Native Title from Mabo to Akiba: A Vehicle for Change and Empowerment
Brennan, Davis, Edgeworth & Terrill (eds.)
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Reviewed by Danny Masters

This collection of essays examines the way in which Australian law has recognised Indigenous rights over land and how the various forms of that recognition have impacted on change and empowerment in the Indigenous situation. The essays draw on contributions from Indigenous and non-Indigenous authors from a variety of disciplines including academia, law, anthropology, economics, politics, history and community development.

The Legal Structure
Part One entitled “Legal Dynamics in the Development of Native Title” examines how the law has defined Indigenous land rights and the limitations created by that definition.

Earlier consideration of Indigenous land rights showed the difficulty of accommodating an entirely different conceptual basis for owning land. In Milirrpum v Nabalco (1971) 17 FLR 141 (Gove Land Rights Case) Blackburn J struggled to reconcile pre-existing Indigenous property rights with the British based property regime in Australian law.

The breakthrough in Mabo v Queensland (No.2) (“Mabo”) (1992) 175 CLR 1 gave formal acknowledgement that in 1788 the British asserted sovereignty over land which was populated with land owners and there were legal systems in place. This decision was soon followed by the Native Titles Act 1993 (“NTA”).

In Akiba v Commonwealth (“Akiba”) (2013) 250 CLR 209 native title rights to take marine resources for commercial purposes as part of non-exclusive rights over sea country were recognised. The High Court declined to specify the full extent of native title rights, instead preferring to have those details emerge to align with factual usages of those rights over time past. Legislation governing licenses had regulated, rather than extinguished, native title rights to fish for trading purposes.

The legal structure created remains crucial to future possibilities. Judicial pronouncements have been issue specific, piecemeal in concept and unpredictable for long term planning as native title continues to evolve. The Crown is usually the respondent in decided cases and its opposition to native title is evident. The scope of Indigenous land rights has been constrained and limits economic potential.

Change and Empowerment
Part Two entitled “Native Title as a Vehicle for Indigenous Empowerment” considers the impact made by native title and the economic, social and political potential of native title rights. It compares the impact with that of a parallel land rights regime and other means by which empowerment can be achieved.

Native title was essentially “retro-fitted” into the existing system of land law in Australia. Political resistance to it was strong and strategies, doctrines and techniques emerged in the Courts,
legislators and in the conduct of respondent parties with the purpose or effect of containing the implications of the "new" native title rights.

The opportunities created by recognition of native title rights tested the capacities of Indigenous communities and their organisations which were created and designed with different purposes in mind. They needed to define and pursue objectives in a new environment, to unify and organise internally for new challenges and to find the necessary resources to explore the extent and implications of the rights recognised and to deal with the social, political and practical obstacles inhibiting full utilisation of them.

Two examples of Indigenous empowerment in action are drawn upon.

The first is the activities of the Central Land Council (CLC) in Central Australia. Indigenous land rights were recognised in the *Aboriginal Land Rights (Northern Territory) Act (Cth) 1976* ("ALRA") and claims for Indigenous land had been successfully made long before Mabo and the NTA came into effect.

Indigenous relations with the mining industry have improved significantly after a poor start, providing opportunities for economic and community development. Community Development Agreements have been increasingly used by the CLC in their dealings with mining, oil and gas extraction industries on Indigenous lands. Priority is given to uses which are considered positive for community development, and uses likely to create social tension or involve direct cash payments to individuals are prohibited. Land use payments from the mining industry or leasing land are directed in part to affected individual landowners, but a portion of the income is set aside for community development activity. This has provided a very positive opportunity for empowerment as it increases local involvement in decision-making, allows for control of resources and permits Indigenous communities to undertake development initiatives important to them that the shifting sands of government policy will not or will not continue to support.

The second is the Noongar Settlement Agreement under which the South West Aboriginal Land and Sea Council ("SWALSC") in south east WA decided to forego litigation and legislation to secure their rights and instead opted to negotiate an agreement with the WA State government. The negotiation is described as "nation-to-nation dialogue" to secure recognition of traditional land and allow self-determination based on economic participation and community development in line with the Noongar people's expectations.*

**Conclusion**

Legal recognition of Indigenous ownership of land was a ground-breaking first step. Legislative, judicial and other hurdles to capitalising on the recognition remain and will take time to explore and overcome. Decades of neglect of Indigenous people in terms of education, self-belief and involvement in decision-making has left an initial dearth of experienced decision-makers capable of maximising the benefit of the opportunity that this recognition has presented. There are some signs of improvement and the CLC model, which has been in existence for much longer than others, shows some very positive results. Empowerment is a developing prospect. Most importantly for Indigenous people is the awareness that their condition is now changing after decades of benevolent direction. As Kelly and Bradfield write “It is up to us as Noongar, we are the people we have been waiting for”.

(*In McGlade v Native Title Registrar the Federal Court in February 2017 decided that the agreement was invalid because some of the representatives of the Noongar people did not sign it. SWALSC continues to lay the groundwork for implementation of the agreement and legislation which would enable the agreement to proceed is presently before the Senate*)

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