

# *Law Text Culture*

---

*Volume 12, Issue 1*

2008

*Article 5*

THE PROTECTION OF LAW

---

## Legislating away Indigenous Rights

D. Howard-Wagner\*

\*

Copyright ©2008 by the authors.  
<http://ro.uow.edu.au/ltc>

# Legislating away Indigenous Rights

D. Howard-Wagner

## Abstract

In January 1998, after two years of implementing the Howard government's agenda in relation to various national and highly controversial issues, such as the granting of consent under the then World Heritage Properties Conservation Act 1984 (Cth) for the development of Hinchinbrook marina and resort, I was promoted to a senior policy position within the Office of Indigenous Affairs. This was the branch of the Department of the Prime Minister and Cabinet responsible for advising the Prime Minister and Cabinet on Indigenous affairs. It was a particularly contentious period for Indigenous affairs. The Office of Indigenous Affairs was conducting a review of policy development functions, and administration of the Aboriginal and Torres Strait Islander Commission (ATSIC); drafting the Native Title Amendment Bill 1998 in response to the High Court Wik decision; drafting the Aboriginal and Torres Strait Islander Heritage Protection Bill 1998 in response to the Hindmarsh Island Bridge affair; and managing matters relating to the Howard government's decision to approve the construction of a uranium mine at Jabiluka within the World Heritage-listed Kakadu National Park. It also housed the Council for Aboriginal Reconciliation. I was assigned to a small legal policy team responsible for the preparation of the Aboriginal and Torres Strait Islander Heritage Protection Bill 1998 that would repeal and replace the existing Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Cth). Our small team of three people was responsible for working with the Office of Parliamentary Counsel within the federal Attorney-General's Department in preparing the clauses and content of the Aboriginal and Torres Strait Islander Heritage Protection Bill ('the Bill') and the Explanatory Memorandum. We were also charged with responsibility for liaising with the states and territories about specific sections of the Bill. The team prepared all parliamentary speeches, including the second reading speech that introduced the Bill into Parliament. While we were responsible for these tasks, we received our directions from the Prime Minister and Cabinet, including specific details about the objectives and intent of the legislation. Official and confidential Cabinet documents detailed this information. At the direction of the Prime Minister and Cabinet, bureaucrats designed the Bill to take a broader focus than simply Indigenous heritage protection. The Bill focused on balancing competing interests.

# Legislating away Indigenous Rights

Deirdre Howard-Wagner

## Introduction

In January 1998, after two years of implementing the Howard government's agenda in relation to various national and highly controversial issues, such as the granting of consent under the then *World Heritage Properties Conservation Act 1984* (Cth) for the development of Hinchinbrook marina and resort, I was promoted to a senior policy position within the Office of Indigenous Affairs. This was the branch of the Department of the Prime Minister and Cabinet responsible for advising the Prime Minister and Cabinet on Indigenous affairs. It was a particularly contentious period for Indigenous affairs. The Office of Indigenous Affairs was conducting a review of policy development functions, and administration of the Aboriginal and Torres Strait Islander Commission (ATSIC); drafting the Native Title Amendment Bill 1998 in response to the High Court *Wik* decision; drafting the Aboriginal and Torres Strait Islander Heritage Protection Bill 1998 in response to the Hindmarsh Island Bridge affair; and managing matters relating to the Howard government's decision to approve the construction of a uranium mine at Jabiluka within the World Heritage-listed Kakadu National Park. It also housed the Council for Aboriginal Reconciliation. I was assigned to a small legal policy team responsible for the preparation of the Aboriginal and Torres Strait Islander Heritage Protection Bill 1998 that would repeal and replace the existing *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth). Our small team of three people was responsible for working with the Office of Parliamentary Counsel within the federal Attorney-General's Department in preparing the clauses and content of the Aboriginal and Torres Strait Islander Heritage Protection Bill ('the Bill') and the Explanatory Memorandum. We were also charged with responsibility for liaising with the states and territories about specific sections of the Bill. The team prepared all parliamentary speeches, including

## Howard-Wagner

the second reading speech that introduced the Bill into Parliament. While we were responsible for these tasks, we received our directions from the Prime Minister and Cabinet, including specific details about the objectives and intent of the legislation. Official and confidential Cabinet documents detailed this information. At the direction of the Prime Minister and Cabinet, bureaucrats designed the Bill to take a broader focus than simply Indigenous heritage protection. The Bill focused on balancing competing interests.

Once it was tabled in Parliament the Bill was, at the direction of the Senate, referred to the Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund for consideration. Indigenous people, communities and organisations were now able to comment on it, and their comments were directed to the Howard government through the mainstream media and through submissions to this parliamentary committee. What Indigenous discourses revealed was that the Bill diverged considerably from the recommendations set out in Elizabeth Evatt's review of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth), which was intended to form the basis of reforms to the Act (Evatt 1996).

In 1995 Evatt had been commissioned by the then federal Keating Labor government to conduct a review of the operation of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth). The review was aimed at examining the limitations of Indigenous heritage protection legislation, more generally in light of the Hindmarsh Island Bridge affair and other controversial developments considered under the Act. Evatt's report provided a detailed review of the federal, state and territory heritage protection regimes following consultation with various stakeholders including Indigenous people, communities and organisations. Evatt's recommendations for the Act's reform 'proceeded on the basis that the Commonwealth provide a remedy of last resort as a national responsibility' (Joint Committee On Native Title and the Aboriginal and Torres Strait Islander Land Fund 1998: 1). Amongst other key recommendations, the review called for presumptive (blanket) protection of significant Indigenous cultural heritage and the

setting of uniform standards of accreditation for states and territories that provided for substantial improvement to existing laws (Evatt 1996). The report also called for greater recognition and respect of Indigenous customary law, particularly in relation to the disclosure of restricted information such as 'secret women's business'. It proposed that legislation take into account the cultural and customary concerns of Indigenous peoples, recommending that these accounts not be bound by technicalities, legal forms or rules of evidence (Evatt 1996). Evatt's report was presented to the Howard government shortly after it came to power in 1996.

The review, to some extent, was a response to the Hindmarsh Island Bridge affair. It was, in part, due to limitations of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) itself that the application for protection of a significant sacred site on Hindmarsh Island (Kumarangk) became one of the most controversial applications to be considered under the Act by a federal Minister for Indigenous Affairs. What commenced in 1998 with the intention to build a marina at Hindmarsh Island (Kumarangk) later turned into a proposal to build a bridge, known as Hindmarsh Island Bridge. A group of Ngarrendjeri women claimed that a site within the proposed area for development was significant in terms of 'secret women's business'. The group of women later applied to the then federal Labor Minister for Aboriginal and Torres Strait Islander Affairs, Robert Tickner for protection of the site under the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth). What came to be known as the 'Hindmarsh Island Bridge affair' was the subject of two Commonwealth *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) section 10 reports, a South Australian royal commission, and a federal government inquiry (Pritchard 2000: 1).

Within only months of coming to power, the new Howard government introduced the Hindmarsh Island Bridge Bill 1996 into the House of Representatives. The objective of the Bill was to remove the area around Hindmarsh Island Bridge from the scope of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth).

## Howard-Wagner

The Explanatory Memorandum that accompanied the Bill through Parliament explained in plain English the intent of each clause within the Bill, setting out that:

The Bill is to enable the construction and operation of the Hindmarsh Island Bridge without any further action being taken under the Heritage Protection Act.

Legislation enabled the unimpeded construction and operation of the bridge. The *Hindmarsh Island Bridge Act 1997* (Cth) removed the ability of the federal minister to make declarations in respect of the area and removed the obligation of the minister to undertake a section 10 inquiry under the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth). The 1984 Act, as it then stood, covered all Australian territories except the area surrounding Hindmarsh Island Bridge. The *Hindmarsh Island Bridge Act 1997* (Cth) provided the entrée to the redefining and redrafting of Indigenous heritage protection legislation.

Next the Aboriginal and Torres Strait Islander Heritage Protection Bill 1998 was designed to replace and repeal the existing Act, overhauling federal Indigenous heritage protection legislation more generally. The Bill, which was introduced into the House of Representatives on 2 April 1998 and the Senate on 25 June 1998, set out to regulate and legitimate new forms of economic and social relations in which competing interests were to be balanced. Indigenous cultural heritage protection was reconstructed in terms of economic enterprise (Peters 2001: 3).

The proposed reforms represented a fundamental shift in the nature of the federal government's involvement in Indigenous heritage protection. The Bill set out that once states and territories were accredited according to a set of minimum standards, rather than providing a remedy of last resort as a national responsibility, federal Indigenous heritage protection legislation could only be triggered in times when there was a threat to the 'national interest'. In its rationalisation of Indigenous heritage protection, the Howard government intended to devolve responsibility for Indigenous heritage

protection to the states and territories through a regime that did not provide for presumptive (blanket) protection or uniform standards of accreditation that would substantially improve existing laws. Effectively the Bill provided for the decentralisation of any decision-making away from the federal government — a freeing up of the development approval process rather than greater protection of significant Indigenous cultural heritage. Essentially, according to this model, the development of Hindmarsh Island Bridge in South Australia, the initial dam proposal at Junction Waterhole in the Northern Territory, and the development of the Old Swan Brewery in Western Australia would have gone ahead in their original form as approved by the relevant state or territory government. The federal minister would no longer have their former power to protect significant Indigenous sacred sites, which was given under section 10 of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth). This was a shift in the articulation of the state and its role in Indigenous cultural heritage protection. Commonwealth intervention in the past was constructed as having hindered and delayed the approval process.

The new model for governing Indigenous heritage protection was outlined in the second reading speech that accompanied the introduction of the Bill into Parliament:

In order to achieve a *fair and effective process* for Indigenous heritage protection a number of important changes are being introduced in the Bill. In particular the Commonwealth heritage protection regime will be reformed to address a number of difficulties with the operation of the 1984 Act and to clarify the respective roles of the Commonwealth and the States. ...

Alongside the processes for protection of heritage areas and objects there must be a system whereby other parties can seek approval to undertake activities in relation to such areas or objects. This will ensure that unnecessary delays or Court battles, such as we have seen at Hindmarsh Island, can be avoided. Therefore the minimum standards require that a State or Territory promote *negotiated outcomes* between those who want to undertake an activity and the Indigenous people concerned to protect an area. In addition, the minimum standards require the provision of a process

## Howard-Wagner

whereby a developer can seek early approval for a proposed activity. This may include relevant Indigenous people and an appropriate state authority assessing the proposal and determining whether there are any heritage sites at risk (Campbell 1998: 4046, emphasis added).

The Aboriginal and Torres Strait Islander Heritage Protection Bill 1998 sought to balance the various interests that come into conflict as a result of Indigenous people making applications for the protection of a significant site or area in relation to a proposed development such as Hindmarsh Island Bridge. The Howard government thus shifted the objectives of Indigenous heritage protection legislation away from simply the protection of significant Indigenous heritage sites and areas, creating a legislative instrument that would facilitate *negotiated outcomes* in relation to conflicts arising from the proposal to develop within a site or area of significant Indigenous cultural heritage. The reference to *fair and effective processes* is a reference to negotiating and balancing competing interests. A freeing up of the market occurs through the freeing up of the approval process. While previously the legislation privileged the protection of significant Indigenous cultural heritage, the law now set out new procedures to rectify the imbalance. This, for me, evidenced the application of a form of neo-liberal governance.

Working alongside those who were involved in reworking the Native Title Amendment Bill 1997, I witnessed a similar process in the drafting of amendments to the *Native Title Act 1993* (Cth) to the drafting of the Aboriginal and Torres Strait Islander Heritage Protection Bill 1998. Bureaucrats mechanically went about implementing the Howard government's agenda, following directives set out in Cabinet documents. The then Prime Minister John Howard and his Cabinet were taking a direct role in resituating Indigenous rights in federal legislation. Amendments to native title and Indigenous heritage protection legislation became a point of comparison for me.

What paralleled these and future changes to federal Indigenous heritage protection legislation were amendments to federal native title legislation, following the High Court handing down its decision in relation to the *Wik Peoples v Queensland* on 23 December 1996, a

case wherein the Wik and Thayorre peoples questioned whether the granting of specific pastoral leases had extinguished native title. The High Court determined by a 4:3 majority that pastoralists' rights and native title rights could coexist on the same land.

This presumed ambiguity about leasehold titles in relation to the coexistence of native title caused a ripple of outrage from the mining and pastoral industries of Australia, and specific members of the Liberal and National parties, that permeated the Australian populace. A major scare campaign was mounted concerning the possible implications of the *Wik* decision by mining and pastoral sectors of the Australian community (Rothwell 1997: 1, 6). These sectors represented their concerns not so much as a crisis for their industries but for the nation as a whole. 'Native title' was antithetical to Australia's long-term economic interests and viability. Minority rights were being given precedence over long-term viability of the nation. The National Farmers' Federation ran a national 'scare campaign' on television and in the print media, asserting that no one was safe and that the Aboriginal population could lay claim to anyone's backyard (Kuhn 1998).

For the Howard government reform to native title law was seen as necessary to pre-empt the development of common law by defining extinguishment in legislation and specifying the grants that provided for extinguishment (Burke 1998). Its campaign against native title reflected much of the new moral forms and ethical basis for neo-liberal governance at the national political level. This took the form of a political response launched in reaction to what came to be known as 'the *Wik* decision'. In the words of John Howard, 'the pendulum had swung too far in favour of Aboriginal people' (1997b). Effectively amendments to native title and Indigenous heritage protection legislation were about realigning the pendulum — balancing competing interests. For Howard, the *Wik* decision had established a framework for 'native title' in relation to leasehold land, particularly pastoral and mining leases, that were untenable in relation to Australia's long-term economic interests and viability. Indigenous rights, in their existing form, violated one of the cardinal principles of a neo-liberal

## Howard-Wagner

logic — that is, ‘the potential right to veto over 78 per cent of the land mass in Australia’ (Howard 1997a), not only obstructing the free functioning of market forces but privileging minority interests. Howard announced his ‘Ten Point Plan’ that outlined amendments that were to be made to the *Native Title Act 1993* (Cth), in light of the *Wik* decision, which set out to rectify this imbalance.

Reforms to the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) which were set out in the *Aboriginal Land Rights (Northern Territory) Amendment Bill 2006 Explanatory Memorandum* adopted a similar logic:

The principal objectives [of the Bill] are to improve access to Aboriginal land for development, especially mining, to provide for the establishment of devolved decision making structures for Aboriginal people, and to improve the socio-economic conditions of NT Aboriginal people (*Aboriginal Land Rights (Northern Territory) Amendment Bill Explanatory Memorandum 2006: 3*).

As with the *Native Title Amendment Act 1998* (Cth) and the *Aboriginal and Torres Strait Islander Heritage Protection Bill 1998*, the legislation set out to regulate and legitimate new forms of economic and social relations in which competing interests are balanced, freeing up and removing impediments to the smooth operation of a viable economy within the Northern Territory.

The second reading speech accompanying the Bill’s introduction into federal Parliament in May 2006 set out that ‘the reforms in this bill are designed to do three things: provide for individual property rights in Aboriginal townships, streamline processes for the development of Aboriginal land and improve efficiency and enhance accountability of organisations under the Act’ (Brough 2006b: 6). Changes to land ownership, usage and tenure were central to reforms to the Northern Territory land rights legislation in terms of providing for quicker processes for exploration and mining, facilitating economic development and allowing individual land management and ownership. This objective was further reinforced through changes to land tenure and the permit system under the Northern Territory National

Emergency Response legislation, which was put in place in response to violence and child sexual abuse in Indigenous communities (Howard-Wagner 2007b). Through the move away from a community-based approach to land management and ownership to a model of individual housing/leasehold tenure, the Howard government attempted to change the nature of land usage and tenure in the Northern Territory (Scullion 2007).

Reflecting on the intent of the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) in the second reading speech accompanying the introduction of the Aboriginal Land Rights (Northern Territory) Amendment Bill 2006 into federal Parliament, the then Minister for Aboriginal and Torres Strait Islander Affairs argued that ‘hopes that the granting of land would lead to an improvement in the lives of local people [had] not been realised’, ‘the act had not been successful in facilitating productive use of the land’ and that the ‘act need[ed] to be amended to provide better economic outcomes’ (Brough 2006b: 5). However, Brough’s claims were slightly misleading. In 1998 the Reeves report, entitled *Building on Land Rights for the Next Generation — Report of the Review of the Aboriginal Land Rights Act (Northern Territory) 1976* indicated that, despite the land’s marginal economic value, Aboriginal Territorians had greatly benefited from the creation of ‘a situation that enables Aboriginal Territorians to own, live on or freely visit their traditional “countries” [and that this was] a highly productive use of this land’.

While the Howard government argued that the ‘measures contained in the bill were vital to improving the well being of Indigenous people in the Northern Territory’ (Brough 2006b: 7), in conducting its inquiry into the proposed amendments as set out in the Bill the Senate Committee on Community Affairs received a number of submissions which contradicted this argument, suggesting that the Bill could be detrimental to Indigenous land rights as communal title. For example, the submissions highlighted the potential long-term undermining effects of an individual title scheme, 99-year leases and traditional owners losing control over decision-making in relation to their land

## Howard-Wagner

(Calma 2006). The Law Council of Australia went as far as noting that '[a]spirations toward individual ownership of property is not inimical to Indigenous culture' (Law Council of Australia 2006: 6). The submission argued that 'it is clear that Indigenous communities observing traditional lifestyles maintain and share a unique relationship with their land, which should not be disrupted by commercial agreements ...' (Law Council of Australia 2006: 6).

### **Privileging Indigenous interests and separate rights**

The privileging of Indigenous interests and separate rights were of great concern to the Howard government. As the then Prime Minister stated in his historic speech at the Reconciliation Convention in 1997:

... *We all have rights and obligations as Australians.*

... We cannot share a common destiny if these *rights* are available to some Australians, but not all.

Likewise, we cannot share a common destiny together as Australians if different groups in our society have different standards of conduct and different systems of accountability ...

You will all be aware that I have spent a great deal of time in trying to find a just, *fair and workable outcome* in response to the decision of the High Court of Australia in the *Wik* case. In working towards that solution, my Government's primary goal has been to *strike a fair and reasonable balance between the rights of indigenous people and the rights of other Australians*, in particular those in the pastoral and mining industries ...

I believe that the plan which I have put forward provides an *equitable balance* between respect for the principles of Native Title, as laid down in the *Mabo* decision, and the very legitimate interests of pastoralists and others in securing certainty in carrying on and planning their activities.

I understand the heat and passions that this issue has generated on both sides of the debate and I believe that it provides a fair and equitable outcome

and I believe that my ten point plan provides the only basis of a proper approach ... (Howard 1997c: 1, emphasis added).

The speech refers to the ruptures in Australian society created as a result of the *Wik* decision. The Howard government positioned itself as the adjudicator or facilitator of ‘fairness’, as having the role of striking the ‘best and fairest solution’ — one that ‘strikes the Australian fair balance’ between interest groups. The Howard government had a moral imperative to act as Indigenous rights were seen as an impediment not simply to the economy but also to the unity of the nation. Fairness and unity were about an ethics of conduct, but the latter passing of legislation to ‘strike this balance’ was a moral injunction.

As already indicated, much of the Howard government’s debate about federal Indigenous law sought to question the appropriateness of Indigenous rights, firstly, by asserting that Indigenous interests were privileged over and above those of the general population and, secondly, by questioning the integrity of Indigenous claims under current legislation. For example, the Howard government later opposed the Senate’s proposed amendments to the government’s Native Title Amendment Bill 1998. The then Prime Minister argued:

The Bill [Native Title Amendment] as amended by the Senate will not treat farmers and Aborigines equally. The Bill as amended by the Senate gives special *privilege* to *one group of Australians denied to others*. It contains provisions which are not available to other sectors of the Australian community and are specifically available to one group, and that group of Australians alone. *It is a fundamental of our kind of society*, and it is certainly a fundamental of the approach of my government, *that all Australians should be treated equally before the law* (Howard 1998: 2959, emphasis added).

Howard was critical of ‘social justice’ and its moral effects and the demands of special interest groups who require special privileges. The claims of all ‘interested parties’ must be treated as equivalent and assessed in terms of practical outcomes for the general populace. This was set against the previous legislation that privileged ‘special interests’.

## Howard-Wagner

Howard argued that the state should not grant and protect the rights of some that are not available equally to others, particularly those of Indigenous peoples, who seek special measures and rights not available to others. This argument, to a degree, reflected the logic of Hayek, an influential neo-liberal scholar and thinker who was critical of the demands of special interest groups that required special privileges (Hayek 1976). As Hayek stated, ‘the essence of the *liberal* position ... is the denial of all privilege, if privilege is understood in its proper and original meaning of the state granting and protecting rights to some which are not available on equal terms to others’ (1976: xxxvi). Hayek was also extremely critical of ‘social justice’ and its moral effects (see Popper 1966). Hayek still stipulated, though, that it is the state’s duty to the poor or minorities to provide social services. Nonetheless government intervention, including one’s duties to the poor or minorities, as Hayek saw it, should be strictly limited to providing for the smooth operation of the market (see Hayek 1960). However, Hayek’s thesis was not so much that the state should act to establish the free market; rather, it was to be based on spontaneous outcomes of the interaction of thousands or millions of individuals. While the Howard government recovered this core Hayekian principle, it deviated from the basic philosophy behind it. Hayek did not see market process as occurring through legal compulsion or manipulation; that is, to use a variety of measures — manipulation, bribery, law — to bring about a situation in which market processes are taken as the norm. Hayek’s view was that the spontaneously arising and operating market is in a sense prior to law — a view which he expresses as follows: ‘The rule of law is therefore not a rule of the law, but a rule concerning what the law ought to be, a meta-legal doctrine or a political ideal’ (1960: 206). Hayek adds that ‘... in a democracy this means that it will not prevail unless it forms part of the moral tradition of the community, a common ideal shared and unquestionably accepted by the majority’ (1960: 206). At this point in time, this was not the case. Despite the scaremongering, the Australian populace was divided over native title. The High Court *Mabo* decision in June 1992, which overturned the doctrine of *terra nullius*, and the Keating government’s response

to it, including in the form of Keating's famous 'Redfern speech' and the *Native Title Act* 1993 (Cth), had ensured that native title had, to a degree, found an accepted place within the Australian psyche.

Thus the objection to separate rights and special privileges under the Howard government had its own epistemological character. Individuation served certain purposes and it stemmed from a neo-conservative as well as neo-liberal moral basis, and it was not essentially egalitarian in nature (Galeotti 1987). The Howard government's concern with 'special privileges' had as much to do with the moral principles of neo-liberalism as it did to concerns that land rights operated as an impediment to market forces as to the implementation of new subjectivities through political, moral and cultural reforms. It reflected, too, the merging of neo-liberal principles with neo-conservative principles.

In later years the Howard government's sentiments in relation to the recognition of Indigenous culture or Indigenous customary law as mitigating factors in criminal matters mirrored those expressed in earlier years that *all Australians should be treated equally under the law*. This was evidenced in the second reading of the Crimes Amendment (Bail and Sentencing) Bill, read on the introduction of the Bill into federal Parliament in September 2006, in which Senator Sandy McDonald stated the following:

*All Australians should be treated equally under the law.* Every Australian may expect to be protected by the law, and equally every Australian is subject to the law's authority.

Criminal behaviour cannot in any way be excused, justified, authorized, required or rendered less serious because of customary law or cultural practices. The Australian Government rejects the idea that an offender's cultural background should automatically be considered, when a court is sentencing that offender, so as to mitigate the sentence imposed.

Likewise the bill will preclude any customary law or cultural practices being taken into account, in the process of granting bail to an alleged offender, in such a way that the criminal behaviour is seen as less culpable:

## Howard-Wagner

All Australians, regardless of their background, will thus be equal before the law ...

The high levels of family violence and child abuse in Indigenous communities is appalling. The law covering such crimes must reflect the fact that such criminal behaviour is unacceptable. (McDonald 2006: 10, emphasis added).

The argument presented in the second reading speech for the Crimes Amendment (Bail and Sentencing) Bill 2006 concerns removal of Indigenous law or cultural belonging as the basis for a defence or to mitigate the sentence imposed. The reforms were presented as being necessary to stem the high levels of violence and abuse in Indigenous communities and to ensure that proper sentences were imposed for violence or sexual abuse against women and children (McDonald 2006). Effectively, too, though, *equal treatment of all before the law* is presented as serving the objective of removing the arbitrary and uncertain elements of social and legal order. The amendments in the *Crimes Amendment (Bail and Sentencing) Act 2006 (Cth)* were designed to govern judicial discretion and interfere with judicial powers in relation to Commonwealth matters and it was hoped that the states and territories would follow with reforms to criminal law in their jurisdictions. Thus the Howard government attempted to constrain the judiciary from applying the law in an arbitrary and discriminatory manner; the Howard government effectively restored what it considered an imbalance in the area of common law. The moral basis to this argument concerned what the law ought to be. It involved a normative claim about the legal rights that ought to be established and the type of equality society must protect.

### **Legislating separate rights for Indigenous Australians**

The jurisprudence of distributive or social justice puts forward an alternative argument concerning what type of equality a just society must protect. The most legitimate principle on which human rights

have been claimed is the principle of distributive or social justice. For example, distributive or social justice models legitimise laws that apply specifically to women or racial groups such as Indigenous peoples. Within this logic, rights are valid claims made on the basis of certain moral principles. It is based on a moral principle which argues that, in order for particular groups and peoples to achieve 'rights', there is a need for equality of treatment that results in societies putting in place special measures (substantive equality). The jurisprudence around the claims brought by Indigenous people for distinct and separate Indigenous rights were, for example, assisted through the passing of the *Racial Discrimination Act 1975* (Cth), particularly the inclusion of section 8, which is a special measures provision (Donaldson 2007: 1). This resulted in different rights, such as native title and land rights, being enshrined in law. Importantly too, the very logic of having a 'right' is seen in terms of the belief that it is to be protected from someone else's notion of 'common good' (Brown 1999: 120).

While it is questionable whether successive federal governments adequately developed a working model of Indigenous self-determination and gave adequate recognition to Indigenous rights such as native title and land rights, from the 1970s to the mid 1990s various legislative instruments, policies, practices and institutions were set up along the way which, to a degree, recognised self-determination and Indigenous rights.

The *Aboriginal and Torres Strait Islander Commission Act 1989* (Cth) established a separate statutory authority to ensure maximum participation of Aboriginal and Torres Strait Islander people in government policy formulation and implementation, promote Indigenous self-management and self-sufficiency, and further Indigenous economic, social and cultural development. Previously, federal policy and law only reflected a reconceptualised notion of self-determination in Australia, which essentially, throughout the 1970s and early 1980s, referred to self-management. Through the establishment of ATSIC, which was intended as a representative body, federal government policies and programs for Indigenous people were

## Howard-Wagner

structured as separate policies and delivered as separate programs for Indigenous Australians, and were administered via either ATSIC or mainstream departments such as the federal health and education departments.

Thus successive federal governments had worked to develop a compromised, yet working, model of land rights and self-determination through various legislative mechanisms such as the *Aboriginal Land Rights (Northern Territory) Act 1976*, the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth), the *Native Title Act 1993* (Cth) and even, to a degree, the *Council for Aboriginal Reconciliation Act 1991* (Cth) (Altman 2004). ATSIC, native title, Indigenous cultural heritage protection and reconciliation became influential and iconic institutions of Indigenous Australia (Altman 2004: 307).

### Legislating away Indigenous rights

As already indicated, the Howard government's reframing of Indigenous law was more than just a change in economic management; it allowed the Howard government to restrict the scope of Indigenous rights through amendments to the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth), the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) and the *Native Title Act 1993* (Cth). This involved the replacing and recasting of law by legislation to accord with particular neo-liberal rationalities (Chen & Churchill 2005: 5). It was a new normative space, one that instituted a particular model of neo-liberal governance as the normative order for the governing of Indigenous affairs. This was reflected in the reforms to federal legislation, which constituted a new social and legal order in terms of the application of an economic and market theory for the management of Indigenous affairs.

In later years specific neo-liberal principles were applied to the governance of Indigenous affairs more generally, such as markets regulating economic activity, welfare responsibilities being transformed into commodity forms that were regulated according to market principles, economic entrepreneurship replacing regulation, active

individual entrepreneurship replacing passivity and dependency on social welfare (Rose & Miller 1992: 198, Howard-Wagner 2007b). Thus the Howard government actively reconstructed the welfare sphere and particular conditions for Indigenous society were reconstituted in order for Indigenous society to flourish in a particular neo-liberal way (Kendall 2003: 4). For example, Indigenous affairs were governed in terms of economic efficiency and market-based principles were applied to transform the social and welfare aspects of Indigenous affairs, providing the conditions under which Indigenous entrepreneurship, self-government, freedom and responsibility could be possible (Kendall 2003: 6) and, at the same time, inculcating enterprising values in the Indigenous populace (Beeson & Firth 1998: 6). It was a further extension of the principles of the market into the non-economic or social and cultural components of Indigenous life in which the market becomes an ethic in itself, guiding human action and substituting previous ethical beliefs (Fitzsimons 2002).

A new normative order was institutionalised through the passing of the *Aboriginal and Torres Strait Islander Commission Amendment Act 2005* (Cth) which abolished ATSIC. While arguably ATSIC had its problems, the result was that Indigenous people were left with no mechanism for self-determination in the areas of policy development and the administration of Indigenous affairs, marginalising Indigenous people from the policy development, implementation and evaluation process (Calma 2007). The administration of Indigenous programs was transferred to mainstream government departments.

Post-ATSIC the Howard government heralded mainstreaming, mutual obligation and shared responsibility as the way forward for Indigenous affairs. For example, the Secretary of the Department of the Prime Minister and Cabinet, Peter Shergold, announced that a 'whole of government mainstreaming' approach would be adopted for the delivery of infrastructure, services and programs to Indigenous communities and peoples (Shergold 2004). The mainstream way of delivering services promised a *quiet revolution* in Indigenous affairs in terms of a more effective way of not only delivering services to the

## Howard-Wagner

Indigenous population but also incorporating Indigenous citizens into the mainstream (Shergold 2004).

Importantly, in the case of the Howard government's approach to Indigenous affairs, and its approach to the restructuring of social welfare more generally, the application of market-based solutions for the governing of the social did not involve dismantling welfare entitlements or cutting back social assistance. Reforms to social welfare involved overhauling the provision of what is now referred to as social assistance, whereby market-based principles were applied to transform the delivery of social assistance from 'passive welfare' to 'active welfare' (Altman 2000). Such a restructuring of welfare and social services was evidenced in the Howard government's abolition of the Commonwealth Development Employment Program (CDEP), a program that was initially set up to address the high unemployment rates in remote Indigenous communities and one that provided a combined community development, employment creation and income support scheme (Altman 2007: 1). Reforms involved the setting up of new social security arrangements under the *Social Security and Other Legislation Amendment (Welfare Payment Reform) Act 2007* (Cth), replacing CDEP with Structured Training Employment Projects (STEP). The objective of STEP was to provide broker services tailored to the needs of Indigenous job-seekers, placing Indigenous people in employment or providing them with the general skills to be placed in paid employment in the future (Department of Employment and Workplace Relations 2006). For the Howard government, this approach was intended to assist Indigenous job-seekers to move into the workforce, or what the then Minister Hockey (2007) called 'real jobs', and to obtain 'economic independence' rather than to participate in what Hockey (2007) also referred to as the 'false' economy of government-funded community projects.

Hence, changes to federal Indigenous legislation became a powerful resource for responding to, containing and re-mapping the discursive field (Miller & Rose 1990: 22). Reforms to federal Indigenous law examined above were not only a response to the 'pendulum having

swung too far' (Howard 1997a); they were about establishing a particular social order — one in which the market was central. More generally, the *Hindmarsh Island Bridge Act* 1997 (Cth), the Aboriginal and Torres Strait Islander Heritage Protection Bill 1998, the *Native Title Amendment Act* 1998 (Cth) and the *Aboriginal Land Rights (Northern Territory) Amendment Act* 2006 (Cth) laid down new rules and procedures facilitating and establishing a market culture where markets did not previously exist.

### Conclusion

The Howard government's model of neo-liberal governance was as much about removing impediments to the free working of market forces, and dismantling the welfare state, as it was about inculcating the moral principles of neo-liberalism such as the denial of privilege and equality under the law. Neo-liberal rationalities were clearly evident in the discourses and practices governing Indigenous law reform at the federal level. Indigenous rights, such as rights to native title and Indigenous cultural heritage protection, were constantly rationalised as impediments to the free working of market forces. In this sense native title and Indigenous cultural heritage protection were opposed on the same grounds as unionism or tariff barriers. However, native title and Indigenous cultural heritage protection were also opposed because they were rights not available equally to others; it was the state granting and protecting rights to some which were not available on equal terms to others that the Howard government opposed. Hence, amendments, for example to the *Aboriginal and Torres Strait Islander Heritage Protection Act* 1984 (Cth) and *Native Title Act* 1993 (Cth), were as much about limiting Indigenous rights as they were about providing for the smooth working of market forces. The law was thus used to enact neo-liberal procedures and principles (Hunt & Wickham 1994: 67).

## References

- Altman J 2004 'Indigenous Affair at a Crossroads' *Australian Journal of Anthropology* 15/3: 306–309
- Beeson M and Firth A 1998 'Neoliberalism as a Political Rationality: Australian Public Policy Since the 1980s' *Journal of Sociology* 34/3: 215–231
- Betielle A 1986 'Individualism and Equality' *Current Anthropology* 27/2: 121–134
- Brough M 2006a 'Historic reforms to NT Land Rights' Press Statement Minister for Families, Community Services and Indigenous Affairs <<http://www.atsia.gov.au/Media/media06/3506.aspx>> 31 May
- 2006b 'Aboriginal Land Rights (Northern Territory) Amendment Bill 2006: Second Reading Speech' *House of Representatives Hansard* 31 May: 5–7
- 2007 'Northern Territory National Emergency Response Bill 2007: Second Reading Speech' *House of Representatives Hansard* 7 August <[http://www.facs.gov.au/internet/minister3.nsf/content/nter\\_bill\\_7aug07.htm](http://www.facs.gov.au/internet/minister3.nsf/content/nter_bill_7aug07.htm)>
- Brown C 1999 'Universal Human Rights: A Critique' in Dunne and Wheeler eds 1999: 103–127
- Burke P 1998 'Evaluating the Native Title Amendment Act 1998' *Australian Indigenous Law Reporter* 3/3: 333–356
- Calma T 2006 *Submission to the Australian Senate, Community Affairs Legislation Committee on The Aboriginal Land Rights (Northern Territory) Amendment Bill 2006 (Cth) from the Aboriginal and Torres Strait Islander Social Justice Commissioner and Act Race Discrimination Commissioner Tom Calma*, 13 July 2006 - Submissions received by the Community Affairs Legislation Committee Aboriginal Land Rights (Northern Territory) Amendment Bill 2006 - Submission 5
- 2007 Address to Indigenous Legal Issues Forum 35<sup>th</sup> Australian Legal Convention
- Campbell I 1996 'Hindmarsh Island Bridge Bill 1996: Second Reading Speech' *Senate Hansard* 18 November: 5423–5425
- Chen T and Churchill D 2005 'Neo-liberal Civilization and the Economic Disciplining of Human Rights: Convergent Models in the United States and China' *Rhizomes* 10 <<http://www.rhizomes.net/issue10/chen.htm>> accessed 25 April 2005

- Davidson J, Gunn K, Neilson M A, Harris Rimmer S and Gardiner Garden J 2006 'Corporations (Aboriginal and Torres Strait Islander) Bill 2005' *Parliamentary Library Bills Digest* 31 January 2006 No. 82 2005–06
- Donaldson M 2007 'The Human Rights and Equal Opportunity Commission: Responses to Racism and Strategies for Building Diversity' *Eliminating Racism: Valuing Diversity Conference* 21 March <[http://www.hreoc.gov.au/about/media/speeches/race/2007/Eliminating\\_racism210307.html](http://www.hreoc.gov.au/about/media/speeches/race/2007/Eliminating_racism210307.html)> accessed 16 January 2008
- Dorn J 1981 'Law and Liberty: A Comparison of Hayek and Bastiat' *Journal of Libertarian Studies* 5: 375–397
- Dunne T and Wheeler N J eds 1999 *Human Rights in Global Politics* Cambridge University Press Cambridge
- Entsh W 2005 'Corporations (Aboriginal and Torres Strait Islander Bill 2005: Second Reading Speech' *Senate Hansard* 23 June: 12–15.
- Evatt E 1996 *The Review of the Aboriginal and Torres Strait Islander Heritage Protection Act. Commonwealth of Australia, The Parliament of the Commonwealth of Australia* — Parliamentary Paper No.170 of 1996
- Ewald F 1990 'Norms, Discipline and the Law' *Representations* 30: 138–161
- Fitzsimons P 2002 'Neoliberalism and education: the autonomous chooser' *Radical Pedagogy* 4:2 <[http://radicalpedagogy.icaap.org/content/issue4\\_2/04\\_fitzsimons.html](http://radicalpedagogy.icaap.org/content/issue4_2/04_fitzsimons.html)> accessed 20 February 2007
- Galeotti A E 1987 'Individualism, Social Rules, Tradition: The Case of Freidrich A. Hayek' *Political Theory* 15/2: 163–181
- Grant C 2006 'Egalitarianism and the Law' *Injustice* Jurisprudence Discussion Group University of Oxford
- Hage G 2001 'The Politics of Australian Fundamentalism: Reflections on the Rule of Ayatollah Johnny' *Arena Magazine* 52: 27–31
- Hayek F 1944 *The Road to Serfdom* Routledge London
- 1960 *The Constitution of Liberty* Routledge and Kegan Paul London.
- 1967a *Studies in Philosophy, Politics and Economics* Routledge and Kegan Paul London
- 1967b 'Principles of a Liberal Social Order' in Hayek 1967a: 162
- Hockey J 2007 Indigenous Employment Services Reforms Announced, Ministerial Media Release 17 February <<http://mediacentre.dewr.gov>.

## Howard-Wagner

- au/mediacentre/MinisterHockey/Releases/IndigenousEmploymentServicesReformsAnnounced.htm> accessed 20 February 2007
- Howard J 1997a Transcript of the Prime Minister, the Hon. John Howard, television interview with Kerry O'Brien, *The 7.30 Report* ABC TV 4 September <[www.pm.gov.au/news/interviews/1997/730rep.html](http://www.pm.gov.au/news/interviews/1997/730rep.html)> accessed 25 April 2005
- 1997b 'Mining' *House of Representatives Hansard* 29 March: 4432
  - 1997c Speech given at the 1997 *Reconciliation Convention* in Melbourne 27 May
  - 1997d 'Aboriginal Reconciliation' *House of Representatives Hansard* 27 March: 4110
  - 1998 'Native Title Amendment Bill 1997 [No.2] Consideration of Senate Message' *House of Representatives Hansard* 9 April: 2959–2962
- Howard-Wagner D 2007a 'Restoring social order through tackling "passive welfare": The statutory intent of the *Northern Territory National Emergency Response Act 2007* (Cth) and Social Security and Other Legislation Amendment (Welfare Payment Reform) Bill 2007 (Cth)' *Current Issues in Criminal Justice* 19/2: 1–9
- 2007b 'State in Denial to National Emergency — Governing the Indigenous population through responses to violence and child sexual abuse in Indigenous communities' *Violence and the Post-Colonial Welfare State in France and Australia* <<http://conferences.arts.usyd.edu.au/viewabstract.php?id=746&cf=18>>
- Hunt A and Wickham G 1994 *Foucault and Law: Towards a Sociology of Law as Governance* Pluto Press London
- Joint Committee On Native Title and the Aboriginal and Torres Strait Islander Land Fund 1998 'The Aboriginal and Torres Strait Islander Heritage Protection Bill 1998' (Report 12)
- Kuhn R 1998 'Rural Reaction and War on the Waterfront in Australia' *Monthly Review* 50/6: 30–44
- Law Council of Australia 2006 *Aboriginal Land Rights (Northern Territory) Amendment Bill 2006 Senate Committee on Community Affairs* 13 July 2006 – Submissions received by the Community Affairs Legislation Committee Aboriginal Land Rights (Northern Territory) Amendment Bill 2006 Submission 7

- MacDonald S 2006 Crimes Amendment (Bail and Sentencing) Bill 2006 Second Reading Speech *Senate Hansard* 14 September: 10
- Miller P and Rose N 1990 'Governing Economic Life' *Economy and Society* 19/1: 1–27
- Ogus A 1989 'Law and Spontaneous Order: Hayek's Contribution to Legal Theory' *Journal of Law and Society* 16: 393–409
- Peters M 2001 'Education, Enterprise Culture and the Entrepreneurial Self: A Foucauldian Perspective' *Journal of Educational Enquiry* 2/2: 58–71
- Popper K 1966 *The Open Society and its Enemies* Routledge and Kegan Paul London (5<sup>th</sup> edn)
- Pratt A 2003 'Make or Break? A Background to the ATSIIC Changes and the ATSIIC Review' *Current Issues Brief* 29 <<http://www.aph.gov.au/library/pubs/CIB/2002-03/03cib29.htm>> accessed 14 November 2005
- Pritchard S 2000 'Between Fact and Fiction: The Hindmarsh Island Bridge "Affair" and the "Truth" about Secrets' *Jouvert: journal of postcolonial studies* 4/2 <<http://social.chass.ncsu.edu/jouvert/v4i2/spritch.htm>> accessed 15 May 2003
- Rose N 1993 'Government, Authority and Expertise in Advanced Liberalism' *Economy and Society* 22/3: 283–299
- Rose N and Miller P 1992 'Political Power Beyond the State: Problematics of Government' *British Journal of Sociology* 43/2: 173–205
- Rothwell N 1997 'Turning Point' *The Weekend Australian Review* 22–23 March: 1, 6
- Schech S and Haggis J 2001 'Migrancy, Multiculturalism and Whiteness: Re-charting Core Identities in Australia' *Communal/Plural* 9/2: 143–159
- Scullion N 2007 'Northern Territory National Emergency Response Bill 2007' *Senate Hansard*: 10–18
- Shergold P 2005 'Sharing responsibility: A new approach to delivering services to Indigenous Australians' National Reconciliation Planning Workshop Canberra 31 May <[http://www.pmc.gov.au/speeches/shergold/sharing\\_responsibility\\_2005-05-31.cfm](http://www.pmc.gov.au/speeches/shergold/sharing_responsibility_2005-05-31.cfm)> accessed 5 June 2005

### **Legislation**

*Aboriginal and Torres Strait Islander Commission Act* 1989 (Cth)

*Aboriginal and Torres Strait Islander Commission Amendment Act* 2005 (Cth)

## **Howard-Wagner**

*Aboriginal and Torres Strait Islander Heritage Protection Act* 1984 (Cth)  
*Aboriginal Land Rights (Northern Territory) Act* 1976 (Cth)  
*Aboriginal Land Rights (Northern Territory) Amendment Act* 2006 (Cth)  
*Council for Aboriginal Reconciliation Act* 1991 (Cth)  
*Crimes Amendment (Bails and Sentencing) Act* 2006 (Cth)  
*Hindmarsh Island Bridge Act* 1997 (Cth)  
*Native Title Act* 1993 (Cth)  
*Native Title Amendment Act* 1998 (Cth)  
*Racial Discrimination Act* 1975 (Cth)  
*Social Security and Other Legislation Amendment (Welfare Payment Reform) Act*  
2007 (Cth)  
*World Heritage Properties Conservation Act* 1984 (Cth)

## **Cases**

*Mabo v Queensland (No 2)* (1992) 175 CLR 1  
*Wik Peoples v Queensland* (1996) 187 CLR 1

