WIK: LEGAL MEMORY AND HISTORY

Lee Godden[*]

> Rather, the gist of *Mabo [No 2]* lay in the holding that the long understood refusal in Australia to accommodate within the common law concepts of native title, rested upon past assumptions of historical fact, now shown them to have been false. Those assumptions had been made within a particular legal framework which had been developed over a long period.[1]

Introduction

The furore occasioned by the *Wik* decision and the subsequent political controversy about the role of the High Court and 'judicial activism'[2] has focused attention on the manner of legal change through the judicial decision-making process. It is evident that there has been a significant change from the position enunciated in *Milirrpum v Nabalco Pty Ltd and the Commonwealth* (the *Gove land rights* case) to that in *Mabo v State of Queensland (No 2)* (*Mabo (No 2)*).[3] More recently, *The Wik Peoples v The State of Queensland* (*Wik*) represented another extension of this process of legal change whereby legal doctrine has progressively recognised native title on the basis that the historical foundation upon which doctrine rested has been increasingly revealed as a false understanding of Australian history.[4] This article examines Australian native title jurisprudence to analyse the manner in which 'the particular legal framework' of common law reasoning defines

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* Lecturer, Faculty of Law, Griffith University. The article is dedicated to the reconciliation process in Australian society; to acknowledging our history in our law. The author would like to thank Shaun McVeigh for his considerable assistance in suggesting readings and in discussions which helped to illuminate many issues. The author also thanks the reviewers of the article whose comments assisted in clarifying many points. However, as always, responsibility for the ideas expressed remains with the author.

1 *The Wik Peoples v The State of Queensland* (1996) 187 CLR 1 at per Gummow J.

2 See the comments of the Queensland Premier, Rob Borbidge, and the leader of the National Party, Tim Fisher, in this regard in the period 10–14 March 1997. There was extensive media coverage of the debate. See, for example, A Meade, 'Whitlam blasts Borbidge over title', and DD McNichol, 'Land rights advocate doubts judicial method', both in the *Australian,* 11 March 1997, p 2.

3 *Milirrpum v Nabalco Pty Ltd and the Commonwealth* (1971) 17 FLR 141; *Mabo v State of Queensland (No 2)* (1992) 175 CLR 1.

A similar thesis has been proposed by a number of writers such as D Ritter, 'The "Rejection of Terra Nullius" in *Mabo*: A Critical Analysis' (1996) 18 *Syd LR* 5 and J Webber, 'The Jurisprudence of Regret: The Search for Standards of Justice in *Mabo*' (1995) 17 *Syd LR* 5.

4 *Wik* at 179 per Gummow J.

the relationship between law and history and encompasses legal change. Justice Gummow's comments in *Wik* concerning the declaratory theory and its implications for legal change provide the catalyst for this discussion, a discussion which focuses as much on the methodology of reasoning as on its substantive content.[5] It is argued that a new understanding of Australian colonial history has been incorporated into legal memory through the mechanism of a declaratory 'common law method'.

Such redefinition of legal memory, while necessary to decisions such as *Mabo (No 2)* and *Wik* does not resolve a paradox implicit to the common law reasoning. This paradox is best characterised as a change/immobility tandem which holds together, yet in opposition, a doctrine of precedent based on a policy of following previous decisions to preserve a sense of a collective past, together with a necessity for legal change. The central paradox posed by the process of legal change within a common law method of reasoning which incorporates the doctrine of precedent was averted to by Julius Stone some years ago. He posed the problem thus: 'what magic at the heart of the system of stare decis can transform a symbol of immobility into a vehicle of change?'.[6] The question raised here is how do judges deal with this paradox in native title jurisprudence through a particular construction of the relationship between law and history. As it is integral to the nature of a paradox that it cannot be resolved, then there cannot be an ultimate solution to this difficulty within native title jurisprudence. However, the declaratory theory of adjudication as propounded in recent cases acts as a largely rhetorical but nonetheless essential way of moving beyond this paradox by the courts.

Thus, in examining how changing visions of history are accommodated in law, we begin with this central dilemma emerging from Australian native title jurisprudence. On the one hand, according to a narrow view of adjudication and strict adherence to precedent, judges do not make law. The corollary of such a position would suggest that, in effect, they are unable to give cognisance to any revised understanding of Australian colonial history. But alternatively, existing legal doctrine has been shown to be predicated upon a false historical memory. How then to change the law to reflect what is now perceived as the true understanding of history but to remain within a designated role for adjudication and the bounds of precedent? From the majority judgments in *Wik,* it seems the answer lies in a revitalised sense of the scope and function of the declaratory process of common law reasoning. It is a process which uses as its fulcrum, a changed perception of historical fact; but the dynamic in law goes beyond the simple equation that a new history must compel a 'new' law.

Nonetheless, changing historical facts are marshalled in the two key decisions of *Mabo (No 2)* and *Wik* to support a supplanting legal memory whereby the legal fiction of terra nullius was rendered irrelevant and a counter memory of the co-existence of native title and other interests in land

5 However, it is conceded that it is difficult, if not impossible, to separate substance and form.

6 J Stone, 'The Ratio of the Ratio Decidendi' (1959) 22 *MLR* 597, p 597.

ultimately becomes the declared legal memory.[7] Recognition of alternative standpoints upon history has as its concomitant that law which rests on historical foundations may also have alternative formulations and may be declared to be different to that which rested upon an earlier, 'erroneous' understanding of history.

Common Law Declaratory Theory

The declaration of law in accordance with current perceptions of history has been regarded by some as untoward judicial creativity.[8] The idea that, within Australia's constitutional system, judges do not 'make' law reflects the ascendancy of popular sovereignty and an increasing prominence for parliamentary law-making.[9] Evans contends that a drive for certainty in the 19th century saw a hardening of the doctrine of precedent and a more narrow categorisation of the judicial function.[10] The extreme of this view, and one expressed recently as part of the opposition to the High Court's decision in *Mabo (No 2)* and *Wik*, is the stance that judges do not 'make' law; they simply declare or interpret that which has already been posited. With the rise of popular sovereignty, democracy and the bureaucratic state in the 18th and 19th centuries, that which was 'posited' increasingly meant statute law laid down by the people's parliament.

On this point, Postema suggests that '[i]n classical positivist theory precedent is seen as derivative in two respects: (1) its proper role is only to fill gaps in the law where the declared legislative will is silent, and (2) the nature and force of the precedent case is understood on the model of statute law'.[11] In contrast, there is an alternative position within common law reasoning which Postema calls the traditionary approach. This adopts a less binding function for precedent and emphasises that decisions should be adhered to on account of their reasonableness.[12] A traditionary approach shares some similarities with, but according to Postema, is not co-extensive with a natural law position in which law pre-exists the act of adjudication.[13] Increasing displacement of a natural law basis by positivism has been

7 This idea draws upon the idea of the declaratory theory of the common law. It is a view popularised as early as Blackstone, who argued that common lawyers do not 'make' the law but simply enunciate or declare existing principles. For a more complete discussion, see G Postema (1987) 'Some Roots of our Notion of Precedent' in L Goldstein (ed) *Precedent in Law*, Clarendon Press.

8 During 1997 there has been a sustained commentary about the judicial activism of the High Court by some Australian political leaders.

9 Within Australia, such a view was identified with 'strict and complete legalism', as enunciated by Sir Owen Dixon during his time as Chief Justice of the High Court. For example, see O Dixon, 'Concerning Judicial Method' (1956) 29 *ALJ* 468.

10 J Evans (1987) 'Change in the Doctrine of Precedent During the Nineteenth Century' in L Goldstein (ed) *Precedent in Law*, Clarendon Press, pp 35–9.

11 Postema (1987) p 15.

12 Ibid, p 17.

13 Ibid, p 18.

associated with a more confined scope for the declaratory theory. However, a central tenet of the declaratory theory has been retained in that judges are able to 'declare' the law as it stands at any one time. Such a declaration can encompass a change in the law to replace an earlier erroneous statement when true principles had been revealed.

Popular Sovereignty and Adjudication

Postema argues that elements of the positivist and traditionary approaches have been combined[14] although more recently a distinction between adjudication and legislative power has been emphasised. The view that judges do not 'make' but only interpret already posited law has come to be an accepted view of the function of adjudication as opposed to the making of law through legislation. Murphy questions the orthodoxy as to the supposed 'tension between statute and common law, between legislation and adjudication' by arguing that both co-exist within the common law system.[15] Arguably though, at least in Australia, aspects of that tension remain.

It is perhaps not coincidental that a positivist influenced delimitation of the proper scope of adjudication arose almost concurrently with the rise of the nation state and the predominance of democratic theory, the apogee of which is the sovereignty of the people expressed through the parliamentary law-making function.[16] Yet the working through of the constitutional struggles in Britain which culminated in the sovereignty of the people and thereby the priority of parliamentary law-making occurred over a long period.[17] This priority of the majority was preceded by a long history of the common law; the judge-made law, which readily encompassed notions of legal change. Such a constitutional tradition inherited and adapted to Australia was moulded together with elements taken primarily from the American federal constitutional structure to form the basis of Australia's federal constitutional fabric.[18] But the supremacy of Parliament was not seen by the founding 'fathers' of Australia's Constitution as an unmixed blessing.[19] Indeed, the concept of the supremacy of parliamentary law making co-exists in a constitutional structure which includes the doctrine of separation of powers predicated upon a system of checks and balances, including the independence of the judiciary, to ensure the effectiveness of the

14 Ibid, p 31.

15 WT Murphy, 'The Oldest Social Science? The Epistemic Properties of the Common Law Tradition' (1991) 54 *MLR* 182, p 185.

16 P Parkinson (1994) *Tradition and Change in Australian Law*, Law Book, pp 67–94.

17 JH Baker (1990) *An Introduction to English Legal History*, 3rd edn, Butterworths, ch 1.

18 For a general discussion of judicial law-making, see the Hon M McHugh, 'The Law Making Function of the Judicial Process' Parts I (1988a) 62 *ALJ* 15 and Part II (1988b) 62 *ALJ* 116.

19 For a detailed discussion of the development of the Australian Constitution, see JA La Nauze (1972) *The Making of the Australian Constitution*, Melbourne University Press.

rule of law.[20] Current debates about the 'proper' role of adjudication have tended to adopt a narrow conception of adjudication when discussing Australia's constitutional fabric.

If it is accepted that a more narrow view of the appropriate role of adjudication displaced an earlier, more expansive formulation of the scope of common law adjudication, then with respect to the jurisprudence of native title, this earlier formulation appears to be undergoing a renaissance. It is a renaissance wherein the notion of legal change by the judiciary is based on a declaration of law founded upon a changed view of history.[21] Moreover, this approach rests on an intricate relationship between legal memory and history.

While it has long been held the genius of the common law method of reasoning that it can adapt to prevailing social context, the need for legal doctrine to accord with prevailing histories of the settlement/conquest of Australia is a more novel contention. A recognition that there may be alternative visions of Australian colonial history poses a challenge for judges if a restricted view of adjudication is pre-eminent. If judges do not make but simply interpret that which exists, what exists, including the historical foundation upon which legal doctrine rests, must by implication be unitary and unchanging. Yet such an analytical framework for adjudication limits the potential for any legal change, as there is no mechanism for judges to bring legal doctrine to accord with any new understanding or perspective upon Australian history.

At one level, particularly evident in *Wik*, the resolution that is presented is that the changed but now 'true' history compels a new declaration of the law. But at another level, such an explanation is superficial as it denies the 'selection' of history through the legal memory of common law adjudication. In *Wik*, the choice between a feudal history and one more attuned to the circumstances of Australia's colonial pastoral settlement clearly distinguishes the majority and minority judgments and thereby the declaration of the relevant law.

Emergence of a Distinctively Australian Jurisprudence

The trend to recognise the uniqueness of Australian history and society in our law is not limited to native title jurisprudence. The need to develop an Australian jurisprudence that is responsive to changing understandings of Australian history and society has been a prominent theme of Australian law in the recent years.[22] While raising a debate about whether judges 'make' or change law, the emergence of a uniquely Australian jurisprudence in the late

20 For a discussion of the rule of law, see A Hutchinson and P Monahan (eds) (1987) *The Rule of Law: Ideal or Ideology*, Carswell.

21 Some have argued that the rise of 'realism' has seen the demise of the declaratory theory. See Lord Reid, 'The Judge as Law Maker' (1972) 12 *JSPTL* 22, p 22.

22 B Horrigan, 'Towards a Jurisprudence of High Court Overruling' (1992) 66 *ALJ* 199, p 200.

20th century also underscores the development of such a distinctive body of Australian law.[23] As Sir Anthony Mason stated, '[t]he belated recognition after the lapse of 800 years, that our judges make law, has concentrated attention on the place and role of values in the law'.[24] To date, much of the debate about legal change and consequently judicial activism has been confined to questions of the appropriateness of political neutrality of the High Court and the values which may, or should, underpin judicial decisions.

The notion of a constancy of values to which our understanding of doctrinal law must adhere has been a theme explored in analyses of the role of the High Court[25] and, more generally, as a question deserving of jurisprudential reflection.[26] Development of a law that reflects Australian history and society has been identified extra-judicially by a number of recent High Court judges.[27] It is echoed in an advice on the implications of the *Wik* case, prepared by the Commonwealth Attorney-General's office.

> The *Wik* decision provides evidence of a developing Australian jurisprudence on the common law principles for recognition and extinguishment, [of native title] and an approach which reflects the history of settlement and development in Australia.[28]

Wik does indeed continue a trend in Australian jurisprudence which reflects a recently acknowledged understanding of the history of settlement and development in Australia. In its ability to challenge long-held assumptions of Australian history and legal structure, the implications of the *Wik* decision extend beyond the development of principles relating to native title, although it is necessary to give due cognisance to the effect of the decision upon native title.

The Relationship between Common Law and History

A 'received' history as much as the 'received' law required revision in order to accommodate the progression from the *Gove Land Rights* case to the *Wik* decision. In *Wik,* the majority judgments adopt particular parameters for

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23 B Galligan, 'Realistic "Realism" and the High Court's Political Role' (1988) 18 *FLR* 40.

24 Sir Anthony Mason (1996) 'Rights, Values And Legal Institutions', ANU Public Lecture, Canberra, 13 August, p 1.

25 Sir Anthony Mason, 'Changing the Law in a Changing Society' (1993) 67 *ALR* 568.

26 For a discussion of the debate between realism, fundamental values and formalist reasoning, see R Dworkin (1986) *Law's Empire*, Fontana, and J Finnis, 'On Reason and Authority in Law's Empire' (1987) 6 *Law & Phil* 357.

27 For example, see the Hon Justice Toohey, 'Towards an Australian Common Law' (1990) 6 *Aust Bar Rev* 185.

28 Attorney-General's Department (Cth) (1997) *Legal Implications of the High Court Decision in The Wik Peoples v Queensland,* Current Advice, Attorney-General's Department, 23 January, p 20.

'history' which emphasise a detailed local context for the development of Australian land law. It is a vision of history which partakes of, but distinguishes itself from, the previously accepted, more monolithic understanding of the historical forces of imperial power, colonisation and settlement within Australia. This 'use' of history, which the majority adopt as a catalyst for legal change, allows for a continuity yet evolution of the law and thus goes some way in moving beyond the immobility/change paradox.

The More It Changes, The More It is the Same?

In discussing the recognition of native title and the question of the extinguishment of native title interests, courts have pondered the issue of legal change and the relationship between legal doctrine and history. In *Mabo (No 2)*, the leading judgment of Justice Brennan emphasised the need to bring legal doctrine into alignment with central human values, provided that such a realignment did not 'fracture the skeleton of the common law'.[29]

What has not been explored is a fundamental tension which exists in seeking to align historical and legal change within a common law method built in large measure on the retrospective practice of following a doctrine of precedent and, by reference, to unvarying values. In considering legal change and adherence to precedent, the application of the declaratory theory to native title law has come under judicial scrutiny. In *The State of Western Australia v The Commonwealth* (*Native Title* case), the declaratory nature of common law judgements was explored in the majority judgment of Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ.[30] The central issue to which this discussion related was whether section 12 of the *Native Title Act* 1993 (Cth) invested the common law, in respect of native title, with the force of a law of the Commonwealth. In this context, the common law was described in the following manner.

> But the common law is not found in a text; its content is evidenced by judicial reasons for decision. Isaacs J explained in *Australian Agricultural Co v Federated Engine-Drivers and Firemen's Association of Australasia*[31] ... that it is the declaratory nature of a judgment[32] ... that allows for the evolution of the common law: 'A prior decision does not constitute the law, but is only a judicial declaration as to what the law is. The declaration, unless that of a superior tribunal, may be wrong, in the opinion of those whose present function is to interpret and enforce the law.'[33]

29 (1992) 175 CLR 1 at 19. For a discussion of the relationship between values, morality and judicial decision-making, see S Berns, 'Judicial Decision Making and Moral Responsibility' (1991) 13 *Adel LR* 119; J Braithwaite, 'Community Values and Australian Jurisprudence' (1995) 17 *Syd LR* 351; and Webber (1996).

30 *The State of Western Australia v The Commonwealth* (1995) 183 CLR 373.

31 (1913) 17 CLR 261 at 275–276.

32 See also *Waterside Workers' Federation of Australia v JW Alexander Ltd* (1918) 25 CLR 434 at 463 and *Reg v Kirby; Ex parte Boilermaker' Society of Australia* (1956) 94 CLR 254 at 281.

33 *Native Title Act* case (1995) 183 CLR 373 at 485.

In *Giannarelli v Wraith*, Brennan J said:

> In the view of a court sitting at the present time, earlier decisions which are not binding upon it do not necessarily represent the common law of the earlier time, though they record the perception of the common law which was then current.[34]

His Honour went on to say that if a court, because it perceives the common law to be different from what it was earlier perceived to be, so declares it, then effect will be given to that declaration as truly representing the common law.[35]

> In construing s 12, the 'common law' must be understood either as a body of law created and defined by the courts or as a body of law which, having been declared by the courts at a particular time, may in truth be — and be subsequently declared to be — different. Whether the common law be understood by reference to its source in judicial reasons for decision or by reference to its content as developing from time to time, there are objections to its being treated as a law of the Commonwealth.[36]

The decision in the *Native Title* case, while upholding the validity of all other sections of the Commonwealth *Native Title Act* 1993, held that section 12, which imported the common law relating to native title, was invalid.

From this recent decision, there comes a view of common law as, 'an organic, developing but unwritten body of law'.[37] Evolution of the law, the change that is not change but a different and now true statement of the law, is effected through the declaratory function of a common law judgment.

With particular reference to the common law and native title, the majority stated:

> The common law relating to native title is not regulatory; it is substantive law the content of which is declared from time to time by the courts. *Mabo (No. 2)* is a dramatic example of how the declaration of the common law relating to native title can change when a new judicial examination is made of the basic legal principles which underlie a proposition earlier accepted.... The content of the common law will, in the ordinary course of events, change from time to time according to the changing perceptions of the courts.[38]

Legal change according to this view is contained within the declaratory nature of the common law judgment itself. In declaring the law, it is also

34 (1988) 165 CLR 543 at 584.

35 *Native Title Act* case (1995) 183 CLR 373 at 485 per majority (citations omitted).

36 Ibid.

37 Ibid.

38 Ibid at 486 per majority.

possible to acknowledge that it is different from that which was the earlier perception of the courts. But this proposition still leaves open the question of the catalyst for the different declaration.[39] Moreover, such a position skirts the issues as to why the earlier version of history can no longer be countenanced. But the acknowledgment that within the declaratory theory of judicial decision-making the law undergoes change indicates that there has been a movement away from strictly positivist conceptions of adjudication and from a narrow conception of the role of the judge. This position is more fully developed by Justice Gummow in *Wik*, where legal change is characterised as gradual, evolutionary rather than revolutionary and of necessity subsequent to social change.

Precedent, Evolution and Legal Change

As Justice Gummow stated in *Wik*,

> Perhaps the general understanding, with its emphasis upon the evolutionary and the functional was expressed by Lord Radcliffe in 1956 in his speech in *Lister v Romford Ice and Cold Storage Co Ltd:*[40]
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> 'No one really doubts that the common law is a body of law which develops in process of time in response to the developments of the society in which it rules. Its movement may not be perceptible at any distinct point of time, nor can we always say how it gets from one point to another; but I do not think that, for all that, we need abandon the conviction of Galileo that somehow, by some means, there is a movement that takes place.'
>
> Here is a broad vision of gradual change by judicial decision, expressive of improvement by consensus, and of continuity rather than rupture. Yet much of the common law is subjected to statutory modification, often drastic. The task of the courts then is to construe that statutory change to the common law, employing common law methods and techniques of interpretation and adjudication....[41]

Nonetheless, his Honour is prepared to concede that judicial change is not always of a glacial pace as he states at another point in his judgment. 'Movement also may plainly be perceptible, and there may be an explicit change of direction, where, in the perception of appellate courts, a previously understood principle of the common law has become ill adapted

39 At a more general level, the identification of a reference point for initiating judicial change has occasioned extensive jurisprudential debate, ranging from the positivist inspired views of John Raz, who argues that courts have regard to 'non legal' criteria (ie they exercise discretion), to ideas of an open textured reference to 'values'. For a discussion of some of these issues, see M Cohen (ed) (1984) *Ronald Dworkin and Contemporary Jurisprudence*, Rowan & Allenheld.

40 [1957] AC 555 at 591–592.

41 *Wik* at 179 per Gummow J.

to modern circumstances."[42] Justice Gummow then refers to points made as follows by Mason J in *State Government Insurance Commission v Trigwell.*

> If it should emerge that a specific common law rule was based on the existence of particular conditions or circumstances, whether social or economic, and that they have undergone a radical change, then in a simple or clear case the court may be justified in moulding the rule to meet the new conditions and circumstances. But there are very powerful reasons why the court should be reluctant to engage in such an exercise. The court is neither a legislature nor a law reform agency.[43]

Thus, the potential for change through the judicial decision-making remains one that should be exercised with caution, even though the declaratory theory is seen as able to encompass differing perceptions of fact and circumstance.

> There have been few adherents in recent times to a declaratory theory in an absolute form. For one thing, the principles and doctrines of equity were never 'like the rules of the Common Law, supposed to have been established from time immemorial'; rather, they were 'established from time to time — altered, improved, and refined from time to time.[44]

For another, to use the words of Windeyer J, '[l]aw is to be accommodated to changing facts'.[45]

One might note that the very idea of 'changing facts' and thus changing history is intriguing, given that according to accepted scientific understanding, facts are seen as objectively determined externally existent 'states of being' and thus immutable.[46] If facts themselves are seen as changeable, then how is history as an assemblage of facts to be understood? Which then leads us back to the problem posed for adjudication in recent native title jurisprudence, wherein law builds a new superstructure of doctrine upon a changing view of history. If facts and thereby history can change and are open to selection or rejection, do they then compel a particular legal outcome? How can the acceptance of such a new history and thereby a new doctrine be reconciled with a function of adjudication as an objective interpretation of already existent law constrained by the operation of precedent?

In *Wik*, facts and history are proposed as central core values to which law must conform. Any choice of a particular construction of history is

42 Ibid.

43 (1979) 142 CLR 617 at 63 per Mason J.

44 *Re Hallet's Estate* (1880) 13 Ch D 696 at 710 per Jessel MR.

45 *Ex parte Professional Engineers' Association* (1959) 107 CLR 208 at 267.

46 For a discussion of the association between science, objectivity, positivism and fact, see P Munz (1985) *Our Knowledge of the Growth of Knowledge: Popper or Wittgenstein?*, Routledge.

obscured by the attempt to 'naturalise' the now-accepted colonial history of Aboriginal dispossession of land and pastoral occupation.[47] A naturalisation of history also has resonances of a declaratory common law where judges looks to enunciate immutable values and immemorial principles. We now turn to examine how this accommodation or naturalisation of fact and history occurs in the three central native title cases identified in the introduction.

Fact, History and Law

An interaction of changing facts and history was specifically addressed in *Mabo (No 2)*. Justices Deane and Gaudron stated that they felt that the circumstances of the Aboriginal dispossession of land were such that it warranted a reopening of the validity of fundamental propositions of land law. In a more circumspect manner, Justice Brennan indicated,

> In discharging its duty to declare the common law of Australia, this court is not free to adopt rules that accord with contemporary notions of justice and human rights if their adoption would fracture the skeleton of principle which gives the body of our law its shape and internal consistency. Australian law is not only the historical successor of but is an organic development from the law of England. Although our law is the prisoner of its history, it is not now bound by decisions of courts in the hierarchy of an empire then concerned with the development of its colonies.[48]

While the High Court may have been able to adjust legal doctrine to changeable facts, Justice Blackburn was more closely bound by precedent in the earlier *Gove land rights* case.[49] In this case, it was argued on behalf of several Aboriginal clans from Arneham land on the Gove Peninsula that they should be granted relief in relation to possession and enjoyment of areas of Arneham land over which the Commonwealth had granted mining leases to Nabalco. Relief was sought on the basis that the clans had occupied the areas from time immemorial as of right. Under a doctrine of communal native title, the clans contended that the rights under native law were capable of recognition by the common law.[50] Further such rights must be respected by the Crown unless validly terminated. Building on this proposition, it was further argued that the bauxite mining leases granted by the Commonwealth over the land were invalid, as the land over which they were granted had never ceased to belong to the Aboriginal peoples of the clans.

The Court heard extensive evidence from anthropologists and members of the Aboriginal clans as to the customs, beliefs and social organisation of

47 'Naturalise' is used here to refer to natural law concepts whereby certain values/concepts are seen as existing beyond contingent, social construction.

48 *Mabo (No 2)* at 29 per Brennan J.

49 (1971) 17 FLR 141.

50 Ibid at 149.

the Aboriginal people of Australia and of Arneham land in particular.[51] It was established at a factual level that there existed an elaborate social system incorporating a relationship with traditional lands which was recognisable as a system of laws.

However, despite an acknowledgment at a factual level of a different perspective upon history to the prevailing legal memory of Australia's colonisation, it was held by Justice Blackburn that the doctrine of communal native title was not part of Australian law. Such a doctrine was inconsistent with the received view of Australia as a settled colony. Categorisation of Australia, or rather New South Wales, as a settled colony allowed for the application of English law in the overseas possessions of the Crown and this application did not allow for a recognition of indigenous communal land title.[52] Further, there was no explicit statutory recognition of Aboriginal rights. Although at a factual level the history of Australia at colonisation as a land without inhabitants having an established system of 'laws' had been displaced, the common law as declared by Justice Blackburn did not recognise the relationship of the clans to the Arneham lands as a recognisable right of property or as conforming to an interest in land under the relevant land acquisition legislation.

In this manner, the *Gove land rights* case straddles a transition. Historical facts are not only changeable but are changed as part of an altered perception of Australian history based on anthropological and Aboriginal oral evidence. But legal change without higher authority remains untenable, cannot be declared to be otherwise, although in many aspects, the supporting factual and historical infrastructure for the law relating to 'settled' colonies has been replaced by a counter-memory.

A revision of 'legal memory' by the adoption of a particular construction of history through the legal process had to await the *Mabo* and *Wik* decisions and a more expansive functioning of the declaratory process of common law reasoning. But this more expansive conception of the common law still retained history as its central reference point. The two decisions are remarkable for their reference to, and analysis of, 'empirical' and, by implication, neutral facts to support the declaration of legal principle. It is just that these 'facts' differ so markedly from the conception of history that had supported the enunciation of the previous legal memory of terra nullius and settled colonies.

Interestingly, in *Wik* it is acknowledged that the previous legal memory of terra nullius and settled colonies was not the only view of history that was open to law. A proposition is illustrated by the following statement by Justice Gummow in *Wik* when discussing the relationship between fact, 'dominant' history and legal change.

> At what level of primary fact does one perceive the disappearance of the foundation for native title by reason of the washing away by 'the tide of history' of any real acknowledgment of traditional law and

51 Ibid at 159–71.

52 Ibid at 262–274 per Blackburn J.

> real observance of traditional customs? Again, for example, one might speculate on the significance their Lordships in *Cooper v Stuart*[53] might have attached to the observations of Governor Hutt in 1841 had they been dealing with the position in Western Australia...[54]

Indeed, one may speculate about the potential impact of this different view of history, this counter-memory which acknowledged not only the existence of traditional indigenous law and real observance of traditional customs but also the effect of the pastoral occupation of inland Australia upon this law and custom as noted by Governor Hutt. Could enough 'facts' have been marshalled to challenge the perspective of the past upon which *Cooper v Stuart* was based? Perhaps it was then the only perspective on history that was made available, as the accumulation of a displacing counter-memory within Australian history and law did not reach sufficient gravity until 1992.

Mabo (No 2), Legal Memory and Australian Colonisation

As Justice Kirby notes in *Wik*:

> Before the decision of the Court in *Mabo v Queensland [No 2]* the foundation of land law in Australia was as simple as it was clear. From the moment the lands of Australia were successfully annexed to the crown, they became in law the property of the King of England. No act of appropriation reservation or setting apart was necessary to vest title in the land in the Crown ... land. Interests were thereafter enjoyed only as or under grants made by the Crown.[55]

That there was a gap between this legal doctrine and the factual situation was highlighted by his Honour in the following observation in relation to the vesting of all waste lands in the Crown. He notes: '[i]nto this settled and certain world of legal theory and practicality, the decision in *Mabo (No 2)* intruded'.[56]

In *Mabo (No 2)*, having displaced the paradigmatic legal principle of terra nullius,[57] the court was then able to consider more directly the local and specific historical facts constituting the counter-memory of indigenous occupation of land which formed a foundation for the recognition of native title. As Justices Deane and Gaudron state,

> It follows from what has been said in earlier parts of this judgment that the application of settled principle to well known facts leads to the conclusion that the common law applicable to the Colony in

53 (1889) 14 App Cas 286.

54 *Wik* at 183 per Gummow J.

55 Ibid at 205 per Kirby J.

56 Ibid at 206.

57 Justices Deane and Gaudron (ibid at 71) also differentiate between the act of state establishing New South Wales, which is not justiciable, and the 'assertion of rights within domestic law'.

> 1788, and thereafter until altered by valid legislation, preserved and protected the pre-existing claims of Aboriginal tribes or communities to particular areas of land with which they were specially identified, either solely or with others, by economic, social or ritual purposes.[58]

It is this sense of a memory long unacknowledged and linked with the concept of pre-existing rather than newly found rights in *Mabo* that is echoed in the present *Native Title Act* 1993 (Cth).

Discourse and Legal Change

In a 'discourse' analysis, Ritter argues that the problem for the High Court in *Mabo (No 2)* was to find a doctrinal explanation that would effectively quell ' the discursive crisis engendered by Milirrpum'. The solution lay in the doctrine of terra nullius. Ritter contends that the concept of terra nullius was doctrinally irrelevant to whether native title existed under Australian common law; however, it 'emotively connoted the historical reality of how Aboriginal people had been treated upon colonisation'.[59] He argues that a revision of history and of Aboriginal culture to reveal a different 'factual understanding' preceded the changes to legal doctrine.

Justice Gummow makes a similar point by reference to *Cooper v Stuart* and its discussion in *Mabo (No 2)*.

> As a step in their reasoning, their Lordships declared that the colony of New South Wales had peacefully been annexed to the Crown, being territory 'practically unoccupied, without settled inhabitants or settled law' .... Of that proposition it was said in *Mabo [No 2]*:
>
> 'The facts as we know them today do not fit the '"absence of law" or "barbarian" theory underpinning the colonial reception of the common law of England. That being so, there is no warrant for applying in these times rules of the English common law which were the product of that theory. It would be a curious doctrine to propound today that, when the benefit of the common law was first extended to Her Majesty's indigenous subjects in the Antipodes, its first fruits were to strip them of their right to occupy their ancestral lands.'[60]

In the interplay between history and law, changing historical visions are regarded as precipitative of changes in legal doctrinal understanding of native title. Ritter and other commentators argue that an alternative perspective upon Australian colonial history was a necessary precondition to the *Mabo (No 2)* decision. Moreover, implicit to their view is the assumption that that there cannot be 'historical fact' which exists independently of a constituting cultural perspective to that historical fact. The potential for *Mabo (No 2)* to be seen as an alternative 'historical discourse' upon our colonial past has been mooted.[61]

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58 *Mabo (No 2)* at 100 per Deane and Gaudron JJ.

59 Ritter (1996) pp 26–32.

60 *Wik* at 181–182 per Gummow J.

61 For an example, see N Pearson, address given when Director of the Cape York

As Burton-Phillips states,

> Valuing the fact that Australians have backgrounds and cultures drawn from all over the world has rendered aspects of our current constitutional structures anachronistic.... It also reveals a view of our history which expands beyond the frontier-mentality expressed by orthodox Anglo-centric views. Once this perspective is seen in its specific cultural context as only one of the perspective of the past which is available, it is possible to properly review the structures put in place when it was the dominant, indeed only view expressed.[62]

Once historical facts are established contrary to those on which the legal doctrinal foundation rested, then 'erroneous' law must be reinterpreted and subsequently declared in this new light.

An analysis whereby a given understanding of history is challenged by a contrary perspective and thus becomes the legal memory is, at one level, appropriate in suggesting a change of constituting perspective, the replacement of one mode of historical and legal discourse by another. But at another level, it cannot provide an adequate explanation for how this substitution becomes part of an 'organic whole' that is central to the evolution of common law as identified in the *Native Title* case. Arguably, it describes what has happened without analysing how that replacement is effected within common law reasoning. In Stone's terms, it cannot explain the magic whereby the seemingly immobile precedent of *Cooper v Stuart* is retained yet distinguished on the facts and becomes part of the vehicle of legal change which recognises native title and finds such interests not extinguished by pastoral leases.

In explaining the immobility/change tandem in the development of the common law, it is more instructive to see the declaratory theory of common law adjudication as it operates within native title jurisprudence as akin to a dialectical relationship between history and legal change rather than one of competing and necessarily substitutive discourses. Categorisation of the relationship of law and history as one of competing discourses suggests a determinancy for history that is not substantiated in Australian native title jurisprudence. History, while influential, cannot compel but facilitates the declaration of law. If it was otherwise, then the *Gove land rights* case would have been decided differently. A dialectical relationship founded on the continuity of declaratory common law methodology has allowed the High Court to acknowledge a changed historical foundation for legal memory without fracturing the skeleton of the immutable values and earlier precedents defining that common law framework.

Land Council, on 'Late Night Live', ABC Radio National, Tuesday, 30 May 1995.

62 S Burton Phillips (1995) 'Self Determination: What is it and what are its Implications?', paper presented at the National Environmental Law Conference, Sydney, 14 September, p 6.

> Thus, it was appropriate to declare in 1992 the common law upon a particular view of past historical events. That view differed from assumptions, as to 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.[63]

Wik and a Revision of Australia's Pastoral History

Building on the re-evaluation of Australian history implicit to *Mabo (No 2)*, we now turn to an explicit recognition of the different histories of land use in feudal England and colonial Australia in the majority judgments in *Wik*. Traditional English property law as a prevailing legal memory or 'legal heritage' (the term employed by Justice Gummow) is reassessed in these judgments in the light of a reappraisal of a particular history of the settlement of Australia.[64]

The Findings in Wik

The decision of the High Court in *Wik*, by a majority of one, held that the grant of a pastoral lease under statute did not extinguish native title but that native title might co-exist with the rights of the lessee. Where there was an inconsistency between those interests; the interests of the pastoralist prevailed. The central argument that a lease conferred exclusive possession and thus extinguished native title was distinguished by the majority judgments as being applicable to leases at common law. However, as the leases in question had been granted under the *Land Act* 1910 (Qld) and *Land Act* 1962 (Qld), then as creatures of statute, they were to be seen as conferring an interest consistent with the construction of the statute under which they were granted. That statutory bundle of rights comprising a pastoral lease did not confer exclusive possession. Other rights of access and use of pastoral land, including those of indigenous peoples, were maintained when the *Land Acts* under which the leases were granted were considered in the light of contemporary circumstances.

The majority judges in *Wik* held that the common law concepts integral to leases were not necessarily imported into the statutory leases. As Justice Gummow stated, 'land law is but one area in which statute may appear to have adopted general law principles and institutions as elements in a new regime, in truth the legislature has done so only on particular terms'.[65] Even more forcefully, Justice Gaudron commented,

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63 *Wik* at 182 per Gummow J.

64 The impact of the declaratory theory of adjudication is referred to by Justice Gummow when, in discussing *Mabo (No 2)*, he adverts to the 'declaration of the content of the common law upon a particular view which now was taken of past historical events': ibid.

65 Ibid at 182 per Gummow J.

> It is clear that pastoral leases are not the creations of the common law. Rather, they derive from the specific provisions in the Order in Council of 9 March 1847, issued pursuant to the *Sale of Waste Lands Act Amendment Act* 1846 (Imp) and, so far as is presently relevant, later became the subject of legislation in New South Wales and Queensland. That they are now and have for very many years been anchored in statute law appears from the cases which have considered the legal character of holdings under legislation of the Australian states, and, earlier the Australian colonies authorising the alienation of Crown land.[66]

Reference to the local and unique situation surrounding the development of the statutes in Australia and the particular history of pastoral occupation of eastern Australia provides the support for the majority finding that the leases are creatures of statute. The reappraisal of Australian pastoral occupation is undertaken by the majority in *Wik* as part of a very careful interpretative approach.[67] The judges turn their attention to the local, to documenting the specific historical facts surrounding the concept of pastoral leases, understood as creatures of statute rather than as conforming to feudal theories of the English property law. It is this statutory regime that encompasses the legal heritage, the legal memory that is the particular history of settlement and development unique to Australia.

As Justice Toohey notes,

> The grant of the pastoral leases with which these appeals are concerned did not take place in an historical vacuum. It reflected the history of land grants in Queensland. That history cannot be understood without some reference to what had taken place in New South Wales of which Queensland earlier formed part.[68]

From a similar perspective, Justice Kirby states,

> It is useful to record, briefly, something of the history of the emergence of pastoral leases in Queensland. As a result of the different patterns of availability and utilisation of land in England, such leases were unknown in that country. They are creatures of Australian statutes.[69]

The unique nature of these property institutions is reiterated by Justice Toohey and he details the 70 or so forms of unique tenure that developed in Queensland. Emphasis upon these tenures as contained in legislation is regarded as part of the re-focus upon Australian history.

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66 Ibid at 149 per Gaudron J.

67 His Honour Justice Robert French characterised the majority judgments in this manner in an address given to the conference *Wik, The Way Forward*, Brisbane, 7 February 1997.

68 *Wik* at 108 per Toohey J.

69 Ibid at 226 per Kirby J.

As Justice Toohey notes,

> To approach the matter by reference to legislation is not to turn one's back on centuries of history nor is it to impugn basic principles of property law. Rather it is to recognise historical development, the changes in law over the centuries and the need for property law to accommodate the very different situation in this country.[70]

Legal Consequences of a New Understanding of Australia's Pastoral Occupation

The importance of the finding that pastoral lease are creatures of statute for the question of whether native title is extinguished by pastoral leases is that such leases are not seen as conferring exclusive possession. Exclusive possession would imply that the pastoralists moved onto an 'empty' land. Indeed, some mid-20th century historical accounts of the squatting age suggest just such a scenario.[71] A more recent revision of the history of Australia's pastoral occupation during the 19th century and early 20th century reveals the presence of indigenous peoples upon the land that was occupied and attempts of the Imperial and later Colonial Parliaments to balance the interests of the pastoralists and the Aboriginal peoples' right to remain on their traditional lands.[72] Such a perspective upon history marks a similar change in supporting facts to that which occurred with respect to Australia's initial colonisation in *Mabo (No 2)*.

In *Mabo (No 2)*, the changed historical understanding largely related to the nature of Aboriginal and Torres Strait Islander culture and occupation of the land upon the establishment of British sovereignty over Australia. In *Wik*, the changing historical facts relate to the circumstances upon which the later pastoral occupation of Australia was effected. From the majority judgments, there emerges a sense of history where the demands of the pastoralists for 'security of tenure' are placed in the context of Imperial policy and Australia's unique physical and social environment.[73] Such an historical context compels the finding that property institutions fashioned in England and drawing upon feudal concepts were replaced by those more suited to local conditions. Part of those 'local' conditions, it is now acknowledged, included the presence of Aboriginal people who continued to occupy and use their land according to traditional custom and law where they were not totally displaced by the relentless progression of pastoral occupation. The history of a simultaneous occupation of pastoral land also

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70 Ibid at 112 per Toohey J .

71 The idea that squatters moved into an empty land was perpetuated in many school texts which, until the latter part of the 20th century, provided a history of exploration and pastoral occupation with little or no reference to aboriginal people. For a discussion, see, S Ryan (1996) *The Cartographic Eye: How Explorers Saw Australia*, Cambridge University Press, p 23.

72 *Wik* at 143 per Gaudron J.

73 Ibid at 108–112 per Toohey J.

provides the context for the development of the legal concept of co-existence of interests, albeit that pastoral interests prevail over native title interests to the extent of any inconsistency.

The changing historical facts marshalled by the majority serve as a foundation upon which to displace the prevailing legal 'heritage' or memory of feudal doctrines and English land law concepts as inapplicable to the particular circumstances surrounding the grant of the Holyroyd and Mitchelton leases. Even so, it needs to be recognised that there is no wholesale displacement of English land law in relation to the more general incidents of property institutions within Australia.[74] The majority judgments, while declaring the law with respect to native title and pastoralism, ensure that any change is evolutionary and remains part of an organic whole. Statutory change is accommodated through common law methods and techniques.

Indeed, the need for caution is captured by Justice Gummow when he rejects the attempt to make a general extension of native title principles apart from a specific context.

> From such a foundation, the further elucidation of common law principles of native title, by extrapolation to an assumed generality of Australian conditions and history from the particular circumstances of the instant case, is pregnant with the possibility of injustice to the many, varied and complex interests involved across Australia as a whole. The better guide must be 'the time-honoured methodology of the common law'[75] whereby principle is developed from the issues in one case to those which arise in the next. On the present appeals, this requires close attention to the terms of the 1910 Act and the 1962 Act.[76]

Thus, there is a view of continuity preserved by the common law method, of the careful development of principle, despite the radical reformation of its historical basis. Such a position underscores the fact that the process of common law adjudication retains its traditional legitimacy through its methodological consistency, even while incorporating a changing substantive conception of law and history.

Conclusion

Juxtaposition of the three indigenous peoples' land rights cases reveals a process of substantiation of particular historical fact through the legal process. It is a history at first denied legal substantiation in the *Gove land rights* case but later affirmed in *Mabo (No 2)* and ratified in *Wik*. It is a use of history incorporated as legal memory through the declaratory methodology of the common law, which illuminates not so much a 'reconstruction' of Australian history but a dialectical relationship which holds within its

74 Ibid at 182 per Gummow J.

75 *R v Van der Peet* (1996) 137 DLR (4th) 298 at 377 per McLachlin J.

76 *Wik* at 184 per Gummow J.

oppositions the change/immobility paradox. Fact and law, once seen as the only possible account of Australian 'history' whose consequence was to compel a finding of no land rights, is challenged by a counter-memory. A changing historical perspective supports a legal memory which is declared as representing the true statement of the common law.

Mabo (No 2) commenced a revision of Australia's history of colonisation and settlement in terms of the legal commemoration of Australia's past through recognition of native title. The *Wik* decision continues that revision by causing us to re-examine the manner in which traditional concepts of English land law can be accommodated to the Australian social and historical environment. In an analogous manner to *Mabo (No 2)*, the majority judgments in *Wik* reveal the disjuncture between historical fact and previous legal doctrine but they also set in place, through the declaratory method, a process for a greater accordance between law and the 'current' history of Australian pastoral occupation.

That there is a relationship between acceptance of a given history and legal change with respect to native title jurisprudence is clear. Contentious reception of native title decisions has spotlighted the historical bas relief on which such decisions are formulated. Yet the extent to which other well-accepted legal doctrine relies upon less controversial understandings of fact and history is rarely explicitly acknowledged. An explanation may lie in the contention that, despite the common law's retrospective nature and claims sometimes made that it has existed since time immemorial, the common law method is often presented as ahistorical.[77]

Whatever the source of an ahistorical treatment of legal decision-making, with little cognisance of a contextual, historical foundation, then law can be represented as a free-standing edifice of already posited law, which simply requires interpretation and not 'law-making' by the relevant judicial authority.

But the artificiality of not acknowledging any inter-relationship of law and history is readily apparent by reference to Australian native title jurisprudence. On this aspect, Justice Gummow seems to have identified a lacuna in our understanding of the relationship between law and history. Lawyers have 'been bemused by the apparent continuity of their heritage into a way of thinking which inhibits historical understanding'.[78]

If we are to begin to understand, let alone acknowledge, our unique Australian history in the formulation of legal norms, at first instance, we need to recognise the inter-relationship of history and law. Secondly this relationship must be seen together with long-standing traditions of law-making within common law adjudication. Law can no longer present an ahistorical countenance yet, as suggested, to reduce legal change to historical determinism has its own inherent limitations. While a reinvigorated declaratory theory of the common law cannot resolve all tensions between change and continuity based on following precedent, it does provide a framework in

77 A factor perhaps yet again attributable to the predominance of positivist understandings of the function of adjudication.

78 *Wik* at 182 per Gummow J.

which these dialectics can be addressed. Moreover, reliance upon the 'time honoured methodology of the common law' serves to emphasise the importance of the long, established history of adjudication, which, together with statutory law-making, informs and structures Australia's constitutional fabric.

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