

INDIGENOUS EQUALITY: THE LONG ROAD

GREG MCINTYRE SC*

This essay identifies some of incremental progress towards substantive racial equality in Australia for First Nations Peoples observed in the course of a legal practice extending over the past 44 years, affected by cases brought before the courts, particularly the case of Mabo v Queensland. It discusses the impact on that progress of legislation, particularly the Native Title Act. It concludes that recognition of the fiduciary duty of the Government towards its First Nations Peoples may be a necessary prerequisite to according them self determination and equality within the Australian nation.

* LLB (UWA) 1974, Barrister, Michael Kirby Chambers, Western Australia, Adjunct Professor, UNDA and UWA.

CONTENTS

I	INTRODUCTION.....	2
II	MY INTRODUCTION TO INDIGENOUS EQUALITY.....	3
III	LITIGATION OR LEGISLATION.....	5
IV	LEGISLATING NATIVE TITLE.....	5
V	PUSHING BACK THE STATES.....	6
VI	PASTORAL LEASES V NATIVE TITLE.....	7
VII	HOWARD’S TEN POINT PLAN.....	7
VIII	EXTINGUISHMENT AND COMPENSATION.....	9
IX	BUNDLE OF RIGHTS.....	11
X	EXTINGUISHMENT AND REVIVAL OF NATIVE TITLE.....	12
XI	THE LIMITATIONS OF NATIVE TITLE.....	15
XII	CONTROL: PROPERTY.....	16
XIII	POSITIVES AND NEGATIVES.....	17
	A <i>COLLATERAL NEGATIVES</i>	21
	B <i>COLLATERAL POSITIVES</i>	22
XVI	SOVEREIGNTY, NATIVE TITLE AND SELF-DETERMINATION.....	22
XVII	HONOUR OF THE CROWN/FIDUCIARY DUTY.....	23
XVIII	CONCLUSION.....	24

I INTRODUCTION

The road to Indigenous equality in Australia is proving to be a long one for Indigenous people over the past 232 years, since the assertion of British sovereignty. This essay traces my experiences, observations and participation as a legal practitioner in some of the legal changes over the past 44 years which have been affected by cases brought before the courts, particularly in the area of native title. It references legislation, which, in some instances, has been reactive to those cases. The essay identifies some of the incremental progress towards substantive racial equality in Australia. The essay, while identifying

deficiencies and limitations in the legal process, also suggests the direction in which Australia should be heading, if it is to achieve legal and social equality for First Nations Peoples.

II MY INTRODUCTION TO INDIGENOUS INEQUALITY

As a law student at the University of Western Australia in 1972, I participated with a group of fellow law students in an awareness raising survey of the conditions in which Aboriginal people were living in the south-west of Western Australia. We visited towns in the south-west and observed things such as Aboriginal Reserves having one tap to four houses. Following a workshop comparing our experiences, the student Blackstone Law Society resolved to participate in a voluntary legal aid service which had just been established by the Justice Committee of the New Era Aboriginal Fellowship. In 1974, I joined that Committee, as its student representative. It evolved into the Aboriginal Legal Service of Western Australia in that period.

The first job I took upon obtaining my legal practice certificate in 1976 was with the Aboriginal Legal Service of Western Australia in its new Kalgoorlie office. In 1977, I attended the second meeting of Central Desert communities of Western Australia, South Australia and the Northern Territory which, during the course of that year, became incorporated as the Pitjantjatjara Council to fight to obtain land rights, which mirrored what had been enacted by the *Aboriginal Land Rights (Northern Territory) Act 1976*.¹

In 1978, a delegation of leaders from the Pitjantjatjara Council travelled to Perth with their employed solicitor, Phillip Toyne.² We met with the Premier of Western Australia, Sir Charles Court, to argue the case for Western Australia enacting land rights legislation. I do not recall that we gained much traction with the Premier, but the delegation did draw some public attention to the cause.

I was convinced at that time that if Governments would just recognise the rights to land, which it appeared to me that Aboriginal people self-evidently held as an integral part of

¹ Which brought together communities for the whole of the Western Desert Cultural Bloc – Ngaanyatjarra, Ngatatjarra, Pitjantjatjarra, and Yankutatjarra peoples.

² See a summary of Phillip Toyne's career at Andrew Campbell, 'Phillip Toyne cared for land-carers, black and white', *The Conversation* (Web Page, 15 June 2015) <<https://theconversation.com/phillip-toyne-cared-for-land-carers-black-and-white-43235>> and 'Phillip Toyne', *Wikipedia* (Web Page, 20 August 2020) <https://en.wikipedia.org/wiki/Phillip_Toyne>.

their existence, it would deliver to them all that was required for them to be self-determining and socially and economically secure. I could see from my time travelling around the Central Desert communities how intimately their lives were connected with the land to which they belonged.

In 1978, I attended the second meeting of the Kimberley Land Council and then, with its Chairman, Frank Chulung,³ traversed the Kimberley, identifying areas of land that were of significance to Aboriginal people which could be purchased on their behalf by the Aboriginal Land Fund Commission,⁴ or preserved by being added to the Conservation estate, by what we anticipated may have been a State Government willing to establish a network of Conservation Reserves throughout the Kimberley.

I secured a grant from the Australian Institute of Aboriginal Studies in the latter half of 1978,⁵ to conduct a study on the topic of 'Aboriginal Land Rights at Common Law'.⁶ The thesis I started with was that, if local legal customs could be recognised as part of the law of England, then that was a basis for recognition of Aboriginal title in Australia.

In 1981, I was invited to a conference on the topic of 'Land Rights and the Future of Race Relations in Australia' organised by the James Cook University Student Union in North Queensland and the Townsville Treaty Committee on the topic 'A High Court Test Case?'⁷ Eddie Koiki Mabo, alongside historian Noel Loos, was a co-chair of the Townsville Treaty Committee and, following some side discussions during the conference, I received instructions to commence a test case for land rights on Murray Island.

³ 'Our History', *Walalakoo* Aboriginal Corporation (Web Page) <<https://www.walalakoo.org.au/history>>; 'Tom Stephens', *Wikipedia* (Web Page, 24 October 2020) <https://en.wikipedia.org/wiki/Tom_Stephens>; Rod Dixon.

⁴ Established under the *Aboriginal Land Fund Act 1974* (Cth) and the precursor to the Indigenous Land and Sea Corporation.

⁵ Now known as the Australian Institute of Aboriginal and Torres Strait Islander Studies, after reading academic critiques of the 1971 decision of Justice Blackburn in the Supreme Court of the Northern Territory in *Millirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141 by Geoffrey Lester and Graham Parker, 'Land Rights: The Australian Aborigines have lost a battle, but...' (1973) 11(2) *Alberta Law Review* 189; John Hookey, 'The Gove Land Rights case: a judicial dispensation for the taking of Aboriginal lands in Australia' (1972) 5(1) *Federal Law Review* 85; John Hookey, 'How much of a roadblock is the Gove case?' in Garth Netteim (ed), *Aborigines, human rights and the law* (ANZ Book Co, 1974) 99-103; and, with the encouragement of the Principal Legal Officer at the ALS, Graham McDonald and Ken Colbung, its Chair, who was also Chair of the Australian Institute of Aboriginal Studies.

⁶ A more detailed account of how that study unfolded is set out in 'Genesis of a Test Case', in Toni Bauman and Lydia Glick (ed), *Limits of Change: Mabo and Native Title 20 Years On* (AIATSIS Research Publications 2012) 7-20.

⁷ The papers from the Conference were published in Erik Olbrei (ed), *Black Australians: the prospects for change* (James Cook University of North Queensland Student Union, 1982).

Starting with five plaintiffs and a committed legal team, proceedings commenced on 20 May 1982 in the High Court and resulted in the decision handed down on 3 June 1992 in *Mabo v Queensland [No 2]* recognising native title at common law.⁸

III LITIGATION OR LEGISLATION

In 1983, I travelled with Mick Miller,⁹ the Chairman of the North Queensland Land Council, to Canberra to meet with the Secretary of the Department of Aboriginal Affairs, Charles Perkins,¹⁰ and the Minister for Aboriginal Affairs, Clyde Holding. The Minister was confident that the Hawke Government would enact national land rights legislation. However, as Paul Keating later described it:

In 1983, the Hawke Government promised a national land rights bill which included an inalienable freehold title and compensation for past acts and alienations. But this promise of uniform national land rights was broken in March 1986 when Bob Hawke buckled under pressure applied by the then Labor Premier of Western Australia, Brian Burke...¹¹

In that context, the pursuit of the claim on behalf of the Meriam People was to maintain its significance. A political and legislative recognition of Indigenous rights to land had dropped off the agenda by 1983. The path of recognition through litigation was all that was left.

IV LEGISLATING NATIVE TITLE

Following the High Court's decision in *Mabo [No 2]* in June 1992, Paul Keating has said that there was an 'opportunity' in the willingness of the Labor Government he led to 'legislatively validate and develop the decision of the High Court of Australia' in *Mabo [No 2]*.¹² He has expressed the view that the High Court in *Mabo [No 2]* had opened the door to a possibility of consultation and negotiation between the colonial government and the

⁸ (1992) 175 CLR 1. The details of that 10 year journey are chronicled in Bryan Keon-Cohen, *A Mabo Memoir: Island Custom to Native Title* (Zemvic Press, 2013).

⁹ 'Mick Miller (Aboriginal statesman)', *Wikipedia* (Web Page, 3 September 2020) <[https://en.wikipedia.org/wiki/Mick_Miller_\(Aboriginal_statesman\)](https://en.wikipedia.org/wiki/Mick_Miller_(Aboriginal_statesman))>.

¹⁰ 'Charles Perkins (Aboriginal activist)', *Wikipedia* (Web Page, 15 November 2020) <[https://en.wikipedia.org/wiki/Charles_Perkins_\(Aboriginal_activist\)](https://en.wikipedia.org/wiki/Charles_Perkins_(Aboriginal_activist))>.

¹¹ Paul Keating, 'Time to Revisit Native Title Laws' in Toni Bauman and Lydia Glick (eds), *Limits of Change: Mabo and Native Title 20 Years On* (AIATSIS Research Publications 2012) ch 32, 409.

¹² *Ibid* 406.

country's Indigenous representatives on the country's common law but without a 'comprehensive, firm and quick legislative response that door would have just as quickly closed'.¹³

The negotiations which ensued involved Indigenous representatives in what they had hoped was a 'settlement process' but as Darryl Cronin described it, 'in reality, given the enormous power of industry and territory governments, they became engaged in a political battle to protect the basic core of native title'.¹⁴ The *Native Title Act 1993* (Cth) which emerged from the negotiations was 127 pages long. It declared at section 3 that it had four objects: (a) 'recognition and protection of native title'; (b) a procedure for future dealings with native title; (c) a mechanism for determining native title; and (d) validating past acts invalidated by native title. However, as Les Malezer has commented, 'a large impact of the 1993 *Native Title Act* was that any land titles issued between 1973 and 1994 (and later extended to 1996 [after the High Court's *Wik* decision]) were validated retrospectively'.¹⁵

V PUSHING BACK THE STATES

The State of Western Australia was the most active of all the States in reacting against recognition of native title. It enacted the *Land (Titles and Traditional Usage) Act 1993* (WA). That Act purported, by Section 7, to extinguish any native title that existed in the State and, in its place, entitled any Aboriginal group who had held native title 'to exercise rights of traditional usage'. The legislation was challenged in High Court proceedings by native title claim groups from the Kimberley and the Western Desert of Western Australia on the basis that it was inconsistent with Section 10 of the *Racial Discrimination Act 1975* (Cth).¹⁶ The State of Western Australia, in proceedings which were heard at the same time, challenged the constitutional power of the Commonwealth to enact the *Native Title Act*

¹³ Ibid 407.

¹⁴ Darryl Cronin, 'The Lead up to the Passage of the *Native Title Act*' in Toni Bauman and Lydia Glick (eds), *The Limits of Change: Mabo and Native Title 20 years On* (AIATSIS Research Publications 2012) Ch 7, 69.

¹⁵ Les Malezer and Toni Bauman, 'Interview with Le Malezer' in Toni Bauman and Lydia Glick (eds), *The Limits of Change: Mabo and Native Title 20 years On* (AIATSIS Research Publications 2012) Ch 15, 160.

¹⁶ *The Wororra Peoples & Anor v The State of Western Australia* No 147 of 1993 and *Teddy Biljabu & Ors v The State of Western Australia* No P45 of 1993, reported as *Western Australia v Commonwealth* [1995] HCA 47; (1995) EOC 92-687 (extracts); (1995) 69 ALJR 309; (1995) 183 CLR 373. I appeared for the Kimberly Land Council in those cases with A R ('Ron') Castan QC and B A ('Bryan') Keon-Cohen in those cases.

1994 (Cth).¹⁷ The High Court ruled that the state legislation was invalid and the Commonwealth *Native Title Act* was a valid exercise of the power to make special laws for the people of a race.¹⁸

VI PASTORAL LEASES V NATIVE TITLE

Early purported decisions by the President of the National Native Title Tribunal in relation to the extinguishing effect of pastoral leases on native title were the subject of challenge.¹⁹ The High Court concluded in March 1996 in *North Galanja Aboriginal Corporation and Anor for and on behalf of the Waanyi People v the State of Queensland and Ors* that the question of whether a pastoral lease extinguished native title was fairly arguable.²⁰ Therefore, the President should not have formed the opinion that it was not arguable that the native title had survived the grant of a pastoral lease and thus, declined to accept an application for native title on that basis. The issue of the co-existence of native title with pastoral leases was resolved on 23 December 1996, when the High Court handed down its decision in *Wik Peoples v Queensland*.²¹

VII HOWARD'S TEN POINT PLAN

In the wake of the *Wik* decision, then Prime Minister John Howard on 1 May 1997 announced a 'Ten Point Plan' to amend the *Native Title Act*. On 8 May 1997, the Prime Minister released a statement, introducing a marginally amended Ten Point Plan, in which he said:

My aim has always been to strike a fair balance between respect for native title and security for pastoralists, farmers, and miners. That is one reason why I staunchly oppose blanket extinguishment of native title on pastoral leaseholds.

¹⁷ *Western Australia v Commonwealth* [1995] HCA 47; (1995) EOC 92-687 (extracts); (1995) 69 ALJR 309; (1995) 183 CLR 373.

¹⁸ *Constitution* (Cth) s 51(xxvi).

¹⁹ *Waanyi Peoples (No 2)* 14 February 1995 and *Ngaluma/Injibarndi* December 1995.

²⁰ [1996] HCA 2; (1996) 185 CLR 595. I appeared for the Kimberley Land Council, as intervener in the High Court in that case.

²¹ [1996] HCA 40; 187 CLR 1; 71 ALJR 173; 141 ALR 129. I appeared for Napranum Aboriginal Council (7th Respondent) and for Kimberley Land Council, Nanga-Ngoona Moora-Joonga Association, Western Desert Puntukurnuparna Aboriginal Corporation, Ngaanyatjarra Land Council, Intervening in that case.

The fact is that the *Wik* decision pushed the pendulum too far in the Aboriginal direction. The 10 point plan will return the pendulum to the centre.²²

Explaining the government's position on ABC TV, Deputy Prime Minister Tim Fischer produced what has been described as 'a memorable oxymoron'. The legislation would, he said, provide 'bucket loads of extinguishment and bucket loads of native title'.²³

The Western Australian Aboriginal Native Title Working Group had serious concerns about the likely impact on native title parties of the proposed amendments to the legislation. In particular, the fact that it would impose an additional 33 forms of procedural rights in place of the right to negotiate associated with future acts affecting native title and the proposal for states to be able to administer an alternative right to negotiate to that applying under the Commonwealth *Native Title Act*.

The Working Group appointed a Negotiating Team to lobby to avoid the most onerous elements of the proposed amendments,²⁴ and in particular, oppose the shifting of the negotiating regime to one managed by the State of Western Australia, bearing in mind the oppositional stance which the Western Australian Government had been taking in relation to native title.

An alternative state regime for Western Australia was approved by a determination by legislative instrument by the then Commonwealth Attorney-General Darryl Williams.²⁵ However, the legislative instrument failed to be approved by the Parliament, as is required for a legislative instrument to have the force of law. Due to the casting vote of Senator Brian Harradine, it never came into force in Western Australia.

Of the many amendments to the *Native Title Act* introduced in 1998, the most onerous was the introduction of a complex registration test,²⁶ which had to be passed before an

²² 'John Howard's Amended Wik 10-Point Plan', *Australian Politics* (Web Page, 8 May 1997) <<https://australianpolitics.com/1997/05/08/howard-amended-wik-10-point-plan.html>>.

²³ 'Blackfellas, whitefellas and the hidden injuries of race', *The Age* (Web Page, 17 April 2004) <<https://www.theage.com.au/entertainment/books/blackfellas-whitefella-and-the-hidden-injuries-of-race-20040417-gdxov8.html>> quoted by J Brough, 'Wik Draft Threat to Native Title', *The Sydney Morning Herald* (Sydney, 28 June 1997) 3. See also Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report – July 1996 – June 1997* (Human Rights and Equal Opportunity Commission, Sydney, 1997), 59-100.

²⁴ Which operated between 1998 and 1999 and included Pat Dodson, then chair of the Reconciliation Council, Peter Yu, Executive Officer of the Kimberley Land Council, and Michael O'Donnell as its Principal Legal Adviser and I was an Executive Officer and legal Adviser to the Team.

²⁵ As was required by the *Native Title Act 1993* (Cth) s 207A.

²⁶ Set out in the *Native Title Act 1993* (Cth), ss 190A(6), (6A), 190B-190C.

application for a determination of native title could be accepted for registration and attract negotiating rights. The registration test was multi-faceted and required a native title application to address every element of the test with precision and a sophisticated understanding of both the common law relating to native title and the *Native Title Act 1993* (Cth) as amended in 1998, which had quadrupled in size from its 1993 origins to become a statute of 441 pages.

Between 1998 and 2000, I led a Western Australian Native Title Support Team to develop a pro forma application for a determination of native title that satisfied the technical requirements of what needed to be expressed in an application in order for it to meet the registration test. It assisted the Native Title Representative Bodies and some individual claimants throughout the state to prepare applications in a form which had some prospect of passing the registration test. It was a test upon which the applicant needed to score a 100% correct result, and, thus, it required careful attention to detail.

VIII EXTINGUISHMENT AND COMPENSATION

Professor Kent McNeil, an international authority on native title accepted by the High Court in *Mabo [No 2]*,²⁷ has comprehensively demonstrated that the position the Court arrived at in that case, which condoned extinguishment of native title by executive act without statutory authority and without compensation, is contrary to fundamental common law principles. He has written:

The Executive acting on behalf of the Crown can extinguish native title by executive act if unambiguously authorised by valid legislation to do so and the intention to extinguish is clear and plain.²⁸

...

Statutes authorising the Crown compulsorily to acquire lands for public purposes, for example, might apply to lands held by native title, permitting that title to be extinguished in accordance with the legislation. However, if that is the case, compensation would have to be paid to the native titleholders unless

²⁷ *Mabo v Queensland (No 2)* (1992) 175 CLR 1, 39 (Brennan J) nn 97, (Toohey J) 178 nn 71-2, 180 nn 76 ('*Mabo No 2*').

²⁸ Kent McNeil, 'Racial Discrimination and Unilateral Extinguishment of Native Title' (1996) 1(2) *Australian Indigenous Law Review* 181.

the legislation clearly provided otherwise. As for statutes authorising the Crown to grant interests in lands, in the absence of unambiguous legislative intention to the contrary that authority, like the common law power to grant, extends only to interests which are the Crown's to give. The Crown cannot grant interests which it does not have, nor can it extinguish the property rights and interests of its subjects by granting their lands to someone else....

The law just summarised is not the law as applied by the High Court in *Mabo [No 2]* ... [T]he judges were in general agreement that, subject to the constitutional limitations discussed above, native title can be extinguished by executive acts. In particular, apart from Toohey J they decided that it can be extinguished either by a grant of a freehold or lesser estate or by appropriation by the Crown, to the extent that the grant or appropriation is inconsistent with the continuing enjoyment of native title.²⁹ Moreover, this aspect of the decision was affirmed by the *Western Australia* case.³⁰

My hope is that a time will arrive in the future when it is appropriate to revisit this aspect of the decision in *Mabo [No 2]*. If Australia is to comply with its obligations at common law and under the Universal Declaration of Human Rights and United Nations Convention on the Elimination of All Forms of Racial Discrimination, as adopted into Australian domestic law by the *Racial Discrimination Act 1975* (Cth), and as the High Court in *Mabo (No 1)* concluded, it has an obligation to compensate Indigenous Peoples for the arbitrary taking of their property which has occurred over the last 232 years.

It would not be impossible for the High Court, in an appropriate case brought before it, to review that aspect of its analysis of the common law in *Mabo [No 2]*, bearing in mind that the conclusion on that issue was reached by a majority of 4 to 3 judges of the High Court, by combining the judgment of Justice Brennan, with whom Chief Justice Mason and Justice McHugh agreed, and the dissenting judgement of Justice Dawson, who concluded that native title was not capable of recognition by the common law. Justices Deane and Gaudron, in a joint judgment, and Justice Toohey were all of the view that native title could

²⁹ *Mabo v Queensland (No. 2)* (n 27), per Brennan J at 68-70, Mason CJ and McHugh J concurring at 15; Deane and Gaudron JJ at 89-90, 94, 110.

³⁰ *Western Australia v Commonwealth* (n 17) 47.

not be the subject of an inconsistent Crown grant without compensation, 'in the absence of clear and unambiguous statutory provisions to the contrary'.³¹

If the court were to address this issue, it could have a significant impact upon the assumption upon which the *Native Title Act* is presently being applied. This Act and the various complementary pieces of state and territory legislation enacted pursuant to it,³² explicitly extinguish native title by validating past 'previous exclusive possession acts'.³³ The High Court in *Western Australia v Ward* in its discussion on extinguishment,³⁴ proceeded on the basis that it is only the Crown's grant of title subsequent to the enactment of the *Racial Discrimination Act 1975* (Cth) which may not have been effective in extinguishing native title, because of the operation of that Act which needed to be validated by the *Native Title Act*.

The alternative is that executive governments or legislatures of the future will recognise the injustice which was wrought by the colonising acts which have progressively and arbitrarily dispossessed First Nations Peoples of their property. Effecting a process of just reparation is required, which acknowledges the long history of past arbitrary taking and reaching an agreed position that compensates for the loss which it has occasioned, engrossed in a treaty or treaties with First Nations Peoples.

IX BUNDLE OF RIGHTS

In *Western Australia v Ward*,³⁵ the High Court said that native title rights and interests are properly to be seen as a bundle of rights, the separate components of which may be extinguished separately.

Concerns have been expressed about this analysis because it was thought to confirm that the *Native Title Act* allows the piecemeal erosion of native title,³⁶ and was a rejection of the proposition that native title is solely to be understood as a possessory title based on

³¹ *Mabo (No 2)* (1992) 175 CLR 1, 15 (Mason CJ and McHugh J).

³² *Native Title Act 1993* (Cth) s 23A(4).

³³ *Ibid* pt 2, div 2B.

³⁴ [2002] HCA 28 [104]-[134]; (2002) 76 ALJR 1098, 1128-1134.

³⁵ (2002) 213 CLR 1, [76] (Gleeson CJ, Gaudron, Gummow and Hayne JJ); a case in which I appeared with Walter Sofronoff QC for Kimberley Land Council and appeared leading D Ritter for Yamatji Barna Baba Maaja Aboriginal Corporation (Intervening).

³⁶ Lisa Strelein, *Compromised Jurisprudence, Native Title cases since Mabo* (Aboriginal Studies Press, 2nd ed, 2009) 58.

proof of occupation.³⁷ That concern was somewhat allayed by the majority of the Court in *Ward* referring to the ‘bundle of rights’ description of native title as a metaphor to describe all property interests, noting it may be used to illustrate that there may be more than one right or interest in a particular piece of land and is to be distinguished for a ‘list of activities’.³⁸

X EXTINGUISHMENT AND REVIVAL OF NATIVE TITLE

In *Fejo*,³⁹ the High Court considered whether native title could still exist over land which was once granted in fee simple but later reverted to vacant Crown land. The High Court held that native title was extinguished by freehold grants and that the extinguishment was permanent and that native title under the common law could not be re-recognised or ‘revived’ when the land returned to the Crown. It applied an inconsistency of incidents test.

The test for extinguishment of native title has been revisited by Australian Courts in the last decade in a group of interesting cases.

In *Akiba v Commonwealth*,⁴⁰ French CJ and Crennan J emphasised the presumption in favour of regulation of native title. A statute could be interpreted as affecting the exercise of native title, rather than extinguishing the ‘underlying’ title.⁴¹ Hayne, Kiefel and Bell JJ agreed with that approach.⁴²

In *Karpany v Dietman*,⁴³ the High Court, applying a ‘necessary implication’ test, held that a prohibition on fishing without a licence amounted to regulation, not extinguishment of native title.

³⁷ A proposition which I advocated for in that case. See Noel Pearson, ‘Land is Susceptible of Ownership’ in M Langton et al (eds) *Honour Among Nations?* (Melbourne University Press, 2004) 83.

³⁸ *Western Australia v Ward* (2002) 213 CLR 1, 95 (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

³⁹ *Fejo and Mills (on behalf of the Larrakia People) v The Northern Territory & Ors* [1998] HCA 58. I appeared for the Noongar Land Council, Edna Bropho, William Warrell, the Kimberley Land Council, Kenny Oobagooma and the Goldfields Land Council, Intervening in the case.

⁴⁰ (2013) 250 CLR 209.

⁴¹ *Ibid* [29].

⁴² *Ibid* [68]. See also Sean Brennan, ‘The Significance of the Akiba Torres Strait Regional Sea Claim Case’, in Sean Brennan, Megan Davis, Brendan Edgeworth and Leon Terrill (eds), *Native Title from Mabo to Akiba: A Vehicle for Change and Empowerment?* (Federation Press, 2015) 29–43.

⁴³ (2013) 303 ALR 216.

In *Brown v Western Australia*,⁴⁴ a case which involved the State of Western Australia making an agreement with joint venturers about the development and exploitation of an iron ore deposit at Mount Goldsworthy,⁴⁵ the joint venturers were granted mineral leases. At first instance, Justice Bennett applied the doctrine of 'operational inconsistency' developed by the Full Federal Court in *De Rose*,⁴⁶ and found that native title had been extinguished in those part of the mining lease where the town site and mine had been constructed.

The High Court in *Brown* took a different view,⁴⁷ holding that the grant of the mineral leases did not extinguish those native title rights and interests in relation to the land subject to the mineral leases, concluding that the rights granted under the mineral leases are not inconsistent with the claimed native title rights and interests.

The High Court pointed out that:

The identification of the relevant rights is an objective inquiry.⁴⁸ This means that the legal nature and content of the rights must be ascertained.⁴⁹ The nature and content of a right is not ascertained by reference to the way it has been, or will be, exercised. That is why the plurality in *Ward* said that consideration of the way in which a right has been exercised is relevant only in so far as it assists the correct identification of the nature and content of the right.⁵⁰

Brown may be a sign of a doctrinal shift by the High Court back towards the concept of native title as right to land rather than a bundle of rights. The concept of partial extinguishment has only ever been said to occur by way of extinguishment of 'exclusivity', prompting a need to revisit what had previously been understood to be the outcome of the High Court in *Ward*.

⁴⁴ (2010) 268 ALR 149.

⁴⁵ The agreement was approved by *Iron Ore (Mount Goldsworthy) Agreement Act 1964* (WA) s 4(1).

⁴⁶ *De Rose v State of South Australia* (2005) 145 FCR 290 (special leave refused).

⁴⁷ *Ibid* [3].

⁴⁸ *Ibid* [34].

⁴⁹ Cf *Wik Peoples v Queensland* (1996) 187 CLR 1, 71–72 (Brennan CJ), 185 (Gummow J); [1996] HCA 40.

⁵⁰ [2002] HCA 28, 89; (2002) 213 CLR 1, [78].

The tension between the inconsistency of incidents test of extinguishment and the requirement for a clear and plain legislative intention to extinguish native title is brought into sharp relief in the recent High Court decision in *Queensland v Congoo*.⁵¹

In 2001, the Bar-Barrum People lodged an application in the Federal Court for a determination of native title over an area in Queensland. Part of the determination area was used by the Commonwealth during World War II as an artillery range and live fire manoeuvre range for training the military pursuant to a series of orders made under the National Security (General) Regulations under the *National Security Act 1939* (NSA), which allowed the Commonwealth to take possession of any land. The Commonwealth relinquished control of the land in August 1945.

In a split 3:3 decision, French CJ and Keane and Gageler JJ found that native title did exist; however, Hayne, Kiefel and Bell JJ found that it had been extinguished. Section 23(2) of the *Judiciary Act 1903* (Cth) states that when the Justices sitting as a Full Court are equally divided in opinion in a question where the decision of the Federal Court of Australia or a judge of that Court is called into question by appeal or otherwise, the decision appealed from shall be affirmed. As a result, the appeal was dismissed with costs.

French CJ and Keane J jointly, and Gageler J (with a different reasoning), found that for the Military Orders to have extinguished native title rights and interests, they would have to confer a right of exclusive possession to be able to exclude anyone and everyone for any or no reason at all, and they did not. The orders were concerned with actual physical possession and not exclusive possession.

Gageler J reached the same conclusion by finding that there is no reason to read 'possession' in the regulation to mean 'exclusive possession', and the rights were limited to their objective.

Hayne, Kiefel and Bell JJ found, in three separate judgments, that the Military Orders did allow the Commonwealth to take exclusive possession of the land, and the fact that they took that possession for a limited time did not deny the rights taken were inconsistent with the native title rights and interests.

⁵¹ [2015] HCA 17.

According to French CJ and Keane J:

The clear and plain intention standard for extinguishment formulated in *Mabo [No 2]* is an important normative principle informing the selection of the criterion for determining whether a legislative or executive act should be taken by the common law to have extinguished native title.⁵²

Hayne J rejected the notion that a clear and plain intention standard had continued its application to the extinguishment of native title. He suggested that the majority of the Full Federal Court had reverted to the concept of adverse dominion, adopted by the trial judge in *Ward*, but rejected by the High Court in *Ward*.⁵³

It remains to be seen whether or not this doctrinal divide between the judges will have implications for future cases on extinguishment. On one view, an approach to the construction of legislation that has regard to the objective legislative purpose, ascertained by reference to statutory context and framework in which the provision in question appears, is unremarkable and in accordance with settled authority.⁵⁴ The proposition that such an approach should be eschewed when one comes to a consideration of legislation affecting native title rights and interests, as opposed to other proprietary interests, seems at odds with the common law of native title as developed in other common law countries and imported into Australia, which premises concepts of equality before the law.⁵⁵ As Brendan Edgeworth argued, ‘this post-*Ward* reformulation of native title does no violence to the basic idea of native title as a unitary title established in *Mabo [No 2]*... and most importantly, it advances a fairer balance between native title claimants and others’.⁵⁶

XI THE LIMITATIONS OF NATIVE TITLE

My naïve hope, in pursuing the quest for land rights through the mechanism of the Meriam People’s claim in the High Court, was that it would secure for them and other Indigenous

⁵² Ibid [34]. Gageler J made a similar point at [159].

⁵³ Ibid [78]–[82].

⁵⁴ Ibid (French CJ, Keane J) [36] citing amongst other cases *Project Blue Sky Inc v Australian Broadcasting Authority*. See also Brendan Edgeworth, ‘Extinguishment of Native Title: Recent High Court Decisions’ (2016) 8(22) *Indigenous Law Bulletin* 28, 32.

⁵⁵ *Mabo (No 2)* (1992) 175 CLR 1, [29] (Brennan J).

⁵⁶ *Queensland v Congoo* (n 54) 33.

Peoples a basis for recognition and self-determination within the Australian community. What the *Mabo [No 2]* decision delivered was not quite that.

XII CONTROL: PROPERTY

A real issue about the extent to which native title in Australia has delivered benefits to Aboriginal and Torres Strait Islander Peoples is best explored by considering whether, or to what extent, it has actually delivered or is capable of delivering property to them.

The decision of the High Court in *Mabo v Queensland [No 1]* proceeded on the basis that the ‘traditional rights and interests’⁵⁷ asserted by the Meriam people were property which they were entitled to own and entitled not to be arbitrarily deprived of. The Court based its decision on the *Racial Discrimination Act 1975* (Cth) which invoked the human right to own property and not be deprived of it, accorded by Article 5 of the International Covenant on the Elimination of All Forms of Racial Discrimination and Article 17 of the Universal Declaration of Human Rights (1945).

As the High Court said in *Yanner v Eaton*,⁵⁸ ‘property does not refer to a thing; it is a description of a legal relationship with a thing. It refers to a degree of power that is recognised in law as power permissibly exercised over the thing’. Native title, if it is to truly be a form of property, must contain elements of the capacity to control access to land, waters and the resources within them.⁵⁹ ‘Exclusivity’ is a metaphor for the right to exercise the powers or ownership or the right to exercise the power of ownership or control what makes up the property or title being asserted. It is not an absolute, but a relative concept.⁶⁰ Whether one has the right to exclude is determined by who has the better title. It does not follow, for example, from the fact that native title holder’s rights co-exist with those of a pastoral lease holder that a native title holder is unable to enforce a right of exclusion against a stranger or third party. Chief Justice Lamer in *Delgamuukw v British Columbia* suggested that ‘exclusive use and occupation of land’ is a defining

⁵⁷ (1988) 166 CLR 186.

⁵⁸ (1999) 201 CLR 351, [17].

⁵⁹ See further, Greg McIntyre, ‘Native Title is Property’ in ed Lisa Strelein, *Dialogue About Land Justice: papers from the National Native Title Conference* (Aboriginal Studies Press 2010) 52-3.

⁶⁰ *Mabo v Queensland* (n 27), 208-9 (Toohey J).

element of aboriginal title⁶¹ and allowed that 'joint title can arise from shared exclusivity' a concept 'well known in the common law'.⁶²

The Federal Court in *Fortescue Metals Group v Warrie on behalf of the Yindjibarndi People and Banjima People v State of Western Australia*,⁶³ confirmed that a traditional law creating an obligation of neighbouring Indigenous Peoples to obtain permission from the native title holders to enter their land has a normative character which comprises the 'essence' of a right to exclusive possession. The argument that the practical inability of native title holders to enforce that right against non-indigenous people did not negate the existence of the right was rejected.

The concept of native title as a 'unitary' title discussed above in relation the evolving jurisprudence on extinguishment of native title also supports its existence as something which has that crucial element of power connected to it.

XIII POSITIVES AND NEGATIVES

The Yorta Yorta People's native title claim is illustrative of the fact that even a native title claim which was unsuccessful in the courts can have some positive results.⁶⁴

Justice Brennan in *Mabo [No 2]* said:

[W]hen the tide of history has washed away any real acknowledgement of traditional law and any real observance of traditional customs, the foundation of native title has disappeared.⁶⁵

The 'tide of history' metaphor was adopted by Justice Olney to dismiss the native title claim of the Yorta Yorta people, saying 'the tide of history has indeed washed away any real acknowledgment of their traditional laws and any real observance of their traditional customs'.⁶⁶

⁶¹ (1993) 104 DLR (4th) 470, [117], [155]–[157], [183], [196] La Forest J.

⁶² At [158], referring to *United States v Santa Fe Pacific Railroad Co* (1941) 314 US 339.

⁶³ [2019] FCAFC 177, [281]; [2015] FCAFC 84; (2015) 231 FCR 456, [38] – [42].

⁶⁴ *Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58.

⁶⁵ *Mabo (No 2)* (1992) 175 CLR 1, 60.

⁶⁶ *Yorta Yorta Aboriginal Community v Victoria* [1998] FCA 1606, [129] (Olney J).

Monica Morgan, a Yorta Yorta woman, and spokesperson for the Yorta Yorta/Bangerang native title claimants, whose claim was dismissed by Olney J, said in 2012:

Looking back 14 years after the ‘tide of history’ decision and 20 years after the *Mabo* decision, there are a couple of positives that have come out of the land claim process. The Yorta Yorta native title claim was able to give our story, show our connection to our lands and waters and to each other. Another outcome was to bring the Victorian Government to the table and deliver a negotiated outcome between the Yorta Yorta and the Victorian Government for a joint management over Crown lands within Yorta Yorta traditional country. A negative of the native title process was that the determination cancelled out the possibility of Yorta Yorta/Bangerang peoples receiving compensation for extinguishment.⁶⁷

Brennan et al have identified that:

Achieving positive change and empowerment out of the native title paradigm requires extremely hard and sustained effort, both internally by Indigenous groups, and externally in the interactions between those groups and government, legislatures and third parties.⁶⁸

As they say, success, internally, depends on determining goals: self-determination, empowerment, recognition, and defining goals in a way which secures legitimacy within the group. It also involves deciding on the sharing of decision-making and benefits by balancing accountability, representativeness, and ‘adaptive change’ with retaining identity. Governments, because of their control over legislative regulation and public policy, have a substantial input into whether Indigenous communities are empowered to press claims for recognition of their rights and to leverage a better future from their position as property right holders.

Ciaran O’Farcheallaigh said that ‘[d]espite the challenges they face, Aboriginal people in some of Australia’s resource-rich regions are grasping economic opportunities created by recognition of their native title rights’.⁶⁹

⁶⁷ Monica Morgan, ‘What has native title done for me lately?’ in Toni Bauman and Lydia Glick (ed.), *Limits of Change: Mabo and Native Title 20 Years On* (AIATSIS Research Publications, 2012) 240-1.

⁶⁸ Brennan et al, *Native Title from Mabo to Akiba: A Vehicle for Change and Empowerment* (The Federation Press, 2015) 3.

⁶⁹ *Ibid* 169.

Marcia Langton notes that empowerment to enjoy the benefits which native title may afford requires financial and human resources and organisational structures capable of administering a complex set of legal and practical problems.⁷⁰ She cites the example of philanthropic social enterprise bodies in facilitating expertise being transferred from partner corporations to Aboriginal organisations, in particular Jawun – formerly known as Indigenous Enterprise Partnerships, which supports 60 Indigenous corporations and has over 20 corporate partners who second staff to provide professional skills and advice.

Native title claims have precipitated some significant alternative settlements in recent times. The Noongar Native Title Settlement involved the registration of six Indigenous Land Use Agreements (ILUAs) under the *Native Title Act*. It covered 30,000 Noongar people and around 200,000 km² of land in south-west Western Australia. Its total value is approximately \$1.3 billion, and it includes agreement on rights, obligations and opportunities relating to land, resources, governance, finance, and cultural heritage. In exchange for this package, the Noongar people agreed to surrender all current and future claims relating to historical and contemporary dispossession. The Western Australian Parliament enacted the *Noongar (Koorah, Nitja, Boordahwan) (Past, Present, Future) Recognition Act 2016*, which recognised the Noongar people as the traditional owners and occupiers of south-west Western Australia, and their continuing relationship with country. Around 320,000 hectares of Crown land is to be transferred into the Noongar Boodja Trust (NBT) over five years. The NBT will function as a perpetual trust, upon which the Western Australia Government will make funding instalments of \$50 million (indexed) yearly for 12 years.⁷¹

A matter of continuing controversy among the Noongar people was the State of Western Australia setting as a pre-condition of the settlement that all native title be surrendered. Some members of the Noongar people strongly opposed the Settlement, largely because of that pre-condition. The decisions at meetings authorising the ILUAs were made by slim majorities in most cases. Not all persons authorised to enter into the ILUAs on behalf of

⁷⁰ Ibid 182-3.

⁷¹ Harry Hobbs, 'The Noongar Settlement: Two Lessons for Treaty Making in Australia', *Australian Public Law* (Web Page, 24 October 2018) <<https://auspublaw.org/2018/10/the-noongar-settlement-two-lessons-for-treaty-making-in-australia/>>; Harry Hobbs and George Williams, 'The Noongar Settlement: Australia's First Treaty' (2018) 40(1) *Sydney Law Review* 1; 'Settlement Agreement', *South West Aboriginal Land and Sea Council* (Web Page) <<http://www.noongar.org.au/settlement-agreement>>.

the 6 claim groups could register and sign the ILUAs. Proceedings were commenced by some of those dissentients resulted in a decision of the Full Federal Court in *McGlade v Native Title Registrar*.⁷² It found that the ILUAs were not valid without all registered claimants signing them. That precipitated remedial legislation, retrospectively validating the Noongar ILUAs and hundreds of others around the nation.⁷³ The ILUAs were the subject of applications for registration under the *Native Title Act*. Objections were made to them under the Act. They were registered, despite the objections, and the registrations were challenged in the Federal Court, unsuccessfully in *McGlade v South West Aboriginal Land & Sea Aboriginal Corporation [No 2]*.⁷⁴

The Yamatji Nation ILUA was registered by the National Native Title on 30 July 2020.⁷⁵ The negotiators of that agreement had the benefit of observing the litigious process in relation to the Noongar Settlement and the state accepted the position that agreement was unlikely to be reached if the pre-condition of surrender of all native title was insisted on. The Yamatji Nations ILUA both recognises native title and provides a package of benefits to ensure the social and economic independence of future generations of the Yamatji Nation.⁷⁶ The ILUA covers more than 48,000 square kilometres of land in the mid-west of Western Australia. It was signed on 24 February 2020, following a Federal Court hearing on 7 February recognising the native title rights and interests of the Yamatji Nation over a small selection of significant parcels of land. The Yamatji People negotiating the ILUA, assisted by a legal team, of which I was a part, insisted that it provide an enduring benefits package to ensure self-determination and long-term economic independence for the people of the Yamatji Nation. The State's negotiators embraced that philosophical position and came up with some innovative ideas for a package which the Government could deliver. It comprised a variety of components: cash, mining rental

⁷² [2017] FCAFC 10.

⁷³ 'Majority rules! Parliament acts to make indigenous land use agreements viable again', *Clayton Utz* (Web Page, 14 June 2017) <<https://www.claytonutz.com/knowledge/2017/june/majority-rules-parliament-acts-to-make-the-use-of-indigenous-land-use-agreements-a-viable-proposition-once-more>>; *Native Title Amendment (Indigenous Land Use Agreements) Act 2017* (Cth); 'Finally - a legislative fix for McGlade ILUAs', *Ashurst* (Web Page, 14 June 2017) <<https://www.ashurst.com/en/news-and-insights/legal-updates/finally---a-legislative-fix-for-mcglade-iluas/>>.

⁷⁴ [2019] FCAFC 238 (Allsop CJ, McKerracker and Mortimer JJ).

⁷⁵ 'Yamatji Nation Indigenous Land Use Agreement documents', *Western Australia Government* (Web Page, 6 November 2020) <<https://www.wa.gov.au/government/document-collections/yamatji-nation-indigenous-land-use-agreement-documents>>.

⁷⁶ 'Yamatji Nation Indigenous Land Use Agreement', *Department of Planning, Lands and Heritage* (Web Page, 26 October 2020) <<https://www.dplh.wa.gov.au/yamatji>>.

revenue, funding for governance and business development, joint venture and tourism opportunities, cultural heritage protection measures, recognition of native title, access to housing properties for sale, leasing or development, land transfers, including commercial land, granting of water licences, joint management with the state of the conservation estate.⁷⁷

XIV COLLATERAL NEGATIVES

Over the past decade or so, I have had several people a year ring me to seek my advice about a grievance that the person has about:

- (a) The exclusion of that person's family from a native title claimant or native title holding group; or
- (b) The inclusion of a family in the native title holding or native title claimant group.

Sometimes that grievance is based on an assertion that the genealogical research conducted by or on behalf of the Native Title Representative Body was inadequate, sometimes it is asserted that there has been some deliberate misinformation taken into account in determining the definition of the group or the connection of particular families to the relevant area. In some cases, the inclusion or exclusion of members of the group will have significant economic consequences for those included or excluded, but the grievance is usually expressed in terms of very firmly held views as to the identity and status which ought to be accorded to those asserted, either to be entitled to be included in the group, or those who ought to be excluded from the group. One of the things I have observed is that accurate information concerning genealogy and connection to country is often held by very few people and generally those closest to the descent line in question. Broad community knowledge of particular descent lines is not common. This was not a consequence which I would have predicted 40 years ago that would be an effect on the recognition of land rights/native title. It is one of the impacts which leads to the often-expressed complaint that native title has only brought negative consequences for

⁷⁷ 'Historic Native Title agreement finalised – News Story: A historic Indigenous Land Use Agreement has been finalised with the people of the Yamatji Nation', *Wa.gov.au* (Media Release, 19 February 2020) <<https://www.wa.gov.au/government/announcements/historic-native-title-agreement-finalised>>; 'Yamatji Nation Agreement - Land Component', *Department of Planning, Lands and Heritage* (Web Page) <<https://www.dplh.wa.gov.au/yamatji-nation-agreement-lands>>.

Aboriginal and Torres Strait Islander people, dividing people who previously had no reason to be in dispute with one another.⁷⁸

Most of the native title cases in which I have been engaged have either gone to a contested hearing because of an intra-indigenous dispute, sometimes running in parallel with issues being contested by the State⁷⁹ which usually involved significant disputes unable to be resolved by mediation,⁸⁰ or have been settled by negotiating an intra-indigenous agreement.⁸¹

XV COLLATERAL POSITIVES

One of the beneficial consequences of the native title regime which has emerged incidentally from the processes to which native title claimants have been subjected and often criticised as the irksome task of having to explain their claims and assert their legitimacy,⁸² is the researching and recording of their culture. In some cases, it has led to a new focus upon and revival of culture. It is unlikely that the intensity of resources which have been devoted to genealogical and other research concerning Aboriginal and Torres Strait Islander culture would have occurred without the existence of the native title regime over the last 27 years. It has led to a degree of recognition of First Nations culture in the broader community, which is unlikely to have occurred without the *Mabo* decision or the legislation and litigation which followed it.

XVI SOVEREIGNTY, NATIVE TITLE AND SELF-DETERMINATION

As I have said, the *Mabo [No 2]* decision did not deliver all that it promised or that some hoped it would and it did not deliver self-determination. However, when it came to the

⁷⁸ Australian Human Rights Commission, *Native Title Report 2011* (Report, 2011) Ch 2.

⁷⁹ *AB (deceased) (on behalf of the Ngarla People) v State of Western Australia [No 4]* [2012] FCA 1268; *David Stock & Ors and State of Western Australia & Ors (Niyaparli)* (Federal Court Application WAD6280/1998); *Drill on behalf of the Purnululu Native Title Claim Group v State of Western Australia* [2020] FCA 1510.

⁸⁰ *Mabo v Queensland* (1992) Qd R 73; *Western Australia v Ward* [2000] 170 ALR 159; [2000] FCA 191; *Moses v State of Western Australia* [2007] FCAFC 78; *Harrington-Smith on behalf of the Wongatha People v State of Western Australia* [2007] FCA 31; *Banjima People v WA* [2011] FCA 1454; (No 2) [2013] FCA 868; (No 3) [2014] FCA 201; [2015] FCAFC 84; *McGlade v South West Aboriginal Land and Sea Aboriginal Corporation [No 2]* [2019] FCAFC 238.

⁸¹ *Brooking on behalf of the Bunuba People (Bunuba #2 (Part B)) v State of Western Australia* [2019] FCA 1162; *Warlangurru #2* WAD744/2015; *Holborow on behalf of the Yaburara & Mardudhunera People v State of Western Australia (No 3)* [2018] FCA 1108; *Taylor on behalf of the Yamatji Nation Claim v State of Western Australia* [2020] FCA 42.

⁸² Lisa Strelein, *Compromised Jurisprudence, Native Title Cases Since Mabo* (Aboriginal Studies Press, 2nd ed, 2009) 6.

pursuit of the quest for self-determination, it provided a platform from which to maintain the political struggle towards recognition and self-determination.

There are politically active groups of Indigenous people around Australia who rally under the catchcry that sovereignty was never ceded by them to the British Crown.⁸³ In *Cherokee Nations v Georgia*,⁸⁴ the Supreme Court of the United States of America said of the First Nations Peoples of America:

The Indians are acknowledged to have an unquestionable, and heretofore an unquestioned, right to the lands they occupy until that right shall be extinguished by a voluntary cession to our Government. It may well be doubted whether those tribes which reside within the acknowledged boundaries of the United States can, with strict accuracy, be denominated foreign nations. They may more correctly, perhaps, be denominated domestic dependent nations. They occupy a territory to which we assert a title independent of their will, which must take effect in point of possession when their right of possession ceases.

It is this form of sovereignty which is readily able to be recognised in relation to Australia's First Nations, arising from the common law precedent which the *Cherokee Nations* case provides.

XVII HONOUR OF THE CROWN/FIDUCIARY DUTY

I have long been an advocate for judicial recognition of the Crown's fiduciary duty in relation to Australia's First Nations Peoples, having written on the topic in various iterations and lectures over the years.⁸⁵

⁸³ Bede Harris, *A New Constitution for Australia* (Routledge, 2013) 174.

⁸⁴ 30 U.S. 1 (1831).

⁸⁵ For discussion of the Crown's fiduciary duty to Australia's First Nations Peoples see Greg McIntyre, "The Toohey Legacy: Rights and Freedoms, Compassion and Honour" (2018) 43(1) *University of Western Australia Law Review* 57, 70-74; Greg McIntyre, 'Fiduciary Obligations of Government towards Indigenous Minorities' in Bryan Koen-Cohen (ed), *Native Title in the New Millennium* (Aboriginal Studies Press, 2001) 305-22; Greg McIntyre, Submission No 196 to the Joint Select Committee on Constitutional Recognition Relating to Aboriginal and Torres Strait Islander Peoples, Parliament of Australia (11 June 2018) 20-4. I have also presented this analysis (so far to no avail) in submissions in *Bodney v Westralia Airports Corporation Pty Ltd* (2000) 109 FCR 178; [2000] FCA 1609 and *Collard v State of Western Australia (No 4)* [2013] WASC 455; (2013) 47 WAR 1.

The notion of a fiduciary duty of the Crown towards Indigenous Peoples first arose in the 1831 United States Supreme Court case of *Cherokee Nation v Georgia*⁸⁶ in which a guardianship relationship was referred to. The Canadian Supreme Court first recognised such a fiduciary duty in the 1984 case of *Guerin v The Queen*,⁸⁷ and in 1990 in *R v Sparrow*,⁸⁸ said:

The *sui generis* nature of Indian title, and the historic powers and responsibility assumed by the Crown, constituted the source of the fiduciary obligation ...the government has the responsibility to act in a fiduciary capacity with respect to aboriginal peoples. ... The honour of the Crown is at stake in dealing with aboriginal peoples...⁸⁹

It was held in *Sparrow* that the exercise of indigenous rights could be regulated, but that the 'honour of the Crown' required that there be a valid objective of such legislation beyond the extinguishment of Indigenous interests.⁹⁰

This fiduciary duty of the Crown has also been recognised in New Zealand⁹¹ and it is beyond time, in my view, that it should be recognised in Australia.

XVIII CONCLUSION

I have fought several battles with and on behalf of Aboriginal and Torres Strait Islander Peoples and met and worked with the heroes of those campaigns and some incremental change has occurred. The recognition of native title was part of that.

However, taking into account my experience over the last 46 years of working for and with Aboriginal and Torres Strait Islander Peoples, my observation is that Australia, as a nation, has not yet arrived at a just settlement with its First Nations Peoples commensurate with the value to them of the lands and waters from which it has dispossessed them.

⁸⁶ 30 US (5 Pet) 1 (1831), 16-17; see Darlene M Johnston, 'A Theory of Crown Trust Towards Aboriginal Peoples' (1986) 18 *Ottawa Law Review* 307, 320.

⁸⁷ (1984) 13 DLR (4TH) 321.

⁸⁸ (1990) 70 DLR (4TH) 395, 408; See commentary by Gath Nettheim, '*Sparrow v The Queen*' (1991) 2 *Aboriginal Law Bulletin* 12.

⁸⁹ *R v Sparrow* (n 88) 413.

⁹⁰ *Ibid* 416-17. See discussion by Brian Slattery, *Aboriginal Rights and the Honour of the Crown* (2005) 29 *Supreme Court Law Review* 433.

⁹¹ In *Te Runanga o Wharekaui v A-G* [1993] 2 NZLR 301, 306.

There has been some positive activity by certain state governments in negotiating comprehensive settlement agreements,⁹² and establishing platforms for negotiating treaties.⁹³

Settlement agreements which have emerged out of native title claims, such as those with the Noongar and Yamatji Peoples, recognise the importance of a composite package of reparation including land and economic resources that have the capacity to empower First Nations Peoples to achieve a significant degree of self-determination. They are representative of the form of settlement which has, at its base, recognition of the obligation that the Crown has to repair the injustice wrought by the colonising acts. Such acts have progressively and arbitrarily dispossessed First Nations Peoples of their property, understood as a 'unitary' title to land, which would otherwise have given them power to control what occurred on their lands and its economic resources. That obligation is one which is consequential upon the 'Honour of the Crown' or the fiduciary relationship which has been recognised in other jurisdictions as the principled basis upon which to forge the relationship between a nation and its First Nations Peoples being similarly recognised in the several jurisdictions in Australia. As I wrote in my submission to the Australian Parliamentary Joint Select Committee on Constitutional Recognition Relating to Aboriginal and Torres Strait islander Peoples:⁹⁴

With the renewed call for treaty negotiations overseen by a Makarrata Commission, coming out of the Uluru Statement, made by the Indigenous people gathered at the 2017 National Constitutional Convention,⁹⁵ the need to pursue, in Australia, the development of the legal concept of the Government's fiduciary relationship with First Nations peoples may... [be important in

⁹² *Traditional Owners Settlement Act 2010* (Vic); Western Australian Government, 'South West Native Title Settlement', *Department of Premier and Cabinet* (Web Page, 4 August 2020) <<https://www.wa.gov.au/organisation/department-of-the-premier-and-cabinet/south-west-native-title-settlement>>; Paul Harley and Liz Wreck, 'Latest on the Yamatjii Nation Indigenous land Use Agreement', *HopgoodGanim* (Web Page, 11 May 2020) <<https://www.lexology.com/library/detail.aspx?g=9697f818-d165-496e-8aba-6ff1804ce724>>.

⁹³ Andrew Tillett, 'Labor states lead the way on Indigenous treaty', *Financial Review* (Web Page, 15 July 2019) <<https://www.afr.com/politics/federal/labor-states-lead-the-way-on-indigenous-treaty-20190715-p527c4>>.

⁹⁴ Greg McIntyre, Submission No 196 to the Joint Select Committee on Constitutional Recognition Relating to Aboriginal and Torres Strait islander Peoples, Parliament of Australia (11 June 2018) 20-4.

⁹⁵ A Yolngu term meaning 'coming together after a struggle'.

reinforcing the movement towards self-determination of Australia's First Nations Peoples].

If there is a continuing disinterest of Australian governments in negotiating treaties at national or other levels, then the pursuit of a suitable test case to determine the issue of the Crown's fiduciary duty to Indigenous people is an alternative option to pursue. Such a test case may also provide an opportunity to challenge the conclusion in *Mabo (No 2)* that native title can be extinguished by an executive act without statutory authority of compensation.

REFERENCE LIST

A Articles/Books/Reports

- Australian Human Rights Commission, *Native Title Report 2011* (Report, 2011)
- Bauman, Toni and Lydia Glick (ed), *Limits of Change: Mabo and Native Title 20 Years On* (AIATSIS Research Publications 2012)
- Brennan, Sean, Megan Davis, Brendan Edgeworth and Leon Terrill (eds), *Native Title from Mabo to Akiba: A Vehicle for Change and Empowerment?* (Federation Press, 2015)
- Edgeworth, Brendan, 'Extinguishment of Native Title: Recent High Court Decisions' (2016) 8(22) *Indigenous Law Bulletin* 28
- Erik Olbrei (ed), *Black Australians: the prospects for change* (James Cook University of North Queensland Student Union, 1982)
- Grover, Kirstky, 'The Honour of the Crowns: State-Indigenous Fiduciary Relationships and Australian Exceptionalism' (2016) 38(3) *Sydney Law Review* 339, 359.
- Harris, Bede, *A New Constitution for Australia* (Routledge, 2013)
- Hookey, John, 'The Gove Land Rights case: a judicial dispensation for the taking of Aboriginal lands in Australia' (1972) 5(1) *Federal Law Review* 85
- Hobbs, Harry and George Williams, 'The Noongar Settlement: Australia's First Treaty' (2018) 40(1) *Sydney Law Review* 1
- Johnston, Darlene M, 'A Theory of Crown Trust Towards Aboriginal Peoples' (1986) 18 *Ottawa Law Review* 307
- Koen-Cohen, Bryan (ed), *Native Title in the New Millennium* (Aboriginal Studies Press, 2001) 305
- Lester, Geoffrey and Graham Parker, 'Land Rights: The Australian Aborigines have lost a battle, but...' (1973) 11(2) *Alberta Law Review* 189
- McIntyre, Greg, 'The Toohey Legacy: Rights and Freedoms, Compassion and Honour' (2018) 43(1) *University of Western Australia Law Review* 57

McIntyre, Greg, Submission No 196 to the Joint Select Committee on Constitutional Recognition Relating to Aboriginal and Torres Strait Islander Peoples, Parliament of Australia (11 June 2018)

McNeil, Kent, 'Racial Discrimination and Unilateral Extinguishment of Native Title' (1996) 1(2) *Australian Indigenous Law Review* 181

Pearson, Noel, 'Land is Susceptible of Ownership' in M Langton et al (eds) *Honour Among Nations?* (Melbourne University Press, 2004)

Nettheim, Garth (ed), *Aborigines, human rights and the law* (ANZ Book Co, 1974)

Nettheim, Garth, '*Sparrow v The Queen*' (1991) 2 *Aboriginal Law Bulletin* 12

Slattery, Brian, *Aboriginal Rights and the Honour of the Crown* (2005) 29 *Supreme Court Law Review* 433

Strelein, Lisa, *Compromised Jurisprudence, Native Title cases since Mabo* (Aboriginal Studies Press, 2nd ed, 2009)

B Cases

Akiba v Commonwealth (2013) 250 CLR 209

AB (deceased) (on behalf of the Ngarla People) v State of Western Australia [No 4] [2012] FCA 1268

Banjima People v State of Western Australia [2015] FCAFC 84

Brown v Western Australia (2010) 268 ALR 149

Brooking on behalf of the Bunuba People (Bunuba #2 (Part B)) v State of Western Australia [2019] FCA 1162

Cherokee Nation v Georgia 30 US (5 Pet) 1 (1831)

David Stock & Ors and State of Western Australia & Ors (Niyaparli) (Federal Court Application WAD6280/1998)

De Rose v State of South Australia (2005) 145 FCR 290

Delgamuukw v British Columbia (1993) 104 DLR (4th) 470

Drill on behalf of the Purnululu Native Title Claim Group v State of Western Australia [2020] FCA 1510

Fejo v Northern Territory [1998] HCA 58

Fortescue Metals Group v Warrie on behalf of the Yindjibarndi People [2019] FCAFC 177

Guerin v The Queen (1984) 13 DLR (4TH) 321

Harrington-Smith on behalf of the Wongatha People v State of Western Australia [2007] FCA 31

Holborow on behalf of the Yaburara & Mardudhunera People v State of Western Australia (No 3) [2018] FCA 1108

Te Runanga o Wharekauri v A-G [1993] 2 NZLR 301

Karpany v Dietman (2013) 303 ALR 216

Mabo v Queensland (No 1) (1988) 166 CLR 186

Mabo v Queensland (No 2) (1992) 175 CLR

McGlade v Native Title Registrar [2017] FCAFC 10

McGlade v South West Aboriginal Land and Sea Aboriginal Corporation [No 2] [2019] FCAFC 238.

Members of the Yorta Yorta Aboriginal Community v Victoria [2002] HCA 58

Millirrpum v Nabalco Pty Ltd (1971) 17 FLR 141

Moses v State of Western Australia [2007] FCAFC 78

North Gananja Aboriginal Corporation v The State of Queensland [1995] FCA 869

Purnululu (2018) WAD 536

R v Sparrow (1990) 70 DLR (4TH) 395

The Wororra Peoples & Anor v The State of Western Australia No 147 of 1993

Taylor on behalf of the Yamatji Nation Claim v State of Western Australia [2020] FCA 42

United States v Santa Fe Pacific Railroad Co (1941) 314 US 339

Warlangurru #2 WAD744/2015

Western Australia v Commonwealth [1995] HCA 47

Western Australia v Ward (2002) 213 CLR 1

Wik Peoples v Queensland [1996] HCA 40

Queensland v Congoo [2015] HCA 17

Yanner v Eaton (1999) 201 CLR 351

Yorta Yorta Aboriginal Community v Victoria [1998] FCA 1606

C Legislation

Australian Constitution

Iron Ore (Mount Goldsworthy) Agreement Act 1964 (WA)

Native Title Act 1993 (Cth)

Traditional Owners Settlement Act 2010 (Vic)

D Other

Andrew Tillett, 'Labor states lead the way on Indigenous treaty', *Financial Review* (Web Page, 15 July 2019) <<https://www.afr.com/politics/federal/labor-states-lead-the-way-on-indigenous-treaty-20190715-p527c4>>

'Blackfellas, whitefellas and the hidden injuries of race', *The Age* (Web Page, 17 April 2004) <<https://www.theage.com.au/entertainment/books/blackfellas-whitefella-and-the-hidden-injuries-of-race-20040417-gdxov8.html>>

'Charles Perkins (Aboriginal activist)', *Wikipedia* (Web Page, 15 November 2020) <[https://en.wikipedia.org/wiki/Charles_Perkins_\(Aboriginal_activist\)](https://en.wikipedia.org/wiki/Charles_Perkins_(Aboriginal_activist))>

Harry Hobbs, 'The Noongar Settlement: Two Lessons for Treaty Making in Australia', *Australian Public Law* (Web Page, 24 October 2018)

<<https://auspublaw.org/2018/10/the-noongar-settlement-two-lessons-for-treaty-making-in-australia/>>

'John Howard's Amended Wik 10-Point Plan', *AustralianPolitics* (Web Page, 8 May 1997)

<<https://australianpolitics.com/1997/05/08/howard-amended-wik-10-point-plan.html>>

'Majority rules! Parliament acts to make indigenous land use agreements viable again', *Clayton Utz* (Web Page, 14 June 2017)

<<https://www.claytonutz.com/knowledge/2017/june/majority-rules-parliament-acts-to-make-the-use-of-indigenous-land-use-agreements-a-viable-proposition-once-more>>

Mick Miller (Aboriginal statesman)', *Wikipedia* (Web Page, 3 September 2020)

<[https://en.wikipedia.org/wiki/Mick_Miller_\(Aboriginal_statesman\)](https://en.wikipedia.org/wiki/Mick_Miller_(Aboriginal_statesman))>

Native Title Amendment (Indigenous Land Use Agreements) Act 2017 (Cth); 'Finally - a legislative fix for McGlade ILUAs', *Ashurst* (Web Page, 14 June 2017)

<<https://www.ashurst.com/en/news-and-insights/legal-updates/finally---a-legislative-fix-for-mcglade-iluas/>>

'Our History', *Walalakoo* Aboriginal Corporation (Web Page)

<<https://www.walalakoo.org.au/history>>

Paul Harley and Liz Wreck, 'Latest on the Yamatjii Nation Indigenous land Use Agreement', *HopgoodGanim* (Web Page, 11 May 2020)

<<https://www.lexology.com/library/detail.aspx?g=9697f818-d165-496e-8aba-6ff1804ce724>>

'Settlement Agreement', *South West Aboriginal Land and Sea Council* (Web Page)

<<http://www.noongar.org.au/settlement-agreement>>

'Tom Stephens', *Wikipedia* (Web Page, 24 October 2020)

<https://en.wikipedia.org/wiki/Tom_Stephens>

'Phillip Toyne', *Wikipedia* (Web Page, 20 August 2020)

<https://en.wikipedia.org/wiki/Phillip_Toyne>

Western Australian Government, 'South West Native Title Settlement', *Department of Premier and Cabinet* (Web Page, 4 August 2020)

<<https://www.wa.gov.au/organisation/department-of-the-premier-and-cabinet/south-west-native-title-settlement>>

Yamatji Nation Indigenous Land Use Agreement documents', *Western Australia Government* (Web Page, 6 November 2020)

<<https://www.wa.gov.au/government/document-collections/yamatji-nation-indigenous-land-use-agreement-documents>>

'Yamatji Nation Indigenous Land Use Agreement', *Department of Planning, Lands and Heritage* (Web Page, 26 October 2020) <<https://www.dplh.wa.gov.au/yamatji>>