

ANU's Centre for Native Title Anthropology/Native Title Services Victoria –

***Alternative Pathways to Outcomes in Native Title Anthropology***

Opening address

by the Hon Justice Michael Barker, Federal Court of Australia

12 February 2015, Melbourne

- 1 I thank the Wurundjeri people for their warm welcome to their traditional lands and pay my respects to their Elders, both past and present.
- 2 I also thank Professor Nicolas Peterson and Dr Cameo Dalley from the Centre for Native Title Anthropology at the Australian National University for their kind invitation to open this conference. It is a privilege to be here among professionals engaged in the work of native title.
- 3 The work of native title anthropologists, lawyers and so many other native title professionals is critical to the successful administration of the *Native Title Act 1993* (Cth) (*NTA* or *Act*).
- 4 In taking up Professor Peterson's invitation, in his introduction, to address how the Court sees native title developing, and how the Court treats agreement making, I should say that the views I will express are more mine than the Court's, but I hope are helpful nonetheless. I should add that my views are also totally dependent on the continued active, not to say, creative engagement of people like you, present here today, in the administration of the Act.
- 5 You are both participants in, and scrutineers of, the system by which native title determinations and compensation claims, and negotiations over future acts, are conducted and concluded. I believe you have much to offer by way of critiquing and bringing about constructive change to a system that is often characterised by formulaic approaches to dispute resolution, slowness and expense in arriving at outcomes; outcomes which sometimes are considered of limited or no utility by some indigenous groups and frustrate other parties.
- 6 It is the Court, of course which has the power to make final and binding determinations and orders under the Act, and so it has a special responsibility, in my view, also to take the lead in ensuring that such a characterisation of native title proceedings can be demonstrated to be "false or misleading", to use the language of consumer law.
- 7 Together, we can improve the administration of the Act. Divided we will struggle.

- 8 Courts, of all shapes and sizes, in our system of government, were invented, if I may put it that way, to resolve disputes between citizens and between the State and citizens. They also offer dispute resolution services to corporations, citizens of other countries and indeed, other governments. The essence of judicial power is that it involves the quelling of controversies. There is, in a fundamental way, a difference between an organisation that is set up to assist parties to come to some consensus which enables them to resolve a dispute on their own terms, and a court which imposes a solution to a dispute when the parties cannot themselves agree on one.
- 9 Traditionally, if I may be permitted to employ that term in this company, that is to say, until about the mid-1980s, any consensual resolution of a dispute that had found its way to court, tended to occur outside the court, and usually at the proverbial door of the court, just before a trial was due to commence.
- 10 Such has been the growth in litigation, the length of trials, the expense of litigation, and the inability of most ordinary citizens (the 99%) to afford litigation, that in the 80s courts decided to sponsor practices and procedures, including mediation and other forms of assisted dispute resolution, designed to respond to these issues.
- 11 All of this is well encapsulated by ss 37M and 37N of the *Federal Court of Australia Act 1976* (Cth). Facilitating the just resolution of disputes quickly, inexpensively and as efficiently as possible is the overarching purpose of the civil practice and procedure provisions of the Court. Parties to civil proceedings, including native title proceedings, are required to conduct proceedings (including negotiations for settlement of the dispute) in a way that is consistent with the overarching purpose. Lawyers must take account of the duty imposed on their client in this regard and assist them to comply with the duty. In exercising the discretion to award costs in a civil proceeding (obviously less relevant in a proceeding under the *Native Title Act*) the Court must take account of any failure to comply with these duties. Lawyers can be required to bear costs personally.
- 12 While native title proceedings are civil proceedings, they are different from most others. They are different because the first objective of the Act is to provide for the recognition and protection of native title, an interest in land derived from indigenous custom recognised by the common law of Australia and now by the Act. They are also different because the indigenous people of Australia are vulnerable people who have often been excluded from access to justice and denied human rights, as *Mabo (No 2)* recognised in relation to their

deprivation of traditional land rights. They are also different because the means of proving that native title exists is fundamentally an inquiry into traditional law and custom.

- 13 Native title proceedings are similar to other civil proceedings, however, to the extent that respondents may dispute that native title exists or say it has been extinguished.
- 14 After more than 21 years of the Act's operation, the principles by which native title is shown to exist are reasonably well developed. The principles finally established in *Yorta Yorta* occasionally cause reflection, and the application of those principles can be difficult, but they are reasonably well understood – at least by lawyers! So too are the principles governing extinguishment. There are, of course, new forms of tenure and circumstances which lead to controversy as to whether or not extinguishment, in whole or in part, has occurred by reason of any executive or legislative act; the decision of the High Court in *Brown*, concerning the Mount Goldsworthy mining project, being a case on point.
- 15 I should observe that there is some potential, if proposals in the Australian Law Reform Commission (*ALRC*) Discussion Paper 82 (*ALRC*, 2014), which was released in October 2014 and on which submissions closed on 19 January 2015, were to be adopted by the Parliament in Canberra, of the connection requirements from *Yorta Yorta*, particularly the “society”, generational and no “substantial interruption” requirements, being removed.
- 16 In Alice Springs nearly two years ago, as Professor Peterson said in his introduction, I presented a paper which, amongst other things, highlighted the age profile of about 100 native title proceedings in the Western Australian Registry of the Federal Court (Barker, 2013). I recall that there was a sharp intake of breath from many in the audience when the large number, the age of some and the large number of parties in others was mentioned. I emphasised the Court, across Australia, wished to remove the backlog of cases. I mentioned the approach to be taken of prioritising cases, managing them intensively and, hopefully, putting more attention on tenure analysis at an earlier stage of the court process than has been customary.
- 17 At one point in time, the administration of the Act and the resolution of native title controversies engaged the bipartite efforts of the Court and the National Native Title Tribunal. Until relatively recently, for a significant period, as we all know, the Tribunal had the primary function of endeavouring to facilitate the resolution of those controversies and,

where possible, to achieve consent determinations. In more recent times, the Court has assumed that out-of-court resolution function.

18 In that regard, the amendments in relatively recent times to the Act to enable consent determinations to deal with “non-native title outcomes” are of significance.

19 Nonetheless, the primary focus in most proceedings in the Court is on whether or not native title exists and, if it does, the extent of it. Negotiating over connection and then dealing with extinguishment, after a lengthy tenure analysis, remains the typical process by which business is done in the Court.

20 The Court generally has become concerned to explore alternative ways of doing its business in order to reduce the length and cost of the process – not to mention the entitlement of claimants, and respondents, to have their interests clarified expeditiously. I have said on many occasions, both before and after Alice Springs, that I believe change, for change’s sake, is not a bad thing. There is a context in which I make this statement. It is that, in many circumstances, parties have been relating and exchanging information in the same, unquestioning way for a long time. It is necessary continually to ask whether there are other ways of doing business that produce good outcomes, and that do so more quickly and inexpensively than existing ways.

21 I subscribe to the proposition advocated by Raelene Webb QC, President of the Tribunal, that there may be real value, in the ordinary case, of conducting a proper tenure analysis early on in a proceeding. President Webb is soon to present a paper discussing her proposal at a conference organised by the World Bank in Washington, DC (Webb, 2015). The promise of such an approach is that parties may be led to focus sooner, rather than later (and at reduced cost), on those portions of land or waters that may, in fact, be available for claim. If there is nothing to claim, then obviously there is little point in going on with the application for determination that native title exists. There may, however, be reason to turn one’s thoughts to whether, given all the circumstances, an agreement as to non-native title outcomes might be achievable.

22 In that regard, I see agreement making as of primary importance, not just as to the existence of native title, but also for responding to those cases where native title cannot be shown to exist (in whole or part). In both cases, ILUAs (indigenous land use agreements made under

the Act) about native title and non-native title outcomes have the potential to be of great significance.

- 23 The negotiations currently underway in relation to the Single Noongar claim in Western Australia, is a current example of that approach, following the examples of negotiated settlements under legislation in Victoria after *Yorta Yorta*. There are many parts of Australia where this type of negotiation model would seem to make a lot of sense. I would be hopeful, if the Single Noongar claim has a successful outcome, that this model would be seen as capable of application in other parts of Western Australia.
- 24 There are, of course, forces against proceeding in that way, not the least of which may emanate from within indigenous communities themselves. Some Aboriginal people, regardless of the extent of disruption of their traditional ways since sovereignty, assert that their “sovereignty” over their traditional country subsists, and are not willing to give up on a claim that they still have native title, in a sovereignty sense, despite the overwhelming evidence of its extinguishment.
- 25 The idea that claimants should negotiate with the State at all is sometimes questioned. One indigenous respondent, in case management of the Single Noongar claim, for example, recently questioned whether the Queen had indicated whether she would give her consent to any agreement the parties might make. I understood this respondent to be suggesting the Queen, and not the State Government, should be seen as the legitimate party to negotiate with a sovereign peoples.
- 26 From the early days of native title, when governmental parties began developing protocols to structure negotiations and possible consent determinations, the onus was on applicants –as it still is – to produce data sufficient to satisfy the governmental parties that native title exists. Then, if that could be agreed, a lengthy tenure analysis would be conducted to deal with extinguishment issues.
- 27 While this broad approach to achieving a consent determination is still followed, governmental parties show some flexibility as to the type of data they require or the means by which it may be displayed, in order to agree that claimants have crossed the native title connection threshold. In some cases, a mix of media is adopted. Connection materials might be supplied, information may be supplied on country, and in some cases, the taking of preservation evidence might also come to constitute part of that information sharing process.

I consider the time is right to revisit the processes by which the principal players across Australia – claimants and governmental parties, in the first instance – share information so that a consent determination might be achieved.

28 In this process the role of other, non-governmental parties, is also important. To date States and Territories have performed what has sometimes been referred to as the *parens patriae* – or public guardianship – role. Of course they always act as model litigants. Most of the respondents – including the Commonwealth – have tended to take guidance from the position adopted by the principal governmental party.

29 In a recent case in Western Australia, *Oil Basins*, however, that did not occur. A mining company, despite the indication by the State and other respondents that they would consent to a determination that native title exists, considered it was not sufficiently informed to adopt that position. It complained that neither the State nor the claimants would share information with it, at least sufficient information to enable it to adopt what it considered to be a principled position on connection. In those circumstances, what otherwise would have been a consent determination, became a contested hearing involving only the mining company and for which the claimants had to prepare. At the eleventh hour, before the trial commenced, the mining company did an about face. A consent determination has now been made. The case is interesting, not only because of the questions surrounding the role of non-governmental parties in native title proceedings in the future, but also because of the costs order made against the mining company, in those circumstances, by the primary judge, which was upheld on appeal.

30 In another proceeding in the Court in Western Australia, the question surrounding the role of non-governmental parties has also arisen in relation to pastoral interests. The State indicated, in open case management, that it was reluctant to negotiate any further towards a consent determination without the pastoral respondents making their position clear. Ultimately, the matter was referred to mediation with a view to engaging the pastoralists in the negotiation of a consent determination. As a result of mediation, that matter now has the prospect of proceeding to a consent determination.

31 The point is, I suppose, that the role of non-governmental respondents in native title proceedings has the potential to develop beyond the largely passive role taken to date, and it may well become necessary for claimants and governmental parties to review the way they

engage with other respondents in connection negotiations. The position put by the State of Western Australia in *Oil Basins*, plainly suggests that it does not see itself as having any responsibility for the decision-making of other respondents. That is not remarkable in itself, but it highlights the point I am making.

32 Here I should also note that if proposals in the ALRC Discussion Paper were to be adopted, the Court's powers to decline to join a person as a respondent, or to remove them as a party, would be enhanced.

33 While *Oil Basins* may be said to constitute a form of intra-respondent disputation, intra-indigenous disputation is already a well-established feature of native title claim management. I suspect it has always been a feature of indigenous relations over land. In any event, it is an aspect of native title that requires special consideration by representative bodies and their lawyers and anthropologists – and the Court.

34 One of the consequences of the work done by anthropologists often is, as we are all aware, that some indigenous persons are not included in a claim group when they think they should have been. This often has consequences for claim management and the making, management and administration of agreements. This usually occurs because the excluded persons have been identified as lacking an ancestral connection to a claim area, in the *Yorta Yorta* sense, even though they may have strong historical associations with the claim area.

35 Many groups who are found to fall into the historical category, often wish to pursue claims to native title regardless. If those groups are not willing to accept the clear advice of the professionals about the strength of their claims, the Court may well be obliged to hear and determine their claims, whether at a final hearing or on a summary judgment application. While overlapping claims remain on foot it is difficult for the parties, including respondent parties to agree native title or negotiate in good faith about future acts and make Indigenous Land Use Agreements (*ILUAs*).

36 I should also add, however, that because of the function of the Act in recognising and protecting native title, and given the complexities that often surround proof of native title, the summary dismissal of claims that some might think lack substance, is likely to prove difficult. Instead of such proceedings being removed by a side wind, it may well often be preferable that they be removed, if they are to be, by a proper consideration of the substance of the claim. In this regard, the decision of the Full Court in *Budby* is instructive.

- 37 Intra-indigenous dispute resolution also takes on other forms, as the decision of Rares J in *Weribone*, the Mandandanji Peoples' claim shows. In that case, from Queensland, there was a contest about who should become a replacement applicant. When the evidence did not allow the immediate resolution of the question, his Honour became concerned about the administration of funds that had been received under ILUAs made by the current applicant and made holding orders in respect of them.
- 38 Important questions arise when it comes to the management of monies, because the view may reasonably be taken that funds received under ILUAs are effectively impressed with a trust in favour of those for whom native title is claimed. There is a question, perhaps not yet finally resolved, as to the Federal Court's role in supervising ILUA management and, if so, what its powers are, or should be. (I should note that an appeal by the Commonwealth from the orders of Rares J was discontinued). An amendment to the Act may well be necessary.
- 39 I would suggest such financial management issues will arise in the future under the *Native Title Act*. Recent, and past litigation between the Northern Land Counsel (*NLC*) and traditional owners under the *Aboriginal Land Rights (Northern Territory) Act 1976*, in that regard, may also be considered a portend to such litigation. See for example, the recent decision in *Rirratjingu Aboriginal Corporation* and the earlier *Gagudju Association* decision.
- 40 For the future, I see claims for compensation becoming increasingly important. More than 10 years ago, I predicted an imminent second wave of native title, being compensation claims (Barker, 2002). It has not yet arrived. There have been some settlements of compensation claims in South Australia. The first contested claim that will, as things stand, result in a court determination, is the Gibson Desert Nature Reserve (*Ward*) claim.
- 41 Whether or not there will be a new wave of such claims may well depend on how this case is resolved. It may be considered, in that regard, a little bit like the original *Miriuwung Gajerrong* case, which established the extinguishment principles, and the *Yorta Yorta* case, which helped to settle proof issues.
- 42 10 years ago, when I expressed the thought that compensation claims would be the second wave of native title, I also thought compensation liability might present governments with the incentive to propose more regional agreements.



- 43 The question of how “regional” a native title holding group can or should be has, in some ways, bedevilled native title law and anthropological thinking since the commencement of the NTA. There are those, on both the side of claimants and on the side of respondents, who would be content for that group to be as small as possible. The idea of estate groups holding native title seems to have been parried in the *Miriuwung Gajerrong* litigation. However, as the NLC litigation in the Territory attests, clan-based interests are still strongly pressed in some communities. On the other hand, in *Akiba*, Finn J had little difficulty in determining that various groups of Torres Strait Islanders together held the claimed native title sea rights. There are other cases already in the Court, where claims are based on a more regional basis than has occurred in the past.
- 44 No doubt the nature of a claim group will reflect anthropological and legal advice, and the evidence of the parties. One would have thought, in the long run, that there are significant advantages – despite the opportunities for continued intra-indigenous disputation – in native title being held by a larger group, not only for that group in generations to come, but also for the wider Australian community.
- 45 The position the Federal Court has now arrived at, with the benefit of its long experience in dealing with native title claims, is that, consistent with all other major subject areas within the Court’s jurisdiction, native title practice and procedure will be a subject of national appraisal (FCA, 2014). Professor Peterson mentioned in his introduction, in this regard, that I am a member of the Court’s recently established National Native Title Practice Committee.
- 46 The major areas of native title litigation in Australia are, as we know, Queensland, Northern Territory and Western Australia. To the extent that different approaches to case management, pre-trial orders and trial practice have differed from one place to another, from one judge to another, the Court soon will take the opportunity to review what it does with a view to achieving a more comprehensive and consistent approach across registries and among judges.
- 47 At the same time, experience teaches that one size does not necessarily fit all, and that a customised approach to the management of particular native title proceedings will be required in many cases.
- 48 One thing that is always quite consistent, across the board, however, is that the Court continues to expect that in all proceedings negotiations and agreements will be the standard

way of achieving native title, and non-native title, outcomes. Innovative, creative ways of negotiating and achieving outcomes need to be explored further. What may appear to be novel ideas, should not be dismissed out of hand. No doubt, risks will need to be taken.

49 As I have sketched these thoughts on how the Court sees native title developing, and how the Court treats agreement making, I have also found myself imagining what the state of native title in the Court could be in, say, 10 years from now, well after I have departed the scene. In this regard I dare to dream of an optimistic state of affairs, to this effect:

- Some, but relatively little, disputation about the law governing connection and extinguishment issues;
- Relatively few contested proceedings as to the existence of native title;
- Some continuing compensation litigation;
- Most proceedings being resolved by consent determinations;
- Court-supervised proceedings involving the negotiated settlement of native title claims made on a regional basis, particularly as to non-native title outcomes;
- Occasional disputation in the court between indigenous parties over their respective financial rights under ILUAs.

50 Dreaming is good!

51 As I said at the outset, you are at the forefront of the native title system and are wonderfully placed to consider alternative ways of arriving at optimal native title outcomes. I am pleased that this conference is focussing on this important and timely topic. I am pleased to open your conference and look forward to participating in it and learning from the presentations and, no doubt, your lively discussions.

## Bibliography

### *Articles/Books/Reports/Papers*

**ALRC, 2014:** Australian Law Reform Commission, *Review of the Native Title Act 1993*, Discussion Paper No 82, released 23 October 2014 <<https://www.alrc.gov.au/publications/native-title-dp82>>.

**Barker, 2013:** Hon Justice Michael Barker, ‘Innovation and management of native title claims – What have the last 20 years taught us?’ (Speech delivered at the 2013 National Native Title Conference, Australian Institute of Aboriginal and Torres Strait Islander Studies, Alice Springs, 3-5 June 2013) <<http://www.fedcourt.gov.au/publications/judges-speeches/justice-barker/barker-j-20130603>>.

**Barker, 2002** (published 2006): Hon Justice Michael Barker, “‘Treaty’: what’s in a name?” in Peter Read, Gary Meyers and Bob Reece (eds), *What Good Condition?: Reflections on an Australian Aboriginal Treaty 1986-2006* (ANU E Press, 1 January 2006) 163-170.

**FCA, 2014:** Federal Court website, Practice and Procedure, *Introducing the National Court Framework*, <<http://www.fedcourt.gov.au/law-and-practice/national-court-framework>>.

**Webb, 2015:** President Raelene Webb QC, ‘Historic Tenure Certainty Project – a Tool for Sharing the knowledge, Sharing the Future’ (Speech to be delivered at the 2015 World Bank Conference on Land and Poverty, The World Bank, Washington DC, 25 March 2015), <[https://www.conftool.com/landandpoverty2015/index.php?page=browseSessions&print=yes&doprint=yes&form\\_session=227&metadata=show&presentations=show](https://www.conftool.com/landandpoverty2015/index.php?page=browseSessions&print=yes&doprint=yes&form_session=227&metadata=show&presentations=show)>.

### *Cases*

**Akiba:** *Akiba on behalf of the Torres Strait Regional Seas Claim Group v Commonwealth of Australia* [2013] HCA 33; (2013) 250 CLR 209.

**Brown:** *Western Australia v Brown* [2014] HCA 8.

**Budby:** *Budby on behalf of Barada Barna People v State of Queensland* [2013] FCAFC 149.

**Gagudju Association:** *Gagudju Association v Northern Land Council* [1995] FCA 304 and *Gagudju Association v Northern Land Council* [1995] FCA 305.

**Mabo (No 2):** *Mabo v Queensland (No 2)* [1992] HCA 23; (1992) 175 CLR 1.

***Miriuwung Gajerrong:*** *Ward on behalf of the Miriuwung Gajerrong People v Western Australia* [1998] FCA 1478; (1998) 159 ALR 483.

***Oil Basins:*** *Oil Basins Limited v Watson* [2014] FCAFC 154.

***Rirratjingu Aboriginal Corporation:*** *Rirratjingu Aboriginal Corporation v Northern Land Council* [2015] FCA 36.

***Ward:*** *Ward v State of Western Australia (No 2)* [2014] FCA 825.

***Weribone:*** *Weribone on behalf of the Mandandanji People v State of Queensland* [2013] FCA 255 and *Weribone on behalf of the Mandandanji People v State of Queensland (No 2)* [2013] FCA 485.

***Yorta Yorta:*** *Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58; (2002) 214 CLR 422.

#### *Legislation*

*Aboriginal Land Rights (Northern Territory) Act 1976 (Cth)*

*Federal Court of Australia Act 1976 (Cth) s 37M, s 37N*

*Native Title Act 1993 (Cth)*