Indian Giving? Native Title Rights in the 1990s

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Abstract

The history of native title to land in the common law world is a long one - stretching back to the recognition of "Indian title" in the United States in 1823. However, in Australia, native title to land was recognised only in 1992, in the historic *Mabo* case. Subsequently, native title was enshrined and protected in the *Native Title Act 1993*. This paper examines native title rights created under the controversial "future act" regime of the *Native Title Act*. This regime, which regulates mining and third-party commercial activity on land subject to native title, was affected by sweeping amendments made to the *Native Title Act* in 1998. The paper concludes that although the full impact of the new law remains to be seen, its inevitable result will be an erosion of the native title rights established since 1993.

Introduction

In Australia during the 1990s few issues have attracted the intensity of public interest and debate as that of native title to land.[1] The implications of native title for resource industries are complex and far-reaching: it is not surprising that the pastoral and mining industries have been especially vociferous.

My primary intention in this paper is to examine the "future act" regime created by the *Native Title Act* 1993 (Cth) (NTA), which incorporates the controversial Aboriginal and Torres Strait Islander right to negotiate. This (together with other measures contained in the NTA) has had enormous impact upon the Australian mining industry. First, however, I shall give a brief overview of the development of the law of native title in this country.

In *Mabo v State of Queensland* [2] (*Mabo*) the High Court recognised, for the first time, common law rights of native title to land in Australia. Although the decision in *Mabo* has been cited as a radical 1990s example of "judicial activism", in fact its principles were deeply rooted in legal history. In the United States the existence of indigenous rights to land - "Indian title" - was first recognised in 1823 in the landmark case of *Johnson v McIntosh*.[3] Later in the nineteenth century common law principles of native title were also recognised and developed in New Zealand and Canada.[4] In these three jurisdictions the law recognised the survival of indigenous rights to land despite the acquisition of sovereignty (absolute power) by Britain upon colonisation.

In the two centuries following the establishment of a colony in New South Wales in 1788 the existence of common law native title rights had been consistently denied in Australia.[5] This can be traced to the application in the Australia colonies of the English doctrine of tenure which provides that all land is vested in the Crown: accordingly, only the Crown can grant rights in land to others. The operation of the doctrine of tenure necessarily excluded the common law principles of native title

[1] In this paper the term "native title" is synonymous with the terms "indigenous title" and "Aboriginal title".
[2] (1992) 66 ALJR 408.
[3] (1823) 21 US (8 Wheat 543).
[4] *R v Symonds* (1847) NZPCC 387; *St Catherine's Milling v Attorney-General of Ontario* (1888) 13 SCR 577.
[5] See *Attorney-General v Brown* (1847) 1 Legge 312; 2 SCR (NSW) App 30; *Williams v Attorney-General* (NSW) (1913) 16 CLR 404; *Randwick Corporation v Rutledge* (1959) 102 CLR 54; *Milirrpum v Nabalco Pty Ltd* (1971) FLR 141.

which had developed in the United States, New Zealand and Canada.[6]

However, this position was dramatically reversed in *Mabo*, which is arguably the most significant case in Australia's legal history. In *Mabo* the High Court recognised that native title existed separately from, and was independent of, Crown grant. Current native title law is grounded in that decision.

The *Mabo* Breakthrough

In *Mabo* the High Court declared that native title to land had survived the colonisation of Australia and the imposition of the English legal system. It stated that upon Britain's acquisition of sovereignty in 1788 radical (or ultimate) title to the land was conferred upon the British Crown. However, radical title did not confer absolute beneficial ownership: rather, the Crown's radical title was burdened by native title rights, unless and until these rights had been extinguished (cancelled).

The High Court affirmed that native title to land may still exist where Aboriginal or Torres Strait Islander people are able to show a continuous connection with particular land according to traditional laws and customs. The nature and content of those native title rights depends upon the nature of the customs and traditions practised by the relevant community or group. Those traditional customs and activities[7] are not "frozen" at the time of colonisation: they may change over time.

Significantly, the High Court also stated that the Crown's sovereignty empowered it to extinguish native title by any act (legislative or executive) which indicated a clear and plain intention so to do. Acts which merely regulate the enjoyment of native title or which are consistent with the continued right to enjoy native title[8] would not extinguish it. However, the grant of an interest in land which is inconsistent with the continuing right to enjoy native title will extinguish native title to the extent of the inconsistency. Brennan J observed:

> Thus native title has been extinguished by grants of freehold land or of leases but not necessarily by the grant of lesser interests (e.g. authorities to prospect for minerals).[9]

Thus, the question of the survival of native title on land subject to "lesser interests" than freehold or leasehold estates was left open by the Court. However, the extinguishment of native title by lease was also to be called into question in the case of pastoral leases.[10]

In *Mabo* the High Court was divided on the question of whether compensation was payable to Aboriginal people whose title had been extinguished after colonisation in 1788: a narrow majority of the Court (4:3) concluded that it was not. However, it took a different view in connection with native title rights extinguished after 31 October 1975, the date upon which the *Racial Discrimination Act 1975* (Cth) (RDA) came into force. The Court concluded that the RDA, which prohibits the abrogation of property rights upon the basis of race, precluded extinguishment of native title without the payment of compensation to native title holders after 31 October 1975.

Reactions to *Mabo* ranged from enthusiastic support to outright hostility.[11] The Keating-led Federal Government undertook to support and enshrine the common law principles of *Mabo* in statutory form. After much consultation, debate and negotiation between the major stakeholders,[12] the *Native Title Act 1993* (Cth) (NTA) was enacted, coming into force on 1 January 1994. Despite constitutional and other challenges, the validity of the NTA was affirmed by the High Court in

[6] However, in the 1970s and 1980s statutory indigenous land rights were created in most of the Australian States and Territories (Western Australia being a notable exception).

[7] Traditional customs and activities typically include hunting, gathering, fishing, camping, the performance of ceremonies and the safeguarding of sacred sites.

[8] Such as the dedication of a national park.

[9] *Mabo v State of Queensland* (1992) 66 ALJR 408 at 434.

[10] *Wik v State of Queensland* (1996) 141 ALR 129.

[11] In Western Australia, for example, the Government purported to abolish native title rights, substituting therefor lesser rights of "traditional usage" in the *Land (Titles and Traditional Usage) Act 1993* (WA).

[12] Namely, the State and Commonwealth Governments, Aboriginal interest groups, business and industry interests, including the mining and pastoral industries.

1995.[13] All the States and Territories have now enacted separate legislation complementary to the NTA, to create a national native title regime.[14]

The Second Stage: The *Native Title Act*

A primary objective of the NTA is the recognition and protection of native title. The NTA defines native title as the rights and interests that Aborigines and Torres Strait Islanders have in land or waters in accordance to their traditional laws and customs, where there is a connection with that land or waters, and where those rights and interests are recognised by the common law of Australia.

It may be noted that the view that native title "rights and interests" extend to mineral rights appears to have received judicial support - at least at first instance - in the recent Miriuwung-Gajerrong case.[15] In that case Justice Lee found that the surviving native title rights of the plaintiffs included *inter alia* the right to use and enjoy "resources" and to control the use and enjoyment of "resources" by others. What constitutes "resources" was not defined in Justice Lee's judgment.

The NTA set up structures including the National Native Title Tribunal (NNTT) and Aboriginal and Torres Strait Islander Representative Bodies (Representative Bodies) to facilitate the resolution of native title matters, including determinations of claims for native title. The NTA also deals with the problematic post-1975 grants of title by establishing a "past acts" regime. The term "past acts" refers to legislation, acts or grants in relation to land subject to native title which occurred after 31 October 1975[16] which had impaired or extinguished native title. Such acts were invalid because the native title holders had not received the same procedural rights or compensation which holders of ordinary title would have obtained. Central to the "past act" regime is entitlement to compensation for the diminution or extinguishment of native title rights, assessed on the basis of what would have been payable to the holders of other forms of title.

Another primary aim of the NTA is to facilitate and regulate dealings in connection with land subject to native title after 1 January 1994.[17] This was an inherently difficult and delicate challenge - to find a proper balance between the interests of native title holders and industry. During the consultative process of drafting the NTA in 1993 the Aboriginal interest groups had lobbied for a right of veto over future mining and other development on land subject to native title, but this had been rejected. A compromise was reached: a "future act" regime which incorporated the right to negotiate, which is a mechanism for additional control overdevelopment by Aboriginal and Torres Strait Islanders.

The 1993 "Future Act" Regime and the Right to Negotiate

In its 1993 form, the NTA provided that, after 1 January 1994, mining and other commercial activities on land subject to native title or to native title claims could proceed only if such activities were "permissible future acts". As a general rule, "future acts" were "permissible" if they could have been carried out on land which was held under other forms of title.

Native title holders were to be afforded the same procedural and other rights as holders of "ordinary" (freehold) title in connection with proposed "future acts". Subject to the payment of appropriate compensation, native title rights could be compulsorily acquired in order to facilitate future development of the land by third parties. Not all future dealings attracted the "future act" regime: exceptions included the exercise by third parties of pre-existing legal rights (e.g. the renewal of a mining lease) and acts to be carried out on off-shore places (e.g. coastal waters).

The right to negotiate comprises a compulsory negotiation mechanism which is activated when the relevant Government (State, Territory or Commonwealth) intends to grant mineral exploration or mining tenements over land subject to native title or to compulsorily acquire native title rights in order to benefit third parties (e.g. developers). If necessary, the scheme

[13] In *Western Australia v The Commonwealth* (1995) 183 CLR 373. In this case the *Land (Titles and Traditional Usage) Act 1993* (WA) was held to be breach of the RDA and therefore invalid.

[14] In Western Australia the relevant legislation is the *Titles Validation Act 1995* (WA).

[15] *Ben Ward v Western Australia* Federal Court of Australia Lee J 24 November 1988 WAG 6001/95.

[16] The date upon which the RDA came into force.

[17] The date upon which the NTA came into force.

also provides for resort to arbitration by an appropriate "arbitral body"[18] in the event of a negotiated agreement not being reached within a specified period.

The Government is required to give notice of its intention to the relevant registered native title claimants, as well as to registered native title holders (together termed the "native title parties"). It must also give notice to the proposed grantee and to the public. Members of the public have two months in which to register a claim and thereupon also become native title parties to the negotiation.

The object of the negotiation procedure is to obtain the consent of the "native title parties" to the proposed activities and the making of an agreement pursuant to which the proposed activities can proceed. The parties to the negotiation process are the Government, the proposed grantee (the third party interest) and the native title parties.

Conditions upon which the proposed act might proceed include the payment of compensation to the native title parties, which may be calculated on the basis of amount of profits made, income derived or things produced. Other benefits which may be conferred upon native title parties in the agreement include employment and training opportunities and the provision of infrastructure facilities for community groups.

An expedited (or "fast-track") procedure was created through which the Government could avoid the right to negotiate. The expedited procedure could be invoked when the Government considered that the proposed "future act" would not interfere with the native title holders' community life or significant sites, nor would it inflict major damage on the land or waters concerned (e.g. the grant of a mining exploration licence). Native title parties could object to the application of the expedited procedure and the issue was determinable by the appropriate arbitral body with appeals available only on questions of law.

[18] The NNTT or an equivalent State body, if a State had exercised its power to establish its own separate native title regime.

Disillusionment with the Right to Negotiate

The right to negotiate had been contentious from its inception *inter alia* because it was a right not available to other (non-native) title holders, such as pastoral leaseholders. Within two years of the NTA's coming into operation, the contentiousness of the right to negotiate had greatly increased. This was attributed, at least in part, to anomalies in the final draft of the 1993 legislation, and a number of controversial decisions in the Federal and High Courts.

It should first be noted that the NTA permitted the lodgment of applications for the determination of native title to be lodged by individuals. There was no statutory requirement that applications be representative of a particular community or group. This permitted and possibly even spawned multiple overlapping individual and group claims in connection with the same land. Sometimes even members of the same family would lodge competing applications.

Secondly, the formal requirements for lodging a native title claim were far from onerous. The application form required only minimal information (a description of the claimed land and of any other interests which were "known to the applicant" to exist in it). An accompanying affidavit had only to affirm the claimant(s) belief that native title had not been extinguished, that none of the land was subject to a registered native title claim, and that the statements in the application were true. Whether the claimant(s) had to establish a physical connection with the claimed land was unclear:[19] however, it was apparent that a connection amounting to common law possession of land was not required.[20]

Thirdly, due to what has been described as a "technical fault" in the drafting of the NTA the Registrar of Native Title Claims was obliged to accept an application immediately upon its being lodged unless *prima facie* it was vexatious and frivolous or unable to be made out. This, together with the easily-met formal requirements, created a very low "threshold" test for

[19] Different opinions were expressed on this question in *Mabo v State of Queensland* (1992) 66 ALJR 408, with only Toohey J requiring a "physical presence" (at 486); cf *Coe v Commonwealth* (1993) 68 ALJR 110.

[20] *Mabo v State of Queensland* (1992) 66 ALJR 408 at 486-487 per Toohey J.

the registration of applications: there was no opportunity for a rigorous assessment of the validity of a particular application before it was placed on the Register.[21] It was generally conceded that this situation was unacceptable and that legislative amendments were required to raise the "threshold" test to a more realistic level.

Further, in 1995 it was established that the right to negotiate was automatically triggered by the act of registering a native title application.[22] Thus, native title claimants were able to achieve negotiating party status and its attendant commercial rewards without first having to prove the existence of valid native title rights. Obviously this factor, in combination with those mentioned above, meant that the pool of claimants (genuine or otherwise) with which a proposed grantee had to negotiate could be very large indeed.

Fifthly, the wide definition given to "mining" in the NTA meant that the right to negotiate might apply a number of times in connection with the one project - at exploration, mining and at renewal or extension of tenement phases.

In addition, successful objections to the invoking of the expedited procedure were being made increasingly often: for example, the expedited procedure was held to be unavailable if an exploration licence interfered with the spiritual life of a claimant group.[23] The mining industry claimed that as a result the exploration licence process was being unnecessarily hampered and delayed.

From the Aboriginal perspective, it was claimed that some State and Territory Governments were utilising a variety of measures to circumvent the right to negotiate process, such as directly issuing grants which were conditional upon the grantee accepting complete responsibility for any native title claims.[24] This provoked strong protest, as the right to negotiate was claimed to constitute the only means of protecting the cultural and spiritual significance of traditional land against mining and other development.

The decision of the High Court in *Wik* v *State of Queensland (Wik)* [25] created significant additional native title issues in connection with pastoral leasehold land. The question as to whether pastoral leases[26] extinguish native title had been uncertain, although various State Governments had, for policy reasons, assumed that they did. The NTA did not purport to resolve this question, leaving it to the courts to determine. In *Wik* a narrow majority (4:3) of the High Court held that the grant *per se* of certain Queensland pastoral leases did not extinguish native title. Native title rights and pastoral leasehold right were held to be capable of co-existing, although native title rights were declared to be subordinate to pastoral leasehold rights. The High Court held that where there was an inconsistency between the rights of native titleholders and those of pastoral leaseholders, the rights of the pastoral leaseholders would prevail to the extent of the inconsistency.

Since 1 January 1994 a significant number of mining grants had been made by the States, particularly Queensland, on the assumption that pastoral leases extinguished native title rights. The right to negotiate procedures had not been followed. The decision in *Wik* cast doubts on the validity of these grants, as it was possible that native title rights still survived in the land.

Another important consequence of *Wik* was that an additional estimated 42% of Australia's land area potentially became open to native title claim.[27]

Accordingly, *Wik* was the final straw for the pastoral and mining industries: the call for legislative intervention to lessen the impact of native title became a clamour. On 30 September 1998, after twenty months of heated political and public debate, including a threatened double dissolution of the Federal Parliament, the *Native Title Amendment Act 1998* (Cth) came into effect.

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[21] *North Ganalanja Aboriginal Corporation & Waanyi People v Queensland* (1996) 135 ALR 225.

[22] In *Northern Territory v Lane* (1995) 59 FCR and *Kanak v National Native Title Tribuna*l (1995) 132 ALR 329.

[23] *Ward v Western Australia* (1996) 136 ALR 557.

[24] Aboriginal and Torres Strait Islander Social Justice Commissioner *Native Title Report* AGPS, July 1994-June 1995.

[25] (1996) 141 ALR 129.

[26] Pastoral leases are created in various State laws and constitute a unique form of tenure. The rights of a pastoral leaseholder in connection with the land are limited and relate to the livestock activities.

An Overview of the NTA Amendments and the New Right to Negotiate

Under the complex provisions of the 1998 amending legislation many substantive and procedural changes to the NTA were made, most of which are beyond the scope of this paper.

However, it may be noted that the substantive changes included retrospective extinguishment of native title in connection with "intermediate period" grants made between 1 January 1994 and 23 December 1996. In connection with these any native title rights have been reduced to claims for compensation. Another critical measure is the facilitation of "effective" or *de facto* extinguishment of native title rights by increasing the range of permissible pastoral leasehold activities (even including full primary production and tourism-based activities).[28] On the other hand, the NTA does contain provisions which powerfully support indigenous land use agreements.

Under the amending provisions the right to negotiate has been greatly eroded. This is due to alterations to the "threshold" test for the registration of native title claims together with the repeal and replacement of the "future act" regime.

Entitlement to apply for a determination of native title is now closely circumscribed. Individuals no longer have status to lodge an application: only a person or persons authorised by a "native title claim group" are competent to apply. At least one member of the group must have or have had a traditional physical connection with the land: failing that, the Federal Court is empowered to determine if the parent of the claimant had a traditional physical connection and had involuntarily lost it thorough the action of the relevant Government or a leaseholder.[29]

Secondly, the "threshold" test for the registration of native title applications has been significantly raised and applies to all applications lodged after 27 June 1996.[30] Substantial evidence of the claim must be adduced, including full physical descriptions of the land, its boundaries, the nature of the native title rights being claimed, comprehensive tenure information (including any other interests existing in the land) together with detailed anthropological information. The Registrar must be satisfied that at least some of the native title rights can be made out before the claim is registered.

Both of these measures inevitably will reduce the number of registered claimants, thereby significantly restricting access to the right to negotiate.

Prima facie the general framework of the new "future act" regime appears similar to its predecessor. However, its scope has been diminished.

The right to negotiate will, as a general rule, continue to apply to the granting of exploration licenses under mining legislation. However, a number of exceptions apply. First, the NTA now provides that the expedited procedure will apply if the proposed exploration licence will not directly interfere with the carrying on of community or social activities by native title holders. This permits a higher level of intrusion than the previous standard, which required only disturbance to the spiritual life of the community.

Secondly, the Commonwealth Minister responsible for the operation of the NTA is empowered to approve the grant of certain exploration, prospecting or fossicking tenements (individually, or as a class) without the right to negotiate being attracted. The Minister must first have advised and considered submissions from Representative Bodies and the public before proceeding, and the proposed grantee must consult with native title claimants about minimising the impact of the exploration activities upon native title rights and sacred sites.

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[27] In Western Australia more than 80% of the land area became subject to native title claim.

[28] Such activities may constitute "effective" extinguishment as they upgrade the pastoral leasehold rights to the extent that there is no scope for the continued co-existence of native title rights.

[29] It should be noted that in the recent Miriuwung-Gajerrong case Justice Lee, at first instance, held that a general, cultural connection to the land is sufficient to support a native title claim.

[30] The date upon which the NTA amendment proceedings began in Federal Parliament.

Other exemptions from the right to negotiate at the exploration stage include "low impact" mining activities[31] and the grant of certain water access rights provided that registered native title claimants and Representative Bodies are notified and permitted to comment.

In relation to actual mining activities, the right to negotiate continues to apply to proposed grants or variations to mining rights.

However, as a general rule, the right to negotiate no longer applies to compulsory acquisition for the purposes of constructing "infrastructure facilities" associated with mining activities (e.g. roads, railways, jetties, ports, telecommunications facilities). Compulsory acquisition of native title rights within towns and cities are also now exempt from the right to negotiate.

The new NTA provisions relating to renewals and extensions of mining tenements are complex but, in essence, the right to negotiate will not apply to renewals and extensions granted pursuant to legally-enforceable rights, undertakings or commitments created before 23 December 1996. It will apply to leases, licences and permits granted after 23 December 1996 and to any renewal that involves the creation of new rights (such as a right to mine).

Finally, the pre-existing Ministerial power to intervene in and override "future act" negotiations and determinations has been increased by the amending legislation.

The NTA also empowers the States and Territories to establish their own "future act" regimes in which the Aboriginal and Torres Strait Islander right to negotiate in connection with pastoral leasehold and certain other land is removed. A right to be consulted replaces the right to negotiate: specifically, the new right includes the right to be notified, to lodge an objection, for the objecting parties to be consulted and the objection heard by an independent party, and the right to seek compensation for loss or impairment of native title rights. In Western Australia attempts by the Court Government to introduce a State-based regime have, to date, failed.

Conclusion

In this paper it has been possible only to briefly examine some aspects of current native title law in the context of the mining industry. However, it is clear that the position of native title holders and claimants has been diminished by the 1998 amendments to the NTA.

The right to negotiate is highly valued by Aboriginal and Torres Strait Islanders as it reflects their special attachment to the land. It is arguable that the erosion of the right to negotiate, together with the extinguishing provisions of the NTA, roll back the protective provisions of the RDA and breach international human rights instruments (such as the International Convention for the Elimination of All Forms of Racial Discrimination) which set standards in connection with non-discrimination, property and cultural rights. What was given in 1992 and 1993 was taken away in 1998.

The interests of the mining industry are *prima facie* at odds with those of native title holders. However, these interests, though competing, are not necessarily mutually exclusive. Experience in North America and New Zealand indicates that agreements negotiated in good faith offer the best solution to all parties. It remains to be seen whether the NTA's new "future act" regime is capable of achieving a principled balance between legitimate native title rights and the legitimate interests of others in the land.

[31] Defined in the NTA as fossicking using hand-held instruments, thus not constituting exploration licences under general mining legislation.