THE 2016 SIR FRANK KITTO LECTURE

THE 2016 SIR FRANK KITTO LECTURE: WHITHER NATIVE TITLE?

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> *The modern application of the doctrine of equality, particularly in relation to Aborigines, demands that we confront ourselves, confront our preconceptions and our prejudices; it demands that we know ourselves.*[1]

'[T]he Meriam people are entitled as against the whole world to possession, occupation, use and enjoyment of the lands of the Murray Islands.'[2] On 3 June 1992, with those words, it is said that the High Court freed Australia from the concept of 'terra nullius'.[3] The decision in *Mabo* that the common law recognised and protected Indigenous rights in land that existed at the time Britain acquired sovereignty was truly a watershed moment in Australian legal history, shaking the foundation of land law on which British claims to possession of Australia were based.

In *Wik Peoples v Queensland*,[4] Justice Gummow explained the shift as follows:

> Thus, it was appropriate to declare in 1992 the common law upon a particular view of past historical events. That view differed from the assumptions, as to [the] extent of the reception of English land law, upon which basic propositions of Australian Land law had been formulated in the colonies before federation. To the extent that the common law is to be understood as the ultimate constitutional foundation in Australia, there was a perceptible shift in that foundation, away from what had been understood at Federation.[5]

But that shift did not come without its limitations. Six members of the High Court[6] agreed 'that the common law of this country recognises a form of native title which, in the cases where it has not been extinguished, reflects the entitlement of the indigenous inhabitants, in accordance with their laws and customs, to their traditional lands…'.[7] This limitation was explained as the exposure of native title, which had survived the Crown's acquisition of sovereignty, to extinguishment by a valid exercise of sovereign power inconsistent with the continued right to enjoy native title. Where the Crown grants interests in land to others, or appropriates land to itself for its own purposes, native title will be extinguished to the extent of any inconsistency.[8]

Thus, even though the High Court confirmed that native title existed at the time Australia was settled and that native title rights persisted after the assumption of sovereignty, the gradual dispossession of Indigenous people from their land by expanding settlement of the Australian continent was confirmed.[9]

It is clear that Justice Brennan, when writing the lead judgment in *Mabo* on the recognition of native title, considered that its susceptibility to extinguishment meant that there were limited prospects for the assertion of native title in Australia. He wrote:

> there may be other areas of Australia where native title has not been extinguished and where an Aboriginal people, maintaining their identity and their customs are entitled to enjoy their native title. Even if there be no such areas, it is appropriate to identify the events which resulted in the dispossession of the indigenous inhabitants of Australia, in order to dispel the misconception that it is the common law rather than the action of governments which made many of the indigenous people of this country trespassers on their own land.[10]

Justice McHugh held a similar view, expressed plainly during argument in *Fejo v Northern Territory*,[11] a case concerning extinguishment of native title by an historic freehold grant:

> So far as I was concerned, my view was that native title would apply basically to only unalienated Crown land. If, for example, I thought it was going to apply to freehold, to leaseholds, I am by no means convinced that I would have not joined Justice Dawson, and it may well be that that was also the view of other members of the Court.[12]

Because his Honour thought that native title would only affect 'basically unalienated Crown' he considered that 'the position was, in one sense, the same as it was in 1788'.[13]

But there was a critical difference after *Mabo,* even ignoring the limitation of extinguishment. This difference was expressly acknowledged by Justice McHugh in extra-judicial writing, referring to *Mabo* as an example of a High Court decision where 'the relevant interests are historically accommodated by precepts, but political and ethical ideas have changed'.[14]

That change is voiced most clearly by Justice Brennan:

> The fiction by which the rights and interests of indigenous inhabitants in land were treated as non-existent was justified by a policy which has no place in the contemporary law of this country.[15]

To understand how momentous that change was, requires some critical consideration of the mindset of the early settlers and the attitudes that prevailed in Christian Europe in the 17th and 18th centuries during the expansion of the British Empire into the Americas, and then into Asia and Africa. The British understanding of the relationship between property rights and land was profoundly influenced by the work of John Locke,[16] whose labour theory of property was used as a basis to justify colonial expropriation of land.

Locke's *Two Treatises of Government* were published in 1689.[17] The Second Treatise contains an influential account of the nature of private property. A deeply religious man, Locke's starting point was that God gave humans the world and its contents to have in common, but they were unable to benefit from it until they had expended their own labour on it.[18] For a hunter-gatherer, the benefit of labour is ownership of the food obtained from the land but not the land itself.[19] But the 'farmer' who alters the land through their labour, appropriates it to their private property.[20]

The implications from Locke's labour theory of property became clear in Emmerich de Vattel's 1758 *Law of Nations*,[21] which stated that new territories could be claimed by occupation if the land were uncultivated, for Europeans had the right to bring lands into production if they were left uncultivated by the indigenous inhabitants.[22] The doctrine of terra nullius established in international law is based on the ideas of Vattel, and its enlargement to treat territory (though inhabited) as 'desert uninhabited', is similar to Blackstone's common law counterpart of 'desert and uncultivated' doctrine, recognised by Blackstone 23 years before the British acquired sovereignty over Australia.[23]

Thus Locke's labour theory of property, translated through Vattel into the expanded doctrine of terra nullius in international law, and through Blackstone into the 'desert and uncultivated' (legally uninhabited) doctrine at common law was a foundational tenet of British colonial land policy, which was deployed to justify indigenous dispossession from land, not only in Australia, but also in North America.

The instructions given to Captain Cook in August 1768 when he sailed for the Pacific were as follows:

> With the Consent of the Natives to take possession of Convenient Situations in the country in the Name of the King of Great Britain; or, if you find the Country uninhabited take Possession for his Majesty by setting up Proper Marks and Inscriptions, as first discoverers and possessors. [24]

The picture painted by Captain Cook of Australia was of an immense tract of land, sparsely populated. The Indigenous people were not only few in number, but they were primitive, unclothed, with only rudimentary shelter, and most important of all 'the Natives know nothing of Cultivation'; they were not farmers, they were hunter-gatherers who wandered about 'in small parties from place to place in search of Food'. [25] Yet, despite (or perhaps because of) his observations about the 'Natives of New Holland', Cook 'took possession' of the east coast of Australia at Possession Island on 22 August 1770.

Captain Arthur Phillip's instructions, nineteen years later, were very different. He was ordered to:
immediately upon your landing after taking Measures for

securing Yourself and the people who accompany you, as much as possible from any attacks or Interruptions of the Natives of that Country … proceed to the Cultivation of the Land …[26]

Thus Lockean notions of property, and international law notions of terra nullius were put into practice as soon as the First Fleet landed on Australian soil. The British took whatever land they wished to use, expended their labour on it and appropriated it as their private property, using force to defend it from the Indigenous inhabitants.

In the United States, the argument that Indigenous people acquired no title to the full extent of their lands because they had not cultivated it was rejected by Chief Justice Marshall in a series of landmark judgments of the United States Supreme Court in the 1820s and 1830s.[27] In summary, the reasoning in the decisions was that Indigenous Americans did not exist in a 'Lockean' state of nature but were divided into separate independent nations with law and governments of their own, and had always been legally recognised as such by the United States. The basis for the entitlements of European settlers was therefore conquest, not agricultural labour.[28]

However, in Australia, in the very few legal cases where the issue of 'native title' arose peripherally,[29] the possibility was rejected under the Lockean inspired international law theory of Vattel. These cases effectively held that the land of Australia was to be considered 'practically unoccupied' at settlement so that the Crown became the beneficial owner of the lands.

In *Cooper v Stuart*[30] the Privy Council 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.[31]

Given the history of conflict between the early settlers and Indigenous people in Australia, it is doubtful that Lord Watson's assumption of 'peaceful' annexation was correct. That aside, the other assumption, that the colony of New South Wales was 'without settled inhabitants or settled law' was clearly wrong, as was pointed out in 1971 by Justice Blackburn in *Milurrpum v Nabalco Pty Ltd*:

> The evidence shows a subtle and elaborate system highly adapted to the country in which the people led their lives, which provided a stable order of society and which was remarkably free from the vagaries of personal whim or influence. If ever a system could be called a 'government of laws, and not of men', it is shown in the evidence before me.[32]

Nevertheless, Justice Blackburn considered himself bound by the Privy Council decision in *Cooper v Stuart* and earlier Australian cases to proceed on the basis that New South Wales was 'a colony acquired by settlement or peaceful occupation, as being inhabited only by uncivilised people' as a 'matter of law'.[33] It followed that 'from the moment of foundation of a settled colony English law, so far as it was applicable, applied in the whole of the colony'. The question then to be answered by Justice Blackburn was whether 'English law, *as applied to a settled colony*, included, or now includes, a rule that communal native title where proved to exist must be recognised'. His Honour came to the conclusion, on consideration of the authorities, that 'the doctrine [of recognition] does not form, and never has formed, part of the law of any part of Australia'.[34]

In 1992, the High Court came to a different result, concluding that a mere change of sovereignty did not extinguish native title to land and the common law will recognise and protect native title rights, except if the recognition were to 'fracture a skeletal principle of our legal system'.[35] In so doing, the Court rejected the 'enlarged notion of terra nullius' which had underpinned land law in Australia for over 200 years, and had justified the dispossession of Indigenous people from their lands. The rejection of that notion, 'clear[ed] away the fictional impediment to the recognition of indigenous rights and interests in colonial land'.[36]

However, in rejecting the 'unjust and discriminatory doctrine' that refused 'to recognise rights and interests of the indigenous inhabitants of settled colonies'[37] the Court remained 'curiously dependent on Lockean assumptions'.[38] As Kane points out in his article, 'Man the Maker *versus* Man the Taker', the claim of the Meriam people was that they had valid title to land which they and their ancestors had cultivated for generations.[39] That they were gardeners, not hunter-gatherers, is expressly made clear in the factual findings of Justice Moynihan set out in Justice Brennan's reasons.[40] These were precisely the conditions that Locke's

labour theory of property would have regarded as title to land that British settlers were obliged to recognise and protect.

Justice Brennan, in his leading judgment, argued the injustice of dispossession of land at sovereignty based upon past misunderstandings of the reality of Indigenous law and lifestyle, overruling cases based on those wrong assumptions. His Honour then extended the principle to mainland Australia, where Indigenous people had been, for the most part, hunter-gatherers, not farmers and where there was an expectation by at least some of the judges of the Court, that there would be very limited prospects for establishing native title. Kane argues:

> So powerful was the Lockean theory … that its eventual rejection in Australia had to be founded on its plausibility.[41] Still, there were now 'possibilities' for Indigenous people in Australia which had previously been closed to them by the crushing burden of 'terra nullius'.

Tehan[42] lists these possibilities that 'produced excitement, optimism, caution, anxiety and fear among indigenous people, governments and industry' as follows:

- the possibility that native title might exist over all unallocated Crown land and even over some Crown leases, including pastoral leases and mining leases;
- the possibility that many rights granted or actions taken by the Crown since 31 October 1975 when the *Racial Discrimination Act 1975* (Cth) (RDA) came into effect were invalid because of the disregard by governments of native title that existed in the land subject to Crown actions;[43]
- it was clear that future dealings in relation to land in which native title subsisted would be subject to the RDA but this raised possibilities for a completely new land management order with acknowledgment of indigenous interests in land and direct involvement of Indigenous people in decision making about their land; and
- not only the possibility for a realignment of power relations in land and resource allocation that challenged pre-conceived systems of decision making, but also the possibility of a new relationship between Indigenous and non-Indigenous people that went beyond land management to embrace fundamental issues of rights and status.

In her book, *Compromised Jurisprudence* Strelein writes:

> The *Mabo* decision provided Indigenous peoples with a viable legal doctrine to protect their interests and to facilitate the preservation and strengthening of their culture. It recognised that the granting of future interests in land could coexist with the presence of native title. It merely ensured that dealings with respect to Indigenous land would be concluded in negotiation with Indigenous peoples and that their interests would be recognised by the parties involved and by the law. The movement away from the bestowment of rights on Indigenous inhabitants to the assertion of existing rights created a source of empowerment for Indigenous people that forced non-Indigenous Australians to confront their racism and the injustices of the colonising culture.[44]

The immediate response to *Mabo* was mostly positive with the declaration received by the Council for Aboriginal Reconciliation 'in a spirit of joy and celebration'.[45] The Australian Mining Industry Council initially expressed the belief that the decision 'would not have a dramatic impact on the resource sector'.[46] Hopes were high that the decision would bring positive change in race relations and empower Indigenous groups in Australia politically and economically. However, it did not take long for the voices of the dissenters to come to the fore, with Aboriginal lawyer and activist, Michael Mansell arguing that the *Mabo* decision offered a 'puny reward' for the efforts and costs of litigating, 'something for those who are grateful for small blessings, but nothing in the way of justice'.[47] Others argued that it offered too much, with the then Managing Director of Western Mining, Hugh Morgan, airing his view that reconciliation was an 'exercise in the politics of guilt' and that terra nullius should remain the legal foundation of Australian settlement with calls for the Commonwealth to repeal all or most of the RDA so that states could extinguish native title. Commentator Padraic McGuiness even the suggested a referendum to overrule the High Court's decision and forestall years of costly litigation.[48]

Non-Indigenous responses to *Mabo* focussed largely on its threats to pastoralists and miners, the 'productive users' of land. Controversy escalated in the resource sector with the mining industry vigorously embarking on a public relations campaign which argued that the uncertainty generated by native title would impede significantly the industry's ability to explore and develop minerals and that this should be considered a 'crisis of national interest' threatening the economy and the property rights of 'other Australians'.[49]
In June 1993, the Prime Minister announced that the federal

government would respond to *Mabo* by legislation to facilitate validation of existing land titles, define native title, establish a system of tribunals to register and determine land claims and set parameters for compensation for Indigenous people whose native title rights had been extinguished contrary to the RDA.[50] The ferocity of the attack on *Mabo* escalated further during the 'time of *Mabo* madness' as the Commonwealth's legislative response was negotiated, with themes familiar to Lockean theorists being pressed viz, the perceived threat to economic development and the denigration of Indigenous culture.[51] The heat of the debate, and its focus, confirmed the fact that 'terra nullius' is not only a legal doctrine, it is also a state of mind. Despite the legal rejection of the notion in *Mabo*, the belief in the superior right of the most productive user remained (and remains) deeply ingrained in the Australian psyche.

After a period of intense negotiations between governments, representatives of Indigenous groups, pastoralists and the mining industry, the *Native Title Act 1993* (Cth) (NTA) was passed in late 1993 and came into effect on 1 January 1994. It is a legislative framework dealing with past and future implications of *Mabo*.

In summary, the NTA does the following:

- It recognises and protects native title by:
  - prescribing that native title cannot be extinguished contrary to the Act, and then setting out specific procedures which governments must follow before they can do any act that affects native title, called the 'future act' regime;[52]
  - adopting Justice Brennan's common law description of native title (expanding it to include water) and defining native title in the following terms:[53]
    (1) The expression native title or native title rights and interests means the communal, group or individual rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to land or waters where:
      (a) the rights and interests are possessed under the traditional laws acknowledged, and the traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders: and
      (b) the Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters; and
      (c) the rights and interests are recognised by the common law of Australia.
- It validates 'past acts'[54] of the Commonwealth which may be invalid because of the existence of native title, subject to compensation rights,[55] and permitted states and territories to validate their past acts.[56]
- It provides a mechanism for determining claims to native title and compensation.[57]

The future acts scheme, as part of the protective mechanism, deserves more explanation. Broadly, it had two aspects. If the Crown could do an act over freehold land, it could also do it over native title land, with the same procedural rights extended to native title holders.[58] But in all other circumstances, the Crown had to comply with the future act procedures or the act would be invalid.[59] The second aspect was the 'right to negotiate', which related mainly to mining and compulsory acquisitions for the purposes of third parties.[60] As Tehan points out, for the majority of Indigenous people, this represented a significant shift in their capacity to be involved in decision making affecting their land. It was also reported by the Aboriginal and Torres Strait Islander Social Justice Commissioner[61] to be the provision that created the most fear among state and territory governments and industry in the early days of the NTA.[62]

Debates about 'certainty' and 'workability' from government and industry perspectives continued, with Indigenous people arguing for 'co-existence' and recognition of their unique relationship with land, which does not conform with the deep-rooted understanding of 'property' in non-Indigenous Australia.

These arguments found their way to the High Court in resolving a number of issues left unclear after *Mabo* and the NTA. From 1996 to 2002, the Court delivered seven significant native title decisions: *Wik*;[63] *Fejo*;[64] *Yanner v Eaton*;[65] *Commonwealth v* Yarmirr;[66] Western *Australia v Ward*;[67] *Wilson v Anderson*;[68] and *Yorta Yorta v Victoria*.[69] Threads of Lockean inspired thinking run through these decisions.

Wik (1996)—the pastoral lease case

One of the largest issues to be resolved after *Mabo* was the relationship between native title and pastoral leases. The answer to this question would, in large part, determine the scope for native title on mainland Australia. *Wik* was the test case. A bare majority (4:3) found that native title was not necessarily extinguished by the grant of a pastoral lease. Native title rights and interests could coexist with other interests in land, but the Court reinforced the superiority of granted rights over native title rights.[70] In one sense, *Wik* was at least as important as *Mabo* for the future of native title as it opened up the possibility of native title existing over vast swathes of Australia, where previously it had been thought to have been extinguished.[71] In another sense, it was a 'triumph of thinking about Western land law' applied to Indigenous rights in land.[72]

The ferocious political and industry backlash to *Wik* put the Commonwealth Government under increasing pressure to introduce legislation to extinguish native title on pastoral leases. Such legislation would have left the Commonwealth (and accordingly the tax payers) with a massive compensation bill. Instead, the government came up with the Ten Point Plan which included a number of provisions which either extinguished native title in particular circumstances or significantly diminished the rights recognised at common law and protected by the NTA as it stood. It delivered what was described as 'bucket loads of extinguishment'[73] and significantly decreased the area over which native title might exist. In commenting on the 1998 '*Wik*' amendments, the Aboriginal and Torres Strait Islander Social Justice Commissioner said:

> The legislative response to the Wik decision which proffered a basis for the sharing of interests has been lost, at least for the present. Both the process and the substance of the amendments have been destructive of the most valuable resource we have in working towards reconciliation: trust.[74]

Fejo (1998)—freehold extinguishment

With *Mabo* having foreshadowed that freehold extinguishes native title,[75] the conclusion of permanent extinguishment in *Fejo* was unremarkable, although it was arguable that there was scope of the recognition of native title where land, previously subject to a freehold grant, had been resumed as vacant Crown land. But there are several elements to the decision which draw comment.

In finding that the native title rights were inconsistent with the rights of holder of an estate in fee simple (to use the land as they see fit and to exclude others from access) the Court paid no heed to the unique or *sui generis* nature of native title and overlooked the spiritual and non-physical elements of the Indigenous relationship with land. Instead physical access and control were prioritised and non-Indigenous concepts of private property were superimposed. In truth, it could be argued that the definition of native title in the NTA, which emphasises rights and interests 'in relation to land and waters' provides the basis for this approach. While 'connection' by traditional laws and customs does not require physical presence, rights and interests are expressed as 'activities' in relation to land and waters. Extinguishment by inconsistency then becomes a battle between the rights of grantees to exercise their rights and the rights of native title holders to exercise their native title rights in relation to land; a battle which native title holders always lose because of the superiority of granted rights.

The 'inherently fragile native title right'[76] (to conduct activities on land) is always susceptible to extinguishment by the legal rights conferred on others. The disappointing aspect of *Fejo* for Indigenous groups is the reinforcement of the inherent vulnerability of native title and the superiority of non-Indigenous titles.

Yanner (1999)—regulation or extinguishment

In *Yanner*, the issue was whether the statutory vesting in the Crown of property in fauna extinguished the native title right to hunt and kill estuarine crocodile. On a plain and simple reading of *Fejo*, the answer expected would be 'yes'.[77]

It is not necessary here to go into what Walker refers to as 'the intellectual gymnastics' that lead the majority to find that the statute did not extinguish the native title right but regulated the exercise of it, because 'the property declared by a settler parliament over something as tangible as a wild animal was not really property'. [78]

Seen through a Lockean lens, the intellectual gymnastics are easier to explain.[79] *Fejo* was concerned with ownership of land rendered as exclusive private property by the historic freehold grant which forever extinguished the rights of native title holders who were not understood to have 'mixed

their labour' with the land so as to previously make it their property. *Yanner*, on the other hand, was concerned with a wild animal, the taking of which was sufficient to give the hunter gatherer the benefit of his or her labour for the purpose of nourishment. This concept of 'taking' of a wild animal was easily accommodated under Locke's labour theory of property and was one which could be recognised, even under the enlarged notion of 'terra nullius' at 1788. The principle that where land had been appropriated to private property there was 'qualified property' in wild animals for the time being when they are on the owner's land[80] is also part of Lockean reasoning. Justice Gummow noted that 'it was not argued that the pastoral holding, leased by the Carpentaria Land Council Corporation, which included the land on which the appellants killed the crocodiles was inconsistent with the native title right, or incident, to hunt estuarine crocodiles'.[81]

His Honour emphasised 'that ingrained, but misleading habits of thought and understanding lurk in this area of the law', referring specifically to the situation where 'a community of Indigenous Australians holds both native title and an estate or statutory interest with respect to the same land'.[82]

My considered view is that the same comment applies more generally to most (if not all) areas of native title law. One of the most ingrained and misleading patterns of thought in native title is the deeply embedded notion of a labour theory of property in the Australian psyche—which has difficulty allowing any notion of 'property' derived from other than productive use. This is a notion deeply embedded into the common law of property in Australia.

Yarmirr (2001)—native title in the sea

The majority in *Yarmirr* emphasised the need to 'curb the tendency (perhaps inevitable and natural) to conduct an inquiry about the existence of native title rights and interests in the language of the common law property lawyer'.[83]

But in that case, the first which considered the existence of native title in an area of sea, the claim for exclusive rights in the sea was thwarted, at the first post, by the 'skeletal principle' of freedom of the seas and tidal waters.[84] This principle derived from the idea that the sea, by its nature, is the property of all—an assumption of Grotius (1583-1645), a 17th century Dutch legal scholar and philosopher acknowledged as the father of modern international law. Grotius influenced Locke in developing his labour theory of property.[85]

In the Full Federal Court Justice Merkel referred to 'policy' of freedom of the seas as a 'policy of ancient origin, as is the common law that it informs', explaining that:

> A right of way was reserved from earliest times over property that was, by its nature, common. The sea was a classic example, and was often held by its nature to be *res communis* or the property of all. Grotius referred to such a right of passage as including 'lands, rivers and any part of the sea that has become subject to the ownership of people.
>
> Modern authority is consistent with the Grotian approach. The assumptions of Grotius and his successors have been echoed, with slight variations with respect to both the common law and the international law rights of navigation and passage by writers ever since.[86]

Whilst preferring to stay with concepts of inconsistency, rather than resorting to the metaphorical 'skeletal principle', the High Court in *Yarmirr* agreed that exclusive rights in the sea could not stand with inconsistent common law public rights of navigation and fishing, as well as the right of innocent passage.[87]

The same principles apply to any sea claim in Australia, to deny recognition of **exclusive** native title rights offshore.

The gravamen of the Grotian approach is the distinction drawn between the physical nature of the sea and of land. In *Yarmirr*, at first instance, the Commonwealth identified the distinction between the legal regime on land and offshore as 'the heart of the dispute'.[88] The submission went like this, with strong 'vibes' of Lockean property theory apparent:

> 1.8 This distinction is rooted in the physical nature of sea territory which distinguishes it from land territory and materially affects people's relationship with the sea. Whereas the land is capable of being fenced off, of being cultivated and improved, and of being occupied and lived upon by people, our relationship with the sea is primarily limited to the taking of fish and other sea life from and the traversing of the sea. Our capacity to physically close off and to cultivate the seas has been confined to areas close to shore and only recently has modern technology enabled us to build large structures for the drilling of oil and other such

> purposes in deeper waters of the sea.
>
> 1.9 The different relationship between people and the sea is recognised in the principles of the common law and of international law which govern rights in the sea. The legal regimes of both systems of law are premised first and foremost upon the concept of the freedom of the seas. In the common law, this finds reflection in the ancient public rights to fish and to navigate and in the principles of Magna Carta which enjoined the Crown from granting exclusive rights to fish. In international law in the area of the territorial sea, this finds reflection in the right of the ships of all nations to innocent passage.

And so, even if native title rights **could** be recognised offshore it was said that the common law principles which apply in that area 'necessarily have the result that the customary practices which might be recognised as native title rights are more limited than those which could be recognised on dry land'.[89] And so it has proven to be.

Not only was the distinction between land and sea the heart of the legal dispute, it also highlights the difference between indigenous and western perspectives of property and sea rights. Generally, from an indigenous perspective, no elemental distinction is made between the land and the sea.[90]

Justice Kirby's dissent commenced with acknowledging the difference of approach between the common law, drawing distinctions between land and sea, and traditional law, which does not.[91] Justice Kirby's resolution of this difference in approach would have allowed for native title rights in the sea with elements of exclusivity, even though they were qualified by the public right to navigate and statutory fishing licences.[92]

In his careful (but dissenting) consideration of the case, his Honour made a powerful call for the recognition of a new legal paradigm moving away from 'blind adherence only to the adapted rules of the common law of England'. The approach of 'blind adherence' is not only inconsistent with the essential legal foundation for the step the High Court took in *Mabo* but was also:

> incompatible with the independence and self-respect that should today be reflected in the exposition by this Court of the common law of Australia, at least where that law is concerned with vital and peculiar problems of a special Australian character. The rights of the indigenous peoples of Australia are of that kind.[93]

But the majority in *Yarmirr* was not looking for a 'new source for a special body of law';[94] instead their Honours retreated to the NTA as the starting point for any inquiry,[95] acknowledging that the NTA had supplemented the rights and interests of native title holders under the common law of Australia by providing for its protection. They found that the provision that native title is not able to be extinguished contrary to the Act is 'perhaps, the most important of the Act's protection provisions'.[96]

Ward (2002)—pastoral and mining leases

In *Ward,* the High Court had the opportunity to clarify extinguishment after a 'rather disparate collection of concepts and judicial terminology' had developed in previous native title cases.[97] As Sean Brennan points out, the High Court had a range of choices to describe the interaction between Crown grants and native title: extinguishment, partial extinguishment, suspension or suppression, impairment, regulation and no effect.[98] Over the ten years since *Mabo,* two principles for common law extinguishment had emerged, being a presumption of no extinguishment without a clear and plain intention and a doctrine of inconsistency between two sets of rights.

The majority in *Ward* gave primary regard to the NTA, and not *Mabo* and *Wik,* stating expressly that the 'only present relevance of those decisions is for whatever light they cast on the NTA'.[99] As an exercise of statutory interpretation the majority then relied on the terms of the NTA to say that the Act 'mandated' partial extinguishment[100] and the 'inconsistency' test.[101]

The majority found that native title was not entirely extinguished by Western Australian pastoral leases as these did not amount to grants of exclusive possession, but any unextinguished rights were 'prevailed over' by rights and interests under the leases.[102] However, the right to control access or activities on the land was extinguished; the extinguishment of any other rights depended on the application of the inconsistency of incidents test.

Mining leases were also considered not to entirely extinguish native title, as they were grants of exclusive possession for the purpose of mining, but they did extinguish rights to

control access and activities on the land. Again, whether other rights or interests might be extinguished depended upon the application of the inconsistency of interests test.[103]

The effect on native title of the decision in *Ward* was profound. It confirmed that prior grants and interests could extinguish native title in part, which 'extracted' particular rights and interests from native title permanently and left a 'patchwork of tenures' granted throughout Australia's history which cannot be removed except by legislation.[104]

The extinguishment doctrine emerging from *Ward* was destructive for native title holders. In accepting partial extinguishment and the inconsistency of incidents test, the Court rejected a view that communal native title could be equated with 'ownership' in Western law.[105]

Justice McHugh and Justice Callinan (both in dissent) held that pastoral[106] and mining[107] leases extinguished native title. Both called for reforms of a native title system which seemed incapable of delivering redress to Indigenous people dispossessed from their lands.[108] In Justice McHugh's words:

> … redress cannot be achieved by a system that depends on evaluating the competing legal rights of landholders and native-title holders. The deck is stacked against the native-title holders whose fragile rights give way to the superior rights of the landholders whenever two classes of right conflict.[109]

Wilson (2002)—perpetual grazing lease

Wilson was handed down the same day as *Ward.* It raised the question of whether leases for grazing purposes in the Western Lands Division in New South Wales extinguished all or any native title. The leases were granted in perpetuity for the purpose of grazing. The rationale behind the 'paradoxical perpetual lease'[110] was to strengthen the class of tenure to ensure that lessees could obtain adequate finance on the security of their lease.[111]

By aligning the perpetual lease with freehold in the sense of permanency, and ignoring its limitations in respect of use, the majority of the High Court made a 'presumption of inconsistency in line with freehold'[112] which allowed it to conclude, as a matter of statutory interpretation, that the 'State Act … mandates extinguishment of any native title, with effect from the grant of the Lease.'[113]

With that conclusion, *Wilson* further confined native title rights in Australia and arguably undermined the principles for protection of native title established in *Mabo* and *Wik* by resort to the statute that was intended to give effect to those principles.

Yorta Yorta (2002)—tide of history

Yorta Yorta was concerned with extinguishment of native title by 'non recognition'. *Mabo* had created a perception that (putting questions of extinguishment by inconsistent grants aside) native title could be recognised 'provided the general nature of the connection between the indigenous people and the land remains.'[114] Justice Brennan also observed that:

> … when the tide of history has washed away any real acknowledgment of traditional law and any real observance of traditional customs, the foundation of the native title has disappeared. A native title which has ceased with the abandoning of laws and customs based on tradition cannot be revived for contemporary recognition.[115]

Yorta Yorta tested those perceptions in relation to land and waters in the south east corner of Australia where Indigenous people had experienced seven or eight generations of intensive non-Indigenous presence and activity.[116] Based on his factual findings, the trial judge rejected the native title claim, concluding:[117]

> The tide of history has indeed washed away any real acknowledgment of their traditional laws and any real observance of their traditional customs. The foundation of the claim to native title in relation to the land previously occupied by those ancestors having disappeared, the native-title rights and interests previously enjoyed are not capable of revival. This conclusion effectively resolves the application for a determination of native title.

The Full Federal Court (by majority) upheld the trial judge[118] and the High Court upheld the decision of the Full Court. As with *Ward* and *Wilson* the majority of the High Court in *Yorta Yorta* focussed on the NTA, and particularly the definition of native title in s 223, in its reasons, making almost no mention of *Mabo* or the body of common law that underpinned it.[119] It is not, however, suggested that the result would have been different even if a strict statutory construction had not been taken.

The decision was seen as having strong implications for

future native title claims, particularly in urbanised areas, with the expectation that few, if any, would be successful.

As to the possibilities of empowerment of, and benefits for, Indigenous people post *Mabo,* the 2001–2002 test cases decided by the High Court[120] set 'a strong judicial tone of retrenchment and the prospects for socioeconomic development from native title took a battering.'[121]

But in 2013, the High Court delivered judgment in *Akiba v Commonwealth*[122] creating a renewed sense of optimism for native title reaching the broader potential promised after *Mabo.* The *Akiba* litigation[123] returned the attention of the Court to the Torres Strait. Over twenty years after *Mabo* and its legislative response—the NTA—the Torres Strait Islanders secured recognition of their native title right to take marine resources for commercial purposes, as part of their non-exclusive rights in the sea. The extensive and comprehensive legislative controls on commercial fishing were held to regulate the rights rather than extinguish them. It could be said that the rights were lifted out of the bucket of legislative extinguishment into the realm of regulation and co-existence.

For present purposes, it is not necessary to give a detailed analysis of the reasoning of Justice Finn, or of the High Court, which unanimously reinstated the first instance decision after it was overturned by a majority in the Full Federal Court. It is enough to say that *Akiba* marked a turning point in native title extinguishment law, towards a greater moderation and realism with the High Court seeming now to regard extinguishment as a 'legal conclusion of last resort'.[124]

Two other High Court cases following swiftly after *Akiba* continued the trend away from the harshness of extinguishment in earlier cases. *Karpany v Dietman*[125] involved the successful use of a native title defence to a prosecution for possession of undersized abalone, with the State arguing that the native title right to fish had been extinguished by the *Fisheries Act 1971* (SA). The High Court again found that the legislative regime was regulatory, not extinguishing. Not long after, in *Western Australia v Brown*,[126] the High Court unanimously favoured co-existence over extinguishment, this time in relation to an expired mining lease in the Pilbara.

The confirmation that native title rights can have a commercial aspect in *Akiba* and the emphasis on coexistence over extinguishment, evident in *Akiba, Karpany* and *Brown,* re-awakens the promise of *Mabo,* with the possibility of unlocking greater economic potential for native title holders and empowering them.

In 2003, Tehan reflected on native title in Australia. In the wake of *Ward, Wilson* and *Yorta Yorta,* she wrote:

> Ten years of the NTA has seen the common law of native title emerge, blossom, change and wilt. The promise engendered by *Mabo* has failed to materialise in the form of a robust and enforceable native title. To that extent, the sun may have set, with native title fatally wounded by the NTA and the High Court.[127]

With the advent of *Akiba* and the cases following it, native title may again be back on the path to realising some of the hopes engendered by *Mabo* and *Wik.*

The recent determination of compensation in *Griffiths v Northern Territory*[128] is a step on the way. In a land mark decision, the Northern Territory Government has been ordered to pay over $3.3 million dollars to the Ngaliwurru and Nungali Peoples as compensation for the impact of land grants and public works on their native title. It was the first litigated determination of compensation under the NTA.

This was a small area of land—about 23 sq km—and the sum of $3.3 million awarded was made up of $512,000 for the financial loss of non-exclusive possession over 34 lots in the township of Timber Creek and $1.48 million in interest for the delay in payment over 20 years. In addition, and most significantly for Indigenous interests, the court awarded $1.3 million in relation to the intangible impacts of the dispossession involved in the extinguishment of their native title rights.

The implications of the decision apply to native title which has been extinguished since 1975, when the RDA was enacted, and subsequently validated by the NTA. To date, most native title claims have focused on establishing that native title has not been extinguished and continues to exist, either as exclusive or non-exclusive native title. The decision in *Griffiths* will potentially give rise to further claims seeking determinations of the extinguishment of native title since 1975, and payment of compensation for that extinguishment. In my view, there is likely to be a trend for state and territory governments to negotiate settlements with native title claimants rather than litigate compensation claims. The

decision will also strengthen the position of Indigenous interests in future settlement negotiations.

Of course, the *Griffiths* decision will not be the final word on compensation. The decision has been appealed to the Full Federal Court and the valuation methodology employed in the case will doubtless eventually be considered by High Court, either in an appeal from the Full Court decision in *Griffiths*, or a future compensation decision in another matter.

The picture of native title as it has been determined in Australia is not as bleak as the earlier High Court cases may suggest. To date there have been 303 determinations that native title exists (in the entire or part of a claim area)—277 of those determinations have been by consent, only 26 have been litigated. Native title has been determined to exist over 31 per cent of the land mass of Australia—11 per cent of Australia is subject to exclusive native title; 20 per cent is non-exclusive native title where native title rights and other interests co-exist, for example, over pastoral leases.

Across the mainstream and Indigenous political spectrum, there is almost unanimous consensus that while native title holds great potential for Indigenous Australians, the full benefits have not yet materialised.

There are two key components to the challenge of realising the potential of native title—each poses a completely different problem. Since the NTA was passed over twenty years ago, there has been extensive debate around the **attainment of native title**—which continues to this day. In legal and cultural terms, it is incredibly complex but ultimately for native title claimants there is a definable answer—you either achieve a determination that native title exists, or you do not.

Once a native title determination has been achieved the challenge to leveraging native title to reach its full potential presents a completely different problem. This is the **management problem**. This problem involves an unstructured but complex network of Anglo-Australian rules and regulations, Indigenous perspectives and internal and external stakeholder expectations.

When a determination of native title is made, the NTA requires that the native title holders must establish a corporation to represent them and their interests and manage their native title—either as agent or trustee. These organisations are known as Prescribed Bodies Corporates (PBCs) and are required to incorporate under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth) (CATSI Act) and be registered with the National Native Title Tribunal.[129]

There are now over 160 PBCs managing native title in Australia and the number will grow as more native title applications are determined. This could be described as a 'new corporate sector', underwritten by traditional laws and customs,[130] but required to comply with Anglo-Australian corporate rules which often are at odds or difficult to reconcile with those laws and customs. The next task for native title holders, through their corporation, is to ensure that they realise the full potential of their native title and access the opportunities it presents.

In addition to compliance with the NTA, its Regulations[131] and the CATSI Act, PBCs also have obligations and responsibilities under a wide range of Commonwealth, State or Territory legislation relating to matters such as cultural heritage, land and water management, tenure issues, biodiversity and environmental protection and land use planning (including town planning).

In addition, PBCs are expected by the community generally to fulfil a broader role on Indigenous issues, and there are separate demands from their membership. It might fairly be said that good governance of a PBC is more complex than governance of a multi-million dollar company beholden only to its shareholders.

It is an understatement to say that PBCs need resources and they need effective governance. The many challenges facing these organisations have been well documented in recent reviews of the native title system and Indigenous land administration,[132] among them:

- chronic under-resourcing,
- a lack of access to appropriate skills and advice,
- the ongoing tussle between federal and state and territory government about who is responsible for supporting them, and
- limited access to infrastructure.

These native title corporations have:

> a precarious existence, balancing uncertainty over funding against the incessant demands of third parties, carrying out consultancies and negotiations, usually free of charge,

> and usually while dealing with dire community and family circumstances. [133]

A native title holder describes her experience of native title this way:[134]

> The law says you must have a Prescribed Body Corporate to hold native title. Our corporation does not have income, assets or staff. We do not have an office, a fax, or a computer. We just have meetings under a bough shed. … For our people, 'winning' native title has meant a lot of pain, disappointment and sorrow.
>
> - We have got drastically fewer rights now than we had before our claim was determined
> - We have a massive, unbearable burden of administration to protect the few rights we have.

The Indigenous people who govern these organisations deserve greater public recognition for the incredible contributions they make to their communities. Often with little training except what they bring with them to the job, they oversee the management of complex corporate structures with limited access to infrastructure or expertise, often relying on volunteer labour (often their own) and pro-bono legal advice to see them through from one AGM to the next, one grant to the next. While some PBCs are operating very effectively, it is clear that many do not have the necessary resources to do so, causing frustrations for the native title group, business and government.

Strong PBCs are a key priority if native title is to realise some of the hopes engendered by *Mabo.* What is required is a collaborative approach between PBCs, native title representative bodies, government agencies and other organisations involved with native title, looking to support PBCs to develop administrative, governance and financial management capabilities. If there are to be reforms in this area, they should come out of this collaborative approach.[135] Unless some progress is made in this space, there will be a new wave of litigation arising from PBCs in difficulties, disputes over memberships, financial management, distribution of benefits and many other types of conflict having, as their root cause, management of native title.

The other key priority is to achieve a cultural change in the way we think (and talk) about native title and Indigenous issues in Australia. To do this, it is essential that we 'confront ourselves, confront our preconceptions and our prejudices'[136] and truly know ourselves.

Adapting for all Australians, the message of the Waitangi Tribunal to the New Zealand Government in 2011, when it released its report into the Mai 262 claim: 'Ko Aotearoa Tenei' ('This is Aotearoa' or 'This is New Zealand')[137]—a claim concerning ownership of, and rights to, Maori knowledge in respect of indigenous flora and fauna:

> Unless it is accepted that Australia has two founding cultures, not one; unless Aboriginal and Torres Strait Islander culture and identity are valued in everything government says and does; and unless they are welcomed into the very centre of the way we do things in this country, nothing will change. Aboriginal and Torres Strait Islanders will continue to be perceived, and know they are perceived, as an alien and resented minority, a problem to be managed with a seemingly endless stream of tax-payer funded programs, but never solved.

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* President, National Native Title Tribunal. The views, opinions and conclusions expressed in this paper are strictly those of the author. They do not necessarily reflect the views of the National Native Title Tribunal.

1 Justice Mary Gaudron, 'Equality Before the Law with Particular Reference to Aborigines' (1993) 1 *The Judicial Review* 81, 88.

2 *Mabo v Queensland (No 2)* (1992) 175 CLR 1 ('*Mabo*'), 217, also 76 (Brennan J).

3 The doctrine of *terra nullius* is not a concept of the common law, nor is it justiciable in municipal courts; its common law counterpart is the 'desert and uncultivated' doctrine, recognised by Blackstone 23 years before the British acquired sovereignty over Australia: William Blackstone, *Commentaries on the Laws of England: of the Rights of Persons (1765)* 17th ed (1830) Bk 1, 106–108—discussed in *Mabo* (1992) 175 CLR 1, 34-37 (Brennan J); *Western Australia v Commonwealth* (1983) 183 CLR 373, 427.

4 (1996) 187 CLR 1 ('*Wik*').

5 Ibid 182.

6 Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh, JJ; Dawson J dissenting.

7 *Mabo* (1992) 175 CLR 1, 15 (Mason CJ and McHugh J).

8 Ibid 63-71, 75-76 (Brennan J); 89-90, 110-112, 116-118 (Deane and

Gaudron JJ); 192-198 (Toohey J).

9 Ibid 68-69 (Brennan J).

10 Ibid 69 (Brennan J).

11 *Fejo v Northern Territory* (1998) 195 CLR 96.

12 *Fejo and Anor v Northern Territory of Australia and Anor* [1998] HCATrans 247 (22 June 1998).

13 Ibid.

14 Justice Michael McHugh, 'The Judicial Method' (1998) 73 *Australian Law Journal* 37, 40-1.

15 *Mabo* (1992) 175 CLR 1*,* 42 (Mason CJ, McHugh J agreeing); 109 (Deane and Gaudron JJ); 182-4 (Toohey J).

16 John Locke (1632-1704) was one of the most famous philosophers and political theorists of the 17th century.

17 References in this paper are to John Locke, *Two Treatises of Government* (Cambridge University Press, 1960).

18 Ibid [25]-[27].

19 Ibid [30]: 'Thus this law of reason makes it the case that the Indian who kills a deer owns it; it is agreed to belong to the person who put his labour into it, even though until then it was the common right of everyone.'

20 Ibid [32]: 'A man owns whatever land he tills, plants, improves, cultivates, and can use the products of. By his labour he as it were fences off that land from all that is held in common.'

21 Emmerich de Vattel (1714-1767) was a Swiss philosopher and legal expert whose theories laid the foundation of modern international law and political philosophy.

22 Emmerich de Vattel, *Law of Nations* (1797) Bk 1, 100-101, referred to in *Mabo* (1992) 175 CLR 1, 33 (Brennan J).

23 See discussion at above n 3.

24 John Bennett and Alex Castles (eds), *A Source Book of Australian Legal History* (The Law Book Company, 1979) 254.

25 James Cook, *The Journals of Captain James Cook on his Voyages of Discovery: Volume I, The voyage of the Endeavour 1768-1771 / edited by J.C. Beaglehole* (Cambridge University Press, 1955) 213, 393, 396; James Cook, *The Journals of Captain James Cook on His Voyages of Discovery: Volume II, The Voyage of the Resolution and Adventure 1772-1775 / edited by J.C. Beaglehole* (Cambridge University Press, 1955) 735.

26 See http://www.foundingdocs.gov.au/resources/transcripts/nsw2_doc_1787.pdf 4.

27 *Johnson v M'Intosh* 21 U.S. 543 (1823) held that private citizens could not purchase land from Native Americans; *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831) ruled that the Cherokees where a dependent nation, with a relationship to the United States like that of 'ward to its guardian'; in *Worcester v. Georgia*, 31 U.S. 515 (1832) it was stated, in dicta, that the federal government was the sole authority to deal with Indian nations, laying the foundations for the doctrine of tribal sovereignty in the United States.

28 It is reported that Justice Story wrote to his wife on 4 March 1832: 'Thanks be to God, the Court can wash their hands clean of the iniquity of oppressing the Indians and disregarding their rights.' See Charles Warren, *The Supreme Court in United States History, Volume 1: 1789-1821* (Little, Brown, and Co, 2nd ed, 1926) 757.

29 See *Attorney General v Brown* (1847) 1 Legge 312 (NSW); *Randwick Corporation v Rutledge* (1959) 102 CLR 54; *New South Wales v Commonwealth* (1975) 135 CLR 337. These cases are discussed in *Mabo* (1992) 175 CLR 1*,* 26-28 (Brennan J). See also *Williams v Attorney-General (NSW)* (1913) 16 CLR 404.

30 (1889) 14 App Cas 286

31 Ibid 291 (Lord Watson).

32 (1971) 17 FLR 141, 267.

33 Ibid 244 and 249.

34 Ibid 244-245.

35 *Mabo* (1992) 175 CLR 1*,* 43 (Brennan J).

36 Ibid 45 (Brennan J).

37 Ibid 42 (Brennan J).

38 John Kane, 'Man the Maker versus Man the Taker: Locke's Theory of Property as a Theory of Just Settlement', (2007) 3 *Eighteenth Century Thought* 235.

39 Ibid.

40 *Mabo* (1992) 175 CLR 1*,* 17-18 (Brennan J): 'Gardening was of the most profound importance to the inhabitants of Murray Island at and prior to European contact.'

41 Kane, above n 38, 253.

42 Maureen Tehan, 'A Hope Disillusioned, an Opportunity Lost? Reflections on Common Law Native Title and Ten Years of the *Native Title Act*' (2003) 27(2) *Melbourne University Law Review* 523, 537-8.

43 By a narrow majority *Mabo* held that governments dealing with native title since the *Racial Discrimination Act 1975* (Cth) came into effect were required to act in a manner consistent with its provisions: *Mabo* (1992) 175 CLR 1, 71 (Brennan J), 112 (Deane and Gaudron JJ), 214-216 (Toohey J).

44 Lisa Strelein, *Compromised Jurisprudence* (Aboriginal Studies Press, 2006) 23.

45 John Gardiner-Garden, 'The Mabo Debate: A Chronology' (Department of the Parliamentary Library, 1993) 1-2.

46 Ibid 2.

47 Michael Mansell, 'The Court Gives an Inch but Takes Another Mile', (1992) 2(57) *Aboriginal Law Bulletin* 4.

48 Gardiner-Garden, above n 45, 2-3.

49 Damien Short, *Reconciliation and Colonial Power: Indigenous Rights in Australia* (Ashgate Publishing, 2008) 46-51.

50 Gardiner-Garden, above n 45 , 14.

51 Andrew Markus, 'Between *Mabo* and Hard Place: Race and the Contradictions of Conservatism', in Bain Attwood (ed), *In the Age of Mabo: History, Aborigines and Australia* (Allen & Unwin, 1996) 88, 89-93.

52 The effect of these provisions was to establish a national code for dealings with native title: *Western Australia v Commonwealth* (1995) 183 CLR 373, 453 (Mason CJ, Brennan, Deane Toohey, Gaudron and McHugh JJ).

53 *Native Title Act 1993* (Cth) s 223(1).

54 *Native Title Act 1993* (Cth) s 228.

55 *Native Title Act 1993* (Cth) s 14. *Mabo* held that the *Racial Discrimination Act 1975* (Cth) made it unlawful for governments to do any act which extinguished native title in whole or part. This meant that since 1975 governments had been doing various acts in relation to land which were now considered unlawful and invalid. As part of the compromise during negotiations, it was agreed that any such acts after the *Racial Discrimination Act* and before the *Native Title Act* would be validated and compensation paid for native title extinguished as a result.

56 *Native Title Act (1993)* (Cth) ss 19-20. All the states and the Northern Territory passed legislation validating their past acts.

57 *Native Title Act (1993)* (Cth) s 61.

58 *Native Title Act (1993)* (Cth) ss 23(6), 253.

59 *Native Title Act (1993)* (Cth) s 22.

60 *Native Title Act (1993) (Cth)* s 25.

61 Aboriginal and Torres Strait Islander Social Justice Commissioner, 'Native Title Report 1995' (Human Rights and Equal Opportunity Commission, 1995) 36.

62 Tehan, above n 42, 549.

63 *Wik* (1996) 187 CLR 1.

64 *Fejo v The Northern Territory of Australia* (1998) 195 CLR 96.

65 *Yanner v Eaton* (1999) 201 CLR 351.

66 *Yarmirr & Ors v The Northern Territory of Australia & Ors* (2001) 208 CLR 1 ('*Yarmirr HC*').

67 *Western Australia v Ward* (2002) 213 CLR 1.

68 *Wilson v Anderson* (2002) 213 CLR 401.

69 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422.

70 *Wik* (1996) 187 CLR 1, 132-133 (Toohey J).

71 Pastoral leases covered 38 per cent of Western Australia, 42 per cent of South Australia, 41 per cent of New South Wales, 54 per cent of Queensland and 51 per cent of the Northern Territory: Richard Bartlett, *Native Title in Australia* (Lexis Nexis Butterworths, 2000) 273.

72 Bret Walker, 'The Legal Shortcomings of Native Title' in Sean Brennan et al (eds), *Native Title from Mabo to Akiba: A Vehicle for Change and Empowerment?* (Federation Press, 2015) 14, 19.

73 Aboriginal and Torres Strait Islander Social Justice Commissioner, 'Native Title Report 1997' (Human Rights and Equal Opportunity Commission, 1997) 36.

74 Aboriginal and Torres Strait Islander Social Justice Commissioner, 'Native Title Report 1998' (Human Rights and Equal Opportunity Commission, 1998) 9.

75 *Mabo* (1992) 175 CLR 1, 69 (Brennan J); 89, 110 (Deane and Gaudron JJ).

76 *Fejo v The Northern Territory of Australia* (1998) 195 CLR 96, 151 (Kirby J).

77 This comparison was made by Callinan J, in dissent: *Yanner v Eaton* (1999) 201 CLR 351 410 [157]; see also 374 (McHugh J) also in dissent.

78 Walker, above n 72, 17.

79 This is not to suggest that was any conscious reasoning of the Court, but to comment on deeply ingrained tenets of the Anglo-Australian culture which may also explain the result.

80 *Yanner v Eaton* (1999) 201 CLR 351 386 [80] (Gummow J).

81 Ibid 384 [76] (Gummow J).

82 Ibid.

83 *Yarmirr HC* (2001) 208 CLR 1, 37 [11] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

84 *Yarmirr & Ors* v *The Northern Territory & Ors* (1998) 82 FCR 533 ('*Yarmirr FC*'), 592, 593 (Olney J); *Commonwealth v Yarmirr* (1999) 101 FCR 171 ('*Yarmir FCAFC*'), 228-226 [238]-[239] (Beaumont and von Doussa JJ); 300-301 [570]-[572] (Merkel J).

85 For Grotius property and ownership had to be 'wrested away from early ownership in common'. The ancient commons were divided into two groups: things that are public (the property of people) and things that are private (the property of individuals). Property came into being through acts of occupation and possession. Because the sea could not be occupied it could not be the property of anyone and it belonged to everyone.

86 *Yarmirr FACFC* (1999) 101 FCR 171, 300-301 [570] (Merkel J).

87 *Yarmirr HC* (2001) 208 CLR 1, 68 [98].

88 *Yarmirr FC* (1998) 82 FCR 533, 542 [1.7]-[1.9].

89 Ibid 542 [1.6].

90 Sue Jackson, 'The Water is not Empty: Cross-Cultural Issues in Conceptualising Sea Space' (1995) 26(1) *Australian Geographer* 87, 89.

91 *Yarmirr HC* (2001) 208 CLR 1, 110-111 [245] (Kirby J).

92 Ibid 125 [281], 126 [283] (Kirby J).

93 Ibid 141 [318] (Kirby J).

94 Ibid.

95 Ibid 39 [15], 35 [7] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

96 Ibid 35 [7] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

97 Sean Brennan, 'Native Title in the High Court of Australia a Decade after Mabo' (2003) 14 *Public Law Review* 209, 211.

98 Ibid 211-212.

99 *Western Australia v Ward* (2002) 213 CLR 1, 69 [25], 65 [16] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

100 Ibid 63 [9].

101 Ibid 89 [76].

102 Ibid 131 [192]-[194].

103 Ibid 165-166 [308]-[309].

104 Strelein, above n 44, 77.

105 *Western Australia v Ward* (2002) 213 CLR 1, 91 [82], 92 [84] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

106 Ibid 302 [699] (Callinan J), 213 [472] (McHugh J agreeing)

107 Ibid 353 [848] (Callinan J), 213 [472] (McHugh J agreeing)

108 Ibid 240 [561] (McHugh J), 398 [970] (Callinan J).

109 Ibid 240 [561] (McHugh J)

110 *Wilson v Anderson* (2002) 213 CLR 401, 445 [94] (Gaudron, Gummow and Hayne JJ).

111 Ibid 438-439 [71]-[73] (Gaudron, Gummow and Hayne JJ.

112 Strelein, above n 44, 82).

113 *Wilson v Anderson* (2002) 213 CLR 401, 452 [119] (Gaudron, Gummow and Hayne JJ); 422 [22] (Gleeson CJ agreeing).

114 *Mabo* (1992) 175 CLR 1, 70 (Brennan J); see also 110 (Deane and Gaudron JJ).

115 *Mabo* (1992) 175 CLR 1, 60 (Brennan J).

116 Brennan, above n 97, 213.

117 *Yorta Aboriginal Community v Victoria* (Federal Court of Australia, Olney J, December 18, 1998, unreported) [1998] FCA 1606 at [129].

118 *Yorta Aboriginal Community v Victoria* (2001) 110 FCR 244.

119 Tehan, above n 42, 213.

120 *Yarmirr & Ors v The Northern Territory of Australia & Ors* (2001) 208 CLR 1*, Western Australia v Ward* (2002) 213 CLR 1*, Wilson v Anderson* (2002) 213 CLR 401 *and Yorta Aboriginal Community v Victoria* (2001) 110 FCR 244.

121 Sean Brennan, 'The Significance of the Akiba Torres Strait Regional Sea Claim' in Sean Brennan et al (eds), *Native Title from Mabo to Akiba: A Vehicle for Change and Empowerment?* (Federation Press, 2015) 29.

122 *Akiba on behalf of the Torres Strait Regional Seas Claim Group v Commonwealth of Australia* (2013) 250 CLR 209.

123 *Akiba v Queensland (No 3)* (2010) 204 FCR 1; *Commonwealth v Akiba* (2012) 204 FCR 260.

124 Brennan, above n 121, 38-39.

125 (2013) 252 CLR 507.

126 (2014) 253 CLR 507.

127 Tehan, above n 42, 571.

128 *Griffiths v Northern Territory (No 3)* [2016] FCA 900.

129 Once registered, a PBC becomes a 'Registered Native Title Body Corporate' (RNTBC). For ease of expression, the term 'PBC' is used in this article.

130 Toni Bauman, Lisa Strelein and Jessica Weir (eds), 'Living with Native Title: The Experiences of Registered Native Title Corporations', (Australian Institute of Aboriginal and Torres Strait Islander Studies, 2013) 1, available at <http://www.nativetitle.org.au/documents/3%20Living%20with%20native%20title%20book%20interactive%20PDF.pdf>.

131 Particularly the *Native Title (Prescribed Bodies Corporate) Regulations 1999* (Cth).

132 See, eg, Deloitte Access Economics, 'Review of the Roles and Functions of Native Title Organisations' (2014); Council of Australian Governments, 'Investigation into Indigenous Land Administration and Use' (2015).

133 Toni Baumann et al, 'Navigating Complexity: Living with Native Title' in Toni Baumann et al, *Living with Native Title: The Experiences of Registered Native Title Corporations*, (*Australian Institute of Aboriginal Torres Strait Islander Studies 2013)* 21.

134 Michelle Riley, 'Winning Native Title: The Experience of the Nharnuwangaa, Wajarri and Ngarla People', (Native Title Research Unit Issue Paper No 19, Vol 2, Australian Institute of Aboriginal Torres Strait Islander Studies, 2002) 3, available at <http://www4.falm.info/au/journals/LRightsLaws/2002/7.pdf>.

135 International research suggests that 'collaborative governance is a valuable process for making progress on complex problems': Elizabeth Eppel, 'Collaborative Governance Case Studies: The Land and Water Forum', (Working Paper No. 13/05, Institute for Governance and Policy Studies, Victoria University, 2013), available at <http://igps.victoria.ac.nz/publications/files/ba954d8159a.pdf>.

136 Gaudron, above n 1.

137 Te Taumata Tuarua, 'Ko Aotearoa Tenei: A Report into Claims Concerning New Zealand and Policy Affecting Maori Culture and Identity', (Waitangi Tribunal Report, 2011) xviii, available at <https://forms.justice.govt.nz/search/Documents/WT/wt_DOC_68356606/KoAotearoaTeneiTT2Vol2W.pdf>.