

# GONGS, GREMLINS AND GLITCHES

## Native Title 20 years on, at risk of losing its way?

BRYAN KEON-COHEN

On Australia Day 2013 Bonita Mabo, Eddie Mabo's widow, was awarded Officer in the General Division of the Order of Australia (AO) for 'distinguished service to the indigenous community and to human rights as an advocate' for Indigenous peoples. Like her husband's posthumous Australian of the Year award, announced exactly 20 years earlier by *The Australian* newspaper, this recognition by a grateful nation was richly deserved. Bonita, now 70, lives near Townsville. Despite her age and failing eyesight, she is still an 'extremely vocal advocate for South Sea Islanders' from whom she is descended.<sup>1</sup> Sadly, such admirable advocacy remains necessary in many areas, including the search for Indigenous land justice.

Today the nation's native title regime — triggered by *Mabo (No 2)*,<sup>2</sup> and introduced through the heavily-negotiated *Native Title Act 1993* (Cth) ('NTA') plus a plethora of state and territory complimentary legislation,<sup>3</sup> and with its potential further restricted by several High Court decisions since 1992<sup>4</sup> — is in place, is functioning, does deliver gongs (native title rights and negotiated agreements) to a select few, but is definitely beset by gremlins and is, in the view of some, in danger of descending into ga-ga-land.

In *Mabo (No 2)* the High Court set out a new common law principle for Australia: that the traditional rights and interests of indigenous people to their country may be, in appropriate circumstances, recognised as legally enforceable. Now, two decades on, where are we at? What has the past twenty years revealed about the extent to which Australia's social, political and legal structures can accommodate change, especially the 'revolutionary' (to some) notion that indigenous citizens enjoy traditional property rights of a profound nature at common law, not only by the largesse of governments and their electors.

For me, the short answer is a 'mixed bag' containing significant gains but with many losses along the way. On the positive side, the NTA, a national legislative scheme, commenced operation on 1 January 1994. The NTA seeks to recognise and protect native title. It established a system whereby communities may claim title through mediation and court processes, and provides 'rights to negotiate' for native title claimants and owners entitling them to negotiate terms and conditions whereby the rest of the world — local governments, miners, assorted developers, sporting clubs, commercial fishermen — may enter traditional land and pursue the rest-of-the-world's activities. These are valuable gongs.

The NTA, as is well known, suffered a serious glitch in 1998 (some argue it was effectively gutted) when it was significantly amended, mainly against the interests of claimants. Following the High Court's *Wik* decision,<sup>5</sup> the Howard government introduced amendments based on its 'ten point plan'. Further minor amendments have been legislated since then.<sup>6</sup> In addition, Victoria introduced an entirely new settlement scheme that in substance by-passes the NTA,<sup>7</sup> and more amendments were proposed by the former federal Attorney-General, Nicola Roxon, in June 2012. These are discussed below.

Still on the positive gong side, the native title jurisdiction has been busy since the NTA became operative in 1994. As at 3 June 2012, 475 unresolved claims for a determination of native title under the NTA had been filed and 185 had been determined. Of these, 141 succeeded in whole or in part (covering about 16 per cent of the continent) while 44 had failed. Significantly, of the 141 successful claims, 70 per cent were determined by consent (the highest gong on offer) thus avoiding a contested trial.<sup>8</sup>

In terms of claims for compensation under the NTA, the system is a particularly difficult legal quagmire. Here, when native title originally enjoyed by the claimants' ancestors has been extinguished or impaired by acts of the Crown — for example, granting a fee simple title over the relevant area — the native title regime provides a complex scheme that, theoretically, allows for compensation payments to traditional owners for such extinguishment or impairment. As of May 2012, of the eight compensation claims filed, none have succeeded.<sup>9</sup> This sub-jurisdiction has proven almost unworkable, and requires wholesale reform.<sup>10</sup> My suggestion — to accept that native title was vested in the original occupants from day one of colonisation (as in New Zealand), and compensate for extinguishment by the Crown thereafter — is considered below.

Perhaps the most successful aspect is the NTA's focus on agreement-making as an alternative to litigation to (1) process native title claims and (2) facilitate access to and use of traditional land by third parties. As to claims, the 2009 amendments to the NTA<sup>11</sup> require the Federal Court to refer all claims to mediation, conducted by the National Native Title Tribunal ('Tribunal'). The Tribunal, a central element in the whole regime, may be classified as a gong or a glitch, depending on who's talking. Among many administrative roles, it conducts mediations on behalf of the Court and reports back to it on progress. However, experience shows that

mediations can last several years, be exhausting, and cause significant disputes both within the claimant community, and between it and its traditional neighbors. These can concern the precise location of traditional boundaries (a level of precision demanded not by traditional owners, but by respondents), who should claim what country, and who enjoys what traditional rights and interests in what areas.<sup>12</sup>

Another realm of agreement-making where much has been achieved lies in the 'future acts' and 'right to negotiate' provisions. Under the NTA, once a claim is filed with the Court, and after it passes an onerous 'Registration test' applied by the Tribunal, the claimant group is accorded 'rights to negotiate' concerning the future use of the claimed land. Thus, to 30 June 2011, over 500 such agreements — called Indigenous Land Use Agreements ('ILUAs') — had been finalised and registered with the Tribunal.<sup>13</sup> These too are true gongs and, especially in mining regions, can be made of solid gold.

Mediated 'consent' determinations about the existence of native title (often accompanied by side-agreements concerning a host of non-native title matters), and the signing of ILUAs, with negotiated benefits flowing to the relevant community, are often seen as a win-win in an otherwise fraught area. Mediated consent determinations can facilitate better relationships promoting co-habitation on the land, and avoid costly, protracted, uncertain and exhausting litigation.

But among all these achievements — whether they are labelled gongs or mere glitches — is a serious downside. Representatives of all stakeholders — governments, third-party users, judges of the High and Federal Courts, and most importantly, Indigenous applicants — are, for various reasons, convinced that central features of the scheme have gone ga-ga. These critics are disappointed and frustrated with the legislative scheme and their experience under it. For some years, they have urged the federal government to amend the NTA to overcome numerous log-jams. So far, save for tinkering around the edges, no government since the Howard amendments of 1998 has done so. As is well known, those amendments and their accompanying 'Ten Point Plan' promised, and achieved, 'Bucket loads of extinguishment' in the infamous words of the then Deputy Prime Minister Tim Fischer.<sup>14</sup> In its 2010 Native Title Report, the Australian Human Rights Commission complained:

The Australian government has introduced some welcome reforms to the native title system in recent years. ... However, [it] has failed to address the most significant obstacles ... to the full realization of [indigenous] rights. These ... include the onerous burden of proving native title; the injustices of extinguishment, and other impediments to negotiating just and equitable outcomes.<sup>15</sup>

Thus, since 1998, the NTA's objectives — to recognise and protect native title and to provide an efficient and fair system of processing claims — have been progressively abandoned and distorted into a system notable mainly for its ability to frustrate, rather than

facilitate, claimants. So, how has this national failure come about?

Several factors are at play. First, governments of all persuasions, at state and federal levels, have in the main continued to oppose native title claims, contesting them at every point despite their supportive political rhetoric. Tactics such as technical objections, requests for more and more 'connection' evidence as a pre-requisite to mediation, refusal to accept traditional evidence save after vigorous cross-examination, are often deployed in commercial litigation. But when such tactics are utilised by governments in native title claims, they are usually violently inconsistent with the spirit of the NTA, let alone the responsible Ministers' publicly stated policies. These cynical practices at the coal-face (to seasoned observers, merely normal political hypocrisy), are exacerbated by various bureaucracies in lock-step, who contribute significantly to the current quagmire. The whole system has on this view gone ga-ga, that is to say, degenerated into complexity and grid-lock. Claims typically last five to ten years and many claimant groups feel yet again oppressed by colonisers, their hopes dashed. Many claims have been denied for technical legal reasons (including, for example, to the community upon whose land Uluru stands<sup>16</sup>) and even when a claim succeeds, the lengthy drawn-out process means some (or many) of the community's elders have passed away (like Eddie Mabo) prior to seeing final success. All of this makes a mockery of the stated objectives of the NTA — to facilitate, not frustrate, the lawful recognition of native title for indigenous owners. The current federal Labor government has shown little interest in rectifying this continuing scandal. Perhaps the new federal Attorney-General, Mark Dreyfus QC, might be more pro-active and reformist than his predecessor. One can only hope so.

Secondly, in several decisions since 1992, the High Court has interpreted key provisions of the NTA in a manner never contemplated by Parliament, thus raising significant new evidentiary and legal obstacles in the path of claimants. The evidential burden upon claimants is now very onerous. The onus of proof to be discharged in order to satisfy the tests set out in NTA s 223 is considerable. For example, in the *Yorta Yorta* case, the Court introduced a requirement that the claimants' ancestral community must reach back to the claimed land as at 1788, and must establish they have been a 'normative society' governed by 'normative rules' of custom and tradition in accord with the *current claimant community*.<sup>17</sup> In particular, the current community must demonstrate a 'continuing connection', founded on its customs and traditions, to the claimed land, being a connection not 'substantially interrupted' since settlement. Thus, in closely settled regions (such as the entire eastern seaboard, where dispossession and cultural destruction since 1788 has been greatest), today's surviving communities which have suffered most have least chance of succeeding in 'proving' their native title to the satisfaction of the courts. This remains a glaring problem productive of much despair and injustice. This truly is ga-ga-land going nowhere, and demands substantial reform.

### REFERENCES

1. Andrew Fraser, 'Bonita's battle as vital as Eddie's', *The Weekend Australian* (Sydney), 26-7 January 2013, 19. Bonita Mabo's family was 'black-birded' from islands around Vanuatu to work in Queensland cane fields. She was born in Halifax, near Ingham, Queensland.
2. *Mabo v Queensland (No 2)* (1992) 175 CLR 1. See also, Bryan A Keon-Cohen, *Mabo in the Courts: Islander Tradition to Native Title: A Memoir* (ASP, 2011) (out of print and revised edition forthcoming, *A Mabo Memoir: Islan Kustom to Native Title* (2013), available for order <www.bryankeoncohen.com>).
3. See Butterworths *Native Title Loose Leaf Service* (3 Vols) for a comprehensive annotated compilation.
4. See especially *Yorta Yorta v Victoria* (2002) 214 CLR 422, where the author appeared for the plaintiffs at a lengthy trial.
5. *Wik Peoples v Queensland* (1996) 187 CLR 1.
6. See especially *Native Title Amendment Act 2009* (Cth); *Native Title Amendment Act (No 1) 2010* (Cth).
7. *Traditional Owner Settlement Act 2010* (Vic).
8. National Native Title Tribunal, *Annual Report 2010-2011*, pp 23-4; see also Marcus Priest, 'Mabo's legacy: Joy and sorrow', *Weekend Financial Review* (Sydney), 2-3 June 2012, 50.
9. For one such failure and the most substantial judicial discussion to date of this complex area, see especially *Jango v Northern Territory* (2006) 152 CLR 150.
10. Tom Calma, 'Native Title in Australia: Good Intentions, a Failing Framework?' in ALRC *Reform: Native Title 2009* (Issue 93), 7.
11. *Native Title Amendment Act 2009* (Cth).

12. Dubbed 'lateral violence' by Commissioner Mick Gooda in his Australian Human Rights Commission, *Native Title Report 2011*, 74-115.

13. These cover about 1.2 million square km, or 16 per cent of the continent. See National Native Title Tribunal, *Annual Report 2010-2011*, 23-4.

14. That same politician, in a burst of gross irresponsibility, proceeded to insult the High Court judges who delivered the *Wik Decision* (holding that native title could co-exist with pastoral leases) referring to them as a 'bunch of pissants.' Fischer was subsequently forced to apologise to the Chief Justice.

15. Aboriginal and Torres Strait Islander Social Justice Commissioner, *2010 Native Title Report* (Australian Human Rights Commission, 2010) 13.

16. *Jango v Northern Territory* (2006) 152 CLR 150.

17. *Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422.

Third are the Howard government's 1998 NTA amendments, mentioned above. These damaged claimants' interests and benefited those opposing the very notion of native title, many of whom still lurk, alive and vocal, in Australia's community-trash-can.<sup>18</sup> These 1998 amendments, coupled with state complementary legislation, 'validated' additional extinguishment of native title by reason of tenures issued by governments, watered-down the 'right to negotiate' provisions by allowing states to introduce exemptions, and introduced a tougher 'registration test' being the gateway for claimants to achieve 'rights to negotiate'. None of this has been corrected by subsequent governments. All of it was unnecessary, fuelled by exaggerated fears of 'uncertainty', and was contrary to the spirit of the original NTA.

In recent years, many have called for substantial reforms, including the Australian Human Rights Commission, Indigenous leaders, former Prime Minister Paul Keating who was responsible for the original NTA, the current Chief Justice of the High Court, Robert French, and the Greens. Perhaps the most important suggestion is the Chief Justice's call, in effect, to reverse the onus of proof now required by the NTA and imposed by the Federal Court. Under these reform proposals, essentially, a rebuttable presumption that native title to the claimed area had continued to exist since 1788 would apply. To rebut that presumption, respondents (for example, governments) would bear the onus of proving, by evidence, significant disruption to that continuity.

Governments and those who elect them need not worry as 20 years of discharging this onus has left other serial respondents (such as governments and miners) both skilled and very experienced. Land Departments hold the relevant land-tenure information recording tens of thousands of grants made by the Crown to colonisers since 1788. Many of these grants (an example being a commercial lease) are now 'deemed' to extinguish native title by force of provisions of the original NTA and the 1998 amendments. As the last 20 years amply demonstrate, respondents, especially governments, happily use this information — the law allows them to do so — with devastating effect for claimants.

To their credit, the Greens introduced a Bill into the Senate in 2011 proposing worthy reforms (such as allowing prior extinguishment of native title rights to be ignored, strengthening the 'good faith' negotiation requirements, and clarifying that native title rights can include commercial rights).<sup>19</sup> On 12 May 2011, the Bill was referred to the Senate Legal and Constitutional Affairs Committee. It reported in November 2011 recommending, for a variety of reasons — largely about concerns with substantial 'architectural' changes to the NTA and inadequate compensation — that 'it was not persuaded that the Bill would achieve its stated objectives' and that the Senate 'not pass the Bill'.<sup>20</sup> Back to square one.

In New Zealand, following the *Treaty of Waitangi* (1840), a Maori community's land rights are assumed.

The only questions for the Waitangi Tribunal are: what historical acts of the Crown have extinguished or impaired that title? And how much compensation should be paid to today's Maori traditional owners? That regime has not caused New Zealand to disappear beneath the Pacific Ocean nor implode, economically or otherwise. The basis of this scheme was established upon first settlement by the same Imperial power — Great Britain — that sixty years previously had colonised Australia and adopted the now discredited doctrine of *Terra nullius*. No gongs for finding an explanation: might is right. The Maori mounted fierce, organised and violent campaigns of resistance, forcing the British to negotiate. Hence the *Treaty of Waitangi* (1840). Aboriginal Australia was no less sophisticated, resistive and courageous, but less successful at the only language the colonisers feared: armed conflict.

In Australia, 225 years after settlement, and 20 years and 3 days after *Mabo (No 2)*, former Attorney-General Nicola Roxon announced at the most recent national native title conference that her government had decided to pursue several 'incremental reforms' designed to 'improve the system's efficiency'. These would introduce 'requirements for good faith negotiation'; make ILUAs more flexible; allow parties to agree to ignore historical extinguishment to parks and reserves; and exempt payments made under native title agreements from income and capital gains tax.<sup>21</sup> Nothing was said about a major review, or reversing the onus of proof.

Given the announced federal election in September 2013, one can anticipate that no further reforms will be announced in the life of this federal Parliament. Unhappily for all stakeholders, experience further suggests that it is unlikely native title reform will be a significant election issue — or an issue at all. Such issues are too hard, too divisive, risk triggering the 'race card' and (doubtless focus-group polling shows) there are no votes in it. Meanwhile, some gongs continue to be awarded, glitches continue to aggravate, and vast areas of the country remain ga-ga-land — that is, un-claimable, inaccessible or excluded as a source of compensation to current Indigenous owners due, simply, to government policy and legislation.

Dr BRYAN KEON-COHEN AM QC practices law at the Victorian Bar and was junior counsel in *Mabo (No 1)* & *(No 2)* 1982 – 92; see <[www.bryankeoncohen.com](http://www.bryankeoncohen.com)>. Orders for the author's book *A Mabo Memoir* may be sent to <[bkccchambers@optusnet.com.au](mailto:bkccchambers@optusnet.com.au)>.

© 2013 Bryan Keon-Cohen

18. See, eg, the continuing anti-land-rights campaign conducted by the magazine, *Quadrant*.

19. See the private Senator's Bill, introduced by Senator Siewert on 21 March 2011, *Native Title Amendment (Reform) Bill 2011* (Cth).

20. Senate Constitutional and Legal Affairs Committee, Parliament of Australia, *Native Title Amendment (Reform) Bill Report* (November 2011) [3.82] & [3.92], respectively.

21. Nicola Roxon, 'Echoes of Mabo' (Paper presented at ALATIS Native Title Conference, Townsville, 6 June 2012).