JUSTICE FOR ALL?

Native Title in the Australian Legal System

Edited by

CHRISTOPHER J F BOGE
LLB, LLM (Hons)
Solicitor

Lawyers Books Publications Pty Ltd
2001

Published in Brisbane by –

Lawyers Books Publications Pty Ltd
A.C.N. 089 580 870, A.B.N. 69 089 580 870
PO Box 12139
George St Post Shop
Brisbane Qld 4003
Telephone: 0438926504
Facsimile: 07 32893454

National Library of Australia
Cataloguing-in-Publication entry –

Justice for all? : native title in the legal system.

Includes index.
ISBN 0 9587282 5 9.

1. Native title. 2. Aborigines, Australian - Land tenure.
I. Boge, Christopher J. F.

346.940432

Disclaimer

This publication is sold and/or distributed on the following basis –

1. The publisher is not engaged in giving legal, financial, accounting or other professional or technical advice;
2. The publisher, the editor and authors disclaim liability for the consequences of any action, lack of action or omissions taken or not taken or made by any persons on the basis of anything contained in this publication; any sucb persons are expressly cautioned that they sbould rely on the advice of their own professional advisers;
3. The publisher, editor and authors disclaim any responsihility for any errors and/or omissions in this publication.

CONTENTS

Introduction i

Contributors v

A Fatal Collision at the Intersection? The Australian Common Law and Traditional Aboriginal Land Rights 1
Christopher J F Boge

The common law of Australia is often praised as a body of laws that is inherently strong and rational. But, there exists in Australia another system of laws – one applying to its indigenous peoples – that to such peoples is also strong and rational. For indigenous Australians their laws and customs have their origins in their traditional lands – thus, their existence as peoples depends on their maintenance of a traditional connection with land. The belated recognition by the common law of Australia in 1992 of a right of indigenous peoples to their lands in the form of a "native title" in the decision of *Mabo v The State of Queensland [No 2]* (1992) 175 CLR 1 meant that for a limited purpose indigenous laws and customs were recognised. That recognition represented an intersection between those laws and customs and the Australian common law. However, the consequences of that intersection for land law, resource development and indigenous interests in Australia have not, despite statutory intervention in the form of the *Native Title Act 1993* (Cth) and complementary State and Territory legislation, heen finally settled to date. This paper explores the likely future development of common law native title in Australia and argues, in the context of discussions about the nature and extinguishment of native title, that any development will he heavily influenced by a common law law-making capacity that is qualified by significant historical, policy and practical considerations.

Balancing Native Title and Mining Interests: The Queensland Experience 65
Kathrine Morgan-Wicks

After much delay, the Queensland Government has finally delivered a State based regime to manage the relationship between native title rights and interests and new mining development in Queensland. This paper examines the difficult balancing act performed by the Queensland Government; the equality of the compromise reached between government, native title and mining groups and the steps now required to be followed by interested parties to comply with the new regime. Finally, the practicality of the indigenous land use agreement is evaluated in light of the new right to negotiate regime, as an alternative or complementary route to reaching agreement over mining on Queensland land subject to native title.

Invalidating Provisions of the Native Title Act 1993 (Cth) on Religious Grounds: Section 116 of the Constitution and the Freedom to Exercise Indigenous Spiritual Beliefs 85
Helen Grutzner

Potential constitutional challenges to the *Native Title Act 1993* (Cth) ("NTA") have almost exclusively focussed on whether that Act is supported by the "races power". This paper considers whether certain provisions of the NTA infringe s 116 of the Constitution (Cth) because they have the effect of precluding native title holders from freely exercising their religion.

The paper discusses the way in which indigenous laws and traditions that go to making up native title may be characterised as a religion within the meaning of s 116.

The observance of these laws and customs cannot be exercised in absentia from the land to which they relate. An exclusion from land resulting from provisions of the NTA which deem native title to he extinguished may effectively preclude native title holders from exercising their religion. The paper focuses on provisions of the NTA that deem native title to be extinguished in relation to interests granted under Commonwealth legislation. The paper briefly considers whether s 116 has any application to the NTA provisions governing the scheme of complementary State and Territory native title legislation under which control over native title has largely been transferred. The conclusion of the paper is that certain provisions of the NTA which deem native title to be extinguished in relation to interests granted under Commonwealth laws infringe the prohibition clause of s 116 and are invalid.

The Emerging Law of Native Title Practice: Select Issues and Observations 101

Mark Boge

The recognition by the common law of Australia of native title has inevitably led to a flood of claims by indigenous groups seeking determinations as to their rights over various parts of the Australian landscape. The process by which those determinations are made is, however, usually a long, sometimes complex and potentially costly one. This is partly due to the nature of the process – that is, one that seeks to solve the novel legal problems that arise when dealing with a property right found in systems of laws and customs unfamiliar to the general Australian legal system. This paper provides a native title practitioner's insights into the unique problems that arise in the area of native title litigation and suggests that, in light of those problems, all interested parties must adapt if there are to be just and proper determinations of native title rights and interests. Specifically, the discussion considers emerging practice issues including parties to a native title claim, pre-trial directions, evidence and costs as well as mediation and initiatives of the Federal Court in managing claims.

Index 121