A Native Title Information Talk Delivered at Fernvale Futures on 22 February 2014.

Tim Wishart

Slide 1

I acknowledge and offer my respect to the country on which we meet and to the Traditional Owners of this country and to their Old People and Elders.

The organisation for which I work, Queensland South Native Title Services is a native title service provider recognised and funded by the Federal Government under the *Native Title Act (1993)*.

Slide 2

The area for which QSNTS has statutory recognition under the *Native Title Act* covers an area spanning Queensland, along the New South Wales border from the Coral Sea to the South Australian border, north to about 250 kilometres north of Mt Isa and running diagonally south eastwards to the coast, marginally south of Sarina.

Slide 3

I ought to say that views and opinions expressed are mine and are not necessarily reflective of corporate views or policy of QSNTS.

In this conversation I will refer to the *Native Title Act* as 'the Act'. But in the consciousness of Queensland Aboriginal and Torres Strait Islander society, the expression "the Act" is often a reference to *The Aboriginal Protection and Restrictions of the Sale of Opium Act 1897*. That legislation was an Act of the Queensland Parliament.

As a result of dispersal, malnutrition, use of opium and diseases, all a consequence of European incursion into traditional lands coupled with the attempted genocide that came with that incursion, it was widely believed in Queensland that Aborigines were members of a 'dying race'.

In 1894 pressure from some quarters of the community saw the Queensland Government commission Archibald Meston to look at what had conveniently, for the colonising power, become the plight of Aboriginal people.

Meston made a number of recommendations, some becoming the basis of the *Aboriginal Protection and Restriction of the Sale of Opium Act 1897*. The creators of that Act saw it as a solution to a short term problem, but those charged with administering the legislation had different ideas. The act was used as a device for social engineering and control. It became a very blunt instrument used to strip Aboriginal people of the most basic human rights. That

Act was the first measure of separate legal control over the Aboriginal people and it implemented a system of tight controls and closed reserves.

Slide 4

In an address given shortly after the historic Mabo judgment, Ron Castan QC who was senior counsel for the Merriam People said:

> *'The notion that the Aboriginal people have rights in this country is a difficult one for many in our community to grapple with. That Aboriginal people have the right to be consulted, to be up at the table when it comes to negotiating matters such as land is very difficult for those companies, or groups, or governments which have been accustomed to deciding that we need to use this land for a particular purpose, whether it be mining or farming or building new homes.'*[1]

Regrettably, 22 years after Mabo I suspect that whether born of ignorance or prejudice vestiges of that psyche remain.

At the time of colonisation, land was forcibly taken from Indigenous people to whom it belonged. Today through the doctrine of native title, it is recognised that these colonial acts of dispossession were wrong, but those acts are not considered to have been illegal nor are they accepted to found a right to compensation. Those actions had their genesis in an era when racial discrimination was acceptable to the social philosophy and legal system of the colonising power.

Slide 5

In 1833 a decision of the New South Wales Supreme Court referred to the indigenous people of the Australian colonies as *'wandering tribes ... milling without certain habitation and without laws [who] were never in the situation of a concrete people'*.[2] The colonies were regarded at common law as settled rather than conquered and their land as property of the Crown from the time of their annexation.[3]

Slide 6

In 1889, an English Law Lord said:

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[1] R Castan QC, 'Native Title in Australia: Reflections on Mabo', address to the Annual Dinner of the Australian Jewish Democratic Society (Melbourne 1993)

[2] McDonald v Levy (1833) 1 Legge 39 (NSWSC) 45.

[3] Attorney General v Brown (1847) 1 Legge 312 (NSWSC); Williams v Attorney General (NSW) [1913] HCA 33; (1913) 16 CLR 404 (HCA).

> *'There is a great difference between the case of a colony acquired by conquest or cession in which there is an established system of law, and that of a colony which consisted of a tract of territory practically unoccupied, without settled inhabitants or settled law, at the time when it was peacefully annexed to the British Dominion. The Colony of New South Wales belongs to the latter class.'*[4]

This historical finding, which is a reasonable explanation of the doctrine of terra nullius was later treated as stating the law for Australia and was coupled with a form of Darwinian jurisprudence which governed the recognition of customary land ownership in indigenous societies.

The Privy Council[5] spoke of indigenous people whose place in the scale of social organisation was so low that their usages and conceptions of rights could not be reconciled with the institutions or ideas of civilised society.

The characterisation of the settlement of the Australian colonies, expounded by the Privy Council, defeated the first indigenous claim for recognition of customary title in 1971. That case was Milirrpum v Nabalco Pty Ltd[6].

The Milirrpum action, which was commenced in the Supreme Court of the Northern Territory, involved a claim for the invalidation of leases granted to Nabalco on the basis that they had been granted over land which was subject to the title of the indigenous people of the Gove Peninsula.

slide 7

In dismissing the application Justice Blackburn concluded, based on English precedent, that the doctrine of terra nullius applied and that there was no common law doctrine of native title in Australia. This finding involved an acceptance of the historical fiction that the Australian colonies were settled colonies:

> *'[T]he question is one not of fact but of law. Whether or not the Australian Aboriginals living in any part of New South Wales had in 1788 a system of law which was beyond the powers of the settlors at that time to perceive or comprehend, it is beyond the power of this Court to decide otherwise than that New South Wales came into the category of a settled or occupied colony.'*[7]

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[4] Cooper v Stuart [1889] 14 App Cas 286 (PC) at 291

[5] Re Southern Rhodesia [1919] AC 211.

[6] Milirrpum v Nabalco Pty Ltd (1971) 17 FLR 141 (NTSC)

[7] Millirrpum at 224.

Through the legal doctrine of native title first recognised in the Mabo case[8], it is now accepted and settled law that Indigenous peoples have a rightful claim to their traditional lands. Despite that recognition, the only way open to traditional owners to seek recognition of native title rights is through litigation under the Act.

The Act established a regime under which traditional owners seeking recognition of their common law interests in land and waters must pursue recognition of those rights by the body politic through litigation in the Federal Court. That litigation is invariably contested. The principal respondent to native title determination applications is, inevitably, the state in which the action is based.

The High Court in Mabo told us that these very interests had existed from time immemorial, there is no small irony in the fact that traditional owners must now litigate against the Crown to have any chance of gaining recognition of those ancient and fundamental rights and interests.

Slide 8

It seems somewhat bizarre to me that, in delivering judgment as part of making a determination of native title, the judge will often use words such as:

> *I am satisfied that it is within the power of the Court to make the orders sought and that these orders give recognition under the laws of Australia, to the traditional rights and interests arising from traditional laws acknowledged and the traditional customs observed by the Jinibara People. But it is important to note that these orders do not grant native title to the claimants, they merely recognise the native title that they have long held.*

Slide 9

What is Native Title?

Slide 10

Despite the fact that this year will mark 22 years since the High Court's decision in *Mabo* and despite the subsequent judicial consideration of an Australian concept of native title and despite an increased understanding of the effect of native title on those non-indigenous people closely affected by a native title determination, I suspect that there remains a general lack of understanding about native title, its relationship with land tenure and property rights by mainstream Australia.

Since the scheme of recognition was implemented by the Act in 1993, nationally, there have been 109 determinations that native title exists in part of the claim area, 83 determinations

[8] Mabo v Queensland (No 2) ("Mabo case") [1992] HCA 23; (1992) 175 CLR 1 (3 June 1992)

that native title exists in the entire claim area and 10 determinations that native title does not exist. Of those, in Queensland there have been 15 determinations that native title exists in part of the claim area, 67 determinations that native title exists in the entire area and 3 determinations that native title does not exist.

When QSNTS advertises that a meeting will be held for the purpose of considering the authorisation of a native title determination application, a common media response is to ask us how a native title claim will affect local landholders. The short answer is that it probably won't. I have told an ABC presenter "Mum and Dad's backyard is safe".

The reality in the Queensland South area is that a native title determination is unlikely to yield significant grants of exclusive possession of land to traditional owners.

The National Native Title Tribunal (a body created by the Act) provides a useful definition of native title on its website:

> *Native title is the recognition by Australian law that some Indigenous people have rights and interests to their land that come from their traditional laws and customs.*
>
> *The native title rights and interests held by particular Indigenous people will depend on both their traditional laws and customs and what interests are held by others in the area concerned. Generally speaking, native title must give way to the rights held by others. The capacity of Australian law to recognise the rights and interests held under traditional law and custom will also be a factor.*
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> *Native title rights and interests may include rights to:*
> - *live on the area*
> - *access the area for traditional purposes, like camping or to do ceremonies*
> - *visit and protect important places and sites*
> - *hunt, fish and gather food or traditional resources like water, wood and ochre*
> - *teach law and custom on country.*
>
> *In some cases, native title includes the right to possess and occupy an area to the exclusion of all others (often called 'exclusive possession'). This includes the right to control access to, and use of, the area concerned. However, this right can only be recognised over certain parts of Australia, such as unallocated or vacant Crown land and some areas already held by, or for, Indigenous Australians.*
>
> *Native title rights and interests differ from Indigenous land rights in that the source of land rights is a grant of title from government. The source of native title rights and*

interests is the system of traditional laws and customs of the native title holders themselves.

So, native title is not a grant of land, native title is not sovereignty and native title is not paramount to inconsistent grants of land or dealings in land by the Crown subsequent to 26 January 1788.

In a 2004 speech, delivered in South Africa, Justice Robert French (now Chief Justice of the High Court) usefully identified the common law of native title as declared in the *Mabo* case[9]:

Common law rules underpinning the recognition of native title and the rules governing its recognition as set out in the Mabo decision can be summarised as follows:

1. *The colonisation of Australia by England did not extinguish rights and interests in land held by Aboriginal and Torres Strait Islander people according to their own law and custom.*[10]

2. *The native title of Aboriginal and Torres Strait Islander people under their law and custom will be recognised by the common law of Australia and can be protected under that law.*[11]

3. *When the Crown acquired each of the Australian colonies it acquired sovereignty over the land within them. In the exercise of that sovereignty native title could be extinguished by laws or executive grants which indicated a plain and clear intention to do so – e.g., grants of freehold title.*[12]

4. *To secure the recognition of native title today it is necessary to show that the Aboriginal or Torres Strait Islander group said to hold the native title:*

    a. *has a continuing connection with the land in question and has rights and interests in the land under Aboriginal or Torres Strait Islander traditional law and custom, as the case may be;*[13]

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[9] Justice RS French: *Mabo – Native Title In Australia* paper delivered to Landmark Cases Roundtable Conference, Constitutional Court Of South Africa 10-11 December 2004, Johannesburg

[10] *Mabo (No 2)* at 57 and 69 (Brennan J, Mason CJ and McHugh J agreeing); 81 (Deane and Gaudron JJ); 184 and 205 (Toohey J).

[11] *Mabo (No 2)* at 60 and 61 (Brennan J); 81, 82, 86-87 (Deane and Gaudron JJ); 187 (Toohey J).

[12] *Mabo (No 2)*at 64 (Brennan J); 111, 114 and 119 (Deane and Gaudron JJ); 195-196 and 205 (Toohey J).

[13] *Mabo (No 2)* at 60 and 70 (Brennan J); 86 and 110 (Deane and Gaudron JJ); 188 (Toohey J).

b. *the group continues to observe laws and customs which define its ownership of rights and interests in the land.*[14]

5. *Under common law, native title has the following characteristics:*

    a. *it is communal in character although it may give rise to individual rights;*[15]

    b. *it cannot be bought or sold but can be surrendered to the Crown;*[16]

6. *it may be transmitted from one group to another according to traditional law and custom;*[17]

7. *the traditional law and custom under which native title arises can change over time and in response to historical circumstances.*[18]

8. *Native title is subject to existing valid laws and rights created under such laws.*[19]

While the recognition of native title in the *Mabo* case displaced the discriminatory concept of *terra nullius*,[20] native title remains premised on a discriminatory concept of Indigenous society being a 'relic of prior sovereignty'[21] and therefore fails to recognise Indigenous society as a source of rights and interests at least equal to that of the colonising power.

Despite ultimately agreeing with the other judges, former High Court Justice Michael Kirby in a critical separate judgment[22], emphasised the inherent 'vulnerability' of native title.[23] Justice Kirby suggested that an 'inconsistency lies not in the facts or the way in which the land is actually used but that it lies in a comparison between the inherently fragile native title right, susceptible to extinguishment or defeasance and the legal rights which (a grant of) fee simple confers'.[24]

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[14] *Mabo (No 2*) at (Brennan J); 110 (Deane and Gaudron JJ).
[15] *Mabo (No 2)* at 52 and 62 (Brennan J); 85-86 and 88, 119-110 (Deane and Gaudron JJ).
[16] *Mabo (No 2)* at 60 and 70 (Brennan J); 88 and 110 (Deane and Gaudron JJ).
[17] *Mabo (No 2)* at 60 (Brennan J); 110 (Deane and Gaudron JJ).
[18] *Mabo (No 2)* at 61 (Brennan J); 110 (Deane and Gaudron JJ); 192 (Toohey J).
[19] *Mabo (No 2)*at 63, 69 and 73 (Brennan J); 111-112 (Deane and Gaudron JJ).
[20] *Mabo v Queensland* [No. 2] (1992) 175 CLR 1.
[21] Michael Dodson and Lisa Strelein, 'Australia's Nation Building: Renegotiating the Relationship between Indigenous People and the State' (2001) 24(3) *The University of New South Wales Law Journal* 826, 835
[22] *Fejo v Northern Territory* (1998) 195 CLR 96, 151 [105] (Kirby J).
[23] ibid.
[24] *Fejo v Northern Territory* (1998) 195 CLR 96, 151 [105] (Kirby J).

This characterisation of native title rights as 'fragile' and 'susceptible to extinguishment' acknowledges a hierarchy of rights where Indigenous interests are consistently placed beneath non-indigenous interests. The way non-indigenous interests are privileged through this characterisation has the effect of reinforcing colonial power and perpetuating the undermining of rights of Indigenous people.

Native title law does not privilege the fact that Indigenous people were the first owners of the land (as common law property traditions would), nor does it protect, as the common law would, Indigenous property from arbitrary deprivation by an act of the Crown. A hard reality is that the courts have used a derivative of the common law tradition; that the Crown cannot derogate from a grant once made, to underpin the privileging of non-native title interests over the interests of Traditional Owners.[25]

The High Court has confirmed[26] that a grant of freehold irredeemably extinguishes native title. Extinguishment on the basis of a previous grant of freehold is absolute and forever, regardless of whether rights and interests in land still exist under the Indigenous law from which native title derives its content.

The common law makes no attempt to redress the wrongs of the past.

The development of case law since Mabo, particularly in the way the courts assess and deals with continuity of connection, has significantly increased the difficulty in achieving litigated outcomes. The requirement that a successful native title outcome (successful that is for the traditional owners) is predicated by an ability to demonstrate that it is more probable than not that connection to country through the acknowledgement of traditional law and observance of traditional custom from sovereignty until the time of the determination is onerous.

The development of the law since the Mabo decision means that official and unofficial policies of the State from the time incursions commenced until at least the middle of the twentieth century are not an answer to an assertion by the State that continuity of connection has been lost.

There appears to be a new found determination on the part of the State to apply strict adherence to the jurisprudence even when it knows that will lead to an outcome that native title does not exist. While it is desirable that there be an end to litigation and some certainty about land tenure, I suggest that it is unconscionable to rely on past malfeasances to seek to

[25] see Kent McNeil, *Emerging Justice: Essays on Indigenous Rights in Canada and Australia*, Native Law Centre, Saskatchewan, 2001, pp. 357-408.
[26] *Fejo v Northern Territory* [1998] 195 CLR 96

achieve those ends at the expense of traditional owners who are acknowledged in the preamble to the Native Title Act as the most disadvantaged group in Australian society.

Legislative intervention is required to ameliorate the position the courts have developed at common law. The *Racial Discrimination Act 1975* (Cth) provides some protection for native title and the Act provides additional procedural protections but the fundamental truth remains that the Native Title Act does not achieve the lofty goals in the rhetoric in the preamble to the Act.

The Jinibara People's native title determination application and determination

Relevantly to the local area, there have been a number of native title determination applications that included land and waters within the boundaries of the Somerset Regional Council.

Those claims were lodged by the Jagera People, the Jinibara People and the Kabi Kabi People.

I am reliably told that there are no claims before the court at the present time within the boundaries of the Somerset Regional Council. The claim by the Jagera People was withdrawn at the request of the claim group in 2013.

The claims by the Kabi Kabi or Gubbi Gubbi People have either been withdrawn or dismissed. A new claim by the Kabi Kabi People (called the Kabi Kabi First Nation Tradtional Owners native title claim) was authorised and has been registered by the National Native Title Tribunal. It does not claim land and waters within the Somerset Council area.

On 20 November 2012 the Jinibara People gained a determination of native title recognising the Jinibara People's native title rights and interests over land and waters to the north-west of Brisbane and parts of the Sunshine Coast hinterland.

To achieve that outcome, the Jinibara People were obliged to meet all of the requirements I have discussed.

It is certainly worth noting that the Jinibara determination was a consent determination, that is, all of the parties involved agreed that the Jinibara had articulated their case with sufficient strength that a trial on the merits was not required.

The determination outcomes were achieved with the assistance of the National Native Title Tribunal and the Federal Court of Australia and were the result of negotiations between the Jinibara People and the various parties to the application including the principal respondent,

The State of Queensland, Somerset Regional Council, Sunshine Coast Regional Council, Moreton Bay Regional Council, Brisbane City Council and SEQ Water.

The Jinibara People are made up of 4 clans – the Dal:a, Nalbo, Garumngar and Dungidau clans – and the people in those clans are the biological descendants of:

- Wanambi James McKenzie, (the father of Wangirmau Johnny McKenzie and the paternal grandfather of Gaiarbau Willie McKenzie);
- Dil:l, (the father of Jowalmel Fanny Mason, wife of Wangirmau Johnny McKenzie);
- Edward Ross, (the father of Dick Dahtell Ross);
- Menvil Wanmuarn and his wife, Kitty, (the daughter of King Sambo and Queen Beauty),

who identify as and are accepted by the Jinibara People as Jinibara People according to Jinibara traditional law and custom.

The Jinibara determination recognises that the Jinibara People hold territorial and native title rights in high, low and wet country within the regions of, the Blackall, Conondale and Daguilar ranges and the headwaters of the Caboolture, Mooloolah, Maroochy, Mary, North and South Pine Rivers and Elimbah Creek, over substantial parts of the mid-course of the Brisbane River, and most of the catchment of the Stanley River. The determination area is about 70,325 hectares covering land and waters, including areas of national parks, state forests, forest reserves, reserves, unallocated State land and non-exclusive leases.

Importantly, the determination recognised the Jinibara People's exclusive native title rights equating to exclusive possession of land over about 138 hectares of land. Jinibara People have the rights to possess, occupy, use and enjoy that land to the exclusion of all others.

The Federal Court also recognised the Jinibara People's non-exclusive native title rights over about 70,187 hectares of land and waters. The group has non-exclusive rights to:

- access, move about on and travel over the area;
- camp, and live temporarily on the area as part of camping, and for that purpose build temporary shelters;
- light fires on the area for personal and domestic purposes including cooking, but not for the purpose of hunting or clearing of vegetation;
- fish, hunt, gather, take, keep, use, share and exchange Natural Resources from the area;
- conduct, and participate in, rituals and ceremonies on the area, including those relating to initiation, birth and death;
- be buried and bury native title holders within the area;
- maintain sites, objects, places and areas of significance to the native title holders under their traditional laws and customs and protect by lawful means those sites, objects, places and areas from physical harm or desecration;

- teach on the area the physical, cultural and spiritual attributes of the area;
- hold meetings on the area; and
- be accompanied on the area by certain non-native title holders, such as:
    - spouses of native title holders, pursuant to the exercise of traditional laws and customs;
    - people required or permitted under the traditional laws acknowledged and traditional customs observed by the native title holders for the performance of, assistance with or participation in, rituals, ceremonies or cultural activities; or
    - people who have rights in relation to the area according to the traditional laws and customs of the native title holders.

The group has non-exclusive rights in relation to on-shore water to:

- hunt, fish, gather, take, keep, use, share and exchange Natural Resources from the Water; and
- take, use, share and exchange the water;

for personal, domestic or non-commercial (including cultural or spiritual) communal purposes.

The achievement of native title outcomes remains a challenge for traditional owners, for representative bodies, for the State and for the Commonwealth. There is scope for some of those challenges to be removed through legislative intervention and by the activation of political goodwill. But, it seems to me that the notion of righting historical wrongs inflicted on traditional owners has insufficient traction amongst the greater part of the Australian electorate to enliven any real and significant political goodwill.