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THE EVOLUTION OF NATIVE TITLE IN THE HIGH COURT OF AUSTRALIA

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Queensland

[1] Good afternoon Ladies and Gentlemen. My address today is about native title in Australia – and in particular, its evolution in the High Court.

Introduction

[2] Native title is not a new jurisprudential concept in world terms. I am talking here about an indigenous title to land or waters and the bundle of rights and interests attaching to or arising out of that title.

[3] 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.[1] It was to be an influential decision. New Zealand followed 21 years later in 1847.[2] Canada was next in 1888.[3] Then various African countries in the 1920s.[4] But Australia was even slower – and more cautious. Indeed although the High Court of Australia had accepted in 1941 the concept of native title for Papua New Guinea (then an external territory of Australia),[5] 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]*,[6] which was decided in 1992 – almost 170 years after the United States.

[4] I acted as junior counsel for Queensland in the *Mabo* case. I remember that when I was offered that brief, I looked at my old Law School notes about native title. They dismissed the concept in about 3 pages, principally because of a Northern Territory decision in 1971 which concluded that the common law did not recognise native title.[7] However only 8 years later in 1979, the High Court said that a properly pleaded native title claim would raise an arguable question for hearing and determination.[8] So when the *Mabo* 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.

[5] In the 11 years that have passed since the High Court held that Australian common law recognises 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 hundreds of decisions concerning it. Today I will look briefly at the more important decisions at the High Court level only. Those are the decisions which finally settle the law for Australia.

Mabo

[6] We begin with the 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]".

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1 *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).

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

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

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

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

6 (1992) 175 CLR 1.

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

8 *Coe v Commonwealth of Australia* (1979) 53 ALJR 403, 408, 411, 412.

That was a case which was decided by the High Court in 1988.[9] The *Mabo* cases concerned 3 small islands in the Torres Strait. Ancestors of the indigenous inhabitants had lived there since long before the first European contact with the area hundreds of years ago. After the court proceedings were commenced, Queensland Parliament passed legislation which purported to invalidate any native title interest in those islands retrospectively from when they became part of Queensland in the 1870s. Mr Mabo and his co-applicants challenged this legislation and the High Court, by a 4:3 majority, ruled that it was invalid because it breached the *Racial Discrimination Act 1975*. That was *Mabo [No. 1]*.

[7] So with that background, the trial of this case then proceeded. The hearings occurred in Brisbane, Murray Island and Thursday Island. After factual findings were made by the Supreme Court of Queensland after a 67 day hearing, the case returned to 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*,[10] the trial judge sat for 374 days over a 3-year period – and ultimately gave a decision which the Supreme Court of Canada later said was wrong and should be retried.[11]

[8] Much has been written about the *Mabo* case, but in summary, the Court held (6:1) that the indigenous Meriam people held native title to the island which was recognised by Australian common law; and that native title reflects the entitlements of the indigenous inhabitants in accordance with their laws and customs to their traditional land. In doing so, the Court rejected 2 key propositions which had previously been accepted as correct. First, that when Australia was occupied by the British in 1788, the land was *terra nullius* – in the sense of unoccupied or uninhabited for legal purposes. 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 Aboriginal inhabitants. Members of the Court also said (perhaps as *dicta*) that native title could be extinguished in various ways. The Court would be called upon in later cases to determine a number of extinguishment issues.

[9] The *Mabo* case stimulated enormous public and political debate which culminated in the enactment of the *Native Title Act 1993*. Other countries, such as New Zealand,[12] Canada,[13] the United States[14] and South Africa,[15] also recognise and protect native title.

Native Title Act Case

[10] In 1994, the *Native Title Act* was challenged by the Western Australian government and in March 1995, a unanimous Court held that apart from one section, the *Native Title Act* was valid.[16] Although the case is important for that

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

10 [1991] 3 WWR 97.

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

12 *Treaty of Waitangi 1840*.

13 *Constitution Act 1982*.

14 *Trade and Intercourse Act 1790* (now the United States *Code*).

15 *Restitution of Land Rights Act 1994*.

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

holding and for its analysis of various provisions of the Act, it is also important for deciding that the native title principles which were espoused in the *Mabo* case applied to *mainland* Australia as well. But as we will see, proving native title on the mainland has recently become very difficult indeed.

Waanyi

[11] The next case to reach the High Court was in February 1996: *North Ganalanja Aboriginal Corporation v Queensland*.[17] This is often referred to as the *Waanyi* case, named after the indigenous Waanyi People who were the Aboriginal group involved. I appeared again for Queensland. 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? Most people then thought that it did.

[12] The High Court decided the 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.

Wik

[13] Only 4 months later in 1996, another native title case reached the High Court. It was the well-known *Wik* case.[18] This time, one of the questions squarely raised for the Court was whether native title was extinguished by a pastoral lease. That was still the biggest issue in Australian native title law. More than 40% of Australia is covered by pastoral leases. The hearing in Canberra saw 35 barristers in attendance. I was one of them, appearing again for Queensland. It was always going to be a tight result and 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.

[14] 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 determined. Indeed Justices Callinan and McHugh said recently that there is no clear *ratio* in *Wik*.[19] But fortunately, one of the *Wik* 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".[20]

[15] Justice Toohey said 3 important things. First, the pastoral leases concerned 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

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[17] (1996) 185 CLR 595.

[18] *Wik Peoples v Queensland* (1996) 187 CLR 1.

[19] *Western Australia v Ward* (2002) 76 ALJR 1098, 1196 [480], 1244 [695]-[696]; *Wilson v Anderson* (2002) 76 ALJR 1306, 1344 [195].

[20] (1996) 187 CLR 1, 132.

majority's approach sanctioned the co-existence of native title and the pastoral leases concerned, but with primacy accorded to the pastoral lease.

[16] This, I think, was the high-water mark for native title claimants in Australia. Up to that point in time, the High Court had recognised the existence of native title – hardly a radical step, given the existing international jurisprudence; upheld the constitutional validity of the *Native Title Act*; and then, by the barest of margins, decided that certain Queensland pastoral leases did not necessarily extinguish native title. In doing so, the majority distinguished a number of early Queensland decisions that pastoral leases were leases which conferred exclusive possession – ordinarily an extinguishing event – upon the grantee.[21] More recent United States authority is to similar effect as those Queensland decisions.[22]

[17] The *Wik* decision unleashed considerable criticism and uncertainty in some circles. The Howard government subsequently amended the *Native Title Act* in 1998 to deal with the implications from the *Wik* decision and to tighten up various aspects of the Act. The amendments (which were known as the 10-Point Plan) were strongly opposed by the Indigenous community and the Labor opposition.

[18] The 6 High Court decisions since *Wik* have, however, with 1 exception, considerably limited the scope and content of native title.

Fejo

[19] The year 1998 also saw the High Court look again at native title. The case was *Fejo v Northern Territory*.[23] The question here 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.

[20] 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 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, and it removed any argument that backyards could be subject to native title.

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[21] *Wildash v Brosnan* (1870) 1 QCLLR 17, 18; *Macdonald v Tully* (1870) 2 QSCR 99, 106; *Heness v Bell* (1906) 3 QCLLR 47, 49-50; *R v Tomkins* [1919] StRQd 173, 190, 194, 198.

[22] *Sproul v Gilbert*, 359 P2d 543 (1961).

[23] (1998) 195 CLR 96.

Yanner

[21] The next case was *Yanner v Eaton* in 1999.[24] 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". His defence was that he was acting pursuant to his native title and did not need a permit. The Queensland Court of Appeal rejected his defence and held that the statute extinguished any native title. He appealed to the High Court.

[22] By a majority of 5:2, the High Court accepted his defence and reversed the court below. I again appeared for Queensland. The key deciding point in the High Court 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.

[23] 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.[25] Some of those cases were considered by the High Court in *Yanner*.

Yarmirr

[24] 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 of Australia v Yarmirr*,[26] the question of whether there could be native title to the sea and sea-bed below the low-water mark reached the High Court. The case involved more than 3,300km^2 of sea.

[25] The Indigenous people claimed *exclusive* possession of the sea areas. That would presumably have overridden 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 opposed 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*.[27]

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24 (1999) 201 CLR 351.

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

26 (2001) 208 CLR 1.

27 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:

(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

[26] 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 Commonwealth'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 co-existed with the rights of others. The native title holders therefore could not control commercial operations such as fishing, tourism and so on in the seas and sea-beds. This case was effectively the test case for sea claims.

Ward

[27] In August last year, the High Court decided *Western Australia v Ward*.[28] The *Ward* case was a claim for native title to land and waters in north-western Australia. Some 7,900km^2 and 3 islands were involved. The land included pastoral leases, the Ord River irrigation area, the Argyle diamond mine and some tidal zone waters. The case had an 8-day hearing – an extraordinary length of time by American standards, where only 30 *minutes* per party is allowed in the US Supreme Court. With respect, given the modern reliance upon detailed written submissions, one wonders when the High Court will impose oral submissions time limits perhaps along US lines.

[28] By majority, the High Court found that (a) pastoral and mining leases extinguished any native title to control access to or use of that land, (b) the public right to fish in tidal waters continues, and (c) statutes which said that minerals or petroleum were Crown property – and statutes like this are common throughout Australia – extinguished any native title to those resources. The Court also stressed that native title is a bundle of rights of varying content, which was not necessarily analogous to a fee simple, and which could be extinguished part by part.

Wilson v Anderson

[29] Another decision, *Wilson v Anderson*,[29] was handed down on the same day as *Ward*. It concerned a pastoral lease in the western division of New South Wales. The lease had been granted in perpetuity. The land was the subject of a native title claim. By majority, the High Court decided that those perpetual pastoral leases were like freehold – and so they extinguished native title. This was a big loss for the native title claimants, as these types of leases cover about 40% of New South Wales.

Yorta Yorta

[30] The last native title case decided by the High Court was in December last year – *Members of the Yorta Yorta Aboriginal Community v State of Victoria & Ors*.[30] In

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(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."

[28] (2002) 76 ALJR 1099.

[29] (2002) 76 ALJR 1306.

[30] (2002) 77 ALJR 356.

my opinion, this was the most important case since *Wik* – and perhaps since *Mabo* itself. There are now no native title matters pending in the High Court, and it may be some years before the next native title appeal reaches it.

[31] *Yorta Yorta* was a native title claim under the *Native Title Act*. It sought exclusive possession of the area concerned – some 2,000km^2 of settled land straddling the Murray River in New South Wales and Victoria. After a hearing which lasted 114 days and involved 500-odd respondents, the trial judge found that the "tide of history" had washed away any native title because by 1881, the Aboriginal claimants' ancestors were no longer in possession of their tribal lands and had ceased to observe their traditional laws and customs. By majority, the Full Federal Court agreed.

[32] The appeal to the High Court raised an issue of fundamental importance for all native title claims in Australia. That issue was whether a native title applicant was required by the *Native Title Act* definition of native title to prove all of what the claimants said were the "common law requirements" of native title – which includes proof of continuous acknowledgment and observance of traditional laws and customs since 1788. The lower courts found that the claimants could not prove that key element and so their claim failed.

[33] The High Court dismissed the appeal 5:2, having regard to the findings of the trial judge. Justices Gaudron and Kirby dissented. The majority said that as native title is not a creature of the common law, there were no "common law requirements" of native title. But the key point in the majority's judgments was that under the *Native Title Act*'s definition of native title, the rights and interests had to be possessed under *traditional* laws and customs acknowledged and observed – and unless their acknowledgment and observance had "continued substantially uninterrupted since sovereignty" (which in most cases is 1788), any laws and customs which were *now* acknowledged and observed could not properly be described as traditional.[31] The majority added that the traditional indigenous society must also have continued to exist since sovereignty.[32]

[34] On any view, this interpretation of the statutory definition of native title will place very considerable difficulties in the way of most existing and future native title claims to settled parts of Australia.

Conclusion

[35] The High Court has been very active in the native title field. Having initially determined that Australian law recognises native title, subsequent decisions have in most cases limited the concept. The most recent decision has gone much further in refining the requirements, such that the prospects of success of most unresolved claims to settled areas appears now to be in serious doubt.

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31 At [87].

32 At [89].