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# Native title's days in the sun are over

By Noel Pearson
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This month's High Court decision relating to the Miriuwung-Gajerrong people has killed off any possibility that the common law of Australia would continue to provide the parameters for reconciliation between the sovereign claim of the Crown and the rights of indigenous peoples as the original occupants of their traditional homelands.

It is not the High Court's ruling that partial extinguishment of native title is possible in Australian law, nor that native-title holders do not own the petroleum or minerals on their traditional lands, that is so disappointing about this decision - it is their anthropological rather than common law conception of native title.

For Aboriginal people like myself, harbouring a great belief in the genius of the common law - we have been short-changed.

The High Court incorrectly, and with the consent of the Aboriginal parties appearing before it, treated native title as a creature of the Native Title Act rather than understanding that this legislation was never intended to change the concept of native title at common law.

I was present during the drafting of the 1993 bill and no one spoke of the act as in any way amending the common law definition of native title (it was, after all, a question of utmost concern to anyone interested in preserving common law rights). The act was merely intended to reflect the common law accurately, neither diminishing nor adding to its common law meaning.

As well as this fundamental error in interpreting the Native Title Act, the High Court has produced a deformed and problematic concept of native title.

The conceptual problem has its origins in a key phrase in Justice Brennan's judgment in Mabo, to the effect that "native has its origin in and is given its content by the traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants of a territory". This phrase is correct in describing the internal dimension of communal native title (the inter se rights of the members of the community), but misleading if it is taken as describing its external dimension (the rights held by the community as against the world).

Practitioners and judges have taken from this passage - strictly correct, but only half accurate - the concept that native title is constituted by traditional laws and customs. The communal title was conflated with pendant rights and interests, in a conceptual blancmange that the commentators and practitioners - and eventually the judges - did not have the gumption to sort out.

The correct concept was established when the first native title cases in the English common law tradition were decided in the United States in the 1820s. The Supreme Court accorded the "Indians" the right to possession, based upon their occupation of land - consistent with the common law. The only relevance that the traditional laws and customs of the "Indians" had was in governing the allocation of rights, interests and duties within their tribe.

Therefore, properly understood, the possession of the indigenous peoples of Australia at the time of sovereignty included ownership of the fullest beneficial title to the land, which included ownership of all of the subsurface petroleum and minerals (with the probable exception of those precious metals that remained in the prerogative of the Crown). This title was, after Mabo, susceptible to extinguishment by valid act of the legislature.

The proper task of the common law courts today, therefore, is to start from the position of their original, unimpaired possession at the time of sovereignty.

The question of whether the Miriuwung-Gajerrong people continue to own the minerals and petroleum is one of deciding whether any valid act of the legislature has derogated from that possession. This requires an examination of whether mining and petroleum legislation in the state of Western Australia evinced a "clear and plain intention" to extinguish native title in such resources.

Instead, the High Court first asked, incorrectly, whether ownership of these resources was established by proof of traditional law and custom.

Many centuries ago the possessions of Englishmen included ownership of minerals that were unknown to them and indeed, to contemporary science - and yet there has never been doubt that all of the subsurface was included in this right to possession, subject to the power of parliament to derogate from titles and reserve subsurface resources to the Crown.

This decision is a great travesty for Australia. The concept of native title that the High Court has adopted has not destroyed native title, but the doors have been slammed shut on its maturation as a legal institution.

This does not mean that governments and the mining industry can now forget native title. The procedural impediments to resource development remain. It was the question of procedure, more than ownership of minerals, that burdened development. The high transaction and opportunity costs of native title remain.

The anthropologists who hijacked the conceptualisation of native title, and the legal practitioners and commentators on the Aboriginal side who blindly followed them, are largely responsible for this road-train crash. If the Aboriginal leadership does not take control of its own opportunities, then this B-grade industry will continue to squander our gains.

The High Court has rendered a disservice to black Australians. Most egregious has been the baleful performance of Justice McHugh in recent years. Both his judgments and his extemporaneous statements were extraordinary - for example, he once stated

that he would not have supported Mabo had he known its consequences - and betrayed the policy anxieties of the court, rather than dedication to time-honoured methods and principles.

Ten years in the sunshine of the Rule of Law was all that black Australians were fated to enjoy. That this has happened at the hands of usually rigorous lawyers such as Chief Justice Gleeson and Justice Gummow adds acutely to the tragedy.

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