Native Title 15 Years On

By B A Keon – Cohen QC

Fifteen years on since *Mabo (No 2)*[1], where are we at? In 1992, key players such as industry, state and federal governments, wanted native title like a hole in the head.

On 3 June 2002, Fred Chaney, Deputy President of the NNTT, summarised 'ten years on'. He referred to three 'gains': first, 30 determinations over 225,000 square kilometres, almost all of it in Queensland and Western Australia; second, a new culture of negotiation, reaching into wide areas of national life; and third, the realisation that obtaining recognition of native title is arduous, requiring all the stamina of Eddie Mabo, and the skills and long-term commitment of talented professionals. He might also have mentioned, to balance the picture, a failure of vision by all political parties and governments, that ignored much of the potential opened up by *Mabo,* and produced an unduly repressive, expensive, and cumbersome national solution.

Despite greater acceptance from business leaders and the general community, governments of all political persuasions, remain comfortable in their limited vision, and native title's most determined opponents – especially at the bar table.

As to real results on the ground, attitudes vary widely. The Yorta Yorta people, and others, would say they have gone backwards. They must live (for ever) with a determination, *in rem,* which rejects any native title rights over their traditional lands; and which removed their 'right to negotiate' over future acts as well. The National Native Title Tribunal (NNTT) would say: 'steady progress' - and trot out, by way of support, a string of statistics, especially concerning Indigenous Land Use Agreement's negotiated and entered into, and claims resolved. The Western Australian government won't answer your correspondence and will usually reject any consent determination, preferring to fiercely oppose claims at trial. Recent examples such as *Wongatha*[2] in the Goldfields; and the *Single Noongar Claim*[3] to Perth make it hard to distinguish between a genuine desire to clarify the law and the pursuit of costly, policy-driven appeals. The current Federal Government, ideologically driven to wind-back native title generally, and land rights in the Northern Territory[4] under the umbrella of abused children, will turn up at consent determinations and talk cynically of good progress while supporting respondents and seriously under-funding Native title Representative Bodies (NTRBs or Representative Bodies) and Prescribed Bodies Corporate (PBCs), creating costly log-jams in the entire system. Representative Bodies express frustration with burdensome auditing requirements, while being unable to properly represent their clients. The increasing numbers of PBCs say that until recent months, they have for a decade been scandalously denied *any* resources or any technical assistance in administering native title on behalf of their traditional owners – a task the Commonwealth law demands. Meanwhile, the High Court says: come to Canberra at your peril. Since the *Wik* watershed in 1998, the High Court has largely settled the law, given clear (and restrictive), rulings on the meaning of s 223 of the Act, and, in the process, created major evidential burdens for claimants (that no one else suspected existed). In the foreseeable future, the Court is unlikely to change its adverse attitude. The *Native Title Act 1993* (Cth) and these decisions – particularly *Ward*[5] and *Yorta Yorta*[6] - mean that those native title claimants that succeed enjoy a fragmented 'bundle of rights' susceptible to extinguishment; success at trial is now all but impossible for 'non-remote' communities; and that negotiated, often minimal, outcomes is the sum total offered by *Mabo (No 2).* An interesting, exception to that bleak assessment is the recent *Noongar* Perth claim[7] - now subject to appeal by Western Australia.

One example of the influence of government policies can be seen in Victoria. Under the Kennett conservative government, the Yorta Yorta people failed at trial, following a fully contested, knock-down fight in the Federal Court. By contrast, after ten years of negotiation with the Bracks government, the Gunditjmara people from Western Victoria succeeded, recording the 100th registered determination of native title.[8] On 30 March 2007, at Mt Eccles National Park Justice North made a consent determination recognising the Gunditjmara people's non-exclusive native title rights over 140,000 hectares of country.

The statistics continue to mount. As at 19 April 2007, 583 claims were being processed: 537 claimant applications, 11 compensation claims, and 35 non-

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

[2] *Harrinfton Smith v WA (No 9)* [2007] FCA 31.

[3] *Bennell v Western Australia* [2006] FCA 1243.

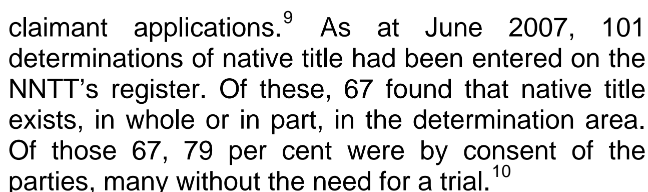
[4] See *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth).

[5] *Western Australia v Ward* (2002) 191 ALR 1.

[6] *Yorta Yorta v Victoria* (2002) 194 ALR 538.

[7] *Bennell v Western Australia* [2006] FCA 1243.

[8] *Lovett v Victoria* [2007] FCA 474.



claimant applications.[9] As at June 2007, 101 determinations of native title had been entered on the NNTT's register. Of these, 67 found that native title exists, in whole or in part, in the determination area. Of those 67, 79 per cent were by consent of the parties, many without the need for a trial.[10]

The Commonwealth has recently introduced two amending Bills. The first, the *Native Title Amending Bill 2007,* became operative law on 15 April 2007.[11] The changes it introduces affect Representative Bodies, PBCs, respondent parties, and the operations of the Federal Court and the NNTT. For example, the NNTT has been given extra powers and functions to deal with native title claims referred to it by the Federal Court for mediation.

The second is the *Native Title Amendment (Technical Amendments) Act 2007,* introduced into the House of Representatives on 29 March 2007. It was referred to the Senate Legal and Constitutional Affairs Committee, which reported back to the Senate on 9 May 2007. Its recommendations included enabling the NNTT Registrar to assist parties seeking to register an Indigenous Land Use Agreement; the reviewing of NTRB decisions affecting claimant groups; and allowing PBCs to charge a third party costs incurred for performing statutory functions.[12] Greens Senator Rachel Stewart, commenting upon the amendments, passed the view that:

> The promise of native title has been hamstrung by an overly complex and bureaucratic system, the reluctance of the NNTT to use its arbitration powers to impose conditions on mining companies, and the recalcitrance of governments who do not wish to concede any ground.[13]

I agree with Senator Stewart. However, I also agree with Fred Chaney. Upon his retirement from the NNTT in April 2007, he said that over the past 50 years of him observing Indigenous Australia:

> native title has been the greatest single agent of positive change. However imperfectly, it has shifted the balance in the relationship and has brought Aboriginal people to the (negotiation) table as never before.[14]

I said as much upon *Mabo (No 2)* being handed down in 1992.

After fifteen years, serious questions remain unanswered at both national policy and on-the-ground levels. The outlook cannot be characterised as 'positive' for the severely dislocated communities along Australia's eastern seaboard, who are largely excluded from the native title regime other than a 'right to negotiate'. Further, the Tiwi owners and the residents of the Alice Springs town camps are now under pressure from Minister Mal Brough to fragment their communal title to 99-year leases, and take-up private home ownership. Such imposed sub-division and transference of land rights from traditional-communal to various crown titles (for example, fee-simple, leasehold) proved disastrous for Indigenous owners in New Zealand from the 1860s, and in the USA during the notorious 'allotment era' (1887-1934). In both jurisdictions, traditional owners were exploited, and their land was lost to colonisers block by block. The ramifications of these potentially devastating attacks upon Indigenous land gains since 1976 and 1992 remain to be seen.

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[9] (2007) 8 *Native Title News* (2 May) 26, 30.

[10] Graham Neate in *NNTT Hotspot* (Issue No 23, June 2007).

[11] Act No 61 of 2007.

[12] *NNTT Talking Native Title* (Issue No 23, June 2007).

[13] *Koori Mail,* National, 28 March 2007.

[14] NNTT *Talking Native Title* Issue No 22, March 2007.