Native Title Holders as Vulnerable Publics: Conflict between Spatial Planning and Native Title Law in Australia

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Surviving rights and interests comprising the native title of Aboriginal and Torres Strait Islanders within the Commonwealth of Australia were recognised in 1992 in the ground breaking Mabo decision of the High Court. Over the past 17 years since Mabo, inclusion of this significant public in spatial planning has been only occasionally egregious, although more often spasmodic, and even begrudging and perfunctory. Constitutional responsibility for spatial planning lies almost wholly within the aegis of the six original colonial States who federated in 1900 to become the Commonwealth. Local Government is delegated by the States to undertake most spatial planning, and continues to struggle with the reality that native title is not a land use waiting to be regulated, but an ancient land tenure. A blunt assessment of the entire spatial planning process reveals this continuing failure to comprehend the nature of native title.

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The decision in *Mabo and ors. -v- the State of Queensland* ((1992) 175 CLR 1) (*Mabo*)) was a unique case in Anglo-Australian land law, a confluence of two seemingly different notions of property rights to land and sea. The distinguishing feature of *Mabo* was that Anglo-Australian land law was utilised to recognise the rights and interests of the Meriam people of the Torres Strait.

While the principles established in *Mabo* for the determination of surviving native title were according to Sharp (1996, 209) welcomed at the time, equally important was the comfort offered to the settler society in the Court decision that "the piece by piece dispossession" would not be reversed. The *Mabo* decision also mirrored earlier judicial recognition of indigenous property rights in other common law countries, such as *Calder v A-G (British Columbia (1973) 34 DLR (3d) 145 (SC(Can))* by the

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Canadian Supreme Court. Indeed, in the Canadian Province of British Columbia debate continues over the invalidity of title grants stretching back to 1871, and yet has not impeded investment and development according to Bartlett (1997).

The recognition in *Mabo* of native title has produced a dyschronous (separate in time) Australian land law, which has yet to be addressed in particular by State and local Governments. In addition, the subsequent decision in *The Wik Peoples-v-The State of Queensland and Ors (1996) 141 ALR 129 (Wik)* clearly highlighted the need for the development of new approaches to the management of land where there may be coexisting native title, and obviously the inevitable need for assessment of compensation for the unavoidable extinguishment of such rights in certain circumstances. There is little case law dealing with the management of such rights, and particularly in the area of compensation for native title. The National Native Title Tribunal (NNTT) (2000, 1) has identified that local Government in particular, is required to comprehend the concept of native title, and especially the processes in the *Native Title Act 1993 (Cth.), (NTA*) noting that "anything" local Government implements in respect of land 'may effect' native title.

Further, the Tribunal observed that local Government is obligated under the *NTA* when undertaking spatial planning for an area where native title may be known to exist, that specific procedures necessarily should be followed for the planned activity or development on land to be valid. There are obligations upon local Government to inform local native title holders about spatial planning and the resultant land use. If the procedures are not carried out, activities authorised by local Government "may be invalid" and exposure to damages claims and compensation could arise (NNTT, 2000, 2).

In support, the Australian Local Government Association (ALGA) (1998a, b) has developed advisory documents showing how agreements between local Government and indigenous peoples are being developed in various parts of Australia, and the relationship between the *NTA* and such agreements.

The Planning Institute of Australia and the Australian Property Institute have also been significant contributors to knowledge on such issues and have identified significant areas of concern, which still remain unresolved. Of critical importance are the needs to first develop spatial planning techniques compatible with native title, and second the development of culturally sensitive approaches to agreements which may involve hybrid monetary and/or non monetary forms of compensation (API/PIA, 1997; API, 2000).

The question now is to ascertain the appropriate relationship between native title holders as vulnerable publics and existing spatial planning regimes in Australia. In attempting to answer this question, it is also necessary to shed light on four crucial issues, namely the reality of native title, the cost of disregarding native title, the appropriate form and quantum of compensation, and the adaptive capacity of existing spatial planning processes.

NATIVE TITLE HOLDERS AND SPATIAL PLANNING

There is often a failure to appreciate that the bundle of interests or rights comprising native title relies solely for its existence in Australian society upon validation by that society, the High Court confirming this view in *Fejo v. Northern Territory* (1998) 156 ALR 721 where it observed that "a different legal system accords them its recognition".

As unpalatable as this judicial view may be, the reality is that whilst native title rights and interests may continue within the world of Aboriginal traditions and customs, they rely wholly for their legal existence as a valuable property right on the Anglo-Australian legal system. Injustices of the past ought not divert attention from the substantive recognition of native title which occurred in *Mabo,* and importantly that legal recognition should not be confused with "rhetorical recognition" (McGlade and Strelein, 2002, 3).

Given the above, it is clear that any attempt to manage or value native title rights and interests is dependant upon their effectiveness expressed in terms, which while they reflect sensitivity to cultural differences, must be within the evidentiary framework of the law to the degree achievable, made understandable and hence capable of relating to the existing spatial planning regime, and/or compensation processes. However, the complexities of spatial planning in the light of recognition of native title have clearly not been adequately recognised by State Governments, especially local Government.

It has been suggested by Neate (1994) and Hughes (1995) that existing land use controls notably those dealing specifically with spatial planning, environmental and building matters may be incompatible with some of the bundle of rights comprising native title. This incompatibility is clearly at odds with the (then) Prime Minister's second reading speech in 1993 on the *Native Title Bill*, where he said:

> The bill provides that laws and regulations applying generally in the community also applying to native title land provided that they are consistent with this bill. This covers such matters as heritage protection environmental and health controls and fishery regulation. Native title land is thus kept fully within the reach of Australian law (House of Representatives, 1993, 2883).

However, existing spatial planning and other land use controls and regulations are increasingly being questioned as is the right of the Crown to absolute ownership of land. Rogers (1995, 191) notes that as the Court in *Mabo* decided in the absence of any 'other proprietor', radical title upon the surrender or extinguishment of native title would enlarge to absolute ownership by the Crown. This fiction of automatic assumption of the residuary rights should not, according to Rogers be assumed to rest with the Crown. Importantly, from the standpoint of spatial planning, the Court decided that the Crown was so placed to gain absolute ownership, and as a result, the opportunity for a public property regime (*res communes*) in national

resources such as land was lost. Accordingly the benefits from such a regime in the area of spatial planning were also lost. The judiciary reaffirmed the innate private property rights in these resources, rather than recognise their vesting as *res communes*, or common property.

It is this aspect of *Mabo* which places Australia in a different position relative to its Pacific neighbours, many of whom are also common law countries. Pulea (1984) observes that many countries in the Pacific have a complex body of traditional law, practices and total institutions which coexist in varying degrees with other primary sources of law such as the sometimes simplistic land use controls enacted by the colonial and post-independence governments. The continued existence of customary law and associated traditional management practices is not surprising where the older hunter-gatherer order either still exists, or exists in partial transformation.

Given the above, it is somewhat surprising that the difficulties of reconciling customary laws and traditions with spatial planning have received such scant attention. Perhaps, this can be explained by the persistent but erroneous view held by local government planners (Hewitt, 1998) that native title is just another form of land use to be addressed in the usual manner through statutory spatial planning instruments. Hewitt erroneously asserts albeit in the context of spatial planning in the State of Queensland that there is a balance to be achieved between native title as "private use rights" and the "values of the community at large" (Hewitt, 1998, 359).

Disquietingly the pervasive view that native title is just another form of land use to be regulated, is maintained by Moran (2002, 80) proposing development of "an appropriate statutory planning framework with a native title agreement". Nevertheless, archaeology and management of surviving indigenous relicry appears to be increasingly informing landuse planning decisions in areas where such relicry is viewed, in particular as a diagnostic marker for existing or predicted native title (Newell, 2009).

Indigenous rights and interests arising from the survival of native title are an ancient form of land tenure, and are not just a hitherto unrecognised category of land use. The correct view is that regulation of native title in statutory spatial planning instruments and other State and local government regulatory tools is wholly subject to *ss10-11* of the *NTA* which provide for the recognition or extinguishment of native title only in accordance with the provisions of the *NTA*.

The efforts by the ALGA (1998c) over recent years will hopefully foster an understanding of native title by local government. Clearly, the various agreements that have already been concluded between local Government and native title holders in various parts of Australia are some indication that a heightened appreciation of indigenous aspirations is slowly being recognised.

Such agreements which result from direct negotiations between local Government (and sometimes State Governments), native title holders and other stakeholders appear to have the greatest possibility for resolving conflict between customary land

uses and spatial planning. Importantly, some agreements deal just not with land use but also with environmental and resource management, and development control amongst other wider ranging issues. This approach to fostering agreements mirrors similar earlier international experience in Canada (Richardson, Craig and Boer, 1995), the United States (Josephy, 1989; Oswalt and Neely, 1996) and New Zealand (Graham, 1997).

Clearly, the lessons for the future of native title holders as vulnerable publics in conflict with spatial planning can be garnered from the South Pacific experience where traditional spatial management has been incorporated into the post colonial legal systems. Pulea notes that incorporation of tradition with modernity is just not complimentary but also integrative as both "achieve the same goals" (1984, 356). There is hope that the relationship between spatial planning and native title holders as important vulnerable publics in Australia will not remain as uneasy as currently appears.

A key issue facing spatial planning is that as native title law continues to evolve so the cost of inappropriate action or inaction through spatial planning will increasingly rise and obviously give cause for claims for damage or even compensation arising from local government decision making which cannot be reversed.

It appears thus that the relationship between spatial planning and the rights and interests arising from the survival of native title remain uneasy and hopefully will receive future in-depth consideration.

DISREGARDING NATIVE TITLE HOLDERS AS VULNERABLE PUBLICS

Underlying the problematic relationship between native title holders and spatial planning is four crucial issues which have not been given proper consideration by the States or their progeny, local government, namely:

- Diminution or extinguishment of native title arising from the effect of statutory spatial planning.
- The conversion of reserved or trustee lands held by local government to a freehold estate necessitating the extinguishment of native title by means of compulsory acquisition, notwithstanding that the current use of the land is unchanged.
- Sale of "waste Crown land" under the control and management of local government to a third party.
- Compulsory acquisition by local government of a freehold estate, or lesser interest such as an easement for pipeline or access, which extinguishes or diminishes any surviving native title.

Whilst the above tabulation is not exhaustive, nevertheless it provides a useful *aide memoire* when considering the range of activities undertaken by local government which may impact upon native title and hence give rise *ab initio* for a claim for compensation. In an important warning to local government, the ALGA as long

ago as 1998 recommended that native title was an "issue for consideration" when carrying out land transactions or constructing public infrastructure, and hence may impair or extinguish native title which for local government "the risk is the extent of exposure to compensation" (ALGA, 1998a, 5).

As stated earlier, it should be recognised that whether or not property rights held by a native title holder are fully subject to the planning, development and environmental management controls which all other title holders are subject to, remains problematic. Earlier in this paper it was indicated that there is an increasing body of thought that native title holders are in a different position to that of other title holders. This vexed legal question will only be clarified in the fullness of time by the Australian Courts.

THE SPECTRE OF COMPENSATION

Once the question of liability for compensation has arisen, an assessment of the likely quantum and form of compensation arises for both native title holders and local government. Because native title is a recent arrival in Australian land law there is little guidance in compulsory acquisition case law as to the worth of such rights. Whilst it is accepted that any assessment of compensation for the diminution or extinguishment of native title must evidence sensitivity to cultural differences, any assessment must obviously be within the current skeletal legal framework to be valid. Whilst there are clearly many elements of the bundle of property rights comprising native title which are analogous to existing known land estates, there has been no recognition of intangible factors such as sentimental (or spiritual) attachment in existing Australian case law. Future court decisions will almost certainly direct how compensation for the losses of cultural, social or spiritual values should be assessed, however little confidence at present surrounds such unresolved issues.

Given the above, compensation due to the native title holders arising from the impact of spatial planning and the subsequent land uses arising therefrom will obviously include loss of access to ceremonial lands, spiritual deprivation and loss, and loss or perceived loss of social environment. A critical issue to be resolved is whether such rights existed at European contact, and whether they have continued until the present time, notwithstanding that they may have altered as a result of European contact or activities.

As these compensation questions are resolved over time by the Courts, the specific losses claimed by holders of expropriated native title will be tested and determined. As McGlade and Strelein (2002, 3) have mentioned, such questions require progress along "the path from rhetoric to substance". In any approach to compensation assessment, the ripple effects of diminution or extinguishment may be far reaching, and the assessment of the losses arising from social, spiritual and broader cultural deprivation will necessitate a close rare working relationship between a number of

disciplines, such as anthropology, archeology, spatial science, and land economics.

In summary, all of the above demonstrates how difficult it currently is to determine the quantum of compensation arising from the expropriation or diminution of native title within the existing Australian legal structure. Hence the issue of compensation is of particular concern to local government, given that native title is now a recognised land tenure which according to Reynolds (2002, 4) has "all the protection accorded to landed property by English law".

CONCLUSION

This article analyses the vexed state of play between native title holders who comprise a vulnerable public whose interests are to be protected as set out in the *NTA*. Notwithstanding, arguably most native title claims if ultimately successful would probably be achieved in an analogous form of tenure demonstrably less than freehold, amounting to only marginally more than an easement. However, because the hitherto unknown elements of native title such as spiritual and cultural attachment must also be addressed, of necessity reliance is increasingly being placed on the interplay between Australian and other common law jurisdictions especially in regard to indigenous jurisprudence.

Native title in the hands of traditionally holders is not frozen in time and can evolve. This evolution is however subject to the caveat that the broad nature of connection is still evident through the maintenance, for example, of established traditional practices. Nevertheless, in Australia, it appears that the conservative and incremental manner in which existing land law has developed may provide an irresistible framework for the development by the Courts of any resolution of the conflict between spatial planning and native title. In particular avoidance of unnecessary exposure to compensation claims arising from ignorant application of spatial planning will be an important by product of any resultant case law.

The development of spatial planning procedures appropriate for such ancient rights will necessitate a recasting of current planning and compensation approaches and indeed, judicial interpretations. The latter will only occur slowly in the traditional way of the Courts when dealing with hitherto un-addressed or "new" legal issues. The central issue when dealing with native title is that we must find the material for a sharper argument, one where we are able to deal with meaning, interpretation, opinion and belief. These are not issues that we have had to deal with until recently in Anglo-Australian land law, spatial planning or compensation.

The uncertainty surrounding issues such as compensation arising from the diminution or extinguishment of native title provides a sobering lesson for spatial planners in State and in particular local government. Clearly, a reassessment of current land use planning practice is required, to ensure that any detrimental impact upon native title holders arising from a future action or decision is minimised. Failure

to manage the risk arising from decisions of local government may have not only financial consequences in terms of damages and even compensation, but could also be fatal to the influence of local government at large.

Nevertheless, the positive and developing role of Australian local government in dealing with vexed issues such as spatial planning in the native title context has the potential to be an important guidepost to the other levels of government. Indeed, in the recent historical novel *Beyond Duck River,* the indigenous author Angela Martin (2001, 127) a Darug woman from western Sydney, poignantly reminds us of the spatial importance of such guideposts, notably ancient guideposts:

> One day everyone will respect the spirit of this place: the river spirits, the mountain spirits and the sea spirits, the marks in the rocks.

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