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## Recognising native title in Australian law: *Mabo v Queensland [No 2]*

High Court of Australia, 1992

In May 1982, five Murray Islanders initiated an action against the government of Queensland seeking declarations of rights to the use and enjoyment of traditional land that had been continuously occupied by the Meriam people before and since the annexation by the defendant government. To the surprise of many, the High Court decided in favour of the plaintiffs.<sup>1</sup> The order contained a declaration to the effect that, apart from any inconsistent grants, the Meriam people are entitled ‘as against the whole world to possession, occupation, use and enjoyment of the lands of the Murray Islands’, subject to the power of the state government to extinguish the title by valid exercise of legislative or executive powers. Without denying its importance to the Meriam people, the greatest impact lay not in the order itself, rather in the context of the judgment. Each judgment considered the action in wider terms than would normally be sufficient to determine the case at hand. The principles enunciated in the judgments provided the basis for development of the law applicable to native title.<sup>2</sup>

The High Court reviewed the cases decided in this and other jurisdictions, prior to and since the decision by Justice Blackburn in *Milirrpum v Nabalco Pty Ltd*,<sup>3</sup> on the effect of colonisation. In view of these decisions, and in spite of many of them, the Court was prepared to reject longstanding assumptions of colonial legal theory. The standards adopted at the time of acquiring sovereignty were seen to be no longer appropriate for a rule of common law. In the lead judgment, Justice Brennan said that there was a ‘choice of legal principle to be made’, noting that:

it is imperative in today’s world that the common law should neither be or be seen to be frozen in an age of racial discrimination...

The fiction by which the rights and interests of indigenous inhabitants in land were treated as nonexistent was justified by a policy which has no place in the contemporary law of this country.<sup>4</sup>

Before Justice Brennan was prepared to enter into a review of previous authority he was concerned that to do so would not ‘fracture the skeleton of legal principle which gives the body of our law its shape and internal consistency’.<sup>5</sup> Justice Brennan concluded that no such fracturing of legal principle occurred in bringing the law of Australia into line with notions of justice and human rights. Although the theoretical basis of the law was not destroyed, the practical implications were yet to be understood. There was an inherent inconsistency between the new doctrine and the principles upon which Australia’s land law had been based that, no doubt, would give rise to complicated and intricate reconsideration of Australian property regimes.

### **The consequences of settlement**

The central question to be determined in *Mabo v Queensland [No. 2]* (*Mabo*) was whether, on acquiring sovereignty, the Crown became owner of all of the land or whether the Crown’s title was burdened by any prior title.<sup>6</sup> The Court was not prepared to question the status of Australia as a ‘settled’ country, but they were prepared to examine the consequences of settlement and the way in which the common law was received into the territory. The Court in *Mabo* accepted that the settlers brought the common law with them in accordance with the settlement doctrine,<sup>7</sup> but ‘only so much of it ... as was “reasonably applicable to the circumstances of the Colony”’.<sup>8</sup> The Court, in determining the content of the body of law received in the colony, reconsidered some of the conclusions that had earlier been drawn from the settlement thesis, in particular, the idea that the acquisition of sovereignty over territory automatically gave absolute beneficial ownership of land to the Crown.<sup>9</sup> On the principle that ‘ownership could not be acquired by occupying land that was already occupied by another’,<sup>10</sup> the way was clear of ‘fictional impediments’ to the recognition of Indigenous rights and interests in colonial land. Thus, the Court rejected the assertion that sovereignty invariably carries with it the beneficial title to all the lands of the territory, and determined that the pre-existing rights of the Indigenous peoples survived the acquisition of sovereignty.<sup>11</sup>

### **Establishing title**

In a joint judgment, Justices Deane and Gaudron described common law native title as a title derived from and conforming to traditional custom but

recognised and protected by the common law.<sup>12</sup> As such, Justice Brennan explained, legislative or executive recognition by the sovereign is not required, and thereby, '[n]ative title, though recognised by the common law is not an institution of the common law'.<sup>13</sup> According to Justice Brennan (and much like his colleagues):

Native title has its origins in and is given its content by the traditional customs observed by the Indigenous inhabitants of a territory. The nature and incidents of native title must be ascertained as a matter of fact by reference to those laws and customs.<sup>14</sup>

The Court in *Mabo* was concerned that native title be a heterogeneous concept that reflects the diversity of Indigenous peoples' law and custom.

Justices Deane and Gaudron, commenting on the accommodation of the idea of native title within Australian law, suggested that:

Obviously, where the pre-existing native title interest was 'of a kind unknown to English law', its recognition and protection under the law of a newly settled British colony would require an adjustment either of the interests into a kind known to the common law or a modification of the common law to accommodate the new kind of interest.<sup>15</sup>

They concluded that the common law was capable of this accommodation.

In order to assert title, Justice Brennan explained that a group of Indigenous inhabitants must show a connection with the relevant land which is maintained through continued acknowledgment of the laws and the customs of the group.<sup>16</sup> Justices Deane and Gaudron referred to:

an established entitlement of an identified community, group or (rarely) an individual to the occupation or use of particular land and that that entitlement be of sufficient significance to establish a locally recognised special relationship between the particular community, group or individual and that land.<sup>17</sup>

On this construction, the majority argued that it was not necessary to superimpose a regime of property rights that were approximate to those known to English common law and that to do so defeated the purpose of protection and recognition.<sup>18</sup> The connection with the land in accordance with traditional law and custom is the source of the title. Any difficulty that arose from this characterisation could not justify non-recognition.<sup>19</sup> For this reason, native title was described as *sui generis*, or unique in law, because it reflects the rights of Indigenous people under their own legal system.<sup>20</sup>

The laws and customs are therefore considered to be a matter of fact, and their idiosyncratic details were considered irrelevant to the proof of native

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title.<sup>21</sup> Justice Toohey argued that it should be proof of a presence amounting to occupancy, which is not random or coincidental, that forms ‘the foundation of the title and which attracts protection, and it is that which must be proved to establish title’.<sup>22</sup> The nature of occupancy should be determined by ‘the demands of the land and society in question’.<sup>23</sup> Like Justices Deane and Gaudron, Justice Toohey held that there is therefore no separate requirement to prove what kind of society, only to prove that its presence is part of a functioning system.<sup>24</sup> Importantly, Justice Brennan (with whom Chief Justice Mason and Justice McHugh agreed) did not require that the connection include some kind of physical presence, recognising that the spiritual connection of Indigenous peoples to the land may also constitute proof of continued connection.<sup>25</sup>

For Justices Deane and Gaudron, proof of occupancy was likely to provide adequate proof of the continued connection to land and the continued operation of law and custom. The two judges did not expressly separate physical presence (as proof of title) and law and custom (as the content of title). Nor did they overstate or over-prescribe the kind of evidence required. This formulation allows for circumstances in which proof of occupancy may not be the appropriate standard of proof, particularly where physical connection has been affected by the grant of other interests or the actions of others. In the result, a continuous chain of occupation is not required where there is acknowledgement of connection through law and custom.

The requirements of proof set forth in the substantive judgments of the majority can be summarised thus:

- existence of an identifiable community or group;
- traditional connection with or occupation of the land under the laws and customs of the group; and
- the substantial maintenance of the connection.<sup>26</sup>

Justice Toohey mostly clearly expressed the qualification that, while the connection with the land must be shown to be significant, it would not be necessary to prove an exclusive relationship.<sup>27</sup> The judges contemplated a range, or continuum, of native title from a kind of title that approaches full ownership to a lesser interest, which recognises limited rights to hunt or traverse the land.

In many parts of Australia, the failure of governments to satisfactorily recognise Indigenous rights to land has led to reliance by Indigenous peoples on the spiritual relationship with the land in order to assert any control over the use of that land, primarily through heritage legislation. There is no comparable experience elsewhere, with North American jurisprudence

having emphasised traditional occupancy of the land, often recognised in treaties or through doctrines dating back to early contact.<sup>28</sup> Under the formulation put forward by the High Court in *Mabo*, physical presence is not the sole consideration or a condition precedent to establishing title. An arguable case can be put forward by Indigenous people who have been dispossessed or excluded from their land who maintain a connection in some other way.

Generally, native title will contain communal rights for the use and enjoyment of the group but Justices Deane and Gaudron did not rule out the 'rare' possibility of an identified individual entitled to occupation and use of a particular land where the other requirements are satisfied.<sup>29</sup> At base, those entitled to use and enjoyment under those rights are to be ascertained from the traditional laws and customs. Similarly, there was no allusion to biological determinants of ancestry in defining the membership of the group.<sup>30</sup> This was consistent with the idea that the native title is founded in the laws and customs of the group, including laws and customs in relation to membership.

In the United States, the courts have attempted to identify groups by common social, cultural or political elements. Canadian authority has developed a similar criteria: a 'distinctive cultural entity',<sup>31</sup> or an 'organised society'.<sup>32</sup> In the Inuit claim in *Hamlet of Baker Lake v Minister of Indian Affairs and Northern Development*, Justice Mahoney required that the claimants prove that 'they and their ancestors were members of an organised society'.<sup>33</sup> It was acknowledged that the relevant groups were not necessarily a particular anthropological construction such as a clan or tribe, rather they were geographic groups that showed a commonality in culture and language. Similarly, Indigenous peoples in Australia organise on different levels for different purposes, from clan estates through to large cultural and linguistic groupings. The group that may be appropriate to hold a communal title, it was presumed, may vary across the continent.

In order for native title to be recognised under the common law as a burden on the radical title of the Crown, the connection with the land must be a pre-existing relationship, persisting at the time that Crown sovereignty was established. Justice Toohey pointed out that the connection need not be established long prior. If occupation is an established fact at the time of annexation, then nothing more is required.<sup>34</sup> Sovereignty over the New South Wales colony was said to have been successfully asserted by 1788.<sup>35</sup> In Western Australia, by contrast, the time that radical title vested in the Crown appears to be 1829. In relation to the Murray Islands itself, it was held that sovereignty was acquired in 1895. Thus, the time of vesting is a matter of

fact to be determined with reference to the legislative or executive act that annexed the particular territory to the colony.

The Court held that the group must be able to show that the connection to the land has been substantially maintained.<sup>36</sup> Failure to establish a continued connection loses the foundation of the title because, Justice Brennan explained, 'native title which has ceased with abandoning of laws and customs based on tradition cannot be revived for contemporary recognition'.<sup>37</sup> But a particular plaintiff group need not show that they are the same group that occupied the land at the time sovereignty was established if traditional law and custom contemplates the acquisition or transfer of rights, or succession of title, from one Indigenous group to another; this may extend to circumstances where a group dies out or is subsumed into a larger group.<sup>38</sup>

Outside the system of traditional law, native title is inalienable except to the Crown. Justice Brennan suggested that this is consistent with Indigenous conceptions of inalienability of land.<sup>39</sup> He takes this further to suggest that rights and interests possessed as a native title can only be possessed by Indigenous people, more specifically by a member of the native title holding group who acknowledges and observes the traditional laws and customs.<sup>40</sup> Justices Deane and Gaudron expressed the inalienability of native title in terms of a right of pre-emption that was enjoyed by the Crown on acquiring sovereignty, such that native title could not be transferred outside the Indigenous system of law and customs except by surrender to the Crown.<sup>41</sup>

## The nature and content of native title

The High Court retained the foundations of colonial property law by confirming that the underlying or radical title vested in the Crown was an assertion of sovereignty. But, through the recognition of native title, the common law conferred a beneficial interest on the Indigenous people that recognises and protects their pre-existing interests. The High Court recognised that the content of the native title interest could approximate to full ownership, which would reduce the Crown's radical title to one that 'extends to comparatively limited rights of administrative interference'.<sup>42</sup> The extent, or content, of native title is those rights that arise from the traditional laws and customs of the people. All other rights to deal with the land attach to the Crown's radical title. Where native title ceases to exist, for example, through surrender to the Crown, the radical title expands to create a 'plenum dominium', that is, the full beneficial as well as radical title.<sup>43</sup>

In *Mabo*, the High Court suggested that native title, while unique, is properly described as ‘proprietary’, if that idea is understood in a non-discriminatory way. Justice Brennan said:

If it be necessary to categorize an interest in land as proprietary in order to survive a change in sovereignty, the interest possessed by a community that is in exclusive possession of land falls in to that category.<sup>44</sup>

In contrast, Justices Deane and Gaudron conceived of native title as a personal or usufructuary right, because of its inalienable nature.<sup>45</sup> Yet, they immediately recognised limitations of this characterisation, where, in all other respects, the title approached full exclusive possession. They returned to the idea, as described in *Amodu Tijani* and *Guerin*, that the title should be accepted as unique.<sup>46</sup> While referring to native title as having a personal and usufructuary character, that is, not a right in the land itself, Justices Deane and Gaudron also imbued the title with significant strength:

If common law native title conferred no more than an entitlement to occupy or use until the Crown or those acting on its behalf told the native title holders to cease their occupation or use[,] the term ‘title’ would be misleading, the ‘rights’ under it would be essentially illusory.<sup>47</sup>

Justice Brennan went so far as to suggest that ‘it is not possible to admit a traditional usufructuary right without admitting a traditional proprietary title’.<sup>48</sup> Usufructuary rights of individuals within the group are therefore ‘derived from the community laws and customs and are dependent on community title’.<sup>49</sup> Thus, Justices Deane and Gaudron concluded that ‘rights of use and occupation conferred by the common law native title are not ... illusory. They are legal rights which are infringed if they are extinguished’.<sup>50</sup>

The content of native title, and hence the extent of the interests thereunder, was a more difficult question. Justices Brennan, Deane, Gaudron and Toohey agreed that the content of the title and the identity of those upon whom it is conferred are to be ascertained in accordance with traditional laws and customs acknowledged and observed by the Indigenous inhabitants of the territory.<sup>51</sup> The Court did not therefore prescribe the content of the title.

It was further agreed by the majority in *Mabo* that, while the title crystallised at the time of annexation, the content of the title did not. The customs did not need to be frozen as at the time the territory was annexed to the Empire.<sup>52</sup> Where the general nature of the connection is maintained, the decision appeared to leave open the notion that the evolution of

land use would include forms of contemporary sustenance and resource development.<sup>53</sup> This view is supported by Canadian case law.<sup>54</sup>

The position with respect to ownership of resources was immediately contentious. The High Court did not specifically deal with the question of ownership of resources but did consider the operation of legislation governing Crown land. Provisions of the *Land Act 1962* (Qld), which referred to the ‘waste lands of the Crown’, were held to constitute merely an assertion of sovereignty, not of beneficial ownership, and thus did not affect native title.<sup>55</sup> Legislation that reserves mineral rights to the Crown generally goes further than this to assert that sub-surface minerals and fossil fuels are ‘the property of the Crown’.<sup>56</sup> But this was not a matter that was determined by the Court in *Mabo*. It would not be until nearly ten years later, in the *Ward* decision, where the High Court would conclusively decide whether, in asserting a proprietary claim to minerals, the Crown extinguished any claim to recover minerals as an incident of common law native title.<sup>57</sup> On the Court’s reasoning in *Mabo*, however, the onus is on the Crown to establish a clear intention to extinguish Indigenous rights to resources.<sup>58</sup>

## Extinguishing title

Justice Toohey argued that, whether personal or proprietary, the nature of native title should not determine the power of the Crown to extinguish the title unilaterally.<sup>59</sup> Despite the emotive statements regarding the need to reject doctrines that justify discriminatory treatment of Indigenous rights, the High Court decided that, up until the passing of the *Racial Discrimination Act* in 1975, the colonies and later the states and Commonwealth had the power to abrogate the rights of Indigenous peoples for the private benefit of non-Indigenous settlers. Justice Brennan explained that, while native title survived the acquisition of radical title, native title was exposed ‘to extinguishment by a valid exercise of sovereign power inconsistent with the continued right to enjoy native title’.<sup>60</sup> The High Court held that native title could be lost where the traditional connection with the land has broken, had been surrendered, or become extinct. More importantly, a pre-existing title could be unilaterally extinguished by the new sovereign ‘by valid exercise of sovereign power inconsistent with the continued right to enjoy native title’.<sup>61</sup> The majority of the Court found it unnecessary to reach a conclusion on the issue of extinguishment in the case of the Murray Islands but all of the judges engaged in some discussion of the modes of extinguishing title.<sup>62</sup> Where title has been extinguished through surrender, abandonment, extinction or divestiture, future generations cannot maintain

a claim because, in the case of surrender, abandonment and extinction, the connection that sustains the title is lost; in the case of divestiture, recognition and protection have been unilaterally revoked by the Crown.

The possibility of surrender was proposed by Justice Brennan, although the difficulties associated with such extinguishment were not explored.<sup>63</sup> The surrender of native title is not a simple acquisition by the Crown under the general laws of property. That is why in other jurisdictions any such surrender to the Crown is done by treaty or treaty-style agreement.<sup>64</sup> Even then, because of the communal and intergenerational nature of native title, a difficulty arises in trying to identify who in the group has the capacity, and under what process they would have the power, to surrender the title in an agreement binding on the whole group and on future generations. Even if such an agreement were ratified by legislation, it is not clear that the arrangement would be beyond challenge. The advantage of voluntary surrender is the ability of the group to alienate the land under terms agreed upon by negotiation rather than the unilateral action of the Crown. It was not clear from the decision whether the doctrine established in *Mabo* explicitly precluded Indigenous people from dealing with their land without necessarily surrendering title. Nor was it conclusive whether native title land can be dealt with without requiring complete surrender. That is, so long as any divesting of interests occurred through the Crown and not through private alienation, the native title holders could surrender particular rights under their title to the Crown and retain the balance of their title on conditions that preserved their connection and control over the land. Agreements and consultation to secure access to native title land were obviously to become an integral part of land and resource development in the future and would require clarification of these matters.

Short of surrender, and without alienating native title, the community's laws may regulate the transmission of rights, access to land as well as responsibilities and uses of land.<sup>65</sup> As discussed earlier in relation to connection, though the common law does not support alienability outside the system of law and custom, alienability and succession, within and between groups, can be part of native title. According to Justice Brennan, the 'incidents of a particular native title relating to inheritance, the transmission or acquisition of rights and interests ... are matters to be determined by the laws and customs of the Indigenous inhabitants'.<sup>66</sup>

Without inheritance, acquisition or succession of title under traditional law or custom, title might be abandoned according to the majority in *Mabo*, where the group has ceased to acknowledge their laws and customs because in so doing, the connection between the Indigenous people and the land is lost. Similarly, the title to an area could be extinguished on the

death of the last of the members of the group and native title cannot revive if some other group subsequently acknowledges the traditional laws and customs of that group. That being said, Justices Deane and Gaudron were of the view that there could be no abandonment where there had been continuous occupation, that is, continuous occupation is sufficient evidence of continued acknowledgement.<sup>67</sup>

The most significant form of extinguishment, given the belated recognition of native title, was the Court's finding that the Crown has the power to extinguish title unilaterally (that is, without consent) by legislation or by executive act. This aspect of native title doctrine was a clear assertion of colonial sovereign power.

A general principle was established: that specific action that purports to affect native title must show a clear and plain intention to extinguish the native title interest. Thus Justices Deane and Gaudron concluded that:

If lands in relation to which [common law native] title exists are clearly included within the ambit of ... legislation, the legislative provisions conferring executive powers will, in the absence of clear and unambiguous words, be construed so as not to increase the capacity of the Crown to extinguish or diminish the native title.<sup>68</sup>

Despite this general principle, native title was held to be extinguished, by necessary implication, by the grant of private rights in the land to the exclusion of the Indigenous people.<sup>69</sup> The rationale behind the prioritisation of the later grant was that a valid grant of an interest in land is binding on the Crown and it is unable to derogate from it.<sup>70</sup> The High Court contrasted the title of the Indigenous people to such grants, holding that the rights of Indigenous peoples pre-existed and burdened the radical title of the Crown upon acquisition of sovereignty. Because native title was said not to have its source in the Crown, it does not enjoy the same protection as a grant from the Crown and is therefore extinguished wherever there is a necessary inconsistency. In these cases, the clear and plain intention will be implied.<sup>71</sup> Similarly, title was said to be extinguished by the appropriation, reservation or dedication of land for purposes inconsistent with the title.<sup>72</sup>

The same reasoning was applied where the Crown has dealt with land in a manner inconsistent with the continued existence of native title. It was considered by the Court to be sufficiently clear intention if, for example, the Crown appropriated land for roadways and other permanent public utilities.<sup>73</sup> In contrast, uses by the Crown that are consistent with the continued enjoyment of rights under native title, such as the mere reservation of land for state forest or national parks, were considered by Justice Brennan to be consistent with the continued enjoyment by the

Indigenous peoples.<sup>74</sup> North American decisions had already shown that regulation of Indigenous activities for the purpose of, and to the extent required for, conservation did not extinguish title. Those decisions were relied on by the High Court in *Mabo*.<sup>75</sup> Justice Brennan also saw the reservation of land for use by Indigenous people as consistent with the continuation of native title.<sup>76</sup> In the Murray Islands specifically, the activities of the state government after annexation had not shown derogatory intent. To the contrary, the system of reservation and trusteeship over the islands preserved the benefit of the native title for the Indigenous inhabitants. Thus, simply granting or reserving land for any purpose does not automatically extinguish native title; there must be actual inconsistency with continued enjoyment of native title.

In preserving the skeleton of principle of the land tenure system, the Court held that the Crown is able to grant any interest in land including a fee simple. It was clear from the discussion by Justice Brennan that a grant of a fee simple in land would likely be sufficient to extinguish title.<sup>77</sup> A fee simple is the largest interest in land known to the common law, thus raising the question whether there is any room for the continued enjoyment of rights under native title.<sup>78</sup> Other grants by the Crown – including leasehold interests and lesser interests (such as mining leases, exploration licences, extraction permits and leases, and interests under pastoral ‘leases’) – were thought unlikely to be sufficient to extinguish the title.<sup>79</sup>

### Wrongful extinguishment

The majority in *Mabo* agreed that the legislature and executive have power to extinguish native title, though native title survives annexation. Chief Justice Mason and Justice McHugh, in a joint judgment, identified a conflict over the issue of compensation for such extinguishment:

The main difference between those members of the Court who constitute the majority is that, subject to the operation of the *Racial Discrimination Act 1975* (Cth), neither of us nor Justice Brennan agrees with the conclusion to be drawn from the judgements of Deane, Toohey and Gaudron JJ that, at least in the absence of clear and unambiguous statutory provision to the contrary, extinguishment of native title by the Crown by inconsistent grant is wrongful and gives rise to a claim for compensatory damages... We are authorised to say that the other members of the Court agree with what is said in the preceding paragraph.<sup>80</sup>

Justices Toohey, Deane and Gaudron agreed that non-statutory extinguishment, though effective, gave rise to a cause of action in equity for

compensation.<sup>81</sup> Though acknowledging the power of the Crown to extinguish title, Justices Toohey, Deane and Gaudron held that wrongful extinguishment by inconsistent grant without clear and unambiguous legislative intent would be subject to compensation to the title holders.<sup>82</sup> Moreover, Commonwealth legislation is subject to the *Australian Constitution*. The Commonwealth parliament has the power to legislate and to acquire property under any head of power for which it is able to legislate generally. The legislative heads of power under s 51 are diverse, and the external affairs power (s 51(xxix)) allows an almost plenary power to legislate for any issue that is the subject of a treaty to which Australia is a signatory. Moreover, the Commonwealth parliament has the power, under s 51(xxvi), to make laws for people of any race, including Indigenous peoples. But, in order to compulsorily acquire property, the Commonwealth government must do so on just terms, under s 51 xxxi). This provision has been considered a constitutional guarantee, and, as a result, is construed liberally.<sup>83</sup> It is difficult to conceive that this guarantee was denied to Indigenous peoples by the Court. The High Court reasoning in relation to the power of the acquiring sovereign to unilaterally extinguish native title drew on a common law tradition. But that common law position should be subject to the superior law of the Constitution. Thus, in 1901, with the coming into force of the Constitution, the compulsory acquisition of native title, by the Commonwealth at least, should have been subject to compensation, because, as Justices Deane and Gaudron concluded, 'any legislative extinguishment ... would constitute an expropriation of property, to the benefit of the underlying estate for the purposes of s 51 xxxi)'.<sup>84</sup>

The difficulty arose from the authority given to Chief Justice Mason and Justice McHugh to summarise the findings of the Court.<sup>85</sup> The basis of their statement appears to be Justice Brennan's conclusion that the grant of an interest inconsistent with the continued enjoyment of the communal title, made with the clear intention of extinguishing that title, is valid. As the extinguishment of title was not considered to be wrongful, no right to compensation arises. But there was nothing in the judgment of Justice Brennan that inevitably denied compensatory relief. Justice Brennan expressed the view that, as a title recognised and protected by the common law, the extinguishment of traditional title was a serious consequence and, where it has not been extinguished, it remains legally enforceable.<sup>86</sup> Justice Brennan also cited, approvingly, a precedent for the granting of compensation, stating that the issue of compensation was not one that was to be decided in the case.<sup>87</sup> The decision by Justice Brennan seemed to allow scope for further development of the law and a closer review of the

issue of wrongful extinguishment, which was not directly relevant to the case before the Court in *Mabo*.

Justice Toohey offered a more secure title, under which the exercise of legislative or executive action must be exercised with regard to the fiduciary relationship between the government and the title holders.<sup>88</sup> The duty was said to arise out of the state's power to affect the interests of the title holders, whose vulnerability gives rise to the need for the application of equitable principles. Justice Toohey pointed to the protectionist policies of the governments toward the Indigenous people as an indication of an undertaking not to act to their detriment.<sup>89</sup> With Justices Deane and Gaudron, Justice Toohey determined that unilateral extinguishment, while it might be valid, gave rise to compensation. Unfortunately, with the authority of the Court, the view of Chief Justice Mason and Justice McHugh stands: under the common law, the extinguishment of native title by the Crown is not subject to compensation.

In that same short judgment, Chief Justice Mason and Justice McHugh also drew attention to the impact of the *Racial Discrimination Act* (1975) (Cth) (RDA). In *Mabo v Queensland [No. 1]*, the *Queensland Coast Islands Declaratory Act 1985* (Qld) was declared invalid because it was inconsistent, with s 10 of the RDA.<sup>90</sup> As a result, it could not be relied upon by the state government to effectively terminate the proceedings.

Under the common law of native title emerging from the *Mabo* decision, any purported extinguishment of title by executive or legislative action made before 31 October 1975 was not affected by the RDA and would not be open to challenge for compensation or any other relief. However, any extinguishment of rights on or after the introduction of the RDA may be invalid or may be modified to give equal protection to Indigenous peoples in the enjoyment of their rights. The High Court's reasoning in relation to the protection provided by the RDA ensures that equal protection of the just terms clause is enjoyed by native title holders only from 1975.

State governments are not directly bound by the Commonwealth constitutional provisions, although most have their own just terms provisions. The principal limitation that the Constitution places on the state legislatures identified by Justices Deane and Gaudron, is the paramountcy provision, s 109: 'When the law of a state is inconsistent with a law of the Commonwealth the latter shall prevail, and the former shall, to the extent of the inconsistency be invalid'.<sup>91</sup> Importantly then, the state legislatures and executives are bound by the RDA. The RDA can operate in two ways: where legislation deprives persons of a right enjoyed by others and where the legislation confers a particular right on people generally but not

on people of a particular ethnic origin. For example, the compensation provision of the *Mining Act 1978* (WA), which applies in respect of the owners and occupiers of private land and certain occupiers of Crown land but not native title holders. This provision would be extended under s 10 of the RDA to apply equally to native title holders or to invalidate a grant of mining that did not guarantee compensation.

The application of the comments of the majority to past acts and existing legislation has proved to be a difficult exercise as the intention, and impact of every legislative and executive act over more than two hundred years must be analysed to determine any extinguishing effect. The question of compensation remains outstanding. There is still no decision that seeks to place a value on the loss of native title.

## Conclusion

The *Mabo* decision provided Indigenous peoples with a viable legal doctrine to protect their interests and to facilitate the preservation and strengthening of their culture. It recognised that the granting of future interests in land could coexist with the presence of native title. It merely ensured that dealings with respect to Indigenous land would be concluded in negotiation with Indigenous peoples and that their interests would be recognised by the parties involved and by the law. The movement away from bestowment of rights upon Indigenous inhabitants to the assertion of existing rights created a source of empowerment for Indigenous people that forced non-Indigenous Australians to confront their racism and the injustices of the colonising culture. This redefining of the relationship was to result in more than a decade of litigation over the extent of recognition and the limits of protection.