Beyond the Rhetoric: The Next Step for Indigenous Affairs

Policy
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While the focus of this federal election has shifted to international issues, there remain many important domestic issues facing the next government. Among them is the longstanding problem of policies related to Indigenous (Aboriginal and Torres Strait Islander) Australians. Although this group accounts for only two per cent of the Australian population, their position as the first inhabitants of the continent and their continuing economic disadvantage and poor health record gives them a political significance that far exceeds their numbers.

Over the term of the next parliament, there will no doubt be considerable debate over the merits or otherwise of a treaty with Indigenous Australians. Another important political issue will be the role and progress of the reconciliation process, which means different things to different people.

There are no ‘quick fixes’ for the longstanding problems of Indigenous Australians and neither a treaty nor the reconciliation process are likely to have large practical effects on Indigenous Australians in the immediate future. However, changes in two policy areas may have important implications for Indigenous Australians during the life of the next parliament: welfare reform and the associated push to get welfare recipients of working age into work, and developments with respect to native title.

Welfare Reform

The gradual incorporation of Indigenous Australians into the Australian welfare state took place over the 1970s and 80s and has had major implications for Indigenous communities. Estimates from the National Aboriginal and Torres Strait Islander Survey (NATSIS) conducted by the Australian Bureau of Statistics in 1994, show that 63 per cent of the Indigenous adult population cited income from government transfers as their principle income source. Employment rates have shown a long-term downward trend among Indigenous people and employment growth has not kept up with the rapidly expanding Indigenous working-age population (Taylor and Hunter 1998). In this context, welfare transfers have played a major role in maintaining real incomes.

However the days of passive welfare entitlements are over. The shift towards a more active welfare policy following the McClure report has been further developed with the program Australians Working Together, launched in the 2001 budget. This will have significant implications for those currently dependent on income support, which includes a disproportionately large number of Indigenous Australians. While there are good arguments for moving away from ‘sit down money’, the emphasis on the
The obligation of welfare recipients to do something in return for their income support is likely to put additional pressure on this already economically vulnerable group.

It is important that the shift toward a more active program is properly supported and recognises the additional difficulties Indigenous Australians face in the mainstream labour market. For those living in remote communities, there simply may not be a real labour market. The only option is often part-time work on the work-for-the-dole program for Indigenous Australians, known as the Community Development Employment Projects (CDEP) scheme. The Coalition government is now encouraging CDEP schemes to act as employment agencies and there are financial incentives for them to move participants off the scheme into mainstream jobs. While this may be feasible in areas with developed labour markets, there will remain communities where there are just no mainstream jobs available. In this context, the Aboriginal and Torres Strait Islander Commission (ATSIC) is establishing Community Participation Agreements with remote communities in which an agreed list of activities will be established which entitle an individual to income support.

Although it will be relatively easy to develop these lists of approved activities, it will be much harder to actually make the recipients better off from undertaking them. Important factors limiting Indigenous employment opportunities include low levels of education and skills among Indigenous Australians, relatively high fertility rates compared with other Australians, the large proportion of Indigenous people who live in rural and remote Australia where jobs are scarce, discrimination against Indigenous people, and the cultural preference of many Indigenous people to continue to work within a predominantly Indigenous environment.

Working on CDEP may be important for community and individual morale, but payments for participants on the scheme are limited to welfare entitlements. These people may be working but it will not raise their household incomes. A focus on long-term economic development is required to translate this extra work effort into improved living standards. In addition to the development of relevant skills, the provision of banking and telecommunications services are important in rural and remote areas.

A Future for Native Title?

The recognition of native title by the Australian High Court in the Mabo decision of 1992, and the subsequent enactment of the Native Title Act 1993 by the Australian Government, heralded a fundamental shift in Australia’s legal foundations and in its property law. It is now almost a decade since the Mabo decision and timely to ask whether the great expectations and fears held by different groups were warranted. The dust has settled. Native title is here to stay. Overall, the public and government are probably less fearful, but many Indigenous Australians are less hopeful, criticising the legislation for not meeting their historical grievances.
So what is the current status and future of native title in Australia? There are real possibilities of advancing the matter of native title through the rapidly growing practice of agreement making. In some respect the actuality may be getting ahead of the debate, which can seem bogged down both in misunderstanding and political positioning. Stakeholders in the native title game are exploring ways to negotiate and arbitrate outcomes as opposed to pursuing costly litigation — which currently takes on average 4–5 years to get through the court system. There have been 21 determinations of native title — 13 by consent and 8 after trial. As at February 2001, some 2,343 future act agreements have been made over mining and 57 about non-mining acts (NNTT, various years). There is little doubt that some issues are being resolved through the agreement process.

However, while the ground rules for native title are set and statutory procedures in place, there remain many complex legal and policy matters to be resolved. There were over 550 active claimant applications as at January 2001, of which 42 are before the court. Native title still has to be determined on a case-by-case basis. The key issues still to be addressed include:

- Where does native title exist?
- Who has native title?
- What is the content of native title in each case?
- How can other interests practically co-exist with native title?

Both policy consideration and judicial declaration will be vital to developing a solid foundation for dealing with these questions. The potential role of State and the Federal Governments on many native title issues is not clear. Common law recognition is a moveable feast and we are still in a period of transition. Many of the key concepts and principles first declared in Mabo have been the subject of further consideration by the courts through a series of cases testing a number of fundamental propositions, including the definition of native title itself. What the courts have articulated with increasing clarity is the principle that native title is a proprietary right. It is neither an institution of the common law nor a form of common law tenure, but is recognised by the common law.

The core questions that will require policy and common law clarification over the next decade include:

- What is the nature of the native title connection to land?
- Is native title a full and compact proprietary title or a bundle of rights that can be successively extinguished?
- What exactly does ‘exclusive possession’ mean?
- What is the status of native title in national parks and reserves, and over seas and seabeds beyond the low water mark?
- What constitutes legal extinguishment of native title, and can extinguishment be partial?
• How is just compensation for extinguishment of native title to be achieved?

A multitude of agreements on matters other than the recognition of native title has been negotiated under the umbrella of the Native Title Act. The extent to which those agreements will provide long-term benefits to Indigenous Australians remains unclear. And the burden of proving native title should not be underestimated. For many Indigenous Australians, the loss of their traditional law and custom was made legally complete under the legislation, and recognised by the creation of the Indigenous Land Fund. Resolution of native title matters through negotiation and mediation can be resource-intensive, but probably far less so than litigation, which seems simply to exacerbate conflict. The challenge for policy-makers is to make the legislation workable, diminish the conflict, and facilitate the delivery of durable and just outcomes.

There is no magic wand that will solve all the problems of Indigenous Australians. Certainly the experience of the last thirty years has shown that money alone is not the answer. In its recently released Report on Indigenous Funding 2001, the Commonwealth Grants Commission has identified the critical issues that government and policy makers need to address. These are the need to promote: local and regional agreements about service delivery, the pooling of block program funding, community control of service provision, and dynamic linkages between joint decision making at higher government levels and local community governance.

It is also important policies recognise the social and economic circumstances in which many Indigenous Australians live. In the context of the election, it is hard to distinguish between the practical impacts of the two major party policies with respect to reconciliation.

REFERENCES


NNTT — National Native Title Tribunal (various years) Annual Reports. Data are also available online at http://www.nntt.gov.au/.
