Adani, native title and minority rights

Native title law is notoriously skewed against Indigenous people trying to recover some small remnant of their rightful, natural estates. It is a bureaucratic, legalistic and lengthy process that often tragically defies every dimension of civility and decency. It frequently rubs salt into wounds and would drive the most sane and stable claimant to an early grave.[1]

I have no love of the process.. though of course there are outstanding Federal judges, lawyers and others of good will.. the problem is that the process eats up precious energy, time and dollars that should be being applied to the social and economic development of Aboriginal nations across Australia. There is a vast bureaucracy of law just overseeing the process whereby remnant lands can be returned to their rightful owners. It should be a simpler process.

The injustice and inefficiency of it all creates its own imbalances. The way in which land councils hire more lawyers than skilled people with healing and educational gifts who can make a difference in peoples lives is deplorable. Land councils control land and control resources in a kind of bottle neck of legality at the cost of Aboriginal employment, health, economic development and a myriad of Aboriginal social and cultural agencies that so badly need resources and support across the country. Meanwhile the remnant cultures of traditional ceremonial life and homelands are not supported by any form of decent investment outside of arts and entertainment grants.

On the positive side of this national disgrace, morass and swamp of law it has also showed the sheer determination of Australia's Aboriginal peoples to survive and claw back their lands against all odds. Eddie Mabo, the Yolngu claimants in the famous Millpirum vs Nabalco case and a thousand Indigenous Land Use Agreements (ILUAs) across the country demonstrate a will that is unstoppable and magnificent.

But to see Native Title law as any forum worthy of moral or ethical merit is questionable. It is so flawed at its foundations that to even argue about principles is a nonsense. Any subtlety of understanding in what might be called Aboriginal estates or true native title law seems also to be lost. Mining companies and governments alike seem to want to have a King or Queen or at least a set of owners to which royalties or rent can be paid or rates charged. They also want to give Aboriginal people the least autonomy and independence as possible. We know that in at least one province of Australia the concept of entitlement of lands in Aboriginal society spanned different groups of people over

1 See for example Ben Langford, "The Tide of History or a Trace of Racism? The Yorta Yorta Native Title Tragedy", The Journal of Indigenous Policy - Issue 4, 2004

different generations in an amazing system of custodial responsibility and succession planning. This from all accounts was a way to ensure there was no conflict over land and created a harmonious management of important sources of food and water.(Williams and Australian Institute of Aboriginal Studies. 1986) But all that is irrelevant to Australian native title law.

For Aboriginal people in Australia rights have been a bitter battleground. For this reason I read with interest and often agree with Marcia Langton and Noel Pearson's frequent powerful political assaults that show up the hypocrisy of anyone who crusades from some position of political purity, whether green or Labor or bleeding heart.

Marcia and Noel are often right but also sometimes off the mark.

In her latest piece in the **Saturday Paper** Marcia Langton implores us, with her usual power and passion, to support the so-called McGlade amendments to the Native Title Act which in effect mean that the power of a democratic majority of a native title group must be endorsed and recognised by a court.

If that was the only thing Marcia was arguing for then perhaps we might be able to agree with her but the implications of her arguments go much further.

She says that without the McGlade amendments the right of native title claimants and recipients to negotiate and to make statutory agreements is meaningless. Marcia argues, and the Federal Court agreed, that the February 2 2017 McGlade v Native Title Registrar [2017] FCAFC 10 decision, not only invalidated the biggest native title case in the country but also 120 -150 registered Indigenous Land Use Agreements (ILUAs) that were not signed by all members of the Registered Native Title Corporation, including members who were deceased.

At the heart of the McGlade decision was the fact that several claimants seemed to be excluded from the native title process. In my view this was a legitimate and justified concern of the court. The unfortunate consequence thoiugh was to invalidate the largest and most successful single native title claim in the country, namely the Noongar native title claim over the remnant lands and waters around Perth and many others similarly constructed. It seems to me that the whole basis of any amendments to the process should have been to honour this agreement and any others while amending the way in which consensus and application for a claim to the native title body takes place.

In her article in the **Saturday Paper** Marcia contends that Adrian Burragubba by asserting the primacy of his minority position within a native title group against the Carmichael mine in Central Queensland puts at risk the native title rights of the majority of the traditional owners of the area and the native title rights of Aboriginal people across the country. This is clearly wrong. It's like saying that the Goolabooloo people had no right to argue against their own country men, the Kimberley Land Council and hundreds of lawyers and public relations people hired by the WA Government under Colin Barnet

against the James Price Point gas development in Broome.

I have no problem with the amendments to the Native Title Act that fix the retrospective invalidity (after McClade) of 100s of ILUAs previously agreed to by the Federal Court. However the process behind native title claims must be more democratic and open. It is maddening that Native Title law would invalidate native title claims and ILUAs because all parties would not or cannot sign or cannot agree on aspects of a claim. But the merit of the McGlade Federal decision was that it demonstrates the weakness of the process of decision making behind native title law. Native title outcomes are often not in any way a reflection of Aboriginal polity or all people's aspirations. One cannot expect pure justice from a system which in itself is flawed. But the principle of consensus is not only important in Aboriginal customary law it is one of the most important foundations of our democracy. It is also often missing as land council heavies and lawyers stand over white-boards and family trees sorting out who is eligible to speak or decide in relation to native title negotiations. In the case of the James Price Point situation the native title consultations ran over the United Nations Principle of Free, Prior and Informed Consent that should be the basis of all native title negotiations whatever the fragile and limited rights of Australian native title.

The bigger and correct point that Langton makes was also made by the KLC in relation to the James Prices Point development, namely that "In an ideal world, Aboriginal traditional owners should have a right to veto mining or any other development project. However, the Native Title Act does not give us that right, and stops well short of a veto by offering a "right to negotiate". On this basis the KLC argued a deal should be cut over James Prices Point. What was even more gut wrenching in this case was that thirty years of meticulous documenting of sacred Aboriginal names, places and sites would have to be ignored or not even acknowledged. The Goolaboroo people and Joseph Roe argued that money and deals could not be cut under any circumstances regardless of their limited rights. They would fight all the way. Thank god they did.

Marcia Langton argues that the "frail right (to negotiate) was put at risk by opposition to the McGlade amendments." I think this is a vexed question and in a way this argument is irrelevant. Sure if the said ILUAS and Noongar Native Title decision was invalid there was no right to negotiate. However, whether Native Title rights give a veto to mining or negotiate or not, it is within the rights of all of native title holders to oppose a mining development by whatever peaceful and legal means in their power. Moreover within a democratic process the opposition of even a minority of native title holders is a powerful and important symbol that something is not right. In fact everything about the James Prices development was wrong and so too may be the case with the Adani development.

Even more than this the rights of minorities are important. This brings us back to the native title process itself. What is needed not only in matters of native title negotiation but in so many areas of Aboriginal community governance is

merit based decision making by elders that is agreed to whole heartedly not just by a majority but by all Aboriginal community members. Of course this is a dreadfully hard bar that should be applied in the broad community as well and of course it cannot be applied exclusively to all decisions. But in relation to big decisions it creates a slow, steady and calmer less bitter way of life that in my opinion is in the end more constructive, effective and timely than any other way of proceeding.

There were wars and winner-take-all warriors in traditional Aboriginal society in times of want, imbalance and greed. But for the most part the majesty of Aboriginal life comes from the same principles of democracy that were dear to the often unacknowledged writer of the Australian constitution Andrew Inglis Clark. Clark believed in the rights of a minority to express their views and to be formally a part of all decision making and governance. For those that want to live under the rule of benevolent dictators, business men and lawyers then there are two excellent options in the form of the United States under Trump and Russia under Putin. But to me the future partnership of white and black Australians hinges on a better way of doing things.

The most important lessons I have learned from Aborginal people in Australia stand in stark opposition to a politics of winner takes all and first past the post. I applaud Adrian Burragubba and every other Aboriginal person who choses to make their voices heard in native title cases or in opposition to mining on Aboriginal land despite the apparent majority or conventional wisdom or the power and passion of powerful advocates. These minority advocates do not weaken us they strengthen us all. They also strengthen the validity of native title and its profound relevance in a world of money, resources and short term profits.

Peter Botsman

workingpapers.com.au

3/7/2017

Williams, N. M. and Australian Institute of Aboriginal Studies. (1986). The Yolngu and their land : a system of land tenure and the fight for its recognition. Canberra, Australian Institute of Aboriginal Studies.