

Land, Rights, Laws: Issues of Native Title

Native Title Research Unit

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The recognition of native title in the High Court's Mabo decision in 1992, the Commonwealth Native Title Act in 1993, and the Wik decision in 1996 have transformed the ways in which Indigenous peoples' rights over land may be formally recognised and incorporated within Australian legal and property regimes. The process of implementation has raised a number of crucial issues of concern to native title claimants and other interested parties. This series of papers is designed to contribute to the information and discussion.

The question of whether native title is extinguished by a grant of freehold is one which elicits a strong response from many sections of the Australian community. In this paper Dr Lisa Strelein analyses the decision in Fejo v Northern Territory and explores the uncertainty the decision creates for Indigenous peoples. Dr Strelein discusses other outcomes that may have been possible in the decision, and addresses the legal myths and fictions which currently dominate in the treatment of native title by the courts.

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EXTINGUISHMENT AND THE NATURE OF NATIVE TITLE FEJO V NORTHERN TERRITORY

Lisa Strelein

Most observers expected that the High Court would find that native title is extinguished by the grant of a freehold estate. Yet, despite the outcome being as predicted, many Indigenous peoples were disappointed by the decision in *Fejo and Mills v The Northern Territory and Oilnet (NT) Pty Ltd*. Arguably, there was scope within the concept of native title for recognition of the interests of Indigenous peoples in freehold land in some form, and certainly in land that had been resumed as vacant Crown land. There was hope that a principle or presumption of non-extinguishment may result in a more positive outcome in this case. More than this, there are aspects of the Court's reasoning in the *Fejo case*, and in particular the characterisation of the title, that are troubling for the future of the doctrine of native title as a vehicle for recognising the rights of Indigenous peoples over lands.

Background to the case

The Larrakia people, whose country includes areas in and around Darwin, Palmerston and Litchfield in the Northern Territory, have a registered application with the National Native

Title Tribunal for a determination of native title. The action in *Fejo v Northern Territory* was precipitated by the granting of leases, with an option to acquire freehold title, over lands that had been subdivided by the Northern Territory government but which were within the area subject to the native title application. The Larrakia people took action against the Northern Territory government and one of the lessees, Oilnet, with respect to the validity and consequences of the grant of such leases.

In the Federal Court, the Larrakia people sought a declaration that native title exists in relation to the subject lands and that the Larrakia people are the native title holders in respect of those lands. They argued that the Northern Territory government was required by the *Native Title Act 1993* to either negotiate with the Larrakia or to compulsorily acquire their native title. The Larrakia people also sought injunctions to prevent any further development on the lands.

The High Court was asked to consider a single ground of appeal: that the trial judge was wrong to hold that the grant of land extinguished all native title rights and interests in the land so that, upon the land being re-acquired by the Crown, native title rights and interests could not be recognised by the common law.

The facts of the case, specifically the tenure history of the subject lands, raised two important issues that were yet to be authoritatively determined by the High Court. The land, now the subject of the Crown leases, which was in dispute in this case was once part of a tract of land granted to John Benham in April 1882. The land was later acquired by the Commonwealth in 1927 for public purposes, specifically, as a quarantine station and later a leprosarium. Both public purpose proclamations were revoked in 1980. The land thus became vacant Crown land once again.

The first issue is whether a grant of freehold extinguishes native title so that no form of native title can co-exist with freehold title. The second question is whether extinguishment was permanent and absolute or whether there was potential for native title under the common law to 'revive' when the land returned to the Crown. The case also dealt with the issue of injunctive relief available outside the operation of the *Native Title Act 1993*.

These issues are imperative for the Larrakia because much of their land was dealt with in the same way, with large grants of freehold never developed and later taken up by the Crown while the Larrakia continued to assert and exercise rights over the areas. The issues are also important for Indigenous peoples in other parts of Australia, particularly in more settled regions. To this end, the Yorta Yorta, Nyungar, Wororra and Miriuwung Gajerrong peoples, amongst others, intervened to support the action of the Larrakia people.

The freehold question

The grant made in 1882 was for the land, all timber, minerals and appurtenances to Benham, 'His Heirs, and Assigns for ever'. These terms are recognised to convey an estate in fee simple, commonly called a grant of freehold title.

The High Court was unanimous in determining that native title was extinguished by a grant in fee simple, although Justice Kirby gave separate reasons. For Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ, native title was extinguished by such a grant because:

The rights that are given by a grant in fee simple are rights that are inconsistent with the native title holders continuing to hold any of the rights or interests which together make up native title.¹

An estate in fee simple is said to be the closest thing to absolute ownership that exists in the Australian system of land tenure, by which it allows 'every act of ownership which can enter into the imagination'.²

The conclusion that freehold extinguishes native title was foreshadowed in *Mabo's case* where Brennan J explained the relationship between inconsistency and extinguishment by reference to freehold:

Where the Crown has validly alienated land by granting an interest that is wholly or partially inconsistent with a continuing right to enjoy native title, native title is extinguished to the extent of the inconsistency. The native title has been extinguished by grants of freehold or of leases but not necessarily by the grant of a lesser interest (e.g. authorities to prospect for minerals).³

Similarly, Deane and Gaudron JJ stated that native title was 'susceptible of being extinguished by an unqualified grant by the Crown of an estate in fee . . .'.⁴

In a separate judgement in the *Fejo case*, Kirby J acknowledged that these statements were not essential to the cases then at hand, indeed the question had not been fully argued, therefore the Court in this instance was not bound by such statements.⁵ Moreover, the authorities to date had given rise to a test that could be applied to determine whether, and to what extent, native title is extinguished by the grant of freehold title.

This test focuses on inconsistency as the essence of extinguishment. In the *Native Title Act case*, for example, the joint judgement of the majority referred to 'extinguishment or impairment' by 'a valid exercise of sovereign power inconsistent with the continued or unimpaired enjoyment of native title'.⁶ As such, the extent of extinguishment or impairment would depend on the extent of any inconsistency. It was open to suggest that, under the test, extinguishment could not be construed in a way which takes on an absolute character.

This view was reinforced by the decision of the High Court in the *Wik peoples' case*. There, the nature of the pastoral lease was examined to assess the extent of inconsistency and indeed was found not to be inconsistent with the continued enjoyment of some elements of native title, although the rights of the pastoralist, to the extent of any inconsistency, would prevail.⁷ Therefore, the question of whether freehold title extinguished native title was open to be tested.

A bundle of rights

In applying the test of inconsistency in the *Fejo case*, the High Court gave little or no consideration to the ways in which native title may co-exist with freehold title. Instead, the way in which the two interests were characterised led the Court to conclude that there was no possibility for co-existence. There are two problems with the way in which native title has been characterised. The first is the adoption of the 'bundle of rights' approach and the second is the class of rights attributed to it.

The judgements in the *Fejo case* gave judicial support to the ‘bundle of rights’ conception of native title. In seeking to explain native title, the joint judgement stated that extinguishment does not depend upon the intention of the party making the grant but on ‘the effect that the later grant has on *the rights which together constitute native title*’.⁸ Similarly, Kirby J referred to ‘the bundle of interests we now call native title’.⁹

The joint judgement then listed the rights of native title, which relate to the use of land, and ‘may encompass a right to hunt, to gather or to fish, a right to conduct ceremonies on the land, a right to maintain the land in a particular state or other like rights and interests’.¹⁰

These, it was said, are ‘rights and interests that are inconsistent with the rights of a holder of an estate in fee simple’.¹¹ A fee simple estate gives the holder of that estate the right to use the land as they see fit and exclude any and every person from access.

This prioritisation of physical access and control does not reflect the unique nature of the relationship to and interest in the land that Indigenous peoples hold. Moreover, it goes against those aspects of the decision in *Mabo’s case*, which embraced the spiritual and non-physical elements of Indigenous peoples’ traditions, customs and laws relating to lands. Instead, the High Court superimposed non-Indigenous understandings of relations with land, and the rights and interests that can attach to land, over the concept of native title.

Indigenous peoples in Australia have made little or no claim to displace the rights of those who hold title under the Australian tenure system. Yet, they clearly see the potential for recognition of some form of native title over lands regardless of the tenure but these were not explored. The judgements in the *Fejo case*, in assuming the kind of rights asserted required physical access to and indeed control over lands, failed to appreciate the potential for recognition in the concept of native title.

A unique title

The uniqueness, or *sui generis* character, of native title was undermined in the *Fejo case*. In addition, the importance of understanding native title as a site of mutual recognition between two peoples and two systems of law found no expression. This is not merely a reflection on the *Fejo case* but on the development of the doctrine of native title since the decision in *Mabo’s case*.

The judgements in the *Fejo case* rejected the need to examine the Indigenous law to see whether any native title rights could co-exist with freehold title. Instead, the investigation was carried out wholly within the sphere of the Australian tenure system. Although the ‘bundle of rights’ attached to common law native title resembled the character of an Australian tenure, the High Court rejected any analogies between native title and other interests that have long been accepted as capable of co-existing with a fee simple interest.

In rejecting such an analogy, Kirby J made clear the place of native title in the non-Indigenous law. They do not, Kirby J stated, come from the same legal source. His Honour was at pains to reiterate the ‘inherent vulnerability’ of native title. Like the majority, Kirby J relied on the idea that native title has its source in, and derives its content from a body of law outside the common law, as the source of this vulnerability. This reasoning assumes an inherent superiority in titles which exist under non-Indigenous law.

This characterisation reflects a ‘contingent’ approach to Indigenous peoples’ rights, by which the law of the coloniser recognises rights as it pleases. This goes against the notion that the rights of Indigenous peoples to their lands are inherent rights or fundamental human rights. The Court has here adopted a vision of law based on power which comes from the capacity to dominate.

Drawing on the jurisprudence of *Mabo's case*, Chief Justice Lamer of the Supreme Court of Canada, spoke of Aboriginal title, as it is known in Canada, in the context of a reconciliation of prior occupation by Indigenous peoples with the assertion of Crown sovereignty. As such, Lamer CJ suggested that courts need to take into account both perspectives and to accord due weight to Indigenous perspectives.¹²

It should be noted however, that the judges in the *Fejo case* rebuffed perceived over-reliance on overseas precedents, despite clear examples where freehold title had been found to be subject to customary, or specifically Aboriginal titles in the way asserted in this case.¹³ In all of the judgements, it was argued that decisions in other common law jurisdictions could offer little guidance to the High Court because the legal, political and historical considerations were so markedly different.¹⁴ For Kirby J, the belated recognition of native title in this country was seen as a significant factor which negated the value of overseas authority.¹⁵ Again, this approach is disappointing in that it suggests that our own political and legal history provides an excuse for a limited response to the claims of Indigenous peoples.

The High Court narrowed rather than enhanced the potential of native title. More and more, the unique character of native title as a concept which bridges two legal systems, showing equal respect to the perspective of both, has been replaced with a more restricted conception of an interest which reflects understandings of land and ownership that are more familiar to the courts of the coloniser.

A new vulnerability

Despite observations in the judgements to the contrary, it appears that native title has become a creature of the common law, as the common law attaches to it characteristics of other tenures in the Australian tenure system. More devastating is that in doing so, native title enters a hierarchy of interests and, as the *Fejo case* demonstrably makes clear, its place is being forged at the lowest point in the scale.

The idea of an ‘inherent vulnerability’ in native title, which was emphasised by Kirby J, has been an undercurrent of previous judgements. In *Mabo's case*, for example, Brennan J observed that by the assertion of sovereignty by the Crown, ‘rights and interests in land that may have been indefeasible under the old regime become liable to extinction by exercise of the new sovereign power’.¹⁶

Similarly, Deane and Gaudron JJ had argued that native title could be extinguished by an exercise of sovereign powers in a manner inconsistent with native title, as we have seen. However, native title was not protected against impairment by subsequent grant, unlike an earlier title emerging from the non-Indigenous tenure system.¹⁷

Rather than explore the principle of inconsistency, Kirby J, in the *Fejo case*, placed the emphasis on the inherent vulnerability of native title as the basis for determining that native

title had been extinguished by the grant of freehold title. Indeed, in rejecting any possibility of co-existing rights, Kirby J stated that:

The inconsistency lies not in the facts or in the way in which the land is actually used. It lies in a comparison between the inherently fragile native title right, susceptible to extinguishment or defeasance, and the legal rights which fee simple confers.¹⁸

Thus, extinguishment occurred because the titles were inconsistent in law, rather than in fact, according to the characterisation by the Court.

Kirby J also advocated judicial restraint in this context arguing, firstly, that the Court should not 'destroy or contradict' established legal principle, that is, the skeleton of principle referred to by Brennan J in *Mabo's case*.¹⁹ A second reason for restraint was the fundamental importance attached to fee simple and exclusive possession under the law. Kirby J went so far as to suggest that such tenures were essential to the peace, order and economic prosperity of every society and, as such, it would not be the role of the courts to make any change to those tenures. Moreover, Kirby J suggested that the courts should approach any claim that casts doubt on fee simple interests as a whole with particular caution. Kirby unapologetically privileged non-Indigenous interests, especially freehold interests, reinforcing the status quo of colonial power relations and undermining the newly recognised rights of Indigenous peoples in Australia.

The selective use of the unique status of native title to reinforce its susceptibility to extinguishment is a disappointing aspect of the doctrine of native title, and for the rights of Indigenous peoples in general.

Revival and extinguishment

Similar considerations were extended to arguments regarding the re-recognition of native title. The Larrakia people argued that to the extent that any inconsistency had extinguished native title, that title could be re-recognised if the land were to return to the Crown and its essential character as unalienated Crown land was restored. Of course this would depend upon the Indigenous people showing that native title had continued in fact. This argument was consistent with the conception of native title in *Mabo's case*. Native title, while derived from Indigenous law, relies on the common law for recognition. Arguably, then, where rights continue in Indigenous law the common law has the capacity to re-recognise native title. The High Court rejected this view in the *Fejo case*.

The joint judgement in the *Fejo case* stated that 'references to extinguishment rather than suspension of native title rights are not to be understood as some incautious or inaccurate use of language'.²⁰ The decision in the *Fejo case* determined that extinguishment was absolute and forever, regardless of the rights and interests that continue in Indigenous law from which native title derives its source and content.

While recognising that native title has its origins in, and is given its content by, the laws of Indigenous peoples, the joint judgement further undermined the status of those laws. While reaffirming that native title is neither an institution of the common law nor a form of common law title, they stated, succinctly, that while the existence of Indigenous law is necessary to establish native title, it is not sufficient. The existence of rights over land under Indigenous

law will not be enough to receive recognition under the common law. The High Court dismissed the claim to revival as seeking 'to convert the fact of continued connection with the land into a right to maintain that connection'.²¹ Surely most Indigenous peoples would agree that is exactly the basis of their claim.

Kirby J took a slightly different view and did not consider that the ordinary meaning of extinguishment was sufficient basis for rejecting the appellants' arguments.²² But Kirby J had already foreshadowed his opinion on this issue. In deciding that a grant of freehold extinguished native title, Kirby J had stated that:

Doubtless the bundle of interests we now call 'native title' would continue, for a time at least, within the world of Aboriginal custom. It may still do so. But the conferral of a legal interest in land classified as fee simple had the effect, *in law*, of extinguishing the native title rights.²³

Further, Kirby J argued that to recognise a 'revival' of native title in land when it returns to the Crown would be to recognise a 'new right'. As such, Kirby J suggested that this outcome would be incompatible with the notion that native title has its origins in Indigenous law. But this argument is fraught. To consider that a revived native title is a new right, while consistent with the reasoning of the Court in terms of extinguishment, certainly does not reflect the continued existence of the laws and customs which underpin native title in the first instance. In the result, the decision of the Court with regard to revival combines with the reasoning of the judgements concerning inconsistency to ensure that, to be enforceable under the common law, native title must fit within the cracks left by the Australian land tenure system.

The High Court has made a distinction between native title which exists in fact and where it may exist in law. With this reasoning, native title has truly become a creature of the common law. Once again a legal fiction, this time called extinguishment, is used to deny the existence of an alternative legal system which legitimately confers rights and interests, to make those rights and interests unenforceable under colonial law. As the Court moves to a bundle of rights approach, centred upon physical access, and continues to assert that the recognition of native title is dependent upon the common law, the idea that the source of the right lies in Indigenous law and society becomes difficult to reconcile with the doctrine that is developing.

Conclusion

In the *Fejo case*, Kirby J justified the High Court's characterisation of extinguishment by arguing that legal history, legal authority, legal principle and legal policy had combined to determine that native title was extinguished absolutely upon a grant of freehold and could never revive.²⁴ For Indigenous peoples, the question remains – whose legal history, and by whose authority are their rights taken away?

Considerations of legal policy, primarily the quest for certainty for non-Indigenous interests, have left Indigenous peoples' rights and interests more uncertain than ever. As the connection that Indigenous peoples maintain with their land is transformed, in law, to a 'bundle of rights' centred on physical control, and as their rights, in law, become increasingly more vulnerable to the arbitrary exercise of power, Indigenous peoples again find themselves without recourse. The doctrine of native title has created a hierarchy of rights and interests which, at every turn, places other interests above those of Indigenous peoples. The recognition of rights in *Mabo's*

case, and the attempt by the High Court to reconcile the common law with Indigenous peoples' prior and continuing law and authority, has been continually wound back to accommodate non-Indigenous interests to the detriment of Indigenous peoples.

Certainty comes from the making of decisions. The decision in the *Fejo case* could have created certainty by recognising that Indigenous peoples' connection to land is an undeniable and essential part of Indigenous identities and societies. Over freehold land, it may be that the respect that one system can show to the other is the recognition of traditional custodianship, that is, the right to be acknowledged as the first peoples and first owners of that land. The rights and interests of the fee simple title holder could have been confirmed, as in the *Wik peoples' case*.

However, a relationship that acknowledges and respects Indigenous peoples as peoples, could have been reached by recognising that Crown land, whatever its tenure history in Australian law, must be dealt with in a way that recognises the native title holders. Respect for the law of Indigenous peoples and their struggle for survival could have been celebrated by recognising that native title cannot be extinguished absolutely in the Australian legal system where it continues to exist in Indigenous law.

Legal history and authority are littered with myths and fictions that privilege the powerful, particularly in relations between Indigenous peoples and the colonial state. But justice and rights also, presumably, continue to hold a place in legal tradition. Unfortunately for Indigenous peoples, this country, its people and institutions have been unable to acknowledge the reality of colonisation, the injury in its past, and the legitimacy of the claims of Indigenous peoples, nor the potential to change the continuing relations of domination.

¹ *Fejo and Mills v The Northern Territory and Oilnet (NT) Pty Ltd* (unreported decision of the High Court of Australia, 10 September 1998), para. 43.

² *Commonwealth v NSW* (1923) 33 CLR 1, 42 per Isaacs J.

³ *Mabo v Queensland [No. 2]* (1992) 175 CLR 1, 69.

⁴ *ibid.*, 89, see also 110; *WA v Commonwealth (the Native Title Act case)* (1995) 183 CLR 373, 422; *Wik Peoples v Queensland* (1996) 187 CLR 1, 176 per Gummow J, 250 per Kirby J.

⁵ para. 100.

⁶ *W.A. v Commonwealth (the Native Title Act case)* (1995) 183 CLR 373, at 439, per Mason CJ, Brennan, Deane, Toohey, Gaudron, and McHugh JJ.

⁷ *Wik Peoples v Queensland* (1996) 187 CLR 1.

⁸ emphasis added, para. 47.

⁹ para. 106.

¹⁰ para. 47.

¹¹ para. 47.

¹² *Delgamuukw v British Columbia* (unreported decision of the Supreme Court of Canada, 11 December 1997), para 81-2; *R v. Van der Peet* [1996] 2 SCR 507, para. 42, 49-50.

¹³ See for example, *Public Access Shoreline Hawaii v Hawai'i County Planning Commission* 903 P 2d 1246 (1995).

¹⁴ See the joint judgement, at para. 54.

¹⁵ paras 103, 111.

¹⁶ *Mabo [No.2]*, at 63.

¹⁷ *ibid.*, at 89.

¹⁸ para 105.

¹⁹ *Mabo [No.2]*, at 43.

²⁰ para. 45.

²¹ para. 46.

²² para. 110.

²³ emphasis added, para. 106.

²⁴ para. 107.

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