

*Notes for the introduction to the conference on  
'Alternative Pathways to Outcomes in Native Title Anthropology', to be held in Melbourne on  
the 12<sup>th</sup> and 13<sup>th</sup> February 2015*

### **Introduction**

Don Dunstan, a minister in the South Australian government, introduced the first statutory land right in Australia in 1966, 178 years after the first white settlement of the continent. Until then no Aboriginal people had owned land under Australian law because they were Aboriginal. One might have thought that the colonisers had got away with appropriating Aboriginal land without compensation after such a long period. That they had not underlines the complexity of the moral, political, economic and legal issues that persist around this issue.

The legislation that Dunstan introduced went some small way to rectifying a major injustice in one state, and gradually replicated across the nation, that arose from the failure of the first colonists to negotiate with Aboriginal people about the terms on which land could be used and occupied by them. This failure to negotiate has created a situation in which Aboriginal people have had since that time a highly legitimate ground for complaint and a matter that natural justice calls out to be addressed.

The South Australian parliament's legislation made possible the transfer of ownership of lands reserved for the use and benefit of Aboriginal people in that state to a land trust controlled by Aboriginal people. As this was a freely chosen act of the parliament, the legislation was clearly beneficial legislation that was meant to provide benefits to the Aboriginal groups that took advantage of it.

It needs to borne in mind, however, that in passing such beneficial legislation, the clear intention was that it would also have a benefit for the wider society in terms of ameliorating, to a degree, the legitimate grievance and go some way to meeting the requirements of natural justice. The legislation was also expected to contribute to improving the circumstances of Aboriginal people socially, culturally and economically.

As state or territory based legislation, statutory land rights has varied very widely in the rights and benefits it confers. There is no doubt, however, that the Aboriginal Land Rights

(Northern Territory) Act 1976 is the high water mark of statutory legislation. This is because it has not only returned considerable amounts of land to Aboriginal people but it has also empowered them through its financial arrangements and administrative structures.

With the Mabo judgement the courts acknowledged that the common law could recognise the existence of Aboriginal property rights in land that had their source in the precolonial period.

While this is quite different from beneficial legislation, I think there is little doubt that there was at the time of the judgement, and that there is now, a general hope that recognising native title is another step towards ameliorating the legitimate grievance and meeting the requirements of natural justice. Of course neither statutory land rights nor native title is perfect or without its critics.

Dealing with complex social, economic and political issues of natural justice by legal means has both its strengths and its weaknesses. Certainly both national and international law has been a very powerful driver for the recognition of indigenous rights, but there are issues that the legally driven arena of native title does not deal with particularly well. Principal among these are the consequences of the history of colonisation. While native title can deliver substantially in many remote areas of the country, it is not so good in settled Australia where the impact of white settlement and government policy on many Aboriginal people's lives and ties to land has been strongest.

The consequence is that in areas of settled Australia, in particular, people often cannot get rights recognised in court, and where they can such recognition may be weak. It goes without saying that failure of a native title claim in court is extremely disappointing for the claimants, but it is not necessarily entirely negative. Preparing for a court case is a very healthy discipline requiring the gathering of extensive evidence with the aid of professional researchers, which would rarely have happened without the hearings, the marshalling of arguments, and the whole process including the court hearing is inevitably consciousness raising. The process nearly always brings to light and orders a great deal of evidence that would not have happened without the hearings. This is to say that the preparation in particular will almost certainly have provided excellent evidence for the basis of legitimate grievances, helped people articulate them effectively and thus strengthened the case that

natural justice requires to be settled. Or to put it another way, the moral and political problem does not go away simply because a case does not get up in court, and the proceedings are likely to make it more difficult for governments to ignore the existence of legitimate grievance just because the case does not get up.

This, of course, is where agreements become particularly important. Agreements come in many forms from treaties, and regional agreements, through formal contractual arrangements to informal understandings. Since the 1998 amendments to the Native Title Act there has been an emphasis on agreement making and mediation. Agreements offer the possibility of breaking free of legal constraints, of reimagining institutions, reshaping organisational arrangements, and negotiating outcomes on non-native title matters to achieve the widest social and economic benefit. Agreements open up the possibility of putting collective interests and long term objectives above individual interests and short term considerations, and laying the foundations for a better collective future. They can also be more inclusive than the narrow focus that native title can bring with it, and in the right circumstances go some way to mute the differential economic treatment of traditional owners, from long established historical peoples in the same area where they live in identical circumstances. Equally important is they may make it possible to put the PBCs or body administering an agreement on a sustainable footing.

They bring with them extra challenges too. The problems of localism and internal conflict may challenge people in constituting themselves as a coherent and effective negotiating party, and reaching an agreement can bring its own problems, for as soon as it is made some people are likely to feel they could have done better had they held out: there are often recriminations. While it is important to be realistic about what negotiated agreements can achieve we should not let this detract from the blue sky opportunities they open up for those of good will and imagination.

All this and much more we will hear about in the coming two days. Agreements are the future not just of native title but of a more reconciled future and in foregrounding them we are returning to some of the basic aims of the native title act.

In starting the conversation we will begin where we should begin, with the court and how it sees native title developing and treats agreement making.

It is my great pleasure to introduce The Honourable Justice Michael Barker who is a member of the Federal Court of Australia and formerly a judge of the Supreme Court of Western Australia. He has had a long-term interest in Aboriginal land rights issues going back to the 1980s when he was a member of the Faculty of Law at the ANU. He has appeared as counsel for the claimants in the Miriuwung Gajerrong (Ward) and Ngarluma Yindjibarndi (Daniel) native title claims; and, early on, in the Wongatha claim. Since joining the Federal Court in 2009 he has been involved in a number of proceedings under the NTA, including the Banjima people's claim, and appeals in James, Brown, Ngadju, and BP (deceased). He is currently reserved on the Badimia people's claim and the Wyman & Brown River people's appeals; and is part-heard on the Gibson Desert people's compensation claim. Justice Barker is a member of the Federal Court's recently established National Native Title Practice Committee, and also co-ordinates native title proceedings in WA.

Some of you may have heard his very instructive address at the Australian Institute of Aboriginal and Torres Strait Islander Studies in Alice Springs Native Title Conference in 2013. In that address he emphasised that under the court's new case management system there was the expectation that many more cases would be resolved, and resolved more speedily, by consent determinations. I am sure we all look forward to hearing how things are developing. Please welcome the Honourable Justice Michael Barker.