First published Jan, 2006
UPDATED Jan 2007
NATIONAL
Indigenous Times
FACT SHEET SERIES FROM www.nit.com.au
Image: Wayne Quilliam

A beginner's guide to Indigenous land rights in Australia

Everything you need to know about native title, Mabo, Wik, land rights and the '10 Point Plan' from the *National Indigenous Times* Fact Sheet Series.

If you want to understand Aboriginal rights to land in Australia, there's a very simple way to get your head around it. Think of the game 'paper, scissors, rock'.

Scissors represents Aboriginal rights to land. Rock represents everyone else. Forget about paper... it represents government bureaucracies and is therefore unhelpful (particularly in this scenario).

As Bart Simpson says, "Good old rock, nothing beats rock." And in this case, Bart is right - Aboriginal rights to land (scissors) never prevail over everyone else's rights (rock).

If pastoralists rights come into conflict with native title rights, the pastoralists' rights prevail.

If mining company rights come into conflict with native title rights, the mining companies' rights prevail.

If federal government rights come into conflict with native title rights, the federal government's rights prevail.

If Joe Public's freehold rights come into conflict with native title rights, Joe prevails. You get the picture...

To quote Sydney lawyer James Fitzgerald, from Chalk and Fitzgerald: "Native title is the great diminishing right."

That's not to say Aboriginal people have no rights to land in Australia - they do. But native title and land rights are not the panacea for Aboriginal people that many Australians believe.

And things may very well take a turn for the worse in the coming months and years, with a widespread belief among Indigenous leaders that the Howard government, having taken control of the federal Senate, will weaken Aboriginal land rights even further (*NIT* calls it the 'War on Terra'). With that in mind, *NIT* has prepared a guide to all things land rights. We've relied, in part, on an excellent resource that appears on the Human Rights Council of Australia's website, written by Jeff Kildea, an expert in native title law.

Click on this link (http://www.hrca.org.au/Native%20Title%20Simple%20Guide.htm) or go to their home page, www.hrca.org.au and scroll down to the section marked 'Links to HRCA sites and documents' then click on the link marked 'Native Title: A Simple Guide: A Paper for those who wish to understand Mabo, the Native Title Act, Wik and the Ten Point Plan.

NIT has consulted other native title experts in the creation of this guide, but stresses to readers that any errors are *NIT's*. We also acknowledge that some of the concepts discussed are open to legal (not to mention political) debate.

This guide is intended to give *NIT* readers a broad but basic understanding of the complex issues surrounding land tenure.

DID YOU KNOW?

Captain James Cook, the man credited with 'discovering' Australia was actually in the Pacific Ocean primarily to observe the 'transit of Venus', a rare lunar event. His orders stated that once he had observed the transit, he should head south (but only if he was able) in search of the 'Great Southern Land', which the British knew existed. The discovery of Australia was never Cook's priority.

How do the British acquire sovereignty?

1. Treaty - by coming to an agreement with the owners of a land. This was done in the case of the colonisation of New Zealand (the Treaty of Waitangi - although the British regularly breached the terms of the treaty).

2. Conquest - by going in and killing as many people as you can, until they surrender.

3. Terra nullius - by claiming that the land belonged to no-one when you 'found' it. This is what the British did in Australia, although as is now well known, the claim was false.

Where it all began... a replica of Captain Cook's Endeavour, pictured at the Graving Dock in Cardiff, England. Cook's 'discovery' of Australia still haunts Aboriginal people today.

Does conquest, treaty or terra nullius mean the British Crown owns all the land?

Yes... and no. The British acquire sovereignty simply by asserting it - that is, they turn up somewhere and claim to run the place (and the British claim the French are arrogant!?) But sovereignty - the ultimate power to make laws to govern a people - does not mean you can necessarily claim to own all the real estate. Under British common law, the Crown owns all the land in Australia. But just because it acquired sovereignty, doesn't mean it acquired "beneficial or full ownership" of the all land.

Kildea explains: "... sovereignty conferred on the Crown authority to take beneficial ownership of the land if it chose to do so. But, if it did not choose to do so, the land continued to belong to the Indigenous people according to their laws and customs."

In other words, the Crown only enjoys *full* ownership of the land if it uses that land for some purpose or gain - it's not enough to simply point out to the horizon and say you own everything.

• Continued over page 2

NATIONAL Indigenous Times
FACT SHEET SERIES FROM www.nit.com.au

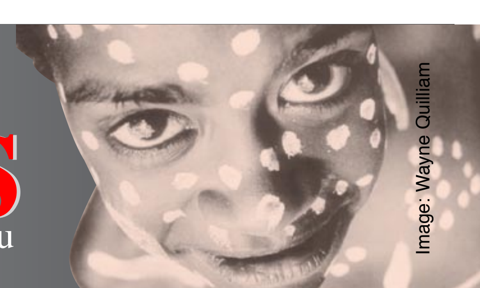


Image: Wayne Quilliam

A beginner's guide to Indigenous land rights in Australia

• *Continued from page 1*

What is the difference between native title and land rights?

Land rights are legislations passed by state and federal governments to give Aboriginal people certain rights to land as a form of compensation for loss of land through colonisation. Most of the land rights legislations were passed during the 1980s, well before the 1992 determination by the High Court in the Mabo case. Native title, by contrast, is a legal concept that has been around for centuries. Kildea explains: "The recognition of native title has been part of English law for hundreds of years. It was based on the fundamental principle that the inhabitants of a territory with prior possession of land had a right to retain that land against newcomers including the English settlers. In all parts of the British Empire where the British settled, bar one, the laws and customs of the Indigenous people relating to land ownership and management (ie. "native title") were given recognition by the common law: in North America, New Zealand and Africa - but not in Australia." The great irony about the relationship between land rights and native title is that in the mid-80s, Australian governments started compensating Aboriginal people for their loss of land, while at the same time maintaining Aboriginal people never actually owned any land.

So why did Australia maintain the lie of 'terra nullius' for so long?

When Captain Cook set foot on Australian soil, he considered that Aboriginal people were nomadic, too small in number and too primitive to be considered land-owners.

Captain Arthur Phillip arrived with the First Fleet in 1788 and it soon became obvious that Cook was wrong on all fronts - Aboriginal people were not nomadic, they were large in number (possibly around 4 million people, who made up around 500 separate nations) and they had developed a very complex system of land ownership and custodianship, based on traditional laws and customs. But it was in everyone's 'interests' (except, of course, Aboriginal people) to continue to claim Australia was empty when they found it. Kildea writes that by the middle of the 1800s, many British people, including members of the government, plus many Australians had formed a different view about Australia purportedly being a 'land of no-one'.

"But by then, the demand for more and more land to accommodate the squatters' expansion into the bush meant that nothing was done about changing the approach which the law had adopted, namely that Australia in 1788 was terra nullius.

"This approach was confirmed in 1889 by the Privy Council (which is Britain's equivalent of Australia's High Court) which in Cooper v. Stuart held that Australia in 1788 was "a tract of territory practically unoccupied without settled inhabitants".

That remained the case until 1992, when the High Court ruled that Eddie Mabo and the Meriam people did, in fact, own land.

While Mabo was a ruling about the Meriam Island in the Torres Straits, it's wider implications meant Australia could no longer maintain that mainland Aboriginal people did not also own land.

DID YOU KNOW?

When Australia was 'discovered' by the British there were several million Aboriginal people living all over the nation (although some scientists believe it was more like 500,000). There were several hundred languages and up to 500 different dialects. Back then, Australia was more like Europe - a conglomeration of nations on one continent. In 2005, the estimated population of people who identify as Aboriginal or Torres Strait Islander is 500,000.

So what are the main principles of Mabo?

The main principles of Mabo, according to Kildea, are:

1. Although the British Crown acquired sovereignty, it did not acquire beneficial or full ownership of the land.
2. Where native title continues to exist, the laws and customs of the Indigenous people who have connection with the land determine the rights which the native title confers - ie. whether it is to reside on the land, to hunt and fish or to hold ceremonies etc - and who may exercise those rights.
3. Native title to particular land is extinguished if the tribe or group having native title loses its connection with the land. [The great irony in this, of course, is that it was government practice for more than 150 years to remove people from their land and assimilate them into white society, enforcing in many cases the partial loss not only of connection to land, but kinship, language, law and customs].
4. Native title over any parcel of land may be surrendered to the Crown but the rights and privileges conferred by native title are otherwise inalienable (ie. non-transferable).

• *Continued page 3*

A fictional case study on the Aboriginal 'right to negotiate'

AN ABORIGINAL clan group known as the Murri people believe they are the native title holders over land surrounding Smithsville, in Queensland.

The Murris commence an application in the Federal Court to have their native title rights recognised. Their application is then sent to the Native Title Registrar, who works within the offices of the National Native Title Tribunal (NNTT - www.nntt.gov.au). The registrar goes through the application and ticks it off against a registration test, which generally involves satisfying the NNTT that the Murri people have a reasonable prospect of proving they could be the traditional owners of that land.

The Murri people's application is accepted and they are formally registered as the Native Title claimant group for the land around Smithsville. It's important to understand that at this point, the Murri people are not recognised under Australian law as the Native Title holders over the land. They are simply accepted as the registered Native Title claimant group who could, down the track, possibly prove they were the traditional owners. But the Murri people at least now have the right to negotiate about "future acts" (which could be future acts of legislation by governments, but also future acts of development, such as mining).

Within weeks, the Murri people receive a 'future act' notice in relation to a company called Blue Sky Mining.

Blue Sky believes some of the land registered in the native title claim - which includes a small corner of land that is being leased by a local farmer - might contain nickel and silver. Blue Sky wants to mine the area.

The farmer is also approached by Blue Sky, because he has a non-exclusive lease over the land. While the farmer has no right to negotiate with Blue Sky - because he doesn't own the land or minerals, he just leases it to graze his cattle - under the terms of his lease Blue Sky is bound by legislation to compensate him for "loss of pasturage" and other impacts of the proposed mine. But there is no guarantee of compensation for the Murri people, because they are not yet proven to be the owners of the land, just the Native Title claimant group.

The Murri people have a maximum of four months to negotiate an agreement with Blue Sky Mining. If they take any longer, Blue Sky can simply apply to the National Native Title Tribunal for an order that the mining lease be granted and the Murri people will lose their right to negotiate for that mining lease.

The Murri people seek the assistance of their local Native Title Representative Body to assist in the negotiations. It is mediated by the National Native Title Tribunal.

All parties meet on several occasions, and eventually Blue Sky Mining agrees to provide a certain number of jobs to the local Murri people when (or if) the mining operations commence plus some royalty payments to be paid to a registered Aboriginal corporation controlled by the Murri people.

Blue Sky also agrees to hire a cultural heritage officer to advise the company on sacred sites during any construction phase or when mining commences.

Five years down the track, the Murri people are finally recognised as the native title holders of the land around Smithsville, after a "consent determination" is reached.

This happened because all the people and organisations with an interest in the land - the government, the local farmer plus Blue Sky Mining - agree to the Murri people as being the native title holders of that land while the Murri people agreed to protect certain interests held by the other stakeholders.

NATIONAL
Indigenous Times
FACT SHEET SERIES FROM www.nit.com.au

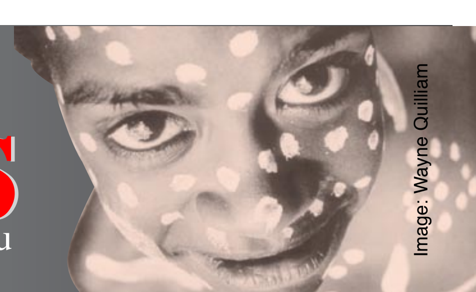


Image: Wayne Quilliam

A beginner's guide to Indigenous land rights in Australia

• Continued from page 2

What is freehold title?

First and foremost, Australians own land but not quite in the way they think. The Crown (or in a modern context, the federal government) ultimately owns all the land on this continent, or at least claims to. That ownership is known as 'radical title'.

You may hold a freehold title to land, but you hold that title at the grace of the Crown. Your freehold title allows you to occupy your land to the exclusion of all others, and to trade and sell it. But at any stage, the Crown can remove your title (compulsorily acquire it). If the Crown does compulsorily acquire your land, the Australian Constitution says that you must be compensated "on just terms", the phrase made famous by the movie *The Castle* (where it was argued you may be able to be compensated for loss of land, but how can you compensate someone for the loss of a 'home').

So what is native title?

Unlike freehold title, which gives you the right to occupy your land "to the exclusion of all others", native title is more a "bundle of rights" (according to the High Court).

Native title might mean that you have exclusive possession to a parcel of land, but that's less often the case. More often, native title only gives traditional owners the right to practice their customs and laws on that land. They may have no right to actually occupy it. So, for example, if you have native title over a parcel of land in Queensland, but a farmer also has a pastoral lease over the same plot, as a native title holder you may be allowed to visit that land, hunt on it and practice some of your laws and customs, but only where those practices don't impinge on the rights of the farmer to continue to use that land according to the terms of his lease. Many farmer's were outraged by the Wik decision and called for legislation to wipe out native title. It's ironic when you consider the farmers rights' had been treated in much the same way as native title rights - ie as possibly having 'non-exclusive' rights to land.

DID YOU KNOW?

Eddie Koiki Mabo died in January 1992, just a few months before the High Court handed down the Mabo Decision. Koiki was just 56 years of age, which is one year short of the average life expectancy of an Indigenous Australian male compared to 77, the average life expectancy for a non-Indigenous Australian male.

LEFT: Eddie Koiki Mabo's grave, in Townsville, Queensland. It was vandalised soon after it was erected.

What's the difference between freehold and native title?

Freehold title can be bought or sold and gives you the right to exclusive possession. Native title is 'inalienable', which means it can't be sold or transferred by Aboriginal people. It can be surrendered, and it can be taken away by government because the Crown, ultimately, can acquire any land it wants. Unlike freehold, native title also does not give you exclusive possession of the land - you have to share the land with people whose ancestors, ironically, arrived after your ancestors.

Native title land in some cases may be leased by traditional owners to anyone.

Why would someone surrender native title?

Kildea explains this very well: "The Aboriginal community may transfer or surrender its native title to the Crown. The restriction on dealing with native title land may not be a problem where the land is of particular spiritual significance and is to be held in perpetuity for spiritual purposes. However, where particular land does not have such significance, and an Aboriginal community wishes to develop the land for commercial purposes, it may be important to be able to deal with it in the same way that land subject to ordinary title can be dealt with. One way that it could do that is to surrender the native title to the Crown in return for a grant of freehold over that land or for monetary compensation which would enable the Aboriginal community to purchase other land."

What is the Native Title Act (NTA)?

Following the Mabo judgement in 1992, the Keating government realised it had to legislate to recognise native title. In 1993, after an enormous amount of debate and negotiation between black and white leaders, federal parliament passed the Native Title Act (NTA). Kildea explains the five main features of the NTA:

"1. Recognition and protection of native title rights.

2. A mechanism regulating future activities affecting native title.

3. A mechanism by which native title rights can be established and compensation determined.

4. Validation of past acts which may be invalid because of the existence of native title.

5. Establishment of an Indigenous land fund for those Indigenous people who will not benefit from native title because of prior extinguishment.

The NTA was the result of a compromise whereby Indigenous people made significant concessions in terms of their substantive rights in return for procedural rights such as: the statutory procedures for extinguishment of native title; simplified mechanisms for proving native title; and the right to negotiate process."

What is Wik?

A court generally only passes judgement on what is before it. Eddie Mabo approached the High Court to determine whether or not he owned the lands of the Meriam Islands.

The High Court found he did, but because there were no pastoral leases on Meriam Island, the High Court did not hand down a formal opinion as to whether or not pastoral leases extinguished native title (although it did discuss the issue and the court was split).

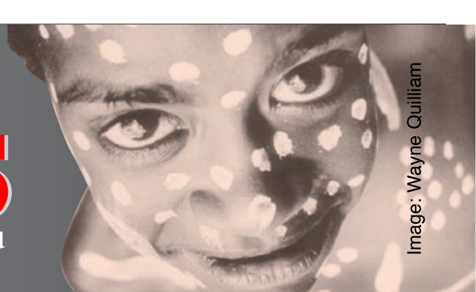
The case of the Wik people in Northern Queensland resolved this issue in 1996. The High Court found that pastoral leases did not necessarily extinguish native title. The reason for this is that like native title, a pastoral lease does not necessarily give its owner "exclusive possession" of the land (just like native title).

All a pastoral lease does is give the farmer rights according to the terms of the lease, such as allowing the farmer to simply graze his cattle.

Therefore, there was no reason to say that all native title rights - such as the right to hunt and practice law and customs - were always extinguished by pastoral leases.

• Continued page 4

NATIONAL Indigenous Times
FACT SHEET SERIES FROM www.nit.com.au



A beginner's guide to Indigenous land rights in Australia

THE MAIN PLAYERS IN THE 1998 WIK DEBATE

• Independent Senator, Brian Harradine

• Prime Minister John Howard

• Aboriginal leader Prof Mick Dodson

• Cape York leader Noel Pearson

What happened after Wik?

Bitter debate and a public frenzy, is the short answer. Wik was regarded, at least by some conservative leaders and commentators, as the disaster Australia didn't have to have. The High Court was accused of "judicial activisim" and many Australians, already 'traumatised' by Mabo, believed that Wik meant the end of their ownership of land - that Aboriginal people were going to be able to claim the backyards of urban Australia.

It was, of course, complete nonsense.

In 1997, the Howard government announced it would deal with the Native Title Act and the Wik decision via its now infamous '10 Point Plan'. There was talk of "bucketfuls of extinguishment" of Aboriginal native title but it never quite came to pass.

Formally known as the Native Title Amendment Bill 1997, it was introduced to parliament, passed by the Coalition (who had the numbers in the House of Representatives) but blocked in the Senate, most notably with the key vote of Tasmanian independent, Senator Brian Harradine.

The issue went on to become the longest debate in Australian parliamentary history. Kildea explains there were four major sticking points in the 10 Point Plan - the sunset clause; the registration test for becoming a native title holder; the Native Title Act's relationship to the Racial Discrimination Act; and the right for Aboriginal people to negotiate on pastoral leases.

The Sunset clause

Kildea says: "The government wanted all claims for determination of native title under the NTA to be made within six years. The Senate rejected that approach on the basis that after 200 years of dispossession, it was unreasonable to expect Indigenous people to be in a position to lodge their claims within six years."

The Registration test

Kildea says: "The Native Title Amendment Bill (NTAB) provided that claims would be processed through the Federal Court rather than the National Native Title Tribunal (NNTT), [which previously held the job]. However, claims which passed a threshold test would be registered by the NNTT. The main advantage of registration would be that native title claimants would have the benefit of the right to negotiate even before the Federal Court had determined whether or not they had native title. It was generally agreed that there should be a threshold test which ensured that only those claims which were likely to succeed would become registered. However, the Senate considered that the government's threshold test was too restrictive. In particular it failed to acknowledge the disadvantage suffered by children of the "stolen generations" and victims of the "locked gates" practices."

Racial Discrimination Act

In 1975, the government passed a law that made it illegal to discriminate against people based on their race.

The Racial Discrimination Act (RDA) remains today one of the nation's most important pieces of legislation, at least in terms of social justice.

During the amendment debate, the Senate insisted that a provision be included in any new native title legislation that compelled it to be interpreted in a way consistent with the principles already laid down in the Racial Discrimination Act.

The government argued this would be too confusing.

The reason the Senate argued for this provision is that a new act of parliament subsumes an old one.

So unless the Racial Discrimination Act - passed in 1975 - was specifically referred to in the 1998 native title amendments, the new legislation could simply ignore the principles set down in the 'old' Racial Discrimination Act. Ironically, the Senate amendments were eventually passed, but the new Native Title Act has been condemned by many, including the United Nations, as racially discriminatory.

The right to negotiate on pastoral leases

Kildea explains: "This was the major issue between the government and the Senate. As a fundamental element of the 10 Point Plan, the government proposed to allow State governments in effect to abolish the right [of Aboriginal people] to negotiate on pastoral leases. This measure was strongly supported by the mining industry, which did not want to have to negotiate with native title holders and claimants over 78 percent of the continent. If the NTAB passed, they would only have to negotiate in respect of the 36 percent (which comprised vacant Crown land). The government was also supported by the pastoralists who believed it was unfair that Indigenous people had more rights in dealing with mining companies than they did."

What was the end result?

The government lost the sunset clause; the registration test was softened; the new legislation would have to be read and construed subject to the Racial Discrimination Act; and the right of Aboriginal people to negotiate on pastoral leases was preserved.

But Aboriginal people didn't get things all their own way. Not by a long shot.

What were the practical effects of the changes?

Since its implementation, the Howard government's '10 Point Plan' has been criticised by just about everyone with an interest in native title, including mining companies, pastoralists and Aboriginal people.

Indigenous leaders such as Professor Mick Dodson refer to the '10 Point Plan' as having wrecked the native title aspirations of Aboriginal people. Of all the changes, it was the 'tweaking' of the 'right to negotiate' provisions which caused the greatest anger among Aboriginal people.

Under the old Act, Aboriginal people had a reasonable chance of negotiating with government, mining companies and pastoralists on what happened to land that was subject to native title claim. But under the new act, the right to negotiate was substantially weakened.

Specific 'future acts' which are to occur on land subject to native title claim that were now not subject to the 'right to negotiate' provisions include:

- compulsory acquisitions for privately built infrastructure;
- with the approval of the Commonwealth Minister, the creation or variation of certain mining rights allowing some kinds of low impact or small scale mining;
- acts within a town or city;
- acts to the extent that they relate to the intertidal zone.

• ENDS