

How Lawyers Can Assist Aboriginal and Torres Strait Islander Peoples to ‘Heal Country’

Matthew Box

In Australia, lawyers have a duty, first and foremost, to the court and the law.³⁹ However, lawyers also have a role to play in Australian society and one of the ways they can fulfil this role is through assisting Aboriginal and Torres Strait Islander Peoples to ‘Heal Country’. To ‘Heal Country’ calls for all Australians to “seek greater protection for our lands, our waters, our sacred sites and our cultural heritage from exploitation, desecration, and destruction”.⁴⁰ The two clearest ways for Indigenous Peoples to ‘Heal Country’ are through ownership and stewardship of traditional lands, which is achieved through native title and lands rights claims, as well as the implementation of Indigenous land care and management strategies. Lawyers are in a unique position to assist in these areas due to their role as advocates in court, their chance to influence the evolution of case law and their over-representation in legislative bodies, particularly the Federal Parliament.⁴¹ Through their efforts, lawyers can increase the number of native title and land rights cases which are brought to court and can assist in the implementation of Indigenous environmental management strategies in place of the western strategies which, in past years, have been ineffective in Australia. Lawyers have a role to assist Aboriginal

³⁹ Justice Emilios Kyrou, ‘A Lawyer’s Duty’ (2015) 89(½) 34 *Law Institute Journal*.

⁴⁰ National NAIDOC Secretariat, ‘2021 Theme Heal Country’ (2021).

⁴¹ Kirrily Schwarz, ‘Do lawyers make good politicians?’ (2019) *Law Society Journal Online*.

and Torres Strait Islander Peoples to ‘Heal Country’ through advocacy in native title and land rights claims and by influencing legislators to consider Indigenous environmental care and management strategies.

I. SUPPORTING INDIGENOUS LAND RIGHTS

Native title is legal recognition of the rights of Aboriginal and Torres Strait Islander Peoples over their traditional lands, through involvement in these cases lawyers can assist Indigenous Peoples to ‘Heal Country’. With the *Mabo* ruling in 1992⁴² and the subsequent Native Title Act⁴³, native title has been recognised over approximately 32% of land in Australia.⁴⁴ Native title rights to an area allow Indigenous Peoples to inhabit the area, use the area for traditional cultural practices, protect important sites in the area, hunt, fish and gather food and traditional resources and teach law and custom on their country.⁴⁵

Native title over an area has the chance to improve Indigenous Australians’ ability to ‘Heal Country’, however, their options may remain limited. Under s35(1)(a) of the Native Title Act,⁴⁶ for the Commonwealth to take certain future acts on native title land (which include leases, renewals, and the conferral of some mining rights) there is a minimum ‘good-faith’ negotiation period of 6 months between native title parties and the Commonwealth or grantee parties before which the decision can go to the National Native Title Tribunal (NNTT). The involvement of lawyers in this process, advising and assisting native title parties would be valuable for the success of the negotiations and the outcomes which Indigenous Australians see. While this can allow for Indigenous Peoples to have some say over the use of their native title land and thus, the environmental protection of this land,

⁴² *Mabo v Queensland (No 2)* (1992) 175 CLR 1.

⁴³ 1993 (Cth)

⁴⁴ Australia Trade and Investment Commission, ‘Native Title’.

⁴⁵ *Ibid.*

⁴⁶ 1993 (Cth).

there is a clear advantage given to the other negotiating parties. Determinations made by the NNTT cannot impose financial conditions based on the value of (in the case of a mining lease) goods extracted and to date, the NNTT has not denied a mining lease application, nor has it tended to impose “onerous conditions” on mining companies.⁴⁷ Due to this history, there is more pressure on native title parties to reach an agreement than exists for Commonwealth and grantee parties. The opportunity for negotiated agreements Australia-wide is limited, however, the Northern Territory may provide a better avenue for Indigenous Peoples to ‘Heal Country’. Under the Aboriginal Land Rights (Northern Territory Act) Act 1996 applicants for mining leases on reserve lands must seek the consent of Aboriginal Trustees, if this consent is not given it can be overridden by the Territory Administrator, however, all applications to date have been negotiated.⁴⁸ It is a lawyer’s role as an officer of the court to uphold the law, through involvement in these negotiation processes, lawyers can assist Indigenous Peoples to ‘Heal Country’, doing this work pro bono may also be an option as Indigenous communities and groups are obviously at a resource disadvantage compared to the Commonwealth Government and large mining companies.

As native title can confer rights for the use of land for traditional cultural practices and to teach traditional customs and laws on country, there is a clear connection between the native title and the cultural side of ‘Heal Country’.⁴⁹ This is an element of ‘Heal Country’ which may not be apparent at first, however, for Indigenous Peoples whose culture is tied to country and the land, the protection of traditional culture and traditional lands are inseparable.⁵⁰ Thus, through assisting Aboriginal

⁴⁷ Ciaran O’Faircheallaigh & Tony Corbett, ‘Indigenous participation in environmental management of mining projects: The role of negotiated agreements’ (2005) 14(5) *Environmental Politics* 629-647.

⁴⁸ Ibid.

⁴⁹ Australia Trade and Investment Commission, ‘Native Title’; National NAIDOC Secretariat, ‘2021 Theme Heal Country’ (2021).

⁵⁰ National NAIDOC Secretariat, ‘2021 Theme Heal Country’ (2021).

and Torres Strait Islander Peoples to win native title rights to an area, lawyers can assist Indigenous Peoples to ‘Heal Country’.

Additionally, the right to visit and protect important cultural sites, which can be granted as part of a native title determination, is imperative to reducing the “exploitation, desecration, and destruction” of country.⁵¹ Native title and ‘Heal Country’ are intertwined through the rights which the former grants and the responsibilities which the latter imposes on Aboriginal and Torres Strait Islander Peoples.

Lawyers have a role to assist Aboriginal and Torres Strait Islander Peoples to ‘Heal Country’ by both supporting and advocating for native title claims and by supporting Indigenous communities and groups in negotiations over the use of native title land. Through these actions, lawyers can help to ensure the protection of country, both in terms of the environment, and cultural value for Indigenous Peoples.

II. LAWYERS’ INFLUENCE ON THE EVOLUTION OF CASE LAW AND LEGISLATION

Lawyers, as officers of the courts, have a role to play in the evolution of case law. Additionally, as members of society with connections to, and which are overrepresented in, legislative bodies, they have a role to influence the legislative policies of the government of the day to create positive change.

Paul H. Rubin and Martin J. Bailey suggest that judges and litigants are both able to impact the evolution of case law through, respectively, their conscious and unconscious preferences and the cases which they bring to court.⁵² However, they argue that it is attorneys who have more of an

⁵¹ Australia Trade and Investment Commission, ‘Native Title’; National NAIDOC Secretariat, ‘2021 Theme Heal Country’ (2021).

⁵² Paul H. Rubin and Martin J. Bailey, ‘The Role of Lawyers in Changing the Law’ (1994) 23(2) *The Journal of Legal Studies* 807-831.

impact on case law, according to their research the law tends to move in a direction which favours the interests of lawyers.⁵³ While this research was conducted in the United States which has a different court system than in Australia, it seems unlikely that this difference would make a particular impact on lawyers' influence on the evolution of case law. The larger issue with relying on this article is that it was researched and written in the context of torts cases and examined how the law tended towards favouring lawyers' economic interests rather than the moral or ethical leanings of lawyers.⁵⁴ However, these are all the interests of the lawyer involved, if a lawyer is genuinely interested in furthering the cases of Aboriginal and Torres Strait Islander Peoples either in native title or environmental protection cases, even when there is no obvious economic benefit to the lawyers, then it seems likely that a lawyer could positively impact case law in this area.

Additionally, according to the Law Society Journal,⁵⁵ eleven of Australia's thirty Prime Ministers have had legal backgrounds, and in the 43rd Parliament (2013) more than 25% of Labor and 20% of Coalition parliamentarians were law graduates, with 13% having pursued legal careers.⁵⁶ The New South Wales Law Society reports that in 2018 there were 76,303 practising solicitors in Australia.⁵⁷ Taking barristers into account as well, it can be said that lawyers account for less than 1% of the Australian population. This represents a significant overrepresentation in Federal Parliament, so we see that lawyers are both better connected to legislators and are more likely to become legislators than the average person. Through these connections and opportunities, lawyers have an important role in influencing legislation to assist Aboriginal and Torres Strait Islander Peoples to 'Heal Country'. One way they could do this is to influence legislation to

⁵³ Ibid.

⁵⁴ Ibid.

⁵⁵ Kirrily Schwarz, 'Do lawyers make good politicians?' (2019) *Law Society Journal Online*.

⁵⁶ Ibid, citing Politics and Public Administration Section, Department of Parliamentary Services (Cth), 'The 43rd Parliament: Traits and Trends', Research Paper (2013) 6, 7.

⁵⁷ Urbis, '2018 National Profile of Solicitors Final' (2018) Law Society of New South Wales.

increase the adoption of Indigenous environmental care and management strategies.

While these areas of influence provide significant chances for lawyers to assist Indigenous Peoples to 'Heal Country', the chances themselves may be idealistic. Then-District Court Judge Jack Goldring suggested in 2004 that in the past 30 years the role of lawyers has changed in many areas and that lawyers no longer find it as easy to influence social and political change.⁵⁸ While this may be true, it is nonetheless the role of Australian lawyers to work to influence social, legal and political change to help Aboriginal and Torres Strait Islander Peoples to 'Heal Country'.

III. INDIGENOUS ENVIRONMENTAL MANAGEMENT STRATEGIES

Aboriginal and Torres Strait Islander Peoples have environmental management strategies that differ greatly from the western strategies in wide usage throughout Australia. Indigenous land management approaches are "place-specific and holistic",⁵⁹ this means that the methods used are specific to the area being managed and cannot be used outside of this area. Cultural burning is the use of fire to prepare an area for bushfire season, the traditional knowledge which comes from Indigenous elders ensures that all flora and fauna in the area are safe while the burning takes place.⁶⁰ The implementation of cultural burning aims to 'Heal Country' "for environmental and cultural sustainability" by improving preparedness for bushfires.⁶¹ Through this

⁵⁸ Jack Goldring, 'Australian Lawyers and Social Change – 30 Years Later' (Conference Paper, Australian National University Australian Lawyers and Social Change Conference, 22-24 September 2004).

⁵⁹ University of Melbourne Cultural Burning Research Group, 'Submission to the Inquiry into the 2019-2020 Victorian Bush Fire Season' (2020), 2.

⁶⁰ Ibid.

⁶¹ Ibid, 7.

implementation, Aboriginal and Torres Strait Islander Peoples would be able to achieve the goals of 'Heal Country' by protecting traditional lands and culture from "destruction and desecration".⁶²

According to Alan Chenoweth, Jon Womersley and Helen Ross, Indigenous Peoples have considerable knowledge of the "adaptive systems which make up the environment" and this includes the management of resources for human populations, risks and the variations in Australia's seasons.⁶³ The use of this knowledge would work towards the goals of 'Heal Country' and lawyers in Australia have a part to play in the implementation of Indigenous approaches.

Additionally, the involvement of Indigenous Peoples in water management is an emerging field. Between 2013 and 2017 New South Wales had an Aboriginal Water Initiative which aimed to include Indigenous Australians in the management of water throughout the state.⁶⁴ While this group faced challenges and was eventually disbanded, Bradley J. Moggridge, Lyndal Betteridge and Ross M. Thompson suggest that the experience of the group can provide strategies for further attempts to integrate Indigenous cultural practices into water management.⁶⁵

⁶² National NAIDOC Secretariat, '2021 Theme Heal Country' (2021).

⁶³ Alan Chenoweth, Jon Womersley & Helen Ross, 'Environmental practice and Indigenous Peoples: we can't do it without them!' (2021) 28(3) *Australasian Journal of Environmental Management*, 215-219.

⁶⁴ Bradley J. Moggridge, Lyndal Betteridge & Ross M. Thompson, 'Integrating Aboriginal cultural values into water planning: a case study from New South Wales, Australia' (2019) 26(3) *Australasian Journal of Environmental Management*, 273-286.

⁶⁵ *Ibid.*

IV. LAWYERS AS ADVOCATES FOR INDIGENOUS ENVIRONMENTAL MANAGEMENT STRATEGIES

While Indigenous environmental management strategies would be effective in achieving the goals of ‘Heal Country’, currently, there is limited implementation of them within state and federal environmental management policies.⁶⁶ It is the role and responsibility of lawyers to work towards the implementation of Indigenous environmental management approaches, primarily through representations and submissions to enquiries and influencing legislation to include Indigenous methods. Following the 2019-2020 bushfire season, the Australian Government established the Royal Commission into National Natural Disaster Arrangements to examine the impact of climate change on natural disasters and consider whether changes are needed to land management.⁶⁷ The Report made 2 recommendations (18.1 and 18.2) regarding the investigation and use of Indigenous land management methods by Australian, state and territory governments.⁶⁸ Through representations and written submissions, lawyers can influence the findings and recommendations of inquiries such as the Royal Commission which then go on to inform legislative decisions. Additionally, lawyers can leverage their connections to legislative bodies to help implement Indigenous environmental management strategies into government policies. Lawyers within and without the legislative process can assist in this by lobbying for consultation with Indigenous communities and experts on land management strategies by governments.

⁶⁶ Alan Chenoweth, Jon Womersley & Helen Ross, ‘Environmental practice and Indigenous Peoples: we can’t do it without them!’ (2021) 28(3) *Australasian Journal of Environmental Management*, 215-219.

⁶⁷ Mike Foley, ‘Scott Morrison announces royal commission into bushfires’, *Sydney Morning Herald* (Sydney, 20 February 2020).

⁶⁸ *Royal Commission into National Natural Disaster Arrangements* (Report, October 2020), 43.

Furthermore, through their work as advocates in court lawyers can assist Aboriginal and Torres Strait Islander groups and communities to bring actions against companies infringing on environmental protection laws and hold companies operating on native title land to the conditions of their leases.

Through their influence on the evolution of case law and legislation, lawyers can assist Aboriginal and Torres Strait Islander Peoples to ‘Heal Country’.

V. CONCLUSION

The role of lawyers in Australian society extends far beyond their position as officers of the court, they also have a role to ensure we live in a just society and this includes assisting Aboriginal and Torres Strait Islander Peoples to ‘Heal Country’. This essay has looked at several ways in which Aboriginal and Torres Strait Islander Peoples can achieve the goals of ‘Heal Country’,⁶⁹ and how lawyers can be involved in these processes. Through the acquisition of native title, Indigenous Australians can maintain cultural practices and the teaching of customs and laws on country. Lawyers need to be involved in native title claims to increase the community’s understanding of the issues and chances of a successful claim. Additionally, native title grants Indigenous Australians the right to negotiate the use of traditional lands, while this is a limited right, the involvement of lawyers in the process would give Indigenous Australians more guidance on how agreements would impact land usage, assisting them to ‘Heal Country’. Turning to the direct influence lawyers have on case law and legislation, it is the role of lawyers to effectively advocate on the behalf of Indigenous Peoples for the adoption of Indigenous environmental management strategies which have been used for thousands of years to care for the Australian

⁶⁹ National NAIDOC Secretariat, ‘2021 Theme Heal Country’ (2021).

environment.⁷⁰ In researching and writing this essay, it became clear that there is limited academic research into the specific issues relevant, most writing on the connection between lawyers and Indigenous Australians focuses on access to justice for Indigenous Peoples and the lack of legal resources for Indigenous Peoples generally. This essay focused on joining the areas of native title, Indigenous environmental management and the role and influence of lawyers, however further research into the role of lawyers in this area would be beneficial to Australian lawyers wanting to work with Indigenous Peoples to 'Heal Country' through the protection of the environment and continuance of Indigenous culture. Lawyers in Australia have a role to assist Aboriginal and Torres Strait Islander Peoples to 'Heal Country' by representing them in native title claims, assisting in native title land use negotiations and working to help implement Indigenous environmental management strategies throughout the country.

References

A. Articles/Reports

- Chenoweth, Alan, Jon Womersley and Helen Ross, 'Environmental practice and Indigenous Peoples: we can't do it without them!' (2021) 28(3) *Australasian Journal of Environmental Management*, 215-219
- Foley, Mike, 'Scott Morrison announces royal commission into bushfires', *Sydney Morning Herald* (Sydney, 20 February 2020)
- Hunt, J., "'Caring for country': a review of Aboriginal engagement in environmental management in New South Wales' (2012) 19(4) *Australasian Journal of Environmental Management*, 213-226

⁷⁰

Alan Chenoweth, Jon Womersley & Helen Ross, 'Environmental practice and Indigenous Peoples: we can't do it without them!' (2021) 28(3) *Australasian Journal of Environmental Management*, 215-219.

- Justice Emilios Kyrou, 'A Lawyer's Duty' (2015) 89(½) 34 *Law Institute Journal* <<https://www.liv.asn.au/LIV-Home/Practice-Resources/Law-Institute-Journal/Archived-Issues/LIJ-Jan-Feb-2015/A-Lawyer-s-Duty>>
- Moggridge, Bradley J., Lyndal Betteridge & Ross M. Thompson, 'Integrating Aboriginal cultural values into water planning: a case study from New South Wales, Australia' (2019) 26(3) *Australasian Journal of Environmental Management*, 273-286
- O'Faircheallaigh, Ciaran and Tony Corbett, 'Indigenous participation in environmental management of mining projects: The role of negotiated agreements' (2005) 14(5) *Environmental Politics* 629-647
- Politics and Public Administration Section, Department of Parliamentary Services (Cth), 'The 43rd Parliament: Traits and Trends', Research Paper (2013)
- Royal Commission into National Natural Disaster Arrangements* (Report, October 2020)
- Rubin, Paul H. and Martin J. Bailey, 'The Role of Lawyers in Changing the Law' (1994) 23(2) *The Journal of Legal Studies* 807-831
- Schwarz, Kirrily, 'Do lawyers make good politicians?' (2019) *Law Society Journal Online* <<https://lsj.com.au/articles/do-lawyers-make-good-politicians/>>
- University of Melbourne Cultural Buring Research Group, 'Submission to the Inquiry into the 2019-2020 Victorian Bush Fire Season' (2020)
- Urbis, '2018 National Profile of Solicitors Final' (2018) Law Society of New South Wales
- Young, Elspeth A., 'Aboriginal land rights in Australia: expectations, achievements and implications' (1992) 12 *Applied Geography*, 146-161

B. Cases

Mabo v Queensland (No 2) (1992) 175 CLR 1

C. Legislation

Native Title Act (1993) (Cth)

D. Other

Australia Trade and Investment Commission, 'Native Title'
<<https://www.austrade.gov.au/land-tenure/native-title/native-title>>
Goldring, Jack, 'Australian Lawyers and Social Change – 30 Years
Later' (Conference Paper, Australian National University Australian
Lawyers and Social Change Conference, 22-24 September 2004)
National NAIDOC Secretariat, '2021 Theme Heal Country' (2021)
<<https://www.naidoc.org.au/get-involved/2021-theme>>