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Native title system restricting benefits for Indigenous Australians, research finds

Report finds weaknesses within legislation leave native title holders at the mercy of their negotiating partners

A dancer during the ceremony settling the Kenbi native title land claim last year. A study found structural inequalities in the native title system are limiting the flow of benefits to traditional owners.

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Inequalities in the native title system are limiting the flow of benefits to traditional owners from agreements with governments and industry, a new report suggests.

The report, released by Curtin University and the University of Western Australia this week, found that, even after native title had been recognised, the weak bargaining position "inherent in the legislation" created significant barriers to positive outcomes for native title holders and left them at the mercy of their negotiating partners.

In one case, it found, that led to native title holders feeling they had bargained away native title rights without receiving anything in return.

About 85% of Western Australia's land mass is either held under native title or currently subject to a native title application. The majority of applications are made in the Kimberley, where 70% of the region is held under a determined native title

claim but native title also covers significant parts of the Pilbara, central desert, Goldfields and south-western districts.

The largest of those claims, settled after years of negotiation through the $1.3bn Noongar Indigenous Land Use Agreement (ILUA), was ruled invalid in the federal court last month after some traditional custodians refused to approve the agreement.

That prompted the Turnbull government to propose a hasty amendment to the Native Title Act (1993) to protect other agreements from appeal by restoring the presumption that agreements only needed majority support from native title holders to be valid. Labor has indicated on Tuesday that it will support the move.

Curtin University associate professor Michael Dockery, who co-authored the report, said native title law was a “minefield” and the collapse of the Noongar deal “just highlights how complex it is and how much these people are at the whim of the legal system and changes of government and policy”.

“Native title doesn’t really give you any sort of power,” he said. “You don’t really own the land, you just have a right to negotiate ... That doesn’t necessarily offer you anything tangible. You are not sitting on a pot of gold.”

The report contained a qualitative analysis of three post-determination native title agreements in WA: the 2013 ILUA between Yindjibarndi Aboriginal Corporation and Rio Tinto in the Pilbara; the 2005 ILUA between the Miriuwung-Gajerrong people, operating MG Corp, and the WA government in the Ord River valley, known as the Ord final agreement; and a series of right to negotiate or future acts agreements between the Gooiyandi Aboriginal Corporation and pastoral stations in the the Fitzroy Valley.

It found that while the Yindjibarndi were generally happy with their agreement with Rio, and felt Rio had generally operated “in good faith”, the Miriuwung-Gajerrong had been strung along by a 10-year promise for agricultural land that had not eventuated because the WA government had delayed the roll out of the Ord River scheme, upon which all promises of economic development and job creation hinged.

“It’s very clear the proponents that we spoke to from the Miriuwung-Gajerrong ... were essentially let down by the state government,” Dockery said. “Everything was delayed by a unilateral decision from the state government and they essentially left the traditional owners hanging.”

That agreement saw the WA government compulsorily acquire 65,000ha held under exclusive possession native title to develop the Ord River stage 2 agricultural scheme in return for a $57m package, which included $24m to establish and maintain MG Corp, $14m into a charitable community trust, $11m in compensation for damage done when the Ord River was dammed and flooded in the 1960s, and $15m in land transferred to the Miriuwung-Gajerrong community, including nine community sites.

Eleven years on, the report found, there had been no improvement in the living conditions of Miriuwung-Gajerrong people.

“All those benefits that came from the Ord agreement had conditions put to them, right, and the conditions were never favourable to what MG wanted to do, right, because we had to comply with them for the first 10 years,” one Aboriginal director of MG Corp, quoted in the report, said.

He continued: “There were supposed to be certain lands which were to be released for economic developments. The Ord final agreement gave the Miriuwung-Gajerrong people or the MG Corporation 10 years to ‘make yourself self-sustaining’. Ten years have gone. The lands, which were economically viable, we still haven’t got, and the state keeps telling us ‘when it is convenient’ for them.”

Dockery said native title holders were at a disadvantage in negotiations because they did not receive any formalised funding or support to operate as directors of a corporation, despite being required to establish a prescribed body corporate under the Native Title Act.

“The prescribed bodies are created by law, by federal legislation,” he said. “To actually properly facilitate those orders, you really need to be an expert in law, in finance, in commercial law ... it takes an enormous commitment in time.

“The burden is such that it prohibited [directors of native title corporations] holding any other job. You can’t work when this is taking up all your time and all of it is completely unpaid. You couldn’t imagine a similar situation in a white fella world.”

The report recommended the WA government petition the Council of Australian Governments to introduce a funding regime for native title corporations and investigate establishing a tertiary education course to give directors of those organisations the legal and financial knowledge to both negotiate with developers and manage a charitable trust.