Ethics and Native Title : Reconstructing a role for civil society in public policy

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As we all are aware by now, the end of each century tends to bring about a speeding-up of the processes of change. New structures and systems under consideration suddenly become more prominent and mainstream. Hitherto marginal streams begin flowing into the main tributary of public discourse. In the presence of such an atavistic government as the current Federal Coalition, this natural course has become dammed in the interests of the superficial ideologies and election-cycle thinking it carries as part of its public policy baggage. This truth has been displayed consistently in the course of this government's actions. Most significantly, it has been evidenced by the government's native title legislation. The passage of legislation amending native title arrangements has major ramifications for the future of justice and equity in this country as it has severely undermined, perhaps fatally so, the relationship between the parliamentary institutions and civil society, on which basis a modern, functioning society depends.

Given that the *Native Title Amendment Act* (NTAA) is now law, and assuming that alterations to it will not be forthcoming (both the Coalition and the ALP have more or less squashed such a possibility), the atmosphere now calls for workable, contemporary solutions to the problems which infest the Act. These solutions rest on an increased role for civil sector organisations, particularly mining, environmental and indigenous groups. It also requires an on-going dedication by all to ensure that the right-to-negotiate vacuum in the new NTAA is adequately filled in the interests of all concerned.

Shell and the new paradigm

It is noteworthy that around the time the NTAA was inching through parliament, the major resources conglomerate, the Royal Dutch/Shell Group, was putting the final touches to a report which illuminates some of the flaws built into the Act and the erroneous foundations on which it is built. The report lends enormous weight to the increasingly popular belief that, as governments fade in influence, it is incumbent on both civil sectors, private and public, to take up the slack.

The Shell Report centres on a Statement of General Business Principles — a series of commitments in nine broadly categorised areas such as Health, Safety and the Environment, the Community, as well as broad consultation with concerned communities. It must be said that the report is, at least in part, a public relations response to the battering Shell received as a result of its misendeavours in Nigeria and on the Brent Spar, where the company made world headlines by virtue of its violations of basic human rights and environmental principles. It remains to be seen whether their self-styled 'Road Map' of progress is followed.

Nevertheless, the principles informing The Shell Report are significant in that they identify the problems inherent in an approach which is dedicated to getting governments on-side, and then, as in the case of the Ogoniland fields in Nigeria, working through the government, or even standing over it, to strategically remove the perceived impediments to their operations. Implicit in Shell's change of tack is the effective rejection of the omnipotence of governments, and an opening up to the possibility of working directly with non-government actors. In the words of the report: "Our commitments are to the communities and the nations in which we operate, not just to the government of the day".[1] This indicates a move by Shell to acknowledge not just the laws introduced by governments, but the wider mores of a social or civil character, which, according to the Chairman of the Committee of Managing Directors, Cor Herkstroter, "reinforce[s] the ethical underpinning of the Group as it enters the next hundred years".[2]

In the context of the NTAA, the implications of this new environment for mining companies and their relations with green and indigenous groups are powerful. Despite the increasingly inescapable spread of those implications,

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1 "Profits and Principles — Does there have to be a choice?", The Shell Report, 1998, p 38.

2 The Shell Report, 1998, above, n 1, p 48.

many mining companies have been slow to recognise the sea change around them. Like a tanker full to the brim with crude oil, they are proving to be slow to turn. This need not cause alarm, conditioned cultures do not change overnight, but it does indicate that structural impediments do exist within the managerial and administrative infrastructure of many in the resources sector. Given the radical change in culture, and the size of the Royal Dutch Shell group, Shell is leading the way in this gigantic cultural change.

The report, in principle, marks a trend returning to 19th century principles of liberal democracy, one of the conditions of which, according to historian Eric Hobsbawm, was that "democratic governments did not have to do much governing". He added that "nineteenth-century bourgeois society assumed that the bulk of its citizens' lives would take place, not in the sphere of government, but in the self-regulating economy and in the world of private and unofficial associations (civil society)".[3] Hobsbawm goes on to note that governments have traditionally acted as brakes to a social, economic and political machine that constantly threatens to go too fast and plunge over the edge into anarchy. The role in which governments have been cast, and, in which they have cast themselves, in the last decade or so, has seen them not only taking their foot off the brake, but attempting to sell the car itself to those commercial interests which can afford to pay. They now seem quite prepared to sit and watch the vehicles of commercialism pass them by, and to have very little control over where they go, or how fast they travel. Moreover, governments are less concerned with those who are run over.

The reducing role of government

As governments continue to lead the charge for freer and freer trade, breaking down barriers to business, it would seem that, perversely, they are making themselves redundant. Governments appear to have awakened to a decision that if they don't work with business, then business will swamp them anyway. So, better to continually show to the commercial sector what government can do for them, even if this only involves removing more and more of the institutions that have been built up over the last century, which are now seen as obstacles to trade rather than components of an increasingly functional relationship between the various sectors of contemporary society. This strategy is clearly designed to generate the political pay back of bringing business closer to government, and the mutual, if somewhat exclusive,

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[3] E Hobsbawm, *Age of Extremes, The Short 20th Century 1914-1991*, Michael Joseph, London, 1994, p 139.

benefits a cosy relationship between the business and political elites will bring to each.

But, in the process, significant concepts in the process of law making in a democratic country are being undervalued and are threatening to drop off the scale in considerations of public policy. What can be characterised as the "social ethical quotient" (the set of broadly accepted norms through which fairness and equity can be tested, established and maintained) is diminishing in the face of governmental shrinkage. Civil society is the most appropriate sector from which an ethical component in public policy might emerge, but governments have proven to be unwilling to open up to, and maintain relations with, the large part of the civil community which does not have a trade agenda. As such, an important mechanism in the construction of workable public policy initiatives is being largely ignored.

This governmental and business sector spurning of civil society runs counter to a mass move in the opposite direction. A study published recently in *Society*[4] reported that the civil society sector absorbed 11.9 million workers in the eight varied countries its authors studied. This translates to one in every 20 workers employed and one in eight in the respective service sectors. In France, 60,000 civil associations were formed in 1990 alone. Sweden has about 200,000 civil associations, and even formerly Communist Hungary had established 13,000 within two years of the Soviet withdrawal. The USA has upwards of one million. In Australia, it was estimated in the early 1990s that more than 100,000 had been established. While it is impossible to put an exact figure on the number of civil associations around the world — both domestically and globally engaged — a recent estimate put it "certainly in the millions".

The fact that civil society has not had much input into the globalisation process, exemplified by the lowly position usually afforded labour unions in many regional economic organisations, such as the Association of South East Asian Nations (ASEAN) and Asian Pacific Economic Co-operation (APEC), or the marginal status of non-government organisations (NGOs) at the Kyoto greenhouse conference, has resulted in a globalisation process which has been largely untempered by non-economic concern.

For those working in the mining and resources industry, the image of the rapacious multi-national casts a large shadow. Many civil associations and

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[4] L M Salaman, and H K Anheier, "The Civil Society Sector" (1997) 34(2) *Society* 60-66.

pressure groups have effectively demonised the industry, and many of the accusations have been legitimate. A recent editorial in *New Internationalist* noted that "Mining companies are good at issuing statements but not at answering questions".[5]

Perhaps the most salient example of this failure was the British mining corporation, Rio Tinto's (RTZ-CRA), in its approach to the Panguna copper mine on Bougainville. This mining deal was done in the name of a distant, central government in Port Moresby among politicians, bureaucrats and business in 1972 without input from either local residents or civil associations. This led to a ludicrous and untenable situation where the local community felt they were far worse off than before the establishment of the mine. The company failed to take into account the long-running issue of succession on the island, and paid no attention to the concerns of the local communities. By way of a final insult, local Bougainvillians were allotted less than one percent of the profits, an offer which was merely a token as the mine was going ahead anyway.

This set-up would simply not cut it in the new era we are entering. In a contemporary context, Panguna's fate was predictable. And there are others dealing with similar land rights issues. Freeport (West Papua), Ok Tedi and Porgera (PNG), Yana Machi/Pilcomayo Rivers (Peru), Wassa Fiase (Ghana) and in Australia, Olympic and Ranger. Most recently we have Jabiluka.

Jabiluka

The Jabiluka experience presents many of the issues surrounding current land rights and mining issues in Australia. The flak sustained by Energy Resources of Australia (ERA), who run Ranger and who purchased the Jabiluka lease from Pan-Continental in 1982, has been the result of not engaging adequately with the changing circumstances of the environment in which they operate. Ignoring the trend towards more open and holistic business practices, ERA rode roughshod over civil and community concerns, despite the fact that they were clearly expressed and articulated at the time. Their current operations are founded on the now anachronistic actions of previous governments, particularly the Fraser government which were clearly unjust and unethical in that they were not established on the premise of parity and justice. Their actions, now and then, are strategies from an era now past on the global socio-political landscape.

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[5] *New Internationalist*, March 1998, p 1.

Issues of consent were usually skirted around or left until everything else had been decided, making the consent by local custodians of the land virtually a *fait accompli,* by virtue of the pressure that could be brought to bear by the federal government and ERA at the final stages of the negotiation process. Often, indigenous landholders were not even aware that they were being consulted about mining at all. Ian Viner, then the Aboriginal Affairs Minister in the Fraser government, in his first and last on-site meeting with the Mirra people in 1979, made the position clear: "The question now is not whether or not there is going to be mining, but how it is to be carried out".[6] By that time, the government had clearly decided to move ahead with the mine. Negotiation had become instruction. It is difficult to find any ethical component in the actions of either governments or the mining companies involved in the whole process in this area.

The Ranger and Jabiluka settlements also call into question the validity of government-appointed "civil" groups to act on behalf of communities. In both cases, evidence suggests that the Northern Land Council, interestingly formed in 1979, at the same time as the final negotiations on the mine were taking place, were bullied into making a decision to go ahead with the mine which was contrary to the views of the community they represented. Speaking at one meeting between the NLC and local Aborigines in 1978, an NLC representative summed up their position: "We are entitled to be pushed around by any government in power ... that is a fact of life".[7] Moreover, another government-appointed body, the Office of the Supervising Scientist, established to "independently" monitor the Ranger mine has been so under-staffed and under-funded that it cannot effectively do its job. Clearly, civil groups can only be effective when they emerge "spontaneously" from a society and when they have little or no financial connection with other stakeholders.

The determination of the Howard government to amend the *Native Title Act,* which ATSIC Chairman Gatjil Djerrkura had described as "still settling in, and, despite all articulation to the contrary, working quite well"[8] emphasises their tenacity to continue to force the concept of progress through the filter of a comparatively narrow idealism. This creates an imbalance disfavouring

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6 "Jabiluka", TV documentary initially screened on SBS-TV on 11 August 1998.

7 "Jabiluka", above, n 6.

8 Aboriginal and Torres Strait Islander Commission submission (reference AB144) to the Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund, 24 September 1998, p 2.

the ethical in comparison with the political/economic components in public policy making. The stress that has been placed on driving the legislation through parliament has been in the face of an enormous amount of research and analysis undertaken by hundreds of groups and individuals, conducted to impart an ethical ingredient in the legislation. Indeed, the NTAA is a watershed in the manner in which public policy is constructed in this country. It is more than a question of law. There is a question mark over the ethics, or lack of, that have informed this legislation, and over the future of law making in this country in its wake. In the words of ATSIC Social Justice Commissioner, Mick Dodson: "Our Parliament's handling of the Native Title Amendment Bill 1997, will be a measure of the *values* by which we live and work together as a nation".[9]

As such, the Jabiluka decision to go ahead with the mining of uranium in the Kakadu region sits on unstable and potentially volatile ground. The parliament has effectively got this one wrong, leaving both mining and "green-black" concerns in the lurch. The "green-black" groups have been severely undermined and their vital role as the central civil sector medium has been fatally affected. Mining groups, on the other hand, have been left without a secure legislative environment, one which promises them a sustainable, and uninterrupted, future.

So, what are mining companies to do? If they operate to the letter of the amended Native Title legislation, they seem doomed to become ostracised by every fair-thinking citizen in the country, not the least being the increasingly prominent and influential indigenous groups, environmentalists and associated issue groups. They may well be forced to deal with legal challenges that may be encouraged by future legislation recognising the unfairness of the law and making amendments to it in favour of indigenous interests. They will almost certainly attract the worst PR they have ever had. The NTAA is a national time bomb. Indigenous and green groups have identified it as such, but, most mining companies, unfortunately, have not.

Challenges to the democratic structure

The enactment of the NTAA raises one of the anomalies in the representative democratic system: that decisions made in parliament are often seen as being

[9] Aboriginal and Torres Strait Islander Social Justice Commission submission (reference AB645) to the Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund, 3 October 1997, p 2 (emphasis added).

intrinsically right and just. This belief, backed by an array of state institutions, is based on an ignorance of the overt politicisation of any issue that lands in parliament, and of the effect that has on the voting patterns.

The question arises, is a law, passed through parliament, even if it had, say, a 51% public support quotient, right and just, given that at least 49% of the population may disagree with it. The only way it can be justified is by applying the most hardened and mathematical principles of utilitarianism, which offer support for a fuzzy "for the greater good" ideology, but seem deficient when "greater good" and "greater evil" are so closely matched. This though, is the state-based democratic principle. It is the embodiment of the "mass man" consciousness famously identified by Jose Ortega y Gasset in the 1920s — "The mass man does in fact believe that he is the state, and he will tend more and more to set its machinery working on whatsoever pretext, to crush beneath it any creative minority which disturbs it — disturbs it in any order of things, in politics, in ideas, in industry".[10]

The numbers upon which virtually all political decision making is based, *even when party lines are abandoned,* do not always provide an appropriate basis on which to make laws which will be binding for the entire population. Parliaments get it wrong. In our society, the most apt medium for such a debate to be carried on is not in the parliament, but in the zone between the public political and bureaucratic apparatus and the private space of the individual: that is, in the space we call civil society. This process should inform the Parliament, both prior to drafting the initial legislation, and during the enactment of the law.

Civil society's role in a democracy

The value of civil society in this respect and others was noted relatively early-on in the great democratic experiment of the western world in mid-19th century America by Alexis de Tocqueville. In his seminal study of the American system, written in the 1840s, he noted that, while dangers to the state clearly existed with the presence of such potentially powerful non-state actors, "the omnipotence of the majority seems to me such a danger to the American republics that the dangerous expedient used to curb it (the freedom of civil associations) is actually something good."[11] He goes on to suggest

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[10] R Cockett, *Thinking the Unthinkable — Think-Tanks and the Economic Counter Revolution 1931-1983*, Fontana Press, London, 1995.

[11] A de Tocqueville, *Democracy in America,* Fontana Press, London, 1994, p 192.

that "there are other nations who pervert (civil association) by their excesses and turn a fount of life into a cause of destruction".[12] While he does not mention it as such, it appears that de Tocqueville's notions encourage the belief in the vital role played by ethics in the modern state, and that this function is assured by the specifically tailored and perhaps more responsive inputs of the civil associations he identified in 19th century America.

The importance of de Tocqueville in the context of this article arises from his unique ability to judge comparatively the workings of a nascent, and original, democratic structure against that which had emerged in Europe. He was clearly aware of the damage caused by directly tearing down the belief system of one group in the community in order to promote the rise of an elite agenda, the result of the "tyranny of the majority", because he had seen its consequences in Europe. It is one thing to disagree — this was pluralism, it is another to entirely disallow the presence of an alternative view — this was tyranny — even if it emerged from a parliamentary system.

Currently, of course, the denial of civil communities is clearly managed via the wielding the hatchet now known by its generic term: economic rationalism. This is curious because the major impetus for the ideology's thrust into the mainstream itself came from the margins of civil society. The work of the Mont-Pelerin Society in the 1940s and 1950s, led by Frederich von Hayek, can easily be traced as the source of "Thatcherism", and latter day derivatives and misinterpretations of that society's belief in individualistic economies. Perhaps even more curious, one of the early members of that mostly academic group, was Karl Popper, who was a great believer in civil society and who so heavily influenced George Soros and his pro-civil society beliefs. Soros openly credits Popper's work as his major influence. Drawing on Popper, he wrote in his now famous *Atlantic Monthly* essay "The Capitalist Threat": "When a society does not have boundaries, where are the shared values to be found? I believe there is only one possible source: the concept of the open society itself".[13] For both Popper and Soros, this is the realm of civil society.

The inability to elicit input from the civil sector, and to incorporate its principles, challenges our current parliamentary system in its propensity to operate ethically, even as the Parliament itself is quite clearly operating legally within the Constitution (notwithstanding potential challenges to the

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[12] de Tocqueville, above, n 11, p 193.

[13] G Soros, "The Capitalist Threat" (1997) 279(2) *The Atlantic Monthly* 55.

NTAA's constitutional legitimacy). It leads to the conclusion that laws made in the hitherto unchallenged regime of a parliamentary democracy, imbued with the ideologies of economic rationalism, can be unethical in the context of a truly pluralist and modern socio-cultural milieu.

The issue of the universally unethical law

This raises the further issue of the extent to which citizens are obliged to comply with laws which they know to be universally unethical. This issue was famously raised during the post-WWII Nuremburg Trials. In the face of the political failure of the NTAA and the undeniable value of civil sector harmony, mining companies need to find answers to this question. They have the opportunity to go beyond the law — not outside the law — and enact the ethical roles to which they, and their fellow civil society travellers, can mutually sustain without conflict.

The business sector as well as parts of the indigenous and green movements have been characterised by their tendency to take an adversarial approach when they move into zones of interaction with their civil society co-members. The inability of members of the civil sector to adopt a more conciliatory tone in their dealings at this level seems to epitomise the fear of losing, and the consequential unwillingness to give any ground, engendered in a society imbued with economic rationalist ideals.

The clashes so often seen between mining concerns and anti-mining civil groups and civilians attest to a failure in the system to adequately allow for different agendas to meet and for ethical outcomes to be constructed which can then be entered into the public policy arena and, eventually, into law. Civil associations (NGOs, religious groups, students, unions) and the private-for-profit sector (business, financiers, investors), must enact the principles that govern their activities on the basis of the test articulated by Immanual Kant: "Act as though the maxim of your action were by your will to become a universal law of nature.[14] Or, to put it slightly differently, on the basis of "do unto others as you would have them do unto you". If, therefore, we assume that all rational human beings desire a more fair and ethical world, mining companies will need to consider whether utilising the framework set up by the amending native title legislation was in their best *ethical* interests. If they correctly conclude that it is not, there is only one real strategy left to them: negotiate.

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[14] P Singer (ed), *Ethics*, Oxford University Press, 1994, p 274.

The value of negotiation

Negotiation between native title holders and miners has been greatly criticised by influential mining industry bodies such as the Association of Mining and Exploration Companies (AMEC) and the Minerals Council of Australia (MCA). The mining industry's concerns surrounding the right to negotiate can be summarised as: costs, uncertainty, delays, and lost opportunities through denial of access. These claims do not stand up to closer scrutiny, and rest perhaps, on the ulterior motives of mining interests too slow to adapt to changing circumstances. In a research paper commissioned by ATSIC, and included in its submission to the Senate Committee on the Native Title Bill, the National Institute of Economic and Industrial Research noted that: "the major cost to mining companies is probably not the relatively small claim on cash flow, nor the negotiation cost, nor the cost of delays, but the cost of changing management to allow co-operation with indigenous people".[15] It goes on to conclude "there is strong evidence that the benefits of the right of indigenous people to negotiate reasonable terms and conditions for mining projects outweigh the costs".[16]

Some mining companies have seen this future and are creating it. The conciliatory approach by these mining companies and the indigenous custodians, such as Hamersley Iron and the Pilbara people, Pegasus and the Jawoyn, and various miners in the Tanami desert and the Warlpiri, and others involved in similar relationships, should be commended. Yet, while these companies are working ethically, the unethical legislation which purports to rule their affairs will allow unethical concerns a competitive advantage by encouraging corporations to override indigenous concerns. When unethical operators are given such legislative leverage, it is surely time to reconsider how our public policies are constructed and maintained.

Conclusion

The system of public policy making is being short-circuited. This has been clearly evidenced by the debate surrounding the amendments to the *Native Title Act* which has been highly politicised. Civil society has been banished from its rightful place in the debate and negotiation process in the formulation of sustainable laws. This has led, in turn, to the marginalisation

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[15] I Manning, "Native Title, Mining and Mineral Exploration", Attachment B to Aboriginal and Torres Strait Islander Commission, above, n 9, p 24

[16] Manning, above, n 15, p 26.

of ethical considerations in current and evolving government legislation and in commercial relationships with communities. Civil society, trade and non-trade interests alike need to re-enter the policy debate. Salaman and Anheier drew a similar conclusion: "developing mutually supportive relationships between the non-profit sector and the state, and with the business community as well, may be one of the highest priorities for the promotion of democracy as well as economic growth throughout the world".[17]

In the context of the NTAA, mutually supportive relationships can be achieved by direct negotiations between commercial mining interests and indigenous landholders and custodians, above and beyond the NTAA. State, federal and local governments can only open-up to this trend and adapt appropriately. Along with the mainstream political shift towards a closer relationship with principles increasingly driven by economic values, ethical treatment for all in a democratic society has faded as a right and become cast as a privilege. We are conditioned to believe that it is impossible in a capitalist society for everyone to be treated fairly with respect and dignity. Winners are Grinners and the Vanquished are Anguished. Many seem to accept this dogmatic truth. Yet, this adherence to capitalist "tooth and claw" dogma threatens to undermine democracy as we know it. In the current context, a closer relationship between businesses and civil associations is not only advantageous, it is vital.

[17] Salaman and Anheier, above, n 4, p 65.