NATIVE TITLE IN QUEENSLAND TWENTY-FIVE YEARS POST-MABO

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ABSTRACT

The *Mabo* decision was undoubtedly one of the most significant in Australian legal history, removing the fiction that the land had been settled as terra nullius, and recognising that native title to land had survived the acquisition of sovereignty. Subsequent cases established the principles of law in regard to questions such as whether pastoral leases extinguished native title. An examination of the 2017 Federal Court cases relating to native title claims in Queensland has highlighted that, frequently, the main issue was whether the claimants could prove continuity with their traditional laws and customs. The High Court decision in *Yorta Yorta v Victoria* established the principles relevant to this question and is the case that is most likely to be cited in present day native title decisions. The successful claims have recognised native title rights such as hunting, carrying out ceremonies and maintaining sacred sites. These rights, however, have not been granted as exclusive rights, with local councils and mining companies being some of the groups that have maintained concurrent rights.

I INTRODUCTION

It is now 25 years since *Mabo v Queensland [No 2]* ('*Mabo*')[1] established that native title exists in Australia. The decision was undoubtedly one of the most significant in Australia's legal history and brought Australia into line with the rest of the world in regard to the issue of indigenous land rights. Subsequent to the decision, the *Native Title Act 1993* (Cth) ('NTA') was enacted. It now states what native title is in Australia. Claims under it are still being decided and this article will examine the 2017 Federal Court decisions in relation to claims made in Queensland to establish what the main issues are 25 years post-*Mabo*. First, however, it will provide a brief overview of the history of native title in Australia to provide the legal background to these decisions.

II NATIVE TITLE IN AUSTRALIA

A The Pre-Mabo Cases

While *Mabo* is undoubtedly a landmark decision in Australian legal history, it did not appear in isolation, there being earlier cases relevant to native title in Australia. While the issue in *Cooper v Stuart*[2] was whether the rule against perpetuities was operative in New South Wales, Lord Watson addressed the question of how Australia had been acquired. His Lordship noted that there were legal differences between a Colony acquired by either conquest or cession, where there was an established system of law,

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[1] (1992) 175 CLR 1.

[2] (1889) 14 App Cas 286.

and 'that of a Colony which consisted of a tract of territory practically unoccupied, without settled inhabitants or settled law, at a time it was peacefully annexed.'[3]

Thus, even though the case had nothing to do with Indigenous Australians, it enforced the concept of 'enlarged terra nullius', that is, even if there were actually people present, if they were not cultivating the land in a European way, the land could still be considered 'empty. In *Milirrpum v Nabalco*[4] Justice Blackburn held that while the Indigenous people had laws and customs in relation to the land, this did not lead to a proprietary interest in the land.[5] Later, in *Coe v Commonwealth*[6], Justice Gibbs (as he then was) stated that it was 'fundamental to our legal system that the Australian colonies became British possessions by settlement, and not by conquest.'[7] His Honour referred to *Cooper v Stuart* as authority Australia that was effectively 'a colony acquired by settlement which, by European standards, has no civilized inhabitants or settled law.'[8]

Justice Murphy, however, stated that the plaintiff, Paul Coe, was entitled to try 'to prove that the concept of terra nullius has no application to Australia, that the lands concerned were acquired by conquest, and to rely on the legal consequences that follow.' In regard to the terra nullius question, Murphy J referred to the *Advisory Opinion on Western Sahara*[9] in which the International Court of Justice had stated that 'independent tribes, travelling over a territory or stopping in certain places, may exercise de facto authority' and that this will then prevent the territory from being considered terra nullius.[10] Justice Murphy also stated that Coe was entitled to argue that sovereignty acquired by the British Crown did not extinguish 'ownership' rights of Indigenous Australians and that they had certain proprietary rights.[11] Thus, this minority judgment contains the principles that were to form the basis of the *Mabo* decision.

B The Mabo Decisions

The first aspect of *Mabo* that needs to be acknowledged is that it was almost defeated before the native title argument even reached the High Court. In response to proceedings commenced in 1982 by James Cook University gardener, Eddie Mabo, in regard to common law native title over the Murray Islands, the Queensland parliament enacted the *Queensland Coast Islands Declaratory Act 1985* (Qld). This act effectively extinguished any native title that may have existed on the Murray Islands. However, in a 4-3 decision, the High Court held it was in breach of the *Racial Discrimination Act 1975* (Cth) and was therefore invalid,[12] paving the way for the native title claim.

In what is considered to be the leading judgment in *Mabo*, Justice Brennan (as he then was) pointed out that 'it would be a curious doctrine to propound today that, when the benefit of common law was first extended to Her Majesty's indigenous subjects in the Antipodes, its first fruits were to strip them of their right to occupy their ancestral

[3] Ibid, 288.
[4] (1971) 17 FLR 141
[5] Ibid, 272.
[6] (1979) 24 ALR 118.
[7] Ibid, 129.
[8] Ibid.
[9] [1975] 1 ICJR 39.
[10] Ibid, 75.
[11] *Coe v Commonwealth* (1979) 24 ALR 118, 138.
[12] *Mabo v Queensland (No 1)* (1988) 166 CLR 186, 204.

lands.'[13] After referring to the *Advisory Opinion on Western Sahara*, his Honour stated that 'the common law of this country would perpetuate injustice if it were to continue to embrace the enlarged notion of terra nullius' and characterise the indigenous inhabitants 'as people too low on the scale of social organization to be acknowledged as possessing rights and interests in land.'[14]

Justice Brennan then set out a nine–point summary outlining what common law native title constituted in Australia. These were that the Crown's acquisition of sovereignty could not be challenged, and through this acquisition of sovereignty, the Crown had acquired radical title. Native title to the land, however, survived the Crown's acquisition of sovereignty and radical title, but was exposed to extinguishment by a valid exercise of such power that was inconsistent with native title. This meant that a Crown grant, wholly or partially inconsistent with native title, extinguished native title to the extent of that inconsistency. Thus, freehold grants extinguish native title, but not necessarily a grant of lesser interests, and the valid appropriation of land by the Crown for roads, railways or public buildings also extinguishes native title to the extent of the resulting inconsistency. Most significantly, though, his Honour found that native title to particular land was 'ascertained according to the laws and customs of the people who have a connexion with the land.'[15]

Later, in *Wik Peoples v Queensland*[16] Justice Brennan addressed the issue of where native title lay within Australia's land system, stating that native title was not tenure and that it was not an interest held of the Crown. On the contrary, it was derived from the traditional laws and customs of the indigenous people, which was then recognised by the common law until it had been extinguished. It should therefore be considered as sitting with the tenure system, rather than being derived from, or being a part of, that system.[17] In *Fejo v Northern Territory,*[18] meanwhile, the High Court likewise stated that native title is not an institution of the common law, nor was it a form of common law tenure, but was an interest recognised by the common law. There was, therefore, 'an intersection of traditional laws and customs with the common law.'[19]

C The Post-Mabo Decisions

Various cases after *Mabo* have had to deal with specific aspects of native title, and in *Wik* the issue was whether or not the grant of a pastoral lease extinguished native title, with the majority holding that, as pastoral leases did not grant exclusive possession,

[13] *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 39. It should be noted that Justice Brennan also discussed the doctrine of tenure, noting that it was derived from feudal origins, and was then brought to the Australian colonies. His Honour also noted that it was 'far too late in the day to contemplate an allodial or other system of land ownership' and tenure is a doctrine that 'could not be overturned without fracturing the skeleton which gives our land law its shape and consistency':
[14] Ibid, 58.
[15] Ibid, 68-69.
[16] (1996) 187 CLR 1.
[17] Ibid, 91.
[18] (1998) 195 CLR 96.
[19] Ibid, 128.

native title was not extinguished.[20] Later, in *Ward v Western Australia*[21] the High Court applied a similar interpretation in regard to the relevant Western Australian Acts, and held that native title was not extinguished by mining leases.[22] Another significant aspect of that case, was the High Court's reference to native title as representing 'a bundle of rights.'[23]

The issue of extinguishment of native title was meanwhile addressed in *Fejo*. In that case the claim area had been subject to a freehold grant in 1882 and was later compulsory acquired by the Commonwealth in 1928, with the proclamation of land for these purposes being revoked in 1980. It was held that the words used in the 1882 grant had extinguished any native title, and that this was irreversible.[24] A crucial element of native title is proving a connection with the land with this being the major issue in *Members of the Yorta Yorta Aboriginal Community v Victoria*.[25] This case involved a claim for native title over land around the Murray River, an area which had not only been subject to early European settlement, but government policy had also resulted in children being separated from their parents with traditional ceremonies being banned. The High Court referred to s 223(1) of the NTA, and in a joint judgment Gleeson CJ, Gummow and Hayne JJ stated that changes and adaptations to traditional laws and customs, or some interruptions to the enjoyment of native title rights in the time since European settlement will not necessarily be fatal to a native title claim. However, since the term traditional refers to laws and customs acknowledged and observed at the time of sovereignty, observance must therefore, have been continued substantially uninterrupted since sovereignty.[26] Justice Callinan meanwhile held that, under s 223(1) a physical presence was essential,[27] though the minority of Gaudron and Kirby JJ held that the connection could be a spiritual one.[28] *Bennell v Western Australia*[29] meanwhile held that native title may exist on areas of Crown land in Perth that had never been the subject of a freehold or leasehold grant, the case also highlighting that even in built up areas, a traditional connection can still be proven.

While these High Court cases have been important in clarifying certain aspects of native title, the law that needs to be applied is the NTA.

D The Native Title Act

The objects of the NTA are set out in s 3 which provides that the 'main objects' are: to provide for the recognition and protection of native title; to establish ways in which future dealings that affect native title may proceed and to set standards for those

[20] (1996) 187 CLR 1, 120, 166. Note that in reaching this conclusion, Justice Gaudron referred to the relevant Queensland legislation, namely the *Land Act 1910* (Qld), Justice Toohey, to the original imperial acts that created pastoral leases in New South Wales which, at the time, also included present day Queensland, both pointing out that other parties had limited rights to use the pastoral lands.
[21] (2002) 213 CLR 1.
[22] Ibid, [186].
[23] Ibid, 95.
[24] *Fejo v Northern Territory* (1998) 195 CLR 96, 131.
[25] (2002) 214 CLR 422
[26] Ibid, 442-43.
[27] Ibid, 492.
[28] Ibid. For further discussion on the High Court native title decisions see Chris Davies and Gwilym Owen, 'Customary Land Title in Australia and Wales' in Cox N and Watkin T.G. (Ed) *Canmlwyddiant, Cyfraith a Chymreictod* , 2013, The Welsh Legal History Society.
[29] [2006] FC 1243.

dealings; to establish a mechanism for determining claims to native title; and to provide for, or permit, the validation of past and intermediate period acts invalidated because of the existence of native title.[30] Section 223 sets out the definition of native title as including, inter alia:

> *Common law rights and interests*
> (1) The expression ***native title*** or ***native title rights and interests*** means the communal, group or individual rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to land or waters, where:
> (a) the rights and interests are possessed under the traditional laws acknowledged, and the traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders; and
> (b) the Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters; and
> (c) the rights and interests are recognised by the common law of Australia.

In *Sandy on Behalf of the Yugara People v Queensland*[31] it was pointed out that the heading, 'Common law rights and interests' was an acknowledgement that in *Mabo*, the High Court had held that 'under the common law of Australia native title survived the coming of the new British sovereign in Australia from 1788 onwards.'[32]

The NTA primarily sets out the procedures for native title applications, s 61 requiring an application to be to be lodged with the Federal Court, the application then being passed onto the Registrar of the National Native Title Tribunal (NNNT) established under s 107.[33] Under s 66 the Registrar must give notice of all applications to those 'whose interests are affected by a determination,' and anyone who is so affected can become a party to the application under s 84. The preferred option under the NTA is for native title issues to be resolved by means of negotiation and mediation (ss 86A and 86B), with s 87 allowing the Federal Court to make orders in accordance with any

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[30] Note that past acts cover the period between 1975, when the *Racial Discrimination Act 1975* (Cth) was enacted, and 1 January 1994 when the *Native Title Act 1993* (Cth) came into effect. They consist of grants of freehold and other interests made since 1975, which, while not prima facie racially discriminatory, may have had a discriminatory effect. This may have occurred if the grants would have extinguished native title interests without procedural rights and compensation, but would not have extinguished other relevant interests without compensation. Division 2, Part 2 of the Act therefore validates these past acts, but then allows for compensation. Intermediate period acts cover the period from the date the Act came into effect, that is, 1 January 1994 and 23 December 1996 when the *Wik* decision was handed down. These intermediate period acts cover situations where grants may have been made which did not observe the future act regime, and procedures for pastoral leased land where, if they affected Native Title, they could be invalid because of the *Native Title Act.* Division 2A of Part 2, which is one of the post-*Wik* amendments, validates these acts. Division 3 of Part 2 meanwhile covers future act. Under s 233 an act is a future act if it consists of either the making, amendment or repeal of legislation on or after 1 July 1993 (when the *Native Title Act* was passed by the Commonwealth parliament), and the carrying out of any other act on or after I January 1994. The future act regime allows the Commonwealth to decide that some grants over native title land and waters should be prohibited, whilst others should be allowed. A future act is, therefore, one that affects the legal rights of native title holders and the future act regime under the *Native Title Act* sets out what governments can do in the future affecting native title, and how they can do it.

[31] [2017] FCAFC 108.

[32] Ibid, [10].

[33] The NNNT has two primary roles, namely, the mediation of native title and compensation, and the administration of the future act regime. The power of the NNNT to determine native title are therefore essentially grounded in consensual conduct or mediation as it cannot determine native title except by agreement.

agreement that is reached. Indigenous Land Use Agreements (ILUA) are therefore an integral part of the NTA.[34]

What will now be examined are the decisions handed down in 2017 by the Federal Court in relation to native title claims in Queensland, some of which have been successful, some of which have been unsuccessful.

III THE RECENT QUEENSLAND DECISIONS

A The Successful Claims

The Ankamuthin People lodged an application with the NNTT on 29 October 1997 in respect to their Cape York land, and almost 20 years later, it was finally granted.[35] Justice Greenwood noted 'the parties had made substantial progress in resolving the many difficult intra-indigenous issues that had arisen over time, and which, unfortunately had proved difficult to resolve.'[36] Thus, one of the things the case illustrates is that, even in the more traditional areas, there can be disputes between the Indigenous people themselves in regard to the claim. Justice Greenwood referred to s 223(1) of the NTA, stating that 'the Amkamuthin claim group, as part of the broad Northern Cape York society, have provided extensive evidence of their continuing connection to the claim area.' This was by means of 'adherence to particular laws, customs, practices and beliefs.'[37] These rights, which were the result of a s 87 agreement, consisted of non-exclusive rights to access land; hunt and fish; use water and natural resources; live, camp and light fires on the area; conduct ceremonies and maintain places of importance; teach about the physical and spiritual attributes of the area.[38]

The case of *Anderson on behalf of the Northern Cape York #3 Native Title Group v State of Queensland*,[39] likewise involved a claim on Cape York. Justice Greenwood stated he had 'closely considered the anthropological and genealogical reports of Dr Anthony Redmond.'[40] It was from these reports that his Honour was able to conclude that those holding rights and interests 'to the Determination Area at the time of "effective sovereignty" were the apical ancestors of persons who today identify as members of the Angkamuthi Seven Rivers group, the McDonnell Atampaya group and the Gudang/Yadhaigana group.'[41] It was further held that the interests were 'derived from and consistent with the traditional law and customs observed at sovereignty and as adapted since sovereignty.'[42] Thus, the case highlights the need to show connection to traditional laws and customs by establishing direct descent, but also that these laws and customs can adapt in the time since sovereignty. These rights were the same rights

[34] See subdivisions B, C, D, and E of Division 3 of Part 2 of the NTA.
[35] *Woosup on behalf of the Ankamuthi People #2 v Queensland*, [2017] FCA 832, [3].
[36] Ibid, [13].
[37] Ibid, [39].
[38] Ibid, [42].
[39] [2017] FCA 830.
[40] Ibid, [9].
[41] Ibid, [10].
[42] Ibid.

of access, fishing, hunting and the ceremonial rights granted to the Ankamuthin People, as well as the right to be buried on the land.[43]

The native title rights for the Bigambul People, whose claim area was inland from Toowoomba and stretched down to the NSW border, was likewise for non-exclusive rights to access, hunt and fish, camp and take natural resources.[44] These rights were granted after Justice Reeves stated that he was satisfied that there was ' free and informed agreement between the parties, that the terms of the proposed determination were "unambiguous and clear"' and therefore it was 'appropriate to make the proposed determination attached to the s 87 agreement.'[45]

Another successful claim was that made by the Yulluna people who were held to be the traditional owners of 10 027 square kilometres of land in north-western Queensland,[46] Justice Dowsett stating that he was satisfied that the rights and interests granted were 'derived from the traditional laws and customs of the Yulluna people.'[47] These rights, as they were with the other successful applications, were to access, hunt and fish, take and use natural resources, conduct ceremonies and maintain places of importance, teach on the area the physical and spiritual attributes of the area.[48]

The case of *Congoo on behalf of the Bar Barrum People #10 v Queensland*[49] meanwhile involved a claim for their traditional lands on the Atherton Tableland. Justice Reeves noted that the first application by the Bar Barrum People had been lodged in 1996, and that five previous applications had been previously been made,[50] the present application covering 'boundary watercourses and lakes' not forming part of these previous determinations.[51] These rights were for access, camping, hunting and fishing, conducting ceremonies and maintaining places of importance, and teaching about the area. There was a right granted to light fires, but this was restricted to 'domestic purposes including cooking.'[52] It was expressing stated that this right was 'not for the purpose of hunting or clearing vegetation.'[53] However, it is known that the Indigenous people of Australia made extensive use of fire to clear vegetation for hunting and other purposes, and had done so for thousands of years.[54] This 'firestick farming' is therefore unquestionably a traditional custom. However, the rights granted to the Bar Barrum People were 'non-exclusive',[55] the other rights and interests in the determination area

[43] Ibid, [32].
[44] *Doctor on behalf Bigambul People v Queensland* [2017] FCA 716, [6]. It should be noted that the application had been split into two parts, A and B, and that it had been agreed by the parties that in regard to part B, native title had been extinguished except for 92 853 hectares of state forests.
[45] Ibid, [20].
[46] *Sullivan on behalf of the Yulluna People #4 v State of Queensland* [2017] FCA 122 [1].
[47] Ibid, [9].
[48] Ibid, [8].
[49] [2017] FCA 1511.
[50] Ibid, [1]. The other decisions were *Congoo on behalf of the Bar Barrum People #2 v Queensland* [2016] FCA 693; *Congoo on behalf of the Bar Barrum People #3 v Queensland* [2016] FCA 694; *Congoo on behalf of the Bar Barrum People #4 v Queensland* [2016] FCA 695; *Congoo on behalf of the Bar Barrum People #5 v Queensland*; [2016] FCA 1504; *Congoo on behalf of the Bar Barrum People #6 v Queensland* [2016] FCA 696.
[51] Ibid, [4].
[52] Ibid.
[53] Ibid, [6].
[54] Josephine Flood, *Archaeology of Australia*,
[55] Ibid.

being with the Mareeba Shire Council, Ergon Energy, Consolidated Tin Mines Limited and Bookall Mining Company Pty Ltd. Any right to traditional use of fire would be inconsistent with their rights. A further small claim by the Bar Barrum People in relation to 1.5 square kilometres on a pastoral lease in the Walsh River district was also found in their favour by Justice Reeves, the rights being the same as the watercourse and lakes application.[56]

While only involving a practice and procedure ruling, *Akiba on behalf of the Torres Strait Regional Seas Claim v Queensland*[57] still highlights some of the potential issues with a native title claim. It is also one that, 25 years post-*Mabo*, involves a claim in relation to another area of the Torres Strait. There are in fact two claims being made, a Part A Sea Claim group being one, the other being the Part B Torres Strait Regional Sea claim. An issue that arose was whether the plaintiff, Leo Akiba, had the authority to speak on behalf of both claims.[58]

The ruling itself was in regard to orders made by Mortimer J that imposed a confidentiality regime on the transcript of a case management hearing that had been conducted on Thursday Island.[59] The order was that the transcript of a closed Court session remain confidential to those present who included Leo Akiba, his daughter, Deirdree Nona, and son, Bishop Nona, the Torres Strait Regional Authority (TSRA) and various legal representatives and court staff.[60] Justice Mortimer stated that she 'considered it was appropriate that Mr Akiba gave sworn evidence to the Court' and noted that his daughter, Deirdree, was present as a support person while his son, Bishop, acted 'as an interpreter, so that Mr Akiba could speak his own language through a person he knew and trusted.'[61]

In regard to the confidentiality order, Mortimer J stated that it had been 'made in urgent circumstances'[62] and the purpose of the closed session order was 'to facilitate Mr Akiba being as comfortable as possible in giving evidence to the court.'[63] However, while acknowledging there was good reason for not making the transcript publically available at the time of the closed session, Justice Mortimer did not consider there was 'a continuing justification'[64] and the confidentiality order was therefore vacated.

Thus, there were a number of successful claims in Queensland in the twenty-fifth year following the *Mabo* decision, all these claimants being able to show a continuous connection with the land. However, it was this requirement that has proven to be the biggest problem with unsuccessful claims.

B The Unsuccessful Claims

The first issue in the application for the Kungardutyi Punthamara People for land on the Queensland and NSW border was that it did not comply with s 61 of the NTA since

[56] *Congoo on behalf of the Bar Barrum People #9 v Queensland* [2017] FCA 1510.
[57] [2017] FCA 1438.
[58] Ibid, [45].
[59] Ibid, [1].
[60] Ibid, [3].
[61] Ibid, [43].
[62] Ibid, [46].
[63] Ibid, [47].
[64] Ibid, [53].

it was not authorised by all those holding rights.[65] Justice Jagot stated that 'the notice of an authorised meeting must be expressed in a form and promulgated in a matter that is likely to result in all the members of the native title claim being offered a reasonable opportunity to decide whether to attend the meeting and participate in its deliberation.'[66] The notice, however, described the members of the claim group as being 'the descendants of four lines of descent' but Jagot J noted it was apparent 'that there are other lines of descent which include people who are likely to form part of the claim group.'[67] Since it was not authorised as required, the application was considered to have 'no reasonable prospects of success'. It was therefore 'not in the interests of justice for the proceeding to be heard.'[68]

The case of *Sandy on Behalf of the Yugara People v Queensland,*[69] meanwhile, involved an appeal to the Full Court regarding an unsuccessful claim in the area around present-day Brisbane. One of the issues in the case was the dispute between the Turrbal People and Yugara People 'as to who had actually held native title at the time of sovereignty.'[70] The court noted that the applicants needed 'to establish descent from those who held native title at sovereignty' and that the rights now held 'are the same as, or acceptable adaptations of, the laws and customs acknowledged and observed by their antecedents at sovereignty.'[71]

Both the applicant groups claimed biological descent from those forming the Indigenous society at the time of sovereignty. However, in regard to the Yugara People, the Full Court upheld the trial judge's finding that there was 'the better part of a century with respect to which the court does not have any relevant evidence.'[72] Furthermore, 'most of the evidence did not relate to the claim area' but to the area further south around Beaudesert.[73]

The contention of the Turrbul People had been that they could prove direct descent from an Indigenous man known as the Duke of York and that Connie Isaacs, who was born in 1920 and had died in 2013, 'was able to connect those earlier generations with today.'[74] It was also claimed by the Turrbul People that consideration should be given to the forceful removal of Connie's parents, Billy Isaacs and Bella McLean, from the area under the *Aborigines Protection and Restriction on the Sale of Opium Act 1897* (Qld).[75] The Court held, however, that there was no evidence Connie Isaacs was directly descended from the Duke of York. It was also stated that 'a substantial interruption of the connection of a people to a claim area by the traditional law and customs is not to be mitigated by reference to white settlement' since 'the reasons for a substantial

[65] *Booth on behalf of the Kungardutyi Punthamara People v Queensland* [2017] FCA 638,[1]
[66] Ibid, [32].
[67] Ibid, [31].
[68] Ibid, [78]. Justice Jagot also noted that s 85A(1) of the NTA requires that each party bears its own costs 'unless the Federal Court orders otherwise.' It was then held that, as the conduct in bringing the proceeding was unreasonable, costs were to be awarded against the applicant.
[69] [2017] FCAFC 108.
[70] Ibid, [5].
[71] Ibid, [12].
[72] Ibid, [122].
[73] Ibid, [123].
[74] Ibid, [183].
[75] Ibid.

interruption are not relevant to the inquiry required under s 223.'[76] It was then held that 'it was reasonable to conclude … that physical displacement was accompanied by cessation in the observance of traditional customs.'[77] The appeal was therefore dismissed.[78]

C Potential Future Claims

At present there are a number of claims being made for areas of North Queensland. The Gurambilbarra Wulgurukaba people are making a claim for the area around Townsville, the Bindal people for areas around Charters Towers and the Burdekin, and the Nywaigi people for an area south of Ingham.[79] It is suggested that the main issue is likely to be continuity as the applicants will need to prove direct descent from those living in the area at the time of sovereignty, and that the rights claimed are the same as, or involve acceptable adaptations of, the traditional laws and customs of that time. While *Bennell* illustrates that this is not impossible in an urban area, *Sandy* highlights the difficulties in establishing the existence of native title in such areas. *Bennell*, however, also shows that if the applicants can show a continuous connection, they may be able to claim native title to Crown land that has never been the subject of a freehold or leasehold grant. It should also be noted that there is already an intra-indigenous issue regarding the case with reports of a claim by Wulgurukaba elder, Arthur Johnson, that 'there are people that are not traditional owners of the claim' with Johnson also questioning the actual boundaries of the claims.[80]

IV Conclusion

The first observation in regard to the Federal Court judgments relating to Queensland in 2017 is that *Mabo* itself was only mentioned once, in *Sandy*, and only to confirm that s 223 reflects that common law decision. That does not in any way diminish the significance of the *Mabo* decision, but simply reflects that the relevant law is now contained in the NTA. A case, however, that was referred to on a number of occasions was *Yorta Yorta* which reflects the fact that connection to the claim area remains a crucial issue in many claims with the cases also illustrating that anthropological evidence can be critical in establishing it. The Full Court of the Federal Court decision in *Sandy* meanwhile confirms that, if there has been a physical removal from the ancestral area, it will be hard to prove continuity in the observance of traditional laws and customs. Another issue highlighted by these decisions has been that disputes can exist between various indigenous groups in regard to who is actually descended from the apical ancestors in the claim area, *Woosup* illustrating this can be the case even in successful claims.

Twenty-five years on from *Mabo*, native title claims are still being decided, illustrating the on-going significance of this ground-breaking decision.

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[76] Ibid, [221].
[77] Ibid, [225].
[78] Ibid, [252].
[79] Tony Raggatt, 'Native title claims blanket huge area,' *Townsville Bulletin*, 20 October 2016, http://www.townsvillebulletin.com.au/news/nativetitle.
[80] Victoria Nugent, 'Elder ready to fight' *Townsville Bulletin*, 9 February 2017. http://www.townsvillebulletin.com.au/news/elder-ready-to-fight.