

S 223 Native Title Act Workshop

AGENDA

Agreements, Treaties and Negotiated Settlements (ATNS) Project,
www.atns.net.au

Thursday 14 May 2009

Room 920, 9th Floor
Melbourne Law School
185 Pelham Street, Carlton

Sponsors:



Australian Government

Office of Indigenous Policy Coordination



THE UNIVERSITY OF
MELBOURNE

Workshop Goals:

The aim of the workshop is to gather a small group of primarily academic experts to critically examine the operation of s223 of the *Native Title Act 1993* (Cth) as part of a process of developing alternative approaches to the establishment and enjoyment of native title in Australia. The primary analysis will be conceptual and theoretical and will bring comparative perspectives to native title both under the Act and at common law. This will be accomplished through a series of commissioned papers that focus on elements of the section. These papers will be subject to review and form the basis of discussion at the workshop. Following discussion it is planned to publish the papers either in an edited collection or perhaps a special edition of a Journal. The papers will also provide the basis for discussion at a broader based workshop which will consider issues of practice and the application of the analyses and proposals arising out of the small workshop.

Workshop Structure:

The structure of the workshop will involve the distribution of draft papers prior to the workshop. Each session of the workshop will have an assigned respondent on the paper presented as well as general discussion among all participants.

The role of the respondent will include reviewing the principal paper as well as presenting comment on the main issues in the session.

The sessions and papers have been focused on particular aspects of s223. However, there will be overlap in the sessions as many will involve issues of recognition of title and rights contrasted with recognition of law as well as consideration of *Yorta Yorta* and its application in relation to issues of 'tradition', 'society' and normative systems.

Each session has been allotted approximately one hour. The papers will have been distributed prior to the workshop and presenters are asked to limit their presentations to 20 minutes to allow the responder approximately 15 minutes with the balance for discussion.

Each session will have a chair.

Workshop Organisation:

The Workshop is organised by the ATNS project. The main contact for workshop is: Phoebe Talbot:

Email: ptalbot@unimelb.edu.au Telephone: 03 8344 9269 Mobile: 0425 762 491

Thursday 14 May 2009: Workshop – The S223 Problem

8.45-9.00

SESSION 1: WELCOME

Professor Marcia Langton

9.00-10.00

SESSION 2: INTRODUCTION

Chair: TBC

Presenters:

1. **Noel Pearson**

A brief overview of the ‘problem’ and “Land is Susceptible of Ownership” in *Honour among Nations*

2. **Vance Hughston**

An overview of the *Bennell* decision and the application of *Yorta Yorta* case.

10.00-11.00

SESSION 3: COMMUNAL, GROUP OR INDIVIDUAL RIGHTS

Chair: TBC

Presenter:

3. **Lisa Strelein**

The interpretation and significance of the reference to ‘communal. Group or individual rights’

Respondent: Justice North (TBC)

11.00-11.15

MORNING TEA

11.15-12.15

SESSION 4: LAW AND CUSTOM: ‘TRADITIONAL’

Chair: TBC

Presenter:

4. **Simon Young**

The meaning given to ‘tradition’ and ‘traditional’ in the context of s223; the problems associated with this interpretation; alternative interpretations

Respondent: Pat Lane (TBC)

12.15-1.15

LUNCH

1.15-2.15

SESSION 5: LAW AND CUSTOM: ‘SOCIETY’

Chair: TBC

Presenter:

5. **David Yarrow**

A discussion of why a ‘society’ is needed, how it is to be found and attributes it must exhibit. This will involve questions of law and custom, normativity, the language of s 223 and the various judgments including *Yorta Yorta* and its application.

Respondent: Lee Godden

2.15-3.15

SESSION 6:
LAW AND CUSTOM: ‘CONNECTION’

Chair: TBC

Presenter:

6. **Vance Hughston QC**

The meaning of ‘have a connection with land’ in s223; interpretation in the cases; issues in application

Respondent: Lisa Strelein (TBC)

3.15-3.30

AFTERNOON TEA

3.30-5.00

SESSION 7: SOME ALTERNATIVES

Chair: TBC

Presenters:

ALTERNATIVE #1: AMENDING S223

7. **Justice North**

The test for native title as established by *Yorta Yorta* has led to the inexplicable position that the greater the effect of colonisation on Indigenous communities, the less likely that community is able to establish native title. The paper proposes a two part amendment to s 223.

Respondent: Sean Brennan (TBC)

ALTERNATIVE #2: COMMON LAW ABORIGINAL TITLE: COMPARATIVE MODELS – CANADA

8. **Professor Kent McNeil’s paper**

This comparative session will engage with s223 and the common law interpretation of aboriginal title both in Australia and Canada. The focus will be to bring a comparative perspective to the both the interpretation of s223 and Australian common law to investigate what native title might ‘look like’ without s223.

Respondents: Simon Young and David Yarrow
