
REFORMING THE REQUIREMENTS OF PROOF: THE AUSTRALIAN LAW REFORM COMMISSION'S NATIVE TITLE INQUIRY

by Lisa Strelein

INTRODUCTION

The 20th anniversary of the commencement of the *Native Title Act 1993 (Cth)* ('NTA'), the legislative response to the High Court's recognition of native title in *Mabo v Queensland [No.2]* (1992) ('*Mabo*')¹, passed in December 2012 with little fanfare. The Commonwealth response was designed to recognise and protect native title from abrogation by the states,² as well as to create an orderly system for the identification of where native title might exist, to determine how native title would be dealt with in the future, and to resolve any implications that recognition may have on other titles and interests. Among the largely procedural provisions of the NTA, the definition of native title in section 223 has come to be understood as setting the parameters for the requirement of proof as to whether native title exists. This specific section of the NTA has been a focus of jurisprudence in the courts, as well as a source of contention in public commentary on the perceived injustices and complexities of the native title system.

Section 223, in part, sets the terms for native title groups and government entering into settlement negotiations, and casts a long shadow over negotiations. By defining native title, section 223 sets the requirements for proving native title and the High Court has said that this is where the inquiry must start if the end sought is a determination that native title exists.³

In 2014, section 223 of the NTA will again be at the centre of public policy and legal scrutiny as the Australian Law Reform Commission ('ALRC') holds an inquiry into, among other things, the requirements of connection 'relating to the recognition and scope of native title rights and interests'.⁴ The ALRC inquiry builds upon a long debate about ways in which the requirements of proof could be reformed, including two private members bills introduced to the Parliament; the most recent in 2013. In particular, the ALRC has been asked to consider various proposals including:

- a presumption of continuity of acknowledgement and observance of traditional laws and customs and connection;
- clarification of the meaning of 'traditional' to allow for the

evolution and adaptation of culture and recognition of 'native title rights and interests';

- clarification that 'native title rights and interests' can include rights and interests of a commercial nature;
- confirmation that 'connection with the land and waters' does not require physical occupation or continued or recent use; and
- empowerment of courts to disregard substantial interruption or change in continuity of acknowledgement and observance of traditional laws and customs where it is in the interests of justice to do so.

As may be evident from this list, the limitations of section 223 have been criticised, not necessarily because of the terms of the definition, but because of the way they have been interpreted and applied. This article focuses on four key limitations that should underpin the ALRC inquiry:

- Section 223 as a statutory definition separates native title negotiation and judicial reasoning from the common law history and principles of justice, including international and comparative law.
- Section 223 has been interpreted by the courts as requiring an unnecessarily complex and high benchmark for proving native title.
- The narrow and reductive interpretation of native title rights, when combined with section 225 has negatively impacted on the scope of the enjoyment of native title.
- The courts' interpretations have unnecessarily been relied upon by state governments in negotiating consent determinations (under the shield of section 87), and the flexibility of the law has been underutilised.

SEPARATION FROM THE COMMON LAW

Section 223 was drafted as a reflection of the common law and was drawn primarily from the judgment of Brennan J in *Mabo*, with a smattering of wording from Deane and Gaudron JJ and Toohey J in the same case. However the Courts have made it clear, particularly after the introduction of the 1998 amendments, that the NTA was the primary driver of any inquiry under the NTA. As a

result, the common law, including the *Mabo* decision, were merely contextual.⁵ In the hands of the Federal Court, whose speciality is interpretation of statute, the process of determining native title has become very much a statutory interpretation exercise.⁶

Why does this matter? Contrary to the intimation from the Courts, native title was not an invention of statute—it is of a different character to land rights in that sense. The law of native title has a long history, beginning as far back as 1608⁷ and traversing the common law concerning conquered and colonised territories.⁸ The history of native title jurisprudence has many less than savoury aspects. Native title is as much a tool of colonisation as it has been a tool for decolonisation⁹ and the tension between these two roles are not evident if the history is masked by statutory re-invention.

Interestingly the courts have drawn a distinction between claims brought under the NTA for rights defined under that Act, and any parallel common law native title that may exist.¹⁰ Indeed this distinction is supported by compensation provision in the NTA that are predicated on the assumption that provisions of the Act may have extinguished or affected common law native title giving rise to liability.¹¹ This makes sense, as the NTA does not extinguish common law native title, but delineates how and where native title will be recognised. The statutory framework should not, however, preclude the development of native title jurisprudence based on principles of justice and non-discrimination.

ONEROUS REQUIREMENTS OF PROOF

Perhaps the most prevalent criticisms of the interpretation of section 223 have been the overly rigorous and detailed inquiry required to establish the elements of proof. Every phrase in section 223 has a series of interpretive tests. Most notably, the words ‘connection’ and ‘traditional’ have resulted in torturous and costly research focused on establishing the continued observance of laws and customs, which have their roots in the pre-existing normative systems and have remained vital through ‘each generation’ since the assertion of British sovereignty.¹² To complicate matters, each state and territory has imposed different guidelines for ‘proving’ native title.

While the courts have acknowledged that certain inferences may be made back beyond living memory,¹³ the full court in *Bodney v Bennell* (2008) (*Bennell*) established a stricter requirement of proof; in particular where written evidence exists that may demonstrate some sort of interruption, proof of continuity in the face of interruption is expected.¹⁴

It was evident in the appeal in *Bennell* that the judiciary had bogged themselves in a quagmire of proof. Since this decision, the judiciary,

interestingly, have been leading the debate on the need for reform in the proof of native title. Notably, Justice French (as he then was) proposed a presumption of continuity of connection that would effectively shift the onus of proof to the State to prove discontinuity, concluding that:

Such a presumption would enable the parties, if it were not to be challenged, to disregard a substantial interruption in continuity of acknowledgment and observance of traditional laws and customs. Were it desired, the provision could expressly authorise disregard of substantial interruptions in acknowledgment and observance of traditional law and custom unless and until proof of such interruption was established.¹⁵

Section 223 has been a source of contention in public commentary on the perceived injustices and complexities of the native title system.

But there are innate risks in this proposal—most importantly, it is based on the somewhat brave assumption that state and territory governments want to reach agreements that native title exists wherever possible.¹⁶ Given the approach that most states have taken to date in robustly defending or testing claims, in practice, it may not reduce the burden on claimants. For example, Queensland assists the development of connection reports by conducting their own research to identify possible interruptions—forced removal, massacres and the like, as well as climactic events, and then asks that connection reports address how native title survived.

Justice North proposed that a presumption of continuity would need to be augmented by a form of estoppel, whereby the State would not be able to rely on its own wrongful acts in order to dispute continuity.¹⁷ The main difficulty with this proposal, apart from relying on the willingness of the State to want to embrace, rather than rebut the presumption, is that it does not change the requirements of proof themselves.

The judiciary has indicated that they want and require a clear indication from the legislature that the nature of the inquiry has changed. Noel Pearson has proposed simply removing the current definition in section 223 altogether and allowing the common law and the courts to define native title.¹⁸ In this way, Pearson hoped that some of the historical and comparative jurisprudence would be used to remove the overreliance of law and custom to introduce more possessory rules for proof. However, given the courts are

largely responsible for the complexity of the interpretation of section 223, there is a question as to whether they would likely take a different route to the course already set if the provision were simply removed.

One option is to clarify or redefine the meaning of 'traditional' with reference to native title, or to remove the term altogether from the section. This reform could overcome the technical meaning that the courts have attached to the word and remove the need to establish that laws and customs have remained 'substantially unchanged'. Tom Calma, former Social Justice Commissioner, proposed a definition of tradition that incorporates a less onerous

notion of laws and customs that are 'identifiable through time'.¹⁹ Yet there remains a strong argument for more radical change to address the problem of the burden of proof.

These issues of construction of section 223 and the presumption of continuity are likely to be the focus of the ALRC inquiry. However, there are two remaining issues this paper will explore in relation to the interpretation of section 223.

USE AND ENJOYMENT OF NATIVE TITLE SECTIONS 223 AND 225

The third problem with section 223 is the interplay between

Paradox of Inequality, 2011

Bronwyn Bancroft

1500mm x 1500mm, Acrylic on canvas



sections 223 and 225, and the impact on the enjoyment of rights and interests once recognised. In the jurisprudence, exclusive possession native title is generally understood to be equivalent to full ownership.²⁰ However, when another interest is identified, the courts have engaged in a process of breaking down the title to identifiable rights and interests, traceable to particular laws and customs. This is in response to the concept of ‘partial extinguishment’, by which any inconsistency results in the yielding of native title rights and interests. Moreover, the process is undertaken incident by incident, parcel by parcel—a process which is time consuming and expensive. Section 225 reinforces this fractious inquiry by requiring a determination of native title to include a description of the rights and interests. While section 225 is not intended to require an exhaustive list, there is a tendency to view the list of rights and interests in a determination as the content of the title. Moreover, the list is often the outcome of negotiation toward a consent determination, in which the State has required a particularisation of the rights and interests more as activities; thus reducing native title to the level of defining the exercise, or use and enjoyment, of native title.

Justice Finn has criticised the developing practice of fragmenting native title rights and interests as unnecessary. Explaining that such an approach results in dilution of the proprietary interest, Finn J argued that it results ‘in the over definition, and subdivision of, individual rights and interests and in the dilution of a proprietary conception of native title.’²¹

Chief Justice French has similarly criticised the fractal mapping of inter-societal allocation of rights and interests.²² Most recently the High Court, in *Akiba v Commonwealth* (2013) (*Akiba*), referred to this as an inappropriate focus on the mode of enjoyment of rights and interests instead of on the rights and interests that underpin the exercise.²³ To this end, there has been an over emphasis on structuring native title as a ‘bundle of rights’ as an imperative rather than as metaphor. In particular, economic and commercial rights have been under-represented in determinations, especially those negotiated by consent.

The ALRC should pay significant regard to the High Court decision in *Akiba*, as it is the most important statement on the current jurisprudence of native title and may have significant influence on the Federal Court and on native title practice. In *Akiba*, the High Court has moved some way toward resolving the issue of the relationship between the right to use resources and engage in commercial enterprise. The ALRC inquiry will also be considering proposals for a stronger legislative clarification of the position in section 223 that native title, by definition, expressly includes commercial use.

There remains a strong argument for more radical change to address the problem of the burden of proof.

USING SECTION 223 AS A SHIELD

The final section 223 challenge is the over-reliance by state governments on the issues raised above to limit the negotiated outcomes of consent determination; and by requiring far too much detail in connection reports.

Section 87 of the NTA requires the court to make a consent determination where it is appropriate to do so. The Commonwealth and the courts have repeatedly encouraged flexibility in the negotiation of consent determinations and, while both parties must properly consider the proposed determination, it is appropriate that the standard of proof (that is, the amount of evidence required) should be less than that required at trial.²⁴

There has been a failure to utilise the flexibility available in the law, but to what end? The Victorian response to the constraints of section 223—the introduction of an alternative scheme in the form of the *Traditional Owners Settlement Act 2010* (Vic) (‘TOSA’)—reveals the fact that when native title process *doesn't* resolve Indigenous peoples claims, those claims for land justice simply do not disappear.

CONCLUSION

The specific proposals referred to the ALRC have, in some form, been adapted in two private members bills before the Commonwealth Parliament; most recently, the Seiwart (The Greens) Native Title Amendment (Reform) Bill 2011, which was referred to a parliamentary committee in 2013. This Bill lapsed with the proroguing of the Parliament. Any reforms to the NTA in response to the ALRC inquiry will be the prerogative of the current government. Prior to the election, the Liberal and National parties showed no aversion to considering changes to the NTA that would lead to more efficient processes or toward providing a stronger economic base for Indigenous communities. How this openness might translate in the context of the requirements of proof has not been tested.

Native title has the potential to be an empowering process and deliver outcomes that promote the enjoyment of rights, economic potential and cultural resurgence. In order to achieve this, a clear and economically valuable property right that

supports Indigenous governance and traditions and long term prosperity must be provided.

Lisa Strelein is the Director of Research at the Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS). Among her many publications and contributions to native title debates, her book 'Compromised Jurisprudence' remains a pivotal text in native title law. Dr Strelein is the Convenor of the National Native Title Conference, Australia's largest Indigenous policy conference.

1 *Mabo v Queensland [No.2]* (1992) 175 CLR 1.

2 At the same time as the Native Title Act was being drafted, the Western Australian Government was drafting its own legislation to extinguish native title throughout that state; *Western Australia v Commonwealth* (1995) 183 CLR 373.

3 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, [32].

4 In August 2013 the Australian Law Reform Commission received a reference from then Attorney General, the Hon Mark Dreyfuss QC MP. The ALRC inquiry is being led by Professor Lee Godden. The terms of reference can be found at <<http://www.alrc.gov.au/inquiries/native-title-act-1993/terms-reference>>. A second term of reference seeks advice on 'any barriers imposed by the Act's authorisation and joinder provisions to claimants', potential claimants' and respondents' access to justice'. This article deals with only the connection reference.

5 See for example: *Members of the Yorta Yorta Aboriginal Community v Victoria*, (2002) 214 CLR 422, 31-2; *Western Australia v Ward* (2002) 213 CLR 1, 16.

6 Lisa Strelein, 'A Captive of Statute' (2009) 93 *Reform (Native Title)* 48-52.

7 *Calvin's Case* (1608) 7 Co. Rep. 1a; See also *The Case of Tanistry* (1608) Davis 28; 80 ER 516; *Blankard v Galdy* (1693) 90 ER 1089; and *Campbell v Hall* (1774) 98 ER 848, 895-6.

8 For a detailed history see Robert A Williams, Jr, *The American Indian in Western Legal Thought* (Oxford University Press, 1990).

9 L Strelein and T Tran, 'Building Indigenous Governance from Native Title: Moving away from 'Fitting' into Creating a Decolonised Space' (2013) 18(1) *Review of Constitutional Studies* 19.

10 *Western Australia v Ward* (2002) 213 CLR 1, 16; *Bodney v Bennell* (2008) 63 FCAFC 136-7; Strelein, *A Captive of Statute*, above n 6.

11 *Native Title Act 1993* (Cth) s 23J.

12 *Bodney v Bennell* (2008) 63 FCAFC 70.

13 *Gumana v Northern Territory* (2005) 50 FCAFC 50 195.

14 *Bodney v Bennell* (2008) 63 FCAFC 70.

15 Robert French, 'Lifting the Burden of Native Title: Some modest proposals for improvement' (2009) 93 *Reform (Native Title)* 10, 13.

16 Justice A M North & Tim Goodwin, 'Disconnection – the Gap between Law and Justice in Native Title: A Proposal for Reform' (Paper delivered at the 10th Annual Native Title Conference, Melbourne, 4 June 2009) 16; For further discussion of state attitudes to proof of connection see Australian Human Rights Commission, *Native Title Report 2009* (2009) 88-93.

17 Justice A M North & Tim Goodwin, 'Disconnection – the Gap between Law and Justice in Native Title: A Proposal for Reform' (Paper delivered at the 10th Annual Native Title Conference, Melbourne, 4 June 2009) 15.

18 Noel Pearson, 'Land is Susceptible of ownership' in *Up From the Mission: Selected writings* (Black Ink Books, 2009).

19 Australian Human Rights Commission, *Native Title Report 2009* (2009) 85.

20 *Neowarra v Western Australia* (2004) 189 FLR 249; *Bodney v Bennell* (2008) 63 FCAFC 158.

21 Paul Finn, 'Mabo into the Future' (Paper presented at the Native Title Conference, Townsville, 6 June 2012) 7.

22 *Sampi v Western Australia* (2005) 777 FCAFC, 954.

23 *Akiba v Commonwealth of Australia* (2013) 300 ALR 1.

24 For a brief exposition of the exercise of the s87 power by the Court in consent determinations see *Jangga People v Queensland* (2013) 1082 FCAFC.

Little Ray of Sunshine, 2006

Bronwyn Bancroft

Linear Linkages

1500mm x 1500mm, Acrylic on canvas

