

Marcia:

We have Graeme Neate President of the Native Title Tribunal he has a very long history of judicial and research in this area as well as land rights law and Professor Doug Williamson from the Faculty of Law at the University of Melbourne so I will hand over to Graeme and we'll take questions at the end.

Agreement-Making and the Native Title Act¹

by

Graeme Neate²

It is a pleasure to be here this evening. I have come to Melbourne from Brisbane this week to participate in a course that Professor Doug Williamson organises each year and I have been able to combine this evening's presentation with the teaching of native title law and resources development at Melbourne University. We will share with you some ideas about agreement making under the *Native Title Act 1993*. This is an area that Doug and I practise in regularly, in my case full-time and in Doug's case defacto full-time, even though he is a part-time member of the National Native Title Tribunal. We will deal with a range of types of agreements and the whole process and rationale of the agreement making for the *Native Title Act* in our presentations this evening.

Background to the *Native Title Act 1993*

It might be a useful introduction to the agreement-making process to look at the background to the *Native Title Act* itself.

On 3 June this year, we will be marking the 10th anniversary of the High Court's decision in the case of *Mabo v Queensland (No 2)*³ and there will be a number of

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³ *Mabo v Queensland (No 2)* (1992) 175 CLR 1

occasions where people will be reflecting on where we come from with native title, where we are at the moment and where we might be heading in the near and longer term. Anniversaries of this sort are, perhaps, rather artificial occasions but are useful nonetheless to take stock of what has happened.

The background to the *Native Title Act* predates the High Court's decision in *Mabo (No 2)* 10 years ago, and I want very briefly to traverse the legal history of native title and its precursors in Australia.

When the Crown assumed sovereignty over different parts of Australia there was no recognition under the introduced law of Indigenous rights and interests in the land. The first act of possession on behalf of the Crown was by Lieutenant (as he was then) James Cook in 1770. Cook had instructions to "take possession" of the land "with consent of the natives". Cook was instructed, if there were Indigenous people there, to "cultivate a friendship and alliance with them...shewing them every kind of civility and regard" and seek to promote an interests of the Crown in the area. If he found the land "uninhabited", he was to take possession for the Crown. Clearly Cook did not find the land uninhabited, but he took possession for the Crown nonetheless. Somewhat ironically, in a recent consent determination of native title on certain islands in the Torres Strait, Justice Drummond in his reasons for decision quoted Cook's observation about Aboriginal people on those Islands as support for the fact that the people had continuous links to the islands from the date which the Crown assumed sovereignty until now in order to establish their native title.⁴ So James Cook, having made the records that he did, was cited more than 200 years later in support of Indigenous rights in Australia, albeit that he took possession on Possession Island as if there were no inhabitants.

The Crown assumed sovereignty progressively over different parts of Australia. When Captain Arthur Phillip ran up the British flag in what became known Port Jackson in 1788, he acted on instructions. The Crown asserted sovereignty westward to a line of longitude somewhere west of Gove Peninsula. 1788 became

⁴ *Kaurareg People v Queensland* [2001] FCA 657 at [3]-[5].

a significant date in the case of *Milirrpum v Nabalco Pty Ltd* (the Gove Land Rights case).

Over time the Crown assumed sovereignty over other parts of Australia – in 1825, then 1829 in Western Australia and progressively through to 1879 in the Torres Strait.⁵

You will all be aware of the notion which prevailed in Australian law that, at least so far as the law was concerned, it was not necessarily that there were no people present in Australia, but the people who were present were considered to be so low on the scale of social organisation that they were incapable of forming legal relations. So depending on how you interpret the term *terra nullius*, there was either nobody there or nobody worth dealing with. Notwithstanding that this flew in the face of historical reality, it was a legal fiction which underpinned much of the development of the law in Australia and it was stated from time to time in some very authoritative judgements. It was a sort of taken-for-granted assumption. Nobody really tested the proposition. It was simply stated that Australia was a colonised country, not one that had been, for example, invaded or that the people had been conquered.

The Gove land rights case: This fiction of *terra nullius* proceeded, in a formal legal sense, to be unchallenged until the late 1960s when the Commonwealth was wanting to grant some interests in the Gove Peninsula area of the Northern Territory in favour of a bauxite mining company. The local Aboriginal people decided to assert that they had what they called common law native title rights in respect of the land, and they commenced proceedings in the Supreme Court of the Northern Territory. That resulted in a long trial in which, amongst other things, senior people produced to the Court highly important ceremonial objects and paraphernalia in a way that had not been disclosed to judges and lawyers before that date, in order to convince the Court that they really did have clear links to their

⁵ See M H McLelland “Colonial and State Boundaries in Australia” (1971) 45 Australian Law Journal 671; G Neate “Proof of Native Title” in B Horrigan and S Young (eds) *Commercial Implications of Native Title*, 1997, Federation Press, 254-258.

areas of traditional country. The Gove Land Rights case decision was handed down in 1971.⁶

Justice Blackburn, in a very long and scholarly judgement, held amongst other things that the local people had a recognisable system of law.⁷ However, he also held that the law he was applying did not include, and had never included, the doctrine of communal native title.⁸ So, although these people had a recognisable legal system, the law of Australia at that point as his Honour understood it did not include the doctrine of native title. Given that the rights and interests in land they purported to have were spiritual or religious in nature and had so little resemblance to property notions in land as the law understood it, there was nothing there to recognise as property rights.⁹ In any case, in the absence of doctrine of native title, he was incapable, as a judge applying the law at that time, to recognise those rights.

Land rights legislation: In the absence of judicial recognition of native title rights and interests, the debate then moved to the parliaments and this became a political issue. Governments don't usually develop policies in these areas in a vacuum. Around the time of the Gove case there had been not only agitation that had led to those proceedings but a number of other events which placed the issue of Indigenous land rights on the political agenda. For example, in the mid-1960s there had been a strike at Wave Hill, where the Gurindji people walked off to a place called Wattie Creek which is part of their traditional country. They went on strike for a whole range of reasons including working conditions, but out of that grew aspects of what became known as the land rights movement. In the early 1970s the Aboriginal tent embassy was established outside the (old) Parliament House in Canberra.

And so in various ways, in various circumstances around the country the issue of Indigenous land rights was on the political agenda. In the 1972 federal election campaign, the Australian Labor Party made it one of the planks in its election

⁶ *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141.

⁷ *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141 at 267, 268.

⁸ *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141 at 143

⁹ *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141 at 273.

platform that a Labor government would legislate for land rights for Aboriginal Australians. Soon after the Whitlam government was elected in 1972, they appointed Justice Woodward to conduct a Commission of Inquiry into what form land right legislation would take. Justice Woodward was a recently appointed judge, having been senior counsel for the plaintiffs in the Gove land rights case. So, having been on the losing team, he was appointed to draw up some proposals for land rights legislation. And he did¹⁰. He was assisted in this project by the relatively recently established Central Land Council and Northern Land Council in Northern Territory. The Northern Land Council engaged as their barrister to help them Mr Gerard Brennan QC from the Brisbane Bar who was later to become Justice Brennan of the High Court, and then Chief Justice of the High Court. Justice Brennan wrote the lead judgement in the *Mabo (No 2)* case.

Mr Brennan QC prepared a proposal for a land rights Act in the Northern Territory which, as I understand it, was not only in essence but in detail that adopted by Justice Woodward in his recommendation to the Federal Government. The Government, in turn, adopted the recommendations and incorporated them into land rights legislation. Interestingly, because politics surrounds all this, the legislation was stalled in Federal Parliament when the Whitlam government was dismissed in 1975, and was reintroduced in an amended form by the Fraser government the following year. The *Aboriginal Land Right's (Northern Territory) Act 1976* was enacted by the Federal Parliament on what was really a bipartisan approach to Aboriginal land rights issues. The Labor Party and the Liberal Country Party coalition in those days were pretty much at one on the broad architecture of the legislation. The difference was the detail.

That legislation proceeded on the basis that something had to be granted by a law of the Parliament to Aboriginal people because the common law had failed to recognise any pre-existing rights that the people had. So the land rights that were granted over the past 25 or so years were grants from the Crown to particular groups of Aboriginal people. A grant of fee simple title – a special sort of fee

¹⁰ A E Woodward, *Aboriginal Land Rights Commission, First Report*, 1973, AGPS, Canberra;
A E Woodward, *Aboriginal Land Rights Commission, Second Report*, 1974, AGPS, Canberra.

simple with special conditions surrounding it, a particularly secure form of fee simple title - was nonetheless a grant from the Crown to the Aboriginal people.

There followed subsequently a range of Acts of parliament in different states and territories around the country. Some of you will have heard of the *Pitjantjatjara Land Rights Act 1981* in South Australia, where something like 10% of the area of South Australia was subject of a grant to the Pitjantjatjara people.¹¹ That was followed by the *Maralinga Tjarutja Land Rights Act 1984* where another area of land was granted to local Aboriginal people. The New South Wales Parliament created its own land rights regime in the mid 1980s – the *Aboriginal Land Rights Act 1984*. The Queensland Parliament enacted the *Aboriginal Land Act* and the *Torres Strait Islander Land Act* in 1991, and there have been other pieces of legislation which have either granted specific parcels of land to particular groups or have created a scheme under which Aboriginal people could lay claim to specific parcels of land or specific types of land.¹²

Again, the important underpinning principle of the land rights legislation is that, in the absence of judicially recognised rights to the traditional land and waters of particular groups, it was essential for parliament to make laws if Aboriginal people and Torres Strait Islanders were to obtain legally enforceable rights to parts of their traditional country.

The Mabo litigation: It was against that background that Eddie Mabo's case was brought into the High Court. The idea for litigation took form at a conference in Townsville in 1981, and proceedings commenced in the High Court in 1982. The High Court remitted the proceedings back to the Supreme Court Queensland for trial, and this rather novel procedure was overseen by Justice Martin Moynihan. His Honour was trying to find as a matter of fact whether the plaintiffs in that case the rights used to land which they said they had. He was not asked to decide whether native title existed. That was a question in which the High Court reserved itself. So unlike, I suppose, any other trial judge he was trying a long trial in the

¹¹ See *Gerhardy v Brown* (1985) 159 CLR 70.

¹² For a summary of the key features of the litigation see the entry on "Interests in Land" in "Aboriginals and Torres Strait Islanders," *Halsbury's Laws of Australia*, volume 1.

absence of a legal framework. He had no idea whether native title would be recognised. He was just asked to find out what sort of links Mr Mabo and Father Passi and others had to their land. In due course, he would prepare a three volume report, and that formed the basis of the litigation in the High Court. There were other interruptions along the way but I won't digress for the moment.¹³

The case was argued in the High Court as a case of legal principle in the middle of 1991. Now, the findings in fact weren't all favourable to the plaintiffs. In fact, Mr Mabo, on Justice Moynihan's assessment, was a far from satisfactory witness.¹⁴ And this posed some real dilemmas for counsel for the plaintiffs in the High Court because they were trying to establish a principle of law on the basis of findings which were not all entirely favourable to their clients' interests.¹⁵

About a year later on 3 June 1992, the High Court declared that "the common law of this country recognises a form of native title which, in the cases where it has not been extinguished, reflects the entitlement of the indigenous inhabitants, in accordance with *their laws and customs*, to their traditional lands."¹⁶

This was, as we know, a landmark decision. It changed the common law of Australia. On one view, because the High Court never had to deal with this question head on, the law had just never been decided. This was not so much a change in the law as the first time the High Court had had a chance to have a look at the issue. But certainly in practical terms, this was a shift in Australian legal thinking and, in any case, the earlier decisions of the Privy Council and the High Court which had taken for granted that Australia was *terra nullius*, were themselves now disputed or overruled on that particular point or assumption.

The Native Title Act 1993: The High Court, having declared that native title was recognised under Australian law except in those areas where it had been extinguished, set up in very broad terms, a new legal way of thinking, a new

¹³ For a detailed account of the litigation see BA Keon-Cohen "The Mabo litigation: a personal and procedural account" (2000) 24 Melbourne University Law Review 993-951.

¹⁴ Ibid, at 938-940.

¹⁵ Ibid, at 941.

¹⁶ *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 15

framework within which the legal system was able to think. But a decision like this is a decision on the issues before the court and does not purport to answer every question that necessarily flows from it. Courts have a specific function. The High Court performed its role in this case. But then other questions were left to be answered:

- If the law now recognises that native title exists, where does it exist? We know that it exists on one Island in the group of Islands known as the Murray Islands, we know that the Meriam people have it. But is it confined to the Torres Strait or does it apply on the mainland? The application of the principle to the mainland was determined early on.¹⁷ If it applies in the mainland, where does it apply? Which parts of the country are susceptible to native title?
- Who holds the native title, who are the people who have these rights?
- If they have native title, what is it? What is the content of native title rights and interests? What does it mean, how does it fit in relation to other legal rights and interests?
- If somebody else wants to do something on areas of land and waters where native titles exist, how do they go about doing it?

These are questions which could conceivably have been left to the courts to resolve. Mr Mabo and Father Passi and others had proceeded through to Australia's highest court to get a declaration of their rights. It could have been left to groups of other Indigenous people to do the same thing. But there were clearly a range of other interests involved. One of the early concerns that was expressed, and is still expressed ten years on, was the concern for there to be certainty as to who had rights, what they were, where they existed and what other people could

¹⁷ *Coe v Commonwealth* (1993) 118 ALR 193 at 200 per Mason CJ; *Mason v Tritton* (1994) 34 NSWLR 572 at 578-579 per Kirby P; *Western Australia v Commonwealth* (1995) 183 CLR 373 at 418.

do to explore, mine, build roads, construct pipelines, conduct tourist activities and so on.

The Federal Government of the day moved fairly quickly to issue a discussion paper and proposals for national legislation. That legislation is what we now have as the *Native Title Act 1993*. I know that Marcia Langton was involved and she remembers no doubt, much more than I do, the politics and the appeal-making, at the time. Nearly ten years down the track, some of that perhaps has been lost in the mist of time. But there was an enormous amount of discussion and activity and negotiation to get the legislation through. Significantly the Bill that was introduced into the House of Representatives was extensively amended in the Senate and so a deal had to be made to get this piece of legislation through. I recall this being very close to Christmas in 1993 and I think the Prime Minister said, in effect, that parliament would just continue to sit until this legislation went through - and low and behold it was passed, just before Christmas¹⁸. There was a very touching scene in the Senate when Senator Evans embraced then Senator Kernot.

On 1 January 1994, New Year's Day, Australia awoke to the *Native Title Act* in operation and the National Native Title Tribunal as the body to administer that Act.

That is by way of introduction because I think it is useful to know that these pieces of legislation do not just fall out of the sky; there is a history behind them and there is a social and political context in which they are developed.

Agreement-making - a principle of the *Native Title Act 1993*

One of the underlying principles of the *Native Title Act*, which has become much more evident (at least in terms of legislative language) since its amendment in 1998, is the emphasis on agreement-making as the preferred method of dealing with native title issues.

¹⁸ See D Watson, *Recollections of a Bleeding Heart*, Knopf, 2002, 451-454.

Eddie Mabo and his colleagues had to go to court, and their proceedings, for a range of reasons, took ten years to work through the system. Whilst it was not thought that subsequent litigation would necessarily take ten years, it was thought that litigating every aspect of native title probably was not the best way to go. So a scheme was created to provide for negotiated or mediated outcomes to deal with as many native title issues as it was possible for parties to deal with by agreement, rather than having to resort to courts.

We have an Act which has as its main objects:

- (a) to provide for the recognition and protection of native title;
- (b) to establish ways in which future dealings affecting native title may proceed and to set standards for those dealings;
- (c) to establish a mechanism for determining claims to native title;
- (d) to provide for, or permit, the validation of past acts, and intermediate period acts, invalidated because of the existence of native title.¹⁹

I will deal with that last point briefly because it is not essential to the issues I am talking about tonight. Once the High Court had determined that native title exists and was a legally recognisable interest in land, it became apparent that many dealings had occurred throughout Australia's history in total disregard of Indigenous peoples' interest in land. The High Court decided by a majority that compensation was not payable for past acts other than in those circumstances where the *Racial Discrimination Act 1975* (Cth) applied. The *Racial Discrimination Act* became part of the law of Australia in 1975 and so there was a range of activities and actions that had taken place between 1975 and the High Court's *Mabo (No 2)* decision in 1992 which were arguably invalid because they were in breach of the *Racial Discrimination Act*. So the *Native Title Act* purported to remedy that by retrospectively validating anything that had been done that might have been subject to legal challenge and converted the native title rights thus being extinguished into rights for compensation.

¹⁹ *Native Title Act 1993* s 3.

We are yet to deal with compensation applications. It is a great “sleeper” in the *Native Title Act*. There has been one agreement and no decisions under the *Native Title Act* on a compensation application. There are some quite difficult issues which have to be resolved, but that is another issue which I will have to put to one side.²⁰

The *Native Title Act* itself is now premised on agreement-making as the preferred method of resolving a wide range of native title issues - including where native title exists and what acts can be done where native title exists or may exist. Justice Kirby of the High Court, for example, has noted:

“the stated emphasis of the Act on the facilitation of agreement through negotiation rather than through instant recourse to judicial decision”²¹

There are other statements by judges of the Federal and High Court to a similar effect.²²

The emphasis on agreement making is clear from the specific sections of the Act as well as from the preamble to the Act which sets out the policy considerations which the Federal Parliament took into account in enacting the Act. As one Federal Court judge has observed, the government has taken an unusual step to providing an extensive preamble to the Act so that the purposes of the Act may be clearly revealed.²³ Consideration of the preamble is an aid to understanding the purpose and object of such a provision. The preamble is part of the context in

²⁰ See, for example, National Native Title Tribunal, *Compensation for native title: issues and challenges, 1999*.

²¹ *Fejo v Northern Territory* (1998) 195 CLR 96 at 139.

²² Madgwick J has described the objects of the Act as including “arriving at agreement if possible as to who are the appropriate native title claimants, or at least minimising the scope for such disputes”: *Eora People-Brown v NSW Minister for Land & Water Conservation* [2000] FCA 1238 [27]. Emmett J has stated “One important object and purpose to be found in the Act is resolution of issues and disputes concerning native title by mediation and agreement, rather than by Court determination. Detailed procedures are set out in the Act to achieve those objects.”: *Munn for and on behalf of the Gunggari People v Queensland* [2000] FCA 1229 at [28]. Branson J has noted that the Act “discloses an intention of encouraging and facilitating the resolution of native title claims by agreement”: *Kelly on behalf of the Byron Bay Bundjalung People v NSW Aboriginal Land Council* [2001] FCA 1479 at [23].

²³ *Brownley v Western Australia (No 1)* (1999) 95 FCR 152 at 160 [16] per Lee J.

which the provisions of the Act are construed. The preamble goes for many pages and says, amongst other things:

“A special procedure needs to be available for the just and proper ascertainment of native title rights and interests which will ensure that, if possible, this is done by conciliation and, if not, in a manner that has due regard to their unique character.”

The preamble to the Act goes on to say:

“Governments should, where appropriate, facilitate negotiation on a regional basis between the parties concerned in relation to:

- (a) claims to land, or aspirations in relation to land, by Aboriginal people or Torres Strait Islanders; and
- (b) proposals for the use of such land for economic purposes.”

So right from the outset there is an emphasis on trying to resolve this range of issues by agreement. Then there are specific provisions throughout the Act which provide for agreement-making to be done - the resolution of native title applications, a range of matters in relation to native title applications and what are called “future acts” (that is things which ordinarily would be done in the future in relation to land where native title has been proved to exist or may exist and which would adversely affect native title).

The Act also provides for a special form of agreement, called the Indigenous Land Use Agreement, which we will deal with a little later and which are particular features of this statute for agreement making.

Now, having established that agreement making is a core theme or policy basis for this legislation, the parliament has then gone the next step and said that we need bodies to facilitate the agreement-making process. The Act creates the National Native Title Tribunal. We are an administrative body and many of our functions are to assist parties in the negotiation of agreements. We have a specific role (which I

will spell out in more detail in a moment) in mediating claimant applications. We also have a role in assisting people who want these future acts (things like the grant of exploration or mining tenements) to reach agreements about whether such tenements should be granted and, if so, whether they should be granted subject to conditions. We also deal with things like compensation applications and assist clients to negotiate Indigenous Land Use Agreements on a whole range of topics.

We are not the only body that is created or recognised under the *Native Title Act* with agreement making functions. Indigenous groups need to be represented in asserting their interests and the Act provides for the recognition of native title representative bodies around the country. In many cases these are bodies which existed before the *Native Title Act* came along. I mentioned earlier the Northern and Central Land Councils of the Northern Territory which now owe their existence to the *Aboriginal Land Rights (Northern Territory) Act 1976*. But they have taken on additional functions under the *Native Title Act*. The Aboriginal Legal Rights Movement in South Australia was established many many years ago but it is now also a representative body under the *Native Title Act*. The Mirimbiak Nations Aboriginal Corporation is the representative body for Indigenous people in Victoria.

The *Native Title Act* spells out in some detail what the functions of these bodies are.²⁴ They include assisting people in making native title applications, doing research for them, acting for or arranging the representation for people in negotiations about claim applications and a whole range of things including future acts. They also have an important role in dispute resolution between the constituents in their area. Disputes often arise in the course of lodging claim applications and sometimes that is reflected in overlapping and disputed claimant applications.

The *Native Title Act* also expressively empowers the Commonwealth Attorney-General to provide legal aid funding to various other parties where those parties want assistance, for example, to negotiate Indigenous Land Use Agreements and other types of agreements²⁵.

²⁴ *Native Title Act 1993* ss 203B – 203BK

²⁵ *Native Title Act 1993* s 183.

The Federal Court, which is involved in native title matters, has a role in giving affect to agreements once reached. If parties can agree that native title exists in a particular area, and a particular group has native title, and they can formalise that agreement in the terms of the Act, the Federal Court would make orders to that effect.²⁶

Judicial support for agreement making

Which brings me then to what the judges think about agreement-making. There have been some very strong statements from our superior courts about the importance of agreement making in relation to native title matters. The High Court, in a case decided in 1996, said this,

“If it be practicable to resolve an application for the determination of native title by negotiation and agreement rather than by the judicial determination of complex issues, the Court and the likely parties to the litigation are saved a great deal in time and resources.”

And I pause there: that’s a fairly obvious statement to make - you can reach an agreement and save the time and expense of going to court. But interestingly the High Court goes on as follows:

“Perhaps more importantly, if the persons interested in the determination of those issues negotiate and reach an agreement, they are enabled thereby to establish an amicable relationship between future neighbouring occupiers. To submit a claim for determination of native title to judicial determination before the stage of negotiation is reached is to invert the statutory order of disposing of such claims.”²⁷

²⁶ *Native Title Act 1993* s 87.

²⁷ *North Galanja Aboriginal Corporation v Queensland* (1996) 185 CLR 595 at 617 per Brennan CJ, Dawson, Toohey, Gaudron and Gummow JJ.

Now, this is a very important statement early on in the life of the native title from the High Court because the judges are saying, as judges are often heard to say: "Go away and settle things - you'll save resources that way, even the court's resources." But they go on to say, perhaps more importantly: "You will develop sound relationships because you have to share the country and, if you are going to be 'future neighbouring occupiers' of the land, it is better to sort these things out by agreement than have a judge impose an outcome on you." And so, on a number of occasions since then, other judges have quoted this passage in the context of their decisions.²⁸

Now, this is a very positive reason for preferring agreement-making. There are some other very practical considerations also. You will all be familiar with the outcome before Justice Olney of the *Yorta Yorta* case in Victoria and southern New South Wales. That was a case which ran for something like 114 days at trial - not 114 consecutive days, it took a lot longer than that for the case to run its course, but the court actually sat on 114 days. At the end of the trial, the Yorta Yorta people lost. I realise that case is subject to an appeal and I am not wanting to talk about that aspect of it, but there is a very interesting passage towards the end of the judgement where Justice Olney also highlights why agreement-making is far better than litigating with native title matters:

"Many of the difficulties inherent in litigating a complex native title determination application have been highlighted by what has occurred in this proceeding. A substantial portion of the enormous mass of evidence presented to the Court, prepared at considerable expense to the parties, deals with matters relating to the extinguishment of native title rights and interests, an issue which only arises in the event that the observance and acknowledgement of traditional laws and customs in relation to land are shown to have survived. As it happened, in light of the conclusion expressed above, it is unnecessary to embark upon a consideration of whether

²⁸ See *Byron Environment Centre Incorporated v Arakwal People* (1997) 78 FCR 1 at 24 per Merkel J; *Fejo v Northern Territory* (1998) 195 CLR 96 at 134 per Kirby J; *Mitakoodi/Juhnjar People v Queensland* [2000] FCA 156 at [11] per Spender J; *Anderson v Western Australia* [2000] FCA 1717 at [8] per Black CJ.

and to what extent, native title rights and interests have been subjected to extinguishing events, nor does the question of the coexistence of native title and other rights arise. The time and expense expended in the preparation and presentation of a large part of the evidence has proved to be unproductive, a circumstance which calls into question the suitability of the processes of adversary litigation for the purpose of the determining matters relating to native title.”²⁹

Whatever you think about the outcome of that case, here is the judge that tried it saying that there was an awful amount of time and expense incurred unnecessarily. This just goes to illustrate, as his Honour said, that litigation is really not the best way to deal with it.

By comparison, and perhaps contrast, the Aborigines in the *Ward* case, the Miriuwung Gagerrong trial in Western Australia, succeeded in the result. It is also on appeal to the High Court but for different reasons.³⁰ The Federal Court said in the judgement (and this was a case that went for 83 days in trial), that native title exists but then other people such as pastoralists, miners all have rights that had to be recognised. Where did that leave the parties? Well, right at the end of the judgement, the judge said: “How concurrent rights are to be exercised in a practical way in respect of the determination area must be resolved by negotiation between the parties concerned. It may be desirable that the parties be assisted in that endeavour by mediation.”³¹

So, having gone through this great long trial at huge expense, the judge said in effect “you get this, you get that, you get something else; how this is going to work on the ground, you’ve got to go away and negotiate now. I can tell you the legal outcome. How it’s going to work is for you to work out. You really need to negotiate between yourselves.” This is a passage which I have used a fair bit in my mediation practice because I say to people: “If these matters go to trial and at

²⁹ *Members of the Yorta Yorta Aboriginal Community v Victoria* No VG 6001 of 1995, unreported decision dated 18 December 1998, [130].

³⁰ See *Ward v Western Australia* (1998) 159 ALR 483; *Western Australia v Ward* (2000) 99 FCR 316; and the subsequent High Court decision in *Western Australia v Ward* [2002] HCA 28, delivered after this seminar.

³¹ *Ward v Western Australia* (1998) 159 ALR 483 at 639.

the end of the day the Aboriginal people get some recognition of their native title rights, the court is not going to solve how you all get along on the ground. It is going to send you away to negotiate. If that's a likely outcome of a trial, it is going to be costly in time and expense to get to that result. It is likely to be adversarial, so that the relationships are likely to be strained in the course of litigation. At the end of the day - having incurred all that expense, straining and perhaps fracturing the relationships between yourselves - the court will say now go away and negotiate about what this is going to mean on the ground."³²

So, for various reasons, courts have said its better to negotiate and reach agreements, than to fight these matters out in the court. There are various instances, as more and more matters are resolved by agreement, when the Federal Court congratulated the parties, not just for reaching agreement generally, but for reaching quite specific agreements about resolving issues that need to be determined on a case by case basis.³³

So there is both legislative and judicial support for the notion of agreement-making as the best way to resolve native title issues.

Agreement-making and determinations of native title

Let me deal with one aspect of agreement-making and then enable Doug to talk about some other aspects of agreement-making. I want to talk about specific forms of agreement making in relation to native title determination applications - that is, applications for a declaration that native title exists over a particular area of land and waters and that a particular group, or collection of groups, of people have native title rights.

There are three particular forms of agreement that can assist in resolving these applications. The prime formal agreement is an agreement that native title exists,

³² See also *Smith v Western Australia* (2000) 104 FCR 494 at 500 [27].

³³ *Anderson on behalf of the Spinifex People v Western Australia* [2000] FCA 1717 at [7]. See also *Passi on behalf of the Meriam People v Queensland* [2001] FCA 697 at [9]; *Congo v State of Queensland* [2001] FCA 868 at [17]; *Ngalpil v Western Australia* [2001] FCA 1140 at [33].

that is, an agreement that there be a determination of native title. This does not come about by accident and it certainly does not come about easily but it does happen. The process for making it happen is briefly this:

- A group of Aboriginal people or Torres Strait Islanders will file an application for a determination of native title in the Federal Court of Australia.
- The Federal Court immediately sends the application to the National Native Title Tribunal for certain administrative processes to occur. These are carried out by the Native Title Registrar or his delegates.
- Each claimant application is subjected to what is known as the registration test, to see whether it satisfies various statutory criteria. If an application satisfies all the conditions in the Act, its put on the Register of Native Title Claims and, from that point, the Aboriginal people or the Torres Strait Islanders get certain procedural rights, as if they were native title holders. So, long before their claim is actually resolved, they have certain procedural rights under the *Native Title Act*, and people have to deal with them as if they had proved their claim.
- Whether or not an application passes the registration test, the Registrar notifies particular bodies and individuals and the community at large that an application has been lodged and people are invited to apply to the Federal Court to become parties to the proceedings.
- The Court then reviews the applications to become parties, settles the party list and sends the matter back to the Tribunal for mediation.

Now in a sense this is where the hard work starts for the Tribunal. Sometimes we have done preliminary work but, in any case, it is usually necessary to do what we call “pre-mediation” work, that is, to get people in a frame of mind and at a level of understanding that they can actively and positively in their agreement making process. Why is that necessary? It is necessary for a range of reasons. For the most part, people who are drawn into these proceedings are not drawn into them freely. They are reacting to an application on assertion of native title rights and interests and sometimes there are literally hundreds of parties to a particular application. Doug Williamson for example is mediator in the Wotjobaluk people’s

application in Victoria which, when it was referred to the Tribunal had 447 parties. Doug has to find a way in which to get all those parties (through their representatives) to work through the issues to see if an agreement can be reached.

Now that is a large number of parties but it is by no means unusual. We have matters where we have hundreds of parties to deal with. Many of them have absolutely no idea about native title or the native title process and, in order to mediate successfully, one has to sit down with people (sometimes individually) and talk them through the process: What this is about? How can their interests be accommodated? What possible outcomes might there be? What is the best result for Aboriginal people? What is the most they are likely to achieve out of this process? How might that affect the land holder or someone who's got freehold parcel of land which isn't under claim but which draws water from the river and the water's under claim? How does this affect the pastoralist in Western Queensland, an exploration mining company with a gas pipeline development, a local shire council who's concerned about where the site for the rubbish tip is going to be or how the town boundaries might need to be expanded for future development?

So we spend a lot of our time and effort just talking people through the process, introducing them to what native title is about. We then set up a series of meetings - sometimes with all the parties, sometimes with only those with a particular interest. The applicants sit down with, say, the graziers or the miners or the explorers or prospectors, or local authorities to talk through what it is the native title claimants hope to achieve from the process and how the interests of others might be accommodated, in order to see whether agreement can be reached.

The *Native Title Act* actually sets out an agenda for the mediation process. It says what the purpose of mediation is. When the court sends a matter to us for mediation you know from the Act that the purpose of mediation is to see whether parties can agree on some key issues.³⁴

³⁴ *Native Title Act 1993* s 86A(1)

- Does native title exist?
- If it does exist, who holds native title?
- What are the native title rights and interests?
- What are the interests of other people (the graziers and so on) in relation to the area?
- How do the various rights and interests relate to each other? What is the relationship between native title rights and interests on one hand and the interests of others on the other hand?

So the Act says our purpose as a Tribunal is to get people together to see whether an agreement can be reached upon some or all of these issues. If agreement can be reached, then the parties go back to the Federal Court and request a determination of native title in terms of agreement. The *Native Title Act* sets out quite precisely what a determination must say.³⁵ And the determination must say whether native title exists or not, and if it does exist:

- who the persons, or each group of persons, holding the common or group rights comprising the native title are; and
- the nature and extent of the native title rights and interests in relation to the determination area; and
- the nature and extent of any other interests in relation to the determination area; and
- the relationship between the various rights and interests; and
- whether the native title rights and interests confer exclusive possession, occupation, use and enjoyment of any of the land or waters on the native title holders.

I mentioned two cases earlier, the *Yorta Yorta* case which went for 114 hearing days and the *Ward* case which went for 83 days. Other trials have not been as long but they have been fairly long, and it's not uncommon for these cases in trial to go 30 or 40 days - by conventional litigation standards, a reasonably long trial. The cost and delays, for these sorts of actions, are usually compounded by the desire of the Indigenous parties, to hold at least some of the hearing on country.

³⁵ *Native Title Act 1993* s 225.

So the court and all its entourage, various lawyers and their advisors, instructing solicitors and expert witnesses and so on, troop out to remote locations to conduct these trials. Marcia Langton and I have shared these sorts of experiences under other regimes in years gone, and they've been pretty exciting experiences and very rewarding, but there is a lot of hard work involved and certainly a lot of hard work in preparing the trial as well as actually hearing it

We are finding that a majority of claimant applications resolved to date have been resolved by agreement; many of them without the need for a trial at all. In some of them, agreement was reached half way through a hearing. In other words, a trial will commence, but then at a point in the trial an application will be made to the court for the matter to be sent back to mediation and we will try and assist parties to reach an agreement. So of the, I think 30 or 32 determinations of native title exist to date, about three quarters of those have been via agreement.³⁶ I am confident in thinking that that trend will continue into the future.

Of course, there will be difficult cases that cannot be resolved by agreement. There will either be legal issues which need judicial attention or there will be disputes about the facts - for example, can the group of Aboriginal people or Torres Strait Islanders really prove that they have the native title rights that they claim? This is particularly complicated in those circumstances where two or more groups of Aboriginal people are in dispute about who has native title rights and interests over a particular area. It has been our experience, since the start of the mediation process under the *Native Title Act*, that state government and many other parties, even if they are inclined to settle these matters by agreement, will not decide between disputing Aboriginal groups. If Aboriginal groups cannot sort these issues out between themselves, other parties are either incapable or unwilling to determine which group they should be dealing with and hence will leave it to the court to resolve. I can imagine that in the future, notwithstanding that a number of state governments in Australia are happy to be seeing agreed outcomes, these matters at least will have to go to trial.

³⁶ For up to date information about determinations of native title see the Tribunal's website nntt.gov.au

Increasingly the trend is towards resolving native title determination applications by agreement; which means that not only do we save the time and resources but, in the process of mediating these claims, new relationships are formed. For the first time, often, people are introduced to each other. They are introduced in the context where they are being asked to make an agreement with people they do not even know yet - and so the process takes a while. People have got to get used to each other, find out what they're really about on all sides, and try and work out some relationships in the course of the negotiations which will endure after the negotiations are completed. There are some quite moving, interesting human stories that emerge along the way. But it can be a long and drawn-out process.

The process is supervised by the Federal Court, and the Court does not let it drift. We have to report back from time to time on the progress of mediation. If progress is not being made, if the parties are dragging the chain or if it appears no agreement will be reached, the Court can set the matter down for trial. So the Court has an active role to supervise the process which we are undertaking, but also ultimately to resolve these issues if agreement cannot be reached. If agreement can be reached, the court makes a formal order that native title exists in or consistent with the terms of the agreed order.

Agreements associated with determinations of native title

Native title determinations are one species of agreement, but we are finding increasingly that, as part of the resolution of native title determinations, there are associated agreements. If, for example, the land includes an area of pastoral leases, then ordinarily pastoral lessees who might agree that native title exists will want an individual agreement on their property about who can come onto the property and when and what circumstances. They want a written agreement for their property as part of the overall package of agreements for settling the native title application - and this is where you get down to the "nitty gritty, the very issues that Justice Lee said in the *Ward* case that he couldn't resolve, the very issues that he said the parties would ultimately have to negotiate. If native title exists, what do you do about the number of people who come on to exercise their native title rights? What amount of notice, if any, do they have to give to the pastoral lessee?.

Can they bring on dogs, guns, and vehicles? Can there be shooting or hunting on the property? Can you carry out these sorts of activities all year round or not at times when people are mustering cattle? What about gates? Are they to be left open or closed, and who is responsible for them? And an issue which is looming very large, and perhaps even larger now that there is such a crisis in Australian insurance at the moment, what about public liability insurance? If you are a pastoral lessee and you've got a public liability insurance policy and you're more than happy for the Aborigines to come on and exercise their native title rights, what if somebody rolls a Toyota, or if they're camping there and somebody gets injured, with a fire or some such thing? Who carries the insurance cover? Who pays the premium?

These are all very real practical issues. They go way beyond the slogans about "we should all make an agreement". How do you make an agreement in respect with a particular property, with a particular group and a particular pastoral lessee? When we get to what we call the "white board" stage of agreement (where people have agreed generally that they will settle this by agreement and these are the principles), the really hard work starts by writing the agreement down in a form that people are willing to sign off on.

There is a range of associated agreements which can attach to a determination of native title. One of the entities that is a party at just about every native titles application around the country is Telstra. Telstra has installations just about everywhere. Telstra has a very highly developed approach to mediation. They say, in effect, "We believe native title determinations should be sorted out by mediation. We're really not too fussed about getting involved in who the right people are, but once that issue is sorted out, what we want is an agreement which allows us to maintain our installations and just keep the service provided. Here is a more or less standard form of agreement. We are happy to negotiate with the right people. Everybody else should sort out who the right people are. Please keep us 'in the loop.' We'll come in at an appropriate stage and try and negotiate the agreement."

The situation is similar in Queensland, at least, with the relevant power authorities. And so with a number of recent determinations of native title have been a side agreement with the electricity company, Telstra, the local shire council and so on. Sometimes these agreements take the form of indigenous land use agreements and sometimes the agreements have to be negotiated then registered before the determination of native title takes affect. Sometimes the native title determinations may be first, relying on everybody to sign off on the agreements that have already been agreed in principle.³⁷

The other form of agreement which might result on settlement of a native title application is what is called a non-native title outcome. This might be a result of a claimant application which is lodged for a determination of native title being settled without any determination of native title. That might be, for example, because if this matter went to court, the applicants could not prove that they have got native title; they just do not have enough evidence. But the other party is happy to do some sort of other deal which recognises that they are the traditional people for the area and make some other sort of agreement. In those states which have land rights legislation, the agreement could for example take the form of a grant of title under say, the *Aboriginal Land Rights Act* in New South Wales. That is happening where there are grants of title to land, not determinations of native title, but at the end of the day, it seems, the parties are happy with that sort of result.

And so, in exploring the way in which native title claimant application can be resolved, one can be fairly creative about a whole range of other agreements which will enable everybody's interests to be accommodated.

Conclusion

Let me summarise very briefly my part of the presentation.

The *Native Title Act 1993* did not emerge from a vacuum. It was the result of 200 years or more of historical development, social forces and so on in Australian history. It came at a particular time when history imposed a number of very

³⁷ For examples see National Native Title Tribunal, *The Kaurareg People's Native Title Determinations: Questions and Answers*, 2001.

practical challenges for the Australian community. How those challenges were to be met and the procedures for meeting them were set out in the *Native Title Act*. That Act prefers agreement-making if at all possible and set outs processes and institutions to facilitate the agreement making process. I am very please to be head of the body which is charged with assisting people with these agreements, in addition to the agreements that have been made about future act applications and thousands of other agreements made for exploration, mining and other such things. There is an environment of agreement making which was not apparent in the years immediately after the *Mabo* decision; but as a nation we are increasing accepting that the native title is here to stay. It is part of the legal and social landscape, and the best way to sort out these issues is by agreement rather than have somebody else say that a court imposed an outcome on them. I am very pleased to be part of the process to help people to reach those agreements.

And I am also very pleased to be sitting down and have Professor Douglas Williamson take over.

(END OF GRAEME NEATE)