The High Court's Abandonment of 'The Time-Honoured Methodology of the Common Law' in its Interpretation of Native Title in Mirriuwung Gajerrong *and* Yorta Yorta**

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There are fundamental problems with the way in which the High Court has interpreted native title in Australian law in its two most recent decisions: *Mirriuwung Gajerrong*[1] and *Yorta Yorta*[2]. In the space of this lecture I will only be able to deal with three key problems:

- The Court's misinterpretation of the definition of native title in section 223(1) of the *Native Title Act 1993* (Cth)[3].

- The Court's misinterpretation of how the common law treats traditional indigenous occupants of land when the Crown acquires sovereignty over their land as an injusticiable Act of State.

- The Court's disavowal of native title as a doctrine or body of law within the common law – and its failure to judge the Yorta Yorta people's claim in accordance with this body of law (rather than in accordance

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1 *Western Australia v Ward; Attorney-General (NT) v Ward; Ningarmara v Northern Territory* [2002] HCA 28 (8 August 2002) (*'Mirriuwung Gajerrong'*).

2 *Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58 (12 December 2002) (*'Yorta Yorta'*).

3 Hereafter referred to as the *Native Title Act*. Except where otherwise noted, all statutory references in this publication are to the *Native Title Act*.

4 *Mabo and Others v Queensland (No. 2)* (1992) 175 CLR 1 (*'Mabo'*).

with its wrong interpretation of section 223(1)).

I will close with some views about what I think needs to be done in all justice to Aboriginal people.

But before I undertake this critique, let me first set out my understanding of what *Mabo*[4] and native title should have meant to Australians. It is a view of the historical meaning of native title – and the historic compromise which it should represent – which I have expressed on many occasions over the past decade. My most recent articulation of the three principles of native title was in the Hawke Lecture in November last year. This is what I said:

> The High Court told us on 3 June 1992[5] that our understanding of our legal history was incorrect. The true history, according to the High Court, was that at the moment of sovereignty in 1788 when the British Crown unilaterally assumed sovereignty over the Antipodean continent the Aboriginal peoples in truth became subjects of the British Crown.
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> At the moment of sovereignty, as subjects of the British Crown in occupation of their traditional homelands and entitled to the protection of the new land law brought on the shoulders of the settlers from England, the indigenous peoples became in British law no less than the comprehensive owners of the entire continent. Native Title existed wherever Aboriginal people held traditional connections with their homelands. The High Court told us that their dispossession of those titles occurred over the next 204 years through a process of "parcel by parcel" extinguishment.
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> This legal truth about the foundations of the country was obscured for two centuries and that obfuscation of the legal truth resulted in the dispossession and removal and suffering and death of numerous Aboriginal peoples. Coming to determine the question of whether the Aboriginal people had rights to land under the law of England imported here in 1788, the High Court had to reconcile two realities, the reality of English law and its respect for the position of indigenous peoples who become subjects of the British Crown upon sovereign acquisition, and the reality of 204 years of history where numerous tribes and peoples have been dislocated and dispossessed and indeed, in some cases, completely annihilated.
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> The problem facing our seven High Court Judges when they came to determine the *Mabo* decision was this: how was this country going to reconcile the truth of its English legal traditions with the realities of history and all of the accumulated title that had taken place over two centuries? The High Court articulated in *Mabo* two important principles of native title law which really form the cornerstones of compromise, the cornerstones of a proposed settlement put before us by our judicial elders.
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> The first part of that compromise, if we are truthful, was the most unequivocal. The first part of the compromise said that the titles accumulated over the last two centuries inhering in the settlers and their descendants, could not now be disturbed. Those titles were now indefeasible. Even if those titles were gained in circumstances of regret and denial of right, the Court said that the

[5] Above.

accumulation of these many millions of titles over two centuries could not now be disturbed. The first limb of native title law in this country is to confirm the privileges and titles of the settlers and their descendants. If we were certain about anything in the wake of the *Mabo* decision, we were certain of that fact, that the Courts in this country and the common law of this country, would not allow us to derogate from those accumulated privileges.

The second principle of native title law articulated by the Court is very simple also. It proposed that all of those lands that remained after 204 years, unalienated, was the legal right of the traditional owners. Whatever land had not been alienated and in the most settled parts of the country, these lands are few and far between indeed. If you want to find unalienated Crown land on the east coast of Australia you would need to go down near the mangroves and find a block of unallocated state land or down near the dump or some inhospitable wedge of land in some remote corner of the countryside and of course most generously, in the most deserted regions of our continent.

That was what was proposed by the High Court in the *Mabo* decision. Let me put it colloquially: *the whitefellas get to keep everything they have accumulated, the blackfellas should now belatedly be entitled to whatever is left over*. The imperative flowing from the *Mabo* decision in 1992 was the swiftest unambiguous and ungrudging delivery of that remainder to the indigenous peoples entitled to that belated recognition. In some of our states we have yet to get one hectare, we are yet to get one acre, we are yet to get one square metre of land under a Native Title determination after 10 years.

The third part of native title law, the third part of the compromise was put forward by the High Court in 1996 in the *Wik* decision[6]. It said that there are some large areas of land covered by pastoral leases and national parks where Native Title may co-exist with the Crown Title. The Court ruled by a majority of four to three that in that co-existence, the Crown Title prevails over the Native Title if there is any inconsistency.

So those are the three limbs of Native Title Law as articulated by our High Court in this country. The whitefellas keep all that is now theirs, the blackfellas get whatever is left over and there are some categories of land where there is co-existence and in the co-existence the Crown Title always prevails over the Native Title. That is the proposition put forward to us as Australians by our judicial elders for our consideration, to see whether as a people we would embrace those terms as a just compromise 204 years after the initial failure of recognition.

Have we as Australians embraced the corners of that compromise? Have we delivered on the justice of that compromise? Have we been faithful, given the opportunity we have under our civilised institutions, our constitution and our Common Law heritage, have we lived up to that opportunity? Because it seems to me it will fall upon us as a generation, the question will fall upon us as a generation as to whether we showed fidelity to the terms of that compromise or we wasted the once-in-a-nation's-lifetime opportunity to settle a question of fundamental grievance, a question that plagues too many nations and societies right across the globe, as long as the questions remain unfulfilled and unanswered.

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[6] *Wik Peoples v Queensland* (1996) 187 CLR 1.

Then the High Court delivered its judgment in *Yorta Yorta* in December and put the lie to my interpretation of the meaning of native title. The three principles of native title law are not that the whitefellas get to keep all that they have accumulated, that the blackfellas get what is left over and they share some larger categories of land titles with the granted titles prevailing over the native title. Rather the three principles of native title are that the whitefellas do not only get to keep all that they have accumulated, but the blacks only get a fraction of what is left over and only get to share a coexisting and subservient title where they are able to surmount the most unreasonable and unyielding barriers of proof – and indeed only where they prove that they meet white Australia's cultural and legal prejudices about what constitutes "real Aborigines". To the Australian courts charged with the responsibility of administering the historic compromise set out in *Mabo*, the Yorta Yorta Peoples were not sufficiently Aboriginal to get one square metre of what was left over after the whites had taken all that they wanted.

After all, let us think about what native title claims are all about today. Native title claims are made in respect of lands that are left over. They simply cannot be made in relation to titles owned by other people. No successful native title claim can be made which diminishes the existing title of any other Australian. In other words, no one can lose a legal right in the event that a native title claim succeeds.

And yet not only is there political and social resistance to these claims for leftover land, but there is now significant judicial and legal impediment to the working out of this belated and meagre land justice. The present High Court does not know what it is doing with the responsibility which their predecessors assumed with *Mabo*. They have rendered a great disservice to indigenous Australians and to our past and future as a nation. For in their flawed and discriminatory conceptualisation of native title and in their egregious misinterpretation of fundamental provisions of the *Native Title Act*, they are destroying the opportunity for native title to finally settle the outstanding question of indigenous land justice in Australia.

Let me now turn to the first problem:

The High Court's misinterpretation of the definition of native title in section 223(1) of the *Native Title Act*.

The enactment of native title legislation in the wake of the High Court's 1992 decision in *Mabo* was the subject of an intense national political and legislative debate during 1993, in which Aboriginal advocates participated vigorously.

What were we defending in that process and what did we think that we had achieved with the Commonwealth government under Prime Minister Paul Keating?

We thought, and I am sure all members of Parliament and all Australians who followed the proceedings thought, that the whole exercise was about preserving the rights declared under the common law of Australia. In other words we thought that the *Mabo* decision, and the

rights and interests that flowed from that decision, was being recognised and protected in Commonwealth legislation. The chief reason for this recognition and protection in Commonwealth legislation was to protect native title from arbitrary extinguishment by hostile governments.

So we thought that the *Native Title Act* preserved the *Mabo* decision. And we thought that all claims for native title that would be made under the framework of the new legislation would be adjudicated according to principles of the High Court's decision in *Mabo* and the body of common law of which it forms a part.

But this is not what the High Court has determined in the cases leading up to, and now settled in, *Yorta Yorta*. Whilst the High Court denies that it is approaching native title as a creature of the *Native Title Act*, nevertheless it has given an independent role to the definition of native title set out in section 223(1). Indeed the High Court has taken the legislation as the starting point and the ending point for interpreting native title.

Indeed the relevance of the *Mabo* decision to understanding native title is almost rejected by the court. In their joint judgment Gleeson CJ and Gummow and Hayne JJ remarked as follows in relation to Olney J's analysis in his judgment at first instance:

> The legal principles which the primary judge considered were to be applied to the facts found were principles which he correctly identified as being found in the *Native Title Act's* definition of native title. It is true to say that his Honour said that this definition of native title was "consistent with" language in the reasons in *Mabo [No 2]* and that it was, in his Honour's view, necessary to understand the context in which the statutory definition was developed by reference to what was said in that case. It may be that undue emphasis was given in the reasons to what was said in *Mabo [No 2]*, at the expense of recognising the principal, indeed determinative, place that should be given to the *Native Title Act*.[7]

Let me repeat this astounding last sentence: "It may be that that undue emphasis was given in the reasons to what was said in *Mabo [No 2]*, at the expense of recognising the principal, indeed determinative, place that should be given to the *Native Title Act*."

The majority explain their approach to section 223(1) as follows:

> To speak of the "common law requirements" of native title is to invite fundamental error. Native title is not a creature of the common law, whether the Imperial common law as that existed at the time of sovereignty and first settlement, or the Australian common law as it exists today. Native title, for present purposes, is what is defined and described in s 223(1) of the *Native Title Act*. *Mabo [No 2]* decided that certain rights and interests relating to land, and rooted in traditional law and custom, survived the Crown's acquisition of sovereignty and radical title in Australia. It was *this* native title that was then

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[7] Chief Justice Gleeson, Gummow and Hayne JJ, above n 2, 23.

> "recognised, and protected" in accordance with the *Native Title Act* and which, thereafter, was not able to be extinguished contrary to that Act.
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> The *Native Title Act*, when read as a whole, does not seek to create some new species of right or interest in relation to land or waters which it then calls native title. Rather, the Act has as one of its main objects "to provide for the *recognition* and *protection* of native title" [emphasis added], which is to say those rights and interests in relation to land or waters with which the Act deals, but which are rights and interests finding their origin in traditional law and custom, not the Act. It follows that the reference in par (c) of s 223(1) to the rights or interests being *recognised* by the common law of Australia cannot be understood as a form of drafting by incorporation, by which some pre-existing body of the common law of Australia defining the rights or interests known as native title is brought into the Act. To understand par (c) as a drafting device of that kind would be to treat native title as owing its origins to the common law when it does not. And to speak of there being common law elements for the *establishment* of native title is to commit the same error. It is, therefore, wrong to read par (c) of the definition of native title as requiring reference to any such body of common law, for there is none to which reference could be made.[8]

This is how section 223(1) defines "native title" and "native title rights and interests":

> *the communal, group or individual rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to land or waters, where:*
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> (a) the rights and interests are possessed under the traditional laws acknowledged, and the traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders; and
> (b) the Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters; and
> (c) the rights and interests are recognised by the common law of Australia.

In the broadest terms there are two possible meanings that could be attributed to this definition:

Firstly, the definition could be seen as a faithful and accurate reflection of the meaning of native title under the common law of Australia. In other words the definition did not in any way alter the common law meaning of native title: it neither added to nor diminished its meaning and requirements for its proof.

Secondly, the definition could be seen as somehow altering or replacing the meaning of native title under the common law of Australia. In other words the statutory definition either added to or diminished its meaning and requirements for its proof. It either made it easier or harder to prove.

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[8] Above.

The second possibility – that the statutory definition has somehow altered or replaced whatever meaning it may have had under the common law of Australia – seems to be what the High Court majority has decided.

And when I say "majority" I mean all of the members of the court including Kirby and Gaudron JJ, as well as Callinan J. All members of the High Court other than McHugh J (to whose judgment I will turn in due course) have interpreted section 223(1) as defining native title to the exclusion of its common law meaning.

But it is not possible that the definition of native title in the statute has changed from its common law meaning because this would involve "just terms" problems under the Constitution. This is an undeveloped analysis as yet, but it seems to me that if native title has been added to or detracted from by its definition in section 223(1) then this would necessarily involve an acquisition of property – either property belonging to the native title-holders if the statutory definition denied them their native title rights that would have existed at common law, or property belonging to the Crown if the statutory definition denied it beneficial title to land where native title would have otherwise been extinguished at common law. The "just terms" provision in section X of the *Native Title Act* could not have been intended to cure this kind of constitutional problem.

But there are even more compelling reasons why the approach of the High Court to its interpretation of section 223(1) is wrong.

The High Court's interpretation is patently at odds with the intention of Parliament, both during the time of the Keating government in 1993 and at the time the *Native Title Amendment Act 1998* (Cth) was passed by the Howard government in 1998. Both Parliaments understood that their respective laws were preserving the common law rights articulated in the *Mabo* decision.

Justice McHugh's short judgment in *Yorta Yorta* sets out the whole truth and in order to comprehend the travesty of the High Court's misinterpretation in this judgment, McHugh's judgment must be extracted at length:

> Given the decisions in *Yarmirr* and *Ward*, the [position of the majority judges] concerning the construction of the Act must be accepted as correct.
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> However, I remain unconvinced that the construction that this Court has placed on s 223 accords with what the Parliament intended. In *Yarmirr*, I cited statements from the Ministers in charge of the Act when it was enacted in 1993 and when it was amended in 1997. They showed that the Parliament believed that, under the *Native Title Act*, the content of native title would depend on the developing common law. Thus, Senator Evans told the Senate in 1993:
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> We are not attempting to define with precision the extent and incidence of native title. That will be a matter still for case by case determination through tribunal processes and so on. *The crucial element of the common law is the fact that native title as such, as a proprietary right capable of being recognised and enjoyed, and excluding other competing forms of proprietary claim, is recognised as part of the common law of the country.* [emphasis added]

Similarly, Senator Minchin told the Senate in 1997:

> I repeat that our [A]ct preserves the fact of common law; who holds native title, what it consists of, is entirely a matter for the courts of Australia. *It is a common law right.* [emphasis added]

Section 12 of the *Native Title Act 1993* also made it clear that the content of native title under that Act was to be determined in accordance with the developing common law. Section 12 provided:

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

In *Western Australia v The Commonwealth (Native Title Act Case)*, however, this Court held that s 12 was invalid. In the *Native Title Act Case*, six justices of the Court said:

> If s 12 be construed as an attempt to make the common law a law of the Commonwealth, it is invalid either because it purports to confer legislative power on the courts or because the enactment of the common law relating to native title finds no constitutional support in s 51(xxvi) or (xxiv).

Section 12 has now been removed from the statute book. But its enactment in the 1993 Act shows that the Parliament intended native title to be determined by the common law principles laid down in *Mabo v Queensland [No 2]*, particularly those formulated by Brennan J in his judgment in that case. When s 223(1)(c) of the 1993 Act referred to the rights and interests "recognised by the common law of Australia", it was, in my view, referring to the principles expounded by Brennan J in *Mabo [No2]*.

But this Court has now given the concept of "recognition" a narrower scope than I think the Parliament intended, and this Court's interpretation of s 223 must now be accepted as settling the law. As a result, the majority judges in the Full Court erred when they approached the case in the manner that they did.[9]

Justice McHugh's understanding of what section 223(1) meant is my understanding of what was meant. It is Paul Keating and Gareth Evans' understanding of what was meant. It is John Howard and Nick Minchin's understanding of what was meant.

Amazingly, despite McHugh J's clear statement that his colleagues had settled upon what was a "narrower" interpretation of section 223 – contrary to Parliament's intention – he capitulated to this narrower interpretation and was prepared to accept it as settled law. This in itself is instructive. Justice McHugh was dealing here with a profound question of fundamental property rights of Australian citizens entitled to rigorous application of the rules of law when they bring their claims before the

[9] Justice McHugh, above n 2.

courts for adjudication. It is hard to imagine any other area of law where a judge would so lightly abandon his or her conviction about an interpretation of a statutory provision which is pivotal not just to the instant case, but to all future cases to come before the courts.

Even if McHugh J is prepared to accept this narrow interpretation of the *Native Title Act* to the detriment of indigenous interests – it can hardly be expected of indigenous Australians that they accept this derogation of their already meagre rights with such equanimity.

The High Court's misinterpretation of how the common law treats traditional indigenous occupants of land when the Crown acquires sovereignty.

At the heart of this whole misconception is our understanding of how the common law treats traditional indigenous occupants of land when the Crown acquires sovereignty over their homelands.

Prior to *Mabo* it was unclear what effect the Act of State constituting the acquisition of sovereignty by the Crown would have on the position of indigenous occupants of land made subject to the change in sovereignty.

It is clear that it was open to the Crown to acquire not only the radical title to the territory occupied by indigenous inhabitants, but it could also expropriate the beneficial title to the land and thereby dispossess the indigenous inhabitants of their title. Under the Act of State doctrine this expropriation needed to occur at the time of the acquisition of sovereignty. Such an expropriation would have been injusticiable in the municipal courts.

Following annexation however, if the Crown had not expropriated the private title of the indigenous inhabitants, it could not do so subsequently except under authority of legislation. This is because the indigenous peoples would have become British citizens and entitled to the protection of the imported common law which had now become the law of the land. Any seizure of land against the indigenes at some time following annexation would have amounted to the commission of unlawful Act of State on the part of the Crown against its own citizens. This was prohibited by the law and the Crown had no such authority to expropriate land except with legislative authority.

This statement of the law concerning Acts of State in this context is uncontroversial.

The question that was controversial before *Mabo* was whether the survival of Aboriginal land rights following a change in sovereignty required a positive act of recognition by the Crown of the original indigenous title, or whether there was a presumption of continuity of indigenous title. The authorities preceding *Mabo* fell into two categories, which the Canadian scholar, Professor Kent McNeil, labelled in his landmark work *Common Law Aboriginal Title*[10], as those falling under the "doctrine of recognition" and those falling under the "doctrine of continuity".

In the absence of any positive act of recognition of indigenous title on the part of the Crown in the settlement of its Australian colonies – if the

[10] Kent McNeil, *Common Law Aboriginal Title* (1989).

High Court had followed those cases that fell under the "doctrine of recognition", then the result in *Mabo* would have been that there is no native title in Australia. Instead the High Court ruled, consistently with rulings across the common law world, that those cases falling under the "doctrine of continuity" represent the correct position in Australian law.

Again, the correctness of the application of the "doctrine of continuity" is now also uncontroversial. It is settled law in Australia and Canada and all of the leading cases in both of these jurisdictions are founded upon the acceptance of continuity.

But now that we know that the rights of indigenous inhabitants of land at the time of the acquisition of sovereignty, in the absence of any express abrogation, are presumed to continue under the new sovereign and the new legal order, there is a further unresolved question – which the courts have not asked. The question is this: what is it that continues after sovereignty?

Contrary to the simplistic assumptions that have been made by legal academics, practitioners and judges in answer to this question, there are yet extremely important questions to be resolved in answer to the question of *'what continues'* after the change in sovereignty?

There are two possible answers to this question. And all of the assumptions that have been made in Australian law answer this question in this first way: it is the rights and interests established by traditional law and custom which continue after annexation.

But there is another, more subtle and correct way of answering the question: it is the right to occupy and possess the land under one's traditional law and custom which continues after annexation.

It is the occupation of land under authority of, and in accordance with, an indigenous community's traditional laws and customs, that continues after annexation.

It is the occupation stupid that excites recognition and protection by the common law.

It is not the idiosyncratic rights and interests established by reference to traditional laws and customs of the indigenous community, that are afforded recognition by the common law. The idiosyncratic laws and customs of the community are only relevant in four narrow senses:

- these laws and customs identify entitlement (that is, which indigenous people are entitled to the right to occupation of the land and the descent of this entitlement through the generations)
- these laws and customs identify the territory to which the indigenous people are entitled, and
- these laws and customs identify the internal allocation of rights, interests and responsibilities amongst members of the indigenous community

But the point is this: the communal native title of the indigenous com-

munity is founded upon their occupation of land. This is what Toohey J meant when he said in *Mabo* that:

> It is presence amounting to occupancy which is the foundation of the title and which attracts protection, and it is that which must be proved to establish title...Thus traditional title is rooted in physical presence.[11]

Now is not the time to expand on the implications of my argument that it is the entitlement to occupy the land which continues after sovereignty, not the incidents of rights and interests that are established by reference to arcane traditional laws and customs.

It is enough to say in this context that the High Court made an assumption about "what continues" following annexation without any consideration that the answer may not be as straightforward as hitherto presumed. They proceeded with their assumption without grappling with the host of Canadian authorities which emphasise occupation at the time of sovereignty as the foundation of native title – not the least the leading case of *Delgamuukw*[12], brought down by the Supreme Court of Canada in 1997. They proceeded with their assumption without grappling with what our own Court has said in *Mabo* about the role that occupation plays in the foundation of native title.

When you approach the question of what continues after annexation by answering the rights and interests established by traditional law and custom – rather than by answering that it is the right to occupy land by authority of, and in accordance with one's traditional laws and customs – has profound implications for the way in which one conceptualises native title and ultimately, how one deals with its proof. This is why the High Court's error in relation to this issue was so prejudicial to the way in which they understood and approached the *Yorta Yorta* appeal.

Let me now turn to the third problem which really summarises the first two problems:

The High Court's disavowal of native title as a doctrine or body of law within the common law meant that it failed to judge the Yorta Yorta people's claim in accordance with this body of law

Let me illustrate the main point I am making about how the High Court is treating native title. The judgments in both *Mirriuwung Gajerrong* and *Yorta Yorta* run to hundreds of pages. And all of these pages of discussion concern statutory interpretation – rather than any discussion of cases.

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[11] Justice Toohey, above n 5.

[12] *Delgamuukw v Queen in right of British Columbia* (1997) 153 DLR (4th) 193 (SC).

Astoundingly there is absolutely no reference whatsoever to the Supreme Court of Canada's 1997 decision in *Delgamuukw.* This is the leading Canadian case in native title – their equivalent of *Mabo* which was substantially informed by the Australian High Court's decision. And the only reference in *Mirriuwung Gajerrong* to *Delgamuukw* is a reference to Lambert J's decision in the British Columbia Court of Appeal.

Despite the fact that in *Delgamuukw* Lamer CJ discussed the very issues concerning the concept and proof of native title which are at fundamental issue in these Australian cases – there was no reference to the emerging Canadian law. There was no reference to any other cases either. *Mabo* itself is not discussed and only mentioned for historical and contextual purposes.

There is no discussion of important questions that have hitherto been unresolved and uncertain in the common law of Australia and Canada – many of them still under development – by reference to cases. Meanings are attributed to key concepts such as "continuity", "connection", "tradition", "suspension", "extinguishment", "expiry", "suspension", "possessed under", and so on – without any reference to case law. These important concepts are treated as part of a statutory interpretation exercise, in an area of statutory interpretation which is conveniently without precedent.

What the High Court has decided is that it will draw a line between the Australian law on native title after the enactment of the *Native Title Act* and the body of North American and British colonial case law which has dealt with native title over the past two centuries, and which informed and underpinned the decision in *Mabo.*

This case law, upon which Brennan J and other members of the court drew in their judgments in *Mabo* concerning colonies in the subcontinent and West Africa, the United States and Canada – as well as cases concerning Wales and Ireland – has been conveniently disposed of. Rather than developing the fledgling Australian law by grappling with this considerable body of law, with which – as *Mabo* showed – there are more areas of common principle than there are differences, the High Court has taken the easy road of interpreting and developing native title under the rubric of statutory interpretation.

By treating native title as defined by section 223(1) the High Court is ruling on important questions and principles on the basis of bare assertion, rather than through what McLachlin J called "the time-honoured methodology of the common law" whereby cases are ruled upon according to the established and developing precedents:

> care must be exercised in the use of judicial authorities of other former colonies and territories of the Crown because of the peculiarities which exist in each of them arising out of historical and constitutional developments, the organisation of the indigenous peoples concerned and applicable geographical or social considerations..."[13]

[13] Justice McLachlin in *R v Van der Peet* (1996) 137 DLR (4th) 289 at 377, cited by Gummow J in *Yanner v Eaton* B52/1998 (5 May 1999).

Earlier, I quoted a passage from the judgment of Gleeson CJ and Gummow and Hayne JJ where they dismissed the view that there were "common law requirements" or "common law elements" to the establishment and proof of native title, concluding that "[i]t is, therefore, wrong to read paragraph (c) of the definition of native title as requiring reference to any such body of common law, for there is none to which reference could be made."[14]

This is a completely scholastic and unfortunate argument. Yes, native title is not an institution of the common law, it is a title recognised by the common law. Yes, native title is not a common law title in the sense that, say, adverse possession is.

But there is a body of common law which discusses the recognition, proof, content and extinguishment of native title – and this body of law is very large and it has been developed in countless decisions of the Privy Council, the United States Supreme Court, the Supreme Court of Canada and throughout the common law world. It is to this body of law which paragraph (c) of section 223(1) – if it had been properly interpreted – is directed. It is this body of law of which *Mabo* forms the cornerstone of the Australian law on native title. So it is a nonsense for the High Court to disavow the existence of this body of law which deals with the recognition, proof, enforcement and extinguishment of native title.

Conclusion

I wish to make two points in the conclusion to my address here this evening.

Firstly, it is to assert that the Yorta Yorta Aboriginal Community's claim for the recognition of their remnant native title to their homelands was not dealt with according to law. Their claim was considered and rejected according to the definition of native title set out in section 223(1). It was not considered in accordance with the common law.

The Yorta Yorta went to the courts to claim their rights under common law. They went to claim rights emanating from the same source as that of the Meriam People of the Murray Islands who had successfully established their title in *Mabo.*

Instead their claim was considered under the terms of a statutory definition – interpreted in a way that Parliament never intended. In my view, the claim of the Yorta Yorta under the common law of Australia and under the terms of the *Mabo* decision remains to be properly considered and adjudicated upon.

That legislation that was meant to result in legislative recognition and protection of rights that exist under the common law of this country, should result in Aboriginal claims being considered without the benefit of the methodologies and precedents of the common law – leads me to

[14] Above n 8.

the second point that I wish to make in this lecture.

It is this: given the gross misinterpretation of section 223(1) by the High Court, this provision in the *Native Title Act* must be amended before any further cases are determined. Section 223 must be amended to reflect the original intentions of the Parliament in 199315 and 199816: that the definition of native title was supposed to mean that all native titles would be proved in accordance with the High Court's decision in *Mabo* and the body of common law which surrounds that decision.

Section 223(1) should instead read that:

> 'native title' and 'native title rights are interests' are those rights and interests which are recognised by the common law

Without such an amendment then the whole basis upon which the *Native Title Act* was enacted – to recognise and protect native title – is destroyed forever.

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[15] *Native Title Act.*

[16] *Native Title Amendment Act 1998.*