

5 Indigenous benefit-sharing in resource development – the Australian Native Title experience

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Introduction

An increasing number of multi-lateral environmental agreements (MEA) involve some form of rights-based participatory process for engaging local and indigenous peoples. Given international developments, two decades of Australian experience of working with national indigenous land legislation which provides rights of participation in decision-making about development should be of broader interest. Enacted in 1993, the Australian Native Title Act (NTA) provides a mechanism for the recognition of native title.¹ Australia's native title processes provide an analogue to international arrangements for the participation of local and indigenous people. In particular, this article describes the processes of indigenous representation, negotiation and agreement-making over mining and development that is mandated under the NTA, and then evaluates what lessons and learning may apply to similar processes under MEAs (such as free, prior informed consent). In particular, the

purpose is to describe participation in negotiation processes with industry and government, rather than to address dynamics at a community level.

Native title – indigenous peoples' rights to land and water arising from their own customary laws and customs – was only recognised in Australia in 1992 in the case of *Mabo v Queensland (2)*. This is much later than similar decisions elsewhere in the group of countries that follow the common law (including the USA, Canada and New Zealand) inherited from the United Kingdom. The Australian law of native title departs from that of other common law jurisdictions in important respects (Strelein, 2009). The NTA was the Australian government's legislative response to the Mabo case – it set up a legislative system to deal with the welter of claims that were expected to follow the decision.

Background – native title claims, future acts and representative bodies

The purpose of the Commonwealth Native

¹ For more information see: http://www.hreoc.gov.au/social_justice/native_title/index.html

Title Act was to provide an orderly process for resolving native title claims in Australia. Significantly the legislation did not create rights to land, but established a mechanism for the recognition of property rights that may have existed under the common law of Australia, but hitherto had never been recognised. The claim process provided for applications for recognition of native title to be lodged that would then be subject to a mediation process. In the course of this, the indigenous claimant community would engage with all statutory title holders in the area in question in a bid to achieve a legally binding consensus. This article is not concerned with the system for claiming land itself, but with two ancillary elements of the legislative architecture:

- The ‘future act system’, which set out how land and waters subject to registered native title claim could be dealt with by the government and third parties prior to the claim being decided;
- The ‘representative body system’, under which special ‘Aboriginal corporations’ were mandated with particular authority and provided with funding to represent indigenous groups bringing native title claims.

The functioning and interaction of the future act and representative body systems together governed how resource companies and governments have obtained permission from indigenous groups to undertake development on land subject to native title in Australia.

Broadly, the future act system stated that once a native title claim had been registered, a resource development in the area in question could only take place once certain indigenous procedural rights had been exhausted.

The term ‘future act’ is defined in the NTA. Broadly a future act means either the creation of a mining tenement (see Box 1) or a compulsory acquisition of land by government, on an area subject to a registered native title claim or area where native title had been determined to exist. The

future act system describes the statutory mechanism set up in the NTA for dealing with future acts.

The strongest of these rights was a ‘right to negotiate’ (for a minimum of six months) for the creation of a full right to mine. The weakest was no more than a right to be notified. Crucially (and contrary to some popular mythology in Australia), the NTA never established any right to free, prior informed consent or anything like the simple capacity to veto. Like the statutory arrangements for dealing with native title claims themselves, the intention of the right to negotiate was that contentious matters should be resolved by alternative dispute resolution (negotiation in good faith, mediation and arbitration if necessary), rather than be contested in court.

The right to negotiate and other procedural rights available under the future act system is vested in the registered native title claimant groups themselves and in particular in certain named individuals who enjoyed special status as the named applicants. However the NTA also intended that claim groups should be able to avail themselves of native title representative bodies (NTRBs). These NTRBs were special Aboriginal corporations with geographically bounded areas of operation who were funded to retain lawyers, anthropologists and other staff to provide expert advice and representation to native title claimant groups within their jurisdiction. Funding was generally provided by the Commonwealth government, with additional money also sometimes coming from state governments. Over the life of the NTA, the level of financial support provided to the NTRBs by the Australian government has often been woefully inadequate with dire consequences for the effectiveness of the services provided. One leading study in 1999 found that, Australia wide, it would be impossible for NTRBs to professionally discharge their functions because of lack of funding. These were functions that the government itself had



Photo: Ric Davies

Applicants for the Mayala native title claim sign the Irvine Island mining agreement following a claim meeting attended by some 250 Mayala people in Broome, Western Australia in June 2011.

imposed on the bodies as mandatory.

Underfunding by government created a direct imperative for NTRBs to seek alternative funding from resource companies on a cost recovery basis: that is, when a resource company required negotiations with a native title claimant group to be discharged under the future act system as a precondition to obtaining their mining tenements, the corporation would provide additional financial resources to make the engagement possible. These additional monies would generally go on the cost of extra community meetings (often expensive and resource intensive affairs to bring a dispersed community together), as well as the impost associated with retaining additional staff potentially including lawyers, anthropologists, archaeologists, indigenous liaison officers and others. This further capacity might be hired for short periods or for years – depending on the scale and duration of the negotiations in question.

The author's primary involvement in the native title process was as Principal Legal Officer of the NTRB for the Murchison, Gascoyne and Pilbara regions of Western Australia (the north west) between 1999 and 2005, now known as the Yamatji Marlpa Aboriginal Corporation (YMAC). YMAC's jurisdiction covers over 1 million square kilometres, with offices in Geraldton, South Hedland, Karratha, Tom Price and Perth. *Yamatji* means Aboriginal 'man' in the Murchison and Gascoyne, while *Marlpa* is used to denote the Aboriginal people of the Pilbara.

The areas in question are highly resource rich, including significant deposits of iron ore, natural gas, copper, molybdenum and gold. As a consequence, the major emphasis of my job became overseeing the professional advice and representation provided on negotiations with resource companies, rather than pursuing the land claims themselves. The direct result of development pressure was that actually

having native title applications decided was pushed into the background. Many claims remain unresolved after a decade or more in the system.

Methods and processes – indigenous representation and response

It was clear that despite the enactment of the NTA, without streamlining and systematisation, the indigenous people of the north west – the Yamatji and Marlpa peoples – would miss out on the procedural rights and associated opportunities created by the legislation. There were simply too many resource companies wanting to mine and explore to deal with tenement applications on an *ad hoc* basis.

Six key steps were taken to maximise the rights and opportunities available to the Yamatji and Marlpa peoples:

1. Procedural rights about mining and development only accrued to indigenous peoples once a native title claim had been registered, so it was essential to ensure that native title claims had been registered over the entire area of the YMLC's jurisdiction.
2. The number of tenement applications and strictness of the timelines for response meant that it was essential to have a reliable method for taking legal and political instructions from the claim group. Accordingly each native title claim group within the YMLC's jurisdiction appointed a smaller working group (usually of around a dozen people) who would meet for one-two day meetings on around a six-weekly basis to make all decisions.
3. As far as possible the YMLC obtained standard instructions from each claim group to 'object' to everything, not because there was necessarily actual opposition, but in order to maximise indigenous say over development.
4. Standard instructions were also obtained to recover costs of dealing from resource developers as often as possible.
5. Although always imperfect, certain protocols and ways of behaving were made standard to minimise the friction associ-

Box 1: Tenements and mining rights

Tenements are a form of title that gives the holder the permission to mine – it is a form of mining title. Different tenements are created for different levels of resource activity, such as mining, exploration, prospecting and infrastructure. Australia has a federal system of government in which the power to grant land titles is held by the States.

ated with cross-cultural communication between indigenous and non-indigenous people.

6. Although dealing with each tenement application was a discrete process under the NTA, it became the convention for particular classes of tenement to be dealt with consistently:

- Consent to prospect was generally provided in exchange for a small scale survey to ensure that no places of particular cultural significance would be disturbed;
- Consent to exploration was generally provided in exchange for a larger scale survey; and
- Consent to full scale development was generally provided in exchange for large-scale benefit-sharing, usually including direct monetary payments; jobs, training and business opportunities; share offers, etc.

Each of the above would be set out in a written contract. Typically, the smaller scale agreements could be dealt with comparatively quickly, while negotiations over large-scale developments could take months or even years. The scale of the payments was generally decided by a process analogous to a market: native title groups would generally obtain the largest amount that they could reasonably bargain for, bearing in mind that they did not have the power to veto development, only to delay for a finite period of time. The art of the negotiations was to trade the consent at precisely the moment when it was worth the most to do so. In most mining negotiations, the best time to reach agreement would be when the resource proponent was

Box 2: The Badimia Working Group

Since 1997, the Badimia Working Group – a group of approximately one dozen ethnically and culturally Badimia people (a tribal group from near Mt Magnet in Western Australia) have met regularly to make decisions about native title processes associated with all proposed exploration, mining and development on the land that they are claiming under the Native Title Act. There are many other tribal working groups throughout the north west of Western Australia.

under the greatest pressure to obtain the necessary permissions to go ahead as (for example) a precondition to further capital investment.

The system set out above constituted a radical departure from the functioning of indigenous societies in the north west prior to the NTA. Having never before held rights in relation to development, there were no pre-existing indigenous systems for dealing with such matters. The whole edifice for maximising access to the rights and opportunities inherent in the future act system was imposed – albeit with the active participation in design and consent of the communities in question. Nevertheless, the system described was never completely detached from indigenous law and custom.

However, native title meetings take time and are often stressful, imposing a considerable burden on indigenous communities. The social realities of indigenous people in Australia also mean that many of those attending native title meetings may often have very serious mental or physical health issues.

The representative structures mandated by the NTA and further elaborated in native title practice acted as a substitute for direct participation by the entire community at all times. The point of the substitution was essentially practical: to provide a legal and administrative mechanism by which certainty of indigenous consent and agreement could be given under the NTA. However, a variety of feedback loops exist in the native title process to try and minimise the extent to which the

representative structures may become distanced from the broader communities which they represent. For example, under section 66B of the NTA, a named applicant to a native title claim who is not acting in accordance within the scope of community authorisation can be removed as an applicant. This presents an intersection of traditional authority with statutory power. In the case of *Daniel v Western Australia [2002] FCA 1147*, for example, an applicant was removed, after the broader community which he was meant to represent had authorised him to execute a native title agreement and he refused to do so. Behind the face of the decision, lay considerable community stress and conflict around the land use decisions in question.

Rights to participate in decision-making, for example, were often determined by traditional authority and would be manifested in people being chosen to conduct negotiations, or heritage surveys on the basis of their right to ‘speak for the country’ in question. ‘Speaking for country’ is an expression commonly used in the Yamatji and Marlpa lands to refer to an individual having the right of traditional authority over an area of land or waters. For example it might be said ‘Old Jack speaks for that country’.

Lessons learnt, critical reflections and analysis – Australia’s Native Title era

Undoubtedly, the system described above was successful in ensuring that development did not take place on land under native title claim in the north west without some process of engagement with the indigenous traditional owners taking place. Many hundreds of individual dealings took place, giving rise to numerous agreements and tens (possibly now hundreds) of millions of dollars worth of commitments by developers. It seems likely that numerous sites of traditional significance were saved from destruction. A generation of post-colonisation indigenous people experienced a hitherto unknown level of

Photo: Ric Davies



Carrying out a flora survey on Irvine Island. Aboriginal traditional knowledge has been invaluable in assisting with environmental studies.

empowerment apropos of resource development, leading to the tangible economic returns described above. In the north west, all of this occurred in a reasonably predictable, effective and cost-effective economical fashion, at least by the standards of Australia's native title system. Evidence remains mixed and ambiguous as to whether the inward flow of monies arising out of these negotiations has resulted in any improvement in the social or economic well-being of the communities in question (I expand on this in Ritter, 2009, pp. 58-61).

However, it is also easy to overstate the case for what occurred. At one level the functioning of the NTA in general and the future act system in particular was more intended to ensure the orderly processing of resource tenements than to preserve indigenous rights. After the initial upheaval associated with the NTAs introduction, the system settled reasonably quickly in to a market-like system of exchange in which

developers would come and negotiate timely permission in exchange for consideration for value. The eventual impact of the NTA was not only the emancipation of indigenous people to have significant procedural rights, but a form of commoditisation. In effect, the NTA functioned to give traditional rights a narrow pecuniary value, creating what was in substance a 'native title market'.

There are a number of lessons from Australia's future act and native title representative body system that could have wider application.

- Determining traditional tenure can be an extremely lengthy and complex process, taking literally years.
- There is a tension between conserving traditional structures and the provision of complex procedural rights: the dynamic is never straightforward, but it seems likely that the internal functioning of Australia's indigenous societies was affected by the procedural obligations of the NTA. Proce-

dural rights should be designed to impinge on traditional structures as little as possible, but even with the best will in the world there are limits: it is simply not feasible to graft liberal procedural rights onto a system of traditional law and custom without causing some friction and a certain amount of underlying cultural transformation.

- New procedural rights do not escape the gravity of underlying political and economic pressures: in the end it was hard not to think that the native title system mainly functioned to facilitate resource development. A true right of veto would have made the situation very different as it would have given traditional landholders the genuine capacity to decide whether or not to participate in the resource economy on a case-by-case basis.
- Adequate resources and expert advice is essential to ensure that indigenous peoples are fairly able to utilise procedural rights to their advantage.
- Standardising procedures, cost recovery measures and cross communications protocols can go some way toward maximising rights and opportunities.
- Rightly or wrongly, the participation of

indigenous people in the system was confined by the limitations placed by a pre-defined process, including the absence of any right of veto.

Conclusion

Any system which creates rights for indigenous people – no matter how well intentioned or designed – will still inevitably have a transformative effect to the extent that it requires the people in question to act and think in new ways. In Australia, the Native Title Act did succeed in giving indigenous people a seat at the bargaining table every time a resource developer wanted to mine or explore on land under claim. The consequence was large-scale benefits coming into indigenous communities and development causing less destruction than it may have otherwise entailed. But it would be wrong to imagine that native title in Australia acted as break on development. Far from it, the native title system provided a way of bringing traditional indigenous rights in land within Australia's resource economy in an orderly way. Things changed, so that things could remain the same.

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REFERENCES

There is an extensive array of writing about the native title system in Australia. The comprehensive guide to the current state of Australia's native title system can be found in Neate G. *et al.*, *Native Title Service*, LexisNexis. On the distinctive nature of native title law in Australia see: Strelein, L. (2009) *Compromised Jurisprudence*. AIATSIS, Canberra.

The author's own views on native title as expressed in this essay are expanded and set out in:

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