MABO AND THE WET TROPICAL FORESTS OF NORTHERN QUEENSLAND

World Heritage Tropical Forests Conference

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Let me first express my pride in the efforts of my indefatigable colleague, Dr Keto, and the organising committee, for putting together a conference of such high calibre and with such distinguished contributors. I trust that our guests, particularly friends from abroad, have enjoyed their time here in glorious North Queensland.

Clearly, I'm not here to talk science. Rather, I am going to attempt to describe developments in law and policy concerning indigenous people and their traditional homelands in Australia over recent years, and to discuss the implications for the future management of tropical forests in Australia with particular reference to the Wet Tropics World Heritage Area.

I have divided my talk into four parts.

Firstly, I will attempt to explain the legal concept of traditional title (or native title) to land that emerged from the historic decision of the High Court of Australia in the Mabo Case on 3 June 1992.

Secondly, I will attempt to discuss the moral and policy implications of the historical compromise which Mabo represents. This will include a brief account of the passage of the Native Title Act, the controversial legislation passed by the Commonwealth Parliament in 1993.

Thirdly, I will discuss what has taken place since the High Court's decision and the enactment of the Native Title Act.

Finally, I will attempt to locate these developments within the Wet Tropics and discuss some of the implications for its management.

I have attempted to explain these issues, particularly the law of native title in such a way as might be explicable to colleagues from abroad who may not be familiar with the situation in Australia. My aspiration was to have provided a kind of David Attenborough style rendering of this complex area of law, alas, I fear that I have failed. For those chloroformed by my account, please understand that it was not my intention.

THE CONCEPT OF NATIVE TITLE IN AUSTRALIAN LAW

Prior to the High Court's decision in the Mabo in 1992, the indigenous peoples of Australia had the same legal status as the marsupials that have been the subject of dissertations at this conference. The position in Australia was different from other countries that were inheritors of the common law tradition of England. Whereas in the United States the title of the Native American inhabitants was recognised by the Supreme Court in 1823, and in New Zealand in 1859, there was an assumption that prevailed for more than 200 years that the English common law concept of communal native title to land did not apply to the indigenous peoples of Australia.

Why was a well-established principle of the common law applied to other British colonies and not Australia?

A decision of the Privy Council in Re Southern Rhodesia offered the rationale. Whilst acknowledging that the common law of England did recognise native title, the Privy Council opined that there were some indigenous societies that were so low in the scale of social organisation that it would be idle to impute any concept of land ownership to such peoples. They were so primitive that they were essentially fauna roving over the landscape, having no sense of property in the soil.

It is interesting how the rationale in this case coincided with the development of pseudo-Darwinian notions of social evolution. The law simply reflected popular eugenical speculations to the effect that certain indigenous peoples were socially and biologically inferior. According to such pseudo-science, the Aborigines of Australia, occupied a position only a rung up from baboons on the 'evolutionary ladder'.

Even as the humanity of the Aborigines came to be accepted in the Australian community in the latter half of this century, there was and still is some lingering doubt. Many of the racial concepts of an older Australia still inhabit the deep recesses of the Australian subconscious.

In the 1970's Australia began to move towards recognising traditional ownership of land through the enactment of land rights legislation. However all such legislation was premised on the idea that Aboriginal people had no inherent or preexisting rights to land. Rather Parliaments created the rights and presumed to grant land back to its original owners.

The High Court's decision in Mabo changed the entire foundation of land rights. Aboriginal people were held to have preexisting rights. Australian law did not create these rights, it merely recognised the rights.

In Mabo the High Court described how native title exists wherever indigenous peoples maintain connections to land under their traditional laws and customs. The court ruled that the Crown has the power to extinguish native title. This can be done through the grant by the Crown of rights in the land to third parties, or where the Crown appropriates land for itself and puts it to a use inconsistent with the ability of the traditional owners to continue to enjoy their title.

According to the common law theory therefore, at the time of British acquisition of sovereignty of Australia in 1788, the Aboriginal peoples became subjects of the Crown and their native title was recognised at law. Conceivably therefore, the entire continent was subject to native title.

The court then said that since 1788 there has been a parcel by parcel process of extinguishment of native title, as through the colonial history the Crown has made grants to third parties.

This parcel-by-parcel process has resulted in the extinguishment of native title over much of Australia. Only in the remote and inaccessible areas, and remnant areas where grants have not been made, is there a prospect that native title survives to be enjoyed.

Now because the High Court's decision in Mabo only gave us a preliminary description of the law on native title, there are many questions that remain uncertain. Much of the speculation in the enormous literature that has emerged in the wake of the decision, is confused. I will therefore attempt to describe briefly three pertinent aspects of native title. These are:

- What is the concept of native title?
- What is extinguishment?
- What is the content or nature of native title?

Surprisingly, the answers to these three simple questions are by no means settled. The jurisprudence of North America and the prosecution of native title law in Australia over the past three years, has not yielded much clarity.

Concept of Native Title

I have been developing the following model to explain native title in the common law of Australia. I start from two simple propositions.

Firstly the proposition of the High Court in Mabo, where it said that native title is not a title of the common law, but rather it is a title recognised by the common law. This is straightforward.

However we have failed to recognise a second proposition: native title is also not a title of Aboriginal law. Because Aboriginal law will allocate and recognise entitlement where the common law will not. This is patently logical.

Native title is therefore not a common law title and neither is it an Aboriginal law title. It occurs where the common law recognises Aboriginal law. It is a concept of recognition by one legal system of another.

Seeing native title as a recognition concept, therefore allows us to see that there are two systems of law running in relation to lands with which traditional peoples are connected. Firstly the Australian legal system including the common law. Secondly the system of Aboriginal law which allocates entitlement to traditional owners.

The legal test as to whether the common law recognises Aboriginal law in relation to any particular land (in other words whether native title exists), is the test of consistency. Is the continued enjoyment of title by the traditional owners consistent with any grant or dealing that the Crown has lawfully authorised in relation to the land? If it is inconsistent, then the native title is not recognised. If partially inconsistent, then the native title is partially recognised to the extent of its consistency.

Extinguishment of Native Title

In accordance with this understanding therefore, the extinguishment of native title should be understood as 'extinguishment of recognition' of native title. Patently the extinguishment of recognition does not therefore result in the extinguishment of Aboriginal title in relation to the land. It survives as a social reality under Aboriginal law, even though it is not afforded recognition under the rules of the common law. This is clearly logical.

Once you accept the logic of this model, the fallacy of the approach to extinguishment that has been assumed since Mabo, becomes clear: namely the fallacy that an historical legal event that resulted in a partial or total inconsistency which has since been lifted, is fatal to the contemporary recognition of native title. It is not. Understanding that extinguishment is extinguishment of recognition, logically where the inconsistency has been removed or has now lapsed and the contemporary tenure is consistent, then there is continued recognition of native title.

For those familiar with these issues, this understanding of extinguishment is critical. There may be contemporary tenures, such as many of the tenures within the Wet Tropics, which are presently consistent with native title, but which may have historically been subject to inconsistent grants. Government and the National Native Title Tribunal, as well as land claim advocates have laboured, in my respectful opinion, under the misconception that the existence

of a historical inconsistency has resulted in a permanent and irrevocable extinguishment.

Content of Native Title

There are all kinds of misconceptions about the content and dimension of native title. Can it merely be a collection of usufructuary rights or is it comparable to titles understood by the general law?

The confusion has arisen because the High Court says in Mabo that the content of native title is determined by reference to the relevant Aboriginal law and custom. And yet in Mabo the Court also ruled in its Order that the Meriam Peoples were entitled to 'possession, occupation, use and enjoyment as against the whole world' of the Murray Islands. This begs the question: is the content of the Meriam People's title a right to possession or is it the rights established under their traditional laws?

My view is that native title has two aspects. Firstly it is an internal aspect. This internal aspect must be understood by reference to the traditional law. Traditional law and custom determines the content of title of the traditional titleholders as between themselves.

Contrary to the implication that can be drawn from the statements of the Court in Mabo, traditional law and custom is however not relevant to the external aspect of native title.

The external aspect of native title - that is how the outside legal system (the common law) recognises Aboriginal title - is understood by the simple common law concept of possession. Possession is the fullest dimension of ownership of land recognisable under the common law. Clearly for Aboriginal title to be understood as being of any lesser dimension than full ownership would be discriminatory and contrary to Mabo itself. Aboriginal title has the same dimension as the titles of other human groups claiming dominion over land under their own laws. Aboriginal title is the same as English title and is the same as Chinese title and is the same as Fijian title, in terms of its dimension and content.

The question for land claims therefore is not to be misled by the notion that native title will vary according to what is established under the various traditional laws and customs of various groups. Rather the task is simple. The Courts must identify those valid actions of the Crown or the Legislature - such as the passage of legislation or the grant of interests to third parties - that have qualified or partially extinguished the recognition of native title. The content of native title is therefore full ownership less the identified qualifications.

THE IMPLICATIONS OF MABO FOR AUSTRALIA

Let me now turn to the implications of Mabo for Australia.

Of course the law of native title came to light in Australia late in the day. It arrived after 204 years of colonisation, after much murder and dispossession. It arrived after much dislocation and the extermination of many groups. It arrived at a time when most groups have lost most, if not all, of their traditional lands which are now owned by the colonists.

The actual legal application of Mabo is therefore very narrow. A small percentage of Australia's indigenous people will be able to secure title under its rules, and this will most substantially occur in the remote regions.

But beyond the narrow legal question, Mabo raised a bigger question: what about the titles that have been lost without consent or compensation? What reparation is there going to be?

The High Court understood clearly the moral implications of its judgment. Justices Deane and Gaudron spoke clearly about the legacy of 'unutterable shame' that the denial of native title had left for the country. Justice Brennan said frankly that the 'dispossession of the indigenous inhabitants underwrote the development of the nation'.

Mabo raised another question: what about the fact that Aboriginal law is still running in relation to land where the common law may not recognise native title, can there be some respect afforded to the Aboriginal interest in the land? What measures can and should be taken to recognise the on-going Aboriginal interest in the land?

The establishment of the Indigenous Land Fund, which is intended to purchase land for groups who are unable to claim native title, is one response to the broader moral and historical implications of the Mabo decision.

Mabo at its core is a pragmatic compromise struck by the High Court. The Court sought to establish a reconciliation between the fact of original ownership of the land by indigenous peoples and the colonial accumulation of rights which cannot now be usurped.

I am one of the few believers in the correctness of the compromise. There are many indigenous people who will feel that it has been too little, too late. There is no shortage of white Australians who feel that it is too much. The truth is that it represents the only logical compromise available for the law to construct.

In the wake of the court decision, Aboriginal organisations negotiated with the Federal Government the Native Title Act in 1993. The Act had the following functions (i) to provide protection for native title from arbitrary extinguishment by State and Territory governments (ii) to provide for a system to identify where native title exists (iii) to provide rules for dealing with native title whilst it remains unidentified and (iv) to provide rules for dealing with native title after it has been identified.

The Native Title Act involved a year long process of negotiations and arguments between the Commonwealth Government and Aboriginal organisations. The Act itself basically preserves the common law of native title. It also provides for the validation of titles that may have been invalid because native title existed at the time of the grant and the grant therefore was inconsistent with the Commonwealth's Racial Discrimination Act.

In the wake of Mabo a great fuss was raised by industry groups and governments about the effect of the Racial Discrimination Act. It was feared that any titles granted over native title land after 1975, when the Racial Discrimination Act came into effect, would be invalid. Thousands of mining and other titles were said to be potentially invalid. The uncertainty of tenure had to be remedied.

In response to the national hysteria generated by industry, the Commonwealth Government announced that it would enact legislation.

In the negotiations leading to the passage of the Act, it was the Aboriginal organisations who proposed to the Prime Minister that validation legislation would be supported. This act of graciousness on the part of Aboriginal people turned out to be a fatal mistake. Rather than industry and State governments being gracious about the Aboriginal support for validation, industry (particularly the mining industry) essentially said 'thanks for the validation of our title, but we want extinguishment as well'. There then followed a national shitfight with the Prime Minister and Aboriginal people eventually prevailing over a motley coalition of the Federal Conservatives, industry, State and Territory governments and every man and his dog who believed that Mabo was some kind of heinous national disease that had to be eradicated.

THE AUSTRALIAN RESPONSE TO MABO

As to the historical lesson and the moral implications of Mabo for the country, it clearly has failed to penetrate. That proportion of the Australian populace that have traditionally supported land rights are the people who have taken on board its implications. It has been very hard to enjoin the great majority of Australians to accept the historic compromise that Mabo represents. They don't accept the need for, the importance of, nor indeed the validity of any form of compromise.

The High Court's moral prescriptions have largely fallen on fallow hearts. The failure of Mabo to take root in the general populace is a reflection of the vehement and abiding opposition that has been mounted by governments, their bureaucracies and industry.

At the time of the passage of the Native Title Act in late 1993, the then leader of the Federal Coalition, Dr John Hewson, described it as 'a day of shame' for Australia. We now have a Federal Coalition government that is committed to a major overhaul of the Act. The Act and the remnant rights of indigenous peoples that it seeks to protect, is now in grave danger of being completely disemboweled.

The 1993 compromise deal is being revisited by the opponents of Aboriginal people. They are seeking to re-deal the cards, to redistribute the allocation of rights under that deal.

As to the efficacy of the Act let me make the following points:

It is said that the Act is too complex. Well, its complexity is a reflection of the sophisticated compromise that it represents. The arch enemy of native title, the State government of Western Australia, passed a law (which was subsequently ruled invalid by the High Court) which sought to arbitrarily and in one fell swoop, extinguish native title throughout the entire State. The Act was very simple, because it had a simple purpose. The Native Title Act's complexity comes from the fact that it attempts to preserve the common law rights of Aboriginal people whilst also preserving historically accumulated rights.

It is said the Act has failed. Fair from it. In its primary purpose - that is the protection of native title from arbitrary extinguishment - the Act has been spectacularly successful. It has withstood a concerted three yearlong attempt by the country's most cunning and unscrupulous political, legal and bureaucratic minds to either (i) extinguish native title or (ii) ignore native title. The Act and the rights that it seeks to protect, has been under a perpetual siege since its passage. No government has sought to work with the Act in a proactive sense and with goodwill. Rather they have grudgingly and defensively dealt with the Act whilst always calling for its essential abolition. Wherever they can thwart, hold up, ignore or simply be intransigent about the processes under the Act, they do so. There is no commitment from the State or Territory governments and now from the Commonwealth government, to make the processes of the Act work in the way in was intended.

Then why has there not been one determination of native title anywhere under the Act? The Act provides for land claims to be settled by negotiation and mediation at first. Parties can choose to settle claims by agreement. Where agreement is not possible, then the claims must be heard by the Federal Court through a full-blown litigation. There are now a number of claims that are in the process of litigation in the Federal Court. Most claims however, are stuck in mediation. And the biggest impediment is the unwillingness of State and Territory governments to make agreements to recognise native title.

At the end of the day the processes of the Native Title Act are victim of the federal system. The scheme requires State and Territory governments to agree to claims. And they simply refuse to

put the necessary good will in to make the processes work.

Aboriginal negotiators in 1993 had anticipated this problem and had proposed that the State and Territory governments be left out of the claims process. This would have been legally possible, but politically the Federal Government was not prepared to assume exclusive control of native title. These recalcitrant governments are therefore entitled to be involved in the claims, and no matter if all of the other parties have reached agreement on claims, the State government can still refuse to agree and thereby thwart agreement.

This is most tragically illustrated in the Wellington Town Common claim in western New South Wales. This claim was the subject of a mediated agreement between the Wiradjuri peoples, the local white community and a mining company which held interests in the land (CRA Ltd), almost three years ago. The only party that is needed to sign up to the first native title claim on mainland Australia, is the New South Wales State Government. The Liberal Government refused to do so, and the present Labor Government has not done anything for two years.

Clearly, without some goodwill, especially when it concerns such modest areas of land where parties from the community have agreed to the claim and where the Aboriginal people concerned own no other land, the Act will simply not deliver outcomes in the consensual way that was hoped. Rather governments seem intent upon litigation in the Federal Court. In most such cases the cost of litigation will far exceed the value of the land concerned.

So what we are left with then is a situation in Australia where there is a legal scheme in place which provides certain protection for remnant common law rights. This protection is in the form of federal legislation which over-rides any State legislation that might seek to do something contrary to the federal principles. But we now have a Federal Government that was bitterly opposed to the Act in 1993 and is intent on changing it. They have already tabled in Parliament a Bill which seeks to substantially detract from the current indigenous rights under the Act. More amendments will be tabled when Parliament next resumes sittings.

In an attempt to see if common ground could be reached with industry groups about mutually beneficial changes to the Act, over the past three months Aboriginal organisations have been involved in talks aimed at developing proposals that might be acceptable to both sides. Aboriginal representatives made it clear to industry that they would not support any diminution of Aboriginal rights. These talks broke down this week, when the industry groups decided to walk out. It appears as if they have made the assessment that the Government will deliver the changes they want, and they will be able to get them through the Senate. Aboriginal organisations who have been involved in this intense process are extremely distraught that the talks have come to nothing.

What industry and the present Federal government fail to appreciate is that Mabo and the Native Title Act represent a modest compromise in relation to matters of fundamental importance to indigenous Australians and to the country's history and morality. In my assessment indigenous Australia embraced the compromise and saw it as foundation for reconciliation as long as the letter and the spirit of the decision was embraced by the country.

Now we have a unilateral intention of infidelity to the compromise on the part of the Federal government. If these people had any sense of the significance of what they propose to do and what important things they desire to tear up and destroy, they would be filled with shame.

MABO AND THE WET TROPICS

Whilst the Native Title Act remains intact (and there is no certainty as to what will become of the legislation in Federal Parliament over the next few months), clearly the consequences of

Mabo and the legislation have implications for tenure and management of Australia's tropical forests, insofar as they are located on lands which may be subject to native title.

Mabo has of course changed the whole outlook on how Australians must now view the environment. The lands of this continent are not wilderness in so far as that term implies terra nullius, lands having no human dimension. The land is not unpeopled. Australia's tropical forests are not vacant lands, they are lands that are likely to be imbued with Aboriginal law which in many cases founds recognition of enforceable native title rights at law.

The Wet Tropics World Heritage Area represents a collection of mainly Crown tenures, with which there are continuing traditional associations. It is likely that native title survives over much of these lands.

The establishment of title to various areas within the World Heritage Area will have implications for its long-term management. The Native Title Act may in some cases prescribe management that may not be consistent with the conservation objectives of the World Heritage Area. There is therefore an imperative for Aboriginal people and conservation authorities to negotiate mutually satisfactory outcomes. It seems to me that the tradeoff must be between recognition of tenure and management rights of indigenous peoples, in return for optimum conservation outcomes. Without such a tradeoff the fact that native titleholders will be placed in the same position of other private landholders within the Area, may have negative consequences for the management of the area that could be avoided if there are negotiations in good faith with Aboriginal groups.

There is an extraordinary complexity and much delay and expense involved if the working out of native title in the Wet Tropics is going to be left to the Federal Court litigation process. There will be a patchwork quilt of tenures and management will be dictated by tenure considerations and not the ecological imperatives.

It is in the interests of all parties for the settlement of native title in the Wet Tropics, including questions of tenure and management, to take place through a comprehensive negotiation process. At the present time there is no facility for such negotiations to occur. The Wet Tropics Management Authority does not have the authority to make decisions in relation to these matters. A negotiation process needs to be established and supported by the Federal and State Governments.

A framework regional agreement could be negotiated at the regional level setting down certain agreed principles between Aboriginal groups and the two governments. The agreement could set out the processes for working through and negotiating, legally binding agreements at the sub-regional or local levels.

It would be folly in my view for a strictly legal approach to be taken. There are to my mind substantial conservation pitfalls as well as pitfalls for Aboriginal people. Let alone the time, cost, uncertainty and the problems that the legal route represents for the interim planning and management of the World Heritage area.

CONCLUSION

Even if by force majeure Mabo and the Native Title Act is amended so that its legal consequences are neutralised, the truth is that the Aboriginal law which runs with the lands within the Wet Tropics World Heritage area and the other tropical forests of Australia, will not thereby be extinguished and go silent.

No matter what the superior law might be made to say, the fact is that the World Heritage area

is imbued with the memory of countless generations, its lands and seascapes are imbued with culture and spiritual meaning, it is land in which there is law. These facts cannot be denied by arbitrary means. These facts have survived and will continue to survive and will have to be eventually reckoned with.