Native Title Article Analysis

By Nermin Sadak – Ryde Secondary College

Task

With reference to the 3 media articles below, write a response to the question below:

'Assess the effectiveness of the law reform process in achieving just outcomes in regard to native title.'

Before you begin:

- Underline the verb – the word that tells you what you have to do
- Circle the subject – what you will be focusing on
- Squiggly underline the rest – this is the content of your response, i.e. what you have to link to the subject.
- Directive term 'assess' requires you to make a judgement of value, quality outcomes results; arguments for and against.

What you should consider in developing your response:

- Consider the relevant section of the syllabus. Which "student learn to" will you be demonstrating?
- Consider how you will draw on the relevant Themes and Challenges in the Syllabus to add depth to your response.
- What LCMDI will you refer to support your thesis and arguments throughout your response?
- And finally, use the **TEEL** acronym to help you structure your paragraphs
  - **Topic Sentence**: Begin each paragraph with a *topic sentence*. This need to be clear, as it is the start of the sustained and logical progression of your argument.
  - **Explain**: Here you need further explain your topic sentence.
  - **Example**: Elaborate on your explanation by using examples to support your point/arguments. This should involve a range of legislation, cases, media articles, documents and/or international sources (***LCMDI***).
  - **Link**:Finish your paragraph with a linking sentence, which brings your point back to your thesis.

The Sydney Morning Herald

Article 1: Historic ruling opens new native title era

March 20, 2019
https://www.smh.com.au/national/historic-ruling-opens-new-native-title-era-20190319-p515i9.html

More than a quarter of a century after the High Court's historic Mabo ruling confirmed Indigenous land rights, it has delivered a similarly significant decision, this time placing a financial valuation on first Australians' cultural and spiritual connection to the land.

The nation's native title law is evolving from establishing rights to compensation for their unlawful loss. The finding that members of Northern Territory town Timber Creek are due compensation for the spiritual pain of being cut off from ancestral land by external decisions to build infrastructure is thought likely to trigger similar claims that could cost governments and mining companies billions of dollars.

After sitting in Darwin for the first time, the court gave its first assessment of constitutionally just terms in compensating people for the unilateral extinguishing of native title. Compensation comprises two components – economic loss and cultural damage. Governments and courts have determined the former (it has fallen in recent years to 50 per cent of freehold value from 75 per cent).

Until now, the latter was unsettled. The High Court, hearing an appeal against a Federal Court judgment that gave the title holders 80 per cent, reduced the freehold proportion to 50 per cent – the Indigenous community acknowledges it has also benefited from the school, public housing, water pipelines and other projects created by 53 decisions by Northern Territory governments.

But the pivotal aspect is the unprecedented financial assessment for extinguished native title – such cases have only recently started to go before courts. The claim, under the 1994 Native Title Act that flowed from the Mabo case, centred on 1.27 square kilometres in Timber Creek.

The full bench upheld the Federal Court's groundbreaking granting of $1.3 million for the cultural loss. It said: ''There is nothing to suggest that the trial judge's award would not be accepted by the Australian community as appropriate, fair or just.''

The Native Title Act's acknowledgment of compensation rights extends at least to 1975, when the Racial Discrimination Act came into effect. The Timber Creek decision creates a formula for determining compensation.

There are 2.8 million square kilometres of native title holdings in Australia and 375 native title groups that could now lodge compensation claims. Six other native title compensation claims, three each in Western Australia and Queensland, are before the courts.

The Queensland government warns that such compensation might be a "significant liability''. Mining companies with tenements are likely also to be liable. The WA and NSW governments have introduced bills to to force companies to carry some of the cost.

It is, surely, a reasonable cost. The case was not about whether the right for compensation exists – it was about how to put a fair financial measure on undue cultural loss. The High Court has, above all, sought to honour the legal and ethical tenet of Section 51 of the Constitution, which gives the government the power to compulsorily acquire land, but only on ''just terms''. The Herald strongly supports the court's decision, buoyed by its confidence to determine the matter with fairness and decency.

Article 2

Adani Indigenous challenge dismissed by Federal Court, Government could cancel mine native title

By Josh Robertson and Talissa Siganto, 17 Aug 2018
https://www.abc.net.au/news/2018-08-17/adani-federal-court-traditional-owners-native-title/10131920

PHOTO: Members of the W&J family council had argued the Adani Indigenous land use agreement was not valid.
(ABC News: Isobel Roe)

Traditional owners who oppose the Adani mine have appealed to the Queensland Government not to permanently extinguish their native title rights before they take their case to the High Court.

A Federal Court decision on Friday, upholding Adani's Indigenous Land Use Agreement (ILUA) with the Wangan and Jagalingou (W&J) people, paves the way for the State Government to cancel all native title over the mine site.

In a 91-page judgment, Justice John Reeves said none of the grounds of the challenge by the mine opponents had "any merit".

If Adani gains freehold over the site, the W&J could not reclaim native title rights in the future, regardless of whether or not the controversial mine project goes ahead.

An ILUA is a critical step for Adani gaining finance, as leading global financiers do not fund resource projects without traditional owner consent.

W&J lawyer Colin Hardie said the court's ruling was not unexpected and that they would look at filing an appeal in the next few weeks.

"We had anticipated a decision of this nature," he said.

Outside court, W&J family council spokesman Adrian Burragubba said he respected the ruling but maintained their position that the agreement was "bogus".

He said Adani had split the traditional owners "and destroyed the will of people".

Mr Burragubba said the court process had been a "great pain" to him and other members against the mining giant.

"It's been a long, hard battle for us, it had a personal impact."

Delay sought ahead of High Court challenge

Last month, the W&J family council wrote to Premier Annastacia Palaszczuk and three senior ministers, asking the State Government not to rush any decision to hand over property rights to Adani ahead of a possible High Court challenge to the Federal Court ruling.

Mr Burragubba said on Friday it would be a "travesty" for the Government to wipe out native title for Adani.

"If Queensland can stop them dredging the reef before Adani has the money, or pull the pin on NAIF [Northern Australia Infrastructure Facility] funding, they can surely protect our rights to our land," he said.

"We have called on the United Nations for scrutiny of what's happening here.

"The Government must bring itself into the modern era on our human rights and leave us to protect our country and chart a better future than coal mining."

The W&J are split on Adani, with opposing groups holding rival authorisation meetings to claim or reject support for a deal with the Indian mining firm.

The W&J native title representative group, which initially approved the ILUA with a 7-5 majority, is now split 6-6.

One representative, Craig Dallen, withdrew his support for the mine, alleging Adani paid him and others to recruit mine supporters, including Indigenous people outside the W&J with no link to the mine site.

Adani and its W&J supporters insisted the process was legitimate.

The W&J family council letter to the State Government warned there was a "substantial risk of an injustice in the face of a project that appears to have little real prospect of going ahead".

"It would be unfair and unreasonable to act prematurely to extinguish our native title by any means until the litigation is fully completed."

The mine's Indigenous opponents cited legal advice from their barristers, Stephen Keim and David Yarrow, that argued the Government was under no obligation under the ILUA to extinguish native title by granting freehold to Adani.

"Any pressure from Adani to act upon the Adani ILUA should be resisted, as extinguishment of native title involves the exercise by your Government of statutory discretions that cannot be fettered in advance (whether by contract or otherwise)," Mr Keim and Mr Yarrow said in the W&J submission to the Queensland Government.

The barristers also said the Government should also wait for Adani to lock in finance, pay rehabilitation bonds in full, sign royalty agreements with the state and get approval for groundwater plans.

Queensland Environment Minister Leanne Enoch has confirmed to a parliamentary committee hearing that her department is forcing Adani to identify the source of the Doongmabulla Springs.

The ABC has previously reported that scientists had concerns the springs, a key cultural heritage site for the W&J, could run dry under Adani's water extraction plans.

The State Government has previously promised to block dredging of Great Barrier Reef waters for Adani's port unless finance was locked in.

We will work with the W&J people: Adani

An Adani spokeswoman said the company welcomed the decision upholding an ILUA that was challenged by "a minority group of W&J people".

She did not say whether Adani now expected the Government to extinguish native title.

"We look forward to working with the State Government and the traditional owners to take the next steps in order to finalise land tenure for our project," she said.

"We will work with the W&J people under the guidance of the ILUA, while respecting the rights, history, future intentions and requests of the traditional owners."

Article 3

Native title review finds process slow, resource intensive and inflexible

Monica Tan and Nick Evershed, Mon 29 Jun 2015
https://www.theguardian.com/australia-news/2015/jun/29/native-title-review-finds-process-slow-resource-intensive-and-inflexible

Calls for an overhaul to streamline proof as Guardian Australia analysis shows successful claims in NSW take an average of 13 and a half years

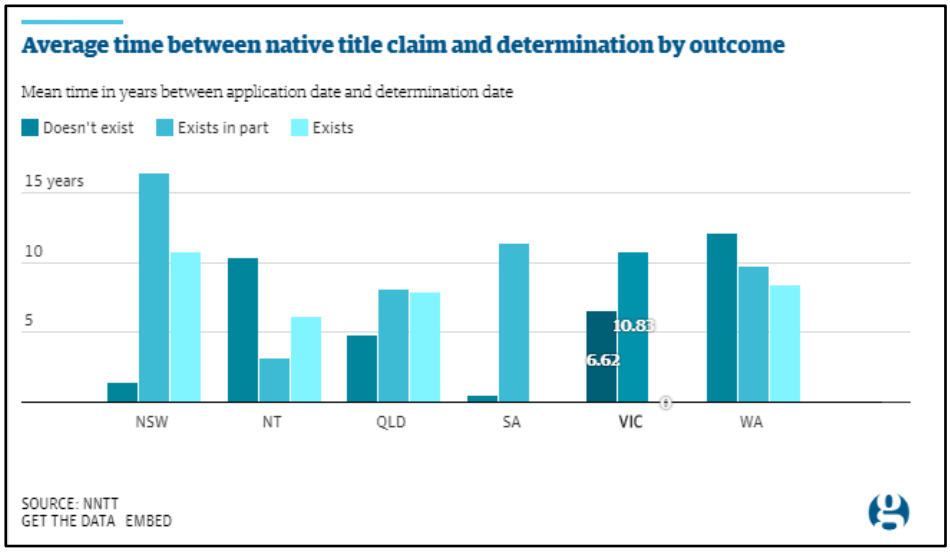
A major review of Australian native title has found the process is unduly onerous, complex and technical and called for amendments to streamline proof requirements.

The review was carried out over almost two years by the Australian Law Reform Commission and will be formally launched on Monday.

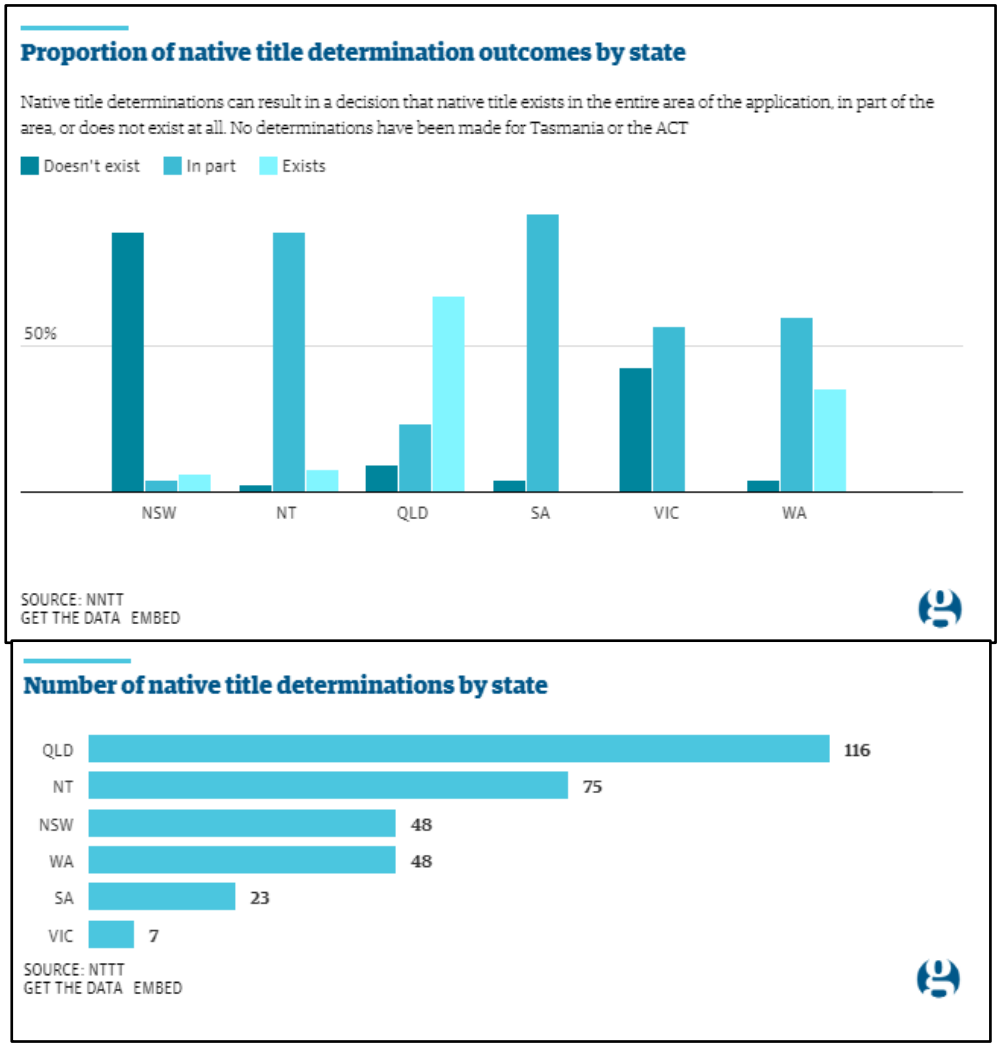
It stated that the native title system was "highly resource intensive" with costs borne by a range of public and private institutions, but most acutely by Aboriginal and Torres Strait Islander people. Such costs are sometimes compounded by the long timeframes for native title claim resolutions.

According to a Guardian Australia analysis, while the mean time it took for a native title application to be determined was six and a half years, the average length varied between states and territories, and by the outcome of the determination.

For example, successful claims in New South Wales, where the determination found that native title either exists, or exists in part, were among the longest in Australia. These claims take an average of 16.5 and 10.8 years respectively.



And unsuccessful claims take a short time in comparison, with an average length of one and a half years. Conversely, in Western Australia, it is unsuccessful claims that take the longest. NSW is also particularly notable for having the lowest success rate for native title applications, with 89.6% of determinations finding that no native title exists, out of a total of 48 claims. Victoria has the next highest proportion of unsuccessful native title claims, at 42.9%.



Rosalind Croucher, the president of the Australian Law Reform Commission, said “20-odd years of case law” had seen extra bits added to the native title requirements of proof. These “slow things down, like barnacles on a boat”.

While lengthy periods were not inherently bad, she said, and were sometimes an inevitable and necessary part of the negotiation process, it was of concern if such periods were the result of additional and unnecessary requirements that are getting in the way of proving native title.

The report found a requirement for applicants to prove their laws had been passed from generation to generation was particularly stringent and should be removed – especially when viewed in light of Australia's history of dislocation, forced removal of people from their lands and prohibitions on the exercise of cultural practices.

The law does not adequately acknowledge how the relationship of Aboriginal and Torres Strait Islander people to their land and waters can and do adapt to changing circumstances. "The influence of European settlement makes that inevitable," it stated.

So while the Native Title Act should remain focused on the acknowledgement of traditional laws and customs, it should also be "flexibly applied", the report said, to allow for the evolution and development of such laws and customs.

Any undue burden of proof placed on applicants sat "in tension" with the object of the act, the report stated, and instead stakeholders should rely more on inference in certain circumstances.

It was also recommended for amendment that native title rights could be exercised not only for non-commercial but commercial purposes as well, which would bring the act in line with a decision made in a landmark 2013 high court case, Akiba v commonwealth, Croucher said. A right to trade should also be included.

Croucher added it was important to remember the central purpose of native title as an acknowledgment in "white man's law" of pre-existing Indigenous rights and interests, which by definition came with certain limits.

In contrast to property rights which are "newly crafted", native title was a kind of translation of ancient Indigenous laws and customs and only "a slice of the broader social justice and land justice issues" – not some kind of universal panacea.
"It's very significant, symbolically and practically, in recognising Australia was not terra nullius," Croucher said. "That's the big symbolism of native title.

"But the act as a legal construct tries to put into 'white man's law' concepts which are very significant for Indigenous people. So for us, as a law reform body, the native title act applies a very specific and legal lens, and to the extent that we can make that lens better focused, we have done so."

The review draws on more than 150 consultations with government agencies, judicial officers, Indigenous leaders and traditional owners, Indigenous organisations and industry representatives.

The attorney general, George Brandis, said the government was considering the recommendations as part of broader ongoing policy dialogue about the native title system, including discussions through the Council of Australian Governments investigation into Indigenous land administration and use.

“Consistent with the direction announced in the white paper on Developing Northern Australia launched last week,” Brandis said, “the government is exploring reforms which would enable native title holders who wish to use their native title to drive economic development in their communities to do so.”

The longest-running native title claim in the history of NSW was recognised by the federal court on Thursday. The Yaegl people from the lower Clarence river in the northern region of the state first filed their claim in 1996.

The court acknowledged their right to camp, hunt, fish, gather, hold ceremonies and protect sites of significance in accordance with traditional law.

Yaegl man Billy Walker said his heart was “filled with relief and joy” as federal judge Jayne Jagot handed down the decision.

He paid tribute to the many elders who had been involved in the claim and since passed away. “We have lost too many elders during this journey,” he said. “It should not take 19 years to finalise a native title claim.

Eileen Mcleay, known by many as Aunty Nudie, called upon the NSW government to speed up the process. “No one is losing out when native title is recognised,” she said. “Our rights to fish, hunt, gather, camp and hold ceremony don’t take precedence if there is a conflict.”

She also said native title paved the way for their participation in the management of the land and water, including alongside government and business.

“It is very satisfying to get the proper recognition as traditional owners,” she said. “The claim areas always have and always will be Yaegl land. Recognition of native title shows everyone that we hold the knowledge about our country.”