

The Native Title Market

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In Memoriam

To the members of the Ngarluma and Yindjibarndi native title claims who died before seeing their native title formally recognised by the Federal Court of Australia.

Preface

Since I first began acting in native title negotiations in the mid-1990s, I have had it in mind to write some analysis on the dynamics of native title agreement-making. Accordingly, drafts of some parts of this work date back to the last millennium. More recently, in 2006 and 2007, when discharging a project pursuant to a grant provided by the Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS) and auspiced by the Faculty of Law at The University of Western Australia dealing with the institutions and ideologies of native title, agreement-making again loomed up as something that I thought required critical attention. So, when the AIATSIS project was complete, I dusted off some old notes and made some new ones and this short tract is the result. I've tried to prevent this being solely a lawyer's book by avoiding technical details as much as possible, demystifying whenever I have been able and keeping footnotes to a minimum. The result has inevitably been a tendency towards generalisation and the omission of various technical exceptions. I stress too, that this book does *not* deal with all kinds of native title agreements, just those between Aboriginal groups and resource interests, about some proposed new exploration or development. Where I give examples without identifying names and places or any footnote, except where otherwise indicated, these are products of my own experience as a practitioner involved in negotiations.

Acknowledgements

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This work is previously unpublished, with the exception of a few passages that previously appeared in a short commentary entitled 'Native Title: Conventional Wisdoms' in the *Australian Mining and Petroleum Law Association Yearbook*, 2006.

I

Setting the Scene

Introduction

What ever happened to native title? Once upon a time native title was *the* dominant issue in Australian politics. For those old enough, a moment of recollection may bring to mind the commotion about *Mabo* and *Wik*; Paul Keating's Native Title Act and John Howard's 'Ten Point Plan'; the doom-mongering of figures like Hugh Morgan and Graeme Campbell; the pathos of the desecration of Eddie Mabo's grave and the clamouring accompaniment of banner headlines and editorialising. The storm climaxed in the mid-1990s, but since then the issue has blown remarkably quiet. So what occurred? Why did the tempest go away? In short, in place of the controversy, most immediate issues arising from native title are now resolved through negotiation and agreement under a largely settled system of laws and conventions. Reflecting on the significance of the change, some commentators have referred warmly to the rise of a 'new culture of agreement-making' which, among other things, is said to address socio-economic disadvantage, bring satisfaction to all stakeholders, promote Aboriginal unity and advance the cause of Reconciliation.

This new age of agreement-making is reflected by the reduced noise in the media as the uproar of the 1990s has largely given way to a gentle drone. Today's native title headlines are likely to be further down the news: 'Native Title Agreement' on page 76 or 'Aboriginal company to run iron ore operation' as a minor item, half heard and not remembered, late in a radio bulletin.¹ Indeed, the good news story of a resource interest and an Aboriginal group reaching agreement has become so run-of-the-mill that the media releases often don't get picked up by the mainstream at all. By

July 2007, when 'Queensland Ores Ltd rushed to inform the world that it had signed a native title agreement at its Wolfram Camp project', all veteran mining journalist Tim Treadgold could remark witheringly was '[w]ow, hold the press'.² The once novel is now routine and native title 'news' ever less newsworthy. Though barely audible or listened to, the soothing cultural murmurings nonetheless continue to be reassuring in their low volume, sonorosity and consistency: agreements are being reached; agreements are being reached...

This book applies a sceptical ear to the comforting humming about native title agreement-making. If one listens carefully, the calming sound of deals being announced is a noise we know very well: it is the sound of a market at work. The messy controversy that once existed, particularly between minerals exploitation and Aboriginal rights, has been replaced by a fully functioning native title market. The most often used agreement-making parts of the Native Title Act function as a market arena, in which resource interests haggle with native title groups that trade their permission for exploration or extraction to go ahead. The 'new culture of agreement-making' is that of the bazaar.

Describing a major element of the native title system as a market challenges many existing and rather more elevated interpretations of what has been going on. In June 1996 for example, Seán Flood who was then a Member of the National Native Title Tribunal, told the Rotary Club in Willoughby, on the North Shore of Sydney that:

Mabo gave us a new and exciting vision of Australia. It opened a window on the past and showed us what Australia can become. Removing or severely curtailing the rights of Indigenous Australians to negotiate regarding future acts on "their lands" will obscure the view from this window and work further injustice and dispossession on Indigenous Australians. On the other hand, preserving the right to negotiate offers Indigenous Australians the opportunity to construct a more beautiful Australia; one that all its people can participate in – a journey of the spirit in the future.³

The 'right to negotiate' to which Flood referred is the basic statutory mechanism that gives Aboriginal groups the leverage to make agreements with resource interests under the Native Title Act. More than anything else, it was the creation of the right to negotiate that established the marketplace

that is discussed in this book. We can think of the right-to-negotiate processes as a kind of virtual shopping centre, in which miners, explorers and energy companies purchase their permissions to go on native title land from Aboriginal groups acting as vendors.

At the time of Flood's comments, there was no 'culture of agreement-making'. Although the Native Title Act had been passed, very few deals of any kind had been reached and the right to negotiate was being threatened with legislative oblivion by the new federal government of John Howard. Accordingly, Flood's words should be read as a sincere exhortation made by a man ardently and seriously preoccupied with the future of his nation at a time of political rupture.⁴ Yet what remains striking is that, albeit in the passion of the historical moment, Flood was attaching profound transcendent meaning to a statutory process. We don't usually think of legislation as a spiritual matter and what 'preserving the right to negotiate' offers is not divine progression but the opportunity for the parties to reach agreements about land use. If there is any 'journey of the spirit' under the relevant parts of the Native Title Act, it finishes in execution by contract, probably in triplicate.

Distinguishing between the euphemistic expression 'agreement' and the more technically correct term 'contract' is important here. Almost all 'native title agreements' are contracts which are distinguishable as a form of agreement because they are enforceable at law. You can sue for non-performance of a contract to which you are a party. Two people might share an agreement to go for a walk together at midday, but it is very unlikely that one has any ability at law to sue the other party in the event that he or she ends up staying at home at noon to read a book instead. In contrast, if you make a contract with someone and pay them to supply ten crates of apples, if the fruit is not delivered or turns out to be worm-eaten, you can sue for the breach of your deal. A contract can be written or verbal, though as any lawyer will say, it is likely to be much easier to enforce something that is recorded in writing. Making contracts is so incredibly mundane that, like all people living in capitalist societies, we do it many times a day without even really registering that we have done so. When you buy the newspaper in the morning, you are making a contract; the cup of coffee on the way to work is another; the sandwich for lunch from the kiosk is a third and so on. You will of course be earning a living through a range of contractual relationships and it is likely that various kinds of contracts (rental, purchase,

loan, mortgage and insurance) will govern where you sleep at night. Even the bigger contracts in our lives are not invested with great meaning. We might be excited after buying a new vehicle or a house, but we don't see the process of making contracts as particularly special and certainly not sacred, because it is the ordinary way in which business is transacted. Our lives are full of contracts.

The Native Title Act created a new and unusual arena for contract-making, but the behaviour and practise of contracting could not be more mundane and is as old as the village square. The native title legislation merely facilitated the transfer of some very ordinary values and norms of capitalist culture to the unfamiliar subject of traditional Aboriginal interests in land. Nevertheless, although later commentators rarely engage in quite the same elevated prose as Seán Flood, his assumption that native title agreements are invested with a higher meaning is widely accepted and has matured into a general celebration of the rise of the 'culture of agreement-making.' This book highlights the bathetic gap between the rhetoric of native title agreement-making and the plainer actuality. Contrary to many of the prevailing interpretations, what is truly remarkable about the native title agreement-making process is its very banality. The emergence of the native title market is a triumph not of the sacred, but of the profane functioning of amoral exchange. It is a victory for contract as a way of normalising relations between Aboriginal societies and commercial interests.

Going behind the myths

Native title agreements over mining and other resource developments are not little fish, but their detail is certainly submerged, obscured by the foamy waters of commercial secrecy arrangements. We know from what is freely available that the scale and importance of the agreements as a whole is beyond question. Most of Australia is covered by registered or successful native title claims with the consequence that at least one Aboriginal group has the right to negotiate for that area. Many of the Indigenous communities in question have reached quite a number of deals.⁵ The total value of the contracts may now be in the billions, the overall numbers of Aboriginal people involved are substantial and some of the corporate parties in question are among the most powerful resource interests in the world. Native title agreement-making raises significant issues associated with resource development, land administration, infrastructure renewal and socio-economic redistribution.

Nevertheless, despite the importance of the subject, we know comparatively little about what goes on in the course of agreement-making or what the deals contain. Instead, the publicity machines of the relevant institutions churn out a cycle of almost relentlessly positive press releases, illustrated with pictures of ostensibly satisfied Aborigines in the company of apparently equally content resource company representatives. Like the final scene in a family film, the photo moments are an exercise in finishing the story with a glow, catching the action at an instant when there seems to be a happy ending.

The images and ideas that are nurtured and propagated about native title agreement-making represent the promulgation of 'myth', in the sense of a flexible story that is repeated and which provides guidance in how to interpret events. The idea of myth is complicated, embracing everything from the heroic stories of antiquity to contemporary urban legends about giant reptiles rampant in sewers. There are cultural and political myths too, of which the national 'coming of age at Gallipoli' is probably the most well known in Australia. Myths are traditional stories that are repeated in various forms and which act to explain some part of our natural or social environment. None of these stories are simple falsehoods, though they may be untrue in whole or in part (and will only ever be partly true) in a strict forensic sense. Rather, myths condense and shape their subject, offering an interpretation that is partial, meaning that other possible explanations are ruled out. The truth encapsulated within a myth might not rely on accurately narrating real events, but on the lessons or wisdom that can be derived from the story. Ancient myths gave guidance to the people of the distant past about how to lead the good life, while urban legends of today may provide warnings about the dangers of the big city. Almost one hundred years since the outbreak of World War I, the Anzac ideal is regularly rallied to legitimise contemporary political and foreign policy projects. Myths are tools of interpretation that provide us with readymade ways of understanding experience. The most enduring and powerful myths become self-evident and so beyond questioning within a society. A myth can contain wisdom, even if not describing something that actually happened, or might act to justify the distribution of power.

A number of myths are told about native title agreement-making which purport to explain what the process is all about and to guide the way that we think about the deals. These myths are retold in media statements, glossy

brochures, conferences presentations and even academic publications. Like other myths, the stories are not wholly wrong and certainly not deliberately false or intentionally wicked. The retelling of myth should not be confused with lying or conspiring, and nothing in this book should comfort those who trade in facile theories that Aboriginal history is 'fabricated' or that Indigenous affairs policy is all a plot. Indeed, the most vocal proponents of the mythology associated with 'the new culture of agreement-making' in native title include some of the most analytically engaged, best informed and well-intentioned people involved in the process. Nevertheless, the stories that we hear about native title agreements invariably do represent a partial view of reality that is conditioned by belief. This book attempts to identify and make plain the inner logic and assumptions of a number of the principal myths about native title agreement-making; to describe the stories and suggest reasons for why they are told.

One of the prevailing myths that needs to be challenged is that all native title agreements are worthy of celebration. The truth is that sometimes there is a legally binding accord, but one or both parties are left feeling deeply chagrined by the terms of the arrangement. In the world of native title negotiations, some deals seem objectively fair, but others have produced clear winners and losers. The prospect of native title contracts leaving people feeling bewildered, bitter and resentful is something that the brightly painted language of agreement-making fails to admit. However, while the existence of some deals of dubious fairness or merit is an important strand in this book, the central argument is definitely not that the native title market is simply a new exercise in beads and mirrors that invariably rips off the indigenes. Rather than a few bad apples or hushed up scandals, we are preoccupied here with how the native title process between resource interests and Aboriginal groups routinely functions. The focus is on norms, rather than exceptions.

Talking turkey

When discussing native title, some jargon is inevitable. The (Commonwealth) *Native Title Act 1993*, which is the pre-eminent source of the law of native title, makes sense to those who are paid to understand it, but like any technical document the legislation can be rather impenetrable to outsiders. In part the murkiness of the native title legislation arises because some of the defined terms are simply opaque or seem on their face to describe something

they do not mean. The Act describes, for example, a clearly dispassionate individual known as ‘the Independent Person’, talks of a rather opaque class of transactions referred to as ‘permissible lease etc. renewals’ and describes a category of ‘acts attracting the expedited procedure’, which one might guess would be theatrical performances that warrant an early exit by the audience, or perhaps the swift application of a crook to the necks of the performers. Unfortunately, when the subject is native title, using a certain number of these technical expressions is inevitable

One term in the Native Title Act that is critical to understand here, because it forms the boundaries of the discussion, is *future act*. Although, the precise definition is more complicated in the legislation, *future act* can be roughly defined as something that is to happen on land subject to native title but for which legal permission does not yet exist. The arguments contained in this book are confined to contracts about future acts because different considerations apply to broader agreements about whether native title itself exists, and to other kinds of deals that are made under the legislation. This book is also predominantly preoccupied with the commonest kind of future acts, those concerning proposed new exploration for, or extraction of, minerals or energy sources. If, for instance, you want to explore for diamonds on land covered by a native title claim and you don’t have permission to do so, the combination of getting the exploration licence and then exploring, would be a future act under the native title legislation. If you have found a deposit of gold or iron ore and you want to dig it up and sell it, the mixture of getting the mining leases and doing the digging would be a future act. The government owns all minerals and petroleum in Australia, so resource developers need permission to get them out of the ground and trade them, in return for which they pay a range of monies to the public purse. The permissions themselves are known as *tenements*. After the Native Title Act was passed, miners and explorers not only needed state permission, but to have gone through the future act processes. Another important bit of jargon here: the Native Title Act calls a resource interest that is seeking a tenement *the grantee*, meaning the party that wishes to be granted the legal permission to do the mining or exploration. Deals over future acts are by far the most frequent kind that occurs under the Native Title Act and they are often invoked as clear evidence for the emergence of the culture of agreement-making. The processes that result in future act agreements are explained in more detail later.

Although the vast majority of native title ‘agreements’ are contracts it was not uncommon in the earlier years of the Native Title Act for representatives of mining companies to urge that it would be preferable if arrangements remained informal, based solely on the trust and friendship of a handshake, rather than set out in contracts. We can all be sympathetic to the idea that greater warmth and intimacy are attached to relationships that are not legally enforceable. (Perhaps, as an experiment, try asking for an enforceable commitment in writing on the next occasion when a friend or family-member asks you over for a meal and see whether it increases closeness between you.) However, it was never realistic to expect Indigenous groups, of all people, given historical experiences and particularly when being advised by lawyers, to simply take a promise on trust without the ability to enforce the deal. Certainly any competent counsel would be duty-bound to express solemn misgivings against their client relying on any pledge that was less than legally binding.

In order to make sure that a contract has come into existence, Australian law provides that certain elements must be present including the following:

- an offer must be made by party A;
- the terms of the proposed transaction must include consideration that is definite and of value; and
- the offer must be accepted by the party B.

In some instances, there may be offer and counter-offer and so on before the final terms are settled, or even many parties to an agreement exchanging a complex array of multiple promises. However, in all cases the essential three elements must be satisfied in order for a contract to have been made. When we buy our newspapers, coffees and haircuts, there is offer, consideration and acceptance, even if these transactions don’t normally get executed in the stilted language of the law. We don’t, of course, stroll into a newsagent and say, ‘I would, as the vendee, like to offer you, as vendor, three dollars as the valuable consideration in exchange for that magazine,’ but when the purchase is made, the law characterises our behaviour in those terms.

‘Thank you for welcoming us on to your country.’

Native title agreement-making represents the transplanting of the everyday practice of market relations into a new social environment, but with the abiding ordinariness of the contracting process masked. In part, the

obscuring of the commonplace nature of the native title market can be explained by the exoticism of the context. Anthropologists Kate and Robin Fox use the expression 'ethnographic dazzle' to describe the 'blindness to underlying similarities between human groups and cultures' that occurs 'because we are dazzled by the more highly visible surface differences'.⁶ When we think about native title agreement-making it is very easy to be blinded by striking cultural dissimilarities. The surface of a native title negotiation can look very different indeed to a contract made in business circles in a capital city or a supermarket in a suburb. Ultimately though, Indigenous cultural practices that are inconsistent with engaging in contractual negotiations and execution must ultimately give way, at least to the extent made necessary by the inconsistency.

While describing the cultural and logistical complexities associated with 'doing business with Aboriginal communities' is not the main aim here, no discussion about native title would be complete without some attempt at evoking the practicalities associated with getting the work done.⁷ Mostly, future act negotiations will commence with representatives of the grantee visiting a meeting of the relevant Aboriginal group, probably somewhere within, or near to, the group's traditional country. Different native title claim groups do their business in varying ways: some meet as whole communities where all are welcome, others appoint so-called 'working groups' or set up their own corporations. On other occasions a particular 'big man' may emerge who purports to speak on behalf of a grouping. It is not uncommon for there to be divisions about how business is to be done, with some advocating group engagement, others preferring one or more individuals to have the mandate to deal on behalf of all. Authority may also shift in the course of negotiations depending on what is being talked about, but how and why particular people have the right to speak at various times may be thoroughly obscure to outsiders. The question of who has the power to talk at what times may also be contested within a native title group. Much to the frustration of impatient third parties, negotiations over resource developments often provide a stimulating new environment for the extension of pre-existing historical and traditional politics and rivalries among Aboriginal people. In different ways, it can all be maddeningly stressful and complex for everybody involved.

The desolate demographics of Aboriginal Australia – stark rates of early morbidity, substance abuse, illiteracy, chronic illness, homelessness,

overcrowding and family violence – take an obvious toll on the capacity of a community to concentrate on something as infuriatingly incremental and prosaic as contractual negotiations. In a recurrent tragedy, important community members have often passed away before negotiations over their country, with which they have been deeply involved, have been concluded. At times, it is hard to avoid the suspicion that the stress of agreement-making may hasten the end of an individual's life, though one should be deeply cautious making assumptions about the inner life of any human soul. A morality tale, in which an elder struggling for his or her country is worn down to death by the anxieties of negotiation, may provide just another appealingly simple interpretation of the future act process, investing contracting with the weight of martyrdom. On the other hand, stories about senior Aboriginal men or women gaining a fresh lease on life through having the opportunity to 'have a say about what happens on their country' should also be treated quizzically. Any interpretation that seems to flatten the complexity of human experience into a narrative giving rise to the lesson that native title agreement-making is a consecrated process, is just a bit too cute and convenient not to be read with humane scepticism.

The persistence of Aboriginal law and custom also represents another complication for outsiders hoping to get business done. In particular, rules associated with taboos on using certain words, relationships of avoidance, systems of familial obligation and the existence of non-delegable duties to care for sites on country can all create obstacles, while funerals and ceremonial business may preclude negotiations from occurring for lengthy periods. It is important to note though, that people rarely remain static in the face of change around them. Some Aboriginal communities have been in a state of near constant negotiation since their claims were first registered in the 1990s. Negotiators who were babes in the commercial woods in 1994 may now be experienced, hardened and shrewd. A similar process is at work among the more experienced employees and consultants of resource companies, for whom the cultural strangeness of talking to rooms full of Aborigines or sitting in creek beds waiting for something to happen has faded with time. Nevertheless, even for the experienced participant, negotiation meetings are often a challenging atmosphere and their interior workings are inherently unpredictable. The sheer numbers of participants – meetings about proposed future acts frequently involve quite large groups of Aboriginal people, as well as their advisers, often facing multiple representatives from a resource

company – can make the orderly transacting of business a considerable challenge. It is not uncommon for individual meetings to last for a whole day – or even a couple of days – and for months (or years) to be required to conclude a tranche of negotiations. Cycles of meetings may turn with the seasons, progressing with the slowness of caricature. As time passes, the parties may develop a closer rapport, or might grow heartily sick of the sight of each other. Consultants and employees come and go.

Negotiation meetings frequently take place in challenging environments: draughty community halls with hopeless acoustics and broken air-conditioners; municipal offices cramped with over-sized chairs; river-banks or bough sheds in 47 degrees Celsius in the shade. There are issues with kids and dogs, unreliable transport and the never-ending capacity of what technicians starchily call ‘non-native title issues’ to divert meetings or prevent them from occurring at all. At more than one meeting an Aboriginal group has effectively said to their earnest legal advisers, ‘We know why you are here, but we have our own priorities today and we are dealing with those first.’ The author once travelled more than 1,500 kilometres by aeroplane and road to take instructions from clients at a meeting, but all that turned up to the community centre in the course of the fruitless day was a single small and mangy dog. The clients who had been invited to attend simply had more pressing priorities.

Native title negotiation meetings can be bemusing and even amusing and not infrequently characterised by complete mutual incomprehension. In parts of Australia some Aboriginal people may not speak English at all, while in others ‘Aboriginal English’ is the mode of common communication, which has additional complications, including rich potential for talking at crossed purposes.⁸ One senior anthropologist has been known to relay the story of a mining company adviser opening a meeting by addressing four old Aboriginal men of high cultural standing, sitting in the front row of a large assembly of their compatriots in a community hall, with the following words: ‘Now, I suppose we all know how difficult it is to obtain bridging finance?’ To which the four elders responded, very politely, ‘Yes, yes, yes,’ signifying that they had heard, rather than that they had understood. Nevertheless, the mining company adviser, now confident in the fiscal acumen of his audience, swept away with a long presentation couched in the language of trade investment. Inadvertent jokes work in multiple directions: a foolish or overwrought resource representative may well give rise to exchanged glances

and suppressed smiles among claimants, later giving way to head-shaking and grins when the company man or woman finally vacates the room. More than one company representative has fallen at the cultural hurdle of being unable to laugh confidently and generously at their own expense.⁹ Native title negotiations can be deeply exhilarating, immensely frustrating and not infrequently lend themselves to moments of some absurdity, but they are rarely straightforward. At their most truculent, the politics of negotiations may morph in to violence within a community, complex and confronting and generally little understood by concerned non-Indigenous witnesses.

In contrast to the vivid and untidy realities, the Native Title Act sets out an apparently clinical process of negotiations between three separate entities: the state, the grantee party and the native title group. In real life, the boundaries between the parties are frequently less well defined than the legislation imagines. Primary industry becomes enmeshed with Indigenous politics, because the employees of the former and the members of the latter often participate within the same community. Larger resource interests are likely to be highly influential within the localities in which they operate. Company staff and Indigenous people may well interact outside of formal negotiations: they might meet in the street, or play football for the same team, or participate in the same borough consultative committee on behalf of their respective interests, or go fishing together. Not infrequently, a claimant will be an actual employee of the company with whom their traditional society is negotiating. Some resource company operatives, with greater, lesser or no sinister intent, may develop what are effectively client-patron relationships, through the doling out of favours and gratuities. It might be as simple as picking up a round of drinks or ice-creams, giving someone a lift, arranging tickets to the football or organising for company vehicles to resurface a community road. Multiple motivations may be at work simultaneously. There are no clear rules about how these cluttered relationships work and no bright line that divides acts of genuine regard, personal kindness, neighbourly courtesy or philanthropy, from attempts to gain leverage or build political capital. In the wider world it is everyday business practice to cultivate relationships in order to facilitate transactions. Nevertheless, interaction does get confused, making a mockery of the clean lines of the statute. Both naivety and shrill judgment are best avoided.