CHAPTER 30

Time for a New Doctrine: The Yawuru experience

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Introduction

The *Mabo*[1] decision presented Australia with an overwhelming moral and legal conundrum that lies at the heart of our nation-building quest. 'Terra nullius' was the legal fiction that provided a wrongful legal basis for the takeover of Indigenous people's lands and in many cases the expulsion of Indigenous people from their country. Mass extinguishment of traditional title occurred without consent of the traditional owners and without compensation. The High Court said that this history 'underwrote the development of the nation' and has left a 'national legacy of unutterable shame'.[2]

But the question remains, have we done all we can to displace the myth of 'terra nullius' and rid it from our national conscience, and if not why not? 'Terra nullius' — the notion that the land belonged to no one — has its roots in the Doctrine of Discovery and Western colonial expansion. Underlying the Doctrine was the belief that it was the right of a Christian monarch to lay claim to the newly discovered lands of non-Christian people. This view of Christian expansion evolved in international law in the United States, most notably in the property law case, *Johnson v M'Intosh*,[3] in which Chief Justice Marshall of the US Supreme Court opined that the British had also been operating under this Doctrine when they colonised North America. Applying this Doctrine, Marshall expounded the view that at the time of discovery the Native American tribes were no longer a completely sovereign people, and their property rights were diminished because the British had acquired radical title with the right to extinguish their

right to occupancy — a power which Marshall held was reserved only to the federal government. At the core of Marshall's endorsement of the Doctrine of Discovery was a justification of the dispossession of Native American people's lands and an affirmation of the primacy of Western Christian law over the laws, customs and property rights of non-Christian people. This Doctrine, according to Tonya Gonnella Frichner, Special Rapporteur to the United Nations Permanent Forum on Indigenous Issues, has rationalised the dehumanising and subordination of Indigenous peoples throughout the world, and evolved 'into an interpretative framework that had become institutionalised in law and policy, at national and international levels'.[4]

For Australia to fully embrace the spirit of the *Mabo* decision, the Doctrine of Discovery needs to be seriously questioned and rejected as an accepted philosophical underpinning of our sense of sovereignty. To do otherwise means that we continue to entrench native title in a legal landscape that cannot allow any development of native title beyond the concept of radical title, reinforcing the view explicit in the Doctrine of Discovery that all we are entitled to after our so-called 'discovery' are the remnants.

There is a need to develop an inclusive philosophical understanding about Indigenous people's native title rights and interests that moves beyond the confining nature of Australia's land tenure system, the legal precedence governing native title since its construction at common law and the legislative expressions designed to uphold the status quo. An inclusive and meaningful philosophical understanding of Australia will hopefully lead to the acceptance of an Indigenous Doctrine, a 'Doctrine I', which I suggest is needed to displace the legacy of the Doctrine of Discovery and reassert the value and integrity of Indigenous people and their cultures within the Australian nation state.

I believe the concept of Doctrine I is needed to promote a policy framework for agreement-making that allows for the practical implementation of Indigenous people's sovereign rights at the local and regional level. It is the necessary work of reconciling history and dealing with the realities of post native title determination and post-colonialism for the benefit of Indigenous peoples and the Australian nation state. If under the native title legislation we have to establish our prior occupation, existence and connection since colonisation in the various jurisdictions surely our free, prior and informed consent is now required as to how our rights are affected.

Much of the content to support the proposition for the need for a new Doctrine to override the Doctrine of Discovery is drawn extensively from the experience as a Yawuru native title holder in the Kimberley region involving many years of litigation, negotiation and current implementation of a complex native title agreement.

Yawuru *Liyan*

The Yawuru are the determined native title holders of lands in and around the Western Australian town of Broome. The determination area also includes exclusive native title to a pastoral lease property known as Roebuck Plains[5] which abuts the town to the east, and partial native title to another pastoral lease further south, known as Thangoo. Native title in the town of Broome was also found to exist, with partial native title in the intertidal zone running from Willie Creek in the north of the town to the southern boundary of the Thangoo pastoral lease. The existence of native title land in town was subject to negotiation and an agreement between the State of Western Australia and the Yawuru native title holders. This agreement was registered in two Indigenous land use agreements (ILUAs), the content of which is now the subject of implementation by parties to the agreement; the Yawuru, the State Government and the Shire of Broome.

Despite more than a century of brutal assault on Yawuru culture and society by pearlers, pastoralists, missionaries, native protectors and the press of modernity, we were able to prove that our cultural connection had remained intact and that we held native title in the town and surrounding areas. Much was extinguished, either completely or partially.

The essence of Yawuru native title is our belief in *Bugarrigarra*. *Bugarrigarra* is the force that gave shape, meaning and form to the landscape. In a romantic and general sense the wider community understand this to be the dreamtime. *Bugarrigarra* is associated with events that created our world deep at the beginning of time. It is not detached from contemporary life. It continues to exist and is the spiritual force that shapes our on-going cultural values and practice; our relationships with each other and the obligations and responsibilities we have to each other that forms our community. The Federal Court found Yawuru native title exists because of the contemporary belief of *Bugarrigarra* and the cultural and social practices that flow from it.

Within this broad framework defined by Yawuru belief in *Bugarrigarra* are four fundamental components of Yawuru existence that describe our native title. The first is customary law, which is the skeletal principle to the intelligibility of our ontological and existential reality. It makes sense of the uniqueness of who we are as Yawuru belonging to a particular geographic location and maintaining adherence to the principles that have come from the *Bugarrigarra*.

The second is community. There are between 1000 to 2000 Yawuru people who relate to each other through common belief systems, ceremony, language, history, and importantly, through culturally determined obligations. The modern economic model use of land and resources does not sit easily with the Indigenous sense of community. Yet our survival as a community is fundamental to a mix and match of our native title rights and challenges of the social, economic cultural factors impacting Broome now and into the future. A resilient community is our aim.

The third is country. Our connection to country — how we use and occupy the seas and lands on Yawuru country is fundamental to who we are as a people. The protection of our country is a primary imperative. This means we have to constantly deal with other peoples' interest in using our lands and waters. The constant challenge is how we balance development on our lands for economic purposes while protecting our country for the enjoyment and cultural sustenance for contemporary and future generations. A country capable of reliable prosperity is our aim for our people.

The fourth is *Liyan*, a concept that relates to Yawuru and other Aboriginal people's view of their well-being. The term *Liyan* is a Yawuru term used to describe the interconnectedness between a sense of personal self with the wider community and the natural landscape. Yawuru people's connection to country and joy of celebrating our culture and society is fundamental to having good *Liyan*.

This is our native title — the all encompassing power and richness of *Bugarrigarra* and the interdependent elements of our world that flows from that — customary law, community, country and *Liyan*.

Regardless of the overwhelming evidence of Yawuru cultural strength, we were given little encouragement that we would be able to prove native title when we first lodged our claim in 1994.[6] The Yawuru were eventually forced into litigation to prove we were capable of holding native title because the state government would not consider

recognising our common law rights, which doomed the mediation efforts of the National Native Title Tribunal.

The adversarial court process and the onus placed on us to show connection to our country has not been without consequence, leading to divisions within families in a community that was once considered close. Our experience as litigants to some extent reflected a text book colonial example on how to conquer natives within the modern day setting of the Federal Court of Australia, giving us first-hand experience of the divide and rule tactic so effectively deployed by the colonisers in their attempt to dispossess us of our lands and waters.

Years of bitter litigation against the State of Western Australia saw our people stand firm. Despite our lack of familiarity with adversarial litigation, we endured the constant questioning of our integrity and our fidelity to our traditions, customs and practices, as well as the assault upon people's characters and their lineage.

The experience of the Yawuru people illuminates the wider Australian Indigenous experience. In this adversarial process much was revealed about how the nation has dealt with Indigenous rights since *Mabo*. At the hub of it are extinguishment, discreditation and a begrudging acknowledgement compelled for legal reasons, not because of the value of the Yawuru people.

When the Federal Court determined Yawuru native title in 2006,[7] which it confirmed on appeal in 2008,[8] it was incumbent on Yawuru people, the State Government and the Shire of Broome to negotiate an agreement about how Yawuru people should be compensated for traditional title to lands that had been invalidly taken or impaired. It was also necessary to the form of tenure we might enjoy in reality. The essence of these negotiations was to work out how Yawuru native title can coexist within the use and planning system for land of the Broome region. In the negotiations Yawuru had to deal with their future land use aspirations of the town and that of the State of Western Australia. The State would not contemplate the non-extinguishment principle within the town and insisted upon freehold being the tenure, but when trying to value its equivalent, they had other ideas. In this way we had to negotiate a Global Agreement,[9] settling generic usages for land in accord with the Town Planning requirements and regulations. We also agreed to maintain many of the conservation zones that had already been proposed in Broome's town planning scheme.

You might think of the registration of two ILUAs as a consequence of the negotiation as a modern day treaty. However, in Australia this terminology is not used. It would perhaps be true if post fact the relationship had changed, and the agreement had not just been about compensation paid for extinguishment of our title and how to manage the recognition of our surviving native title rights.

Our native title agreement is a mixture of a financial settlement, land for cultural protection, and a jointly managed conservation estate with the state comprising terrestrial and marine dimensions of our country and significant parcels of freehold property for residential and commercial development. These are all subject to the land regulatory legislative frameworks of the state, local government planning and revenue systems. There are no concessions. They were sought but emphatically denied at the negotiating table.

Yawuru's objective in negotiating the agreement was to have a secure basis for income generation and to get government out of our lives. We are in the second year of the agreement and there are major challenges, much of which is within land development and tax imposts without a guaranteed income source. Selling land is not an income stream and developing it with concessions to native title holders is a benefit to them but does not necessarily guarantee future income to sustain the Yawuru.

Our traditional country is being affected by development plans for gas and oil development which is unprecedented for our region and the impact of which is difficult to imagine. These are developments beyond our control and we need strategies and agreements to mitigate these new impacts. Our participation is almost mandatory and the need for good mitigation policies and practices are paramount.

Yawuru's native title determination is the assertion of our sovereignty. But native title at common law is not recognition of our sovereignty. It does not offer anything to many Aboriginal people, and, to those who can establish its existence, it does not offer secure rights or economic security. It is a form of recognition within the legal framework imported from Britain back in 1788. It can be challenged in the future and extinguished if evidence to support its continued existence is not provided.

Time for a new Doctrine

The incorporation of Indigenous people's rights and interests within the modern Australian nation requires inclusive land tenure and planning regimes, equitable natural resource extraction practices and effective public funding and citizenship services that embraces Indigenous cultural imperatives. Reforms in these areas should not be marginalised as Indigenous benefits but rather as necessary changes to the paradigm of 'destructive modernity'. In this way we can navigate toward an accommodation that is respectful of our pre-occupation and connection to these lands. These changes are imperative to building a resilient nation confronting the legacy of overwhelming social and environmental challenges. When we feel disrespected or abused our Liyan represents life which can be disjointed, unintelligible and unattractive. This can be corrosive for both the individual and the community, indeed the nation, if not reconciled.

The stark reality, however, is that Yawuru and many other Aboriginal nations throughout Australia are using native title determinations and agreements as leverage in a continuing struggle to assert their sovereignty. In the absence of a political framework to negotiate an enduring political settlement, Indigenous people and their corporations are ensnared in seemingly endless incrementalism and run the risk of extinguishing their native title interests to progress such marginal gains.

I believe it is crucial for us, as a people, to contemplate how we can re-imagine our sovereignty as communities of peoples so that we can begin to encourage our people to regain our resilience and reassert control over our destinies in the modern world we inhabit. This will not be achieved by remaining in the paradigm we find ourselves in today, but by us developing a new framework around our own values and foundational principles.

Self-determination, governance and economic development are essential building blocks for this. To establish these building blocks as foundations for a resilient pluralist society we need a new philosophical narrative; a new paradigm of thought to replace the Doctrine of Discovery that gave rise to the legal myth and insidious real practice of 'terra nullius'. There needs to be global Indigenous discussion about developing a new philosophical doctrine that helps humanity transcend the destruction of post–Columbus modernity. From this new philosophical doctrine a new praxis could emerge.

Indigenous people, the greatest victims of modernity, have a special status to lead a global discourse about such a doctrine. It should be a way of thinking that embraces the interconnected Indigenous worldview of sustainability and reliable prosperity. At the heart of such thinking should be people's well-being or what makes our *Liyan* feel good.

The concept of *Liyan* has many names and is universal to the world's Indigenous people. This is one of many values we share, as is our struggle to nurture and assert them within a world where Western philosophic thought which underpins modernity, dominates us. When that is out of kilter our well-being and *Liyan* suffers. This disposition arises partly because settler state values tend to dominate our desire for solutions and so we do not ground our approaches in our own foundational values but someone else's. Our challenge is to extricate ourselves from this framework and into one of our own making, based upon our wisdom, values and practices. This is why, as Indigenous peoples, we need a new doctrine to repudiate the legacy of the Doctrine of Discovery and reassert are own well-being and sense of worth.

Conclusion

In this chapter I explored in general terms the idea of Doctrine I as a fundamental philosophical basis for including Indigenous sovereign peoples within the Australian sovereign state. Whilst the Doctrine of Discovery and consequential demands for extinguishing Indigenous title remain at the centre of Australian nation building, the recognition of a sovereign Indigenous position has no political or philosophical resonance. Without a clear national commitment to understand and recognise a sovereign Indigenous position this nation remains trapped in the paradigm of denial, exclusion and assimilation — ultimately failing to recognise Aboriginal people's presence and position prior to British settlement and certainly non-respectful of their continuing rights and interests within the nation.

To reconcile this history the nation must rid itself of the insidious scourge of extinguishment that pervades contemporary public policy and which remains a legal weapon in the continuing native title litigation battlefield. To expunge extinguishment from Australian nation building we have to override the Doctrine of Discovery that

legitimised western powers' takeover of Aboriginal lands throughout the globe.

The emergence of Doctrine I is evident wherever Indigenous peoples are asserting their sovereignty in locations where historical forces have shaped unique circumstances and challenges for countless Indigenous nations. Asserting Indigenous sovereignty is largely dictated by the political forces within nation states created by the historical colonial spread of Western power. In Australia the recognition of Indigenous rights at common law provides a strategic leverage for Indigenous people to renegotiate their relationship with the settler state. In the case of Yawuru we are revitalising traditional language, preparing to manage land and seas jointly with the State and local government based on Yawuru cultural and environmental imperatives and negotiating the re-design of urban development that enmeshes Yawuru values within the state regulatory regime. We believe that the settler state's system of land management and governance is capable of including the Yawuru cosmology of the *Bugarrigarra* and our existential reality that flows from it — our customary law, our connection to country, our community and our *Liyan*.

Yet these potentially local transformative efforts will only be sustained into a generational future by a national policy commitment that is underwritten by the recognition of Indigenous people's position in the nation's Constitution. The recommendation to the Australian Government by the Expert Panel on Constitutional Recognition of Indigenous Australians that there be a new head of power that would incorporate a statement of recognition similar to a preamble, and also give the Commonwealth Parliament the power to pass laws for Aboriginal and Torres Islander peoples is fundamental for the inclusion of Indigenous people in Australian nation building. The Expert Panel recommended that the 'Race Power' contained in Section 51, Subsection 26 and the explicitly racial discriminatory provisions contained in Section 25 be struck from our nation's Constitution. The language of race that is currently contained in the Constitution belongs to the colonial era that was shaped by the Doctrine of Discovery. It should not have a place in our nation's future. Indigenous people's recognition in the nation's Constitution is a logical evolution in Australian nation building post–*Mabo*. The 20 years of litigation and confused public policy speaks volumes for why constitutional change is required.

Notes

1. *Mabo v Queensland [No 2]* (1992) 175 CLR 1 *(Mabo)*.
2. Ibid.
3. 21 US 8 (Wheat.) 543 (1823).
4. TG Frichner, 'Impact on Indigenous peoples of the international legal construct known as the Doctrine of Discovery, which has served as the foundation of the violation of their human rights', Preliminary Study presented at the Permanent Forum on Indigenous Issues Ninth Session, New York, 19–30 April 2010, p. 1.
5. At the time of writing, this lease is still in the hands of the Indigenous Land Corporation (ILC).
6. Rubibi 1 Application.
7. *Rubibi Community v Western Australia (No 6)* [2006] FCA 459 (28 April 2006).
8. *Western Australia v Sebastian* [2008] FCAFC 65 (2 May 2008).
9. Yawuru use the term 'Global Agreement' to describe the Yawuru native title agreement, rather than a settlement which it clearly is not. Yawuru also avoid using the term 'comprehensive agreement' so as not to compare the Yawuru agreement with Canadian comprehensive agreements that have been negotiated between the Canadian nation state and First Nations and Inuit peoples which have the support of constitutional recognition, legislation and established public policy in Canada. Yawuru consider that the 'Global Agreement' concept is an accurate way to describe the Yawuru agreement as a strategic leverage to protect Yawuru rights and interests and a basis for social and economic development. The word 'global' is intended to describe the wide reach of matters contained in the Yawuru agreement that responded to some Yawuru priorities and also the priorities of the state, although far short of a comprehensive set of matters which Yawuru would have asked to negotiate had there been a formal policy of agreement-making between governments and native title holders in Australia.