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Access to Justice in Western Australia: Native Title

Newsflash

Kellehers was approached several months ago by descendants of one of the Indigenous peoples of the Western Australian Goldfields.

Their story linked to the great Seven Sisters Dreaming, which crosses the entire Australian continent.

We immediately sought to find them legal assistance in Western Australia. The case was interesting. But what we discovered concerned us.

Native Title Claimants in Western Australia, who seek independent legal representation from established Native Title Representative Bodies, can often face an uphill battle securing a lawyer.

Only a small pool of lawyers in Western Australia accept native title work, whether *pro bono* or not. As native title cases require particular expertise and knowledge, the small pool is not itself surprising.

However, in native title, a major problem is that many lawyers, because the pool is small, have established conflicts of interest through existing and past Claimant and Respondent clients.

While the problem could be framed as an 'access to justice' issue, it is also, to a very large extent, an outcome of the *systemic* reality of native title.

Litigation through representative bodies is, typically, the means by which Aboriginal Peoples secure legal assistance in native title cases.

But there are many complaints by individuals and sub-groups within these 'representative' bodies.

Such complaints have been notorious all over Australia for many years.

The Federal Court is aware of this issue. For example, in 2009, Justice John Dowsett (1), discussed the Court's case management role:

> We quickly discovered that the performance of the land councils was, to say the least, uneven. It was unclear how funds were allotted to cases. In some areas, decisions as to Native Title funding seemed arbitrary, with little money being used for that purpose. Some land councils seemed to cause friction in the indigenous community rather than resolve it.

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Justice Dowsett went on to say:

> The Court was partly responsible for these problems. Had we been more demanding in our case management requirements at an earlier stage, the recalcitrant land councils might have been forced to address their practices. Perhaps we would have avoided substantial waste of money. When we applied pressure to the applicants (and therefore to the land councils) in the form of case management goals, there were both positive and negative responses. The poor performances by some land councils became more obvious. At least in part, the recent reconstruction was brought about by these uneven responses.

Justice Michael Barker in a 2013 address (2) commented that 'the last 20 years experience with native title teaches [us]' that:

> Adequate funding of the native title system to achieve timely native title outcomes is fundamental to the next, Court managed phase of native title resolution.

The focus on Court case management, however, may be inappropriate.

As Dr Kelleher has noted (3), native title often propels, at times unprepared claimants into substantial and costly litigation.

> "The veil needs to be lifted on Aboriginal outcomes as required by the Preamble [to the Act]," Dr Kelleher said.
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> "It is of great concern that the Native Title Act has substantially fallen outside any Regulatory Impact Assessment Process for nearly twenty years."

Securing local and independent legal representation can be of equal or greater significance in assisting dissident groups towards an appropriate outcome – and a sense of justice done – than a successfully administered Court process.

Given the influential role of lawyers in establishing entrepreneurial opportunities in native title (3), funding needs to be sufficient to allow Benefit Groups to be adequately represented by lawyers.

Groups with limited resources and/or uninspired legal assistance will be assured, through template agreements, of minimal provisions to optimize entrepreneurial opportunity.

Kellehers wishes acknowledge, in this recent instance, the support of our Western Australian colleagues as follows:

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(1) Dowsett, Justice John --- "Beyond Mabo: Understanding Native Title litigation through the decisions of the Federal Court" (FCA) [2009] Federal Judicial Scholarship 10

(2) Barker, Justice Michael --- "Innovation and management of native title claims: what have the last 20 years taught us?" (FCA) [2013] Federal Judicial Scholarship 14

(3) Kelleher, Leonie --- Schumpeter’s Bahnbrechen considerd in the light of Native title Legislation and Indigenous entrepreneurship, (2012) unpublished PhD thesis, pp. 259