

INNOVATIVE WAYS TO RESOLUTION OF NATIVE TITLE IN AUSTRALIA
PROMOTING SECURE FUTURES ON PASTORAL COUNTRY

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Abstract

Negotiated agreements between traditional owners and pastoralists about use and management of lands held under pastoral lease tenures in the arid and semi-arid rangelands of Australia will promote secure futures for both parties.

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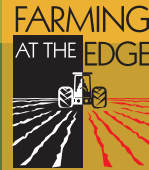
Australian rangelands. First we will explain the particular meaning of the Australian jargon we use throughout this paper - traditional owner, pastoralist and pastoral lease tenure. Following this we envision what the agreements that will result from current negotiating processes will deliver and how they will work 'on the ground'. We consider some of the challenges for the negotiating process and useful roles for business and property planning as tools to shape the content of agreements.

The Australian context for making agreements

Farming at the edge of the world

Pastoral farming in Australia is unique or 'at the edge of the world' in the marginality of these farming systems. This is due to low productivity of the rangeland pastoral resource, widespread degradation of the resource over the first century of British colonisation, low and highly variable rainfall patterns, and long distance from markets and services. These are harsh lands for farming, harsh lands for living, harsh lands for Indigenous peoples in terms of the recorded history of colonisation and dispossession.

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In Australia this is the frontier – the interface between farming and desert and the interface between Indigenous peoples and colonists - and what we are pursuing is reconciliation on the frontier.

Traditional owners

Traditional owner is the term commonly used in Australia for those Indigenous people who have rights and responsibilities for country (land, waters, natural resources) in terms of their own customary law system. There were several hundred Indigenous peoples in Australia at the time of British colonisation some two centuries ago – that is self identified cultural groups with their own systems of governance and economies based primarily on hunting, fishing and gathering and using fire and spiritual agency to manage productivity of land. Most of these groups have a contemporary identity even though colonisation has impacted greatly on their access to their traditional country, their customary law for management of country, languages, economy and health.

Contemporary traditional owners of pastoral lands live in the towns and cities of Australia as well as in rural and remote settlements on or close to their traditional country. They work in the public and community service sectors, in enterprise particularly arts and crafts production and tourism, and in management of the 16% of Australia that they hold as freehold or leasehold lands as a result of land grants and purchases. Most of this land is in tropical savannah and desert regions and is managed for conservation of endangered species and for sustainable subsistence production even though this is now a minor part of indigenous economies. Government transfer payments (pensions, unemployment benefit) form the main income source for many Indigenous people. A small number of indigenous groups have agricultural businesses.

Pastoralists and pastoral leases

Pastoralists in Australia are typically non-Indigenous people who make a living from grazing sheep or cattle on native pastures for external markets. In international parlance, Australian pastoralists are 'ranchers' – they hold their land as individuals or corporations, rather than in common as the traditional pastoralists of central Africa and Asia do, and they and their herds are not nomadic.

Australian pastoralists typically own their 'stations' under pastoral lease tenure, a distinctively Australian tenure which is non-exclusive. In the Wik case of 1996, the High Court ruled that 'pastoral leases' were not 'leases' in the sense that this term is understood in common law. Since they are grants under statute, the rights they convey need to be understood in terms of the legislation under which they were granted (Love 1997). Pastoral leases had their origin in the determination of early colonial governments in Australia to prevent land that was being occupied by 'squatters' beyond the settled surveyed districts being retained by them in perpetuity, to protect Crown claims of ownership and Aboriginal peoples'

subsistence economies (Foster 1998). Today about half of Australia's rangelands, which cover 70% of the continent, are held under pastoral lease tenure.

Like their colonial antecedents, contemporary pastoral leases are a non-exclusive tenure. Their terms and conditions vary between the different State/Territory jurisdictions which grant them. In South Australia, a pastoral lease carries the right to graze sheep or cattle up to a maximum number. The lessee may not use the land for other purposes except with the prior approval of the Pastoral Board. Statutory provisions for Aboriginal access and public access apply. There are also statutory restrictions on cultivation, pasture improvement and establishing new water points in previously ungrazed areas as part of the protection of native vegetation and biodiversity. In general terms, the Crown has retained ownership of non-pastoral resources and may allocate rights to use these separately to the pastoral lessee or to third parties. In some states valuable timber is harvested from pastoral leases by third parties under licence from the Crown, such as with sandalwood production in Western Australia and cypress pine in Queensland. However in South Australia the most commercially valuable non-pastoral resources other than natural gas and minerals are tourism and outdoor recreation opportunities.

Although we often hear that pastoralists aspire to 'more secure tenure', we consider that South Australian pastoral lease tenures are not insecure, by any objective measure. For example, under the provisions of the *Pastoral Land Management and Conservation Act 1989*, the leases are granted for a term of 42 years and the Pastoral Board will extend each lease back to a full term of 42 years after 14 years has elapsed unless there has been wilful breach of lease conditions which has resulted in land degradation or a similarly serious failure by the lessee in their general duty to apply good land management practices. Our own research also informs us that the financiers who lend money to rural businesses in SA do not consider pastoral leases to be an insecure form of tenure. Neither pastoral lease tenure nor potential risks from Aboriginal issues have any significant influence on their lending decisions which are overwhelmingly determined by the quality of business management.

Co-existence between pastoralists and traditional owners

Indigenous people were once the backbone of the pastoral industry in Australia through their work with livestock and in domestic support roles. This kept them in close contact with their traditional country even though their property rights to that country under their own systems of customary law were not recognised by Australian governments. However industry restructuring, changing technologies and skill requirements since the 1960s mean that there is now comparatively little employment of Indigenous people on commercial pastoral stations and there are large parts of their traditional country where indigenous traditional owners have no relationship with contemporary pastoralists.

This means that even though Aboriginal people of South Australia have statutory rights to access pastoral leases for traditional pursuits, for example to camp and to hunt kangaroos, they may not be at all confident in exercising those rights. In some cases this is because they are uncertain about how they will be treated by the pastoralist. In other cases they have been excluded from access by the pastoralist's locked gates or by threats, some at gunpoint. Overall the past 150 years of pastoral occupation has psychologically conditioned Aboriginal people to not press their statutory right to traverse pastoral lands. This needs to be balanced by the many examples where Aboriginal people have good relationships with pastoralists. For instance over the past decade the Adnyamathanha people have developed an excellent understanding with many pastoralists in the Flinders Ranges.

The idea of making agreements between traditional owners and pastoralists for use and management of pastoral country is quite new having originated in 1992 when native title was recognised for the first time in Australia through the Mabo decision of the High Court. Indigenous traditional landowners' perspectives on this issue are much more long standing. Their customary law provides that anyone who wants to access their traditional country or use its resources should have their permission – they should 'always ask' (Myers 1982). However, this did not happen when government tenures were granted over land and resources in Australia, either through the making of treaties, or through other kinds of agreement.

When native title was recognised by the High Court it prompted outcry of threat and fear from some quarters about native title impacting on non-Indigenous property rights, and this chorus was even louder after December 1996 when the Wik decision of the High Court established the legal basis for co-existence of native title and pastoral lease tenures. However the threats and fears have proved to be quite unfounded. Indeed, disturbingly, in terms of the initial promise that recognition of native title would deliver a measure of social justice to Indigenous nations of Australia, native title rights are now understood in Australian law to be effectively limited to rights to customary, non-commercial resource use which yield to any co-existing grants of rights by government in the event of an inconsistency.

In entering into negotiations for agreements which advance traditional owners rights and interests in South Australia, we have aspired to have outcomes that are just to all parties, not bound within narrow legalistic definitions (see Agius et al 2002). This has required us to think broadly and creatively about how traditional owner rights and interests interact with those of pastoralists and with the public interest on the pastoral lease lands of South Australia.

International experiences in negotiating agreements have provided some guidance though we are not aware of any specific parallels to the multiple tenure and land use situation of co-existing non-indigenous pastoralist and indigenous traditional owner rights that exists in Australian rangelands. In looking to international experience for models of agreement making, indigenous peoples and their advocates in Australia have been informed particularly by Canadian experiences in negotiating comprehensive regional settlements (see for example Richardson et al 1995, Ivanitz 1999).

Indeed the South Australia negotiations and agreement making for pastoral lands that we describe here are part of a more comprehensive process which carries our vision of rebuilding the state's institutions with meaningful recognition of Indigenous peoples built into it (Agius et al 2002).

This negotiation process is operating across several industry sectors (notably pastoral, fishing, local government, mining) and at both local and state-wide scales. At the state-wide scale it involves peak industry bodies, the SA Government negotiating team and the Aboriginal Legal Rights Movement Native Title Unit (ALRM NTU) in developing 'templates' for local level agreements and identifying overall policy directions and agreed directions for legislative reform. At local scales, Aboriginal traditional owners for particular lands and waters, supported by the ALRM NTU, negotiate directly with other parties, including pastoral lease holders where the negotiations are about their rights and interests in the country within the lease.

What will an agreement for a pastoral station be like?

Pilot processes for negotiating local level agreements between pastoralists and native title groups commenced two years ago in South Australia and are still underway. The specific details of what is being negotiated are confidential to the negotiating parties. However we can share our broad vision of what relationships between pastoralists, indigenous people and the land will be like under an agreement. In our involvement with these negotiation processes, supporting the native title groups to clarify their aspirations and the outcomes they want, we have found it critical to have such a vision.

When there is an agreement between traditional owners and pastoral lessees, each party will be confident that the other party understands and respects their rights and interests, values and aspirations for the land. We consider this to be self-evident because unless mutual understandings and respect are achieved during the negotiation process, then the parties will not make an agreement. We recognise there is a risk that one or both parties might be pushed into signing a document of agreement, by their advisors or by the pressure of external agendas, before they have achieved mutual understanding and respect. One reason that coming to agreement is a slow process is that it needs to guard against this risk. We have been investing considerable effort in building relationships between pastoralists, traditional owners and other relevant parties through facilitated workshops, informal meetings and inspections of country, in order that the people in each party have the tools to judge themselves whether mutual understanding and respect is being achieved.

In establishing a negotiating agenda, a list of matters that traditional owners want out of agreements, we use six headings which we have found to be meaningful to traditional owners and equally pertinent to pastoralists and in other industry sectors. These are:

- recognition,
- past injustice,
- protection of important country,
- access,
- benefits, and
- participation in decision making.

Table 1: Key issues for native title groups and the perceived importance to each party

Issue	Native title groups	Pastoralists
Recognition	Very important: before talks commence and in agreements	Yes
Past injustice	Very important: in early stages of talks	Yes: some are unaware of the depth of feeling among Aboriginal people
Protection of important country	Very important: some difficulty in publicly identifying this country	Yes: willing to accept native title group identification without seeking reasons
Access	Very important: to be clarified during negotiations	The most important issue: many details to be dealt with during negotiations
Benefits	Very important: from future access to non-pastoral resources	Yes: from opportunity to diversify in future
Participation in decision making	Important: to groups collectively, and negotiated with government at state wide level	Yes: individual pastoralists are not concerned

Two issues are pertinent to our agenda for negotiations at the broader scale of all the rangelands in South Australia. These are participation in government decision making (about use and management of lands, waters and natural resources) and resources (for the negotiation process and for effective implementation of agreements). However most elements of our vision for the provisions of agreements between individual pastoralists and traditional owners can be encompassed under the five locally applicable headings, as outlined below.

Agreements will be based on mutual recognition and trusting relationships between pastoralists and traditional owners. The traditional owners will recognise and respect the pastoral lessee's rights under the pastoral lease, the pastoralist's business and family-related relationships to land, their obligations and aspirations. The pastoralist will recognise and respect the traditional owners as being the people who have rights and responsibilities in their customary law for the station and its natural resources. The pastoralist will acknowledge and respect their relationship to land, their customary obligations to care for the land and their customary uses of the land and its resources. Recognition for each others' authority will ensure the agreement is a mutually respected governance institution.

The parties will have reconciled to past injustice, such as arose as a consequence of British colonisation and the dispossession of traditional owners, without apportioning guilt or blame. Traditional owners' feelings and pastoralists' feelings about these matters will have been aired and shared.

Agreements will set out provisions for protection of important country. There will have been open and honest discussion about situations where one party's land use impacts on values that are important to the other party. Proposals from each party for future land uses will have been tested against the values and aspirations of the other party, and there will be an agreement about how important values will be protected into the future. Traditional owners and pastoralists may agree to collaborate on some actions to protect country that are important to both of them – such as fencing natural waterholes from stock impacts or promoting regeneration of native species that are culturally and economically important.

Both parties will have confident and secure access. Each party will understand how they can access the country without impacting on the other party's values and land uses, economic, cultural and spiritual. Each party may have made some modifications to its initial expectations in order to accommodate the other's access needs. Both parties will cooperate in agreed ways in the managing how other people, such as tourists, access the property and will look to protect each other's interests as well as their own in relation to this third party access. The parties will have worked out ways of providing for each other's needs for privacy and exclusive use of parts of the station country, whether on a seasonal, permanent, or irregular basis.

The agreement will bring benefits - commercial and non-commercial - to both parties. Both parties will have the opportunity to generate economic benefit from commercial use of non-pastoral resources, with priority to traditional owners in order to help secure the economic base that they currently lack. In some circumstances the parties might joint venture, such as for business development in eco-cultural tourism. Regional economies will benefit from the increased direct engagement of Indigenous people in a market economy that agreements will progressively foster. Each party will be confident that their aspirations for new commercial uses of the property will not risk being thwarted or delayed by lack of a workable process to deal with the other party's interest. Agreements will bring reconciliation of the commercial use of land with the spiritual and cultural foundations of Indigenous customary law and contemporary subsistence production. This will be important to building a new, contemporary and properly Australian land care ethic, combining indigenous and non-Indigenous traditions, that will build market appeal for regionally branded products and services which are clean, green and socially just, as endorsed by traditional owners.

Farm management issues

Negotiated agreements bring some significant farm management issues to deal with. We do not speak for farmers and pastoralists in general, but we recognise the following issues as being important matters that will influence the negotiating process and the content of agreements:

- The scale of the lands involved: in South Australia some 40% of the state is pastoral leasehold where native title is likely to coexist with pastoral rights.
- A concern by pastoralists about access by people disrupting stock watering patterns and impacting on animal husbandry and biosecurity.
- The generally low profitability of pastoralism in particular for wool sheep over the past decade means that many pastoral families are focusing on business survival rather than negotiating a secure future for their family.
- The value of property resource management and business plans and planning processes as aids to ensuring that agreements take proper account of the future business development and sustainable management of the country.
- Statutory protection of Aboriginal heritage which applies across all of South Australia has rarely been enforced on station country to date.
- Concerns that the SA Government may increase rentals or introduce new constraints on land use, such as for increased biodiversity protection
- Concerns that financiers will identify an increased need to be reassured of the positive risk management implications of a negotiated agreement.
- The requirement for much improved business management skills to handle negotiations with traditional owners. This need is in addition to recent demands for higher quality management already coming from financiers through their requirement for business plans and property plans; the Pastoral Board with its requirements for sustainability and

maintaining biodiversity; and markets with their promise of premium access for branded, quality assured, organic and environmentally sound production systems. Pastoralists generally have good technical and production skills, but are disadvantaged by distance from upgrading their business skills.

At ALRM we are very aware of these issues. Many of our traditional owners have a history of involvement or work on pastoral stations and have a deep understanding of animal behaviour and the response of country to cycles of rain and drought. Aboriginal people and family groups own many pastoral leases. We employ pastoral advisers who tell us of the problems and offer solutions. ALRM uses a process of capacity building for native title groups that are preparing to negotiate: this training includes building awareness of pastoral business needs, customer changes and the role of land management bodies such as the Pastoral Board.

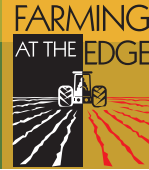
Challenges for realising the vision

Just about everything about this vision for agreements is different to the situation on most SA pastoral leases today. Hence even though the log of indigenous claims that it represents is not onerous, it is a challenge to negotiate.

Some features of the land use of each party present particular challenges. One is the increasing importance to pastoralists of biosecurity. The adoption of quality assurance (QA) systems and environmental management systems (EMS) by leading pastoral operations demands closer scrutiny of visitor behaviour and action to reduce the risk of pathogens and weed seed transport to stations on visiting vehicles. We consider that traditional owners who understand these risks can become allies of pastoralists in helping to manage the risk posed by other visiting vehicles. However further investment needs to be made in ensuring that traditional owners do themselves understand the biosecurity risks and have systems in place to ensure their own use of the property does not add to these risks.

Another challenge is in giving practical effect to the legal protection that Aboriginal heritage sites have from inadvertent or deliberate disturbance through pastoral management operations. Pastoralists are often interested to find out more about Aboriginal heritage and the significance in customary law of particular places on their property and to protect them as far as possible. However traditional owners can be reluctant to identify significant features to people outside their own group. This reluctance is typically because of cultural restrictions on dissemination of knowledge about spiritual traditions. Further they can find it difficult to identify discrete culturally significant areas in landscapes which are imbued with cultural meaning and significance. The establishment of trusting relationships between traditional owners and pastoralists can help to overcome these difficulties, but it needs investment of time, patience and goodwill on both sides.

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We have developed models for property planning, business planning and risk assessment plans to help address these issues.

Property planning is an emerging feature of innovative farmers. Although all pastoral leases have now had land condition assessment and infrastructure mapping completed by government officers with some participation by lessees, it seems few pastoral lessees have prepared formal property resource management plans. Property plans use maps showing features of the natural landscape, land use, tracks, watered areas and infrastructure. We advocate the use of property plans to add value to negotiated agreements, and insist on full involvement of traditional owners in the planning process. We have developed a reciprocal property planning model that allows pastoralists and traditional owners to plan in good faith based on each party's business, social and cultural goals. Government will need to be involved as landlord with a statutory responsibility for protecting the environment. Government faces the challenge of managing biodiversity conservation on leases with the major threat being extension of grazing into previously ungrazed areas and the loss of species which decline under grazing. Property planning provides a structured mechanism for government to be proactively involved at the planning level, in addition to pastoral lease monitoring and assessment conducted by the SA Government's Pastoral Board.

Biographical details

Parry Agius is a Narungga man whose traditional country is the Yorke Peninsula of South Australia. He has brought a professional background in community development to the Native Title Unit of the Aboriginal Legal Rights Movement, which he had led since its establishment in 1994.

Dr Jocelyn Davies is a geographer whose work is predominantly on issues for Aboriginal peoples in natural resource management. She co-leads the governance research theme of the newly established Desert Knowledge Cooperative Research Centre, and is also conducting research in social and institutional issues in the commercial kangaroo industry.

Don Blesing is an agribusiness adviser and farmer from South Australia. He provides pastoral and agribusiness advice to the Native Title Unit in South Australia. His work specialises in the people, industries and issues of the Australian rangelands and includes business and environmental strategy, strategic planning and foresight, and wool industry strategy.

References

Love, Mark. 1997. Lighting the Wik of change. *Land, Rights, Laws: Issues of Native Title*, AIATSIS, Canberra. 1 (14). Online: <http://www.aiatsis.gov.au/rsrch/ntru/ntpapers/ntip14.pdf>

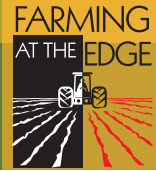
Foster, Robert. 1999. The origin of the protection of Aboriginal rights in South Australian pastoral leases. *Land, Rights, Laws: Issues of Native Title*, AIATSIS, Canberra. 1 (24). Online: <http://www.aiatsis.gov.au/rsrch/ntru/ntpapers/ip24web.pdf>

Agius, P., Davies, J., Howitt, R. and Johns, L. 2002. Negotiating Comprehensive Settlement of Native Title Issues: building a new scale of justice in South Australia. *Land, law, rights: issues of native title*, AIATSIS, Canberra 2(20). <http://www.aiatsis.gov.au/rsrch/ntru/ntpapers/IP20v2.pdf>

Myers, F. 1982. Always ask: Resource use and land ownership amongst Pintubi Aborigines of the Australian western desert, in Nancy Williams and Eugene S. Hunn (eds). *Resource managers: North American and Australian Hunter Gatherers*. Australian Institute of Aboriginal Studies, Canberra: 173-196.

Richardson, B. J. and D. Craig, et al. 1995. *Regional Agreements for indigenous lands and cultures in Canada*, North Australia Research Unit, Darwin.

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Ivanitz, M. 1999. The emperor has no clothes: Canadian Comprehensive Claims and their relevance to Australia, in *Regional Agreements – key issues in Australia: Vol 2 Case Studies*, M. Edmunds (ed), AIATSIS, Canberra, pp.319-342.