Good Governance and Indigenous Peoples: What's Western Law got to say about it

This presentation represents work in progress by Laura Beacroft, Toni Matulick and Melanie Poole for the next edition of *Indigenous Legal Issues* by McCrae, Nettheim and Beacroft, a textbook used by a wide range of people.

This presentation covers matters related to Indigenous governance and race discrimination. It consists of a PowerPoint, with notes used by the speakers for the seminar.

Any suggestions for improvements to this text book will be gratefully received by the authors, contact Laura Beacroft at beacroftl@law.anu.edu.au. or on 0406 378 013

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Why Talk About this Now?

- Negative judgements about governance by Indigenous peoples is at heart of loss of sovereignty, and still relevant today eg is part of driver for 'Northern Territory emergency intervention';
- Commonwealth government has been implementing 'quiet revolution' - involving 'practical reconciliation' to meet needs and not focus on rights based initiatives, 'normalising' arrangements and getting away from 'separatism', departing from welfare entitlements to 'mutual obligation' in order to better overcome disadvantage;
- While representative body, ATSIC, was dismantled in order to have mainstream agencies 'normalise delivery of services and Indigenous specific programs, the NT emergency intervention is different treatment, not 'normal' in Australia, and saved by being excluding the application of Race Discrimination Act 1975.
- Evidence to date (Audit of Whole of Government Indigenous Service Delivery Arrangements ANAO 2007) ' is that focus on achieving difference on ground has not translated into appropriate performance and delivery strategies or measurable outcomes. Also progress on indicators identified by Productivity Commission is not yet able to be well demonstrated (Overcoming Indigenous Disadvantage Report 2007 Productivity Commission)
- Appears to be no guiding principles in the rush to overcome disadvantage, an ad hoc 'just get it done' approach has risks especially if it is legally racially discriminatory as the NT emergency intervention is.
- There are recognised principles for effective policy development and implementation, in part to be found in the Racial Discrimination Act 1975 - far from being impractical they are critical to succeeding in reducing disadvantage and managing risks of failure in this goal.
- A theme of these principles is that process matters, especially in a crisis, if disadvantage is going to be overcome.

Big subject – focus on big impact matters

- Good Governance in Western law – what do the courts say
- Negotiated Indigenous governance arrangements – an overview
- Rights based Indigenous governance arrangements: Native Title – an overview
- Race Discrimination Act 1975, what has it got to offer the process of overcoming disadvantage

Western law and Indigenous governance – the story so far!

- Australian and international law (what I call Western law in this seminar) relies on jurisprudence on the act of colonisation dating largely back to the 1700's, which legitimates today the loss of sovereignty (or nationhood) by Indigenous peoples through colonization (see Vatel and Blackstone, pages 143, 145 *Indigenous Legal Issues* 2001). Note there is research that suggests older jurisprudence offered a more inclusive approach to Indigenous peoples sovereignty and governance – see Anaya (1996)

- Western sovereignty of the Australian colony was legally gained by England with the arrival of settlers to an 'empty land' (after Mabo better described perhaps as an 'ungoverned land'), which was then settled 'without the need for conquest' and with no treaty. All the laws of England then applied to the colony since sovereignty rested with England. Arguably Australia gained full sovereignty from England as a matter of law in 1986 when certain laws ended the supremacy of English laws. (In international law, a state is an entity that has a defined territory, perm pop, under the control of its government and that engages and has the capacity to engage in formal relations with such entities; supreme law making powers are associated with western views of sovereignty .)

- Under Australian law sovereignty is shared between the Commonwealth and state governments, and people of Australia when a referendum is held. Under the Australian Constitution Indigenous peoples do not share sovereignty as peoples, only as citizens in a referendum or as participants in state or Commonwealth governments.

- Both the Milllirrpum (1971) and the Mabo (No 2) 1992 cases confirmed loss of sovereignty by Indigenous peoples in Australia due to this settlement jurisprudence. Mabo differed from MIllirrpum in the impact of this loss of sovereignty, not all rights are thereby lost - recognised that in some circumstances Indigenous peoples retain their original native title (consistent with jurisprudence dating from Vatel in the 1700's which in summary says that while sovereignty can be lost, peoples can retain rights to their 'domain' - to occupy and use the land).

- While Mabo (1992) recognised native title, no right to governance was recognised – the comments in a previous case (Coe 1979) were confirmed. The Coe Case rejected arguments that Indigenous peoples were like the American Indians, a 'domestic dependent nation' while also citizens of a larger Nation "because "the history of relationships …has not been the same.. , the [Australian] Aboriginal people are [not] organised as a 'distinct political society separated from others', ..[and] they have not been treated as a state'. Note court in NSW in the 1800s had found a basis for Aboriginal people being part of a domestic dependent nation (Bonjon 1841, however J Willis 'sacked').

- Underpinning this jurisprudence about loss of sovereignty is jurisprudence about 'good governance' - "peoples with erratic nations whose scanty population is incapable of occupying the whole…[and who are not fulfilling] the obligation to cultivate the earth…..cannot exclusively appropriate to themselves more land than they have occasion for (Vatel at page 143 *Indigenous Legal Issues* 2001).

- Judgements about 'good governance' in the coloniser's law in part have justified the loss of sovereignty and non-recognition in Australia of 'domestic dependent nationhood. The judgements are obviously European concepts of good governance from centuries ago: the "dominant defining characteristics are exclusivity of territorial domain and hierarchal, centralised authority", which is in contrast to many Indigenous peoples arrangements involving kinship based organisation, de-centralised structures and overlapping spheres of resource control (see Anaya *Indigenous Peoples in International Law* (1996) page 15, at page 148 *Indigenous Legal Issues* 2001) .

- Indeed the judgements of good governance at the root of the jurisprudence outlined above are out of alignment with best practice today across the Western world – we are fast de-centralising authority and creating overlapping spheres of control through measures such as 'economic communities' between states, and within states measures such as 'connected government', co-operative federalism and participative government.

At the moment, negotiated governance arrangements in Australia are the main arena for Indigenous governance to be achieved – the story so far

- No recognised Treaty/ies in Australia – contrast with Canada, US and New Zealand where treaties in place for all or some of their Indigenous people, which now have constitutional and/or statutory and/or common law recognition; significant historical difference since absence of treaty removes basis for recognition of 'domestic dependent nation'; importantly common law in most nations with treaties protects to some extent overriding the treaties by future acts; also there are new treaties in other countries for eg comprehensive land claim agreements in Canada, which include governance rights and which are supported by constitutional recognition. Maybe a treaty in Australia will be negotiated in the future, but if it is a statute only and so can then be overridden by further legislation, what will its value be?
- Some governance by Indigenous peoples in Australia has evolved from land and associated statutory rights –eg Land Rights legislation in most states creates statutory councils and land holding trust corporations that in managing the land rights responsibilities under the legislation and/or the land necessarily deliver elements of governance to the people that reside on the lands; obviously such corporations are of importance; however there are practical and legislative limitations for such corporations to practice governance ;
- Some role by Indigenous people in mainstream government – local governments, regional authorities, state governments and Commonwealth governments; no dedicated place n Parliaments like NZ, although this matter has been considered seriously in Australia at Commonwealth level and also regarding NSW Parliament; statistics for participation in 3 levels of Parliament are : 2 members of Federal Parliament to date, 20% of the Northern Territory Legislative Assembly are Indigenous; first state member was in WA in 2001 and now one in NSW and Tasmania, numerous Indigenous people have been on local governments; some Indigenous bodies are local governments eg Torres Strait Regional Authority (TSRA);
- most negotiated governance activity occurs at local level – why is this so - started in QLD with arguably racially discriminatory legislation that set up second class councils, or DOGIT councils, whose residents could not then vote in mainstream elections for local government; largely preserved today but turned into non-viable 'shires' with constant audit problems; other trends: long discussion in WA and NT about reforms – WA has established an Indigenous controlled shire at Warburton which is admirable; NT is in process of setting up regionally based shires but intending to exclude from some of the regime the predominantly non-Indigenous northern shire. Commonwealth set up TSRA which is local government for Torres Straits and audits showing this body is performing well.
- Corporations – see later slide
- Trusts, growing in number and complexity, often associated with Indigenous Land Use Agreements under Native Title Act, largely unregulated although new legislation (CATSI) allows some regulation of trusts connected to corporations under that Act.

Corporations - Overview

- Huge growth over 1990's, stabilising now – how many is too many ?
- Main drivers today are public funding initiatives and native title/other land holding initiatives; also emerging driver is private funds connected to 'new economics' eg carbon trading initiatives, funds from resource boom
- Diversity in Indigenous sector is great - diverse functions and compliance requirements by corporations, many operate in remote areas and are filling in for structural gaps in Australia eg corporations may deliver local government services where no local government body exists or where true local government body does not deliver them;
- New corporate regulation legislation allows for tradition and custom to be practiced within framework of mainstream corporate regulation (*Corporations (Aboriginal and Torres Strait Islander) Act 2006* or 'CATSI' see www.oratsic,gov,au)
- Perceptions of poor governance mainly driven by 'nepotism' issues, fraud is not as big a problem as media suggests (see Australian Institute of Criminology 2002), cross cultural issues regarding nepotism difficult eg International Olympic Committee and unresolved issues regarding behaviours in lead up to Sydney winning its bid (*Gifts of Corruption"? Ambiguities of Obligation in the Olympic Movement* Douglas Booth (1999) Olympika: The International Journal of Olympic Studies Vol VIII Pp43-68)
- CATSI's treatment of nepotism is very straightforward – the mainstream corporations law framework basically applies, with a heavy emphasis on duties of directors and key staff being clear, these duties and other parts of CATSI require disclosure and transparency of any conflicts, with members of corporations (who are the owners) in some circumstances deciding whether a benefit is OK or not– there are penalties for breaches. (see www.oratsic.gov.au for more information and details)

Governance linked to Native Title Rights

- Native title is common law right which can't be taken away by Parliament, it has survived colonisation, unlike statutory land rights which are granted by Parliament
- It is a property right for purposes of just terms provisions of Constitution - statutory land rights may not be
- While no distinct right to governance recognised in Mabo (2), inevitably native title is raising governance challenges and opportunities:
  - Internal governance by group of its native title
  - Governance by group of its interface with non-Indigenous interests
- This governance is in part done through corporations (Prescribed Bodies Corporate) that are mandated to incorporate under CATSI Act, criticism of this use of a corporation however what is the alternative if group is to trade? Funding for these corporations is an issue, some have income from agreements and some do not. Their good governance is very important, they currently own or have an interest in about 9% of Australia and this is projected to increase further for some years.
- Special accommodation of native title governance responsibilities are in CATSI – eg directors cannot breach directors duties if they are fulfilling Native Title Act such as their duties to consult with traditional owners; also traditional owners by virtue of their role in native title decisions cannot be regarded as shadow directors.

Race Discrimination Act 1975 – overview

- Prevents Commonwealth and States enacting racially discriminatory legislation– this is how discriminatory Qld legislation (intended to defeat any common law native title claim in Qld) was found to be invalid (Mabo (1)), so allowing Mabo (2) to proceed successfully – most successful role for RD Act (Gaze AJHR (2005))

- Offers protection against racism eg adverse comments by then Human Rights Commission about 'dogit' arrangements in Qld

- Shows framework by which differences can be accommodated in context of equality, either through recognition of differences as inherent aspect of equality (eg native title is probably an example of this) or as a necessary and temporary special measure (eg land rights, Gerhardy v Brown (1985))

- For RD Act to be valid needs to stay aligned with the Convention on the Elimination of All Forms of Racial Discrimination (CERD) and its interpretation internationally; core test internationally for whether CERD is breached is 'substantive' equality test: this test recognises that there may be equality with difference, identical treatment may in fact be discriminatory and therefore the test is 'what is the result of the alleged discriminatory action', ? (see Perm Ct in Adv Op re Minority Schools in Albania [PCIJ] Series A/A (1934) where court recognised same treatment, if forced, can be discriminatory and different treatment provided just and reasonable can be non-discriminatory);

- In addition affirmative action which on its face might be racially discriminatory is legal under CERD and therefore the RD Act l if meets the 3 pronged test for special measure: sole purpose is securing advancement of the group impacted, ,it is necessary for their advancement, and the measure is 'catch up' or temporary;

- However Australian government in native title debate has rejected the international test for race discrimination (the substantive test) using Gerhardy v Brown as its precedent.

- In Gerhardy v Brown the court took the view that formal equality is the test eg where there is a race criteria the act is discriminatory unless justified as a special measure. This view in Gerhardy is not aligned with international thinking and some comments by High Court have raised doubt about Gerhardy – at the moment the test for racial discrimination remains uncertain law in Australia.

- Commonwealth legislation commonly over rides RD Act – eg 1998 Native Title amendments that validated some extinguishment of native title and most recently NT emergency intervention, part of stated rational for this is 'certainty

- Consequences of this approach by government :
  - Is RDA valid, since Australian interpretation of the test for discriminatory behaviour is not the same as what is accepted internationally?
  - There is a vacuum in equality principles underpinning processes for achieving legislative goals; resulting in a risk of culture of unlawfulness occurring in overall landscape of lawful racial discrimination (eg stolen generations); and there is a risk of legal unintended racial discrimination occurring in the implementation of legislation (eg cdep anomalies, refer to p 451 *Indigenous Legal Issues* 2001). Note, on this point HREOC criticises the NT emergency Intervention for its absence of guidance to decision makers and implementers about how to act in regard to race discrimination, which is especially important given the intervention displaces the RD Act

- Compliance with the RDAct framework, coupled with sound implementation strategies, are key to achieving any legislative goals related to Indigenous peoples: contrast processes supporting alcohol restrictions in Northern Territory which were found to be special measures (see p 450 Indigenous Legal Issues 2001 and HREOC Submission to Committee enquiring into NT Emergency Response Legislation), Note that the latter alcohol restrictions consistent with RD Act in mid 90's were not well supported by government and attracted very little extra funds, and so are perceived as a failure. It is not RD Act that undermined them, but lack of support and funding.

Alcohol restrictions consistent with Racial Discrimination Act offer sound process for implementation

- In Alcohol Report (1995) HREOC comprehensively and in a very practical way set out how to implement alcohol restrictions consistent with Racial Discrimination Act:
  - Special measure requires consultation and generally consent from the people subject to it;
  - Where consent not obtained due to differences among people impacted, then consultation still required and human rights to be a key benchmark for resolving the matter;
  - Without application of racial discrimination legislation, there is a vacuum in how the people implementing behave, creates a significant risk that culture of race discrimination and indeed unlawfulness will occur

Process matters in the law

- Sovereignty lost and not shared with Indigenous peoples in Australia, but constitutional reform and/or treaty over time may change this
- No recognised special rights to governance by Indigenous peoples in Australia but some implicit in native title
- Negotiations about Indigenous governance arrangements occur mainly in respect of land rights and local government, these can be racially discriminatory and should be assessed using RD Act framework as benchmark
- RD Act should not be displaced, since it offers practical framework for assessing when do 'ends justify the means', and a framework that is internationally recognised
- Consequences of displacing RD Act great, since there is then no framework for how the means are acted out – displacement of RD Act sends out a message that race discrimination is OK and indeed necessary, and it risks creating a culture of race discrimination and general unlawfulness like occurred in the stolen generations.
- Private corporations and trusts are a significant force which need careful nurturing in line with mainstream and special measure laws, once again using RD Act as benchmark for what is OK; new CATSI legislation for corporations does not displace RD Act and indeed must be administered in accordance with it.
- RD Act framework shows way for non discriminatory measures, which maximise stakeholder support, and sound policy development and implementation strategies