

Land, Rights, Laws: Issues of Native Title

Native Title Research Unit
Australian Institute of Aboriginal and Torres Strait Islander Studies

Editor: Jim Fingleton

February 1995

Issues paper no. 7

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.

Dr Mary Edmunds is an anthropologist who was appointed as a foundation member of the AIATSIS Native Titles Research Unit in 1993. She is now the Director of Research at the Institute. She is also acting as one of the two consultant anthropologists to the Aboriginal committee set up by the Northern Land Council to hear the Wagait dispute.

CONFLICT IN NATIVE TITLE CLAIMS

Mary Edmunds

The experience of the claims process is demonstrating that the recognition of native title, and the material and symbolic benefits resulting from it, has brought into the public arena a significant number of intra-Aboriginal disputes over land ownership. The majority of claimant applications received by the Tribunal involve disputing groups. An increasing number of cases brought by Aboriginal groups to the courts - Supreme, Federal and High Courts - also involve disputes.

The Tribunal, at least as it has operated to date, is only able to deal with such disputes by dealing with the disputing groups as separate and equal interest groups along with non-claimant parties, as, for example, in the first claim to come to the Tribunal for mediation - the Wellington Common claim in New South Wales. In this instance, the claimant group and the opposing Aboriginal group are both Wiradjuri. Both claim common descent and rights of use and occupation of the Common under claim. A claim to exclusive ownership by the claimants, as anticipated by the Act, was neither appropriate nor, probably, sustainable. The Tribunal's mediation process was, in this case, successful in bringing about agreement between the groups (although not between

these groups and the State government). A significant element in this success was the active involvement of the two Aboriginal organisations - the New South Wales Land Council and the Aboriginal Legal Service - in working towards an agreed outcome. Much of this work took place within the framework of the Tribunal's hearings but outside Tribunal conferences.

The Wellington Common claim highlights a number of the elements likely to be present in other claimant disputes. These are:

- i) the context of the conflict - with the ongoing deep concern of Aboriginal people for country, despite the removal of people from their country and the fragmentation of traditional networks of relations between neighbouring groups;
- ii) the underlying factors in the dispute - a division that has grown up between country and town. There is also the issue of the claimant group's being composed mainly of women and the opposing group of men who assert seniority;
- iii) some factors in reaching agreement - recognition that both groups have rights in the Common, though of different kinds; and the close involvement of the Aboriginal organisations in providing a broader basis for the claimants to go beyond the assertion of exclusive rights.

1. The context of disputes

In the year since the passing of the Act, it has become clear that the Act itself has become a context for disputes. This is not because the Act, or disputes associated with it, are novel but that they act, rather, as one more factor that has been added to the resources of Aboriginal political life. The disputes that are confronting the Tribunal and the courts in many instances demonstrate some of the fundamental principles of Aboriginal social action, for example:

- traditional ownership of land takes a number of varying forms, and individuals and groups exercise differential rights within an overall collective ownership. What appears, then, as conflicting claims to ownership may in fact be addressing different aspects of ownership, which exist in relationship to each other;
- the principles on which dissent develops are also the principles on which traditional relations operate, for example, questions of descent, of who has the right to speak, of who holds what knowledge and how that knowledge may be used. Particular disputes may be long-standing and deeply embedded, but often signal the importance of the matters at stake and the buoyancy of Aboriginal interests (Fingleton *et al.* 1994: 14-15). Conflict, that is, is an indication of the continuing vigour of Aboriginal society, not of its breakdown.

Within this broader context, there are a number of particular and recurring factors that can be identified as common to many disputes, either as provoking disputes or as exacerbating them.

2. Factors in disputes

These factors belong to two different, though interconnected, orders:

- a) those that relate to the principles that underlie Aboriginal social life and
- b) those that have emerged as a result of the procedures established by the Act and the Tribunal.

a) Principles that underlie aboriginal social life

(i) Descent

In native title claims, the issue that is emerging most clearly is that the continuing existence of whole named descent or language groups has been ignored, denied, or suppressed. This may be because the group was thought to have died out, or because its members have tended to be subsumed into a larger group which has then, in many cases, exercised or attempted to exercise rights of succession to the other group's country. In a

growing number of instances, there has been a reassertion of group identity and associated rights, and a demand for recognition and legitimacy, by members of groups thought to have effectively disappeared. This has been so, for example, with the Dieri people of the Lake Eyre region in relation to the Arabunna people, the Djugun of the Broome area in relation to the Yawuru, the Kamu of Daly River in relation to the Malak Malak. Often such groups have common lines of descent and may well have constituted particular groups within a larger language or descent group. Historical evidence to support the arguments of one group or the other is generally poor. Past ethnographies tend to be partial and inconsistent. The appearance of certainty presented by materials such as the Tindale map is, at best, flawed and cannot stand alone. In any case, the Tindale map does not provide any evidence at all about the kinds of relationships that were in place between groups - even those identified as different 'tribal' groups - at the time. Nor can his boundaries be read as anything other than indicative.

ii) Representativeness and the right to speak

These two matters are not the same, but are increasingly equated by the requirements of the Act, as well as by the broader processes of Australian political life. The Act makes provision both for claimants to be named as representatives of a claimant group (see S61), and for particular Aboriginal organisations to act in a representative capacity as representative bodies (S202). Actions taken under both of these provisions have already been formally challenged. In the Ngunnawal claim (south-eastern New South Wales), the right of the Ngunnawal Local Aboriginal Land Council to lodge the claim has been challenged by the Ngunnawal Elders Council on the grounds that the land council does not represent its people, and that the land council chairwoman does not have the right to call herself a Ngunnawal elder or to lodge a land claim on behalf of the Ngunnawal people. Of groups in the Kimberley, the Kamali Land Council has challenged the right of the Wororra claimants to be representative and to have the right to speak for the group. It has also challenged the right of the Kimberley Land Council to be gazetted as a representative body under the Act.

iii) Knowledge and its use

As Rose points out:

In Aboriginal societies, knowledge is land-based; personal authority, personal achievement, the authority of seniors, and the integrity and autonomy of local groups depend on the control of knowledge through restrictions on its dissemination...Knowledge constitutes proof of ownership of land (Rose 1994: 2)¹.

It should come as no surprise, therefore, to find tensions over the dissemination of knowledge. There are several areas in which these tensions manifest themselves. One is the preparation of the claim itself and the kinds of evidence that people judge that they need to support their claim, or that are asked for by other parties in the mediation process or will be needed in the courts. In the Djabugai claim in north Queensland, for example, the claimants are being asked for extensive materials by the State, with little indication of what the limits may be. There is concern that, particularly where there are rival Aboriginal groups involved, the process for proving ownership through demonstrations of knowledge may lead to loss of control over knowledge (Rose 1994: 6) - and therefore over one of the principal bases of political life. In some instances, as, for example, in the Finnis River land claim in the Northern Territory, there have been bitter accusations of knowledge being stolen.

¹ It has been pointed out, however (Peter Sutton: pers. comm.), that lack of knowledge is not necessarily or always disproof of ownership, unless under certain circumstances. Infants, for example, or members of the groups with an intellectual disability, can be regarded as full members of the claiming/landholding group.

A common source of tension, and of the emergence of disputes over claims, is also closely related to the question of possession of knowledge about country and ceremony. This is a conflict between town and bush-based groups, with the latter continuing to hold greater knowledge on the basis of continuing practices directly related to country, though often the former have more access to mainstream education. This is the situation, as we saw, in the Wellington Town Common claim. Many of the groups who are now largely town-based are in this position because their land was the focus of the "greatest impact of colonisation, often because it was coastal or good farming land. Much of their country has now been settled as towns - Ngarluma lands by the towns of Roebourne, Wickham, probably Karratha; Djugun country by Broome; Larrakia country by Darwin; virtually all the groups in the southern and eastern parts of the continent. Many groups were removed from their country by government policies and relocated to missions, reserves, or compounds. Those groups with the greatest continuity of presence on their country have been largely those whose land was appropriated for the pastoral industry. This permitted them to a greater or lesser extent to remain on their own country and maintain traditional practices. Such groups often now hold the advantage of greater knowledge and integrity of sites than their town-based counterparts. The town-based groups, nevertheless, continue to assert their ownership of country both within and outside the town limits, and resist what they see as attempts by other groups to claim their lands.

iv) Bases of group definition

It may be argued that, like succession (Peterson et al. 1977), fission - the splitting of groups into smaller units - is a recurrent and therefore normalised process of Aboriginal life. This reflects in part the fact that individual members of a group have a wide variety of links - through descent, adoption, marriage, conception, and so on - with other groups and country. All of these links are available to be exercised under certain circumstances and at different times. At the same time, there is a tension between this array of relatedness at one level and, at another, identification with a core unit, which is much more narrowly family-based (although the definition of 'family' varies, and spouses always retain a distinctive identity and set of relationships). In the past, the pressures to redefine a group in terms of a smaller unit are likely to have been demographic and seasonal. Now, they are likely to have developed from the disruption of traditional networks of exchange, ceremony, trade, resulting often in greater isolation of groups from each other, with a consequent lessening of the experience of reciprocity and mutual obligations. One outcome of this has been a denial of legitimacy between groups and the elevation of particular rights of land ownership - held differentially in relation to other groups - to separate, exclusive, and full possession for narrowly defined groups. Group redefinitions are likely to be on the basis - rather than with the inclusion - of individual or family rights. Such a development is particularly likely in the case of disaffected groups - those who feel that their interests have not been or are not being adequately cared for. The Kamali Land Council challenge to the Wororra claim and to the Kimberley Land Council is one such example. So too was the challenge to the Northern Territory *Aboriginal Land Rights Act* in *Pareroultja and others v Tickner and others* in the Federal and then High Courts. The plaintiffs in this case were unhappy with the outcome of the Lake Amadeus land claim which they saw as marginalising their interests.

v) Access to material or symbolic benefits

A determination of native title ownership by the Tribunal or by the Federal Court will provide clear benefits to native title holders. This has already happened through the land claims process in the Northern Territory, where traditional owners as recognised under the *Land Rights Act* are able to exercise and enjoy a wide range of rights over their land, including in relation to other members of their communities who are not traditional owners. The High Court's recognition of native title offered legitimacy to all Aboriginal and Torres Strait Islanders. It provided particular benefits to the Murray Islanders. Other

groups now want particular as well as general recognition, in terms of identity, legitimacy, and the right to exercise control over their ancestral lands. In many instances, this is requiring the assertion of those rights in relation to other Aboriginal groups as well as to non-Aboriginal ones.

b) Disputes emerging from the claims process

i) Proving native title

The High Court decision and the Act have situated native title and its proof within a legal framework that requires a high level of understanding of legal processes and their implications. Most native title claimants, like most other ordinary citizens, do not have this. There is therefore, for many groups, a lack of realisation concerning the impact of disputed claims and the possibility of weakening the claim. Such weakening is in terms of the achievement of legal recognition of ownership and of maintaining Aboriginal control in the face of development pressures. Part of this lack of understanding relates to the exclusiveness test indicated by S225(b)(ii) of the Act for a determination of native title. Because of the differential rights provided by ownership, issues of exclusiveness are also differential. They are based not just on maintaining distinctiveness from neighbouring groups, but also on a range of categories which include gender, age, type of relationship. They are rarely absolute. Aboriginal understandings of the right to exclude others are likely, therefore, to be different from legal ones, and to require much broader definitions of the claimant group or groups than initially realised, or easily accepted, by disputing groups.

ii) Confusion of ownership with land use

In the present procedures, there is no forum set up to deal with ongoing disputes over land and land use as distinct from disputes over ownership. Disputes over differential rights in land by different groups are being elevated, within the claims system, to disputes over ownership. The mediation process itself is based on an assumption that all conflict is both resolvable and needs to be resolved. In terms of claims, it is only disputes over ownership and the associated recognition of relevant groups' inclusion in any determination of ownership that need to be resolved. Other disputes - often low-level, everyday conflicts that are almost intrinsic to many land-based situations - should not be addressed as part of reaching an agreement. The process should work towards de-emphasising such conflicts, rather than highlighting them by forcing them to a resolution (Fingleton *et al.* 1994: 15).

iii) The adversarial framework

The way in which the claims process has been established encourages an adversarial approach by rival claimant groups, each of whom is free to engage its own lawyer or other advisers. This approach is, in a number of instances, being exacerbated by rivalry, or at least lack of coordination or cooperation, among representative organisations (whether gazetted as representative bodies or not). Where this is occurring, such bodies are tending to act in the interests of particular claimants against the interests of other claimants. There has been little attempt to reconcile different claims within an overall structure that might provide the possibility of recognising the rights of all groups to the land and therefore, together, the exercise of full beneficial ownership.

iv) Funding

S203 of the Act provides for financial assistance to be given by ATSIC to representative Aboriginal and Torres Strait Islander bodies. Specific criteria are set out for the selection of these bodies under S202(1). These include broad regional representativeness and an established record in relation to performance of its existing functions. Funding is not, however, confined to representative bodies. Claimants may request assistance from other bodies which have not been gazetted as representative bodies. There is no effective

process in place for setting funding priorities. Nor is there any procedure for assessing whether what appear as opposing claims may in fact be related to each other within a broader land-owning structure. Separate funding for each group provides encouragement for a maintenance of divisions rather than a search for possible common ground. Nor has there been, to date, any means of assessing the quality of advice being given to claimants outside the representative bodies, either by organisations or by lawyers or other advisers. At the same time, this unprioritised spreading of limited funds has meant that, while the workload of the representative bodies has increased rapidly, this has not been adequately matched by an increase in resources.

v) Claims that do not reflect the land-owning structures of claimant groups

While there are important political questions still to be resolved about indigenous sovereignty and self-determination, and about the need for non-indigenous Australians to acknowledge the full extent of dispossession that occurred as a result of colonisation, there are significant problems associated with claims that are unlikely to be supported by appropriate evidence from claimant groups. The Utemorrhah claim in the Supreme Court of Western Australia, for example, has had its statement of claim challenged seven times by applications for it to be struck out, the most recent being ordered by the court in March 1993. Some of the problems of supporting such an extensive claim are indicated by the lodging of the Barunga claim over land within this broad area in early 1993. The Utemorrhah claim itself was broken up into six separate claims in the Supreme Court in May 1993: the Bardi, Wororra, Ngaranyn, Wunanbil, Kwinli, and Kitcha claims, reflecting more closely the ways in which groups are actually interrelated. As well, the complexity and slowness of the proceedings have meant that a number of the key claimants, including the principal claimant herself, after whose family the claim is named, have died before seeing any outcome, or even being able to give formal evidence. All these factors militate against the ultimate success of the claim and others like it.

vi) Involvement of outside interests in support of one group against another

One of the outcomes of redefining the limits of a claimant group on a narrowly-based individual or family interest is the isolation of such groups and their greater accessibility to outside interests. This appears to have been the case in the Lake Amadeus challenge. It has certainly been reported in relation to the Dieri people. In May 1993, an agreement was signed between a Dieri tribal elder and the managing director of Western Mining, Hugh Morgan (*Kalgoorlie Miner* 27/5/93). Western Mining has an interest in Finnis Springs station, for water to be used for the Olympic Dam project and the long-term expansion of Roxby Downs township. The agreement, and its overt support for one group's claims over another in an area that is subject to strong disagreement, has provided another volatile ingredient in the conflict and may, in the longer run, prove counter-productive to the success of any native title claim and the ability of the Aboriginal groups involved to maintain control in the face of such strong development interests.

3. Factors in working towards agreements

S202(4)(b) of the Act defines one of the functions of representative bodies as assisting in 'the resolution of disagreements among such individuals or groups about the making of such claims'. This responsibility goes jointly with the function of facilitating the preparation of claims (S202(4)(a)), and must be seen as an essential and early part of it. Because these are statutory responsibilities,

- claimants should be encouraged, through clear funding guidelines, to use a gazetted representative body for their claim.

If this does not happen, there should be close cooperation between that body and the one chosen by the claimants.

It is important that disagreements of this kind be dealt with outside the Tribunal's mediation process as far as possible. A number of the representative bodies are already doing this and achieving some success. Their experience, and that gained from other processes of addressing Aboriginal disputes, indicates a number of elements that, together or in certain combinations depending on particular circumstances, need to be present in reaching agreements.

a) *The framework*

Pre-Tribunal discussions should, as far as possible, be organised by the regional representative body or bodies who are already engaged in dealing with broader regional issues and provide a forum in which disputing claimants may make public and explicit their positions. The chair must be a neutral respected person of authority who may, in some circumstances, work as part of a committee of senior Aboriginal people, including women. It may be useful for claimants to have professional assistance at this stage, such as a trained dispute resolution expert, in order to canvass their own positions.

b) *Ground rules*

The ground rules for these initial discussions need to be well-established and adhered to. As a minimum, they should include:

- inclusion by name of all groups who claim ownership of rights in the land;
- acceptance by all others of the right of each group to be a party in the dispute;
- no group to be allowed to air old grievances or grievances not directly relevant to the claim;
- each group to be able to put their case without being challenged as to their legitimacy or motives;
- initial discussion to be limited to a statement of each group's interests in the land and the rights that they claim;
- each group to produce its own statement about the desired outcomes of the claim.

c) *Provision of information*

It is important that lawyers or other professionals explain clearly the legal position and the implications of the Act and Tribunal procedures in relation to claims and their determination. Other comments by advisers should be confined to particular problems arising from each case, not to support for any group. An adversarial approach should at all costs be avoided.

d) *Immediate outcome*

In order to continue the process, an agreed working group should be established as a result of these initial discussions. The working group should include at least representatives of each of the claimant groups, some of them women, and the representative body. The brief of the working group should include the development of a team approach to native title claims in the region.

e) *Assessment of the cases*

After these early discussions, all sides should be given a fair and balanced assessment of the case, preferably in each other's presence. This should include a realistic assessment of the strength and success of each group's case in terms both of separate claims and of a joint claim. If there is the option of a joint claim, it must be one in which differing rights and interests would be recognised. A range of various alternatives should be canvassed, in the event that the pre-Tribunal discussions do not produce agreement. This should include an assessment of the probable outcomes, for example, of going to the Federal Court, in relation to each group's claim separately as well as to a joint claim.

f) *The second stage*

In the light of the initial discussions, the working group should develop a well-structured proposal that:

- distinguishes between the aspects of the dispute relating to ownership of land on the one hand and, on the other, conflict over particular rights in and uses of land;

- would allow differential use, benefit and control of the land, but within an overall structure of land-holding rather than as a territorial carve-up among the parties;
- recognises the distinct but related identities of the different groups, as separate named groups and/or as 'peoples';
- within this overall framework, the proposal should allow flexibility and room for continuing negotiation amongst the groups and the possibility of a continuation of conflict outside the claims process;
- in order to deal with continuing conflict, as well as with general land and heritage matters, a forum should be agreed to, made up of representatives of the various groups and, where appropriate, the representative body, and a representative of the ATSIC regional council.

g) Approaches to the media

There needs to be coordination of and agreement about approaches and responses to the media.

h) Evaluation of funding

ATSIC funding guidelines need to be developed that allow for disputing parties to prepare and present their cases but encourage the development of agreements where this is possible. This would involve the evaluation of the use of funds at a number of different stages of the claims process, one of which would be at the end of the initial discussions.

The issue of disputes among claimant groups is not one that will disappear, nor one that will always be amenable to resolution. Conflict will continue to be part of Aboriginal and Torres Strait Islander, as of other, political life. Some of the customary strategies for dealing with disputes that may have been adequate in the past will continue to be so. Others will need to be, or are in the process of being, developed to deal with the more complex situation in which indigenous peoples now have to operate. In relation to native title claims, there appear to be three basic principles.

- One is to maintain the distinction between disputes over ownership and those over land use and associated rights.
- A second is to recognise that what appear to be separate and competing claims may in fact arise from different aspects of ownership whose relatedness needs to be established within a broader structure of landowning.
- The third is the involvement of an experienced Aboriginal or Torres Strait Islander organisation, usually a representative body, whose concerns include the interests of the disputing parties but also go beyond them.

References

- Fingleton, J., M. Edmunds & P. McRandle (eds) (1994) *Proof and management of native title*, Native Titles Research Unit, Australian Institute of Aboriginal and Torres Strait Islander Studies, Canberra.
- Rose, D.B. (1994) 'Whose confidentiality? Whose intellectual property?', *Claims to knowledge, claims to country*, (ed.) M. Edmunds, Native Titles Research Unit, Australian Institute of Aboriginal and Torres Strait Islander Studies, Canberra. ,
- Peterson, N., I. Keen, and B. Sansom (1977) 'Succession to land. Primary and secondary rights to Aboriginal estates'. In *Official Hansard Report of the Joint Select Committee on Aboriginal Land Rights in the Northern Territory*. Canberra, Australian Government Printer, 19 April 1977: 1002-1014.

ISBN No.: 0-85575-268-8

Native Titles Research Unit
 Australian Institute of Aboriginal and Torres Strait Islander Studies
 Acton House Marcus Clarke Street Acton
 GPO Box 553 Canberra ACT 2601
 Telephone 02 6246 1161 Fax. 02 6249 1046
