Native title under the *NTA*

Recognition In Australia, claims for recognition of native title rights should be assessed under NTA s 223, rather than the definition in Mabo v Queensland (No 2): Western Australia v Ward.

Native title: section 223
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.

Hunting, gathering and fishing covered
(2) Without limiting subsection (1), rights and interests in that subsection includes hunting, gathering, or fishing, rights and interests.

Statutory rights and interests
(3) Subject to subsections (3A) and (4), if native title rights and interests as defined by subsection (1) are, or have been at any time in the past, compulsorily converted into, or replaced by, statutory rights and interests in relation to the same land or waters that are held by or on behalf of Aboriginal peoples or Torres Strait Islanders, those statutory rights and interests are also covered by the expression native title or native title rights and interests .

Note: Subsection (3) cannot have any operation resulting from a future act that purports to convert or replace native title rights and interests unless the act is a valid future act.

Subsection (3) does not apply to statutory access rights

(3A) Subsection (3) does not apply to rights and interests conferred by Subdivision Q of Division 3 of Part 2 of this Act (which deals with statutory access rights for native title claimants).

Case not covered by subsection (3)

(4) To avoid any doubt, subsection (3) does not apply to rights and interests created by a reservation or condition (and which are not native title rights and interests):

(a) in a pastoral lease granted before 1 January 1994; or

(b) in legislation made before 1 July 1993, where the reservation or condition applies because of the grant of a pastoral lease before 1 January 1994.

Rights possessed under traditional laws and customs—section 223(1)(a)

Native title has its origin in, and is given its content by, the traditional laws acknowledged and the traditional customs observed by the Indigenous inhabitants of a territory. The nature and incidents of native title must be ascertained as a matter of fact by reference to those laws and customs: Mabo (No 2).

Per Yorta Yorta Aboriginal Community v Victoria:

- There must be a body of traditional 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
- The rights and interests possessed pre-sovereignty must have had a continuous existence and vitality on a substantially uninterrupted basis: Yorta Yorta Aboriginal Community v Victoria.

It must be shown that the society under whose laws and customs the native title rights and interests are claimed has continued to exist as a body united by its acknowledgment and observance of those laws and customs: Yorta Yorta.

Connection with the land or waters—section 223(1)(b)

The basis of native title is the traditional occupation of, or connection with, the land by Aboriginal people.

It is possible for Aboriginal peoples to acknowledge and observe traditional laws and customs during periods in which they have not maintained a physical connection with the claim area. The length of time during which they have not used or occupied the land may be significant in assessing whether traditional laws and customs have been acknowledged and observed: De Rose v South Australia (No 2).

Connection is not limited to physical presence on the land, nor does it depend on the precise locus of native title rights and interests within a community, so long as they can be regarded as held collectively by the community: Northern Territory v Alyawarr.

Connection may be mainly spiritual rather than physical, and may not involve physical access to each and every part of the land: Worimi (aka Gary Dates) v Worimi Local Aboriginal Land Council.

Adaptation, modification, or interruption

Interruptions which affect the presence of claimants in an area may sever the requisite connection if the interruption subsequently affects the continuous observation of traditional customs and laws since the acquisition of sovereignty: Risk v Northern Territory of Australia.

Even if a later society adopts the same laws and customs, it would not be a continuation of the first society, but rather laws and customs rooted in the new, later society and not in pre-sovereignty traditions and customs: Bodney v Bennell.

The question is whether the laws and customs acknowledged and observed now could be properly described as the traditional laws and customs of the people concerned: Yorta Yorta v State of Victoria.

Nature and content of native title

The content of native title, its nature and incidents, will vary from one case to another. It may comprise what are classified as personal or communal usufructuary rights involving access to the land in question to hunt for or gather food, or to perform traditional ceremonies. At the opposite extreme, the degree of attachment to the land may be such as to approximate that which would flow from a legal or equitable interest therein: Wik Peoples v Queensland.

The nature and content of native title must be ascertained as a matter of fact by reference to the traditional laws and customs asserted: Mabo (No 2).

The only statutory limitation on the scope of native title rights and interests is that the rights and interests must be capable of being recognised by the common law: NTA s 223(1)(c).

Native title rights are a bundle of rights, with each component potentially being separately extinguished: Akiba v Commonwealth.

Claimants must prove the existence of each right they claim.

Right to trade for commercial purposes

A broadly framed right to trade for commercial purposes was endorsed by the High Court in Akiba. Evidence of commercial activity is not necessary but evidence of the right itself is.

Rights in relation to territorial sea and seabed

In Commonwealth v Yarmirr, the High Court held that while the Crown did not have radical title over the territorial sea (because the common law rights of citizens terminated at the low-water mark), the Crown still held sovereign rights and interests over the sea. Native title could therefore exist in this area, as it is not a creature of common law and can

coexist with the Crown's sovereign rights as long as there is no inconsistency between the two or until the Crown extinguishes native title rights.

The majority of the court also found that at the time of settlement, certain common law rights—such as the right of citizens to fish in territorial waters (as established in Malcomson v O'Dea) and the right to navigate through territorial waters (see Lord Fitzhardinge v Purcell)—were part of local law. These common law rights were inconsistent with exclusive native title rights, so the court determined that only non-exclusive native title could be recognised over sea country.

Non-exclusive rights over tidal waters and the territorial sea have been recognised in a number of cases: Gumana v Northern Territory of Australia (right to fish and navigate); Lardil Peoples v Queensland.

Right to maintain, protect, and prevent misuse of cultural knowledge

Native title does not extend to the protection of intellectual property rights in relation to land: Ward.

Rights to minerals

Native title does not inherently include rights to minerals or petroleum: Yunupingu (cf perhaps ochre). Legislation has extinguished any possible native title rights to minerals.

Exclusive possession

When making a native title determination, the court must specify the nature and extent of the rights and incidents of native title, including whether the rights include exclusive possession: NTA s 225.

There is no presumption of exclusive possession: any such claim must be proved by evidence: Ward.

The claimant must prove:

- The traditional laws and customs included a right to exclude others; and
- The right to exclude others has not been extinguished: Ward.

Non-exclusive native title rights include:

- Access to land to hunt or gather food, or to perform traditional ceremonies: Mabo (No 2);
- The right to fish and navigate in territorial waters: Yarmirr;
- The right to camp and erect temporary structures: Congoo (on behalf of the Bar-Barrum People) (No 4) v Queensland;
- The right to take natural flora, fauna, fish, and other traditional resources from the land: Western Australia v Brown;
- The right to engage in traditional rituals and ceremonies on the land: Brown;
- The right to care for, maintain, and protect particular sites and areas of significance: Brown.

Extinguishment

'Extinguishment' means that native title rights and interests cease to be recognised by the common law, and therefore cease to be native title rights and interests within the meaning of s 223 of the NTA.

Once extinguished, native title cannot be "revived".

Native title can only be extinguished by a "Crown act" — that is, a legislative or executive act of the Commonwealth or of a State or Territory.

Inconsistency of incidents

In Mabo, extinguishment was said to occur when the Crown does an act which evinces a clear and plain intention to extinguish native title. Wik introduced the inconsistency of incidents approach.

The test for extinguishment is whether the Act or executive act is inconsistent with the claimed native title rights and interests: Wik. It is an objective inquiry that involves identifying and comparing two sets of rights: those arising from traditional law and custom, and those arising from statutory powers.

Inconsistency refers to a state of affairs where the existence of one right necessarily implies the non-existence of the other: Brown. The decisions in Wik and Ward confirmed that the grant of rights to use land for specific purposes (such as pastoral, mining, or other activities) does not automatically extinguish native title rights, such as the rights to camp, hunt, gather, conduct ceremonies, or care for the land. This is the case unless the grant also includes a right to exclude everyone from the land, for any reason or no reason at all.

Two rights are either inconsistent or they are not. If they are inconsistent, extinguishment will occur to the extent of the inconsistency; if they are not, extinguishment does not occur: Ward.

[Note: Insonsistent grants must manifest a plain and clear intention to extinguish native title and such an intention will manifest where rights under the grant and native title are unable to co-exist]

It is only the grant of an interest in land that can extinguish native title, not the exercise of rights under that grant: Brown (Inconsistency is measured by regard to the nature of the rights and not by their manner of exercise)

For example, in Brown, the court examined whether the rights granted to the joint venturers under the mineral leases necessarily meant that the claimed native title rights could no longer exist. The court concluded that the mineral leases did not grant a right of exclusive possession. (This was similar to the situation with pastoral leases in Wik, mining leases in Ward, and the Argyle mining lease also discussed in Ward.) The mineral leases did not allow the joint venturers to exclude anyone from any part of the land. Instead, the joint venturers were granted more limited rights, such as the ability to carry out mining and associated activities without interference. These limited rights were not inconsistent with the native title holders' rights, who could continue to exercise their rights (such as hunting, camping, and conducting ceremonies) on the land without infringing upon the rights of the joint venturers.

Where the Crown has granted an interest in land to a third party, ask whether the native title right was extinguished, or merely regulated: Ward.

Clear and plain intention

The “clear and plain intention” standard for extinguishment, formulated in Mabo (No 2), is an important normative principle informing the criterion for determining whether a legislative or executive act should be taken by the common law to have extinguished native title. That standard has not been displaced by any subsequent decision of the High Court: Congoo.

There are three ways in which native title can be extinguished:

- Through grants to third parties;
- Through legislation regulating conduct;
- By the Crown appropriating land to itself.

Grant of inconsistent interest in land to third parties

Note that where a Crown grant is invalid, it does not extinguish native title, even though the putative grantee may have acted as if it were valid: Dungog Shire Council v Attorney General of New South Wales.

Freehold estate

A grant of a freehold estate will permanently extinguish native title, because the rights conferred by a grant in fee simple are inconsistent with native title holders continuing to hold any of the rights or interests that make up native title: Fejo v Northern Territory.

Common law lease

A common law lease will extinguish native title because it confers on the tenant a right of exclusive possession, which is inconsistent with the continued existence of native title rights.

Pastoral lease

[Note: As creatures of statute, pastoral leases do not incorporate all characteristics of leases at common law.] Pastoral leases do not necessarily extinguish native title, unless they grant a right of exclusive possession. The question to ask is whether the statutory interests could be enjoyed only with the full abrogation of any native title rights: Wik.