The Native Title Amendment Act 2009: Minor amendments or just playing it small and safe?

By Kevin Smith, CEO Queensland South Native Title Services

This is an abridged version of a paper delivered at the National Indigenous Legal Conference, University of Adelaide, 24 September 2009.[1]

If Indigenous affairs presents as a parallel universe to mainstream Australia, then native title comprises multiple parallel universes; universes that equal the number of interests that are represented at the Bar table (and they can run into the hundreds) all layered 221 years deep with entrenched attitudes and behaviors caused by the colonisation process.

The Native Title Act[2] (bound in its befitting psychedelic swirling purple cover) along with its equally bizarre jurisprudence attempts to harmonise these disparate interests and in the view of many falls spectacularly short with reliable regularity.

In this chaos and over the cacophony of innumerable stakeholders, a common refrain is the need for faster, fairer and cheaper resolution of native title claims. From an Indigenous perspective, what we have got in return have been policies that border on the painfully malevolent (1998 Amendments where the then Deputy Prime Minister promised bucket-loads of extinguishment) to the insipidly painful (here, I would include the 2007 and 2009 amendments).

A holistic, comprehensive coordinated legislative and administrative programme is simply too much to ask for in this environment. All manner of metaphor is par for the course in this area; one step forward two steps back; dancing on moving carpet. But since we are in grand final season, this is an area where the Black fellas always run up hill on an uneven playing field, against the wind toward increasingly smaller goalposts without half time respite!

As the so-called Minor Amendments to the Native Title Act received the royal assent last week on 17 September[3] I was reminded of Nelson Mandela's words of wisdom:

> *"There is no passion to be found playing small – in settling for a life that is less than the one you are capable of living."*

These recent *minor* amendments should be recast as the *small* amendments, the *safe* amendments, if one was cynical even the *recession-busting* amendments because they are guaranteed to ensure that everyone in this industry has another 30 years of work while we fumble through the outstanding 484 odd claims left on the court lists!

If there ever was an opportunity to play it **big -** this was it! If there ever was an opportunity to realise the potential that this Act is capable of achieving - this was it! I understand the trepidation of any Government making amendments to the Native Title Act but this was the opportunity to re-calibrate the legislation to ensure its provisions aligned with the promise of the Preamble – and there is no Act of parliament that has a more inspiring, and dare I say it, passionate Preamble!

Why were these Minor Amendments a lost opportunity? The simple reason is that over the past 12 months and leading up to these amendments, we had a very large section of the users of the native title system saying that it is time to change the legislation to introduce at least three reforms:

1. Changing the burden of proof[4] – this change was capable of evoking the behavioral change we all speak of

[1] K Smith, 'The Native Title Amendment Act 2009: Minor amendments or just playing it small and safe?', paper presented at the National Indigenous Legal Conference, University of Adelaide, 24 September 2009.
[2] *Native Title Act 1993* (Cth).
[3] *Native Title Amendment Act 2009* (Cth).
[4] Australian Greens Senator Rachel Siewart unsuccessfully moved an amendment to the Native Title Amendment Bill 2009 (Cth) that would have inserted a presumption of continuity into the principal Act. The amendment was based on an amendment suggested by Chief Justice French in July 2008: See, Commonwealth, *Parliamentary Debates Hansard*, Senate, 14 September 2009, 53-54 (Senator Rachel Siewart); Justice French.

2. Disregarding some forms of extinguishment – when you increase the options there is a commensurate probability of achieving negotiated outcomes (in fairness the minor amendments includes judicial recognition of non-native title outcomes but it is not the same as disregarding extinguishment)
3. Streamlining the process for recognising native title (the minor amendments focused on this backend option – many of my Rep Body colleagues and our supporters supported these changes but you have to get to the end of a very convoluted process to avail yourself of them)

The most astonishing observation that can be made about these proposals was not only **what** was being said but **who** was saying it. Obviously when native title representative bodies, the Aboriginal and Torres Strait islander Social Justice Commissioner and AIATSIS say that there is a dire need to reform the system that would be expected but you don't expect the Chief Justice of the High Court[5], current and former judges of the Federal Court and the Law Council of Australia to openly support such reforms. Indeed getting lawyers to agree on anything is hard enough but when they give such advice freely you don't play small!

The Proposals

The different models

There are a number of models that could be put forward to ameliorate the current harsh evidential burden placed on Applicants. The two popular and abundantly sensible models are proffered by Chief Justice French and Justice North.

In a nutshell the **French model** is a rebuttable presumption of continuity of the relevant society and the acknowledgement of its laws and customs from sovereignty to the present time.[6] This presumption will be based on the fact that the native title claim group acknowledges laws and observes customs it **reasonably believes to be the laws and customs acknowledged and observed by their ancestors right back to sovereignty;**[7] in a sense a 'reverse domino of continuity'. It would then be up to the State or another respondent to rebut the presumption based on credible evidence.[8] The Chief Justice even drafted two additional subsections to the existing s61 to facilitate the change.[9] It was that simple!

Justice North proffered a different approach.[10] Under the **North model**, applicants would need to show that there were Indigenous people at sovereignty occupying the land in question according to traditional laws and customs.[11] The onus would then shift to the respondents to demonstrate that the other requirements of the *Yorta Yorta* test do not exist. Justice North suggested the changes be made to s223.[12] Justice North's model is consistent with overseas common law jurisdictions where there is a presumption of continuity from sovereignty – so this concept is no stranger to the common law. However, a distinguishing feature of those cases is that in those overseas jurisdictions the Aboriginal parties have the benefit of treaties recognizing those Peoples at the time sovereignty was asserted.

These models are not the panacea to the woes of native title litigation – one could never be that naïve. There is the reality of overlapping claims (who is entitled to the presumption or does the existence of an overlap negate the presumption from the outset); under the North model, how do you explain concepts of succession (where one group takes over the rights and interests to land and waters of another group). While these present as issues they are far from insurmountable in fact they border on the infinitesimal compared to the current nonsense of complying with the Yorta Yorta test.

The NNTC's submission[13] on these collateral issues included the utilisation of the registration test so that the presumption would be limited to those claims that are registered. It would also require NTRBs and applicant groups themselves to sort out intra and inter Indigenous disputes and unmeritorious claims. A challenge that needs to be accepted if such reforms are embraced!

'Lifting the burden of native title – some modest proposals for improvement'. Paper presented to the Federal Court Native Title User Group (Adelaide, 9 July 2008).

[5] See e.g., French, above n4.

[6] Ibid [28].

[7] Ibid [29].

[8] Ibid [30].

[9] Ibid [31].

[10] See, Justice AM North and T Goodwin, '*Disconnection – the gap between law and justice in native title: A proposal for reform*', paper delivered to the AIATSIS National Native Title Conference, Melbourne, 4 June 2009.

[11] Ibid 14.

[12] Ibid 16.

[13] See, National Native Title Council, '*Submission – Proposed Minor Native Title Amendments*', submission to the Attorney-General in response to the December 2008 Commonwealth discussion paper on proposed minor native title amendments, 20 February 2009.

Behavioural change

I appreciate that legislation can be a blunt instrument when it comes to behavioral change but it is the only tool we have left in the tool box. Parties and their legal representatives are not going to change their behaviour or indeed their professional standards when the law and process favours them and their clients. Only in the parallel universe of native title would you get fundamentally good people behaving inherently unfairly. Real change - behavioral change – cannot occur unless the current playing field is leveled. Legislative amendments ought to serve as a significant catalyst to change attitudes.

The presumption of continuity, whichever model is adopted, would achieve the following:

- Make the system fairer for Indigenous parties
- Places the burden on the State; the party that has the tactical advantage of disproving continuity and extinguishment through the "institutional memory" of how it colonised
- Investigating issues of connection and extinguishment simultaneously and by the one party is the most logical way of getting a clear picture of the evidence: each grant of tenure has locked within it a story about what happened to the Aboriginal people on that land
- The commercial reality (and there is no commercial reality in current native title land) of being put to proof on both connection and extinguishment is enough to explore a broader range of options – the cost of proving or disproving is often more sometimes twice and thrice as much as the freehold value of the land in question
- There is nothing like pricking the raw nerve of morality to invoke an epiphany: the State would need to prove that each succeeding government was an effective coloniser the sordid details that would include acts of genocide would be abhorrent.
- It would dispense with the current linear, technical and blinkered way native title cases are prosecuted and defended
- With the reduction of unnecessary transaction points, time, money and misery is saved – sounds like faster, cheaper, fairer outcomes??

Increasing the options for a negotiated outcome

It is particularly heartening to hear the range of options that are available to increase the options. The Chief Justice, Justice North, Justice Mansfield and former Justice Wilcox have all made invaluable contributions. Those contributions range from disregarding historical extinguishment to judicial recognition of non native title outcomes: the latter being picked up in the minor amendments.

Sadly increasing the options don't get you anywhere if you are stuck at first base on the connection issue. At present, respondent parties have no real motivation to consider negotiated outcomes. The process is linear and respondents, patiently or impatiently, wait in turn to play their role in the process as the system heaves along. If we change the process, we change the behaviours and it is in that space where options abound.

There are many extinguishing tenures that could be characterised as "historical extinguishment". Justice French has suggested that a modest amendment to the NTA:

> *would allow extinguishment to be disregarded where an agreement was entered into between the States and the applicants that it should be disregarded. Such agreements might be limited to Crown land or reserves of various kinds. The model for such a provision may be found in ss47 to 47B. …Native title so agreed would also be subject to existing interests. If, for example, the vesting of a reserve was taken to have extinguished native title an agreement of the kind proposed could require that extinguishing effect to be disregarded while either applying the non-extinguishment principle under the NTA or providing in the agreement itself for the relationship between native title rights and interests and the exercise of powers in relation to the reserve.*[14]

Confidence in the system

Finally, parties need to be confident that their agreement will be recognised. The Minor Amendments pick up Justice Mansfield's statements around agreed statements of fact in s 87 consent determination. This proposal is very positive but, alone does not represent a comprehensive response to ensure fairness in the negotiation process. We need to reiterate the interrelationship of s87 process changes to the proposed presumption of continuity and increasing the available options.

[14] French, above n4, [32].

The Minor Amendments also includes the interesting suggestions of former Justice Wilcox being judicial recognition of matters other than native title, this might include recognition of say, traditional ownership[15]. This is a very constructive amendment that obviously needs to be explored in the context of how that power might be exercised.

Conclusion

I agree that behavioural change is critical to faster, fairer and more cost effective outcomes. I also agree that the recent amendments are a move in the right direction. But those amendments alone will not evoke the necessary behavioural change. In fact the changes associated with implementing the amendments are likely to add yet another layer of confusion and effort upon an already change-fatigued environment.

We need to introduce the other limbs to the reform programme as soon as possible; not in two, three or four years' time. If the changes were made and made quickly, the system stands a good chance of reducing 30 years of work down to 10. In fact why not aim for five years! After all "there is no passion to be found in playing small".

Kevin Smith, CEO Queensland South Native Title Services at the 2009 National Indigenous Legal Conference in Adelaide.

Kevin Smith is also a member of the Native Title Research Unit Advisory Committee.

[15] The new s87(4) states "without limiting subsection (2) or (3), if the order under that subsection involves the Court making a determination of native title, the Court may also make an order under this subsection that gives effect to terms of the agreement that involve matters other than native title".

Native Title in Context: Report from the 2009 National Indigenous Legal Conference

By Cynthia Ganesharajah, Research Officer NTRU

As a part of professional development a colleague and I were afforded the opportunity to travel to Adelaide and participate in the 2009 National Indigenous Legal Conference.[16] For me, the Conference highlighted the importance of recognising and being continually aware, that native title does not exist in a vacuum. Rather, it is important to understand the role of native title within broader discussions about self-determination, sovereignty and non-discrimination.

At the Conference Federal Attorney General Robert McClelland spoke about closing the gap, creating partnerships, and Aboriginal and Torres Strait Islander peoples taking responsibility for their own communities. Yet, it is difficult to see why, or even how, Aboriginal and Torres Strait Islander peoples should, or could, take primary responsibility for the end product of successive government policies. As pointed out by Dr Irene Watson in her keynote address, the role of colonisation in producing dysfunction and impairing capacity is often overlooked. Dr Watson further argued that the colonisation of Aboriginal and Torres Strait Islander peoples is ongoing. The acknowledgement of this continuing colonisation is a necessary precursor to decolonisation and discussions of sovereignty.

Interestingly, Dr Watson maintained that the underlying rationale for the continuing colonisation of, or at least discrimination against, Aboriginal and Torres Strait Islander peoples is control. In my view, racism also plays a major role. This was highlighted in a presentation by Professor George Williams who spoke about the Australian Constitution and Indigenous people. As a foundational governing document, and the highest

[16] Selected papers are available at: http://www.nilcsa2009.com/