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Access and Native Title – can't get there from here

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SUMMARY

Access to land and water is an issue often overlooked in negotiating agreements or consent determinations, particularly access through the country of other native title holding groups.

This paper will examine the issues and difficulties associated with access to native title land, by reference to provisions for access in native title determinations where native title has been found to exist, including both consent and litigated determinations.

Questions of access will be discussed from the perspective of native title holding groups, holders of private interests granted by the Crown and members of the public who are seeking access to native title land.

Rights of native title holders and holders of other estates or interests to control access to land and waters which is subject to non-exclusive native title will also be examined.

ACCESS TO ABORIGINAL LAND

Since the commencement of the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth)[1] there have been issues relating to access to Aboriginal land[2] in the Northern Territory. Those issues arise in the context of a statutory scheme which recognises traditional Aboriginal interests in, and relationships to, land by way of freehold grants of title. That title is held by a Land Trust for the benefit of Aboriginals who are entitled by Aboriginal tradition to the use and occupation of the land concerned. The legislative scheme also attempts to provide for effective control by Aboriginal people over activities on their land.

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[1] Hereinafter referred to as "ALRA".

[2] "Aboriginal land" is defined in s 3(1), ALRA as "(a) land held by a Land Trust for an estate in fee simple; or (b) land the subject of a deed of grant held in escrow by a Land Council".

The relevant provisions in ALRA which provide for access to Aboriginal land are in Pt VII of the Act and can be shortly summarised. Section 70(1) of ALRA makes it an offence for a person to enter or remain on Aboriginal land. However there are various defences available. A person has a defence in proceedings for an offence against s 70(1) in the following circumstances:

- if the person enters or remains on the land in performing functions under, or otherwise in accordance with, ALRA or a law of the Northern Territory;[3]
- if the person enters or remains on the land in accordance with an authorisation in force under s 19(13) (Land Trust authorisations);[4]
- if the relevant land is subject to a lease under s 19A (head lease of a township) and the person entered or remained on the relevant land for any purpose that is related to the use or enjoyment, of an estate or interest by the owner of the estate or interest;[5] or
- if the person charged proves that his entry or remaining on the land was due to necessity.[6]

Section 71 provides Aboriginal people with a statutory right to enter upon, use or occupy Aboriginal land in accordance with Aboriginal tradition governing the rights of those Aboriginals with respect to the land; except that such entry, use or occupation is not authorised if it would interfere with the use or enjoyment of an estate or interest in the land held by a person, not being a Land Trust or an Aboriginal Council or other incorporated association of Aboriginals.

A person (other than a Land Trust) who holds of an estate or interest in Aboriginal land may enter and remain on the land for any purpose that is necessary for the use or enjoyment of that estate or interest by the owner of the estate or interest[7]. A law of the Territory cannot authorise a person to enter or remain upon land if the person's presence on the land would interfere with the owner's use or enjoyment of his or her estate or interest.[8]

The question of access to an estate or interest in Aboriginal land or in the vicinity of Aboriginal land, where there is no practicable way of gaining access other than by crossing Aboriginal land, is dealt with in s 70(4) of ALRA. This requires an agreement (or determination by an Arbitrator) as to the route by which the estate or interest can be accessed across Aboriginal land. Thus the right of access to an interest in land is entrenched in the statute, even though the precise access route remains a matter for negotiation (or determination). The route agreed or determined over Aboriginal land does not become a road over which the public have a right of way.[9]

[3] Section 70(2A), ALRA.
[4] Section 70(2B), ALRA.
[5] Section 70(2C), ALRA.
[6] Section 70(3), ALRA.
[7] Section 70(2)(a), ALRA.
[8] Section 70(2)(b), ALRA.
[9] Section 70(7), ALRA.

Section 73(1)(b) of ALRA confirms the capacity of the Territory legislature to make laws regulating or authorising the entry of persons on Aboriginal land, but so that any such laws shall provide for the right of Aboriginals to enter such land in accordance with Aboriginal tradition. The *Aboriginal Land Act* (NT) passed in 1978, is such a law. Part II of that Act deals with entry onto Aboriginal land. Subject to Pt II and any provision to the contrary in a law of the Territory, s 4 makes it an offence for any person, other than an Aboriginal person entitled by Aboriginal tradition, to enter onto or remain on Aboriginal land, or use a road, unless issued with a permit in accordance with Pt II of the *Aboriginal Land Act*. The persons or authorities who are authorised under Pt II to issue permits are: the Land Council for the area concerned;[10] the traditional Aboriginal owners;[11] the Administrator of the Northern Territory in respect of roads where the Land Council or the traditional owners have refused to issue the permit sought or have not, within a reasonable time, issued the permit;[12] and the relevant Northern Territory Minister in relation to certain government employees.[13]

It should be noted here that a reference to an "estate or interest" in Aboriginal land for the purposes of Pt VII of ALRA includes a reference to: "(a) a mining interest; (b) an interest arising out of the operation of the *Atomic Energy Act 1953* or any other Act authorizing mining for minerals; (ba) a lease or other interest in land or a right granted under a law of the Northern Territory relating to the mining or development of extractive mineral deposits; (c) an interest arising out of the taking possession, mining or occupation of land by virtue of a miner's right; and (d) an interest by way of the occupation or use of land in accordance with section 12A, 14, 18, 18A or 18B."[14]

Part IV of ALRA deals with mining on Aboriginal land. An exploration licence or a mining interest over Aboriginal land will not be granted unless there has been agreement with the relevant Land Council as to the terms and conditions to which the exploration licence[15] or the mining interest[16] will be subject. In both cases the application for an exploration licence or comprehensive proposal for the grant of the mining interest which an applicant is required to submit to both the Land Council and the Minister must include, inter alia: "the proposed method and amount of vehicular access to and within the affected land with reference to any proposals to construct roads, landing strips or other access facilities."[17]

Thus it is that ALRA deals with access to and over Aboriginal land to ensure that holders of estates or interests in Aboriginal land (which include mining interests) can get there from there.

[10] Section 5(1), *Aboriginal Land Act*.
[11] Section 5(2), *Aboriginal Land Act*.
[12] Section 5A, *Aboriginal Land Act*.
[13] Section 6, *Aboriginal Land Act*.
[14] Section 66, ALRA. But see s 3(2), which excludes those interests from a reference to estate or interest in land elsewhere in the Act.
[15] Section 40, ALRA.
[16] Section 45(a), ALRA.
[17] Section 41(6)(d)(iv) (exploration licence) and s 46(1)(a)(iv) (mining interest), ALRA.

ACCESS TO NATIVE TITLE LAND

Native title does not involve a Crown grant of an interest in land. Rather, it is the recognition of pre-existing rights and interests of Aboriginal peoples and Torres Strait Islanders in relation to land and waters. Native title must find its source in the body of laws and customs acknowledged and observed by the predecessors of the present native title holders at sovereignty. Because native title gets its content from the traditional laws and customs of the particular group, it may vary, unlike a grant of title to Aboriginal land under ALRA.

There have now been numerous judicial determinations of the existence of native title resulting from applications made under the *Native Title Act 1993* (Cth). Some determinations have been made by consent, others have been made following a contested hearing. Whether made by consent or as a litigated outcome, each determination of the existence of native title must set out details of the matters mentioned in s 225 of the *Native Title Act*. Relevantly, the determination must identify both the nature and extent of the native title rights and interests in relation to an area of land and waters[18] and also the nature and extent of other interests in relation to the same area.[19] In addition, the determination must describe the relationship between the native title rights and interests and other interests identified.[20]

The vital question of how, in practical terms, native title rights and interests and other interests may be exercised and enjoyed is not addressed by a native title determination. This gives rise to a "second generation" native title issue, which focuses on the practical interaction between native title holders and others who have interests in an area of land and waters. As recognised judicially, there are limitations on the capacity of the court to deal with these matters in a determination of native title by providing an exposition of how two sets of rights and interests will interact in a practical sense.[21]

The *Native Title Act* and determinations made by the Federal Court attempt, in general terms, to deal with the relationship between co-existing native title and non-native title rights. Some relevant sections in the *Native Title Act* are s 15 (partial extinguishment), s 44H (exercise of rights pursuant to valid authority) and s 238 (the non-extinguishment principle).

A recent example of how the court has dealt the relationship between native title and other interests is drawn from the determination made by Merkel J in *Rubibi Community v State of Western Australia (No 7)*:[22]

[18] Section 225(b), *Native Title Act*.
[19] Section 225(c), *Native Title Act*.
[20] Section 225(d), *Native Title Act*.
[21] *Ward v Western Australia* (1998) 159 ALR 483 at 639 per Lee J; *Smith v Western Australia* (2000) 104 FCR 494 at 500 per Madgwick J.
[22] [2006] FCA 459 at [11].

> "RELATIONSHIP BETWEEN NATIVE TITLE AND OTHER INTERESTS (S 225(D))
>
> (a) to the extent that any of the other rights and interests is inconsistent with the continued existence, enjoyment or exercise of the native title rights and interests, the native title rights and interests continue to exist in their entirety, but the native title rights and interests have no effect in relation to the other rights and interests to the extent of the inconsistency during the currency of the other rights and interests; and otherwise,
>
> (b) the existence and exercise of the native title rights and interests do not prevent the doing of any activity required or permitted to be done by or under the other rights and interests, and the other rights and interests, and the doing of any activity required or permitted to be done by or under the other rights and interests, prevail over the native title rights and interests and any exercise of the native title rights and interests, but do not extinguish them."

Another description of the manner in which the rights of native title holders and the interests of other persons are intended to interact is found in *Griffiths v Northern Territory of Australia (No 2)*:[23]

> "To clarify any doubt:
>
> (a) to the extent, if at all, that the exercise of the native title rights and interests referred to herein conflicts with the exercise of the rights and interests of the persons referred to in clause 12(a), the rights and interests of the persons referred to in clause 12(a) prevail over, but do not extinguish, the native title rights; and,
>
> (b) the native title rights and interests referred to herein coexist with the rights and interests of the persons referred to in clause 12(b)."

Clause 12(a) refers to "rights of access by an employee, servant, agent or instrumentality of the Northern Territory, Commonwealth or other statutory authority as required in the performance of his or her statutory duties" and cl 12(b) encompasses the "interest of members of the public to the access and enjoyment (subject to the laws of the Northern Territory and the Commonwealth) of: (i) the waters of Timber Creek; (ii) beds and banks of Timber Creek".

The above formulations of the relationship between native title and other interests are, at best, a general representation of the manner in which the rights and interests determined will interact. This is not surprising, given that s 225 of the *Native Title Act* is focused more on the nature of the legal rights and interests of native title holders and others, and not on the manner of their exercise. Even so, the question of access to land and waters often arises in a s 225 determination when the court is describing both native title rights and interests and also other interests.

To return to the example of the determination in *Griffiths v Northern Territory (No 2)*, the description of the nature and extent of the native title rights and interests contains references to "access" in the following contexts:

[23] [2006] FCA 1155 at [13].

"In relation to estate group members:

- the right to travel over, move about and to have access to the determination area;[24]
- the right to have access to and use the natural water of the determination area;[25]
- the right to have access to, maintain and protect sites of significance on the determination area;[26]

In relation to members of estate groups from neighbouring estates – rights of access to, and rights to hunt, fish and gather the natural resources on the land and waters of their neighbouring estate group members;[27]

In relation to spouses of estate group members – rights of access to, and to hunt, fish and gather the natural resources on, the land and waters of their spouse's estate."[28]

The description of native title by reference to rights of access is not surprising. Even though the relationship between indigenous people and their country has been consistently described as a spiritual or religious relationship,[29] from a practical perspective, the rights and interests that are native title are largely concerned with access to land and waters and to resources. In the context of exclusive native title, the rights and interests of native title holders extend to control over the land and waters and its resources. Questions of access to land and waters which is subject to native title are also crucial issues for holders of "other interests".

However, unlike ALRA, the *Native Title Act* is, by and large, silent on the essential issues of access for both native title holders (or claimants) and holders of other interests, at least in a practical sense. One place where the *Native Title Act* does expressly deal with access and the relationship with non-native title holding interests is in Subdiv Q of Div 3, Pt 2. Access rights are conferred on native title claimants in respect of non-exclusive agricultural and pastoral leases in order to carry on "traditional activities";[30] the rights of non-native title holders in relation to the area are said to "prevail" over those statutory access rights.[31] That is to say, the existence and exercise of the statutory access rights do not prevent the doing of any thing in exercise of the rights of the non-native title holders.

24 Order 5(a).
25 Order 5(d).
26 Order 5(g).
27 Order 8(a).
28 Order 8(b).
29 See, eg, *R v Toohey; Ex parte Meneling Station Pty Ltd* (1982) 158 CLR 327 at 356-7 per Brennan J; *Commonwealth v Yarmirr* (2000) 101 FCR 171 at [302]-[307] per Merkel J.
30 "Traditional activity" is defined in s 44A(4), *Native Title Act*.
31 Section 44B(2), *Native Title Act*.

AGREEMENTS UNDER THE NATIVE TITLE ACT

There are various provisions in the *Native Title Act* which contemplate agreements being reached as to the "manner of exercise" of native title rights and interests.[32] Section 86A(1)(b)(ii) contemplates that a mediated agreement may be reached in relation to "the nature, extent and manner of exercise of the native title rights and interests in relation to [an] area". Even though the matters set out in s 86A(1) are noted to be based upon those required, under s 225 of the *Native Title Act* for a determination of native title, it is clear that the inclusion of the "manner of exercise" of native title in a mediated agreement goes beyond the requirements of s 225(b) which refers only to the "nature and extent" of the native title rights and interests in relation to the area.

There is no doubt that the *Native Title Act* places an emphasis on agreement making to resolve native title issues rather than by "instant recourse to judicial decision".[33] As Emmett J has stated:[34]

> "One important object and purpose to be found in the Act is resolution of issues and disputes concerning native title by mediation and agreement, rather than by Court determination. Detailed procedures are set out in the Act to achieve those objects."

The court has also recognised that a judicial determination of native title does not (and cannot) spell out practical ways of exercising concurrent rights and that agreements between native title holders and others are essential to managing the ongoing relationship between native title holders and others. In *Smith v Western Australia*,[35] when outlining the effects of what his Honour referred to as an "innovative" settlement which was given effect by a consent determination of non-exclusive native title, Madgwick J said:[36]

> "the principal rules have been worked out as to practical interaction between the native title holders and those such as the pastoralists who have other rights to be on and to use the land. It is an important consideration in my mind, that it would probably not be possible for this Court to settle such a working out of on-the-ground practicalities without the agreement of the parties."

In that case, the determination of native title did not take effect immediately but was contingent upon the execution of an agreed form of pastoral access protocol and the execution and registration of an Indigenous Land Use Agreement (ILUA) pursuant to s 24CG(1) of the Act.[37] Both the ILUA (an area agreement) and the

[32] Section 24BB(c), *Native Title Act* (ILUA, body corporate agreement); s 24CB(d) (ILUA, area agreement); s 24DB(d) (ILUA, alternative procedure agreement); s 44B(3) (access rights for native title claimants over non-exclusive agricultural and pastoral leases); s 86A(b)(ii) (NNTT mediation based upon matters set out in s 225).

[33] *Fejo v Northern Territory* (1998) 195 CLR 96 at 139 per Kirby J.

[34] *Munn for and on behalf of the Gunggari People v Queensland* [2001] FCA 1229 at [28].

[35] (2000) 104 FCR 494.

[36] At [32].

[37] At [4].

pastoral access agreements found expression as "other interests" in the determination area.[38]

Another approach to agreement-making is to negotiate and register an ILUA before a consent determination is made. This approach was taken by the Kaurareg People in making an area agreement with the Torres Strait Shire Council and the State of Queensland.[39] This included an agreement as to future developments that could take place on seven islands in the Torres Strait. Agreement was also reached as to some areas on the islands which could be accessed by the public without requiring the permission of the Kaurareg People; in relation to other areas permission would have to be requested and granted. Indigenous Land Use Agreements were also reached with Telstra and Ergon Energy which included agreement for rights of access to existing infrastructure on the islands and a process to be followed if new infrastructure was to be built by Ergon and Telstra. After the ILUAs were registered on 16 March 2001, the court made five consent determinations of native title,[40] all but one determining that the native title rights and interests were held to the exclusion of all others, except for those determined to have "other interests" in the Determination areas. As was the case in *Smith v Western Australia*[41] the interests set out in the ILUAs were identified as "other interests" in the Determinations.

A third approach is to lodge ILUAs for registration after the making of a determination of native title. This was done in the Bar-Barrum People's Native Title Determination[42] where it was recognised by the parties that the consent determinations would not provide all of the details of how native title would work on the ground, and so additional agreements were necessary for that purpose. Amongst other matters, the post-determination ILUAs dealt with public access and access of rights-holders to their interests in the determination area, but because the ILUAs were not registered at the date of the Determinations they are not identified as "other interests" (although reference is made to certain "deeds of agreement"). For the consent determination see *Congoo v Queensland*.[43]

DIFFICULTIES WITH ACCESS AGREEMENTS AND ILUAS

In the context of mining, there are a number of matters which require careful attention in negotiating effective access agreements. It is beyond the scope of this paper to canvass all issues which could arise. However there are three important issues which come to mind.

[38] See Sched 3 of the Determination.

[39] See Kaurareg People's native title determinations: questions and answers, May 2001: http://www.nntt.gov.au/metacard/1021171238_27986.html.

[40] *Kaurareg People v Queensland* [2001] FCA 657.

[41] (2000) 104 FCR 494.

[42] See The Bar-Barrum People's Native Title Determination: Questions and Answers: http://www.nntt.gov.au/metacard/1021178065_28733.html.

[43] [2001] FCA 868.

Intra-Indigenous Conflict

It is often the case that there are conflicting and overlapping claims in relation to an area of land. There is very little point in conducting a negotiation or attempting to reach agreement with groups of native title claimants who are in fundamental disagreement amongst themselves as to who holds the native title to an area of land and waters, and the nature and extent of the native title. Even with the best endeavours of non-native title parties, no progress can be made unless, and until, the disputing claimant groups are able to reach an agreement as to how their differences are to be managed in the native title process.

The Hopevale Heads of Agreement (21 February 1996)[44] provides an example of how this can be achieved. The Agreement was made between 11 clans in the Hopevale area in order to pursue recognition of their native title rights collectively. Since 1994, the Aboriginal community had been divided by disputes as to traditional boundaries for the purpose of native title applications. Under the Agreement the 11 clans agreed to make a single native title application together whilst agreeing to respect each other's rights over individual clan estates. Each group agreed to hold its native title separately and to administer its own estate and affairs whilst recognising the rights of the clans to conduct activities on each other's clan estates. A common corporation with a representative from each clan to deal with land matters common to more than one clan was to be formed. Importantly, the Agreement established a process for negotiation involving the Elders of respective groups, where disputes arising between clans which could not be resolved by the Elders were to be referred to an independent mediator.

The National Native Title Tribunal (NNTT) has issued template agreements covering a number of topics, including the Cooperative Negotiation Agreement as an Intra-Aboriginal Agreement which can be tailored to specific needs and circumstances.[45] The Cooperative Negotiation Agreement is designed to be used to reach a Memorandum of Understanding between different native title parties whose respective claim areas are subject to a proposed mining lease. It is envisaged that these groups of native title claimants would adopt a joint approach in their dealings with both the mining company and the State.

The template agreement[46] covers matters including:

- all parties will ensure that they are authorised to speak on behalf of their group under traditional law and custom;
- in reaching agreement on the joint approach to be adopted in negotiations with the mining company, all decision-making should be on a consensus basis;
- disputes will be resolved according to terms reached in the Memorandum of Understanding; and

[44] http://www.atns.net.au/biogs/A000102b.htm.
[45] http://www.atns.net.au/biogs/A003037b.htm.
[46] http://www.nntt.gov.au/agreements/files/TemplateCoopNegotiationIAA/.

- all matters discussed in reaching the Memorandum of Understanding will be strictly confidential.

Access through Other Native Title Land

It may be that access to your interest involves travelling over the land of other native title-holders. If your interest is in a remote location, this may involve travel over areas which are not public roads. In that case, access may have to be negotiated with more than one native title group, and a number of agreements may need to be entered into.

In the case of an application for a mining tenement, a future act agreement can be entered into with the native title party/ies who consent to the grant of the tenement over the area in respect of which they have native title rights and interests. However, in remote areas where there are no existing public roads, further agreement may be required with one or more adjoining (or contiguous) native title holding groups in order to make sure you can access the area of the tenement. Be prepared to negotiate not only a future act agreement in respect of the grant of the tenement on the particular area, but also (most likely) ILUAs for access over other areas of native title land. Ideally, an access and native title mining agreement could be entered into with all of the native title groups in respect of their native title lands, but this will require that the native title groups are willing to work together.

Use of Roads

Determinations have attempted to deal with access to existing mining tenements by reference to access over existing roads and tracks in a determination area. An example is the consent determination made by French J in *James on behalf of the Martu People v State of Western Australia*[47] where existing tracks and roads (which were able to be identified) were marked on a plan.[48]

A difficulty arises when tracks and roads are rerouted for any reason. Where the access roads and tracks are used for private interests, s 24KA of the *Native Title Act* which permits the construction, operation, use, maintenance and repair of, inter alia, roads to be operated for the "general public" does not apply.

In these circumstances it would be prudent to agree a protocol or procedure for re-routing, repair or reconstruction of roads and tracks with the relevant native title group or groups as part of an ILUA or other agreement to ensure that you can get there from here.

[47] [2002] FCA 1208.

[48] See Determination, paras 5(e) and (f) of the Second Schedule (the nature and extent of other interests).

CONCLUSION

Native title legislation and determinations do not cover all, or even most, of the issues which may arise in relation to access. Questions of access to and through native title land can be a frustrating business for all concerned if they are not addressed early and in conjunction with more substantive interests, claims and agreements. And, as matters in this jurisdiction, good will and patience will be the best survivors over this somewhat rocky terrain.

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