

## Chapter 12

# The Federal Court and Native Title Law

*Mick Dodson\**

Naaji Gurrijin, hello everyone.

I would like to acknowledge the Gadigal people of the Eora Nation the traditional owners on whose ancestral lands the Federal Court in Sydney is located. I pay my respects to your elders past and present.

The Federal Court has been in existence 40 years; and has had the native title jurisdiction from 1994. In that 24-year period, the jurisdiction and powers of the Court have evolved and been supplemented in 1998, 2009 and again in 2012.

This year, is the 25th anniversary of the High Court's *Mabo* decision in which the legal fiction of 'terra nullius' was finally debunked.<sup>1</sup> It held that where not extinguished, native title continues to exist and is capable of recognition by the common law.

As Social Justice Commissioner between 1993 and 1997, I also had a statutory<sup>2</sup> function to prepare an annual Native Title Report to the Attorney General regarding the operation of the Act and its effect on the human rights of Aboriginal and Torres Strait Islander Peoples.

By the time of the tabling of my first report in April 1995, validating legislation had been enacted in each State and Territory (except WA), the National Native Title Tribunal (NNTT) had been established, and Western Australia had failed in an attempt to extinguish native title and replace it with a statutory rights scheme.<sup>3</sup>

There were no other determinations yet, except for over Mer Island arising from the *Mabo* decision. My introduction to that report reflects the hopes and fears of what the future could hold following the *Mabo* decision and the introduction of the *Native Title Act* as a 'special measure' under the *Racial Discrimination Act 1975* (Cth). I said:

Native title has spurred governments, industry and others into action so as to cope with the legacy of over 200 years of denial and so as to maintain their claimed dominium over titles.<sup>4</sup>

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\* I am deeply indebted to Katie Stride for her excellent research assistance and writing suggestions in preparing this presentation. I would also like to thank Dr Asmi Wood and Dr Siobhan McDonnell for their very helpful tips.

1 *Mabo v Queensland (No 2)* (1992) 175 CLR 1 ('*Mabo*').

2 Under *Native Title Act 1993* (Cth) s 209.

3 The *Land (Titles and Traditional Usage) Act 1993* (WA) (the 'WA Act') came into operation on 2 December 1993 and was challenged immediately by two Aboriginal communities in the original jurisdiction of the High Court: see *Western Australia v Commonwealth* (1995) 183 CLR 373.

4 Michael Dodson, *Native Title Report January – June 1994* (Human Rights and Equal Opportunity Commission, 1995) 4.

This is a preview. Not all pages are shown.