Land, Rights, Laws: Issues of Native Title

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The High Court Mabo decision in 1992 and the passing of the Commonwealth Native Title Act in 1993 mark a fundamental shift in the recognition of indigenous rights in Australia. The Act, like the High Court decision on which it is based, transforms the ways in which indigenous ownership of land may be formally recognised and incorporated within Australian legal and property regimes. The process of implementation, however, raises a number of crucial issues of concern to native title claimants and to other interested parties. Many of these will have to be decided in the courts. Nevertheless, information about and discussion of the issues are important for those needing to address the matters raised by the claim process.

This series of papers is designed to contribute to the information and discussion. The papers address the shift from notions of statutory land rights to the rights of indigenous peoples that pre-existed colonisation and exist within the broad spectrum of their human rights. Within these rights, land is an essential component.

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Exclusions under S26(3) and (4) of the *Native Title Act 1993* from the right to negotiate

EXCLUSIONS UNDER S26(3) AND (4) OF THE *NATIVE TITLE ACT 1993* FROM THE RIGHT TO NEGOTIATE

Patrick Sullivan

In the *Native Title Act 1993*, Part 2 Division 3 Subdivision B is dedicated to the right to negotiate by native title holders or registered native title claimants in the case of certain permissible future acts. Effectively, such acts are the creation, variation, or extension of a right to mine.

S26(3) and (4), however, includes provisions for certain acts to be excluded from this right to negotiate. The substance of these exclusions are:

- certain acts done on land or waters where there has been an unopposed non-claimant application,
- certain acts done on land or waters where there has been a renewal of an interest in the land or waters that was created before the Act came into force,
- the Commonwealth Minister determines that the act will have minimal effect on any native title concerned and, if the act is indeed excluded, that
- native title holders will be appropriately consulted about access (with procedures set out under S26(4)(b)(i) and (ii)).

The important concept here is that of 'minimal effect on any native title concerned'. The Prime Minister stated in his Second Reading Speech, 'the Bill recognises that the bulk of dealings in land are done by the States and Territories'. He then went on to say that:

> In regard to decisions on land use, where we have recognised State and Territory processes, the Commonwealth will step back. State bodies, not the Commonwealth tribunal will decide whether grants should proceed.

S26 specifically and exclusively allows for the Commonwealth to determine that a future act may be excluded from the right to negotiate. In a media release of 1 June 1994, however, the Special Minister of State, the Honourable Gary Johns, told the Federal Parliament that the States and Territories had been informed that 'they could take action to exempt certain exploration from native title procedures' (Media Release, 1/6/94). He went on to say that:

> It was...possible for State and Territory Governments to facilitate exploration activity. They can propose that exploration methods with minimal effect on native title can be excluded completely from any right to negotiate procedures.

In line with this approach, he said, the Commonwealth had written to the States and Territories on 13 May 1994, outlining the general Principles on which the States could take action to exempt certain exploration from native title procedures. In his letter, the Minister stressed that 'industry groups should now be encouraging State and Territory Governments to submit exclusion proposals to the Commonwealth'.

The Principles outlined by the Commonwealth require that:

- the activity would have a small and temporary effect on native title,

- there should be adequate notification and consultation with native title holders and registered claimants,
- physically disruptive and intensive activities, such as bulk sampling, possible under an exploration tenure would not be excluded from the right to negotiate,
- appropriate measures should be taken to limit such disruption as may occur to native title rights and interests,
- particular arrangements will be made for petroleum exploration where the right to explore carries production rights with it.

The next stage in this process is for State and Territory governments to come forward with specific proposals for exclusions, upon which the Commonwealth Minister will then act. It is not envisaged that every proposal for an exclusion will be submitted separately, a process that would make it little different from the right to negotiate. Instead,

- State and Territory governments will need to submit proposals about the categories of exploration activities that they wish to have excluded.

Such proposals will be required to contain considerable detail about such categories of activities and the bases for their exclusion. Once the Commonwealth Minister, in terms of S26(3) and (4) of the Act, agrees that certain categories of exploration activities are to be excluded,

- all such activities will thereafter be automatically excluded from the right to negotiate.

At the time of writing, no formal proposals by any State or Territory government have been received. (This may be due, at least in part, to an unwillingness to act until after the outcome of the High Court proceedings in relation to the Western Australian challenge to the Commonwealth legislation, and the challenges to the West Australian legislation. The High Court heard these cases in September 1994. It is expected that it will hand down its judgement in March or April 1995). Also at the time of writing, there are no State or Territory arbitral bodies in place.

There are a number of issues of concern to Aboriginal and Torres Strait Islander people in these developments:

1. Responsibility for decisions about native title being left with the States/Territories

(a) Aboriginal and Torres Strait Islander preference is for Commonwealth primacy in Aboriginal affairs. A constant criticism has been that the Commonwealth has, in the past, not made sufficient use of the constitutional power to legislate for Aboriginal and Islander people given to it by the 1967 Referendum. It was made very clear in the negotiations over the *Native Title Bill*, from the Eva Valley meeting onwards, that the Aboriginal negotiators held a strong preference for the Commonwealth to play the major role. This view is clearly based on the generally poor record held by the States/Territories in carrying out their responsibilities, in legislating for land rights as well as in service delivery, towards Aboriginal people.

(b) There has been clear opposition by Western Australia to native title. This opposition carries the obvious corollary that, should its own legislation be declared invalid, the Western Australian government is likely to adopt a hostile or, at the least, unsympathetic

approach to all native title issues. South Australia has aligned itself with Western Australia in opposing in the High Court aspects of the Commonwealth's *Native Title Act*.

(c) There is also fear, based on considerable past experience, that States would attempt go beyond the intention of S26(3) and (4) of the *Native Title Act* and attempt to include categories of exploration activities that extend the interpretation of both the Act and of the Principles.

- The role of the Commonwealth in enforcing the Principles is therefore paramount.

2. The definition of 'minimal effect'

In his press release of June 1st, 1994, the Special Minister of State, the Honourable Gary Johns, said:

> The overarching principle when considering whether an act proposed to be excluded will have minimal effect on any native title concerned, was that the Commonwealth would need to be satisfied as to the small and temporary effect on any native title rights and interests. In addition that measures existed to ensure these rights and interests can be exercised once any temporary effect is removed.

This statement of principle appears straightforward and clear. The Minister's approach, however, contains significant potential for contradiction. Such a contradiction would be between, on the one hand,

- the invitation to the States to provide rapid access to native title land under S26(4), and, on the other,
- their need to keep within the Principles, which stipulate consultation and measures to limit disruption.

In either case, the proposal appears to assume that it will be the type of exploration activity that will determine the level of impact, not the significance for Aboriginal people of the land on which it is to occur.[1]

If the Principles were to be strictly adhered to, much of the streamlining of exploration activity on native title land would be lessened. It is a matter of concern whether the need to provide certainty of access to explorers will overcome the good intentions of the Principles when the States come to implement these proposals. Moreover, the reference to an activity having 'a small and temporary effect on native title' needs to be read very carefully.

- Occupation and use, in the Aboriginal view, can be impaired by the exercise of very minimal activity.

- For native title claimants and native title holders, the central issue in any proposals about exclusions submitted by State or Territory governments to the Commonwealth is the process of consultation.

[1] It may be argued that the *Native Title Act* does not need to address issues of significance of the land, since this is covered in other legislation such as heritage or sacred site laws. The experience of Aboriginal people indicates, however, that such legislation has not always provided adequate protection. It is important, therefore, that these matters be kept in mind in consultations or negotiations carried out under the *Native Title Act*.

S26(4)(b) and (c) of the Act requires that the Minister notify any relevant representative bodies, invite submissions from them, and ensure that, if the proposed determination is made, any native title holders concerned will be appropriately consulted about access. The Principles also require adequate notification and consultation with native title holders and registered claimants.

- The Commonwealth has the responsibility to ensure that these processes of consultation are fully carried out in relation to any proposals received from State and Territory governments.

It is not difficult to understand the reasoning behind the Minister's proposals to the States and, on the face of it, it is reasonable. The mining industry could be immediately reassured about the acceptability of new exploration programs wherever there is the possibility of a native title determination application going ahead. In many instances, this would obviate the need for a non-claimant application, and initial exploration could proceed, while negotiation over possible greater impact activity begins. Since the effect on land is 'small and temporary', it is assumed, no real harm is done and everyone wins.

Three points need to be taken into consideration:

- The first is political. Aboriginal people strongly perceive a need for justice and equity. Their representatives have struggled to achieve this under the native title legislation. This means that any regime put into place in co-operation with the States, without meeting Aboriginal aspirations, will not meet the objective of resolving uncertainty in the commercial sphere.

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- The second problem is conceptual; the Principles may allow a misunderstanding of the nature of native title. As indicated in S223 of the Act, native title is not envisaged as exclusively a form of property right. It is important that actions to implement the Act do not have the effect of narrowing it in this way. Since native title arises out of Aboriginal custom and tradition, harm to the title follows from harm to this body of cultural practice, not simply from harm to the land itself. Proposals based on a ranking of activities according to impact on the terrain itself will not work.

- The final problem with the proposals is procedural. No fair regime can be implemented to give effect to these provisions of the *Native Title Act* without a thorough examination of the significance of the land itself that will be subject to disturbance. Clear guidelines need to be established to carry this out, and they need to adhere to existing best practice. The danger for Aboriginal groups is that the consultation procedure will be abandoned when it is realised how demanding it is and blanket approval for certain types of activity, already provided for under S26(3) and (4) of the Act, will be given.

The three problem areas

The *Native Title Act* gives the title holders or registered native title claimants the right to negotiate over development activity on the land. This does not include the right to say no to it. In the case of exclusions under S26(3) and (4), they do not have even the right to negotiate, although the Principles stipulate that they must be consulted and measures taken to limit the impact of activity. Many would argue that these provisions amount to at least significant impairment of some aspects of common law native title and an effective practical, if not legal, extinguishment. These provisions are likely to be challenged when a suitable case arises.

As indicated earlier in this paper, in section l(c), entering into arrangements with the States so that activity can be approved on native title or potentially native title land, without adequate consultation with the native title holders or registered claimants, will be viewed as provocative by Aboriginal groups and will bring these confrontations to the fore. There is concern that the nature of disruptive activities excluded from negotiation may in practice be widened. If so,

- the negotiation provisions of the *Native Title Act* will have been reduced, in many instances, to a consultation provision;
- conflict over this will increase, rather than lessen, the period of post-Mabo uncertainty for resource developers.

Consultation itself is not a simple process. It cannot proceed without an investigation of the significance of the land, whether under the *Native Title Act* or other legislation, for which disturbance is proposed. The fundamental principle is that:

- it is not the type of activity that determines whether significant harm will be done to title,
- it is the significance for Aboriginal people of the land on which the activity is proposed.

For this reason consultation and investigation must be built into the process of applying for and carrying out exploration.

Aboriginal occupation and use of the land is significantly affected in two ways by adverse activity:

- firstly, it is significantly harmed by entering on to, damaging, or behaving inappropriately in areas of particular significance in tradition and custom;
- secondly, it is damaged by dealing in a culturally inappropriate way with the native title holders or registered claimants.

As to the first point: it is established beyond argument in Aboriginal ethnography that entering on to certain areas of land, by any person in some instances, or by certain categories of persons in many cases, or at inappropriate times or in an inappropriate manner, can cause damage to the group with responsibility for the land as well as to the trespasser. In these areas,

- there is no activity with minimal impact unless it is highly managed.

There are other areas of land which are not harmed by all activity, but which may be disturbed by certain types of activity, for example, ground disturbance. Then there may be areas of land which might not be harmed in general by a certain amount of surface disturbance but which may suffer harm beyond a critical point as activity is carried out intensely, or continually over a long period of time. In all of these cases, it is not possible to determine from the type of exploration program proposed what the extent will be of any possible harm to title.

The second point is less easily explained but is nevertheless important. Native title is not simply a property relationship registered under Anglo-Australian law. The property aspect is very limited in Aboriginal tradition and derives from a much broader body of land-related practices and beliefs. In this body of practices and beliefs, a group's

relationship to the land is an expression of the relations among its members, and their involvement in the practice of their religion.

- All of their intersecting practices and beliefs make up native title in Aboriginal customary law. Native title as recognised under the common law reflects this.

The way in which title is dealt with by non-native title holders can affect these relationships and practices, and therefore enjoyment of the title itself. It may appear a legitimate restraint under European law to subject a form of title to the limitations that certain activities cannot be prevented even after negotiation, and that others only require consultation. To Aboriginal owners, the legal terms so much reduce the expression of their title, compared to its expression in Aboriginal terms, as to constitute significant impairment which, in some cases, amounts to extinguishment.

The intention of excluding certain activities from the right to negotiate under S26(4), is to allow activities that are of such low impact they will not impair or extinguish title.

- However, the very way in which these activities are permitted may negate Aboriginal traditional belief and practice. In doing so, the existence of title under European law would become barren for the owners, as the basis on which it rests in Aboriginal tradition has been undermined or destroyed.

In the light of the above, if the current proposal is that the States should consult with Aboriginal groups and, having done so, produce a list of types of activity for which no further consultation is required, this is clearly unworkable.

- What is required instead is a system by which all applications for exploration and other development permits on all land of interest to Aborigines be worked out. And that this should be at least equal to current best practice.

Without adequate investigation, it will not be known whether any proposed activity is in fact low impact activity; nor will it be possible to respond to notification as set out in the Principles; nor will it be possible to decide what are appropriate measures to limit disruption. This investigation will have to include:

- the extent of the proposed activity,
- the significance of the land on which it is proposed, and
- the appropriateness of the group consulted.

Aspects of current best practice

Current procedures used by the Kimberley Land Council, known as the Work Program Clearance method, have been shown to be among the most practical, economical, accurate, and amenable to Aboriginal cultural sensitivity. In this methodology, strict adherence is paid to the provision of maps, plans and written information concerning the proposed activity. This activity and these areas, and no others, are assessed for disruptive impact. No cultural information is divulged. Further activity requires further clearance, usually less demanding in time and resources. Aboriginal owners are involved in every aspect of scrutinising the plans, inspecting the proposed sites, and certifying the acceptability of the activity.

If procedures along these lines were proposed by the States as part of the process of applying for and getting the necessary clearances for exploration activity, the exclusions provisions, though still seen by many Aboriginal people as unjust, could be workable. There is a further proviso, however. The procedures must apply to all land of Aboriginal

interest, not simply land already held under the *Native Title Act* or the subject for application for determination. This is because the Act will be resorted to, whether successfully or not, for protection of any land where there is any Aboriginal interest. This will result in legally complex claims being put forward only so that they may enjoy the negotiation or consultation provisions of the Act.

At present, in several states, notably Western Australia, the strongest protection Aboriginal groups have from the disruption of their land is, having lodged an application for determination of title with the National Native Title Tribunal, to become registered native title claimants with, therefore, the right to negotiate. This is likely to be so, even acknowledging the importance of heritage or sacred site legislation, which has proved to be inadequate in important instances, as, for example, in Western Australia. From the point of acceptance of the application and registration of the claimants, the negotiation and mediation provisions of the *Native Title Act* come into force.

Conversely, the only protection that developers have from native title claims over land in which they have invested significant amounts of money in planning, feasibility and exploration is to ask the Tribunal for a determination. This is an unwelcome process on both sides, but particularly on the Aboriginal side, as it demands a response which is often inappropriate and difficult to achieve in the time available. From the point of view of the Tribunal, it threatens clogging the process with non-claimant applications to the extent that the fast-tracking provisions of the Act and the need for certainty for developers are negated.

This paper has shown that if an attempt is made to circumvent these problems by guaranteeing access to Aboriginal land for certain activities this will be unenforceable, as it will address only the question of impact on land, which is not the same as harm to title, and will be challenged. The alternative, establishing an agreed procedure that protects all interests, while initially time consuming and more costly, may produce more positive results.

References

Commonwealth Government, 1994, Exploration Exclusions Principles
Johns, Hon. Gary, 116/94, Media release
Hansard, 2887-2883, 5313

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