

Land, Rights, Laws: Issues of Native Title

Native Title Research Unit

Australian Institute of Aboriginal and Torres Strait Islander Studies

Editor: Lisa Strelein

July 1998

Issues paper no. 23

*The recognition of native title by the High Court in *Mabo v Queensland [No.2]*, and the legislative regime of the Native Title Act 1993 (Cth), 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 implementing that recognition 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.*

This paper is the third in a group of papers examining issues of compensation in native title processes. Here, Kado Muir examines the relationship between Indigenous and non-Indigenous laws in the concept of extinguishment and the cultural and social impacts of future acts. The paper draws from this discussion some conclusions regarding the appropriate basis for conceiving compensatory regimes. This paper was first presented to the Australian Anthropological Society Native Title Workshop in February 1998.

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“THIS EARTH HAS AN ABORIGINAL CULTURE INSIDE”¹ RECOGNISING THE CULTURAL VALUE OF COUNTRY

Kado Muir

As in Indigenous person brought up in a community which observed ‘the law’ first and then having to accommodate the vagaries of the Australian legal system, I was perplexed to discover there was limited recognition of ‘the law’ in the outside world. As my knowledge of the world grew so did my understanding of the falsehoods and injustices perpetrated against ‘the law’, the old people, the elders, my generation and the future generations. In trying to navigate through a relatively recent common law and statutory framework I became confused as to where ‘the law’ fitted into everything. This confusion and then frustration grew and grew with each exposure I had to the system.

I, like many Aboriginal people, inherited the struggles of my forebears against injustice, intolerance and discrimination. I found myself working in the struggle for land and the protection of our heritage. I became involved in native title from the day the *Mabo decision* came down. To many in my community the *Mabo decision* re-ignited the struggle for land rights. However the nature and form of this concept has caused much confusion and frustration². As I received a reasonable whitefella education I was charged with

informing and organising my people to deal with native title. Many Elders and people in the community would ask me, ‘what is native title?’ To which my stock response was ‘you have to tell me (and when they come, tell the Judges) because it comes from our traditions, laws and customs’. This response did little to answer their queries.

In this paper I will begin with a focus on Indigenous human rights. In many respects the effective and appropriate recognition and respect for human rights is the basis for any relationship dealing with the inherent rights of Aboriginal and Torres Strait Islander peoples. The recognition, respect and protection afforded by the *Native Title Act* for Aboriginal and Torres Strait Islander peoples and their land must be considered in the context of international human rights standards. I will then briefly consider the interaction between the two laws, Indigenous and Australian. The operation of Indigenous laws affect every facet of Aboriginal and Torres Strait Islander peoples lives. Observances of these laws are then doubled with the observance of Australian laws. In many instances these laws collide, the area of property rights in land is the most public focus of this collision.

I will conclude with a discussion of the issues practitioners in native title should consider when addressing compensation for acts affecting native title rights and interests. The value attributed to native title comes within two general themes, the first is equating the value to general Australian and common law experiences of title and the latter is to consider an Indigenous perspective.

International Human Rights Context

The former Aboriginal and Torres Strait Islander Social Justice Commissioner was required under section 209 of the *Native Title Act 1993* to prepare and submit a report to the minister on the operation of the Act, and the effect of the Act on ‘the exercise and enjoyment of human rights of Aboriginal peoples and Torres Strait Islanders’.

The rationale for this requirement is set out in the preamble to the Act, which states:

The Australian Government has acted to protect the rights of all of its citizens, and in particular its Indigenous peoples, by recognising international standards for the protection of universal human rights and fundamental freedoms. . .

The preamble then identifies the international instruments ratified and related domestic legislation by which the Australian Government has acted to protect the rights of all of its citizens.

Similarly, the objects of the Act, which are:

- (a) To provide for the recognition and protection of native title; and
- (b) To establish ways in which future dealings affecting native title may proceed and set standards for those dealings; and
- (c) To establish a mechanism for determining claims to native title; and
- (d) To provide for, or permit, the validation of past acts invalidated because of the existence of native title.

clearly spell out the intention of NTA to set standards by which property rights are enjoyed, whether those rights are derived from the Crown or from Indigenous laws. It

aims to recognise and protect the property of Aboriginal and Torres Strait Islander peoples by setting standards for future dealings, and provides recognition and protection for the majority of property holders whose titles were invalid because of native title.

The Act establishes a mechanism to determine claims to native title. These mechanisms and processes have the greatest potential to infringe the human rights of Aboriginal and Torres Strait Islander peoples in Australia. The reason for this is that the intention of the NTA is to protect property. Yet, in this case we have two clearly divergent standards for protecting property. The property rights derived from non-Indigenous law were afforded protection with the passage of NTA, whereas the property rights derived from Indigenous law must be proven before they are formally recognised and protected.

I don't intend to do an analysis on the implications of the *Native Title Act* for the enjoyment of human rights, this has been thoroughly handled by the Social Justice Commissioner since 1993. My main intention here is to show that the operation and effect of the *Native Title Act* is clearly intended to be measured against internationally recognised standards that protect the rights of all citizens, particularly Indigenous peoples.

The Two Laws

In Australia we have two systems of law. There are the laws of Aboriginal and Torres Strait Islander peoples (Indigenous law) and the non-indigenous law of Australia. The non-indigenous law asserts that it is dominant. This assertion of dominance has little to do with the inherent characteristics of the laws; rather it has more to do with the weight behind the hammer.

Historically the non-indigenous system found it difficult to acknowledge and recognise Indigenous laws. Justice Blackburn recognised that Indigenous peoples in Australia observed Indigenous laws when commenting on Yolngu society, 'if ever a system could be called "a government of laws, and not of men", it is that shown in evidence before me'³. Unfortunately this decision failed to accept that Indigenous laws could establish title to land. It was only with the *Mabo decision* in 1992 that the non-indigenous law recognised that Aboriginal and Torres Strait Islander people held a form of title to land in accordance with 'their laws, traditions and customs', now called native title. The subsequent introduction of the *Native Title Act* in 1993 set out to establish a framework, by which the rights and interests flowing from native title can be recognised, protected and dealt with by the Crown.

Unfortunately, in my view, the 'determination process' established by the NTA takes us full circle to a situation that again supports the notion that the Australian law is the only legitimate law. It fails to deliver on the truth of the *Mabo decision*, which is that native title is derived from the traditions, laws and customs of the native titleholders. These aspects of culture are the very source of communal title from which native title rights and interests arise. The very act of overturning the concept of *terra nullius* gives rise to the presumption that where Indigenous laws are practiced and acknowledged then those laws will contain property rights. The process of inquisition into the nature, extent and incidents of property rights derived from the Indigenous laws is not essential to establishing the existence of native title.

The approach to native title should reflect the fact that the *Mabo decision* recognised a system of laws, Indigenous laws, and that those laws allocated rights in land, albeit subject to the Crown's right of extinguishment. The logical next step should then be to identify where these acts of extinguishment occurred. Where extinguishment did not occur then as a matter of logic native title or rights to land allocated through Indigenous laws must continue to exist.

Native title is, as Pearson says, a recognition concept⁴. It is recognition of an aspect of Indigenous law, however it is also a conditional recognition, that is, conditional upon Indigenous law being submissive to the dominant regime. The real issue is how much and to what extent this dominant group is prepared to tolerate the operation of Indigenous laws in parallel to its own laws.

The difficulty from this selective myopia is that the Indigenous laws continue to operate regardless of the intrusions of Australian law. It continues to allocate rights and interests in country, dictate the nature of social interactions and acts as the basis of Indigenous social, cultural and political identity. The implications for land management, extinguishment and subsequent compensation is that acts which serve to extinguish the recognition of native title only really operate to extinguish recognition in the domain of Australian law. That is, a grant of an interest or a right under Australian law, which wipes out the recognition of native title over that land, may not necessarily do so under Indigenous law.

Unfortunately the granting of rights and interests under Australian law enables the grantees to completely alter the social, cultural and natural environment of Aboriginal and Torres Strait Islander peoples. There are, therefore, two levels at which the interaction of Indigenous and non-Indigenous law operate, the first is at the level of recognition and the second is at the level of disturbance created by a lack of recognition. This cessation of recognition does not necessarily kill the Indigenous law; it does however throw it into chaos and results in detrimental effects throughout the Indigenous community.

In the next section I discuss some examples of the nature of rights and interests found in my community, and how acts of extinguishment or impairment serve to disrupt the lives of my people. It is critical to understand that Australian law does not and simply can not extinguish Indigenous law, however it does impact on the ability of Aboriginal and Torres Strait Islander peoples to maintain a way of life free of oppression, marginalisation and injustice⁵. This impact on the life of Indigenous people then has compensable ramifications. Often the value of these ramifications is very difficult to quantify without a comprehensive assessment of way of life of the people affected, and the impact on that way of life.

What Extinguishment means at home

I come from the Northern Goldfields my country is on the southwestern edge of the Gibson Desert. In my community at Leonora there are four resident language groups, the Kuwarra, Tjupan, Ngalia and Waljen people. I am a Ngalia. Martu, Ngaanyatjarra and Pitjatjantjarra people also visit and live in Leonora. In every day affairs we usually identify as Wangkatja or 'people'. My group identifies more with the Martu to the north and the Ngaanyatjarra to the east. We engage in ceremonial contacts with these neighbours.

The northern Goldfields has many of the dreaming tracks or Tjukurrpa connecting with these neighbours, the people who follow the law in Leonora are charged with the responsibility of looking after the sacred landscape associated with the Tjukurrpa.

In the Goldfields the responsibility for looking after the sacred landscape is the single most difficult job in the world. In other parts of Australia the fight to protect a sacred area may only occur once, some would say once too often given the strains it creates within the community. In the Goldfields it is a daily ritual, every day there is ground-disturbing activity occurring somewhere. It is not unusual to go on a seasonal hunting trip only to find the earth turned inside-out, a large hole with its accompanying mountain of dirt and stone, where only the year before we could hunt, travel, visit sites and camp for days. People are then forced to shift the pattern of sustenance, often going back to the areas of now decommissioned minesites. These areas were avoided previously as the mining activities disturbed the habitat of fauna and created restrictions on movement.

While the focus of activities may change it is not a simple matter for the community. The nature of natural resources is that you get it where you find it, the flora, the fauna and even the cultural resources are tied to areas of land. The activities we often engage in are the full rights of occupation, use and enjoyment in accordance with our laws. I have attempted to outline some of these rights as a guide for consideration when investigating the native title rights and interests. This should have a disclaimer in that it is not a guide developed from substantial research, it is not a definitive account of incidents of native title but rather reflects some aspects of the way of life of people in Leonora as I experience it. Further, it should be noted that there are at least two cultural groups in Leonora and in this instance I am only able and authorised to discuss the activities of my own group.

Connection to Country – Occupation, Use and Enjoyment

The recognition of native title seems to focus on two general themes, they are the physical and the spiritual attachment to land. The consideration of physical connection as a separate heading to spiritual relationship with country is entirely artificial as the spiritual relationship of Aboriginal people to country permeates their entire interaction with country. Under Indigenous law there is no demarcation of these areas. The Aboriginal worldview comes from the Tjukurrpa and all things are done and acknowledged as belonging to the Tjukurrpa. The following aspects of Aboriginal relationship to country are essentially spiritual but are often observed as a physical phenomenon.

Camping is a regular activity practiced by the group. People go camping to visit land, to hunt and gather or just get away from town. It is a traditional means of accessing the land, passing on traditions around the campfire at night, teaching the younger generation bush skills, hunting and gathering, passing on knowledge about plants, animals, the country and cementing relationships within the group. There are many campsites out bush where people go to collect wood for artifact production. People often do this to sell to tourists and others in town. Sometimes the people trade or buy weapons from other communities.

Hunting is a key aspect of modern Aboriginal lifestyle in Leonora. People regularly hunt fauna including, Goannas, Kangaroos, Emus and feral animals. Today people hunt in motor vehicles ranging over an extensive area of land often travelling hundreds of

kilometers. The means of hunting is usually with a rifle sometimes dogs and often with two or more people. Hunting is most regularly conducted on weekends, sometimes if fresh meat is required people hunt during the week.

Gathering bush tucker is a regular activity. Children often delight in finding silky pear (Karlkula), flax onions (Tjalu), bush tomatoes (Kampararr), acacia seeds (Tjalka) and gum from trees (Ngurturl) and such. In addition people actively collect bush medicine, whether they are derived from native flora or fauna. Many households in Leonora are stocked with supplies of bush medicine. People need access to country to continue teaching children these valuable bush skills and the names and uses of these plants.

Hunting and Gathering bush tucker are two activities that serve to cement the bonds within the group. When a family group goes out hunting they usually bring back surplus produce for distribution to other family members or to other members of the political group. This distribution is done in accordance with the law as practiced for countless generations in the past.

Traveling occurs simultaneously with these sorts of activities. Travelling requires extensive access to country. The travelling is done by motor vehicle and covers more country than the 'old people' ever did. In travelling to and visiting places people are reinforcing the spiritual connection to country.

Aboriginal people often clean out and maintain water sources on the land including rockholes, soaks, springs and waterholes. They have also been known to clean out troughs and effect some minor repairs to windmills on stations to which they 'belong'. In recent times with many stations being purchased by mining companies and destocked, people have found it necessary to care for and maintain traditional water sources. These water sources are used whilst camping and travelling, but are also taken back to town in water drums for domestic consumption, as water in Leonora is of extremely poor quality. Again, these activities often occur whilst travelling, hunting and camping and constitute a regime of land management to ensure that natural resources are replenished.

Caring for the land occurs in two forms, one is the physical land management, including the shooting of feral cats to protect native fauna, and the second is the spiritual, which includes performing increase rituals. The country is also cared for spiritually by the physical act of visiting. There are many instances of people not visiting country for many years, when they visit they find it is largely a 'wilderness'. However within a short period of going back to the area a couple of times the country 'comes alive again'.⁶ People often meet on the land for cultural activities: visiting sites, discussing impacts on sites and now having native title meetings on the land. The active use of meetings on land usually serves to introduce strangers to country, better articulate ones relationship with country and meet to engage in social, cultural and economic activities.

Ceremonial activities occur less frequently on a large scale, however there are some places at which small-scale ceremonies occur, these include major water places and increase sites. The small-scale rituals are conducted wherever and whenever people travel and include increase rituals, introduction to country and observing codes of conduct at some places. The major religious ceremonies are now held at the ceremonial centres at Jigalong, Wiluna, Warburton and the Central Lands.

The act of looking after sites on the land can manifest in many forms, from performing detailed rituals, to actively thinking about a place and talking about it. This latter activity increases as mining and exploration activities increase. This is often closely yet discretely scrutinized by the neighbouring communities. It is in fact the main activity that carries the full brunt of punishment under traditional laws. If one actively seeks to damage a site then one can be punished. If the person with responsibility for a site fails in protecting it then that person will be punished. The maintenance and protection of sites is one of the aspects of Indigenous laws that is subject to extinguishment under non-Indigenous law.

The discussion above was intended to give some indication of the nature of activities that constitute native title rights and interests yet which are disguised as normal everyday activities. I can't reiterate enough the significance of spiritual connection to country. This spiritual connection continues to dictate the nature and conduct of activities on the land.

Compensation for infringing rights

I will now round up this paper by refocusing on the NTA, which is the mechanism designed to protect the property rights of all Australians. Section 39 articulates the various issues that must be considered when attempting to resolve the negative impacts which flow from interfering with Indigenous rights to land, through an arbitral process. This is in contrast to other sections of the NTA, which allow for negotiated outcomes (ss. 21, 31 and 33). The significant difference between a negotiated and an arbitrated outcome is the value one must attribute to the act of extinguishment. In a mining context section 33 allows for values to be measured by reference to recouping value for the proposed uses of the land.

The arbitration process in s. 38(2) does not allow for such an outcome, rather:

. . . minerals should not be the criterion upon which compensation for mining activity be based, if compensating Aborigines for the damage mining does to their rights is in fact the objective of the payments. The reason for this being that the damage bears little, if any, relation to the value of the minerals extracted.

It would appear that when drafting the NTA the government took these considerations into account. In the negotiation period the contract between miners and Aborigines can refer to the value of the minerals present, a quasi royalty payment, but in the arbitration stage the arbitral body bases the amount of compensation it awards upon damage done to native title rights by the mine.⁷

This must also be taken into account when considering equating the value of compensation to market values of land. Indigenous rights to the land do not translate to a bounded interest in an area of land on a lot by lot basis. It is in fact an interest that is based on spiritual, social, cultural and economic values flowing from the very culture of Aboriginal and Torres Strait Islander peoples.

The cultural structure of Aboriginal and Torres Strait Islander peoples is dependent upon continued access to land. This access is to hunt, gather, travel, camp, teach and maintain a relationship with other members of the group through the land. An 'extinguishing act' will

prevent the people from participating in cultural activities on the land therefore denying the basic human right of passing on traditional knowledge and cultural information to future generations. These cultural activities and knowledge include but are not limited to those considered earlier.

Aboriginal peoples need a land base from which to develop enterprises and activities to generate a source of income. In many cases they do not have adequate use, management and control of land to generate income. The acts of extinguishment will result in the potential losses of income for people through denying the opportunity for economic use of the land, this includes traditional economic sustenance uses and modern attempts to establish land based enterprises.

In summary, there are the two levels at which native title must be considered, the first is at the conceptual level of interaction between Indigenous and non-Indigenous laws and the second is the impact that non-recognition has on Indigenous communities. These two levels must bear equally on a decision if that decision is to be fair and just. The first level is both a legal and a political issue. There is a legal framework established now to promote a rational discourse for mutual recognition. Unfortunately at this point in time there appears to be a lack of rationalism in political circles that serves to hinder any progress toward mutually beneficial outcomes. If we don't get proper recognition of Indigenous laws then the entire native title, reconciliation and social justice process will be fundamentally flawed. The second level, which is the impact of non-recognition on the way of life, culture and traditions of Aboriginal and Torres Strait Islander peoples, is the point at which most of activities are focused. The impact of 'extinguishing acts' will deny the people access to the land. This will compound the gradual erosion of social, cultural and economic structures.

The method of developing a formula for calculating compensation payments is not a simple matter. In this paper I hoped to bring to the discussion a perspective which says that one must guard against equating rights which flow from Indigenous laws and culture in a non-Indigenous manner.

¹ Deborah Bird Rose, 'Nourishing Terrains: Australian Aboriginal Views of Landscape and Wilderness', Australian Heritage Commission, Canberra, 1996, p.85.

² One issue that continues to cause offence to members of my community is the introduction of the term 'native'. It seems that after years of struggling for recognition of our rights the success is then diminished by the reintroduction of a colonial term.

³ *Milirrpum v Nabalco* (1971) 17 FLR 141.

⁴ Noel Pearson, 'Concept of native title', in Proceedings of Land Rights – Past, Present and Future, Northern and Central Land Councils Conference, Canberra, 16-17 August 1996, p. 120.

⁵ This lack of recognition of Indigenous law not only impacts on rights to land it also affects the entire interaction between Indigenous and non-Indigenous Australians.

⁶ A common saying of Elders who return to country. This action of the country coming alive again also demonstrates the revival of Indigenous law to an area.

⁷ S.L. McKenna, 'Assessing the Relative Allocative Efficiency of the Native Title Act 1993 and the Aboriginal Land Rights (Northern Territory) Act 1976', *CAEPR Discussion Paper No.79*, Centre for Aboriginal Economic Policy Research, Australian National University, Canberra, 1995.

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