

Land, Rights, Laws: Issues of Native Title



Native Title Research Unit
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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.

Indigenous Land Use Agreements (ILUAs) are often characterised as a positive aspect of the 1998 amendment process for native title holders. As ILUAs are being promoted and negotiated across the country, Lee Godden and Shaunnagh Dorsett examine some of the fundamental contractual principles that Indigenous groups should bear in mind. This paper examines the ILUA provisions and effects of Registration and discusses the ambiguity of the contractual status of ILUAs under this process. The authors point to intergenerational agreements and contractual remedies as the key issues requiring careful consideration by parties contemplating entering into ILUAs under the Native Title Act 1993 (Cth).

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CLAIMANT GROUP DESCRIPTIONS: Beyond the Strictures of the Registration Test

Jocelyn Grace

The demands of the registration test with respect to describing claimant groups simultaneously resolved and precipitated problems for claims in the Goldfields. It did not create them, as they were evident in the many existing overlapping claims, but the process of the registration test has made them more explicit – better defined and articulated. Before discussing these problems, I will explain a little of the history of the amendments to the *Native Title Act 1993* (NTA) which brought about the registration test, and the rules related to claimant group descriptions, for those who are not familiar with them. Then I will describe the approach adopted by the Goldfields Land Council (GLC) in formulating claimant group descriptions for those claims they represent in the Goldfields and some of the issues which the registration test has raised. These issues are often the bases of factional disputes between claimants and need to be addressed in the course of preparing claims for determination in the Federal Court.

The amendments

It was not only parties fundamentally hostile to the notion of native title who advocated amendments to the NTA. The National Indigenous Working Group on Native Title supported amendments to correct flaws in the Act, most particularly its failure 'to require that claims be

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made on behalf of the native title holders as a group, not by disparate members of the group or individuals'.¹ The National Native Title Tribunal was, in the past, regularly criticised for its 'low-scale screening test' for acceptance of native title claims, particularly when new claims overlapped old ones.² The amendments to the NTA which were passed in July 1998 introduced the registration test, which included stringent requirements about claimant group descriptions (s.190B(3)) and a rule stating that, if physically overlapping claims have common claimants, the most recently lodged claim would fail the test (s.190 C(3)).³ Failure of the registration test results in the loss of certain rights to negotiate over future acts (such as mineral exploration and mining, infra-structural and residential development) on the land over which Aboriginal people have made the native title claim.

Restrictions on claimant group descriptions

Shortly after the amendments to the NTA were passed, the National Native Title Tribunal (NNTT) distributed guidelines to applicants and representative bodies to assist them in meeting the requirements of the soon to be imposed registration test. Section 190B(3) of the amendments specified that the members of the claimant group had to be identified either by listing all claimants or by describing the group in such a way as to satisfy the Registrar (or Delegate) that it is possible to ascertain, by some objective means, whether any particular individual is or is not a member of that claimant group. The NNTT guidelines suggested that the latter could be achieved by reference to biological descent, and explicitly stated that self-identification, named family groups or cultural bloc labels alone would be insufficient to satisfy this criteria. It was also suggested that another acceptable approach was to describe a set of rules ('traditional laws and customs') or criteria by which membership of the group is determined. Such descriptions did have to meet the criteria of 'objectivity' in order to satisfy the Registrar (or Delegate). These conditions clearly placed stringent restrictions on the way in which claimant groups could describe themselves.

In a paper written by Fiona Powell (consultant anthropologist) and myself in September 1998, we addressed the subject of the requirements of the registration test in respect to describing claimant groups.⁴ It was clear then that listing members within claimant groups was in most cases logistically impossible given the constraints imposed by the time and resources available.⁵ In the Goldfields region, then, we were directed down the path of defining membership of claimant groups largely on the basis of biological descent.⁶ In fact it can be argued that for the majority of claimants in the Goldfields, this was an acceptable, indeed a desirable, approach. As we explained in the earlier paper, 'in the Goldfields, kinship is the fundamental organising principle; and the construction of genealogies is basic to a claimant group's self-definition'.

Following discussions with those assisting the Registrar or Delegate, a standard format was arrived at for claimant group descriptions in the Goldfields. In the early stage of the registration test process, some claimant groups sought to include those who had married into the group. This was deemed by some Delegates not to meet the criteria of 'objectivity'. A second category, adoption, was also not sufficient alone, and a description of the rules for adoption was required as well. A third category, that of people who have historical and cultural connection to country included in the claim area, was also an option. Some groups chose to include the second and/or third categories in their claimant group descriptions while others did not.

It could also be argued that basing all claimant group descriptions on a biological descent model is inappropriate, most particularly so for those claimant groups in the northern Goldfields which

place less emphasis on physical parenthood and descent principles, distinguishing less between actual and classificatory relationships and placing a greater emphasis on individual rather than social group affiliation to land than non-Western Desert people.⁷ It is interesting to note that there has generally been strong support for the approach being taken by the GLC among claimants in those areas as well as in the non-Western Desert areas of the Goldfields. One possible explanation for this is that in this region of the Western Desert people may have placed greater emphasis on descent than has been documented for other areas of the Western Desert.⁸ A second explanation, which does not exclude the first, is that the distribution of conception sites and places of birth have been greatly reduced as Aboriginal residence has become increasingly concentrated in and around settlements (for example missions, ration stations, places of employment, Aboriginal communities); as Sutton puts it, 'Sedentism produces descent, putting it very crudely'.⁹

Rule on overlapping claims and common claimants

The three most common approaches people had taken when naming their claims and describing their claimant groups in the Goldfields prior to the amendments to the NTA were by cultural bloc/language names, named family groups, and named local groups. Powell argued that of these the cultural bloc approach offered the most advantages. First, it invites inclusiveness, enabling several, locally connected groups to unite on mega-cultural dimensions to form a large, strongly-based claimant group. Second, by amalgamating smaller groups into a cultural bloc, overlapping claim areas become an internal rather than external matter. Third, the rationalisation of claims make for a more effective use of the limited financial resources available to the land council for research and legal representation.¹⁰

This approach is also preferable from a forensic point of view, as disputes can be resolved within the context of larger claims prior to, rather than fought out during, Federal Court proceedings between conflicting claimants.¹¹ In addition to these long-term advantages, in the short-term context of meeting the registration test requirements, the amalgamation of overlapping claims with common claimants into one claim means that the various claims do not fail the registration test under Section 190C(4) of the NTA and so do not lose their negotiation rights.

The GLC has been relatively successful in brokering the amalgamation of numerous family and/or local group-based claims into cultural bloc/language group claims. In order to survive the strictures of the registration test, alliances between disputing local and family groups became essential, and so internal factionalism was overridden by the need for regional solidarity.¹² Certainly, some factional disputes have not been resolved, although in some cases they have, as predicted, merely become internal rather than external matters.

Beyond the registration test: Issues to be addressed

As mentioned above, the strictures of the registration test raised a number of important issues and highlighted problems which need to be addressed as each native title case is prepared for hearing in the Federal Court. These issues include the bases on which people are claiming native title rights and interests in a particular area, the relative rights of individuals and sub-groups within a claim area, and whether and how these rights are ranked. In the Goldfields, these issues in many cases have previously given rise to overlapping claims. Unfortunately, time constraints imposed by statutory deadlines did not allow for all of these to be addressed in preparing claimant group descriptions and claim boundaries within the registration test context. I will now seek to clarify these issues, and discuss possible processes for resolving or reconciling them.

A claimant group description based on biological descent requires a considerable amount of solid, genealogical research. The result of this research generates open discussion in claimant meetings, in some cases sufficient discussion to resolve inter- or intra-claim disputes. For many people who are uncertain about their position within claims, the process can reassure them that they will definitely be included in the claim/s which they feel they have a right to be in. This clarification of who are members of claimant groups, together with the process of applicants having to be authorised by the claimant group, has the potential to empower many people. This has been manifest in the Goldfields region people speaking out at meetings, challenging applicants, becoming applicants themselves, and being willing to give affidavits directed towards providing *prima facie* evidence of native title rights and interests.¹³

The process has also highlighted the essential difference between those with ancestral and those with historical connection to country. Some claimant groups have rejected people whose connection to the claim area is historical rather than ancestral, while others have accepted and included them under that category. The relative status of claimants whose connection to the country is based on both ancestral and on-going historical connections, as opposed to those with only ancestral or historical connection, is a matter which each claimant group has had to decide for itself. Some are still coming to grips with these issues.

Genealogical research has also revealed to some their ancestral connection to claim areas in which the core claimants do not know or recognise them. While descendants of the named ancestors have intermarried in the area, and so are accepted by virtue of their consociation and demonstrated knowledge of country, others have had no connection with the country in a number of generations.¹⁴ Some of these people choose to activate their rights purely through ancestral connection, while others pursue inclusion on other claims relating to country where they were born and grew up. In some cases their claims have been based on historical and cultural connection to that country without having ancestral links. This, however, is often a matter of great concern to those whose connection to the claim area is both ancestral and based on continued physical and spiritual connection, and intimate knowledge of their country. The dynamics of how these matters are negotiated by individuals and core claimant groups are usually a matter of some concern, as they can cause considerable resentment amongst those on both sides. They require lengthy and sensitive mediation and discussions among the parties involved in order to reach agreements about exclusions or inclusions and people's rights and status on the claim.

Resolving conflict, reconciling conflict

The long-term stability of many of the Goldfields new claims, formed by an often tense and volatile alliance of people long in dispute, depends on the resolution or reconciliation of conflicts over rights to country. Keen divides intra-Aboriginal claimant conflict over land tenure into two categories – those where the groups agree on the grounds or bases on which country is held, but not on the facts of the matter, and those where people:

have rather different opinions about the significance of country, or have very incomplete knowledge, and express relations to country in somewhat different terms.¹⁵

The first, Keen suggests, may either be resolved by establishing who has the best evidence of connection or be reconciled by being explained as normal within the broader system of traditional laws and customs. The resolution approach is dependent on the anthropologist having access to the evidence the claimants in dispute have, in order to make such an assessment. In the Goldfields, withholding evidence from researchers (anthropologists and

linguists) contracted to carry out research is a common symptom of factional politics between and within claims, making resolution via this approach difficult to achieve at times.

The alternative approach, accommodating disputes within the description of the broader system of traditional laws and customs to be described for the native title claim, certainly has its advantages, particularly in dealing with those in the Western Desert areas of the Goldfields. Keen states that 'there is no firm rule [in the Western Desert] that a person inherits country primarily from their father'. People will have different reasons for claiming connection to particular areas of country, including filiation, spirit conception, birth, death of a parent, initiation, long-term residence and consociation, and religious knowledge. For this reason one would expect people to be in conflict over claims to country, because they will ascribe to each varying degrees of strength, disagree on the rights they confer, and question the bases of each others claims.¹⁶

While Keen emphasises the flexibility or fluidity of the Western Desert system of land tenure, Sutton argues that it is also important to draw attention to its structured or stable aspects, particularly in the context of providing native title evidence.¹⁷ Continuing in this vein, Sutton states,

... in the Western Desert ... where rights and interests in country were more strongly individuated than elsewhere and subject to considerable short-term change ... there is always a huge emphasis on country rights mediated by religious knowledge ... The Dreaming (*tjukurrpa*) and their sites and tracks seem to be the most stable elements of the system, one that was demographically porous as individuals came and went over long periods.¹⁸

The matter of succession will be very important for some claims in the Goldfields, and it will be argued that this has occurred under the traditional laws and customs of the Western Desert. In order to do this, we need a reasonably clear sense of the 'rules' which regulate succession, such as those outlined by Peterson, Keen and Sansom in a submission to the Ranger Uranium Environmental Inquiry in 1977. With the extinction of primary heirs, estates pass to new owners. The principle of transmission of rights in such instances is that recognised secondary rights become the basis for claims to ownership of the estates that lack owners. In short, their secondary rights become primary rights of ownership.¹⁹

The second category of conflict over land tenure which Keen describes is based on people having competing views about connection to country. ²⁰ Expectations of the relevance of personal history often vary between individuals in land claims, as Peterson explains,

This situation may be aggravated in the more settled areas where relations to land have been radically transformed and people have lost contact with their original country through forced removals and migration.²¹

The devastating impact of the gold rush, missionary activities, and forced removals of Aboriginal people in the Goldfields are terribly evident to those doing research and experiencing claimants' relationships with each other and to country. In the past, limited or differing understandings of traditional laws and customs generated claims which alone would not have been substantial enough to meet the test of a Federal Court hearing, or would be seriously challenged by other native title parties. For example, some people had assumed that if their father participated in Law business at a particular place, that it must have been part of his country, and therefore, theirs by inheritance. Some people have confused historical and traditional connection to country, lodging claims over areas of country where their parents or grandparents lived and worked, outside of their own country. Such 'historical' connection

can, in fact, 'be a form of "traditional" connection if it was licit under local cultural conditions at the time'.²² This being the case, those people and their descendants would have native title rights and interests in the area, but they would be contingent rights, and only those with core rights would have the authority to make decisions about that country. It will also be those with 'core rights' who decide whether or not to allow such people to be included in the claimant group.

Other differences of opinion about native title rights and interests are not the product of lack of knowledge or understanding of traditional laws and customs, but a conflict of cultures. The Central West and the Southern areas of the Goldfields in pre-contact time, while not part of the Western Desert bloc, experienced the incursion of Western Desert Law, and practiced circumcision. Due to the pressures of police, missionaries and pay-back killings, men of authority in those areas made the decision to stop practicing secret, sacred Law. Missionary activities in the Northern Goldfields also had a powerful effect. There are many claimants throughout the Goldfields who do not practice the Law – some respect its authority, and some do not. Where the Law is no longer practiced, there is tension between those who wish to revive it and those who do not. Similarly, there is tension in those areas where the Law is practiced, between those who defer to its authority and those who do not.

It is important to understand that not having been through the 'Law' does not mean that people do not have traditional knowledge of country, do not know stories and songs associated with sites, and cannot speak for country, and so have ongoing native title rights and interests. It is not necessary to be practising secret, sacred men's or women's Law business to have ongoing traditional laws and customs, and so native title. It is unfortunate that the Law and 'traditional laws and customs' are often conflated, causing people to conclude that once the practice of Law stops or is in suspension, there is no native title. There are many claimants who have a wealth of knowledge about their country, and exercise their native title rights and interest over it in numerous ways as often as they can. For Aboriginal people, Aboriginal law and custom shapes and permeates their everyday lives, whether they live in towns or in the bush.

Whether conflicts within or between claims are based on disputed facts or differences of opinion about the ways in which country can be claimed and the relative rights these ways bestow, ideally they need to be resolved or reconciled before cases are heard in the Federal Court.²³ The evidence to support each individual's or family group's claim to hold native title in any particular area needs to be compiled and assessed by researchers and lawyers with the cooperation and participation of claimants. This process will solve the majority of disputes and allow solid cases to be built. A major advantage of dealing with intra-claimant conflict within, rather than between claims, is that it allow for the identification of overlapping areas of country where people hold varying rights, and sub-areas within claims where certain claimants hold rights to the exclusion of all other claimants. These can then be discussed and made the subject of internal agreements between claimants.

Conclusion

The strictures of the registration test did not allow for the nuances of Aboriginal social relations and relations to country in the context of overlapping claims. The amalgamation of claims was necessary, however, not only for the purposes of the registration test but also to accommodate shared interests in country and intermarriage between neighbouring claimant groups, while retaining negotiation rights. The registration test acted as a catalyst for bringing people together in a forum where they could express their grievances. It also forced an uneasy alliance between people in conflict – in some claims these alliances may last while in

others they may not. For those groups who have forged solid alliances after going through this difficult process, further work on resolving or reconciling the remaining contentious issues continues. For the few who have not, a re-configuration of claimant groups and areas of country may have to be explored.

1. Muir, Kado, 'Negotiating regional settlements on native title: perspectives from the Goldfields of Western Australia', in Mary Edmunds (ed), *Regional agreements: Key issues in Australia Volume 2 Case studies*, Native Title Research Unit, AIATSIS, Canberra, 1999, p. 250.

2. Kee, Sue, 'The process of developing a claim from the perspective of the National Native Title Tribunal', in *Heritage and native title: Anthropological and legal perspectives: proceedings of a workshop*, Native Title Research Unit, AIATSIS, Canberra, 1996.

3. This privileging of older claims over more recently lodged claims implies that the former are more likely to have veracity than the latter, despite this not necessarily being the case.

4. Powell, Fiona and Jocelyn Grace, 'Addressing 190B(3) of the threshold test, naming all member of the native title claim group or describing the group (clearly enough to satisfy the Registrar that any particular person can be identified as being a member or not of that group)', Native Title Research Unit, AIATSIS, Canberra, forthcoming.

5. The registration test timeframe is dependent upon various circumstances, such as the date of lodgement of the application for native title or the date when a Section 29 notice by the State government of a proposed Future Act is issued. From that time, the Tribunal has four months to complete the process of applying the registration test. In practical terms, any amendments to the claim/s must be filed in the Federal Court within two to three months. Of the claims represented by the GLC, about a third were triggered by the first Section 29 notice in early October 1998, another third by the second two weeks later, and the majority of the rest, two weeks after that.

6. There was considerable debate on this matter when this paper was presented at the AAS conference at the University of NSW in July. Some anthropologists working for other representative bodies in other States expressed surprise, having prepared claims for the registration test which passed with much more open-ended descriptions, thereby showing considerable inconsistency of approach to these matters by the Tribunal within the registration test process.

7. Sutton, Peter, 'The system as it was straining to become: fluidity, stability, and Aboriginal country groups', in J.D. Finalyson, B. Rigsby, and H.J. Bek (eds), *Connection in native title: genealogies, kinship and groups*, CAEPR, ANU, Canberra, 1999.

8. For example the Puntipi, as described by Myers, 1986, cited by Sutton, *ibid*.

9. Sutton, personal communication, 1999.

10. Powell and Grace, *loc cit*.

11. Vincent, Philip, Principal Retained Counsel, Goldfields Land Council. Personal communication, 1999.

12. Of the claims represented by the GLC, in one area twenty claims have been amalgamated into one, in another, fifteen into two.

13. Previously, most claim register documents named only those now known as applicants

(previously the A1s and A3s), referring to the rest of the claimants (previous A5s) in only a general way (e.g. the X people, or X, Y and Z family groups). Therefore, some people were not sure whether or not they were included.

14. It is difficult to image one family group in the Goldfields which does not have links through marriage with a number of families on a number of other claims in the Goldfields. This highlights the absurdity of s.190C(3) of the Act from an Aboriginal and an anthropological point of view.

15. Keen, Ian, 'Conflict in Aboriginal land tenure', in *Proof and management of native title, summary of proceedings of a workshop*, Native Title Research Unit, AIATSIS, Canberra, 1994, p. 27.

16. Keen, *ibid*, p. 29ff.

17. As Sutton explains, 'In some of the more recent anthropological literature, fluidity is at times examined and "problematized" in the absence of equal treatment being given to that with which fluidity is usually in constant dialectic, and without which it is a vacuous category, namely, stability', *ibid*, p. 15.

18. Sutton, *ibid*, p. 31-32.

19. Peterson, Nicolas, Ian Keen, and Basil Sansom, 'Succession to land: primary and secondary rights to Aboriginal estates, a submission to the Ranger Uranium Environmental Inquiry', prepared on behalf of the Northern Land Council, 1977, p. 1003.

20. Keen *ibid*.

21. Peterson, Nicolas, 'Organising the anthropological research for a native title claim', in *The skills of native title practice: proceedings of a workshop*, Native Title Research Unit, AIATSIS, Canberra, 1995, p. 8.

22. Sutton, personal communication 1999.

23. In commenting on this paper, Sutton (1999b) makes the point that 'the court could still find for native title at the root level, leaving the beneficial title to be sorted out locally and regionally, so long as people could present a reasonably unified view of what the country consisted of culturally, how to behave towards it, and how to determine the worth of claims made over it'. I do not disagree with this statement, however would make the point that some disputes to which I refer in this paper are of a nature which preclude such a 'reasonably unified view' being presented in court. The distinction Sutton is making here seem to parallel that which the court would make between 'a matter of law' and 'a matter of facts'. My main concern then, in light of this distinction, is how to deal with inter- or intra- claimant disputes which are based on opposing views of the former.

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