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Native Title and its Implications

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Native Title and its Implications

Introduction

High Court's decision in Mabo

In the beginning there was *Mabo*.¹

In 1982 Edward Koiki Mabo, David Passi and James Rice, members of the Meriam people who occupied the Murray Islands in Torres Strait, brought an action against the State of Queensland and the Commonwealth of Australia in the High Court on their own behalf and on behalf of the members of their respective families. They claimed that the Crown's sovereignty over the Islands was subject to the land rights of the Meriam people based upon local custom and traditional native title.²

By the time the High Court handed down its decision on 3 June 1992, only 2 of the 5 original named applicants were still alive. Edward Mabo died on 21 January 1992 and did not live to see the changes that his High Court action brought about.

The *Mabo* High Court was constituted by Chief Justice Mason and Justices Brennan, Deane, Toohey, Gaudron, McHugh and Dawson. In the result, six members of the Court (with Dawson J dissenting) agreed that the common law of Australia can recognise a form of native title which, in cases where it has not been extinguished, reflects the entitlement of the indigenous inhabitants, in accordance with their laws or customs, to their traditional lands.³

Justice Brennan wrote the leading judgment. His Honour summarised the arguments raised by the State of Queensland as follows: First, Queensland made reference to the fact that on 10 October 1878 at Westminster, Queen Victoria passed Letters Patent "for the rectification of the Maritime Boundary of the Colony of Queensland, and for the annexation to that Colony of [certain] Islands lying in Torres Straits, and between Australia and New Guinea".⁴ Secondly, Queensland argued that the legal effect of the Letters Patent was to vest in the Crown absolute ownership of, legal possession of and

exclusive power to confer title to, all land in the Murray Islands. Thirdly, the Queen took the land occupied by the Meriam people on 1 August 1879 without their knowing of the expropriation. Finally, the Meriam people were no longer entitled without the consent of the Crown to continue to occupy the land they had occupied for centuries past.⁵

The State of Queensland's arguments were not, in the end, successful.

This paper will focus on the judgment of Justice Brennan. In reaching his conclusions, Justice Brennan discussed:

- The nature of British acquisition of sovereignty in the new colony.
- The introduction of English common law into the Australian colony.
- The nature of feudal English land law and its application in Australia.

Acquisition of sovereignty

Quoting from the *Seas and Submerged Lands Case*, Justice Brennan noted the principle that:

The acquisition of territory by a sovereign state for the first time is an act of state which cannot be challenged, controlled or interfered with by the courts of that state.⁶

Although the questions of whether and how a territory has been acquired by the Crown are not justiciable before municipal courts, those courts have jurisdiction to determine the consequences of an acquisition under municipal law.⁷ Accordingly, it was within the High Court's power to determine the consequences of an acquisition so as to determine the body of law in force in the newly-acquired territory.

When British subjects, such as Captain Cook were sailing the New World so as to claim new territories on behalf of the British Empire, the English common law was keeping in step with the international law of the time.⁸ In the late 18th Century there were many ways of acquiring

sovereignty. The three which were of consideration in *Mabo* were: conquest; cession; or settlement.⁹

To acquire territory by conquest or cession there must be a confrontation between the invading power and the indigenous inhabitants of the new territory that is settled by war or treaty. Australian Colonial history tells us that neither occurred here. Further, the indigenous inhabitants of Australia were believed to be without a sovereign and primitive in their social organisation.

The British Imperialists applied the concept of *terra nullius* to describe the new territory. *Terra nullius* literally means uninhabited land or no-one's land. In 1788, the term 'terra nullius' was used to describe not only a territory that was uninhabited but also a new territory that was inhabited by primitive people without a sufficiently sophisticated system of laws. In effect, it was considered reasonable and justifiable to ignore the indigenous societies present in Australia on 7 February 1788.¹⁰

Reception of the common law

Application of the descriptor *terra nullius* allowed the British Imperialists to argue that Australia was therefore 'occupied' or 'settled' by the British. As Australia was considered to be settled (ie neither conquered nor ceded), the common law of England was immediately applicable to the English settlers and the 'condition of the infant colony'.

Terra nullius overthrown

By a majority of 6 to 1, on 3 June 1992 and 204 years after British 'settlement', the High Court in *Mabo* overturned the application of the concept of *terra nullius* to the Australian nation.

The justifications for overthrowing the concept are best summarised by the following quotes from Justice Brennan:

If it were permissible in past centuries to keep the common law in step with international law, it is imperative in today's world that the common law should neither be nor be seen to be

frozen in an age of racial discrimination.¹¹

The fiction by which the rights and interests of indigenous inhabitants in land were treated as non-existent was justified by a policy which has no place in the contemporary law of this country.¹²

Whatever the justification advanced in earlier days for refusing to recognise the rights and interests in land of the indigenous inhabitants of settled colonies, an unjust and discriminatory doctrine of that kind can no longer be accepted. The expectations of the international community accord in this respect with the contemporary values of the Australian people.¹³

High Court's Dilemma

In overturning the concept of *terra nullius*, the High Court was faced with a dilemma. As a nation we could not very well turn back the clock to allow the British to acquire the territory by conquest or cession. The legitimacy of the sovereign power could not be called into question. Nor would anyone be happy if the validity of our property rights was called into question. Justice Brennan reasoned that the "recognition by our common law of the rights and interests in land of the indigenous inhabitants of a settled colony would be precluded if the recognition were to fracture a skeletal principle of our legal system".¹⁴

The High Court did not wish to fracture the backbone of Australian property law and thereby call into question the validity of all land titles. To avoid this, it investigated the fundamental concepts underlying property law to test whether our common law property system could withstand the recognition of traditional native title.

English feudal land law

To understand what the High Court did next, we need to reach even further back into English history to the time just after the Norman Conquest when William the Conqueror ruled as the King of England. Under the reign of William I there was a traditional belief that all title to

land vests in the Crown.¹⁵ This gave rise to two doctrines in English land law: the doctrine of tenure; and the doctrine of estates.

- **Doctrine of tenure:** The term 'tenure' is used to signify the relationship between the tenant and the lord not the relationship between tenant and land. It is essentially a feudal concept as every parcel of land in England is believed to be held either mediately or immediately by the King/Queen. Everyone else holds land 'of the Crown' and all title can be traced back to a Crown grant.
- **Doctrine of estates:** To understand the doctrine of estates we need to refer to the concepts of 'radical title' and 'full beneficial ownership' or 'full title'. The Crown is understood to hold the 'radical title' to all land and everyone else will own an estate (eg a freehold estate) which they obtain pursuant to a Crown grant. The Crown will obtain 'full beneficial ownership' when there is no other owner. For example, when the Crown retains or acquires all estates in land for its own purposes (eg to construct a road, railway or other public work).

In *Mabo* the High Court of Australia held that when the British Empire acquired sovereignty over the colony of New South Wales, and then the entire Australian continent, it acquired the **radical title** to all the land.

Contrary to what the State of Queensland argued, it did not find that when the British acquired sovereignty that they acquired full beneficial ownership on behalf of the King. The High Court held that it is a fallacy to equate acquisition of sovereignty with acquisition of full beneficial ownership.¹⁶ It held further that the recognition of the Crown's radical title is consistent with the recognition of native title to land.¹⁷

Nature and incidents of native title

It was held therefore that Australian common law can recognise (and even protect) the interests to land of members of an indigenous clan or group, whether those interests are held

communally or individually. However, because native title rights and interests emanate from a source other than the common law, recognition is only possible when it is established that:

- the native title rights and interests are held in conformity with the traditional laws and customs of the people to whom the clan or group belong; and
- the members of the clan or group acknowledge those laws and observe those customs; and
- the laws and customs stem from the laws and customs acknowledged and observed prior to the acquisition of sovereignty by the British.¹⁸

This in effect became the common law test for the recognition of native title and is best encapsulated in the following paragraph of Justice Brennan's judgment:

Where a clan or group has continued to acknowledge the laws and (so far as practicable) to observe the customs based on the traditions of that clan or group, whereby their traditional connexion with the land has been substantially maintained, the traditional community title of that clan or group can be said to remain in existence.¹⁹

The foundation of native title disappears when the tide of history has washed away any real acknowledgment of traditional law and any real observance of traditional customs. Once traditional native title expires, it cannot be revived.²⁰ This is the first way in which native title may be 'lost'. In other words, native title may be lost due to loss of 'connection'.

The extinguishing of native title

The second way it may be lost is when it is extinguished due to the valid exercise of the sovereign power either through the legislature or the executive. This is because, upon the change of sovereignty, native title became vulnerable to the acts of the new sovereign power.²¹

Extinguishment has serious consequences for the indigenous inhabitants. In recognition of this,

the High Court repeatedly emphasised that the exercise of the sovereign power must reveal a clear and plain intention to extinguish native title. The High Court provided some initial guidance with Justice Brennan reasoning that:

- the grant of a freehold or leasehold estate in land would extinguish native title as would the appropriation and use of land for a public purpose inconsistent with native title, for example for roads, railways or other public works; but that
- the grant of lesser interests, such as authorities to prospect for minerals, would not bring about an extinguishment unless such an interest was inconsistent with the continued existence of native title.²²

Political responses to *Mabo*

The High Court's decision in *Mabo* caused a great deal of public and political controversy. Mining companies and agriculturists argued that the decision created uncertainty about the status of land held on mining leases, exploration licences and pastoral leases and would discourage investment in Australian industries. Some indigenous groups argued that it was 204 years too late and that a Treaty was required.

Introduction of the *Native Title Act*

Caught in the eye of this political storm, the then Keating Government introduced the *Native Title Act 1993* (Cth) (NTA) which came into operation on 1 January 1994. The main purposes of the original NTA were to:

- Recognise native title rights and set down some basic principles in relation to native title in Australia.
 - For example, in s 223 we find a definition of 'native title rights and interests' and in s 225 we find a list of all of the issues that a native title determination must address.
- Provide for the validation of past acts which may be invalid because of the existence of native title.

- When we discuss 'past acts' we are referring to the period prior to the introduction of the NTA.
- In the spirit of compromise engendered by the Keating Government's negotiations with indigenous leaders, native title holders agreed to the validation of all past acts in return for a say in how their interests would be treated in the future.
- Provide for a future regime in which native title rights are protected and conditions imposed on acts affecting native title land and waters.
 - When we discuss 'the future' or 'future acts' we are referring to acts done after the introduction of the NTA.
- Establish the National Native Title Tribunal (NNTT) whose mandate has been to assist in the resolution of native title claims by mediation.
- Provide a process by which native title rights can be established and compensation determined.

Native title statistics

Since its introduction, the NTA has been amended twice. The first time was in 1998 when the 'future act regime' was comprehensively augmented following the High Court's decision in *Wik*. And, earlier this year, to allow for closer integration of the processes run by the NNTT and the Federal Court.

In the last 15 years there have been 105 determinations made across the country. Of these, in 70 it was found that native title exists in the whole or part of the area and, in the remaining 35 it was found that native title did not exist over the entire area. Twenty claims were resolved by litigation and the balance were resolved by the consent of all of the parties. There are presently 16 claims filed in the Federal Court which relate to land and waters in Victoria.

Legal developments since *Mabo*

Given the number of claims across the country, past and present, there are a number of reported cases. I do not propose to discuss all of these. I will discuss 3 of the more significant ones: *Wik* (23 December 1996); *Ward* (8 August 2002); and *Yorta Yorta* (12 December 2002).

Wik Peoples v Queensland [1996] HCA 40; (1996) 187 CLR 1 (23 December 1996) (*Wik*)

In *Wik*, the High Court determined that native title rights and interests could co-exist with the rights and interests of farmers who hold a pastoral lease.

Following *Wik*, the Commonwealth government introduced what many claimants referred to as ‘bucketloads of extinguishment’. By this, they were referring to the fact that the Commonwealth introduced a new Schedule 1 to the NTA. The Schedule has a separate entry for each State and Territory which lists those property interests which serve to fully extinguish native title without there having to be any further analysis. Examples from Victoria’s Schedule 1 entry include:

- a lease under s 118 of the *Irrigation Act* 1886;
- a settlement interim lease under the *Soldier Settlement Act* 1946 or the *Rural Finance Act* 1988
- a lease under paragraph 41(1)(a) of the *Emerald Tourist Railway Act* 1977 for a refreshment room, shed, office or shop

Therefore, if an interest you are dealing with is listed here, then native title has been fully extinguished over the land (and/or waters) in question. If not, then you have to wade through the provisions of the NTA to work out its effect on native title. We refer to this process as a tenure and extinguishment assessment.

Western Australia v Ward [2002] HCA 28; 213 CLR 1 (8 August 2002) (*Ward*)

In *Ward*, the High Court applied its reasoning in *Wik* to its examination of the concept of exclusive possession with regards to the Argyle Diamond Mines Joint Venture Agreement which was ratified by the *Diamond (Argyle Diamond Mines Joint Venture) Agreement Act 1981* (WA). The High Court found that the lease holders did not have exclusive possession of the land and that consequently, native title had not been fully extinguished.

The High Court’s decision in *Ward* also provided guidance as to how to conduct a tenure and extinguish assessment. It is authority for the following propositions:

- Native title rights and interests comprise a bundle of rights and because of this, there can be partial extinguishment (ie some rights may be extinguished whilst other rights may survive).²³
- Whether there has been extinguishment is to be determined by an objective inquiry requiring identification of and comparison between the alleged native title rights and interests and the competing grant of rights to third parties.²⁴
- The purpose of a tenure and extinguishment inquiry is to identify whether there is any inconsistency between the two sets of rights so that extinguishment will be found to exist to the extent of any inconsistency.²⁵
- The basic inquiry is about inconsistency of rights not inconsistency of use.²⁶
- The inquiry is about rights created in others or asserted by the executive, not the way in which they may have been exercised at any time.²⁷

In summary, consideration of extinguishment requires reference to the *Racial Discrimination Act 1975* (Cth) and to the operation of Div 2 and Div 2B of Pt 2 of the *NTA 1993* (Cth).²⁸ This system divides ‘time’ up into segments which are significant to the native title process. For

example, 1788; the introduction of the *Racial Discrimination Act*; *Mabo*; NTA; *Wik*; NTA *Amendment Act* 1998; and *Ward*.

Members of the Yorta Yorta Aboriginal Community v Victoria [2002] HCA 58 (12 December 2002) (Yorta Yorta)

Unlike the other 2 cases which dealt with tenure and extinguishment, *Yorta Yorta* is a case which deals with issues pertaining to connection and, in particular, it dealt with the issue of what is meant by the term 'traditional'.

Since *Mabo*, it was understood that the term 'traditional' meant that the laws and customs had to have been passed on from generation to generation by word of mouth or practice since the acquisition of sovereignty by the British Crown. In *Yorta Yorta*, the High Court was divided as follows: Gleeson CJ, Gummow and Hayne JJ delivered a joint judgment; McHugh J and Callinan J each delivered individual judgments; and Gaudron and Kirby JJ delivered a dissenting judgment.

The 3 judge majority, held that in s 223, the reference to traditional laws acknowledged and traditional customs observed is a reference to a 'normative system'. They further held that the laws and customs that originated in the pre-sovereignty era must have had a continued existence and vitality from sovereignty to the present.

What is meant by the phrase 'normative system'?

In the native title context, we understand this phrase to refer to the fundamental and constant concepts and beliefs that underlie a society. These are the principles that are said to bind a society together and which may also serve to differentiate it from other different societies. For example, different 'religious texts' could be argued to serve as the fundamental binding principles for different societies.

Native title claims in Victoria

Yorta Yorta

Yorta Yorta was the first claim to be progressed in Victoria. In December 1998, Justice Olney held that the tide of history had washed away the traditional laws and customs of the Yorta Yorta People. His finding was eventually upheld by the High Court which delivered its judgment in 2002.

Wotjobaluk Jaadwa Jadwadjali Wergaia and Yupagalk native title consent determination 13 December 2005

Whilst *Yorta Yorta* was winding its way through the Court system, there was a change of government in Victoria and with it a change in government policy. Unlike its predecessor, the new government introduced a policy which favours the resolution of native title claims by mediation.

The Wotjobaluk claim was the first claim to be progressed to final settlement under the State's new policy. Mediation between the State and the Wotjobaluk began in earnest in early 2001. When I joined VGSO in May 2001 my then manager allocated this file to me. I did not realise then that I would work on the matter from May 2001 until Justice Merkel handed down his determination at Horseshoe Bend, Little Desert National Park on 13 December 2005.

The mediation involved intensive negotiations between the State and the Wotjobaluk People in the first instance and then with the non-State Respondents. These parties ranged from grazing licence holders, beekeepers and fishermen to the private utility companies and other large industries in the area.

The Wotjobaluk consent determination recognises the existence of limited native title rights and interests along the bed and banks of the Wimmera River. Determination Area A commences from the northern most point of Lake Albacutya and ends at the Yarriambiack Creek offtake. The Wotjobaluk People were

recognised as holding the following rights over Determination Area A: to hunt, fish, gather and camp for personal, domestic and non-commercial communal needs.

They established the Barengi Gadjin Land Council Aboriginal Corporation which now holds the native title rights on their behalf. Other features of the overall settlement include:

- A determination that native title does not exist over the balance of the claim area.
- Negotiation and signing of an 'Access Agreement'. This agreement was signed by all parties with an interest over Area A.
- Co-operative Management Agreement.
- Consultation Agreement
- Sale of 3 parcels of Crown land of cultural significance to the Wotjobaluk.
- Indigenous Land Use Agreement
- Funding Agreement.

When the Wotjobaluk & State In-Principle Settlement was announced in October 2002 it was the first of its kind in Australia. Across the country, State and Territory governments are severely criticised for settling native title claims in stages. Often you will hear about the signing of an ILUA to be followed 6 or so months later by a determination. In addition, Victoria was the first State to deal with a settlement in a comprehensive manner by providing financial support to the newly established Land Council so that it could run effectively. At the National Native Title Conference held in Darwin in 2006, the Wotjobaluk Settlement was held up as a model.

Gunditjmara #1 and #2 native title consent determination 30 March 2007

This same approach was essentially followed in the negotiations between the State and the Gunditjmara People. The Gunditjmara native title mediation also involved intensive negotiations between the State and the

Gunditjmara and about 400 non-State Respondents.

The Gunditjmara settlement has the following features:

- Determination by consent that the Gunditjmara People hold the following native title rights and interests over certain the Crown land and waters: non-exclusive right to have access to or enter and remain on the land and waters; right to camp on the land and waters landward of the high water mark; right to use and enjoy the land and waters; right to take resources of the land and waters; and right to protect places and areas of importance on the land and waters.
- Determination by consent that native title does not exist over the balance of the application area.
- Indigenous Land Use Agreement
- Co-operative Management Agreement
- Contract of Sale
- Funding Agreement

The entire claim was not settled in March. Part B of the claim area is to be settled by September 2008.

Native title and infrastructure projects

When you are planning a project over Crown land it is important that you work out whether or not you will need to comply with the *Native Title Act*. Compliance with the *Native Title Act* may involve providing a notice to claimants of a planned project or negotiating an Indigenous Land Use Agreement for your project. The system set up by the *Native Title Act* to deal with new projects is called the 'Future Act Regime' and the projects are called 'future acts'. It is a complex regime and often counter-intuitive.

As a first step, you will need to ask DSE to carry out a tenure and extinguishment assessment regarding the Crown land and waters in

question. If the assessment shows that native title has been fully extinguished, your project can proceed without any reference to native title. If not, then your project may be classified a 'future act' and you will need to comply with the requirements of the 'future act regime'.

Proposed new native title claims in Victoria

In addition to the areas already subject to a claim, we understand that NTSV is presently carrying out research to support at least 4 new claims.

The Bunurong People have lodged a claim over some of the waters in Port Phillip Bay and we understand that there are plans to file a claim over Metropolitan Melbourne. There are also plans to file claims in relation to the areas east of

Gunditjmara and areas in the central part of the State.

For more information

For further information or legal advice on any issues raised in this paper contact:

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The VGSO is the primary source of legal services to the Victorian state government and its statutory authorities, providing strategic advice and practical legal solutions.

This topic was the subject of the monthly VGSO lunchtime seminar held on 26 September 2007.

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The notes are not be regarded as legal advice.

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

² See *Mabo* Headnotes at 4

³ *Mabo* per Mason CJ and McHugh J at 15

⁴ *Mabo* per Brennan J at 20

⁵ *Mabo* per Brennan J at 25

⁶ Quote from Gibbs J in *New South Wales v The Commonwealth* (1975) 135 CLR at 388

⁷ *Mabo* per Brennan J at 32

⁸ *Ibid*

⁹ *Ibid*

¹⁰ *Mabo* per Brennan at 32 to 34

¹¹ *Mabo* per Brennan J at 41

¹² *Mabo* per Brennan J at 42

¹³ *Ibid*

¹⁴ *Mabo* per Brennan J at 43

¹⁵ Justice Brennan made reference to Digby's *History of the Law of Real Property* (1897) p 34 and *Blackstone's Commentaries*, Bk II, ch 4, pp 50-51

¹⁶ *Mabo* per Brennan J at 51

¹⁷ *Mabo* per Brennan J at 50

¹⁸ *Mabo* per Brennan J at 58 to 63

¹⁹ *Mabo* per Brennan J at 59 to 60

²⁰ *Mabo* per Brennan J at 60

²¹ *Mabo* per Brennan J at 63

²² *Mabo* per Brennan J at 63 to 71 and point 4 of the summary at 69

²³ Majority in *Ward (HC)* at [76]

²⁴ Majority in *Ward (HC)* at [78] and [468, point 5]

²⁵ Majority in *Ward (HC)* at [82]

²⁶ Majority in *Ward (HC)* at [215]

²⁷ Majority in *Ward (HC)* at [234]

²⁸ Majority in *Ward (HC)* at [98] to [140]