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CUSTOMARY TITLE, HERITAGE PROTECTION, AND PROPERTY RIGHTS IN AUSTRALIA: EMERGING PATTERNS OF LAND USE IN THE POST-MABO ERA

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Abstract: The *Mabo* decision represented a major doctrinal change in the relationship between Indigenous people and the settler legal system. However, significant legislative developments in land use and management recognizing some Indigenous interests in land had already laid the groundwork for joint land management schemes and concurrent land uses. These developments have formed the basis for ongoing expansion of coexistent land uses with the negotiation of formal and informal agreements for co-management of land. A range of factors influence these agreements, including the existence of enforceable property rights and non-property based heritage protection legislation. These regimes are currently in a state of flux. In an uncertain political environment there are possibilities for further recognition of Indigenous involvement in land management. There are also real possibilities for contraction of the limited rights of Indigenous people over land. Either development will impact the significant involvement of Indigenous people in resource and environmental management.

I. INTRODUCTION

While there are vastly different legal regimes across the Pacific Rim, land use and management is characterized by a number of recurring themes including the need to reconcile different relationships with land and to reconcile conflicting aspirations between development and preservation of both Indigenous cultural heritage and Indigenous land use systems. Many different methods of regulating Indigenous heritage and land interests have been devised, including systems that protect private property interests, provide compensation for infringement of interests, or involve registration of interests as a form of managing and controlling them. Within the Australian context, many of these issues have been played out in the search by Indigenous people for common law and statutory recognition of their relationships to, and interests in, land by the settler legal system. The contemporary common law recognition of native title, that is, pre-existing aboriginal land interests, has brought the search for cognizable land rights into sharp focus.

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The pre-European system of land use and "ownership" in Australia underwent a cataclysmic change in 1788 when Britain extended sovereignty control over the continent.¹ This was the starting point of conflict between dramatically and fundamentally different expressions of relationships with land. The differences existed in many dimensions, including the institutional and cultural underpinnings of the relationships, the knowledge systems through which meaning and identity are ascribed, and the processes by which the relationships are known and enforced. Unraveling the immense differences has been a 210 year journey characterized by conflict and subjugation of Indigenous interests to those of the colonizer, but also, surprisingly, by coexistence. This journey continues and each of these elements remains a feature of the contemporary patterns of land use, both in the granting of interests in land by settler governments and the recognition and protection of Indigenous interests, whether by recognition of forms of ownership or statutory protection of Indigenous cultural heritage.

Until the landmark decision in *Mabo v. Queensland*,² Australian courts did not recognize Indigenous people's common law rights and interests in land; furthermore, the Australian settler experience had entailed limited statutory recognition of land based interests through Indigenous heritage legislation and land grant schemes. For 200 years, land policies on the Australian continent were characterized by dispossession of Indigenous people.³ This process has been a result of colonial governments and, more recently, State governments, either through legislation or executive acts, exercising their power to grant interests in land for a variety of purposes, including grants of estates in fee simple or "ownership rights," grants of mining exploration rights to private individuals, and the creation of reserves

¹ The validity of the acquisition of sovereignty was not challenged in *Mabo v. Queensland* (1992) 175 C.L.R. 1 [hereinafter *Mabo II*]. It is not accepted by all Indigenous people and has been the subject of two unsuccessful challenges: *Coe v. The Commonwealth* (1979) 24 A.L.R. 118 and *Post-Mabo II, Coe v. The Commonwealth* (1993) 118 A.L.R. 193.

² See *Mabo II*.

³ *Id.* at 68, per Brennan J:

As the Governments of the Australian Colonies and, latterly, the Governments of the Commonwealth, States and Territories have alienated or appropriated to their own purposes most of the land in this country during the last 200 years, the Australian Aboriginal people have been substantially dispossessed of their traditional lands. They were dispossessed by the Crown's exercise of its sovereign powers to grant land to whom it chose or to appropriate to itself the beneficial ownership of parcels of land for the Crown's purposes.

for the conservation of bio-diversity or other purposes. This was done with disregard of, or indifference to, Indigenous land interests.⁴

Two recent High Court decisions, *Mabo II*⁵ and *Wik Peoples v. Queensland*,⁶ dealt with the issue of "native title," that is, Indigenous interests in, and relationships with, land that survived British colonization.⁷ By recognizing a limited form of native title, the *Mabo II* Court confirmed that certain pre-existing Indigenous rights and interests in land not only survived Britain's initial settlement, but also survived subsequent legislative and executive actions and have endured to the present. *Mabo II* not only raised the possibility of the recognition of some Indigenous rights and interests in land, previously unknown to the law, but questioned the validity and extent of rights and interests previously granted in land over which some form of native title could be claimed. In response to this new uncertainty, the Commonwealth Parliament passed the Native Title Act in 1993 to define the extent of aboriginal land rights based on native title.⁸ The Act validated past legislative and executive acts while prescribing a method for valid future dealings with land in which native title existed. Following the *Wik* decision, substantial amendments to the Native Title Act were proposed.⁹

The fundamental elements of Indigenous people's relationships to land, however characterized, are central to the concept of native title and thus its recognition provides implicit protection of Indigenous cultural heritage which is on native title land. However, where native title cannot be established, the issue of recognition and protection of Indigenous heritage remains tenuous and uncertain. This Article examines the emergence and direction of these two different regimes for the recognition and protection of Indigenous

⁴ The extent of the dispossession has varied among Indigenous groups and geographical locations. Partial or complete physical absence from land has not necessarily resulted in a loss of knowledge or the economic, religious and cosmological connection that people have with their land. However this process of dispossession has contemporary relevance because of the characterization of native title both judicially and legislatively.

⁵ *Mabo II*.

⁶ *Wik Peoples v. Queensland* (1996) 141 A.L.R. 129 [hereinafter *Wik*].

⁷ The Full Bench of the Court has decided two other native title cases since 1992. The first, *Western Australia v. The Commonwealth* (1995) 183 C.L.R. 373, dealt largely with the validity of the Native Title Act, 1993 (Austl.) and the conflicting Land (Titles and Traditional Usage) Act, 1993 (W. Austl.), the extent of Commonwealth powers and the application of the Racial Discrimination Act, 1975 (Austl.) to dealings with native title. The second, *North Galanjanja Aboriginal Corporation v. Queensland* (1996) 135 A.L.R. 227, dealt largely with procedural issues arising under § 63 of the Native Title Act, 1993 (Austl.) and the regulations made under the Act.

⁸ See Tim Rowse, *How We Got A Native Title Act*, 65 AUSTRALIAN QUARTERLY 111 (1993) for an insightful analysis of both the public debate and the negotiations which produced the legislation in its final form.

⁹ The Native Title Amendment Bill, 1997 was finally introduced into the Commonwealth Parliament on September 4, 1997. The Act was passed in July 1998 and came into effect on September 30, 1998.

relationships with land. It is suggested that while the parameters of native title are uncertain, it has provided a legal basis for the renegotiation of land interests between the settler society and Indigenous people. On the other hand, it is suggested that systems for the protection of Indigenous heritage outside of native title provide little protection and are diminishing in their capacity to protect Indigenous land based interests.

II. THE CONSTITUTIONAL FRAMEWORK

Australia's political and constitutional history has directly impacted the development of Indigenous/settler relations and land laws. The original colonization of the east coast of Australia occurred on 26 January 1788. Sovereignty over other parts of what is now known as Australia was claimed at various times after that date. For example, sovereignty of what is now the State of Western Australia was not claimed until approximately 1829,¹⁰ and sovereignty of the Island of Mer, the subject of the *Mabo II* case, was not claimed until 1879.¹¹ At various times during the nineteenth century, existing Australian colonies were divided to create new ones.¹² During that period, the powers of colonial legislatures were determined by their relationship with the British Crown and the powers that the Crown delegated. These delegated powers ultimately included the power to grant interests in land in accordance with the colony's constitution,¹³ and each colony established its own system of land titles registration.¹⁴ In the course of exercising their powers over land, the Colonies acquired ownership of the sub-surface and minerals and established systems for the regulation of the exploration and extraction of minerals and other resources.¹⁵

Colony land management included grants of fee simple freehold land and a range of licenses and (so called) leases in more remote and marginal areas. This latter system was designed to impose some order and government control on an anarchic grab for land known as "squatting." The granting of

¹⁰ N. OGLE, *THE COLONY OF WESTERN AUSTRALIA: A MANUAL FOR EMIGRANTS* (1839).

¹¹ See *Mabo II*, (1992) 175 C.L.R. 1, at 19.

¹² For example, the colony of Queensland was carved out of the colony of New South Wales in 1859.

¹³ The nature and extent of these powers have themselves been subject of considerable debate. See ALEX C CASTLES, *AN AUSTRALIAN LEGAL HISTORY* (1982). The legal and constitutional relationships between colonies and the Crown has renewed significance in the contemporary native title debate. See *Wik* (1996) 141 A.L.R. 129.

¹⁴ Each colony established its own Torrens system of land registration.

¹⁵ Throughout the late nineteenth century, colonies passed legislation claiming ownership of most minerals for themselves. This is a significant difference between the Australian, United States and Canadian systems of sub-surface rights attaching to the fee simple.

freehold fee simple title was considered inappropriate in such areas and so the institution known as pastoral leases was born.¹⁶ The capacity of the colonies to make grants was limited by their constitutions; in particular, the Executive's power to make grants was limited by the authority granted by the legislature.¹⁷ A huge number of different types of land tenures were developed for various geographical and social situations¹⁸ and covered significant portions of the Australian land mass. Many of these tenures have survived to the present day.¹⁹

On 1 January 1901, the six colonies formed a Federation under the Australian Constitution. Power to make laws in relation to a range of matters was specifically given to the Commonwealth while the States retained residuary powers.²⁰ The States may legislate matters within the jurisdiction of the Commonwealth, but the validity of that legislation is subject to any inconsistent or overriding Commonwealth legislation.²¹

The division of powers between different governments has produced a complex web of statutory provisions governing not only Indigenous land interests and heritage, but also resource and environmental management. There is, as a result, a myriad of schemes for recognition, management and protection of Indigenous interests in land and their coexistence with other uses. There are four major factors supporting Commonwealth influence on the schemes. First, the power of the Commonwealth to make laws in relation to Indigenous people was confirmed by a 1967 referendum that changed section 51(XXIV) of the Australian Constitution to empower the Commonwealth to make special laws it "deemed necessary" for people of particular races including "Aborigines." Second, the Commonwealth's power has also been expanded as a result of a series of High Court decisions that have confirmed Commonwealth legislative competence when exercised

¹⁶ See ANDREW LANG, *CROWN LANDS IN NEW SOUTH WALES* (1973) and Henry Reynolds & James Dalziel, *Aborigines and Pastoral Leases—Imperial and Colonial Policy 1826-1855*, 19 U.N.S.W. L.J. 315 (1996), for a discussion of aspects of this history.

¹⁷ *Cudgen Rutile (No. 2) Pty. Ltd. v. Chalk* (1975) 4 A.L.R. 438. See also *Wik* (1996) 141 A.L.R. 129, at 224 per Gummow J. "The management and control of waste lands in Queensland was vested in the legislature and any authority of the Crown in that respect had to be derived from statute." *Id.*

¹⁸ See *Wik* at 225 per Gummow J. ("a bewildering multiplicity of tenures," quoting A.C. MILLARD & G.W. MILLARD, *THE LAW OF REAL PROPERTY IN NEW SOUTH WALES* (1930)).

¹⁹ It is the characterization of these tenures and their relationship with native title, both its continued enjoyment and its extinguishment, that lies at the heart of *Wik*.

²⁰ AUST. CONST. § 51.

²¹ *Id.* § 109. For a discussion of the development of the Australian Constitutional development see PATRICK LANE, *A MANUAL OF AUSTRALIAN CONSTITUTIONAL LAW* (1991).

pursuant to International agreements and obligations.²² The power deriving from international agreements has emerged as the crucial element for protection of Indigenous interests through the application of the Racial Discrimination Act 1975, the municipal implementation of the International Convention on the Elimination of All Forms of Racial Discrimination.²³ Third, while the schemes for creating conservation reserves or granting licenses or leases for exploration and mining (resource tenements) remain squarely within the legislative competence of the States, the Commonwealth has been able to influence resource developments by refusing to exercise its powers, for example, in granting export licenses, unless there has been compliance with its own regime for environmental and resource management.²⁴ Finally, the Commonwealth has direct power over Territories which has been important because of the large Indigenous population and geographical size of the Northern Territory.²⁵

The consequence of this complex scheme has been an ongoing negotiation and renegotiation of Commonwealth/State relations. In relation to environmental management, there have been some moments of Commonwealth activism, but successive Governments have tended to pursue a process of cooperative federalism, creating policies and goals through Ministerial meetings and negotiation.²⁶ The Commonwealth's capacity to intervene in resource management has largely been confined to the use of its constitutional powers over such areas as the environment,²⁷ Indigenous heritage,²⁸ or trade.²⁹ The impact of the exercise of power has largely been on the implementation of large scale developments and their form and scope.³⁰

²² AUST. CONST. §51, cl. XXIX. See *Commonwealth v. Tasmania* (1983) 158 C.L.R. 1; *Koowarta v. Bjelke-Petersen* (1982) 153 C.L.R. 168.

²³ See *Koowarta v. Bjelke-Petersen*; *Mabo v. Queensland* (1988) 166 C.L.R. 186 [hereinafter *Mabo I*]; *Mabo II* (1992) 175 C.L.R. 1; *Western Australia v. Commonwealth* (1995) 183 C.L.R. 373.

²⁴ *Murphyores Incorporated Pty. Ltd. v. Commonwealth* (1976) 136 C.L.R. 1.

²⁵ AUST. CONST. § 122.

²⁶ GERRY BATES, *ENVIRONMENTAL LAW IN AUSTRALIA* 76 (1995).

²⁷ *World Heritage Properties Conservation Act, 1983* (Austl.); *Commonwealth v. Tasmania* (1983) 158 C.L.R. 1.

²⁸ *Aboriginal and Torres Strait Islander Heritage Protection Act, 1984* (Austl.).

²⁹ *Murphyores* 136 C.L.R. 1.

³⁰ For example the refusal of the Commonwealth to issue export licenses meant that only three uranium mines could operate in Australia. This policy has recently been abandoned by the recently elected Federal government. Similarly, the exercise of powers under both the *Aboriginal and Torres Strait Islander Heritage Protection Act, 1984* (Austl.) and the Territories power enabled the Commonwealth to prevent the development of a large mine at Coronation Hill in the Northern Territory. The High Court recently held that the Commonwealth's action amounted to an acquisition of the resource developers' property and that just compensation for the taking was required under § 51(XXXI) of the Australian Constitution. *Newcrest Mining (WA) Ltd. v. Commonwealth* (1997) 147 A.L.R. 42.

Schemes for the granting and regulation of resource tenements have been left to the States, with the Commonwealth only influencing the process by imposing additional conditions prior to exercising its necessary authority, or preventing the project from proceeding because of either environmental or heritage considerations.

The final piece in the constitutional mosaic of land use law relates to the Commonwealth's liability to pay compensation to landowners for the compulsory acquisition of property. The Constitution specifically provides that the Commonwealth may only acquire property on "just terms"³¹ and thus its power to affect property interests is fettered to some extent by the requirement to pay compensation. The States have no similar constitutional limitation on compulsory acquisition of land, but most States have legislation that requires the payment of compensation for compulsory acquisitions of land.³² These provisions have emerged as significant factors in the developing pattern of land use regimes since the *Mabo II* decision.³³ It is against this legal and constitutional background that Indigenous land relationships have sought recognition and protection.

III. INDIGENOUS HERITAGE AND RELATIONSHIPS TO LAND

It is almost impossible to generalize Indigenous people's relationships to land. At the time of colonization, there were over 500 different language groups in Australia and although some of these were related and connected in both language and cultural interchanges, many were quite distinct and diverse.³⁴ In the modern context, the extent of distinctions might be seen in a simple comparison of the claims in the two major native title cases. In *Mabo II* the claim covered three small islands in the Torres Strait with a total area of nine square kilometres.³⁵ This might be contrasted with the claim of the Wik and Thayorre peoples in *Wik*, in which the claim covered a combined area of 1,754 square miles.³⁶

Indigenous relationships with land are complex and various, revolving around spatial, spiritual, and social organization deriving from, and given meaning through, connections to particular land. They are the source of laws,

³¹ AUST. CONST. § 51, cl. XXXI.

³² See The Land Acquisition and Compensation Act, 1986 (Vict.).

³³ *Mabo II* (1992) 175 C.L.R. 1.

³⁴ NORMAN TINDALE, *ABORIGINAL TRIBES OF AUSTRALIA* (1974).

³⁵ *Mabo II*, at 16.

³⁶ *Wik* (1996) 141 A.L.R. 129, 140. The diversity also provides a partial explanation for the many disputes between Indigenous people about native title claims and the right to "speak for country."

customs, and identity, and represent a complex of meanings which explain the universe and provide a "kind of narrative of things that once happened; a kind of charter of things that still happen; and a kind of logos or principle of order transcending everything significant for Aboriginal man."³⁷ Land and the landscape, including specific features such as rocks, hills, river beds, trees, and waterholes, as well as the plant and animal life associated with the land, provide the central connecting element in this set of meanings.³⁸

The Indigenous relationship and connection to land may arise in a variety of ways, such as biological succession through birth or adoption, through association by conception or birth at a particular place, or through territorial proximity. The nature of a person's association with land will determine the extent of their rights and duties and responsibilities in relation to the land, including whether they are the major spokesperson for, or whether they are entitled to, the fruits of the land.³⁹ However, as indicated by Stanner,⁴⁰ these relationships include all aspects of peoples' lives, including the material as well as the spiritual.⁴¹ They comprise a central element of a person's identity, giving them a place within the complex set of cultural relationships to the people and the world around them.⁴²

The nature of traditions associated with, and deriving from, land varies from group to group. For example, in the Murray Islands, the relationships consist of "specified plots of clearly bounded land handed down mainly by patrilineal inheritance."⁴³ The source of the relationship derives from "sacred endowment and religious certitude."⁴⁴ In contrast, western desert cultural

³⁷ W.E.H. STANNER, *WHITE MAN GOT NO DREAMING: ESSAYS 1938-1973*, 24 (1979).

³⁸ These meanings vary between groups. For a detailed discussion of very different Indigenous groups and cultures see TINDALE, *supra* note 34; NONIE SHARP, *STARS OF TOGAI: THE TORRES STRAIT ISLANDERS* (1993); FRED MYERS, *PINTUPI COUNTRY PINTUPI SELF* (1986).

³⁹ Kenneth Maddock, "Owners," "Managers" and the Choice of Statutory Traditional Owners by Anthropologists and Lawyers, in *ABORIGINES, LAND AND LAND RIGHTS* 211 (N. Peterson & M. Langton eds., 1984); Peter Sutton, *The Robustness of Aboriginal Land Tenure Systems: Underlying and Proximate Customary Titles*, 67 *OCEANIA* 7 (1996).

⁴⁰ STANNER, *supra* note 37.

⁴¹ See, e.g., MYERS, *supra* note 38; A.P. ELKIN, *THE AUSTRALIAN ABORIGINES* (1964). In fact, this distinction between the spiritual and economic has been criticized by a number of writers who see it as a source of the problems in judicial treatment of Indigenous people's relationships with land. See Nonie Sharp, *No Ordinary Case: Reflections on Mabo No.2*, in *ESSAYS ON THE MABO DECISION* 23, at 31-36 (Law Book Company ed., 1993) (criticizing Moynihan J in *Mabo* for his emphasis on the economic to the exclusion of the spiritual); NANCY WILLIAMS, *THE YOLNGU AND THEIR LAND* 202 (1986).

⁴² See MYERS, *supra* note 38.

⁴³ NONIE SHARP, *NO ORDINARY JUDGMENT* 165 (1996).

⁴⁴ *Id.* at 162.

"knowledge"⁴⁵ covers large areas (approximately half the continent) and consists in part of particular places and in part of tracks which join places in a network of tracks made by ancestral beings which criss-cross the desert. Songs, stories, and rituals, known as the *tjukurrpa*, link many people across this vast area of the desert in systems of stories constituting "a changing political charter of who and what are identified at various levels."⁴⁶ That is, the hierarchy of decision-making and control stems from this complex spiritual system. In a substantial part of the central and western deserts of the Australian continent, land interests range across wide areas and, according to Myers, cannot be limited to an identifiable and bounded parcel of land.⁴⁷ Rather, there is an interconnectedness between people across these vast areas involving negotiation of ownership claims and social acknowledgment of potential responsibility for the area, which may involve diverse duties such as cleaning waterholes, "burning of country," performing ceremonies "directly related to the land," for example retelling creation stories represented in land formations and preserving animal and plant species, making and maintaining of ceremonial artifacts, and other duties that affect the well-being of the group and the individuals within it.⁴⁸

Land is the significant and central element in all aspects of the Indigenous people's existence. Such a complex system makes differentiating the elements of the relationship with land difficult and attempts to do so may be inappropriate because it breaks up the coherent whole of culture and existence. However, such a differentiation has occurred within the settler legal system in a variety of ways, including in the formulation of heritage legislation,⁴⁹ the differentiation (in legislation) between movable heritage such as archaeological artifacts and land based sites of significance, and regimes for the protection of intellectual property. These regimes protect production associated with the relationship between land and production, but not the knowledge that underpins or is represented in that production. At a more fundamental level, Sharp suggests that the attempt to differentiate between elements of this cosmology, for example between the spiritual and the economic, is at the root of the difficulty that the settler legal system has

⁴⁵ The "western desert cultural bloc" covers those groups occupying a large part of the central and western desert areas of the Australian continent and has been identified in anthropological literature as groups having significant spiritual and land based relationships in common. Ronald Berndt, *The Concept of "The Tribe" in the Western Desert of Australia*, 30 OCEANIA 81 (1959).

⁴⁶ MYERS, *supra* note 38, at 60.

⁴⁷ *Id.* at 73.

⁴⁸ *Id.* at 95-102.

⁴⁹ See notes 89-134 and accompanying text.

experienced in understanding and recognizing Indigenous people's relationships with land.⁵⁰

How then has the settler legal system, both legislatively and at common law, recognized and protected these relationships to land?

IV. INDIGENOUS LAND INTERESTS PRE-*MABO*

A. *Indigenous Interests at Common Law*

Until the High Court's decision in *Mabo II*,⁵¹ there had been a widely (but not universally)⁵² held view⁵³ that no Indigenous rights, customs, or law, including any land interests, survived "the acquisition of sovereignty by the British Crown." This view was based on a series of appellate cases that confirmed that with sovereignty, the laws of England had become the laws of the colony. These cases dealt with the power of the Crown to make grants of interests in land to settlers and confirmed that in accordance with the doctrine of tenure, the land was a Royal demesne and the Crown held beneficial title; it was not possible for any interest in land to arise, be created or exist, other than by way of a grant from the Crown.⁵⁴ That principle was adopted in a number of subsequent High Court cases also dealing with the relationship between the Crown and settler interests or, later, between states and the Commonwealth.⁵⁵ The decisions rested upon the *terra nullius* doctrine, a set of common law principles deriving from International law. Under the doctrine, a colony could be established on "uninhabited land"; land was uninhabited if its occupants were nomadic and had no settled law. The view was clearly enunciated by the Privy Council in *Cooper v. Stuart*.⁵⁶

⁵⁰ SHARP, *supra* note 43 at 103.

⁵¹ *Mabo II* (1992) 175 C.L.R. 1.

⁵² Richard Bartlett, *Mabo: Another Triumph for the Common Law*, 15 SYDNEY L. REV. 178 (1993); Garth Nettheim, *Judicial Revolution or Cautious Correction? Mabo v. Queensland*, 16 U. NEW SOUTH WALES L.J. 1 (1993).

⁵³ Gabriel Moens, *Mabo and Political Policy-making*, in *MABO: A JUDICIAL REVOLUTION* 48, 50 (Margaret Stephenson, & Suri Ratnapala eds., 1993); L.J.M. Cooray, *The High Court in Mabo: Legalist or l'egotiste*, in *MAKE A BETTER OFFER: THE POLITICS OF MABO 65* (Murray Goot, & Tim Rowse eds., 1994).

⁵⁴ *Cooper v. Stuart* (1889) 14 App. Cas. 286; *Attorney-General v. Brown* (1847) 1 Legge 317.

⁵⁵ *Williams v. Attorney-General (N.S.W.)* (1913) 16 C.L.R. 404; *New South Wales v. Commonwealth* (1975) 135 C.L.R. 337.

⁵⁶ *Cooper v. Stuart*, at 291. The Privy Council said:

The extent to which English law is introduced into a British Colony and the manner of its introduction must necessarily vary according to circumstances. There is a great difference between the case of a Colony acquired by conquest or cession, in which there is an established system of law and that of a Colony which consisted of a tract of territory, practically

None of these cases directly addressed whether Indigenous land interests were entirely extinguished upon colonization, although the issue was considered in the course of the decisions. The first case to raise such a claim was heard in 1971 by a single judge in the Supreme Court of the Northern Territory of Australia.⁵⁷ This case involved a claim by the Indigenous inhabitants of the Gove Peninsula, the Yolgnu, for common law Aboriginal title based upon the argument that their title had survived sovereignty. Although the judgment recognizes the complexity of the relationship of land to the plaintiffs, the court felt bound by the decision in *Cooper v. Stuart*. The claim that Indigenous interests survived the "acquisition of sovereignty" was unsuccessful.⁵⁸ The issue of recognition and protection was thus left to the legislatures.

B. *Statutory Regulation of Indigenous Interests*

1. *Reserves and Land Rights Legislation*

From the time of colonization, official colonial policies expressed various levels of concern for the Indigenous population. Legislative benevolence was not necessarily reflected in the practical interactions between Indigenous inhabitants and settlers, which were marked by conflicting aspirations in relation to land.⁵⁹

From the mid-nineteenth century and throughout this century, colonial and state governments embarked on a process of creating reserves for the "use and benefit of the aboriginal inhabitants," under general lands legislation.⁶⁰ The reserves were initially characterized by two dominant features. They provided protection for Indigenous people from the impacts of colonial society and enabled them to continue some elements of their own culture.⁶¹

unoccupied, without settled inhabitants or settled law, at the time it was peacefully annexed to the British dominions. The colony of New South Wales belongs to the latter class.

⁵⁷ *Milirrump v. Nabalco Pty. Ltd.* (1971) 17 F.L.R. 141.

⁵⁸ *Id.*

⁵⁹ For discussion of this early period of relations between Indigenous groups and settlers and colonial policy see, HENRY REYNOLDS, *FRONTIER* (1987); MARC GUMBERT, *NEITHER JUSTICE NOR REASON* (1984); CHARLES ROWLEY, *THE DESTRUCTION OF ABORIGINAL SOCIETY* (1970).

⁶⁰ *See, e.g.*, An Act for Regulating the Sale of Waste Land Belonging to the Crown in the Australian Colonies, 1842 (Imp); Land Act, 1898 (W. Austl.); Crown Lands Consolidation Act, 1877 (S. Austl.). Similar legislation was passed in other colonies and most current land legislation still includes these provisions. The equivalent Queensland legislation Crown Lands Alienation Act, 1876 (Queensl.) was one such piece of legislation and was considered in *Mabo II* (1992) 175 C.L.R. 1, at 71 per Brennan J.

⁶¹ HEATHER GOODALL, *INVASION TO EMBASSY: LAND IN ABORIGINAL POLITICS IN NEW SOUTH WALES, 1770-1972*, Part 2 (1996).

Towards the end of the nineteenth century, the reserves became tools for colonial administrations to impose severe constraints on the lives of Indigenous people. Groups were moved to reserves in locations often hundreds of miles from their traditional lands. People were not permitted to leave the reservations and the superintendent of the reserve had power over most aspects of people's lives. What began as a protective measure became a means of cultural destruction and massive dislocation, and continued well into the second half of the twentieth century.⁶²

Occasionally, the location of reservations coincided with the land interests of the Indigenous groups,⁶³ but for the most part, reservations were created without reference to, or consideration of, Indigenous land interests and relationships, and managed without the involvement of Indigenous people. Reserves were mechanisms for control and "protection" of Indigenous people either through government administration or Christian missions.

In the middle of the twentieth century the dominant policy changed from one of protection to one of assimilation; reserves became a key factor in implementing the policy.⁶⁴ The assimilation policy was based on the idea that "in practical terms ... in the course of time, it is expected that all persons of Aboriginal birth or mixed blood in Australia will live like white Australians do."⁶⁵ The policy rejected Indigenous culture and attempted to incorporate Indigenous people into the dominant culture. The policy was most dramatically marked by the removal of Aboriginal children from their families.⁶⁶

Paradoxically, reserves have assumed a new significance in the native title era. Because the lands were reserved for the benefit of Aboriginal people, it is less likely that there has been any technical extinguishment as a result of some inconsistent grant or use of the land, and in that sense it is more likely that native title will have been preserved.⁶⁷

Reserves, then, became a dominant feature of land management for Indigenous people in the settler legal and land administration system. They were rarely seen as beneficial by Indigenous people, at least during the twentieth

⁶² *Id.* at Parts 3 and 4; SURVIVAL IN OUR OWN LAND (Christabel Mattingley & Ken Hampton eds., 1988). See Neal v. R. (1982) 149 C.L.R. 305 for a particularly cogent and contemporary discussion of the operation of this system by Murphy J.

⁶³ The Murray Islands are a clear example of this coincidence.

⁶⁴ GOODALL, *supra* note 61.

⁶⁵ GUMBERT, *supra* note 59, at 19.

⁶⁶ C. EDWARDS & P. READ, THE LOST CHILDREN (1989); BRINGING THEM HOME: REPORT OF THE NATIONAL INQUIRY INTO THE SEPARATION OF ABORIGINAL AND TORRES STRAIT ISLANDER CHILDREN FROM THEIR FAMILIES (1997). This factor now has significant consequences in relation to the need to establish unbroken links with land in order to claim native title.

⁶⁷ *Mabo II* (1992) 175 C.L.R. 1, at 64 per Brennan J; *Pareroutlja v. Tickner* (1993) 117 A.L.R. 206.

century, and were often seen as the source of cultural devastation and disharmony. Conspicuously absent from this regime was the notion of land management, much less ownership, by Indigenous people in terms commensurate with, and comprehensible to, their systems of knowledge and culture.

The mid 1960s brought a change in government attitudes. Policy refocused on the land needs of Indigenous people. The first example of this change was the establishment of Aboriginal Land Trusts in South Australia⁶⁸ and Western Australia.⁶⁹ These efforts did not focus on land relationships, but did acknowledge that the Indigenous inhabitants of reserves had some land needs. Management of the reserves was given to Indigenous people, but was at a State rather than local reserve level.

Activities on reserves by non-Indigenous interests usually required some element of special consent by the body with responsibility for management of the reserve. The most common activity was mining exploration and development. Such activity was not subject to consent or even advice from the Indigenous inhabitants of reserves. Most jurisdictions established administrative regimes for the processing of applications⁷⁰ and there were often arrangements made for special payments, including royalties, from the activity. These payments would most often become part of consolidated revenue and rarely, if ever, were the funds used on the reserve.⁷¹

From the mid 1960s there were parallel developments that began to focus specifically on Indigenous people's relationships with land and their cultural priorities. A major change occurred with the Australian Land Rights Commission Report⁷² and the resultant Aboriginal Land Rights (Northern Territory) Act 1976 (Cth.). The crucial aspect of the report and the legislation was that it provided for land ownership in the form of an inalienable fee simple grant, held by a group having some traditional connection with the land. In addition, there was a regime under which the land owners could regulate activity, particularly mining, on the land. Several states subsequently adopted Land Rights Acts implementing similar models.⁷³

⁶⁸ Aboriginal Lands Trust Act, 1966 (S. Austl.).

⁶⁹ Aboriginal Affairs Planning Authority Act, 1972 (W. Austl.).

⁷⁰ See Maureen Tehan, *Practising Land Rights: The Pitjantjatjara in the Northern Territory, South Australia and Western Australia*, 65 AUSTRALIAN Q. 34 (1994) for a consideration of these administrative arrangements in Western Australia.

⁷¹ *Id.*

⁷² E. WOODWARD, ABORIGINAL LAND RIGHTS COMMISSION: FIRST REPORT (1973); E. WOODWARD ABORIGINAL LAND RIGHTS COMMISSION: SECOND REPORT (1973). Woodward had been senior counsel for the plaintiffs in *Milirrpum* (1971) 17 F.L.R. 141.

⁷³ Other legislation modeled on the Woodward Report included The Pitjantjatjara Land Rights Act, 1981 (S. Austl.) and the Maralinga-Tjarutja Land Rights Act, 1984 (S. Austl.). Other states also passed

The method of recognizing the relationship between Indigenous land interests and the Anglo-Australian system of land tenure was through a statutory definition seeking to adequately describe the key elements of the relationship and identify "owners," those people with some connection to the land, the features of its landscape, and its resources.⁷⁴

This model has been criticized because it has difficulty reflecting a range of disparate Indigenous cultures. Maddock argued,⁷⁵ for example, that the definition of "traditional Aboriginal owner" in section 4 of the Act has had the effect of excluding certain groups of Aboriginal people who might be said to have interests in land. Similarly, "local descent group" has been interpreted in some land claims as individuals who are "totemically connected in the male line to a site on the land being claimed."⁷⁶ In turn, the definition and its interpretation has resulted in groups with connections to the land akin to that of "managers" being excluded from the benefits such as royalty payments under the Act, with these benefits confined to those identified as "owners." Attempts were made to broaden this approach by arguing that descent groups were ambilineal⁷⁷ (being both from the male and female line) and cognatic (including both owners and managers).⁷⁸

Thus, even a statutory scheme that recognizes Indigenous land "ownership" is often incongruous with the traditional laws and customs it seeks to recognize and protect.⁷⁹ A key challenge for the future is the extent to which a legislative definition of "ownership," and its judicial interpretation, will

legislation: Aboriginal Land Rights Act, 1983 (N.S.W.), Aboriginal Land Act, 1991 (Queensl.); and Torres Strait Islander Land Act, 1991 (Queensl.). Under each of these statutes, old reserves were converted into grants of freehold title under the relevant legislation. In both New South Wales and Queensland, grants of land are not confined to traditional association but could be based on residence or historical association.

⁷⁴ Aboriginal Land Rights (Northern Territory) Act, 1976, § 3 (Austl.): "traditional aboriginal owner" means a local descent group of Aboriginals who- (a) have common spiritual affiliations to a site on the land, being affiliations that place the group under primary spiritual responsibility for that site and for the land; and (b) are entitled by Aboriginal tradition to forage as of right over that land. A more general definition of traditional Aboriginal owner can be found in § 4 of the Pitjantjatjara Land Rights Act, 1981 (S. Austl.): "an Aboriginal person who has, in accordance with Aboriginal tradition social, economic and spiritual affiliations with and responsibilities for the lands or any part of them," but this definition has not been the subject of judicial comment or significant anthropological work.

⁷⁵ Maddock, *supra* note 39, at 211.

⁷⁶ *Id.* at 212.

⁷⁷ R. Layton, *Ambilineal Descent and Traditional Pitjantjatjara Rights to Land*, in *ABORIGINES, LAND AND LAND RIGHTS*, *supra* note 39, at 14.

⁷⁸ Maddock, *supra* note 39, at 217. Even in the earlier literature, there was no agreement on the meaning and significance of terms such as "local descent group" and its role in ownership. These matters took on greater significance with the need to provide meaning to such words in a judicial context

⁷⁹ *Id.* at 218.

encompass the laws and customs of the Aboriginal group.⁸⁰ The seeming freeing up of the concept of land ownership under the native title jurisprudence and legislation suggests that a more appropriate method of determining the interconnections between Indigenous land relationships and the dominant legal system might emerge.⁸¹

The statutory schemes include provisions for the regulation of resource development and other uses on granted land. Each establishes a detailed regime for the consideration of applications by developers, allowing for a veto of such proposals by Indigenous landowners, subject only to Commonwealth ministerial override in the case of the Northern Territory legislation and arbitration under the Pitjantjatjara Land Rights Act.⁸² There is no prescription as to the nature of negotiations that might occur or the outcomes of those negotiations, although the practice has been to negotiate agreements that include such matters as access for exploration and development, heritage and environmental protection, employment, education and business opportunities for the Indigenous land owners, as well as payments of compensation for disruption.⁸³

Environmental management has also been a feature of these land regimes. Partly spurred by some international developments⁸⁴ and partly by Indigenous people's aspirations for control and management of their lands, a range of schemes for joint management of conservation areas were developed. The two most well known of these, for Uluru Kata-Tjuta National Park and Kakadu National Park, establish co-management regimes over land granted to Indigenous land owners under the Aboriginal Land Rights (Northern Territory) Act 1976 (Cth.). The major joint management tool in both circumstances is a board of management with a majority of Indigenous land owners. There are similar arrangements in relation to national parks and conservation reserves in other jurisdictions, entered

⁸⁰ G. Neate, *Looking After Country: Legal Recognition of Traditional Rights to and Responsibilities for Land*, 16 U. NEW S. WALES L.J. 161, at 187-195 (1993); see also *R. v. Toohy: Ex parte Meneling Station Pty. Ltd.* (1982) 158 C.L.R. 327 at 357 per Brennan J.

⁸¹ At this stage there is insufficient jurisprudence on the subject to determine the direction of this issue.

⁸² See Tehan, *supra* note 70, for a discussion of the regimes under these two statutory schemes as well as the regime governing resource development in reserves in Western Australia prior to the native title decision and legislation.

⁸³ There are provisions in both Acts for payment of some form of statutory royalties although the detail of agreements is unavailable because of confidentiality provisions.

⁸⁴ For example, the RIO DECLARATION ON ENVIRONMENT AND DEVELOPMENT, AGENDA 21 and THE CONVENTION ON THE CONSERVATION OF BIOLOGICAL DIVERSITY both refer to the role of Indigenous people in land and environmental management. In the Australian context, see B. Richardson et al., *Indigenous Peoples and Environmental Management: A Review of Canadian Regional Agreements and Their Potential Application to Australia—Parts 1 and 2*, 11 ENVIRONMENT AND PLANNING LAW JOURNAL 320 (1994).

into under some form of land rights or environmental legislation.⁸⁵ There are also schemes for participation of Indigenous people in environmental management outside of conservation reserves and formal joint management arrangement through ranger programmes and resource management.⁸⁶ While all these programmes have deficiencies and have yet to come to grips with conflicting knowledge systems and management paradigms,⁸⁷ they provide some models and starting points for renegotiating the relationship between Indigenous people and environmental managers in the dominant settler system.

2. *Heritage Legislation*

Legislative regimes for the protection of land based cultural heritage are of recent origin.⁸⁸ Acts relating to preservation of relics or archaeological finds were passed generally in the 1960s⁸⁹ and early 1970s⁹⁰ and the Aboriginal Heritage Act 1972 (Western Australia) became the first legislation protecting land-based cultural heritage.⁹¹ Twelve years later, the Commonwealth passed its own legislation, the Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Commonwealth).

Early heritage legislation reveals a concern to preserve cultural artifacts as an aspect of Australia's pre-history and as objects suitable for study, rather than as protection of the living and contemporary cultural heritage of Indigenous people. For example, the name of the Victorian legislation, Archaeological and Aboriginal Relics Preservation Act, indicates its focus. The Act provided for protection of relics, defined as "a relic pertaining to the past occupation of the

⁸⁵ For example, arrangements in Witjira National Park under the National Parks and Wildlife Act, 1972 (S. Austl.). There is provision for land grants and joint management under the Aboriginal Land Act, 1991 (Queensl.) and similar legislation in New South Wales.

⁸⁶ These include participation in programmes for protection of heritage sites, training and employment as rangers in reserves or as guides in tourist or cultural activities, restoration and protection of rock art sites, as well as in research programmes. See ABORIGINAL INVOLVEMENT IN PARKS AND PROTECTED AREAS 223, 241, 265, 271, 312, 319 (J. Birckhead et al., eds., 1993).

⁸⁷ L. Strelein, *Indigenous People and Protected Landscapes in Western Australia*, 10 ENVIRONMENTAL AND PLANNING LAW JOURNAL 380 at 382 (1993); Maureen Tehan, *Indigenous Peoples, Access to Land and Negotiated Agreements*, 14 ENVIRONMENTAL AND PLANNING LAW JOURNAL 114, 119-21 (1997).

⁸⁸ In addition to tangible heritage such as burial sites and artifacts, the term "land based cultural heritage" is used in Australia and in this article to describe aspects of Indigenous culture, deriving from traditions, customs, and lore that have physical manifestations in land such as trees, rivers, and rock formations. These physical manifestations have a spiritual place in contemporary Indigenous cultural practices.

⁸⁹ Aboriginal and Historic Relics Preservation Act, 1965 (S. Austl.); The Aboriginal Relics Preservation Act, 1967 (Queensl.).

⁹⁰ Archaeological and Aboriginal Relics Preservation Act, 1972 (Vict.).

⁹¹ Other states and territories passed similar legislation at various stages. See, e.g., Native and Historical Objects and Areas Preservation Ordinance, 1976 (N. Terr.).

Aboriginal people of Victoria and includes any Aboriginal deposit, carving, drawing, skeletal remains⁹² The Act confirmed Crown ownership of relics and delegated to the Director of the State Museum responsibility for protecting relics. The Act established an Archaeological Advisory Committee of ten, of which only one was to be an Indigenous person. This provision was later amended to increase the number of Indigenous members to three.⁹³ While the Act requires strict compliance with its provisions,⁹⁴ its focus is indicative of the general approach to Indigenous heritage since colonization—a preoccupation with heritage as an object of curiosity or study.⁹⁵ This Act remains the current law in Victoria.⁹⁶

Legislation introduced in the 1970s began to recognize land based cultural heritage in addition to cultural objects. The Aboriginal Heritage Act 1972 (W. Austl.) is a useful example. In many respects, it differed little from the Victorian regime in its definitions,⁹⁷ method of protection through declarations and control of objects by the State Museum,⁹⁸ offences for interference,⁹⁹ the role of the Museum,¹⁰⁰ and the absence of an Indigenous voice in heritage protection. However, the Act provided protection for "Aboriginal sites," which were not confined to archaeological sites as in the Victorian Act, but included "any place, including any sacred, ritual or ceremonial site, which is of importance or special significance to persons of Aboriginal descent."¹⁰¹ The Act not only was expressed in the present tense, indicating the contemporary significance of land to Indigenous people, but its language also acknowledged that Indigenous relationships to land could lead to statutory protection of specific sites.¹⁰²

The Act provided protection through declarations¹⁰³ in relation to specific areas with a system of fencing off areas and displaying notices detailing the status

⁹² Archaeological and Aboriginal Relics Preservation Act, 1972, § 2 (Vict.).

⁹³ Archaeological and Aboriginal Relics Preservation (Amendment) Act, 1980. (Vict.).

⁹⁴ *Berg v. Council of the Museum of Victoria and Others* (1984) V.R. 613.

⁹⁵ *Id.*; Mark Harris, *Scientific & Cultural Vandalism*, 21 ALTERNATIVE L. BULL. 28 (1996).

⁹⁶ Attempts to amend the Victorian legislation in 1986 failed to pass through the upper house of Parliament. Consequently, at the request of the Victorian Government, the Commonwealth inserted Part IIA—Victorian Aboriginal Cultural Heritage—into the Aboriginal and Torres Strait Islander Heritage Protection Act, 1984 (Austl.) which established a special regime for heritage protection within Victoria. The Act is being reviewed but is yet to be substantially amended.

⁹⁷ Aboriginal Heritage Act, § 4, 1972 (W. Austl.).

⁹⁸ *Id.* § 40.

⁹⁹ *Id.* §§ 17, 43.

¹⁰⁰ *Id.* §§ 28-39.

¹⁰¹ *Id.* § 5(b).

¹⁰² *Id.* § 4. "Site" is the language of the Act.

¹⁰³ *Id.* § 21.

of the area.¹⁰⁴ The Act provided for the protection of such sites on private land¹⁰⁵ subject to consideration of objections to such declarations¹⁰⁶ and to compensation for compulsory State acquisition of land.¹⁰⁷ Compulsory acquisition occurred by operation of the statute, vesting in the Museum on behalf of the Crown "the exclusive right of occupation and use of . . . every protected area"¹⁰⁸ The Act also provided that the Museum could covenant with people with an interest in land on which a site was located. Such covenants were in favour of the Museum and imposed conditions on the use of the land, and could be either permanent or for a specified time.¹⁰⁹ The covenant could be dealt with in the same manner as other covenants under the Transfer of Land Act 1893 (W. Austl.).¹¹⁰ The provisions providing for compulsory acquisition and dealing in covenants suggest an emergence of the "property" aspects of the regime absent from the legislation protecting objects. However, these "property" provisions did not involve Indigenous people. The Act did not provide for Indigenous involvement in decision-making about whether or not a site was "significant"; such determinations were left to the Trustees of the Museum.¹¹¹

The Act established a process for allowing work to be undertaken that would be deleterious to a site if competing interests were sufficient.¹¹² The decision allowing injury to a site was largely in the hands of the Trustees of the Museum. One of the few amendments to the Act altered this process by significantly increasing the power of the Minister in the decision-making process and by providing for appeal to the Supreme Court by the owner of land on which the work is proposed.¹¹³

¹⁰⁴ *Id.* § 23.

¹⁰⁵ *Id.* § 18.

¹⁰⁶ *Id.* § 18.

¹⁰⁷ *Id.* § 22(2).

¹⁰⁸ *Id.* § 22(1).

¹⁰⁹ *Id.* § 27(1).

¹¹⁰ *Id.* § 27(3).

¹¹¹ *Id.* § 18.

¹¹² *Id.* § 18.

¹¹³ Aboriginal Heritage Act, 1980, § 6 (W. Austl.). The Minister was empowered to direct the Trustees in the exercise of their discretion and to make the final decision in relation to interference with a site. Michael Dillon, *A Terrible Hiding . . . Western Australia's Aboriginal Heritage Policy*, 42 AUSTRALIAN J. OF PUB. ADMIN. 486 (1983); STEVE HAWKE & MICHAEL GALLAGHER, NOONKANBAH 314 (1989) (referring to the events that led to these amendments and their use in the Noonkanbah dispute). The need for further amendments has been acknowledged by successive Western Australian Governments. The most recent review was conducted by Dr. Clive Senior in 1995. Amendments in the Aboriginal Heritage Amendment Act, 1995 (W. Austl.) made only minor amendments to the Act. The fragility of the right granted is evidenced by the Aboriginal Heritage (Marandoo) Act, 1992 under which the Marandoo nickel project was removed from the impact of the provisions of the Aboriginal Heritage Act, 1972.

The South Australian Aboriginal Heritage Act 1988 (S. Austl.) represented a significant change in the approach to protecting heritage. The Act allowed Indigenous people to determine what constitutes heritage¹¹⁴ and to manage and control protection efforts.¹¹⁵ It did not, however, change the ultimate power of the Minister to authorize the damage or destruction of a site.¹¹⁶

The Commonwealth passed the Aboriginal and Torres Strait Islander Heritage Protection Act (Cth.) in 1984.¹¹⁷ The Act did not seek to establish a regime for identifying and protecting sites, but only to prevent damage to sites when State legislation was ineffective in providing protection. The Act was intended to operate concurrently with State legislation and to be used as a last resort.¹¹⁸ To invoke the Act, a site was required to be in "serious and immediate threat of injury or desecration"¹¹⁹ The Act included reference to land and land relationships in the range of things it aims to protect. A declaration, either emergency or otherwise, may be made when a "significant Aboriginal area" is threatened.¹²⁰ A "significant Aboriginal area" is, among other things, defined as "an area of land in Australia . . . of particular significance to Aboriginals in accordance with Aboriginal tradition."¹²¹ "Aboriginal tradition" is further defined as "a body of traditions, observances, customs and beliefs of Aboriginals generally or of a particular community or group of Aboriginals, and includes any

¹¹⁴ Aboriginal Heritage Act, 1988, § 3 (S. Austl.) defines Aboriginal tradition as "traditions, observances, customs or beliefs of the people who inhabited Australia before European colonization and includes traditions, observances, customs and beliefs that have evolved or developed from that tradition since European colonization."

¹¹⁵ *Id.* §§ 7, 8, established an Aboriginal Heritage Committee consisting of Aboriginal people. The Committee has power to identify and protect heritage in accordance with the Act.

¹¹⁶ It was this power that became the subject of scrutiny in the *Kumarangk* (or *Hindmarsh Island Bridge*) case. This case has dominated debate about Aboriginal heritage legislation during the past four years. It arose from a proposal to build a bridge between an island and mainland Australia as part of a tourist development. A group of local Indigenous people, the *Narrindjeri*, objected on the basis that the bridge interfered with or destroyed an element of heritage based upon cosmological beliefs of *Narrindjeri* women. The Commonwealth Minister exercised his powers under the Aboriginal and Torres Strait Islander Heritage Protection Act, 1984 (Austl.) to prevent the bridge from being built. The controversy led to the establishment of an Inquiry into the operation of the Act. A parliamentary committee is now holding hearings on the report of the Inquiry. There have been two inquiries under the Act, a Royal Commission into the beliefs upon which the area was claimed to be heritage, two Supreme Court of South Australia actions, two Federal Court, one High Court case, and a special Act of Parliament passed. Leave was granted on September 2, 1997 to challenge the validity of the legislation before the full bench of the High Court. The Court upheld the validity of the legislation in *Kartinyeri v. The Commonwealth* (1998) 152 A.L.R. 540.

¹¹⁷ The history and operation of this and other Commonwealth legislation directed at protecting a range of Indigenous cultural heritage is discussed in Graeme Neate, *Power, Policy, Politics and Persuasion—Protecting Aboriginal Heritage Under Federal Laws*, 6 ENVIRONMENTAL & PLANNING LAW JOURNAL 214 (1989).

¹¹⁸ Aboriginal and Torres Strait Islander Heritage Protection Act, 1984, § 7 (Austl.).

¹¹⁹ *Id.* § 9(1)(b)(ii).

¹²⁰ *Id.* §§ 9, 10.

¹²¹ *Id.* § 3.

such traditions, observances, customs or beliefs relating to particular persons, areas, objects or relationships."¹²²

Together these definitions establish a link between land and Indigenous traditions. The nature of the interest protected is not just based on historical or archaeological significance, but on tangible and intangible Indigenous relationships with particular land. The form of those relationships is limited to their Indigenous source and the requirement that they be of "particular significance." Otherwise, there is a degree of freedom in how the relationships might be characterized and explained.

Whether protection should be accorded a site under the Act is a matter of Ministerial discretion. Some requirements and obligations are imposed on the Minister in the exercise of discretion, including consideration of a report by a person appointed by the Minister.¹²³ The Act only creates a right to apply to the Minister for an emergency¹²⁴ or other declarations,¹²⁵ and to have the application dealt with in accordance with the Act. The existence of a relationship to land of the sort set out in the Act is in the nature of a threshold test, providing the Minister with guidance in the exercise of her or his discretion.¹²⁶ The right created under the Act is not a property right, nor does it create any property rights either at common law or arising from the statute. The extent of the right created is to have an application dealt with according to the rules of natural justice. The existence of the relationship does not guarantee that Indigenous interests in the land will be protected. Cultural heritage legislation has tended to provide little protection. It is subject to Ministerial discretion, and therefore political decision making has taken a narrow view of what might be considered heritage and how it might best be protected.

These statutory schemes recognize the importance of Indigenous heritage as part of living contemporary cultures. Experience with the statutes reveals an ambivalence about what is to be protected, why it is worthy of such protection, and what interests will be dominant in Ministerial decision-making. The disregard of property rights in the disposition of land interests is a major problem

¹²² *Id.*

¹²³ *Id.* § 10. The Minister must consider the report which must deal with certain matters set out in section 10(4) of the Act. These include "the significance of the area to Aboriginal people . . . , the nature and extent of the threat of the injury . . . ," and "the effects the making of the declaration may have on the proprietary or pecuniary interests of persons other than the Aboriginals" These are in the nature of procedural requirements which go to the issue of *how* the decision is made under the Act and the proprietary interests of others, rather than the substance of the interest protected by the decision. These require compliance and any decisions may be reviewed under the Administrative Decisions (Judicial Decisions) Act, 1977 (Austl.).

¹²⁴ Aboriginal and Torres Strait Islanders Heritage Protection Act, 1984, § 9 (Austl.).

¹²⁵ *Id.* § 10.

¹²⁶ *Tickner v. Bropho* (1993) 114 A.L.R. 409, at 419 per Black J.

with the heritage protection schemes because of the limited enforceable rights that accrue to Indigenous people under the scheme.

The *Kumarangk* case is an example of the difficulties experienced in actually establishing the significance of a particular area according to Indigenous laws and customs and having that area protected.¹²⁷

The Evatt Inquiry was established in response to the difficulties experienced in the *Kumarangk* case. The Inquiry's Report recommended that the procedure for determining heritage significance be a matter for Indigenous people,¹²⁸ and the procedures for its protection be improved through more transparent and accessible decision-making,¹²⁹ better coordination of the State and Commonwealth systems and agencies,¹³⁰ with an emphasis on mediation and agreements.¹³¹ However, the Inquiry also recommended that decision-making remain in the political domain and that the status of heritage remain unchanged.¹³² The extent to which any or all of these recommendations will be implemented awaits the outcome of a Parliamentary Committee Inquiry into both the current Commonwealth legislation and the Report. However, the passage of special legislation, requiring the suspension of the operation of the Racial Discrimination Act 1975 (Cth.) in order to allow the Hindmarsh Island Bridge to be built,¹³³ suggests a view that will reinforce the diminishing significance of heritage.

Nonetheless, the legislation provides protection of heritage for many Indigenous people without access to statutory land rights regimes and has been the basis for entering into agreements with resource explorers and developers for the protection of heritage.¹³⁴ The changing legal landscape that has given rise to the recognition of native title has provided the promise of a property based system of protection for Indigenous land interests absent from heritage schemes. Heritage protection schemes remain in place and continue to operate in conjunction with native title and more importantly, remain the only tool for legal protection of heritage on land where no native title exists.

¹²⁷ *Supra* note 116.

¹²⁸ E. EVATT, REVIEW OF THE ABORIGINAL AND TORRES STRAIT ISLANDER HERITAGE PROTECTION ACT 1998, ch. 8 (1996).

¹²⁹ *Id.* ch. 10.

¹³⁰ *Id.* ch. 5.

¹³¹ *Id.* ch. 9.

¹³² *Id.* ch. 10.

¹³³ The constitutional validity of the legislation was challenged but upheld. *Katinyeri v. The Commonwealth* (1998) 152 A.L.R. 540.

¹³⁴ Tehan, *supra* note 70.

V. NATIVE TITLE JURISPRUDENCE AND POST-*MABO* LEGISLATION

A. *Mabo v. Queensland: Judicial Recognition of Native Title*

In *Mabo II*, the High Court found that some Indigenous rights over land survived after Britain acquired sovereignty over Australia in 1788.¹³⁵ The term “native title” was used by the Court to describe those rights and interests which derive from the traditions, laws, and customs of Indigenous people. The traditions, laws, and customs must have been practiced prior to sovereignty, must continue today, and must not have been extinguished by the Crown. The interest is not a common law tenure, but is a sui generis interest recognized by the common law. Although the Court found that native title existed, many of the details of the form and impact of the interest were not decided by the Court.

The decision signaled a new era in the relationship between Indigenous people and the settler legal system. It acknowledged inherent, surviving Indigenous property rights, based upon traditional and continuing connections with land. The recognition of Indigenous property interests has challenged the dominant property paradigm under which no Indigenous interests were recognized and any interests claimed were always subjugated to the dominant settler interests. Recognition of native title has produced a new set of conflicting land uses and interests in public and in limited circumstances, private land. Although Indigenous land interests existed in some form under statutory Indigenous land rights schemes, they were given new impetus with the extension of native title to large areas of the Australian land mass. Here was a new interest arising out of Indigenous people’s relationship to land previously unknown to the common law.

The *Mabo II* decision had two major elements: recognition of native title and development of the detail of its form and content. It overturned the notion that the Australian continent was *terra nullius*. While the Court acknowledged that it might be overturning significant law on this issue,¹³⁶ it nevertheless considered that “whatever the justification advanced in earlier days for refusing to recognize the rights and interests in land of the Indigenous inhabitants of settled colonies, an unjust and discriminatory doctrine of that kind can no longer be accepted.”¹³⁷ Rejection of *terra*

¹³⁵ *Mabo II* (1992) 175 C.L.R. 1.

¹³⁶ *Mabo II* at 20 per Brennan J.

¹³⁷ *Mabo II* at 31.

nullius was considered necessary for the court to allow the survival of Indigenous rights and interests which existed at the time sovereignty was acquired.¹³⁸

The Court reassessed the significance of the acquisition of sovereignty to the Crown's power to make grants of land. It made a distinction between the Crown's radical title incorporating this power and the notion of the Crown as the holder of absolute beneficial title to all the land. In this way, it became doctrinally possible for pre-existing land interests to be said to have survived the acquisition of sovereignty and to overcome the earlier cases.¹³⁹ Unraveling the meaning and import of this distinction for the land management and property law system then became the project for subsequent decisions.¹⁴⁰

The Court considered the form of native title and how it could affect current land uses and management laws and practices. The detail of this recognition of rights, including the form and effect of the interest, that is native title¹⁴¹ directly impacts shared land use and management law and practice.¹⁴²

The Court said that native title derives from the traditional laws and customs of an identifiable group which establish a connection between that group and specific land. The connection with the land must have existed prior to the acquisition of sovereignty and have been maintained until the present. The connection may relate to economic, cultural, or religious or spiritual life on the land, and must be more than random or coincidental. The group must continue to acknowledge laws, practice customs, and identify as a community.¹⁴³ The nature or incidents of native title and the way in which the

¹³⁸ The extent to which such an overturning of previous authority was necessary and the doctrinal basis of the Court's recharacterisation of Australia's colonization have both been questioned. See Nettheim, *supra* note 52; Gerry Simpson, *Mabo, International Law, Terra Nullius and the Stories of Settlement: An Unresolved Jurisprudence*, 19 MELBOURNE U. L. REV. 195 (1993); David Ritter, *The "Rejection Of Terra Nullius" in Mabo*, 18 SYDNEY L. REV. 5 (1996).

¹³⁹ This view is also at the heart of *Wik*. Gummow J refers to this as the constitutional basis of the *Mabo* decision. *Wik* (1996) 141 A.L.R. 129 at 227-30.

¹⁴⁰ Reviewing the meaning of land tenures under the settler legal system in light of this view was central to the decisions of the majority in *Wik* and the reconfiguration of the relationship with those surviving rights and the settler system particularly on the issue of extinguishment and coexistence.

¹⁴¹ *Mabo II* (1992) 175 C.L.R. 1.

¹⁴² Although the Court did not explore this issue further in its judgment Edgeworth has suggested that such a narrow view of the common law property system was always inappropriate in the Australian context and in fact, this view was largely confirmed by the High Court in *Wik*. See Brendan Edgeworth, *Tenure, Allodialism and Indigenous Rights at Common Law: English, United States and Australian Land Law Compared after Mabo v. Queensland*, 23 ANGLO-AM. L. J. 397 (1994).

¹⁴³ *Mabo II* at 50-51.

land is used and occupied will vary from group to group and will depend upon the laws and customs of that group. The complexity of the interest, so characterized, is readily apparent, and carries with it substantial requirements in adequately defining the laws, customs, and group, as well as the continuing nature of those laws and customs. The absence of a substantial body of law that refines and provides guidance on each of these points, as well as the unique nature of each group's laws, customs and contact history, readily suggests both the complexity and time required for the conduct of native title litigation.¹⁴⁴

Deciphering the relationship between native title and the range of common law or statutory interests in land created or granted since the acquisition of sovereignty was a significant part of the Court's excursion into native title. The central element in this relationship was whether or not the granting of common law and statutory interests had the effect of extinguishing native title. This issue has come to dominate both the political and judicial landscape.¹⁴⁵

In *Mabo II*, the Court held that even if native title survived the acquisition of sovereignty by the Crown, it could be extinguished by the lawful operation of the municipal laws of the state, provided the intent to extinguish title was clear.¹⁴⁶ Once extinguished, whether by legislation, executive order, surrender, abandonment, or death, at least one judge held that the title could not be revived.¹⁴⁷ Native title is extinguished only to the extent legislation or land grants pursuant to legislation are inconsistent with Indigenous interests. Grants in fee, for example, extinguish native title; limits on activities on nature conservation reserves, however, do not. Native title is preserved whenever Indigenous rights can co-exist with other land rights. The *Mabo II* decision alluded to the difficulty in determining the relationship

¹⁴⁴ There have only been three determinations of native title to date. Two were by consent. Only one final and contested determination has yet been made although there are now a number of cases proceeding. See *Mary Yarmirr v. Northern Territory* (Fed. Ct. of Aust., Olney, July 6, 1998, unreported).

¹⁴⁵ See, e.g., *Wik* (1996) 141 A.L.R. 129; *Mason v. Tritton* (1994) 34 N.S.W.L.R. 572; see also: Lenore Taylor & Paul Syvret, *Industry Dismayed by Wik Ruling*, THE AUSTRALIAN FIN. REV., Dec. 24, 1996, at 1; Alan Moran, *Wik Decision Settles Nothing for Miners*, THE AUSTRALIAN, Dec. 24, 1996, at 13; Denis Burke, *Judgment Adds to Delay and Expense*, THE AUSTRALIAN, Jan. 7, 1997, at 11; Lenore Taylor *It's true—a Wik is a Long Time in Politics*, THE AUSTRALIAN FIN. REV., Jan. 24, 1997, at 33.

¹⁴⁶ In order to extinguish "the exercise of a power to extinguish native title must reveal a clear and plain intention to do so, whether the action be taken by the Legislature or by the Executive." *Mabo II* (1992) 175 C.L.R. 1, at 64 per Brennan J.

Three other majority judges agreed that native title could be extinguished by the lawful exercise of sovereign power under the constitution and laws of the State provided that the language extinguishing title was clear and plain. *Id.* at 110 per Deane and Gaudron JJ; and at 196 per Toohey J.

¹⁴⁷ *Id.* at 60 per Brennan J. Note that this proposition was challenged in *Wik*.

between potentially inconsistent acts and extinguishment. The precise parameters of these propositions remained unclear in the decision. *Wik* in particular has refined and added meaning to some elements of the doctrine and further blurred others.¹⁴⁸

The *Mabo II* decision acknowledged that the Racial Discrimination Act 1975 (Cth.) limits the sovereign power to extinguish native title.¹⁴⁹ Under the Act, the Crown in right of the States can not purport to extinguish native title in a manner that treats a native title holder less favourably than the holder of another property interest. Both the *Mabo I* decision and a subsequent High Court decision on the validity of the Native Title Act 1993 (Cth.) confirm that the interest is akin to a property interest, at least for the purposes of the Racial Discrimination Act.¹⁵⁰ This characterization of the native title interest, or at least its protection from extinguishment by racially discriminatory acts, has been a crucial factor in determining the power of the various interests in negotiating native title issues.

In understanding the impact of *Mabo II*, it is essential to understand that, though the Court confirmed that native title survived colonization, the details of the form, substance, and significance of native title were not necessary to the Court's holding. Its comments upon these aspects, however, were seen as significant in providing guidance about the impact of its primary decision. As a result of *Mabo II*, there was uncertainty about the validity and effect of prior Crown grants of interests in land that may have been subject to native title at the time the grant was made and the breadth and content of native title itself. This uncertainty was addressed in the Native Title Act and in subsequent cases.¹⁵¹

B. *The Native Title Act*

In response to the uncertainty created by *Mabo II*, the Australian legislature passed the Native Title Act. The Act confirms the existence of native title as part of the law of Australia and defines the nature of native title that draws largely upon the general statements in *Mabo II*.¹⁵² It confirms that

¹⁴⁸ *Wik* (1996) 141 A.L.R. 129.

¹⁴⁹ *Mabo II* at 67 per Brennan J, 119 per Deane and Gaudron JJ, 214-216 per Toohy J. The Racial Discrimination Act, 1975 (Austl.) represented the domestic implementation of the International Convention on the Elimination of All Forms of Racial Discrimination. The Act had previously been upheld as a valid exercise of Commonwealth power and one which bound the States. *Koowarta v. Bjelke-Petersen* (1982) 153 C.L.R. 168.

¹⁵⁰ *Mabo I* (1988) 166 C.L.R. 186; *Western Australia v. Commonwealth* (1995) 183 C.L.R. 373.

¹⁵¹ *Wik* (1996) 141 A.L.R. 129.

¹⁵² *Mabo II* (1992) 175 C.L.R. 1; Native Title Act, 1993, § 223 (Austl.).

native title is a compensable property interest¹⁵³ and describes how native title claims can be established.¹⁵⁴ The Act also confirmed the validity of all titles and interests granted prior to the Act's 1 January 1994 effective date. It prescribed the effect of the validation of those grants on native title and provided a system which detailed a code for future dealing with native title land by governments and industry. It detailed a compensation regime for native title that had been extinguished by prior land grants or that might be extinguished in the future. The National Native Title Tribunal was established to process and mediate native title claims and to process and mediate applications and objections to future acts on native title land. The legislation passed after months of tortuous negotiation between the key stake holders, including State governments, resource development and farming industry groups, non-government environmental organizations, and Indigenous people. While no group was completely satisfied with the outcome and many groups, including the Indigenous groups, were not in complete agreement among themselves, the outcome represented a compromise with which most groups appeared satisfied.¹⁵⁵

The Act seeks to legislatively implement the effect of the *Mabo II* decision, but in some circumstances, it goes beyond the case itself.¹⁵⁶ However, it provides no guidance or clarity on the matters that the Court left unanswered and that now require clarification by the Courts in subsequent cases, such as the nature or extent of "connection" and "continuity."

1. Past Land Grants

The Native Title Act validated prior land grants that were invalid because of the existence of native title, probably because of a breach of the Racial Discrimination Act.¹⁵⁷ The effect of that validation depended upon the nature of the grant. The validation of a fee simple grant, and certain other grants, had the effect of extinguishing native title and compensation could be claimed.¹⁵⁸ The validation of grants of mining interests did not have the effect of extinguishing native title. Rather, native title was subject to the

¹⁵³ For example in relation to compulsory acquisitions of native title. Native Title Act, 1993, §§ 23(3), 253 (Austl.).

¹⁵⁴ *Western Australia v. The Commonwealth* (1995) 183 C.L.R. 373 at 453.

¹⁵⁵ Rowse, *supra* note 8.

¹⁵⁶ For example, the Act specifically provides in § 223(1)(b) that native title includes water claims. Native Title Act, 1993, § 223(1)(b) (Austl.).

¹⁵⁷ Validly granted interests were unaffected by the Act.

¹⁵⁸ Native Title Act, 1993, §§ 15(1), 229 (Austl.).

exercise of any rights granted under the mining tenement and in effect was "suspended" until termination of the mining tenement. Upon termination of the mining interest, all native title interests in the land may be resumed.¹⁵⁹ The validation of other acts, such as Crown reservations for environmental and conservation purposes, did not extinguish native title, but allowed concurrent enjoyment to the extent possible.¹⁶⁰

2. *Future Grants*

Where native title exists or may exist, a State must comply with the procedures in the Act whenever it grants land interests to third parties. Failure to comply will render the grant invalid.¹⁶¹ The procedure requires that notice be given to a native title party, that is, a person who may have native title or who has claimed native title. If the native title party objects to the proposed grant, negotiation between the native title party, government, and third party ensues.¹⁶² If negotiation is unsuccessful, arbitration ensues.¹⁶³ The Minister may override the decision of the arbitrator in the interest of the State or Commonwealth.¹⁶⁴ This process must be completed within sixteen months of notice being given in the case of a proposed grant of a mining tenement for production, or within fourteen months of the notice being given in the case of an exploration tenement.¹⁶⁵ The purpose of the process is to determine whether the proposed grant should be made and if so, on what conditions.¹⁶⁶

The procedure for land grants operates concurrently with the process for determining whether native title exists in land. Many claims for native title are in fact lodged (as they are required to be)¹⁶⁷ in response to the notification of a proposed grant of an interest on native title land and in order to preserve native title rights. Parties can mediate the issue of whether native title exists, but such a procedure is rare.¹⁶⁸ Typically, claims are referred to

¹⁵⁹ *Id.* §. 15(1)(d). See also §§ 17, 238 (discussing the non-extinguishment principle).

¹⁶⁰ *Id.*

¹⁶¹ *Id.* §. 22. The effect of this provision was confirmed in *Western Australia v. Commonwealth* (1995) 183 C.L.R. 373.

¹⁶² Native Title Act, 1993, §§ 26-31 (Austl.).

¹⁶³ *Id.* §§ 35-39.

¹⁶⁴ *Id.* § 42.

¹⁶⁵ These figures are a combination of all the time limits at each stage of the process.

¹⁶⁶ Native Title Act, 1993, §§ 38, 39 (Austl.).

¹⁶⁷ *Id.* § 30.

¹⁶⁸ Only two mediated determinations of native title have occurred. One mediated determination was a consent determination between native title holders and the New South Wales government in

the Federal Court for determination.¹⁶⁹ The first of these referred cases is only now being heard.¹⁷⁰ Although the two processes operate concurrently, it is not necessary to determine whether native title exists prior to the procedure.

C. *The Impact of Wik*

Access to the processes and remedies of the Native Title Act is dependent upon claiming or establishing native title. Determining whether native title has been extinguished is the crucial factor in determining the rights, interests, and obligations of the various parties under the Act. It is for this reason that *Wik*¹⁷¹ was so crucial. *Wik* took up and began to explore some of the doctrinal bases of the judgments in *Mabo II*,¹⁷² as well as some of the Court's general comments in relation to extinguishment. In arriving at its decision, the Court addressed a number of issues that are central to the property law regime in Australia. These included the nature of the Crown's power to grant land, as well as the relationship between English common law property principles and the specific regimes for granting interests in land, first within the Australian colonies and subsequently the States and the Commonwealth.

Wik involved the grant of a number of pastoral leases in far north Queensland between 1910 and 1974. The central issue was whether these grants extinguished native title. There were four separate majority opinions delivered, and one minority opinion which had the support of three judges. While the opinions are complex, the issue basically revolved around the characterization of the interest granted—was it a common law lease granting exclusive possession or was it some form of statutory grant?

The four judges in the majority found that the grant of pastoral leases was authorized by statute. The effect of the statute and the instrument granting the interest, according to the court's interpretation, was a specific

relation to an exchange of land for native title to a national park. For details of the agreement see *The Crescent Head Agreement*, 2 AUSTRALIAN INDIGENOUS L. REP. 100 (1997).

¹⁶⁹ Native Title Act, 1993, § 81 (Austl.).

¹⁷⁰ The pre-trial procedures can occupy more than a year and it is not uncommon that interlocutory matters or substantive questions of law are referred for determination by Appeal Courts. Hearings can last for many months. Seventeen cases had been referred to the Federal Court by August 1997.

The Yorta Yorta claim began in 1994. The Federal Court hearing began in October 1996 and the taking of evidence is not expected to be completed before October 1997.

¹⁷¹ *Wik* (1996) 141 A.L.R. 129.

¹⁷² *Mabo II* (1992) 175 C.L.R. 1.

statutory interest and the interpretation of the statute indicated that it was not a grant of exclusive possession to the lease holder.¹⁷³ A crucial aspect of the majority's view was that the Crown held only radical title to the land rather than the full beneficial title. As a result, as not full beneficial title existed, it was possible for native title to co-exist with this statutory interest. In the postscript to the judgment of Toohey J, all the judges constituting the majority agreed that if there was a conflict, the native title holders must yield to the rights of the leaseholder. However, the majority did not say what the effect of such inconsistency was, or that the native title rights in this instance were extinguished. Accordingly, the precise legal effect of this conflict on the extinguishment of native title is unclear.¹⁷⁴

One major effect of the decision has been to require a re-examination of the applicability of English common law principles in the Australian property law regime.¹⁷⁵ The second major impact has been the illustration of the difficulty in attributing meaning to the general comments of the Court in *Mabo II*.¹⁷⁶ Both the majority and the minority took up aspects of the reasoning, but applied them to the case in different ways, producing very different outcomes. Indeed, Toohey J was very clear about the limits of *Mabo II*. Discussing the comments of Brennan J on extinguishment by leasehold, his Honour said "At their highest, the references are obiter."¹⁷⁷ The difficulty in predicting outcomes of future cases is well exemplified.

As a result of *Wik*, native title persisted on pastoral lease land and any actions taken on pastoral lease land since the Native Title Act came into effect must have been done in accordance with that legislation, otherwise, they would be invalid. This raised questions about the validity of resource tenements and government reservations of land made on any pastoral lease land since the Act came into effect. In addition, questions arose about the boundaries of rights, duties, and obligations of pastoralists under their grants

¹⁷³ *Wik* (1996) 141 A.L.R. 129, at 181 per Toohey J.

¹⁷⁴ The factual issues about the precise detail of the laws and customs of the group claiming native title and the extent of the rights of each party was referred back to the Federal Court for determination. The lack of clarity raises the possibility that native title is "suspended" in this instance. Such a view may not be consistent with that expressed in *Mabo II* that once extinguished native title could not be revived.

The minority took the view that the rights granted under statute amounted to common law lease rights. An integral aspect of the exercise of the Crown's power was the doctrine of *plenum dominium*, that is, upon the exercise of its powers to grant a lease, a reversion in the Crown came into effect. At this point, the Crown acquired absolute beneficial title and therefore it was not possible for native title to persist. *Wik* at 156 per Brennan J.

¹⁷⁵ *Id.* at 226 per Gummow J.

¹⁷⁶ *Mabo II* (1992) 175 C.L.R. 1.

¹⁷⁷ *Wik* at 183.

of pastoral leases. Furious public debate¹⁷⁸ on these issues led to the introduction of amendments to the Native Title Act to “clarify” aspects of its operation in relation to shared uses.

D. *Native Title Act Amendments*

A number of amendments to the Native Title Act were proposed in 1995 and further amendments were proposed when a new federal government was elected in 1996. The former involved mainly procedural matters while the latter included a complex test for access to the right to negotiate procedures, as well as a bundle of amendments recognizing and allowing for the enforcement of a range of negotiated agreements.¹⁷⁹ The proposed amendments in reaction to *Wik* include provisions removing the right to negotiate from pastoral lease land, requiring a specific and contemporary physical presence on pastoral lease land in order to permit “traditional” use of the land, increasing the rights of grantees under pastoral leases to engage in a range of activities that are not currently permitted by their leases, and allowing States to extinguish native title all together provided that they pay compensation.

The effect of these proposals are far reaching. First, they remove the impetus for negotiation with native title holders and thus significantly diminish the “value” of native title and the possibilities for joint use and management. Second, by requiring a specific physical connection with land, the legislation is both prescribing and limiting elements of traditional laws and customs that are at the heart of native title. The imposition of this limiting element suggests a return to dominance of the settler legal system at the expense of Indigenous land relationships. Third, the unilateral increase in the rights of pastoral lessees will have a significant uncontrolled and negative impact on environmental management of sensitive arid and semi-arid environments. It also diminishes the extent to which native title might be concurrently enjoyed with pastoral activities by valuing the settler land use and interests above those of native title holders. Finally, allowing extinguishment significantly reasserts the dominance of the settler system at a time when the balance had been shifted, representing a reversion to pre-*Mabo II* practices.¹⁸⁰

¹⁷⁸ *Supra* note 145.

¹⁷⁹ This was designed to overcome any problems associated with the lack of such provisions that meant that parties must currently rely on contract to enforce their agreements.

¹⁸⁰ The Native Title Amendment Act 1998 (Austl.) was passed in July and became law on September 30, 1998. The broad outline of the Amendments do not vary substantially from the matters referred to here.

VI. RECONCILING ENVIRONMENTAL AND RESOURCE MANAGEMENT AND NATIVE TITLE

The notion of coexistent rights and concurrent enjoyment of land by native title holders and other users, while not new to the common law,¹⁸¹ has created a new and challenging dimension to land management in most areas in Australia. Two major and identifiable responses to this challenge can be discerned in the post-*Mabo II* era. The first has been litigation and reliance on the strict legal entitlements established within the Native Title Act; the second has been innovative agreements, not strictly relying upon the Native Title Act although significantly underpinned by its existence.

A. *The Litigation Approach*

The litigation approach is characterized by a strict reliance upon rights set out in the Native Title Act or at common law and a willingness to enforce those rights in the courts. The clearest illustration of this approach involved an application by Century Zinc Ltd. for required mining licenses and leases from the Queensland government to establish a mine to recover a proven and substantial zinc deposit in the Gulf country of northern Australia.

In 1994, prior to the tenements being granted, a native title claim was lodged on behalf of the Waanyi people to the land covered by the proposed mine. The land had been the subject of a grant of a pastoral lease in 1883, but the lease had never been taken up by the lessor and was ultimately forfeited. The Waanyi had occupied the land before and since that time in accordance with their tradition. The President of the National Native Title Tribunal determined that native title had been extinguished by the grant of the pastoral lease and refused to accept the application. The Waanyi appealed the decision to the Federal Court¹⁸² and then to the High Court.¹⁸³ The High Court limited its ruling to procedural issues, dealing with the powers of the President of the National Native Title Tribunal under the relevant provisions of the Native Title Act. The effect of the decision was that the Tribunal was required to accept the application and the various time limits in the Native Title Act (a maximum of sixteen months in this case) began to run.¹⁸⁴

¹⁸¹ MAUREEN TEHAN, COEXISTENCE OF INTERESTS IN LAND: A DOMINANT FEATURE OF THE COMMON LAW (1997).

¹⁸² *North Ganalanja Aboriginal Corporation v. Queensland* (1995) 132 A.L.R. 565.

¹⁸³ *North Ganalanja Aboriginal Corporation v. Queensland* (1996) 135 A.L.R. 225.

¹⁸⁴ *North Ganalanja Aboriginal Corporation v. Queensland* (1996) 135 A.L.R. 225.

The parties were in precisely the same position they would have been if the application had been accepted and processed in June 1994, though they were now required to negotiate with each other in the context of three years of animosity and argument. The case was complex as the project involved both the mine area and areas of land for pipelines covering hundreds of kilometres. There were fourteen Indigenous groups involved in the process. Ultimately, the process ran its course, proceeding to arbitration, although a final agreement was reached prior to the arbitrator making a finding. This approach effectively delayed the process for two and half years. The impact of the approach on the on-going relationship between the parties will only emerge over time.

While *Century Zinc* is an extreme case, it is illustrative of the problems associated with formal legal processes. In contrast, the agreements approach suggests both quicker and mutually beneficial outcomes for all parties.

B. *The Agreements Approach*

Both the range of issues covered by agreements and the circumstances in which they have been negotiated vary enormously. However, it is the existence or possible existence of native title and the rights and interests that might involve that has underpinned all of the agreements. While some agreements have emerged directly from the processes of the Native Title Act, others have been negotiated outside the Act. Concurrent with the development of negotiated agreements has been the changing corporate cultures of resource developers¹⁸⁵ and a concomitant change in the approach of at least some Indigenous groups to development.¹⁸⁶

Native title claims are the impetus for negotiation of agreements. The Native Title Act facilitates the negotiation of agreements, either because they can be entered into under § 21(4) or might emerge as a result of mediation under §§ 31 or 72 of the Act. Claims do not necessarily lead to an agreement or

¹⁸⁵ RICHIE HOWITT, *THE OTHER SIDE OF THE TABLE: CORPORATE CULTURE AND NEGOTIATING WITH RESOURCE COMPANIES* (1997).

¹⁸⁶ Each agreement is different in significant ways but each represents possibilities for the resolution of competing land uses and interests. For example, the Jawoyn recently launched a comprehensive mining policy which sets out the group's approach to exploration and mining as well as details of prospective land available for exploration signaling an active approach to resource development on their land: Maria Ceresa, *Jawoyn Launch First Tribal Mining Policy*, THE AUSTRALIAN ONLINE: DAILY NEWS, Sept. 25, 1997.

even to negotiation.¹⁸⁷ The Act does not prescribe negotiation nor does it include any enforcement provisions for such agreements.¹⁸⁸

Many agreements have been achieved to date. Six of those, which revolve around competing uses of, or access to, resources, will be examined.¹⁸⁹ The six fall into two identifiable categories. The first is framework agreements that provide a decision making process to resolve disputes concerning land use planning and accommodation of different land uses and interests. The second category is project or site specific agreements that detail how land is actually to be used, the ways in which native title land interests will be protected, and the benefits to flow to the native title holders.

The earliest agreement was the Cape York heads of agreement, while others include the Rubibi Working Group's interim agreement in relation to town planning in Broome, the Mount Todd Agreement, the Anaconda Agreement, the Pilbara agreement and the Gawler-Craton agreement.¹⁹⁰

The first agreement was negotiated between Cape York Land Council, the Cattlemen's Union, and Conservation groups in the region and provides a framework for future resource decision making. As part of the agreement Indigenous groups agreed to exercise their rights in a manner that did "not interfere with the rights of pastoralists" and the pastoralists agreed to "continuing rights of access for traditional owners to pastoral properties for traditional purposes."¹⁹¹ The agreement also dealt with regimes for identifying areas of high conservation values and World Heritage listing of Cape York.¹⁹² The agreement does not involve either an acknowledgment that native title exists or a surrender of native title interests. The agreement was reached outside of any formal native title negotiation and without the

¹⁸⁷ The Western Australian government has been found not to have negotiated in good faith in relation to future act proceedings under § 31(1)(b) of the Native Title Act, 1993 (Austl.). See *Walley v. Western Australia* (1996) 137 A.L.R. 561.

¹⁸⁸ Native Title Amendment Bill, 1997, §§ 24BA-24EC.

¹⁸⁹ For example, the Mount Todd agreement between the Jawoyn Association, the Northern Territory Government and Zapopan NL in relation to a mining project; the Broome Tropical Aquaculture Park Management Agreement between the Western Australian Minister for Fisheries and the Rubibi Aboriginal Land, Heritage and Development Company Pty. Ltd. in relation to an aquaculture area near Broome; the Anaconda agreement between Anaconda Nickel and the Waljen in relation to the development of a nickel project in the goldfields region of Western Australia; the Hopevale agreement between a number of Indigenous groups in the Hopevale area setting out the basis upon which they will jointly advance their native title interests.

¹⁹⁰ The detail of these agreements are generally subject to confidentiality clauses. The information included here is all available publicly.

¹⁹¹ 1 INDIGENOUS L. REP. 446, at 447 (1996).

¹⁹² *Id.* at 447-48.

involvement of the Native Title Tribunal.¹⁹³ The central feature of the agreement was the creation of a framework for the resolution of disputes. To date, the Queensland government has not indicated any willingness to endorse and become a party to the agreement and the Commonwealth government has indicated it may withdraw its support, thus creating doubt about the long term effectiveness of the agreement.

The Broome agreement involves an acknowledgment that Indigenous people have an interest in land use and management which might be achieved by ensuring Indigenous participation in planning and that Indigenous interests are a legitimate part of the planning process. The agreement includes the possibility of joint management of resources particularly in relation to coastal management.¹⁹⁴ Neither the recognition, nor the surrender of native title, was part of the agreement. The native title claim is proceeding. The agreement was reached as part of the mediation process of the native title claim and the Native Title Tribunal was involved in the mediation,¹⁹⁵ although its involvement has been criticized¹⁹⁶ as "a process which is highly culturally intimidating, where there is considerable duress to participate, in which the parties meet unequally, and in which those inequities can be institutionalized by the process."¹⁹⁷ This form of agreement has considerable potential for the resolution of urban planning disputes as it enables a wide range of interests to be incorporated into the decision-making process. Rather than recognizing Indigenous interests as marginal or separate, there is an acknowledgment of the relevance and even centrality of those interests to any shared land use regime.

The Mount Todd agreement was reached prior to passage of the Native Title Act, but after the *Mabo II* decision. Under the agreement between the Jawoyn Association, the Northern Territory Government, and Zapopan NL, the Jawoyn agreed not to proceed with a native title claim, to surrender its native title rights, and to allow the Mount Todd mine of a proved gold deposit to proceed. In return, it received a grant of freehold title over a smaller area of land from the Northern Territory government and Zapopan NL agreed to a range of payments, employment and commercial preferences, education and

¹⁹³ Rick Farley, who later became a member of the Tribunal, was involved in facilitating the negotiations.

¹⁹⁴ 1 INDIGENOUS L. REP. 464, at 465 (1996).

¹⁹⁵ *Id.*

¹⁹⁶ S. JACKSON, WHEN HISTORY MEETS THE NEW NATIVE TITLE ERA AT THE NEGOTIATING TABLE 36-44 (1996); P. Sullivan *Problems of Mediation in the Native Title Tribunal*, in ANTHROPOLOGY IN THE NATIVE TITLE ERA 97 (J. Fingleton & J. Finlayson eds., 1995).

¹⁹⁷ See Sullivan, *supra* note 196.

training programmes, and other economic benefits for the Jawoyn as well as procedures for cultural and environmental protection.¹⁹⁸

The Anaconda agreement between Anaconda Nickel and the Waljen covered the development of a \$900 million nickel deposit in Western Australia. The Waljen agreed not to proceed with its native title claim. In return, Anaconda will establish a foundation into which it will pay annual amounts and Waljen will be able to access funds through the foundation.¹⁹⁹

The Pilbara agreement is perhaps the most far reaching. The agreement involved Hamersley Iron (a subsidiary of RTZ-CRA, the same company involved in the Century Zinc case) and the Gumala Aboriginal Corporation. The agreement allows for the development of a \$500 million iron ore deposit at the Yandicoogina mine. In return, the Gumala Aboriginal Corporation will receive compensation of \$60 million and a range of other benefits and cultural and environment protection mechanisms. Native title remains unaffected and claims will proceed in the usual way. The agreement was negotiated over fourteen months between Hamersley and the corporation with the assistance of an experienced mediator. The process required three different language and cultural groups to come together in a group, resolve their differences, and then negotiate an outcome. The negotiation took place outside of the Native Title Act but clearly the potential existence of native title provided the key to bringing the parties to the table.²⁰⁰

The Gawler-Craton agreement between Grenfell Resources and a number of Aboriginal communities in Western and South Australia allows for a two year exploration programme and includes a process for heritage protection that satisfies the requirements of both native title and heritage legislation.²⁰¹ While there are provisions for payments to communities for surveying costs associated with heritage protection activities, there are no "up front" or compensation payments.²⁰² Again, under this agreement, the native title issue has not been determined nor does it operate as an undue limitation on the exploration activities of the developer. However, the agreement ensures that any native title is protected or preserved, but does not impede the commercial activity of a resource developer.

¹⁹⁸ 1 INDIGENOUS L. REP. 445 (1996).

¹⁹⁹ Patrick Hosking, *Anaconda-Aboriginal Pact*, AGE, July 4, 1996, at B1.

²⁰⁰ Richard Sproull, *Title Bouts*, AUSTRALIAN, April 7, 1997, at 24.

²⁰¹ Amanda Hodge, *Grenfell Announces Native Title Deal*, AUSTRALIAN ONLINE: DAILY NEWS July 24, 1997.

²⁰² *Id.*

There is a significant capacity to expand these agreements to include a broader range of resource projects and environmental and planning matters, and to increase the capacity of Indigenous people to influence and shape environmental and resource management.

Comprehensive agreements covering service delivery by governments and self-government issues have not been reached though they have been proposed in a number of circumstances.²⁰³ These agreements would require input from, and cooperation by, State and Commonwealth governments, especially for service delivery agreements. The precise nature of these agreements,²⁰⁴ the size and geo-political elements²⁰⁵ of the parties, and the content will all vary according to the interests and concerns of the parties. Such agreements remain the most significant factor in land use management that might emerge from the native title process.

The amendments to the Native Title Act facilitate negotiation by providing for registration and enforcement of agreements. Ironically, the amendments will also severely limit the circumstances in which negotiations might occur. For example, the right to negotiate on pastoral lease lands is abolished.²⁰⁶

As indicated in the Broome agreement, native title can provide the basis for expanding the matters on which Indigenous interests are considered, and regimes and protocols can be developed that incorporate these interests in decision making. Each of the agreements referred to above include substantial environmental elements and assessments in which Indigenous people are expected to participate. In relation to management of conservation reserves and resources, there has been a continuation of the patterns developed pre-*Mabo II*. At the very least, there has been both a judicial and

²⁰³ See, e.g., NORTHERN LAND COUNCIL & KIMBERLEY LAND COUNCIL, NATIVE TITLE, PASTORAL LEASES AND MODELS FOR CO-EXISTENCE (Jan. 1997); COEXISTENCE NEGOTIATION CERTAINTY: INDIGENOUS POSITION IN RESPONSE TO THE WIK DECISION (April 1997). Western Australian Premier Richard Court in relation to the Ngaanyatjarra leased lands in Western Australia. Interestingly the Premier suggested that the agreement would be negotiated "outside the 'unworkable' federal law." However, while the agreement may not use the Native Title Act, there can be no doubt that the recognition of native title and the procedures enshrined in the Act provide the impetus for such a proposal. *WA on Verge of Land Deal with Aborigines*, SUNDAY AGE, Nov. 17, 1996, at 2. The government's initial response to the decision was to attempt to extinguish all native title: *Land (Titles and Traditional Usage) Act 1993 (WA), struck down in Western Australia v. The Commonwealth* (1995) 183 C.L.R. 373.

²⁰⁴ JUSTICE ROBERT FRENCH, LOCAL AND REGIONAL AGREEMENTS (1997); Marcus Lane et al., *Land and Resource Planning under Native Title: Towards an Initial Model*, 14 ENVTL. & PLAN. L. J. 249 (1997).

²⁰⁵ RICHIE HOWETT, THE GEO-POLITICS OF REGIONAL AGREEMENTS (1997).

²⁰⁶ By abolishing the right to negotiate on pastoral leases. See *supra* part V D; *Alcan Agreement "Would Not Be Permitted Under Wik Law,"* AAP NEWSFEED, Sept. 3, 1997.

legislative recognition of Indigenous interests in reserves and the preservation of native title within environmental reserves.²⁰⁷

Agreements inspired by native title claims will usually include heritage protection measures. The precise nature of these measures will vary from agreement to agreement and depend to a large extent upon the aspirations of the Indigenous groups involved. Resource managers will seek to ensure that they are protected from future disruption through actions under heritage legislation while Indigenous groups will be anxious to ensure that heritage is adequately protected within the regimes and protocols negotiated into agreements. The nature and status of heritage is subsumed by native title. Encompassed in Native Title are the laws and customs of the group, including its connection to land and elements of heritage, whether knowledge or features in the landscape or resources on the land. As a result, native title provides an all embracing means of addressing Indigenous land and heritage interests.

VII. CONCLUSION

*Mabo v. Queensland*²⁰⁸ changed the relationship between Indigenous people and the settler legal system. *Mabo II* and *Wik*²⁰⁹ have expanded the range of rights and interests in land enjoyed by Indigenous people as well as the geographical coverage of those rights and interests. Legislation has had an equivocal impact, both expanding and attempting to contract the rights recognized at common law. The regimes established for the regulation of native title, including the capacity for negotiated agreements and other land uses have built on and expanded the experiences of pre-*Mabo II* land management arrangements. They have added an edge to the arrangements derived from the uncertainty created by native title claims. The parameters and content of these arrangements remain to be fully explored, but represent a significant change in the model of decision making for land and resource use. In particular, they have extended the area of land over which Indigenous interests must be taken into account and have provided the opportunity for partnerships negotiated between different land users. The recognition of native title has a central place in this rearrangement of property interests.

²⁰⁷ Native Title Act, §§ 1.5(d), 238, 1993 (Austl.).

²⁰⁸ *Mabo II* (1992) 175 C.L.R. 1.

²⁰⁹ *Wik* (1996) 141 A.L.R. 129.

Paradoxically, with new models for recognition of Indigenous land interests and the consequent Indigenous involvement in land and resource use and management, there has been a diminution in the moral and legal imperative for effective heritage protection. The pre-existing heritage schemes continue to provide the only protection of Indigenous heritage on lands on which native title has been extinguished. Legislative heritage protection is inadequate and the combination of judicial and legislative approaches is currently producing a diminishing protective regime.

Through a series of judicial and legislative decisions, the right to claim heritage protection has seemingly been reduced to a simple statutory right to make an application, with an expectation of *some* measure of procedural fairness. The right carries no property interests and, in the absence of native title, no enforceable rights to protection. The possibilities for heritage protection regimes that include substantial recognition of Indigenous interests in land, outside of the native title concept, is remote.

This recognition of native title has seen a privileging of native title land at the expense of Indigenous heritage on land or in areas where native title has been extinguished.²¹⁰ While the development of jurisprudence that acknowledges some property interest in heritage could bring into play a range of constitutional and common law protections, the thrust of both the cases and the debate suggests this is unlikely.

There is a coincidence between the general description of both native title and heritage. Heritage is based on the relationship of Indigenous people to land and includes "a body of traditions, observances, customs and beliefs of Aboriginals."²¹¹ The resonance with the judicial and legislative formulation of native title—"the traditional laws acknowledged by and the traditional customs observed by the Indigenous inhabitants"²¹²—are obvious. However, native title has become the Indigenous form of property rights, not heritage. No prospective developments challenge this pattern.

²¹⁰ This argument is developed at length in Maureen Tehan, *To Be Or Not To Be (Property): Anglo-Australian Law and the Search For Protection Of Indigenous Cultural Heritage*, 15 U. TASMANIA L. REV. 267 (1996).

²¹¹ Aboriginal and Torres Strait Islander Heritage Protection Act, 1984, § 3 (Austl.).

²¹² *Mabo II* (1992) 175 C.L.R. 1, at 58 per Brennan, J. See also Native Title Act, 1993, § 223 (Austl.).