

PRESENTATION TO THE FEDERAL COURT NATIONAL NATIVE TITLE USER GROUP MEETING

ADELAIDE 9 JULY 2008

Peter Tonkin, Managing Solicitor, Native Title Section, Crown Solicitor's Office, SA

Introduction

When I arrived in the SA Crown Solicitor's Office 9 years ago, they were mid-way through the preparations for the first (and, so far, only) native title claim to come to trial in SA, the *De Rose Hill Claim*. Since then my group's title has progressed from 'Litigation Team' to 'Mediation & Litigation' to 'Claim Resolution' to finally not being a separate team at all - one of the principal tasks of the entire Section is to assist in achieving resolution of the 22 current claims over the State.

I have been asked to put a generic States and Territory's view on the current system. I do so from the point of view of a legal representative of the State of South Australia but much of what I will say are personal comments and frustrations. I should not necessarily be taken to be stating South Australian Government policy.

I think we all agree that dealing with native title in contested trials causes real problems. While we are all here to look for inspiring and dramatic changes to the system and the way it operates, I approach this presentation from the personal view that systemic changes will realistically need to be incremental to be politically acceptable.

The courts themselves have commented several times on the less-than-ideal position of an adversarial judicial body dealing with native title matters. However, it is a fact of life and we all need to work within that framework. My view is that we can all do things better to make that reality work more smoothly.

Like many test cases, *De Rose* was long and hard-fought. In the end it cost millions of dollars and destroyed relationships at all levels. Just about every State and Territory has had a similar experience.

Even before *De Rose* went to trial, this State adopted a specific policy of wanting to resolve native title claims by negotiation rather than trials wherever possible, and the fact that no other cases have proceeded to trial here is due in large part to the efforts of all parties to deal direct with each other and persuade the Court that trials are not necessary.

Other jurisdictions have followed suit in focussing on negotiated outcomes. The problem is that the results aren't happening as fast as most want (especially those outside the process who do not appreciate the complexities involved and the nature of the issues being dealt with).

Courts and Governments have pressures to clear the lists. The SA Government now has a specific target in its Strategic Plan to resolve 75% of all claims by 2014.

What is holding back the resolutions?

Native title claims are complex and emotional. The law has become clearer over the years but it remains difficult. Lawyers and Courts are getting more attuned to considering Aboriginal evidence.

An extra layer of complexity comes from the emotions raised by these claims, not only (as usual in litigation) between the parties, but also within and between claimant groups, and within

respondent parties. Sometimes this spills into criticism of some participants by others who are not prepared to look at things from their viewpoint.

Claims are basically representative actions, with many, many parties. Often, in practice, the effects and issues of native title fall on individuals, yet the system is set up so that everyone is put into supposedly 'like-minded' groups.

Long term solutions need strong relationships and well thought out packages, with elements coming from several areas, including many different agencies of Government.

As a matter of policy, the SA Government also wants native title claims resolved in a way that future economic development and Aboriginal welfare are underpinned. This increases the complexity of claims resolution and the time taken to reach a resolution. There is inevitably a tension with the Federal Court which is charged with dealing just with the claimants' applications, which do not, on their face, include such matters.

Real, long-lasting resolution - as opposed to mere determination whether native title exists or not - takes time to develop. These are not commercial cases (although the real and lasting benefits will often be the commercial elements of the settlements). Many factors mean that you cannot usefully adopt the hard-line case management tactics in native title.

Aboriginal negotiation takes time and involves expensive community meetings often in far-flung places. However, try to skimp on that or add pressure to finalise a deal and you may well be skimping on the quality of the agreement reached. You may well also jeopardise the eventual acceptance of negotiated settlements by claimant communities and non-Aboriginal parties. In the case of ILUAs, this can torpedo registration and render the whole process a failure.

There are, also, several times when those representing all parties (whether lawyers, social scientists or well-meaning enthusiasts) contribute to the delays.

The Problem - Lack of collaboration.

People say there is a lack of resources, both money and people. In fact, there are lots of resources compared to some other areas crying out for assistance, including millions of dollars each year - but there is not enough to achieve the sort of progress some people want.

We would all like more resources, but we could also use existing resources better if people could change their attitude to claims and work more collaboratively.

This appears to me to be an area where participants at all levels on all sides sometimes seek to prove something over the other participants. For example:

- Professionals (Anthropologists and Lawyers) sometimes try to intellectually out do each other. This ranges from general battles inherent in litigation to tussles between (and within) the disciplines of law and anthropology.
- There seems to be a tendency for stakeholders (Courts, Tribunals, Governments, Rep Bodies, etc) to try to be the *one* that found the silver bullet. It is far too rare that they pool their efforts to finding a collaborative result.
- There is all too often a reluctance in advisors on all sides to give clients (both claimants and respondents) the hard truth, therefore raising false expectations.

Other factors

- There is often a lack of consistency of approach between different Judges and jurisdictions of the Federal Court. There are often cases to support both sides of a disputed issue.
- This is a no-cost jurisdiction – There is a very clear policy reason for that, but it has consequences on the speed of resolutions. My many years in commercial litigation showed just how much pressure is exerted on litigants by their own costs and the threat of paying others'. This doesn't happen in native title where nothing stops people from taking points of "principle". There can be little incentive to compromise and commit to a resolution when you are not paying the lawyers to do your talking. The Commonwealth has recognised this to an extent with changes to the respondent funding guidelines, but we all need to bear it in mind and seek other ways to discourage untenable negotiating positions.

All parties other than the State (or Territory) are funded by the Commonwealth. There have been suggestions that the rules surrounding this funding, its split between Aboriginal and non-Aboriginal parties and the quantum of funds available, all need improvement.

I don't want to go into this other than to say it is welcome that the Commonwealth is reviewing the whole native title funding framework in a climate where Commonwealth Ministers seem to recognise the need to increased funding for NTRBs, especially. SA wants to play a positive and constructive role in this review and there has been good dialogue with Commonwealth departments. As I understand it, however, any significant changes are not likely to come into effect until 2009-10.

- For claim groups whose claims cover areas rich in minerals or petroleum and who might not have a strong likelihood of an eventual determination in their favour, the existence of the right to negotiate means they have no real incentive to push their claim to resolution.
- SA has never required extensive evidence of connection in order to negotiate claim-wide ILUAs. The fact that there is a registered claim with no overlaps or other areas of unresolved controversy is generally sufficient for our purposes, given the safeguards involved in the certification and registration processes.

With Consent Determinations, however, there is a heavy reliance on quality, experienced anthropologists (of which there is a finite number). Assessment of reports is taking much too long in many cases, often because those preparing and vetting the reports are not focussing on what is (and more importantly, what is not) required. In conjunction with the State's NTRB, we propose to review our guidelines to try to clarify what we need. The process being managed by the Court now for six possible consent determinations in the State's far north will obviously inform that review.

- The need to analyse the historical tenure information over entire claim areas to agree extinguishment takes huge resources. SA plans to reach agreement with claimants for reduced work in that area, relying instead, where possible, on generic descriptions of extinguishment in reaching consent determinations.

Existing improvements

There have been a lot of changes for the better in the last 5 years.

- The nation has changed to a virtually universal focus on negotiated outcomes. Many are following SA's approach of only requiring a formal connection assessment for a consent determination and moves are afoot to simplify and speed up that assessment as well.
- There is now a more realistic assessment by all of the actual effect of native title on third party respondent interests. Agreements that have been made have been seen not to have caused the sky to fall in.
- The review of Respondent funding arrangements from Commonwealth was therefore welcome.
- Extra work has gone into attracting young, talented people into representative bodies with initiatives like the Aurora programme.
- Similarly, the Commonwealth has put funds into increasing the capability of anthropologists in a programme that came out of the NNTT/AIATSIS "Getting Outcomes Sooner" workshop held in the Barossa Valley last year.
- The addition of s87A, facilitating consent determinations over parts of claim areas, has already been used to good effect in this, and many other, States.
- In this State, people are starting to embrace our more collaborative approach to assessment of connection.
 - Our process is almost inquisitorial. Instead of asking "What's wrong with this report? Where are the holes?", we now try to work with the claimants and their advisors to ask "Does native title exist in this area and, if so, what does it consist of and who holds it?"
 - There is sometimes difficulty in gaining people's trust to enter into such a process in a litigious environment - from both Claimants and Respondents – but we are gradually educating people.

The Role of the State (or Territory)

The Court has often described the role of governments to look out for the interests of the community at large. Indeed, it does so in virtually every set of reasons accompanying native title consent determinations. SA takes its duty very seriously. We agree that the process of negotiating consent determinations is one best carried out in a small, collaborative, inquisitorial arena, but we must do it with rigour and transparency.

Generally, we do not dispute that Aboriginal people existed in most of the State at time of European settlement, and, in the northern parts, especially, do not dispute the general areas where particular groups existed.

Rather than concentrate too heavily on the past, our main concern is to ensure that, where native title is recognised, the holders are the right people to hold that native title for the future.

We speak to the claimants' representatives before their native title report is prepared to identify areas we think need to be concentrated upon. We then look at the evidence, frankly identify problems and, where possible, suggest ways in which further evidence may be found. If the

necessary evidence is not there, we will not consent to a determination, but that doesn't mean the claimants may not receive the benefit of ILUAs over the area.

There is sometimes a tension, including before the Court, between this public interest role expected of the State and the extent to which the State needs to be satisfied before consenting to a determination. We appreciate that it is up to other respondents whether they consent, and accept that one of the valid roles of the State is to explain to other respondents how the State has come to its conclusions and help them in their own decision.

Another strategy that has fallen on the State and has helped in SA relates to the treatment of new overlapping claims lodged by dissentient claimants or others. Where these are clearly unsustainable claims, SA has adopted the approach of rapidly seeking to have them struck out so that the main negotiations can continue. The Court is obviously vital to that approach.

What should we change?

We need a clear understanding of the roles of the various parties in negotiations and in agreeing to determinations.

It would be useful to receive guidance from the Court as to the particular role it sees the States taking and the levels of proof required across the country for both connection and extinguishment. Exactly how much evidence does the Court want to see if all the parties are agreed that a determination is appropriate?

We need to find ways to exert some incentive on all parties to break through impasses and reach agreement. Currently the Court has used the threat of listing and then hearing trials. The problem is, when push comes to shove, it is not easy for the Court to execute the threat and, as I've said, acting on the threat also negatively affects the negotiations.

We need to allow sufficient time for issues to be discussed and debated, with sufficient incentives (preferably positive) to bring things to a close.

There may also be more scope in the future for greater use of section 86D, NTA, to settle contentious points of law or fact, and to take limited evidence, particularly from aged or infirm witnesses.

Some parties may still adopt unreasonable stances and approaches. Rather than join in marginalising them, we intend to make more use of the Court. If we show that we have been reasonable we will seek the Court's assistance in managing those who are intransigent or unreasonable.

There may also be room for more costs orders under s.85A(2), NTA, as, even if they are not enforced, they can be useful in preventing further applications that are clearly unsustainable.

Long term agreements

The State in SA wants native title claims to be resolved in a way that not just determines whether or not native title exists, but also puts in place arrangements that are sustainable and provide very real benefits well into the future. This has been the foundation of the State's policy position since 1999.

It would be easy to respond to various pressures to show claims being resolved by focussing solely on consent determinations and withdrawals. These are obviously important matters but are not, in the eyes of the State, conclusive.

We have all learnt from past experience that the grant of land rights to Aboriginal groups with no additional support to make it work on the ground can lead to enormous problems down the track.

Similarly, native title determinations in themselves often provide little real and lasting advantage to claimants apart from recognition of their status. Recognition of that legal status is very important but does not of itself solve problems of employment, education, poor health or other problems endemic to many Aboriginal communities. Those problems are the proper focus of State policy and the State sees the process of resolving native title claims by negotiation as a valid way of addressing many of them while also dealing with the legal status - not as a lever to provide Aborigines with benefits that are their right as citizens, but additional benefits that would not necessarily otherwise be on the table.

The real concrete benefit of native title claims for Aboriginal people is that they gain a place at the negotiating table. At that table, very real benefits can be negotiated for *all* participants:

- The State gets certainty on previously granted, and perhaps, future interests.
- Claimants get financial and social benefits providing employment opportunities, a say in the management of country and the possibility of real economic development.
- Other respondents get recognition of their interests and clarity on issues such as access and heritage.

ILUAs and other agreements such as parks co-management agreements allow us, while acknowledging the past, to focus on the future. They get us away from having to analyse the past and how “traditional” it was. They allow us to look forward to the future improved relationships.

At the same time, there needs to be an acknowledgement in native title arena that the best agreements (as everywhere else in the litigious world) often involve compromise by all parties. It is time to give up on trying to make that new principle of law and to work instead, together, on achieving real differences to people on the ground.

At a recent workshop in Brisbane, Dr David Martin suggested to several leading anthropologists that they should be putting more effort into the back end of the process - using their skills, experience and analysis to design agreements that will address claimants' aspirations well into the future whilst being alert to the social and political processes at play in every community.

A far greater attention needs to be placed on the structure of native title settlement packages and on the bodies that will be created to administer both them and the native title rights and interests where determinations are made.

The Commonwealth has started turning its mind (and funds) to Prescribed Bodies Corporate, but the governance of each of those bodies must be carefully developed using experts in the society concerned.

This fits in with the comments recently made by the Federal Minister for Indigenous Affairs at the 2008 Mabo Lecture and the general philosophy that has always underpinned SA's Statewide negotiations in what is now called the South Australian Native Title Resolution (SANTR) process. I only hope that the whispers coming out about the focus being almost solely on the structure of packages are wrong – All three areas mentioned by the Minister (improving the claim process, improving indigenous representation *and* ensuring packages are structured to benefit future generations) require attention.

The role of the Court?

The Commonwealth Courts have had a unique position in native title – One that would sit uncomfortably in virtually any other legal area. All sorts of hopes were raised by the High Court with the Mabo and Wik cases, only to be brought back down to earth with Ward and Yorta Yorta. Since then, the Federal Court has actively involved itself in finding new ways to hear these cases and new arguments to apply the Yorta Yorta principles fairly on mainland Australia. The Court has had to devise and try out new methods of case management with callovers, regional plans and local and national user groups like this one.

Many of the innovations have been instrumental in helping to move parties to a position where they are ready to reach agreements, not only as to consent determinations but also to wider ranging agreements.

I am a fan of the expert 'hot-tub', providing it is well facilitated by someone who understands the difference between 'pure' anthropology and 'native title legal' anthropology.

Similarly, we are partaking with interest in the current process before Justice Mansfield in 6 claims in the far north of this State whereby draft consent determinations are sent at an early stage to all the parties in an attempt to determine what the true issues really are.

There needs to be some care exercised in ensuring that new processes do not force some parties to adopt positions early, as that tends to encourage some of those positions to be more hardline.

Most of these cases are frustrating to us all at some stage or other – It must be worse for the judges who call matters on for review after intervals of several months and see very little, if any, progress.

I understand that, of necessity, Judges need to remain somewhat aloof from all the machinations and deliberations that other parties undertake, and cannot get the same 'on the ground' experience of negotiating these agreements and the multitude of things (some avoidable, some not) that affect the progress of negotiations.

I also understand that, like all Courts, the Federal Court is keen to ensure that matters proceed to resolution so that justice delayed is not justice denied. Many potential witnesses have died before their claims can be resolved.

Native title is a unique jurisdiction, however, and it would be helpful from our point of view if the Court did not feel the same need to push matters to resolution if *all* the parties, applicants and respondents alike, are satisfied with progress because they are working through complex and ultimately beneficial matters in a measured way.

The problem for us is that, if the Court sets a matter down for trial, we must necessarily turn a lot of our resources to preparing for that trial. This usually means that other areas get set aside, and well-progressed negotiations might be put into limbo and may be very hard to revive further down the track.

It also is likely to result in heating up the relationships between the parties - adversarial aggravation rears its head. In other words, setting a matter down for trial may actually make more difficult, not less, the long-term resolution of claims in a way that all the parties are willing to pursue.

In the same way that the Court expects the State to look out for the interests of the community at large in aspects of consent determinations, we think it would be helpful if the Court accepted

submissions from the State and other respondents about matters that should not proceed to trial, even if progress seems glacial in the eyes of the Court.

One of the areas the State and others can perhaps work on more is its reporting of future programs. It is understandable that the Court will challenge the State and others if we have fallen short of the progress we had previously reported that we expected to achieve. Perhaps we need to be more circumspect and conservative about the progress we predict - as long as that does not of itself give a general impression that no progress is being made. It is a dilemma we feel acutely.

Conclusion

We all love to whinge about our pet dislikes in the native title system and those dislikes still differ hugely between different participants in the system. However, if we look at it carefully (and dispassionately), the general atmosphere in native title has rarely been better than it is today following the recent key addresses from new Commonwealth ministers.

Assuming the claims all remain in the court arena, which we must, the Federal Court can assist us all by giving us the space to reach the agreements, the guidance on what is required for consent determinations and the means to overcome impasses, distracting and unsustainable claims and unreasonable delays.

In return, I think we can assist the Court by being more informative and realistic about the likely progress of negotiations, and by involving the Court more actively in resolving particular aspects of those negotiations (such as through section 86D proceedings).

We are all trying to resolve native title claims, although we don't all have the same exact understanding of what resolution means or entails. Nevertheless, in a climate of finite resources and complex, competing demands and considerations, it behoves us all to recognise each other's valid role and, as far as possible, to work in ways that make progress towards resolving claims. I hope my comments today help that process.