The National Legal Eagle

Volume 8
Issue 1 *Autumn 2002*

Article 4

2002

The story of native title

Michael Weir
Bond University, Michael_Weir@bond.edu.au

The Story of Native Title

Associate Professor Michael Weir
Law School Bond University

It is only a few years since native title bas been accepted as a part of the common law of Australia. This article traces the history of native title from the dream time to modern times. We will consider the major cases and events that have impacted on the development of the story.

Dreamtime

Australian aborigines are said to have arrived in Australia more than 50,000 years ago. Since their arrival they have developed stories that make sense of the land on which they live and their relationship with that land. The oral tradition of aborigines has ensured that these stories survive into modern times. These dreamtime stories provide the basis of the relationship between aborigines and the land and is the underpinning of the legal acknowledgment of native title in Australia.

Cooper v Stuart

In earlier times the English law heritage of our common law did not always accept that native title should be acknowledged. In the 1889 Privy Council case of *Cooper v Stuart* the court considered that in 1788 on settlement by Europeans there were 'no settled inhabitants or settled law' in Australia. This provided the basis to ignore native title in subsequent authorities.

Milirrpum v Nabalco Pty Ltd

The first major decision relevant to Aboriginal land rights prior to the *Mabo* decision in Australia, was the decision of Mr Justice Blackburn of the Federal Court in *Milirrpum & Others v Nabalco Pty Ltd.* That case involved an action by a group of Australian Aborigines who claimed native title in regard to land on the Gove Peninsula in the Northern Territory.

Mr Justice Blackburn held against the Aboriginal plaintiffs on the basis of his view that for a communal native title to be acknowledged by the common law it would be necessary for the native title to demonstrate that it constituted a proprietary interest. This would necessitate that interest to demonstrate the outward indicia of proprietary interests such as the right to use and enjoy land, the right to exclude others and the right to alienate. In his view the plaintiff's claim did not demonstrate those attributes existed in that case.

In addition, based upon the Privy Council decision in *Cooper v Stuart,* he considered that the common law of Australia did not acknowledge the concept of native title. Mr Justice Blackburn stated that even if communal native title did exist, then in the circumstances of that case these rights had been extinguished.

Mabo's Case

It was with this background that the application in *Mabo v The State of Queensland* was heard. The Court's decision was handed down on 2 June 1992. It is one of the most significant decisions the High Court has ever delivered.

The case was heard by a Full Bench of the High Court comprising seven Justices namely Mason CJ, Brennan J, Deane J, Toohey J, Gaudron J, McHugh J, and Dawson J. Only Dawson J dissented from the decision to acknowledge the existence of native title.

As is the case in many decisions of the Australian High Court although six judges supported the concept of communal native title the majority differed in their reasoning. A useful summary of the ratio decidendi of the case is found in the short judgement of Mason CJ and McHugh J where they state:

'In the result, six members of the Court (Dawson J, dissenting) are in agreement that

(1.) the common law of this country recognises a form of native title which,
(2) in the cases where it has not been extinguished,
(3) reflects the entitlement of the indigenous inhabitants, in accordance with their laws or customs, to their traditional lands and that,
(4) subject to the effect of some particular Crown leases, the land entitlement of the Murray Islanders in accordance with their laws or customs is preserved, as native title, under the law of Queensland'.

Australia was one of the last western countries to acknowledge native title. For many years native title has been acknowledged in New Zealand; the USA and Canada.

Native Title Act 1993

As a response to the Mabo decision, just before Christmas 1993, the Federal Government passed the *Native Title Act 1993.* Legislation reflecting the model provided by the Commonwealth legislation has since been passed in all other states to regulate the acts of State governments whose activities often impact on native title.

Main Objects of Native Title Act

Section 3 sets out the four main objectives of the legislation. These objectives are:

1. Provision for the recognition and protection of native title;
2. Provision for the validation of past acts potentially invalidated because of the existence of native title i.e. where government has granted interests in land that impacted upon native title and did not pay compensation;
3. Establishment of a mechanism for determining claims to native title and;
4. Establishment of how future dealings effecting native title may proceed and setting standards for those dealings.

Protection and Recognition of Native Title

Section 10 states that native title is to be recognised and protected in accordance with the act. Section 11 provides that native title is not to be extinguished contrary to the act. This means in effect the act provides a code to allow native title to be determined, protected and dealt with.

Wik Case

The *Wik* decision was delivered by the High Court on Christmas eve 1996. This decision was of some importance as the question of whether pastoral leases extinguished native title had not been conclusively determined in the *Mabo* decision. Many people were of the view that native title was extinguished by pastoral leases based upon the statements of the some of the judges in the *Mabo* decision.

The case involved two pastoral leases the in Cape York affected by a native title claim by the Wik and Thayorre people. The pastoral leases had been granted early in the 20th century.

In the Federal Court Drummond J had determined that the native title claims over these pastoral leases were extinguished by the grant of the crown leases as these leases gave an entitlement to exclusive possession of that land to the tenant and this was inconsistent with native title. The claimants appealed to the High Court on this point.

The court split 4:3 (Toohey J , Gaudron J, GummowJ and Kirby J; Brennan CJ, Dawson J and Mc Hugh J dissenting) in favour of the claimants with each judge delivering a separate judgement.

The majority accepted that at common law a lease involves the grant of exclusive possession and that would extinguish native title. The majority added that a pastoral lease was not a creature of common law but of statute. Pastoral leases were created in a time of colonial expansion to secure the activities of pastoralists. Exclusive possession could be a feature of a particular pastoral lease but was not necessarily so. The existence of the legal entitlement to exclusive possession relied upon the words of the relevant statute, the terms of the lease and the actions of the tenant.

The determination of whether extinguishment of native title has occurred depended upon a consideration of the terms of the grant and the nature of the native title claimed. The majority considered it was necessary for clear language to suggest extinguishment of native title.

If after a comparison of these aspects there was an inconsistency the native title must yield to the rights under the pastoral lease. Otherwise the two coexist. Here the terms of the pastoral lease in the opinion of the majority allowed the continuation of native title rights.

The implications of the decision were substantial. The majority acknowledged the decision introduced an element of uncertainty into the area. It meant arguably that a decision had to be made in regard to each pastoral lease to determine if native title was extinguished.

This decision attracted a substantial amount of negative comment from those impacted by the principles expressed in the case. Prior to *Wik* it was considered by many that native title was extinguished by pastoral leases many years ago. The view prior to *Wik* was that the type of land that was likely to be subject to native title claims was unclaimed crown land (including reserves and national parks) which was found mainly in WA and Qld.

The *Wik* decision broadened substantially the area of land that was potentially subject to native title as vast areas of all states were subject to various types of crown leasehold and these areas were often impacted upon by mining leases and tenures. The *Wik* decision was interpreted as a political, legal and economic problem for the Federal Government as powerful elements in Australia were affected. The *Wik* decision was a positive result for native title claimants but potentially impacted upon agriculture; pastoral pursuits and mining.

The issues that arose after *Wik* were:

1. How would leaseholders and native title holders coexist where the leasehold was not exclusive and thereby would only extinguish to the extent of inconsistency?
2. What provision could be given for access rights pending confirmation of claims for native title?
3. Would every lease be dealt with individually in terms of the relevant native title and the impact of that lease on that native title?
4. Would the use of land subject to native title for normal agricultural or pastoral uses be considered to affect native title?

1998 Amendments to the Native Title Act

Substantial amendments were made to the Native Title Act in 1998: This Act:

- Validated certain tenures granted without negotiation with native title owners ie when the state thought native titles had been extinguished based on a pre Wik view of the law. (This related particularly to some mining leases granted in Queensland over pastoral lease areas)
- Toughened the ability for native title claimants to make a claim for native title.
- Made broad provisions for negotiation of joint use of land by native title holders and persons with interests in land ie pastoral lease holders.
- Permitted ordinary agricultural and pastoral pursuits without requiring compensation or permission from native title owners.
- Confirmed the extinguishment of native title by a long list of crown leaseholds with compensation when appropriate.

These amendments were an attempt to forge a compromise between the native title claimants and industry. Some have criticised these amendments as being unduly harsh on native title claimants and too accommodating to industry concerns.

Croker Island Case

Does native title apply to the seabed? If native title can extend to the sea bed what are the extent of the rights enjoyed? Can native titleholders stop ordinary marine transport or control commercial or recreational fishing? Certainly most people thought that native title could exist over the sea bed and it was contemplated in the definition of *Native Title Act s(223)*

These issues were discussed in 2001 in The *Commonwealth of Australia v Yarmirr* (the Croker Island case)

The case is significant for its further general discussion of the nature of native title and its elucidation of the applicability of native title to the sea. The facts involved an application for native title by a number of clans of aborigines to an area of the seabed surrounding Croker Island in the Northern Territory. The application incorporated a claim for exclusive possession of the area. If granted this would presumably mean that native titleholders could regulate or control fishing and navigation in the native title area.

The Trial judge confirmed in accordance with the *Native Title Act* that native title is capable of being recognized in

relation to the sea. He found the native title rights included the right to fish, hunt and gather for personal and non-commercial needs and right of access for travel and to protect places of cultural or spiritual significance. He said the evidence did not support the view the right was exclusive and could not exist because of the public rights of navigation and fishing at common law and Australia's obligations under international treaties. The Commonwealth argued that as the common law did not extend to the sea native title could not be recognized by the common law.

The High Court of 7 judges provided a joint judgement of Gleeson CJ, Gaudron Gummow and Hayne and separate judgments of McHugh; Callinan and Kirby.

The court supported the native title claim subject to the public rights of navigation and fishing at common law and Australia's obligations under international treaties. This meant that the native title rights enjoyed did not extend to exclusive use of the area claimed.

The Future

As time goes on further case law will determine the boundaries of native title and how it fits into the Australian legal system. The determination of that relationship has been difficult for the legal system as it necessitated incorporating property concepts that are foreign to the Australian common law system. The acknowledgment of native title has been a painful process for native title holders, government and industry as Australia's belated acknowledgment of native title has required Australia to incorporate claims for native title 200 years after European settlement commenced.

Discussion Issues

Do the changes in the law's attitude to native title reflect changes in social attitudes to issues relating to indigenous peoples in Australia and elsewhere?
Why do you think the Mabo *and* Wik *decision attracted such vehement criticism from sections of society?*