

Land, Rights, Laws: Issues of Native Title

Editor: George Boeck

Volume 2

October 2001

Issues paper no. 10

The common law recognition of native title in the High Court's Mabo decision in 1992 and the Commonwealth Native Title Act have transformed the ways in which Indigenous peoples' rights over land may be formally recognised and incorporated within Australian legal and property regimes. The process of implementation has raised a number of crucial issues of concern to native title claimants and other interested parties. This series of papers is designed to contribute to the information and discussion.

This paper presents Graeme Neate's summation of the National Native Title Tribunal's Native Title Forum 2001: Negotiating Country held on the first week of August in Brisbane.

Graeme Neate is the President of the National Native Title Tribunal. Between 1992 and 2000 he was the Chairperson of the Aboriginal and Torres Strait Islander Land Tribunals in the State of Queensland and a member of the Land Court of Queensland. Mr Neate edits a loose leaf native title legal publication and is a co-author of the section of Halsbury's Laws of Australia on Aboriginals and Torres Strait Islanders.

REVIEW OF CONFERENCE: EMERGING ISSUES AND FUTURE DIRECTIONS

Graeme Neate

Introduction

In the first of his recent Boyer lectures on *The Rule of Law and the Constitution*, Chief Justice Murray Gleeson quoted a passage from the play *A Man for All Seasons* in which Thomas More refers to the laws of England. The character More says:

This country's planted thick with laws from coast to coast ... and if you cut them down ... d'you really think you could stand upright in the winds that would blow then?

This passage, or at least aspects of it, have resonated in my mind as we prepared for and participated in the Native Title Forum. Whether or not you are immersed in the practice of native title, these past two days alone would have created an impression that 'this country's planted thick with laws'.

For some, that is a dreary or intimidating prospect. This can easily be characterised as an arena created by lawyers for specialist lawyers. Those of us who work in the area soon learn a jargon (terms like 'future act' and the 'non-extinguishment principle') or use acronyms (such as ILUAs) or abbreviations (such as 'rep bodies') in ways that might confuse if not deter people who are coming to the native title area and actively seeking ways to deal with native title issues.

Thomas More's statement was meant to reassure people that the law provides a shelter. The law restrains and civilises power. It provides a sense of order – or an ordered environment – in which to deal with the many native title issues that need to be resolved.

Australia is thick with laws on native title. There is the *Native Title Act 1993* of the Commonwealth and a range of regulations and administrative orders under that and other Federal statutes, including the *Federal Court Act 1976*. There is State and Territory legislation. There is the common law. And, like a forest, the law is changing. Acts are amended, and judgements of our superior courts develop, or at least clarify, legal thinking on what are still novel. But the laws of the parliaments and the courts are not the only laws in the forest.

Early on in the same Boyer lecture, the Chief Justice outlined the development of the common law of Australia from the law inherited from England. He then said:

That is not to say there was no law here before European settlement. On the contrary, court decisions and legislation on the subject of native title proceed upon the basis that the Aboriginal people were a people of law and binding custom.

It is the recognition of traditional law and custom by the general law that has provided us as a nation with so many challenges.

The *Native Title Act* defines native title rights and interests by reference to, among other things, the rights and interests that are 'possessed under the traditional laws acknowledged, and the traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders'.

As the Full High Court observed in the *Fejo* case:

Native title ... is recognised by the common law. There is, therefore, an intersection of traditional laws and customs with the common law.

At the risk of mixing metaphors, it is at that intersection that the forest of laws is thickest.

To extend the analogy, we need to take care that we don't miss the forest for the trees – that we don't lose our way in a maze of individual circumstance or obscure statutory provisions. In other words, we need to keep a clear idea of the big picture in what we do and how we approach the challenges ahead.

Overview of the Forum presentations

The two days of this Native Title Forum have focussed on only some of the issues that we face and some of the ways of resolving them.

I do not intend to summarise all that has been said, but I will recall briefly some of the statements or observations that several of our speakers have made.

Yesterday the focus was primarily on indigenous land use agreements.

The welcome by local Aboriginal elder Dr Bob Anderson OAM set the tone for positive engagement and agreement making.

The Commonwealth Attorney-General, Hon Daryl Williams, in a detailed opening speech noted, among other things, that native title has proven to be far more complex and far reaching than originally anticipated. In an environment where the rules are constantly shifting and evolving, the expectation created by the original *Native Title Act* – that the majority of native title issues could be resolved by agreement from the time the Act came into effect – were perhaps naïve.

Senator Ferris recounted to us various examples of the frustrations, as well as the successes, of people trying to negotiate indigenous land use agreements ('ILUAs'). The Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund, which Senator Ferris chairs, intends to report on its inquiry into the ILUA provisions of the Act by the end of this year and we will benefit from the Committee's views. I hope that, to some extent at least, the papers delivered at this Forum, and the formal and informal exchanges that have taken place, might further inform the Committee's deliberations.

Ruth Wade, a part-time member of the Tribunal, spoke about the role and scope of ILUAs. The Native Title Registrar, Chris Doepel, spoke about the notification and registration of ILUAs. In my paper, I addressed a range of somewhat technical legal issues in relation to indigenous land use agreements.

Other speakers discussed the different types of agreements they have been negotiating and the different types of negotiations.

Today we have considered various aspects of dealing with native title applications, focussing on the mediation process and the roles of the Federal Court and the NNTT, as well as all the parties.

Graham Hiley QC presented a comprehensive outline of legal developments and made predictions about the next round of judicial decisions.

Current issues

The issues raised at this Forum need to be considered in the current climate of opinion. That is different from when the *Native Title Act* commenced to operate. There is widespread acceptance that native title exists – that it is part of the legal and social fabric of Australia. The issues are not whether native title should be recognised, or whether there should be wholesale extinguishment at the stroke of a legislator's pen, but what are the best practical ways of dealing with a range of native title issues.

The current issues, highlighted at the Forum include:

- the *volume* of native title work to be done (including the 585 claimant applications in the system at 1 August 2001);
- the *variety* of native title work to be done (including claimant applications, future act negotiations, ILUA negotiations, and other non-native title agreement negotiations);
- the cultural disjunction that sometimes exists – in the sense that the aspirations of Indigenous people are often more diverse than the non-indigenous parties (or project proponents) envisage.

The issues arising from mediation and negotiation processes are being assessed by the participants. For example, the Aboriginal Legal Rights Movement of South Australia has just provided me with *Uniting the Voices: Decision making to negotiate for native title in South Australia*, an independent review of the ALRM Native Title Unit's facilitation of decision making by South Australian Native Title Management Committees, July-October 2000.

We have now moved onto 'next generation' issues – issues that arise after determinations of native title are made and after ILUAs are registered. For example:

- How are parties to deal with disputes under agreements or arbitrated outcomes of native title matters?
- Where ILUAs are being varied, particularly long-term agreements, in what circumstances would the varied agreements need (or not need) to be registered?

- How do we ensure that there is appropriate training and resources for prescribed bodies corporate who hold native title?

Underneath all these issues is the question of the adequacy of resources available to parties and institutions:

- sufficient *finance* to enable negotiation and authorisation meetings to occur, advice to be obtained, and the text of any agreement to be prepared;
- adequate *expert advice* (possibly including legal, land management, economic or anthropological advice) *and other assistance* to each party; and
- adequate *time* to negotiate an agreement, and have all the necessary steps taken so that it can be given full legal effect.

Future trends

It is a risky venture to try to predict future trends, but I will outline what I am reasonably confident about.

1. The volume of native title work will increase

For example, the increasing number of native title applications (currently 585) will result in more people being identified as potential native title holders, and will eventually lead to more determinations of native title, with more people having negotiating rights in respect of what happens on those areas of land or waters.

2. Agreement making will become the usual method of resolving native title issues

For example, agreements will increasingly be struck in relation to:

- Claimant applications (last year: 16 applications were determined by consent, 3 were determined after trial)
- Future act activities on land where native title exists or may exist (eg ILUAs)

Why should that be so?

- As more determinations of native title are made there will be more certainty about who has native title and what the native title rights and interests are, resulting in more confidence about which groups of Aborigines or Torres Strait Islanders to deal with, and what the likely range of outcomes will be.
- The law will become clearer, eg after decisions in the *Miriuwung Gajerrong case (Western Australia v Ward)*, the *Croker Island Case (Commonwealth v Yarmirr)*, *Wilson v Anderson*, and the *Yorta Yorta case*.
- A more positive agreement-making environment will encourage more agreements to be made.

3. The form and content of agreements will vary from place to place

Why should this be so?

- We live in a federal system where there are different laws in each State and Territory. For example, the Western Australian government has this week released a discussion paper including Technical Task Force recommendations to change the *Mining Act*. There are also different land tenure laws, and alternative State provisions to the exploration and mining provisions of the *Native Title Act* in Queensland and South Australia.

- There are different policies on native title agreement making, eg the Queensland government's policy on ILUAs.
- States have different histories of colonisation and subsequent land settlement.
- Indigenous groups have different aspirations or social circumstances.

4. Timeframes for negotiating agreements should, on average, be reduced.

Why should that be so?

- There will be more certainty in the law.
- There will be more certainty about who has native title and what native title rights and interests are.
- Parties will develop more experience in the process of negotiating agreements
- The existence of more template agreements (which are in the public domain and not confidential) will provide guidance or options for others.

5. The actions of the Federal Court will continue to influence, if not drive, the native title process.

Why?

- The Federal Court is increasingly setting the time constraints on the mediation and litigation of native title applications, which in turn affects the capacity of parties to negotiate such things as ILUAs and future act agreements.
- There will need to be strategic listing and management of cases before the Federal Court.

6. Resource allocation and use among the key institutions and parties will directly influence the capacity for agreement making to occur

- Institutions and parties need to think and plan strategically
- We need to keep talking to each other so that our activities, if not coordinated, are at least not at crossed purposes, with consequent waste of resources
- There is an ongoing need to ensure a reasonable relativity of resources.

7. Land planning, land access and land use laws may need to be revised or refined in light of experience

- For example, laws may need to provide for or acknowledge the effect of ILUAs in certain circumstances, as various Queensland and New South Wales statutes do.

8. There will be an increased focus on information management.

As more information is produced for various native title purposes there will be increased attention on how access to and the use of that information is managed. For example, there will be issues about the use of and access to:

- connection reports that are prepared for use in mediation or expert reports prepared for litigation;
- information about agreement making and the contents of agreements;

- information that is generated or collated for one purpose but which may (with other information) have regional or more general significance.

Basic information on native title and the native title processes will still be needed as new parties are drawn into the process.

9. The resolution of native title issues will not, of itself, address or resolve a wider range of social issues, though some agreements (eg ones where employment opportunities are created) will assist.

There will continue to be a debate about how to address broader social justice issues in relation to land and waters, especially for those groups in parts of Australia where native title is not legally recognised and where native title law offers little or no benefit.

- The debate will be influenced by decisions of the High Court about where native title exists (land and sea), what native title is, and where native title has been extinguished.
- There will be an increased role for bodies such as the Indigenous Land Corporation.
- There will be an ongoing debate for other mechanisms to deal with these broader issues (for example ATSIC Chair Geoff Clark's call, at the Forum dinner last night, for a treaty).

Conclusion

The resolution of native title issues provides a range of challenges for all who are parties to particular proceedings, the institutions who administer the law and to the broader Australian community.

We need to use our best endeavours and our skills to try, where possible, to resolve those issues by agreement.

We should share and draw on each other's experiences as we try together to reach fair and durable outcomes in the interests of all.

Negotiating Country: Native Title Forum 2001

Thursday 2 August

- 9.00 am Chairman's welcome**
Graeme Neate, President, National Native Title Tribunal
- 9.10 am Opening address**
The Hon. Daryl Williams AM QC MP, Commonwealth Attorney-General
- 9.30 am Introduction and outline of proceedings**
Graeme Neate, President, National Native Title Tribunal
- 9.35 am Indigenous land use agreements**
Chair: Professor Doug Williamson QC, Member NNTT
Role of indigenous land use agreements (ILUAs):
 - Outline of different types of ILUAs
 - When are they appropriate
 - Relationship with future act regimes and Federal Court determinations of native title

- The Tribunal's role in ILUA assistance

Presenter: Ruth Wade, Member, National Native Title Tribunal

10.10 am Outline of issues raised during the Joint Committee's 2001 inquiry into indigenous land use agreements

Senator Jeannie Ferris, Chair, Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund

11.00 am Notification and registration

- Statutory and other Tribunal roles
- Practice: facilitation and compliance

Presenter: Chris Doepel, Registrar, National Native Title Tribunal

12.00 pm Legal issues

Relationship of ILUAs with:

- Contract law
- Future act and Queensland alternative state provisions
- Claimant applications
- Confidentiality and implementation
- Compensation

Presenter: Graeme Neate, President, National Native Title Tribunal

2.00 pm Negotiation of ILUAs

Chair: Dr. Mary Edmunds, Member NNTT

Panel:

Cultural issues: conflict and expectations

Presenter: Kado Muir, Research Fellow, Centre for Management of Arid Environments, Curtin University, WA

Challenges of negotiating a state-wide agreement

Presenter: Perry Agius, Executive Officer, Aboriginal Legal Rights Movement, SA

Direct negotiations with numerous native title holders and project proponents

Presenter: Francis Les Deemal, Deputy Project Director, First Nations Joint Company, Qld

A project proponent's perspective

Presenter: Doug Young, Blake Dawson Waldron Lawyers, Brisbane, Qld

Why ILUAs are important to Government

Presenter: James McNamara, Executive Director, Native Title Services, Department of Premier and Cabinet, Qld

4.00 pm Open forum with panel members

Chair: Dr. Mary Edmunds, Member NNTT

Comments and questions from participants

7:30 Dinner Address

Geoff Clark, Chairperson, ATSIC

Friday 3 August

9.00 am Mediation and native title determinations

Chair: The Hon. Michael Lavarch, Deacons Lawyers, Qld

Panel

Process - managing the critical stages

Presenter: Bardy McFarlane, Member, National Native Title Tribunal

Role of the Tribunal and the Federal Court

Presenter: John Sosso, Member, National Native Title Tribunal

Certification and authorisation

Presenter: Fred Tanner, Case Manager, Native Title Unit, Aboriginal Legal Rights Movement, SA

Anthropology/connection reports

Presenter: Dr Julie Finlayson, President, Australian Anthropologists Society, ACT

Land access issues as part of resolving claimant applications

Presenter: Geoff Gishubl, Partner, Jackson McDonalds, Barristers and Solicitors, WA

Comments and questions from participants

11.00 am Managing native title matters in the Federal Court

- Respective roles of the Court and the National Native Title Tribunal
- Case management
- Role of the provisional docket judge and docket judge
- Federal Court's mediation function and case management conferences
- Court's powers and discretions in making consent determinations of native title
- Pre-trial orders - what the Court expects of parties in native title litigation
- Features of native title trials

Presenter: Louise Anderson, National Native Title Coordinator, Federal Court of Australia

12.00 pm Key legal developments

Presenter: Graham Hiley QC

1.30 pm Forum with panel members

2.30pm Review of the forum: Emerging issues / Future directions

Presenter: Graeme Neate, President, National Native Title Tribunal

3.00 Close

ISSN	1 3 2 6	-	0 3 1 6
ISBN	0 8 5 5 7 5 3 8 6 2		

Native Title Research Unit

Australian Institute of Aboriginal and Torres Strait Islander Studies

Acton Peninsula Lawson Crescent

GPO Box 553 Canberra ACT 2601

Telephone 02 6246 1161 Facsimile 02 6249 7714

Email ntru@aiatsis.gov.au; website www.aiatsis.gov.au

Views expressed in this series are not necessarily those of the Australian Institute of Aboriginal and Torres Strait Islander Studies.