COMMONWEALTH NATIVE TITLES ACT 1993

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ABOUT THE AUTHOR

Jennifer formerly occupied the position of NSW Attorney General's Librarian and Law Librarian - University of Technology.

During those years, she was studying law and now has been practicising for 10 years as a solicitor both inside and outside the NSW Government. The time inside the NSW Government was spent mainly as a Legal Aid Duty Solicitor appearing for clients charged with criminal offences. The clients were both non Aboriginal and Aboriginal. From there, she went to the Aboriginal Legal Service and became interested in Aboriginal and human rights issues.

Approximately 4 months ago, Jennifer joined CaLM and is mainly working in the Aboriginal Land Rights and Native Title areas.

NATIVE TITLE

On 2 June 1992 in the case of Mabo v State of Queensland (No.2) (1992) 175 CLR 1 the High Court recognised that "the Miriam people [were] entitled as against the whole world to possession, occupation, use and enjoyment of the lands of the Murray Islands" and in doing so recognised that native title existed in the common law of Australia and that terra nullius (no-ones land) had no application to real property law in Australia. As a concept of international law however terra nullius was not abolished by the Mabo decision. Terra nullius for anyone who is not familiar with the term is a way in which land could be settled by Nations along the reasoning that the inhabitants had no organised system of rule or government and the land therefore belonged to no one. The other ways of settlement are by conquering the existing inhabitants or by the existing inhabitants surrendering the land.

The Mabo decision although it clarified the issue of terra nullius in relation to real property in Australia left many issues unanswered about native title in respect of how it existed, where it existed and how exactly it might be extinguished and what monetary value was to be accorded it. The Commonwealth Native Title Act 1993 was enacted to provide some type of legislative framework whereby answers to some of these questions could be provided.

You may be at this moment asking "what has this got to do with Surveyors" and why it is relevant to my work. The answer is that native title interests may potentially exist in any piece of Crown land and anyone who surveys Crown land should be aware that they are providing surveys over land in which native title interests may exist or may have existed and been extinguished by a past dealing with the land, or if not extinguished the existence of native title may prevent a future dealing with the land except in accordance with the Native Title Act 1993. In a broad sense native title is relevant for anyone dealing with Crown land because it has altered the way in which estates and interests in land have to be viewed and dealt with.

As surveyors you may be consulted on land management and in this role you must stay abreast of any new laws that relate to land including native title laws. In the narrower concept from day to day you may be determining the boundaries of 2 native title interests in land or you may be asked to define boundaries when native title rights are converted to freehold so it is appropriate that you are familiar with the way in which the legislation and case law operates.

WHAT THE NATIVE TITLE ACT DOES

1. Gives protection to native title rights and interests as recognised by the common law of Australia.

2. Validates any past acts done by the Commonwealth Government as long as they were valid acts but were invalid only because of the existence of native title. The Act also enables State Governments to validate their past acts by the enactment of legislation which New South Wales has done already.

3. Defines which past acts extinguish native title and provides for a compensation scheme.

4. Creates a body called the National Native Title Tribunal to make determinations in relation to native title with an appeal mechanism to the Federal Court.

5. Determines which future acts are permissible and which are impermissible and includes the right to negotiate regime if there are native title claimants.

6. Establishes a National Aboriginal and Torres Strait Islander Land Fund to assist Aborigines to acquire land where they do not benefit directly from the Native Title Act 1993.

So having said what the Act does you may ask, but how does one tell whether native title has been extinguished or not. It is often difficult to tell but the guidelines hereunder are helpful in relation to making decisions about the extinguishment of native title. Three separate time frames are relevant.

For acts taking place from 1 January 1994 onwards extinguishment occurs as follows:

1. Surrender of the native title by the native title holders.

2. Loss of connection to the land by Aboriginal persons or death of the last member of the clan or group.

3. Act to effect compulsory acquisition under a Compulsory Acquisition Act.

4. Future act wholly inconsistent with native title after an unopposed non claimant application.

5. Future act which comes within the definition of a Category A or B past act. For example these may be acts which were commenced but not completed before 1 January 1994 such as leases enforceable in law or equity or legally enforceable rights done in the case of legislation before 1 July 1993 or other acts done before 1 January 1994.

The non extinguishment principle will apply to all other acts which means that the native title will resume once the act is completed.

For acts taking place from 31 October 1975 when the Racial Discrimination Act commenced to 1 January 1994 extinguishment of native title takes place as follows:

1. Surrender of native title by the holders of native title.

2. Loss of connection with the land or death of the last member of the clan or group.

3. Legislation which is wholly inconsistent which is not invalid because of the Racial Discrimination Act 1975.

4. Executive acts which are wholly inconsistent with native title and are not invalid because of the Racial Discrimination Act.

5. Category A and Category B past acts such as the granting of freehold estates existing at 1 January 1994, grants of commercial, agricultural, pastoral and residential leases in force at 1 January 1994.

   Public works constructed or in the process of construction before 1 January 1994.

Mining leases are different to other leases and are Category C past acts where any native title rights are simply suspended if these are incompatible with the lease.

Incompatibility is often likely in these cases because it would be very difficult for Aboriginal persons to go onto the land to hunt, fish and gather when large mining machinery and works are present.

The native title rights revert under the non extinguishment principle once mining is completed. Category C past acts never extinguish native title nor do Category D acts which are defined as any other acts not in the categories of A - C inclusive.

Acts that occurred prior to 31 October 1975

One has to go back to the principles set down in the Mabo decision for these acts.

Brennan J outlined 3 ways in which native title in land could be extinguished which are as follows:

1. Surrender of the native title to the Crown by the Aboriginal persons entitled to enjoy it.

2. Extinction of the clan or groups or loss of connection with the land by ceasing to acknowledge the traditional laws and customs of the clan.

3. Valid alienation by the Crown for example by granting an interest that is inconsistent with a continuing right to enjoy native title.

Mabo also indicates that the exercise of a power to extinguish native title must reveal a clear and plain intention to do so whether the action be taken by the Legislature or by the executive.

The difficulty with this approach is that prior to the Mabo decision no Executive or Legislature knew about the existence of native title so could not have formed an intention to extinguish it by the doing of any action.

Be this as it may, a grant of a freehold, a compulsory acquisition of all interests, a lease or public works before Mabo existed would have had the effect in practice of extinguishing native title in spite of the legislature or executive not knowing of its existence because these acts would have created third party rights that were completely inconsistent with Aboriginal persons continued enjoyment of native title interests in the land. These types of interests often conferred exclusive possession on third parties.

Some of the difficulties that exist now are due to the failure of Mabo to provide answers in respect of whether native title has been extinguished by the granting of the many different types of interests that could be created in Crown land. We will take a look at some of these interests and see what was said in Mabo in relation to the extinguishment of native title.

Aboriginal Reserves

Brennan J (p.66) stated clearly that the creation of Aboriginal reserves did not extinguish native title. He said as follows:-

> "To reserve land from sale is to protect native title from being extinguished from alienation under a power of sale. To appoint trustees to control a reserve does not confer on the trustees a power to interfere with the rights and interests in land possessed by the indigenous inhabitants under a native title".

Land dedicated for a public purpose

Whether native title to land that falls within this category has been extinguished was held by Brennan J "to be sometimes a question of fact, sometimes a question of law and sometimes a mixed question of fact and law" (p.68). Deane and Gauldron JJ proposed a relevant test for land in this category as follows (p.90):

1. Have third party rights been created which are inconsistent with the continued exercise of native title.

2. Has the land been regulated/and/or used in such a way that the actual occupation or use of the land by the native title holders has been terminated.

For example when looking at National Parks and Reserves, the legislation would need to be examined as well as the subsequent use of the land and also the extent to which the use of the land precludes the Aborigines from the use of the land in the traditional sense.

Brennan J said "the reservation of land for future use as a school, courthouse or public office will not by itself extinguish native title" but the building of these structures would do so (p.68). This line of reasoning can be extended to include many public purposes for which Crown land is set aside.

Pastoral Leases

It is unknown whether the granting of pastoral leases extinguishes native title.

Henry Reynolds in an article "Mabo and Pastoral Leases" indicates that the "Imperial Legislation prevented the Crown from granting interests which were inconsistent with the standard constituent rights of native title.[1]

In 1849, an order in Council was signed by the Queen which stated that

> "pastoral leases should contain such conditions . . . . . exceptions and reservations, as may be necessary for securing the peaceable and effectual occupation of the land comprised in such leases."[2]

This order in Council was despatched to the Governor of New South Wales subsequent to instructions that stated that although pastoral leases were intended to confer exclusive possession to graze animals they were not intended to deprive the Aborigines the right to hunt or wander over the land. These events appear to indicate that there was no clear and plain intention to extinguish native title when pastoral leases were granted or rather no intention to create third party rights inconsistent with the Aborigines native title interests in the land.

In spite of this Brennan J in Mabo (p.53) did indicate that the granting of a lease with similar conditions to a pastoral lease would extinguish native title and Mason and McHugh JJ agreed with his reasoning.

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1 Reynolds, H. "Mabo and Pastoral Leases", Aboriginal Law Bulletin Vol.2, No. 59.

2 ibid p.9

In the recently decided case of the State of Western Australia v Commonwealth decided on 16 March 1995 Dawson J who was the dissenting Judge in Mabo said that the view of Brennan J departed least from his views.

We now have a position that if called to do so, 4 out of 6 High Court Judges would most likely indicate that the granting of a pastoral lease extinguished native title.

Current decisions that impact on the Native Title Act 1993

The National Native Title Tribunal was established under the Act to undertake a number of functions as follows:

1. Determination of uncontested claims for native title for both claimant and non claimant applications.

2. Determination of contested claims for native title and for compensation.

3. Mediation of contested claims for native title and for compensation.

4. Determination of whether certain grants can proceed over native title land if negotiations under the right to negotiate regime are unsuccessful. The right to negotiate regime operates in relation to future acts where there are Aboriginal claimants to the land which is subject to the proposed future acts.

In spite of the Tribunal being set up to perform mostly determination functions, the case of Brandy v HREOC which was decided on 23 February 1995 in the High Court has rendered the determinations of the National Native Title Tribunal unenforceable by the Tribunal and therefore not too useful. In Brandy's case it was held that the Human Rights and Equal Opportunity Commission did not have the power to enforce its own decisions because of the operation of the separation of powers doctrine. This doctrine ensures the separation of the legislative, executive and judicial functions and operates to prevent in this instance a federal Tribunal such as the National Native Title Tribunal from exercising a judicial function such as enforcement of a determination. It is not known whether the Commonwealth government will make a move to cure this impediment in respect of determinations given by the National Native Title Tribunal.

A couple of points about the operation of the Tribunal that I can make as a practitioner in the native title area are that the Tribunal is taking a very wide view of what is meant by the word "interest". Only persons who have "an interest" in the land are entitled to bring a non claimant's application in respect of a parcel of land. If a Government disagrees with the decision of the Registrar to accept a non claimant's application in relation to Crown land because the applicant has a lack of interests in the land the Native Title Act does not offer the means for challenging the Registrar's decision.

This area may have to be addressed by alternative means such as judicial review or by use of the declaratory and administrative law remedies. This has not been tested to date but I envisage this will occur in the near future and will have an impact on the Act and its operations.

Another decision worth noting is the **Western Australia v Commonwealth challenge to the Commonwealth Native Title Act.**

In this case which was decided on 16 March 1995 by the High Court the State of Western Australia challenged the validity of the Native Title Act 1993 (Cth) and there were various counter claims brought by Aboriginal groups that the Land (Titles and Traditional Usage) Act 1993 (WA) was invalid for being discriminatory.

The Court found by unanimous decision that the Native Title Act 1993 (Cth) was valid with the exception of section 12.

Section 12 reads as follows:

> "Subject to this act, the common law of Australia in respect of native title has, after 30 June 1993, the force of a law of the Commonwealth".

This section was found to be invalid because it also purported to confer legislative power in the judiciary which under the separation of powers doctrine is not able to be done.

The Commonwealth had relied on section 52(xxvi) or (xxix) of the Constitution to support section 12 of the Native Title Act 1993 (Cth).

These sections of the Constitution empower the Commonwealth to make laws relating to external affairs and relating to the people of any race for whom it is deemed necessary to make special laws.

The Court held that section 12 of the Native Title Act as it stood could not be a law with respect to race because if the common law changes the Parliament would not be able to consider whether the change was necessary or not within the terms of section 51(xxvi) of the Constitution (the racial power).

It was also held that section 12 was not within the external affairs power as it had NO external element and had not been enacted for the purpose of giving effect to any international obligations.

Although section 12 of the Native Title Act 1993 is now invalid the practical effect is not significant because the act can rely on its own definition of native title which preserves the common law of Australia.

How the Act defines native title is contained in section 223(1) and is as follows:

> S223(1) the expression "native title" or "native title rights and interests" means 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.
>
> Rights and interests also includes hunting, gathering or fishing rights and interests.

Any State law that is passed that is inconsistent with this definition will be invalid because of section 109 of the Constitution.

It was held that the Western Australian Act which was challenged by the Aboriginal groups was totally invalid because it was inconsistent with the Racial Discrimination Act 1975 and the Native Title Act 1993 (Cth).

Further Information Required

Should any further information be required please do not hesitate to contact Jennifer Jude, Senior Legal Officer, Legal Services Division, Department of Conservation and Land Management, 23-33 Bridge Street, Sydney NSW 2000 - Telephone (02) 228 6530.

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