Researching Native Title in Australia: Looking for a Needle in a Pastoral Lease

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One of the most significant topics in contemporary Australian law is native title. A large number of legal practitioners and academics are now heavily involved in the formulation and application of native title law and policy, and in the resolution of native title disputes. Any analysis of native title issues is, for a variety of reasons, inherently problematic. Accordingly, research in the field is a difficult undertaking. The purpose of this article is to provide something of a conceptual and practical framework for legal native title research. Following a discussion of basic legal principles and current developments in the field, some of the most significant factors that complicate work in the area will be considered, and finally key research tools will be itemised.

Part 1 – An Overview of Key Developments in Native Title

Simon Young

The essential history of native title in Australia is signposted by four High Court decisions and the enactment of the *Native Title Act 1993* (Cth). While an attempt has been made here to state the principles concisely and simply, to some extent that is misleading in that it belies the magnitude of the legal, political, economic and social complications arising in the field. Nevertheless, it is a place to start.

The Foundations for Protection: Anti-Discrimination Laws

The *Racial Discrimination Act 1975* (Cth) provides important protection for common law native title rights and interests. Its potential operation in this field was recognised in the course of preliminary legal argument in the Mabo litigation before native title itself was formally recognised.

Shortly after the initiation of the primary Mabo litigation, the State of Queensland enacted legislation declaring that upon annexation, the relevant Torres Strait Islands vested in the Crown free from other rights, interests and claims (with no compensation being payable). In Mabo (No 1)[1], the High Court considered the validity of this legislation as a preliminary question. For these purposes, the parties agreed to assume that the native title rights claimed by the plaintiffs in the primary litigation did in fact exist unless validly extinguished by the Queensland legislation.

[1] Mabo v Queensland (1988) 166 CLR 186

A majority of the High Court[2] upheld the challenge to the Queensland legislation primarily upon the basis of s10 of the *Racial Discrimination Act 1975* (Cth) In the leading judgment it was found that the Queensland legislation had impaired the Meriam people's human rights regarding property while leaving unimpaired the human rights of non-Meriams. The Act to that extent was in conflict with s10 and therefore failed.[3]

In view of the Courts' 'substance-orientated' approach to the meaning of s10, the *Racial Discrimination Act* provides important protection for common law native title rights, particularly from state legislation. One of the major points of contention in the recent debate over proposed amendments to the *Native Title Act 1993* (Cth) was the appropriate relationship between the discrimination legislation and the federal native title legislation.

The Recognition of Native Title in Australia

The substantive Mabo litigation proceeded to trial unhindered by the State extinguishing legislation and subsequently to the High Court. A majority of the High Court in Mabo *(No 2)*[4] rejected the doctrine of *terra nullius* in its application to the Australian continent as at the time of European arrival. It was held that the common law of Australia recognised a form of native title which (when not extinguished) reflects the entitlement of indigenous inhabitants, in accordance with their laws and customs, to their traditional lands. The Meriam people were entitled to possession, occupation, use and enjoyment of much of the island of Mer in the Torres Strait.[5]

The Court found that native title will, however, have been extinguished where the traditional holders of that title have lost their connection with the land. Further, whilst the acquisition of sovereignty by the Crown did not in itself effect the extinguishment of native title, native title was thereby 'exposed' to extinguishment by subsequent legislative or executive action that was inconsistent with the continued enjoyment of native title.[6]

A number of issues arising from these basic principles have proven problematic in later cases and in the formulation of legislation:

- the nature of the requisite traditional connection with land;
- the extinguishing effect of past government acts; and
- the relationship between indigenous rights and the rights of government grantees

Federal Legislation

It was recognised that the principles of Mabo (No 2) had potential application to various parts of mainland Australia. The federal government embarked upon a process of extensive consultation with state and territory governments, and indigenous and industry representatives. The resulting native title legislation was introduced into federal parliament in November 1993. The substantive provisions of the Act became operative on 1 January 1994. In broad terms, the *Native Title Act 1993* (Cth):

- provides for the validation of certain past government activities where their validity is possibly affected by the existence of native title;

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2 Brennan, Toohey and Gaudron JJ in a joint judgment and Deane J in a separate judgment
3 (1988) 166 CLR 186 at 317
4 Mabo v Queensland (No 2) (1992) 175 CLR 1.
5 Id at 40-42 and 58, at 109, at 15. 76, and at 119.
6 Id at 60, 70, 110, 188-189, and at 64, 68-69, 110-112, 195-196

- establishes a regime to regulate future acts potentially affecting native title;
- creates processes by which native title rights and rights to compensation can be determined; and
- establishes a detailed administrative regime headed by the Native Title Registrar and the National Native Title Tribunal.

The validation of 'past acts'

One major uncertainty to emerge from Mabo (No 2) was the exact effect from 1975 of the racial discrimination legislation upon past government activities, particularly grants of title. The federal *Native Title Act* seeks to validate these 'past acts' – which are essentially pre-1 July 1993 legislative acts and pre-1 January 1994 non-legislative acts, together with certain prospective extensions

The term 'acts' is defined broadly to include legislative and executive action, actions in relation to interests, licences, legal rights etc and other acts "*having any effect at common law or in equity*". Those activities that qualify as 'past acts' are divided into four categories (A to D) and their effect upon native title is determined according to that division. For example, grants of freehold and certain leasehold interests are 'category A' past acts and native title is extinguished. Certain other leasehold grants are 'category B' past acts and native title is only extinguished to the extent of any inconsistency. The grant of a mining lease is a 'category C' past act and native title is not extinguished, but is subject to the lease for the duration of its term. Any remaining prior acts are 'category D' and again native title is not extinguished, but is 'subjugated' for the duration of the act.

The existing 'past acts' validation regime is important both structurally and substantively to more recent developments in the field including the Wik decision and the current legislative proposals.

The regulation of 'future acts'

While there is currently a proposal on foot to replace the existing regime, the new version can only be understood and assessed against the backdrop of the original. The starting point in the current regime is section 22 of the *Native Title Act 1993*, which provides that 'impermissible future acts' are generally invalid to the extent that they affect native title [7] The essence of 'permissibility' is a requirement that the particular act applies in the same way to native title holders as it would to ordinary title holders. However, certain other activities are deemed to be 'permissible' – namely, certain renewals, offshore future acts, low impact future acts and acts authorised by agreements. Generally speaking, native title rights are suspended to the extent of inconsistency with permissible future acts.

Certain other features of the future acts regime warrant mention in this context:

- section 24 (dealing with 'unopposed non-claimant applications') affords protection to future acts (even impermissible ones);[8]
- section 25 protects certain legally enforceable renewals from the impermissibility and validity provisions; and

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[7] Accordingly, among the current legislative proposals is a plan to validate certain government 'future acts' (grants of title) made over property on the erroneous assumption that native title had been extinguished thereon by pastoral leases (this assumption was proven wrong by the Wik decision)

[8] A 'non-claimant application' is an application for a determination in relation to an area other than by persons claiming to hold the native title

- the creation of a right to mine, the variation of such a right, the extension of the period for which such a right has effect, and certain compulsory acquisitions of native title rights attract the 'right to negotiate' – even where those activities qualify as permissible future acts.[9]

The National Native Title Tribunal

The National Native Title Tribunal, currently headed by Justice French, is central to the federal legislative response to the common law recognition of native title. A detailed analysis of its composition and operations is beyond the scope of this paper, however a few essential points can usefully be made.

In basic terms the Tribunal is, firstly, a mechanism by which claims to native title can be determined by agreement and, secondly, a mediator and arbitrator in relation to the doing of 'future acts'.[10] Whilst the Tribunal has various judicial-type powers (for example the power to summon witnesses) it is directed to proceed in a fair, just, economical, informal and prompt way. It is not bound by technicalities, legal forms or rules of evidence.

In practice, it is widely acknowledged that the Tribunal and its members are key contributors to the developments in this field – for example through the refinement of appropriate cross-cultural negotiation techniques, through community awareness programs, and through media and academic publication.

The Role of the States and Territories

The States and Territories have passed legislation complementary to the *Native Title Act 1993* (Cth) – in some cases mirroring the federal Act and in some cases providing the minimalist additional regulation contemplated by the federal Act. In a number of the Acts, provisions have been included for the establishment of State or Territory bodies to determine a range of matters relating to native title (the federal Act expressly provides for the establishment of such bodies). However, it is important to note that in a crucial respect the federal Act constitutes a national "code": s 11 of the Act provides that native title is not able to be extinguished contrary to the Act. Accordingly, the States are largely bound to the federal regimes (in force at the time) for dealing with both past and future acts.

The Validity of the Federal Legislation

The validity of the federal native title legislation was considered in *Western Australia* v *Commonwealth*.[11] That case primarily concerned legislation passed by the Western Australian parliament[12] purporting to extinguish native title and replace it with statutory rights of traditional usage. The High Court was called upon to consider arguments that the Western Australian legislation was inconsistent with both the federal *Native Title Act 1993* and the federal *Racial Discrimination Act 1975*.

The Court found, in the course of its reasoning, that the *Native Title Act 1993* was (with the exception of one minor provision) a valid law of the Commonwealth under s51 (xxvi)

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9 The phrase 'right to negotiate' connotes significant procedural rights that are conferred upon registered native title claimants and registered native title holders

10 Note that the Native Title Amendment Bill 1997 (Cth) proposes the transfer of certain of the Tribunal's functions to the Federal Court (this is a consequence of doubts cast upon the validity of the existing procedures by the decision in Brandy v Human Rights and the Equal Opportunity Commission (1995) 183 CLR 245)

11 (1995) 183 CLR 373

12 *Land (Titles and Traditional Usage) Act 1993* (WA)

of the Constitution [13] The essential operation of the Western Australian Act failed by virtue of the fact that it did not satisfy the conditions for extinguishment prescribed by the federal *Native Title Act 1993*.

Furthermore, the Western Australian Act was found to be inconsistent with the racial discrimination legislation. According to the majority of the Court, s10 of the *Racial Discrimination Act 1975* ensures that Aborigines who are the holders of native title have the same security of enjoyment of their traditional rights over land as others who are holders of Crown title. Therefore, if under state law property held by members of the community generally may not be expropriated except for prescribed purposes or upon prescribed conditions, a state law purporting to authorise expropriation of property characteristically held by Aborigines for additional purposes or on less stringent conditions is inconsistent with the terms of s10.[14]

The Pastoral Lease Issue

The single most important issue in the development of native title to date has been the question of whether native title has been extinguished by the grant of valid pastoral leases under state land legislation. Strictly speaking, this issue was left unresolved in Mabo (No 2) and by the *Native Title Act 1993*.

The question came squarely before the Court in the Wik litigation.[15] The majority held, primarily in reliance upon the absence of a right to exclusive possession on the part of the pastoral lessees, that the grants in question did not 'necessarily' extinguish native title. However, to the extent of any inconsistency the pastoral lessee's rights would prevail over native title rights.[16] The effect of a lease in such circumstances was to be determined by reference to the language of the statute and the lease itself.[17]

Several considerations can be isolated as essential to the majority's reasoning:

- the non-application of statutory penalty and removal provisions to Aborigines;
- the number and variety of reservations and restrictions that were attached to the grants;
- the stipulation that the leases were for "pastoral purposes only"; and
- the historical circumstances of the lease regime and the geographical and agricultural characteristics of the properties (all of which pointed towards a conclusion that the pastoral lessee's interest was a limited one)

Having held that native title was 'not necessarily' extinguished on the facts, the judges were not required to consider a range of alternative arguments relating, for example, to:

- the possibility that native title rights and interests may be merely 'suspended' rather than extinguished; and
- the possible existence of a fiduciary duty owed by the State to the indigenous people

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[13] (1995) 183 CLR 373 at 461-462. The exact scope of s51(xxvi) (the 'races power') was recently considered in Kartinyeri v Commonwealth (1998) 152 ALR 540 (the Hindmarsh Island Bridge case). There were marked differences of opinion among the judges on the important issue of whether the power supports laws that are 'detrimental' to Indigenous people, and accordingly the case provides little definitive guidance in the native title context.

[14] See (1995) 183 CLR 373 at 437-438 and 468.

[15] *The Wik Peoples* v *Queensland* (1996) 187 CLR 1.

[16] Id at 122, 131, 133, 155, 171, 233, 242-243, 246-247 and 250.

[17] Id at 71-72, 76, 135, 185 and 235-238.

The essential issue dealt with in the Wik case, namely the effect of pastoral leases, and the issues expressly reserved such as mere suspension and fiduciary duty, remain central to the current native title debate.

Recent Legislative Developments

A 1995 bill proposing substantial amendments to the federal native title legislation lapsed upon the dissolution of the House of Representatives in January 1996. A further bill was prepared in 1996, however debate upon this bill was deferred pending the handing down of the Wik decision. In 1997 another bill was drafted incorporating earlier proposals and the government's response to the Wik decision. This bill was introduced into parliament in September 1997.

The essential goal of the 1997 bill was to remove the delays and confusion that were perceived to have arisen from the operation of the original legislation. In the course of parliamentary debates, the government focused particularly upon the burdens that had been placed upon resource industries, the lack of tangible benefits for indigenous people, and the uncertainty arising from the Wik decision.[18]

Schedule 1 to the Bill contains various amendments relating to the interaction between native title rights and interests and non-indigenous rights and interests in land or waters.

Important features include:

- the validation of pre-Wik government grants made without reference to the 'future acts' regime on the erroneous assumption that previous pastoral leases had necessarily extinguished native title at the time of their grant;
- confirmation of the effect on native title of various pre-Wik acts (with the goal of alleviating some of the confusion emerging from the Wik decision); and
- replacement of the existing 'future act' regime.

The new 'future act' regime will be operationally similar to the existing one where a future act that affects native title will be invalid to the extent that it does not comply with the division. However, under the new scheme there will be many more ways in which future acts can 'comply' with the division and therefore be valid. For example, future acts may find validity in provisions relating to indigenous land use agreements, primary production activities, off-farm activities, rights to remove certain natural resources, the management or regulation of surface and subterranean water, living aquatic resources or airspace; specified renewals, extensions or re-grants; public reserves; and the provision of public services.

A new 'right to negotiate' regime is also proposed. While the new version is structurally similar to the existing one, there is a significant range of exemptions from the new regime. They include acts covered by indigenous land use agreements, compulsory acquisitions for privately built infrastructure facilities, the creation or variation of certain small-scale mining activities, and acts relating to an area wholly within a town or city. Other significant changes to the existing regime include:

[18] See, for example, Australia, House of Representatives, *Parliamentary Debates* (1997) H of R, p7886.

- provision for the combination of future acts relating to a single project;
- changes in the provisions relating to the timing of notices;
- clarification of the 'negotiation in good faith' requirement;
- variations to the criteria to be considered in the making of arbitral determinations;
- the introduction of new powers of ministerial intervention in the process; and
- provision for the States and Territories to implement alternative processes.

Schedule 2 of the 1997 bill contains a variety of amendments to native title application, registration and determination procedures. Some of these relate to a partial transfer of functions from the Native Title Tribunal to the Federal Court, believed to be necessitated by the decision in Brandy v Human Rights and Equal Opportunity Commission[19] concerning the separation of powers. Also important is the development of a new registration test for claims which has important implications for claimant access to statutory rights such as the right to negotiate.

The provisions of the 1997 amendment bill were debated in the Senate in late 1997 and over 200 amendments were made by a variety of parties. The Senate amendments covered a variety of subjects, including: agreements; application, registration and processing arrangements; public service facilities; water and airspace management; validation, confirmation of extinguishment and compensation; renewals and extensions; the right to negotiate; the impact of the *Racial Discrimination Act 1975*; pastoral activities; and access rights.

Many of the amendments were accepted by the House of Representatives, yet significant disagreement emerged upon key issues:

- the proposed restructuring of the 'threshold test';
- the application of the statutory negotiation process;
- the relationship between the *Racial Discrimination Act 1975* and the native title legislation; and
- the proposed six year limitation upon applications (the 'sunset clause').

A revised bill incorporating the agreed amendments was returned to the Senate in April 1998. The key independent Senator (Senator Harradine) ultimately maintained his conclusive opposition to the government on the four 'sticking' points and the bill was therefore again returned to the House of Representatives with significant amendments. The government in the House of Representatives declared the amendments to be unacceptable. The bill presently stands as a potential trigger for a double dissolution election.

Part 2 – The Research Task

Simon Young

As stated at the beginning of this article, any analysis of native title issues and any native title research is complicated by a number of factors. The most important of these are set out below.

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[19] (1995) 183 CLR 245

Native title research is often unavoidably cross-disciplinary

Experts from a number of diverse disciplines may be involved in researching a native title claim. They may include lawyers, anthropologists, linguists, archaeologists, historians, archivists, and indigenous culture experts. Dispute resolution processes may involve many others such as financial advisers, engineers, planners, and environmental consultants. The inter-disciplinary nature of the subject is evidenced by the frequency of cross-faculty academic work in the field and the development of formal working associations between professionals such as lawyers and historians

Legislation in this field is extremely complicated and political and is being constantly scrutinised for amendment. Refer to the previous discussion of the slow and controversial evolution of the federal legislation.

The issues at stake are often of great private or public economic importance.

There are continuing conflicts between major development projects and native title claims across the northern states. As frequently noted by both federal and state government representatives, these conflicts are of national economic importance as well as being of major private concern. Disputes are therefore inherently multifaceted, multi-partied and highly-publicised, resolution is often urgent, and respective bargaining positions are often very disparate.

The issues are difficult – the recognition of native title involved a fundamental change to the Australian legal system.

The frequency with which new and unanticipated problems emerge in this field is a function of the fact that a myriad of legal doctrines (and for that matter a range of social perspectives) are gradually being dragged into line with the fundamentally new principals of Australian land tenure. The Courts are currently provided with a steady flow of difficult interconnected questions. For example, questions concerning the relationship between fauna conservation and native title; the effect of road reservations upon native title; and the possible existence of a fiduciary duty owed by the Crown to indigenous title holders.

It is increasingly apparent that native title issues are closely linked with other aspects of indigenous law and policy.

For example: past practices regarding the removal of Aboriginal children pose difficulties for the identification of traditional title holders; the recognition of native title inevitably reopens broader questions relating to the recognition of Aboriginal customary law and indigenous rights to self-determination; and issues concerning cross-cultural negotiation in the justice system are of great importance to native title dispute resolution.

The issues are rarely free of political and social complications.

Political and social complications arise primarily from the reconciliation of strongly conflicting economic, political and cultural interests and perspectives – however there are a range of difficult peripheral issues such as the desirability of an increasingly 'dualist' legal system

Native title in Australia is strongly influenced by developments in international law and in comparable overseas jurisdictions.

For a variety of reasons; particularly the commonality of experiences across jurisdictions, indigenous law and policy lends itself to comparative analysis and to the development of international standards. The High Court has relied heavily, in the context of native title, upon overseas (particularly North American) principles and developing international law principles. Recent overseas developments of importance to Australian law and policy include the recent decision of the Canadian Supreme Court in Delgamuukw v British Columbia[20] and the current progress of the draft *Universal Declaration on the Rights of Indigenous Peoples* through the UN hierarchy.

Part 3 – Key Research Tools in the Field

Carmel O'Sullivan

This list of key research tools cannot hope to be comprehensive, rather it is intended to provide some starting points and indicate how varied native title research can be, depending on the researcher's perspective and focus. It is a reflection on the newness of native title research, and the rapid developments in the area, that many of the tools included are Internet sites.

Native Title Tribunal

The primary resource for native title research is the National Native Title Tribunal web site at http://www.nntt.gov.au

For the beginner, the NNTT provides a comprehensive and enlightening list of Questions and Answers. The topics range from 'What is Native Title?', to the difference between native title and land rights, to how land or waters may be used when native title is uncertain, to the issue of compensation.

The NNTT site also contains the full text of determinations, model agreements, templates for agreements, and a host of other practical information. It is a crucial resource for native title research.

The bibliographies available from the Publications section are particularly useful, and demonstrate the cross-disciplinary nature of research in this area.

Legislation

A noted up version of the *Native Title Act 1993* is available from the NNTT site. It incorporates changes proposed by the government as well as the Senate amendments, and uses shading and bold typeface to distinguish between the original act and the various proposed changes. The result is an invaluable research tool.

ScalePlus at http://scaleplus.law.gov.au contains the full text of legislation, including "pasteups" (current consolidations), numbered Acts, and historical Acts. Historical Acts show the legislation as it was at a particular date.

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[20] [1997] 3 SCR 1010

AustLII http://www.austlii edu.au also gives access to the full text of legislation (but not historical versions)

BillsNet http://www.aph.gov.au/parlinfo/billsnet/main.htm contains bills, explanatory memoranda, and amendments made in the House and the Senate.

Government Sites

The Government Entry Point at http://www nla gov.au/oz/gov is an excellent starting point for both federal and state government information. Try the Department of Prime Minister and Cabinet, which has information on Aboriginal Reconciliation, information from the Office of Indigenous Affairs, and a special section on native title and Wik.

Cases

Case law is found in the conventional places – authorised report series, with electronic access via CD-ROM, or free of charge on AustLII and ScalePlus. In addition, native title determinations are available at the National Native Title Tribunal site.

ATSIC

ATSIC (http://www.atsic gov.au) produces some useful information on indigenous issues. The site has a native title area, but also of interest are its areas on culture, international indigenous issues, law and justice, and ATSIC publications. The ATSIC publications include some interesting bibliographies and links, as well as the full text of various reports and other ATSIC publications.

National Farmers' Federation

The National Farmers Federation site – http://www.nff.org.au – is fairly basic, and has a number of empty pages, but does contain press releases and speeches.

Reconciliation and Social Justice Library

AustLII (http://www.austlii edu.au) hosts the Reconciliation and Social Justice library, as well as the home page for the Council for Aboriginal Reconciliation. Both are worth browsing, especially for hard to come by speeches and articles on indigenous issues.

Print Resources

The best way to find print resources is to check catalogues and publications lists. New works are constantly being published. As has been emphasised in this paper, it is important to look beyond the conventional legal publishers for texts written from historical, anthropological, and archaeological perspectives.

Journals dealing with native title and indigenous issues include the *Indigenous Law Bulletin* (previously Aboriginal Law Bulletin), the *Alternative Law Journal, Native Title News* and the *Australian Indigenous Law Reporter*.

There are numerous government reports which are important to native title research, both directly and indirectly They range from the Woodward reports on land rights (1973 and 1974) to the recent report on the stolen generations, *Bringing Them Home* Researchers should look for Parliamentary reports, reports of Royal Commissions, ATSIC reports, HREOC reports, and Law Reform Commission reports on topics from customary law to the impact of the Native Title Act

Librarians may find the *Aboriginal and Torres Strait Islander Thesaurus,* compiled by Heather Moorcroft and Alana Garwood and published by the National Library, a useful tool to assist in indexing materials on indigenous issues

International Influence

International materials can be found in a variety of places, including AustLII, the United Nations page (http://www un org), and at http://www tufts edu/departments/fletcher/multilaterals html, the Multilateral Conventions site at Fletcher Law School

The Canadian experience is also of interest Some useful resources are –

- Virtual Canadian Law Library : http://www droit umontreal ca/doc/biblio/en/bv/bv html
- Canadian Supreme Court decisions : http://www droit umontreal ca/doc/csc-scc/en/index html
- Canadian Department of Indian Affairs : http://www inac gc ca/index_e html
- Bloorstreet Aboriginal Links : http://www bloorstreet com/300block/aborl htm This site is particularly good for its international links

CD-ROMs containing the full text of Canadian land claims and agreements are also available

Conclusion

Native title is a dynamic and complex subject that inevitably crosses jurisdictions, disciplines and perspectives Therefore, sound research in the field inevitably requires some degree of 'multi-skilling' This is a potentially daunting prospect – daunting not only at the point of first involvement but rather every time a new issue is approached

While native title research is plagued with difficulties, for this very reason it is a fascinating and rewarding area in which to be involved Furthermore, perhaps more than in any other contemporary legal field, there is a huge amount of important work to be done