MABO: Where Have We Been and Where Have We Yet to Travel?

Bradley Selway QC*

SUMMARY

The historical background to the decision in Mabo is discussed. The differences between the common law as applied in Australia and that as applied in North America and elsewhere is identified. The result was that Aborigines in Australia were relatively disadvantaged. By 1990 the political response to correct that disadvantage had stalled.

Mabo was the High Court's response to this legal and political disadvantage. It created a new common law rule for Australia which recognised Aboriginal rights existing since settlement. The rights so recognised were narrow and fragile rights, though their significance was much enhanced by the High Court's decision in Wik. The nature and extent of the common law rights are discussed.

The Native Title Act 1993 (NTA) was the Commonwealth Government's response to the issues raised by Mabo. The fundamental weakness of the NTA is that it is neither a legislative code nor is it merely a protection of the common law. It "meddles" with the common law creating significant problems in interpretation and application. The operation and effect of the NTA is discussed.

A number of fundamental issues in relation to native title remain to be resolved. These include whether the right to self government is a "native title" right; whether native title rights can be transferred between Aboriginal groups; the appropriate level of abstraction in classifying or characterising native title rights; the inherent problem in resolving conflicts between co-existing rights which are derived from different legal systems together with the practical problems of resolving claims within the structure of the NTA.

* Solicitor General for South Australia; Adjunct Professor of Law, University of Adelaide. Some parts of this paper are derived from other papers written and presented by the author, most particularly Selway, "The Role of Policy in the Development of Native Title" (2000) 28 FLR 403. I acknowledge the assistance of Jenny Hart, Danielle Seal and Ben Allgrove, all of the South Australian Crown Solicitor's Office, for their helpful comments.

Whilst much has been achieved in the decade since Mabo was decided, it is apparent that the final resolution of the issues raised by Mabo is still a long way off.

INTRODUCTION

It is now more than 10 years since judgment was given in *Mabo (No 2)*. Much has been achieved in that time in identifying what *Mabo* means and how it should be applied.[1] On the other hand, much still remains to be done. Little progress has been made in actually securing rights to land of the Aboriginal people. At the same time considerable expense has been added to the cost of development projects in much of Australia.

A decade seems an appropriate time to reflect on where we have been and to consider where we are going.

THE BACKGROUND

It is perhaps not surprising that there were quite detailed common law rules that determined what law applied in a newly established colony. The problem with these common law rules was that there was considerable variation in them depending upon the nature or classification of the colony involved. This also is not surprising. After all the British had spent several centuries establishing colonies in a variety of places. Some of them had established legal systems of the sort that Englishmen would be happy to live with; some did not.

At international law, if a colony was populated by a people with an established legal system then it could not be "settled", but could only be acquired by conquest or cession. On the other hand, if the colony was uninhabited, or effectively uninhabited (that is, if it was "terra nullius"[2]), it could be "settled". The question whether the colony was inhabited or not was to be determined as a matter of fact.

The common law recognised a similar distinction. A colony could not be "settled" unless it was uninhabited by people with a legal system that Englishman would recognise. However, this did not mean that the common law courts could determine, as a fact, whether the colony was inhabited by people with a legal system. The relevant classification of

[1] See Commonwealth Parliamentary Library, *Mabo: Ten Years On* (http://www.aph.gov.au/library/intguide/SP/mabo.htm).

[2] See Ritter, "The Rejection of Terra Nullius in Mabo: A Critical Analysis" (1996) 18 Syd L Rev 5 at 7-9.

the colony was determined by the courts from the practices of the Crown.[3] The common law courts did not inquire into whether the practices of the Crown were correct or not – only what those practices were. In determining whether a colony was settled on the one hand, or ceded on the other, the courts relied upon how the Crown had treated the colony. If the Crown treated the colony as being effectively uninhabited and subject to English law then it was "settled" no matter what the true factual situation may have been. To this extent the position at common law differed from that at international law.

The classification of the colony by the common law determined what laws applied in the colony. For example, if a colony was classified as one acquired by cession or by conquest then the laws of the relevant territory in place immediately before the establishment of the colony continued to apply[4] until altered by, or confirmed by, the Crown,[5] subject to such variation as was necessary to make those laws consistent with English procedures. So, for example, pre-existing property rights continued to apply and continued to be enforced by the common law courts, subject to the "radical title" of the Crown which entitled the Crown, if it wished, to extinguish the pre-existing rights by making a new and inconsistent grant.[6]

On the other hand, the law applicable within colonies classified as being acquired by cession or conquest was different from that in colonies acquired by settlement. In relation to a "settled" colony, the common law applied from the date of settlement,[7] to the extent that it was appropriate to the condition of the colony.

Between these two classifications there seemed to be any number of variations. For example, where English settlers formed their own separate community within a larger community that had been acquired by cession or conquest (or even that remained independent) that English community was governed by English law although the native inhabitants were not.[8] This qualification seems to have been an 18th and 19th century policy response to the apparent need to ensure that the English "factories" in India and later in China and other Asian countries were governed by English law.

A variation on this approach was adopted in the United States. This involved an accommodation of the legal regime for settled and

3 *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 32.

4 Forsyth, *Cases and Opinions on Constitutional Law* (1869) at 12-18.

5 *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141 at 201-204.

6 For example, *Amodu Tijani v Secretary, Southern Nigeria* [1921] 2 AC 399. That case concerned land in Lagos, which had been acquired by cession: see at 404, 409.

7 *Cooper v Stuart* (1889) 14 App Cas 286 at 291-292; Forsyth, *Cases and Opinions on Constitutional Law* (1869) at 17-18; Castles, "Reception and Status of English Law in Australia" (1963) 2 Adel L Rev 1.

8 See *Advocate General of Bengal v Ranee Surnomoye Dossee* (1863) 15 ER 811 at 824.

for conquered colonies which was developed by Chief Justice Marshall of the United States Supreme Court.[9] Under this approach the colonies of North America were treated as settled colonies, but the aboriginal nations continued to enjoy a limited degree of sovereignty. Aboriginal laws were not recognised or applied by the common law courts, but the aboriginal nations could apply their own laws to all who were present on their lands. The Crown (and its successors) had the exclusive right to acquire aboriginal land, but this right was subject to an obligation to protect the aboriginal nations from unfair or non-consensual dispossession.

Yet another variation was adopted in Canada.[10] Again this seems to involve an accommodation of the legal regime for settled and for conquered colonies, but the reasoning is very different from that in the United States. It does not involve any recognition of continuing sovereignty. Instead, the former colonies are treated as being settled. English common law applied to the exclusion of Aboriginal law. However, in Canada it has come to be accepted that English common law itself recognises and will apply and protect Aboriginal law. Consequently under the Canadian common law there is not a recognition of Aboriginal courts as such; rather the common law as applied by the ordinary courts in Canada has come to include Aboriginal law.

As can be seen a number of these approaches involve the acceptance of "pluralism" within the legal system.[11] But they also involve the development of an approach to the recognition of Aboriginal law and Aboriginal rights that is fundamentally based upon history. As I have suggested elsewhere:

> "The history of British colonisation in [North America and Australasia] was that English settlers living in what were, in effect "English communities" usually applied English law and ignored that of indigenous peoples. The English settlers ignored native property rights if they could do so with impunity; if they could not then they seized those rights by force or entered into treaties to obtain them by consent. For example, the British colonies in

[9] See Bennett, "Aboriginal Title in the Common Law: A Stony Path through Feudal Doctrine" (1978) 27 *Buffalo Law Review* 617 at 620-622; Berman, "The Concept of Aboriginal Rights in the early Legal History of the United States" (1978) 27 *Buffalo Law Review* 637; Bartlett, "Native Title: From Pragmatism to Equality Before the Law" (1995) 20 MULR 282 at 284-286; Lokan, "From Recognition to Reconciliation: The Functions of Aboriginal Rights Law" (1999) 23 MULR 65 at 67-68 (particularly fn 11).

[10] The current approach of the Canadian Supreme Court seems to be derived from the analysis by Slattery (see eg Slattery, "Understanding Aboriginal Rights" (1987) 66 Can Bar Rev 727). Slattery's analysis is ultimately based upon Canadian history. It is a legal description of what occurred politically (see Slattery at 732-741).

[11] See Amankwah, "Post-Mabo: The Prospect of the Recognition of Customary (Indigenous) Law in Australia" (1994) 18 U Qld Law Journal 15 at 17.

> North America were settled colonies. It was necessary that they be characterised as "settled" colonies if the colonists were to enjoy the advantages of English law. On the other hand, the Crown made wars and treaties with the Indian tribes which were treated as separate, if dependent, nations. For domestic law purposes within the English communities the colonies were treated as if they were settled, but in respect of the dealings between the Crown and the Indian tribes the colonies were treated as conquered or ceded. Similar comments can be made about the history of the Crown's relationship with the indigenous inhabitants of the north island of New Zealand. Although the North American and New Zealand colonies were treated as settled colonies which received English law, the history of wars and of treaties with the indigenous inhabitants and the recognition of native title in each of those colonies is more suggestive of a conquered rather than of a settled colony."[12]

The development of the common law in Asia and in North America was essentially an attempt by the local courts to accommodate English common law with the historical position with which they were faced.[13] The changes they made to the common law in those jurisdictions involved what were pragmatic policy responses to the real possibility either that what had been accepted as the land law within the relevant jurisdiction was invalid or that the rights of the Aboriginal inhabitants could be ignored completely (as they were in Australia). This was understood by the local courts. For example, Chief Justice Marshall made the point clearly and forcefully:

> "However extravagant the pretension of converting the discovery of an inhabited country into conquest may appear, if the principle has been asserted in the first instance, and afterwards sustained; if a country has been acquired and held under it; if the property of the great mass of the community originates in it, it becomes the law of the land and cannot be questioned."[14]

What of Australia? Recent research suggests that there was considerable uncertainty in New South Wales as to whether the colony was "settled" or "conquered" and that this uncertainty

[12] Selway, *The Constitution of South Australia* (1997) at 2-3.

[13] Webber, "The Jurisprudence of Regret: The Search for Standards of Justice in Mabo" (1995) 17 Syd L Rev 5 at 7-9.

[14] *Johnson v McIntosh* 21 US 543 (1823) at 591 (see also at 571) and see generally on US history, Strickland (ed), *Cohen's Handbook of Federal Indian Law (1982 Ed)*, pp 145-206; as to Canada, see *R v Van Der Peet* (1996) 137 DLR (4th) 289 at 304-310 and see Macklen, "Indigenous Peoples and the Canadian Constitution: Lessons for Australia" (1994) 5 PLR 11 at 13-18; as to New Zealand see *Te Runanga o Muriwhenua Inc v AG* [1990] 2 NZLR 641 at 654-655.

persisted until at least the decision in *R v Murrell* in 1836.[15] For the first 50 years of settlement there may at least have been an assumption that as between Aborigines living in their own communities, the law applicable to them was not the law of England, but their own law enforced by their own institutions. This effectively treated the Australian colonies as "conquered", but also treated the settled areas as if they were English plantations. There certainly seems to have been no question that Aboriginal law (including in relation to rights to land) would be applied to settlers, even in their dealings with Aborigines.

However, in 1847 the New South Wales Supreme Court gave judgment in *Attorney General (NSW) v Brown*[16] where it was held that the Australian colonies were settled colonies and that English law applied to all within them. That was the position applied in Australian courts until *Mabo (No 2)*.

Until *Mabo (No 2)* the Australian courts (following the Privy Council decision in *Cooper v Stuart*[17]) adopted a "bright line" distinction between settled colonies on the one hand, and those obtained by conquest or cession on the other. For example, Gibbs J in *Coe v Commonwealth* explained:

> "It is fundamental to our legal system that the Australian colonies became British possessions by settlement and not by conquest. It is hardly necessary to say that the question is not how the manner in which Australia became a British possession might appropriately be described. For the purpose of deciding whether the common law was introduced into a newly acquired territory, a distinction was drawn between a colony acquired by conquest or cession, in which there was an established system of law of European type, and a colony acquired by settlement in a territory which, by European standards, had no civilized inhabitants or settled law. Australia has always been regarded as belonging to the latter class: see *Cooper v Stuart* (1889) 14 App Cas 286 at 291."[18]

[15] (1836) 1 Legge 72. The report of the decision suggests that by the time of that case it had been accepted that Aboriginal people were subject to the common law: see eg Ritter, "The Rejection of Terra Nullius in Mabo: A Critical Analysis" (1996) 18 Syd L Rev 5 at 10-11. More recent research suggests that the actual decision in *Murrell* may have been to recognise that English law was not applicable to Aborigines and that the case has been misreported: see Castles & Gill, "Canadian Supreme Court clarifies Mabo Paradox" (1997) 3(88) *Aboriginal Law Bulletin* (1997) at 11-12. As to the law before *Murrell* see introduction by Kercher to the entry for *R v Ballard, R v Murrell, and R v Bonjon* at (1998) 3 *Australian Indigenous Law Reporter* 410-425. See also Kercher, "The Recognition of Aboriginal Status and Laws in the Supreme Court of New South Wales under Forbes CJ, 1824-1836" in Buck, McLaren & Wright (eds), *Land and Freedom: Law, Property Rights and the British Diaspora* (2001) and Kercher "Native Title in the Shadows: the Origins of the Myth of Terra Nullius in Early New South Wales Courts" in Blue, Bunton & Crozier (eds), *Colonialism and the Modern World Order: Selected Studies* (2002).

[16] (1847) 1 Legge 312.

[17] (1889) 14 App Cas 286 at 291-292.

[18] (1979) 24 ALR 118 at 129.

As we have seen this was too simplistic an analysis. That bright line distinction did not recognise examples such as the English factories in India or the recognition of native sovereignty in the United States where the common law had effectively amalgamated the principles relevant to settled colonies with those established by conquest. Similarly, the Australian courts treated the English common law as being that body of law applicable in England. Settled colonies (of which Australia was one) applied English law and recognised English rights to the exclusion of all other laws and other rights. The Australian courts did not recognise that in other jurisdictions and particularly Canada and New Zealand, English common law was understood as recognising some pre-existing interests.

Simplistic or not, the Australian approach was well entrenched. This is not to say that the problems with the Australian approach were not understood. Blackburn J in *Millirrpum v Nabalco*[19] clearly showed that the Aboriginal community in the case before him possessed a "subtle and elaborate" system of law. The necessary consequence of his analysis was that the Crown had been wrong in treating the colonies as settled. However, Blackburn J held that the classification of the colony was a question of law based upon the acts of the Crown, not a question of fact.[20] This was criticised. In particular, Professor Henry Reynolds, in a series of books and articles[21] went further. He suggested that the Imperial Crown (or, at least, some of its officers) did not, in fact, treat the Australian colonies as settled colonies, and that the courts had been in error in their categorisation of the Australian colonies as "settled".[22] Many, certainly in the law and in academic communities came to the view that there had been a great injustice to the Aboriginal people.

However, the general view was that the injustice done to the Aboriginal people could only be resolved by legislation. As it was put by a former Chief Justice of South Australia, Dr John Bray:

> "But it is too late to right these wrongs through the law courts. It will have to be done by legislation. In some States such legislation already exists. It is to be hoped that the principle will be recognised throughout the continent. To quote another Latin phrase, *Quod fieri non debet, factum*

[19] (1971) 17 FLR 141 at 267.
[20] (1971) 17 FLR 141 at 244.
[21] For example, *The Law of the Land* (1987; 2nd ed, 1992); "Mabo and Pastoral Leases" (1992) 2(59) *Aboriginal Law Bulletin* 8-10; "The Mabo Judgment in the Light of Imperial Land Policy" (1993) 16 UNSW Law Journal 27; *Aboriginal Sovereignty* (1996) and with Dalziel, "Aborigines and Pastoral Leases - Imperial and Colonial Policy 1826-1855" (1996) 19 UNSW Law Journal 315.
[22] The analysis by Reynolds has been criticised: see *Anderson v Wilson* (2000) 171 ALR 705 at 763-764, 768-772.

> *valent*, what should never have been done may nevertheless acquire legal validity after it has been done."[23]

Legislation was enacted for the Northern Territory and in a number of States by which large areas of land were vested in the Aboriginal traditional owners.[24] However, by the late 1980s the attempt to right the wrongs done to the Aboriginal people by legislation had clearly stalled. The attempt by the Commonwealth to create a nation-wide scheme for Aboriginal land rights was shelved in 1986, in large part as a result of pressure by the mining industry. There was no land rights legislation in either Queensland or Western Australia and no reasonable likelihood that such legislation would be introduced in the foreseeable future.

This forms the background to the High Court's decision in *Mabo (No 2)*.

MABO

The court in *Mabo (No 2)* began with the widely accepted assumption that the common law of Australia had worked a major injustice upon the Aboriginal people.[25] As we have seen, if the Australian common law (as it then was) was compared with that in other former colonies, that assumption is clear and obvious.

Against that background the first question facing the court in *Mabo (No 2)* was simple enough. Should the court follow precedent or should it change the common law?

With only one dissenter[26] the court decided to change the common law.[27] The reason for this was most clearly stated by Brennan J:

> "A common law doctrine founded on unjust discrimination in the enjoyment of civil or political rights demands reconsideration. It is contrary both to international standards and to the fundamental values of our common law to entrench a discriminatory rule which, because of the supposed position on the scale of social

[23] John Bray, Review of the *Law of the Land* by Henry Reynolds in *The Adelaide Review*, February, 1988.

[24] For a description of the legislation, see Selway, "The Role of Policy in the Development of Native Title" (2000) 28 FLR 403 at 409-414; French, "The Role of the High Court in the Recognition of Native Title" (2002) 30 UWAL Rev 129 at 134-138.

[25] See *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 28-29 (Brennan J), 109 (Deane & Gaudron JJ), 145 (Dawson J), 180-182 (Toohey J).

[26] Ibid at 145-150 per Dawson J.

[27] It is clear that the High Court *changed* the common law in Australia: *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 25-30, 40-43, 57-58, 109; *Mason v Tritton* (1994) 34 NSWLR 572 at 597; *Western Australia v Commonwealth* (1995) 183 CLR 373 at 427, 431-433; *Wik v Queensland* (1996) 187 CLR 1 at 177-184, 205-207.

> organisation of the indigenous inhabitants of a settled colony, denies them a right to occupy their traditional lands."[28]

However, the judicial method necessarily limits the extent to which a court can change the common law in order to correct a perceived injustice.[29] Again the limit in the capacity of the court to change the previous common law was expressed by Brennan J:

> "Although this court is free to depart from English precedent which was earlier followed ... it cannot do so where the departure would fracture what I have called the skeleton of principle."[30]

The result, particularly in the reasoning and judgment of Brennan J (with whom Mason CJ and McHugh J agreed), but also in the reasoning of the other judges who accepted the need to change the common law was to identify a new common law rule for the recognition of native title in Australia. In doing so they drew on the overseas experience, particularly in Canada and New Zealand.

But the new common law developed by the High Court was necessarily constrained by Australian history and Australian circumstances. What would fracture the fundamental principles of the common law of Australia would be the adoption of a theory of recognition of Aboriginal law and custom which involved the potential invalidity of titles granted by the Crown. As it was put by Brennan J: "Land in Australia which has been granted by the Crown is held in a tenure of some kind and the titles acquired under the accepted land law cannot be disturbed."[31]

What then are the significant historical facts that were taken into account by Brennan J? First was the undoubted fact that the Crown in Australia did not treat with the Aboriginal tribes and communities in the same way as the Crown had treated with the indigenous inhabitants in the United States, Canada and New Zealand. In Australia there were no treaties that had been recognised and applied. There was no recognition of Aboriginal sovereignty. Instead the courts recognised and accepted the claim of British sovereignty as an act of State.[32] Second is the fact that colonial governments and legislatures assumed that native title did not exist[33] and made grants parcel by parcel which grants were inconsistent with native title.[34]

[28] *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 42.
[29] See Justice McHugh, "The Judicial Method" (1999) 73 ALJ 37; Justice Kirby, "Judicial Activism" (1997) 27 UWALR 1; Chief Justice Doyle, "Judicial Law Making – Is Honesty the Best Policy" (1995) 17 Adel L Rev 161.
[30] *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 29-30.
[31] Ibid at 47.
[32] Ibid at 31. See also *Coe v Commonwealth* (1979) 24 ALR 118.
[33] Ibid at 52-53. See also *Western Australia v Commonwealth* (1995) 183 CLR 373 at 431-432.
[34] Ibid at 58, 68-69. See also *Western Australia v Commonwealth* (1995) 183 CLR 373 at 433.

The result was the development of a new Australian common law rule that was different from that in the other former English colonies. The differences are the result of the different cultural and social organisation of Aboriginal inhabitants from indigenous peoples elsewhere and of the different history of the relationship between those inhabitants and the Crown in different jurisdictions. As it was subsequently put by Kirby J:

> "The ways in which each of the former colonies and territories of the Crown addressed the reconciliation between native title and the legal doctrine of tenure sustaining estates in land varied so markedly from one former territory to the other and were affected so profoundly by local considerations (legal and otherwise) that it is virtually impossible to derive applicable common themes of legal principle. Still less can a common principle be detected which affords guidance for the law of this country. Australia is a late entrant to the field following the change of understanding in the common law as it was previously conceived, evidenced in this Court's decision in *Mabo (No 2)* and cases since."[35]

THE NEW AUSTRALIAN COMMON LAW

Before discussing the Australian common law of native title it is necessary to sound a note of caution. As David Jackson QC has commented: "the court has constructed, from really nothing, a completely new doctrine. It is ... a case where in form the Court has written a book, but in reality has given only the chapter headings."[36] This is an area of the law where the law is still developing. It may develop in entirely new, different and even unforeseen directions.

With this necessary qualification, the Australian common law of native title as first identified in *Mabo (No 2)* and as clarified and explained in later cases has the following elements:

Sovereignty

On settlement, the Imperial Crown held all sovereign powers in respect of the territory acquired. Any pre-existing sovereignty in Aboriginal tribes was extinguished by the act of settlement.[37] That

[35] *Fejo v Northern Territory* (1998) 195 CLR 96 at 150. See also *Wik v Queensland* (1996) 187 CLR 1 at 182-184, 214; *Yanner v Eaton* (1999) 166 ALR 258 at 294 fn 139.

[36] "The Lawmaking Role of the High Court" (1994) 11 Aust Bar Rev 197 at 211; See also French, "The Role of the High Court in the Recognition of Native Title" (2002) 30 UWAL Rev 129.

[37] *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 37-38, 60-61; *Walker v New South Wales* (1994) 182 CLR 45 at 48-50; *Coe v Commonwealth* (1993) 118 ALR 193 at 200. This distinguishes the Australian common law from that in the US. The US courts recognised a limited sovereignty remaining in the American Indian tribes.

consequence of imperial sovereignty cannot be challenged in any Australian court.[38]

Further the colonies were "settled" colonies and "the common law thus became the common law of all subjects within the colony who were equally entitled to the law's protection as subjects of the Crown."[39]

Recognition by the Common Law at Settlement

However, the common law would recognise rights created under Aboriginal custom and tradition prior to settlement. In order to recognise those rights some preconditions had to be met:

- The relevant right, its incidents and the persons entitled thereto must be ascertained according to the laws and customs of the indigenous people.[40] This inquiry is highly fact specific.
- The relevant right will be recognised by the common law as at settlement provided that the right is not inconsistent with any applicable statute or the common law.[41]

It is now clear (if it was not before) that common law recognition is not limited to the recognition of rights in land.[42] On the other hand, it remains unclear just what aspects of Aboriginal life can give rise to "rights" and what aspects do not. For example, the Canadian Supreme Court has held that the common law will protect those aboriginal customary rights which are the result of an activity which is "integral to the distinctive culture of the aboriginal group".[43] The Canadian Supreme Court has also held that "native title" (or customary rights to occupy land) is merely a subset of such customary rights, although it is not necessary to show that native title is "distinctive" because of the requirement under Canadian law (not apparently reflected in Australia) that there be continuous occupation of the land.[44]

Recognition by the Common Law Today

The common law will continue to recognise the relevant Aboriginal right if:

[38] *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 69.
[39] Ibid at 38.
[40] Ibid at 58, 70.
[41] *Commonwealth v Yarmirr* (2001) 184 ALR 113 at 132 [50], 135 [61], 145 [100]; *Western Australia v Ward* [2002] HCA 28 [91].
[42] Ibid at 131-132 [47]-[49]; *Western Australia v Ward* [2002] HCA 28 [60]-[61].
[43] See *R v Van Der Peet* (1996) 137 DLR (4th) 289 at 310.
[44] *Delgamuukw v British Columbia* (1997) 153 DLR (4th) 193 at 230, 231, 243, 244, 246, 247, 252-260, 272-273.

- the relevant Aboriginal group has continued as a biological group and has continued to observe the traditions and customs of that group (which traditions and customs may change and develop),[45] or the right has been transferred in accordance with the relevant Aboriginal custom;[46]
- the group has continued to exercise the relevant right. (The extent and nature of the required continuity remain unclear); and
- the relevant right has not been extinguished.

Extinguishment of Aboriginal Rights

Aboriginal rights will be extinguished by a lawful act of the sovereign (usually in legislation) which evinces a clear and plain intention to extinguish that right.[47]

Native Title in Land

The above common law rules have been most developed in relation to rights in relation to land. In respect of those rights:

- The potential inconsistency between the common law of tenures and Aboriginal rights in land is resolved by the theory of the Crown's radical title.[48] Where there are subsisting Aboriginal rights in land ("native title interests"), the Crown's radical title at settlement was subject to the native title rights, which were recognised by the common law and which could be enforced at common law.
- Native title will continue to be recognised and enforced by the common law providing that it has been continuously held by the "same" Aboriginal community (as defined in accordance with Aboriginal law and tradition[49]). The question of the nature and extent of the common law requirement of continuity remains contentious.[50] The source of that contention is, in large part,

[45] *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 59-60, 61, 70; See Sutton, *Native Title and the Descent of Rights* (1998) for a detailed discussion of the relationship between biological descent and Aboriginal custom.

[46] Ibid at 60, 70.

[47] Ibid at 69-70; *Commonwealth v Yarmirr* (2001) 184 CLR 113 at 144-145; *Western Australia v Ward* [2002] HCA 28 [388].

[48] Ibid at 50-51; *Commonwealth v Yarmirr* (2001) 184 ALR 113 at 131-132 [47]-[49].

[49] See *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 60-62, 70; *Ngalakan People v Northern Territory* (2002) 112 FCR 148; *Rubibi Community v Western Australia* (2002) 112 FCR 409. See also *Delgamuukw v British Columbia* (1993) 104 DLR (4th) 470 at 727.

[50] See *Yanner v Eaton* (1999) 166 ALR 258 at 269-270 where the majority comment that "an important aspect of the socially constituted fact of native title rights and interests that is recognised by the common law is the spiritual, cultural and social connection with the land"; *Hayes v Northern Territory* (unreported) [1999] FCA 1248 at paras 124-127; Meyers, "Native Title and Living Resource Management" (1995) 14 U Tas Law Rev 1 at 17-18; *Yorta Yorta* (2001) 180 ALR 655 at 684-685, 692-693, 696-703 contrast 666, 669 (on appeal to the High Court).

based upon the acknowledgement that Aboriginal law and tradition can change over time without affecting the recognition of native title.[51] This principle seems entrenched, although it is difficult to reconcile it with the refusal of the common law to recognise even a limited continuing Aboriginal sovereignty. The issue may have been resolved by the NTA at least in relation to claims under that Act (post).

- Native title can be extinguished by an exercise of the sovereign power of the Crown. The "exercise of a power to extinguish native title must reveal a clear and plain intention to do so, whether that action be taken by the Legislature or the Executive".[52] The relevant statutory land management schemes in the States (for example, the relevant Crown Lands Acts) are not read as having themselves extinguished native title,[53] but are read as empowering relevant persons to make grants which can extinguish native title.[54] The intention to extinguish native title is to be determined from the legal effect of the grant and not from the subjective intention of the person making the grant;[55] nor is it relevant whether or not the extent of occupation pursuant to the grant is inconsistent with native title.[56] The legal effect of the grant is to be ascertained from the terms of the grant itself and of the statutes pursuant to which the grant was made.[57] Extinguishment occurs where the legal effect of the grant is

[51] See *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 61.

[52] *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 64-65. Subject to statute, native title rights could be extinguished by land grant made pursuant to the prerogative: *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 50-51, 69, 75-76, 89-94, 100, 110. In relation to extinguishment by the prerogative, it should be noted that the relevant prerogative has not applied anywhere in Australia since at least 1842, see *Wik v Queensland* (1996) 187 CLR 1 at 108-111, 139-143, 171-174, 227-228, 243; *Western Australia v Ward* [2002] HCA 28 [167]; *Cudgen Rutile (No 2) P/L v Chalk* [1975] AC 520 at 533. Although much of the analysis of extinguishment in *Mabo (No 2)* seems to relate to the exercise of prerogative powers, it is unlikely that the effect of prerogative powers is of any practical significance.

[53] *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 64-65, 111, 196; *Western Australia v Commonwealth* (1995) 183 CLR 373 at 431-433; *Fejo v Northern Territory* (1998) 195 CLR 96.

[54] *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 63-64, 110-111; *Pareroultja v Tickner* (1993) 117 ALR 206 at 218-219.

[55] *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 68; *Western Australia v Commonwealth* (1995) 183 CLR 373 at 422; *Mason v Tritton* (1994) 34 NSWLR 572 at 591; *Re Wadi Wadi People's Application* (1995) 129 ALR 167 at 178; *Wik v Queensland* (1996) 187 CLR 1 at 71, 85-86, 133, 233-238; *Fejo v Northern Territory* (1998) 195 CLR 96 at 126-128, 154-156. This is to be contrasted with the early view of some commentators that the Canadian position should apply in Australia: see eg Bartlett, "The Aboriginal Land which may be Claimed at Common Law: Implications of Mabo" (1992) UWAL Rev 272.

[56] *Western Australia v Ward* [2002] HCA 28 [148]-[152], [233]-[234]. This is subject to the possibility that the grant itself may make provision for "occupational inconsistency" eg where the grant is a licence which is capable of co-existing, but the grant includes a right to fence part of the property with a right to a lease of the fenced part and to exclude third parties from the lease. This possibility is adverted to in *Wik v Queensland* (1996) 187 CLR 1 at 203 (re building an airstrip).

[57] *Wik v Queensland* (1996) 187 CLR 1 at 91, 112, 150-155, 197-198, 243-244.

inconsistent with the native title rights,[58] or some of them, and the legislation does not merely regulate those rights.[59] In order to determine the extinguishing effect it is necessary properly to characterise the relevant native title right or rights so as to determine whether the grant is inconsistent with the relevant native title right or rights. "Partial" extinguishment is possible.[60]

- A grant of an exclusive right to occupy is necessarily inconsistent with the continuation of native title. This is because such a right gives a power to exclude and such a power is inconsistent with the continuation of possessory rights.[61] The grant of a fee simple or of a common law lease[62] is a grant of a right of exclusive occupation; so too is the grant of a "Western lands" lease in New South Wales[63] as is the grant of a variety of other statutory rights.[64] On the other hand, the grant of a statutory right does not necessarily confer a right of exclusive possession or extinguish native title rights even if that right is described in the legislation as a "lease"[65] (see discussion – post).

- Where the Crown occupies Crown land without making a grant, native title will be extinguished to the extent that the occupation is, in fact, inconsistent with native title.[66]

- Once extinguished, native title cannot be revived.[67]

- The effect of extinguishment was subject (in 1992) to the qualification that, from 1975, the power to make grants pursuant to State legislation would be subject to the *Racial Discrimination Act* 1975 (Cth),[68] and that the power of the Commonwealth Parliament to extinguish native title may be subject to the payment of compensation on just terms.[69]

58 Ibid at 133, 166, 203, 249; *Commonwealth v Yarmirr* (1999) 184 ALR 113 at 125 [28]-130 [41].
59 *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 64.
60 Western Australia v Ward [2002] HCA 28.
61 Ibid at [186].
62 *Western Australia v Ward* [2002] HCA 28 [369].
63 *Wilson v Anderson* [2002] HCA 29 [36].
64 See eg *Western Australia v Ward* [2002] HCA 28 [249], [349], [357], [432]-[433].
65 *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 68-69, 89, 110, 196; *Wik v Queensland* (1996) 187 CLR 1 at 71, 155, 176, 236-237, 250; *Fejo v Northern Territory* (1998) 195 CLR 96; *Western Australia v Ward* [2002] HCA 28 [177]-[185]; *Wilson v Anderson* [2002] HCA 29 [153].
66 *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 68; *Wik v Queensland* (1996) 187 CLR 1 at 225-226, 233-234; *Fourmile v Selpam* (1998) 152 ALR 294; *Ngalakan People v Northern Territory* (2002) 112 FCR 148.
67 *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 70; *Mason v Tritton* (1994) 34 NSWLR 572; *Larrakia People v Northern Territory* (1998) 152 ALR 477 at 484-487; (on appeal) *Fejo v Northern Territory* (1998) 195 CLR 96.
68 *Mabo v Queensland (No 1)* (1988) 166 CLR 186; *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 67, 74, 112, 172-173, 214-216; *Western Australia v Ward* [2002] HCA 28 [100]-[126]; see McIntyre, "Aboriginal Title: Equal Rights and Racial Discrimination" (1993) 16 UNSW Law Journal 57.
69 *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 111.

The combined operation of the requirement of continuity and of the power to extinguish is that native title in land was particularly fragile. As it was put by Brennan J:

> "As the Governments of the Australian Colonies and, latterly, the Governments of the Commonwealth, States and Territories have alienated or appropriated to their own purposes most of the land in this country during the last two hundred years, the Australian Aboriginal peoples have been substantially dispossessed of their traditional lands. They were dispossessed by the Crown's exercise of its sovereign powers to grant land to whom it chose and to appropriate to itself the beneficial ownership of parcels of land for the Crown's purposes.... Aborigines were dispossessed of their land parcel by parcel, to make way for expanding colonial settlement. Their dispossession underwrote the development of the nation."[70]

Wik and Co-Existence

The conclusion of the High Court in *Wik* was that the grant of a pastoral lease as described in the relevant statute was, in fact, not the grant of a "lease" as understood at common law in that it did not grant a right of exclusive possession.[71] The result was that native title was not necessarily extinguished. That decision has had a significant effect upon the understanding of the extent and nature of common law native title that may still remain. On a practical level it has meant that instead of about 20 percent of non-Aboriginal land[72] in South Australia being potentially available for claim about 60 percent of non-Aboriginal land was available for claim. Most of this land had been or was the subject of pastoral leases.

Not only did the decision in *Wik* have the practical effect of considerably expanding the area available for claim, it also squarely raised the problem of "co-existence".[73] There is no obvious means at common law of resolving issues of "co-existence". This is because, at common law, native title is a burden upon the Crown's title. It does not burden the pastoralist's title which has priority.[74] At common law

[70] *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 68-69.

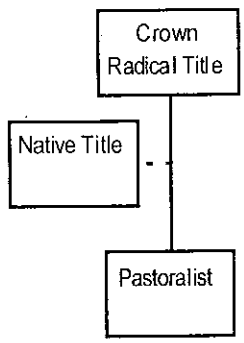
[71] *Western Australia v Ward* [2002] HCA 28 [178]-[184]. Even where the pastoral lease contains a reservation in favour of continued Aboriginal use of the pastoral lease (as has existed in Western Australia, South Australia and the Northern Territory), native title may extend beyond the terms of the reservation, depending upon what rights and incidents are found to comprise the relevant native title: *Western Australia v Ward* [2002] HCA 28 [417].

[72] About 20% of the land in the State was already held by Aboriginal groups under various South Australian statutes. The further 20% thought to be available for claim was vacant Crown land and parks and reserves.

[73] See later comments under heading "Co-Existing Titles" in Section dealing with "Reflections", p 127.

[74] *Western Australia v Ward* [2002] HCA 28 [179]-[186], [193]-[194].

there is no legal relationship between the pastoralist and the native title holder. The position can be shown diagrammatically as follows:



Minerals and the Common Law

In *Ward* the majority in the Full Federal Court held that the statutory vesting of minerals in the Crown extinguished any native title rights in minerals.[75] The High Court has confirmed this view.[76]

Of course, it is one thing for the Crown to have the exclusive rights to minerals – it is another thing entirely to obtain access to them. Such access is usually provided by a mining "lease" or other tenement. Notwithstanding the use of the word "lease" in the relevant statute a "mining lease" does not necessarily connote a common law lease. Rather, it may connote a profit a prendre giving a right to go onto the land and remove the specified mineral or minerals from it.[77] Nevertheless, the Full Federal Court in *Ward* also held that Western Australian mining leases wholly extinguished all native title over the whole area of the lease. The High Court rejected this approach, holding that whatever rights were given to the holder of a mining lease they were only for mining purposes and consequently were not necessarily inconsistent with all incidents of native title.[78] Given the apparently strict approach taken by the High Court majority to the question whether a Western Australian mining lease can confer a right of exclusive possession it may be unlikely that mining leases elsewhere will be understood as wholly extinguishing native title. Nevertheless, they may have extinguished some native title rights to the extent that the lease was inconsistent with them. The extent of that inconsistency is likely to vary from one jurisdiction to another

[75] *Western Australia v Ward* (2000) 170 ALR 159 at 289-283 [520]-[544].

[76] *Western Australia v Ward* [2002] HCA 28 [382]-[364], [640].

[77] *Ex p Henry* (1963) 63 SR (NSW) 298 at 301-305; (on appeal) (1964) 114 CLR 322 at 327, 329, 333, 335; *Wade v New South Wales Rutile Mining Co Pty Ltd & Ors* (1970) 121 CLR 177 at 188-189, 192-193 (Windeyer J); *Newcrest Mining (WA) Ltd v Commonwealth* (1997) 190 CLR 513 at 616-617 (Gummow J).

[78] *Western Australia v Ward* [2002] HCA 28 [285]-[308], [331] contrast [849]-[860].

because of the diversity between the relevant mining legislation in each Australian jurisdiction. For example under s 276(1)(d) of the *Mineral Resources Act* 1989 (Qld) it is a condition of a mining lease that without the consent of the Minister the holder should not obstruct or interfere with any right of access held by any person to the land. On the other hand, s 76 of the *Mining Act* 1992 (NSW) provides that the holder of a mining lease can fence the whole or any part of the land subject to the lease, and must fence certain areas if given a notice by the landholder. On the face of it a New South Wales mining lease is more likely to be inconsistent with native title rights than is a Queensland mining lease. Certainly, petroleum licences raise very different issues.

NATIVE TITLE ACT

Background to the NTA

Common law native title was inherently subject to extinguishment. To that extent it was fragile.[79] After 1975 the capacity to extinguish native title was limited by the provisions of the *Racial Discrimination Act* 1975 (Cth) (RDA) although that limit only required that native title holders be treated in the same way as holders of equivalent rights created under ordinary law.[80] That protection may well have proven to be illusory at least in relation to rights other than rights to occupy land. Even in relation to rights to occupy land, it would often give rise to a right to compensation rather than the continuation of the pre-existing native title rights. On the other hand, in relation to native title rights to occupy land, there was considerable uncertainty whether grants of land and grants of mineral tenements made since 1975 were valid. There was also uncertainty as to how native title should be dealt with during the protracted period when claims were being tested in the courts. The result of all this was the perceived need for legislation to provide a framework for dealing with native title. As one of the issues needing to be addressed was the operation of the RDA it was obvious to all except some in Western Australia that the legislation would need to be Commonwealth legislation.

[79] *Anderson v Wilson* [2002] HCA 29 [138].

[80] See *Western Australia v Commonwealth* (1995) 183 CLR 373 at 437. The effect is explained in more detail in *Western Australia v Ward* [2002] HCA 28 [100]-[126]. The position may be summarised as follows. Section 9 RDA is unlikely to have any effect. Section 10 operates where native title holders are treated less well than others having interests in land such that (a) if the State law confers a benefit, but native title holders do not receive that benefit, the RDA confers the relevant benefit; (b) if the State law imposes a burden, but only on native title holders, the law is invalid.

Following the High Court decision in *Wik* in 1996 there was a further need for legislation to deal with issues arising from "co-existence".

The *Native Title Act* 1993 (Cth)[81] (referred to herein incorporating the substantial amendments made in 1998 as the NTA) is the Commonwealth Parliament's response to these issues.

In various important ways the NTA reflects some of the concepts from the *Aboriginal Land Rights Act (Northern Territory)* 1976 (Cth) which, in turn, were based upon recommendations of the Woodward Report. For example, before the Federal Court can make a determination of native title under the NTA the court must determine whether the native title will be held by a prescribed body corporate (PBC) on trust for the common law holders[82] or, if not, it must determine which PBC will perform the relevant functions under the Act and Regulations (s 57, NTA). In either case the PBC is registered on the National Native Title Register and becomes a registered native title body corporate.[83] The practical result is that, if the common law native title holders wish to seek a determination under the NTA they must establish a PBC which will act either as trustee or as agent for them in relation to their native title interests.[84] The NTA treats the Aboriginal entity holding native title as being no more than the conglomeration of its members.[85] And, of course, the purpose and role of the PBC is to act in substitution for that entity and, at least where the PBC acts as trustee, to limit its rights. This role of native title corporations (together with the "representative role" of the Land Councils) reflects the proposals of Woodward.

The use of artificial corporate structures is understandable in the context of a statutory scheme which was then perceived as the only source of special Aboriginal rights. However, within the context of the recognition by the common law of Aboriginal rights the requirement to establish a PBC creates logical difficulties. At common law native title is held by a community which is defined in accordance with Aboriginal law and tradition.[86] Presumably the community can take legal proceedings to enforce the rights that were identified.[87] That community is likely to be a family or some other group. However, it

[81] See generally as to the effect of the NTA prior to the 1998 amendments: *Western Australia v Commonwealth* (1995) 183 CLR 373 at 453-9.

[82] Section 56, NTA.

[83] Section 193, NTA.

[84] See generally, Mantziaris and Martin, *Native Title Corporations - A Legal and Anthropological Analysis* (2000).

[85] See eg s 66B of the NTA and the definition of "group of common law holders" in reg 2(2) of the *Native Title (Prescribed Bodies Corporate) Regulations*.

[86] See *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 60-62, 70. See also *Delgamuukw v British Columbia* (1993) 104 DLR (4th) 470 at 727.

[87] Ibid at 59-60, 62.

is also necessarily a political entity – it has a system of laws and it has the capacity to change those laws.

The potential for conflict between the traditional owners and their traditional political structures with the new PBC is obvious.

Relationship of NTA and the Common Law

The statutory requirement for native title to be held by corporations is merely one example of a more general difficulty in the operation of the NTA. It is unclear how the statutory scheme established by the NTA is intended to interact with the common law.

There are two aspects of this:

(a) First, there are many aspects of the protection and enforcement of Aboriginal rights that are simply not touched on by the NTA. For example, the NTA primarily deals with the actions of governments. Generally, it does not deal with the actions of private persons or bodies. Assume, for example, that a pastoral lease provides that the pastoralist must give access to the traditional owners. That access right is also a native title right, whether at common law or under the NTA. The pastoralist nevertheless refuses access to the native title holders. The NTA would seem to have little to say about this, save that the private act cannot "affect" native title (although it also could not have done so at common law) and native title holders may be able to rely upon any determination under the NTA in order to establish their rights.[88]

Cases such as *Mabo*, *Wik*, and *Fejo* all involved common law claims, not claims under the NTA.[89]

This general comment is subject to some aspects of the NTA which constitute a code. Certainly the "future act" regime in the NTA relating to acts by Government which could "affect" native title seem to be a code. But so may some other provisions of the NTA. This depends upon the potential effect of s 11(1) of the NTA which provides that "native title cannot be extinguished contrary to this Act". There is some indication in the joint judgment in *Anderson v Wilson* that s 11(1) applies to past extinction.[90] If so, then extinction may now be subject to the NTA even in relation to common law claims.

[88] Although even this is subject to the possibility that later circumstances may result in changes to the Federal Court determination: see NTA, s 13(1); *Western Australia v* Ward [2002] HCA 28 [32].

[89] See *Western Australia v Ward* [2002] HCA 58 [2].

[90] See *Anderson v Wilson* [2002] HCA 29 [46]. Contrast *Western Australia v Ward* [2002] HCA 28 [21] and [43] which suggest that the common law of extinguishment is picked up by s 223(1)(c) of the NTA and that s 11(1) of the NTA has a narrower operation.

Similarly, the NTA only deals with rights in land.[91] It does not deal with other Aboriginal rights which may also be protected by the common law. The NTA would not seem to have any application in relation to rights not related to land.

(b) Second, the interaction of the common law and the NTA remains problematical even where relevant proceedings are brought under the NTA.

Ultimately that interaction depends upon the interpretation of s 223 (1) of the NTA which provides:

> "223.(1) The expression 'native title' or 'native title rights and interests' means the communal, group or individual rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to land or waters, where:
>
> (a) the rights and interests are possessed under the traditional laws acknowledged, and the traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders; and
>
> (b) the Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters; and
>
> (c) the rights and interests are recognised by the common law of Australia."

On its face s 223(1)(c) of the NTA incorporates the common law concept of native title into the definition.[92] Consequently, it might be thought that the requirements of the common law in respect of continuity and extinguishment are "picked up" and applied by s 223(1) of the NTA.

However, it has been argued that this is not the case. In particular, the majority in the Full Federal Court in *Commonwealth v Yarmirr*[93] took the view that para (c) must be read down in light of paras (a) and (b) which otherwise would be superfluous. They suggested that para (c) should be read down to refer to the "kind" of rights that the common law would recognise. The result of this analysis was that a loss of connection did not matter in relation to a claim brought under the NTA providing that there was an existing right or interest possessed under the traditional laws. There is some support for this

91 *Western Australia v Ward* [2002] HCA 28 [59], [644].

92 *Western Australia v Commonwealth* (1995) 183 CLR 373 at 452.

93 (1999) 168 ALR 426 at 439-445 [42]-[70]. However, the same judges appear to have taken a different approach in *Western Australia v Ward* (2000) 170 ALR 159 at 179 [60], 182 [76]-[77], 193-202 where they seem to have accepted that it is necessary to satisfy each of the paras (a), (b) and (c) and that (c) requires proof of all common law requirements including continuous connection. A similar approach was taken by Black CJ and Sackville J in *Anderson v Wilson* (2000) 171 ALR 705 at 711-712 and by Beaumont J in that case (at 768) and (probably) by all members of the Full Federal Court in *Yorta Yorta* (2001) 180 ALR 655 at 666, 669, (Black CJ); 684-685, 692-693, 696-703 (Branson & Katz JJ) although they differed as to the extent of continuity required.

approach by at least Justice Kirby in the High Court's decision in *Commonwealth v Yarmirr*.[94] It was specifically rejected in the judgments of McHugh and Callinan JJ.[95] However, the majority joint judgment is, at best, equivocal.[96]

The question was revisited by the High Court in *Western Australia v Ward*. The majority seem to have accepted that the effect of para (b) is that there is no need for continuity of use.[97] The majority treat para (c) not as incorporating common law concepts, but only of providing for the "recognition" of the relevant "rights".[98] What is meant by this is unclear, but it would seem to be something similar to the approach of the majority of the Full Federal Court in *Yarmirr*. So, for example, the majority, whilst accepting that s 223(1)(c) of the Act incorporated the principles of extinguishment,[99] looked primarily to Divs 2 (past acts) and 2B (confirmation) of Pt 2 of the NTA.[100] They seem to have accepted that these Divisions incorporate common law concepts of extinguishment, but nevertheless held that the inquiry was directed to the statutory requirements, not the common law.

This is a somewhat surprising result. It would suggest that, in those circumstances where the NTA is not as rigorous as is the common law, the Commonwealth Parliament may have "created" native title in circumstances where common law native title had already been "washed away" by the tide of history. It is plain that if this is the result it was an inadvertent one. One of the consequences of such an interpretation would be that the Commonwealth would be obliged to pay just terms compensation to the States for the interests in land that the NTA had acquired from the States and conferred on Aboriginal claimants.

And, as already remarked, it also creates the potential that "native title" may have a different meaning when proceedings are taken under the common law or under the NTA.

The NTA does a number of things.[101]

[94] (2001) 184 ALR 113 at 182-184 [254]- [258] where Kirby J suggests that the phrase "recognised by the common law" in para (c) should take its meaning from paras (a) and (b) of the definition.

[95] Ibid at 151 [126]-[128] (McHugh J); 212 [340]-[341] (Callinan J).

[96] Ibid at 120 [9], 129-130 [40]-[42] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

[97] *Western Australia v Ward* [2002] HCA 28 [64], [578], contrast [648]-[650]. The majority do seem to accept some requirement for continuity, but do not specify what it is: see [32].

[98] Ibid [20]-[21].

[99] Ibid [21].

[100] *Anderson v Wilson* [2002] HCA 29 [44]-[60], [145]; *Western Australia v Ward* [2002] HCA 28 [2], [135]-[140], [304].

[101] The NTA is a very long, complex and detailed statute. In *Anderson v Wilson* [2002] HCA 29 [126]-[127] it was described by Justice Kirby as an "impenetrable jungle" which can only be passed through by "keeping the eyes focussed on clear sources of light - like the rising sun in the morning or, at night, the constellation we call the Southern Cross." The discussion of the NTA that follows is only intended to illuminate the issues dealt with by the Act in the broadest terms. The discussion is not comprehensive. It is not intended as a detailed analysis of the operation of the NTA. See generally French, "A Hitchhiker's Guide to the Native Title Act" (1999) 25 Mon LR 375.

Prevents Extinguishment

Subject, of course, to the legislative power of the Commonwealth Parliament to change the law, the NTA prevents the extinguishment of "native title" (as defined in s 223 of the NTA) except in accordance with the provisions of the NTA.[102] Subject to the operation of the RDA other Aboriginal rights recognised by the common law are presumably still fragile and subject to extinction.

Creation of "Native Title"

The NTA expressly provides that the previous extinguishment of native title at common law is to be disregarded in certain limited circumstances, for example, where the property is a pastoral lease held by a native title claimant or a trustee or company holding on behalf of a claimant;[103] where legislation or grant pursuant to which the land is held expressly makes provision for the land to be held for the benefit of Aboriginal peoples[104] or where the land is vacant Crown land which is actually "occupied" by claimants at the time that the claim is made.[105] The previous extinguishment would only seem to be disregarded in relation to the NTA. To the extent that a determination of native title under the NTA operates in rem (see below) this limitation could be disregarded where there is a determination; however, it is unclear whether these provisions would have any effect if native title holders did not have a determination and merely instituted common law proceedings (for example, for trespass) to protect their rights.

In addition the NTA expressly provides for statutory access rights to cross over and hunt on pastoral lands once a claim respecting those lands has been registered.[106] It also provides that Aborigines can continue to perform certain activities (such as hunting and fishing) in exercise of their native title rights if the activities would otherwise be subject to a licence or an approval.[107]

And, as discussed above, it may be that the narrow construction of the definition of native title in s 223(1) of the NTA itself creates a new species of statutory native title rights, particularly where the common law requirement of continuity has not been met, but there is a current spiritual connection with the land.

[102] NTA, ss 10, 11, 211.
[103] NTA, s 47.
[104] NTA, s 47A; See *Rubibi Community v Western Australia* (2001) 6(2) AILR 42 & [2001] FCA 1553.
[105] NTA, s 47B. See *Hayes v Northern Territory* (1999) 97 FCR 32 at [118].
[106] NTA, ss 44A, 44B.
[107] NTA, s 211. See *Yanner v Eaton* (1999) 166 ALR 258.

Confirmation of Common Law

The NTA "confirms" that certain grants made prior to 23 December 1996 extinguished native title and authorises the States to make similar provision.[108] Where the grant was of an "exclusive possession act" (some of which are prescribed) then native title is absolutely extinguished.[109] If the grant was of a "non exclusive possession act" (for example, a pastoral lease) then the rights granted prevail over any native title rights[110] and native title rights are extinguished to the extent of any inconsistency.[111] Compensation is payable where native title has been extinguished by reason of these provisions.[112] The NTA also confirms the existing rights of the States to minerals and waterways and the rights of those holding existing fishing rights.[113] As noted above, these provisions are now the source of extinguishment in relation to proceedings under the NTA, and perhaps even at common law.

Validation of Previous Acts

The NTA provides a procedure to validate certain titles granted before 1 January 1994[114] ("past acts") and for the validation of "intermediate period acts" which occurred between 1 January, 1994 and 23 December 1996.[115]

The States and Territories are permitted to enact legislation that validates all "past acts" which otherwise would have been invalid due to the existence of native title providing that such legislation complies with the NTA scheme. Under that scheme past acts are divided into four categories. "Category A" comprises freehold grants, grants of commercial, pastoral, agricultural or residential leases and the construction of permanent city, town or private residences or other works as a result of a mining lease.[116] These extinguish native title. "Category B" comprises leases other than leases to the Crown or mining leases or those in category A.[117] Category B includes, for example, some miscellaneous leases, although the reasons why these are treated differently from agricultural leases etc remains but one of

[108] For various reasons of politics and policy some of the State provisions are narrower than the Commonwealth provisions, particularly in relation to the scheduled interests.
[109] NTA, s 23B.
[110] NTA, ss 23G, 23I, 44H.
[111] NTA, s 23F but see the notification requirements in s 23HA.
[112] NTA, s 23J.
[113] NTA, s 212.
[114] NTA, ss 14-20.
[115] NTA, ss 21, 232A. In some circumstances there are obligations to notify etc, see NTA, s 22H.
[116] NTA, ss 15(1)(a) and 229. (Category A does not include grants to the Crown or grants to Aboriginal people: NTA, s 229).
[117] NTA, ss 15(1)(c) and 230.

the mysteries of this Act. Category B acts extinguish native title to the extent of any inconsistency. And "Category C"[118] and "Category D"[119] comprise mining leases and all other interests, including grants to the Crown. In respect of Categories C and D the "non extinguishment" principle applies, that is, native title is merely suspended and will revive when the relevant act ceases to apply (in whole or in part) so as to prevent native title from operating.[120]

"Intermediate period acts" are acts which would otherwise be invalid and which are done in the relevant period pursuant to or under a valid grant of a freehold or of a lease (other than a mining lease) or which comprise a public work over certain areas including areas where a pastoral lease had previously been granted. Again there are four categories.

Where the relevant past act or intermediate period act is validated, compensation is payable by the Commonwealth or State.[121]

Determinations of Native Title

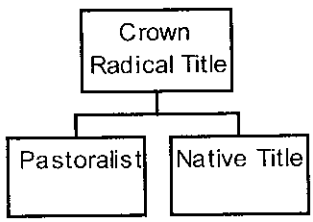
The NTA provides a procedure for the determination of the existence of native title.[122] A determination "is a determination whether or not native title exists ... and, if it does exist a determination of" various other matters.[123] The determination is made at a particular point in time and relates to the existence of native title as at that date.

There is no procedure under the NTA for "group" applications, much less any recognition of the group as a political entity. Instead the application for native title must be made by an individual or individuals who are authorised by all the persons who hold the common or group rights. Persons so authorised can apply to the Federal Court for a determination that native title exists.[124] The Federal Court has broad powers to deal with the claim, including by

[118] NTA, ss 15(1)(d) and 231.
[119] NTA, ss 15(1)(d) and 232.
[120] NTA, s 238.
[121] As the case may be: NTA, ss 17, 20, 22D and 22G. It should be noted that compensation under the NTA is "capped" at the amount payable for the compulsory acquisition of freehold, although that amount can be exceeded if it would not result in "just terms" for the purposes of the Commonwealth Constitution: see NTA, ss 51A and 53.
[122] NTA, ss 13(1) and 61.
[123] Section 225, NTA.
[124] As might be expected there are disputes as to who are the properly authorised representatives: see eg *Re Ridgeway on behalf of the Worimi People* [2001] FCA 848; *Duren v Kiama Council* [2001] FCA 1363; *Johnson in the matter of Lawson and Lawson* [2001] FCA 894; *Ward v Northern Territory* [2002] FCA 171. There are also disputes as to what other parties should be heard: see *Harrington-Smith v Western Australia* [2002] FCA 184; *Kooma People v Queensland* [2002] FCA 86; *Munn v Queensland* [2002] FCA 78; *Britten v Western Australia (No 2)* [2002] FCA 163.

referring the claim to the National Native Title Tribunal for mediation.[125] Ultimately, the Federal Court has power to determine whether native title exists and, if it does, its nature and extent.[126] It is likely that the determination of the Federal Court would be an "in rem" decision which would bind third parties.[127] Nevertheless, the jurisdiction is not exclusive and common law proceedings could still be instituted in State courts, for example, for trespass or for injunctions to restrain threatened interferences with common law native title. Such proceedings can also be taken in the accrued jurisdiction of the Federal Court.[128]

The procedure for making a determination of native title in respect of co-existing tenures may be more burdensome than is required by the common law. Where a determination involves the recognition of native title in relation to an area containing a pastoral lease (for example) the NTA appears to require the court to define with some precision the rights of both the pastoralist and the native title holders[129] so as to minimise any conflict between them. Section 225 of the NTA certainly implies that the court must determine the relationship between the rights of the pastoralist and the native title holders. In effect, the rights of the pastoralist and the native title holder, once defined, are treated as equal. This is to be compared with the common law position discussed above. The position under the NTA can be shown diagrammatically as follows:



Authorisation of Future Acts

Future acts which "affect" native title[130] are invalid unless:[131]

[125] NTA, s 86B.

[126] NTA, ss 79A, 81, 94A, 225. The determination must specify a "prescribed body corporate": see above discussion under the heading "Background to the NTA", p 111.

[127] See *Wik Peoples v Queensland* (1994) 49 FCR 1. That decision may not have been correct at the time it was given, but in light of the broader jurisdiction now given to the Federal Court, the reasoning would now seem correct: see *Western Australia v Ward* (2000) 170 ALR 159 at 208.

[128] *Lardil Peoples & Ors v Queensland* (2002) 185 ALR 513.

[129] *Western Australia v Ward* [2002] HCA 28 [51]-[53].

[130] NTA, ss 24AA, 28. Contrast approach of High Court in *North Ganalanja Corp v Queensland* (1996) 185 CLR 595 where it was held that the "right to negotiate" applied even if there was no native title that could be affected. The 1998 Amendments make it clear that there is no limitation upon future acts if native title does not exist: *Lardil Peoples & Ors v Queensland* (2002) 185 ALR 513.

[131] NTA, ss 10, 11, 24AA, 24OA.

- The act is consented to in an Indigenous Land Use Agreement.[132] There are four types of agreements: body corporate agreements;[133] area agreements;[134] alternative procedure agreements;[135] and agreements which comply with any requirements specified by regulation.[136]

- A "non claimant application" has been made[137] and, three months after the making of that application, no native title claim has been registered then all acts done thereafter are valid, even if they result in the extinguishment of native title, until a native title determination (if any) is eventually made. However, compensation is payable.

- In relation to a lease which permits "primary production activity":[138] (1) A State can authorise the lessee of a non-exclusive lease to carry out other primary production activities on the land, but not if the effect of doing so is to convert the lease to one conferring exclusive possession. The non-extinguishment principle applies and compensation is payable if native title is affected. (2) Primary production activities which were permitted under the lease prior to 31 March 1998 are permitted to continue and prevail over, but do not extinguish native title. Compensation is not payable. (3) A State can authorise minor activities, such as cutting timber or removing gravel, providing that certain procedural requirements are met.

- In relation to waters and airspace a State can make and amend legislation and make grants and confer entitlements.[139] The non-extinguishment principle applies and compensation is payable.

- The act is pursuant to a "right based"[140] obligation existing prior to 23 December 1996 or is a renewal or extension of specified leases.[141] There are certain procedural obligations imposed. If the lease grants a right of exclusive possession then the grant of the renewal or extension extinguishes native title, but otherwise the non-extinguishment principle applies. Compensation is payable.

- The act involves the use of land for a purpose for which the land was dedicated or reserved by the State prior to 23 December 1996

[132] NTA, s 24EA, 24EB, 24EC.
[133] NTA, s 24BA: all registered bodies corporate must be parties to agreement.
[134] NTA, s 24CA (all reasonable efforts must be made to identify all potential claimants who each must agree).
[135] NTA, s 24DA: not necessary that all registered bodies be parties or that all claimants agree, but the Registrar must be satisfied that agreement is fair. The agreement cannot extinguish native title.
[136] NTA, s 24DM.
[137] NTA, ss 24FA, 66(10).
[138] NTA, ss 24GB, 24GC, 24GE.
[139] NTA, s 24HA.
[140] NTA, s 24IB to mean an act in exercise of a valid, legally enforceable right or an act in good faith giving effect to an offer, commitment or undertaking evidence in writing at the relevant time.
[141] NTA, s 24IA.

(or for another purpose having no greater effect upon native title).[142] If the use involves a public work then native title is extinguished. Otherwise the non-extinguishment principle applies. Compensation is payable.

- The act is by a State and consists of permitting, requiring or involving the construction, use or maintenance of public facilities.[143] Public facilities are, for example, roads, jetties, and utilities. Native title holders must have the same procedural rights as other land holders, have reasonable access to the land and heritage sites must be protected by legislation. The non-extinguishment principle applies and compensation is payable.
- The act is a "low impact future act"[144] on land where there has been no determination of the existence of native title. Such acts are defined broadly, but exclude grants of exclusive possession, grants of leases, excavation or clearing (other than for reasons of public health, public safety or the protection of the environment), mining (other than fossicking), the construction of fixtures and the disposal of poisonous, toxic or hazardous waste. The non-extinguishment principle applies.
- The act relates to an "off-shore" place.[145] If the act consists of a compulsory acquisition then native title is extinguished; otherwise the non-extinguishment principle applies. Compensation is payable.
- The act consists of legislation which treats the native title holders the same or better than if they held freehold; or an act which is other than legislation and which applies to an "on shore place" and which treats the native title holders the same or better than if they held freehold and where there is in place heritage protection legislation; or an act which consists of opal or gem mining in certain circumstances[146] and, in each case, the "right to negotiate" procedure and other procedural requirements have been complied with.[147]
- In the absence of satisfactory alternative State provisions,[148] an act consisting of a right to mine[149] or of a compulsory acquisition by the Commonwealth or a State for the benefit of third parties (other than

[142] NTA, ss 24JA and 24JB. There are procedural requirements that must be complied with.
[143] NTA, s 24KA. Note the exemption for "compulsory acquisition" in s 24KA(1A). This term is not defined but presumably this does not render the rest of the section meaningless.
[144] NTA, s 24LA.
[145] NTA, s 24NA.
[146] NTA, ss 24MB(2), 24MD. There must be in place heritage protection legislation. The act is valid but only if the "right to negotiate" and other procedural requirements are complied with.
[147] NTA, ss 24MA, 24MB(1), 24MD. The effect of the act depends upon what the act is, eg, a compulsory acquisition will usually extinguish native title.
[148] NTA, ss 43, 43A. Only South Australia and Queensland have approved alternative procedures. The approval of the Queensland provisions was held invalid in *Central Queensland Land Council v Attorney General (Cth) & Queensland* (2002) 188 ALR 200 (subject to appeal).
[149] There are some qualifications, see eg NTA, ss 24MD(6B)(b), 26.

public infrastructure) or of any other act specified by the Minister where the "right to negotiate" procedure has been complied with.[150]

The "right to negotiate" procedure referred to above consists of the notification of the public and of various parties,[151] negotiation in good faith with those parties[152] with the assistance of an "arbitral body"[153] or, if the negotiations fail to reach a resolution within six months of the commencement of the procedure, a compulsory arbitration by the "arbitral body".[154]

REFLECTIONS

There have been many wasted opportunities in the last 10 years. Indeed, one does not have to stop there. With hindsight it is clear that the Australian political system lost an enormous opportunity when it failed to address the issues of native title rights in a statutory context in the 1970s and 1980s. The mining industry must wear its share of blame for that failure.

In *Ward v Western Australia* McHugh and Callinan JJ called for reform of the NTA in order to resolve the unfairness, cost and expense in the current system.[155] I have some sympathy for that view. My State has argued consistently over the last 10 years that the proper response to *Mabo (No 2)* was for the Commonwealth to legislate a statutory code for native title. Such a code would have had to be fair. It would need to have conceded much more than some States and than the mining industry would have been prepared to concede in 1993. In the absence of any consensus the possibility of a statutory code disappeared. But a fair statutory code in 1993 would not have had to make provision for co-existence on pastoral leases. It probably would not have had to make provision for the recognition of Aboriginal political structures much beyond that already contained in the

[150] NTA, s 26. The procedure does not apply where the relevant act is a compulsory acquisition wholly within a town or city or where the act is valid under some other provision of the NTA (NTA s 26(2)). The Minister may exempt certain acts from the "right to negotiate procedure" eg, exploration acts, gold or tin mining, opal or gem mining and renewals of earlier rights (NTA, ss 26A, 26B, 26C, 26D. In each case the Minister must be satisfied as to various matters). If there are satisfactory alternative State provisions then those provisions apply to the exclusion of the "right to negotiate".

[151] NTA, s 29. Claimants are only entitled to take part in the right to negotiate procedure if they are "registered". As to tests for registration see NTA, ss 190A(6), 190B and 190C. However, even if claimants are not registered, representative bodies must be notified.

[152] NTA, s 31.

[153] Either the National Native Title Tribunal or, if a State has established a satisfactory body, a State body: NTA, s 27.

[154] NTA, s 35. In some circumstances a less onerous "expedited procedure" may be available: see NTA ss 32, 237 and see *Little v Western Australia & Anor* [2001] FCA 1706.

[155] [2002] HCA 28 [560]-[561], [969]-[971].

Aboriginal Land Rights legislation in the Northern Territory. If a fair code were attempted today there is no doubt that it would need to deal with these issues. Consensus is probably less likely now than it was a decade ago. The longer it is delayed the harder it gets. Realistically, a code is now probably impossible.

It is likely that we will have to continue to work with the NTA. This means that it is unlikely that native title issues can be resolved within a reasonable time frame.

This does not mean that there has not been progress in the last 10 years. There has been considerable progress. The knowledge and experience of Aboriginal rights and Aboriginal expectations by governments and by the legal system are much more developed than they were. This in itself is a major advance. And there have been the legal developments discussed above. What there has not been is any speedy resolution of native title issues. This has resulted in frustration and disillusion. Nor can there be any reasonable expectation of such a resolution in the near future. What the last decade had taught us is that we are in for the long haul.

There are a number of legal and policy issues discussed below that will need to be addressed in the future.

Self Government

The basic position of the Australian common law is that the recognition of Aboriginal rights does not involve any continuing recognition of Aboriginal sovereignty or self-government post settlement. The Canadian and New Zealand courts take the same approach, although in each country there are exceptions for "treaties". The purported explanations for this exception are far from convincing. As time progresses the explanation comes closer and closer to the United States position of recognising limited sovereignty.

It is also difficult to see how the Australian common law position is sustainable in the long term, particularly if the analysis herein is correct that the High Court decision in *Commonwealth v Yarmirr*[156] means that the common law can recognise Aboriginal customary law generally and not just in relation to land.

Once it is accepted (as it clearly is) that Aboriginal tradition can change over time and that it is that tradition, as changed, which provides the necessary continuity, then there must be a consequent

[156] (2001) 184 ALR 113 at 121 [12], 132 [50], 135 [61], 145 [100].

acknowledgement of the existence and the effect of Aboriginal political structures in changing the traditions which are, in fact, applied and enforced by Australian courts. The prospect of change in rights in consequence of a change in Aboriginal law and custom necessarily involves a recognition of Aboriginal "public law". The recognition of Aboriginal self-government seems an inevitable consequence.

Succession

As discussed above, there is a current debate about whether the NTA requires proof of continuity since settlement. This debate has not been resolved by *Ward* although it is now clear that continuity of use is not required. The High Court's decision in *Yorta Yorta* when delivered, may throw more light on the problem. Assuming that continuity is required, the question then arising relates to succession or transfer of native title from one Aboriginal group to another. It would appear that as at the date of British settlement there were in Australia many separate and distinct Aboriginal groups each with their own separate traditions and customs. Put another way, there were many groups with separate legal systems. Some of the analysis by Brennan J in *Mabo v Queensland (No 2)*[157] seems to assume that succession of native title can only occur within an Aboriginal group.

The question whether there can be succession or transfers between groups is an issue of some importance in relation to the western desert peoples. Not only was their lifestyle more nomadic than in some other parts of the country, but the coming of settlement has caused significant movement of these peoples. Yet many of these groups have retained a more obvious traditional lifestyle than others who have remained on their traditional lands.

It is clear that the recognition by the common law of any succession between groups cannot be based solely on the traditions and customs of the alleged transferees or successors. Indeed, where the process of occupation by that group is inconsistent with the occupation of the "original" group then the original group could seek the assistance of the common law to protect their rights even against other Aborigines.

However, succession and transfer can be explained consistently with the common law basis for recognition of native title, at least if that recognition is based upon the recognition of a legal system, rather then merely "rights". This is not a major jump, at least if it is accepted that any test of continuity of rights which includes the prospect of change in consequence of a change in custom or law

[157] (1992) 175 CLR 1 at 58-63, 70.

must involve a recognition of Aboriginal public law and, in particular, the Aboriginal legal system. After all, "rights" are merely a consequence of a legal system. It is suggested that in order for any Aboriginal group to establish that they are the transferees or the successors to native title they would need to establish:

- that native title existed as at the date of British sovereignty;
- which group or groups held the native title as at that date;[158] and
  - where the current group claim to be the successors of those holding native title as at settlement, to show "biological descent" from the indigenous people at settlement or (for those members of the group who cannot show "biological descent"), mutual recognition of those members by the other members of the group plus the descent of the tradition and customs of the group holding native title as at settlement; or
  - where the current group claim to have an effective transfer from the group that held native title as at settlement, to show either: that both groups were part of a larger group which larger group has customs and traditions permitting or providing for such transfer or succession; or that at all relevant times the traditions and customs of *both* groups permitted and provided for and recognised such transfer.[159]

Of course, if, at any stage, the customs and traditions of the Aboriginal group in occupation as at the date of British sovereignty but no longer in occupation, do not recognise the rights of the Aboriginal group actually in occupation then there has been a break in continuity. Similarly, if at any time the group in actual occupation has no right to such occupation in accordance with their own customs and traditions then there has been a break in continuity. In either case native title will have been extinguished.

Correct Classification of Native Title Rights

This issue has been alluded to above. It is best explained by example. In *Yamirr* it was accepted that the Croker Island people had occupied their island to the exclusion of all others from time immemorial. As a necessary consequence or incident of that right of

[158] It is possible that at the date of British sovereignty two or more groups could have native title rights in relation to the same area, although the Australian common law has not yet developed any mechanism for resolving any conflicts between the traditions and customs of different Aboriginal groups each in physical occupation as at the date of British settlement (assuming the evidence established such a conflict).

[159] *Re Waanyi People's Application* (1995) 129 ALR 118 at 133-134; Sutton, "The Robustness of Aboriginal Land Tenure Systems: Underlying and Proximate Customary Titles" (1996) 67 *Oceania* 7.

exclusive possession the Croker Island people had the exclusive right to hunt any and all animals on that island. This would include animals that had no spiritual or traditional significance to them. Evidence was given in that case, for example, that crocodiles were of no traditional significance to the Croker Island people, at least as a source of food.

This is to be contrasted with the evidence in *Yanner*. In that case there was clear evidence that the hunting of crocodile was of totemic significance to the relevant Aboriginal community. On that basis the right to hunt crocodile was a separate Aboriginal right from any right they may have had to occupy the land.

The significance of the difference can be seen by considering the issue of extinguishment. Consider, for example, a law prohibiting all hunting of crocodile. That law merely regulates an incident of the right of exclusive possession of the Croker Island people. It only affects their right to exclusive possession by regulating one aspect of it – the right to take crocodile. If the law is later repealed then the Croker Island people could recommence hunting crocodile if they want to. They are in the same position as anyone else with a right of exclusive possession.

The law prohibiting taking crocodile has a very different effect where the only Aboriginal right is simply a right to take crocodile. There is a direct inconsistency and the right is extinguished. It does not revive when the legislation is repealed.

Of course, the issue can be more complex when there is a co-existing native title right of occupation with specific native title rights to hunt, to hold ceremonies and so on.

The joint judgment in *Ward v Western Australia* alludes to this problem, although in the particular context of describing native title rights too broadly or of confusing native title rights with common law rights.

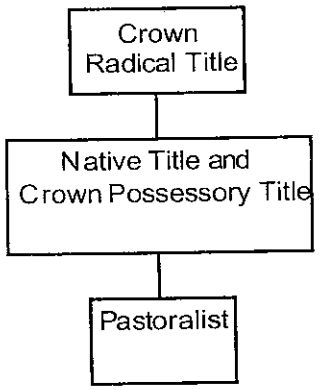
Although the consequences of correct characterisation seem reasonably obvious there is no methodology currently developed to make the relevant characterisation. It would seem to be obvious that some aspects of Aboriginal lifestyle cannot be characterised as a "right". Everybody eats, drinks and breathes air. Merely performing these activities would not seem to have the relevant significance to characterise the activities as "rights". But clearly some acts of eating, drinking or even (perhaps) breathing may have traditional significance sufficient for those acts to be characterised as "rights". As discussed above, in Canada they have developed a test that the relevant right must be "distinctive to the culture of the relevant group".[160] This test seems almost entirely subjective. But it does identify the sorts of issues that need to be considered.

[160] *R v Van Der Peet* (1996) 137 DLR (4th) 289 at 310; *R v Adams* (1996) 138 DLR (4th) 657 at 666; *Delgamuukw v British Columbia* (1997) 153 DLR (4th) 193 at 201-202, 251-252; there is a good description of the development of Canadian law in this area in Lokan "From Recognition to Reconciliation: The Function of Aboriginal Rights Law" (1999) 23 MULR 65 at 94-101.

Co-Existing Titles

As discussed above, the NTA would seem to require the Federal Court to determine the relative rights inter se of the native title holders and of others having interests in the land. The problem is that this would seem to require the court to accommodate rights and interests created by the ordinary law, on the one hand, with rights and interests created by Aboriginal law on the other. It seems likely that this is an almost impossible task.[161] In *Ward v Western Australia* the trial judge, concluded: "How concurrent rights are to be exercised in a practical way in respect of the determination area must be resolved by negotiation between the parties concerned."[162] If the courts are unable to define the interrelationship between co-existing title it is difficult to see how the parties are going to be able to do so.

It may be that it would be simpler conceptually if native title were treated as part of the chain of title in land. Certainly it is a singular aspect of the chain in that it is inalienable; it may not be the full amount of the title otherwise available; and, given the theory of radical title, it may be that it can wane but not wax and so on. Nevertheless, conceived in this way it is then clear that native title was and is subject to any other valid grants in the land. As between the claimants and the pastoralist it is then only necessary to define the rights of the pastoralist. This is already done by the pastoral lease. On the other hand, any dispute as to the extent and nature of native title is a dispute with the Crown which should not have any direct consequence upon the pastoralist. Obviously this conception of native title may well have presentational difficulties for those affected by it, but it is, after all, the conception that seems to explain *Wik*.



[161] French, "The Role of the High Court in the Recognition of Native Title" (2002) 30 UWAL Rev 129 at 165-166.
[162] (1998) 159 ALR 483 at 639.

Practical Issues

There are a number of obvious problems with the NTA. Some of these have been discussed above. A prescriptive or statutory resolution of native title issues of the sort adopted in the *Pitjantjatjara Land Rights Act* seems to be precluded by the NTA. Instead the NTA focuses on the common law. It also focuses on the existence, rather then the enforcement of rights. The primary means of resolving disputes under the NTA is by court order.

With ordinary property disputes those disputes usually arise because party A interferes with some right that party B claims to have. Many potential disputes are avoided through acquiescence. Most neighbours do not rush off to court or even to their lawyers every time any issue between them arises. They know that litigation is expensive and often self-defeating.

The NTA does not favour mere acquiescence. Under significant pressure to create certainty in the land tenure systems of Australia the Commonwealth Parliament has attempted to bring matters to a head. The NTA has the practical effect that any person claiming native title has little choice but to make a claim before the Federal Court, if only to prevent being gazumped by some other claimants. Having made a claim then the scheme established by the Act has the consequence that if the parties do not reach some affirmative agreement (whether through mediation or otherwise) they are ultimately involved in litigation. This is so even if they would not otherwise be in dispute. Acquiescence is not a solution.

In most cases an agreement is not a solution either. Neither the Aborigines themselves, nor the various applicable statutes have been able to develop a governance structure which is capable of making affirmative decisions within a reasonable time frame and maybe not at all. This is not only an Australian issue. The same problems can be seen in the lack of significant progress with making agreements in Canada, notwithstanding the political will that has existed there for a decade to resolve disputes by agreement. It is too difficult to obtain an agreement on native title issues. In the absence of prescriptive legislation the end result is litigation.

Whatever might be said of it in other contexts litigation is not a satisfactory means of resolving disputes in relation to pastoral lands and other areas where there are co-existing rights. There is no evidence yet that litigation is capable of achieving a resolution of claims involving co-existing entitlements.

The only way of avoiding litigation is by agreement. The Indigenous Land Use Agreement (ILUA) process is the mechanism by

which claims can be settled. It is the only means under the Act by which native title claimants can integrate their rights into the common law title system, for example, by converting their native title to an equivalent common law title. The advantage of this is that the title can then be dealt with commercially. Native title under the NTA cannot. A judicial declaration of native title, without more, may simply force the holders of that native title into a life of dire poverty on marginal lands. An ILUA, on the other hand, may enable the native title holders to raise moneys by borrowing on the security of a mortgage and to use those borrowings to develop the lands.

However, an ILUA is not effective until it is registered. Registration is a very cumbersome process, requiring in practical effect, the agreement of all persons in the claimant group. It is likely that the reason for the cumbersome nature of that process is the perceived need to protect claimants from being dispossessed of their rights. The history in North America of the dispossession of the indigenous people through the sale of Indian lands to third parties highlights the need for caution in this area.[163] Nevertheless there must be some cause for concern that the current procedures are so cumbersome that they may result in the parties adopting a litigious process simply for convenience.

At a more practical level the fundamental problem with the ILUA process is that it is largely unfunded for claimants. Funding for native title claimants is provided through ATSIC. ATSIC is obviously under-resourced for this role. Maybe some funds have not been spent sensibly. In any event, only limited funding has been provided to claimants. It is also not clear that the distribution is fair to all regions.[164] What funding that has been provided has primarily been for litigation. Little or no funding is provided for negotiating ILUAs.

This brings us back to the point made at the beginning of the paper. Much has been achieved in the last decade, but a very great deal remains to be done.

[163] See, eg, Debo, *A History of the Indians of the United States* (1995) at 117 ff, 299 ff; *Cohen's Handbook of Federal Indian Law 1982 Edition* (1982) at 39-42, 98-102, 129-138. There were 156 million acres of Indian lands in the US in 1881. This was reduced to 48 million acres in 1934, mostly by sale to non-Indians.

[164] ATSIC funds particular Representative bodies. It does not fund on a State by State basis. Nevertheless ATSIC funding for native title claims up until 1 February 2002 was: Queensland $17,365,946; NSW $3,282,836; Vic $1,820,000; SA $3,700,000; NT $5,314,642; WA $16,946,000. On the face of it SA, NSW and the NT would seem to be underfunded compared to WA and Queensland. Various reasons can be given for the divergence in funding. In particular the land rights arrangements in SA, NT and NSW which pre-existed the NTA may mean that there is not so great a need to pursue land rights through the NTA in those jurisdictions. Further, the decision in *Anderson v Wilson* [2002] HCA 29 may have the effect that there is significantly less potential for co-existing tenures in NSW than in those jurisdictions with pastoral leases. On the other hand, it may be a matter for regret that the chance to explore non-litigious outcomes in those jurisdictions with some experience in the area has not been more actively supported by ATSIC.

CONCLUSION

Returning again to the comment of David Jackson QC at note 36 above, the court in *Mabo (No 2)* has indeed written a book of chapter headings. The last decade has seen a considerable amount of work and toil in filling in some of those chapter headings. That work has included the work of the Commonwealth Parliament and courts, but it has also included the enormous effort made by indigenous communities, by pastoralists, by miners and by others both to understand the new legal reality and to shape it.

The progress that has been made should not blind us from acknowledging that much of the book still remains empty. Some chapters in it still only contain headings. Progress remains slow and expensive. New issues are still being identified and old issues remain to be resolved. But the most basic problem from the last decade is that the fundamental injustice to which *Mabo (No 2)* was directed still remains. The rights of the traditional owners to use and occupy their traditional lands has not been secured.

The most interesting question now facing us is whether the work that has been done in the last decade will enable claimants, governments and others over the next decade to reach accommodation so that, by 2012 it is possible to say that that fundamental injustice was being addressed. I cannot answer that question except to note that, notwithstanding how far we have come thus far, we still have a long way yet to travel.