NATIVE TITLE – THE FUSION OF LAW AND POLITICS

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I acknowledge that we stand on Gurambilbarra Wulgurukaba Country and pay my respects to your Elders past and present. I also acknowledge the Board and Staff of NQLC and AIATSIS and all the hard work put in to make this conference possible. Finally, I acknowledge all the Traditional Owners from across the country in the room today.

On this 25th anniversary of the Mabo Judgment, I want to reflect upon how law and politics has impacted and shaped native title to date, and as Indigenous Peoples:

1. How we were once victims of both;
2. How we used one to secure the other;
3. How they interacted to complicate the claim process;
4. How our own politics can straitjacket the potential of our hard-fought recognised legal rights; and
5. Finally how we need to harness both, to redefine each to make a different country for all of us.

I LAW AND POLITICS – 'THE COLONISER'S TOOLS'

We don't need to spend any time on how we were enslaved on our own Country by Colonisers that wielded racist political power by concocting legal fictions to enact racist laws to justify the invasion and embed the status quo.

Townsville is an appropriate place to have a conversation about race relations. It is poignant that we are holding this 25th anniversary celebrating Indigenous rights in a place that bears the name of a blackbirder; Robert Towns, who infamously made his name as a blackbirder in the 19th century kidnapping South Sea Islanders for slave labour on Queensland sugar cane farms.

That 50 odd kilometres away the Island paradise of the Munbarra, named Palm Island by James Cook as he passed by in 1770, was turned into a living hell by the Aboriginal Protector by the forced relocation of over fifty different Aboriginal and Torres Strait Islander tribes sent to Palm Island for punishment for their recalcitrance.

And that it was from this place that Koiki Mabo started his long battle against those racist political and legal forces.

Against this backdrop, it is befitting, that traditional owners from the four corners of Australia gather on Gurambilbarra Wulgurukaba country, to commemorate a legal decision that reverberated to each of those four corners with a renewed hope of land justice.

And like his namesake, acknowledge Koiki, who four months after his passing, became the monsoon wind that finally blew the grit of terra nullius from the eye of a nation that was blind to its First Peoples, our laws and customs, our rights and interests to our lands and waters that we owned, possessed, used and enjoyed since time immemorial.

II How Did We Use Political Rights – to Create New Legal Rights?

Whilst we gather here to celebrate 25 years since the *Mabo v Queensland (No 2)*[1] ('*Mabo (No 2)*') judgment, we have to remember the struggle that preceded it. For you don't have a *Mabo (No 2)* without a *Mabo v Queensland (No 1)*[2] ('*Mabo (No 1)*'). And if we celebrate *Mabo (No 1)* we must also celebrate its link in politics, law and history to another important land rights case of *Koowarta v Bjelke-Petersen* ('*Koowarta*').[3]

The strategic vision, steely-resolve and inspiring leadership of these political giants, Koiki Mabo of the Meriam and John Koowarta of the Wik Nation played key roles in the formation of our current native title jurisprudence.

In 1992 Mabo and his co-plaintiffs Passi, Salee and Rice, smashed the terra nullius fiction and paved the way for legal recognition of the Meriam People's continuity of connection to their land and waters that gave rise to native title.

Soon after in 1996, Koowarta's People, the Wik and Wik Way Peoples, expanded the application of native title to include pastoral leases and hence opened up vast tracts of land to claim that were prior to that time, presumed to have extinguished native title.

[1] (1992) 175 CLR 1.
[2] (1988) 166 CLR 186.
[3] (1982) 153 CLR 168.

These two cases are the pillars of our native title system and it is fascinating to explore the similarities of the legal and political struggles of those two Elders for their respective peoples who, standing steadfast in their traditional laws used the white man's law against a common enemy, the State of Queensland, intent on their political suppression.

I would like to talk briefly of those earlier cases, because *Mabo (No 1)* and the *Koowarta* case underscore the importance of how legal rights are shaped by the political will to achieve change and can be the source of inspiration and guidance as we all ask how our recognised legal rights can be used as a platform for broader change to achieve social justice.

Both cases demonstrate how politics and the law can be used as a sword against Indigenous Peoples but how, in turn, Indigenous People can use the law as a shield and politics as the catalyst for change. Both cases are also caustic examples of how a Government can abuse political power and how human rights and the Constitution can repel those abuses. Finally, they serve as salient reminders of the obstacles and pitfalls that can beset us but underscore the maxim that there is always strength in unity.

The facts of the 1982 High Court case of *Koowarta* are that the Commonwealth Aboriginal Land Fund Commission attempted to purchase a pastoral lease on the Archer River in Queensland on behalf of John Koowarta and his People. The owner of the station was prepared to sell but the Bjelke-Petersen Government refused to consent to the transfer on the basis that official Cabinet policy was that:

> 'The Queensland Government does not view favourably proposals to acquire large areas of freehold or leasehold for development by Aborigines or Aboriginal groups'.[4]

On one hand, Koowarta alleged a breach of the commonwealth *Racial Discrimination Act 1975* (Cth) ('*RDA*'), and on the other, the Government challenged the validity of the *RDA* itself.

By a slim majority, the High Court found that the *RDA* was valid under the Constitution's external affairs power by giving domestic effect to implement

[4] Ibid 177.

international treaty obligations, in this case the *International Convention on the Elimination of All Forms of Racial Discrimination.*[5]

Koowarta's case was remitted to the Supreme Court of Qld and in 1988 the court found in his favour. Despite Koowarta winning, Bjelke-Petersen's Government thwarted the sale by subsequently declaring the area as national park, hence denying Koowarta his land. Bjelke-Petersen was no 'greenie' revealing the enmity he had for Aboriginal peoples and Torres Strait Islanders.

In 1982, the very same year as the *Koowarta* High Court judgment, Koiki Mabo, David Passi and James Rice instituted proceedings against the State of Queensland in the original jurisdiction of the High Court of Australia, seeking a declaration that their traditional rights and interests to their Island home had survived the annexation of Mer in 1879.

To frustrate the plaintiffs' legal proceedings, the State of Queensland (again Bjelke-Petersen) enacted the *Queensland Coast Islands Declaratory Act (1985)* (Qld) effectively declaring no residual native title had survived the annexation of the islands.

In 1988, interestingly the same year of Koowarta's Supreme Court win, the High Court found that the *Queensland Coast Island Declaratory Act (1985)* (Qld) was intended to extinguish native title and therefore it was inconsistent with the commonwealth *RDA* and hence invalid by reason of s 109 of the *Commonwealth Constitution*.

What is clear from *Koowarta* and *Mabo (No 1)* is the direct link between civil and political rights that underpinned the international human rights conventions and laws that significantly contributed to the subsequent success of the *Mabo (No 2)* litigation.

Put another way, if there was no global civil and political movement in the 1960s that gave rise to the *International Convention on the Elimination of All Forms of Racial Discrimination,* there would be no commonwealth *Racial Discrimination Act* in 1975 and thus the despicable Queensland legislation of 1985 in all likelihood would have brought an end to the *Mabo* litigation. Later High Court cases may have assisted our cause but we certainly wouldn't be here today celebrating this silver anniversary of the *Mabo (No 2)* judgment.

[5] Opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969).

Before leaving this point, I respectfully acknowledge similar land justice battles were being fought right around the country at that time.

What is important in the telling of this story, is that as Indigenous Peoples, together we leveraged a political and civil rights movement that gave rise to the native title and land rights we enjoy today.

III How Law and Politics Interacted to Complicate the Claim Process

After this historic judgment, law and politics again converged. From scare-mongering by politicians that suburban backyards were under threat, to the mining industry who warned that the economic sky was about to fall-in.

The intensity was palpable. The *Native Title Act 1993* (Cth) was a fiercely fought parliamentary battle and came into force relatively quickly some 18 months after the judgment.

Reflecting on the past 25 years, some would say that the *Mabo (No 2)* Judgment was not only the beginning but the high point of native title, and that the system has been in decline ever since by delivering too little, after too long by exacting too much from Indigenous claimants in proving their claims.

That criticism is well made but we need to be conscious of some unique features at play here:

A *The Three Pronged Approach*

In 1993, the Keating Government and the Indigenous leadership foresaw the limitations of the Native Title Act in meeting the aspirations of all Indigenous Australians and offered it as but one prong in a three prong solution; the other two being the land fund and the social justice package.

With the election of the Howard Government in 1996, the social justice package was never taken up and due to the legal uncertainties associated with the early phase of native title, the land fund moved in a different direction. As an aside, it is noteworthy and positive to see in recent times that the ILC (Indigenous Land Corporation) (and the IBA (Indigenous Business Australia) for that matter) is re-focussing on native title.

As then Social Justice Commissioner, Dr Tom Calma, commented in 2008:

> 'the other two limbs did not eventuate in the form intended, and this abyss is one of the underlying reasons why the native title system is under the strain it is under today'.[6]

Put another way, if nature abhors a vacuum, so do aspirations, and Indigenous Australians poured their aspirations into pursuing native title claims; but on this 25th anniversary we should all wonder where we might have been today had all three prongs been given a chance as the architects intended.

B *Institutional Arrangements*

On another important point, the original intent of the Native Title Act was for the bulk of the process to be commenced and undertaken in the 'less formal' National Native Title Tribunal with the Federal Court recognising the outcome. Constitutional defects with this intended model became known in 1995 when the High Court found that the Tribunal could not constitutionally perform the functions of a court, but the ongoing institutional struggle and role confusion between the NNTT (National Native Title Tribunal) and Federal Court continued as late as 2009 when statutory changes better clarified the relationship.

Another interesting point is that native title is a legal area were all three limbs of our Westminster system: the judiciary, executive and legislature play very active roles as arbiter, policy-setter/funder/respondent party and law maker respectively, and together still influence and impact upon the land justice aspirations of Indigenous Australians.

C *Federalism*

Our federal system of government also adds a layer of complexity. Whilst the statutory regime is national and proceedings are brought in the Federal Court of Australia, the principal respondent to each native title claim is the relevant State or Territory government – and their attitude to native title claims depends upon the political colour of those in government at the time. So every three to four years, native title claimants may be facing nominally the same principal respondent but with a completely different attitude and disposition toward native title.

[6] Aboriginal and Torres Strait Islander Social Justice Commissioner, 'Native Title Report 2008' 44, 46.

D *Pace of Legislative and Jurisprudential Change*

For the first 10 years or so, we had major changes occurring every 12 to 24 months including the 1998 Amendments when one former deputy Prime Minister infamously promised 'bucket loads of extinguishment'[7] to the 2002 High Court cases of *WA v Ward* (Miriuwung Gajerrong) case where native title was characterised as a bundle of rights with each right being capable of extinguishment until there is nothing in the bundle,[8] to the '*Yorta Yorta'* case, after which, respondents stopped focussing on asserting that their tenure extinguished native title to turning the blowtorch on whether native title claimants could make out the continuity of connection issue.[9]

E *Current Statistics and Predictions*

However, since 2009 the rate of claim resolution has increased significantly and after 25 years we currently have 244 native title applications in the system and 323 positive native title determinations – so we have reached our tipping point. It is debatable whether it will take another 10 to 20 years to resolve the outstanding claims noting that:

- some claims will be straightforward and can rely upon earlier determinations by the same group,
- some claims may have been parked because they represent overlapped or shared country; and
- other claims might be very difficult to secure a successful outcome because of the impact of colonisation in terms of continuity and wide-scale extinguishment.

There will be second generation issues still to be resolved such as compensation applications and, over time, revision applications, and these applications may have an impact on the resolution rate of claim applications into the future.

Another challenge is that native title holders who have the benefit of consent determinations may be exposed to revision applications if judgments in future

[7] Brough, J., 'Wik draft threat to native title', The Sydney Morning Herald, 28 June 1997, 3.
[8] (2002) 213 CLR 1.
[9] *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422.

contested hearings involving compensation or adjoining claims, make adverse findings on connection.

State Governments have standing to bring these revision applications so we all need to be conscious of the implications of over-reach or poorly-constituted/conceived court applications.

It is critical that the native title system take a strategic approach to the development of the compensation jurisprudence but also that we reduce the risks of adverse findings that may impact upon existing consent determinations.

I hope that risk never materialises but native title holders will need to be hyper-vigilant to the allure of promised 'rivers of gold' in compensation applications especially spruiked by 'ambulance chasing' lawyers. I think it is a case of Native Title Holder Beware!

IV Internal Politics and its Dissipating Effect on Legal Rights

Whilst the challenge of discharging the burden of proof is onerous and must be done to secure a native title determination, we have to be mindful of how that process itself can cause trauma.

As native title holders and claimants we are justified in being angry and frustrated by a system that demands proof of who we are by those who once treated us as invisible due to terra nullius. That however is the system and nothing has really changed since the Mabo plaintiffs commenced their original action 35 years ago.

Every native title group in this room has gone, is going or will go through this proof process. It is tough regardless of the outcome; and the outcomes are varied, from recognition of native title with exclusive possession to non-exclusive possession to not meeting the connection requirements at all resulting in a negative determination. The emotional spectrum ranges from fatigued jubilation to heart-wrenching despair.

Native title has also had a fragmenting effect that chooses 'winners and losers'.

There is a cruel stubbornness with proof, in that proving native title claims to accord with the jurisprudence is a highly forensic exercise that can negatively impact upon the cohesion of longstanding communities. As the number of

native title determinations grow, there is a corresponding group of people who have lived in communities for generations, that side by side together endured the ravages of colonisation with their now native title holder brothers and sisters that the native title system makes 'invisible'…again.

This is a travesty of the current system.

This evidence-gathering process can cause people to be excluded from claims, can support one claim group over another or can lead to the claim or claims having little to no prospects of success at all. It is in this context, when discharging their statutory duties, Rep Bodies and Service Providers have a duty to those people who may hold native title and frequently hard legal assessments need to be made by rep body lawyers whose highest duty is to the Federal Court to ensure that claims are based on credible evidence.

Out of this harsh process more disputes are created and contribute to tensions that are at breaking point.

These disputes don't end at the door of a court determination but carry forward into the PBC (Prescribed Body Corporate) and its governance. Recent statistics from the Office of the Registrar of Indigenous Corporations (ORIC) has PBC complaints disproportionately higher than non-PBC *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth) corporations with disputes about membership eligibility, internal Board issues and ordinary member/board relationships being the main areas of concern.

Disputes are a normal consequence of human interaction but when they paralyse a group from exercising and enjoying their native title rights then that is the start of the erosion of those rights from within and that is far more dangerous than a full frontal assault from external forces.

As a system we have to come up with better solutions and more nuanced responses to prevent, manage and resolve internal disputes otherwise we have sown the seeds of our own demise.

Some of the solutions lie in setting up a framework that draws on our human capital rather than dissipating it.

V SO HOW DO WE HARNESS OUR LEGAL AND POLITICAL RIGHTS TO RE-DEFINE THE FUTURE?

There are 169 PBCs managing native title and a forecast from the National Native Title Tribunal is that this figure will increase to about 270 over the next ten years. The biggest challenge now and over the horizon is to ensure that PBCs have strong governance and operational proficiency so they can maintain this important role and leverage opportunities whilst protecting their estate.

However, without sufficient funding and support these entities are at risk of failure and that would be an indictment on the whole system.

The challenge for everyone in this room, regardless of the hat we might be wearing, is are we going to let those tensions define the relationship into the future or are we capable of transcending the past and unite the different limbs of the system for the benefit of all our mobs to make real change in this nation.

So what is our strategy? If strategy is the art of making use of time and space then, with the growing number of determinations, and PBCs/Traditional owner corporations holding an area of over 40% of the land mass of Australia and expanding, we must devise that strategy now and part of that strategy is drawing upon a structure capable of supporting the system and advocating for change.

I would contend that the representative body system and the PBC system are two sides to the one coin. We share a symbiotic relationship whether we like it or not:

- PBCs hold rights as agents or trustees for native title holders in perpetuity, whilst rep bodies have decades of experience and expertise in advising how those rights operate and intersect with other rights;
- PBCs have cultural and political authority at a local level, and rep bodies are experienced at leveraging and amplifying that authority through their spheres of influence whether they be governments, professional bodies, universities or key sectoral stakeholders;
- Almost 50% of all PBCs have little income, few resources and lack experience in securing resources where Rep Bodies have specialised staff, systems, assets and knowledge on accessing public, private and not-for-profit resources and in-kind support;
- PBCs and Representative bodies have statutory responsibilities and common objectives to protect native title holders;
- PBCs currently don’t have a formal inter-PBC network, representative bodies have numerous formal and informal linkages whether it be the

National Native Title Council or state-based alliances that exist in WA, Qld and NT and hence can draw on the intellectual capital and experience of different states and territories acquired over decades.

Time is of the essence. Current funding arrangements for PBC Support are limited to four years with self-sufficiency being the objective.

Rep bodies have four years to demonstrate value for money before PBCs move to a direct funding model; conversely, PBCs should exploit every opportunity to receive whole-of-client services for free or below commercial rates to build their own capability or at least be in a position to compare services with commercial providers in terms of costs, quality and fit.

The next four years represents an opportunity to coalesce these two limbs – to make this sector a strong force that influences and shapes the broader Indigenous Affairs landscape as well as beyond.

For all its shortcomings, the native title process has proven to be an efficient and effective organising framework within which considerable rights-based negotiation experience has been acquired in both the claim and future act regimes. It is time to bring the rights-based regime into the centre of a political movement hungry for substantive change as evidenced by the recent Uluru Statement.

Unity is critical for achieving native title legal recognition, and so too will unity, across the native title holders, PBCs and rep bodies, prove critical to shaping the next political movement that will recast new legal rights and forge different respectful relationships with non-Indigenous Australians at local, regional, state and national levels.

We have never entered a political domain with such a solid rights-based foundation such as those currently recognised and held in the native title rights regime. We will be poorer for it if we do nothing and we won't die wondering if we put aside our difference, unite and simply go for it.

What would those Elders who have now passed and gave so much expect us to do; in honouring them and teaching the next generation that looks at our every move and hears our every word, what will we decide to do?

Au eswua, thank you.