

# OPPORTUNITY AND RESPONSIBILITY\*

by P A Keane<sup>†</sup>

I begin by quoting some words attributed to an Aboriginal elder, who remains anonymous.

“Traveller, there are no paths. Paths are made by walking.”

I want to ask the question: In finding our way in what for many is a new and challenging area of law and engagement, have Australian courts and indeed Australian lawyers “reduced native title to what they conceive of as a social and cultural artefact, not a legal title to land that encompasses any economic meaning or benefit”?

This is the question Noel Pearson asked in his lecture, “Where We’ve Come From and Where We’re At with the Opportunity that is Koiki Mabo’s Legacy to Australia.”<sup>1</sup>

If Noel Pearson’s reproach is just, the questions arise whether the situation is remediable and how?

One does not need to delve deeply into the history of engagement between Indigenous peoples and Settler States to find examples of the relationship between land ownership, economic leverage and political power.

The history of the colonial powers themselves shows this relationship at play. In the book, “Who Owns Britain”,<sup>2</sup> Kevin Cahill traced some of the direct linkages between the acquisitions of land by William the Conqueror’s followers in 1066 and the economic and political power structure of modern Britain. These linkages are best exemplified by the Grosvenor estates. These estates were worth an estimated £10 billion in 2002. This included £3.3 billion for holding significant tracts of Mayfair in London, as well as managing, for the Grosvenor family trusts, 200 acres of Belgravia.

Gerald Cavendish Grosvenor is the current Duke of Westminster. His personal history may be traced to the 1066 conquest.<sup>3</sup>

The relationship between land ownership and economic and political power is also highlighted by the history of the Plantagenet family:<sup>4</sup>

“The Plantagenets ruled England, Wales, Ireland and occasionally Scotland, or parts of it, from around 1154 to 1485. In terms of ruling families their incumbency is nothing particularly remarkable in British history, just 331

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<sup>1</sup> Noel Pearson, “Where We’ve Come From and Where We’re At with the Opportunity that is Koiki Mabo’s Legacy to Australia”, Mabo Lecture, *AIATSIS Native Title Conference 2003*, ‘Native Title on the Ground’, Alice Springs, 3-5 June 2003, p.9.

<sup>2</sup> Kevin Cahill, “Who Owns Britain” (Canongate Books, Edinburgh, 2002).

<sup>3</sup> *Burke’s Peerage and Baronetage* (1896) as cited in Kevin Cahill, “Who Owns Britain” (Canongate Books, Edinburgh, 2002), p. 150.

<sup>4</sup> Kevin Cahill, “Who Owns Britain” (Canongate Books, Edinburgh, 2002), p. 27.

years. They were, however, supposed to have departed the scene 516 years ago. Yet when [Tony] Blair evicted the [hereditary Lords] from the House of Lords in 1999, he threw out no less than 49 Plantagenet heirs, 20 of whom appeared in the *Sunday Times* Rich List for 2000 and nine of whom appear amongst the top 30 landowners in the country, with five in the top ten of individual landowners. What confounds modern economists and historians is how a supposedly ‘extinct’ royal line continues to thrive and prosper right into the twenty-first century.”

On the other hand, there are, no doubt, at least as many of the descendants of William the Conqueror’s kleptocracy who did not deal successfully with the land acquired by their ancestors.

The point is that land ownership can mean enduring political power, but the key to achieving that power is the ability to unlock the economic value of land and then to deal prudently with that value.

The questions that I wish to explore are whether and how the economic value of native title can be unlocked and managed for the future so as to “mean enduring political power”. In opening these questions up for your consideration I want to mention, albeit very briefly, some questions which arise in relation to how determinations of native title might serve to provide indigenous people with another key to unlocking the economic value of their interest in their land.

We have become familiar with the use of Indigenous Land Use Agreements (ILUAs) as a means to unlock the economic value of land for indigenous peoples. ILUAs can be made without the need for a prior determination of native title. They highlight the value inherent in the right to negotiate.

We must not forget, however, the importance of a determination of native title – this importance being so powerfully expressed in the preamble to the *Native Title Act 1993* (Cth) (NTA). In the preamble to the NTA it is stated that:

**“It is particularly important to ensure that native title holders are now able to enjoy fully their rights and interests. Their rights and interests under the common law of Australia need to be significantly supplemented.**

...

Governments should, where appropriate, facilitate negotiation on a regional basis between the parties concerned in relation to:

- (a) ...aspirations in relation to land, by Aboriginal peoples and Torres Strait Islanders; and
- (b) proposals for the use of such land for economic purposes.”

[Emphasis added].

Usually, if the economic, and ultimately political, value of land is to be unlocked, it must be able to be made available for commerce or trade, whether by lease or as security for loans or ultimately as an item of commerce itself. This means that it must be alienable.

There is a view abroad that rights in relation to land recognised upon a determination of native title are simply inalienable. It is at least debatable whether that view is universally correct. In *Mabo v The State of Queensland (No 2)*<sup>5</sup> Brennan J, with whom Mason CJ and McHugh J agreed, said:

“... [U]nless there are pre-existing laws of a territory over which the Crown acquires sovereignty which provide for the alienation of interests in land to strangers, the rights and interests which constitute a native title can be possessed only by the indigenous inhabitants and their descendants. Native title, though recognized by the common law, is not an institution of the common law and is not alienable by the common law. Its alienability is dependent on the laws from which it is derived. If alienation of a right or interest is a mere matter of the custom observed by the indigenous inhabitants, not provided for by law enforced by a sovereign power, there is no machinery which can enforce the rights of the alienee. The common law cannot enforce as a proprietary interest the rights of a putative alienee whose title is not created either under a law which was enforceable against the putative alienor at the time of the alienation and thereafter until the change of sovereignty or under the common law. ...”

Brennan J went on to say:<sup>6</sup>

“Australian law can protect the interests of members of an indigenous clan or group, whether communally or individually, only in conformity with the traditional laws or customs of the people to whom the clan or group belongs and only where members of the clan or group acknowledge those laws and observe those customs (so far as it is practicable to do so). ...”

It follows that a right or interest possessed as a native title cannot be acquired from an indigenous people by one who, not being a member of the indigenous people, does not acknowledge their laws and observe their customs; nor can such a right or interest be acquired by a clan, group or member of the indigenous people unless the acquisition is consistent with the laws and customs of that people. Such a right or interest can be acquired outside those laws and customs only by the Crown ... The native title may be surrendered on purchase or surrendered voluntarily, whereupon the Crown’s radical title is expanded to absolute ownership... for there is then no other owner.”

[Footnotes omitted].

This passage recognises the attachment of Indigenous peoples to land and waters; and that there is an intrinsic value in native title that has not yet been assessed and determined through the Anglo-Australian legal tradition and its courts. There is an open question, and a fundamental one - what value is communal native title and how is value assessed? It may also be thought that this passage means that a desire on the part of native title holders to deal with their interest in land by lease or mortgage or sale in order to realise its commercial value, is

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<sup>5</sup> (1992) 175 CLR 1 at 59.

<sup>6</sup> *Mabo v The State of Queensland (No 2)* (1992) 175 CLR 1 at 60.

always and everywhere inconsistent with the observance of the fundamental customs and traditions of the land holders, so that acting upon that desire would result in the immediate extinguishment of native title.

To take that strict view could be said to deny to indigenous Australians the life defining choice of the kind available to holders of other forms of land title. It would also be to assume that indigenous societies and their laws and customs do not change. That assumption would be contrary to the universal anthropological truth of human beings capacity to change in order to adapt and respond to new environmental challenges. No human culture is ever “a closed, entirely coherent system, but contains within it polyvalent, contestable messages, images and actions.”<sup>7</sup> Non-indigenous Australians certainly would not accept a suggestion that our laws are fixed and immutable.

The recognition of over 100 claims to native title and the continued assertion of native title by over 400 Indigenous groups within Australia tell us that Indigenous law and culture is vibrant and fluid. Since 1 July last year, there have been 28 determinations of native title. And we expect that by the end of this year, there will be 44 more determinations of native title. The legal challenge is to establish that the fluidity has a base in or is enlivened by traditional Law and custom.

It is hardly surprising then that Brennan J in *Mabo (No 2)* went on to say:<sup>8</sup>

“Of course in time the laws and customs of any people will change and the rights and interests of the members of the people among themselves will change too. But so long as the people remain as an identifiable community, the members of whom are identified by one another as members of that community living under its laws and customs, the communal native title survives to be enjoyed by the members according to the rights and interests to which they are respectively entitled under the traditionally based laws and customs, as currently acknowledged and observed.”

In *The Seas Claim Case*, Finn J suggested that a choice might be open to Indigenous peoples to decide, in accordance with their laws and customs, to alienate their rights. In his reasons for judgment, Finn J said:<sup>9</sup>

“734. [The High Court’s decision in] *Yorta Yorta HC* clearly established, first, that before native title rights and interests in land could be recognised they had to find their origin in pre-sovereignty law and custom: at [45]; and secondly, that upon the Crown acquiring sovereignty over a territory, the indigenous law-making system which then existed could not thereafter validly create new rights, duties or interests in the territory: at [44]. ...

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<sup>7</sup> Sally Engle Merry, “Law, Culture and Cultural Appropriation” (1998) 10 *Yale Journal of Law and the Humanities* 575 at 582.

<sup>8</sup> (1992) 175 CLR 1 at 61.

<sup>9</sup> *Akiba on behalf of the Torres Strait Islanders of the Regional Seas Claim Group v State of Queensland (No 2)* [2010] FCA 643 at [734]-[738].

735. ... [M]y understanding of what the High Court was discountenancing was the recognition of new native title rights in land over which territorial sovereignty had previously been acquired. This proposition, though, is subject to the qualification (also mentioned in *Yorta Yorta HC* at [44]) that account can be taken of such post-sovereignty alteration to, or development of, traditional law and custom as is contemplated by that law and custom: ...

736. As *Yorta Yorta HC* also makes plain, the continued existence of pre-sovereignty native title rights and interests presupposes the continued existence and observance of the traditional laws and customs under which those rights were, and are, possessed. The advent of British sovereignty did not thereafter deny the existence of the pre-existing normative system. Rather, it simply denied recognition of its law-making capability in the territory over which sovereignty had been asserted.

The remarks of Finn J were not directed to the precise question I am discussing, nor were they part of the binding reasoning in his Honour's decision. Further, they do not address the issue as to how the decision to alienate title might be made in accordance with the law customs of the Indigenous people concerned. But they provide food for thought.

It is not necessary, however, to pursue these thoughts to a final conclusion for two reasons. First, the question is largely academic since no purchaser would regard native title rights which have not been determined as sufficiently certain to pay to acquire them. And secondly, the discussion thus far has been about native title rights before the making of a determination of native title. There may be to hand a more certain vehicle for dealing in native title once a determination has been made.

After a determination of native title, the prescribed bodies corporate (PBC) provisions of the NTA seem to afford a means whereby native title holders can deal with their land to their best advantage.

The trustee PBC provisions of the NTA seem to contemplate the possibility of dealings which involve *assigning* in whole, or in part, native title rights and interests.<sup>10</sup> That suggestion was based on the terms of s 56(4), (5) and (6) of the NTA. Sections 56(5) and (6) are relevantly in the following terms:

*“Protection of native title from debt recovery processes etc.*

- (5) Subject to subsection (6), native title rights and interests held by the body corporate are not able to be:
- (a) assigned, restrained, garnisheed, seized or sold; or
  - (b) made subject to any charge or interest; or
  - (c) otherwise affected;
- as a result of:
- (d) the incurring, creation or enforcement of any debt or other

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<sup>10</sup> Matthew Storey, “Dealing in Native Title” (2007) 26(1) *Australian Resources and Energy Law Journal* 56, 66.

- liability of the body corporate (including a debt or liability owed to the Crown in any capacity or to any statutory authority); or
- (e) any act done by the body corporate.

*Subsection (5) not applicable to dealings authorised by regulations*

- (6) Subsection (5) does not apply if the incurring of the debt, creation of the liability or doing of the act was in connection with a dealing with the native title rights and interests authorised by regulations for the purposes of paragraph (4)(c).”

Subsection 56(4)(c), in turn, originally provided as follows:

*“Holding of native title to be as prescribed*

- (4) The regulations may also make provision in respect of the following matters relating to the holding in trust of the native title rights and interests:
- ...
- (c) the circumstances in which the rights and interests may be surrendered, transferred or otherwise dealt with;”

It is not suggested in these provisions that the surrender or transfer or other dealing with the rights and interests recognised by a native title determination can only be a surrender or transfer or dealing with the Crown.

Regulation 6(1)(e) of the *Native Title (Prescribed Bodies Corporate) Regulations 1999* (Cth) (PBC Regulations) contemplates that a PBC may perform functions “relating to the native title rights and interests as directed by the common law holders.”

Regulation 8(2) contemplates that a trustee PBC must consult with and obtain the consent of the common law holders before making a decision to surrender native title rights, or to agree to do any other act that would affect the native title rights or interests of the common law holders.

On this basis it is arguable that a native title determination and the trustee PBC provisions gave to the native title rights, defined and determined under the NTA the quality of alienability not available in respect of native title rights which have not yet been determined under the NTA. Even if land is not alienable in the terms of being sold or mortgaged or leased, these PBC provisions may empower the NT holders to deal with the native title in ways that can unlock economic potential.

This opens up the possibility of making native title rights economically meaningful. It highlights the importance of a determination of native title by the Federal Court and the benefits of using a trustee PBC as opposed to an agent PBC. Additionally, it exemplifies why it is essential for PBCs to have adequate funding and resources so that they may utilise the determined native title. The sorts of decisions that need to be made require commercial skill as well as prudence. It is in the nature of commercial dealings that they can turn out badly for one side or the other.

One further note of caution should be made here. The terms of s 56 of the NTA have been amended so that section 56(5) and 56(6) are still the same and make the same reference to s 56(4)(c), however, the wording of sub-section 4(c) has changed. The original text is now found in s 4(a)(iii).

Sub-section 4 now provides:

*“Other matters relating to the trust to be dealt with by regulation*

- (4) The regulations may also make provision in respect of:
- (a) the following matters relating to the holding in trust of the native title rights and interests:
    - (i) the functions to be performed by the body corporate;
    - (ii) the nature of any consultation with, or other role for, the common law holders;
    - (iii) the circumstances in which the rights and interests may be surrendered, transferred or otherwise dealt with;
    - (iv) the determination of any other matter by the Federal Court;
    - (v) any other matter; and
  - (b) the replacement of the trustee where the common law holders wish the trustee to be replaced; and
  - (c) the determination by the Federal Court of a prescribed body corporate to replace the trustee, and any other matter in relation to the replacement of the trustee; ...”

It is not clear why amendments were not made to ensure the continuation of the link between s 56(5) and (6) and s 56(4)(a)(iii). There does not seem to have been any intention to cut down the commercial options available to trustee PBCs. Pages 75 – 78 of the explanatory memorandum to Bill number 125 of 2007, which brought about the changes to the NTA, do not suggest any intention that debt should no longer be recovered for the surrender, transfer or otherwise dealing of native title rights and interests. The reasons for the change are simply said to stem from the fact that it is regarded as favourable to authorise a PBC to charge a third party for costs and disbursements reasonably incurred in performing its statutory functions under the NTA or PBC Regulations at the request of the third party.

There are two things necessary to enable one to be confident about the ability of PBCs to bring native title interests to engagement with the broader economy. First, a clarification of the legislative mandate available to trustee PBCs should clear up the awkward expression of s 56(4), (5) and (b) of the NTA, and to make regulations specifically authorising dealings with land other than surrender or transfer. And secondly, at the practical level, there needs to be an available body of expertise to ensure that the PBCs operate efficiently, responsibly and responsively to the interests of native title holders.

There are two final points I would like to make. The first is that to the extent that trustee PBCs do afford a vehicle whereby native title may be brought into the broader economy, the issue is whether the relevant native title group chooses to use it for that purpose: responsibility and opportunity must rest with the native title holders for whose benefit the trustee PBC holds the title.

The second point is that in negotiations towards a consent determination of native title, the parties should not expect the Court to delay the hearing of the claim simply because arrangements for the accommodation of native title interests have not been concluded.

These two points are separate but related. They are related because what is to be made of native title managed by a PBC in terms of the broader economy and the intersection of native title interests and the interests of pastoralists or miners or commercial fishermen or governments depends on the choices to be made by indigenous people and given effect through their PBC and the negotiations conducted by it.

You will all be aware that the Court takes very seriously its responsibility to manage native title cases towards a satisfactory conclusion. It must be understood by all parties that native title litigation is subject to the provisions of s 37M and s 37N of the *Federal Court of Australia Act 1976* (Cth) which makes the just resolution of disputes according to law and as quickly, inexpensively and efficiently as possible “the overarching purpose of the civil practice and procedure” of the Court.

The parties to native title proceedings before the Federal Court are obliged to conduct the proceedings consistently with that overarching purpose.

Of course, the Court appreciates the practical reality that all stakeholders will be anxious to resolve land management issues at the same time as they resolve the native title issue.

This does not mean, however, that parties should devote all their energies to resolving issues other than the dispute as to the existence of native title which is the issue before the Court prior to resolving the native title application itself. The issue in such an application is not the arrangements relating to land management of the land in question, or of the management of native title claimants’ interests in that land. Those interests can be managed in the future – if the claim is successful – by the indigenous people through their trustee PBC.

Determining who holds native title, in respect of what area and establishing a PBC to deal with this title are one key to Indigenous peoples taking responsibility for their futures and their dealings in land, and for the broader Australian community - it provides certainty and predictability as to how land will be dealt with and who to negotiate with.

Agreeing on what commercial arrangements should be made would be the right and responsibility of native title holders through their PBC.

The path ahead may well be difficult, but paths are made by walking.