PROCEEDINGS OF THE AUSTRALIAN RANGELAND SOCIETY BIENNIAL CONFERENCE

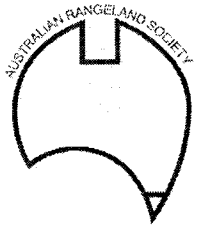
Official publication of The Australian Rangeland Society

Form of Reference

The reference for this article should be in this general form;
Author family name, initials (year). Title. *In*: Proceedings of the nth Australian Rangeland Society Biennial Conference. Pages. (Australian Rangeland Society: Australia).
For example:
Anderson, L., van Klinken, R. D., and Shepherd, D. (2008). Aerially surveying Mesquite *(Prosopis* spp.) in the Pilbara. *In*: 'A Climate of Change in the Rangelands. Proceedings of the 15th Australian Rangeland Society Biennial Conference'. (Ed. D. Orr) 4 pages. (Australian Rangeland Society: Australia).

Disclaimer

The Australian Rangeland Society and Editors cannot be held responsible for errors or any consequences arising from the use of information obtained in this article or in the Proceedings of the Australian Rangeland Society Biennial Conferences. The views and opinions expressed do not necessarily reflect those of the Australian Rangeland Society and Editors, neither does the publication of advertisements constitute any endorsement by the Australian Rangeland Society and Editors of the products advertised.



The Australian Rangeland Society

INITIATIVES IN NATIVE TITLE AND LAND MANAGEMENT IN SOUTH AUSTRALIA: THE STATEWIDE NATIVE TITLE NEGOTIATIONS PROCESS

Parry Agius and Jocelyn Davies

Aboriginal Legal Rights Movement Native Title Unit, 4/345 King William St, Adelaide.

ABSTRACT

The statewide negotiating process initiated three years ago in South Australia to give meaningful recognition to native title and to settle native title claims involves native title groups, the Aboriginal Legal Rights Movement, the SA Government, the SA Farmers Federation, and the SA Chamber of Mines and Energy. In the rangelands it is highlighting and building on common ground between native title groups and pastoralists. Through the development of Indigenous Land Use Agreements, it will bring improved relationships, equity and justice, and stronger leadership among native title groups.

INTRODUCTION

Ten years ago this year the Mabo decision of the Australian High Court recognised indigenous native title for the first time in Australia. The High Court reinforced the implications of this decision for rangelands in 1996 when the Wik case established that native title rights and pastoral lease rights co-exist. In themselves these decisions and the *Native Title Act*, 1993 have not delivered recognition 'on the ground' for Aboriginal peoples. But they have paved the way for several rangelands Aboriginal groups, particularly in WA, to be accorded this recognition through consent determinations – determinations of native title in which all parties to the claim, both Aboriginal and others, have agreed about the existence of native title and its contemporary meaning for land use. We are working for similar outcomes in SA. A statewide negotiating process through which we are aiming to give meaningful recognition to native title and to settle native title claims involves native title groups, the Aboriginal Legal Rights Movement (ALRM), which is the Native Title Representative Body for SA appointed under the Native Title Act to represent native title groups, the SA Government, the SA Farmers Federation (SAFF), and the SA Chamber of Mines and Energy (SACOME). These parties have all agreed to work to the development of Indigenous Land Use Agreements (ILUAs) about their common and conflicting interests.

ILUAs are provided for in the Native Title Act as a mechanism for native title groups and others to conclude legally binding agreement about the interface between native title and other rights and interests in land and natural resources. ILUAs can apply to the use and management of a particular area, such as an individual pastoral property, or they can provide for procedures for decision making (including 'future acts' as defined in the Native Title Act) across a class of activities, such as diversification on pastoral leases, or conduct of mineral exploration.

As well as working towards ILUAs on these kinds of issues, the SA process is spawning initiatives in legislative and policy reform. It has for example developed a discussion paper about legislative changes to reconcile procedural difficulties in simultaneously implementing the *Aboriginal Heritage Act* (SA) 1988 and the *Native Title Act*, 1993, while retaining the protection that both Acts accord to Aboriginal cultural values and providing a clearer, more workable process for development approvals. This discussion paper is now in a public comment phase (see SA Native Title Negotiations 2002). In the minerals and energy sector, the SA process has developed an employment and training strategy for Aboriginal people which is of particular relevance to exploration activities, since opportunities for Aboriginal employment or other benefit from any particular exploration project are limited by the small scale, transitory, and uncertain nature of these industry operations. In the longer term, we hope that this native title negotiations process and the ILUAs it concludes will lay the ground work for consent determinations of native title to be made by the Federal Court.

In our work for and on behalf of SA native title groups as part of this process, we aim at meaningful recognition of native title – that is recognition of native title groups' current and future responsibilities to care for country, recognition of past injustice, access needs, protection of important country, economic and other benefits to end Aboriginal socio-economic marginalisation, and a far greater role for native title groups in future decisions about their country than they have had in the recent past. Associated outcomes which we are working towards include improved relationships between native title groups and other rangeland stakeholders, and stronger leadership among native title groups for sustainable development. ILUAs can bring these outcomes. And since ILUAs are developed through negotiation, they will bring these positive outcomes for native title groups only to the extent that they also address the outcomes sought by other parties to the negotiations. Already we are seeing positive outcomes in the willingness and capacity for government, SAFF and SACOME to work with native title holders in developing cooperative approaches to mutually important issues, as in the examples above.

Rangelands native title groups have many common interests with pastoralists, as also with mining companies and with government priorities for rangeland management. They include, for example, economic development and improved regional economic opportunities and services, which are important outcomes for all rangelands people; and conservation of Aboriginal cultural heritage, since this is part of what all Australians value about rangeland environments, and since – for Aboriginal peoples – this encompasses biodiversity conservation and restoration of degraded landscapes. Part of the rationale behind negotiating for native title settlement in SA, rather than pursuing claims through court, is to develop improved relationships and understanding between native title groups and others, as an improved basis for working on these common interests. There has not previously been a forum in South Australia through which Aboriginal and pastoral interests can work towards shared goals and interests. The statewide native title negotiating process is thus breaking quite new ground.

The process is complex. It necessarily operates at a number of scales and within a number of policy and legislative sectors. For example, while questions of how native title rights and interests are given meaningful recognition on an individual pastoral property are of paramount concern to the pastoral lessee and the native title group for that property, at a broader scale policy and legislative frameworks for biodiversity and cultural heritage conservation, regional development, diversification of pastoral businesses, tenure review, and public access need to be considered to establish the scope of 'on the ground' negotiations.

Here we first outline the structure that has developed for the statewide native title negotiations process. We then outline some of the governance issues for native title groups which are critical to their participation in this process, and to their management of its outcomes. Finally we discuss some issues encountered to date from considering how native title coexists in practice on pastoral lease land.

STRUCTURE FOR STATEWIDE NEGOTIATIONS

The peak forum for the SA statewide native title negotiations is known as the 'Main Table', representing SA Government, SAFF, SACOME and ALRM with the National Native Title Tribunal (NNTT) as an observer. Main Table meetings started late in 1999 when all these parties came to agree that court action would be a costly and lengthy way of pursuing settlement of native title claims. And that the outcomes from court action would work against building of sustainable relationships between native title groups and other South Australians. Late in 2000, native title groups also agreed to participate in this negotiating process.

The Main Table has developed protocols for discussions between the parties about settlement of native title claims, identified issues of concern to each party, and it oversights a work program to address these issues. It has taken responsibility for managing the approach to negotiations, the order in which issues are addressed and the interrelationships between them. Its workhorses are various 'Side Tables' which involve all or some of the Main Table parties and are concerned with particular sectoral issues. These Side Tables consider the specifics of issues as each party sees them, research background

information and provide a discussion forum for developing potential solutions. While each party has its own responsibilities to its own constituents which condition its approach at the Side Tables, discussion in these forums is often frank and wide ranging and this can make it easier for everyone to 'think outside the box' and to set points of difference aside in favour of positive initiatives on matters of mutual concern. The Main Table and Side Tables all have the same independent Chair, whose consistent involvement helps to ensure focus is maintained on terms of reference, agreed outcomes and work programs. Representatives of the parties also meet very informally in Working Groups, from which they report back to Side Tables on progress and matters that require wider consideration and research.

To date, the Side Tables have operated on the following issues: Heritage, (Minerals) Exploration, Pastoral, Communications and 'Relationship to Land'. The first three concern particular sets of substantive issues and have been the highest priority sectors in a list that also includes Local Government issues, Protected Areas and Fishing, for example. The Communications Side Table concerns media and public statements. The 'Relationships to Land' Side Table is perhaps the most innovative, being a forum to encourage the parties to develop a better understanding of each others' cultures; how these cultures determine relationships to land, and how these relationships to land can be effectively protected and enhanced through settlement of native title claims. As such, it is a forum which assists in developing effective mechanisms to address emotional and procedural issues which are critical to effective negotiation on substantive issues.

The work program of the Relationships to Land Side Table includes developing understanding of cross cultural negotiation processes and of effective tools for cross cultural communication and understanding. In a departure from the typical stereotype where cross cultural training aims at improving non-Aboriginal peoples' understanding of Aboriginal cultures, this Side Table is taking a mutual approach. As well as developing tools whereby farmers and miners and the government can better understand Aboriginal cultures and relationships to land; it is equally concerned with tools whereby Aboriginal people can better understand the cultures of farmers, miners and the government and their relationships to land. It also has a brief to consider questions of terminology, and to develop mechanisms to build mutual understanding of the meaning that different people give to the same term, where necessary settling on a common definition to use in agreements. One early outcome is a statement of common understanding and the basis of an MOU between SAFF and ALRM to mark the cooperative relationship that their leadership groups have now begun to develop for the first time.

Although native title is often characterised as a Commonwealth responsibility, this process would not have started at all without the foresight, practical support and funding of the SA government, initially when the Liberal Party was in power, and now under Labor. Continuity of funding for participation is an issue for all parties as each is reliant on special allocations from State and/or Commonwealth sources to maintain its involvement. Mutual advocacy for each other's funding requirements has emerged as all parties realise that they cannot make progress to their own goals for the negotiations without the participation of other parties.

A major part of ALRM's resource needs are for communication with and involvement of native title groups (see below). ALRM has also needed to augment its core legal and anthropological expertise with economists, geographers and advisers experienced in government process, mining and agri-business. This has been important to giving ALRM and its constituents a well developed understanding of issues for the mining and farming sectors and for government land managers and a capacity to respond to the concerns of other parties and propose workable directions on key issues. This broadening of professional expertise is perhaps a hallmark of the cultural change necessary if Aboriginal organisations are to be effective in settling native title claims through negotiation.

GOVERNANCE AND REPRESENTATION OF NATIVE TITLE GROUPS

Native title groups need to be represented directly in these native title negotiations because it is the future of their native title which is being addressed. Native title holders themselves emphasises that

in Aboriginal customary law (which Australian law has established as determining the content of native title and its meaning) only traditional owners (ie native title holders) can speak for country. Further, native title groups' participation directly in negotiations will itself deliver outcomes in terms of empowerment of the native title groups and their members – through information, improved understanding of how native title is viewed and managed in government process, and improved mechanisms and experience of decision making. Such outcomes are critical for sustainability of agreements that are reached during the negotiation process – they build the native title groups' capacity to implement agreements that are reached, as well as helping to ensure that agreements are actually satisfactory from the native title group's point of view.

Our concern to have native title groups as active participants in these negotiations seems to set this SA approach to settling native title claims apart from negotiating processes in other states (Agius et al 2001) where many of the agreements concluded at a statewide or regional level have been negotiated by representative bodies, ALRM's counterparts, with very limited direct involvement of native title groups. However, while the principle of native title group representation at the negotiating table is sound, there are considerable practical difficulties in implementing it.

In SA ALRM works with 22 native title groups. Until the Mabo decisions the existence of these self defined Aboriginal cultural groups was ignored by government, who instead directed their efforts to promote Aboriginal self determination and to strengthen the internal dimensions of Aboriginal governance towards the old mission or government reserve communities and to residential groups of Aboriginal people in Adelaide and major towns. Having only become visible entities with relevance to government decision making within the last ten years, most native title groups remain unincorporated and lacking in even basic communication resources.

As a result of ALRM's work with native title groups over the past four years, each group now has identified a Native Title Management Committee (NTMC), at least with interim status. These NTMCs comprise the named applicants for each claim, and other people nominated by the group. They are authorised by all the members of the claim group to lead decision making about the management of the claim. Securing the NTMCs' decision about whether or not to participate in the Statewide native title negotiations involved ALRM in convening conferences of all the NTMCs, termed Congress meetings, to share information and perspectives and come to decisions. ALRM continues to work towards mechanisms whereby the Congress and its NTMCs will be direct participants in the Main Table and Side Table processes. Resource needs for communication and building effective governance amongst claimants at a statewide level are considerable and outcomes are slow to emerge when working with such a large and diverse group of constituents. To date, the aim of achieving active participation of NTMC/Congress in the Main Table and Side Table processes remains elusive. At a local scale, however, NTMC leadership for negotiations is occurring through pilot negotiation processes.

PILOT NEGOTIATIONS

Through pilot negotiation processes at a local level ALRM, the SA Government, SAFF and SACOME aim to develop experience in negotiation methods which is applicable to broader scale issues, and to settle some key issues for three particular NTMCs. One of these, outside the rangelands, represents Narungga people. They are involved as a pilot because the SA government agreed in 2001 to pursue settlement of a list of issues of concern to them in their country on the Yorke Peninsula, in partial recognition of the Narungga agreement to extinguishment of native title on 16 ha of 'public' foreshore reserve which was necessary to allow the development of a privately owned canal residential estate. The process showed the serious concern and deep emotion that extinguishment of native title arouses for Aboriginal people, as well as the goodwill of the State government in committing to address issues that are central to Narungga people's future but which were marginal to the government's agenda until raised by Narungga.

The other two pilot groups – Yankunytjatjara and Anatakarinya - are both peoples of the rangelands of north central SA. Within their traditional lands are a range of issues of key concern to many stakeholders – such as processes for mining exploration, pastoral lease futures, biodiversity conservation, outback tourism and protected area management. Other key influences leading to their nomination as pilot groups for the negotiations are that they are internally coherent and have few overlaps on boundaries, or shared claim areas, with other native title groups. They also have extensive experience in negotiations from previous involvement in mining exploration and mining agreements. A program of meetings on country is now developing to facilitate the direct involvement of these groups in particular issues for the future of native title, including about how native title and pastoral operations interface on a pastoral lease.

PASTORAL ISSUES

There are many issues for negotiation in respect of native title rights and interests and those of pastoralists and other parties on pastoral leases in South Australia. The Main Table and Side Tables processes can have most impact on policy and legal issues which apply to all pastoral leases, and in identifying and scoping practical issues that can only be resolved by direct negotiation between individual pastoral lessees and native title group members.

SA pastoral leases have always contained a reservation to Aboriginal people of their rights and interests 'as if this lease had not been made' (to quote lease wording). In recent years, this has been reflected in section 47 of the *Pastoral Land Management and Conservation Act* (SA), 1989 (PLMC Act) which provides rights of access by Aboriginal people to pastoral leases for the purpose of carrying out traditional pursuits except within defined distances of homestead and artificial water sources. The provisions in the Act are not however satisfactory to native title groups, as there is no enforcement mechanism and claimants in some parts of the state consider their access rights for traditional pursuits have never been available in practice. For pastoralists the provisions raise practical difficulties such as potential disturbance to livestock.

Management of the Act by the Pastoral Board has never had any input from Aboriginal people and one of the broader issues for consideration in negotiations is how this situation can best be remedied. Since 1993 the Native Title Act has placed a legal requirement on the Pastoral Board to consider native title in its decision making. However in practice, the PLMC Act, together with the policies that the Pastoral Board has adopted in the interests of ensuring ecological sustainability of SA rangelands put as strict, or stricter, controls on some matters, such as diversification of land use and changes to land tenure on pastoral leases, than the Native Title Act does. Nevertheless, these legal frameworks do not provide much guidance to addressing many native title and related issues that are of concern to either pastoralists or native title groups or both. For example, if legal access is available to Aboriginal people as of right (under the PLMC Act, regardless of native title considerations), how can there be assurance to the pastoralist that it will not impose additional unreasonable costs on the pastoral operation? Aboriginal heritage is legally protected, but how can Aboriginal groups be assured that routine pastoral operations will not damage or destroy heritage sites? What liability do pastoralists and Aboriginal groups carry for Aboriginal access and for public access to pastoral leases? How should the benefits of diversification and potentially of changes to pastoral tenures be apportioned between lessees, native title groups and the broader public interest? Pastoral Board representatives, as participants on the Government team in the SA native title negotiation process, now have opportunity to bring their considerable expertise to bear on these policy and practical issues.

Issues such as these involve heartfelt emotions, questions of identity, principles of authority and priority, as well as practical aspects of on the ground communication and cooperation. They are the subject of relationship building and informed negotiations in local processes, as well as statewide negotiations oversighted through the Main Table and leading potentially to template ILUA agreements. One of the early outcomes at the statewide negotiation level are clear guidelines and procedures for Aboriginal burials on pastoral leases, facilitating the continuation of this traditional practice.

The SA native title negotiation process provides a structure to potentially address far more complex policy issues such as that raised by the recent Productivity Commission report on Pastoral Lease Tenures (2002) which asks: *to what extent are pastoral lease arrangements still an appropriate policy instrument?*. The report proposes a more rigorous review of net public benefits from pastoral lease tenures, using the framework of National Competition Policy, than has been attempted previously. It argues that "more performance-oriented or outcome-focused pastoral leasing arrangements may better provide for the long term economic and ecological prospects of the Australian rangelands" and it cautions that any changes will need to be consistent with native title. If such questions are to be addressed anywhere in Australia, they need to be done systematically and dispassionately, with due account to the aspirations of both pastoralists, native title groups, and other relevant interests and avoiding the racist scaremongering hysteria that characterised the aftermath of the Wik decision. In SA, the statewide native title negotiation process is proving to be a forum that might achieve this.

CONCLUSION

The decision in SA to enter into statewide negotiations about native title has been a significant one. The negotiations process that is developing is unprecedented in Australia in that it operates over a number of sectors and scales, and is increasingly involving native title claimants themselves rather than only their representative bodies or lawyers in addressing issues of concern to both themselves and other parties in the rangelands. It is strengthening governance structures of native title groups, which will be critical in ensuring that native title groups have a central place in future decisions about the country they share with other rangeland people. The process is progressively developing the governance mechanisms that will allow Aboriginal people's rights and interests in their traditional country to be effectively represented in planning and management decisions about SA rangeland futures, for the first time. It is also building a solid foundation of understanding and respect between peak body leadership in Aboriginal, pastoral and mining sectors, developing the will to search for mutually beneficial outcomes, and the cross cultural understanding necessary to identify these.

REFERENCES

Agius, Parry; Davies, Jocelyn; Howitt, Richie and Johns, Lesley. 2001. Negotiating Comprehensive Settlement of Native Title Issues: building a new scale of justice in South Australia. Paper presented to Native Title Representative Bodies Legal Conference, Townsville, August 2001 (Submitted: Land, law, rights: issues of native title, AIATSIS, Canberra)

Productivity Commission 2002, *Pastoral Leases and Non-Pastoral Land Use*, Commission Research Paper, AusInfo, Canberra. (On-line; accessed 120702 URL: http://www.pc.gov.au/research/commres/pastoralleases/pastoralleases.pdf)

SA Native Title Negotiations, 2002, *A Proposal To Change South Australia's Aboriginal Heritage Protection Scheme*, Discussion Paper by SA Government, SA Farmers Federation, SA Chamber of Mines and Energy and Aboriginal Legal Rights Movement Inc. (On-line, accessed 020702, URL: http://www.iluasa.com/heritage_prot_scheme.asp)