NATIONAL AFFAIRS

AUSTRALIA

Aboriginal Hunting Rights and Fauna Protection Legislation

– *Yanner v. Eaton* [1999] in its Political Context –

by Frank G. Nicholls *

Introduction

A decision of the High Court of Australia,[1] (referred to in this paper as "Yanner") bearing on the hunting rights of Aboriginal people in relation to fauna protection legislation, has aroused wide interest, not only in Australia but in many other areas where similar conflicts of interest can arise.

The appellant in this case was Murrandoo Yanner, an Aboriginal who is active in the "land rights" movement. He had been prominent in action against the Century Zinc Mine project in north Queensland. The High Court's decision must be considered in the broader context of the political struggle currently being pursued by Aboriginal Australians in establishing recognition of their traditional rights.

Five judges held that the Fauna Conservation Act (Qld)[2] (referred to in this paper as the Fauna Act), which established a regime forbidding the taking or keeping of fauna without a licence, gave "rights of control" but not full beneficial ownership to the Crown. The Court confirmed that regulation of rights does not extinguish "native title." Yanner was therefore entitled to hunt and fish because State fauna licensing requirements did not apply to native title holders exercising rights for personal, domestic or non-commercial needs. Two judges dissented, holding that the State law extinguished native title in this case.[3]

The Aboriginal Cause

Australia was settled by colonists from England, starting with the founding of the Colony of New South Wales in 1788, with other Colonies being established in subsequent years. The Commonwealth of Australia was formed in 1901 by the federation of the six existing States.

At settlement, the assumptions were implicit that Australia was *terra nullius*, in the sense of being unoccupied or uninhabited for legal purposes, and that the municipal laws of England, including the common law, became the laws applying to Australia. This assumption of *terra nullius* was not challenged until 1992 when the High Court brought down its decision on *Mabo and Others (2)*[4] (referred to in this paper as 'Mabo 2').

In 1788, little was known about Australia; a circumnavigation of the continent to define its boundaries did not take place until 1803. The first settlers were aware that Aboriginals existed but had no knowledge of their numbers or their organisation. Their contacts were at first peaceful but conflicts occurred as the settlers moved into more and more of the territory. Introduced diseases, as well as local warfare, reduced Aboriginal numbers markedly over the next century or so.[5]

The assumption of *terra nullius* should not have been sustained since the Australian continent was, in 1788, already occupied by Aboriginal people with a defined structure of customary law. Present estimates of population at that time vary from 300,000 to 1,000,000 or more. It is now known that "Under the laws or customs of the relevant locality, particular tribes or clans were, either on their own or with others, custodians of the areas of land from which they derived their sustenance and from which they often took their tribal names. Their laws or customs were elaborate and obligatory. The boundaries of their traditional lands were likely to be long-standing and defined."[6]

From the time of settlement, "the white expropriation of land continued spreading not only throughout the fertile regions of the continent but to parts of the desert interior."[7] The rights of Aboriginal people were disregarded and they were driven off their traditional territories. Under the 1901 Constitution, they were not counted as part of the Australian population. It was not until the passing of the 1967 Referendum that they were given full citizenship and included as Australians.

After the passing of the 1967 Referendum, there was increasing pressure from Aboriginal groups for recognition of their traditional rights, in particular, their rights to land.

The passing of the Racial Discrimination Act 1975 (Cth),[8] which brought into Australian law the International Convention Against all Forms of Racial Discrimination,[9] had an important bearing on later action although it does not specifically deal with Aboriginal people.

In particular, it enabled a ground-breaking case to be dealt with by the High Court (Mabo 2). The case was concerned with the right of inhabitants of Murray Island (a Torres Strait Island) to own their own island. In the course

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of the case, the Court concluded that a Queensland Act of 1985 purporting to extinguish retrospectively all rights of Torres Strait Islanders back to the original acquisition of sovereignty by the British Crown in 1879 was void.[10]

Although the case was concerned with the Torres Strait Islanders, who are recognised as being different from Aboriginal Australians, it dealt with matters of specific interest to all indigenous groups. In the course of the case the High Court explored the doctrine of *terra nullius* and the question of "native title" rights, and this resulted in changes to legislation affecting native title.

The Yanner Case

The High Court of Australia in its decision on Yanner allowed (5 to 2) an appeal by Murrandoo Yanner, a member of the Gunnamulla clan of the Gangalidda tribe of Aboriginal Australians. The appellant used a traditional form of harpoon to catch two juvenile estuarine crocodiles in the Gulf of Carpentaria area of Queensland. He and other members of his clan ate some of the crocodile meat; he froze the rest of the meat, and the skins of the crocodiles, and kept them in his home.

The appellant had been charged in the Magistrates Court of Queensland with one count of taking fauna contrary to the Fauna Act[3] (since replaced by the *Nature Conservation Act 1992* (Qld)).[11] The appellant contended, and the Magistrate accepted that section 211 of the Native Title Act 1993 (Cth)[12] (referred to in this paper as "the Native Title Act") applied, allowing him to exercise or enjoy native title rights and interests including hunting.

Courtesy: The Independent

The Magistrate found that the appellant's clan "have a connection with the area of land from which the crocodiles were taken" and that this connection had existed "before the common law came into being in the Colony of Queensland in 1893 and … thereafter continued." He further found that it was a traditional custom of the clan to hunt juvenile crocodiles for food and that the evidence suggested that the taking of juvenile rather than adult crocodiles had "tribal totemic significance and [was based on] spiritual belief." The Magistrate found the appellant not guilty and dismissed the charge.[13]

The informant (a police officer) applied for an order to review the Magistrate's decision. The Court of Appeal of Queensland set aside the Magistrate's decision dismissing the complaint and remitted the proceedings to the Magistrates Court for the matter to proceed according to law. The Court of Appeal decided (2 to 1) that the Fauna Act extinguished the relevant native title rights and vested ownership of fauna in the State. By special leave the appellant appealed to the High Court of Australia against this decision.[14]

The appellant contended that in taking the crocodiles he "was exercising or enjoying his native title rights and interests: these rights and interests were preserved by the Native Title Act." He further contended that the Fauna Act, to the extent to which it prohibited or restricted the taking of crocodiles in the exercise of those rights, was invalidated by section 109 of the Australian Constitution.[15]

The respondent contended that any native right to hunt crocodiles, which the appellant may have enjoyed, had been extinguished by the enactment of the Fauna Act and that these rights had been extinguished before the Native Title Act was enacted.[16]

The Fauna Act provided [section 7] that "All fauna, save fauna taken or kept otherwise than in contravention of this Act during an open season with respect to that fauna, is the property of the Crown and under the control of the Fauna Authority." It also provided [s 54(1)(a)] that: "A person shall not take, keep or attempt to take or keep fauna of any kind unless he is the holder of a licence, permit, certificate or other authority granted and issued under this Act."

Earlier forms of Queensland fauna legislation had provided expressly that those Acts did not apply to any "Aboriginal killing any native animal for his own food." Unlike these earlier Acts, however, the Fauna Act did not deal expressly with Aboriginals taking native animals or birds for food. That being so, much of the argument in the Court "concerned what effect the Fauna Act's vesting of 'property' in some fauna in the Crown had on the native title rights and interests asserted by the appellant."[17]

After much discussion of "property" in relation to fauna, the Court concluded: "the statutory vesting of 'property' in the Crown by the successive Queensland Fauna Acts can be seen to be nothing more than 'a fiction expressive in legal shorthand of the importance to its people that a State have power to preserve and regulate the exploitation of an important resource.'"[18] In other words, "the 'property' which the Fauna Act and its predecessors vested in the Crown was therefore no more than the aggregate of the various rights of control by the Executive that the legislation created."[19]

The Court was particularly concerned with what was meant by native title rights and interests in section 223 of the Native Title Act.[20] That Section provides in part:

"(1) The expression *native title* or *native title rights and interests* means the communal, group or individual rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to land or waters, where:

(a) the rights and interests are possessed under the traditional laws acknowledged, and the traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders; and

(b) the Aboriginal peoples or Torres Strait Islanders,

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by those laws and customs, have a connection with the land or waters; and

(c) the rights and interests are recognised by the common law of Australia.

(2) Without limiting subsection (1), *rights and interests* in that subsection includes hunting, gathering, or fishing, rights and interests."

"The hunting and fishing rights and interests upon which the appellant relied were rights and interests 'possessed under the traditional laws acknowledged, and the traditional customs observed', by the clan and tribe of which the appellant was a member. At least until the passing of the Fauna Act those rights and interests were recognised by the common law of Australia."[21]

The Court then turned to how such rights might be extinguished. Important extracts from the majority judgement follow:

"It is clear that native title in land is extinguished by a grant in fee simple of that land. As was said in the joint judgement in *Fejo v Northern Territory*[22] 'it is extinguished because the rights that are given by a grant in fee simple are rights that are inconsistent with the native title holders continuing to hold any of the rights or interests which together make up native title.' That is, native title is extinguished by the creation of rights that are inconsistent with the native title holders continuing to hold their rights and interests. The extinguishment of such rights must, by conventional theory, be clearly established."[23]

"Native title rights and interests must be understood as what has been called 'a perception of socially constituted fact' as well as 'comprising various assortments of artificially defined jural right'. And an important aspect of the socially constituted fact of native title rights and interests that is recognised by the common law is the spiritual, cultural and social connection with the land. Regulating particular aspects of the usufructuary relationship with traditional land does not sever the connection of the Aboriginal peoples concerned with the land (whether or not prohibiting the exercise of that relationship altogether might, or might to some extent). That is, saying to a group of Aboriginal peoples, 'You may not hunt or fish without a permit,' does not sever their connection with the land concerned and does not deny the continued exercise of the rights and interests that Aboriginal law and custom recognises them as possessing."[24]

The Court concluded that the Fauna Act did not extinguish the rights and interests upon which the appellant relied. Accordingly, by operation of s 211 (2) of the Native Title Act and section 109 of the Constitution, the Fauna Act did not prohibit or restrict the appellant, as a native title holder, from hunting or fishing for the crocodiles he took for satisfying personal, domestic or non-commercial needs.

Two of the Judges (McHugh J. and Callinan J.) dissented from this view, holding that the Fauna Act did in fact extinguish native title. Callinan J. states:

"The Native Title Act is not retrospective. It does not operate to create new rights or to revive native title rights that have been extinguished. In *Western Australia v The Commonwealth* (*Native Title Act Case*), Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ said:

"An act which was wholly valid when it was done and which was effective then to extinguish or impair native title is unaffected by the Native Title Act. Such an act neither needs nor is given force and effect by the Act. But, as acts purporting to extinguish or impair native title might be impugned as inconsistent with the Racial Discrimination Act if they were done after that Act came into operation, the Parliament has chosen to include certain legislative and executive acts of the Crown within the definition of 'past acts.'"

The Fauna Conservation Act (Q) relevantly answers the description of an Act which was wholly valid and effective when passed in relation to any native title right in respect of the taking of fauna."[25]

Comments

The Yanner case is one of the recent High Court and Federal Court cases that have an important bearing on native title.

In this case, the appellant maintained his right to traditional hunting in the ways of his ancestors. Evidence was presented to the Magistrate's Court that the Ganga–lidda people, of whom the appellant was a member, traditionally occupied the area where the alleged offence took place and that the appellant's genealogy could be traced back to 1870. The Magistrate said that although traditional hunting methods had changed over the years, the way in which the appellant hunted crocodiles was "pretty much the same" as the way his ancestors had.[26]

This was despite the fact that the appellant used a modern boat with an outboard motor and a steel tomahawk to administer the *coup de grâce* to the crocodile.[27] This widening of "traditional hunting" was not questioned in the High Court case. Yet, the extent to which the holders of native title may exercise the relevant rights in a "modern" fashion, and the connected issue of whether they might even commercially exploit those rights, remain to be examined. They are of considerable importance in the broader examination of Australian native title law.[28] In this connection, important developments in this area are taking place in Canada.[29]

It is important to note that the Native Title Act moderates but does not destroy the capacity of the States and Territories to regulate the exercise of native title rights along with other rights, as in fishing, conservation, and safety legislation which might apply equally to indigenous and non-indigenous people.[30] The High Court's comments on extinguishment of native title[31] will be critical in future test cases on native title determinations.

Already the full court of the Federal Court of Australia in *Commonwealth of Australia v Yarmirr*[32] has dismissed appeals against a determination of native title by Justice Olney of the Federal Court made in Alice Springs in 1998. Justice Olney decided that native title rights existed to fish, hunt and gather in coastal waters of the Northern Territory, stating that these rights were not exclusive. The judgement in Yarmirr includes an extensive examination of native rights. ➨

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The Yanner decision says little about the role of the Racial Discrimination Act, since the Fauna Act predated that Act. There are likely to be State and Territory Acts concerned with fauna protection and native title passed between 31 October 1975 (the commencement of the Racial Discrimination Act) and June 1992 (when native title was legally recognised for the first time)[33] that will require examination. There are also likely to be a range of regulatory regimes that will need reviewing especially those relating to flora and fauna.[34]

It seems clear that Australian governments will examine the extent to which their wildlife protection and conservation laws allow room for sustainable indigenous uses of wildlife, and the factors – conservation, commerce, respect for human rights, etc – which will affect the assessment of what is "sustainable".

Revision of existing laws in this area will require carefully planning – it will not be a matter of simply redrafting vesting and ownership provisions to ensure that native title is extinguished. Important policy decisions will have to be taken affecting the balance of rights and interests between all the stakeholders and, in addition, government legislative action will be limited by both the Native Title Act and the Racial Discrimination Act.[35]

Politics

Right and left in Australian politics are fairly evenly divided; the conservative side is represented by a semi-permanent coalition between the Liberal Party and the National Party (currently controlling the lower house of the Australian Parliament) and their opposition, the Labour Party. A centre party, the Australian Democrats, holds the balance of power in the upper house (the Senate). Green parties exist but they have attracted little electoral support. A right-wing group, One Nation, attracted considerable electoral support in Queensland several years ago on what was judged as a racist platform, but it has since fragmented and its support base has eroded.

The two major parties are confronted, on the one hand, by their desire to see social justice for Aboriginal Australians and, on the other hand, their concern about the effect that native title claims will have on the pastoral and mining industries which are of major importance to the Australian economy. Both parties have an ongoing interest in setting a firm regime specifying the limits of native title.

The Australian Democrats have already signalled that they consider that the Yanner case highlights the need for a review of wildlife protection laws. One of their members chaired the recent two-year Senate inquiry into commercial use of native wildlife; the report found that wildlife protection laws did not make allowance for sustainable indigenous use of native wildlife.[36]

One Nation saw the decision as "another blow for the environment and equality of treatment." Its press release speculated on native hunting using "rifles and telescopic sights instead of spears and woomeras."[37]

Conservation groups have in the past supported Aboriginal Australians in their struggle for land rights, seeing the movement as allies against mining and other exploitative land use. They have pointed to past Aboriginal land use as being environmentally friendly and sustainable. Thus, for example, the Friends of the Earth Indigenous Rights Conference held in Melbourne in November 1998 featured Mr Yanner as a keynote speaker for his opposition to the Century Zinc Mine project in north Queensland. As yet no co-ordinated position by these groups on the outcome of the Yanner case has emerged.

Acknowledgements

This paper draws heavily on the High Court decisions in the cases cited and has adapted material from the relevant judgements.

A valuable commentary on the Yanner case by Brian Horrigan and Simon Young of the Faculty of Law, Queensland University of Technology[26] has also been freely used.

Notes

1 High Court of Australia: *Yanner v Eaton* [1999] HCA 53 (7 Oct 1999) (referred to here as "Yanner").
2 Yanner, *ibid*.
3 Queensland, the *Fauna Conservation Act* 1952.
4 High Court of Australia: *Eddie Mabo and Others v the State of Queensland and the Commonwealth of Australia* S. 86/001 (27 Feb 1986); High Court of Australia: *Mabo and Others v Queensland (No. 2*) (1992) 175 CLR 1 F.C. 92/014 (28–31 May 1992) [referred to here as "Mabo 2"]
5 Aboriginal population numbers have been restored to 300,000 which is 1.6 per cent of the 1997 total Australian population of 18.5 million. Life expectancy of Aboriginal Australians is about 15–20 years less throughout all age groups than for non-indigenous Australians. Poor living conditions, high unemployment, alcohol abuse and smoking are significant contributing conditions to the shortened life spans. (Australian Bureau of Statistics: "Health and Welfare of Australia's Aboriginal and Torres Strait Islander Peoples", 1997.)
6 Mabo 2, 37.
7 Mabo 2, 51.
8 Commonwealth of Australia: the *Racial Discrimination Act No. 52,1975*.
9 The International Convention on All Forms of Racial Discrimination, 1965.
10 Castan, R. "Native Land Title in Australia: Reflections on Mabo", address to the 1993 annual dinner of the Jewish Democratic Society, Melbourne (http://www.vicnet.au/COUNTRY/jewish/mabo.htm).
11 Queensland: the *Nature Conservation Act 1992.*
12 Commonwealth of Australia: the *Native Title Act No. 110, 1993.*
13 Yanner, 4.
14 Yanner, 6.
15 Yanner, 7.
16 Yanner, 8.
17 Yanner, 9.
18 Yanner, 28.
19 Yanner, 30.
20 Yanner, 32.
21 Yanner, 33.
22 High Court of Australia: *Fejo v Northern Territory of Australia* (1998) HCA 58 (10 September 1998)
23 Yanner, 35.
24 Yanner, 38.
25 Yanner, 158.
26 Horrigan, B. and Young, S. "Murrandoo Yanner, His Crocodiles, and the Native Title Implications", On Line Opinion October/November Edition 1999 (http://www.onlineopinion.com.au/Oct99/Horrigan.htm).
27 Yanner, 133.
28 Horrigan, *ibid.*
29 Horrigan, *ibid.*
30 Horrigan, *ibid.*
31 Yanner, 106–117.
32 Federal Court of Australia: *Commonwealth of Australia v Yarmirr* (1999) FCA 1668 (3 December 1999)
33 Mabo 2.
34 Horrigan, *ibid.*
35 Horrigan, *ibid.*
36 Press release, Australian Democrats, 7 October 1999.
37 Press release, One Nation, 8 October 1999.

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