

Land, Rights, Laws: Issues of Native Title

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The common law recognition of native title in the High Court's Mabo decision in 1992 and the Commonwealth Native Title Act has transformed the ways in which Indigenous peoples' rights over land may be formally recognised and incorporated within Australian legal and property regimes. The process of implementation has raised a number of crucial issues of concern to native title claimants and other interested parties. This series of papers is designed to contribute to the information and discussion.

*The range of questions about native title tends to increase, rather than subside, as our depth of experience with these matters develops. Basic issues about native title are still to be resolved and, as Basten concludes, the underlying principles of Australian property law are being reconsidered. This paper is arranged thematically around connection to country, content, extinguishment, and exclusive possession. National parks and reserves are commented upon. At the time of writing, two of the five cases discussed were reserved awaiting judgement: *The Commonwealth v Yarmirr*,¹ which has subsequently been handed down; and, *Ward v Western Australia*,² also known as the Miriwung/Gajerrong Case. *Anderson v Wilson*³ was argued subsequently and is presently reserved. Special leave has been refused in DPP Reference No. 1,⁴ and granted in *Yorta Yorta*.*

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RECENT DEVELOPMENTS IN NATIVE TITLE LAW AND PRACTICE: ISSUES FOR THE HIGH COURT

John Basten QC

The purpose of this paper is to provide some background to some of the specific issues critical to native title and perhaps to set a tone of uncertainty as to the present state of the law. The issues which I am to address are those which are either presently before the High Court or are on their way there. We are in

a position to identify the questions and suggest possible answers – the authoritative answers will no doubt be forthcoming, in some instances, later this year.

Connection with land

Although there may still be one or two pre-Act claims still before the courts, I think it is true to say that every claim lodged after the commencement of the *Native Title Act 1993* (Cth) (NTA) has been lodged under that Act and that even, where there were pre-existing *Mabo* style claims, in each case fresh claims were lodged under the Act.

Of course, it does not follow that all issues relating to native title will be decided under the NTA. *Yanner v Eaton*⁵ was an example of a case which arose otherwise. That case involved a prosecution of Murrandoo Yanner for taking two estuarine crocodiles in a creek on the southern coast of the Gulf of Carpentaria. He was charged with killing the reptiles without an appropriate authority given under the *Fauna Conservation Act 1974* (Qld). He defended himself on the basis that he was exercising a native title right and, pursuant to s.211 of the NTA, was entitled to do so without such authority. His claim was upheld by the magistrate and, ultimately, the High Court held there was no legal error in that result.

This is not, of course, the first case in which important native title issues have arisen through criminal proceedings. *Mason v Tritton*⁶ provides another example in New South Wales. *DPP Reference No. I* provides an example in the Northern Territory and almost every Canadian case concerning fishing rights has arisen in this way. Indigenous people practice their traditional laws and customs and if challenged by prosecution then defend their right to do so in the criminal courts.

However, the point I was seeking to make is that, for one reason or another, native title holders have not, generally speaking, sought to run native title claims in state courts under the common law. Of course, to the extent that the common law has been varied by the operation of the NTA, such a course would not vary the substantive law to be applied. Indeed, in some circumstances it would be positively detrimental, because the reversal of extinguishment which may be achieved under ss.47A and 47B will only arise in relation to applications made under the NTA.

The result is that, in order to establish native title, a claimant must satisfy the definition in s.223 of the NTA and obtain a determination pursuant to s.225. So where does that leave the judgment of Brennan J in *Mabo v Queensland (No. 2)*?⁷ Although one might expect that the focus of what is needed to establish native title might focus on the statutory definition, the Courts almost invariably resort to the judgment of Brennan J in *Mabo* in order to find out what native title is. To the extent that the concepts and terminology in s.223 appear to reflect to *Mabo*, that is understandable. The correct approach is, nevertheless, surely to start with the statutory definition – to do otherwise is at least conducive to error and it may lead to a wrong emphasis.

This problem lies at the heart of the special leave application in *Yorta Yorta*. The applicants assert that the trial judge erred by focussing on the need to establish continuous connection between a relevant community and particular land from the date of acquisition of sovereignty by the British Crown to the present time. Any gap in the evidence may demonstrate loss of traditional connection. Rather, it is argued that the proper approach is to ask whether the claimants continue to acknowledge traditional laws and observe traditional customs and, if they do, whether they have a connection with particular land or waters by those laws and customs. If that is established, the rights and interests existing under their traditional laws will be of a kind recognised by the common law so long as they are not contrary to principles which underlie the common law and which would preclude enforcement in the courts. In short, the trial judge and the majority in the Full Court (Chief Justice Black dissenting) were too ready to

assume that the extensive dispossession of Aboriginal people in the Murray Valley during the 19th century had resulted in the loss of all traditional law and custom. Further, the Court too readily assumed that an assertion in a petition prepared by a missionary in 1881 and avowing a wish to adopt European ways and develop agricultural pursuits should be relied on as the basis for concluding that traditional laws and customs had then been abandoned. These concerns are given further credence by Merkel J in a recent decision concerning a ceremonial ground in Broome, a case reported as *Rubibi Community v Western Australia*.⁸

The operation of s.223 was also, of course, central to the *Yarmirr* proceedings. Ever since its success in the *Seas and Submerged Lands Case* in 1975,⁹ the Commonwealth has been convinced not only that the boundaries of colonies ended at the low-water mark, but that the common law had no operation below the low-water mark. Accordingly, applying s.223(1) of the *Native Title Act*, the Commonwealth argued that the common law could not have recognised native title in the seas beyond the low-water mark. Accordingly, the declaration in s.6 of the NTA that:

This Act extends ... to the coastal sea of Australia and to any waters over which Australia asserts sovereign rights under the *Seas and Submerged Land Act 1973*

were empty words. The Act did not itself extend the common law to the territorial seas, where, accordingly, native title was unknown.

That traditional laws and customs extended to the seas was never questioned; that European people have enforceable rights in relation to the territorial seas in Australian courts was never questioned; nevertheless, it was said that the modern non-discriminatory framework failed to accord Aboriginal people enforceable rights in Australian courts.

From that absolutist position, the Commonwealth maintained a number of alternative positions to which it retreated one at a time. However, when the Commonwealth's arguments were unanimously dismissed, it appealed to the High Court.

Mary Yarmirr and the other claimants also appealed from the decisions in the Federal Court. They were, of course, happy that the Court had recognised their native title; they were not pleased, however, with what they viewed as a compromise decision which rendered their rights under traditional law impotent in the face of the so-called public right to fish. Thus a right which had been developed in feudal England under Magna Carta as a right to be exercised against an attempt by the Monarch to assert exclusive rights of fishing could be called in aid by the government of the former colonies of Australia, not against the British Crown, but against the Indigenous inhabitants. In *Mabo* the Court said:

It would be a curious doctrine to propound today that, when the benefit of the common law was first extended to Her Majesty's indigenous subjects in the Antipodes, its first fruits were to strip them of their right to occupy their ancestral lands.¹⁰

Apparently at a lesser level of barbarity was the dispossession 'of land parcel by parcel as British settlement expanded.'¹¹ That result was achieved lawfully because of the racially discriminatory principle of the common law that 'Crown tenures are protected against impairment by subsequent Crown grant' but other forms of title are not.¹² It took the enactment of the *Racial Discrimination Act 1975* (Cth) to override that remaining block to the common law protection of native title.

Against this background, it may not be surprising that there remains doubt as to the extent to which native title will be recognised in the seas. To those people whose sustenance and cultural integrity comes from their relationship with their sea-country, anything less than recognition of their traditional rights to

control access to and use of the resources of the seas will provide less than justice. Nevertheless, any form of recognition of traditional fishing rights carries with it a degree of political power which will increase as the resources of the seas diminish. There is growing recognition that even domestic and recreational fishing requires regulation. There is also mounting evidence that current levels of exploitation are having an impact on traditional fishing. Even a co-existing traditional fishing right may be protected against impairment. If governments do not give native title holders with traditional fishing rights a say in the management and preservation of the resources of the sea, there is likely to be further litigation.

Content of native title

In order for native title rights and interests to be recognised, the rights must arise under traditional law and custom. They need not be rights in land, so long as they qualify as rights or interests 'in relation to' land or waters. The extent of these rights has been identified as an issue in the *Miriuwung/Gajerrong Case* because the majority in the Full Court removed from the determination made by the trial judge reference to:

The right to maintain, protect and prevent the misuse of cultural knowledge of the common law holders associated with the determination area.¹³

It is undoubtedly true, as the majority noted,¹⁴ that traditional laws and customs, including the spiritual and religious beliefs which are integral to them, may subsist despite the extinguishment of title in relation to particular land. However, it does not follow that, where native title has not been extinguished, manifestations of the connection provided by traditional law and custom cannot be protected. The most obvious example of such a manifestation may be seen in the performance of secret and sacred ceremonies and in artworks, for example on rock, which constitute an essential expression of spiritual or cultural knowledge associated with the land. Defacement or inappropriate viewing or reproduction of such material may significantly diminish the law and customs themselves.

A particular instance of the connection between religious knowledge and protection of sites and land is the religious knowledge which by traditional law may only be revealed to initiated men. For the Miriuwung and Gajerrong people knowledge of this kind concerns the language, travels and activities of Ngarankani Beings, is possessed in narrative and song cycles, measures the boundaries of territory and defines the significance of particular places, the physical features of such places and the spiritual presences associated with such places. Protection of such religious knowledge and compliance with the restrictions imposed by traditional law on the revelation of it is essential to maintaining the significance and essential character of particular places. Revelation of the knowledge in a manner that is unlawful according to traditional law would destroy the significance and character of sites and, according to the beliefs of the Aboriginal people responsible, cause damage to the land.

Accordingly, the protection of such knowledge – whether described as religious, spiritual or cultural – is central to the protection of land and places on the land. It is also central to the acknowledgement of traditional laws and observance of traditional customs under which the native title rights and interests are possessed. To protect the land and places on the land, knowledge that forms an essential part of the traditional laws and customs must also be protected. While the determination included reference to 'the right to maintain and protect places of importance under traditional laws, customs and practices in the determination area',¹⁵ thereby recognising the underlying principle, the right so defined is manifestly inadequate to protect secret/sacred narratives, song cycles and ritual which in the case of the Miriuwung and Gajerrong people is a fundamental aspect of their traditional law and custom and of their connection with their land.

This matter was dealt with by the majority in the Full Court in a brief passage which commenced with an entirely different issue. The passage appears to contain two main thoughts. The first is that the right in question 'is a personal right', presumably being a right which can be enforced by appropriate common law remedies. The second element in the reasoning is that the right is not a right 'in relation to land', in the sense that it is not 'a burden on the radical title of the Crown'.¹⁶

Each of these propositions may be seen to be infected by an erroneous understanding of the concept of native title. First, Brennan J's description of native title expressly recognised that there could be title to particular land 'whether classified by the common law as proprietary, usufructuary or otherwise'.¹⁷ Accordingly, it is not sufficient to dismiss a particular element of title as being merely a 'personal' right. Secondly, it is an empty gesture to purport to recognise the religious and spiritual dimension of the relationship of Aboriginal people with their land and yet dismiss the right to protect the very core of that relationship as something other than 'a right in relation to land'. Unless Aboriginal people have rights possessed under their traditional laws and customs, and 'by those laws and customs, have a connection with the land or waters', they have no native title.¹⁸ To deny protection to a key element of that 'connection' is to belittle, if not destroy, the very relationship with the land which the common law recognises and protects. It is also to ignore the protection given to those interests under s.9 of the *Racial Discrimination Act*. The High Court has expressly recognised on two occasions that the rights protected by the *Racial Discrimination Act* may be rights which have no counterpart in domestic law.¹⁹ The Federal Court's approach also fails to recognise that native title may involve interests which are *sui generis*²⁰ and that:

... native title, being recognised by the common law (though not as a common law tenure), may be protected by such legal or equitable remedies as are appropriate to the particular rights and interests established by the evidence, whether proprietary or personal and usufructuary in nature and whether possessed by a community, a group or an individual.²¹

There is clear authority for the view that the right to come onto land for ceremonial purposes is a native title right,²² even if 'all other rights in the land belong to another group'.²³ But ceremony may require the exclusion of men or women or the uninitiated, including non-Aboriginal people. In this respect, protecting cultural or spiritual knowledge may be seen as incidental to conducting ceremonies, hence it is not necessary for it to be identified as a separate right. This, however, was not the reasoning of the majority in the Full Court.

A related issue also arises in relation to *DPP Reference No. 1*. In that case, the defendant had applied reasonable force, in accordance with traditional Aboriginal law governing the rights of traditional owners of land, to punish an act which was wrongful under that law. The question raised by the case is whether the honest belief of the defendant that he had a right to conduct himself as he did could constitute a defence under the *Criminal Code Act* (NT).²⁴ That would only be the case if the right was one which was recognised by the civil law in force in the Northern Territory, including by virtue of s.10 of the *Racial Discrimination Act*. This in turn raises a question as to how far the *Racial Discrimination Act* may go in providing equal protection under the law to those who observe traditional law and custom.

In this context, it is worth noting the reluctance of the High Court in recent judgments to place weight upon developments in North America and particularly Canada. Although reference was made to the Northern American jurisprudence in *Mabo*, the Court has more recently been at pains to emphasise the differences rather than the similarities of colonisation in Canada and the USA. In relation to Canada, the two primary bases of distinction are the existence of numerous treaties between the British and the

Indigenous inhabitants. Second, there has been since 1982 a specific constitutional provision recognising and affirming 'existing Aboriginal and treaty rights of the Aboriginal peoples of Canada'. These rights arguably extend beyond native title rights as recognised and protected under Australian law.

Nevertheless, these differences should not be over-emphasised. For example, in British Columbia treaties were the exception rather than the rule. Accordingly, at least in that province, one point of departure from Australian experience disappears. It is therefore interesting that a recent decision of the Supreme Court of British Columbia considered the extent of the protection given by s.35 of the Constitution in relation to a treaty concluded on 4 August 1998 by the Nisga'a Tribal Council. The question concerned the right of the provincial and national governments and the Council to make provision for a limited form of self-government which, it was argued, was constitutionally protected by s.35(1). In upholding the validity of the treaty, Williamson J held:

The right to Aboriginal title 'in its full form', including to right for the community to make decisions as to the use of the land and therefore the right to have a political structure for making those decisions, is, I conclude, constitutionally guaranteed by s.35(1).²⁵

His Honour echoed the comments of Lamer CJC in *Van der Peet*:

In my view, the doctrine of Aboriginal rights exists, and is recognised and affirmed by s.35(1), because of one simple fact: when Europeans arrived in North America, Aboriginal peoples, were already here, living in communities on the land, and participating in distinctive cultures, as they had done for centuries. It is this fact, and this fact above all others, which separates Aboriginal peoples from all other minority groups in Canadian society and which mandates their special legal, and now constitutional, status.

More specifically, what s.35(1) does is provide the constitutional framework through which the fact that Aboriginals lived on the land in distinctive societies, with their own practices, traditions and cultures, is acknowledged and reconciled with the sovereignty of the Crown. The substantive rights which fall within the provision must be defined in light of this purpose ...²⁶

The precise differences between that which is protected constitutionally in Canada and that which is protected under the *Racial Discrimination Act* and the NTA in Australia deserve close attention. Differences there may be, but the similarities are equally important.

Questions of extinguishment

Late in year 2000 I commented to a senior official in ATSIC that there might need to be a rethinking of the ways in which native title moneys were expended once the High Court had resolved the major outstanding issues in relation to extinguishment. I had in the mind the decision the Court was likely to deliver in the *Miriuwung/Gajerrong Case* later this year. I am now less optimistic as to the extent of the issues which are likely to be resolved.

This concern has relevance in relation to *Anderson v Wilson* as well. That case was considered by three members of the High Court on a special leave application on 13 October 2000. The Court, comprising the Chief Justice and Justices McHugh and Kirby, referred the application to a Full Court for hearing as on the hearing of an appeal.

I took the view at the time that the Court would refuse special leave for one of two reasons. The first was that in substance, though not in form, this was merely an attempt to re-open *Wik*. Second, to the extent that further guidance was needed in relation to the effect of pastoral leases, it was likely that the *Miriuwung/Gajerrong Case* would provide the appropriate vehicle for that exercise. I was apparently wrong on the first count. The possibility that pastoral lease issues may not be adequately resolved in *Ward v Western Australia* therefore becomes a matter of significance in this context.

The problem with *Ward* is that the Full Court of the Federal Court failed to apply the relevant provisions of the NTA, as amended in 1998. In relation to Western Australia, it did so deliberately, on the basis that the nature of the appeal to that Court meant that the relevant law which was that applicable at the date of judgment given by the trial judge. At that time, Western Australia had not enacted complementary legislation to the *Native Title Amendment Act 1998* (Cth). Accordingly, the critical provisions relating to extinguishment, now found in Part 2, Division 2B of that Act, were not in force in WA. The High Court had, in a Family Court appeal, already expressed a rather different view of the nature of an appeal to the Full Court of the Federal Court.²⁷ Assuming, as seems likely, that the High Court will affirm its different view of the nature of a Federal Court appeal, much of the matter may be referred back to the Full Court for reconsideration in accordance with the principles set out in the NTA.

In relation to the law applicable in the Northern Territory, the Full Court appears to have worked on the same basis as in relation to Western Australia, without noting that the Northern Territory had passed complementary legislation prior to the judgment of the trial judge.

The principal issue for determination under Division 2B was the effect of a non-exclusive pastoral lease on native title rights and interests. On one view, the result of applying the NTA would simply have been to drive the Court back to the common law. However, s.23G is a complex provision and its meaning is by no means clear. The High Court seemed unattracted by the proposition that it should examine the operation of this provision, without any assistance from the Courts below, and then apply its conclusions to matters which had not been so considered below.

On the other hand, the Full Court had given detailed consideration to the effect of Western Australian legislation, including a reservation in favour of the Aboriginal inhabitants in terms which restricted the reservation to land which were not enclosed or improved. The Full Court held that ‘enclosed’ meant ‘fenced’.

As was noted by the majority in *Anderson v Wilson*²⁸ the purpose of fencing can be important. Fencing may simply be designed to prevent cattle from straying beyond the boundaries of a property. Alternatively, fencing may be intended to prevent cattle having access to parts of the property which are set aside for cultivation or for other purposes, such as a water supply for the pastoralist. In other circumstances, fences may be designed to exclude people as well as cattle. To the extent that the leases envisaged boundary fencing, it would have been quite inconsistent with the purpose of the reservation, which was to allow Aboriginal natives to enter upon pastoral lands to allow boundary fencing to result in the extinguishment of any right of Aboriginal people to use the land. Second, the concept of ‘improvement’ must also be read in the statutory context in which it arises. The rights of others to depasture stock on the land were always qualified by reference to unimproved land. No stock can be depastured without access to water. It is therefore unlikely that the land surrounding and permitting access to a dam or artesian bore was intended to be treated as ‘improved’ land.

It was also clear that the concept of ‘improvements’ in the various Western Australian Land Acts included reference to fencing. However, it is apparent that a boundary fence around a property would not result in the whole property becoming ‘improved’ land.

There must also be an inter-relationship between the construction of these terms and the effect of the reservation in favour of Aboriginal people and the other reservations in the leases. Thus, the broader the impact of the limitation on the geographical operation of the reservation, the less the likelihood that there was any intention to extinguish native title in areas of land not subject to the reservation.

Properly understood the words 'unenclosed and unimproved parts of the land' in the reservation in s.106(2) of the *Western Australia Land Act 1933* should be read, not as alternatives, but as an hendiadys (two words used, but one thing meant), supporting the view that the reservation was directed to parts of the land internal to the lease rather than the totality.

These are absolutely critical issues in Western Australia, where vast areas have been turned over to pastoral leases and boundary fenced. It is possible that the Court will determine the correctness of the Full Court's approach to these issues.

A second major issue arising in *Ward* was the manner in which the Full Court dealt with the Ord River Project. Putting to one side questions arising from the nature of the statutory resumption provisions, the relevant principles were those applied by Brennan J in considering the effect of a reservation or appropriation of land for government purposes. Again, a problem arose from the failure of the Court to apply the terms of Part 2B of the NTA. Importantly, the point which required resolution was whether the statutory extinguishment provisions, by reference to the effect of public works, constitute a code in relation to extinguishment by appropriation for government purposes. Again, this is a matter which may not be finally determined by the Court.

Third, there were issues relating to the ownership of minerals and the right to mine. One question was whether the effect of a reservation to the Crown of rights to minerals, together with a statutory declaration that the Crown owned minerals in the land, constituted a form of beneficial ownership or merely a radical title sufficient to support the grant of mineral leases. On one view, the answer to that question was of little practical significance because the grant of a mineral lease, in a non-discriminatory manner, would validly dispose of the minerals rights. However, if native title holders owned the minerals, compensation might be payable for the sale of their minerals.

It is quite possible that the High Court will deal with this issue, as, at least in relation to Western Australia, the point was fully argued and there was no real reason to suppose that Division 2B would directly affect the matter.

Finally, the case raised a major issue as to the effect of the grant of a mining tenement in Western Australia.

It is well established that the term 'mining lease' or 'mineral lease' is an unusual use of the word 'lease'. As noted by Lord Cairns in *Gowan v. Christie*:

What we call a mineral lease is really, when properly consider, a sale out and out of a portion of land. It is liberty given to a particular individual, for a specific length of time to go into and under the land, and to get certain things there if he can find them, and to take them away, just as if he had bought so much of the soil.²⁹

It would follow that a grant of a valid mineral lease will extinguish native title in the minerals in fact recovered and removed.

It is also clear that a mining operation will cause damage to the land (in varying ways and to various degrees depending upon the nature of the operation) and will interfere with the possession or right of occupation enjoyed by a person holding a prior existing interest in the land. Consistently, legislation

permitting the grant of mining tenements on private land provides for compensation for damage and interference, though not typically compensation for removal of the mineral.³⁰

Accordingly, it is clear that the grant of a mining tenement, while providing rights which may be inconsistent with any existing underlying tenure to the land, does not extinguish that tenure. That being the case, there is no reason why the grant of such a tenement should extinguish existing native title rights in the land.

The argument to the contrary appears to be based on one of two propositions, namely that:

- the mineral lease conferred a right of exclusive possession on the miner; and
- the nature of mining operations would preclude the contemporaneous exercise of native title rights.

The use of the concept of ‘exclusive possession’ as a touchstone of extinguishment of native title is reflected in Division 2B of Part 2 of the NTA. However, the inappropriateness of that concept as one of general application has been noted on more than one occasion.³¹ Indeed, that it should not be treated as a universal criterion is recognised by the NTA itself. Thus, in seeking to ‘confirm’ past extinguishment of native title by a lease that confers a right of exclusive possession over particular land or waters, the NTA expressly excludes a mining lease.³² That is consistent with the policy underlying the validation of past acts, contained in Part 2 Division 2 of the NTA, which identifies mining leases as Category C past acts,³³ the effect of which was subject to the non-extinguishment principle.³⁴ That result was preserved by the absence of mining leases from s.23B. The further validations effected by Division 2A in relation to ‘intermediate period acts’ followed the same scheme, thus expressly providing that mining leases granted after 1 January 1994 but on or before 23 December 1996 were to be validated, but were to be subject to the non-extinguishment principle in determining their effect on native title.³⁵ In other words, in any case where a mining lease may have been granted in respect of land subject to native title and may, for that reason, have been to any extent invalid, when validating the tenement, the Parliament has provided that there shall be no extinguishment of native title. Similarly, in relation to mining tenements which did not require validation, the Parliament expressly excluded them from the category of acts which it has declared to have extinguished native title.

While it may be argued that, in relation to tenements which did not require validation, the Parliament has left the effect of such tenements on native title to be determined by the Courts, on a case by case basis, the conclusion of the majority in the Full Court that such tenements did routinely extinguish native title is anomalous. It is anomalous not merely because it provides an unjustifiable differentiation between those tenements requiring validation and those which do not, but also because it produces an effect which can hardly have been intended by the relevant legislatures. It would be curious to argue that an interest which was well understood to impair, but not to extinguish, pre-existing interests conferred by the Crown should have been intended to extinguish allodial interests, the existence and incidents of which were not in contemplation. The result would be discriminatory and would serve no legitimate purpose under the common law.

The error on the part of the majority in the Full Court in considering this matter may have resulted from the failure to distinguish properly between the effect of a mining tenement in relation to, first, the minerals and, secondly, the area of land the subject of the tenement. In relation to the latter consideration, the conditions of mining leases are strongly suggestive of an absence of intention in the grant of a mining tenement to damage or destroy any Aboriginal heritage and a clear intention to ensure that any disturbance to the existing vegetation and natural land form is restored prior to completion of the lease. Such an approach fails to demonstrate any plain and clear intention to extinguish native title.

Exclusive possession – revisited

One issue which clearly arises in numerous ways in relation to native title is the meaning of the term ‘exclusive possession’. As was pointed out by the Chief Justice and Sackville J in *Anderson v Wilson*,³⁶ the concept of exclusive possession was developed by the common law as a means of distinguishing a tenant from a licensee. Its application in relation to native title is less apparent and has given rise to considerable confusion. Its genesis may in part be the declaration in *Mabo* that the Meriam people ‘are entitled as against the whole world to possession, occupation, use and enjoyment of the lands of the Murray Islands’.³⁷ In *Wik*, the questions formulated by the trial judge included the question:

Does the pastoral lease confer rights to exclusive possession on the grantee?³⁸

Various members of the High Court commented on the awkwardness achieved by asking a question in these terms. The real question was whether the grant of the pastoral lease demonstrated, in its statutory context, a plain and clear intention to extinguish native title. That, in turn, may have been formulated in terms of a question enquiring whether the pastoralist had an unqualified right to exclude native title holders from the area of the lease. If he or she had such a right, then it could be inferred that the grant of the lease was inconsistent with the continued exercise or enjoyment of native title rights (at least those referred to by Brennan CJ as accessory rights) and at least for the period of the lease. Despite their concerns, their Honours answered the questions in the terms asked. That terminology was then picked up by the drafter in Part 2, Division 2B of the *Native Title Act* by use of the defined term ‘previous exclusive possession act’.³⁹ One such act was an exclusive pastoral lease, which was defined as a pastoral lease that:

confers a right of exclusive possession over the land or waters covered by the lease.⁴⁰

As a result, the NTA requires that questions continue to be formulated in those terms. However, a finding that a lease is an exclusive pastoral or agricultural lease, will result in the permanent extinguishment of native title over the land. Accordingly, the concept of ‘exclusive possession’ must be read in this statutory context.

The problem can arise most starkly by noting the exclusion from the definition of previous exclusive possession acts of mining leases.⁴¹ This provision envisages that a mining lease may be within the category of leases conferring rights of exclusive possession, and yet not extinguish native title for the purposes of Division 2B. What is the consequence at common law? If s.23B is not a code as to extinguishment by exclusive possession acts, then presumably Parliament accepted at least the possibility that some tenures conferring exclusive possession might not extinguish native title.

These are questions that remain to be resolved.

National parks and reserves

There are numerous other issues remaining to be resolved, some of which arose in *Ward* and may or may not ultimately be addressed by the High Court in its forthcoming judgment. Issues of some practical concern to native title claimants and their lawyers include the wide-spread need to accommodate within a native title determination co-existing non-native title rights. For example, land of significance to native title holders is often found within national parks or within areas which are proposed to be national parks. In Western Australia the state government has sought to create national parks since the commencement of the NTA, on the apparent assumption that they will have no impact on existing native title rights and interests. In other cases, including the Full Court judgment in *Ward* itself, it has been assumed that elements of native title may be permanently extinguished by the creation of a national park. Somewhat curiously, the Full Court was apparently of the view that a national park would impact on native title in the same way, or to a lesser extent than, the grant of a pastoral lease.

A national park is not a tenure held by a private person from the Crown. Nor is it land appropriated to government purposes which is developed in a manner inconsistent with the continued exercise or enjoyment of native title. But the creation of a national park does appear to create public rights, pursuant to which non-native title holders have access, as of right, to the land. Does such a public right impair what might otherwise be a right to exclusive possession held by native title holders? Or is it simply a right created by law to which an otherwise exclusive native title is subjected.

The answer to such questions may have symbolic importance for native title holders; it may also have practical significance. For example, a bald statement that native title holders do not have exclusive possession has quite different legal consequences from the proposition that native title holders have exclusive possession, subject to certain specified rights in others. Such limited rights may, for example, permit access only for a particular purpose. Where that purpose is exceeded or abandoned, the person seeking to assert a right of access may become a trespasser.

Conclusion

There is no doubt that native title has already led to a fresh consideration of many principles underlying property law in Australia. It will continue to do so, no doubt, for some time. What is less clear is the extent to which it will provide tangible benefits to the majority of Indigenous Australians. That for many the loss of traditional law and custom is legally complete was recognised when the NTA commenced. The creation of the Indigenous Land Fund was a partial response to that reality. There is, I fear, a false hope held by some optimists, that maintaining one's cultural identity is sufficient to establish a basis from which to assert native title. In some cases that will be justified, in many, and sadly, it will not. Nor should anyone underestimate the burden (to say nothing of the cost) of proving native title in a contested proceeding. In the absence of government-based negotiations, many supportable claims will fail simply for want of resources.

In the end, as many Canadian experts have stated, the complexity of these issues will only become manageable once governments and Indigenous groups sit down around the table with other interested parties and thrash out appropriate agreements to allow for regulated co-existence.

¹ *Yarmirr v Northern Territory* (1998) 82 FCR 533 (Olney J) and *Commonwealth v Yarmirr* (2000) 168 ALR 426 (Full Court).

² (1998) 159 ALR 483 (Lee J) and (2000) 170 ALR 159 (Full Court).

³ (2000) 97 FCR 453.

⁴ (2000) 134 NTR 1.

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- ⁵ (1999) 73 ALJR 1518.
- ⁶ (1994) 34 NSWLR 572.
- ⁷ (1992) 175 CLR 1.
- ⁸ [2001] FCA 607 (29 May 2001).
- ⁹ (1975) 135 CLR 337.
- ¹⁰ (1992) 175 CLR 1 at 39 (Brennan J).
- ¹¹ See *Western Australia v Commonwealth* (1995) (the 'Native Title Act Case') 183 CLR 373 at 431.5.
- ¹² See *Wik Peoples v Queensland* (1996) 187 CLR 1 at 84.7 (Brennan CJ).
- ¹³ (1998) 159 ALR 483 at 640 (Lee J).
- ¹⁴ (2000) 170 ALR 159, para 666.
- ¹⁵ (1998) 159 ALR 483 at 639 (Lee J).
- ¹⁶ (1998) 159 ALR 483 at 666.
- ¹⁷ *Mabo [No. 2]* 175 CLR 1 at 170, para 6.
- ¹⁸ *Native Title Act* s.223(1)(a) and (b).
- ¹⁹ See *Mabo v Queensland* (1988) 166 CLR 186 and *Native Title Act Case* (1995) 183 CLR 373, 436-437.
- ²⁰ *Mabo [No. 2]* 175 CLR 1 at 89.5 (Deane and Gaudron JJ).
- ²¹ *Mabo [No. 2]* 175 CLR 1 at 61.3. See also at 88-89 (Deane and Gaudron JJ).
- ²² See, for example, Gummow J in *Wik* 187 CLR 1 at 169.4.
- ²³ See Toohey J in *Mabo [No. 2]*, 175 CLR 1 at 190.4, referring to the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth).
- ²⁴ Code, s.30(2).
- ²⁵ *Campbell & Ors v Attorney-General (British Columbia) & Ors* (2000) BCSC 1123, para 137.
- ²⁶ *Ibid*, para 167.
- ²⁷ See *CDJ v VAJ* (1998) 197 CLR 172 at paras 100ff.
- ²⁸ (2000) 97 FCR 453 at para 129.
- ²⁹ (1873) LR 2 Sc & Div 273, 283. Considered in *Wade v New South Wales Rutile Mining Co* (1969) 121 CLR 177 at 192-193. See also *Wik Peoples v Queensland* (1996) 187 CLR 1 at 117 and *Newcrest Mining v Commonwealth* (1997) 190 CLR 513 at 616 cf. majority of the Full Court in *Ward* at paras 559-568.
- ³⁰ For a summary of the position in Western Australia and the Northern Territory see *Halsbury's Laws of Australia*, volume 21, paras 170-205-210 and 170-505-545.
- ³¹ See, for example, *Mabo [No.2]* 175 CLR 1 at 207 and 212-213 per Toohey J.
- ³² Section 23B(2)(c)(viii).
- ³³ Section 231.
- ³⁴ Section 15(1)(d).
- ³⁵ See ss.22B(d) and 232D.
- ³⁶ 97 FCR 453, par 45.
- ³⁷ *Mabo [No.2]* 175 CLR 1 at 217.
- ³⁸ See question 1B(b) at 187 CLR 66.1.
- ³⁹ Section 23B.
- ⁴⁰ Section 248A.
- ⁴¹ Section 23B(2)(c)(viii).

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