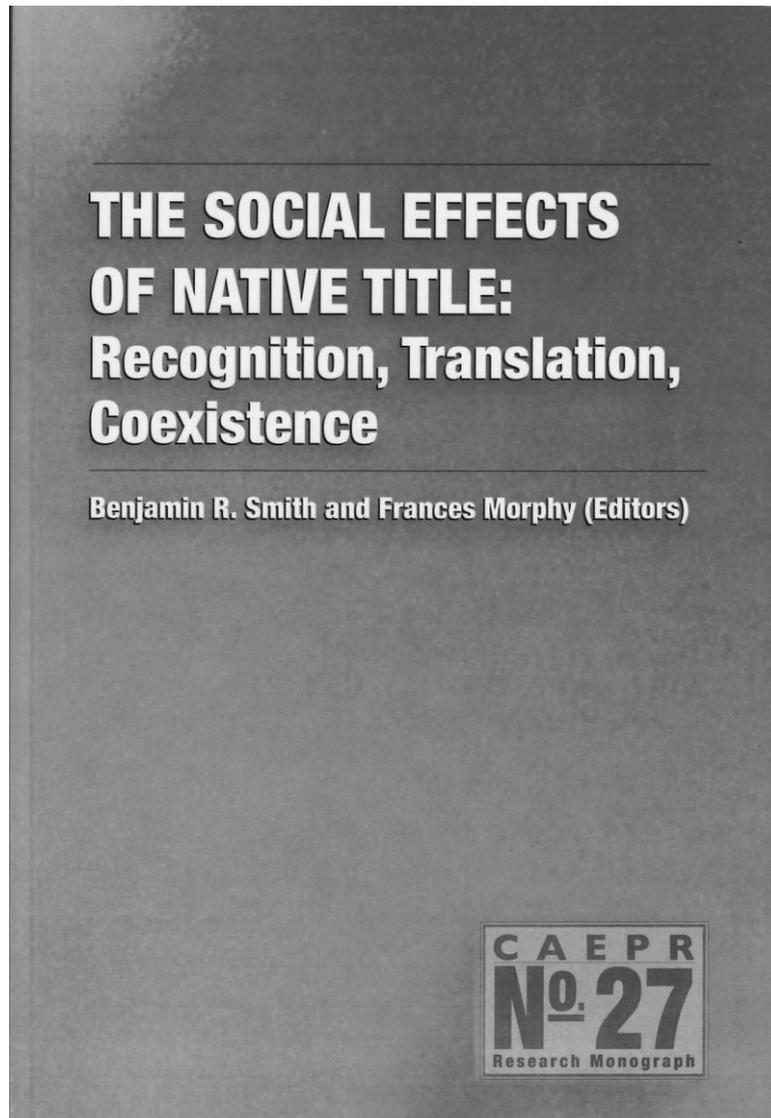


BOOK REVIEW



**The Social Effects of Native Title: Recognition,
Translation, Coexistence**
Editors: Benjamin R. Smith and Frances Morphy
CA.E.P.R.
ISBN: 9781921313516

Reviewed by Alison Vivian*

Federal Minister for Indigenous Affairs, Jenny Macklin has heralded the federal government's intention to review the operation of the native title system, which she says is overly complex and exceedingly slow, with processes that defy comprehension, cost millions and leave claimants without the best possible representation. Previous amendments of the Native Title Act (NTA) have not been to the benefit of native title claimants and it is to be hoped that Minister Macklin's reforms remained centred on delivering justice.

The collection of papers edited by Smith and Morphy provides an instructive starting point for any genuine analysis of the limitations of the native title system needed to identify fundamental reform. A dominant message from the collection is that native title cannot be considered in isolation from a broader social context. As Smith observes, there has been a tendency to conceive of native title as a legal process focused on systems. While not painting an optimistic picture, Smith argues as a 'total social fact', a broader investigation of the social effects of native title points towards ways in which social justice may be achieved and what forms social justice might take.

The collection reflects three interrelated themes of recognition, translation and co-existence and illustrates the multifaceted and complex nature of native title. A number of contributors describe a 'recognition space' where native title is situated in the overlap of Indigenous law and Australian law. This necessarily requires a translation from Indigenous 'relations' defined by traditional law and custom to native title rights and interests recognisable by the common law. Translation requires comparison of differing cultural forms, which the editors note almost always involves transformation. This translation/transformation is illustrated in the court process itself which Morphy describes in part as 'enforced commensurability'. Lahn also illustrates forcible transformation, where native title claimants on the island of Warraber in the Torres Strait were forced to recharacterise their group identity from that which they considered to have legitimacy to suit the requirements of native title

Recognition that does not reflect the realities of contemporary Indigenous relations is critiqued in the collection. As the Yorta Yorta, Larrakia and Noongar are only too aware, the narrow interpretation of the NTA has

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created technical and legalistic burdens of proof leading to limited scope for recognition, especially for Indigenous peoples in areas heavily impacted by colonisation. The collection criticises the native title system's inability to foster a sophisticated understanding of indigenous identity (see Weir & Ross) and inability to adequately deal with cultural change, which has largely been equated with a loss of identity or authenticity (see Barcham). Thus, explicit recognition of the Larrakia as a vibrant, dynamic society embracing its history and tradition was not sufficient to gain recognition under the NTA (see Scambary). Ironically, while the recognition of native title is premised on the continuation of traditional laws and customs, Claudie and Glaskin identify the difficulties in framing structures that reflect proper Indigenous governance.

One devastating social impact of native title is the level of conflict it has generated that is illustrated in a number of papers. Claudie focuses on one of the most vexed situations in native title claims, where one group sees itself as the legitimate traditional owners, marginalised by other claimants that it considers to have a "questionable connection to land". Claudie portrays accommodation of the state government and other stakeholders' interests to the detriment of traditional owners' rights. Similarly, Foley criticises the NSW land rights system that he describes as resulting in a 'land grab' by 'usurpers' to the detriment of traditional owners and custodians.

Other papers reflect on conflict between claimants and third parties, whether the hostile response of pastoralists to native title claims in the Cape York Peninsula and Northern Kimberly with quite different outcomes (see Smith and Redmond) or the backlash against the Larrakia native title claim over Darwin (see Scambary). Scambary describes political manoeuvrings that sought to discredit the Larrakia and impacted on the relationship between the Larrakia and itinerant groups which had formerly been harmonious.

Thankfully the collection does not deliver entirely bad news. The optimism that initially surrounded native title in Australia may have dissipated and native title may be "implicated in the continuing dynamics of colonisation", as Lahn describes it. Nonetheless, the collection also emphasises the impact of native title in raising sovereign consciousness. While the editors are correct to observe that, from the perspective of the courts, to enter into a native title claim is to submit to the state's authority, the assertion of traditional authority enlivened by the native title process (regardless of the result) cannot be ignored.

Weir and Ross identify the Yorta Yorta as exemplifying that failure to achieve a determination of native title does not destroy traditional owners' inherent authority and relationship to country. Determined to circumvent the native title system, the Yorta Yorta never doubted their legitimacy as traditional owners, which has now been acknowledged, including, ironically by some who opposed their claim. Similarly, Morphy observed that the Yolngu have never accepted that their sovereignty has been eclipsed by colonisation. In the Blue Mud Bay native title hearing, the Yolngu consciously adopted strategies to insert their discourse about sovereignty, even potentially to their detriment. More pragmatically, native title may provide impetus to exercise

self-determination through agreements and partnerships outside the native title framework.

This collection of papers provides a valuable exposition of the limitations of the native title system. It is easy to forget that the NTA was enacted to address the dispossession of Indigenous peoples, and was intended to rectify the consequences of past injustices and to ensure that Indigenous peoples received full recognition and status within Australian society. Importantly, by focusing on the broad social effects of native title, this collection situates native title in a context of social justice that indicates the urgent need for fundamental overhaul.