Yorta Yorta — High Court appeal

Members of the Yorta Yorta Aboriginal Community v Victoria [2002] HCA 58

Gleeson CJ, Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ,12 December 2002

Issue

This decision deals primarily with the meaning of 'native title' and 'native title rights and interests' as defined under s. 223(1) of the *Native Title Act 1993*(Cwlth) (NTA). It arises out of an appeal brought by the Yorta Yorta people against the finding that they did not have native title to their traditional lands.

Background

In 1998, Justice Olney found that the tide of history had washed away any real acknowledgement by the Yorta Yorta of their traditional laws and any real observance of their traditional customs and, therefore, that native title did not exist in relation to the area claimed. In 1999, a majority of the Full Court of the Federal Court dismissed the appeal against this decision. In 2001, the High Court gave the claimants special leave to appeal.

Gleeson CJ, Gummow and Hayne JJ

Their Honours delivered a joint judgment in which they held that the appeal should be dismissed and that the Yorta Yorta people should pay the costs of the appeal. Justices McHugh and Callinan with those orders but each delivered reasons for judgment.

Primacy of the NTA

In the joint judgement, their Honours emphasised that consideration of a claimant application begins with the *Native Title Act 1993* (Cwlth) (NTA): '[W]hat the claimants sought was a determination that is a creature of that Act, not the common law'—at [32].

Gleeson CJ, Gummow and Hayne JJ also commented that, at first instance, Olney J may have given 'undue emphasis' to what was said in *Mabo (No 2)*(1992) 175 CLR 1; [1992] HCA 23, 'at the expense of recognising the principal, indeed determinative, place that should be given to the Native Title Act'—at [70].

Later, it was said that:

> To speak of the "common law requirements" of native title is to invite fundamental error. Native title is not a creature of the common law ... . Native title, for present purposes, is what is defined and described in ... the Native Title Act. *Mabo [No 2]* decided that certain rights and interests ... survived the Crown's acquisition of sovereignty ... . It was this native title that was then "recognised, and protected"... in accordance with the Native Title Act—at [75].

Require a normative system that pre-dates sovereignty
It was noted that the native title rights and interests that survived the acquisition of sovereignty 'owed their origin to a normative system [i.e. a system of laws or rules] other than the legal system of the new sovereign power'. In other words, those rights and interests originated from acknowledged traditional laws and observed traditional customs and not from the common law of the new Sovereign power. Their Honours went on to say that it was 'clear' that the relevant laws and customs are those that derive from a body of norms or a normative system that existed before sovereignty was asserted. They were quick to point out that it would be incorrect to assume that this is a reference to a system that has all the characteristics of a body of written laws. However, the rules that constituted the traditional laws and customs of the group under which the rights or interests are possessed must be rules having normative content: 'Without that quality, there may be observable patterns of behaviour but not rights or interests in relation to land or waters'—at [38] to [42].

Effect of assertion of sovereignty
It was found that, once the Crown acquired sovereignty, the normative system that gave rise to native title could no longer validly create new rights, duties or interests. Further, as from the time sovereignty was asserted, there could be no parallel law-making system. As a result, the only rights or interests that will be recognised as native title rights and interests after the date of the assertion of sovereignty are those that find their origin in pre-sovereignty law and custom—at [43] and [44].

It was noted that the new legal order recognised then existing rights and interests in land and the rules of traditional law and custom which dealt with the transmission of those interests. Further, changes or developments in traditional law and custom that occurred after sovereignty was asserted may need to be taken into account, at least where these are of a kind contemplated by that traditional law and custom—at [44].

Meaning of traditional in s. 223(1)(a)
According to the judges, in the NTA context, the use of the word traditional refers to a means of transmission of law or custom and conveys an understanding of the age of the traditions. Only the normative rules of the Indigenous societies that existed before the assertion of sovereignty are 'traditional' laws and customs. The judges later said that traditional:

> [D]oes not mean only that which is transferred by word of mouth from generation to generation, it reflects the fundamental nature of the native title rights and interests with which the Act deals as rights and interests rooted in pre-sovereignty traditional laws and customs—at [46] and [79]. See also Callinan J's comments at [186].

It was found that s. 223(1)(a) is the relevant section for considering the issues raised by these proceedings, rather than s. 223(1)(c), upon which the Full Court had relied.

Continuing, vital system required
The judges emphasised that the normative system must have continued to function uninterrupted from the time sovereignty was asserted to the time of the

determination of native title. In their view, the reference in s. 223(1)(a) to rights or interests in land or waters being possessed under traditional laws acknowledged and traditional customs observed by the peoples concerned requires that the traditional laws and customs must be a 'system that has had a continuous existence and vitality since sovereignty'. If the system ceased to operate for any period, then the rights and interests that owe their existence to that system will cease to exist. Any attempt to revitalise that former system would not 'reconstitute the traditional laws and customs out of which rights and interests must spring if they are to fall within the definition of native title'—at [47].

Their Honours noted that law and custom do not exist in a vacuum. Rather, they arise out of and define a society i.e. a body of persons united in and by its acknowledgment and observance of a body of law and customs:

> ´[I]f the society out of which the body of laws and customs arises ceases to exist as a group which acknowledges and observes those laws and customs, those laws and customs cease *to have continued existence and vitality*. Their content may be known but if there is no society which acknowledges and observes them, it ceases to be useful, even meaningful, to speak of them as a body of laws and customs acknowledged and observed, or productive of existing rights or interests, whether in relation to land or waters or otherwise´—at [50], emphasis added.

This was because 'laws and customs and the society which acknowledges and observes them are inextricably interlinked'. In this context, the judges concluded that when deciding whether or not s. 223 is satisfied: ´it will be necessary to inquire about the relationship between the laws and customs now acknowledged and observed, and those that were acknowledged and observed before sovereignty, and to do so by considering whether the laws and customs can be said to be the laws and customs of the society whose laws and customs are properly described as traditional laws and customs—at [55] and [56].

Meaning of 'recognised by the common law'

The reference in s. 223(1)(c) to the rights or interests being recognised by the common law does not incorporate some pre-existing body of the common law of Australia defining the rights or interests known as native title into the NTA:

> It is...wrong to read par (c) of the definition of native title as requiring reference to any such body of common law, for there is none to which reference could be made—at [76].

The requirement for common law recognition has two functions:

- it may mean that rights or interests which, in some way, are antithetical to fundamental tenets of the common law are refused recognition; and
- it emphasises the fact that two legal systems intersected when sovereignty was asserted. It is the rights and interests that existed at sovereignty and which survived the change in legal regime are the rights and interests which are 'recognised' by the common law—at [77].

Evidence

The judges acknowledged that 'demonstrating the content of that traditional law and custom may ... present difficult problems of proof'. But it was said that 'the difficulty of the forensic task which may confront claimants does not alter the requirements of the statutory provision'. Their Honours went on to note that claimants were likely to

> [I]nvite the Court to infer ... the content of traditional law and custom at times earlier than those described in the evidence. Much will, therefore, turn on what evidence is led to found the drawing of such an inference and that is affected by the provisions of the Native Title Act—at [80].

It was also said that the amendments to s. 85 of the NTA in 1998 may have narrowed the 'base [that] could be built for drawing inferences about past practices'. Under the old Act, the court was not bound by technicalities, legal forms or rules of evidence and was required to pursue the objective of providing a mechanism of determination that was 'fair, just, economical, informal and prompt'. The new Act now provides that the court is bound by the rules of evidence 'except to the extent' that the court 'otherwise orders' and the reference to fairness etc. was removed—at [81].

Changes in laws and customs

In relation to the extent to which native title rights and interest could change over time, it was said that:

- demonstrating the content of pre-sovereignty traditional laws and customs may be especially difficult in cases where the laws or customs have been adapted in response to the impact of European settlement;
- some change to, or adaptation of, traditional law or custom or some interruption of enjoyment or exercise of native title rights or interests in the period between the assertion of sovereignty and the present will not necessarily be fatal to a native title claim;
- it may be difficult to assess what, if any, significance should be attached to the fact of change or adaptation or to decide what it is that has changed or adapted. There is no single 'bright line' test for deciding either what inferences may be drawn or what changes or adaptations are significant;
- the key question is whether the law and custom can still be seen to be traditional law and traditional custom i.e. is the change of such a kind that 'it can no longer be said that the rights or interests asserted are possessed under the traditional laws acknowledged and the traditional customs observed by the relevant peoples when that expression is understood in the sense earlier identified?'—at [82] and [83].

Interruption of use and enjoyment

The judges acknowledged that the interruption of use or enjoyment of rights and interests arising under traditional law and custom presented more difficult questions than those raised by change or adaptation of laws and customs because:

- the exercise of native title rights or interests may constitute powerful evidence of both the existence of those rights and their content;
- evidence that, at some time since sovereignty was asserted, some native title claimants have not exercised the rights and interests they are claiming does not

inevitably lead to a conclusion that s. 223(1) has not been satisfied. Those provisions are directed to:
    - possession of the rights or interests, not their exercise;
    - the existence of a relevant connection between the claimants and the land or waters in question.
- both ss. 223(1)(a) and (b) are cast in the present tense, which means that the inquiry is focussed on present possession of rights or interests and present connection of claimants with the land or waters. However, the continuity of the chain of possession and the continuity of the connection are relevant;
- the claimants must prove that their connection to country is a connection by their traditional laws and customs, in a context where traditional refers to the body of law and customs acknowledged and observed by the ancestors of the claimants at the time of sovereignty;
- laws and customs will only be properly described as the traditional laws and customs if acknowledgment and observance of those laws and customs has continued substantially uninterrupted since sovereignty—at [84] to [86].

Their Honour's conclusion was that any interruption to use and enjoyment would mean that traditional laws and customs had not been transmitted from generation to generation of the society for which they constituted a normative system. If use and enjoyment resumed, it would not be the same normative system in operation in the same society. This was so, in their view, even where the body of laws and customs commonly accepted or agreed to by a 'new society of indigenous peoples' has a content that was similar to or 'perhaps even identical with, those of an earlier and different society' of their ancestors:

> [C]ontinuity in acknowledgment and observance of the normative rules [i.e. the traditional laws and customs] in which the claimed rights and interests are said to find their foundations before sovereignty is essential because it is the normative quality of those rules which rendered the Crown's radical title acquired at sovereignty subject to the rights and interests then existing and which now are identified as native title—at [87] and [88].

The qualification that acknowledgement and observance must have continued 'substantially' uninterrupted was said to be important because:

- proof of continuous acknowledgment and observance of traditions that are oral traditions over the many years that have elapsed since sovereignty is very difficult; and
- European settlement profoundly affected Aboriginal people. It is inevitable that the structures and practices of those societies and their members will have undergone great change since European settlement.

However, they went on to say that:

> [I]t must be shown that the society under whose laws and customs the native title rights and interests are said to be possessed has continued to exist throughout that period [i.e. from the assertion of sovereignty to the present] *as a body united by* its acknowledgment and observance of the laws and customs—at [89], emphasis added.

Interruption, not abandonment or expiry

It was held that describing the consequences of an interruption in the acknowledgment and observance of traditional laws and customs as 'abandonment' or 'expiry' of native title is apt to mislead. For example, abandonment might be understood as suggesting that there has been some conscious decision to abandon the old ways, or to give up rights and interests in relation to the land or waters. (It was noted that proof of continuous acknowledgment and observance of traditional laws and customs would negate any suggestion of conscious decision to abandon rights or interests)—at [90].

Their Honours were of the view that the inquiry about continuity of acknowledgment and observance does not require consideration of why acknowledgment and observance stopped. Continuity of acknowledgment and observance is a condition for establishing native title. If it is not demonstrated that that condition was met, examining why that is so is important only to the extent that the presence or absence of reasons might influence a judge's decision about whether there was such an interruption—at [90].

While expiry may be a more neutral term, using it to describe the situation may distract attention from the terms in which native title is defined. 'That is reason enough to conclude that its use is unhelpful for it is the words of the Native Title Act to which the inquiry must always return'—at [91].

This means that, in cases such as this one, the finding should be that there has been an interruption in the continuity of acknowledgement and observance of traditional law and custom and, therefore, a failure to fulfil the requirements of proof of native title under s. 223.

Conclusion

As their Honours found that the society that had once observed traditional laws and customs had ceased to do so, it was held that it no longer constituted the society out of which the traditional laws and customs sprang. Therefore, any claim by the Yorta Yorta people that they continued to observe laws and customs which they, and their ancestors, had continuously observed since sovereignty must be rejected—at [92] to [95].

It was expressly stated that this conclusion was not about changes in law and custom over time. It was about the interruption of observance of traditional laws and customs. This was, they said, a 'more radical finding than is acknowledged by arguments about the particular content of laws and traditions at particular times'. What had been found was that:

- the forebears of the claimants had ceased to occupy their lands in accordance with traditional laws and customs; and
- there was no evidence that they continued to acknowledge and observe those laws and customs.

'Upon those findings, the claimants must fail'—at [96].

Therefore, despite finding that the majority of the full court had made some errors in its interpretation of s. 223(1) and in reading that paragraph as incorporating notions of extinguishment by expiry into the definition of native title, since they were of the view that the claim was destined to fail in any case, their Honours dismissed the appeal with costs.

McHugh J
His Honour was 'unconvinced' that the interpretation of s. 223(1)(c) by the other members of the court reflected what the Parliament intended, making reference to statements made in the Senate: '[Those statements] showed that the Parliament believed that, under the Native Title Act, the content of native title would depend on the developing common law' and the principles laid down in *Mabo v Queensland* [No 2]—at [132].

In McHugh J's view, excluding the common law from the definition of native title, gave s. 223 a narrower scope that was intended. However, his Honour was also of the view that the appeal should be dismissed with costs—at [135] and [136].

Callinan J
His Honour agreed that the appeal should be dismissed with costs. In relation to the interruption in connection, it was said that there may be exceptional cases where the laws or customs of the group 'contemplated discontinuity of acknowledgment or observance, or absence or departure from the land'—at [174].

Callinan J made reference to s. 190B(7)(a). His Honour expressed the view that this section, which is the part of the registration test that requires that the Native Title Registrar must be satisfied that at least one member of a native title group currently has, or previously had a traditional physical connection with the claim area, supported his view that the NTA implicitly requires actual presence on the land claimed—see [184].

However, his Honour did not note that the section does not always require evidence of traditional physical connection in circumstances where the claimants have, for various reasons, been unable to access the claim area—see s. 190B(7)(b).

Gaudron and Kirby JJ (dissenting)
In a joint judgment, their Honours held that the appeal should be allowed with costs and the matter remitted to Olney J for reconsideration. Their Honours acknowledged that the notion of continuity is a matter that 'bears directly on the question whether present day belief and practices can be said to constitute acknowledgement of traditional laws and observance of traditional customs'—at [111].

However, they found that s. 223(1)(b) requires 'only that there be a present connection to the claim area' and holding otherwise led Olney J to make an error of law. They were also of the view that s. 223(1)(a) does not require that the claimants

establish that the claimed rights and interests have been continuously exercised—at [103].

'The notion of continuity as a traditional community "does not... find expression" in the definition of "native title" and "native title rights and interests" found in the NTA'—at [109].

Gaudron and Kirby JJ were of the view that:

> The question whether there is or is not continuity is primarily a question of whether, throughout the period in issue, there have been persons who have identified themselves and each other as members of the community in question—at [118].

In their view, physical presence in a particular place was not necessary:

> Communities may disperse and regroup. To the extent practicable, individuals may, on the dispersal of a community, continue to acknowledge traditional laws and observe traditional customs so that, on regrouping, it may be that it can then be said that the community continues to acknowledge traditional laws and observe traditional practices—at [119]. See also [104].

In relation to the requirement that laws and customs be traditional, Kirby and Gaudron JJ said:

> In the face of the acknowledged history of dispossession, it must be accepted that laws and customs may properly be described as "traditional" ... notwithstanding that they do not correspond exactly with the laws and customs acknowledged and observed prior to European settlement—at [113].