CRITIQUE AND COMMENT

A MOMENT OF CHANGE — PERSONAL REFLECTIONS ON THE NATIONAL NATIVE TITLE TRIBUNAL 1994–98

JUSTICE ROBERT FRENCH∗

[The National Native Title Tribunal was set up under the Native Title Act 1993 (Cth) to provide an institutional mechanism for receiving, registering and mediating native title determination and compensation applications, and for arbitrating on the proposed grant of mining interests affecting native title. In this article, the former President of the Tribunal reflects upon the first five years of the Tribunal’s existence from his perspective and through his experiences as its President from 1994 to 1998. The embryonic state of the new common law of native title, combined with a new and complex statute, interacted with indigenous expectations and non-indigenous fears, uncertainties and hostilities. This created a challenging and difficult environment for the National Native Title Tribunal, which was established to manage substantial parts of the native title process. The article considers the impact of procedural amendments to the Native Title Act 1993 (Cth) and recent judicial decisions upon the future direction of native title law and indigenous aspirations for recognition in Australia.]

CONTENTS

I Introduction: The Discontinuity ................................................................. 489
II The Shock of the New .................................................................................. 490
   A Tension and Obstacles ........................................................................... 490
   B Responses from Pastoralists and the Mining and Fishing Industries .... 492
   C Interpreting and Applying Native Title Law: Lessons Learnt.............. 493
III The Announcement of the New Common Law .............................................. 495
IV The Development of the Legislative Response ............................................. 496
V The Native Title Act 1993 (Cth) — The Opening Narrative ..................... 498
VI The Native Title Act 1993 (Cth) — The Tribunal and Its Processes .......... 499
   A President .............................................................................................. 499
   B Tribunal Registrar ............................................................................... 500
   C Mediation and Other Procedures of the Tribunal ................................ 500
VII The Knowledge Deficit — Narrowing the Gap ........................................... 502
VIII Membership and Administration ........................................................... 505
IX Engaging with the Media .......................................................................... 507
X Entering New Country — The Tribunal Grapples with the Law ............... 508
XI Mediation Experiences — Wellington, Broome, Crescent Head, Hopevale and Torres Strait ................................................................. 511
   A Wellington ......................................................................................... 512
   B Broome .............................................................................................. 512
   C Crescent Head ................................................................................... 513
   D Hopevale ........................................................................................... 513
   E Torres Strait ...................................................................................... 515

∗ BSc, LLB (UWA); Justice of the Federal Court of Australia.
I Introduction: The Discontinuity

He’s running this hillbilly tribunal and he has to be responsible for all the stuff-ups and blunders that have occurred.¹

It came upon Australia as one of those moments of existential discontinuity — when a choice is made which is life altering and seems to have little connection with what has gone before. When the High Court decided in *Mabo v Queensland [No 2]*² that the common law of Australia would recognise the traditional relationships of indigenous people to their land and waters, and give effect to rights arising out of them, most Australians either did not know the decision had been made or had little idea of its significance. Yet it reflected a significant shift in Australia’s constitutional foundation.³ It also reflected a fundamental change in the relationship between the indigenous people and the rest of the Australian community. Suddenly, indigenous groups were armed with rights over land and waters, and began to claim their recognition and enforcement. In asserting their traditional ownership, these indigenous groups were no longer solely reliant upon the grace and favour of legislative and executive largesse which underpinned statutory land rights schemes.⁴

This discontinuity in Australian legal history, which occurred on 3 June 1992, echoed into my own life when I accepted appointment as President of the National Native Title Tribunal in May 1994. From the relatively well-defined and controlled existence of a judge of the Federal Court, I moved into a working environment which was heavily political, multi-dimensional in complexity and barely able to be managed at the margins, much less controlled by any organisation or individual. This new working environment involved the application of legal rules of uncertain scope by a body set up primarily to achieve consensual resolution of highly contentious issues affecting a large range of rights and interests in lands and waters. What follows is a personal reflection based upon

---


² (1992) 175 CLR 1 (‘Mabo [No 2]’).

³ The *Wik Peoples v Queensland* (1996) 187 CLR 1, 182 (Gummow J) (‘Wik’).

my involvement in the National Native Title Tribunal over the period of 1994 to 1998, when the new common law and its new statutory vessel were being applied and tested and were evolving.5

II THE SHOCK OF THE NEW

In the front line of contention about native title after Mabo [No 2] and the Native Title Act 1993 (Cth) (‘NTA’) were indigenous groups and organisations who were only just coming to grips with the new common law and the Act. Indeed, these groups were sometimes in conflict among themselves about their traditional laws and customs and the entitlements to which they gave rise. Furthermore, they also had to adjust to the fact that they had rights at all. As the Aboriginal and Torres Strait Island Social Justice Commissioner, Michael Dodson, said:

In mediation of native title claims, one of the most significant effects of dispossession is that Aboriginal people are not accustomed to having their rights respected and having a say in decisions affecting their land. Groups need time to formulate their ideas about issues and about what they want for the future of their communities. After 200 years of oppressing, assimilating and ignoring indigenous peoples, it is unrealistic to expect communities to have their aspirations and ambitions packaged and ready to trade with developers and governments.6

In addition to these difficulties, there were, as there still are, many cases in which the historical dispossession and forced relocation of indigenous people and the impact of the colonising culture upon their societies made adherence to traditional laws and customs and connection with country difficult to maintain and to demonstrate.7 However, in spite of these obstacles and the burdens which they bore, indigenous people engaged with the process and faced up to its challenges. Those challenges involved important public declarations of cultural identity which engaged with, and sometimes confronted in a concrete way, wider Australian society. This gave rise to a degree of tension between indigenous and non-indigenous Australia. That, however, was to be expected.

A Tension and Obstacles

Statutory land rights in the Northern Territory had engendered anxiety, uncertainty, resentment and substantial litigation.8 The historian C D Rowley, writing in 1986 about the popular reaction to land rights laws, spoke of the ‘shocked

5 A more comprehensive coverage of this period is found in National Native Title Tribunal, A Five Year Retrospective, above n 1.
8 Until 1993 there were some 14 cases in the High Court arising out of the Northern Territory land rights legislation: see Justice Robert French, ‘The Role of the High Court in the Recognition of Native Title’ (2002) 30 University of Western Australia Law Review 129, 136. See also Risk v Northern Territory (2002) 188 ALR 376, which held that the seabed of the historic bays and internal waters of the Northern Territory was not available for claim under the Aboriginal Land Rights (Northern Territory) Act 1976 (Cth).
disbelief turning to wrath’ of miners and pastoralists. As the late Ron Castan QC stated in 1993, ‘the notion that the Aboriginal people have rights in this country is a difficult one for many in our community to grapple with.’ For many Australians the advent of common law native title rights required a substantial adjustment.

The primary non-indigenous actors in the native title process were state and territory governments. In some cases, particularly in Western Australia and the Northern Territory, governments adamantly opposed the newly disclosed rights. At best they were feeling their way towards policy responses in a setting of general uncertainty about the legal foundation for such policies. The Commonwealth government itself was involved, albeit in substantial conflict with some of the states and territories. Industry groups, particularly in the mining, pastoral and fishing industries, exhibited a mix of surprise, anxiety and hostility about native title. The media, for the most part reflecting the view of the wider community, did not have any real understanding of the implications of native title and so tended to emphasise the difficulties and dangers of recognising it. Academics displayed a spectrum of responses, ranging from cool analysis to heated polemic. One of the more dramatic examples of the latter was a professorial denunciation of the High Court’s decision:

The Mabo case … except in relation to the Murray Islanders, is nothing more than a monstrous, presumptuous obiter dictum. In the mould of Tasmanian Dams, it represents yet another usurpation by the Court of the constitutional power of the Australian Parliaments and people.

Many people were puzzled by the change wrought by the Mabo [No 2] judgments and wondered why it was all necessary. A South Australian pastoralist summed up an important strand in mainstream industry attitudes rather well when he said to me at a country meeting over a cold VB: ‘[i]f “they” want to come down and hunt or fish on the property they just ring me up and I say okay and they say “thanks, boss”.

‘Thanks, boss’ said it all. The man saying it was, like most of those affected by native title on the ground, an ordinary person grappling with a radical shift in the law — a shift which was not going to make life any easier for him — and which raised legitimate concerns about his business and the value of his assets. There were many whose businesses were economically marginal and who saw their leases as their major asset. For them, native title represented just another bureaucratic burden. For others, at a deeper level, it impinged on their view of their place in Australian society, their relationship with indigenous people and their own role and history as custodians of the land.

10 Ron Castan, ‘Native Land Title in Australia: Reflections on Mabo’ (Speech delivered at the Annual Dinner of the Australian Jewish Democratic Society, Melbourne, 18 August 1993).
B Responses from Pastoralists and the Mining and Fishing Industries

There were many common elements in the responses of pastoralists to the advent of native title. However, that is not to say that those responses were entirely uniform. They were complex and operated on a variety of levels, both personal and collective, or by adoption from industry representatives. Generally speaking, the industry was uncertain, and to some degree fearful, about the advent of native title. Ben Patrick, a spokesperson for the Pastoralists and Graziers Association of Western Australia, speaking at a conference in Perth organised by the Tribunal in December 1994, spoke of the Act as creating ‘an air of uncertainty about the future of the pastoral industry.’ It made potential new entrants to the industry nervous about investing their money. It made those already in the industry nervous and unwilling to invest further, basically sitting back and waiting to see what happened until certainty returned. Patrick also pointed to ‘a bad feeling over the last couple of years — or a worsening feeling — between Aborigines and the pastoralists in the area’.

The responses of the mining industry seemed less complex, although it should not be imagined that the industry was an homogeneous cultural bloc. There was a range of participants. Ten years ago there were, as there are now, large well-resourced corporations with international experience, including the experience of dealing with indigenous issues in gaining access to land. There were smaller companies with fewer resources and a narrower knowledge base, ranging down to junior explorers who regarded the transaction costs of dealing with indigenous groups on heritage or related land access issues as an unacceptable burden, and beyond the junior explorers were the small individual prospectors. Although the industry as a whole was unhappy with the recognition of native title, and had not engaged with the negotiation process leading up to the enactment of the Act, the attitudes of its members were generally pragmatic rather than ideologically or culturally based. The principal concerns of the explorers and miners centred on their ability to gain valid and certain access to land for the purposes of exploration or mining. That this might involve agreements with indigenous people was accepted — provided they could be concluded in a timely manner and with the right people. Simon Williamson, a spokesperson for the Chamber of Mines and Energy in Western Australia, speaking in December 1994, said:

12 An excellent study of pastoral attitudes to Aboriginal people in the context of the earlier events of equal pay and heritage legislation, which is relevant to an understanding of some responses to native title, may be found in Mary Edmunds, They Get Heaps: A Study of Attitudes in Roebourne, Western Australia (1989) ch 2.
14 Ibid.
15 Ibid.
17 Ibid 169.
18 Ibid.
The main issue for the mining industry is the maintenance of access to land. The industry believes that the procedures relating to access to native title land need clarification. Exploration is the lifeblood of the industry and without clarification in those areas we cannot survive.\footnote{Ibid.}

The fishing industry, without the benefit of any judicial statement about native title in the sea, felt ‘vulnerable, and anxious and uncertain, probably like every other group in Australia.’\footnote{Guy Leyland, ‘Native Title and the Fishing Industry’ in Frank McKeown (ed), 
_Native Title: An Opportunity for Understanding_ (1994) 176, 176.}

C Interpreting and Applying Native Title Law: Lessons Learnt

The anxiety and anger reflected in the responses of various segments of the community to _Mabo [No 2]_ and to its legislative sequelae is a salutary reminder of the unintended impact of changes in the law on the lives of ordinary people and of the unpredictable diversity in their ways of dealing with it. The impact of change may also be distorted by misunderstanding or by facile representation. Such distortion is almost inevitable with any contentious statutory innovation and, a fortiori, with contentious judge-made law.

The unintended consequences of judicial exposition came home to me following the suggestion in _Wik_ that native title rights might be extinguished by persons carrying out physical activities authorised by statute which were ‘physically inconsistent’ with the continuance of existing native title rights and interests.\footnote{_Wik_ (1996) 187 CLR 1, 185 (Gummow J).}

The examples given were the construction of airstrips and dams in fulfilment of the conditions of a grant relating to physical improvements.\footnote{Ibid 202–3.}

This observation opened for debate the possibility that the exercise of a right conferred upon a landholder by statutory grant, as in the case of a pastoral lease, might be subject to the provisions of the Act relating to future acts.\footnote{An act is defined in s 226 of the _NTA_ to include legislative and executive acts, and acts having any effect at common law or in equity. A future act is defined, in substance, as an act affecting native title in relation to land or waters to any extent. The doing of future acts prior to the 1998 amendments attracted procedural rights to native title holders (_NTA_ s 23) and, in respect of mining tenements and compulsory acquisitions of native title, a statutory right to negotiate. See further _NTA_ ss 26–44, and for an overview of these provisions and the more elaborate provisions introduced by the 1998 amendments, see Justice Robert French, ‘A Hitchhiker’s Guide to the _Native Title Act_’ (1999) 25 Monash University Law Review 375, 382–6, 388.}

That possibility resonated with at least one well-informed member of the New South Wales rural community: not long after _Wik_, when doing a talkback session on the ABC’s Country Hour for New South Wales, I was asked by a farmer, who rang in by mobile telephone from his tractor, whether he was free to remove a fallen tree from a stream on his property. His concerns were not atypical.

The difficulties of interpreting native title law for people affected by it were exacerbated by some in leadership positions in government or industry who seemed to be prepared to magnify fear and uncertainty to enhance their own authority among their constituents. The media, which for the most part endeavoured to transmit an accurate account of the law and its application and the
issues arising from it, was also bedevilled by a few who had little regard for informing their audience, preferring to play to their prejudices.

Over a period of more than four and a half years as President of the Tribunal, I learned, or had reinforced, a number of important lessons about the operation of our legal system. One of these concerned the need for legislators to give careful consideration to the practical impact of the laws that they make and the transaction costs generated by their implementation. The same is true for judicial law-makers. In the judicial sphere, where in the construction of a statute a choice exists, there is much to be said for adopting an interpretation which not only serves the purpose of the statute but also maximises the probability that those who have to administer it will be able to make it work. My experience of judicial review in relation to some procedural aspects of the NTA affecting Tribunal processes (including the registration of claims and the requirements for notification)24 almost converted me to a sympathetic view of the American doctrine of judicial deference to the interpretations of statute adopted by administrative agencies. This period also demonstrated to me the need for administrators of public authorities to be able to stand aside from time to time from the unrelenting pressures of decision-making large and small, and to reflect upon the fundamental objectives of the statutes which they administer. A clear working picture of fundamental objectives is indispensable to those in positions of leadership in any organisation. The picture will require frequent visualisation and revisualisation as an act of inventive imagination. It is too easy to lose one’s way in internal processes if the view from the outside is not kept fresh.

As President of the Tribunal, I also learned a great deal more than I had known before about the indigenous people of Australia. Like all societies they had their heroes and a few villains. They also had many extraordinary ‘ordinary’ people confronting the challenges of daily existence against the legacy of a disastrous history of dispossession. Australian indigenous people sought to proclaim their cultural identity and to translate that into enforceable rights and thereby build a better future for themselves and their children. Their leaders bore (and continue to bear) sometimes inhuman burdens imposed by the needs and demands of their own people, the wider community and their own personal histories. For them and those of their communities who engage in the native title process, those burdens are increased by what must seem to be an endless series of meetings stretching over years, in the pursuit of final recognition of their traditional laws and customs and the rights arising under them. To meet and get to know these people was to enjoy a sense of enormous privilege and, associated with that, disquiet about the new burdens and risks visited upon them by the invitation to take their traditional law and custom into the halls of Australian justice.

24 See *Northern Territory v Lane* (1995) 59 FCR 332 which held that an application was entitled to registration immediately upon lodgment and prior to acceptance; *North Ganalanja Aboriginal Corporation v Queensland* (1996) 185 CLR 595 which severely restricted the scope for pre-acceptance screening of applications; and *WMC Resources Ltd v Lane* (1997) 73 FCR 366 which obligates the Registrar to notify individually all persons whose interests might be affected by a claim.
At this point it is useful to revisit briefly the important aspects of the common law of native title, the legislative response to it, including the creation of the Tribunal, and its early development.

III THE ANNOUNCEMENT OF THE NEW COMMON LAW

The majority judgments in *Mabo [No 2]* accepted that when the Crown acquired each of the Australian colonies it acquired sovereignty over the land and waters within them. Nevertheless, the common law would recognise rights and interests in land held by Aboriginal and Torres Strait Islander people according to their traditional laws and customs. It would not regard those rights and interests as extinguished by the acquisition of sovereignty. However, in the exercise of sovereignty, native title could be extinguished by law or by executive grants indicating a plain and clear intention to do so. The judgments required, as a condition of recognition of native title, that those seeking a determination demonstrate a continuing connection with the land in question, rights and interests in the land under traditional law and custom, and continued observance of the laws and customs defining their ownership of the rights and interests claimed.

The native title so recognised was communal in character and could not be disposed of, except by surrender to the Crown or by transmission from one group to another according to traditional law and custom. The judgments also accepted that traditional law and custom under which native title arises can change from time to time and in response to historical circumstances. Native title at common law was subject to existing valid laws and rights created under such laws.

The decision was 10 years in the making. The litigation commenced in 1982. The State of Queensland attempted to defeat it by enacting a law purporting to declare that upon the Islands of the Torres Strait becoming part of Queensland they were vested in the Crown in right of that State, ‘freed from all other rights, interests and claims of any kind whatsoever.’ However, in December 1988, a majority of the High Court in *Mabo v Queensland [No 1]* held the Queensland

---

26 Ibid 60–1 (Brennan J), 81–2, 86–7 (Deane and Gaudron JJ), 187 (Toohey J).
27 Ibid 57 (Brennan J), 81 (Deane and Gaudron JJ), 184, 205 (Toohey J).
28 Ibid 64 (Brennan J), 111, 114, 119 (Deane and Gaudron JJ), 195–6, 205 (Toohey J).
29 Ibid 59–60, 70 (Brennan J), 86, 110 (Deane and Gaudron JJ), 188 (Toohey J).
30 Ibid.
31 Ibid 59 (Brennan J), 110 (Deane and Gaudron JJ).
32 Ibid 110 (Deane and Gaudron JJ).
33 Ibid 60, 70 (Brennan J), 88, 110 (Deane and Gaudron JJ).
34 Ibid 60 (Brennan J), 110 (Deane and Gaudron JJ).
35 Ibid 61 (Brennan J), 110 (Deane and Gaudron JJ), 192 (Toohey J).
36 Ibid 63, 69, 73 (Brennan J), 111–12 (Deane and Gaudron JJ).
37 *Queensland Coast Islands Declaratory Act 1985* (Qld) s 3(a).
38 (1988) 166 CLR 186 (‘Mabo [No 1]’).
statute to be inconsistent with s 10 of the *Racial Discrimination Act 1975* (Cth), and so to be inoperative by reason of s 109 of the *Constitution*.39

*Mabo [No 1]* raised an issue of general importance for Commonwealth, state and territory governments in the event that native title were recognised. Many state and territory laws and executive acts, which occurred after the *Racial Discrimination Act 1975* (Cth) came into effect, might be invalid because of their discriminatory operation in relation to native title. For the Commonwealth, the further possibility existed that its laws or executive acts might have effected acquisitions of native title rights without just compensation and, therefore, be contrary to the requirements of the *Constitution*.40 So, when native title was recognised in *Mabo [No 2]*, the validity of past legislative and executive acts affecting native title was put in question and required resolution. Also requiring resolution was the effect of the possible existence of native title upon future legislative and executive acts which might extinguish or impair it.

### IV The Development of the Legislative Response

On 27 October 1992, the Commonwealth government embarked upon a process of consultation — which became in some respects acrimonious negotiation — with state and territory governments, Aboriginal and Torres Strait Islander organisations and industry groups to consider and devise a response to *Mabo [No 2]*. A ministerial committee chaired by Prime Minister Paul Keating was established, as was an interdepartmental committee of officials. A discussion paper was published by the Commonwealth government in June 1993,41 setting out a ‘Framework of Principles’ which had been developed by the ministerial committee.42 The Council of Australian Governments considered *Mabo [No 2]* at a meeting on 8–9 June 1993 without reaching agreement on a common approach to native title.

On 2 September 1993, the Commonwealth released an ‘Outline of Proposed Legislation on Native Title’.43 On 16 November 1993, the Native Title Bill 1993 (Cth) was introduced into the House of Representatives,44 and was debated there on 23, 24 and 25 November.45 In the course of his second reading speech Prime Minister Keating identified four key aspects of the legislation:

1. Ungrudging and unambiguous recognition and protection of native title;
2. Provision for clear and certain validation of past acts — including grants and laws — if they had been invalidated because of the existence of native title;

---

39 Ibid 214, 219 (Brennan, Toohey and Gaudron JJ), 232–3 (Deane J). Wilson J (at 202–8) and Dawson J (at 242–4) dissented, while Mason CJ did not express an opinion.
40 Section 51(xxxi).
42 Ibid 98.
2003] Personal Reflections on the National Native Title Tribunal 497

3 A just and practical regime governing future grants and acts affecting native title; and

4 Rigorous, specialised and accessible tribunal and court processes for determining claims to native title and for negotiation and decisions on proposed grants over native title land.46

Reference to the Tribunal was brief:

Much of the bill concerns detailed arrangements to establish a national native title tribunal and to develop a capacity in the Federal Court to determine native title and compensation claims. The tribunal will conciliate and determine proposed uses of native title land where there are no recognised state or territory bodies. The bill sets out criteria for Commonwealth recognition of state bodies.47

The Native Title Bill 1993 (Cth) was introduced into the Senate on 25 November 199348 and referred to the Senate Standing Committee on Legal and Constitutional Affairs.49 That Committee conducted four days of public hearings and reported on 9 December 1993.50 Ultimately it was passed by the Senate on 21 December 1993 and resubmitted to the House of Representatives with amendments introduced by the Senate. It was passed by the House of Representatives on 22 December 1993,51 and for the most part the Act commenced operation on 1 January 1994.

This spare statement of the legislative passage of the Native Title Bill belies the passions which it engendered. The Leader of the Opposition at the time, Dr John Hewson, said: ‘The Native Title Bill 1993 (Cth) is without any qualification, one of the greatest disasters that is before this country and we will be paying a price for this for decades to come’.52

In a crudely reductionist economic sense, it was undoubtedly true that native title came at a price. The creation of any new right will almost always involve a corresponding limitation of an existing freedom and, in some cases, an impact on existing rights. Native title rights had to be respected and acknowledged by those who wanted to use the land. Further, compensation was payable where native title was extinguished or impaired by third party interests. On the other hand, from the indigenous perspective, it could be said that the common law did no more than recognise rights which it should have recognised from the time of colonisation. In the 200 year meantime, indigenous people had borne (and continued to bear) the immense social burden and costs arising from their dispossession and the impact of the colonisers upon their traditional societies. This was recognised in the Preamble to the Act.

46 Commonwealth, Parliamentary Debates, House of Representatives, 16 November 1993, 2878 (Paul Keating, Prime Minister).
49 Ibid 3808 (Bruce Childs).
50 See generally Commonwealth, Parliamentary Debates, Senate, 9 December 1993, 4283–313.
52 John Hewson, 1 January 1994, cited in National Native Title Tribunal, A Five Year Retrospective, above n 1, 47.
V THE NATIVE TITLE ACT 1993 (Cth) — THE OPENING NARRATIVE

The Act, rather unusually, had a lengthy preamble which referred to the progressive dispossession of Aboriginal peoples and Torres Strait Islanders from their lands. It cited the failure of successive governments to 'reach a lasting and equitable agreement' with indigenous peoples concerning the use of their lands. The Preamble referred to the 1967 Constitutional Referendum which authorised the Commonwealth Parliament to make special laws for the people of the Aboriginal race, the ratification by Australia of international treaties, including the International Convention on the Elimination of All Forms of Racial Discrimination,53 the acceptance of the Universal Declaration of Human Rights54 and the enactment of legislation such as the Racial Discrimination Act 1975 (Cth) and the Human Rights and Equal Opportunity Commission Act 1986 (Cth).

After setting out the essential elements of Mabo [No 2], the Preamble, with bold aspiration, asserted the intention of 'the people of Australia':

(a) to rectify the consequences of past injustices by the special measures contained in this Act announced at the time of introduction of this Act into the Parliament, or agreed on by the Parliament from time to time, for securing the adequate advancement and protection of Aboriginal peoples and Torres Strait Islanders; and

(b) to ensure that Aboriginal peoples and Torres Strait Islanders receive the full recognition and status within the Australian nation to which history, their prior rights and interests, and their rich and diverse culture, fully entitle them to aspire.

The Preamble acknowledged the needs of the broader Australian community for 'certainty and the enforceability of acts potentially made invalid because of the existence of native title', acknowledging that '[i]t is important to provide for the validation of those acts.'

The requirement, in justice, of compensation on just terms was acknowledged. So too was the principle that future acts affecting native title land 'should only be able to be validly done if, typically, they [could] also be done to freehold land'.

The establishment of the Tribunal was foreshadowed in one paragraph:

A special procedure needs to be available for the just and proper ascertainment of native title rights and interests which will ensure that, if possible, this is done by conciliation and, if not, in a manner that has due regard to their unique character.

The Preamble declared that the Parliament intended for the Act to take effect according to its terms and be ‘a special law for the descendants of the original inhabitants of Australia.’ This was to bring it within the terms of the powers conferred upon the Parliament by s 51(xxvi) of the Constitution.

VI  THE  NATIVE  TITLE ACT  1993  (CTH) —  THE  TRIBUNAL AND ITS PROCESSES

The arrangement of the Act reflected its main objects as set out in s 3:

(a) to provide for the recognition and protection of native title; and
(b) to establish ways in which future dealings affecting native title may proceed and to set standards for those dealings; and
(c) to establish a mechanism for determining claims to native title; and
(d) to provide for, or permit, the validation of past acts invalidated because of the existence of native title.55

A President

Part 6 of the Act dealt with the establishment, purpose and mode of operation of the Tribunal. It was to be headed by a President, who was required to be either a judge of the Federal Court or a former judge of the High Court, a federal court or the Supreme Court of a state or territory. Deputy presidents could be appointed as presidential members subject to the same qualifications. Other non-presidential members could also be appointed on the basis of their special knowledge in relation to Aboriginal or Torres Strait Islander societies, land management, dispute resolution or any other relevant class of matters.56

The requirement that the President be a judge or former judge lent the weight of judicial office to a position which needed to quickly establish its authority and impartiality in the midst of the native title debate. However, it had the potential to engender confusion and misunderstanding about the role of the Tribunal, a problem exacerbated by the term ‘tribunal’. The primary purpose of the Tribunal was conciliation and mediation. A proposal in 1995 that the Tribunal be redesignated as ‘The National Native Title Mediation Service’ fell on deaf ears.57 The cognate proposal, also advanced at the same time, was that judicial qualification not be necessary for appointment as President or as a Presidential Member.58

Although not without opposition, this was more successful when the necessary amendment to the legislation was brought into Parliament. There was resistance from indigenous interests to the proposal on the basis that it would involve a downgrading of the status of the President of the Tribunal. Eventually, the

55 The objectives were unchanged by the 1998 amendments, save for the inclusion of a reference to ‘intermediate period acts’ in para (d). This was a reference to things done (eg, legislation passed or grants made) in the period between the enactment of the NTA in 1993 and the Wik decision in December 1996. The provisions of the amended Act relating to intermediate period acts were intended to validate acts which may have had a discriminatory impact on native title because they were done on the incorrect assumption that pastoral leases extinguished native title.

56 Original NTA s 110. References to the ‘Original NTA’ denote the version of the NTA as enacted in 1993.


58 Ibid 81, 84. The proposal expressed at the time was that no serving judges be involved in the ongoing work of the Tribunal. This evolved into a proposal that the judicial qualification no longer be necessary as a condition of appointment as President or as a Presidential Member.
change in qualification was passed as part of the 1998 amendments\(^{59}\) on the vote of Senator Brian Harradine in support of the government parties in the Senate. This allowed for Mr Graeme Neate to be appointed as President of the Tribunal at the beginning of 1999. He was not a judge or a former judge. However, he was one of Australia’s leading authorities on native title and land rights generally. Indeed, he had long practical experience in the field dating back to his service as associate to Justice John Toohey, the first Aboriginal Lands Commissioner appointed under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth).

\[ \text{B Tribunal Registrar} \]

Another important statutory office created under the Act was the Native Title Registrar. The Registrar was charged with receiving native title applications, determining whether they should be accepted and entering them on the Register of Native Title Claims.\(^{60}\) The President of the Tribunal was responsible for managing the administrative affairs of the Tribunal.\(^{61}\) In the management of those administrative affairs the President was to be assisted by the Registrar.\(^{62}\) In effect, the Registrar had a role as the chief executive officer of the Tribunal, subject to the President. The Registrar also had a distinct statutory function in relation to the receipt and processing of applications and the registration of claims.

The Act required lodgment of native title determination applications with the Registrar, entry upon the Register of Native Title Claims, acceptance or non-acceptance by the Registrar, and notification of accepted applications to persons whose interests might be affected by a determination.\(^{63}\) In the case of unopposed applications, the Tribunal was authorised to make a determination if satisfied that the applicant had made out a prima facie case for a determination, and that the determination was just and equitable in all the circumstances.\(^{64}\) Similarly, if the parties to an application reached agreement as to the terms of a determination, and the Tribunal was satisfied that it would be within its powers and appropriate, it could make a determination in accordance with the agreement.\(^{65}\)

\[ \text{C Mediation and Other Procedures of the Tribunal} \]

The mediation role of the Tribunal was provided for in remarkably spare terms in s 72 of the original Act, later repealed by s 18 of the *Native Title Amendment Act 1998* (Cth) (‘NTAA’). If an application was accepted and the Tribunal did not make a consent determination, the President of the Tribunal was required to ‘direct the holding of a conference of the parties or their representatives to help

\(^{59}\) *Native Title Amendment Act 1998* (Cth) (‘NTAA’).
\(^{60}\) Original *NTA* s 185.
\(^{61}\) Original *NTA* s 128.
\(^{62}\) Original *NTA* s 129.
\(^{63}\) Original *NTA* ss 61–8.
\(^{64}\) Original *NTA* s 70. This power now lies with the Federal Court of Australia: *NTA* s 86G.
\(^{65}\) Original *NTA* s 71. This power now lies with the Federal Court of Australia: *NTA* s 87.
in resolving the matter. It was on this narrow base that the mediation processes of the Tribunal were constructed. There was never an application that was unopposed or where the parties simply reached agreement at the end of the notification period.

The Act provided that, if at the end of a mediation conference the parties advised the Tribunal that they had reached agreement, the Tribunal, if satisfied that the agreed determination would be within its powers and appropriate, was required to make a determination consistent with those terms. Superimposed upon this determination process was a requirement that the Tribunal hold an inquiry into unopposed applications or applications where agreement as to a determination had been reached between the parties. The Tribunal could refer questions of law arising at an inquiry to the Federal Court for a decision. If at any stage of the inquiry the Tribunal was satisfied that the application was frivolous or vexatious it could dismiss the application. It could also dismiss the application if satisfied that the applicant was unable to make out a prima facie case in relation to the application. The Tribunal was then required to make a determination about the matters covered by the inquiry. As soon as practicable after the determination was made, the Registrar was to lodge it in a Registry of the Federal Court. Upon registration of a determination it would have effect as if it were an order made by the Federal Court. These procedures turned out in practice (and with the clarity of hindsight) to be convoluted, impractical, conceptually confused and, at their end point, unconstitutional.

It was an egregious absurdity of the Act’s drafting that the Tribunal was armed with the power to strike out an application for want of a prima facie case only after the parties had reached agreement about a determination of native title flowing from it. It was also only at this point that the Tribunal could refer questions of law to the Federal Court. Within four months of my appointment I proposed that the Tribunal should have power to hold an inquiry at any time to determine whether there was a prima facie case. This would allow for important points of law affecting the negotiation process to be referred to the Federal Court. It was, of course, too early in the day for such a proposal to have any chance of acceptance. Yet within a year or so, in 1995, it would become clear

66 Original NTA s 72, amended by NTAA s 3 and sch 2, item 18.
67 Original NTA s 73.
68 Original NTA s 139.
69 Original NTA s 145.
70 Original NTA s 147.
71 Original NTA s 148, amended by NTAA s 3 and sch 2, item 39.
72 Original NTA s 160, amended by NTAA s 3 and sch 2, item 45.
73 Original NTA s 166, amended by NTAA s 3 and sch 2, item 46.
74 Original NTA s 167, amended by NTAA s 3 and sch 2, item 46.
75 Constitutional invalidity of the provisions providing for registration of determinations in the Federal Court was foreshadowed by the decision in Brandy v Human Rights and Equal Opportunity Commission (1995) 183 CLR 245 (‘Brandy’), with respect to similar provisions in the Racial Discrimination Act 1975 (Cth), and confirmed by Fourmile v Selpam Pty Ltd (1998) 80 FCR 151, 155–6 (Burchett J), 176 (Drummond J), 187 (Cooper J).
that the process required substantial change. In the meantime the search for resolution of the important legal question — whether pastoral leases extinguished native title — would lead me into a misapplication of the acceptance process in the Waanyi People’s claim77 at the site of the proposed Century Zinc mine in Far North Queensland.

VII THE KNOWLEDGE DEFICIT — NARROWING THE GAP

Central to the original Act’s objective of native title recognition was its sequencing of mediation by the Tribunal and the requirement that it be exhausted before referral of its application into the Federal Court as a proceeding.78 There was no procedure by which issues of law or fact could be determined by a court as an incident of, or as an aid to, the statutory mediation process. The common law of native title when the Tribunal was established was that set out in Mabo [No 2]. Those decisions left unanswered many questions which were of critical concern to applicants and respondents, including state and territory governments, local authorities and industry groups (particularly in the mining, pastoral and fishing industries). There was never going to be any real prospect that these respondents would agree to native title determinations without a clear understanding of the impact of those determinations on their interests, whether as land managers, holders of tenements or as leaseholders. In addition, no determination affecting land or waters covered by non-extinguishing, non-indigenous interests could be made without ancillary agreements relating to the management of the co-existence of native title rights and those interests.

The obstacles to agreement presented by the absence of authoritative legal answers on critical questions became apparent at a very early stage in the life of the Tribunal. So, because of the uncertainty about the effects of pastoral leases on native title, there was a reluctance on the part of pastoral organisations and their members to enter into agreements involving the recognition of native title subsisting with their leases. Other difficulties that emerged relatively early arose from the poor preparation of some applications and from the lodging of overlapping applications. The latter reflected intra-indigenous conflicts, some ephemeral and intra-familial, and others long-term, requiring lengthy processes and essentially experimental techniques to resolve or at least to manage them.

Early discussions with the Commonwealth Department of Finance relating to the Tribunal’s budget indicated a surprising lack of appreciation on the part of the Department of the nature of the task confronting the Tribunal. The Department suggested that for budgeting purposes, a 60 day turnaround time from lodgment of applications to determination should be assumed, on the basis of similar standards applicable to the Administrative Appeals Tribunal. One of the means adopted to overcome this startling vision of the Tribunal’s function was to coopt a member of the Department of Finance to undertake, in conjunction with the Attorney-General’s Department, a review of the Tribunal’s corporate goals.

77 Re Waanyi People’s Native Title Application (1995) 129 ALR 118. At the Tribunal, I directed the Registrar not to accept the Waanyi People’s application.

78 Original NTA s 74.
and objectives. A similar review of the Tribunal’s mediation process was undertaken in early 1996.

From the first day of the Act, there was an overwhelming need to communicate as widely as possible with that part of the general community affected by native title issues. The Tribunal became a major provider of information and education in this respect. A community liaison policy was adopted. Liaison committees (in substance, user groups) representing the various stakeholders, Aboriginal representative bodies, governments, local governments and industry were set up in each state and in the Northern Territory. A National Liaison Committee was also established. In addition, there were individualised community information programs established in order to ‘foster a positive climate for the mediation process and to minimise the possibility of adverse community responses based on fear, ignorance, uncertainty or prejudice.’

An important objective of community education also involved the mitigation of cynicism about indigenous peoples’ claims, in particular the view that in some cases the ‘connection’ to land was a recent invention designed to generate a registrable claim. In its 1994–95 and 1995–96 annual reports, the Tribunal provided information about the historical context of accepted native title determination applications. Many of the applications took their place in a long history of assertions by indigenous people in the area of their traditional ownership. A complete and annotated version of the appendices to the annual reports was placed on the Tribunal’s website.

The Tribunal also organised conferences and seminars to discuss and explore native title issues. The aim was to develop a knowledge base for reaching agreement between native title holders and claimants on the one hand, and governments, local governments and industry on the other.

The first of these, ‘Native Title: An Opportunity for Understanding’, was held at the University of Western Australia in December 1994. Its published proceedings still provide a useful overview of the intellectual landscape of native title and the cultural questions that arise in its processes and determination. Although initially intended as a ‘Members and Staff Induction Course’ it ended up with 95 participants including the Chief Justice of the Federal Court and five Federal Court judges, in addition to those who were Tribunal members.

A second major conference, ‘The Indigenous Land Use Agreements Conference’, was held in Darwin in September 1995. It was convened to discuss and develop models for the various forms of agreement that might be made relating to land use issues where native title was affected. The conference’s title has now found its way into the Act by virtue of the 1998 amendments. It was a term agreed upon by the organising committee, which comprised Patrick Dodson, then Chairman of the Council for Aboriginal Reconciliation, Patricia Turner, the Chief Executive Officer of the Aboriginal and Torres Strait Islander Commission, and myself. It was designed to cover agreements providing, inter alia, for recognition of traditional ownership, which might be coupled with the authorisa-

tion of mining, pastoral or other developmental activities (including joint activities between indigenous and non-indigenous interests). The term applied to the joint management of parks and reserves, and to agreements for the co-existence of Aboriginal and non-Aboriginal interests or activities in forests, internal waters and offshore. It included agreements with local authorities about development and planning decisions affecting traditional country in and around rural towns and other areas. Indigenous Land Use Agreements (‘ILUAs’) could in time form the building blocks of larger, more comprehensive arrangements.

It was important at that time not to confuse these generally small-scale forms of agreement with the large-scale regional agreements negotiated under the treaty system in Canada. Although there were some enthusiastic proponents for the development of such agreements in Australia, it was questionable whether there was a capacity among indigenous people or governments to provide the infrastructure to implement them. In any event, native title rights and interests were hardly sufficient to support them. Further, political will was tempered by the tendency in Australia to associate regional agreements with notions of indigenous separatism.

There was an important legal constraint affecting the extent to which even modest ILUAs could be made and implemented. One of the weaknesses of the Act, as it stood prior to the 1998 amendments, was the absence of any adequate statutory support for land use agreements. There was an inescapable uncertainty, in the absence of a determination about the identification of the people who were authorised to enter into such agreements, namely the native title holders. Section 21 of the Act provided some basis for reaching such agreements, and the Tribunal had urged governments and others to consider ways in which it could be applied.

In the event, in the many discussions between indigenous, industry and government representatives in the lead-up to the 1998 amendments, it was common ground that there was a need for a new statutory mechanism to support certain and valid land use agreements. As a participant in a number of those meetings convened by the Council for Aboriginal Reconciliation in Canberra, I proposed a further mechanism under which such agreements, once registered, could be treated as statutory instruments so as to be effective in rem. However, some state governments had concerns about the impact of this upon state law. What was accepted, in the end, was a statutory provision for the making of ILUAs which were capable, after an objection period and subsequent registration, of ensuring

---

81 See, eg, Chippewa Indians (Williams) Treaty, made on 31 October 1923 between his Majesty the King and the Chippewa Indians; Williams Treaty, made on 15 November 1923 between his Majesty the King and the Mississauga Indians of Rice Lake, Mud Lake, Scugog Lake and Alderville; Robinson Treaty, made on 7 September 1850 with the Ojibewa Indians of Lake Superior.


that acts done in accordance with their terms would be valid notwithstanding their effects upon native title. Today, ILUAs are increasingly being used across Australia.84 At the time of writing, the South Australian government and the Aboriginal Land Rights Movement in that State are endeavouring to negotiate a state-wide ILUA.85 The term and the acronym which began its life at the 1995 Darwin conference are now well entrenched in the Act. They are used as freestanding agreements and as ancillary agreements made in conjunction with agreed determinations of native title.

VIII MEMBERSHIP AND ADMINISTRATION

The first appointment as President of the Tribunal was Justice Deirdre O’Connor of the Federal Court of Australia on 1 January 1994. Justice O’Connor was then President of the Administrative Appeals Tribunal. She was appointed pending the appointment of the first permanent President. I was appointed to succeed her as President for three years with effect from 2 May 1994. Justices Peter Gray and Howard Olney of the Federal Court were appointed as Presidential Members, each for a five year term commencing 17 May 1994. The first permanent Registrar, Patricia Lane, was appointed on 17 May 1994 for a term of three years to take effect from 11 July 1994. The national headquarters of the Tribunal was located in Perth. This was a condition of my acceptance of the appointment, which was informed in part by the unremitting hostility of the government of Western Australia at the time to the Act and to the native title process. It was important, in Western Australia, where many major claims were likely to be made, that the Tribunal was not able to be depicted as geographically and psychologically remote.

Over the following months a number of important appointments were made to expand the membership of the Tribunal.86 The first indigenous member was Anthony Lee from Western Australia. Further appointments were made in

84 At 1 August 2003, 84 ILUAs were registered nationally, 34 of which had been registered in the preceding 12 months. Forty eight were registered in Queensland. A further twenty nine were under consideration for registration. For current information on ILUAs, see National Native Title Tribunal <http://www.nntt.gov.au/ilua/browse_ilua.html>.

85 See discussion of this ongoing proposal in Jones v South Australia [2003] FCA 538 (Unreported, Mansfield J, 30 May 2003) [23]–[49].

86 They included three former Ministers of the Crown, The Hon Fred Chaney AO and The Hon Ian Viner QC (who had both been Commonwealth Ministers for Aboriginal Affairs), and The Hon Christopher Sumner (formerly the Attorney-General of South Australia). There were three serving judges of the Federal Court appointed, two of whom, Justices Gray and Olney, had extensive experience as Aboriginal Land Commissioners for the Northern Territory. Justice Jane Mathews, who succeeded Justice O’Connor as President of the Administrative Appeals Tribunal, was also appointed. Two former state Supreme Court judges who became members of the Tribunal were Paul Seaman QC (who had conducted the Aboriginal Land Inquiry in Western Australia in 1983–84) and Hal Wootten AC QC (former Justice of the Supreme Court of New South Wales, former Dean of the Law Faculty at the University of New South Wales and Founding Chairman of the Aboriginal Legal Service of New South Wales). Dr Mary Edmunds (Director of Research at the Australian Institute of Aboriginal and Torres Strait Islander Studies) and Kim Wilson (a former judge of the Supreme Court and the National Court of Papua New Guinea) were also appointed, as were Susan Ellis, who had extensive mediation experience, and Sean Flood, who had been a Public Defender in New South Wales.
December 1995. These and subsequent appointments — and the range and diversity of the skills and experience that they represented — made the Tribunal, even in its formative years, a near unique body among the many public authorities that inhabit the Australian governmental landscape.

The performance of the Tribunal was at all times under scrutiny from a variety of quarters. It was subject to all the usual processes of administrative and judicial review, like any other Commonwealth agency. These included the Auditor-General and the Ombudsman. There was the potential for challenges to Registrar or Tribunal decisions under the *Administrative Decisions (Judicial Review) Act 1977* (Cth). The Tribunal was also subject to examination by a Parliamentary Joint Committee on Native Title established by the Act and comprising 10 members, five drawn from the Senate and five from the House of Representatives. The Committee’s duties included extensive consultation about the implementation and operation of the Act with various stakeholders, reporting from time to time to both Houses of Parliament on its implementation and operation, and examining each annual report of the Tribunal and reporting to both Houses on matters appearing in, or arising out of, those reports. In addition, the Committee was given the task, at the end of two years after the commencement of the Act, of inquiring into, and reporting to both Houses on, the effectiveness of the Tribunal and other matters related to the operation of the Act. The report of the Joint Committee has yet to be completed. The time limit was removed by the 1998 amendments. I resolved at an early stage that I would personally appear before the Committee in the course of its hearings into the Tribunal’s annual reports. That was a mutually educational and beneficial experience. The knowledge bases of the members of the Committee and the different members’ grasp of the issues varied significantly. The hearings, however, provided a useful opportunity to explain the work of the Tribunal and the legal framework within which it was operating. For the most part, the inquiries were not particularly partisan. They did, however, reflect a range of attitudes — from support of, to opposition to, the advent of common law native title. They became somewhat more partisan in 1998 as the members of the Committee collected ammunition for the debate about the amendments to the Act and the government’s Ten Point Plan for its reform.

The Aboriginal and Torres Strait Islander Social Justice Commissioner, appointed under s 46B(1) of the *Human Rights and Equal Opportunity Commission Act 1986* (Cth), was required by the Act to prepare and submit to the Commonwealth Minister, as soon as practicable after 30 June in each year, a report on the

---

87 These included the Tribunal’s second indigenous member Michael McDaniel, Graeme Neate, Pam O’Neil (a former member of the Northern Territory Legislative Assembly and Commonwealth Sex Discrimination Commissioner), Rick Farley (who had been the Executive Director of the National Farmers Federation from 1988–95) and Dianne Smith (a Research Fellow at the Centre for Aboriginal Economic Policy Research at the Australian National University).

88 Original NTA s 206.

89 Original NTA s 206(d).

90 Original NTA s 206(d).

91 NTA s 206(d).

operation of the Act and its effect on the exercise and enjoyment of human rights of Aboriginal peoples and Torres Strait Islanders. This became, in part, a report on the functions of the Tribunal.

IX ENGAGING WITH THE MEDIA

For most people, the media was the primary source of information about native title and the processes of the Act. Effective lines of communication with journalists were essential, although the ultimate product of an interview with a journalist, whether print or electronic, was never entirely predictable or controllable. I characterised such interviews as providing ‘a verbal tailings dump with a licence to treat’. An experienced media officer with an understanding of the important elements of the law was indispensable. The officers who served the Tribunal worked as a bridge between it and the media, advising the Tribunal’s President and Members of requests for interviews and providing background briefs to journalists so that their questions did not proceed on false premises. Generally they succeeded in greatly improving the effectiveness of public communication. Most interviews were genuine attempts by the interviewer, within the necessary constraints of print space or airtime, to elicit information for viewers or readers.

Even so, unaided by media officers or journalists, I secured a significant public relations reversal for the Tribunal in 1995. This resulted from my application of the term ‘cargo cult mentality’ to expectations that the native title process would yield rapid resolutions. The metaphor, which was intended to apply primarily to non-indigenous impatience with the process, was taken as a slur on indigenous people. I was roundly denounced in The Australian with such wounding epithets as ‘conservative’ and ‘not very helpful’. Sensitivity to the unexpected resonances of seemingly innocuous expressions is no doubt an essential part of the successful politician’s toolkit. Absent that awareness honed by long experience, I settled thereafter for a deeply cautious approach to catchy metaphors.

Inner calm, careful reflection and a relaxed mien are indispensable to the management of interviews in the electronic media. However, these do not always suffice. Following my decision to refuse the Waanyi People’s application and the subsequent reversal of that decision by the High Court, I appeared on Lateline with Patrick Dodson to discuss the issues around the highly contentious Century Zinc project. Dodson and I were both participating from Broome, where there was no ABC studio available. We were placed in the back of a furniture removal van set up as a studio for the occasion. We each faced a camera and sat on a wooden chair with a blue tarpaulin hung behind us. Our contact with the

93 Original NTA s 209.
95 Noel Pearson, quoted in ibid.
97 Re Waanyi People’s Native Title Application (1995) 129 ALR 118.
98 North Ganalanja Aboriginal Corporation v Queensland (1996) 185 CLR 595 (‘Waanyi’).
Canberra studio, where Maxine McKew was presenting, was by a small plastic earpiece. We could hear, but not see, what was happening on the rest of the program.

The program opened with David Solomon flicking through the pages of the High Court judgment in *Waanyi* pointing out, with scholarly relish, the passages in which the Court said I had erred. Noel Pearson was interviewed. I have a vague recollection of being denounced yet again. Patrick Dodson, Aden Ridgeway, a Century Zinc executive and myself then formed the standard panel of talking heads. At one point the presenter asked, with saccharine sincerity, whether I had a sense of ‘missed opportunities’. I responded shortly that no doubt things would have been better had I adopted the approach to the construction of the Act which the High Court later said was correct. So saying, and having in mind my family’s advice that I should relax more on television, I attempted to smile. This loosened the small plastic earpiece which was my lifeline to the Canberra studio. It was necessary therefore to halt the development of what should have been an engaging facial expression somewhere at the level of a strained smirk.

In spite of these and other occasional hardships with the media, the overall experience of the Tribunal and my own experience with them was surprisingly positive. Most journalists were prepared to listen to explanations of the native title process so that they could ask more informed questions or write more informed articles. Mistakes were generally not the product of ill will but ignorance, misunderstanding or a rushed job in writing up a piece or putting a program together for television or radio.

**X ENTERING NEW COUNTRY — THE TRIBUNAL GRAPPLES WITH THE LAW**

From its establishment, the Tribunal entered into uncharted territory. It was bedevilled to some extent from the outset by its very designation as a ‘tribunal’. That designation obscured the central function of the Tribunal which was mediation. In this respect the second reading speech of the Native Title Bill 1993 (Cth) was somewhat misleading when it described as a key aspect of the Act ‘rigorous, specialised and accessible tribunal and court processes for determining claims to native title’.99

The Tribunal, in common with all those engaged in native title processes under the Act, faced a number of questions about the operational aspects of those processes, arising from a combination of the drafting of the legislation and the open-textured content of the common law relating to the recognition of native title. These questions included:

---

1 What test should the Native Title Registrar apply to decide whether an application for a native title determination or for compensation should be accepted?100

2 When should a claim be registered? There were two relevant and apparently inconsistent provisions of the Act. One required registration of a claim upon its lodgment.101 The other appeared to require registration following acceptance of the application.102

3 What was the scope of land tenure information relevant to questions of extinguishment that the Registrar should obtain before deciding on acceptance?

4 What was the extent of the duty to notify persons whose interests might be affected by a native title determination application? Was individual notice required to each one of the potentially hundreds or thousands of interest holders in the claim area?

5 How was the Tribunal to undertake the task of mediating issues of such multi-dimensional character and of such complexity, particularly where state governments, if not overtly hostile to the whole process, were only beginning to address the development of policies which would inform their responses to claims over particular classes of land?

6 What was the proper role of the Tribunal in seeking to achieve non-native title outcomes in cases where a native title determination application could not be agreed upon, but in which some other form of recognition and agreement in relation to the use of traditional lands might be possible?

7 How was the Tribunal to deal with the potentially vast volume of proposed grants of mining tenements attracting the application of the right to negotiate process, including arbitral hearings?

8 What scope was there for mediation if a major respondent would not mediate?

From the time of its establishment, there was pressure on the Tribunal to state its position with respect to the acceptance of applications affecting specific classes of interests in land (particularly pastoral leases and mining leases). Within two weeks of appointment as President, I issued a set of procedures for the acceptance and registration of applications.103 These were revised on a number of occasions in subsequent years.104 They specified the requirements of the Tribunal for maps and land descriptions to accompany applications. They provided for the Registrar to arrange with the relevant state or territory government for the conduct of current and historical land tenure searches to determine whether there were any extinguishing interests (such as freehold title in the claim

100 A test to be applied by the Native Title Registrar was proposed in the Original NTA and remained in force until the 1998 amendments: see Original NTA s 63.

101 Original NTA s 190(1).

102 Original NTA s 66.

103 The first procedures were issued on 16 May 1994.


---

2003]  Personal Reflections on the National Native Title Tribunal  509
area). They also foreshadowed the issuing of specific guidelines relating to applications covering land or waters which were the subject of particular kinds of third party interests. Prior to acceptance, every application would be examined in relation to the basis upon which native title was claimed and the existence of extinguishing events. The first limb of that examination would usually require the research department of the Tribunal to provide some generalised anthropological and historical literature relevant to the claim area. If an application was referred by the Registrar to a Presidential Member, the Presidential Member could invite submissions on the question of acceptance from third parties. This would allow early identification of factual matters which might have a bearing upon whether the claim was arguable.

The procedures tried to impose some discipline on the inquiry and the preparation to be carried out before an application was lodged. There is no doubt that many applications were lodged without any or adequate preparation and, in some cases, without proper consultation with members of the relevant community of native title holders. The first claim presented for parks and reserves and Crown land in the Perth metropolitan area was accompanied by a copy of a metropolitan road map with a texta pen line defining the boundaries of the claim. The outline was of sufficient imprecision to cover at least one freehold riverside property in what was popularly known as ‘Millionaires’ Row’ in Perth.

The screening procedures applied to acceptance processes, particularly in relation to an application by the Waanyi People which I rejected as President of the Tribunal,105 were the subject of trenchant criticism in 1995, on appeal to the High Court.106 The Court held, inter alia, that the receipt of third party submissions and the determination of questions of law and fact going to the arguability of the application was ‘tantamount to a proleptic exercise of [federal] jurisdiction’.107 Moreover, it was seen as inconsistent with the objectives of the Act, which gave priority to mediation. Five Justices said:

> If it be practicable to resolve an application for determination of native title by negotiation and agreement rather than by the judicial determination of complex issues, the Court and the likely parties to the litigation are saved a great deal in time and resources. Perhaps more importantly, if the persons interested in the determination of those issues negotiate and reach an agreement, they are enabled thereby to establish an amicable relationship between future neighbouring occupiers.108

The Waanyi People’s disenchantment with the Tribunal’s acceptance process was concisely and wittily set out on t-shirts which they wore in the High Court building during the hearing of the case, and which bore the legend ‘Ban French Testing’ and at least one other less complimentary observation.

The effect of the Waanyi decision was that the criteria and processes specified in the Act for the acceptance of applications provided only a low level screening test. The Tribunal’s procedures were changed accordingly. This, combined with

---

105 Re Waanyi People’s Native Title Application (1995) 129 ALR 118.
108 Ibid 617.
the decision of O’Loughlin J in _Northern Territory v Lane_\(^{109}\) that an application was entitled to be registered upon lodgment, encouraged the lodgment and registration of large numbers of applications thereafter. The growth curve from 1994 to 1998 was exponential. In the first six months to 30 June 1994, 14 claimant applications had been lodged. By 30 June 1995 this had grown to 82, and by 30 June 1996, post _Waanyi_, to 367. By 30 June 1997, the numbers had reached 552, and on 30 June 1998, there had been 804 claimant applications lodged with the Tribunal.\(^{110}\)

The Tribunal’s procedures set out the general principles to be followed in mediation. The Tribunal, in mediation conferences, would endeavour to apply interests-based negotiation involving the parties:

1. Identifying their own and the other parties’ interests relevant to the application.
2. Thinking about a variety of options for resolution of the application before deciding how to proceed.
3. Considering the options against some acceptable standard of fairness or reasonableness.

It was foreshadowed that the mediation conference process might involve more than one meeting at different times and places. Meetings might be between the mediator and the parties together and, in some cases, ex parte meetings between the mediator and each of the parties before or after the full mediation conference sessions.

The interests-based approach was interpreted by some indigenous groups as requiring an analysis of their claimed native title into a ‘bundle of rights’.\(^{111}\) This was not a necessary feature of the process proposed. However, the objectors to this approach pointed out, quite persuasively, that the relationship with country was holistic, generally embracing rights of possession and occupation. The relationship was not defined by particular uses any more than the rights of a freehold owner are defined by the way in which the owner uses the land.\(^{112}\)

\[\text{XI Mediation Experiences — Wellington, Broome, Crescent Head, Hopevale and Torres Strait}\]

As the number of native title determination applications lodged with the Tribunal grew, so too did the Tribunal, with the establishment of offices in all


\(^{110}\) By 1 August 2003, 1321 claimant applications had been lodged. Six hundred and thirty three of them were active, many others having been combined, withdrawn or settled: see National Native Title Tribunal <http://www.nntt.gov.au/applications/index.html>.

\(^{111}\) See generally _Western Australia v Ward_ (2002) 191 ALR 1, 35, 40 (Gleeson CJ, Gaudron, Gummow and Hayne JJ) (‘_Ward_’).

mainland capital cities and in the regional centres of Kalgoorlie and Cairns. Staff of the Tribunal, known as Case Managers, and Members of the Tribunal were engaged in preparing, commencing and carrying out mediations pursuant to s 72 of the Act in a wide variety of desert, rural, semi-rural and urban landscapes.

A Wellington

Although the Tribunal developed a draft mediation strategy at a relatively early stage, its members and staff were essentially learning on the job, evolving techniques and adjusting them to particular circumstances. The first Tribunal mediation conference was held at Wellington in New South Wales on 14 May 1994, two weeks after I had commenced as President. A group of Wiradguri People, led by Rose Chown, had lodged an application for a native title determination over the Wellington Town Common, an area of 180 hectares.

On the day of the first mediation conference, and in the presence of a large press contingent on the Common, an agreement was made about the boundaries of the claim, contracting them from the far bank of a bounding river to its midline. This enabled a neighbouring farmer, who had been concerned about his riparian rights, to withdraw as a respondent. It was the first positive outcome of the mediation process, and at the time had a symbolic and educational value well beyond its significance to the particular claim.

The Wellington claim, it may be noted, remains unresolved after nearly 10 years of meetings, agreements and false starts, not least because of continuing intra-indigenous issues. An ILUA was reached between the State of New South Wales and the representative Aboriginal body for that State. There were, however, objections from local indigenous people, and on 2 October 2002 registration of the agreement was refused by the Native Title Registrar. Negotiations are ongoing.113

B Broome

An approach to the management of intra-indigenous issues was modelled in Broome by a number of different claimant groups who formed what became known as the Rubibi Working Group. It was chaired by Patrick Dodson, a member of the Yawuru People of the area. There was some difficulty in the early stages in engaging the Western Australian government in mediation of the native title claims in the area. Initial discussions proceeded with the local authority, the Shire of Broome, and with other non-indigenous interests, including representatives of the pearling and fishing industries. An interim agreement was negotiated with the Shire of Broome in May 1996. It provided for mutual recognition and respect for indigenous and non-indigenous interests in the area. Importantly, it established a framework for structured Aboriginal participation in planning decisions. The agreement was publicised around Australia as a possible template

113 Personal communication with the National Native Title Tribunal State Manager (NSW), July 2003.
for the engagement of indigenous people and local government authorities.\textsuperscript{114} It presaged a high level of positive involvement by local governments and the Local Government Association of Australia in making agreements with native title claimants.\textsuperscript{115} This was of importance, not least because local governments (being the level of government closest to their communities) could do much to assuage fears and tensions about the native title process. Further agreements were made with the Shire of Broome. However, there was no consensual resolution of the native title applications. In respect of one of the applications in the area there was a significant intra-indigenous conflict. The applications have gone to trial and, at the time of writing, judgment is reserved.

\textbf{C Crescent Head}

The first consent determination of native title on the mainland related to the claim of the Dunghutti People at Crescent Head in New South Wales.\textsuperscript{116} That determination was made on 7 April 1997. New South Wales has otherwise been unable to achieve any consent determinations. The consent determination of the Dunghutti People was driven by concerns about a subdivision in the area, which had been approved without reference to native title rights and interests and which may have been invalid for that reason. An agreement was signed on 9 October 1996 providing for a consent determination, the surrender of native title by the holders and the payment to them of compensation which was fixed at 1.5 times the freehold value.\textsuperscript{117}

\textbf{D Hopevale}

The first permanent\textsuperscript{118} mainland consent determination was at Hopevale in Far North Queensland over land contained in a reserve vested in an Aboriginal Land Council under Queensland law. The land was occupied by a number of clans of traditional owners and by other Aboriginal people who were not traditional owners but had an historical association with it. The process leading to the determination was complicated by a number of factors. The Land Council in which the Hopevale land was vested had a royalty agreement with a mineral sands miner which yielded a significant annual return. The mine was located on the territory of one of the clans. The question whether that clan’s native title

\begin{itemize}
\item \textsuperscript{115} In December 1996 the Tribunal, in conjunction with the Australian Local Government Association, the West Australian Municipal Association and the Council for Aboriginal Reconciliation produced an information booklet for local authorities that was launched in Canberra in June 1997. A national information kit was also developed by the Australian Local Government Association and the Royal Australian Planning Institute.
\item \textsuperscript{116} \textit{Buck v New South Wales} (Unreported, Federal Court of Australia, Lockhart J, 7 April 1997).
\item \textsuperscript{117} Dunghutti People, New South Wales Minister for Land and Water Conservation and New South Wales Aboriginal Land Council, \textit{Crescent Head Agreement} (9 October 1996), reproduced in \textit{(1997) 2 Australian Indigenous Law Reporter} 100.
\item \textsuperscript{118} The word ‘permanent’ is used to distinguish the Hopevale consent determination from the earlier consent determination at Crescent Head which was accompanied by an immediate surrender of the native title to the State of New South Wales.
\end{itemize}
interests would entitle it to the full benefit of the royalty was a source of conflict with the other clans. This was ultimately resolved on the basis that the determination of native title could not affect the existing statutory rights and powers of the Land Council or its status as legal owner of the land, nor the contractual rights acquired pursuant to its ownership and its statutory authority. The position was further complicated because the area was occupied by both traditional owners and by others who had come in later, and could not be counted as part of the community of native title holders. In addition, the Land Council, which exercised many of the powers of a local authority, had purported to grant a range of leasehold type interests to persons in the community. Such grants had been made, in some cases, without proper authority or documentation. These leases were generally for the purposes of residences.

The native title process began on 15 July 1994 with the lodgment of an application by the Dingaal Clan and was followed on 30 November 1994 by the lodgment of what was called the Dhubbi-Warra application. After a 15 month period an agreement was reached between all of the Hopevale clans in relation to their clan boundaries and the joint pursuit of native title. They called themselves the Congress of Clans. The agreement recognised the rights of the non-traditional or historical land owners at Hopevale. A joint claim was lodged on behalf of all clans and the Dhubbi-Warra claim was withdrawn. A further agreement was made in November 1996 between the Dingaal Clan and the Congress of Clans to pursue their native title jointly. The next step was an agreement between the Hopevale Aboriginal Council and the native title applicants. That was signed on 11 December 1996.

Between December 1996 and October 1997, 20 meetings involving the Tribunal were held with various parties at Hopevale, Cooktown, Brisbane and Cairns. On 24 October 1997, the Dingaal claim was withdrawn to the extent of the overlap with the joint claim, and the parties signed a final agreement at Hopevale with State government representatives. The Premier of Queensland signed off on the agreement on 11 November 1997. All other respondents signed the agreement in December 1997 and, on 8 December 1997, the Federal Court made a consent determination at Cairns.119

The outcome was a remarkable achievement much assisted by the legal representatives for the applicants and the team of officials from the State government. The most important contribution of the Tribunal in the later part of the process was to lend the authority of an external agency in facilitating dialogue — between some of the applicants who had been in conflict and their respective advisors, as well as between the applicants and the State government and other respondents.

The process illustrated the benefits of a disciplined and focused team of government officials. It was a measure of their thoroughness that before the agreement was finally submitted to the Premier of Queensland, its terms were canvassed with each of 18 State government departments or authorities that might have had an interest in it. This ensured that the path was clear for final authori-

It was also a remarkable fact that the Premier who signed off on the agreement was the National Party Premier, Mr Rob Borbidge, whose level of enthusiasm for native title was probably on a par with that of Premier Richard Court of Western Australia. It may be noted that the final determination was supported by ancillary agreements with the Hopevale Aboriginal Council and with State government authorities involved in the provision of public utilities. A process was also put in place for the long-term regularisation of the leasehold and other interests which had been granted over a period, with uncertain authority or inadequate documentation, by the Hopevale Aboriginal Council.

E Torres Strait

The Hopevale determination provided a template for determinations over other Aboriginal and Torres Strait Islander land in Queensland. The islands of the Torres Strait each comprise land vested in a statutory Island Council with powers similar to those of the Hopevale Aboriginal Council. Some consent determinations have already been made on those islands and more are pending.120

XII The 1998 Amendments

A Relationship between the Tribunal and the Federal Court

There were many aspects of the 1998 amendments to the Act which engendered heated debate between indigenous groups, industry and government. By contrast, there were other changes of a procedural character which affected the work of the Tribunal but were not contentious. One of the most important of these was the change to the process of lodgment of applications and the relationship between the Tribunal and the Federal Court of Australia. In its decision in Brandy,121 the High Court held that administrative determinations of the Human Rights and Equal Opportunity Commission could not validly be registered and take effect as judgments of the Federal Court. The Court found this to be inconsistent with the separation of executive and judicial power reflected in Chapter III of the Constitution.122 The statutory model in the Human Rights and Equal Opportunity Commission Act 1986 (Cth) was the same as the model in the Act, which provided for the Tribunal to make consent determinations that would be registered in the Federal Court and take effect as orders of the Court. The


122 Ibid 264 (Mason CJ, Brennan and Toohey JJ), 271 (Deane, Dawson, Gaudron and McHugh JJ).
Tribunal adapted to the *Brandy* decision by changing its procedures. Accordingly, the end point of mediation would not be an inquiry and determination by the Tribunal, but rather a referral of the matter to the Federal Court as though unresolved, following which the parties could seek a consent order in the Court. The invalidity of the relevant provisions of the Act was declared by the Full Court in *Fourmile v Selpam Pty Ltd*.

Although it was possible to overcome the *Brandy* difficulty by side-stepping the Tribunal inquiry and determination process and referring the matter to the Federal Court for a final consent determination, there was still a fundamental problem with the mediation process. This had to be exhausted before the Court’s jurisdiction could be invoked. The Tribunal made representations as early as 1995 to change the process so that applications would be lodged in the Federal Court and then referred to the Tribunal for mediation. However, the Tribunal wanted to save its capacity to refer questions of fact or law for determination by the Court and for continuing Court supervision of the mediation process. In the event, that was the substance of the new system introduced by the 1998 amendments.

B Revised Application Procedures

Another important innovation was the requirement that persons making applications for native title determinations had to be authorised by all persons who claimed to hold native title. This again was common ground between indigenous and other interests in the discussions convened by the Aboriginal Reconciliation Council in the lead up to the amendments. The native title process prior to 1998 had been bedevilled by applications lodged by individuals or small splinter groups. They were seeking to obtain an advantage at the negotiating table alongside those whose claims were brought on behalf of the whole of the relevant native title group.

A screening test for registration was introduced which had the effect that the right to negotiate could not be obtained by the mere act of lodgment of an application. New and more flexible provisions for notification of applications were also inserted. The Federal Court was given the power to terminate mediations and to request reports on the progress of mediation from the Tribunal. The Tribunal was given the facility to refer questions of law or fact to the Court if the Presiding Member considered that it would expedite agreement on

---

123 (1998) 80 FCR 151, 155–6 (Burchett J), 176 (Drummond J), 187 (Cooper J).
124 See especially *NTA* ss 61, 86B–D.
125 *NTA* s 61(1).
126 The authorisation requirement is found in *NTA* s 61, and is defined in *NTA* s 251B. Removal of an applicant for lack or excess of authority is provided for in *NTA* s 66B: see *Moran v Minister of Land and Water Conservation (NSW)* [1999] FCA 1637 (Unreported, Wilcox J, 25 November 1999) [48]; *Western Australia v Strickland* (2000) 99 FCR 33, 52 (Beaumont, Wilcox and Lee JJ); *Daniel v Western Australia* (2002) 194 ALR 278, 283 (French J).
127 *NTA* ss 190A–D, read with sub-div P of div 3 of pt 2, and especially ss 29–36.
128 *NTA* s 66. See also *Bropho v Western Australia* (2000) 96 FCR 453.
129 *NTA* ss 86C, 86E.
any matter that was the subject of mediation. Some state governments had objected to the Tribunal pursuing with parties the possibility of non-native title outcomes in relation to applications that were unlikely to yield a native title determination. This concern was reflected in the Act by the confinement of the purposes of mediation involving the Tribunal through s 86A. The purposes of mediation were expressed in terms of the necessary elements of a native title determination as set out in s 225 of the Act. The Tribunal fought a rear guard action to save a facility for pursuing non-native title outcomes and secured the inclusion of s 86F of the Act. Under that provision, some or all of the parties to a proceeding in relation to the application may negotiate with a view to agreeing to action that will result in the withdrawal of or amendment to the application, or a variation in the parties or any other thing. The Tribunal has no statutory right or obligation to assist in those negotiations, but the parties may request assistance from the Tribunal for that purpose. The provision has been of increasing importance in the pursuit of recognition of the relationship of indigenous people to their country through a variety of mechanisms where a native title determination appears to be unlikely.

C The Mediation Process

The mediation process is now the subject of considerably expanded provisions. These contemplate that a conference may involve only one or some of the parties, thus expressly authorising ex parte and bilateral or single issue meetings to be held as part of mediation. Third parties may participate in a conference if the Presiding Member considers that it would assist in reaching agreement and the parties present give their consent. So, an industry association representative may participate where there are members of the industry who are parties to the application, but who are not using the association as their agent. The amendments also permit a Member, with the consent of the parties at the conference, to permit other persons to attend as observers. The Tribunal is now authorised to exclude disruptive parties or representatives from a conference. Indeed, any party may be excluded if the Presiding Member considers that it would help to resolve matters. Conferences are required to be held in private, and the Tribunal Member presiding may prohibit disclosure of information given, statements made or documents produced at the conference. Members and officers of the Tribunal and mediation consultants cannot be required to give evidence or produce documents in a court contrary to a direction given by the Presiding Member. At the end of mediation, the Member must
provide a written report to the Federal Court. Where parties reach agreement about the terms of a Federal Court order in relation to all or part of the proceedings, then the Court may make such order if it is within its power and appropriate to do so.

It is not necessary for present purposes to canvass the complete range of amendments to the Act effected in 1998.

The full potential of the procedural amendments introduced in 1998 has yet to be realised. The growth of ILUAs is encouraging. However, although there have now been a number of consent determinations of native title and some litigated determinations, the overall process is still very slow and is hindered by the resource limitations of the main players. Nevertheless, with the new interaction of the Court, and the Tribunal and the Court’s facility to give directions and indeed to conduct litigation and mediation in parallel, the process can be more focused and systematic than it has been in previous years.

XIII THE ONGOING DEVELOPMENT OF THE LAW

The principles enunciated in Mabo [No 2] and the operation and construction of the Act have been the subject of a number of important High Court decisions over the past decade. In Western Australia v Commonwealth, the High Court upheld the validity of the NTA. It was deemed a valid law of the Commonwealth supported by the race power conferred by s 51(xxvi) of the Constitution. The Court also found the Land (Titles and Traditional Usage) Act 1993 (WA), which purported to extinguish native title and replace it with statutory rights, to be inoperative due to its inconsistency with the provisions of both the Racial Discrimination Act 1975 (Cth) and the NTA.

In the Waanyi case, the High Court, in overturning my decision as President of the Tribunal directing non-acceptance of the Waanyi People’s application on the basis of the extinguishing effect of prior pastoral leases, made some important normative statements about the priority to be given to mediation and negotiated solutions under the Act. The Court left open the question whether the grant of pastoral leases extinguished native title. That question was answered in Wik where the Court held (by a majority of four to three) that the pastoral leases in issue did not confer exclusive possession of the areas to which they applied and that they had not necessarily extinguished all incidents of native title.

---

138 NTA s 136G.
139 NTA s 136G(2), (3).
140 NTA s 87.
144 Ibid 450.
The sanctity of freehold title was upheld in *Fejo v Northern Territory*\(^{147}\) which held that such grants extinguished native title\(^{148}\) and that such extinguishment was irreversible.\(^{149}\) The operation of s 211 of the Act (‘preservation of certain native title rights and interests’) was considered in *Yanner v Eaton*.\(^{150}\) The High Court there held that a native title right to hunt crocodiles was not extinguished by the *Fauna Conservation Act 1974* (Qld). Hunting activities were merely regulated by that Act, so that hunting in the exercise of native title rights was permitted by the overriding operation of s 211.

A decision of great importance to indigenous people and to the fishing and pearlling industries was that of the High Court in *Commonwealth v Yarmirr*\(^{151}\) which held that a non-exclusive native title could subsist in the seas and seabeds around Croker Island in the Northern Territory. The determination at first instance\(^{152}\) (which was upheld by the Full Federal Court)\(^{153}\) recognised rights to fish, hunt and gather for the purpose of satisfying the personal, domestic or non-commercial communal needs of native title holders and for the purpose of observing traditional, cultural, ritual and spiritual laws and customs. It offered no threat to commercial fishing or pearlling operations.\(^{154}\)

*Ward*\(^{155}\) reflected a conservative approach by the High Court to underlying principles, and an emphasis on black letter law which was foreshadowed in *Yarmirr*. That is evidenced by the emphasis placed upon the definition of ‘native title rights and interests’ in s 223 of the Act in determining what constitutes native title or native title rights and interests. That decision concerned a major native title determination in north-west Western Australia and the Northern Territory. Broadly speaking, it may be said that it:

1. Foreshadowed limited development of the common law of native title.\(^{156}\)
2. Accorded the provisions of the Act primary importance in identifying the content of native title.\(^{157}\)
3. Did not explore the content of the metaphors of ‘recognition’ and ‘extinguishment’ which lie at the heart of the common law of native title, although the tests for extinguishment were extensively discussed.
4. Favoured a statute-based characterisation of native title as a ‘bundle of rights’.\(^{158}\)
5. Held that native title, as a ‘bundle of rights’, may be extinguished in part or incrementally.\(^{159}\)

\(^{147}\) (1998) 195 CLR 96.
\(^{148}\) Ibid 120–31 (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).
\(^{149}\) Ibid 127, 131.
\(^{150}\) (1999) 201 CLR 351.
\(^{151}\) (2001) 208 CLR 1 (‘Yarmirr’).
\(^{152}\) *Yarmirr v Northern Territory [No 2]* (1998) 82 FCR 533.
\(^{154}\) *Yarmirr* (2001) 208 CLR 1, 33 (Gleeson CJ, Gaudron, Gummow and Hayne JJ).
\(^{156}\) Ibid 17, 19 (Gleeson CJ, Gaudron, Gummow and Hayne JJ).
\(^{157}\) Ibid 19.
\(^{158}\) Ibid 40.
Specifically held that:

(i) native title may be partially extinguished but is not necessarily wholly extinguished by pastoral leases and mineral leases in Western Australia;  

(ii) the vesting of land under the Land Act 1933 (WA) extinguishes native title;  

(iii) native title rights and interests do not extend to subsurface minerals.

The High Court emphasised the legal effect of grants inconsistent with the continuance of native title. The importance accorded by the High Court to the requirement for particularity in the analysis of extinguishing events led it to reject the global approach to extinguishment taken by the Full Court of the Federal Court (which had held that the Ord River Project extinguished native title). The High Court’s conclusions about the effect of vesting of Crown reserves under the Land Act 1933 (WA) had a substantially adverse affect on native title holders. It meant that the creation of national parks in Western Australia would be taken to have extinguished native title.

Following Ward, the High Court held in Wilson v Anderson that Western Division leases in New South Wales extinguished native title. This affected a large area of New South Wales.

Most recently, in Members of the Yorta Yorta Aboriginal Community v Victoria, the High Court again emphasised the statutory definition of native title as defining the criteria that had to be satisfied before a determination could be made. To that extent the Court appears to have moved away from the original concept of the Act as a vehicle for the development of the common law of native title. Indeed so much seems to have been recognised by McHugh J who was unconvinced that the construction placed by the Court on s 223 accorded with that which the Parliament had intended. His Honour referred to statements he had cited in Yarmirr from the Ministers responsible for the Act when it was enacted in 1993 and when it was amended in 1997: ‘[t]hey showed that the parliament believed that, under the Native Title Act, the content of native title would depend on the developing common law.’

He went on to say: ‘But this court has now given the concept of ‘recognition’ a narrower scope than I think the parliament intended, and this court’s interpretation of s 223 must now be accepted as settling the law’.

---

159 Ibid 55 (with respect to pastoral leases), 97 (with respect to mining leases).
160 Ibid.
161 Ibid 132.
162 There was no evidence of any traditional Aboriginal law, custom, or use relating to petroleum or any of the substances dealt with under State mining legislation. Had there been, such rights would have been extinguished by s 117 of the Mining Act 1904 (WA) and s 9 of the Petroleum Act 1936 (WA): Ward (2002) 191 ALR 1, 113, 134 (Gleeson CJ, Gaudron, Gummow and Hayne JJ).
165 (2002) 194 ALR 538 (‘Yorta Yorta’).
166 Ibid 572.
167 Ibid 573.
In Yorta Yorta, the High Court upheld a finding by Olney J of the Federal Court that the Yorta Yorta People had failed to prove the maintenance of their connection with the land under claim from settlement to the present day in accordance with their traditional laws and customs from the time of annexation. Evidence of past occupation was insufficient to show the required acknowledgement and observance of traditional laws and customs.\textsuperscript{168} The trial judge had concluded that ‘the tide of history’ had washed away any real acknowledgement of traditional laws and any real observance of traditional customs.\textsuperscript{169} The High Court held that once the traditional normative system had ceased to exist, attempts to revive adherence to it would not resurrect the native title rights and interests that had previously existed. This did not involve any rejection of the proposition that change to and adaptation of traditional law and custom is able to be recognised by the common law.

There is a widespread perception among indigenous groups and their representatives that the effect of the Yorta Yorta decision is significantly to contract the areas within Australia in which determinations of native title will be obtained.\textsuperscript{170} This may be so. In its emphasis on the identification of discrete elements of the ‘bundle of rights’ making up native title,\textsuperscript{171} the High Court decision has the potential to burden the determination process with a mass of costly technicality. The way in which it applies the words of ss 223(a) and (b) of the Act to the determination of native title rights and interests may have transformed the Act from a vessel for the development of the common law into a cage for its confinement. Whether these concerns are borne out remains to be seen. Whatever the future of native title jurisprudence, the history of agitation by Australia’s indigenous people in relation to their traditional lands and waters suggests that native title will continue to be of importance as one of the range of tools which they can employ in seeking their rightful recognition.

\textbf{XIV Conclusion}

For Australia’s indigenous people, the native title process has provided opportunities and incentives to assert and to articulate with determination the vitality of their cultures, and the reality of their traditional laws and customs. It is of fundamental importance that they have been able to claim rights — and the right to be heard — in a range of ways that were not available before the decision in Mabo \textit{[No 2]}. The statutory response and recent jurisprudence has not made their path any easier. The politics of the Commonwealth, state and territory governments have had their own, and at times confusing and frustrating, impacts on the evolution of the law and practice. All parties continue to be

\textsuperscript{168} Members of the Yorta Yorta Aboriginal Community v Victoria [1998] FCA 1606 (Unreported, Olney J, 18 December 1998) [129].
\textsuperscript{169} Ibid.
\textsuperscript{171} See Yorta Yorta (2002) 194 ALR 538, 549 (Gleeson CJ, Gummow and Hayne JJ) for discussion of the rights and interests of the indigenous people.
bedevilled by resource limitations in pursuing both mediation and litigation. However, despite these difficulties and challenges, a return to the pre-\textit{Mabo} days would represent a major impoverishment of our society. The native title process has forced many Australians, including myself, to confront in a new way the challenge of our relationships with indigenous people and the past and future of our Australian Federation. In so doing, it enriches the whole nation.