Book review: *The Native Title Market*

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This is a challenging and useful book that should be read by anyone involved in, or needing to understand, Australia’s native title system. In fact, it would also assist people anywhere interested in the interaction between Indigenous people and the extractive industry. The basic thesis is this: Australia’s native title system gives Indigenous groups the ability to delay proposed resource development; they can exchange this in return for benefits from the developer, but if they wait too long the ability to delay is lost and a project can proceed with little benefit to the group. It’s a sobering view, given the usual presentation of the native title system as reducing Indigenous disadvantage, promoting reconciliation, or assisting community-building. David Ritter explains how these other results gain some assistance from native title, but essentially as by-products of its much less edifying operation and basis. He thoroughly outlines and justifies his arguments in this book.

Ritter briefly notes the background which led to Australia’s native title system: the historical denial of Indigenous connection and rights to land, by colonial authorities and then various Australian Governments; the slow adjustments in the 1970s and 1980s; the Mabo court decision in 1992 which led to the Native Title Act beginning in 1994; the industry and state government opposition to that law; and gradual accommodation, particularly following the 1998 amendments. But this is all described in a few pages and the book’s focus is on what has happened since 1994, particularly in relation to agreements between resource developers and native title groups.

There is almost universal acclaim for the current practice of agreement-making, where new resource developments only occur after agreement between the local native title groups and the developer. Ritter acknowledges this improvement over previous practice in Australia, but questions whether the benefits which are frequently asserted or assumed from such agreements actually exist. He addresses five ‘myths’ of native title:

- agreement-making is alternative;
- agreement-making reduces Indigenous disadvantage;
- an agreement means all parties are satisfied;
- agreement-making contributes to reconciliation; and
- agreement-making encourages community collectivism.

As Ritter observes, 'A disinterested bystander could be forgiven for thinking that the profusion of...agreements are...a product of everybody simply deciding to be nicer to each other for a change'. However there is surprisingly little evidence to support these ‘myths’: Ritter notes the lack of disclosure of the actual agreements means that analysis of how agreements are reached and what they contain is based largely on the self-
congratulatory media releases of the parties involved. Ritter asks, and answers: what really is the context for agreement-making?

In contrast to the myths, Ritter explains the stark inequality between the negotiating strength of Indigenous groups and resource developers. The legal inability of Indigenous groups to say 'no' to a proposed development cannot help but colour what should be understood when they say 'yes'. Ritter notes that the National Native Title Tribunal, which sits as arbitrator if the parties cannot reach agreement, is legally constrained in the decisions it can make (being unable to address the financial benefits from production) and has never decided that a proposed development could not proceed. Even though that last aspect has changed since Ritter wrote his book, all the other areas outlined in this book remain valid – the underfunding of indigenous land councils, the lack of indication as to what compensation should involve, or the usually disinterested governments who just observe the company-Indigenous negotiations.

What Ritter urges from this is that agreement-making be seen not as good or bad, but instead amoral – simply a tool which the law requires as part of the process of resource development in Australia. Ritter reminds us that contracts and contracting, which are such a part of most lives, isn't usually venerated as some noble process: we don't talk of 'finding common ground' when describing our sale of a car, or of 'interest-based negotiations' when purchasing groceries at the supermarket. These are simply commercial exchanges. Ritter argues that is how native title negotiations should be seen – a commercial exchange of the Indigenous 'ability to delay' for benefits and money from resource development. Where a developer needs to 'buy' that ability to delay urgently, or can provide extensive benefits from the project, then Indigenous groups will likely get significant advantages through an agreement. However Ritter documents various situations where this was not the case - the 'agreement' was not something that any Indigenous group would freely choose. Agreement does not mean the parties are satisfied, sometimes it is simply that they were unable to refuse.

These observations may trouble many who work in, or support, the native title system. Ritter views the 'right to negotiate' provided by the native title system as simply creating this market – a very different view to Australia's Human Rights Commission which has described the right to negotiate as 'a diminished reflection of [Indigenous] need to "look after" the land and can be characterised as part of Indigenous culture'.

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wondering, or at least wanting, that we can have some of the cake and eat it too. Describing the basic operation of many activities can disguise much of their purpose and meaning – for example do we see 36 people running around on grass chasing some misshapen leather ball, or do we watch a Footy Grand Final? Do we hear various people hitting and moving pieces of wood and metal, or do we listen to a band/orchestra playing pleasant music? Ritter has identified some base motivations of native title agreement-making, but does that mean that none of the more inspirational/commendable aims cannot also be sought and progressed? Ritter acknowledges that these sometimes also occur, but his incisive perspectives should warn many to reconsider how realistic are their aims and desires of native title’s agreement-making.

Ritter’s extensive experience as a ‘native title lawyer’ (my words, not his) have enabled him to provide the reader with glimpses of how the native title system works, including:

- the practical (how most agreements are structured and what they cover);
- the wistful (Indigenous parties ‘have been known to complain with justified irony [that] engaging seriously with the process of statutory recognition and protection of traditional rights and interests can leave little room for actually enjoying them’); and
- the amusing (‘one way of distinguishing the geologists and anthropologists from the lawyers is that the latter are more likely to bungle the folding of the maps at the close of a meeting’).

He criticises, or at least offers negative reflections on, companies, governments, tribunals and their staff and advisers. At times, I wasn’t sure whether this was ‘native title: warts and all’ or just the warts! But Ritter also criticises some of his own previous observations. He presents a realistic assessment of how native title is working and urges the adjustment of expectations that have grown from native title ‘myths’. But he also has some suggestions for how the situation might be improved. This includes a better connection between native title agreements and broader government initiatives to assist Indigenous development; increased funding and reforms to land councils; greater transparency of agreements; and more attention to agreement implementation.

[Disclosure note: the reviewer worked with the author in a land-council in Australia’s north-west from 2000-2001]

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