In an attempt to move forward and overcome shortfalls within the current tax system and legal environment, specifically with regard to the use of charitable trusts, and to address issues of capacity building, community development and Aboriginal economic development, the Minerals Council of Australia (MCA) presented the 'Aboriginal Community Development Corporation' (ACDC) model drawing on work by Adam Levin. Under this model, the ACDC would be established under the *Income Tax Assessment Act 1997* as a new category with tax exemption of deductible gift recipient status. Debate around this potential model highlighted the lack of appropriate 'corporate' forms to meet the functional needs of Indigenous communities, and provided a valuable starting point for the development of new or innovative governance structures.

Throughout the Symposium, the nature of the interaction between Indigenous Australians, corporations and the tax system was debated. Some argued that Indigenous Australians, like their US and Canadian counterparts, should be given sovereign immunity from tax in order to help overcome Indigenous disadvantage. Others perceived such a view as 'special treatment', which would work against the aim of building economically sound communities, whilst others took the view that special tax considerations were simply 'cost shifting' and that Indigenous people should be prepared to engage with risk and responsibility. These discussions made it plain that there exists a need to shift attitudes, thinking and language away from concepts of charity and welfare and towards concepts of national priority, incentivisation, partnership and engagement with the private sector.

To achieve these ends, agreement was reached to establish a working group with broad ranging representation to continue this work and further discuss issues raised throughout the Symposium. Presentation of these issues will be further facilitated through the annual Native Title Conference in June 2008 in Perth, and the Aboriginal Enterprises in Mining and Exploration Conference associated with the MCA conference to be held in Darwin in September.

The Symposium set the stage for increased discussion, research and development of alternate arrangements for enhancing economic benefits for Indigenous communities and their interactions with government and the private sector, and continues the ongoing work of the ATNS Project, which began in 2002. Funded by an Australia Research Council Linkage Grant, the Project involves a partnership between the University of Melbourne, the Native Title Research Unit at AIATSIS, the Department of Families, Housing, Community Services and Indigenous Affairs and Rio Tinto Pty Ltd. The Project more broadly, involves a comparative study of the implementation of agreements and treaties with Indigenous and local peoples across selected Australian and international case studies. It aims to investigate the specific factors that promote long-term sustainability of agreement outcomes and the capacity of agreements to endure over time and continue to meet the economic, environmental and social objectives and goals of the parties.

The workshop was supported by AIATSIS, BHP Billiton, Newmont Australia and Santos. For more information on the work of the Agreements, Treaties and Negotiated Settlements Project, please visit www.atns.net.au. The work of AIATSIS on Taxation, Trusts and the Distribution of Benefits can also be viewed online http://ntru.aiatsis.gov.au/major_projects/taxation_trusts.html.

The role of native title in reconciliation

Speech delivered by the Attorney General, the Hon Robert McClelland MP

Just under two weeks ago, in the Australian Parliament, our Prime Minister said 'sorry'. He said 'sorry' for the past mistreatment of Indigenous people – particularly the stolen generation. He apologised for the pain and suffering caused to them, and to their families – and the indignity and degradation inflicted on a proud people and a proud culture. However, he also talked of the importance of moving forwards together, of forging new relationships, new partnerships. I believe native title has a crucial role to play in forging this new relationship. Just as an apology recognises and acknowledges the past hurt caused by the removal of children, through native title we acknowledge Indigenous peoples ongoing relationship with the land. To bury native title in a unnecessary complexity is an affront to that heritage. In short, native title is but one way of recognising Indigenous peoples' connection to land.

Where indigenous people have lost their native title by removal or through the passage of time, we should be able to find a way to recognise their relationship with land. In summary, we need to move away from technical legal

arguments about the existence of native title.

In my short period as Attorney-General I have spent some time trying to get on top of native title. I have not yet succeeded. But I have discovered four things:

- native title is highly technical and complex;
- native title nonetheless has great potential – both symbolic and practical;
- we have a long way to go before we realise the full potential native title can bring.
- nonetheless, there are some excellent examples of how to achieve real outcomes.

The other thing to keep in mind is that native title is important but it is far from a complete answer to addressing the rights of all indigenous Australians. This recognised in the Preamble of the Act, which states in part; "It is also important to recognise that many Aboriginal people and Torres Strait Islanders, because they have been dispossessed of their traditional lands will be unable to assert native title rights and interests…."
In that context it should not be overlooked, for instance, that members of the stolen generation – and their descendants have by third party intervention may have been deprived of their historical connection to their traditional land.

The Rudd Labor Government is also committed to a new partnership with the indigenous community and closing the gap between Indigenous and non- Indigenous Australians. It is committed to halving the gap in literacy, numeracy, housing, infant mortality and employment outcomes and opportunities between Indigenous and non-Indigenous Australians.

Native title can play a role in this new partnership. In short, native title is about more than just delivering symbolic recognition. It can and should have practical benefits as well. A native title system which delivers real outcomes in a timely and efficient way can provide Indigenous people with an important avenue of economic development. This is a key priority of the Rudd Labor Government. We have an obligation to past and future generations not to squander that opportunity.

Nearly 15 years ago the High Court found that Australia's common law could recognise Indigenous peoples ongoing connection to the land. It recognised what courts in other common law countries had recognised up to 100 years before– that Indigenous people had a form of land ownership prior to white settlement.

The Native Title Act that followed was a cautious step forward. The Act sought a way through the complexities and uncertainties of common law claims. It struck a fine balance between allowing for the recognition of native title and validating other forms of land tenure. The heart of the Act was the principle that the recognition of Indigenous peoples' ongoing connection with their land should be resolved by negotiation and mediation not litigation.

Regrettably that admirable intention of the Act has not been realised. Anecdotally, it seems all too often negotiations are characterised by the absence – rather than the presence – of "good faith". All participants from government down can do much better. Much better in resolving native title claims. Much better in creatively and innovatively using negotiations as a vehicle to achieve practical outcomes.

What caused this negative and often obstructive attitude to negotiation ? I think in some ways it was a reaction to the Mabo case itself. Some have painted the decision as the zenith of judicial activism. Both the meaning of the Mabo decision and the intent of the Native Title Act soon became casualties of a spiteful culture war. If the scaremongers were to be believed, backyards were at risk and an apartheid system was being created in the Australian outback. As a result, native title was seen as a zero sum game. It became strangled in litigation and arguments over technical provisions of a complex Act. An opportunity for reconciliation has all too often become an instrument of division.

But we must now have the opportunity to grasp the momentum created by the apology. It's time to develop new attitudes and new ways of thinking and doing things. In this 15th anniversary of the Mabo decision, there has never been a more pressing need for a new way of thinking in relation to native title. More to the point – there has been more opportunity to achieve outstanding outcomes.

But tinkering at the edges is not enough. Real progress will only come through a change of attitude on the part of all native title participants; whether it is the purists intoxicated by their expertise in an horrifically complicated system that – at times – they have aggravated. Whether it is governments that have obstructed the resolution of claims because of a belief that there are matters which can only be resolved by a court. Whether it be some claimant groups who unreasonably refused to accommodate legitimate claims by others. Whether it be some respondents who have all but persuaded themselves of fanciful arguments about potential prejudice.

Native title negotiations can present a real opportunity to facilitate the reconciliation process. Last year's determination at Noonkanbah consent determination in Western Australia was a case in point. In the 1970s that country was the scene of confrontation and protests. But thirty years later, through native title processes, the Aboriginal group, Government and other parties were able to come together and agree to recognise the Yungngora Peoples rights in the land.

Improving the way we consult and the relationships we forge along the way are two of the things that will characterise this Government's approach to Indigenous affairs.

The Way Forward

We now have an incredible amount of knowledge and experience about what native title is, and what it isn't. And about the sadness of people dying before their peoples' claims are determined.

We are all aware how complex native title can be. It has been graphically illustrated by a number of recent cases. In the case of the Rubibi claim, native title was described – with some justification – by the judge as being in a "state of gridlock". In some cases, courts are being asked to resolve issues to which are not well suited to the winner takes-all judicial processes. It is a tragedy to see people dying before their peoples' claims are resolved however, the knowledge and positive experience that now exists the opportunity to improve outcomes.
To achieve this we must put aside old attitudes. And we must no longer expect our courts to resolve issues which should be dealt with by negotiation rather than litigation.

The Rudd Government is determined to see more, and better, outcomes delivered through native title processes.
Our objectives for the native title system are:

- where-ever possible, resolving land use and ownership issues through negotiation, because negotiation produces broader and better outcomes than litigation
- facilitating the negotiation of more, and better Indigenous Land Use Agreements and ensuring that traditional owners and their representatives are adequately resourced for this
- making native title an effective mechanism for providing economic development opportunities for Indigenous people;
- Avoiding unduly narrow and legalistic approaches to native title processes that can result in the further dispossession of Aboriginal and Torres Strait Islander people.

Above all, my objective is to ensure that native title is not seen as an end in itself. I repeat it is not all gloom. There have been some truly inspiring outcomes. And it is a credit to those involved. I am committed to working constructively with my State and Territory counterparts to share ideas and lessons learned. With our collective experience in the native title system, we need to identify the policies and practices that work best, and learn from each others' mistakes.

To this end I am pleased to announce that in July 2008 I will be participating in a Native Title Ministers' Meeting that will for the first time bring together Ministers from like-minded governments around the country. Through all Governments working together - through cooperative federalism - to find a new approach to resolving native title issues an enormous amount can be achieved.

On the issue of funding, Native Title Representative Bodies must have the resources they need to properly assist native title parties pursue timely and mutually beneficial native title outcomes. Prescribed Bodies Corporate will also play an increasingly important role as greater numbers of claims are determined.

To make sure we are funding the system adequately into the future, my Department is currently coordinating a comprehensive review of Commonwealth native title funding to be completed by July 2008.

There is room for all parties to take a step back, and adopt a more flexible and willing approach to negotiations. For example, the current approach in many native title claims is to start by considering connection. However, problems arise because there aren't enough experts, and there is no straightforward way to make them more readily available. Where experts can be secured, reports are slow and costly. Claims can become mired in competing arguments about connection to quite specific areas.

Effectively, we are trying to take an historic and geographic aerial snapshot in circumstances where there was no registrar of titles and certainly no GPS to determine boundaries.
We should consider finding a different starting point. Purists may be horrified at that suggestion; but I believe there can be benefits all round. For instance the new

starting point could involve taking an interest-based approach to claims. It may involve starting with a consideration of tenure. It may be having a connection process run in parallel with discussions about a range of outcomes, native title and non native title.

By sitting down at the start and discussing what interests they have and what outcomes they are seeking, parties may be more readily able to identify opportunities for the timely and satisfactory resolution of the claim.

This may be through a determination of native title, or it may be through non-native title outcomes. It may be a combination of the two. If native title pure and simple is the desired outcome, then connection evidence will still be required to determine the claim. However, should connection not be made out, the parties can consider whether there are alternative agreements that can still be reached.

Similarly, early consideration of tenure may more readily identify where native title may continue to exist, and where it may have been extinguished. It may assist in resolving overlaps, and identifying where connection evidence will be required. Knowledge of the tenure in a claim may provide all parties with the opportunity to consider what kind of outcome is possible.

Importantly, being unable to meet the required standard for a determination of native title at a particular point in history does not mean those Indigenous people do not have strong relationships with the land and with each other. But it does mean that claimants need to consider what other results they may be willing and able to achieve from a claim. And Governments need to consider how they might meet those aspirations. For example, I am keen to work with Minister Macklin to explore how land ownership and management opportunities through the Indigenous Land Corporation can be more readily accessed as part of a negotiated outcome.

It may be possible to sit down and negotiate where Government can assist in developing comprehensive business plan.

Much can be achieved if parties are up front about what they really want and open-minded about finding creative solutions. One successful example is the agreement negotiated in the Wotjobaluk case, between the native title claimants, the Victorian Government and a number of other respondent parties, including the Australian Government.

While the determination recognised native title rights over less than three percent of the original claim area in Western Victoria, the broader settlement package delivered a range of outcomes.

These included:

- recognising ties to traditional country,
- establishing a consultation process with traditional owners,
- cooperative land management arrangements and
- freehold title to parcels of land of cultural significance.

In taking this approach Victoria has recognised the broad opportunities native title processes can present, and that the experience people take from the process can make or break future relationships.

Native title - as a property right under Australian law - presents a real opportunity to Indigenous people to negotiate positive economic outcomes. The Ord River Agreement in WA is an example where native title negotiations have resulted in millions of dollars being targeted at developing the capacity of local communities to engage in the local economy and benefit from future development.

In the Northern Territory, the Larrakia people have used native title processes to successfully negotiate a number of agreements with the Northern Territory Government. From seed funding of $10,000, the Larrakia Development Corporation has developed 57 residential lots without any recourse to government assistance. After private investment of $6.4 million in the project, the Corporation is debt free and has returned $250,000 in grants to the Larrakia people from its operations. And one of the Corporations businesses, Larrakia Homes, has recently won a number of Housing Industry Awards.

These are just some of the examples of the benefits that can be achieved if all parties take a flexible, creative approach and seek to resolve a range of issues within the context of native title negotiations. I would like to see more outcomes like these being achieved where native title rights are a basis for building sustainable long-term outcomes for communities. As I say, native title should not be seen as an end in itself.

Our collective experiences in negotiating native title matters should equip us all to take advantage of opportunities to secure broader and better land outcomes.

To ensure the Australian Government engages with other stakeholders in a constructive and transparent way, I will be consulting with my ministerial colleagues about principles the Government will follow when undertaking future act negotiations.

Conclusion

As in all areas of the law, there are, and will continue to be, outstanding questions in native title. However, fifteen years of experience with the native title system should enable parties to accept that that an outcome does not have to be legally perfect to work in a practical sense. In particular, it is clear that in this area, there will sometimes not be clear cut legal answers or the court's decision will not be entirely predictable. So unless participants want to risk an all or nothing legal throw of the dice, there must be a will on both sides to devise workable solutions.

Through parties focusing on their interests in claims, and how these might be met in practice, it should be possible for parties to negotiate more timely and satisfactory outcomes.

Native title is uniquely placed - to acknowledge traditional laws and customs, and the relationship between Indigenous people and the country they have lived on for thousands of years; and to provide opportunities to the present day native title holders and their communities.

More that fifteen years on from Mabo, the native title system presents all parties with an opportunity to generate real and lasting outcomes. I would encourage all participants in the system to grasp those opportunities and ensure native title processes deliver real benefits for more Indigenous Australians. If properly done right native title can help develop positive and enduring relationships between Indigenous and non-Indigenous Australians. There is no point for it to be a point of division.

Native title negotiations get people talking – people who might otherwise have had no reason to sit around a table together. They can be a vehicle for reconciliation and ongoing positive relationships.

Strong relationships are the cornerstone to long lasting and effectively implemented agreements – and to wider partnerships as we build a modern nation better equipped to meet the challenges of the future – for all Australians.

This speech was delivered at the Negotiating Native Title Forum Lawson Ballroom, Level 2, The Novotel Brisbane 200 Creek St, Brisbane, 29 February 2008. The speech is available online: http://www.attorneygeneral.gov.au/www/ministers/RobertMc.nsf/Page/Speeches_2008_29February2008-NegotiatingNativeTitleForum

What's New

Reforms and Reviews

Dept of Industry, Tourism and Resources. Leading Practice Sustainable Development Program for the Mining Industry: Working With Indigenous Communities

This handbook acknowledges the traditional and historical connection that Aboriginal people have to the land, and the effects of colonisation and development, including mining. It also addresses cross cultural issues and how mine operations impact on neighbouring Indigenous communities. Issues to do with the recognition of land rights and native title are discussed as well as how relationships are developed and fostered between mining companies and Indigenous communities through agreement making. Recognition of differences in culture, language, law and custom are an important part of these processes, and some principles of community engagement are discussed.

Recent Cases

Australia

Doyle & Ors on behalf of the Kalkadoon People #4 v State of Queensland *[2007] FCA 1941*

Directions hearing concerning the Kalkadoon People #4 claim. Prior to the lodgement of the claim there were a number of claims in existence that were withdrawn. The applicant (Mr Taylor) was a member of an applicant group in the withdrawn claims but was no longer a part of the Kalkadoon #4 claim. He filed a notice of motion seeking to be joined as a party to the proceedings and for an order that the proceedings be struck out got failing to comply with the authorisation requirements of the *Native Title Act 1993* (Cth). However Justice Dowsett found that the claim was properly authorised. His Honour noted that it was