THE MORE THINGS CHANGE ...: INFORMED CONSENT AND HUMAN RIGHTS FOR INDIGENOUS AUSTRALIANS

Considerable attention has been drawn recently to the Bark Petitions lodged by Yolngu clans from North East Arnhem Land with the Australian Parliament in August 1963—the theme for NAIDOC week 2013 was 'We value the vision: Yirrkala Bark Petitions 1963'.

The Bark Petitions are quite rightly interpreted as a precursor for the establishment of a House of Representatives Select Committee specially formed to hear the grievances of Yirrkala Aboriginal people about the proposal to mine their Yolngu clan lands located within the then Arnhem Land Reserve without any consultation with them, let alone their consent.

While sympathetic, the Select Committee did not recommend that mining activity desist. Its concluding recommendation was that for 10 years from 1963 a Standing Committee of the House of Representatives examine the condition of the Yirrkala people and the implementation of its 11 other recommendations. As mining did not occur immediately this recommendation was not implemented.

The Petitions were also the precursor for subsequent legal action by the same clans against another mining company the North Australia Bauxite and Alumina Company Ltd (NABALCO) and the Commonwealth in the NT Supreme Court in what is generally referred to as the Gove Land Rights case. The court case *Milirrpum and others v Nabalco and the Commonwealth* attempted to halt mining at Gove that had been granted by a special law, the *Mining (Gove Peninsula Nabalco Agreement) Ordinance* of 1968. It is now well known that Mr Justice Blackburn ruled against the Yolngu and that mining was allowed to proceed at Gove for a period of 84 years to 2052 as specified in the Ordinance.

It is now generally accepted that the perceived social injustice to Yolngu of the Gove case heard by Mr Justice Blackburn and unappealed was instrumental in the formation of the Woodward Land Rights Commission in 1973 and the implementation of its recommendations that resulted in the passage of the Commonwealth *Aboriginal Land Rights (Northern Territory) Act 1976.*

Land rights law provides traditional owners with free prior informed consent rights in relation to future mineral exploration on their lands. Unfortunately for the Yolngu the massive existing bauxite extraction and alumina processing industrial complex on the Gove Peninsula was defined as a prior interest and so deemed immune from retrospective consent provisions. However, financial aspects of the agreement made between the Commonwealth and the mining were open to periodic renegotiation every seven years within stipulated parameters.

The signatories of the original Bark Petitions were concerned that mining had been approved on land reserved for their exclusive use without any consultation with them; the tripartite negotiations had been between the Commonwealth government, the Gove Mining and Industrial Corporation Ltd (GOMINCO) and the Methodist mission at Yirrkala where most of the signatories lived. And they were deeply concerned that they would lose access to their land and livelihood and to sacred places and places of birth crucial to identity. Crucially the Yolngu were fearful of the impact of an urban mining town on Yolngu society drawing an explicit analogy with what they perceived as the negative consequence for the Larrakia of the establishment of Darwin.

The tabling of the Bark Petitions just a year after the Commonwealth Electoral Act was amended to give Indigenous people the right to enrol and vote in Commonwealth elections demonstrates the extraordinary ability of the Yolngu to adapt to western institutions, albeit in a highly intercultural and bi-lingual manner, with assistance and mediation by members of the Parliament.

Having tried to use the Parliament to address their concerns in 1963, the Yolngu resorted to using the western legal system, again with assistance from white lawyers and anthropological experts to hear their case in 1968. Again they lost.

Fifty years on the Yolngu and Indigenous Australia and even Australia's political elites celebrate the Bark Petitions as visionary, which it was. At the same time the workings of settler colonial institutions in cahoots with multinational corporations conspired to defeat the Yolngu.

Today there is an emerging diversity of views among Yolngu about the resultant mining.

Some continue to resent its imposition on their traditional lands and its negative environmental and cultural impacts. One senior traditional owner described to me the transformations that massive open cut mining had caused to the landscape as the equivalent of scarring his body—he demonstrated this graphically by running his fingers across his chest. Historically, and today, few Yolngu work at the mine for many reasons including as appropriate respect to their forefathers who fought against its establishment.

Others, most notably Gumatj leader Galarrwuy Yunupingu extol members of their regional Yolngu community to belatedly embrace the mine and the employment and enterprise opportunities that it might represent. But Yunupingu also wants Yolngu to have stronger property rights in minerals, graphically suggesting that 'the bark should have more bite'.

Other Gumatj elders have expressed concern that the mine's closure, a distinct possibility owing to declining global prospects for alumina, might rob them of

mainstream economic opportunity.

Two weeks before NAIDOC a report from the Parliamentary Joint Committee on Human Rights was tabled that examined the compatibility of the Stronger Futures in the Northern Territory Act 2012 with human rights.

The Committee considered the Stronger Futures laws in response to submissions from a diversity of interests (including mine), but most particularly from the National Congress of Australia's First Peoples and Yolngu Makarr Dhuwi (the Yolngu Nations Assembly). While the Australian Gillard government-of-the-day was adamant that scrutiny of its laws was not needed, the Committee decided otherwise. This was mainly because so many of over 400 submissions made to an earlier Senate Community Affairs Legislations Committee inquiry in 2012 had raised human rights concerns with these laws.

The Report made two key observations.

First that it is critically important to ensure the full involvement of affected communities in policy making and policy implementation processes. It notes that article 1 of each of the International Covenants on Human Rights as well as the UN Declaration on the Rights of Indigenous Peoples, requires meaningful consultation with, and in many cases the free, prior and informed consent of, Indigenous peoples during the formulation and implementation of laws and policies that affect them. To do otherwise risks producing the disempowerment and feelings of exclusion and marginalisation reported in so many of the 400 submissions to the Community Affairs Legislation Committee.

Second, that a number of the Stronger Futures measures, notably income management and school attendance measures, represent significant limitation on human rights; and extend regulation a long way into the private and family lives of the persons affected by these schemes.

Like the Select Committee in 1963 in relation to mining, it did not recommend the legal overturning of the Stronger Futures laws. Instead the Parliamentary Joint Committee highlights the need for continuing close evaluation of measures claiming to have benefit and the potentially disempowering effects of such measures. Like the Select Committee, the Parliamentary Joint Committee on Human Rights saw a role for itself in ongoing oversighting of the Stronger Futures laws and a review in a year's time.

It might have just been the timing of the release of the Stronger Futures report just prior to NAIDOC week and the Yolngu celebration of the 50th anniversary of the bark petition, but similarities between the two events resonated for me. In both the key issues were human rights, social justice and free prior informed consent.

And in both parliamentary processes were found wanting, although interestingly in 1963 the government of the day supported establishment of the Select Committee, in 2013 the government disapproved of the focus on Stronger Futures. And in both Yolngu played a role, in the case of the Bark Petitions the key role, in advocating for Indigenous rights.

The Stronger Futures laws are locked in for another 9 years and one wonders if they, like mining at Gove, might be legally challenged? And if so, using what court? And one also wonders how we, as a nation, might look back at this period in Indigenous policy-making and implementation in 50 years' time, in 2063?

There is a French expression: the more things change, the more they stay the same (*plus ça change, plus c'est la même chose*). Evidently, and sadly, such an expression has applicability in 21st century liberal democratic Australia—to our collective ability to ignore the free prior and informed consent and human rights of Indigenous people in accord with United Nations guidelines.

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