

The Native Title Amendment Act 2009: Minor amendments or just playing it small and safe?

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I acknowledge the Kaura Peoples the traditional owners of the land upon which we meet and pay respects to their Elders past and present.

I also acknowledge my Aboriginal and Torres Strait Islander Brothers and Sisters from all around the country. It is both strengthening and heartening to see us all together once more to discuss these very important Indigenous legal issues. My congratulations are extended to the organisers of the fourth conference – you have done a truly exceptional job!

I also acknowledge my esteemed co-speaker in this session. The benefit of having a legal authority such as Justice Mansfield speaking on this topic permits me to stray into the socio-political aspects of native title law and practice. I will obviously defer to his Honour on the legal points.

If Indigenous affairs presents as a parallel universe to mainstream Australia, then native title comprises multiple parallel universes; universes that equal the number of interests that are represented at the Bar table (and they can run into the hundreds) all layered 221 years deep with entrenched attitudes and behaviors caused by the colonisation process.

The Native Title Act¹ (bound in its befitting psychedelic swirling purple cover) along with its equally bizarre jurisprudence attempts to harmonise these disparate interests and in the view of many falls spectacularly short with reliable regularity.

In this chaos and over the cacophony of innumerable stakeholders, a common refrain is the need for faster, fairer and cheaper resolution of native title claims. From an Indigenous perspective, what we have got in return have been policies that border on the painfully malevolent (1998 Amendments where the then Deputy Prime Minister promised bucket-loads of extinguishment) to the insipidly painful (here, I would include the 2007 and 2009 amendments).

A holistic, comprehensive coordinated legislative and administrative programme is simply too much to ask for in this environment. All manner of metaphor is par for the course in this area; one step forward two steps back; dancing on moving carpet. But since we are in grand final season, this is an area where the Black fellas always run up hill on an uneven playing field, against the wind toward increasingly smaller goalposts without half time respite!

If you can detect a hint of crankiness; the reason is that I prepared this speech after reading last week's Hansard where the next round of amendments to the Native Title Act was passed by the Senate. Senator's used language like:

- *There is a need for behavioural change*² - so does this mean a mass epiphany is at hand followed by a group hug!
- *The objective of the Act is to recognise Indigenous peoples ongoing relationship with their lands*³ – yes...and
- *this will result in faster and better outcomes*⁴ – and leap tall buildings
- *there must be equality before the law*⁵ – in other words, there is nothing like due process to wear down a weary adversary

¹ *Native Title Act 1993* (Cth).

² Commonwealth, *Parliamentary Debates Hansard*, Senate, 14 September 2009, 53 (Senator Penny Wong, Minister for Climate Change and Water).

³ *Ibid.*

⁴ *Ibid* 51 (Senator David Johnston).

- Aboriginal people have a *'forensic advantage'* of proving continuity therefore there should be no reversal of proof⁶ – the learned Senator was obviously discharging his senatorial duty by defending State rights to colonise as they wish with impunity
- Any *substantial change would need to be the subject of broad community consultation before proceeding*⁷ (with the greatest respect to the Attorney-General, we Black Fellas read that as code for delay or too hard basket)

Colleagues, as the so-called Minor Amendments to the Native Title Act received the royal assent last week on 17 September⁸ I was reminded of Nelson Mandela's words of wisdom

"There is no passion to be found playing small – in settling for a life that is less than the one you are capable of living."

These recent *minor* amendments should be recast as the *small* amendments, the *safe* amendments, if one was cynical even the *recession-busting* amendments because they are guaranteed to ensure that everyone in this industry has another 30 years of work while we fumble through the outstanding 484 odd claims left on the court lists!

If there ever was an opportunity to play it **big** - this was it! If there ever was an opportunity to realise the potential that this Act is capable of achieving - this was it! I understand the trepidation of any Government making amendments to the Native Title Act but this was the opportunity to re-calibrate the legislation to ensure its provisions aligned with the promise of the Preamble – and there is no Act of parliament that has a more inspiring, and dare I say it, passionate Preamble!

Why were these Minor Amendments a lost opportunity? The simple reason is that over the past 12 months and leading up to these amendments, we had a very large section of the users of the native title system saying that it is time to change the legislation to introduce at least three reforms:

1. Changing the burden of proof⁹ – this change was capable of evoking the behavioral change we all speak of

⁵ Ibid 54 (Senator George Brandis).

⁶ Ibid 55 (Senator George Brandis).

⁷ Ibid 54 (Senator Penny Wong).

⁸ *Native Title Amendment Act 2009* (Cth).

2. Disregarding some forms of extinguishment – when you increase the options there is a commensurate probability of achieving negotiated outcomes (in fairness the minor amendments includes judicial recognition of non-native title outcomes but it is not the same as disregarding extinguishment)
3. Streamlining the process for recognising native title (the minor amendments focused on this backend option – many of my Rep Body colleagues and our supporters supported these changes but you have to get to the end of a very convoluted process to avail yourself of them)

I will return to all three proposals shortly. The most astonishing observation that can be made about these proposals was not only **what** was being said but **who** was saying it. Obviously when native title representative bodies, the Aboriginal and Torres Strait Islander Social Justice Commissioner and AIATSIS say that there is a dire need to reform the system that would be expected but you don't expect the Chief Justice of the High Court¹⁰, current and former judges of the Federal Court and the Law Council of Australia to openly support such reforms. Indeed getting lawyers to agree on anything is hard enough but when they give such advice freely you don't play small!

To appreciate how we got to this parlous state I would like to give a brief history of the short life of native title. It will certainly put these proposals into context and underlines the importance that we can't stop with minor amendments and need to push for the full reform programme – as a matter of urgency!

I would like to talk about the following:

- Outcomes to date
- The legal and administrative developments
- The unique practice issues that Indigenous claimants have to confront

⁹ Australian Greens Senator Rachel Siewart unsuccessfully moved an amendment to the Native Title Amendment Bill 2009 (Cth) that would have inserted a presumption of continuity into the principal Act. The amendment was based on an amendment suggested by Chief Justice French in July 2008: See, Commonwealth, *Parliamentary Debates Hansard*, Senate, 14 September 2009, 53-54 (Senator Rachel Siewart); Justice French. 'Lifting the burden of native title – some modest proposals for improvement'. Paper presented to the Federal Court Native Title User Group (Adelaide, 9 July 2008).

¹⁰ See eg, Justice French. 'Lifting the burden of native title – some modest proposals for improvement'. Paper presented to the Federal Court Native Title User Group (Adelaide, 9 July 2008).

Outcomes

So what has the system yielded by way of outcomes from 1 January 1994 (when the NTA commenced) to date?

Native Title Determinations: There have been 127 determinations (Consent 77; Litigated 22; Unopposed 25). Native Title has been recognised in 88 of those determinations.¹¹

Applications: There are 484 active applications in the system; the vast bulk being native title determination applications. There have been some 1813 applications since commencement of the NTA; while the reduction from 1813 to 484 applications represents effort it is difficult to fully characterise the reduction as finalised claims as many claims have simply been combined or new applications lodged.¹²

Indigenous Land Use Agreements¹³ There are currently 390 registered ILUAs; the vast majority being (205) in Queensland.¹⁴ While ILUAs are not strictly part of the claim process they are frequently used as the machinery to dispose of applications, for example, determinations can be made conditional upon the registration of an ILUA or ILUAs can be used as a mechanism for alternative settlements such as the surrender of native title for other land outcomes.

I will not comment on the statistics on the Future Act Regime¹⁵ (which includes the Right To Negotiate¹⁶ and Comment) the only legal linkage to the court process is that there must be a claim that is lodged in the Federal Court but registered on the Register of Native Title Claims to be afforded procedural rights¹⁷. This linkage of the future act

¹¹ National Native Title Tribunal, National Native statistics as at October 2009.

¹² Ibid.

¹³ "*indigenous land use agreement*" has the meaning given by sections 24BA Indigenous land use agreements (body corporate agreements), s24CA Indigenous land use agreements (area agreements) and s24DA Indigenous land use agreements (alternative procedure agreements).

¹⁴ National Native Title Tribunal, Indigenous Land Use Agreement statistics as at October 2008.

¹⁵ S233 NTA provides that the future act must affect native title. A future act affects native title 'if it extinguishes the native title rights and interests or if it is otherwise wholly or partly inconsistent with their continued existence, enjoyment, or exercise'.¹⁵

¹⁶Subdivision P NTA--*Right to negotiate*. If the claim is accepted for registration, the Registrar must, under paragraph 186(1)(g), enter on the Register of Native Title Claims details of only those claimed native title rights and interests that can, prima facie, be established. Only those rights and interests are taken into account for the purposes of subsection 31(2) (which deals with negotiation in good faith in a "right to negotiate" process) and subsection 39(1) (which deals with criteria for making arbitral body determinations in a "right to negotiate" process). For example s 24AA (5), s24 and s31 (1).

¹⁷ S253 NTA "*procedural right*", in relation to an act, means: (a) a right to be notified of the act; or (b) a right to object to the act; or (c) any other right that is available as part of the procedures that are to be followed when it is proposed to do the act.

regime to the court process is a very important one that I will return to later. Suffice it say that there are thousands of future act agreements.

So we know that these are the outcomes over the past 15 odd years but these figures mean very little in terms of productivity if we do not know the costs.

The Commonwealth Government funds the native title claim system; all the key institutions and bodies including the Courts, the NNTT, Representative Bodies¹⁸ and most of the Respondents (other than the States/Territories). Unfortunately, it is difficult to get these global figures. The information can be sourced but it would involve scouring a decade or more of departmental annual reports- not an attractive option. Anecdotally, we know that the appropriation has averaged around \$100 Million a year¹⁹ having regard to funding peaks and troughs; at least half of this amount going to Representative Bodies to represent native title applicants. So we are talking in global amounts of \$1.4 Billion²⁰ (in reality probably much more) since the inception of the NTA. We can't say precisely how much has gone into the claim process but we know the bulk of it has.

The National Native Title Tribunal has recently commented that on current disposition rates it will take another 30 years²¹ to deal with the outstanding claims; presumably at a similar rate of investment. I would argue more resources will be needed as the claims in the rest of the country are not going to get factually easier due to the increased number of respondents as we move into more populated areas and the historical impact of more extensive colonisation. Leaving aside whether the outcomes to date have been derived efficiently, from where I am sitting there are billions of dollars yet to be spent in the system just to have the legal debate as to whether native title exists; in areas where there is likely to be only relatively little exclusive possession recognised.

Before I move on from the outcomes, I don't want to dismiss or understate the value of the achievements to date. Achievements, that have not only resulted in tangible economic and cultural benefits from having native title recognised but important intangibles; being, the emotional and psychological strengthening of Indigenous people individually and collectively, along with the forging of constructive working relationships with other parties in the process.

¹⁸ S203C NTA.

¹⁹ Attorney- General's Portfolio Budget Statements 2007-08 allocated \$33.20 million dollars allocated to National Native Title Tribunal. FaHCSIA Budget Portfolio Statements 2008-09 indicate Native Title and Land Rights total resources 2007-08 \$65.25 million.

²⁰ Based on current allocation of funding resources.

²¹ National Native Title Tribunal, "National Report: Native Title", June 2008 at 1.

Sadly though, comparing those who currently enjoy those tangible and intangible benefits with those who don't and the knowledge of what they have to do to get there, simply underscores and reinforces the current problem and the future challenge. Having regard to what lies ahead my personal view is simply that the system is not working for Indigenous Peoples.

The Development of the law of native title – the impact of frequent change

Native title has evoked such a wide array of sentiment since its inception that it is easy to lose sight of the fact that native title has only been a feature on the Australian legal landscape for a relatively short time - 17 years.²² Therefore it is useful to outline the significant changes. I propose to give a potted history of the significant legal changes, more to highlight the frequency of change rather than expounding upon the legal principles that underpin each change:

- We all know of the historic *Mabo (No 2)*²³ High Court judgment in June of 1992 that started this process.
- After one of the longest parliamentary debates since federation the *Native Title Act* was enacted in December 1993.²⁴ The Bill was passed by the Senate on 22 December 1993 after the longest debate in the Parliament's history (at that time) of 51 hours and 45 minutes. Commonwealth, *Parliamentary Debates*, Senate, 16 December 1993, 5500 (Gareth Evans, Minister for Foreign Affairs). The debate on the 1998 amendments holds the record for the longest Parliamentary debate on legislation. It is understood that the contender for the third longest debate is the Abolition of the Communist Party – there is nothing like the threat of black fellas or commos taking over to get the blood pumping!

²² There was significant critical response from the non-indigenous community. Some questioned whether the Court had carried 'judicial activism too far in departing from principles that were thought to be settled for over a century'. Sir Harry Gibbs, 'Foreword' in Margaret Stephenson and Suri Ratnapala (eds), *Mabo: A Judicial Revolution* (1993) xiii, xiii.

²³ (1992) 175 CLR 1.

²⁴ The Bill was passed by the Senate on 22 December 1993 after the longest debate in the Parliament's history (at that time) of 51 hours and 45 minutes. Commonwealth, *Parliamentary Debates*, Senate, 16 December 1993, 5500 (Gareth Evans, Minister for Foreign Affairs). The debate on the 1998 amendments holds the record for the longest Parliamentary debate on legislation.

Graeme Neate *Dealing with native title applications and related issues – past developments, present practice and future trends* University of Queensland, 7 April 2005.

- The handing down of the *Wik*²⁵ Judgment in December 1996 that gave rise to the principle that pastoral leases did not necessarily extinguish native title; this judgment was later to prompt major amendments to the NTA by the new Howard Government that was elected earlier in that year.
- The 1998 Amendments significantly altered the administration of the Act and while it did not change the legal definition under s223, the amendments I would submit, deviated from the intent that this was to be beneficial legislation.²⁶ For the purposes of this paper I wish to highlight only three of the changes:

1. ***Introduction of new Registration Test provisions*** – this test is an administrative decision applied to claims by the Native Title Registrar; registration status affording important procedural rights upon native title applicants (something I shall return to later);

2. ***Introduction of Indigenous Land Use Agreements (ILUAs)***; a statutory contract to make agreements enforceable as between the native title party and other parties;

3. ***Changing the institutional arrangements*** so that all applications for determinations were lodged with the Federal Court of Australia rather than the National Native Title Tribunal to comply with the 1995 High Court judgment in *Brandy v Human Rights and Equal Opportunity Commission*²⁷

- The 2002 High Court Judgment of *Ward on behalf of the Miriuwung and Gajerrong People v Western Australia*²⁸ that, inter alia, described native title as a “bundle of rights”; each right in the bundle being capable of extinguishment; from a practical point this decision is significant as it not only required the particularisation of the traditional laws and customs but also the particularisation of each right and interest possessed under those laws and customs.

²⁵ (1996) 187 CLR 1.

²⁶ In his second reading speech, the Prime Minister identified the ‘twin goals ... to do justice to the *Mabo* decision in protecting native title and to ensure workable, certain, land management. Paul Keating Commonwealth, *Parliamentary Debates*, House of Representatives, 16 November 1993, 287-8.

²⁷ [1995] HCA 10.

²⁸ [2002] HCA 28.

- The 2002 *Yorta Yorta Aboriginal Community v Victoria*²⁹ judgment introduced a construct being the need to prove a pre-sovereign *society* that had continued to the present and that each generation of that society had continued to acknowledge and observe laws and customs substantially uninterrupted since sovereignty – the criticism of this case has been that in other overseas jurisdiction, courts have presumed continuity upon proof of establishing the pre-sovereign society.³⁰
- 2007 Amendments - there were a raft of amendments designed to improve the claim resolution process including giving additional powers to the National Native Title Tribunal.³¹
- And on 17 September the so-called Minor Amendments that reversed most of the 2007 Institutional changes between the NNTT and the Federal Court and introduced changes to improve what I call the back-end.

There have been other important legal developments occasioned by a number of High Court, Full Federal Court and Federal Court judgments but I highlight the above legal changes that have significantly altered the operation of the native title system; each change event ushering in an orientation phase that in turn has influenced the positioning of the myriad of parties in the system. It is submitted that the legal developments have concretised positions rather than changed positions and the underlying attitudes.

In this regard we cannot understate the significance of *Ward and Yorta Yorta*. Although the burden of proof is always on the applicant to discharge and it is clear that these cases raised the evidentiary bar, these two cases also significantly influenced the negotiation of native title to the extent that the legal requirements that applicants might need to prove at trial became the gate to the negotiation table. In my opinion, some State and Territory governments

²⁹ 214 CLR 422.

³⁰ In other jurisdictions upon native title being proven to exist at the time of sovereignty, there is a presumption that it continues thereafter. See *Amoudu Tijan v Secretary, Southern Nigeria* [1921] 2 AC 399, see also *Calder v A-G (British Columbia)* 1973 34 DLR (3d) 145 at 308.

³¹ The *Native Title Amendment Act 2007* (Cth) is part of a package of reforms aimed at providing more efficient and effective outcomes from the current native title system. The changes affect native title representative bodies and prescribed bodies corporate; many respondent parties to native title claims; the Federal Court ('the Court') and the National Native Title Tribunal ('the Tribunal'), Graeme Neate 2007 ILB, *New Powers and Functions of the National Native Title Tribunal*.

have formulated and implemented Connection Guidelines³² that have significantly contributed to additional costs and delays. It is the aboriginal parties that bear the brunt of that dogmatic approach.

The number of changes has definitely influenced the timeframes for resolving native title but it is how the parties have responded to the legal changes rather than the legal principles themselves that has compounded problems which in turn has had a direct bearing on practice.

Practice

There are some key factors that have a bearing on the complexity of native title practice which I will outline below.

1. The inherent challenges that face Indigenous people in prosecuting a claim.
2. The number of statutory functions that involves input by the native title party; suffice it to say that there are functions that the institutions and respondent parties wouldn't have a clue about and are frequently used by those to blame the native title party for dragging the chain in the prosecution of their claims – parallel universes!
3. The availability of Resources – financial and human.
4. The number of non government respondent parties and hence the span of rights and interests that need to be reconciled with the native title rights and interests.

1. Challenges for Indigenous people in prosecuting native title claims

There are many cultural, linguistic and historical factors that impact upon Indigenous people's interaction with the legal system. Such factors that include:

- Fragmentation of knowledge as to who can speak on certain matters.

³² Western Australia rely on the *Guidelines for the Provision of Information in Support of Applications for a Determination of Native Title* (October 2004) ("Connection Guidelines"). The QLD government also published guidelines. The Department of Premier and Cabinet, Queensland Native Title Services released the *Compiling a Connection Report*.

- The complex kinship systems that may influence who can speak to whom.
- The protocols around sorry business and the periods for grieving.
- Different decision-making processes.
- English is a second, third or fourth language for many Indigenous peoples and that Aboriginal English has its own syntax which can cause its own cross - cultural communication difficulties.
- For historical reasons, the deep-rooted and perfectly understandable mistrust that Indigenous people have of the legal system and all those within it – sometimes, even their own legal representatives.
- Many Indigenous people are disadvantaged across the full range of social indicators; health, housing, employment, education, etc – this disadvantage impacts upon their ability to understand and engage in the process

For these reasons, the Senator who made the comment that there must be equality before the law is not aware of these challenges nor Aristotle's famous quote: **"Injustice is when the equal are treated unequally, and the unequal are treated equally."**

Moreover, it will be interesting to see how the Federal Court deals with this reality when it takes over the mediation process and tightens case management timeframes and compliance. With the greatest respect to the Judges in that jurisdiction, I have seen many a criminal record start by state courts being unable to comprehend these cultural issues that resulted in Aboriginal Peoples and Torres Strait Islanders being jailed for failing to comply with Bail Act requirements and the like due to sorry business obligations.

There are countless other challenges. It is the compounding effect that is the real problem in receiving instructions and giving advice in native title matters.

Other realities include:

- The applicants are more often than not geographically spread out across a claim area that spans hundreds if not thousands of kilometers.³³
- The areas are invariably remote where there is no public transport.
- Applicants are generally not remunerated and undertake these serious responsibilities for their people on a voluntary basis, usually afterhours.
- Many applicants are cultural Elders so they have other functions to perform within their communities; many are also elderly and frail so there are real capacity constraints.

2. The interrelationship of other functions

- Native title parties not only have to prosecute their claims but there are other functions that they have to contend with including the future act regime that covers the right to negotiate to the right to comment. The future act regime covers every industry under the sun; from mining and exploration under the right to negotiate regime to the right to comment on minor road infrastructure, issuing irrigation permits and fishing licenses, etc – literally hundreds of these notices come across Rep Body desks in any given month, which are in turn forwarded to the applicant to try and make sense of this avalanche of paper work.
- Indigenous Land Use Agreements (ILUAs) are a common tool to resolve a range of future act issues from town expansions, mining and exploration and infrastructure development – yes there may be some economic development opportunities but there are many ILUA and other Agreements that have little to no financial benefit.

The disappointing point about these other responsibilities is that they are frequently characterised as the only reason for why claims are lodged in the first place and hence an alleged abuse of process. What the court needs to appreciate is that if native title parties don't protect their rights under the future act regime (whether right to negotiate/comment or under ILUAs) there won't be anything left to recognise as rights and interests are effectively extinguished in a piecemeal fashion! The astonishing thing is that respondents will use preoccupation with the future act regime as an abuse of process until they want to do a deal to protect their particular interests!

³³ The *Combined Wongatha People* Claim relates to some 160,000 sq kms of land in Western Australia.

3. Resources – financial and human

Native title is not conventional litigation. The unique legal and factual issues coupled with the inherent complexities of running a representative action for a large group of people (that happened to be also severely disadvantaged) and responding to the myriad of respondent parties and their interest, demands adequate resources to meet those needs.

These resources are both financial and human. In conventional litigation, the legal representative wouldn't dream of paying the travel costs of his or her clients for the purpose of taking their instructions or giving advice. In fact, some clients you may never see if the work can be done electronically. This luxury does not exist in native title work, at least, when representing applicants. This is for all the reasons outlined earlier. If the representatives can't get the applicants together at least three or four times a year, the work can't be done, case file momentum is lost, solicitor-client rapport is diminished if not damaged, sometimes irreparably and the claim languishes.

By way of example there are 53 claims in my area and at an average of \$10 000 a meeting (this cost is due to the number of applicants³⁴ some who need support persons - and the remoteness of and the distance between their respective residences) at four times a year; the client travel budget alone is around the \$2 Million mark. The primary evidence³⁵ in native title claims is that of the claimants themselves but native title work is heavily dependent on expert witness such as anthropologist to provide supporting evidence on issues of society, membership, continuity of connection, etc. A connection report costs around \$100 000; reports generally require 100 days of field, research and writing time at around \$1000 a day. There is a range of other experts that might be used such as linguist, historians, etc at similar rates.

In fact many NTRB are resourceful enough to try and "piggyback" claim work on future act work where a proponent is prepared to pay for a meeting.

Financial resources is but half of the equation. The shortage of senior anthropologist to undertake this work is such that there are simply not enough appropriately qualified experts to do the work. Representative bodies then effectively become competitors with each other as we attempt to engage anthropologist in a very thin market. This limited resource is further depleted as some anthropologist may be conflicted out of a region as they may have done work for an overlapping claim group in the past.

³⁴ The number of Applicants on a Native Title can range from one to more than ten.

³⁵ *Sampi v State of Western Australia* [2005] FCA 777.

4. Parties – the sheer number!

Native title applications invariably have a high number of respondent parties³⁶ which reflects the large geographical area of claims but also the many layers of proprietary interests that can attach to a parcel of land. Prior to the 2007 amendments, parties were 'automatically' entitled to become a party if the person held a proprietary interest registered in any public register, provided application was made in writing to the court within 3 months of a notification date.³⁷ Parties had a right to join outside of time upon application to the Federal Court.

The 2007 amendments included an additional requirement that the interest be affected by a determination in the proceedings. In spite of the amendment, many interest holders remain as parties. Bear in mind that native title will yield to any interest holder that has an inconsistent right or interest; in my rather partial view, most respondents will sustain no loss and in my view there is no interest affected and should withdraw or be removed from proceedings. It is of no surprise that native title claims can have tens if not hundreds of respondent parties that are eligible for taxpayer funded legal assistance to potentially resist an application.

It is clear that there are a number of issues that impact upon native title practice that go far beyond the normal constraints of conventional litigation.

The Proposals

The different models

There are a number of models that could be put forward to ameliorate the current harsh evidential burden placed on Applicants. The two popular and abundantly sensible models are proffered by Chief Justice French and Justice North.

In a nutshell the **French model** is a rebuttable presumption of continuity of the relevant society and the acknowledgement of its laws and customs from sovereignty to the present time.³⁸ This presumption will be based on the fact that the native title claim group acknowledges laws and observes customs it **reasonably believes to be the**

³⁶ The number of Respondent parties can quite easily be into the hundreds.

³⁷ S66 (3) identifies which persons or bodies the Registrar must provide notice to.

³⁸ See, Justice French. 'Lifting the burden of native title – some modest proposals for improvement'. Paper presented to the Federal Court Native Title User Group (Adelaide, 9 July 2008) [28].

laws and customs acknowledged and observed by their ancestors right back to sovereignty;³⁹ in a sense a 'reverse domino of continuity'. It would then be up to the State or another respondent to rebut the presumption based on credible evidence.⁴⁰ The Chief Justice even drafted two additional subsections to the existing s61 to facilitate the change.⁴¹ It was that simple!

Justice North proffered a different approach.⁴² Under the **North model**, applicants would need to show that there were Indigenous people at sovereignty occupying the land in question according to traditional laws and customs.⁴³ The onus would then shift to the respondents to demonstrate that the other requirements of the *Yorta Yorta* test do not exist. Justice North suggested the changes be made to s223.⁴⁴ Justice North's model is consistent with overseas common law jurisdictions where there is a presumption of continuity from sovereignty – so this concept is no stranger to the common law. However, a distinguishing feature of those cases is that in those overseas jurisdictions the Aboriginal parties have the benefit of treaties recognizing those Peoples at the time sovereignty was asserted.

These models are not the panacea to the woes of native title litigation – one could never be that naïve. There is the reality of overlapping claims (who is entitled to the presumption or does the existence of an overlap negate the presumption from the outset); under the North model, how do you explain concepts of succession (where one group takes over the rights and interests to land and waters of another group). While these present as issues they are far from insurmountable in fact they border on the infinitesimal compared to the current nonsense of complying with the *Yorta Yorta* test.

The NNTC's submission⁴⁵ on these collateral issues included the utilisation of the registration test so that the presumption would be limited to those claims that are registered. It would also require NTRBs and applicant groups themselves to sort out intra and inter Indigenous disputes and unmeritorious claims. A challenge that needs to be accepted if such reforms are embraced!

³⁹ Ibid [29].

⁴⁰ Ibid [30].

⁴¹ Ibid [31].

⁴² See, Justice AM North and T Goodwin, 'Disconnection – the gap between law and justice in native title: A proposal for reform', paper delivered to the AIATSIS National Native Title Conference, Melbourne, 4 June 2009.

⁴³ Ibid 14.

⁴⁴ Ibid 16.

⁴⁵ See, National Native Title Council, 'Submission – Proposed Minor Native Title Amendments', submission to the Attorney-General in response to the December 2008 Commonwealth discussion paper on proposed minor native title amendments, 20 February 2009. Available at <http://www.ag.gov.au/nativetitlesystemreform#submissions>

1. Behavioural change

I appreciate that legislation can be a blunt instrument when it comes to behavioral change but it is the only tool we have left in the tool box. Parties and their legal representatives are not going to change their behaviour or indeed their professional standards when the law and process favours them and their clients. Only in the parallel universe of native title would you get fundamentally good people behaving inherently unfairly.

Real change - behavioral change – cannot occur unless the current playing field is leveled. Legislative amendments ought to serve as a significant catalyst to change attitudes.

The presumption of continuity, whichever model is adopted would achieve the following:

- Make the system fairer for Indigenous parties
- Places the burden on the State; the party that has the tactical advantage of disproving continuity and extinguishment through the “institutional memory” of how it colonised
- Investigating issues of connection and extinguishment simultaneously and by the one party is the most logical way of getting a clear picture of the evidence: each grant of tenure has locked within it a story about what happened to the Aboriginal people on that land
- The commercial reality (and there is no commercial reality in current native title land) of being put to proof on both connection and extinguishment is enough to explore a broader range of options – the cost of proving or disproving is often more sometimes twice and thrice as much as the freehold value of the land in question
- There is nothing like pricking the raw nerve of morality to invoke an epiphany: the State would need to prove that each succeeding government was an effective coloniser the sordid details that would include acts of genocide would be abhorrent.

- It would dispense with the current linear, technical and blinkered way native title cases are prosecuted and defended
- With the reduction of unnecessary transaction points, time, money and misery is saved – sounds like faster, cheaper, fairer outcomes??

2. Increasing the options for a negotiated outcome

It is particularly heartening to hear the range of options that are available to increase the options. The Chief Justice, Justice North, Justice Mansfield and former Justice Wilcox have all made invaluable contributions. Those contributions range from disregarding historical extinguishment to judicial recognition of non native title outcomes: the latter being picked up in the minor amendments.

Sadly increasing the options don't get you anywhere if you are stuck at first base on the connection issue.

At present, respondent parties have no real motivation to consider negotiated outcomes. The process is linear and respondents, patiently or impatiently, wait in turn to play their role in the process as the system heaves along. If we change the process, we change the behaviours and it is in that space where options abound.

There are many extinguishing tenures that could be characterised as "historical extinguishment". Justice French in his paper 'Lifting the burden of native title – some modest proposals for improvement' makes the following contribution:

The second suggestion, by way of modest amendment to the NTA, would allow extinguishment to be disregarded where an agreement was entered into between the States and the applicants that it should be disregarded. Such agreements might be limited to Crown land or reserves of various kinds. The model for such a provision may be found in ss47 to 47B. By way of example, arcane argument over long dead town sites might be avoided by resort to such agreements. Presumably some form of registration or formal public record of the agreement would have to be maintained. Native title so agreed would also be subject to existing interests. If, for example, the vesting of a reserve was taken to have extinguished native title an agreement of the kind proposed could require that extinguishing effect to be disregarded while either

*applying the non-extinguishment principle under the NTA or providing in the agreement itself for the relationship between native title rights and interests and the exercise of powers in relation to the reserve.*⁴⁶

3. Confidence in the system

Finally, parties need to be confident that their agreement will be recognised. The Minor Amendments pick up Justice Mansfield's statements around agreed statements of fact in s 87 consent determination. This proposal is very positive but, alone does not represent a comprehensive response to ensure fairness in the negotiation process. We need to reiterate the interrelationship of s87 process changes to the proposed presumption of continuity and increasing the available options.

The Minor Amendments also includes the interesting suggestions of former Justice Wilcox being judicial recognition of matters other than native title, this might include recognition of say, traditional ownership⁴⁷. This is a very constructive amendment that obviously needs to be explored in the context of how that power might be exercised.

Conclusion

I agree that behavioural change is critical to faster, fairer and more cost effective outcomes. I also agree that the recent amendments are a move in the right direction. But those amendments alone will not evoke the necessary behavioural change. In fact the changes associated with implementing the amendments are likely to add yet another layer of confusion and effort upon an already change-fatigued environment.

We need to introduce the other limbs to the reform programme as soon as possible; not in two, three or four years' time. If the changes were made and made quickly, the system stands a good chance of reducing 30 years of work down to 10. In fact why not aim for five years! After all "there is no passion to be found in playing small".

⁴⁶ Justice French. 'Lifting the burden of native title – some modest proposals for improvement'. Paper presented to the Federal Court Native Title User Group (Adelaide, 9 July 2008) [32].

⁴⁷ The new s87(4) states "without limiting subsection (2) or (3), if the order under that subsection involves the Court making a determination of native title, the Court may also make an order under this subsection that gives effect to terms of the agreement that involve matters other than native title."