
ARTICLES

The Role of the High Court in the Recognition of Native Title



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This essay, in honour of the late Ron Castan QC, traces the history of native title litigation in the High Court of Australia. Castan appeared for the Aboriginal plaintiffs in many of the leading cases, including the landmark decision in Mabo v Queensland (No 2).

THE SHOCK OF THE OLD

Recognition between people is the human experience of seeing each other anew. In a related sense recognition involves acknowledgment of our shared humanity and the dignity and rights of each individual. Recognition is also the metaphor that names the legal act which lies at the heart of the law of native title. The human experience and the legal act are not far apart. For Ron Castan QC, whose memory is honoured by this address, they were inseparable. He put to the High Court of Australia that legal recognition of the relationship between Aboriginal and Islander peoples and their country was something the judges could and should do. His argument was informed by a powerful personal conviction which is no better expressed than in his own words:

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At the heart of the legal fiction of terra nullius lies an obnoxious racism, which involves treating Aboriginal people as less than human. The ultimate denial of the inherent humanity of one's fellow human beings consists of saying that those persons, although manifestly physically present and alive, are not worthy of being treated as 'people' at all – they are no more than part of the flora and fauna of the land.¹

Linked to this was his consciousness of the denial of the history of Australia's treatment of its indigenous people and the failure to acknowledge that history – the 'Cult of Disremembering' or 'The Great Australian Silence,' as Professor Stanner called it.² The answer to it, he said, was –

to write more books, give more talks, fight more native title cases in the courts, tell more stories of the Stolen Generation, teach more courses in schools and universities and build more monuments and statues of indigenous freedom fighters so that the cult of disremembering can never take hold again.³

The Cult of Disremembering was dealt a great blow with the decision of the High Court in *Mabo v Queensland*, in which Ron Castan appeared for the plaintiffs. It was seen as a moment of discontinuity in our legal history, later described by Justice Gummow in the *Wik* case as a shift in Australia's constitutional foundation.⁴ Castan did not see it that way. What the High Court had to deal with in *Mabo* was not a revolutionary doctrine, but accorded with what had been accepted in other British colonies. Nor, in his view, did it represent a change by the High Court for the Court had never previously been asked to pronounce on the issue.⁵ It is right to say that the decision involved not so much the discovery or the creation of a new principle but the doing of a new thing – the legal act we metaphorically call recognition. It is a legal *act* rather than a new principle because it takes its character from the human act of recognition. That is not just a passive seeing of something afresh. Its key element is cognition. It translates the old into the new. It conveys the reconstruction of understanding – the shock of awareness – the new realisation of what we had passed over unseen. It brings a knowledge of what has always been, and for many a sense of the loss of what could have been. This is a powerful strand in the still unfolding history of native title in Australia.

1. R Castan 'Land, Memory and Reconciliation' (1999) 11 Without Prejudice 3, 4.

2. WEH Stanner 'After the Dreaming: Black and White Australians – An Anthropologist's View' The Boyer Lectures (Sydney: ABC, 1969) 18, 53.

3. Castan *supra* n 1, 7.

4. *Wik Peoples v Qld* (1996) 187 CLR 1, Gummow J 182.

5. R Castan 'Native Land Title in Australia: Reflections on *Mabo*': Address to the Annual Dinner of the Australian Jewish Democratic Society (Melbourne, 1993).

That unfolding is a small part of a much larger history. It resides in the law and custom of Aboriginal and Islander people expressed in oral and artistic traditions, in the paintings, songs, dances and story-lines which create and define their Australian landscapes and their place in them. Galarwuy Yunupingu wrote of these traditions in 1976 in his 'Letter from Black to White':

The land is the art. I can paint, dance, create and sing as my ancestors did before me. My people recorded these things about our land this way, so that I and all others like me may do the same. I think of the land as the history of my nation. It tells us how we came into being and what system we must now live.... My land is my foundation.... Without land I am nothing.⁶

The rules of the Federal Court provide for evidence in native title proceedings to be given 'by way of singing, dancing, storytelling or in any other way'.⁷ Ten years ago such a rule of court would have been unimaginable. The judicial system has been moved. And the first movement came from the High Court.

QUESTIONS POSED

The focus of this address is on the way in which High Court decisions have created and developed the common law of native title. The decisions considered are not only the few made to date about native title, but others that have set the scene for its recognition and protection. What has been decided so far is incomplete. It leaves open many issues. They include the nature of what is called 'recognition' and its limitations and qualifications, some of which attract the misleading metaphor 'extinguishment'. The decisions made so far also point to the need to understand the limitations which the nature of the High Court – and indeed all courts – place upon what may be achieved through them. The act of legal recognition takes place in a virtual reality, the universe of legal discourse. It defines rights and assigns their relative priorities. The management of the relationships between those rights and between the people who hold them is part of the human experience of recognition. It takes place in the real world between real people.

TERRA NULLIUS: RECOGNITION THRESHOLDS AND ODISIOUS COMPARISONS

To understand the jurisprudence of native title it is necessary to refer to the cases which have been decided in the High Court and what they did. Before *Mabo* that jurisprudence was fairly straightforward and embodied in the judgment of Sir

6. G Yunupingu 'Letter from Black to White' (1976) 2 Land Rights News 9.

7. Federal Court Rules O 78 r 32.

Richard Blackburn in the Supreme Court of the Northern Territory in the *Gove Land Rights* case.⁸ He held, in accordance with his reading of 19th century Privy Council authority,⁹ that Australia, at the time of colonisation, was settled or occupied rather than conquered or ceded. In *Cooper v Stuart*, Lord Watson had said:

There is a great difference between the case of a Colony acquired by conquest or cession, in which there is an established system of law, and that of a Colony which consisted of a tract of territory practically unoccupied, without settled inhabitants or settled law, at the time when it was peacefully annexed to the British dominions. The Colony of New South Wales belongs to the latter class.¹⁰

This was consistent with the approach taken by the colonial courts of New South Wales. In 1833, the indigenous inhabitants were described as ‘wandering tribes ... living without certain habitation and without laws [who] were never in the situation of a conquered people’.¹¹ It was, moreover, received wisdom that the lands in the colony were the property of the Crown from first settlement.¹²

Blackburn J concluded from *Cooper v Stuart* that the doctrine of terra nullius applied and that there was no common law doctrine of native title in Australia. In any event he found there were no rights under traditional law and custom of the kind necessary to attract recognition at common law. A threshold of equivalence of traditional rights and interests in land with those of the common law had been set up as a condition of recognition by the Privy Council in *In Re Southern Rhodesia*.¹³ Lord Sumner spoke of indigenous people whose place in the scale of social organisation was so low that their usages and conceptions of rights could not be reconciled with the institutions or ideas of civilised society. It was not open, on his approach, to impute to such people ‘some shadow of the rights known to our law and then ... transmuted into the substance of transferable rights of property as we know them’.¹⁴ He did, however, contemplate recognition of indigenous rights in land above a certain threshold of comparability with common law rights and used the word ‘transmute’ where the word ‘recognise’ might be used today. By way of contrast, in *Amodu Tijani*, decided three years later, the Privy Council cautioned against the tendency to fit traditional title to land into conceptual categories appropriate only to systems which had grown up under English law.¹⁵ Blackburn J

8. *Milirrump v Nabalco Pty Ltd* (1971) 17 FLR 141.

9. *Cooper v Stuart* (1889) 14 App Cas 286.

10. *Ibid*, 291.

11. *Macdonald v Levy* (1833) 1 Legge 39, 45.

12. *A-G v Brown* (1847) 1 Legge 312; *Williams v A-G (NSW)* (1913) 16 CLR 404.

13. [1919] AC 211.

14. *Ibid*, 233-234.

15. *Amodu Tijani v Secretary, Southern Nigeria* [1921] 2 AC 399, 403.

found on the evidence before him a 'stable and elaborate system highly adapted to the country in which the people led their lives', a system which he was prepared to label a government of laws and not of men.¹⁶ Nevertheless, he would have applied the approach taken in *In Re Southern Rhodesia* to conclude that, absent rights under traditional law and custom which could be described as rights of property, there could be no common law native title.

In the year that terra nullius was affirmed in Australia, and traditional law and custom found wanting in the attributes necessary for recognition, Ron Castan represented indigenous New Guinean people in a land compensation case in the Supreme Court of Papua New Guinea, which was then still an Australian territory. Neither its creation as a territory nor its previous status as a British protectorate had disturbed the customary title of its people which was recognised by Australian Land Ordinances. So the High Court could say:

The law of the Territory of Papua and New Guinea affords clear recognition of native interests in land, whether those interests are communal and usufructuary or individual and proprietary.¹⁷

It struck Castan as 'particularly strange that in this part of what was then Australia, this was accepted as a matter of course' whereas 'back on the mainland for some reason indigenous people were treated totally differently'.¹⁸ He reflected also upon the position of indigenous people in New Guinea under German occupation in the 19th century observing:

The German colonial land law which I studied, and then argued in detail in a Supreme Court hearing in Lae before an Australian judge, was truly enlightened compared to the position in mainland Australia. The first German settlers were not entitled to claim ownership of any land that was owned by indigenous natives according to their own customs. Having claimed sovereignty over the Territory, the only land that could be actually settled and owned by the German New Guinea Kompanie was land not owned by local native peoples according to their own customary laws.¹⁹

For Castan, a Jew, this also raised what he called the 'strange irony' that the Germany which could show such an enlightened attitude to indigenous people could deliberately seek to kill him and succeed in killing a small number of his own family and a very large number of his wife's family.²⁰

16. *Milirrpum v Nabalco* supra n 8, 267.

17. *Administration of PNG v Daera Guba* (1973) 130 CLR 353, Gibbs J 458, Barwick CJ 397.

18. Castan supra n 5, 1.

19. Castan supra n 1, 2.

20. *Ibid.*, 7.

STATUTORY LAND RIGHTS

Australia's national conscience was moved to some extent following the *Gove Land Rights* case. The Woodward Royal Commission was established, which in turn led to the enactment of the Aboriginal Land Rights (Northern Territory) Act 1976 (Cth). Its recommendations proposed the establishment of a regime for the grant of statutory land rights underpinned by a process of inquiry and recommendation by an Aboriginal Lands Commissioner. The aims of the regime, as formulated by Woodward, were:

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

Justice Toohey, the first Aboriginal Lands Commissioner appointed under the Act, described its object thus:

Essentially the object of the Act is to give standing, within the Anglo-Australian legal system, to a system of traditional ownership that has so far failed to gain recognition by the courts.²¹

The process of claim, inquiry and recommendation set out in the Act involved an administrative recognition by the Aboriginal Lands Commissioner of traditional Aboriginal owners of the land under claim. Only unalienated Crown land could be claimed. Grants under the Act were made after a recommendation by the Commissioner. They were not made as of right, but in the exercise of the statutory power of a Commonwealth minister. The same general concept of administrative recognition, followed by a grant effected by legislation or a legislative process,

21. *Report on Yingawunarri (Old Top Springs) Mudbura Land Claim* Report No 5 (Canberra: AGPS, 1980) para 70.

informed land rights statutes passed subsequently in New South Wales, Queensland and South Australia.²²

Statutory land rights for Aboriginal people did not pass without adverse reaction. As the historian CD Rowley pointed out in 1986, for nearly two centuries systems of land ownership and government land management had been developed 'free from any real understanding of, or influence by, their dispossessed Aboriginal owners'. He described reaction to such statutory rights thus:

Self-interest is a firm basis for beliefs and mores in us all, and one can at least understand the shocked disbelief turning to wrath as miners and pastoralists now hear what they claim as their legal rights questioned or see them restricted.²³

In so saying Rowley foreshadowed that which was to come, but far more acutely, in the wake of the High Court's decision to recognise native title rights in *Mabo (No 2)*.²⁴ As Ron Castan would write in 1993:

The notion that the Aboriginal people have rights in this country is a difficult one for many in our community to grapple with. That Aboriginal people have the right to be consulted, to be up at the table when it comes to negotiating matters such as land is very difficult for those companies, or groups, or governments which have been accustomed to deciding that we need to use this land for a particular purpose, whether it be mining or farming or building new homes.²⁵

TERRITORY LAND RIGHTS IN THE HIGH COURT

The Aboriginal Land Rights (Northern Territory) Act 1976 had a litigious history involving contests between applicants and the Northern Territory government and other parties in relation to a variety of issues, many focusing on the jurisdiction of the Aboriginal Lands Commissioner and the legal limits on the class of land available for claim. In a sense this foreshadowed the extinguishment debates of the native title era. The attempts by the Northern Territory government to extend town sites to

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

23. CD Rowley *Recovery: The Politics of Aboriginal Reform* (Melbourne: Penguin, 1986) 84.

24. *Mabo v Qld (No 2)* (1992) 175 CLR 1.

25. Castan *supra* n 5.

Table 1: The Aboriginal Land Rights (NT) Act 1976 in the High Court

Case	Issues Raised
<i>R v Toohey, ex parte A-G (NT)</i> (1980) 145 CLR 374.	Whether land under a pastoral lease held by the Aboriginal Land Fund was thereby 'alienated' and unavailable for claim.
<i>R v Toohey, ex parte Northern Land Council</i> (1981) 151 CLR 170.	Whether the validity of regulations extending town areas to exclude land from claim could be considered by the Commissioner.
<i>Re Toohey, ex parte Stanton</i> (1982) 44 ALR 94.	Whether the Commissioner had failed to deal properly with evidence in relation to sites and their significance to the question of traditional Aboriginal ownership.
<i>R v Toohey, ex parte Meneling Station</i> (1982) 158 CLR 327.	Whether the Commissioner had to have regard in making his recommendation to the effect of a grant on third parties.
<i>R v Kearney, ex parte Northern Land Council</i> (1984) 158 CLR 365.	Whether Crown land unalienated at the time of application remained available for claim notwithstanding subsequent rezoning as a town.
<i>R v Kearney, ex parte Japanangka</i> (1984) 158 CLR 395.	Whether the grant by the Crown of a perpetual lease on land under claim to the Northern Territory Development Land Corporation after the inquiry had commenced was valid and/or took the land out of the claim.
<i>R v Kearney, ex parte Jurlama</i> (1984) 158 CLR 426.	Whether a claim could be made to part of traditional country when all relevant sacred sites were outside the claim area.
<i>A-G (NT) v Kearney</i> (1985) 158 CLR 500.	Whether legal professional privilege existed in relation to communications between the Northern Territory government and its legal officers with respect to regulations extending the townships of Darwin and Katherine with a view to excluding areas around them from claim.
<i>Minister for Aboriginal Affairs v Peko Wallsend</i> (1986) 162 CLR 24.	The obligation of the Minister to take into account the detrimental effect of a grant on applicants for mining leases in the claim area.
<i>Northern Land Council v Cth</i> (1986) 161 CLR 1.	Whether the assignee of an agreement under section 44(2) of the Land Rights Act, which permitted mining of uranium at the Ranger Project Area in Kakadu, was authorised by the Atomic Energy Act 1953 to enter Aboriginal land the subject of a grant under the first Act.
<i>Northern Land Council v Cth (No 2)</i> (1987) 75 ALR 210.	Unconscionable dealing by the Commonwealth and whether it owed a fiduciary duty to the traditional Aboriginal owners in relation to an agreement under the Land Rights Act.
<i>A-G (NT) v Maurice</i> (1986) 161 CLR 475.	Whether Aboriginal claimants waived legal professional privilege in relation to source materials for a claim book by lodging the book with the Commissioner.
<i>A-G (NT) v Hand</i> (1991) 172 CLR 185.	Whether the Commissioner could recommend the grant of land on which a research station was conducted by the Northern Territory government.
<i>Cth v Northern Land Council</i> (1993) 176 CLR 605.	Whether Cabinet notes could be required to be produced in proceedings to set aside an agreement between the Northern Land Council and the Commonwealth under section 44(2) of the Land Rights Act.

take land out of the category of unalienated Crown land, available for claim, was a case in point. The High Court was involved in deciding many of these matters. There are no less than 14 reported decisions of the Court touching matters connected with the administration of the Act. Ron Castan appeared as counsel in seven of them. The issues raised in the cases were various: see Table 1.

The Act provided for the restoration of some areas of land to Aboriginal control and gave legislative recognition to Aboriginal rights and interests in that land.²⁶ Section 50, which described the function of the Commissioner, was not to be construed as though contained in 'a textbook of traditional land tenure in the feudal system'. Its context was the novel concepts and arrangements that entered into Australian law through the provision of statutory land rights.²⁷ Importantly, however, statutory land rights, while providing a legal framework within which traditional owners could exercise their rights under indigenous law and custom, did not operate as a model of such rights. Having regard to the nature of traditional ownership described by Brennan J as 'primarily a spiritual affair rather than a bundle of rights,' they could not.²⁸

In the cases brought under the Act, the High Court was essentially involved in the construction of a Commonwealth statute in the context of what were largely judicial review applications. But it was a statute in which the concept of traditional land ownership was firmly embedded and recognised by the Court. The Court was also exposed to the very adversarial relationship between the Northern Territory government and the statutory representatives of traditional owners. And, in the context of an agreement made under section 44(2) of the Act, common law native title was raised before the Court in 1987. It arose in the long-running litigation between the Northern Land Council and the Commonwealth over their 1978 agreement about the mining of uranium in the Ranger Project Area. The Council sought rescission of the agreement. It alleged unconscionable conduct and breach of fiduciary duty by the Commonwealth in connection with the making of the agreement. The statement of claim was amended in October 1986 to include an allegation that the traditional owners had native title in the land preceding the vesting of the land in the Land Trust established under the Act. The existence of this antecedent native title was relied upon in support of the plea of a fiduciary relationship with the Crown. In a case stated, the Court rejected the existence of a fiduciary duty based upon the statute alone but went on to say:

Whether the nature of the relationship at common law between an identified group of Aboriginal people and the unalienated Crown lands which they have

26. *R v Toohey, ex parte Meneling Station Pty Ltd* (1982) 158 CLR 327, 355.

27. *R v Toohey, ex parte A-G (NT)* (1980) 145 CLR 374, Wilson J 392.

28. *R v Toohey* supra n 26, 358.

used and occupied historically and still use and occupy is such as to found a fiduciary relationship or a trust of some kind is a question of fundamental importance which has not been argued on the present stated case.²⁹

Members of what was to be the *Mabo (No 1)* court, involved in many of these decisions, were Justices Mason, Brennan, Deane and Dawson. Mason J covered the entire span of the cases to which reference has been made. Toohey J was directly involved as the first Aboriginal Lands Commissioner seeing and hearing evidence on country under claim, including evidence from traditional owners, anthropologists and other experts. When the first *Mabo* decision was made, seven of the land rights judgments listed in Table 1 had been given. Another six had been given by the time *Mabo (No 2)* was delivered.

It would be unwise to link the High Court's recognition of native title in 1992 too directly to its exposure to a decade of land rights litigation. But the values underpinning the Land Rights Act, as enunciated by Woodward, could not have been lost on the Court. There was a strong normative element in the *Mabo* judgment. It is not unreasonable to suppose that some of it may have been informed by the experience of that contentious statute. But there was another very strong and more explicit normative input which also had significant practical consequences for native title law. That was the Racial Discrimination Act 1975 (Cth), the vehicle by which Australia honoured its obligations under the International Convention on the Elimination of All Forms of Racial Discrimination.³⁰

THE RACIAL DISCRIMINATION ACT 1975, *MABO (NO 1)* AND THE RACE POWER

Native title, once recognised, initially derived much of the protection which it enjoyed not from the act of recognition but from the Racial Discrimination Act 1975 (Cth). That Act was passed to give effect to the International Convention on the Elimination of All Forms of Racial Discrimination, to which Australia is a party. Section 9 provides:

Racial discrimination to be unlawful

- (1) It is unlawful for a person to do any act involving a distinction, exclusion, restriction of preference based on race, colour, descent or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of any human right or fundamental freedom in the political, economic, social, cultural or any other field of public life....

29. *Northern Land Council v Cth (No 2)* (1987) 75 ALR 210, 215.

30. Aust TS 1975 No 40: adopted 7 Mar 1966, entered into force generally 4 Jan 1969.

- (2) A reference in this section to a human right or fundamental freedom in the political, economic, social, cultural or any other field of public life includes any right of a kind referred to in Article 5 of the [International Convention on the Elimination of All Forms of Racial Discrimination].

Ron Castan played an important role in securing the constitutional validity of that section, and of the Act generally, in the *Koowarta* case.³¹

In 1974, the Aboriginal Land Fund Commission, a Commonwealth authority, entered into an agreement to take a transfer of a Crown lease of a pastoral property in Queensland. The Minister for Lands in Queensland refused consent to the transfer under the Land Act 1962 (Qld). He did so in furtherance of a government policy which opposed the acquisition by Aborigines of large areas of land in the State. John Koowarta was a member of the Winychanam Group for whose use the Aboriginal Land Fund Commission had contracted to buy the Crown lease. He commenced proceedings in the Supreme Court of Queensland against the then Premier, the Honourable Joh Bjelke-Petersen, and other members of the Queensland government. He claimed damages under section 25 of the Racial Discrimination Act 1975. Queensland challenged the statement of claim on the grounds that the Act was outside the legislative power of the Commonwealth and was invalid. John Koowarta was represented by Castan. As junior counsel appearing with him were Paul de Jersey, now Chief Justice of Queensland, and Tony Skoien, now a judge of the District Court of Queensland. The Commonwealth intervened to support the validity of the Act. The Solicitor-General, the late Sir Maurice Byers QC, represented the Commonwealth. Ian Hanger from Queensland and myself from Western Australia were his junior counsel.

Two provisions of the Commonwealth Constitution were in issue. The primary provision debated was the power of the Commonwealth to make laws with respect to external affairs: section 51(xxix). The second was the power of the Commonwealth to make laws for the people of any race for whom it was deemed necessary to make special laws: section 51(xxvi). The latter provision had been amended by Constitutional referendum in 1967 to remove the exclusion of Aboriginal people.

Four of the seven justices held that the provisions of sections 9 and 12 of the Act were valid laws with respect to external affairs. This was globalisation at work through the nation's Constitution. For in this case the High Court upheld the validity of laws made by the Australian parliament which imported norms of conduct derived from international law and applied them to the way in which Australians were to deal with each other. The dissenters saw the growth of the external affairs power as generating new subjects of legislative hegemony for the Commonwealth

31. *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168.

and eroding the federal balance of powers established by the Constitution.³² Sir Ninian Stephen, who formed part of the majority, encapsulated the High Court's acknowledgment of globalisation:

The great post-war expansion of the areas properly the subject-matter of international agreement has ... made it difficult indeed to identify subject-matters which are of their nature not of international but of only domestic concern.... But this does no more than reflect the increasing awareness of the nations of the world that the state of society in other countries is very relevant to the state of their own society.³³

The growth in the content of the external affairs power reflected 'the new global concern for human rights and the international acknowledgement of the need for universally recognised norms of conduct, particularly in relation to the suppression of racial discrimination'.³⁴ These universally recognised norms of conduct were also to play a role in the *Mabo* litigation, which went beyond defining the content of the external affairs power to inform the development of the common law itself.

The race power under section 51(xxvi) of the Constitution was also relied upon by those arguing for validity. However, it was held not to support the Act because the Act applied equally to all persons and was therefore not a special law for the people of any one race. In the course of their judgments, a number of the justices expressed the obiter view that the race power would support laws which discriminated against the people of a particular race as well as laws discriminating in favour of a particular race.³⁵ Mason J, having found the Act supported by the external affairs power, did not consider whether it was also supported by the race power and expressed no view as to the scope of that power. Murphy J considered the power could only be exercised for the benefit of the peoples of a particular race but did not elaborate.³⁶

The race power was again considered by the High Court in the *Tasmanian Dam* case in 1983.³⁷ Ron Castan appeared for the Commonwealth with the then Solicitor-General, Sir Maurice Byers QC. The case concerned a number of constitutional issues affecting the validity of Commonwealth legislation under which the Commonwealth sought to restrain Tasmania and its Hydro-Electric Commission from proceeding with the construction of a dam on the Gordon River. Certain parts of the World Heritage Properties Conservation Act 1983 (Cth) provided protection

32. Ibid, Gibbs CJ 200, Aickin J concurring 243, Wilson J 251.

33. Ibid, Stephen J 217.

34. Ibid, Stephen J 218, Mason J 227, Murphy J 238-239, Brennan J 258.

35. Ibid, Gibbs CJ 186, Aickin J concurring 243, Stephen J 209, Wilson J 244.

36. Ibid, 242.

37. *Cth v Tasmania* (1983) 158 CLR 1.

for specified Aboriginal sites. Section 8(1) of the Act declared that it was necessary to enact the protective provisions as special laws for the people of the Aboriginal race. Four of the justices, Mason, Murphy, Brennan and Deane JJ, held that the provisions were within the legislative power conferred by section 51(xxvi) of the Constitution. In a passage that again may be regarded as reflecting conceptual scene-setting for the later recognition of native title, Mason J said:

The cultural heritage of a people is so much of a characteristic or property of the people to whom it belongs that it is inseparably connected with them, so that a legislative power with respect to the people of a race, which confers power to make laws to protect them, necessarily extends to the making of laws protecting their cultural heritage.³⁸

There were now two justices, Murphy and Brennan JJ, prepared to say that the race power could only be exercised to benefit the people of the particular race to which its exercise was directed. Brennan J said:

The approval of the proposed law for the amendment of paragraph (xxvi) by deleting the words 'other than the aboriginal race' was an affirmation of the will of the Australian people that the odious policies of oppression and neglect of Aboriginal citizens were to be at an end, and that the primary object of the power is beneficial. The passing of the Racial Discrimination Act manifested the Parliament's intention that the power will hereafter be used only for the purpose of discriminatorily conferring benefits upon the people of a race for whom it is deemed necessary to make special laws.³⁹

The Racial Discrimination Act 1975 having been held to be valid, at least so far as sections 9 and 12 were concerned, was to play a critical role in the progress of the *Mabo* litigation towards the recognition of native title for the Meriam people. That litigation commenced in 1982 with a writ and statement of claim filed in the High Court. Interlocutory steps were lengthy. On 26 February 1986, the then Chief Justice of the High Court, Sir Harry Gibbs, remitted the matter for trial of all factual issues to the Supreme Court of Queensland. The trial began on 13 October 1986, but the time set aside being patently inadequate it was adjourned part-heard on 17 November 1986.⁴⁰ In the meantime Queensland had passed the Queensland Coast Islands Declaratory Act 1985 (Qld). The Act applied to islands in the Torres Strait which were part of the State of Queensland and included Mer. It declared that upon the islands becoming part of Queensland, they were vested in the Crown in right of Queensland 'freed from all other rights, interests and claims of any kind whatsoever'.

38. Ibid, 159.

39. Ibid, 242.

40. An account of the proceedings may be seen in R Castan & B Keon-Cohen 'Mabo and the High Court: A Reply to SEK Hulme QC' (1993) 87 Vic Bar News 47.

The State amended its defence and pleaded the Act against the *Mabo* claim. Its asserted effect was to extinguish the rights which Mabo and the other plaintiffs claimed in Mer and to deny any right of compensation in respect of that extinction.⁴¹ The validity of the Act and the viability of Queensland's newly-pleaded defence were challenged by the plaintiffs on a demurrer in the High Court which was argued in March 1988. Ron Castan was counsel for the plaintiffs. In December 1988, a majority of the justices held that the Act was inconsistent with section 10 of the Racial Discrimination Act 1975. In substance that section provides that if a Commonwealth, State or Territory law discriminates between persons of different race, colour, national or ethnic origin so that a person from one group enjoys a right to a lesser extent than a person from another then, by force of the Commonwealth law, they shall enjoy the right to the same extent. In the joint judgment in what became known as *Mabo (No 1)*, Brennan, Toohey and Gaudron JJ said:

In practical terms, this means that if traditional native title was not extinguished before the Racial Discrimination Act came into force, a State law which seeks to extinguish it now will fail. It will fail because section 10(1) of the Racial Discrimination Act clothes the holders of traditional native title who are of the native ethnic group with the same immunity from legislative interference with their enjoyment of their human right to own and inherit property as it clothes other persons in the community. A State law which, by purporting to extinguish native title, would limit that immunity in the case of the native group cannot prevail over section 10(1) of the Racial Discrimination Act which restores the immunity to the extent enjoyed by the general community. The attempt by the 1985 Act to extinguish the traditional legal rights of the Meriam people therefore fails.⁴²

The invalidation of the Queensland law raised the question whether other State or Territory laws or executive acts, done after the Racial Discrimination Act 1975 came into effect, might be invalid because of their discriminatory operation in relation to native title, if native title were able to be recognised. For the Commonwealth there was the further question whether its laws or executive acts might have operated to effect acquisitions of native title rights without just compensation and therefore contrary to the requirements of the Constitution. None of this would matter, of course, if native title were not able to be recognised at common law. And that question remained to be answered in *Mabo (No 2)*. But it is not surprising that when native title was recognised in *Mabo (No 2)*, it gave life to the general issue of the validity of past acts implied in *Mabo (No 1)* and the need to ensure that future acts affecting native title did not offend against the Racial Discrimination Act 1975 or the requirements of the Constitution. The question of compliance with the Racial

41. *Mabo v Qld (No 1)* (1988) 166 CLR 186, Brennan, Toohey and Gaudron JJ 213.

42. *Ibid*, 218-219.

Discrimination Act 1975 had particular implications for State and Territory governments in relation to land use management, and for the pastoral and mining industries and other users of land in areas in which native title claims might arise. So it was that Ron Castan was able to say in 1993 that the Racial Discrimination Act 1975 lay at the heart of the *Mabo* debate.⁴³ He wrote:

It is the Racial Discrimination Act which has so frightened and angered the politicians, the miners, the pastoralists, the journalists and some lawyers. For if indigenous people have rights to land, then those rights may only be taken away in a non-discriminatory way. Thus, since 1975 the continuing dispossession of Aboriginal people may have been unlawful, unless the Racial Discrimination Act is overridden or suspended.⁴⁴

MABO (NO 2): THE ACT OF RECOGNITION

The decision of the High Court in *Mabo (No 2)*,⁴⁵ in which Ron Castan again appeared for the plaintiffs, was the culmination of ten years of forensic effort. It was an act of legal recognition expressed in the declaration made on 3 June 1992 that:

The Meriam people are entitled as against the whole world to possession, occupation, use and enjoyment of the lands of the Murray Islands.⁴⁶

The 'recognition' was, however, limited and qualified in its terms by reference to a parcel of land leased to the Trustees of the Australian Board of Missions and other parcels of land validly appropriated for use for administrative purposes, which use was inconsistent with the continued enjoyment of the rights and privileges of the Meriam people under native title. The recognition was also qualified by the further declaration made:

That the title of the Meriam People is subject to the power of the Parliament of Queensland and the power of the Governor in Council of Queensland to extinguish that title by valid exercise of their respective powers, provided any exercise of those powers is not inconsistent with the laws of the Commonwealth.⁴⁷

The orders declared rights enforceable at law under the designation, 'Possession, occupation, use and enjoyment ... as against the whole world'. The rights so declared were, however, subject to extinguishment. The orders reflected

43. Castan *supra* n 5.

44. R Castan 'Australian Catharsis: Coping with Native Title' *Bnai Brith Oration* (1993) <<http://www.join.org.au/articles/ntitle.htm>>.

45. *Supra* n 24.

46. *Ibid*, 217.

47. *Ibid*.

the two metaphors of recognition and extinguishment, key elements in the High Court's jurisprudence of native title from the outset.

The essential principles underpinning the common law of native title in Australia, or what may be called the common law rules for the recognition of native title as set out in the *Mabo (No 2)* decision, can be summarised thus:

1. The colonisation of Australia by England did not extinguish rights and interests in land held by Aboriginal and Torres Strait Islander people according to their own law and custom.⁴⁸
2. The native title of Aboriginal and Torres Strait Islander people under their law and custom will be recognised by the common law of Australia and can be protected under that law.⁴⁹
3. When the Crown acquired each of the Australian colonies it acquired sovereignty over the land within them. In the exercise of that sovereignty native title could be extinguished by laws or executive grants which indicated a plain and clear intention to do so (eg, grants of freehold title).⁵⁰
4. To secure the recognition of native title today it is necessary to show that the Aboriginal or Torres Strait Islander group said to hold the native title:
 - (a) has a continuing connection with the land in question and has rights and interests in the land under Aboriginal or Torres Strait Islander traditional law and custom, as the case may be;⁵¹ and
 - (b) the group continues to observe laws and customs which define its ownership of rights and interests in the land.⁵²
5. Under common law, native title has the following characteristics:
 - (a) it is communal in character although it may give rise to individual rights;⁵³
 - (b) it cannot be bought or sold;⁵⁴
 - (c) it may be transmitted from one group to another according to traditional law and custom;⁵⁵
 - (d) the traditional law and custom under which native title arises can change over time and in response to historical circumstances.⁵⁶
6. Native title is subject to existing valid laws and rights created under such laws.⁵⁷

48. Ibid, Brennan J 57, Mason CJ & McHugh J concurring 15, 69, Deane & Gaudron JJ 81, Toohey J 184, 205.

49. Ibid, Brennan J 60, 61, Deane & Gaudron JJ 81, 82, 86-87, Toohey J 187.

50. Ibid, Brennan J 64, Deane & Gaudron JJ 111, 114, 119, Toohey J 195-196, 205.

51. Ibid, Brennan J 59-60, 70, Deane & Gaudron JJ 86, 110, Toohey J 188.

52. Ibid, Brennan J 59, Deane & Gaudron JJ 110.

53. Ibid, Brennan J 52, 62, Deane & Gaudron JJ 85-86, 88, 119-110.

54. Ibid, Brennan J 60, 70, Deane & Gaudron JJ 88, 110.

55. Ibid, Brennan J 60, Deane & Gaudron JJ 110.

56. Ibid, Brennan J 61, Deane & Gaudron JJ 110, Toohey J 192.

57. Ibid, Brennan J 63, 69, 73, Deane & Gaudron JJ 111-112.

These principles embody the rules of what is said to constitute legal 'recognition' of indigenous relationships to land defined by traditional law and custom. They do not operate directly upon those relationships or the traditional laws and customs from which they are derived. That is so even where common law native title is said to be extinguished. For such extinguishment is no more than a qualification of the common law rules of recognition. It says nothing about their subject-matter.

Before considering further the notions of recognition and extinguishment, it is useful to bear in mind the normative setting of the legal act of what the High Court decided in *Mabo (No 2)*. The decision was a manifestation of the continuing globalisation of Australian law. It was also reflective of perceived contemporary, social or community values. This is made explicit in the judgment of Brennan J, with whom Mason CJ and McHugh J agreed. Brennan J aligned what he called 'the expectations of the international community' with 'the contemporary values of the Australian people' and said:

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 organisation of the indigenous inhabitants of a settled colony, denies them a right to occupy their traditional lands.⁵⁸

Deane, Gaudron and Toohey JJ made no express reference to international norms of conduct. Deane and Gaudron JJ referred, however, to long-standing principles of 'natural law' embodied in the works of early international law jurists such as Wolff, Vattel, de Victoria and Grotius.⁵⁹ They also referred to authority applicable to a wide spectrum of British colonies including New Zealand and Canada. In so doing, they accepted as a correct general statement of the common law what the Privy Council had said in *Adeyinka Oyekan v Musendiku Adele*:

The courts will assume that the British Crown intends that the rights of property of the inhabitants are to be fully respected.⁶⁰

When they posed for themselves the key question, 'Should the proposition supported by the Australian cases and past practice be accepted?', Deane and Gaudron JJ did not mince their words. They saw the terra nullius principle and the proposition that full legal and beneficial ownership of all the land in the Australian colonies vested in the Crown at annexation as 'the legal basis for the dispossession of the Aboriginal peoples of most of their traditional lands'. They said:

58. Ibid, 42.

59. Ibid, 43.

60. [1957] 1 WLR 876, 880.

The acts and events by which that dispossession in legal theory was carried into practical effect constitute the darkest aspects of the history of this nation. The nation as a whole must remain diminished unless and until there is an acknowledgment of, and retreat from, those past injustices.⁶¹

As Gummow J was later to observe in his judgment in the *Wik* case, the majority judges in *Mabo (No 2)* moved to a new and particular view of past events upon which they declared the content of the common law. The gist of *Mabo (No 2)* lay in the holding that the long-understood refusal in Australia to accommodate concepts of native title within the common law rested upon past assumptions of historical fact now shown to be false.⁶² That shift of view was affected by powerful normative considerations.

What, then, is the nature of the recognition which the common law accords to indigenous relationships to the land? As already observed, it does not affect those relationships. It is expressed in a declaration of rights comprehensible in common law terms. This does not mean that it requires a selection of closest analogues from the common law library. There is, however, a right or set of rights, whether expressed severally or holistically, that are ascertained in the common law universe when a determination is made. They answer to the designation 'common law native title'. They are sui generis creatures of the common law. To the extent that the word 'title' suggests a land law analogue it is, as Toohey J has said, 'artificial and capable of misleading'.⁶³

The sui generis character of common law native title is mandated by the range of traditional indigenous relationships to land that may be recognised. Brennan J was prepared to categorise what he called 'the interest possessed by a community that is in exclusive possession of land' as 'proprietary'.⁶⁴ This classification could be made even though the land was inalienable according to traditional law and custom. And it could be made even though individual members of the community might enjoy usufructuary rights that themselves are not proprietary in nature. It is questionable, though, whether they can accommodate the full range of spiritual relationships with land including the relationship maintained at a distance which was seen as capable of recognition by the Full Court of the Federal Court in *Western Australia v Ward*.⁶⁵

Deane and Gaudron JJ unequivocally rejected the proposition that indigenous relationships to land, able to be recognised by the common law, were confined to 'interests which were analogous to common law concepts of estates in land or

61. *Mabo (No 2)* supra n 24, 109.

62. *Wik* supra n 4, 179-180.

63. *Mabo (No 2)* supra n 24, 178.

64. *Ibid*, 51.

65. (2000) 170 ALR 159, Beaumont & von Doussa JJ 221.

proprietary rights'.⁶⁶ They rejected the narrow approach of the Privy Council in *In Re Southern Rhodesia* in favour of the more flexible principles expressed in *Amodu Tijani*⁶⁷ and *Adeyinka Oyekan*.⁶⁸ It was inappropriate to force native title to conform to traditional common law concepts; it should be accepted as 'sui generis or unique'.⁶⁹

Toohy J, speaking of common law native title, stated the position most clearly when he said:

In the case of the Meriam people (and the Aboriginal people of Australia generally), what is involved is 'a special collective right vested in an Aboriginal group by virtue of its long residence and communal use of land or its resources'.⁷⁰

Here his Honour was quoting from the report of the Australian Law Reform Commission on the Recognition of Aboriginal Customary Laws.⁷¹ He added:

In truth what the courts are asked to recognise are simply rights exercised by indigenous peoples in regard to land, sufficiently comprehensive and continuous so as to survive annexation.⁷²

What does 'recognition' of native title mean? To speak of recognition by the common law is in one sense to personify the common law and attribute to it a cognitive function. Avoiding personification and cognitive metaphors, recognition can be regarded as the outcome of the application of rules under which certain rights arising at common law are ascertained. These rights vest in an indigenous community by virtue of its relationship to land or water.

When the fundamental propositions of the common law of native title enunciated in *Mabo* are understood as rules of recognition, a proper distinction can be drawn between the content of indigenous law and custom and that of the common law. The common law does not operate directly upon the traditional laws and customs or the relationships with land to which they give rise. That is so even where native title is extinguished. For extinguishment is a barring or qualification of the common law rules of recognition. It has nothing to say about traditional law or custom or the relationship of Aboriginal people to their land.

The identification of indigenous groups, their rules of definition and membership, their traditions and customs, and their relationship to land and waters may be described and interpreted in court proceedings by anthropologists and

66. *Mabo (No 2)* supra n 24, 85.

67. Supra n 15.

68. Supra n 60.

69. *Mabo (No 2)* supra n 24, 89.

70. Ibid, 178-179 (footnote omitted).

71. ALRC *The Recognition of Aboriginal Customary Laws* Report No 31 (Sydney, 1986).

72. *Mabo (No 2)* supra n 24, 179.

other experts. Those things constitute the subjects of the common law of native title. The common law establishes the rules – lawyer-made or, to be more precise, judge-made – which are the rules for recognition. Certain benefits attach to that recognition. These include common law protections for that which is recognised. Beyond the common law protections there are protections conferred by statute such as the prohibition against discriminatory impairment conferred by the Racial Discrimination Act 1975, the right to negotiate and the entitlement to compensation for extinguishment or impairment conferred by the Native Title Act 1993 (Cth). The rules of recognition are qualified and limited. The common law native title which they yield is a poor reflection of the full cultural, historical and human reality from which that title is derived. They are confined and reductionist although ambulatory in nature. Nevertheless, they largely define the terms of the debate in which lawyers who participate in native title litigation, and applicants and their expert witnesses, must engage if recognition, for what it is worth, is to be invoked.

Brennan J used the term ‘extinguishment’ to describe acts of the Crown wholly or partially inconsistent with the continuing right to enjoy native title. His Honour also used it in a quite different sense when he said:

Native title to an area of land which a clan or group is entitled to enjoy under the laws and customs of an indigenous people is extinguished if the clan or group, by ceasing to acknowledge those laws, and (so far as practicable) observe those customs, loses its connexion with the land or on the death of the last of the members of the group or clan.⁷³

The use of extinguishment in these two senses risks confusing two quite different concepts. One is that of extinguishment as a limit on common law recognition which does not, and cannot, of itself affect the relationship between the indigenous group and its country. The other concerns the loss of that relationship, which means there is no subject-matter for recognition by the common law.

The idea of extinguishment as a limit on what the common law can do is affected by the nature of the metaphor which the word imports. It is too easy to think of common law extinguishment as something which annihilates the indigenous relationship to country. But, as Toohey J said in the *Wik* case, native title rights affected by inconsistent grants are ‘unenforceable at law and, *in that sense*, extinguished’.⁷⁴ There is a risk, in using this metaphor, of conceptual confusion. Indeed, it may be an impediment to the development of a coherent theory of extinguishment, which is best regarded as a mutable rule of recognition or non-recognition.

73. Ibid, 70.

74. *Wik* supra n 4, 126 (emphasis added).

In *Fejo v Northern Territory of Australia*⁷⁵ the High Court held that native title is extinguished by a grant in fee simple and is not revived if the land reverts to the Crown. In explaining the common law basis for this proposition, their Honours said:

The underlying existence of the traditional laws and customs is a *necessary* pre-requisite for native title but their existence is not a *sufficient* basis for recognising native title.⁷⁶

In dealing with the issue of the revival of native title, they said:

The rights created by the exercise of sovereign power being inconsistent with native title, the rights and interests that together make up that native title were necessarily at an end. There can be no question, then, of those rights springing forth again when the land came to be held again by the Crown. Their recognition has been overtaken by the exercise of 'the power to create and to extinguish private rights and interests in land within the Sovereign's territory'.⁷⁷

The Native Title Act 1993 tries to give permanence to extinguishment by its definition of the word in section 237A. This provides:

Extinguish

The word *extinguish* in relation to native title, means permanently extinguish the native title. To avoid any doubt, this means that after the extinguishment the native title rights and interests cannot revive, even if the act that caused the extinguishment ceases to have effect.

This definition only applies to that type of extinguishment for which the Act provides. But extinguishment recognised by the common law is mutable; whether derived from common law or imposed by statute it can be reversed by statute law. The Native Title Act 1993 itself demonstrates the revocability of the concept in sections 47, 47A and 47B. Those sections provide that, under certain circumstances, prior extinguishment of native title is to be disregarded for all purposes under the Act. Those circumstances relate to pastoral leases held by native title claimants and to reserves and vacant Crown land covered by claimant applications.

In summary, *Mabo (No 2)* established rules of recognition ascertaining common law native title over land as sui generis rights and interests which can be enjoyed by indigenous communities whose relationship to the land falls within those rules. The rules are qualified or limited by rules relating to extinguishment of common law native title.⁷⁸

75. (1998) 195 CLR 96.

76. Ibid, 128.

77. Ibid, 131 (footnote omitted).

78. I should acknowledge that Noel Pearson has written about rules of recognition, although he places native title in what he calls a 'recognition space', which belongs neither to the

A STATUTORY RESPONSE: THE NATIVE TITLE ACT 1993

The requirements in *Mabo (No 2)* for the proof of traditional title and the complexity of the interaction of common law native title with Commonwealth, State and Territory laws, and grants made under such laws, meant that the litigation of claims for common law native title would be time-consuming and expensive. A process was needed to facilitate recognition by agreement where that was possible. In the meantime dealings with land were proceeding and there was a need to protect indigenous communities pending the recognition of their title at common law and to provide for compensation where the common law native title was found to be extinguished or impaired. The general question of validity raised by *Mabo (No 1)* in respect of past acts of the States and Territories had to be addressed as did the possible invalidity of past Commonwealth acts for non-compliance with requirements of the Constitution that the acquisition of property be on just terms.

The Native Title Act 1993 had, as its objectives, the establishment of a process for the recognition of native title, the protection of native title in respect of future acts and the validation of past acts. It established the National Native Title Tribunal to receive applications for determinations of common law native title, to accept and register them, to identify and notify parties and to assist applicants and parties to reach negotiated outcomes. Provision was made for applications to be referred to the Federal Court for determination in the event that agreement could not be achieved.

In respect of the protection of native title, governments proposing to pass laws or do executive acts affecting native title were required to observe a non-discrimination principle in relation to native title holders. Onshore dealings with land affecting native title holders were to be done in a way that would not discriminate between them and freeholders. Entitlements to compensation were created. Provision for compulsory negotiation and arbitration was made in respect of the grants of mining and mining exploration tenements and the acquisition by governments of native title rights and interests where the purpose of the acquisition was to confer rights or interests on a third party.

Legislative and executive past acts of the Commonwealth which were to any extent invalid because of their impact on native title were validated by the Act

indigenous or common law universes. This analysis also carries with it the implication that extinguishment is no more than a limitation or qualification upon recognition. That view is supported in *Lardil v Qld* [2001] FCA 414 (unreported 11 Apr 2001) para 45. See N Pearson 'The Concept of Native Title at Common Law' in G Yunupingu (ed) *Our Land is Our Life: Land Rights – Past, Present, Future* (Brisbane: Qld UP, 1997). See also P Palton 'The Translation of Indigenous Land into Property: The Mere Analogy of English Jurisprudence' (2000) 6 Parallax 25.

subject to compensation. The States and Territories were permitted to pass laws to validate their own past acts. Validation so effected or authorised was linked to statutory extinguishment, partial extinguishment or temporary suppression of native title, and to compensation rights according to the class of past act validated. Freehold grants, and pastoral, residential and commercial leases so validated, extinguished native title completely albeit the effect of the leases at common law was not addressed by the Act.

THE FIRST CHALLENGE: THE *NATIVE TITLE ACT CASE*⁷⁹

Immediately prior to the passage of the Native Title Act 1993 the Western Australian Parliament passed the Land (Titles and Traditional Usage) Act 1993 (WA). That Act purported to extinguish native title and replace it with statutory rights of traditional usage under a regime prescribed by the Act. Western Australia also commenced proceedings against the Commonwealth seeking a declaration that there was no part of Western Australia in which, or in relation to which, there was 'native title' or 'native title rights and interests' within the meaning of the Native Title Act 1993 and that the Act, in so far as it had application in respect of such rights and interests, had no operation in, or in relation to, Western Australia. Alternatively, a declaration was sought that the Commonwealth Act was beyond the legislative powers of the Commonwealth and invalid. In the same year, indigenous groups (the Wororra people and the Martu people) sued the State of Western Australia in the High Court seeking declarations that the State Act was invalid for inconsistency with the provisions of the Racial Discrimination Act 1975 and/or the provisions of the Native Title Act 1993. Ron Castan appeared for the Wororra peoples.

The Court held that the history of the establishment of the Colony of Western Australia did not reveal an intention on the part of the Crown to extinguish generally the native title existing over land within the proposed colonial boundaries. The presumption that the acquiring sovereign did not intend to extinguish native title was not rebutted. The holders of statutory rights under the State Act were found not to enjoy the same security in the enjoyment of those rights as would the holders of common law native title. The State Act was therefore inconsistent with section 10(1) of the Racial Discrimination Act 1975, and was invalid to the extent of the inconsistency by operation of section 109 of the Constitution.

The Native Title Act 1993 was held to be a valid law of the Commonwealth, supported by the race power conferred by section 51(xxvi) of the Constitution. It was a 'special' law for the purposes of the race power as it conferred uniquely on

79. *Western Australia v Cth* (1995) 183 CLR 373.

Aboriginal holders of native title a benefit protective of that title. *Koowarta* and the *Tasmanian Dam* case were applied. The question whether such a law was 'necessary' in terms of section 51 (xxvi) was a matter for Parliament and there were no grounds on which the Court could review Parliament's decision if it had the power to do so.

The Court rejected an argument that the Native Title Act 1993 purported to control the exercise of legislative power by Western Australia or directly rendered its laws invalid. It did not impermissibly discriminate against Western Australia or impair its ability to function as a State. The requirement imposed by the Act that the State should pay compensation if it exercised a power of compulsory acquisition, imposed a burden on the exercise of State power but did so as an incident of the protection of native title. The race power was not impliedly limited so as to prevent the Commonwealth from protecting the holders of native title in that way. Section 12 of the Native Title Act 1993, a curious provision which purported to give to the common law of native title the force of a Commonwealth statute, was held to be invalid.

Six of the justices, Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ, delivered a joint judgment. Dawson J wrote separate reasons, but he substantially agreed with the majority and agreed with the outcomes proposed, which were by way of answers to questions that had been reserved to the Full Court by Mason CJ. The rule of recognition of traditional Aboriginal title and of extinguishment was encapsulated in the following passage in the joint judgment:

Under the common law, as stated in *Mabo (No 2)*, Aboriginal people and Torres Strait Islanders who are living in a traditional society possess, subject to the conditions stated in that case, native title to land that has not been alienated or appropriated by the Crown. The content of native title is ascertained by reference to the laws and customs of the people who possess that title, but their enjoyment of the title is precarious under the common law: it is defeasible by legislation or by the exercise of the Crown's (or a statutory authority's) power to grant inconsistent interests in the land or to appropriate the land and use it inconsistently with enjoyment of native title.⁸⁰

It is to be noted that the rule thus expressed assumes the process of recognition to be one of ascertaining common law native title as a right already possessed by those who satisfy the conditions of recognition set out in *Mabo (No 2)*.

The extinguishment principle was stated early in the joint judgment in the context of Western Australia's submission that native title in that State had been extinguished upon annexation. Their Honours said:

After sovereignty is acquired, native title can be extinguished by a positive act which is expressed to achieve that purpose generally... provided the act is valid

80. Ibid, 452-453.

and its effect is not qualified by a law which prevails over it or over the law which authorises the act. Again, after sovereignty is acquired, native title to a particular parcel of land can be extinguished by the doing of an act that is inconsistent with the continued right of Aborigines to enjoy native title to that parcel – for example, a grant by the Crown of a parcel of land in fee simple – provided the act is valid and its effect is not qualified by a law which prevails over it or over the law which authorises the act.⁸¹

It is clear enough from this passage that extinguishment operates upon the common law native title rights which would otherwise exist. It identifies two modes of extinguishment. The first is by a law or an act directed at achieving that outcome. The second is by a law or act which is inconsistent with the enjoyment of common law native title.

Against this background, the Court characterised the Native Title Act 1993 as removing the common law defeasibility of native title and securing Aboriginal people and Torres Strait Islanders in the enjoyment of their native title, subject to prescribed exceptions which provided for it to be extinguished or impaired. The Act provided only three exceptions. The first was the occurrence of a past act which had been validated; the second, an agreement on the part of the native title holders; the third, the doing of a permissible future act.⁸² Thus, the Act effectively limited the application of the extinguishment qualification upon common law recognition of native title to the circumstances for which it provided or which it authorised. The Court's characterisation of the Act was necessary to determine whether it was supported by the race power. It was seen as conferring its protection upon native title holders who, *ex hypothesi*, are members of a particular race. The observation of Deane J in the *Tasmanian Dam* case that the relationship between Aboriginal people and the lands which they occupy lies at the heart of Aboriginal cultural and traditional life was cited as indicating the undoubted significance of security in the enjoyment of native title by its holders.

The judgment is important for its discussion of the race power, which carries the unusual condition that it must be 'deemed necessary' that 'special laws' be made for 'the people of any race'. The special quality of a law made pursuant to the race power was to be ascertained by reference to its differential operation upon the people of a particular race. The possibility that the power might be exercised to the disadvantage of a particular race was implicit in the observation of the joint judgment that, 'A special quality appears when the law confers a right or benefit or imposes an obligation or disadvantage especially on the people of a particular race'.⁸³

81. Ibid, 422.

82. Ibid, 459.

83. Ibid, 461.

The Native Title Act 1993 was held to be ‘special’ in that it conferred uniquely on the Aboriginal and Torres Strait Islander holders of native title a benefit protective of their native title. Whether it was ‘necessary’ to enact the law was a matter for Parliament to decide, and, having regard to *Mabo (No 2)*, there were no grounds on which the Court could review Parliament’s decision, even assuming it had power to do so.⁸⁴ So Western Australia’s submission that the Native Title Act generally did not answer the constitutional description of a law within section 51(xxvi) of the Constitution was rejected.

The Court also considered the relationship between the Racial Discrimination Act 1975 and the Native Title Act 1993. It pointed out that the Racial Discrimination Act protects native title holders against discriminatory extinction or impairment of native title. The Native Title Act, on the other hand, protects them against any extinction or impairment of native title, subject to the specific and detailed exceptions which the Act prescribes or permits.

FOCUS ON NEGOTIATION: THE WAANYI CASE ⁸⁵

The validity of the Native Title Act 1993 and the invalidity of the Western Australian Act having been established in the *Native Title Act* case, it fell to the Court in the *Waanyi* decision to consider the operation of the registration and mediation provisions laid down in the Act. In that case, as President of the National Native Title Tribunal, I had directed that an application by the Waanyi people over land in the area of the proposed Century Zinc mine in North Queensland not be registered on the basis of the extinguishing effect of prior pastoral leases granted in the area. An appeal to the Full Court was dismissed. The High Court held that the procedure adopted, which included receiving material and submissions from the State and affected mining companies, was wrong, that the claim was fairly arguable and that the application should have been accepted. Ron Castan appeared for the appellants. The Court observed that it was inevitable that the recognition of native title by the common law and its protection by the Racial Discrimination Act 1975 would generate novel legal problems relating to the title to land claimed by Aborigines in accordance with traditional laws and customs. The issues of fact raised by claims to native title were complex and, in the event of opposition, were likely to take significant time and resources to determine. The preservation of the status quo pending determination of claims would pose a particular problem, not only for claimants and the Crown, but also for those who might be seeking access to the land

84. Ibid, 462.

85. *North Ganalanja Aboriginal Corp v Queensland* (1996) 185 CLR 595.

for mining or other non-traditional purposes. The preamble to the Act indicated a legislative preference for resolving these problems by negotiation.⁸⁶ It was necessary to read the Act with an understanding of the novel legal and administrative problems involved in the statutory recognition of native title. The Court recognised that the remoteness of many Aboriginal communities and their lack of familiarity with the legal criteria for determination of native title would pose practical difficulties for many who might be entitled to claim it. The task of tracing the tenure history of any parcel of land during the previous two hundred years was likely to be beyond the resources of many prospective claimants. On the other hand, there was a perceived commercial need for despatch in the settlement of claims for native title and in the administrative disposition of applications by miners and others seeking access to unalienated land.⁸⁷ Native title claims required an examination of facts that fell broadly into two categories – the continuity of the connection of the claimants and their ancestors with the land in which native title was claimed and the ‘tenure history’ of that land so far as it appeared from Crown grant, Crown licence or Crown use. The Court adverted to two factors in favour of the determination of native title by negotiation and agreement rather than by judicial determination. The first was the saving in time and resources. The second, and perhaps more important, was this:

If the persons interested in the determination of those issues negotiate and reach an agreement, they are enabled thereby to establish an amicable relationship between future neighbouring occupiers.⁸⁸

The Court’s construction of the procedural provisions of the Native Title Act 1993 in the *Waanyi* case did not involve any reflection on the common law of native title beyond its indication that the extinguishing effect of pastoral leases was an open question.

The decision in *Waanyi* had important implications for the screening processes of the Tribunal and the facility with which applications for native title determinations could be made and registered and the right to negotiate attracted. Acceptance of claims was to be based on the papers submitted by the applicants unless there was some extraneous indication that the claim was frivolous or vexatious.

This decision, combined with a line of Federal Court decisions that registration of claims was to be effected immediately upon lodgment and prior to acceptance,⁸⁹ had the practical result that some claims were lodged without adequate preparation,

86. *Ibid.*, 614.

87. *Ibid.*

88. *Ibid.*, Brennan CJ, Dawson, Toohey, Gaudron & Gummow JJ 617.

89. *Northern Territory v Lane* (1995) 59 FCR 332; *Kanak v National Native Title Tribunal* (1995) 132 ALR 329.

without proper consultation within the relevant indigenous community and in competition with, and overlapping, other claims. In some cases in the Goldfields, there were up to 20 overlapping claims on the same area of land. Each attracted the right to negotiate in relation to the grant of mining tenements. In the event, it was accepted by all parties that there was a necessity to change the system for acceptance and registration of native title determination applications.

In the same volume of the Commonwealth Law Reports in which the *Native Title Act* case is reported, is another decision of the High Court which had nothing to do with native title but which sounded the death knell for the statutory scheme under the Native Title Act 1993 in so far as it provided for the National Native Title Tribunal, following a negotiation process, to make consent determinations and register them in the Federal Court to take effect as judgments of the Court. A similar regime in relation to the Human Rights and Equal Opportunity Commission was struck down by the Court in *Brandy v Human Rights and Equal Opportunity Commission*.⁹⁰ The Tribunal altered its procedures so that, if agreement were reached for the making of a consent determination, no determination would be made by the Tribunal. Rather, the matter would be referred to the Federal Court under section 74 of the Act and the parties would seek a consent order directly from the Federal Court. This left in place the process whereby applications were received by the Tribunal and Tribunal mediation had to be exhausted before the proceedings could be referred to the Federal Court.

WIK: EXTINGUISHMENT — FREEHOLD TITLE AND PASTORAL LEASES

The next decision of the High Court, *Wik Peoples v Queensland*,⁹¹ was concerned primarily with the question of extinguishment in relation to pastoral leases. The decision was upon preliminary questions of law in a native title determination application pending in the Federal Court. It was the only native title case in which Ron Castan did not appear. The principal question concerned the prior grant of pastoral leases over areas of the land the subject of the application for a native title determination. By a majority of 4:3, the High Court held that the pastoral leases did not confer exclusive possession of the areas to which they applied and that the grants did not necessarily extinguish all incidents of native title.

The Court's conclusion turned upon a detailed consideration of the terms of the grants of the leases and the statutes under which they were made. The Court

90. (1995) 183 CLR 245.

91. *Supra* n 4.

did not resolve the question whether the leases did extinguish native title in the areas to which they applied. That could only be decided after considering the particular native title rights and interests asserted and established. If there were inconsistency between the native title rights and interests and those conferred by the grants of the leases then the native title rights and interests would yield to that extent to the rights of the grantees. The test for extinguishment was considered in this case. As previously noted, in the *Native Title Act* case two kinds of extinguishing law or executive acts were identified. The first was a law or act expressly extinguishing native title. The second was a law or act which extinguished by reason of inconsistency. *Wik* was concerned with the case of an act conferring what were said to be rights inconsistent with the recognition of common law native title.⁹² Kirby J addressed the nature of the interaction between the indigenous relationship to the land and the non-indigenous law. He referred to the submission by the Thayorre people that native title was outside the common law, had its own sources and integrity and could not be destroyed by a legal theory outside its own regime. Although the Australian legal system would determine whether and when it would grant recognition and enforcement, the title itself would continue to exist. This argument he rejected as ‘suggested neither by legal authority applicable to this country nor by legal principle or polity’. He continued:

What is in issue is *title* in respect of the land.... As such, it is not a question about the intention or actions of the Aboriginal parties, any more than of the Crown or governmental officials. The question is not whether indigenous people have *in fact* been expelled from traditional lands but whether those making claim to such lands have the *legal right* to exclude them.⁹³

If what the Thayorre people were contending was that their relationship to their country as defined by traditional law and custom was independent of recognition by the common law, then it is difficult to see why Kirby J rejected their proposition. In any event, as will be seen, that proposition was consistent with what was later said in *Fejo*, discussed below.

A second contention, namely that an agreement between the State of Queensland and Comalco, and the grant of mining leases pursuant to that agreement, were in breach of requirements of procedural fairness and in breach of trust or a fiduciary duty owed to the applicants was rejected. The agreement had the force of law under the relevant Act and obliged the State to grant the mining leases in issue. The validity of the leases could not be impugned for want of procedural fairness or breach of fiduciary duty.

92. Ibid, Brennan CJ 86, Dawson J concurring 100, McHugh J concurring 167, Toohey J 124, Gummow J 186, Kirby J 238.

93. Ibid, 237.

Gummow J emphasised that to extrapolate native title principles from the particular circumstances of the case to an ‘assumed generality of Australian conditions and history [would be] pregnant with the possibility of injustice to the many, varied and complex interests involved across Australia as a whole’. The better guide was the method of the common law ‘whereby principle is developed from the issues in one case to those which arise in the next’.⁹⁴ Consistently with this view, it was apparent from all the judgments that the question of extinguishment of native title by statutory grants and interests would generally be resolved on a case-by-case basis. It was of little consolation to those who were the grantees of pastoral leases that if native title rights and interests subsisted in the same land, they must yield to the rights and interests conferred by the statutory grant. Pastoralists were concerned about facing an inchoate regime of co-existing rights. Miners seeking to conduct operations on land which was or had been the subject of a pastoral lease were now subject to the right to negotiation processes of the Native Title Act 1993. From their perspective, the ‘time honoured methodology of the common law’ referred to by Gummow J was not going to deliver certainty of outcome nor, on the High Court’s record to that point, the outcomes they wanted. These concerns, combined with the agendas of some State governments in relation to their land management powers, provide the background to the 1998 amendments to the Act.

THE 1998 AMENDMENTS TO THE NATIVE TITLE ACT

The *Wik* decision may be viewed, from a legal perspective, as a not very dramatic application of the *Mabo* principles and as embodying the proposition that just because a statutory grant is called a lease, this does not confer upon it the incidents of a lease at common law. The practical impact of the decision for the pastoral and mining industries, however, generated the political momentum which led to the 1998 amendments to the Native Title Act 1993.

Some amendments had been foreshadowed by reason of the decision in *Brandy*, referred to earlier. Indeed, a Bill to give effect to them was introduced into Parliament in 1995 but lapsed when Parliament was prorogued for the federal election. Those amendments were then subsumed in much more extensive changes introduced by the Coalition government. The specific issues which, as a result of the *Wik* decision, were pressed upon legislators included:

1. The validity of intermediate period acts done by governments on the assumption that pastoral leases extinguished native title.

94. Ibid, 184.

2. The application of the right to negotiate in relation to grants of mining interests over land which were or had been the subject of pastoral leases.
3. The ability of pastoralists to undertake activities authorised by their leases without the requirement to comply with provisions of the Native Title Act 1993 and their ability to undertake other activities which they had customarily undertaken without such authority.
4. The possibility of continuing uncertainty about the subsistence of native title in conjunction with a wide range of statutory interests in land.

The amendments provided for the validation of intermediate period past acts. The system for recognition of native title was changed so that all applications were commenced as proceedings in the Federal Court with provision for mediation by the National Native Title Tribunal. A much more extensive and demanding registration test was introduced which had to be satisfied before the right to negotiate could be accessed by applicants in relation to the grant of mining tenements and certain other future acts. Provision was made for statutory extinguishment of native title in respect of certain classes of past acts, known as 'previous exclusive possession acts'. Another class, known as 'previous non-exclusive possession acts', extinguished native title rights and interests to the extent of inconsistency between them.

A wider range of future acts, being acts affecting native title, were able to be done validly without any obligations to negotiate with native title holders although some procedural obligations were to be observed and compensation paid. Provision was also made for registerable Indigenous Land Use Agreements which would confer validity upon acts done under them.

The amendments were controversial. They were seen as withdrawing benefits conferred by the original Act and, by extending the categories of statutory extinguishment, as adverse to indigenous interests. There was debate about whether, in the circumstances, the amendments were supportable by the race power. That is a debate upon which the High Court has not yet been called to rule, although its decision on the race power in another context is not encouraging.⁹⁵

THE *FEJO* CASE ⁹⁶

In December 1996, the Larrakia people lodged an application for a determination of native title covering land in the area of Darwin, Palmerston and Litchfield in the Northern Territory. The application was accepted in April 1997. Between March

95. *Kartinyeri v Cth* (1998) 195 CLR 337.

96. *Supra* n 75.

and November 1997, the Northern Territory granted Crown leases in respect of five parcels of Crown land the subject of the application. The land the subject of two of the leases had formed part of a tract of land granted to James Benham in 1882. It had subsequently been acquired for the purposes of a quarantine station in 1927 and was so proclaimed in 1935. The land was appointed a leprosarium in 1956. These appointments were revoked in 1980.

The applicants sought declarations that native title existed in the area the subject of the Crown leases to the mining company and that the Northern Territory was obliged either to negotiate with the Larrakia people or compulsorily acquire their native title before it could grant a valid lease. The Territory sought summary dismissal of the proceedings and the Larrakia people sought interlocutory injunctions. The application was summarily dismissed at first instance on the basis that the grant to Benham had been effective to extinguish all native title rights and interests so that on the land being re-acquired by the Crown no native title rights and interests could then be recognised by the common law. An appeal was taken to the Full Court of the Federal Court, but that aspect was removed to the High Court pursuant to the Judiciary Act 1903 (Cth). Ron Castan appeared in that case also, this time intervening for the Yorta Yorta Aboriginal community.

The Court, now comprising Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ, unanimously held that native title is extinguished by a grant in fee simple and not revived if the land is later again held by the Crown. The Larrakia people in their argument relied upon the joint judgment in the *Waanyi* case with respect to the priority to be given to mediation procedures in relation to applications for determination of native title. This rule, it was argued, had been broken in the *Fejo* case by the primary judge deciding, before the exercise of the right to negotiate, that the claim to native title must fail.

The Court distinguished the *Waanyi* case on the basis, inter alia, that it had concerned the adoption of a procedure by the Tribunal that inverted the statutory regime. In the case before it, however, the Registrar had accepted the claim lodged on behalf of the Larrakia people. The Tribunal had dealt with it in the ordinary way observing the statutory procedures. The Larrakia people chose to seek relief by way of interlocutory injunction. The relief sought from the Federal Court was relief of the character known under the general law, and, in accordance with long-established principle, they had to demonstrate a sufficiently arguable case to obtain that relief. They also sought final relief, including declarations of right that native title existed. The respondents sought summary dismissal. To decide their motion the primary judge had to determine whether the claims made were plainly bad.

The Court did observe that ordinarily the fact that an applicant for an injunction is a registered native title claimant will suggest, if not demonstrate, that there is a claimed native title that is arguable – the Registrar being obliged to accept the application unless of opinion that it is frivolous or vexatious or that prima facie the

claim cannot be made out.⁹⁷ Nevertheless, the Registrar's administrative act of accepting an application would not put the question of title beyond debate on an application by a registered native title claimant for an injunction or on an application to dismiss summarily an action instituted to obtain relief of that kind. Having concluded that the primary judge was not precluded by the provisions of the Native Title Act 1993 from proceeding as he did, the Court turned to the substantive issue of the effect of the grant of a fee simple.

The appellants acknowledged it had been said more than once in previous decisions of the Court that native title was extinguished by a grant of an estate in fee simple. The Court referred to its observations in that respect in *Mabo (No 2)*, in the *Native Title Act* case and in *Wik*. The references in those cases to extinguishment rather than suspension of native title rights were not to be understood as being some incautious or inaccurate use of language to describe the effect of a grant of freehold title. A grant in fee simple did not have only some temporary effect on native title rights or some effect conditioned upon the land not coming to be held by the Crown in the future. And in a significant passage, their Honours said:

Native title has its origin in the traditional laws acknowledged and the customs observed by the indigenous people who possess the native title. Native title is neither an institution of the common law nor a form of common law tenure but it is recognised by the common law. There is, therefore, an intersection of traditional laws and customs with the common law. The underlying existence of the traditional laws and customs is a *necessary* pre-requisite for native title but their existence is not a *sufficient* basis for recognising native title. And yet the argument that a grant in fee simple does not extinguish, but merely suspends, native title is an argument that seeks to convert the fact of continued connection with the land into a right to maintain that connection.⁹⁸

The distinction between the existence of traditional law and custom and the question of its recognition at common law undermines the observation of Kirby J in *Wik* rejecting the submission of the Thayorre people that native title is independent of recognition, if, as seems likely, the reference to native title was to the relationship of indigenous people to their country as defined by their traditional law and custom.

The extinguishing effect of freehold title derived from the inconsistency of native title rights and interests with the rights of a holder of an estate in fee simple. For –

subject to whatever qualifications may be imposed by statute or the common law, or by reservation or grant, the holder of an estate in fee simple may use the land as he or she sees fit and may exclude any and everyone from access to the land.⁹⁹

97. Ibid, 125 – a comment based upon the Native Title Act 1993 as it stood prior to the 1998 amendments.

98. Ibid, 128 (footnotes omitted).

99. Ibid.

The non-revival of common law native title following a grant of freehold title flowed from the position that the rights created by the exercise of sovereign power being inconsistent with native title, the rights and interests that together made up that native title were necessarily at an end. There could be no question then, the Court held, of those rights springing forth anew when the land came to be held once again by the Crown:

Recognition has been overtaken by the exercise of 'the power to create and to extinguish private rights and interests in land within the Sovereign's territory'.¹⁰⁰

If it be accepted, as is implicit in the Court's reasoning, that extinguishment relates only to common law native title and not to the subject matter of recognition, then it is not clear why revival is precluded.

THE YANNER CASE

In the case of *Yanner v Eaton*,¹⁰¹ the Court held that a native title right to hunt crocodiles was not extinguished by the Fauna Conservation Act 1974 (Qld). Hunting activities were merely regulated by that Act. Hunting in the exercise of native title rights was thereby permitted by the overriding operation of section 211 of the Native Title Act 1993.

The High Court revisited the topic of extinguishment. In the joint judgment of Gleeson CJ, Gaudron, Kirby and Hayne JJ, native title rights and interests were referred to as 'a perception of socially constituted fact' as well as 'comprising various assortments of artificially defined jural right'.¹⁰² Their Honours then went on to make an observation which seemed to allow the possibility that non-indigenous law could sever the connection of Aboriginal people with their country:

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. Regulating particular aspects of the usufructuary relationship with traditional land does not sever the connection of the Aboriginal peoples concerned with the land (whether or not prohibiting the exercise of that relationship altogether might, or might to some extent).¹⁰³

Indigenous people would find it hard to accept that a statute could ever sever their connection with the land. To the extent that the above passage might imply the

100. Ibid, 131 (footnote omitted).

101. (1999) 166 ALR 258.

102. Ibid, 269-270, citing K Gray & SF Gray 'The Idea of Property in Land' in S Bright & J Dewar (eds) *Land Law: Themes and Perspectives* (Oxford: OUP, 1998) 15, 27.

103. Ibid, 270.

contrary, it is difficult to square with the preceding case-law. The words in parenthesis seem to leave the question open. Perhaps what the passage highlights is the need for a more coherent and precise theory of recognition and the relationship between common law native title and the indigenous relationship with land.

Gummow J, in a separate judgment, spoke of the relationship between a community of indigenous people and the land, defined by reference to that community's traditional law and customs as the 'bridgehead to the common law'.¹⁰⁴ Callinan J dissented on the basis that the fauna in question were vested in the Crown.

THE YARMIRR CASE

The most recent decision of the High Court in native title is *Commonwealth v Yarmirr*.¹⁰⁵ The Court dismissed an appeal from the Full Federal Court which had upheld a determination of non-exclusive native title in the seas and seabeds around Croker Island in the Northern Territory to the low water mark. The determination recognised, inter alia, rights to fish, hunt and gather for the purpose of satisfying the personal, domestic or non-commercial communal needs of the native title holders and for the purpose of observing traditional, cultural, ritual and spiritual laws and customs. Rights of access to the sea and seabed were also recognised. The joint judgment of Gleeson CJ, Gaudron, Gummow and Hayne JJ held that the common law did not have only a limited territorial operation. In considering whether the common law recognised native title rights and interests in areas below the low water mark the Court considered the concept of 'recognition'. Its closest approach to a definition of recognition by the common law was in the following terms:

[The common law] will, by the ordinary processes of law and equity, give remedies in support of the relevant rights and interests to those who hold them. It will 'recognise' the rights by giving effect to those rights and interests owing their origin to traditional laws and customs which can continue to co-exist with the common law the settlers brought.¹⁰⁶

The Court saw the question of recognition as requiring consideration of whether and how the common law and the relevant native title rights and interests could co-exist. If the two were inconsistent the common law would prevail:

If, as was held in *Mabo (No 2)* in relation to rights of the kind then in issue, there is no inconsistency, the common law will 'recognise' those rights.¹⁰⁷

104. Ibid, 278.

105. (2001) 184 ALR 113.

106. Ibid, 130 (footnote omitted).

107. Ibid.

What is meant by the co-existence of the common law and traditional laws and customs? Such a co-existence may be of qualitatively different things, intangibles each having existence in its own universe. Co-existence requires consideration of the rights and interests which could be ascertained were the common law to recognise the traditional relationship between the relevant indigenous group and the area of land or sea in issue and whatever common law rules would apply in that case. Co-existence is most intelligibly considered by reference to the interaction of qualitatively similar rules, rights and interests.

The existence of native title rights and interests (presumably at common law) was held not to be contingent upon the existence of the so-called radical title of the Crown which is only 'a tool of legal analysis ... important in identifying that the Crown's rights and interests in relation to land can co-exist with native title rights and interests'.¹⁰⁸ Thus, the absence of radical title in the sea or seabed could not lead to the conclusion that the sovereign rights and interests asserted over the territorial sea were necessarily inconsistent with the continued existence of native title rights and interests. The question of inconsistency or consistency arises between those sovereign rights and interests and the native title rights and interests. There was never any claim of ownership to the territorial sea or seabed before federation. Nor was there any necessary inconsistency between the rights and interests asserted by imperial authorities and the continued recognition of native title.¹⁰⁹ This was subject to the qualification that the rights and interests asserted at sovereignty carried with them recognition of public rights of navigation and fishing and possibly the international right of innocent passage.¹¹⁰

CONTINUING ISSUES

There are two important native title cases presently pending in the High Court. One which is reserved for judgment is *Ward*.¹¹¹ The other is *Yorta Yorta*,¹¹² in which special leave was granted on 14 December 2001. *Ward* raises issues of connection and the nature of extinguishment as well as the question whether the common law can contemplate temporary suppression of native title, perhaps analogous to the operation of the non-extinguishment principle in the Native Title Act 1993. The important practical question of the effect on common law native title of pastoral leases in Western Australia also falls for decision.

108. Ibid, 132.

109. Ibid, 135.

110. Ibid, 131.

111. *Western Australia v Ward* (2000) 170 ALR 159 (Full Fed Ct).

112. *Yorta Yorta Aboriginal Community v Victoria* (2001) 180 ALR 655 (Full Fed Ct).

Yorta Yorta may raise for consideration the operation of section 223 of the Native Title Act 1993. In the course of debate on the special leave application, Kirby J spoke of the error of starting with the common law instead of the statute. The statute, however, does provide a framework for common law recognition of native title. This seems evident from section 223 as it stood prior to the amendments defining native title rights and interests by reference, *inter alia*, to the requirement that they be 'recognised by the common law of Australia'.

THE LIMITS ON WHAT THE HIGH COURT CAN DO

The High Court decisions which have been referred to in this paper have set the scene for the recognition of the common law of native title and its protection against discriminatory action. They have also illuminated the operation of the Native Title Act 1993 and secured its validity as an exercise of the race power of the Commonwealth. Major questions remain to be addressed about what is necessary to prove native title, the concept of partial extinguishment and the existence and nature of common law native title in offshore waters. The contribution of the Court to the recognition of native title has plainly been fundamental, and Ron Castan, in whose honour this paper has been written, has played an historic role in that course of judicial decision-making.

Although the role of the High Court and the judicial system generally has been of fundamental importance in the development of native title, there are inherent limits on what can be achieved by court decisions. A fundamental limit was stated by Sir Gerard Brennan in *Patrick Stevedores Operations (No 2) Pty Ltd v Maritime Union of Australia*. His Honour said:

The courts do not – indeed they cannot – resolve disputes wider than legal rights and obligations. They are confined to the ascertainment and declaration of legal rights and obligations and, when legal rights are in competition, the courts do no more than define which rights take priority over others.¹¹³

This statement sets out the core business of courts generally – making decisions about legal rights and obligations and, where necessary, their priorities *inter se*. The limitation on that business so defined is constitutional in its character – a rule by which courts are distinguished in their functions from executive governments and legislators. In a postscript to the judgment of Toohey J in *Wik* (which postscript was authorised by the other majority justices, Gaudron, Gummow and Kirby JJ), his Honour said:

113. (1998) 195 CLR 1, 16.

If inconsistency is held to exist between the rights and interests conferred by native title and the rights conferred under the statutory grants, those rights and interests must yield, to that extent, to the rights of the grantees.¹¹⁴

In public debate much has been said about the co-existence principle enunciated in *Wik*. But when native title litigation proceeds to judgment and common law native title is recognised, the content of the judgment will be a determination that native title exists, and that it is or is not exclusive. The identity of the holders, the native title rights and interests of importance and the interests to which the native title is subject will also be identified. For example, if native title is determined to exist in land the subject of a pastoral lease, it will be expressed to be subject to that lease.

There is no mechanism by which the Court can embody in its determination rules or directions for the management of the relationship between co-existing rights. Yet these are matters of fundamental concern to those involved in native title litigation. They go beyond pastoral leases to the whole array of tenures with which native title potentially co-exists. The formulation of practical arrangements for the exercise of declared rights is not within the normal range of judicial functions. This suggests, perhaps, a closer integration between the courts' determinative role and consensual mechanisms for the resolution of management issues. In the case of consent determinations it is not unusual that they are backed by ancillary agreements which deal with the management of co-existence. In the end, however, those agreements depend upon the people who have to co-exist. That in turn requires application of the human act of mutual recognition in the real world. This is a work that neither the High Court nor any of the courts can undertake. The significance of what they do, and of the work of Ron Castan and people like him, will depend on how a still incomplete legal theory of native title is put into practice in future.

114. *Wik* supra n 4, 133.