

**Property Law 2015**  
**Take-Home Assignment**  
**Native Title**

Words: 2000 (excluding footnotes)

### **Question 1:**

For a native title claim, Anthony Goodes on behalf of the Adnyamathanha community pursuant to s 13 and s 61 of the *Native Title Act (1993)* (Cth) ('*The Act*'), will need to prove the requirements from s 223 of the *The Act* to be successful. The integral provisions of native title that appear in *The Act*, mirror those elements of the Australian common law in *Mabo v Queensland (No2)*<sup>1</sup> ('*Mabo*'). Proof of practice of their traditional laws and customs and ongoing connection to the land must be established to show their native title has not been extinguished.

Native title is recognised and protected under s 10 of *The Act*. Moreover, it cannot be extinguished other than in accordance with s 11.

### **Extinguishment:**

#### A. Crown grant in fee (UAM)

The grant of a fee simple estate will permanently extinguish native title.<sup>2</sup> In order for native title to be extinguished at common law by legislation, there must be a 'clear and plain intention' to do so.<sup>3</sup> This idea is also incorporated into s 23C(1)(a) of *The Act*. On the facts, even though the land was reverted back to the Crown, native title is still extinguished. Considering a freehold estate is a creature of the common law, it cannot have any interaction with native title<sup>4</sup> as freehold title is tantamount to ultimate ownership. A native title claim under this area would not succeed.

It should also be noted that squatters contributed to the land by developing it and should be recognised. Having said that, as titled squatters, they do not have any legal right to occupy premises as the Crown can remove their occupancy at any time therefore, recognition of their development does not necessarily amount to exclusive possession.

#### B. The Goldberg Lease

Pastoral leases are creatures of statute and are therefore, questions of law not fact.<sup>5</sup> The legislation that created the pastoral lease must be looked at to determine whether native title has been extinguished. Pastoral leases can co-exist with native title but the granting of a pastoral lease does not give rise to exclusive possession because it is not a freehold estate.<sup>6</sup>

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<sup>1</sup> (1992) 175 CLR 1.

<sup>2</sup> Ibid.

<sup>3</sup> Ibid 64 (Brennan J).

<sup>4</sup> *Fejo v Northern Territory* (1998) 195 CLR 96.

<sup>5</sup> *Wik Peoples v Queensland* (1996) 187 CLR 1, 149.

<sup>6</sup> Ibid.

Pursuant to s 23C(1) of *The Act*, native title will be extinguished by ‘previous exclusive possession acts.’ The legislation between rights conferred by statutes and those under native title will need to be examined to see if any inconsistencies are apparent. Due to the isolation of the area, it could be found that there is exclusive possession considering the area is not suitable for permanent settlement. However, looking at the *Land Act 1888* (SA) (*‘The Land Act’*) in the facts, the area of the lease is defined as remote and not a specified area pursuant to s 40(2) thus, there is an inconsistency in the grant.<sup>7</sup> Therefore, native title can partially be extinguished to the extent of the inconsistency.

Pursuant to s 10(1) of the *Racial Discrimination Act 1975* (Cth) (*‘RDA’*), the Commonwealth, States and Territories must treat native title equivalent to property rights therefore, native title cannot be extinguished without first expropriating the land. Assuming that the Goldberg Lease was granted after 1888 and prior to 1975 before the introduction of the *RDA*, compensation is not payable.

### C. The Pollini Lease

This grant is analogous to the case of *Western Australian v Ward*<sup>8</sup> as fences have been erected on the land thus implying the exercise of exclusive possession. Exclusive possession can be granted expressly or constructively. Per s 40(1) of *The Land Act*, any Crown land is open for pastoral lease. The Pollini Lease is not expressed to be only for pastoral purposes however, the performance of depasturing stock shows the lease’s intention. Hence, if it looks like a lease and acts like a lease, then it is a lease in equity.<sup>9</sup> Native title is not, as a direct consequence, extinguished through the granting of a pastoral lease yet, pursuant to s 24BA of *The Act*, an exclusive pastoral lease confers a right to exclusive possession which extinguishes native title.

Where the rights of the lease are in conflict with native title rights, the rights under the lease will prevail to the extent of any inconsistency. It will not however, extinguish all rights over the area such as hunting, painting or fishing. However, native title is a bundle of rights, not a ‘sui generis’ right<sup>10</sup> so the rights must be dealt with separately. The right to erect fencing and prevent cattle from escaping compared with the rights under native title to access the waterholes provides a propriety predicament. Based on the facts, the fences are erected for cattle only not for people so there is only partial extinguishment. The reservations listed were similarly found in *Wik Peoples v Queensland* (*‘Wik’*),<sup>11</sup> and were concluded to be found non exclusive in nature hence, adding to partial extinguishment.

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<sup>7</sup> *Fejo v Northern Territory* (1998) 195 CLR 96.

<sup>8</sup> (2002) 213 CLR 1.

<sup>9</sup> *Walsh v Lonsdale* 1882) 21 Ch D 9.

<sup>10</sup> *Western Australia v Ward* (2002) 213 CLR 1.

<sup>11</sup> (1996) 187 CLR 1.

## Merits of the claim:

The essence of the definition of native title is in reference to the customs of the particular group whose relationship with the land is in question. A successful native title claim will require the Adnyamathanha people (an existing and identifiable community) to satisfy the criteria under s 223 of *The Act*. The Adnyamathanha people will need to prove that their traditional laws and customs were still practiced on the land and that a connection to the land is still present.

Firstly, s 223(1)(a) of *The Act* notes that the claimants must show that they observe traditional laws and customs which recognise the property rights claimed. On the facts, anthropologists have reported that men and women did continue to practise various forms of ceremonies related to the land whilst living at the mission. There is no express mention of other traditional rights such as hunting or fishing yet, these are interests covered in s 223(2) of *The Act*.

The right to access land by the Adnyamathanha people was suppressed during the establishment of the mission. Admission to land is a native title right, 'to use the area for the purpose of learning about it and the traditional laws and customs pertaining to it.'<sup>12</sup> The Adnyamathanha people also practiced religious and cultural ceremonies which will need to be recognised and claimed as traditional customs.

To further satisfy s 223(1)(b), the Adnyamathanha people must have maintained an unbroken connection with the land. If there is disruption in the community, native title is extinguished. The high threshold test in *Members of the Yorta Yorta Aboriginal Community v Victoria*<sup>13</sup> ('Yorta') denotes that continuity is key and requires that rights being claimed must connect to the earlier pre sovereignty aboriginal structure (1788).<sup>14</sup> There is to be no interruption and hence, indicates a 'frozen in time approach.'<sup>15</sup> The Adnyamathanha people suffered extensively with their connection to the land whereby they were prevented from returning to their ancestral homes and practicing cultural ceremonies. However, the fact the community was disrupted as a consequence of European settlement, they have, 'cease[d] to have continued existence and vitality.'<sup>16</sup> A native title claim will likely be unsuccessful here.

Despite the fact that the Adnyamathanha people were aided by the missionaries, they were still removed from their land. In contrast to *Yorta*,<sup>17</sup> the decision in *Bennell and Others v Western Australia and Others* ('Bennell')<sup>18</sup> highlights that if the continuity of practice of traditional laws and customs were carried out, physical connection to the land is immaterial. On the facts, the missionaries had a deliberate policy to

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<sup>12</sup> *Bennell and Others v Western Australia and Others* [2006] FCA1243, 329 [841].

<sup>13</sup> (2002) 214 CLR 422.

<sup>14</sup> *Ibid* 444 [46].

<sup>15</sup> *Ibid* 437 [22].

<sup>16</sup> *Ibid* 445 [50].

<sup>17</sup> *Ibid*.

<sup>18</sup> [2006] FCA 1243.

suppress the indigenous culture but connection was never lost as the Adnyamathanha people still continued to perform ceremonies and customs to the land.

The Adnyamathanha people could be successful in a native title claim under the *Bennell*<sup>19</sup> decision although, in advising Anthony, *Bennell*,<sup>20</sup> though influential in principle, is a lower case decision compared to *Yorta* and the likelihood of a native title claim on this basis is unlikely.

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<sup>19</sup> *Bennell and Others v Western Australia and Others* [2006] FCA 1243.

<sup>20</sup> *Ibid.*

## **Question 2:**

As Reynolds notes in his book *Aboriginal Sovereignty*, 'Terra Nullius' has created conflict and difficulties in Australian colonisation.<sup>21</sup> The establishment of land rights and titles for indigenous Australians has proven to be a difficult task. It is imperative for Anthony to understand that, 'native title' is not a new form of title as it was here prior to settlement. Native title is essentially the legal recognition of Aboriginal rights that have been about for centuries.

The decision in *Mabo*<sup>22</sup> led to the creation of *The Act*. This developing legislation however, has left many native title claimants unsure of where they stand in the eyes of the court. The courts have had difficulty in deciding what does and what does not amount to native title. This wrestle involves common law doctrines and traditional aboriginal laws and customs. A native title claim is essentially the relief between this grapple. It attempts to find an equilibrium between the Crown and prior aboriginal sovereignty.

On a different spectrum, there is the idea that the land is a spiritual being noted by Ronald Berndt in his article *Traditional Concepts of Aboriginal Land*, 'life came from and through the land, and was manifested in the land. The land was not an inanimate "thing": it was, and is, "alive."' <sup>23</sup> This would identify greatly with the Adnyamathanha people as Anthony has said that they were prohibited from practising religious and cultural ceremonies relating to the land.

A native title claim itself is a strenuous process as outlined in *Yorta*.<sup>24</sup> Watson writes in her article, *Buried Alive*, that,

'...native title applicants are required to prove the extent to which their nativeness has survived genocide. If nativeness is not proven it is considered extinguished. If it is proven it is open to extinguishment. Native title is extinguishment. Extinguishment is a form of genocide.'<sup>25</sup>

Watson argues that, 'our relationship to land is as irreconcilable to the western legal property law system, as it is to fit a sphere on top of a pyramid.'<sup>26</sup> To achieve the balance is frustrating and implausible. The rights of native title are hence, hard to acquire and retain.

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<sup>21</sup> Reynolds, H. (1996). *Aboriginal Sovereignty*. St. Leonards, NSW: Allen & Unwin, p.1.

<sup>22</sup> *Mabo v Queensland (No2)* (1992) 175 CLR 1.

<sup>23</sup> Ronald Berndt, 'Traditional Concepts of Aboriginal Land' in Ronald Berndt (ed), *Aboriginal Sites, Rights and Resource Development* (University of Western Australian Press, 1982) 2.

<sup>24</sup> *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422.

<sup>25</sup> Irene Watson, 'Buried Alive.' (2002) 13 *Law and Critique* 263.

<sup>26</sup> *Ibid* 257.

Anthony's understanding is correct whereby the Adnyamathanha people will receive a bundle of rights but are most likely to be a set of non-exclusive rights.<sup>27</sup> The rights consistent with traditional laws and customs will be awarded. This means the precise rights the Adnyamathanha people claimed in their native title application under s 60(1)(b), (2) and (3) of *The Act*, is the extent of rights granted. The right to negotiate will be a key right regarding future projects and activities on the land but it is not a veto power.

A pastoral lease on the other hand is Crown land that the government allows to be leased. As noted they are creatures of statute therefore, the rights and interests of a pastoral leaseholder must be determined by looking at the relevant statute and at the lease itself. The pastoralist does not own the land but pays rent to the Crown and at the expiry of the lease, it will revert back to the Crown.

In *Wik*,<sup>28</sup> it was found that pastoral leases did not bestow leaseholders a right to exclusive possession. Consequently, the granting of a pastoral lease does not necessarily extinguish native title. As noted, native title has the potential to co-exist with the rights of a pastoral lease depending on the terms; however, native title rights can be hard to acquire and can be removed. In a sense, native title is like a stamp as it holds very little legal title compared to a pastoral lease of strong statutory enforcement.<sup>29</sup>

The most important aspect in my advice for Anthony is that where there is a conflict in the exercise of these rights, native title rights are inferior to those of the pastoral leaseholder. Even though native title and pastoral leases can co-exist, the rights of pastoralists prevail over any rights of the native title holders.

In answer to Anthony's question, I would advise him that native title does not provide equal rights to that of pastoral lease rights based on the discussion above.

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<sup>27</sup> The National Native Title Tribunal, (2009). Native title: an overview. [online] Government of Western Australia. Available at: [http://www.dmp.wa.gov.au/documents/NATIVE\\_TITLE\\_AN\\_OVERVIEW\(5\).pdf](http://www.dmp.wa.gov.au/documents/NATIVE_TITLE_AN_OVERVIEW(5).pdf) [Accessed 15 Sep. 2015].

<sup>28</sup> *Wik Peoples v Queensland* (1996) 187 CLR 1, 149.

<sup>29</sup> Watson, above n 25, 264.