

LEXISNEXIS 4th ANNUAL NATIVE TITLE SUMMIT CONFERENCE

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“Native Title 20 years on: Rights, Responsibilities and Reform”¹

by

Dr Bryan Keon-Cohen AM QC²

In May 1982 five Murray Islanders issued a writ in the original jurisdiction of the High Court. They were Eddie Mabo, Celuia Mapo Salee³, Revd Dave Passi,⁴ his elder brother Sam Passi⁵ and James Rice.⁶ They sued on their own behalf, and “on behalf of their respective family groups” – ie, a representative action from day one. Their litigation – *Mabo* – was, in one sense, unremarkable: an action at common-law about interests in property that sought declarations, injunctions and damages. *Mabo* visited the High Court twice during a decade of forensic trench warfare, and resulted in a profound declaration that established native title.⁷ After all this effort, the High Court announced a new principle: that the common law of Australia, in appropriate circumstances, recognized as legal enforceable rights, the traditional rights and interests of indigenous people to their country.

When the High Court delivered its judgment in *Mabo (No 2)* on 3rd June 1992, I appeared for just two remaining plaintiffs - Dave Passi and James Rice – to take judgment. Over the decade, of the original five, two had died (Celuia Mapo Salee and Eddie Mabo), and a third had withdrawn and thereafter became unwell (Sam Passi). But in another sense, the plaintiffs had expanded dramatically. Following discussion with the Bench (especially Justice William Deane) on day three of the final hearing in May 1981, the representative action was re-cast and enlarged, to become an action by the plaintiffs on their own behalf, and on behalf of the entire “Meriam Community” – whoever they might be.⁸ This very late amendment to the pleadings was reflected in the High Court’s final order:

¹ I record my thanks to Alexandra Galanti and Erik Dober, law students, La Trobe University, for their invaluable research assistance. Any errors remain my own. This paper is copyright and may not be reproduced in any form without my prior written permission.

² Member of the Victorian Bar; junior counsel in *Mabo (No 1) & (No 2)* 1982 – 92.

³ Eddie Mabo’s aunt, an elderly lady in 1982 who died, prior to the trial commencing, in 1985.

⁴ Anglican Minister serving on Murray Island and member of an influential family; he discontinued in October 1986, one week prior to the trial commencing. He was re-admitted as a plaintiff, by order of the trial judge, after opposition from Queensland and legal argument, in 1989.

⁵ Dave’s elder brother, former Council Chairman. He too discontinued with Dave in October 1986, suffered a mild heart attack, gave limited evidence for the plaintiffs in 1989, but did not re-join as a plaintiff.

⁶ School teacher, ex Council Chairman.

⁷ See *Mabo v Queensland (No 1)* (1988) 166 CLR 186; (“*Mabo (No 1)*”); *Mabo v Queensland (No 2)* (1992) 175 CLR 1 (“*Mabo (No 2)*”)

⁸ See B A Keon-Cohen, *Mabo in the Courts: Islander Tradition to Native Title: A Memoir* (ASP, 2011, 2 Vols) for these and other propositions. A 2nd edition is being prepared with new publishers. Order forms may be obtained only from the author, at bkcchambers@optusnet.com.au. The total number of people comprising the “Meriam Community” is unknown. At any one time, 200 – 300 live on the island, with many more living on the mainland.

“... declare that... the Meriam people are entitled as against the whole world to possession, occupation, use and enjoyment of the Murray Islands ...”⁹

After the Court adjourned, I returned to the 6th floor of the building and rang Murray Island on the community’s only available phone at that time – a public phone booth located outside the Council Chambers - to break the news. A lady answered, screamed with delight, and headed off down the beach-side road yelling “We won! We won!” leaving the receiver – and me – dangling in the tropical breezes. I’m told the Murray Islanders partied long and hard that night.

What Rights? – or – So Where’s the Party? That was 3rd June 1992. Twenty years on, how’s the party going? What is the state of play concerning native title processes across the nation? What, if anything, has the past twenty years revealed about the ability of Australia’s social, political and legal systems to accommodate radical change, especially the notion that our indigenous citizens may enjoy traditional property rights to areas of lands and seas, not by the largesse of governments and parliaments, but of a more profound nature founded, whether the community and its politicians like it or not, in Australian common law?

The short answer is: a very mixed bag: some euphoria but also many headaches, hangovers, and considerable heartache. We have seen both significant gains and many losses along the way. On the positive side *we do have* a national legislative scheme supposedly intended to recognize and protect native title, and “to establish a mechanism for the just and proper ascertainment of native title rights and interests”.¹⁰ However, as is well known, the NTA was significantly amended, delivering “Bucketloads of extinguishment” in 1998 following the High Court’s *Wik* decision, ie, the Howard Government’s “ten point plan”.¹¹ The NTA has been amended, in minor ways, since then;¹² Victoria has brokered an entirely new settlement scheme by-passing the NTA altogether;¹³ and more amendments have been proposed by the Greens, and very recently by Attorney-General Nicola Roxon which I have described as “welcome fiddling around the edges, but fiddling none the less”.¹⁴ These are discussed below.

During these twenty years, still on the positive side, as at 3 June 2012, 475 unresolved claims for a determination of native title had been filed. 185 had been determined. Of these, 141 succeeded, in whole or in part (covering about 16% of the continent) while 44 failed.¹⁵ Of more significance, perhaps, is that of the 141 successful claims, 70% were determined by agreement.

⁹ *Mabo (No 2)* p 217. Damages and restraining orders were not sought before the High Court. The plaintiffs had led no relevant evidence, and counsel had enough to contend with, focusing on the issues of principle.

¹⁰ *Native Title Act 1993* (Cth) (“NTA”) s 3 (objects) and preamble.

¹¹ See *Wik Peoples v Queensland* (1996) 187 CLR 1; and comments of the then Deputy Prime-Minister, Tim Fischer.

¹² See especially *Native Title Amendment Act 2009* (Cth) which, inter alia, empowered the Federal Court to manage native title claims, especially mediation: see NTA s 86B(1); *Native Title Amendment Act (No 1) 2010* (Cth) which creates a new future act process for construction of public housing for communities on indigenous held land: see Australian Human Rights Commission *Native Title Report* (“AHRC”) 2011 p 36.

¹³ See *Traditional Owner Settlement Act 2010* (Vic).

¹⁴ Author’s letter, *Australian*, 7/6/2012, p

¹⁵ See NNTT *Annual Report 2010-2011*, pp 23-24; Marcus Priest, “Mabo’s Legacy: Joy and Sorrow: *Weekend Australian Financial Review*, 2-3/6/2012, p 50.

In addition, eight claims for compensation had been filed but as at June 2012, none had succeeded.¹⁶ In Social Justice Commissioner Tom Calma's words: "The compensation provisions [of the NTA] have ... failed dismally."¹⁷ He cited *Jango*¹⁸ as the leading example:

*"In 2006, applicants who primarily represented the Yankunytjatjara and Pitjantjatjara people, claimed compensation for extinguishment ... in [and around] Yulara. Yulara ... is a town which sits in the shadows of Uluru. Their claim for compensation was denied. If the traditional owners of the red centre of this country, an area which most Australians see as the heart of Indigenous Australia, cannot gain native title – let alone compensation – then where will Indigenous people be able to succeed?"*¹⁹

Indeed, when it comes to "just terms" compensation mandated by *Constitution*, s 51(31) and the NTA, after 20 years, nobody knows, even in terms of guiding principle, how extinguishment or impairment translates into dollar numbers.²⁰

Unquestionably the scheme's most successful aspect is its focus on agreement-making as an alternative to litigation when processing native title claims and in regard to third parties accessing and using claimed land. As to claims, amendments to the NTA in 2009²¹ require the Federal Court to refer all claims to the NNTT for mediation. However, these mediations are no walk in the park. The Tribunal reports that the average time for claims determined by consent was 71 months (almost six years) whereas for litigated determinations, the average was 84 months (seven years).²² Clearly, reaching agreement can be as time-consuming, costly and exhausting as litigation. Further, this process, experience now shows, can all too often trigger significant disputes both within a claimant community, and between it and its traditional neighbours – dubbed "lateral violence" by Commissioner Mick Gooda in his latest report.²³ Issues concerning the precise location of boundaries (requiring 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 are frequent candidates for trashing the party.

Victoria Parties Next Door: One of the most successful agreement-making exercises – albeit outside of, and as an alternative to the NTA – has arisen in Victoria under its new Traditional Owner Settlement legislation – "the first state to achieve the sort of true land justice that was intended by the NTA".²⁴ Announcing the Victorian Native Title Settlement Framework in June 2009, the Attorney General, Rob Hulls, following four years of negotiations, spoke of:

*"... a partnership between the state and traditional owners [that] has produced an out of court alternative to the conventional [ie, NTA] process, the Victorian Native Title Settlement Framework."*²⁵

¹⁶ See, for one such failure and the most substantial judicial discussion to date of this complex area, *Jango v Northern Territory* (2006) 152 CLR 150.

¹⁷ T Calma, "Native Title in Australia: Good Intentions, a Failing Framework?" *ALRC Reform: Native Title 2009* (Issue 93, 2009) p 7.

¹⁸ *Jango v Northern Territory* (2006) 152 CLR 150; [2006] FCA 318.

¹⁹ T Calma, "Native Title in Australia: Good Intentions, a Failing Framework?" *ALRC Reform: Native Title 2009* (Issue 93, 2009) p 7.

²⁰ See B A Keon-Cohen, "Compensation and Compulsory Acquisition under the Native Title Act 1993" (2002) 28 *Mon L R* 17 – 58.

²¹ See *Native Title Amendment Act 2009* (Cth).

²² *NNTT Annual Report 2010 – 2011*, p 25.

²³ *AHRC 2011 Ch 2 pp 74 – 115*.

²⁴ See *AHRC, Native Title Report 2009*, p 47.

²⁵ R Hulls, Speech to AIATSIS Native Title Conference, Melbourne, 4/6/2009.

Amongst the Framework's objectives, it intends to

*"... establish a streamlined, expedited, and cost-effective approach to settling native title claims by negotiation, resulting in equitable outcomes consistent with the aspirations of traditional owners and the state."*²⁶

In 2010 the facilitating legislation was enacted - the *Traditional Owner Settlement Act 2010* (Vic) - reviving the party in that state. Thus, on 22 October 2010 the first settlement "package" was finalized when the Federal Court issued a consent determination arising from the Gunaikurnai people's claim, accompanied by the signing of a *Recognition and Settlement Agreement*, enabled by the new legislation. In the result, traditional ownership to some 22,000 sq km of East Gippsland was recognised.²⁷ The package included:

*"... a determination that native title exists over land and water ... and a Recognition and Settlement Agreement (an ILUA) the first under the Victorian ... Framework. That agreement includes provision for the grant of Aboriginal title [a Victorian title created by the Settlement legislation] to 10 parks and reserves ... to be jointly managed by the Gunaikurnai people and the State Government under a joint management plan."*²⁸

Similar settlements of native title claims under this alternative scheme have been achieved in Victoria including for the Yorta Yorta people who, famously, failed to satisfy the Federal and High Courts that their claimed native title rights to large areas of northern Victoria and the Riverina had not been "washed away by the tide of history."²⁹

Another realm of agreement making where much has been achieved across the nation lies in the NTA's future act regime and the abovementioned "rights to negotiate." To 3 June 2012, according to media reports, "almost 600" ILUAs and "thousands more private deals with companies" have been finalized.³⁰

Headaches, Hangovers and Heartache But amongst all these achievements is a serious down side: for most, the party is over. Indeed, many communities complain that it never started. Twenty years on we can say, without any doubt, that native title rights are unattainable for many indigenous communities, such that the former regime of denial and injustice remains securely in place. This applies, especially unjustifiably, to those communities most impacted by colonization along the eastern seaboard of the continent. The destructive impact upon traditional culture and connection to country since 1788 of policies and legislation that enabled dispossession and settlement (not to mention the removal of children from their communities) coupled with the extensive validation of Crown grants – especially "intermediate period acts" – achieved by the

²⁶ Victorian Department of Justice, *Objectives of the Native Title Settlement Framework*, (June 2009) cited at AHRC 2011 p 48.

²⁷ See *Mullett on behalf of the Gunai/Kurnai People v Victoria* [2010] FCA 1144 (22/10/2010, North J). After much backsliding by Canberra, the Victorian and Federal governments each contributed \$6 million towards the \$12 million settlement package.

²⁸ NNTT *Annual Report 2010 – 2011* p 27; AHRC 2011, pp 38-40.

²⁹ See B A Keon-Cohen & P Seidel, "The Yorta Yorta Native Title Claim: Litigation, Negotiation and Partial Settlement, 1994 – 2012 and Continuing" in T Bauman & L Glick (eds) *The Limits of Change: Mabo and Native Title 20 Years On* (AIATSIS, 2012) 242 – 262 ("Limits of Change 2012").

³⁰ Marcus Priest, "Mabo's Legacy: Joy and Sorrow," *Weekend Australian Financial Review*, 2-3/6/2012, p 50. As at 30/6/2011 the figure was 497 registered ILUA's: see NNTT *Annual Report 2010-2011*, p 23. An ILUA is an Indigenous Land Use Agreement negotiated under the NTA by claimants and those seeking to access and use traditional land.

NTA and compounded by the 1998 *Wik* amendments, means that through no fault of their own, such claimants are entirely shut out of the promised benefits of *Mabo*. The well-known historical dispossession and many injustices perpetrated upon the original occupiers – the “darkest aspect of the history of the nation” spoken of by Gaudron and Deane JJ in *Mabo (No 2)*³¹ - now compounded by a second wave of dispossession constituted by the failings of the native title scheme, give impetus for calls for both radical change, and claims in the conservative press the *Mabo* has produced nothing but “collective misery”.³² Indeed, in its submissions to a Senate Committee concerned with reversing the onus of proof in claims, the NNTT considered that requiring a government party to argue that “continuity had effectively been broken because of actions that in our modern human rights climate would be considered abhorrent, eg, genocide or other breaches of international human rights law” might achieve “positive behavioral changes” in government parties”, ie, might encourage State respondents to accept a lower standard of proof.³³

Almost without exception,³⁴ all stakeholders – governments, third-party users, judges of the High Court and Federal Court, and most importantly, indigenous applicants - are, for various reasons, critical, disappointed, and frustrated with the legislative scheme and their experience under it. All of these players, for a decade or more, have urged the Federal government to amend the NTA to overcome numerous log-jams in the system. To date, save for tinkering around the edges, and despite Attorney-General Roxan’s announcements in Townsville on 6th June (discussed below) no government since the Howard *Wik* 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 Fisher.³⁵ In 2010, 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.”*³⁶

Thus, since 1998, the NTA’s objectives – to recognize 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. How has the party imploded? And how should it be re-ignited? More particularly, can we rely on the invited guests, or should we throw the doors open and let the community rush in?

Who’s Responsible? Who stopped the music? Several factors are at play. The first headache to record is that governments of all persuasions, at state and federal levels, despite their high-sounding rhetoric, have, in the main, continued to oppose native title when in litigation mode, contesting them at every point. Government lawyers (and those of other respondents) raise, as lawyers do, technical objections, requests for more and more “connection” evidence as a

³¹ *Mabo (No 2)* at 109.

³² Gary Johns, “Mabo’s lofty dreams of native title dissolve into collective misery”, *The Australian*, 7/6/2012, p 16.

³³ Senate Constitutional and Legal Affairs Committee, Report *Native Title Amendment (Reform) Bill 2011* (Department of Senate, November 2011), p 33.

³⁴ The Greens in the Australian Senate are one: see below.

³⁵ That same politician, in a burst of gross irresponsibility, proceeded to insult the High Court judges who delivered the *Wik Decision* (holding that in Queensland, native title could co-exist with pastoral leases) as a “bunch of pissants.” Fisher was subsequently forced to apologise to the Chief Justice.

³⁶ AHRC 2010 *Native Title Report* p 13.

pre-requisite to entering mediation, refusal to accept traditional evidence save after vigorous cross-examination, and so forth. These are all proper tactics by lawyers in litigation, but, in the case of governments, especially the Commonwealth, are often violently inconsistent with their clients' – ie the responsible Ministers' – publicly stated policies and may also fall well short of standards expected of the Crown as a 'model litigant'. These cynical practices at the coal-face, exacerbated tenfold by various bureaucracies also apparently deaf to their masters' political rhetoric (doubtless devised by the same said bureaucrats), have contributed significantly to the current quagmire, where the whole system has degenerated into complexity and grid-lock. Claims typically last 5-10 years; are denied for technical legal reasons (see for example the Wangatha saga to the WA goldfields³⁷ and the *Jango* compensation claim to Uluru country³⁸); and even when a claim succeeds, the lengthy drawn out process means some or many of the claiming 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.

A second series of headaches lies in decisions of the High Court which have interpreted key provisions of the NTA in a manner never contemplated by the Parliament, placing additional significant evidentiary and legal obstacles in the path of claimants. Thus, the evidential burden upon claimants – always formidable – got even higher. Further, in *Yorta Yorta*³⁹ the Court introduced notions of an ancestral community being required to exhibit a "normative society" governed by "normative rules" of custom and tradition, as must the *current claimant community* itself. Further, the requirement of demonstrating "continuing connection", founded on customs and traditions, to claimed land, being a connection that has not been "substantially interrupted" since settlement, were introduced.

The result is that in closely settled regions – eg, the eastern seaboard – where dispossession and cultural destruction since 1788 has been greatest, those very same communities who have suffered most now have least chance of successfully 'proving' their native title to the satisfaction of the courts or governments. This remains a glaring problem productive of much heartache and injustice. Truly, for these groups, the party never started.

Third are the Howard government Wik amendments of 1998 which, again, damaged the interests of claimants and benefited those who oppose the very notion of native title – and there remain many still lurking, alive and vocal, in the Australian community.⁴⁰ These amendments (amongst one useful reform, establishing ILUAs) coupled with state complimentary legislation, 'validated' many extinguishing past acts of by governments; watered-down the right to negotiate provisions by allowing states to introduce exemptions; and introduced a tougher 'registration test' to achieve 'rights to negotiate'. None of this has been wound back by subsequent governments. All of it was unnecessary, fueled by exaggerated fears of "uncertainty", and was contrary to the spirit of the original NTA. As Social Justice Commissioner Tom Calma said, these 1998 amendments:

³⁷ *Harrington Smith v WA (No 9)* [2007] FCA 31 (5/2/2007, Lindgren J).

³⁸ *Jango v Northern Territory* (2006) 152 CLR 150; [2006] FCA 318; T Jowett & K Williams, "Jango: Payment of Compensation for the Extinguishment of Native Title" (2007) *Land, Right, Laws, Issue of Native Title*, Vol 3, Issues paper No 8.

³⁹ *Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422.

⁴⁰ See, for example, the continuing anti-land rights campaign conducted by the magazine, *Quadrant*.

“... seriously undermined any benefits the Act could offer [to] Indigenous Australians. The amendments provided the “bucket loads of extinguishment” that the then government promised, and shifted the fragile balance of power and possible benefits from [Indigenous] people to the already powerful non-indigenous interests.”⁴¹

All of it virtually doubled the size of the NTA; produced Kafkaesk complexity, and seems motivated then, and now, by a peculiar meanness of spirit when it comes to acknowledging injustice and sharing this country with its original occupiers. It is this obsession to identify and detail every possible extinguishing event in the now voluminous and complex complimentary legislative scheme enacted by the Federal and State and Territory parliaments, that is so disappointing.

Reforms: Let’s party again: like for real: A society that claims to be ‘civilized’ is judged by how it treats its most vulnerable. On any view, this native title injustice is a national (and international) embarrassment, and cannot be allowed to continue. Perhaps mindful of the High Court’s reference to “unutterable shame” Federal Court Judges have recognized the nation’s continuing moral bankruptcy. The Full Court has observed:

“The [NTA] preamble declares the moral foundation upon which the NTA rests. It makes explicit the legislative intention to recognize, support and protect native title. That moral foundation and that intention stand despite the inclusion in the NTA of substantive provisions, which are adverse to native title rights and interests and provide for their extinguishment, permanent and temporary, for the validation of past acts, and for the authorization of future acts affecting native title.”⁴²

In my view, nothing less than a wholesale re-think and re-structuring of the current flawed system is needed. But as usual, governments faced with such a challenge are the last to deliver.

For several years, many players have called for substantial reforms, including the Australian Human Rights Commission, Indigenous leaders, former Prime Minister Paul Keating, the current Chief Justice of the High Court, Robert French, and the Australian Greens. Perhaps the most important suggestion was Justice Robert French’s call, made in June 2007, to reverse the onus of proof now required by the NTA.⁴³

To their credit, in 2011 the Greens responded to this idea, and others, and introduced a Bill into the Senate proposing a range of reforms: eg, 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.⁴⁴ On 12/5/2011, the Bill was referred to the Senate Legal and Constitutional Affairs Committee.

The central proposal – to reverse the burden of proof in claims – was both supported (by claimant groups) and rejected (mostly by governments). I would suggest that Governments (and

⁴¹ T Calma, “Native Title in Australia: Good Intentions, a Failing Framework?” *ALRC Reform: Native Title 2009* (Issue 93, 2009) p 6.

⁴² *N T v Alyawarr* (2005) 145 FCR 442, at [63] (Wilcox, French, Weinberg JJ).

⁴³ See address to NTRB conference, Cairns, 8/6/2007, reprinted as “Plus ca change, plus c’est la meme chose? – the 2007 Amendments to the Native Title Act” in (2008) *Land, Rights Laws: Issues of Native Title* (Vol 3, Issues paper No 12). His Honor was then a Judge of the Federal Court.

⁴⁴ See the private Senators Bill, introduced by Senator Siewert on 21/3/2011, *Native Title Amendment (Reform) Bill 2011* (Cth).

those that elect them) need not worry about such a reform: after all, they are skilled and very experienced at discharging this onus of demonstrating a “substantial” break in continuity. Land Departments hold all land-tenure information recording tens of thousands of extinguishing grants made by the Crown to colonizers since 1788 (eg a commercial lease); governments have successfully amended the NTA to enable reliance on such grants to achieve extinguishment; and, as the last 20 years amply demonstrates, they happily use this material with devastating effect for claimants.

The Senate Committee reported back in November 2011 recommending, for a variety of reasons largely concerned with concerns about substantial “architectural” changes to the NTA with what the majority called “inadequate” consultation, that “it was not persuaded that the Bill would achieve its stated objectives” (para 3.82) and that the Senate “not pass the Bill” (para 3.92).⁴⁵ In a minority report, the Greens disagreed. What the Senate will do with this evidential “hot potato” in the current fractious Canberra climate, is obvious: nothing. Back to square one.

Such onus-of-proof amendments, if introduced, would align the Australian scheme with that now operating in New Zealand. There, the relevant Maori community’s land rights, following the Treaty of Waitangi (1840), are assumed. The only question for the Waitangi Tribunal is: what historical acts of the Crown have extinguished or impaired that title; and how much compensation should be paid to Maori traditional owners? Australia clearly has much to learn from its cousins across the ditch.

In her recent announcement in Townsville on 6 June, the Federal Attorney-General, Nicola Roxan, to her credit, announced that her government had decided to pursue several “incremental” reforms designed to “improve the system’s efficiency”: ie: it would, in the Attorney’s words:

- *“seek to legislate criteria to outline the requirements for a good faith negotiation”;*
- *“plan legislative change to reform ILUAs. These voluntary agreements will be made more flexible. A wider range of topics will be able to be negotiated ...”*
- *“The Government will work with stakeholders to allow parties to agree to put aside issues of historical extinguishment in parks and reserves. Our discussions may even identify a wider application of this concept.”*
- *“...I can finally clarify the tax treatment of payments from native title agreements – income tax and capital gains tax will not apply”.⁴⁶*

The Attorney also announced that she would commission an inquiry into NTRB’s and PCB’s.

As already indicated these proposals, while welcome, in my view and in the view of indigenous leaders, do nothing to resolve the critical systemic failings identified above. The most interesting, I think, is the intriguing suggestion of a “wider application” of parties agreeing to ignore extinguishment. This segues into the constitutional reform suggestion, mentioned below.

⁴⁵ Senate Constitutional and Legal Affairs Committee, Report *Native Title Amendment (Reform) Bill 2011* (Department of Senate, November 2011).

⁴⁶ The Hon Nicola Roxan, “Echoes of Mabo”, paper delivered at AIATSIS Native Title Conference, Townsville, 6/6/2012.

Meanwhile, the Attorney's announcement expressly ruled out reversing the onus of proof. Party over for now.

A Modest Proposal: Party with the People This time round, the Courts, clearly, are not the avenue most likely to achieve the radical reforms required. Nor, it seems (save for Victoria) are the governments or Parliaments of this country. Nor can indigenous claimants struggling for land-justice expect anything better should the current Federal opposition achieve government. This time, I think, we need to party with the people: ie, engage in some constitutional reform.

At the moment, amongst all the political and *Mabo* 20th anniversary noise, a proposal to reform the Australian Constitution by recognizing indigenous people in our foundation document, is quietly circulating.⁴⁷ The panel of experts has recommended, in short, that the *Constitution* be amended as follows:

- S 25 be repealed;
- S 51(xxvi) be repealed;
- A new s 51A be inserted along the following lines:

“Section 51A Recognition of Aboriginal and Torres Strait Islander Peoples
Recognising etc etc ...
The Parliament shall, subject to this Constitution, have power to make laws for the peace, order and good government of the Commonwealth with respect to Aboriginal and Torres Strait Islander peoples.”
- A new s 116A be inserted, along the following lines:

“Section 116A: Prohibition of Racial Discrimination
(1) The Commonwealth, a State or a Territory shall not discriminate on the grounds on race, colour or ethnic or national origin.
(2) Subs-section (1) does not preclude the making of laws or measures for the purpose of overcoming disadvantage, ameliorating the effects of past discrimination, or protecting the cultures, languages or heritage of any group.”
- A new s 127A be inserted, along the following lines:

“Section 127A: Recognition of Languages
(1) The national language of the Commonwealth of Australia is English;
*(2) The Aboriginal and Torres Strait Islander languages are the original Australian languages, a part of our national heritage.”*⁴⁸

These proposals are important, and worthy of discussion and bi-partisan support. For current purposes, the solution in relation to establishing a new foundation for the recognition and protection of native title over the next century, seems to me obvious: adding a clause to the above proposals to entrench such rights. In effect, this takes the Attorney's foreshadowed extension of “agreeing to ignore extinguishment” to its logical, if most radical, conclusion.

Many technical and political issues are raised by such a proposal: for the moment, I offer the following justification. As has often been said, we cannot rely on parliaments, state or federal, to fix the native title imbroglio. They don't want to: and in any event, governments are

⁴⁷ See Report of Expert Panel on Constitutional Recognition of Indigenous Australians, *Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution*, (January, 2012) p xviii (“*Constitutional Recognition Report*”).

⁴⁸ *Constitutional Recognition Report*, p xviii.

elected; they and their policies come and go. There can be no security in this contentious area as the years roll by. Tom Calma has commented:

“... ‘attitudes’ to policy are discretionary and depend on the elected government for each jurisdiction. It does not create certainty, predictability or equity in native title outcomes across Australia. If a government changes then there is no guarantee that [its] approach [to native title issues] will be maintained. The different outcomes that result after a change in government or a change in a government’s approach have been seen many times.”⁴⁹

This observation, though perhaps obvious, is nevertheless important. It applies across governments and across jurisdictions. For example, the Northern Territory land Rights Bill – introduced by the Whitlam government in 1975, continued, amended, and finally legislated by the Fraser government in 1976 – included a right in traditional owners to veto mining developments on their lands.⁵⁰ One cannot imagine such a right being included by any shade of government today. Clearly, the right to negotiate regime – including the sad history of decisions on review by the Native Title Tribunal where one mining development only has been “vetoed” in 20 years – delivers, very deliberately, not only no “veto” but encouragement to miners to procrastinate and play hard-ball in mediations.⁵¹

This abandonment of the veto power indicates how far the debate has slipped – backwards – in this country over the past 40 years. I would add one corollary to Calma’s observation: hard experience tells us that in this arena at least, government policy indeed changes but with rare exceptions, generally against Indigenous interests: vide Howard’s *Wik* amendments of 1998. The exceptions in relation to Indigenous ‘land rights’ are worth noting: the abovementioned 1976 Territory *Land Rights Act*; and the pioneering legislation of the S A Dunstan Labor government in the 1960s.⁵²

The only solution, therefore, is to abandon the politicians, and the courts, and invite the Australian electorate to revive the party: ie, pursue, by way of constitutional amendment, the entrenchment of native title rights, in appropriate form, in the Australian Constitution. This requires a different level of thinking. One must see the larger picture. For example:

“... the recognition of the existence of native title has meant that the Australian legal system has acknowledged a strong degree of legal pluralism in Australia. Aboriginal law can be the foundation of mainstream legal rights. Despite the many limits that have been placed on the practical expression of this recognition, it has profound implications for who we are as a community in Australia.”⁵³

Such notions were actively discussed in the ALRC’s land-mark report on the recognition of Aboriginal Customary Law, tabled in Federal Parliament in 1986.⁵⁴ They also approach, but are very distinct from, the question of continuing Indigenous “sovereignty” in Australia – an

⁴⁹ T Calma, “Native Title in Australia: Good Intentions, a Failing Framework?” *ALRC Reform: Native Title 2009* (Issue 93, 2009) p 7.

⁵⁰ See *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) ss 40, 43. The veto is subject to a Ministerial review “in the national interest” and has rarely been used.

⁵¹ The only decision is *Holocene* [2009] NNTTA 49 (27/5/2009) ; see discussion at AHRC 2009 *Native Title Report* 35-42.

⁵² See *Aboriginal Land Trust Act 1966-1975* (SA); and see now *Anangu Pitjantjatjara Yankunytjatjara Land Rights Act 1981* (SA).

⁵³ Alex Reilly, “Native Title as a cultural phenomenon”, *ALRC Reform: Native Title 2009* (Issue 93, 2009) p 41.

⁵⁴ See ALRC, *The Recognition of Aboriginal Customary Law* (AGPS , 2 Vols, 1986)

issue still agitated – including on the recent *Mabo day* celebrations – but clearly rejected, at least as a matter of law, by Chief Justice Mason in 1993 in *Coe*.⁵⁵

When we consider entrenching native title rights in the Constitution, numerous new and serious problems arise: the need for political cross-party support; the high level of support required (a majority of states plus a majority of electors); the unhappy track-record of failed referenda since 1901; the need to keep it simple; and so on.⁵⁶ However, one should also recognize advantages: the stunning success of the 1967 referendum where 90.8% voted “Yes” in favour of that reform; and readily transferable precedents worthy of examination (though not necessarily adoption) from equivalent common-law countries, notably Canada and New Zealand. The underlying principles and rationales however, are similar: ie, we are dealing here, unquestionably, with the first nations; they are already recognized in the nation’s legal and political structures; outstanding issues of justice, equity and social and economic development require urgent attention; and the constitutional entrenchment path has not shattered equivalent overseas economies nor societies: indeed, they have remained economically prosperous and culturally and socially enriched. I refer, of course, to Canada since 1982; and New Zealand, since 1840. Further, in all such countries, a central proposition should be embraced: that it is a privilege, not solely a problem, to still have within our society a vibrant indigenous population that is both connected to the distant past, and a unique identifying feature of our community into the future.

Much has already been written on the question of constitutional entrenchment, the hazards and poor track record of referendums in Australia, and the merits of such an initiative. Likewise, the utility and impact of s 35 of the Canadian Constitution has been much discussed over the years - a useful precedent, in my view, to adapt to Australian conditions. Section 35 states, relevantly:

“s 35(1) The existing aboriginal and treaty rights of Aboriginal people of Canada are hereby recognized and affirmed;...

(3)... treaty rights includes rights that now exist by way of land claims agreements or may be so acquired.”⁵⁷

An equivalent of s. 35, coupled with the primacy of Commonwealth over state law, would entrench native title rights, requiring a further constitutional amendment to eliminate them. This sort of amendment, coupled with the simple proposition that the entire country was, at the dates of extension of sovereignty to various parts of the country⁵⁸ the subject of native title rights and interests held by the relevant ancestral communities, would settle the problem of fluctuating government policies, and communities’ loss of connection to country due to colonization. The only question then, as in New Zealand, would be: (1) who is entitled to what

⁵⁵ See *Coe v Commonwealth* (1993) 68 ALJR 110; [1993] HCA 42. Mason CJ said at [27]: “*Mabo (No 2)* is entirely at odds with the notion that sovereignty adverse to the Crown resides in the Aboriginal people of Australia”.

⁵⁶ See, for a brief account, *Constitutional Recognition Report* pp 31-32.

⁵⁷ See also s 25 contained in Part I of the new (1982) Constitution entitled “The Canadian Charter of Rights and Freedoms” which contains several anti-discrimination and civil-liberties provisions. S 25 declares that none of the rights or freedoms contained therein shall be “construed so as to abrogate or derogate from any Aboriginal treaty or other rights or freedoms that pertain to the Aboriginal peoples” including any that may be acquired “by way of land claims settlement.” Section 25 does not confer rights: it merely exempts certain Aboriginal rights from the effect of the Charter’s provisions.

⁵⁸ Ie, 1788 (eastern seaboard), 1829 (WA), 1835 (SA and NT).

country? (2) In relation to country where native title has been extinguished (eg, the area now covered by the city of Melbourne) how should that loss of native title property rights be compensated; and (3) to whom should those benefits be provided?

When we think at this level, a further issue arises. The Keating government's policy by way of response to *Mabo* entailed three programs: they are, indeed, set out in the NTA preamble. It states that the NTA was one only of a three pronged policy response: ie,

- (1) create, via the NTA, a system that would recognize a form of native title "*that reflects the entitlement of Indigenous inhabitants of Australia, in accordance with their traditional laws and customs, to their traditional lands*";
- (2) establish a land fund that would assist Indigenous peoples to acquire land;
- (3) implement a broader social justice package that would complement these two land-specific policies.

As to the land fund, it emerged as the Indigenous Land Corporation ("ILC") established in 1995. It administers the Aboriginal and Torres Strait Islanders Land Account which holds substantial funds.⁵⁹ Utilizing this fund, the ILC has purchased more than 6 million hectares around Australia on the open market. However, Commissioner Calma comments:

*"... it is questionable whether, in its administration, the ILC meets the original intent of the fund and provides an accessible and alternative form of land justice when native title is not available. The [ILC's constituting] Act, the Aboriginal and Torres Strait Islander Act, 2005 (Cth) acknowledges its role in reparation for dispossession in its preamble, but does not draw any connection to native title and the complimentary role the ILC was created to play. Many [Indigenous] people have voiced confusion and frustration to me about the ILC's role, activities, and the outcomes it is achieving."*⁶⁰

Meanwhile, the Social Justice package disappeared without trace, and has not been seen since. Prior to the 2007 election, the Labor Party's National Policy Platform recorded that that Party "recognizes that a commitment was made to implement a package of social justice measures in response to ... *Mabo* and [it] will honour this commitment."⁶¹ Those fine words were removed following the Rudd government's election in 2007 and remain absent today.⁶² The current federal coalition opposition's policies on native title are similarly silent on this issue.⁶³

Perhaps the "compensation" package mandated by the constitutional reform suggested above might revive this lost "social justice package" initiative. Whether returning this policy to the Labor Party's platform will revive the current federal Labor government is another matter:

⁵⁹ The Land Account was funded by a fixed annual allocation of \$121 million from the federal budget over ten years, ceasing at 30/6/2004. Over \$1 billion has been deposited in the account over time. Around 2/3 of this sum is invested with the balance available to fund the ILC's activities. See *ILC Annual Report 2010 – 11*.

⁶⁰ T Calma, "Native Title in Australia: Good Intentions, a Failing Framework?" *ALRC Reform: Native Title 2009* (Issue 93, 2009) p 8.

⁶¹ Australian Labor Party, *Australian Labor Party National Platform and Constitution* (2007) at www.alp.org.au/platform/>, Ch 13.

⁶² Australian Labor Party 2012 *Agenda*, www.alp.org.au/Agenda/policies accessed 8/6/2012

⁶³ See *Coalition Election Policy 2010* at www.liberal.org.au/media/media/Files/Policies/Community/Indigenous>

while it languishes at 26% in the polls,⁶⁴ its apparatchiks might think that anything is worth trying once.⁶⁵ Otherwise, more than one party is surely “over.”

18th June 2012

⁶⁴ *The Age*, 14/6/2012, p 1.