

LAND IS SUSCEPTIBLE OF OWNERSHIP

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ABSTRACT

Contrary to recent decisions of the High Court, the common law of native title recognises that indigenous people in occupation of land are entitled to *possession* where the Crown has declined to expropriate their title by the act of State constituting the acquisition of sovereignty. McNeil's rigorous analysis in *Common Law Aboriginal Title* was referred to by members of the Court in *Mabo v Queensland (No 2)*. This paper will reiterate McNeil's analysis with two amendments: first, that possessory title is not a claim to land separate from that of native or customary law title; and secondly, that indigenes have allodial possession rather than a fee simple on the presumption of a lost grant.

PAPER

In its recent decisions in *Commonwealth v Yarmirr*¹, *Western Australia v Ward*² and *Members of the Yorta Yorta Aboriginal Community v Victoria*³, the High Court has misinterpreted the definition of native title under the *Native Title Act 1993-1998 (Cth)*⁴ and fundamentally misapplied the common law. Before turning to these two allegations, I will first set out the historic meaning of the High Court's decision in *Mabo v Queensland (No 2)*.⁵

The Three Principles of Native Title

On 3 June 1992 the High Court finally illuminated the true legal history of the British colonisation of Australia. Properly understood, the law of the colonisers recognised a native entitlement to land from the time that sovereignty was first acquired. Contrary to the assumption that the land was *terra nullius*, the High Court confirmed that the common law of England, carried upon the shoulders of the colonists and falling upon Australian soil, included the doctrine of recognition of native title.⁶

¹ (2001) 208 CLR 1 ('*Yarmirr*').

² (2002) 191 ALR 1 ('*Ward*').

³ (2002) 194 ALR 538 ('*Yorta Yorta*').

⁴ '*Native Title Act*'

⁵ (1992) 175 CLR 1 ('*Mabo No 2*').

⁶ *ibid*, 58 (Brennan J), 109 (Deane and Gaudron JJ), 182 (Toohey J).

The then High Court had to contend with two compelling realities. First was the fact of original occupation and possession of Australia by its indigenous peoples and the recognition of this by the imported common law. The second was that the recognition and protection of these original rights to the land did not occur until 204 years after sovereign acquisition, and the colonists and their descendants had acquired many titles and privileges over the course of the preceding two centuries. How was the fact that native title formed part of the common law of Australia, inherited from Britain, to be reconciled with the fact of colonial history and the accumulation of rights and titles on the part of the colonists and their descendants over 204 years?

In my view the Mason and then Brennan Courts articulated three basic principles which set out a reconciliation of these two realities, and which should have formed the architecture for the final settlement of the longstanding and unresolved question of indigenous land justice.

The first principle was that non-indigenous Australians who had accumulated rights and titles over two centuries could not be now disturbed in the enjoyment of their privileges, notwithstanding the circumstances by which they came to possess them. So the first principle of native title law in this country should be known to all Australians – though it is not – as the ‘white land rights’ principle; that the lands of the non-indigenes, including the lands alienated by the Crown for its own use, are indefeasible, and cannot now be disturbed by any claim to native title.

The second principle was that, seeing as the whole country was once subject to native title, whatever lands were left unalienated after 204 years, was the entitlement of its traditional owners; and in all fairness title should be declared for their benefit forthwith.⁷ In other words, the indigenous people were entitled to whatever lands were left over. The remnant lands after two centuries were not substantial, the largest areas being in the desert and remote parts of the country.

The third principle, which was articulated in *Wik Peoples v Queensland*⁸ in 1996, was that there were some larger tenures, such as pastoral leases and national parks, where the Crown title could coexist with native title, and in that coexistence the Crown-derived title prevailed over native title in the event of inconsistency.⁹

These three principles, if properly understood, and if faithfully followed, potentially laid the foundations for a just settlement of the historic grievance about land justice which lay unresolved between the old and new Australians.

Alas, it has not turned out this way. Ten years after *Mabo (No 2)* we are engaged in expensive and time-consuming battles over whether remnant lands should now be declared in favour of indigenous peoples and whether a subservient native title should coexist with Crown titles where the latter always prevails over any native title.

What is not understood about native title claims after *Mabo (No 2)*, and certainly after the *Native Title Act*, is that it is simply not possible for non-indigenous parties to lose any legal rights or title as a consequence of a native title finding. These land claims are not true

⁷ *ibid*, 70 (Brennan J).

⁸ (1996) 187 CLR 1 (*‘Wik’*).

⁹ See, eg. *ibid* 249 (Kirby J).

litigations in the sense that either party may suffer loss as an outcome. Non-indigenous parties to land claims can never lose any of their rights or titles, because these were either indefeasible under the common law – and if they were ever invalid, the *Native Title Act* has now cured any invalidities.¹⁰

The only party that can truly lose in a native title claim is the indigenous claimant. The non-indigenous parties to claims – including the Crown – have nothing to lose on their own part, only an argument to the effect that the indigenous people have no entitlement.

The travesty of the current native title system in Australia, and the reason why the process is not delivering on the justice which the principles of *Mabo (No 2)* set out, lies in the fact that non-indigenous parties are allowed to oppose claims for native title even though they have no rights or interests that are vulnerable as a result of a native title finding.¹¹ These third parties are in an extraordinary position: all of their rights and interests are guaranteed by the common law and by validating legislation, and the Attorney-General pays for their legal costs – so they have nothing to lose by refusing to consent to native title determinations under the framework of legislation which was founded on the assumption that most claims could be settled by mediation and negotiation. If you can never ultimately lose, and the Attorney-General is paying your legal costs, you can resist native title until the cows come home. And, parliaments and the judicial system assume that you are a vulnerable party in the native title claims process, without actually understanding the clear truth: that non-indigenous Australians are completely secure in their entitlements and can never lose a vested right, or even an expectation of a right as result of the broadening of the definition of ‘past acts’¹² in legislation.

The country forgets that in April 1993 when indigenous leaders met with Prime Minister Paul Keating to discuss impending legislation responding to *Mabo (No 2)*, it was the indigenous leadership that proposed support for legislation validating non-indigenous titles that were uncertain as a consequence of the operation of the *Racial Discrimination Act 1975 (Cth)*. To the extent that non-indigenous rights were uncertain after *Mabo (No 2)* it was indigenous people that proposed the validation of these uncertain titles.¹³ This was a gracious concession

¹⁰ See *Native Title Act* div 2, div 2A, div 2AA.

¹¹ More than 500 parties joined the *Yorta Yorta* litigation alleging that they had interests that were affected by the claim. See further, Wayne Atkinson, “‘Not One Iota’ of Land Justice: Reflections on the *Yorta Yorta* Native Title Claim 1994-2001’ (2001) 5 *Indigenous Law Bulletin* 19, 21-2.

¹² *Native Title Act 1993-1998*: s 228.

¹³ The document handed to the Prime Minister was called the ‘Aboriginal Peace Plan’. An account of this document and this meeting between indigenous leaders and the Prime Minister is set out in Mick Dodson, Aboriginal And Torres Strait Islander Social Justice Commission, *First Report*, 1993. Then Commissioner Dodson wrote:

‘The Aboriginal Peace Plan contained eight principles, including:

- protecting native title interest by requiring the titleholders to consent to any future dealings in native title land,
- expanding the basis of claims to include people who cannot claim traditional connection to land,
- ensuring future claims for native title could be made more simply,
- establishing a process for settlement of future claims.

on our part in 1993. But the position of other parties to native title over the past decade has essentially been this: not only do we want our own rights and titles to be secure, we will resist any claims for remnant native titles as well.

Let me now turn to the two allegations I alluded to in the beginning. The first concerns the misinterpretation of s 223(1) of the *Native Title Act*, namely, the very definition of native title.

The Misinterpretation of the *Native Title Act* s 223(1)

Section 223(1) reads:

The expression **native title** or **native title rights and interests** means the communal, group or individual rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to land or waters, where:

- (a) the rights and interests are possessed under the traditional laws acknowledged, and the traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders; and
- (b) the Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters; and
- (c) the rights and interests are recognised by the common law of Australia.

In my respectful view, the Court's decisions in *Yarmirr*, *Ward* and now *Yorta Yorta*, have yielded a complete misinterpretation of a fundamental provision of the *Native Title Act*.¹⁴ I am in respectful agreement with the judgment of his Honour, Justice McHugh, in *Yorta Yorta* in relation to s 223(1).¹⁵ This definition was intended to make clear that native title was whatever the common law of Australia decided it was. Paragraphs (a) and (b) of s 223(1) were intended to faithfully reflect the key requirements of the common law as set out in the judgment of Justice Brennan, as he then was, in *Mabo (No 2)*. They were not intended to supplant or in any way amend or supersede the definition of native title at common law.

And yet the court has basically taken the view that the *Native Title Act* has somehow 'transmogrified'¹⁶ the common law meaning of native title; that the starting point – and

In return, the Aboriginal Peace Plan proposed to accept the validation of interests granted over native title land which may have been invalid because of the *Racial Discrimination Act*. The validation proposal said that compensation should be negotiated, not decided upon by government.'

¹⁴ See Noel Pearson 'The High Court's Abandonment of "The Time-Honoured Methodology of The Common Law" in Its Interpretation of Native Title in *Mirriuwung Gajerrong* and *Yorta Yorta*', Sir Ninian Stephen Annual Lecture 2003, Law School, University of Newcastle, 17 March 2003 (www.capeyorkpartnerships.com).

¹⁵ *Yorta Yorta* (2002) 194 ALR 538, 571-3 (McHugh J).

¹⁶ Whilst the judgments in *Yarmirr*, *Ward* and *Yorta Yorta* do not refer to the common law rights in *Mabo (No 2)* being 'transmogrified' by the *Native Title Act*, this seems to be the assumption on the part of all justices other than McHugh J and perhaps Callinan J. This underlying assumption was articulated most explicitly by Kirby J during the course of argument in *Ward* (High Court Transcripts, P59/2000, 6 March 2001):

KIRBY J: You seem to be starting your submissions with the common law. You are going back to *Mabo* and to what Justice Brennan said and so on.

ending point – for the definition of native title is legislation that was intended to protect, not define, the title. As a result, in *Ward and Yorta Yorta*, the entire discussion of native title is treated as an exercise in statutory interpretation rather than an articulation of the common law. Important questions concerning the concept and nature of native title, its content, extinguishment and proof are dealt with, without any reference to the large body of common law of which Australian native title forms a part.

Even a circumspect party to the Australian native title story since *Mabo (No 2)*, Justice French, the first President of National Native Title Tribunal, makes clear that the High Court's interpretation of s 223(1) defied reasonable understandings and expectations:

Most recently, in *Members of the Yorta Yorta Aboriginal Community v Victoria*...the High Court again emphasised the statutory definition of native title as defining the criteria that had to be satisfied before a determination could be made. To that extent the Court appears to have moved away from the original concept of the Act as a vehicle for the development of the common law of native title.¹⁷

His Honour went on to say:

The way in [the High Court in *Yorta Yorta*] applies the words of ss 223(a) and (b) of the Act to the determination of native title rights and interests may have transformed

MR BARKER: Yes, I am, your Honour.

KIRBY J: Is not the starting point now, the river having moved on, the statute, because the people in Parliament have, as it were, taken another step? Recognition by the common law is one element in what Parliament has provided, but the starting point now is surely the Act of the Federal Parliament (emphasis added).

And later:

KIRBY J: ...At least on one view, the passage of the *Native Title Act* transmogrified the common law entitlements. It is an Act valid on the face of it, it has been enacted under the powers that are given by the Constitution to the Federal Parliament. It talks of "title", and it provides for the recognition of native title as defined – that is in section 10 – it provides for limits on extinguishment in section 11, and, at least in my view at the moment, foraging around amongst what members of this Court said before the Federal Parliament within its constitutional power provided for native title, its recognition and limits on its extinguishment, is just misconceived. It is starting at the wrong place.

We have title, we have native title, but we have it under an Act of the Federal Parliament, the validity of which is not challenged, and at least orthodox approaches would suggest that you then look into the Act with the benefit of the past, but not controlled by the past. You are giving meaning to what the Federal Parliament, within its constitutional power, has provided. It has talked of "title" and therefore you have to give content to an Act, not forage around amongst the predecessor provisions of the common law (emphasis added).

¹⁷ Justice Robert French 'A Moment of Change – Personal Reflections on the National Native Title Tribunal 1994-1998', (2003) 27 *Melbourne University Law Review* 488, 520. See also Maureen Tehan 'A Hope Disillusioned, an Opportunity Lost? Reflections on Common Law Native Title and Ten Years of the *Native Title Act*', (2003) 27 *Melbourne University Law Review* 523, 558-64.

the Act from a vessel for the development of the common law into a cage for its confinement.¹⁸

A search of the cases cited in *Ward* and *Yorta Yorta* reveals that hardly any cases are canvassed in support of the Court's conclusions on the state of Australian law. There is absolutely no reference in either of these Australian cases to what is the seminal Canadian decision on native title, and in my view the most important decision on the subject since the High Court's decision in *Mabo (No 2)*, namely the decision of the Supreme Court of Canada in *Delgamuukw v British Columbia*.¹⁹ Given that *Delgamuukw* dealt with the very issues that were at issue in *Ward* and *Yorta Yorta*, it is startling that no reference²⁰ is made to it in Australian law. Indeed *Mabo (No 2)* itself is only referred to for its place in the chronology of native title in Australian law, rather than for the purposes of discussing its articulation of the common law.²¹

¹⁸ op cit, French, 521.

¹⁹ [1997] 3 SCR 1010 ('*Delgamuukw*').

²⁰ The only reference, in *Western Australia v Ward* (2002) 191 ALR 1 at 34, 36 and 177 is to Lambert J's judgment in the British Columbia Court of Appeal's decision in *Delgamuukw v British Columbia* (1993) 104 DLR (4th) 470. There is no reference in any of the cases to the Supreme Court's decision in *Delgamuukw*.

²¹ In their joint judgment in, op cit, *Yorta Yorta* at paragraph 70, Gleeson CJ and Gummow and Hayne JJ almost dismiss the relevance of *Mabo (No 2)* to the meaning of native title:

The legal principles which the primary judge considered were to be applied to the facts found were principles which he correctly identified as being found in the *Native Title Act's* definition of native title. It is true to say that his Honour said that this definition of native title was 'consistent with' language in the reasons in *Mabo (No 2)* and that it was, in his Honour's view, necessary to understand the context in which the statutory definition was developed by reference to what was said in that case. It may be that undue emphasis was given in the reasons to what was said in *Mabo (No 2)*, at the expense of recognising the principal, indeed determinative, place that should be given to the *Native Title Act* (emphasis added).

In *Yarmirr* (2001) 208 CLR 1, 39, Gleeson CJ, Gaudron, Gummow and Hayne JJ had said that whilst the *Native Title Act* should be the starting point of any inquiry, it should be understood as 'supplementing the rights and interest of native title holders under the common law of Australia'. Later in *Ward* (2002) 191 ALR 1, 16, Gleeson CJ, Gaudron, Gummow and Hayne JJ moved the emphasis decisively towards the legislation:

No doubt account may be taken of what was decided and what was said in [*Mabo (No 2)*] when considering the meaning and effect of the *NTA*. This especially is so when it is recognised that paras (a) and (b) of s 223(1) plainly are based on what was said by Brennan J in *Mabo (No 2)*. It is, however, of the very first importance to recognise two critical points: that s 11(1) of the *NTA* provides that native title is not able to be extinguished contrary to the *NTA* and that the claims that gave rise to the present appeals are claims made under the *NTA* for rights that are defined in that statute (emphasis added).

And later:

Yet again it must be emphasised that it is to the terms of the *NTA* that primary regard must be had, and not the decision in *Mabo (No 2)* or *Wik*. The only present relevance of those decisions is for whatever light they cast on the *NTA* (emphasis added).

In my respectful view the Court has drawn a transparent and convenient line between the common law of native title up to the time of the passage of the *Native Title Act*, and its subsequent articulation in Australian law, where the meaning of native title is treated as a question of statutory interpretation. This leaves Australian pronouncements on native title open to bare assertion, as the body of the common law dealing with native title is rendered irrelevant because the legislation is treated as having superseded the common law. That this is what has happened is readily evidenced by a perusal of the cases cited in *Ward* and *Yorta Yorta*.

It is not possible in this paper to set out a complete refutation of the High Court's reasons for completely ignoring the common law on what is called 'Aboriginal Title' in Canada, and which we call 'native title'. The High Court has not given 'reasons', as much as expressed bald assumptions, beginning with Justice Kirby's over-generalised dismissal of overseas precedents in his decision in *Fejo v Northern Territory*:

...care must be exercised in the use of judicial authorities of other former colonies and territories of the Crown because of the peculiarities which exist in each of them arising out of historical and constitutional developments, the organisation of the indigenous peoples concerned and applicable geographical or social considerations...²²

This statement of approach underlies the approach taken by all of the members of the High Court to overseas precedents. The approach is in stark contrast to the judgments in *Mabo (No 2)* which drew heavily from other common law jurisdictions (and indeed Justice Brennan had specifically rejected as discriminatory²³ the notion that what Justice Kirby refers to as 'the organisation of the indigenous peoples concerned' should ever be a factor in determining whether their rights to land would be respected by the common law). During the course of argument in *Ward* Justice Gummow said that the applicability of the Canadian law in the Australian context was 'an important question'.²⁴ It was a question that remained unanswered in all of the judgments in that case, and indeed in the subsequent *Yorta Yorta* case. If the court has not been derelict in its duty to the indigenous peoples of Australia in failing to give sound reasons for refusing to grapple with overseas precedents that are at odds with its preferred views, it has certainly made its task easier by relying upon the legislation rather than engaging with two centuries of precedent developed throughout the English common law world.

If the Court's interpretation of s 223(1) of the *Native Title Act* be accepted as correct then the Parliaments that passed the 1993 legislation and the amendments of 1998 were under grave

²² (1998) 187 CLR 721 at paragraph 101 ('*Fejo*').

²³ *Mabo (No 2)* (1992) 175 CLR 1, 41-2 (Brennan J).

²⁴ High Court Transcripts, P59/2000, 6 March 2001:

BARKER: Yes. There is no doubt, your Honour, that *Delgamuukw* sets up a contrary proposition, that Justice Lee strongly relied on it and we, indeed, strongly rely on it here. We do not accept that on any proper reading of *Delgamuukw* the constitutional provisions infect the reasoning in a way that makes it inapplicable in the Australian common law.

GUMMOW J: That is an important question, I guess.

MR BARKER: It is an important question, and I would like to come back to that as well, if I could (emphasis added).

misapprehension as to what they had done. Indeed indigenous leaders and Prime Minister Paul Keating had assumed that the legislation simply protected native title from hostile extinguishment – that what was being protected by the legislation was the common law right.²⁵

It is not enough to say that it is a misnomer to talk of native title as a ‘common law right’.²⁶ Native title is not a common law title, but it is a title recognised by the common law.²⁷ The point about the common law and native title was well made by Justice McHugh in *Yorta Yorta* when he reviewed the statements made in Parliament in respect of s 223:

...I remain unconvinced that the construction that this Court has placed on s 223 accords with what the Parliament intended...They showed that the Parliament believed that, under the *Native Title Act*, the content of native title would depend on the developing common law.²⁸

Upon reflection, it should be readily appreciated that the one agenda of the indigenous parties to the 1993 arguments about native title legislation, was the concern that the common law rights articulated in *Mabo (No 2)* be protected. We were vigilant against any attempt to replace or transform the common law rights to any form of statutory creature. Our understanding of s 223(1) was consistent with that of the Commonwealth, namely that it was intended to be a faithful reflection of the common law – no more and no less.

Now that the High Court has contradicted this position, it would seem to me that the most urgent reform to the Australian law on native title is to amend the definition of native title to make clear that native title means whatever the common law of Australia says that it means. Native title should be illuminated, not by bare assertion in respect of statutory provisions enacted to protect native title from extinguishment, but by what Justice MacLachlin, as she then was, described in that elegant phrase in *R v Van der Peet*²⁹, quoted by Justice Gummow in *Wik*³⁰, ‘the time-honoured methodology of the common law’.³¹

The Misapplication of the Common Law

Let me now turn to the second allegation concerning the misapplication of the common law in relation to the concept of native title.

²⁵ See, eg, Commonwealth, *Parliamentary Debates*, House of Representatives, 16 November 1993, 2877-83 (Paul Keating, Prime Minister); Commonwealth, *Parliamentary Debates*, House of Representatives, 9 March 1998, 781-8 (Daryl Williams, Attorney-General).

²⁶ op cit *Yorta Yorta* at paragraphs 75-76.

²⁷ op cit, *Mabo (No 2)* F.C. 92/014, Brennan J said as follows at paragraph 65:

Native title, though recognized by the common law, is not an institution of the common law and is not alienable by the common law.

And also at paragraph 68:

...native title, being recognized by the common law (though not as a common law tenure)...

²⁸ op cit, *Yorta Yorta*, per McHugh J at paragraph 129.

²⁹ [1996] 2 SCR 507 (‘*Van der Peet*’).

³⁰ *Wik* (1996) 187 CLR 1.

³¹ op cit, *Van der Peet*, 377.

It is now settled law that provided that the Crown did not, by act of State, extinguish the rights of the indigenes, their rights would continue after annexation. This is consistent with the so-called ‘doctrine of continuity’³² and *Mabo (No 2)* and the *Native Title Act Case*³³ confirmed that the acts of State establishing the colonies of Australia did not extinguish the rights of the indigenous inhabitants. Whilst the principle that rights continue after the change of sovereignty is clear, what is unclear is ‘*what continues?*’

In his seminal treatise, *Common Law Aboriginal Title*, the Canadian Professor, Kent McNeil, applied the English law on possession to the position of indigenous inhabitants at the time the British Crown acquired sovereignty.³⁴ He concluded that the fact of indigenous occupation of land gave rise to the right to possession.³⁵

Professor McNeil’s treatise is the most rigorous examination of the English common law on possession as applied to the situation of indigenous peoples. He concluded, and the one judge that discussed this thesis in *Mabo (No 2)*, Toohey J, accepted, that indigenous people would be entitled to a so-called possessory title to land.³⁶ Both Professor McNeil and Toohey J assumed that possessory title and native title – what Professor McNeil called ‘customary title’ and his Honour called ‘traditional title’ – were separate concepts, and separate bases of claim to land by indigenous people.³⁷

In my respectful view, this assumption was in error. Rather than possessory title being separate from native or customary title to land, my view is that the common law on possession *applies to native title*. The principles concerning occupation and possession apply to native title. Indeed if we return to the foundational cases on native title in the common law world – namely the decisions of the United States Supreme Court under Chief Justice Marshall in the early decades of the 19th century: *Johnson v McIntosh*³⁸, *Worcester v Georgia*³⁹ and *Mitchell v United States*⁴⁰ – we find that Indian title was founded on the fact of occupation of land, not in a primary sense on their traditional laws and customs. Sure the Native American Indians lived on their land in accordance with their traditional laws and customs which determined entitlement between them and governed their internal affairs – but the protection afforded by the common law arose from the fact of occupation of their homelands. After a very careful analysis of the early American cases, Kent McNeil concluded as follows:

The Crown (and hence the States or the United States, as the case might be)...acquired the ‘naked fee’, which it could grant, subject always to the Indian right of occupancy...That right, it seems, is generally the same throughout the United

³² Kent McNeil *Common Law Aboriginal Title*, Clarendon Press, 1989, at 171-4, *Mabo (No 2)* per Toohey J at paragraph 26.

³³ *Western Australia v Commonwealth (‘Native Title Act Case’)* (1995) 183 CLR 373.

³⁴ op cit, McNeil 1989. See also Kent McNeil ‘A Question of Title: Has the Common Law been Misapplied to Dispossess the Aboriginals’ (1990) 16 *Monash University Law Review* 91.

³⁵ op cit, McNeil 1989, 205-8.

³⁶ ibid, *Mabo (No 2)* (1992) 175 CLR 1, 207-13 (Toohey J).

³⁷ op cit, McNeil 1989, 195, 300, 241; *Mabo (No 2)* (1992) 175 CLR 1, 178 (Toohey J).

³⁸ 21 US 543 (1823).

³⁹ 31 US 515 (1832).

⁴⁰ 34 US 711 (1835).

States: it depends not on the particular customs or laws of individual tribes (the general existence of which has none the less been acknowledged)...but on their actual occupation of lands from what has occasionally been said to be 'time immemorial'...⁴¹

The core misconception centres on our understanding of what happened at the time of sovereignty when the rights of the indigenous inhabitants to their homelands continued under the doctrine of continuity. What continues after annexation? The rights and interests established under traditional laws and customs, or the right to occupy and possess the land under authority of, and in accordance with, the traditional laws and customs of the indigenous people?

It has been assumed throughout the Australian discussion⁴² of native title and through some of the Canadian discussion⁴³ up to *Delgamuukw* – including that of Professor McNeil⁴⁴ – that

⁴¹ op cit, McNeil 1989, 255 (emphasis added)

⁴² See, eg, *Mabo (No 2)* (1992) 175 CLR 1, 58-9 (Brennan J); 88 (Deane and Gaudron JJ).

⁴³ Lambert J's interpretation of the doctrine of continuity in the British Columbia Court of Appeal's decision in *Delgamuukw v British Columbia* (1993) 104 DLR (4th) 470 is based on the assumption that it is the rights established under Aboriginal laws and customs which continue after annexation, and which is the 'source' of Aboriginal title. This was in contrast to the emphasis on occupation (rather than traditional laws and customs) in earlier decisions of the Supreme Court of Canada (*Calder v Attorney-General of British Columbia* [1973] SCR 313 'Calder', and *Guerin v The Queen* [1984] 2 SCR 335, 'Guerin'. In *Calder* at 328 Judson J spoke on behalf of three of the seven justices when he described Aboriginal title as follows:

...the fact is that when the settlers came, the Indians were there, organized in societies and occupying the land as their forefathers had done for centuries. This is what Indian title means and it does not help one in the solution of this problem to call it a 'personal or usufructuary right'. What they are asserting in this action is that they had a right to continue to live on their lands as their forefathers had lived and that this right has never been lawfully extinguished.

In *Guerin* at 376 Dickson J said that *Calder* 'recognized aboriginal title as a legal right derived from the Indians' historic occupation and possession of their tribal lands'.

⁴⁴ See op cit, McNeil 1989, ch 6. Following the British Columbia Court of Appeal's decision in *Delgamuukw* and before the Supreme Court's decision on the appeal, Kent McNeil analysed the judgments of the Court of Appeal in 'The Meaning of Aboriginal Title' in Michael Asch *Aboriginal and Treaty Rights in Canada*, UBC Press, 1997, 135 at 137 and commented on the source of Aboriginal title as follows:

The courts seem to be vacillating between two possible sources of Aboriginal title – Aboriginal occupation and Aboriginal laws – without pronouncing in favour of one or the other.

It was this search for a single answer to the question of 'what is the *source* of native or Aboriginal title?' – which is the subject of much of the circular commentary on native title over the years – that led to the misconception which this paper is directed at. It is not a question of *choosing* between Aboriginal occupation or Aboriginal laws as the source of indigenous title – both are relevant, because indigenous title is sourced in *the occupation of land by indigenous peoples under the authority of their Aboriginal laws and customs*. Aboriginal law determines:

it is the rights and interests established under traditional laws and customs that continue. In my respectful view the correct answer is that it is *the right to occupy and possess the land* under the authority of, and in accordance with, the traditional laws and customs of the indigenous people, that survives annexation. The distinction is subtle, but crucial.

This distinction underlines that the foundation of native title is possession arising from occupation – not the details of traditional laws and customs. These laws and customs determine who is entitled to the possession, and it governs the internal allocation of rights, interests and responsibilities amongst members of the native community – but they do not determine the content of the community’s title, which is possession. Possession being what Justice Toohey described as a ‘conclusion of law’ arising from the fact of occupation.⁴⁵

Instead our Australian law has misconceived native title by focusing on the traditional laws and customs of the indigenous people. The end result – now evident from the High Court’s decision in *Yorta Yorta* – is that in order to establish native title today, indigenous claimants are forced to prove the details of their traditional laws and customs at the time of sovereignty, when the English common law of possession would only require that claimants prove occupancy which precluded the Crown from obtaining beneficial title. An horrendous burden of proof has been placed upon native claimants, purely through the misconception of title arising from the misapplication of the common law.

This explication, that communal native title is a right to possession arising from the occupation of land by the predecessor native community at the time of sovereignty, also explains the content of the title which arises from occupation. The content of communal native title is the title which occupation affords, namely possession. Properly understood, communal native titles across the continent are not determined by what his Honour Justice Gummow described in *Yanner v Eaton* as the ‘idiosyncratic’ laws and customs of the particular native community.⁴⁶ These idiosyncratic laws and customs do determine those native title rights and interests that are variously described as ‘pendant upon’⁴⁷, ‘parasitic upon’⁴⁸, ‘privileges of’⁴⁹ or ‘carved out of’⁵⁰ the communal title. But the title of the

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- (i) *who* is entitled to the communal possession which the common law recognises as arising from the fact of occupation of the land by a native community and
 - (ii) the *allocation of rights, interests and responsibilities* that are ‘carved out of’ of the communal possession, within the community of titleholders

Aboriginal law also contributes evidence of:

- (iii) the *territory* to which the native community is entitled to possession
- (iv) the *descent* of this entitlement to possession from the predecessor native community that held the title at the time of annexation, to the successor native community which holds the contemporary entitlement

For a summary of my views on this matter see Noel Pearson ‘Principles of Communal Native Title’ (2000) 5 *Indigenous Law Bulletin* 4.

⁴⁵ *Mabo (No 2)* (1992) 175 CLR 1, 207 (Toohey J).

⁴⁶ (1999) 201 CLR 351, 384 (Gummow J) (*‘Yanner’*).

⁴⁷ *Western Australia v Ward* (2000) 170 ALR 159 at paragraphs 96 and 106, per Beaumont and von Doussa JJ.

⁴⁸ *op cit*, *Delgamuukw*, per Lamer CJ at 241.

⁴⁹ *Yanner v Eaton* [1999] HCA 53, per Gummow J at paragraph 74:

The exercise of rights, or incidents, of an indigenous community’s native title, by sub-groups and individuals within that community, is best described as the exercise of

community as a whole, as against the world, is a mundane possession. Following 1788, all communal native titles in the acquired colonies were the same. They all amounted to a uniform possession. If there is variation between communal native titles today it is because they have suffered some form of specific derogation by valid act of the legislature or Crown – not because they were originally diverse and determined by idiosyncratic laws and customs.⁵¹

Pendant native title rights and interests should be understood as constituting any right or interest to which possession gives rise as regulated by traditional law and custom, and of course today, subject to any valid derogation or regulation by valid act of the legislature or Crown. Traditional laws and customs regulate the exercise of any and all of the rights and interests that flow from possession. This is where evidence of traditional law and custom is relevant.

However in the Australian law as it now stands, it is assumed that native titles are entirely constituted by reference to traditional laws and customs adduced as a matter of proof.

There are two further sources for this misconception. Firstly, the term ‘native title’ is subject to a confusing conflation – it is used indiscriminately in the sense of the communal native title and also in the sense of the rights and interests that are carved out of the communal title.⁵² But there is critical difference between the communal title and the pendant rights and interests. Mr Yanner’s entitlement to hunt crocodiles is a right which is carved out of the communal title of his people. The right to hunt crocodiles is an incident of possession and the traditional laws and customs of the Gangalida people regulate Mr Yanner’s exercise of rights under the communal tenure.

The problem is that the judicial and academic discussion of native title switches (often unconsciously) between the discussion of native title in its communal sense, and its pendant rights and interests sense, thereby causing conceptual confusion. The principles which apply to both senses of native title are critical and different. This is why the oft-quoted statement of

privileges of native title. The right, or incident, to hunt may be a component of the native title of a numerous community but the exercise by individuals of the privilege to hunt may be defined by the idiosyncratic laws and customs of that community.

⁵⁰ op cit, *Mabo (No 2)*, per Brennan J at paragraph 69:

...where an indigenous people (including a clan or group), as a community, are in possession or are entitled to possession of land under a proprietary native title, their possession may be protected or their entitlement to possession may be enforced by a representative action brought on behalf of the people or by a sub-group or individual who sues to protect or enforce rights or interests which are dependent on the communal native title. Those rights and interests are, so to speak, carved out of the communal native title. A sub-group or individual asserting a native title dependent on a communal native title has a sufficient interest to sue to enforce or protect the communal title...

⁵¹ With respect, I believe it is the failure to grasp this point which leads Kent McNeil to error in his interpretation of *Wik*, to which I make reference in note 55 below.

⁵² S 223(1) of the *Native Title Act* conflates the two forms of title by including in the same definition ‘native title’ and ‘native title rights and interests’; expressions which are said to ‘mean the communal, group or individual rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to land or waters’.

Justice Brennan in *Mabo (No 2)* is the source of so much of the confusion into which the Australian law has fallen, where he said:

Native title has its origin in and is given its content by the traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants of a territory. The nature and incidents of native title must be ascertained as a matter of fact by reference to those laws and customs.⁵³

This statement is correct in relation to the native title rights and interests that are carved out of the communal title. But it is apt to mislead in relation to the description of communal native title⁵⁴. After all the title of the Meriam People in *Mabo (No 2)* amounted to ‘possession, occupation, use and enjoyment’, ‘as against the world’ – concepts known to the common law and not comprising the details of Meriam law and custom.⁵⁵ It is elsewhere in his judgment that Justice Brennan articulated the approach to understanding the nature of communal native title when he said:

If it be necessary to categorise an interest in land as proprietary in order that it survive a change in sovereignty, the interest possessed by a community that is in exclusive possession of land falls into that category. Whether or not land is owned by individual members of a community, a community which asserts and asserts effectively that none but its members has any right to occupy or use the land has an interest in the land that must be proprietary in nature: there is no other proprietor...The ownership of land within a territory in the exclusive occupation of a people must be vested in that people: land is susceptible of ownership and there are no other owners.⁵⁶

His Honour went on to describe the relationship between the communal title and the pendant rights and interests when he referred to *Milirrpum v Nabalco Pty Ltd*:⁵⁷

The fact that individual members of the community, like the individual plaintiff Aborigines in *Milirrpum*, enjoy only usufructuary rights that are not proprietary in nature is no impediment to the recognition of a proprietary community title. Indeed, it is not possible to admit traditional usufructuary rights without admitting a traditional proprietary community title.⁵⁸

⁵³ *Mabo (No 2)* (1992) 175 CLR 1, 58.

⁵⁴ In a 1997 article, ‘Aboriginal Title and Aboriginal Rights: What’s the Connection?’ (1997) 36 *Alberta Law Review* 117 at 138-142, Kent McNeil set out the most coherent understanding of Brennan J’s judgment in *Mabo (No 2)* – which corrected the prevailing misinterpretation in the Australian judicial and academic commentary. Despite the availability of this excellent analysis, it has been completely ignored – both by the judgments and by the submissions put forward by practitioners representing native claimants in Australia. It is not possible in the space of this paper to set out my allegation that McNeil was however in error in his analysis of *Wik* at 142-3.

⁵⁵ *op cit*, *Mabo (No 2)* (1992) 175 CLR 1, 76 (Brennan J).

⁵⁶ *ibid* 51 (Brennan J).

⁵⁷ [1972-3] ALR 65 (‘*Milirrpum*’).

⁵⁸ *Mabo (No 2)* (1992) 175 CLR 1, 51 (Brennan J).

There is a second source of misconception, and this is the failure to recognise that the term ‘title’⁵⁹ has two senses that are related but distinct, one referring to the manner in which a right to real property is acquired and the other referring to the right itself. That is the first sense concerns ‘entitling conditions’ and the second concerns ‘rights’. The two senses correspond respectively with conditions and consequences; the one causal, the other resultant.

In the term ‘native title’ the common law and Aboriginal law play different roles. Aboriginal law determines *who* is entitled to the rights recognised by the common law arising from the occupation of land at the time of sovereignty (and indeed Aboriginal law recognises the descent of these rights to any contemporary claimant community). The form of the title is possession, which flows from occupation. The entitling condition is the occupation of land under authority of Aboriginal law and custom. The right afforded by the common law is possession.

Rather than appreciating that ‘native title’ incorporates the common law and Aboriginal law in its two different senses, the prevalent assumption is that native title is constituted by Aboriginal law alone.

Conclusions

I will conclude by amending Professor McNeil’s compelling thesis on possessory title in two respects. Firstly, as I have already said, in my respectful view, Professor McNeil was incorrect to assume that possessory title is a separate basis of claim to that of customary law or native title. Rather the law on possession applies to the law on native title. In my view, this position is already confirmed by the Supreme Court of Canada in its decision in *Delgamuukw*. Then Chief Justice Lamer said:

...prior occupation, however, is relevant in two different ways, both of which illustrate the sui generis nature of aboriginal title. The first is the physical fact of occupation, which derives from the common law principle that occupation is proof of possession in law: see Kent McNeil, ‘Common Law Aboriginal Title’⁶⁰

and:

Under common law, the act of occupation or possession is sufficient to ground aboriginal title and it is not necessary to prove that the land was a distinctive or integral part of the aboriginal society before the arrival of Europeans⁶¹

and:

However the aboriginal perspective must be taken into account alongside the perspective of the common law. Professor McNeil has convincingly argued that at

⁵⁹ This explanation follows McNeil, op cit, 10. McNeil discusses the term ‘title’ as part of his introduction to possession and title to land in English law. He did not, as I have now done, apply this explication of the term ‘title’ to native title, or customary law title as he called it. The question of the meaning of ‘native title’ was fruitlessly discussed in argument before *Ward* (High Court Transcripts, P59/2000, 6 March 2001).

⁶⁰ *Delgamuukw* [1997] 3 SCR 1010, 1082 [114] (emphasis added).

⁶¹ *ibid* 1098 [145] (emphasis added).

common law, the fact of physical occupation is proof of possession at law, which in turn will ground title to the land: Common Law Aboriginal Title.⁶²

So there we have it: the application of the English common law principles concerning possession to the law on native title.

The second respect in which I would amend Professor McNeil's thesis, concerns the question of the form of title to which possessory title gives rise. Professor McNeil argued that the indigenous occupants of land, holding possession, would be entitled to a fee simple on the basis of a presumed lost grant.⁶³ That is, the common law would apply in much the same way as it would to any possessor who could not show an actual grant from the Crown (in the case of England the presumed lost grant applied to a great many titles in that country). At least one commentator has balked at piling fiction upon fiction.⁶⁴ In my respectful view, it is unnecessary to conclude that possessory title amounts to a fee simple on the fiction of a lost grant. Rather the title should be taken as it truly is: it is a *sui generis* form of possession. It is *sui generis* in that it is an allodial possession and does not have its origin in the tenurial system, and secondly, it is subject to derogation by valid exercise of sovereign power.

By way of conclusion, let me revisit Lord Sumner's famous statement in *Re Southern Rhodesia*⁶⁵ where his Lordship described a now outdated approach to the recognition of native title by reference to where claimant peoples stood in relation to some 'Darwinian' scale of social organisation. The passage is as follows:

The estimation of the rights of aboriginal tribes is always inherently difficult. Some tribes are so low in the scale of social organisation that their usages and conceptions of rights and duties are not to be reconciled with the institutions or the legal ideas of civilised society. Such a gulf cannot be bridged. It would be idle to impute to such people some shadow of the rights known to our law and then to transmute it into the substance of transferable rights of property as we know them.⁶⁶

Justice Brennan, as he then was, said in *Mabo (No 2)* that this kind of approach 'depended on a discriminatory denigration of indigenous inhabitants, their social organisation and customs', and he concluded that 'it is imperative in today's world that the common law should neither be nor be seen to be frozen in an age of racial discrimination'.⁶⁷

The danger into which the Australian law on native title has fallen is that whilst the discriminatory approach inherent in *Re Southern Rhodesia* has been rejected in respect of whether indigenous rights in a settled colony survive annexation – no matter how peculiar the social organisation and customs of the people concerned might be – in relation to the question that follows, namely 'what rights survive annexation?', the prejudice of *Re Southern Rhodesia* is revived and indigenous social organisation and customs are used to accord to

⁶² *ibid* 1110-1 [149] (emphasis added).

⁶³ *op cit*, McNeil 1989, 208, 242-3.

⁶⁴ Brendan Edgeworth 'Tenure, Allodialism and Indigenous Rights at Common Law: English, United States and Australian Land Law Compared after *Mabo v Queensland*' (1994) 23 *Anglo-American Law Review* 397.

⁶⁵ [1919] AC 211.

⁶⁶ *ibid* 233-4.

⁶⁷ *Mabo (No 2)* (1992) 175 CLR 1, 41-2 (Brennan J).

indigenous occupants of land a lesser form of possession than would be accorded to any other occupant by the common law. Indeed the content of the title of an adverse possessor is not limited to what she can prove by reference to laws, customs, and social organisation – rather she is accorded possession because she is in factual occupation. Yet, the title of the indigenous occupant is limited by proof of whatever traditional laws and customs may be adduced to a court, no matter how arcane they might be. Indigenous claimants can say to the High Court of Australia today: the common law only required that we prove occupation at the time of sovereignty, but *Yorta Yorta* now requires us to prove the details of the traditional laws and customs that existed more than two centuries ago.

This situation is not good. The situation is pregnant with the prospect that the opportunity which *Mabo (No 2)* represented for the settlement of land grievance in accordance with the three principles I outlined at the beginning of my submission, will ultimately be unfulfilled. In my view this situation can only be fixed if the definition of ‘native title’ in s 223(1) of the *Native Title Act* is restored to its original intention by Parliament, and that the explication of native title be undertaken by the Australian courts in accordance with ‘the time-honoured methodology of the common law’. This is the least that indigenous peoples having faith in the common law heritage of this country, could expect from the country’s Parliament and High Court.