

# THE LOST PROMISE OF MABO: AN UPDATE ON THE LEGAL STRUGGLE FOR LAND RIGHTS IN AUSTRALIA WITH PARTICULAR REFERENCE TO THE WARD AND YORTA YORTA DECISIONS

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## Abstract / Résumé

In 1992, the *Mabo* decision was handed down by the High Court of Australia. The judgement was heralded as marking a great leap forward in the historico-legal struggle of Indigenous rights in or in relation to land. This paper argues that the case symbolised hope, aspiration and a heightened willingness, on the part of the judiciary, to respond to racial and legal injustice. Yet, the paper also concludes that the promise contained in *Mabo* has not been fulfilled and that more recent decisions of the High Court, such as *Ward* and *Yorta Yorta*, have helped undermine that hope and promise, so much so that the pursuit of Native title might not be the most beneficial course available to those seeking greater land justice.

En 1992, la High Court de l'Australie a rendu le jugement *Mabo*, qui a été salué comme un grand bond en avant dans la lutte historique et juridique pour les droits territoriaux des Autochtones. La présente communication met de l'avant que le cas *Mabo* a symbolisé l'espoir et les aspirations des Aborigènes, ainsi qu'une bienveillance accrue de la part du système judiciaire de réagir aux injustices raciales et juridiques. Pourtant, l'auteure conclut que la promesse contenue dans le jugement *Mabo* n'a pas été réalisée et que les décisions plus récentes de la High Court, telles que les jugements *Ward* et *Yorta Yorta*, ont sapé quelque peu cet espoir et cette promesse, à telle enseigne que la poursuite des droits de propriété autochtones pourrait ne pas être le meilleur moyen à la disposition des personnes et des groupes qui recherchent la justice en matière de revendications territoriales.

## Introduction

This paper seeks to examine the historico-legal struggle of Indigenous Australians for recognised rights in, or in relation to, land, once contact with the British colonisers had occurred. In so doing, it analyses the method of acquisition of land by the British Crown, in 1788, and the effect of that acquisition process on the ability of Indigenous people both to steward and control the land as well as to use and enjoy its spiritual and physical offerings.

The paper briefly traces the legal impact of colonization and the consequent struggle for land rights through the legislative forum, but it focuses more fully on how the common law (largely through the *Mabo (No2)*<sup>2</sup> decision in 1992) encouraged hope and gave rise to a promise of a better deal in regard to land rights. The paper explores how subsequent legal developments have made that promise seem a little empty leaving a dissonance between aspiration and reality. It is argued that the symbolism of *Mabo (No2)*<sup>3</sup> today represents something of a taunt; beguiling and empty words that have left Indigenous people and their supporters sceptical of the common law as a tool for achieving equality and change. It is also suggested that the 'hope' engendered by *Mabo (No 2)*<sup>4</sup> needs to be re-envisioned as ultimately more of a tantalizing dream; an elusive aspiration or a false hope. Finally, the paper briefly considers what may have contributed to the dissonance between promise and practice.

## The Story of Annexation

It is often recorded that, in 1770, James Cook, a captain in the British Navy, claimed the land later known as Australia, for the British Crown. For decades of Australian school children, Cook was seen as a hero and founding father of the Great South Land but as further details of the acquisition and its consequences came to light, other narratives emerged which began to question the process by which Indigenous Australians were denied access to the land that had belonged to their forebears for several millennia.

Given the rush by major powers to colonise during the eighteenth and nineteenth centuries, the invasion of Indigenous lands by militarily superior powers during this time was not an unusual phenomenon. Generally, it involved varying degrees of force and subjugation. To that extent the Indigenous experience in encountering Cook and his men was nothing exceptional but what did make the confluence stand apart are the instructions with which Cook was issued and on which he was supposed to conduct his interaction with the locals. The Admiralty's instruc-

tions to Cook issued in 1768 contained the following limitations:

'You are also *with the consent of the Natives* to take possession of convenient situations in the country in the name of the King of Great Britain, or if you find the country uninhabited take possession for His Majesty by setting up proper marks and inscriptions as first discoverers and possessors.'<sup>5</sup>

These instructions left open whether a simple courtesy was being afforded to the Indigenous population or alternatively whether the instructions contained an inherent recognition of Indigenous rights in land; interference with which Indigenous people were being asked to consent to.<sup>6</sup>

Ultimately, the Admiralty's instructions were not followed and Cook simply claimed *Terra Australis* on behalf of the British Crown, by-passing any consent requirement. Cook's attitude, in not respecting any pre-existing rights or interests in land of the prior inhabitants was not one that proved to be exceptional. Nettheim, citing Reynolds, suggests that the reason for such disregard of the imperial government's instructions is made apparent in Sir Joseph Bank's testimony to the House of Commons' Committee on Transportation in 1785.<sup>7</sup> That testimony incorrectly claimed that Indigenous people lived mainly on the coastal fringes of New South Wales and thus represented only a very small, perhaps even, negligible population. Accordingly, it was rationalized that as their presence was almost non-existent, Indigenous people could not have any rights worthy of protection.<sup>8</sup> Apparently such a view was common, leading Flannery to note in *The Explorers* that Sir Thomas Mitchell, of Australian inland fame, was indeed quite unusual in 'recognizing and wishing to perpetuate a sense of prior Aboriginal ownership of Australia.'<sup>9</sup>

The marginalisation of the Indigenous population, evident in Cook's by-passing of the consent requirement, fed very easily into the legal doctrine of *terra nullius*; a term meaning land belonging to no-one. (Note that an alternate meaning to this term can be found in the words of Yunupingu, a present day elder of the Gumatj clan, at Yirrkala, on the Gove Peninsula. He said:

We [Indigenous people] learned that [English common] law told them [the English colonisers] a story called terra nullius, which meant that if you go to a land where the people don't look like you or live like you, then you can pretend they don't exist and take their land.'<sup>10</sup>

The denial of the very existence of an Indigenous population provided the socio-political basis for the adoption of the legal doctrine of *terra nullius*.<sup>11</sup> It followed that application of this doctrine meant that if Australia belonged to no-one and was, therefore, 'uninhabited' or 'desert

and uncultivated,' then it was impossible for the 'settlers' to enter into a treaty with previous land owners. Previous owners did not exist.<sup>12</sup> Further, if the land belonged to no-one it would have been most illogical to acknowledge pre-existing laws belonging to prior inhabitants who, in the eyes of the law, did not exist.

However, law like history, has the potential to engage in an element of myth and the fact that British officials, initially and after occupation, began to encounter the presence of dark-skinned people (whose difference and mere existence both frightened and intrigued them) set reality and the myth contained in the doctrine of *terra nullius* on a collision course.<sup>13</sup>

As evidence of resistance to and/or collaboration with British colonisers became more prevalent, it consequently became increasingly difficult to maintain the delusion that Australia had no prior occupants.<sup>14</sup> Inter-cultural clashes together with examples of inter-cultural collaboration provided undeniable proof of Indigenous existence. That there now rages a dispute, as to the extent of Indigenous fatalities in post-contact conflict, does not alter the fact that Indigenous people had a presence in Australia, at the point of contact and thereafter.<sup>15</sup> Any acknowledgement of conflict or collaboration points to the prior occupation of Indigenous people; an occupation that threatened the legal underpinning of the *terra nullius* doctrine.

One way of dealing legally with the apocrypha that Australia had no prior occupants, when evidence of their existence was abundant, was to rely on the 'extended' doctrine of *terra nullius*.<sup>16</sup> Such a doctrine acknowledged the physical existence of Indigenous people but deemed them to be so barbarous as to be incapable of possessing any settled law. However, this doctrine sat awkwardly with other court decisions that recognised Indigenous institutions and customs. For example, Chief Justice Forbes, found in the case of *R v Ballard or Barrett*, that intra-Aboriginal crimes should be settled according to Aboriginal people's own customs and Justice Dowling, in the same case, stated that he knew 'of no reason human, or divine, which ought to justify us interfering with their *institutions* (emphasis added) even if such an interference were practicable.'<sup>17</sup> Accordingly, the complaint of Indigenous barbarity was somewhat difficult to maintain in the early nineteenth century. If Indigenous people had customs and institutions, how lawless could they have been?

Given the difficulties evident in applying the *terra nullius* doctrine, one is led to ask why that doctrine was embraced in the first place and why continued adherence to it was so strong? The answer to these questions seems to lie in the three documented modes of acquisition in

relation to new territories. According to the legal scholar, Blackstone, new territory could be acquired by: (a) settlement; (b) conquest; or (c) cession.<sup>18</sup> Acquisition by settlement is prefaced on the presumption that the land is uninhabited and, therefore, can be 'settled,' whereas conquest and cession necessarily involve recognition of a prior occupier, who is displaced. Legally, it follows that if Australia were settled, as much of the law of England that was applicable to the colonists' own 'situation and the condition of the infant colony' was received into Australia.<sup>19</sup> Hence, the colony was governed by the laws of England, in conjunction with the law that was made in Australia. There was no responsibility to rely on, alter or repeal any pre-existing law of any prior inhabitants because there were neither prior inhabitants nor prior laws with which to contend. By contrast, if Australia were acquired by way of conquest or cession, different legal principles were applicable. For example, cession (by treaty) or conquest would have seen the laws of either those surrendering or those who had been conquered, remaining in force, until such time as those laws were replaced by the laws of the invader.

Annexation by 'settlement,' together with the British Crown's acquisition of sovereignty, operated to deny Indigenous people any continuing sovereignty. Hence, when the English legal doctrine of tenure was imported, as a consequence of the acquisition process, all land in Australia was held 'of' the Crown.<sup>20</sup> The Sovereign was the ultimate owner or Paramount Lord and no allodial holdings were recognised.<sup>21</sup> This paradigm provided no space for the recognition of Indigenous law, even if it were found to exist. In being law that was not dependent on ultimate Crown ownership, Indigenous law had no place in the doctrine of tenure.

The collision course between myth and reality, referred to above, was not resolved legally, until 1992, when the *terra nullius* doctrine was finally overturned and the truth of Indigenous people's presence, at contact (and later), on the land of their ancestors, together with the recognition of their law, customs and traditions, was acknowledged.<sup>22</sup> With the overturning of the *terra nullius* doctrine and the gentle re-casting of the all-pervasiveness of the doctrine of tenure, there emerged the possibility of recognition of Native title; a title which is underpinned by the continued existence of Indigenous customs and traditions that survived the acquisition of British sovereignty.

## The Legal Struggle for Land Rights

The legal struggle for the recognition of rights in or in relation to land in Australia was binary; it involved both the common law and legislation. It was also a struggle that took some time to find momentum. Many factors may have contributed to the delay, not the least of which were

the diseases that ravaged Indigenous Australia, taking a serious toll on its Native inhabitants. For example, small pox alone allegedly wiped out between 30–60 percent of the estimated population of at least 750,000, in 1788.<sup>23</sup> With steadily decreasing numbers, one assumes it would have been difficult to focus on the assertion of rights. Further, whilst Indigenous people fought for Australia in two world wars the Commonwealth's right to make laws for them was only confirmed in 1967 when an amendment to s 51 (xxvi) of the Constitution (the race power) was supported in a referendum by 91% of voters.<sup>24</sup> The same referendum resulted in the deletion of s 127 of the Constitution which had read: 'In reckoning the numbers of the people of the Commonwealth, or of a State or other part of the Commonwealth, Aboriginal Natives shall not be counted.'

Despite these debilitating factors, the legal push for land rights, by Australia's Indigenous population, did eventually come but it was not until the 1960s and 1970s. It is arguable that the push is best understood as part of a broader, developing and sometimes militant, worldwide struggle by minorities, for political, legal and social recognition. In Australia, in 1966, the Gurindji pastoral workers led the Indigenous struggle, when, they staged the Wave Hill 'walk-off.' The immediate trigger, causing the Gurindji to withdraw their labour and physically walk off the Wave Hill cattle station (situated in a remote part of the Northern Territory) was dissatisfaction with inadequate pay and conditions, provided by the Vestey group, which leased the station. Having left their workplaces, the Gurindji then camped on traditional land at Daguragu and effectively staged a 'sit-in' until the Wave Hill lease was handed to their representative, the elder, Vincent Lingiari, in 1975, by the then Labor Prime Minister, Gough Whitlam.<sup>25</sup>

While the Gurindji's struggle was unfolding, the common law was used in another attempt to establish Indigenous rights in land.<sup>26</sup> A legal case was mounted, in which it was argued that the Yolgnu people from Arnhem Land, had rights in land. The case, *Milirrpum v Nabalco*, often referred to as the Gove case, was decided in 1971.<sup>27</sup> The intention of Milirrpum's counsel was to establish Indigenous rights in land and then use those rights to stave off bauxite mining (by the mining company, Nabalco). Yet, from the Yolgnu's perspective, the case was unsuccessful. Whilst Justice Blackburn did find that the Yolgnu had a system of laws, those laws did not accord with common law notions of property and hence, the Yolgnu were held not to have property in land. Partly in response to the failure of that case to achieve recognition of Indigenous rights in land, through the common law, the push began to focus on the development of land rights through the passing of legislation.

In pursuit of legislative reform, Indigenous people went to Canberra,

setting up a 'tent embassy', from which they petitioned the Federal Parliament. Eventually, the Labor Party, which was in opposition at the time, promised to introduce land rights legislation if it were elected. When it did gain office, it set up the Woodward Royal Commission as a precursor to the drafting and passing of the *Aboriginal Land Rights (Northern Territory) Bill*. However, before Labor could enact any legislation, it lost office. It then was up to the Liberal Party, led by Malcolm Fraser, to pass the *Aboriginal Land Rights (Northern Territory) Act*, which it did, albeit with amendments that considerably cut back the Woodward Royal Commission's recommendations. For example, although Woodward's recommendation that vacant Crown land potentially be available to claimants was included in the legislation, other recommendations were left out. The recommendation that claimants also be given recourse to other land and resources in lieu of that lost, was one of those deleted.<sup>28</sup>

### The Struggle for Land Rights Legislation

Different states and territories took up the mantle of legislative reform for the establishment of land rights, at different times. Land rights legislation now exists in all states with the exception of Western Australia, the most geographically vast state of all. Other states, such as Tasmania, were very tardy in developing specific legislation to assist their Indigenous populations gain access to land but eventually did so. No state or territory makes land already alienated, in fee simple, by the Crown, available as the subject of a claim. In lay terms, this means that if an individual already 'owns' land, it is not claimable by Indigenous people under the relevant legislation.

Unfortunately, much of the land rights legislation is designed to make access to land, by Indigenous people, dependent on sequential steps involving various approvals and support, for example by parliament or the Minister. It is arguable that such requirements may be used negatively causing delay, obfuscation and in some cases denial of access to land.

Perhaps with the exception of the *Aboriginal Land Rights (Northern Territory) Act 1976*, the extent that legislation has permitted or encouraged the acquisition, by Indigenous people, of rights in land, has not been very extensive.<sup>29</sup> For example, in Tasmania, land held by the Aboriginal Land Council amounts to 0.06% of land in the state.<sup>30</sup>

The land rights legislation covering the states and territories of Australia is often characterized as tri-pronged. These prongs are :

- [the] return of land which is culturally significant;
- compensation for dispossession and loss [and];
- [recognition of] land as an economic base and to facilitate viable

Aboriginal communities which can regenerate and be self sufficient.<sup>31</sup>

While these characteristics are worthy in themselves, it is unfortunate that their operationalisation through legislation has not led to greater land justice.

A summary of the land rights legislation in each state and territory is contained in Appendix A.

## **The Struggle for Rights in Land Through the Common Law**

### **From *Milirrpum* to *Mabo*: Laying *Terra Nullius* to Rest**

As noted above Indigenous plaintiffs used the common law as another avenue for the recognition and assertion of legal rights in or in relation to land. The common law is judge-made law, worked out through legal cases and based on precedent rather than the passing of Acts by parliaments.

As already observed, *Milirrpum v Nabalco* was one of the important, early cases that argued for land rights, through the common law. Although the plaintiffs were unsuccessful the decision was not appealed.<sup>32</sup> However, those seeking to test the existence of land rights through the common law persevered and were encouraged by two later cases. They were *Administration of Papua v Daera Guba* and *Coe v Commonwealth*.<sup>33</sup> In the first, Justice Barwick intimated that Native title could exist, while in the second, the whole court agreed that the issue of Native title was arguable if properly raised.<sup>34</sup>

The proposition that Indigenous people had rights in or in relation to land which survived the British acquisition of sovereignty, was argued in the landmark case, *Mabo (No 2)*.<sup>35</sup> That case gestated in the legal system for ten years. Its progress was marred by many obstacles, including the need to clarify whether legislation purporting to declare retroactively that, upon annexation, the islands off Queensland (including the plaintiffs' home island of Mer) were vested in the Crown, free from all other interests or claims, was valid.<sup>36</sup>

Ultimately, the High Court handed down its decision, in 1992, finding that the Meriam people were entitled to possess, occupy, use and enjoy the Murray Islands, of which Mer was one.<sup>37</sup> Unfortunately, the first plaintiff, Eddie Koiki Mabo, did not live long enough to hear the decision.<sup>38</sup>

In coming to its conclusion the High Court found that the question of British sovereignty was not justiciable in a municipal (Australian) court but the consequences of the acquisition of that sovereignty were differ-

ent from those previously understood.<sup>39</sup> For example, the Court found that absolute beneficial ownership of all land in Australia, by the British Crown, was not a concomitant of sovereignty. Instead, when the Crown acquired sovereignty it acquired radical or ultimate title. Radical title could co-exist alongside Native title and only in circumstances where Native title had been extinguished did the Crown's radical title blossom into full beneficial ownership.

Further, the High Court concluded that the common law of Australia recognised a form of title, known as Native title, which had its basis in the laws and customs of Indigenous people. Put another way, the origin and nature of Native title lay in the 'traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants of a territory' and '[t]he nature and incidents of Native title must be ascertained as a matter of fact by reference to those laws and customs.'<sup>40</sup> Change of and adaptation to those laws and customs was permissible so that they would not be frozen in time, but evidence of an ongoing connection to the land still needed to be established.<sup>41</sup>

### Redressing a 'Legacy of Unutterable Shame'

Yet, in order to find that Native title could even potentially exist, the Court had firstly to over-turn the fallacy of *terra nullius*; a doctrine discussed earlier. Presumably, Justices Deane and Gaudron were, at least in part, prepared to do so, because a denial of the applicability of the *terra nullius* doctrine helped overcome what they described as 'a legacy of unutterable shame.'<sup>42</sup> But overturning legal precedent, particularly when it is the precedent of the highest court in the land is not a task undertaken lightly.

Justice Brennan's judgement in *Mabo (No2)* raised several concerns regarding the re-directing and re-casting of established doctrines and principles. Nevertheless, despite his concerns he supported fundamental changes to principles and doctrines in cases where not to do so results in a rule which 'seriously offends the values of justice and human rights...[they being] aspirations of the contemporary legal system.'<sup>43</sup> He also observed the High Court's freedom to bring about change, by bypassing precedent, when he stated that:

Although our law is the prisoner of its history, it is not now bound by the decisions of courts in the hierarchy of an Empire then concerned with the development of its colonies.... [T]his court is free to depart from English precedent which was earlier followed as stating the common law of this country.'<sup>44</sup>

The key limitation that Justice Brennan placed on the Court's re-

positioning and re-directing of the law was one which prevents the adoption of rules 'that accord with contemporary notions of justice and human rights,' if that adoption would 'fracture the skeleton of principle which gives the body of our law its shape and internal consistency.'<sup>145</sup> But where change is necessary for reasons of justice, truth and morality it seems that, according to Justice Brennan, the only limitation on changing the law lay in the need to preserve its 'shape' and 'internal consistency.'<sup>146</sup> In practical terms, we must ask: 'if the rule were to be overturned...[would] the disturbance to be apprehended...be disproportionate to the benefit flowing from the overturning?'<sup>147</sup>

Clearly, Justice Brennan was in favour of the law being modified to reflect the values of a contemporary era so as 'to bring it into conformity with contemporary notions of justice' but he was against 'the skeleton of principle' being 'destroyed.'<sup>148</sup>

What seems to emerge from Justice Brennan's words is a moral underpinning to his position. His judgement appears to embrace a social policy element as well as a legally doctrinal re-direction. The same could be said of Justices Deane and Gaudron's joint judgement, which carefully detailed the pain of Indigenous dispossession and noted that 'the oppression and, in some areas of the continent, the obliteration or near obliteration of the Aborigines were the inevitable consequences of their being dispossessed of their traditional lands.' Those latter two judges ultimately concluded that '[t]he acts by which that dispossession in legal theory was carried into practical effect constituted the darkest aspect of the history of our nation.'<sup>149</sup> What was powerful about all of these judgements was the recognition that past legal practices had operated as weapons of harm and causes of Indigenous pain and suffering. In doing so, these judgements took an important early step towards reconciliation. They represented what Taft, in reflecting on Tavuchis and the discourse of apology, calls 'the public hearing of the inner conversation;' a conversation where it is necessary to identify and actually set out what constitutes the wrongdoing.<sup>50</sup>

### **Creating a Spirit of Hope**

The *Mabo (No 2)* decision generally encouraged an expectation of change. Its subtext was one of 'righting the wrongs.' It was anchored in the importance of truth, at least in so far as that concept exists, given that it is one necessarily moderated by memory and perspective. Further, it was a refreshing and inspiring judgement because, at last, respect was accorded to the existence and importance of Indigenous customs and traditions when Native title was defined by reference to them. Finally, the judgement encouraged aspiration, possibility and vision while

employing flexibility and creativity to come to its conclusions. Certainly, the judgement also had its limitations. For example, it did not provide an avenue for compensation where Native title was extinguished and while it overturned the doctrine of *terra nullius*, it did not embark on a complete re-vamping of the doctrine of tenure. Presumably, Justice Brennan thought that to undertake the latter would have fractured the 'skeleton of principle,' despite the fact that the doctrine of tenure is suggested by others to have been accorded an importance beyond that which it deserves.<sup>51</sup> However, overall *Mabo (No 2)* created a spirit of hope.<sup>52</sup> Many supporters of Indigenous rights found it uplifting and it seemed to represent a new phase of enlightenment and promise, concerning land justice issues. Indeed, according to Indigenous activist and lawyer, Noel Pearson, there was every reason to think that non Indigenous Australia should embrace *Mabo (No2)* wholeheartedly.<sup>53</sup> It was, after all: (a) a product of non Indigenous heritage, that is, of the English common law heritage and; (b) it recognised a title that 'could never result in anyone [in White Australia] losing any legal rights they held in land or in respect of land already.'<sup>54</sup> It was also a decision that Pearson has described as 'correct' and one which 'truly represented an opportunity to settle the question of land justice for indigenous people in the Australian nation.'<sup>55</sup> True it was, that *Mabo (No2)* represented a compromise that was weighted in favour of non Indigenous Australians but given that the legal gains, for Indigenous people, in regard to land, over the preceding 204 years had been quite minimal, the decision still inspired hope and optimism.<sup>56</sup> It represented a promise that things would improve for Indigenous Australians.

### **Legislative Reaction to *Mabo (No2)***

It is important to note that after the handing down of *Mabo (No2)*, the Australian legislature passed the *Native Title Act 1993*.<sup>57</sup> In retrospect it can be seen that this Act has contributed to the erosion of the promise in *Mabo (No2)*.<sup>58</sup> The Act was a direct response to the *Mabo (No 2)* decision and both its passage through parliament and its application thereafter, caused ructions throughout the community. (The Act was amended in 1998 and again those amendments stirred strong reactions in the community).<sup>59</sup> Some supporters of the *Mabo (No2)* decision were sceptical about the need for an Act at all, but many others thought that the legislation upheld, crystallized and protected the rights flowing from the common law finding.

The Act defined Native title in s 223 and it set up a procedure to deal with claims.<sup>60</sup> It also validated land titles that came into existence after the passing of the *Racial Discrimination Act 1975 (Cth)*. There was an

argument that the post 1975 'ordinary' titles might not have been valid because, if those titles had the effect of extinguishing Native title and no compensation for loss of Native title had been paid, the act of issuing the 'ordinary' title, could be deemed discriminatory and therefore, in breach of the 1975 Act. The discrimination would have arisen from the fact that extinguishment of 'ordinary' titles by the Federal government is subject to the constitutional right to compensation for loss of property whereas no such compensation was available for the loss of Native title.

The Act's strengths have been described as: (1) the 'recognition and protection of common law rights' and; (2) '[the] protection against wholesale extinguishment [of Native title] by hostile governments' while its weaknesses have been described as: (1) 'the unfair allocation of certainty;' (2) 'the granting of party status to third party interests whose rights and interests were already secured under the common law- or by the NTA;' (3) its focus on 'procedures rather than substantive rights;' (4) 'the suspension of the Racial Discrimination Act and the breach of the International Convention' on the Elimination of All Forms of Racial Discrimination.<sup>61</sup> This list of weaknesses highlights the beginning of the failure to live up to the promise of *Mabo (No 2)*.<sup>62</sup> Unfortunately, the scope of this paper does not permit a detailed analysis of these strengths and weaknesses<sup>63</sup> but it is useful to note that the allocation of certainty is definitely weighted in favour of non Indigenous titles and that such an allocation represents a critical factor in inhibiting the effective 'workability' of the Native title regime embodied in the Act.<sup>64</sup> The Act makes very few aspects of Native title certain, save, of course, its extinguishment. By contrast, whether Native title exists at all and by what standards its existence is to be tested, are issues that are far from certain. Clearly, the lack of certainty has important implications for Indigenous litigants. If the test by which the existence of their rights is to be adjudged is still a 'work in progress,' how do they know what case to prepare and put before the court? What tack should they take to deal with the shifting sands? Perhaps this lack of predictability might go some way to explaining why Justice Kirby has described Native title as 'an impenetrable jungle.'<sup>65</sup>

### **Has the 'Promise' of *Mabo (No2)* Been Eroded?**

In this section I examine whether the 'promise' contained in the *Mabo (No2)* decision has been eroded and, in that regard, I focus particularly on two recent cases dealing with Native title claims. They are the *Ward* decision,<sup>66</sup> which is sometimes referred to as the Mirriuwung Gajerrong decision, and the *Yorta Yorta* decision.<sup>67</sup>

In the 2003 Sir Ninian Stephen Annual Lecture, Noel Pearson, re-

ferred to these two cases and claimed that before they were handed down, Native title, in Australia stood for the propositions that:

- (a) non Indigenous title granted to 'settlers,' by the British Crown, after annexation was indefeasible. That is Native title, in Australia, confirmed 'the privileges and titles of the settlers and their descendants' and 'the common law of this country, [does] not allow us to derogate from those accumulated privileges';<sup>68</sup>
- (b) 'all of those lands that remained after 204 years, unalienated, was the legal right of the traditional owners';<sup>69</sup> and
- (c) in areas of land covered by pastoral leases and national parks, where Native title may co-exist with Crown title, if there is any inconsistency between these two titles, the Crown title will always prevail.<sup>70</sup>

In summary he said that:

'the whitefellas get to keep everything they have accumulated, the blackfellas should now belatedly be entitled to whatever is left over and there are some categories of land where there is co-existence and in the co-existence the Crown title always prevails over the Native title.'<sup>71</sup>

Whereas, after the *Yorta Yorta* decision, Pearson thought a more apt statement of the law was:

'...[T]he three principles of Native title are that the whitefellas do not only get to keep all that they have accumulated, but the blacks only get a fraction of what is left over and only get to share a coexisting and most subservient title where they are able to surmount the most unreasonable and unyielding barriers of proof-and indeed only where they prove that they meet White Australia's cultural and legal prejudices about what constitutes 'real Aborigines.'<sup>72</sup>

### The *Ward* and *Yorta Yorta* Decisions

The *Ward* decision, like the *Yorta Yorta* decision, dealt with Native title as defined under the *Native Title Act* 1993.<sup>73</sup> The claim in *Ward's* case was made by the Mirriuwung Gajerrong people, in 1994, and was for 8,000 square kilometers of land, some of which was in the East Kimberley region of Western Australia, while other parts were in the Northern Territory. The area of land under claim was vast and included the Ord River Irrigation Area, Lake Argyle and Lake Kununurra, Glen Hill Pastoral lease, part of the Argyle diamond mine, Keep River and Mirima National Parks, some Aboriginal-owned land, areas of vacant crown land that had formerly been part of a pastoral lease, 3 islands in Cambridge Gulf and part of the inter-tidal zone of the Gulf.

The decision involved four appeals from the Full Federal Court and the key issues under consideration were: (a) whether there could be partial extinguishment of Native title rights and interests; and (b) 'what principles should be adopted in determining whether Native title rights and interests have been extinguished in whole or in part.'<sup>74</sup> The High Court remitted several issues to lower courts for hearing but it did make some important findings in regard to the definition of Native title and the meaning of 'tradition' and 'traditional', for example.<sup>75</sup>

It was argued by the claimants in the *Ward* case that the definition of Native title needed to be worked out, by reference to pre-existing case law.<sup>76</sup> The Court rejected this supposition and found that the *Native Title Act* 1993 not only contained a definition of Native title on which it was compelled to rely but that the definition in the legislation was different from the one available in case law, such as *Mabo (No2)*.<sup>77</sup> The Court stated that '[t]he statute lies at the core of this litigation.'<sup>78</sup> In brief, subsection (c) of s 223 imposed a further requirement over and above the common law definition of Native title. While subsections (a) and (b) effectively re-iterated the common law by defining Native title with reference to '*traditional laws* acknowledged and '*traditional customs* observed' [emphasis added] and requiring that 'those laws and customs have a *connection* to the land or waters' [emphasis added] subsection (c) went further. It required that Native title rights and interests be 'recognised by the common law of Australia.'

The inclusion of this additional requirement poses some difficulties when defining Native title because as the High Court stated, the Indigenous relationship to land is an essentially spiritual one but according to the Act, that spiritual relationship to land must be understood in terms of rights and interests. Rights and interests are what the common law recognises and Native title must be seen in those terms, too, in order to comply with s 223 (1) (c) of the Act. The conundrum for the majority was captured in the words of Chief Justice Gleeson and Justices Gaudron, Gummow and Hayne when they said:

'The spiritual or religious is translated into the legal. This requires the fragmentation of an integrated view of the ordering of affairs into rights and interests which are considered apart from the duties and obligations which go with them. The difficulties are not reduced by the inevitable tendency to think of rights and interests in relation to the land only in terms familiar to the common lawyer.'<sup>79</sup>

Nevertheless, despite being aware of the difficulties which reliance on s 223 of the *Native Title Act* 1993 caused, the majority found that it was compelled to rely on that section when deciding this case. Given

this, it is worth exploring a little further some of the difficulties that such reliance may cause.

### **Fitting the Proprietary Mould or Opening Up the Recognition Space?**

Perhaps one of the difficulties of reliance on s 223 (1) (c) of the Act is that if Native title rights have to be recognised by the common law, as the majority thought they did, it may potentially foreclose more imaginative understandings of Native title by a process of 'fitting' the unknown into the mould of the known. In that process of moulding, shaping and re-casting Indigenous customs and traditions so that ultimately they look like something non-Indigenous outsiders understand or know, it may be that their integrity is harmed, making them lose something of their original essence. An alternative may be to respect difference and acknowledge that although traditional customs and laws might bear no synonymy with the common law, they should be upheld anyhow. Further, to retain the common law requirement contained in s 223 (1) (c) may effectively cause that section to act as a filter to keep out any customs or traditions that are regarded as too removed from the common law. As I have observed elsewhere, this would be unfortunate and may result in opportunities for interpreting aspects of Native title that are different from the cultural and legal understandings that non-Indigenous people bring to the matter, being denied.<sup>80</sup> If the High Court is to be taken seriously when it refers to Native title as a *sui generis* right, the uniqueness of that right should not be compromised by legislative interpretation that forces the right to conform to common law understandings, in order to provide recognition.<sup>81</sup>

Several years ago, in reflecting on how Native title should be characterized, Pearson formulated the term, 'recognition space.' To him, Native title provided a place where Indigenous customs and traditions could be recognised.<sup>82</sup> Those customs although often foreign to the common law, found in Native title a place, where like faces in a mirror, they were reflected, so that others could see and understand them.

By employing this conception, Native title can be seen as providing a medium for interpretation or reflection of Indigenous customs and traditions. At times these customs and traditions will be akin to known rights in the common law such as proprietary, personal and usufructuary rights but at other times there will be no synonymy with the common law at all. Where Indigenous rights have no equivalence with rights known to the common law, compliance with s 223 (1) (c) may cause these unique and special Indigenous rights to go unrecognised due to their lack of likeness to known rights. If the common law cannot recognise them,

they cannot be Native title rights. Such an approach imposes severe limitations on the establishment of Native title rights.

Perhaps because of a fear that Native title may go unrecognised there has been a tendency by some legal academics to try to fit Native title into a proprietary model; ie to see it as a form of property.<sup>83</sup> If it looks like property, then it will be recognised by the common law and will satisfy the requirement of s 223(1) (c). Yet, to take this approach is less than satisfactory. As Webber states:

‘[I]ndigenous title is frequently discussed as though it were simply another kind of interest affecting land, slipped into the structure of Australian property law. The implications are thoroughly captured by determining the content of indigenous law according to the rules of indigenous customary law, examining to what extent the title has been extinguished by prior acts of the non-Indigenous sovereign, and then enforcing the remaining interests. That view of indigenous title, is, however, altogether too limited, not just because it misunderstands what the recognition of indigenous title necessarily involves. Indeed, it mischaracterizes the very nature of indigenous title as legal doctrine.’<sup>84</sup>

Another problem with this approach is that it may also lead to a process of ‘rights reductionism’ and could result in the ‘delegitimation of Indigenous rights.’<sup>85</sup>

It is suggested that a better way of approaching the problem of the restrictions inherent in s 223 (1) (c) is to reform the statute, rather than trying to fit ‘square pegs’ into ‘round holes,’ which is the effect of ‘forcing’ Indigenous customs and traditions to find a synonymy with common law rights in cases where none exists.

### **Purposive Interpretation: Looking to the Intention of Parliament**

There is good reason to repeal s 223 (1) (c) in that, arguably, the legislature never intended to go beyond the common law definition of Native title when it was devising the *Native Title Act* 1993. It can, therefore, be argued that subsection ‘c’ is an aberration. Indeed the *Explanatory Memorandum* to the *Native Title Bill* 1993, stated that:

The Commonwealth’s major purpose in enacting this legislation is to recognise and protect Native title.... Native title is defined as the rights and interests that are possessed under the traditional laws and customs of Aboriginal peoples and Torres Strait Islanders in land and waters and that are recognised by the common law. The Commonwealth has sought to adopt the common law definition.<sup>86</sup>

Even as late as 1997 when the *Native Title Amendment Bill* was being introduced, the *Explanatory Memorandum* to it stated that: 'The NTA adopted the common law definition of 'Native title'.'<sup>87</sup> These statements together with statements by Senator Gareth Evans,<sup>88</sup> the Attorney General in 1993, and Senator Minchin<sup>89</sup> suggest that subsections (a) and (b) of s 223 (1) would have been sufficient to import the common law definition of Native title into the Act but that was not done. More was included and when the High Court decided the *Ward* and *Yorta Yorta* cases on the basis of the Act in force (including s 223 (1) (c)) its decisions contributed to the eroding of the promise in *Mabo (No 2)*.<sup>90</sup> The long struggles for land rights recognition in the form of Native title were lost. In the case of the Yorta Yorta people nine years of pursuing land rights along 1,860 square kilometers along the Murray River had come to nothing. The hurdle was raised too high, and the threshold that the claimants were expected to satisfy was unrealistic.

According to Pearson, the High Court, itself, was to blame for choosing to interpret s 223 (1) (c) as it did in the *Yorta Yorta* case.<sup>91</sup> He complained that in the Court's

'flawed and discriminatory conceptualization of Native title and in their (sic) egregious misinterpretation of fundamental principles of the *Native Title Act*, they (sic) are destroying the opportunity for Native title to finally settle the outstanding question of indigenous land justice in Australia.'<sup>92</sup>

Whilst it is true that the outcomes of the *Ward* and *Yorta Yorta* decisions were very disappointing, there is an argument that the High Court, in being shackled by the restrictions that s 223 (1) (c) imposed, had little choice other than to define Native title in the manner in which it did. Such a view is underpinned by more of a literalist approach to statutory interpretation. Yet, reliance on a literalist approach has its limitations and has been avoided in the interpretation of many statutes relating to land law.<sup>93</sup> A viable alternative may be to apply a purposive approach because it is capable of yielding outcomes of integrity which are also workable. If such an approach were to be employed in the present circumstances, recourse to the parliamentary debates preceding the passing of the *Native Title Act* 1993 would be useful. Those debates suggest that the purpose of the subsections in s 223 was to re-iterate the common law definition contained in *Mabo (No2)*.<sup>94</sup> If that approach had been taken by the High Court in recent cases on Native title, the common law jurisprudence developed both here and in Canada could have been used to inform the decisions in *Ward* and *Yorta Yorta* and perhaps different outcomes would have ensued.<sup>95</sup>

It is notable that Justice McHugh, of the High Court, also gave strong

support to Pearson's belief that s 223 had been wrongly interpreted by the majority. He stated:

'I remain unconvinced that the construction that this Court has placed on s 223 accords with what the Parliament intended...this court has now given the concept of 'recognition' a narrower scope than I think the Parliament intended....'

But he acknowledged that given the position taken by the High Court, in earlier cases such as *Yarmirr* (known as the Croker Island case) and the *Ward* case, the position of Gleeson CJ, Gummow and Hayne JJ in *Yorta Yorta*, had to be taken as correct.<sup>96</sup>

In Pearson's view the position taken by Justice McHugh is the same as that taken by Paul Keating (former Prime Minister), Senator Gareth Evans, John Howard (present Prime Minister) and Senator Nick Minchin.<sup>97</sup> How the High Court could take a different view leaves Pearson bewildered but the Court did do just that and in so doing it is argued that it contributes to the gap between the promise of *Mabo (No 2)* and the reality that Native title is incredibly difficult to establish.<sup>98</sup>

### **Act of State and the Doctrines of Recognition and Continuity**

Another area where there is a disparity between the aspiration encouraged by the *Mabo (No2)* decision and the position of later cases concerns the effect on Indigenous occupants of the act of State, constituting the acquisition of British sovereignty.<sup>99</sup> Under the act of State doctrine it was possible for the British Crown to expunge any Indigenous rights at the point of acquisition of Crown sovereignty and so acquire not just radical title to the land but absolute beneficial title. Had absolute beneficial title been acquired, the related expropriation of Indigenous rights would not have been justiciable in a municipal court. However, if the British Crown did not expropriate all Indigenous rights on the acquisition of sovereignty, the Crown could only expropriate Indigenous rights later by virtue of authorizing legislation. Having become British citizens, Indigenous people would have been entitled to the protection of the common law of England; the law that governed the colony.<sup>100</sup>

Yet, until *Mabo (No2)* was handed down it was uncertain in cases where Indigenous rights survived the acquisition of British sovereignty, whether those rights needed to be affirmed by the Crown in a positive act of *recognition*, or whether it could be presumed that the surviving Indigenous rights simply *continued* to exist without the need for affirmation. McNeil referred to the first approach as the doctrine of recognition and the second as the doctrine of continuity.<sup>101</sup> Had the doctrine of recognition been applied in Australia, Native title could not have been found to exist in *Mabo (No2)* because no positive acts recognised the

continuance of Indigenous rights. Indigenous rights were just presumed to continue to exist. Hence, the position in Australia became one of application of the doctrine of continuity. Yet, this begs the question: exactly what continued to exist after the Crown acquired sovereignty? Pearson argues that there are two possible answers to a question such as this. They are:

- (1) 'the rights and interests established by the group's traditional laws and customs which continue after annexation;' or
- (2) 'the right to occupy and possess the land under the group's traditional laws and customs that continues after annexation.'<sup>102</sup>

He clearly favours the latter formulation referring to it as 'more subtle and correct'<sup>103</sup> and more at one with the approach taken in the Canadian case of *Delgamuukw*.<sup>104</sup> Weaving the concept of 'occupation' into the formulation has 'profound implications for the way in which one conceptualizes Native title and ultimately how one deals with proof.' According to Pearson '[t]his is why the High Court's error in relation to this issue was so prejudicial to the way in which they[sic] understood and approached the *Yorta Yorta* appeal.'<sup>105</sup> Unfortunately, Pearson does not pursue this argument further but two things are worth commenting on from what he does say. The first is that Pearson believes 'occupation ...excites recognition and protection of the common law.'<sup>106</sup> It is perhaps a small point but I would suggest that it is possession that the common law protects, rather than occupation. One is a conclusion of law and the other a conclusion of fact. Evidence of occupation does not necessarily lead to the conclusion in law, of possession. However, where it does, there is a nexus with Pearson's argument. If Indigenous people have a right to occupy land in accordance with their customs and traditions, and that right leads to the conclusion in law of possession, then that conclusion assists in satisfaction of s 223 (1) (c) of the *Native Title Act* 1993 because a right to possession is recognised by the common law.

However, the majority in *Yorta Yorta* saw the issue differently.<sup>107</sup> It found that where rights survived sovereignty they were the rights and interests established by the group's traditional laws and customs. In applying this principle the Court ultimately failed to find that Native title existed in the claim areas.<sup>108</sup> The hope that Native title could be established faded quickly. Even where there was evidence of great tenacity by the 300 parties to the action and even with a court<sup>109</sup> willing to take oral evidence on 'country,' in a temporary shelter at Rumbalara Community near Mooroopna, in rural Victoria and later at 65 other locations in Victoria and New South Wales, the outcome for the claimants was still unsatisfactory.

### **Interpreting Tradition: Whose and What Evidence?**

Another issue dealt with in the *Yorta Yorta* case, which has diminished the hope inspired and the promise promoted by *Mabo (No 2)*, is the question of how the Court chose to understand and interpret the concept of 'tradition' or 'traditional.'<sup>110</sup> The *Yorta Yorta* case raised fundamental questions about what level and type of 'tradition' is needed to support and nourish Native title, as well as how evidence to prove that is to be obtained.<sup>111</sup> In consideration of these issues it is helpful to reflect on the positions at first instance and on appeal in this case. At first instance, the *Yorta Yorta* led oral evidence, in which they asserted that they maintained a continuing system of customs and traditions which were grounded in a traditional relationship to the land; a relationship that was in evidence through continuous physical occupation of the land of their ancestors.<sup>112</sup> Justice Olney, however, chose to reject their evidence preferring the evidence on tradition and custom that was gleaned from an historical account of Indigenous laws and customs provided by the written records of Edward Curr, a squatter, in the district, in the nineteenth century. That the written record of an 'outsider' was favoured over the oral narratives passed from generation to generation by the *Yorta Yorta*, raises issues of both historiography and legal evidentiary standards. Is one account intrinsically more valid than the other? How much weight is to be given to the perspective of an 'insider' who may not fully appreciate the nuances of tradition and custom, as against the possibility that oral evidence may be more readily corrupted by the failure of memory?

When Justice Olney chose to favour Curr's account of the *Yorta Yorta*'s customs and traditions, he locked that group of people into a continuing observation of only those customs and traditions. As a result he found that although it may have been laudable for the *Yorta Yorta* to protect sites of cultural significance and to be engaged in issues of land and water management, these were not manifestations of an earlier cultural tradition. Curr had not mentioned them. His Honour stated that:

'The preservation of Aboriginal heritage and conservation of the natural environment are worthy objectives...but in the context of a Native title claim the absence of a continuous link back to the laws and customs of the original inhabitants deprives those activities of the character of traditional....'<sup>113</sup>

### **Interpreting Tradition: Frozen or Fluid**

In the same way Justice Olney found that although witnesses orally attested that a practice of the *Yorta Yorta* was to take only as much food

from the land and water as was needed, Curr had not observed this practice among the group in the 1800s, so any continuation of it, in contemporary circumstances was not seen as an example of the continuation of an earlier custom or tradition.<sup>114</sup> Justice Olney's approach seemed to require that the contemporary exercise of a tradition or custom be closely related to the custom as observed by Curr, if the practice in question were to be regarded as a continuation of a cultural tradition. If that were true, it left open the criticism that Justice Olney's approach froze in time traditions and customs. A long line of cases had previously found that customs and traditions could change and be modified to accommodate contemporary life. Indeed *Mabo (No2)* had commented that customs and traditions 'change and evolve as the society changes and evolves'<sup>115</sup> and in *Yanner v Eaton* fishing from a motorized boat was seen as a modern manifestation of a tradition or custom.<sup>116</sup> On appeal to the Full Federal Court in *Yorta Yorta*, the majority confirmed that some degree of change was permitted stating that the

'primary issue is whether the law or custom has in substance been handed down from generation to generation...[and that] it cannot now be accepted that the fact that an indigenous society has adopted certain aspects of the now dominant culture means that the society has necessarily abandoned its traditional connection with land or waters.'<sup>117</sup>

Chief Justice Black, in dissent, in the Full Federal Court, was also against a frozen rights approach. He did not think that the *Yorta Yorta* judgement at first instance employed a frozen rights approach but he thought the approach taken was too restrictive nevertheless.<sup>118</sup>

On appeal to the High Court the majority suggested that the ordinary meaning of the word 'tradition' was inapplicable. Normally that word meant the 'transmission of law or custom', 'from generation to generation' and 'usually by word of mouth'<sup>119</sup> but under s 223 of the Act the meaning was altered to incorporate two other elements. Those other elements are that: (1) the Indigenous traditions and customs date back to a time before British sovereignty was asserted and; (2) the rights or interests in land or water which are possessed under traditional laws acknowledged and traditional customs observed, require that the normative system under which those rights and interests are possessed, has been in continuous existence and has demonstrated a continuous vitality since the acquisition of British sovereignty.<sup>120</sup>

In summary, the traditions and customs need to relate back to the pre-acquisition of sovereignty period because the source of Native title lies in the normative rules existing in that period. Further, the chain of custom and tradition dating back to the normative system must be con-

tinuous. Although, the Court did not insist on the tracing of individual activities to the pre-acquisition period it did require evidence of a continuing body of law. That construction of 'tradition' is fairly onerous. Indeed Chief Justice Gleeson and Justices Gummow and Hayne said as much, when they stated, some might say somewhat unsympathetically, that:

'It may be accepted that demonstrating the content of that traditional law and custom may very well present difficult problems of proof. But the difficulty of the forensic task which may confront the claimants does not alter the requirements of the statutory provision.'<sup>121</sup>

The majority also acknowledged that difficult questions of fact and degree may emerge when assessing change to and adaptation of customs and traditions. It felt unable

'to offer any bright line test for deciding what inferences may be drawn or when they may be drawn, any more than [it could offer] such a test for deciding what changes or adaptations are significant.'<sup>122</sup>

However, the High Court did concede that some change to or adaptation of, traditional law and custom would not necessarily be fatal to a Native title claim.<sup>123</sup> Yet, it observed that in some cases change and adaptation would take on high levels of significance in deciding the issue but always the key question should be 'whether the law or custom can still be seen to be traditional law and traditional custom.'<sup>124</sup>

The majority's approach in regard to the question of interruption of use and enjoyment was even less liberal. On that issue the Court found that:

'acknowledgement and observance of those laws and customs must have continued substantially uninterrupted since sovereignty. Were that not so, the laws and customs acknowledged and observed *now* could not properly be described as the traditional laws and customs of the people's concerned.'<sup>125</sup>

Although the majority led by Gleeson CJ, Gummow and Hayne JJ noted that European settlement changed a lot of practices and had profound effects on Indigenous societies, substantial interruption still could not be tolerated if Native title were to be established.

'[B]ecause what must be identified is possession of rights and interests under traditional laws and customs, it is necessary to demonstrate that the normative system out of which the claimed rights and interests arise is the normative system of the society which came under a new sovereign order

when the British Crown asserted sovereignty, not a normative system rooted in some other, different society.<sup>126</sup>

Unlike the majority, Justices Gaudron and Kirby agreed that Indigenous communities could disperse and regroup later without losing continuity. Those judges believed that a community could demonstrate the requisite continuity if people identified as part of the community and recognised others as part of that community.<sup>127</sup> However, the majority found that there had been dispersal of the original Yorta Yorta people and that the people who had brought the Native title claim in this case were not part of the group who had originally held Native title.<sup>128</sup> Both the majority and the minority of the Court deferred to Justice Olney's findings at first instance but they drew different conclusions from those findings. The minority did not understand Justice Olney to have found that the Yorta Yorta people had ceased to exist as an identifiable group<sup>129</sup> whereas the majority did. The pedigree test for ongoing group membership appears to be quite strict and involves lineage checks of an extensive nature. By contrast, under old system title of Native title a good root of title can be established by 30 years worth of documentation.<sup>130</sup> Yet Indigenous people may be expected to establish that they have an inheritance line going back over two hundred years. This places a heavy onus on Indigenous claimants and one is led to ask if such inquiries are within the spirit and intendment of *Mabo (No2)*?<sup>131</sup>

### Diminishing the Spirit of Hope

Application of these principles left the Yorta Yorta people without Native title. Native title proved to be as elusive as ever<sup>132</sup> leaving one wondering whether such a technical test for the satisfaction of Native title was ever envisioned by the Court in *Mabo(No2)*.<sup>133</sup> Perhaps the answer is that it was never part of that Court's brief to devise a system for the mechanics of proof of Native title and so the Court would have had no view but one cannot help but feel that the present state of Native title is a long way from the encouragement, aspiration, understanding and regret that is seen, particularly in the words of Justices Brennan, Deane and Gaudron, in *Mabo (No2)*.<sup>134</sup>

That the disappointment associated with the failure of the Yorta Yorta people to prove Native title was not universal can be seen in the words of the press release issued by the Commonwealth Attorney-General's Department, immediately after the *Yorta Yorta* decision was handed down.<sup>135</sup> Its tone and message was in contrast to the spirit of *Mabo (No2)*.<sup>136</sup> The press release began in a triumphalist tone 'welcom[ing] the decision.'<sup>137</sup> It then asserted that the *Yorta Yorta* decision 'does not represent a departure from what had been understood at the time of the

*Mabo* decision about what is required for Native title to be established.<sup>138</sup> Yet, as the *Mabo* decision pre-dates the statute under which this case was decided and the statute as noted above, has been interpreted to reach beyond the common law definition spelled out in *Mabo (No 2)*, this statement seems somewhat curious.<sup>139</sup>

The tone of the following words is also worthy of comment. The press release stated that:

‘It is worth noting that the Preamble to the 1993 Act recognises that many Aboriginal peoples and Torres Strait Islanders, because they have been dispossessed of their traditional lands, will be unable to assert Native title rights and interest’<sup>140</sup>

Whilst it is all too true that dispossession of their traditional lands has meant that many Indigenous people are unable to satisfy the test of ‘connection’ necessary to establish Native title, there appears to be a lurking tone of dismissiveness in these words. The subtext seems to be that Indigenous people should not have had such hopes for Native title and that their disappointment in the lack of satisfaction of aspiration and expectation, should have been tempered by an awareness that the test for Native title was very difficult to satisfy. If this were the case, this position would be in sharp contrast to the jurisprudence of compassion that can be observed in *Mabo (No 2)*.<sup>141</sup>

Finally, the press release notes that:

‘It is important to remember that the Commonwealth Government provides a mechanism, through the Aboriginal and Torres Strait Islander Land Fund, that enables those indigenous Australians who cannot establish Native title, to obtain access to land.... In addition, Commonwealth and State land rights schemes are also available to assist indigenous peoples gain access to land of particular significance.’<sup>142</sup>

These words seem to deal with the loss and disappointment of Indigenous people in a peremptory fashion. They appear to give cursory attention to the fact that Indigenous peoples’ struggle for the assertion of either rights in or in relation to land have once again proved elusive. That Indigenous people are advised to direct their attention to the Land Fund and various land purchase schemes seems not only to be a tad dismissive but also representative of a lack of willingness to confront the obstacles placed in the path of effectively operationalising Native title in Australia.

### **‘Winning Native Title’ – Is There Such a Thing?**

Although the claimants in the *Yorta Yorta* case and many others failed

to establish Native title, a limited number of cases have been successful in establishing Native title.<sup>143</sup> In the few cases where this has been so Native title has not proved to be the great benefit that Indigenous people and their supporters had hoped. Again, there is a dissonance between aspiration and reality. That dissonance is well depicted in Michelle Riley's account of how Native title must be managed once it is established.<sup>144</sup> Instead of proving to be an advantage, Riley argues that for her people, the Nharnuwangga, Wajarri and Ngarla, it has been a costly burden. Since Justice Madgwick, made an order on 29 August, 2000 that her people held Native title in their claim area they have entered into several secondary agreements<sup>145</sup> and have had to set up a Prescribed Body Corporate (PBC) to hold Native title. This requirement is mandatory but the PBC has no income, assets or staff. The Corporation has no office, fax or computer but it has onerous administrative and reporting responsibilities. It has obligations as a fiduciary and a trustee but it does not have any funding for legal advice about what these obligations mean or for training members of its Governing Committee.<sup>146</sup> Riley concludes:

When we lodged our claim, we did not do it because we thought that we would get money or benefits. We did it because we thought that it would provide a future for our children. We did it because we thought it would mean that they would receive more respect for our sacred land and our laws than we ever did.

For us, getting Native title was never about money. But now that we have Native title, we find that we are losing it because we do not have the money to protect it.<sup>147</sup>

In the euphoria and excitement that followed *Mabo (No2)* it is unlikely that many contemplated such an unsatisfactory outcome.<sup>148</sup>

## Conclusion

It has become increasingly clear that the optimism which accompanied *Mabo (No2)* has dissipated.<sup>149</sup> The eleven years since that judgement was handed down have proved to be a period of ongoing struggle for rights either in or in relation to land. It has been a time marked by disappointment and frustration for claimants and their supporters.

There are many reasons that account for the change of mood and the diminution of optimism. They include the fact that the High Court is now differently constituted from the one which handed down *Mabo (No 2)*. Indeed all of the bench which was responsible for that decision has now retired with the exception of Justice McHugh<sup>150</sup> and the new Court has a reputation for greater conservatism.<sup>151</sup> Further, there has been a populist backlash against 'judicial activism' and 'judicial creativity,' which

has, at times, been fuelled by overt hostility from some members of the government.<sup>152</sup> These factors may be contributing to the Court's timidity in finding the existence of Native title.

Given that the 'promise' of *Mabo (No2)* has proved difficult to live up to, one is led to ask what can be done to improve the situation. In that regard three issues come to mind. They are:

- (1) reform of s 223 of the *Native Title Act* 1993 particularly by repealing subsection c;<sup>153</sup>
- (2) re-grouping and reconsidering strategies and;
- (3) turning to mediation instead of litigation.

The first point has been discussed above and repeal of s 223(1) (c) is recommended so that the definition of Native title can revert to the common law definition intended by parliament.

In regard to the second strategy, Pearson stated (some might say rather bravely) in his *Mabo* Lecture of June 2003 that, '[N]ative title is not a dead issue.'<sup>154</sup> Perhaps that is so but the promise of *Mabo (No2)* has certainly been eroded severely and several post- *Mabo* decisions have militated against that promise being fulfilled. Whilst Pearson may be correct when he says that Native title will continue to impact on the development of the natural resource industries,<sup>155</sup> it is also true that other strategies need to be developed to facilitate a fairer distribution of land in Australia.<sup>156</sup> Neither land rights legislation nor Native title have resulted in land justice, so perhaps it is time to think about a new form of title; one that is not rigidly tied to a strict proof of lineage<sup>157</sup> or alternatively to dependency on the doctrine of tenure.<sup>158</sup> Maybe it is time to conceive of a new form of statutory title. But for this to occur there would need to be the requisite political will and it would seem that this is absent at the present. Today's climate does not seem favourable to expanding the ways in which Indigenous people may gain access to land. True it is, that the politics of 'One Nation' are no longer overtly at the forefront but one explanation for why this is so is that those politics have now been 'mainstreamed' in Australian politics, evidence of which can be seen in Australia's attitude towards the detention of refugees seeking asylum.<sup>159</sup> Public sentiment would not presently appear to be in harmony with the further development of methods for land justice.

Without a will for radical reform attention has turned to mediation and negotiated agreements, such as Indigenous Land Use Agreements (ILUAs). Indeed, after the *Yorta Yorta* decision was handed down, the President of the Native Title Tribunal, Graeme Neate, suggested that mediation might be the best course of action for Indigenous claimants, as litigation had proved 'an onerous way to go.'<sup>160</sup> He alluded to improved skills and methods in negotiation today as compared with when

it was attempted by the *Yorta Yorta* people several years ago. Yet, mediation is not likely to be very effective unless the parties have equal bargaining power. Without that there is little incentive for compromising and re-positioning. If Indigenous people know that their recourse to Native title is unlikely to be successful and that the rights they may be able to enforce through land rights legislation are limited, one wonders how much they have with which to bargain.

### Appendix A

The following material surveys the legislation in each jurisdiction.

#### Northern Territory

The Commonwealth legislation, which covers the Northern Territory and is known as the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) is the most favourable in the country, to the acquisition of rights in land, by Indigenous people. This Act is sometimes known as the *Aboriginal Land Rights Act* or the *ALRA* and under it 40% of land, in the Northern Territory, has been successfully claimed by Indigenous people.<sup>161</sup>

Land rights in the Northern Territory are also subject to another Act, namely the *Pastoral Land Act 1992* (NT). This latter Act permits a successful claimant to acquire rights in land that is the subject of a pastoral lease.<sup>162</sup> Acquisition involves an excision process.<sup>163</sup> There are several points of intersection between these Acts and Native title; Native title being a common law doctrine now regulated in part, by legislation. For example, *Pareroultja v Tickner* held that a grant of an estate, in fee simple, to a Land Trust under the *ALRA* does not extinguish Native title.<sup>164</sup>

When enacted, the *ALRA* both directly vested existing reserves in Aboriginal ownership and provided mechanisms for land claims to be lodged by Aboriginal groups.<sup>165</sup> The latter process requires that Aboriginal claimants convince an Aboriginal Land Commissioner that they are the owners of the land in question, under Aboriginal law. If convinced of their claim, the Aboriginal Land Commissioner then makes a recommendation to the relevant Commonwealth Minister, suggesting that the land should pass to the Aboriginal people, by the grant of a title under Australian law. Hence the title that successful Aboriginal claimants receive is one that exists within the common law.

In 1987, important changes to the Act were passed. They introduced a ten year sunset clause into the *ALRA*, the effect of which is that the 5 June, 1997 marked the date on which any new claims can be brought

under the Act. By this date, 249 claims had been lodged and by 2002, 51 claims had been finalized, 26 withdrawn and 12 claimed areas had been added to the Schedule 1 of the Act.<sup>166</sup> Hence, although there are still claims to be decided there is now a limitation on the number of claims available under this Act.

### **South Australia**

In South Australia, there is no legislation permitting a claims procedure. The legislation in that state rests on a different premise, namely that of transfer and land trust. The *Aboriginal Lands Trust Act 1966 (SA)* sets up a transfer system, by which reserve land is transferred to a state-wide land trust, which acts for the benefit of the traditional Aboriginal owners of the land.<sup>167</sup> One of the drawbacks of this Act is that it does not permit any additional land to be reserved to the Trust.

### **Victoria**

The position in Victoria is similar to that of South Australia, in that the relevant legislation does not contain a formal claims mechanism. In Victoria, six Acts comprise the land rights legislation. They are (1) the *Aboriginal Lands Act 1970 (Vic)*; (2) the *Aboriginal Lands Act 1991 (Vic)*; (3) the *Aboriginal Land (Lake Condah and Framlingham Forest) Act 1987 (Cth)*; (4) *Aboriginal Lands (Aborigines' Advancement League) (Watt Street, Northcote) Act 1982 (Vic)*; (5) the *Aboriginal Land (Northcote Land) Act 1989 (Vic)*; and (6) the *Aboriginal Land (Manatunga Land) Act 1992 Vic*. The amount of land affected by these Acts is quite small. For example, the land affected at Lake Condah amounts to half of a square kilometer, while at Framlington Forest it amounts to 11 square kilometres and in Watt St, Northcote, a suburb of Melbourne, where an Aboriginal Community Centre exists, it amounts to the site of the community centre itself. One is left to conclude that the operation of the combined legislation has not greatly assisted the push for land rights through legislation in that state.<sup>168</sup>

### **New South Wales**

In New South Wales, Local Aboriginal Land Councils or the New South Wales Aboriginal Land Council hold land that was previously vested in a land trust under earlier legislation.<sup>169</sup> Today, the *Aboriginal Land Rights Act 1983 (NSW)* governs land rights in New South Wales. It permits claims to be made over permissible areas of Crown land. One of the Act's key features is that it does not require claimants demonstrate a traditional affiliation with the land. This approach is laudable, in that it arguably

provides implicit acceptance of the view that Indigenous people once had a relationship to the land under claim. By not requiring evidence of an affiliation with the land the Act also permits partial accommodation of the effects of government policies such as the forcible removal of children; a policy which was the subject of the 'Stolen Generation' report. The policy of forcible removal of children potentially denied the opportunity for Indigenous people to remain affiliated with the land.<sup>170</sup> Yet, the lack of the traditional affiliation requirement does present some difficulties. For example, it has set up a tension between traditional owners and other Indigenous people resident in the same area. The question of whether non-traditional owners should be able to claim the same land as traditional owners becomes pertinent and the issue of whose claim is more meritorious is put on the political agenda.<sup>171</sup> Where a land claim is successful, land is granted as a freehold estate except in one region, known as the Western Lands Division. There, successful claimants can be granted leases (in non-urban areas) in perpetuity. Grants made under the *Aboriginal Land Rights Act 1983 (NSW)* are subject to any Native title rights.

### **Queensland**

In Queensland, a range of approaches has been used to cover land rights. Aboriginal reserves were the earliest method by which land tenure was established but in the 1980s this system was partly replaced by DOGITs.<sup>172</sup> DOGIT is an acronym for the term 'deed of grant in trust.' DOGITs were made to Aboriginal and Torres Strait Islander communities. Legislation was passed which attempted to give Indigenous people more say in how former reserve and DOGIT land was administered. A claim process was also established but as '[j]ust over two per cent of the state is available for claim' this cannot be regarded as a very extensive or far-reaching claim scheme.<sup>173</sup>

### **Tasmania**

In Tasmania, specific land rights legislation did not exist until the *Aboriginal Lands Act 1995 (Tas)* was passed. It has been suggested that perhaps the delay in passing legislation was because there was a belief, quite erroneous, as it turns out, that Tasmanian Aborigines died out with Truganini, in 1876.<sup>174</sup> Be that as it may, the Tasmanian legislation sets up the Aboriginal Land Council, which is a body corporate and is constituted by a representative Aboriginal group of eight people, who are elected to represent five regions.<sup>175</sup> Like several other states, the legislation does not provide a claims mechanism. Instead, it operates on the

basis of the Council using and managing Aboriginal land and its natural resources, which it holds in perpetuity, for the benefit of Aboriginal people. The land that is vested in the Council comprises twelve areas but in practical terms they only amount to 0.06% of land in the state.<sup>176</sup> However, land may be purchased by the Council and added to its holding.<sup>177</sup> Nowhere under the Act is there any overt reference to the type of title under which the Aboriginal land is held. Clearly, the type of title dictates what rights and remedies flow. One positive feature of the Act is that it does not permit Aboriginal land to be compulsorily acquired. Perhaps this should be seen as the saving grace of legislation that was a long time in coming and once operational affects so little of Tasmanian land.

### **Western Australia**

In Western Australia, a geographically vast state, with a high Indigenous population, there is no land rights legislation. This is despite the fact that an inquiry conducted on behalf of the Western Australian Minister with Special Responsibility for Aboriginal Affairs recommended the drafting of such legislation back in 1984.<sup>178</sup>

The operation of the *Land Administration Act 1977 (WA)* does permit land to be transferred to an Aboriginal person in fee simple or by virtue of a lease of Crown land for either a fixed term or in perpetuity<sup>179</sup> but these provisions do not operate by way of right. It is also possible for the Minister to reserve land for a specific purpose such as for the benefit of Aboriginal people and further lands may be added to the reservation but only on the recommendation of the Minister, once he or she has referred the matter to the Aboriginal Affairs Planning Authority, which, in turn, writes a report to accompany the Minister's recommendation. One of the difficulties with the latter provisions, as far as Indigenous people are concerned, is that their operation is not only dependent on ministerial intervention/support but that there are too many opportunities for a positive recommendation of the Minister to be rejected.<sup>180</sup>

Finally, under the *Aboriginal Affairs Planning Authority Act 1972 (WA)* an Aboriginal person may enter unenclosed or unimproved land held under a pastoral lease if the entry is for the seeking of sustenance in his/her accustomed manner.<sup>181</sup> Should the land be enclosed or improved this section is inapplicable.

### **Australian Capital Territory**

The *Aboriginal Land Grant (Jervis Bay Territory) Act 1986 (Cth)* governs land rights in the Australian Capital Territory (ACT). The provisions of the Act transferred land at Jervis Bay (which was part of the ACT) to

the Wreck Bay Aboriginal Community.<sup>182</sup> The benefit of this transfer for Indigenous people is reduced by the fact that the Wreck Bay Aboriginal Council had to grant a 99 year lease back to the Commonwealth so that the land is made available to all members of the community and not just Indigenous people.<sup>183</sup>

Further, the Minister may make a declaration under which land is transferred to Aboriginal people if that land adjoins Aboriginal land and is of significance to Aboriginal people. However, the weakness in this procedure is that the parliament can object and prevent the declaration from becoming effective. It can be observed that the Act does not contain any claims mechanism.

### Notes

1. Janice Gray lectures law, in the Faculty of Law, at the University of New South Wales. Her book J. Gray & B. Edgeworth, *Property Law in New South Wales*, Butterworths, Sydney was published in 2003. She also writes in the fields of Property and Equity and has published nationally and internationally on Native Title.
2. *Mabo v Queensland (no2)* (1992) 175 CLR 1; 107 ALR 1.
3. *Mabo v Queensland (no2)* (1992) 175 CLR 1; 107 ALR 1.
4. *Mabo v Queensland (no2)* (1992) 175 CLR 1; 107 ALR 1.
5. J. M. Bennet and A. C. Castles, *A Source Book of Australian Legal History*, Law Book Company, Sydney, 1979, pp 253-4.
6. See J. Gray & B. Edgeworth, *Property Law in New South Wales*, Butterworths, Sydney, 2003, pp 116-121.
7. G. Nettheim, 'Native Title: Facts, Fallacies and the Future,' University Symposium Papers, University of New South Wales, Sydney, 1998 p 15. Nettheim cites H. Reynolds, *The Law of the Land*, Penguin, Ringwood, 1992.
8. Brennan J. rejects this fiction in *Mabo v Queensland (no2)* (1992) 175 CLR 1 at 32; 107 ALR 1 at 28.
9. T. Flannery, *The Explorers*, Text Publishing, Melbourne, 1998, p 13.
10. G. Yunupingu, 'We know these things to be true,' The Third Vincent Lingiari Memorial Lecture, 20 August, 1998, p 2. Reproduced on the Reconciliation and Social Justice Library site hosted by [www.austlii.edu.au](http://www.austlii.edu.au). Note also that what Indigenous people saw as the absurdity of the annexation process and its concomitants, were parodied when Burnam Burnam, and a small group of Indigenous people landed on a beach near Dover, England, planted the Aboriginal flag, proclaimed Aboriginal sovereignty over the British Isles

and presented trinkets to a bewildered onlooker. Indeed G. Nettheim in 'Indigenous Rights, Human Rights and Australia: The legal situation of indigenous people in Australia—with Canadian comparisons—and the evolution of international law relating to indigenous peoples,' *Australian Studies Centre, Working Paper in Australian Studies*, held at UNSW library, LQ KM208.43 N8 1 p 1 points out that the bemused bystander was an Australian tourist! Meanwhile the rest of Britain remained unaware of the activity.

11. If the land were regarded as *terra nullius* when British sovereignty was acquired that meant, according to Blackstone's Commentaries, that the law relating to settled colonies applied. Blackstone, *Commentaries on the Law of England*, Book 1, Chapter 4, Seventeenth Edition, 1930, pp 106-108.
12. See words of Lord Kingsdown in *Advocate-General of Bengal v Ranees Sumomoye Dossee* (48) (1863) 2 Moo N S 22, at 59' (15 ER 811, at 824.)
13. Accounts of Indigenous and 'settler' clashes and conflicts can be found in Blagden Chambers' first hand account of the massacre at Pigeon Creek (*Black and White: The Story of a Massacre and Its Aftermath, Methuen Australia*, Melbourne, 1988) and Michael Organ's collection of documents about the Aboriginal history of the New South Wales South Coast (*Black and White: The Story of a Massacre and Its Aftermath, Methuen Australia*, Melbourne, 1988) mentioned in B. Elder, *Blood on the Wattle*, New Holland Publishers, Sydney, 1998. Note also that Deborah Rose gives an allegorical account of encounters between Indigenous and non Indigenous people in "The Saga of Captain Cook; Morality in Aboriginal and European Law," *Australian Aboriginal Studies*, 2 1984 pp 31-34. See also Gipps to Glenelg, 19 December, 1838 in *Historical Records of Australia*, series 1, vol 19 and H. Goodall, *Invasion to Embassy*, Allen and Unwin, Sydney, 1996, p 27 for a discussion of resistance by the Dharuk and Gandangara landowners to the penetration of White farmers.
14. Reynolds in *Dispossession - Black Australians and White Invaders*, Allen and Unwin, NSW, 1989 details numerous instances of armed Aboriginal retaliation with respect to the taking of their lands. At 26, he quotes Curr "The Australian Race, Volume 1, Melbourne 1886, pp 100-6 who stated that "the meeting of White and Black races considered generally, results in war." Reynolds also notes that lists were often compiled of Aboriginal attacks against White settlers by governmental and police authorities, irrefutable evidence of official knowledge of Aboriginal resistance.
15. The protagonists in the dispute about the extent of Indigenous deci-

mation are Prof Henry Reynolds author of: *The Other Side of the Frontier: Aboriginal Resistance to the European Invasion of Australia*, Penguin, Victoria, 1982 and Mr. Keith Windschuttle, author of *The Fabrication of Indigenous History. Vol. 1, Van Dieman's Land 1803-1834*, Macleay Press, Paddington, NSW, 2002. This dispute has spawned much literature including the publication by R. Manne & H. Reynolds (eds), *Whitewash*, Black Inc, Melbourne, August 2003.

16. *Re Southern Rhodesia* [1919] AC 211 at 233.
17. *R v Ballard or Barrett* reported in B. Kercher, Decisions of the Superior Courts of New South Wales, 1788-1899 at: [www.law.mq.edu.au/scnsw/index.htm](http://www.law.mq.edu.au/scnsw/index.htm) See also B. Kercher, 'The Recognition of Aboriginal Status and Laws in the Supreme Court of New South Wales under Forbes CJ, 1824-1836' in A Buck, J. McLaren and N.E. Wright (eds), *Land and Freedom: Law, Property Rights and the British Diaspora*, Ashgate, Aldershot, 2001, pp 83-102; B. Kercher, 'R v Ballard, R v Murrell and R v Bonjon', (1998) 3 (3) *Australian Indigenous Law Reporter*, 410.
18. William Blackstone, *Commentary on the Laws of England*, 14th ed, T. Caddell and W. Davies, London, 1803, p 107. See also A.C. Castles, *An Australian Legal History*, Law Book Company, Sydney, 1982, pp 9-13.
19. William Blackstone, *Commentary on the Laws of England*, 14th ed, T. Caddell and W. Davies, London, 1803, p 107.
20. Evidence of the importation and consequences of the doctrine of can be seen in *Attorney-General v Brown* (1847) 1 Legge 312.
21. Allodial holdings are absolute holdings. See *Mabo v Queensland (no2)* (1992) 175 CLR 1; 107 ALR 1 at 79
22. *Mabo v Queensland (no2)* (1992) 175 CLR 1 at Austlii para 50; 107 ALR 1 at 33.
23. P. Grimshaw, M. Lake, A. McGrath, and M. Quartly, *Creating a Nation*, McPhee Gribble, Ringwood, 1994 pp131-138.
24. Section 51 (xxvi) of the Constitution had given the Commonwealth Parliament the right to legislate 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.' (italics added) The amendment deleted the words in italics.
25. Paul Kelly's song 'From little things, big things grow' is about the Wave Hill walk-off and the role of Vincent Lingiari.
26. Used in this sense, the term common law means judge-made law.
27. *Milirrpum v Nabalco*, (1971)17 FLR 141.
28. See T. Libesman & C. Cunneen, *Indigenous People and the Law in Australia*, Sydney, Butterworths, p 137.

29. See Appendix A which refers to 40% of the Northern Territory having been successfully claimed by Indigenous people.
30. See Appendix A.
31. T. Libesman & C. Cunneen, *Indigenous People and the Law in Australia*, 1995, Sydney, Butterworths, p 143.
32. *Milirrpum v Nabalco* (1971) 17 FLR 141.
33. *Administration of Papua v Daera Guba* (1973) 13 CLR 353 at 397; *Coe v Commonwealth* (1979) 53 ALJR 403.
34. *Coe v Commonwealth* (1979) 53 ALJR 403 per Gibbs J. at 408; Jacobs J. at 411 and Murphy J. at 412. See J. Gray & B. Edgeworth, *Property Law in NSW*, Butterworths, Sydney, 2003 p 123.
35. *Mabo v Queensland (No 2)* (1992) 175 CLR 1; 107 ALR 1 at 79.
36. The Act whose validity had to be tested was the *Queensland Coast Islands Declaratory Act 1985* (Qld). It was found to contravene the *Racial Discrimination Act 1975* (Cth) s10.
37. The Court left open the position of land that was the subject of a lease and other land used by the Queensland government for administrative purposes.
38. Five Meriam plaintiffs initiated proceedings but two dropped out, leaving Eddie Mabo, David Passi and James Rice to continue.
39. *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 32; 107 ALR 1 at 20.
40. *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 58; 107 ALR1 at 42.
41. *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 110; 107 ALR 1 at 83. For a discussion of the issue of connection to land see J. Gray & B. Edgeworth, *Property Law in New South Wales*, Butterworths, Sydney, 2003, pp 130-134; R. Bartlett, *Native Title in Australia*, Butterworths, Sydney, 2000 .
42. *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 59; 107 ALR 1 at 79.
43. *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 30; 107 ALR 1 at 19.
44. *Mabo v Queensland [No2]* (1992) 175 CLR 1 at 29-30; ALR at 18.
45. *Mabo v Queensland [No2]* (1992) 175 CLR 1 at 29; ALR at 19.
46. *Mabo v Queensland [No2]* (1992) 175 CLR 1 at 29; ALR at 18.
47. *Mabo v Queensland [No2]* (1992) 175 CLR 1 at 30; ALR at 19
48. *Mabo v Queensland [No2]* (1992) 175 CLR 1 at 30; ALR at 19.
49. *Mabo v Queensland [No2]* (1992) 175 CLR 1 at 109; 107 ALR 1 at 82.
50. L. Taft, 'Apology Subverted: the commodification of the apology' (2000) 109 (5) *Yale Law Journal* 1135 at 1136; see also N. Tavuchis, *Mea Culpa: A Sociology of Apology and Reconciliation*, Stanford University Press, 1991.
51. See T. Cyprian Williams, 'The Fundamental Principles of the Present Law of Ownership of Land' (1931) 75 *Solicitor's Journal* 843; P. Butt, *Land Law*, Law Book Co, Sydney, 1996, p 60 claims that 'Australia

was never organized along feudal lines.'

52. That hope was abundantly clear in the newspaper reports that followed the handing down of the *Mabo (No 2)* decision but it was equally clear from those same reports, that in some quarters, eg mining and pastoral quarters, there was much fear and nervousness. See J. Gray, *The Mabo Case: Radical Decision?* (1997) 17 (1) *Canadian Native Studies Journal* 33.
53. *Mabo v Queensland [No2]* (1992) 175 CLR 1.; 107 ALR 1.
54. N. Pearson, 'Where we've come from and where we are at with the opportunity that is Koiki Mabo's legacy to Australia,' Mabo Lecture, Native Title Representative Bodies Conference, Alice Springs, 3 June, 2003, p 3. Note that Native title cannot be found to exist where there has been a grant of land, creating a right to exclusive possession.
55. N. Pearson, 'Where we've come from and where we are at with the opportunity that is Koiki Mabo's legacy to Australia,' Mabo Lecture, Native Title Representative Bodies Conference, Alice Springs, 3 June, 2003, p 3.
56. *Mabo v Queensland [No2]* (1992) 175 CLR 1; 107 ALR 1.
57. *Mabo v Queensland [No2]* (1992) 175 CLR 1; 107 ALR 1.
58. *Mabo v Queensland [No2]* (1992) 175 CLR 1; 107 ALR 1.
59. See G. Nettheim, *The Search for Certainty and the Native Title Amendment Act 1998 (Cth)* (1999) 22 (2) *UNSWLJ* 564; G. Nettheim, 'Native Title: Facts, Fallacies and the Future' University Symposium Papers, University of New South Wales, Sydney, 1998.
60. See R. Bartlett, *Native Title Law in Australia*, Sydney, Butterworths, 2000 for an account of the claims procedure and the past and future acts regimes etc.
61. N. Pearson, 'Where we've come from and where we are at with the opportunity that is Koiki Mabo's legacy to Australia', Mabo Lecture, Native Title Representative Bodies Conference, Alice Springs, 3 June, 2003, pp 4-6.
62. *Mabo v Queensland [No2]* (1992) 175 CLR 1; 107 ALR 1.
63. For a discussion of these and other issues associated with the Native title process see, H. McRae, G. Nettheim, L. Beacroft, & L. McNamara, *Indigenous Legal Issues*, LBC, Sydney, forthcoming 2003, chapter 7.
64. Dissatisfaction with how the issue of certainty has been dealt with is a common in the literature. See N. Pearson, 'Where we've come from and where we are at with the opportunity that is Koiki Mabo's legacy to Australia,' Mabo Lecture, Native Title Representative Bodies Conference, Alice Springs, 3 June, 2003.
65. *Wilson v Anderson* (2002) 190 ALR 313 at 345 per Kirby J.

66. *Western Australia v Ward* (2000) 170 ALR 159.
67. *Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58. A discussion of this case necessarily involves consideration of some provisions of the *Native Title Act* 1993.
68. N. Pearson, 'The High Court's Abandonment of the "Time-Honoured Methodology of the Common Law" in its Interpretation of Native Title in *Mirriuwung Gajerrong* and *Yorta Yorta*,' Sir Ninian Stephen Annual Lecture 2003, Law School, University of Newcastle, 17 March, 2003, p 5.
69. N. Pearson, 'The High Court's Abandonment of the "Time-Honoured Methodology of the Common Law" in its Interpretation of Native Title in *Mirriuwung Gajerrong* and *Yorta Yorta*,' Sir Ninian Stephen Annual Lecture 2003, Law School, University of Newcastle, 17 March, 2003, p 5.
70. N. Pearson, 'The High Court's Abandonment of the "Time-Honoured Methodology of the Common Law" in its Interpretation of Native Title in *Mirriuwung Gajerrong* and *Yorta Yorta*,' Sir Ninian Stephen Annual Lecture 2003, Law School, University of Newcastle, 17 March, 2003, p 5. Here Pearson was referring to the position after the *Wik Peoples v Queensland* (1996) 187 CLR 1.
71. N. Pearson, 'The High Court's Abandonment of the "Time-Honoured Methodology of the Common Law" in its Interpretation of Native Title in *Mirriuwung Gajerrong* and *Yorta Yorta*,' Sir Ninian Stephen Annual Lecture 2003, Law School, University of Newcastle, 17 March, 2003, p 4.
72. N. Pearson, 'The High Court's Abandonment of the "Time-Honoured Methodology of the Common Law" in its Interpretation of Native Title in *Mirriuwung Gajerrong* and *Yorta Yorta*,' Sir Ninian Stephen Annual Lecture 2003, Law School, University of Newcastle, 17 March, 2003, p 5.
73. *Western Australia v Ward* (2000) 170 ALR 159; *Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58.
74. *Western Australia v Ward* [2002] HCA 28 (8 August, 2002) para 1.
75. The High Court split 5:2 in this case.
76. *Western Australia v Ward* [2002] HCA 28 (8 August, 2002) para 1
77. *Mabo v Queensland (No 2)* (1992) 175 CLR 1; 107 ALR 1.
78. *Western Australia v Ward* [2002] HCA 28 (8 August, 2002) para 2.
79. *Western Australia v Ward* [2002] HCA 28 (8 August, 2002) para 14.
80. J. Gray & B. Edgeworth, *Property Law in New South Wales*, Butterworths, Sydney, 2003, p 166.
81. For references to the *sui generis* nature of Native title see *Mabo v Queensland (No 2)* 1992 175 CLR 1 at 88-89; 107 ALR 1 at 66-67 per

Deane and Gaudron J.J.; and CLR 132-133; ALR 101-102 per Dawson J.

82. N. Pearson, 'Concept of Native Title at Common Law', Northern and Central Land Councils, *Land Rights Past, Present and Future, Proceedings of the Conference on 20 Years of Land Rights*, Canberra, 1991, p 118.
83. See R. Bartlett, *Native Title in Australia*, Butterworths, Sydney, 2001.
84. J. Webber, 'Beyond Regret: Mabo's Implications For Australian Constitutionalism' in D. Ivison, P. Patton & W. Sanders, *Political Theory and the Rights of Indigenous Peoples*, Cambridge University Press, Cambridge, 2000, p 61.
85. M. Harris, Native Title in Australia – the Frustration of Aspirations' paper presented to the Law and Society Conference, Central European University, Budapest, Hungary, 4-7 July, 2001.
86. *Explanatory Memorandum to the Native Title Bill 1993*, Part A at p 1.
87. *Explanatory Memorandum to the Native Title Bill 1997*, para 3.7.
88. Australia, Senate, *Parliamentary Debates* (Hansard) 16 December, 1993 at 5097.
89. Australia, Senate, *Parliamentary Debates* (Hansard) 2 December, 1997 at 10171. Referred to by McHugh J. in *Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58 paras 129-130.
90. *Western Australia v Ward* (2000) 170 ALR 159; *Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58; *Mabo v Queensland (No2)* (1992) 175 CLR 1; 107 ALR 1.
91. *Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58.
92. N. Pearson, 'The High Court's Abandonment of 'The Time-Honoured Methodology of the Common Law' in its Interpretation of Native Title in Mirriuwung Gajerrong and Yorta Yorta,' *Sir Ninian Stephen Annual Lecture*, 2003, Law School, University of Newcastle, 17 March, 2003.
93. *Conveyancing Act 1919 NSW*, s 23 C is an example of a section where statutory interpretation has been employed in a creative and sometimes unexpected manner. Although s 23 C (1) (c) is contained in a section on 'dealings with land' it has been found to apply to personalty as well.
94. *Mabo v Queensland (No 2)* (1992) 175 CLR 1; 107 ALR 1.
95. *Western Australia v Ward* (2000) 170 ALR 159; *Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58.
96. *Commonwealth v Yarmirr* (2001) 75 ALJR 1582; *Western Australia v Ward* (2000) 170 ALR 159; *Members of the Yorta Yorta Aboriginal*

- Community v Victoria* [2002] HCA 58.
97. N. Pearson, 'The High Court's Abandonment of 'The Time-Honoured Methodology of the Common Law' in its Interpretation of Native Title in Mirriuwung Gajerrong and Yorta Yorta', *Sir Ninian Stephen Annual Lecture*, 2003, Law School, University of Newcastle, 17 March, 2003, p 12.
  98. *Mabo v Queensland (No2)* (1992) 175 CLR 1; 107 ALR 1.
  99. *Mabo v Queensland (No2)* (1992) 175 CLR 1; 107 ALR 1.
  100. This discussion is taken from N. Pearson, 'The High Court's Abandonment of 'The Time-Honoured Methodology of the Common Law' in its Interpretation of Native Title in Mirriuwung Gajerrong and Yorta Yorta', *Sir Ninian Stephen Annual Lecture*, 2003, Law School, University of Newcastle, 17 March, 2003, p 14.
  101. K. McNeil, *Common Law Aboriginal Title*, Clarendon Press, Oxford, 1989.
  102. This discussion is taken from N. Pearson, 'The High Court's Abandonment of 'The Time-Honoured Methodology of the Common Law' in its Interpretation of Native Title in Mirriuwung Gajerrong and Yorta Yorta', *Sir Ninian Stephen Annual Lecture*, 2003, Law School, University of Newcastle, 17 March, 2003, p 15.
  103. This discussion is taken from N. Pearson, 'The High Court's Abandonment of 'The Time-Honoured Methodology of the Common Law' in its Interpretation of Native Title in Mirriuwung Gajerrong and Yorta Yorta', *Sir Ninian Stephen Annual Lecture*, 2003, Law School, University of Newcastle, 17 March, 2003, p 15.
  104. *Delgamuukw v British Columbia* (1997) 153 DLR 192.
  105. This discussion is taken from N. Pearson, 'The High Court's Abandonment of 'The Time-Honoured Methodology of the Common Law' in its Interpretation of Native Title in Mirriuwung Gajerrong and Yorta Yorta', *Sir Ninian Stephen Annual Lecture*, 2003, Law School, University of Newcastle, 17 March, 2003, p 18. See also K. McNeil, *Common Law Aboriginal Title*, Clarendon Press, Oxford, 1989.
  106. This discussion is taken from N. Pearson, 'The High Court's Abandonment of 'The Time-Honoured Methodology of the Common Law' in its Interpretation of Native Title in Mirriuwung Gajerrong and Yorta Yorta', *Sir Ninian Stephen Annual Lecture*, 2003, Law School, University of Newcastle, 17 March, 2003, p 15.
  107. *Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58.
  108. *Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58.
  109. The Federal Court travelled to these locations. It sat for 114 days

and heard evidence from 201 witnesses. The decision at first instance is: *Yorta Yorta Peoples v Victoria* [1998] FCA 1606. The case then went on appeal to the Full Federal Court in *Members of the Yorta Yorta Peoples v Victoria* [ 2001] FCA 25; (2001) 110 FCR 244; (2001) 180 ALR 655 and finally on appeal to the High Court in *Yorta Yorta Peoples v Victoria* [2002] HCA 58.

110. *Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58; *Mabo v Queensland (No2)* (1992) 175 CLR 1; 107 ALR 1.
111. *Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58
112. *Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58 at paras 17-20 where Gleeson C.J., Gummow and Hayne J.J. summarise the appeal of the claimants.
113. *Yorta Yorta Peoples v Victoria* [1998] FCA 1606 at para 128.
114. *Yorta Yorta Peoples v Victoria* [1998] FCA 1606 at para 123.
115. *Mabo v Queensland (No2)* (1992)1 CLR1; 107 ALR 1.
116. *Yanner v Eaton* [1999] HCA 53 (7 October 1999) per Gummow J. at para 68.
117. *Members of the Yorta Yorta Aboriginal Community v Victoria* [2001] FCA 45 at para 127.
118. *Yorta Yorta Peoples v Victoria* [ 2001] FCA 25.
119. *Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58 at para 46.
120. *Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58 at para 47.
121. *Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58 at para 80.
122. *Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58 at para 82.
123. *Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58 at para 83.
124. *Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58 at para 83.
125. *Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58 at para 87 per Gleeson CJ, Gummow and Hayne JJ.
126. *Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58 at para 90.
127. *Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58 at para 117.
128. *Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58 at para 117.
129. *Members of the Yorta Yorta Aboriginal Community v Victoria* [2002]

- HCA 58 at para 119.
130. Conveyancing practice once set this at 60 years but today statute sets the period at 30 years. See *Conveyancing Act 1919 NSW s 53 (1)*.
  131. *Mabo v Queensland (No2)* (1992) 175 CLR 1; 107 ALR 1.
  132. This is also the thesis of L. Strelein in 'Members of the *Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58 (12 December 2002) Comment,' Land, Rights, Laws: Issues of Native Title, Native Title Research Unit, Australian Institute of Aboriginal and Torres Strait Islander Studies, p 6. Available at [www.aitsis.gov](http://www.aitsis.gov).
  133. *Mabo v Queensland (No2)* (1992) 175 CLR 1; 107 ALR 1.
  134. *Mabo v Queensland (No2)* (1992) 175 CLR 1; 107 ALR 1. The word regret calls to mind J. Webber's excellent article, 'The Jurisprudence of Regret: The search for standards of justice in *Mabo*,' (1995) 17 (5) *Sydney University Law Review* 5.
  135. *Mabo v Queensland (No2)* (1992) 175 CLR 1; 107 ALR 1; *Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58.
  - 136 *Mabo v Queensland (No2)* (1992) 175 CLR 1; 107 ALR 1.
  137. Press release issued by the Federal Attorney-General's Department, 12 December, 2003. Available at [www.ag.gov.au/attorneygeneralhome](http://www.ag.gov.au/attorneygeneralhome).
  138. Press release issued by the Federal Attorney-General's Department, 12 December, 2003. Available at [www.ag.gov.au/attorneygeneralhome](http://www.ag.gov.au/attorneygeneralhome).
  139. *Mabo v Queensland (No2)* (1992) 175 CLR 1; 107 ALR 1
  140. Press release issued by the Federal Attorney-General's Department, 12 December, 2003. Available at [www.ag.gov.au/attorneygeneralhome](http://www.ag.gov.au/attorneygeneralhome).
  141. *Mabo v Queensland (No2)* (1992) 175 CLR 1; 107 ALR 1.
  142. Press release issued by the Federal Attorney-General's Department, 12 December, 2003. Available at [www.ag.gov.au/attorneygeneralhome](http://www.ag.gov.au/attorneygeneralhome).
  143. See the Native Title Tribunal's website for statistics on the progress and outcomes of claims. [www.nntt.gov.au](http://www.nntt.gov.au)
  - 144.M. Riley, "Winning" Native Title: The Experience of the Nharuwangga Wajarri and Ngarla People,' Land Rights, Laws: Issues of Native Title, Native Title Research Unit, Australian Institute of Aboriginal and Torres Strait Islander Studies, November, 2002 (ed J. Weir) pp 3-5. [www.aitsis.gov.au](http://www.aitsis.gov.au)
  145. These are: an Indigenous Land Use Agreement; a heritage agreement and; pastoral access protocols.
  - 146.M. Riley, "Winning" Native Title: The Experience of the

Nharnuwangga Wajarri and Ngarla People,' Land Rights, Laws: Issues of Native Title, Native Title Research Unit, Australian Institute of Aboriginal and Torres Strait Islander Studies, November, 2002 (ed J. Weir) pp 3-5. [www.aitisis.gov.au](http://www.aitisis.gov.au)

147. M. Riley, "Winning" Native Title: The Experience of the Nharnuwangga Wajarri and Ngarla People,' Land Rights, Laws: Issues of Native Title, Native Title Research Unit, Australian Institute of Aboriginal and Torres Strait Islander Studies, November, 2002 (ed J. Weir) p 5. [www.aitisis.gov.au](http://www.aitisis.gov.au)
148. *Mabo v Queensland (No2)* (1992) 175 CLR 1; 107 ALR 1.
149. *Mabo v Queensland (No2)* (1992) 175 CLR 1; 107 ALR 1.
150. Note that one of the retirees was Justice Dawson and that he was in dissent in *Mabo (No2)*.
151. This can be seen in a number of areas not just Native title. See for example its lack of inclination to elaborate implied rights in the Constitution.
152. These terms have gained currency in the popular press and they tend to be used pejoratively. NB The former leader of the National Party, Tim Fisher, was one government member, who was, at times, quite critical about the role of the judiciary. Recent criticism about a generous award of damages for a swimmer at Bondi Beach, who was injured when not swimming between the flags, is an example of the scrutiny that the courts face. Similar scrutiny can be seen in relation to the courts' sentencing decisions in rape cases.
153. This recommendation is also made in J. Gray & B. Edgeworth, *Property Law in New South Wales*, Butterworths, Sydney, 2003 and is also called for later by N. Pearson in The High Court's Abandonment of the "Time-Honoured Methodology of the Common Law" in its Interpretation of Native Title in *Mirriuwung Gajerrong and Yorta Yorta*, Sir Ninian Stephen Annual Lecture 2003, Law School, University of Newcastle, 17 March, 2003, p 22.
154. N. Pearson, 'Where We've Come From And Where We're At With The Opportunity That Is Koiki Mabo's Legacy To Australia,' Mabo Lecture, Native Title Representative Bodies Conference, Alice Springs, 3 June, 2003 p 2.
155. N. Pearson, 'Where We've Come From And Where We're At With The Opportunity That Is Koiki Mabo's Legacy To Australia,' Mabo Lecture, Native Title Representative Bodies Conference, Alice Springs, 3 June, 2003 p 2.
156. Pearson is mindful of this in N. Pearson, 'Where We've Come From And Where We're At With The Opportunity That Is Koiki Mabo's Legacy To Australia,' Mabo Lecture, Native Title Representative Bod-

- ies Conference, Alice Springs, 3 June, 2003 but there he limits the new strategies to the avoidance of a 'delegated industry involving lawyers and anthropologists.'
157. As is Native title.
  158. As is a fee simple estate held directly or in trust through land rights legislation.
  159. One Nation is a political party formerly led by Pauline Hanson and now led by David Oldfield. It has restrictive views on immigration and Indigenous rights.
  160. *Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58; See press release of the National Native Title Tribunal, 12 December, 2003 at [www.nntt.gov.au/media](http://www.nntt.gov.au/media).
  161. This figure is taken from G. Nettheim, G. Meyers & D. Craig, *Indigenous Peoples and Governance Structures: A Comparative Analysis of Land and Resource Management Rights*, Aboriginal Studies Press, Australian Institute of Aboriginal and Torres Strait Islander Studies, Canberra, 2002, p 294 who rely on C. Anthanasiou, 'Land rights or Native title' (1998) 4 (12) *Indigenous Law Bulletin*, p 14-15.
  162. A pastoral lease is a statutory lease that requires the lessee to undertake certain pastoral/ agricultural activities as a condition of the lease.
  163. G. Nettheim, G. Meyers & D. Craig, *Indigenous Peoples and Governance Structures: A Comparative Analysis of Land and Resource Management Rights*, Aboriginal Studies Press, Australian Institute of Aboriginal and Torres Strait Islander Studies, Canberra, 2002 p 240 & 248. See also Part 8 *Pastoral Land Act* 1992 (NT).
  164. *Pareroutja v Tickner* (1993) 117 ALR 206. G. Nettheim, G. Meyers & D. Craig, *Indigenous Peoples and Governance Structures: A Comparative Analysis of Land and Resource Management Rights*, Aboriginal Studies Press, Australian Institute of Aboriginal and Torres Strait Islander Studies, Canberra, 2002 p 294 note that the Reeves Report recommends the *Native Title Act* 1993 be amended to provide that a past or future grant of land under the *ALRA* causes the extinguishment of Native title rights in the subject land. See J. Reeves, *Building on Land Rights For the Next Generation: The Review of the Aboriginal Land Rights (Northern Territory) Act 1976*, ATSIC 1998. Clearly, interaction between the *ALRA* and Native title continues.
  165. The word, 'Aboriginal' is used in the legislation, not 'Indigenous'.
  166. This information is taken directly from G. Nettheim, G. Meyers & D. Craig, *Indigenous Peoples and Governance Structures: A Comparative Analysis of Land and Resource Management Rights*, Aboriginal

Studies Press, Australian Institute of Aboriginal and Torres Strait Islander Studies, Canberra, 2002, p 242.

167. *Aboriginal Lands Trust Act 1966 (SA)* s 5.
168. For an excellent account of the operation of these Acts and the areas of land affected see G. Nettheim, G. Meyers & D. Craig, *Indigenous Peoples and Governance Structures: A Comparative Analysis of Land and Resource Management Rights*, Aboriginal Studies Press, Australian Institute of Aboriginal and Torres Strait Islander Studies, Canberra, 2002 p 262-266.
169. The legislation, now repealed, which vested land in land trusts was the *Aborigines Act 1969 (NSW)*.
170. The formal reference for the report is: *Bringing Them Home. Report of the National Inquiry Into the Separation of Aboriginal and Torres Strait Islander Children From Their Families*, April, 1997 presented to the Attorney General, The Hon Darryl Williams AM QC MP by Ronald Wilson, the President of the Human Rights and Equal Opportunity Commission.
171. See J. Gray & B. Edgeworth, *Property Law in New South Wales*, Butterworths, 2003, p 122.
172. G. Nettheim, G. Meyers & D. Craig, *Indigenous Peoples and Governance Structures: A Comparative Analysis of Land and Resource Management Rights*, Aboriginal Studies Press, Australian Institute of Aboriginal and Torres Strait Islander Studies, Canberra, 2002, p 271. For a more detailed analysis of the various modes of land rights regulation in Queensland see pp 271-281.
173. T. Libesman & C. Cuneen, *Indigenous People and the Law*, Butterwoths, Sydney, 1995 p 149.
174. This view is put in G. Nettheim, G. Meyers & D. Craig, *Indigenous Peoples and Governance Structures: A Comparative Analysis of Land and Resource Management Rights*, Aboriginal Studies Press, Australian Institute of Aboriginal and Torres Strait Islander Studies, Canberra, 2002, p 281.
175. *Aboriginal Lands Act 1995 (Tas)* s 18 (1) (a).
176. G. Nettheim, G. Meyers & D. Craig, *Indigenous Peoples and Governance Structures: A Comparative Analysis of Land and Resource Management Rights*, Aboriginal Studies Press, Australian Institute of Aboriginal and Torres Strait Islander Studies, Canberra, 2002, p 282.
177. *Aboriginal Lands Act 1995 (Tas)* s 18 (1) (b).
178. The inquiry was conducted by Paul Seaman QC between May 1983 and September, 1984.
179. *Land Administration Act 1997 (WA)* s 41.

180. If either house of the Western Australian state parliament rejects the recommendations of the Minister they cannot be put before the Governor. See G. Nettheim, G. Meyers & D. Craig, *Indigenous Peoples and Governance Structures: A Comparative Analysis of Land and Resource Management Rights*, 2002 Aboriginal Studies Press, Australian Institute of Aboriginal and Torres Strait Islander Studies, Canberra, 2002, p 286.
181. *Aboriginal Affairs Planning Authority Act 1972 (WA)* ss 25 & 26.
182. *Aboriginal Land Grant (Jervis Bay Territory) Act 1986 (Cth)* s 8.
183. *Aboriginal Land Grant (Jervis Bay Territory) Act 1986 (Cth)* s 10.