

Land, Rights, Laws: Issues of Native Title

Native Title Research Unit

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The recognition of native title in the High Court's Mabo decision in 1992, the Commonwealth Native Title Act in 1993, and the Wik decision in 1996 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.

Recent amendments to native title legislation have further restricted the right to negotiate over future acts on lands subject to native title application. This paper examines the right to negotiate in the context of procedural fairness under common law and the Constitutional guarantee of just terms for the compulsory acquisition of property by the Crown. Indeed, Neil Löfgren argues that the 'aboriginal right to negotiate' is part of native title and should therefore have the protection of common law procedural fairness and the Constitutional guarantee of just terms.

This paper is published posthumously with the permission of the family. Neil (Jangala) Löfgren was a writer and documentary film maker and was completing a Masters of Law at Bond University. Neil's contribution to the law and to the Institute will be sadly missed.

COMPULSORY ACQUISITION AND THE RIGHT TO NEGOTIATE

Neil Löfgren

The High Court has consistently applied a broad interpretation to property in interpreting the Constitution,¹ and in *Minister for the Army v Dalziel*,² Rich J observed that '[p]roperty, in relation to land, is a bundle of rights exercisable with respect to land'. Chief Justice Latham similarly observed that '. . . the term property is ambiguous, as applied to land it may mean the land itself in relation to which rights of ownership exist, or it may refer to rights of ownership which exist in relation to the land'.³ The Chief Justice further stated that 'property' should be liberally '. . . interpreted so as to include land itself and also proprietary rights in respect of land'.⁴

Arguably these judgments could support the right to negotiate as an element of the bundle of rights exercisable with respect to land. Additional support is provided by Longo's proposition that the concept of property is organic, and contemporary property theory '... seems to be groping for a new concept of property ... which explains and reflects the new circumstances and aspirations of modern society'.⁵ The right to negotiate prior to compulsory acquisition is a long established community aspiration. Indeed, Stoebuck analysed the history of compulsory acquisition and argued that even before the requirement for compensation was the requirement that '... property could be taken only by consent - of the individual in person or by his representatives consenting for him'.⁶

Similarly, nearly three centuries ago, Blackstone, in his *Commentaries on the Laws of England*, observed that parliament can compulsorily acquire land, subject to three qualifications: 'a full indemnification and equivalent', 'a reasonable price', and 'indulgences with caution'.⁷ Traditionally, judicial interpretations of compulsory acquisition have tended to focus on compensatory equivalence (Blackstone's first two qualifications), to the detriment of the procedural aspects of acquisition (Blackstone's third qualification).

Procedural Fairness, the Hearing Rule, and the Right to Negotiate

Procedural fairness encapsulates a common law duty to act fairly when making decisions which directly and individually affect a person's rights, interests, and legitimate expectations.⁸ There is a strong presumption that procedural fairness must be observed in the exercise of public power,⁹ and legislation must not be construed as displacing this presumption unless the intention to do so has been clearly and unambiguously expressed.¹⁰

Traditionally, the rules of procedural fairness reduce to the hearing rule (*audi alteram partem*), and the rule against bias (*nemo debet esse iudex in propria sua causa*).¹¹ In the leading case of *Cooper v Wandsworth Board of Works*,¹² a statutory authority ordered the demolition, at the owner's expense, of the plaintiff's partially completed house because he failed to give notice of an intention to build. The Court of Common Pleas held that '... the board ought to have given notice to the plaintiff, and to have allowed him to be heard'.¹³ Chief Justice Erle further stated:

I fully agree that the legislature intended to give the district board very large powers indeed: but the qualification I speak of is one which has been recognised to the full extent. It has been said that the principle that no man shall be deprived of his property without an opportunity of being heard, is limited to a judicial proceeding ... but the law, I think, has been applied to many exercises of power which in common understanding would not be at all more a judicial proceeding than would be the act of the district board in ordering a house to be pulled down.¹⁴

The High Court in *Municipal Council of Sydney v Harris*,¹⁵ similarly held that property must not be demolished without affording the owner a hearing. Chief Justice Griffith further held that the hearing rule is not confined to a judicial proceeding '... but applies to any case in which a person or public body is invested with authority to decide'.¹⁶ There is also a long line of authority requiring procedural fairness when making decisions affecting

property rights and interests.¹⁷ In the context of procedural fairness the right to negotiate flows from the hearing rule. The events in both *Cooper v Wandsworth Board of Works* and *Municipal Council of Sydney v Harris* are analogous to government compulsorily acquiring property without affording the owner the right to negotiate. This approach is in accord with the flexible interpretation the courts have taken to procedural fairness.¹⁸

The Constitutional Guarantee of Just Terms

The Constitution, s.51(xxxi), confers power on the Commonwealth to make laws with respect to '[t]he acquisition of property on just terms from any State or person in respect of which the Parliament has power to make laws'. This provision also applies to Commonwealth acquisitions in the territories.¹⁹ The High Court has held that the Constitutional guarantee of just terms encompasses procedural fairness. Arguably, then the property owner's right to negotiate with government should be similarly clothed with Constitutional protection in those circumstances in which just terms apply.

Scores of Commonwealth laws contain specific provisions which require just terms and additionally, Commonwealth statutes²⁰ granting self-government to the Australian Capital Territory, and the Northern Territory ensure that these legislatures may only make laws for the acquisition of property on just terms.²¹ The High Court has held that the Constitution's just terms provisions both support and constrain not only Commonwealth laws effecting an acquisition of property,²² but also Commonwealth laws with respect to acquisition of property. Given that Commonwealth statutes granting self-government to the Australian Capital Territory, and the Northern Territory are of the latter type, judicial interpretations of the Constitution's just terms provisions also apply in these jurisdictions.²³ Conversely, the Constitution's just terms constraints do not apply to the laws of the States.²⁴

The High Court has further held that the Constitutional guarantee of just terms should not be narrowly construed,²⁵ and in *Nelungaloo Pty Ltd v Commonwealth*, Dixon J stated that, '[u]nlike "compensation" [under United States law], which connotes full monetary equivalence, "just terms" are concerned with fairness'.²⁶ Fairness requires consideration of community needs, and in *Grace Bros Pty Ltd v Commonwealth*,²⁷ Chief Justice Latham observed that '[j]ustice involves consideration of the interests of the community as well as the person whose property is acquired'. These judgments provide highly persuasive precedent that just terms encompasses procedural fairness, not only in the compensation process,²⁸ but also during the procedural aspects associated with acquisition.

Acquisition of Land Acts in New South Wales, the Australian Capital Territory and the Northern Territory also provide compensation on just terms when acquiring land.²⁹ Whereas, similar legislation in Victoria, Queensland, Western Australia, South Australia and Tasmania, do not.³⁰ Therefore, procedural fairness based on just terms only applies to the Commonwealth, the Australian Capital Territory and the Northern Territory on the basis that the statutes establishing these respective legislatures ensures laws which acquire property must do so on just terms.³¹ Consequently, the right to negotiate does not apply in the Australian States based on the Constitutional guarantee of just terms, but on the basis that procedural fairness has not been statutorily displaced by State Acquisition of Land Acts.

The Aboriginal Right to Negotiate

The *Native Title Act 1993* (Cth), ss.26-44 provides a statutory framework for the recognition and protection of common law native title and includes specific provisions which provide Aboriginal peoples and Torres Strait Islanders with a right to negotiate for acts relating to mining, and the compulsory acquisition of native title land for the purpose of making a grant to a third party. The native title claimants have a right to negotiate before such an act takes place. Where parties cannot agree, there is provision for arbitration, with decisions of the arbitral body subject to Ministerial over-ride in the national, state or territory interest.

In the lead judgment in *Mabo v Queensland [No.2]*,³² Brennan J (with whom Mason CJ and McHugh J agreed) stated that, '[n]ative title has its origins in and is given its content by the traditional laws acknowledged by and traditional customs observed by the indigenous inhabitants of a territory'. And in a parliamentary submission, Michael Dodson, the former Aboriginal and Torres Strait Islander Social Justice Commissioner emphasised that this passage supports the right to negotiate as an incident of common law native title. Dodson further emphasised, '[t]hat the right to control access to and activities on traditional estates is a consistent feature of Australian indigenous law',³³ and:

. . . the right to negotiate is not a special right which is given to indigenous people "above" the rights of other Australians. The right to negotiate acknowledges that indigenous peoples have an attachment to land which includes not only economic but also cultural and spiritual aspects.³⁴

The Privy Council and both the superior courts of Australia and Canada have recognised the *sui generis* or unique nature of both aboriginal title and aboriginal rights.³⁵ Indeed, Justice Lambert, of the British Columbia Court of Appeal, in *Delgamuukw v British Columbia [No.2]*, cogently observed that:

. . . it is not only aboriginal title to land that is *sui generis*, all aboriginal rights are *sui generis*. And it is not only in relation to aboriginal title that trying to describe the title in the terminology of common law tenures is both unnecessary and misleading; trying to describe aboriginal rights in terms of rigorous jurisprudential analysis may well be equally unnecessary and misleading.³⁶

Following this line of reasoning, the right to negotiate is a *sui generis* aboriginal right associated with common law aboriginal title. Indeed, Tully argues that the common law has always recognised ' . . . two different but juridically equal systems of property',³⁷ one British, the other Aboriginal, and this common law tradition is being rediscovered by a number of legal scholars to justify aboriginal property rights. The Federal Court explicitly recognised the common law aboriginal right to negotiate in *Western Australia v Ward*,³⁸ where Lee J held that the ' . . . right to negotiate is an incident of the rights of native title'. Dodson, commenting on the *Native Title Act 1993* (Cth), further asserted that this ' . . . right to negotiate is a much diminished statutory reflection of this traditional incident of title'.³⁹ Similarly, Sean Flood, a former Member of the National Native Title Tribunal observed that:

[t]he right to negotiate is not a right conferred by the *Native Title Act 1993* (Cth); it is not an addition to the common law rights exercised in *Mabo v Queensland [No2]* (1992) 175 CLR 1. When it exists, it is a common law right exercised in accordance with the traditional laws acknowledged by and the traditional customs observed by the indigenous native title holders. In my experience it is always a requirement under traditional laws and customs for any outsider to negotiate activity and entry on Aboriginal country with the traditional owners.⁴⁰

Against this background the Coalition Government has steadfastly rejected the argument that the right to negotiate is sourced from a common law aboriginal right. The implications of the government's assertions are that, as a statutory right, the right to negotiate would be susceptible to variation without just terms.⁴¹ To this end, key provisions in the *Native Title Amendment Act 1998* (Cth)⁴² further reduce the already diminished statutory right to negotiate contained in the *Native Title Act 1993* (Cth). Prior to the Senate passing the Bill, the Acting Prime Minister released an information paper which described the right to negotiate as '... a statutory procedural right (created by the Labor Government and not available to other Australian titleholders) ... It is not a common law native title right'.⁴³ This analysis may have been motivated more from wishful thinking rather than a dispassionate analysis of the law.⁴⁴

Concluding Observations

In *Mabo v Queensland [No2]*,⁴⁵ Deane and Gaudron JJ accepted that native title is property,⁴⁶ and the High Court has consistently⁴⁷ recognised the equality of the Aboriginal right to land with the interests of the wider Australian community after two centuries of '... arbitrary, coercive and uncompensated dispossession'.⁴⁸ The right to negotiate is an indispensable element of the bundle of property rights associated with the ownership of land and, in the context of procedural fairness, flows from the hearing rule. Native title holders, in common with all other members of the wider Australian community, possess a common law property right to negotiate with government prior to compulsory acquisition. Additionally, native title holders possess an aboriginal right to negotiate which enjoys Constitutional protection in so far as just terms has been interpreted by the courts as including a requirement for procedural fairness in government decisions affecting property rights and interests.⁴⁹

It is also interesting to note recent overseas developments, for example, both the Privy Council and the New Zealand Court of Appeal have unanimously held that the principles of the *Treaty of Waitangi*,⁵⁰ impose a duty on government and others to consult with Maori '... on truly major issues'.⁵¹ Similarly, the Supreme Court of Canada has accepted that government has a fiduciary obligation to aboriginal peoples to consult and gain their consent prior to legislating on regulatory matters in relation to aboriginal lands. In *Delgamuukw v British Columbia*,⁵² Chief Justice Lamer (with whom Cory, McLachlin and Major JJ agreed) held that government must consult

... in good faith, and with the intention of substantially addressing the concerns of the aboriginal peoples whose lands are at issue. In most cases,

it will be significantly deeper than mere consultation. Some cases may even require the full consent of an aboriginal nation, particularly when provinces enact hunting and fishing regulations in relation to aboriginal lands.

Notwithstanding differences in Australian case law in relation to both treaty and fiduciary obligations to Aboriginal peoples and Torres Strait Islanders; given the *sui generis* nature of both common law aboriginal rights and aboriginal title, the breadth of the aboriginal right to negotiate may not necessarily be restricted to compulsory acquisition, but may encompass a much broader right to be consulted and provide consent on major issues which impact upon native title.⁵³

¹ *Minister for the Army v Dalziel* (1944) 68 CLR 1 at 276, 285, 295 and 305; *Bank of New South Wales v Commonwealth Bank (Bank Nationalisation Case)* (1948) 76 CLR 1 at 349; *Commonwealth v Tasmania (Tasmanian Dam Case)* (1983) 158 CLR 1 at 282-283; and *Australian Tape Manufacturers Association Ltd v Commonwealth* (1993) 176 CLR 480 at 508-510.

² (1944) 68 CLR 269 at 285.

³ *Ibid* at 276.

⁴ *Ibid*.

⁵ J P Longo, 'The Concept of Property and the Concept of Acquisition on Compulsory Acquisition of Land' (1983) 7 (3) *University of Tasmania LR* 279 at 292.

⁶ W B Stoebuck, 'A General Theory of Eminent Domain' (1972) 47 *Washington LR* 553 at 567.

⁷ W Blackstone, *Commentaries on the Laws of England*, Vol 1, 15th ed, Cadwell and Davies, London, 1809, p 139.

⁸ *Kioa v West* (1985) 159 CLR 550 at 584. See also *Haoucher v Minister for Immigration and Ethnic Affairs* (1990) 169 CLR 648 at 652-653 and 680; and below n 9.

⁹ *Annetts v McCann* (1990) 170 CLR 596 at 598.

¹⁰ *Cooper v Wandsworth Board of Works* (1863) 14 CB (NS) 180 at 194; and *Delta Properties Pty Ltd v Brisbane City Council* (1955) 95 CLR 11 at 18.

¹¹ E I Sykes, D J Lanham and R R S Tracey, *General Principles of Administrative Laws*, 3rd ed, Butterworths, Sydney, 1989, chpts 16-17.

¹² (1863) 14 CB (NS) 180.

¹³ *Ibid* at 188.

¹⁴ *Infra* at 189.

¹⁵ (1912) 14 CLR 1.

¹⁶ *Ibid* at 7.

¹⁷ *Delta Properties Pty Ltd v Brisbane City Council* (1955) 95 CLR 11; *Commissioner of Police v Tanos* (1958) 98 CLR 383; and *Twist v Randwick Municipal Council* (1976) 136 CLR at 112-113. See also *Lisafa Holdings Pty Ltd v Commissioner of Police* (1988) 15 NSWLR 1; *Lisafa Holdings Pty Ltd v Gaming Tribunal [No3]* (1992) 26 NSWLR 391; and above n 12 and 15.

¹⁸ *Russell v Duke of Norfolk* [1949] 1 All ER 109 at 118; *Mobil Oil Australia Pty Ltd v Federal Commissioner of Taxation* (1963) 113 CLR 475 at 504; *Kioa v West* (1985) 159 CLR 550 at 613-615; and *Lisafa Holdings Pty Ltd v Gaming Tribunal [No3]* (1992) 26 NSWLR 391 at 401.

¹⁹ *Newcrest Mining (WA) Ltd v Commonwealth* (1997) 71 ALJR 1346.

²⁰ *Northern Territory (Self-Government) Act 1978* (Cth), s.50; and *Australian Capital Territory (Self-Government Act) 1988* (Cth), s23(1)(a).

²¹ *Lands Acquisition Act 1988* (NT), s70; and *Lands Acquisition Act 1994* (ACT), s.78.

²² *P J Magennis Pty Ltd v Commonwealth* (1949) 80 CLR 382 at 402, 423-424 and 430; and *Gambotto v Resolute Samantha Ltd* (1995) 69 ALJR 752 at 764.

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- ²³ *Lange v Australian Broadcasting Corporation* (1997) 71 ALJR 818 at 829.
- ²⁴ *Pye v Renshaw* (1951) 84 CLR 58 at 83.
- ²⁵ *Minister for the Army v Dalziel* (1944) 68 CLR 261 at 276 and 284-285; *Trade Practices Commission v Tooth and Co Ltd* (1979) 142 CLR 397 at 403 and 407; *Clunies-Ross v Commonwealth* (1984) 155 CLR 193 at 201-202; *Australian Tape Manufacturers Association Ltd v Commonwealth* (1993) 176 CLR 480 at 508; *Mutual Pools and Staff Pty Ltd v Commonwealth* (1994) 179 CLR 155 at 168 and 184; *Re Director of Public Prosecutions; Ex parte Lawler* (1994) 179 CLR 270 at 285; and *Georgiadis v Australian and Overseas Telecommunications Corporation* (1994) 179 CLR 297 at 303 and 320.
- ²⁶ (1948) 75 CLR 495 at 569.
- ²⁷ (1946) 72 CLR 269 at 280.
- ²⁸ *Australian Apple and Pear Marketing Board v Tonking* (1942) 66 CLR 77 at 109; *Johnson Fear and Kingham and the Offset Printing Co Pty Ltd v Commonwealth* (1943) 67 CLR 314 at 333; and *Commonwealth v Tasmania (Tasmanian Dam Case)* (1983) 158 CLR 1 at 291.
- ²⁹ *Land Acquisition (Just Terms Compensation) Act 1991* (NSW), s3(1)(b); and above n 21.
- ³⁰ *Land Acquisition and Compensation Act 1986* (Vic); *Acquisition of Land Act 1967* (Qld); *Land Acquisition and Public Works Act 1902* (WA); and the *Land Acquisition Act 1993* (Tas). See also D Brown, *Land Acquisition*, 4th ed, Butterworths, Sydney, 1996, p 7.
- ³¹ Constitution, s.51(xxxi), and above n 20.
- ³² (1992) 175 CLR 1 at 58.
- ³³ M Dodson, *Commonwealth's Proposed Amendments to the Native Title Act: Address to Public Hearing*, Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund, Submission No 36A, 4 October 1996, p 1.
- ³⁴ M Dodson, *Notes on the Commonwealth's (October) Amendments to the Native Title Amendment Bill 1996*, Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund, Submission No 36B, 17 October 1996, p 1.
- ³⁵ Most recently, see *Delgamuukw v British Columbia* (unreported, Canadian Supreme Court, 11 December 1997). See also *Amodu Tijani v Secretary, Southern Nigeria* [1921] 2 AC 399 at 409-410; *Mabo v Queensland [No2]* (1992) 175 CLR 1 at 89 and 133; *Guerin v R* (1984) 13 DLR (4th) 321 at 339; and *R v Sparrow* (1990) 70 DLR (4th) 385 at 41.
- ³⁶ (1993) 104 DLR (4th) 470 at 644. While Lambert JA was the dissenting judge in this decision, the Supreme Court of Canada overturned the decision in *Delgamuukw v British Columbia* (unreported, Canadian Supreme Court, 11 December 1997)
- ³⁷ J Tully, 'Aboriginal Property in Western Theory: Rediscovering a Middle Ground' in eds E F Paul, F D Miller and J Paul Jnr, *Property Rights*, Cambridge University Press, Cambridge, 1994, p 154.
- ³⁸ (1996) 141 ALR 753 at 766.
- ³⁹ M Dodson, *Further Submission on the Commonwealth's Proposed Amendments to the Native Title Amendment Bill 1996*, Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund, Submission No 36C, 5 November 1996, p 1.
- ⁴⁰ S Flood, 'Native Title: the Right to Negotiate - Common Law Right or Right Conferred by Statute', in ed G D Meyers, *Implementing The Native Title Act - The Next Step: Facilitating Negotiated Agreements*, National Native Title Tribunal, Perth, 1996, pp 83-85.
- ⁴¹ *Georgiadis* (1994) 179 CLR 297 and *Peeverill* (1994) 79 CLR 226.
- ⁴² Schedule 1 - Amendments relating to applications, registrations and claims etc, Subdivision P - Right to negotiate, cls 25-44.
- ⁴³ T Fischer MP, 'Native Title Made Easy', Information Paper, Office of the Deputy Prime Minister, Minister for Trade and Leader of the National Party, Canberra, 11 January 1998, p 2.
- ⁴⁴ See also *Native Title (Queensland) Act 1993* (Qld), s.144B which provides by way of example that pastoral leases extinguish native title.
- ⁴⁵ (1992) 175 CLR 1.
- ⁴⁶ *Ibid* at 110-112. Native title was also described as 'proprietary' at 51; as 'personal' at 88-89, 110 and 132-133; and as 'unique' at 194-195. See also D Skapinker, 'A Property Law Perspective on the Wik Peoples v Queensland' (1997) 8 PLR 107.
- ⁴⁷ *Mabo v Queensland* (1988) 166 CLR 186; *Mabo v Queensland [No2]* (1992) 175 CLR 1; *Western Australia v Commonwealth* (1995) 183 CLR 373; *North Ganalanja Aboriginal Corporation v Queensland* (1995) 61 FCR 1; and *Wik Peoples v Queensland* (1996) 187 CLR 1.
- ⁴⁸ R Bartlett and A Sheehan, 'The Duty to Negotiate in Good Faith' (1996) 3 (78) ALB 4.
- ⁴⁹ For a discussion on this point see Parliamentary Joint Committee on Native Title and the Aboriginal and

Torres Strait Islander Land Funds, *Third Minority Report: Native Title Amendment Bill 1997*, Parliament House, Canberra, October 1997, p 109.

⁵⁰ See the schedule of the *Treaty of Waitangi Act 1975* (NZ) for an English translation.

⁵¹ See *New Zealand Maori Council v Attorney-General* [1994] 1 NZLR 513 at 517; and *New Zealand Maori Council v Attorney-General* [1989] 2 NZLR 142 at 152. For commentary see F M Brookfield, 'Constitutional Law' (1994) 4 *New Zealand Recent Law Review* 276 at 378-379.

⁵² (unreported, Canadian Supreme Court, 11 December 1997) at paras 168 and 209.

⁵³ N Löfgren and P Kilduff, 'Some Just Terms Implications for Native Title' (1997) 3 (5) *Native Title News* 66.

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