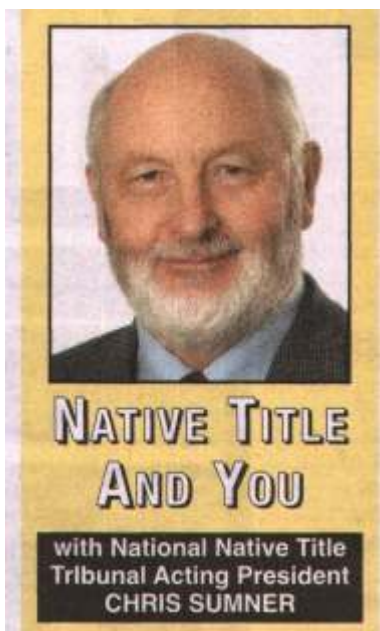




Change in the wind



THE native title system could be set for changes this year, based on proposals currently being considered by the Federal Government on how to improve the system and speed up the settlement of claims.

Amendments to the Native Title Act, possible formation of a national representative body and strategies to help native title holders optimise benefits from native title agreements are among Federal proposals.

In Victoria, an alternative to native title is being considered for traditional owners who are unable to prove an ongoing connection to the land. These proposals follow criticisms of the native title process which is said to be slow, complicated, overly technical and costly while not delivering land justice or economic benefits to Aboriginal people.

Since the Native Title Act was introduced in 1994, 92 claims have resulted in native title being recognised for Indigenous people and about 475 native title claims are now in the system.

Some criticism is understandable, but it is important to view the problems in an historical context.

Despite a number of initiatives, such as the Northern Territory Land Rights Act (1976) and proposals in the 1980s, no statutory national land rights regime was established.

It was in this context that the High Court in the Mabo case (1992) reversed the long-standing legal position and concluded that native title could be recognised by the common law.

The resulting Native Title Act established a procedure for the consideration of claims and to protect native title through the right to negotiate.

There is a legitimate debate about whether a statutory regime (where Parliament could anticipate problems and streamline processes) or the development of the common law is the best way to recognise land rights or native title.

The problems in the current system are largely the result of dealing with native title through the common law.

The Mabo decision did not resolve all aspects of native title law and there has been a reluctance to settle claims through mediation while the law was unclear. The common law process also requires matters to be resolved through the courts, facing the usual adversarial system and rules of evidence and involving many parties.



An important development in the history of native title law was the High Court's acceptance in the Wik case (1996) that native title could co-exist with pastoral leases – it had previously said in Mabo that pastoral leases extinguished them.

This finding led to a very significant increase in the area where native title could be claimed. It also dramatically increased the cost and time required to resolve claims.

The system and most parties involved are largely funded by taxpayers. There are limitations

on public funding and human resources, such as anthropologists, some of whom are reluctant to get involved because of the adversarial nature of court proceedings.

There have been proposals to set up a special court or division of the Federal Court and to adopt simpler, more inquisitorial procedures. These would have allowed for greater specialisation, consistency and direction in handling matters, but this suggestion has never been taken up.

Despite difficulties, there has been progress and as the law becomes more established, the rate of settlements should

increase. There is also greater acceptance of native title by stakeholders, including miners and pastoralists, and Commonwealth and State government agencies are becoming more experienced in making the system work effectively.

Mabo and the Native Title Act have at least given Aboriginal people a seat at the table to negotiate about some developments on their land, such as mining. Some agreements have led to benefits that wouldn't have been available pre-Mabo.

The best thing to do now is for everyone to get on with the job. Any legislative or procedural changes which could enhance the process are welcome, but given the historical context, change to procedures would only affect the system at the margins.

Progress can be made when there is:

- Clear, consistent direction from the Federal Court – since 1998 the Federal Court has had capacity to oversee the progress of cases, and set milestones for mediation action

- Acknowledgement of the role of the Tribunal in mediation (including in intra-Indigenous disputes) and of the central role of native title representative bodies

- Regular strategic planning with governments and other key players and overview reports submitted to the court that address the whole spectrum of native title matters, including Indigenous land use agreements, future act activity and the resources required.

This is the situation in some jurisdictions, including South Australia where I have had most experience. It is likely most SA claims will be resolved in the next five years.

The fact that the system is funded by taxpayers and there are no cost penalties if claims are unsuccessful also means that cases cannot be treated as 'ordinary' in court. Claims need to be categorised and prioritised, partly based on the strength of the case, in a process that involves all key agencies and parties.

The Tribunal is continuing to go about its tasks. It offers many services – claim mediation, registration testing, future act mediation and arbitration and ancillary services such as geospatial and research – which assist the Federal Court and parties to resolve matters.



The late Justice Richard Cooper with children at Aurukun, north Qld, taken after the Federal Court hearing in 2004 where he made a determination that recognised the rights of the Wik and Wik Way people to most of their traditional lands and waters on western Cape York Peninsula. This followed the landmark Wik High Court decision in 1996 that native title could co-exist with pastoral leases.