WESTERN AUSTRALIAN FORUM

Racism and the Constitutional Protection of Native Title in Australia: The 1995 High Court Decision

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The High Court's decision in Wororra Peoples v WA *represents a massive snub to the Coalition Government of Western Australia. This article examines the fall-out from the decision and explores the case for protecting native title by an amendment to the Commonwealth Constitution.*

On the evening of 16 March 1995, the day the High Court decision in *Western Australia v The Commonwealth*[1] was handed down, the Premier of Western Australia refused to accept that the State Land (Titles and Traditional Usage) Act 1993 (WA) had been declared racist and in breach of the Racial Discrimination Act 1975 (Cth). The Premier insisted on characterising the decision as an intrusion into the State's land management powers. Such was not the proper characterisation. The High Court ruled that the State Act denied equality before the law to Aboriginal people and that, in the words of the order: '[T]he whole of the 1993 WA Act ... is inconsistent with the provisions of section 10 of the Racial Discrimination Act and therefore invalid.' A denial of equality before the law to a particular racial group is racism.

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1. *WA v The Commonwealth; Wororra Peoples v WA; Biljabu v WA* (1995) 128 ALR 1.

This article examines racism in the context of the recognition and protection of native title, and the constitutional protection of native title in Australia. It begins with a review of the policies pursued toward Aboriginal people and their lands in the absence of constitutional protection, and concludes with the suggestion that equality before the law — the antithesis of racism — be constitutionally entrenched.

THE HISTORIC NEED FOR CONSTITUTIONAL PROTECTION

> The protection of the Aborigines should be considered as a duty peculiarly belonging and appropriate to the Executive Government, as administered either in this country or by the Governors of the respective colonies. This is not a trust which could conveniently be confined to the local legislatures.[2]

The 1837 *Report of the Select Committee of the House of Commons on the Aborigines of the British Settlements* reached this conclusion after an examination of all the British settlements in North America, Africa and Australasia. The Committee made particular reference to the 'acts of injustice committed by the new settlers' in Western Australia.[3] The Report concluded that the local legislatures were 'unfit' to exercise jurisdiction over Aboriginal peoples and their lands. Those legislatures represented 'the feelings of the settled opinions of the great mass of the people for whom they act' and the 'settlers in almost every Colony [had] either disputes to adjust with the native tribes, or claims to urge against them'.[4] The Report recognised that a settlement founded on the traditional lands of Aboriginal people would deny them equality before the law, and accordingly suggested constitutional protection from the 'new settlers'.

The suggestion of the Report that 'the protection of the Aborigines should be considered as a duty' to be performed by the Governor or Imperial Government was maintained in Western Australia until 1905. In 1887, Governor Broome had recommended that 'some special arrangement should be made, when Responsible Government is granted, to ensure the protection and good treatment of the northern native population'.[5] He recommended that jurisdiction over Aboriginal people and their reserves should remain under Imperial control and not be transferred to the local legislature. The Legislative Council strongly opposed the suggestion, declaring:

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2 Select Committee (HC) *Report on Aborigines (British Settlements) 1837* Brit Parl Papers, vol 2 (Shannon: Irish UP, 1968) 77

3 Id, 12

4 Id, 77

5. *Reports and Correspondence Relating to the Australian Colonies 1889* Brit Parl Papers, vol 31 (Shannon: Irish UP, 1969) 358.

> No ground whatever of necessity has been shown for placing the interests of the Aboriginal population in the hands of a body independent of the local ministry.[6]

Governor Broome justified his recommendation to the Imperial Colonial Office by reference to 'evil-disposed persons' in the colony, and the 'many despatches and papers in your Lordship's office' which supported that view. He observed that 'the general principle seems so clear, that I feel I can abstain from bringing forward particular cases in support of it'.[7]

The Governor's advice was followed in the Aborigines Act 1889 (WA). The statute declared that administration of Aboriginal affairs should be the responsibility of the Governor 'without the advice of the Executive Council'. This jurisdiction could only be amended or repealed upon the assent of the imperial government. At the third attempt[8] in 1905 the State of Western Australia managed to persuade the imperial government to assent to the repeal of this denial of local jurisdiction. The State, along with the other member States of the Federation, assumed exclusive jurisdiction with respect to Aboriginal people and their traditional lands. The Aborigines Act 1905 (WA) was assented to despite the findings of the Royal Commission of Inquiry conducted by Dr Roth, the Chief Protector of Aborigines for Queensland. The Commission had been appointed in response to criticism from England and the Eastern States. Roth concluded that 'wrongs and injustice' were taking place throughout the State, with particular 'cruelties and absences' in the unsettled districts.[9] He made particular reference to the dispossession of Aboriginal people in the North and the 'hunting of them off the land', and observed that if the present practice of 'might against right' continued 'all the blacks would be hunted into the sea'.[10]

The 1905 Act maintained a policy of control and segregation in the interests of 'protection' of Aboriginal people. The powers conferred under the Act, and extended in 1935, embraced every aspect of Aboriginal life, including control of movement and confinement on reserves, removal of children, control of marriage and employment, and suppression of tribal customs. Dwyer CJ observed in 1947 that the object of the legislation 'is the better protection of natives. Perusal of its provisions makes it evident that the main method by which that purpose is to be achieved is by *segregation* of the natives from the non-native population'.[11]

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6. Id, 374.
7. Id, 382.
8. See P Johnston 'The Repeals of Section 70 of the WA Constitution Act 1889: Aborigines and Governmental Breach of Trust' (1989) 19 UWAL Rev 318.
9. Royal Commission (WA) *Report on Condition of the Natives* (1905) V&P (LC) no 5, 32 (Roth Report).
10. Id, 28.
11. *Hodge v Needle* (1947) 49 WAR 1, 3 (emphasis added).

Exclusive State jurisdiction in Australia had led, in fulfilment of the 1837 Select Committee's fears, to the imposition of controls and restrictions which served the interests of the settlers but not the Aboriginal people. No interest in the traditional lands of Aboriginal people was recognised prior to the conferment of Commonwealth jurisdiction. Aboriginal reserves were Crown lands under Crown management and control. The policies pursued were manifestly racist and denied equality before the law to Aboriginal people.

Not until the 1960s was the policy of control and segregation abandoned in Australia. In 1961, Commonwealth and State ministers agreed upon a policy of assimilation:

> To ensure that all aborigines and part aborigines will attain the same manner of living as other Australians and live as members of a single Australian community enjoying the same rights and privileges, accepting the same responsibilities, observing the same customs and influenced by the same beliefs, hopes and loyalties as other Australians.[12]

Legislation was introduced throughout Australia to remove restrictions and controls upon Aboriginal people. The Native Welfare Act 1963 (WA) was enacted to such end in Western Australia. But the Act maintained Crown control over reserves and recognised no Aboriginal interest therein. State legislatures were prepared to rescind the controls which manifested the most extreme aspects of a denial of equality before the law, but were not prepared to recognise that equality before the law required recognition of an interest in the traditional lands of Aboriginal people.

In the late 1960s and 1970s some States did make provision for the recognition of such rights in traditional lands. The provision was contemporaneous with the conferment of Commonwealth jurisdiction with respect to Aboriginal people. But Queensland and Western Australia opposed any such suggestion. The 1976 Annual Report of the Queensland Department of Aboriginal Affairs vilified the concept of 'Aboriginal land rights' and termed it 'Australia's unique form of apartheid - privilege and benefits extended to selected Aborigines and denied to other Australians, all on the basis of race rather than need.... [This is] discrimination in its purest form and a situation not in the interest of national unity and heritage'.[13]

In November 1980, following the dispute at Noonkanbah, the then Premier of Western Australia, Sir Charles Court, declared:

> The land of Western Australia does not belong to the Aborigines. The idea that Aborigines, because of their having lived in this land before the days of white

12. Native Welfare Conference, Cth and State Authorities *Proceedings and Decisions* (Canberra, 1961).
13. Dept of Aboriginal Affairs & Islanders Advancement *Annual Report* (Brisbane: Govt Printer, 1976).

> settlement, have some prior title to the land which gives them a perpetual right to demand tribute of all others who may inhabit it, is not consistent with any idea of fairness or common humanity. In fact, it is as crudely selfish and racist a notion as one can imagine. Nor is it an idea which has ever accorded with the law of this nation.[14]

Western Australia remains the only jurisdiction in Australia, and possibly the only jurisdiction in the common law world, with a substantial Aboriginal population, which has refused to recognise Aboriginal rights to traditional land. Without constitutional arrangements providing for the protection of Aboriginal interests in traditional land it must be doubtful if the State would ever recognise such rights.

STATE AND FEDERAL JURISDICTION WITH RESPECT TO NATIVE TITLE[15]

1. The States

Since responsible government, the Colonies, now the States, have been invested with 'the entire management and control of the waste lands belonging to the Crown ... including all royalties, mines and minerals'.[16] The power has always been exercised as though it empowered the States to deny, diminish or extinguish Aboriginal rights to traditional land. And the High Court affirmed that understanding in *Mabo (No 1)*,[17] *Mabo (No 2)*[18] and *Western Australia v The Commonwealth*.[19] All of the justices in *Mabo (No 1)* concluded that the Parliament of Queensland was empowered to extinguish native title without compensation. Wilson J declared that the Queensland legislature was possessed of unlimited power to deal with the 'waste lands' of the Crown and was empowered to deprive a person of property without compensation. Brennan, Toohey and Gaudron JJ pointed out that the legislature might utter declarations of law which were 'historically false but that does not deny them legal effect'.[20] But the justices also recognised that the power of Queensland to extinguish native title was subject to the Constitution of the Commonwealth and the paramountcy of

14. Letter to Mr DW McLeod (Perth, 3 Nov 1980) cited in R Bartlett 'Aboriginal Land Claims at Common Law' (1983) 15 UWAL Rev 293.
15 R Bartlett 'Resource Development and the Extinguishment of Aboriginal Title in Australia and Canada' (1990) 20 UWAL Rev 453.
16. Australian Waste Lands Act 1955, 18 & 19 Vict c 56 (Imp); NSW Constitution 1855, 18 & 19 Vict c 54 (Imp); Vict Constitution Act 1855, 18 & 19 Vict c 55 (Imp); Constitution Act 1867, 31 Vict c 38 (Qld); Constitution Act 1890, 53 & 54 Vict c 26 (Imp).
17. (1988) 166 CLR 186.
18. (1992) 175 CLR 1.
19. Supra n 1, 27.
20. Supra n 17, 211.

Commonwealth laws, in particular the Racial Discrimination Act 1975 (Cth).

In *Mabo (No 2)* the Court affirmed the power of the State to extinguish native title. Brennan J declared:

> The power to reserve and dedicate lands to a public purpose and the power to grant interests in land are conferred by statute on the Governor in Council of Queensland and an exercise of these powers is, subject to the Racial Discrimination Act, apt to extinguish native title. The Queensland Parliament retains, subject to the Constitution and to restrictions imposed by valid laws of the Commonwealth, a legislative power to extinguish native title.[21]

In *Western Australia v The Commonwealth* the court affirmed such conclusion in declaring that native title in Western Australia had been extinguished 'parcel by parcel' by the 'valid exercise of power to grant interests in some of those parcels and to appropriate others of them for the use of the Crown'.[22]

2. The Commonwealth

Federal jurisdiction with respect to native title has two critical aspects: the 'external affairs' power in the Constitution (section 51(xxix)) and the 'race' power (section 51(xxvi)). It is upon the 'external affairs' power that the constitutional protection of native title is founded, because it is pursuant to that power that the Racial Discrimination Act 1975 (Cth) was enacted and upheld. The Act was enacted to give effect to the International Convention on the Elimination of all Forms of Racial Discrimination. The Convention imposes obligations on parties to prohibit racial discrimination (Article 2(1)(d)) and to 'guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law' inter alia with respect to the 'right to own property'. The High Court upheld the enactment of the Racial Discrimination Act as a valid exercise of the legislative power of the Commonwealth with respect to 'external affairs' in *Koowarta v Bjelke-Petersen*[23] and *Gerhardy v Brown*.[24]

It was in *Mabo (No 1)* that legislation which sought to deny Aboriginal rights to traditional land, by the extinguishment of native title without compensation, was first struck down under the Racial Discrimination Act. The High Court held that the effect of the Queensland legislation was to deny equality before the law to the Miriam people with respect to the right to own property. The conclusion was affirmed in *Mabo (No 2)*, where Deane and Gaudron JJ observed that *Mabo (No 1)* demonstrated that the Racial Discrimination Act represented 'an important restraint upon State or Territory

21 *Mabo (No 2)* supra n 18, 67: see also Deane & Gaudron JJ, 110-111; Dawson J, 138.
22. Supra n 1, 21.
23. (1982) 153 CLR 168.
24. (1985) 159 CLR 70.

legislative power to extinguish or diminish common law native title'.[25] The restraint was acted upon again in 1995 in the striking down of the Western Australian legislation in *Western Australia v The Commonwealth.*

The other critical aspect of the Federal jurisdiction with respect to native title is the 'race' power. On Federation in 1901, section 51(xxvi) of the Constitution gave to the Commonwealth parliament 'power to make laws for the peace, order and good government of the Commonwealth with respect to ... the people of any race, other than the Aboriginal race in any State, for whom it is deemed necessary to make special laws'. The Constitution thereby conceded jurisdiction with respect to Aboriginal people outside the Commonwealth Territories to the States. In 1967, the phrase excluding Aboriginal people in the States from the Federal power conferred by section 51(xxvi) was deleted from the Constitution. The power of the Federal parliament to make special laws respecting the Aboriginal people was thereby made concurrent with that of the States, and by virtue of section 109 of the Constitution, paramount.

After 1967 the 'race' power enabled the Commonwealth to pass laws for the protection of Aboriginal people. Such laws were passed with particular respect to Queensland: the Aboriginal and Torres Strait Islanders (Queensland Discriminatory Laws) Act 1975 (Cth) and the Aboriginal and Torres Strait Islanders (Queensland Reserves and Communities Self-Management) Act 1978 (Cth). In 1983, the possibility of the Commonwealth acting to protect native title under the 'race' power was suggested[26] but it was not until after *Mabo (No 1)* and *Mabo (No 2)* that such legislation was enacted by the Commonwealth. The first of all the enacted objects of the Native Title Act 1993 (Cth) is 'to provide for the recognition and protection of native title'[27] and it declares that native title 'is not able to be extinguished contrary to this Act'.[28] It establishes an exclusive code governing the recognition, protection, extinguishment and impairment of native title.[29]

In *Western Australia v The Commonwealth* the State challenged the degree to which Commonwealth laws could intrude upon State powers in the application of the Native Title Act in the State, arguing inter alia that:

- the Native Title Act (Cth) was beyond the legislative power of the Commonwealth, and could not be supported by section 51(xxvi) (the 'race power') or section 51(xxix) (the 'external affairs power); and
- even if the Native Title Act (Cth) was prima facie supportable by sections 51(xxvi) or 51(xxix), its impact upon Western Australia exceeded the limits of those powers implicit in the federal structure of the Constitution,

25. Supra n 18, 112.
26. Bartlett supra n 14, 344.
27. S 3(a).
28. S 11(1).
29. *Western Australia v The Commonwealth* supra n 1, 10.

in that, inter alia, it impermissibly discriminated against Western Australia and impermissibly impaired the ability of the State to function as such.

The High Court readily determined that the Act answered the 'constitutional description' of section 51(xxvi), that is, it is a law with respect to 'the people of any race for whom it is deemed necessary to make special laws'.[30] The Court considered that the judgment of what is necessary 'is for the parliament, not for the court',[31] and in any event '[t]he removal of the common law's general defeasibility of native title by the Native Title Act is sufficient to demonstrate that the Parliament could properly have deemed that Act to be "necessary"'.[32] The Court particularly observed that the creation of 'administratively defeasible rights' in place of native title by the Western Australian Act certainly did not make the Native Title Act unnecessary.[33] The 'special quality' of a law was to be ascertained by 'reference to its differential operation upon the people of a particular race'.[34] The law might be special 'even when it confers a benefit generally, provided the benefit is of special significance or importance to the people of a particular race'.[35] The Court determined that:

> The Native Title Act is 'special' in that it confers uniquely on the Aboriginal and Torres Strait Islander holders of native title [the 'people of any race'] a benefit protective of their native title.[36]

But the State sought to challenge the application of the Act to the State on the ground that it exceeded the limits of Commonwealth legislative power implied by the federal nature of the Constitution. The Court responded by stressing that, provided the power contemplated application to the States, and that the law did not deprive the States of 'their capacity to function as governments' and was of general application, it could not be read down.[37] The Court rejected any 'impermissible discrimination' against the State. It was observed that in order to exercise the 'race' power to protect native title it was necessary to control the exercise by the States and Territories of the power to extinguish or impair native title. It clearly contemplated that the power would extend to the States:

> The power cannot be limited by an implication which exempts the States from the application of such a law without denying what is at the *heart* of section 51(xxvi) so far as it may be exercised for the benefit of the people of the indigenous races of

30. Id, 71.
31. Id, 43.
32. Ibid.
33. Id, 45.
34. Id, 43.
35. Id, 43-44.
36. Id, 44.
37. Id, 54-56.

Australia.[38]

The Court recognised that Western Australia was subject to a differential effect of 'practical importance' inasmuch as a greater area and proportion of land might be subject to native title than in other parts of the Commonwealth. But such differential effect arose 'simply' because of 'history and geography' and did not indicate impermissible discrimination.[39]

The State further argued that the capacity and power to grant, appropriate and otherwise administer and dispose of lands and resources was essential to the continued existence of the State and its capacity to function as a government and was a 'fundamental sovereign function' which the Native Title Act impaired. But the Court pointed out that the Act did not affect the 'machinery of government' nor the capacity of the State to acquire personnel, property, goods or services which were required to exercise its powers.[40] The Act did not impair 'the capacity to exercise' constitutional functions of the State although it might affect 'the ease with which those functions are exercised'.[41] The practical effect upon the power of the State to administer legislation respecting land and resources was more properly 'attributed to the realisation that land subject to native title is not the unburdened property of the State'.[42]

The Court added that it would have considered it 'surprising' if the Constitution had impliedly limited the power of parliament to enact a law which gave effect to the 'standard of fair dealing'.[43]

The decision of the High Court not only upheld the prima facie power of the Commonwealth to protect native title, but also recognised the inevitability of intrusion upon State land management powers if such protection was to be achieved.

THE STANDARD OF PROTECTION: RACISM AND EQUALITY BEFORE THE LAW

1. Genuine equality

The standard of protection of native title is set by the Racial Discrimination Act 1975 (Cth). Section 10 guarantees equality before the law where that right is otherwise denied by a law of the Commonwealth, State or Territory. A denial of equality before the law to a particular racial

38. Id, 57 (emphasis added).
39. Id, 58.
40. Id, 59.
41. Id, 60.
42. Id, 59.
43. Id, 60.

group is racism.

Equality before the law requires genuine, not merely formal, equality. Section 10 is concerned with whether or not the effect of a law, not merely its form, is to deny equality before the law. Deane J declared in *Mabo (No 1)*:

> [Section 10] is concerned with the operation and effect of laws. In the context of the nature of rights it protects and of the provisions of the International Convention which it exists to implement, the section is to be construed as concerned not merely with matters of form, but with matters of substance, that is to say, with the practical operation and effect of an impugned law.[44]

Genuine equality before the law requires that regard be had to the particular effect of the law in order to determine if there is a denial or abridgement of a protected right. It is not enough to apply the same principles without regard to their effect.

As Stephen J (dissenting) said in *Henry v Boehm*:

> I regard it as incorrect to say of a disadvantage that because it is the consequence of a requirement of universal application that disadvantage is equally applicable to all; if the discriminating factor relates to the personal attributes of individuals some only of whom possess those attributes then, while the requirement may be said to apply equally to all, the disadvantage will apply unequally for it will apply only to those who do not possess those attributes.[45]

Equality is not uniformity. 'True equality of treatment requires that artificial and irrelevant distinctions be put aside, but that distinctions which are genuine and relevant be brought into account'.[46]

In *Mabo (No 1)*,[47] all members of the High Court who reached a conclusion on the question of equality before the law, including Wilson J (otherwise dissenting), agreed on the need to have regard to the particular effect in order to obtain genuine equality before the law. The High Court held that the effect of the Queensland legislation was to deny equality before the law to the Miriam people with respect to the right to own property. Brennan, Toohey and Gaudron JJ explained:

> By extinguishing the traditional legal rights characteristically vested in the Miriam people, the 1985 Act abrogated the immunity of the Miriam people from arbitrary deprivation of their legal rights in and over the Murray Islands. The Act thus impaired their human rights while leaving unimpaired the corresponding human rights of those whose rights in and over the Murray Islands did not take their

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44. Supra n 17, 230: see also Brennan, Toohey & Gaudron JJ, 218-219; Dawson J, 242.
45. (1973) 128 CLR 482, 502; approved in *Street v Qld Bar Assoc* (1989) 168 CLR 461; Mason CJ, 485-488; Brennan J, 517-518; Deane J, 532-533; Dawson J, 549; Toohey J, 560; Gaudron J, 569-570; McHugh J, 582.
46. Gaudron J 'Equal Rights and Anti-Discrimination Law' (Canberra: ACT Law Soc, 1992) 25.
47. Supra n 17, 186.

> origin from the laws and customs of the Miriam people [48]

The Miriam people enjoyed their human rights of ownership and inheritance of property to a 'more limited' extent than others who enjoyed the same human right.[49]

The Court expressly recognised that the traditional interests asserted by the Miriam people were interests which could not be asserted by others but readily concluded that their abrogation constituted a denial of equality before the law.[50] As Deane J explained, the effect of the Queensland Coast Islands Declaratory Act 1985 (Qld), which had the effect of extinguishing native title if it existed, was to distinguish between interests according to whether they were 'ultimately founded in pre-annexation traditional law and custom or post-annexation European law. It discriminates against the former ...'.[51] Any regard to the effect of the impugned Queensland legislation, although on its face non-discriminatory, would entail the conclusion that it discriminated against, indeed 'singled out', the rights of Torres Strait Islanders.[52]

The only dissent on the ground that there was no inequality before the law within the meaning of section 10 was that of Wilson J. He founded his dissent on the determination that no persons of another race enjoyed the same rights of which the plaintiff Miriam people were deprived by the Queensland Act. Accordingly, the effect of the 1985 Act was 'to remove a source of inequality formerly existing between the plaintiff and persons of another race'.[53] There would be, in his view, formal equality before the law. Wilson J expressed reservations as to the justice of this result. He declared:

> Of course, a deep sense of injustice may remain. This is because *formal* equality before the law does not always achieve effective and *genuine* equality. The latter will only be achieved by reason of the former when the factual circumstances in which the different groups are placed are comparable.[54]

Mabo (No 1) made clear that equality before the law was denied where a law of general application singularly and particularly affected Aboriginal people. Aboriginal people are possessed of a unique history and relationship to the land which predates European settlement. Equality before the law requires recognition of that history and relationship and the rights arising therefrom. Denial of those rights is a denial of equality before the law and is a racist act.

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48. Supra n 17; Brennan, Toohey & Gaudron JJ, 218
49 Ibid.
50. Id, Deane J, 231-232.
51. Ibid.
52. Id, Deane J.
53. Id, 206.
54 Ibid (emphasis added).

The majority of the High Court concluded that the Queensland Act denied equality before the law to the Miriam people and did not comply with section 10 of the Racial Discrimination Act 1975 (Cth). In the view of Brennan, Toohey and Gaudron JJ the State law failed because 'by purporting to extinguish native title' it limited the immunity from interference with 'the human right to own and inherit property' of the 'native group' to a greater extent than 'the general community'. Section 10(1) 'clothes the holders of traditional native title who are of a native ethnic group with the same immunity' as it clothes other people in the community'.[55]

2. The Western Australian Act and the Commonwealth Native Title Act

Mabo (No 1) concerned the 1985 Queensland legislation directed to the general extinguishment of native title without consent, compensation or any procedures for consideration or consultation. On 2 December 1993 Western Australia enacted legislation — the Land (Titles and Traditional Usage) Act — which, although providing for compensation of a sort, declared an inferior and subordinate status for native title and provided for illusory consultation procedures.

The Act provided for the extinguishment of all surviving native title throughout the State and the substitution of 'rights of traditional usage'.[56] The 'rights of traditional usage' were declared to be subject to all other titles[57] and the application of general laws.[58] They were subject to extinguishment or suspension by ministerial notice.[59] Schedule 1 to the Act provided amendments to the Mining Act 1978 (WA), Land Act 1933 (WA), Petroleum Act 1967 (WA), Petroleum (Submerged Lands) Act 1982 (WA), Petroleum Pipelines Act 1969 (WA), Public Works Act 1902 (WA) and the Pearling Act 1990 (WA). Schedule 1 established a common procedure whereby grants of other interests or acquisitions would override rights of traditional usage. It contemplated limited notice and consultation requirements, all of which might be 'disapplied' by the minister. All past titles were confirmed and were not to be regarded as invalid or affected by native title.[60]

On 24 December 1993 the Commonwealth enacted the Native Title Act 1993 (Cth). It was structured in accordance with the standard of genuine equality before the law as between holders of native title and holders of

55. Id, 219
56. S 7.
57. S 20.
58. S 17
59 S 26.
60. S 5.

other interests. In particular it established principles requiring that similar procedures and protections be extended to native title as to holders of 'ordinary title' with respect to future grants or legislation. Section 7(1) declared that '[N]othing in this Act affects the operation of the Racial Discrimination Act'.

The mining industry campaigned against the Commonwealth legislation. It sought to deny the unique history and relationship to land of the Aboriginal people which predates European settlement and thereby to deny them equality before the law. The campaign was particularly pernicious and fundamentally racist insofar a it sought to clothe its advertising in the language of equality. In the national campaign one of the industry's advertisements asked: 'Is this really one Australia for all Australians?' The advertisement declared:

> The Australian Mining Industry is not opposed to Aborigines being granted titles.... But we believe all Australians should have the same rights over these titles. The Australian Mining Industry supports the same land rights for all Australians.[61]

The advertisement was fundamentally an assertion that native title promotes inequality. It was anything but a recognition of the High Court decision which, in small print, it purported to be. It recognised only the legitimacy of title granted by the Crown after European settlement and not the rights of Aboriginal people to whatever residual traditional land was left to them arising from their relationship to the land prior to that time. Other advertisements in the series stressed the economic woes the Court's decision might give rise to and the national identity of Australians: 'If we get *Mabo* wrong, we'll all lose again';[62] 'We've found the solution to *Mabo* Australians have been looking for'.[63] A state mining industry campaign against the native title and the Commonwealth legislation was to similar effect. Under the heading '*Mabo:* protect your children's future' it urged that 'all Australians must be equal', rejected 'special rights and privileges based on race' and called for the restoration of the 'principle of equality'.[64]

The State government campaigned in support of its legislation in a similarly deceptive manner proclaiming that it was 'A fair solution to *Mabo* for all Western Australians' in leaflets distributed to every household in the State — and it advertised to the same effect, with a toll-free telephone line, in newspapers.[65] The President of the Liberal Party, Mr Bill Hassell, stressed

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61. Advertisement placed in *The West Australian* by the Chamber of Mines and Energy, Aug 1993.
62. *The West Australian* 6 Aug 1993, 19.
63. *The West Australian* 14 Aug 1993, 26
64. Assoc of Mining and Exploration Companies *Mabo — Protect Your Children's Future* advertising pamphlet (Leederville, WA: GMA/AMEC, Oct 1993).
65. *The West Australian* 6 Nov 1993, 23

the 'fairness' of the legislation and asserted it was 'far from discriminating against Aboriginal people'.[66] The campaign and the advertisements sought to deny the inherent difference of Aboriginal people — their history and relationship to land prior to European settlement. Such a denial of a unique aspect of a people is anything but the furtherance of equality.

3. Western Australia v Commonwealth; Wororra v Western Australia; Biljabu v Western Australia

The Wororra peoples, Teddy Biljabu and others brought actions asserting that the State legislation was invalid as being contrary to the Racial Discrimination Act 1975. In the High Court the plaintiff Aboriginal peoples argued that section 10 of the Racial Discrimination Act 1975 demanded genuine equality before the law in the respect accorded the traditional Aboriginal relationship to land.[67] The fundamental premise was that, whatever its content, native title was neither inferior nor subordinate in status to other interests. It possessed a unique or sui generis tenor arising from its unique source and, although no other interest was truly analogous, it was not an inferior or subordinate interest. Equality before the law required adherence to the general principle as applied to all other interests that 'full respect' be accorded the particular tenor of rights and interests in land. 'Full respect' required that native title not be extinguished nor impaired arbitrarily, without compensation according to tenor, and most fundamentally without a particular public purpose.

It was argued that the regime substituted by the Western Australian Act provided for the subordination of the traditional Aboriginal relationship to land, provided inadequate and inferior consideration, protection, and compensation, and diminished its content in ways which denied equality before the law as guaranteed by section 10 of the Racial Discrimination Act. The argument focused upon the 'critical elements' of subordination to other interests and their inferior consideration and protection, and declared that the Western Australian Act constituted 'a deliberate and complicated sham which denies equality before the law'. It was argued that the Racial Discrimination Act demanded enhanced protection to that which the common law provided to the traditional Aboriginal relationship to land, and it was accordingly contrary to the Act to perpetuate the common law regime as it prevailed until 1975.

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66 W Hassell 'State *Mabo* Bill is Equitable for All' *The West Australian* 11 Nov 1993, 11: see Submission of WA Liberal Party to the Senate Standing Committee on Legal and Constitutional Affairs *Report on the Native Title Bill* (Canberra, 1993).

67 R Bartlett 'Court Challenges to the Native Title Legislation in Australia and Equality before the Law' (1994) 4 Can Native L Rep 1.

The High Court did not consider it necessary to consider all of the arguments. It unanimously concluded that the Western Australian Act violated section 10. In the Court's view it sufficed to consider the arguments relating to the extinguishment and impairment of native title. The Court declared that section 10 'does not alter the characteristics of native title', but confers on holders of native title 'security of enjoyment in that property to the same extent as the titleholders of other races'. The Court thereby affirmed the rights conferred by the unique relationship to land of Aboriginal people and declared their protection by the Racial Discrimination Act. 'The Racial Discrimination Act is superimposed on the common law and it enhances the enjoyment of those human rights'.[68] In the result the Court declared that the substituted 'rights of traditional usage', as qualified by the Western Australian Act, 'fell short of the rights and entitlements conferred by native title the enjoyment of which is protected by section 10(1) of the Racial Discrimination Act. The shortfall is substantial'.[69]

In reaching that conclusion the Court rejected the subordination of native title and the 'priority' of other interests expressly declared in the Act. The Court also focused on the operation of the Land Act, Mining Act, Petroleum Act and Public Works Act in comparing the degree of security of enjoyment of holders of rights of traditional usage and of the holders of other interests. With regard to the Land Act the Court said:

> In comparison with the holders of title, whose estates or interests in land granted by the Crown cannot be destroyed by executive action except, generally speaking, by resumption under statutory authority, section 7 rights [subordinated rights of traditional usage] possessed by Aboriginal people ... can be extinguished or impaired simply by exercise of the legislative power to dispose of the land ... [T]he restrictions [in the WA Act] are transparently insubstantial in comparison with the restrictions which protect the security of the holders of other forms of title'.[70]

With regard to the Mining Act the Court said:

> The protection of section 7 rights under the Mining Act is as much at the discretion of the Minister for Mines as the protection of section 7 rights under the Land Act is at the discretion of the Minister for Lands.... The protection ... is significantly less than the protection against a similar liability given by the Mining Act to the holders of 'title' to private land or an 'occupier' of Crown land'.[71]

With regard to the Petroleum Act the Court said:

> The holders of section 7 rights ... have lesser rights than the holders of title to private land'.[72]

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68. Supra n 1, 25.
69. Id, 34.
70. Id, 37.
71. Ibid.
72. Id, 31.

With regard to the Public Works Act the Court said:

> The provisions for resumption of land subject to rights of traditional usage denied the same protection against compulsory acquisition as the protection by way of notice, the right to object and the right to proper consideration of objections which the law and judicial review accord to the holders of other forms of title.[73]

In making the comparison between the protection accorded 'rights of traditional usage' and other titles the Court made reference to both private land and occupiers of Crown land. With respect to the Mining Act the Court observed that 'it suffices to compare the position of a private land owner and the position of the holder of section 7 rights (rights of traditional usage)'.[74] The analysis of the Petroleum Act was entirely concerned with private land. Private land is freehold or leasehold but not pastoral lease land. The Court accepted that for the purposes of determining the standard of protection to which native title is entitled the standard is that of private land. Such analysis is consistent with the argument that native title is unique or sui generis, and if analogies or comparisons are necessary, it is appropriate to refer to the status of freehold in fee simple.

The Court did not expressly consider the operation of the amended provisions of the Pearling Act 1990 (WA). Such consideration would have required the Court to articulate more explicitly the unique tenor of native title because there are no interests readily analogous to compare to native title off-shore. But the Court did strike down those provisions. It would suggest that fishery acts and other general legislation such as forest or game legislation may also be challenged insofar as they provide for the subordination and lack of protection for native title in violation of the Racial Discrimination Act. Such legislation runs counter to the general principle applied to all other private interests that 'full respect' be accorded the particular tenor of Aboriginal rights and interests in land.

The standard set by the High Court decision is not only applicable to State legislation. It is also, of course, applicable to the Commonwealth. But the High Court rejected any suggestion that the Native Title Act in its present form was inconsistent with the Racial Discrimination Act or the International Convention on the Elimination of all Forms of Racial Discrimination. It considered that the Native Title Act provided equality before the law and thereby met the standard of protection demanded. Amendments seeking lesser protection would violate that standard. The Court explained:

> The Native Title Act provides the mechanism for regulating the competing rights and obligations of those who are concerned to exercise, resist, extinguish or impair

73. Id, 33.
74. Id, 29.

> the rights and interests of the holders of native title. In regulating those competing rights and obligations, the Native Title Act adopts the legal rights and interests of persons holding other forms of title as the benchmarks for the treatment of the holders of native title'.[75]

THE DEGREE OF CONSTITUTIONALITY OF THE PROTECTION

The constitutionality of the protection of native title rests upon section 109 of the Constitution and the paramountcy of Commonwealth laws, and in particular the Racial Discrimination Act 1975 and the Native Title Act 1993. The legislation is not 'entrenched' and is subject to amendment or repeal in the normal processes of the Commonwealth parliament. But the Racial Discrimination Act 1975 may well be considered legislation which it is politically unacceptable to amend so as to impair the rights of any racial group. A critical question then becomes which enactment should prevail in the event of inconsistency. The Court considered the question in the context of the argument of Western Australia that the Native Title Act was inconsistent with the Racial Discrimination Act. The State relied on section 7(1) of the Native Title Act: 'Nothing in this Act affects the operation of the Racial Discrimination Act'. The Court declared that the specific provisions of the Native Title Act would prevail over the general provisions of the Racial Discrimination Act:

> Even if the Native Title Act contains provisions inconsistent with the Racial Discrimination Act, both Acts emanate from the same legislature and must be construed so as to avoid absurdity and to give each of the provisions a scope for operation. The general provisions of the Racial Discrimination Act must yield to the specific provisions of the Native Title Act in order to allow those provisions a scope for operation. But it is only to that extent that, having regard to section 7(1), the Native Title Act could be construed as affecting the operation of the Racial Discrimination Act'.[76]

But the paramountcy of those specific provisions is strictly limited to circumstances where an 'inconsistency' is determined to exist. It is the finding of 'inconsistency' that is the significant interpretative exercise. The Acts will be interpreted so as to give effect to both. The Court stressed that any ambiguous terms in the Native Title Act 'should be construed consistently with the Racial Discrimination Act if that construction would remove the ambiguity'.[77] In the task of such construction it is appropriate to give a liberal construction to enactments such as the Racial Discrimination Act

75. Id, 61-62.
76. Id, 62.
77. Id, 37, n 192.

which seek 'to preserve and maintain freedom from discrimination'.[78] Moreover the Court has recognised that where a statute 'is ambiguous the courts should favour that construction which accords with Australia's obligations under a treaty or international convention' and accordingly should reject a 'narrow conception of ambiguity'. 'If the language of the legislation is susceptible of a construction which is consistent with the terms of the international instrument and the obligations which it imposes on Australia, then that construction should prevail'.[79]

Beyond municipal forums the Commonwealth remains, of course, subject to complaints of violations of the International Convention. Under Article 14 of the Convention a complaint may be considered by the Committee on the Elimination of Racial Discrimination established by the Convention. All available domestic remedies must be exhausted before the complaint can be considered. The Committee may make suggestions and recommendations to resolve the complaint and must include them in its annual report. In that manner, irrespective of any limits upon the statutory protection of native title, the protection of the International Convention extends to holders of native titles who have been denied equality before the law.

THE NEED FOR CONSTITUTIONAL ENTRENCHMENT OF EQUALITY BEFORE THE LAW

In the result, the High Court decision exposed the racist nature of the Western Australian government's campaign to deny native title and struck down its legislative aspect. But the forum has now moved from the State legislature to the Commonwealth. On the day the Western Australian Act was struck down[80] the Premier declared that he would 'fight politically to have [the Federal government's native title legislation] changed'. The High Court has affirmed the standard of genuine equality for all and will strive to maintain that standard in the determination of whether any inconsistency exists between the Racial Discrimination Act and the Native Title Act. Short of an explicit repeal of the Racial Discrimination Act any attempt to lower the standard of protection accorded to native title will be productive of uncertainty and litigation. Moreover such denial of equality before the law would violate the Commonwealth's obligations under the International Convention. It is to be hoped that any amendments to the Native Title Act

78. *Koowarta v Bjelke-Petersen* supra n 23; Gibbs CJ, 182. See also *Gerhardy v Brown* supra n 24; Brennan J, 128.

79. *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 128 ALR 353; Mason CJ and Deane J, 362. See also Gaudron J, 374-376; McHugh J, 384-387; Toohey J, 373.

80. Supra n 1.

do not come at the expense of the entitlement of Aboriginal people to equality. But the possibility does point up the need for a constitutional guarantee of equality before the law in Australia. It constitutes a fundamental value in society which should not be subject to 'disapplication'. Sir Hersch Lauterpacht observed that equality before the law 'occupies the first place in most written constitutions' and is the 'most fundamental of the rights of man.... [I]t is the starting point of all other liberties'.[81] Equality before the law may provide an effective standard of protection, but it requires constitutionally entrenched protection in Australia.

81. H Lauterpacht *An International Bill of the Rights of Man* (New York: Columbia UP, 1945) 115. Quoted by Brennan J in *Gerhardy v Brown* supra n 24, 128.