

Land, Rights, Laws: Issues of Native Title

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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 peoples involved in native title processes often rely very much on the advice and direction of their legal representatives, whether through Native Title Representative Bodies or through independent legal advice. The engagement of lawyers occurs at all points along the process, too, from deciding to lodge an application for a determination, in mediation and in litigation. In this article, David Ritter and Merrilee Garnett explore some of the issues raised for lawyers by the challenges of native title practise.

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BUILDING THE PERFECT BEAST: NATIVE TITLE LAWYERS AND THE PRACTISE OF NATIVE TITLE LAWYERING

David Ritter and Merrilee Garnett

The native title process has precipitated a proliferation of lawyers who 'practise in native title'. This is because the native title process is fundamentally a legal process, which requires both Indigenous and non-Indigenous parties to comply with complex legislative provisions in order to obtain and exercise rights in land and waters. Indeed, the native title process has been intensely criticised for being too legalistic and giving rise to a 'lawyers picnic'. This criticism reflects the perception that lawyers are adversarial by nature and that they are not capable of participating in a process which is based on alternative dispute resolution, rather than litigation. Lawyers are viewed as loners, unable to work in a team or in a multidisciplinary environment such as native title. There is also a perception that lawyers are incapable of communicating in plain English. This has resulted in an ambiguous perception of lawyers in a

native title context: on the one hand we are seen as essential to the native title process, while on the other hand we are reviled for our involvement. In this discussion paper, we consider an eclectic mixture of issues in native title lawyering: some technical, some theoretical and some practical. We conclude by suggesting how standards of native title lawyering in general might be further improved.¹

If nothing more...

Lawyers act as a kind of insurance. It is our role to ensure that legal rights are not lost, that there is compliance with legal obligations and that unnecessary exposure to liability is avoided. In a native title context this primarily requires us to provide advice on compliance with the *Native Title Act 1993* (Cth) as amended (the NTA) and complementary state and territory legislation. Native title law and practise is, of course, not limited to statute and includes the common law, and spreads beyond 'pure' native title into mining and resources, contracts, trusts, real property, intellectual property, fiduciary obligations and many other areas. Even the most capable of non-lawyers cannot be responsible for providing advice on native title law and procedure due to the complexity of the area. Lawyers are there to ensure that despite the best intentions of the parties in the process, their actions do not pave the road to the extinguishment of native title, the desecration of a site, or a determination that native title does not exist. It is our role to attempt to make sure that the legal rules of the game do not unnecessarily disempower or diminish the rights of Indigenous people.

Creative native title lawyering

Ideally the contribution of a native title lawyer will go beyond acting as a mere safeguard. Lawyers have the capacity to bring a special kind of pragmatic creativity to the native title process. The native title process demands that Indigenous people act in certain timely and prescribed ways in order to interface with non-indigenous systems of authority. This process necessitates Indigenous people developing new and varied forms of organisational expression. Lawyers can provide advice to Indigenous groups on the various options that are open to them in responding to this dynamic. Here lawyers have a major role in creating functional space by finding forms of words that both express Indigenous feeling and allow Indigenous groups to interact with non-indigenous systems. We have a major role in defining the 'recognition space' of native title:² the fact that we 'know the rules' gives us the ability to know how 'the rules' can be used not to stultify Indigenous aspirations but to facilitate their development. We can explore and exploit the potentialities and the elasticity in the common law, and the statutory framework of the NTA and other legislation, so as to create opportunities for Indigenous people to assert their rights and interests.

Avoiding unrealistic expectations

We must attempt to communicate to our clients what they can reasonably expect from the native title process and the harsh realities of the process prior to any result being achieved. Indigenous people have been deprived of their rights for so long that they often expect the native title legal process to be a dead-end. Alternatively, Indigenous people may expect the legal system to be able to redress 200 years of dispossession in one process. Either way, it is

imperative that Indigenous people are properly advised about the stringent limits on what is available through the native title process. For example, it is important that Indigenous people are informed that sovereignty is non-justiciable; that native title cannot overturn any valid and existing interest in land; that non-indigenous interests in land prevail over native title to the extent of any inconsistency; and that native title can be determined to have been abandoned or washed away by the tide of history. Such harsh legal assessments may be substantially at odds with Indigenous people's own lived reality. Furthermore, Indigenous people need to know how hard the native title process is: it is time consuming, traumatic, uncertain, expensive and difficult. Our clients need to know that for every *Mabo* there will be a *Yorta Yorta*. Our clients need to know that the *Mabo* case took ten years and the awful truth that Eddie Mabo died before the *Mabo* decision was handed down.

Lawyers: the equaliser

Lawyers have the capacity to assist in bringing Indigenous groups up to something approaching an equality of negotiating power with government and powerful third party interests. Lawyers are perhaps the best tool for avoiding unequal negotiations which result in unfair and inappropriate results for Indigenous people.³ This can permit far more meaningful negotiation to take place between Indigenous groups and others. Government and industry sources have often been heard to complain about the involvement of lawyers in the right to negotiate process. However, such criticisms are patently self serving because it is government and industry that are held to account in negotiations when Indigenous people have access to appropriate legal and commercial advice.

Talking properly: Cross-cultural communication

Being a lawyer corrupts your language. When you are working as a lawyer, there is a tendency for legalese to infiltrate everyday language and for the uniformity of legal expression to diminish more nuanced vocabulary. This makes it difficult to talk to clients and the difficulty is magnified when cultural and linguistic differences are an issue. It is absolutely fundamental that native title lawyers develop good communication skills with Indigenous people in order to get across in a meaningful way the impact of native title law and in order to obtain informed instructions. At least in part, good cross cultural communication skills only come with experience, but if lawyers are to be effective in assisting the native title process, then it is essential that they consult one of the standard works on Indigenous communication (such as Diana Eades, *Aboriginal English and the Law*) and undertake cross cultural training. Indigenous and Torres Strait Islander people have cultural ways that are different to the cultural practises of non-indigenous people and if lawyers, whether acting for Indigenous people or other parties, are to be able to communicate effectively with Indigenous people, they need to learn about cultural mores and taboos. It is not going to assist the process if lawyers offend Indigenous people through a mistake caused by simple ignorance. Every culture, including the legal culture, has rules and etiquette and it is essential that people who need to work within that culture understand and follow the etiquette. For example the custom of not mentioning the name of someone who is recently deceased is common to most Indigenous groups. This custom is easily followed but can cause conflict and shame if it is not followed.

Perhaps above all, the keys to effective cross cultural communication lie in basic human empathy (do unto others...) and in appreciating the diversity of human societies. Hal Wootten has reflected on these issues at length:

[T]read with humility and respect. If you do this, your cultural faux pas will probably be understood and excused, quite probably with gales of laughter. The arrogance of ignorance, or of the little knowledge which is a dangerous thing, will cut you off. By all means do your cultural awareness course; it may rub off some rough edges and help you avoid the more egregious errors. But it will not make you an expert in 'Indigenous culture'; still less an expert in the many distinct Indigenous cultures that exist in Australia... Some things are universal currency in doing business - honesty, openness, frankness and good humour, the ability to make or enjoy a joke at your own expense.⁴

Despite best efforts, native title lawyers will tell of numerous depressing and ironic examples where efforts at cross cultural communication quite dismally failed. One colleague recalls how, in one instance in the course of a directions hearing before the National Native Title Tribunal acting in its arbitral capacity, the presiding Member of the National Native Title Tribunal gave what he considered to be a suitable plain English explanation of what was going on. The response from the unrepresented Indigenous party was nothing more than a dismissive and curious 'Who's that bloke?' Another colleague recalls being asked by a native title claimant who had been involved in a statutory mediation for two years what 'mediation' meant and when it would start.

Identifying the client: From whom do you take instructions?

The NTA gives the named applicants the power to deal with all matters arising under the Act in relation to the application: NTA s62A. It appears obvious from that section of the NTA that it is the applicants who have the power to give lawyers their instructions. In reality though, the position is much more complicated. Often the persons who are applicants will be applicants for particular historical or symbolic reasons. In numerous instances the business of progressing the native title claim in question will be left to a working group or steering committee of some sort which may be a partially or wholly different set of individuals to the applicants. Further, there may be particularly significant decisions that can only be decided by a community meeting or other more suitable process. It might be that even a whole community meeting is unable to instruct a lawyer on a particular issue because the particular family or elder who talks for a certain area of country is unable to be present at that meeting. Or perhaps instructions are taken from community meetings, attendance at which is entirely fluid from one meeting to the next. What this may lead to is a plethora of decision making mechanisms with respect to a single native title claim.

This often presents a dilemma to native title lawyers. There is both a functional imperative and an ethical and legal duty to ensure that we are taking instructions from the appropriate Indigenous people or an appropriately representative Indigenous group. This requires lawyers to have some knowledge of the dynamics of the community which they represent and where knowledge is absent, to make inquiries and to themselves take advice and be assisted by

other experts in these matters. Our opinion in this respect is, in part, like many of the issues raised in this paper, a plea for a more sensitive and informed kind of lawyering.

Conventional legal practises do not accord with dealing with the dynamics of a large group which, to the untrained eye, seems to be largely unstructured. Again it is training that is essential. There is no such thing as a large unstructured group of Indigenous people! However, it requires knowledge of Indigenous culture and a relationship with the particular Indigenous group in question to be able to discern the various relationships and obligations operating which give structure to the group. This is an example of why a cross disciplinary approach is essential to the practise of native title. Anthropologists are usually more familiar with the group and the group's decision making structures than the lawyer. It is tempting for lawyers to appoint a spokesperson or working group who has absolute authority to provide instructions to the lawyers on all matters. However, this practise does not recognise the dynamic structure of Indigenous groups and the complex levels of authority and responsibility which operate, nor does it necessarily allow for consensus decision making models to operate. Further, this practise often causes rifts within the group as (in social reality) there are no spokespersons who have 'absolute authority'. As Smith has commented:

[the] fluidity of Indigenous authority and the context related character of group identity does not easily fit into the expectations of other parties to be able to negotiate with the same group and with spokespersons who have continuing representative legitimacy.⁵

Notwithstanding the difficulties, it is vital that we endeavour to take instructions from the right people at the right time and to do so transparently. It is essential that all people in a native title claimant group know who the lawyer is taking instructions from.

One rule of thumb that we have found useful is that a variation of instructions should only be accepted from the same or an equivalent group who gave the initial instructions. For instance, if a whole community has given instructions on a particular issue (and was the appropriate body to give instructions), then the course of action should not then (without more) be varied simply on the instructions of the applicants alone.

Practising responsibly

Lawyers acting irresponsibly can do great damage to the native title process. We implore all lawyers to act responsibly: to encourage a collective approach by Indigenous groups; to support representative bodies; to discourage the lodging of overlapping native title claims; to refuse to be involved in back-door deals between resource companies and unrepresentative applicants; to encourage reconciliation. We also urge lawyers to charge fairly for their services and to structure their fee-recovery mechanisms in a fair and transparent way that takes into account the practicalities of working with Indigenous communities.

Practise Management Issues

The practise of native title raises numerous management issues for lawyers, particularly those involved in private practise. How does one charge for work performed for native title clients?

How does one build frequent travel into a practise? What practical measures will a native title lawyer need to adopt to do his or her job properly?

The mobile phone is a native title lawyer's basic tool. All native title lawyers should invest in a pencil case, and a lightweight plastic map carrier is tremendously useful. Native title lawyers will also no doubt invest in hats, boots, insect repellent and possibly a swag. Native title lawyers working in tropical Indigenous communities will need immunisation. These very simple practise management issues can be decisive: the difference between effectively communicating and obtaining instructions or not can depend on whether the lawyer has remembered to pack butcher's paper, paper clips or whiteboard markers.

The travel and intensity of native title work are also quality of life issues for native title lawyers. It is work that is extremely demanding not only of the practitioner but of his or her partner and family. There are new practise realities for native title lawyers - they are being asked to do a version of 'fieldwork' and to spend time in communities, to get to know their clients in a more intimate way than is usual for a lawyer-client relationship.

Lawyers have limitations and should remember it

Law is a very limited discipline. Being a native title lawyer does not qualify you as an anthropologist, an historian, an archaeologist, an economist, an accountant, a cartographer, a demographer or a linguist. Yet each and maybe all of these disciplines will be necessary in the course of progressing a native title claim. Lawyers should know their limitations and know when and where to go for help from other disciplines. Furthermore, other professionals should be treated with respect: there is plenty of anecdotal evidence of inter-disciplinary tension, with lawyers being criticised for their arrogance, jargon, hierarchical attitudes and territoriality. There is much to be gained from a multi-disciplinary approach to native title practise. This multi-disciplinary approach can also assist to keep the objectives of the process in sight and to provide opportunities to consider alternative, creative (often non-legal) outcomes and processes.

What is our job? Native Title's Social Context

A native title lawyer should see the totality of his or her client's position. To see a native title claim as nothing more than an application made by one litigant that is to be responded to by other litigants is to severely misrepresent the nature of the native title enterprise. Native title is simply one tactic, one tool among many which is available to Indigenous people to assert their rights and interests. It is but one of a range of mechanisms by which Indigenous people can achieve economic, cultural and social self-determination.

Native title lawyers need to be focused on the whole picture or at least to recognise that there is a bigger picture. This means knowing that your clients may be better served by reaching a deal with a mining company, rather than 'defeating' the mining company with a glorious injunction. It means accepting that while your clients could win a native title claim obtained by hard-fought litigation, they may well be better off with a negotiated settlement that falls short of being an actual determination of the existence of native title. The issue here is that it is not for legal advisers to decide on courses of action: rather, it is our role to develop and

present options in an intelligible manner and to act on the informed instructions that are given in response. The process is not ours, it belongs to our clients and we must actively listen to our clients at all times.

Putting away the boxing gloves

Contrary to popular belief, the lawyer's role in the native title process can be and often should be non-adversarial. The NTA's primary mechanisms for resolving native title issues are mediation and negotiation. In these contexts an Indigenous group's interests will not be served by legalistic and adversarial lawyers. Rather, because the area of native title is so new and because it involves an attempt to bring together two cultures which are disparate in a number of respects, our role often requires us to be creative and to adopt skills usually reserved for mediation rather than litigation.

The practise of native title must be pragmatic and solutions-based

Native title lawyers must enter the process looking for solutions. Our clients should not be consigned to an indefinite and unplanned road of meetings, mediation, negotiations and litigation that leads to nowhere other than to keep lawyers employed. Our clients cannot afford us to conduct our practise in a passive or reactive way. We must give the process momentum. It is up to native title lawyers to think about results, to develop plans and timetables for achieving results and to anticipate sustainable outcomes. Both native title claims and future act negotiations should be 'project-managed' with defined objectives and key-process indicators. Not only is this the most efficient approach for achieving results, it will suit ATSIC and government utilities and is also the approach that is likely to leave Indigenous communities the least fatigued and disillusioned.

The Irony of the Process

It does no harm for native title lawyers to humbly acknowledge the irony of their position. While we endeavour to provide advice to Indigenous people to assist them to achieve their aspirations, in so doing we are further manifesting the colonisation of our clients. We are part of a push to compel Indigenous people to take part in a legal process that is foreign to them and not of their own making; urging Indigenous people to divulge their cultural information in circumstances not of their choosing and to describe and arrange their social and cultural affairs such that the native title process can be cognisant of them. In this respect all native title lawyers are agents both of colonisation and empowerment.

Conclusion: Getting better at it: where do we go from here?

There is no doubt that there is now a significant body of genuine expertise amongst native title lawyers in Australia. What was once just the founding group of lawyers who took on the land rights cases under the ALRA in the Northern Territory, has now burgeoned into a large group of committed and competent individuals spread throughout Australia. There is already a healthy collegiate atmosphere amongst many native title lawyers. It can only be to our own benefit as native title lawyers and to the benefit of our clients, the Indigenous people of Australia, if this collegiate atmosphere is taken further, and is extended across professional

boundaries. In our view, the following steps can be taken to share expertise among native title lawyers and to ensure minimum best-practise standards among those who are acting on behalf of Indigenous people:

- Specialist elective law units in native title are now being taught at a number of universities around Australia. We applaud this and consider that other universities should work towards adding a native title unit to both their undergraduate and postgraduate curricula. Further, it is our view that ‘Indigenous People and the Law’ should be a compulsory unit for all undergraduate law students.
- State and Territory law societies should ensure that continuing legal education occurs in Indigenous legal issues and cross cultural communication.
- That lawyers actively facilitate cross-disciplinary workshops to develop better working relationships across disciplines.
- There are strong arguments for the development of an accreditation system for native title lawyers. At the very least we consider that there should be a specific code of ethics for native title lawyers.
- Finally, there is no ‘Australian native title lawyers’ association’ and no annual Australia native title lawyers’ national conference. We believe that an Australia native title lawyers’ association should be established and would like to receive expressions of interest from other lawyers practising on behalf of parties involved in native title forming a steering committee to set up such an association. ANTLA (standing for Australian Native Title Lawyers’ Association) has appeal as an acronym. If you are interested, please contact us on mgarnett@wa.gadens.com.au or dritter@tower.net.au.

¹ Our comments, of course, are primarily directed at non-indigenous lawyers who (regrettably) remain numerically dominant.

² ‘Recognition space’ is the ‘space within which the Australian legal system gives formal recognition to the relations between Indigenous people and their physical environment’ as defined in C. Mantziaris and D. Martin, *A Guide to the Design of Native Title Corporations* (Draft version 25-6-99 at 1), borrowing from an earlier discussion of recognition space by Noel Pearson.

³ Diane Smith once facetiously described the right to negotiate as the right of the negotiating parties to hire lawyers (D.E. Smith, ‘From Humbug to Good Faith? The Politics of Negotiating the Right to Negotiate’, in D.E. Smith and J. Finlayson, *Fighting Over Country*, Centre for Aboriginal Economic Policy Research, Canberra, 1997, p. 100).

⁴ H. Wootten, ‘Some Thoughts on Native Title and Doing Business’ in G.D. Meyers (ed), *Implementing the Native Title Act*, National Native Title Tribunal, Perth, 1996, p. 52.

⁵ Smith, op. cit., p. 102.

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