Implementing Native Title in Australia: The Implications for Living Resources Management

GARY D MEYERS*

Introduction

In June 1992, the High Court of Australia announced its decision in *Eddie Mabo and Others v The State of Queensland* (*Mabo* (*No* 2)).[1] In perhaps its most historic and far-reaching decision ever, the High Court declared that the common law of Australia recognises the doctrine of native title to lands inhabited by Australia's indigenous peoples. The *Mabo* case has fundamental importance for re-fashioning the Australian identity. As Professor Garth Nettheim, Chair of the Aboriginal Law Centre at the University of New South Wales notes, the case's overarching significance arises because the issues discussed in the various judgments of the Court strike at both the historical and jurisprudential foundations of Australia.[2]

Specifically, the issues raised in *Mabo* demand that the Commonwealth and States re-assess their land and resource management regimes. It is this aspect of the case that has generated considerable controversy[3] and it is this aspect that this paper intends to discuss, particularly the implications of the *Mabo* decision for the management of Australia's living resources.

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* BA *cum laude* (University of Southern California); JD (Lewis & Clark College, Northwestern School of Law); LLM (University of Pennsylvania Law School); Senior Lecturer, Murdoch University School of Law.

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1 (1992) 175 CLR 1.

2 G Nettheim, 'As Against the Whole World' (1992) 27(6) *Australian Law News* 9.

3 See generally, the essays contained in RH Bartlett (ed), *Resource Development and Aboriginal Land Rights in Australia* (the Centre for Commercial and Resources Law of the University of Western Australia and Murdoch University, 1993).

This paper is divided into three parts. First, the paper reviews land allocation and management law in Australia pre-*Mabo*, that is, the law regarding allocation of private rights to land prior to the High Court's decision. Secondly, Part II provides a brief summary of the High Court's decision in *Mabo*. Finally, Part III addresses the state of the law post-*Mabo*. That is, it assesses the implications of the *Mabo* decision for land and resource management in Australia. This third part of the paper is intended to provide a broad theoretical perspective on post-*Mabo* resource management, rather than a specific assessment of Commonwealth and State legislation which responds to the *Mabo* decision. To some extent, that discussion is provided elsewhere.[4] More problematically, a critical review of the legislation must await High Court determination of the constitutionality of both the Commonwealth Act and at least one State land management Act.

Responding to the *Mabo* decision will clearly require accommodation on the part of Aboriginal and non-Aboriginal Australians. That accommodation is perhaps made more complex by the fact that the High Court was essentially writing on a clean slate: the High Court had not considered the acceptance of native title in the common law of Australia prior to the *Mabo* case. This paper concludes that such an accommodation is, however, possible. Moreover, while such an accommodation may require an adjustment in resource management strategies, the jurisprudence and practice from other common law countries like the US, Canada, and New Zealand demonstrates that resource development, management, and conservation can be carried out cooperatively between indigenous peoples and governments.

Part I: Australian Land Law Pre-Mabo

The basic assumption guiding all land law in Australia prior to the *Mabo* decision was that at the time of the annexation of Australia by Great Britain all land was held by the Crown which possessed both the sovereign title to land, that is the right to dispose of land and the proprietary title to land, or the right to use that land.[5] In consequence, private land is held by a grant of the Crown which passes the proprietary title to the land holder or land owner, while

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4 See generally the essays contained in RH Bartlett and GD Meyers (eds), *Native Title Legislation in Australia* (Centre for Commercial and Resources Law of the University of Western Australia and Murdoch University, 1994).

5 See the discussion of early Australian land law precedent as referred to by Brennan J in *Mabo (No 2)*, (1992) 175 CLR 1 at 26-29; and his discussion of the feudal basis of the proposition of absolute Crown ownership in land, ie the doctrine of tenure, at 46-52.

retaining the sovereign title, that is the right to regulate the use of the land and to resume the proprietary title. Typically such a resumption of the land requires that the government have a specified public purpose for using the land and pay just compensation to the land owner or land holder for the loss of the use, enjoyment or ownership of the land.[6]

What did such a system mean for Aboriginal peoples? First, under pre-*Mabo* land laws, Aboriginal people could own land just like other Australians: individual Aboriginal people could purchase a home, lease a property for a business, or otherwise hold land like non-indigenous Australians. Secondly, however, this system typically precluded the ownership of land and the exercise of rights with respect to that land according to traditional customs of Aboriginal and Torres Strait Islander peoples.[7] Thirdly, and most importantly, land management regimes existing before the *Mabo* decision and, land law in general, effectively dispossessed large numbers of Aboriginal peoples from traditional lands held for thousands of years.[8]

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6 See eg *Public Works Act* 1902 (WA) s 10.

7 Unlike European-derived individual 'private' property rights, Aboriginal land rights are typically characterised as collective rights belonging to a culturally identifiable group. In one commentator's view they derive their character and existence from the common law's recognition of prior occupancy of land and social organisations: W Pentney, 'The Rights of Aboriginal Peoples of Canada in the Constitution Act, 1982, Part II, Section 35: The Substantive Guarantee', (1988) 22 *U BC LR* 207 at 258. See also *Mabo (No 2)* (1992) 175 CLR 1 at 51 per Brennan J, characterising native title rights as community rights arising out of a particular community's occupation of land, and id at 86-88, per Deane and Gaudron JJ. The deprivation of traditionally determined land management regimes, is, as other commentators note, a means of undermining the cultural survival of indigenous peoples: DM Johnston, 'Native Rights as Collective Rights: A Question of Self Preservation' (1989) 2 *Can J of Law and Juris* 19 at 32.

8 As Brennan J notes:

> '[t]he dispossession of the indigenous inhabitants of Australia was not worked by a transfer of beneficial ownership when sovereignty was acquired by the Crown, but by the recurrent exercise of a paramount power to exclude the indigenous habitants from their traditional lands as colonial settlement expanded and land was granted to the colonists. This possession is attributable not to a failure of native title to survive the acquisition of sovereignty, but to its subsequent extinction by a paramount power.' *Mabo (No 2)* (1992) 175 CLR 1 at 58.

His Honour also notes that '[s]ince European settlement of Australia, many clans or groups of indigenous people have been physically separated from their traditional lands and have lost their connection with it'. Id at 59.

How did such a regime come about, in other words, how were Aboriginal peoples dispossessed of their land? As the High Court points out in the *Mabo* decision, the reception of English common law in newly acquired territory depends upon the method of acquisition of that territory.[9] Early in the development of international law in the 16th through 18th centuries, it became a settled practice that sovereignty over 'new' territory could be acquired in three ways: by conquest, voluntary cession, or settlement.[10] Paralleling that development, English common law held that the reception of the law in a new territory depended upon the method of acquisition of that territory.[11] Under the first two methods, laws of the conquered or ceded territory were presumed to continue (unless essentially incompatible with the common law) until those laws were affirmatively altered.[12]

Settlement, the third method, could, however, only be accomplished in land which was 'terra nullius', that is land belonging to no-one or land that was unoccupied. Since there was no occupation there was no law and English common law became the law of the newly settled lands wholesale. As noted, under the first two methods, land that was held privately and the laws governing the ownership and use of that land continued unless the land was seized by the new sovereign or the laws were replaced. In contrast, under the third method, since there was no land ownership, the Crown acquired the full ownership of all the lands in the newly settled territory, that is, both the sovereign and beneficial title to the land. And such acquisition was accomplished under English common law.[13]

As Deane and Gaudron JJ note, the propositions that Australia was *terra nullius* and that the full legal and beneficial ownership of all the lands in Australia vested in the sovereign, unaffected by the claims of Aboriginal peoples, 'provided the legal basis for the dispossession of the Aboriginal peoples of most of their traditional land. The acts and events by which that dispossession in legal theory was carried into practical effect constitute the darkest aspect of the history of this nation'. Id at 109.

9 Id at 34-35 per Brennan J.

10 See the judgment of Deane and Gaudron JJ, id at 77.

11 Id at 35, per Brennan J who notes that:

'[a]ccording to Blackstone, English law would become the law of a country outside England either upon first settlement by English colonists of a "desert uninhabited" country or by the exercise of the Sovereign's legislative power over a conquered or ceded country'.

12 Ibid; and see also, id at 79, per Deane and Gaudron JJ.

13 Id at 34 per Brennan J, who cites Blackstone's Commentaries, which note: 'for it hath been held, that if an uninhabited country be discovered and planted by English subjects, all the English laws then in

How then did the doctrine of terra nullius come to be applied to Australia? The common law had, since colonisation of the Americas in the early 17th century, and at least since 1763 with promulgation of the Royal Proclamation in Canada, clearly recognised the rights of indigenous populations in British colonies to hold their land according to their customs.[14]

As the High Court in *Mabo (No 2)* pointed out, early in the expansion of imperial powers and colonisation of new lands, the doctrine of *terra nullius* was extended (and recognised by international law) to apply to lands that were 'practically unoccupied',[15] or as stated by the Privy Council in the case of *In re Southern Rhodesia*, to encompass lands occupied by peoples so low on the scale of social development and civilisation as to have no recognisable system of law.[16] Thus, as the High Court in *Mabo (No 2)* noted, to facilitate the colonisation of Australia, laws which had protected indigenous inhabitants of new European colonies in the Americas were transformed to exclude certain groups in Africa, Asia and Australia from those protections so that white people could settle the lands without interference.[17] In essence, one commentator notes, the notion that Australia was unoccupied land or *terra nullius*, was a convenient legal fiction to enable the 'settlement' of Australia.[18]

Early in Australia's history, in a case unrelated to Aboriginal interests or rights to land, the Privy Council determined that Australia was a settled colony.[19] Thus, when the issue of Aboriginal

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being, which are the birthright of every subject, are immediately there in force ... but in conquered or ceded countries, that have already laws of their own, the King may indeed alter and change those laws; but, till he does actually change them, the ancient laws of the country remain, unless such as are against the law of God, as in the case of an infidel country'.

14 See generally, K McNeil, *Common Law Aboriginal Title* (Clarendon Press, 1989); and on the Royal Proclamation, see GD Meyers, 'Different Sides of the Same Coin: A Comparative View of the Indian Hunting and Fishing Rights in the United States and Canada' (1991) 10 *UCLA J Envtl Law & Pol'y* 67 at 92-93 and footnote 150.

15 *Mabo (No 2)* (1992) 175 CLR 1 at 32-34, per Brennan J.

16 In *Re Southern Rhodesia* [1919] AC 211 at 233-34 (PC 1918).

17 *Mabo (No 2)* (1992) 175 CLR 1 at 39-42, per Brennan J.

18 SB Phillips, 'Reconstructing the Rules for the Land Rights Contest', in *Essays on the Mabo Decision* (Law Book Co, 1993) p1.

19 *Cooper v Stuart* (1889) App Cas 286 at 291 (PC). Of particular import in this case is the statement of Lord Watson that the colony of New South Wales 'consisted of a tract of territory, practically unoccupied, without settled inhabitants or settled law, at the time when it was peacefully annexed to the British Dominions'.

land rights was presented for the first and only time prior to the *Mabo* decision, in *Milirrpum v Nabalco*[20] (the *Gove Land Rights* case), Justice Blackburn rejected the claim to native title based on the legal precedent that Australia was a settled colony. In doing so, his Honour noted that despite the prior decision in *Cooper v Stuart*[21] being based on historically incorrect facts, the legal theory it established - Australia as a land that was 'settled' - was more important than the fact of indigenous occupation in Australia.[22]

The *Milirrpum* case was not a High Court case; it was a decision emanating from the Supreme Court of the Northern Territory. This case, which rejected a native title claim to land based on a spiritual connection to that land or religious use of the land was, however, assumed by many to establish the non-recognition of the doctrine of native title as the law of Australia. Thus, until the *Mabo* decision, it was generally accepted that the indigenous peoples of Australia who have inhabited the continent for well over 40,000 years were somehow excluded from the protection of English common law. In essence the law of Australia was that the original inhabitants were so low on the social scale of organisation and civilisation that their laws, to the extent that they were recognised, were ineffective to establish a pattern of organisation sufficient to give rise to native title in Australia.

Part II: A Brief Review of Mabo

The *Mabo* litigation took approximately ten years to complete. In 1982 Torres Strait Islander people filed an action in the High Court invoking the Court's original jurisdiction against the State of Queensland seeking a declaration that they were the rightful holders of 'native title' to the lands and waters comprising the Murray Islands. Following a submission for findings of fact, the State of Queensland attempted to derail the litigation by enacting the *Queensland Coast Islands Declaratory Act* 1985, which, inter alia, declared that upon annexation of the Murray Islands in 1879 the title to those islands vested in the Crown free of any prior claims and retroactively validated all Crown dispositions of lands in those islands. The 'stated' purpose of the Act was to remove doubts regarding the legal status of title to the Islands.[23]

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20 (1970) 17 FLR 141.

21 See note 19 above.

22 See Brennan J's reference to the *Milirrpum* decision, *Mabo (No 2)* (1992) 175 CLR 1 at 39.

23 See the second reading of the *Queensland Coast Islands Declaratory Bill* (1985) *Queensland State Parliamentary Reports* 4741 at 4932-33.

Queensland's attempt to forestall the litigation failed. In its first full consideration of the *Mabo* case, the High Court voided the *Queensland Coast Islands Declaratory Act* because it purported to extinguish only one class of property rights, that is, the rights of Torres Strait Islanders, and as such it violated the *Racial Discrimination Act* 1975 (Cth).[24] The High Court noted that where a law which violates the *Racial Discrimination Act* extends a right to one ethnic group over another, that right will be extended to those not protected and that when a State law deprives the members of a group of a right enjoyed by others, such a law is constitutionally invalid.[25] Without deciding the issue, the High Court assumed arguendo the existence of the plaintiffs' claim to native title in the Murray Islands.

On 3 June 1992, the High Court delivered its final judgment on the merits of the plaintiffs' claims and confirmed the Torres Strait Islanders claim to native title to the Murray Islands. Perhaps more crucially, the High Court confirmed in *Mabo (No 2)* the acceptance of the application of the common law doctrine of native title to all indigenous peoples throughout Australia.[26] In doing so, the Court rejected the existing precedent and assumed wisdom that Australia was *terra nullius* when annexed by Great Britain.[27] The Court explicitly rejected the legality of extending the *terra nullius* doctrine to lands which were in fact occupied prior to colonisation and also rejected the morality of attempting to distinguish between peoples which were considered civilised and peoples which were considered uncivilised and without organised systems of law.[28]

The main features of the *Mabo (No 2)* judgments may be summarised as follows. In consequence of its determination that Australia was not *terra nullius*, the Court held that upon annexation of Australia, the Crown acquired only the sovereign or radical title to the land and waters comprising Australia, but not the full beneficial ownership of

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24 *Mabo v State of Queensland (No 1)* (1988) 166 CLR 186.

25 Id at 219, per Brennan, Toohey and Gaudron JJ and at 198, per Mason CJ; and see also M Wilkie and GD Meyers, 'The WA Land (Titles and Traditional Usage) Act 1993: Content, Conflicts and Challenges' (1994) 24(1) *Univ WA LR* 31 at 36.

26 *Mabo (No 2)* (1992) 175 CLR 1 at 25-26, per Brennan J and at 179, per Toohey J.

27 Id at 57-58, per Brennan J, at 100, per Deane and Gaudron JJ, and at 183-184, per Toohey J.

28 Id at 42, 58 per Brennan J, at 99-100, per Deane and Gaudron JJ and at 182, per Toohey J.

this land.[29] The Court noted that instead, lands occupied by indigenous peoples are held by the Crown in its sovereign capacity, but the beneficial title, that is the right to occupy and use those traditional lands, remains vested in native owners.[30] In other words, native title to traditional lands burdens or qualifies the proprietary estate in land which would otherwise have vested in the Crown.[31] It is important to note that in reaching its decision, the Court determined that the acceptance and recognition of native title would

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29 As Brennan J notes at 43-44, '[t]here is a distinction between the Crown's title to a colony and the Crown's ownership of land in the colony.' He goes on to note:

'[I]t was only by fastening on the notion that a settled colony was *terra nullius* that it was possible to predicate of the Crown the ownership of land in a colony already occupied by indigenous inhabitants. It was only on the hypothesis that there was nobody in occupation that it could be said that the Crown was the owner because there was no other. If that hypothesis be rejected, the notion that sovereignty carried ownership in its wake must be rejected too.' Id at 45.

Brennan J also comments that:

'it is not a corollary of the Crown's acquisition of a radical title to land in an unoccupied territory that the Crown acquired absolute beneficial ownership of that land to the exclusion of the indigenous inhabitants ... [but] if the land were occupied by the indigenous inhabitants and their rights and interests in the land are recognised by the common law, the radical title which is acquired with the acquisition of sovereignty cannot itself be taken to confer an absolute beneficial title to the occupied land.' Id at 48.

See also, id at 86-87, per Deane and Gaudron JJ.

30 Brennan J notes that:

'[t]he preferable rule, supported by the authorities cited, is that a mere change in sovereignty does not extinguish native title to land ... It is sufficient to state that, in my opinion, the common law of Australia rejects the notion that, when the Crown acquired sovereignty over territory which is now part of Australia, it thereby acquired the absolute beneficial ownership of the land therein, and accepts that the antecedent rights and interests in land possessed by the indigenous inhabitants of the territory survived the change in sovereignty.' Id at 57.

31 Ibid; and see also id at 86-87, per Deane and Gaudron JJ who note:

'If there were lands within a settled colony in relation to which there was some proved existing native interest, the effect of an applicable assumption that the interest was respected and protected under the domestic law of the colony would not be to preclude the vesting of radical title in the Crown. It would be to reduce, qualify or burden the proprietary estate in land which would otherwise have vested in the Crown, to the extent which was necessary to recognise and protect the pre-existing native interests.'

not unduly disturb or burden Australia's common law land disposition and management scheme.[32]

Having decided that native title arises at common law in Australia, the various judgments next considered the rules for establishing native title or what might be described as the elements of proof of title. The Court then went on to consider the nature and content of native title. The various judgments note that to establish native title, an identified group of indigenous peoples must prove a right to occupy particular lands; or prove an entitlement to occupy or use those lands; or establish a continuous 'presence' on the land.[33] Whether defined as occupation, an entitlement to occupy or use, or a continuous presence, the claim of native title, as in other common law jurisdictions like the US or Canada, must be continuous since the time of colonisation.[34] Most critically, the Court notes that the occupation or use of lands subject to native title is to be determined by reference to the claimants' traditional customs,[35] unfettered by reference to European legal usages foreign to indigenous societies.[36]

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32 Brennan J notes:

'[N]or is it necessary to the structure of our legal system to refuse recognition to the rights and interests in land of the indigenous inhabitants... The English legal system accommodated the recognition of rights and interests derived from occupation of land in a territory over which sovereignty was acquired by conquest without the necessity of a Crown grant.' Id at 48-49.

See also, GD Meyers and J Mugambwa, 'The Mabo Decision: Australian Aboriginal Land Rights in Transition', (1992) 23 *Env L* 1203 at 1214-15.

33 *Mabo (No 2)* (1992) 175 CLR 1 at 51, per Brennan J at 86, per Deane and Gaudron JJ, and at 184-8, per Toohey J .

34 See Meyers and Mugambwa, note 32 above, at 1219.

35 As Toohey J notes, the quality of the occupancy, presence or entitlement to land is determined by the traditions and customs of the claimants - that is, meaningful use of the land must be proved, ' but it is to be understood from the point of view of the members of the society [claiming native title]': *Mabo (No 2)* (1992) 175 CLR 1 at 188.

36 *Mabo (No 2)* (1992) 175 CLR 1 at 51, per Brennan J, at 83-88, per Deane and Gaudron JJ and at 184-88, per Toohey J. For example, Toohey J is clear that:

'It would defeat the purpose of recognition and protection if only those existing rights and duties which were the same as, or which approximated to, those under English law could comprise traditional title ...' Id at 187.

See also Meyers and Mugambwa, note 32 above, at 1218-19. For further discussion of this topic see GD Meyers, 'Aboriginal Rights to the "Profits of the Land": The Inclusion of Traditional Fishing and

The content of native title or what might be called the extent and nature of the native presence on lands is to be similarly determined by reference to local custom, that is, the claimant group's traditional and customary usages of the land.[37] As will become apparent in Part III, the Court's determination of the content of native title is particularly critical for determining the impact of native title on other land uses claimed by the Crown or private parties. And, as with its discussion of the proof of native title, the Court's discussion of the nature and extent of native title follows a reasonably uniform line of cases arising in former British colonies.[38] In sum, native title may include a full, exclusive right to occupy certain lands or it may include a shared right to occupy certain lands; it may also include a lesser right to take a profit from those lands, such as the right to hunt, fish or gather food from the lands; and finally it may include the right to pass over certain lands to reach important cultural and religious sites.[39] In reaching its decision, the Court rejected the determination of Justice Blackburn in the *Milirrpum* case that a religious or cultural interest in the land is insufficient to establish native title. The Court instead specifically notes that this religious presence on the land may well be sufficient to establish native title to certain lands.[40]

The Court continued its consideration of native title by discussing the extinguishment of that title. A fundamental feature of native title accepted by jurisdictions such as the US and Canada is that it is inalienable except to the sovereign and is moreover qualified by the sovereign's right to limit or regulate that title.[41] The Court notes that native title may be surrendered either voluntarily or involuntarily. Title may be 'voluntarily' surrendered either by the abandonment of the land by a group of indigenous people, the death of all of the group's members or the cession of that land to the state.[42] The Court

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Hunting Rights in the Content of Native Title', in *Native Title Legislation*, note 4 above, p213 at pp220-22.

37 See *Mabo (No 2)* (1992) 175 CLR 1 at 58 per Brennan J who notes that: '[t]he nature and incidence of native title must be ascertained as a matter of fact by reference to [the claimants'] law and customs'. See also, id at 109-10, per Deane and Gaudron JJ.

38 See Meyers and Mugambwa, note 32 above, at 1220-21.

39 *Mabo (No 2)* (1992) 175 CLR 1 at 42-45, 49, per Brennan J, at 83 per Deane and Gaudron JJ, and at 189-90 per Toohey J. See also Wilkie and Meyers, note 25 above, at 13-14.

40 See 'Aboriginal Rights to the "Profits of the Land"... ', note 36 above, at 216-17 and notes 20-21 above.

41 See 'Different Sides of the Same Coin', note 14 above, at 71-73 and 94-114.

42 *Mabo (No 2)* (1992) 175 CLR 1 at 70, per Brennan J.

focussed its attention, however, on the involuntary surrender of title to the sovereign.

Although it is unlike other private property interests, in that native title may only be surrendered to the sovereign, the Court observes that in one important respect native title is like other property interests in that it may be extinguished by executive action pursuant to valid legislative enactment or by valid Commonwealth or State legislation.[43] The Court notes, however, that given the serious consequences of extinguishing native title, in either case, the state must demonstrate a clear and plain intention to extinguish native title.[44] As with other aspects of the case, this ruling regarding the extinguishment of native title is similar to that followed in common law jurisdictions like the US and Canada.[45]

In the case of executive action, the clear and plain intention of the sovereign is demonstrated by a Crown reservation of land for a particular purpose, such as the grant of a freehold interest in land or other interest that transfers exclusive possession to another, as well as the reservation of land for a public purpose such as a school building or highway.[46] The 'intent' in this instance is demonstrated by the reservation or use of the land for a purpose that is inconsistent with the continuance of native title.[47] However, the inconsistency does not arise until the land is actually used for that particular purpose.[48]

Legislative action is treated similarly but the legislation is held to a more demanding standard. A legislative extinguishment of native title must clearly demonstrate in the legislation in unambiguous

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43 Id at 63-69, per Brennan J, at 110-12, per Deane and Gaudron JJ, and at 192-96, per Toohey J.

44 Id at 64, per Brennan J, at 111, per Deane and Gaudron JJ, and at 192-93, per Toohey J.

45 Id at 63-69, per Brennan J, at 110-12, per Deane and Gaudron JJ, and at 192-96, per Toohey J.

46 Id at 68, per Brennan J.

47 Ibid. As Brennan J notes, actual intent is not determinative: the extinguishment of native title depends on the effect of the grant of land.

48 Brennan J writes:

'If a reservation is made for a public purpose other than for the indigenous inhabitants, a right to continued enjoyment of native title may be consistent with the specified purpose - at least for a time - and native title will not be extinguished. But if the land is used and occupied for the public purpose and the manner of occupation is inconsistent with the continued enjoyment of native title, native title will be extinguished.' Ibid.

terms that the legislature plainly intended to extinguish native title.[49] Thus general legislation reserving or authorising the disposal of Crown lands will not be interpreted as extinguishing native title.[50] The Western Australian *Land (Titles and Traditional Usage) Act* 1993 provides a classic example of purported legislative extinguishment of native title [51] Again, the actual use authorised by or envisaged by the legislation must be inconsistent with the continuance of native title.[52] In either event, that is by executive or legislative action, the power of the Commonwealth or States to extinguish native title is subject, in the case of the Federal Government, to provisions of the Commonwealth Constitution, and in the case of State governments to overriding provisions of Commonwealth laws such as the *Racial Discrimination Act* which was considered in the *Mabo (No 1)* case.[53]

Two issues were left unresolved by the High Court in *Mabo (No 2)*: the question of compensation for extinguishment of native title and the nature of the relationship between Aboriginal peoples and the sovereign. Neither question was directly in issue in the *Mabo* case, so the comments of the judgments on these issues are obiter. Those comments do however presage possible future judgments in native title litigation.

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49 Id at 64, per Brennan J, and at 111, per Deane and Gaudron JJ who note that:

'[t]he ordinary rules of statutory interpretation require ... that clear and unambiguous words be used before they will be imputed to the legislature in an attempt to expropriate or extinguish valuable rights relating to property without fair compensation'.

Although Toohey J agrees with the methods of extinguishing native title, he suggests that the extinguishment of native title cannot be legally accomplished without the consent of native title holders. Id at 192-96; and see also, Meyers and Mugambwa, note 32 above, at 1223-28.

50 Id at 111, per Deane and Gaudron JJ, and at 196, per Toohey J.

51 See s 7, *Land (Titles and Traditional Usage) Act* 1993 (WA). Without expressing an opinion as to the validity of the Act, the Act does clearly state that its purpose is to extinguish all native title in the State; and see generally Wilkie and Meyers, note 25 above.

52 See *Mabo (No 2)* (1992) 175 CLR 1 at 64-65, per Brennan J who notes that:

'[a] clear and plain intention to extinguish native title is not revealed by a law which merely regulates the enjoyment of native title or which creates a regime of control that is consistent with the continued enjoyment of native title [or] ... a law which reserves or authorises the reservation of land for the purpose of permitting indigenous inhabitants and their descendants to enjoy their native title ...'

53 Id at 71, and at 111-12, per Deane and Gaudron JJ.

Nowhere in his opinion does Justice Brennan, author of the principal judgment in *Mabo (No 2)*, state expressly that compensation is not required for the extinguishment of native title. In the process of noting that compensation was not at issue in the case,[54] his Honour does, however, cite with approval the proposition announced by Lord Denning in *Adeyinka Oyekan* v *Musindiku Adele*[55] that:

> whilst, therefore the British Crown, as sovereign, can make laws enabling it compulsorily to acquire land for public purposes, it will see that proper compensation is awarded to every one of the inhabitants who has by native law an interest in it.[56]

Additional comments by Justice Brennan indicate that he is of the opinion that native title encompasses legally protectable property rights.[57] These statements make problematic the concurring statement by Chief Justice Mason and Justice McHugh who note that

> the main difference between those members of the court who constitute the majority is that subject to the operation of the *Racial Discrimination Act* 1975 (Cth), neither of us nor Brennan J agrees with the conclusion to be drawn from the judgments of Deane, Toohey and Gaudron JJ, that, at least in the absence of clear and unambiguous statutory provision to the contrary, extinguishment of native title by the Crown by inconsistent grant is wrongful and gives rise to a claim for compensatory damages.[58]

As indicated by that statement, Justices Deane, Toohey and Gaudron all seem to agree that compensation is payable upon the extinguishment of native title. Justices Deane and Gaudron, for example, note that Commonwealth Constitutional provisions as well as prevailing Commonwealth legislation (and in some cases State legislation as well) require compensation for the extinguishment of native title by either the Commonwealth or the States.[59] Moreover, they indicate that there is a general duty under the common law to compensate native title holders for loss of their rights to land and resources.[60] Similarly, Justice Toohey indicates that Commonwealth

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54 Meyers and Mugambwa, note 32 above, at 1229-30.

55 [1957] 1 WLR 876 at 880 (PC, on appeal from Nigeria).

56 *Mabo (No 2)* (1992) 175 CLR 1 at 56, per Brennan J.

57 Meyers and Mugambwa, note 32 above, at 1230.

58 *Mabo (No 2)* (1992) 175 CLR 1 at 15, per Mason and McHugh JJ. For a discussion of this aspect of the case see Meyers and Mugambwa, note 32 above, at 1228-38.

59 *Mabo (No 2)* (1992) 175 CLR 1 at 110-112, per Deane and Gaudron JJ.

60 Deane and Gaudron JJ note that:

'[i]f common law native title is wrongfully extinguished by the Crown, the effect of ... legislative reforms is that compensatory damages can be

Constitutional provisions and Commonwealth and State legislation will require compensation upon the extinguishment of native title.[61] He also indicates that Australia's adherence to international treaties such as the *International Convention on the Elimination of all Forms of Racial Discrimination*[62] requires compensation when native property rights are extinguished by the sovereign.[63]

Justice Dawson's dissenting opinion is clearest on this issue. He asserts that there is no general rule either in law or in history requiring compensation for the loss of native title.[64] In contrast, Justice Brennan's opinion seems to allude to a general common law duty assumed by the British Crown to fully respect prior native interests in land and to compensate indigenous peoples for the loss of those rights.[65] In this respect, he is supported by scholarly commentary which indicates that the common law generally shielded aboriginal peoples in former British colonies from a taking of their lands without compensation.[66]

It is possible to reconcile the seemingly conflicting judgments of the Court on the issue of compensation by distinguishing between past extinguishments of native title and present or future extinguishments of native title which appear to be constrained by constitutional authority and legislative enactments.[67] Moreover, Chief Justice Mason and Justice McHugh write only that they are unable to conclude that the extinguishment of native title by the Crown by an inconsistent grant would give rise to a claim for compensation. Thus it is possible to confine their statement to executive action alone and not to legislation which intentionally extinguishes native title.

In either event, it appears that Commonwealth legislation, the *Native Title Act* 1993 (Cth), forecloses either Commonwealth or State action to extinguish native title without the payment of compensation.[68] Moreover, it is likely that the Court will be clearer on the question of

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recovered provided the proceedings for recovery are instituted within the period allowed by applicable limitations provisions'. Id at 112.

61 *Mabo (No 2)* (1992) 175 CLR 1, at 216, per Toohey J.

62 660 UNTS 195 (opened for signature, March 7, 1966).

63 *Mabo (No 2)* (1992) 175 CLR 1, at 214-16, per Toohey J. See also Meyers and Mugambwa, note 32 above, at 1235-36.

64 *Mabo (No 2)* (1992) 175 CLR 1 at 126, per Dawson J.

65 See notes 53-56 above, and accompanying text.

66 See McNeil, note 14 above, at 248-49.

67 Meyers and Mugambwa, note 32 above, at 1236-38.

68 *Native Title Act* 1993 (Cth), s 7. See also R Orr, 'Compensation For Loss of Native Title Rights', in *Native Title Legislation*, note 4 above, at p110.

compensation when this issue is raised directly in future litigation and will provide a final answer on this issue.

The other issue left unresolved by the Court is the nature of the relationship between the sovereign and Aborigines of Australia. Potentially, the sovereign is under a greater obligation than the mere duty to pay compensation for the extinguishment of native title. Justice Toohey's judgment was the only judgment to discuss this issue in depth. In Canada and the US, the relationship between indigenous peoples and the sovereign has been described as a fiduciary relationship.[69] In general, the common law as interpreted by the Supreme Courts of both countries requires the sovereign to act for the benefit of native title holders.[70] The exact contours of the relationship are important for and related to the question of compensation. Justice Toohey notes that this trust-like duty requires more than compensation for the loss of native title: fundamentally, this fiduciary relationship imposes a duty on the sovereign to act for the benefit of native titleholders, or in other words, requires that the sovereign generally act not contrary to the interests of native title holders.[71] Again, future litigation will likely define this relationship between the sovereign and Aboriginal peoples with greater clarity and certainty.

Part III: Post-Mabo: The Implications of Native Title for Land and Resource Management

The *Native Title Act* (Cth) defines native title as:

> ... 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 and Torres Strait Islanders; and

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69 'Different Sides of the Same Coin', note 14 above, at 89-93.

70 Id at 93. See also *Mabo (No 2)* (1992) 175 CLR 1 at 204, per Toohey J in which his Honour notes: 'Generally, to the extent that a person is a fiduciary he or she must act for the benefit of the beneficiaries'.

71 Toohey J notes that generally the Crown cannot take decisions affecting native title without taking account of the effect of those decisions. More specifically, he notes that:

'[t]he obligation on the Crown ... is to ensure that traditional title is not impaired or destroyed without the consent of or otherwise contrary to the interests of the title holders. ... [The] extinguishment or impairment of traditional title would not be a source of the Crown's obligation, but a breach of it'. Id at 204-05.

(b) the Aboriginal peoples and 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.[72]

The Act expressly states that these rights and interests include 'hunting, gathering, or fishing, rights and interests'.[73] Moreover, these native title rights encompass any rights and interests either compulsorily converted or replaced by statutory rights held by or on behalf of Aboriginal peoples, with the exception of rights to use pastoral leases created by statutory reservations or conditions.[74] Note, however, that the exception of reservations to pastoral leases extends only to rights and interests converted or replaced by statutory land rights schemes prior to January 1, 1994.[75] Thus, statutory reservations granted after January 1, 1994 are excluded and are encompassed within the term 'native title'. Therefore, those common law native title interests which continue to exist in pastoral leases may well be preserved. Thus, Justice Robert French's determination, as President of the National Native Title Tribunal (NNTT), to entertain native title claims to pastoral leases is arguably within the letter of the Commonwealth legislation.[76]

Given that native title rights include rights to hunt, fish, and gather food in traditional lands and waters, native title will clearly have implications for living resources management by the Commonwealth and States. Understanding those implications requires a two-fold focus: first, on the content and nature of rights associated with common law native title (and the proof of those rights); and second, on the nature of the relationship of Aboriginal peoples with traditional lands and waters which give rise to claims of native title.

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72 *Native Title Act* 1993 (Cth) s 223(1)(a)-(c).

73 Id at s 223(2).

74 Id at ss 223(3) and (4).

75 Id at s 4.

76 See 'Statement on pastoral leases angers NFF', *The Australian* (Sept 9, 1994) p 7; ' Test case to decide pastoral lease claims', *The Weekend Australian*, (Sept 3-4, 1994) p6. Ironically, a determination that common law Aboriginal access rights to pastoral leases are preserved under the rules of native title while statutory rights granted or reserved prior to January 1, 1994 are not may well work inequities favouring indigenous peoples in jurisdictions without statutory reservations, while Aboriginal groups in Western Australia and South Australia which have statutory reservations in pastoral leases may lose those rights without compensation. Further complications arise from the presumption that statutorily granted rights after January 1, 1994 will be encompassed in the ambit of native title rights like common law rights, unlike pre-January 1, 1994 statutory rights.

The former defines what lands, waters, and living resources are subject to claims of native title.[77] The latter gives rise to questions regarding how those resources can and ought to be managed and by whom.

A The Content and Proof of Native Title: What Living Resource Interests are Included

The proof of native title depends upon, in Justice Brennan's words, the proof of 'occupation' of an area.[78] Occupation is defined broadly to encompass an entitlement to use an area[79] or, in Justice Toohey's words, 'presence on the land'.[80] As Professor Kent McNeil notes regarding Aboriginal occupation, the key feature is an established connection to the land. He writes that the connection to or 'occupation' of the land 'is relative, depending on all circumstances including the nature and location of the land, and the conditions of life, habits, and ideas of people living there'.[81] Nomadic lifestyles which involve people using certain areas at certain times of the year or for particular purposes such as fishing or hunting grounds, are sufficient to establish occupation, a customary use, or presence on the land giving rise to a claim for native title.[82] McNeil notes: '[t]hus it is clearly not necessary for lands to be cultivated, fenced, built on or the like to be occupied'.[83]

Occupation or use of the land contains an element of permanence, but where courts speak of a continuous occupation of the land giving rise to native title, they are speaking of a long-standing connection to the land, rather than daily occupation; that is, occupation dictated by traditional practices and customs.[84] The majority judgments in *Mabo*

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77 For example, the *Native Title Act* 1993 (Cth), s 225(a)-(b)(i) and (ii) defines a determination of native title as a determination of whether it exists and if so, who holds it and what rights to possess, occupy or otherwise use lands and waters, whether exclusive or shared, subject to native title.

78 *Mabo (No 2)* (1992) 175 CLR 1 at 51, per Brennan J.

79 Id at 86, per Deane and Gaudron JJ.

80 Id at 184-88, per Toohey J.

81 K McNeil, 'A Question of Title: Has the Common Law Been Misapplied to Dispossess the Aboriginals?' (1990) 16 *Monash UL Rev* 90 at 103-4 .

82 Id at 104.

83 Ibid.

84 Brennan J notes for example:

'[w]here a clan or group has *continued to acknowledge* the laws and (so far as is practicable) to observe the customs based on the traditions of that clan or group, whereby *the traditional connexion with the land* has

(No 2) all acknowledge that Aboriginal use and occupation of lands and waters may give rise to both proprietary and usufructuary rights[85] claimable under the rubric of native title. The question then of the existence of usufructuary interests in living resources such as fishing, hunting, and gathering rights in any particular instance, depends upon 'the traditional laws [regarding the use of lands, waters, and resources] acknowledged by and the traditional customs observed by the indigenous inhabitants of a territory'.[86] As noted in an earlier work, '[w]hether the content of rights associated with a claim of native title include hunting and fishing rights, ... is a question of fact; it is a matter of proof, not a question of existence'.[87]

Aboriginal rights to hunt, fish, and gather living natural resources may arise in association with a native title claim to particular lands and waters. They may also arise, however, in one commentator's view, by virtue of customary practice independent from any association with native title claims to land.[88] Perhaps the most likely assertion of customary rights in living resources are claims to non-exclusive rights to fish in territorial and non-territorial seas.[89] Such claims may also be extended to use or take otherwise - protected species of wild fauna and flora for particular cultural or religious rights.[90] In the case of high seas or territorial seas fishing interests, these claims to non-exclusive, customary-use rights may avoid

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been substantially maintained, the traditional community title of that clan or group can be said to remain in existence'. *Mabo (No 2)* (1992) 175 CLR 1 at 60-61 (emphasis added).

85 Id at 51, per Brennan J at 86, per Deane and Gaudron JJ and at 187-88, per Toohey J.

86 Id at 58, per Brennan J.

87 'Aboriginal Rights to the Profits of the Land', note 36 above, at 227; see *Mabo (No 2)* (1992) 175 CLR 1 at 58, per Brennan J.

88 D Sweeny, 'Fishing, Hunting and Gathering Rights of Aboriginal Peoples in Australia' (1993) 16 *UNSW Law Journal* 97 at 103.

89 Id at 110.

90 See J Isaacs (ed), *Australia Dreaming: 40,000 Years of Aboriginal History* (Lansdowne Press, 1980) p33, who notes that certain species of wildlife are associated with particular groups by virtue of their creation myths; and RM Berndt, 'Traditional Concepts of Aboriginal Law', in RM Berndt (ed), *Aboriginal Sites, Rights and Resource Development* (University of Western Australia Press, 1982) p14, who notes that religious ritual associated with ceremonial country includes rites for the perpetuation of sacred species.

problems that could otherwise arise from extinction of native title by assertions of sovereignty by the Crown.[91]

The elements of proof to establish customary rights are essentially the same as those required to establish native title.[92] Such rights to hunt and fish have been recognised by other common law jurisdictions including Canada and New Zealand.[93] Arguably, customary rights are merely another means of asserting usufructuary rights and should be treated identically to native title claims of traditional resource-use rights.

Given that Aboriginal rights to and interests in living natural resources may arise as incidents of native title claims (or customary rights), the principal question facing State resource management agencies is the degree to which those rights may affect what was an exclusive and unencumbered right of the State to manage the allocation, development, and conservation of those resources.

Whether an Aboriginal clan or tribe is able to establish specific rights to hunt, fish and gather food plants, or otherwise use the living resources of a particular area or region, depends upon the customary and traditional practices of the claimant group to define the 'content' or 'nature and extent' of native title rights.[94] Clearly, however, for all Aboriginal peoples, the land has always had a significant economic value; and for many, the land and sea continues to provide Aboriginal groups their livelihoods.[95] This view is reinforced by a 1986 Australian Law Reform Commission Report which notes that traditional hunting, fishing and food gathering practices provide important sources of sustenance to many Aboriginal peoples.[96]

Among the living resources that traditionally played and continue to play a significant role in the life of Aboriginal communities are

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91 See generally, A Bergin, 'A Rising Tide of Aboriginal Sea Claims: Implications of the Mabo Case in Australia' (1993) 8 *Int'l J Marine and Coastal L* 359 at 365-68 .

92 'Aboriginal Rights to the Profits of the Land', note 36 above, at 226. The elements include an identified group, ie ascertainable beneficiaries, continuous use, certainty of content based on tradition, and consistency with the common law.

93 Sweeny, note 88 above, at 111.

94 See notes 35-39 above, and accompanying text.

95 See Berndt, *Aboriginal Sites, Rights and Resource Development*, note 90 above, at pp2-4; and M Hill, ' Tradition-Oriented Cultures', in M Hill and A Barlow (eds) *Black Australia: An Annotated Bibliography* (Australian Institute of Aboriginal Studies, Canberra/Humanities Press Inc, 1978) pp 28-29.

96 Australian Law Reform Commission, *The Recognition of Aboriginal Customary Laws* (ALRC 31, 1986) vol 2, p 885.

freshwater and sea fisheries, as well as other coastal and estuarine resources.[97] 'Sea country', which encompasses marine, coastal and intertidal resources, is an equally important element in the life of many Aboriginal peoples as is the land itself to maintain the economic and cultural traditions of those peoples.[98] The native title rights and interests in coastal waters and areas may be substantial. As a consultant's report to the Resource Assessment Commission Coastal Zone Enquiry notes, nearly one-half (120,000) of Australia's indigenous peoples live within 20 kilometres of the coast, and their reliance on coastal resources for religious purposes, economic sustenance and commercial activity is significant.[99]

Understanding that the content of native title may include rights of access to living resources raises a number of considerations for State and Commonwealth resource management authorities. Since, typically, these native title rights and interests are claims to shared use rather than exclusive occupation of an area,[100] the first question is quantitative: what is the share of resources apportionable to Aboriginal resource users? In answer, the level of use, whether for subsistence purposes, religious and cultural ceremonies or perhaps, for commercial activity, depends upon the customs and traditional practices of the group claiming a right of access or use.[101] Moreover, there is some room for changes in those rights, for as Justice Brennan notes the rights associated with native title are not frozen at the time of settlement.[102] Rights and interests will change as the laws and customs of a people change, and such change is acknowledged within the ambit of native title as long as the rights asserted are based on traditional laws and customs 'as currently acknowledged and observed'.[103] Certainly, the manner of fishing or hunting may change: Aborigines will not, if court decisions from other

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97 M Mansell, 'Australians and Aborigines and the Mabo Decision: Just Who Needs Whom the Most? ' in *Essays on the Mabo Decision*, note 18 above, at p52.

98 See generally, 'The Role of Indigenous Peoples', *Resource Assessment Commission, Final Report: Coastal Zone Enquiry*, (Australian Government Publishing Service, 1993) pp 165-89.

99 D Smyth, 'A Voice in All Places: Aboriginal and Torres Strait Islander Interest in Australia's Coastal Zone', *Consultancy Report for the Resource Assessment Commission Coastal Zone Enquiry* (Commonwealth of Australia, 1993), pp 13-19.

100 See generally, Sweeny, note 88 above.

101 As noted in *Mabo (No 2)* (1992) 175 CLR 1 at 58, per Brennan J, '[t]he nature and incidents of native title must be ascertained as a matter of fact by reference to ... [the claimant groups'] laws and customs'.

102 Id at 61.

103 Ibid.

jurisdictions are any guide, be restricted to the use of primitive hunting and fishing technologies in the exercise of these rights.[104]

A related issue is whether Aboriginal hunting and fishing rights include interests beyond mere subsistence hunting and fishing. Do they include rights to share in commercial trade in fish stocks or wildlife species? Again, the answer depends on whether the customs and practices of a claimant group include a trade in fish and wildlife products. North American courts have interpreted the concept of commercial trade liberally, to include customary bartering activities between different tribes,[105] and have recognised that native title rights may include both non-commercial and commercial hunting and fishing activities.[106]

Determining the level of living resources use, based on traditional practices and encompassed within a legitimate claim to native title, is perhaps the easiest question confronting resource managers. The more difficult considerations entail determination of what that recognised level of use means for resource management decisions and how those decisions should be implemented. Before moving to consider how decisions ought to be implemented, I want to consider briefly the role of the States (or the Commonwealth) as the regulator of resource use and the implications of native title to resources for that regulation.

Clearly, the State and Commonwealth governments may continue to regulate the use and allocation of living resources that are subject to native title claims. As Justice Brennan observes, such regulation is not inconsistent with the continued enjoyment of native title rights.[107] Existing statutory regimes which provide for special Aboriginal access to wildlife and fish resources or reserve rights to gather food on pastoral leases lend support to the notion that such access is possible under and compatible with State and Commonwealth regulations.[108]

While the sovereign may regulate the use of living resources subject to native title, North American precedent establishes the principle

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104 See *Simon v The Queen* (1985) 2 SCR 387 at 402-403 in which the Canadian Supreme Court noted that restricting native hunting rights and methods to those used in 1752 would be out of line with accepted principles of native title rights.

105 *Washington v Washington State Commercial Passenger Fishing Vessel Association* 443 US 658 (1979).

106 *Simon v The Queen*, note 104 above, at 402; and see also *Sparrow v The Queen* (1990) 3 Can Native L Rep 160.

107 *Mabo (No 2)* 1992 175 CLR 1 at 64, per Brennan J.

108 'Aboriginal Rights to the Profits of the Land', note 36 above, at p224.

that such regulation must generally be non-discriminatory,[109] and directed to a legitimate government function such as the conservation of the resource.[110] Moreover, in some instances, regulation should and must give preference to native title rights, particularly subsistence rights.[111] The preference flows from the nature of native title as a pre-existing right recognised by the common law at the time of colonisation but not owing its genesis to common law property rights.[112]

Finally, with respect to what government regulation is appropriate, the existence of native title interests in shared access to living resources may itself compel regulation. In both the US and Canada, the courts have suggested that the existence of native title rights may impose an environmental servitude on the government to protect indigenous property rights.[113] In both countries, cases implying the

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109 See *Puyallup Tribe v Department of Game* (Puyallup I) 391 US 392, 396 (1968) in which the US Supreme Court held that States may legitimately establish conservation measures regulating the time and manner of resource use and establishing size limits so long as such regulations do not discriminate against Indian tribes.

110 In (Puyallup II) *Department of Game v Puyallup Tribe* 414 US 44-49 (1973) the Court clarified what it meant by non-discriminatory conservation regimes, noting that the need to conserve a particular species from extinction and preserve shared access to the species is legitimate, but that conservation regulations must accommodate native fishing rights. In this case the State had banned all net fishing, which was on its face legitimate, but in fact regulated only Indian fishing for they were the only net fishers.

111 For example, the Canadian Supreme Court in the *Sparrow* case noted that given the nature of the right to fish, any allocation of priorities after imposition of valid conservation measures should give preference to Indian subsistence fishing for food: *Sparrow*, note 106 above, at 204: and see also *Denny, Paul and Silliboy v The Queen* (1990) 2 Can Native L Rep 115 at 131-32, a case in which the Nova Scotia Court of Appeals awarded Micmac Indians a priority fishing right over all other interests except conservation, noting that such a priority derives from the nature of the right to fish and is appropriate given the tribe's long standing native title subsistence rights.

112 Brennan J describes native title as encompassing antecedent rights which burden the Crown's sovereign estate, and which though recognised by the common law are not institutions of the common law: *Mabo (No 2)* (1992) 175 CLR 1 at 57-58, per Brennan J.

113 See *US v Winans* 198 US 371, 381 (1905); *Fishing Vessel*, note 105 above, at 678-79; and *Bolton v Forest Management Institute* (1985) 21 DLR 4th 242 at 248-49 (BC CA). See also MC Blumm, 'Native Fishing Rights and Environmental Protection in North America and New Zealand: A Comparative Analysis of Profits á prendre and Habitat Servitudes' (1989) 8 *Wisc Int'l L J* 1; and GD Meyers, 'US v Washington (Phase II)

existence of habitat servitudes to protect native title rights have arisen in treaty interpretation decisions. However, to the extent that statutory schemes such as the *Native Title Act* (Cth) confer recognition on such rights, arguably, the same rules should apply. Again, the duty on the state results from the nature of the right as a pre-existing right, antecedent to British settlement of Australia, or as the Canadian Supreme Court characterised aboriginal rights: rights existing from time immemorial.[114] In summary terms, to the degree that the state sanctions living resource rights, it takes on a corresponding duty to preserve those rights. As the US Supreme Court noted in the *Fishing Vessel* decision, a recognised right to take fish is more than a right guaranteed the tribes to cast their nets into the water and come up empty. It is a right to an equal allocation of the resource.[115] Such a right, thus imposes a duty on the government to conserve the resource sufficient to meet recognised native property interests in that resource.

B Shared Resource Management: The Inclusion of Aboriginal Values

Perhaps the most problematic consideration facing living-resource management authorities is how shared resources ought to be managed. The extent and type of management is, as already noted, informed by existing precedent in common law jurisdictions recognising native title. The method of regulation and the inclusion of Aboriginal values in management decisions is less clear, more open to interpretation and sovereign discretion, and arguably more dependent on understanding the normative quality of the Aboriginal relationship with land.

The relationship of indigenous peoples to their land is unique, and stands in stark contrast to Eurocentric conceptions of the land and its resources as commodities to be modified, exploited, or exchanged for cash.[116] The spiritual and cultural connection that Aboriginal peoples retain with their land was acknowledged as one of the bases

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Revisited: Establishing an Environmental Servitude Protecting Treaty Fishing Rights' (1988) 67 *Oreg L Rev* 771.

114 *Calder v Attorney General of British Colombia* (1973) 34 DLR 3rd 145 at 173.

115 *Fishing Vessel*, note 105 above, at 679.

116 See: AL Booth and HM Jacobs, 'Ties That Bind: Native American Beliefs as a Foundation for Environmental Consciousness' (1990) 12 *Environmental Ethics* 27, 31; R Kapashesit and M Klippenstein, 'Aboriginal Group Rights and Environmental Protection' (1991) 36 *McGill LJ* 925, 929-30; and AJ Brown, *Keeping the Land Alive: Aboriginal Peoples and Wilderness Protection in Australia* (Environmental Defender's Office, NSW, 1992) pp 8-12.

upon which a claim to native title might legitimately be asserted in *Mabo (No 2).*[117]

As noted in an earlier work,

> [t]he spiritual connection of indigenous peoples to the land and its resources is, however, far more important than providing a basis for assertion of native title to the land .... For Aboriginal peoples in Australia, this unique relationship with land is fundamental to the maintenance and continuation of their cultures. This historical relationship is both deeply symbolic and practically related to their day-to-day lives.[118]

This special relationship encompasses all the wildlife and flora species found within traditional homelands.[119] The relationship of Aboriginal Australians and other indigenous peoples with the plant life and animal life that populate their lands might properly be called one of kinship,[120] in which the land, its resources, and the people are unified by a system of mutually reciprocal relationships.[121]

For Aboriginal peoples, the land is law, defining relationships between people and the dreamtime creators, among different peoples, and people with the natural world.[122] As noted earlier, these relationships apply equally to sea country, as Aboriginal and Torres Strait Islander peoples 'both incorporated sea areas within their clan estates and governed these estates by similar norms covering resource rights and management responsibilities'.[123]

Religion and culture, that is Aboriginal land law, dictates that the relationship of Aboriginal peoples to land is particularised. Each clan is part of, or related to, identifiable lands, 'bounded by physical features and meted by religious ceremony and cultural heritage'.[124]

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117 *Mabo (No 2)* (1992) 175 CLR 1 at 189-190, per Toohey J; and see also, 'Aboriginal Rights to the Profits of the Land', in *Native Title Legislation*, note 4 above, at 216.

118 Id, 'Aboriginal Rights to the Profits of the Land' at p 217.

119 H Ross, E Young, and L Liddle, 'Mabo as Inspiration for Australian Land Management' (1994) 1 *Australian J Envtl Management* 24 at 27.

120 'Different Sides of the Same Coin', note 14 above, at 80-81.

121 G Neate, 'Looking After Country: Legal Recognition of Traditional Rights To and Responsibilities For Land' (1993) 16 *U NSW LJ* 161 at 184; and LM Strelein 'Indigenous Peoples and Protected Landscapes in Western Australia' (1993) 10 *Environment & Planning L J* 380 at 381-82.

122 'Aboriginal Rights to the Profits of the Land', in *Native Title Legislation*, note 4 above, at pp 218-19.

123 Ross, Young and Liddle, note 119 above, at 28.

124 'Aboriginal Rights to the Profits of the Land', in *Native Title Legislation*, note 4 above, at p 219.

It is this particularised relationship which provides the basis for native title. But equally true, it is this unique relationship with land involving mutual obligations, giving rise to Aboriginal responsibilities to maintain the land,[125] which poses special challenges for government regulation of shared resources.

As Ross, Young, and Liddle note, Aboriginal and Torres Strait Islander land, resource, and marine management practices are traditionally founded on 'principles of sustainability in which land and natural resources are managed for the long-term'.[126] These land and resource management practices are based upon detailed ecological knowledge, with the husbandry, harvesting and use of land and living natural resources 'governed by complex social norms and beliefs'.[127] Aboriginal resource use and management practices encompass considerations for future generations[128]- thus they may well have been the first peoples to practice ecologically sustainable development as classically defined by the World Commission on Environment and Development.[129] The dilemma posed for resource management authorities is how (and whether) to incorporate Aboriginal values, management techniques, and knowledge in resource decision-making and governance. Aboriginal peoples are not opposed to resource use and development,[130] and experience in the US and Canada demonstrates that resource development is compatible with the existence of native title.[131]

One possible avenue to assure inclusion of Aboriginal perspectives in resource decision-making is negotiated agreements to share living resource management responsibilities. Sometimes called

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125 Ibid.

126 Ross, Young and Liddle, note 119 above, at 29.

127 Ibid.

128 'Aboriginal Rights to the Profits of the Land' in *Native Title Legislation*, note 4 above, at p 219.

129 See World Commission on Environment and Development, *Our Common Future* (Oxford University Press, 1987) p 43, in which the WCED defines sustainable development as 'development that meets the needs of the present without compromising the ability of future generations to meet their own needs'.

130 See eg, 'Aborigines give miners go-ahead', *The Australian* (Aug 17, 1994) p 10.

131 See generally, RH Bartlett, 'Native Title: Universal, Long-Established and a Boon to Resource Development', in Conference Proceedings, *Indigenous Rights: A Beginning* (The Foundation for Aboriginal and Islander Action, Brisbane, Queensland, April 26-27, 1993); and M Allen, 'Native American Control of Tribal Natural Resources Development in the Context of the Federal Trust and Tribal Self-Determination' (1989) 16 *B C Envtl Aff L Rev* 857.

'cooperative management' or 'co-management' regimes, these agreements can be useful for including Aboriginal land management expertise in resource decision-making processes. They may also provide a measure of self governance for Aboriginal peoples. These agreements are by no means perfect, and given the general dominance of non-Aboriginal interests in many negotiated agreements, they may tend to reflect prevailing non-Aboriginal views regarding resource use and development.[132] On the other hand, North American co-management regimes, which were initially confined to managing specific wildlife species such as caribou, walrus, and migratory birds, as well as joint fisheries agreements, have led to broader wildlife and habitat management programmes.[133] In Canada, comprehensive settlement agreements have led to a wide range of shared responsibilities and provided native Canadians with a large measure of self determination in their traditional homelands.[134]

In Australia, joint management of national parks is prevalent in the Northern Territory where Aboriginal-owned parks have been leased back to the government in return for extensive co-decision-making authority.[135] Advisory roles in park management in other States have increased Aboriginal responsibilities and have led to the incorporation of Aboriginal values in and changes to parks policy.[136] What is most clear is that in many instances Aboriginal peoples are prepared to enter into cooperative management or joint management regimes for governing shared resources, and that such regimes have the potential to offer benefits to both Aboriginal peoples and government authorities.[137]

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132 See generally, M Asch, 'Defining the Animals the Dene Hunt and the Settlement of Aboriginal Rights Claims' (1989) 15 *Can Pub Policy* 205 at 208-12; and DS Case, 'Subsistence and Self-Determination: Can Alaskan Natives Have a More Effective Voice?' (1989) 60 *U Colo L Rev* 1009.

133 Ross, Young, and Liddle, note 119 above, at 36.

134 See BJ Richardson, D Craig and B Boer, 'Indigenous Peoples and Environmental Management: A Review of Canadian Regional Agreements and their Potential Application to Australia - Part I' (1994) 11 *Environment & Planning Law Journal* 320; and RH Bartlett, 'Only an Interim Regime: The Need for a Long Term Settlement Process', in *Native Title Legislation*, note 4 above, at p 263.

135 See: Ross, Young, and Liddle, note 119 above, at 31, who note that additional benefits for Aboriginal people include parks employment and training programs and development of cultural conservation policies.

136 Id at 31-32.

137 See generally, M Sibosado, 'Native Title and Regional Agreements: Kimberley Region', in *Native Title Legislation*, note 4 above, at p 279.

Conclusion

The *Mabo (No 2)* decision and the implementation of native title legislation throughout Australia compel a re-assessment of land and resource management policies by the Commonwealth and State governments. This re-assessment must acknowledge that native title claims will inevitably include interests in and rights to use the living resources of the lands and waters of Australia. The High Court has clearly signalled that, as in other common law jurisdictions, native title recognised by the common law of Australia encompasses hunting, fishing and food gathering rights. Existing State legislation and the newly enacted Commonwealth *Native Title Act* reinforce this view.

Australian Aborigines now have a right to share in the harvest of Australia's living resources. How these interests and rights are shared, and how their management, allocation, and conservation is governed poses challenges for government resource-management authorities. Aboriginal peoples have different culturally based views regarding the use of these resources, but are not opposed to resource development. Their legal interests in these resources, as well as ethical considerations compel the inclusion of Aboriginal values and practices in resource management and decision-making.

The active and progressive negotiation between governments and native title holders of shared resource management regimes, cooperative arrangements, and even advisory roles for Aboriginal peoples in resource management, has many practical advantages for both government and indigenous peoples. Models are available in Australia, New Zealand, the US and Canada which will facilitate the development of cooperative resource management ventures. Aboriginal peoples have much to contribute to resource management decision-making and policy. Their traditional ecological expertise and practices provide a largely untapped reservoir of knowledge for resource use and management.[138] Aboriginal communities have much to gain from participation in cooperative agreements: security of resource access, protection of cultural heritage, experience in self-government, employment and training experience, and potentially, income from commercial activities that will assist their communities.[139]

In addition to the many benefits that may flow to Aboriginal communities, governments have far more to gain from negotiated agreements regarding resource use, than from protracted litigation

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138 Ross, Young, and Liddle, note 119 above, at 29-31.

139 M Latham, 'How Land Rights and Business Can Co-Exist' *The Australian*, (Aug 16, 1994) p 16, cols. 1-6

over the allocation and management of shared rights and interests in living resources. The *Mabo* litigation took ten years to complete and future cases, even if they take fewer years, will only add to any uncertainty regarding resource use. As Justice French of the National Native Title Tribunal notes, litigating native title claims may expend considerable time and cost millions of dollars.[140] Thus, governments have a huge financial stake in resource security, as well as a moral obligation to reach fair accommodation with Aboriginal peoples who share an interest in the living natural resources within their jurisdictions.

After 200 years, the High Court acknowledged in *Mabo (No 2)* that Aboriginal peoples have legitimate rights and interests in the land they have occupied for over 40,000 years, in the living resources of the lands and waters of Australia, and most importantly, in the continuance and maintenance of their way of life, their cultures, traditions and religious beliefs. The primary responsibility of those implementing that decision and native title legislation is to ensure not just that the 'letter of the law' is followed, but also that the spirit of the High Court's acknowledgment of Australia's history and the aspirations of Aborigines in its future is assured.

140 'Native Title Boss Warns of Litigation', *The Australian* (Sept 13, 1994) p 4.