A HOPE DISILLUSIONED, AN OPPORTUNITY LOST?
REFLECTIONS ON COMMON LAW NATIVE TITLE AND
TEN YEARS OF THE NATIVE TITLE ACT

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(It is 10 years since the Native Title Act 1993 (Cth) was passed in response to the High Court’s Mabo decision. Those years have been marked by an interplay between the common law and statute. Following the High Court’s decision in Ward and Yorta Yorta, this interplay has been starkly enunciated and redefined. The Act is dominant and the common law has been almost relegated, at least for the moment, to a historical artefact. Noel Pearson described the process most dramatically: ‘Ten years in the sunshine of the Rule of Law was all that black Australians were fated to enjoy’. How is it that such a determinate view of the state of native title could be made a mere 10 years after the promise engendered by the Mabo decision? While there is little doubt that the nature of the rights emerging from both the common law and the Act have been significantly diminished by both the Native Title Amendment Act 1998 (Cth) and the recent decisions in Ward, Yorta Yorta and Wilson v Anderson, it is indisputable that the recognition and protection of native title as a result of Mabo provided the underpinning for a realignment of relationships between indigenous and non-indigenous Australians. Indigenous rights and interests in land can no longer be ignored or cast aside. This article argues that in spite of both legislation and the courts diminishing the concept of native title and the rights associated with it, the process of change unleashed by Mabo and the Native Title Act 1993 (Cth) cannot be reversed. The question now is where this process of change will lead.)

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I  I N T R O D U C T I O N

Land is at the centre of the discordant and legally-endorsed relationship of dispossession that marks the landscape of settler societies.¹ This idea of dispossession goes beyond the physical removal of people from land and encompasses ideas about land that are part of the imagination, psyche and memory. The spirits, beings and ideas about land that inhabited and animated the country prior to colonisation gave the land and people meanings that had nothing to do with the imaginings and meanings of the coloniser.² In the process of colonisation, the two complexes of power and meaning were in touch with each other and ultimately one was overridden by the other — never completely and never without resistance. The process of colonisation resulted in a complex of power of external origin in charge of a new geopolitical space. New meanings became engraved upon the landscape and in its peoples’ consciousness.³

This complex of relationships and meanings is at the heart of the decision in Mabo v Queensland [No 2]⁴ and the responses it provoked. The Native Title Act 1993 (Cth) ("NTA") was one such response. It is now almost 10 years since the Commonwealth Parliament passed the Act. On such anniversaries it is apposite to reflect upon the path travelled and where that path has led. This article is one story of that journey: reflecting upon and critically examining the substance and effect of the NTA, from where it came and where it has taken us.

The common law of native title and the Act are intimately entwined. Neither can be fully comprehended without reference to the other, and the interplay between them has given each its shape and form. The fact that the concept of native title has been shaped as much by the political environment as by the judicial decisions of the High Court means that any discussion of the NTA must reflect upon both the common law and the legislation itself. After all, both the Parliament and the courts have been responsible for the alternating delineation, expansion and curtailment of the rights of indigenous Australians.⁵ This serves as a reminder that native title, from a settler point of view, is as much about politics as it is about law. From an indigenous perspective, it is about life itself.⁶

¹ Cole Harris, The Resettlement of British Columbia: Essays on Colonialism and Geographical Change (1997) xii. The term ‘settler societies’ are those that were colonised during the period of European expansion, in which colonising institutions of government and law are dominant, and in which colonising populations form a majority (and indigenous peoples a minority).
³ Harris, The Resettlement of British Columbia, above n 1, xii.
⁴ (1992) 175 CLR 1 ("Mabo").
⁵ The word ‘indigenous’ is used in this article to refer to people of Australian Aboriginal and Torres Strait Islander descent. Other terms such as ‘Aboriginal’ or ‘Torres Strait Islander’ are used as the context requires.
Following the High Court’s decisions in *Western Australia v Ward*,⁷ *Wilson v Anderson*⁸ and *Yorta Yorta v Victoria*,⁹ the interplay between the common law and the *NTA* has been starkly enunciated and redefined. The Act is dominant and the common law has been almost relegated, at least for the moment, to a historical artefact. Noel Pearson described the process most dramatically: ‘Ten years in the sunshine of the Rule of Law was all that black Australians were fated to enjoy’.¹⁰

How is it that such a determinate assessment of the state of native title could be made a mere 10 years after the promise engendered by the *Mabo* decision? Was this the outcome envisaged by the federal Parliament when it debated and passed the Act in 1993 or when the Act was amended in 1998? Was it the inevitable outcome of the political and social division that *Mabo* and the subsequent legislation revealed and that remains unreconciled? Is Pearson’s view an accurate assessment of the present state of the law of native title or is it possible to read the current state of native title in a more expansive way? Even if Pearson’s view is accurate, has the decade since *Mabo* produced changes and responses that cannot be undone? Has the ‘sunshine of the Rule of Law’ set or has it been temporarily clouded? Has a new course been charted?

These uncertainties illustrate the need for an exploration of the impact and meaning of native title and its legislative variations. The scope and content of the rights recognised by the Court in *Mabo* were varied and in some respects diminished by the *NTA*.¹¹ In relation to future uses of native title land and resources, the native title rights were arguably enhanced through the future act regime.¹² There is little doubt, however, that the nature of the rights that emerged from both the common law and the Act have been significantly diminished by both the *Native Title Amendment Act 1998* (Cth) and the recent decisions in *Ward, Wilson v Anderson* and *Yorta Yorta* and, to a lesser extent, *Commonwealth v Yarmirr*.¹³

Arguably, the rights recognised in *Mabo* were never expansive. But equally, the rights there recognised have been slowly eroded with each new engagement with the institutions of the dominant legal system, whether the common law or the legislature. However, it is indisputable that the recognition and protection of native title afforded by *Mabo* provided the underpinning for a realignment of relationships between indigenous and non-indigenous Australians, including relationships with government and industry. Indigenous rights and interests in land could no longer be ignored. This was particularly so in relation to state

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⁷ (2002) 191 ALR 1 (*Ward*).
⁹ (2002) 194 ALR 538 (*Yorta Yorta*).
¹¹ See the discussion about validation and extinguishment in below Part IV(B).
¹² Whether the right created by the future acts regime did enhance and go beyond the body of rights which are native title at common law, it was presented in this way by indigenous negotiators and the Commonwealth government during the negotiations about the Act in 1993: see below Part III.
¹³ (2001) 208 CLR 1 (*Yarmirr*).
jurisdictions and industry sectors that had traditionally disregarded indigenous rights. This article argues that, in spite of both legislative and judicial limitation of the concept of native title and the rights associated with it, Mabo and the NTA unleashed a process of change that cannot be reversed. The question now is: where will this process of change lead?

II THE PROMISE OF MABO: THE HIGH COURT’S ‘GREAT LEAP FORWARD’

Mabo was a watershed. The litigation lasted 10 years and resulted in ‘the first determination by the High Court of the rights of Aboriginal people to land at common law’. The decision produced responses across the legal and political spectrum. According to former Chief Justice Sir Harry Gibbs, ‘few, if any, [decisions] have given rise to such a diversity of responses, ranging from euphoria to deep anxiety’. Indigenous people responded in a variety ways, some seeing it as a ‘most cautious and belated recognition’, others as a self-serving decision giving indigenous people very little in terms of recognition of their rights in land.

There was significant critical response from the non-indigenous community. Some questioned whether the Court had carried ‘judicial activism too far in departing from principles that were thought to be settled for over a century’. Judicial activism was the theme of much critical legal commentary, while some criticism encompassed the likely adverse economic impact of the decision. The cry of ‘continued uncertainty’ was heard from the resources sector, while one critic, Hugh Morgan, focused on the Court’s failure to perform its ‘important duty of providing a legal and public defence of property’, thus placing ‘the

14 See below nn 63–72 and accompanying text.
18 Noel Pearson, ‘204 Years of Invisible Title’ in Margaret Stephenson and Suri Ratnapala (eds), Mabo: A Judicial Revolution (1993) 1, 175.
20 Gibbs, ‘Foreword’, above n 17, xiii.
economic and political future of Australia and our territorial integrity … under threat’.24

The reactions were not unexpected. The decision was unsettling. For some it challenged and disrupted deeply-held notions about the constitutional basis of the Australian nation,25 while others saw it as a ‘cautious correction’26 or an inevitable realignment of Australia’s common law with that of other jurisdictions.27 It reignited tensions between old adversaries: the resources sector and its supporters (including state governments), and indigenous interests.28 It was described by Frank Brennan as a ‘door which has been left slightly ajar by the High Court, now waiting to be prized open by a series of test cases and political agitation’, but one which some miners and pastoralists saw ‘as a door to be firmly closed before further uncertainty is caused.’29 The state of uncertainty reflected in Brennan’s comment lies at the heart of the conflicts produced by Mabo; and it was these conflicts that were a portent of the battles to be fought over the ensuing legislation.

A Before Mabo: The Common Law

Until Mabo, there was a widely-held view that no indigenous rights, customs or law, including any land interests, survived the acquisition of sovereignty by the British Crown.30 The basis of this view — whether or not an accurate or undisputed one31 — was a series of appeal cases that confirmed that, with sovereignty, the laws of England had become the laws of the colony. These cases dealt with the power of the Crown to make grants of interests in land to settlers and confirmed that in accordance with the doctrine of tenure, the land was a Royal demesne in which the Crown had beneficial title to all land and, therefore, it was not possible for any interest in land to arise, be created or exist, other than

24 Hugh Morgan, quoted in G Hughes, ‘High Court Failed Nation with Mabo, Says Mining Chief’, The Australian (Sydney), 1 July 1993, 1–2.
28 See below Part III.
30 See, eg, Lumb, ‘The Mabo Case’, above n 25. See also Coe v Commonwealth (1979) 24 ALR 118, 129–30 (Gibbs J), 135 (Jacobs J), 137 (Murphy J) where this view was accepted but also suggested that alternative views may be arguable.
by way of a grant from the Crown. This approach was adopted in a number of
High Court cases also dealing with the relationship between the Crown and
settler interests, or between sovereign entities within the Australian Constitu-
tion. The view was clearly enunciated by the Privy Council in Cooper v Stuart:

The extent to which English law is introduced into a British Colony and the
manner of its introduction must necessarily vary according to circumstances.
There is a great difference between the case of a Colony acquired by conquest
or cession, in which there is an established system of law and that of a Colony
which consisted of a tract of territory, practically unoccupied, without settled
inhabitants or settled law, at the time it was peacefully annexed to the British
dominions. The colony of New South Wales belongs to the latter class.

This was said to follow from the terra nullius doctrine, a set of common law
principles deriving from international law at the time of Australia’s colonisation,
under which a colony was considered settled if it was uninhabited at the time
sovereignty was acquired. Cooper v Stuart was said to take the doctrine further
by indicating that a colony could be considered uninhabited if its occupants were
nomadic with no settled law.

None of these cases dealt with the relationship between the Crown and the
land interests of indigenous people. Then, in Milirrpum, Blackburn J consid-
ered this issue. Although the judgment recognises the complexity of the plain-
tiff’s relationship to land, Blackburn J felt himself bound by the decision in
Cooper v Stuart on the effect of acquisition of sovereignty, concluding that ‘the
Crown is the source of title to all land; … no subject can own land alodially, but
only an estate or interest in it which he holds mediately or immediately of the
Crown’. The claim that indigenous interests survived the acquisition of
sovereignty was thus unsuccessful. The decision was not appealed.

While all these cases provided the basis for the conventional view that no
indigenous rights survived the acquisition of sovereignty, this view was not

32 Cooper v Stuart (1889) 14 App Cas 286; A-G v Brown (1847) 1 Leggs 312;
Milirrpum v Nabalco Pty Ltd (1971) 17 FLR 141 (‘Milirrpum’).
33 Williams v A-G (NSW) (1913) 16 CLR 404; Randwick Municipal Council v Rutledge (1959) 102
CLR 54; New South Wales v Commonwealth (1975) 135 CLR 337.
34 (1889) 14 App Cas 286, 291 (Lord Watson).
36 (1889) 14 App Cas 286, 291 (Lord Watson). This principle was critically considered by
context has been criticised: Robert van Krieken, ‘From Milirrpum to Mabo: The High Court,
Terra Nullius, and Moral Entrepreneurship’ (2000) 23 University of New South Wales Law
Journal 63; Gerry Simpson, ‘Mabo, International Law, Terra Nullius and the Stories of Settle-
ment: An Unresolved Jurisprudence’ (1993) 19 Melbourne University Law Review 195; David
Review 5.
37 (1971) 17 FLR 141.
38 Ibid 270.
39 Ibid 245.
40 Ibid 267.
41 For a discussion of the case, see Paul Watson, ‘The Gove Land Rights Case: Hard Cases Make
universally held. Most other common law jurisdictions around the world had accorded some recognition to indigenous rights and interests in land. In 1984, a prescient piece by Hookey critically examined the approach of the plaintiffs in Coe v Commonwealth and suggested that there was support for the non-conventional view. Referring to the recently filed proceedings in Mabo v Queensland, he concluded that ‘the old issues of the constitutional origins of the Australian colonies and their implications for the status and rights of the Aboriginal people remain unresolved’.

B Before Mabo: Statutory Recognition of Indigenous Rights

Perhaps as a portent of things to come, the response to Milirrpum was to switch the focus away from the common law to the political process, with the prospect that legislation might fill the common law void by providing land for indigenous people. Until that time, legislation had historically dealt with the setting aside of land as reserves or, more recently, through limited heritage protection legislation. The Whitlam government established the Aboriginal Land Rights Commission, which recommended the introduction of a form of statutory land rights. The main elements of the report were implemented in the Aboriginal Land Rights (Northern Territory) Act 1976 (Cth) under which,
perhaps paradoxically, a large amount of Aboriginal reserve land was immediately handed over to its traditional indigenous owners, while other Crown land was able to be claimed. A claims process was established and substantial control over land management decisions, especially in relation to mining, was given to indigenous land owners.

Some states also introduced statutory schemes. These varied widely in their scope and effect, with some delivering expansive rights, but others that were much more limited in scope, with each ‘shaped partly by the particular needs of the indigenous community, and partly by community and government attitudes’. In some states — most notably Western Australia — no legislation was passed. However, Western Australia became the site of a major battle over indigenous rights to land when land rights proposals from both the State and Commonwealth governments foundered in the face of furious opposition from the resource industry.

Following the election of the Burke Labor government in Western Australia in 1982, a land rights inquiry was established. Paul Seaman chaired the inquiry and recommended a land rights scheme encompassing land grants accompanied by significant control and management of resources, although the government


Paradoxically, because by 1976 Aboriginal reserves had come to be seen in a negative light as a significant element of the discredited assimilation policy: see Goodall, above n 2, 115–260; Christabel Mattingley and Ken Hampton (eds), Survival In Our Own Land (1988). See Neal v The Queen (1982) 149 CLR 305, 317–19 (Murphy J) for a particularly cogent and contemporary discussion of the operation of this system.

Aboriginal Land Rights (Northern Territory) Act 1976 (Cth) sch 1.

Aboriginal Land Rights (Northern Territory) Act 1976 (Cth) s 50.

Aboriginal Land Rights (Northern Territory) Act 1976 (Cth) s 50(1)(a).

Aboriginal Land Rights (Northern Territory) Act 1976 (Cth) pt IV. See Reeves, Building on Land Rights for the Next Generation, above n 52, ch 24; Maureen Tehan, Practising Land Rights: The Pitjantjatjara in the Northern Territory, South Australia and Western Australia’ (1995) 65(4) Australian Quarterly 34. Indigenous control has often been described as a ‘veto’. This is not strictly accurate as there is a capacity for intervention by the Minister and limited arbitration: Aboriginal Land Rights (Northern Territory) Act 1976 (Cth) ss 43, 48E. However, the right to control resource activity is significantly greater than under either the original or the amended NTA: see below Parts IV(D) and V.

The Pitjantjatjara Land Rights Act 1981 (SA) and Maralinga Tjarutja Land Rights Act 1984 (SA) provided for direct grants of inalienable freehold land to land-holding corporations with varying processes for decision-making about mining and other developments; Aboriginal Land Rights Act 1983 (NSW) under which application could be made to the Minister for a land grant of freehold title; Land Act (Aboriginal and Islander Land Grants) Amendment Act 1982 (Qld) under which freehold title, known as a deed of grant in trust (‘DOGIT’) was vested in the councils of Aboriginal reserves. Queensland subsequently passed more comprehensive legislation: Aboriginal Land Act 1991 (Qld) and Torres Strait Islander Land Act 1991 (Qld). In Victoria, some legislation vesting ownership of reserves or small areas of land was passed: Aboriginal Lands Act 1970 (Vic); Aboriginal Land (Aboriginal Advancement League) Wall Street Northcote) Act 1982 (Vic); and later Aboriginal Land (Northcote Land) Act 1989 (Vic); Aboriginal Lands Act 1991 (Vic); Aboriginal Land (Manatunga Land) Act 1992 (Vic). Most curiously, the Commonwealth Parliament passed the Aboriginal Land (Lake Condah and Framlington Forest) Act 1987 (Cth). The Act operated in Victoria and was accompanied by a preamble in which certain historical matters were asserted and the following curious provision: ‘and whereas the Commonwealth does not acknowledge the matters acknowledged by the Government of Victoria, but has agreed to the enactment of such an Act’.

McCrae, Nettlehim and Beacroft, above n 22, 171.

ultimately proposed a legislative scheme with little control over resource management.61 This process coincided with the federal Hawke Labor government’s proposal for a national land rights scheme under which minimum standards for land rights would be set by the Commonwealth and legislated by the states. The national proposal was based on principles similar to those that guided the *Aboriginal Land Rights (Northern Territory) Act 1976 (Cth)*, including inalienable freehold title, protection of sites, control in relation to mining, access to royalty equivalent payments and negotiation of compensation for lost land.62 Although watered down, both pieces of proposed legislation were met by a ferocious media campaign waged by the mining industry in Western Australia. This amounted to a racially-based fear campaign with advertisements about threats to private land, ideas of inaccessible Aboriginal land and disingenuous claims about significant sites. The State legislation failed to pass the Legislative Council and was not reintroduced. An opinion poll showed overwhelming opposition to both land rights proposals, and the impending Western Australian election provided the impetus for abandoning the national proposal.63

Competing interests over access to land and resources were also played out in other legal environments, particularly around specific resource development proposals and sites of cultural significance. Two such instances — Noonkanbah and Coronation Hill — exemplify the point.

At Noonkanbah in the Kimberley region of Western Australia, a dispute over two years culminated in a blockade of the land by its traditional indigenous owners and the forced entry of a drilling rig onto Noonkanbah station.64 It was clear that the *Heritage Act 1972 (WA)* provided no assistance to indigenous people, since it neither protected areas or sites of significance to indigenous people nor defined any process for dealing with threats to such sites.65 At the same time, perceived difficulties created by the *Heritage Act 1972 (WA)* for the government and the resource industry were overcome by amendments to the Act providing for the Minister to permit the destruction of sites of significance.66

Coronation Hill in the Northern Territory was centre stage for two years as the Hawke government considered whether to permit mining in the region in the face of opposition from the Jawoyn people based upon the cultural and spiritual

61 *Aboriginal Lands Bill 1985 (WA).*
63 McCrae, Nettheim and Beacroft, above n 22, 155–7. A detailed analysis of this period can be found in Ronald Libby, *Hawke’s Law: The Politics of Mining and Aboriginal Land Rights in Australia* (1989). Although no legislation was ever passed in Western Australia following the failure of the land rights proposals, the government negotiated 99 year leases of some reserve land in the far east of the State and various administrative procedures were established under existing reserves management legislation (*Aboriginal Affairs Planning Authority Act 1972 (WA)*) to facilitate indigenous participation in land management decisions. See Tehan, ‘Practising Land Rights’, above n 57 for a discussion of the operation of these processes.
66 *Aboriginal Heritage Act 1972 (WA)* s 18, amended by *Aboriginal Heritage Amendment Act (No 2) 1980 (WA)* s 6. On the heritage legislation issue specifically, see Dillon, above n 65.
significance of the area. The Resource Assessment Commission conducted an investigation and the government ultimately decided not to permit the mining project, incorporating the area into the Kakadu National Park. However, over a two year period there was a destructive public debate about the authenticity of the Jawoyn beliefs and the extent to which they should be permitted to inhibit ‘development’.

Consistent themes and issues emerged from these engagements with indigenous land interests by the settler system of law and politics. The battle over access to land and resources remained at the heart of conflicts. Discourses around the validity and even the existence of indigenous beliefs dominated any conflict that arose. As Langton points out, this was particularly so during and after the resources boom of the 1960s and 1970s. Indigenous protection of land stood in stark contrast to the discourse of economic development as a ‘good thing’. The culture of conflict that accompanied each dispute, and the overriding of indigenous aspirations seemingly at will, were ingrained in the practice of government decision-making, particularly at a state level. On the other hand, statutory land rights schemes granted title and established schemes for decision-making about land and resource use, giving indigenous people significant and enforceable rights. They provided a vision of a new way forward.

It was into this environment of dissonance, conflict and expectation that Mabo and its new way of seeing the relationship between settlers and indigenous peoples fell. It was these themes of dissonance and expectation that were reprised and reinvigorated as the debate about the NTA proceeded.

C The ‘Great Leap’

Mabo’s leap was in declaring that the common law recognised and protected indigenous rights in land that existed at the time the British acquired sovereignty. The decision immediately extended the possibility of enforceable rights in land

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68 Donald Stewart, Report under Section 10(4) of the Aboriginal and Torres Strait Islander Heritage Protection Act 1984 on the Kakadu Conservation Zone (1991).
69 Kakadu Board of Management, Kakadu National Park Plan of Management (1998) 16. See Newcrest Mining (WA) Ltd v Commonwealth (1997) 190 CLR 513, in which the decision to prevent the exercise of rights under mining leases was held to be an acquisition of property for the purposes of s 51(xxxi) of the Constitution.
70 Hamilton, above n 67, 1; Marcia Langton, ‘The Hindmarsh Island Bridge Affair: How Aboriginal Religion Has Become an Administrable Subject’ (1996) 11 Australian Feminist Studies 211.
72 Ibid 216.
73 See Below Parts III (concerning the original Act) and V (the amending Act). This remained the situation notwithstanding that the Parliament passed the Council for Aboriginal Reconciliation Act 1991 (Cth) with bipartisan support, with the aim of transforming ‘Aboriginal and non-Aboriginal relations in this country’ Commonwealth, Parliamentary Debates, House of Representatives, 30 May 1991, 4409 (Robert Tickner, Minister for Aboriginal Affairs).
to those areas of the nation where no statutory schemes had been established or where those schemes were of limited application.

The decision had three broad and linked elements: it restated the constitutional basis of the Crown’s powers; by that restatement, the Court made a space for the recognition and protection of indigenous rights and interests, which it called native title; and finally, the Court articulated some elements of the protection afforded by the common law to the newly-recognised rights. The first two of these elements involved the Court unsettling — if not disrupting — preconceived notions, while the third assumed new significance in the protection afforded to these rights. In the highly-charged political environment of competing claims to land and resources, the decision was bound to provoke agitation and animosity.74

Without traversing the whole of the decision, it is important to identify some key elements in order to understand the response to it. The majority proceeded on the basis that Australia was not terra nullius when sovereignty was acquired. While the Court acknowledged that it might have been overturning some significant law on this issue,75 it nevertheless considered that ‘[w]hatever the justification advanced in earlier days for refusing to recognize the rights and interests in land of the indigenous inhabitants of settled colonies, an unjust and discriminatory doctrine of that kind could no longer be accepted.’76 It has been suggested that such a forthright statement that it was overturning accepted authority may not have been necessary,77 but by rejecting the notion of terra nullius the Court found the conceptual space to allow for the survival of rights and interests existing at the time sovereignty was acquired. There was also a moral and ethical force in the rejection of terra nullius, whether or not it was doctrinally necessary.

The Court linked the acquisition of sovereignty to the Crown’s power to make grants of land: that is, it drew a distinction between the Crown’s radical title incorporating this power (‘the Crown’s title to a colony’)78 and the notion of the Crown as the holder of absolute beneficial title to all the land (the Crown as ‘the owner of land in a colony’).79 In this way, it became doctrinally possible for pre-existing land interests to survive the acquisition of sovereignty and to be recognised and protected by the common law,80 but only to the extent that such a reordering did not ‘fracture a skeletal principle of our legal system’.81 Rights that survived operated as a burden on the Crown’s radical title.82 In both these aspects of its decision, the Court rejected the conclusion in *Milirrpum* that rights

74 See above nn 21–7 for some of these reactions.
75 *Mabo* (1992) 175 CLR 1, 20, 43 (Brennan J).
76 Ibid 42 (Brennan J).
79 Ibid (Brennan J) (emphasis added).
80 Ibid 48 (Brennan J).
and interests in land could only derive from the Crown. By acknowledging that an interest in land could exist outside of, or unsourced from, a grant from the Crown, the Court prised open the doctrine that had previously been thought to underpin the property law system.83

This shift was described by Gummow J in *Wik Peoples v Queensland*84 in the following terms:

Thus, it was appropriate to declare in 1992 the common law upon a particular view of past historical events. That view differed from assumptions, as to extent [sic] of the reception of English land law, upon which basic propositions of Australian land law had been formulated in the colonies before federation. To the extent that the common law is to be understood as the ultimate constitutional foundation in Australia, there was a perceptible shift in that foundation, away from what had been understood at federation.85

This perceptible shift became the focus of criticism of the judgment.86

The second element of the decision was the detail of the interest that was recognised and protected. Brennan J’s statement is now classic: ‘Native title has its origin in and is given its content by the traditional laws acknowledged and the traditional customs observed by the indigenous inhabitants of a territory.’87

Where a group has continued to acknowledge the laws and (so far as practicable) to observe the customs based on the traditions of that clan or group, whereby their 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.88

It was clear from this and the other judgments that there must be a link between the laws and customs acknowledged and observed at the time sovereignty was acquired, and those currently practised. The boundaries of the link were unclear, but the possibility of loss of connection was raised.89

This uncertainty did not affect the outcome of *Mabo*:90 the Court declared that the plaintiffs were ‘entitled as against the whole world to possession, occupation, use and enjoyment of Mer.’91 However, it provided the basis for some commen-

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83 Curiously, Grattan and McNamara have suggested that this aspect of the decision has actually reinvigorated the feudal nature of the property law system: Scott Grattan and Luke McNamara, ‘The Common Law Construct of Native Title: A “Re-Feudalisation” of Australian Land Law’ (1999) 8 Griffith Law Review 50. See also Patricia Lane, ‘Native Title — The End of Property As We Know It?’ (2000) 8 Australian Property Law Journal 1.

84 (1996) 187 CLR 1 (‘*Wik*’).

85 Ibid 182.

86 See above nn 21–2.

87 *Mabo* (1992) 175 CLR 1, 58.

88 Ibid 59–60 (Brennan J).

89 Ibid 60 (Brennan J).

90 The issue of laws and customs giving a connection to land and the current practices establishing this connection were contested in the case but were established by the findings of fact by Moynihan J in *Mabo v Queensland* [1992] 1 Qd R 78. The approach of Moynihan J to the evidence has been strongly criticised, but ultimately did not affect the outcome of the case: see Nonie Sharp, ‘No Ordinary Case: Reflections upon *Mabo (No 2)*’ (1993) 15 Sydney Law Review 143, 151–6.

91 *Mabo* (1992) 175 CLR 1, 76 (Brennan J).
tary doubting the applicability of the decision to mainland Australia. 92 The title was clearly outside the common law’s tenurial system, 93 but it encompassed rights that were recognised 94 and protected 95 by the common law, although those rights were not a part of the common law itself. In fact, the title was said to be sui generis 96 and the precise nature of the title and where it sat within the broader property system was unclear. Was it proprietary or was it merely a usufructuary right? 97 98 

92 The basis of this view was that the manifested aspects of land use by the people of Mer, such as cultivation and ideas of individual ownership found by Moynihan J, were different from that of indigenous people on the mainland: Pearson, ‘204 Years of Invisible Title’, above n 18, 77. See also Michael Hunt, ‘Mineral Development and Indigenous People — The Implications of the Mabo Case’ (1993) 11 Journal of Energy and Natural Resources Law 155; Lumb, ‘The Mabo Case’, above n 25, 4–6.

93 Mabo (1992) 175 CLR 1, 61 (Brennan J).

94 Ibid 57–8 (Brennan J). The theory of recognition is important in establishing native title as a continuing right from the time sovereignty was acquired, rather than one that was granted or enlivened by the Crown or the common law. The rights or title always existed. Viewing the title in this way allows for the interplay of two systems of law and reinforces the social reality of indigenous law. Extinguishment principles operate to extinguish ‘recognition’ rather than the social and lived reality of indigenous law in relation to land: Noel Pearson, ‘The Concept of Native Title’ in Galarrwuy Yunupingu (ed), Our Land Is Our Life: Land Rights Past, Present and Future (1997) 150, 155–6, 159.

95 Mabo (1992) 175 CLR 1, 61 (Brennan J).

96 Ibid 59 (Brennan J).

97 Ibid 61 (Brennan J), 112–13 (Deane and Gaudron JJ).

98 This issue was given considerable attention prior to the High Court decision in Ward (2002) 191 ALR 1. In Mabo, the declaration was to the effect that the rights and title of the Meriam people amounted to exclusive possession: (1992) 175 CLR 1, 76 (Brennan J). The view developed that the title gave rights to the land itself, and the particular laws and customs enunciated and emerging from law and custom were expressions of, or rights pendant upon, that title to the land. Consequently, no native title was extinguished unless all the rights were extinguished. The alternative view was that each of the observable expressions of law and customs were individual rights or sticks in a bundle, each of which was amenable to extinguishment. The different approaches are considered in some detail in the majority and minority decisions in the Full Federal Court decision in Western Australia v Ward (2000) 170 ALR 159. For detailed consideration of this issue, see also Katy Barnett, ‘Western Australia v Ward — One Step Forward and Two Steps Back: Native Title and the Bundle of Rights Analysis’ (2000) 24 Melbourne University Law Review 462. In Ward, the High Court majority held that the title consisted of a number of separate rights in a bundle and could be extinguished one by one, but did not engage in any detailed analysis of the conceptual issues: (2002) 191 ALR 1, 35–6, 40 (Gleeson CJ, Gaudron, Gummow and Hayne JJ), and see below Part VI(A). On this latter view, exclusive possession might be among the separate rights or sticks that comprise the native title rights. Rights of exclusive possession might also arise under a possessory title. This argument was advanced in Mabo but only dealt with by Toohey J. (1992) 175 CLR 1, 206–14. Toohey J concluded that the plaintiffs may well have a possessory title based upon prior possession, called common law aboriginal title, but this argument was ‘no more beneficial for the plaintiffs than traditional (native) title: at 214. This approach took up the work of Kent McNeil, Common Law Aboriginal Title, above n 31, which subsequently provided substantial assistance to the Canadian Supreme Court in its decision in Delgamuukw v British Columbia [1997] 3 SCR 1010. Pearson has suggested that these two approaches can be reconciled: Pearson, ‘The Concept of Native Title’, above n 94, 153. Whether they are able to be reconciled or subsumed into the same conceptual set of rights is uncertain. However, McNeil has argued that Brennan J’s decision in Mabo in effect was recognising a proprietary title based on exclusive and prior occupation: Kent McNeil, ‘The Relevance of Traditional Laws and Customs to the Existence and Content of Native Title at Common Law’ in Kent McNeil (ed), Emerging Justice?: Essays on Indigenous Rights in Canada and Australia (2001) 416, 420–3, 435. Note that Strelein has taken a slightly different approach, suggesting that Brennan J’s characterisation of the title allows for a ‘continuum of interests to accommodate
The third element of the decision dealt with protection of the title. The title was said to attract proprietary remedies.\(^{99}\) However, it would not be protected if it was contrary to ‘natural justice, equity or good conscience’.\(^{100}\) It was clear that native title could be extinguished by the Crown validly exercising its powers,\(^{101}\) either by legislation or by executive act, in making grants of rights and interests to third parties or reserving land for its own use or for the benefit of the public.\(^{102}\) It seemed that this could be done without consent or compensation.\(^{103}\) However, it was emphasised that any Crown action must show a ‘clear and plain intention’ to extinguish.\(^{104}\) In summarising his findings about native title, Brennan J gave indications about what actions might or might not extinguish native title, indicating that freehold and leasehold grants would extinguish but other grants might not.\(^{105}\) These comments were not a necessary element of the decision, but came to be relied upon with adverse consequences for indigenous interests.\(^{106}\)

Another central aspect of the protection afforded came from the Racial Discrimination Act 1975 (Cth) (‘RDA’): governments dealing with native title since that Act was passed were required to act in a manner consistent with its provisions.\(^{107}\)

The decision recognised indigenous rights in land, linked to laws and customs associated with prior occupation. Recognition did not affect the laws and customs or create the rights, but rather expressed them ‘in a declaration of rights comprehensible in common law terms’.\(^{108}\) It is only when a remedy is sought that the rights are enumerated. Moreover, enumeration of those rights, or even extinguishment of them at common law, does not touch, or say anything about, ‘traditional law or custom or the relationship of Aboriginal people to their non-possessor rights’: Lisa Strelein, ‘Conceptualising Native Title’ (2001) 23 Sydney Law Review 95, 115.


\(^{100}\) Mabo (1992) 175 CLR 1, 61 (Brennan J).

\(^{101}\) Ibid 63 (Brennan J), 110–11 (Deane and Gaudron JJ), 184 (Toohey J).

\(^{102}\) Ibid 68 (Brennan J), 89–90 (Deane and Gaudron JJ), 195 (Toohey J).

\(^{103}\) Ibid 15 (Mason CJ and McHugh J), 126 (Dawson J). The principle of derogation was said not to apply because the title was not sourced in a grant from the Crown: at 64 (Brennan J). Both McNeil and Pearson have argued that this approach is incorrect: Kent McNeil, ‘Racial Discrimination and Unilateral Extinguishment of Native Title’ (1996) 1 Australian Indigenous Law Reporter 181; Pearson, ‘The Concept of Native Title’, above n 94, 153. However, the principle has now been accepted in subsequent cases: Ward (2002) 191 ALR 1; Yorta Yorta (2002) 194 ALR 538; Yarmirr (2001) 208 CLR 1. See below Part VI.

\(^{104}\) Mabo (1992) 175 CLR 1, 64 (Brennan J). The emphasis on ‘clear and plain intention’ was significantly diminished in Ward (2002) 191 ALR 1, 35–6 (Gleeson CJ, Gaudron, Gummow and Hayne JJ). See below Part VI(A).

\(^{105}\) Mabo (1992) 175 CLR 1, 71 (Brennan J), 112 (Deane and Gaudron JJ), 214–16 (Toohey J).

\(^{106}\) The assumption that all leases extinguished native title created difficulties that were played out following the Mabo decision and the amendments to the NTA: see below Part V. Assumptions about the extinguishing effects of the creation of national parks continued until surprisingly overturned in Ward (2002) 191 ALR 1, 77–82, 128–9 (Gleeson CJ, Gaudron, Gummow and Hayne JJ); see below Part VI(A).

\(^{107}\) Mabo (1992) 175 CLR 1, 69–70.

The declaration proposed by Brennan J recognised the particularity of the rights of the Meriam people in relation to the island of Mer. The detail of the native title rights and their relationship with settler rights and interests was unclear, but the possibilities were clearly evident. It was these possibilities that at once produced excitement, optimism, caution, anxiety and fear among indigenous people, governments and industry. The application of the RDA raised the possibility that many rights granted or actions taken by the Crown since 31 October 1975 (the date the Act largely came into effect) were invalid because of the disregard by governments of native title that existed in the land subject to Crown actions. Such actions prior to 31 October 1975 were not subject to the Act but their effect on native title was subject to the principles of common law extinguishment tentatively expressed in the various judgments. The combination of the effect of the RDA and the common law extinguishment provisions had to be considered in order to determine where native title might, in 1992, exist. It seemed to be accepted that freehold grants to third parties extinguished native title. However, it was now possible that native title — whatever that title consisted of — might exist over all unallocated Crown land and even over land the subject of some (if not all) Crown leases, including pastoral and mining leases. It was certainly possible that native title might exist in a large number of Crown reserves or even in land vested in Crown authorities. It was clear that future dealings in relation to land in which native title subsisted would be subject to the RDA but this raised possibilities for a completely new land management order with acknowledgment of indigenous interests in land and the direct involvement of indigenous people in decision-making about their land. Now indigenous people, previously shut out of such processes in some states or

109 Ibid 147.
110 Mabo (1992) 175 CLR 1, 76.
111 Brennan, ‘Mabo and the Racial Discrimination Act’, above n 29, 212; Greg McIntyre, ‘Aboriginal Title: Equal Rights and Racial Discrimination’ (1993) 16 University of New South Wales Law Journal 57. The High Court by a narrow majority in Mabo v Queensland [No 1] dealt with the effect of the Act on (at that time) a potential native title: In practical terms, this means that if traditional native title was not extinguished before the Racial Discrimination Act came into force, a State law which seeks to extinguish it now will fail. It will fail because s 10(1) of the Racial Discrimination Act clothes the holders of traditional native title who are of the native ethnic group with the same immunity from legislative interference with their enjoyment of their human right to own and inherit property as it clothes other persons in the community. A State law which, by purporting to extinguish native title, would limit that immunity in the case of the native group cannot prevail over s 10(1) of the Racial Discrimination Act which restores the immunity to the extent enjoyed by the general community. The attempt by the 1985 Act to extinguish the traditional legal rights of the Mirrriam [sic] people therefore fails.

112 Mabo (1992) 175 CLR 1, 69 (Brennan J), later confirmed in Fejo v Northern Territory (1998) 195 CLR 96 (‘Fejo’), although the issue of Crown to Crown grants was not determined.
114 Mabo (1992) 175 CLR 1, 69–70 (Brennan J).
with limited rights in others, could anticipate protection of their interests and engagement in decision-making. Large areas of land previously excluded from such considerations might now be subject to them.

There was, then, not only a *possibility* for a realignment of power relations in land and resource allocation that challenged preconceived systems of decision-making, but also the possibility of a new relationship between indigenous and non-indigenous people that went beyond land management to embrace fundamental issues of rights and status. The notion of equality, backed largely by the RDA, became a touchstone. These possibilities, and the doctrinal imperatives underpinning them, became the focus of academic and political debate and discourse. How should the nation and its institutions respond to the challenge of these possibilities?

III UNEASY TENSIONS: BATTLES BETWEEN THE COMMON LAW AND STATUTE OVER LAND AND RESOURCES

Although there were trenchant criticisms of the Mabo decision, Markus suggests that the immediate response to the judgment was muted when compared with the ‘ferocity of the attack that was to be mounted and maintained over a period of months’ as the Commonwealth government’s legislative response was negotiated. This “time of Mabo madness” intensified through the middle months of 1993. Of the five themes identified by Markus in this response, at least two — the perceived threat to economic development and the denigration of indigenous culture — were familiar themes that had accompanied pre-Mabo land disputes. Two others — the idea that indigenous people were privileged to the disadvantage of non-indigenous Australians, and the denigration of the High Court itself and thus the legitimacy of the decision — would have growing significance in the developing political discourses around native title.

Much of this rhetoric was directed at winning the political battle that was emerging between the Commonwealth and the states (and other interested parties, including indigenous people) about the proper response to the decision. The themes of this battle revolved around a number of key ideas. First, the economic cost of native title. Second, the tension between the need for ‘certainty’ and preservation of the states’ land management powers on the one hand,

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117 Ibid 93.

118 Ibid 89–93.

119 See above 64–70.
and on the other, the desire to build upon the Mabo decision by recognising the rights enunciated. Third, the desirability of a scheme to implement those rights against a background of substantive inequality, international obligations, past dispossession and principles of coexistence of indigenous and settler land interests.

The then Prime Minister Paul Keating set the basis for the Commonwealth’s position in his Redfern speech when he indicated that Mabo should be seen as a ‘practical building block of change’ and ‘the basis of a new relationship between indigenous and non-Aboriginal Australians.’ Although the Commonwealth government’s position varied over the course of the negotiations, it was basically set out in its discussion paper, Mabo: The High Court on Native Title, released on 3 June 1993. Favouring a cooperative approach, the Commonwealth would validate any grants of interests in land up to 30 June 1993 and would similarly allow the states to validate their grants. It would not permit negotiation on these validations. In relation to future dealings it would support ‘consent’ provisions in relation to future acts where a similar consent right was enjoyed by other title holders. State tribunals would determine native title. There would be some financial support from the Commonwealth to the states. The discussion paper also took up ideas flagged by the Prime Minister in his Redfern address by proposing a settlement package that addressed broader issues of dispossession and disadvantage, including the creation of a national fund for land acquisition and the development of broader principles of reconciliation and settlement of outstanding issues.

In April 1993, indigenous groups presented their approach, ‘The Aboriginal Peace Plan’, in which they sought an approach of coexistence of native title and other interests. They sought, among other things, an extension of native title.
title to all reserves and the prevention of extinguishment of native title by future grants. The plan proposed validation of invalid mining titles granted since 1975, but subject to negotiation and agreement on a range of matters including protection of sites, environmental protection measures and financial arrangements. This position was further developed in the ‘Eva Valley Statement’ in August,133 with a restatement of the propositions in the ‘Peace Plan’ and an exhortation that the Commonwealth honour its international obligations and redress past injustice.134

The various states had different positions but all required validation of past grants and that they be entitled to deal with land at the expense of native title, subject only to compensation if required by the RDA.135 There was even talk of a constitutional referendum to reverse the Mabo decision.136 The possibility of a cooperative approach appeared unlikely following the breakdown of talks at the Council of Australian Governments meeting on 8–9 June 1993, after which the Prime Minister announced that the Commonwealth would legislate to establish national minimum standards, regardless of the attitude of the states.137 Ultimately, the states and territories accepted the Mabo decision, although they continued to negotiate with the Commonwealth about its approach and threatened to implement their own legislation.138 Only Western Australia ‘expressly rejected’ the judgment,139 and passed its own legislation in November 1993 in which it purported to extinguish native title and replace it with use rights, establishing a scheme for decision-making about land use and access which was significantly less favourable than that proposed by the Commonwealth.140

The Opposition in the Commonwealth Parliament offered ‘minimal recognition of the High Court’s new principle’141 and was particularly opposed to the link in the June discussion paper between validation and the land acquisition and reconciliation proposals.142 Ultimately, the Opposition in the Senate did not

the Native Title Act 1993 (1997) <http://www.faira.org.au/niwg/coexistence.html>. Arguably, the idea has been diminished by the 1998 amendments to the NTA (see below Part V) and the recent High Court decisions which have the effect of subjugating native rights to settler land interests: see below Part VI. On the idea of coexistence, see also Maureen Tehan, ‘Co-Existence of Interests In Land: A Dominant Feature of the Common Law’ (Issues Paper No 12, Native Title Research Unit, Australian Institute of Aboriginal and Torres Strait Islander Studies, 1997); Kent McNeil, ‘Co-existence of Indigenous and Non-Indigenous Land Rights: Australia and Canada Compared in Light of the Wik Decision’ (1997) 4(5) Indigenous Law Bulletin 4.

134 Ibid.
135 Rowse, ‘How We Got a Native Title Act’, above n 121, 114–16.
136 Bartlett, Native Title in Australia, above n 43, 36.
137 Ibid 121–2.
138 Bartlett, Native Title in Australia, above n 43, 36.
139 Land (Titles and Traditional Usage) Act 1993 (WA). This legislation was held to be invalid in Western Australia v Commonwealth (1995) 183 CLR 373. See Meredith Wilkie and Gary Meyers, ‘Western Australia’s Land (Titles and Traditional Usage) Act 1993: Content, Conflict and Challenges’ (1994) 24 University of Western Australia Law Review 31.
140 Ibid.
141 Rowse, ‘How We Got a Native Title Act’, above n 121, 117.
negotiate on amendments to the legislation once it was introduced. It opposed the legislation in its entirety, thus requiring the government to negotiate with the Democrats and the Greens to secure passage of the legislation.

Details of the Commonwealth’s proposed legislation were released on 2 September 1993. The proposals allowed for significant state involvement in determination and management processes, for the suspension of the RDA to allow for validation of potentially invalid acts, and for renewals of previously granted mining and pastoral leases. On the other hand, it also provided for the non-extinguishment of native title by the validation or grant of mining interests. The proposals were seen as accommodating the states and the mining industry to the detriment of indigenous interests. Over the next month, negotiations ensued with the various interested parties and changes were made to the proposed legislation. The Opposition maintained its position of opposing the whole of the legislation because it combined the issue with reconciliation and because the legislation intruded into the state sphere of land management. The states’ responses were varied, with the Victorian and Queensland Premiers reservedly supporting the proposals, while others, particularly the Western Australian and New South Wales Premiers, opposed it to varying degrees.

Indigenous negotiators ultimately agreed to the validation of post-1975 grants (and the suspension of the RDA) but characterised this as a special measure because of the accompanying benefits in the legislation, including the maintenance of a federal jurisdiction for determining claims, ‘just terms’ as the measure of compensation for extinguishment of native title, expansion of the scheme for negotiation about future use of land and the inclusion of reference to a ‘social justice package’. The agreement reached at this point was hailed by O’Donoghue:

Very late last night we secured a negotiated outcome that meets the major interests not only of our people but of all Australians and, by so doing, ensures that we start off together down the long path to genuine reconciliation. It is an his-

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143 Ibid 130–1.
144 Ibid 130.
147 Ibid 7–9.
148 Ibid 34.
149 Ibid 7–8, 15, 35.
150 Rowse, ‘How We Got a Native Title Act’, above n 121, 124–5.
151 Ibid.
152 The Opposition was not necessarily united in this outlook. Some members were supportive of aspects of the Bill and others crossed the floor to support some amendments in the Senate. The approach of coalition governments in Victoria and Western Australia varied, Victoria being accommodating towards the Commonwealth Bill: ibid 128–31.
154 It is arguable that the treatment of the RDA in the validation regime is not a ‘special measure’: McCrae, Nettheim and Beacroft, above n 22, 327–8.
155 Rowse, ‘How We Got a Native Title Act’, above n 121, 127.
toric decision … We have been willing to compromise in the interests of a truly national settlement.\textsuperscript{156}

The Native Title Bill 1993 (Cth) was introduced into Parliament on 16 November of that year.\textsuperscript{157} In his second reading speech, the Prime Minister Paul Keating referred to the need to recognise the past and to grasp the legislative response to \textit{Mabo} as ‘an opportunity’.\textsuperscript{158} He identified the ‘twin goals … to do justice to the \textit{Mabo} decision in protecting native title and to ensure workable, certain, land management.’\textsuperscript{159} Keating then set out a number of key elements of the legislation, many of which also appeared in the preamble to the Bill. These included ‘ungrudging and unambiguous recognition and protection of native title’; validation of past grants and laws that might have been invalid because native title existed; ‘a just and practical regime’ governing future grants and acts affecting native title; and a ‘rigorous, specialized and accessible tribunal and courts process’ dealing with both claims and future acts.\textsuperscript{160} He asserted that the Bill complied with Australia’s international obligations, and set out the basis upon which the Bill operated as a ‘special measure’.\textsuperscript{161} The Bill was said to incorporate the principle of non-discrimination by requiring that native title be treated in a similar fashion to freehold for the purposes of government grants (other than mining rights).\textsuperscript{162} Keating made clear that he wanted a cooperative approach with the states and territories, but insisted that they comply with the standards set out in the Bill, and that the Western Australian extinguishment approach was unacceptable and would be overridden.\textsuperscript{163} The Bill was presented as achieving a balance between indigenous rights and the need for commercial certainty and security of title.\textsuperscript{164}

The Bill did not codify native title rights, but rather was arguably designed to give full play to the common law.\textsuperscript{165} It also sought to redress the effects of colonisation where native title could not be claimed through the establishment of a land fund and through a social justice package.\textsuperscript{166}

In the Senate, the Bill was referred to the Senate Standing Committee on Legal and Constitutional Affairs, which took evidence in early December and reported on 9 December 1993.\textsuperscript{167} Considerable amendments were made while the Bill

\textsuperscript{156} Lois O’Donoghue, ‘A Step towards Reconciliation’, \textit{The Australian} (Sydney), 20 October 1993, 2.
\textsuperscript{157} Commonwealth, \textit{Parliamentary Debates}, House of Representatives, 16 November 1993, 2883.
\textsuperscript{158} Ibid 2878.
\textsuperscript{159} Ibid 2877–8.
\textsuperscript{160} Ibid 2878.
\textsuperscript{161} Ibid.
\textsuperscript{162} Ibid 2880.
\textsuperscript{163} Ibid 2878–9. This was achieved by invalidating past legislative acts only if they were passed before 30 June 1993. If the Western Australian legislation fell foul of the \textit{RDA}, it would not be rescued by the validation provisions of the Commonwealth Act.
\textsuperscript{164} Ibid 2880.
\textsuperscript{165} Ibid 2879. See below Part VI(C) for a discussion of how this idea has been addressed in subsequent cases.
\textsuperscript{166} Ibid 2882–3.
\textsuperscript{167} Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, \textit{Native Title Bill 1993} (1993).
was in the Senate as negotiations continued with the various parties. However, in the face of Opposition intransigence, the government was required to negotiate with the Democrats and the Greens and this produced amendments favourable to indigenous negotiators.\textsuperscript{168} The effect of the Opposition’s unwillingness to engage in negotiations was exemplified by a government proposal to allow renewals of mining and pastoral leases without negotiation. The amendment failed because it was not supported by the Opposition (although it was supported by three National Party Senators) and was opposed by the Democrats and the Greens.\textsuperscript{169}

The Bill was passed by the Senate on 22 December 1993 after the longest debate in the Parliament’s history (at that time) of 51 hours and 45 minutes.\textsuperscript{170} Passage through the House of Representatives was a matter of course. The Act came into operation on 1 January 1994.\textsuperscript{171} The hopes for the Act were expressed by the Prime Minister in his second reading speech: ‘today we move that much closer to a united Australia which respects this land of ours, values the Aboriginal and Torres Strait Islander heritage and provides justice and equality for all’.\textsuperscript{172} Senator Gareth Evans concluded his third reading speech thus:

\begin{quote}
We do owe our indigenous peoples, our Aboriginal and Torres Strait Islander fellow Australians, a huge debt for the destruction and dispossession that we non-Aboriginal Australians wreaked for over 200 years of Australian history. I hope that, by passage of this legislation tonight, we have repaid just a little of that debt.\textsuperscript{173}
\end{quote}

\section*{IV  \textsc{The Native Title Act 1993 (CTH)}}

Born out of conflict, compromise and pressured last-minute negotiations, the Act was bound to have flaws. However, on its face, it also delivered on its twin goals of certainty for non-indigenous titles and the provision of a range of positive rights capable of the ‘special measures’ description, underpinned by a commitment to coexistence of indigenous and non-indigenous rights and interests in land and water.

Without traversing the \textit{NTA} in too much detail, it is useful to refer to some key provisions that over time have become significant in the Act’s application, effect and subsequent amendment. The aspirations of the \textit{NTA} are embodied in the Preamble which recalls past dispossession and states that the Act is a special measure to address past injustices; that compensation on just terms should follow

\textsuperscript{168} O’Donoghue, ‘A Step Towards Reconciliation’, above n 156; Rowse, ‘How We Got a Native Title Act’, above n 121, 131.

\textsuperscript{169} Rowse, ‘How We Got a Native Title Act’, above n 121, 130. In fact it was a proposition revived by the Coalition once it returned to office in 1996.

\textsuperscript{170} Commonwealth, \textit{Parliamentary Debates}, Senate, 16 December 1993, 5500 (Gareth Evans, Minister for Foreign Affairs).

\textsuperscript{171} The Land Fund provisions in s 201 came into effect on 30 June 1994: Attorney-General’s Legal Practice, \textit{Native Title Legislation with Commentary} (1994) C1.

\textsuperscript{172} Commonwealth, \textit{Parliamentary Debates}, House of Representatives, 16 November 1993, 2883 (Paul Keating, Prime Minister).

\textsuperscript{173} Commonwealth, \textit{Parliamentary Debates}, Senate, 16 December 1993, 5502 (Gareth Evans, Minister for Foreign Affairs).
any effects of the Act on native title; and that native title rights be fully enjoyed, significantly supplemented and protected in a similar fashion to freehold title, while giving certainty. The objects in s 3 also embody these four main aims of the Act.

A Recognition and Protection

The NTA recognised and protected native title by saying just that.\(^{174}\) Section 11 provided that native title could not be extinguished contrary to the Act; s 11(2) made it clear that legislation passed on or after 1 July 1993 could only extinguish in accordance with the future act regime in Division 3 of Part 2 or by validating a ‘past act’.\(^{175}\) The effect of these provisions was to establish a national code for dealings with native title.\(^{176}\) Section 11, when read together with the definition of a ‘past act’ to include only legislation passed before 1 July 1993\(^{177}\) (as opposed to grants or other acts done before 1 January 1994), was squarely designed to capture the attempt by Western Australia to extinguish native title by state legislation.\(^{178}\)

A key element in the recognition and protection regime was the intention of the Commonwealth to exercise its authority under the race power\(^{179}\) and the external affairs power\(^{180}\) and thus to constrain the states, allowing them only to pass legislation or do acts in relation to native title that were not inconsistent with the Commonwealth Act.\(^{181}\) Thus, the key protagonists — the Western Australian government on the one hand and the Commonwealth and indigenous groups on the other — were immediately joined in battle.\(^{182}\) Western Australia sought a declaration that the NTA was beyond the legislative power of the Commonwealth and therefore invalid, or that the impact of the Act on Western Australia was disproportionate.\(^{183}\) The Wororra people and the Martu people had

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174 NTA s 10: ‘Native title is recognised and protected in accordance with this Act’.
175 This provision was specifically drafted to capture the invalidity of the Land (Titles and Traditional Usage) Act 1993 (WA).
176 Western Australia v Commonwealth (1995) 183 CLR 373, 453 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ). However, the Court did not appear to be saying that all aspects of native title were codified. Such a view would have been contrary to the comment in the Prime Minister’s second reading speech that

[quote]
This bill does not codify native title rights. Rather it provides that, in determining native title claims, the federal or state bodies involved will ascertain the rights in each particular case. Because the foundation of our position is acceptance of the High Court’s decision, the bill protects native title to the maximum extent practicable.
[quote]
Commonwealth, Parliamentary Debates, House of Representatives, 16 November 1993, 2879 (Paul Keating, Prime Minister).
177 NTA s 228(2)(a)(i).
178 Land (Titles and Traditional Usage) Act 1993 (WA). See above n 140.
179 Australian Constitution s 51(xxxvi).
180 Australian Constitution s 51(xxix).
181 The approach in the NTA varied from requiring strict compliance with the Act (s 19) to allowing for the Commonwealth to recognise state bodies and tribunals for the purpose of determining native title or carrying out various functions relating to future acts subject to the state’s arrangement satisfying the criteria set out in s 251 of the Act.
182 The battle was played out in Western Australia v Commonwealth (1995) 183 CLR 373, which became known as the ‘Native Title Act Case’.
183 The State also sought a declaration that no native title rights existed in the State: ibid 421.
also sought a declaration that the Western Australian *Land (Titles and Traditional Usage) Act 1993* was inconsistent with both the *RDA* and the *NTA*, and was therefore invalid by operation of s 109 of the *Constitution*. The applications were heard together.

The Court upheld the *NTA* as a valid exercise of Commonwealth legislative power as a law in relation to ‘the people of any race for whom it is deemed necessary to make special laws’ 184 and conferred ‘uniquely on the Aboriginal and Torres Strait Islander holders of native title … a benefit protective of their native title’. 185 The Act removed ‘the common law general defeasibility of native title’ 186 subject to the three exceptions in the Act: by validation of a ‘past act’; by agreement; and by a ‘permissible future act’. 187 The State Act was therefore invalid because it fell foul of these allowable extinguishment provisions and was racially discriminatory. 188 Importantly, the *NTA* had survived as a valid exercise of Commonwealth power that constrained the states and would impact upon their land and resource management practices. 189

The second key element of recognition and protection was in the provisions defining the nature of the title and its accompanying rights. To this end, there was a clear conjunction of the common law and the Act. Section 223 adopted ‘the common law definition of native title’, 190 using the words of Brennan J to define native title in the following terms:

(1) The expression native title or native title rights and interests means the communal, group or individual rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to land or waters, where:

(a) the rights and interests are possessed under the traditional laws acknowledged, and the traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders; and

(b) the Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters; and

(c) the rights and interests are recognised by the common law of Australia.

The definition expanded the common law by providing that native title could exist in water. 191

184 *Australian Constitution* s 51(xxxvi); *Western Australia v Commonwealth* (1995) 183 CLR 373, 462 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ).


186 Ibid 460 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ). The idea of defeasibility here refers to the possibility of extinguishment at common law.

187 Ibid 461 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ). However, the common law remained relevant and the Court indicated that the Act should be read in the light of the common law: at 452.

188 Ibid 451 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ).

189 Bartlett, *Native Title in Australia*, above n 43, 69.

190 Attorney-General’s Legal Practice, above n 171, C9. Note also the comments of the Prime Minister in his second reading speech: see above n 176.

191 Native title in water as a right recognised by the common law was confirmed in *Yarmirr* (2001) 208 CLR 1. Other provisions preserved the existing rights to hunt and fish, whether at common law or under statute: *NTA* ss 223(2)–(3), 210–11, 47; and allowed any prior extinguishment by pastoral leases to be disregarded if the lease was held by native title claimants: s 47.
Generally, this link between the common law and the Act was referred to in *Western Australia v Commonwealth* where the Court said that the Act should be read in the light of the common law.\(^{192}\) It was thought that this section was intended to give legislative effect to Brennan J’s exposition of native title. However, subsequent decisions have significantly altered this view.\(^{193}\)

**B Validation and the RDA**

Indigenous negotiators agreed to the validation regime and, in particular, the extinguishment of native title by validated pastoral leases, in return for an enhancement of the future act regime and other positive measures in the legislation. The mechanism for validation was simply to state in the *NTA* that ‘past acts’\(^{194}\) were validated.\(^{195}\) Consequences of validation were included in the Act. These ranged from extinguishment of all native title by validation of freehold titles and certain leases, including pastoral leases,\(^{196}\) to suspension of the enjoyment of native title rights where a mining lease or other grant or Crown action was validated,\(^{197}\) through to the application of the non-extinguishment principle.\(^{198}\) Reservations in favour of indigenous people were preserved.\(^{199}\) Compensation was available for any extinguishment or impairment of native title as a result of the operation of these provisions in the Act.\(^{200}\) The states were permitted to validate their ‘past acts’ in a similar way.\(^{201}\) This approach exemplified both the goals of coexistence of interests with native title and the principle of non-discrimination. The Prime Minister indicated that this accorded with the existing practice of mining tenements, allowing the exercise of full rights under the tenement but not extinguishing the title to the land over which it was granted.\(^{202}\)

The significant element of the scheme has been the definition of a ‘past act’ as an act taking place before 1 January 1994\(^{203}\) and that was ‘invalid to any extent

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\(^{194}\) Section 228.

\(^{195}\) Section 14.

\(^{196}\) Section 15(2).

\(^{197}\) Section 15(2).

\(^{198}\) Section 238.

\(^{199}\) Section 16.

\(^{200}\) Section 17.

\(^{201}\) Sections 19–20. All the states and the Northern Territory passed legislation validating their past acts: *Native Title Act 1994* (ACT) ss 8(1)–(2); *Native Title (New South Wales) Act 1994* (NSW) ss 10–11; *Validation (Native Title) Act 1994* (NT) ss 5–6; *Native Title (Queensland) Act 1993* (Qld) ss 10–11, 15; *Native Title (South Australia) Act 1994* (SA) ss 33–4; *Native Title (Tasmania) Act 1994* (Tas) ss 6–7; *Land Titles Validation Act 1994* (Vic) ss 7–8, 13; *Titles (Validation) and Native Title (Effect of Past Acts) Act 1995* (WA) ss 6–7.

\(^{202}\) Commonwealth, *Parliamentary Debates*, House of Representatives, 16 November 1993, 2880 (Paul Keating, Prime Minister). In fact, this approach was used in argument in relation to the 1998 amendments to support a formal equality approach to many future act amendments: Jennifer Clarke, ‘Racial Discrimination Standards and Proposed Amendments to the *Native Title Act*’ (Issues Paper No 16, Native Title Research Unit, Australian Institute of Aboriginal and Torres Strait Islander Studies, 1997) 1.

\(^{203}\) Note that only legislation made before 1 July 1993 was validated: *NTA* s 228(2)(a)(i).
but would have been valid to that extent if the native title did not exist’. This provision was designed to validate those acts that might have breached the RDA since 1975. Only acts that were invalid because native title existed were validated, and thus attracted compensation.

Whether there were in fact any invalid acts was a matter of conjecture at the time the Act was passed. The Commonwealth indicated that the provisions were to ‘remove any doubt’ about validity, but added that ‘this is not to indicate that the Commonwealth is of the view that past acts by the Commonwealth, States or Territories are invalid.’ The extent of the application of the provisions must be ascertained on a case by case basis. If the provision is to apply, native title must subsist in the land and the act must actually impair native title. Native title may subsist in land but if the act does not affect or impair it, there is no invalidity. There must be a breach of the RDA to such an extent that the act is invalid, rather than simply being an act generating a right to claim compensation. However, the narrow application of the provisions suggests that a right to claim compensation may well be the most common situation and that, while the possibility of invalidity existed over land (and in some cases was a trigger for negotiations), there may be little invalidity in fact.

C Applications: A Mechanism for Determining Claims to Native Title

The third element of the NTA involved establishing a scheme for determining native title and compensation applications. Applications were to be made to the National Native Title Tribunal. Although not necessarily intended, the Federal Court interpreted s 63 of the Act as requiring the Registrar to register all applications provided they complied with the procedural and technical requirements of the Act. No account was taken of the likelihood of success in any application. The Commonwealth government’s view was that this was not the intention of s 63 and proposed amendments that required the Registrar of the National Native Title Tribunal to register an application unless the Registrar was ‘of the opinion that prima facie … the claim cannot be made out’.

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204 NTA s 228(2)(b).
205 Attorney-General’s Legal Practice, above n 171, C12.
206 Ibid.
208 Mineralogy Pty Ltd v National Native Title Tribunal (1997) 150 ALR 467.
209 Although this was not clear at the time, Ward confirmed this as the correct approach: (2002) 191 ALR 1, 43–4 (Gleeson CJ, Gaudron, Gummow and Hayne JJ).
210 No compensation claims have yet been determined.
211 Commonwealth, Parliamentary Debates, House of Representatives, 16 November 1993, 2881 (Paul Keating, Prime Minister); NTA s 3.
212 NTA s 61.
214 Department of the Prime Minister and Cabinet and Attorney-General’s Department, Commonwealth, Outline of Proposed Amendments to the Native Title Act 1993 (1995) 4. This aspect was ultimately amended in 1998 by inserting ss 190A–190C into the NTA: Native Title Amendment Act 1998 (Cth) sch 2, item 64.
The Tribunal had power to mediate among the parties to an application and, if agreement was reached, to make a determination.215 Where agreement could not be reached, the matter would be referred to the Federal Court for hearing and determination.216 As a result of the High Court decision in *Brandy v Human Rights and Equal Opportunity Commission*,217 this procedure became invalid and required amendment by ensuring that applications and determinations were made in the Federal Court.218 Although the determination function of the Tribunal was rendered inoperative by *Brandy*, its mediation function continued.

The application process was slow. This was due in part to the requirements of proof in any claim. The burden on the applicants to address the two limbs of any claim — the continued connection with land or water in accordance with law and custom, and the lack of extinguishment by Crown act — required immense research, time and financial resources.219 Often intra-indigenous disputes had to be resolved,220 governments that held land tenure histories were not always cooperative,221 and the adversarial framework and procedures for dealing with claims222 inevitably led to delay. Even though there was provision for mediation, this produced its own difficulties.223 For example, in the Yorta Yorta claim, there were some 470 parties involved in mediation, making meaningful discussions impossible.224 Where a party — in this case, the New South Wales government — took a view that native title was extinguished, progress through mediation was clearly impossible.225 Thus, it was not surprising that no determinations that native title existed were made in the early years.226 Even though the reasons for this were myriad, the absence of such determinations was relied upon to support substantial amendments to the Act because of the supposed ‘uncertainty’ it caused.227

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215 NTJ ss 72–3.
216 NTJ s 74.
217 (1995) 183 CLR 245 (*Brandy*).
218 Department of the Prime Minister and Cabinet and Attorney-General’s Department, Commonwealth, above n 214, 6–9.
222 Ibid ch 3.
223 Ibid 3–5.
224 Ibid 100.
225 Ibid 101.
226 By June 1994, 16 claimant applications had been made: ibid app 3.
D Future Acts and the Right to Negotiate

The final element of the NTA was ‘a specific protective structure’ for decision-making in relation to land in which native title does or may exist. The future acts scheme had two broad aspects. The first was the requirement that native title land be treated the same as freehold title for the purpose of Crown actions. If the Crown could do the act over freehold land, then it could be done over native title land. Similar procedural rights also extended to native title holders. In all other circumstances, the future act procedures applied and an act would be invalid if it did not comply with the provisions. The second was a special scheme ‘in recognition of the special attachment that Aboriginal peoples and Torres Strait Islanders have to their land’ for dealing mainly with mining and compulsory acquisitions for third parties, known as the right to negotiate. Similar procedures requiring negotiation existed under statutory schemes in the Northern Territory and South Australia, and so there was some positive experience of these procedures. However, for the majority of indigenous people, it represented a significant shift in their capacity to be involved in decision-making affecting their land. This was also the provision that created the most fear among state and territory governments and industry. The provisions operated on land where native title existed or may have existed. The states and territories were permitted to establish their own schemes provided they satisfied the Commonwealth that the schemes met minimum standards. In spite of the states’ fierce arguments in 1993 about their need to control these functions, only South Australia established its own scheme.

The main focus of activity under these provisions and a major source of criticism of the Act was in relation to the right to negotiate. The right was trig-

229 These provisions did not extend to offshore waters: NTA ss 235(8)(a).
230 Commonwealth, Parliamentary Debates, House of Representatives, 16 November 1993, 2880 (Paul Keating, Prime Minister). This was the ‘similar compensable interest test’: NTA ss 23(3), 23(6), 240.
231 NTA ss 23(6), 253.
232 NTA s 22.
233 Attorney-General’s Legal Practice, above n 171, C17.
234 NTA s 25.
235 See above Part II(B). See also Tehan, ‘Practising Land Rights’, above n 57.
237 NTA s 43.
238 Mining (Native Title) Amendment Act 1995 (SA). Following the amendments to the NTA in 1998, Western Australia and the Northern Territory unsuccessfully sought to establish their own schemes. Queensland also established its own scheme but has since discontinued it and reverted to the Commonwealth scheme.
239 NTA pt 2, div 3B. The procedure required that the government give notice of its intention to make a grant of an interest to a native title party (that is, a person who may have native title or who has claimed native title): s 29; the native title party could object to the proposed grant, and negotiation between the native title party and the government and third party then ensued: ss 26–31; if negotiation was unsuccessful, the parties could seek arbitration by the National Native Title Tribunal: ss 35–9; there was provision for the Minister to override the decision of the arbitrator in the interest of the state or Commonwealth: s 42; time limits were imposed at...
gered by the state issuing a notice of its intention to do the act under s 29. The procedure operated concurrently with the process for determining whether native title existed in land. Many claims for native title were lodged within the two month period (as they were required to be) in response to the notification of a proposed grant of an interest on native title land, in order to preserve native title rights. This period for response was then increased to three months by the Native Title Amendment Act 1998 (Cth). Once a claim was registered, the right to negotiate came into play. Inevitably in the early years, negotiation about projects became entwined with issues of whether native title existed as applications moved through the various stages of mediation and hearing. The difficulty with the process was real, since the first consent determination was not made until 7 April 1997. However, it was more a function of timing, rather than there being any fundamental flaw in the process. Most early criticisms about the process by government and industry were directed at the uncertainty produced by this situation.

Another major focus of criticism from the indigenous point of view was the operation of the expedited procedure, which allowed governments to make limited grants without the right to negotiate procedures if the proposed act did not directly interfere with community life or areas or sites of particular significance, or did not involve major disturbance. Bartlett was scathing about the National Native Title Tribunal’s implementation of these provisions as creating ‘illusory rights’ and further dispossession, a view endorsed by the Aboriginal and Torres Strait Islander Commission Social Justice Commissioner. However, Bartlett also points out the paradox in the Federal Court’s emphasising the importance of spiritual affiliation in interpreting ‘interference’, which thus...

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240 Note that the South Australian system operates differently.
241 NTA s 30.
242 NTA s 29(4).
243 NTA ss 29(2), 30.
245 The Aboriginal and Torres Strait Islander Social Justice Commissioner suggested one solution to this ‘uncertainty’ might be ‘to assume that the entire continent is still owned by indigenous peoples’: Aboriginal and Torres Strait Islander Social Justice Commissioner, Native Title Report: January 1994–June 1994, above n 236, 143.
246 NTA s 32.
247 NTA s 237.
248 Richard Bartlett, ‘Dispossession by the National Native Title Tribunal’ (1996) 26 University of Western Australia Law Review 108, 121. The use of this procedure was also of concern to the Social Justice Commissioner: Aboriginal and Torres Strait Islander Social Justice Commissioner, Native Title Report: July 1994–June 1995, above n 219, 171.
250 Ward v Western Australia (1996) 69 FCR 208.
dramatically changed the approach of the National Native Title Tribunal. Other factors were identified as creating difficulties, such as the lack of resources for indigenous parties and the rigid time frames.

Section 21 of the Act allowed for native title parties to enter into agreements with governments to either surrender their native title or to authorise future acts in relation to their native title land. It had been anticipated that this provision would encourage agreements outside of the more formal procedures and even allow for wide-ranging regional agreements. However, this did not occur because of doubts about the enforceability of agreements, at least insofar as they would displace the operation of the right to negotiate, and some ancillary matters, such as determining who should be party to such agreements. The Act also allowed for non-indigenous parties to apply for a determination that native title did not exist — thus ensuring the validity of any acts done in relation to the land.

Amendments addressing some of the procedural and related issues were proposed in September 1995. The main contentious amendment was in relation to the new registration test which would have imposed a higher standard on the likelihood of success and made clear that only claimants meeting this higher standard could access the right to negotiate. The amendments lapsed when the Parliament was prorogued for the March 1996 election.

Other changes were occurring. Throughout 1995 a change was apparent in the approach of some major resource companies and even state governments such as Western Australia. CRA Ltd lead the way publicly in a series of addresses by its then Managing Director Leon Davis arguing that there were sound business reasons to embrace indigenous communities and work with them.

251 Bartlett, ‘Dispossession by the National Native Title Tribunal’, above n 248. The Native Title Amendment Act 1998 (Cth) had the effect that interference must be to the physical manifestations of native title rights and that such interference must be likely rather than possible. See Western Australia v Smith (2000) 163 FLR 32; Smith on Behalf of Gnaala Karla Boora People v Western Australia (2001) 108 FCR 442.
253 Ibid 166–8.
255 Department of the Prime Minister and Cabinet, Commonwealth, Towards a More Workable Native Title Act, above n 227, 19–20; Department of the Prime Minister and Cabinet and Attorney-General’s Department, Commonwealth, above n 214, 13.
256 NTA s 24.
257 Department of the Prime Minister and Cabinet and Attorney-General’s Department, Commonwealth, above n 214; Native Title Amendment Bill 1995 (Cth).
258 Department of the Prime Minister and Cabinet and Attorney-General’s Department, Commonwealth, above n 214, 4; Aboriginal and Torres Strait Islander Social Justice Commissioner, Native Title Report: July 1994–June 1995, above n 219, 91.
259 Aboriginal and Torres Strait Islander Social Justice Commissioner, Native Title Report: July 1994–June 1995, above n 219, 188–91; Richie Howitt, ‘The Other Side of the Table: Corporate Culture and Negotiating with Resource Companies’ (Regional Agreements Paper No 3, Australian Institute of Aboriginal and Torres Strait Islander Affairs, 1997).
261 Ibid.
These gradual changes, however, were lost in the fog of the new battle that arose in response to the High Court decision in *Wik*.262


‘Certainty’ and ‘workability’ had become the touchstones of the native title debate for those promoting amendment to the *NTA*. On the other hand, ‘coexistence’ and recognition of their unique relationship with land were the guiding principles for indigenous people.264

The Howard government was elected in March 1996. The Coalition’s policy was to retain the *NTA* but to amend it ‘to ensure workability’,265 to respect the *RDA* and to consult widely.266 By May 1996, the new government had produced an outline of proposed amendments which were much more far-reaching than the 1995 proposals.267 Apart from the necessary procedural amendments, there were proposals to raise the threshold test for registration; to allow governments to alter and expand the conditions of pastoral lease holders; to exclude exploration from the right to negotiate; to shorten the time allowed for negotiation; to remove renewals of pre-1994 mining leases from the right to negotiate; to impose statutory obligations on Native Title Representative Bodies,268 while expanding their role; and to amend the agreement-making provisions.269 The Council for Aboriginal Reconciliation brought indigenous and resource industry negotiators together in an attempt to present a united position to government.270 Despite these efforts, industry and indigenous negotiators took different positions on the proposals.271 According to Farley, these talks failed over the issue of whether groups and individuals could lodge applications and make agreements without the involvement of the Representative Bodies.272 The Bill became bogged down but the issue of native title and amendments to the Act was reignited by the High Court’s *Wik* decision on 23 December 1996.273

*Wik* involved the grant of a number of pastoral leases in Far North Queensland between 1910 and 1974. The central issue was whether or not these grants

264 National Indigenous Working Group on Native Title, above n 132.
266 Ibid.
267 Department of the Prime Minister and Cabinet, Commonwealth, *Towards a More Workable Native Title Act*, above n 227.
268 The Native Title Representative Bodies are those bodies corporate recognised under pt 11 of the *NTA* as representing the interests of native title holders in a defined region.
269 Department of the Prime Minister and Cabinet, Commonwealth, *Towards a More Workable Native Title Act*, above n 227.
271 ‘Native Title Stakeholders Meeting: Outcome on Agreements’ (16 June 1996) (copy on file with author).
extinguished native title. The issue of the relationship between native title and pastoral leases had been central in much of the discourse about native title. It was a key element for indigenous negotiators in finally reaching agreement with the Commonwealth government on validation in 1993.\textsuperscript{274} In spite of assertions to the contrary,\textsuperscript{275} the possibility of native title surviving the grant of a pastoral lease had been discussed widely\textsuperscript{276} and the High Court had considered the proposition arguable.\textsuperscript{277} It is now well known that the Court held by a majority of four to three that native title was not necessarily extinguished by the grant of a pastoral lease. This was decided on the basis that a pastoral lease was a specific statutory interest, and the interpretation of the statute and the grant indicated that it did not grant exclusive possession to the pastoralist and certainly not possession to the exclusion of indigenous people.\textsuperscript{278} Pastoral leases were valid grants of interests and the grantee could exercise the rights granted but, at the same time, the native title holders could continue to exercise their native title rights. If there was a conflict, the rights of native title holders would yield to the rights of the pastoralist.\textsuperscript{279}

The decision was significant for a number of reasons, but two stood out.\textsuperscript{280} The possibility of native title existing across vast areas of Australia was now a reality for many indigenous people\textsuperscript{281} and, if native title existed, then the future act provisions of the Act might be triggered.\textsuperscript{282} This raised the possibility of invalidity of resource tenements and other rights granted or created on any pastoral lease since the Act came into effect. Also, the rights, duties and obligations of pastoral lessees under their grants became an issue of critical importance.

The press headlines at the time tell the story of political and industry responses to \textit{Wik}.\textsuperscript{283} Indigenous people responded by emphasising the shared aspects of

\textsuperscript{274} O'Donoghue, above n 156.
\textsuperscript{275} NTA preamble; Commonwealth, \textit{Parliamentary Debates}, House of Representatives, 16 November 1993, 2880 (Paul Keating, Prime Minister).
\textsuperscript{276} Reynolds, ‘Native Title and Pastoral Leases’, above n 113; Frank Brennan, ‘Pastoral Leases, \textit{Mabo} and the \textit{Native Title Act} 1993’ (Issues Paper No 1, Native Title Research Unit, Australian Institute of Aboriginal and Torres Strait Islander Studies, 1994), and Justice Robert French, ‘Pastoral Leases, Reservations and Native Title’ (Issues Paper No 1, Native Title Research Unit, Australian Institute of Aboriginal and Torres Strait Islander Studies, 1994); Henry Reynolds and James Dalziel, ‘Aborigines and Pastoral Leases: Imperial and Colonial Policy 1826–1855’ (1996) 19 University of New South Wales Law Journal 315.
\textsuperscript{277} North Ganalanja Aboriginal Corporation v Queensland (1996) 185 CLR 595.
\textsuperscript{278} Wik (1996) 187 CLR 1, 121–2 (Toohey J).
\textsuperscript{279} Ibid 132–3 (Toohey J). The factual issues about the precise detail of the laws and customs of the group claiming native title and the extent of the rights of each party were referred back to the Federal Court for determination. The lack of clarity raised the possibility that native title was ‘suspended’ in this instance. This became a focus of much debate.
\textsuperscript{281} Pastoral leases covered 38 per cent of the land in Western Australia, 42 per cent in South Australia, 41 per cent in New South Wales, 54 per cent in Queensland and 51 per cent in the Northern Territory: Bartlett, ‘Native Title in Australia’, above n 43, 273.
\textsuperscript{282} NTA s 233.
land use as a result of the decision, and the idea of coexistence became the theme for their response to the decision.284 The significant political response was that the Commonwealth government framed both its previous and newly-proposed amendments as a response to *Wik*, claiming that the decision necessitated wide-ranging changes to the Act, while also in a technical sense claiming that it was implementing the decision. This was the Ten Point Plan.

Delivering what was described as ‘bucket loads of extinguishment’,285 the plan included a number of elements. Grants made after the *NTA* came into effect but before the 1996 *Wik* decision would be validated in a similar manner to ‘past acts’ in the original Act.286 No account was taken of the various governments’ disregard for the Act during the period and indigenous groups argued that there should at least be rights to negotiate before the validation of some grants.287 Whereas the ‘past act’ validation was ultimately agreed to by indigenous groups in 1993, there was no such agreement here.288 There would be legislative extinguishment under the Act by grants (including historical grants) that purported to give ‘exclusive possession’.289 Major changes to the future acts regime would allow many activities previously subject to the regime to be lawfully done. These included grants of freehold to third parties,290 certain mining activity,291 the expansion of permitted activities on pastoral leases292 and limiting native title holders to procedural rights of notice but not rights to negotiate in relation to a range of activities or on particular types of land.293 A sunset clause on applications was proposed.294 There was also a proposal to allow states and territories to establish their own future act regimes which would allow them to opt out of the right to negotiate.295 Justification for these changes was said to be


285 Ibid 36. This phrase was also used by the then Deputy Prime Minister Tim Fisher to describe the effect of the plan: ABC Television, ‘Interview with Tim Fisher by John Highfield on Native Title Act Amendments’, *World at Noon*, 4 September 1997, 1.

286 These were called ‘intermediate period acts’: *NTA* div 2A.

287 National Indigenous Working Group on Native Title, above n 132. The government’s position was that it was not unreasonable to assume that native title was extinguished: Nick Minchin, *Fairness and Balance: The Howard Government’s Response to the High Court’s Wik Decision* (1998) 11.


289 By confirmation of ‘previous exclusive possession acts’: *NTA* div 2B.


292 Ibid 15.

293 For example, pastoral leases: see Bartlett, *Native Title in Australia*, above n 43, 58.

294 This provision was deleted before the final amending Act was passed.

295 Apart from the South Australian regime established under the original Act, there are no state or territory schemes: see above n 238.
the backlog of resources applications that were documented in the government’s briefing material. It was clear that the balance of interests had shifted.

Most of the amendments were strongly opposed by indigenous people on the basis that they amounted to a significant diminution of the rights recognised at common law and either protected or extended by the original NTA in 1993. Apart from some of the procedural amendments, there was support for the proposal to enhance agreement-making possibilities by amending s 21, ultimately appearing in the amended Act as Indigenous Land Use Agreements (‘ILUAs’).

The Native Title Amendment Bill 1997 (Cth) incorporating the Ten Point Plan was introduced into Parliament on 4 September 1997. The Senate made 217 amendments to the Bill, about half of which were accepted by the House of Representatives. The contentious areas of the Bill related to the changes to the right to negotiate, the future act provisions and the threshold test for registration. The Bill was reintroduced into the House of Representatives with the agreed amendments in March 1998 and covered 346 pages. Ultimately, the Bill was passed on 8 July 1998 with the support of independent Senator Brian Harradine, who obtained some minor concessions in relation to the Bill. The Act came into effect on 30 September 1998.

The overall effect of the amendments was to significantly diminish the area of land and water over which native title might exist and the areas of land or water and the types of activities over which indigenous people have meaningful rights in relation to future uses. The effect of the changes, which provide only for procedural rights and notice, have been of little consequence, with the courts unwilling to provide injunctive or other relief in the event of breaches of those procedural requirements.

The Aboriginal and Torres Strait Islander Social Justice Commissioner argued that rather than building on the principle of shared land use and coexistence underpinning the Wik decision, the amendments not
only amounted to a lost opportunity but were also ‘destructive of the most valuable resource … trust’. \textsuperscript{306} Indigenous people made it clear that they rejected the amendments and that they were not consulted nor did they consent to the Act. \textsuperscript{307} It was clear that native title was a subordinate right. \textsuperscript{308} This appeared to conflict with the requirement of non-discrimination and the goal of substantive equality, \textsuperscript{309} a result described by Bartlett as the ‘specific disapplication of the protection of the Racial Discrimination Act’.\textsuperscript{310}

VI ‘Remnant Lands, Remnant Rights’\textsuperscript{311}: The Recent High Court Decisions

The most recent piece in the jigsaw of native title has been a trilogy of High Court decisions which have had the effect of narrowing the scope of the rights recognised as native title and limiting the range of people who might successfully seek a determination that native title exists: \textsuperscript{312} \textit{Ward}, \textsuperscript{313} \textit{Wilson v Anderson},\textsuperscript{314} and \textit{Yorta Yorta}.\textsuperscript{315} In these decisions, the Court has focused narrowly on the provisions of the \textit{NTA} almost to the exclusion of the common law. This has elevated the Act to a previously unimagined status. In taking this approach, the Court has, as Pearson says, ‘disavowed native title as a doctrine or body of law within the common law’.\textsuperscript{316} The corollary has been that the common law has

\begin{itemize}
  \item \textsuperscript{306} Aboriginal and Torres Strait Islander Social Justice Commissioner, \textit{Native Title Report 1998}, above n 263, 9.
  \item \textsuperscript{307} Aboriginal and Torres Strait Islander Social Justice Commissioner, \textit{Native Title Report: July 1996–June 1997}, above n 284, 7.
  \item \textsuperscript{308} Ibid.
  \item \textsuperscript{309} Ibid.
  \item \textsuperscript{310} Bartlett, ‘Native Title in Australia’, above n 43, 53 (emphasis in original). Bartlett also raises the possibility that the amended Act is unconstitutional because it can no longer claim the status of a ‘special law’ under the race power or a special measure under the \textit{RDA}; at 69–70. See also Gillian Triggs, ‘Australia’s Indigenous Peoples and International Law: Validity of the \textit{Native Title Amendment Act 1998} (Cth)’ (1999) 23 \textit{Melbourne University Law Review} 372; Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund, Parliament of Australia, Sixteenth Report: Consistency of the \textit{Native Title Amendment Act 1998} with Australia’s International Obligations under the Convention on the Elimination of All Forms of Racial Discrimination (2000).
  \item \textsuperscript{311} Pearson argues that this is all native title has been about but it is an especially apt description of the current state of indigenous native title rights since the decisions of the High Court in \textit{Ward}, \textit{Wilson v Anderson} and \textit{Yorta Yorta}: Noel Pearson, ‘Where We’ve Come from and where We’re at with the Opportunity That Is Koiki Mabo’s Legacy to Australia’ (Speech delivered at the Native Title Representative Bodies Conference, Mabo Lecture, Alice Springs, 3 June 2003) <http://www.capeyorkpartnerships.com/noelpearson/np-mabo-lecture-3-6-03.doc> 3–4.
  \item \textsuperscript{313} (2002) 191 ALR 1.
  \item \textsuperscript{314} (2002) 190 ALR 313.
  \item \textsuperscript{315} (2002) 194 ALR 538.
  \item \textsuperscript{316} Pearson, ‘Where We’ve Come from and where We’re at’, above n 311, 13. See also Reilly, above n 115, [34].
\end{itemize}
been relegated to a position of insignificance. The combination of this approach by the Court and the provisions of the Act has diminished rights of native title claimants and holders, and has turned native title into little more than a barren statutory right. Through this process, the Act has assumed a force and effect that may never have been envisaged. Arguably, such an approach is inconsistent with the original intent of the Act expressed in both the second reading speech and the Act’s Preamble, which both indicate the purposes of the Act as overcoming past injustices and implementing the Mabo decision. McHugh J in Yarmirr made the point that during the parliamentary debates ‘more than once, [Senator Gareth Evans] made statements in the Senate to the effect that native title for the purpose of the Act was to be determined by the courts in accordance with the principles laid down in Mabo [No 2].’

Two forerunners of the recent trilogy must first be remembered. Wik represented the high point of the common law, with the decision promoting the idea of coexistence of rights while also reinforcing the superiority of granted rights over native title rights. The 1998 Fejo case was unremarkable in that it dealt primarily with two narrowly defined issues and unanimously found that native title was extinguished by the grant of a freehold estate to a third party and that,

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317 Reilly suggests in a detailed analysis of Ward from the first instance hearing through to the appeal to the High Court decision that the case ‘exemplifies how the potential of native title has been restricted’: Reilly, above n 115, esp [5].

318 Commonwealth, Parliamentary Debates, House of Representatives, 16 November 1993, 2880 (Paul Keating, Prime Minister).

319 (2001) 208 CLR 1. McHugh J also stated (at 77) (citations omitted):

As this Court pointed out in Western Australia v Commonwealth the effect of s 11(1) is to remove the vulnerability of native title to defeasance at common law by providing a prima facie sterilisation of all acts which would otherwise defeat native title. The corollary of that proposition is that the Act alone governs the recognition, protection, extinguishment and impairment of native title.

Pearson argues that this is his understanding of what was meant by s 223(1) during the negotiations about the Act: Noel Pearson, ‘The High Court’s Abandonment of “The Time-Honoured Methodology of the Common Law” in its Interpretation of Native Title in Mirriuwung Gajerrong and Yorta Yorta’ (Speech delivered at the Sir Ninian Stephen Annual Lecture, University of Newcastle, 17 March 2003) <http://www.capeyorkpartnerships.com/noelpearson/lecture.doc> 13.


321 (1996) 187 CLR 1, 132–3 (Toohey J). Pearson makes the point that from Mabo on, there has never been any doubt about the superiority of granted titles over native title and that ‘native title could never result in anyone losing any rights they held in land or in respect of land’: Pearson, ‘Where We’ve Come from and where We’re at’, above n 311, 3.

322 (1998) 195 CLR 96. These issues were whether the grant of a freehold estate to a third party extinguished native title and the idea of suspension or revival of native title.

323 Ibid 126 (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ), 150–1 (Kirby J).
once extinguished, native title could not revive.\textsuperscript{324} The Court indicated that the Act ‘provides for the establishment of native title’\textsuperscript{325} and that native title was an ‘inherently fragile’ right.\textsuperscript{326} At the time, the former point passed unnoticed but with the benefit of hindsight can be seen as a portent. The latter point (and the approach to revival and historic extinguishment) was the subject of criticism,\textsuperscript{327} while the extent of the vulnerability of the right has only become clear in the recent trilogy of High Court decisions.\textsuperscript{328}

A Western Australia v Ward\textsuperscript{329}

In \textit{Yarmirr}, the Court indicated that while the Act should be the starting point for any inquiry,\textsuperscript{330} it may be seen ‘as supplementing the rights and interests of native title holders under the common law of Australia’.\textsuperscript{331} A little over a year later, the Court turned this approach on its head with the majority in \textit{Ward} saying:

No doubt account may be taken of what was decided and what was said in \textit{[Mabo]} when considering the meaning and effect of the \textit{NTA}. This especially is so when it is recognised that paras (a) and (b) of s 223(1) plainly are based on what was said by Brennan J in \textit{Mabo (No 2)}. It is, however, of the very first importance to recognise two critical points: that s 11(1) of the \textit{NTA} provides that native title is not able to be extinguished contrary to the \textit{NTA} and that the claims that gave rise to the present appeals are claims made under the \textit{NTA} for rights that are defined in that statute.\textsuperscript{332}

The point was more explicitly made by the majority when speaking of the effect of ss 23B and 23F (‘previous exclusive possession acts’ and ‘previous non-exclusive possession acts’) in the amended \textit{NTA}: ‘Yet again it must be

\textsuperscript{324} Ibid 126–7 (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ), 154–5 (Kirby J).
\textsuperscript{325} Ibid 120 (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).
\textsuperscript{326} Ibid 152 (Kirby J).
\textsuperscript{327} Lisa Strelein, ‘Extinguishment and the Nature of Native Title: Fejo v The Northern Territory’ (Issues Paper No 27, Native Title Research Unit, Australian Institute of Aboriginal and Torres Strait Islander Studies, 1999) 1.
\textsuperscript{330} Justice Robert French, ‘\textit{Western Australia v Ward}: Devils and Angels in the Detail’ (Paper presented at the Native Title Conference 2002: Outcomes and Possibilities, Geraldton, 4 September 2002).
\textsuperscript{331} (2001) 208 CLR 1, 39 (Gleeson CJ, Gaudron, Gummow and Hayne JJ).
\textsuperscript{332} Ibid 35 (Gleeson CJ, Gaudron, Gummow and Hayne JJ).
emphasised that it is to the terms of the NTA that primary regard must be had, and not the decisions in Mabo [No 2] or Wik. The only present relevance of those decisions is for whatever light they cast on the NTA. These provisions were central to the Court’s disposition of the extinguishment question and consideration of common law aspects of extinguishment were relegated to a subsidiary status. The majority asserted the dominance of the Act by using various provisions to inform the Court’s reasoning on questions relating to the nature of the title and extinguishment not directly covered by the Act. In particular, the Court pointed to references in the Act to aspects of the title that supported the view that native title was a bundle of rights and not a title to the land itself (and therefore could be partially extinguished).

Interpreting the specific provisions and the general intent of the Act in this way gave full force and effect to the extinguishing and diminishing effects of the Native Title Amendment Act 1998 (Cth), perhaps even beyond the expectations of those who had sought significant legislative regulation and extinguishment of native title.

The twofold impact of Ward on native title was not just the narrow application and use of the statutory provisions, but also the impact of the Court’s reasoning on extinguishment issues generally. The relevant principles included that native title might be partially extinguished, a preference for the inconsistency test over the requirement for a clear and plain intention and, as Bartlett suggests, the presumption against extinguishment. The application of the principles produced extinguishment, entirely or in part, in a significantly wider range of circumstances.

Wherever any rights were created in third parties,


334 These provisions were also central to the Court’s decision in Wilson v Anderson (2002) 190 ALR 313.

335 Ward (2002) 191 ALR 1, 35–7 (Gleeson CJ, Gaudron, Gummow and Hayne JJ); Reilly, above n 115, [31]. Although this issue occupied considerable space in the judgments of the Full Federal Court, the issue was dealt with by the High Court in 10 short paragraphs (namely [73]–[82]): Ward (2002) 191 ALR 1, 34–7. The minority judgment, which dealt primarily with these issues, was dismissed in one paragraph on a question of the meaning of ‘inconsistency’. Interestingly, the majority did not conversely use the existence of references in the Act to suspension (in s 23G) to support the notion that suspension of native title rights might be possible. For a discussion of the bundle of rights/title to land issue, see Lane, above n 65, 20–2; Barnett, above n 98.

336 See above Part V.


339 Ibid 35–6 (Gleeson CJ, Gaudron, Gummow and Hayne JJ), 175–6 (Callinan J).


342 For example, by non-exclusive pastoral leases: Ward (2002) 191 ALR 1, 68, 122 (Gleeson CJ, Gaudron, Gummow and Hayne JJ).
including rights in the general public, the native title right to control access or use of land was said to be extinguished.343 By the application of the ‘inconsistency of incidents’ test,344 it is possible that most if not all surviving native title rights might also be extinguished. The application of this test in all situations, including in relation to Crown reservations, was at odds with Brennan J’s view in Mabo that use of land rather than its reservation for a purpose will cause extinguishment,345 thus unexpectedly extinguishing some native title rights.346 Further, unexpected and complete extinguishment was held to occur as a result of vesting of Crown reserves, in particular nature reserves and national parks.347

The majority found that native title was not entirely extinguished by Western Australian pastoral leases as these did not amount to grants of exclusive possession.348 However, the right to control access to, or activities on, the land was extinguished. Whether other native title rights might also be extinguished depended upon the application of the inconsistency of incidents test.349 Similarly, mining leases were held not to extinguish all native title as they were grants of exclusive possession for the purpose of mining,350 but they did extinguish rights to control access and activities on the land.351 Again, whether other native title rights might also be extinguished depended upon the application of the inconsistency of incidents test.352

B Wilson v Anderson

The combined effect of the amended Act and the change in approach by the Court was also evident in Wilson v Anderson,353 a decision handed down on the same day as Ward. The case considered whether leases for grazing purposes in the Western Lands Division in New South Wales extinguished all or any native title. The case required consideration of the applicability of the Wik decision to these New South Wales leases in the post-Native Title Amendment Act 1998 (Cth) environment. In three separate judgments, a majority (Kirby J dissenting)354 held that the leases granted exclusive possession, and therefore native

343 Ibid 74–5 (Gleeson CJ, Gaudron, Gummow and Hayne JJ).
344 Ibid 37 (Gleeson CJ, Gaudron, Gummow and Hayne JJ); Kirby J reaffirmed this view, which he had previously expressed in Wik: at 164–5; Callinan J accepted this as the test although his Honour suggested that use of land might extinguish in some situations: at 175–9.
345 (1992) 175 CLR 1, 68.
347 This was said to create a fee simple in the nature of a public trust, which thus extinguished all native title: ibid 77–9 (Gleeson CJ, Gaudron, Gummow and Hayne JJ).
348 Ibid 68–9, 121 (Gleeson CJ, Gaudron, Gummow and Hayne JJ).
349 Ibid 68–9 (Gleeson CJ, Gaudron, Gummow and Hayne JJ).
350 Ibid 94, 97, 105 (Gleeson CJ, Gaudron, Gummow and Hayne JJ).
351 Ibid 97–8, 105 (Gleeson CJ, Gaudron, Gummow and Hayne JJ).
352 Ibid 55, 97, 105 (Gleeson CJ, Gaudron, Gummow and Hayne JJ).
354 Kirby J found that there was no exclusive possession. Perhaps more significantly, Kirby J suggested that Wik should be adhered to:

This Court should be slow to reverse the steps, taken by Mabo [No 2] and Wik, in the recognition of the native title rights of Aboriginal peoples. Particularly so, because no party in this case sought to reargue the correctness of either of those decisions. Especially so, because the Federal Parliament accepted the holdings in those cases, adopted and amended the NTA ac-
title was extinguished by operation of s 23B of the \textit{NTA}. First, the majority judgments distinguished \textit{Wik} in various ways in finding that the perpetual lease granted exclusive possession rights, and therefore found that the lease fell within the definition of a ‘previous exclusive possession act’ in s 23B of the Act.\textsuperscript{355} As a result of the operation of that provision, all native title was extinguished.\textsuperscript{356} The Western Lands Division leases covered approximately 40 per cent of the land in New South Wales and, as a result of the decision, that land is no longer subject to the future act provisions of the Act, and some agreements over the land may be reviewed.\textsuperscript{357}

\textbf{C Yorta Yorta v Victoria}

The approach of the majority in \textit{Yorta Yorta}\textsuperscript{358} similarly focused on the \textit{NTA} as determinative, particularly s 223, and found no place for the common law. Pearson suggests that, in giving meaning to s 223(1) of the Act, the Court had a choice of either seeing it as the embodiment of the common law or ‘as somehow altering or replacing the meaning of native title under the common law of Australia’.\textsuperscript{359} The Court chose the latter approach, indicating, in perhaps its only criticism of the decision at first instance, that ‘it may be that undue emphasis was given in the reasons to what was said in \textit{Mabo [No 2]}, at the expense of recognising the principal, indeed determinative, place that should be given to the \textit{Native Title Act}.’\textsuperscript{360}

In construing s 223(1), the judgments make almost no mention of \textit{Mabo} or of the body of common law that underpinned it.\textsuperscript{361} Rather, the judges sought to give

\begin{itemize}
  \item \textsuperscript{355} \textit{Wilson v Anderson} (2002) 190 ALR 313, 355–6.
  \item \textsuperscript{356} \textit{NTA} s 23F; \textit{Native Title (New South Wales Act) 1994} (NSW) s 20. Interestingly, in \textit{Ward} the Court found that the pastoral leases under consideration in that case did not grant exclusive possession rights: (2002) 191 ALR 1, 68–9, 121 (Gleeson CJ, Gaudron, Gummow and Hayne JJ). See Hiley, ‘Pastoral and Grazing Leases and Native Title’, above n 341, 271–5.
  \item \textsuperscript{357} Young, above n 341, 223–4. This also follows from the decisions in \textit{Ward} and \textit{Yorta Yorta} and would apply in circumstances where consent determinations or agreements have been made in relation to native title rights which, as a result of the principles enunciated in these decisions, may not exist, having been extinguished or otherwise lost.
  \item \textsuperscript{358} (2002) 194 ALR 538.
  \item \textsuperscript{359} Pearson, ‘The High Court’s Abandonment of “The Time-Honoured Methodology of the Common Law”’, above n 319, 9.
  \item \textsuperscript{360} \textit{Yorta Yorta} (2002) 194 ALR 538, 558 (Gleeson CJ, Gummow and Hayne JJ). This issue of ‘choice’ in the context of the decision in \textit{Ward} was considered at length in Reilly, above n 115, [38]–[80].
  \item \textsuperscript{361} Pearson, ‘Where We’ve Come from and where We’re at’, above n 311, 13. Note in particular that the Court appears to have discarded any reference to, or reliance upon, common law principles emanating from outside Australia, notwithstanding that these principles played a significant part in the majority \textit{Mabo} judgments: Reilly, above n 115, [67]–[80]; Pearson, ‘The High Court’s Abandonment of “The Time-Honoured Methodology of the Common Law”’, above n 319, 19–22.
\end{itemize}
meaning to concepts of tradition, connection and currently observed laws and custom as legislative concepts. In so doing, the joint judgment imposed requirements of proof and continuity that harked back to the reasoning in *Milirrpum*,362 essentially requiring evidence of a society and a system of law cognisable to the settler system.363 The Court interpreted s 223(1) as requiring that laws and customs currently acknowledged and observed must arise out of and define a particular society364 and derive from a ‘body of norms’ or ‘normative system of law’365 that has a continuous existence and vitality since sovereignty.366 This requirement appears to be at odds with the approach in *Mabo*, where it was suggested that these issues should not be viewed from the perspective of the settler law.367 However, the Court concluded that native title did not exist because the society or community claiming it was not the same society with the same or similar rules as existed at the time sovereignty was acquired and which had continued to exist since that time.368 This, the Court said, was the consequence of the application of these statutory provisions.369

The second key element of the decision was the finding of fact by Olney J that by 1881 the Yorta Yorta community had ceased to acknowledge its traditional laws and customs.370 Although the methodology of the judge in reaching this view by relying on particular written histories had been criticised,371 the joint judgment concluded that the assessment of such matters ‘was quintessentially a matter for the primary judge’.372 This dubious assessment and the methodology applied were thus allowed to stand.

362 (1971) 17 FLR 141.
368 For critical analysis of this decision and its consequences in terms of difficulty in establishing native title, see Castan and Kee, above n 333, 85–7; Pearson, ‘Where We’ve Come from and where We’re at’, above n 311 and Pearson, ‘The High Court’s Abandonment of “The Time-Honoured Methodology of the Common Law”’, above n 319; Richard Bartlett, ‘An Obsession with Traditional Laws and Customs Creates Difficulty Establishing Native Title Claims in the South: *Yorta Yorta*’ (2003) 31 University of Western Australia Law Review 35.
369 It is not clear whether the application of the common law would have produced a different result.
Whether the result would have been different even if this strict statutory approach had not been taken is uncertain. At least some commentators consider that it would not. Basten, for example, suggests that the decision was in accordance with principle, while Waters suggests that ‘much of what is said echoes and clarifies propositions that originate in Mabo’. It may be that the problems associated with the evidence and findings of fact would have been fatal in any event. Nevertheless, the combination of the strict statutory approach, the Court’s failure to criticise the methodology and its reliance upon the finding to support the view that the society bound by normative rules had not survived and was different from the contemporary society, suggest that it will be difficult for many groups to satisfy the requirements of continuity now seemingly required by the Court.

D Native Title after the Trilogy

That native title is a vulnerable right was soundly reinforced in these cases, particularly in Ward. By providing that native title rights can be extinguished one by one, together with the view that certain Crown reservations and vestings extinguish native title completely, the decision has overturned some views about extinguishment deriving from Mabo, with the result that native title will now not exist at all or, at best, only minimal native title rights will now exist on much Crown land. It is true that the decision in relation to the non-extinguishing aspects of pastoral leases and mining leases potentially preserves some native title rights over these leases. However, the combined effect of the three recent cases is to dramatically reduce the numbers of indigenous people who will be able to successfully claim native title either because native title has been extinguished over land or because of the difficulties of proving the necessary elements said to be required under s 223 of the Act. Given the requirement for the listing of native title rights in determinations, it is now possible that some consent (and possibly contested) determinations will be revisited, and the rights enunciated in the determinations or the area of land over which the determinations have been made will be diminished. In relation to the future act regime, the various rights flowing to native title holders will also be correspondingly diminished because the regime will not apply to some areas of land and, where it

374 John Waters, ‘Members of the Yorta Yorta Community v Victoria’ (2003) 6 Native Title News 6, 10.
376 This difficulty may not be restricted to groups in settled areas where there has been considerable movement and dislocation: see De Rose v South Australia [2002] FCA 1342 (Unreported, O’Loughlin J, 1 November 2002).
377 The consequence of its finding that the title is a ‘bundle of rights’: Ward (2002) 191 ALR 1, 35–37 (Gleeson CJ, Gaudron, Gummow and Hayne JJ).
379 (1992) 175 CLR 1, 69–70 (Brennan J).
380 NTA s 228.
does apply, the requirement to notify, consult or negotiate will be diminished as the range of rights affected by proposed acts is limited.

In the end, as Pearson says, in interpreting the Act, the Court discarded the spirit of Mabo and Wik and the intent of the Parliament in 1993, and produced decisions that failed to take account of the fundamental principle of prior indigenous occupation of the land. Thus, native title might now be aptly described as remnant lands and remnant rights.

VII  A NOTHER STORY: AGREEMENT-MAKING

The story told so far is of native title as a legal artefact and a political battlefield; of a right that has been slowly diminished; a hope disillusioned; an opportunity lost. There is, however, another story — of negotiation, of agreement-making, of changed approaches, of activity beyond the strict requirements of native title law. This story is one of gradual change from the rigid attitudes and approaches that characterised relationships before 1992. This change was evident prior to the period when the Act was amended and has continued since.

The change in attitude and culture should not be overstated: it did not manifest itself during the debate on the 1998 amendments to the Act in which state governments and the resource industry sought to wind back the beneficial elements of the Act. However, over the post-native title period there has been a gradual change in approach and an embracing of agreement-making — a stark contrast, particularly in jurisdictions such as Western Australia, to the pre-native title era.

An emerging culture of agreement-making may not be all it seems. Agreements may not be negotiated in environments of equal bargaining power and resources. Agreements may fail to deliver promised benefits because of a lack

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382 Commonwealth, Parliamentary Debates, House of Representatives, 16 November 1993, 2883 (Paul Keating, Prime Minister).
of resources or a failure to address implementation issues, or because the terms have been poorly negotiated. However, a changed approach to accommodating indigenous interests is discernible and it is this change that may provide a path for the future.

Tracking this change is challenging, as there is no central recording of agreements and the existence or content of many agreements is confidential. The precise number of agreements being negotiated has always been difficult to quantify. Agreements cover every part of the country and a wide variety of

I must say that I do not share the optimism that has been voiced at this conference, and in many other forums — including by parliamentary committees, that agreement making processes under the Native Title Act offer a de facto treaty making process. This is too simplistic and fundamentally ignores the point that the native title system as structured is one that is not based on equality and non-discrimination. It does not facilitate the full and effective participation of indigenous people. It is not a respectful system. Only when the native title system does provide real equality of opportunity — ranging from adequate, and equitable, resourcing of native title representatives through to the ability to negotiate over economic and development opportunities through to processes which facilitate indigenous governance rather than imposed management structures — can it aim to fulfill this broader role.

385 Ciaran O’Faircheallaigh, ‘Implementing Agreements between Indigenous Peoples and Resource Developers in Australia and Canada’ (Research Paper No 13, School of Politics and Public Policy, Griffith University, 2003); Ciaran O’Faircheallaigh, ‘Negotiating a Better Deal for Indigenous Land Owners: Combining “Research” and “Community Service”’ (Research Paper No 11, School of Politics and Public Policy, Griffith University, 2003).


387 The Agreements, Treaties and Negotiated Settlements project has a database including a wide range of agreements, which gives a sense of the breadth and scope of agreements, but is not and cannot be quantitatively exhaustive: see Agreements, Treaties and Negotiated Settlements Database <http://www.atns.net.au/database.html>.

388 At least 30 agreements were the subject of press releases between March 1997 and September 1998: Aboriginal and Torres Strait Islander Commission, Media Reports of Land Use Agreements in 1997 and 1998 <http://www.atsic.gov.au/programs/Social_and_Cultural/Native_Title/native_title_agreement_summaries.asp>. There may well have been many other small-scale or local agreements that were not the subject of publicity during this period. National Native Title Tribunal, Annual Report 1999–2000 (2000) indicates that for the period 1 July 1999–30 June 2000, 14 ILUAs were lodged as compared with an anticipated 50. This was explained by the fact that there was uncertainty in the registration process for ILUAs: at 72. The report also indicates that the Tribunal was directly involved in 260 negotiations that led to determinations by consent: at 85. The Tribunal was involved in 285 budgeted agreement negotiations in the year 2001–02: Aboriginal and Torres Strait Islander Commission, Performance Information and Level of Achievement 2001–2002 <http://www.mnt.gov.au/about/perf_tables.html>. There are no comparable figures available for 1998–99. National Native Title Tribunal, Annual Report 2001–2002 (2002) details the scale of agreement making: in 2001–02, 40 ILUAs were lodged for registration (at 48), 96 claimant, non-claimant and compensation agreements were negotiated with Tribunal assistance (at 55). At 1 August 2003, 84 ILUAs were registered nationally: National Native Title Tribunal <http://www.mnt.gov.au/ilua/browse_ilua.html>. These figures do not take account of agreements made outside the native title process or not resulting in ILUAs. Indeed, many agreements are now being made even where no native title exists: Marcia Langton and Lisa Palmer, ‘Modern Agreement Making and Indigenous People in Australia: Issues and Trends’ (2003) 8(2) Australian Indigenous Law Reporter (forthcoming). Indigenous heritage protection legislation of the various states, territories and the Commonwealth still operates regardless of the existence of native title and this will continue to operate as a lever for negotiations. It should also be noted that it is not possible to say that this change would not have occurred without Mabo and the protection given to native title by the RDA and the future act provisions of the NTA.
What does emerge from a review of these agreements is that there was initially a reluctance to engage in negotiation, and an adversarial and litigious approach predominated. The Century Zinc case is one example of this approach, while the Western Australian government’s insistence on negotiating heritage clearances through the native title procedure, rather than through a protocol agreement, is another. This approach appeared to gradually change, and negotiations and agreement-making became more common. However, agreement-making had also been occurring from the early stages of the post-Mabo period. Some well-known examples of agreements made across this period provide some insight into the process of engagement and change.

The Cape York Peninsula Heads of Agreement was negotiated between the Cape York Land Council, the Cattlemen’s Union and conservation groups in the region, and provides a framework for future resource decision-making. Indigenous groups agreed to exercise their rights in a manner that did ‘not interfere with the rights of pastoralists’ and the pastoralists agreed to ‘continuing rights of access for traditional owners to pastoral properties for traditional purposes.’ The agreement also dealt with regimes for identifying areas of high conservation value and the World Heritage listing of Cape York. This did not involve either an acknowledgment that native title existed or a surrender of native title interests. The agreement was reached outside of any formal native title negotiation procedures, although funds for a mediator were provided by the Council for Reconciliation.

The 1997 agreement involving Hamersley Iron (a subsidiary of RTZ-CRA Ltd, now Rio Tinto Ltd) and the Gumala Aboriginal Corporation allowed for the development of a $500 million iron ore deposit at the Yandicoogina mine in Western Australia. In return, the Gumala Aboriginal Corporation received compensation of $60 million and a range of other benefits and cultural and

389 Langton and Palmer, above n 388.
392 George Irving, ‘The Kimberley Region Native Title and Heritage Protection Memorandum of Understanding and the Native Title and Heritage Protection Model Agreement’ in Bryan Keon-Cohen (ed), Native Title in the New Millennium: A Selection of Papers from the Native Title Representative Bodies Legal Conference (2001) 163, 164.
393 This change is tracked in Tehan, ‘Customary Title, Heritage Protection, and Property Rights in Australia’, above n 390, 795–801. Again, the precise number is difficult to quantify. At least 30 agreements were the subject of press releases between March 1997 and September 1998: Aboriginal and Torres Strait Islander Commission, Media Reports of Land Use Agreements in 1997 and 1998 <http://www.atsic.gov.au/programs/Social_and_Cultural/Native_Title/native_title_agreement_summaries.asp>. There may well have been many other small-scale or local agreements that were not the subject of publicity.
394 Reprinted in (1996) 1 Australian Indigenous Law Reporter 446
395 Ibid 447.
396 Ibid.
environment protection mechanisms. Native title remained unaffected and claims were to proceed in the usual way.\textsuperscript{399} More recently, Hamersley Iron has reached agreement with the Eastern Guruma people covering mining and other matters over 7276 square kilometres of land in the Pilbara.\textsuperscript{400} There has also been a large-scale agreement covering the Burrup Peninsula in which there was a transfer of title and a lease-back of land, as well as financial agreements.\textsuperscript{401}

One of the most significant agreements is the \textit{Western Cape Communities Co-Existence Agreement}. Finalised in 2001, the agreement covers areas of land in and around Weipa on Cape York Peninsula, the site of a Comalco alumina mine.\textsuperscript{402} The parties to the agreement are Comalco, the Queensland government, the Cape York Land Council, traditional landowners and community representatives.\textsuperscript{403} The agreement is registered as an ILUA under the \textit{NTA}\textsuperscript{404} and covers land that is, or will be, the subject of native title as well as land over which native title does not exist. It also provides for some of the land, currently leased by Comalco, to be returned to indigenous people once it is no longer required for mining.\textsuperscript{405} The agreement acknowledges the traditional owners of land covered by the Weipa township, which will continue to be used for development.\textsuperscript{406} It provides for the transfer of other lands, including pastoral leases, to traditional owners.\textsuperscript{407} There is provision for payments starting at $4 million annually — including a contribution of $2.3 million from Comalco to communities and a further commitment of $500 000 annually from Comalco — to be expended on

\begin{itemize}
\item Transfer of title to more than 60 per cent of the Burrup Peninsula to the native title claimants which will be leased back to the State Government and jointly managed by the native title claimants and WA’s Department of Conservation and Land Management.
\item A sum of $500 000 for the development of a management plan for the reserve; $2.25 million over five years for the management of the reserve; and $8 million over five years for the construction of buildings and infrastructure, including a visitors’ centre and roads and tracks.
\item $200 000 over three years for the establishment and running of an employment service provider to facilitate employment and training opportunities for the Roebourne Aboriginal Community.
\item $75 000 over two years to the native title groups’ body corporate to provide education assistance to the Roebourne Aboriginal Community.
\item Preservation of some rock art on the industrial estates by prohibiting ground-disturbing activities in certain areas and consideration being given to seeking World Heritage listing of rock art galleries.
\end{itemize}


\textsuperscript{400} ‘Native Title in the News’ [2002] \textit{6 Native Title Newsletter} 7, 8.

\textsuperscript{401} See National Native Title Tribunal, \textit{Burrup Peninsula Native Title Agreement WA} <http://www.nntt.gov.au/media/Burrup.html>:

The benefits to flow from the agreement include:

\begin{itemize}
\item Transfer of title to more than 60 per cent of the Burrup Peninsula to the native title claimants which will be leased back to the State Government and jointly managed by the native title claimants and WA’s Department of Conservation and Land Management.
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\end{itemize}

\textsuperscript{402} For a brief overview of Comalco’s activities at Weipa, see Richard Howitt, ‘Developmentalism, Impact Assessment and Aborigines: Rethinking Regional Narratives at Weipa’ (Discussion Paper No 24, North Australia Research Unit, 1995).


\textsuperscript{404} Ibid. See also National Native Title Tribunal, \textit{Register of Indigenous Land Use Agreements} <http://www.nntt.gov.au/ilua/bynumber_index.html>.

\textsuperscript{405} Cape York Land Council and Comalco, above n 403.

\textsuperscript{406} Ibid.

\textsuperscript{407} Ibid.
training and education, and a government contribution of $1.5 million for community projects. The agreement also provides for heritage protection. The term of the agreement is around 50 years and includes obligations to allow further mining and development to proceed under protocols and a decision-making process specified in the agreement.

In South Australia, negotiations are continuing on a state-wide ILUA. Other agreements, such as a multi-party agreement to allow exploration to occur in the Cooper Basin, have been reached. In Victoria, there have also been agreements of different types and involving various governments

The Western Australian government has agreed to a number of consent determinations that native title exists. Four of these were agreed to by the Liberal government, the same government that passed the *Land (Titles and Traditional Usage) Act 1993* (WA). Some of these determinations were accompanied by agreements that established protocols for subsequent land use decisions. The first of these involved a group known as the Spinifex People. The area covered by the determination was a remote location in the Great Victoria Desert. There were no competing settler interests other than some mining interests. The group involved had not had contact with settlers until the 1950s and 1960s. The determination involved rights of exclusive possession over an area of approximately 45 000 square kilometres and non-exclusive rights over a further 7000 square kilometres. Agreement was reached not only about native title but also

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408 Ibid.
409 Parry Agius et al, ‘Negotiating Comprehensive Settlement of Native Title Issues: Building a New Scale of Justice in South Australia’ (Issues Paper No 20, vol 2, Native Title Research Unit, Australian Institute of Aboriginal and Torres Strait Islander Studies, 2002) 2.
412 *Karajarri People: Nangkiriny v Western Australia* (2002) 117 FCR 6; *Kiwirrkurra People: Brown v Western Australia* [2001] FCA 1462 (Unreported, French J, 19 October 2001); Martu and Ngurrara Peoples: *James v Western Australia* [2002] FCA 1208 (Unreported, French J, 27 September 2002); Nharnuwanga People: *Smith v Western Australia* (2000) 104 FCR 494; Spinifex People: *Anderson v Western Australia* [2000] FCA 1717 (Unreported, Black CJ, 28 November 2000); Tjurabalan People: *Ngalpil v Western Australia* [2001] FCA 1140 (Unreported, Carr J, 20 August 2001). Note the suggestion that some of these determinations might be revisited following the decision in *Ward* in which some previously held views about the survival of native title have been revised: see above n 357 and accompanying text.
414 *Anderson v Western Australia* [2000] FCA 1717 (Unreported, Black CJ, 28 November 2000).
415 Note that post-*Ward* there is a question whether this determination might be revisited because of the High Court’s findings in relation to partial extinguishment and extinguishment of the right to control access.
about the process or protocols for future decision-making over land use, particularly mining.416

The determination in *Smith v Western Australia*417 involved an area of land that had been the subject of intensive settler land use through the grant of pastoral leases and some mining activities. The rights were determined to be non-exclusive native title rights, which consisted of rights to hunt and fish, to be acknowledged as the traditional Aboriginal owners of the area as against any other Aboriginal group, to travel through the area and to visit and care for places of cultural and spiritual significance.418 The consenting parties were not only the Western Australian government but also 14 pastoralists over whose land the claim had been made. The consent determination also involved a further agreement under the ILUA provisions of the *NTA* covering future use (including mining activity) in the area.419

Agreements have been made that go beyond resolution of native title or resource issues. For example, the Western Australian government and the Aboriginal and Torres Strait Islander Commission have signed a Statement of Commitment to better distribute resources and to develop partnerships and regional agreements covering a wide range of activities.420

Agreement-making is not new: it was a feature of some of the earlier statutory land rights schemes. What is new are the parties that now engage in agreement-making, the process and willingness to negotiate, the numbers engaged and the scale and subject matter of agreements. Many agreements are made outside formal native title processes. However, the role of native title as an enforceable right in bringing about this change cannot be understated as a trigger to engagement and negotiation. Recognition by the common law and the *NTA* both extended rights and possibilities for engagement in decision-making over land, requiring new approaches and new relationships to be formed between indigenous people and settlers. The significant factor that can be discerned in the post-*Mabo* period is this change in approaches and relationships, however incomplete and complex.

To suggest that there has been a perceptible change in attitudes is not to deny that there have been significant difficulties both in the process of negotiating agreements, and in the substance of those agreements. Indeed, Pearson,421 Jonas,422 Ritter423 and O’Faircheallaigh,424 among others, have identified serious


*(2000) 104 FCR 494* (‘*Smith*’).

Ibid 502–3 (Madgwick J).


issues about the disparate bargaining power of parties, the unwillingness of some
parties and governments to enter into good faith negotiations and the significant
failure of some agreements to deliver benefits. The agreement in Smith referred
to above has been the subject of particular criticism. Nor does acceptance of
the proposition discount the real diminution in rights effected by the 1998
amendments or the problematic future act regime, which have generally reduced
indigenous participation in negotiations to one of process rather than substantive
agreement about access and use of resources. The effect of these processes in
the long term is yet to be gauged.

With the dilution of native title in its breadth of rights, its geographical spread
and application as a result of both the Native Title Amendment Act 1998 (Cth)
and the recent High Court decisions, the impetus to negotiate has been dimin-
ished and removed in some areas. Agreements made as risk-management tools to
take account of native title rights may not be so easily reached now that the
possibility of native title existing is so diminished. Yet the change that has
occurred over the last 10 years in the approach to negotiation between indige-
nous people and settler institutions is dramatic. This is not to say that events such
as ‘Noonkanbah’ will not occur, but it is less likely.

VIII Conclusion

What, then, has 10 years of the NTA produced? Can the clock be rewound to
the pre-Mabo era? Has the paradigm shift brought about by Mabo and the NTA
produced such change that turning the clock back is now impossible? Whatever
now happens will occur in this new and changed post-Ward and Yorta Yorta
environment, in which indigenous interests lack the expansive protection they
might once have had.

For some time, disquiet has been expressed about the capacity of the native
title scheme to meet the aspirations of indigenous people. In the wake of Yorta

424 O’Faircheallaigh, ‘Implementing Agreements between Indigenous Peoples and Resource
Developers’, above n 385; O’Faircheallaigh, ‘Negotiating a Better Deal for Indigenous Land
Owners,’ above n 385.

425 O’Faircheallaigh, ‘Implementing Agreements between Indigenous Peoples and Resource
Developers’, above n 385; O’Faircheallaigh, ‘Negotiating a Better Deal for Indigenous Land
Owners,’ above n 385. See also David Ritter, ‘So, What’s New? Native Title Representative
Bodies and Prescribed Bodies Corporate after Ward’ (2002) 21 Australian Mining and Petro-

426 See the Agreements, Treaties and Negotiated Settlements Database, above n 387.

427 The Hindmarsh Island Bridge case is a reminder of that: see Margaret Simons, The Meeting of
the Waters: The Hindmarsh Island Affair (2003).

428 For example, in Re Waanyi People’s Native Title Application (1995) 129 ALR 118, 166,
French J referred to the need for Parliament to address the ‘moral shortcomings’ of the native
title scheme. See also Kirby J in Wilson v Anderson (2002) 190 ALR 303, 345, who referred to
the land law scheme as an ‘impenetrable jungle’ and said:

That impenetrable jungle of legislation remains. But now it is overgrown by even denser foli-
age in the form of the Native Title Act … and companion State legislation … It would be easy
for the judicial explorer to become confused and lost in the undergrowth to which rays of light
rarely penetrate. Discovering the path through this jungle requires navigational skills of a high
order. Necessarily, they are costly to procure and time consuming to deploy. The legal advance
that commenced with Mabo v Queensland (No 2), or perhaps earlier, has now attracted such
difficulties that the benefits intended for Australia’s indigenous peoples in relation to native
Yorta, politics, not law, was identified as the way forward.429 As Pearson remarks, the failure of law to live up to the promise of *Mabo* is now apparent.430

With curious prescience, Dawson J in dissent in *Mabo* said that ‘the responsibility, both legal and moral’ for change lay ‘with the legislature and not with the courts’,431 a view echoed by Callinan J in *Ward*.432

Politics was the site of change when law failed in *Milirrpum*. But politics itself failed in 1986 and even in 1997 to address the fundamental claims of indigenous people to recognition of their place as prior occupiers. We may be at a similar place now as we were immediately post-*Milirrpum* when, at least for a time, politics, not law, became the site of negotiation and action to address ‘the outstanding question of indigenous land justice in Australia’.433 Politics may again fail. The political possibilities and challenges are significant as governments and other parties consider whether to reopen consent determinations and agreements, whether to return to the period of disregard and denigration of indigenous laws and cultures or to sustain the change in approach engendered over 10 years. Any political debate will occur in a changed environment where negotiation and agreement are now commonplace and the manner of engagement is respect rather than fear. Native title has produced the change, even though native title as envisaged in *Mabo* may not survive the change.

Ten years of the NTA has seen the common law of native title emerge, blossom, change and wilt. The promise engendered by *Mabo* has failed to materialise in the form of a robust and enforceable native title. To that extent, the sun may have set, with native title fatally wounded by the NTA and the High Court. However, the ideas, discourses and practices unleashed by *Mabo* and the Act, and particularly the practice of negotiation, cannot easily be set aside. As the common law of native title lies dormant, waiting for the common law to revive and reinvigorate it as a set of fuller rights, the promise and process of change and the search for a fair and just relationship will continue.