CHALLENGES IN THE NATIVE TITLE SYSTEM

Of the many challenges in the native title system, the first is understanding what native title is, and how it relates to land rights and cultural heritage.

What is native title?

Native title is part of the legal landscape in Australia and is here to stay. It has been recognised by the High Court of Australia, and by Federal, State and Territory legislation.

To understand what native title is, two key concepts need to be grasped.

- Native title is not a new idea invented by the High Court in Mabo
- Mabo did not give benefits to Aboriginal people and Torres Strait Islanders; it recognised rights which had existed for thousands of years

Unlike land rights, which is given by governments to indigenous people through legislation, native title is a principle of our common law which recognises that indigenous people did not necessarily lose their land when the colonies were established.

The recognition of native title has been part of English law for hundreds of years. It is based on the fundamental principle that the inhabitants of a territory with prior possession of land have a right to retain that land against newcomers including the English settlers of that territory. In all parts of the British Empire where the British settled, bar one, the laws and customs of the indigenous people relating to land ownership and management (ie. ‘native title’) were given recognition by the common law:

Indigenous title in land which continued to exist after settlement was recognised by courts:
- in North America, as early as 1823
- in New Zealand in 1847
- in Canada in 1888
by the High Court of Australia in Papua New Guinea in 1941

But it was not recognised as existing in Australia until 1992.

Why did it take so long to recognise native title in Australia?

To answer that we need to step back and consider the continent of Australia, with a land area of about 7.692 million square kilometres – about five per cent of the world land's mass. It is the sixth largest country after Russia, Canada, China, the United States and Brazil.

In this vast island continent, there are an estimated 23.7 million people, most of whom live on the eastern seaboard. Of Australia’s estimated population of 23.7 million, three percent, or 711,000, identify as Aboriginal or Torres Strait Islanders – the original inhabitants.

There are no accurate estimates of the population of Australia before first European settlement, which occurred in 1788. Estimates range from 315,000 to over 1 million, with more recent archaeological evidence suggesting a population of 750,000 could have been sustained. What is clear is that the entire continent was in possession of indigenous nations until 1788, possibly about 500 tribes, each with their own territory from which they believed they had been created.

However, when the British first occupied Australia, they did not believe that the indigenous peoples of the continent had any laws and customs concerning land that required recognition. Influenced by the reports of William Dampier who visited these shores in 1699, and Captain Cook and others who came here in 1770, it was generally thought in Britain at the time of the First Fleet that the natives of New Holland, as the continent was then called, were in small numbers, that they wandered around without having any fixed territory, and that they were such a primitive people that they had no recognisable system of laws and customs.

As a result, the concept of native title, which in 1788 was well known to British law, was not recognised in Australia. It followed that in the eyes of British law at the time, all ownership of the lands of the Colonies vested in the Crown upon 'settlement'.

On 26 January 1788, settlement of Australia as a British colony began when Captain Arthur Phillip took formal possession, on behalf of the British Crown, of the whole of the eastern part of the Australian Continent and Tasmania. Despite the presence of people
already living on the continent, the British Government proceeded to settle the land as though it was ‘terra nullius’, in the sense of ‘practically unoccupied’.

Thus when Captain Arthur Philip ‘took possession’ of the colony of New South Wales (the western boundary of which was defined to be the 135th meridian), in the eyes of the law at that time, all rights in land vested in the Crown.

In 1825 the British government moved the western boundary of New South Wales to the 129th meridian and redefined the southern boundary to create the separate colony of Van Diemens Land.

In 1829 the British government took possession of the remainder of the continent, west of the 129th meridian, establishing the colony of Western Australia.

After European contact, the indigenous population decreased dramatically with the impact of new diseases, repressive and often brutal treatment, social and cultural disruption, disintegration and sustained dispossession of their lands as settlement of the colony expanded. Dispossession from lands was followed by dispossession from family as governments, Federal and state, implemented an assimilation policy with a strategy of removing children from their indigenous parents. In the face of concerted criticism of the ‘meagre achievements’ of the assimilation policy, the denial of civil rights that it entailed and the poor international image it gave Australia, the Federal Government began to reform the system within its own jurisdiction. In the early 1960s it lifted restrictions on eligibility for benefits, extending the federal franchise, and removed various legal disabilities. The states found themselves under pressure to follow suit and most discriminatory state legislation was soon repealed.

Through this period, the assumption of the Australian continent as terra nullius, or practically unoccupied, was confirmed in the few cases before the court where indigenous entitlements arose only as a peripheral issue. It was not until 1970 that any legal action was brought in Australia raising indigenous claims to land.

That case was the Gove Land Rights case. The Aboriginal inhabitants of Gove Peninsula in Arnhem Land argued that the mining leases granted by the Crown were invalid, and that their rights held under traditional law and custom had survived the acquisition of sovereignty, unless terminated by the Crown. The action was dismissed on the basis that the doctrine of communal title did not form part of Australian law, and if it did, that title was extinguished by opening the land to grant to colonial settlement.
It was not until 1992 that the misconception that Australia was unoccupied in 1788 was finally disproved by the High Court in the case of *Mabo v Queensland*. At the time, Mabo was seen as an adventurous decision by some commentators, but as Chief Justice Mason pointed out, far from being an adventurous decision on the part of the High Court, it was really Australia catching up with what had happened elsewhere in the world.

Following the Mabo decision, the Federal Parliament passed the *Native Title Act* with the purpose of recognizing and protecting native title, which had existed for tens of thousands of years and was not necessarily lost when the Australian colonies were established. The *Native Title Act* also confirmed the dispossession of indigenous land, ‘parcel by parcel’, by providing for extinguishment of native title. The Act then provides a process for native title to be claimed and determined where it has not been extinguished.

Importantly, for miners and explorers, it sets up a process to ensure that, in future, acts that affect native title should only be able to be done if, typically they can only be done to freehold land, and if, where appropriate, every reasonable effort has been made to secure the agreement of native title holders through a special right to negotiate. This is usually referred to as the ‘future act’ process.

**What is the process for determining the existence of native title?**

An application for a determination of native title is advanced in the following stages:

**Filing:** An application for a determination of native title is filed in the Federal Court. Once the application is accepted for filing in the Court a copy of the application is provided to the Native Title Registrar so that the Registrar can apply the registration test and notify the application.

**Registration:** The Native Title Registrar will apply the registration test. This is a set of twelve conditions that must be applied to all claimant applications. It is an administrative test only and does not determine if native title exists or who holds it.

Passing the registration test gives the native title claim group certain procedural rights, including the right to negotiate (e.g. over mining or mineral exploration).

Applications which fail the registration test can still proceed through the Court, but the applicants do not have the right to negotiate. If the Native Title Registrar does not accept the claim for registration, the applicant may ask the Tribunal to reconsider the Registrar’s decision or ask the Court to review the Registrar’s decision.
**Notification:** The Native Title Registrar will advise the public and any individual or body (including State or Territory governments) whose interests may be affected by a native title determination to apply to the Court to become a respondent party to the case. The period in which a person can apply to the Court is three months.

**Federal Court case management/mediation:** The Court will receive the applications to become a party and will decide whether or not the person is a party.

Then there is usually a directions hearing which is attended by the applicants and other parties (and their legal representatives). At the directions hearing, the Judge may finalise the party list and refer an application to case management by a Registrar of the Court or mediation.

If agreement is reached between the parties for a determination of native title, the Court will then consider making a determination of native title consistent with the agreement.

**Litigation (if no agreement):** If an agreement is not reached between the parties then the Court may hear the evidence and determine whether native title exists. Threshold issues are:

- **connection:** a claim group must provide evidence to support their claim to hold native title rights and interests, possessed under the traditional laws and customs observed by the group.

- **tenure:** native title cannot be claimed over areas where it has been extinguished. Historical extinguishment is relevant, not just current tenure.

**Progressing native title claims**

The need for tenure certainty is a driver for earlier resolution of native title claims. The preferred approach embedded in the *Native Title Act* is resolution by agreement, although the process provided for determination is litigious and hence inherently adversarial.

Just as Australia was frustratingly slow to recognize native title; the slow progress of native title claims to completion has continued to frustrate. The statistics tell the story. As at 31 December 2014, 263 determinations have been made in relation to claimant applications. Of those determined, 33 have been litigated, while the remaining 230 have been resolved by consent between parties.
The rise in determinations made over recent years is due to a concerted effort by the Federal Court to resolve claims. However as at 31 December 2014, there remained 328 current claimant applications. Of these 328 applications:

- 115 (or 35%) were lodged within the past five years
- 40 (or 12%) were lodged between five to ten years
- 105 (or 32%) were lodged between 10 to 15 years
- 68 (or 21%) were lodged earlier (i.e., 15 years plus)

However the requirement for compliance with the future act process does not depend upon there being a determination of native title. It is sufficient that there is the possibility that native title exists.

Before explaining the future act process, let me return to my opening comments that native title is not land rights. The concepts are often confused, and can be confusing.

As miners and explorers you will find yourselves dealing with land rights, native title and with Aboriginal culture and heritage issues, all of which operate differently. Let me briefly explain each of those concepts, before returning to native title and future acts.

**What are land rights?**

Native title and land rights both recognise the traditional rights of Aboriginal and Torres Strait Islander peoples' to land. However, they are legally very different. Native title has its source in the laws and customs of indigenous peoples: it is recognised and protected in Australia by the *Native Title Act*. On the other hand, statutory land rights are created by legislation based upon a perceived need of indigenous peoples to have access to, or ownership, of country.

Beginning with South Australia in 1966, all states, except Western Australia, have passed land rights legislation. The Commonwealth passed the *Aboriginal Land Rights (Northern Territory) Act* in 1976.

In Western Australia, the Aboriginal Lands Trust (ALT) is created by legislation, primarily to acquire and hold land and to use and manage that land for the benefit of persons of Aboriginal descent. Land may be held by the ALT as freehold, leasehold or reserve land.

The regime for exploration on land held as ‘land rights’ varies between jurisdictions.
For example, in New South Wales, exploration activities on land owned by an Aboriginal Land Council requires:

- the consent of that Council’s members

and

- the approval of the New South Wales Aboriginal Land Council or the Land and Environment Court

In Western Australia, a consent to mine, issued by the Minister, is required before mining activities, including exploration, can take place on reserves managed by the Aboriginal Lands Trust. The Minister is required to consult with the ALT, which in turn, must ensure that any residents of the reserve or holders of native title interests which may be affected have been consulted. Permits can be issued by the ALT to access ALT lands for mining activity.

A significant feature of the Northern Territory land rights regime is that it gives traditional Aboriginal owners the right to withhold consent (‘veto’) to exploration (and consequently ‘mining’ activities) on Aboriginal land in all but cases of national interest.

Time today does not allow me to go through these different regimes. Importantly, however, native title and land rights can exist in the same land. Both the land rights regime and the future act processes of the Native Title Act will need to be complied with where native title may exist.

But even where native title does not exist there is still a need to comply with cultural heritage legislation and guidelines.

**What is Aboriginal culture and heritage?**

Cultural heritage is not native title.

Aboriginal culture and heritage refers to the sites, places, objects and stories that relate to Aboriginal life. Land or sites may be of cultural value regardless of whether the land is freehold, Crown land or otherwise – and regardless of native title and land rights.

Cultural heritage issues are addressed differently in each jurisdiction. Again, time does not allow us to explore those differences today.

But the challenge for mineral explorers is the need to engage with land rights, cultural heritage and native title obligations – potentially in respect of the same land.
Each regime is separate; complying with one is not enough. And even if the land upon which you are conducting your exploration activities is an area where native title has been extinguished, and it is not subject to land rights – you will still need to have your mind on culture and heritage obligations.

**Mining and the Native Title Act**

Let me turn now to mining and native title. At least in respect of native title, there is only one relevant overarching piece of legislation, no matter where you are conducting exploration activities in Australia. And the future act processes of the *Native Title Act* operate the same way across Australia, subject to differing policy decisions made by State and Territory governments. However, those different policy approaches can be quite bewildering for those working with future acts. I will come back to the impact of some of those different policy approaches shortly.

**Native title and future acts**

A ‘future act’ is an act done after 1 January 1994 which affects native title.

Common examples of future acts are grants of mining tenements or land titles. The *Native Title Act* provides that if the future act processes are followed, the government may validly grant these tenements or titles.

*The future act process*

The future act process provides native title holders and registered native title applicants with specified rights from the time a claim is registered, until it is determined. These rights vary from the right to be consulted, to the right to negotiate over some future acts, or activities on the land.

If there is the possibility that native title may exist and may be affected by the activities to be done under the grant, the first step is that the government notifies native title holders or registered native title applicants of the intention to grant a mining tenement. In most cases native title holders and registered native title applicants instruct their representatives (usually one of the native title representative bodies) to represent them in ongoing proceedings or negotiations regarding the future act.

Native title parties, as well as members of the public, are notified of proposed future acts under section 29 of the *Native Title Act*. 
The right to negotiate

Registered native title claimants and native title holders (native title parties) have the right to negotiate about proposed activities and development, such as mining, if the proposal may affect their native title rights and interests.

If no native title parties come forward after four months from the date given in the section 29 notice, the act can be done without further reference to the Native Title Act. If, however, there are objections at the end of the four month period, the government, the grantee party and the native title party must negotiate 'in good faith' for at least six months about the effect of the proposed development on the registered native title rights and interests.

The parties can ask the Tribunal to mediate during the negotiations. If the negotiations do not result in an agreement, after the parties have negotiated for at least six months, the parties can ask Tribunal to decide whether or not the future act should go ahead, or on what conditions it should go ahead.

The expedited procedure

If the government considers that the future act will have minimal impact on native title (e.g. some exploration and prospecting licences), the section 29 notice will include a statement to the effect that the act attracts the 'expedited procedure'. This means that the government considers that the act should be 'fast-tracked'. If the expedited procedure is used, the future act can be done without negotiating with the native title parties.

Native title parties can object to an application being fast-tracked. If the Tribunal receives an objection, it will set up a preliminary conference with the native title party, the grantee party, and the government party, to facilitate discussions between the parties.

An agreement may be reached on the basis of, for example, site clearance surveys, heritage protection agreements or other matters. If a negotiated agreement cannot be reached, the Tribunal will conduct a formal inquiry to determine whether the expedited procedure should apply or not.

If the Tribunal determines that the expedited procedure applies, the development can then go ahead without a negotiation process. If, however, the Tribunal determines that
the expedited procedure does not apply, the proposed future act is moved into the right to negotiate stream. All parties then enter into formal negotiations in good faith.

**Agreements under the right to negotiate**

Agreements reached under the right to negotiate usually include access and heritage protection as well as compensation for the loss or impairment of the native title rights and interests. A right to negotiate agreement is contractually binding for all parties involved in the negotiation.

**Indigenous Land Use Agreements**

An alternative to the right to negotiate is to enter into an Indigenous Land Use Agreement (ILUA). An ILUA is a voluntary agreement between Aboriginal groups and others about the use and management of land and waters.

An ILUA is much more flexible than a right to negotiate agreement and may include a broader range of interests. An ILUA:

- can address past and intermediate acts as well as future acts
- may address issues of access, compensation, extinguishment and coexistence.
- may be made separately from the formal native title process, form a part of that process or pave the way for a native title determination.
- does not extinguish native title but may, by agreement, allow for the surrender of native title

**Future act statistics**

The following tables compare future act activity across New South Wales, Queensland, Victoria and Western Australia.

**Future act notices - 1 January 1994 to 31 May 2015**

<table>
<thead>
<tr>
<th>Notice type</th>
<th>NSW</th>
<th>QLD</th>
<th>VIC</th>
<th>WA</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>S 29 tenement (non-expedited procedure)</td>
<td>402</td>
<td>1230</td>
<td>609</td>
<td>8364</td>
<td>10605</td>
</tr>
<tr>
<td>S 29 tenement (expedited procedure)</td>
<td>6</td>
<td>4782</td>
<td>0</td>
<td>57840</td>
<td>62628</td>
</tr>
<tr>
<td>S 29 Land acquisition</td>
<td>9</td>
<td>1</td>
<td>1</td>
<td>345</td>
<td>356</td>
</tr>
<tr>
<td>Total</td>
<td>417</td>
<td>6013</td>
<td>610</td>
<td>66549</td>
<td>73589</td>
</tr>
</tbody>
</table>
Future act applications - 1 January 1994 to 31 May 2015 (counted by tenement

<table>
<thead>
<tr>
<th>Application type</th>
<th>NSW</th>
<th>QLD</th>
<th>VIC</th>
<th>WA</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Future act mediation</td>
<td>16</td>
<td>229</td>
<td>31</td>
<td>2289</td>
<td>2565</td>
</tr>
<tr>
<td>Future act objection application</td>
<td>6</td>
<td>1832</td>
<td>0</td>
<td>23093</td>
<td>24931</td>
</tr>
<tr>
<td>Future act determination application</td>
<td>10</td>
<td>149</td>
<td>15</td>
<td>5239</td>
<td>5413</td>
</tr>
</tbody>
</table>

These statistics highlight several policy differences in approaches to future acts taken by States – as well as some practical aspects of native title.

- The low level of notices for NSW is a result of NSW having its own legislation for low-impact petroleum or minerals exploration, which has been approved by the Commonwealth Attorney-General under the *Native Title Act*. Explorers need an access agreement when entering native title land but do not need to go through the right to negotiate process.
- Victoria does not require holders of exploration permits to use future act processes unless they access land where native title exists, in which case the right to negotiate applies.
- Western Australia has a policy of applying the expedited procedure to all exploration licences – even where there has been a determination previously in respect of the same land that an act could not be done.
- Queensland is more rigorous in deciding whether native title may be impacted and so has less expedited procedure notices depending on the result of its view of potential extinguishment and the possibility of native title existing.

Importantly, there is no need to follow the future act processes if native title has been extinguished – decisions about this can be made by governments without the need for a native title determination. However, because tenure considerations, particularly of historic tenure, can be onerous, this early analysis of extinguishment may not be done and the future act processes may be entered into even if not strictly required.
This map shows potential extinguishment of native title by current tenure. Delving down into historic tenure would result in even more extinguishment. The Tribunal is working with several States, particularly in South Australia, and also New South Wales and potentially Queensland, to assist in accessing tenure information at an early stage to assess areas of extinguishment. We are willing to work with any government or other parties to assist in this area. However, as States are the holders of this tenure information, their cooperation in this process is essential.

**Challenges for mineral explorers:**

Of the challenges facing mineral explorers in this area, I have highlighted the following:

- Understanding and working with different legal regimes concerned with land rights, heritage and native title in respect of the same land.
- Overcoming delays in finding out where native title has been extinguished. In my view, sharing tenure and making tenure assessments earlier, rather than later, is more important in creating certainty than waiting for a determination of native title.
• Increased collaboration and transparency in dealings between native title parties, governments and miners will result in more and better agreements – and less arbitral work for the Tribunal – but we are happy to assist you negotiate agreements.

• Creative agreement making is the way forward. Being willing to look at different ways of getting the result all parties want is essential – this applies to the attitude of all parties.

Resolution of native title issues involves a combination of knowledge, understanding and goodwill. It involves acceptance and understanding by each party of each other and a willingness to explore range of possible outcomes.

Conclusion:

This is a complex area and difficult to navigate. In this short discussion, I have only been able to gloss over the topic. However, the Tribunal is happy to provide more detailed information upon request, or come and talk further with you about any aspects of native title and the challenges it brings.

Let me leave you with this thought:

‘Every challenge is actually an opportunity’.

These are not just weasel words.

It is no coincidence that a lot of significant sites are close to uranium and other mineral deposits. Those sites have been there long before mining came on the scene in Australia.

Miners are interested in exploring for, and extracting, minerals.

Indigenous people are interested in protecting their culture, and their important sites.

The two objectives are not mutually exclusive.

As native title parties, governments and miners start to genuinely collaborate, share information early and learn to trust each other – benefits will flow for all.