COMMENTS ON THE MABO ORATION 2009

Murray Wilcox QC, former Federal Court judge

The Mabo Oration has become an important event in our national life. It gives us an opportunity, each second year, to reflect on issues concerning the relationship between Indigenous and non-Indigenous Australians. It is an honour for me to be invited to comment on the 2009 Oration, delivered by Mr Tom Calma. In doing so, I join him in acknowledging the traditional owners of the land on which we meet, the Turrbal and Jagera people.

In his thought-provoking address, Mr Calma covered many topics. He calls them "self-evident" truths. But something is self-evident only to those prepared to look. Unhappily, over a very long time, too few of us have been willing to look. Perhaps that is because, to use Al Gore's term, each truth is also an inconvenient truth. It is a sad reflection on the non-Indigenous community, past and present, that these truths exist, 221 years after the first European settlement on this continent.

Time does not permit me to comment on all the issues raised by Mr Calma. I will limit myself to quick comments about two matters, education and "justice reinvestment", and say a little more about native title.

Education

I am astonished to hear, from a source as authoritative as the Aboriginal and Torres Strait Islander Social Justice Commissioner, that governments in Australia still "have no idea of the number of Aboriginal and Torres Strait Islander students with limited or no access to schools within their region." This in the context of public education systems, in all States and Territories, dating back to the 19th century. To ensure that all children *could* attend school, there evolved a proud Australian tradition of providing a local school--perhaps only a single room, one-teacher school-- even in the most remote areas. To ensure that all children *would* attend school, attendance, up to a prescribed age, was made compulsory.

Today, we realise, in horror, that this was only ever intended to apply to white kids. We ask ourselves how our forebears could have been so racist. But it seems our horror has yet to morph into a determination to ensure that 21st century black kids are provided for at least as well as 19th century white kids. Surely it is not too much for us to expect—indeed demand—that, say by the end of this year, our governments will conduct a thorough investigation to identify all the black kids who are outside the schooling system and make a plan for each child's inclusion.

Justice reinvestment

Second, I am excited about Mr Calma's suggestion of a fund for "justice reinvestment." In most, if not all, States and Territories, elections usually feature a "law and order" auction during which the major parties seek to persuade the electorate they are more "tough on crime" than their opponents. They promise longer gaol sentences and greater limitations on the discretion of judges to let the punishment fit the crime. The result has

been a boom in the Australian convict population, the number of gaols required to accommodate them and the cost of doing so.

The fallacy, of course, is that all prisoners, except those convicted of the most horrific crimes, must one day be released back into society. For some people, prison is a redemptive experience. Many others emerge hardened in their anti-social ways; their imprisonment has been counter-productive. We need to put much greater resources into improving the redemption rate.

I accept that we must have gaols, but it makes sense, both from a financial and humanitarian point of view, to make a much greater effort to keep people out of gaol in the first place. This means having skilled people work with dysfunctional families and "at risk" children and teenagers.

What I have just said applies generally. However, as Mr Calma's statistics demonstrate, it applies particularly in the Indigenous community. It ought not surprise us that Indigenous crime and imprisonment rates are higher than for the community at large. The effect of European settlement on Indigenous communities has been shattering. In most parts of Australia, Indigenous people were hunted off their land. Communities were broken up, often with individuals' loss of their language and culture. Generations of children were taken from their parents. The healing process will take a long time. It makes sense to assist that process in the manner Mr Calma suggests.

Native title: the problem of proving connection

I turn to native title. Sadly, I have to agree with Mr Calma that the "promise of the Mabo case has not been met". Indeed, I would put the matter higher. I believe that, except for those relatively few communities that remained substantially unaffected by European settlement until the early years of the 20th century, native title has become a mirage. It promises so much, but delivers so little. I say nothing about Torres Strait Islanders—the conditions there are different—but most mainland Aborigines could be forgiven for regarding native title as the whitefellas' latest confidence trick.

I do not suggest those who designed the *Native Title Act* set out to deceive. On the contrary, I believe Prime Minister Keating, and the members of Parliament who voted for the legislation, sincerely thought they were faithfully applying the principles underlying the *Mabo* decision and doing a good thing by facilitating the speedy recognition of claims that fell within those principles. Unfortunately, it has not worked out that way.

The problem arises out of the requirement for a claimant group to show a connection with the claimed land and waters, continuing to the present time from the relevant proclamation of sovereignty: 1788 in eastern and central Australia and 1829 in Western Australia.

Connection was not an issue in *Mabo*. The Meriam people had lived on Murray Island from time immemorial. Neither the 19th century annexation of the island by Queensland, or the subsequent construction of a sealing factory, had disturbed the Islanders' traditional way of life. It is understandable, therefore, that, without finding it necessary to analyse the concept, the members of the High Court who decided *Mabo* referred to connection as a justification for rejecting *terra nullius*, and in crafting the necessary elements of native title.

True to that script, the *Native Title Act* required a claimant group to show a connection between its members and the group of people whose laws and customs governed the

claimed land at the date of sovereignty. However, and this was the problem, it was not allowed to be enough that the members of the claimant group could show descent from the sovereignty group; they had to establish continuous recognition of the sovereignty date laws and customs down to the present time.

In the Noongar case, I held the claimants had made good their claim for recognition of native title. I made three critical findings:

(i) in 1829, the south-west of Western Australia was occupied by a group of people, the Noongars, who shared a common language, although with dialectical differences, and were governed by laws and customs that were substantially the same throughout;

(ii) in 2005, when the case was heard, there remained a body of people who identified themselves as Noongars and who continued to observe many, but not all, of the 1829 laws and customs, although with some changes consistent with their need to adapt to the consequences of European settlement;

(iii) especially having regard to evidence from the older Aboriginal witnesses about the teaching given to them as children by their old people, it ought to be inferred that the Noongar society had existed continuously between 1829 and 2005, with continuous observance of the traditional laws and customs.

On appeal. a Full Court of the Federal Court held (iii) was not correct. The Commonwealth government had submitted to the Full Court that it was necessary for a claimant group to demonstrate that *each generation* of the society had adhered to the traditional laws and customs. The Full Court apparently agreed. The judges said (at para. 179) that it was necessary for claimants "to demonstrate that connection (to the relevant area) has, in reality, been substantially maintained since the time of sovereignty." Apparently, inference from recent and present conduct is not enough; there needs to be direct evidence covering the whole period.

If this is the law, the only successful claims will be those concerning remote areas. The Noongar Full Court decision probably does not exclude the inference that communities followed their traditional laws and customs until they were substantially disturbed by Europeans. However, according to that decision, for the time thereafter there needs to be direct evidence. As Aborigines have no tradition of written records, this burden can only be sustained by calling oral evidence to cover all that time. Sometimes a witness can give reliable hearsay evidence going back to his or her grandparents' day, but not more. That is why I say the only claims likely to succeed are those in which substantial European disturbance was no earlier than the beginning of the 20th century. That writes off most of the Australian mainland.

For opponents of native title claims, it is tactically wise to argue that the relevant group, at date of sovereignty, was a small clan group, rather than a substantial society like the Noongar People. In the absence of a birth recording system, it is virtually impossible for anybody to establish descent from a particular clan group, so the claim will then necessarily fail. As Aborigines had no written legal materials, and few early European settlers took much interest in Aboriginal law and custom, it is often extremely difficult to identify the relevant group.

Mr Calma referred to the backlog of native title cases. I can assure you this does not arise out of reluctance by Federal Court judges to hear the cases. On the contrary, the judges have become frustrated about getting native title cases into court. To a small extent, the backlog arises out of claimants' lack of the funds necessary to run a case. However, to a much greater extent, the reason is the now widespread realisation by claimants' advisers that their case will not meet the stringent connection requirements

that have been developed by the courts. No doubt the advisers try to explain the problem to their clients; but I can well understand that, knowing their own family tradition, the clients find it impossible to comprehend that a court could fail to find the land was theirs. So the claim is not abandoned. But neither is it progressed. It stagnates in the court's list.

As Mr Calma has noted, the present Commonwealth Attorney-General is looking to improve the situation. Chief Justice French has suggested reversal of the onus of proof of connection; connection would be presumed until disproved. In many cases, this would resolve the problem. But it would not help those cases, like *Yorta Yorta*, in which a defendant could prove a break in the observance of the traditional laws and customs.

A court decision to recognise native title always unleashes a tide of joy. I believe this has nothing to do with any additional uses of the land—generally very marginal—that the determination makes available; rather, the fact that a government institution has formally recognised the claimant group's prior ownership of the subject land and the fact of its dispossession. That recognition is what Aboriginal people are seeking. It is a step towards reconciliation. It costs non-Indigenous people nothing. So why do we need to maintain such a high bar to recognition? Why could we not empower the Federal Court to make a declaration about traditional ownership, based on descent and without needing to find continuous observance of laws and customs or to make orders about particular uses of the land? I believe such a power would enable the court to satisfy the need that underlies most native title claims, without any reduction in the ability of governments to control the use of that land.

Compulsory acquisition of native title

In his 2008 Native Title Report, Mr Calma expressed concern about the effect of the decision of the High Court of Australia in *Griffiths v Minister for Lands, Planning and Environment (NT).* I share that concern.

The Northern Territory *Lands Acquisition Act* empowered the Minister to acquire land compulsorily "for any purpose whatsoever". The High Court held this power enabled the Minister to compulsorily acquire native title interests, even for the purpose of facilitating private development of the land.

Given the terms of the Northern Territory legislation, the result is not surprising. But it is very worrying. Obtaining recognition of native title is usually a laborious process involving prolonged deep commitment by many people. Recognition is often obtained in the teeth of opposition by the relevant State or Territory government. *Griffiths* opens the way for this success to be swept away by the stroke of a pen, not necessarily because the land is required for a public purpose. It is enough that the government wishes to assist a private developer.

It is true that compensation would be payable, but how would a native title right be valued? And would any amount of money recompense those who had suffered the trauma of being deprived of the right to their country they had so painstakingly established?

The content of their compulsory acquisition legislation is a matter for the States and Territories. But native title is a matter for the Commonwealth. The Commonwealth Parliament could make rules about the compulsory acquisition of interests recognised under the *Native Title Act.*

The Commonwealth *Lands Acquisition Act* contains requirements and limitations in relation to compulsory acquisition for Commonwealth purposes. Notice must be given,

specifying the purpose. The landowner is entitled to ask the Administrative Appeals Tribunal to review the reasonableness of the decision to acquire. The Tribunal may set aside the decision. If these protections are necessary in the case of Commonwealth acquisitions for public purposes, surely they are appropriate in the case of compulsory acquisition of native title interests.

Conclusion

I congratulate Mr Calma on his stimulating Oration. I am sure I speak for you all in acknowledging the quality of his service as Social Justice Commissioner and in wishing him well in whatever is to follow.