Native Title in Australia

3RD EDITION

Richard H Bartlett

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3rd edition

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To Maryrose and Jim

Preface

Up until the publication of the first edition of *Native Title in Australia* in 2000, there had been no attempt to provide a comprehensive treatment of the law of native title in Australia. Any such work needed to overcome the problems presented by:

- the relatively recent date of the recognition of native title in Australia;
- the need to recognise the influence of overseas jurisprudence, particularly that of the English Privy Council, and the supreme courts of Canada and the United States;
- the changing legislative approach to native title; and
- finally, and most significantly, the uncertain philosophical grounding and rationale of the concept in Australia.

Each edition of this book has attempted to meet the challenges and provide a starting point for consideration of the concept of native title in Australia.

The first edition was grounded in the principle of the recognition of native title tentatively declared by the six justices of the majority of the High Court of Australia in *Mabo v Queensland (No 2)* (1992) 175 CLR 1; 107 ALR 1, and applied in *Wik Peoples v Queensland* (1996) 187 CLR 1; 141 ALR 129, that being the principle of equality.

However, by the second edition of the book in 2004, the High Court (with a composition significantly different from those justices who reached the decision in *Wik*) in *Western Australia v Ward* (2002) 213 CLR 1; 191 ALR 1 and *Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422; 194 ALR 538 seemingly rejected the rationale of equality in favour of that of the uniqueness and subordinate status of native title grounded in traditional laws and customs. The unique rationale of native title was relied on to:

- impose unique and substantial barriers to proof of native title;
- narrow, if not, freeze the content of native title; and
- broaden and declare a wide scope for the operation of the extinguishment of native title.

Indeed, the *Ward* decision may properly be seen as the declaration by the High Court of the 'bucket-loads of extinguishment' advocated by the Commonwealth Government in 1998 on the enactment of the Native Title Amendment Act 1998 (Cth).[1] Lower courts, taking the lead from the High Court, went so far as to suggest that shopping in a supermarket might deny proof of native title,[2] and that native title might include the right to live in humpies but not houses.[3] The resultant common law jurisprudence in Australia was significantly at variance with principles of equality declared and applied to native title elsewhere in the world.

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1. See J Highfield, 'Interview by Tim Fischer with John Highfield on Native Title Act Amendments', ABC-TV *World At Noon*, transcript provided by the Office of the Deputy Prime Minister and Minister for Trade, 4 September 1997, p 1; referenced in Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report — July 1996 to June 1997*, Human Rights and Equal Opportunity Commission, p 37.
2. *De Rose v South Australia* [2002] FCA 1342 at [500].
3. *Daniel v Western Australia* [2003] FCA 666 at [260].

The rejection of the principles of equality by the High Court, its focus on the uniqueness of native title and its inclination to regard the Native Title Act 1993 (Cth) as amended in 1998 as the determinant of the character of native title,[4] required substantial change and rewriting of the first edition to provide the sound and comprehensive treatment of the law of native title that the book attempts.

Fortune favoured the timing of the writing and publication of the third edition. The first High Court decisions with respect to native title for over 10 years were handed down in 2013 and 2014. The decisions seem to suggest a return to a greater adherence to principles of equality in the development of the law relating to native title. The principles governing extinguishment may once more have more in accord with equality than pragmatism. Whether or not principles of equality will be applied with respect to proof and content of native title is much less clear. Australian law with respect to native title remains at a significant remove from that which equality would dictate, and that applies to native title elsewhere in the world, but there is some suggestion that it may be moved in that direction by the High Court. Any movement in that direction must, however, address the substantial jurisprudence of a contrary nature which has developed over the last 10 years, and which must also be incorporated into this book. The absence of a new edition for 10 years means that many new cases and amendments have needed to be considered and added to this third edition.

Native Title in Australia seeks, in nine parts and 36 chapters, to trace the historic, political and legal background to native title and its development through cases and legislation, to determine the nature of the concept of native title and its proof, content and extinguishment; explain its limited degree of protection in the context of future acts; and apply the principles to resource development and traditional pursuits. The final chapters address the institutions of native title, and some brief reflections on the development of native title in Australia. Three wholly new chapters, and another part, have been added in the third edition: Chapter 8 'Nigh Impossible to Prove Native Title in Urban Areas: *Bennell*', Chapter 9 'Returning to the First Principles of *Mabo* and *Wik* in *Akiba* and *Brown*' and Chapter 10 'Efficiency, Not Equality, the Focus of Legislative Change'. The new additional part is Part 5 'Right to Negotiate, Agreements and Settlements, and Compensation', which entails a reorganisation, particularly of the treatment of indigenous land use agreements and consent determinations, to reflect the increased significance of the settlement of native title disputes by agreement.

The law is stated as of 1 July 2014.

Thanks and my sincere gratitude must go to the wonderful editorial work and support of Nicola Tomlin.

Richard Bartlett
Perth, 2014

4. *Western Australia v Ward* (2002) 213 CLR 1; 191 ALR 1; *Wilson v Anderson* (2002) 213 CLR 401; 190 ALR 313.

About the Author

Richard Bartlett is Winthrop Professor of Law and Co-Director of the Centre for Mining, Energy and Natural Resources Law in the Faculty of Law at The University of Western Australia. He teaches mining law, energy law and native title at undergraduate, postgraduate and professional levels. He has practised, published and taught in the area of indigenous peoples and the law — and, in particular, native title — in Australia and Canada for almost all his working life. His research in recent years has encompassed native title and resource development, and water resources law. He appeared before the High Court of Australia in several of the leading native title cases in Australia. His writings have been cited by both the High Court of Australia and the Supreme Court of Canada.

About the Cover Art

Artist: Ande K Terare
Language group: Bundjalung
Tribe/clan: Minjungbal
Title: *Walking Tracks*

Ande K Terare was born in 1970 on the North Coast of New South Wales. He gained his knowledge of traditional culture from his older siblings and other relatives in his family. His paintings depict the traditional ways of life — the land, natural resources, ceremonies, stories and legends — and his contemporary works are largely influenced by his Aboriginal heritage. He currently shows his work at Art Yarramunua Gallery in Melbourne (<www.artyarramunua.com>).

Photo: Paul Williamson

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