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Native title judge in push for new system 1971 Cabinet Papers

Laura Tingle
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The judge who made a landmark 1971 ruling that Aboriginal people had no legal rights to land with which they were traditionally associated privately believed a system of Aboriginal title was "morally right and socially expedient".

The Gove case was a landmark in the history of Aboriginal land rights legal debate which the 1992 Mabo case noted was "the only reported decision of an Australian court directly dealing with the merits of an Aboriginal claim to particular traditional tribal or communal lands".

Cabinet papers released today from 1971 show that Justice Richard Blackburn, of the Northern Territory Supreme Court, prepared notes for the McMahon Government on Aboriginal land titles some months after he ruled against the Yirrkala people's claims on the Gove Peninsula in the Northern Territory.

The judge's contribution reflects some of the earliest struggles to come to terms with the concept now known as native title, and of finding a way of justly recognising and compensating for loss of that title.

In a covering note on the judge's comments, the then Interior Minister, Ralph Hunt, says the judge "stresses that he does not want to influence policy merely to make sure the Ministerial Committee has available to it such information as he has".

In his paper Justice Blackburn "suggest(s) no-one should take it for granted that the introduction of a system of Aboriginal title is either morally right or socially expedient. It may be both: personally I think it probably is; but I am out of sympathy with demands for 'Aboriginal land rights' which assume the need for such a system is self-evident, and its morality beyond question...

"My personal opinion, for what it is worth, is that the establishment of a system of Aboriginal title, integrated within the framework of Australian law, and providing proper machinery for its own practical application and development, is desirable in order to give, to some groups of Aboriginals who want it, a sense of responsibility for their own future, and order to satisfy the aspirations of Aboriginal people..."

Justice Blackburn says that Aboriginal title would "have to be created by legislation" but there would be problems, including determining what tribes were to be recognised as still in existence; determining what land was linked with each tribe; and

what law system "must be adopted or invented to regulate the holding of land by Aboriginals".

He proposed a commission to determine tribes and tribal land based on the work of anthropologists. As for the legal basis of Aboriginal title, he said "it might be possible to devise a completely new system and put it into force by statute, with provision for all the problems of accommodation with the existing system.

"But in practice such a scheme would be unimaginably difficult to devise and put into force and there seems no good reason to attempt it."

He proposed instead the use of trusts or incorporation to solve the problem of communal ownership of land a system subsequently adopted for many Aboriginal funding bodies but also suggested landholdings should be leases, not freehold, to ensure "Aboriginal people took proper care of the land".

Justice Blackburn's contribution came at a time when there was a fierce divide within the Cabinet about what form of assistance to give to Aborigines.

As National Archives historical consultant Ian Hancock observes, there was a clear difference between the Council for Aboriginal Affairs headed by H.C. "Nugget" Coombs, who "wanted to abandon assimilation and to support land claims" and Mr Hunt, who insisted any concession to the principle of land rights amounted to a policy of separatism based on race rather than need. No decision was reached by the end of 1971 on the issues.