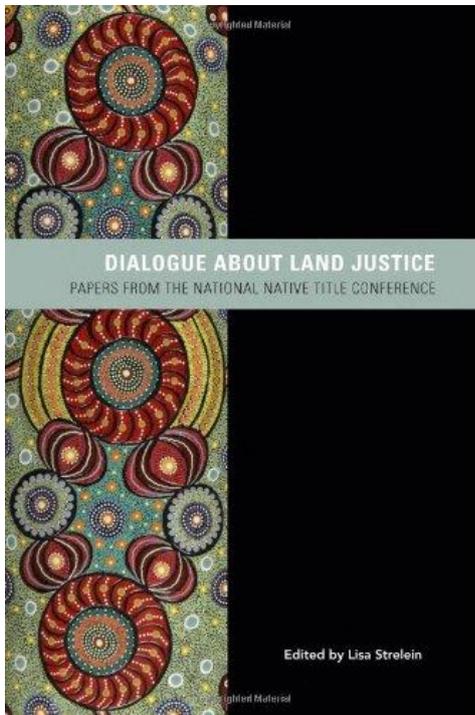


*Dialogue About Land Justice: Papers from the National Native Title Conference* edited by Lisa Strelein. Canberra: Aboriginal Studies Press, 2010, pp. iii + 346, AUD \$45.00 Paperback, ISBN: 9780855757144.



For over ten years, the Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS) has held an annual Native Title Conference, at which speakers from a range of disciplines and backgrounds share their knowledge of and experiences with native title. This book, edited by legal academic and AIATSIS Director of Research Programs Dr Lisa Strelein, provides a selection of the papers presented to the conference over the past decade.

As Strelein notes, the ‘disjunction between legal doctrine and the fact of Indigenous peoples’ connection to country permeates a number of the papers in this book’. (4) The papers reflect widespread disappointment that Australian native title law is not ‘about land justice’ except in the most oblique sense. ‘Let us not pretend,’ says AIATSIS Chair Mick Dodson, ‘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’. (14)

The bureaucratic reality is made explicit in the comprehensive paper by Graeme Neate, President of the National Native Title Tribunal. Neate discusses the system’s procedural intricacies, arguing that it ‘is not in a state of gridlock’ (252) and analyses ‘the steps which could and should be taken’ by participants to resolve claims more quickly. (200) Although Neate refers to ‘just and enduring outcomes’ (252), it is clear that the ‘resolution’ of claims on which the system is predicated falls well below broader concepts of justice: a claim may be ‘resolved’ by a determination that no native title exists due to extinguishment by state action or loss of claimants’ connection to country following years of dispossession.

It is arguable that the native title system also effects a more subtle resolution – reaffirming the postcolonial state by confining challenges to its legitimacy to the legal rather than the political realm. One of the book’s highlights is the paper by Judge Joe Williams, a Māori claimant, New Zealand Supreme Court judge and former Chief Judge of the Māori Land Court. Williams provides a critical analysis of ‘transitional justice’, the sphere in which the native title system is located. He notes that the ‘prime and unstated purpose’ of transitional justice regimes is to ‘affirm [the existing] legal order’ (22) – such regimes are therefore ‘inherently conservative’. (23) Williams notes that transitional justice is ‘achieved within the existing game’ and has ‘the effect of confirming the moral legitimacy of that game’, and states frankly that ‘from the Indigenous perspective, transitional justice is about the price that can be extracted from the legal order in return for the offer of moral legitimacy’. (22)

In Australia, the price paid by the nation state has been low; Justice John Basten reminds us that *Mabo* was ‘less radical in legal terms than both its champions and its denigrators would have it’. (72) The book’s chapters reflect years of debate as to the ways in which the system could be altered to address the power imbalance between native title claimants and the state: Greg McIntyre QC argues that the courts have misconceived native title, which is properly regarded as ‘property in land and waters’ and which ought not to be capable of

partial extinguishment (52); Noel Pearson suggests that the courts have misinterpreted the *Native Title Act* and, in abandoning the common law in favour of a rigid statutory construction, have left the nation with ‘a deformed and unjust native title law’. (48)

For some, the system is simply beyond repair. Les Malezer, currently the Chairperson of the Global Indigenous Caucus to the United Nations, characterises native title as ‘an inefficient, ineffective and ultimately manipulated process which draws everyone’s attention and takes our mind off the results being achieved, or not achieved’. (277) Instead, he focuses on the United Nations Declaration on the Rights of Indigenous Peoples. Malezer’s paper articulates a radical separatist, and at times unsettlingly essentialist, position of a kind rarely encountered in contemporary political debate.

The chapters do not all tread the same line – although ideological variations are often muted in the interests of operational unity, native title supporters conceptualise the system in distinct ways. Further, views within the native title world have shifted in the years since *Mabo*, both in response to legal and political developments and due to changes in participants’ analytical approaches. The chapters in *Dialogue about Land Justice* represent snapshots in time. Thus former lawyer David Ritter notes that his paper on ‘social native title’ – a concept that embraced the ‘human and citizenship rights and political aspirations of Indigenous people in relation to country that are outside of conventional jural native title’ – was ‘an expression of a particular political moment’ (118, 115). The paper was delivered in 2002 at ‘a certain instant ... when one generation of land council advocates was scrabbling around for additional devices to add to the tool box for a legal and political struggle that was appearing increasingly problematic’. (115)

The book’s most incisive analysis of this struggle is Noel Pearson’s 2003 paper, which is to be commended to those on the left who would dismiss the author for his views on social welfare. Pearson, the co-founder of the Cape York Institute for Policy and Leadership, is nakedly honest about the conflict at the heart of the native title system. His paper notes that those who opposed native title claims – including state and federal governments and the natural resource industries – were ‘ruthless, determined and resolute’ (35). In a similar vein, referring to the Single Noongar case, Dodson argues that the legal arguments invoked by the State represented ‘structural and systematic opposition ... to the recognition of native title’ as well as profound disrespect. (15) Pearson characterises *Mabo* as an ‘opportunity for a just compromise’ (36) which was not so much lost as rejected. After noting that non-Indigenous Australians can never ‘lose’ from native title, he asks rhetorically: ‘So why such bitter and expensive struggles over remnant lands? This is the question white Australians must ask themselves’. (36)

The papers’ focus is not wholly negative however; they celebrate hard-won triumphs and pay tribute to the countless people, both Indigenous and non-Indigenous, who have worked towards the recognition of native title. In Tom Calma’s 2009 paper, the former Race Discrimination Commissioner asks ‘who is driving the Indigenous policy agenda?’ (255) and exhorts his audience to use their experience within the system to ‘come up with ... plans for how we can take back control of our agenda’. (266) Calma also reminded his audience that political changes were afoot: Australia was then in the process of establishing a new national Indigenous representative body and the federal government had ‘signalled an openness to reconsidering some of the fundamentals of native title law’. (254-55)

Several of the chapters, such as that by anthropologist Kingsley Palmer on the concepts of ‘society’ and ‘community’, explore native title’s complexities. As Strelein notes, the conversation at the annual conference is however not limited to the system’s more technical aspects. She argues that for Aboriginal and Torres Strait Islander people, ‘native title is not isolated from other aspects of Indigenous relations with the state’. (1) The book’s chapters should therefore be viewed in the context of ‘Indigenous affairs’ more broadly, a realm

whose focus has shifted from self-determination to mainstreaming, ‘shared responsibility’, and the current emphasis on ‘closing the gap’ during native title’s lifetime.

Many of the papers reflect the frustration participants experienced during the Howard years, and the book closes with Aden Ridgeway’s paper from the 2005 conference. The former Democrats senator charged that an ‘ideological wet blanket has been placed over all debate on Indigenous issues’. (91) In particular, he noted that ‘almost all government activity [in the area of Indigenous affairs] is based on commitments to address Indigenous disadvantage. We are defined as “disadvantaged citizens”’. (291) Ridgeway attacked the term’s neutrality, noting that it attributes no responsibility to the settler state for its economic exclusion of Aboriginal and Torres Strait Islander people.

The direction that native title will take in the future is difficult to predict, but the system’s continued presence is assured; Neate suggests that based on current progress the existing undetermined claims could take more than 30 years to resolve. The question hovers: what will the native title landscape look like in 2040?

*Dialogue about Land Justice* provides both a vivid history of recent political battles and a series of unresolved questions for the future.

SARAH BURNSIDE  
*Oxford University*