

NATIVE TITLE RIGHTS TO EXCLUSIVE POSSESSION, USE AND ENJOYMENT AND THE YINDJIBARNDI

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I THE YINDJIBARNDI AND FORTESCUE METALS

The recent trial court determination of the rights of the Yindjibarndi people to their traditional lands, *Warrie (on behalf of the Yindjibarndi People) v State of Western Australia (Yindjibarndi No 2)*,¹ attracted extensive media coverage. The reason for the extensive coverage was because Fortescue Metals had recently established a large iron ore mine on the traditional lands the subject of the determination without any agreement with the native title claimants. The mine is projected to have revenues of \$280 billion over 40 years. The case drew attention to the rights of exclusive possession which the native title claimants were able to establish.

Fortescue Metals announced very shortly after the trial judgement that the decision would be appealed, the chief executive officer saying that “the court’s decision appeared to be based on a very different interpretation of exclusive native title possession, and could have major implications” beyond the immediate case². The chief executive officer voiced concern as to the compensation that might be payable, and the rights the Yindjibarndi could exercise over the land.

This paper traces developments with respect to native title rights to exclusive possession, in particular how the Federal Court has interpreted the requirements of proof with respect to traditional laws and customs in a way which has served to benefit native title holders, rather than, as is commonly the case, limiting³

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1 *Warrie (on behalf of the Yindjibarndi People) v State of Western Australia (Yindjibarndi No 2)* [2017] FCA 803.

2 *The Australian*, 22-23 July 2017, 26; *Australian Financial Review*, 21 July 2017. Notice of Appeal by Fortescue Metals was lodged on 4 December 2017.

3 Richard Bartlett, ‘The Judicial Treatment of Native Title: Equal or *Sui Generis*? Using Traditional Laws and Customs as a Barrier, Limitation and Weakness’ in R Bartlett and J Milroy (ed), *Native Title Claims in Canada and Australia: Delgamuukw and Miriuwung Gajerrong* (Centre for Aboriginal Programmes and Centre for Commercial and Resources Law, University of Western Australia, 1999); Simon Young and Richard Bartlett, ‘From Rights to Relics: A Two-Part Critical Comparative Analysis of the Role of Traditional Laws and Customs in Native Title Doctrine’ (2002) 5 *Balanyi: Culture, Law and Colonialism* 124–61; Richard Bartlett, ‘Humpies not Houses or the Denial of Native Title: A Comparative Assessment Of Australia’s Museum Mentality’ (2003) 10 *Australian Property Law Journal* (2003) 83–107; Simon Young, *The Trouble with Tradition: Native Title and Cultural Change* (Federation Press, 2008); Richard Bartlett, ‘Content of Native Title’ in *Native Title in Australia* (LexisNexis, 3rd ed, 2015).

their rights. The interpretation is focused upon the spiritual relationship to land underpinning the traditional laws and customs of the aboriginal people, and the degree to which non-Aboriginal people are relevant to the exercise of rights held under those traditional laws and customs. The interpretation seems more consistent with the original landmark decision in *Mabo v Queensland (No 2)*⁴ and to reflect a movement away from the limitations declared in *Western Australia v Ward*⁵. The conclusions with respect to native title rights to exclusive possession are similar to those reached in the United States and Canada, but by a more convoluted and onerous process. These developments have reached public prominence with the *Yindjibarndi No 2* decision. The paper offers a rationale for the interpretation of those requirements of proof grounded in the fundamental principles which underpin the recognition of native title in Australia.

The decision in *Warrrie (on behalf of the Yindjibarndi People) v State of Western Australia (Yindjibarndi No 2)* offers a particular insight into the evolution of the law with respect to the establishment of a native title right to exclusive possession. That insight arises from the circumstance that a first decision was made with respect to the rights of the Yindjibarndi people to their land in 2003: *Daniel (and Others on behalf of the Yindjibarndi People) v Western Australia (Yindjibarndi No 1)*⁶. The *Yindjibarndi No 1* decision followed the approach suggested in *Western Australia v Ward*. The latest decision in July 2017 made a determination with respect to Yindjibarndi land immediately to the south of the land subject to the *Yindjibarndi No 1* decision. But the decision entailed an application of the Federal Court's interpretation which adhered much more to the approach in *Mabo v Queensland (No 2)*.

II *MABO V QUEENSLAND (NO 2): AN ENTITLEMENT AGAINST THE WHOLE WORLD*

It is commonly overlooked that in the first determination of native title at common law in Australia, *Mabo v Queensland (No 2)*, the order of the High Court declared that the content of native title of the Meriam People amounted to an entitlement 'as against the whole world to possession, occupation, use and enjoyment of the lands of the Murray Islands'.⁷ Accordingly native title could clearly amount to exclusive use and enjoyment. Indeed s 225(e) requires that determinations of native title must determine whether the native title rights and interests 'confer possession, occupation, use and enjoyment to the exclusion of all others'. However the High Court in *Mabo No 2* also declared an emphasis upon traditional laws and customs as grounding the origin and content of native title rights⁸, which commonly operates as a limitation:

4 *Mabo v Queensland (No 2)* (1992) 175 CLR 1.

5 *Western Australia v Ward* (2002) 213 CLR 1.

6 [2003] FCA 666.

7 *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 217, 169–70, 55–6 per Brennan J.

8 *Ibid* 58 per Brennan J.

[T]he contents of the rights and the identity of those entitled to enjoy them must be ascertained by reference to that traditional law or custom.⁹

III ACTUAL CONTROL OF ACCESS AND EXCLUSION REQUIRED

In the decisions that immediately followed *Mabo No 2* the courts required that a finding of exclusive use and enjoyment required evidence of acknowledgment and observance of traditional law and custom seeking to *control access*. Such control might be shown by a practice of requiring permission to enter traditional land and excluding those who did not have permission. In *Yarmirr v Northern Territory*¹⁰ the Federal Court rejected a claim for exclusive use and enjoyment of the sea and seabed. The High Court dismissed an appeal, having particular regard to the ‘large numbers’ of ‘non-Aboriginal peoples who sought to and did enter the [claimed] area and take its resources’ before the acquisition of British sovereignty.¹¹

A claim for exclusive use and enjoyment was likewise rejected, where a *current* practice seeking to exclude or require permission to enter could not be shown, in *Hayes v Northern Territory*.¹²

There is however no evidence that in recent times any Aboriginal person or group has been excluded from entering or remaining on the claimed land or other traditional country of the claimant groups. Nor indeed that any person, Aboriginal or *non-Aboriginal*, has sought permission either to enter upon the claimed land or to establish a permanent residence there.¹³

Significantly the Federal Court seemed to consider that a right to control access under traditional laws and customs needed to extend to non-Aboriginal people. Consistently with those decisions the High Court in *Western Australia v Ward*¹⁴ declared that the touchstone of native title rights of exclusive possession was the right to control access, evidenced by traditional laws and customs relating to requirements of permission and powers of exclusion:

It is necessary to recognise that the holder of a right, as against the whole world, to possession of land, may control access to it by others and, in general decide how the land will be used. But without a right of possession of that kind it may greatly be doubted that there is any right to control access to land or make binding decisions about the use to which

9 Ibid 107, 110 per Deane and Gaudron JJ.

10 (1998) 82 FCR 533;

11 *Commonwealth v Yarmirr* (2001) 208 CLR 1; [2001] HCA 56, [90] per Gleeson CJ, Gaudron, Gummow and Hayne JJ.

12 (1999) 97 FCR 32; [1999] FCA 1248.

13 *Hayes v Northern Territory* (1999) 97 FCR 32; [1999] FCA 1248, [48].

14 (2002) 213 CLR 1, [51]-[52] per Gleeson CJ, Gaudron, Gummow and Hayne JJ.

it is put.

The High Court “accepted that...” a core concept of traditional law and custom [is] the right to be asked permission and to ‘speak for country’” and if those rights were established under traditional law and custom they “are expressed in common law terms as a right to possess, occupy, use and enjoy land to the exclusion of all others.”¹⁵

But the Court seemed to consider such a right would not be commonly established. The Court rejected the proposition that a community that held community title at the acquisition of sovereignty would have native title rights amounting to ownership. The Court considered that such an approach was “not useful because it assumes, rather than demonstrates, the nature of the rights and interests that are possessed under traditional law and custom.”¹⁶

The Court went on to declare that a principal reason for the inherent fragility of native title at common law was that after the acquisition of sovereignty the right to be asked permission and to speak for country was “inevitably confined, if not excluded”. The imposition and exercise of the new sovereign authority asserting rights to control access to land must deny rights of control over access to the traditional owners.¹⁷ The Court seemed to offer solace, as native title rights of exclusive possession would not commonly be established, by emphasising that “there are other rights and interests which must be considered, including rights and interests in the use of the land”. The reasoning of the Court in *Western Australia v Ward* suggested a concept of control of access concerned with *actual* exclusion against *all* persons, including non-Aboriginal people, and thus a right of exclusive possession would not commonly be established by native title claimants.

But the observations of the Court with respect to the content of the native title rights were obiter dicta, and it could not be said that their import was entirely clear. The decision was in any event largely directed to the question of extinguishment and the issue of the content of native title rights was remitted back to the Federal Court, where the determinations were resolved by agreement.¹⁸

But shortly after *Ward*, and relying on the dicta, Nicholson J in *Daniel v Western Australia*,¹⁹ *Yindjibarndi No 1*, assessed the evidence with respect to whether or not a right to control access could be found such as to sustain a right to ‘possession, occupation, use and enjoyment to the exclusion of all others.’

15 Ibid [88].

16 Ibid [84].

17 Ibid [91].

18 *Ward v State of Western Australia* [2006] FCA 1848; *Attorney-General of the Northern Territory v Ward* [2003] FCAFC 283; (2003) 134 FCR 16.

19 *Daniel v Western Australia* [2003] FCA 666, [292].

Such evidence as there is as set out on this matter... establishes only that... some Yindjibarndi... claim the right to control access to identified portions of Yindjibarndi land. My impression of the evidence was that while there is evidence of a surviving practice to seek permission to enter land considered to be Ngarluma or Yindjibarndi land, when that occurs it is a matter of respect rather than in recognition of a right to control. There is no exercise presently of this aspect of the right claimed.

Nicholson J accordingly rejected any right to control access to or use of land and resources and of course any finding of native title rights as to exclusive possession. Nicholson J made a determination as to the content of *non-exclusive* native title rights and interests held by the claimants²⁰. It consists in a list of rights relating to, access, ceremony, camping and shelter, fishing, foraging, hunting, taking ochre and water, protecting and caring for sites of significance, in accordance with traditional law and custom. The land in question was the traditional land of the Yindjibarndi immediately to the north of that claimed in the *Yindjibarndi No 2*.

In the result by the time of *Daniel (Yindjibarndi No 1)* a determination of native title right of exclusive possession appeared difficult to obtain because of the need to establish the continued acknowledgement and observance of traditional laws and customs sustaining a right to control access, including as against non-Aboriginal people. Establishing such a right, by showing a practice of requiring permission and actually enforcing exclusion, in the context of colonisation and the introduction of the Australian legal system, particularly against non-Aboriginal people, appeared problematic.

IV FEDERAL COURT PREFER MABO TO WARD: NEITHER CONTROL OF NON-ABORIGINAL PEOPLE NOR ACTUAL EXCLUSION REQUIRED

But the Federal Court seemed more inclined to follow the decision in *Mabo* and the order in that case which provided for “possession, occupation use and enjoyment” as against the whole world, than the obiter dicta in *Ward*. In *Neowarra v Western Australia*²¹ Sundberg J upheld a claim to a native title right to possession, occupation, use and enjoyment of the claim area as against the whole world, declaring “[I]t would be wrong to approach the analysis on the basis of whether or not non-Aboriginal people respect the custom”. Indeed Sundberg J regarded the evidence of the complaints of the native title claimants regarding the non-observance by “white people” of the claimants’ rights to control access as supporting the existence of the traditional laws and customs underpinning the right. The court essentially declared that in establishing a right to control access

20 Which was rephrased and upheld by the Full Court in *Moses v Western Australia* (2007) 160 FCR 148.

21 *Neowarra v Western Australia* [2003] FCA 1402, [310].

it was not necessary to have regard to the exclusion or conduct of non-Aboriginal people.

A like determination was made in *Rubibi Community v Western Australia (No 6)*²² but not on the basis of the irrelevance of the exclusion or conduct of non-Aboriginal people, but rather because practical enforcement was not required. The court had no doubt that the evidence established that there was a traditional requirement for permission to be sought by strangers to access Yawuru country, but recognised that “as a result of both colonisation and modern realities, the requirement cannot be, and is not being, enforced”. But the court was “satisfied that the evidence... establishes the existence of the right and its content.”²³ Merkel J had “some concern as to how a right of exclusive possession and occupation can operate in any practical way in urban and other areas in common use by the general community. However, the difficulty in practical enforcement of a native title right is not a proper ground for denying its existence.”²⁴

As Selway J explained in *Gumana v Northern Territory of Australia*²⁵, practical enforcement or exclusion was not the issue, but rather the fact of whether or not the Aboriginal traditional law and custom existed and continue to be acknowledged and observed.²⁶

The Northern Territory submitted that the evidence of “permission” was that there seemed to be many cases where persons actually entered the land without expressly obtaining permission. On that basis the Northern Territory submitted that the rights conferred by Aboriginal tradition were not rights of exclusive possession, but were lesser rights which were subject to general rights of entry. It seems to me that this submission misunderstands the issue. The question is one of fact – is there a relevant tradition and what is it?

The court in *Gumana* was also required to consider whether or not the right to control access needed to extend to non-Aboriginal people, because the Northern Territory argued the claim should fail because permission was only required from Aboriginal visitors and not required from non-Aboriginal visitors. Selway J seemed to consider that control of access of non-Aboriginal people was relevant by finding that evidence supported attempts to control the access of non-Aboriginal people, pointing out that up “until at least the 1930s the Yolngu people asserted their rights to land by the exercise of force” and thereafter using whatever means they could to assert their rights including political and legal action. Selway J concluded that... “[t]he actual practice of the claimants and their ancestors in

22 *Rubibi Community v Western Australia (No 6)* [2006] FCA 82.

23 *Rubibi Community v Western Australia (No 6)* [2006] FCA 82, [115]–[116] per Merkel J.

24 *Ibid* [117].

25 [2005] FCA 50.

26 *Gumana v Northern Territory of Australia* [2005] FCA 50, [208].

relation to European visitors is consistent with a right of exclusive possession.”²⁷

V SPIRITUAL SANCTIONS SUFFICE: *GRIFFITHS*

It was left to the Full Federal Court to provide a full explanation of why, consistent with the origins and foundation of native title, actual control and exclusion was not required to establish exclusive possession. In *Griffiths v Northern Territory*²⁸ the court overturned the finding of the trial judge who had rejected a claim of exclusive native title rights. The court considered that the trial judge had fallen into error by having sought to determine if exclusive rights could be found by analysis of whether or not the rights were proprietary and more than usufructuary in nature, such that he was led “to require some taxonomical threshold to be crossed before a finding of exclusivity could be made.”²⁹ The court stressed the character of native title as being derived from traditional laws and customs and that it was not an institution of the common law. And then went on to emphasise the spiritual nature of the relationship between aboriginal people and their traditional land, emphasising that “if control of access to country flows from spiritual necessity because of the harm that “the country” will inflict upon unauthorised entry, that control can nevertheless support a characterisation of the native title rights and interests as exclusive”.³⁰

The court recognised that as long as there was continued acknowledgement and observance of traditional laws and customs relating to the control of access, sanctioned by spiritual harm, then the right of exclusive possession could be sustained.

The question of exclusivity depends upon the ability of the appellants effectively to exclude from their country people not of their community. If, according to their traditional law and custom, spiritual sanctions are visited upon unauthorised entry and if they are the gatekeepers for the purpose of preventing such harm and avoiding injury to the country, then they have, in our opinion, what the common law will recognise as an exclusive right of possession, use and occupation.³¹

The court reconsidered the evidence tendered at trial and concluded that it sustained “the status of the appellants as gatekeepers” which led to a finding of exclusive possession under the traditional laws and customs. The Full Court determined that the native title rights included “rights in accordance with traditional laws and customs to the possession, occupation, use and enjoyment of that part of the determination area to the exclusion of all others”.

27 Ibid [213].

28 [2007] FCAFC 178.

29 Ibid [127].

30 Ibid.

31 Ibid.

The decision is highly significant in emphasising the unique origins of native title in traditional laws and customs and the spiritual nature of sanctions which enforce those laws and customs. The emphasis on traditional laws and customs served to benefit the native title claimants rather than the more common outcome of confining and limiting the uses to which native title land and resources can be put. The decision puts to one side questions of actual enforcement and exclusion, as the common law might emphasise, in favour of an emphasis upon the belief in the vitality of spiritual sanctions in accordance with traditional laws and customs.

Findings of exclusive use and enjoyment followed the *Griffiths* decision in both contested and consent determinations, but did not explicitly address the matter of the control of access of non-Aboriginal people.³²

VI CONDUCT OF NON-ABORIGINAL PEOPLE IRRELEVANT: *BANJIMA*

Griffiths may have provided an explanation for why actual exclusion and enforcement of a right to control access need not be shown, but it did not explain or address the question of whether the right needed to be demonstrated with respect to non-Aboriginal people. The matter was considered in 2015 in *Western Australia v Banjima People*³³ by a five-member Full Court with particular regard to how traditional laws and customs could sustain a native title right to control access of non-Aboriginal people.

The State argued that there was minimal evidence of Europeans seeking permission to enter traditional lands and the court did not disagree, explaining that “It would be accurate to say that the Banjima People had no capacity whatsoever to enforce their laws and customs against Europeans because, until *Mabo No 2* native title was not recognised in Australia”. But the Court declared that wasn’t relevant because “Europeans stood outside the universe of traditional laws and customs. In other words, it is the Banjima People and other indigenous people that matter,

32 In *Sampi (on behalf of the Bardi and Jawi People) v Western Australia* [2010] FCAFC 26, [147]–[153], the Full Federal Court affirmed the pattern of determinations of native title rights to “possession, occupation, use and enjoyment to the exclusion of all others”, or “against the whole world” and provided a list of cases where such a form of wording had been adopted: contested cases: *Ngalakan People v Northern Territory* (FCA, O’Loughlin J, 7 February 2002, unreported) (order 9.1); *Attorney-General (NT) v Ward* (2003) 134 FCR 16; [2003] FCAFC 283 (order 9); *Neowarra v Western Australia* [2004] FCA 1092 (order 4); *Gumana v Northern Territory (No 2)* [2005] FCA 1425 (order 4). See also *Griffiths v Northern Territory* (2007) 165 FCR 391; [2007] FCAFC 178, [128]; *Banjima People v Western Australia (No 2)* [2013] FCA 868, [724], [852] per Barker J. Consent determinations: *Ngalpil v Western Australia* [2001] FCA 1140 (order 4(i)); *Brown v Western Australia* [2001] FCA 1462 (order 4(1)); *Nangkiriny v Western Australia* (2002) 117 FCR 6; [2002] FCA 660 (order 4(a)); *James v Western Australia* [2002] FCA 1208 (order 5(a)); *Warria v Queensland* [2004] FCA 1572 (order 3); *Nona v Queensland* [2005] FCA 1118 (order 3); *Nona v Queensland* [2006] FCA 412 (order 3).

33 [2015] FCAFC 84. Special leave to appeal to the High Court refused: 28 July 2016.

not people who stand outside the relevant frame of reference”³⁴. Accordingly “the conduct of Europeans in not seeking permission and not heeding the spiritual dangers of Banjima country or respecting sacred or religious sites created in the Dreaming says nothing about the acknowledgment and observance by Banjima and other traditional societies of Banjima traditional laws and customs”³⁵.

So the Court rejected the relevance of the State’s argument that the primary judge failed to consider the ability of the Banjima People effectively to exclude non-Aboriginal people. The scope of traditional laws and customs did not “include Europeans” and there was “ample” and “strong” evidence of the “need” for indigenous people to obtain Banjima permission to enter Banjima country”³⁶.

In the result the Full Court upheld a determination that the native title rights of the Banjima included “the right as against the whole world to possess, occupy, use and enjoy the land and waters... “subject to and exercisable in accordance with... the traditional laws and customs of the Banjima People”.

By the time of the *Yindjibarndi No 2* decision in 2017 the Full Court had declared that in establishing a native title right to “possession, occupation, use and enjoyment to the exclusion of all others” it was not necessary to demonstrate actual exclusion of others, nor was it necessary to have regard to conduct with respect to access of non-Aboriginal people.

VII WARRIE (ON BEHALF OF THE YINDJIBARNDI PEOPLE) V STATE OF WESTERN AUSTRALIA (YINDJIBARNDI NO 2)

Six days after the original draft determination in *Daniel (Yindjibarndi No 1)*, on July 9, 2003, the Yindjibarndi filed a claim over the area immediately to the south. The claimed area includes lands over which there are mining leases, in particular the mining leases held by Fortescue Metals, on which had been developed the Solomon iron ore mine hub. The principal respondents, including the State, accepted in large part that the Yindjibarndi had the non-exclusive rights found by Nicholson J in *Daniel (Yindjibarndi No 1)*. But the claim sought to establish exclusive possession founded on a right to control access to the land and resources, the claim which had failed in *Daniel (Yindjibarndi No 1)*.

The State and Fortescue Metals argued³⁷ that the Yindjibarndi claim to rights of exclusive possession amounted to an abuse of process because the Yindjibarndi were “seeking to re-litigate the issue of exclusive possession that Nicholson J [in *Daniel (Yindjibarndi No 1)*] had determined against them”, being reliant

34 Ibid [21].

35 Ibid [22].

36 Ibid [23].

37 Ibid at [40], [342]-[344].

upon the same traditional laws and customs. The argument was rejected because a determination of native title under the Native Title Act “may be revoked or varied on the ground in that “the interests of justice require the variation or revocation of the determination”.³⁸ Rares J described the power to vary or revoke a determination as “a statutory exception to the general law principles... of abuse of process”.³⁹ And an evolution of the law, such as was enunciated in the *Griffiths* decision, could readily be accommodated within the ground of “the interests of justice”. The dimension enunciated in the *Griffiths* decision “was not in issue or articulated before Nicholson J in the way in which *Griffiths* subsequently identified would support a determination of, effectively, native title rights and interests equivalent to exclusive possession”. Indeed Rares J went further and suggested that “it is possible, indeed probable that [Nicholson J] would have come to the same findings” as to exclusive possession as he had.⁴⁰ Rares J considered that the change and evolution in the law afforded a ground for reaching a decision that was inconsistent with the earlier Yindjibarndi decision in *Daniel (Yindjibarndi No 1)*.

But if the argument of abuse of process was rejected the claimants were still required to bear the onus of proof to establish exclusive rights to their traditional lands and led evidence to that end accordingly. Rares J found that the evidence established a right to control access to lands which they have “possessed continuously since before sovereignty under their traditional laws and customs”.⁴¹ The Court adopted the approach declared in *Griffiths* that spiritual sanctions sufficed as indicative of the enforcement of the right to control access under traditional laws and customs. Non- Yindjibarndi must seek permission from a senior elder to access traditional lands not only to protect those lands, but also to protect the non-Yindjibarndi from spirits when on those lands. Social displacement and technology may have changed the way in which control was exercised but it has “not affected the essential normative character of those laws or customs or their observance at the present time”.⁴²

It was argued that the evidence merely established that there was shown a “respect or courtesy” by the seeking of permission, not recognition of a right to control access, essentially being an argument that actual control or exclusion had to be shown. But given the approach adopted in *Griffiths* and followed in the instant case, it was concluded that the requirement to seek permission went beyond mere respect and “under Yindjibarndi laws and customs was in the nature of a real proprietary right equivalent to the common law right of exclusive possession”.⁴³

Reliance upon the failure of non-Aboriginal people to seek permission to enter was also rejected because, relying upon the Full Court’s decision in *Banjima*,

38 Ibid at [360], [373]. See *Native Title Act 1993* (Cth) s 13(5)(b).

39 Ibid at [375].

40 Ibid at [380], [382].

41 Ibid at [132].

42 Ibid [132], [139].

43 Ibid [105].

the conduct of non-Aboriginal people was considered irrelevant as to the acknowledgement and observance of traditional laws and customs by Aboriginal people with respect to the right to control access to their traditional lands.⁴⁴

The court concluded, following the Full Federal Court decisions in *Griffiths* and *Banjima* that the Yindjibarndi have the exclusive right to control access to their lands under their traditional laws and customs.⁴⁵

VIII A RIGHT ENFORCEABLE AGAINST ALL OTHERS, INCLUDING NON-ABORIGINAL PEOPLE, EXPLAINED

In *Warrie (on behalf of the Yindjibarndi People) v State of Western Australia (Yindjibarndi No 2)* and like cases the native title right to possession, occupation use and enjoyment has been framed in terms of a right “as against the whole world” or “to the exclusion of all others”, and includes the right to exclude non-Aboriginal as well as Aboriginal people. And the right is regarded as being equivalent to exclusive possession or an estate in fee simple:

... if the Yindjibarndi are entitled to a determination that they have the right to control access to the claimed area, that will entitle them to a determination that they have a right equivalent to exclusive possession, which in turn will equate to the full rights of ownership of an estate in fee simple.⁴⁶

But the evidence that was provided was only with respect to a right under their traditional laws and customs to control access of Aboriginal people. How does such evidence give content to a right that controls access of all people, including non-Aboriginal?

It can be explained as derived from the right to control access, equivalent to exclusive possession, that was held under traditional laws and customs *at the acquisition of sovereignty, when there were generally no non-Aboriginal people*.⁴⁷ That right is recognised and protected upon the acquisition of sovereignty under the doctrine of acquired rights. That right becomes “subject to the new legal regime and may be modified or extinguished in accord with the powers of the new

44 Ibid [98], [107].

45 Ibid [21]–[22], [149]–[151].

46 Ibid [18].

47 But exceptionally there were non-Aboriginal people and such is recognised consistently with this analysis in *Commonwealth v Yarmirr* (2001) 208 CLR 1; [2001] HCA 56, [90] per Gleeson CJ, Gaudron, Gummow and Hayne JJ where the High Court upheld the rejection of a right of exclusive possession “having particular regard to the ‘large numbers’ of ‘non-Aboriginal peoples who sought to and did enter the [claimed] area and take its resources’ before the acquisition of British sovereignty”.

sovereign”.⁴⁸ The traditional legal system does not continue as against the larger sovereign society, but “the fact of the existence and the nature of the interest and relationship” does.⁴⁹

If the right to control access can be proven to exist at sovereignty along with continued acknowledgement and observance of the traditional laws and customs thereafter, the right will be enforceable against the whole world. At the acquisition of sovereignty a right to exclusive possession would have been established and that right continues until acknowledgement and observance of the supporting traditional laws and customs fails, or extinguishment or suspension of the right is shown. Extinguishment or suspension must be established in accordance with the common law or under the Native Title Act. And the determinations that have been made have always acknowledged that limitation. Thus in *Banjima* the determination the Full Court upheld was of native title rights that “are subject to and exercisable in accordance with the laws of the State and the Commonwealth, including the common law”.⁵⁰

How then is it possible for Fortescue Metals to have established a major iron ore mine on land subject to the Yindjibarndi native title right to exclusive possession without agreement with the Yindjibarndi? The mine was established in accordance with and validated by the future act regime of the Native Title Act. The mining leases which authorise the mine were granted following determinations by the National Native Title Tribunal that the leases could issue⁵¹, following the breakdown of negotiations towards agreement⁵². The effect of the grant of the leases is to suspend native title rights to the extent of inconsistency with the mining leases⁵³. The Native Title Act provides that compensation is payable in accordance with the principles that would be applicable to the holders of a freehold estate⁵⁴. The establishment of the mine, without agreement, on land where the

48 Richard Bartlett, “Doctrine Of Acquired Rights: Respect For Existing Rights” in *Native Title in Australia* (LexisNexis, 3rd ed, 2015).

49 Ibid.

50 [2015] FCAFC 84, [2], [46]-[47].

51 The National Native Title Tribunal (NNTT) determined that the mining leases might be granted in 2009 – [2009] NNTA 69 (M47/1407, 47/1408, 47/1410), [2009] NNTA 91 (M47/1413), [2009] NNTA 69 (M47/1409, 47/1411). The determinations of the Tribunal were appealed to the full Federal Court on constitutional grounds, but the appeal failed – [2011] FCFCA 100.

52 Fortescue Metals lodged applications for three mining leases (M47/1413, 47/1409, 47/1411) in the Solomon Hub area in 2007 and 2008, being the holder of exploration licences which conferred a priority right to such leases. Negotiations began with the native title holders through the Yindjibarndi Aboriginal Corporation (YAC). Apparently the YAC were seeking a 0.5% royalty, whilst Fortescue Metals was offering a \$10 million per annum package, comprising \$4 million in cash and \$6 million in employment and training. Nick Evans, *Perth Now Online Archive*, 8 April 2011. The YAC argued that there had been no good faith negotiation, but the argument was rejected by the National Native Title Tribunal – [2009] NNTA 38 (M47/1413), [2009] NNTA 63 (M47/1409, 47/1411).

53 *Native Title Act 1993* (Cth) s 24 MD (2): application of the non-extinguishment principle and suspension of the native title rights and interests to the extent of inconsistency.

54 *Native Title Act 1993* (Cth) s 51.

Yindjibarndi hold a native title right to exclusive possession is an instance of the subjection of native title to the “laws of the Commonwealth” as declared in every determination of native title.

IX REACHING THE SAME CONCLUSION AS THE UNITED STATES AND CANADA, BUT BY A MORE CONVOLUTED AND ONEROUS PROCESS

Native title jurisprudence in the United States and Canada has recognised full beneficial ownership of indigenous people to their traditional lands, but by a far less convoluted and onerous process. If a traditional indigenous group or society maintained exclusive use and occupation of land it was regarded as having beneficial ownership. Neither the United States Supreme Court nor the Supreme Canadian Supreme Court demanded proof of traditional laws and customs sustaining exclusive possession of the land⁵⁵.

Early on in 1823 United States Supreme Court declared in *Johnson v McIntosh*⁵⁶ that indigenous people “were admitted to be rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion”. Shortly thereafter the Court in *Mitchel v United States* declared that “Indian possession or occupation was considered with reference to their habits and modes of life; their hunting grounds were as much in their actual possession as the cleared fields of the whites; and their rights to its exclusive enjoyment in their own way and for their own purposes were as much respected.”⁵⁷

Recognition by the Canadian courts of native title beneficial ownership came later. The Canadian Supreme Court in 1985 in *Guerin v R*⁵⁸ emphasised that portion of the judgment in *Johnson v McIntosh* which had declared the native title right to ‘use [the land] according to their own discretion’⁵⁹ and concluded that Indians have a ‘legal right to occupy and possess’ such lands.⁶⁰ The conclusion was affirmed in *Delgamuukw v British Columbia*⁶¹ where the indigenous appellants argued ‘that Aboriginal title is tantamount to an inalienable fee simple’, while the Province argued that it was limited to those rights traditionally integral to indigenous cultures. Chief Justice Lamer concluded that ‘Aboriginal title encompasses the right to *exclusive use and occupation* of the land held pursuant to that title for a variety of purposes, which need not be aspects of those Aboriginal practices,

55 Richard Bartlett, ‘Full Beneficial Ownership’ in *Native Title in Australia* (LexisNexis, 3rd ed, 2015).

56 8 Wheat 543; 5 L Ed 681 (1823).

57 *Mitchel v United States* 34 US (9 Pet) 711, 746 (1835).

58 *Guerin v R* (1985) 13 DLR (4th) 321.

59 *Guerin v R* (1985) 13 DLR (4th) 321, 336 (SC(Can)).

60 *Guerin v R* (1985) 13 DLR (4th) 321, 339 (SC(Can)).

61 *Delgamuukw v British Columbia* [1998] 1 CNLR 14.

customs and traditions which are integral to distinctive Aboriginal cultures'.⁶² He laid emphasis on the source of native title in the 'physical fact of occupation' of the land by indigenous people, and accordingly applied the universal 'common law principle that occupation is proof of possession in law'.⁶³ The Supreme Court of Canada recently affirmed in *Tsilhqot'in Nation v British Columbia*⁶⁴ that native title in Canada confers beneficial ownership.

The approach adopted by the Full Federal Court in Australia reaches ultimately the same result as in the United States and Canada, but only after an exhaustive and onerous examination of traditional laws and customs. It tends to be forgotten that Toohey J in the case that recognised native title in Australia, *Mabo (No 2)*, had explained that the imposition of such a burden was unnecessary. Toohey J recognised that the proof of native title required proof of the existence of 'traditional interests', but emphasised that it was *inconceivable* that the utilisation of land was not derived from a legal system of rights and duties, and thus traditional laws and customs.⁶⁵ Assuming the existence of such a legal system, Toohey J accordingly declared that 'it is presence amounting to occupancy [under such traditional laws and customs] which is the foundation of the title and which attracts protection and that which must be proved to establish title'.⁶⁶

X A FEDERAL COURT INTERPRETATION MUCH MORE CONSISTENT WITH MABO NO 2 THAN WARD

The origin of native title rights is the traditional relationship of the aboriginal people to the land at the acquisition of sovereignty. It is the rights established at that time that are given effect to in the native title jurisprudence of Australia. If there was a native title right to exclusive possession at the acquisition of sovereignty than that right is continued until extinguished, suspended, or the underlying traditional relationship fails. And that right is exercisable against the whole world, just as it was at the acquisition of sovereignty, even though at that time there were generally no other people.

The emphasis of native title jurisprudence in Australia on traditional laws and customs has led to a very onerous burden of proof being imposed on native title claimants, and if they are unable to meet the burden of establishing exclusive possession, then they will succeed in obtaining only a declaration of traditional rights of use "frozen" as at the acquisition of sovereignty. Accordingly traditional laws and customs have commonly functioned as a severe limitation on the native title rights which have been recognised.

62 *Delgamuukw v British Columbia* [1998] 1 CNLR 14, [117].

63 *Delgamuukw v British Columbia*: [1998] 1 CNLR 14, [116].

64 [2014] SCC 44 (SC(Can)).

65 *Mabo v Queensland (No 2)* (1992) 175 CLR 1, 188

66 *Mabo v Queensland (No 2)* (1992) 175 CLR 1, 188 n 19, Toohey J quoting almost verbatim from R Bartlett, 'Aboriginal Land Claims at Common Law' (1983) 15 *University of Western Australia Law Review* 293, 310, 311, 319–20.

But if exclusive possession can be shown, upon the basis of a right of control of access under traditional laws and customs being proven at the time of the acquisition of sovereignty and adhered to thereafter, then the limitation becomes less severe. Because the right recognised connotes exclusive use and enjoyment, and is exercisable against the whole world. The right must be exercised in accordance with traditional laws and customs, but a right of access or use of those lands by others, including non-Aboriginal people, can only be obtained under state or Commonwealth laws. The result is much more consistent with the original native title decision, *Mabo No 2*, and its recognition in the original native title determination of rights exercisable against the whole world of “exclusive possession, occupation, use and enjoyment.” The Federal Court has consistently relied upon the acknowledgement and observance of the traditional laws and customs, and the vitality of belief in the spiritual sanctions underlying those laws and customs, so as to sustain a right of exclusive possession established at the acquisition of sovereignty. And thereby rendered irrelevant an emphasis upon actual exclusion, and the enforcement of the right against non-Aboriginal people. The line of Federal Court decisions adheres to the reasoning in *Mabo No 2* rather than the reluctance to recognise any rights of exclusive possession declared in *Ward*.

Moreover if the burden of proof can be met then the result is not so very different from that reached in the United States and Canada, where the native title right of exclusive use and enjoyment is founded on the fact of occupation by a traditional society. No enquiry into the traditional laws and customs of the society is demanded. And ultimately the explanation for similar conclusions being arrived in the three jurisdictions is essentially the same – namely the origin of native title is the use and occupation by a traditional society – it is just that in Australia the courts and the *Native Title Act* have insisted that there must be proof that the traditional society had laws and customs governing use and occupation of the land. And it must surely be acknowledged that it is inconceivable, as Toohey J declared, that a traditional society would not have had such laws and customs. All that the emphasis on traditional laws accomplishes is to place a much more onerous burden on native title claimants.