NATIVE TITLE:
A VEHICLE FOR CHANGE AND EMPOWERMENT?
WORKSHOP REPORT

by Jackie Hartley and Dylan Lino

INTRODUCTION

On 5-6 April 2013 UNSW's Indigenous Law Centre hosted a workshop (with the support of the UNSW Law School and the Gilbert + Tobin Centre of Public Law) to mark the 20th anniversary of the *Native Title Act 1993* (Cth) (the 'Act'). Focusing on the theme of 'change and empowerment', the workshop provided participants with the opportunity to reflect on the legacies of the Act and to consider what the future may hold.

In opening the workshop, Associate Professor Sean Brennan invited participants to reflect upon the key ingredients for Indigenous empowerment; the relationship between economic and political empowerment; the variety of modes of engagement in Indigenous-settler state relations; and the ways in which native title has changed non-Indigenous Australia. Presenters, discussants and participants at the workshop provided rich and varied perspectives on the achievements, disappointments and limitations of the native title system, and critically examined what must change if native title is to serve as a vehicle for economic and political empowerment for Indigenous peoples.

ACHIEVEMENTS AND POTENTIAL

The recognition of native title has profoundly influenced Australian law and society. Unimaginable 50 years ago, a substantial proportion of Australia's landmass is now held under various forms of Indigenous tenure. As Professor Jon Altman observed, the recognition of Indigenous tenure is 'remapping' the bounds of justice in Australia. In particular, as Professor Brendan Edgeworth examined, the recognition of native title has transformed Australian property law by fostering a more inclusive and equitable distribution of property rights.

Several presenters explored how Indigenous peoples have strategically seized these opportunities to help realise their development aspirations. Indeed, Professor Tim Rowse suggested that the capacity for Indigenous political actors to successfully borrow and adapt non-Indigenous political technologies, such as incorporation, to achieve their own ends should not be underestimated.

The workshop heard that the native title and land rights systems have provided significant financial and non-financial benefits to many Indigenous peoples. For example, Andrew Chalk provided a detailed review of the operation of the *Aboriginal Land Rights Act 1983* (NSW) and the benefits that have accrued to Indigenous peoples in NSW under this well-established land rights regime. Similarly, Dr Danielle Campbell and Dr Janet Hunt profiled the achievements of the Central Land Council's Community Development Program, which works with landholders to apply income derived from land use agreements towards community development initiatives.

THE NEED FOR REFORM

However, many presenters cautioned that the shortcomings and perversities of the native title system impose unfair and discriminatory barriers to Indigenous empowerment. The system, many argued, is in urgent need of reform.

NATIVE TITLE, SELF-GOVERNMENT AND ECONOMIC EMPOWERMENT

A common observation was that the recognition of rights of self-government can be vital for long-term economic empowerment. In particular, Professor Ciaran O'Faircheallaigh criticised the way in which Australian laws and policies have severed rights of self-government from native title rights and interests. This separation diminishes Indigenous political power and denies Aboriginal and Torres Strait Islander peoples the ability to institutionalise their hard-earned gains from native title determinations and agreements.

In addition, David Yarrow, of the Victorian Bar, argued that Australian native title law has accepted the principle of 'inalienability' without sufficient analysis or justification. The principle potentially constrains the capacity of native title holders to benefit economically from their rights and interests. If inalienability is reconceptualised in light

of Indigenous self-government, it is possible to imagine that native title-holders might be able to confer rights upon third parties while retaining supervisory rights and an underlying title.

However, the recognition of self-government rights may only be a distant possibility. In light of this, Dr Lisa Strelein suggested a number of legislative reforms to 'free up' the commercial aspects of native title in the short-term. This could include: amending the *Native Title Act 1993* (Cth) to confirm that native title rights and interests can include rights and interests of a commercial nature; and clarifying that the rights of native title holders to use their resources are not limited by reference to the purposes for which they traditionally used those resources.

FURTHER BARRIERS TO EMPOWERMENT

Other presenters highlighted further barriers to economic and political empowerment within native title law. Bret Walker SC powerfully drew attention to the extensive deficiencies at the core of native title law, including the extraordinary evidentiary burden imposed on native title claimants, the injustice of the law concerning extinguishment and the deep conflicts that native title determinations can inflame within Traditional Owner groups.

Similarly, Jonathon Hunyor analysed the significant and manifold interactions between native title and Australian racial discrimination law. While norms of non-discrimination and equality have frequently been important in the protection of native title, Hunyor argued that their application has been selective and often conceptually confused.

The administrative burdens imposed upon vulnerable, under-funded native title entities also impose significant barriers to economic empowerment. Professor Marcia Langton critically examined the complex structures that native title processes have imposed upon native title-holders. The result is a proliferation of small Indigenous entities, leading to high costs, inefficiencies and a lack of capacity to fulfil their responsibilities. Professor Langton argued that governments will not provide the solution. Aboriginal people need to drive the change process themselves, potentially through the formation of regional entities.

MOVING BEYOND NATIVE TITLE

Other presenters agreed that Indigenous peoples may need to take charge and forge their own creative solutions, unbounded by the limitations of native title.

In their review of the negotiations between the Noongar people and the Western Australian Government, Glen Kelly and Dr Stuart Bradfield (South West Aboriginal Land and Sea Council) delivered this message clearly. They argued that governments will not rectify the shortcomings of the native title system and, as such, native title is best left behind. Indeed, Noongar people are using the surrender of native title to secure an extensive package of land, money, community development initiatives and much more. The regional, nation-to-nation nature of the negotiations has afforded the Noongar people significant political power in negotiations. As Kelly concluded, rather than wait for a magic wand to be waved, 'Let's just do it and take it'. In short, this is self-determination in action.

FINAL OBSERVATIONS

Overall, the workshop provided an invaluable opportunity to take stock of the achievements and limitations of the native title system, 20 years on. The workshop concluded with a powerful session in which five participants (Heron Loban, Professor Bradford Morse, Raelene Webb QC, Les Malezer and Tony McAvoy) offered their views on the workshop proceedings and led participants in a final discussion.

As Dr Lisa Strelein acknowledged at the close of the workshop, in focusing on the problems of the native title system we must never lose sight of the tremendous achievements of those who, despite all odds, have successfully attained recognition of their rights. Barrister Tony McAvoy similarly emphasised that, after generations of denial and dispossession, the formal recognition of native title can be significant and powerful in itself.

Yet, as identified in the final discussion, the workshop raised several important questions. These include:

- Who is empowered by native title?
- Is there a need to abandon the fragile model of native title rights and interests in favour of a national freehold model (similar to the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth)) or other more secure forms of title?
- What will it take to change the dynamics of the Australian legal and political landscape, such that self-government rights are recognised?
- In what ways can Indigenous peoples act collectively, on a regional or even international basis, to remedy or circumvent the defects of the native title system?
- What can international standards and models of development offer Indigenous peoples in Australia?

The questions do not have easy answers. That they remain unresolved 20 years after the recognition of native title prompts deep reflection on whether native title is truly 'a vehicle for change and empowerment'.

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