Native Title Legislation Under Attack: The West Australian Challenge

Samantha Hepburn*

This article considers the nature and impact of the Western Australian challenge to the Commonwealth Native Title Legislation[1] in *WA v Commonwealth.*[2] Consideration is given to the character and operation of the Commonwealth legislation and the nature of the challenge launched by the Western Australian government. It is suggested that the most important effect, overall, of the High Court decision to uphold the validity and operation of the NTA in Western Australia is the recognition, acceptance and tolerance it displays towards native title rights and compensatory rights for the extinguishment of native title rights. The decision reinforces the developments introduced by *Mabo v Queensland (No. 2)*[3] and the NTA.

On a more specific level, the WA decision systematically examines constitutional and intergovernmental difficulties purportedly associated with the NTA (the details of which shall be considered further in the article), rejects the allegation that the NTA is discriminatory according to the provisions of the *Racial Discrimination Act* 1975 (C'th), considers the discriminatory effect of the *Land (Titles and Traditional Usage) Act* 1993 (WA) according to the provisions of the *Racial Discrimination Act* and invalidates s 12 of the NTA, but only to the extent that the provision is interpreted as an attempt to make common law immune from affectation by the exercise of legislative power. The invalidation of s 12 of the NTA does not, however, affect the validity of any other provision in the legislation. Whilst the WA decision may not represent such a landmark decision as that in *Mabo (No.2)*, it highlights the willingness of the High Court to

* Lecturer in Law, Deakin University.

1 *Native Title Act* (1993) C'th ('*NTA*')

2 (1995) 128 ALR 1

3 (1992) 175 CLR 1 ('*Mabo (No. 2)*')

"make room" for the effective and flexible operation of native title within the Australian constitutional and common law infrastructure. Before considering the WA decision in detail, a brief overview of the scheme of the NTA is considered so that the WA decision can be put into perspective.

1. The Native Title Legislation

While *Mabo (No.2)* was a great move forward for aboriginal land rights, it left unresolved a number of key issues. In particular cases it may be difficult to establish whether or not native title actually exists, the nature and extent of the title, whether that title has been extinguished and, if not, the relationship of that title with respect to other interests in land. The *Native Title Act* which was introduced by the Commonwealth government seeks to establish a process for resolving these types of concerns.

The NTA was introduced with the express aim of achieving the following objectives:

(i) Recognising the validity of native title and laying down some basic principles regarding the application of native title;

(ii) provide for the validation of past acts which may be invalid due to the existence of native title; projected and conditions imposed on acts affecting native title land and waters;

(iv) provide a tribunal process by which native title rights can be established and compensation determined, and by which determinations can be made as to whether future grants can be made or acts done over native title land and waters; and

(v) provide for a range of other matters, including the establishment of a National Aboriginal and Torres Strait Islander Land Fund.

2. Commonwealth Approach to Native Title

The major purpose of the Commonwealth in enacting this legislation was to recognise and protect native title (ss 3 and 10). The Commonwealth has sought to adopt the common law definition of native title. Native title is defined within the legislation as the rights and interests that are possessed under the traditional laws and customs of Aboriginal peoples and Torres Strait Islanders in land and waters that are recognised by common law and this is set out in s 223(1). Section 223(2) of the legislation further defines "rights and interests" to include hunting, gathering or fishing, rights and interests. The emphasis of the whole section is upon

rights which directly correspond with the actual usage and cultivation of the land. Furthermore, s 223(3) incorporates statutory rights into the native title ambit by stating that the expression "native title" will cover any rights and interests which would have been included within s 223(1) but which have since been converted into or replaced by statutory rights which are applicable to the same land or waters that the native title interest relates to.

The definition of native title under s 223 of the NTA differs from that which was introduced under *Mabo (No.2)*. The definition of native title under the NTA appears broader. Brennan J in *Mabo (No.2)* defined native title as

> "the interests and rights of indigenous inhabitants in land, whether communal, group or individual, possessed under the traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants."[4]

The definition of native title under the NTA is more comprehensive and categorical in the sense that the scope of such title and the type of rights associated with it are expressly set out within the statutory provisions. Native title under the NTA covers both land *and* waters and it extends the notion of rights to include not only possessory rights, but also rights associated with the cultivation and usage of the land. The NTA definition of native title is broader because it's purpose is to expand upon the founding principles relating to native title introduced by *Mabo (No.2)* rather than enacting a completely distinctive and separate definition. The NTA was able to make express reference to a variety of differing rights attaching to native title because of the conclusion in *Mabo (No.2)* that native title rights are determined according to traditional customary laws rather than the common law.[5] In this way, the definition of native title under *Mabo (No.2)* and that contained within the NTA were intended to operate together to create and expand upon the concept of native title rather than independently.

3. Protection of Native Title

Once native title is established and recognised, the Act seeks to protect and entrench such title. According to s 10, native title as defined by the Act will be "recognised and protected in accordance with the Act". Furthermore, in s 11(1), native title as defined by the Act is not able to be extinguished in a manner which is contrary to the Act. In both of these

---

4 Above, at n 3, at 57

5 See P O'Connor "Aboriginal Land Rights: *Mabo & Ors. v. Queensland*", (1992) 18 Monash University Law Review 251 at 259.

provisions the NTA seeks to safeguard the statutory creation and enforce ability of native title rights and prevent the destruction or extinguishment of native title by any act which is not recognised or accepted by the Act. Obviously these provisions are relevant for the WA decision as we shall see further in the article.

4. Validation of Past Acts

The Act provides for the validation of past acts which have been carried out in respect of land or waters over which native title is sought and in particular past grants to third parties. Validation effectively refers to the substantiation of actions or transactions which have previously been carried out over areas which may now be subjected to native title claims. This validation is statutorily endorsed by the Native Title legislation with the aim of removing any doubt which may exist concerning such actions. Section 14 of the Act provides for the validation of past Commonwealth acts and s 19 for States and Territories. Examples of past acts which are validated include the making of legislation, the grant of a licence or permit, the creation of any interest in land or waters and the exercise of executive power (s 226).

5. Entitlement to Compensation

Native title holders are entitled to compensation for the effect of the validation of past acts on their rights where:

(i) Native title has been extinguished, compensation will be on just terms (ss 17, 20 and 51).

(ii) Where the native title is impaired but not extinguished in relation to an onshore place, compensation will be paid to native title holders where freeholders would have received compensation (ie assessed under the same regime) (ss 17, 20 and 51(3)).

(iii) Where the native title is impaired and the act could not have been done over freehold land, compensation on just terms will be awarded(ss 17, 20 and 51).

The Act allows for Commonwealth rights to compensation, even for the effect of State and Territory validations. In this sense, the Act recognises the impact which State legislation can have upon native title rights and attempts to reduce this by expressly endorsing compensatory claims for state and territory validations. This provision has the effect of expanding

the compensatory basis for Aboriginal and Torres Strait Islanders who hold native title claims whilst at the same time endorsing the authority of past state validations. These claims may be pursued in the National Native Title Tribunal (NNTT) and the Federal Court. The Act also provides for a regime to deal with proposed "future acts" over land which may affect native title.

6. The Tribunal and Court Process

To provide the most effective means of dealing with issues of native title, the Act establishes a new body, The National Native Title Tribunal and gives the Federal Court jurisdiction in these matters. The NNTT is established as a separate body (dealt with in Part 6 of the Act) to deal with uncontested claims to native title and uncontested claims for compensation. Applications should initially be made to the Native Title Registrar (s 61) and if the requirements are met, the registrar must make a native title determination; if native title is accepted the application will be registered on the register of native title claims. Notification must be then given to persons whose interests may be affected and if there is an objection, mediation by the NNTT will occur which if successful will be registered on the National Native title Register. If mediation is unsuccessful, the matter can be referred to the Federal Court for the determination of native title.[6]

7. Summary of the NTA and its Effect Upon the States

It is clear from the provisions of the NTA that it was intended to apply to all of the States equally. Sections 10 and 11(1) are particularly relevant in this regard as they effectively operate as a safeguard against the possibility of another separate piece of legislation attempting to interfere, alter or extinguish native title. The drafters of the NTA were obviously concerned that states would attempt to override the purpose of the NTA and introduce legislation specifically modifying or interfering with the operation of the NTA. These provisions effectively entrench the operation of native title according to the provisions within the NTA and ensure that the issue of native title remains a Commonwealth concern. Under s 11(1) native title is not able to be extinguished *in a manner which is contrary to the Act.* This would seem to indicate that if a State government introduces or attempts to enforce legislation which the Commonwealth feels is contrary to the provisions of the NTA, the State legislation will be ineffective.

[6] See also P Butt (1994) 68 ALJ 285 on the scheme of the NTA.

Section 12 of the NTA goes even further in this regard by claiming that:

> "Subject to this Act, the common law of Australia in respect of native title has, after the 30 June 1993, the force of a law of the Commonwealth."

The purpose of s 12 appears to be to take the common law with respect to native title and invest it with the force of a law of the Commonwealth. This is a further attempt to ensure that State governments do not attempt to interfere with the operation or validity of native title. The validity of this provision was directly challenged in the WA decision, as we shall see, because it was argued that it attempts to confer legislative power upon a judicial branch of government.

Finally in this respect, the NTA expressly sets out in the compensatory provisions that compensation will be payable according to the NTA regime, even if the right arises within a State where the State has already enacted laws dealing with such compensatory rights. Once again, the purpose of this was to prevent State governments from interfering, reducing or modifying the effect of the NTA.

8. *The State of Western Australia v The Commonwealth*[7]

On the 7th of April, 1994, the government for the State of Western Australia lodged a statement of claim with the High Court outlining the reasons why they believed that the Native Title legislation has no and should have no effect in that State. The statement of claim incorporated a number of arguments which can basically be categorised into the following:

(i) That the NTA is contrary to the provisions of the *Racial Discrimination Act* (RDA) because it leads to the maintenance of separate rights for different racial groups and that s 7 of the NTA provides a basis for interpreting that the NTA was intended to be subject to the RDA.

(ii) That native title in Western Australia was extinguished because the Crown intended to acquire full beneficial ownership in that state before the boundaries of the Colony were fixed and that this can be proven from historical documentation.

(iii) That the NTA is ineffective in Western Australia because of the enactment of the *Land (Titles and Traditional Usage) Act* 1993 (WA) (the WA Act) which purported to extinguish native title and replace it with statutory rights of traditional usage within a regime prescribed by that Act.

[7] Above, at n 2.

(iv) That the NTA is constitutionally inoperative because: the Commonwealth did not have the constitutional power to enact such legislation and that the NTA did not fit within the definition of "necessary" under s 51(xxvi); the NTA provisions purport to control the exercise by the State of its legislative power or purport to render State laws invalid, contrary to s 107 of the Constitution and the NTA interferes with the rights of Western Australia to govern and make legislation with respect to land which is or may be the subject of native title claims.

(v) That s 12 of the NTA is invalid because it purports to confer legislative power upon the judiciary and/or because the Commonwealth has no constitutional power under either s 51(xxvi) or (xxiv) to make such a law.

On 16 March, 1995 the High Court handed down its determination upon each of these claims. A summation and analysis of these claims follows in the same order as listed.

9. The NTA and the Racial Discrimination Argument

The RDA has its legislative foundation in the *International Convention on the Elimination of All Forms of Racial Discrimination* 1969.[8] The RDA covers discrimination by reason of race, colour, national or ethnic origin or, in some situations, immigration.

Section 9(1) of the *Racial Discrimination Act* makes it unlawful for a person to do:

> "any act involving a distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of any human right or fundamental freedom in the political, economic, social, cultural or any other field of public life."

It is important to determine exactly what "distinction, exclusion, restriction or preference" means. These terms are wide and, to some extent, overlapping in their operation. This breadth is important because it operates to catch as many forms of discriminatory conduct as possible. A distinction clearly involves difference. An exclusion means to shut or keep out whilst a restriction refers to some form of confinement or limitation. Preference means to set or hold in better or higher regard than other per-

[8] This Convention was ratified by Australia on 30 September 1975 and is the Schedule to the *Racial Discrimination Act*.

sons. Sections 2–8 of the *Racial Discrimination Act* specifically sets out that discrimination will include distinctions, exclusions, restrictions and preferences based upon:

(i) in the case of Aboriginal peoples, "race"; and

(ii) in the case of Torres Strait Islanders, "descent" or "ethnic origins",

both being within the meaning of Article 1, paragraph 1 of the Convention.

The International Convention provides some exceptions to the application of racial discrimination. Article 1 of the Convention sets out that a nation may distinguish between citizens and non-citizens; a nation may make its own laws with respect to nationality, citizenship and naturalisation, provided that those laws do not discriminate against any particular nationality and finally that necessary affirmative action measures may be taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups, provided that such measures are discontinued when their objectives have been attained.

The Native Title legislation sets out in its preamble that it is intended to be a "special measure for the advancement and protection of Aboriginal peoples and Torres Strait Islanders, and is intended to further advance the process of reconciliation among all Australians". To this extent it would seem that the Act intended to provide a separate system of rights for Aboriginal and Torres Strait Islanders in order to secure the advancement of these groups considering the fact, as the preamble notes, that the Aboriginal peoples and the Torres Strait Islanders have become "the most disadvantaged in Australian society".

The West Australian government alleged that the introduction of the Native Title legislation is in contravention of Australia's obligations pursuant to the convention and the *Racial Discrimination Act* ratifying this convention. Despite the fact that the preamble of the Native Title legislation claims that it operates as a "special measure", the statement of claim alleges that the provisions of the *Native Title Act* are not a "special measure"; three reasons are given. The first is because the Native Title legislation is not for the sole purpose of securing adequate advancement of the Aboriginal peoples and the Torres Strait Islanders: it has a number of different objectives. The second reason given is that the *Native Title Act* was not "necessary to ensure... equal enjoyment or exercise of human rights and fundamental freedoms" because aboriginal rights were already recognised by the common law prior to the introduction of the Act.

Finally, the statement of claim sets out that the Native title legislation will lead to the maintenance of separate rights for different racial groups because persons other than Aboriginal peoples or Torres Strait Islanders or prescribed corporations, may not hold such title. Native title will confer privileges and protections not given to the holders of other forms of

title and that, according to s 37A(4) of the Native Title legislation, as far as is practicable, the persons who may be appointed assessors are to be selected from Aboriginal peoples or Torres Strait Islanders.

The High Court concluded that there was no inconsistency between the NTA and the RDA and that even if there was, a later Commonwealth Act will override an earlier one because as both acts emanate from the same legislature, they must be construed so as to avoid absurdity and give each of the provisions scope for operation. The court made the following conclusions on this matter:

> "... it is not easy to detect any inconsistency between the Native Title Act and the Racial Discrimination Act. The Native Title Act provides the mechanism for regulating the competing rights and obligations of those who are concerned to exercise, resist, extinguish or impair the rights and interests of the holders of native title. In regulating those competing rights and obligations, the Native Title Act adopts the legal rights and interest of persons holding other forms of title as the benchmarks for the treatment of the holders of native title. But if there were any discrepancy in the operation of the two Acts, the Native Title Act can be regarded either as a special measure under s 8 of the Racial Discrimination Act or as a law, which though it makes racial distinctions, is not racially discriminatory so as to offend the Racial Discrimination Act or the International Convention on the Elimination of All Forms of Discrimination."[9]

It is certainly hard to see how the NTA can be described as discriminatory and outside the ambit of Article 1, paragraph 4 of the Convention. In the first place, the whole legislation has a special aim of rectifying the disadvantaged position which Aboriginal peoples and Torres Strait Islanders have experienced since the advent of European settlement. As the preamble to the NTA notes:

> "They (the Aboriginal peoples and the Torres Strait Islanders) have been progressively dispossessed of their lands. This dispossession occurred largely without compensation, and successive governments have failed to reach a lasting and equitable agreement with Aboriginal peoples and Torres Strait Islanders concerning the use of their lands... The people of Australia voted overwhelmingly to amend the Constitution so that the Parliament of Australia would be able to make special laws for peoples of the aboriginal race."

The *Native Title Act* is clearly a "special measure" within the intended meaning of paragraph 4, Article 1, of the International Convention. The substantial purpose underlying the introduction of the legislation was to secure the advancement of the Aboriginal race by providing categorical, statutory recognition of land rights. The fact that the legislation simultaneously sets up an infrastructure for the validation of acts performed with

[9] Above, at n 2, at 61–62.

respect to potential native title areas does not preclude nor overwhelm this purpose. In fact, it operates to verify it. An efficient, functional and practicable approach to land rights would not be possible without the simultaneous recognition of existing social and commercial realities.[10] If the Native Title legislation ignored the fact that many acts have been carried out over potential native title areas it would have substantially lessened our ability to accept and more importantly, absorb native title into our own social ethos.

Any suggestion that the Native Title legislation was not "necessary" to secure the advancement of Aboriginal land rights is simply incorrect. The fact that prior to the introduction of the legislation, Aboriginal land rights were recognised, does not change the fact that such recognition was, on the whole, spasmodic and unstructured. The NTA was "necessary" because it promoted a more cohesive approach to the implementation of native title. It also statutorily endorsed the right of the Aboriginal race to compensation for the effect of validation of past acts upon their rights. The legislation is vitally significant precisely because of the categorical confirmation it provides not only the existence but also the validity of Aboriginal land rights.

The High Court also rejected the argument that s 7(1) of the NTA could be interpreted so as to make the NTA subject to the provisions of the RDA. Section 7(1) of the NTA reads as follows: "[n]othing in this Act affects the operation of the *Racial Discrimination Act* 1975". The court held that the whole purpose of the NTA was to prescribe specific rules governing rights and obligations over land which is subject to native title claims and s 7(1) should not be construed as operating contrary to those aims. The provision should be seen on the part of the drafters as evidence of an abundant caution rather than any attempt to nullify the operation of the native title provisions.

10. The extinguishment of Native Title in Western Australia

One of the most controversial arguments raised by the Western Australian government was that native title was extinguished in the colony of Western Australia due to the impact of certain historical documents. The court held that there was no reason to single the State of Western Australia out and hold that native title had been extinguished in that jurisdiction alone. The State had submitted that it was the Crown's intention to extinguish native title and that this could be inferred generally from the terms of the instrument relevant to the establishment of the Colony of

[10] See Australian Law Reform Commission, Report No 31, *The Recognition of Aboriginal Customary Laws* (1986), vol 1, esp paras 148, 150.

Western Australia as it showed an intention on the part of the Crown to acquire absolute ownership.

The High Court held that the facts revealed by the history of the establishment of Western Australia show only that it was intended to exercise the sovereign power of the Crown to grant land to immigrant settlers and that:

> "Once it is realised that the common law theory which underlay the acquisition of sovereignty in "settled" colonies at the time of settlement of Western Australia regarded the territory of a colony inhabited by indigenous people to be "desert uninhabited", an inference that the British Crown intended a general extinguishment of native title cannot be drawn."[11]

Hence, the High Court effectively held that because of the existence of the extended *terra nullius* policy, the Crown could not have intended a general extinguishment of native title upon colonisation because that would not have been necessary. Consequently then the presumption remains that native title was not extinguished in Western Australia and that there is no difference in legal terms to native title in the state of Western Australia and that which is applicable to other Australian states.[12]

11. The effect of the WA Act on the NTA

The Western Australian government claimed that the WA Act overwhelmed the application of the NTA in that State. The High Court was therefore asked to reach a determination on the validity and operation of the WA Act in light of its potential breaches of the *Racial Discrimination Act* and its inconsistency with the NTA.

The court concluded that the attempt by the WA Act to extinguish native title was contrary to the RDA or if not contrary, inconsistent with the NTA and therefore invalid on the basis of s 109 of the *Commonwealth Constitution*. The conclusion that the WA Act was contrary or inconsistent with the Commonwealth *Racial Discrimination Act* is not a new argument.[13] In this case, the High Court held that the WA Act was inconsistent with s 10(1) of the *Racial Discrimination Act*. Section 10(1) of the Act ensures that any statutory provision which has the effect of excluding or limiting a right from a person of a particular race, colour, nationality or

---

[11] Above, at n 2, at 20.

[12] One possible issue is that raised by Dawson J in *Mabo (No.2)* and Professor G. Nettheim in "...As Against the Whole World", (1992) 27 (6) *Australian Law News* 9, 11 is whether the survival of native title is dependant upon legislative or executive recognition; the High Court in the WA case came to no conclusion on this issue.

[13] In *Mabo v Queensland ('Mabo No.1')* (1988) 166 CLR 186 the High Court held that the *Queensland Coast Islands Declaratory Act* 1985 was ineffective as it was contrary to the *Commonwealth Racial Discrimination Act* 1975.

ethnic origin which is enjoyed by persons of another race, colour, nationality or ethnic origin, shall be ineffective. The High Court held that the effect of this provision is inter alia to ensure that aborigines, who are holders of native title, have the same security of enjoyment of their native title rights as others who are holders of title granted by the Crown.

Section 5(1) of the WA Act confirmed the validity of grants of title made after the *Racial Discrimination Act* came into operation where those grants actually purported to extinguish or impair native title. The High Court held that if native title was protected by the *Racial Discrimination Act*, then only a law of the Commonwealth could effectively modify the operation of the act. To this extent, the court concluded that a state act could not make such a modification. Consequently, s 5 of the WA Act was ineffective in the sense that it had no legal operation as it was contrary to s 10(1) of the Racial Discrimination legislation.

This decision represents an extension of the argument in *Mabo (No.1)* where it was held that legislation which purports to completely extinguish indigenous land rights is inconsistent with the aims of the RDA generally and inconsistent with the operation of s 10(1) specifically.

12. The Constitutional Validity of the NTA

There are two basic arguments raised by the Western Australian government here. The first is that the NTA is constitutionally invalid because the Commonwealth does not have the power to enact such legislation and that it cannot be incorporated into s 51(xxvi) which confers on the Commonwealth Parliament power to "make laws with respect to the people of any race for whom it is deemed necessary to make special laws". The Western Australian government argued that s 51(xxiv) does not validate the NTA because it is already protected by the RDA and regulated by the WA Act. The Western Australian government argued that the true character of the NTA was a law with respect to governments and governmental activity, including the validity of that activity rather than a necessary special law.

The High Court rejected this argument holding that the NTA was within the scope of s 51(xxvi) and further that it was necessary, in order for the NTA to protect native title from extinguishment or impairment, to control the exercise by other governments of powers in this area. The court reached the following conclusion:

> "As extinguishment or impairment can be effected at common law only by or pursuant to a law enacted by a competent legislature, the power conferred by s 51(xxvi) must extend to the support of a law which excludes wholly or in part, State or Territory law from operating to affect native title."[14]

[14] Above, at n 2, at 57.

The Western Australian government further alleged that the NTA interferes with the capacity of the Western Australian government to regulate, obtain revenue from and otherwise deal with land and other resources. The Western Australian government made reference to the fact that the administration of land and mineral resources was vitally significant to the state due to the fact that it has a greater proportion of land capable of being subjected to native title claims. The constitutional challenge to this was also based upon a characterisation argument. The Western Australian government argued that as the NTA affected Western Australia particularly, and as it interfered with their primary source of revenue and regulation, it could not be properly defined as a necessary law for a special race pursuant to s 51(xxiv).

The difficulty with this argument is that the there is no evidence that the NTA directly interferes with the machinery of the government of the State. As Mason CJ clearly states:

> "The constitution of the three branches of government is unimpaired; the capacity of the State to engage the servants it needs is unaffected; the acquisition of goods and services is not impeded; nor is any impediment placed in the way of acquiring the land needed for the discharge of the essential functions of the State save in one respect, namely the payment of compensation."[15]

The argument that the NTA impairs the ability of the Western Australian government to function effectively is predicated upon the fact that there is a lot of land in that state which may be potentially subjected to native title claims. The fact that the NTA may potentially apply to large tracts of land in Western Australia does not mean that the legislation was introduced with the direct aim of interfering with the regulatory functions of the Western Australian government. The characterisation of a law is not achieved by considering the indirect consequences that an application of that law might have; as the High Court recognises, consideration must be given to the aims and operation of the actual legislation. The primary purpose of the NTA is to regulate and protect native title, wherever such title may be raised; there are no provisions which directly impair the ability of the Western Australian government to function effectively as a state.

13. The Invalidity of s 12 of the NTA

The one argument which the High Court did accept in the Western Australian challenge was the invalidity of s 12 of the NTA. Section 12 of the NTA sets out that subject to the operation of the NTA "the common law of Australia in respect of native title has, after 30 June 1993, the force of a

[15] Above, at n 2, at 60.

law of the Commonwealth". The Western Australian government alleged that the Commonwealth does not have the power to take the common law and attempt to invest it with the force of a law of the Commonwealth. If the purpose of s 12 is an attempt to confer legislative power upon the judicial branch of the government, according to the High Court it must fail:

> "... either because the parliament cannot exercise the powers of the courts or because the courts cannot exercise the powers of the parliament."[16]

The Constitution does not confer upon parliament the power to delegate to the courts a law making power because such a power involves a discretion or at least a choice as to what that law should be.[17] Furthermore, it is not possible for s 12 to be justified under s 51(xxvi) because that power will only support a law if it is one which the parliament has deemed necessary for the people of a race. Section 12 purports to make the common law regarding native title a law of the Commonwealth. Such a provision cannot, according to the High Court, be necessary for the people of a race because it is the common law rather than parliament which is making the change. The common law will change periodically and these changes largely occur without reference to the parliament which has the power to make special laws pursuant to s 51(xxvi). As the High Court concluded on this matter:

> "A "law of the Commonwealth", as that term is used in the Constitution, cannot be the unwritten law. It is necessarily statute law, for the only power to make Commonwealth law is vested in the parliament."[18]

Hence, the High Court concluded that s 12 of the NTA was invalid however it was clearly stated that the invalidity of this provision would not affect the validity of the rest of the Act. The High Court further noted that if one of the aims of the NTA was to prevent State governments from overriding the common law, it would diminish the legislative power constitutionally conferred upon the States. Section 109 of the *Commonwealth Constitution* would not validate such a cause because that section only deals with *legislative* inconsistencies.

---

[16] Above, at n 2, at 63.

[17] See *Victorian Stevedoring and General Contracting Co Pty Ltd and Meakes v Dignon* (1931) 46 CLR 73, at 93 and *Commonwealth v Grunseit* (1943) 67 CLR 58 at 66, 82–83.

[18] Above, at n 2, at 64.

14. Conclusion

The decision in *WA v Commonwealth* provides a further milestone in the evolution of native title. The Western Australian government raised many different challenges to the NTA ranging from constitutional invalidity to racial discrimination and the specific exclusion of the state of Western Australia from the application of native title. The High Court systematically uprooted most of the alleged difficulties associated with the NTA and apart from invalidating s 12, the overall legitimacy of the legislation, and more importantly, its applicability to the state of Western Australia was confirmed. The significance of this decision cannot be underestimated. The whole issue of State and Commonwealth powers was reassessed.

One of the most important consequences of the decision is its categorical confirmation of the power of the Commonwealth to regulate native title. The High Court has now stated, in no uncertain terms, that native title is applicable to all of the Australian States and the mere fact that some States may have a larger concentration of potential native title claims than others does not mean that such States should be justified in introducing their own legislation modifying or extinguishing such claims. This decision provides a firm precedent for the future and will hopefully prevent any further State challenges to the applicability of the legislation. Such a decision is vitally important, not only to confirm the legal validity of the native title legislation, but also to instil public confidence, certainty and judicial conviction in the whole native title debate.