Chapter Five

Revisiting *Mabo* : Time for the Streaker's Defence?

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In Brisbane two years ago I was privileged to present a paper to this Society on *Proving Native Title*.(1) It questioned the sort of evidence which would be used to implement the High Court's *Mabo* discovery. Dare I suggest that recent events at the Murray River sharpen the point of comments made at that time?(2)

Critics of the judicial propriety of *Mabo* generally accept that theirs is a lost cause; proposals for change now begin with a ritual genuflection to the principle of native title. However, "correctness" has eased a little of late, and in a recent issue of the *Australian Law Journal* a distinguished constitutional lawyer shot a Parthian arrow at "rights-driven social engineers operating, in their elitist way, outside Parliament House and outside the electorate".(3)

We are now contemplating amendments to the *Native Title Act* (*NTA*) -- some which the Government hopes the Senate will let it make, and some which the Government hopes the High Court will make *for* it. The Government claims that the Act is unworkable. A son of Chief Justice Frank Brennan sees "under the cloak of workability ... the wolf of dispossession and disempowerment."(4)

Flimsy Foundations?

The Government is not posing the ultimate question and so I venture to raise it again. Native title claims are only as good as the evidence led to support them, and we should look very carefully at the quality of evidence upon which the elaborate theory depends. Will it often be reliable enough to warrant handing over or restricting the use of large tracts of Crown land, leaving future generations to deal with the results of today's political or commercial expediency?

Little "hard" evidence is available to identify native parties' customs and "continuous connections". The lay (or "traditional") evidence for claimants is hearsay upon hearsay upon hearsay, manifestly open to bias or error. Before they testify, witnesses come in close contact with activists and anthropologists in their employ. Even in less politicised circumstances there are clear dangers in allowing "experts" to interview lay witnesses to gather "facts" on which the expert's opinion in court is based.(5) Contested claims of native title do at least go to a court, instead of a tribunal created by and for the cause. But the court procedure needs an amendment which is not on the present agenda. Section 82(3) of the *NTA* is an extraordinary provision which exempts native title cases from the rules of evidence. It should be deleted.

Land rights claims depend upon the evidence of anthropologists or other "social scientists". If anthropology is a science,(6) is it a sufficiently exact one to govern the disposition of vast areas of Crown land? If so, are its practitioners likely to be impartial in these cases? After all, the prime subject-matter of Australian anthropology is Aborigines. Asking an anthropologist whether native title evidence is reliable may seem like asking whether anthropology is bunk. At the Hindmarsh Royal Commission one or two brave experts gave evidence of fabrication and

were then subjected to the pressures which all such hierophants can expect to endure. They are not likely to be allowed into "the field" to check the evidence used to support a native title claim. In 1994 I offered evidence (including admissions) suggesting that anthropologists are predisposed to favour native title claimants and strongly discouraged from assisting other parties. Soon afterwards a note arrived from a national firm of solicitors which specialises in land rights cases. It read in part:

> "I can certainly endorse from personal experience what you had to say about the difficulty in finding anthropologists who are prepared to provide reports and to testify in circumstances where their evidence is likely to be construed as being contrary to Aboriginal interests".

In August, 1994 I received a letter from the President of the Australian Anthropological Society complaining that criticism of his colleagues' brand of evidence was "unsympathetic". The letter challenged none of the published evidence of bias but merely confessed and avoided by pleading "ethical duties". I replied:

> "I cannot finally decide the validity of the claims [of bias] ... but the sources of my information have a lot of relevant experience, and in some cases they are [anthropologists] making statements against interest. So far I have seen no reasoned refutation of what they have to say. I do sympathise with witnesses who fear ... that they will suffer professional prejudice, or peer group pressures, or public abuse for giving evidence which some noisy and influential people deem `incorrect'. I appreciate your point about ethical inhibitions but they arise with other expert witnesses ... [expert] evidence given every day is confidential but at law it is not immune from disclosure. Besides, in other cases a `second opinion' can be obtained from another expert ... In those professions such a witness does not risk an official or unofficial `blackball'. If every anthropologist who has had a decent chance to examine claimants and their environment is *ipso facto* to be regarded as having some bond of fealty to the examinees, how can a genuine judicial inquiry be held? ... If I am mistaken I am willing to be set right. I would be happy to discuss ... what I see (on present information) as inherent weaknesses in lay and expert evidence in this field."

Although it was the anthropologist who had initiated the contact, no reply was ever made.
The experiences of non-claimants which I summarised in 1994 were replicated in the Hindmarsh case, where the solicitor for the developers was moved to write:

> "Anthropologists and archaeologists working in the Aboriginal heritage field are beholden to the Aboriginal people for their livelihood. To write a report adverse to an Aboriginal claim is to jeopardise that livelihood. These experts freely admit the existence of this problem. They are reluctant to act for developers as that can cause the expert to be `frozen out' by the Aboriginal community -- as happened in the Bridge case. This is a major issue which must be addressed."(7)

Lawmakers who ignore this "major issue" take the risk of sponsoring an enormously expensive charade.

NNTT Seeks a Future

There is broad acceptance that the *NTA* is not working well. When we met in Brisbane two years after *Mabo*, the only known native title was on a little island near New Guinea, inhabited by Melanesians who emphasise their racial and cultural differences from Australian Aborigines.(8) So far as Australia was concerned, we did not know where the new-found title resided, or what rights it entailed, or who was entitled to it. In mid-1996 we are none the wiser.

In 1994 the National Native Title Tribunal (NNTT) opened with great *éclat*. Its President toured the country at no small expense, holding Press conferences and advertising the possibility that titles could be created by "mediation" under NNTT auspices. The Tribunal is an elaborate registry for claims which, if contested, still have to be decided by courts doing their best with the vague *Mabo* criteria. As at 1 May, 1996 some 238 claims had been registered(9) but the Tribunal, which is said to have cost more than $40 million so far,(10) has not sponsored a single title.

Hopes that the NNTT would soon produce numerous settlements by "fair, just, economical and informal" procedures -- a mantra of the promoters of new tribunals -- have been sadly disappointed. The President is consoled by the thought that the very concept of native title is a "catalyst for a whole range of negotiations".(11) But the first duties of miners, bridge builders and other developers are to their shareholders and creditors. It is not reasonable to expect them to be the principal crusaders for land management which is in the best interests of future generations of Australians.

After the High Court's decision in *Brandy v Human Rights and Equal Opportunity Commission*,(12) the President recommended that the NNTT be reduced to a mediation role.(13) Certainly these claims should go to a court and not to some bureau which owes its existence and prospects of growth to the native title movement. But for reasons which would best be given by Sir Humphrey Appleby, no important person has explained why the NNTT should be kept alive.

Mediation

There is a question whether this fashionable replacement for the old "without prejudice" conference is quite so impartial and non-coercive as its disciples claim. These comments by Mr Justice Young of the NSW Supreme Court are worth considering:

> "Mediation and other forms of Alternative Dispute Resolution have become the flavour of the year. ... Anecdotal evidence suggests that some mediators preside over a conference of the disputants and their lawyers and try to talk things out, often in the atmosphere that the alternative of litigation would be worse than anything else that could happen. ... Although mediators tend to keep saying that they are merely helping parties reach their own solutions ... parties feel that they have had the mediator's solution imposed on them.
>
> "Another message that comes from anecdotal evidence in Sydney is that a person with a bad case should always choose mediation. In court, a person with a bad case will lose with costs. In a mediation that person will always save or win something ... Another criticism is that it involves a lot of hypocrisy. The mediator has to pretend that he or she is merely helping the parties deal with their own dispute, whilst in reality the mediator is, to a greater or less extent, deciding the dispute on non-legal grounds ... The idea behind mediation is hardly new. Barristers and solicitors have been settling cases for centuries. ... An interesting question is whether the costs of a mediator at so much per hour plus the hire of rooms and so forth is really a marked improvement."(14)

The judge was referring to normal litigation. His comments about pressure to settle apply *a fortiori* when a claimant, simply by claiming, gains the equivalent of an injunction(15) which will impose a long and costly delay if the claimant is not well paid to go away.

Whatever may be thought of mediation in principle, the assumption that the NNTT is an impartial mediator is open to question, considering the circumstances of its birth and promotion. In younger and happier days the President trusted that people would stay away from the NNTT if they were not sympathetic to the cause. A few, perhaps, suffer from an excess of zeal. Henry II,

in days of yore, felt bound to tell his subjects that a few of his courtiers took his complaint about Thomas a'Becket -- "Who will rid me of this turbulent priest?" -- just a mite too literally. In like vein is a passage from one Tribunal Member's contribution to mediation and "reconciliation". It should be emphasised that these *dicta* were delivered in a non-claimant case in which there was no opposition at all to the building of a retirement village. Indeed one Aboriginal witness described it as a "fantastic idea". After making the formal order (all that was needed) the Member delivered a gratuitous harangue:

> "We, the newcomers, have a responsibility for the plight of the descendants of the original owner occupiers ... Soon after [British settlement there] began the invasion of their gene pool. We shamefully treated and taunted the offspring of these usually violent sexual encounters. Those we referred to as having `a touch of the tar brush' or `half caste black bastards' found refuge in Aboriginal societies or were stolen from their mothers and communities by the State. Despite all this suffering, however, Australia's indigenous people have survived and although often damaged remain distinguishable in heritage, culture, cohesion and loyalty ... The modern put-down in many urbanised areas is that *they* (always *they*) are not real Aborigines because *they* are not full blood tribal people .... More often than not these statements are made by people who have never met or spoken with Aboriginal people. ... Too often Aborigines have been denied the chance to live on their land and to hunt, fish or gather on that land and waters; are we now to tell them they have abandoned a traditional lifestyle and therefore they have lost their native title in those few places in Australia where native title has not otherwise been extinguished by past Crown dealings? I hope we can accept that modern Aborigines still identify with their homelands in ways that *transcend common law notions of property or possession*." (Emphases in original).(16)

Do Pastoral Leases extinguish Native Title?

This is the most vexed of all the questions about native title at present. Vast areas of Western Australia, Queensland, South Australia and the Northern Territory are subject to pastoral leases. The question is urgent not only for pastoralists but also for developers interested in such areas -- the *Waanyi* and the *Wik* claims in north-western Queensland are very much in point. It is complicated by the fact that there are several (perhaps many) varieties of pastoral lease. In Western Australia, South Australia and the Territory they often contain reservations, devised long before native title was heard of, which allow Aboriginal activities to continue.

A representative of the Kimberley Land Council rejoices that the uncertainty surrounding pastoral leases "gives a certain strength to our negotiations".(17) A relative of the author of the leading judgment in *Mabo* observes that:

> "Uncertainties about the effect of the High Court's decision in *Mabo* provided the political stimulus for federal politicians to act ... even when the results [of litigation] are uncertain [they] can increase the political leverage of disadvantaged groups."(18)

This uncertainty was not supposed to exist after the *NTA* was passed. On the second reading of the Bill, Prime Minister Keating stated:

> "I draw attention ... to the recording in the Preamble of [sic] the Bill of the Government's view that under the common law past valid freehold and leasehold grants extinguish native title".(19)

And the long and argumentative Preamble to the *NTA* declares:

> "The High Court has ... held that native title is extinguished by valid governmental acts that are inconsistent with the continued existence of native title rights and interests, such as the grant of freehold or leasehold estates."

But when the Bill became law its operative parts did not clearly support the Prime Minister. In November, 1995 some 86 of the 156 native title claims then registered related to pastoral leases.(20) It seems likely that these figures refer only to current leases, and that other claims cover areas where pastoral leases have expired. (*Mabo* indicates that the expiry of a Crown lease does not revive native title.)

In the *Wik* case a Federal Court judge held that native title *is* extinguished by a type of pastoral lease (without relevant reservations) which has been used in Queensland since the 1890s.(21) The *Wik* people appealed. By special arrangement the normal appeal to the Federal Court was bypassed and in a few days' time(22) Brennan CJ and his brethren return to the Parnassus of judge-made law to contemplate native title. Judgment will be reserved; if this conference would only adjourn to next summer this paper could be a little less tentative.

There are now two judges on the High Court who were not there when *Mabo* appeared, one with a well-known predilection for the grand gesture. Some members of the Court are probably unshaken in their belief that the 1992 decision was a fine bid for a place in history. But there may be others who are tempted to file the Streaker's Defence: "It seemed like a good idea at the time". Whatever the dominant instinct, it will take more judicial legislation to sort out the mess. *Mabo*, which was gratuitously extended from tiny islands to the whole of Australia, contains all manner of equivocations(23) which leave room for contraction or expansion, as the legislative judges see fit.

It is unlikely that the Court will stunt the growth of its child by simply saying: "Yes, all pre-1975(24) pastoral leases extinguish native title." It is more likely to say: "Pastoral leases *without reservations* extinguish native title but other leases are another story, which we may tell in the coming bye and bye."

Political or commercial compromises aside, we would then have to wait for the courts to discover in each case the existence and nature of native title, and the extent to which it can co-exist with the lease in question. Millions more could be spent on acrimonious publicity, mediation and litigation. A third possibility would be to say, "No, pastoral leases are really just a special sort of licence which never extinguishes native title". This, I suspect, is a bombshell which the Court would not now dare to release.

A prediction of an inconclusive result in the *Wik* case assumes that the High Court will follow judicial tradition by refraining from "advisory opinions". That is a large assumption these days but only last February, in the *Waanyi* case, the Court took refuge in that rule.(25) It is a rule based on the separation of powers, a doctrine which has not greatly troubled the Court in recent years. (If 95 per cent of *Mabo* is not an advisory opinion then I do not know what *Mabo* really is.)

From the Government's viewpoint, the next best thing to a complete clearance for pastoral leases would be a categorical statement of the position of every common type of pastoral lease in Australia *vis a vis* native title. The Court may see this as a viable alternative to pleading the Streaker's Defence despite its recently-affirmed rule against advisory opinions. Kirby J, who joined the Court just before the federal election, was keen to do this in the *Waanyi* case, upbraiding his seniors for confining themselves to a narrow point of procedure:

> "The judicial function should not be frozen in time. [C]ourts should endeavour to be constructive and useful to parties in a dispute."(26)

However, one of Kirby's brethren (McHugh J) did recognise that the burning question could not be avoided much longer:

> "[Everyone] will be left in a position of doubt until this Court finally resolves the consequences of pastoral leases."

The result of the *Wik* appeal depends on the resolution of two competing interests:

(a) retaining the warm glow of the original decision; and

(b) escaping the unforeseen consequences of the self-indulgently wide *dicta* in *Mabo*.

At the preliminary hearing which "fast tracked" the *Wik* appeal, shafts of realism did peep through. Justice McHugh looked beyond Lake Burley Griffin:

> "Surely these issues affect the economies of Queensland and Australia and are probably starting to affect the social fabric of the country, at least those parts where native title is alleged. Surely somebody's got to make a start on addressing these questions."(27)

Chief Justice Brennan ventured: "It is not desirable [that] it should be delayed at all".(28) Compromise is likely, but will it produce more questions than answers?

The Government accepts that it is politically impossible to solve the pastoral leases problem by legislation. It points to an obstructive Senate and to the high excitement that would be aroused by changes to the *Racial Discrimination Act* (*RDA*) which underpins *Mabo*. In effect the Government says: "Let the High Court fix the mess of its own making".

At the time of writing some backbenchers were seeking a firmer line, arguing that the Government's resigned attitude endorses the legislative pretensions of the Court. The Government's reply is that extinguishment by legislation would involve untold compensation under the "just terms" clause of the Constitution,(29) and an interminable round of litigation as to whose title was extinguished, what it amounted to, and what it is worth. (I leave it to higher intelligences to explain how a non-assignable(30) title which may fall far short of ownership can sensibly be valued.)

The Government's hope that all pre-1975 pastoral leases extinguished native title depends heavily on the Brennan view that:

> "... the limited reservations in the special conditions [in leases on Murray Island] are not sufficient to avoid the consequence that the traditional rights and interests of the Meriam people were extinguished. By granting the lease, the Crown purported to confer possessory rights on the lessee and to acquire for itself the reversion expectant on the termination of the lease. The sum of those rights would have left no room for the continued existence of rights and interests derived from Meriam laws and customs."(31)

But the logical consequences of this statement could be avoided, if other judges so desired, by arguing:

(i) That the leases in *Mabo* were not *pastoral* leases;

(ii) That Brennan J left open the possibility that reservations in other cases are not so "limited" that traditional rights are extinguished; and

(iii) That the Deane-Gaudron judgment in *Mabo* takes a different line:

> "This lease recognized ... rights of the Murray Islanders ... It would seem likely that ... it neither extinguished nor had any continuing adverse effect upon any rights ... under common law native title. It is, however, appropriate to leave the ... possible effect of that lease until another day."(32)

But on the other hand one may ask why Brennan J limited the power of extinguishment to Crown *leases*:

> "The rights ... conferred by native title were unaffected by the Crown's acquisition of ... sovereignty [but it] exposed native title to extinguishment by a valid exercise of sovereign power inconsistent with the continued right to enjoy native title ... Thus native title has been extinguished by grants of estates of freehold or of leases but not necessarily by the grant of lesser interests ....".(33)

Why stop at leases? Why does not *any* proprietorial behaviour by the Crown amount to extinguishment of native title? *Mabo* depends on a new-found dichotomy between (a) the Crown's assertion of sovereignty ("radical title") over land, and (b) its assumption of ownership. But does not *any* Crown grant, lease, licence or permit imply that the Crown is owner of the property concerned? If so, any and every Crown concession would convert the Crown's "radical title" to ownership, and the Australian legal system might no longer be holding the High Court's fractious baby. But the Court's experiment has probably gone too far.

While the status of pastoral leases remains uncertain, the right to convert them to freeholds -- a right conferred by the Land Acts of most States -- is also under a cloud. If permission to "freehold" a lease affected native title, compensation calculated in some incalculable way would be payable by the government concerned.

The "Right to Negotiate"

When the Keating government drafted the *NTA* Aboriginal politicians demanded a veto and went away more or less content with a special "right to negotiate" (*NTA* sections 26-44). It is more potent than any right enjoyed by other owners facing resumption of land held under a title much clearer than native title. Bolstered by the *Waanyi(34)* decision, the right to negotiate gives a mere claimant(35) the equivalent of an *ex parte* injunction to restrain development for a year or more -- unless the developer buys his way out. Now people who are given interim injunctions usually have to promise the court that they will compensate the other party for the delay if they do not prove their claim ("the usual undertaking"). But not here: the right to negotiate perfects the bargaining counter which *Mabo* created. It does not require a clever lawyer to see that it may be worth paying even a very dubious claimant to go away if delay will be expensive. The reason why few ransoms have been paid so far is that neither *Mabo* nor the *NTA* enables a developer to be sure that if he pays off the present claimant no other "true owner" will bob up later on.

The "right to negotiate" is one of the *NTA*'s more remarkable additions to *Mabo*. There is mounting evidence, noted by Justice McHugh in *Waanyi*, that the right to negotiate and the uncertainty about pastoral leases threaten Australia's economy. The Government proposes to shorten the time for negotiation from 6 months to 4 and to make it more difficult to gain the bargaining counter by simply filing a claim. There is no legal duty to provide "reverse discrimination" in the form of rights not conferred on other owners facing acquisition. No doubt reasonable notice of developments on Crown land should be given as a matter of fairness, and to reduce the risk that someone will later claim that some sort of native title has been disturbed. But this does not require all the paraphernalia of the "right to negotiate". There are normal court injunctions to protect substantial claims. But defenders of the right to negotiate are well aware

that courts do not give injunctions as a matter of course; they look harder than the NNTT at the question of a *prima facie* case, they allow other parties to oppose the application, and they deter gung-ho applicants by demanding the "usual undertaking".

The Government would make it more difficult to register a claim by requiring every application to be accompanied by a "tenure history" -- an official summary of dealings with the subject land which would disclose "extinguishing" transactions and dispose of claims which have no reasonable chance of success.

Extinguishment Issues First

The Act should make it clear that when an issue of extinguishment arises the Court must decide that point first.(36) The ruling on this point may decide the whole case with considerable savings of time and money. The evidence on an extinguishment issue will be documentary and all parties will have equal access to it. If it shows that native title (if any) has been extinguished there will be no need to plunge into the miasma of "traditional" and anthropological evidence, to which access will seldom be equal.

The Government also intends to raise the "entry test" by giving approved "representative bodies" -- including, no doubt, the already potent Land Councils -- a power to pick the claims that deserve a court hearing, and authority to decide between rival claimants to the same land. The writer foreshadowed some such move in 1994:

> "Mining companies have been warned to confine negotiations to the `big unions' of Aboriginal affairs. Bureaucratic nature being what it is, it will not be surprising if an oligopoly of native title brokers commends itself to the central government,although some native groups in the Northern Territory have challenged the hegemony of the Central and Northern Land Councils."(37)

But the proposal ignores evidence of nepotism in the distribution of funds, favours and legal aid. The price of conferring these powers on "leaders" who are already *de facto* native title brokers may be too high. And how long will the brokers take to sift the wheat from the chaff or to resolve internecine disputes? Longer than the present right to negotiate perhaps?

Another plan is to abolish the right to negotiate when a licence to search for minerals is applied for, and to confine it to applications for mining leases. (It now arises at each stage.) But by the time a lease is sought it will be apparent that profit is in the offing, and the ransom will be much higher than at the experimental stage.

Native title brokers will say that profit-sharing and special royalty(38) arrangements are already part and parcel of "negotiations". But why should they be? No other landowner can demand a share in the profits of a mining company with a Crown lease over his property, and still less can he expect the government to share its royalties with him. Generally minerals are the property of the Crown, not of the private landowner. The latter is entitled to compensation for damage, disturbance and so on, but that is all. Why should not the same principles apply to native title holders in so far as their rights can be valued?

The right to negotiate is the only "settlement lever" held by the native title claimants. Executives of mining companies have been warned by an officer of the Northern Land Council not to be too critical of "traditional" claims:

> "At some point in time it's going to look pretty bloody stupid if you ... have a thousand Aboriginal people sitting on your front door of your development with placards blockading what's happening. It's not a threat. It's just a statement of fact that it will happen. It's part of reality and part of business. ... If you're the company executive that has to go back and

> explain to the chairman or the shareholders, why there are a thousand Aboriginal people camped outside your door and why you are a world-wide incident, then your life in the company isn't going to be that long."(39)

The same gentleman dismisses any suggestion that Land Councils are "manipulative power brokers with their own agenda".

In a few years, willy-nilly, the "2000 Olympics" will be upon us. In December, 1993 the writer concluded a short article in these words:

> "On the day this article was completed the 2000 Olympic Games were awarded to Australia. In the [native title] area they may become a more potent bargaining counter than *Mabo*."(40)

Dark hints that the Games could be used as a bargaining counter began in 1993(41) and intensified this year.(42) In a disingenuous disclaimer similar to the one above, Mr Charles Perkins said: "I am not threatening the government, I'm just saying that we've got five years to get it right".(43)

This type of negotiation is often accompanied by references to nebulous "international opinion". It is now commonplace to exaggerate the size and unity of special interest groups by alluding to some keenly supportive "community" in the background. Here we are asked to assume that there is an "international community", all-wise, all-knowing, with nothing better to do than to barrack for lobbies in Australia, and to be implicitly obeyed by Australians whenever the lobbies allege that "international opinion" demands our obedience.

Will Government be able to Amend?

Even modest changes to the *NTA* will be politically arduous. "Racism", a hissing term of abuse, will often be heard, regardless of its proper semantic limits. The land rights cause has attained a *quasi*-religious status in several ways. *First*, "indigenous" fashions have been imported from abroad without regard to different historical and legal circumstances. *Second*, claims of native title are advanced without recognition of other forms of assistance, including statutory land rights in the Northern Territory and in several States. Claims approved under the NSW Act in the last twelve months cover 4626 hectares of former Crown land worth about $44 million.(44) More than 40 per cent of Northern Territory is subject to statutory land rights, and 23 per cent of South Australia is earmarked for Aboriginal reserves and statutory land claims.(45) The ATSIC budget exceeds $1 billion per year; there is a Land Acquisition Fund(46) and other benefits which need not be detailed here.

Third, there is a good deal of romantic myth-making which ignores the degree of integration with, and dependence on Western culture and technology, even in remote areas. Defending herself against other activists, the magistrate Pat O'Shane noted that "close to 60 per cent of Aboriginal Australians live in urban communities".(47) If provincial towns were taken into account that figure might well be higher. There are implicit admissions of integration in demands for water, sewerage and other services in areas which no urban infrastructure can possibly reach, and where non-Aboriginal people provide them for themselves. "Leaders" who live and travel well, and who naturally promote their kin in modern middle-class style, perpetuate "the romantic myth ... that some Aborigines can continue to maintain the hunter-gatherer lifestyle ... frozen in time for the amusement of anthropologists and tourists."(48)

When the *Wik* judgments appear there will be many delicate judicial variations on the "inconsistency" theme. Perhaps the truth of the matter is that late twentieth Century Australia, of which Aborigines are an important part, is simply inconsistent with native title. Can the clock

really be turned back to a reconstructed if not mythical past, while retaining and using in the Aboriginal cause culture and technology brought to this country since 1800?

Section 21 of the *NTA*

There are other dubious parts of the *NTA* which ought to be on the reform agenda.

Section 21 provides that in exchange for surrendering native title or consenting to a development, native title holders may receive from the Commonwealth or a State "the grant of a freehold ... or any other interests in ... land ... that [they] may choose to accept." There is no stipulation that the value of the substitute property shall not exceed the value of the rights surrendered. There are no criteria for valuing the native title concerned, and there is no provision for public scrutiny of the bargain.

It is part of *Mabo* doctrine that native title is non-assignable, except by surrender to the Crown, or within the relevant clan if its customs so permit.(49) It follows that native title has quite a limited market value, even if it comes near to ownership in the ordinary sense. *Mabo* emphasises that the content of native title depends on customs which may vary greatly from place to place. Native title may be a mere right of passage at a certain time of the year.

The mystical nature of Aborigines' relationship with land is stressed in campaigns for land rights and in attacks upon their critics. But when a foothold is gained, commercial considerations understandably come to the fore, as in a homily recently delivered to mining company executives by an officer of the Northern Land Council:

> "Those companies that will talk to Aborigines as equals will understand that attachment to land and sacred sites are legitimate concerns ... [But it's] a myth that Aboriginal people are anti-mining ... Most Aboriginal people want development as it is extremely profitable".(50)

Frank Brennan, too, conjoins also switches from mystical to monetary considerations:

> "Ever since the Fraser Government passed the Northern Territory land rights legislation Aborigines have claimed that a right of veto over development ... has been essential for cultural survival and self-determination. The right has also armed them with economic bargaining power against miners."(51)

Land rights have brought considerable wealth to Aboriginal corporations and executives in the Northern Territory, and it is disingenuous to claim that all or most objections to development have an other-worldly basis. Therefore it is conceivable that an expedient or "politically correct" government, possibly encouraged by a developer willing to "contribute", could use section 21 for a quiet handover of property far more valuable than the native title (established or merely alleged) which is surrendered. It is naive to expect that governments and developers will ensure that there are no imprudent "swaps" which later generations will regret. Native title itself is protected by elaborate processes of negotiation and arbitration. By the same token, section 21 should not be capable of "upgrading" native title at public expense to much more valuable forms of property. If not repealed, the section should be circumscribed by publicity and independent scrutiny.

Accountability and Equitable Distribution

Two years ago the writer observed:

> "So far remarkably little has been heard about ensuring that all title holders receive, equitably and efficiently, a proper share of the government grants, compensation and other fruits of the native title movement. Some of the zeal displayed elsewhere could well be applied to this area. There is also a question whether public sector emoluments and allowances absorbed in

a labyrinth of `representative' organisations will leave enough for distribution among those for whom the structure is said to exist."(52)

- There is still too little attention paid to equitable *distribution* of land rights, native title and financial assistance. In Aboriginal as in non-Aboriginal affairs, the cosy word "community" can mask strongly-held differences within the allegedly united group.(53) The authority of some grandiloquently titled "leaders" is questionable. Participation in ATSIC elections is less than impressive.(54) There may be sharp differences of opinion between traditionalists who place native title above commerce and "leaders" with a more entrepreneurial frame of mind.

In the near future we may see a new species of native title litigation with a new class of respondents -- not landowners or developers, but Aboriginal companies and "leaders" who allegedly have failed to distribute the fruits of native title and land rights fairly and efficiently. We need not now explore numerous allegations (and some convictions) relating to large amounts of public money channelled through ATSIC to its many subsidiaries. (A select bibliography is appended.(55)) These stories have risen from one-day stands in obscure corners of the newspapers to detailed discussions closer to page one. They present patterns of tried if not trusted practices such as sales of personal property to milch companies at inflated prices, large cheques drawn to "cash" without supporting details, records destroyed or never made, fictitious employees, excessive travelling expenses and the modern gambit of charging lavish fees for "consultancies" based on no discernible work or qualifications.

A barrister well known to me was briefed by a "representative organisation", in an elaborate show of concern, to advise on recovery of money advanced without proper authority, and spent unaccountably by ATSIC clients in Queensland. It was apparent from the brief that certain people sat on the committee which voted the funds, and also on the committee which received them. Records were fragmentary. Money had been spent on "employees" who probably did not exist, or who had done little or no real work. Despite the strategic gaps in the records, my friend was able to advise that there was enough evidence to recover approximately half of the $1.5 million in question. Clearly this was not the advice that he was expected to give. It is now well over a year since advice to sue was given. The rest is silence.

But abusive censorship still applies. The former federal Minister Barry Cohen notes a "near-hysterical response to suggestions that all is not well in Aboriginal legal services", and he is not surprised that "few are prepared to submit themselves to such psychological thuggery".(56) In a flagrant case, Hal Wootten, QC -- an NNTT mediator no less! -- described routine cries of "racism" as "shameful ... If you are going to have somebody exploiting an organisation it doesn't matter whether they are black or white. It has to be dealt with."(57) Fraud aside, complaints of nepotism, waste and inefficiency abound. People with no relevant qualifications administer some legal aid bureaux and other organisations with large budgets drawn from public revenue.

Slowly but very productively flood waters percolate down through the Channel Country of the Outback. More speedily, if not so productively, over one billion dollars filtered through ATSIC to more than 1600 dependent bodies in 1994-95.(58) In this Byzantine profusion of agencies purporting to cater for less than two per cent of our population, pretentious titles and sonorous job descriptions abound. There is easy incorporation under special legislation, and when a body becomes insolvent, as many do, the normal rules of liquidation and investigation do not apply.(59)

But these are not primarily matters for company law, criminal law or the inquiries which seldom go anywhere. They are questions of care, skill and honesty on the part of trustees towards their

intended beneficiaries. The larger the Aboriginal "trust fund" becomes, the more numerous the complaints of maladministration are likely to be. Should these internecine disputes be left to wind their way through the equity courts at public expense without any particular legislative guidelines? I think not; the *NTA* should have more to say about the accountability of "leaders", native title trustees and "representative bodies". Less should depend on the unregulated discretion of title brokers and regional oligarchs.

"Supermabo"

The review of the *NTA* should extend to kindred legislation. Since 1994 we have heard a great deal about the Hindmarsh Bridge affair and the Press seems to have left the public with a vague idea that it is a "*Mabo* claim". It is not; *Hindmarsh Bridge* is a child of the *Aboriginal and Torres Strait Island Heritage Protection Act* 1984 ("the *Heritage Act*") as interpreted by ex-Minister Tickner.

The declared purpose of the *Heritage Act* is to protect "areas or objects of particular significance" to Aborigines from "desecration" (section 4). No one has yet asked the High Court whether laws of this kind amount to the Commonwealth "establishing" a religion.(60) The Minister may issue "emergency declarations" (effectively long-lasting *ex parte* injunctions) for up to 60 days in response to an oral or written claim that a significant area is threatened (section 9). He may then proceed to place a long-term ban on development of or entry to the land, after "due consideration" of a report by someone selected by him, and any submissions made in response to a public advertisement. The reporter may see fit to consider the "pecuniary interests of non-Aboriginal people" (section 10). The power which this Act puts in the hands of activists and any Minister inclined to indulge them is quite remarkable. Land can be tied up and developments halted at great expense, without compensation, by a mere *fiat* of the Minister. No court or tribunal - not even a tribunal tailor-made for claimants - need be consulted before a ban is imposed. There is no appeal on the merits.

As a matter of constitutional form the Act provides for compensation to be paid when property is "acquired" (section 28). However, as the *Tasmanian Dam* case reveals,(61) "acquisition" is a slippery concept, and until the High Court adopts a more realistic definition of that term, land use can be severely restricted without activating the "just terms" clause.

Natural justice would normally require that people liable to suffer from a "heritage" listing be given notice of the applicants' claims and a chance to contest them before any permanent order is made. However, in the Hindmarsh case it was held that this elementary rule of justice does not apply to the Aboriginal heritage regime.(62) It is not surprising that counsel for the Chapmans, the developers in the Hindmarsh case, found it very difficult to frame counter-submissions to Minister Tickner. Somehow they had to deal with unseen allegations by unidentified people!

A different view was taken by a full Federal Court in *Douglas v Tickner* on 28 May, 1996 in a decision which simply restores an elementary rule of natural justice. But it remains to be seen how the courts will handle disclosure issues when (as in the *Hindmarsh* case) claimants say that their assertions are too "sensitive" to be examined by profane eyes. In Northern Territory cases there has been much tremulous to-ing and fro-ing on this point, and some parties have been allowed to get away with a degree of non-disclosure which would not be tolerated in any non-Aboriginal party seeking orders affecting large amounts of property. Indeed, shortly after the *Douglas* case a single judge of the Federal Court held that the substitute "reporter" in the Hindmarsh Bridge affair could hand material back to the claimants without disclosing it to the developers, because it had been given to the reporter in "innocence and trust."(63)

The Chapmans succeeded on a point of form rather than substance. The Minister's advertisements were inadequate, and his failure to give personal consideration to claims of "secret women's business" breached his duty to give "due consideration" to the case.(64) Therefore his ban was invalid, but that is not necessarily the end of it. It is an inherent weakness of judicial review that when a court sets a Minister's mistakes aside the Minister may try again -- as Mr Tickner was busy doing when he was voted out of office.

These facts remain:

(1) The Minister may impose a "heritage" order whatever the consequences to non-Aboriginal parties may be.

(2) This can generally be done without compensation.

(3) The Minister may impose his will without any hearing on the merits in a court or even in a tribunal which, in mediation *patois*, is "user-friendly" to applicants. There is obviously no assurance that political expediency or ideological fashion will be excluded from the decision-making process.(65) The only available remedy is judicial review, which is by no means an appeal on the merits. If Tickner had dotted his technical 'I"s and crossed his formal 'T"s in *Hindmarsh* he could have done pretty much as he liked.

(4) Native title claims can only be made over Crown land but there is no such curb upon "heritage" claims, as the owner of a suburban backyard in Alice Springs discovered in early 1995.(66)

"Supermabo" indeed. Curiosities such as these should be added to Senator Minchin's shopping list of amendments.

Endnotes

1. *Upholding the Australian Constitution : Proceedings of The Samuel Griffith Society*, Volume 4 (1994), p. 31.

2 *Report of the Hindmarsh Island Bridge Royal Commission,* State Print, Adelaide, December, 1995; Ron Brunton, *The False Culture Syndrome*, IPA Backgrounder, Volume 8, No.2, March, 1996.

3. P. H. Lane, *The Changing Role of the High Court* (1996) 70 ALJ 246 at 246.

4 *The Australian*, 27 May, 1996 : *This Time There is Nothing to Offer Aborigines*, Frank Brennan SJ.

5. *Forrester v Harris Farm Pty Ltd*, unreported, 2 February, 1996, ACT Supreme Court (Miles CJ).

6. It appears that we must now defer not only to anthropology but also to feminist anthropology: cf Hindmarsh Royal Commission Report, *op.cit*., p.161.

7 S. Paylyga, *Australian Lawyer* (1995) Vol. 30, No.8, p.24.

8 Torres Strait Regional Authority chairman Getano Lui : "We are two races. I would not expect the National Reconciliation Council or ATSIC to speak for us ... we have

been struggling for recognition as a separate indigenous race for a long time". *Courier Mail*, 30 May, 1996 : *PM Has Snubbed Us Say Torres Strait Islanders*.

9 Commonwealth of Australia, *Towards a More Workable Native Title Act: An Outline of Proposed Amendments*, Canberra, May, 1996, p.5.

10 ABC *Midday* programme, 2 April, 1996.

11. *Courier Mail*, 23 April, 1996.

12 (1995) 69 ALJR 191.

13 He has also suggested that the Tribunal change its name to "National Native Title Mediation Service" and that judges no longer be involved in its work: *Weekend Australian*, 18Ä19 March, 1995 : *Judge Seeks Mabo Tribunal Overhaul*.

14. (1994) 68 ALJ 55 : *Current Topics - Mediation*.

15 That is, the "right to negotiate".

16 *Re Greater Lithgow City Council*, NNTT, 4 April, 1995, S. Flood, Member.

17. Peter Yu, *Nationwide*, ABC television, 7 March, 1996.

18 Frank Brennan SJ, *Land Rights Make Room for Self Rule* in *One Land One Nation*, University of Queensland Press, quoted in *The Australian*, 31 July, 1995.

19. CPD (HR), 16 November, 1993, p.2880.

20 Figures quoted by Kirby J during the hearing of the *Waanyi* appeal: *The Australian*, 22 March, 1996 : *Court Sidesteps Waanyi Decision*.

21. *Wik Peoples v Queensland*, 29 January, 1996, Federal Court, Brisbane (Drummond J).

22. Hearing of the appeal to the High Court was set down to commence on 11 June, 1996.

23. J.R. Forbes, *Mabo and the Miners* in *Mabo: A Judicial Revolution*, Stephenson and Ratnapala (eds), University of Queensland Press, 1993, pp.213-215.

24. That is, leases granted before the *Racial Discrimination Act* came into effect.

25 *Re North Ganalanja Aboriginal Corporation*; *ex parte Queensland* (1996) 70 ALJR 174, applying *Re Judiciary and Navigation Acts* (1921) 29 CLR 257.

26. *Courier Mail*, 22 March, 1996 : *Judge Criticises Court's Inaction*.

27 *The Australian*, 16 April, 1996 : *Native Title Case on Pastoral Leases Heads for High Court*.

28 *Ibid.*

29 Unless the High Court subsequently decided that *all* pastoral leases extinguish native title.

30. It is a basic tenet of *Mabo* that native title cannot be assigned, save perhaps within the group which is entitled to it, if their customs envisage assignment.

31 *Mabo* (1992), 175 CLR 1 at 72Ä73.

32. *Ibid*. at 117.

33. *Ibid*. at 69.

34. *Re North Ganalanja Aboriginal Corporation*; *ex parte Queensland* (1996) 70 ALJR 174 Ä order that the NNTT register applications not obviously frivolous, and not allow other parties to present a case for non-registration Ä a procedural ruling reached after the appearance of 8 QCs and 11 other barristers.

35. In the media, perhaps under the influence of ATSIC or Land Council press releases, there is a persistent and tendentious application of the term "traditional owners" to mere claimants.

36 There are ample precedents for listing decisive points of law first, but a single judge case (noted *Weekend Australian*, 23-24 December, 1995 : *Court to Seek Federal Ruling on Native Title*) suggests that the Federal Court may not follow this practice in native title cases without legislative prompting.

37 *Mabo and the Miners - Ad Infinitum?* in M. A. Stephenson (ed), *Mabo: The Native Title Legislation*, University of Queensland Press, 1995, p.53. (The article was completed in the year before publication.)

38 This is a misnomer for profit sharing or for some special payment from government. The true meaning of "royalty" is a payment by a miner to the Crown as the price of resources owned by the Crown.

39. Darryl Pearce, quoted in *Australian Journal of Mining*, April, 1996 : *Developers Must Negotiate With Aboriginals*.

40. AMPLA Bulletin, March, 1994, *If the Commonwealth Had Its Way*.

41 *Weekend Australian*, 25-26 September, 1993 : *Aborigines Want Their Own Team*; *Courier Mail*, 27 September, 1993 : *Blacks Threaten Olympic Games*; *The Australian*, 27 September, 1993: *Black Leaders Attack Racist Mabo Proposal* ("... could lead to revolution and protest in the lead up to and during Sydney 2000 Olympic Games"); *Courier Mail*, 29 September, 1993 : *Aborigines Urge Boycott of Olympics*.

42 *Weekend Australian*, 6-7 January, 1996 : *Black Australia's Game Plan*; *The Independent*, April 1996 : *Caught in the Spotlight* ("the cameras of the world's TV stations and the press will be focused on Australia"); *Courier Mail*, 15 April, 1996 : *Aborigines Unite Against PM*; *Courier Mail*, 16 April, 1996 : *Minister Flippant and*

Dull Says ATSIC ("Ms O'Donoghue said she could not rule out civil unrest, particularly at the 2000 Olympics"); *The Australian*, 18 April, 1996 : *No Future in Return to Racial Paternalism* (quoting Marcia Langton); *Courier Mail*, 20 April, 1996 : *Australia's Reputation Hanging on Mabo Action* ("potential for Aborigines to embarrass the Australian Government internationally during the Sydney Olympic games `considerable'"); *The Australian*, 15 May, 1996 : *Perkins Warns of Sydney 2000 Turmoil*.

43 *The Australian*, 15 May, 1996 : *Perkins Warns of Sydney 2000 Turmoil*.

44 *The Australian*, 27 May, 1996 : *Black Council to Challenge Land Claim Rejections*.

45. ABC Radio ("AM") 22 May, 1996, Premier Brown.

46. *Land Fund and Indigenous Land Corporation (ATSIC Amendment) Act* 1995. There are to be annual grants to the Land Fund from Consolidated Revenue according to an "indexation factor multiplied by $121 million". (sections 193, 193D). The present Government's attitude to the "social justice package" which was to supplement the fund is not yet clear.

47. *The Australian*, 26 April, 1996 (letter, Pat O'Shane, Woollahra, NSW).

48 *The Australian*, 11-12 May, 1996 : *The Gulf Between Black and White* (Barry Cohen, a former minister in a federal Labor administration). Cohen notes that Maori author Alan Duff has trenchantly criticised a similar dualism in New Zealand "indigenous" politics.

49. *Mabo* (1992) 175 CLR 1 at 70.

50 *Australian Journal of Mining*, April, 1996 : "Developers Must Negotiate With Aboriginals".

51 *The Australian*, 27 May, 1996 : *This Time There is Nothing to Offer Aborigines* (Frank Brennan).

52. *Mabo and the Miners Ä Ad Infinitum?* in *Mabo Ä The Native Title Legislation*, M. Stephenson (ed), University of Queensland Press, 1995, p.53.

53. See for example the litigation over distribution of legal aid funds in *Majar v Northern Land Council* (1991) 37 FCR 117.

54. Only about one third of the 120,000 people eligible to vote have bothered to vote in the two ATSIC elections so far held, and some regional councillors have been elected with a mere handful of votes: *The Australian*, 15 April, 1996 : *Our Own Vehicle of Apartheid*.

55. *The Australian Financial Review*, 15 June, 1993 : *Mabo Reference Guide*; *Sunday Mail* (Brisbane), 27 June, 1993 : *Sugar Ray Heads the Battle for Land Rights*; *The Australian*, 30 August, 1993 : *ATSIC Urges Tighter Control of Funds*;

Courier Mail, 14 September, 1993 : *CJC Tells of Courtroom Arson*; *Sunday Mail* (Brisbane), 19 September, 1993 : *Audits Not Complete, Probe Told*; *Weekend Australian*, 27-28 November, 1993 : *The Bucks Stop Here*; *Courier Mail*, 2 December, 1993 : *Millions Wasted: Auditor*; *Courier Mail,* 4 December, 1993 : *Black Leaders Should Tighten Finances: Goss*; *Courier Mail*, 15 December, 1993 : *Police to Probe ATSIC Vote Rigging Claims*; *The Australian*, 15 December, 1993 : *Auditor Slams Land Council*; *The Australian*, 23 December, 1993 : *The Prince of Tithes: `A Grim Fairy Tale'*; *The Australian*, 29 December, 1993 : *Black Agency Collapse Spurs Inquiry*; *Sun-Herald* (Sydney), 20 February, 1994 : *Prosecutions May Follow Investigation*; *Courier Mail*, 26 February, 1994 : *Minister Says Black Councils Will Be Sacked*; *Courier Mail*, 8 March, 1994 : *Blacks Half Way Houses to Be Sold*; *The Australian*, 22 April, 1994 : *Staff `Squander Black Funds on Luxury Goods'*; *Sunday Mail* (Brisbane), 8 May, 1994 : *Where Black Hostel Cash Went*; *The Australian*, 20 May, 1994 : *Black Charity Faces Probe into $3.2 Million Funding*; *Sunday Mail* (Brisbane), 19 June, 1994 : *Homes Company Crashed After Boss's Property Deals*; *Sunday Mail* (Brisbane), 19 June, 1994 : *The Guilt Edged Licence to Fraud*; *Courier Mail*, 30 June, 1994 : *Call for Inquiry into Misuse of $600,000*; *Weekend Australian*, 9-10 July, 1994 : *Black Councils in Financial Disarray*; *The Australian*, 20 July, 1994 : *Blacks Accuse ATSIC Leaders*; *West Australian*, 9 August, 1994 : *Waste Appals Aboriginal Group*; *The Age*, 13 August, 1994 : *Black Finances Review Sparks Investigation*; *Courier Mail*, 1 November, 1994 : *$1.5 Million `Missing' from Black Funds*; *Courier Mail*, 11 February, 1995 : *Conscience Money Fails*; *The Australian*, 4 April, 1995 : *Tickner Urged to Act on ATSIC Staffer*; *The Australian*, 7 April, 1995 : *State ATSIC Chief Rejects Calls to Quit*; *Courier Mail*, 15 April, 1995 : *Police Inquiry Into Blacks' Committee*; *Weekend Australian*, 15-16 April, 1995 : *Bamblett's Resignation from ATSIC a Landmark*; *Sunday Mail* (Brisbane), 16 April, 1995 : *Council Cooked the Books: Auditor*; *Weekend Australian*, 6-7 May, 1995 : *Black Council Squandered ATSIC Funds: Audit*; *Weekend Australian*, 27-28 May, 1995 : *Secret Report Lists Aboriginal Fund Abuses*; *Weekend Australian*, 17-18 June, 1995 : *Tickner to Seek Tighter Accounting of ATSIC*; *The Australian*, 28 July, 1995 : *ATSIC Probes Regional Council*; *The Australian*, 2 August, 1995 : *ATSIC Staff Face Charges Over Contract*; *Courier Mail*, 30 August, 1995 : *Costly ATSIC House Lashed*; *Courier Mail*, 25 September, 1995 : *New Law on Black Cash*; *The Australian*, 27 October, 1995 : *Aboriginal Legal Group Sacks CEO*; *Weekend Australian*, 20Ä21 January, 1996 : *ATSIC in Firing Line for $1.7 Million Land Gift*; *Courier Mail*, 18 March, 1996 : *Auditor's Doubt on Black Homes Group*; *Sydney Morning Herald*, 28 January, 1996 : *ATSIC Attacked on Use of Funds*; *Courier Mail*, 1 April, 1996 : *Probe on `Misuse' of ATSIC Funding*: *The Australian*, 2 April, 1996 : *Herron Targets Black Law Services*; *Courier Mail*, 3 April, 1996 : *Opening Pandora's Box*; *Weekend Australian*, 6-7 April, 1996 : *A Crisis of Accountability*; *Courier Mail*, 8 April, 1996 : *Ex-Judge Calls for ATSIC Clean Up*; *The Australian*, 11 April, 1996 : *Aboriginal Legal Head Faces Inquiry*; *Weekend Australian*, 13Ä14 April, 1996 : *ATSIC Fails to Supply $10 Million Funding Details*; *Courier Mail*, 18 April, 1996 : *Land Deal for ATSIC Leaders*; *Courier Mail*, 25 April, 1996 : *Minister Demands Report*; *Sydney Morning Herald*, 27 April, 1996 : *ATSIC Faces New Inquiry*; *Weekend Australian*, 27Ä28 April, 1996 : *Conviction a Reason for ATSIC Queries*;

Courier Mail, 10 May, 1996 : *Police Probe ATSIC Boss Over Bribe Claim*; *The Australian*, 17 May, 1996 : *Activist Gets Three Years for Depriving His People*; *The Australian*, 23 May, 1996 : *Lawyers to Lodge Coe Complaints*; *Courier Mail*, 25 May, 1996 : *Aboriginal Leader in Row Over $10 Million `Gift'*; *The Australian*, 28 May, 1996 : *Senior Bureaucrat Investigated*.

56 Barry Cohen, *Weekend Australian*, 11Ä12 May, 1996 : *The Gulf Between Black and White*.

57. *Courier Mail*, 8 April, 1996 : *Ex-Judge Calls for ATSIC Clean-Up*.

58. *Courier Mail*, 17 April, 1996 : *ATSIC Under Siege*.

59. *Re Woorabinda Aboriginal Council*, Queensland Law Reporter, 6 April, 1996.

60. "The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance ....". (The Constitution, section 116)

61. J.R. Forbes, *Taking Without Paying: Interpreting Property Rights in Australia's Constitution* (1995), 2 Agenda, p.313.

62 *Chapman v Minister for Aboriginal and Torres Strait Islander Affairs* (1995) 133 ALR 74.

63 *The Australian*, 14 June, 1996 : *Hindmarsh Bridge Developers Fail in Bid for Secrets*.

64. *Chapman v Minister for Aboriginal and Torres Strait Islander Affairs* (1995) 55 FCR 316; affd *Norvill v Chapman* (1995) 133 ALR 74. For a similar exhibition of ministerial incompetence or arrogance see *Douglas v Tickner* (1994) 49 FCR 507.

65. For an argument for reform of this Act, see S Paylyga, *Australian Lawyer* (1995), Vol 30, No 8, p.22.

66. *Weekend Australian*, 10Ä11 September, 1994 : *Backyard Sacred Site Finding Sparks Freeholder's Protest*; *The Australian*, 10 April, 1995 : *One Man's Backyard is Another's Sacred Site*.