1 Introduction

This lecture examines the relationship between the common law and land rights legislation and analyses the extent to which they have delivered Indigenous land justice. The path to Mabo will be followed from the assertion of British sovereignty to the High Court's decision in Mabo (No. 2) (1992). This will provide the basis for examining the Mabo decision and for assessing the barriers to land justice that have been constructed post Mabo, 1992 and Wik, 1996. The question of whether those barriers that were deconstructed by Mabo have been replaced by new ones will be bought out in the analysis of the Yorta Yorta Native Title Claim (YYNTC).

This paper is a chapter from my thesis ‘Not One Iota: The Yorta Yorta Struggle for Land Justice’, PhD Thesis, Faculty of Law, LaTrobe University, 2000. Chapter. 5 The Mabo Setting.

It will:

Examine the path to land justice before Mabo and the key political actions that culminated in the introduction of Land rights legislation in some states and in the Northern Territory NTLRA, 1976.

The key events that led up to LR were:

1. Political Struggle of the 1930’s in which Indigenous leaders challenged the basis of English Sovereignty asserting inherent rights to land.

2. Gurindji and Yirrkala struggles in the Territory 1960’s

3. The Tent Embassy, which put land justice, back on the political agenda, and was instrumental in the Whitlam Governments commitments to land
rights through the establishment of the Woodward Commission on land rights and the passing of the NTLRA 1976.

Indigenous Land Justice and the Path to Mabo

Woodward Commission

Towards the end of the 20th Century Indigenous land justice in Australia followed the path of statutory land rights. The Woodward Commission 1974 offered a framework for land rights legislation at the federal level. South Australia had already introduced legislation for the transfer and holding of former reserve lands in trust for Indigenous people (see [Aboriginal Land Trusts Act 1966](#) (South Australia)). The bulk of Woodward's recommendations were accepted and implemented in the Northern Territory under the Commonwealth's [Aboriginal Land Rights (Northern Territory) Act 1976](#) (ALRNTA). (SLIDE 6) This allowed some Aborigines to claim unalienated Crown land on the basis of particular forms of traditional ownership, and enabled claimants to exercise some control over mining and other activities on the claimed lands (although 'National Interest' provisions can be invoked to over-rule Aboriginal views). Previous reserve lands were automatically transferred to Indigenous land trusts. An independent Aboriginal Land Commissioner makes determinations of claims to unalienated Crown land in the Northern Territory, normally a specifically appointed Judge of the Federal Court of Australia.

Much of the framework for defining traditional connections with country, including laws, customs and social groupings, has developed in the course of cases heard under the Northern Territory legislation. Many of the problems associated with legal and anthropological interpretations of traditional connections, and the disjunction between Anglo laws and Indigenous title have been rigorously debated. Indeed the Land Commissioners have a wide range of experience to draw from, and the so-called experts engaged in land claims have the benefit of the Northern Territory experience to assist in interpreting traditional rights. While the legal requirements are different in some areas, there are many valuable lessons that can be drawn from the way prior rights have been interpreted into legal rights (Merlan 1994:21; Altman, Morphy and Rowse, 1999:1–10; Galligan, 1999:11–23).

On the other hand, one of the great problems created by the Northern Territory experience involves getting anthropologists, lawyers and Judges to unlearn things that they have begun to take for granted. Many lawyers and Judges, having finally understood the nature Indigneous land relations and traditional connections are now unable or unwilling to move beyond this and think that the only 'real'
Aborigines live north of the Tropic of Capricorn. Indeed some judges are said to have made remarks to this effect during the YYNTC. This is an important reference point for later analysis (McRae, Nettheim and Beacroft, 1997:240–2; Edmunds, 1994:27; Gumbert, 1984:71–81; Hagen, personal consultation on evidence presented in the Yorta Yorta case 1999–2000).

1.3 Path to Land Justice through the Common Law

The path to achieving land justice and the recognition of prior occupation has been through the common law. While this approach has been well recognised in other common law jurisdictions, it has been only recently applied in Australia. Various attempts have been made, the most notable of which was the Gove case, but it was not until Mabo that the common law was used with a degree of success. Mabo recognised prior rights to the occupation, possession and use of land according to traditional law and custom; a complex of rights and interests commonly known as Native Title. These common law rights were subsequently partly codified (turned into statutory rights) by the passage of the Native Title Act 1993 (Cwlth) (NTA). This Act and associated common law provide the legal framework for the YYNTC. While the Howard Government in 1998 made substantial amendments to the Act, the YYNTC was heard under the provisions of the original NTA, 1993.

Following the Woodward Commision, most States (NT, NSW, SA, WA) had introduced legislation designed to transfer and grant land to Indigenous communities by the 1980s. In the absence of State-wide legislation, State governments have power to grant land to Indigenous people on the basis of traditional connections and as a form of compensation (see Chapter 4). While statutory laws gave some control of returned lands to Indigenous people, and some preamble recognition of prior occupation, the full control is vested in the relevant Minister on behalf of the Crown. The question of common law rights was a matter that was left to the Courts and the NTA 1993. The statutory process for gaining land and the recognition of prior rights will now be contrasted with the process through which common law Native Title has been recognised.

Important Distinction

The important distinction that needs to be drawn at this point, is that Native Title does not need to be granted by the Crown because it is a legal right that arises
from prior occupation. That is those rights that arise from prior occupation were not created by the Anglo legal system but were determined by complex hereditary cultural processes embedded in traditional conceptions of kinship, and cultural connections with the ancestral lands (Reeves, 1998:33–48; Pearson, 1994a: 179–81; Royal Commission into Aboriginal Deaths in Custody, 1991:482–97; Chapter. 19: McRae, Nettheim and Beacroft, 1997:149–51).

As a lead up to Mabo, I will now analyse the legal basis of *terra nullius* and its ramifications for Indigenous land justice in Australia.

1.4 Legal basis before *Mabo*

The traditional legal view is that in 1788 Britain not only gained sovereignty but ownership of all the land. Unlike those former British colonies in North America and New Zealand, where Native Title rights were recognised from an earlier time, Australia was treated by the British as though it were uninhabited and *terra nullius*. The denial of Indigenous rights in Australia needs to be examined against the way 18\(^{th}\) Century rules of colonisation were applied.

1.4.1 *Terra Nullius*

A crucial element of Anglo law is the principle of occupation and possession. If the land was occupied, it could be gained by conquest and cession or by treaty, as was applied in North America and New Zealand. If the land was treated as *terra nullius*, which implied that the land was uninhabited, the colonising power could acquire the territory by occupation and settlement. This was the claimed legal basis for the colonisation of Australia, and the means by which prior Indigenous land rights were denied. Underpinning the concept of *terra nullius* at international law, however, were the rules of colonisation as they applied to the acquisition of land under the imported common law (McRae, Nettheim and Beacroft, 1997:35, 75; Bartlett, 1993:9; Hookey, 1984:1–18).

Most important was the necessity to make adjustments to accommodate local conditions, particularly in situations where the application of the law involved territories that were occupied by Indigenous people. This allowed for the importation of English law without 'abrogating rights arising form pre-existing customary law (McNeil, 1989:115–16). The extent to which Indigenous law was retained depended on the circumstances of each colony, but the question of whether a region was *terra nullius* or settled was irrelevant to the relativity of Indigenous occupation. Physical presence and occupation of land was the prerequisite to ownership under international and common law rules (McNeil, 1989:115–116). *Terra nullius*, as Bartlett explains 'was never considered a bar to
native title in Australia or elsewhere'. By comparison with other British colonies, it was the application of the common law rules of occupation, and the treatment of equivalent Indigenous land rights in Australia, that was the central issue. The Crown's assertion of ownership and the acquisition of Indigenous lands without consent or the payment of compensation was constantly challenged.

The different treatment of Aboriginal and Torres Strait Islander rights is reflected in how the law was applied. From the outset, all the land was treated as the property of the Crown which empowered itself to alienate land through the enactment of the *Sale of Wastelands Act 1842* (Imp) and the *New South Wales Constitution Act 1855* (Imp). These Acts were used to bolster the Crown's rather shaky position, but there were other factors that contributed to undermining Indigenous possession at law. The seeds of denial had already been sewn by racial ideologies and Anglocentric notions of Indigenous occupation and land use (see Chapters 1–2).

1.4.2 Foundation of Native Title

Cook's limited observations of the southeastern seaboard of Australia were part of the problem, but Joseph Banks' perceptions that the land was uninhabited were probably more significant and influential.

Cook's limited observations of the southeastern seaboard of Australia were part of the problem, but Joseph Banks' perceptions were probably more significant and influential. Banks claimed that:

…their houses and sheds in the woods, which we failed to find, convinced us of the smallness of their parties. We saw indeed only the seacoast: what the immense tract of inland country may produce is to us totally unknown: we may have liberty to conjecture however they are totally uninhabited' (P. Brunton, 1998:97).

While not the basis of *terra nullius*, this view is an important aspect of the ideology of race that shaped subsequent thinking (P. Brunton, 1998:97).

Banks, a man of substantial financial means and even greater political influence than Cook, was the main advocate for the establishment of a British colony in Australia. (Cook, of course, was killed in 1779 in Hawaii, some nine years before the 'First Fleet' arrived at Botany Bay). In the same year that Cook died, Banks (by then the President of the Royal Society) advocated the establishment of a penal colony at Botany Bay. Banks' views had huge influence with the Imperial government in the early 1800s. Cook was a mere naval captain. To use a modern
analogy: Cook was the chauffeur, Banks was the bloke in the back of the stretched limo, with the ear of kings and prime ministers.

The weight placed on these observations would have been easier to justify if they had proved to be correct. But the extent to which Banks got it wrong would revisit those who ventured into Aboriginal land and hound those governments that dwelt on legal fictions into the 21st Century. Other factors that assisted in undermining Indigenous rights related to the distance between the home government and the events that took place on the ground. From 1788, onwards it was the common law, that Reynolds argues, ‘turned a blind eye to everything that happened in Australia and retreated further from the real world into the world of injustice as the 19th Century progressed’ (Reynolds, 1987:31–32. see-also Gardiner-Garden, 1994:5; Von Savingny, *Treatise of Possession*, 1848; Wolff, *Jus Gentium*, 1934; De Vattel, 1916). Australia was too far away, and the inability of Britain to control the colonists and the Australian courts aided and abetted the process of denying Indigenous rights. It seemed that squatters had gained too much power for British Colonial policy to have any real impact. This is bought home in the instructions to Governors on the establishment of colonies in Victoria and South Australia and the actual events that followed. It was easy for the British Government to issue instructions that recognised Indigenous rights to the soil. It was much harder to put them into practice, however, when the frontier was ruled by the gun and not by the letter of law (Havemann, 1999:13–17; Reynolds, 1987:31–2, 81–101; Christie, 1979:24–52; Hagen, personal consultation on evidence presented in the Yorta Yorta case and Native Title matters, 1999–2000; *Amodu Tijani v Secretary, Southern Nigeria* (1921); *Re Southern Rhodesia* (1919).

The barriers to land justice in Australia seemed insurmountable but Indigenous people kept 'chipping away' (this analogy is often used by Kooris to describe process of gaining justice).

1.5 The struggle to assert Land Rights at Common Law

The assertion of the Crown's ownership of Australia did not go unchallenged. It was first raised in the infamous Batman Treaty, 1835 and subsequently in other cases (see *Cooper v Stuart* (1889); *R v Murrell* (1836); *Attorney-General v Brown* (1847); *Williams v Attorney General* (1913) and *Randwick Corp v Rutlege* (1959).

1.5.1 Batman Treaty

The Batman Treaty went directly to the principle of prior occupation. It recognised Indigenous rights to the soil fifty years after the Crown's assertion of ownership. The treaty, which remains the subject of much debate, was negotiated
with the Wurundjeri supposedly in return for the cession of some 600,000 acres of tribal land. The recognition of prior land rights not only challenged the Crown's ownership but it exposed the colonial government's vulnerability. It demonstrated that some colonists were aware of the basic rules of colonisation and attempted to put them into practice.

The Batman Treaty demonstrated that customary law principles were operating on a highly organised level, a matter that was subsequently partially recognised by the courts in *Milirrpum v. Nabalco* (1971) and *Mabo* (No. 2) 1992. Although the original owners were in some cases willing to accommodate white interests, they were soon to learn that their attempt to reconcile their law with the introduced one was a rather futile exercise. The proposition that Australia was 'a tract of territory practically unoccupied without settled inhabitants' (see *Cooper v Stuart* (1889) was binding on Australian courts. The Crown's vulnerability, however, had already been exposed and the issue of Indigenous rights remained quietly on the legal and political agenda (Bartlett, 1993:12; McNeil, 1989:120–1; Reynolds, 1987:32–3).


The barriers remained for much of the 20th Century, but the matter was put back in the Court by the Yolngu people of North East Arnhem land in *Milirrpum v. Nabalco* (1971) (the Gove case). The Gove case before Blackburn J. sought to restrain mining on traditional Yolngu lands which they argued had been approved without the consent of the traditional owners (*Milirrpum v. Nabalco* (1971) at 167, 223, 245, 253, 272–3).

Blackburn J. recognised that the Yolngu community had been governed prior to the intrusion of Anglo society by a system of law that was highly adapted to Indigenous needs, provided stability and order, and was remarkably free from the vagaries of personal whim or influence (*Milirrpum* (1971) 267–8). On the face of it and at the time, this was a statement of profound implications. It recognised the existence of Indigenous legal and political systems. The laws and customs acknowledged by Blackburn J. are the content of Native Title rights that arise from Indigenous sovereignty. The recognition of an Indigenous sovereignty at settlement may allow for the evolution of a domestic form of sovereignty as that practised by Indigenous people in the United States. It may be the basis for negotiating an agreement in the form of a treaty, compact or agreement between Indigenous society and the state (Bartlett, 1993:10; *Mabo* (No. 2), Brennan, J. at 26; Toohey J. at 145; *Worcester v Georgia* (1832) at 515; Toohey J. at 145).
In hindsight, Blackburn J's acknowledgment of customary laws was an attempt to clarify the disjunction between the two legal systems. When it came to the question of co-existence, however, Blackburn J. quickly retreated to the Crown's position, which at the time was held to be final and one that could not be overturned by a reconsideration of the historical evidence.

1.6 Australian Law and other British Colonies

Blackburn J, in *Millirrpum*, ignored the precedents that were applied in other common law jurisdictions that recognised Indigenous rights. The rules of negotiating and purchasing Indigenous land were deeply entrenched in colonial practice and in the common law itself. Precedents demonstrating how the common law applied to Indigenous rights were clearly cited in the cases from the relevant jurisdictions in New Zealand and North America, including *Johnson v McIntosh* (1823); *Campbell v Hall* (1774); *R v Symonds* (1847); *Calder v Attorney-General of British Columbia* (1973).

Concept of Native Title

The concept of Native Title was defined by Marshall CJ. in early US cases, including *Johnson v McIntosh* (1823). It was a legal right that was based on the fundamental principle of prior possession. Indians were admitted to be the rightful occupants of the soil, with a legal as well as a just claim to retain possession. The other elements were:

1. It did not depend on any particular land use or kind of settlement, and agriculture was never regarded as a prerequisite for Native Title, which was considered with reference to their habits and modes of life; their hunting grounds were as much their actual possession as the cleared fields of the whites; and their rights were to its exclusive enjoyment in their own way or for their own purposes.

2. It did not exist in opposition to the complete, ultimate title of the United States (or the Crown). The government had the exclusive right to extinguish Native Title. But that title had to be considered as a form of property. Indian consent should be sought and compensation paid when the Government exercised its right of pre-emption (*Mitchell v U.S.* (1835); *Fletcher v Peck* (1810); *Johnson v McIntosh* (1823); *Worcester v Georgia* (1832); *Cherokee Nation v Georgia* (1834).

Marshall's judgments were important landmarks in dealing with cross-cultural interests in land, particularly the way that the common law was applied to the reality of Indigenous occupation and land use. He did not simply take account of settler interests, but focused on how he could achieve a balance between competing interests. **PRAGMATISM WAS THE GUIDING PRINCIPLE**
The common law's recognition of Indigenous rights was 'a new and different rule better adapted to the state of things'. These views were followed in the New Zealand Supreme Court in *R v Symonds* (1847). Justice Chapman (at 387) defined Native Title as a qualified dominion that was not inconsistent with the absolute rights of the Crown and which secured to 'the indigenes all the enjoyments from the land which they had before the intrusion of the Europeans'. Chapman J. declared that Indigenous title was a right that was entitled to be respected and could not be extinguished without the free consent of the Indigenous occupants (McRae, Nettheim and Beacroft, 1997:205–6; Reynolds, 1987:32–3).

Both Chapman and Marshall were upholding old common law principles. Being established law in the 1970s, the key question is: why were these principles disregarded by Blackburn J. in relation to the existence of native title in Australia? These anomalies were soon to be challenged (*Milirrpum v Nabalco* (1971)).

The barriers to Indigenous land justice created by *terra nullius* and consolidated by the *Gove* case in 20th Century Australia, brought strong political resistance from Indigenous people and supporters. The continued denial by the courts of Indigenous land justice was an opportunity to expose the way the law had reduced Indigenous people to the status of aliens in their own land. Indigenous leaders were quick to seize the opportunity arising from Blackburn's treatment of Indigenous claims and established a Tent Embassy on the lawns of the Federal Parliament in 1972 (Goodall, 1996:338–9; Jonas and Langton, 1994:33). The embassy was successful in drawing national and international attention to the plight of Indigenous people and in exposing the injustices caused by land loss. It became a symbol of the land struggle and the means by which Indigenous people could put their case to the Australian and International community. With the discontent generated by *Gove*, fuelled by the growing agitation of Indigenous leaders, the Tent Embassy was instrumental in putting land justice back at the front of the political agenda (ABC Radio National, Interviews with people involved in the establishment of the 'Tent Embassy' in 1972, 13 March 1999; Iorns Magallanes, 1999:246; Gary Foley, 1996; Bourke, C., Bourke, E. and Edwards, 1994:57–8; Ningla A-Na, 1989).

1.7 The *Mabo* Litigation 1982–92

It was not until 1982, when action was first brought in *Mabo* (No. 1), that the courts were again called upon to determine whether Native Title was part of the common law of Australia. The application came from a group of Torres Strait Islanders, including the late Eddie Mabo. The legal action was against the State of Queensland on behalf of the Meriam people, requesting the Court to declare that
the Meriam (Murray Island) people held Native Title to the Murray Islands in the Torres Strait and that this would give them ownership and control over their traditional lands and fishing areas (Mabo v Queensland (No 1) (1988)).

The Queensland Government tried to circumvent the action by introducing the Queensland Coast Islands Declaratory Act 1985 (Qld), which was designed to retrospectively extinguish any possible Native Title in the Islands and any claims to compensation from the date of annexation in 1879. In March 1988 the High Court found that the 1985 legislation was invalid and in breach of the Racial Discrimination Act 1975 (Cwlth) (RDA), because it took away property rights under Meriam law while leaving intact property rights under Queensland law (Mabo v Queensland (No. 1) (1988) at 34; RDA s. 10(1)(2)). The High Court did not decide whether the Meriam people held Native Title to the Islands, but stated that if it did exist, it could not be extinguished and was protected under constitutional laws.

Mabo (No. 1) was referred to the Supreme Court in November 1990 for determination of issues of fact and was then presented to the High Court in May 1991 for trial. As the parties prepared for the final court battle in a ten-year saga (1982–92), the two main issues on the agenda were:

1. Would the High Court overrule Blackburn J's 1971 decision in Milirrpum, and find that Native Title existed in Australia?
2. What test would the Court formulate to determine whether Native Title rights had been extinguished?

Will Leave it there and will look at the issue of Koori Land Justice in Victoria next week and then come back to Mabo and Wik as a lead up to the Yorta Yorta case.

1.8 The Mabo Decision 1992

The High Court, in Mabo (No. 2), made one of its most significant decisions, overruling Milirrpum and abolishing the legal fiction of terra nullius. The Court 'upheld the plaintiff's claim to Native Title', and recognised 'the existence of native title at common law in Australia'. Native Title survived colonisation and continued where it could be proven to exist 'in accordance with the traditional laws and customs' of the Native Titleholders. The crucial question of whether or not Native Title was part of the common law of a settled territory such as Australia was
derived from the case law dealing with Native Title in other common law jurisdictions. Australia was held to be no different and the matter of whether or not a region was 'terra nullius' or 'settled' was not considered a bar to Native Title. In hindsight *Mabo* attempted to break down old legal and ideological barriers that stood in the way of Indigenous land justice. It was these events that Deane and Gaudron JJ. condemned for being 'the darkest aspect of the history of this nation' The retreat from past injustices appeared to be necessary steps towards bringing the law into line with fundamental human rights principles and in touch with contemporary values. These principles and those expressed by Brennan J. below become crucial for analysing the extent to which they have been applied in YYNTC (*Mabo* (No. 2), Brennan J. at 41, 43, 109; Deane and Gaudron JJ. at 82–3, 109; Toohey J. 142; Dawson J. at 106; Bartlett, 1993:9; Stephenson and Ratnapala, 1993:14–15).

Brennan J. in *Mabo* (No. 2) confirmed the human rights principles of justice, equality and the full respect of Native Title before the law (*Mabo* (No. 2), at 50). Reflecting on the way the common law had denied Indigenous land justice, in Australia Brennan J. held that it took away Indigenous rights to land, deprived them of their religious, cultural and economic sustenance, and vested the land in the Crown without any right to compensation. It was these events that Brennan J. concluded were unjust and discriminatory and that the fiction of *terra nullius* had no place in the contemporary law of Australia (*Mabo* (No. 2) Brennan J. at 29, 40–3).

The legal authority in *Mabo* (No. 2) was drawn from the 1823 United States Supreme Court decision in *Johnson v McIntosh* (1823). The decision was guided by the 'actual state of things' rather than the letter of the law per se, and the need to depart from antiquated assumptions about Indigenous societies. Pragmatism seems to have won out on the day and the recognition of Indigenous title has its origins in the compromise reached in *Johnson v McIntosh*. *Mabo* did not make new law but reaffirmed old rules that went missing in 19th Century Australia (*Johnson v McIntosh* (1823); Bartlett, 1993:10–12; *Mabo* (No. 2), Brennan J. at 64).

The rhetoric of *Mabo* and the reality of Indigenous land justice will be tested to its fullest by Indigenous claimants. A crucial issue is 'whether Anglo-Australians are willing to abide by their own law's respect for Indigenous title' and the degree of equality that Indigenous title is given (Pearson, 1994a: 179–81). The actual legal status of Native Title under common law notions of property rights is still very ambiguous. *Mabo* certainly raised hopes, but the barriers to gaining land justice
within contemporary politico-legal processes, will be analysed in the YYNTC as a case study in the Native Title process.

1.8.1 Test for Proving Native Title

The requirements of Native Title as defined in *Mabo* and the NTA are:

1. *The existence of an identifiable community or group.* The High Court emphasised the vesting of Native Title in a community and referred to a community consisting of a clan, group or society.

2. *A traditional connection with or occupation of the land* under the laws and customs of the Aboriginal group, which are regarded as the source and content of Native Title.

3. *The maintenance of the connection with or occupation of the land.* Claimants are required to prove a connection between the community today and the Indigneous community in occupation at colonisation who by inference are connected to the Indigneous ancestors that were in occupation at the time of British sovereignty. The concept of ‘change adaption and continuity’ is crucial for the analysis of the extent to which a community can change and the laws and customs can change over time (*Yorta Yorta v State of Victoria and Ors Appeal to Federal Court* (1999)).

I will now analyse the limitations imposed on Native Title by the doctrine of extinguishment and then examine the status that Native Title is accorded under *Mabo*.

1.8.2 *Mabo* and Extinguishment of Native Title

The High Court secured the property rights of introduced interests by validating those grants that extinguished Native Title, namely grants that gave exclusive possession. The compensation issue was a very close decision. Deane, Toohey, and Gaudron found that extinguishment by the Crown did give rise to compensation. Brennan, Mason and McHugh found that it did not. Dawson, of course, found against Native Title altogether and it was his vote that ultimately determined the matter. Compensation did not apply to those lands that were granted in the past, except for those granted after the *Racial Discrimination Act 1975* (Cwlth). This placed the rights of Indigenous people to own and inherit property at a severe disadvantage.
1.8.3 Communal Nature of Native Title

Native Title at common law can only be held by Indigenous people. It is a communal title that can be held by an individual, group or community. It may be passed from one Aboriginal group to another under traditional laws and customs but cannot be alienated or transferred to someone outside that group.

1.8.4 Change and Continuity

Brennan J, with the support of Mason CJ. and McHugh J, recognised the changing and evolving nature of Aboriginal culture and noted the practical considerations that need to be taken into account when determining the extent to which traditional laws and customs change over time. It was 'immaterial that the laws and customs underwent some change' since colonisation, as the 'laws and customs of any people will change and the rights and interests of the members of the people among themselves will change too'. But the central issue was:

So long as the people remain as an identifiable community, the members of whom are identified by one another as members of that community living under its laws and customs, the communal native title survives.

Deane and Gaudron JJ. recognised the ‘fluid’ nature of the traditional laws and customs that form the basis of Native Title and emphasised that they are not:

frozen as at the moment of establishment of a Colony

Brennan J. held that:

where a clan or group has continued to acknowledge the law and (so far as practicable) to observe the traditional based laws and customs, and the traditional connection with the land has been substantially maintained, the Indigneous title remains in existence (Mabo (No. 2) Brennan J. at 66).

Toohey J. saw change as essentially irrelevant to the question of Native Title:

Modification of traditional society in itself does not mean traditional title no longer exists (see Hamlet of Baker Lake (1979) at 527–529, 584–585). Traditional title arises from the fact of occupation, not the occupation of a particular kind of society or way of life. So long as occupation by a traditional society is established now and at the time of annexation, traditional rights exist. An indigenous society cannot, as it were, surrender its rights by modifying its way of life

For Toohey J. 'traditional title is rooted in physical presence. That the use of the land was meaningful must be proved but it is to be understood from the point of view of the members of the society' (Mabo (No. 2), Toohey J. at 188).

Special Significance to Murry Islands
The question of cultural change as it was applied to the Murray Islands is of crucial significance to mainland groups. Toohey J. (at 192) held that the claimant's case did not fail because their presence on the Islands was too recent; the relationship of the people to the Islands was sufficient; their presence was not coincidental and random; and 'modification of traditional society in itself does not mean traditional title no longer exists' (Mabo (No. 2) Toohey J. at 192; see also Bartlett, 1993:5).

The analysis of the extent to which the effects of change has been qualified by the court in relation to the existence of Indigenous title, is relevant to the Yorta Yorta case (see Chapters 2–3). The extent to which change can be interpreted as washing away connections, under euphemistic phrases like the 'tide of history', will become clearer when we examine, the way Mabo and the concept of change has been applied to Yorta Yorta occupation of the claim area. As indicated, and as will be further demonstrated, the Yorta Yorta withstood many tides of changes.

1.8.5 Onus of Proof

The extent to which claimants have to prove ongoing links with the land, particularly in view of changed social relations and urbanisation, has come under much criticism from Indigenous people.

Aboriginal and Torres Strait Islander Social Justice Commissioner, Mick Dodson, argues that the onus of proof placed on claimants is unjustified particularly when one considers that the land under customary law is unquestionably Indigenous land. Dodson challenges the notion that Native Title can be lost by physical separation and suggests that spiritual connections for Indigenous groups remain strong.

The expectations imposed by Mabo to prove Native Title are unjust when considered with the same requirements required of common law property holders. Added to this is the derogation of Indigenous interest to being a burden title (see Chapter 2). From this analysis one can see that there are already insurmountable barriers that have been constructed in front of claimants. That is not to mention other barriers that may arise in the way that the principles of Mabo are applied.

In contrasting the rhetoric of Mabo with the realities of gaining justice and equality before the law for Indigenous Australians, one is left with many shortcomings. Indigenous title seems to be treated as a tag-on interest that can be extinguished by inconsistent grants without consent or the application of fair and just principles. The extent to which Indigenous rights have been compromised to
accommodate the interests of introduced titles and the criteria imposed on claimants in order to gain Native Title are other factors that need to be assessed.

1.9 Assessment of Mabo

Indigenous groups that have managed to hold on to their links through more favourable circumstances may be hopeful, while those most affected by invasion and government policies have reason to be doubtful. Criteria that favours those who may be able to establish ongoing connections over those whose links were affected by extraneous factors seems likely to produce divisive outcomes. It is ironic that Mabo could create a situation of the 'haves' and the 'have nots', in land, and that 'correcting' past injustices may well recreate the same conditions of alienation and marginalisation (Indigenous Land Fund, NTA, s. 2010, 1993; Mabo, Brennan J. at 60, 105). The only recourse for the most disadvantaged is a cap-in-hand approach to the Indigenous Land Fund. Some groups may be eligible for assistance to purchase land for cultural purposes and to buy land on the open market, but the funds available are never likely to produce real justice for those who have suffered most (Indigenous Land Fund, NTA, s201 (1)(2), 1993).

Indigenous commentators question the application of fair and just principles for extinguishment and the degree of equality given to Native Title. Michael Mansell of the Tasmanian Aboriginal Centre attacks the limitations imposed on Native Title and argues that that 'Mabo gave an inch and took a mile'.

The Yorta Yorta is equally concerned about the benefits that might flow from Mabo. Given our history of land restitution (see Chapter 4), we had every reason to be cautious about whether or not Mabo and the NTA would deliver. Not to imply that the Yorta Yorta were ever doubtful about the strength of their claims, but if Mabo, could create a more level playing field on which Indigenous interests could be adjudicated we took the position that there was nothing to lose. With these thoughts in mind, we prepared ourselves for the long haul that the Murray Islanders had come through.

1.9.1 Drafting Mabo into Australian Statutory Law: The NTA, 1993

The reality of an Indigenous title arising from prior occupation presented problems in how it should be given equality and protection before the law. Within the non-Indigenous community, there was much antipathy towards the decision and its implications, particularly for those titles issued after the enactment of the RDA 1975. Other concerns related to the need to provide certainty for resource development and other interests, that may have been subject to Native Title (Batchelord, 1997:14–15; Butt, 1996:92–9). An option that may prove to be the
most appropriate in terms of results and cost effectiveness was to initiate a similar action to that of *Mabo* in the High Court or to use the common law itself to resolve Native Title claims on a case-by-case basis. In response to these concerns, the Keating Government passed the NTA, 1993, which came into force on 1 January 1994, the main objectives being:

- to provide for the recognition and protection of Native Title,
- to establish ways in which future dealings affecting Native Title may proceed and set standards for those dealings,
- to establish mechanisms for determining claims, and
- to permit the validation of prior land Acts that might otherwise be invalidated because of the existence of Native Title (NTA, s. 3).

The NTA defines Native Title as the rights and interests that Indigenous people have in land or waters in accordance with their traditional laws and customs, which may include hunting, gathering or fishing (NTA, s. 223). The Act specifically states that Native Title must be recognised in Australian common law, at that point restricting it to the definition provided in *Mabo* rather than the common law requirement, which simply states that physical presence is sufficient (McNeil, 1989).

1.9.2 Recognition Space between Anglo law and Native Title

In drafting the *Mabo* principles into Australian law, there was the question of the 'recognition space' between the two systems of law (Pearson, 1997:150–61). It was anticipated that a synthesis between Native Title and the Anglo-Australian law would develop within the Native Title process (McRae, Nettheim and Beacroft, 1997:242; Pearson, 1997:179–81).

1.10 Conclusions

In light of *Mabo*, one needs to return to the central question of land justice within Australia (see Chapters 1–2). The interpretation of Native Title rights in the more populous regions are some of the challenges facing the courts. Accepting that Indigenous title has survived two centuries of domination by the Anglo-legal system, one would assume that the time is ripe for the delivery of Indigenous land justice. Indeed the courts are now in a position to review their treatment of Indigenous property rights, within the contemporary legal framework and make amends for past mistakes (McRae, Nettheim and Beacroft, 1997:256; Edmunds, 1994:27–8; Goote and Rowse, 1994:181).
It is not a question of creating new law, but one of using the existing legal framework to legitimise the due entitlements of Indigenous people. Reconciling the interests of Anglo property holders with Indigenous interests is the general task that faces the courts and the Reconciliation process. The degree of scrutiny that claimants are subjected to in order to prove Native Title rights, and the compromises that they are expected to make in the process are questions that will be brought out in the analysis of the YYNTC (McRae, Nettheim and Beacroft, 1997:240–4; Mansell, 1992:6).

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