

Book Reviews ~

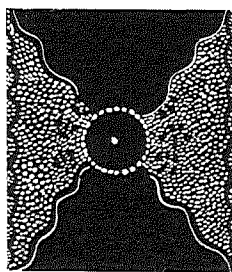
Past Wrongs, Future Rights
by Michael Warby
Tasman Institute, Melbourne,
1997, 167pp., \$20.00
ISBN 1-875-56411-X

This study of anti-discrimination, Native Title and Aboriginal and Torres Strait Islander Policy is well laid out and introduces a comprehensive history of constitutional relations between the Commonwealth and Aboriginal people in the period 1973-1997. Intertwined in the discussion is an analysis of the pitfalls of viewing native title in terms of communal, inalienable and partial title. This book is a useful addition to the all too scant literature that critically questions the assumptions of indigenous policy in Australia.

The central thesis of Michael Warby's book is that the major failing of native title, as communal, inalienable and partial title, is that it does not represent a sound instrument for significantly improving the conditions and prospects of Aboriginal and Torres Strait Islander Australians. The costs involved to the Australian community are not balanced by commensurate benefits to indigenous Australians.

Indigenous legal interests 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. Continuing to treat indigenous Australians as a collective special case runs the risk of retarding the process of adaptation that is vital if indigenous people are to

prosper. On a more general level, the whole emphasis on a collective special case deflects attention from the kinds of developments that may be necessary to overcome the legacy of the past discrimination against indigenous people. These include such things as a well developed sense of individual responsibility, self discipline and the development mechanisms that foster trust and collaboration with people outside the extended family.



Past Wrongs, Future Rights

Michael Warby
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Warby goes about his task by examining in detail the historical background of constitutional relations between indigenous and non-indigenous Australians through various Acts of State, Territory and Federal Parliaments and through the ratification of various international human rights initiatives during the 1975-1997 period. The thrust of his argument is that the welfare approach to indigenous policy, which characterized this period, detracts from or even frustrates cultural adaptation. He suggests that focusing on discrimination and allegations of racism

emphasises attitudes to a biologically trivial and scientifically irrelevant distinction, rather than achieving the necessary improvements within indigenous communities. In effect, he is rejecting the idea that 'race' has a role to play in public policy. Public policy should be 'colour blind,' with specialist programs used only if they assist in the development of the personal skills, knowledge, and informal and formal institutions that will generate and sustain social outcomes commensurate with those of mainstream Australian society. If there is to be a criticism of the book it would be that this section is far too comprehensive, leaving the author little time to investigate the more conceptual aspects of indigenous policy.

The other major thread of Warby's book concerns the jurisprudence of native title. The development of mass prosperity in countries like New Zealand and Australia 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. The system of property rights that developed had a pervasive effect on the incentives for individuals to use resources optimally. Warby argues that native title has created considerable uncertainty about property rights in Australia. The resulting regime has significantly raised the cost of land use with damaging consequences for investment and prosperity. He suggests it is a retrograde step in Australian law.

The core of Warby's argument here is that because native title is communal and inalienable and confers limited usage rights, it will provide little or no economic benefit to indigenous Australians. Allied to this, the

diversity of Aboriginal cultures means that the local content of native title rights is likely to be diverse, increasing problems of uncertainty and raising transaction costs. Codification of native title will either be expensive and complex, or else represent an exercise of such simplifying abstraction as to largely empty it of any cultural authenticity.

Warby suggests that for Aboriginal Australians to forge their place in society, indigenous title needs to be tradable; land owned under indigenous title should be capable of easy conversion to alienable freehold. As part of this process of conversion of title to full freehold, pastoral lessees should also have the option of purchasing freehold title, including the ability to 'buy out' native title holders on the payment of a mutually agreed fee. A 'layered' approach to indigenous interest in land should be available so that:

- communal title can be used for sites of high cultural value through devices such as deeds of grant in trust;
- other land can be held via joint-stock corporations, possibly with restricted membership or rights of sale, or under other shareholder arrangements.

The effect of this would be to allow indigenous Australians the full range of ownership options so they can truly make their own choices. Warby concludes by emphasising the need for Aboriginal and Torres Strait Islander people to generate institutions to deal with these issues themselves rather than falling back on imposed structures.

Critics may argue that Warby has over-emphasized the importance of accepted thinking on property rights issues, and that although Native Title is potentially inefficient because of its

collective emphasis, the framework it provides is better than no title at all. It is a form of title where one formerly did not exist. However this objection represents the type of compromise on conceptual issues that continues the cycle of disadvantage for indigenous people. As Warby argues, the more uncertain property rights are, either in their extent or in their security, the less incentive there is to find better uses for them, particularly over the long term. The larger the number of players that have to be dealt with, regardless of whether they contribute to the exchange, the higher the costs of transacting and the fewer exchanges will take place. As a result, Native Title will not allow Aboriginal people to adapt to modern society and develop the personal status, knowledge, and formal and informal institutions that will enable them to take their place as equal members of Australian society.

The general difficulties Warby outlines in his book regarding treating indigenous people as a special collective case are mirrored to a certain extent in New Zealand in the government's dealing with indigenous Maori people. Maori claim reparation for past injustices suffered at the hands of the Crown or Crown agencies. Many of these claims are indisputable. However the framework the Crown has opted for emphasises 'tribal' identity; if one does not 'belong' or identify with a tribe one is not eligible for Crown compensation for past injustice. Again we have an example of treating indigenous people as a collective case that runs the risk of constraining indigenous people themselves, undermining attempts to improve their disadvantaged position and threatening their individual liberties. In New Zealand the collectivist approach typically benefits the traditional rural leadership while impoverishing and excluding the urban

majority; the cycle of government dependency continues!

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*Keeping the Bastards Honest:
The Australian Democrats'
First Twenty Years*
edited by John Warhurst
Allen & Unwin, Sydney, 1997,
314pp., \$29.95
ISBN 1-86448-420-9

If 'power tends to corrupt, and absolute power corrupts absolutely,' then the balance of power can corrupt even the best and most noble intentions, to the point of power without responsibility. Contrast this with the reality of the major parties in government: no matter what their ideological vantage point or platforms in opposition, the implementation of public policy is constrained by the bureaucracy, by public opinion, and by the rights and duties of governing 'for all Australians.'

Our system of proportional representation and almost equal powers for the Senate has resulted since 1980 in the Australian Democrats holding the balance of power. Either alone or with others, they have had the ability to amend legislation without having to wear the consequences of this power in government. This situation has been mirrored to a lesser extent at