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# The Next Chapter in the Story of Native Title

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In a previous issue we discussed the significant authorities and statutes that have impacted upon the extent to which native title has been protected in the Australian legal system. Since that article a couple of significant High Court authorities have provided a further chapter in the story of native title.

### Western Australia v Ward

On the 8 August 2002 the High Court delivered judgment in *Western Australia v Ward* [2002] HCA 28 (8 August 2002). The case related to a claim for native title over the East Kimberley area of Western Australia totally an area of 7,900 square kilometres. The native title claim land was subject to pastoral leases, freehold lots and Crown land. The question for decision by the High Court was whether native title had been extinguished and whether native title extended to minerals or petroleum that might be found in the claim area.

The High Court sat with seven judges and delivered a joint majority judgement of Gleeson CJ; Gaudron J, Gummow J and Hayne J with Kirby J providing a separate judgment that generally agreed with those judges. McHugh J and Callinan J delivered minority judgments that did not endorse the majority view.

The majority made a number of points:

- As the claim was made under the Native Title Act 1993 (Cth) (NTA) that is the statute that governs the question of whether native title exists or has been extinguished. This means in determining native title claims primary attention should be directed to the NTA and not to common law cases like *Mabo*.
  - The court confirmed that the determination of whether native title is extinguished is based on an objective assessment of whether the interest in land ie pastoral lease or mining lease is inconsistent with native title. This assessment is based on an objective assessment of the legal nature of the rights granted under the mining lease or pastoral lease and the nature of and extent of the native title under consideration.
  - As native title is derived from a connection between an aboriginal group and land the NTA does not protect cultural knowledge that is not related to the connection between a native title group and their land ie it does not protect native art or other significant issues of copyright and patents that may be protected under other legislation.
- \* The grant of a pastoral lease takes away the right for native

title owners to control access to those areas but the native title is probably not extinguished by the pastoral lease. If there is conflict between the interests granted under the pastoral lease and the native title the interests protected by the pastoral lease prevailed over native title rights. This substantially confirmed the approach taken by the High Court in the *Wik* decision.

- As there was no evidence of native title right or interest in any mineral or petroleum it was not part of native title and no issue of extinguishment arose. This is a blow to attempts by aboriginal groups to mount a claim to the entitlement to minerals. Of course if a mining lease is sought over native title land the NTA requires negotiations with the relevant native title claimants or owners. This will usually require compensation to be paid before that lease is granted.
- The public right to fish extinguished any native title claim to exclusive rights to fish in tidal water.

### Members of the Yorta Yorta Aboriginal Community v Victoria

On December 12 2002 the High Court of Australia delivered judgement in *Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] HCA. The High Court was constituted by seven justices. The native title claim related to public land and waters in Northern Victoria and Southern New South Wales near the Murray and Goulburn Rivers. The original application made in May 1994 and 1995 was the first matters that went to trial for determination under the NTA. The Federal Court determined that native title did not exist in relation to the claim area and this was confirmed on appeal to the Full Court of the Federal Court.

The Full Court of the Federal Court made their determination based primarily on their assessment that since 1788 the Yorta Yorta people had ceased to acknowledge traditional laws and customs and had ceased to have a connection with the land in question.

The Yorta Yorta people claimed that because of the activities of Europeans they had been forced into an adapted form of native title. The basis of their claim was that they had native title because they or their ancestors has been present physically on the lands from 1788 to the present day or alternatively if there was no continuing physical presence their had been a continuing traditional connection that demonstrated a continuing connection with the land.

In the judgment of Gleeson CJ; Gummow and Hayne JJ the High Court confirmed that it is necessary to refer to the NTA definition of native title to determine if the applicant's claim is sufficient to satisfy that concept. The High Court confirmed that it is not sufficient for native title claimants to claim a traditional connection with their land without the necessary observance of traditional laws and customs. Once an indigenous culture does not continue to observe those customs the basis for native title is lost. The court accepted the historical evidence presented at the original trial that suggested that by the late 1800's the ancestors of the claimants were no longer in possession of their tribal land and had ceased to observe their traditional laws and customs and that this dispossession had continued until modern times.

The High Court confirmed the importance of the definition of native title under s223 of the NTA. This definition requires that the laws and customs claimed must be those rights and interests possessed under the traditional laws acknowledged and customs observed. The High Court considered the connection to the land must be pursuant to those laws and customs.

Some quotes: 'When the society whose laws or customs existed at sovereignty ceases to exist, the rights and interests in land to which these laws and customs give rise, cease to exist. If the content of the former laws and customs is later adopted by some new society, those laws and customs will then own their new life to that other, later, society and they are the laws acknowledged by, and customs observed by, that later society, they are not laws and customs which can now properly be described as being the existing laws and customs of the earlier society. The rights and interests in land to which the re-adopted laws and customs give rise are rights and interests which are not rooted in pre-sovereignty traditional law and custom but in the laws and customs of the new society.'<sup>1</sup>

There is an acknowledgment by the High Court: 'That European settlement has had the most profound effects on Aboriginal societies and that it is, therefore, inevitable that the structures and practices of those societies, and their members, will have undergone great change since European settlement. Nonetheless, because what must be identified is possession of rights and interests under traditional laws and customs it is necessary to demonstrate that the normative system out of which the claimed rights and interests arise is the normative system of the society, under whose laws and customs the native title rights and interests are said to be possessed, has continued to exist throughout that period as a body united in its acknowledgment and observance of the laws and customs.'<sup>2</sup>

One significant aspect of the case is the view taken by the majority that s223(1) (c) that states that native title includes "the rights and interests that are recognized by the common law of Australia" does not thereby incorporate common law concepts into the definition of native title. The judgment confirms that native title is not a common law concept but that the common law merely recognizes and protects native title. In this way any attempt by the Federal Court to apply common concepts of what native title might be was deemed incorrect. The reference to recognition by the common law refers to the fact that any native title protected by the NTA must not be contrary to fundamental common law concepts and must be capable of surviving the change in sovereignty

that occurred in 1788. This meant that the majority considered the reference to common law issues as relevant to native title was inappropriate.

Despite this error of law the majority decision considered the trial judge's conclusion that the observance of laws and customs had ceased before the end of the 19th century meant that the claim for native title must fail.

Gaudron and Kirby JJ agreed that the trial judge and Full Court of the Federal Court were incorrect in the legal test that they applied for different reasons but allowed the appeal. They suggested the matter be referred to the trial judge for rehearing. Gaudron and Kirby considered the Full Court of the Federal Court had placed inappropriate emphasis on the need to show a continuity of a traditional community from 1788 to the date of the application. Gaudron and Kirby considered that based on the NTA this was a relevant consideration but the primary issue was whether traditional laws and customs are acknowledged and observed and whether by those laws and customs the claimants have a connection with land and waters in that claim area.

Mc Hugh J agreed with the majority but disagreed with their interpretation of s 223(1) (c). He considered that common law tests could be introduced by the terms of s223(1) (c) but he accepted that based on this case and previous decisions his contrary position on this point was not accepted. Callinan J also dismissed the appeal.

## Implications of Decisions

The result of these cases is that any native title group that has lost contact with their tribal lands and now longer observes traditional laws and customs will find it difficult to establish native title under the NTA. This is despite the fact that on many occasions that disconnection with traditional lifestyle was caused many years ago by the impact of European settlement in Australia. This result accords with the somewhat strict interpretation of the law by Brennan J in Mabo where he indicated that native title did not exist in that circumstance. These cases also confirm that native title cannot be re-established by modern day re-establishment of traditional laws and customs as in that case it is impossible to demonstrate the required connection between current practice and the traditional practice at the time Europeans acquired sovereignty in 1788. The High Court has acknowledged that practices may change over time but must be able to be seen as adaptations to the traditional practice.

This legal position creates what many consider an unjust result. The inability to confirm native title is often caused by the activities of Europeans in excluding aborigines from their traditional lands against their will and thereby destroying or adversely affecting traditional culture.

## Discussion Points

*Should native title be acknowledged where connection with the land is destroyed by the effect of civilization?*

*Does the Yorta Yorta decision deliver a just result for the applicants?*

*Do these cases now make the ability to obtain native title almost illusory?*