

CREATING CONFLICT: CASE STUDIES IN THE TENSION BETWEEN NATIVE TITLE CLAIMS AND LAND RIGHTS CLAIMS

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A Case Study¹

A land rights claim was placed on a particular parcel of land, including a small river.² A successful claim will mean that the land is granted to the local Aboriginal land council (LALC). Membership of the LALC is based on an Aboriginal person's residence within the boundary of the LALC, or alternatively, based on that person's association with that area.³ Traditional connection to the land within the boundaries of the LALC is not required for membership. In this scenario, imagine that the majority of the membership of the LALC consists of Aboriginal people who do not have a traditional association with the parcel of land.

Imagine now that the traditional owners (some of whom are not members of the LALC) hear that the LALC is "claiming our land and is going to sell it". The LALC believe they are entitled to claim the land under the *Aboriginal Land Rights Act (ALRA)*. They don't want to offend the traditional owners, but their finances are in a terrible state as their investments (made possible by the sale of previous land grants) have depreciated significantly. The LALC wants to establish several enterprises which they estimate will employ over one hundred local Aboriginal people. The members of the LALC see employment as the key to overcoming the socio-economic disadvantage facing the local Aboriginal community.

The traditional owners have continued to hunt on this land and fish in the river that is within the boundary of the 'claimable crown land' the LALC is claiming. Not only the Elders, but also the young people, continue these traditions. The river is the closest place to swim and is within walking distance

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¹ This scenario is based on an actual dispute from the north coast of NSW that has still not been resolved. Over the three years 2002-2004, Kelly attended numerous native title and land council meetings at which native title claims were being considered. Throughout this, and other chapters, the description of the substance of the dispute has been retained, whilst names, places, dates and figures (such as areas of land or land valuations) have been altered or deleted in order to ensure the anonymity of meeting participants and the organisations themselves.

² *ALRA*, section 36.

³ *ALRA*, section 54(2).

of the (old church) mission. In the summer the young and the old people swim and fish almost every weekend. On weekdays, you'll always find a few local Aboriginal people fishing there, as fish remains a staple food for the traditional owners.⁴ The native title claimants are very angry and offended that Aboriginal people without any traditional connection to the land are claiming what they consider to be their land – land that has been passed down from their ancestors to the current descendants.

Situations such as these create conflict within Aboriginal communities: intra- and inter-family feuding, and disputes within and between Aboriginal organisations. The above example, in which both parties to the dispute have 'legitimate' claims to the parcel of land, cannot be described simply as *native title v land rights*. Conceptualising these disputes as a clash between 'tradition' (being native-title law-based and driven by pre-invasion connection) and 'modernity' (being land-rights law-based and driven by economic need) is a distortion that removes the dispute from the milieu of contemporary Aboriginal life. But neither is this saying that the 'big picture' should be disregarded.

Rather, we are saying that the *minutiae* of the dispute needs to be addressed – and sometimes at great length. This is something that can irritate lawyers; we want to get to *the facts* of a dispute, and then argue the facts based on *the law*. This can lead us to ignore the humanity of the dispute; such disputes can be so heartfelt that brother is pitted against brother, mother against daughter. To attempt to resolve such conflict through the court system will not only be expensive (in terms of time, money and emotion), but will spell the end of many family/kin and community relationships.

The resulting disharmony of such disputes in Aboriginal communities is an additional burden for communities already stressed by social and economic problems. Effective Aboriginal dispute resolution models are needed to address the conflict created as a result of competing native title and land rights claims.

I . The Claim to Land ...

If we had the means ourselves, or if it was made available we are sure the great expense would be the greatest and the progress would be possible by the profits of the venture. We claim the native has a right to live in the "Land of His Father".

William Cooper, 16 June 1937

Many of our great Indigenous leaders have understood the connection between the claim to land and its capacity to provide the basis for both economic self-sufficiency and greater independence. When Indigenous people seek to reclaim land either through native title or land rights regimes, it is for

⁴ The legal issues are not intended to be discussed here, but for information on the recognition of Aboriginal interests in rivers, see Behrendt J and Thompson P, "The Recognition and Protection of Aboriginal Interests in NSW Rivers", *Occasional Paper OCP 1008*, Healthy Rivers Commission (NSW)/Chalk and Fitzgerald Lawyers and Consultants, Sydney, November 2003; also presented at the 5th *Australasian Water Law & Policy Conference*, Melbourne 2003.

the furtherance of the goals of self sustainability and self determination as much as to reclaim land for cultural significance.

However, in the pursuit of land justice, conflict often occurs both between claimant groups and between native title holders and other Aboriginal people who are entitled to benefits. This article seeks to highlight how the conflict between Indigenous groups is complicating the process of land reparation for Aboriginal people. In particular, it will highlight the issues arising from competing claims over land made by Aboriginal people under the *Aboriginal Land Rights Act 1983 (NSW) (ALRA)* and the *Native Title Act 1993 (Cth) (NTA)*.

We argue that an Aboriginal dispute resolution process is required to sort out the conflict arising from these competing claims. However, even if a dispute resolution process(es) is successfully established, one should remember the broader context of such conflict: that land justice is *not* being achieved for the majority of Aboriginal people across Australia.

We do not examine land rights legislation of other states and territories. However, it is reasonable to assume that wherever other jurisdictions have established land rights regimes, the complex interaction between land rights and native title would produce difficulties for Indigenous communities. So despite legislative differences, the situations we describe will undoubtedly resonate in some other Australian states and territories.

II. The Native Title and Land Rights Regimes – Socio-Political

Context

Although native title and land rights both relate to the recognition of Indigenous people's rights to land, they are very different from both a socio-political and a legal perspective.

Land rights legislation⁵ and native title legislation were enacted with quite dissimilar political motivations. Land rights legislation, in the various

⁵ *Aboriginal Land Rights (Northern Territory) Act 1976 (CTH)*, *Aboriginal Land Grant (Jervis Bay Territory) Act 1986 (CTH)*, *Aboriginal Land (Lake Condah and Framlingham Forest) Act 1987 (CTH)*; *Aboriginal Land Rights Act 1983 (NSW)*; *Aboriginal Land Act 1978 (NT)*; *Aboriginal Land Act 1991 (QLD)*, *Torres Strait Islander Land Act 1991 (QLD)*; *Aboriginal Lands Trust Act 1966 (SA)*, *Pitjantjatjara Land Rights Act 1981 (SA)*, *Maralinga Tjarutja Land Rights Act 1984 (SA)*; *Aboriginal Lands Act 1995 (TAS)*. Small areas have been transferred under a number of Victorian Aboriginal land statutes (including the *Aboriginal Lands Act 1991 (VIC)*); Lake Condah and Framlingham Forest were transferred under the Commonwealth statute mentioned above, at the request of the Victorian Government. The *Aboriginal Lands Parliamentary Standing Committee Act 2003 (SA)* came into effect on 18 September 2003, which established a bi-partisan Standing Committee of the South Australian Parliament. The functions of the Committee (s 6) are: "(a) to review the operation of the *Aboriginal Lands Trust Act 1966*, the *Maralinga Tjarutja Land Rights Act 1984* and the *Pitjantjatjara Land Rights Act 1981*; and (b) to inquire into matters affecting the interests of the traditional owners of the lands; and (c) to inquire into the manner in which the lands are being managed, used and controlled; and (d) to inquire into matters concerning the health,

Australian jurisdictions, was enacted in response to a broad social and political movement, which evolved from the 1960s to the 1980s to include people from a broad spectrum of society – both Indigenous and non-Indigenous people; the politically conservative and the radical.

Native title legislation, on the other hand, had its impetus in the courts – with the judicial recognition of native title in *Mabo (No 2)* in 1992. That decision gave new impetus to the ongoing campaign to have land rights recognised on a *national* basis. It provided the justification to the wavering Labor Federal Government (although both Labor and Coalition governments had toyed with the idea since the early 1970s) to provide a legislative basis for recognising Indigenous rights to land across the nation. But this was by no means ‘land rights’, in the sense that we know it in New South Wales. It was not a *political* recognition of Aboriginal rights to land; it was more like dressing up *judicial* recognition in the garments of Keating’s newfound Indigenous social justice agenda.

We were present at Prime Minister Keating’s famous Redfern Park (Sydney) address in December 1992, at which the Federal Labor Government jumped on the *Mabo* wave that was produced by the (at the time) radical decision of the High Court:

By doing away with the bizarre concept that this continent had no owners prior to the settlement of Europeans, *Mabo* establishes a fundamental truth and lays the basis for justice. It will be much easier to work from that basis than has ever been the case in the past. For that reason alone we should ignore the isolated outbreaks of hysteria and hostility over the past few months. *Mabo* is an historic decision – we can make it an historic turning point, the basis of a new relationship between indigenous and non-indigenous Australians.

The message should be that there is nothing to fear or to lose in the recognition of historical truth, or the extension of social justice, or the deepening of Australian social democracy to include indigenous Australians.⁶

Mabo opened the door for the Keating Federal Government to introduce a national system for achieving Indigenous land justice (through the *NTA* along with the Indigenous Land Fund and the never delivered “social justice package”), whilst simultaneously closing the door on criticism from mining and pastoral interests – the former of which had halted attempts by the previous Hawke-led Labor Government to introduce national land rights legislation. Criticism of national “land justice” legislation could now easily be deflected by pointing to the judicial origins of native title in the High Court.

So land rights legislation stemmed from a broad-based socio-political movement, whereas native title legislation was enacted in order to provide an

housing, education, economic development, employment or training of Aboriginal people, or any other matter concerning the welfare of Aboriginal people.”

⁶ Keating PJ, “Speech by the Honourable Prime Minister, PJ Keating MP, Australian Launch of the International Year for the World’s Indigenous People: Redfern 10 December 1992” (1993) 3(61) *Aboriginal Law Bulletin* 4 at 5.

administrative structure to channel the native title claims that would inevitably result from *Mabo*.

The differing social, political and juridical environments led to quite different legal regimes for land rights and native title (at least in New South Wales), which manifests itself in local land disputes.

In practice, the engines driving these two systems are resulting in conflict between Aboriginal community members who are claiming, or entitled to claim, land under either or both regimes. The source of the conflict is the differing cultural, social and political views in relation to the rights of traditional owners of parcels of land that now vests (or may vest in the future) with a LALC. That is, there are those who believe that traditional owners (people who have traditional cultural affiliations with particular land) should have priority over non-traditional owners (namely, members of the LALC – who may also include traditional owners). Then there are those who believe that the (usually) economic interests of the LALC should prevail. This conflict is beginning to polarise Aboriginal communities in New South Wales; and there are traditional owners who sit on both sides of the fence.

The extent of dispossession and dislocation of Aborigines in NSW led to the promulgation of a land-holding body based on residence, rather than tradition, in the ALRA. As Behrendt and Thompson point out, “it was considered inappropriate to premise land rights legislation on establishing such a traditional connection such as that required in the Northern Territory.”⁷ McRae, et al, explain that even in the more “traditionally-oriented” Northern Territory:

[T]raditional owner-based models can generate cultural dysfunction and conflict ... although on the whole that legislation [*Aboriginal Land Rights (Northern Territory) Act 1976* (Cth)] seems to have worked well. The New South Wales legislation,... has engendered considerable conflict.⁸

An extract from Sutton in the same text explores this further:

Pursuit of legal recognition of native title in [New South Wales] ... has raised the temperature, highlighting claims based on ‘way back’ deep connections as against those formed in historical [post-invasion] time through migration and deportation⁹

One might suggest that land rights legislation already addresses such conflict through its provisions for native title; section 36 of the *ALRA* states that land that is subject to a native title claim (or on which native title already

⁷ Behrendt J and Thompson P, “The Recognition and Protection of Aboriginal Interests in NSW Rivers”, *Occasional Paper OCP 1008*, Healthy Rivers Commission (NSW)/Chalk and Fitzgerald Lawyers and Consultants, Sydney, November 2003, p 37.

⁸ McRae H, et al, *Indigenous Legal Issues: Commentary and Materials* (3rd ed), Lawbook, Sydney, 2003, p 224.

⁹ Sutton P, “The Reeves Report and the Idea of the ‘Community’”, in Altman J, et al, *Land Rights at Risk? Evaluations of the Reeves Report*, Research Monograph 14, Centre for Aboriginal Economic Research, ANU, Canberra, 1999, p 41, in McRae H, et al, *Indigenous Legal Issues: Commentary and Materials* (3rd ed), Lawbook, Sydney, 2003, p 224.

exists) is not claimable under the *ALRA*. The problem here is that traditional owners who have native title interests in the land may not, for several reasons, be actively claiming native title. Although native title may exist, the traditional owners may not be seeking its 'official' recognition. All too often, such a decision stems from a belief that they cannot overcome the numerous barriers facing claimants in the native title process.

The differing socio-political bases of the *ALRA* and the *NTA* are well illustrated by an actual scenario in an Aboriginal community on the north coast of NSW.¹⁰ Specific details have been deleted or altered so as to protect the identity of the individual(s) and the Aboriginal community.

Under the *ALRA*, a LALC had claimed all "claimable crown land" (s 36) between 1986 and 1992. The claims covered various parcels of land within the boundary of the LALC. Although the entire area of the LALC was situated within the territory of only one nation/language group, nevertheless there were geographically and culturally-distinct northern, southern and western clans. The claimed parcels (which were ultimately granted) were located across all areas of the LALC. The 'southern' clan was considered a culturally unique group and had its own Aboriginal corporation, as well as its own Elders council. Many members of the southern clan were also members of the LALC. The southern clan was supportive of the 1986-1992 claims.

Following the introduction of the *NTA*, the southern clan, for various reasons, decided not to lodge a native title claim, despite having sufficient (in the opinions of Kelly and a local archaeologist/anthropologist) oral and written evidence to support a native title claim. In particular, the Elders from the clan just wanted to "keep everything like it is."¹¹ They were comfortable with the claims lodged by the LALC, and indeed had benefited from past claims. For instance, many clan members live in homes built by the LALC on land that vests with the LALC. Their children and grandchildren already have work through CDEP (Community Development Employment Project – the Indigenous forerunner to 'Work for the Dole'); and a LALC parcel of land in the southern area was being leased back to the clan's Aboriginal corporation (at well below market rent) to establish a local business. On the other hand, there is still widely held unresolved anger within members of the southern clan due to the actions of the LALC in selling a block of land in 1990 that was within the clan's boundary and for which no consultation took place with the traditional owners prior to the sale. The land sold is considered by the clan to have deep traditional (pre-invasion) significance.

Recently (early 2004), the LALC decided to sell several other blocks of land within the southern clan's traditional boundary. These blocks are now considered by non-Aboriginal people to be 'prime real estate'. This is not an uncommon situation, at least in north coastal NSW. Aboriginal people on the

¹⁰ This research was undertaken by Loretta Kelly and made possible by a three-year grant (2001-2003) from the Australian Research Council.

¹¹ Anonymous native title claimant 'O', *Interview with Loretta Kelly*. Location and date of interview withheld as it may identify the interviewee, the land council or the other Aboriginal organisation involved.

east coast usually settled into reserves and missions (as well as some permissive occupancies of crown land), which were considered by white people to be of marginal agricultural value. In areas close to the coast, this often meant land near or on beach dunes, as well as wetlands draining into estuaries. Over the last two decades, the value to white people of these ‘beach-front’ and ‘water-view’ lands has soared. In the scenario, the local clan members do not want the land sold to non-Aboriginal people – they want to buy the land themselves from the LALC.

In attempts to settle the matter, clan members met with LALC members at a special general meeting to try to convince LALC members not to sell the land, or if the land had to be sold, that it be sold to the clan’s Aboriginal corporation at ‘G value’ (unimproved capital value). An expression of interest from the clan to this effect was handed to the chairperson of the LALC.¹² The clan members were told that the land would have to be sold as the LALC needed the money, and that it could not be sold at G value. This was apparently because of advice from the NSW Aboriginal Land Council that land could not be sold at below market value, and that the ‘best offer’ had to be accepted. Clan members were advised that there were 15 other expressions of interest from property developers who were willing to purchase the land at market value. Clan members were told that their expression of interest would be considered “on merit along with the others.”¹³ Traditional affiliation would not form part of the criteria for ‘merit’ – merit would be based on economics alone.

Not surprisingly, a dispute arose at the meeting. People who supported the traditional owners made various supporting statements (including some supporters who were not clan members). One person (not from the clan) stated: “it is f...ing ridiculous that traditional people have to buy back their traditional land.”¹⁴ Opinions were not necessarily based on clan affiliation. Indeed one person stated:

I come from there [the southern clan area]. That’s where my mob is from. But I’m here as a member of the Land Council and I have to make a decision that’s in the best interests of our members, not what’s best for my mob.¹⁵

The dispute was brought into order by the Chairperson of the LALC. Clan members were told, “if you have a problem with this then lodge a native title claim.” A representative Elder for the clan replied, “we didn’t want to do that. We were happy to work with you mob.”

Needless to say there were polarised views in the meeting. The issue was unresolved. Some left the meeting saying, “I can’t believe they have to

¹² Kelly was present at this meeting.

¹³ Coordinator of a north coast NSW local Aboriginal land council, *Land council meeting attended by Loretta Kelly in 2004*. Location and date of meeting withheld as it may identify the coordinator or the land council.

¹⁴ Member of a north coast NSW local Aboriginal land council, *Land council meeting attended by Loretta Kelly in 2004*. Location and date of meeting withheld as it may identify the member or the land council.

¹⁵ *Ibid.*

compete with property developers to buy back their traditional land.”¹⁶ A clan Elder said after the meeting:

We don't have to own it under whiteman's law, we know we are the real custodians. But now the land council is forcing us to put in a native title claim. We can't afford to lose the land. The land council will just sell it for millions of dollars to whitefellas and we won't have access anymore.¹⁷

Of course the clan could attempt to stop the sale of the land under section 40D of the ALRA, which states that:

(1) A Local Aboriginal Land Council may, subject to the provisions of any other Act, sell, exchange, mortgage or otherwise dispose of land vested in it if:
(a) at a meeting of the Council specifically called for the purpose (being a meeting at which a quorum was present) not less than 80 per cent of the members of the Council present and voting have determined *that the land is not of cultural significance to Aborigines of the area* and should be disposed of. [emphasis added]

The issue here is that the clan would need to get the supporting numbers to argue that the land is culturally significant to the southern clan. They would have to argue that the land is significant to the clan in terms of the traditions, observances, customs, beliefs or history of Aborigines.¹⁸ Moreover, this would only be an interim solution. The clan would still have to lodge a claim under the NTA, otherwise the land would continue to vest with the LALC and may be subject to future attempts to dispose of it. The temptation to sell may be too strong for many cash-poor / property-rich¹⁹ LALCs.

This situation shows that there are Aboriginal people, clans and communities who continue to assert their native title rights, but do not wish to take legal action under 'whiteman's laws' to obtain a determination of native title. The clan was happy to work with the LALC but, because their needs were not being met, are now forced to enter into the native title system by "our own mob."²⁰ A native title claim will undoubtedly subject the (physically fragile) Elders to a long, distressing period with uncertain outcome.

¹⁶ Member of a north coast NSW local Aboriginal land council, *Land council meeting attended by Loretta Kelly in 2004*. Location and date of meeting withheld as it may identify the member or the land council.

¹⁷ Anonymous native title claimant 'O', *Interview with Loretta Kelly*. Location and date of interview withheld as it may identify the interviewee, the land council or the other Aboriginal organisation involved.

¹⁸ ALRA, section 40D(3).

¹⁹ The authors are not implying that *any* LALC is wealthy in terms of land: there is no such thing as a LALC having 'too much' land, because *all* the land morally belongs to Aborigines. Therefore every LALC has too-little land. The point here is relative: the majority of LALCs have small funds in relation to the amount of land they hold. On the other hand, there are a few LALCs, mainly in coastal metropolitan areas of the State, which, thanks to their sales of high value coastal land, have extremely healthy cash balances.

²⁰ Anonymous native title claimant 'O', *Interview with Loretta Kelly*. Location and date of interview withheld as it may identify the interviewee, the land council or the other Aboriginal organisation involved.

This scenario is indicative of the political view held by some Aboriginal people throughout NSW – “whitefella law allows for non-traditional owners to claim the land, and where there are legal rights we’ll use them.”²¹ On the other hand, there are many Aboriginal people who believe that land rights law must be used in a way that respects traditional owners. They hold the view that traditional owners must, according to the customary laws of the land, have priority over non-traditional owners. As we will see below, a claim under NSW land rights law does not extinguish native title – so the traditional owners can ‘simply’ lodge a native title application.

Of course, it is not as ‘simple’ as it sounds. Traditional owners are asking for *respect* as the traditional custodians of the land and are asserting cultural norms and traditions. Many Aboriginal people feel that local Aboriginal land councils need to respect the rights of traditional owners (rights that exist according to customary law). However, land rights legislation does not specifically allow for this. It is insufficient to have provisions in the *ALRA* to prohibit the sale of culturally significant land.²² Australian laws need to respect and reflect Aboriginal customary laws, or else conflict within Aboriginal communities will continue to arise.

III. The Native Title and Land Rights Regimes – The Legal Differences

The *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) was the first piece of legislation to comprehensively provide for Aboriginal land rights in Australia. The Act provides for claims by traditional Aboriginal owners who “have common spiritual affiliations to a site on the [claimable] land” and “are entitled by Aboriginal tradition to forage as of right over that land”.²³ Once granted, the land is held on trust and administered by land councils for the benefit of traditional owners and other Aborigines who hold traditional rights of entry, occupation or use. It has been argued that these statutory definitions together with the legislative scheme “fully encompass the interests and rights contemplated by the common law term ‘native title’.”²⁴

A claim under the *Aboriginal Land Rights Act 1983* (NSW) (*ALRA*) on the other hand, does not require proof of any traditional association with the land. Rather, land must be ‘claimable Crown lands’²⁵; the land is transferred to the local Aboriginal land council (LALC), which holds the land on behalf of its

²¹ Member of a north coast NSW local Aboriginal land council, *Land council meeting attended by Loretta Kelly in 2004*. Location and date of meeting withheld as it may identify the member or the land council.

²² *ALRA*, section 40D(1)(a). Actually, the legislation is framed in the positive, *permitting* the disposal of land *if* 80% of the LALC members present determine that it is *not* of cultural significance.

²³ *ALRA*, section 3.

²⁴ Levy R, *Twenty years of land right – lessons for the Native Title Act* (1996) 3(85) *Aboriginal Law Bulletin* 22, p 23.

²⁵ *ALRA*, section 36(1).

members; and membership is based on an Aboriginal person's residence within the LALC's boundary.

In comparing the ALRA with the provisions of the *Aboriginal Land Rights (NT) Act 1976* (Cth), it is clear that the latter is more similar to the *NTA*, as it recognises traditional interests in land. The following table compares and contrasts the *ALRA* and the *NTA*.²⁶ In contrasting these two legislative regimes, it becomes apparent how, at a grass-roots community level, conflict can arise between Aboriginal community members who are claiming under different regimes.

²⁶ This is based on a table by: Jacobson R, "*Aboriginal Land Rights and Native Title*", NSW Native Title Services, Dubbo, 2002 (unpublished).

Table 1. Comparison of the *Aboriginal Land Rights Act 1983 (NSW) (ALRA)* and the *Native Title Act 1993 (Cth) (NTA)*

<i>ALRA</i>	<i>NTA</i>
Applies only in NSW	Applies across all of Australia
A claim under <i>ALRA</i> triggers government decision	A claim under the <i>NTA</i> triggers legal proceedings
<p>Claims under the <i>ALRA</i> are for: ‘claimable crown lands’;</p> <ul style="list-style-type: none"> • there is no need to prove any traditional association with the lands; • previous tenure of the lands doesn’t matter; • lands are granted in freehold or leasehold in Western Division 	<p>Claims under the <i>NTA</i> are based on:</p> <ul style="list-style-type: none"> • native title rights and interests • traditional laws, customs, practices and association with the land must be proven in court or accepted by all non-claimant parties (in a consent determination) • there is a spectrum of native title rights to different parcels of land (some may equate to freehold and others merely to a licence)
LALC boundaries are not necessarily consistent with any Aboriginal traditional boundaries	A native title group can only claim rights and interests in its traditional boundaries
<i>ALRA</i> grants land to LALCs	The title to the land is usually held by a prescribed body corporate
Any Aboriginal person living in the LALC boundary is entitled to be a member and benefit from LALC services	Only Aboriginal people who have a traditional (ie pre-invasion) connection with the land can be a member of a claim group; but they do not have to live on country to benefit from any recognised rights or interests
An individual can benefit from LALC services	Native title rights and interests belong to the whole group, not just an individual or family
National Parks and Wildlife Services’ policy is to consult with LALCs regarding site issues	National Parks and Wildlife Services generally does not approach native title groups unless they are registered

Source: This table compiled by Rhonda Jacobson.

IV. Competing Claims and Conflicts

Section 36 of the *ALRA* states that land that is subject to a native title claim (or on which native title already exists) is not claimable under that Act.²⁷ So if a native title claim has already been made over a parcel of land, then a land rights claim cannot be made. But if the land rights claim was made *first*, the situation is different, as follows:

If a parcel of land is transferred to a local Aboriginal land council under a land rights claim lodged *before* 28 November 1994, it is a valid transfer *despite* any claimed native title.²⁸ However, any native titleholders would be entitled to claim compensation from the NSW Government in such a situation.²⁹ For example, a claim lodged on 27 November 1994. If the State Government grants this land to the claimant Aboriginal land council, the land council's title to the land is still valid, despite any later determinations of native title over the land. However, the native titleholders could claim compensation for the loss of their rights and interests. But such compensation will be reduced if the native titleholders receive any rights, interests or other benefits from the land council.³⁰ If the native titleholders are also members of the land council, then it is quite possible that they would not receive compensation because they are, in effect, already 'owners' of the land through the land council.

If a parcel of land is transferred to a local Aboriginal land council under a land rights claim *lodged on or after 28 November 1994*, the *ALRA* states that any native title rights on that land will prevail.³¹ Although the effect of these sub-sections is unclear, in any case the *NTA* makes no provision for validating such transfers. In other words, it is quite possible that the transfer of the land to the land council would be invalidated by a determination that native title exists on the land.

For example, a claim lodged on 1 December 1994. If the State Government grants this land to the claimant LALC, LALC's title to the land can be defeated by a later determination of native title over the land.

Aboriginal family and community conflict can arise from competing claims under the *ALRA* and *NTA*. Four situations are outlined below that illustrate the point. Note that the facts have been changed to disguise the Aboriginal communities and individuals.³²

²⁷ *ALRA*, section 40D(3).

²⁸ Section 22J of the *NTA* and section 27 of the Native Title (New South Wales) Act 1994 (NSW).

²⁹ *NTA*, section 22L.

³⁰ *NTA*, section 22L(3).

³¹ *ALRA*, section 36(9) and (9A).

³² These situations are so sensitive that not only have names been deleted, but facts have been slightly altered. Interviewees for Kelly's research not only wished to remain anonymous, but many (about half) requested that the audio tape of their interview be returned by Kelly, together with a copy of the transcript, relying on her promise not to make any copies of the tape. Two individuals refused to allow the interview to be tape-recorded at all, permitting only hand-written notes to be taken by Kelly.

Scenario 1

In a small town on the north coast of NSW, with a large minority Aboriginal population, live two brothers. Each currently has roles in relation to legal processes of claiming land. One brother is the chairperson of the LALC and the other brother is a member of the Management Team of the Aboriginal Corporation that is the prescribed body corporate for the vesting of native title land (no land has yet vested). The two brothers have been in dispute, unofficially, for several years about how to proceed to claim land with which their family has traditional association (this land is ‘unallocated crown land’). Three years ago, after a huge argument about whether to lodge a native title claim over the parcel of land, the family ultimately decided to “leave it alone”³³ No legal action was taken.

The brother, who is now part of the management team of the prescribed body corporate, had recently realised the importance of native title. He has consulted with the Elders of the community and has commenced the process of lodging a native title claim over the parcel of land. The claim has not yet been lodged; the group is in the process of getting support for the claim and legal representation.

The brother, who is now the chairperson of the LALC, has convinced the LALC to lodge a claim over the parcel of land under the *ALRA*. At the last meeting of the LALC (prior to lodging the claim), two Elders stated that the land council should not do this as there is a native title claim in progress over the land. The Chairperson of the LALC informed the Elder, in a manner that many present considered very rude that, until the court makes a native title determination, the LALC could do what they wished. The Coordinator of the LALC explained at this meeting that section 36 of the *ALRA* meant that the LALC would only be prevented from lodging a claim on the land if it was subject to a native title claim; and given that there was currently no native title claim, the Coordinator advised members that there was nothing currently preventing the LALC from lodging a claim under the *ALRA*.

Although section 36 of the *ALRA* provides for protection of native title, in reality family and community pressures can prevent such native title claims from being pursued. In this scenario the native title claimant group has been persuaded not to pursue the native title claim. Promises have been made by the LALC to the native title claimant group members (who are also LALC members) in exchange for abstaining from lodging the claim. Such incentives include being placed on the priority housing list, which will essentially mean that the next LALC house that becomes available will be leased to a member of the native title claimant group. Others have been promised full-time employment from business ventures that are planned as a result of the land vesting with the LALC (assuming the land is granted). However, the ‘native title’ brother refuses to be “bought out.” The conflict came to the fore when,

³³ Anonymous native title claimant ‘O’, *Interview with Loretta Kelly*. Location and date of interview withheld as it may identify the interviewee, the land council or the other Aboriginal organisation involved.

several weeks ago, the brothers “had a punch up”, which ended before the police arrived.

There are other siblings who have now been brought into this conflict. There has been a demarcation within the family – those who support the land rights claim and those who support the native title claim. This example illustrates the point that a culturally appropriate dispute resolution process needs to be in place to resolve this type of conflict, or prevent it from arising in the first place. A culturally sensitive forum that would enable open and informed discussion about the benefits of each claim would prevent corruption and intimidation influencing decisions that must be made by the community, according to the customs of the community.

Scenario 2

A high level of conflict exists over a parcel of land jointly held by two LALCs, which was claimed and granted prior to 1994. A native title claim had been lodged by a small group of Aboriginal people. This small group are a minority within a much larger group of traditional land owners³⁴. The larger group feel strongly that ownership of this parcel of land was settled, as they had already achieved land ownership through the grant under the *ALRA* to the two LALCs. The majority of traditional owners, as well as other (non-traditional) members of the LALCs, believe that the *ALRA* allows them greater freedom than native title to pursue economic development and self-reliance. They feel that this (native title) claim was designed to undermine and/or wrest control over the land from them (the LALCs).

The majority traditional owners were nominally included in the native title claim. However, day-to-day control of the claim fell to only three members of the minority.³⁵ The “leader” of this minority group (one of the three) is perceived in the community as a “control freak” and “power hungry.”³⁶ This Elder has often been heard at meetings to say, “this is my tribe and I’m claiming it [the LALC land]”³⁷ This Elder is widely criticised for “putting a blanket claim over the whole nation ... which we [the traditional majority] objected to.”³⁸

It can be very difficult for a non-Aboriginal person mediating a dispute to come to grips with the personalities involved, the complexities of their roles and their familial relationships. This scenario just described is not an isolated example of the relationships between individuals in an intra-cultural land dispute. Indeed, the facts have been simplified for the purposes of this example.

³⁴ The term “owners” refers to ownership according to Aboriginal customary law.

³⁵ Kelly has obtained a letter from the legal advisors addressed to *one* member of this minority, clearly implying that this person has control of the claim.

³⁶ Anonymous native title claimant ‘M’, *Interview with Loretta Kelly*, 27 May 2003. Location of interview withheld as it may identify the interviewee.

³⁷ *Ibid.*

³⁸ *Ibid.*

Scenario 3

The following example also illustrates the power games between players on both sides; the LALC and the native title claimant group.

In this scenario a large family group had lodged a native title claim in 1999. The native title claimant group members were siblings and cousins, who were the descendants of two men (brothers, now deceased) with traditional connections to a parcel of land. Various mediations had been conducted by the National Native Title Tribunal (NNTT). One claimant stated that the NNTT Member was a white person and had “missed the point”³⁹ about the pressure being put on the native title claimants by the LALC to withdraw their claim.

The interviewee stated that the native title claimants were pressured by the LALC to “drop the claim”⁴⁰ and that the LALC:

[H]ad been ringing asking us to pull it out – pull the native title claim off. They were gunna offer us a house down in [name of street] Street, we said ‘no. This is about native title, it’s not about getting a bloody house.’⁴¹

The claimant recalled attending the mediation and feeling quite intimidated by the members of the LALC present because “they was pissed off ... because we put the native title claim on”⁴² The native title claimant recalled at the mediation being urged by the LALC to withdraw the native title claim:

We said, ‘no, this has gone through the system. This is going through the Federal Court’. So when we came up for mediation at that time the Land Council members were already on their high horse...they had my grandfather’s death certificate ... (and the coordinator spoke of my deceased grandfather and he) had no right at all to even mention grandfather’s name. He is not from this country. If he was to speak about my grandfather or any ... (deceased person) ... he has to refer to Mr [grandfather’s surname]. ... I was stunned by this type of disrespect. We said, ‘who are you questioning my grandfather?’ (The secretary of the LALC) was there going on about a few things. So since that day I have never really trusted, you could say from the mediation down at ... [location of mediation] I did not trust the Local Land Council because they never showed respect for my dad. My dad was also the driving force going for (one of the LALC’s first claims under the ALRA).⁴³

At interview, the native title claimant recalled that the mediator did nothing to address the disrespect shown to the grandfather. This demonstration of disrespect and the failure of the mediator to allow for a space in the mediation for the issue to be addressed, impacted on the level of trust between

³⁹ Anonymous native title claimant ‘I’, *Interview with Loretta Kelly*, 18 March 2004. Location of interview withheld as it may identify the interviewee.

⁴⁰ *Ibid.*

⁴¹ *Ibid.*

⁴² *Ibid.*

⁴³ Anonymous native title claimant ‘I’, *Interview with Loretta Kelly*, 18 March 2004. Location of interview withheld as it may identify the interviewee.

Parentheses are used to clarify the idea being expressed by the interviewee; the words in parentheses are not the interviewee’s actual words. Brackets are used where a person’s name, place or language group/tribe has been deleted that may identify the interviewee.

the parties, and this affected the outcome of the mediation. The native title claimant stated:

So at the mediation when it came about that this person was being disrespectful to my grandfather – a fully initiated [name of tribe] man – so after that I did not have respect for the Land Council stemming from the first meeting and confirmed by following meetings. So we went back to court.⁴⁴

Another aspect of this conflict within the Aboriginal community relates to family feuding. A feud between several Aboriginal families started in the early 1970s and continues to the present. The feud has been “passed down” from the previous generation and is considered by all as “unfinished business.”⁴⁵ Despite this issue being raised in the NNTT mediation, the issue was not addressed by the mediator – and so it remains unfinished business today. Presumably, the mediator could not see how this was relevant to the dispute – perhaps the family feud was only mentioned briefly in the mediation. Even though the family feud has no direct bearing on the dispute, it does relate to the ability of the parties to talk rationally to each other and consider options for resolution. The phrase “family feud” evokes, to an Anglo-Australian, a comical image of wild hillbilly or cattle-station families carrying on an irrational and trivial argument from by-gone days. But to Aboriginal people, the phrase is very serious; the quiet mention of “family feuding” or “family fighting” means that a long-standing inter- or intra-family conflict, over a fundamental issue, has not been resolved. It is like a volcano that has violently erupted recently – and may do so again without notice.

Further conflict arises when an individual wishes to purchase land that has vested with a LALC, and the individual has a traditional connection to the land.

Scenario 4

A native title claimant purchased land that was sold by a LALC (“Lot 20”). The claimant had lived in Melbourne for work but returned to her traditional land to retire. Her family were native title claimants to two parcels of land (Lots 21 and 22) that adjoined Lot 20. Lot 20 had vested with the LALC as a result of a claim under the *ALRA*. Whilst renting premises locally, the native title claimant became a member of the LALC. When Lot 20 was going to be sold by the LALC, the claimant and other family members went to the LALC to express their concern with the sale and to reinforce their connection to the land. The claimant and her family told the LALC that the land should not be sold because of s 40D *ALRA*, which can preclude the sale of

⁴⁴ Anonymous native title claimant ‘I’, *Interview with Loretta Kelly*, 18 March 2004. Location of interview withheld as it may identify the interviewee.

⁴⁵ Anonymous native title claimant ‘J’, *Interview with Loretta Kelly*, 25 March 2004. Location of interview withheld as it may identify the interviewee.

land that is of cultural significance. The claimant, bluffing, told the LALC that she had the numbers to prevent the sale.

In actuality, the claimant was very concerned that she would not be able to get sufficient numbers to prevent the sale of the block. She was also conflicted because she wanted to purchase the land for herself and her family (as she had the money to do so from her superannuation).

The native title claimant recalled the ethical dilemma in which she was placed:

[W]ith Lot [20] I had to say, 'I cannot vote on this because this land is of cultural significance to me. I cannot say that Lot [20] is not of cultural significance.' 'Cause (the LALC) had to say that the land is not of cultural significance. I had to abstain. Others had to abstain as well. My Uncle was there and he didn't want to vote but he had to so that I could buy it. I needed the numbers. That's the whole irony of the whole system.⁴⁶

Further conflict arises when Aboriginal people lodge native title claims to land that they no longer live on, or near. In an interview, a native title claimant stated:

And of course we didn't live in the [area]. And it was already said to me, they said, 'why you put that on, you're not livin' there.' I said, 'that's not the point. This little piece of land, my mum has connection to that.'⁴⁷

Such comments ("why you put that on, you're not livin' there") may be made not only by Aboriginal people with traditional connections to the relevant land, but also by Aboriginal people who have moved to the area with no traditional connection to the land. For example, traditional owners expressed their anger towards a man who was born on their land, but whose parents were both from a different nation/language group. This man consistently claims that he *is* a member of the nation on whose land he was born, and that he is therefore entitled to be a native title claimant to land in that nation. This is despite the traditional owners' lawyers and anthropologists (not to mention the traditional owners themselves) informing him that he is *not* entitled to be a member of the native title claimant group. He has disrupted numerous meetings and intimidated many people – especially women – with his ongoing vitriol. In particular, he is critical of traditional owners who have lived away from the land, perhaps for twenty or thirty years, to work in Sydney or Brisbane, and who later come back to become involved in community action, including native title claims. White advisers (lawyers and other professionals) to the native title claimants do not appear to know how to deal with this man. The claimants feel that, since the advisers are the agents of the claimants and 'run' the meetings, it is up to them to put him in his place.

⁴⁶ Anonymous native title claimant 'T', *Interview with Loretta Kelly*, 18 March 2004. Location of interview withheld as it may identify the interviewee.

⁴⁷ *Ibid.*

V. Native Title and National Parks in NSW – Another Situation of Conflict

Another area in which potentially competing claims can arise is in the joint management of land dedicated or reserved under the *National Parks and Wildlife Act 1974* (NSW) (*NPWA*). In 2001, both the *ALRA* and the *NPWA* were amended. The *ALRA* amendments provide for a Register of Aboriginal Owners.⁴⁸ The *NPWA* amendments provide for the reservation, dedication and management of land.⁴⁹ These amendments provide for a board of management⁵⁰ for the lands, the majority of which must consist of Aboriginal owners from the Register.⁵¹ In order to be placed on the Register the Aboriginal person must: be a direct descendant of the original inhabitants of the cultural area in which the land is situated; have a cultural association with the land that is derived from the traditions, observances, customs, beliefs or history of the original inhabitants of the land; and have consented to the entry of their name in the Register.⁵²

At face value this structure appears to address the deficiencies in the *ALRA* in relation to traditional owners having control over their traditional lands. That is, unlike the Northern Territory's land rights legislation, the NSW legislation did not, prior to the 2001 amendments, recognise traditional interests in land.

However, with this new structure, new sources of conflict have arisen. The management of the land is undertaken by the board, the majority of who must hold cultural associations with the land. These traditional owners may well make decisions in relation to the land that do not concur with the majority view of the members of the LALC. The legal position is that the LALC must, in relation to land vested in the LALC but dedicated or reserved under the *NPWA* (also known as s 36A lands or *ALRA* lands) "act only with the agreement of the Aboriginal owner board members for the lands"⁵³.

The reality is that the legal title to the land vests with the LALC. A LALC must act in the best interests of its members, the majority of who may not share the same view as the Aboriginal owner board members. There is no legislated mechanism for resolving a dispute between the LALC and the

⁴⁸ *ALRA*, sections 170-175.

⁴⁹ *NPWA*, sections 71B-71BN.

⁵⁰ The members of the board of management are appointed by the Minister administering the *NPWA*, with the concurrence of the Minister administering the *ALRA*: section 71AN(2), *NPWA*.

⁵¹ Baird W, *Guide to The Aboriginal Ownership and Joint Management of Lands in NSW*, Office of the Registrar, Aboriginal Land Rights Act 1983 (NSW), Sydney, November 2002, p 5; sections 5(1) and 71AN(3), *NPWA*.

⁵² *ALRA*, section 171(2).

⁵³ Baird W, *Guide to The Aboriginal Ownership and Joint Management of Lands in NSW*, Office of the Registrar, Aboriginal Land Rights Act 1983 (NSW), Sydney, November 2002, p 7; section 71BG, *NPWA*. Aboriginal owner board members means "the Aboriginal owners who are members of the board of management for the lands": section 5(1), *NPWA*.

Aboriginal owner board members. There is also no definition in the *NPWA* of what it means for the LALC to have the agreement of the Aboriginal owner board members: does it mean, for example, that the Aboriginal owner board members must agree *unanimously* with the LALC? This highlights the necessity for an effective dispute resolution mechanism, which must be in place to promptly address any conflict between the LALC and the Aboriginal owner board members.

Conflict can also arise between the board of management and native title claimants. Although the board members must have cultural association with the land, it does not necessarily mean that they represent the wishes of native title claimants. The board of management is only authorised to enter into arrangements with native title holders (that is, where there is a determination that native title exists) to ensure that native title rights and interests in relation to lands are preserved.⁵⁴ Therefore, if there is not a determination, the board of management is not authorised to enter into such arrangements with Aboriginal native title *claimants* (or other Aboriginal people claiming traditional ownership). A native title claimant group can constitute all descendants of the original tribal group, which could include hundreds of people. As we will highlight in the following chapter, the time frame in which a determination of native title can be made may be many years. Family, clan and tribal feuding may be exacerbated by the delay – or the delay itself may cause conflict.

The joint management process will not extinguish or impair native title rights and interests existing in relation to the land.⁵⁵ Aboriginal people who believe that they have native title rights and interests in the land can continue to assert these rights, even if they have not lodged a claim, nor had a native title determination. The concern is that any action taken by the board of management that interferes with the locals will force them to take legal action to formally assert their rights. As mentioned above, Kelly's research identified local Aboriginal people who continue to assert their native title rights, but do not wish to take legal action under "whiteman's laws". Being forced to enter into the native title system by other Aboriginal community members creates family and community disharmony.

VI. Conclusions – Managing Conflict

These examples illustrate the conflict that can, and does, arise when there are competing claims to land between Aboriginal people.

The key to more effective mediation of those disputes to alleviate on-going conflict can be found in the following observations of an Aboriginal mediator:

⁵⁴ Baird W, *Guide to The Aboriginal Ownership and Joint Management of Lands in NSW*, Office of the Registrar, Aboriginal Land Rights Act 1983 (NSW), Sydney, November 2002, p 18; section 71BI(2), *NPWA*.

⁵⁵ Baird W, *Guide to The Aboriginal Ownership and Joint Management of Lands in NSW*, Office of the Registrar, Aboriginal Land Rights Act 1983 (NSW), Sydney, November 2002, p 18; section 71BI(1), *NPWA*.

[P]eople look at me in disbelief around all the disputes that are happening in Aboriginal society: How can people do all this sort of stuff? Why is this happening? Because, in the romantic view, we all got on very well... [...but] You stepped out of country, you're in conflict – and that's what people do forget.

But a lot of money has been put in on Aboriginal and non-Aboriginal reconciliation. And this is what brings me to this point. Not one cent has been put on Aboriginal and Aboriginal reconciliation – and that's the key that's missing. That's the most vital key that's going to open the door to our own freedom. Our own redemption. Our own focus at where we want to see our culture go in the future. But we've had nothing – even disputes alone, if looking at the government backing us with mediators is starting to make some restorative justice around our own issues. At this point there's none. We have to go cap in hand to governments that may provide us with some small infrastructure to provide a service. At the end of the day, it's pittance to what healing needs to happen, out in the community. And there's no better person than ourselves.⁵⁶

These situations of conflict show the need for dispute resolution models that addresses the types of disputes that occur within Aboriginal communities. One of the advantages of employing dispute resolution processes that utilise Aboriginal cultural values is that they reinforce those values and reassert Aboriginal authority. In this way, dispute resolution processes that actually empower Aboriginal people can be seen as nurturing Aboriginal self-determination and sovereignty. This reassertion of authority is particularly important at the community and family level where Aboriginal people are very much engaged with disputes and outcomes that are focused on issues that are going to fundamentally affect the people involved. Control over the important aspects of our lives is a key aspect of the notion of Aboriginal sovereignty.

This increased feeling of control over people's own lives is even more important in an era which has seen increasing attacks on Aboriginal people's ability to make decisions on behalf of their communities on many issues. The abolition of the Aboriginal and Torres Strait Islander Commission, and its network of elected regional councils, was illustrative of this shift. Even when Federal Government policies are focused on 'shared responsibility agreements', many questions are raised about the capacity of communities to organise and represent themselves in these negotiations, particularly after the regional council system has just been abolished. In such an environment, it is all the more important that Aboriginal communities are given opportunities to assert their authority in a wide range of issues and areas. The resolution of disputes is a key place in which this assertion of authority should be fostered. Alternative dispute resolution would, particularly in relation to native title, benefit from building models and processes that started with assumptions of Aboriginal sovereignty and cultural authority. These models would not only recognise and empower Aboriginal people, they would create processes that fundamentally shifted a colonial power imbalance that worked against Aboriginal claimants.

⁵⁶ Anonymous mediator and native title claimant 'F', *Interview with Loretta Kelly*, 1/10/2003. Location of interview withheld as it may identify the interviewee.

It's true to say that, at no time during colonisation, have Indigenous people stopped considering ourselves to be sovereign. We have at all times, at the most local of levels, continued to work in ways that reinforce a political and cultural entity.