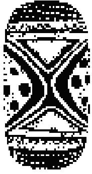
Land, Rights, Laws: Issues of Native Title



Native Title Research Unit
Australian Institute of Aboriginal and Torres Strait Islander Studies

Contributing to the understanding of crucial issues of concern to native title parties

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The High Court Mabo *decision in 1992, the passing of the Commonwealth* Native Title Act *in 1993, and the* Wik *decision in December 1996 mark a fundamental shift in the recognition of indigenous rights in Australia, transforming the ways in which indigenous ownership of land may be formally recognised and incorporated within Australian legal and property regimes. The process of implementation, however, raises a number of crucial issues of concern to native title claimants and other interested parties. Many of these will have to be decided in the courts. Nevertheless, information about and discussion of the issues are important for those needing to address the matters raised by the claim process.*

This series of papers is designed to contribute to the information and discussion. The papers address the shift from notions of statutory land rights to the rights of Indigenous peoples that pre-existed colonisation and exist within the broad spectrum of their human rights. Within these rights, land is an essential component.

Maureen Tehan's paper examines the conceptual bases of land legislation in Australia, demonstrating that Anglo-Australian property law has always accommodated more than one proprietary interest in the same piece of land. In the later section of the paper she considers ways in which current models for the co-existence of public and private rights and interests in land may provide a basis for resolution of the co-existence issues arising out of the Wik *decision.*

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CO-EXISTENCE OF INTERESTS IN LAND: A DOMINANT FEATURE OF THE COMMON LAW

Maureen Tehan

Introduction

In a complex set of judgments in the *Wik* case, the High Court affirmed the fundamental principles of its decision in *Mabo* in relation to the existence and recognition of native title at common law. More importantly, the Court reaffirmed its view that native title was an interest in land that was capable of co-existing with other interests in land.

The majority, in four separate judgments, found that the grant of a pastoral lease under the *Land Act 1910* (Qld) did not confer exclusive possession and therefore did not extinguish native title. Thus, the two interests could co-exist. The majority made clear, in a postscript by Toohey J, (82-3) that such a view was 'in no way destructive of the title of those grantees' and that where there is conflict between the two sets of rights, native title 'rights and interests must yield to the rights of the grantees.' Therefore the validity of the grant is not in question nor is the right of the pastoralist to carry out acts authorised by the grant or the statute under which the grant is made.

The import of the majority judgments is to reaffirm the views expressed in *Mabo v Queensland* concerning the co-existence of native title with other land uses. The new element introduced by the *Wik* judgment is to confirm that there might be co-existence of native title and private rights and interests in land in circumstances not previously addressed by the Courts that is, with pastoral leases, and to raise some question about the parameters of the co-existing rights. In *Mabo* it was suggested that where no prior extinguishment had occurred co-existence of native title was possible in certain Crown land reserved for specific purposes such as national parks and land reserved for the benefit of Aboriginal people. It was anticipated that co-existence of native title and some interests granted under mining legislation, for example exploration licences, could occur. Thus the notion of native title co-existing with both public and private interests is not new. Nor is the notion of co-existence of rights and interests in land in the Australian property law system. Similarly there are now many examples of Aboriginal and non-Aboriginal interests in land co-existing in a non-native title context.

This paper considers the range of ways in which both private and public rights and interests in land can and do co-exist and the ways in which these may provide a basis for resolution of the co-existence issues arising out of the *Wik* decision.

Co-existence of interests in land

In its regulation of private interests in land, Anglo-Australian property law has always accommodated more than one proprietary interest in the same piece of land. The conceptual underpinnings for this scheme have traditionally been identified as the

doctrine of tenure and the doctrine of estates. While the former is, arguably, of diminishing contemporary importance, it provides historical support for the fragmentation of interests in land. In England, the doctrine was based on the notion that the ultimate title to all land was in the Crown and all tenures were referable to some original grant. The doctrine enabled many different interests to be granted and harmoniously co-exist in the one piece of land, each interest having a shape and form that allowed concurrent enjoyment and determined priority, if necessary, of those interests. Brennan J discussed this doctrine in *Mabo* pointing to its centrality in the Anglo-Australian property system, namely that all common law tenures must be as a consequence of a Crown grant. His Honour identified native title as the only interest in land that is not so acquired (61).

The doctrine of estates provided for successive interests in land and generally determined who would be entitled to possession of the land. Through a system of freehold, leasehold and life estates, it is possible for more than one person to have a right to possession of land, albeit that the right to possession of one or more persons might be postponed for the duration of some prior estate. For example one person may hold the freehold but their right to possession is postponed because of a lease on the land for a term of years, or, that person may have a right at some future time to possession because the person currently in possession of the land has an estate in the land that will cease upon their death. Nonetheless each person in these examples has an estate in the land. These principles, sometimes modified by statute, remain central to the regulation of property interests in land in Australia.

These doctrines then, provide the conceptual basis for concurrent interests in land as well as pointing to a distinction between those interests (or estates) which carry with them a right to possession of land for a defined duration and those which bestow some proprietary right but do not carry with them a right to possession. The regulation of these estates and interests derives from both common law and statute. As an irresistible feature of the property law system there are numerous examples of the principle.

The practical consequence of these doctrines is that a freehold (or leasehold) estate in land will generally give the holder of the estate a right to possession. This freehold estate is commonly equated with ownership. A range of other interests capable of co-existence may be created in the same land. Three common interests that impact on this ownership are restrictive covenants, easements and profits a prendre. While there are some technical differences, all are private interests, proprietary in nature in that they are enforceable against successors in title, exist at common law or equity, or have been tempered by equity and in most jurisdictions have been modified by statute.

Restrictive covenants

Restrictive covenants can impose significant limitations upon the manner in which an owner may use land. For example, there may be limitations as to the height, composition, size or external features of any building on the land or restrictions on uses such as maintenance of certain natural features, bush, garden and the like. More importantly,

such restrictive covenants run with the land and may bind successors in title. In these cases there will generally not be a right of entry onto the land but there will nonetheless be a significant and enforceable limitation on the manner in which the owner may enjoy her or his property. The enforceable right is the restrictive covenant.

Easements

Easements similarly operate as an imposition or limitation on the rights of an owner of land. Statutory easements for water and sewerage provide a very obvious example. However, a private owner or occupier of land may have certain rights, including rights of entry, onto adjacent private land for a variety of purposes including a right of way, a right to discharge water or effluent or to use amenities on the land. The rights attached to the particular easement are enforceable against the owner, even where this impinges upon the manner in which the owner may use the land. Again, such rights run with the land and will bind successors in title, in some circumstances whether they know about the easement or not. In some jurisdictions, easements are enforceable against subsequent registered proprietors of land in the land titles registration system, even where the easement is equitable and unknown. It provides an exception to the rule that inchoate, unregistered interests do not bind subsequent registered proprietors.

In the case of both restrictive covenants and easements, there is clear recognition that these interests in land may be concurrently enjoyed with the owner, even where these rights impinge upon the owners enjoyment of the land. Provided they are properly created and meet the requirements that characterise the interest, they will be enforceable against the owner of the land.

Profits

Profits a prendre are similar. They exist both at common law and under statute and are also proprietary interests. Unlike an easement, a profit entitles the holder to enter another's land and to take the soil or part of the soil from it. The most familiar example relates to rights to mine, although this is not the only type of profit. Profits may be created by agreement between parties. In the case of grants of mining tenements a profit type statutory interest is imposed upon the land owner under statute. Most grants of freehold or crown leases reserve minerals to the Crown and therefore it might be suggested that the land owner or lessee never owned the minerals. While this is technically so, the practical effect of the statutory grants of mining tenements is to impose a burden on the enjoyment of the land that an owner may otherwise have.

Mining

Most mining regimes are governed by relevant State and Territory statutes which empower the executive to make grants of mining tenements in accordance with procedures and powers set out in the statutes. While it is difficult to generalise, there are some common features of these regimes. With few exceptions, (for example some

agricultural land in Western Australia), the consent of private owners of land to the grant of a mining tenement is not required. There are often restrictions in relation to residential land or limitations on the proximity of the mining operations to improvements or interference with water sources as well as provision for compensation for disruption. However there is no right to oppose the grant of the tenement or the proper operation of the mining activities thereunder. It is common for mining tenements to be granted over agricultural or pastoral land, whether it is freehold land or some other tenure. Once granted, provided the holder of the mining tenement complies with the requirements of the relevant statute and any conditions in the grant, the land owner has no right to interfere with the mining operations.

There are common elements of these diverse interests that impinge on the rights of land owners. The interests themselves are well known at common law, although the precise rules regulating each may have been varied over time, by the on-going development of the common law, by the application of equitable principles or by statute. The interests may be created by agreement between the parties but even where this is so, the interest may bind successors in title, in some circumstances without notice of the interest. The interests may be imposed by statute or by executive act under which there is no consent requirement even though there may be a significant imposition upon the enjoyment of the land by its owner. However, the dominant feature of all these interests is that they may be enjoyed concurrently with the rights and incidents of land ownership enjoyed by the holder of the estate in land.

The interest is known to the common law and it has certain essential elements. However, the nature and extent of the right granted in each category of interest depends upon the content of the agreement between the parties and any applicable legislation. The rights co-exist but the precise import of the rights in any particular case may vary. For example, at common law, the easement must satisfy four criteria before it will be recognised and enforced as an easement. But whether it is an easement for pipes or a right of way, the conditions attaching to each will depend upon the detail of the grant.

The interests referred to that might co-exist are essentially private interests. However significant limitations on the rights of ownership of land are also imposed by public interests. The most obvious of these are planning regulations and restrictions but they also include such things as the regulation of dangerous substances on private land through environment protection legislation, the limitation on land management created by regimes for protection of flora and fauna or public access on pastoral leases.

The whole scheme of concurrent interests in land resonates with the rights and interests of native title holders in relation to private interests in land and in particular, those statutory rights which are granted as a pastoral lease. If the essence of the majority in *Wik* is that native title and these private statutory rights might co-exist, then the schemes for concurrent enjoyment of interests in land provide significant models for the management of these concurrent interests. Although the range and substance of these interests are known, their parameters are subject to change, particularly by but not limited to, statute.

As change occurs, private owners have been required to adjust their interests to accommodate the changing boundaries of these concurrent interests. So with native title.

Co-existence of Aboriginal and non-Aboriginal interests in land

Prior to *Mabo* and the *Native Title Act 1993* (Cth), Aboriginal people had been granted certain statutory rights in relation to land.

In the context of private interests in land, in some jurisdictions (although generally not Queensland), pastoral leases included reservations in favour of Aboriginal people allowing them to hunt and to use the land for ceremonial purposes and even to erect traditional dwellings. In the context of public land, a range of rights have been granted including the right to hunt and gather in conservation reserves and the right to take otherwise protected plant and animal species for cultural purposes. Since the middle of last century, reserves have been created, usually under various Land Acts, expressed to be for the use and benefit of Aboriginal people. While the reserves system has not generally provided for Aboriginal control of land, it has often enabled Aboriginal inhabitants to continue to enjoy the land in accordance with tradition and to express views about land management and resource development within the reserves. Within this context, there has been shared use of the land, although the legally enforceable rights of the Aboriginal inhabitants have not been clearly defined.

In the Northern Territory and some States Aboriginal land rights legislation has provided for grants of land, including freehold title, to Aboriginal groups. In each of these jurisdictions there is also provision for concurrent enjoyment. There are provisions to allow resource development under certain conditions as well as tourist and conservation activities. While the regimes vary, there is a common thread of shared use with resource developers, tourist operators, environmental managers and the public. In each situation, there are statutory rights which regulate the relationship between the Aboriginal land owners and the co-users.

In the case of the *Northern Territory Land Rights Act 1976* (Cth), for example, there is a clearly defined process for negotiating access to land by resource developers. The rights of each party are set out in the legislation. There are certain requirements that must be complied with in the processing of an application. However, once agreement between the parties is reached, both the Aboriginal and non-Aboriginal rights and interests co-exist, with each group entitled to use the land in a manner permitted under the legislation. In this context, with the exception of inalienability, the statutory freehold title of the traditional Aboriginal owners is little different from that of other freehold title holders vis a vis the holders of the mining tenement.

In relation to conservation areas, there are examples of national parks owned by Aboriginal people and leased to governments for the purpose of park management. There are also examples of parks leased to Aboriginal people for park management purposes or arrangements where there is some involvement in park management by Aboriginal people without any grant of land tenure. In these varied circumstances, the practical

effect of the arrangements is to create shared interests and shared use. There may not be specific, identifiable legal interests such as those referred to above, although there will almost always be some statutory or agreed basis for the arrangements. While these arrangements may limit the full exercise of rights by traditional Aboriginal owners, there is concurrent enjoyment of some rights. Other rights may be postponed for the term of the lease. As in property law generally, the temporal limitation of rights is not uncommon.

Shared land use in these contexts provides some practical examples for the possibilities of co-existence. The legal basis for such shared or co-existing interests may vary, but there are some common elements for success. These include the clear enunciation of the rights of the parties and the regime within which shared land use occurs, acknowledgment of the special attachment to land enjoyed by Aboriginal people as a basis for the arrangements and the development of meaningful and reliable relationships among the joint land users. Many of these elements also characterise the concurrent use and enjoyment of land by non-Aboriginal parties.

Co-existence of native title and other interests in land

As Brennan CJ indicated in his *Wik* judgment (reiterating his view in *Mabo*), native title is not a common law tenure (as are those referred to above), but rather an interest in land that is recognised and capable of protection by the common law. One aspect of this recognition is the practical protection provided to native title by the *Racial Discrimination Act 1975* (Cth). One result of this view is that native title is a new and relatively unknown interest that may affect common law interests in land.

The boundaries and substance of the interest are unknown. While it was made clear in *Mabo*, and again in *Wik* , that the content of native title is derived from the customs and traditions of the native title holders, it was also conceded that the content will vary from case to case. As a result, when considering the concurrent enjoyment of native title with other interests, it will be necessary to consider the content of native title in order to determine the precise extent to which co-existence is possible and the parameters of each set of rights. In some circumstances, native title will give a right of possession whereas in other circumstances the rights may be restricted to a right to use the land for hunting or ceremonial purposes.

The extent of the rights enjoyed as native title will have a consequential impact upon the rights with which it seeks to co-exist. Where a right to possession is held, this may have an impact on other lawful activities unless it is clear which of the interests should predominate where there is conflict. In circumstances where the native title rights amount to a right to exclusive possession, full enjoyment of native title rights will not be amenable to concurrent enjoyment. This may mean that those rights are extinguished, only capable of partial enjoyment or full enjoyment may be postponed until the expiration of the other interest.

To date there is little practical or legal guidance on how this issue should be resolved. The majority in *Wik* made it clear that native title rights must yield to those of the pastoralists, but did not provide clear guidance on the effect of that on extinguishment. Some agreements have been reached that accommodate concurrent enjoyment and these agreements help to define the boundaries of the competing interests. For example, the Cape York Heads of Agreement includes a provision that native title rights will not be exercised in a way that interferes with the rights of pastoralists. The Mount Todd agreement includes a provision that the traditional owners will forbear from making any native claims or claims under the *Aboriginal Land Rights (Northern Territory) Act 1976*. These indicate that, as a practical solution, negotiation of the boundaries of each interest is one method of resolving difficulties.

Wik is the first decision to give guidance on the issue in relation to native title on pastoral leases and is clear in its view that where there is conflict, the rights granted under the pastoral lease prevail. While this approach raises some technical issues in relation to extinguishment, it also suggests that where co-existence is possible both legally and practically, the issue of extinguishment need not be relevant. The key issues emerging for determination in relation to co-existence of native title with other interests in land are the boundaries of each interest rather than the issue of extinguishment.

Conclusion

This discussion paper has suggested that the co-existence of rights and interests in land is common place both at common law and under statute in Australia. This scheme is characterised by the definition of each of the interests in order that they do not conflict. Once the parameters of each interest and the means for determining conflicts are clear, there is no bar to the continued, concurrent enjoyment of the rights of each party. Each of the interests can be enforced to the extent of the rights granted. These schemes provide a legal basis for concurrent enjoyment of land.

The practical implications of concurrent enjoyment might be seen through the range of other statutory arrangements and in particular, these arrangements have allowed for concurrent use of land by Aboriginal and non-Aboriginal interests in circumstances which have allowed the continued use and enjoyment of land by both groups in accordance with their rights and interests.

In *Mabo*, the common law recognised a further interest - native title - and suggested that this could co-exist with other interests in land including national parks and other interests held by the Crown. *Wik* has confirmed that another of the interests with which native title may co-exist is pastoral leases. The discussion in this paper has suggested that co-existence of these interests is not in itself remarkable or problematic. The new elements that have been introduced are first, native title as an interest in land and second, pastoral leases are among the interests with which native title may co-exist. In order to accommodate this co-existence, clearer definition of the parameters of each of the rights granted, may be required. Because of the variance in the incidents of native title, this may need to be done on a case by case basis, as suggested by Toohey J in the postscript to his

Honour's judgment. However, the project should be one of teasing out the boundaries and adjustment at the margins of each interest in order to accommodate co-existence rather than one requiring the extinguishment of one interest in order to accommodate the other. That approach has not been necessary in relation to the multiplicity of concurrent common law interests in land and is not necessary here.

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