

**WHERE WE'VE COME FROM AND WHERE WE'RE AT WITH THE
OPPORTUNITY THAT IS KOIKI MABO'S LEGACY TO AUSTRALIA**

*Mabo Lecture
Native Title Representative Bodies Conference*

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To the traditional owners of Alice Springs I bring greetings from our people in Cape York Peninsula. To the Central Land Council, let me convey the great admiration we in Cape York have for your achievements in the struggle for the recognition of the land rights of your people in Central Australia. It was indeed the Central and Northern Land Councils that inspired us in Cape York to belatedly get organised and to form our own organisation to prosecute the land rights of our people. David Ross: you have been a paragon of persistence and diligent service to your people, and we from Cape York wish to acknowledge you and the elders who have worked with you over the past decades.

I wish to thank Michael Dodson and the Australian Institute of Aboriginal and Torres Strait Islander Studies for the honour which you have extended me to deliver this year's annual lecture in honour of the late Eddie Mabo. To Mrs Mabo, let me also say what a privilege it is to share this day with you and to have the opportunity to speak about the legacy your late husband left to Australians.

It is now the 11th anniversary of the High Court of Australia's decision in the *Mabo* case. On the occasion of the 10th anniversary, a widespread sense that the native title system was not working was articulated. Then, later in the year, the Gleeson High Court delivered its tragic decisions in *Mirriuwung Gajerrong* and *Yorta Yorta*, and if governments – States, Territories and Commonwealth – were uncertain about making consent determinations on native title when the law according to the High Court was uncertain, they are now certainly opposed to making such determinations now that the law has been made more certain and the court has foreclosed on issues. Of course the bind faced by native title claimants is this: it is only where a legal issue has been foreclosed upon that governments are prepared to accept that there is sufficient clarity to make decisions. Where a legal issue remains unsettled governments are unwilling to negotiate the settlement of claims.

One of the most remarkable features of the original *Mabo* litigation was that it had taken 10 years of bitter perseverance and struggle for the claim of the Meriam People to their traditional homelands of the Murray Islands to be finally determined. Ten years is an incredibly long time, and Eddie Mabo died at the end stage of that long struggle for recognition. Next year will be the 10th anniversary of numerous claims under the Native

Title Act that are a long way off from delivering any sort of recognition to the indigenous people's who have made them. On eastern Cape York, the Yalanji People's claim to their remnant homelands in the rainforests of the Wet Tropics of North Queensland, will enter its 10th year of long-suffering and patience on the part of the traditional owners. This is despite the fact that the Yalanji put forward a proposal for an agreement that met the State's interest in creating new national parks on lands subject to native title. It is despite the fact that the Queensland Premier committed himself to a protocol to bring the deal to a conclusion within a set timeframe. The deadline originally set by the Premier is now almost two years past and the bureaucrats are no closer to settling Yalanji than they were when the original Yalanji proposal obtained the in-principle support of the Premier.

The question hanging over the heads of many leaders and advocates of native title claimants at this conference is the question of whether the hope of native title has been dashed. I suspect that the same question is harboured by those whose function it is to resist the recognition of native title. I am compelled to confront this question, but as an advocate for native title I must confess that it is difficult to discuss the question with the frankness that is needed. The question necessarily raises matters of critical strategic importance to those who are in favour of native title and whose function it is to achieve its recognition at law. How can questions of crucial legal and tactical importance to indigenous people be discussed in the midst of the opponents of native title from the natural resources industries and governments? I have never been able to comprehend why this conference is open to parties that are opposed to native title, and I and the Cape York Land Council have voiced our objections to this for a number of years now. If this is the one opportunity advocates for native title have to take stock of the strategic political and legal situation facing indigenous claims and to discuss potential solutions, then how is it that we invite those who are resolutely opposed to the legal rights of our clients to participate in these discussions? How naïve can we be? Have we not, with nearly 10 years experience of these miserable processes, yet learned that the interests of *our* clients and the policy of *their* clients are at mortal odds – one against the other? It would be one thing if we devoted as much time, attention and resources to convening confidential strategic discussions involving the interest of indigenous claimants – we could then afford the collegial dialogue with those who are contemptuous opponents of the rights of our people. But I know of no such other opportunities. It is like we are playing a game of pretend. They pretend that they are not resolutely opposing native title. We pretend the same thing in return. What do we think we are running: an objective, dispassionate university seminar? Or are we running native title claims where the opponents to these claims are ruthless, determined and resolute?

Despite these unsatisfactory circumstances, I am compelled to answer the question of what is left for native title after the High Court's decisions in *Mirriuwung Gajerrong* and *Yorta Yorta* as follows. Native title is not a dead issue. It will continue to represent a crucial factor in land tenure and use in Australia for many decades to come. It will still need to be dealt with so far as the development of natural resource industries are concerned. It will continue to be an impediment to development where indigenous groups have not given consent. However, indigenous people will need to develop alternative strategies, because allowing native title to continue as a delegated industry

involving lawyers and anthropologists as has been the case over the past 10 years, will get many of our clients nowhere.

Let me now go back and review where we have come from with native title.

The High Court decision

There is no doubt in my mind that the High Court's decision of 3 June 1992 was correct and truly represented an opportunity to settle the question of land justice for indigenous people in the Australian nation. If the spirit, and I would argue *the law*, of *Mabo* had been faithfully implemented, then the High Court's decision would have fulfilled the hopes that many Australians held for settling this fundamental outstanding issue of land justice for indigenous people.

There were at least two reasons why I thought that non-indigenous Australians should have embraced *Mabo*. The first reason was that it was because native title and the *Mabo* decision was the product of their heritage – the English common law heritage of this country. How could they repudiate their own law? If their legal traditions delivered justice – why would they not claim it as theirs? The second reason was that native title could never result in anyone losing any legal rights they held in land or in respect of land. Where native title existed in its own right under the common law or where native title co-existed with other tenures, the native title could not result in the extinguishment or any derogation whatsoever of any rights granted by the Crown or by legislation. So why wouldn't non-indigenous Australians embrace a title which could never dispossess them of their own accrued rights and titles?

We forget this second point too easily. In fact it is probably not even a matter of forgetting, because we have never planted this point in our own heads in the first place – and we have never succeeded in getting Australians to understand this truth: the truth that native title is not about anyone else losing any legal rights that they have accumulated in the 200 years since colonisation. We have never convinced anyone of the truth that native title is all about the balance, it is all about the remnants, it is all about what is left over – and no finding of native title can disturb the rights of any other parties other than the Crown.

And land rights have never been about dispossession of the colonisers and their descendants. Whether it be statutory land rights or common law land rights – these land rights have always been focused on remnant lands.

So why such bitter and expensive struggles over remnant lands? This is the question white Australians must ask themselves. And an ancillary question is whether white Australians feel that it is important that our nation settles the longstanding question of indigenous land justice. Because history tells us – all over the planet – that land injustice is one of those tenacious wounds that never heal if no honest justice is done. If there is no just compromise, then land injustice will plague our nation long into the future.

What Eddie Mabo had achieved with the *Mabo* decision was that he had forged the opportunity for a just compromise. From the common law of Australia, the Murray Island plaintiffs had constructed the best possible framework for the Australian people to settle the grievance in relation to land. That broad framework encompassed three principles that underpinned the compromise: non-indigenous people get to keep all of their legal rights and titles in relation to land, indigenous people get recognition of any remnant rights and titles, and Crown-derived titles and native title co-exist in certain situations where the Crown interest prevails over the native title interest in the event of any inconsistency. I have often expressed this as the white fellas keep their land rights, the black fellas get what is left over, and we share some categories of land where the Crown title prevails over the native title in the event of conflict.

Why is this form of compromise not reasonable? Why have white Australians and their governments resisted this compromise? Do we not feel anxious about losing the opportunity that is Eddie Mabo's legacy to us as Australians – white and black?

I would like to now briefly review the problems with the responses of the Commonwealth Parliament, indigenous people and the courts to the opportunity that native title represented. Let me first turn to

The problems with Parliament's Response

The Commonwealth Parliament's response to *Mabo* was the enactment of the Native Title Act in 1993, which was then of course amended in 1998.

The strengths of the Parliament's response were:

1. Recognition of common law rights
2. Protection against wholesale extinguishment by hostile governments

It was the protection against wholesale extinguishments that was the greatest strength of the NTA. The prospect of State and Territory governments enacting legislation to extinguish native title was the gravest threat against which indigenous leaders fought during ructions leading up to the enactment of the 1993 Act. After all, the then Australian Mining Industry Council's position was that native title had to be extinguished within mining leases, despite the fact that mining leases never extinguished any other form of underlying tenure. And of course the Western Australian Government had enacted its Land Titles and Traditional Usages Act which attempted to extinguish native title across the whole of Western Australia. In the *Native Title Act Case* Richard Court's Act was struck down and the effectiveness of the NTA in protecting native title against extinguishments by hostile governments was affirmed.

The Fundamental Problems with Parliament's response were as follows:

1. The unfair allocation of certainty

This is probably the greatest failing of the native title system in Australia. Certainty has been unfairly allocated – and the judiciary are completely blind to these facts. Native Title legislation gives protection against hostile extinguishment to indigenous people, but it gives certainty of the existence and indefeasibility of title to non-indigenous people. Wherever non-indigenous titles were subject to any question as to their validity, and as to the scope of the rights to which they gave rise – the legislation provided certainty. All the certainty that was provided to native title, was protection against extinguishment.

And certainty for non-indigenous rights and interests – including the rights and interests of the Crown – was guaranteed up-front: in the NTA. They did not have to go through any procedures or meet any tests, or prove any legal rights, before they obtained their certainty. Certainty kicked in on day one of the legislation. In contrast, whether indigenous people held any native title and what those interests amounted to, was left uncertain and had to be proved.

And it was not only the vested rights of non-indigenous people and the Crown that was afforded certainty. It was also a whole range of expected rights and interests that were made certain through the broad definition of “past acts”, especially of course with the 1998 amendments.

The extinguishment of native title was made certain in the legislation, but the existence of native title was not. All that was guaranteed was protection from hostile extinguishment.

This whole unfair allocation of certainty is testament to the fact that indigenous people – in 1993 and in 1998 – were preoccupied with the primary struggle to protect native title from extinguishment. Protection was what we got out of the certainty deal. Of course our opponents on behalf of the Crown and on behalf of industry got a lot more out of the certainty deal than protection of their rights from extinguishment or defeasibility. They got certainty as to the definition of their rights and as to the impact that any native title would have on their rights.

2. The granting of party status to third party interests whose rights and interests were already secured under the common law – or by the NTA

This point too is lost on the judiciary and in the public understanding of the native title claims process. As I have already discussed, the native title claims process is not a true litigation in the sense that one party may win and the other party may lose. The non-indigenous third parties can *never* lose any rights of interests that they hold. It is only the indigenous parties that can ever lose a case. All that the non-indigenous third parties have to lose in any litigation is an argument to the effect that there is no native title. But if they have legal rights and titles, the validity and utility of these rights can *never* be affected.

The validity and utility of these third party rights and titles was first guaranteed at common law by the *Mabo* decision itself. We can take *Mabo* as authority for the law that rights and interests granted by the Crown or by legislation cannot be invalidated or derogated from by the existence of native title.

The only real uncertainty that existed was due to the effect of the Racial Discrimination Act 1975 (Cth), but of course the validation provisions of the NTA operated to cure any uncertainties caused by the RDA.

So if all of the rights and interests of the third parties are guaranteed at law and can never be affected by a finding of native title – why are third parties allowed to become parties to native title claims? Why are they treated by governments and the courts as if they have rights and interests that are at stake – when they do not? Why are they funded by the Commonwealth Government to represent themselves in these claims?

Experience has shown that if there is a third party that (a) has all of his rights and interests already guaranteed at law and therefore he can never lose anything, and (b) has all of his costs paid for by the Attorney General of the Commonwealth – then of course these third parties are not going to be amenable to negotiated settlement of claims, and will resist recognition until the cows come home, or the native titleholders have surrendered most of their rights.

3. Procedures rather than substantive rights

This is of course another feature of the legislation: it is full of procedures rather than substantive rights for native titleholders. I will deal with the transaction and opportunity costs which the country pays for in relation to this aspect of the legislative scheme, later in my talk.

4. The suspension of the Racial Discrimination Act and the breach of the International Convention

I will not expand at length on this problem with the legislation, but I will make two comments. Firstly, I wish to say that Geoff Clark, Les Malezer and others who brought this issue to the attention of the CERD Committee must be commended for their advocacy. Indeed ATSIC's Native Title Unit and particularly the work of Greg Marks was crucial, and as a long-distance observer of this process, I can only say that the prosecution of this issue was done diligently and with great perseverance. They have highlighted the fact that Australia is in breach of the International Convention on the Elimination of All Forms of Racial Discrimination. This is an issue that the nation will never escape or be able to hide in the long term, even if it is difficult to raise as an issue of domestic importance in the present. Secondly, it is my view that the RDA problem is not just a 1998 problem, it was a problem with the 1993 legislation as well. I do not accept the political argument that was constructed at the time that the 1993 legislation amounted to a "special measure" within the meaning of the Convention, whereby the beneficial provisions of the NTA somehow cured the suspension of the RDA in relation

to its validation provisions. The fact is that suspension of the RDA was seen in 1993 as the only way that the validation provisions could be made absolutely certain. The 1998 amendments simply widened the provisions in the NTA which were not made subject to the RDA. My point is that the racial discrimination problem with native title legislation in Australia is a problem of the ALP as much as the Coalition, and the country will need to find a resolution for this issue. The country will have to find a way of validating titles without discrimination against indigenous people by suspending the application of the RDA in relation to native title – but not in relation to any other titles. Otherwise we will remain in constitutional terms, as we exist today, no different from Zimbabwe, in that we sanction racial discrimination in relation to how our Commonwealth laws deal with land title.

Let me now briefly summarise

The problems with the Indigenous Response

1. Disputes and conflicting, overlapping claims: the inability to control greed and power struggles, and the lack of strategic leadership by Representative Bodies

The way in which claims were organised, lodged and prosecuted by indigenous groups and their advisors following the enactment of the 1993 legislation could not have been more harmful to indigenous interests. We failed to control greed and the power struggles within and between claimants groups, not the least between conflicting parts of families. The Representative Bodies largely failed to provide any strategic leadership to address the emerging problems – though this was of course very hard after 1993 when freelance lawyers roamed the countryside picking off clients and setting them off against rivals, including the Representative Bodies themselves. The 1998 amendments helped to put more rigour into the process, but many of the claims that are registered were prepared with about as much planning, strategy, forethought and consultation as went into the European dismemberment of colonial Africa.

The legacy of this madness and the problems that they represent for the future conduct of these claims still remains an outstanding responsibility for the Representative Bodies and the claimants. There is no use just hoping that litigation will provide resolution instead of subjecting all claims to proper research and intra-indigenous consideration and mediation.

I was recently struck by some comments made by the late Professor Bill Stanner in a note on *Aboriginal law and its possible recognition* where he concluded as follows:

“The social situation of many Aborigines will change with rapidity over the next decade. Many will die wealthy, in possession of money or other assets for which their traditional law provides no disposal-procedure. There will be conflicts of interest between Aborigines which may be insoluble unless their own doctrine of what I have termed rights, duties, liabilities and immunities can be developed.

The ‘Aboriginal problem’ thus goes beyond the ‘retention of their traditional lifestyle’: there is a problem of development as well as one of preservation.”

We have so far failed to develop our own doctrines to deal with our lands and resources as commercial property, which can be accumulated and developed. Greed and conflict will continue to plague our people as long as we fail to confront Professor Stanner’s prescient advice.

2. The failure of indigenous leaders and organisations to resist the development of a second-rate native title legal and consultancy industry

I will not go on at length about the problem being that the native title legal and consulting industry that sprung up in the wake of the NTA is at best, second-rate. It is a generalisation that does not do full justice to everyone; but it must be our predominant conclusion. My main point is not just that the quality of the professionals who have been involved on the indigenous side has been poor – often they are not – but it is the failure of indigenous leaders and organisations to control their actions and activities. Having protected native title through the legislative battles, the indigenous leadership then delegated to the lawyers and the consultants the whole responsibility for prosecuting native title. And we allowed an unaccountable, undirected, often wasteful, industry to develop around native title claims – and failed to insist on strategic leadership. That we have ended up in a hole is in considerable part the consequence of poor strategic, intellectual and political organisation on our part.

3. The failure to develop a high standard legal discourse on the common law meaning of native title

This point is related to the previous point. The Australian legal and intellectual discourse on the common law meaning of native title in my view is *embarrassing* compared with the Canadian discussion. Most of the discourse and publications since 1993 have centred on procedural issues arising from the legislative framework. There has been comparatively little quality discussion of the common law. We have no equivalents to Kent McNeil and Brian Slattery of Canada. In fact Kent McNeil’s few commentaries on the Australian law represent the best that there is. And the Australian academic and intellectual discussion of native title has had *no impact* on the judiciary, in the way that the Canadian commentators have had on the decisions of their Supreme Court.

Of course the publications and commentaries produced by the onetime research division of the National Native Title Tribunal and the Centre for Aboriginal Economic Policy Research did not answer the need for a high quality discourse on the meaning of native title at common law. There are still today so many crucial conceptual issues that remain unresolved and unarticulated in native title. These issues are just left dangling – we hope that the courts will give meaning and clarity in the absence of any serious consideration from advocates for native title.

4. Poorly argued test cases

I particularly have a problem with the way in which the interpretation of section 223(1) of the NTA was approached in the test cases that went before the High Court, but I will expand on my complaints in the next section.

I turn now to

The problems with the response of the Courts

1. Discriminatory conceptualisation of native title by misapplication of the common law

Fundamental to the ruling in *Mabo* was the High Court's refusal to allow the social and cultural organisation of the indigenous peoples of Australia to preclude them from recognition of their land entitlement surviving the acquisition of sovereignty by the Crown. Indeed the High Court explicitly rejected the decision of the Privy Council in *Re Southern Rhodesia* to the effect that there may be societies that are "so low in the scale of social organisation" such that the common law could not recognise them as having rights and interests in land.

In this rejection of *terra nullius* on the basis of prejudicial assessments of social and cultural organisation Justice Brennan made strong declarations on behalf of the common law of Australia, when he said that the common law could no longer be, nor seen to be, "frozen in an age of racial discrimination". This was an important rejection of discrimination concerning the law of native title.

The problem with the application of this principle of non-discrimination is that whilst it has been applied in respect of the question of *whether Aboriginal title survives sovereignty* – where social and cultural organisation is irrelevant to whether there be recognition by the common law – it has not been applied to *the form of Aboriginal title which survives sovereignty*.

On the question of form of title, native title has been devalued and discriminated against by reference to the different social and cultural organisation of indigenous Australians. The very discrimination in *Re Southern Rhodesia* is maintained against Aboriginal people so that the content of their title is less than the content of non-indigenous titles derived from the English legal tradition. This is done by reference to indigenous laws and custom. You only get what you can prove your indigenous laws and customs entitle you to – and it is the laws and customs that existed at the time of sovereignty that must be proved.

This is blatant racial discrimination of the very kind articulated in *Re Southern Rhodesia*. It is discriminatory for at least two reasons.

Firstly, why should the indigenous conception of ownership of land be any less comprehensive than that of landholders in the English legal tradition? It can only be through miscomprehension and all of the difficulties of the fact-finding process of the courts, that courts can say that indigenous people owned the land in any sense less than possession. But it is this very miscomprehension and the difficulties of process that are resulting in native titles being determined to be less than ownership. And the courts are able to carry out this discrimination by saying that these minimal rights are what the traditional laws and customs of the people have disclosed as a matter of fact. But what people – of whatever social and cultural organisation – do conceive of their occupation and possession of land as being anything less than what the holder of a fee simple would conceive of? As against the world, the conception of possession of the Englishman, the Trobriand Islanders, the nomadic peoples cited by Justice Brennan in the *Western Sahara Case*, and indeed the Aboriginal peoples of Australia, is a universal conception. This is what Justice Brennan meant when he said in his classic statement in *Mabo*: “Land is susceptible of ownership, and there are no other owners”.

The second reason why this approach to the content of native title as a lesser right than would be accorded to a fee simple holder of title, is discriminatory, is that it fails to apply the common law principle that it is occupation which gives rise to possession. It matters not what the nature of the indigenous social and cultural organisation may be, it matters not what arcane and idiosyncratic laws and customs the indigenous people may have governing their internal allocation of rights, interests and responsibilities amongst their members. It matters not whether it is an English Lord slaughtering innocent fowls on his estate, or whether it is an Australian Aborigine standing on one leg in the sunset on his father’s ancient homelands – *the title is the same*. The common law is only concerned to presume possession in those who are in occupation. And the content of this possession is not determined by the nature of the occupation, and certainly not by the laws and customs of the occupants. The form of the title is the title which occupation affords, which is possession.

But this is not how the Australian courts have approached native title. They have recast the prejudice in *Re Southern Rhodesia* so that prejudice against social and cultural organisation is used to justify indigenous Australians being accorded a *lesser* form of ownership than would be accorded by the common law to someone who was in wrongful occupation, such as that of an adverse possessor.

2. Stripping native title of any economic meaning or benefit

The courts have reduced native title to what they conceive of as a “fragile” social and cultural artefact, not a legal title to land that encompasses any economic meaning or benefit. And of course the whole mediation and negotiation process with governments and third parties leading to consent determinations, is resulting in native titles being stripped of almost all economic or commercial meaning. The position taken by the courts in their discriminatory conceptualisation of native title stands in stark contrast to the decision of the Supreme Court of Canada in *Delgamuukw* which affirms that communal native title involves the right to possession, of the surface and the subsurface.

3. Failure to see and implement *Mabo* as a reconciliation of the Crown acquisition of the country with the pre-existing occupation of the indigenous peoples

In Canada, the Supreme Court has treated Aboriginal Title as a special responsibility of the court and the Chief Justice has repeatedly referred to it in terms of “reconciliation”.

In *Delgamuukw* Chief Justice Lamer laid down what is a fundamental, overarching principle of Aboriginal Title. His Honour said:

“In cases involving the determination of aboriginal rights, appellate intervention is also warranted by the failure of a trial court to appreciate the evidentiary difficulties inherent in adjudicating aboriginal claims when, first, applying the rules of evidence and, second, interpreting the evidence before it. As I said in *Van der Peet*, at para. 68:

In determining whether an aboriginal claimant has produced evidence sufficient to demonstrate that her activity is an aspect of a practice, custom or tradition integral to a distinctive aboriginal culture, a court should approach the rules of evidence, and interpret the evidence that exists, with a consciousness of the special nature of aboriginal claims, and of the evidentiary difficulties in proving a right which originates in times where there were no written records of the practices, customs and traditions engaged in. The courts must not undervalue the evidence presented by aboriginal claimants simply because that evidence does not conform precisely with the evidentiary standards that would be applied in, for example, a private law torts case.

The justification for this special approach can be found in the nature of aboriginal rights themselves. I explained in *Van der Peet* that those rights are aimed at the reconciliation of the prior occupation of North America by distinctive aboriginal societies with the assertion of Crown sovereignty over Canadian territory. They attempt to achieve that reconciliation by "their bridging of aboriginal and non-aboriginal cultures" (at para. 42). Accordingly, "a court must take into account the perspective of the aboriginal people claiming the right. . . . while at the same time taking into account the perspective of the common law" such that "[t]rue reconciliation will, equally, place weight on each" (at paras. 49 and 50).”

This statement of fundamental principle, and of course its very important guidance for the proof of native title, puts to shame the Australian High Court’s desultory comments in relation to proof in the *Yorta Yorta* case. This is what Chief Justice Gleeson, and Justices Gummow and Hayne said in this most recent case on the question of evidence:

“When the primary judge was hearing evidence in this matter the *Native Title Act* provided that, in conducting proceedings under the Act, the Federal Court, first¹, was “not bound by technicalities, legal forms or rules of evidence” and, secondly², “must pursue the objective of providing a mechanism of determination that is fair, just, economical, informal and prompt”. It may be that, under those provisions, a rather broader base could be built for drawing inferences about past practices than can be built since the 1998 Amendment Act came into operation ... The kinds of evidentiary questions which may arise in this regard are well illustrated by *Millirrpum*³ but it is neither necessary nor appropriate to consider whether the answers given to the questions that arose in that case were right. Were they to arise again, in proceedings in the Federal Court, it would be necessary to consider them by reference to the *Evidence Act* 1995 (Cth).”

There is no sense that the High Court has any high policy or perspective in relation to the way it approaches native title as a reconciliation between Crown sovereignty and the original occupation of the land by the indigenous peoples. This may have been understandable if their predecessors in *Mabo* had not stated that the historic denial of native title had left the country with that Justices Deane and Gaudron had called a “legacy of unutterable shame”. It is completely incomprehensible when you consider the preamble to the Native Title Act upon which the High Court relies in its interpretation of native title. Parliament was unequivocal about the larger policy perspective on native title and its historical and contemporary significance – and the High Court is completely unmoved by any such largeness of spirit.

4. Misinterpretation of the NTA

I will not here repeat at length what I said in my Sir Ninian Stephen Lecture⁴, about the High Court’s misinterpretation of the definition of native title in section 223(1) of the Native Title Act. The short judgment of Justice McHugh in *Yorta Yorta* tells the truth about what Parliament intended the statutory definition to mean: that it was supposed to define native title according to the common law decision in *Mabo*. In other words the section 223(1) definition did not replace or in any way alter the common law meaning of native title, but was intended to be an accurate and faithful reflection of its meaning at common law. As Justice McHugh said, the majority adopted a “narrower” interpretation of section 223(1) than Parliament intended – to the great detriment of the *Yorta Yorta* and to indigenous Australians generally.

¹ s 8(3)

² s 82(1)

³ (1971) 17 FLR 141 at 151–165

⁴ “*The High Court’s abandonment of ‘the time-honoured methodology of the common law’ in its interpretation of native title in Mirriuwung Gajerrong and Yorta Yorta*” 2003 Sir Ninian Stephen Lecture, Law School, University of Newcastle, 17 March 2003 (see www.capeyorkpartnerships.com)

In effect, in *Yorta Yorta*, the High Court disavowed native title as a doctrine or body of law within the common law. What this amounted to is a gross dereliction of the court's duty to approach native title law according to what a member of the Supreme Court of Canada, Justice MacLachlin, had referred to in *R v Van der Peet* as "the time-honoured methodology of the common law" – instead the High Court denied that there were "common law requirements" and "common law elements" for the establishment of native title. The judgment of Gleeson CJ and Gummow and Hayne JJ is, in this respect, the most transparently scholastic attempt to disregard this large body of caselaw on native title drawn from right across the common law world. As I said in the Sir Ninian Stephen Lecture, whilst native title is not a common law title (being a title recognised by the common law) – there is *a vast body* of common law which deals with its recognition, proof, enforcement and extinguishment. This body of law has developed over two centuries in decisions of the Privy Council, the United States Supreme Court, the Supreme Court of Canada and numerous other cases concerning West Africa, subcontinental Asia and the Pacific, not the least New Zealand. It is this body of common law which informed the original *Mabo* decision in 1992 and numerous overseas cases were cited by the High Court in that case.

What has happened in *Yorta Yorta* – and in the cases leading up to it – is that the High Court has decided to draw a line between the two centuries of common law leading up to *Mabo*, and the development of Australian native title law since the Native Title Act. By resorting to the legislative definition of native title in section 223(1) the court is intent upon treating the development of native title law *as essentially an exercise in statutory interpretation*. Rather than diligently grappling with what is a complex and unsettled body of law – and importantly, rather than explaining why overseas precedents should be distinguished from the Australian law on the subject – the High Court has conveniently confined their duty to one of interpreting the meaning of statutory clauses. They have conveniently set out for themselves a clean slate upon which they can rule on critical, unresolved conceptual issues in native title, simply on the basis of statutory interpretation. Two critical, unresolved conceptual issues – namely the meaning of "connection" and "continuity" in native title law – cannot be analysed in isolation from the international jurisprudence on native title. Otherwise all is bare assertion.

And indeed it is bare assertion which the High Court has served up to the *Yorta Yorta* who pleaded their case in the expectation of a fair hearing of their claim in accordance with the common law. The High Court has served up fundamental derogations of the rights of indigenous people – largely on the basis of bare assertion.

The most startling evidence for this abandonment of the common law is a survey of the cases which are referenced in both *Mirriuwung Gajerrong* and *Yorta Yorta*. Despite the fact that these cases occupy hundreds of pages of judgment, there is literally *no reference* to native title cases other than recent decisions of the court dealing with statutory interpretation. Even the judgments in *Mabo* are not discussed. *Mabo* is only mentioned for contextual and historical purposes – not as precedent for many of the bald assumptions and assertions made by the court.

In my commentaries in honour of Sir Ninian Stephen I pointed out that the problem did not just lie in the majority judgment of the Chief Justice and Gummow and Hayne JJ. Kirby and Gaudron JJ were also responsible for this disaster. It was reported in the media that Kirby J had admonished counsel at the time of the appeal hearing of *Mirriuwung-Gajerrong* to “stop foraging around the common law” and to instead understand that native title had been “transmogrified” by the Native Title Act. Transmogrification indeed – what we now have is a deformed and unjust Australian native title law, the foundation of which is a blatant misinterpretation of what was intended by the Commonwealth Parliament.

Let me now summarise

What we are left with

1. Native title without any economic benefit
2. Unfair denial of land justice and the failure to use Eddie Mabo’s legacy to settle the indigenous land justice problem in our country
3. Lose-Lose procedural framework that is marked by
 - a. debilitating high transaction costs
 - b. debilitating high opportunity costs
4. Prospect of long-term Australian under-performance in land and resource development
5. The problems with revisiting the allocation of rights and interests under the NTA and other legislation

Moving from a Lose-Lose Framework to a Win-Win Framework

The opportunity and transaction costs of the Native Title Act must be the subject of careful and urgent consideration. The administration of the legislation, the costs of preparing and prosecuting claims and following the procedures of the Native Title Act, versus the returns in terms of title determinations and economic and social advantages for Aboriginal people – do not add up and do not make sense. When the costs and lost opportunities are considered for all parties (including governments and industry parties) then the opportunity and transaction costs problems seem to be a universally shared problem: all sides, including Aboriginal people, are paying high costs for small or no returns.

The situation is a lose-lose situation, and strategic thinking is required to see how it is that win-win approaches to native title might work. The advantage for Aboriginal interests in the current strategic context is that those interests that oppose or at least resist native title are also suffering from the high opportunity and transaction costs. Whilst Aboriginal people may be getting limited and delayed returns from the native title systems, the other parties are also bearing significant burdens. These other parties also have an interest in reform and new strategies.

The current legislative scheme is flawed because it is the outcome of a (necessary and inescapable) win-lose struggle between Aboriginal people and other interests (governments and industries). Whilst both sides have secured “wins” against “losses” by the other side, the total outcome is in reality a “lose-lose” situation for all parties.

Whenever change is considered, both sides think in terms of winning against losses by the other side. This is what the governments and industry did in the 1998 amendments to the 1993 legislation. Whilst they succeeded in derogating from the rights of Aboriginal people in a discriminatory and unjust way, the totality of the outcome has not delivered a clear “win” for governments and industry. The Alternative State Regimes have not delivered the kinds of solutions to the mining industry which they were hoping for.

The fact is that a “win-lose” approach to thinking about native title will not work for either the proponents or opponents of native title. Only “win-win” solutions are likely to lift parties out of their entrenched and defensive positions.

The difficulty is that “win-win” solutions are unlikely to emerge from any process sponsored by government. Governments, whilst purporting to be independent arbiters or brokers representing the interests of the whole community including the Aboriginal communities, are partisan in favour of its own interests and that of industry – ahead of Aboriginal interests. When reform or any form of change is placed into the public policy/legislative reform process, the struggle immediately becomes one of parties seeking to advance at the expense of other parties. Each side enters into the debate seeking not only to preserve its own position, but to enhance that position at the expense of concessions or defeats by the other side. What emerges from this adversarial, tug of war public reform process is then usually some form of compromise that is cobbled together. Whilst compromise is inevitable and probably necessary, the problem is that rather than being a “highest common denominator” outcome, the results from the adversarial public policy development process is the worst form of compromise: “the lowest common denominator” outcome.

So the native title process – whilst producing meagre native title determinations for Aboriginal people and producing some land use outcomes for governments and developers – is really not optimal. It is nearly grid-locked by an adversarial framework that encourages parties to only see what is in their own interests, rather than seeing how mutual interests could be served.

Two basic challenges

At its essence, two of the most basic challenges facing the native title system are posed in the following questions:

- How can we have a system where it is in the interests of, or at least not seen to be at all contrary to the interests of government, industry and the public interest, for Aboriginal title to be settled where it potentially exists?

- How can we have a system where it is in the interests of Aboriginal people for economic development to proceed efficiently and with the support of Aboriginal people?

Rules of engagement

The first phase of any serious exploration of reform must be to see if there are any solutions that will address the needs of all parties. Such an exploration would need to be premised on the following principles:

- That parties are not required to surrender or to concede any property or procedural rights under the law
- That, if there is a change in the allocation of rights under the law, rather than losing such rights, such rights should be “converted” into rights that are of equivalent or greater value
- That such “conversions” or “exchanges” in the allocation of property or procedural rights should be rationally attractive to the parties so that they choose to make the changes because they see it is in their own interests for the changes to be made

In other words, the challenge is to find truly “win-win” solutions.

Native title legislation and the allocation of rights in property and procedure is vastly and particularly complicated – not the least because of the adversarial political process that followed the Mabo decision and the passage of the Native Title Act – and they were not constructed with an eye to mutual interest and common ground. There are potentially other ways to achieve “certainty” which are more workable and which encourage both sides to support outcomes for the other side. It is not the case that all options and possibilities have been explored and exhausted.

Let me now close with one final point.

The Yorta Yorta had proved their case

Contrary to the High Court’s dismissal of the *Yorta Yorta* appeal, the Yorta Yorta People had proved their case. The trial judge, Justice Olney, made three crucial findings of fact that, in my view, mean that the Yorta Yorta proved their case.

Firstly, Justice Olney found that Aboriginal people were in occupation of the claimed land at the time of sovereignty.

Secondly, Justice Olney found that two of the ancestral figures – Edward Walker and Kitty Atkinson/Cooper – were descended from those who occupied the land at the time of sovereignty.

Thirdly, Justice Olney accepted that many of the contemporary Yorta Yorta claimants were descendants of these two ancestral figures.

This is what Justice Olney concluded at para 104:

“From the foregoing I conclude that only the descendants of Edward Walker and those of Kitty Atkinson/Cooper, have been shown to be descended from persons who were in 1788 indigenous inhabitants of part of the claim area. Without going into detail, it is fair to say however, that a significant number of the claimant group, including some who specifically identify themselves as Bangerang, are descended from either Edward Walker or Kitty Atkinson/Cooper. There are however some claimants whose line of descent does not include either of these ancestors.”

So the Yorta Yorta had proved that a native title burdened the radical title of the Crown at the time of sovereignty: Native title came into existence at this time. They had proved that these occupants included two ancestors of the claimants: Edward Walker and Kitty Atkinson/Cooper. They had also proved their descent from these two ancestors. They had therefore proved their case.

So how is it that Justice Olney and the High Court could then presume to cast the Yorta Yorta into an identity wilderness – a people who didn't exist as a people anymore? This represents misapplication of the common law – and we cannot accept this.