# Chapter Five

# Taking Stock of the Role of the Courts

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The inaugural Conference of The Samuel Griffith Society was held in Melbourne on 24 July, 1992. Not long before, on 3 June to be precise, the High Court had delivered its judgment in what is now known as *Mabo No. 2*, surely one of the most bitterly criticised judgments ever delivered in a British territory with respect to the highest court in that territory, and regarded then and over the ensuing years as evidencing breathtaking contempt for established legal principle and for the eminent predecessors of the judges who decided it, whose views obviously counted for nothing.

The President of the Society, Sir Harry Gibbs being unavoidably absent, I was invited to deliver the inaugural address and took advantage of the opportunity to nail a flag to the staff of Sir Owen Dixon's strict legalism. *Mabo* was a case in which the law had been firmly settled from 1847 at the very latest, the principle being that the waste lands of the colony of New South Wales were — and had ever been from the time of the first settlement of the colony in 1788 — in the Crown: that they were, and ever had been, from that date (in point of legal intendment), without office found, in the Sovereign's possession; and that, as thenceforth her property, they had been and might now effectually be granted to subjects of the Crown.

That statement, of course, came from the decision of Stephen CJ in *Attorney-General v. Brown (1848)*.[1] It had never been doubted in Australia by a competent court until 3 June, 1992. It had been affirmed by the most distinguished High Court Justices of the past, including Isaacs J in 1913, Windeyer J in 1959, Barwick CJ (with the concurrence, be it noted, of McTiernan, Menzies and Stephen JJ) in 1973, and by Dawson J in 1988 in *Mabo No. 1*. Stephen J observed in the *Seas and Submerged Lands Case,*[2] "That originally the waste lands in the colonies were owned by the British Crown is not in doubt". Nonetheless, in *Mabo No. 2* Brennan J revealed to an astonished profession, a good 200 years too late, that the decisions and opinions of the past confounded sovereignty with title to land. This unflattering opinion was delivered with remarkable insouciance, having regard to the fact that the name of Dixon himself could have been added to the list of Justices mentioned above.[3]

This was but the beginning. At the Society's second Conference in July, 1993 papers on this subject were delivered by Mr SEK Hulme, QC, the Hon. Bill Hassell and Mr Jack Waterford. At the third Conference in November, 1993 papers on *Mabo No. 2* were delivered by Dr Colin Howard, who spoke on the *Racial Discrimination Act* 1993, which is of course the linch pin of the *Mabo No. 2* revolution, and by Mr Graeme Campbell, MP. The Proceedings for that year reveal that the Hon. Sir Walter Campbell, on the launching of Volume 2, also had much to say on the topic.

The fourth Conference in July, 1994 saw Dr Geoffrey Partington and Dr John Forbes delivering papers on relevant aspects of the problem posed by *Mabo No. 2*. Dr Partington's paper was of considerable value as enabling the uninstructed to identify the source of findings made by Deane and Gaudron JJ in highly emotive language in *Mabo No. 2* as to the treatment meted out to the Aborigines in the course of settlement. It is now clear that the source of these bitter revelations was James Cook University. The fact that they were never tested by being received into evidence, which would have enabled them to be countered by other appropriate evidence, and that they played a major part in the judgment of those Justices as, indeed, they freely concede, is one of the many odd features of that case. Some would regard breast-beating as a curious approach to the resolution of a question essentially of law. This Conference saw two other papers on the native title question, one already noted by Dr John Forbes and the other by Dr Colin Howard.

The fifth Conference has been the only one in which native title did not play a major part, but there were no less than three papers on the external affairs power which, as is now generally recognised, is capable, whenever invoked, of permitting the Commonwealth to legislate on any subject it chooses, thus rendering s.51 of the Constitution otiose and destroying the original essentially federal character of the Constitution. It is curious to recall that this development, long advocated by the political forces which never really approved of the federal distribution of power between the Commonwealth and the States, goes back to the *Tasmanian Dam Case,* when the Commonwealth, then in the hands of a conservative majority, acted out the policy of its opponents to enable it to intervene in the domestic affairs of the State of Tasmania in a matter which was, in truth, none of its domestic business.

The sixth Conference in November, 1995 not unnaturally saw a great deal of concern about the external affairs power and the state of the federation, with a powerful address by Sir Garfield Barwick, then in retirement, and a masterly review of the foreign affairs power by Mr Hulme, QC. However, the native title question had not slipped from the agenda, which included a scholarly paper on this topic by Dr Howard dealing with problems peculiar to the State of Western Australia. There was also a powerful paper by Sir Harry Gibbs on the subject of a possible Bill of Rights, to which he was strongly opposed. The notion of a Bill of Rights is dear to the hearts of those who would see political questions "judicialised". Indeed, the recently retired Chief Justice of the High Court had acknowledged that this would be the consequence of a Bill of Rights, of which he spoke with enthusiasm at a conference in Canberra in July, 1992.

In June, 1996 the Society held its seventh Conference, and the emphasis at this stage was very much on native title, the Commonwealth having passed its *Native Title Act.* By then it had become apparent that there would be no attempt at a rational examination of the problems involved, but at least the leader of the government which put through the *Native Title Act* 1993 believed that the legislation would produce a measure of certainty and security to those who, prior to *Mabo No. 2*, never suspected that grants of title could be displaced or endangered by the process of judicialising this essentially political question.

In a paper by Dr Forbes attention is drawn to the statement of the Prime Minister, Mr Keating, on the second reading of the Bill, stating his Government's view that, under the common law, past valid freehold and leasehold grants extinguished native title, a view which is expressly recorded in the preamble to the *Native Title Act* 1993. This had indeed been the view of Mason CJ, Brennan J and McHugh J in *Mabo No.2*.[4] It is obviously no fault of Mr Keating's that the *Wik Case* effectively negated his assumption, which was clearly based on the principle stated in *Attorney-General v. Brown* referred to earlier in this paper.

When the eighth Conference was held in March, 1997 the *Wik* decision had been delivered, and this Conference and its successor in October, 1997 were dominated by the problems created by the concept of native title, which was coming to be seen as an illegitimate child which must somehow be accommodated if it could not be got rid of.

The unwisdom of departing from the understanding of the law which existed prior to *Mabo No. 2* had been pointed out by Dawson J in his judgment in that case.[5] However, when *Wik* was argued no party sought to reargue the correctness of *Mabo No. 2*.[6] One would therefore have expected that the majority view in that case would have been applied. The conclusion of Kirby J was, however, that the Court had decided that grants by the Crown falling short of an interest in fee simple (being the equivalent of full ownership) may permit the possibility of the co-existence of the rights under a "pastoral lease" and what we must now call "native title".[7] It is becoming the new orthodoxy. It matters little that an assumption to the contrary was held by the government of the day when the *Native Title Act* 1993 was passed, and that that assumption is to be found in the preamble to that Act. It matters naught that the proposition is directly inconsistent with the law which had governed the situation since 1788.

It is entertaining, though scarcely reassuring, that Kirby J took the opportunity in *Wik* to point out the unwisdom of the *Mabo No. 2* decision, emphasising the many reasons of legal authority, principle and policy which made preferable the understanding of the law which had been stated in *Attorney-General v. Brown.* His Honour pointed to some, at least, of the distinguished High Court Justices of the past who had accepted the principle of that case.

The *Wik* decision is reported.[8] At pp. 205 to 207 Kirby J had this to say as part of the introduction to his judgment:

**"The Mabo decision and its aftermath:**

> Before the decision of this Court in *Mabo v. Queensland [No.2],*[9] the foundation of land law in Australia was as simple as it was clear. From the moment that the lands of Australia were successively annexed to the Crown, they became 'in law the *Property* of the King of England'.[10] It was so in respect of Eastern Australia when Governor Phillip received his first commission from King George III on 12 October, 1786. It was so after the first settlement of the English penal colony was established in Sydney in 1788.[11] No act of appropriation, reservation or setting apart was necessary to vest the title in the land in the Crown. All land, including all waste lands of the colony, were 'without office found, in the Sovereign's possession.... as his or her property'.[12] Land interests were thereafter enjoyed only as, or under, grants made by the Crown. This doctrine, providing the ultimate source of all interests in land in Australia, was upheld by early decisions of the courts of the Australian colonies. But it was also accepted,[13] affirmed[14] and reaffirmed[15] by this Court. Although the indigenous inhabitants of Australia (Aboriginal and Torres Strait Islanders) 'had neither ceded their lands to the Crown nor suffered them to be taken as the spoils of conquest',[16] their legal interests in, and in relation to, the annexed land were considered to be extinguished. If they were to enjoy any such interests thereafter, they could do so only by, or under, a grant from the Crown, the universal repository of the ultimate or 'radical' title.[17]
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> "This apparently unjust and uncompensated deprivation of pre-existing rights distinguished the treatment by the Crown of the indigenous peoples in Australia when compared to other settlements established under the Crown in the American colonies,[18] Canada,[19] New Zealand[20] and elsewhere. The principle was criticised.[21] However, from the point of view of the settlers, their descendants and successors, it was part of Australia's historical reality. From the point of view of legal theory, it had a unifying simplicity to commend it: no legally enforceable rights to land pre-existing annexation and settlement. No title to land except by or under a Crown grant made out of the royal prerogative of the Sovereign in the earliest days and thereafter pursuant to enabling legislation.
>
> "Into this settled and certain world of legal theory and practicality, the decision in *Mabo No. 2*[22] intruded. By that decision, this Court unanimously affirmed that the Crown's acquisition of sovereignty over the territories which now comprise Australia might not be challenged in an Australian court. Upon the acquisition of such sovereignty, the Crown acquired a radical title to the land. But, by majority, the Court held that what it called 'native title' survived the Crown's acquisition of sovereignty and of the radical title".

Some of the decisions referred to by Brennan J in *Mabo No. 2* and restated by Kirby J in *Wik* were dealt with in my paper in Volume 2 of this Society's Proceedings, where it is pointed out that the Canadian and United States decisions required settled habitation for native title to be recognized, and that the doctrine of *terra nullius* was recognized by the International Court in the very decision relied on by Brennan J in *Mabo No.2*. I shall not repeat what I said on that occasion. However, further cases cited in the passage above by Kirby J show the high level of social organisation and lengthy tenure which existed before the Courts of those countries acknowledged Indian or native title.

The case of *Cherokee Nation v. Georgia*[23] cannot rationally be invoked as authority for Aboriginal native title in Australia. The Cherokee were found by the European settlers "in the quiet and uncontrolled possession of an ample domain", and had "by successive treaties yielded their lands", those treaties solemnly guaranteeing the residue "until they retained no more than was deemed necessary to their comfortable subsistence".[24] The Supreme Court of the United States had no difficulty in recognising them as a state, they having been accepted as such from the settlement of what is now the United States. Their title to their land was not and never had been in dispute.

The headnote to *Worcester v. Georgia*[25] clearly evidences the immense difference between Australia and the United States in this connection. Thus it is said that the Indian nations "had always been considered as distinct, independent political communities retaining their original natural rights, as the undisputed possessors of the soil from time immemorial".

The *Pasamaquoddy Tribe Case*[26] concerned a treaty establishing a guardianship role between the United States and the tribes, and the decision went simply to the right of the tribe or the State of Maine to terminate the responsibility of the US Government under the legislation.

The *Apassin Case*[27] dealt with the question whether "spouse" included a "common law spouse".

The paragraph cited earlier from the judgment of Kirby J makes a number of things quite clear. First, the "native title" held by the majority to have survived the Crown's acquisition of sovereignty was, in fact, entirely inconsistent with that sovereignty, and with the doctrine that the sole source of interests in land was the Crown or a grant from the Crown as owner. Second, the Court's decision in *Mabo No. 2* dispossessed the sovereign of property in the wastelands of Australia. Third, the decision of the majority could only operate as a reversal of longstanding legal principle, unchallenged since 1847. It was not a return to earlier principles erroneously displaced by some past decision, nor was it a development of the law in response to some change of circumstance. It was thus wholly outside any ordinary course of judicial decision-making.

*Guerin's Case*[28] dealt with a statutory scheme of disposing of Indian land, the question being whether the Crown was in the position of a trustee. It is difficult to see what this sort of situation contributed to the judgments.

It is difficult to resist the conclusion that the majority in *Mabo No. 2* were emotionally driven by what they saw as unjust treatment of the Aboriginal people, as compared with the attitude towards them of the United States, on the one hand, and our sister Dominions on the other; and, above all, by the leadership said to have been displayed by the International Court in, as it is contended, rejecting the notion of *terra nullius.*

Kirby J appears to have accepted the view attributable to Brennan J in *Mabo No. 2*, that treatment of the Aboriginal people in Australia was unjust compared with the treatment of aboriginal people in the American colonies, Canada and New Zealand. His Honour appears to be relying upon the references to those decisions which are to be found in the judgment of Brennan J, as he then was, in *Mabo No. 2*.

The simple fact, however, is that all of the decisions emphasise the fact that a precondition of native title was settled habitation of long standing. The references are given in the paper which I delivered at the second Conference in July, 1993.[29] The reason was obvious as a matter of history. In pre-historic times, wave after wave of human beings, obviously under the pressure of increasing populations, flooded across Europe, and race after race enjoyed brief superiority only, in turn, to be replaced by a further wave of population.

However, by the time of European colonisation of the New World, it came to be accepted that the displacement of settled people from places which they and their ancestors before them had colonised was unacceptable. On the other hand, where land in the New World was found not to be the property of anyone, that is to say, as we would put it, had not been reduced into possession or, to use the Latin phrase, was *terra nullius,* no moral or ethical objection was seen to its being

colonised by Europeans. In other words, the intermittent presence of itinerant nomads was not seen as a barrier to European settlement. The conditions on which international law disapproved the dispossession of aboriginal people in the new world were precisely those which came to form part of the law relating to native people as set out in the decisions relied upon by Brennan J in *Mabo No. 2*, four of which are analysed in my paper in Volume 2. It should be mentioned that the assertion by Brennan J that the International Court had rejected the *terra nullius* test in the Western Sahara case is also shown there to be quite incorrect.[30]

Shortly, the law of nations required settled habitation for a substantial period, and the domestic law of the United States, Canada and New Zealand accorded native title to those who could meet these scarcely stringent conditions. Any other view would have justified the nomad in seeking to exclude the farmer in perpetuity from the land over which the nomad moved with the seasons. The development of towns and ultimately cities could not have occurred.

In situations in which the human race was hungry for land, it would indeed have been an incitement to violence if the whole of the Australian continent, while presumably from time to time visited by the nomadic tribes, had been regarded as subject to a form of native title which excluded the new settler, especially where the new settler had the skill to produce the fruits of the earth by farming it, while the original inhabitant did not settle on the land and was no more than an intermittent hunter and gatherer. To say this is not to despise the nomad, who is indeed celebrated in Professor Blainey's famous book, *The Triumph of the Nomad*. It is simply to deny his right to lock the land away from settlement and improvement.

What then is the present position? It is now obvious that *Mabo No. 2* was not intended by the inventor of native title to be much more than a public relations exercise, assuring the Aboriginal population of the existence of "native title" subject to largely unprovable conditions such as continued connection with the land, but accompanied by a wink and a nod to the holders of pastoral leases by way of assuring them that their tenures would exclude "common law title".

***Dis aliter visum***

By the time *Wik* was decided, Brennan CJ found himself in a minority, in which he was supported by Dawson J, who had never believed in the *Mabo* doctrine but who did believe in the stability of the land tenure system, and by McHugh J, consistently with his position in *Mabo No. 2*. Obviously enough, both of these Justices had considered that Crown leaseholds would be a satisfactory limitation on the otherwise massive intrusion of "common law title" into the settled land of the continent.

This view has now proved illusory. The warm inner glow generated by the invention of "common law native title" must now yield to the cold reality of *Wik,* and the realisation that the land title system of rural Australia is in a state of total uncertainty. For the effect of each pastoral lease must, it seems, be individually examined for its possible effect on native title, the only attendant certainty being that, even when the lease prevails, it will take years and immense financial outlays to establish the legal situation. This will, of course, be more than acceptable to the industries which have sprung up around native title (notably specialist lawyers on the one hand and compliant anthropologists on the other).

As to the first, in *Wik* there were sixteen interests or groups each with their own solicitors, separately represented by a total of seventeen senior counsel (QCs or SCs) and sixteen juniors. The parties included the Commonwealth, all the States except NSW, and the Northern Territory. As Kirby J pointed out, no party in *Wik* sought to reopen the correctness of *Mabo No. 2,* which must now be perceived to have been invented with a disastrous miscalculation as to its effects on pastoral and mining interests. The wink and the nod has now proved as illusory as the law which, for nearly 200 years, had guaranteed the title of Crown lessees.

The Aborigine is not a farmer. If there is any credible evidence of serious grazing or farming of the vast tracts of the Northern Territory which have been handed to the Aboriginal people, the fact is certainly not widely known. The present consequence of all this self-indulgent but not

unrewarded activity by the legal profession at all levels certainly invests the Aboriginal claimants with a nuisance value which is probably of more use to them than the title itself. Aided and abetted by sociologists and lawyers they are, at this stage, invested with a capacity to delay, seemingly indefinitely, development which is essential to the country. We are, in a sense, back to the problems which led medieval lawyers to speak of land being held in *mortmain*, that is, by a dead and unproductive hand.

**Conclusion**

The Court, of its nature, has no capacity for pragmatic decision making, which is why the efforts of the Justices to dig themselves out of the quagmire they have created lands them even deeper in the mess. Only the Parliament can sort it out. It is quite incredible that, in the few short years since 1992, the land titles of Australia should have become a playground for lawyers, sociologists, anthropologists and journalists. No one dares to tell the electorate how much it is costing, but they can tell for themselves that it is never-ending and, so far, has served no useful purpose.

One pragmatic solution might be to accept *Mabo No. 2* with all its faults so that, at least, a Crown grant would be conclusive of the title of the grantee. The other is to abandon the oppressive requirement that title holders whose titles are attacked by Aboriginal claimants be under an obligation to negotiate until a case has been made out. The current situation offers them a choice between walking off the land and bankrupting themselves in protracted negotiation with claimants who may never make out a case, but are funded by government at the expense of the Australian people in asserting their claims.

**Happy ending?**

Since this paper was initially prepared, the Senate has reconsidered many aspects of the native title problem. As a result of understandings reached between the Government and Senator Harradine, the Senate has withdrawn from certain positions which it had adopted, and the Bill, with consequential modifications, was returned to the House with the amending legislation essentially as amended by the Senate. By reason of the drafting complications, the final text is not yet available, but for immediate purposes the state of the legislation may be shortly and no doubt imperfectly described as follows.

The most helpful document available at the moment of writing (24 July, 1998) is a paper which was made available to the writer by Senator O'Chee, the National Party Whip in the Senate. It is headed *Native Title Amendment Bill,* July, 1998 Amendments. References to "the Agreement" are to the agreement reached between the Government and Senator Harradine. The essential features of that agreement are set out in the paper, the principal of such features being as follows:

**"Rationale**

> The agreement delivers certainty in relation to freehold, exclusive leases and non-exclusive leases. Those with grants of freehold or exclusive possession have the certainty of knowing native title is extinguished completely and permanently.
>
> Pastoral leases have the certainty that native title is suppressed for the term of the pastoral lease (including any renewals) to the extent native title is inconsistent with primary production activities.
>
> The High Court is currently considering the question whether native title can revive after a freehold grant. It was argued that the position in relation to grants of non-exclusive leases (e.g., pastoral leases) is not so clear because some of the judgments in the High Court's decision in Wik left open the possibility that native title rights which are inconsistent with such a grant are only 'suppressed' for the duration of the grant, not extinguished.

In any event, the Government believes that its view of the law, that a pastoral lease does in fact extinguish inconsistent native title rights permanently, will be ultimately confirmed by the High Court…..

**4. Primary production**

***Original position***

The Bill makes clear that a government can grant additional rights to a pastoralist to undertake new activities in the future provided that those activities come within the definition of 'primary production'…..

***Agreement***

The Bill will now limit the operation of this provision to activities which could have been authorised on a lease on 31 March, 1998.

***Rationale***

All relevant State and Territory governments had confirmed that their legislation regulating pastoral leases contained sufficient discretions (either in the Minister or Pastoral Board) to give full effect to the intentions of the 10-point plan concerning diversification on pastoral leases.

**5. Primary production — "off-farm" activities**

***Original position***

The Bill ensures that a government can grant licences for grazing or for access to or the taking of water in the future (where such rights are not now in existence) on vacant Crown or reserved land abutting pastoral or freehold tenures where that activity is connected with the farming activity on those tenures, provided notification is given to any native title holders and they have an opportunity to comment. Renewals of such rights can be made without reference to native title holders……

**6. Renewals of pastoral lease and other interests**

***Rationale***

These amendments confirm the right to negotiate will not affect pastoral lessees extending the term of their lease or converting it to perpetual. However it does provide native title holders with an opportunity to be consulted by the relevant State or Territory Government".

One of the features of the previous legislation which had occasioned most difficulty for miners and pastoralists was the seemingly endless right to negotiate at a stage when it was not clear whether the claimants would ever make out a native title. The required factual basis for a claim of native title is now largely to be found in section 190B, subsection (5) of which calls for evidence that:

(a)the claimants have and their predecessors had an association with the area;

(b)traditional laws and customs giving rise to the claim are observed by the claimants; and

(c)the claimants have continued to hold the native title in accordance with those traditional laws and customs.

The language in which these requirements are stated reflects the extreme difficulty of identifying rights to be accorded to nomadic people who make no claim of possession. Presumably "association" would be satisfied by the periodical resort of the claimants or their ancestors to the land in question for hunting, food gathering or traditional practices. The notion of traditional laws and customs will obviously give rise to difficulties for, of their nature, they are not recorded, but the ingenuity of the supporting industries, as evidenced in Hindmarsh Island, will no doubt overcome this problem.

A much greater difficulty will be posed by s.190B(5)(c). What is meant by "holding the native title"? No doubt it will be contended that this means "claiming the native title", but the two are obviously not the same, particularly when there are rival claimants. Of course, the fact that the ancestors of the claimants were never in possession of identifiable land is where the whole problem started at the time of first settlement. Had they been in possession, then it was the duty of the Governors to respect their settled habitation. This problem has not gone away in the ensuing 200 years, and it never will.

The intention of the amending legislation is to confirm that grants of freehold and exclusive possession extinguish native title completely and permanently. Pastoral leases are to "suppress" native title for the term of the lease (including renewals) to the extent that native title is inconsistent with "primary production", an expression which is to extend to additional activities by way of diversification authorised by the relevant government, including "off-farm" activities. It is to be made clear by s.241 C that leases, licences and the like may be renewed or extended (even to perpetuity) without the involvement of native title holders provided the area is not extended. In relation, however, to mining leases, the right to negotiate is, it seems, to be maintained if the period of the lease is to be extended or rights thereunder are to be enlarged.[31]

Provision is to be made for State governments to provide alternatives to the former right to negotiate in relation to current and historic pastoral leases, subject to the requirements of s.43A of the Bill, which calls for the same procedural rights for native title holders as for others. The provisions appear to reflect concern about the possible impact of mining leases or acquisitions on native title. The ultimate authority is to be with the Minister for Aboriginal Affairs, and the criterion is to be that the development in question is "in the interest of the State", which will be defined to include social and economic benefit including that of the indigenous peoples. Compulsory acquisition for infrastructure and in towns and cities will remain exempt from the right to negotiate, but native title holders will be consulted in relation to the impact of the proposed development on them.

It is important to note that the new legislation imposes a more rigorous test for the establishment of native title by s.190B(7), which requires that at least one of the claimants has or has had a "traditional *physical* connection with some part of the land or waters claimed", or would reasonably have been expected currently to have such a connection but for things done by or under the authority of the Crown or the holder of a lease.

It is clear that the grant of a lease, or the exercise of the lessee's rights, are not in themselves factors which are to be regarded as excluding the requirement of traditional physical connection. Obviously the Parliament intends that *action*, either by the Crown or the grantee from the Crown, precluding traditional physical connection shall have occurred before the applicant is excused from showing that physical connection. It should be noted that s.190B(7) means that the Parliament has rejected the notion of spiritual connection with the land as a basis for native title, and has opted for the down to earth and at least manageable notion of impairment of the actual lifestyle of the Aboriginal people.

This, however, is not the end of the matter. By s.190D(1A), if the claim for registration is rejected, because s.190B(7) is not satisfied, the Federal Court may order the claim to be accepted if "*prima facie* at least some of the native title rights and interests claimed can be established" and a parent of one of the claimants, in the latter's lifetime, had the necessary connection with the land in question and would have maintained it but for things done under the authority of the Crown or a lessee: s.190D(4).

The legislation is intended to clarify the part to be played in the future by the *Racial Discrimination Act* 1974. The intention of the Parliament is that the *Racial Discrimination Act* cannot impair the validity of a statute of the Parliament of the Commonwealth affecting native title. It was established in *Western Australia v. The Commonwealth*[32] that the *Racial Discrimination Act* did not alter the common law relating to native title (that is, the common law

as declared by *Mabo No.2*). It did, however, by s.10 add to the common law rights of native title holders a statutory protection against discriminatory impairment of native title.[33] It is pointed out, however, that the *Native Title Act* protects native title holders against *any* impairment of their native title.

In conclusion, I offer the tentative opinion that the legislation will ultimately achieve something like an acceptance of *Mabo No.2* with all its faults. In other words, the invention of native title is obviously here to stay but is likely to be overridden by Crown grants. The right to negotiate is no longer intended to be never ending, and much of it is to be replaced by ministerial decision. It will be noted that this last feature would seem to indicate that the Parliament has despaired of the Courts in this area.

Putting aside the propriety, from a legal point of view, of the invention of native title in *Mabo No.2,* and the inconsistency of that essentially legislative exercise with the doctrine of separation of powers so dear to the hearts of High Court Justices, the most disruptive act of the High Court was the refusal of the *Wik* majority to accept the opinion of Mason CJ, Brennan and McHugh JJ that Crown grants completely override the newly invented native title. McHugh J is on record as saying that the invention might well not have been supported by himself and others had they realised that native title could survive Crown grants of freehold and pastoral leases, and that he had assumed that native title would apply only to alienated or vacant Crown land. The legislation recently before the Senate has restored a measure of sanity. The assumption made by the majority in *Mabo No. 2* was not unreasonable at the time, but the subsequent history of the native title invention has demonstrated to all who value the certainty of the judicial system how unwise legal adventurism can be. As to native title, it may fairly be hoped that the *Native Title Amendment Act* will, in its essentials, prove a workable solution of a judge-made imbroglio.

**Endnotes:**

1. 1 Legge 312.

2. (1975) 135 CLR at 438.

3. See *Randwick Corporation v. Rutledge* (1959) 102 CLR 54 in which Dixon CJ concurred in the opinion of Windeyer J.

4. 175 CLR 1 at 71 per Brennan J, agreed in by Mason CJ and McHugh J at 15.

5. *Ibid.*, at 145-60.

6. See the judgment of Kirby J in *Wik* (1996) 187 CLR 1 at 250.

7. "A preferable description is 'traditional title' "; cf. *Mabo v. Queensland [No2]* (1992) 175 CLR 1 at 176, per Toohey J. The words "aboriginal natives" appeared in the Constitution, in s.127 (now repealed) and in colonial legislation. In the statement of claim and notice of appeal, the appellants refer to "Aboriginal title". However, such title rights are not confined to Aborigines. They extend to other indigenous peoples. The term "native title" has been used repeatedly in decisions of this Court and other Australian courts. It is now used in Federal and State legislation. It is therefore used throughout these reasons".

   (This paragraph is printed as a footnote to the judgment of Kirby J.)

8. (1996) 187 CLR 1.

9. (1992) 175 CLR 1.

10. *Williams v. Attorney-General (NSW)* (1913) 16 CLR 404 at 439, per Isaacs J. See also Fry, *Land Tenures in Australian Law, Res Judicatae,* Volume 3 (1947) 158.

11. *Attorney-General (NSW) v. Brown* (1847) 1 Legge 312.

12. *Attorney-General (NSW) v. Brown* (1847) 1 Legge 312.

13. *Williams v. Attorney-General (NSW)* (1913) 16 CLR 404 at 439.

14. *Randwick Corporation v. Rutledge* (1959) 102 CLR 54 at 71.

15. *New South Wales v. The Commonwealth* (the *Seas and Submerged Lands Case)* (1975) 135 CLR 337 at 438.

16. *Mabo [No2]* (1992) 175 CLR 1 at 29, per Brennan J.

17. See also Fry, *Land Tenures in Australian Law*, *Res Judicatae,* Volume 3 (1947) 158 CLR, at p. 158, citing *Williams v. Attorney-General (NSW)* (1913) 16 CLR 404 at 439, per Isaacs J.

18. *Cherokee Nation v. Georgia* (1831) Peters 1; *Worcester v. Georgia* (1832) 6 Peters 515; *Menominee Tribe of Indians v. United States* (1968) 391 US 404; *Joint Tribal Council of the Pasamaquoddy Tribe v. Morton* (1975) 528 F 2d 370; cf. *Mabo [No2]* (1992) 175 CLR 1 at 135-36.

19. *Guerin v. The Queen* [1984] 2 SCR 335; (1984) 13 DLR (4th) 321; *Sparrow v. The Queen* [1990] SCR 1075; (1990) 70 DLR (4th) 385; *Delgamuukw v. British Columbia* (1993) 104 DLR (4th) 470; affirmed sub nom *R. v. Van der Peet* [1996]2 SCR 507; (1996) 137 DLR (4th) 289; *Apassin v. The Queen* [1995] 4 SCR 344; (1995) 130 DLR (4th) 766; cf. *Mabo [No2]* (1992) 175 CLR 1 at 131-35.

20. *In re the Ninety-Mile Beach* [1963] NZLR 461 at 468; cf. *Mabo [No2]* (1992) 175 CLR 1 at 137.

21. *Milirrpum v. Nabalco Pty Ltd* (1971) 17 FLR 141 at 256.

22. (1992) 175 CLR 1.

23. (1831) 5 Peters 1.

24. *Ibid.*. See per Marshall CJ at 14-15.

25. (1838) 6 Peters 515.

26. (1975) 528 F 2d 370.

27. (1995) 130 DLR (4th) 766, cited under note 19 *supra*.

28. (1984) 2 SCR 335.

29. *Upholding the Australian Constitution,* Proceedings of The Samuel Griffith Society, Volume 2 (1993), pp. 100-102.

30. *Ibid.,* pp. 103-4.

31. See at p.7 of the paper provided by Senator O'Chee, paragraph 10.

32. (1995) 183 CLR 373.

33. *Ibid.*.