



ABORIGINAL
PROVISIONAL
GOVERNMENT

The Declaration on the Rights of Indigenous Peoples in Australia

In the current political climate there is some urgency in getting the best of the Declaration into Australian law. Haste does not mean acceptance at any cost, for the Declaration needs improvement in order to be more effective for Aboriginals and Torres Strait Islanders.

The declaration of human rights of indigenous peoples has been agreed to by Australia, but that is only a first step. The next step is to make it part of Australian law so that Aborigines can sue governments based on breaches of that law.

The Declaration itself is better than what currently exists but falls short of its high aims. It can easily be improved. I have not commented on all 46 provisions of the Declaration to see just how much improvement is necessary. I have limited my effort to how to implement the Declaration, self determination and land rights.

Implementing the Declaration

Normally, implementing an international human rights document into Australian law is done through federal legislation. There are other options. They include putting the Declaration:

- in the Australian Constitution;
- in a treaty; or
- in a Bill of Rights

Getting constitutional change in a referendum is always difficult. Indigenous peoples could be left waiting for years for the right result. Placing the Declaration in the Constitution is an attractive option, but fraught with issues. High Court Chief Justice Gleeson pointed out that the Constitution is not designed to protect human rights:

*'The Australian Constitution was not the product of a legal and political culture, or of historical circumstances, that created ...limitations upon legislative power [to] protect the rights of individuals. It was not the outcome of a revolution, or a struggle against oppression. It was designed to give effect to an agreement for a federal union, under the Crown, of the peoples of formerly self-governing British colonies.'*¹

¹ Roach v Electoral Commissioner [2007] HCA 43

A constitutional provision dealing with the Declaration would need to be read subject to other parts of the Constitution². This would have the effect of watering down key parts including self determination and Aboriginal sovereignty. The High Court has already ruled in *Coe v Commonwealth*³ and *Mabo*⁴ that disputes over Australian sovereignty are beyond legal dispute leaving only a single sovereign under Australian law.

Trusting the outcome to politicians is always a problem. As John Howard's manipulation of the Republic referendum showed, the right question never got to the people. The full Declaration of 46 provisions being put to referendum could lead to misunderstandings, political gamesmanship and the risk that those who support human rights for indigenous peoples might not agree with every provision. Summarising the Declaration, then putting that summary to the vote, might be better. That might also overcome the disadvantage of freezing indigenous rights at the time that a constitutional amendment was made, although Article 43 states that '*The rights recognized herein constitute the minimum standards*', leaving scope for later improvement.

Placing the Declaration in a treaty with indigenous peoples is equally problematic. A treaty takes its character from the equal status of the parties as well as from the content of the agreement. Sovereignty is the sticking point. Concessions on both sides would require Australia conceding Aboriginal⁵ sovereignty on the one hand, and indigenous peoples conceding Australian legitimacy on the other. Although I have previously written that each side could remain silent on the point, I no longer see that as beneficial. Silence would imply there is only one sovereign, and that the treaty was purely a domestic arrangement.⁶

If the treaty was put in the constitution the High Court would read its terms in the context of other constitutional provisions. That would effectively result in parliamentary supremacy, and one sovereign instead of two. Such a 'treaty' would be no more than a piece of domestic legislation. An alternative is to register a treaty that contains the declaration within it, at the United Nations, giving it a flavour of internationalism. Whether this would make a difference is a hot legal issue.

A treaty leaving supremacy of the Commonwealth is more of a domestic pact than a treaty, a bit like a wife agreeing her husband can continue to bash her.

Another option is to rely on a Bill of Rights which the Federal Government is considering. That Bill could incorporate the Declaration. However it is worth noting that there was nothing to prevent incorporation in the two human rights laws already enacted in the A.C.T. and Victoria. In each case, the rights of indigenous peoples recognised were pitiful suggesting that, at least in those two jurisdictions, there was not much enthusiasm for greater recognition of Aboriginal rights. The other difficulty with a legislated Bill of Rights incorporating the Declaration is that the Declaration may be supported but other elements of

² *Wurridjal v Commonwealth* [2009] HCA 2

³ [1979] HCA 68

⁴ [1992] HCA 23

⁵ Wherever I refer to 'Aboriginal', I also mean Torres Strait Islanders

⁶ Another possibility is that each party maintains their respective positions which could be placed in a treaty.

the BOR's not. Whether to throw the declaration in with other human rights, or go separately, really is a matter of judgement.

The attraction of legislating the Declaration separately from any other law is more attractive for its simplicity, if for no other reason. The passing of a law on the Declaration, especially if the Declaration was improved, would mark a significant milestone in Australia's treatment of indigenous rights.

The current status of the declaration

The Declaration on the Rights of Indigenous Peoples has not yet been legislated into Australian law. Nevertheless courts can either use the Declaration as a tool to aid interpretation of a statute or incorporate relevant parts of the Declaration into existing laws. In *Aurukun Shire Council v CEO Office Liquor Gaming*,⁷ the Queensland Court of Appeal accepted that the human rights standards expressed in the Declaration on the Rights of Indigenous Peoples could be incorporated into domestic law through s10 of the Racial Discrimination Act 1976.

That the Declaration has not yet been legislated in Australia does not mean it has no legal significance. Where a statute is ambiguous the courts should favour that construction which accords with Australia's obligations under a treaty or international convention to which Australia is a party, or it may play a part in the development by the courts of the common law.⁸

Like Britain and the US, Australian governments may embrace international principles on human rights without making domestic legal obligations that people can sue on. International legal obligations are created by the Parliament, not the national government.

Canada has a charter for human rights, and the US has constitutional human rights guarantees. Britain has adopted the European Convention on Human Rights. Australia has been reluctant to follow suit leaving it to the ACT and Victoria to enact human rights laws. The High Court has been criticised for not being able to find implied protection for human rights in the Constitution beyond 'a right to defame politicians, subject to limited qualifications.'⁹

How to make the Declaration law is linked to what the document says. The Declaration took 20 years to evolve, shows the strain of competition between indigenous groups and governments, with some unnecessary compromises tainting the final outcome.

⁷ (2010) 265 ALR 536 per McMurdo P [32]; Keane JA [113]& [116], and Phillippedes J [240] did not refer specifically to the Declaration but accepted other human rights instruments to which Australia is a party are covered by s10 of RDA

⁸ Teoh's case (1995) 128 ALR 353

⁹ Sir Robin Cooke, 'Final Appeal Courts; Some Comparisons' 2003 12 The Commonwealth Lawyer, 43 cited Hon Ian Callinan, 'In Whom Shall We Trust', 79 in Don't Leave Us With the Bill 2009 Menzies Research Centre

Self determination

Before the white invasion of Australia in 1788, Aboriginal people enjoyed exclusive rights over the continent of Australia, its islands and its seas. No one could claim a better title, no one could tell us what to do. In modern language, we were a sovereign people.

Since then, whites have dominated us. Only one power has ruled since. History also shows that Aboriginal sovereignty has not been far away. Paul Coe sued the *Commonwealth* over sovereignty in 1978, Kevin Gilbert wrote about it in Treaty 88 and the Aboriginal Provisional Government was established in 1990. The Central Australian Aboriginal organisations said it all-

'We have never conceded defeat and will continue to resist this ongoing attempt to subjugate us. The Aboriginal people have never surrendered to the European invasion and assert that sovereignty over all of Australia lies with them. The settler state has been set upon Aboriginal land. We demand that the colonial settlers who have seized the land recognise this sovereignty and on that basis negotiate their rights to be there'.¹⁰

Our struggle is like that of the Palestinians, East Timorese, Tibetans and Cubans - we want our day. The invasion of Holland, Belgium, Poland and France during the Second World War prevented them exercising sovereignty, but no-one disputes that sovereignty still resided in the occupied peoples. The same applies with Afghanistan and Iraq in more recent times. Why would it be any different for Aborigines?

Self determination is an uncomplicated term. It means people themselves determine their fate, not someone else decide. We decide if we are a defeated people, or a people proud and free. We decide to be beneath nations, or equal to them. The motives of those who wish we would assimilate may be pure, but self determination means we, not others, decide our future.

What does the Declaration on the Rights of Indigenous Peoples say about this?

Articles 3 and 4 are the main Articles that deal with self determination. I reproduce them below.

Article 3 states:

Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

But the next **Article 4** reduces that right to '*autonomy or self-government in matters relating to their internal and local affairs*'.

Article 4 is quite demeaning and paternalistic towards indigenous peoples. The qualification is at odds with other human rights instruments that openly state that '*all peoples have the*

¹⁰ cited in Senate Report, AGPS, 1983 at p 10

right to self determination'. If all peoples do have the right, why should indigenous peoples have limited to *internal and local affairs*? Article 4 should be rejected.

Article 46 seeks to protect state sovereignty and territorial integrity. If the purpose of Article 3 of the Declaration is to let indigenous peoples in Australia have full self determination, there is little point in keeping Article 46 that says the opposite. Article 46 should be thrown out.

In the Canadian case of *re Secession of Quebec* the predominantly French population of Quebec wanted to break away from Canada. The Court had to decide if *international law gives Quebec the right to secession from Canada*?

The Court decided '*a right to secession only arises under the principle of self-determination of people at international law where "a people" is governed as part of a colonial empire; where "a people" is subject to alien subjugation, domination or exploitation; and possibly where "a people" is denied any meaningful exercise of its right to self-determination within the state of which it forms a part*'.¹¹

Kosovo and East Timor were both granted independence under the principle of self determination despite Serbian (continuing) claims to sovereignty over Kosovo, and Indonesia claiming East Timor as part of its territory. In neither case could it be said that the Serbia and Indonesia were 'alien' powers.

The most interesting aspect of the Canadian judgement was its third criteria for full self determination, namely that *"a people" is denied any meaningful exercise of its right to self-determination within the state of which it forms a part*'. Under this part the Aboriginal claim would be that Aborigines have been dominated to such an extraordinary degree, over such a long period, that the disadvantage is a product of that domination. Vast areas of previously owned land are still not with Aborigines. Services are elements of assimilation, especially where statements by Jenny Macklin about use of welfare funding would be used to break up Aboriginal communities. Aboriginal representation is through advisory bodies with no power; that are selected by our opponents, the government. There is a real case here for Australia to answer about whether Aborigines really do have internal self determination or are just dominated.

Australia would argue that Aborigines freely participate in elections and indeed, in the N.T. Assembly, elected Aborigines formed a sizeable portion of the Labour Government. The newly formed Congress, a creature carefully chosen by the Minister for Indigenous Affairs, is held up as internal self determination. In creating the Congress, the Federal government undoubtedly had one eye on criticism from the UN human rights bodies about the disbanding of ATSIC, and the NT Intervention with its suspension of the RDA.

There is a difference between whether a right exists and whether that right can be exercised. Australia may well argue that self determination *should not apply in Australia*. That should not excuse Australia from having to answer to an independent authority on the merit of its

¹¹ *ibid*, discussion under question 2

claim. There are, of course, many indigenous peoples who want to be Australians, but that is not every Aboriginal. Differences of opinion about individual tastes are no reason to deny others a human right of fundamental importance.

Land rights

The Declaration has 8 Articles dealing with land issues. *Article 25* reaffirms the spiritual basis for indigenous connection to traditional areas; *Article 29* calls for a healthy environment for people on traditional lands; *Article 30* with restrictions on military use of the lands while cultural and biodiversity rights are dealt with in *Article 31*. A requirement of consultation with indigenous land owners for use and development of their lands is required under *Article 32*.

Articles 25-28 are key land rights sections. Those Articles deal with protection of the spiritual basis for existing occupation and ownership (Article 25); security of tenure (Article 26); establishing mechanisms to determine indigenous rights to areas (Article 27); and rights of peoples no longer on traditional land areas (Article 28).

Article 25

Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard.

The Native Title Act provides a national mechanism for native title claims based on customs and traditions. There is no equivalent mechanism for those dispossessed and unable to prove native title. The Commonwealth Aboriginal TSI Heritage Protection Act 1984 can be used to protect an area of land or water of significance according to Aboriginal tradition but fails to protect other Aboriginal cultural places. The NT Land Rights Act 1976 acknowledges the spiritual basis for land as does the NT Aboriginal Sacred Sites Act.

It was stated in Ward's case¹² 'As is now well recognised, the connection which Aboriginal peoples have with "country" is essentially spiritual. In *Milirrpum v Nabalco Pty Ltd*, Blackburn J said that:

"the fundamental truth about the aboriginals' relationship to the land is that whatever else it is, it is a religious relationship. ... There is an unquestioned scheme of things in which the spirit ancestors, the people of the clan, particular land and everything that exists on and in it, are organic parts of one indissoluble whole." '

Article 25 does not, in my view, offer any additional advantage to Aboriginal people.

¹² *Western Australia v Ward* [2002] HCA 28 per Gleeson CJ, Gaudron, Gummow and Hayne JJ para 14

The requirement that indigenous peoples must prove their rights to land by reference to their laws and customs is discriminatory. White people in Australia do not have to prove their history, their stories or their particular connection to a parcel of land in order to own it. Nor are they threatened with compulsory acquisition of their property because of a perceived or embellished claim that they are socially dysfunctional. Aboriginal people should not have to either.

Article 26

1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.

2. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.

3. States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.

Those able to prove native title by proof of traditional rights to areas would satisfy Article 26 (1). Article 26 (2) is more precise in that it provides for ownership, use and control of areas, but only of areas that '*they possess*'. This subsection appears limited to those groups still in possession. Article 28 (1) states, '*Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible...*'.

It is not stated why giving ownership of the land back is not possible. There are two forms of property rights in Australia, as was discussed in Mabo. One is the radical title owned by the crown or the sovereign, the other is alienated lands in freehold, leases or native title. So the crown 'owns' all land throughout Australia but cannot use it where that land is private property, leases or native title. The crown can use its compulsory acquisition powers to get the full title but is obliged to pay compensation.

Where land has been alienated, the residual or radical right in the crown remains intact. When did the crown legitimately acquire its 'radical title' interest from indigenous peoples? Property owners could continue to exercise their rights to private property as they do now if the radical title reverted to the Aboriginal people.

Article 28 (1) clearly contemplates compensation rather than regaining of rights where possession has been lost¹³. Such a focus offers little for those dispossessed of their country.

It is likely existing mechanisms for land claims such as the Commonwealth's Native Title Act and land purchases through the ILC, together with land rights laws in NSW, Victoria and

¹³ see discussion below on 'just terms'.

Tasmania would satisfy an international human rights committee that Australia complies with Articles 27 and 28.

It would be tragically stunning if a human rights document intended to redress dispossession meant that nothing changed. The ambiguity in the Declaration's land rights Articles should be refined with a specific outcome- either all crown lands are returned to Aboriginal people or national uniform land rights laws are passed to ensure smooth transfer of lands required by Aboriginal people is guaranteed. This would *not* mean a tribunal placing the onus on Aborigines to show they were dispossessed- dispossession is an established fact.

That pretty well leaves the question of whether lands Aborigines own or possess have the security of tenure contemplated by Article 26.

The NT Intervention laws took control of much Aboriginal land. The federal intervention gained approval from the High Court in *Wurridjal*¹⁴. The NT Emergency laws had suspended the Racial Discrimination Act so that Aborigines could be discriminated against. Aborigines were to be compensated for any loss of property rights.

Under the NT Land Rights Act 1976¹⁵, successful Aboriginal claimants were granted fee simple ownership of traditional lands. Rights to control access and share in royalties for mining accompanied the title. To the extent it could, the NT Land Rights Act put Aborigines in a position enjoyed prior to the invasion.

The intervention laws applied to community living areas and town camps. The Federal government claimed there was a need for more houses to be built. In order that this could be done quickly the government had a need to "*control* the land in the townships for a short period."¹⁶(my emphasis)

Article 26 of the Declaration refers to protection of indigenous ownership '*and control*'. The Commonwealth allocated to itself exclusive possession of the land through granting leases to itself, without consultation and regardless of consent. The Aboriginal owners of the land covered by a compulsory Commonwealth lease were not able to vary or terminate it under the new law¹⁷. The Commonwealth could not transfer its newly acquired lease but could sublease, license, part with possession of, or otherwise deal with, its interest in the lease¹⁸. The Minister was granted broad powers to deal with the land while the Commonwealth lease remained in force.¹⁹

The above description of the powers that the Commonwealth gave to itself shows that this was a land grab. It was a take-over of Aboriginal land. It destroyed any semblance of

¹⁴ *Wurridjal v Commonwealth* [2009] HCA 2

¹⁵ traditional Aboriginal owners to land are defined as those having a '*common spiritual affiliations to a site on the land, being affiliations that place the group under a primary spiritual responsibility for that site and for the land...*'

¹⁶ Australia, House of Representatives, *Parliamentary Debates* (Hansard), 7 August 2007 at 11, cited in *Wurridjal*

¹⁷ s 35 (4) NT National Emergency Response Act 2007

¹⁸ s 35 (5) NT National Emergency Response Act 2007

¹⁹ s 36 NT National Emergency Response Act 2007

peaceable enjoyment of the fruits of ownership of their lands and reduced Aborigines to mere tenants of the Commonwealth. On its face it was clear breach of Article 26.

One problem that arose in native title discussions with the Keating government in the 1990's lead up to the Native Title Act was the title holding body where native title was recognised. The Government wanted Aboriginal land interests assimilated into the domestic property regimes so that, mostly, companies could go direct to a representative land holding entity- an association, body corporate etc.- rather than be forced to deal with a 'community of owners'. Australian policy does not accept that forcing Aboriginal owners into an English derived property regime is compromise enough, a position different from the intent of Article 26. Once title has been returned it should be secure from further interference regardless of whether the land holding authority is traditional, statutory or common law.

Justice Michael Kirby grasped this point in *Wurridjal*²⁰. He believed Aborigines were given constitutional protection that would invalidate the loss of control. Kirby J looked at the cultural and spiritual basis of Aboriginal interests in land and noted that that was the essence of the Mabo decision. How could money or rents fairly compensate these interests, Justice Kirby pondered, and referring to international law developments²¹ believed the majority had got lost among the trees and could not see the woods.

Justice Kirby, highlighting the different values between Aboriginal and European society, noted '*The owners of shares in the Bank of New South Wales, when that bank and others were purportedly nationalised by federal legislation, rarely if ever loved the share scrip as such. A few might have had sentimental or employment attachments to the bank, dating as many of the affected banks did back to colonial days. However, the only real virtue of the shares for shareholders was the [money]. For such value the promise in the legislation to pay a "reasonable amount" and monetary "compensation" might well satisfy the "just terms" requirement.*'²²

Accepting previous authority expressed by Dixon J in *Nelungaloo*²³ that just terms is concerned with fairness, Justice Kirby found that the lack of fairness could mean the constitutional guarantee of just terms was not satisfied in the intervention case. A lack of consultation and participation²⁴ protected Aboriginal land owners from the type of legislation under consideration. Keifel J²⁵ took a similar broad approach noting,

'The plaintiffs' case in this respect did not depend only upon the notion that special value attaching to rights associated with sacred sites was incapable of assessment and therefore could not be the subject of compensation in money. It was claimed to be a consequence of this that the Minister was obliged to consider whether the acquisition of these lands was for the benefit of Aboriginal people having such rights. Such a consideration might oblige a

²⁰ op cit [305-8]

²¹ ibid [269]

²² ibid [304]

²³ [1947] HCA 58

²⁴ Wurridjal op cit [308]

²⁵ ibid [469]

conclusion to the contrary. So understood, the issue is not whether just terms can be provided, but whether the Minister should decide to acquire the land at all'.

The High Court majority did not pick up the distinction between the values that different societies put on 'property', 'land' and money as Justice Kirby did, prompting this jibe, *'the majority rejects the claimants' challenge to the constitutional validity of the federal legislation that is incontestably less favourable to them upon the basis of their race. Far from being "gratuitous", this reasoning is essential and, in truth, self-evident'*²⁶.

Australian law puts all Aboriginal-owned land vested under land rights legislation²⁷ or otherwise at risk. Native title is protected by the Native Title Act and the Racial Discrimination Act, and both protections can be altered or repealed. The only way other Aboriginal people can regain collective ownership of stolen lands is via the legislative process²⁸. Statutory titles are subject to repeal. Unlike the minority judges, the majority of the court in *Wurridjal* left fairness for Aboriginal land rights to parliaments to decide. Kirby J is right to acknowledge that Aborigines want land, not money.

Mechanism for enforcement

As High Court Justice Michael McHugh points out, Australia must ensure that any person whose rights or freedoms are violated shall have an effective remedy, otherwise it is in breach of article 2 (3) of ICCPR, a covenant Australia has agreed to abide by. It would be entirely unsatisfactory if such a mechanism required indigenous peoples to plead their case to a white tribunal as happens under native title. Something akin to South Africa's Truth Commission would be more appropriate.

The Declaration is a significant advance on the current state of policy towards indigenous peoples in Australia. Since *Mabo*, gains have been few and far between. The treaty talks and reconciliation proposals have been abandoned. Apologies have proved to be hollow gestures, like the preamble acknowledgements in some State's constitutions. Proposals for constitutional reform look equally shallow. This state of affairs should not compel a weak and morally shallow approach to the Declaration - it should jolt us as a wake-up call to make sure we get it right.

Michael Mansell

Secretary

APG

30th September 2011

²⁶ *ibid* [215]

²⁷ Aboriginal Lands Act 1995 Tas; NSW Aboriginal Lands Act 1983; Framlingham and Lake Tyers Aboriginal Reserves, Victorian Aboriginal Lands Act 1970

²⁸ even purchase of land for Aborigines under the Indigenous Lands Corporation is established by legislation.

