

## *Native Title from Mabo to Akiba: A Vehicle for Change and Empowerment?*

edited by Sean Brennan, Megan Davis, Brendan Edgeworth  
and Leon Terrill

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In 2013, 12 years after Leo Akiba first lodged a native title claim over approximately 37,800 square kilometres of sea country between Cape York and Papua New Guinea on behalf of a coalition of Torres Strait Islander peoples, and 21 years after the landmark Mabo case, the High Court of Australia handed down a decision that for the first time recognised commercial native title rights.

The Akiba decision will probably never achieve the iconic status of Mabo, but it nevertheless marks a critically important step forward – conceptually at least – in progressing land justice for Indigenous Australians. It marks the point at which the recognition of Aboriginal and Torres Strait Islanders’ traditional rights went from being largely symbolic, surviving only where they have not been extinguished by the imposition of new forms of land tenure, to having actual potential to influence people’s socioeconomic circumstances. As editor Sean Brennan (Chapter 4) argues in his contribution to this significant collection, the Akiba decision was a signal to both government and others that it was time to get on board with native title. Things just got real.

Given their legal significance, the Mabo and Akiba decisions make sensible bookends for a volume of interdisciplinary essays that collectively attempt to understand whether native title has the potential to change people’s lives for the better. This framing, however, is somewhat deceptive, for it suggests the existence of a grand narrative to help make sense of the journey of native title

over the past two and a half decades. But *Native Title from Mabo to Akiba* is not a linear tale of a journey from one radical legal moment to another. Rather, like the native title regime itself, its character is more rhizomatic.

Bret Walker's sharp reflective assessment of the flaws of native title law (Chapter 2) combined with Paul Finn's concerns about its tendency to 'Balkanise' Indigenous landowning groups (Chapter 3) set the tone for the volume, which might at best be described as a form of tenacious optimism qualified by hindsight but actually teetering on the edge of pessimism.

For, as the contributions to this volume make clear, despite the possibilities of native title its remedial potential remains considerably limited by both law and policy. To give but a few examples, Lisa Strelein (Chapter 5) alerts us to the unnecessary constraints placed upon economic rights, while Marcia Langton describes some of the burdens that nevertheless accompany them (Chapter 12). Ciaran O'Faircheallaigh (Chapter 11) makes a strong case for self-government being essential to enabling Aboriginal and Torres Strait Islander landowning groups to fully benefit from their rights, but reminds us that, as it currently stands, native title does not include an inherent right to self-government. And David Trigger (Chapter 14) argues that the beneficial reach of the native title system as a whole is constrained as it cannot and does not bring all Aboriginal and Torres Strait Islanders along for the ride.

Nevertheless, the loose threads of a greater, positive historical force is visible throughout, weaving in and out of the frames of various chapters. Brendan Edgeworth's essay (Chapter 7) comes closest to providing a cohesive historical anchor from which the contributions of other authors is moored. In the context of his analysis of how the jurisprudence of native title has contributed to the construction of an influential narrative about the history of property rights, Edgeworth argues that native title represents one of the most important and dramatic social developments in the late twentieth-century history of Australia. In effect, the Mabo decision corrected the historical record, revised legal doctrine, and cemented a new form of inclusive national identity that recognised a dual system of land ownership, an identity that is manifest in the 'land title revolution' so powerfully visualised by Jon Altman and Francis Markham (Chapter 9). As a result, Edgeworth argues, a new 'vibe' can be sensed around our collective social identity and the fears of non-Indigenous Australians about stolen backyards and beaches have given way to 'grudging acceptance' (p. 98).

Tim Rowse's chapter about Indigenous incorporation as vehicles of empowerment (Chapter 13) attempts to unpack why it is that, somewhat paradoxically, such 'grudging acceptance' of native title is not so apparent among some in the academy who otherwise remain deeply suspicious of Australian public policy in general and native title in particular. The answer lies, Rowse suggests,

in the 'default pessimism' of contemporary critical theory about the Australian colonial state and the Indigenous political condition that focuses not on the enabling effects of government policy but on its inherent cultural disrespect (p. 187). His is a nuanced and measured argument about the need to historicise and not essentialise Aboriginality in critiques of self-determination strategies such as native title.

One of the most positive and perhaps prophetic accounts to emerge from this volume is one in which native title rights have *not* been recognised, but rather have proven to be a vital bargaining chip in negotiations towards a regional settlement of the kind that Noel Pearson recently suggested is a form of quasi-treaty making. Glen Kelly and Stuart Bradfield (Chapter 17) have been instrumental to assisting the Noongar peoples of south-west Western Australia to negotiate the South West Native Title Settlement, the most comprehensive native title agreement proposed thus far. The historic agreement involves around 30,000 Noongar people and covers approximately 200,000 square kilometres, and when finalised will provide not only millions of dollars in benefits to Noongar people but also a guaranteed ongoing relationship with the Western Australian Government. In exchange, the Noongar people will surrender their native title rights. In the depressed political and economic environment created by the mining downturn in Western Australia, the South West Native Title Settlement is no small achievement. What it brings home more clearly than perhaps any other contribution to this volume is the extent to which the true empowerment offered by native title is not achieved via traditional rights themselves, but rather via the strategic opportunity their potential recognition presents to forge new kinds of political and economic relationships with non-Indigenous Australia. What's more, the fact that the Western Australian Government is prepared to pay such a high price to take native title rights off the table, so to speak, suggests that native title is still considered a significant threat and has not, perhaps, lost all of its original rhetorical potency.

Overall, the impression left by this extraordinary collection of essays, along with the editors' deft connections between them, is that leveraging native title rights in order to help improve people's lives is very hard work, both conceptually and practically. Building and sustaining the relationships between traditional owners and third parties is enormously difficult, and the internal and external pressures on Indigenous communities are immense. In the end, native title may well prove to be a vehicle of empowerment that Aboriginal and Torres Strait Islander peoples choose to ride with for a while, before disembarking to engage with another more promising strategy. But although the jury may still be out on the question of whether native title has been a force for positive social change, this volume confirms that its historical importance is beyond dispute.

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