Courts of the Conqueror

Adani and the shortcomings of Native Title law

In late August 2019, it was reported that the Queensland government had granted freehold title to mining company Adani over part of the lands of the Wangan and Jagalingou (W&J) people near Clermont in Queensland.[1] The story caught on, with social media outrage directed at what was described as a 'pro-coal move' by the Palaszczuk government.[2]

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In response, QLD Minister for Natural Resources, Mines and Energy, Dr Anthony Lynham, clarified that:

[the grant] was enabled by an ILUA [Indigenous Land Use Agreement] … authorised by the native title claimants and registered by the Native Title Tribunal almost two years ago. [3]

Depending on one's perspective, [Adani] has aroused debate about mining, infrastructure, jobs, energy, royalties, exports, environmental protection, climate, and not least of all, native title.

The terms of ILUAs are confidential, yet the Native Title Tribunal register reveals that the W&J and Adani ILUA deals with 'extinguishment, large mining',[4] supporting the Minister's statement. But public criticism has remained focused on mining approval processes rather than native title itself.

The Adani Carmichael mine is at the frontline of the anti-coal environmental movement in Australia[5] and beyond.[6] For years the proposed mine has raised a multitude of intersecting legal and political issues. Depending on one's perspective, the mine has aroused debate about mining, infrastructure, jobs, energy, royalties, exports, environmental protection, climate, and not least of all, native title.

The claim by the W&J people has been one of the more high-profile recent native title cases. Numerous court battles led by W&J cultural leader, Adrian Burragubba, and the group's prominent media campaigns have brought attention to the claim.

That the lands of the W&J people include the site of the proposed Adani Carmichael mine has resulted in widespread interest in Burragubba's attempts to protect his people's culture from the effects of mining. But for all the public concern over the mine and the complex systems of approvals for the project, there is less acknowledgement of the problems, especially for claimants, of native title processes themselves.

Native Title

In 1992, the High Court of Australia handed down the *Mabo* decision.[8] The judgment recognised for the first time, that land title could be derived other than through a Crown grant. This shift in legal doctrine created an opportunity for the Anglo-Australian legal system to recognise interests in land that had existed before colonisation.

Under these new principles, where claimants can show that they have an ongoing connection with land according to their 'traditional' laws, and their interest has not been extinguished, then the court may declare that their interest be recognised.

Following the decision, and amidst heated public debate,[9] the Keating government enacted the *Native Title Act 1993* (Cth) ('NTA'). The Act was designed as beneficial legislation to provide for: recognition and protection of native title;[10] its validation[11] and registration;[12] negotiation,[13] mediation[14] and determination of interests;[15] and for compensation.[16]

Claims are commenced by notification to the National Native Title Tribunal. Once this occurs, activities to be carried out on the claimed land – such as mining – fall under the 'future acts' regime of the NTA,[17] giving claimants a right to negotiate in relation to those activities.

Although these provisions give a status to traditional owners that did not exist before the Act, their rights are limited: the negotiation process is skewed in favour of non-Indigenous parties; there is no right to veto the activity; and only a minority of agreements offer traditional owners any substantive benefit.[18]

The *Mabo* decision and the NTA's Preamble talk in lofty terms about 'contemporary notions of justice and human rights'[19] and of 'just and proper ascertainment of native title rights and interests'.[20] Yet the capacity of the NTA to bring justice to Aboriginal and Torres Strait Islander Australians after two centuries of dispossession remains constrained by its operation as a tool of the colonising state.

THE NEGOTIATION PROCESS IS SKEWED IN FAVOUR OF NON-INDIGENOUS PARTIES

The norms of the dominant system inevitably reflected in the Act are entrenched through interpretation of the law by the 'courts of the conqueror' – a phrase used by Chief Justice John Marshall in 1823 to describe the American judicial system[21] but which is equally applicable to other colonised societies.

There are widely recognised

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problems with the architecture of native title law. These include:

- its failure to adopt conventional legal standards applicable to property rights,
- the unfairness of placing the burden of proof on claimants[22] coupled with the difficulties of proving a normative system of pre-colonisation rights,
- over-specification of the 'content' of the rights claimed,
- harsh extinguishment rules, and
- 'legislation that, from the outset, encourages [property rights'] erosion by compromise' through undue emphasis on mediation.[23]

The NTA was extensively reviewed in a 2015 Australian Law Reform Commission ('ALRC') Report.[24] The recommendations have so far been ignored.

The role of the NTA in making it difficult to achieve its professed aim – of justice for Indigenous Australians – is evident in the claim by the W&J people for their lands.

The W&J Claim

The original W&J claim was lodged with the Native Title Tribunal in 2004 by eight named members of the claimant group over an area of approximately 30,200 km^2.[25] Those eight people together comprise a single 'applicant' representing the group throughout the legal process, including in entering into the ILUA. The group was changed slightly in 2015.

Despite a series of meetings by the W&J claimant group to authorise an ILUA with Adani, by early 2016 they had so far rejected agreement.[26] In March 2016, the Wangan and Jagalingou Traditional Owners Family Council ('W&J Council') called a meeting seeking to remove four named members of the applicant. The Council cited concerns about whether negotiations with Adani had been authorised and that members of the applicant had inappropriately received sitting fees from Adani.[27]

The meeting resolved to replace the four members, and, noting that the original group had no mandate to negotiate an ILUA with Adani, rejected the ILUA.

The following month, April 2016, saw another authorisation meeting that: rescinded the resolutions of the March meeting; affirmed the original members of the applicant; and authorised the Adani ILUA. Following this meeting, the Native Title Tribunal determined the authorisation process to be valid and registered the ILUA. Subsequently, Adrian Burragubba – a member of the applicant and of the W&J Council – challenged the ILUA on a number of grounds.

He claimed that the ILUA was invalid due to the miner's fraud, and adduced evidence of the adverse effect of the mine on the culture of his people. But the Federal Court found against Burragubba[28] and the decision was upheld on appeal.[29]

In another action,[30] Burragubba challenged the agreement-making process. He questioned whether the ILUA was authorised as not all of the claimant group had agreed with its terms. He sought to uphold the resolutions of the March meeting which would necessarily overturn the ILUA. The Federal Court found, however, that in calling the March meeting, Burragubba had failed to adhere to the requirements of the NTA. His claim failed.

The Court therefore confirmed that the W&J people approved the ILUA despite apparent disagreement within the group, and despite evidence as to the cultural damage wrought by the proposed mine. It upheld the authorisation through technical requirements concerning the notice of meeting. Yet it did not address the concerns held by

IMAGE: © Barbara Dieu-Flickr

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Burragubba and others of the circumstances of approval of the ILUA and of its terms.

Although Burragubba and his supporters obviously disagree that upholding the ILUA is just, the question of justice goes beyond the fact of the ILUA, to the nature of native title itself.

Shortcomings of Native Title

The shortcomings in the native title process are evident throughout the W&J claim. The now 15-year-old claim, still unresolved, has so far afforded only the 'thin' right to negotiate rather than the plenary rights expected of property ownership. The process has involved mechanisms for decision-making and dispute resolution inadequate for the needs and norms of the claimants themselves.

What comprises native title

Although native title rights prevail against all but the Crown,[31] in Australia the Crown owns all minerals.[32] Other than rights to ochre, Australian courts have denied mineral rights as part of native title because there is 'no evidence of any traditional Aboriginal law, custom or use'[33] of minerals.[34] Native title holders are therefore subject to the State's mandate to grant mining rights over their land.

In this respect, native title has equivalent status to freehold and

In Australia the Crown owns all minerals… Native title holders are therefore subject to the State's mandate to grant mining rights over their land.

PHOTO: Adrian Burragubba

said that native title rights inconsistent with pastoralists' rights were merely suppressed for the duration of a lease. During the native title debate, the Government took the view that these rights were extinguished, though under the Howard-Harradine agreement the matter was left to the courts to decide. This and other aspects of the Miriuwung Gajerrong judgment are being appealed by the Western Australian Government.

"It is wrong and utterly misleading to equate pastoralists with progress and Aborigines with backwardness. ... Aborigines not only share Australia's pastoral heritage, they shaped it. Traditional lands have become cattle country and many Aborigines embrace the change as part of their lives and their people's histories ... They incorporated aspects of cattle culture into their own, combining a bush and station lifestyle not in a partial 'adaptation' but in a creative breakthrough.

"The Wik decision ... potentially enables Australians to embrace our full bush heritage. National institutions like the Stockman's Hall of Fame thus have the exciting scope to explain a more positive and more inclusive national story: one of creative adaptation and dynamism, where Indigenous and other Australians pioneered economically productive, co-operative, though in the long run, tragically unequal relationships."

Ann McGrath,
from 'The history of pastoral co-existence', in the Aboriginal and Torres Strait Islander Social Justice Commissioner's Native Title Report, July 1996–June 1997

From As a Matter of Fact, 2nd edition Aboriginal and Torres Strait Islander Commission web site, www.atsic.gov.au

What the *Mabo* decision means for industry

But although *Mabo* and subsequent case law established that customary native title survived white settlement and the introduction of English common law, Mr Christopher Davie, partner with the law firm Clayton Utz, says they also decided native title can be extinguished, either by the loss of the connection between the tribe or band of Aborigines concerned and the land, or by government action, such as legislation or the grant of a new title or other right inconsistent with native title rights.

The 1992 High Court decision in the *Mabo* case has forced the mining industry to adapt to the common law recognition of the existence of traditional or native title held by indigenous people in accordance with their laws and customs, according to Mining 2000, in *The Age*.

Mr Davie says: "In the US, the issue of indigenous land title has largely been settled by treaties between Indian nations and the Federal Government. But in Canada and Australia, the law is developing. In Australia, the courts have ruled that each form of native title must be considered on its merits, implying that native title rights differ from place to place.

"Hence, the extinguishing effect of government actions (for example, grants of title) must be separately considered for each place and it is difficult to generalise."

Mr Davie says that in 1993 the Commonwealth Parliament passed the *Native Title Act*, which was extensively amended in 1998. Under the Act, all native title has been extinguished over freehold land and over the area of some Crown leases, but not over pastoral lease lands, reserves or other Crown lands.

"The Act," he says, "has the effect that mining tenements, such as mineral leases and exploration permits, will be invalid to the extent

"... it ought to be possible in most cases to arrive at an appropriate consensus between the mining company and the native title parties for the mutual benefit of both."

Mining boss predicts decade or more of costly native title uncertainty

The full impact of native title on Australia might not be known for up to 20 years, senior mining industry executive Hugh Morgan said yesterday. Nigel Wilson reports.

"Australia has embarked on a voyage of legal and community discovery that has a long way to go," the WMC Ltd managing director said in Sydney.

He said delays in securing native title clearance were producing substantial costs for the mining industry. "We have, during this decade, introduced significant changes in the law of property," he told a Foreign Correspondents' Association lunch.

The outcome was a system that was vague and uncertain and would be subject to change and challenge for perhaps 15 to 20 years.

Mr Morgan has curbed his outspokenness on public issues at the instruction of the WMC board following an adverse judgment in the NSW Supreme Court in 1993, although he reserved the right to speak out on Aboriginal issues.

It is more than seven years since the High Court handed down its *Mabo* judgment, which held that native title could exist in certain circumstances on the Australian mainland. Despite two major pieces of federal legislation, only a handful of title claims have been settled.

Since the Keating government legislation came into effect in 1994 only nine claims have been settled, five by agreement and four through the courts. These four are being appealed.

The National Native Title Tribunal said yesterday that in the same period about 1,300 agreements had been reached between miners and Aboriginal groups that did not require formal determination of native title.

The mining industry claims there will be long-term harm caused by reduced exploration and fewer mining development projects.

Mr Morgan said it was difficult to say where the native title debate was going.

The Federal Government had produced strong legislation and had demonstrated a commitment to resolve the issues. But none of the State governments had yet passed legislation to give effect to the Commonwealth's legislation.

Mr Morgan said it was unclear how the issue was affecting capital investment in mining in Australia, as present indications were masked by low prices for commodities and the Asian economic crisis. These had produced a 10 per cent fall-off in commitments in the past year.

But he warned that uncertainty concerning the impact of native title would be one of the matters assessed by corporations in future investment decisions.

The Australian
7 July 1999, p.2

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leasehold titles. Landholders' rights are constrained to negotiating the terms of entry rather than any more substantive right such as a power of veto.[35]

In the overall scheme of native title, however, this is but one example of how the law limits what *might* comprise native title. It imposes constraints on the nature and extent of the right recognised, based upon what the common law is prepared to cede as vesting in Indigenous Australians.

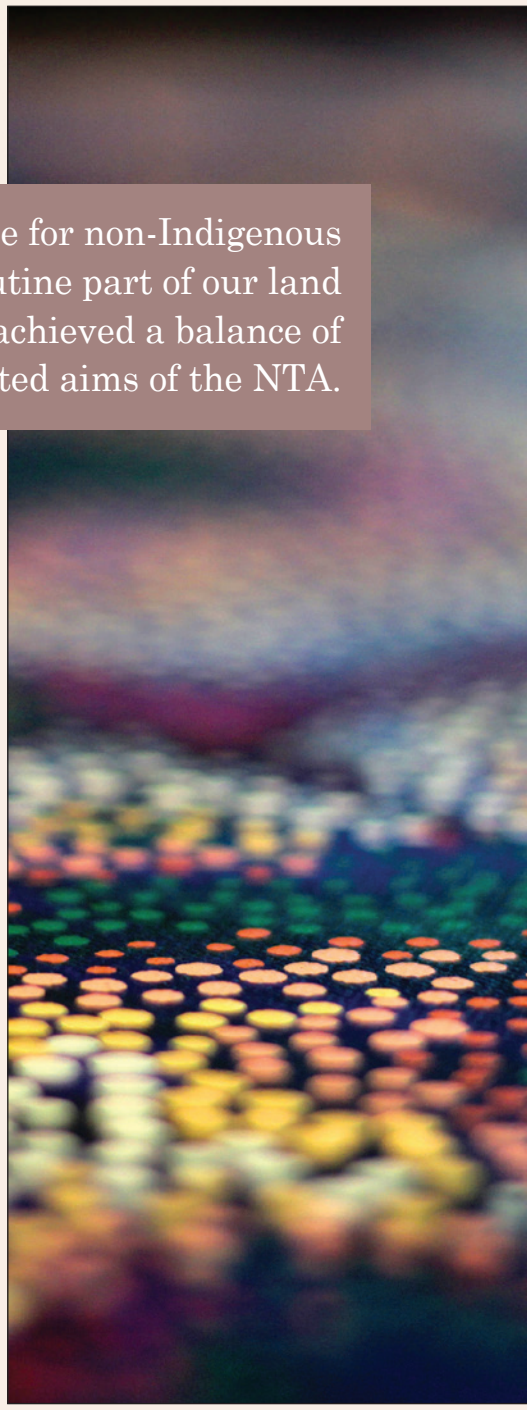
This inherent limitation manifests in the right to negotiate but without the power of veto or, as Burragubba has claimed, the right to protect culture in the face of powerful political and industry interests.

Authorisation is technical

In addition to the constraints on what native title is, NTA processes are highly technical, creating challenges for traditional owners.

For example, until 2017, courts had accepted that an ILUA would bind a claimant group if a majority of representatives agreed to its terms.[36] However, following the negotiation of a complex series of agreements in the longstanding Noongar claim in Western Australia, the resulting ILUAs were challenged[37] on the basis that not *all* of the representatives had agreed to them: some representatives did not agree, and others had died before the ILUAs were finalised. The Court found that the language in the NTA required every single named representative to

IMAGE: © Yale Law Library



Native title was once unthinkable for non-Indigenous Australians but is now a routine part of our land tenure mix. Yet we have not achieved a balance of rights that would fulfil the stated aims of the NTA.

agree to the ILUA for it to be binding.

In response, the government promptly amended the NTA, to a mixed reception. Many, including traditional owner groups and miners, were keen to see a procedural amendment to protect existing interests. But many traditional owners were keen to be involved in the amendments and felt excluded from the process — a feature of lawmaking on matters affecting Indigenous Australians. Those opposing the rushed amendments included claimant groups who were challenging ILUAs before the courts, amongst them, the W&J Council.[38]

Despite those objecting having a substantive interest at stake, the government narrative prevailed, encapsulated in then-Prime Minister Malcolm Turnbull's promise to mining company Adani:

…assur[ing] senior executives from Adani that native title issues threatening the … proposed $21 billion Carmichael coal mine … will be fixed.[39]

Possible reform

We are now further away from the *Mabo* decision than the 1992 decision was from the 1967 Referendum. Native title was once unthinkable for non-Indigenous Australians but is now a routine part of our land tenure mix. Yet we have not achieved a balance of rights that would fulfil the stated aims of the NTA and the urgent need to establish proper legal relations with Indigenous Australians.[40]

A number of reforms to native title have been mooted over time. The difficulties briefly outlined here suggest some in particular. For example, as Richard Bartlett has pointed out, 'Under conventional principles regarding the acquisition of territory, existing rights and relationships are recognised as a fact under the law of the acquiring state.'[41] Thus native title could simply be recognised as extant rights upon colonisation.

Further, the onus on claimants to prove that their interest has *not* been extinguished fails to accord with the law in equivalent jurisdictions where '[o]nce Aboriginal title is established it is presumed to continue until the contrary is proven.'[42] The burden of proof could instead be shifted to the State.

In accordance with the UN

Although the *Mabo* decision cleaved sovereignty from land ownership as a question of Anglo-Australian law, **conversations about land rights naturally intermix with questions of treaty and self-determination.**

Declaration on the Rights of Indigenous Peoples, the process of determining interests and takings by the State, such as the freehold grant to Adani, should adhere to principles of free, prior, and informed consent.[43] Adopting such a threshold for dealing with Indigenous estates embraces principles of constitutive self-determination, affording 'meaningful participation, commensurate with [claimants'] interests, in procedures leading to the creation of or change in the institutions of government under which they live.'[44] These suggestions for reform are not new, but they are politically bold given the fractious state of land management in Australia. Consequently, despite numerous reviews of the NTA[45] and critiques of its operation, native title continues to reflect broader policy failure in Aboriginal and Torres Strait Islander issues in Australia.[46] Australia will remain a laggard in affording meaningful land rights without a much bolder, and broader, reform agenda.

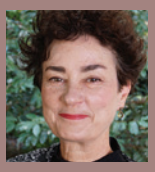
Although the *Mabo* decision cleaved sovereignty from land ownership as a question of Anglo-Australian law, conversations about land rights naturally intermix with questions of treaty and self-determination.

We would be fooling ourselves to think that we could adjust the mechanisms of the NTA in isolation, without broader acknowledgement of the structures of governance within Indigenous Australian communities, and the clearly stated aspirations of Aboriginal and Torres Strait Islander Australians for Voice, Treaty, Truth articulated in the *Uluru Statement from the Heart* and the Report of the Referendum Council.[47]

There is widespread acknowledgement of the shortcomings of the NTA. But to implement law reform in the absence of deep engagement with Indigenous Australians would be a mistake. The Regional Dialogues resulting in the Uluru Statement involved Indigenous communities around Australia prioritising their own future[48] – one part of which involves a constitutionally enshrined Voice to Parliament.

It is now incumbent on the broader community, on policy makers and politicians, to bring these aspirations into being. While there may be other solutions, the Voice to Parliament is an elegant model that entrenches the voices of Aboriginal and Torres Strait Islander Australians within law-making institutions. Its validity is derived from the process of engagement already undertaken in the Dialogues, and to be continued.

Its purpose can clearly be seen in the urgent need for reform of native title law — reform which must be led by Indigenous Australians themselves.



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