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The art of the possible

And in the end?

The native title era in Australian is necessarily ephemeral. Applications for the recognition of native title will not continue indefinitely. The time will come when no new claims are lodged and those made will be determined or will have been discontinued, for whatever reason. Looking back in the future, the native title era will be seen as a comparatively short period of time marked by the confluences of a postcolonial desire to right past wrongs, to bring certainty following the Mabo decision and as yet another component in the complex rubric of Indigenous–state relationships. And how will it be judged? The deficiencies and limitations of native title will be apparent from a reading of this book. Applications for the recognition of native title require complex and often expensive legal process over which the claimants have little or no control. Outcomes are uncertain as claimants cannot know beforehand how the court will respond to their application or how it will judge their claims. Proof of continuity is not only a problem in terms of the evidence required, but seems an especially unfair requirement for those so thoroughly dispossessed and who were the subject of multiple policies that worked to eradicate the very laws and customs now demanded of them by the native title law. For those Indigenous Australians who were hardest hit by the European settlement of their country and their cultural dispossession most marked, the requirements of the proof of native title are unlikely to be within reach. Generally, recognition of native title favours those in remote areas of Aboriginal Australia and disadvantages those in urban and rural parts

– particularly in the south. This seems hardly fair or equitable. Claims are giving rise to considerable disagreements between Indigenous groups that have split some communities. Redress is often sought through the courts thus furthering the entrenchment of the legal process in the determination of proprietary interests in land for Australian Indigenous minorities. While recognition of prior rights to country is undoubtedly of value to many Aboriginal people, the tangible and economic benefits of native title may prove elusive in some cases at least.

There will, then, be some harsh judgments. Some I expect will say that it was 'too little too late'. Others, better understanding the necessity of the native title legislation, may see it as compromised legislation vainly designed to fix a problem that started with the declaration of sovereignty by the British Crown in 1788 which had no simple or single solution.

I commenced this book with some recent history and outlined a number of the events, political thinking and idealism that led to the enactment of the *Native Title Act.* So, did the Act furnish the opportunities Paul Keating promised it would? Did it provide for certainty where only uncertainty had existed? Did it mark an historical turning point and the basis of a new relationship between Indigenous and other Australians? The fact is that after the Mabo High Court decisions there was a new relationship between Indigenous and other Australians; the *Native Title Act* can take no credit for that. The European settlers had not possessed vacant land. It belonged to someone else under a system of laws and customs that the settlers' law belatedly recognised. After Mabo, then, nothing was quite the same again, including the relationship between Indigenous Australians and the state. For the majority of the Australian landmass, legal certainty was achieved by the passage of the Act. While the process required to settle native title claims was for many protracted and expensive, the Act provided the framework for an orderly settlement of claims as well as for the negotiation of just terms for future acts over claimed land. As for the 'opportunities', some at least could have been embraced without native title or Mabo. The Keating government's response to Mabo was a trinity of measures. The first was the *Native Title Act*, validating past grants of land to the new settlers and setting up a process for the recognition of rights that had survived the colonisation of the continent. The second was the establishment of the Indigenous Land Fund managed by the Indigenous Land Corporation (ILC) that acquired, by purchase, alienated land for Indigenous groups (Sullivan 2009, 8). The third, a social justice package,

was never implemented, prompting some to observe that the *Native Title Act* was never designed to provide the full remedy to Indigenous disadvantage.

> 3.75 Stakeholders have pointed out that the Native Title Act was never intended to be the sole response to Mabo v Queensland [No. 2] and to Indigenous demands for land justice, or to the economic and social disadvantage that is a consequence of dispossession. It was to be accompanied by a land fund and social justice package, thus providing a comprehensive response.
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> 3.76 In 2008, the then Social Justice Commissioner, Dr Tom Calma, commented that 'the other two limbs did not eventuate in the form intended, and this abyss is one of the underlying reasons why the native title system is under the strain it is under today'.[1]

The functions and policies of the ILC are not my concern here, although they have received attention by other scholars (see, for example, Sullivan 2009). The *Native Title Act* has operated in a policy vacuum that has undoubtedly rendered it more imperfect than it otherwise might have been. That accepted, the *Native Title Act* has accomplished a number of things that had never been afforded to Indigenous Australians before. First, it gave recognition that Indigenous Australians were the first Australians and that their rights to country not only existed in a manner capable of recognition by the invaders but that some of these rights had endured to this day despite repeated acts of aggression, dispossession and ignorance. Second, the *Native Title Act* secured the rights of Indigenous Australians to have a say about any future acts planned for country subjected to a registered claim. Third, it provided a means whereby rights to country could be determined by the Federal Court to have validity, in the same way as other Australians enjoyed property rights. Native title applications provide one way (and perhaps now the only way) to gain recognition of rights within terms legitimated by the conquerors. Finally, it made provision for the payment of compensation (in some circumstances) for the loss of native title rights. These are no mean achievements.

1 Australian Law Reform Commission (ALRC) 2014, 63–64. (Original referencing footnotes excluded.)

The Single Noongar Claim

There are many examples of successful claims in Australia and I could, no doubt, have chosen others to illustrate my point. The native title process is one that requires an appreciation of the limitations of the *Native Title Act* as well as what is possible given the standards of proof required. But it is also one that needs an inspired appreciation of the possibilities. I was privileged to undertake the research for the Single Noongar Claim.[2] The report I wrote in this regard is published elsewhere and, as is therein noted, much transpired after the initial case was heard in 2005 (Palmer 2016, vii). While the final outcome was not a determination of native title by the Federal Court, protracted negotiations undertaken by the South West Aboriginal Land and Sea Council resulted in a number of Indigenous Land Use Agreements (ILUAs) approved by Noongar people at six authorisation meetings held across Noongar country between January and March 2015 (ibid.). This result was not without controversy and some members of the Noongar community strenuously opposed the settlement. One principal sticking point was that the claimants were required to exchange their native title rights for the rights and benefits contained in the ILUAs.

The agreement met a legal obstacle in early 2017 in the form of a court challenge to the Tribunal's registration of ILUAs that were to effect the arrangement. In short, it was asserted that not all applicants had signed the necessary documents. The majority of the Full Bench of the Federal Court found:

> 244 … if, in relation to any proposed area agreement, one of the persons who, jointly with others, has been authorised by the claim group to be the applicant, refuses, fails or neglects, or is unable to sign a negotiated, proposed written indigenous land use agreement, for whatever reason, then the document will lack the quality of being an agreement recognised for the purposes of the NTA [*Native Title Act*].[3]

2 Single Noongar Native Title Claim (W6006 of 2003 & W6012 of 2003); *Bennell v Western Australia* [2006] FCA 1243; *Bodney v Bennell* (2008) 167 FCR 84.

3 *McGlade v Native Title Registrar* [2017] FCAFC 10.

The decision had implications for many existing ILUAs that had not been signed by all named applicants, some of which involved substantial development projects.[4] The Turnbull government introduced the Native Title Amendment (Indigenous Land Use Agreements) Bill 2017 on 15 February 2017. The bill was referred to the Senate Legal and Constitutional Affairs Legislation Committee and was eventually passed into law on 22 June 2017. It confirmed the legal status of existing agreements and ensured that ILUAs could be registered without requiring the signature of every named applicant.[5]

There can be little doubt that from the outset there was much scepticism about the possibility of winning a combined claim to the whole of Australia's southwest. There was substantial opposition to such a claim from respondent groups; the more traditional anthropology available was, at least in part, not supportive of the proposition that there could be shown to be a continuity of laws and customs. The size of the claim, the disparate groups and internal wrangling all made this seem like a challenge of unprecedented proportions. However, the claimant evidence was strong, the legal case painstakingly and adroitly put together and the field data collected substantial. The trial judge found in favour of the applicant although the case was sent back to the court on appeal and reassigned to a new hearing, though no finding was made that rejected the claim. Out of this seemingly unpromising odyssey came recognition and benefits that merit more attention than they appear to have received. As a part of the agreement reached between the parties, the Western Australia Government passed the *Noongar (Koorah, Nitja, Boordahwan) (Past, Present, Future) Recognition Act 2016*. This is 'An Act for the recognition of the Noongar people as the traditional owners of lands in the south-west of the State'. The Preamble to the short Act, which provides recognition of the Noongar people and their lands, runs as follows:

> A. Since time immemorial, the Noongar people have inhabited lands in the south-west of the State; these lands the Noongar people call Noongar boodja (Noongar earth).
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> B. Under Noongar law and custom, the Noongar people are the traditional owners of, and have cultural responsibilities and rights in relation to, Noongar boodja.

4 See, for example www.theaustralian.com.au/national-affairs/indigenous/george-brandis-failed-to-act-on-land-rights-warning/news-story/b9e1fe24cd744fdaadfa4250cb7a4906, accessed 9 March 2017.
5 www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r5821, accessed 9 March 2017. *Native Title Amendment (Indigenous Land Use Agreements) Act 2017*.

> C. The Noongar people continue to have a living cultural, spiritual, familial and social relationship with Noongar boodja.
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> D. The Noongar people have made, are making, and will continue to make, a significant and unique contribution to the heritage, cultural identity, community and economy of the State.
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> E. The Noongar people describe in Schedule 1 their relationship to Noongar boodja and the benefits that all Western Australians derive from that relationship.
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> F. So it is appropriate, as part of a package of measures in full and final settlement of all claims by the Noongar people in pending and future applications under the *Native Title Act 1993* (Commonwealth) for the determination of native title and for compensation payable for acts affecting that native title, to recognise the Noongar people as the traditional owners of the lands described in this Act.
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> [Assented to 16 May 2016]

The website of the WA Department of the Premier and Cabinet describes the settlement as:[6]

> The South West Native Title Settlement (the Settlement) is the most comprehensive native title agreement proposed in Australian history, comprising the full and final resolution of all native title claims in the South West of Western Australia, in exchange for a package of benefits. The historic agreement involves around 30,000 Noongar people and covers approximately 200,000 square kilometres. The Settlement represents a significant investment in both the Noongar community and the shared future of the Western Australian community as a whole.
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> The Settlement will provide the Noongar people with long-term benefits and opportunities for developing Noongar interests. The Settlement will also provide an opportunity for the WA Government to work in partnership with the Noongar people to improve economic, social and cultural outcomes for the Noongar community. In addition the Settlement will deliver long term cost benefits to the WA Government and land users through the resolution of native title and the removal of all 'future act' obligations across the south west.

6 www.dpc.wa.gov.au/lantu/south-west-native-title-settlement/Pages/default.aspx, accessed 5 January 2017.

The settlement package included the establishment of a perpetual trust funded at $60 million per annum over 12 years, the establishment of regional corporations, and the creation of a Noongar land estate comprising a minimum of 320,000 hectares of Crown land into the Noongar Boodja Trust over five years. Other benefits included joint management programs, heritage agreements and economic development.[7]

The settlement package will always attract its critics and it will remain a matter for judgment as to whether the deal was a good one. The alternative would have been to go back to the court, fight the claim anew and await the uncertain outcome of the trial and the inevitable subsequent appeals. It stands as a good example of an alternative settlement and, on the facts as they are presented in the public domain, has much to recommend it. In considering this outcome, it is pertinent to remember that the settlement is the product of an application for the recognition of native title. Without the forthright engagement in that process by Noongar claimants, their lawyers and anthropologists, this end point is unlikely to have been reached. The reality of the native title legislation and the court findings provided the leverage that effected the final result.

And anthropologists?

Otto von Bismarck is credited with saying that politics was the art of the possible.[8] In coming to an understanding of what Bismarck may have meant by this saying, it is enough to note that Bismarck was a man who liked to get things done, generally in difficult circumstances and against the odds. The saying is apposite to native title, not because Bismarck can be understood to have any correspondence or likely sympathy with native title principles (in fact, the opposite is likely to be the case), but because it encapsulates a relevant principle. Like politics, native title is an art that seeks positive outcomes through an appreciation of what is practically obtainable. Anthropologists who participate in the native title process need to appreciate this fact and employ that comprehension when they become involved in a native title process. What is possible and

7 www.dpc.wa.gov.au/lantu/south-west-native-title-settlement/Pages/default.aspx, accessed 5 January 2017.

8 'Politics is the art of the possible, the attainable …the art of the next best'. (In German: Die Politik ist die Lehre vom Möglichen.) This sentence was printed in the newspaper *St. Petersburgische Zeitung*, on 11 August 1867. Reprinted in, *Fürst Bismarck: neue Tischgespräche und Interviews,* Vol. 1, p. 248 (1895). www.shmoop.com/quotes/politics-art-of-impossible.html, accessed 9 January 2017.

attainable is circumscribed by three factors. These I distil from the native title processes in which I have been involved. They are not, of themselves, particularly complex or mentally challenging. However, I am frequently surprised by the lack of attention to them by some of my anthropological colleagues.

Finding your role in the legal performance

Seeking recognition of native title is a legal process. It is a matter filed with the court, mediated by the court and ultimately determined by the court. Accordingly, it is a business for lawyers. It will be members of the legal profession that decide how cases are to be run, how time and resources are to be apportioned and, ultimately, how evidence will be presented to the court – including the evidence of experts. The legal process allocates a quite specific responsibility to anthropologists – usually as an expert and potentially as a witness. It is, then, essential to understand the dynamics of the process and the sort of role allocated to the researcher. In this anthropologists are unlikely to have, and indeed should not have, an executive or directing role. When it comes to the actual prosecution of the application an anthropologist in a native title claim occupies a back seat. This does not mean that we should be inattentive to the process or to the substance of what transpires, particularly if the matter goes to trial. Part of the job of the anthropologist is likely to be the provision of expert testimony to the court. In this the evidence of the claimants will provide an essential part of how we develop our opinions.

Anthropologists do, then, have a substantial and significant role to play in native title claims. This contribution is one that must be understood in the context of all other players. In this regard I have long advocated for a genuine, inclusive team approach to native title work involving the claimants, their lawyers, staff of the Representative Body as well as the anthropologist. The dynamic observable between lawyers and anthropologists has been subject to a degree of exploration and self-analysis – a matter I have reviewed elsewhere (Palmer 2007). So, part of the art of the possible is getting the balance right between those who run the claim (the lawyers) and those whose expertise is essential to the success of the application. This demands respect and patience on both sides but, above all, an appreciation of the true topography of the native title process which is governed by legal contours.

The role allotted to anthropologists in the native title process may not sit comfortably with all members of the profession. Some, perhaps as a result of long-term relationships formed through fieldwork or, to my mind, the erroneous belief that they have a privileged appreciation of those whom they study that is denied to others, consider they merit a role and status beyond that which is likely to be afforded to them. Anthropologists can all too easily become precious about their role and unrealistic about their importance. Anthropologists have been reluctant to let go of the special access they have enjoyed to social policy development and governance as well as input to the drafting of legislation relevant to Australia's Indigenous peoples. Anthropologists have, in my mind rightly, been replaced by advice from Indigenous individuals and groups who command now greater legitimacy.

Understanding our role as anthropologists should also instruct us to avoid straying too far into the legal domain of analysis and opinion. While it is important that we understand what is required of us in a native title claim, both in terms of the original legislation and subsequent case law, this does not equip us to present views and opinions that should more properly be furnished by trained lawyers.

Knowing what is required

Native title is elemental in the sense that its recognition is determined by specific elements identified in the originating legislation and subsequent case law. Aspects of the conditions necessary for the recognition of native title will be subject to substantial legal argument (if the matter goes to trial) and different lawyers will take different approaches – some wiser than others. This accepted, there remain some basic factors that are important to the proof of native title (or its disproof), all of which (I hope) I have covered in this book. For example, native title recognition requires that there be shown to be a continuity of laws and customs of the claimant group, including those laws and customs that relate to the holding of rights to land. These laws and customs must be shown to have substantial continuity since the acquisition of sovereignty by the British Crown. The laws and customs observable are the creation of a society. Consequently, that society (or societies) needs to be shown to have had continuity since the date of sovereignty in order that the laws and customs of that society are also understood to have remained, more or less, intact. If the system of gaining rights to country is via descent, then accounts

of how the claimants trace descent from those who might properly be regarded as being in possession of the country of the claim at the time of sovereignty must be provided. The court or evaluating respondent groups (particularly the state or territory) will be interested to know to what degree the laws and customs of the claimant group have remained intact. They may be interested to know some detail about how the claimants relate to the country of the claim, how it holds special significance for them as well as how they visit and use the country today. There are many additional strands to what might be included in the anthropologist's account. However, these represent some of the more important ones.

What is not included and what needs to be excluded are data and expert opinion on matters that have no relevance to a native title application. There is sometimes a danger that a researcher has a favoured topic – a bone to pick or pet obsession – and sees the native title report as a means of expiation. If this is not eradicated in good time by counsel this can be quite damaging to the case: at worst eroding the credibility of the expert and at best wasting time and resources by the provision of distracting and irrelevant materials. Native title research is not an indulgence but should be a focused exercise in applied anthropology.

Understanding what is possible

Anthropologists work from their field data, which must provide a sound basis for the opinions and expert views advanced. Field data or the researcher's ethnography are the fundamental building blocks upon which the opinions are founded. Should the data not support positive responses to fundamental native title questions, then it is imperative to state that this is so. Whether commissioned by the applicant or the respondent, transparency, honesty and total absence of advocacy are all critical elements. The work of the anthropologist is to bring his or her expertise to bear on the issues identified for them openly, veraciously and with scholarship and proper study.

Forays into the battleground that is the contested realm of Australia's relationship with its Indigenous peoples readily evokes emotion, idealism, aspiration and demands for social justice. Native title activity readily affords a portal into this beleaguered world. Useful work may only be performed by anthropologists in this domain by understanding that their participation cannot allow for the distractions of partisan participation. Rather, it is a matter of appreciating what can be accomplished with what

is available: the native title law, the reality of the claimant testimony and their ethnography, the archival evidence, and the role assigned to the expert. Those directly involved in the realising of native title aspiration need to accept that some claims will never gain the recognition the claimants seek. The onus of proof rests with the applicant and the bar is set high. Alternatives to recognition of native title rights should never be discounted.

Native title is a practice for lawyers and anthropologist that seeks to utilise federal legislation that sought to bring certainty in the face of apparent uncertainty. This developed from the acceptance by the High Court that Indigenous rights had not been wholly extinguished and that *terra nullius* was a convenient legal fiction without basis or foundation. It was legislation born of political necessity and tempered by a desire to engineer social advantage in the face of persistent and historical disadvantage. It was but one of three measures to remedy past wrongs – one of which never saw the light of day. This provides for an imperfect and potentially unsatisfactory means whereby prior rights can be recognised. In this, given the circumstances, the legal context and the imperfections, a sound appreciation of what is possible is paramount. A necessary part of the pursuit of native title must be a proper and realistic understanding of what it is capable of achieving and, most importantly, what it is unlikely to achieve. This is the exercise of the art of the possible. It is an art and a practice that must be based on both a comprehensive understanding of what can be accomplished by application of compromised legislation as well as the scholarly representation of the ethnography that it is the anthropologist's task to comprehend and explain to others. Australian anthropology pursued in the context of native title claims is a specialised endeavour in that it requires a thorough understanding of the parameters that circumscribe the hoped-for outcomes and their interrelationships. This book has sought to explore some of these.

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