WESTERN AUSTRALIA'S LAND (TITLES AND TRADITIONAL USAGE) ACT 1993: CONTENT, CONFLICTS AND CHALLENGES

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Western Australia's Land (Titles and Traditional Usage) Act 1993 currently faces a High Court challenge. This article addresses one ground of potential challenge - namely, the inconsistency of the Act with the Commonwealth's Racial Discrimination Act 1975.

INTRODUCTION

In June 1992, after approximately ten years of litigation, the High Court of Australia announced its decision in *Eddie Mabo v The State of Queensland No 2* ("*Mabo No 2*"),[1] declaring that the common law of Australia recognised the doctrine of native title to lands occupied by the country's indigenous peoples. The Court's decision has been characterised by commentators as "perhaps its most important and historically far-reaching decision",[2] as a turning point in Australian jurisprudence,[3] and as of fundamental importance because the issues strike at "the historical and juridical foundations of the Australian nation".[4]

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1. (1992) 107 ALR 1.
2. G D Meyers & J T Mugambwa "The *Mabo* Decision: Australian Aboriginal Land Rights in Transition" (1993) 23 Env L Rev 1203, 1204.
3. G Brysland "Rewriting History: The Wider Significance of *Mabo v Queensland*" (1992) 17 Alt LJ 162, 165.
4. G Nettheim "As Against the Whole World" (1992) 27 Aust Law News 9.

Mabo No 2 has generated considerable controversy and commentary.[5] Most importantly, this historic decision has set in motion a process of responding to the Court's judgments by all sectors of Australian society. This process, including the wider aspects of "reconciliation" between indigenous and non-indigenous Australians,[6] is likely to continue for many years.

The principal response to *Mabo No 2* is the adoption of legislation by Commonwealth and State governments to implement the decision. This article addresses that aspect of the process and, in particular, reviews whether the Western Australian response, the Land (Titles and Traditional Usage) Act 1993 (the "WA Act"), is compatible with the High Court's determination that Crown extinguishment of native title must be consistent with the Commonwealth Racial Discrimination Act 1975 (the "RDA").

The article is in three parts. The first summarises the principal points of the two *Mabo* decisions, setting the context for analysis of the WA Act. The second examines the *Mabo No 1*[7] requirement for State action to be consistent with the RDA. The third reviews the WA Act and assesses whether its provisions are consistent with the RDA. We conclude that although the WA Act has not been drafted in ignorance of *Mabo* and the RDA, it is unlikely to survive a High Court challenge.

PART I: A BRIEF REVIEW OF MABO

In 1982, a group of Torres Strait Islander people filed an action in the High Court against the State of Queensland seeking a declaration that they were the rightful holders of "native title" to lands and waters comprising the Murray Islands. In an attempt to cut off this litigation, the Queensland Government enacted the Queensland Coast Islands Declaratory Act 1985, which, inter alia, declared that, upon annexation in 1879, title to the Murray Islands vested in the Crown free of all prior claims, and purported to validate retroactively all prior Crown dispositions of land in the Islands. Officially, the purpose of the Act was to "remove doubts" regarding the legal status of title to the Islands.[8]

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5. See eg Meyers & Mugambwa supra n 2; R H Bartlett (ed) *Resource Development and Aboriginal Land Rights in Australia* (Perth: Centre for Commercial & Resources Law, 1993); M A Stephenson & S Ratnapala (eds) *Mabo: A Judicial Revolution* (St Lucia: Qld UP, 1993); Symposium Issue (1993) 15(2) Sydney L Rev.
6. See Meyers & Mugambwa supra n 2, 1239, n 90.
7. (1988) 166 CLR 186.
8. Queensland Coast Islands Declaratory Bill 1985, Second Reading, *Qld Legislative Assembly Debates* 4740, 4932-4933.

In *Mabo No 1*,[9] the High Court considered the validity of the Queensland Act. The existence of the Meriam people's native title to the Murray Islands was assumed. The Queensland Act was declared void because it purported to extinguish only one class of property rights, namely native title and to do so without compensation on just terms. It therefore violated the RDA which enshrines the principles of non-discrimination and equality before the law. The Court held that an Act which purports, after October 1975, to extinguish native title in a discriminatory fashion (eg, without providing compensation), will be invalid because it is inconsistent with section 10(1) of the RDA and by operation of section 109 of the Australian Constitution.[10]

On 3 June 1992, the High Court in *Mabo No 2* confirmed the Meriam people's native title to the Murray Islands. Perhaps more crucially, the Court confirmed the application of the common law doctrine of native title to indigenous peoples throughout Australia.[11]

The main features of the *Mabo No 2* judgments may be summarised as follows. First, the Court rejected the claim that Australia was terra nullius when annexed by Great Britain.[12] In consequence, it held that upon annexation of Australia, the Crown acquired only the sovereign or radical title to lands and waters comprising Australia, but not the full beneficial ownership of those lands.[13] Instead, lands occupied by indigenous peoples were held by the Crown in its sovereign capacity, but the beneficial title or right to occupy and use those traditional lands vested in indigenous owners. In other words, those traditional titles "burden the proprietary estate in land which would otherwise have vested in the Crown".[14] Secondly, all the majority judgments agreed that native title creates legally enforceable property rights and interests.[15]

Having decided that native title is recognised by the common law of Australia, the various judgments considered how native title may be established, how its content may be determined and how it may be validly extinguished. To establish native title, a group must prove a right to occupy

9. Supra n 7.
10. S 109 provides: "When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid."
11. *Mabo No 2* supra n 1, Brennan J, 21–22. Brennan J's judgment, in which Mason CJ & McHugh J concurred, is considered the principal judgment.
12. Terra nullius in the following senses was rejected: (i) that Australia was unoccupied: id, Brennan J, 29; Toohey J, 142; and (ii) that Australia was occupied only by uncivilised people without settled laws and government: id, Brennan J, 28–29; Deane & Gaudron JJ, 82.
13. Id, Brennan J, 34; Deane & Gaudron JJ, 82; Toohey J, 142.
14. Id, Deane & Gaudron JJ, 64–65.
15. Id, Brennan J, 43; Deane & Gaudron JJ, 83; Toohey J, 169–170.

particular lands,[16] or an entitlement to occupy or use certain lands,[17] or establish a continuous "presence" on the land.[18] That right, entitlement or presence, as in other common law jurisdictions like the USA and Canada,[19] must be shown to have been continuous since the time of colonisation. Critically, the entitlement is to be determined by reference to the claimant's traditional customs, not by European legal usages foreign to indigenous societies.[20]

We refer in detail to the Court's rulings on the content of, extinguishment of, and compensation for, loss of native title in Part III. In summary, it is clear that the content of native title is to be determined by reference to the applicable local indigenous traditions.[21] As to extinguishment, it is a fundamental feature of native title that it is inalienable except to the sovereign and is qualified by the sovereign's right to limit, regulate or extinguish.[22] The Court's discussion of compensation for extinguishment of native title has engendered considerable confusion.[23] Perhaps the only statement that can be made regarding the case is that the comments in the various judgments are merely dicta because, as Brennan J noted, compensation was not at issue in *Mabo No 2*.[24] The general rule in other common law jurisdictions, however, is that the law "shields Aboriginal peoples in former British colonies from a taking of their native lands without compensation".[25]

In summary, the combined effect of the two *Mabo* cases is that:

- Native title survived the British occupation of Australia;
- The Crown has the right to extinguish native title;
- Native title may be extinguished by a Crown grant wholly inconsistent with the continued enjoyment of the native title or by a valid legislative enactment that unambiguously intends to extinguish the title;
- The Crown's right to extinguish native title has, since the proclamation of the RDA in October 1975, been fettered by the requirement that extinguishment can only be achieved in a way that does not discriminate

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16. Id, Brennan J, 36.
17. Id, Deane & Gaudron JJ, 64.
18. Id, Toohey J, 144–150.
19. See Meyers & Mugambwa supra n 2, 1219.
20. Id, 1218–1219 & nn 70–75.
21. On this point, once again, the Court followed a reasonably uniform line of cases arising in former British colonies: Meyers & Mugambwa supra n 2, 1220.
22. *Mabo No 2* supra n 1, Brennan J, 42–45; Deane & Gaudron JJ, 83.
23. Meyers & Mugambwa supra n 2, 1228–1238.
24. Supra n 1, Brennan J, 40.
25. Meyers & Mugambwa supra n 2, 1230–1231.

on the basis of race; and

- The effect of the requirement of non-discrimination is that, at least, any compulsory acquisition of native title must be made on "just terms".

The second part of this article examines the points raised in *Mabo No 1* in the context of a review of the WA Act. Of particular concern is the compatibility of the WA Act's provisions regarding extinguishment of, and compensation for, loss of native title with the Commonwealth RDA.

PART II: MABO NO 1 AND THE RDA

In light of the decision of the High Court in *Mabo No 1*, and assuming the validity of the Commonwealth's own "Mabo response", the WA Act must be consistent both with the RDA and with the Native Title Act 1993 (Cth). The RDA remains a principal touchstone in determining the validity of compulsory resumption of Aboriginal land. The Native Title Act preserves the full effect and operation of the RDA[26] except as it might otherwise have applied to the retrospective validation of past invalid extinguishments of native title.[27] In this article, we assess only those provisions of the WA Act which are clearly unaffected by section 7(2) of the Native Title Act.

The question of the consistency of the remaining provisions of the WA Act with the RDA is identical with that posed in *Mabo No 1*[28] with respect to Queensland's 1985 attempt to extinguish native title. That question was restated by Toohey J in *Mabo No 2*:

> The question here is whether extinguishment of the traditional title of the Meriam people without the compensation provided for in the Acquisition of Land Act 1967 (Qld)[29] means that, by reason of a law of Queensland [the Queensland Coast Islands Declaratory Act 1985],[30] persons of a particular race, colour or national or ethnic origin do not enjoy a right that is enjoyed by persons of another race, colour or national or ethnic origin or enjoy a right to a more limited extent than those persons. If the traditional title of the Meriam people may be extinguished without compensation, they do not enjoy a right that is enjoyed by other titleholders in Queensland or, at the least, they enjoy a right to a more limited extent. A law which purported to achieve such a result would offend section 10(1) of the Racial Discrimination Act and in turn be inconsistent with the Act within the meaning of section 109 of the Constitution. The Racial Discrimination Act would therefore prevail and the proposed law would be invalid to the extent of the inconsistency.[31]

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26. Native Title Act 1993 (Cth) s 7(1).
27. Id, s 7(2).
28. Supra n 7.
29. In WA, the comparable statute is the Public Works Act 1902.
30. In WA, the Land (Titles & Traditional Usage) Act 1993.
31. *Mabo No 2* supra n 1, 168–169.

The question for Western Australia, then, is whether the WA Act purports to extinguish native title in a discriminatory fashion. It certainly purports to extinguish all existing native title in the State.[32] It does not do so, however, without a compensatory mechanism. Thus, it cannot be assumed that the High Court will invalidate the WA Act as readily as it did the Queensland legislation at issue in *Mabo No 1*.

The RDA, section 10(1), is concerned with laws which limit or deny a human right to one racial or ethnic group without limiting or denying it to others (or, conversely, which grant rights to one ethnic group without extending them to others). The effect of section 10(1) depends on which objective is revealed by the impugned legislation. Where one ethnic group is *favoured* by legislation, section 10(1) operates to extend the right so granted to all other ethnic groups (indeed, to all people) within the jurisdiction.[33] It provides that "persons of the [neglected] race ... shall, by force of this section, enjoy that right to the same extent as persons of [the favoured] race ...". As Mason CJ stated in *Mabo No 1*: "[I]f racial inequality under the law in the enjoyment of a relevant right is shown to exist, section 10 remedies that wrong by conferring the relevant right on those who do not enjoy it".[34]

Where legislation, rather than favouring one group, purports to strip the members of one ethnic group of their human rights, that legislation is inconsistent with section 10(1) since the objective of the section is to achieve equality before the law of both Commonwealth and States or Territories. Where State legislation purports to achieve this outcome, section 109 of the Constitution renders it invalid to the extent of the inconsistency.

The rights protected by section 10(1) include those listed in Article 5 of the International Convention on the Elimination of all Forms of Racial Discrimination ("ICERD").[35] Among them are the right to own property[36] and the right to inherit property.[37] The majority of the judges in *Mabo No 1* decided that those rights necessarily imply an immunity from arbitrary

32. WA Act ss 5 & 7.

33. The RDA permits an exception. "Special measures taken for the sole purpose of securing the adequate advancement of certain racial or ethnic groups ... requiring such protection as may be necessary in order to ensure ... [their] equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination ...": International Convention on the Elimination of all Forms of Racial Discrimination, art 1.4, as incorporated by RDA s 8(1).

34. Supra n 7, 198.

35. (1969) 660 UNTS 195. See RDA s 10(2).

36. ICERD, art 5(d)(v).

37. ICERD, art 5(d)(vi).

deprivation of one's property.[38] According to Brennan, Toohey and Gaudron JJ: "A State law which, by purporting to extinguish native title, would limit that immunity in the case of the native group cannot prevail over section 10(1) of the Racial Discrimination Act which restores the immunity to the extent enjoyed by the general community".[39]

Implicit in this statement of principle are the propositions: (i) that native title is property; (ii) that extinguishment is a deprivation of property; (iii) that "arbitrary" deprivation is a breach of human rights; and (iv) that the RDA prohibits all (racially discriminatory) arbitrary deprivations and not solely uncompensated deprivation. It must be recognised that the RDA itself does not prohibit the arbitrary deprivation of property.[40] Rather, it ensures that arbitrary deprivation is not visited upon only one group within the population, identified and distinguished by its race. Because State legislation[41] secures the immunity of non-native title holders from arbitrary deprivation of their property, an inquiry must be made whether the WA Act effects an arbitrary deprivation of the property of Aboriginal native title holders.

The adjective "arbitrary" has a meaning in the international law of human rights somewhat broader than its domestic scope. It means not only "illegal" (in the sense of not being supported by, or in accordance with, law) but also "unjust"[42] in the sense of being contrary to "long-established notions of justice".[43] Australian notions of what is "just", when the Crown compulsorily resumes private property, are given expression in compulsory acquisition legislation and by the short-hand "just terms". Like other such legislation, the Public Works Act 1902 (WA) contains both the substantive guarantee of compensation and a set of procedural guarantees. Arbitrariness can be as much a result of the denial of procedural guarantees as of the denial of substantive justice.

38. Supra n 7, Brennan, Toohey & Gaudron JJ, 217; Deane J, 230. This immunity is expressly declared by art 17.2 of the Universal Declaration of Human Rights.

39. Ibid, 219.

40. In the absence of compulsory acquisition legislation, the Crown's prerogative power to take land is fettered by an obligation to pay compensation: *A-G v De Keyser's Royal Hotel Ltd* [1920] AC 508, applied in *Burmah Oil Co Ltd v Lord Advocate* [1965] AC 75. However, in *Mabo No 1*, supra n 7, Wilson J, 202, with whom Mason CJ & Dawson J agreed, held that, "it is not beyond the power of a State legislature to deprive a person of property without compensation, provided the deprivation is otherwise effected according to law".

41. Public Works Act 1902 (WA).

42. *Mabo No 1* supra n 7, Brennan, Toohey & Gaudron, 217.

43. Id, Deane J, 226: "Long-established notions of justice that can be traced back at least to the guarantee of Magna Carta ... against the arbitrary disseisin of freehold".

Procedural issues were not raised by *Mabo No 1*. Since the case was one of outright denial of compensation, the focus of the judgments was on the basic need for compensation. That focus does not justify a view, however, that the mere provision of compensation will necessarily satisfy the RDA's requirements regardless of quantum and fairness in calculation and distribution. The objective of equality before the law must be fully served.

In Western Australia, the following procedural guarantees articulate our "notions of justice" with respect to compulsory acquisition:

- The specification of a public work to support the resumption;[44]
- The identification of individual parcels with the specified public work or purpose;[45]
- The right of the land-holder to notice of both the intention to resume and the fact of the accomplished resumption;[46] and
- A right in the affected land-holder to object to the resumption and to have his or her objections considered.[47]

A resumption not in accordance with at least the significant elements of these procedures would smack strongly of arbitrariness. Where they are guaranteed to one race but denied to another, section 10(1) of the RDA is contravened.

PART III: AN ASSESSMENT OF THE WA ACT

1. The policy and effect of the WA Act

The central concerns motivating the enactment of the WA Act were said by the Premier to be: first, that all of the land of Western Australia should be governed by one system of law, and secondly, that the stability and certainty of land tenure and rights is critical to the economic development of the State.[48] The Premier outlined four basic objectives of the Bill (as introduced):

- To ensure that the policy and administration of Western Australian land and natural resources management remain in the control of the State;
- To provide for certainty of land title for existing and future title holders (necessarily excluding native title holders);

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44. In WA, land may be resumed under the Public Works Act 1902 only for the purposes of undertaking, constructing or providing public works: s 10.
45. Implicit in the procedures and the purpose itself.
46. Public Works Act 1902 (WA), ss 17(2)(c)(ii) & 19.
47. Id, s 17(2)(d).
48. Land (Titles & Traditional Usage) Bill 1993, Second Reading, *WA Legislative Assembly Debates* 4 Nov 1993, 6327.

- To provide for timely and orderly project approvals; and
- To be part of a wider approach which includes strategies to improve Aboriginal standards of living in areas such as health, housing, education and employment.[49]

The Act's policy, therefore, is:

- To rid the State of the "dual" system of native and Crown titles;
- To avert native title claims which, on some estimates,[50] could cover up to 90 per cent of the State's land mass (without taking into account claims to coastal waters); and
- To avoid inconsistency with the RDA by "compensating" native title holders.

The WA Act distinguishes two categories of native title. For ease of reference, we term these "post-1975 titles" and "surviving titles". The Act extinguishes both but with different effects. The first category includes titles invalidly extinguished since the commencement of the RDA in October 1975 ("post-1975 titles"). From that date, according to the High Court in the *Mabo* cases, extinguishment needed to be compensated on just terms in order to be valid. Where that was not done, Crown grants in the post-1975 period could be subject to native title claims. The effect of the WA Act is to validate retrospectively post-1975 Crown grants and to validate native title extinguishments since October 1975.[51] The Act purports to satisfy the non-discrimination requirement by permitting claims for compensation to be lodged by the Aboriginal groups affected.[52] The operation of the RDA as it might affect post-1975 titles is now potentially complicated by section 7 of the Native Title Act. For this reason, we make no further reference to post-1975 titles in this article. Our concern is with the validity of the WA Act's provisions dealing with the second category of native title.[53]

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49. Id, 6329.
50. R H Bartlett "The Aboriginal Land which may be Claimed at Common Law: Implications of *Mabo*" (1992) 22 UWAL Rev 272, 294.
51. Supra n 30, s 5.
52. Id, ss 28 & 37.
53. The combined effect of the speculation of some justices in *Mabo No 2*, and of the less than precise language of the WA Act, is that there are some classes of land which are not obviously either "surviving" or "post-1975" title. It remains for a court to determine, for example, whether unenclosed land on pastoral leases, or national parks, remained subject to native title at the date of commencement of the Act. In the case of pastoral leases, the common reservation for Aboriginal traditional uses may be argued as evidence of an intention on the part of the Crown to preserve native title. That reservation provides that "[t]he aboriginal natives may at all times enter upon any unenclosed and unimproved parts

The second category is that surviving to the date of commencement of the Act — that is, where no purported extinguishment has previously occurred ("surviving titles"). Apart from unalienated Crown lands, the obvious example is that of Aboriginal reserves, there being no competing interest-holder in these lands. Native title in such reserves survived, unchallenged by any competing non-native title.[54]

Such surviving native title is also extinguished by the WA Act.[55] No claim for compensation may be lodged however. Instead, the native title is automatically replaced by statutory rights of traditional usage.[56] If at some later date these statutory rights are extinguished, compensation may be claimed as for post-1975 titles.[57]

The table below summarises the effects of the WA Act on the two categories of native title and on traditional usage rights.

Categories of Title Affected

	SURVIVING TITLE	**TRADITIONAL USAGE RIGHTS**	**POST-1975 TITLE**
Definition	Native title which survived until the date of commencement of the WA Act because there had been no inconsistent Crown grant.	Arise automatically upon extinction of surviving title; equivalent unless Act is otherwise: s7.	Native title against which a Crown grant was made since October 1975 albeit without compensation.
Extinguish-ment	Upon commencement of the Act: s 7(1)(a).	By inconsistent Crown act or by notice: ss 23, 26.	Retrospectively, at date of Crown grant: s 5(2).
Compensa-tion	None.	Cash or kind to be negotiated by Minister: s 22.	Cash or kind to be negotiated by Minister: ss28, 37.
Surviving interest	Statutory right of traditional usage: s 7(1)(b).	None.	None.

of the land the subject of a pastoral lease to seek their sustenance in their accustomed manner": Land Act 1933 (WA) s 106. Pastoral leaseholders would be feigning surprise if they were now to complain of the residual rights of Aborigines over their lands.

54. *Mabo No 2* supra n 1. Brennan J, 48, reasoned that "[t]o reserve land from sale is to protect native title from being extinguished".

55. S 7(1)(a).

56. S 7(1)(b).

57. Ss 22 & 28.

On its face, it may appear that the WA Act covers all bases as far as the "*Mabo* requirements" for validity are concerned. Surviving native title is extinguished but automatically replaced with a "title" deriving from the Crown. Extinguishment of post-1975 title by Crown grants is compensable, as is any later extinguishment of traditional usage rights. If the RDA requires only that compensation be paid for acquisition of native title, the WA Act seems to be secure. However, both the RDA requirements themselves, and the real meanings of "compensation" and "traditional usage rights", as used in the Act, need detailed unravelling before this conclusion can be reached with confidence.

Potentially, the sovereign is under an additional obligation to native title holders, over and above that to extinguish on just terms. As Brennan J noted, native title is a title which burdens the Crown's estate in land.[58] Though the issue of the contours of the relationship of the sovereign to native peoples did not need to be reached in *Mabo No 2*, Toohey J's discussion of the fiduciary-like quality of that relationship is instructive for future litigation where the issue will arise directly. He noted that the common law, as interpreted by the Supreme Courts of Canada[59] and the United States,[60] requires the sovereign to act for the benefit of the native title holders.[61] While the nature of the fiduciary or trust-like duty may vary given different circumstances, at a minimum it requires that loss of title be compensated, and generally that native title ought not be impaired or destroyed "contrary to the interests of the title-holders".[62] In our view, that implies that government must have some compelling purpose to extinguish title contrary to the interests of native title holders, and that government must seriously consider the interests of native title holders, weighed against the specifically proposed use of the land, before extinguishing their titles. The WA Act accomplishes neither of these tasks. Given the reliance of the majority judgments in *Mabo No 2* on this line of cases, the High Court is likely to adopt a similar stance in future litigation.

2. Analysis of the WA Act and its consistency with the RDA

The "just terms" provisions of the Public Works Act 1902 (WA) apply to neither the resumption nor the compensation of native title or traditional

58. *Mabo No 2* supra n 1, 34. See also Deane & Gaudron JJ, 64–65.
59. *R v Guerin* [1984] 2 SCR 335; *R v Sparrow* [1990] 3 CNLR 160, 180.
60. *Cherokee Nation v Georgia* (1831) 5 Pet 1 (US) 16–17; *Seminole Nation v US* (1942) 316 US 286, 296–297.
61. *Mabo No 2* supra n 1, 159.
62. Id, 159–160.

usage rights. Resumption and compensation are, instead, the objectives of the WA Act which establishes a separate regime for native title. The mere existence of two regimes, one applying to resumption of non-native titles deriving from the Crown and the other to native title, suggests racial discrimination. However, if the WA Act provides for equal or even superior protection of the property rights of the Aboriginal title holders, the mere existence of two separate regimes would seem unlikely to offend section 10(1) of the RDA. This would particularly be the case if the procedures and compensation formula took into account the disadvantaged position of Aborigines in comparison with other members of the community and attempted to redress that disadvantage by providing "special measures" to secure their "adequate advancement".[63]

In our view, however, far from supplying special measures for the advancement of Aboriginal title holders, the WA Act erects a discriminatory and far from advantageous regime of resumption and compensation in respect of native title. This contention is supported by a direct comparison between the procedures and formulas established by the Public Works Act and the WA Act respectively.

(i) The extinction of surviving title

The Public Works Act authorises the Crown to resume (or "take") "any land required for the purposes of [public] work".[64] The procedures established by the Act for notice to be given to the land-holder and the occupier, the right of the land-holder and the occupier to object to the taking, as well as the wording of the authorising section itself, support the view that the Act intends each taking of land to be for a specified public work, identifiable in relation to the land resumed.

In contrast, the WA Act makes no direct link between the native title extinguished and any proposed public works. Rather, it purports to achieve universal extinguishment of all native title in WA wherever it may be and without the specification of any particular public works to be provided. It may be that the extinguishment of surviving native title furthers a more general public purpose, for example, the securing of "one people, one law" by bringing native title holders under the State land management system, or the securing of economic certainty and stability. Whether or not one agrees

63. Special measures for this purpose are permitted, indeed encouraged, by ICERD, supra n 35, arts 1.4 & 2.2; and permitted by the RDA s 8(1).

64. S 10.

with these objectives for extinguishing native title, it should be clear that native title holders are deprived of significant legal rights provided to all other title holders in Western Australia by the Public Works Act: the right to individual notice of an intention to resume; the right to specification of the relationship between their land and the public work to be erected or provided; and the right to object to and challenge the resumption (since the WA Act purports to effect extinguishment automatically). Far from benefiting Aboriginal native title holders over others, there is a clear denial of equality before the law.

It may be argued by defenders of the WA Act that its effect is not to resume surviving native title;[65] rather the intention is simply to incorporate such titles into the State land management system whereby all title is derived from the Crown. The argument would effectively be that the absence of notice and other procedural safeguards is not fatal because this extinguishment is not analogous to resumption. But the success of this argument depends on the assumption that the rights of traditional usage which replace surviving native title are *equivalent to* native title.[66] Such equivalence is the presumption of the Act, with the significant proviso, "unless this Act provides otherwise".[67]

In unravelling the ways in which the WA Act derogates from native title rights in the creation of rights of traditional usage, two features require comparison: their respective vulnerability to extinguishment and their content.

Any private interest in land, including native title, can be revoked by the Crown.[68] Given the serious consequences of extinguishing native title, "the exercise of a power to extinguish native title must reveal a clear and plain intention to do so, whether the action be taken by the Legislature or by the Executive".[69] The consensus of the High Court seems to be that the granting of a title *inconsistent* with the continued use and enjoyment of native title would sufficiently reveal such an intention and be effective to extinguish the latter title.[70] Like native title, traditional usage rights are extinguished by "any

65. In spite of the clear words of the Act: s 7(1)(a).

66. If traditional usage rights are lesser rights than the native title rights they replace, compensation would be needed for the extinction of those lost native title rights.

67. S 7(2).

68. *Mabo No 2* supra n 1, Brennan J, 47; Deane & Gaudron JJ, 84; Toohey J, 152.

69. Id, Brennan J, 46–47; Deane & Gaudron JJ, 84; Toohey J, 152–153. As with other aspects of the decision, the ruling regarding extinguishment of native title is similar to that followed in the USA and Canada: id, Brennan J, 47; Toohey J, 153. And see generally: G D Meyers "Different Sides of the Same Coin: A Comparative View of Indian Hunting and Fishing Rights in the United States and Canada" (1991) 10 UCLA J Env Law & Policy 67.

70. *Mabo No 2* supra n 1, Brennan J, 51. In the case of executive action, clear and plain

legislative or executive action which is clearly and plainly (i) intended to extinguish the rights; or (ii) inconsistent with the continued exercise of the rights".[71]

Other means of extinguishing traditional usage rights also mirror those recognised by the High Court as effective to extinguish native title: abandonment or surrender by the group; loss of the relevant connection with the land; death of the last member of the group; as well as grants of freehold or leasehold titles without reservation of rights of traditional usage.[72] Provided they are compensated in a non-discriminatory way, traditional usage rights seem to be no more vulnerable to extinction by the Crown than native title was rendered by the High Court in *Mabo No 2*.[73]

The content of native title is determined "by the traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants of a territory. The nature and incidents of native title must be ascertained as a matter of fact by reference to those laws and customs".[74] The High Court accepted that the content of native title might vary considerably within Australia, being dependent on the local indigenous law. Brennan J suggested that, in any particular case, the evidence might establish that the native title is "proprietary or personal and usufructuary in nature";[75] that it may confer a "right of user consisting in legal rights and interests" or "a mere usufruct".[76] In sum, native title may include a full, exclusive right to occupy

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intention is demonstrated by a Crown reservation of land for a particular purpose, such as building a school, or grant of an interest in land, such as freehold title, that is inconsistent with the continued enjoyment of native title: see Meyers & Mugambwa supra n 2, 1224–1225 & nn 103–109. Similarly, legislation must clearly, unambiguously, and plainly intend to extinguish native title. Thus, general legislation reserving or authorising disposal of Crown lands will not be interpreted as extinguishing native title: *Mabo No 2* supra n 1, Deane & Gaudron JJ, 84; Toohey J, 153. If the actual use authorised by legislation is inconsistent with continuing native title, the effecting of that use will extinguish the title: id, Brennan J, 51. It is possible for 2 interests — native title and a Crown-derived title or interest — to co-exist with respect to the same land. This is recognised by the WA Act with respect to traditional usage rights: s 23. For example, para (d) provides that "the dedication, reservation or use of the land for public or other works or purposes" will extinguish the traditional usage rights, but only to the extent that such "dedication, reservation or use is inconsistent with the continued exercise of the rights".

71. WA Act s 23(a).
72. Id, s 23. See also Meyers & Mugambwa supra n 2, 1223–1224.
73. Our argument above as to the fiduciary responsibilities of the Crown to native title holders, however, could result in significantly greater protection for native title than the WA Act awards rights of traditional usage.
74. *Mabo No 2* supra n 1, Brennan J, 42. See also Deane & Gaudron JJ, 83.
75. Id, Brennan J, 44.
76. Id, Brennan J, 49.

certain lands, or a lesser right to take a profit from those lands (eg, hunting, fishing and gathering rights) or the right to pass over certain lands to reach cultural and religious sites. The content of native title, therefore, cannot be generally or universally assumed. Its content will be established by the local indigenous law on the subject of land entitlement. In particular, it cannot be assumed that all native title is a "mere" usufruct.[77]

A number of provisions of the WA Act are addressed to the content of the rights of traditional usage. Section 18 stipulates that traditional usage includes the right to "take and use food, water and materials from the land for sustenance or for purposes relating to Aboriginal tradition". This provision could not be interpreted as an exhaustive list of the contents of traditional usage rights, especially in light of section 7(2) which stipulates that the contents are to be equivalent to those of native title unless the Act provides otherwise. The Act does so in ways that, conceivably, significantly limit the entitlements of the native title holders. Local Aboriginal law, for example, may be shown to confer a right to control forest products and/or water resources on the subject land. Sacred water-holes are likely to be in the charge of and under the control of custodians. The WA Act, however, denies a right of control over "forest produce or water" together with minerals and petroleum.[78]

Again, Aboriginal law may confer a right on a particular group to exclude others from access to or use of certain areas or resources. Indeed, evidence in the *Gove Land Rights* case,[79] as well as in *Mabo No 2* itself, established that there were traditional rules to that effect. The WA Act, however, denies any such right to exclude or hinder others. Traditional usage is not to be exercised in a manner inconsistent with the rights of holders of any Crown title with respect to the land;[80] the rights of the latter are not to be restricted or impaired.[81] Even in the absence of other Crown title holders, the public are not to be hindered in their access to national parks, waterways,

77. Clause 19(1) of the WA Bill provided that the right of traditional usage was not to be a proprietary right. It is perhaps significant that this clause was removed prior to the Bill's passage into law. Its retention could have described a fatal distinction between native title and traditional usage.

78. S 19. Moreover, while the Crown reserves the right to sub-surface minerals in all land (and not only land subject to rights of traditional usage), rights to water and timber on other private property are not so reserved. It is prima facie discriminatory to treat traditional usage rights differently.

79. *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141.

80. S 8(2)(b).

81. S 20.

public reserves and similar areas.[82]

The Act, therefore, creates a right of traditional usage which could well be shown by any particular Aboriginal group to confer far fewer rights than does their traditional law as to native title. We submit, therefore, that the rights of traditional usage created by the WA Act are *not* equivalent to those arising under common law native title. Thus, the argument that the Act does not extinguish surviving title but merely re-names it is not supported.[83] As noted, the Act initiates a comprehensive extinguishment of all native title to traditional lands without regard to the proposed use of the land and without regard to the effect on Aboriginal peoples. The RDA, as interpreted in *Mabo No 1*, at least requires compensation for those native title rights lost to Aboriginal groups now entitled only to the *lesser* "traditional usage rights". Since the WA Act provides no entitlement to such compensation, it is in direct conflict with the RDA.

(ii) The extinction of traditional usage rights

Traditional usage rights — being property rights in some, if not all, cases — are also protected by the RDA from arbitrary resumption. As described above, traditional usage rights can be extinguished by inconsistent Crown acts without notice.[84] Notice is but one of the ways in which traditional usage rights can be extinguished in the future.[85] In our view, since the right to notice

82. S 21.
83. An alternative suggestion may be that the effect of the WA Act is to provide a more appropriate and superior *compensation* for extinguishment of surviving native title, in the form of rights of traditional usage, than could be expected under the Public Works Act. The provision of a separate non-financial compensation regime would need to be justified as a "special measure" in terms of the RDA s 8(1). If it is a special measure, the racially discriminatory denial of compensation on the Public Works Act formula may be excused. Native title holders may well seek to retain some relationship with their land as compensation for the loss of full native title in preference to an amount of money coupled with exclusion from their land. The notion that compensation for compulsory resumption and substitution of traditional usage for native title are of the same order and have the same objective seems far-fetched. Compensation is for ejectment from land, whereas traditional usage envisages that the Aboriginal group will continue to exercise many of the same rights over, and enjoy many of the same uses of, the land as they did under native title. The language and scheme of the WA Act also argue strongly against the suggestion that traditional usage rights are an alternative (and superior) compensation scheme.
84. WA Act s 23 lists the ways in which such rights can be extinguished or suspended.
85. S 26. One consequence of the absence of notice is a cruel evidentiary imposition upon Aboriginal compensation claimants. Not only must they prove their former entitlement, its extent and the boundaries of the land to which it applied, but also the fact that that entitlement has been extinguished. Such a requirement is unconscionable in light of the fact that it will usually be a legislative or executive act of the Crown which effects

is part and parcel of just terms resumption, any extinguishment other than by notice will be arbitrary and invalid.[86]

An Aboriginal group whose rights of traditional usage are extinguished or impaired[87] may submit a claim for compensation. The claim must be submitted within 12 months of the date of the act of extinguishment.[88] This time limit is somewhat more generous than the six months allowed under the Public Works Act.[89] Yet the Public Works Act claimant has notice of both the intention to resume and of the resumption itself, whereas many Aboriginal groups will have received no notice at all. From this perspective, the imposition of *any* limitation period at all offends accepted notions of justice and certainly creates a regime for Aboriginal groups much less fair than that under the Public Works Act.[90]

When an Aboriginal claim for compensation is received, it is to be published and objections invited.[91] The Act seems to envisage that objections to the award of compensation might come from any quarter. There is no analogous provision in the Public Works Act, conceivably because registration of interests in land makes proof of entitlement simpler and more certain. With respect to Aboriginal traditional interests, the objection provision appears designed primarily to extend to competing Aboriginal groups, if any, an opportunity to challenge or to share in the claim for compensation.[92]

Under both the Public Works Act and the WA Act, compensation is

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extinguishment. It certainly imposes a far heavier burden on Aboriginal claimants than any imposed by the Public Works Act 1902.

86. S 27 of the WA Act is unlikely to be found to supply the deficiencies in procedural justice for the following reasons. First, it does not of itself require the application of the rules of natural justice. Rather, it authorises the making of regulations to provide for natural justice. To the date of writing, such regulations have not been made. Second, the rules of natural justice will not necessarily be as comprehensive as those provided in the Public Works Act 1902. In particular, it is difficult to see how rules of natural justice could overcome the difficulties with extinguishment by legislative or executive act as set out in s 23(a)-(d), which clearly contemplates that no notice will be given. Third, the WA Act provides that extinguishment by grant of titles before 1 January 1994 without natural justice may not be impugned for that reason: s 27(3).

87. WA Act s 23(b) & (c) provides that some Crown grants will not entirely extinguish traditional usage rights but will impair those rights.

88. S 29(3).

89. S 36(1)(b). Under s 36(2)(a) the 6 month period can be extended by the Minister.

90. When factors such as isolation, lack of access to legal advice, and the educational, cultural and language barriers inhibiting Aboriginal groups are added to the absence of notice, the extent of actual discrimination against them comes into sharp relief.

91. WA Act s 32.

92. Thus s 33(2) of the WA Act envisages that some objectors may wish to become party to a compensation agreement.

negotiable. Under the Public Works Act,[93] the Minister makes an offer of compensation after examining the claim and obtaining a report on the value of the land and the damage sustained by the claimant. The claimant can accept or reject that offer[94] and the Act envisages negotiations on the amount of the award.[95] Similarly, the WA Act instructs the Minister to negotiate with Aboriginal claimants.[96] In both cases, statutory compensation principles must be taken into account and unsettled matters can be referred to the Supreme Court (in the case of native title[97]) or the Compensation Court (for other resumptions[98]).

One striking difference between the Public Works Act compensation principles[99] and those of the WA Act[100] is that the former are grounded in the value of the land (recognising the proprietary nature of the interests resumed) while the latter fail to make mention of the value of the land as real estate (implicitly denying that traditional usage rights are proprietary in nature). Instead, compensation for loss of traditional usage rights is to have regard "primarily to what constitutes fair compensation for actual loss of or interference with the entitlement to exercise the affected rights".[101] This formulation implies that these are principally usufructuary rights, whereas usufructs are only one in the panoply of rights that arise under common law native title.

A second, even more striking, difference is that compensation under the WA Act can be "in kind" as well as, or instead of, cash. The Minister is authorised to negotiate a compensation package which can include one or more of the following:

- Monetary compensation;
- Title to land;
- Rights of traditional usage over other land;
- Provision of services or facilities;
- Employment or community programs or "other privileges or opportunities having economic, cultural or social value";

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93. S 46.
94. S 47.
95. Ss 46A & 47A(a).
96. S 33.
97. S 34.
98. S 47A(c).
99. S 63.
100. S 38.
101. S 38(1)(a).

- Any other form.[102]

This provision might be cited as justifying the barring of Aboriginal traditional owners from seeking compensation under the Public Works Act. Conceivably, a special and separate set of compensation principles recognises the disadvantages under which Aboriginal groups labour and provides more socially and culturally appropriate "compensation" than would be available under the Public Works Act. The WA Act gives the Minister the flexibility to respond to the actual situation and needs of each Aboriginal group.

When considering the lawfulness of separate "special measures" for one racial group, the RDA recognises that such measures may be required to redress the lingering effects of past discriminatory treatment. It is drawing a rather long bow across this principle, however, to attempt to justify using what would otherwise be an award of compensation to remedy the lingering effects of past (and, indeed, continuing) discriminatory neglect of Aboriginal communities.[103] A "special measure" justification would not seem to contemplate the victims of past injustice funding their own "catch up" programs.[104]

CONCLUSION

The WA Act has not been drafted in ignorance of the *Mabo* requirements for consistency with the RDA. It is unlikely, however, that the measures

102. S 37(1).

103. Relevant to this argument, too, is the provision that "the maximum amount of compensation that can be awarded is the amount that could have been determined under the Public Works Act": s 38(1)(c).

104. The WA Act clearly does not contemplate that compensation is to be only by way of programs unavailable to others in the community (ie, programs which privilege Aboriginal groups over others). There is no such limit on the "services and facilities" (s 37(1)(b)(iv)) and "employment and community programmes" (s 37(1)(b)(v)) which might be included in a compensation package. Moreover, the Act grants a broad discretion to the Minister to negotiate for any form of compensation s/he "thinks fit" (s 37(1)(b)(vi)), including compensation which addresses past disadvantage. While it should be acknowledged that 20% may be added to a compensation award "for loss of or interference with special attachment to the land or spiritual or cultural connection with the land" (s 38(1)(h)), double the 10% permitted for compulsory taking in consideration of the special circumstances of the particular case under the Public Works Act (s 63(c)), that provision will meet a considerable measure of moral outrage. The outrage of people forced to accept such miserly compensation for the permanent loss of any hope of a future for their cultural identity — that is, for the ethnocide or cultural genocide involved in forced removal from their lands. See D M Johnston "Native Rights as Collective Rights: A Question of Self-Determination" (1989) 2 Can J L & Juris 19, 32, who notes that the relationship of traditional peoples with their land is basic to their existence as separate, identifiable peoples.

included to meet those requirements will satisfy the High Court. In particular, the replacement of surviving native title with inferior rights of traditional usage and the procedural deficiencies of the compensation plan for the extinguishment of traditional usage rights create a discriminatory regime which significantly disadvantages Aboriginal title holders in comparison with Crown title holders in this State. Moreover, the difference in compensation schemes between the Public Works Act which applies to all non-native titles and the WA Act which applies *only* to native titles raises prima facie conflicts between the WA Act and the RDA.

Finally, we would argue that the fundamental precept of common law native title is that it burdens the Crown's title to land, with the result that the Crown has a fiduciary-like responsibility to act in the best interests of native title holders. The blanket extinguishment of all native titles accomplished by the WA Act cannot be read as satisfying that requirement. There has been no pretence of a consideration of the impact of the State's actions on the interests of Aboriginal title holders in this State.