

OUTCOMES FOR ALL? OVERLAPPING CLAIMS AND INTRA-INDIGENOUS CONFLICT UNDER THE *NATIVE TITLE ACT*

Sarah Burnside*

I Introduction

With the internal disputes within the Yindjibarndi native title claim group in the Pilbara and the Goolarabooloo Jabirr Jabirr in the Kimberley – regarding, respectively, a proposed land access and mining agreement with the Fortescue Metals Group¹ and the construction of an offshore gas processing plant at James Price Point² – intra-Indigenous conflict in the native title realm has recently been thrust into the spotlight. Such disagreements are not new to native title, as the system has stimulated heated debates on many different levels from the outset, and by its nature contains the seeds of discord between and within claim groups. Conflict has long been a concern within the native title sphere – there is a wealth of useful material that focuses on ways of managing and minimising disputes between and within claim groups, and participants in the system often emphasise the importance of Indigenous³ unity. This article, taking a specifically legal perspective, focuses on those conflicts about rights to specific areas of land and waters that are manifested in claims which overlap each other.⁴ The article does not dispute that conflict under the *Native Title Act 1993* (Cth) (*'NTA'*) may cause profound difficulties to claimants and requires sensitive management. However, it also notes that conflict is unavoidable in any system of property law, as valuable rights capable of legal recognition will always be the subject of competing claims. It is suggested that the inevitability of conflict needs to be more widely acknowledged in a native title context.

In discussing the operation of the native title system, this article takes an analytical, rather than a normative, approach. It does not defend the *NTA* from criticism, and notes the conclusion of lawyer, academic and public intellectual Hal Wootten that the legal process is ill-suited to addressing historical

dispossession. Wootten has contended that relegating postcolonial dilemmas 'to litigation in private actions based on existing rights, in courts designed to settle legal rights by an adversary system within a relatively homogeneous community, is at once an insult to the Indigenous people and a prostitution of the courts'.⁵ The native title regime also arguably exacerbates intra-Indigenous conflicts, which may cause pain, frustration and heartache, experiences that must not be silenced. Referring to disputes between traditional owners at James Price Point, lawyer and public intellectual Noel Pearson concludes that the 'differences within Aboriginal communities that are convulsed by arguments such as this produce much psychological and spiritual hurt. Indeed, it physically sickens and kills people'.⁶

Aboriginal and Torres Strait Islander Social Justice Commissioner Mick Gooda has noted that native title 'can be a catalyst for lateral violence': expressions of conflict and aggression within oppressed groups. For Gooda, the potential for such violence, whether physical or emotional, inheres in the fact that 'the native title process reinforces our oppression and dispossession of our lands, and raises questions about our identity – issues that are already sensitive for us given our harsh history of colonialism'.⁷ Gooda argues that '[l]ateral violence resulting from our engagement in native title is having a devastating impact on our families and communities', and that 'we need to work out ways to address this'.⁸ This article does not dismiss the seriousness of intra-Indigenous conflict or the need to minimise, address and manage it, nor the extent to which native title-related disputes can have a negative impact on claimants' lives. However, the article suggests, first, that conflict is often unavoidable given the legal nature of the native title system; and second, that supporters of Indigenous rights to land need to take a more nuanced view of discord within the

system, one which explicitly acknowledges the factual and legal bases of the rights being contested.

II The System, the Players and the Rules

The process established in the *NTA* is a legal one: applications for a determination of native title are determined by the Federal Court and mediated by the National Native Title Tribunal ('NNTT') and the Court; state and Commonwealth governments – and numerous other parties – act as respondents in opposition to a claim; evidence is tendered to prove and disprove a claim; and, by and large, formal court procedures are followed.⁹ Although claim groups are free to engage private representation, the *NTA* also provides for the establishment of Native Title Representative Bodies ('NTRBs') to assist claimants in progressing claims.¹⁰ These bodies have particular obligations and functions under the *NTA* to which other legal practitioners are not subject. For instance, NTRBs are obliged to 'assist', 'consult with', and 'have regard to the interests of' any 'registered native title bodies corporate, native title holders and persons who may hold native title'.¹¹ A representative body must also attempt to 'identify persons who may hold native title',¹² and must maintain organisational structures and administrative processes that 'promote satisfactory representation ... of native title holders and persons who may hold native title' within the region it represents.¹³ Representative bodies face both longstanding funding constraints and more fundamental limitations stemming from the content of the *NTA* and its interpretation by the courts.

During its comparatively brief lifetime, Australian native title law has been extensively critiqued for its limited and fragmented recognition of Indigenous rights to lands and waters. Dr Lisa Strelein wrote recently that native title law had been fatally flawed from its inception with the 'discriminatory compromise'¹⁴ of the *Mabo* decision,¹⁵ which concluded, for instance, that prior to the enactment of the *Racial Discrimination Act 1975* (Cth), the Commonwealth could extinguish native title without giving rise to a right to compensation.¹⁶ Strelein also charged that in addition to existing flaws in the *NTA*, the courts had repeatedly 'read down' native title rights and interests and imported higher standards of proof, arguing:

the veil of statutory interpretation cannot hide the fact that the courts have chosen interpretations of the words of the statute that have added layers of meaning ... without

regard to the principles of non-discrimination and beneficial interpretation that should apply when considering the rights of Indigenous peoples.¹⁷

It is critical to make a distinction between native title law as embodied in the *NTA* and interpreted by Australian courts, and the sense in which the term 'native title' is often used to refer to broader conceptualisations of Indigenous rights to land. In a lecture at the annual Native Title Conference in 2007, Mick Dodson, Chair of the Australian Institute of Aboriginal and Torres Strait Islander Studies, reminded his audience: 'let us not pretend that the [*Mabo*] decision by the High Court recognised land rights as we understand them, as we understand our responsibilities for country and connections with each other'.¹⁸ The *NTA* does not echo or codify Indigenous laws. Rather, as Pearson argues, native title constitutes 'the recognition space between the common law and the Aboriginal law'.¹⁹ In his discussion of lateral violence in Indigenous communities in the 2011 *Native Title Report*, Mick Gooda distinguished between 'native title, which recognises our rights and interests in our lands, and the native title process that is enacted in the *Native Title Act*', arguing that '[n]ative title itself provides immense benefits to Aboriginal and Torres Strait Islander peoples; it is the process that we need to follow to prove our native title that provides opportunities for lateral violence'.²⁰ This article takes a similar approach, drawing a distinction between the existing native title process and the recognition of Indigenous proprietary rights. References to 'native title' in this article connote the legal regime established by the *NTA*, rather than Aboriginal or Torres Strait Islander norms about land ownership or land use, or the broader set of aspirations for postcolonial land justice.

Of particular relevance to the issue of intra-Indigenous conflict is the concept of 'society' that forms part of the native title system. In *Members of the Yorta Yorta Aboriginal Community v Victoria*,²¹ a majority of the High Court found that claimants of group rights must be members of a 'group united by its acknowledgment of ... laws and customs', with the rights and interests claimed being the 'creatures of the laws and customs of a particular society that exists as a group which acknowledges and observes those laws and customs'.²² The majority found that to satisfy the requirements in section 225 of the *NTA*:

acknowledgment and observance of those laws and customs must have continued substantially uninterrupted

since sovereignty. Were that not so, the laws and customs acknowledged and observed now could not properly be described as the traditional laws and customs of the peoples concerned.²³

Native title rights and interests to land and waters can only be possessed, then, if there exists a normative society, united by acknowledgment and observance of traditional laws and customs, that gives rise to those rights and interests. Such a society need not be constituted by an individual claim group – it could be a wider regional group – but the society must have had a continuous existence and vitality since the assertion of British sovereignty. Crucially, a claim must include all members of the society, and must not include any persons who are not members.

The *NTA* seeks to provide certainty in relation to Indigenous landholdings. Accordingly, only one determination of native title can be made in respect of an area of land or waters. In its original form however, the *NTA* allowed multiple claims to be *registered* – thus attracting procedural rights, including the right to negotiate – within the one area.²⁴ This anomaly was removed when the *NTA* was amended in 1998, but the overlaps extant at that date remain in place. As of 31 December 2007, of the 521 active claimant applications, 45 per cent still had at least one overlap.²⁵ Pearson has argued that

[t]he way in which claims were organised, lodged and prosecuted by Indigenous groups and their advisors following the enactment of the 1993 legislation could not have been more harmful to Indigenous interests. We failed to control greed and the power struggles within and between claimant groups, not the least between conflicting parts of families. ... The 1998 amendments helped to put more rigour into the process but many of the claims that are registered were prepared with as much planning, strategy, forethought and consultation as went into the European dismemberment of colonial Africa.²⁶

In addition to frustrating third parties, who may be required to consult or negotiate with multiple claim groups under the *NTA*'s future acts process, the presence of overlaps causes problems for claimants themselves. First, as noted above, only one determination of native title can be made in respect of an area. Second, governments and some other respondent parties will not participate in substantive mediation towards a consent determination of native title

until overlaps are resolved. Third, overlaps cause difficulties in negotiating agreements under the *NTA*'s future acts regime. Fourth, the presence of overlaps – which may reflect longstanding tensions and rivalries as well as disputes as to landholdings under traditional law and custom – is often profoundly distressing for native title claimants and can lead to disputes.²⁷ The native title system is thus often criticised, by both Indigenous and non-Indigenous participants and commentators, for stimulating conflict within Aboriginal and Torres Strait Islander communities.

Analysis of the native title system's legal framework and adversarial nature occasionally blurs into criticism of the lawyers who practice within the system. The role of barristers and solicitors in the native title process is routinely subject to scrutiny, reflecting impatience with the legal regime as well as the interests and outlook of other participants. Third parties who seek to interact with native title claimants may view their legal representatives as unhelpful 'gatekeepers'; native title claimants and anthropologists note that legal expertise does not connote an understanding of Aboriginal or Torres Strait Islander cultural mores;²⁸ claimants become impatient with legal advice that does not accord with their land aspirations; and it is not uncommon for native title lawyers themselves to adopt an apologetic stance vis-à-vis their profession, conceding that this area is plagued by 'too many lawyers'.²⁹ At a more general level, legal practitioners also provide a useful scapegoat for the system's relative paucity of positive outcomes. Addressing a forum on 'Negotiating Native Title' in 2008, no less an authority than Commonwealth Attorney-General Robert McClelland was critical of 'purists intoxicated by their expertise in a technical and complicated system',³⁰ arguing that 'we need to move away from technical legal arguments about the existence of native title'.³¹ The frustrations expressed by McClelland and others stem from the painful clash of hopes and reality, the distance between broader concepts of 'land justice' and the limited nature of the existing native title system.

The sense that native title *ought* to be more than a legal process³² has arguably contributed to a tendency to downplay some of the consequences flowing from the system's legal character. For instance, and with some notable exceptions,³³ the implications of lawyers' professional obligations are not often explored in a native title context. Australian legal practitioners are subject to duties to the court and their clients, which are derived from the common law and articulated in statutory or regulatory form in each jurisdiction.³⁴ In

Western Australia for instance, the *Legal Profession Conduct Rules 2010* provide that practitioners' duty to the court and the administration of justice is 'paramount', and prevails to the extent of inconsistency with any other duty including duties owed to clients.³⁵ The *Rules* further note that a legal practitioner must 'act in the best interests of a client in any matter where the practitioner acts for the client' and must 'avoid any compromise to the practitioner's integrity and professional independence'.³⁶ The 'relationship between client and [lawyer] is one of the most important fiduciary relationships known to the law';³⁷ the lawyer owes the client a duty of undivided loyalty which has been characterised as 'inflexible'.³⁸ Obligations to the court and the client prevail over duties to one's employer,³⁹ and will trump any more generalised desires to resolve intra-Indigenous disputes, preserve relationships or maintain harmony.⁴⁰ It must be noted, however, that legal obligations to one's client may create difficulties where the 'client' is not a single person but a group of people who may well have disparate views about the conduct of their native title claim.

III Great Expectations and Win-Lose Outcomes

Statutes are products of the prevailing political winds of their time, and the *NTA* arguably reflects the 'third way' ideology that attracted some western democracies in the 1990s. The belief that society is no longer riven by internal, economically rooted divisions – and that, accordingly, parties of good sense and goodwill can simply resolve disputes by negotiating – is embodied in the *NTA*'s emphasis on mediation, which masks the inescapably political nature of native title. Initially, any such disguise was futile; the furor with which *Mabo* was greeted in 1992 and the sustained campaigns of mining and pastoral lobby groups and state governments against the *NTA* demonstrated only too well the contested nature of Indigenous rights to land in Australia. The dust has now settled, and former native title lawyer David Ritter notes that the current focus on 'agreement-making'⁴¹ is 'an expression of power relations that were the subject of vigorous contest and have now settled into a configuration that the principal parties either broadly accept or lack the facility to meaningfully seek to overturn'.⁴² With this acceptance has come a great deal of disappointment for Aboriginal and Torres Strait Islander people, as well as an understandable scepticism about the native title process. The *NTA* offers limited benefits: it enables Indigenous people who can prove that they possess proprietary rights under pre-sovereignty regimes to have

those rights recognised by the Australian legal system, and the standard of proof is exacting.

The existence of intra-Indigenous disputes has also been dissatisfactory for many of the 'reliable supporters' of Indigenous rights to land within what could be termed the broad Left,⁴³ and it is frequently lamented that the *NTA* has proved divisive within Aboriginal and Torres Strait Islander communities.⁴⁴ Former Aboriginal and Torres Strait Islander Social Justice Commissioner Tom Calma noted in 2009 that throughout his personal and professional experiences, he had 'witnessed Indigenous peoples and communities divide under a native title law which is defined by Western understandings of land ownership and Western priorities for land'.⁴⁵ Calls for 'unity' among native title claimants and NTRBs are also common: in 2008, Wayne Bergmann, then CEO of the Kimberley Land Council, posited that 'if we stand together as one mob across Western Australia, and even Australia, we will achieve more consistent native title outcomes'.⁴⁶ The adversarial process can be destructive and unhelpful; in the words of anthropologist Toni Bauman and mediator Rhiân Williams, it 'will often achieve outcomes at the expense of relationships and sustainability'.⁴⁷ The 'significant social disruption caused to Indigenous communities by the process of claiming and proving native title'⁴⁸ has also been the subject of both humane concern and scholarly analysis.⁴⁹ It is clear then that conceptualising the native title system in purely legalistic terms produces a limited picture that overlooks claimants' lived realities and their experiences of the conflict engendered or exacerbated by the system.

However, the system's adversarial nature cannot be denied. In seeking a positive determination of native title, claimants may well be required to engage in adversarial behaviour and act in a manner contrary to the interests of other claim groups: this is the way the Australian legal system works. Native title has become assimilated within this structure; as Wootten notes, 'the hand that signs the paper saying what native title will be recognised by Australian law will be that of a lawyer, and what is written will be in language that ... lawyers can understand and use'.⁵⁰ By lodging a claim, Indigenous groups themselves become enmeshed in the legal system and need to play by its rules. There is, of course, some room to move. A competent and ethical legal practitioner will advise clients of the pitfalls of litigation, and may strongly recommend settling out of court, rather than undergoing the full gamut of legal battle. In particular, intra-

Indigenous agreements between overlapping claim groups can provide for the reduction of claims and access to disputed areas. These agreements, entered into in a spirit of genuine mutual respect, may well constitute a preferable alternative to a legal battle. Unfortunately, however, sometimes the much-prized 'win-win solution' does not exist, whether due to the strict requirements of the *NTA*⁵¹ or the intransigence of other parties. This simple fact seems often overlooked. For instance, in 2008 NNTT President Graeme Neate used an unusual metaphor to describe the native title system, arguing that it

is not in a state of gridlock. The traffic is not always moving as it should. Each party is in a driver's seat and should cooperate with others so that they are moving in the same direction, toward the timely resolution of claims. Not every party will end up at the same destination. Some claimants will end up with determinations that native title exists. Others will not. ... Whatever their destinations, all participants in the native title system must work to find ways to reach outcomes in a timely and more efficient manner for the hundreds of current native title applications and those that are to come.⁵²

Despite acknowledging that different parties will not arrive at the same destination, Neate seems to suggest that they are headed in the same *direction*. This is rather an optimistic analysis. Patently, not all parties are seeking 'the timely resolution of claims', and not all are motivated by a benevolent concern for the applications 'that are to come'. There are mining companies that remain intractably opposed to native title; governments that seek to impose ever more conditions on their consent to a positive determination; third parties who pursue outcomes entirely out of proportion to their interest in a claim; and, relevantly, claimants who do not seek to 'resolve' their claim because the resolution is unlikely to be to their liking.⁵³

IV 'Recognition' and Its Limits

As previously noted, extra layers of complexity are added to the lawyer-client relationship in a context that is bound up with questions of historical wrongs and where the client is composed of many people, all of whom together claim communal rights. However, it bears emphasising that, notwithstanding the need to engage with the specific circumstances peculiar to native title claims, legal practitioners are generally not in the business of improving relationships or achieving social cohesion. Rather, they are

retained specifically to provide legal advice to those seeking outcomes, such as a positive determination of native title. Put starkly, not all native title claim groups are capable of achieving this outcome within the parameters of the *NTA* as interpreted by the courts. The 'recognition space' of native title is increasingly limited, encompassing only a relatively small number of Aboriginal and Torres Strait Islander groups.

There are many reasons why a group may not be capable of being determined to hold native title rights and interests. For instance, and particularly in areas which saw early contact between European settlers and Indigenous peoples, the extent of dispossession may have fractured the 'normative society' the court requires. Those who have been most affected by colonisation are therefore least likely to become determined native-title-holders, a fundamental unfairness acknowledged in the *NTA*'s Preamble.⁵⁴ Second, native title rights and interests may have been extinguished by previous acts of government, such as the grant of exclusive tenure. Third, claims made on the basis of occupation of particular areas will fail if this occupation itself is not grounded in 'traditional' laws and customs: those which existed at the time of the assertion of British sovereignty, which varies between and within states.⁵⁵ There is thus a distinction between 'traditional people' – those with rights and interests in land and waters which are derived from traditional laws and customs – and 'historical people', who may have lived in the area for many years but whose connection with it does not predate the assertion of British sovereignty.

The existence or otherwise of native title under the *NTA* is not an abstraction, it is a factual as well as a legal matter. We are here in the realm not of notions of justice, fairness or unity, but of distinct bodies of traditional law and custom, the rights they generate and the identity of the holders of those rights. Some claims will not meet these factual bases and will simply lack merit, in the eyes of other Indigenous people as well as the court. During early debates about the role of NTRBs in 1995, anthropologist Diane Smith noted that although it was

reasonable to expect a NTRB to fully investigate all asserted native title claims in its region, it is not realistic to expect it to finally represent all those asserted interests. ... [O]ne could argue that to do so would be eminently 'un-Aboriginal'. For if the 'representativeness' of some NTRBs is an issue, then surely so is the 'representativeness' of the groups and

individuals proposing themselves as claimants. Some will be recognised within the indigenous domain as owners of particular areas; others will not be.⁵⁶

Indeed, rhetoric to the effect that Indigenous people must form a united front and support each others' land aspirations can receive short shrift from claimants themselves, who may be distressed and angered by the lodgement of claims perceived not only as incapable of success under the *NTA*, but contrary to traditional law and custom. For instance, at a meeting held in 2009 to 'resolve overlaps' between three registered native title claims, the statements of one individual (whose claim was widely regarded as spurious among Aboriginal people of the region) that the native title system was 'making Aboriginal people fight each other' and that the people gathered in the room ought to 'stand together' was greeted with profound scepticism by the members of other, overlapping claim groups.⁵⁷ There may be sympathy among many participants in the native title system for Justice Reeve's comment in the case of *Quall v Northern Territory* that in deciding to strike out a claim, he took into account the 'just and efficient allocation of the Court's resources' and was

mindful of the fact that there are many other native title applicant groups waiting in the Court's native title list to have their native title determination applications determined ... I consider that it is in the interest of the administration of justice, so far as this Court has any control over the matter, that I ensure that the Court's resources are devoted to the resolution of real and genuine native title determination applications that have not yet been provided with a determination on their merits.⁵⁸

Strike-out applications are rare. Overlapping claims are involved in compulsory mediation, and NTRBs are required to attempt to resolve overlaps,⁵⁹ a deceptively bland phrase which sums up processes which may involve skilful diplomacy by claim group members, mediation, negotiation and research. NNTT Member Dan O'Dea has noted that '[e]ven when dealing with relatively minor boundary overlaps, a great deal of effort, resources and emotional energy needs to be expended ... before they can be resolved'.⁶⁰ O'Dea stated that in his experience, meetings called to 'resolve' overlaps could be 'extremely volatile, emotional and occasionally violent'.⁶¹ Writing about broader settlements, also known as non-native title or alternative settlements, NNTT researcher David Edelman also highlighted the 'conflict and disputation which may

arise within or between Aboriginal groups which are seeking recognition as traditional owners'.⁶² Edelman noted that '[p]recisely *because* this symbolic recognition can be so important, disputes and arguments sometimes arise ... about which people can rightfully assert traditional ownership of a particular area of country'.⁶³

V Whose Interests?

As briefly noted above, not all native title claim groups are represented by NTRBs. Some may retain private lawyers by choice, while others may be refused assistance from an NTRB under its internal policies on the grounds of, for instance, the lack of a compelling historical and anthropological basis. NTRB resources are scarce, and claims that are more likely to meet with success will be prioritised. Those groups that are not assisted by an NTRB and are unable to afford private legal representation may pursue their claims as unrepresented litigants.⁶⁴ Decisions by NTRBs to refuse to represent particular groups have occasionally been controversial and led to legal challenges under the *Administrative Decisions (Judicial Review) Act 1977* (Cth).⁶⁵ More broadly, NTRB decision-making has contributed to accusations of 'favouritism'. It is commonly and erroneously supposed that NTRBs have a duty to assist 'all Aboriginal people'⁶⁶ and achieve positive native title outcomes for all groups within their regions. These assumptions reflect what Smith characterises as a 'non-Aboriginal preoccupation with equity and appeals procedures'. Smith argues that this preoccupation 'should not pre-empt indigenous decisions about these matters by requiring the inclusion of individuals into a claimant group who are deemed to have no rightful or legitimate claims according to Aboriginal criteria ... or by requiring NTRBs to represent all proposals put to it'.⁶⁷ Providing legal representation to all Indigenous people resident in a particular area may be an impossible task for an NTRB acting within the confines of the *NTA*, notwithstanding duties owed to 'persons who may hold native title'.⁶⁸

The success of a claim for a determination of native title may well be contingent upon the argument that another, overlapping claim is either wholly unmeritorious or constitutes a (non-traditional) sub-group of the former. This underlying reality is often obscured in public pronouncements on the native title process, which tend to focus on resolution through agreement-making.⁶⁹ In the early years of the *NTA* regime, anthropologist Mary Edmunds noted that the 'way in which the claims process

has been established encourages an adversarial approach by rival claimant groups, each of whom is free to engage its own lawyer or other advisers'.⁷⁰ Edmunds then observed that representative organisations, including NTRBs, were 'tending to act in the interests of particular claimants against the interests of other claimants'.⁷¹ It must be noted that these observations were made prior to the 1998 amendments to the *NTA*, which caused substantial changes to the operation of NTRBs. In a similar vein, Pearson stated that the work of NTRBs had been rendered very difficult 'after 1993 when freelance lawyers roamed the countryside picking off clients and setting them off against rivals, including the representative bodies themselves'.⁷² Edmunds' statement must be viewed in its historical context. However, its potential implication that there is something illegitimate or unhelpful about legal representative bodies acting in the interests of their clients arguably reflects a widespread sentiment. It is not uncommon for external parties who interact with NTRBs to suggest that their legal advocacy for specific claim groups is problematic or unfair⁷³ and this notion merits unpacking.

To a lawyer, this suggestion may be somewhat curious. Practitioners are obliged to act in their clients' best interests, regardless of any negative consequences for other parties. Further, the legal mindset takes it as read that the interests of one party will be contrary to those of another. The fiction writer and essayist Margaret Atwood has noted that 'extreme Utopias' do not need any lawyers, as 'all are of like and right mind'.⁷⁴ Humanity is better at imagining utopias than creating them, and the society does not yet exist where there is perfect consensus on the allocation of rights. Beyond the world of fiction, property law is rife with conflict (consider disputes between landlords and tenants, purchasers and vendors, and mortgagees and mortgagors), and family and trust law have also witnessed many unedifying disputes. It is hardly surprising, then, that the native title realm might also be a site of discord. It must be acknowledged that native title has distinctive characteristics that render conflict particularly problematic, including the issues of historical dispossession and identity with which it is bound up, the communal nature of the title, which magnifies the potential for disagreement,⁷⁵ and the fact that parties to a legal dispute are likely to live at close quarters so disputes impact claimants' daily lives. Nevertheless, it is important to note that native title law is by no means unique in stimulating disagreement. Further, to state that conflict is inevitable is not to conclude that it is harmless or benign, but merely to acknowledge the realities of the adversarial legal system.

To give a brief example of oppositional interests under the *NTA*, imagine that A is a registered native title claim group represented by an NTRB, and B is a registered claim group with private legal representation.⁷⁶ B's claim overlaps A's. As stated above, overlaps must be 'resolved' before a determination can be made; it is therefore in A's interests to have this overlap removed. If and when the NTRB has sufficient funds available, detailed anthropological and historical research will be carried out to determine whether native title rights and interests exist in the overlap area and, if so, which persons hold those rights and interests. A and B will negotiate with each other on the basis of the research. Ideally, such negotiation would take place with a view to reaching consensus on an appropriate boundary between the claims. If the research indicates that native title rights are held by A, and that B's claim over this area has no or dubious merit, it will be in A's interests to have the overlap removed, either by persuading B to withdraw its claim, insofar as it overlaps A's, by applying under the *NTA*, or *Federal Court Rules* to have B's claim, in whole or in part, struck out or summarily dismissed,⁷⁷ or by proceeding to a litigated determination, where the court will determine whether native title exists in the relevant area and, if so, who holds it.

B's members, however, may have become emotionally invested in the claim to the extent that withdrawal is simply not perceived as a viable option. In addition, it will be in B's economic interest to maintain its claim over as large an area as possible in order to retain procedural rights in respect of any future acts.⁷⁸ In the event that B declines to withdraw its claim from the overlap area, A will be faced with either making an application to strike out B's claim, or proceeding to a costly and stressful litigation process. In this instance, the NTRB would likely advise A to proceed with the former.⁷⁹ It must be noted, though, that any 'success' in the legal arena on A's part may be undermined by ongoing conflict with the members of B, particularly if members of both claim groups live in the same town or community. A result that may be in a client group's interests from a legal perspective may well pose ongoing and painful dilemmas at a practical level.

This brief discussion of the relative merits of hypothetical overlapping claims is intended to illustrate the potential for conflict under the *NTA*, and refers merely to the claims' likelihood of success before the court, rather than to any deeper worth on the part of the claimants. The discourse – engaged in by NTRBs as well as native title claimants and external parties – about 'the right people for country'

or 'the true native title holders' can be unhelpful in that it imports a moral dimension into an already fraught forensic legal process. The concept of morality is inherent in the very concept of land rights – Toni Bauman suggests that 'rights talk is a fundamentally moral discourse'⁸⁰ – but is nowhere present in the provisions of the *NTA* that govern the recognition of native title rights and interests. Investigations as to the identity of 'the right people for country' are painful processes, and the denial of 'native title group membership' has been identified as 'a significant cause of hurt and pain for many Indigenous people in Australia'.⁸¹ Bauman and Williams note that a 'number of disputes in native title, and in land issues more broadly, revolve around issues of Indigenous self-identification'.⁸² This state of affairs has been subject to critique; the anthropologist Gillian Cowlshaw argues that the native title process 'has forced questions of the legitimacy of cultural identity into the courts, a most inappropriate place for such sensitive matters to be decided'.⁸³

It should also be noted that registered claim groups may be longstanding and meaningful social entities even if constituted in such a way as not to be capable of being determined to hold native title rights and interests. The role played by native title in developing or enhancing a social identity is often cited as a positive outcome of the system.⁸⁴ However, if such an entity is found not to constitute a traditional group capable of holding native title, the effect could be extremely distressing for persons whose aspirations for the future are strongly linked to their claim group. A lawyer may well, on receipt of anthropological and historical research, have to advise a client group that a claim is likely to fail for want of a traditional (pre-sovereignty) basis. Legal advice to the effect that the identity assumed by a claimant group is unsupported by evidence⁸⁵ will be hurtful and offensive regardless of how sensitively it is given. Nonetheless, such advice must be provided – with all attendant harm to social cohesion – if the lawyer is to fulfil his or her obligations to the client group under statute and common law,⁸⁶ and duties under the *NTA*.

VI The Discourse of Conflict under the *NTA*

As with other issues affecting Aboriginal and Torres Strait Islander peoples, intra-Indigenous conflict over native title has often been the subject of misleading reporting,⁸⁷ and discussion of 'disunity' among Indigenous people more generally can prove problematic. As Sarah Maddison noted

in 2009, the 'intense media interest in any sign of trouble in Aboriginal communities' is such that 'there is pressure placed on communities to appear trouble free'.⁸⁸ Further, '[d]isagreements between Aboriginal leaders and activists have often been used to embarrass them or to undermine their credibility'.⁸⁹ As Maddison has argued, the resulting tendency to 'smother their disagreements' has not been without its costs.⁹⁰ The pressure Maddison describes also exists within a native title context; discussion of the very ordinariness of conflict under the *NTA* is often difficult for advocates of Aboriginal and Torres Strait Islander rights to land, who may worry that arguments over country will 'discredit' not only the existing system, but the concept of land rights more generally. There is an understandable reluctance to exacerbate criticism of a law which has never been popular among the non-Indigenous majority and which, for all its flaws, at least provides some measure of recognition. Further, to acknowledge that there are claims which lack merit might be thought to encourage scepticism about the veracity of native title claims more generally, which has previously been expressed at the highest levels. Speaking to a group of pastoralists following the 1996 *Wik* decision,⁹¹ former Prime Minister John Howard characterised the right to negotiate as 'that stupid property right ... a licence for people to *come from nowhere* and make a claim on your property'.⁹² However, avoidance of in-depth discussion about intra-Indigenous conflict on the broad Left has arguably contributed to an overly simplistic perception of the system and an illusory sense of unity, as well as ceding ground to those on the ideological right who are then able to claim that they alone acknowledge the existence of divisions.⁹³

Indeed, it is not only claimants and their advocates who express 'concerns' about intra-Indigenous conflict in the native title arena. Denunciations of the system's divisiveness have also come from those who oppose meaningful recognition of Indigenous rights to land: Ritter notes that in the late 1990s, even as they were 'lobbying for statutory protection of native title to be substantially weakened', mining industry representatives were apt to 'express generous concern about whether native title was benefiting Indigenous people themselves'.⁹⁴ More recently, disputes between overlapping claims have been invoked to justify compulsory acquisition and the consequent extinguishment of native title rights. For instance, the Premier of Western Australia, Colin Barnett, justified his 2010 decision to commence compulsory acquisition proceedings over an area in James Price Point on the grounds of, among other things, the well-publicised

intra-Indigenous dispute about the merits of constructing a gas hub in the area. Barnett explained:

I cannot do any more, there have been endless meetings, lawyers being paid huge amounts of money ... when you just have Aboriginal groups within the [Kimberley Land Council] taking legal action against each other, suing each other ... I can't deal with it any more.⁹⁵

Criticism of the system's potential harm to Indigenous groups has increasingly come from within the resources industry. For instance, former Fortescue Metals Group CEO Andrew Forrest, who has been criticised for his company's approach to negotiations under the *NTA*,⁹⁶ has lamented that native title was 'terribly divisive amongst the Aboriginal people'.⁹⁷

It seems that the old Hansonesque argument made by those who critiqued the recognition of traditional rights to land – that such recognition was 'divisive' as between Indigenous and non-Indigenous Australians and thus threatened national unity⁹⁸ – may now be replaced by the contention that the system encourages divisions among Indigenous people themselves, and is therefore harmful. It is important not to dismiss fears about conflict within the native title system. Such concerns will often reflect the lived reality of native title claimants, who may be left with irreparably damaged relationships with their neighbours long after their lawyers have departed the scene, with any legal 'success' rendered somewhat illusory and any losses simply adding insult to injury. However, critiques of native title's 'divisiveness' can be problematic in the context of the current and troubling conflation of native title with social welfare initiatives. Contrary to the many newspaper reports which describe the Federal Court or the High Court as having 'granted' native title, the courts merely recognise existing rights which are held under traditional law and custom. As former Prime Minister Paul Keating stated in a recent documentary on the *Mabo* decision, native title is 'a set of rights as distinct from a gift ... this was a set of rights earned by way of traditional association'.⁹⁹ Rather than being seen as a system predicated on legal rights, however, native title is increasingly conceptualised as a means to a broader end, a way to 'close the gap'. Disharmony is thus viewed not as an inevitable side-effect of *any* property law system – albeit one which can be particularly pernicious in the context of communally held rights – but as an indication of fundamental flaws in the very recognition of Indigenous proprietary rights. This viewpoint arguably undermines native title claimants' positions as

decision makers and holders of proprietary rights. Instead, it reinforces the 'widespread perception that legitimate property rights under the *NTA* are a gratuity',¹⁰⁰ with the existence of conflict standing as evidence that the allocation of this largesse has been fatally misguided.¹⁰¹

VII Conclusion

Proceeding from the rather simple observation that intra-Indigenous conflict is often inevitable under the *NTA*, this article has set out some of the ways in which such conflict might arise and be perceived, both by commentators and by participants in the process. It has suggested further that the common tendency to downplay such conflict creates a simplistic picture that fails to acknowledge the adversarial nature of the Australian legal system. The article has not sought to dismiss the genuineness of concern expressed by both Indigenous and non-Indigenous Australians on the impact of disputes under the *NTA*, nor the need to minimise such conflict. Rather, it maintains that for all the system's manifold flaws, the status of native title rights as proprietary rights merits defending, and suggests that this imperative – and the factual nature of these rights and interests – must be borne in mind in discussions of intra-Indigenous disagreements in the native title realm.

* The author was employed as a legal officer at a native title representative body from 2007–10. The views expressed here are her own. The author is grateful to Dr Carolyn Tan, Ms Tessa Herrmann, and the *Australian Indigenous Law Review's* anonymous referees for their incisive comments.

- 1 See, eg, Australian Broadcasting Corporation, 'Iron and Dust', *Four Corners*, 18 July 2011 <http://www.abc.net.au/4corners/special_ed/20110718/mining>; Tom Cowie, 'Is the Yindjibarndi Native Title Deal from FMG Up to Scratch?', *Crikey* (online), 19 April 2011 <<http://www.crikey.com.au/2011/04/19/is-the-yindjibarndi-native-title-deal-from-fmg-up-to-scratch>>.
- 2 See, eg, 'Federal Court Dismisses Gas Hub Appeal', *Sydney Morning Herald* (online), 29 April 2011 <<http://news.smh.com.au/breaking-news-national/federal-court-dismisses-gas-hub-appeal-20110429-1e07w.html>>; Noel Pearson, 'When Outsiders Stir Up Tensions in Tribal Societies', *The Australian* (online), 10 September 2011 <<http://www.theaustralian.com>>.

- au/national-affairs/opinion/when-outsiders-stir-up-tensions-in-tribal-societies/story-e6frgd0x-1226133481670>.
- 3 The term 'Indigenous' is used here to refer to both Aboriginal and Torres Strait Islander peoples.
- 4 Internal conflict within native title claims is not a focus of this article.
- 5 Hal Wootten, 'Conflicting Imperatives: Pursuing Truth in the Courts' in Iain McCalman and Ann McGrath (eds), *Proof and Truth: The Humanist as Expert* (Australian Academy of the Humanities, 2003) 15, 34.
- 6 Pearson was referring in particular to the role of environmental groups who oppose the planned gas hub at James Price Point. He charged that such groups were 'exploiting divisions within the traditional owners': see Pearson, above n 2. These contentions are not the subject of this article.
- 7 Australian Human Rights Commission, *Native Title Report 2011* (2011).
- 8 Ibid.
- 9 *NTA* s 82(1) provides that the Federal Court is bound by the rules of evidence 'except to the extent that the Court otherwise orders'. Section 82(2) enables the Court to 'take account of the cultural and customary concerns of Aboriginal peoples and Torres Strait Islanders' in conducting its proceedings, 'but not so as to prejudice unduly any other party to the proceedings'.
- 10 *NTA* pt 11. For a discussion of the creation, disparate aims and internal contradictions of NTRBs, see David Ritter, *Contesting Native Title: From Controversy to Consensus in the Struggle over Indigenous Land Rights* (Allen & Unwin, 2009) ch 3.
- 11 *NTA* ss 203BB(1)(b), 203BC(1)(a).
- 12 *NTA* s 203BJ(b).
- 13 *NTA* ss 203BA(2)(a).
- 14 Lisa Strelein, *Compromised Jurisprudence: Native Title Cases Since Mabo* (Aboriginal Studies Press, 2nd ed, 2010) 35.
- 15 *Mabo v Queensland [No 2]* (1992) 175 CLR 1 ('*Mabo*').
- 16 Strelein, above n 14, 19.
- 17 Ibid 115.
- 18 Mick Dodson, 'Mabo Lecture: Asserting Our Sovereignty' in Lisa Strelein (ed), *Dialogue about Land Justice: Papers from the National Native Title Conference* (Aboriginal Studies Press, 2010) 13, 14.
- 19 Noel Pearson, 'The Concept of Native Title' in Galarrwuy Yunupingu (ed), *Our Land Is Our Life: Land Rights, Past Present and Future* (University of Queensland Press, 1996) reprinted in Noel Pearson, *Up from the Mission: Selected Writings* (Black, 2009) 44.
- 20 *Native Title Report 2011*, above n 7.
- 21 (2002) 214 CLR 422.
- 22 Ibid 445 [50] (Gleeson CJ, Gummow and Hayne JJ).
- 23 Ibid 456 [87] (Gleeson CJ, Gummow and Hayne JJ).
- 24 The registration process is set out in *NTA* pt 7.
- 25 Graeme Neate, 'Achieving Real Outcomes from Native Title Claims: Meeting the Challenges Head On' in Lisa Strelein (ed), *Dialogue about Land Justice: Papers from the National Native Title Conference* (Aboriginal Studies Press, 2010) 198, 207. Of these claims, 17 per cent had one overlap, 13 per cent had two overlaps, four per cent had three overlaps, five per cent had four overlaps and six per cent had five or more overlaps.
- 26 Noel Pearson, 'Mabo Lecture: Where We've Come from and Where We're at with the Opportunity That Is Koiki Mabo's Legacy to Australia' in Lisa Strelein (ed), *Dialogue about Land Justice: Papers from the National Native Title Conference* (Aboriginal Studies Press, 2010) 33, 40.
- 27 *Native Title Report 2011*, above n 7.
- 28 Anthropologist Peter Sutton has characterised 'the native title industry' as a 'factor propelling many cleanskin legal professionals ... into contact with Indigenous people and cultures for the first time'; Peter Sutton, *The Politics of Suffering: Indigenous Australia and the End of the Liberal Consensus*, (Melbourne University Press, 2009) 154.
- 29 This observation is based upon the author's own experience.
- 30 Robert McClelland, (Speech delivered at the Negotiating Native Title Forum, Brisbane, 29 February 2008) [17].
- 31 Ibid [5].
- 32 Ritter, above n 10, 14.
- 33 See Tessa Herrmann, 'Legal Ethics and Professional Conduct in the Native Title Context' (Paper presented at the National Native Title Conference 2012, Townsville, 4 June 2012).
- 34 The Council of Australian Governments currently proposes to institute a national regulation scheme for the legal profession. The scheme will, however, only be 'national' in a limited sense, as the Attorneys-General from South Australia, Western Australia, Tasmania and the ACT have indicated that their concerns with the system have not been adequately addressed; see Chris Merritt, 'Smaller States Reject National Regulatory Scheme as Favouring the East Coast', *The Australian* (online), 23 September 2011 <<http://www.theaustralian.com.au/business/legal-affairs/smaller-states-reject-reform-as-favouring-the-east-coast/story-e6frg97x-1226143994473>>.
- 35 *Legal Profession Conduct Rules 2010* (WA) r 5.
- 36 *Legal Profession Conduct Rules 2010* (WA) rr 6(1)(a), (d).
- 37 *Mallesons v KPMG* (1990) 4 WAR 357, 361 (Ipp J).

- 38 *Birtchnell v Equity Trustees, Executors & Agency Co Ltd* (1929) 42 CLR 384, 408 (Dixon J), citing *Parker v McKenna* (1874) LR 10 Ch App 96, 124 (James LJ).
- 39 The precedence of duties to clients over obligations to employers in a native title context was briefly discussed in *Magnesium Resources Pty Ltd v Cox* (2010) 259 FLR 181, 199.
- 40 NTRB lawyers may also face tensions between duties owed to their clients and the broader representative obligations of NTRBs under the *NTA*. Such issues are beyond the scope of this article.
- 41 See David Ritter, *The Native Title Market* (University of Western Australia Press, 2009).
- 42 Ritter, above n 10, xiv.
- 43 For a discussion of some of the ‘myths, complexities and problematic assumptions’ that have underpinned this support, see David Ritter, ‘Native Title Left Behind’, *The Australian* (online), 14 December 2009 <<http://www.theaustralian.com.au/news/opinion/native-title-left-behind/story-e6frg6zo-1225809979051>>.
- 44 See Ritter, above n 10, 58, 60; ‘Native Title Branded a Divisive Nightmare’, *ABC News* (online), 2 June 2010 <<http://www.abc.net.au/news/2010-06-02/native-title-branded-a-divisive-nightmare/851188>>.
- 45 Tom Calma, ‘Who’s Driving the Agenda?’ in Lisa Strelein (ed), *Dialogue about Land Justice: Papers from the National Native Title Conference* (Aboriginal Studies Press, 2010) 253, 254.
- 46 Wayne Bergmann, ‘Native Title, Agreements and the Future of Kimberley Aboriginal People’ in Strelein (ed), *Dialogue about Land Justice: Papers from the National Native Title Conference* (Aboriginal Studies Press, 2010) 183, 197.
- 47 Toni Bauman and Rhiân Williams, ‘The Business of Process: Research Issues in Managing Indigenous Decision-Making and Disputes in Land’ (Research Discussion Paper No 13, Australian Institute of Aboriginal and Torres Strait Islander Studies, 2004), 4 <<http://www.aiatsis.gov.au/research/docs/dp/DP13.pdf>>.
- 48 Lisa Strelein and Stuart Bradfield, ‘The Single Noongar Claim: Negotiating Native Title in the South West’ (2004) 6(2) *Indigenous Law Bulletin* 11, 11.
- 49 See, eg, Benjamin R Smith and Frances Morphy (eds), *The Social Effects of Native Title: Recognition, Translation, Coexistence* (ANU E Press, 2007) 27; Michelle Riley, ‘Winning Native Title: The Experience of the Nharnuwangga, Wajarri and Ngarla People’ (*Land, Rights Laws: Issues of Native Title*, vol 2, Issues Paper No 19, Native Title Research Unit, Australian Institute of Aboriginal and Torres Strait Islander Studies, November 2002) <<http://ntru.aiatsis.gov.au/ntrpapers/IP19v2.pdf>>.
- 50 Hal Wootten, ‘The End of Dispossession? Anthropologists and Lawyers in the Native Title Process’ in Julie Finlayson and Diane Smith (eds), *The Native Title Era: Emerging Issues for Research, Policy and Practice* (Centre for Aboriginal Economic Policy Research, 1995) 101, 105.
- 51 For example, as stated above some claim groups may seek to resolve conflicts by way of informal ‘shared country’ relationships. However, if two or more groups formally assert that shared native title rights and interests exist over the same area, the Court will need to be satisfied that this arrangement is rooted in pre-sovereignty tradition, rather than reflecting a contemporary political compromise. See Andrew Chalk, ‘Redefining the Role of the Federal Court in Settling Native Title Matters’ (Paper presented to the 3rd Annual Negotiating Native Title Forum, Melbourne, 19 February 2009) 10 <<http://chalkfitzgerald.com.au/Resources/3>>.
- 52 Neate, above n 25, 208–9.
- 53 ‘More than one claim group that fully grasped the *NTA*’s procedural opportunities was quite prepared to keep dancing until the music stopped’: see Ritter, above n 10, 60.
- 54 ‘It is also important to recognise that many Aboriginal peoples and Torres Strait Islanders, because they have been dispossessed of their traditional lands, will be unable to assert native title rights and interests and that a special fund needs to be established to assist them to acquire land’: *NTA* Preamble.
- 55 In theory though, if under traditional law and custom ‘historical people’ were capable of being absorbed into the society of the ‘traditional people’, and they had been so absorbed, they could be part of a native title holding group.
- 56 Diane Smith, ‘Representative Politics and the New Wave of Native Title Organisations’ in Julie Finlayson and Diane Smith (eds), *The Native Title Era: Emerging Issues for Research, Policy and Practice* (Centre for Aboriginal Economic Policy Research, Research, 1995) 59, 68–9.
- 57 The author, who was in attendance at said meeting, observed this reaction herself.
- 58 [2009] FCA 18, [119].
- 59 *NTA* s 203BC(3)(b) provides that in performing its facilitation and assistance functions, a representative body must ‘if the land or waters covered by the application are wholly or partly covered by one or more applications (including proposed applications) of which the representative body is aware – make all reasonable efforts to minimise the number of applications covering the land or waters’. NTRBs also have dispute resolution functions under s 203BF.
- 60 Dan O’Dea, ‘Managing Emotion in Native Title Matters’

- (Speech delivered at the Institute of Arbitrators & Mediators Western Australia Chapter Mediation Colloquium, Perth, 8 December 2009) 18 <http://www.nntt.gov.au/news-and-communications/speeches-and-papers/pages/managing_emotion_native_title.aspx>.
- 61 Ibid 23.
- 62 David Edelman, 'Broader Native Title Settlements and the Meaning of the Term 'Traditional Owners' (Paper presented at the Australian Institute of Aboriginal and Torres Strait Islanders Native Title Conference, Melbourne, 4 June 2009) 10 <<http://www.nntt.gov.au/News-and-Communications/Speeches-and-papers/Documents/2009/Broader%20native%20title%20settlements%20and%20traditional%20owners.pdf>>.
- 63 Ibid (emphasis added).
- 64 *NTA* s 85 permits parties to be represented in court by a person other than a barrister or solicitor, subject to provision of leave by the Federal Court.
- 65 See, eg, *Hicks v Aboriginal Legal Service of Western Australia Inc* [2000] FCA 544.
- 66 For example, the author is aware of an instance in which a lawyer who was the solicitor on the record for a native title claim which overlapped claims represented by an NTRB appeared surprised that the NTRB's clients supported the State's strike-out motion in respect of the claim he represented. The lawyer stated privately that 'rep bodies should help all Aboriginal people'.
- 67 Smith, above n 56, 69.
- 68 See *NTA* ss 203BB(1)(b), 203BC(1)(a), 203BJ(b) and 203BA(2)(a).
- 69 For a critique of the myth of a 'culture of agreement-making' in the future act context, see Ritter, above n 41.
- 70 Mary Edmunds, 'Conflict in Native Title Claims' (*Land, Rights, Laws: Issues of Native Title*, vol 1, Issues Paper No 7, Native Title Research Unit, Australian Institute of Aboriginal and Torres Strait Islander Studies, February 1995) 5 <<http://www.aiatsis.gov.au/ntru/docs/publications/issues/ip95n7.pdf>>.
- 71 Ibid.
- 72 Pearson, above n 26, 40.
- 73 This observation is based upon the author's own experience.
- 74 Margaret Atwood, 'Writing Utopia', in *Writing with Intent: Essays, Reviews, Personal Prose: 1983–2005* (Carroll & Graf, 2006) 94.
- 75 Native title can 'provide a stimulating new environment for the extension of pre-existing historical and traditional politics and rivalries among Aboriginal people': Ritter, above n 41, 9.
- 76 In this scenario, both claims will have been lodged prior to 1998 when, as noted above, multiple overlapping claims were capable of being registered within the one area of land or waters.
- 77 *NTA* s 84C; *Federal Court Rules 2011* (Cth) s 26.01.
- 78 No moral judgment inheres in this characterisation of B's interests. Economic considerations are relevant to native title claim groups as they are to other parties. Jon Altman, the Director of the Centre for Aboriginal Economic Policy Research, has characterised the right to negotiate as 'a form of property because it can be traded away, much like a futures option': Jon Altman, 'Native Title and the Petroleum Industry', (Discussion Paper 125, Centre for Aboriginal Economic Policy Research, 1996) <<http://caep.ranu.edu.au/Publications/DP/1996DP125.php>>.
- 79 The situation described above becomes, of course, vastly more complicated if both A and B are represented by the same NTRB. Problems of this nature are beyond the scope of this article.
- 80 Toni Bauman, 'Whose Benefits? Whose Rights? Negotiating Rights and Interests Amongst Indigenous Native Title Parties' (*Land, Rights, Laws: Issues in Native Title*, vol 3, Issues Paper No 2, Native Title Research Unit, Australian Institute of Aboriginal and Torres Strait Islander Studies, April/May 2005) 5 <<http://www.aiatsis.gov.au/ntru/docs/publications/issues/ip05v3n2.pdf>>.
- 81 Ibid 7.
- 82 Bauman and Williams, above n 47, 11.
- 83 Gillian Cowlshaw, *The City's Outback* (UNSW Press, 2009) 189.
- 84 See, eg, Strelein and Bradfield, above n 48.
- 85 Bauman and Williams note that the native title system 'places demands on Indigenous peoples to frame their identities in particular ways'. It will often be lawyers who articulate this demand: Bauman and Williams, above n 47, 13.
- 86 Lawyers owe their clients a duty of candour. *Legal Profession Conduct Rules 2010* (WA) r 7(c) provides that a lawyer must 'be completely frank and open with the client'.
- 87 On the other hand, in some instances reporters overlook disputes over interests in land entirely: see Sarah Burnside, 'The Monthly's Blindspot on the Burrup', *New Matilda* (online), 1 March 2011 <<http://newmatilda.com/2011/03/01/monthlys-blindspot-burrup>>.
- 88 Sarah Maddison, *Black Politics* (Allen & Unwin, 2009) xxx.
- 89 Ibid.
- 90 Ibid xxxi.
- 91 *Wik Peoples v Queensland* (1996) 187 CLR 1.
- 92 Quoted in Larissa Behrendt, *Achieving Social Justice: Indigenous Rights and Australia's Future* (Federation Press, 2003) 50 (emphasis added).

- 93 See, eg, Sara Hudson, 'False Notions of Indigenous Community', *The Drum Opinion* (online), 15 June 2011 <<http://www.abc.net.au/unleashed/2759152.html>>.
- 94 Ritter, above n 10, 107.
- 95 See 'Premier Colin Barnett Fed Up with Kimberley Gas Hub Talks', *Perth Now* (online), 1 September 2010 <<http://www.perthnow.com.au/business/news/premier-colin-barnett-fed-up-with-kimberley-gas-hub-talks/story-e6frg2qu-1225912845172>>.
- 96 See Australian Broadcasting Corporation, above n 1; Cowie, above n 1; Marcus Priest, 'Brand New Day', *Australian Financial Review Magazine* (online), 12 July 2006 <http://www.nswbar.asn.au/docs/resources/media/brand_new.pdf>.
- 97 Australian Broadcasting Corporation, 'Interview with Andrew Forrest', *Four Corners*, 12 August 2002 (Ticky Fullerton) <<http://www.abc.net.au/4corners/stories/s646583.htm>>.
- 98 For a particularly anxious and succinct statement of this view, see Pauline Hanson, *We Must Extinguish Native Title* (1 October 1997) Pauline Hanson's One Nation <<http://www.gwb.com.au/onenation/press/011097.html>>.
- 99 Australian Broadcasting Corporation, 'Judgment Day', *Four Corners*, 10 May 2012 (Liz Jackson and Lisa McGregor) <<http://www.abc.net.au/4corners/stories/2012/05/03/3494661.htm#transcript>>.
- 100 Sarah Burnside, "'We're from the Mining Industry and We're Here to Help": The Impact of the Rhetoric of Crisis on Future Act Negotiations' (2008) 12(2) *Australian Indigenous Law Review* 54.
- 101 This argument has also been made elsewhere; see Sarah Burnside, 'Divide and Conquer in the Pilbara', *New Matilda* (online), 27 July 2011 <<http://newmatilda.com/2011/07/27/divide-and-conquer-pilbara>>.