MABO INTO THE FUTURE:

NATIVE TITLE JURISPRUDENCE

by Justice Paul Finn

Justice Paul Finn has been a long serving Judge of the Federal Court of Australia. This is an edited version of a keynote address given by Justice Finn at the National Native Title Conference, 6 June, 2012.

In four weeks' time my resignation from the Federal Court will have occurred. As I will no longer have to deal with native title matters I can, perhaps, be somewhat more candid than I otherwise could be as a serving judge. As we are concerned with *Mabo*[1] and native title, I should indicate at the outset that I will say nothing about the ongoing significance of Aboriginal Land Rights legislation.

I begin with quotations from two very recently published books. Both pose questions for us. The first is the final paragraph of Paul McHugh's *Aboriginal Title*,[2] a book that analyses native title jurisprudence in primarily Commonwealth countries and particularly Australia and Canada from the final quarter of the twentieth century. It asks:

> Did common-law Aboriginal title change the plight of tribal peoples for the better or did it merely reinscribe in another form a longstanding and negative pattern to their historical experience of relations with the Anglo-settler polity?[3]

That is a challenging question.

The second quotation comes from Bryan Keon-Cohen's *Mabo in the Courts*.[4] Speaking of the decline in the opportunity for reconciliation presented by the *Mabo* decision he observes:

> After 200 years, the High Court dramatically corrected a notorious legal fiction. Within a decade, governments around the nation and a differently constituted High Court (none of the *Mabo* judges still serve) have severely restricted *Mabo*'s potential as an evolving common law platform for a measure of recognition of Indigenous traditional life and law, and reconciliation with the general community. This particularly applies to the onus of proof imposed upon claimants by the NTA.[5]

A further decade gone, and he comments:

> The manifest need for urgent native-title reform requires … political will. However, the dreaded political hot-potato syndrome that, in part, led to *Mabo* in the first place and the Mason court's 'activist' response, one fears, has risen again.[6]

Are things that bleak?

I have been a serving judge for 17 years but it was only five years ago that I was exposed to contested native title cases. Three were appeals, one was a trial. Only the trial brought any joy to the claimants. That was in the *Torres Strait Regional Sea Claim*.[7] The appeals in their own way were arresting. I will only comment on two of them—*Risk v Northern Territory*[8] (the Larrakia-Darwin case) and *Bodney v Bennell*[9] (the Noongar-Perth Metropolitan Area case). The third, *Jango v Northern Territory*,[10] was lost essentially for deficiencies in pleading—a most unfortunate way to lose a native title claim. Both *Risk* and *Bodney* attracted criticism for imposing obstacles to proving native title claims. Of that I will only say this: it is the function of intermediate courts of appeal to apply binding authority. *Yorta Yorta*[11] and *Ward*[12] were such authorities and bound the Federal Court in both cases.

The Larrakia people failed because, notwithstanding they remained a 'society'—a term not used in the *Native Title Act 1993* (Cth)—their present laws and customs were not ones which had 'continued substantially uninterrupted' since sovereignty.[13] Here we have the *Yorta Yorta* requirement of 'continuity'. Again I would notice neither this term nor the word 'continuous' are contained in the Act's section 223 definition of 'native title'.

The Noongar claim to land in and around Perth failed because of lack of proof both of 'continuity' of the traditional laws and customs (the *Yorta Yorta* requirement) and of 'connection' by the Noongar's laws and customs to Perth. As the High Court indicated in *Ward*, connection is a distinct requirement of the section 223 definition of native title.

I emphasise the grounds of failure in these two cases for this reason: claims made for native title rights under the Act are for rights defined, not by the common law, but by the Act itself. One's room for manoeuvre is set by the language of the Act. To understand what those rights under

the Act are and what is required by way of proof of them involves an exercise in statutory interpretation. This is what the High Court engaged in in *Yorta Yorta* in particular. How it interpreted the section 223 definition of native title, I would respectfully suggest, produced a discernible hardening of the arteries of the Native Title Act.

Many, myself included, have subsequently commented to this effect. The 'continuity' requirement *Yorta Yorta* insisted upon was, to use Sean Brennan's useful shorthand, 'continuity of a society from sovereignty to the present, continuity in the observance of law and custom and continuity in the content of that law and custom'.[14]

If there had been dispossession and dispersal of a society as a result of colonisation or government action and an interruption in the observance of its traditional laws and customs, later attempts to re-build that society and to re-establish as best one could its laws and customs would be to no avail.

The onus cast on claimants by the Native Title Act as so interpreted is a severe one and one commonly considered to be strangely at odds with the moral foundation and beneficial purpose of the Act. In effect, claimants are required to pass through the eye of a needle.

The need for legislative reform has been widely recognised. You are probably aware that in 2008, Chief Justice French, then a Federal Court judge, proposed several ameliorative steps to ease the burden imposed on claimants, the principal of which was (through a proposed legislative change) to create a presumption of continuity in specified circumstances so in effect reversing the *Yorta Yorta* onus.[15] The current Native Title Amendment (Reform) Bill 2011 (Cth) has taken up and extended the French proposals. Significantly, the Bill confronts directly the importance to be attributed to a substantial interruption to acknowledgement of laws and customs caused by governmental or settler action. The apparent intent here is to ensure that claims such as in *Risk* and *Bodney* do not fail where the claimants failure to observe their laws and customs resulted from the manner of their dispersal and dispossession.

There is a real need here to be met. What is required as Bryan Keon-Cohen observed, is political will.[16] And what is apparent is that the above Bill languishes friendless.

There are two further aspects of statutory interpretation I should mention because of their continuing significance in native title claims.

The first is the High Court's divination in *Yorta Yorta* of the 'society' requirement. The word 'society' as I have said does not appear in the Native Title Act. Three of the judges put the matter this way:

> To speak of rights and interests possessed under an identified body of laws and customs is … to speak of rights and interests that are the creatures of the laws and customs of a particular society that exists as a group which acknowledges and observes those laws and customs.[17]

Viewed from the perspective of a trial judge, a problematic and quite time consuming distraction was set loose in native title litigation.

The *Torres Strait Regional Sea Claim* illustrates this difficulty in a simple way. The Islanders' primary case was that they were one society; the Commonwealth's, that there were four societies, these representing the four island groups involved in the hearing; and, the State of Queensland alleged there were thirteen societies, each being one of the thirteen inhabited islands. Needless to say the anthropologists, understandably, had some difficulty with this. Their difficulty reflected a more deep rooted problem with the society concept.

The society requirement puzzled me in three ways. First, the evidence clearly established a significant body of laws and customs dealing with trade and trading relations that extended south to Cape York and north into Papua. This *lex mercatoria* or law merchant, of which the medieval Venetians would have been proud, was clearly acknowledged and observed for well over a millennium by a discernible group of persons who extended from the Cape to Papua and who engaged in trade beyond their own island or mainland area. How did the 'society' requirement accommodate these laws? What was the society whose laws they were?

Secondly, it may well have been the case that a group or groups in the lower mainland of Papua had shared, or common, laws and customs with the Islanders. If so, were they also part of 'the society'? Indeed, where did such a society—if it was a society—stop? I did not need to decide this. Even if the Papuans' laws and customs gave them rights in a part of Torres Strait, they could not obtain recognition of them under the Act. Its benefit extended only to Aboriginals and Islanders.

Thirdly, and here is the nub of the matter, as I said in my reasons for judgment:

> My conclusion [on the society issue] is … that the Applicant has established its one society case. There is an irony in this … [T]he answers to the question of native title rights and interests – which is, after all, the concern of the NT Act – would in all probability be the same whether my conclusion had been one, or four, or thirteen societies.[18]

So was all the disputation about 'society' unnecessary? It is not for me to say that. Yet a commentator on my decision said to me that my 'one society' finding would over time prove to be of no little significance to the Islanders, even if it had no real relevance to the proof of native title. If this be so, the Islanders can thank *Yorta Yorta* for this fortuitous finding.

The final point I want to make about statutory interpretation is one of enduring importance. It relates directly to the robustness of native title rights in our legal system. As you may be aware in the *Torres Strait Regional Sea Claim*, I decided as a matter of statutory construction that, despite a century and more of State and Commonwealth fisheries legislation, the Islanders' right to take the resources of the sea for trading or commercial purposes had not been extinguished. In so doing I invoked the interpretative principle that if the respective Parliaments intended to extinguish that right, they must manifest a clear and plain intent to do so. The justification for using this principle in a native title setting was given by Justice Brennan in *Mabo [No 2]*:

> This requirement, which flows from the seriousness of the consequences to Indigenous inhabitants of extinguishing their traditional rights and interests in land, has been repeatedly emphasized by courts dealings with the extinguishing of the native title of Indian bands in North America. … [R]eference to the leading cases in [Canada and the United States] reveals that, whatever the juristic foundation assigned by those courts might be, native title is not extinguished unless there be a clear and plain intention to do so. That approach has been followed in New Zealand. It is patently the right rule.[19]

By a majority of 2-1, the Full Court of the Federal Court reversed my conclusion. The Islanders have applied to the High Court for special leave to appeal.

I will say no more about this matter other than there is potentially a very important issue to be resolved here concerning the robustness, the durability, of the native title rights that were at stake. However, I do not suggest that even a successful appeal could presage a revisiting of now established interpretations of section 223 stemming from *Yorta Yorta*.

There are two additional matters in native title jurisprudence I should mention. The first is something

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I consider to be a disrupting influence in the fair and effective prosecution of contested native title claims and will continue to be so.

Paul McHugh in his *Aboriginal Title* suggests that the initial promise of common law native title was compromised by downstream developments—in Australia's case, by the Native Title Act and the jurisprudence it spawned.[20] Doctrine became technicality laden; the judicial focus, microscopic. There is, with respect, justice in this and it has produced two characteristic features. The first is what I would call the fragmentation of native title rights and interests. It results, in my view, in the over-definition, and subdivision of, individual rights and interests and in the dilution of a proprietary conception of native title.

Our habit of fragmentation was fostered, I suspect, first, by the requirements of section 94A and section 225 [of the Native Title Act] that a native title determination must set out the details (amongst other things) of the nature and extent of the native title rights and interests in relation to the determination area; and, secondly, by the High Court's resort in *Ward* to the old metaphor of a 'bundle of rights' to describe what is comprehended by native title. Subdivision may be useful in some contexts, but it ought not be an imperative. Let me give you an example.

I can understand how the right to take resources from a claim area must be a right possessed under traditional laws acknowledged and customs observed. Section 223(1)(a) requires this. I equally can understand why, if those laws prescribe the allowable use of what is taken or proscribe what is not allowable, then the enjoyment of the rights themselves is circumscribed. A simple example of such circumscribed rights are those governing the taking of turtle and dugong by Torres Strait Islanders. Such rights can properly be said to be 'traditional rights' in that sense. But merely because other rights have been used in particular ways in the past, for example, for subsistence because there was no opportunity otherwise to exploit them, that should not of itself preclude newer modes of taking, i.e. using new technologies, or newer purposes in taking, i.e. for commercial purposes, because the opportunity presents itself to do so *after* sovereignty.

At the end of last year the Supreme Court of Canada refused to recognise the Lax Kw'alaams Indian Band asserted right to fish for commercial purposes notwithstanding the harvesting and consumption of fish resources and products was practiced for centuries.[21] The reason for this refusal was that there was no tradition pre-contact of conducting a fishery or a significant trade in fish or fish products. The Torres Strait Islanders were traders for centuries and so succeeded in establishing a right, pre-sovereignty, to take marine resources *for trading or commercial use*. But should this matter? Why should the date of sovereignty freeze for the future the manner of exercise of the right to take?

The second characteristic of our jurisprudence is its tendency to Balkanise claim groups. The reasons for this probably are quite complex and may well be related to our typology of rights into communal, group and individual rights. Be this as it may, we have a greater preparedness to permit small group claims than I consider should properly be countenanced. I for one favour the emphasis being upon the largest reasonable claim group being the party carrying the responsibility for native title determinations in a given area—hence in *Bodney* the Full Court's unpreparedness to preclude the large, single Noongar claim group for the South West of Western Australia from proceeding despite its loss in that matter.

There are other matters which require our attention. To give a simple illustration, I would regard as undue our pre-occupation with native title as 'communal title'. It is, I suggest, unhelpful to begin with a one size fits all conception of native title. Surely it is the claimants' laws and customs which define the character of native title in a particular determination area. In the *Torres Strait Regional Sea Claim*, for example, the claimants together most decidedly did not have communal title to the determination area. How native title was dispersed was far more complex than that.

If I have not said much that is positive about how the Native Title Act has been interpreted, it is important to note that a quiet revolution of a procedural character has been rung in under the tutelage, and with support, of the Federal Court. It is reflected in the raft of consent determinations now being made.

It is fair to say that governments and mining and pastoral interests have come to appreciate of recent times that native title is not a Trojan horse. A consequence of this is that distrust, hostility and insistence upon the onerous requirements of proof are being displaced progressively by a claim environment more conducive to cooperation, goodwill and reasonable accommodations.

I do not wish to overstate this, but state and Commonwealth governments seem to be moving de facto in the direction proposed by Chief Justice French in 2008.[22]

Two weeks ago I participated in the consent determination of the Arabana People. It provided what I hope will be a window into the future. The processes adopted by the State Government in evaluating the Applicant's anthropological evidence were cautious but fair and did not require the usual set piece, adversarial, exchanges of reports, and the like. Likewise the State was prepared to accept, and to be satisfied properly with, what reasonably was proffered by the Applicant as proof of the native title requirements rather than insisting they be made out with the exactness required in hard fought litigation. In short, the manner of proof had been loosened, the onus of proof lightened.

The Federal Court has facilitated and encouraged these developments and, I am sure, will continue to do so. To put it shortly, the objective is to encourage reasonable compromise, not to fan unreasonable contest.

An important related development is the emerging practice of building Indigenous Land Use Agreements ('ILUAs') and other contracts around a consent determination. In the Arabana matter four ILUAs were signed at the determination ceremony. All I wish to say here is that these agreements are potential vehicles for building upon the advantages given by the acknowledgment of a claimant group's native title rights. They can be an instrument of the group's material advancement in appropriate circumstances. What is to be emphasised is that the parties' agreements may involve matters other than native title. It should also be emphasised, these ancillary agreements can themselves, since 2009, be made the subject of court orders under section 87 and section 87A of the Native Title Act.

This brings me to the final matter I wish to mention. There has been considerable debate of recent times about whether the acknowledgement of native title has, beyond its cultural and spiritual importance to claimants, improved or assisted in improving their material wellbeing. The Preamble to the Native Title Act expresses the hope that this might be so, but is realistic enough to suggest that the benefits which native title rights give successful claimants may need to be supplemented significantly.

With the advantage of hindsight one can today say that those optimistic expectations one may have had of the part native title might play in securing recognition of traditional life and law, reconciliation with the white community, and significant material benefits for successful claimants, have ebbed in quite some degree.

The Native Title Act is, and will remain, an important element in the pursuit of those objectives. But, as the jurisprudence on the Act has developed, the Act also stands reef-like and able to shipwreck those who cannot read its waters well. I am not optimistic that judicial interpretation of the Act will soon change significantly. For obvious reasons I make no prophesy about the likelihood of significant legislative changes to the Act. Nonetheless, I am optimistic that the changes we are now seeing in the procedures which parties to native title claims are prepared reasonably to adopt, bode well for the future.

Let me put it this way. The native title cocktail has three constituents: parliaments and governments; the courts and lawyers; and the parties. All three have a part to play. Nonetheless, it is my expectation that the future will be set in considerable degree by the parties. Using contractual procedures with imagination and goodwill and recognising that decency is simply good sense, they may yet realise some of the promise of native title.

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

2 P G McHugh, *Aboriginal Title: The Modern Jurisprudence of Tribal Land Rights* (Oxford University Press, 2011).

3 Ibid 339.

4 Bryan Keon-Cohen, *Mabo in the Courts: Islander Tradition to Native Title: A Memoir* (Australian Scholarly Publishing, 2011) vol 1.

5 Ibid 586-7.

6 Ibid 591.

7 *Akiba on behalf of the Torres Strait Islanders of the Regional Sea Claim Group v State of Queensland (No 2)* [2010] FCA 643.

8 *Risk v Northern Territory* [2007] FCAFC 46.

9 *Bodney v Bennell* [2008] FCAFC 63.

10 *Jango v Northern Territory of Australia* [2007] FCAFC 101.

11 *Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58.

12 *Western Australia v Ward* [2002] HCA 28.

13 *Risk v Northern Territory of Australia* [2006] FCA 404 [58].

14 Sean Brennan, 'Statutory interpretation and Indigenous property rights' (2010) 21 *Public Law Review* 239, 255.

15 Robert French CJ, 'Lifting the burden of native title: Some modest proposals for improvement' (2008) *Australian Law Reform Commission* <http://www.austlii.edu.au/au/other/alrc/publications/reform/reform93/3.html>.

16 Bryan Keon-Cohen, *Mabo in the Courts: Islander Tradition to Native Title: A Memoir* (Australian Scholarly Publishing, 2011) vol 1.

17 *Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58, [50].

18 Keon-Cohen, above n 4.

19 *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 75 (Brennan J).

20 P G McHugh, above n 2, 329.

21 *Lax Kw'alaams Indian Band v. Canada (Attorney General)* [2011] 3 S.C.R. 535.

22 Robert French CJ, above n 15.