Chapter Four:
Native Title Now

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There are causes that seem to entitle their promoters to parade as worthier and more enlightened than the rest of us. Aboriginal "land rights" had this *cachet* by 1970.

Mabo the First

Events of the last thirty years are still "native title now". In 1971 Woodward, QC led the first attempt to take the cause to the courts: *Milirrpum v. Nabalco*. But our judges were not yet accustomed to political litigation. As a political gesture, however, *Milirrpum* was not in vain. Woodward and Gerard Brennan were commissioned to devise land rights for the Northern Territory – statutory rights to fit into the legal system without upsetting the land law of Australia. They designed a new kind of Crown grant, the Aboriginal land trust, but not in time for Mr Whitlam to take the credit; in 1976 Malcolm Fraser put the *Aboriginal Land Rights (Northern Territory) Act* through Parliament and now almost half the Territory is subject to it.

The grand plan was to make the Northern Territory Act a national scheme, but the Hawke Government got cold feet, leaving it open for six judges to seek a place in history, as they saw it, in a re-run of *Milirrpum: Mabo v. Queensland* (No 2). Land rights enthusiasts organised it in the name of a Townsville university employee. The statement of claim was amended and re-amended until finally, as Toohey J noted, it was "formulated during the [High Court] hearing" itself. Apparently this chopping and changing of the story did not affect its credibility in any way.

The High Court decided to collect some evidence before legislating. The task was assigned to a Queensland judge. He was sharply critical of Eddie Mabo, some of his witnesses, and Europeans' "noble savage" romances that glossed over the less appealing aspects of traditional island life. But the High Court largely ignored the trial judge's report as it transformed a claim to a tiny Torres Strait island into vague judicial legislation for Australian Aborigines, who were not parties to the cause. In blithe disregard of judicial method the court answered questions that did not arise. What the Hawke Government had decided not to do was done by judges free from electoral responsibility. It is doubtful whether they expected their decrees to be workable, but they were a means to force governments to legislate, and citizens to "negotiate", regardless of the fact that the Northern Territory and several States already had more intelligible and less disruptive "land rights" in place.

At first *Mabo* affected only Crown lands not leased to private interests, or so Brennan J, its chief architect, said. But confusion reigned supreme and the *Native Title Act* 1993 ("the *NTA*") did little to resolve it. The *NTA*'s main contribution was a statutory injunction called the "right to negotiate". It made *Mabo* a more potent means of securing "voluntary" settlements from governments, farmers, miners and developers. The *NTA* also extended *Mabo* to areas offshore. A billion-dollar "land acquisition fund" was established for people who were unlikely to profit from *Mabo.*

***Mabo* extended**

The judges had not finished yet. For Christmas, 1995 they gave us the *Wik* decision, greatly enlarging the amount of Australia open to native title claims. Contrary to the Brennan version of *Mabo*, it was now revealed that many Crown leases were not really leases, because they do not confer the exclusive possession that rules out native title. Why not? Because governments 50 or 100 years ago overlooked the possibility that in 1992 judges would be disposed to make radical changes to our land law – Catch 22, because most of the relevant laws and leases were made long before *Mabo* was thought of.

This is Kirby J's rationalisation of *Wik*:

> "The present must revisit the past to produce a result, wholly unexpected at the time [with] ... an inescapable degree of artificiality".

Sir Humphrey Appleby could hardly put it better. Brennan J dissented, disowning his overgrown child, but the genie was out of the bottle. Six months later Malcolm Fraser deplored the runaway effects and unintended consequences of his Northern Territory Act.[1] (That was before Malcolm began to compete with Governor-General Deane as Conscience of the Nation). The media was already describing native title claimants as "traditional owners".

Then *Mabo* was matched by a ministerial fiat under the *Aboriginal and Torres Strait Islander Heritage Protection Act* 1984. In the name of "secret women's business", Minister Robert Tickner banned construction of a Hindmarsh Island bridge for 25 years. So secret was the "business" in Tickner's reverent eyes that he did not look for evidence of it before he imposed the ban.

For that legal howler the ban was set aside. Thereupon the zealous politician abandoned his original adviser (an academic lady from Melbourne) and recruited a female Federal Court judge to conduct another inquiry. That plan backfired for constitutional reasons, after the judicial lady spent a great deal of money: *Wilson v. The Commonwealth* (1996). After more extravagant litigation and much public acrimony a Royal Commission concluded that the "secret business" was fabricated. The ALP Opposition then supported an amendment to exempt Hindmarsh from further "heritage" claims.

But taxpayers had not finished paying for "secret business". Back in the High Court it was argued that laws for the special benefit of Aborigines can never be amended down or repealed: *Kartinyeri v. The Commonwealth* (1998). That bold challenge failed, but the rest is *not* history. Late last month a Federal Court judge held that the "secret business" might not be a sham after all: *Chapman v. Luminis Pty Ltd* (No 5) 22 August, 2001.

One of the few clear points in *Mabo* is that freehold land is immune from native title. But when legal aid flows freely almost anything is "arguable". In a 1998 case sponsored by the Northern Land Council the High Court was asked to rule that when a freehold is compulsorily resumed (as for a hospital) it is open to native title claims again. The patience of Michael McHugh, a not-so-enthusiastic member of the *Mabo* majority, was now exhausted:

> "You are trying to argue this case ... without paying any attention to what the Court said in *Mabo*. ... So far as I was concerned, my view [there] was that native title would apply only to unalienated Crown land. If, for example, I thought it was going to apply to freehold, [or] leaseholds, I [may well] have joined Justice Dawson [in dissent], and it may well be that that was also the view of other members of the Court ... If [native title over Crown leases] had ... been ... part of the *Mabo* issue – again, I am not sure ... whether I would have subscribed to the *Mabo* doctrine".

But he did. It seemed like a good idea at the time, and the brethren were so excited about it:

> "But in the setting of the time, and given the reservations in *Mabo*, it seemed to me proper that the Court should take the step that it did, because it was going to affect basically unalienated Crown land".[2]

This exercise in litigious politics failed, and for once the High Court was unanimous: *Fejo v. Northern Territory* (1998).

Mabo goes to sea

The next politico-legal foray was the *Croker Island Case*, sponsored by the Northern Land Council: *Yarmirr v. Northern Territory* (1998). Exclusive fishing rights were claimed over a wide sweep of ocean off Darwin; and for good measure, title to the seabed and minerals under it. Substantially the claim failed. The consolation prize was a non-exclusive, non-commercial fishing right, but no seabed or minerals.

Inevitably, there was a publicly-funded appeal. Off went the plaintiffs to three judges of the Federal Court. That tribunal has no special Appeal Court; any three of its forty-odd judges may constitute a "full court". An ex-industrial lawyer, for instance, may hear an appeal in a legal area in which he has little or no experience. It would be interesting to know how panels for the Federal Court's more political cases are selected, and whether there is lobbying to be on them.

However, the Croker Island appeal was dismissed by two votes to one, Merkel J dissenting. Ronald Merkel was appointed to the Federal Court in 1996, having shown special interest in "native" litigation. In October, 1994, as a barrister, he addressed a three-day conference of "stolen children" on ways and means of seeking damages against governments and welfare agencies.[3] According to another Queen's Counsel that address "kindled and inflamed feelings of great injustice ... when that was not the case, and raised their hopes of substantial financial compensation ... [later] dashed by the courts".

As a matter of professional prudence and propriety, "no barrister should give advice to a large gathering of people, each of whom has a different story".[4] In August, 1999 the Victorian Solicitor-General objected to Merkel's sitting on the *Yorta* appeal (below). He was a member of the Koori Heritage Trust for almost three years after he joined the court that has a near-monopoly of "native" litigation. It was also objected that Merkel, as a barrister, had advised the Yorta Yorta clan.[5] He was absent from the appeal.

A second Croker Island appeal was heard by the High Court last February. Judgment is reserved.

Claiming the Riverina

In 1998 the Croker Island judge, Olney J, heard another ambitious action: *Yorta Yorta People v. Victoria and Others*. The plaintiffs claimed native title over about 2,000 square kilometres of long-settled lands along the Victoria-NSW border, including the towns of Shepparton, Echuca and Wangaratta. They were supported by 56 Aboriginal witnesses and two anthropologists. The defendants called two of the very few anthropologists prepared to question native title claims, namely Kenneth Maddock and Ronald Brunton. According to Maddock, there was "at most ... a shadowy and vestigial survival" of the "traditional laws and customs" of the Yorta Yorta.

Olney does not subscribe to the view that native title claims must be approached with credulous reverence. He refused to "play the role of social engineer ... according to contemporary notions of political correctness". He detected "two senior members of the claimant group ... telling deliberate lies", and found some of their supporters equally unimpressive: "Evidence based on oral tradition does not gain in strength or credit through embellishment". He discounted, albeit gently, the credit of the claimants' chief anthropologist:

> "Mr Hagen ... spent 5 weeks working with the applicants. In evidence he conceded that his active participation in the conduct of the proceedings indicates a close association with the applicants and perhaps [sic] a degree of partisanship ... Mr Hagen conceded that the only evidence he had concerning the boundaries ... was ... supplied by the applicants themselves. That information must necessarily be regarded as ... [a] recent invention".[6]

A witness for the claimants testified: "We are trying to ... put everything back together ... a lot of our stuff is lying dormant but we could fire that up again". But Olney did not "regard [him] as a reliable witness but rather as one prone to avoid direct answers to straightforward questions". Generally the judge was unimpressed by recent efforts to de-assimilate, re-tribalise, or "revive the lost culture". In a passage that has miraculously escaped charges of blasphemy he wrote:

> "The main ... contemporary activity by members of the claimant group has to do with the protection of what are regarded as sacred sites ... Oven mounds, shell middens and scarred trees ... [But the] shell middens are nothing more than accumulations of the remains of shell fish frequently found on the banks of rivers ... there is no evidence to suggest that they were of any significance to the original inhabitants other than for their utilitarian value, nor that any traditional law or custom required them to be preserved".

It is a tenet of romantic primitivism that Aborigines were model conservators of the environment and natural resources. With respect to fishing the evidence in *Yorta* is to the contrary.

Even so, the *zeitgeist* may have induced some compromise if the defendant States had not had the good fortune to turn up a significant document from 1881. It was a petition to the Governor of New South Wales, signed by forty-odd ancestors of the plaintiffs, indicating that they had abandoned their traditional lifestyle. It read in part:

> "We have been under training for some years and feel that our old mode of life is not in keeping with the instructions we have received and we are earnestly desirous of settling down to more orderly habits of industry, that we may form homes for our families".

After 114 days' hearing, 201 witnesses, and a transcript of 11,664 pages, Olney J gave judgment on 18 December, 1998. His reasons are admirably concise – just forty-odd pages compared with hundreds in *Ward and Cubillo* (below). The action was dismissed. Any relevant native title had been extinguished:

> "When the tide of history has washed away any real acknowledgment of traditional law and any real observance of traditional customs, the foundation of native title has disappeared".

In the light of the solemn petition Olney concluded:

> "It is clear that by 1881 those through whom the claimant group now seeks to establish native title were no longer in possession of their tribal lands and had ... ceased to observe those laws and customs based on tradition which might otherwise have provided a basis for the ... claim".

He noted – the irony was no doubt unintended – that "Yorta [is] a word for 'No' amongst people of this area". It remained for taxpayers to bear costs of several million dollars.

The Yorta appealed, arguing that the trial judge had not taken a sufficiently broad and benign view of "surviving and continuing" traditions: *Yorta Yorta Aboriginal Community v. State of Victoria* (2001). But a majority of the Full Court (Branson and Katz JJ) disagreed. In their opinion there was "more than adequate" proof that the relevant traditions and connections to land no longer existed:

> "So long as there is evidence which is open to an interpretation that supports the finding of the trial judge, we consider this court should not interfere with the findings".

However, they offered this encouragement to claimants when their opponents have less luck in the search for evidence in rebuttal:

> "In circumstances where it is impractical to continue a physical presence [a group] may nevertheless maintain its spiritual and cultural connection with the land in other ways. Whether it has done so will be a question of fact".

Black CJ dissented, contending that native title can survive "profound changes" in the manner in which people of Aboriginal background choose to live. Despite the admissions in 1881 he was convinced that "a spiritual and cultural connection with the land" had been maintained since the First Fleet landed at Sydney Cove. Recently revived expeditions for "bush tucker" were persuasive, even if "the hunter obtained his ordinary sustenance ... at a supermarket"!

Meanwhile a case about crocodiles wound its costly way to the High Court: *Yanner v. Eaton* (1999). In 1994 Jason (aka Murrandoo) Yanner slew two crocodiles without the licence required by Queensland's fauna protection laws. The State Court of Appeal rejected a claim that he, as a part-Aborigine, was entitled by tradition to ignore those laws, but the High Court accepted it. So the hunt remained "traditional" despite the use of a metal motor boat, and the storage of the meat in a large modern refrigerator. Evidently this is what is meant by a "spiritual" approach to what are alleged to be pre-1788 customs. According to Gummow J (as echoed by Black CJ in *Yorta*): "This was an evolved or altered form of traditional behaviour", and "... hunting with a motor vehicle or a firearm is an adaptation of a traditional right to hunt". However, native title defences to unlawful fishing charges were rejected by State courts in *Mason v. Tritton* (NSW 1994) and *Dillon v. Davies* (Tasmania 1998).

No less ambitious than *Yorta* was an action promoted by the Kimberley Land Council entitled *Ward v. Western Australia* (1998). Three weeks before the *Yorta* judgment, Lee J gave two clans sweeping native title rights over 7,900 square kilometres of north-west Australia, including Lake Argyle and the Ord River irrigation scheme, and parts of the Northern Territory's Keep River National Park. The award included all "resources" in that mineral-rich area. (Lee coyly avoided the word "minerals".) Just what "traditional laws and customs" had to do with diamonds and minerals deep in the earth and recoverable only by modern mining technology was not adequately explained.

Western Australia and the Territory challenged Lee's imaginative decrees: *Western Australia v. Ward* (2000). Beaumont and Von Doussa JJ substantially allowed the appeal, with North J, a former industrial advocate, dissenting. Native title over remote areas and some pastoral leases was allowed to stand, except where lessees had enclosed or improved their land. But contrary to Lee's judgment it was extinguished in the Ord River irrigation area and the Argyle Diamond project, where modern land uses were "completely inconsistent with the continued enjoyment of native title". Moreover any native title to minerals was extinguished by legislation long before *Mabo* was thought of. (The position is the same in Queensland – *Wik Peoples v. State of Queensland* (1996) – and the Northern Territory: *Yarmirr v. Northern Territory* (1998). This writer expressed the same opinion in 1993.[7])

But as in *Yorta*, crucial ambiguities were preserved. A "spiritual" connection to land may suffice if access has been denied, or if the claimant group has so "dwindled" that it cannot maintain a physical presence. Spiritual connection is a matter of "fact and degree", as assessed by the federal judge who is assigned to the case. If those *dicta* seem vague, ponder these: "The degree of specificity required in a determination ... is likely to vary from case to case". Lee J was entitled to find a "spiritual" connection with some of the land claimed because "none of the witnesses for the [claimants] said that their connections with the land had ceased". Would they be likely to, with others listening? Where else does the absence of an admission that "X" is non-existent amount to proof that "X" exists?

A High Court appeal in *Ward* was completed on 16 March this year. Judgment is reserved.

Uncertainty about pastoral leases increased in April, 2000 when a full Federal Court held that a soldier settlement lease in western New South Wales, granted in 1953, is open to native title. There are 8,494 similar leases covering almost half the State.

"Stolen Children"

The "stolen child" cases are closely associated with native title litigation. Each type of action pursues "indigenous" separatism, grievances and financial ambitions in courts instead of Parliaments. In "stolen child" cases, however, the historical perspective is shorter, and the prospects of testing claimants' stories are better, although defendants still confront stories of 50 or 60 years ago. At all events there is less scope for the anthropologists, whose advocacy is so helpful where land is involved.

This form of politico-legal activity began in 1997 with a claim that the Northern Territory's child-welfare laws of the 1940s violated certain "implied rights" in the Commonwealth Constitution: *Kruger v. Commonwealth* (1997). The case was planned when the Mason-Brennan court's enthusiasm for "implied rights" was high, but by the time *Kruger* was heard that fashion was waning. The suggested "implications" were not visible to Their Honours and so the action failed. A makeweight plea of "genocide" was rejected on two grounds: there is no such cause of action in Australian law, and there was no evidence of an intention to destroy any ethnic, religious or racial group.

After *Kruger* it was decided that private law actions for compensation were a better bet. First off the rank was an action in the New South Wales Supreme Court: *Williams v. The Minister, Aboriginal Land Rights Act* (1999). Before the hearing ended it had ceased to be a case of a "stolen child"; the plaintiff had to admit that her mother voluntarily placed her in care. The action was hastily re-designed as a claim for damages for ill-treatment resulting in mental illness.

Abadee J, who had the invidious duty of dismissing the action, made an initial effort to mollify its publicists and promoters: "I am particularly conscious of the sensitive, indeed controversial nature of the issues ...". He disclaimed the language of "a different Australia", such as "illegitimate", "half caste", and even "fair skinned". Perhaps people had been brought in to glower and murmur in the public gallery, a common enough practice in these cases.

But the soothing overture gave way to sharper notes. Abadee J refused to judge the 1940s "through the so-called enlightened ... views of the 1990s". There had been inexcusable delay in commencing the action, occasioning serious prejudice to the defence. Grave and inflammatory allegations were maintained long after they became untenable. Williams' complaints of sexual assaults and racial prejudice were false. The judge went out of his way to vindicate people who had cared for her as a child: "No criticism of [them] for failing to take proper care is justified on the evidence before me". Williams had had "every chance to prove her case" in a hearing lasting almost four weeks but had failed to do so, despite the extraordinary privilege of giving evidence in writing without cross-examination. An appeal to the High Court was dismissed on 22 June, 2001.

Enormous resources were invested in *Cubillo and Gunner v. The Commonwealth* (2000), the flagship of the "stolen child" fleet so far. The plaintiffs alleged that in 1947 and 1956 respectively they were made wards of state and kept in church homes against their parents' will. They claimed heavy damages for wrongful imprisonment and breaches of duties of care. The claims could have been nipped in the bud for long and inexcusable delay – even longer than in *Williams*. "So much time has passed", said O'Loughlin J, "[and] so many witnesses are dead, that it is not possible to proceed with confidence". But proceed he did, mindful, no doubt, of protests that would be orchestrated if he struck the action out. Eventually delay was one of the grounds for dismissal, but only after a trial lasting 94 days, huge outlays of court resources and legal aid, and a judgment of 485 pages. Judges do not usually write books to explain why they have sent plaintiffs away empty-handed.

As in *Williams*, "exceptionally serious accusations ... were made ... [and] maintained until the last moment". The judge remarked that the Wilson-Dodson *Bringing Them Home* report was "not referred to ... by any [party]". As in *Williams*, there was an initial display of "cultural sensitivity", but the judgment contains more robust criticisms than placebos. There was no substance to the invalidity argument. The plaintiffs had failed to prove any wrongful removal or detention, and there was no evidence of any policy of removing part-Aboriginal children without regard to their welfare:

> "Many of the children who lived in the [same home as Cubillo] were there because it was the wish of their families ... There were part-Aboriginal children residing in [another home] ... whose parents were paying ... an amount towards their board and keep. These payments were a clear indication that those children were [there] ... with the informed consent [of their parents]".

It is a judicial act of grace, in rejecting a witness's evidence, to abstain from expressly calling him a liar, even when he is. So at first O'Loughlin attributed false evidence to subconscious rearrangements of reality:

> "I do not think that the evidence of either Mrs Cubillo or Mr Gunner was deliberately untruthful but ... I am concerned that they have unconsciously engaged in exercises of reconstruction, based not on what they knew at the time, but on what they have convinced themselves must have happened, *or what others may have told them*". [emphasis added]

But in due course there was plainer speech:

> "[Mrs Cubillo's] evidence on [removal] cannot be accepted as reliable ... there were aspects of her story which caused me concern. She had earlier said ... that she had little knowledge of English as a small child. ... Nevertheless she claimed she was able to remember that Mr McGinness said to Mr Harney that she was a 'half caste'. I find it difficult to accept that she would have been able to understand and remember such a statement...
>
> "I am satisfied that Mrs Cubillo has engaged in an exercise of reconstruction. *Perhaps* she did it subconsciously. However, there are too many contradictions in her evidence to accept her description [of removal]". [emphasis added]

Cubillo complained that she was not allowed to visit her family. But they knew where she was, and other children were allowed to spend holidays with their relatives. If Cubillo's family ties were as strong as she claimed, why didn't she do the same?

> "As so often happened when an embarrassing question was put to her, Mrs Cubillo gave a disjointed answer ... *[She] saw the trap.* If Olive Kennedy could regularly visit her family, why could Mrs Cubillo not visit hers?". [emphasis added]

Cubillo claimed that for years when she was in a church home, her mother visited her often. When asked how her mother travelled to Darwin for that purpose Cubillo said that she obtained lifts in a delivery truck. Other evidence showed that the truck was available for a few months only. Cubillo then said that her mother walked to and from Darwin. When reminded that the trip was 65 kilometres each way:

> "Mrs Cubillo replied that she did not know the distance .... There then followed a frustrating series of questions and answers designed to extract ... a concession that it would have taken a considerable time to walk that distance. Mrs Cubillo [knew] that it would not have been possible for Maisie to have made a regular habit of walking such distances. She sought to avoid the issue".

She was asked about a conference in October, 1994 when Merkel, QC (now of the Federal Court) encouraged the "stolen generation" to sue. She agreed that she was there but claimed she "didn't understand the legal jargon". O'Loughlin J did not believe her:

> "I do not accept this passage of false modesty ... I am satisfied that she would have well understood the purpose of the conference ... She was very defensive ... Her demeanour, at this stage, was not impressive".

Another question was whether Cubillo was interviewed by an organiser named Katona in 1990. Katona produced a record of the meeting, but:

> " Surprisingly, [Cubillo] vehemently rejected it to the point of rudeness. ... [she] denied, most strenuously, that she had ever spoken to Katona ... [This is] most difficult to accept".

Finally judicial patience was exhausted. No longer was it a case of subconscious "exercises of reconstruction":

> "There [is] no room for a gentle finding that there may have been a lapse of memory. ... I must conclude that Mrs Cubillo *deliberately* attempted to mislead the court". [emphasis added]

The credit of witnesses in native title cases may often be similarly affected, but it is usually much harder to check.

The judgment presents the plaintiff Gunner as "sullen and moody" and a "very unreliable witness". "Simple questions that were capable of simple answers were converted into confused ramblings", although Gunner had worked as a law clerk. Initially he claimed that his family rejected him when he left the church home, but under cross-examination "he told an entirely different and contradictory story". All in all:

> "There were many areas in the evidence of Mr Gunner that were, for one reason or another, unsatisfactory. They were, in some cases, so unsatisfactory that I would not rely on them without independent corroboration".

The trial judge in *Mabo* said the same about the man who gave his name to that case. Other evidence for Cubillo and Gunner was not impressive:

> "Under cross-examination Mr Lane became first defensive, then truculent. He has instituted proceedings in the High Court claiming compensation against the Commonwealth, allegedly because he is a member of 'the Stolen Generation'. ... However, when a copy of the writ was put to him he denied that he had ever given instructions for its issue. Mr Lane is not illiterate".

There was the unexplained absence of available and potentially important witnesses. There was evidence that when Gunner was a baby, his mother (Topsy) rejected him. O'Loughlin J remarked:

> "[W]ho better than Topsy's sisters to give evidence to the contrary? Their absence suggested that their evidence would not support a finding of non-consensual removal [and] was most noticeable".

It was an over-arching purpose of the action to advertise the claim that hundreds, even thousands were "stolen", but only eight Aborigines testified for the plaintiffs. Four of them conceded that "they had been placed in the institution at the request of their parents". The plaintiffs had ready access to other "stolen children" but they were not presented to the court.

Fifty-odd years after the events in question, the Commonwealth was naturally unable to call many of the people who administered Aboriginal welfare at the time. Many of their records had perished – some in the Japanese air raids on Darwin in 1942. But surviving documents impressed the judge as "powerful reminders that there were European people in the Northern Territory in the 1940s who were dedicated [to] the health and education of Aboriginal people". Two former welfare officers still living were Messrs Penhall and Lovegrove. The judge referred to Lovegrove in glowing terms:

> "I came to realise that I was listening to a man who had dedicated his life to the betterment of the Aboriginal people. I am happy to accept his evidence, without qualification ... Mr Lovegrove said, and I accept, that he never received an instruction to bring in a part-Aboriginal child irrespective of the wishes of the child's family. ... His evidence goes a long way towards a conclusion that, in his time, there was no widespread practice of forcibly removing part-Aboriginal children from their mothers".

The plaintiffs complained that after they emerged from State care they were unable to resume their traditional way of life. But Gunner admitted under cross-examination that he made no serious effort to do so:

> "He knew in 1969 where to find his mother [and] his community ... but he did not go back until 1991 – 22 years later. He complained that he is not an initiated man but the evidence established ... that he could undergo the initiation ceremonies if he wanted to".

Mrs Cubillo's efforts to de-assimilate were even more perfunctory:

"One would expect some effort to be made if, as she said, she wanted to know more about her tribal life. She knew before she left the [church] home where her family was located. No reason was advanced ... that would explain ... why ... she did not make any attempt to return to her relatives ... She has had the opportunity since she was about 17 ... to return to the tribal life ... but she has elected to stay wholly within an urban environment ... Everything about Mrs Cubillo points to her having a strong urban background. ... [and a desire] to succeed in a western culture. [No relative of hers] was living a truly tribal life".

Supercilious critics of our nation's history make little allowance for the conditions and *bona fide* beliefs of times past, as Geoffrey Blainey has patiently and lucidly explained.[8] According to the judgment, what were the relevant conditions in the Territory when Cubillo and Gunner were children? In 1953 the Administrator of the Territory reported that only about 800 Aborigines were still living a "fully tribalised life", and that it was "in the process of disintegration". Between 1950 and 1957 a total of 46 Aboriginal children were taken into care, including 18 in 1950. (Thus fewer than 5 children per year were removed in the period 1951-1957). Three of them told the court "how pleased they were that they had the opportunity of a western education", and four others agreed that "they had been placed in the institution at the request of their parents".

There was considerable evidence of rejection of half-caste children by Aboriginal communities at the time. One witness said that he was accepted well enough, but "regrettably the evidence of other witnesses told a different story of rejection and, at times, death". Gunner himself "had a belief for many years that his mother tried to kill him when he was a baby", and one of his own witnesses said that she rejected him. The widow of the manager of Utopia Station, where Gunner was born, produced old diaries reading:

"This baby [Gunner] was completely neglected and looked to be almost starving ... Baby unconscious today, Jimmy was going to bury him! He dug the grave ready ... [My husband] stopped them".

An Aboriginal witness swore that when her mother and a white man had another child, he "was put down by my mother while he was a baby ... that's when they do away with you". The judge found that the same witness "grew up believing that her mother wanted to kill her; [she] struck her with a stick, damaging one of her eyes". A defence witness, who "spoke glowingly" of one of the church homes concerned, "still carries the scar on her head from the blow that her mother gave her with a firestick .... [She said] she had witnessed Aboriginal mothers kill their unwanted half-caste babies". Will the current, cavalier use of the word "genocide" be applied to these practices?

The conditions from which the children were taken were neither healthy nor romantic. An Aboriginal witness said that when she was taken into care she was living "in a humpy with dogs and filth". Mr Penhall, the former patrol officer who tried in vain to address the Wilson-Dodson inquiry, described Aboriginal camps of the 1940s as:

"... extremely primitive. Most of them were living in very poor conditions, in windbreaks, and just with some branches put across the prevailing wind. They'd be sleeping in groups with small fires ... empty tins ... bones of dead animals or animals that they'd had ... everywhere. There were flies everywhere. The old women would not go very far to urinate ... [it was] squalor".

The judge tried to end on a conciliatory note:

"I have great sympathy ... [with] men and women who thought of themselves as well-meaning and well-intentioned and who today would be characterised by many as badly misguided ... . Those people thought that they were acting in the best interests of the child [but] subsequent events have shown that they were wrong".

The sentiment is admirable, but the suggestion of misguided intervention is hardly consistent with His Honour's findings and the evidence of camp conditions fifty years ago.

A Federal Court appeal in *Cubillo and Gunner* was dismissed on 31 August, 2001, the day before this paper was presented. It appears that counsel for the appellants did not ask the court to second-guess the trial judge's findings of fact. Therefore the question of an Australian *Delgamuukw* did not then arise.

Delgamuukw is a decision of the Canadian Supreme Court (an epicentre of political correctness) that is much admired by native title enthusiasts such as the new President of the Native Title Tribunal.[9] Judges in British Columbia rejected a native title claim after a long and painstaking trial and appeal, but the Supreme Court perfunctorily ordered a new trial. It wants judges in the less politicised courts below to take a more devout and credulous approach to the "oral histories" of claimants and their attendant anthropologists. The Chief Justice of British Columbia had looked too carefully at legends of doubtful antiquity and the symbiotic relationships between claimants and their expert witnesses. His approach to westernised "traditional laws and customs" was (as some of our federal judges would say) "frozen in time". He would never be a member of a well-chosen native title tribunal.

But despite efforts of the Mason-Brennan High Court, Canadian and Australian jurisprudence are not yet identical. It will be hard to reverse *Yorta* and *Ward* if judges of appeal take the orthodox approach to findings of fact and assessments of credit by trial judges. But there are probably some federal judges itching to "do a *Delgamuukw*". "User-friendly" standards of proof will be assured if "indigenous" litigation is handed over to tribunals staffed, as some fashionable ones already are, by people with the "correct" bias. A campaign for a special tribunal with power to award up to $500,000 per "stolen child" enjoyed many column-inches and ample ABC air time a few weeks ago.

Traditional violence?

Ever since *Mabo* there has been a constant flow of press releases from well-funded publicists of Aboriginal affairs. No grievance has been too large or too small for the media mills, be it the latest ambit claim to land, the "racist" name of a brand of cheese, or the "deep offence" caused by a grandstand named after a football star of 70-odd years ago. Mayhem in Aboriginal "communities" was mentioned now and then – as one more thing for which others are to blame. But Europeans hadn't had much time to influence "traditional laws and customs" when Watkin Tench, officer of marines, and a man well-disposed towards the Aborigines, wrote in his diary for 1789:

> "[T]he women are in all respects treated with savage barbarity. Condemned not only to carry the children but all other burthens, they meet in return for submission only with blows, kicks and every other mark of brutality. When an [Aborigine] is provoked by a woman, he either spears her or knocks her down on the spot. On this occasion he always strikes on the head, using indiscriminately a hatchet, a club, or any other weapon which may chance to be in his hand".[10]

Quite suddenly, about the middle of this year, campaign journalism took a surprising turn. Temporarily at least, "indigenous violence" became a permissible topic of public discussion and a state of affairs for which "indigenes" themselves might be responsible. (It is now *de rigeur* to use "indigenous" as a synonym for "Aboriginal", to the exclusion of millions of the Australian-born.) Headlines were given to allegations by well-assimilated, well-placed women that Aboriginal oligarchs are ignoring or suppressing evidence of internecine rape, child abuse and endemic violence.[11] A Brisbane journalist who is normally an honorary publicist for ATSIC joined the chorus of concern, quoting a specialist in Aboriginal affairs:

> "[V]iolence against women, including rape and murder, is endemic in traditional black society. ... This was well known before political correctness took over anthropology".[12]

It was recalled that female members of the "Boni Robertson committee" (which investigated the problem for the Queensland government) "were flogged by black men and forced off the committee". The same article described:

> "... a research project into the health of a large Aboriginal community in Northern Australia. The (male) black leaders told the researchers they were welcome provided they didn't talk to any women. ... the ban was to stop the researchers from finding out the incredible violence to which the women are subjected. The person who told me this refused to allow anything that might identify him to be published. If it was, he and his colleagues would never be able to work with Aborigines again".[13]

The closing words are strikingly similar to private explanations of why so few anthropologists are critical of native title claims. In June this year it was reported that some Aboriginal "leaders" to whom white supporters attribute great moral authority have convictions for, or are accused of, rape or other violent crimes. Such a record or reputation is evidently no bar to high positions and generous perquisites in "indigenous" politics. But can one be confident that violence is seldom offered towards, or feared by people in "communities" making native title claims?

Vagueness upon vagueness persists

The vaguer a law the more scope for judicial discretion and the greater the opportunities for judges, if so inclined, to act as politicians. It is bad enough when law depends on one vague concept, but the law of native title piles vagueness upon vagueness in a geometric progression of uncertainty. The ever-expanding law of negligence is a comparative haven of certitude.

"Native Title Now?" is a question to which ten years of judicial circumlocution, public disputation, interminable litigation and haemorrhages of legal aid offer precious few answers. More and more laws give *de facto* legislative power to judges, especially in come-lately federal tribunals. Sometimes Parliament is to blame, but not on this occasion. The federal judiciary took unto itself the power to create and expand native title. That judiciary includes some people who are hardly inhibited by traditional restraints and conventions. Perhaps this was a consideration when the Keating Government overrode State courts to give federal judges a near-monopoly of "indigenous" litigation.

Native title law involves at least five Delphic concepts: "Aborigine", "community", "traditional laws and customs", "connection with land" and "native title" itself. There is much room for forensic and judicial manoeuvre.

"Aborigine"

Obviously this racial category is *Mabo* bedrock. Yet the word on which native title and all its prophets depend remains egregiously vague. Special laws for Aborigines have a circular non-definition: " 'Aboriginal peoples' means peoples of the Aboriginal race of Australia". Whatever "Aborigine" does mean it denotes a rapidly expanding class. In Tasmania alone, according to census records, Aborigines numbered 671 in 1971, and 13,783 in 1996. Michael Mansell recently said what only an Aboriginal activist would be permitted to say: there are more "phoney" Aborigines in Tasmania than real ones and many falsely claim the badge for monetary gain.[14]

Federal Court judge Drummond wrestled with the term in *Gibbs v. Capewell* (1995). Gibbs challenged the right of Capewell (an associate of ATSIC's Ray Robinson) to contest an ATSIC election, on the ground that Capewell is not an Aborigine. Drummond tactfully decided that the term includes all who have some "Aboriginal genetic material". A person who has only a *soupcon* of it will qualify if he claims to be an Aborigine and has the acceptance of an Aboriginal community. (Whose acceptance? A majority's, or the acceptance of self-styled or media-anointed "leaders"?) But given such acceptance, it seems that European ancestry or culture, however dominant, are immaterial, although one federal judge does not agree:

> "[It was] argued that it would be absurd to hold Mr Wouters not to have been an Aboriginal because his mother was one. If that principle is correct, then there will never come a point at which, as generations pass and Aboriginal blood is diluted, one can postulate of an individual that he is not an Aboriginal. He was the child of one partly Aboriginal parent and one European parent and I cannot accept that such a person is necessarily an Aboriginal".

And the bold spirit held that Wouters, who had "light skin and blond hair" was *not* an Aborigine "despite ... a significant infusion of Aboriginal genes": *Queensland v. Wyvill* (1989).

In 1998 the question came before Merkel J, a former ATSIC adviser, in *Shaw v. Wolf*. It was alleged that eight people seeking ATSIC posts in Hobart were not really "Aborigines". Merkel tiptoed through a minefield of political correctness to take refuge in a legal technicality, namely a reversal of the onus of proof. The professed Aborigines did not have to prove their racial qualification; their challenger had to prove the negative, and the standard of proof was high, because a negative answer could have "a severe and deeply personal impact on ... entitlement to participate in programs for the benefit of Aboriginal persons". Despite Merkel's hurdles two respondents failed the racial test. The evidence must have been overwhelming.

But it's another matter when some "indigenes" think that others have too large a slice of the special cake, or are becoming so numerous that the slices will be small. "Toyota dreaming" is a phrase that the Warlpiri of central Australia apply to more assimilated brethren whom they think are "in it for the money", and live ordinary suburban lives.[15] A part-Aborigine put it this way in a letter to *The Australian*:

> "The definition of an Aborigine is not foolproof ... Too many non-Aboriginal people are claiming Aboriginal heritage so as to access indigenous programs. There has to be a line drawn between white and black ... since ATSIC commenced, there has been enough funding to start up a small country".[16]

In December last year Aborigines in the Wide Bay district of Queensland complained that one hundred locals of Sri Lankan descent had received money, cheap housing loans, study grants and preference in employment by posing as Aborigines. One pretender was charged with illegal fishing and ran a native title defence. Diligent prosecutors proved that he had no Aboriginal ancestry at all. He was duly convicted and lost an appeal funded by Aboriginal Legal Aid.[17] This charade led ATSIC's Ray Robinson to claim that up to 15 per cent of all "Aborigines" "are not genuine".[18] Another Aboriginal bureaucrat said that the abuse was "rampant".[19] Interesting assessments if, as we may assume, they were based on the present hyper-elastic "definition".

American Indians seek to restrict their ranks to people of 50 per cent "Indian" descent.[20] It seems logical, if not yet permissible, to suggest that our race-based laws also require a more precise definition of the chosen race.

"Community"

Nowadays this heart-warming word is used by many interest groups to suggest a unity and numerical strength that are often missing. Native title discourse see-saws constantly between "the Aboriginal community" (a patent fiction), and myriad local "communities" and sub-"communities" with names seldom heard before. Which community's immemorial "laws and customs" are to govern a particular claim?

In *Ward v. Western Australia* (2000) Lee J relied on *dicta* in *Mabo* which can be adjusted, *à la* Humpty Dumpty, as the occasion requires:

> "[Brennan J] contemplated that ... there could be within [a] community smaller groups, even individuals, that enjoyed particular rights".

Each judge left it to claimants to decide where the eligible "community" begins and ends, so that absent a suitable agreement we have another province of "native" litigation.

In fact, a good deal of public money has already been spent on conflicting views of "community". In 1995 ATSIC proposed to spend $10 million on land acquisitions in the Northern Territory and only $2 million in other parts of Australia. A rival group had the plan condemned as an abuse of statutory authority: *NSW Aboriginal Land Council v. ATSIC*. In 1999 a South Australian subsidiary of ATSIC received a grant smaller than its neighbour's and demanded to know why. It took a Federal Court action to find out – a rather expensive and unfriendly form of communal dialogue: *Oak Valley (Maralinga) Inc v. ATSIC*.

What happens if a "community" fades away? According to *Mabo*, native title dies with it. But Olney J had a more encouraging idea in *Wandarang Peoples v. Northern Territory* (2000). Waving aside evidence that no one spoke the Wandarang dialect any more, he adopted an anthropologist's suggestion that a dwindling clan can be "topped up" (so to speak) by incorporating outsiders. An indigenous version of chain immigration?

"Traditional laws and customs"

This mantra appears *ad infinitum* in native title scripture. The difference between "laws" and "customs" in a culture without written records or analytical jurisprudence is far from clear. Perhaps it is just another instance of lawyers declining to use one word when two will do.

Be that as it may, the phrase is as slippery as any of the *Mabo* concepts. "It is immaterial", said Brennan J in that case, "that the laws and customs have undergone some change since the Crown acquired sovereignty, provided the general nature of the connection between the indigenous people and the land remains". "An indigenous society," according to his colleague Toohey J, "cannot, as it were, surrender its rights by modifying its way of life". But what are the limits to judicial indulgence? When does "some change" become a change of kind? An upgrade from windbreak to bungalow? From spear to automatic rifle? From bark canoe to power boat? From Shanks' pony to four-wheel-drive? When does separatism become make-believe, and assimilation substantial and irreversible? How European can "laws and customs" become, and still be deemed "indigenous"?

There is a ready-made judicial "put down" for those who are unwilling to stretch "laws and customs" so far as the school of Brennan, Deane and Toohey. They are guilty of the heresy of expecting such practices to be "frozen in time". Black CJ detected this heterodoxy in the *Yorta* majority. So did North J, the odd man out in *Ward v. Western Australia*. But is it not the separatist dogma that is "frozen in time" when it refuses to consider how dilute Aboriginal ancestry or lifestyle may be? A journalist of Aboriginal background acknowledges what native title enthusiasts deny:

> "We need to throw off notions of racial essentialism. ... The Aboriginal middle class adopt the symbols ... of black society ... living comfortably alongside their white friends, ... then, when it suits ... they drop their aitches, drape themselves in the Aboriginal flag, adopt Koori slang, and romanticise ... I've grown tired of hearing Aborigines raised in the comfort of suburbia returning to the birthplace of their grandparents for a day and telling us what 'an amazing experience' it was ... An immutable, homogeneous Aboriginal identity is untenable".[21]

"Connections" with land

Given sufficient judicial imagination, "connections" can be as tenacious as some republicans, including *Mabo* judges, clinging to their knighthoods:

> "Native title to particular land ... and the persons entitled thereto are ascertained according to the laws and customs of the indigenous people who, by those laws and customs, have a connection with the land".
>
> Thus Brennan J, in *Mabo*. His brother Toohey J was expansive but no more enlightening:

> "The nature, extent or degree of the Aborigines' physical presence on the land they occupied ... is to be determined in each case by a subjective test. ... [A] nomadic lifestyle is not inconsistent with occupancy. ... [Title cannot be ruled out] merely on the ground that more than one group utilises land. Either each smaller group could be said to have title, comprising the right to shared use of land in accordance with traditional use; or traditional title vests in the larger 'society' comprising all the rightful occupiers. Moreover, since occupancy is a question of fact, the 'society' in occupation need not correspond to the most significant cultural group among the indigenous people. ... Because rights and duties *inter se* cannot be determined precisely, it does not follow that traditional rights are not to be recognised by the common law".

Even as it allowed the appeal in *Ward v. Western Australia* the Federal Court majority stressed that a "spiritual" connection may suffice. This view was endorsed by the *Yorta* majority, with the unhelpful addition that a "spiritual" connection is "a question of fact, involving matters of degree". Black CJ found a traditional connection in *Yorta* despite the solemn admissions that were made 120 years ago. If "traditional connection" can stretch to *Yorta*, to what case can it not be stretched? How long is a piece of elastic? As I submitted to this Society in 1998:

> "Students of native title should spend less time on speculative theory and more time observing those who are appointed to hear the crucial early cases ... Let there be no illusions about where the main power resides. It will be exercised less by courts of appeal than by judges sitting alone. There is no more autocratic function than fact-finding by a trial judge".

It is hardly surprising that the federal Attorney-General believes that "Australia is still deeply confused by native title" ten years after *Mabo*.[22] The concept of "spiritual connection" is an issue before the High Court in *Ward v. Western Australia*. Judgment is reserved.

Some "connections" seem to weaken soon after the contest is over, or a financial settlement is reached. Two years after the Yalanji clan gained hunting rights over 25,000 hectares north of Cairns, not one beneficiary had used those rights or tended the "sacred sites" featured in the claim. A member of the clan explained that the neglect was due to "the pressures of modern life", and "substance abuse". After all, he added: "To people who are sitting in bars or doing drugs, that land would be three and a half hours out of their life".[23]

"Native title"

The meaning of this phrase is no clearer now than it was in 1992. It may be anything between ownership and some occasional, ephemeral right of access. In every contested case it depends on the story of the plaintiffs, the support of their "experts", the willingness and capacity of governments and other respondents to test the claim, and the receptiveness of the federal judge assigned to the case. If the case is not seriously contested it means whatever a compliant government allows it to mean.

The treatment of evidence

There are judicial reflections on the credit of Aboriginal witnesses in the trial judge's report in *Mabo*, and in *Yorta, Williams* and *Cubillo*. They are more than sufficient to indicate that rigorous examination of native title evidence is warranted. The value of anthropological evidence has been considered elsewhere.[24] *Mabo* gave anthropologists a new forensic importance; with a few noble exceptions they have been witness-advocates *par excellence*. Political and financial ties to the Aboriginal bureaucracies for which many of them work must be properly assessed, or native title claims will remain extremely difficult to contest. Olney J made some allowance for the experts' bias in *Yorta*, but fashion favours the suspension of disbelief. Here is piety in the extreme:

> "The best evidence lies in the hearts and minds of the people most intimately connected to Aboriginal culture, namely the Aboriginal people themselves. Expert evidence from anthropologists and others is of significance .... However, it seems to me that the full story lies in the hearts and minds of the people". [*Ejai v. Commonwealth and Western Australia* (1994), Owen J.]

How could such "evidence" ever be rebutted?

The following remarks of Paul Memmott, native title witness and director of an Aboriginal research "centre" at Queensland University may be added to other evidence "as to credit":

> "Solicitors will normally recommend against including [in our reports] any list of interviewees and any reference to original field research materials, as this may aid discovery by any opposition ... I would consider [it] wise to omit ... lists of informants [and] references to interviews that will allow anthropologists' documents to be subpoenaed; [and] the identifiable views of claimants upon which such individuals may be examined in a later court *but which may be unreasonable to expect them to sustain* ... People should have the right to change their mind on certain matters (especially controversial ... matters). It is wise to present the information in such a way ... that can take into account the loss, adaptation *and re-invention* of particular laws and customs in response to processes of cultural and lifestyle change".[25]

Displays of progressive virtue aside, it is much more comfortable to accept "indigenous" evidence than to reject it. If the answer has to be "No" – even a qualified "No" – great care is usually taken to deflect anticipated abuse. Very few cases feature trials, judgments and appeals of such inordinate length as those in *Ward*, *Cubillo* or *Yorta* – prime examples of a few, effectively wealthy litigants consuming disproportionate amounts of court time.

Even such fatuous proceedings as *Nulyarimma v. Thompson* (1999) were treated with great solemnity. The plaintiff sought warrants for the arrest of the Prime Minister and Deputy Prime Minister for the "crime of genocide". The "crime" consisted of support for the 1998 amendments to the *Native Title Act*! The short answer – to say nothing of abuse of process – was that there is no such crime in Australian law. A Master of the A.C.T. court threw the matter out, but before admitting that he was right three federal judges heard the appellant at great length, and Wilcox J gave a gratuitous display of moral superiority:

> "Anybody who considers Australian history since 1788 will readily perceive why some people think that it is appropriate to use the term genocide to describe the conduct of the non-indigenes".

There followed a homily on dispossession and demoralisation and the repetition of a "moving and eloquent" (and completely irrelevant) story of the rape of a mother by white men, and her removal to a church home. Then this peroration:

> "Many of us non-indigenous Australians have much to regret in relation to the manner in which our forbears treated indigenous people; possibly far more than we can ever know".

Wilcox distinguished himself at the height of the 1996 federal election campaign by making a public attack on the Liberal Party's industrial relations policy. He recently found a critic of a litigious ATSIC subsidiary guilty of contempt of court.

The industry consolidates

As its exegetes are fond of reminding us, native title is here to stay. Industries and careers built on it have had ten years to grow and consolidate. Land claims and "stolen child" claims are *raisons d'etre* for a well-endowed "indigenous" bureaucracy and a Byzantine network of subsidiaries – lawyers, "working groups", "cultural monitors", expert witnesses and academic empire-builders. When a regional corporation in Queensland lost its native title functions to a company that is the *alter ego* of ATSIC's Ray Robinson, the consequent loss of income reduced its full time staff from 30-odd to three.[26] For many lawyers, "indigenous" litigation competes with immigration law as a source of income, moral display and political opportunism. Native title is a fashionable option in entrepreneurial law schools with ultra-high pass rates and honours to match. Only a "bill of rights" is now needed to absorb their over-production of alumni. Federal tribunals, a politicised vanguard of an increasingly politicised legal system, oversee it all.

***Mabo* as licensing regime**

Even the promoters of native title admit that proving it in court is slow and inordinately expensive. In *Ward v. Western Australia* the hearing lasted 83 days, produced 9,000 pages of transcript and a judgment of almost 300 pages. Statistics of the *Yorta* exercise were set out earlier. ATSIC chairman Clark describes the "culture of litigation" as unsustainable, although his clients do not pay for it.[27] When those who litigate at other people's expense begin to notice the cost the position is surely serious. However, Clark's aim is not to reduce *Mabo* claims but to shift them, with the "stolen children", to special tribunals like the Northern Territory land rights commission, which seldom if ever says "No".

Native title has been criticised by friends and foes as non-negotiable property of little commercial value. But a strategic claim and a flourish of the "right to negotiate" can be highly productive of money or money's worth from governments anxious to be "correct" or to foster development, and private interests desperate to avoid years of hyper-expensive, unpredictable litigation. The greater the cost, delay and uncertainty of litigation, the stronger the incentive to pay "go away money". However flimsy a claim, once it is filed in court there are costs that will never be recovered, to say nothing of time and energy that could be far better spent. If a small personal injuries claim will cost the defendant $5,000 (win or lose) there is a strong inducement to offer $3,000 just to "go away", especially if the plaintiff will almost certainly appeal if he loses at first instance.

"Go away" payments are now a well-established feature of the native title scene, and "indigenous land use agreements" ("ILUAs") were introduced in 1998 to encourage them. Securing a regional ILUA and resolving any local objections to it can be as tortuous as litigation, but once it is in place the dreaded "right to negotiate" is suspended (for a consideration) whether or not the claim is ever proved. Indeed, when "compensation" is the real object of the exercise no more may be ever heard of the "traditional laws and customs". They may sleep beside the hunting rights of the Yalanji.

Native title, then, is fast evolving as a unique system of licensing conducted at public expense, over Crown lands, for the benefit of claimants or their organisers. Even before ILUAs arrived, the quasi-religious attachment to land that gives *Mabo* its emotive appeal was being exchanged for mundane and more negotiable assets. In 1997, after many alarms and excursions, Queensland's Century Zinc mine made peace with native title claimants by paying $24 million (including $500,000 for a "women's business" centre), and assigning normal titles to two grazing properties. A development-minded State pledged another $30 million.[28] Perhaps it is no coincidence that the project is now up for sale.

Other "payoffs" in 1997 were $1.3 million by a gold mine at Tenterfield,[29] and an undisclosed amount from Striker Resources to clients of the Kimberley Land Council to "license" a diamond mine.[30] The NSW government paid $738,000 to dispose of a claim at Crescent Head.[31] Shrewd "negotiators" have been heard to say that "there are a lot more Crescent Heads around". Australian Gas Light Ltd bought a "licence" for a pipeline to proceed.[32] But claimants priced themselves out of the market when a "negotiating company" owned by the late Charles Perkins demanded $120 million from the Ernest Henry mine in Queensland. It refused to pay and a native title claim was filed forthwith.[33]

In July, 1998, when almost 2,500 mining projects in Western Australia were held up by "rights to negotiate", observers noted an "increasing trend towards negotiated agreements".[34] Miners were becoming openly resigned to "go away money". A representative told *The Australian*:

> "Practically every mining and mineral exploration in this country has been delayed or seriously inconvenienced by the demands of native title claimants. In a large number of cases the expedient solution is to pay the claimants to facilitate progress".[35]
>
> He was supported by a leading resources lawyer:
>
> "A project proponent wishing to develop in any commercially acceptable time frame will have to negotiate agreements with native title claimants".[36]

One need not be a claimant or an anthropologist to turn native title into a serious commercial proposition. In 1998 Queensland electricity authorities were paying "cultural monitors" $31 per hour to steer landlines around "culturally significant" sites. Some "monitors" received as much as $2,000 per week, while exasperated public servants railed at "*de facto* compensation rackets".[37] Seventy Aborigines demanded "sitting fees" of $350-$800 per day to "advise" on "cultural heritage" along a power line from Mt Isa to the already well-mulcted Century Zinc mine. Some were reported to be earning $100,000 for "consultancy services" to the beleaguered mine, with generous accommodation and travel allowances. By January, 1999 the North Queensland Electricity Corporation had spent nearly $1 million on "consultants" in one year, and was "unable to afford any further meetings with Aborigines at typically $70,000 [a time]".[38] In March, 1999 it cost the Beveridge uranium mine in South Australia $850,000 per annum to be free from claims. Four months later the federal government promised $6 million for a "comprehensive package of social and welfare benefits" to Aborigines opposing the Jabiluka uranium mine. The company offered another $9 million.[39]

In May this year Queensland surrendered title to seven islands in Torres Strait.[40] In June, Black CJ of the Federal Court was off to Murray Island with staff and preening politicians, at public expense, to make a consent order he could have rubber-stamped in Melbourne. There was a similar performance by his brother Carr in Western Australia a week ago, and no doubt there will be more. In this self-promotional age even courts have an eye to "PR".

Comalco's bauxite mine at Weipa hopes to enjoy trouble-free expansion by spending $500,000 per year on "Aboriginal education and training".[41] Presumably it expects to pass on the cost. A casino on the Gold Coast has just paid a large amount (as much as $600,000) to induce "traditional owners" of that urban area to go away.[42] Two months ago Aborigines on Stradbroke Island near Brisbane were promised $500,000 down, and about $740,000 per annum in royalties by the State government to drop objections to existing sand mines and to "license" a new one. The proceeds are supposed to be distributed equitably among 600 people, who will also be given jobs and normal titles to land.[43] Just eight years ago Labor Premier Wayne Goss condemned the Stradbroke claim as a "political stunt and a try-on", driven by "*Mabo* madness" and lawyers "out to make a fast buck".[44] Four years later, with no settlement yet in sight, the Stradbroke Land Council declared that the mines threatened their most sacred site.[45] The same Council is now prepared to let mining continue indefinitely. "We want as much as we can get for our people".[46]

So far only a few defended cases have been completed. Three were outright failures, and – subject to High Court judgments pending – the results in two others fell far short of expectations. "Stolen child" cases have been particularly unrewarding. It is unlikely that many titles to land will be established in court cases that are fully contested. Probably most of the titles that are eventually established will be gained by default or by consent, either through lack of political will to examine claims unromantically, or to avoid long and prodigiously expensive litigation. Governments so disposed can "run dead", as did the Commonwealth in *Mabo* itself. The trial judge in *Yorta* remarked that Victoria was "actively engaged at all stages". Would that still be the case today?

Primary producers and miners are becoming resigned to it. Politicians can win points for "political correctness", and pretend that native title is working well while they consent to encumbrances on Crown land which (they hope) will not need to be redeemed in their lifetimes. And yet, if our population rises as fast as Malcolm Fraser desires, there just might have to be some buy-backs (double compensation) in the not-too-distant future.

Native title is as Delphic as ever, a *Mabo* licensing system prospers, and those who are slow to offer "go away money" risk facing a court or tribunal where the disciples of *Delgamuukw*[47] hold sway.

Endnotes:

1. *The Australian,* 1 December, 1993.

2. High Court transcript, 22 June, 1998, p.27.

3. *The Australian*, 4 October, 1994.

4. *The Australian,* 11 September, 2000.

5. *The Australian,* 18 August, 1999.

6. On anthropologists and native title evidence see *Upholding the Australian Constitutuion*, Proceedings of The Samuel Griffith Society, Volume 4 (1994), 46 ff; Volume 7 (1996), 112 ff.

7. *Mabo and the Miners*, in *Mabo: a Judicial Revolution,* University of Queensland Press, 1993, pp.206, 211.

8. *A Black Arm-Band for Australia's 20th Century?,* in *Upholding the Australian Constitution*, Proceedings of The Samuel Griffith Society, Volume 12 (2000), p.241.

9. G Neate, *Three Lessons for Australians from* Delgamuukw v. British Columbia, in *Native Title in Perspective,* Aboriginal Studies Press, p.228.

10. Watkin Tench, *A Narrative of the Expedition to Botany Bay and a Complete Account of the Settlement at Port Jackson,* ed. T Flannery, Text Publishing Company, Melbourne, 1996, p.264.

11. *The Australian,* 14-15 April, 2001; 24 April, 2001 (Peter Sutton); *The Sydney Morning Herald,* 16-17 June, 2001; and *The Sydney Morning Herald*, 20 June, 2001.

12. *Courier Mail,* 30 June, 2001 (Tony Koch).

13. *Courier Mail,* 10 May, 2000, *Black Mark in Australia's Heart.*

14. *Canberra Times,* 17 February, 2001.

15. *The Australian,* 24-25 June, 2000.

16. *The Australian,* 21 August, 2000 (letter David Green).

17. *Courier Mail,* 16 December, 2000.

18. *Courier Mail,* 18 December, 2000.

19. *Courier Mail,* 19 December, 2000.

20. *The Sydney Morning Herald,* 12 May, 2001.

21. *Sydney Morning Herald,* 11 July, 2001.

22. *Courier Mail,* 3 August, 2001.

23. *The Australian,* 20 November, 2000.

24. J R Forbes, *Mabo and the Miners*, *op.cit.,* at pp.216-217; *Mabo and the Miners: Ad Infinitum,* in *Mabo: The Native Title Legislation,* University of Queensland Press, 1995 at pp.58-63; *Proving Native Title*, in *Upholding the Australian Constitution,* Proceedings of The Samuel Griffith Society, Volume 4 (1994), p.31.

25. *Establishing the Factual Basis for Native Title,* in *Native Title in Perspective,* Aboriginal Studies Press, Canberra, 2000, at p.94, emphases added.

26. *Courier Mail,* 22 August, 2001.

27. *The Sydney Morning Herald,* 4-5 August, 2001.

28. *Courier Mail,* 21 August, 1997.

29. *The Sydney Morning Herald,* 26 July, 1997.

30. *The Sydney Morning Herald,* 21 August, 1997.

31. *The Sydney Morning Herald,* 4-5 August, 2001.

32. *The Sydney Morning Herald,* 15 December, 1997.

33. *The Australian,* 3 December, 1997.

34. (1998) 17, *Australian Mining and Petroleum Journal,* p.23.

35. *The Australian,* 19 January, 1998, p.8 (W J Ryan).

36. Michael Hunt, *'Workability' of the Native Title Act*, (1998) 17, *Australian Mining and Petroleum Journal*, p.339.

37. *Courier Mail,* 23 November, 1998.

38. *Courier Mail,* 4 January, 1999.

39. *The Australian,* 22 March, 1999; 14 July, 1999.

40. *Courier Mail,* 23 May, 2001.

41. *The Sydney Morning Herald,* 16 July, 2001.

42. *Courier Mail,* 28 August, 2001.

43. *The Australian,* 19 July, 2001.

44. *Sunday Mail* (Brisbane), 20 June, 1993.

45. *Courier Mail,* 28 April, 1997.

46. *The Australian,* 19 July, 2001.

47. "Rogue judges", as Peter Walsh might say.