NATIVE TITLE IN NORTH AND FAR NORTH QUEENSLAND THIRTY YEARS POST-MABO

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ABSTRACT

The 30th Anniversary of the Mabo decision was a central theme to James Cook University's 2022 Mabo Lecture. This article develops this theme further by examining the native title cases in North and Far North Queensland from the previous five years. These cases involved successful claims in the Townsville and Cardwell regions, as well as in Cape York and the Gulf of Carpentaria. Claims are on-going in the Cairns region, and also for some islands in the Torres Strait. The rights granted in these successful claims included hunting, gathering, access, camping, the carrying out of ceremonies and maintaining sites. Any water rights were restricted to domestic use and the use of fire was likewise restricted to domestic use, such as cooking. The fact that there were a number of successful claims in North and Far Northern Queensland highlights the ongoing significance of *Mabo*.

I INTRODUCTION

The year 2022 marked the 30th Anniversary of the High Court's *Mabo v Queensland [No 2]*[1] judgment that established native title in Australia. It was a decision with a strong connection to James Cook University (JCU) due to Eddie Mabo having worked at the university. It was while working that Mabo had discussions with Professor Henry Reynolds and Dr Noel Loos. Mabo also attended a student conference at JCU in 1981 where an attendee suggested his claim could form the basis for a native title claim. That was the genesis of the legal action.

Given JCU's close connection to the decision, well respected television journalist and Indigenous Australian, Stan Grant, was the guest speaker at the university's 2022 Mabo Lecture.

The purpose of this paper is to build on the theme of JCU celebrating and acknowledging the significance of the 30th Anniversary of the *Mabo* decision. It will do this by, firstly, examining the recent cases, both in the North and Far North Queensland region, and in the region where it all started, the Torres Strait. It will then discuss the basis of these native title claims, what the native title rights that were recognized involved, and the procedural issues that arose from the cases.

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[1] *Mabo v Queensland [No 2]* (1992) 175 CLR 1.

II NORTH AND FAR NORTH QUEENSLAND

A *The Townsville and Cardwell Regions*

Both the Townsville and Cardwell regions have seen successful native title determinations in recent years. In *Lightning on behalf of the Nywaigi People v State of Queensland*[2] a claim had been made in respect of areas controlled by the Townsville City and Hinchinbrook Shire Councils. The trial judge, Justice Robertson, accepted archaeological, anthropological and linguistic material, as well as testimonial evidence from the Nywaigi group. This evidence established that the group 'spoke a dialect of the Nywaigi language, known as the Nywaigi dialect, used and occupied Nywaigi country prior to 1788.'[3] Native title was therefore held to exist, the external boundary of the determination area being described as 'the south eastern bank of Victoria Creek at its mouth extending generally southerly … to the centreline of Rollingstone Creek; then generally southerly along that centreline.'[4] Thus, the 'traditional country is lands and waters in and around Victoria Creek to the north and Rollingstone Creek to the south, west to the Paluma Ranges and east to the waters of Halifax Bay.'[5] This bay lies to the north and west of Townsville.

The nature and extent of the native title rights recognized included hunting, fishing and gathering, as well as the taking and use of water 'for personal, domestic and non-commercial communal purposes.'[6] There were further rights in regard to access, camping, teaching, conducting ceremonies and maintaining places of significance. The lighting of fires was also permitted 'for domestic purposes including cooking, but not for the purpose of hunting or clearing vegetation.'[7] It should be noted that the Orders made by the judge were consent orders, and limiting use of fire reflects the need for Indigenous use of fire to confirm with Council fire management practices. The claim area in *Muriata on behalf of the Girramay People #2 v State of Queensland*[8] meanwhile was described as being 'approximately 946.3km^2 encompassing the Mulga Guyurru (Murray Falls) area near Cardwell in Far North Queensland.'[9] It had been the subject of a consent determination in favour of the Girramay people in 2009 by Justice Dowsett[10] 'in respect of 4,795 km of land and waters adjacent to the present claim area.'[11] The 2018 hearing relied on an expert report which stated that 'the contemporary Girramay people have a continuing connection to the Girramay country.'[12] This was based on oral testimony and written records which showed

[2] [2018] FCA 493.
[3] Ibid, [40].
[4] Ibid, [15].
[5] Ibid, [1].
[6] Ibid, [6].
[7] Ibid, [7].
[8] [2018] FCA 1120.
[9] Ibid, [1].
[10] *Girramay People v State of Queensland* [2009] FCA 1450.
[11] *Muriata on behalf of the Girramay People #2 v State of Queensland* [2018] FCA 1120.
[12] Ibid, [11].

they were linked to the country, were recognised and accepted by neighbouring regional community, and continue to acknowledge and observe traditional laws and customs.'[13] It was therefore held that the Girramay people were the native title holders in the claim area.[14]

B *The Cairns Region*

The Cairns region was also the subject of a native title claim with there being five proceedings in what was described as 'overlapping areas in and around the City.'[15] These claims were 'brought on behalf of' the Gimay Walubara Yidinji People, the Yirrganydji People, the Cairns Regional Claim Group and the Kunggandji Gurrabuna People.[16] In April 2019 Justice Robertson had 'referred three questions to a senior referee and an anthropological referee for inquiry and report.' These questions 'were directed to the issue as to which group or groups held native title rights and interests in a specified area immediately before acquisition of sovereignty, and to the identification of the traditional owners' apical ancestors.'[17]

The subsequent report was 'more than 200 pages with 21 annexed Schedules.' The first question addressed the issue of which groups held the native title interests before the acquisition of sovereignty. The referees concluded that the ancestors of the Yidinji totemic patricians and the Djabugay and/or Yirrganydji totemic patricians 'were within the same regional society at effective sovereignty.'[18]

The second question related to what was the 'normative system law and custom to which those land holding groups held native title and interests.' It was agreed that these included mutual recognition of patrician estates and general areas associated with language; social networks of kin and in-laws and organizing regional events; trading networks; and rules of succession in the territory.[19]

In relation to the third question 'the referees concluded that the normative system of laws and customs was based in filiation.'[20]

Justice Charlesworth then held that these 'findings were favourable to the Cairns Regional Claim Group in respect of the Redlynch Bump.'[21] They were also 'favourable to the Gimuy Walubara Yidinji applicant in respect of that area described as the "Yidinji Patricians" and the "Bulway Djabugay Patricians" but not in respect of the area to the north of their claim determined by the referees to be that of the Yirrganydji Patricians.' However, it was noted

[13] Ibid.
[14] Ibid, [2].
[15] *Singleton on behalf of the Yirrganydji People v State of Queensland* [2021] FCA 316.
[16] Ibid, [2].
[17] Ibid, [4].
[18] Ibid, [37].
[19] Ibid, [37].
[20] Ibid, [38].
[21] Ibid, [41].

that the 'Gimuy Walubara Yidinji applicant does not resist the consequence that the boundary of their claim must be retracted southward.'[22] The findings were 'wholly adverse to the Kunggandji Gurrabuna applicant in that no part of the study area was found to be land in respect of which … [they] held native title rights and interests at sovereignty.'[23] They were also held to be adverse to the Yirrganydji in relation the southern areas of their claim, 'particularly those parts encompassing the city of Cairns and an area to the south of the city.'[24] Both the Kunggandji Gurrabana and Yirrganydji applicants therefore resisted 'the contention that the boundaries of their claim must be redrawn so as to accord with the referees' findings.'[25]

When examining the submissions Justice Charlesworth noted that under 'clause 3 of the Protocol Deed the Aboriginal parties agreed to be "bound by the findings of the referees' report."'[26] The submission 'that the referees had no "jurisdiction" to make findings of fact relating to any period of time after the assertion of sovereignty' was also rejected. This was because the way Question 3 was phrased meant 'it formed part of their task that they do so.'[27] Justice Charlesworth stated that 'I am independently satisfied that the Report, on its face, sets out a reasoned and cogent basis for the opinions expressed.'[28] He also concluded 'that the Court's power to deal with the Report as it thinks fits in accordance with s 54A(3) of the *Federal Court of Australia Act 1976* (Cth) and r 28.67 of the *Federal Court Rules 2011* (Cth) includes the discretion to adopt both the referees' opinions and reasons for those opinions.'[29] It was therefore an order of the court that whole of the Report be 'adopted of the purpose of resolving the questions referred to the referees.'[30]

C *Cape York and the Gulf of Carpentaria*

The application made by the Cape York United #1 Claim Group was described by Justice Mortimer as being 'gargantuan' and comprised of large tracts of Cape York.[31] Given the scope of the claim, it was almost inevitable there would be issues such as who should be a part of the proceedings, and in *Ross on Behalf of the Cape York United #1 Claim Group v State of Queensland (No 1)*[32] Justice Mortimer was required to address those claims in two interlocutory applications. The first involved Norma Hobson on behalf of the Kuuku Ya'u Aboriginal Corporation, the claim being that their board had 'not been properly consulted

[22] Ibid, [42].
[23] Ibid, [43].
[24] Ibid, [44].
[25] Ibid, [45].
[26] Ibid, [63].
[27] Ibid, [97].
[28] Ibid, [99].
[29] Ibid, [100].
[30] Ibid, [2].
[31] *Ross on Behalf of the Cape York United #1 Claim Group v State of Queensland (No 2) (Kuuku Ya'u)* [2021] FCA 1464.
[32] [2021] FCA 1463.

about apical ancestors and boundaries on the proposed determinations and that arrangements for the s 87A authorisation meeting being changed to Cairns were made at such short notice that some Kuuku Ya'u people could not attend.'[33] The other involved Lucy Hobson, whose complaint was in relation to the way she understood how her ancestors had been identified, and Anthony Pascoe who, amongst other things, did 'not agree with the apical ancestor list or the southern boundary proposed for the Kuuku Ya'u native title group.'[34] Justice Mortimer, however, dismissed both applications, stating that there had been 'methodical, resource-intensive and long-running activities by the Cape York Land Council to engage with claim group members at appropriate points in the process of settling on group descriptions, apical ancestors and boundaries, as well as the authorisation issues.'[35]

Subsequently, in *Ross on Behalf of the Cape York United #1 Claim Group v State of Queensland (No 2)*[36] Justice Mortimer held that native title existed in certain areas of the claim in the north-eastern and north-central regions of the Cape York Peninsula, around the Pascoe and Lockhart Rivers.[37] It was subject to other interests including those made under a number of Indigenous Land Use Agreements (ILUA), the rights of corporations such as Telstra and Ergon Energy, and the Cook Shire Council.[38] The nature and extent of the title, included access to the area, the right to live and camp there as well as providing for hunting, fishing and gathering. There was also a right to teach the traditional laws and customs, conduct ceremonies, and also to be buried there.[39] Similar native title rights were determined in other areas around the Lockhart River and the Night Island in *Ross on Behalf of the Cape York United #1 Claim Group v State of Queensland (No 3)*.[40]

The case of *Taylor on behalf of the Gangalidda People v State of Queensland*[41] meanwhile involved a smaller claim area in the southern region of the Gulf of Carpentaria in what was known as the Konka application. It involved a claim that native title existed 'in all the land and waters and covering approximately 2,273.81 square kilometres within the outer external boundary' of the Konka pastoral holding.[42] Justice Collier stated 'it is common ground that the Konka application is in respect of a claim area which in turn relates to four other sets of native title determinations involving the Gangadilla People.' These included

[33] Ibid, [3].
[34] Ibid, [5].
[35] Ibid, [88].
[36] *Ross on Behalf of the Cape York United #1 Claim Group v State of Queensland (No 2) (Kuuku Ya'u)* [2021] FCA 1464.
[37] Ibid, [1].
[38] Ibid, [11].
[39] Ibid, [6].
[40] *Ross on Behalf of the Cape York United #1 Claim Group v State of Queensland (No 3)* [2021] FCA 1465, [2] (Mortimer J).
[41] [2019] FCA 297.
[42] Ibid, [6].

the recognition in *The Lardi Peoples v State of Queensland*[43] that native title was held by the Gangadilla People in relation to the land and waters adjoining the northern boundary of the application area. Other successful determinations had included native title rights to nearby islands in the Gulf and also non-exclusive native title rights to nearby pastoral holdings. As Justice Collier noted, 'it is common ground that the Konka Claim area is surrounded by land and waters in which the Gangadilla People have been determined to hold exclusive and non-exclusive native title.'[44]

It was further noted that at the time the application was made, a 30-year pastoral lease was held over the claim area by Walaji Pty Ltd 'on trust for the Walaji Trust.' This was a 'charitable trust for the benefit of current and future generations of members of the community including the Gangadilla People. Section 47 of the *Native Title Act 1993* (Cth), which covered pastoral leases held by native title claimants, therefore applied, subs3 of which states that if native title is determined to exist, it does not affect the validity of the lease. Native title by the Gangadilla People was held to exist. The rights it conferred included access, hunting, conducting ceremonies and maintaining sites, burials, and lighting fires for domestic purposes.[45]

Thus, there have a number of successful applications for native title in both North and Far North Queensland in recent years. What will now be examined is an ongoing case involving islands in the area of the Far Northern Queensland coast, namely the Torres Strait.

III THE TORRES STRAIT

The case of *Nona on behalf of the Badu People (Warral & Ului) v State of Queensland*[46] involved an application for the determination of native title on two islands in the islands of Warral and Ului in the Torres Strait. It included 'all land and waters within the high-water mark' with the Badu [or Badulgal] people asserting that they had 'exclusive proprietary and beneficial rights to the claim area.' It was noted by the Court that it was a proceeding that had 'been on foot in this form for 18 years.'[47]

The application sought leave to amend the claim to change the actual applicants by replacing Victor Nona with nine others. It also involved a joinder application brought by five Badulgal, all members of the claim group, who claimed that their native title interests were affected by the proposed amendments.[48]

Justice Mortimer noted that native title had been determined to exist in most of the islands in the relevant area of the Torres Strait, including that 'held by the Badulgal and Mualgal over "numerous uninhabited small islands, islets and rocks' lying just north of Warall and

[43] [2004] FCA 298.
[44] Ibid, [9].
[45] Ibid, [7].
[46] [2020] FCA 983.
[47] Ibid, [1].
[48] Ibid, [3].

Ului.'[49] Her Honour also noted that the 'key amendment' was to include the Mualgal and Kuarareg people.[50] She further noted that, following mediation back in 2015, members of the claim group had held an authorisation meeting on 1 February 2020.[51]

However, there was an issue as to whether sufficient notice of that meeting had been given in order to provide the necessary authorisation of the decision to make a joint claim.[52] Justice Mortimer stated there were issues with the notice as it did not sufficiently 'highlight the critical aspect of the meeting: namely the proposal to move from a claim of traditional ownership of the two islands by the Badulgal to a claim of traditional ownership of the islands jointly by the Badulgal, Mualgal and Kaurareg people.'[53] Her Honour, however, held that:

> [W]ith some hesitation, I am prepared to find that the contents of the notice were sufficient to allow an understanding of the purpose of the meeting, and that there was a reasonable breadth of distribution of the notices to allow those who wished to attend the meeting a reasonable opportunity to do so[54] … While acknowledging the very real issues with the authorisation process and the meeting on Badu in particular, it seems to me the position being advanced (seriously and genuinely) by the joinder applicants and those who support them will not be prejudiced by the making of orders under s 64 and s 66B, so long as the orders are also made and the matters the joinder applications seek to raise can be fully ventilated in an appropriate way, probably through a trial of some kind.[55]

Justice Mortimer also noted this approach would relieve Victor Nona 'of the burden of being the only Badu man who comprises the Badu application a burden which on evidence he is no longer prepared to carry on, which is understandable.'[56] He was therefore replaced by seven applicants, including Titom Nona.

Two and a half months later, Justice Mortimer was required to determine a further interlocutory application, this time regarding the proposed 'on-country hearing' that had been listed to commence on 6 October 2021. This was in regard to the problems caused by the Covid restrictions placed on movement between states as many of those involved were from interstate, including the judge. Despite this, however, Her Honour stated 'the priority is for the court to take lay evidence, so as to understand, from those who claim native title, how each side to this dispute says the island belong.'[57] Furthermore, the Court had made it 'clear that it wishes to hear the key evidence given orally, not by way of witness statement

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[49] Ibid. [10] quoting *Nona v State of Queensland* [2006] FCA 412 [1].
[50] Ibid, [19].
[51] Ibid, [20].
[52] Ibid, [105].
[53] Ibid, [109].
[54] Ibid, [106].
[55] Ibid, [236].
[56] Ibid, [239].
[57] *Nona on behalf of the Badulgal, Mualgal and Kaurareg Peoples (Warral & Ului) v State of Queensland* [2021] FCA 1059 [4] (Mortimer J).

or affidavit.' Another consideration for having the hearing heard on country was the requirement that those involved 'participate in an on-country mediation at the conclusion of the lay evidence.'[58] Furthermore, the applicants had 'emphasised the importance of the Court having a view of the islands, and the court has accepted this is crucial.'[59]

It was for these reasons that Justice Mortimer held it was 'neither just nor practicable to conduct a remote hearing for the lay evidence.'[60] She further stated that the 'Court can take judicial notice of the fact that State and Territory governments have taken, and are likely to continue to take, immediate decisions with no or little notice to change border restrictions, and restrictions within the State and Territory concerned.'[61] Her Honour therefore held that:

> [O]n balance I consider there are still more factors weighing in favour of the trial continuing as scheduled in October 2021 than against it. If Queensland Health grants all participants an exemption to travel to Queensland, and allocates places for those from NSW, ACT and Victoria in hotel quarantine, then the reality is the trial is able to proceed. [62]

At the time of writing, however, there has still been no determination in regard to this case. An issue that arose in early 2022 was that an expert who was due to give evidence at a hearing in Cairns on 16 May was affected by the 'catastrophic floods in Lismore.'[63] Justice Mortimer decided that a full adjournment of the hearing for the expert evidence in order to keep all that evidence together. This would then allow the court to 'listen to and consider the expert evidence in a more holistic way.'[64] The hearing for the expert evidence was therefore adjourned to 18 July 2022. Due to Justice Mortimer's other commitments it was also stated that a further hearing for the final closing submissions could not take place until October 2022.[65]

III DISCUSSION

The first aspect to note regarding the successful claims was the consistency of the nature and extent of the native title rights granted in all the determinations. These rights included traditional hunting, fishing and gathering practices of the people. Further rights were granted to allow access and camping on the lands on which native title was held, as well as being able to conduct ceremonies and maintain places of significance. The taking, and using, of water was also permitted, but in all cases this was restricted to domestic and non-commercial communal purposes. This is consistent with the *Water Act 2000* (Qld), s 26 of

[58] Ibid, [5].
[59] Ibid, [7].
[60] Ibid, [50].
[61] Ibid, [54].
[62] Ibid, [56].
[63] *Nona on behalf of the Badulgal, Mualgal and Kaurareg Peoples (Warral & Ului) v State of Queensland (No 4)* [2022] FCA 566 [4].
[64] Ibid, [5].
[65] Ibid, [17].

which states that all water rights reside with the State, with there then being exceptions such as for indigenous groups under s 95, and riparian owners under s 96, with this being restricted to domestic purposes. The lighting of fires was also permitted, but again this was limited to domestic purposes, such as cooking. Significantly, it did not include using it as a traditional method for hunting or clearing vegetation.

Thus, these cases reinforce what had been previously held by the High Court in *Ward v Western Australia*,[66] namely that native title involves a bundle of rights, with what these involve being determined by the traditional laws and customs of the peoples making the claim.[67]

However, the one traditional custom that was not granted in either *Lightning* or *Taylor* was the burning of traditional lands for hunting and vegetarian clearance purposes. While the need for this restriction is the presence of other stakeholders in the area, it still means that, as Australia comes to terms with the possible, or even probable, increase in the danger of bushfires, the Ingenious people of the country who, for millennia, carried out practices to reduce such risks, are no longer able to exercise them in some areas.

An essential feature of any successful native title claim is that the group be able to show a connection to the land, with expert reports being needed to establish this. For instance, in *Lightning* the Court accepted archaeological, anthropological and linguistic material to help establish that the Nywaigi occupied their traditional country prior to 1788.

In *Taylor,* meanwhile, expert reports prepared by Dr David Trigger and Dr Richard Martin were filed in relation to the claims made by the Gangalidda People while genealogical sheets were also prepared by Dr Trigger.

The *Nona* case meanwhile illustrates the need to try to ensure that expert evidence is heard together to allow other parties to question any expert, and to allow such evidence to be considered in a more holistic way.

These cases also highlight that written and oral evidence from lay witnesses provided additional, and crucial, evidence regarding connection to the land. In *Taylor*, for instance, such evidence was presented by 18 members of the Gangalidda people.[68] Similarly, in *Lightning*, testimony from the Nywaigi group was accepted by the Court.

While this testimony can involve written submissions, Justice Mortimer emphasised the significance, and importance, of an actual court hearing in *Nona*. The reason was that this allowed the court to hear oral testimony from the key witnesses, and not just rely on their written statements. This was despite the fact that, at this time, Covid restrictions and lockdowns made the hearing of this oral testimony difficult.

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[66] (2002) 213 CLR 1, 95.
[67] Ibid.
[68] Ibid, [13].

It is also important, when dealing with native title claims, to take into consideration that traditional Indigenous people may have limited ability in written English and, even if their oral use of the language may also be limited, the giving of oral testimony does allow the court a better opportunity to establish what the witnesses actually mean.

Proper procedures are an essential aspect of any court proceedings, and given the sometimes complex nature of native title cases, procedural issues will often arise. This may be due to the fact that, for a particular determination, there may be various groups making competing claims in the respective area.

In *Ross* a procedural issue that arose was whether or not a proper consultation process had been followed in regard to apical ancestors and boundaries of the proposed determination area. This claim, however, was dismissed, with Justice Mortimer being satisfied the Cape York Land Council had properly consulted with claim group members on these matters.

Whether or not sufficient notice had been given for meetings was also a procedural issue in both *Nona* and *Ross*. In *Nona*, Justice Mortimer acknowledged there were such issues with the notice for a meeting, though Her Honour held its contents were sufficient to establish its purpose, and was also sufficiently distributed to provide any interested party a reasonable opportunity to attend. Similarly, in *Ross*, Her Honour dismissed claims that changing the location for a s 87A authorisation meeting had been done at such short notice that some of those interested in attending could not do so.

What a number of these cases also highlight is just how long a native title determination can take. In *Nona* for instance it was acknowledged that the proceeding had been going on for 18 years, while in *Muriata* there had been a consent determination in 2009, yet the actual hearing did not take place until 2018.

However, while the delayed finalisation of any legal matter can be frustrating for the parties concerned, the often complex nature of a native title claim can mean a need for a lengthy proceeding if the proper procedures regarding matters such as proper consultation are to be carried out.

IV CONCLUSION

It is now 252 years since Captain Cook claimed sovereignty over the lands now known as Australia for the British Crown. The year 2022 also marks the 30th Anniversary of the High Court's *Mabo* decision which allowed recognition of native title for those Indigenous peoples who can demonstrate that they have retained a connection to their traditional lands. It is establishing this connection to the land that is often now the main issue in native title cases.[69]

[69] Chris Davies, 'Native Title in Queensland Twenty-Five Years Post-Mabo', (2017) 23 *James Cook University Law Review* 103, 112.

Thirty years on from *Mabo*, native title cases are still being heard by the Federal Court, and the fact that over the last few years there have been a number of successful determinations in North and Far North Queensland highlights the ongoing significance of *Mabo*.

The *Nona* case also highlights that outside factors such as pandemics and catastrophic floods can have an impact on a court's ability to conduct hearings and hear evidence. Both, though, are a fact of judicial life.