

## THE NATIONAL NATIVE TITLE TRIBUNAL AND RECONCILIATION AUSTRALIA

**Hon. Fred Chaney AO**

*Deputy President NNTT*

Could I start by acknowledging the Ngunnawal people on whose traditional lands we meet.

My comments represent a work in progress which, I hope, is not inappropriate because so is the treaty debate and, in some respects, it is still very early days. A lot of commentators see the need to develop approaches and ideas, not least the Aboriginal and Torres Strait Islander communities as ATSIC is promoting at present.

I bring two formal perspectives to the discussion in this series which is *'Limits & possibilities of a treaty process in Australia'*. I bring the perspective of a Member of the National Native Title Tribunal – a body which is engaged in assisting with agreement making around Australia relating to native title – and as a Co-Chair of Reconciliation Australia, which is the body established by the Council for Aboriginal Reconciliation (hereinafter the Council) to carry on the work of providing some national leadership in the on-going process of reconciliation. I intend, therefore, to briefly outline the present position of Reconciliation Australia with respect to the question of the Treaty and then discuss the processes involving native title applications as a demonstration of both their limits and the possibilities. My fundamental point in this regard is that, what is currently being done and what is currently being achieved confirm that there are real possibilities of advancing this matter through the rapidly growing practice of agreement making. In some respect the actuality may be getting ahead of the debate, which can seem bogged down both in misunderstanding and political positioning.

From a Reconciliation Australia perspective, getting it right on the issue of a Treaty is a fundamental element of what we refer to as the reconciliation process. In saying that, I am speaking about the substance of what we mean by a Treaty, in the sense of a negotiated agreement or settlement, rather than making any presumptions about the final title, form or content of any such settlement. They are matters for the healthy debate that we have to have among Aboriginal and Torres Strait Islander people themselves, among the wider community and between representatives of Indigenous people and the nation as a whole.

We, at Reconciliation Australia, inherited the work of the Council and the thousands of Australians who helped to shape the outcomes of the work of the Council. The decade ended with three significant outcomes:

- the release of the Council's reconciliation documents which followed the very extensive public consultation,
- the presentation of the Council's final report and recommendations to the Parliament, and, of course,

- the vast demonstration of public support with the walks for reconciliation all around the country.

Our challenge now is to translate that momentum of broad public support into tangible outcomes.

When you look at the Council's final documents, you will see that it specifically included recommendations relating to a treaty or agreement to resolve outstanding matters. For our part, Reconciliation Australia has released its Strategic Plan for 2001-2003 which sets out three key strategies to achieve those goals and specific actions to implement the strategies. Our goals are:

- to achieve social and economic equity for Indigenous Australians;,
- to strengthen the peoples movement for reconciliation, and third,
- to acknowledge the past and build a framework for a shared future.

That third goal encompasses what we are discussing here today. The need for a treaty, settlement or agreement which honestly acknowledges the past – recognises the legacies of the past and the present – is unfinished business, that is, it remains in contention. What is clear is that we need a framework for a shared future. What should that framework be?

It is this third area which, in fact, raises all the issues in what is called the rights agenda and it is the most contentious part of reconciliation. We can scoot past the broad agreement in the community about remedying disadvantage, however ineffectively we may be dealing with it, but there is far less agreement about the rights-based approach to reconciliation. Reconciliation Australia, however, rejects the suggestion that there is a dichotomy between the rights agenda and remedying disadvantage. Because the practical, symbolic and rights aspects of reconciliation are really all part of the same mosaic, we believe that, if you try to take one part of the agenda, you distort or destroy the whole.

The recommendations of the Council included Recommendation 5. It called on governments and parliaments to recognise that Australia was settled without treaty or consents, that to advance reconciliation it would be most desirable if there were agreements or treaties, and that to make these treaties we need to negotiate a process that protects the political, legal, cultural and economic position of Aboriginal and Torres Strait Islander people.

The sixth recommendation called upon the Commonwealth Parliament to enact legislation to put in place a process which will unite all Australians by way of an agreement or treaty through which unresolved issues of reconciliation can be resolved. The Council provided draft legislation which has been introduced into the Parliament by Senator Aiden Ridgeway.

Reconciliation Australia accepts that one of our key responsibilities is the promotion of informed and objective public debate on a framework agreement or treaty to settle the unfinished business of reconciliation. We are respectful of the process which has been launched by ATSIC, respectful of the need for Aboriginal and Torres Strait Islander

people themselves to formulate their position in a much more detailed way and to strive to seek agreement among themselves before any serious negotiation can take place. Additionally, we accept the responsibility to promote informed discussion on these matters among the non-Indigenous population of Australia and we will be doing that.

Before moving on to the native title aspects of this presentation, let me comment on an earlier contribution to the series by the Chair of AIATSIS Council, Mick Dodson. I think a number of points which he made illuminate why I think the present native title process is, in fact, a movement towards the settling of outstanding issues by agreement. While I accept Christa Scholtz's comment that land claims are certainly not the totality of this matter in that they do not deal with the issue of sovereignty, I think it raises implications about sovereignty which are inescapable. A number of the points Mick Dodson made provide a convenient framework for my, perhaps optimistic, view that current native title and related processes are educating us on the way ahead.

The first extract is the caution which he gave about our being caught up too much with the technicalities of what is meant by a treaty. He says,

It is obvious that in light of such entrenched attitudes the term 'treaty' must be viewed in the broadest possible sense and efforts made to build confidence on all sides in the process and its ultimate objectives. As [was said by] Martinez ... in his treaty study, one should avoid making oneself a prisoner of existing terminology. What really is required is innovative thinking. To put [it] ... another way, a Eurocentric historiography of treaties must be put to rest if we are to progress to new treaty-making.

The second extract to which I want to refer is something he said about the *Mabo* decision. He said this:

... the *Mabo* decision did not deliver a just settlement either through the decision itself or through the *Native Title Act* and its amending Act. It did not address the legitimate historical grievances of Aboriginal and Torres Strait Islander Peoples. It should be remembered that these grievances, these claims, are not only defined in terms of meeting our physical needs as Indigenous people, but they have for us a moral dimension. This moral component will never be met by better informed government policies of service delivery which focus on things like health, housing, education, the so-called practical reconciliation.

To cater for this moral dimension there has to be a recognition, an acceptance by government of two things, ... First, the Aboriginal and Torres Strait Islander Peoples have been injured and harmed [through] the colonisation process ... Second, Aboriginal and Torres Strait Islander Peoples as First Peoples have distinctive rights and special status based on prior occupation of land.

Those words are telling us that recognition of Aboriginal and Torres Strait Islander people's distinctive rights and special status, based on prior occupation of land, is one of the big elements in addressing the moral dimension.

The third point I want to extract from Mick Dodson's paper addresses the important issue of what legal framework would be appropriate to achieve an outcome. He says:

... First, a treaty can be an agreement under international law. ... Second, it can be an agreement that is supported by the constitution. Third, it is an agreement that is supported by legislation; and finally, it can be a simple agreement.

That point, I think, is really a useful reminder. I'm not trying to say whether I agree or disagree with Mick Dodson's preferred approach (which, if I understand him, is the second option). Instead, I wanted to observe that options three and four are currently being used to good effect by some Aboriginal and Torres Strait Islander people and by governments.

Turning to the ideas of sovereignty and native title, the High Court decision in *Mabo No. 2* confirms that, while we fall short of dealing with first nations as sovereign entities, we are for the first time dealing with the reality of two systems of law in Australia. Common law recognition of the legal enforceability of rules coming from Aboriginal law and custom does not and cannot be extended to a challenge to sovereignty in Australian courts. It seems to me that this situation results in some constitutional protection of rights due to Aboriginal polities flowing from the just terms provision of the Constitution and the *Racial Discrimination Act*. This moves us conceptually towards recognition of first nations existing in Australia. While *Mabo* affirmed that the acquisition of territory in a sovereign state cannot be challenged, controlled or interfered with by the Courts of that State, it also affirmed that the Courts do have jurisdiction to determine the consequences of an acquisition under municipal law. The Court must determine the body of law which is in force. The Brennan J judgement also makes it clear that native title has its origin in and is given its content by the traditional laws acknowledged by the traditional customs observed by the Indigenous inhabitants. The nature and incidents of native title must be ascertained as a matter of fact by reference to those laws and customs. Whatever the strength of denials of coexisting sovereignty in the Aboriginal nations of Australia, we are, in fact, operating on the basis that the Courts will acknowledge rights flowing from laws and customs which belong to those Aboriginal groups which might describe themselves as nations.

What the Australian governments and communities are demanding from the Aboriginal people currently, in dealing with the native title of those people who are seeking recognition of their native title rights, is factual proof of group identity and laws and customs which bind the group to land and the land to the group.

Once established as a matter of fact, there is a preparedness to 'treat' on the issue of recognition of rights which are intrinsic to the Aboriginal polity and not to any other source.

In Western Australia, successive Premiers (including a Premier with a clear objection to the notion of native title) have gone out onto unalienated land and acknowledged traditional ownership flowing from Aboriginal law and custom. Richard Court said that 50,000 sq km of the Great Victoria Desert fell under the traditional ownership of the Spinifex people. His Government consented to a Federal Court order confirming (not creating but confirming traditional ownership) exclusive possession of 85 per cent of that land and shared possession of the balance to accommodate State interests in an area of conservation estate. There was, of course, no cession or acknowledgement of a separate

sovereignty as such, but there is a clear recognition of laws and customs which flow from and belong to a clearly identified polity in Aboriginal terms.

The Premier Court press release is interesting in terms of what the State was prepared to agree and, indeed, proclaim as a victory for common sense. The Premier said that, under the determination, the Spinifex people would have:

- a right to possess, occupy, use and enjoy the land, including the right to live on the land,
- a right to make decisions about the use and enjoyment of the land,
- a right to hunt and gather (including ochre), and to take water, for the purposes of satisfying their personal, domestic, social, cultural, religious, spiritual or non-commercial communal needs, including the observance of traditional laws and customs,
- a right to maintain and protect sites of significance to the common law holders under their traditional laws and customs, and
- a right as against any other Aboriginal group or individual to be acknowledged as the traditional Aboriginal owners.

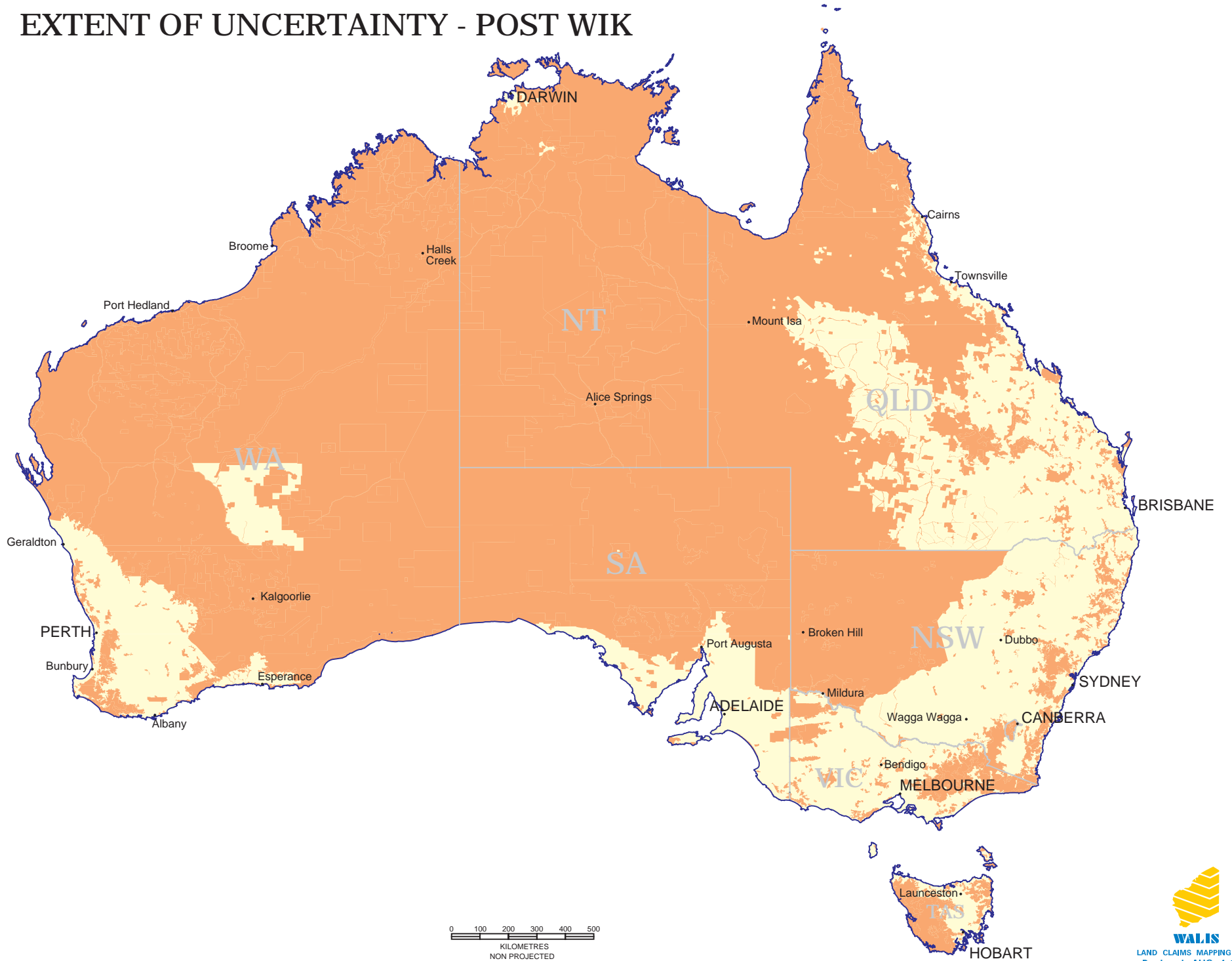
I think what is significant in this press release is that it also contains very strong reaffirmations of State sovereignty. It seems to me the message from that is clear. The State can see that this acknowledgement of these intrinsic rights is potentially an intrusion upon its sovereignty, so you will find affirmations of the State ownership of minerals, petroleum and water and in the confirmation of the right to negotiate. Mr Court said that as part of the determination, ‘... the Spinifex people had acknowledged that these rights were subject to all State and Commonwealth laws and non-exclusive where the State had already granted title to land’.

Premier Gallop has just made the same acknowledgment in the Djurabalan claim over approximately another 25,000 sq km of land round Balgo and nearby pastoral leases, Lake Gregory and Billiluna, and has an announced policy to pursue further agreements. Such agreements can be the basis of a Court order recognising the *fact* of native title (I stress again, not *creating* native title) and/or the basis of a registered ILUA under the *Native Title Act*.

Australia is in fact covered with a vast jigsaw of claims, hundreds of which are at some point of the negotiating process. As at August 2001, there are in mediation 280 native title claims and a further 261 which are not yet in mediation. There is, in this process which I’ve just described two examples of the potential to see negotiation over virtually the whole of the Australian land mass.

I’ll provide a few maps. The first is one is my favourite because it has been used by some politicians to terrify the wits out of their constituents. I am sure you have all seen someone or other waving this around on television. The ‘brown’ area represents what was seen as the maximum reach of native title in Australia after the High Court’s Wik decision.

■ EXTENT OF UNCERTAINTY - POST WIK



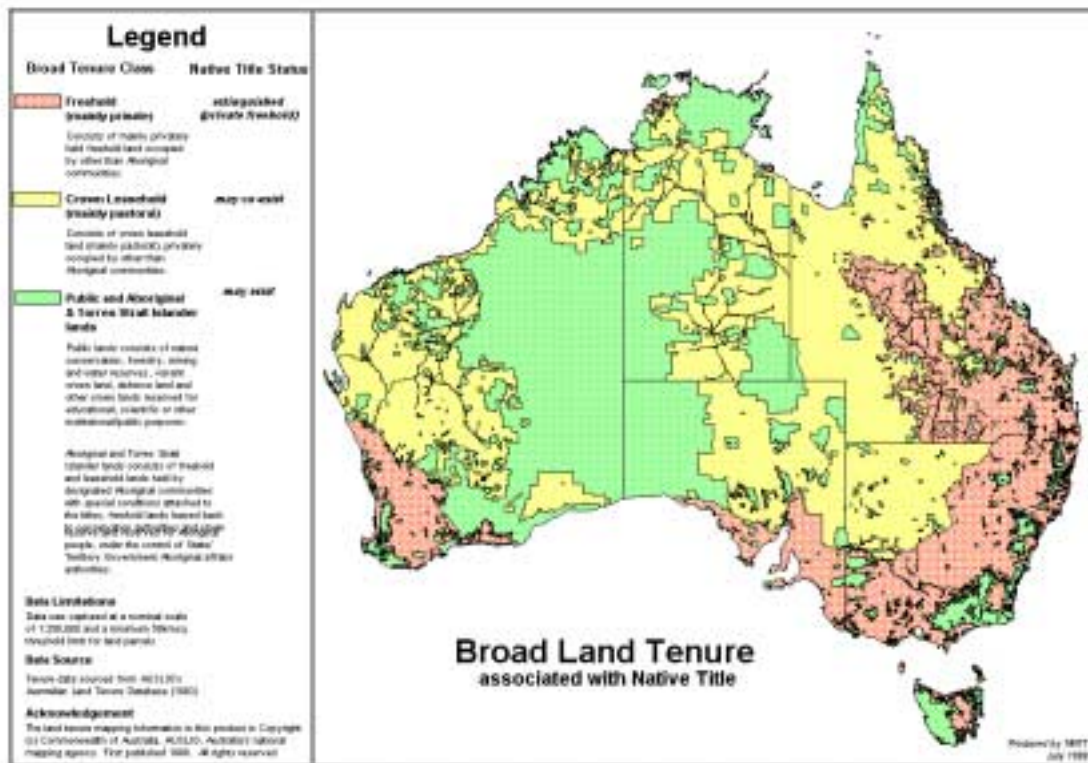
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LAND CLAIMS MAPPING UNIT  
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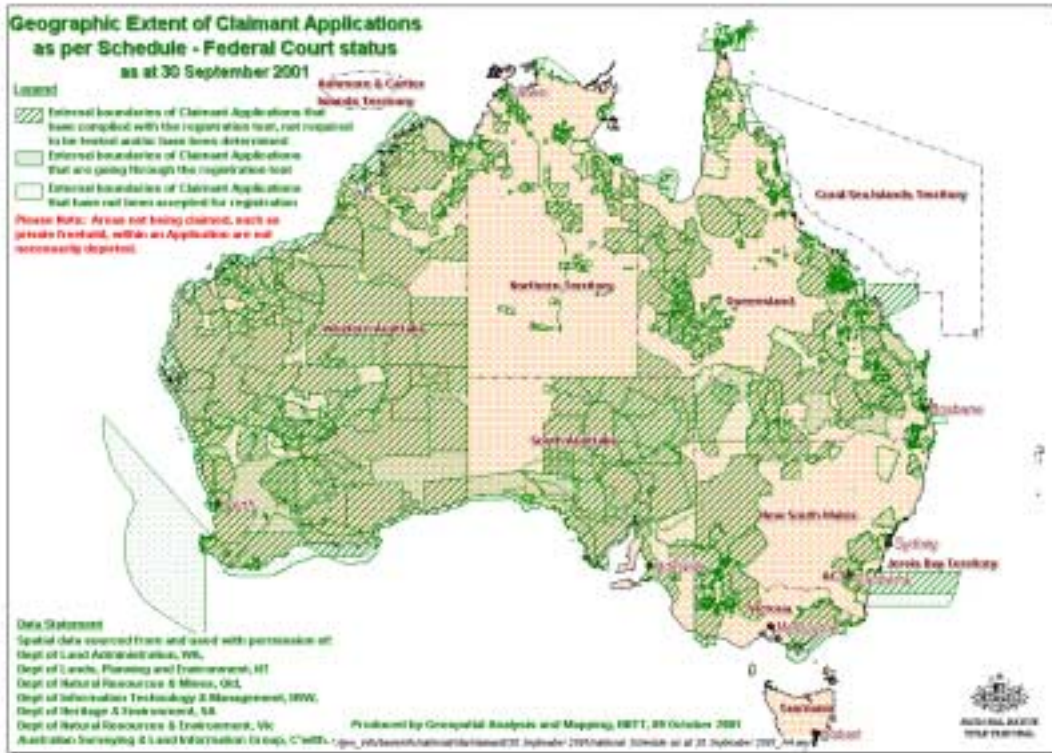
Map produced from digital data set held by AUSLIG 1993

A companion map is interesting because it illustrates the extent to which native title negotiations may extend depending on the High Court decision in *Ward* which should be available very soon. This shows land which is freehold and therefore where native title has been extinguished shaded pink. The green shaded areas are either vacant crown land, as we used to call it, or unallocated crown land and/or reserve or forest areas in the south-east and south-west of Australia as well as land already held by or dedicated to Aboriginals. The buff or yellow is, of course, pastoral lease. What this map indicates is that native title has been destroyed in, basically, the best watered parts of Australia. We do not know, until *Ward* is decided, the extent of whether it will be partial or total extinguishment in the buff areas and in the areas marked green. In South Australia and the Northern Territory, of course, those areas are substantially already Aboriginal freehold under land rights legislation, but the areas under green could, theoretically at least, become virtually full native title with exclusive possession. I think it is fair to say that a vast sweep of Western Australia certainly will be exclusive possession native title within the next few years.



The third map shows as hatched areas the areas which are currently the subject of active native title applications. Again, the map is slightly misleading because, say, in south-west Western Australia the applications of course cover substantial areas where there has been total extinguishment and, indeed, through the whole wheatbelt there on the Western Australian side, there are substantial areas of freehold. It does give you a sense, with the numbers that I have given you of something like 500 claims or more either in mediation

or to be in mediation, of the scope for agreement making which there exists in 2001. The broad green hatched lines are those native title applications which have passed the registration test and which currently, therefore, have the right to negotiate under the *Native Title Act*.

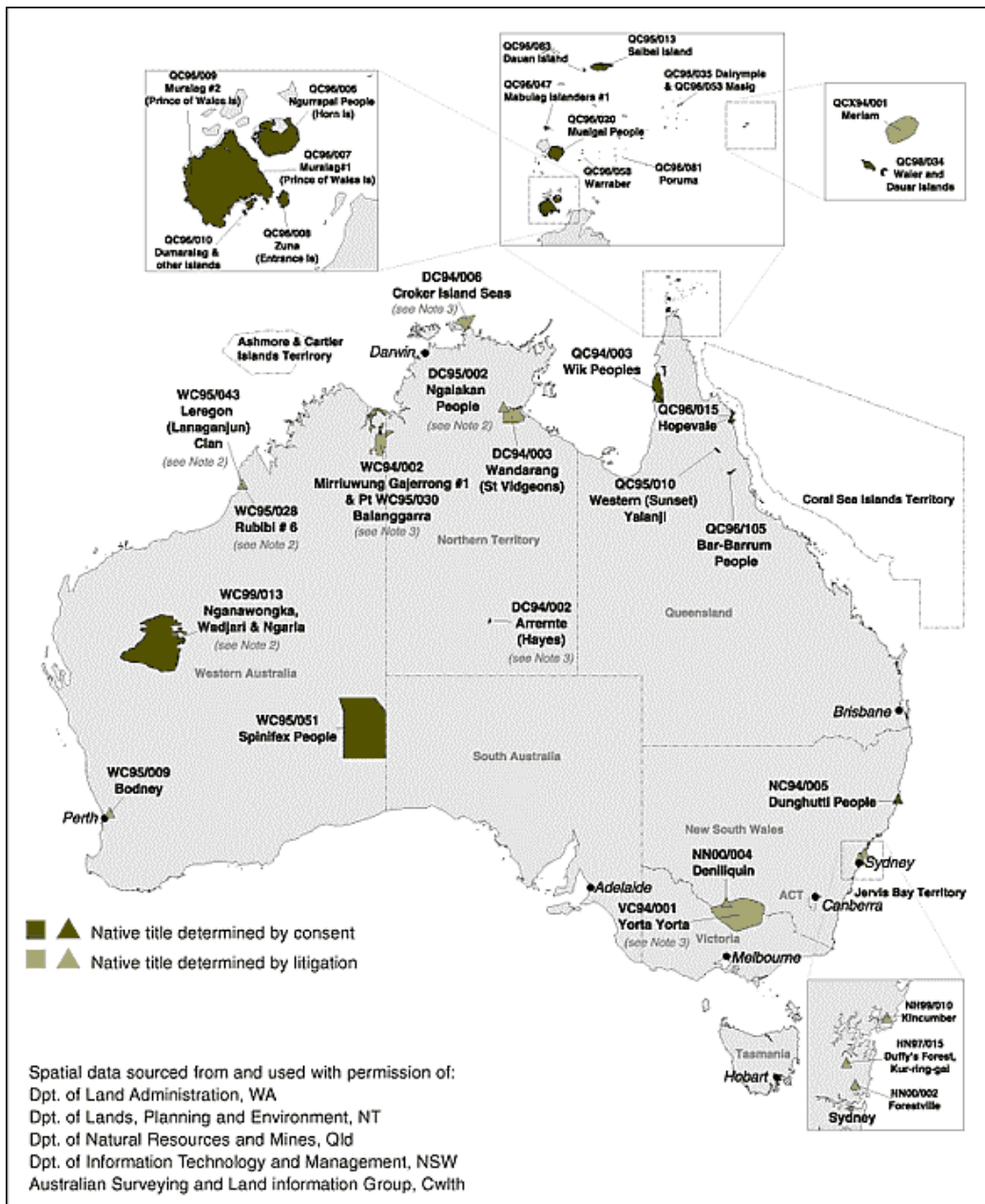


The reason I think this is all relevant to this issue of a treaty is that each of those applications, if it is to be advanced, requires the applicants to define a native title holding group and to define a negotiating team. It requires in turn, the relevant state or territory to organise a negotiating authority. And this quite extraordinary array of attempts at agreement making takes no account of the numerically much larger number of negotiations which are taking place under the right to negotiate, some of which have a regional flavour. These latter sorts of negotiations which are being entered into by some of the major miners, remarkably enough, not only encompass the concerns of those major miners to deal with future acts – the creation of future mining interests – but in some cases are going back to historic relationships to renegotiate the relationship which has existed between the company and the relevant Aboriginal community. We are seeing a retrospective renegotiation which may touch on some of the moral issues which Tim Rouse has written about in *After Mabo* and which are mentioned in Mick Dodson’s paper. Should a wider agreement proposal or a treaty proposal be advanced, it would have to go through similar disciplines and processes and apparent difficulties in the way of such a process are, in fact, being dealt with in the successful native title outcomes which have been achieved to date. What is required to deal with a native title application is in some

respects no different from what would be required for a treaty negotiation. The requirements of the courts and the negotiating State Governments results in the recognition of numerous Aboriginal groups rather than a pan-Aboriginal concept which would be relevant to a National treaty. I note that Mick Dodson, in the paper to which I have already referred, expresses his personal preference or belief that there would need to be a number of treaties rather than a single treaty. This simply reflects the widespread views among Indigenous people that their individual nations are the relevant negotiating bodies.

The actual breadth and potential breadth of the native title process is illustrated by the map that I have shown you of the maximum possible reach of native title in Australia and the broad land tenure map which explains the maximum reach of native title across various tenures. I think that this is a really exciting situation.

How far we have to go in the process of treating over these applications is demonstrated by the map showing determinations as at 30 June 2001.



You will see that in terms of outcomes, a relatively small part of the Australian land mass has been dealt with, but I would say with some confidence that we can expect an acceleration of outcomes in some parts of the country at least. What we are seeing at the, I suppose, eighth or ninth year post *Mabo* is the actual commencement of outcomes which are the result of the negotiating process.

Perhaps the most intriguing experiment in agreement making is taking place in South Australia. There the State Government and the representative body for the State, ALRM, as well as the State-wide mining and farming organisations have been negotiating towards the possibility of a State-wide ILUA which would deal with their respective native title issues. This is an attempt to deal on a State-wide basis with issues relating to native title. Among the matters which are the subject of discussion were:

- how to improve clearances and deal with Aboriginal heritage matters over land,
- how to work out when compensation should be paid, for what, and how much the compensation should be,
- how to provide opportunities to secure improved services and infrastructure provision into remote and rural communities,
- how native title claimants can explore economic opportunities arising from native title,
- how to allow native title claimants to carry out ceremonies, hunting or other traditional activities on land,
- how pastoralists or other land holders can change what they use the land for; (it seems to me they can no longer simply look to the State for their rights there, they have to actually talk to Aboriginal people which seems to me very close to an exercise of some sovereign rights),
- what role native title claimants should play in the management of national parks or reserves, and native vegetation and animals,
- how land holders, explorers, miners and other developers can get sure answers on native title matters quickly, and
- how long the agreements should last, and how (if at all) they should be updated to meet changing needs and circumstances..

They say that this negotiation aims to get agreements that:

- are legally binding,
- give everyone certainty about how the land can be used in future,
- bring about cultural, social and economic benefits for all South Australians,
- resolve current native title claims over the land to the satisfaction of everyone concerned, and
- cover how the agreed points will be put in place over time.

The parties expect, and I am quoting again from one of their formal documents:

... that there will be a State-wide overarching agreement, which will set up a framework for action and for further agreement at local and regional levels. This agreement will also set out the best way to establish better processes for decisions about issues that affect most or all native title claims – processes which can later be put into operation at the local level. If suitable, the parties may register this agreement at an ILUA.

Now, that is a very large ambition and it is still early days. The processes that have had to be put in place to support it seem to me to be directly relevant to the sort of issues that, for example, Mick Dodson has talked about in his paper in this series. There are these different ways that treaty making can be approached. Here, the practice, or what people are attempting in the field is, in that sense, at least up with the debate, if not moving ahead.

I want to refer to how the talks will be managed and funded.

The document says:

In recognising how important these talks are to resolve native title issues, the South Australian Government ALRM, SAFF and SACOME (that is the miners and the pastoralists or farmers) have committed their own staff and funds to their part in the process. The South Australian Government has also made funding available to the ALRM to help it carry out its role, but has made it clear that this does not in any way limit the stand taken by the ALRM or native title claimants in the talks. The Commonwealth Government has also agreed to provide funding assistance. Amongst other things, the funds will be used to help bring people together for meetings as part of the process of consultation, so that issues can be discussed and strategies developed involving as many people as possible.

The process of building up a body capable of negotiating across the boundaries of Aboriginal nations on a statewide basis – the sort of process that might be required for any national treaty – has been described by Parry Agius, the head of the native title unit of ALRM, and Jocelyn Davies of the University of Adelaide in a paper entitled *Post Mabo institutions for negotiating coexistence* – Here we have a very interesting case study dealing with many of the issues which would lead into a treaty process. I think it is a fascinating paper because it explains how something like \$1 million has been spent just on education within the various native title groups to bring them in to a meaningful working relationship with each other. It is I think a very interesting paper about how one group of Aboriginal nations has chosen to tackle this issue of the overarching agreement as against the series of local agreements and a relationship between the two approaches. In the paper they say:

The 22 native title management committees who are at various stages of the re-registration process and are or about to discuss whether to lodge a native title application, [which covers the few areas that are not covered] decided in principle to participate in talks and pursue the potential for a statewide settlement of their claims.

But they also decided to form a new statewide organisation – a united voice – to act on native title issues, which are common across some, or all of the groups and which cannot be resolved by local negotiating processes.

This group, which as yet is not incorporated, is known temporarily as the Congress of Native Title Management Committees. This body, in some form, will ultimately be seated at the negotiating table.

The South Australian experiment is a valuable introduction to the complexities of pan Aboriginal negotiations. The continuing efforts of the parties may well help to demonstrate the feasibility or otherwise of overarching agreements as against more localised agreements between individual Aboriginal nations and governments and other interests.

The idea of making treaties may be contentious but it is clear that the idea of making agreements is not. Making agreements seems to have strong support from the Aboriginal and Torres Strait Islander community, strong support from virtually all governments in Australia, strong support from miners and other interests which have to deal with land and work out a relationship with Aboriginal interests in land. There is a framework in the *Native Title Act* for agreements to be given statutory effect, Indigenous Land Use Agreements. I don't believe that ILUAs are the end of the road in devising new ways to effect settlements between the Aboriginal and Torres Strait Islander community and the general Australian community.

If I may express a purely personal view, the genie is out of the bottle, it will not be put back into the bottle and agreements which settle the relationships between the Australian community and its Aboriginal and Islander people are inevitable. We are learning on the job and learning fast.

### **Discussion Session**

**Tim Rowse:** In part of Christa's talk she made a useful distinction between the substance and the procedure, those being two important but analytically distinguishable aspects of recognition. That distinction came to mind as I was thinking about Fred's talk, so I would like to direct this question to both of them.

In the 1998 amendments to the Native Title Act there was arguably a watering-down of the substance of the native title right, and yet, from what you say, Fred, procedurally we are proceeding very rapidly towards a kind of de facto recognition of Indigenous sovereignty. I know you didn't put it quite as strongly as that, but that was the tendency of your remarks about the genie being out of the bottle. Isn't it paradoxical that we have, if you like, very rapid forward movement on procedure but we are still limited by the Howard government's intolerance for real substance in the nature of native title rights? I wondered if you could comment on that gap.

**Fred Chaney:** I suppose I agree there is that tension, but in my view that is why I would be critical of people who have not, I suppose, got into the native title process as quickly and enthusiastically as they could have. I think that in this case, by achieving

outcomes you reduce the likelihood of continuing political resistance to outcomes. The fear about native title is still out there. I spoke to a church group with a strong Aboriginal content, strong Aboriginal involvement, because they are an Aboriginal ministry, just last weekend. I was given a list of questions – Can native title take my backyard? How can you have two titles over one piece of land? It was the most amazing series of questions. In a sense, my point is that the political problem reflects all of those uncertainties and doubts. It is by actually achieving native title agreements that you will carry the thing forward. I think there has been a huge opportunity that we have not in all cases availed ourselves of as quickly and effectively as we could. My plea would be to see this as a practical way to carry things along to the next steps and to demonstrate that this will work.

In terms of the genie out of the bottle, I cannot understand what has been said by the High Court and what has been done by governments and parliaments, including the passage of the Native Title Act, in any other terms than an acceptance that there is another law-making authority within this country. And if that is not sovereignty, I don't know what is.

**Christa Scholz:** For me the utility of thinking in terms of these two levels, procedural and content, in terms of their comparison. On this issue I compare America with Australia. In America, Indigenous rights have been recognised by the courts since the 1800s. There has been a historical practice of recognising the symbolic aspects of First Nations and their governance structures, but in the political arena there it has been a constant erosion of the content of those rights and the scope of recognised sovereignty. I think what is exciting about Australia, versus America or Canada, is that because the judicial decision for the recognition of rights came so much later, the paradox is that political structures and leverage are already been in place to make the most of rights and recognition in the courts, in the political sphere. I think the erosion that you are talking about there in terms of the restriction of the Howard government of the content of these rights, versus moving forward on procedural aspects of those rights, is an example of how, in the end, things are won in the political sphere, acted in the public sphere and perhaps not necessarily in the court.

**Speaker A:** I would just like to ask Fred about the difference between the simple agreements that are taking place and things happening at a constitutional level. My concern would be that the agreements being made are not as enduring as something that is set within the Constitution. The rights attained during that process may later, in the next generation or so, be easily eroded or that things will need to be negotiated again.

**Fred Chaney:** I think it is highly likely that there will be a need for renegotiation. I think the Canadian/American experience, and indeed life experience, tells us that nothing is forever. You do need, if you are going to have arrangements, to have provision for renegotiation. The Australian Constitution doesn't protect many rights but it does protect property rights. I know that the racial discrimination law to lock in adjunct protection, if you like, can be overridden by statute. We saw that in 1998. But if there is wholesale recognition of native title, it seems to me it has got some constitutional protection, certainly against Commonwealth action, once it is acknowledged. One of the reasons the Native Title Act is so convoluted, in a way, is that at all points I think the draftsmen had

to say, 'Is this something which might be taking something away from Aboriginal people? In which case there has got to be a compensation provision.' So it is not that there is no protection. I think that locking in the identification of native title rights as widely as possible is the most positive thing that could be done to give Aboriginal people the most secure negotiating position. It is never going to be absolutely secure, but it would be a far more powerful position than they have ever had since European settlement.

The other thing is that I think there is potentially a fragility about native title, even where it has been acknowledged by court order and by agreement. The extinguishment-by-abandonment arguments might come up in future, if there has been cultural shift within the Aboriginal community. I really liked the proposal in the original Spinifex framework agreement, which was that they would get acknowledgment of native title, as they have, but also a perpetual state title. I think if I was acting for Aboriginal parties I would be trying to go for the double of a permanent state title which overlies and does not extinguish the native title itself. The second thing that I would be doing is to really look at ways of ensuring – and this needs cooperative agreement with the states – that Aboriginal people who hold native title, that is, not individuals but the communities that hold native title, have a power to create tenures on their title. In other words, that should not just be a matter for the state but, say, the Spinifex People or the people of Tjirrabalan or the people at Jirkala and so on, who are probably next cab off the rank, should have a process whereby they can create tenures for Aboriginal and non-Aboriginal people on their country which do not extinguish native title and which would be commercial tenures.

I think there are a whole series of things that need to be done to lock this in, in a permanent way. One of my worries is that it is so hard to get the thinking on all these things done and for us to cope with them. Visiting Parliament House recently on reconciliation issues when we were fully charged up, it suddenly occurred to me that for that poor mob up on the Hill this is one of a hundred issues they're worrying about. Part of the problem in this treaty/native title issue is how you get sufficient quantity of attention given to it so that you can actually move it forward.

**Ernst Wilhelm:** Fred, following on from that, could you say something about the pace at which you would then pursue an agreement. After the reconciliation marches and so on there was a momentum which one view thought should be seized, that one should be moving forward very quickly. And there is another view – I think Mick Dodson probably takes that view – that one looks at this in terms of a time frame of 10 years or 20 years, or a very, very long time frame. Do you have a view on that?

**Fred Chaney:** I agree with Mick. I think it is a longer rather than a shorter time frame. Publicly and privately, we have been respectful of ATSIC's view that a lot of work needs to be done on the Indigenous side. ATSIC did something that looked very valuable at the end of 1999. They got together a lot of serious-minded contributors from the Aboriginal and Islander community and asked them to talk about this. I remember seeing the paper that flowed from that which really talked about the high level of uncertainty: 'What are people actually talking about?' There was this big agenda that needed to be clarified.

ATSIC has set itself a year and a half timetable, I think, on the idea of a plebiscite. Whether that is a realistic time frame for getting that expression of opinion from the Indigenous community, I don't know. I guess they will make a judgment on that as they go along. I have had quite a few discussions with Aboriginal people – I haven't had a chance to discuss it with any Islander people – but I have certainly haven't had discussions which have led me to think that we should be trying to do all this tomorrow. On the other hand, I am absolutely convinced that working through native title agreements with as much expedition as possible is a very good idea because of the strong negotiating base.

**Lyn Marlow:** I am from Treaty for Change. I was just thinking about the term 'native title'. Only about 10 per cent of Indigenous communities can actually claim native title, so it marginalises a lot of people within the community. Secondly, it is very divisive within our community – there have been a lot of arguments within Aboriginal communities regarding who has the right to claim native title.

If we are talking about a treaty, we have to encompass things like the people left out – the Stolen Generations and people who are dispossessed – and the human rights of those people. I think that we should be looking at a broader idea than just as land rights, when we talk about rights for Indigenous people.

**Fred Chaney:** I couldn't disagree with that last comment. Of course it has to be much broader if it is to encompass the situation of Aboriginal people generally. But I feel it is really important that the Aboriginal community thinks about the notion of divisiveness. If you are actually going to have a treaty negotiation, then you have to decide who you are, you have to decide who represents you and who has authority to negotiate. If, as many Aboriginal people say, 'You don't speak for me. I'm this,' I'm totally respectful of them saying that, but that is something that they have got to sort out. I don't think you can just paper it over and say, 'Well, let's do something that isn't divisive,' to avoid the question of who has authority to represent the Aboriginal community. Similarly, do they want, as Mick Dodson is suggesting, not one treaty but perhaps a series of treaties? As recently as last weekend I was presented with a map of the language groups by an Aboriginal man who said, 'We are acknowledged in that, and we ought to have our own agreements.' So these are issues which I think are for the Indigenous community to sort out one day.

In terms of the 10 per cent, I don't know what the figures are. I guess that the *Ward* appeal will tell us whether all of the people on those buff sections of Australia will also benefit from native title or not. But at the moment there are serious negotiations between the state of Western Australia and the Nyoongar people. There is a negotiating protocol which has been entered into. It is not impossible that there will be native title outcomes in the south-west of Western Australia, an area which has been hugely affected: Aboriginal people have been treated like dirt for generations, a fractured – often fractious – community. But there are serious discussions going on which I personally would hope will lead to native title recognition of some sort in the south-west of Western Australia. If it is possible there, it is possible elsewhere. So I would be very sorry if *Yorta Yorta* led people to say, 'Well, that's the end of the story.' I don't think that is the end of the story

at all. *Yorta Yorta* is a story; it is certainly not the story that is dominating discussion in Western Australia as we speak. So I hope your 10 per cent is a gross underestimate.

**Christa Scholz:** What I think comes from the issue of representativeness while negotiating a remedy from the Aboriginal side of the equation is that, while the treaty history is making these issues simpler in Canada and the US and, less so, in New Zealand, it hasn't made the question simple. The issues of representativeness and who speaks for whom are also echoed there as well and, while perhaps not in as difficult a situation as in the current context in Australia, possibilities still exist.