

Introductory remarks prepared for the Centre for Native Title Anthropology's annual conference to be held at the Travelodge Hotel in Hay street, Perth on 'Emerging and Strategic Issues in Native Title Anthropology' from the 9 to 10th February 2017

Emerging and Strategic Issues in Native Title

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Native title is seen as first and foremost about property rights. Property rights are historically derived social arrangements that vary widely between cultures. In respect of native title property rights here in Australia there is, however, a certain convergence in thinking about them between Aboriginal and non-Aboriginal lawyers and policy makers as well as others who influence public opinion. This convergence is that such rights can be and should be, among other things, a vehicle for positive change and empowerment in the Indigenous community (e.g. see Brennan et al 2017).

How empowerment is understood is certainly variable but is likely to include issues relating to self-determination, self-government, economic development, community development, employment, and more generally improving people's circumstances and control over their lives.

For any of this to happen there is an important range of preconditions that are the immediate concern of this conference. These preconditions relate to the on-going preparation of claims in all their complexity, issues of governance in relation to native title land, the setting up and functioning of PBCs, their support and funding, including the future role of Rep Bodies in servicing PBC needs, and the provision of training and other support, especially where PBCs are small and without their own sources of funding. Where there is funding such as from royalties or compensation there are always going to be tensions around distribution as oppose to investment. Another emergent issue, where there is a lot of work to be done, is in relation to assisting people in the formulation of PBC objectives in order to realise some of the possibilities that their property rights

may offer, and then there is the issue of handling disputes that inevitably arise around property rights, especially those held in common.

I think that the benefits of anthropologists in helping facilitate outcomes in all these aspects of native title are already clear to most of those involved in the day to day native title issues. Securing outcomes is always complex, often conflicted and rarely resolved to the satisfaction of all. At the on-the-ground, everyday level, new issues and ways to deal with them, are constantly emerging from the specificity of particular claims and judgements. Sharing both formally and informally how any particular issues have been handled, or might be handled or planned for, with other practitioners, is one of the major benefits of coming together at conferences like this. As is the opportunity for intergenerational transmission of knowledge and skills such as writing for the courts or being an effective expert witness, both areas that CNTA has been asked to contribute to by the Attorney-General's Department over the next two years.

However, at conferences like this one, it is important too, to look up to the horizon not only to keep ourselves motivated about the broader significance of these daily preoccupations, but to remind ourselves that the choices and decisions taken today while opening up some possibilities for the future, also close off others. Already the uneasy mix of market and inalienable property regimes that make up native title has been left to muddle along for too long without the difficult social policy issues it creates being explicitly addressed. Leaving these issues to legal reasoning and market ideas about property to work out their logic within the particular legal, local and historical contexts in which they come up, abandons the opportunity for the implementation of more purposeful social policies.

Nowhere is this clearer than in relation to empowerment. Among the questions empowerment raises are: Who is it that is being empowered? How does this empowerment relate to the pervasive invoking of the concept of community? Where do historical people fit in, especially when they are the majority of a local or regional population? Is the apparent decline of community organisations since the advent of native title, and the rise of more exclusive traditional owner ones, a good thing?

Community is a notoriously problematic word which covers a wide range of variation, and in which community of interest is so frequently confused with residential community. Residential communities of any size are rarely communities of interest, even if from the perspective of the welfare state and local government they are basic administrative units.

Native title tends to be divisive in terms of residential communities and their empowerment because it leads to the proliferation of legal entities and the fracturing of community in both of the senses mentioned, as David Jagger (2011) has pointed out. Native title has the potential to create inequality, to marginalise, and to leave out as many, if not more than it benefits. Leading to the ironic situation where time and effort in some community development projects can be focussed simply on getting native title holders to share their income more widely.

This is where it is necessary to grasp the nettle of forward looking policy. To think things through rather more explicitly and carefully than has always been done in the past. Western Australia is trying to lead the way with its now stalled 'South West Native Title Settlement' which falls within the general idea of regional agreements that were being advocated by anthropologists and others in the 1990s (e.g. see Edmunds (ed.) 1998 and 1999; Sanders 1995). What is particularly significant about such broad ranging and comprehensive regional agreements is that they can come out of the native title process. The large areal scope of regional agreements should mean that relatively few Aboriginal people living in a region will not be covered. Nevertheless, it is highly likely that such agreements will be structured by entification and so requiring thoughtful attention to how this is done.

The idea of negotiating on a regional basis has also emerged in Victoria and is emerging now in South Australia. It is currently being talked about in terms of treaties with separate groups that between them cover the area of each state. Crucial to this working effectively is getting the definition of the regions right. Thinking regionally can contain the negative aspects of narrow legalism. It can also be argued that it returns to an underlying principle of the Indigenous systems of land tenure across the continent, which are ultimately founded on long term residence. We know the systems of land tenure were dynamic because of natural demographic processes alone. Clans expanded and died out, creating fission and

fusion of land owning groups, with the result that succession was fundamental to the ideology of unbroken inheritance, although obscuring the reality (see Peterson, Keen and Sansom 1977). As the huge literature on Aboriginal property in land makes unequivocally clear, residential groups were always composed of a mix of those with descent connections and others. The policy choice is clear: as long as native title remains a collective and inalienable title there is a historical moral imperative that it should include the recognition of the presence of long-term residents because it was these people that actually allowed the ideology of perpetual descent and the system to work. Regionally based agreements can avoid the making of invidious distinctions and open the way to recognise this, by being formulated so that they give some formal recognition to all long-term residents of a region.

Fostering inequality, and creating landed and landless Aboriginal people does not sit easily with the public emphasis on community values or the intended beneficial aspects of land rights and native title . Yet in the tendency to over emphasise native title as a property right defined by market values, there are inevitably suggestions that inalienability be abolished (e.g. see Yarrow 2015). Alienable land rights were those that Bjelke-Petersen was happy to contemplate. Setting aside issues of intergenerational justice, such a suggestion ignores the fact that in its widest sense, community embraces non-Aboriginal Australians as well,. Failure to recognise this wider community significance, to give in to narrow and destructive self-interest, greatly undervalues the positive benefits native title can have not just for Aboriginal people but for the nation at large.

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