Re-evaluating *Mabo*: the Case for Native Title Reform to Remove Discrimination and Promote Economic Opportunity

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Abstract
This paper seeks to reanalyse the *Mabo* case from the point of view of non-discrimination. It argues that the *Mabo* judgment may have been discriminatory in finding that pre-existing entitlements in surviving native title are restricted to the limited range of activities that can be proven by reference to traditional law and custom and that native title fails as a means of improving the economic and social opportunities of Indigenous Australians because of these restrictions. It suggests that native title law should be reformed on the basis of possession to recognise Indigenous peoples' full and beneficial ownership of their land where this has not been extinguished. The allocation of property rights to Indigenous people should not be limited by misguided and discriminatory assumptions about Indigenous culture and custom.

About the Author
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Re-evaluating *Mabo*: the Case for Native Title Reform to Remove Discrimination and Promote Economic Opportunity

Shireen Morris[1]

Introduction

> English law…paid great respect to possession: it was 'nine points of the law'… The truly amazing achievement of Australian jurisprudence has been to deny that the Aborigines were ever in possession of their own land, robbing them of the great legal strength of that position… The intellectual and moral gymnastics required to sustain that position have been quite extraordinary…[2]

The *Mabo* decision was a landmark for Australia. It recognised, finally, that Indigenous Australians had property rights that were capable of surviving colonisation and the acquisition of sovereignty by the Crown. However, the legal construction of native title is in some important aspects discriminatory. As a result of High Court interpretation and legislation, native title accords Indigenous people an inferior form of property right. Instead of being a forward-looking fee simple based on possession, native title is a history-focused bundle of entitlements bound by traditional law and custom in a way that, in today's world, is economically restrictive. Perhaps as a result, native title has underperformed in ensuring the social, cultural and economic viability of Indigenous Australians living on Indigenous land.

This paper poses two arguments. The first is that the *Mabo* judgment was discriminatory in finding that pre-existing entitlements in surviving native title are restricted to the limited range of activities that can be proven by reference to traditional law and custom; *Mabo* should have recognised Indigenous peoples' prior and continuing right to full and beneficial land ownership where these rights have not been extinguished. The focus on traditional law and custom is inappropriate because it is founded in inflexible assumptions about the culture and aspirations of Indigenous people, which arguably were not supported by the evidence presented in *Mabo*. Even if historically true, this should not be legally enforced in a way that curtails the freedom of Indigenous communities to choose and change their relationships to land.

The second argument is that native title fails as a means of improving the economic and social opportunities of Indigenous Australians because of these restrictions, and because its inalienable and usually communal nature is ill-suited to economic development in the modern Australian economy. Further, native title's failure to provide equal property rights for Indigenous people means that it fails as an instrument of reconciliation.

The time is now right for a rigorous and rational analysis of the fairness and effectiveness of the current native title regime.

Two systems of land law

The law governing the allocation of land to traditional Indigenous owners creates a system of property rights that is distinct from the 'mainstream' common law property rights enjoyed by non-Indigenous people. Grounded in English legal principles, mainstream land law grants indefeasibility of title for those who own land and gives owners the ability to sell, mortgage or lease their interests. Of course, Indigenous people are free to buy land in the mainstream system.

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[1] Shireen Morris is the Constitutional Reform Research Fellow at Cape York Institute for Policy and Leadership. The views expressed in this paper are the author's and do not represent the views of the Institute. The author would like to acknowledge the ongoing leadership, work and publications of Noel Pearson, whose ideas and writing have greatly influenced the author's thinking on these complex issues. She would also like to thank Mick Schuele and Shannon Burns at Cape York Institute for their drafting advice, the AIATSIS peer reviewers and editing team, and her family for commenting on early drafts.

[2] H Reynolds, *The law of the land*, Penguin, 2003, p. 4.

The land rights regimes put in place to remedy Indigenous peoples' dispossession are based primarily on the *Native Title Act 1993* (Cth) (NTA) and various state and territory statutory land systems. In Queensland this includes the *Aboriginal Land Act 1991* (Qld) (ALA). When compared to mainstream property rights, the rights conferred on Indigenous Australians under native title and adjoining state systems are restrictive, limited and do not amount to land ownership in the economic sense. While this paper will focus on *Mabo* and native title, it will make some reference to the ALA, as the Act demonstrates similar and relevant legal attitudes, which help to shed light on the problems with Indigenous land tenure in Australia generally.

The paper seeks to prompt discussion of the following questions: Why are Indigenous Australians allocated property rights inferior to those of non-Indigenous people under mainstream Australian property law? Is a pre-existing Indigenous legal system strictly necessary for the recognition of pre-existing property rights? Is Western understanding of Indigenous cultural history a sound and just basis for the differentiation in Australian land law? Given that the principles of native title have been legislated and can therefore be altered by parliament, is there not a better policy approach? Finally, is the separate system of land law for Indigenous people working to achieve its apparent aims?

Reanalysing *Mabo*

Overturning discrimination but re-entrenching discrimination

The *Mabo* judgment overturned a longstanding discrimination in Australian property law based on the fiction of *terra nullius*. The doctrine of *terra nullius*, land belonging to no one,[3] was the idea that Australia was uninhabited when the British arrived, or that the native inhabitants lacked requisite sophistication and political organisation, thereby enabling the British Crown to acquire sovereignty over the territory of 'backward peoples'.[4] In recognising the existence of native title, the High Court overturned an entrenched racism based on the denial of Indigenous existence or, worse, a belief that Indigenous Australians were subhuman.[5]

Mabo rejected the proposition that 'the Sovereign acquired absolute beneficial ownership of all land because "there is no other proprietor"', a claim which denied 'that the indigenous inhabitants possessed a proprietary interest'.[6] Brennan J asserted: 'Judged by any civilised standard such a law is unjust and its claim to be part of the common law to be applied in contemporary Australia must be questioned.'[7] The cases pre-*Mabo*,[8] Brennan J argued, were wrong to construct Indigenous inhabitants as 'intruders in their own homes and mendicants for a place to live'.[9]

In light of our contemporary standards regarding racial discrimination[10] and the now acknowledged illegitimacy of Social Darwinism, which placed whites at the top of the evolutionary chain and blacks at the very bottom, *Mabo*'s finding that *terra nullius* was a legal and factual fiction was long overdue. Yet the *Mabo* judgment also created a paradox. The case confirmed that, where unextinguished, Indigenous peoples' native title to their land survives colonisation, but it did not confirm surviving Indigenous *ownership* of such land—at least not in the way that land ownership is understood in the common law.

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3 Ibid., p. 14.

4 *Mabo v Queensland [No 2]*(1992) 175CLR 1, 32.

5 See N Pearson, 'Where we've come from and where we're at with the opportunity that is Koiki Mabo's legacy to Australia', Mabo Lecture, National Native Title Conference, Alice Springs, 3 June 2004.

6 *Mabo v Queensland [No 2]* (1992) 175 CLR 1*,* 30–1.

7 Ibid., 29.

8 See *Attorney-General v Brown* (1847) 1 Legge 312; *Randwick Corporation v Rutledge* (1959) 102 CLR 54 at 71; *NSW v The Commonwealth* (1975) 135 CLR 337.

9 *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 29.

10 Ibid.; *Racial Discrimination Act 1975* (Cth); *International Convention on the Elimination of All Forms of Racial Discrimination,* ratified by Australia.

The problem arose at the next step of legal reasoning following the rejection of *terra nullius*, when the High Court asked: what *type* of property right should Indigenous people be recognised as having under Australian law? Having overturned a great discrimination, the High Court then proceeded to allocate property rights to Indigenous people in an inadvertently discriminatory way.

The High Court found that native title was a mere 'occupancy', a personal right to use the land in accordance with traditional law and custom.[11] This focus on traditional law and custom followed from the finding, inherent in overturning the doctrine of *terra nullius*, that Indigenous people *did* demonstrate sophisticated laws and social organisation.[12] Thus, the judges considered the recognition of Indigenous law and custom to be important to the recognition of Indigenous property; indeed, native title works by extending legal recognition in the Australian system to rights and interests held under the pre-colonial Indigenous system.

This logic should not be taken for granted. Rather, the importance of traditional law and custom in recognising native title and how such traditional law and custom is to be ascertained and understood by modern day judges should be questioned.

Over-emphasis on culture and custom has entailed discrimination

In *Mabo*, Deane and Gaudron JJ described native title as being subject to 'three important limitations'.[13] The first was inalienability—that is, the land could not be bought, sold or transferred outside the native title system, apart from by surrender to the Crown.[14] The second and related limitation was that native title was only a 'personal right' and did not 'constitute a legal or beneficial estate or interest in the actual land'. Native title was therefore constructed as being equivalent to a 'mere equity'[15] or licence. The third limitation was that native title was susceptible to being extinguished by the Crown.[16]

It was held that the bundle of personal rights that make up native title must be ascertained by reference to the Indigenous claimants' traditional laws and customs. Native title rights therefore vary from claim to claim and depend on claimants proving a continuing connection with the land in accordance with traditional Indigenous practices.[17]

Confusingly, our current native title system uses a 'racial' classification to attach cultural assumptions to Indigenous people[18] even though 'race' as a scientific category has now been discredited. Indeed there is only one 'race'—the human race. If we agree that the law should accord equal rights and freedom of opportunity regardless of alleged race or culture, then the legal content of native title must be critically examined. The correlation *Mabo* makes between a group's cultural and behavioural practices historically and that group's rights in theory, or their potential rights, to their land is problematic. It has come to limit Indigenous peoples' future rights to their land under Australian law.

Communality

In addition to the three limitations mentioned above, a fourth may be added: native title is generally, in practice, a communal landholding. In *Mabo,* the communal nature of native title rights derives from an emphasis on the communal nature of Indigenous culture.[z] However, the communal nature of native title is not set in stone. If proof of traditional law and custom established individual landholdings, nothing in the law would prevent the recognition of individually held native title. Brennan J also asserts that 'there is no impediment to the recognition of individual proprietary

11 *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 110.
12 Ibid., 39; *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141, 267.
13 *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 88.
14 Ibid.
15 Ibid.
16 Ibid., 89.
17 Ibid., 110.
18 The NTA, in s 253, defines 'Aboriginal peoples' as 'peoples of the Aboriginal race of Australia' and 'Torres Strait Islander' as 'a descendant of an indigenous inhabitant of the Torres Strait Islands'.

rights',[19] a sentiment echoed in s 223 of the NTA. In practice, however, the inalienable, communal and non-economic nature of native title as described in *Mabo* is quite inflexible. It is further entrenched by the legislative framework[20] and the way in which native title claims are argued and proved. Because of the construction of native title, the whole native title claims system is geared towards proving traditional and communal relationships to land.

In the *Mabo* judgment the evidence and logic supporting the correlation between a group's culture and custom and the content of their property rights is far from clear. For example, on the one hand Brennan J notes Moynihan J's earlier finding in the Queensland Supreme Court that 'there was apparently no concept of public or general community ownership among the people of Murray Island, all the land…being regarded as belonging to individuals or groups'.[21] On the other hand he asserts that 'communal life based on group membership seems to have been the predominant feature of life' among the Meriam people.[22]

Brennan J's second point could be said to be true of every culture. Most if not all of us have our histories rooted in ancient communal and traditional cultures; yet the historically communal or cultural characteristics of our diverse non-Indigenous cultures are not enforced in the present day through our non-Indigenous land law. Of course, as non-Indigenous people acquiring property rights under the mainstream system we generally do not go to court to try to prove our surviving rights to the land; instead we pay money for it.[23] Is it that act, the purchase, that entitles us to a fee simple estate whereas native title claimants just get rights of use in accordance with traditional law and custom? This explanation does not seem sufficient. Arguably, it is misplaced cultural inquiries in the legal reasoning that have worked to discriminatorily limit the content of native title rights.

Inalienability

The assumption that native title land must be inalienable is central to the characterisation of native title rights as weak, non-economic rights, as distinct from a fee simple, which gives owners the power to sell, mortgage and lease according to their choice. Several arguments have been advanced in defence of the inalienability of native title land. In *Mabo* Brennan J reasoned:

> True it is that land in exclusive possession of an indigenous people is not, in any private law sense, alienable property for the laws and customs of an indigenous people do not generally contemplate the alienation of the people's traditional land.[24]

What is meant by 'contemplate' in this context? And, with respect, how does Brennan J know what an Indigenous people's laws and customs generally do or do not contemplate for their land, given the great diversity of Indigenous cultures across Australia and the world, and given that the evidence presented in *Mabo* only concerned one group? I note His Honour also uses the present tense to make this point, so the contemplation that the Indigenous people are said to be undertaking regarding the inalienability of their land is occurring circa 1992. In making this point, Brennan J makes the mistake of assuming that, in 1992, the general Indigenous views and aspirations for land have not changed, and that the views and aspirations are homogenous.

Brennan J's use of the word 'generally' is instructive in analysing the legitimacy of the assumption being made. The assumption is indeed a generalisation, albeit one that may have been founded in some historical truth. But why should such a cultural generalisation still be enforced in Australian law upon one subset of Australians in a non-flexible way?

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19 Ibid.

20 For example, the NTA (s 211) allows for use of natural resources for 'personal, domestic and non-commercial' use only.

21 *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 22.

22 Ibid., 17.

23 Note, however, that an adverse possessor under our common law must also go to court to prove his or her title and, if successful, is entitled to a fee simple in the land—fee simple ownership, with all the requisite rights. Why is the emphasis on culture legally relevant to Indigenous people but not non-Indigenous people? See ibid., 161 and N Pearson, 'Promise of Mabo not yet realised', *The Australian*, 29 May 2010.

24 *Mabo v Queensland [No 2]* (1992) 175 CLR 1*,* 51.

Brennan J extrapolates his traditional law and custom argument in favour of inalienability thus:

> …unless there are pre-existing laws of a territory over which the Crown acquires sovereignty which provide for the alienation of interests in land to strangers, the rights and interests which constitute a Native Title can be only possessed by indigenous inhabitants and their descendants. Native Title, though recognised by the common law, is not an institution of the common law and not alienable by the common law.[25]

But how could Indigenous people create 'pre-existing'—that is, pre-colonial—laws to provide for the alienation or trading of their land to so-called strangers (presumably non-Indigenous people) before those strangers had arrived in Australia, and therefore probably before those strangers could have existed in the minds of the Indigenous people concerned? If by 'strangers' Brennan J is referring to Indigenous people from other clans or tribes, what about the view of some historians that Indigenous people would often battle each other for hunting and fishing rights over particular areas of land?[26] Does this behaviour not indicate that alienation of land rights or land ownership was indeed a possibility—one to be fought over and adamantly defended? Indeed, the fact that Indigenous people engaged in bloody defence of their land against the colonisers[27] would also support the argument that Indigenous people knew that alienation of their land was a very real possibility.

While Brennan J argues that inalienability is justified because Indigenous people did not 'contemplate' alienation and Indigenous laws and customs did not allow for it, the colonial argument in favour of native title inalienability was very different. The argument was put forward in the Imperial government's rejection of Batman's attempted treaty with Indigenous people in 1835. John Batman claimed that he had negotiated a treaty with the clans of Port Phillip Bay. As Reynolds explains, the authorities 'refused to recognise the transaction'.[28] It was reasoned by lawyers that, while the colonisers had 'gained ultimate dominion in and sovereignty over the soil,' the Indigenous people retained a 'right of occupancy'.[29] But, because the colonisers were sovereign, allowing Indigenous people rights to sell the land would be inconsistent with the rights of the Crown to retain 'sovereignty and dominion' over that soil.[30] Far from inalienability being a protective restraint to ensure that Indigenous people retain their land in accordance with their laws and customs and do not lose it to market pressures (which is the common concern cited today in favour of inalienability), the notion of inalienability initially was a restraint on the natives' power of choice and control of their land for the purpose of reserving power and control of land for the new sovereign. To this end it was believed appropriate that only the Crown could alienate native title land through extinguishment of native title—not the natives themselves, who, it was considered, had nothing to gain from the right to alienate or sell their land to 'private ventures'.[31] This belief, unlike Brennan J's argument, had little to do with whether or not Indigenous people themselves 'contemplated' their land being alienated or whether their laws allowed for alienation —indeed the attempted treaty with Batman would indicate that the Indigenous people wanted, like real owners, to make deals regarding alienation.[32] Rather, it was about the Imperial government controlling how land was alienated, instead of allowing Indigenous people and white settlers to strike bargains for themselves. Even at this early stage Indigenous people were excluded from the free market emerging in the new settlement. In this early exclusion, it appears, the natives' wishes, views, and laws were irrelevant.

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25 Ibid., 59.

26 H Reynolds, *The law of the land*, Penguin, 2003, p. 72.

27 See, for example, D McKnight, *From hunting to drinking: the devastating effects of alcohol on an Australian Aboriginal community*, Routledge, 2002, pp. 21–22.

28 H Reynolds, op cit., pp. 153–54.

29 Ibid., p. 159.

30 Ibid.

31 Ibid., p. 158.

32 See also Governor King's account of some early negotiations with Aboriginal people regarding their dispossession in 1804: *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 104.

In *Mabo* the issue of inalienability is approached somewhat circularly. The inalienability and communality of native title rights are intertwined with their usufructuary[33] nature.[34] The communal and inalienable rights amount to non-economic rights and align neatly with the proposition that native title is not an interest in the land itself. Because native title is not an interest in the land itself, it is inalienable; because native title land is not alienable by the native title holders, it is not an interest in the land itself. The underlying assumption of this reasoning is, ironically, the very assertion that *Mabo* tried to overturn—that is, that Indigenous people were not really owners of their land.

The evidential problem

The construction of native title in *Mabo* as a mere personal right to use and occupy the land in accordance with traditional law and custom was arguably not supported by the evidence presented in the case. Similarly, the often expressed idea that communal and inalienable property rights are best suited to Indigenous culture appears at odds with the land ownership values evidenced by the Meriam people in *Mabo*.

Brennan J's judgment begins by quoting Moynihan J's description of Indigenous life and culture on the Murray Islands: people lived in 'groups of huts' and houses, and they cultivated land.[35] Garden land, it said, was 'identified by reference to a named locality coupled with the name of relevant individuals', presumably those who were in charge of that garden.[36] Brennan J also refers to Captain Pennefather's 1882 description:

> The natives are very tenacious in their ownership of the land and the island is divided into small properties which have been handed down from father to son from generation to generation, they absolutely refuse to sell their land at any price, but rent small portions… [They] build good houses and cultivate gardens, they are a powerful, intelligent race…[37]

The Acting Government Resident at Thursday Island similarly reported in 1886:

> There is no doubt that if every acre has not a reputed owner (and I am inclined to think that every acre has) but every grove or single tree of any value has its proper and legitimate hereditary owner.[38]

Brennan J also notes the changes to the Indigenous culture that may have started to occur as Western influences began to increase. He quotes a Cambridge anthropologist's 1898 observations that 'in a few instances it is not impossible that English ideas, especially of inheritance are making themselves felt. There is no common land and each makes his own garden on his own land at his own convenience.'[39]

These passages indicate the evidence that was before the High Court in *Mabo*, which clearly demonstrates both individual and family hereditary land ownership, and an economic system of land ownership in which individual owners were empowered to make choices about their land. The Indigenous owners described *chose* at times to rent out, but not to sell, their land. Their ownership of their land was empowered and intelligent.[40] Does the fact that the Meriam people chose not to sell mean that the *right* to sell did not exist?

It may be that the court's finding on the content of native title rights was reached by reference to evidence dating back far earlier than the descriptions above, perhaps even prior to the time colonisation, 1788. But if this were so, and the Meriam people's communal customs and traditions had changed so much that by the 1880s, and certainly by 1992, individual ownership was practised,

[33] A usufructuary right is the right of enjoy property that is vested in another. It is a 'leftover right'—a right to use rather than a right of ownership.

[34] *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 51.

[35] Ibid., 17.

[36] Ibid.

[37] Ibid., 21–2.

[38] Ibid.

[39] Ibid., 24.

[40] Ibid., 22

by Brennan J's own reasoning this would lead him to conclude that the Meriam people's native title no longer existed.[41] If the evidence presented in the case suggests that the individual land ownership the Meriam people demonstrated was a change that occurred post-colonisation, why did the court find that the traditional laws and customs had been maintained? But if this individual ownership was practised before colonisation, why then was it held that native title rights were communal, inalienable, personal rights rather than individual rights in the land itself—real ownership? In this regard the conclusion reached in *Mabo* that native title rights are ascertainable by reference to traditional law and custom is internally inconsistent and seems to lack an evidential basis.

The relevance of culture and custom to property rights allocated is questionable. Even if we accept that Indigenous cultures were communal, with sharing of resources an entrenched part of custom, what does this usefully tell us about land and property rights? As Hiatt argued, 'The fact that Aborigines admired generosity...should not mislead us into thinking they lacked a concept of ownership.'[42] Likewise, just because the Meriam people chose not to sell does not mean that they did not possess the *right* to sell.

The equality before the law problem

Mabo is also inconsistent in its application of the principle of equality before the law. When the British acquired sovereignty of Australia, the English law became sovereign. Brennan J asserted that 'in a settled colony in inhabited territory, the law of England was not merely the personal law of the English colonists; it became the law of the land, protecting and binding colonists and indigenous inhabitants alike and equally'.[43] The Meriam people became British subjects and were 'entitled to such rights and privileges and subject to such liabilities as the common law and applicable statutes provided'.[44] Yet after assessing the evidence that the Murray Islanders owned their land, the court concluded that English property law should apply to Indigenous people in an unequal and culturally relative way.

Brennan J purports to reject the racism of earlier colonial times. In reality, however, the limited, merely personal rights allocated to native title by the High Court employ the same colonialist double standards as demonstrated in the *Re Southern Rhodesia* case of 1919, which *Mabo* sought to overturn. That case described Indigenous tribes as '…so low in the scale of social organisation that their usages and conceptions of rights and duties are not to be reconciled with the institutions or the legal ideas of civilised society…it would be idle to impute to such people some shadow of the rights known to our law and then to transmute it into the substance of transferable rights of property as we know them.'[45]

Ironically, by refusing to acknowledge that the Indigenous interest in land—at very least in a theoretical, potential, or rights-based sense—is an *ownership* interest equal to that presumed by English law, the *Mabo* judgment itself refuses to 'reconcile' Indigenous law and custom with Western common law property rights. This is despite the evidence to support the argument that Indigenous land use is readily 'transmutable' into the Western system. The *Mabo* decision therefore inadvertently applies the *Southern Rhodesia* reasoning quoted above.

This cultural relativism has carried through to more recent cases. In *Ward*, for example, the court said it could not 'impose common law concepts of property on peoples and systems which saw the relationship between the community and the land very differently from the common lawyer'.[46] Again, cultural generalisations collide with assumptions about how Indigenous people *saw* their relationship to land, rather than how they see it in the present day.

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41 Ibid., 45.

42 L Hiatt, 'The Tasmanian Aborigines', *Quadrant*, vol. 47, no. 4, 2003, p. 5; B Attwood, *Telling the truth about Aboriginal history*, Allen & Unwin, 2005, p. 129.

43 *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 37.

44 Ibid., 38.

45 Ibid., 39.

46 *Western Australia v Ward* (2002) 213 CLR 1, [90].

If Brennan J had applied his own reasoning that after the assertion of sovereignty the laws of England should apply *equally* to Indigenous and non-Indigenous people alike, he should have concluded that English land law principles should be used to recognise Indigenous people's rights to land where their land ownership or possession has not been extinguished or appropriated. Arguably, therefore, the *Mabo* reasoning does not follow the overturning of *terra nullius* to its logical conclusion.

Where was the concept of native title born?

The confusion about the origin of the native title concept comes in part from latent confusion between acquisition of sovereignty and acquisition of land ownership, an issue Brennan J explores.[47] As French CJ has noted, the *Mabo* decision confirmed that when the Crown acquired the Australian colonies it also acquired sovereignty of the land. That is why the Crown, in exercising its sovereignty, is able to extinguish native title.[48] Arguably, the judges' attempt to recognise in native title some form of continuing Indigenous authority to self-govern through an acknowledgment of traditional laws and customs surviving colonisation[49] is inconsistent. It is at odds with Brennan J's assertion that the Indigenous people became equal subjects of the English law, with equal rights and protections. If Indigenous people lost their lawmaking authority and were from then on bound to follow English law upon the assertion of British sovereignty, contemporary evidence of Indigenous law and custom should be irrelevant to the determination of their land rights.

In questioning the relevance of traditional law and custom to native title, it is useful to imagine what would have happened if the Indigenous people of Australia had had no laws or customs at all—if they were, as was often the racist colonial assumption, 'barbarians' or lawless 'savages'. Even if this were the case, the English law *non-discriminatorily* applied—and *terra nullius* having been overturned—would recognise that demonstrated occupation and possession entitles the Indigenous inhabitants to a title 'good against all the world'.[50]

Perhaps one reason for the High Court's arguable error was the assumption that native title 'is not an institution of the common law' and therefore that 'Australian law can protect interests of members of an indigenous clan or group…only in conformity with (their) traditional laws and customs'.[51]

But it could be thought of another way. Indigenous people had full beneficial ownership of the land before the British arrived. Before the English common law came to Australia there was no 'native title'; there were only Indigenous people using, possessing and owning their land as they saw fit, without restriction, as people do in every culture. Native title is a wholly Western, common law construction. Native title rights, therefore, should confer Western, common law ownership rights rather than attempting to replicate pre-colonial laws and customs. The creation of native title in the High Court should therefore be seen as a political compromise, one that should attempt to recognise Indigenous land ownership and possession where this has not been extinguished or compromised by other interests.

A discriminatory burden of proof

The over-emphasis on traditional law and custom has also led to a discriminatory burden of proof. As Pearson asserts, current law posits a 'discriminatory estimation of the nature of native title' that amounts to 'whatever berry-picking rights indigenous claimants must be able to prove by reference to their traditional laws and customs as they existed in 1788'.[52]

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47 Ibid., 43.

48 French CJ, 'Native Title—a constitutional shift?', JD Lecture Series, University of Melbourne Law School, 24 March 2009. See *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 64.

49 S Brennan, L Behrendt, L Strelein & G Williams, *Treaty*, The Federation Press, 2005, p. 77.

50 *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 206.

51 Ibid., 60.

52 N Pearson, 'Promise of Mabo not yet realised', *The Australian*, 29 May 2010.

In *Yorta Yorta* it was held that, due to forces of colonisation, traditional practice was interrupted and customs were altered, so the particular native title no longer existed.[53] The claimants noted the 'massive alterations in technical, environmental and economic circumstance', the 'impact of depopulation from disease and conflict during the early years of settlement', the policies under which Indigenous children had been separated from their parents and policies of 'absorption, segregation and integration', which meant that 'much had changed in Aboriginal society as a result of European settlement'.[54] The traditions and customs practised, the claimants contended, were thus in 'adapted form'.

This, however, did not fulfil what the judges said was required in order to prove surviving native title rights. Rather, it was held that the claimants needed to prove continuous and uninterrupted survival of *pre-colonisation* traditional laws and customs.[55] While the case acknowledged that the contemporary laws and customs need not be identical to their pre-colonial origins, and that even 'significant adaptations' would not be fatal, ultimately the 'adapted form' of cultural practice demonstrated by the Yorta Yorta people was not enough.

This type of reasoning can be traced back to Brennan J's reasoning in *Mabo.* Brennan J acknowledged that European settlement displaced many Indigenous clans and altered their connections with their land. But he held that 'where a clan or group has continued to acknowledge the laws and…customs based on the traditions of that clan…where by their traditional connexion with the land has been substantially maintained, the traditional community title of that clan or group can be said to remain in existence… However, when the tide of history has washed away any real acknowledgement of traditional law and…customs, the foundation of native title has disappeared.'[56]

This required burden of proof is unreasonable given the impact colonisation has had on Indigenous people.[57] Former Australian Prime Minister Paul Keating is right to suggest that the burden of proof should be reversed so that there is a presumption of ongoing connection unless the opposite can be proven.[58]

The Hon. Michael Kirby has similarly argued:

> The high hopes that the *Mabo* case provoked, that land rights would alter the economic dynamics of indigenous Australians, have only been partly fulfilled. Other cases and laws have taken away what was given, including by insisting on a burden of proving links to the land that is sometimes hard to discharge in the absence of records and documents. Contrast the way, in a stroke, the New Zealand Parliament has changed this in that country, under a conservative government, by reversing the necessary burden of proof… It is past time for such a law. Without economic change and responsibility, social progress will remain pitifully slow.[59]

Native title as a special measure for Indigenous equal opportunities

I have discussed why, as a matter of legal principle, native title law may be unjustly discriminatory to Indigenous people, both in the content of native title rights and with regard to the required burden of proof. I turn now to practical outcomes. If we are to assess the effectiveness and fairness of the current regime, we must first identify the purpose that native title was intended to fulfil.

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53 *Yorta Yorta v Victoria* (2002) 214 CLR 422, 458.

54 Ibid., 435.

55 Ibid., 434, 444.

56 *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 59.

57 H Reynolds, *The law of the land*, Penguin, 2003, pp. 229–30; see also N Pearson, 'Land is susceptible to ownership,' in *Up from the mission: selected writings*, Black Inc., 2009, p. 102

58 D Nason, 'Reverse proof of title, says Paul Keating', *The Australian*, 1 June 2011.

59 M Kirby, 'Constitutional law and Indigenous Australians: challenge for a parched continent', paper delivered at the Law Council of Australia discussion forum Constitutional Change: Recognition or Substantive Rights?', 22 July 2011, pp. 23–24.

What is the purpose of native title?

The High Court in *Mabo* was attempting to reconcile two competing realities: the fact of the original occupation and possession of Australia by its Indigenous inhabitants, and the fact that the colonists and their descendants had already acquired 'many titles and privileges' to this land.[60] The law of native title, in a political sense, is the law of reconciliation and political compromise—a compromise that must be reached between coloniser and colonised in a fair post-colonial society.

The preamble to the NTA clarifies the legislation's intended purpose with regard to non-discrimination. It says that by enacting the NTA: 'The people of Australia intend to rectify the consequences of *past injustices* by the *special measures* contained in this Act…for securing the adequate advancement and protection of Aboriginal peoples and Torres Strait Islanders…'[61] The NTA is thus constructed as having 'special measures' to enable 'equal enjoyment of human rights and fundamental freedoms' according to the *Racial Discrimination Act 1975* (Cth) (RDA) and the *International Convention on the Elimination of All Forms of Racial Discrimination* (ICERD) to which s8 of the RDA refers.

A special measure is an action undertaken to assist a disadvantaged group to achieve substantive equality with the rest of the population—or, as the liberals among us would put it, to help a disadvantaged group or person access equal opportunities so that they can help themselves. Understood as a measure addressing dispossession, the NTA can therefore be understood as a measure to promote equality in land ownership and property rights.

Is native title achieving its aim?

Has the NTA achieved its self-proclaimed aim of advancing Indigenous equality? If not, is it at least moving Indigenous Australians in the right direction? Are Indigenous Australians being provided with equal opportunities on their returned land? Is native title law helping us 'close the gap'?

The truthful answer to these questions is 'no'. Indigenous Australians are not afforded the freedoms, nor the opportunities, on their land that non-Indigenous property owners enjoy. Native title land has not, in general, assisted Indigenous Australians to participate in Australia's prosperous economy. It cannot be used effectively as an economic asset (at least not by Indigenous Australians). Indeed, Indigenous wellbeing has probably deteriorated since native title and land rights have been achieved.[62]

Land rights should provide Indigenous people with real and useable assets to generate wealth, promote independence and prosperity, and propel Indigenous participation in Australia's economy. Yet today passive welfare and entrenched poverty persist in 'land rich' remote Indigenous communities. Indigenous people are still, as described by former Indigenous Affairs Minister Amanda Vanstone, 'land rich but dirt poor' due to the 'overly bureaucratic system imposed on them'.[63]

This bureaucratic system that Vanstone refers to is epitomised by the NTA and the ALA, both of which impose many restrictions on the economic use of Indigenous land. The NTA allows for only 'personal, domestic and non-commercial' use of natural resources.[64] This derives from the construction of rights protected undernative title as only those rights and interests possessed under the traditional laws and customs of the Indigenous people,[65] as per the *Mabo* judgment. Similarly, there is a lack of individual land ownership and people are perpetually reliant on government-funded social housing.

The ALA appears to provide marginally stronger property rights to Aboriginal people than the NTA, as

60 N Pearson, 'Land is susceptible to ownership,' in *Up from the mission: selected writings*, Black Inc., 2009, p. 101.

61 *Native Title Act 1993* (Cth), preamble (emphasis added).

62 See H Hughes, M Hughes & S Hudson, Submission to Native Title Leading Practice Agreements Discussion Paper, Centre for Independent Studies, 2010; H Hughes, *Lands of shame,* Centre for Independent Studies, 2007; P Sutton, *The politics of suffering*: *Indigenous Australia and the end of the liberal consensus,* Melbourne University Press, 2009.

63 S Peatling, 'Black dilemma: land rich, dirt poor', *The Sydney Morning Herald*, 24 February 2005.

64 *Native Title Act 1993* (Cth) s 211.

65 Ibid., s 223.

it is communal freehold. Even so, under the ALA mortgage and sale is prohibited for transferred land[66] and a lease can only be created with the minister's written consent,[67] with an added requirement for ministerial consent to use the lease for commercial purposes.[68] Before approving a commercial lease, the minister must assess 'the proposed lessee's financial and managerial capabilities…'[69] Similar requirements apply for commercial projects on Aboriginal land.[70] The Act prescribes a very high level of government control and involvement.

Both the NTA and the ALA fail to produce substantive equality or economic participation. Both have three characteristics in common: communality, inalienability and lack of effective land administration.

Pearson has argued that the main failure of public policy in alleviating poverty in Indigenous communities has been the failure to recognise that 'the main actor in development is the individual'. If we want to 'close the gap,' he says, we need to employ the three maxims of liberal economic philosophy: 'self-interest, choice and private property'.[71] The current native title legal and administrative framework ensures that there is no private property ownership. A communal framework arguably inhibits self-interest. The constraint of inalienability inhibits individual and community choice. Lacking transferable and adequately documented individual title, Indigenous people are prevented from using their land to participate in the real economy.[72]

These practical limitations are symptoms of the underlying problem with the conceptualisation of native title discussed earlier. The cultural assumptions made for native title seem to ring true for the ALA as well.

The problem is that the NTA does not deliver *real land ownership* to Indigenous people; instead, it delivers rights to use and occupy land in accordance with traditional law and custom. Traditional law and custom, so the circular logic goes, does not include individual ownership, land transferability or economic development.

What reform should occur?

Possession

Even if Indigenous people had no law or custom, possessory title under English law should still have meant that the occupants had possessory title 'good against all the world except a person with a better claim'.[73] Indigenous customary law should have been irrelevant.

According to English law, there is a presumption that a fee simple (ownership) right exists where *possession* can be shown.[74] There is no requirement of traditional law or custom for the rest of the Australian population to exert this right. Demonstrated acts of possession are all that is required. As Pearson has asked: why has the English law of possession been upheld for the Crown's subjects generally, but not for the benefit of native citizens?[75]

In *Mabo*, only Toohey J acknowledged that simple possession was also a valid claim for the native title applicants. He found that the evidence of occupation of the Meriam Islands by Eddie Mabo's people may have demonstrated possession under English law.[76] In my opinion, the applicants' legal and moral case on the basis of simple possession was clear and the judges in Mabo were wrong to ignore it.

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66 *Aboriginal Land Act 1991* (Qld) s 40C.
67 Ibid., s 40I.
68 Ibid., s 40G.
69 Ibid., s 40G.
70 Ibid., s 77G.
71 N Pearson, 'Adam Smith and Closing the Gap,' *The Weekend Australian*, 24–25 July 2010.
72 N Pearson, review of Hernando de Soto, *The mystery of capital: why capitalism triumphs in the West and fails everywhere else* (Basic Books, 2000), Australian Public Intellectual Network.
73 *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 206
74 Ibid.
75 N Pearson, 'Mabo legacy is still misunderstood', *The Australian*, 27 June 2007.
76 *Mabo v Queensland [No 2]* (1992) 175 CLR 1,212.

The law of possession is a better alternative to the current native title law. It is far simpler to prove and, once proved, allocates a far better property right—a fee simple. Both the reference to law and custom in the NTA and restrictions on the economic use of native title land should be removed. The NTA should be reformed to recognise Indigenous possession of land.

Indigenous land law, whether under the NTA or state land Acts, could be reformed to allow for multiple uses[77] according to community aspirations for their land. For example, tenure zones could include individual or family owned freehold; transferable ownership in townships where appropriate, with registered title; individual or family owned commercial use; transferable blocks where appropriate, with registered title; more accessible commercial leases, with opportunities for outside investors; communally held and inalienable land, non-transferable, on which commercial leases might exist, suitable for eco-tourism or other uses; and communally held and inalienable protected cultural and sacred sites.

Community choice should be central to how land is managed and used. In Alaska, for example, the 1971 Alaska Native Claim Settlement Act was passed to form village corporations that manage land in the same way as companies. As in Australian native title, their shareholdings (land) were inalienable and thus subject to a very limited internal market that was not conducive to economic development. The Act, however, allows shareholders to vote to make land alienable if they wish.[78] Australia should think about introducing similar flexible models that give freedom of choice to Indigenous community members.

Managing the risks

Full ownership rights would include the right to sell land, which Indigenous people currently do not have. With this comes the possibility that economic assets may be mismanaged. This argument is often put forward in support of inalienability, presumably because Indigenous communities are poor and often uneducated and, as in colonial times, people fear that Indigenous people may be tricked out of or bullied off their land. This legitimate fear arises because of the history of dispossession that Indigenous people have suffered.

The past is one thing. But arguably, for substantive equality and equality in rights to be achieved, Indigenous people, and Australia as a nation, must find a way to move beyond this sort of fear, or at least to manage it so that progress can still occur. Communities should have the choice of converting to alienable and individual title, particularly in township areas, if they wish. Any Indigenous land reform of this nature would need to be accompanied by free financial and legal advice for new Indigenous land owners.

It also must be acknowledged that with equal rights come equal responsibilities. Being responsible means managing risks and making difficult choices. Indigenous people should not be sheltered from equal responsibility; nor should they be denied equal rights. Why is it that members of every other culture in Australia are allowed to manage the land they own as they wish, while Indigenous Australians are generally not afforded this choice and are still, as they always were, told what to do and how to do it? Indigenous responsibility is still denied and individual rights ignored in favour of collectivist assumptions. Indigenous irresponsibility is thus exacerbated and perpetuated.

Indigenous people should be trusted and supported to manage their land and the risks that land ownership brings to owners of every culture. Eddie Mabo's people, as the evidence in the case demonstrated, were empowered owners. They refused to sell, *but they had a choice*. There is no reason to suppose that Indigenous people today could not, with the right support and education, be equally empowered.

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77 H Hughes, M Hughes & S Hudson, Submission to Native Title Leading Practice Agreements Discussion Paper, Centre for Independent Studies, 2010.

78 C Helin, *Dances with dependency: out of poverty through self-reliance*, Ravencrest Publishing, 2006, p. 226.

Conclusion

As Wilson J commented in *Gerhardy v Brown*:

> The difference between land rights and apartheid is the difference between a home and a prison. Land rights are capable of ensuring that a people exercise and enjoy equally with others their human rights and fundamental freedoms. Apartheid destroys that possibility.[79]

As a matter of public policy, there is no logic to the millions of public dollars spent on lengthy native title claims that are often doomed to fail because of the discriminatory burden of proof. Likewise, the money and time spent by governments to enable Indigenous people to have their land rights recognised does not pay off in social or economic outcomes because of the restricted nature of the native title rights. If the Commonwealth Parliament wants maximum social gain for its time and expense, it should give Indigenous people full beneficial ownership rights to their returned land, not just 'berry-picking rights'.[80] Why go to all the effort simply to have Indigenous people perpetually reliant on social housing and handouts because Indigenous land is a dead asset?

Before Western law arrived in Australia, Indigenous people had full beneficial ownership of their land. To assume otherwise is to employ the fallacious Eurocentric logic that because Indigenous people had not ploughed, logged and subdivided Australia they were not beneficial owners and did not have an economic relationship with their land. It is the same as saying that lack of logging, ploughing and subdividing shows lack of civilisation or social organisation, supporting a conclusion that the land was *terra nullius*. This reasoning is discriminatory and must be reformed. It arises from colonial theories that perpetuated the myths of non-European people as being somehow genetically or biologically inferior to suit colonial purposes. As Blaut explains:

> One such theory was the postulate that non-Europeans have not developed concepts of private property in important material resources such as land. The theory asserted that private property emerged from ancient European roots…that other civilisations, lacking this history (and by implication, lacking mental and cultural qualities associated with this history), remained at a stage of evolution in which true individual ownership could not be fully conceptualised… In fact, the theory was developed mainly by lawyers and administrators in the European colonial offices and corporations, and had one very concrete purpose: to establish a legal basis for expropriating land from colonised peoples, on the fiction that the colonised had no property rights to this land because they had no *concept* of property rights in land.[81]

Native title, as constructed by Australian law, has not been in existence since time immemorial. But Indigenous ownership, possession and occupation of the land has. The colonisers perhaps could be excused for failing to recognise Indigenous land ownership when they saw it, due to ignorance and racism. Today there is no excuse. It was our Australian law that constructed the idea of native title in its current limited form. Our Australian law should now make it better.

If native title is to be the foundation of a new relationship between Indigenous and non-Indigenous Australians, as Keating hoped,[82] it must be reconstructed on the basis of equality of Indigenous rights to land. If we can learn to see Indigenous Australians as equals perhaps we will realise that their relationships to their land are, and always were, also equal.

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79 *Gerhardy v Brown* (1985) 159 CLR 70, 136.

80 N Pearson, 'Promise of Mabo not yet realised', *The Australian*, 29 May 2010.

81 JM Blaut, *The colonizer's model of the world: geographical diffusionism and Eurocentric history*, The Guildford Press, 1993, p. 25.

82 See B Attwood, *Telling the truth about Aboriginal history*, Allen & Unwin, 2005, p. 29.

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