Indigenous Land Justice in Australia: A Comparative Analysis

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This paper examines the background to *Mabo* by reviewing the barriers that prevented Indigenous Australians from gaining land on the basis of prior occupation. The historic path to *Mabo* will be followed from the denial of Indigenous sovereignty to the High Court's decision in Mabo (No2) 1992.

The Aboriginal land rights struggle which culminated in some land being returned in the 1960s and 1970s has taken two general directions, namely the process of land rights legislation and the more recent *Mabo* decision.

The Woodward Commission of 1973 sought to set up a framework for land rights legislation at the federal level. South Australia had already introduced statutory laws for the transfer and holding of former reserve lands in trust for Indigenous people (see *The 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 (Cth). The legislation 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 (though 'National Interest' provisions can be invoked to over-rule Aboriginal views). Previous reserve lands were automatically transferred to Indigenous land trusts. Determinations of claims to unalienated crown land in the Territory are made by an independent Aboriginal Land Commissioner, normally a specifically appointed judge of the Federal Court of Australia.

Much of the conceptual framework for establishing prior connections with the land and for defining traditional laws, customs and social groupings has been developed in the course of cases heard under the Northern Territory legislation.
5.1.2 Common Law v *Mabo*

The second path to achieving land justice and the recognition of prior rights has been through the use of the common law to assert pre-existing title. While this approach has been well recognised in other former British colonies, for most of the history of white occupation, it has fallen on deaf ears 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 to recognise prior rights.

*Mabo* recognised Indigenous 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 partly codified (turned into statutory rights) by the passage of the *Native Title Act 1993 (Cth)* NTA. It is this Act and associated common law which provides the legal framework for Native Title Claims.

5.1.2 *Pre-Mabo History*

Most land claimed before *Mabo* was restricted to Aboriginal reserves and vacant Crown land. Many of the reserves that were located in remote areas remained Crown land while most of those in the more settled regions were revoked and leased or granted to Europeans—see Chapters 3-4).

Under the *Aboriginal Land Rights (Northern Territory) Act 1976 (Cth)* claims can be made for unalienated Crown land if a particular form of traditional ownership can be shown. This legislation provides a seemingly very strong form of title, called inalienable freehold title, which cannot be bought or sold.

By the 1980s most states (NT, NSW, SA, WA) had introduced legislation designed to transfer and grant land to Indigenous communities. Even in the absence of state-wide legislation, State governments like those of Victoria have powers to grant land to Indigenous people on the basis of traditional connections, and for the purpose of community development and cultural maintenance. While statutory laws gave Indigenous communities some control over the land the ultimate control was vested in the crown and the question of common law rights was a matter that was left to the NTA, 1993 (Reeves, 1998:33-48; Pearson, 1994:179-181; RCADC, 1991:482-497; McRae, Nettieheim, Beacroft, 1991:149-151; RCADC, 1991: Chapter. 19).
5.1.3 Distinction between *Mabo* and Statutory Land Rights

The distinction between statutory land rights and *Mabo* is that *Mabo* recognised an inherent and original right that does not need to be granted by the Crown because it arises out of Aboriginal law and custom. The majority in *Mabo* (No2) found that native title has its origins in Indigenous law and custom and is a title that is recognised by the common law. The nature of the relationship is not one where the Anglo law subordinates itself to Indigenous people, but 'whether non-Aboriginal people are willing to abide by their own law's respect for Aboriginal title'. The actual status of native title under the common is still ambiguous. I return to this question in discussing the *Mabo* decision (Pearson, 1994:179-181; Bartlett, 1993:11; *Mabo* (No2), 1993).

Before *Mabo*, the position regarding the recognition of Aboriginal land rights in Australia lagged significantly behind that of other British colonies. In Australia there was no recognition of any Indigenous land rights based on prior occupation. 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 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 rationale of *terra nullius* needs to viewed against the background of the way 18th Century rules of colonisation were applied to Australia (Nettheim, Beacroft, McRae, 1997:35, 75; Bartlett, 1993:9; Hookey, 1984:1-18; Bird, 1993:50).

5.1.4 Occupation as basis of Prior Rights

A crucial element of European international law in relation to Australia is the question of occupation and possession. If the lands were occupied, they could be gained by conquest and cession, or by treaty as in North America and New Zealand. If they were regarded as unoccupied or *terra nullius*, the colonising power could acquire the territory by occupation and settlement. The latter was the claimed legal basis for the colonisation of Australia, and the means by which prior Indigenous land rights were denied (McRae, Nettheim, Beacroft, 1997:35, 75; Bartlett, 1993:9; Hookey, 1984:1-18).

McNeil explains the general application of the law at the time. The rules were based on the necessity to make adjustments to accommodate local conditions, the most important
being the need to adapt the law to those territories containing Indigenous populations so that the importation of English law did not necessarily 'abrogate pre-existing customary law' (McNeil, 1989:115-116). The extent to which indigenous law was retained depended on the circumstances of each colony. The justification for the characterisation of Australia as a settled colony is one issue but the question of whether or not a region was terra nullius or settled was irrelevant to the central question of prior rights. These rules as Bartlett explains 'were never considered to be a bar to native title in Australia or elsewhere' (Bartlett, 1993:9; McNeil, 1989:115-116).

The accommodation of prior Indigenous rights in Australia obviously went missing, and the extent to which the British got it wrong remained a legal and moral dilemma for the next two centuries. The abrogation of prior Indigenous rights and the imposition of English law formed the basis of colonial policy. From the outset all the land was treated as the property of the Crown. It was held in the name of the King of England while the original occupants were treated as aliens in their own land. The Crown had full control of the land and assumed the right to make grants. All decisions relating to the sale of land were made unilaterally by the Crown before and after the colonial administration became self-governing in 1855 (see- New South Wales Constitution Act 1855 (Imp); McNeil, 1989:113-116).

The Crown's assertion of ownership did not go unquestioned, however and there were a number of cases that challenged the erroneous assumptions on which Indigenous land was appropriated. Indigenous people were in possession of the land that they had occupied since time immemorial. It was a long time before the full antiquity of physical occupation would be substantiated by archaeology but in terms of international and common law rules, physical occupation was the prerequisite to occupation and possession (Butt, 1996:2219; Mabo (No2) Toohey J. at 188; McNeil, 1989: 298-300, 304-306; Reynolds, 1987:19-22).

It was certainly not an illusion, and the reliance on Cook's limited observations of the South Eastern seaboard was not enough to quantify the extent of Indigenous occupation. Cook's party never ventured into the hinterland or gained any real understanding of the nature and structure of Aboriginal society. The weight that was placed on Cook's findings would have been much easier to justify if indeed they proved to be correct. But they were not and the extent to which they got it wrong would revisit those that ventured into Aboriginal land and hound those Governments that dwelt on legal fictions for the next
two centuries (Havemann, 1999:13-17; Reynolds, 1987:31-32; Amodu Tijani v Secretary, Southern Nigeria (1921) A.C. 399: 407; Re Southern Rhodesia (1919) 1 A.C. 211:33).

The difference between Australia and other British Colonies realted to the failure of the Imperial Government to require that usual Colonial rules were followed. Summing up its effect on Aboriginal land holders in Australia, Reynolds concludes that: 'the common law turned a blind eye to everything that happened in Australia after 1788 and retreated further from the real world into the world of injustice as the 19th Century progressed' (Gardiner-Garden, 1994:5; Reynolds, 1987:31-32. see also Von Savingny, Treatise of Possession, 1848; Wolf Jus Gentum,1934; Von Savigny, 1848; Vattel, 1916 ).

5.1.5 The Struggle to Assert Land Rights at Common Law

The 1970s saw a substantial legal action brought in Australia to consider Aboriginal claims to land at common law in Millirpum v Nabarco Pty Ltd (1971) 17 FLR 141(NTSC) (the Gove Case). However the assertion of the Crown's ownership of Australia certainly did not go unchallenged before Gove. It was first raised in the infamous Batman Treaty, 1835, and was again alluded to in a trilogy of cases: Attorney-General v Brown (1847) 1 312; Randwick Corp v Rutledge (1959) 102 CLR 54; Williams v Attorney-General (NSW) (1913) 16 CLR 404.

At the same time the land question was being discussed by local authorities, it was also being raised in broader colonial circles in the Nineteenth Century (see-Chapter 3). The Select Committee Inquiry into British Colonies reported in 1837 that the native inhabitants of any land have an 'incontrovertible right to their own soil' (Select Committee Inquiry 1837). Similar concerns were expressed by the first Government Protectors in Victoria between 1839-49. The Chief Protector of Aborigines admitted that he was 'at a loss to conceive by what tenure we hold this country' ( Broome, 1993:32; Reynolds, 1987:35; Christie, 1979: 42).

The question of Indigenous land rights had been directly raised by the Batman Treaty. The treaty, negotiated with the Wurundjeri supposedly in return for the cession of some 600,000 acres of tribal land, challenged the crown in a more direct manner. The main issue was the fact of a treaty being negotiated with Indigenous occupants some 50 years after the crown had asserted control. The recognition of prior land rights was not only a challenge to the crown's ownership but it clearly embarrassed the colonial Government.
by demonstrating that some colonists were aware of the basic rules of colonisation and attempted to put them into practice.

The Batman Treaty demonstrated that there were pre-existing customary law principles operating on a highly organised level, a matter that was subsequently partially recognised in a handful of cases by settlers and ultimately, 150 years later, by the Australian courts. Although the original owners were in some cases willing to accommodate white interests under traditional law, they were soon to learn that their attempts to reconcile their law with Anglo law was a rather futile exercise. Ultimately, *Mabo* established that the legal and moral basis for the denial of Indigenous land rights could not be ignored. It was wrong and in Justice Brennan's words needed to be rectified (*OBrien, 1994:25; Mabo (No2) Brennan J. at 43,109, Age 12 July 1995:13; Koorier, 1991:17-18; Bird and O'Malley, 1989:35; McNeil, 1989: 116,225; McNeil, 1989: 73,224; *Milirrpum v Nabalco* (1971) 17 FLR 141; *Asher v Whitlock* (1865) LR 1 QB1).

The proposition that Australia was 'a tract of territory practically unoccupied without settled inhabitants' was upheld in *Cooper v Stuart* (1889) and became binding on Australian courts. The Crown's denial of Indigenous rights was still open to attack however and the issue remained quietly on the legal and political agenda (*Bartlett, 1993:12; McNeil, 1989:120-121; Reynolds, 1987:32-33*).


Cooper was seen as binding, for much of the Twentieth Century, but the question of land justice was put back in the court by the Yolngu people of North East Arnhem land in *Milirrpum v. Nabalco* (1971) 17 FLR 141. 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) 17 FLR 141: 167, 223, 245, 253, 272-273).

Blackburn J. recognised that the Yolngu community had been governed by a subtle and elaborate system of law prior to the intrusion of Anglo society. The law was highly adapted to the country in which they lived, provided stability and order, and was remarkably free from the vagaries of personal whim or influence (*Blackburn (1971) 267-268*). On the face of it and at the time, this was a statement of profound implications for Indigenous Australians. 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 and the origins of Indigenous sovereignty. Recognition of an Indigenous sovereignty at settlement may allow for the evolution of a domestic form of sovereignty such as that practised by Indigenous people in the United States and Canada (Bartlett, 1993:10; Mabo (No2) 1992: Brennan, J. at 26; Toohey J.at 145; Worcester v Georgia (1832) 31 US 515).

In hindsight, Blackburn's acknowledgment of traditional laws was a major step towards defining the disjunction between the two legal systems. But despite recognising the existence of laws, Blackburn quickly retreated to the original legal basis for Australia's annexation which he held was 'final' and could not be overturned by a reconsideration of the historical evidence. Blackburn's reasoning is challenged by McNeil who argues that, in determining the classification of a colony the law was one factor, but there must be a factual basis and if one adopts the established system of law approach then New South Wales would appear to have been classified as settled on the basis of 'erroneous factual assumptions' (McNeil, 1989:224).

5.2.1 Australian Law Differs from other British Colonies

In Milirrpan, Blackburn J. ignored the precedents that were applied in other common law jurisdictions to accommodate the same dilemmas that confronted Australia. Blackburn also failed to recognise that the rules as they applied to the realities of conflicting Indigenous and settler interests were different(242-245). He did not have to go far to find precedents that existed in New Zealand and North America. Both countries were clear examples of how the common law was applied to accommodate Indigenous rights to land. The Australian approach proved to be out of step with the way the law was applied in other colonies. By the time Australia was invaded, a tradition of negotiating and purchasing Indigenous land was deeply entrenched in colonial practice and in the common law itself. The precedents were clearly cited in the cases from those relevant jurisdictions including Johnson v McIntosh (1823) 8 Wheat 543; Campbell v Hall (1774) 98 ER 848; and Calder v Attorney General of British Columbia (1973) SCR 313.

The concept of native title had been defined by Chief Justice Marshall in various early US cases, including Johnson v McIntosh (1823), in the following way;
1. It was a legal right based on the fundamental principle of prior possession in which the Indians were admitted to be the rightful occupants of the soil, with a legal as well as a just claim to retain possession of it.

2. 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.

3. 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 judgements were important landmark cases in dealing with the concurrent rights of Indigenous and settler societies. The common law's recognition of Indigenous rights was, in Marshall's words '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 Symmonds (1847) NZPCC 387. Justice Chapman defined native title as a qualified dominion which was not inconsistent with the absolute rights of the Crown against its British Subjects. It secured to 'the indigenes all the enjoymens from the land which they had before the intrusion of the Europeans'. Whatever the opinion of jurists on the nature and extent of native title, Chapman insisted it was entitled to be respected. It could not be extinguished without the free consent of the native title occupiers. Like Marshall Chapman believed that he was defining and upholding a long and well established legal concept (McRae, Nettheim, Beacroft, 1997:205-206; Reynolds, 1987: 32-33).

Both Chapman and Marshall were adamant that native title was part of the common law. It evolved from the traditional English law as defined from time to time in the decisions of the courts. Given that native title was a recognised legal concept in other British colonies in the 1830s and was established law in the 1970s the ultimate questions were; why did Blackburn J. disregard the prevailing legal evidence as 'unnecessary'? and what
were the Judge's reasons for choosing to reject the existence of 'native title' in 'Australian law'? (*Miliirrpum v Nabulco* (1971) FLR 141, 242-245).

### 5.2.2 Significance of *Miliirrpum*

Blackburn's disregard for native title at common law received much scrutiny from fellow judges. The Canadian Supreme Court in *Calder v Attorney General for British Colombia* (1973)34 DLR (3d) 145 attacked Blackburn's judgement, declaring some of his propositions were 'wholly wrong' (per Hall J, Laskin and Spence JJ concurring, at p 218), and confirming that the common law's recognition of native title in a settled colony was correct law (*Calder v Attorney General for British Colombia* (1973)34 DLR (3d) 145).

The *Gove* decision was raised by members of the Australian High Court who indicated that the decision was a long way from being resolved and was 'due for reassessment'. Barwick C J. hinted in *Administration of Papua v Daera Guba* (1973) 130 CLR 353 at 397, 'that native title might exist at common law'. All the judges in *Coe v Commonwealth* (1979) 53 ALJR 403 (HCA), agreed that it would be an 'arguable question if properly raised' and Murphy J. concluded that *Gove* 'was not binding on the High Court' and its definitive statement in Australian law was still to be determined. The door was left open for the High Court to deal with the matter. In *Gerhardt v Brown* (1985) 57 ALR 472 at 532 (HCA), Deane J remarked and Brennan J. later confirmed that Australia had not yet achieved the 'retreat from injustice' brought about in the United States by the recognition of native title (*Mabo* (No2) 1992, Brennan J: 43; McNeil, 1989:122-123 Reynolds, 1987:32-33; *Miliirrpum v Nabulco* (1971) 17 FLR 141, 242-245).

The matter was not raised in the Courts again until *Mabo*. In the interim the *Gove* decision and the denial of Indigenous land justice became important political issues. Indigenous people were quick to utilise the ongoing discontent with the Court's treatment of Indigenous land rights. A Tent Embassy established on the lawns of the Federal Parliament in 1972 was successful in gaining national and international attention. The Embassy helped to expose the appalling socio-economic status of Indigenous Australians, which was directly linked to the legacy of land injustice. The continued denial of pre-existing rights by the courts was an opportunity to expose the injustices of the law which had reduced Indigenous people to the status of aliens in their own land. The embassy 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 public awareness

The underlying reasons for the courts shying away from recognising native title was summed up by Canadian scholar Brad Morse. He argued that the case challenged fundamental norms, including: myths about what Australia is today; the concepts of a bicentennial based on the discovery of a new, vacant land in 1788; the assumptions upon which land ownership, the legal system and the law itself, is based; the legitimacy of the Australian state and the wealth derived from land enjoyed by most Australians. Morse's assessment will be a useful guide for assessing the implications of these challenges in the YYNTC (Morse, 1984:51,65-66).

### 5.3.1 The Mabo Litigation: 1982-1992

It was not until *Mabo* (No1), 1982 that the courts were again called upon to determine whether or not 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. They took legal action against the State of Queensland on behalf of the Meriam people, asking the courts to declare that the Meriam people held native title to the Murray Islands in the Torres Strait (*Mabo v Queensland* (No 1) (1988) 63 ALJR 84; 166 CLR 186; MAKE THIS A FOOTONOTE The High Court spelt the word 'Miriam' in *Mabo* (No 1), 'Meriam' in *Mabo* (No 2).

The Queensland Government tried to stop 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 legislation was invalid and in breach of the *Racial Discrimination Act 1975* (Cth), because it took away property rights under Meriam law while leaving intact property rights under Queensland law. On that basis the Court held that the 1985 Act was invalid and 'therefore fails' (*Mabo v Queensland* (No1) (1988) 63 ALJR 34; *Racial Discrimination Act 1975* (Cth) s10(1)(2). The High Court did not decide whether or not 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 (No1) 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 were:

1. Would the High Court overrule Blackburn J’s 1971 decision in Milirrpum, and hold that native title existed in Australia?

2. What test would the Court formulate to determine whether native title rights had been extinguished?

It is now a matter of history that the High Court, in Mabo (No2) made one of its most significant decisions, over-ruling Milirrpum and 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'. The concept of native title was defined as a right that had survived colonisation and continued where it could be proven to exist 'in accordance with the acknowledged traditional laws and observed customs' of the native title holders. The crucial question of whether or not native title was part of the common law of a settled territory such as Australia was determined by reference to the rules as they applied in the multitude of cases cited from other relevant 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 to be a bar to native title generally (Bartlett, 1993:9; Stephenson and Ratnapala, 1993:14-15; Mabo v Queensland (No.2) (1992) 175 CLR; Brennan, 41, Dean and Gaudron, 82-83; Toohey, 142; Dawson, 106).

In recognising native title at common law in Australia, the High Court questioned the morality of past judgements by declaring that those doctrines that were used to deny native title:

> 'provided the legal basis for the dispossession of the Aboriginal peoples of most of their traditional lands' and the 'acts and events by which that dispossession in legal theory was carried into practical effect constitute the darkest aspect of the history of this nation'.
On the question of those legal barriers that were used to deny Indigenous land rights, Dean and Gaudron JJ held that 'the lands were not terra nullius' and that 'the nation as a whole must remain diminished unless and until there is an acknowledgment of, and retreat from, past injustices' (Mabo (No2), 1992: Deane and Gaudron JJ:109).

Reflecting on the previous cases Brennan J. held that:

the common law itself took from indigenous inhabitants any right to occupy their traditional land, exposed them to deprivation of the religious, cultural and economic sustenance which the land provides, vested the land in the Crown without any right to compensation and made the indigenous inhabitants intruders in their own homes and mendicants for a place to live. Judged by any civilised standard, such a law is unjust and the theory that the indigenous inhabitants of a settled colony had no proprietary interest in the land depended on a discriminatory denigration of indigenous inhabitants, their social organisation and customs. It is imperative in today's world that the common law should neither be nor be seen to be frozen in an age of racial discrimination. The fiction of terra nullius by which the rights and interests of indigenous inhabitants in land were treated as non-existent was justified by a policy which has no place in the contemporary law of this country (Mabo (No.2) (1992) 175 CLR; Brennan J:29,40-43).

Brennan J in Mabo (No2) raised fundamental principles of justice and equality before the law in relation to the status of native title and the right of compensation for the Crown's acquisition of Indigenous lands. These principles, together with the need for the common law to accommodate contemporary land justice, are crucial for analysing how they translate to mainland groups. While the Court found that the Meriam people were entitled to exclusive possession of lands on the Murray Islands, it also found that the principles were applicable to the mainland. Brennan J (Mason CJ, McHugh J concurring) that 'there may be other areas of Australia where native title has not been extinguished and where an Aboriginal people maintaining their identity and their customs, are entitled to enjoy their native title'. This was the main impetus for the current YYNTC (Mabo (No2), 1992:50).

The influence of legal authority in Mabo (No2) was drawn from those jurisdictions that were ignored by Blackburn. Most persuasive was the 1823 United States Supreme Court decision in Johnson v McIntosh (1823) which applied pragmatic solutions to the 'actual state of things' rather than rigid adherence to principles of law. Underpinning the decision was the need to depart from antiquated assumptions about Indigenous people and adapt
the rules to accommodate the respective interests of Indigenous and settler societies. Pragmatism was the guiding light of the day. The test for establishing the existence of native title had its origins in the compromise reached by Chief Justice Marshall in *Johnson v McIntosh* (*Johnson v McIntosh* (1823) 8 Wheat 543; Bartlett, 1993:10-12; Mabo (No2) 1992, Brennan, J at 64).

*Mabo* did not make new law but reaffirmed and applied old rules that should have been but never were applied in colonial and 20th century Australian history. The decision raised the hopes of mainland groups but the barriers and requirements for achieving native title were matters that would inevitably confront claimants. In summarising the test for gaining native title, the majority in *Mabo* held that the following elements of proof were required:

1. 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. These elements have to be determined by the factual evidence drawn from claimants (*Mabo* (No 2) 1992, per Brennan J at 45 and Toohey J. at 188).

2. 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 (*Mabo* (No 2) 1992, Brennan J. at 43; Deane and Gaudron, JJ. at 64).

3. The substantial maintenance of the connection with or occupation of the land.

Having established the basic requirements we can now look at the limitations imposed on native title by *Mabo*. I will examine the question of extinguishment and then look at the status that native title is accorded under *Mabo*.

**5.3.1 Mabo and Extinguishment of Native Title**

In recognising Native Title in Australia, the High Court secured the property rights of introduced interests by declaring that those grants that gave exclusive possession extinguished native title (*Mabo* (No2), per Mason CJ and McHugh J:15). Furthermore, the majority held that compensation did not apply to those lands that were granted in the past, except for those granted after the *Racial Discrimination Act, 1975* (Cth). At the
outset this placed the rights of Indigenous people to own and inherit property on an equal footing with whites at a severe disadvantage. The original title is subordinated to the Crown's radical title and to the introduced titles of white property holders. This will be a recurring question in analysing the degree of status native title is given in *Mabo* and the NTA. The circumstances giving rise to the extinguishment of native title are discussed in each of the land-mark High Court decisions, notably: *Mabo (No2) 1992; Western Australia v The Commonwealth* 183 CLR 373; *The Wik Peoples v Queensland* 187 CLR 1; *Fejo v Northern Territory* 156 ALR 721.

5.3.2 Communal Nature of Native Title

Native title at common law is a legal right that is based on prior occupation and 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 (*Mabo (No2)1992*, Brennan J. Dean, Gaudron JJ. Toohey J at 42,66,151).

5.3.3 Cultural Continuity and Change

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 and adapt over time. It is 'immaterial that the laws and customs have undergone some change since the Crown acquired the land', the Judges held, and 'over time 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 to keep in mind 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 to be enjoyed by the members according to the rights and interests to which they are respectively entitled under the traditionally based laws and customs, as currently acknowledged and observed. (Brennan, J. at 68)
Deane and Gaudron JJ recognised that the traditional laws and customs that form the basis of Native Title are:

not, frozen as at the moment of establishment of a Colony. Provided any changes do not diminish or extinguish the relationship between a particular tribe or other group and particular land, subsequent developments or variations do not extinguish the title in relation to that land (Mabo (No2), 1992 Deane, Gaudron JJ. at 58).

Brennan J. held that where a clan or group has continued to acknowledge the law and (so far as practicable) to observe the customs based on the traditions of that clan or group, whereby that traditional connection with the land has been substantially maintained, the traditional community title of that clan or group can be said to remain in existence.

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 (584) see Hamlet of BakerLake (1979) 107 DLR (3d), especially at pp 527-529. 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 (585). In Hamlet of Baker Lake Aboriginal title was held to exist despite the fact that the Inuit had changed from a nomadic to a settled lifestyle (Mabo (No2) Toohey, J. at 51).

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) 1993, Brennan J. 51,61; Mason and McHugh JJ. 7; Dean and Gaudron JJ, 110; Toohey J, 5, 188).

Of significance to mainland groups is the question of cultural change as it was applied to the Murray Islands in Mabo (No2). Toohey J. 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' (Toohey J. at 192; Mabo (No2),1992; 107 ALR 1:5 see also Bartlett, 1993:5).
In assessing the ramifications of *Mabo* the question of change and adaption are crucial for analysing mainland claims where change has been arguably greater. 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 look at the way the *Mabo* principles are applied to communities like the Yorta Yorta. As discussed in chapters 2-4 the Yorta Yorta experienced many changes but have fought tenaciously to hold onto connections with their ancestral land and waters.

### 5.3.4 Test for Proving Native Title

The extent to which claimants have to prove ongoing links with the land has come under much criticism from Indigenous people particularly in view of changed social relations and urbanisation. It is important that we look at some of these criticisms in relation to *Mabo* and its relevance to outstanding land justice matters.

Aboriginal and Torres Strait Islander Social Justice Commissioner, Mick Dodson gives a compelling example of how connections with country can still be maintained in spite of physical separation. A graphic illustration of an elderly blind Aboriginal woman speaking for her country is given. She still holds important laws, customs, features and connections with the land even after being forcibly removed some fifty years earlier as a result of the Coniston massacre in 1927. Dodson explains:

She sat on the ground facing west and described, in precise detail, the landscape that everyone else could see. She said the names of rocks and trees and told the stories and songs that contain the law for the place. For two and a half hours Rosie explained the land and its meaning at every point of the compass. She explained how, even while she was far away from the place, her people had made her learn the songs and stories so that she could understand and explain that it was her country. The evidence was videotaped and the Commissioner was glued to the television as the witness demonstrated her connection to country in terms that were beyond challenge (Havemann, 1999:125; Aboriginal and Torres Strait Islander Social Justice Commissioner, 1995: 38).

The view that a physical connection is not necessary is further supported by the fact that no express mention of the need for physical presence is mentioned in the NTA, 1993 s 223. Some State Governments pushed for requirements of physical connection and the Commonwealth Government initially agreed but changed its mind in the face of strong
opposition from Indigenous groups and from within the Government itself (see Gregory, 1995).

Canadian authorities support the same view and argue that physical connections are subjective and emotional and are not part of the Aboriginal belief system. Other North American jurisdictions suggest that proof of a continuing spiritual relationship with the land may be a relevant factor, but not sufficient in its own right to prove the required link (Steele J, Attorney-General (Ontario) v Bear Island Foundation (1985) 15 DLR (4th) 321 at 360; United States v Santa Fe Pacific Railroad Co, 314 US 339 (1941) (SC); Tinglit and Haida Indians of Alaska v US, 177 F Supp 452 (1959) (Ct Cl); Sac and Fox Tribe of Indians of Oklahoma v US, 383 F 2d 991 (1967) (Ct Cl)).

The onus of proof placed on claimants is harder to sustain when the land in Dodson's words is unquestionably Indigenous land under customary law. The expectation imposed by Mabo is a heavy and unjust one. Furthermore the suggestion that the original title is a burden on the Crown's radical title is derogatory and ethnocentric. On the contrary, all introduced titles in Indigenous epistemology are parasitic on the original title-our ownership of lands.

The common law recognises the most fundamental human right of equality before the law, but then treats Indigenous land as an inferior title. The 'full respect' supposedly given to native title in Mabo is not mirrored in the way it is applied in Australian law. The role and importance of justice and equality principles are reiterated by Brennan J. to the effect that 'no case can command unquestioning adherence if the rule it expresses seriously offends the values of justice and human rights (especially equality before the law) which are aspirants of the contemporary Australian legal system'. The notion of justice and equality before the law is again relied on by Dean and Gaudron JJ. as the 'guiding principle' for recognising the 'full respect' of Indigenous property rights (Langton, 1999:71-72; Mabo No2, 1992 Brennan J: 30, 40-41; Dean and Gaudron JJ :82-83; Toohey J.:142; Case of Tanistry (1608) 80 ER 516, Re Southern Rhodesia (1919)AC 211).

But Indigenous title is not accorded the 'full respect' and equality that Brennan J asserted as the rationale of his judgement. It is subject to extinguishment by inconsistent grants without either the consent of, or the payment of compensation to, native title holders. As witnessed, Mabo has already compromised pre-existing Indigenous rights in order to
promote and validate the interests of European land holders. The extent to which the fundamental aspirations of equality and justice have been applied against the Mabo rhetoric are matters of great concern to Indigenous people including the Yorta Yorta.

5.3.5 Assessment of Mabo

While Mabo delivered exclusive possession to the Murray Islanders and paid lip service to equality before the law, it remains to be seen how the rhetoric will translate to mainland claimants. In the meantime Indigenous people have good cause to be sceptical about how the common law will be applied and the way Mabo will be interpreted in Claims.

Those groups that 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 more doubtful. The favouring of those who may be able to establish ongoing connections over those who were affected most by factors outside their control seems likely to produce divisive outcomes.

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 through the white occupation of Australia (National Aboriginal and Torres Strait Islander Land Fund, s201.(1)(2) NTA, 1993).

It is ironic that Mabo could create a division of the 'haves' and the 'have nots' out of the Native Title process. The resulting scenario could be that 'correcting' past injustices may well recreate the same conditions of alienation and marginalisation experienced in the past (Indigenous Land Fund, NTA,1993 (s.2010; Mabo, Brennan J. at 60,105).

The contradictions presented by Mabo are many. Noel Pearson of the Cape York Aboriginal Land Council questions how extinguishment of original interests can occur if fair and just principles are applied, but is doubtful that the issue will be fully addressed.

Michael Mansell of the Tasmanian Aboriginal Centre attacks the limitations of the decision which he criticises for not going far enough. Mansell claims that Mabo
perpetuates the dichotomy of domination and subordination of Aborigines by recognising such a meagre form of rights. And his conclusions that 'Mabo gave an inch and took a mile', are analogous to those of William Cooper some 50 years before. In the final analysis they may well be a synthesis of the Native Title process to this point (Pearson, 1994a 179-181; Mansell, 1992:6).

The Yorta Yorta were equally cautious about the benefits that may flow from Mabo. Given their history of land dispute they were very familiar with the way the Anglo-legal system had treated Indigenous rights. They had every reason to be cautious about how Mabo and the NTA would apply in the new era. They approached Mabo on the basis that land justice was now being dealt with on a different legal playing field. The recognition of prior rights meant that Indigenous people now had new legal mechanisms through which they could reassert their rights. With these hopes in mind the Yorta Yorta prepared themselves for the long haul that the Murray Islanders had come through (Yorta Yorta Native Title Claim, 1985).

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

Following Mabo (No2) there were many outstanding issues that needed to be clarified. While the Court found that native title existed, there was little political agreement about how this should be enacted in Australian law. One option was to use the common law itself to resolve native title claims on a case-by-case basis. Within the non-Indigenous community there was much unrest about the implications of the decision and its effect on the validity of those titles issued in the past and particularly those granted after the Commonwealth Racial Discrimination Act 1975. Other concerns related to the need for a legislative process that would deal with the issue of native title, and provide certainty to resource development on land that was subject to native title. The extent to which land was subject to the original native title rights and interests was an old but new reality for all parties (Batchelord, 1997:14-15; Butt, 1996:92-99).

In response to these concerns, the Keating Government passed the NTA, 1993 which came into force on 1 January 1994. The four main objectives of the Act were:

- 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 which might otherwise be invalidated because of the existence of native title (s. 3).

The NTA defined native title as the rights and interests that Aboriginal peoples and Torres Strait Islanders have in land or waters in accordance with their traditional laws and customs, which may include hunting, gathering or fishing (s.223). Native title is a communal right, although it may be held by a community, group or individual. The Act specifically states that native title must be recognised in Australian common law, at that point restricting it to the definition provided in the Mabo case.

5.4.1 Disjunction Between Legislation and Native Title

In drafting the principles of Mabo into Australian law, there was still the question of the disjunction between the two systems of law and the application of native title. In hindsight it is interesting to note that Olney J. in the Yorta Yorta case anticipated that the same problems as those mentioned in the Territory would arise again and the ultimate battle ground where the conceptualisation of native title would be sorted out was the Federal Court.

Others have taken a different view. Reflecting on the development of Australian land rights laws McRae, Nettheim and Beacroft argue that 'Native title claimants, together with the lawyers and anthropologists who work on claims, now have the benefit of the Northern Territory land claims experience behind them'. While acknowledging that the legal requirements are different in various respects, and need to be dealt with case by case, they emphasise that there are many valuable lessons that have been learned from past experiences. In finding a synthesis between Indigenous and Anglo property laws, however, it is imperative that the views of the original occupants and inheritors of native title rights are properly considered.

The experiences gained from the land rights struggle is taken up by Pearson. The perceived problems created by Mabo in Pearson's view can be dealt with in the way the common law is applied to Native Title claims. It is more a question of using the experience gained to apply the law as it relates to original rights rather than procrastinating over how the two laws relate to each other. From this analysis one needs to be extra-cautious about the import of stereotypical images of Indigenous society and
the manner in which the experiences of the Northern Territory are translated to the more settled regions.

Indigenous people are well aware of the prevailing views of Aboriginality amongst the white community which often misunderstand the notions of cultural diversity and continuity (see discussion in chapter 2). This tends to operate on two levels. Firstly many non-Indigenous people disregard the Aboriginality of Indigenous people of the south east. Secondly many assume that 'traditional' practices necessarily involve laws and customs of the type found in northern Australia. While some of the northern experience on conceptual matters may be of assistance in defining native title in the Murray Valley, the south eastern region needs to be viewed in its own unique cultural context. Principles of fundamental justice and equality before the law and their application to contemporary aspirations become crucial elements for hearing claims in the more settled regions.

Accepting the proposition that native title is recognised by the common law one would assume that this has given the Courts more discretion than they have ever had. They are now in a position to deal with Indigenous rights in a fair and just manner, and to create new precedents for Indigenous land law in Australia rather than taking what appears to be an overly cautious and retrograde approach (McRae, Nettheim and Beacroft, 1997:256; Edmonds, 1994:27-28; Pearson, 1994:179-181; Goote and Rowse, 1994:181).

It is not so much a matter of entering into new law but using the existing legal framework to accommodate those pre-existing rights that took over two centuries to be recognised. Striking a balance between human rights and resource development and a pragmatic compromise between the existing interests of property holders and the interests of Aborigines are the challenges at hand. The degree of compromise that native title holders have to make in the process however are matters confronting Indigenous stakeholders. It is against this background that I will analyse the degree of success that the Yorta Yorta are able to achieve under Mabo. Indeed it may be the Yorta Yorta case in which those difficulties that some Judges have alluded to will eventually be sorted out (McCrae, Nettheim, Beacroft, 1997 :240-244; Bartlett, 1993: 178, 185-186; Mansell, 1992:6; ).