
JURD7283 LAND LAW

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1 | NATIVE TITLE

1.1 STEP 1: IS THERE THE EXISTENCE OF NATIVE TITLE RIGHTS – S 223 NATIVE TITLE ACT 1993 (2)

S 223 NATIVE TITLE ACT

COMMON LAW RIGHTS AND INTERESTS

_____ is likely to constitute native title rights under s 223 of the *NTA* because _____.

- (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 lands or water, where:
 - A) The rights and interests are possessed under the traditional laws acknowledged and the traditional customs observed by the Aboriginal peoples or TSI; and
 - B) The Aboriginal peoples or TSI, 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.

To prove X constitutes native title rights under s 223(1)(a) and b):

- There must be a body of norms (laws and customs) that give rise to rights or interests in land or water;
- These traditional laws and customs must have existed at the date of British sovereignty; and
- These laws and customs must have a continuous existence and vitality since then.

HUNTING, GATHERING AND FISHING

_____ is likely to constitute native title rights under s 223 of the *NTA* as a hunting/gathering/fishing interest because _____.

- (2) Without limiting (1) rights and interests ...includes hunting, gathering, or fishing, rights and interests'.

YORTA YORTA – MEANING OF S 223

Meaning of 'traditional' in s 223(1)(a)

- 'Traditional' does not mean only that which is transferred from generation to generation. It means law and custom which has existed before colonisation, and has been continually observed (without substantial interruption) change since colonisation.
- If it was not observed since before colonisation, the ensuing rights will cease to exist.
 - A later attempt to revive those traditional laws and customs will not establish native title.
- One has to look not merely at the present, but also at the relationship between the laws and customs now observed and those observed pre-sovereignty, and if they were traditional.
- Change and interruption to traditional law and custom are not necessarily fatal to a native title claim. However, they may be significant and be substantially uninterrupted since sovereignty.
 - The key question is whether the law and custom can still be seen to be traditional law and traditional custom.

Meaning of 'connection' in s 223(1)(b)

- Connection refers not to physical presence on the land but rather a connection to the land via traditional laws and customs.
- Thus, the physical presence can be interrupted, whilst the abandonment of traditional laws cannot.

Meaning of 'recognition by the common law' in s 223(1)(c)

- This has a negative operation - it means that indigenous rights and interests which may be 'antithetical to the common law' will not be recognised.
- This is a requirement that 'emphasizes the fact that there is an intersection between legal systems and that the intersection occurred at the time of colonisation.

CASES

_____ can be likened to *Ward v WA / Risk v NT of Australia* because _____ are similar.

- Connection can be maintained by the continued acknowledgement of traditional laws and by observance of traditional customs: Ward v WA
 - This may be established by evidence that traditional practices and ceremonies are maintained by the community, insofar as that is possible, off the land, and that ritual knowledge, including knowledge of the Dreaming, which underlie the traditional laws and customs, continue to be maintained and passed down from generation to generation
- Where interruptions affect the presence of a claimant(s) in an area and such an interruption subsequently affects the continued observance and enjoyment of traditional law and customs, the necessary connection will not exist: Risk v NT of Australia [2006]

1.2 STEP 2: HAVE THE RIGHTS BEEN EXTINGUISHED?

Extinguishment is said to occur when the Crown does an act which evinces a clear and plain intention to extinguish native title (Mabo).

Extinguishment of native title rights may be evidenced by:

- Legislative provision expressed to extinguish native title;
- An inconsistent grant or interest in land; or
- Acquisition by the Crown of the land

EXTINGUISHMENT BY LEGISLATIVE PROVISION

The current test is of inconsistency

- Temporary displacement of Indigenous people does not extinguish native title, need to look at the intention of the statute: Congoo
- Two different approaches by judges in Congoo:
 - Intention of parliament to extinguish native title
 - The exercise of a power to extinguish native title must reveal a clear and plain intention to do so: Brennan J in Mabo (No 2)
 - Note that if scenarios are before NTA can't mention intention of legislature
 - Legal inconsistency
 - Executive act which creates rights in third parties are inconsistent with the continued right to enjoy native title to the extent of inconsistency, irrespective of the intention of legislature: Wik Peoples
- In exam – mention both and put view forward as to whether intention or inconsistency is the better test
- A statute that merely regulates activity does not necessarily demonstrate a clear and plain intention to extinguish native title: Akiba
 - Regulating the way in which rights and interests may be exercised is not inconsistent with their existence;
 - Regulation presupposes that the right exists in the first place
 - Native title holders must still comply with licences and regulations and this does not sever connection to the land

Wik Peoples:

- Issue: There was an assumption post-Mabo (and in the NTA) that pastoral leases extinguished native title because of the lease right of exclusive possession
- Held: Pastoral leases do not automatically confer exclusive possession in the sense of the right to exclude NT holders
- As creatures of statute, pastoral leases do not incorporate all characteristics of leases at common law
 - "It is clear that pastoral leases are not creations of the common law... That they are now and have for very many years been anchored in statute law appears from the cases which have considered the legal character of holdings under legislation of the Australian states." (per Gaudron J.)
- **Criteria of inconsistency for the purposes of extinguishment:**
 - Inconsistent grants must manifest a clear and plain intention to extinguish
 - Such intention will be manifested where rights under the grant and under NT are unable to co-exist
 - Inconsistency is measured by regard to the nature of the rights and not by their manner of exercise
 - Rights under pastoral leases prevail over NT rights to the extent of any inconsistency

EXTINGUISHMENT BY INCONSISTENT GRANT OR INTEREST IN LAND

If the Crown makes a land grant inconsistent with continuation of native title, to the extent of that inconsistency, native title be extinguished.

- Grant of freehold estate
 - A grant of freehold estate by the Crown to someone else demonstrates a clear and plain intention to extinguish native title.
 - Rights conferred by fee simple are inconsistent with the rights or interests of native title: Fejo v NT
- Pastoral leases may not be a lease, question is whether there is exclusive possession: Wik
 - The terms of the pastoral lease are _____, being inconsistent with native title rights, and will permanently extinguish some native title rights ('partial extinguishment').
- Exploration licence might be granted to mining company, mineral lease which gives right to go on land to get minerals
 - Both Wik and Ward established that the grant of rights to use land for particular purposes (whether pastoral, mining or other purposes), if not accompanied by the grant of a right to exclude any and everyone from the land for any reason or no reason ... does not necessarily extinguish [all] native title rights ...
 - "It is necessary, as the plurality held in Ward, to ask "whether the rights [granted] are inconsistent with the alleged native title rights and interests"
 - Inconsistency is that state of affairs where "the existence of one right necessarily implies the non-existence of the other"
 - Not necessarily inconsistent with native title
 - Depends on whether the miner has the right to exclude others from the land: WA v Brown
 - When do you determine if there is inconsistency between the native title claim and the law?
 - Look at the day after the lease was given and whether it is inconsistent with native title: WA v Brown
- Leases containing reservations in favour of Indigenous inhabitants
 - Rights that are inconsistent with lease as a whole will still be extinguished: Janjo v NT

DIFFERENCE BETWEEN EXTINGUISHMENT AND REGULATION

YANNER v EATON (animals + plants)

- At common law "wild animals are not in the possession of anyone... only qualified property existed in wild animals... a sort of guardianship for social purposes"
- The property contemplated by the Fauna Act was 'no more than the aggregate of the various rights of control by the Executive that the legislation created... those rights are less than the rights of absolute ownership', in practice the Act regulated certain matters only relating to hunting and royalties of fauna that had been reduced to possession

Leo Akiba on behalf of the Torres Strait Regional Seas Claim Group v Commonwealth of Australia [2013] HCA 33: Torres Strait sea claim to 44,000 sq. km of water seaward of the high water mark – non-exclusive claim

- Like Yanner v Eaton, the nature of the statutory right was merely to license or regulate, not appropriate
- Majority held that the key issue was the inconsistency between the statute and the native title rights, ('inconsistency analysis') - the purpose for taking the fish was not at issue, merely its regulation, hence there was no extinguishment of the NT right.

2 | INDEFEASIBILITY

2.1 INDEFEASIBILITY

___, the registered proprietor, is free from any other interests that are not recorded (s 42(1) of the RPA).

Immediate indefeasibility applies to all registered proprietors in NSW. Since there is a certificate of title, there is immediate indefeasibility of title by the registration of the person named in the register (*Breskvar v Wall*). It "is not a system of registration of title but a system of title by registration" (*Breskvar v Wall*).

- Under s 42 of RPA registered proprietors (not just of fee simple interests but of mortgages, easements and leases) have an 'undefeatable' interest, subject only to interests that are on the register, regardless of notice (s 43)
- If lease's terms are part of interest & lease is registered, takes priority over later mortgage: *Mercantile Credits v Shell*

Real Property Act 1900 (NSW)

40	1	Registered proprietor except in cases of fraud shall hold their land subject to encumbrances notified on CT and is free from all other except: <ul style="list-style-type: none">a. Interests under prior registered Crown grant or CTb. Land included in the Crown grant or CT by wrong description
41	1	No dealing until registered effectually passes an estate or interest in any land.
42 Indefeasibility	1	RP holds the land registered to them in a folio of the Registered over any unregistered interests except in some circumstances.
43 Notice provision	1	Except in case of fraud, no person contracting or dealing with or taking or proposing to take transfer from RP is required to inquire about circumstances of prior registration, or to check whether their interest will be affected by notice of any trust or unregistered interest subject to legal and equitable rules. Knowledge that any such trust or unregistered interest exists is not in itself fraud.
	2	(1) Doesn't defeat any claim based on subsisting interest in existing folio.
45 Protection of purchasers		Extends protection to a bona fide purchaser providing that nothing in the Act is to be interpreted so as to leave a bona fide purchaser for valuable consideration open to an action for recovery of damages or to an action of ejectment or to deprivation of his or her estate or interest, on the ground that they may have derived title from or through a person registered as proprietor through fraud or error.

Note: residential leases under 3 years are not required to be registered as they are an exception to indefeasibility (s 42(1)(d))

Frazer v Walker

- "Their Lordships cannot accept this argument which would be destructive of the whole system of registration. Even if non-compliance with the Act's requirements as to registration may involve the possibility of cancellation or correction of the entry — the provisions as to this will be referred to later — **registration once effected must attract the consequences which the Act attaches to registration whether that was regular or otherwise.**"
- HELD:
 - Registration is effective to vest and to divest title and to protect the registered proprietor against adverse claims.
 - Registration under the Act confers a title immune from adverse claims other than those specifically excepted.
- Justification for deferred indefeasibility:
 - The theory behind deferred indefeasibility is that someone in the position of Radomski, who is actively involved in the mortgage transaction, has an opportunity to check if the documents have been validly executed; he dealt with Mrs Frazer. He had an opportunity to detect the fraud and not go ahead with the transaction. If he didn't detect it and went ahead and registered, then in many circumstances, it may be fair that his title is defeated.

HOW MUCH OF A LEASE IS INDEFEASIBLE?

Once the tenant notifies the landlord of his/her intention to renew within [timeframe], the landlord is contractually bound to grant a new lease. The lease is specifically enforceable and will give the tenant an equitable interest in land.

The right of renewal is so intimately connected to the lessee that it defines the property right (*Mercantile*).

The only difference in the new lease will be less of one option.

HOW MUCH OF A MORTGAGE IS INDEFEASIBLE?

As long as a mortgagee is innocent, a forged mortgage is effective once registered (*Frazer v Walker*).