

***The role of private property: can
we do better for indigenous
Australians?***

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Richard Nixon understood

Many of my experiences as Ambassador in Washington left a lasting impression but one that stands out is a lunch I had for a distinguished group of Native American leaders.

Richard Nixon had worked hard for 20 years to rehabilitate his reputation, but prior to that lunch I had not met anyone who was willing to speak positively of him in an unqualified way. Even G. Gordon Liddy, the unrepentant Watergate Plumber and successful shock-jock, whom I met at Nixon's funeral looked sheepish.

But the Native Americans were unstinting in their praise, crediting Nixon with the landmark enunciation of the policy of Self-Determination, which has proved to be a path breaking and successful turning point in Indian affairs in the US. The big announcement was Nixon's 1970 special message to Congress during his first term in office; the centrepiece of the Nixon message became law in 1975 when the Congress enacted the Indian Self-Determination and Education Assistance Act.

Self-Determination reversed the previous policy of Termination.

Termination was designed to accelerate assimilation by ending the treaties and transferring treaty lands to individual private ownership, a policy that was destroying tribal communities and breaking the link between Native Americans and the land.

Prior to the change, the situation of Native Americans was bleak, with high unemployment, rampant discrimination, appalling education opportunities and debilitating health, drug and alcohol issues.

Against the odds, a new generation of Native American leaders came to the fore in the 60s and 70s who have been able to bring a coherence and dignity to what were a shattered people. Native Americans still have significant social and economic disadvantages but great progress has been made and this has been done in a relatively short space of time.

Native Americans have done the hard work, but they would not have been successful without the changed environment triggered by Nixon's commitment to Self Determination.

Self Determination was a policy handed down from on high and was not the result of detailed discussions with Indian groups or leaders. Initially it was greeted with suspicion, but it was quickly recognised as providing a dramatically new set of opportunities for Native Americans.

Self-Determination brought the 19th century Treaties and notions of Indian sovereignty to the fore. Prior to Self-Determination, the Treaties were seen as an historical anachronism with declining relevance. Self Determination brought with it Congressional support and a number of court decisions that were favourable to Indian interests. It also cemented the notion that Indian title to land was a collective title and that previous attempts to split ownership of Indian lands amongst individuals was a mistake.

Can private property rights advance indigenous interests?

The courts made a number of key decisions clarifying the nature of tribal property and resource rights and the extent to which the tribes could control hunting, fishing and other economic functions.

The Northwest fishing case, *United States v. Washington*, or the *Boldt decision* of 1974, was historic as it defined Indian off-reservation fishing rights. Boldt, a Federal Court justice, was dealing with treaty language that provided for a 'right of taking fish, at usual and accustomed grounds and stations...in common with all citizens of the Territory.' At issue was whether the state had any role in regulating Indian fishing and whether 'in common with' provided for a share of the fish to the tribes. Boldt ruled that the treaties meant that the tribes could harvest one half of the salmon passing their off reservation fishing places. Boldt also recognised the sovereign right of the tribes as governments to regulate the salmon harvest by tribal members.

As well as giving wider access to fishing, the decision was momentous in that it acknowledged the tribes' sovereign right to control a wide range of economic functions.

The decision also had a major impact at a local level. Before the decision, tribal fishers took only about 6 per cent of the catch. Moving to 50 per cent severely affected non-Indian commercial fishers and recreational fishers. The outcry was explosive. Judge Boldt was subjected to great ridicule and abuse. Large-scale illegal fishing continued for years and state courts and officials were slow to enforce the new arrangements.

The Supreme Court backed Boldt and in the end the tribes prevailed.

The Court decisions were not just symbolic judgements which attempted to bring dignity and closure to a sorry period of US history. They had real content because they changed property rights. And because of that, Native Americans were able to change their own circumstances in fundamental ways.

Visitors to the US cannot help but notice the large number of Indian casinos that have sprung up on tribal lands particularly around large cities. The link with the Treaties and the Boldt decision might not be that obvious, but the right to regulate gaming comes with the recognition of sovereignty and the right to regulate a wide range of economic functions. Gaming is a state responsibility and in most states is heavily constrained. All of this provides a wide range of opportunities to the tribes.

Many of the casinos are large entertainment centres and involve capital beyond the resources of individual tribes. But with the legal position secure, private capital has been willing to participate. It has been up to the tribes as to how the individual deals have been structured and what conditions have been imposed. In many ways the casinos have been a mixed blessing; there have been concerns about organised crime and suggestions that the private investors have benefited disproportionately. Nobody conceived of casinos as part of the solution to the economic and social deprivations of Native Americans and nobody would suggest that they are the best way to proceed. They just happened; in a sense they are a very 'US solution'. However, the overall result has been one of expanding opportunities and growing wealth for the tribes.

It is not just casinos where the tribes' enhanced property rights have come to the fore. In the western growth states like Arizona and New Mexico, the tribes have become major property developers as residential development spills over onto tribal lands. Some tribes like the Southern Utes got lucky. Evicted from their treaty reservation in one of the more treacherous episodes in Indian history, the Southern Ute were relocated on three much smaller plots. The irony was that the modern Southern Ute reservation overlay major natural gas resources. Self Determination and canny tribal management saw the tribe develop the skills to go into the gas business. The Southern Utes now own interests in nearly 1000 wells and own 700 miles of pipelines; Southern Ute bonds are issued with a AAA rating.

Tribes have used wealth created in one area to build businesses elsewhere; tribes have set up college scholarship funds and delivered better services. In 1969 there were 3000 Indian owned businesses on reservations and in the cities; in 2000 there were around 200,000.¹

But the successes of the past 35 years were not preordained. It took a President and the Congress to reverse the old policy of Termination and breathe life into the treaties and notions of sovereignty. With the support of the Congress and the President, the courts acted diligently to protect and define the property rights that came with the treaties.

In fact, elected representatives could not have defined sovereignty or determined what the treaties actually meant for Indian property rights and for tribal power. It would have been too contentious. One of the strengths of the American system is that Americans accept that the courts have a proper and very important role protecting and defining property entitlements; they will accept from the Courts, albeit with noisy objections in many cases, what would be unthinkable from an elected chamber.

But at the end of the day, it has been enhanced and secure property rights that have transformed the circumstances of Native Americans. With secure property rights have come opportunities for private capital, which have increased the wealth, income and job opportunities of many tribes and tribal members, in some cases quite dramatically.

The market has not cared who owned the property rights; it has not mattered that an Indian tribe collectively owned the rights and that property was inalienable, just as long as ownership was not contested or capable of being contested and that the rights were clearly identified.

In the US, wealth and power have brought dignity and standing to the tribes and improved the circumstances of individual members. However, not all tribes and tribal members have benefited equally. Poverty is still a significant issue. And there are issues to do with managing the new wealth.

It also remains to be seen whether we will see some rebalancing of tribal rights over time as the courts and Congress review the outcomes of the past three decades. However, the situation is demonstrably better than it was and there is a general optimism that things are improving; census figures show that on reservation unemployment was still 22 per cent in 2000 but it was down from 26 per cent in 1990 and 50 per cent in 1960.

¹ *Blood Struggle, The Rise of Modern Indian Nations*, by Charles Wilkinson W.W. Norton & Company 2005 provides a good account of recent developments.

And it goes without saying; there would have been no progress without the energy of a new generation of Native American leaders and general support from the American people.

Success therefore rests on many things with local action, the courts, the Congress and the President all playing key roles. But it is legitimate to single out the role that enhanced and secure property rights have played. And Americans are legitimately proud how their system has worked, on this occasion, to improve the circumstances of a profoundly disadvantaged and badly treated people over a relatively short space of time.

Australia's missed opportunity

The positive benefits that flow from clearly defined property rights would come as no surprise to the authors of the 1991 Industry Commission Report *Mining and Minerals Processing in Australia*. Written almost 15 years ago, the Commission concluded that better-defined property rights would increase the likelihood of genuine negotiations on mutually accepted terms between traditional owners in the NT and the mining industry. In fact the Report went as far as stating:

'The Commission sees granting traditional owners de jure rights to any minerals found on their land as a possible solution to a great many of the problems currently being experienced as a direct result of ill-defined property rights.'

*The Commission's approach in this area is aimed at increasing efficiency by moving towards a system of better defined property rights. Of course, should traditional owners be given de jure rights over minerals, many of the Commission's recommendations in this area would become redundant.'*²

The Commission then made a series of secondary recommendations covering the operations of the existing royalty arrangements as set out in the *Aboriginal Land Rights (Northern Territory) Act 1976*. These recommendations were again based around the notion that well-defined property rights were in the best interests of both indigenous people and the mining industry.

The Commission drew attention to provisions in the *Indian Act* in the US whereby 'rather than having some person or organisation taking some act regarding mining which is then subject to tribal consent, this Act simply provides that the tribe itself may make an agreement regarding mining if it wishes'. The Commission then commented that their recommendations 'should be seen as providing the opportunity to move towards this situation'.³

The indigenous population in Australia has a different history to that of the US but they also have much in common; both are dispossessed people who have had to deal with a sad history of violence and betrayal at the hands of a dominant invading European population.

It is interesting then to reflect on why the past three decades in the US have been a time of developing optimism and steady progress while in Australia we have seen a number of false dawns and growing despair.

² *Industry Commission, 'Mining and Minerals Processing in Australia' Volume 3: Issues in Detail Report No.7, 25 February 1991 page 67*

³ *Industry Commission, 'Mining and Minerals Processing in Australia' Volume 3: Issues in Detail Report No.7, 25 February 1991 page 70.*

It is easy to say that the existence of the treaties in the US makes the two countries non-comparable and for Australians to then dismiss the US experience. But such reasoning misses the point. For the US experience with the Treaties makes it very clear that dispossessed indigenous populations cannot hope to make a future for themselves without enhanced property rights, which channel wealth and income to identifiable groups of indigenous people.

And for enhanced property rights to work, they have to be held collectively and be inalienable. Putting indigenous property rights on to an individual basis proved to be a mistake in the US. Nixon in 1970 called the old policy of termination 'wrong': It was 'morally and legally unacceptable' and produced 'bad practical results'. As for the tribes' relationship with the Bureau of Indian Affairs, Congress should 'empower a tribe...to take over the control [of federal programs] ...whenever the tribal council...voted to do so.'⁴

The other key inference is that for clearly defined property rights to work their magic, there has to be talented leadership and a cohesion to indigenous communities that can take an opportunity and turn it into a benefit. This is a particularly important issue in Australia, where the despair of recent years has taken us to the point where it is legitimate to ask whether indigenous communities still have the capacity to make a regime of enhanced property rights work.

Australia did embrace self-determination, but it took the form of welfare without responsibility. The people involved were well meaning, but it was possibly the most destructive thing we could have done. Putting indigenous communities back together again needs to be as much of an objective in Australia as putting in place enhanced and clear property rights.

But we should not lose our perspective on what has happened.

It has become the considered wisdom in Australia that all the government programs that have targeted indigenous people over the years have had little or no positive impact. In fact, if anything, the misery and degradation has got worse. In thinking this way, little consideration is given to the framework in which events have unfolded.

One can only guess where the US and Australia would be today, if it had been Australia that had embarked on a policy of self determination and property rights in the 70s and Nixon and the US had continued with Termination and the extinguishing of the Treaties. But it is reasonable to hazard that the circumstances of the indigenous peoples in the two countries would be reversed; in the US the tribes would have disintegrated and in Australia we could well be welcoming study tours pondering on how we have managed to build successful indigenous communities and successful mining companies.

Countries make choices and we unfortunately have yet to make any clever ones when it comes to indigenous matters. And Australia has had opportunities, with the High Court native title decision of 1992 being the most important.

⁴ Richard Nixon Special Message to Congress 1970. *Blood Struggle, The Rise of Modern Indian Nations*, by Charles Wilkinson W.W. Norton & Company 2005 page 196.

The High Court's role

The High Court is part of the fabric of decision making in this country that ensures that Canberra and the political process does not dominate all outcomes. It is one of the reasons why Australia is different from other countries and why we potentially have a flexibility to respond to problems that other countries lack.

In 1992, it is fair to say that many did not see the High Court's judgement in this way and far from welcoming the opportunities that the Court's decision brought, they set about devising ways to negate them.

This was a difficult issue for the Keating government. It was clear from the Court decision that the States had the power to extinguish native title unless such action was inconsistent with Commonwealth legislation.

Keating saw the Mabo judgement as a watershed opportunity to transform the circumstances of indigenous people in Australia. This looked like the start of a process of development for indigenous people based on property rights rather than government transfers. As he said in his Redfern Speech:

*'For this reason alone we should ignore the isolated outbreaks of hysteria and hostility of the past few months. Mabo is an historic decision – we can make it an historic turning point, the basis of a new relationship between indigenous and non-Aboriginal Australians.'*⁵

Protecting native title required Commonwealth legislation. To give such legislation balance it also needed to address the issue of where native title did not apply.

After much negotiation involving the Prime Minister, core parts of the Canberra bureaucracy, indigenous groups, mining and agricultural representatives and the Senate, the *Native Title Act 1993* passed into law.

The Mabo judgement found that the common law had not extinguished native title on settlement and that the Crown had only extinguished native title over time 'parcel by parcel'. The logic of this led the Court to find that:

'there may be other areas of Australia where native title has not been extinguished and where an Aboriginal people, maintaining their identity and their customs, are entitled to enjoy their native title'.

As the Act traded off many competing interests in an attempt to reach a national consensus, it should have provided a sensible basis for considering other native title claims and for granting claims in those situations where native title has not been extinguished. Unfortunately this has not happened.

⁵ Australian Launch of the International Year for the World's Indigenous People, Paul Keating Redfern Park December 10, 1992

The Native Title Act 1993 was a very Canberra response to a situation where one of our US sourced institutions, the High Court, was having a US type moment.

Australia has always been unusual in that we have grafted a number of US checks and balances onto a Westminster system of government. We have a written constitution which limits federal power, along with a Senate and a High Court. The founding fathers built into our system provisions that work against winner takes all politics. Quite deliberately, they imposed upon the new federal government a decentralisation of decision making that does not exist in the UK.

By luck or by design, we have ended up with a system of government that is well suited to the running of a successful modern economy. The experience of the last 30 years shows that success requires the protection of private property, the rule of law, due process, decentralised decision-making and market outcomes. Supporting all this requires governments which are accountable and whose processes are transparent. Countries with powerful governments that sit on top of most economic and social outcomes, in the end, perform poorly.

The US system has lurched too far towards constraining executive power. The British on the other hand, concentrate too much power in their executive, which is constrained by little more than convention. We have many of the checks and balances of the US, but we also allow elected governments to govern.

The modern reality is that it is only hard-wired checks and balances that constrain governments; you can be reasonably confident that given the opportunity, governments will explore the limits of their black print powers and that convention will prove of tenuous value when the crunch comes.

While Australia is fortunate in having the institutions for success, we have not always valued them properly or used them effectively.

The rule of law, the protection of private property and a Federal government that is forced to live within the constraints of the Constitution require a High Court with authority and respect.

For much of our history, both sides of politics have viewed the High Court from a different perspective.

The Labor Party has tended to view the High Court as an ally of conservative elements in the community and as an impediment to any reformist Labor government in Canberra. The fact that the High Court disallowed the Chifley government's Bank Nationalisation Act in the 1940s reinforces this view.

The Liberal Party has always objected to the High Court expanding its role into areas perceived by the Party as outside its responsibilities. In this they have been concerned that the High Court limit its role to interpreting legislation and not make policy. The Liberal Party's rejection of the High Court's involvement with native title is very much in keeping with this tradition.

Both Parties have tended to see the High Court as an undemocratic institution getting in the way of an elected government's right to govern on its terms.

The US Supreme Court has an accepted role in the US. It gives the US the capacity to deal with contentious matters that would be difficult for the US political system to handle and it does deliver justice to people and businesses who would be hard pressed to get a hearing in other systems. While there are those who rail against the 'living Constitution', the Supreme Court gives the American system an ability to adjust to changing circumstances; what is taken as a perceived truth for one generation can be reversed a generation later. In many cases, the main function of the Court is to be a check on the popular enthusiasms of the majority.

The Supreme Court allows a large and diverse country with many competing interests to operate without fracturing. It is fair to say that the US would have disintegrated a long time ago with a winner takes all system.

Even in the US, the Court has to proceed carefully. It cannot afford to be too far out in front of public opinion, nor be overly 'activist' on matters which are opposed by the mainstream. Nor can it stand in the way of a well-supported mood for change.

Abraham Lincoln in his First Inaugural Address took a philosophical view, noting of the Court that:

'...while it is obviously possible that such decision may be erroneous in any given case, still the evil effect following it, being limited to that particular case, with the chance that it may be over-ruled, and never become a precedent for other cases, can better be borne than could the evils of a different practice'.

However, the real sting in his Address came in the following sentence, which reads:

*'At the same time, the candid citizen must confess that if the policy of the government upon vital questions, affecting the whole people, is to be irrevocably fixed by decisions of the Supreme Court, the instant they are made, in ordinary litigation between parties, in personal actions, the people will have ceased to be their own rulers, having to that extent practically resigned their government into the hands of that eminent tribunal.'*⁶

The Court also cannot afford to use its authority in an open-ended way to further the interests of minorities. In fact, Chief Justice Rehnquist is on the record for having written, 'in the long run it is the majority who will determine what the constitutional rights of the minority are.'⁷

The US has sought to preserve the integrity of the Court and maintain the prerogatives of the President and the Congress through the manner in which justices to the Court are appointed and the length of their tenure in office. In this way they are comfortable that whatever might happen in the short run, the government will never fall into the hands of the Supreme Court nor will the Supreme Court lose its capacity to act as a body independent of the government.

But the manner in which the US appoints justices to the Supreme Court is extremely time consuming and potentially destructive; they are nominated by the President and approved by the Senate after an exhaustive process of review. Justices are also appointed for life; just like Popes and monarchs they do not retire. And once they are appointed they have an authority that comes from having been vetted by the political process.

⁶ First Inaugural Address, President Abraham Lincoln, March 4, 1861

⁷ *A Random Thought on the Segregation Cases*, 1953 Justice Rehnquist in Brennan vs Rehnquist, *The Battle for the Constitution*, Peter Irons, Alfred A. Knoff 1994 page 60.

The US system has gone overboard in its pursuit of legal redress, which makes the overall legal system needlessly wasteful and expensive. Australia, on the other hand, is in the fortunate position of having many of the pluses of US arrangements without all the minuses.

The key is for Australians to value the High Court and see it as performing a more centre stage function.

And on this score we could strike a better balance.

A better way of making High Court appointments

As a nation we have sought to resolve the inevitable High Court/government tensions by seeking to restrict the role of the Court. This is understandable but short sighted. The High Court will inevitably have cycles of 'activism' and its behaviour will constantly surprise governments. We would be better off acknowledging that the High Court has a legitimate role to play, that its existence strengthens our country and makes us better able to deal with the pressures of running a modern sophisticated nation.

The key is to put some better balance into how we appoint justices to the Court.

In Australia, justices are appointed with little fanfare. The Prime Minister is solely responsible for their selection and under the constitutional amendment of 1977 they have to retire at 70. At the time, the constitutional amendment of 1977 seemed like a commonsense reform. With hindsight it was probably a mistake, as it makes justices marginally less secure and has detracted from the standing of the Court.

While the Prime Minister of the day appoints the justices, the convention has been that he does not actively engage in testing the views of prospective appointees ahead of making his selection.⁸ In fact, in the past, Prime Ministers often have had only the most superficial knowledge about those they were appointing. In this way we have sought to maintain the integrity of the Court.

People would have greater confidence in the High Court if appointees were more of a known quantity ahead of their appointment, and it would reassure elected representatives if they had some say in the appointment of justices.

Australia benefits from having elected governments who are allowed to govern and it would distort our system if we were to move to the US arrangement where the Senate approves the appointment of Supreme Court justices.

However there would be merit in having the Prime Minister nominate justices to the High Court and for him to then ask the Senate for an opinion, while maintaining his right to appoint his nominee regardless of the Senate's view. In such an arrangement there would be a need to place time limits on the Senate's ability to express a view. Such a process is likely to lead to greater bi partisan support for Court appointments. It would also reassure people, that the High Court could not usurp

⁸ The Prime Minister, of course, might be a woman.

powers that rightly lie with the Parliament if, over time, the Court had a strong incentive to maintain the confidence of an elected Chamber.

Prospective appointees would doubtless find an appearance before a Senate Committee challenging but once appointed they would find their own authority and that of the Court would be higher.

Such an arrangement would have another very important benefit.

There is always a strong incentive for the Prime Minister of the day to break with the convention and enter into a dialogue with prospective appointees before he makes his selection. The practice of the current Government in formally interviewing candidates is a disturbing development.

If this practice becomes the norm we will end up with the worst of all worlds; a distorted manner of appointing justices and a High Court with limited legitimacy.

It would be far better for prospective appointees, the High Court and in the end the Prime Minister himself, if conversations about the views of candidates were public knowledge.

Walking backwards from the original High Court decisions

Touchstone issues with the High Court have traditionally been attitudes to Commonwealth/States rights and issues to do with the foreign affairs and industrial relations power. Having found that native title survived European settlement, it is legitimate to add attitudes to native title to that list.

The political mood and the composition of the High Court have changed and events since 1992 have unfortunately marginalised native title. Native title processes revolve around the registering of claims and the slow process of securing determinations. At end June 2004, there were 506 applications on the Register of Native Title Claims, 45 new claims were accepted during the course of 2003-04 and there were six determinations bringing the cumulative number of registered determinations on the National Native Title Register to 51. Of the six determinations in 2003-04, there were four determinations that native title exists and two that title did not exist.⁹

Court decisions, particularly recent decisions, have emphasised the fragile nature of native title. Moreover native title has been broken down into a bundle of traditional activities; claimants need to address each activity, any of which could have been lost over the years. *Daniel v State of Western Australia* 2003 spoke about the right to build humpies but not houses. The judge also stated that on the evidence before him:

‘the native title rights and interests...are not exercisable otherwise than in accordance with and subject to traditional laws and customs for personal, domestic and non-commercial purposes (including social, cultural, religious, spiritual and ceremonial purposes)’.

These findings were reaffirmed in *Daniel v State of Western Australia* 2005. In this environment it is very difficult for native title claimants to provide sufficient evidence that their traditional laws and customs establish rights of a commercial nature.

⁹ *National Native Title Tribunal Annual Report, 2003-04* pages 42,45,47

The National Native Title Tribunal Annual Report 2003-04 concludes:

*'Although native title itself may not be an economically valuable commodity, economic and other benefits such as heritage are being secured by groups as by-products of native title processes.'*¹⁰

As we have done so often when it comes to indigenous matters, we have gone back to comforting ourselves that it is the symbols that matter.

Having dropped down a ladder in 1992 with the advent of native title and dangled the possibility that indigenous Australians might use a newfound property right to improve their circumstances along the lines of what has been achieved by Native Americans, we have now pulled it back up again. If someone were to ask the proverbial question, 'Show me the money', the response unfortunately is 'There is none'.

Private property rights are the way forward for indigenous Australians

While the courts at the moment are in no mood to widen native title rights, this could change. Future appointees to the High Court could take a different view. It would not be such a large leap to find that the existing native title right to hunt crocodiles included a right to harvest them commercially as well. It maybe a small move but it would have important positive implications for indigenous communities.

But if people accept that property rights are central to any solution, then the situation is not as grim as current circumstances might suggest and there are areas where governments can usefully contribute without supportive action from the courts.

A good starting point would be to revisit the Industry Commission Report *Mining and Minerals Processing in Australia 1991* and its key recommendations regarding the *Aboriginal Land Rights (Northern Territory) Act 1976*. The Northern Territory government would not necessarily support the main recommendation to give de jure rights to any minerals found on their land to indigenous communities but the Commonwealth can still legislate if it wishes.

The US experience would suggest that adopting the main Industry Commission recommendation would transform the situation in the Northern Territory. The disintegration of indigenous communities may make the early years a time of frustration and wasted opportunities but it is reasonable to say that in 20 years Northern Territory indigenous communities would have encouraging similarities to Native American communities and they would be dramatically improved from where they are today.

They would also be a good role model for indigenous communities elsewhere in Australia and a powerful argument in favour of the benefits of clearly defined property rights.

Providing de jure rights to minerals to indigenous communities would be a change from current practice where such rights lie with the Crown. In the past, Treasury Departments have jealously

¹⁰ *National Native Title Tribunal Annual Report, 2003-04 page 23.*

defended this arrangement. But making this change could be the spark that makes the difference. It is one thing not to take action because there is no obvious remedy; it is entirely a different matter if there is a way forward and to chose to ignore it.