

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.

The amendments to the Native Title Act 1993 (Cth) feature a significant paring back of the right to negotiate (RTN) over future acts. This article examines the operation of the RTN in Western Australia prior to the amendments, in relation to the grant of titles under the Mining Act 1978 (WA). It is argued that any unworkability of the RTN was the product of a deliberate strategy of the State government to frustrate the operation of the NTA. Further, had the State government approached negotiations with native title claimants in good faith, the NTA would have provided the opportunity for achieving certainty for resource developers and other interest holders, while also protecting the rights of Aboriginal people. Anne De Soyza is a solicitor with the Aboriginal Legal Service (WA). The views expressed in this article are not necessarily those of the Aboriginal Legal Service of Western Australia (Inc).

ENGINEERING UNWORKABILITY: THE WESTERN AUSTRALIAN STATE GOVERNMENT AND THE RIGHT TO NEGOTIATE

Anne De Soyza

The right to negotiate (RTN) provided to native title claimants under the *Native Title Act 1993 (Cth)* (NTA),¹ is the main right which accrues to native title claimants, prior to a determination confirming recognition of their title at common law. As such it has been the focal point for criticism of the NTA. Governments and industry have claimed that the RTN is unworkable, resulting in uncertainty and delay, which will stymie economic progress and force investment dollars offshore. The result has been two copious sets of proposed amendments to the NTA in 1996 and 1997, and amendments to the NTA promulgated in July 1998 which feature a significant paring back of the RTN. The accuracy of this criticism of the RTN can best be assessed in Western Australia where, since 1995, the State government has implemented the future act provisions of the NTA, within which the RTN is contained.

In this article I will review the practical operation of the RTN in relation to the proposed grant of tenements under the *Mining Act 1978 (WA)*, which form the majority of proposed future acts in that State. The review shows that any unworkability of the RTN was the product of a

deliberate strategy on the part of the State to frustrate the operation of the NTA. The strategy involved working to the narrowest interpretation of its obligations under the NTA. In other words, the State maintained a strict adherence to form rather than substance.

The NTA and future acts

The starting point in any understanding of the RTN is that native title is a pre-existing title to land. Its genesis is in the laws and customs which have operated in Australia from the period prior to the acquisition of sovereignty over the continent by Britain. Aboriginal claimant groups lodging applications for determination of native title with the National Native Title Tribunal (NNTT) do not seek a grant of native title, rather they seek recognition of their title by the legal system established since colonisation.

The NTA created two separate but related processes. The first is the process by which native title can be given effect at law through a process of negotiation between all stakeholders. The second process - the future act regime - validates any future government grants of interests in land over which native title exists or may exist, if those grants could have been made over land which is the subject of freehold title. In applying the procedural rights equivalent to those that a freeholder would have in relation to government appropriation/use of land, the future act regime sought to protect native title by according it the highest form of protection currently available under the common law. This would enable grantees acquiring title to land, to be certain of the validity of the title they acquired *vis a vis* the native title holders.

Although the future act regime conferred on native title claimants the same procedural rights in relation to the appropriation/use of land by government as holders of freehold title would have, native title is not the same thing as freehold. Native title is a unique form of title, an element of which is the spiritual relationship Aboriginal people have to their land. In recognition of this the RTN was included in the future act regime. The RTN applied to grants of interests which created a right to mine,² and to the compulsory acquisition of land for the purposes of conferring an interest on third parties.³ It ensured that, with respect to this limited class of future acts, which would have a particularly deleterious effect on native title, States would negotiate with native title claimants in good faith over the terms of the impairment or extinguishment of their title.

The right to negotiate pre-amendment

If the right to negotiate was to apply to a proposed future act, s.29 of the NTA required that the State government notify any native title claimant in relation to any land or waters that would have been affected by the act, of the State's intention to do the act. Following notification, s.31(1)(b) of the NTA required that the State government (the government party in negotiations) negotiate in good faith with the native title claimants (the native title party) and any grantee party, with a view to obtaining the consent of the native title party to the future act going ahead. In the case of proposed grants of tenements under the *Mining Act*, the grantee is the company or individual which has applied for the grant of the tenement.

The obligation on the government party to negotiate in good faith could be dispensed with if the government party simply included in the s.29 notice, a statement that the future act was an act attracting the expedited procedure. If such a statement was included in the notice then, in order to secure the RTN, the native title party had to apply, within two months, for a

decision of the arbitral body (which was the NNTT in the absence of any State tribunal) that the expedited procedure did not apply. Otherwise the future act could be done (that is, the tenement could be granted).

Where the RTN applied it did not constitute a veto. Under s.35, if no agreement was reached within a limited period of time, usually 6 months from the date of the s.29 notice then, at the request of any of the parties, the NNTT could make a decision regarding the doing of the future act. In addition, s.42 ensures that any decision of the NNTT could be overruled at the discretion of the relevant minister.

The State government and the right to negotiate

The State's initial strategy in dealing with the NTA was outright defiance when it passed the *Land Titles and Traditional Usage Act 1994* (the LTTUA) in an attempt to displace the NTA. After the application of the NTA to Western Australia was confirmed by the High Court in *WA v Commonwealth*⁴, the LTTUA was repealed, and the State began applying the future act provisions of the NTA through the Department of Minerals and Energy (DME). The strategy, which underpinned the application of these provisions, was to defeat the NTA by reducing compliance with its obligations under the RTN to a matter of form rather than substance. In adopting this strategy the State government swapped overt defiance for a more subtle and effective form of resistance.

Implementing the NTA: the first phase of the State's strategy

There are two discernible periods in the State's strategy of passive resistance. The first follows the decision in *WA v The Commonwealth* and ends in mid-1996 when the good faith decision of the Federal Court in *Walley & Ors v WA* was handed down.⁵ In the first phase the State's interpretation of the minimum requirements for compliance with its obligations, was that it merely had to appear to hold itself ready and willing to participate, and to sit out the negotiation period. The State offered to convene meetings between the other parties but was not itself prepared to engage in negotiations. In addition, the State followed the practice of applying for arbitral decisions by the NNTT regarding the doing of the future act, as a matter of standard procedure where the 6 month negotiation period had expired, unless an agreement has been finalised between the grantee party and the native title party.⁶

In June 1996 Carr J in the Federal Court handed down his decision in *Walley v WA*, confirming that the discharge of the State's obligation to negotiate in good faith, was a condition precedent to an arbitral decision by the NNTT regarding the doing of the future act. Diane Smith noted that by November 1996, 90% of the applications (being 224 of 228) for a future act arbitral determination which had been lodged with the NNTT, were withdrawn by the State government, presumably with the intention of recommencing good faith negotiations.⁷ Moreover, Smith added that in this instance, the government party's previous interpretation of its negotiating responsibility has been the direct cause of significantly greater costs to all parties and added delay.

Implementing the NTA: the second phase of the State's strategy

In the wake of the decision in *Walley* the State drew up a set of procedures by which it proposed to fulfil its obligation to negotiate in good faith. The new procedures were contained

in a negotiation protocol (the protocol) which was circulated by the DME to native title parties and to grantees. The protocol established the following procedure:

1. inviting submissions from the native title party regarding the proposed grant;
2. an initial meeting to be convened by the DME with the other parties and, if required, subsequent meetings at which the DME will attempt to identify common ground;
3. if an agreement appears achievable the DME offered to participate in the negotiations either directly or in a monitoring role as agreed by the parties;
4. if negotiations were to break down or any impediments to an early resolution were identified, the DME offered that its staff would be available to discuss these matters with the parties concerned, or request the NNTT to mediate.

It appears that, as with its negotiating strategy in the first period, the State saw itself as a convener of meetings, and an adjudicator between the other parties, rather than as a party to the negotiations with the obligation to negotiate in good faith.

On the agenda for discussion at the initial meeting between DME, the grantee and the native title party was the government party's 'negotiating position', and its role in future meetings. Some of the more salient aspects of the negotiating position as expounded at these initial meetings are set out below.

Limiting the scope of negotiations

Negotiations over matters related to the tenement only

The State would not engage in discussions on any matter unless it was directly related to the granting of the tenement. So, for instance, the native title party could not put up a proposal to assent to the grant of the mining leases, in return for the government party agreeing to include members of the native title party in the management of nature reserves within the area subject to the native title application. The reason given was that an agreement about matters not directly related to the grant of the tenement in question would amount to a 'regional agreement' to which the State was opposed.

There was no basis for this position in the NTA, rather all indications are that the scope of negotiations were to be as wide as possible. For instance s.33 provided that, without limiting the scope of negotiations, they may include the possibility of conditions entitling the native title party to payments referable to the activities undertaken on the land. Also, s.21 of the NTA provided for the making of local or regional agreements authorising future acts, and may have applied to native title claimants as well as determined holders of native title.

Heritage concerns irrelevant

The State's *Aboriginal Heritage Act (WA) 1972* places control over the protection of sites and areas of significance in the Minister for Aboriginal Affairs. Native title parties have sought to negotiate with the State to ensure their involvement in site protection, regarding areas which were the subject of the proposed grants of tenements. An example of the sorts of matters native title parties wished to have addressed is State funding for rangers from among members of the native title applicant group, to ensure that sites in areas of importance to the group were protected during exploration. The State refused to consider negotiating over site protection, contending that the procedures and processes already in place were sufficient to protect the interests of the native title party.

No conditions on the tenement

The State also refused to impose conditions on the grant of tenements, even where the conditions relate directly to the activities which the grantee proposed to conduct on the land. For instance, when the grantee and the native title party both requested that the State include, as conditions of the grant of tenements, that detailed site surveys be conducted at a certain stage of the grantee's exploration program, the State refused. The State refused to include conditions on the tenement notwithstanding that some conditions sought by the native title party related to matters that were prescribed or prohibited, as the case may be, by statute. For example, the State would not include a condition on the tenement requiring the conduct of site surveys and the protection of sites, even though s.17 of the *Aboriginal Heritage Act* makes it an offence to excavate, damage, destroy or in any way alter an Aboriginal site. The reason given for this position was that, to place conditions on the tenement would give the native title party a right of veto over exploration activities. That is, in the event that the grantee breaches the condition, there is potential for forfeiture of the tenement.

Limiting the authority of the government party's representative.

The Land Access Unit of the DME is authorised to represent the State in all proceedings relating to native title negotiations as regards the proposed grant of interests under the *Mining Act*. Any response from the Land Access Unit is to be taken as a response from the State government. There is nothing wrong with nominating a particular department to coordinate the response from the government party, but the State's position was that its involvement be restricted to the DME. In other words, only matters which fell within the jurisdiction of the DME could be canvassed in any negotiations, and the involvement of any other departments or instrumentalities would not be considered. The native title parties were told that concerns and issues could be raised directly with other departments, but these approaches had to be made independently of the negotiation process. Thus, a 'whole of government' approach was not seen as necessary to fulfil the State's obligations under the NTA. In addition, the State followed the practice of sending junior staff from the Land Access Unit to meetings. These personnel did not have the authority to do more than argue with or listen to the other parties.

The State deed

The State in fact approached negotiations with a set position from which it would not divert. The position was foreshadowed in the protocol, and was clearly set out in the standard form State deed. The protocol made a distinction between the 'primary agreement', which all the parties must sign to enable the tenement to be granted, and an 'ancillary agreement', which the native title party and the grantee may reach between themselves. The protocol provided that the ancillary agreement may include other matters not dealt with in the primary agreement and that the document would not be signed by the government party.

The primary agreement, or State deed, was a brief document simply recording the agreement of the native title party to the grant of the tenement, while absolving the government party of any obligations with respect to the other parties. For instance, it affirmed that:

1. the government party did not have any obligations or liability whatsoever, in connection with the rights and obligations of the native title party, or the grantee under an ancillary agreement;
2. the provisions of the State deed and any ancillary agreement would not be conditions of the grant of the tenement under the *Mining Act*;

3. by entering into the deed the government party did not acknowledge the existence of native title to the subject land.

The deed contained the State's 'negotiating position' and its terms were non-negotiable. If the tenement grant was to proceed, it was left to the efforts of the other two parties to conclude an ancillary agreement.

Taking account of Aboriginal concerns in land use

Clearly what the State expects is for Aboriginal groups to agree to the grant of interests in land which impair or extinguish their title, without any reciprocal benefits accruing to them. In the case of mining leases for example, although they are deemed by the NTA not to extinguish native title, they are granted under the *Mining Act* for a period of 21 years with an option to renew for a further 21 years. Thus a mining lease is an interest which can endure for up to 42 years - a lifetime for a great many Aboriginal people.

The NTA does provide a limited right for native title parties to seek compensation for acts affecting their title following a determination of native title. However, Aboriginal groups should at least be entitled to negotiate over the terms of the acquisition and use of their lands, rather than simply have a future limited right to compensation. The compensation recovered in the future may not reflect the actual value of the land to them, or the value derived from the use of the land by others.

Examples of the sorts of benefits native title parties seek to secure in return for the loss or impairment of their title are; the protection of sites, the provision of services to their communities, educational opportunities for their children, training and employment opportunities and assistance in the development of enterprises. The State is not prepared to enter into negotiations with the native title party and the grantee party over any of these things.

An alternative approach

The State could, at any time in the past, have undergone a fundamental attitudinal change to recognising and respecting the property rights of Aboriginal people. The decision in *Walley*, in particular was an opportunity for reassessment of the State's strategy.

Had the State decided to approach negotiations with Aboriginal claimants over future acts with *bona fides*, the NTA provided the gateway to beneficent outcomes for all parties. As noted above, s.33 of the NTA indicated that negotiations under s.31 were to have the widest possible scope. So, for instance, although each future act involving a proposed tenement grant had to undergo a separate notification, if the native title and grantee parties were the same in relation to a cluster of proposed future acts, these could all be dealt with as part of a single negotiation. Some native title and grantee parties favoured this course of action, as it would have enabled a range of benefits to be provided to the native title party, while the grantee would have had its interests in the area dealt with comprehensively. However, the State insisted that it treat each proposed tenement grant as a separate negotiation, again because of its literal interpretation of the relevant provisions of the NTA.

Notwithstanding the State's position, successful comprehensive agreements were concluded between native title and grantee parties. Under these agreements native title parties agreed to the grant of the tenements in question, and any future tenements that the grantee company

may apply for, in consideration of site protection being ensured, and benefits being provided to the native title party. Under such agreements, any future tenement applications made by the grantee will be assented to by the native title party following notification.

In addition to negotiations under the RTN, s.21 enabled government and native title holders to make comprehensive agreements regarding future acts, whereby native title holders could authorise classes of future acts that would have affected their title. The definition of native title holder in s.224 of the NTA may have included claimants whose title had not yet been formally recognised at law through a determination. Therefore, agreements enabling the grant of classes of future acts did not need to await a final determination of native title.

Native title determinations and future acts

The point is that the RTN only maintains the status quo until native title is recognised and given effect at law through a determination.⁸ A determination is preferably achieved through a process of mediation. The processes set up by the NTA are designed to enable native title claimants, the State government, and other interest holders to decide how native title is to be recognised, how existing non-Aboriginal interests in land are to be accommodated and how future interests are to be created. With regard to the accommodation of existing non-Aboriginal interests in land, the NTA enables anyone with a proprietary interest in land to be a party to the mediation.⁹ However, the validity of existing non-Aboriginal interests in land is not an issue. The validity of these interests is confirmed by the NTA, and validating State legislation passed pursuant to it. The validity of existing non-Aboriginal interests in land has, more recently, been confirmed in relation to pastoral leases by the High Court in *Wik People v Qld.*¹⁰

A determination of native title is only relevant to:

1. how native title will be recognised at law or, in other words, what form of recognisable tenure native title holders will have; and
2. how future interests are to be created in land subject to native title or, in other words, how future acts are to be done.

A government committed to approaching the RTN over future acts with good faith, would achieve the best possible outcome for itself and the other parties, if it were to also engage in negotiations with the native title party towards a determination of native title. The added benefit of a determination is that once it is recorded on the National Native Title Register, no other application for a determination of native title can be accepted over an area which is the subject of the determination.¹¹ A determination of native title then, is the key to providing the certainty that the State claims to desire, and moreover, it is a key which the State itself holds. However, it was not until very recently (in the period prior to the amendments being promulgated), that the State indicated its willingness to consider entering into negotiations towards determinations of native title.

The amendments to the NTA

The NTA was amended on 2 July 1998. The amendments remove several categories of future acts from the ambit of the RTN. For example, small scale mining operations, private infrastructure projects like the building of dams, the expansion of a pastoral lessees' interests to enable the cultivation of crops and the conduct of horticultural and forestry operations. In addition, a registration test applies now to limit the access of claimants to the RTN. Moreover, s.43A of the amendments enables States and Territories to provide an alternative scheme to displace the RTN altogether. In respect of lands subject to tenures such as pastoral leases, which cover most of Western Australia, s.43A allows States and Territories to establish a process which provides claimants with an opportunity to be consulted in lieu of the RTN. Although the Commonwealth minister is empowered to ensure that State and Territory proposals for alternative arrangements meet certain minimum standards, no amount of Commonwealth vetting of these proposals can remedy the fact that consultation falls far short of negotiation. A consultative scheme will reserve to the State or Territory, the power

to decide whether it will consider the concerns of native title parties about the loss or impairment of their title.

Conclusion

The success of the RTN and, beyond that, the ability of Aboriginal people to secure recognition and protection of their property rights through the processes provided in the NTA, require a commitment *in good faith* from the State governments in particular. Instead of good faith, the Western Australian State government has sought to discredit the NTA, by approaching its obligations under the RTN in a way that deliberately creates the uncertainty and unworkability that it now complains of. Its strategy of frustrating the operation of the RTN has encouraged widespread criticism of the NTA in the non-Aboriginal community.¹² This criticism has in turn, given credence to the State's claims that the problem lies with the RTN and the NTA. The State's strategy has now paid its dividend, as the amendments to the NTA have excoriated the limited right to negotiate, through which Aboriginal people could seek at least some recompense for the continued diminution of their property rights. In addition, if the State establishes an alternative process pursuant to s.43A, it can do away with the RTN altogether in most areas of Western Australia.

¹ Reference to the NTA is to the NTA pre-amendment unless otherwise stated.

² Mining includes exploration activities: NTA s.253 and s.8 *Mining Act 1978 (WA)*.

³ NTA s.26(2).

⁴ *The State of Western Australia v The Commonwealth* (1995) 183 CLR 373.

⁵ *Walley v The State of Western Australia & WMC & NNTT*; *Taylor v WA & Ors*; *Collard v WA & Ors* (1996) 67 FCR 366: 137 ALR 561.

⁶ The six month negotiation period is a minimum period. Parties can choose to negotiate for a longer period without an arbitral decision being sought if good faith negotiations are progressing satisfactorily.

⁷ Smith, D. '*The Right to Negotiate and Native Title Future Acts: Implications of the Native Title Amendment Bill 1996*', CAEPR Discussion Paper No 124/1996, Centre for Aboriginal Economic Policy Research, The Australian National University, Canberra. See also the comments of NNTT Member Chris Sumner in *The State of Western Australia/Johnson Taylor on behalf of the Njamal people/Garry Ernest Mullan* WF96/7, 7 August 1996 about the State's interpretation of its obligation to negotiate in good faith.

⁸ See the comments of Brennan CJ and others in *North Ganalanja Aboriginal Corporation v The State of Queensland* (1996) 135 ALR 225 at p 235-6.

⁹ NTA ss.66(2) and 68(2)(a).

¹⁰ *Wik People v The State of Queensland* [1991] 71 ALJR 173.

¹¹ NTA ss.62(1)(a)(ii) and 63.

¹² For instance note the views of the managing director of An Feng Kingstream quoted in the *West Australian* Newspaper, 13 March 1998 edition, that 'It is something the Aboriginal people have got the magnificent benefit of some stupid legislation that has been given to them by the politicians'.

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