Book Reviews

The Trouble with Tradition: Native title and cultural change

Simon Young

Sydney: The Federation Press, 2008, pp 483, $125.00 (hardcover)

The land rights of indigenous people were a major legal issue of the last half of the 20th century. International treaties recognised the right of self-determination and the importance of land rights; on a domestic level, Canadian, American, New Zealand and Australian courts began to acknowledge the importance of facilitating a dialogue between dominant legal thought and the laws, customs and traditions of Indigenous cultures. In Australia, the landmark High Court decision of *Mabo (No 2)* was handed down in 1992. Since then, native title has continued to be a source of tension and controversy within Australia. *The Trouble with Tradition* is an overview of 180 years of land rights law in Australia, Canada, New Zealand and America. The author, Dr Young, offers critical, comparative analysis of the approach in each jurisdiction, and Australia-specific analysis of the *Mabo (No 2)* decision, the law flowing from *Mabo*, and suggested new directions in native title law.

The central thesis of the book is that the Australian native title doctrine, following *Mabo*, requires over-specific detail in inquiries into the constancy and continuity of traditions and customs in native title claims. This has lead to an overemphasis on Western notions of 'tradition' and 'custom' in Indigenous assertions of land rights and onerous applications of the 'tradition' test. In order to facilitate discussion of comparative jurisprudence and to support new directions in Australian native title law, *The Trouble with Tradition* offers a purview of land rights case law in Canada, America, New Zealand and Australia. It specifically grapples with the sterilising effect of a Westernised view of Indigenous cultural tradition in the Australian approach to native title, which, Young argues, does not reflect the realities of European colonisation or the way in which Indigenous culture has adapted to colonisation.

The first half of the book is concerned with establishing a comparative context. Part I offers an overview of each jurisdiction, including Australia, and a 'defence' of Young's comparative approach. He explains that each jurisdiction aims toward the same goals of 'legal equality, the reconciliation of histories and interests, the preservation of respective cultural identities and the equal advancement of all peoples'.[1] This is the

[1] Simon Young, *The Trouble with Tradition: Native title and cultural change* (2008) 35.

basis for the comparative approach. Part II offers an historical and contemporary overview of Canadian, American and New Zealand approaches to Indigenous land rights. Young has marked three central concepts in the approaches of the comparative jurisdictions: a broad conceptualisation of the 'title' interest, which allows for change in culture and use of the land; a focus on the survival of the interest itself, rather than, as in Australia, the survival of unchanged 'tradition'; and pre-existing societies in occupation of lands, acknowledging the legitimacy of pre-existing claims.

Parts III and IV critique the legal precedents existing before *Mabo,* the idea of laws, customs and tradition in *Mabo*, and the post-*Mabo* legal developments; both in statute and case law. In the comparative context, it is important to note that the Australian approach to land rights is far stricter than the approaches of comparable jurisdictions. Where other jurisdictions have countenanced cultural change in land rights claims, Australian doctrine has adhered to over-specificity in its definitions of tradition and custom.. Young argues that *Mabo* provided equivocal principles on the inquiry into continuity in tradition, failing to distinguish between the type of rights sought or argued. This has led to conservative interpretations in later cases such as *Ward*[2] and *Yorta Yorta*[3], adversely impacting on native title claims. This is intimately tied to the failure of the Australian approach to credit cultural change as valid in native title claims. This approach is a symptom of the Western discourse on 'tradition' which reinforces dispossession through artificial views of Indigenous culture and change.

Part V concludes Dr Young's detailed comparative analysis with suggestions for a reworking of Australian native title doctrine. His argument is that the Australian native title doctrine needs to fall into line with the approach of comparative jurisdictions, looking to the survival of the interest in land, the changeability of culture over time and the legitimation of pre-existing culture. This ties in with the argument that all land rights law seeks to preserve cultural identities, reconcile histories and interests and create legal equality. Young offers a three point plan for developing native title law in Australia. Underpinning his argument are distinctions between title and rights, and between communal rights and *inter se* rights. Firstly, exclusive title claims should require substantial continuity in tradition, supporting contemporary use and occupation. Secondly, where specific rights are sought to be exercised the inquiry into custom and tradition should be directed only at the continuity and history of the practices that underlie the right of use sought. Finally, where *inter se* rights are argued, the inquiry into traditions, laws and customs should

---

2 *Ward v Western Australia* (1998) 159 ALR 483.

3 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422.

not follow the conservative approach stemming from *Mabo* but should look to contemporary practices. This, Young argues, is a more reasoned approach to tradition in native title, taking into account the nature of the rights sought, and following the more liberal position of comparative jurisdictions.

Dr Yong has offered an in-depth discussion and sharp critique of Australian native title doctrine. The use of the comparative approach highlights the conservativeness of the Australian courts, and provides excellent background of the law in Canada, New Zealand and America as well as Australian case law. *The Trouble with Tradition* is strongly argued, and logically structured; the analysis and discussion is brought together in Part V, to a synthesising of the comparative approach in offering new directions in the Australian native title doctrine. This book is not for the faint-hearted. It is both comprehensive and technical. However, the clarity of writing, and direct style, makes it accessible. Dr Young has written a book that offers a comprehensive overview of Australian case law, dealing with native title, from major cases, such as *Mabo* and *Yorta Yorta* to cases such as *Yanner*,[4] which concerned native title as a defence. Academics and students alike will find this book useful, both for its original thesis, and as an introduction to the current position of land rights law in all major jurisdictions, and native title in Australia.

*Lucy de Vreeze**

The Mason Papers: Selected articles and speeches by Sir Anthony Mason, AC KBE

Geoffrey Lindell (ed)

The Federation Press, Sydney, 2007, p 442, A$85.00 (hardcover)

The Mason Papers: Selected articles and speeches by Sir Anthony Mason, AC KBE is a selection of the legal writings of one of Australia's eminent judicial minds. The judicial career of The Honourable Sir Anthony Mason, AC KBE, spans five decades. He was admitted to the New South Wales Bar in 1951 and was appointed as a QC and Commonwealth Solicitor-General in 1964. Sir Anthony became a Justice of the New South Wales Court of Appeal in 1969, a Justice of the High Court of Australia in 1972 and its Chief Justice in 1987, retiring in 1995. He has several honorary doctorates, has held a professorship at Oxford

4 *Yanner v Eaton* (1999) 201 CLR 351.

* University of Tasmania law school graduate, BA/LLB (Hons) and a co-editor of the University of Tasmania Law Review for 2008.