

Native Title and the Treaty Debate: What's the Connection?

Sean Brennan

The first paper in this series explained why the Treaty Project is being undertaken and looked at some key concepts underpinning the idea of a treaty or treaty-like agreements between Indigenous peoples and Australian governments. The second paper looked at the concept of sovereignty and concluded that it need not be a roadblock to Australia engaging in a modern-day treaty-making process. This third paper looks at one of the main areas of the law where Indigenous groups are engaged right now in pursuing their rights and aspirations, and asks: what is the connection between native title and the treaty debate?

What is Native Title?

To begin with we need an understanding of what native title is and how the concept has developed in Australian law over the last twelve years.

Captain Cook and the Arrival of the First Fleet

In 1768 Captain Cook was instructed by the British Admiralty to explore the great southern continent. If he found it uninhabited he was to take it in the name of the King. Otherwise he was to claim British possession of 'convenient situations in the country' with the 'consent of the natives'. Cook observed Aboriginal people on his journey along the east coast but recorded only fleeting dealings with them in two places before he asserted possession over the entire east coast in August 1770.

When Governor Phillip arrived in January 1788 he had instructions to engage with the local Aboriginal people and seek to 'conciliate their affections' and live with them in 'amity and kindness'. For reasons that are debated by historians, he was not required to negotiate treaties with the local people, purchase their land or obtain their consent to the assertion of British authority. This was despite these being common British practices both before and after 1788 (for example in North America and New Zealand).

Preliminary investigations led by Phillip revealed a local population larger than Cook had thought it to be. Several peaceful exchanges between local Aboriginal people and the British were recorded in those first few days but no formal negotiations over land and sovereignty took place. Within eight days of landing, Phillip planted the flag at Sydney Cove on 26 January 1788 and later a proclamation was read out to the assembled members of the First Fleet. With these symbolic acts the British asserted sovereignty over half the continent (the rest being claimed in the 1820s).



From 1792 onwards, Governors granted blocks of land to settlers and ex-convicts. A prior process of negotiation or requisition to formally acquire that land from the Aboriginal occupiers was not seen as necessary. As High Court Justice Brennan later said, 'Aboriginals were dispossessed of their land parcel by parcel, to make way for expanding colonial settlement. Their dispossession underwrote the development of the nation.'

Underpinning this process of taking control of the Australian continent was an assumption: that it was *terra nullius*, or land belonging to no one.

Discarding Terra Nullius

The problem with *terra nullius* was that it ignored the basic cultural and geopolitical facts of the day. Estimates of the Indigenous population across the Australian landmass in 1770, according to the Australian Bureau of Statistics, range between 300 000 and 1 million people. Numerous groups of people occupied the continent, each bound together by a system of customary law that governed their social, economic and political life. Intricate rules, deriving from a complex world-view, regulated the exercise of authority, the enjoyment of rights and the fulfilment of responsibilities. Systems of customary tenure allocated rights over land, water and resources.

Terra nullius was not so much official British policy in Australia as a mindset. It operated as a background assumption, which allowed successive Governors and colonists alike to assert legal authority over everyone, including Aboriginal people, and to take land without reference to these pre-existing systems that had governed societies on the Australian continent for thousands of years. That mindset and the legal fiction of an empty continent was the bedrock upon which the Australian colonies and later a federated nation was built. The fundamental significance of the High Court decision in *Mabo* in 1992 was that it said *terra nullius* was wrong.

In *Mabo* the High Court was asked whether the common law of Australia would recognise rights in relation to land that the people of Mer (Murray Island) in the eastern Torres Strait enjoyed under their customary system of law. That system of traditional law had regulated the Meriam community before and, to a significant extent, after Queensland claimed sovereignty over the islands in 1879.

Although some courts had dealt with it in the past, the High Court, Australia's top court, had never before had

this question placed squarely in front of it. It was aware, however, that the same issue had arisen in many other parts of the world where Britain had set up colonies in the midst of an Indigenous population. The Privy Council, the United States Supreme Court and other courts had decided that incoming systems of law should recognise pre-existing rights to land (in other words, that the imposition of British sovereignty should not mean that local people lost all rights to the land they had occupied for many generations).

The High Court was also aware that under modern international law great significance was attached to the principle of non-discrimination. Peoples should not be discriminated against on the basis of their race. They should enjoy their rights – including the right to own and inherit property – to the same extent as everyone else. In that context, the fact that their property rights arose from a different legal system was not important.

Armed with knowledge of these two principles, and with the evidence of continuing traditional law and custom on Mer, the judges of the High Court revisited the idea that *terra nullius* was an appropriate legal foundation for Australia. They concluded, by a majority of six to one, that *terra nullius* was a legal fiction. They said it was out of step with the facts of pre-colonial Australia and with basic principles of international law and justice, and it should be discarded.

Instead the Court said the common law *recognised* the existence of traditional legal systems that allocated rights in relation to land. It maintained that the new sovereign power, the British Crown (and its Australian successors), could over-ride these traditional property rights. But where they were not over-ridden, and the Indigenous group maintained its traditional connection to the land, the common law would continue to recognise those rights. The acquisition of British sovereignty in 1788 was not questioned by the High Court in *Mabo*, but that event itself was no longer treated as having extinguished all the land rights of Australia's Indigenous peoples.

The *Mabo* decision established a new concept in Australian law called 'native title', which drew on legal thinking from overseas going back many years. Under the law of native title, Indigenous groups can have rights and interests in their land and waters recognised by the common law if they can satisfy two legal requirements:



1. they have maintained the necessary connection to their traditional country
2. their 'native title' has not been extinguished by parliamentary or government action (eg by the grant of freehold blocks to non-Indigenous settlers).

The Development of Australian Native Title Law

After *Mabo* in 1992 a choice confronted Australia: negotiation or legislation. The difficulties and the opportunities created by *Mabo* could have been resolved around the country on the basis of comprehensive regional negotiations, primarily involving the Commonwealth Government, the State or Territory Government and the Indigenous groups of each region. Those negotiations could have addressed the unresolved implications for land and resource management of the belated recognition of native title. They could also have addressed the broader range of Indigenous aspirations and grievances, of which land rights was but one important element. Up to 1992 governments had been able to keep a tight lid on those aspirations and grievances, largely because the Australian legal and political system had been built on the foundation of *terra nullius*.

The approach of comprehensive negotiations, to resolve both land and resource issues as well as broader political questions, was the one that Canada had chosen almost 20 years earlier. The Canadian Supreme Court has recognised since 1973 a common law property right in Indigenous peoples based on their prior occupation of the land and, since 1982, aboriginal rights have enjoyed strong constitutional protection. Comprehensive negotiations including modern-day treaties have been commonplace in Canadian Indigenous affairs ever since the 1970s.

Australia, however, has mainly gone down the path of legislation to deal with native title. In so doing, it has confined its attention primarily to resolving issues of land and resource management, and in particular addressing the calls for legal certainty from State Governments and non-Indigenous land users such as mining companies, pastoralists and developers. A broader element in the Commonwealth Government's response in 1993 to the *Mabo* decision – the so-called Social Justice Package – has never been delivered.

The main piece of legislation is the federal *Native Title Act* 1993. It emerged from negotiations by the

Commonwealth Government with a whole range of interested parties, including representatives from some of the country's largest Aboriginal organisations. In its original form it gave considerable emphasis to negotiating native title issues and seeking to resolve them by agreement, particularly via mediation by a new body, the National Native Title Tribunal. A number of factors, however, have driven native title in Australia in a more legalistic direction: constitutional cases that limited the potential role for tribunals and other non-judicial bodies, extensive statutory amendment by Parliament in 1998 and the behaviour of various participants at different times (especially their desire for 'test cases' to provide greater legal definition).

Over time the High Court has begun to clarify some of the questions left unanswered by the *Mabo* decision and the original Native Title Act. In 1995 it confirmed that the federal legislation was paramount and would severely limit State Government attempts to 'go it alone' in their approach to native title. In late 1996 the *Wik* decision clarified that native title could co-exist with interests granted by the Crown over the same land or waters. Later it confirmed in the *Fejo* decision in 1998 that the technical act by the Crown of making grants of freehold title to third parties was sufficient to extinguish native title, even where there was evidence that traditional connection had been maintained with the land. The potential for native title to exist offshore was affirmed by the Court's decision in *Yarmirr* in 2001, though in a weaker form than may have been the case under traditional law.

In 2002 the High Court decided a trilogy of cases and significantly restricted the potential for native title to address the question of land rights on a national basis. In *Anderson* the High Court ruled out the possibility of native title across the interior parts of New South Wales covered by Western Division pastoral leases. In *Ward* the Court interpreted native title in a way that rendered it extremely vulnerable to partial or complete extinguishment and finally in *Yorta Yorta* it imposed new and higher legal thresholds on the meaning of 'traditional'. The way the High Court in *Yorta Yorta* defined maintenance of a traditional connection suggests that many Indigenous groups across Australia have little chance of establishing native title and, even if they do, there are significant limits on the range of rights under traditional law that will be recognised.

The High Court said much of its restrictive approach can be sourced to the words chosen by the Commonwealth Parliament in drafting the Native Title Act. While that is debatable, it is certainly true that Parliament has also

contributed to the present state of native title law. Following an acrimonious public and parliamentary struggle from 1996 to 1998, the Native Title Act was substantially amended. Those changes tilted the legal balance in favour of non-Indigenous parties seeking access and use of native title land, reduced the bargaining position of Indigenous groups and injected much greater technical detail into an already complex area.

The native title process is slow and overloaded. At present there are 660 active applications for a native title determination that have been lodged by Indigenous groups around Australia. In the ten years since the Native Title Act came into operation, only 32 determinations have been made in favour of the native title applicants.

The final point to make about native title is that it takes its place in a much broader political context. Before the *Mabo* decision, debate in Indigenous affairs had included a long campaign for statutory land rights, talk of a treaty with the national government, the follow-up to the Royal Commission into Aboriginal Deaths in Custody, the establishment of the elected Aboriginal & Torres Strait Islander Commission (ATSIC) and the commencement of a formal national reconciliation process. Since *Mabo* other major issues have been added to the mix, including a social justice package (promised by government but as yet undelivered), responding to the 'stolen generations' of children removed from their families, the review and possible abolition of ATSIC, a debate about appropriate forms of Indigenous governance, reforming the welfare economy in many communities and tackling substance abuse and family violence.

Indigenous Australia is made up of diverse groups and individuals with their own histories and contemporary situations. Indigenous affairs is characterised by a very broad political agenda and set of aspirations, for addressing the past, the present and in particular the future. But the mathematics of Australian democracy (Indigenous people make up less than 3% of the population) and the general lack of legal and constitutional recognition afforded to Indigenous people limit the avenues available to Indigenous people and have magnified the importance of native title.



The fundamental significance of the High Court decision in Mabo in 1992 was that it said terra nullius was wrong.

The Connection with the Treaty Debate

Native title is complex, in law, in politics and in the way it works itself out on the ground. The idea of a modern-day treaty or treaties has yet to be fully explored in Australia. Nonetheless it is possible to talk about some of the connections between native title and the treaty debate. Set out below are four opportunities relevant to the pursuit of a modern treaty-making process in Australia, generated by developments in native title. After that this paper turns to four limitations in the native title system that might encourage consideration of a broader process such as treaty-making.

Opportunities

1. **Mabo changed the ground rules by discarding *terra nullius* and recognising Indigenous governance.**

The *Mabo* decision was a case about property law. But it was also, fundamentally, a constitutional decision. Before *Mabo*, Australians were essentially governed by laws that came from one of two sources: legislation from Parliament and the common law developed by the courts. *Mabo* recognised that a third source of legal rights and obligations existed before 1788 and survived the acquisition of British sovereignty, often into the present day. The system of traditional law and custom, according to the High Court, defined the content of native title and regulated the rights enjoyed within the group by sub-groups and individuals. In *Yorta Yorta* the High Court sought to restrict these broader implications by saying ‘there could be no parallel law-making system after the assertion of sovereignty’. But politically and intellectually this does not prevent many from drawing their own conclusions about the logic flowing from *Mabo*.

In particular many people see native title law as confirming that Indigenous groups in Australia exercise an internal form of jurisdiction or governance over their members, in terms of defining their rights and entitlements. Further they say that native title law recognises the group has an external form of jurisdiction, namely the ability as a group to enter into binding legal agreements over territory and resources (eg see Professor Marcia Langton’s paper with Dr Lisa Palmer at <http://www.atns.net.au/papers/Langton&PalmerARC1seminar7-3-0.22.pdf>). In the courts, recognition of this jurisdiction or governance may have been expressed differently and confined to land and water. But in the wider political context, the question is whether the fuller implications of overthrowing *terra nullius* and recognising Indigenous governance might be explored through a process of comprehensive negotiations.

2. **The recognition of native title provided Indigenous people with a bargaining position based on inherent legal rights.**

The basis upon which governments, corporations and others deal with Indigenous groups has changed substantially in Australia since the *Mabo* decision. Before 1992 the Australian legal and constitutional system reflected the assumption of *terra nullius* upon which it had developed for over 200 years. The fact that the continent had been occupied by Indigenous peoples under their systems of law for thousands of years is not mentioned in the Constitution that established the nation in 1901. There is no constitutional protection of Indigenous rights as there is in Canada, nor a constitutional prohibition on racial discrimination. There is no sign of a fiduciary duty as there is in Canada, restraining government action where certain Indigenous rights are at stake. The bargaining position of Indigenous peoples in individual contexts and in the wider political context in Australia has been severely weakened by this lack of legal recognition. In many situations little could be done to address government beyond protest or appeals to moral principle or generosity.

The legal recognition of native title – a property right with some procedural and compensation entitlements attached – changed the equation in Indigenous affairs. *Mabo* gave many groups, for the first time, a place at the bargaining table when important decisions were to be made affecting their lives and their communities. After *Mabo* they deal with governments and others not as supplicants but as holders of rights that inhere in them as the first peoples of the continent. This not only creates the ability to take a seat at the table, it also affects what might be possible to achieve once negotiations are underway.

3. **The Native Title Act creates structures and opportunities for negotiating co-existence.**

Taking a place at the bargaining table over native title issues, pursuing a determination of rights through the courts, responding to developers and miners seeking access to native title land, negotiating the possibility of a land settlement with State Governments – all these features of the native title system create another legacy relevant to the treaty debate. To make progress in this system Indigenous groups must sharpen and develop their capacities for negotiation and internal governance. The 17 Native Title Representative Bodies (NTRBs) around Australia that are responsible for advancing the interests of native title groups in their region are typically under-resourced and overloaded with work. Nonetheless, as



they come to grips with the challenges of the native title system NTRBs have developed skills and experience in dealing with governments and others, on a wide range of issues. Similarly the individual native title holding groups, which the NTRBs represent, themselves have developed their capacity for decision-making and negotiation at the interface of their society with the non-Indigenous world.

The Native Title Act makes provisions for binding legal agreements, including Indigenous Land Use Agreements (ILUAs). Though governments are cautious about moving beyond the strict legal context of native title, ILUAs and other types of agreements create the potential for broader non-native title outcomes to be negotiated. Some would argue that these can amount to treaty-like agreements in themselves, while others would disagree with that description.

4. Native title outcomes may provide a platform for moving to the next level of negotiating political arrangements.

So far very few groups have successfully gained recognition of native title. Even fewer have secured recognition of what are essentially ownership rights over a discrete territory of land (as the Meriam people did in the *Mabo* case). But it has occurred, particularly in Queensland and Western Australia. Usually this happens where the State Government agrees to settle a native title claim that all sides acknowledge is legally very strong. Where this occurs opportunities arise to press on from the settlement of basic land interests to the negotiation of broader issues, such as economic development, service delivery and viable forms of self-government within the context of the Australian nation.

For example, the Tjurabalan people of the Tanami Desert in Western Australia obtained a native title determination by agreement, over 26 000 square kilometres in August 2001. They constitute the bulk of the local population, they hold title over a large and discrete area of land and like all communities they want to create a better future for their children. Right now, through a pilot project, the communities within the Tjurabalan region are exploring whether they can re-negotiate their relationship with all levels of government.

Some groups have not waited for a native title determination. They have used the application process itself to develop internal unity and a basis for negotiation and broader political engagement with the State. Noongar people from south-west Western Australia have adopted such a strategy in recent years, through

their NTRB the South West Aboriginal Land and Sea Council and other organisations. The goals are ambitious and the outcomes remain to be defined by negotiation, but the process took a step forward in 2003 with the consolidation of various overlapping native title claims into a single Noongar application over their traditional country.

Limitations

There are also limitations in the native title system which encourage consideration of broader-based alternatives. Four limitations are discussed below.

1. The legal and constitutional backing for native title is insecure.

Native title arises from rights enjoyed under traditional law. The Western legal system offers those traditional rights protection in three ways: the common law, legislation and the Constitution. *Mabo* shows that the common law can have a profound effect; nevertheless politicians can always over-ride the common law by passing legislation through Parliament. Legislation, such as the Native Title Act and the *Racial Discrimination Act 1975*, gives native title in some respects stronger backing than it enjoys under the common law. But again legislation can be changed or overridden by politicians with later legislation. Several judges have suggested that the Constitution offers some protection through the guarantee of 'just terms' when Commonwealth laws deal with the 'acquisition of property'. But it may only be partial and indirect and it has not been fully tested in the courts. All this means that, whatever progress Indigenous groups might make through the native title system in asserting and protecting their rights and interests, their legal position is always politically vulnerable especially as they constitute less than 3% of the voting population.

Perhaps the best illustration of this point is to look at the Wik peoples of western Cape York Peninsula. They were perceived to have had a victory in December 1996 when the High Court said native title rights may co-exist with the legal rights of pastoralists to run cattle over large tracts of land. In fact, the case decided no more than a preliminary question of law. Today, 12 years after launching their case, the Wik peoples are yet to have their rights over large parts of their country determined under native title law. More significantly, the High Court's *Wik* decision was treated at the time by many politicians as a catalyst for amending the Native Title Act. Victory in the courts turned into defeat in the Parliament as

the position of the Wik people along with all other native title groups was diminished by the legislative amendments of 1998.

Many Indigenous people in Australia note that in Canada for example, rights secured through litigation or by negotiation through the modern-day treaty process are protected by the Constitution.

2. The applicability of native title and its potential benefits are unevenly distributed across Australia.

Any group seeking to establish native title face two legal hurdles. They must show there have been no technical acts of extinguishment and they must show maintenance of a traditional connection to their country. Together this means that native title is least likely to be recognised in areas that have been most intensely settled and developed by non-Indigenous people since 1788. Any perception that native title 'solved' the issue of national land rights is quickly dispelled when one realises that a very large percentage of Indigenous people live today in these areas where native title cannot be established. Many groups have been ruled out since the beginning and after the High Court's test case decisions in 2002, it may be that many more will now fail.

The uneven geographic distribution of native title means that many Indigenous groups look to a less arbitrary and more comprehensive process for addressing their rights and aspirations, one that does not penalise those who have been already most thoroughly dispossessed.

3. Native title in Australia has been placed in a highly legalistic framework that constrains possible outcomes.

The native title system in Australia is highly legalistic in two respects. First there is a major focus on litigation, as native title applications must now be lodged in the Federal Court. This has several consequences for the pursuit of Indigenous rights. It is very expensive, it puts the participants into an adversarial posture, timetables are influenced by the courts' desire to see matters completed and overall the process is not participative – people perceive power to be in the hands of lawyers rather than those whose rights are at stake. Since the 1998 amendments to the Native Title Act the technical rules of evidence have become the norm rather than the exception in native title litigation.

Secondly the tough legal requirements in native title law can impede recognition even where a strong common

The uneven geographic distribution of native title means that many Indigenous groups look to a less arbitrary and more comprehensive process for addressing their rights and aspirations...

identity exists within the group and identification with traditional country persists. Also, the restrictions imposed by the High Court's view of what is 'traditional' work against a focus on contemporary community needs, so that even some successful parties have found native titles outcomes limited and frustrating. By comparison Canadian native title law provides for a title more suited to using land for modern economic and social development.

4. National issues cannot be addressed.

The other important characteristic of native title is that it is situation-specific. Even when native title applications are consolidated into what are sometimes known as 'nation' claims, they only relate to a discrete regional area. Even if a State or Territory Government negotiates on a very broad basis and reaches an agreement that transcends the narrow parameters of strict native title law, it cannot deal with issues on a national basis. In many instances this may not matter. But several of the key issues in contemporary Indigenous affairs have a national character and certainly it is impossible to achieve the *constitutional* change that Indigenous people so often advocate (eg a new preamble or a prohibition on racial discrimination) within the native title system.



Conclusion

Clearly the emergence of native title in Australia has had a significant impact in Indigenous affairs. It has changed some basic rules for recognising who Indigenous peoples were in 1788 and are today. Many groups, for the first time, have taken a seat at the bargaining table when decisions are being made that affect them. In doing so they have developed skills, experience and infrastructure for negotiating their relationships with governments and others. Some see an opportunity to take negotiations beyond a strict native title agenda to conclude treaty-like agreements.

However the native title system also involves significant barriers and limitations and these highlight some of the differences between it and a treaty process. If Australia does choose to go down the path of modern treaty-making then inevitably it will be influenced by the opportunities created and the limitations imposed by the native title system.

Issues Papers Series

This series contains papers for a general audience on issues relating to the idea of a treaty or treaties between Indigenous peoples and the wider Australian community. Earlier papers published in this series by the Gilbert + Tobin Centre of Public Law are:

Paper No 1 Why Treaty and Why This Project?

Paper No 2 Treaty – What's Sovereignty Got to Do With It?

They are accessible in electronic form on our website at www.gtcentre.unsw.edu.au (under publications) or as a hard copy by emailing gtcentre@unsw.edu.au.

We welcome your comments or suggestions, which should be forwarded to Sean Brennan, Director of the Centre's Treaty Project, at s.brennan@unsw.edu.au.



The Treaty Project

The Treaty Project is part of a larger collaboration between the Gilbert + Tobin Centre of Public Law and our two Australian Research Council partners. **Professor Larissa Behrendt** is Director of the Jumbunna Indigenous House of Learning at the University of Technology, Sydney. Our other partner is **Dr Lisa Strelein**, Manager of the Australian Institute of Aboriginal and Torres Strait Islander Studies' Native Title Research Unit.

We also have a partnership with **Reconciliation Australia**, and we acknowledge the generous financial support of the **Myer Foundation**.

The Project maintains a resource page of treaty materials, which can be found at www.gtcentre.unsw.edu.au.

Graphic Design by Helena Brusic
UNSW Publishing & Printing Services. Tel 9385 2840
Ref: 31279

May 2004

