

# A study of the aboriginal land rights

[Sociology](#), [Human Rights](#)



## **ABORIGINAL LAND RIGHTS**

### **Establishment of Native Title**

Three basic requirements were enunciated to establish Native Title in Mabo No 2 (1992) 175 CLR 1:

1. There must be an identifiable group,
2. There must be traditional rules and customs,
3. Traditional rules and customs must be in existence so that the group's connection to the land has been substantially retained

If any of these requirements are not met, there can be no native title over the land

### **Application**

On the facts the Marla people are an identifiable group maintaining their connection to their traditional land through traditional use. They have continued to practice traditional customs on their lands.

### **Extinguishment of Native Title**

#### **Fundamental Principles:**

The legislature and/or the executive may extinguish native title by a clear and plain intention (Mabo No 2 (1992) 175 CLR 1).

If the Crown validly alienated the land by granting an interest, wholly or partially inconsistent with native title, native title is extinguished to the extent of the inconsistency (Mabo No. 2 (1992) 175 CLR 1).

## **Application**

### **Aboriginal Reserve**

In *Mabo v Queensland [No 2]* (1992) 175 CLR 1 the High Court held that the creation of the reserve for the Islander inhabitants did not extinguish native title as it did not entail an inconsistent use. The setting aside of the Aboriginal Reserve by the government does not extinguish the Marla people's native title in that area.

### **Freehold**

In a freehold grant, the grantee has the right of exclusive possession over the land and native title is therefore extinguished (*Mabo v Queensland [No 2]* (1992) 175 CLR 1, *Fejo v Larrakia* [1998] HCA 58)

### **Marla Aboriginal Community Association Lease**

The 1000-hectare lease granted to the Marla Aboriginal Community Association in 1970 effectively extinguishes the Marla people's native title in this area because the granting of such an interest is inconsistent with native title.

### **Pastoral Leases**

Pastoral leases do not extinguish all instances of native title (*Wik People v The State of Queensland* (1996) 187 CLR 1). In *Wik* it was held that pastoral leases do not necessarily extinguish native title because they do not confer exclusive possession therefore denying inconsistency with "all incidents" of native title.

**Section 104 of the Land Administration Act 1997 (WA) also provides:**

“ Aboriginal persons may at all times enter upon any unenclosed and unimproved parts of the land under a pastoral lease to seek their sustenance in their accustomed manner.”

Therefore although a grant of a pastoral lease may be inconsistent with ‘ some’ incidents of native title, if particular incidents of native title can be concurrently enjoyed without inconsistency with the Crown grant then they will not be extinguished by it.

Given these findings I believe that the pastoral lease does not extinguish “ all incidents” of the Marla peoples native title over the land. More information is required to determine which incidents of native title are extinguished by the lease however the construction of the holding yards is likely to extinguish native title in this area because it is an ‘ improvement’ to the land and therefore inconsistent with native title.

It may be argued that section 104 by implication appears to exclude those native title rights in respect of enclosed parts of the relevant land. In the present case Charlie has fenced the perimeter of the pastoral lease therefore this act of enclosing the land may in fact, by virtue of section 104, operate as an extinguishment of native title in relation to those parts.

Despite these implications I do not believe the pastoral lease extinguishes “ all incidents” of native title. The doubts in relation to the effect of pastoral leases on native title will remain until a fixed principal is established.

### **The Crown**

The Crown having absolute ownership of the land has a proprietary interest in the holding yards

### **Revival of Native Title**

Once extinguished native title cannot be revived (*Fejo v Larrakia* [1998] HCA 58). Therefore despite the expiration of the 21 year lease and the addition of the 1000 hectares and buildings back to the reserve this will not entitle the Marla people to reclaim native title over this particular piece of land because it was extinguished by the initial lease.

## **ESTABLISHING POSSESSION OF THE FREEHOLD**

### **Conveyance**

Amos is able to transfer possessory interest in the freehold to Charlie because of the provisions of the Wills Act and the fact that he has a fee simple estate

Amos is also able to transfer possessory interest in the pastoral lease to Charlie (*Asher v Whitlock* (1865) LR 1 QB 1).

### **Adverse Possession**

Legislation: The relevant sections of the Limitations Act 1935 (WA) are ss. 4, 5 & 30

s. 4 – The limitation period is 12 years

s. 5 – The right to bring an action to recover land accrues when: the person entitled to possession has

discontinued possession or has been dispossessed

### **Dispossession**

To establish dispossession it must be shown there was:

Factual possession

A requisite intention to possess, animus possidendi; adverse to another party (Buckinghamshire County Council v Moran [1989] 2 ALL ER 225).

### **Application**

David expended time and money on repairing the homestead, and started a domestic vegetable garden. He also borrowed money to buy two fibre-glass water storage tanks to use in his vegetable garden. It would appear from these facts that David demonstrated exclusive physical control and the animus possidendi

### **Continuous Possession for 12 Years**

For adverse possession, Charlie must have been dispossessed for a continuous period of 12 years (Limitation Act 1935). David dispossessed Charlie of the land in June 1988 and will therefore need to dispossess Charlie until June 2000 to successfully claim adverse possession.

### **Abandonment**

When an adverse possessor abandons possession before the limitation period runs out, his or her possessory interest ceases to be effectual for any purpose. (Mulcahy v Curramore Pty Ltd [1974] 2 NSWLR 464 (CA).

Abandonment requires:

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1. factual abandonment
2. a manifest intention to abandon

### **Application**

It would be dubious to suggest that David ‘ abandoned’ the land in October 1998 when he left to be with his ill mother in Perth. Charlie did not express a manifest intention to abandon the property and in fact it is stated that he hopes to develop the freehold into a tourist retreat.

### **Time stopped from running**

Before the limitation period expires it may be stopped from running by the true owner asserting ownership by effective resumption of possession rights. (Symes v Pitt [1952] VLR 412)

### **Application**

Charlie’s discussion with David’s mother is insufficient to amount to resumption of possession.

## **FIXTURES**

The general maxim, is what is annexed to the land becomes part of the land. (Holland v Hodgson (1872) LR 7 CP 328)

### **Degree of Annexation**

The water storage tanks rest on the ground at the back of the homestead. They are not affixed in anyway however water is piped from the tanks to the homestead most likely through underground piping.

**Object of Annexation**

The water tanks are clearly intended to be permanent fixtures because they are used for domestic purposes and may in future be utilised for David's vegetable garden. The tanks are also an improvement to the realty and removing the tanks would impair the functioning of the principal object. (Holland v Hodgson (1872) LR 7 CP 328)

**Consequence**

Despite the lack of physical annexation I believe the object of annexation is sufficient to warrant the tanks being classified as fixtures.

**Rights of Water Tanks Australia Ltd (WTA)**

At the present stage, Charlie still has title over the freehold therefore WTA will not be able to remove the tanks if the contract is dishonoured because Charlie's interest was taken for value without notice of WTA's interest and in such circumstances Charlie's interest will prevail over WTA's. (Hobson v Gorringe [1897] 1 Ch 182 (CA)).

WTA will have a contractual right to enter and sever the tanks in order to repossess them if David acquires title to the freehold and fails to honour the contract. The right to 'enter and sever' will also give WTA an equitable interest in the land however the physical extent of this equitable interest is unclear. (Kay's Leasing Corporation Pty Ltd v CSR Provident Fund Nominees Pty Ltd) [1962] VR 429)

**POSSESSION OF CHATTELS FOUND ON OR IN LAND**

The finder of a chattel on someone else's land acquires possessory rights over the chattel against all save:



1. The actual owner
2. The employee of the finder where the finder is acting in the capacity of an employee
3. The occupier of land where the occupiers control over the chattel in question is manifest

An occupier's control will be manifest where the chattel is either attached to or buried in the land (South Staffordshire Water Co v Sharman [1896] 2 QB 44)

### **Application**

The space junk is embedded in the surface therefore the Marla people as occupiers of the land will acquire a possessory right to keep the space junk against all but the true owner. The Marla people have an obligation to take reasonable measures to inform the true owner of the finding and to care for it meanwhile.

## **RIGHTS TO WATER**

Water flowing in a defined channel on the surface of land is regulated by the common law riparian doctrine. Therefore the owner of the bed or the banks of the watercourse flowing over the surface of the land has a right to interfere with the flow of the water as long as do not diminish the quality or damage the quality of the water (Acton v Blundell (1843) 12 M & W 324 [152 ER 1223] ).

### **Application**

Charlie is therefore entitled to use the water from the stream flowing through the freehold as long as he meets the above requirements

## **CONCLUSION**

Native title is extinguished by the freehold grant and the 21-hectare lease but not by the reserve grant. The pastoral lease may extinguish some but not all incidents of native title. Charlie's title to the freehold will not be terminated until the expiration of the limitation period. The Marla people will acquire possessory rights over the space junk.