HONOURING MABO'S LEGACY- THE NEXT PHASE OF NATIVE TITLE REFORM

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I INTRODUCTION

I am delighted to have been invited to contribute to the JCU Law Review's Mabo 25th Anniversary edition.

Since the passage of the *Native Title Act*, successive Commonwealth governments have worked to ensure that the native title system promotes Indigenous political and economic development. The Abbott and Turnbull governments have been no exception.

My immediate predecessor as Attorney-General, Mr Dreyfus, commissioned from the Australian Law Reform Commission a report into a number of aspects of the Act, more particularly the requirement of connection as well as the authorisation and joinder provisions. Further work has been undertaken by COAG, culminating in the Investigation into Indigenous Land Administration and Use and the report of the senior officers working group.

The purpose of this contribution is to consider how the government might move forward on this body of work and discuss the process that has been announced for doing so.

II *McGLADE v NATIVE TITLE REGISTRAR*

Most recently, the Government has amended the Act to reverse the effect of the Full Federal Court's decision in *McGlade v Native Title Registrar* [2017] FCAFC 10. As is by now well known, in that case the Full Court unanimously held that four Indigenous Land Use Agreements ('ILUAs') in Western Australia were invalid by reason of their failure to comply with s 24CD of the Act.

At [234] North and Barker JJ said:

> The definition of a "registered native title claimant", relying as it does on the definition of an "applicant" in s 61(2), contemplates a singular entity that may, in some circumstances, be comprised of multiple "persons" whose names appear on the Register "as the applicant". In order to construe the provisions of the NTA in a harmonious manner, the reference to "all registered native title claimants" in s 24CD(2)(a) must refer to each "registered native title claimant", if there is more than one, in the sense of the entity defined by s 253, in relation to an agreement area.

Noting the potential inconvenience of their interpretation of the Act, their Honours simply said that 'the textual requirements of the [Act] … are as they are'. To similar effect, Mortimer J considered that:[1]

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[1] At [354]

> …one aspect of 'protection' of native title is the relatively prescriptive set of provisions dealing with the constitution and identification of an applicant/registered native title claimant, and the mechanisms to change the constitution of those entities. These provisions ensure the NT Act's emphasis on representation through express authorisation is maintained, and no overriding of minority, sectional or special interests occurs unless the whole of the native title claim group authorises such an approach in accordance with the processes in s 251B.

Her Honour further opined that as the applicant was 'jointly' comprised of a number of individuals, it followed that they could only act collectively, which expression in turn required that the applicant must act unanimously.[2]

While it is not for me to express a view as to the correctness of the construction adopted by their Honours, it is significant that neither the South West Aboriginal Land and Sea Council nor the State of Western Australia chose to seek special leave to appeal the Full Court's decision.

However, with respect to the policy considerations espoused by their Honours, the Government was (and remains) of the view that authorisation in accordance with the Act by the claim group should not be undermined by one or more recalcitrant registered native title claimants. Claim groups entered into ILUAs in good faith and on the basis of the settled understanding of the Act as interpreted in the *Bygrave* decision.

It is perhaps disappointing that Parliament chose not to act with greater swiftness in restoring certainty to native title holders. Nonetheless, I am pleased that native title holders and those who deal with them can go forward with greater clarity around the important process of making an Indigenous Land Use Agreement.

III CONNECTION

The requirement of connection imposed by s 223 of the Act, as it is now understood, comes from the decision of the High Court in *Yorta Yorta*.[3] It has four limbs:

- the requirement for traditional laws and customs under which members of a society possess rights and interests in relation to the land;
- the laws and customs must be passed from generation to generation of a society;
- the origins of those laws and customs are found in normative rules that existed pre-British sovereignty; and
- the continued existence and vitality of those laws and customs since sovereignty.

In examining the requirements imposed by the High Court, the ALRC considered that they imposed too high a burden on native title claimants.[4] They were fortified in this view by submissions from a number of native title representative bodies and others referring to difficulties of proof. The ALRC's response to the difficulties alluded to was

[2] At [378]-[379]
[3] *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422
[4] Australian Law Reform Commission, *Connection to Country: Review of the Native Title Act 1993 (Cth),* Report No 126 (2015).

to propose that s 223 be amended to 'clarify' that each of the requirements arising from *Yorta Yorta* is no longer necessary in proving native title.[5]

There are a number of difficulties with this proposal. It also presents a number of further questions. Not least of them is what should take the place of the requirements explained by *Yorta Yorta*, and what claimants would have to prove instead of the matters canvassed immediately above. There would be considerable uncertainty and it is inevitable that some other judicial interpretation of what s 223 requires would take the place of the present understanding. It is by no means certain that any new interpretation would be acceptable to native title claimants. Similarly, would the amended s 223 apply to claims filed after commencement, or to matters filed but not yet determined? I do not pretend that these questions are incapable of resolution by Parliament. But neither is free from difficulty.

Nor would uncertainty be limited to what replaces *Yorta Yorta*. If s 223 were amended as the ALRC suggests, it would leave the parties to previous matters in an invidious position. Claimants who had formulated and advanced claims based on the settled understanding of what s 223 required would feel a justified sense of grievance that the bar had been lowered for subsequent matters based on when a claim had been filed.

Issues may also arise for respondents if variation applications were to be made under s 13 of the Act following any amendments to s 223. It is an open question whether s 13(5)(b) providing that a ground for variation is that it is required 'in the interests of justice', permits such applications based on nothing more than a change in the law. If permitted, variation applications could have sweeping implications for native title respondents who have (understandably) ordered their affairs based on the scope of a previous determination of native title. These implications would surely make the difficulties occasioned by *McGlade* pale into insignificance.

Just as I have said in relation to the scope of application of amendments to s 223, I do not mean to suggest that Parliament could not clarify the issue by expressly providing that s 13 does not apply in such cases. Yet that would create two classes of native title determination. That cannot be desirable.

The proof of native title can be a difficulty and lengthy process. As such, the ALRC's proposed alternative to legislatively reversing *Yorta Yorta* deserves careful consideration. The ALRC proposed that the Act provide guidance as to when inferences may be drawn, and more particularly that the Court may infer the existence of traditional laws and customs from contemporary evidence.[6] Such guidance would be consistent with the beneficial purpose of the Act, and could be implemented without the disruption and uncertainty that would be occasioned by the Commission's other proposed changes to s 223. One might nonetheless ask whether it is necessary.

However, difficulties of proof notwithstanding, the Government is encouraged by the increased number of consent determinations of native title and the shorter timeframes for resolution.[7] The relatively small number of determinations of 'no native title' is similarly encouraging.

[5] Recommendations 5-2, 5-3 and 5-4
[6] Recommendation 7-1
[7] ALRC Report [3.53]

More vigorous Federal Court case management is also playing its part. The number of matters older than 24 months continues to decline, both in absolute terms and as a proportion of native title matters in the Court. In 2015-16, the Court resolved more native title cases than in either of the two previous years.

In its report, the ALRC noted 'when codifying, confirming or clarifying an area of settled law, there is a risk of disturbing the settled law, causing uncertainty and unnecessary litigation'.[8] That observation has considerable force, not least so far as it concerns the *Native Title Act*.

IV AUTHORISATION

The *McGlade* litigation indirectly raised the question of authorisation of Indigenous Land Use Agreements ('ILUAs') and the question of how the will of traditional owners can best be given effect.

In the initial draft of the ILUA Bill, the Government proposed to adopt the ALRC's recommendations concerning how claim groups authorise applications for a determination of native title and ILUAs.

The ALRC described a number of different decision-making structures, ranging from the claim group as a whole retaining authority over most decisions to the appointment of a committee to advise the applicant.[9] It is consistent with the preamble and objects of the *Native Title Act* to empower Indigenous Australians to proceed as they would wish in relation to agreement making. For that reason, it remains the Government's intention to proceed with recommendations of the ALRC Report that would allow a claim group to agree on their own processes for authorising the making of applications under ss 251A and 251B of the Act. It is encouraging that these recommendations had broad stakeholder support at the time of the ALRC Report, and I am hopeful that will remain the case.

It is also consistent with empowering Aboriginal people, and more particularly the claim group, to strengthen the rights of the claim group through permitting it to define the scope of an applicant's authority.[10] *McGlade* squarely raised for determination the extent to which a minority of the applicant should be permitted to frustrate the will of the claim group. Adopting the ALRC recommendations around authorisation will make clear that where a claim group has made its will known in a properly notified and conducted meeting, a dissident member of the applicant will be bound by the claim group's wishes.

The ALRC Report also deals with the s 66B process for removing and replacing members of the applicant. In the course of the Senate Legal and Constitutional Affairs Committee's Inquiry into the ILUA Bill, a number of parties expressed frustration with

[8] ALRC Report, [6.34]
[9] ALRC Report, [10.38]-[10.49]
[10] Recommendation 10-5

the expense and delay that s 66B applications entail.[11] The ALRC's recommendations will go some way to addressing those concerns by providing for a more straightforward process where a dissident member of the applicant is unwilling to act or the claim group has planned for the succession of a deceased applicant.[12]

V NEXT STEPS

I have discussed some of the ALRC's more significant recommendations. This is not to diminish what the report has to say about other matters such as authorisation and joinder, or indeed the numerous recommendations made by the COAG Investigation, the Treasury's 2013 report on the taxation of native title benefits or the other proposals from the diverse group of native title stakeholders.

At a roundtable held on 27 April in Melbourne, the Minister for Indigenous Affairs (Senator the Hon Nigel Scullion) and I announced that the Government would bring forward a further series of amendments to the *Native Title Act*. Following passage of the ILUA Bill, Senator Scullion and I wrote to the National Native Title Council to invite them to comment on the outstanding proposals from the ALRC Report, COAG Investigation and Treasury working group.

While these reports form the basis of the Government's proposed approach to future reforms, I do not propose to limit ourselves to that body of work. At a recent Native Title Ministers' Meeting, States and Territories made further proposals for reform. The meeting was a constructive discussion, and I would like to take this opportunity to repeat my thanks to state and territory colleagues for approaching this process in a collegiate and utterly non-partisan fashion.

Following on from the ministerial meeting, the Attorney-General's Department will release an options paper for reform and lead a comprehensive process of consultation with Indigenous Australians and other stakeholders including the mining industry and pastoral interests. I encourage all Australians with an interest in native title to take the opportunity to read the paper (which it is anticipated will have been released by the time this volume of the Review is published) and contribute their thoughts on the future of the Native Title system.

Passage of the *Native Title Act* was a watershed moment in the relationship between first Australians and the rest of the Australian community. But we must frankly acknowledge that in some respects it has not lived up to the promise of providing opportunities for Indigenous people. The result of this consultation process will not remedy all of these failures. But it will be a step in the right direction.

[11] Senate Legal and Constitutional Affairs Legislation Committee Hansard, 17 March 2017, pp.3-4 (resources industry), p.22 (Cape York Land Council), pp.32-3 (Mr Greg McIntyre SC), p. 51 (Queensland South Native Title Services) and 52-3 (National Native Title Council)
[12] Recommendations 10-7 and 10-8