BOOK REVIEW*

Native Title in the New Millennium
Native Title Representative Bodies Legal Conference 16-20 April 2000: Melbourne, Victoria
BRYAN KEON-COHEN (ed)
(Australia: AIATSIS, 2001) pp 480 with CD of complete proceedings.
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The law can sometimes be glacial in its evolution, moving ever so slowly through fine points of interpretation by judges and equally careful (if not ponderous) processes of legislative reform. Only when an observer stands back and looks at a particular area of jurisprudence over a period of a few decades can the movement be clearly detected.

In other instances, the law can seem to be like an earthquake. Everything appears to be quiet and then the High Court or the Parliament destroys an entire legal landscape and replaces it with a new structure.

Depending on your perspective, the law of native title can embody both the characteristics of the glacier and the earthquake. Indigenous Australians and those who argue for the inherited rights of the traditional owners of Australian lands and waters, could reasonably assert that *Mabo v Queensland [No 2]* ('*Mabo*')[1] was generations in coming. It was a decision built on the foundations (if not the wreckage) of previous decisions, royal commissions, statutory land rights successes and failures, international treaties and painfully slow social change.

For others, *Mabo* appeared as a bolt out of the blue, the invention of lawyers which shook the principles upon which the land management system and economic development had operated for well over a century.

Regardless of the perspective that is held of the *Mabo* decision, it undoubtedly was the trigger for the most dynamic period of contemporary Australian jurisprudence. *Mabo* told us that Aboriginal and Torres Strait Islander customary law was the source of traditional rights to land which were recognisable by the common law. It gave the common law basic principles and a framework for understanding the relationship between native title rights and the actions taken by governments in granting statutory interests in land.

It did not, nor could it, do much more than this. The questions of who held native title rights, the geographic locations where the rights could still be

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* Michael Lavarch QC; Secretary-General of the Law Council of Australia and a former Commonwealth Attorney-General. He has practiced extensively in native title law.

1 (1992) 175 CLR 1.

recognised by the common law and the nature of the rights required the establishment of legislative mechanisms and further elaboration of the common law. This means that the law is not merely refined, but is often fundamentally shaped by each further decision of the full Federal Court and the High Court and by the numerous enactments by Commonwealth, State and Territory Parliaments.

It is against this backdrop of dynamic development that Bryan Keon-Cohen has edited the papers comprising *Native Title in the New Millennium.* The papers are drawn from a Conference held in April 2000 sponsored by leading Indigenous representative organisations, the Victorian Government, mining company North Limited and lawyers Arnold Bloch Leibler. The list of presenters at the Conference comprises many leading practitioners and decision-makers in the native title field.

The Conference, and hence the book (with an accompanying CD), aimed to provide 'an analysis of the major aspects of the native title jurisdiction as at mid 2000'. As such, and as is freely pointed out by Keon-Cohen, the pace of change makes the book a snapshot of a particular period rather than a definitive examination of the law and compelling issues. For instance, the High Court will shortly hand down decisions on appeals from the Federal Court in *Western Australia v Ward*[2] and *Commonwealth v Yarmirr*,[3] and both cases may well be as important as *Wik Peoples v Queensland* ('*Wik*').[4]

The aspects of native title examined in *Native Title in the New Millennium* are:

- constitutional issues;
- case management by the Federal Court;
- State and Territory alternative schemes;
- economic development;
- agreements;
- critical issues in the claim process;
- Indigenous land use agreements; and
- international experience.

The paper on constitutional issues was prepared by Commonwealth Solicitor-General David Bennett QC and is a good overview of the constitutional underpinnings of the *Native Title Act 1993* (Cth) ('*Native Title Act*') and the debate which accompanied the passage of the so-called 10 point plan amendments. Of particular relevance is the scope of the races power contained in s 51(xxvi) of the *Australian Constitution* and whether the *Native Title Act* (as amended) is supported by this head of Commonwealth power.

While Bennett gives no concluded view, his brief but clear analysis of the three possible constructions of the races power is a reminder that at some future point, the very basis of the Commonwealth's legislative regime, and the State regimes which flow from it, may be subject to High Court scrutiny. Like the fate

2 (2000) 170 ALR 159.
3 (1999) 168 ALR 426.
4 (1996) 187 CLR 1.

of the Corporations Law regime, the outcome could still be another legal earthquake.

The book's analysis of the legislative schemes applying in Western Australia, South Australia, Queensland and the Northern Territory provides a good understanding of what is in place and previously applied in these jurisdictions. The *Native Title Act* assumes that the States and Territories might avail themselves of the opportunity to integrate the recognition and protection of native title rights within the broader context of the land management system. However, to establish such 'alternative schemes', the approval of both the Commonwealth Government and Parliament is required.

Since mid 2000, only Queensland has established a comprehensive scheme involving a State Tribunal which endeavours to incorporate native title processes within the regime for issuing mining titles. Both Western Australian and the Northern Territory attempts failed the hurdle of the Senate. Like other aspects of native title, it is reasonable to expect the proposed alternative schemes will be revisited in the medium term, particularly with the change of Governments in both Western Australia and the Northern Territory which occurred earlier this year.

The papers on economic development provide an interesting and highly relevant context to the discussion of legal issues. Professor Jon Altman of the Centre for Aboriginal Economic Policy Research ('CAEPR') at the Australian National University draws on his deep knowledge of statutory land rights schemes, particularly in the Northern Territory, to canvass the importance and the viability for native title to expand the Indigenous economy.

Altman compares the relative strength of native title rights as property rights with the rights granted under the *Aboriginal Land Rights (Northern Territory) Act 1976* as a basis to leverage economic outcomes for traditional owners. Clearly the *Native Title Act* scheme provides 'weaker' rights, but the flexibility for agreements under the native title regime can result in more meaningful outcomes for both traditional owners and the proponents of economic ventures on traditional lands.

Bruce Harvey, General Manager, Aboriginal and Community Relations for Rio Tinto Limited, has produced a very useful paper on that company's approach to negotiations of economic agreements with traditional owners. He lists the broad economic options commonly found in land access agreements, including:

- up front cash contributions;
- variable life of mine payments;
- land rent;
- education and employment opportunities; and
- business and contracting opportunities.

He makes the telling observation that the view of Rio Tinto of what the relationship between native title rights holders and the company should be is broadly convergent with that held by the Northern Land Council. The key point concerns the relationship between the stakeholders rather than the strict nature of the legal regime governing mining and the rights of native title groups.

This is no doubt a view with which Altman would agree, but he points to the 'hard questions' of converting 'good relations' into meaningful outcomes which can make an economic difference. For instance, who will exercise native title leverage and how will beneficiaries be delineated? While he believes Native Title Representative Bodies are the key here, the reality is that the relationship between the Representative Bodies and traditional owner groups is often difficult.

Governmental structures are accepted as being not only necessary, but also desirable for all individuals and groups within a given society. But there are some things which no individual or family believes should be settled at a larger collective level. The rights and responsibilities of traditional owners to their country are that of the individual or group under customary law. The transference of decisions about these responsibilities to a Representative Body can be extremely problematic.

The book's section dealing with critical issues in the native title claim process contains a potpourri of loosely linked papers. Because of the passage through the Federal Court of the Croker Island claim, there are a number of papers which go to the existence and enjoyment of native title rights in offshore waters.

Of particular note is the paper by Greg McIntyre and Graham Carter on future acts in offshore areas. The paper in part canvasses the yet untested procedural rights afforded to native title holders under s 24NA(8) of the *Native Title Act*. This provision of the law provides that native title holders in offshore waters are to have the same procedural rights as they would have in relation to a future act on the assumption that they instead held any corresponding non-native title rights. What these corresponding non-native title rights might be and how they are to be ascertained is not addressed adequately either in the Act or in the Explanatory Memorandum.

McIntyre and Carter tackle this question, which is of particular concern to those seeking interests offshore for mineral and petroleum exploitation, fisheries and offshore pipelines and cables, as well as to the traditional owners of the waters. Essentially they argue that certain procedural rights of fairness should be afforded, but it is by no means clear that any rights need be provided in many cases. The uncertainty here for all stakeholders is clearly highly undesirable.

Bryan Keon-Cohen and the Australian Institute of Aboriginal and Torres Strait Islander Studies are to be congratulated on producing *Native Title in the New Millennium*. The book provides a very valuable addition to the growing literature on native title and enables both the interested observer and active players to come up to speed on the essential issues in native title law and practice.

Inevitably, it can be suspected that by the end of this year, many of the book's papers will be of background rather than contemporary value as the law is reshaped again by significant decisions of the High Court. Given the nature of native title jurisprudence, this publication achieves what it sets out to do and that is to give a comprehensive picture of native title as at mid 2000.