

# University of Melbourne Law School

## JD Lecture Series

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### Native Title – A Constitutional Shift?\*

#### Introduction

The recognition of indigenous customary title to land and waters in Australia has been a part of Australia's constitutional history, constitutional in the "C" and "c" senses. That is not surprising for it has involved fundamental questions about the basis upon which Australia was colonised in the 18<sup>th</sup> century, the relationship between the law of the colonies, the common law of England, the provisions of the written Constitution that came into existence in 1901 and the law and custom of the indigenous inhabitants. The constitutional story is also part of a story of Australia's emergence as a nation State in a global community of nations which has become in some respects a global society. In this lecture I will offer an overview of major developments leading to the recognition of indigenous land rights in Australia.

#### Pre-history

The colonisation of inhabited territories has given rise over many generations to acute social, economic and legal questions which persist to the present day. Some of those legal questions, relevant to customary title for land, were set out by Professor Kent McNeil in his book, *Common Law Aboriginal Title*<sup>1</sup>:

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\* This paper reproduces elements of previous papers given by the same author including: French, "The Constitution and the People" in French, Lindell and Saunders (eds) *Reflections on the Australian Constitution* (Federation Press, 2003) at 68-85; French, *The Role of the High Court in the Recognition of*

What effect, then, did colonisation of these territories have on title to land? Did real property rights held by virtue of local custom continue under English rule? What of indigenous people whose relationship to land was conceptually non-proprietary when viewed from a European perspective? Did actual presence on and use of land by these people have juridical consequences under the system of law that the colonizers (sic) brought with them? And what rights, if any, did the Crown as sovereign acquire to lands already owned or occupied when a territory was annexed to its dominions?

The first judicial answers to those questions for Australia were not promising.

In 1833 the Supreme Court of New South Wales described the indigenous inhabitants of that colony as "wandering tribes ... living without certain habitation and without laws [who] were never in the situation of a conquered people"<sup>2</sup>. On the basis that the colony was settled rather than conquered, its land was seen as property of the Crown from the time of annexation<sup>3</sup>. The point was made by the Privy Council in *Cooper v Stuart* in 1889. Lord Watson said:

There is a great difference between the case of a Colony acquired by conquest or cession, in which there is an established system of law, and that of a Colony which consisted of a tract of territory practically unoccupied, without settled inhabitants or settled law, at the time when it was peacefully annexed to the British dominions. The Colony of New South Wales belongs to the latter class.<sup>4</sup>

In 1919 in *Re Southern Rhodesia*, Lord Sumner postulated a class of indigenous people whose place in the scale of social organisation was so low that their usages and conceptions of rights could not be reconciled with the institutions or legal ideas of

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Native Title (2002) 30 *University of Western Australia Law Review* at 124-166; French and Lane, "The Common Law of Native Title in Australia" (2002) 2 *Oxford University Law Journal* at 15-25; French, "A Moment of Change – Personal Reflections on the National Native Title Tribunal 1994-98" (2003) 27 *Melbourne University Law Review* at 488-522; French, "The Race Power – A Constitutional Chimera" in Winterton and Lee (eds) *Australian Constitutional Landmarks* (Cambridge University Press, 2003) at 180-212; French, Rolling a Rock Uphill? Native Title and the Myth of Rolling a Rock Uphill? – Native Title and the Myth of Sisyphus? *Judicial Conference of Australian National Colloquium*, October 2008.

<sup>1</sup> (Clarendon Press, Oxford 1989) at 2.

<sup>2</sup> *Macdonald v Levy* (1833) 1 Legge 39 at 45.

<sup>3</sup> *Attorney-General v Brown* (1847) 1 Legge 312; *Williams v Attorney-General (NSW)* (1939) 16 CLR 404.

<sup>4</sup> *Cooper v Stuart* (1889) 14 App Cas 286 at 291.

civilised society. In his view one could not impute to such people "some shadow of the rights known to our law and then to transmute it into the substance of transferable rights of property as we know them"<sup>5</sup>. He accepted that recognition of indigenous land rights could occur but only above a threshold of comparability with common law rights. In *Amodu Tijani* however, which was decided in 1921, the Privy Council qualified that approach to some degree when it warned against trying to fit traditional title to land into conceptual classes which were only appropriate to systems developed under English law<sup>6</sup>.

### **The Race Power – from Federation to Referendum**

If the jurisprudence that prevailed in the early twentieth century was unpromising to indigenous interests in relation to land title, the Constitution appeared to offer them even less. In 1901 legislative power with respect to Aboriginal people was left in the hands of the States. Section 51(xxvi) of the Constitution, as it stood at Federation, conferred upon the new Commonwealth the power to make laws for the peace, order and good government of the Commonwealth with respect to:

the people of any race, other than the aboriginal race in any State, for whom it is deemed necessary to make special laws.

The power had little or no legal impact for a long time. It appears to have been mentioned in passing only once in the cases covered by the first one hundred and fifty volumes of the Commonwealth Law Reports representing the period from 1903 to 1982. The case was *Robtelmes v Brennan*<sup>7</sup> and concerned the deportation of Kanaka workers.

Agitation for changes to the race power to provide for Aboriginal interests to be protected began as early as 1910. The Australian Board of Missions urged "Federal and State Governments to agree to a scheme by which all responsibility for safeguarding the human and civil rights of aborigines should be undertaken by the Federal Government."<sup>8</sup>

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<sup>5</sup> *Re Southern Rhodesia* [1919] AC 211 at 233-234.

<sup>6</sup> *Amodu Tijonu v Secretary, Southern Nigeria* (1921) 2 AC 399 at 403.

<sup>7</sup> (1906) 4 CLR 395.

<sup>8</sup> Attwood B and Markus A, *The 1967 Referendum: Race Power and the Australian Constitution* (2<sup>nd</sup> ed) (Aboriginal Studies Press Canberra, 2007) at 6.

Similar proposals were made publicly in 1913 by the Australian Association for the Advancement of Science and in the 1920s by the Association for the Protection of Native Races. The Secretary of the latter organisation urged a Royal Commission on the Constitution in 1928 to recommend to the Federal Government that "the Constitution be amended so as to give the Federal Government the supreme control of all aborigines"<sup>9</sup>.

The Report of the Royal Commission on the Constitution in 1929 acknowledged that "a great number of witnesses" had given evidence about the need to give increased attention to Aborigines. Some of the witnesses before it had urged a transfer of power to the Commonwealth primarily because of variations in the laws relating to Aboriginal wages and employment conditions from State to State<sup>10</sup>. The Commission declined to recommend that the race power be amended to authorise the Commonwealth to make laws with respect to Aborigines. It acknowledged that the effect of their treatment on the reputation of Australia was a powerful argument for a transfer of control. However it considered that the States were better equipped to deal with the question than the Commonwealth<sup>11</sup>.

More agitation for change continued through the 1930s supported by the Secretary of the Australian Aborigines League, William Cooper. After World War II there were further calls for federal control of Aboriginal issues. Professor AP Elkin, a distinguished anthropologist, proposed the Commonwealth Government should assume control and financial responsibility.<sup>12</sup> The constitutional referendum of 1944 conducted by the Curtin government proposed that the Commonwealth should be given power to legislate with respect to Aborigines. That proposal was one of some 14 propositions to extend Commonwealth power. A majority of votes was achieved in only two States, South Australia and Western Australia.

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<sup>9</sup> Attwood and Markus op cit at 7.

<sup>10</sup> Report of the Royal Commission on the Constitution (Government Printer, Canberra, 1929) at 219.

<sup>11</sup> Attwood and Markus op cit at 9.

<sup>12</sup> Attwood and Markus op cit at 11.

The Joint Committee on Constitutional Review in 1959 did give some consideration to whether the Commonwealth should have an express power to make laws with respect to Aborigines. It received representations from a number of persons proposing such a change. However its inquiries had not been completed when it reported and no recommendation was made. The Committee did say that its recommendation to repeal s 127 of the Constitution did not necessarily affect the broader question of Commonwealth power over Aborigines<sup>13</sup>.

With increasing awareness of indigenous affairs generally in the 1960s debate about the place of Aboriginal people under the Constitution was heightened. In 1961 the Federal Conference of the Australian Labor Party, at the instigation of Mr KE Beazley MHR, resolved that the exclusion of Aboriginal people under s 51(xxvi) should be removed. In that decade two very prominent Aboriginal protests focused attention on indigenous issues. One was the presentation of the famous Bark Petition to the Commonwealth Parliament on 14 August 1963 by the people of Yirrkala protesting against the excision of 330 square kilometres of the Gove Peninsula Aboriginal Reserve for the grant of special mining leases for bauxite. And in April 1966 the Gurindji people, who were pastoral workers at the Wave Hill cattle station went on strike and walked off the property. In that year the Commonwealth Conciliation and Arbitration Commission extended equal pay to Aboriginal pastoral workers in the Northern Territory.

In the meantime in 1964 the Leader of the Labor Opposition, Arthur Calwell, had introduced the Constitution Alteration (Aborigines) Bill 1964 for a referendum to remove the exclusion of Aborigines from s 51(xxvi) and to delete s 127. That Bill lapsed when Parliament was dissolved. Prime Minister Menzies introduced a Bill for a referendum for the removal of s 127 in 1965 but was not prepared to take the exclusionary term out of s 51(xxvi). In 1966 WC Wentworth proposed another Bill to repeal s 51(xxvi) and to empower the Commonwealth Parliament simply to make laws "for the advancement of the Aboriginal natives of the Commonwealth of Australia". That did not go to a referendum.

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<sup>13</sup> Report of Joint Committee on Constitutional Review (Government Printer, Canberra, 1959) par 397.

In 1967, Prime Minister Harold Holt introduced the Constitution Alteration (Aborigines) Bill which proposed an amendment to s 51(xxvi) to remove the words "other than the Aboriginal race in any State" and also proposed the deletion of s 127. The proposal was supported by the Opposition then led by Mr EG Whitlam. It passed both Houses of Parliament without opposition. At the referendum it was passed by 90.8% of those voting. It was the biggest majority for any referendum proposal ever held in Australia<sup>14</sup>. The amendment to the race power however was not a panacea. It left questions to be debated in later cases about its purposes, whether they were solely beneficial or otherwise and, if so, whether the parliament's judgment as to benefit could be justicible<sup>15</sup>.

### **The move to statutory land rights**

The decision of the Privy Council in *Cooper v Stuart* was applied by Blackburn J of the Supreme Court of the Northern Territory in the *Milirrpum*<sup>16</sup> case in 1971 rejecting a claim to traditional title to land by people from the Gove Peninsula in the Northern Territory. The claim was made in the context of opposition to the grant of bauxite mining leases over the relevant land. Blackburn J dismissed the action. He found that the evidence before him showed a "subtle and elaborate system highly adapted to the country in which the people led their lives" which he characterised as a government of laws and not of men<sup>17</sup>. Notwithstanding that characterisation he concluded that there were no rights arising under traditional laws and customs of the kind that could attract recognition at common law. In accepting *Cooper v Stuart* as applicable to the status of the Australian colonies and their historical characterization as settled rather than conquered, he said:

[T]he question is one not of fact but of law. Whether or not the Australian aboriginals living in any part of New South Wales had in 1788 a system of law

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<sup>14</sup> See generally Summers J "The Parliament of the Commonwealth of Australia and Indigenous People 1901-1967" in Lindell and Bennett (eds) *Parliament: The Vision in Hindsight* (Federation Press Sydney, 2001) at 149-209.

<sup>15</sup> See generally French R, "The Race Power: A Constitutional Chimera" in Lee and Winterton (eds), *Australian Constitutional Landmarks* (Cambridge University Press, 2003) at 180-212.

<sup>16</sup> *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141 at 242.

<sup>17</sup> *Milirrpum* at 267.

which was beyond the powers of the settlers at that time to perceive or comprehend, it is beyond the power of this Court to decide otherwise than that New South Wales came into the category of a settled or occupied colony.<sup>18</sup>

Following the *Milirrpum* decision the Commonwealth government established the Woodward Royal Commission. That Commission proposed a system of inquiry and recommendation by an Aboriginal Land Commissioner upon which the grant of statutory land rights could be made in the Northern Territory. The objectives of the system as proposed by Woodward were as follows:

1. The doing of simple justice to a people who have been deprived of their land without their consent and without compensation.
2. The promotion of social harmony and stability within the wider Australian community by removing, so far as possible, the legitimate causes of complaint of an important minority group within that community.
3. The provision of land holdings as a first essential for people who are economically depressed and who have at present no real opportunity of achieving a normal Australian standard of living.
4. The preservation, where possible, of the spiritual link with his own land which gives each Aboriginal his sense of identity and which lies at the heart of his spiritual beliefs.
5. The maintenance and, perhaps, improvement of Australia's standing among the nations of the world by demonstrably fair treatment of an ethnic minority.

The *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) which was enacted following the Woodward Inquiry established a system broadly in accordance with his recommendations. Grants made under the Act were made in the exercise of a statutory power by the relevant Commonwealth Minister acting upon the recommendation of the Aboriginal Lands Commissioner. Land rights statutes passed in New South Wales, Queensland and South Australia followed the same general model of

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<sup>18</sup> *Milirrpum* at 244.

administrative recognition leading to a grant effected by legislation or a legislative process<sup>19</sup>.

The creation of statutory land rights in the Northern Territory did engender adverse reaction from some sections of the community, particularly those who saw their legal rights questioned or restricted as a result of the new regime<sup>20</sup>.

The *Aboriginal Land Rights Act* of the Northern Territory generated significant litigation between applicants and the Northern Territory Government and other parties. The history of that litigation covered a number of issues. Some related to the jurisdiction of the Aboriginal Lands Commissioner and the classes of land which were available for claim. The High Court was involved in finally deciding many of the cases. Some 13 of them preceded its decision in *Mabo* in 1992<sup>21</sup>. They did involve exposure of the Court to concepts of traditional ownership to the extent that such concepts were reflected in provisions of the Act. An appeal from *Milirrpum* might well not have succeeded. The High Court which decided *Mabo* was a very different High Court from that which existed at the time of the *Milirrpum* decision. It had been exposed to land rights litigation and included in its membership Toohey J who had served as first Aboriginal Land Commissioner appointed under the *Land Rights Act*.

The Act has continued to give rise to litigation. In 2008 in the Blue Mud Bay case, the High Court, in the joint judgment of Gleeson CJ, Gummow, Hayne and Crennan JJ said<sup>22</sup>:

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<sup>19</sup> *Pitjantjatjara Land Rights Act 1981* (SA); *Land Act (Aboriginal and Islander Land Grants) Amendment Act 1982* (Qld); *Maralinga Tjarutja Land Rights Act 1984* (SA); *Aboriginal Land Rights Act 1984* (NSW); *Aboriginal Land Act 1991* (Qld); *Torres Strait Islander Land Act 1991* (Qld). The *Aboriginal Land (Lake Condah and Framlingham Forest) Act 1987* (Cth) was passed by the Commonwealth Parliament on the request of the Victorian government to grant freehold title to a corporation of elders who had proved their clan's traditional relationship to the land. There is otherwise no general provision for statutory grants of Aboriginal land rights in Victoria.

<sup>20</sup> See Rowley CD, *Recovery: The Politics of Aboriginal Reform*, (Penguin Melbourne, 1986)) at 84.

<sup>21</sup> *Mabo v Queensland (No 2)* (1992) 175 CLR 1.

<sup>22</sup> *Northern Territory v Arnhem Land Trust* (2008) 248 ALR 195 at 208 [50].

It is ... apparent that the interest granted under the Land Rights Act differed in some important ways from the interest ordinarily recorded under the Torrens system as an estate in fee simple. But despite these differences, because the interest granted under the Land Rights Act is described as a 'fee simple', it must be understood as granting rights of ownership that 'for almost all practical purposes, [are] the equivalent of full ownership' of what is granted. In particular, subject to any relevant common law qualification of the right, or statutory provision to the contrary, it is a grant of rights that include the right to exclude others from entering the area identified in the grant.

The decision had implications for fishing rights in the inter-tidal zone adjacent to the area covered by a grant under the Act.

The nature of the title granted under the Act again fell for consideration in the recent decision of the High Court in the Northern Territory intervention case, *Wurridjal v The Commonwealth*<sup>23</sup>. By its intervention legislation the Commonwealth created five year statutory leases over townships and other areas in land covered by grants made under the *Land Rights Act*. One of the questions that arose was whether the Commonwealth had thereby acquired property from the Land Trust which held the title, whether it was required to provide just terms compensation pursuant to s 51(xxxi) of the Constitution and whether, if so, the intervention legislation had provided just terms.

A threshold question in the case at least for four of the judges was whether the requirement under s 51(xxxi) of the Constitution, for just terms in laws acquiring property from a State or any person, applied also to the territories. In 1969 the Court had held that the just terms requirement did not apply to laws made under s 122 of the Constitution, which confers power to make laws for the government of any territory<sup>24</sup>. In *Wurridjal* the Court, by majority, overruled the decision. Other justices did not think it necessary to deal with that issue. The effect of the overruling and the nature of the property rights conferred by the *Land Rights Act* was that such property rights could not be acquired by a law of the Commonwealth except on just terms.

### **The Racial Discrimination Act 1975 (Cth)**

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<sup>23</sup> (2009) 252 ALR 232.

<sup>24</sup> *Teori Tau v The Commonwealth* (1969) 119 CLR 564.

The next stage in the long march towards the recognition of native title was the enactment of the *Racial Discrimination Act 1975* (Cth) and the unsuccessful challenge by the Queensland Government to its validity.

The *Racial Discrimination Act* was passed to give effect to the International Convention on the Elimination of all Forms of Racial Discrimination. Section 9 of that Act made it unlawful for a person to do any act involving a distinction, exclusion or restriction of preference based on race, descent or national or ethnic origin with the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of any human right or fundamental freedom in the political, economic, social, cultural or any other field of public life. The reference to a human right or fundamental freedom was explicitly stated to include rights of the kind referred to in Article 5 of the Convention. It soon came to be tested.

In 1974 a Commonwealth authority, the Aboriginal Land Fund Commission, made an agreement to take a transfer of a Crown Lease of a pastoral property in Queensland. The Commission had contracted to buy the Crown Lease for the use of the Winychanam Group of Aborigines of which John Koowarta was a member. The Queensland Minister for Lands refused to consent to the transfer under the *Land Act 1962* (Qld). This was in furtherance of a policy which opposed the acquisition by Aborigines of large areas of land in the State.

Koowarta commenced proceedings in the Supreme Court of Queensland against the Premier and other members of the Queensland Government. He claimed damages under the *Racial Discrimination Act*. Queensland challenged the statement of claim on the grounds that the *Racial Discrimination Act* was beyond the legislative power of the Commonwealth and was invalid.

Two provisions of the Commonwealth Constitution were put in play. The first was the power of the Commonwealth to make laws with respect to external affairs under

s 51(xxix). The second was the race power, the power to make laws for the people of any race for whom it was deemed necessary to make special laws: s 51(xxvi). The latter provision was that which was amended by constitutional referendum in 1967 to remove the exclusion of Aboriginal people.

By a 4/3 majority the High Court held that the provisions of the Act under challenge were valid laws with respect to external affairs<sup>25</sup>. Section 51(xxvi) of the Constitution was also relied upon by those contending for the validity of the Act. The Court held that s 51(xxvi) did not support the Act because the Act applied equally to all persons and was therefore not a special law for the people of any one race. A number of the Justices expressed the obiter opinion that the race power would support laws which discriminated against the people of a particular race as well as laws discriminating in favour of a particular race. The importance of the case to the ultimate recognition of native title was that it was the *Racial Discrimination Act* which would protect native title, once recognised, from discriminatory extinguishment by laws or executive acts of the States or Territories. In that connection it had an important role to play in the litigation commenced by Eddie Mabo and others in 1982. It also gave rise to questions about the validity of State and Territory laws and executive acts passed after its enactment which effected discriminatory uncompensated extinguishment or impairment of native title rights and interests.

### **The *Mabo* litigation**

The *Mabo* litigation was instituted in 1982 in the original jurisdiction of the High Court. It sought recognition of the customary native title of the Meriam People of Murray Island in the Torres Strait. On 26 February 1986, Gibbs CJ remitted the matter for trial of the factual issues to the Supreme Court of Queensland. That trial commenced on 13 October 1986 and was adjourned part heard on 17 November 1986.

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<sup>25</sup> *Koowarta v Bjelke-Peterson* (1982) 153 CLR 168.

In the preceding year Queensland had passed the *Queensland Coast Islands Declaratory Act 1985* (Qld). All of the islands in the Torres Strait, including Murray Island, were part of the State of Queensland. The Act applied to all of them. It declared that upon becoming part of Queensland the Islands had been vested in the Crown in right of Queensland "freed from all other rights, interests and claims of any kind whatsoever". The State of Queensland pleaded the new Act as part of its defence against Mabo's claim. It contended that the effect of the Act was to extinguish the rights which he and the other plaintiffs had claimed on Murray Island and to deny any entitlement to compensation arising from that extinguishment.

Mabo and the other plaintiffs challenged the validity of the Act and the viability of the Queensland defence on a demurrer in the High Court. The demurrer was argued in March 1988. In December 1988 a majority of the Judges held that the State Act was inconsistent with s 10 of the *Racial Discrimination Act*. That section provides that if a Commonwealth, State or Territory law discriminates between persons of different race, colour, national or ethnic origin so that a person from one group enjoys a right to a lesser extent than a person from another, then by force of the Act, they would enjoy the right to the same extent<sup>26</sup>. The operation of the provision was summarised in a passage from the joint judgment of what became known as *Mabo (No 1)*<sup>27</sup>:

In practical terms, this means that if traditional native title was not extinguished before the Racial Discrimination Act came into force, a State law which seeks to extinguish it now will fail. It will fail because s 10(1) of the Racial Discrimination Act clothes the holders of traditional native title who are of the native ethnic group with the same immunity from legislative interference with their enjoyment of their human right to own and inherit property as it clothes other persons in the community. A State law which, by purporting to extinguish native title, would limit that immunity in the case of the native title group cannot prevail over s 10(1) of the Racial Discrimination Act which restores the immunity to the extent enjoyed by the general community. The attempt by the 1985 Act to extinguish the traditional legal rights of the Meriam people therefore fails.

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<sup>26</sup> *Mabo v Queensland (No 1)* (1988) 166 CLR 186.

<sup>27</sup> *Mabo v Queensland (No 1)* (1988) 166 CLR 186 (HCA) at 218-219.

The decision was hypothetical for the Court had not then determined that the common law of Australia would recognise traditional native title. The important possibility that it raised was that other State or Territory laws or indeed executive acts, which had been done after the *Racial Discrimination Act* came into effect and which might be seen as having a discriminatory operation in relation to native title, could be invalid for that reason. That invalidity would arise by operation of s 109 of the Commonwealth Constitution which gives paramountcy to the Commonwealth law, in this case the *Racial Discrimination Act*, in the event of inconsistency with a State law. The possibility also existed, for the Commonwealth itself, that its laws or executive acts might have operated to effect acquisitions of native title rights without just compensation and contrary to the requirements of the Constitution.<sup>28</sup> The question whether native title could be recognised at common law was yet to be answered in *Mabo (No 2)*. When it was so recognised, the general issue of the validity of past acts was enlivened along with a need to ensure that future acts affecting native title would not offend the requirements of the *Racial Discrimination Act* or the just terms provision of the Constitution. The effect of the *Racial Discrimination Act* and the requirement to comply with it had implications for both State and Territory governments in connection with land use management and for the pastoral and mining industries and other users of land in areas in which native title claims might arise.

The hypothetical question remained to be answered in *Mabo (No 2)*<sup>29</sup>. The case was finally decided after comprehensive fact finding by Moynihan J on the remitter to the Supreme Court of Queensland.

On 3 June 1992 the High Court delivered judgment in *Mabo (No 2)* and made a declaration that:

The Meriam People are entitled as against the whole world to possession, occupation, use and enjoyment of the lands of the Murray Islands.<sup>30</sup>

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<sup>28</sup> Australian Constitution s 51(xxxi).

<sup>29</sup> (1992) 175 CLR 1.

<sup>30</sup> (1992) 175 CLR 1.

The legal recognition thus granted was limited and qualified in its terms by the further declaration that:

... the title of the Meriam People is subject to the power of the Parliament of Queensland and the power of the Governor in Council of Queensland to extinguish that title by valid exercise of their respective powers, provided any exercise of those powers is not inconsistent with the laws of the Commonwealth.

The orders declared rights enforceable at law under the designation "possession, occupation, use and enjoyment ... as against the whole world". But those rights were subject to extinguishment. The orders thus reflected the two principal elements of the High Court's jurisprudence of native title which were present at the outset and persisted until today, namely recognition and extinguishment.

Common law rules underpinning the recognition of native title and the rules governing its recognition as set out in the *Mabo* decision can be summarised as follows:

1. The colonisation of Australia by England did not extinguish rights and interests in land held by Aboriginal and Torres Strait Islander people according to their own law and custom.<sup>31</sup>
2. The native title of Aboriginal and Torres Strait Islander people under their law and custom will be recognised by the common law of Australia and can be protected under that law.<sup>32</sup>
3. When the Crown acquired each of the Australian colonies it acquired sovereignty over the land within them. In the exercise of that sovereignty native title could be extinguished by laws or executive grants which indicated a plain and clear intention to do so – eg, grants of freehold title.<sup>33</sup>
4. To secure the recognition of native title today it is necessary to show that the Aboriginal or Torres Strait Islander group said to hold the native title:

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<sup>31</sup> *Mabo (No 2)* at 57 and 69 (Brennan J, Mason CJ and McHugh J agreeing); 81 (Deane and Gaudron JJ); 184 and 205 (Toohey J).

<sup>32</sup> *Mabo (No 2)* at 60 and 61 (Brennan J); 81, 82, 86-87 (Deane and Gaudron JJ); 187 (Toohey J).

<sup>33</sup> *Mabo (No 2)* at 64 (Brennan J); 111, 114 and 119 (Deane and Gaudron JJ); 195-196 and 205 (Toohey J).

- (a) has a continuing connection with the land in question and has rights and interests in the land under Aboriginal or Torres Strait Islander traditional law and custom, as the case may be;<sup>34</sup>
  - (b) the group continues to observe laws and customs which define its ownership of rights and interests in the land.<sup>35</sup>
5. Under common law, native title has the following characteristics:
- (a) it is communal in character although it may give rise to individual rights;<sup>36</sup>
  - (b) it cannot be bought or sold but can be surrendered to the Crown;<sup>37</sup>
  - (c) it may be transmitted from one group to another according to traditional law and custom;<sup>38</sup>
  - (d) the traditional law and custom under which native title arises can change over time and in response to historical circumstances.<sup>39</sup>
6. Native title is subject to existing valid laws and rights created under such laws.<sup>40</sup>

In the judgment international norms were expressly linked to contemporary, social and community values. Brennan J, with whom Mason CJ and McHugh J agreed, aligned the ‘expectations of the international community’ and the ‘contemporary values of the Australian people’ and said ‘[i]t is contrary both to international standards and to the fundamental values of our common law to entrench a discriminatory rule which because of the supposed position on the scale of social organisation of the indigenous inhabitants of a settled colony, denies them a right to occupy their traditional lands.’

Other members of the majority, Deane, Gaudron and Toohey JJ, did not invoke international norms of conduct. However Deane and Gaudron JJ relied upon principles of ‘natural law’ set out in the works of early international law jurists such as Wolff, Vattel, de Vittoria and Grotius. They cited authorities applicable in a wide range of British colonies including New Zealand and Canada and accepted as correct the Privy

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<sup>34</sup> *Mabo (No 2)* at 60 and 70 (Brennan J); 86 and 110 (Deane and Gaudron JJ); 188 (Toohey J).

<sup>35</sup> *Mabo (No 2)* at (Brennan J); 110 (Deane and Gaudron JJ).

<sup>36</sup> *Mabo (No 2)* at 52 and 62 (Brennan J); 85-86 and 88, 119-110 (Deane and Gaudron JJ).

<sup>37</sup> *Mabo (No 2)* at 60 and 70 (Brennan J); 88 and 110 (Deane and Gaudron JJ).

<sup>38</sup> *Mabo (No 2)* at 60 (Brennan J); 110 (Deane and Gaudron JJ).

<sup>39</sup> *Mabo (No 2)* at 61 (Brennan J); 110 (Deane and Gaudron JJ); 192 (Toohey J).

<sup>40</sup> *Mabo (No 2)* at 63, 69 and 73 (Brennan J); 111-112 (Deane and Gaudron JJ).

Council's statement that '[t]he courts will assume that the British Crown intends that the rights of property of the inhabitants are to be fully respected.'<sup>41</sup> In the joint judgment of Deane and Gaudron JJ their Honours characterised the terra nullius doctrine and the proposition that ownership of land in the Australian colonies vested in the Crown at annexation as 'the legal basis for the dispossession of the Aboriginal peoples of most of their traditional lands'. In a frequently cited passage they said:

[t]he acts and events by which that dispossession in legal theory was carried into practical effect constitute the darkest aspect of the history of this nation. The nation as a whole must remain diminished unless and until there is an acknowledgment of, and retreat from those passed injustices.

*Mabo (No 2)* rested upon the proposition that the long standing refusal in Australia to accommodate concepts of native title within the common law depended upon assumptions of historical fact shown to be false.<sup>42</sup>

Common law native title, as appears from the judgments in *Mabo (No 2)*, is a right or set of rights whether expressed severally or holistically, that are ascertained in the common law universe when a determination is made. They are *sui generis* creatures of the common law. To the extent that the word 'title' suggests a land law analogue, it is 'artificial and capable of misleading'.<sup>43</sup> The *sui generis* nature of common law native title is a consequence of the range of traditional indigenous relationships to country that may be the subject of recognition. Brennan J was prepared to characterise as 'proprietary' what he called 'the interest possessed by a community that is in exclusive possession of land'. That land is not alienable under traditional law and custom does not defeat that characterisation. Nor does the fact that individual members of the relevant indigenous community might enjoy usufructuary rights which are themselves not of a proprietary character.<sup>44</sup> There are however no common law analogues which can accommodate the full range of spiritual relationships with land including the relationship maintained at a distance seen as capable of recognition by the Full Court of the Federal Court in *Western*

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<sup>41</sup> *Adeyinka Ayeakn v Musendiku Adele* [1957] 1 WLR 876 (PC) 880.

<sup>42</sup> *Wik Peoples v State of Queensland* (1996) 187 CLR 1 (HCA) at 179-180 (Gummow J).

<sup>43</sup> *Mabo (No 2)* at 178.

<sup>44</sup> *Mabo (No 2)* at 51.

*Australia v Ward*.<sup>45</sup>

The proposition that indigenous relationships to land recognisable by the common law are confined to 'interests which were analogous to common law concepts of estates in land or proprietary rights' was also rejected unequivocally by Deane and Gaudron JJ.<sup>46</sup> They preferred the approach adopted by the Privy Council in *Amodu Tijani v Secretary, Southern Nigeria*<sup>47</sup> and *Adeyinke Oyekan v Musendiku Adele*<sup>48</sup> to the narrower approach reflected in *Re Southern Rhodesia*.<sup>49</sup> Native title should not be forced to conform to traditional common law concepts. It should be accepted as 'sui generis or unique'.<sup>50</sup>

In similar vein, Toohey J said:

In the case of the Meriam people (and the Aboriginal people of Australia generally), what is involved is "a special collective right vested in an Aboriginal group by virtue of its long residence and communal use of land or its resources".<sup>51</sup>

His Honour referred to the Report of the Australian Law Reform Commission on the *Recognition of Aboriginal Customary Laws*.<sup>52</sup> He also said: "...in truth what the courts are asked to recognise are simply rights exercised by indigenous peoples in regard to land, sufficiently comprehensive and continuous so as to survive annexation."<sup>53</sup>

A constitutional dimension of the *Mabo* decision was identified by Gummow J in *Wik Peoples v Queensland*<sup>54</sup> when his Honour said:

"... it was appropriate to declare in 1992 the common law upon a particular view of past historical events. That view differed from assumptions, as to the extent of the reception of English land law upon which basic propositions of Australian land law had been formulated in the colonies before federation. To the extent that the common law is to be understood as the ultimate constitutional foundation in

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<sup>45</sup> 170 ALR 159, at 221 (Beaumont and von Doussa JJ).

<sup>46</sup> *Mabo (No 2)* at 85.

<sup>47</sup> [1921] 2 AC 399 (PC).

<sup>48</sup> [1957] 1 WLR 876 (PC).

<sup>49</sup> [1919] AC 211 (PC).

<sup>50</sup> *Mabo (No 2)* at 89.

<sup>51</sup> *Mabo (No 2)* at 178-179.

<sup>52</sup> Report No 31, 1986, [63].

<sup>53</sup> *Mabo (No 2)* at 179.

<sup>54</sup> (1996) 187 CLR 1 at 182.

Australia, there was a perceptible shift in that foundation, away from what had been understood at federation."

### **Recognition and extinguishment of native title**

The *Mabo* judgment decided not only that 'the native title of Aboriginal and Torres Strait Islander peoples under their law and culture' could be recognised and protected by the common law of Australia. It also determined that native title could be extinguished by valid laws or executive acts of the Crown which indicated a plain and clear intention to do so.

Common law recognition does not operate upon traditional laws and customs nor upon the relationships with land to which they give rise. It is important to keep that proposition clear when considering also the nature of extinguishment. That can be regarded as a qualification or limitation upon the rules which govern recognition. It has, therefore, nothing to say about traditional law or custom nor about the relationship of indigenous people to their land. There is a question about the time at which recognition can be said to occur. Common law native title did not exist immediately before colonisation. The 'rights' of the inhabitants prior to annexation were wholly regulated by their traditional laws and customs. On one view, common law native title sprang into existence at the time of annexation of the relevant colonial territories by the Crown and what followed, by way of incremental extinguishment, was an historical process of subtraction from those primal titles. While that may be a legitimate way of viewing the history of common law native title, it is awkward to describe it by reference to the term 'recognition'. For that term more logically relates to the contemporary process of determination of native title. Consistently with the notion of 'mapping' traditional relationships to land onto the common law universe, recognition may be seen as a present declaration of a mapping that, from the point of view of today's common law, came into existence at the time of annexation.

The existence of people in exclusive occupation of the land at the time of annexation provides the foundation for contemporary claims to recognition of rights

against the Crown in respect of land which remains in the Crown's hands. The identification of indigenous groups today, the rules by which they are defined, the content of their traditions and customs and their relationship to the land and waters which comprise their 'country' may be described and interpreted by evidence in court proceedings given by the members of such groups, anthropologists and other experts. The things of which they speak constitute the subjects of the common law of native title. The common law establishes the judge-made rules for determining whether native title rights and interests exist. These are the rules of recognition.

Certain benefits attach to the recognition of common law native title and, more accurately, to the determination of common law native title which is the expression of that recognition. They include common law protections for that which is determined. Beyond the common law protections, there are those conferred by statute such as the prohibition against discriminatory impairment conferred by the *Racial Discrimination Act* and statutory rights to negotiate and entitlements to compensation for extinguishment or impairment conferred by the *Native Title Act*. The rules of recognition are qualified and limited by the effects of history (native title may be lost by loss of connection) and by the acts of the Crown (the grant of interests in land pursuant to statutory or executive authority may preclude the recognition of any continuing indigenous rights). The common law native title which is the subject of determination does not reflect the full cultural, historical and human reality from which it is derived.

There was evidence, from an early stage, of conceptual confusion about the use of the term 'extinguish'. It was used by Brennan J in *Mabo (No 2)* as a label for the consequences of the acts of the Crown wholly or partially inconsistent with the continuing right to enjoy native title. He used it in a different sense when he said:

[n]ative title to an area of land which a clan or group is entitled to enjoy under the laws and customs of an indigenous people is extinguished if the clan or group, by ceasing to acknowledge those laws, and (so far as practicable) observe those customs, loses its connection with the land or on the death of the last of the members of the group or clan.<sup>55</sup>

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<sup>55</sup> *Mabo (No 2)* at 69.

Extinguishment here is being used in two different ways. One describes a limit on common law recognition which does not and cannot affect the relationship between the indigenous group and its country. The other concerns the loss of that relationship which means there is no subject matter for recognition by the common law. The term 'extinguish' is less useful as a metaphor than the word 'recognition'. Indeed, it is potentially misleading. Common law extinguishment is too readily thought of as something that annihilates the indigenous relationship to country. As Toohey J said in *Wik Peoples v State of Queensland*, native title rights affected by inconsistent grants are 'unenforceable at law and, *in that sense*, extinguished.'<sup>56</sup> (emphasis added).

The idea that extinguishment does not operate directly upon traditional law and custom or indigenous relationship to country is implicit in the observation of the High Court in *Fejo v Northern Territory of Australia*<sup>57</sup> that, while the existence of traditional laws and customs is a necessary prerequisite for the determination of common law native title, it is not a sufficient condition. That case is authority for the proposition that common law native title is extinguished by a grant in fee simple and is not revived if the land subsequently reverts to the Crown. The Court said:

The rights created by the exercise of sovereign power being inconsistent with native title, the rights and interests that together make up that native title were necessarily at an end. There can be no question, then, of those rights springing forth again when the land came to be held again by the Crown. Their recognition has been overtaken by the exercise of 'the power to create and to extinguish private rights and interests in land within the Sovereign's territory'.<sup>58</sup>

This is a statement about limits on the common law rules of recognition. Those limits can be reversed by statute and have been, for certain classes of case, in the *Native Title Act*.

### **Sovereignty – co-existence of incompatible absolutes?**

It is a feature of sovereignty that it tends to exclusivity. Supreme authority, which is its essence, has that character. This is a difficulty which has underpinned debate about

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<sup>56</sup> *Wik* at 126 (emphasis added).

<sup>57</sup> (1998) 195 CLR 96 at 128.

<sup>58</sup> *Fejo* at 131.

a treaty with Australia's indigenous people. It has been argued that implicit in the nature of a treaty is recognition of another sovereignty, a nation within Australia.

The common law of native title as enunciated in *Mabo (No 2)* did not involve any yielding of sovereignty. It rested upon the non-justiciable proposition that the Crown acquired sovereignty over the land upon its annexation of the Australian colonies. The acquisition of that sovereignty, however, did not operate directly upon the traditional laws and customs of indigenous people or the relationship with land and waters to which they give rise. The common law in its recognition of those traditional relationships with land does not do so. Nor do the statutory provisions of the *Native Title Act 1993 (Cth)* which provides for recognition and protection of native title, validation of past invalid acts affecting native title and extinguishment of native title in certain circumstances. To speak of recognition is in one sense to personify the law and to attribute to it a cognitive function. Avoiding personification and cognitive metaphors, recognition can be regarded as the outcome of the application of rules under which certain rights arising at common law are ascertained which are vested in an indigenous community by virtue of its relationship to land or waters. Extinguishment by executive or legislative action is the result of the exercise of the non-indigenous sovereignty which bars or qualifies common law recognition. Importantly it has nothing to say about traditional law or custom or the relationship of Aboriginal people to their land.

There is a question whether the concepts of sovereignty so far discussed have any relevance in describing the relationship between indigenous people and their country under traditional law and custom and their relationships with each other. Sovereignty is a colonising term. Nevertheless, some indigenous leaders have used it to designate what they maintain is their ongoing traditional responsibility for and ownership of country. In *Coe v Commonwealth* the applicant purported to sue on behalf of the Aboriginal community and nation of Australia. He asserted membership of the Wiradjeri Tribe and authority from it and other tribes and the whole Aboriginal community and nation to bring the action. He pleaded, inter alia:

6A. Clans, tribes and groups of Aboriginal people travelled widely over the said continent now known as Australia developing a system of interlocking rights and responsibilities making contact with other tribes and larger groups of Aboriginal

people thus forming a sovereign Aboriginal nation.

The High Court (Gibbs and Aickin JJ), Jacobs and Murphy JJ dissenting) held that Mason J had rightly dismissed Mr Coe's application for leave to amend his statement of claim and that his appeal from that order should be dismissed. In so holding Gibbs J acknowledged that the correctness of *Milirrpum v Nabalco Pty Ltd*, which had denied that the common law could recognise rights and interest in land held by Aboriginal people, would be an arguable question if properly raised. As to the sovereignty claim he said:

The Aboriginal people are subject to the laws of the Commonwealth and of the States or Territories in which they respectively reside. They have no legislative, executive or judicial organs by which sovereignty might be exercised. If such organs existed, they would have no powers, except such as the law of the Commonwealth, or of a State or Territory, might confer upon them. The contention that there is in Australian an Aboriginal nation exercising sovereignty, even of a limited kind, is quite impossible in law to maintain.<sup>59</sup>

Jacobs J said of those parts of the statement of claim which disputed the validity of the Crown's claim of sovereignty and sovereign possession that they were:

Not matters of municipal law but of the law of nations and are not cognizable in a court exercising jurisdiction under that sovereignty which is sought to be challenged.<sup>60</sup>

That judgment was given some 13 years or so before *Mabo (No 2)*. Revisiting the *Coe* pleading in 1993 Mason CJ said<sup>61</sup>:

*Mabo (No 2)* is entirely at odds with the notion that sovereignty adverse to the Crown resides in the Aboriginal people of Australia. The decision is equally at odds with the notion that there resides in the Aboriginal people a limited kind of sovereignty embraced in the notion that they are 'a domestic dependent nation' entitled to self government and full rights ... or that as a free and independent people they are entitled to any rights and interests other than those created or

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<sup>59</sup> (1979) 523 ALJR 403, 408.

<sup>60</sup> (1979) 523 ALJR 403, 410.

<sup>61</sup> *Coe v Commonwealth* (1993) 68 ALJR 110, 115.

recognised by the laws of the Commonwealth, the State of New South Wales and the common law.

The judgments cited make plain the irreconcilability of conflicting claims to sovereignty. That is not to say that the model of recognition derived from the common law of native title may not be suggestive of an approach to an agreement between the Commonwealth and indigenous Australians which does not involve any compromise of sovereignty however that term is understood. Such an agreement could recognise and acknowledge traditional law and custom of indigenous communities across Australia, their historical relationship with their country, their prior occupancy of the continent and that there are those who have maintained and asserted their traditional rights to the present time. This is a cultural reality which can be accepted without compromising, symbolically or otherwise, Australia's identity as a nation. And if that traditional relationship should be asserted by some in terms of sovereignty, it would be sovereignty under traditional law and custom. It may have meaning in that universe of discourse.

### **The *Native Title Act 1993* (Cth) – Rationale, Challenge and Change - 1993-1998**

The difficulty of proving traditional title was well demonstrated in *Mabo (No 2)*. The litigation took 10 years from filing to judgment. Of course it had unique features but the nature of native title litigation meant that it would always be time consuming and expensive merely to establish a basis for recognition. Added to that burden was the complex interaction of native title with Commonwealth, State and Territory laws and grants made under such laws. This involved extensive searches of the history of land dealings to determine whether and to what extent native title rights and interests were impaired or extinguished. It also involved consideration of current tenures, particularly those predating 1975. A process was necessary to try to encourage resolution of native title claims by agreement. There was also a perceived need to protect indigenous communities from ongoing extinguishment of such title as they might have by government action affecting their land while their claims were still pending. The general question of the validity of past acts of the States and Territories, which had been raised by

*Mabo (No 1)*, had to be dealt with. Provision also had to be made for the possible invalidity of past Commonwealth acts for non-compliance with the constitutional limitation that the acquisition of property be on just terms.

The *Native Title Act 1993* (NT Act) was enacted to establish a process for the recognition of native title, its protection in respect of future acts and the validation of past acts subject to payment of compensation. The National Native Title Tribunal (the Tribunal) was established to receive applications for determinations of common law native title, to accept and register them, to identify and notify parties, and to assist applicants and parties to reach negotiated outcomes.

Governments proposing to pass laws or to do executive acts affecting native title were required to observe a non-discrimination principle in relation to native title holders. Onshore dealings with land affecting native title holders were to be done in a way that would not discriminate between them and freeholders. Entitlements to compensation were created to cover the case where native title had been affected by past acts. Provisions were made for compulsory negotiation and arbitration relating to the grants of mining and mining exploration tenements and the acquisition by government of native title rights and interests for the purpose of conferring rights or interests on a third party.

The NT Act provided for the validation of legislative and executive past acts of the Commonwealth which would otherwise have been invalid because of their impact on native title. This was subject to the provision of compensation. States and Territories were authorised to pass laws to validate their own past acts, again subject to compensation.

Since its enactment the NT Act has been subject to significant litigation which has led to a number of decisions in the High Court including a decision upholding its validity against a challenge by Western Australia in 1995<sup>62</sup>. In what came to be called "The Native Title Act Case", the NT Act was held to be a valid law of the Commonwealth

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<sup>62</sup> *Western Australia v Commonwealth* (1995) 183 CLR 373.

supported by the race power conferred by s 51(xxvi). It was a "special law" for the purpose of the race power as it conferred uniquely on Aboriginal holders of native title a benefit protective of that title. The decisions of the Court in *Koowarta*<sup>63</sup> and *Tasmanian Dams*<sup>64</sup> were applied. The Court held that the question whether such a law was "necessary" in terms of s 51(xxvi) was a matter for Parliament and that there were no grounds on which the Court could review Parliament's decision if it had the power to do so.

The Court expressed the rule of recognition of traditional Aboriginal title and of extinguishment in the following passage in the joint judgment:

Under the common law, as stated in *Mabo (No 2)*, Aboriginal people and Torres Strait Islanders who are living in a traditional society possess, subject to the conditions stated in that case, native title to land that has not been alienated or appropriated by the Crown. The content of native title is ascertained by reference to the laws and customs of the people who possess that title, but their enjoyment of the title is precarious under the common law: it is defeasible by legislation or by the exercise of the Crown's (or a statutory authority's) power to grant inconsistent interests in the land or to appropriate the land and use it inconsistently with the enjoyment of native title.<sup>65</sup>

The Court characterised the NT Act as removing the common law defeasibility of native title and securing Aboriginal people and Torres Strait Islanders in the enjoyment of their native title, subject to proscribed exceptions, which provided for it to be extinguished or impaired.

The period in which the NT Act operated between 1993 and 1998 was affected by general uncertainty about some important legal issues, resistance to the whole idea of native title by some governments and industry groups and difficulties between and within some indigenous groups which were manifested in overlapping claims. Applicants for native title determinations who were under pressure to marshal the resources to engage with the mediation or the litigation process were also under pressure to respond to

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<sup>63</sup> *Koowarta v Bjelke-Peterson* (1982) 153 CLR 168.

<sup>64</sup> *Commonwealth v Tasmania (Tasmanian Dams)* (1983) 158 CLR 1.

<sup>65</sup> (1995) 183 CLR 373 at 452-453 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ).

proposed future acts and the negotiation and arbitration systems which were put in place under the NT Act in that regard.

A decision of considerable political importance to the evolution of the NT Act was *Wik Peoples v Queensland*<sup>66</sup>. That case was concerned largely with the question of extinguishment of native title under pastoral leases. By a majority of 4 to 3, the Court held that pastoral leases did not confer exclusive possession of the areas to which they applied and that the grants of such leases did not necessarily extinguish all incidents of native title. This conclusion depended upon consideration of the particular terms of the leases in question in that case and the statutes under which they were made.

The case can be seen within a legal framework as a particular and undramatic application of the *Mabo* principles relating to extinguishment and as reflecting the proposition that just because a statutory grant is labeled a lease does not confer upon it the incidents of a lease at common law. However the practical impact of the decision for the pastoral and mining industries gave rise to political imperatives which led to the 1998 amendments to the NT Act.

The 1998 amendments, among other things, provided for the validation of acts which had been done since the enactment of the NT Act on the assumption that pastoral leases extinguished native title. These were referred to as intermediate period past acts. The system for recognition of native title was changed so that all applications would be commenced as proceedings in the Federal Court and then referred to the Tribunal for mediation. A more extensive and demanding registration test was introduced. It provided the threshold which had to be crossed before applicants could get the statutory right to negotiate in relation to the grant of mining tenements and certain other future acts. There was also provision for statutory extinguishment of native title in respect of certain classes of past acts. A larger class of future acts, being acts affecting native title, could be done validly without any requirement to negotiate with native title holders, although some procedural obligations were introduced and an entitlement to

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<sup>66</sup> (1996) 187 CLR 1.

compensation created. Importantly, provision was also made for registrable Indigenous Land Use Agreements which would confer validity upon acts done under them.

Despite the significant decisions which have been made in the High Court and in the Federal Court since the NT Act was enacted, the essential nature of the process created by the first rules set out in *Mabo (No 2)* and the burdens and the costs which they impose have not been greatly mitigated over the years. There has been an increasing number of mediated determinations, but they still seem to involve long and costly investigations and negotiations. In the absence of a national land rights statute, the rules for the determination and definition of native title rights set out in the NT Act cannot seem to shake off the logistical difficulties imposed by the requirement for proof of connection.

### **The persisting beneficial purpose of the NT Act**

The preamble to the NT Act recites the proposition in the decision of the High Court in *Mabo (No 2)* that:

the common law of Australia recognises a form of native title that reflects the entitlement of the indigenous inhabitants of Australia, in accordance with their laws and customs, to their traditional lands.

It also declares the intentions underlying the enactment of the Act. One of those is rectification of the consequences of past injustices by the special measures contained in the Act. Another is to ensure that Aboriginal people and Torres Strait Islanders receive the full recognition and status within the Australian nation to which history, their prior rights and interests, and their rich and diverse culture, fully entitle them to aspire. The preamble has remained unchanged throughout the history of the NT Act since 1993.

The main objects of the NT Act, set out in s 3, include:

To provide for the recognition and protection of native title.

The overview of the NT Act in s 4 states that it “recognises and protects native title” and provides that native title cannot be extinguished contrary to the NT Act.

As the Full Court of the Federal Court observed in *Northern Territory v Alyawarr*<sup>67</sup>:

The preamble declares the moral foundation upon which the NT Act rests. It makes explicit the legislative intention to recognise, support and protect native title. That moral foundation and that intention stand despite the inclusion in the NT Act of substantive provisions, which are adverse to native title rights and interests and provide for their extinguishment, permanent and temporary, for the validation of past acts and for the authorisation of future acts affecting native title.

The normative foundation reflected in the preamble and the stated objects of the NTA indicate its beneficial purpose. There is a sense that the beneficial purpose has been frustrated by the extraordinary length of time and resource burdens that the process of establishing recognition, whether by negotiation or litigation, impose.

### **The burden of the NT Act - provisions relating to determinations and consent determinations**

Applications for determinations of native title are made to the Federal Court under s 13. When it comes to making determinations of native title, s 94A of the NT Act imposes the following requirement:

An order in which the Federal Court makes a determination of native title must set out details of the matters mentioned in section 225 (which defines *determination of native title*).

Section 225 is in the following terms:

A *determination of native title* is a determination whether or not native title exists in relation to a particular area (the *determination area*) of land or waters and, if it does exist, a determination of:

- (a) who the persons, or each group of persons, holding the common or group rights comprising the native title are; and

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<sup>67</sup> (2005) 145 FCR 442 at [63].

- (b) the nature and extent of the native title rights and interests in relation to the determination area; and
- (c) the nature and extent of any other interests in relation to the determination area; and
- (d) the relationship between the rights and interests in paragraphs (b) and (c) (taking into account the effect of this Act); and
- (e) to the extent that the land or waters in the determination area are not covered by a non-exclusive agricultural lease or a non-exclusive pastoral lease – whether the native title rights and interests confer possession, occupation, use and enjoyment of that land or waters on the native title holders to the exclusion of all others.

This must be read with the definition of native title in s 223, which provides:

- (1) The expression *native title* or *native title rights and interests* means the communal, group or individual rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to land or waters, where:
  - (a) the rights and interests are possessed under the traditional laws acknowledged, and the traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders; and
  - (b) the Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters; and
  - (c) the rights and interests are recognised by the common law of Australia.
- (2) Without limiting subsection (1), *rights and interests* in that subsection includes hunting, gathering, or fishing, rights and interests.
- (3) Subject to subsections (3A) and (4), if native title rights and interests as defined by subsection (1) are, or have been at any time in the past, compulsorily converted into, or replaced by, statutory rights and interests in relation to the same land or waters that are held by or on behalf of Aboriginal peoples or Torres Strait Islanders, those statutory rights and interests are also covered by the expression *native title* or *native title rights and interests*.

Note: Subsection (3) cannot have any operation resulting from a future act that purports to convert or replace native title rights and interests unless the act is a valid future act.

- (3A) Subsection (3) does not apply to rights and interests conferred by Subdivision Q of Division 3 of Part 2 of this Act (which deals with statutory access rights for native title claimants).
- (4) To avoid any doubt, subsection (3) does not apply to rights and interests created by a reservation or condition (and which are not native title rights and interests):
  - (a) in a pastoral lease granted before 1 January 1994; or
  - (b) in legislation made before 1 July 1993, where the reservation or condition applies because of the grant of a pastoral lease before 1 January 1994.

The section, by that definition, governs what applicants for native title determinations must establish in order to obtain a determination.

Where the parties to a native title determination application reach agreement they may apply to the Court for a consent order. The power of the Court and the process is set out in s 87 of the NT Act which provides:

- (1) If, at any stage of proceedings after the end of the period specified in the notice given under section 66:
  - (a) agreement is reached between the parties on the terms of an order of the Federal Court in relation to:
    - (i) the proceedings; or
    - (ii) a part of the proceedings; or
    - (iii) a matter arising out of the proceedings; and
  - (b) the terms of the agreement, in writing signed by or on behalf of the parties, are filed with the Court; and
  - (c) the Court is satisfied that an order in, or consistent with, those terms would be within the power of the Court; and

The Court may, if it appears to it to be appropriate to do so, act in accordance with whichever of subsection (2) or (3) is relevant in the particular case.

- (2) If the agreement is on the terms of an order of the Court in relation to the proceedings, the Court may make an order in, or consistent with, those

terms without holding a hearing or, if a hearing has started, without completing the hearing.

Note: If the application involves making a determination of native title, the Court's order would need to comply with section 94A (which deals with the requirements of native title determination orders).

- (3) If the agreement relates to a part of the proceedings or a matter arising out of the proceedings, the Court may in its order give effect to the terms of the agreement without, if it has not already done so, dealing at the hearing with the part of the proceedings or the matter arising out of the proceedings, as the case may be, to which the agreement relates.

Section 87A makes like provision for consent determinations for part of an area the subject of an application.

### **Requirements for a determination**

It is not necessary to revisit here the entire development of the law of native title through the cases. It is sufficient to focus upon the requirements of s 223 and 225. The High Court held in *Yorta Yorta v State of Victoria*<sup>68</sup> that the statutory definition in s 223 is central. A determination under the NT Act was said to be "... a creature of that Act, not the common law".

The NT Act requires that the native title rights and interests have the following characteristics<sup>69</sup>:

1. They must be communal, group or individual rights and interests of Aboriginal and Torres Strait Islanders.
2. They must be rights and interests "in relation to land or waters".
3. They must be possessed under the traditional laws acknowledged and the traditional customs observed by the Aboriginal peoples or Torres Strait Islanders.
4. The relevant people, by their law and customs, must have a connection with the land or waters.

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<sup>68</sup> (2002) 214 CLR 422 at [32] (Gleeson CJ, Gummow and Hayne JJ).

<sup>69</sup> NT Act s 223(1).

5. The native title rights and interests must be recognised by the common law of Australia.

Each of these is a mandatory requirement for a determination of native title.

Determination of the existence of traditional laws and customs requires more than a determination of behaviour patterns. They must derive from some norms or a normative system. Because there is a requirement that the rights and interests be recognised at common law, the relevant normative system must have had "a continuous existence and vitality since sovereignty". A breach or interregnum in its existence causes the rights or interest derived from it to cease beyond revival. It is on this point in particular that great difficulty can arise. These requirements impose the burden of determining continuity of existence of their native title rights and interests upon the applicants at least by inference or extrapolation from various kinds of evidence. Typically, that evidence can include:

1. Oral evidence from the members of the native title claim group about their traditions and customs and the longevity of those traditions and customs.
2. Anthropological evidence.
3. Linguistic evidence.
4. Archaeological evidence.
5. Historical evidence.

If by accident of history and the pressure of colonisation there has been dispersal of a society and an interruption of its observance of traditional law and custom, then the most sincere attempts at the reconstruction of that society and the revival of its law and custom seem to be of no avail.

The "connection" requirement in s 223(1)(b) is somewhat elusive. The Full Court of the Federal Court in *Alyawarr* endeavoured to come to grips with what it described as

"opaque drafting" which picked up a term used in the judgment of Brennan J in *Mabo (No 2)* and put it into a statutory setting. In the event the Court said<sup>70</sup>:

... "connection" is descriptive of the relationship to the land and waters which is, in effect, declared or asserted by the acknowledgment of laws and observance of customs which concern the land and waters in various ways. To observe laws and acknowledge customs which tell the stories of the land and define the rules for its protection and use in ways spiritual and material is to keep the relevant connection to the land. There is inescapably an element of continuity involved with derives from the necessary character of the relevant laws and customs as "traditional". The acknowledgment and observance, and thereby the connection, is not transient but continuing.

The Court noted that the term "connection" involved continuing assertion by the group of its traditional relationship to the country defined by its laws and customs. This could be manifested by physical presence or in other ways including the maintenance of stories and allocation of responsibilities and rights in relation to it. It was not a qualification or limitation on the range of rights and interests which can be native title rights and interests for the purposes of the NT Act.

Section 225 mandates a determination of "who the persons, or each group of persons, holding the common or group rights comprising the native title are". As the Full Court said in *Alyawarr*<sup>71</sup>:

That requires consideration of whether the persons said to be native title holders are members of a society or community which has existed from sovereignty to the present time as a group, united by its acknowledgement of the laws and customs under which native title rights and interests claimed are said to be possessed.

Identification of the relevant group and its precise composition has also given rise to questions of some nicety the subject of extensive evidence and debate. Are the native title holders to be identified as a society which has subsisted since the time of sovereignty? Are they part of a larger, cultural bloc? Are they to be defined by reference to estate groups specified as distinct native title holding groups limited to interests in

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<sup>70</sup> (2005) 145 FCR 442 at [88].

<sup>71</sup> (2005) 145 FCR 442 at [78].

particular areas? Is the putative native title claim group an impermissible hybrid of distinct groups which should be separately identified as such?

The determination must also specify the nature and extent of other interests and the relationship between them and the native title rights and interests. In remote areas this may not pose much of a problem. In areas where there has been a degree of dealing with the land and waters, it may require extensive research.

### **Consent determinations**

Before the Court can make a consent determination under s 87 of the NT Act it must be satisfied that the order proposed is "within the power of the Court" and "appropriate". The same requirements apply to a consent determination under s 87A where a part of the area under claim is involved.

Those statutory terms "within power" and "appropriate" reflect a principle of general application whenever a Court is asked to make orders pursuant to an agreement between parties to litigation before it. The Court cannot make orders by agreement which it would have no power to make in the absence of agreement. This does not mean that parties who have come to an agreed result must prove their case to the Court. They may have agreed that all the facts exist which support the orders which are sought. But if, for example, the parties to a native title determination application had agreed to a determination of native title rights and interests which were not interests in relation to land or waters, then the Court could not make a determination of such rights or interests. The Court could not make a determination which did not conform with s 225. That is because s 94A requires that it set out details of the matters prescribed in s 225.

The Court must also be satisfied that the proposed determination is "appropriate". This is an evaluative term and so has a somewhat elastic application. Where a determination of native title is made that determination binds not only the parties but is good against the whole world. Words like "to the exclusion of all others" do not apply to exclude only those who are parties to the proceedings. So evidence of the existence of a

proper basis for a determination may be required to reassure the judge that the agreement is rooted in reality.

The cases do not require that anthropological or other expert reports be put before the Court on each occasion although on many, if not most occasions such material has been submitted. It may be however, that a detailed statement of agreed facts, based upon materials contained in such reports or from other relevant sources would suffice. While there may be some variance in what individual judges may require to support a consent determination, there is no rule that the judge must always be provided with volumes of anthropological material. It may be, for example, that a State government has accepted oral accounts from some key members of the native title holders group and, having regard to its own archival materials, is satisfied that it can agree to the determination.

Whatever process is used the material before the Court must be capable of supporting the determination sought. If, for example, anthropological material or a statement of agreed facts were placed before the Court which were inconsistent with the definition of the native title holders group in the proposed consent order, the Court could quite properly require the parties to clarify the apparent inconsistency or amend the proposed determination.

### **Attempts to improve the system**

The Federal Court and the Tribunal have both tried, over the years since the NT Act was passed, to develop systems to improve the management of native title determination applications. In the Federal Court, this has included the identification of list judges in each State to take control of the management of the native title lists on a regional basis while claims were in mediation. Practices evolved between the Court and the Tribunal to support regional management. Groups of claims from the same region in a State were reviewed at the same time in the light of work plans and priorities which were proposed by the applicants, their representative bodies, the State Government and interested industry groups. The Tribunal itself produced regional work reports so that the

judge on a regional case management review could adopt and support, by court orders, appropriate timetables. At times the Court took a more active role in the development of some of its own ADR procedures using case conferences presided over by a Registrar. While these practices were more sophisticated than those which had existed previously, they could not change the labour intensive character of native title proceedings even when such proceedings were entirely focused on mediation. In each case there was a need under the NT Act for an authorisation process by the native title claimant group and the gathering of connection information to satisfy State governments that they ought to engage in the mediation process. There was only a limited number of anthropologists available to do that work and limited resources on the part of the representative bodies.

### **The 2007 and 2009 Amendments**

A Claims Resolution Review was commissioned by the Commonwealth Government and undertaken by Mr Graham Hiley QC and Mr Ken Levy in 2005. Their recommendations led to amendments to the NT Act effected by the *Native Title Amendment Act 2007* (Cth). The intention was to speed up the resolution of claims by conferring on the Tribunal more authority and legal power in mediations.

The new provisions were intended to enhance the powers and effectiveness of the Tribunal in the conduct of mediation proceedings. They were not intended to affect the constitutional distinction between its functions and those of the Court. They did not alter the essential character of native title proceedings as proceedings in the Court subject to its supervision and control. They did not overcome the inescapable burdens and costs associated with the application of the *Mabo* rules as transmogrified by the NT Act.

Recently the Attorney-General introduced a new Amending Bill into the Parliament which proposes a range of further amendments including returning to the Federal Court control of the mediation process. I will not comment further on those amendments. They are presently before the Parliament.

## **Conclusion**

From Federation to the present day, the battle for the advancement of Australia's indigenous people has been almost uniformly uphill. That is not to say there have not been significant gains along the way. The creation of statutory land rights schemes and the recognition of native title at common law have undoubtedly been significant advances. Against the dismal scenarios of dysfunctional communities which dominate the news headlines, there are stories of communities and community leaders striving for major improvements in the life of their people and the recognition of their culture and the customary land title which is an expression of it. Many of these leaders have attended endless meetings and negotiations protracted over many years to secure outcomes. They are the unsung heroes of the native title process. The effort seems relentless and sometimes the rewards seem elusive. However, the acceptance of indigenous land title agreements by governments and by pastoral and mining industries, the increasing sophistication of such agreements to ensure that their benefits flow to those who should benefit from them and the increasing awareness of indigenous culture and customary land rights in Australia – indicate that there has been progress and that progress continues although at a pace which is far too slow for many involved in and observing the process.