jottings on the bar

Mabo (No 2) to Yorta Yorta - turning the full circle

By Raelene Webb QC*

Having a national native title practice means living out of a suitcase. Since moving into my new home almost three months ago, I have spent no more than ten nights in Darwin, the longest continuous spell being about five days.

Over the past few years, whilst appearing as counsel for the Commonwealth, State and Northern Territory governments in various native title matters from first instance through to the High Court, I have lived and worked out of hotel rooms or serviced apartments in places like Perth, Adelaide, Canberra, Broome, Kalgoorlie, Gove and Esperance, in a tent at Roper Bar and have shared a cabin with 6 others at Limmen Bight Fishing Camp.

Living out of a suitcase for most of the year is not fun. But a recompense is that you get paid to travel and are often flown to remote places about which most people only dream. More importantly for me, the law of native title is cutting edge law, always giving rise to new issues and new challenges. A short review of the native title law from *Mabo v Queensland (No 2)*[1] through to the High Court decision in *Members of the Yorta Yorta Community v Victoria*[2] will illustrate my point.

Mabo (No 2) was a common law native title claim by the Meriam people to the Murray Islands north of the mainland of Australia. The determination of the High Court on 3 June 1992 was that "the Meriam People are entitled as against the whole world to possession, occupation, use and enjoyment of [most of] the lands of the Murray Islands".[3]

In *Mabo (No. 2)* it was held that some "indigenous owners" (now referred to as "native title holders") hold valuable and recognisable rights and interests (now described generally as "native title").

* Raelene Webb QC is a Barrister at William Forster Chambers.

"The term 'native title' conveniently describes the interests and rights of indigenous inhabitants in land, whether communal, group or individual, possessed under traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants."[4]

The holding of native title by the Meriam people was dependent upon the claimants establishing certain connections with the relevant land and with those original inhabitants who held such native title rights and interests at the time when the Imperial Crown acquired sovereignty over that land. In many other cases, such native title as then existed no longer exists. This is because the necessary connections with the land have been lost or abandoned, or because such rights have been extinguished by activities of the Crown.

The relevant question for the consideration of the High Court in *Mabo (No 2)* was whether rights and interests derived from the system of laws of the original inhabitants survived acquisition of sovereignty: it was held that rights and interests consistent with the common law brought to the Australian colonies on acquisition of sovereignty could survive. Tanistry, a system of succession not based upon primogeniture, was given as an example of a custom found not to be consistent with the common law because it was founded on violence and because vesting of title under the custom was uncertain. What was meant by "rights inconsistent with the common law" later became a focus of submissions in the Croker Island case in the High Court[5].

Inconsistency with rights and interests granted by the Crown post sovereignty forms the basis for extinguishment of native title, either wholly or in part. Two significant decisions of the High Court in the context of the Northern Territory were *Fejo v Northern Territory*[6], which held that a grant of a freehold estate extinguishes native title totally, and *Ward v Western Australia*[7] which held that the grant of Northern Territory pastoral leases extinguishes native title partially.

In *Mabo (No 2)* [8], Brennan J made his seminal "tide of history" statement as to "connection":

> "Of course since European settlement of Australia, many clans or groups of indigenous peoples have been physically separated from their traditional land and have lost their connexion with it. But that is not the universal position. It is clearly not the position with the Meriam people. Where a clan of group has continued to acknowledge the laws and (so far as practicable) to observe the customs based on the traditions of that clan or group, whereby their traditional connexion with the land has been substantially maintained, the traditional community title of that clan or group can be said to remain in existence...
>
> However, when the tide of history has washed away any real acknowledgement of traditional laws and any real observance of traditional customs, the foundation of native title has disappeared. A native title which has ceased with the abandoning of laws and customs based on tradition cannot be revived for contemporary recognition."

Justice Brennan went on to consider the gradual dispossession of

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Aboriginal peoples to make way for colonial expansion and the possibility of survival of native title on the mainland of Australia[9], concluding in that respect:

> "And there may be other areas of Australia where native title has not been extinguished and where an Aboriginal people, maintaining their identity and their customs, are entitled to enjoy their native title. Even if there be no such areas, it is appropriate to identify the events which resulted in the dispossession of the indigenous inhabitants of Australia, in order to dispel the misconception that it is the common law rather than the action of governments which made many of the indigenous people of this country trespassers on their own land."[10] (empahsis added)

Native Title Act 1993[11]

Mabo (No 2) opened up the possibility of the invalidity of certain acts done after the commencement of the RDA on 31 October 1975. The *NTA* was enacted, in part, to recognise and protect native title by setting up procedures for native title holders to obtain a declaration of their rights[12] for claims for compensation by people whose native title rights have been extinguished. It was also enacted to validate past grants of third party interests, and in certain circumstances their renewal[13] and to set up mechanisms for validly performing activities in the future where such activities might interfere with or extinguish native title[14].

Wik[15]

In *Wik*, the High Court held, by a 4:3 majority[16], that the grant by the Crown of a pastoral lease under Queensland legislation did not necessarily extinguish all incidents of native title. Whether some incidents of native title are extinguished is to be resolved by a test of inconsistency. Considered strictly on its facts, *Wik* applies only to pastoral leases granted under the *Land Act* 1910 (Qld) and the *Land Act* 1962 (Qld).

Kirby J[17] warned against attempting to express a general rule concerning the legal consequences of the grant of pastoral leases in jurisdictions with different colonial histories, legislation, regulation and practices, particularly where there are express provisions in the grant of the leasehold interest to protect the rights of Aboriginal people.

"Exclusive possession" was the key issue identified for determination by the High Court in *Wik*. In determining the effect of the Crown grants on any native title, the question asked was whether the leases there in question conferred a right of exclusive possession on the lessees sufficient to exclude all others, including any native title holders, from the land.

In *Wik* the majority held that there was no such right of exclusive possession in the circumstances of that case. In doing so, reliance was placed on historical documentation indicating that there was no intention to exclude Aboriginal inhabitants from the land upon the grant of a pastoral lease. The "debate" as to the interpretation of history in *Wik* was discussed in the Appendix to the judgment of Beaumont J in *Anderson v Wilson*[18].

Post Wik - amendment to the *NTA*

Prior to *Wik*, governments had largely proceeded on basis that native title had been extinguished where a lease had, at any time, been granted, and consequently acts may have been done or grants made in relation to leasehold land which did not comply with the future act regime in the *NTA*.

After *Wik* made clear that native title can co-exist on pastoral lease land, it was realised that such acts and grants, if they affected native title, may have been invalid because of the *NTA*.

The 1998 amendments to the *NTA* provided, amongst other things, for the validation of "intermediate period acts" (1 January 1994 to 23 December 1996) and also confirmed the extinguishing effect of certain other Commonwealth acts on native title. States and Territories were enabled to similarly confirm the extinguishing effect of their acts if they chose to so do.

Applications for determinations of native title

Since the *NTA* commenced in 1994, there have been relatively few determinations of native title by the Federal Court in cases heard on their merit: that is to say where the respective parties have had to present their complete case, both factual and legal, and had it adjudicated upon. Most those cases have been subject to appeal, and three cases have been considered by the High Court[19]. Certain principles of native title law have been expounded in those cases.

Croker Island case (*Yarmirr*)

The first decision in relation to any application for a determination of native title was handed down on 6 July 1998 by Justice Olney[20]. This was a native title claim to the seas off Croker Island. Whilst *Mabo (No 2)* was concerned with native title to land, the Croker Island case was about native title to the sea. Issues arose as to whether there could be native title over the sea and if so, of what kind.

Justice Olney J held that there could be native title in respect of the sea but that it did not include exclusive rights. These conclusions have now been upheld by the Full Federal Court[21] and by the High Court of Australia in its decision of 11 October 2001[22]. The majority held that the common law would not recognise exclusive rights and interests of the kind claimed because a fundamental inconsistency between them and the common law public rights of fishing and navigation and the international right of innocent passage.[23] The

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Court also declined to interfere with Olney J's findings of fact which were to the effect that the evidence did not support the claimants' contentions that they were entitled under traditional law and custom to exclude anyone and everyone from the claim area.[24]

Some aspects of the decision in *Yarmirr HC* are being revisited in another Northern Territory claim to an area of land and seas in the vicinity of Blue Mud Bay off the coast of Arnhem Land[25]. Here it is being argued by the applicants that traditional rights to close off "djalkiri" areas, either permanently or for specified periods, is capable of recognition at common law.

It was not necessary for the High Court in *Yarmirr* to resolve the difference of approach in the Full Federal Court between the majority[26] on the one hand and Merkel J[27] on the other as to the meaning of "native title" as defined in section 223(1) of the *NTA* and consequently the proper approach to be taken at trial. Whilst these differences were not relevant to the ultimate outcome of the High Court appeal in *Yarmirr* they were relevant to the High Court appeal in the *Yorta Yorta* matter[28].

Miriuwung Gajerrong case (*Ward*)

The claim here was made by the Miriuwung Gajerrong people. It concerned a large area of land in the East Kimberley region of Western Australia and extended into the Northern Territory. The land included the township of Kununurra, surrounding pastoral stations, as well as the area the subject of the Ord River Irrigation Scheme. The claim area also included the land subject of an Aboriginal owned pastoral lease and the Keep River National Park in the Northern Territory.

Two further groups of Applicants for native title were later joined - one being a group comprising the members of three Miriuwung "estate groups" located in the Keep River area in the Northern Territory; the other, the Balangarra People who claimed native title over Lacrosse Island in the Cambridge Gulf. The Respondents included the Commonwealth, Western Australia and the Northern Territory, and over 100 other parties including mining, pastoral, local government, agricultural and business interests.

The decision of Lee J at first instance in favour of the Miriuwung Gajerrong People was appealed by the State and the Northern Territory (and by the second applicants who claimed native title in the NT part of the claim). The Full Court of the Federal Court by majority (Beaumont and von Doussa JJ) by and large dismissed the appeals of the State and the Northern Territory in relation to native title, but upheld many of their appeals in relation to extinguishment.

The High Court heard four appeals[29] from the decision of the Full Federal Court with some overlapping in the grounds of appeal. Numerous issues were involved, relating to both native title and extinguishment. In general terms *Ward HC* dealt with issues of:

(a) the nature of native title rights and interests, how they should be proven and how they should be described in determinations of native title;

(b) the application and effect of the *NTA* to determinations and the interaction between the *NTA* and the *Racial Discrimination Act 1975* ("*RDA*"); and

(c) the criteria for extinguishment of native title by various acts of the Crown[30].

The High Court delivered its reasons for decision on 8 August 2002. The Court allowed each of the appeals, set aside the main orders originally made by the Full Court, and the whole of the orders and determination made by it on 11 May 2000. The Court remitted the matter to the Full Court for further hearing and determination[31].

The guiding Principles from Ward HC are too numerous to be conveniently summarized here. However the dicta of the High Court on the nature of "connection"[32] is of interest as that issue remains to be argued before the High Court in an appropriate case[33].

The High Court referred to "connection" in the following terms:

(a) Whilst the connection which Aboriginal people have with country is recognised as spiritual, the NTA requires that relationship to be expressed in terms of rights and interests in land and waters[34].

(b) There are two inquiries required by the statutory definition of native title in section 223(1) of the *NTA*[35]:

  (i) in the one case for the rights and interests possessed under traditional laws and customs, requiring the identification of both the traditional laws and customs and the rights and interests possessed under those laws and customs[36]; and

  (ii) in the other, for a connection with land or waters by those laws and customs[37].

(c) Both inquiries require the content of traditional laws and customs to be identified. To that extent the same evidence may well be relied upon when identifying "rights and interests" and "connection"[38]. Nonetheless the distinction between the two inquiries is important, when considering what rights and interests are recognised and protected by the *NTA*.

(d) It is only the rights and interests possessed under the laws and customs which connect people with the land that fall within the statutory definition of native title. Traditional laws and customs are not themselves recognised and protected by the *NTA*; nor are rights and interests possessed under laws and customs not connecting people with land[39].

(e) The indefinite character of an order

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for a determination of native title reflects the requirement for the continuing acknowledgement and observance of traditional laws and customs and continuing connection with land implicit in the definition of "native title" in section 223(1) of the *NTA*[40].

First instance cases in which issues of connection presently arise are the native title claim by the Larrakia people over Darwin[41], the claim by the Yawuru people over Broome[42] and the Blue Mud Bay #2 claim[43]. It is to be expected that some, if not all, of these cases will proceed to a hearing in the High Court.

Yorta Yorta case

This case involved an application for a determination of native title in respect of public land and water, mainly State forests and reserves, in northern Victoria and southern New South Wales, including the Murray and Goulburn Rivers, and other waterways and lakes. The claim was for exclusive possession, occupation, use and enjoyment of the land, waters and natural resources therein.

At first instance, Justice Olney found that by the late 19th century, the lives of those Aboriginal ancestors through whom the Applicants sought to establish their native title had been so altered and disrupted by the effects of European settlement, that they were no longer in possession of the tribal lands and had ceased to observe relevant laws and customs which might otherwise have provided a basis for the claim.[44]

Olney J applied the dictum of Brennan J in *Mabo (No. 2)*[45] and found that the "tide of history" had washed away any real acknowledgment of traditional laws and any real observance of traditional customs, such that the foundation of native title had disappeared.[46] Although his Honour found that members of the applicant group had made genuine efforts to revive the lost culture of their ancestors, he held that native title rights and interests once lost are not capable of revival.[47]

The decision of the majority of the Full Federal Court dismissing an appeal against the decision of Olney J was further appealed to the High Court. The High Court handed down its decision on 12 December 2002, dismissing the appeal.

The two main points raised in the *Yorta Yorta* appeal to the High Court were:

(a) whether and to what extent section 223 (1) (c) *NTA* incorporates the whole of the common law into the statutory definition of native title;

(b) assuming that section 223 (1) (c) *NTA* does incorporate the common law, what are the requirements of the common law, particularly in respect of continuity of connection.

In the result, the High Court considered that the resolution of the appeal turned more on a proper understanding of paragraph (a) of section 223(1) and in particular what is meant by "are possessed under the traditional laws acknowledged and the traditional customs observed" than it did on paragraph (c)[48].

As with *Ward HC,* all of the principles established by *Yorta Yorta HC* cannot properly be canvassed here. However, the questions of "traditional" and "society", demand attention.

The High Court held that references in sections 223(1)(a) and (b) of the *NTA* to "traditional" requires that the origins of the law or custom concerned pre-date sovereignty[49]. In addition, the system of laws and customs must have had "a continuous existence and vitality" since sovereignty[50].

So too must the "society" which acknowledges those laws and customs have continued to exist as a group acknowledging and observing those laws and customs since sovereignty[51].

It is not possible for laws and customs adopted by another society post sovereignty to give rise to native title rights and interests, as those rights and interests are not "rooted in pre-sovereignty traditional law and custom but in the laws and customs of the new society"[52].

As to whether or not laws and customs can adapt and change, the key question is "whether the law and custom can still be seen to be traditional law and traditional custom" where "traditional" is referrable back to sovereignty[53].

Acknowledgment and observance of traditional laws and customs must have continued substantially uninterrupted since sovereignty, the qualification of "substantial" being to recognise the profound effects of European settlement on Aboriginal societies[54].

Nevertheless, the society, under whose laws and customs native title rights and interests are said to be possessed, must have continued to exist since sovereignty "as a body united by its acknowledgment and observance of the laws and customs"[55].

The reference in section 223(1)(c) of the *NTA* to "recognition by the common law" in effect means that only those rights and interests which existed at sovereignty and which survived the fundamental change in the legal regime (ie are not "antithetical to fundamental tenets of the common law") are recognised and protected by the *NTA*[56].

Thus it was a correct approach to direct inquiry to the traditional laws and customs in the claimed area at the time of acquisition of sovereignty[57]:

Since the decision in *Yorta Yorta HC*

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applicants for a determination of native title need to prove continuity of a society united by its observance of traditional laws and customs since sovereignty, and the continued existence and vitality of the system of laws and customs since sovereignty In the words of the joint judgment[58]:

> "In the proposition that acknowledgment and observance must have continued substantially uninterrupted, the qualification "substantially" is not unimportant. It is a qualification that must be made in order to recognise that proof of continuous acknowledgment and observance, over the many years that have elapsed since sovereignty, of traditions that are oral traditions is very difficult. It is a qualification that must be made to recognise that European settlement has had the most profound effects on Aboriginal societies and that it is, therefore, inevitable that the structures and practices of those societies, and their members, will have undergone great change since European settlement. Nonetheless, because what must be identified is possession of rights and interests under traditional laws and customs, it is necessary to demonstrate that the normative system out of which the claimed rights and interests arise is the normative system of the society which came under a new sovereign order when the British Crown asserted sovereignty, not a normative system rooted in some other, different, society. To that end it must be shown that the society, under whose laws and customs the native title rights and interests are said to be possessed, has continued to exist throughout that period as a body united by its acknowledgment and observance of the laws and customs."

This requirement of proof of a presently existing society which has continued to exist since sovereignty as a body united by its acknowledgment and observance of laws and customs of a normative system referable back to a pre-sovereignty society is likely to prove fatal to many native title claims. This is particularly so where groups have come together and reformed for the purposes of a native title claim without faithfully reflecting a "traditional society".

Faced with the test posed by *Yorta Yorta HC*, it may well be the case that the situation alluded to by Brennan J in *Mabo (No 2)* will pertain. That is, there may be few areas in mainland Australia "where native title has not been extinguished and where an Aboriginal people, maintaining their identity and their customs, are entitled to enjoy their native title"[59].

So my journey through the maze of native title law continues. My suitcase is again packed, this time in anticipation of hearing "preservation evidence" in Norseman, Western Australia where the main tourist feature is the tailings dump. Who can predict what new issues will arise which will lead to a fascinating journey of legal discovery from Norseman to the High Court in Canberra? ①

Footnotes

[1] (1992) 175 CLR 1 ("Mabo (No 2)").

[2] (2003) 214 CLR 422 ("Yorta Yorta HC").

[3] *Mabo (No 2)* at 217.

[4] *Mabo (No 2)* at 57 per Brennan J.

[5] *Commonwealth v Yarmirr* (2001) 208 CLR 1 ("Yarmirr HC").

[6] *Fejo v Northern Territory* (1998) 195 CLR 96.

[7] (2002) 213 CLR 1 ("Ward HC").

[8] *Mabo (No 2)* at 59-60.

[9] *Mabo (No 2)* at 68.7-69.5.

[10] *Mabo (No 2)* at 69.4.

[11] The Native Title Act 1993 (Cth) ("the NTA") commenced on 1 January 1994.

[12] Referred to in the NTA as a Determination: see section 225.

[13] Referred to in the *NTA* as the "past act regime".

[14] Referred to in the NTA as the "future act regime".

[15] *Wik Peoples v Queensland* (1996) 187 CLR 1 handed down 23 December 1996.

[16] Toohey, Gaudron, Gummow, Kirby JJ; Brennan CJ, Dawson, McHugh JJ (dissent).

[17] (1996) 187 CLR 1 at 218.

[18] (2000) 97 FCR 453 at [280] - [300].

[19] *Commonwealth v Yarmirr* (2001) 208 CLR 1 ("Yarmirr HC"); Western Australia v Ward; Attorney-General (NT) v Ward; Ningarmara v Northern Territory; Ward v Crosswalk Pty Ltd (2002) 213 CLR 1 ("Ward HC"); Members of the Yorta Yorta Community v Victoria (2002) 214 CLR 422("Yorta Yorta HC").

[20] Yarmirr v. Northern Territory (1998) 82 FCR 533.

[21] *Commonwealth v Yarmirr* (1999) 101 FCR 171; 168 ALR 426 ("Yarmirr FC").

[22] *Yarmirr HC* per Gleeson CJ, Gaudron, Gummow and Hayne JJ; McHugh J; Callinan J cf Kirby J dissenting.

[23] *Yarmirr HC* at [61], [76], [94] and [98].

[24] *Yarmirr HC* at [86]-[93].

[25] *Gawirrin Gumana & Ors v Northern Territory* (No D6035 of 2002).

[26] Requiring only that laws and customs are presently "traditional": see Yarmirr FC at [65] per Beaumont and von Doussa JJ.

[27] To the effect that the date of sovereignty remains a fundamental element in section 233(1), NTA: see Yarmirr FC at [401]- [410].

[28] See later discussion about Yorta Yorta HC.

[29] Made by the First Applicants (Ward), Second Applicants (Ningarmara), the State and the

Manage your lawyer: be firm

This column by Paul Brennan (a Queensland solicitor) was originally printed in the Sunshine Coast Daily on Satuday 6 November.

I never realised why people tended to dislike lawyers until I married one. Argumentative, prone to making smart comments and costly, too.

If you are sick of changing lawyers, or you live with one 24 hours a day like me, the solution is to build a "relationship".

I hear you say, "Shouldn't the lawyer be doing this as part of the service?" Hey, these are lawyers we are dealing with here!

Do not just stay and moan. That will affect your business. Your choice is to either sack 'em or lower your expectations.

After years of moaning about lawyers, the best way of lowering your expectations is to accept that all along you were the problem (I did not say this was going to be easy).

Now here are six questions that may help you down this road:

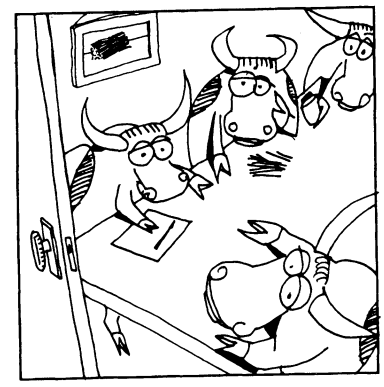
1. Are your matters always urgent?
2. Does the material become non-urgent once the ball is in your court?
3. Is the quality and/or service never really up to scratch?
4. Do you invariably complain about the bill?
5. Do you then call the lawyers and try to get him to repeat steps 1 and 2? Followed by your steps 3 and 4.
6. Do you then in exasperation look for a new lawyer?

Does any of this sound familiar?

Legal services can be: cheap/quick/excellent. You can have any two of these, but not all three. Cheap and excellent, but not quick. Excellent and quick, but not cheap. You get the idea. If your solicitor is consistently delivering all three, be suspicious and look for an angle, eg he is sleeping with your wife.

I hope this helps. Otherwise, keep on sacking - you never know one day your prince will come.①

The Muster Room



Catfish moves to the Bar

Ian Morris, a partner at Hunt and Hunt, is leaving the firm to join the Independent Bar.①

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Northern Territory.

[30] See also Wilson v Anderson (2002) 213 CLR 401 ("Wilson HC").

[31] *Ward HC* at [469]. Determinations have now been made by the Full Court in respect of the WA and NT areas. For the NT area see Attorney- General (Northern Territory) v Ward [2003] FCAFC 283.

[32] See section 223(1)(b), NTA.

[33] No submissions to the High Court were made on this issue in Ward HC: see [64].

[34] *Ward* HC at [14].

[35] *Ward* HC at [18].

[36] S.223(1)(a), NTA.

[37] S 223(1)(b), NTA.

[38] *Ward HC* [18], [64].

[39] *Ward* HC at [18], [19], [21], [64], [468(7)].

[40] *Ward* HC at [32].

[41] *Larrakia Peoples v Northern Territory* (No D6033 of 2001).

[42] *Rubibi Community v Western Australia* (No EAG 6006 of 1998).

[43] *Gawirrin Gumana & Ors v Northern Territory* (No D6035 of 2002).

[44] Yorta Yorta Community v Victoria [1999] 4(1) AILR 91; [1998] 1606 FCA (18 December 1998) ("Yorta Yorta") at [121], also [36], [63] and [118].

[45] *Yorta Yorta* at [60].

[46] *Yorta Yorta* at [129].

[47] *Yorta Yorta* at [121], again citing Mabo (No 2) per Brennan J at 60.

[48] *Yorta Yorta HC* at [12].

[49] *Yorta Yorta HC* at [46].

[50] *Yorta Yorta HC* at [47].

[51] *Yorta Yorta HC* at [50].

[52] *Yorta Yorta HC* at [53].

[53] *Yorta Yorta HC* at [83], [86].

[54] *Yorta Yorta HC* at [87].

[55] *Yorta Yorta HC* at [89].

[56] *Yorta Yorta HC* at [77].

[57] *Yorta Yorta HC* at [63]. See Merkel J's approach in Yarmirr FC at [401]- [410].

[58] *Yorta Yorta HC* at [89]

[59] *Mabo (No 2)* at 69.4.

Diary dates

9 December - Law Society Christmas Drinks from 5.30pm at the Novotel Atrium, Darwin.

10 December - Law Soceity Christmas Drinks from 5pm at Sean's Bar, Alice Springs.

10 December - Supreme Court Christmas drinks.

21 December - NTWLA Christmas Drinks from 5pm at DOJ, Darwin.

31 January 2005 - Opening of the Legal Year in Darwin.

2 February 2005 - Opening of the Legal Year in Alice Springs.

Justice John Dowd has accepted an invitation to be the Law Society's guest speaker at the Opening of the Legal Year lunches in 2005.