

The Concept of Native Title at Common Law, Noel Pearson 15 June 1996

Noel Pearson

Of all of the miserable cargo that ever left the shores of England for the Antipodes, there are three that I celebrate as amongst the finest imports: that sublime game cricket, Earl Grey's tea and the common law of England...

I am concerned about the future development of the common law of native title in Australia. Having long agonised over the jurisprudence I have attempted to grapple with a fundamental question: what is the concept of native title?

Despite the fact that native title is long established all over the common law world, and particularly in North America, my reading of the cases and articles on the subject, particularly the Canadian jurisprudence, leaves me convinced that the correct answer to that basic question still eludes us. Our inability to articulate clearly the concept of native title has implications therefore on our understanding of its recognition, its extinguishment and its content.

I am going to attempt to articulate some arguments about the concept of native title that have been swirling around in my head ever since I rapturously read that judgment of June 1992. These arguments are born of a febrile mind and their shortcomings should be understood, politely suffered and forgiven appropriately.

The Australian and Canadian approaches

My anxiety proceeds from a belief that the way in which advocates and increasingly, judges, have been prosecuting the law on native title since Mabo, is based on a flawed concept of native title. There are threads of reasoning that are still hanging loose from Mabo (but not inconsistent with the fundamental compromise that under pins Mabo) and connections of logic which remain unmade, which are unrecognised and not being developed in the way that would give our common law of native title its optimum share. I hold a great anxiety that the High Court's consideration of the Wik Case might lead to the common law developing in an illogical and unnecessarily unjust way.

Let me first say that I have been greatly assisted in the development of these arguments by Professor Kent McNeil's excellent writings, particularly his unpublished account of the meaning of Aboriginal title as developed in the Canadian jurisprudence. He has also written an excellent article on extinguishment and the decision in Mabo, which I understand has been published by the Aboriginal Law Centre at the University of New South Wales.

Whilst in rejecting terra nullius and finding that native title is not extinguished by the acquisition of sovereignty, the approach in Australia with Mabo is consistent with the Canadian authorities, there seems to me to be an emerging divergence in relation to questions of extinguishment and the source of native title.

Broadly, the Canadian cases emphasise occupation as the source of title, and in this respect, Justice Toohey's judgment in Mabo is consistent. The majority in Mabo however, emphasised the existence of the

Aboriginal law and custom as the foundation of entitlement. The argument that I am developing here, in fact reconciles these apparently different sources of Aboriginal entitlement.

Extinguishment is the respect in which the Canadian and Australian development of the common law, are irreconcilably at odds. Mabo's thesis that inconsistency under pins the question of whether a clear and plain intention has been evinced to extinguish or partially extinguish native title, is at odds with the Canadian approach. The pragmatic compromise which the High Court struck in Mabo has replied upon propositions which are difficult to sustain, both in terms of established common law principles and within the logic of Mabo itself...

The concept of native title

Fundamentally, I proceed from the notion that native title is a 'recognition concept'. The High Court tells us in Mabo that native title is not a common law title but is instead a title recognised by the common law. What they failed to tell us, and something which we have failed to appreciate, is that neither is native title an Aboriginal law title. Because patently Aboriginal law will recognise title where the common law will not. Native title is therefore the space between the two systems, where there is recognition. Native title is want of a better formulation the recognition space the common law and the Aboriginal law which forced recognition in particular circumstances.

Adopting this concept allows us to see two systems of law running in relation to land. This is a matter of fact. No matter what the common law might say about the existence of native title in respect of land which is subject to an inconsistent grant, the fact is that Aboriginal law still allocates entitlement to those traditionally connected with the land subject of the grant. Aboriginal law is not thereby extinguished because it survives as a social reality. It is fictitious to assume that Aboriginal law is extinguished where the common law is unable to recognise that law.

The common law as a matter of justice recognises Aboriginal law in certain circumstances where it can. In other circumstances it will not. The High Court in Mabo constructed inconsistency as the test to decide whether the common law can recognise Aboriginal title. Where there is an interest inconsistent with the continued enjoyment of native title by the native titleholders, then the High Court's schema in Mabo will not allow recognition.

Where there is no inconsistency, then the native title is recognised. It is difficult to see how the concept of inconsistency, which exclusive possession implies, cannot be a keystone to the High Court's construct of what is practical and just in terms of recognising and affirming accumulated historical interests and accommodating belated recognition of original title.

Native title and extinguishment

Appreciating native title as a recognition concept challenges the assumption that we have all laboured under since Mabo, that extinguishment is somehow a fatal and for all time event. The assumption has been that if an obscure past action by the Crown can be found to be inconsistent with the continued enjoyment of native title, then native title will be extinguished no matter the actual facts on the ground and the subsequent history of the land concerned. In my view, lawyers and judges have too quickly assumed that this kind of so-called extinguishment event is a fatal event to the recognition of Aboriginal entitlement to land.

Seeing as native title is a recognition concept, its extinguishment should be understood as being 'extinguishment of recognition'. This leaves open the question of whether the common law will endorse the notion of revival of recognition...

The approach to the recognition and extinguishment of native title has important implications for whether the common law of native title in Australia is going to be a just and fair scheme. There are many lands today (particularly in National Parks, Public Purposes Reserves and Aboriginal Reserves) which were previously subject to tenures (leasehold and freehold) which may have been inconsistent with native title according to the High Court's test in *Mabo*, where the inconsistency has now been removed.

A common law scheme which sees technical legal events as fatal extinguishment events, even where the fact of Aboriginal traditional connection with the land is maintained, would be perverse law and inconsistent with the compromise in *Mabo* that the common law recognises Aboriginal law and native title is a product of that recognition where there is not a competing inconsistent interest.

Conclusion

Further discussion of the contentions about the content of native title and possessory title is necessary. The following though is a summary of the contentions that I have discussed about the implications of this approach of our understanding of the content of native title and the whole question of the relationship between possessory and native title.

1. Native title is neither a common law nor an Aboriginal law title but represents the recognition by the common law of title under Aboriginal law.
2. Extinguishment must therefore be understood as extinguishment of recognition.
3. Extinguishment of recognition of native title occurs where the foundation of title in Aboriginal law and custom has been washed away as a matter of fact. There can be no revival of recognition in this event. This is extinguishment amounting to extinction.
4. Extinguishment of recognition of native title also occurs where there is an interest inconsistent with the continued enjoyment of Aboriginal title. Aboriginal title remains unrecognised by the common law so long as the inconsistent interest remains.
5. Given the recognition concept of native title and the notion of extinguishment of recognition, it follows that where there is partial inconsistency between an interest and the continued enjoyment of native title, then there is a partial extinguishment of recognition of native title. Where the inconsistency is removed, recognition is again possible.
6. The *sui generis* nature of native title is a consequence of the interactions between two systems of law - the common law recognising Aboriginal law with the consequences that Aboriginal title is recognised - has two aspects. Firstly, native title has an aspect in relation to the rest of the world, which is able to be described by the common law, because it is inherent to the occupation of land and identical to the kind of dominion that people of different societies assert over land. As His Honour, Justice Brennan said in that great and succinct phrase in *Mabo*: land is susceptible to ownership. The common law describes this aspect of native title in terms of possession. In relation to the Meriam people the *Mabo* High Court case described it as a right to "possession, occupation, enjoyment and use" of land as against the whole world. Secondly,

native title has an aspect in relation to its holders which must be ascertained by reference to Aboriginal law and custom.

7. Understood in this way, the concept of possessory title, or as Professor McNeil and his Honour Justice Toohey described it "Common Law Aboriginal Title", is therefore an aspect of native title and not a separate concept.

8. These two aspects of native title determine its content. Where there are questions relevant to the rights of the native title holders as between themselves, then content must be determined by reference to Aboriginal law and custom. Where there are questions relevant to the rights of native title holders as against those outside of the Aboriginal system of law and custom, then these must be determined by the common law.

9. We need to recognise the clear articulation by His Honour, Justice Brennan in *Mabo*, that the right of the individual is carved out of the communal right. The usufructuary right is carved out of the communal proprietary and communal title.

10. Where native title, usufructuary and otherwise, is to be established, the task of the common law courts is to assume the existence of a full proprietary title and to then identify those valid acts of the Crown which have qualified that title by regulation or by partial extinguishment or recognition by the creation of an inconsistent interest. The notion that the content of the native title is solely to be determined by reference to the rights established under Aboriginal law and custom as a matter of fact is misconceived.