said, it is probably unachievable, not least because to surrender the moral claims against the majority is to lose the most effective hold a small Indigenous minority has over the population at large. Even more problematically there is no way that future generation can be definitively bound by what happens in this one. The limits to future Indigenous claims will come as the influential audience for them declines. At the moment the audience for Aboriginal claims are at a high point although the continuing deferral of a referendum on the constitutional issue seems to be partly based on uncertainty about the strength of that audience among the population at large, although this is not the most important delaying factor.

If achieving an 'all is forgiven', situation is quite unlikely then presumably the more achievable goals of meeting the requirements of natural justice, removing grounds for legitimate complaint, and helping improve people's circumstances are more likely. At the present time a specific focus related to

these goals is the concern with compensation, largely understood in financial terms. Although I know of no study of the expected numbers of native title holders to receive this compensation it seems safe to say that it will be a minority of native title holders as there must be plenty of areas where there have been no compensable acts. But it is not just in this restricted area of native title that it is only a limited number of native title holders that benefit from recognition of their title, but more generally.

Because of modern settlement patterns native title holders are generally only a small proportion of co-residents in the same town or village. Typically, in the Northern Territory less than 10% of the population live on their own land, even though more than 50% is held by Aboriginal people, so, for example, when rental payments were made to the Aboriginal land-owners on which the settlements are built most people missed out and the payments have tended to be divisive.

Broadly speaking this same issue emerges on many occasions when native title holders' rights are recognised. They result in the disenfranchisement of the majority in the same locality. This tendency is aggravated where money is concerned as it leads to juridification and a proliferation of legal entities, fracturing of community in both of its senses, and the weakening of community-based organisation (see David Jagger 2011). Does that matter?

That depends. If you believe that the power of private property and keeping up with the Jones are universal motivators for capital accumulation and engagement with the market economy, then the tensions created by the unequal distribution of funds in remote communities might be seen as what is needed to stimulate entrepreneurial activity and provide economic incentives to the population. [1]

While Aboriginal life in such communities is undergoing many changes, there are also deep continuities in socio-cultural orientations as reflected in the nature of personal identity, social relations, and economic practices. There is a very extensive, thoroughly researched and evidenced based academic literature on this. Ignoring the deeply embedded socio-cultural difference makes no sense in the light of this evidence, nor does believing that they will

disappear within the compass of a few years if the 'appropriate' economic incentives, from the point of view of mainstream thinking, are provided.

Any serious attention to life in remote communities since Aboriginal people entered the cash economy in 1969, or started collectively receiving substantial royalty payments since the 1980s, would undermine this power of property view despite its prevalence among conservative politicians. There has been no capital accumulation in such communities because there are very powerful social forces preventing it. Even where a small group of native title holders receive hundreds of thousands of dollars annually in rental income in a community of many hundreds, if not thousands, the monies go to consumption not accumulation. That is not a problem in itself, but what is problematic is the expectation that compensation and other monies will substantially improve things for other than a few, and the almost certain lack of lasting or wider benefit. Is benefitting the few and rarely ever achieving any lasting transformation satisfactory?

The unsatisfactory aspects of this situation are highlighted if one thinks that the Federal government has or should have a fiduciary responsibility to Aboriginal people.

Twenty-four years ago, Mr Justice Kirby expressed the opinion that , "whether a fiduciary duty is owed by the Crown to the indigenous peoples of Australia remains an open question" (at 688; Mr Justice Kirby in *Thorpe v Commonwealth (No 3)* (1997) 144 ALR 677) and that still applies.[2]

The case for such a fiduciary responsibility can be made on several grounds including the fact that Aboriginal people have been wards of the states for long periods, and that under land rights and native title legislation their land is only alienable to the Crown. That is, the Crown has placed itself between Aboriginal people and the rest of us in order to protect them, and by that action taken on a fiduciary like responsibility.

Whether these, or other points, are of any legal significance is not important to the question I want to raise here which is not so much whether the states and/or the federal government have a fiduciary responsibility towards

Aboriginal people but if they did what might we expect of them acting as a fiduciary in relation to native title issues.

This is clearly a complex question involving political, practical and moral considerations. It also involves the question of to which one or more of the three branches of government the fiduciary relationship might apply: the executive, the legislature or the judiciary, and brings us face to face with the uneasy mix of market and inalienable property relations enshrined in native title.

While the recognition of native title was a huge leap forward for the nation, and brings benefits to many Aboriginal people, it also disadvantages just as many, if not more people, each time it is recognised, creating enduring conflicts, and inequities. If recognising native title is unequivocally right, but for practical reasons unavailable for all, how could a fiduciary responsibility for those left out be met?

Treaty-making in particular offers state and federal governments one powerful way in which a fiduciary responsibility to include the excluded could begin to be exercised by government and balance out the parochial aspects of native title. Settlements should deal with the whole permanent residential Indigenous population of a region, not just with the narrowest category, native title holders. As an aside it is concerning that in some political contexts the phrase 'native title holders' is used as synonymous with Aboriginal people because it obscures this problem. Benefitting the broader Indigenous population will only be addressed if all those involved in native title matters, anthropologists, lawyers, policymakers, community development workers and particularly the Aboriginal leadership at both local and regional levels, keep this issue on the agenda with both government and those privileged native title holders lucky enough to have their native title recognised.

Lying behind the issue of compensation, royalties and rents flowing into remote communities, is another difficult matter that gives rise to a public interest in these monies in the light of the benevolent aspiration of the preamble to the Native Title Act . Many well-wishers feel it is important to maximise the amounts of these monies because of the poor living

circumstances and low incomes in such places: certainly people can and should benefit from them. But it is important to understand some of their consequences, the most important of these being that they intensify and prolong dependency leading one to ask: are there long-term forms of dependency that do not demoralise or deprive people of valued purpose in life, and do not intensify the burden of living in worlds without work.

To answer this rhetorical question, I would say that they are hard to think of. Given the huge emphasis both Aboriginal and non-Aboriginal people place on the importance of finding jobs for people in remote communities it is clear that it is a common view that long-term dependency is often associated with social problems. On the other hand, in the absence of the commitment to the notion of career and the disinclination of most people in communities adjacent to mines to sell their labour to them in any on-going basis (see Peterson 2021) it will take major changes in those communities before jobs become seriously relevant.

A more profound difficulty that intersects with this issue is the general decline in the widespread engagement with formal education and a lack of interest in acquiring the competences necessary to replace the non-Aboriginal people delivering most services (e.g. Purtill 2017). This means, among other things, that PBCs, and remote communities more generally, with or without income, are and will be dependent for several generations, on outsiders to help them manage their money and affairs.

So far, the task of Representative Bodies has been to bring PBCs into existence through successful claims. It is clear that the current government sees a reduced role for them in the post-determination environment. Current policy is to leave PBCs free to choose their service providers on the open market. The argument is that if the Representative Bodies are offering a competitive service, the PBCs will choose them as their service provider. One does not have to be a skilled political analyst to see the motivation here: it is betrayed by the long-held attitude to the Territory land councils and the constant attempts to weaken or dismember them.[3] The current government do not want Representative Bodies to turn into Territory-like land councils.

Politicians of both persuasions, and others, are sometimes irritated by the actions taken by land councils. Such large organisations can attract high quality well qualified staff; they make efficient use of resources that would otherwise be split between many small service providers; and they develop complex socio-cultural expertise. Equally importantly they provide Aboriginal people with their own professional resources that are not only essential to the management and development of their assets but also to the representation of their wider interests. It is this role in providing Aboriginal people with an effective political voice that is objected to. Ironically it is the larger mining companies that were long opposed to land councils that have come to see that there are benefits in having such organisations.

This issue of effective independent organisations goes to the heart of what it takes to make land rights and native title make a difference: properly funded large professionally trained staff dedicated to the task. If we want to ensure native title can bring benefits to remote regions, and to the under resourced as well as the well-resourced native title holders/PBCs, then we need land council-like Representative Bodies to make it work.[4] It is therefore in the interests of us all that NTRBs are made the default service providers to the PBCs in their region so that they get good advice from organisation that are not simply seeking to make money out of them but to ensure they get the best advice to the benefit of us all. If a PBC wants to go it alone they should have to make the case for seeking independent service providers. We are all well aware that the motivation for independence is often problematic and closely linked to the emergence of localism and the problems that we are discussing here.

Conclusion

Native title is very much an artefact of our culture and legal system with only tenuous links to life before 1788. That, of course, is exactly as it should be. Trying to restore the pre-1788 situation would make no sense, least of all in terms of how the land might be held or how it could articulate with the encompassing market economy. As a result, native title ends up as a curious hybrid. Aboriginal people do not get the full benefit of property ownership as understood in the mainstream (Brennan et al 2015), nor do their rights relate

closely with what happened in the past. Thus, native title is already fashioned in the public interest.

If Representative Bodies become simply another regional service provider not only will there often be organisational and money problems but it will be difficult to leverage many benefits from native title for the population at large. Further there will be a decline in the quality of the staff they can contract and remote Aboriginal people will lose one of the few professionally resourced bodies they have to help them formulate and promulgate their regional interests.

PBCs should have to work thorough fully-funded Representative Bodies: the collectivity of native title holders would get better and more ethical service; access to a wider range of services, such as community development at reasonable cost; and have well-resourced organisations with intercultural expertise to deal with problems. Other Australians would not only get better value for money but would be confident that they were properly empowering native title holders to represent and exercise their interests. The alternative is the economics of abandonment (Povinelli 2011).

As less than twenty percent of the Aboriginal population the contribution of remote Aboriginal people to any future voice to parliament is likely to be easily drowned out if they do not have their own professional organisations.

This situation will only be aggravated in the Territory as the royalty equivalent streams decline over the next ten years and the land councils have to scale back, leaving Aboriginal people in remote Australia with only a hoarse whisper in the corridors of power.

References

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[1] While it is unquestionable that private property is a powerful economic motivator in mainstream Australia, including among many Aboriginal people in metropolitan areas, remote Aboriginal communities are not a part of mainstream Australia, although of course connected to in in many ways.

[2] Two unsuccessful attempts have been made to argue for a fiduciary duty in the Crown in Right of the State of Western Australia: *Bodney v Western Australian Airports Corporation Pty Ltd* (2000) 180 ALR 91 and *Collard v Western Australia [No 4]* [2013] WASC 455. Submission by Greg McIntyre 2018. To Joint Select Committee Constitutional Recognition Relating to Aboriginal and Torres Strait islander Peoples. 11th June 2018.Aph.gov.au. Submission 196.

[3] See Altman et al 1999. Michael Dillion in his November 2020 blog (https://refragabledelusions.blogspot.com/2020/11/minister-wyatt-and-nt-land-councils.html) that recently the conservative government has been throwing money at the land councils and discusses some possible reasons for this.

[4] This is similar to one of the conclusions of Burbidge et al 2021 (see page 9 Recommendation 6): 'Ensure Australian Commonwealth, state and territory processes take into account the significant role played by regional representative bodies, state and territory governments, and inter PBC relationships in the work of PBCs.'