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RECENT DEVELOPMENTS IN NATIVE TITLE IN AUSTRALIA WITH INTERNATIONAL PERSPECTIVES

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[1] Buongiorno! My address today is about native title.

Introduction

[2] Native title is not a new jurisprudential concept in world terms. I am talking here about an indigenous title or right to land or waters or to other resources. One of the earliest statements of recognition was made by Pope Paul III in 1537, who said:[1]

> "[T]he said Indians and all other people who may later be discovered by Christians are by no means to be deprived of their liberty or the possession of their property."

Although those fine words were said only 45 years after Columbus' voyage to America, we all know that the Spanish conquistadors ignored the Papal pronouncement and systematically plundered Indian property in South America.

[3] Centuries later, the United States was the first common law jurisdiction to recognise native title. That happened in 1823, in the Supreme Court of the great Chief Justice John Marshall.[2] It was to be an influential decision. New Zealand followed only 21 years later, in 1847.[3] Canada was next, in 1888.[4] Then various African countries, in the 1920s.[5] But Australia was even slower – and more cautious. Indeed although Australia's highest court had accepted in 1941 the concept of native title for Papua New Guinea (then an external territory of Australia),[6] it would be a further 50 years before that concept would be applied to Australia itself. That occurred in the landmark decision in *Mabo v State of Queensland [No 2]*,[7] which was decided in 1992 – almost 170 years after the United States.

[4] I acted as junior counsel for a government party in the *Mabo* case. I remember that when I was offered that brief at the end of 1988, I looked at my old Law School notes about native title. They dismissed the concept in about 3 pages, principally because of a since-rejected single judge decision of an Australian internal territory court in 1971,[8] which concluded that the common law did not recognise native title. But when the brief was trolleyed in and I began to look more closely at the facts of the case and the legal principles which had been developed in other jurisdictions, the realisation grew that *Mabo* was not going to be a case like any other. It was to be a case that changed our country.

[4] In the 10 years that have passed since Australia's High Court (the equivalent of other countries' national Supreme Court) held that Australian common law

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1 Papal Bull *Sublimis Deus*, quoted in R.H. Bartlett, *Native Title in Australia*, 2000, p 6.

2 *Johnson v McIntosh*, 21 US 542 (1823); *Oneida Indian Nation of New York v County of Oneida, New York,* 414 US 661, 667-9 (1974).

3 *R v Symonds* (1847) NZPCC 387; *Te Runanganui o Te Ika Whenua Inc Society v Attorney-General* [1994] 2 NZLR 20.

4 *St Catherine's Miling & Lumber Co v The Queen* (1888) 14 App Cas 46; *Calder v Attorney-General of British Columbia* [1973] SCR 313.

5 Eg, *Amodu Tijani v Secretary Southern Nigeria* [1921] 2 AC 399; *Sobhuza II v Miller* [1926] AC 518.

6 *Geita Sebea v Territory of Papua* (1941) 67 CLR 544; *Administration of Papua and New Guinea v Daera Guba* (1973) 130 CLR 353.

7 (1992) 175 CLR 1.

8 *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141.

recognised native title, much has occurred in this field of law. In the legislative arena, there has been a national response, in the form of the *Native Title Act 1993*. That Act recognises and protects native title. And in the judicial arena, we have seen literally hundreds of decisions on a variety of aspects of native title and on the relevant legislative provisions concerning it. To analyse each of those decisions would be a task of text book proportions – which someone (not me) may one day attempt.

[4] However today I propose to look briefly at the more important decisions, at the highest appellate level only. In doing that, I intend no disrespect to the many first instance and intermediate appellate decisions which have been made in this arena, and which have themselves developed the Australian jurisprudence. But considerations of time, and an appreciation that it is the decisions at the highest appellate level only which finally settle and elucidate the law, dictate accordingly. That is especially so in the dynamic arena which is native title law. By way of example, in a 1994 case,[9] the High Court refused to grant special leave to appeal (the Australian equivalent of the American certiorari) from an intermediate appellate court decision that an Aboriginal land rights statute did not extinguish native title. Although that of itself is not especially remarkable, the majority added the comment that they were "not to be taken as necessarily agreeing with the conclusion of" the court appealed from.

Mabo [10]

[5] We then begin with the High Court's decision in *Mabo v State of Queensland [No 2]*. I should explain why this case is called "[No 2]". It is because there was a *Mabo* "[No 1]". That was a case which was decided by the High Court in 1988.[11] The *Mabo* cases concerned 3 small islands in the strait between Australia and its northern former territory Papua New Guinea. The islands are part of Australia. Ancestors of the indigenous inhabitants had lived there since long before the first European contact with the area many hundreds of years ago. After the court proceedings were commenced, the state of Queensland (which was the principal respondent in the case) passed legislation which purported to invalidate any native title interest in those islands, retrospectively from the time that they became part of Queensland in the 1870s. Mr Mabo and his co-applicants challenged this legislation and the High Court, by a bare 4:3 majority, ruled that it was invalid because it breached Australia's *Racial Discrimination Act*. That was *Mabo [No. 1]*.

[6] So with that background, the trial of this case then proceeded. The hearings occurred in Brisbane, Murray Island and Thursday Island. On Murray Island, the government team stayed in an old fishing boat called the *Doggai* which was moored offshore. We were rowed ashore each morning and walked across the sand up to the community building where the hearing was held. It was a fantastic experience for everyone. After factual findings were made by a distinguished state judge (Justice Moynihan, who's here today) after a 67

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9 *Pareroultja v Tickner* (1994) 8 Leg Rep SL 2, 3.

10 This symbol refers to the overhead slides (see attachment), which show the approximate area of the native title claim.

11 *Mabo v State of Queensland* (1988) 166 CLR 186.

day hearing, the case was back in the High Court for legal argument. That was *Mabo [No. 2]*. I digress to mention that if it is thought that 67 days was a long time for the hearing of a native title case, that duration pales into insignificance by comparison with one of the leading Canadian cases on native title. In *Delgamuukw v British Columbia*,[12] the trial judge sat for 374 days from May 1987 to June 1990 – and ultimately gave a decision which the Supreme Court of Canada later said was wrong and should be retried.[13]

[7] Much has been written about the *Mabo* case, but in summary, the Court held (6:1) that the indigenous Meriam people held, and still held, native title to the island. After analysing numerous authorities from around the world, the High Court declared that the common law of Australia recognises a form of native title which, where it has not been extinguished, reflects the entitlements of the indigenous inhabitants, in accordance with their laws and customs, to their traditional lands; and that the land entitlement of the Murray Islanders in accordance with their laws or customs is preserved as native title. The actual order made was that putting to one side certain areas of land which were not in issue in the case, the Meriam people were entitled *as against the whole world* to possession, occupation, use and enjoyment of the lands of the Murray Islands.

[8] In doing so, the Court rejected 2 key propositions which had previously been regarded as legally established doctrine. First, that when Australia was first occupied by the British in 1788, the land was *terra nullius* – in the sense of unoccupied or uninhabited for legal purposes. That proposition, of course, was patently absurd – because it is undisputed that at least many hundreds of thousands of indigenous people occupied Australia in 1788. I digress to mention that the notion that inhabited land may be classified as *terra nullius* was rejected by the International Court of Justice in 1975.[14] Secondly, the High Court rejected the view that full legal and beneficial ownership of all the lands in the then new British colony were vested in the Crown, unaffected by any claims of the hundreds of thousands of Aboriginal inhabitants.

[9] The majority judgments emphasised that native title to particular land, the incidents of the native title and the persons entitled to the native title, are ascertained according to the traditional laws and customs of the indigenous people who, by those laws and customs, have a connection with the land.

[10] The Court also considered whether native title could be extinguished. It concluded that it could be extinguished – by the valid exercise of legislative powers which revealed a clear and plain intention to effect an extinguishment. The "clear and plain intention test" originated in the United States,[15] and has been applied in Canada[16] and New Zealand.[17] Comments were also made by some of the Justices in *Mabo [No. 2]* that the grant of freehold or leasehold

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12 [1991] 3 WWR 97.

13 *Delgamuukw v British Columbia* [1997] 3 SCR 1010.

14 *Advisory Opinion on Western Sahara* [1975] ICJ 12.

15 *United States v Santa Fe Pacific Railroad Co*, 314 US 339, 353-6 (1941); *United States v Dion*, 476 US 734, 739-40 (1986).

16 Eg, *R v Sparrow* [1990] 1 SCR 1075, 1099.

17 Eg, *Te Weehi v Regional Fisheries Officer* [1986] 1 NZLR 680, 692-3.

title would also extinguish native title. But those comments may have been *dicta* – and in any event, the Court would be called upon in later cases to revisit them.

[11] The *Mabo* case stimulated enormous public and political debate. The then federal Labor government of Prime Minister Paul Keating determined that a formal legislative response was needed to recognise and protect native title and to deal with the myriad of commercial and other implications which resulted from it. And so the *Native Title Act 1993* was passed and commenced operation on 1 January 1994. However, statutory recognition and protection of native title is not confined to Australia. It is entrenched in the New Zealand *Treaty of Waitangi 1840*, the United States *Trade and Intercourse Act 1790* (now the United States *Code*),[18] the Canadian *Constitution Act 1982*[19] and more recently, the South African *Restitution of Land Rights Act 1994*.

[12] Before moving on, I might just mention 2 not-widely-known aspects of the *Mabo* case. When the case was at the trial stage, there were 3 plaintiffs: Eddie Mabo, James Rice and Dave Passi. The trial judge made some negative findings about Mr Mabo – concerning his credibility and also concerning some areas of land where there were conflicting claims by the Murray Islanders. When the case reached the High Court, no claim was made on behalf of Mr Mabo. Secondly, from the time that the *Mabo* case was initially filed until the morning of day 4 (the final day) of argument in the High Court some 9 years later, the claim was one by the plaintiffs to *individual* blocks of land. I remember that on the afternoon of day 3, Chief Justice Mason indicated to Ron Castan (the late brilliant silk who argued the plaintiffs' case) that the Court thought there were difficulties, because of the factual findings, in the *individual* claim nature of the action – and it may be that a *communal* claim may be more appropriate. Guess what happened? On the morning of day 4, Ron Castan sought leave (which was granted) to amend the statement of claim to a communal claim on behalf of the Meriam People. And as we all know, the Court ultimately upheld the *communal* native title claim – one which didn't descend to metes and bounds and which didn't address individual or disputed claims.

Native Title Act Case

[13] In 1994, the *Native Title Act* was challenged by a state non-Labor government. The challenge was heard by the High Court and in March 1995, a unanimous Court held that apart from one section, the *Native Title Act* was valid.[20] But although the case is important for that holding and for its analysis of various provisions of the Act, it is crucially important for also deciding that the native title principles which were espoused in the *Mabo* case also applied to *mainland* Australia. That latter holding was criticised. Why, some said, did the principles applicable to an indigenous islander community necessarily apply to Aboriginal communities on the mainland, especially in the absence of

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18 25 USC §177 (1976).

19 Section 35(1).

20 *State of Western Australia v The Commonwealth [Native Title Act Case]* (1995) 183 CLR 373.

evidence of factual similarity. The answer is self-apparent once one appreciates precisely what it was that the High Court held in *Mabo [No 2]*. Obviously the case concerned the factual position of Murray Island and decided that those islanders held native title. But as the judgment of Chief Justice Mason and Justice McHugh clearly stated, "six members of the Court … are in agreement that the common law of this country recognises a form of native title". Thus the *legal* principle was that *Australian* common law now recognises native title. The case therefore determined a legal principle that applied *throughout* Australia – not just to 3 small islands. Aspects of the *Mabo* principles have been followed in native title cases in Canada[21] and New Zealand.[22]

Waanyi

[14] The next case to reach the High Court was in February 1996: *North Ganalanja Aboriginal Corporation v Queensland*.[23] This is often referred to as the *Waanyi* case, named after the indigenous Waanyi People who were the Aboriginal group involved. The case concerned the interpretation of a section of the *Native Title Act*, but it is also noteworthy for another reason. The issue behind the case was perhaps the biggest issue at that time in Australian native title law: did a pastoral lease extinguish native title? An Australian pastoral lease, for those of you who are not familiar with the term, is a government-granted lease to a person for a term of years of sometimes vast areas of land for the purposes of raising or grazing cattle or sheep.

[15] The government parties in the case (for one of whom I appeared) urged the High Court to decide this question because of its great public importance, but the native title parties opposed that course. I think that all parties were ready to argue it. However, the Court decided the statutory interpretation point but said (by a 6:1 majority) that as a result, the pastoral lease question did not then arise, and to answer it would constitute the provision of an advisory opinion – which the High Court cannot do. So we all packed up and returned to our respective home cities with our pastoral lease arguments in our back pockets – and the pastoral lease issue still unresolved.

Wik

[16] But only 4 months later, another native title case reached the High Court. It was the now well-known *Wik* case.[24] This time, one of the questions squarely raised for the Court was whether native title was extinguished by a pastoral lease.[25] That was still the biggest issue in Australian native title law. More than 40% of Australia is covered by pastoral leases. There was considerable uncertainty as to whether native title was truly a factor when any of that land was the subject of various commercial activity – although I venture to suggest that most people then thought that the *Mabo* principles probably meant that the grant of a pastoral lease extinguished native title. The hearing in Canberra

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21 Most recently, in *Minister of National Revenue v Mitchell* [2001] 1 SCR 911, 927 [11], 953 [62], 984 [147].

22 Eg, *Faulkner v Tauranga District Council* [1996] 1 NZLR 357, 363.

23 (1996) 185 CLR 595.

24 *Wik Peoples v Queensland* (1996) 187 CLR 1.

25 The other issue concerned the validity or otherwise of 2 legislatively-authorised agreements.

saw 35 barristers in attendance. I was one of them, appearing again for a government party. Seven justices sat. It was always going to be a tight result and I can remember that many people who were there thought that it would be decided 4:3 – but views differed about who would win and about the likely composition of the majority and the minority. All was revealed 6 months later when, by a 4:3 margin, the Court held that native title was *not necessarily* extinguished by the grant of a pastoral lease.

[17] In litigation at all levels, a barrister's advocacy skills can be telling with respect to the ultimate result. *Wik* was no exception. Many brilliant silks appeared, but I want to tell you about the opening arguments made by one of them – Walter Sofronoff QC who led for the plaintiffs. He was first up. He started by inviting the Justices to turn to particular pages of the Appeal Book which showed one of the pastoral leases in issue. He noted that the first lease was granted in about 1918 and forfeited a couple of years later for non-payment of rent, when another lease was granted and itself forfeited shortly afterwards. The lessees never took up possession and some hundreds of Aboriginal people continued to live on the land. The property was very large, with a low cattle-carrying capacity and no ability to be used for cultivation. He went on to say that even though the government parties did not suggest that there was any inconsistency between the native title rights and the pastoral activities, they maintained that the Wik People's native title rights should nevertheless be regarded as extinguished. By that focussed approach, I think that Sofronoff QC may have captured a majority of the Court.

[18] Unlike the United States Supreme Court where there is usually only one judgment for the majority, each of the 4 majority justices wrote a separate, lengthy judgment. That is a practice which sometimes makes it difficult for a *ratio* to be authoritatively determined. But fortunately, one of the majority (Justice Toohey) added a postscript, with the agreement of the other members of the majority, so that, as he said, the significance of the answers given to the questions which were raised for the Court "should be properly understood".[26]

[19] Justice Toohey said 3 important things. First, the subject pastoral leases did not confer exclusive possession on the grantees. Secondly, the question of whether native title *was* extinguished by the grant of a pastoral lease turned upon a comparison between the particular rights and interests conferred by the native title and those conferred under the statutory pastoral lease. And thirdly, if there were inconsistency between the two sets of rights, the native title "must yield, to that extent" to the rights of the grantees. Thus, in a nutshell, the majority's approach sanctioned the co-existence of native title and a pastoral lease. By way of contrast, the minority Justices' approach was relatively straightforward: a pastoral lease is a lease; a lease confers exclusive possession; a grant of exclusive possession is fundamentally inconsistent with a continuing right to enjoy a native title; therefore native title is necessarily extinguished.

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[26] (1996) 187 CLR 1, 132.

[20] The majority's conclusion that a pastoral lease did not confer exclusive possession is contrary to United States authority. In a 1961 case[27] which is little known in Australia, the Supreme Court of Oregon decided by 5:2 that a statutory grazing lease conferred exclusive possession upon the grantee. However, the minority's dissenting view in that case approximated the approach which was adopted by the majority in *Wik*.

[21] The *Wik* decision unleashed considerable criticism in some circles. Uncertainty loomed large. How could a commercial party or a government know if native title was still a live issue in relation to this or that parcel of land? What if that party took a risk and decided to ignore the prospect of native title and it subsequently emerged that native title had not been extinguished? Commonsense, and an eye to commercial realities and risk assessment, usually prevails – and that is what tended to happen. The principle of when in doubt, assume native title exists, was usually applied, and is probably still applied.

[22] Most governments had previously thought that pastoral leases extinguished native title. There were strong comments in *Mabo [No 2]* that leases had that effect. And although those comments were distinguished (or clarified) in *Wik*, a view then prevailed that something should be done to affirm the validity of those grants which had been made by governments on the understanding – erroneously, as it turned out – that native title had been extinguished by grants of pastoral leases. That subsequently occurred when the *Native Title Act* was extensively amended in 1998. That was done by the federal Liberal-National Party government of Prime Minister John Howard. The amendments, which dealt with a variety of issues, were strongly opposed by the indigenous community and the Labor opposition, but were eventually passed by parliament. I will say a little more about the amended *Native Title Act* later.

Fejo

[23] The year 1998 also saw the High Court look again at native title. The case was *Fejo v Northern Territory*.[28] This time the question was whether the grant of a fee simple (a freehold grant) permanently extinguished native title. This was another situation where members of the Court had previously expressed views, perhaps not necessary for the actual decisions in those cases, to the effect that freehold extinguishes native title. But this was the first time in which that question had been squarely raised for decision. The case also contained an unusual feature, in that although the land concerned had been the subject of a freehold grant in 1882, it had been compulsorily acquired by the Australian government in 1927. The native title parties argued that native title was not necessarily extinguished by the freehold grant, but was merely *suspended* during the period of the inconsistent grant and then *revived* 45 years later by the governmental compulsory acquisition. The Court unanimously rejected both arguments, holding that native title is extinguished permanently by a grant in fee simple and is not revived if the land is later again held by the state. The reason that extinguishment results is that the rights

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27 *Sproul v Gilbert*, 359 P2d 543 (1961).

28 (1998) 195 CLR 96.

conferred by a fee simple grant are rights inconsistent with the continuation of any native title rights and interests. That was not a surprising result.

[24] However, this is an example of Australian native title law differing somewhat from other jurisdictions, as there are cases in the United States,[29] Canada[30] and New Zealand[31] which support the view that a grant of freehold title will not necessarily extinguish all native title rights and interests.

Yanner

[25] The next Australian case was *Yanner v Eaton* in 1999.[32] An Aboriginal man speared 2 small crocodiles. He and other members of his clan ate some of the meat and froze the rest. He was charged with taking fauna without a statutory permit. The statute also declared that all fauna was "the property of the Crown" (that is, the state). His defence was that he was acting pursuant to his native title. A state appeal court rejected his defence and held that the statute had extinguished any native title. He appealed to the High Court.

[26] By a majority of 5:2, the High Court accepted his defence and reversed the court below. I appeared for the losing side in the High Court – again! For present purposes, the key point in the majority judgments was that the term "property", in the context of the statutory declaration that all fauna was state property, did not mean full beneficial or absolute ownership. Rather it was no more than the aggregate of the various rights of control by the Executive that the legislation created – such as rights to limit the fauna taken and to receive royalties. Accordingly the native title was not extinguished; and under the *Native Title Act*, a native title holder did not need a permit for hunting.

[27] Speaking for myself, this decision was not entirely unexpected. Over the years, the United States Supreme Court had considered a number of cases where state statutes had declared fish and game to be the property of, or owned by, the state. The Supreme Court decided that in that context, "property" or "ownership" referred to state power to preserve and regulate the exploitation of the resource.[33] Some of those cases were considered and followed by the High Court of Australia in *Yanner*. By way of contrast, in Canada, extinguishment has been held not to result in these circumstances if there is also a statutory exception permitting an aboriginal right to take fauna for sustenance.[34]

[28] The *Yanner* concept of "property" may raise some difficult questions. For example, is a distinction to be drawn between a statute which declares *fauna* to be the property of the state – and which we now know does not extinguish native title, and a statute which declares minerals or petroleum to be the property of the state? In Australia, each state has such a statute. The point

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29 Eg, *Missouri, Kansas and Texas Railway Co v Roberts*, 152 US 114, 116-8 (1894).

30 Eg, *Delgamuukw v British Columbia* [1997] 3 SCR 1010, 1044 [36].

31 Eg, *Faulkner v Tauranga District Council* [1996] 1 NZLR 357, 363.

32 (1999) 201 CLR 351.

33 Eg, *Baldwin v Montana Fish and Game Commission*, 436 US 371 (1978); *Toomer v Witsell*, 334 US 385 (1948).

34 *R v Alphonse* (1993) 80 BCLR (2d)17, 26-7.

has not yet been decided authoritatively by the High Court. However that may soon change, because in one of the 3 native title cases which are presently reserved after argument in the High Court, the issue was squarely raised.

Summary of principles

[29] We now move to the year 2001. By then, the development of native title jurisprudence in Australia had established, at its most authoritative level, the following propositions. There are only 6:

- Australian common law recognises native title.
- Native title requires observance of traditional laws and customs by the relevant peoples.
- It can be extinguished.
- It is extinguished (permanently) by a fee simple grant.
- It is not extinguished by a statute declaring fauna to be state property.
- It is not necessarily extinguished by a pastoral lease.

[30] These few principles had taken 9 years, 6 court cases and many millions of dollars to develop. But there was much more to come in 2001.

Yarmirr

[31] Australia is an island country. By 2001, more than 120 native title claims had been made to areas of sea and sea-bed around Australia's coastline. In *The Commonwealth v Yarmirr*,[35] the question of whether there could be native title to the sea and sea-bed below the low-water mark reached the High Court. It was regarded as the test case, and involved more than 3,300km² of sea.

[32] The case had a number of additional and important features. First, the indigenous people were claiming exclusive possession of the sea areas. That would presumably override the interests of the many commercial fishing permits which had been granted, not to mention the public rights of navigation and fishing and the international right of innocent passage. Secondly, the Australian government was opposing the claim, principally to argue that as native title was a concept recognised by the common law, it could not exist in sea areas because (so it was said) the common law did not apply there. And thirdly, this was the first native title claim which had reached the High Court where the claim was based upon the statutory definition of native title in the *Native Title Act*.[36]

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[35] (2001) 75 ALJR 1582.

[36] Relevantly, s.223(1) of the *Native Title Act 1993* defines "native title" in the following terms:

> "**223 Native title**
>
> Common law rights and interests
>
> (1) The expression ***native title*** or ***native title rights and interests*** means the communal, group or individual rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to land or waters, where:
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> (a) the rights and interests are possessed under the traditional laws acknowledged, and the traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders; and
>
> (b) the Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters; and
>
> (c) the rights and interests are recognised by the common law of Australia."

[33] By a 5:2 majority, the High Court held that the *Native Title Act* clearly indicated that native title rights and interests may extend into the sea, sea-bed and sub-soil beyond the low-water mark. They rejected the Australian government's argument about the purported effect of the common law and said that the rights and interests to which the statute gives effect are not *derived* from the common law. Rather the question was whether the common law will recognise traditional law and custom. Finally, the majority concluded that the resultant native title rights to fish etc were not exclusive, but rather co-existed with the rights of others. Thus the native title holders could not control commercial operations such as fishing, tourism and so on in the seas and sea-beds.

[34] Although *Yarmirr* turned principally upon issues of statutory interpretation concerning the *Native Title Act*, it is interesting nonetheless to observe, by way of comparison, that native title claims to offshore seas and sea-beds in the United States have been unsuccessful, on the basis that there was federal supremacy over the adjacent seas.[37] A similar doctrine applies in Canada.[38]

[35] Yarmirr was the last native title case decided by the High Court. Thus we can add to our summary of established principles (see [31]) the following:

- Under the *Native Title Act*, native title rights and interests may extend into the sea, sea-bed and sub-soil beyond the low-water mark. These rights and interests are not exclusive but co-exist with the rights of others.

Reserved decisions

[36] The High Court currently has reserved after argument 3 native title cases. Two of them are of seminal importance with respect to various fundamental aspects of native title law.

Ward 🖬

[37] The oldest of the reserved decisions is *Western Australia v Ward*, which was reserved in March 2001 after an 8-day hearing – an extraordinary length of time for a hearing by American standards, where only 30 *minutes* per party is the norm in the US Supreme Court.

[38] The *Ward* case was a claim for native title under the *Native Title Act*. It concerned land and waters in north-western Australia. Some 7,900km² and 3 islands were involved. The trial judge found that native title still existed over some of the claim area, but that decision was reversed on appeal. The intermediate appellate court found that the native title had been extinguished. The land concerned included vacant state land, pastoral leases, a very large irrigation area, a lake, an adjacent diamond mine, a national park and some inter-tidal zone waters.

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[37] *Inupiat Community of the Arctic Slope v United States*, 548 FSupp 182 (1982*); Native Village of Eyak v Trawler Diane Marie Inc*, 154 F3d 1090 (1998).

[38] *Re Offshore Mineral Rights of British Columbia* [1967] SCR 792.

[39] A total of 47 issues were said to arise in the appeals.[39] There were actually 4 separate (but related) cases and appeals heard together. Whilst I don't of course propose to canvass each of those issues, some of the more important were the following 5:

- Is native title a "bundle of rights" and can it be extinguished partially? (I digress to mention that in Canada, the bundle of rights argument has been rejected. Native title is regarded there as "the right to the land itself".[40])
- Is any native title to minerals or petroleum extinguished by statutory provisions declaring those resources to be state property?
- Do mining leases or pastoral leases or national parks extinguish native title?
- Is there an exclusive native title right to fish in inter-tidal waters?
- Is spiritual connection with land sufficient to ground a native title?

[40] Although the High Court had previously held (by a 4:3 majority) in the *Wik* case that pastoral leases did not necessarily extinguish native title, the *Ward* case concerned pastoral leases which were said to be different from those considered in *Wik*. And with respect to mining, it is interesting to observe that in the United States, a Native American tribe which owns particular land is entitled to compensation for any third party taking of the underlying minerals.[41]

[41] As will be appreciated, the High Court's decision on these issues will have a profound effect upon the future of native title law in Australia. Indeed, some commentators regard the *Ward* case as the most important since *Mabo* itself. Certainly it is the most important since the *Wik* decision in 1996.

Wilson v Anderson 🖬

[42] The next reserved decision is *Wilson v Anderson*, which was reserved by the High Court in September 2001. This case concerned a statutory pastoral lease in a rural area of an Australian state. The land the subject of the lease is subject to a native title claim. The lease was granted in perpetuity. The question in issue was whether the lease conferred exclusive possession and thus under the *Native Title Act* extinguished native title. The lower courts held that the case was controlled by the holding in *Wik*, such that native title was not necessarily extinguished. The applicant Wilson argued that the lease was different from those considered in *Wik*,[42] and that it extinguished native title.

[43] So there are now 2 reserved decisions where parties have argued that *Wik* should be distinguished. There are 2 reasons why that could happen. First, because of the different wording and nature of the relevant statutes. Secondly, because of the 3 changes which have occurred on the High Court since *Wik* – where 2 of the minority Justices and 1 majority Justice (Justice Toohey) have retired and been replaced.

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39 High Court of Australia, Case Summaries (March 2001).
40 *Delgamuukw v British Columbia* [1997] 3 SCR 1010, 1095 [138].
41 *United States v Shoshone Tribe of Indians*, 304 US 111 (1968).
42 High Court of Australia, Case Summaries (September 2001).

Yorta Yorta

[44] The last of the reserved decisions which are currently before the High Court is *Members of the Yorta Yorta Aboriginal Community v State of Victoria & Ors*. It was reserved after argument only 5 weeks ago. This was a native title claim to settled land in south-eastern Australia. Some 2,000km² is involved. It is regarded as a test case. After a hearing which lasted 114 days and involved something like 500 respondents (including government respondents), the trial judge found that the "tide of history" had washed away any native title,[43] because by 1881, the Aboriginal claimants' ancestors were said to have been no longer in possession of their tribal lands and had ceased to observe their traditional laws and customs. An appeal to an intermediate appellate court was dismissed.

[45] The appeal to the High Court raised an issue of fundamental importance for this claim, and all future native title claims in Australia. That issue was whether a native title applicant was required by s. 223(1)(c) of *the Native Title Act* to prove all of the common law requirements of native title.[44] Section 223 defines native title and paragraph (1)(c) refers to the rights and interests being "recognised by the common law of Australia". The argument in the High Court concentrated upon whether that meant that common law concepts of abandonment and so on were imported into the statutory definition. The Aboriginal parties argued that that was not required and it was not necessary to prove *continuous* acknowledgment and observance of traditional laws and customs since 1788 (the year that Australia was occupied by the British).

[46] Although the case will undoubtedly turn principally upon issues of statutory interpretation, it may be significant to observe that in Canada, only a "reasonable degree of continuity" with past traditions is required.[45] That approach would presumably permit there to have been some breaks in the indigenous observance of the ancestors' traditional practices.

[47] Because of the complexity of the issues involved, I do not expect there to be judgments in the *Yorta Yorta* case until late this year. However due to the time that *Ward* and *Wilson v Anderson* have already been reserved, I would not be surprised if decisions in those cases were not too far away.

Native Title Act

[48] It is appropriate that I make some comments about the *Native Title Act*. This is the legislation under which claims for native title are made in Australia, and which specifies the effect of various activities upon native title. Stakeholder views differ about the effectiveness of the *Native Title Act*. When raw statistics are examined, one finds that only 30 native title applications across Australia have been determined in the past 10 years, that is, since native title was first recognised in Australia – and 80% of those were consent determinations. There are now some 590 unresolved claims. On these figures and rate of

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43 This expression was initially used by Brennan J (with whom Mason CJ and McHugh J agreed) in *Mabo [No. 2]* at p. 60.

44 High Court of Australia, Case Summaries (February 2002).

45 *Minister of National Revenue v Mitchell* [2001] 1 SCR 911, 928 [12].

progress, it would take a further 196 years for all current claims to be resolved. I do not, of course, suggest that anything like that time period will actually be required. But it may well take another 10 plus years. Although many claims raise complex issues and require very time-consuming negotiations, one cannot but make the comment that the progress to date has been slow. Recently, some political, indigenous and industry leaders have called for reforms to the funding and administration of the native title process. Concerns have been expressed about its complexities, uncertainties and cost. However the Australian Attorney-General has expressed the view that the system can work with good will and faith. Legislative refinements therefore seem unlikely.

Conclusion

[49] So there it is. Native title law in Australia is very much a work in progress. It is a relatively new area of law in our country. Many issues – such as compensation for impairment or extinguishment – have yet to be even raised in the High Court. That may well be the next big issue. The applicable principles of native title law will therefore take some time to be worked out in Australia – just as they have done in other jurisdictions.

[50] Finally, I'm pleased to thank the Latimer Clarke Corporation Pty Ltd and Atlapedia Online for kindly permitting me to use their colour map of Australia in this presentation. I also thank my staff for the preparation of the overhead slides.

[51] Grazie!

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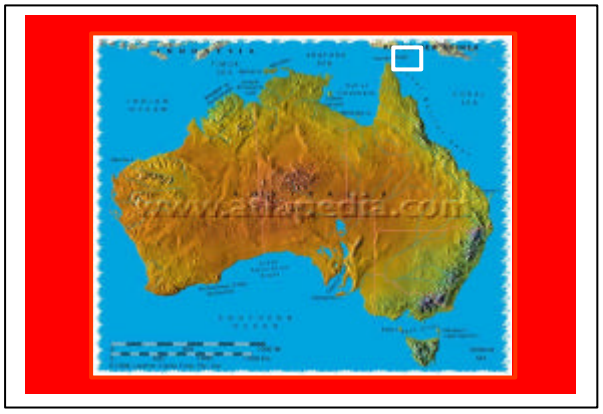

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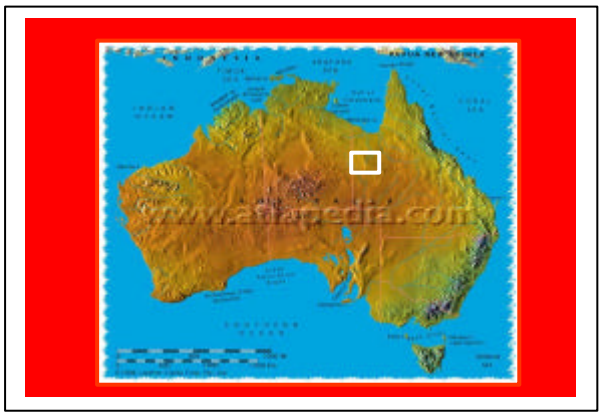

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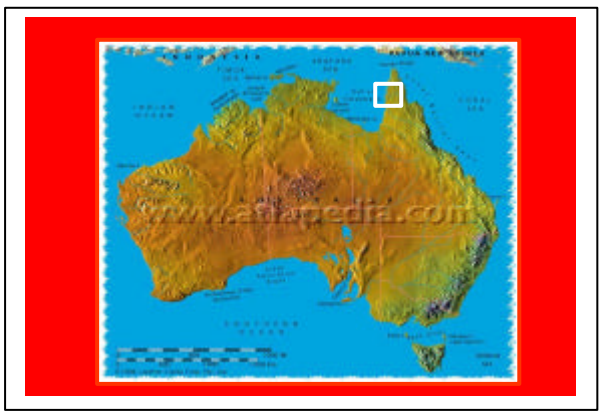

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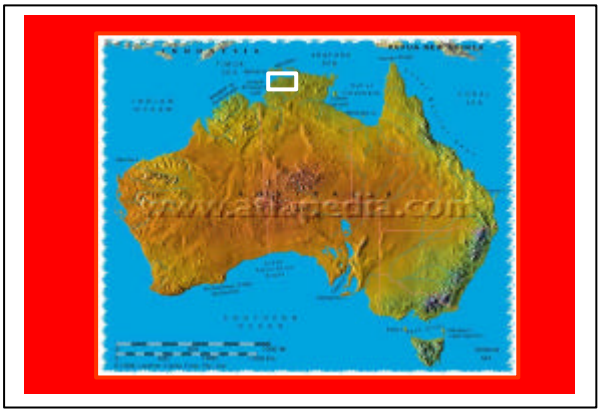

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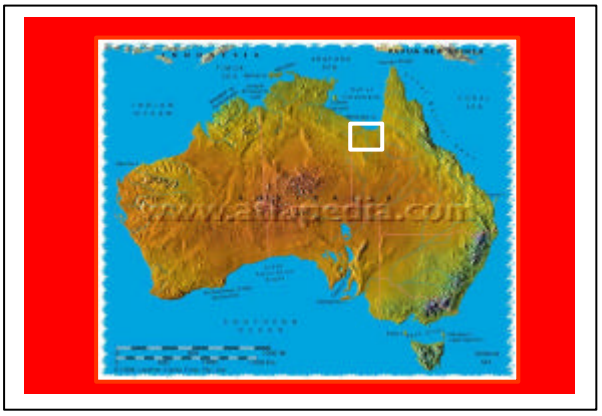

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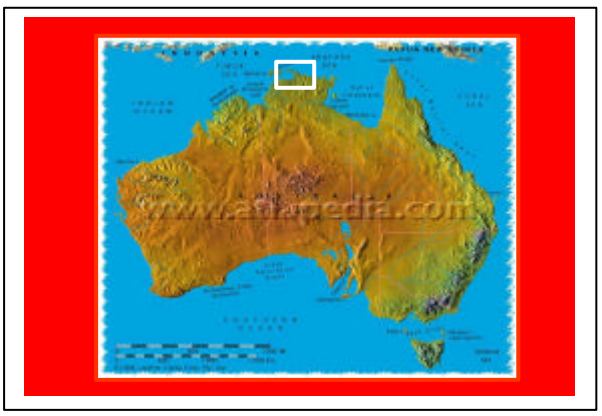

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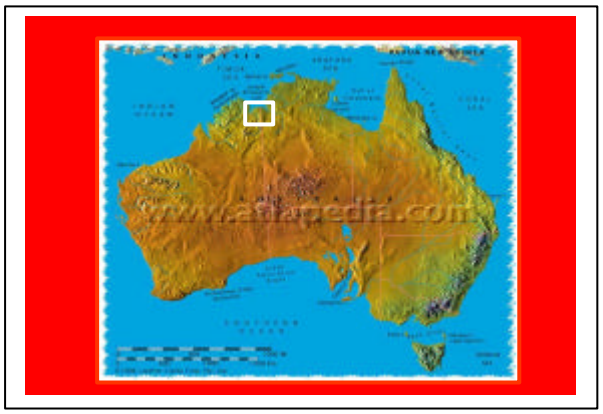

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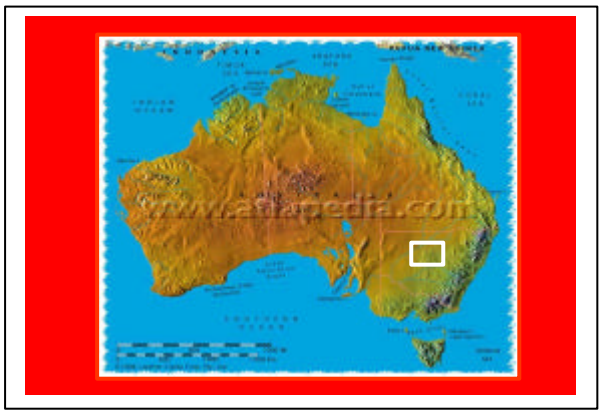
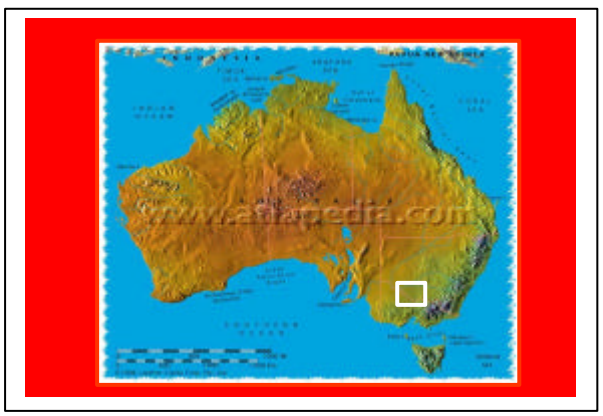


Wilson v Anderson



Yorta Yorta