All items are available for you to read in the AIATSIS Library, and many items may be photocopied in full or part according to copyright rules and conditions of deposit.

Some special items of interest are:

- early contact accounts written by Daisy Bates (1910-1942), Philip Gidley King (1817-1904), or Joseph Bradshaw (1891)
- Canadian and Brazilian documents about agreements and policies concerning land claims
- the list of records holdings relating to Aboriginal people in the Northern Territory, compiled by the Northern Territory Archives Service
- the negotiators draft agreement between Pancontinental Mining Limited, Getty Oil Development Company Ltd and the Northern Land Council.
- the article by John Litchfield on how history research was viewed in the Mabo and Yorta Yorta Claims

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FEATURES

The Native Title Conference: 'Native Title on the Ground'

Edited extracts from summary address for Closing Plenary – Where to from here?

By: Graeme Neate. President, National Native Title Tribunal. Alice Springs, 5 June 2003

Introduction

Providing a summary or overview of this conference is a daunting task. This conference has been wide ranging in its scope. The numerous papers have been descriptive, analytical, conceptually challenging and, in some cases, deeply personal. Some speakers have reported on where we are in native title and others have looked at what might lie ahead.

What I will say is both a selective and personal account, outlining eight of the main themes or messages that have come out of this conference, and illustrating those themes by specific references to some of the presentations made here.

1. The challenges are great, and there are many ways of meeting them

Speakers, such as Noel Pearson, John Basten and David Parsons, offered detailed critiques of aspects of the current state of the law on native title and pointed to some of the practical implications of the law as it is currently understood.

For some people, recent court decisions have led to a sense of despair or grim resignation that there is no prospect of recognition of what they believe to be their native title rights. It is certainly the case that many groups will have difficulty in proving that they meet the strict legal requirements for a determination of native title.

What is clear is that the goal posts, if not finally fixed, are pretty firmly in place.

It is in that context that parties need to work out how to deal with the 635 claimant applications, 22 non-claimant applications and 22 compensation applications currently on the books.

Indigenous groups need to be given clear advice about their prospects in getting such

an outcome. They need to reconsider why they lodged their claimant applications and what they want to achieve from the process.

The Native Title Act provides for various outcomes - including determinations that native title exists,[1] particular forms of agreement such as Indigenous land use agreements,[2] and agreements that may involve matters other than native title.[3]

The options for resolving some applications may lie outside, or may be additional to, native title outcomes. They may include outcomes that can only be derived under state or territory laws. The Wotjobaluk in principle agreement is an example of this approach.

Senator Aden Ridgeway argued that the way forward must be about negotiated outcomes and agreements. He pointed out that going to court narrows what you can negotiate about. Senator Ridgeway and others spoke of the value of comprehensive settlements and regional agreements, as well as local or claim specific outcomes. One example of the comprehensive approach is the statewide negotiation taking place in South Australia.

Some speakers urged a consideration of native title in a much broader social and economic context, including as one way of addressing the relative disadvantages faced in their daily lives by many Indigenous Australians. Noel Pearson lamented that the courts had stripped native title of any economic meaning or benefit, and compared the Australian situation with that of Canada where the courts expressly use the language of reconciliation when dealing with native title (or aboriginal title) issues.

I would suggest, however, that although native title itself may not be an economically valuable commodity, economic benefits as well as heritage protection and other benefits are being secured by groups as a by-product of the process. People are using their procedural rights to negotiate agreements before and independently of a determination of native title.

2. People are at the heart of the native title

Judges and lawyers often say that native title rights and interests are rights in rem, not just the rights of the parties[4] – they attach to the land, and hence a determination of native title has an indefinite character which distinguishes it from a declaration of legal rights as ordinarily understood.[5]

Yet it is people who are at the heart of native title. The preamble to the Native Title Act makes numerous references to Aboriginal peoples and Torres Strait Islanders. The definition of 'native title' is suffused with human elements. Native title rights and interests are, in essence "the communal, group or individual rights and interests of Aboriginal peoples or Torres Strait islanders in relation to land or waters".[6]

That message has come through in many ways at this conference. It was apparent from the moving opening remarks by Mrs Bonita Mabo, who said that Indigenous people all over Australia are proud and are saying where they come from and who they are since native title was recognised.

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1 *Native Title Act 1993* ss 94A, 225.

2 *Native Title Act 1993* ss 24BA-24EC, 199A-199F.

3 *Native Title Act 1993* s 86F.

4 See *Wik Peoples v Queensland* (1994) 49 FCR 1 at 6-8; 120 ALR 465 at 470-472 per Drummond J; *Fourmile v Selpam Pty Ltd* (1998) 80 FCR 151 at 175 per Drummond J; *Western Australia v Ward* (2000) 99 FCR 316 at 368-369 [190], 375 [219]; 170 ALR 159 at 208-209 [190], 214-215 [219] per Beaumont and von Doussa JJ; *Mitakoodi/Juhnjlar People v Queensland* [2000] FCA 156 at [12], [21] per Spender J; *Munn for and on behalf of the Gunggari People v Queensland* (2001) 115 FCR 109 at 114 [22], quoted with approval by Sackville J in *Kennedy v Queensland* (2002) 190 ALR 707 at 714 [30].

5 *Western Australia v Ward* (2002) 191 ALR 1 at 21 [32] per Gleeson CJ, Gaudron, Gummow and Hayne JJ.

6 *Native Title Act 1993* s 223(1).

3. Young people have a significant role – now and in the future

A special feature of this conference has been the Indigenous Youth Forum.

Young people can have an important role in the resolution of native title proceedings and land claims. Certainly the elders will usually be the main witnesses, speaking with knowledge and authority about their traditional country. But for native title to survive,[7] the traditional laws and customs must be passed on from generation to generation.

If it is the responsibility of older people to teach the young, it falls to young people to keep the culture alive. In the De Rose case, for example, Justice O'Loughlin said that, in his opinion, it was "very disappointing and somewhat significant not to have received evidence from more young people. One is left wondering" he said "whether the members of the younger generations have the same interest in native title entitlements as their elders."[8]

4. For native title to work on the ground, relationships must be created, nurtured and maintained

Native title is in part about sharing the country, and to do that effectively requires sound relationships.

Geoff Clark drew inspiration from a church service in New York to make the point that people who share each other's pain and suffering can also give each other encouragement. He urged Aboriginal people to do just that and walk to the top of the hill together. Others here have demonstrated the strength of such relationships.

The other challenge is to build relationships between people who may not have a relationship before they are thrown together by native title proceedings, or who may have had a difficult or hostile relationship. And the challenge is for all the participants. In negotiations that factor can influence choosing an option or approach which at the very least does not damage relationships, but actually enhances them into the foreseeable future.

5. To secure sound agreements or just litigated outcomes there needs to be clear communication

There are various types and levels of communication. Most of the engagement in the native title arena is by written and spoken word.

But not all communication is by language. The elaborately decorated dancers at the opening session gave us a rare glimpse of the rich cultural heritage that they maintain through traditional dancing.

Max Stuart told us that what he has is not in a book, it is in his heart and mind.

Alison Anderson reminded us that English is a foreign language, yet much native title work is transacted in that language. Christine Zuni Cruz pointed out so clearly the cultural gaps between systems of law which must be recognised and respected before justice can be done.

How does one adequately convey in words the essence and detail of the connection between people and land?

This challenge of finding ways to communicate effectively does not just arise between Indigenous and non-Indigenous Australians. It is an issue for practitioners in different disciplines – lawyers, anthropologists, historians and linguists – and is an issue when litigants, lawyers and witnesses engage in the judicial process.

Many other examples given at this conference support the proposition that to secure sound agreements or just litigated outcomes there needs to be clear communication between the participants.

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7 See *Western Australia v Ward* (2002) 191 ALR 1 at 21 [32] per Gleeson CJ, Gaudron, Gummow and Hayne JJ.

8 *De Rose v South Australia* [2002] FCA 1342 at [15], see also [905].

6. The institutions administering native title must keep their practices under review, and refine or change them as necessary

By now, the institutional aspects of the native title system are well known. In particular, the various powers and functions of native title representative bodies, the National Native Title Tribunal and the Federal Court are widely understood.

Indeed, in his powerful Mabo lecture, Noel Pearson made the point that in the past decade much has been written about the procedures rather than the content of native title. In that lecture, he offered a critique of the law and the institutions administering it.

He noted how Indigenous organisations and leaders had responded to and dealt with the challenges of native title. He observed that they had failed to control the actions of professionals who they engaged, allowing them to run the claims. He was implicitly challenging native title representative bodies to raise the level of performance and to raise the level of discourse on the law of native title.

Brian Stacey from ATSIC outlined the need to tackle head on the question whether we are making progress in native title and foreshadowed a review of policy by ATSIC – the body which provides funding to the native title representative bodies. He expressed the hope that the service delivery function of representative bodies will become more effective.

There was detailed discussion of mediation practice used to deal with native title issues. The practices and personnel of the National Native Title Tribunal came under the spotlight and various suggestions were offered. Dr Gaye Sculthorpe, a member of the Tribunal, outlined the Tribunal's proposed training strategy for improving the knowledge and skills of members and staff of the Tribunal in this sensitive and significant aspect of the Tribunal's work.

In a plenary session, the role and practices of the Federal Court were examined. Professor Mick Dodson looked at some of the procedures and values of the court which guide its case management and yet, although well suited to other forms of litigation, may not fit as well to the proper resolution of native title issues. In a suitably measured address, Registrar Warwick Soden outlined the limitations within which the Federal Court operates but pointed out the opportunities for the court, operating as a court, to review and amend its procedures in discharging its responsibilities under the Native Title Act.

For each of those institutions, as well as for governments, such ongoing reassessment is essential if we are to improve our performance and show the leadership expected of us in dealing with the many challenges that native title issues provide.[9]

7. The parties need adequate resources to achieve just outcomes

Resource limitations continue to pose threats to the capacity of the system to deliver outcomes.

Professor Mick Dodson pointed to the apparent disparities in the relative funding of the main participants in native title proceedings.

Resources are not confined to money. One of the real challenges is finding people who are qualified and available to do the work as lawyers or expert witnesses, whether as employees or consultants.

The other resource that is sometimes in short supply is time to do what needs to be done – time to do research, to get instructions, to prepare for a hearing or negotiations, and to comply with court orders.

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9 For references to the leadership role of the Tribunal see NNTT *Strategic Plan 2003-2005*, What we want to be known for; Key success areas.

8. There are runs on the board and more can be scored – but take care how you do it

There have been 31 determinations that native title exists and 14 that native title does not exist. To date some 77 Indigenous land use agreements have been registered and some 23 are being considered for registration. Many more are being negotiated.

Some people have suggested that, after a decade or so of activity, these figures are too low. But these are the tip of the iceberg. Indigenous land use agreements, whether they provide the practical working out of native title determinations or are "stand alone" agreements reached before, and quite independently of, native title determinations are but one form of agreement. Thousands of other agreements have been negotiated under the Native Title Act or because of the possibility that native title exists.

Various speakers have acknowledged that Aboriginal people and Torres Strait Islanders are at the table negotiating about matters in ways and with people that could not have been imagined a decade ago. There has been a change in the mindset of many Australians, and particularly in key industries, so that it is increasingly part of day-to-day business to engage in discussions or negotiations with Indigenous people about a range of land use matters. Many of those negotiations proceed irrespective of whether the group has or can prove native title. Indeed many agreements are made long before native title is shown to exist and, potentially at least, with groups who could not prove that they have native title.

Professor Marcia Langton and her colleagues at Melbourne University, together with project partners, have developed an agreement database, which demonstrates the range and variety of agreement making to date, and will be expanded in the years ahead. It was launched and demonstrated at this conference. It can be accessed at <www.atns.net.au>.

But experience to date is showing that not all agreements will stand the test of time. We are far enough down the track to be able to make an assessment of what works and what doesn't, and even to attempt to describe what the elements of a good agreement are.

So we should acknowledge, indeed celebrate, that there are runs on the board, and we should work in the expectation that more will be scored, but we should work in a more experienced and informed fashion to ensure that agreements are durable.

Conclusion

Native title has received mixed assessments – at this conference and elsewhere. Some of our speakers have referred to a system that is "clearly flawed", to the progressive "whittling away" or rights by legislation and court processes, and to a "growing gap between expectations and outcomes".

Others suggested that as we are stuck with the present system we should do our best to make it work, and make the most of the opportunities that exist. As Professor Larissa Behrendt put it succinctly, there needs to be "a marriage of vision and pragmatism at a local level".

In the Mabo lecture, Noel Pearson said that, despite concerns that the native title system is not delivering, native title is not a dead issue. It will be a crucial factor in land issues for years to come. He described what he saw as the strengths of the Native Title Act and problems with it, and argued that Indigenous people will have to develop new strategies.

Certainly the combined effect of judicial decisions and some provisions of the Native Title Act is that the road will be long, tortuous and expensive if some groups are to achieve native title outcomes. This is a marathon, not a sprint. If people are to embark upon it, they need to have guidance on where they are heading, and what might be encountered along the way.

There have been and will be positive outcomes. As my colleague Fred Chaney sometimes says, one's assessment of these matters depends on whether one sees a glass half full or a glass half empty.

Despite the difficulties, much has been achieved by and for groups of people in different parts of Australia. For those people, Marcia Langton reminded us, a "price cannot be put on that success". Indeed, in a real sense those local outcomes are "priceless, valuable and mean so much" to those people who have achieved them.

The Native Title Act provides, and this conference has demonstrated, that much more than native title determinations and associated agreements can be gained from the system. As I suggested earlier, the challenges are great, but the ways of meeting them are many.

People need to look inside and outside the framework of native title laws to fashion outcomes that meet their needs and aspirations. The challenge we must face is to build on the experience of the past decade to make an even better future.

Youth Forum Rap Poetry

Youth delegates at the Native Title Conference Youth Forum in Alice Springs wrote the following rap poems. We include them here as a testament to the spirit of Indigenous Youth.

There's a demand for land

There's a demand for land
Should be in our hands
Our powers should expand
So we can make our plans
Instead of taking your commands
like a dog
My people been driven to grog
Can't see through the racist fog
Long road to jog
Looks like we 're bogged

By: Willie Sevallos. Robert Niland. Rohan McLoughlin. Michael McDonald. Ryan Liddle. Mitchell I.K

We are the Youth, we are the future

We are the Youth, we are the future
People try to put you down & dispute ya
We wanna put things right
We're not here to fight
Keep things tight
Keep our culture in sight
Respect our elders & our land
Devise a plan to stand hand-in-hand
Be strong, be all we can
Don't pretend, be proud till the end
Don't be shame, play your own game
We want rights to our land
So our children can understand
This is theirs to take in hand
To pass on
After the elders are gone
We are strong, we have pride
We will take the land
Under our stride

By: Lorena Walker. Mica Fleming. Catherine Greene. Gerry Reid. Jessica Laruffa. Meghan Robertson. Centralian College