

Bennelong Conference  
Melbourne  
10 September, 2005

Land Tenure and Impediments to Commercialisation  
A retrospective.

Ray Evans

I joined Western Mining Corporation (as it then was) in 1982 and soon found myself deeply involved in the Aboriginal Land Rights debate. At that time the preferred car sticker for members of the Progressive Left (to use their term of self-congratulation) was

“LAND RIGHTS NOT MINING”

and in Western Australia, where the mining industry had more popular support than in the eastern States, the counter sticker was

“LAND RIGHTS SHOULD BE EQUAL RIGHTS”.

This counter-sticker, much to the fury of the Left, became ubiquitous, not just in the mining regions of WA, but also in Perth.

A brief recent history of Aboriginal Land Rights, up till that point, begins with the Gove Land Rights case which resulted in the Blackburn judgement of 1971. That judgment still remains the best summary of the law of real property as had developed since the founding of NSW, and it upheld the unifying principle of Crown ownership of all Australian land since 1788. The appellant's case was led by Edward Woodward QC with Ron Castan as his junior. I have discussed the Woodward Royal Commission and the passing of the Northern Territory Aboriginal Land Rights Act in 1976 by the Fraser Government in the paper I gave at the Bennelong Society's 2003 conference held in Canberra. That paper is available on our website.

In 1982 the debate about Aboriginal Land Rights was in full flow. In March 1983 the Hawke Government was elected to office having promised a Commonwealth Aboriginal Land Rights Bill. Minister Clyde Holding was energetically pushing this cause, but in the end Prime Minister Bob Hawke pulled the plug on Holding's ambitions. He did so particularly because of representations from WA Premier Brian Burke. Holding's fury and resentment lasted for years, it is perhaps still undiminished, and it was fully manifest in that great TV documentary *Labor in Power*, made many years later.

The Hawke settlement came to an end in June 1992, when the High Court brought down Mabo, 6 to 1, Sir Daryl Dawson being the sole dissident. John Hewson refused point blank to make Mabo an election issue, preferring to campaign on the GST. Paul Keating won the March 1993 election, and on 23 Dec 1993, the Senate passed the Commonwealth Native Title Act, to loud and prolonged applause from the Press Gallery. In 1996 the High Court delivered its judgment in the Wik case, which declared that the granting of a pastoral lease did not extinguish native title (4-3). It is noteworthy that Justice Brennan, the main driver of the Mabo judgment, was in the minority. and in mid-1997 the Howard Govt passed its Wik legislation which, starting off with 10 points, was reduced to 7 ½.

In 2003 the High Court delivered its Yorta Yorta judgment. In this judgment Mabo and the Commonwealth Land Rights Act of 1993 have been so constrained that the likelihood of any native title claim succeeding under the Commonwealth Act is now close to zero. However the rent-seeking privileges to native title claimants still exist (and these privileges are still major burdens on the mining and pastoral industries). A future High Court could, of course, undo Yorta Yorta, but given the changes that have taken place in political and ideological life in Australia over the last 5 years or so, I think that is most unlikely.

What I have been trying to explain, at least to myself, is how was it possible for the Fraser Government to pass its 1976 NT Aboriginal Land Rights Act (NTALRA) with condescending disregard of the predictions which the mining and pastoral industries put forward at the time, predictions which have long since been verified by events? (For example, the responsible minister, Ian Viner, claimed with complete conviction that the amount of land granted under the Act, would never exceed 8 percent of the Territory. The latest figure is 54 percent, and the percentage of coastline granted is 75 percent.)

The Hawke Government backed away from a Commonwealth Native Title Act. But that did not deter six justices of the High Court from overturning the law of real property in Mabo, with arrogant indifference to the social, legal and economic consequences that followed? How could that have happened?

I wish to describe the state of opinion at the time with some quotes. The first comes from a recent article in the London Spectator by Geoffrey Wheatcroft.<sup>1</sup> He was commemorating the 20<sup>th</sup> anniversary of the death of Shiva Naipaul, the very gifted writer who was born in Trinidad, and became famous throughout the English speaking world for his travel and political writings.

Not long before he was struck down by a coronary thrombosis at the age of 40, Shiva Naipaul had visited Australia, and in particular the Northern Territory where he got into trouble with the Northern Land Council over permits to visit Aboriginal lands created under the NTALR Act.

I met him at a dinner in Melbourne early in 1985 where he discussed his experiences in Darwin with an exquisite sense of irony. The Wheatcroft quote is as follows.

“I still laugh when I remember Shiva’s descriptions of his quasi-disastrous

---

1

In the late 1970s he was a columnist for *The Spectator*, and also its literary editor. In the following years he was first the editor of the "Londoner's Diary" in the *Evening Standard* and then that newspaper's opera critic. He is currently a columnist for the *Daily Express*. In the interstices of regular employment he has written many freelance articles and published two books -- *The Randlords* (1985), a study of South African mining magnates, and *Absent Friends* (1989), a collection of biographical sketches. His new book,

[1. \*The Controversy of Zion\*](#), about the history of Zionism, was published in September, 1996, by Addison-Wesley. He is also a frequent contributor to *The New York Times*, *The Wall Street Journal*, and *The Guardian*.

visit to Australia shortly before his death for the purpose of writing another book, and his unhappy dealings with Australian progressive intellectuals, politically correct *avant la phrase*, and altogether one of the most dogmatic groups of people on earth. When he suggested at one such gathering that the Aborigines had not, perhaps, achieved a civilisation to be compared with that of China or of Europe or of India, there was fathomless silence and polar chill.”

Although it is not regarded, in progressive circles as good taste to discuss the issue the debate has shifted in recent years to the complete breakdown of law and order in remote Aboriginal communities, many of which are on Aboriginal land designated under the NTALR Act, and the Pitjantjatjara Lands Act passed by the Tonkin Government in 1981. Petrol sniffing has been identified as the cause of very large numbers of early deaths. But drunken violence is also a frequent cause of death and injury, and sober violence is not unknown.

Three hundred years ago Thomas Hobbes, in his *Leviathan*, described the situation which is now endemic in virtually every remote community.

"The condition of man ... is a condition of war of everyone against everyone."  
"There is no place for industry; because the fruit thereof is uncertain: and consequently no culture of the earth; no navigation, nor uses of the commodities that may be imported by sea; no commodious buildings; no instruments of moving and removing such things as require much force; no knowledge of the face of the earth; no account of time; no arts; no letters; no society; and which is worst of all, continual fear and danger of violent death; and the life of man, solitary, poore, nasty, brutish, and short," -

More recently Mark Steyn wrote of an Inuit community in Canada. His comments apply directly to our situation here. Given that Canada was a source of much of the doctrine and law which was entrenched here in Australia, it is not surprising that the similarities should be so close. Mark Steyn wrote (*London Spectator* 13 August 2005) as follows:

There's an abandoned town in Labrador called Davis Inlet. An Innu community — i.e., natives of the Mushuau people, if you're big on who's who in the Great White North. About a decade ago Canadians switched on their televisions and were confronted by 'shocking' images of the town's populace passing the day snorting drugs, glue, petrol and pretty much anything else to hand. So, as any impeccably progressive soft-lefties would, Her Majesty's Government in Ottawa decided to build the Mushuau a new town a few miles inland — state of the art, money no object, new homes, new heating systems, new schoolhouse, new computers, plus new more culturally respectful town name (Natuashish). Total cost to Canadian taxpayers: \$152 million, which works out to about \$217,142.85 for each of the town's men, women and children. Got a wife and two kids and you're looking at a government handout of about nine hundred thousand bucks.

And the upshot of Canadian taxpayers' generosity? Two years after the new town opened, the former Mushuau chief and the Royal Canadian Mounted Police both agreed that there were more drugs, alcoholism, gas-sniffing etc.,

than ever before. Also higher suicide rates.

Gas-sniffing is not a traditional native activity. Before the first European settlers came, the Mushuau did not roam the tundra hunting for Toyota Corollas to siphon the tanks of. That's a particularly perverse form of cultural co-mingling, but one in which 'compassionate' white liberals seem determined to keep the natives mired. The government showers native communities with money; there's no economic downside to sniffing petrol all day; and as everyone in Natuashish is driving around in brand-new pick-ups on roads that go nowhere you might as well use that full tank of gas for something. The net result of 40 years of a 'caring' policy intended to maintain communities in their traditional 'culture' is that Canadian natives now have tuberculosis, diabetes, heart disease and brain damage at levels accelerating further and further away from those in society at large, not to mention lower life-expectancy, higher infant mortality, and endemic suicide. On the last point, the Canadian government doesn't give natives the rope with which they hang themselves, but they do give them free supplies of ammunition. (Natives have higher murder rates, too.) Identity-group grievance-mongers routinely go on about the first Europeans introducing disease to hitherto vigorous North American Indians four centuries ago, but the current health crises afflicting literally dying communities are of less concern. Nonetheless, the math seems unarguable: too many agonised white liberal multicultural chiefs leads to not enough Indians.

Steyn's comments on declining populations is true only in part as far as our Aboriginal people are concerned. The death rate amongst young men is very high. Stephen Davis referred to the situation in the Western Musgraves as one where no men between the ages of 25 and 40 were to be found. However, as Bob Catley has pointed out, the fertility rate for Aboriginal women in the NT is high, so the Aboriginal population in the NT is characterised by large numbers of children, and small numbers of adult males.

So the debate about remote communities has moved on. The question now being asked, although not loudly enough, is:

How do we close down these places of barbarism, and relocate the people who live there to places where they will be free from the fear, and the everyday occurrence, of appalling violence, and can begin to rebuild their lives, and the lives of their children, so that they have a real prospect of living a decent life?"

Now that the Coalition has a majority in the Senate, and the Howard Government is contemplating changes to the NTALRA the question that is not being asked is what does that Act, and the equivalent Acts in other States, have to do with the problems of these remote communities.

The connection is this. The arguments which drove the Aboriginal Land Rights Movement forward politically were based on what Paul Albrecht called the genetic theory of land rights. I quoted Albrecht on this in my 2003 paper and I repeat that quote today.

Much of what is said on this subject gives the impression that the Aborigines' attachment to their land is genetic---something they were born with, something they have even when they are brought up in an Australian urban setting, without any knowledge of their own language, and without any in-depth knowledge of the mythology relating to their land.

The Aborigines' attachment to their land has nothing to do with genetics, but everything to do with learning, and the subsequent internalisation of the knowledge that has been passed on. Aborigines were/are animists, believing that the supernatural beings (also known as totemic ancestors) who were active at the dawn of time, are still to be found in the land they shaped and fashioned. They also reside in its flora and fauna, in the natural phenomena like thunder and lightning, in the sun, moon and stars, and in the humans to whom they gave birth. It is these same supernatural beings residing in the land and in the people of that land that gives the Aborigines their unique attachment to their land, and their sense of oneness with the land. While our relationship with land can be described as an "I-It" relationship, theirs is an "I-Thou" relationship. This relationship is taught by the adults and initially learnt informally by the children. Then after initiation comes the more formal and in-depth instruction. Men who are prepared to apply themselves to the rigours of learning, and I might add, are prepared to accept the physical pain which is often inflicted as a part of the teaching process, are eventually taught all the knowledge pertaining to their personal totem, and to the totems of their land.

It was argued that the special relationship which Aborigines had to the land from which they came was so important that without secure access to that land to perform the ceremonies and rituals which their culture required they would simply waste away. This was the beginning and the end of the arguments for the upheaval to the law of real property in Australia which the various Aboriginal Land Rights Acts, but more particularly Mabo, brought in their train.

Now that the teaching and the extremely painful initiation rites to which teen-age Aboriginal boys were subjected are no longer carried out, these arguments, whatever validity they might have had, can no longer be accepted. But the logic of the Land Rights game required, first inalienable free-hold title and, second, that at least some Aborigines should continue to live on these lands in order to fulfil the religious demands of those non-Aboriginal Australians who wished to maintain a visible manifestation of a higher spirituality than that which Christianity could provide for them.

Inalienable freehold thus became, not a property right, but a prison; a prison from which it is very difficult to escape. It is not that these lands are surrounded by insurmountable fences, but that those young people who have been born and brought up, if that is the right word, in these dreadful places, have no human capital on which they can rely to make their way in the outside world. The idea that they should be taken from these terrible places, and placed in boarding schools, where they can learn to equip themselves for a successful life in contemporary Australia, is an idea which the Bennelong Society should now be energetically putting into the public domain.

The Howard Government is now thinking about reform of the NTALRA. The focus is on allowing some small parts of the lands granted under the Act to be excised in some way and returned to the economy through enabling mortgages to be secured and businesses established on the security of these mortgages. This proposal has generated a response from Oxfam, a response which was commissioned by Professor Jon Altman, Director of the Centre for Aboriginal Economic Policy Research at the ANU, and one of the remaining Coombsian institutions which lives well at taxpayers' expense.

Oxfam Australia executive director Andrew Hewett says a watering down of land rights will not improve home ownership prospects.

"It won't bring about increased home ownership and it won't bring about economic development," he said.

"We've been concerned that there have been suggestions ... that there should be a dilution of land rights," he said.

"What we thought was important was actually to inject some evidence into the debate."

I think that the Oxfam comments have some merit. There is no prospect of mortgages being granted to people whose houses have no commercial value in the real estate market. Oxfam wants to continue the present arrangements of imprisonment under inalienable freehold, and they see the proposals for excision as the thin edge of the wedge. From my point of view the wedge is much too thin. The arguments need to be turned around to focus on the future prospects of the rising generation, and the imperative of breaking down the walls which keep these young Australians in appalling circumstances.

The only reform of the NTALRA which matters is its repeal. The lands which have been granted to various Aboriginal groups should be transferred to simple freehold. No doubt there will be some difficulties in deciding which particular people get which particular freehold titles, but such difficulties are trivial when compared with the problems which have to be overcome to rescue the imprisoned generation, if I can change the label which the Left created, and with which they caused so much devastation.

These lands are of little economic value. The rents which have been used to fund the activities of the NLC and the CLC have come from mining operations which were established, with one minor exception, prior to 1976. Mining and pastoralism are and will continue to be, doubtless with a few exceptions the industries which require access to, or use of, large areas of basically valueless land. Rent-seeking under "right to negotiate" provisions of these acts have simply diverted exploration expenditure into other areas not subject to such provisions, and to other countries. The economic boom now under way in China and India will require very large increases in mineral production to satisfy the demand for resources which will be generated by this historic shift from mass poverty to mass prosperity.

It would be a tragedy for Australia if we were to fail to participate in this huge change taking place in countries close to us, simply because we wished to continue, against all the evidence, with the imprisonment policy of the various Land Rights Acts.

This session is entitled "Land Tenure and Impediments to Commercialisation". The law of real property in Australia was seriously disturbed by Mabo and Wik, but the High Court in

Yorta Yorta undid much of the damage which Mabo and Wik brought in their train. However the legislation which followed those judgments is still in place and those Acts need to be substantially repealed to bring us back to the happy situation we enjoyed prior to June 1992. The law of real property is extremely important to economic life generally, even though the capital value of land and buildings is much less important in the overall capital structure of a modern economy than it was in the C18 when agriculture comprised about 80 percent of the economy. However, the resources sector, mining and exploration, agriculture, the pastoral industry, do depend on access to land, and secure property rights with respect to that access and subsequent use. The car stickers of the 1980s proclaimed "Land Rights not Mining" and although the mines of the 1980s are still in operation, or many of them are, the exploration required to find the mines of the C21 is not taking place on the scale which is necessary to secure those new mines that are still to be found. The repeal of the Commonwealth Native Title Act, and particularly the rent-seeking clauses of that Act, would be of immense benefit to Australia.

The State Acts can be repealed quite simply. Arguments about compensation are pointless in that most of the land granted under these Acts is valueless.

Where we are going to have to spend large sums of taxpayers' money is in rescuing the prisoners from places such as Yuendumu, Papunya, and the Pit Lands of South Australia.

I keep on returning in my mind to the question "how did all this tragedy come about?" I have been reading recently Robert Conquest's latest book entitled *The Dragons of Expectation: Reality and Delusion in the Course of History*. Robert Conquest was the great historian of the Soviet Union and its unspeakable tyrants Lenin and Stalin. He, almost alone, understood the horrendous nature of the Stalin era and was able to get published, notably in *The Great Terror*, an accurate account of the Soviet Union under Stalin. Like George Orwell he was bitterly attacked by the progressive Left throughout the English speaking world, the group identified by Shiva Naipaul, who refused to concede any fault in their hero Stalin, and the new world he was building in the USSR.

What has this got to do with Aboriginal Land Rights? Well, the Aboriginal Land Rights Movement began with the declaration by the Communist Party of Australia, in 1931, of a commitment to Aboriginal sovereignty,

The "Draft Program of Struggle against Slavery" appeared in the official paper of the Communist Party of Australia, the "Workers' Weekly" of 24th September 1931.

The "Struggle against Slavery" is a long statement. It was one of the consequences of the massive swing to the left which the Comintern (Communist International) executed, under Stalin's orders, in 1928 and 1929, which resulted in purges in every communist party around the world. In Australia, the right wing faction of Kavanagh and Ryan was displaced as a result of the visit of a Comintern agent from the US, H M Wicks. The new, hard left leadership comprised Sharkey, Dixon and Moxon. (Wicks, interestingly, later became an FBI agent)

In the USA the new CP leadership lost no time in calling for the establishment of a separate Negro state, and the new Australian CP leaders were not far behind in demanding a separate state for Australia's Aborigines.

The two key sections of the CPA's "Draft Program of Struggle against Slavery", are as follows

"\* Liquidation of all missions and so-called homes for Aborigines, as these are part of the weapons being used to exterminate the Aboriginal race by segregating the sexes and sending the young girls into slavery.

\* The handing over to the Aborigines of large tracts of watered and fertile country, with towns, sea ports, railways, roads, etc, to become one or more independent Aboriginal states or republics. The handing back to the Aborigines of all Central, Northern, and North West Australia to enable the Aborigines to develop their native pursuits."

I go back to this statement to show the gap between the fantasy of the CP language and the reality of Australian, and Aboriginal, life at the time. But this gap between fantasy and reality continued right up until Coombs and his supporters were able to impose their fantasy, through legislation, on the Australian people, and particularly on the hapless Aborigines who have suffered grievously as a consequence.

Robert Conquest has used a new word the "logosphere" to describe a situation in which words have been used to construct a wall between reality and fantasy. The wall defines a fantasy world from which reality is excluded. Conquest writes

The logosphere is permeated by concepts, ideas, verbalisations, a whole apparatus devised or rather evolved, to form some sort of mental contact with reality, or, to block it off. A large circle of the "thinking" "educated" class takes **ideas** as more veridical than facts." (Veridical - - coinciding with realities.)

It is much easier to maintain separation between fantasy and reality if those people who live in the world of fantasy never actually come into contact with the reality which would make their fantasy more difficult to sustain. And this was true of the Land Rights fantasy.

The Americans tell us that a conservative is a liberal who was mugged by reality. And the story is told of a well known judge in New York, famous, or notorious, for his liberal views on crime and punishment, who was himself mugged one Saturday. He nonetheless turned up in Court on Monday, heavily bandaged and limping his way to his elevated seat behind the bench. Before the case before him commenced, he told the packed court room that although he had himself been mugged on Saturday, what had happened to him would in no way affect his conduct of the case before the court, or his determination of what sentence, if any, he would hand down on the person charged if that person was found guilty.

At that point a voice shouted from the back of the crowded court room - "Mug 'im again".

During the 1880s there was a bitter debate in the Victoria about the provision of a sewerage system for Melbourne. Rural interests did not want to spend the money on the city, and it was

not until there were five deaths from typhoid that the pro-sewerage camp was able to get the votes in the Parliament required to begin construction of the sewerage system.

There have been many hundreds of deaths, and many more beatings and rapes in Aboriginal communities in Australia, and we still have not broken the political opposition to the dramatic change of policy and rhetoric that is required. The Howard Government is proceeding cautiously on a reform path. But it is too little, too late.

Aboriginal Land Rights is one of the key symbols of the Coombsian regime of self-determination and sovereignty. It is the cause of many deaths. It is a symbol which must be pulled down.