Chapter Seven
Native Title Today

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"Native title" is an inalienable, communal form of property effectively controlled by an oligarchy, or by an Aboriginal body similarly controlled. Broadly speaking it includes trust lands granted by State or federal governments, property purchased by means of the Land Acquisition Fund, and *Mabo*-style titles. Not many of the *Mabo* variety have actually been established, but lands-rights enthusiasts usually prefer to concentrate on them, as if other, better and more extensive Aboriginal tenures did not exist. However, let us concentrate here on the fortunes of *Mabo* title. As always, an understanding of the present demands a review of the past.

In the beginning

The campaign for *Mabo* title – or Brennan-Deane title, to give credit where credit is due – began eleven years after a Supreme Court judgment, never appealed, held that no such thing existed.[1] The litigation in Eddie Mabo's name began in 1982. For some ten years the claim was shaped, re-shaped and re-pleaded. One of the many charms of lawyers' law is that, however much the pleadings are re-jigged before trial, the credit of the final version is conventionally unaffected.

The nominal plaintiffs were inhabitants or former inhabitants of an island in Torres Strait. Their case began as a claim for individual rights, but, by grace of the High Court, it ended – so far as matters now – in a vague formula for communal titles for Aborigines, who were never parties to the action.

The High Court rarely conducts trials nowadays, so someone else had to be appointed to hear, organise and assess the evidence. Counsel for the plaintiffs wanted it to be the new Federal Court. Ostensibly he preferred its more "flexible" approach to evidence, but it may have been a silent thought that there was a better chance of finding an activist, or power-seeking judge in that forum. However, Chief Justice Gibbs referred the matter to the Queensland Supreme Court.[2] The hearing was assigned to Martin Moynihan J, who delivered his report to the High Court on 16 November, 1990.

Moynihan soon realised that, among the Melanesians, he was dealing with "a very different society and very different relationships ... towards land" than the judge who heard the Aborigines' claim in 1971. He also found cause to be sceptical, noting that "Eddie Mabo [was]... quite capable of tailoring his story to whatever shape he perceived would advance his cause":

> "I was not impressed with the creditability of Eddie Mabo. I would not be inclined to act on his evidence in a matter bearing on his self-interest (and most of his evidence was of this character) unless it was supported by other creditable evidence ... [His] claims ... are a curious concoction of fact and fantasy ... designed to advance Mr Mabo's cause both in these proceedings and outside them".
>
> It was not only Eddie's evidence that called for some grains of salt:

> "The evidence as to James Rice's claims concerning Dauar [Island] is to my mind in such an unsatisfactory state that I would not be prepared to act on it. It seems that the facts are now largely lost and what we see is part memory, part fabrication or perhaps confabulation and part opportunistic reconstruction".

But all this, and much more, sank without trace in the Mason High Court. Brennan J expanded the inquiry enormously, recoiling from the thought of distinguishing Melanesian from Aboriginal culture. The Melanesians, apparently, do not agree. In 2002 they declined to invite Mabo's widow, and surviving plaintiffs in Townsville, to join in the tenth anniversary celebrations of the High Court's decision. A spokeswoman for the Torres Strait Development Corporation explained: "They need to make a choice between being Aborigines or Torres Strait Islanders".[3]

The Melanesian plaintiffs in *Mabo* raised no issue about land rights for Aborigines. The Islanders were a settled agricultural people, not nomadic like the Australian tribes. But judicial eyes were set upon a place in history, although in fact history had already been made – the Commonwealth and most States had already passed laws to recognise Aboriginal land rights more efficiently, with greater certainty, and at much less expense than *Mabo*-type litigation.[4]

Three years after *Mabo* the Commonwealth established a Land Acquisition Fund and devoted almost $1.5 billion to it, so as to "fill in the legal blank cheque signed by the High Court [when it created] ... rights that would otherwise be little more than expressions of conscience".[5] Thereafter, in addition to, or instead of using the land rights Acts, Aboriginal organisations could purchase land in the normal way, without disrupting our long-established law of real property.

Justices Mason and Deane built their careers as black-letter lawyers, when that was still the recognised path to professional esteem. But the legal fashions were a-changing, and by 1992 there was more power and fashionable approval to be found in judicial "creativity". That was the gospel at judicial gatherings overseas, where Canadian judges enthused about their new bill of rights and its sweeping additions to their legislative powers – so much more interesting than judicial routine of the traditional kind.

In an extraordinary series of extra-judicial statements after the *Mabo* decree was handed down, Chief Justice Mason patronisingly dismissed anyone daring to suggest that it was an excess, not to say an abuse, of judicial authority. Glossing over the difference between judicial lawmaking that is necessary and incremental, on one hand, and gratuitous, sweeping decrees on issues not before the court, on the other, he delivered a *dictum* of breathtaking arrogance:

> "In some circumstances governments ... prefer to leave the determination of controversial questions to the courts rather than [to] ... the political process. *Mabo* is an interesting example".[6]

In other, more candid words:

> "Commonwealth Parliament should have recognised native title. It didn't, so we did".

The potential cost of the adventure to taxpayers, social harmony and the national economy was not considered. In form, *Mabo* is a judicial decision; in substance, it is radical and poorly drafted legislation.

In Canadian style, language was adjusted to remould popular opinion. The most speculative claimants instantly became "traditional owners", and infallible

"elders" and "leaders" were legion. Even the word "Aborigine" was suspected of political incorrectness, so the meaning of "indigenous" was altered, and limited to make it a synonym of "Aboriginal", to the exclusion of many other people who acknowledge Australia as the land of their birth.

The principal *Mabo* judgments were heavily influenced by models drawn from other societies with different socio-legal histories, such as Canada and the United States. It is interesting to compare the following passage in a recent High Court judgment about the immunity of advocates from suits for negligence. In response to a plea to follow American precedents and a recent judicial backflip in England, Chief Justice Gleeson and Justices Gummow, Hayne and Heydon retorted:

> "Where a decision [overseas] ... is based upon the judicial perception of social and other changes said to affect the administration of justice in [that country] there can be no automatic transposition of the arguments found persuasive there to the Australian judicial system".[7]

A very elastic law

Mabo itself did not establish any native title on mainland Australia, but it was a mysterious charter for judicial law-making. "Native title" could mean anything from an occasional right of entry to something akin to ownership. It all depended on native customs from place to place, as asserted by claimants, their anthropologists and other well-disposed witnesses. According to the long and various disquisitions in *Mabo*, the decisive customs might be those of a "clan or group", a "people", a "native people", a "community", a "family, band or tribe", a "tribe or clan", a "tribe or other group", a "relevant group" or an "indigenous people". Who, then, was an "indigenous person"? *Mabo* steered well clear of any definition of where that category begins and ends.

Subsequent cases have done little to reduce vague and verbose rhetoric to reasonably predictable legal rules:

> "Native title is not treated by the common law as a unitary concept. The heterogeneous laws and customs of Australia's indigenous people ... provide its content. It is a relationship between a community of indigenous people and the land, defined by reference to that community's traditional laws and customs".[8] (I trust that this is clear.)

The concepts of continuous occupation and retention of traditional customs are so elastic that a trial judge's fact-finding discretion is virtually unlimited. If a "tribe", "community" (etc) seems to have petered out, continuity can be discovered by reference to outsiders supposedly "adopted" or "incorporated" into the original clan. There is scarcely any limit to indulgent findings that the adoption of European ways of living signifies a development, not substantial abandonment, of a pre-1788 lifestyle. After all, this is civil litigation, and it is only necessary to reach a plausible conclusion on the "balance of probabilities". The vaguer the law, the greater the power of the judges in charge of it.

The elasticity, not to say slipperiness, of *Mabo* concepts is well illustrated in the case of *De Rose v. South Australia*. The trial judge, O'Loughlin J, found that no relevant connection to land occupied by a cattle station survived, as most of the claimants had never bothered to visit the land in question:

> "Many of the Aboriginal witnesses have claimed that they have retained some affinity with the land. However, their actions belie their words. Occasional hunting of kangaroos ... stands out in isolation. No other physical or spiritual activity has taken place in the last twenty or so years.

> The claimants have lost their physical as well as their spiritual connection, and, because of that loss, there has been a breakdown in the acknowledgment of the traditional laws and ... customs. That breakdown is fatal to their applications".

However, a way round that difficulty was found by a full Federal Court.[9] In their Honours' opinion their colleague O'Loughlin focused unduly on the claimants' failure to visit the area. If he had thought more deeply about the case, he would have arrived at a better understanding of the view taken by the traditional laws and customs of that failure. It is, after all, quite possible for Aborigines to maintain that connection notwithstanding long absence due to European social and work practices. The possibility, if not probability, that "European social practices" might have engendered a strong preference for living in a different style in a more congenial place was not considered. The question – we must understand – is not whether claimants *have actually* lost their connection, but whether, according to their current story, *they think* they have lost it.

Perhaps the High Court, if given the opportunity, will put some objectivity back into the "connection" concept, but in the meantime it is difficult to think of anything the Federal Court cannot do in the quest for native title, if only it puts a *De Rose* mind to it.

The right to negotiate

No country could afford to leave its land law in such disarray, so we received the *Native Title Act* of 1993. It made no attempt to define "native title" or "Aborigine", but it added to the confusion by inventing a "Right to Negotiate" to which the judicial imaginations had not extended. Thenceforth the mere making of a claim over a tract of land, however vast, barred any development on it without the consent of the claimants or the Native Title Tribunal, a new bureau with a vested interest in *Mabo* metaphysics. "The right [to negotiate] is a valuable right that may be exercised before the validity of an accepted claim has been determined".[10]

Rapidly, that right became the most important and valuable aspect of many native title claims. However doubtful a claim might be, and whether or not it was ever taken to trial and proved, it was a right that could be very rewarding. While it had no immediate value in areas that seemed devoid of commercial resources, it could serve the collateral purpose of keeping grievances in the headlines. In more prospective areas would-be developers faced these alternatives: (1) Buy the claimants' consent with cash or kind; (2) Venture into a slow, complex and costly legal maze; or (3) Capitulate.

In June, 2002 the chief executive of the rural lobby Agforce complained, with a good deal of evidence to support him: "The moment an exploration permit is granted, almost immediately a native title claim is lodged over that area", giving the claimants "the opportunity to extort [*sic*] the mining companies".[11]

Paul Toohey, a journalist normally very supportive of Aboriginal politics, quoted, without dissent, a legal specialist in the new and fertile field:

> "Let's not be confused. It's just a right to delay and cause humbug. So the other side says: '[Damn][12] it, let's do a deal and get on with it. ... You just have to scatter seed to the blackfellas' ".[13]

The seeding process became known as "cashing out". Federal Court judges increased the pressure to "settle" by stressing the cost, delay and disruption of contested claims.

Nevertheless the Cape York Land Council, as recently as November, 2004, professed surprise and outrage at reports that it had canvassed a discreet "cashing out" with BHP Limited to keep "cultural heritage guides" away from prospective mining areas.[14] The protest of purity followed the original doctrine of a leading native title exponent, Mick Dodson, to the effect that money could not be, and never should be, a substitute for "the opportunity to exercise the human rights of freedom from discrimination and equality before the law".[15] There is a scene in Gilbert and Sullivan's operetta *The Mikado* where a favour is purchased from Pooh-Bah, the Emperor's Minister for Everything Else. The emolument is pocketed, albeit with a lofty expression of disgust: "Another insult, and, I fear, a small one!". The blandishments of "cashing out" have also proved irresistible.

Some products of the Right to Negotiate have been most attractive, whether or not the recipient oligarchs distributed the money fairly, or spent it wisely. A few examples must suffice. In April, 2003 a developer paid $1.5 million to two urbanised "tribes" for abandoning claims over the Gold Coast's Southport Spit.[16] In a more remarkable transaction, the Century Zinc mine in north-west Queensland was able to proceed only after promises by the company and the State government to transfer land, cash and benefits totalling $90 million, including $500,000 for a "women's business" centre. In the Northern Territory the Zapopan gold mining company purchased its freedom from a native title claim with a transfer of freehold and other material benefits. Less successful was a group that tried to halt the construction of a major gas pipeline in Queensland, only to have their case for an injunction robustly dismissed by Drummond J.[17]

Federal Court monopoly

Land law has always been a matter for the States and their long-established Supreme Courts. But the *Native Title Act* 1993 removed jurisdiction in native title cases to the recently-arrived Federal Court, where a majority of the judges had been appointed by the federal regimes of 1983-1996. Appointments to our traditional courts usually depend on retirements – a relatively slow process, which means that a government disposed to stack the bench has to stay in office for a considerable time. But it is quite different when a new Court is created and rapidly expanded – a description uniquely applicable to the Federal Court. In 2000 well over half of its *fifty* judges were appointees of one political party.

It was still possible to raise *Mabo* in a State court by way of defence to a prosecution. An early case of that kind is *Mason v. Tritton*,[18] which began in New South Wales before the Federal Court's monopoly was established. Native title was raised as a defence to a charge of illegal fishing. It failed at first instance, and on appeal, for want of any acceptable evidence. There was no High Court appeal. A gentleman from the Gulf Country, Mr Yanner, fared better in 1999. Charged with the offence of killing protected crocodiles, he argued that, as a part-Aborigine, he had a native title which exempted him from the fauna protection laws. The Queensland courts were unimpressed, but the High Court was persuaded that hunting in a motor boat, with a refrigerator to preserve the meat, was sufficiently traditional to entitle the defence to succeed.

Confusion confounded

The historian Marc Bloch has described history as occasional convulsions followed by long, slow developments. But in this case the next legal convulsion

was not long in coming. In *Mabo* Brennan J indicated that Crown leases were safe from native title claims, and in framing its *Native Title Act* the Keating Government relied on the oracle. But in the dying days of December, 1996, despite Brennan's refusal to change his mind, it was revealed that Crown leases were vulnerable after all.[19] Worse, there was no general rule. If a defendant refused to surrender or "cash out", the result in every single case depended on its own facts, the terms of the particular lease, and a judge's view of them. It was legal uncertainty on stilts.

The "Ten Point Plan"

Further legislation was needed to sort out the judicially crafted confusion. The new Coalition government produced a "Ten Point Plan". But political plans are not law. In 1997 the Senate made 217 amendments to the Bill. The government accepted half of them, but that was not enough to secure its passage. It was not until July, 1998 that the independent Senator Harradine "blinked", and a modified version of the Ten Point Plan became law, as the *Native Title Amendment Act* 1998. The superstructure erected on *Mabo* and the 1993 Act by federal courts and the Native Title Tribunal was already so obscure that the amendments ran to 350 pages!

But they did slow the traffic. Claims became harder to lodge, because more supporting information was required. Grants of leases made in 1994-1996, in the *Mabo*-induced belief that Crown leases extinguished native title, were validated. The Right to Negotiate no longer applied to claims over town and city areas, where some of the silliest, headline-seeking claims had been made. "Low impact" exploration for minerals could be exempted. It was declared that commercial, residential and community purpose leases, and agricultural and pastoral leases conferring exclusive possession, extinguished any native title that would otherwise affect them. Native title was subjected to general rights to water, fish resources and airspace. "Scheduled interests" notified by States and Territories as exclusive possession tenures were given protection. But a six-year deadline for new claims did not survive the Senate.

Compulsory acquisitions remained subject to the Right to Negotiate, while rights to compensation, statutory access rights, and arguments that certain leases do not confer exclusive possession, still leave plenty of room for litigation, as the plethora of subsequent law reports indicates. The "elasticity" of *Mabo* metaphysics, exemplified above, should not be underestimated. The immunity of some "scheduled interests" may also be open to question. Settlements and "cashing out" were formalised in provisions for "Indigenous Land Use Agreements". In certain cases the States were permitted to make arrangements *in lieu* of the Right to Negotiate, but little use has been made of those provisions.

In a comic sequel to the 1998 Act, a gentleman named Nulyarimma commanded the ACT authorities to arrest the Prime Minister, the Deputy Prime Minister and two other members of federal Parliament, and to charge them with genocide for supporting changes to the *Native Title Act* 1993.[20] When no warrants were forthcoming, the pursuer asked the ACT Supreme Court to order the police to act. After a very long and polite judgment the judge found the proceedings to be "essentially misconceived".

Mr Nulyarimma then appealed to three judges of the Federal Court – Wilcox, Whitlam and Merkel JJ. They reluctantly dismissed the appeal; the

composition of the court emphasises the impossibility of allowing it. However, their Honours took the opportunity to write long and gratuitous essays on international law and history, when a page or two of pertinent law would and should have sufficed. In native title cases, however flimsy they may be, many judges are either delighted, or feel obliged, to make elaborate displays of compassion and enlightened thought rarely bestowed on other disappointed litigants.

Putting *Mabo* into practice

The first few titles did not have to be proved. As we have seen, commercial considerations are one inducement to "settle". Another is the temptation for governments to avoid controversy and win modish Brownie points by conceding claims over Crown land. Politicians are ever ready to spend public money for political advantage, however fleeting, so why not public lands? Politically and economically this process is easiest where no prospect of economic return seems to exist. Of course that can change in future, but politicians' views of the future are usually myopic. A tract of Crown land may seem a small price to pay for peace and the approval of native title enthusiasts.

In December, 1997 the Federal Court rubber-stamped an agreement between the Queensland government and thirteen Aboriginal groups with respect to 110,000 hectares at Hopevale, on Cape York. This was the first native title agreement in Australia, but it involved a distinction without much difference, because the land was already in trust for Aborigines under State law. There were exemptions for existing mining operations, and mineral rights remained in the Crown. In mid-2002 Noel Pearson's brother, Gerhard, was still unsure of the precise arrangements at Hopevale:

> "The lawyers and government were so keen on getting an agreement and subsequent promotion [i.e. political kudos] that they pushed people into something that the community is [still] trying to unravel".

The next native title also resulted from a consent order. It covered 12 hectares of Crown land at Crescent Head, on the north coast of New South Wales. The agreement was approved by the Federal Court in April, 1997. The Federal Court's formal approval took almost an hour as Lockhart J, in a thespian process that was later imitated in places much more expensive for a judicial entourage to reach, invited sixty Dunghutti people to the front of the crowded courtroom to "better share the historic day". A few hours later the land was compulsorily acquired for a housing development, upon a down payment of $800,000 and a good deal more to follow.

In September, 1998 the High Court confirmed that a grant of freehold extinguishes native title.[21] This was one of the few points that had seemed clear since 1992, but so great was post-*Wik* uncertainty that a contested case was run through to comfort nervous landowners.

Some settlements do not concede title in the sense of exclusive occupation, use and enjoyment. Lesser rights of access may be involved. For example, in 1998 the Federal Court rubber-stamped an agreement between the Queensland government, graziers Alan and Karen Pedersen, and the Yalanji tribe over a pastoral lease of 25,000 hectares at Mt Carbine, about 300 kilometres from Cairns. It had taken three years to negotiate.

In return for a better class of lease, the Pedersens recognised the Yalanjis' right to occupy about 1 per cent of the property and to camp, fish, hunt and

protect sacred sites elsewhere. (The settlement may well have been more expensive if a mining company had been involved.) Three years later none of the "traditional owners" had returned to exercise the cherished rights. Discouraged by this lack of interest, Derrick Oliver of the Cape York Land Council attributed it to the pressures of modern life, poverty and substance abuse, adding this candid but decidedly impolitic comment:

> "To people who are sitting in bars or doing drugs that land would be three and a half hours out of their life. The hardest part is instilling in young people the desire to run with [native title]".[22]

The Pedersens, who found the long-running dispute an "absolute minefield", told journalists that they never really expected members of the tribe to seek access, although it would take just a phone call to do so.

In June, 2002 a Mrs Mobbs of "Gowrie" station, near Charleville, after waiting five years for a claim over her property to proceed, revealed a similar experience. She said that for at least twelve years no Aborigine ever sought to enter her property for any purpose. Perhaps she and the nominal claimants, like the Pedersens, were simply caught up in a search for a *raison d'etre* by one of the innumerable Aboriginal corporations.

The Hindmarsh Bridge affair demonstrated that even freehold land was and is liable to be "frozen" by ministerial decree under the *Aboriginal and Torres Strait Islander Heritage Protection Act*. After a great deal of expensive to-ing and fro-ing the federal Government and Opposition parties combined to excise that area from the operation of the Act. In *Kartinyeri v. Commonwealth* the High Court allowed that legislation to pass, rejecting the argument that, once special benefits are conferred on a particular race, they can never be reduced or taken away.[23]

At the end of 1998, the Native Title Tribunal published a *Five Year Retrospective* recording that 879 claims had been lodged, and 1,349 agreements made, mostly for minor rights. There had been just four "determinations", and none was the result of a fully contested case.

So numerous are the cases (reported and unreported) that one is forced to be selective. In 1999 a claim to exclusive possession of numerous town sites in Alice Springs failed, although limited rights of access were granted over some of them.[24] Soon afterwards a claim by the Larrakia people on the Cox Peninsula near Darwin succeeded, but that was under the Northern Territory Act of 1976, not under the *Mabo* banner. Even so:

> "Darwin folk [wondered] how it is that people they grew up with have suddenly become Aborigines when before they were just Darwinites like everyone else ... Will the majority of Larrakia, who live in houses, watch TV and speak only English now cross the harbour to dress in lap-laps and dance in ochre paint? In Darwin there is a widely held view that these people never were real Aborigines".[25]

Claims under the Northern Territory Act have rarely if ever failed, and nearly half of the Territory is now Aboriginal trust land.

In legal theory the "stolen children" cases are quite distinct from land claims, but they are a manifestation of the same political movement. The first case was decided in 1999 – *Williams v. Minister, Aboriginal Land Rights Act*, in the Supreme Court of New South Wales. The claim for damages failed when the plaintiff admitted that her mother voluntarily made her a State ward. The NSW Court of Appeal and the High Court upheld the decision of the trial judge.

In 2000 greater resources were devoted to *Cubillo and Gunner v. The*

Commonwealth, in the Federal Court. After a trial lasting 94 days, judgment was given in favour of the Commonwealth. O'Loughlin J observed:

> "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".

An appeal was dismissed. Other unsuccessful cases were brought in NSW by Judy Stubbs and Valerie Linow. However, the results of these cases, and the reasons for their failure, do not appear to have affected the credit of the movement.

In *Rubibi Community v. Western Australia*,[26] a limited right of access to land near Broome for ceremonial purposes was recognised, again by consent. The area was already an Aboriginal reserve. In a remote part of the Northern Territory, an occupational title was recognised over a "phantom" town site that was surveyed in the late 1800s but then practically ignored.[27] In the absence of competing interests this claim met little resistance. The same applies to Western Australia's concession of desert lands to the "Spinifex People" in November, 2000. In that case the rubber stamp could have been wielded in court offices in Melbourne, Sydney or Perth, but Black C J took the opportunity for elaborate symbolism, venturing into the desert to make the consent order, as he sat in the sand in his court robes with local elders:

> "I thought it would help me in my understanding of things ... We had this wonderful experience of sitting under a tree for some considerable time and they were teaching me some words. It was a wonderful communication".[28]

The State reserved rights to all minerals, petroleum and water.

Black C J was off again in June, 2001, heart on sleeve, when he and his entourage flew from Melbourne to Cape York to ratify a concession to the Kaurareg people. Kneeling before the elders in a "highly emotional ceremony", he declared that "it was like being invited into a church or sanctuary".[29] That was not the Federal Court's last expensive publicity exercise. In 2004 another member of the Court carried the rubber stamp to some Torres Strait islands that were handed over by the Queensland government.

Serious contests

The first seriously contested matters to be finalised were: (1) *Yarmirr v. Northern Territory* (the *Croker Island Case*); (2) *Ward v. Western Australia*; and (3) *Yorta Yorta*. In every case the primary judgment was delivered in 1998, and the High Court's decision was handed down in 2002.

Yarmirr was a bid to take *Mabo* offshore so as to gain exclusive rights over part of the Arafura Sea. Judge and entourage camped on Croker Island to hear the Aboriginal witnesses; special arrangements for claimants are common in this class of litigation. But, after a long and costly trial, the award was limited to the protection of objects and places of "cultural significance" and a non-exclusive right to hunt and fish for non-commercial purposes. So the plaintiffs have the same rights to sail and fish there as the rest of us, no more, no less.

The judgment of Lee J in *Ward v. Western Australia* was delivered in November, 1998. The Kimberley Land Council sponsored a claim to 7,900 square kilometres of the State's north-west, including Lake Argyle mine, the Ord irrigation area and parts of the Northern Territory's Keep River National Park. Lee granted the whole claim, including rights to all natural resources in the vast

area concerned. But in March, 2000 his award was severely curtailed by a 2-1 majority of his own Federal Court, which held that modern land uses on the Ord River and in the Argyle mine were "completely inconsistent with the continued enjoyment of native title". Any traditional title to minerals (other than surface ochre) was extinguished by legislation long before *Mabo* was ever heard of. Native title over some remote areas and limited access rights to some pastoral leases were allowed to stand, but not on properties where Crown lessees had enclosed or otherwise improved their land. The creation of reserves, such as National Parks, also extinguished native title.

An appeal to the High Court yielded nothing but further legal costs charged to the taxpayers' account. *Ward* occupied 83 days in the Federal Court and 15 days in the High Court, where most appellants are fortunate to be granted a day or two. McHugh J concluded that *Mabo* title can "hardly be described as satisfactory", and that it is "a system that is costly and time consuming", in which "the chief beneficiaries are the legal representatives of the parties". As a consenting judge in *Mabo* itself, his Honour was understandably a disappointed man. *The Australian*'s legal correspondent had the final word:

> "[So] ends the social and legal adventure begun by Judge Malcolm Lee ... 4 years ago".

In the light of *Ward*, all that seems left of *Wik* is the proposition that a pastoral lease *may* fail to extinguish native title if its terms are very similar to those of the old, non-exclusive Queensland tenures that were involved in that case. In *Wik* itself there was an utterly unrealistic requirement of a legislative *intention* to extinguish native title, although the relevant laws were enacted, and the leases granted, many years before *Mabo* was heard of. By contrast, the judgments in *Ward* ask the more reasonable, objective question: "Does the subject lease *in fact* give exclusive possession?" If so, native title is out of the question.

If *Ward* and *Yarmirr* can fairly be called failures, *Yorta Yorta* was a disaster. After an interminable hearing the trial judge (Olney J) gave judgment on 9 December, 1998, one month after the primary judgment in *Ward*. The Yorta Yortas claimed 1800 square kilometres straddling the Victoria – New South Wales border. But this time the land was too valuable, and the numerous defendants too serious in their opposition, to permit a governmental cave-in of the sort that occurred in other cases, including *Mabo* itself (so far as the Commonwealth was concerned). Active defendants included the States of New South Wales and Victoria and the Murray-Darling Basin Commission.

Ultimately the trial judge had to cope with 11,600 pages of transcript recording the evidence of over 200 witnesses. This time, as fate would have it, the claimants' "oral history", a species of evidence that is usually very difficult to check, had to contend with a formidable document. It was a petition by the plaintiffs' forebears to the Governor of New South Wales, as long ago as 1881, declaring that their old way of life was extinct, and seeking an ordinary grant of land where they could settle down and live in the European way. And there were other difficulties for the plaintiffs:

> "Two senior members of the claimant group were caught out telling deliberate lies ... Evidence based upon oral tradition ... does not gain in strength or credit through embellishment by the recipients of the tradition, and for this reason the testimony of several of the more articulate younger witnesses has not assisted the applicant's case".

Or less ornately: "The problem with oral history is that it is also a

wonderful quarry for the creative and the fraudulent".[30]

Justice Olney was not so ready as some of his colleagues to swallow the evidence of anthropologists whole:

> "In preparation for this claim [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 a degree of partisanship on his part".

Olney was courageously unsentimental about "shell middens and scarred trees ... described by a number of witnesses as sacred":

> "[S]hell middens ... are nothing more than accumulations of the remains of shellfish frequently found on the banks of rivers. Trees from which bark has been removed to make canoes or other objects ... were also treated as sacred by some and as significant by others ... many are protected under heritage legislation, but 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".

The Full Court of the Federal Court (Black C J dissenting on "spiritual" grounds) dismissed an appeal from Olney's judgment, and the High Court did the same. The disappointed litigants, their promoters and supporters promptly accused the courts of "genocide". Professor Bartlett, an academic protagonist of native title, bemoans the fact that in *Yorta* the courts preferred the written admission in 1881, the diaries of a 19th Century grazier named Curr, and other documentary evidence, to "aboriginal tradition".[31] Bartlett evidently lacks a practical lawyer's appreciation of matters going to credit. He does not consider the flexibility of "oral history" under the influence of witnesses' immediate interests, or the fact that the document-makers of the 19th Century made their contemporary notes unaffected by the modern politics of aboriginal separatism.

For several years after *Wik* considerable insecurity was felt by holders of Western Lands leases in New South Wales. But eventually, in *Wilson v. Anderson*,[32] the High Court decided that Crown leases of that type *do* prevail over native title.

Two recent cases are *Lawson v. Minister assisting the Minister for Natural Resources (Lands)*[33] and *Lardil Peoples v. State of Queensland*.[34] The *Lawson* claim failed because the land in question had been acquired by the New South Wales government for public works on the Murray-Darling river system. In the *Lardil Peoples* case the claimants failed to secure exclusive rights over the Wellesley Islands in the Gulf of Carpentaria. They were left with non-exclusive, non-commercial fishing rights, and rights to draw fresh water from springs, and to visit sacred sites. A similar conclusion was reached in *Gumana v. Northern Territory*,[35] although the plaintiffs in that case were already owners of the adjacent land under the 1976 Northern Territory land rights legislation.

To the end of 2002 all awards of native title, apart from one in Western Australia, were made by consent, and in many of those cases the rights recognised were less than exclusive occupation. (An example is the Shoalwater Bay Agreement (1996) which permits hunting for dugong on a military reserve.) Nevertheless, the extraordinarily vague and complex state of the law had by then consumed many hundreds of millions of dollars, a great deal of social harmony, and incalculable legal resources. By mid-2002 the Native Title Tribunal alone had spent more than $150 million since it was established in 1994.[36] The Commonwealth set aside $120 million for native title matters in just one

financial year, 2002-03. In 2003 Queensland abandoned its own native title legislation and handed the problems back to the federal tribunal, leaving three quasi-judicial recipients of State government patronage on life tenure, salaries totalling $675,000 per annum, and very little to do.

By the end of 2003 there were twenty "titles by consent", including eight on Torres Strait islands, courtesy of the Queensland government, and two small areas in New South Wales. Most of them were subject to mining and other prerogatives of the Crown, common law rights of the public, and rights of access for State and local authority employees.[37] No *Mabo* title had been established in South Australia, Tasmania or Victoria.

Native titles (exclusive or non-exclusive) are not to be confused with monetary payments or other arrangements entered into by private interests under pressure of the Right to Negotiate, such as the Striker Resources Agreement (WA, August, 1997 – compensation for mineral exploration), the Redland Shire-Quandamooka Agreement (Queensland 1997 – a mere promise to continue negotiations about claims on North Stradbroke Island), and the Cable Sands Agreement for beach mining in Western Australia (2001).[38]

But despite the modest achievements of the *Mabo* doctrine (consumption of public funds aside) efforts are made from time to time to keep it, and the now seldom heard-of Native Title Tribunal, in the media. During the Western Australian State election last February, when the Opposition parties made an ill-fated promise to channel water from the Kimberleys to Perth, Fred Chaney, Deputy President of the Native Title Tribunal and co-chairman of Reconciliation Australia, issued a warning that any such plan would have to contend with many native title claims along the way. (Incidentally, the estimated cost of the visionary channel was rather less than two years' sustenance for ATSIC.)

Disillusionment

Despite the devoted efforts of anthropological witnesses and some federal judges, and the dazzling versatility of cases such as *De Rose v. South Australia*, the returns from *Mabo* pale in comparison with the vast amounts of money and social energy expended on the cause. It would be interesting, albeit depressing, to know the true size of the bill for the Brennan-Deane experiment – the cost of all the lawyers, mediators, cultural advisers, anthropologists, travelling allowances, court resources and so on, but it is unlikely that we shall ever be told. At the time of writing (late March, 2005) there are almost 500 native title cases listed in the Federal Court section of the AUSTLII website. Some are short procedural matters, others are interim (non-final) hearings, but it can safely be said that few of them were run on a shoestring budget.

Now, after all the excitement and expense, a realisation is growing that *Mabo* was not such a wonderful creation after all. Professor Bartlett opens a chapter of his text with the gloomy prognostication: "Retreating from Mabo – Frozen Rights and Judicial Denial of Equality".[39] Noel Pearson has spoken despairingly of internecine quarrels over "the scraps of native title",[40] recalling not only internecine strife at Hopevale, but also the history of Wellington Common in central-west New South Wales, the very first *Mabo* claim. There, in November, 2001, after eight years of disputation and negotiation, an agreement seemed to have been reached. Then a new group of claimants intervened, and it was back to the drawing board.

Expressions of disappointment have gradually become plainer and stronger. In March, 2002 Rod Towney, chairman of the NSW Land Council, pronounced native title a "disaster". "Our people are being promised lots of land and lots of money and I know that will never happen ... We are better off buying [it] or claiming vacant land under our State Act", which delivered 76,200 hectares to Aborigines in nineteen years. Towney recognised that agreements arising out of native title claims often fall short of *recognising* native title: "Indeed", he declared, "some go a long way to avoid it", and the only winners are "lawyers and anthropologists".[41]

A few months later Senator Ridgway, a former land council officer, described native title, in the *Mabo* sense, as a "spectacular failure".[42] It was becoming quite clear that pre-*Mabo* legislation, with the Land Acquisition Fund, provided simpler, better and more certain access to land than the meandering judicial process. Journalists who had extolled *Mabo* joined the chorus:

> "The reality is that unless you are an Aborigine living in the remotest parts of the country [*Mabo*] was never going to give you much. The Spinifex people won title [in Western Australia] because there were few competing interests ... Elsewhere native title means little more than being able to push open the gate of a cattle station and visit country".[43]

By 2002 David Solomon, of Brisbane's *Courier Mail*, was resigned to the facts that "the *Mabo* decision will provide benefits for relatively few Aboriginal people", and that such benefits as there are would be "political and psychological, not economic".[44] But perhaps this underestimates the Right to Negotiate.

Peter Sutton, a distinguished and singularly impartial anthropologist, reflects that if the school of "Nugget" Coombs, Brennan and Deane were right, Aborigines with land rights would be distinctly better off than their *Mabo*-less brethren. But as he sees it, the very opposite is true; in his view land rights divorced from employment and education are "a hollow promise".[45] Nearly half the Northern Territory was in Aboriginal hands when the local parliamentarian John Ah Kit admitted: "It is almost impossible to find a functioning Aboriginal community [here]".[46]

In January, 2005 Warren Mundine, a member of the new National Indigenous Council, roundly declared that inalienable communal title means "sweet bugger all" to the nominal beneficiaries.[47] Increasing urbanisation, defying the theory of separatism, prevents most people of Aboriginal descent from mounting a credible claim, if they are interested in doing so. The most recent Commonwealth census reveals a rising tendency for Aborigines to live in urban rather than remote areas. Since the census before the last was taken, the Aboriginal population of Coffs Harbour has increased by 30 per cent, Queanbeyan's by 23 per cent, Roma's by 23 per cent, Brisbane's by 28 per cent, while there was a fall of 7 per cent at Tennant Creek.[48]

In the Federal Court, too, the novelty is wearing off. In December, 2004 it complained that unrealistic native title claims were clogging its lists, and it advised hopeful plaintiffs to settle for less than exclusive possession. At the same time it observed – seemingly unaware of what this says about native title litigation – that defendants usually obtain their anthropological evidence (when they can get any) from experts who are near the end of their careers, and so are less concerned "that their ability to do future work for applicant groups may be precluded because they have worked for a respondent".[49]

The symbiotic relationship of native title claimants and anthropologists was considered in a paper presented to this Society several years ago.[50] Some of

the judges are now aware of it:

> "[O]n occasions the evidence has more the ring of a convinced advocate than dispassionate professional ... There is an obvious risk that the involvement of the 'expert' in the preparation [of the case] will at least affect the weight [of] the evidence given ... [if not its] admissibility".[51]

As the appeal of *Mabo* title faded, so too did support for the dysfunctional Aboriginal and Torres Strait Islanders Commission (ATSIC), whose fifteen years of life cost more than $1 billion per annum. But its habits died hard. In 2004 it allocated $85,000 of public funds to Chairman Clark's personal legal fees. In February this year it decided to mortgage property in aid of a bankrupt housing corporation in Queensland, headed by a daughter of sometime Deputy Chairman, Ray Robinson. At the same time it embarked on an asset-stripping exercise while a Senate inquiry kept it on life support, with salaries running at about $65,000 per week. A few weeks ago the Senate relented and passed the abolition bill. Subject to payment of another four months' salaries to its eighteen commissioners, ATSIC is no more.

A new beginning?

Two years after native title was created a percipient critic described it as "too weak a form of tenure for many of the needs of present day Aborigines, which would be better served by a stronger form of proprietary interest".[52] To another writer it is "reminiscent of Australia's only other Utopian experiment – William Lane's venture in Paraguay. ... with miserable consequences for those it was meant to benefit".[53] As Alexander Solzhenitsyn told his Soviet masters thirty years ago: "There can be no independent citizen without private property". The adage: "Everyone's business, no one's business" was recently illustrated in Western Australia, where thousands of cattle on an Aboriginal grazing property near Wiluna had to be rescued by the State Pastoral Lands Board. Only two of thirteen watering facilities were still functioning.[54]

But disappointment is beginning to give way to constructive ideas of returning to normal property law. Early this year a National Indigenous Councillor, Warren Mundine, produced a paper suggesting a gradual change from communal titles to private property, in the form of long-term leases. He points out that 15 per cent of Aborigines in the Northern Territory already hold individual titles to land. He concedes that communal housing organisations have a poor record of rent collection, asset and debt management, and require perennial subsidies.[55]

Supporting Mundine, the Indigenous Council called on State governments to reduce the power of communal entities "with their problematic governance" by allowing Aborigines to enjoy "private ownership through an expanded lease system". One State has already responded. On 16 March, 2005 the Queensland Minister for Natural Resources, Mr Robertson, foreshadowed amendments to the State's *Aboriginal Land Act* to authorise trustees to grant individual leases and to sell portions in urban areas to commercial interests.

Mundine's plan was not completely out of the blue. The tectonic plates of Aboriginal politics have been shifting for the last three or four years, as Noel Pearson, Pat Dodson and others have advocated a change from welfare dependency and symbolic gestures to practical measures against alcoholism, domestic violence, child abuse and drug addiction.

In June last year Pearson demoted Justice Brennan's son, Frank, from the land rights *avant garde*, saying that he and other *Mabo* enthusiasts expect Aborigines to eschew private ownership while their own relatives are "high-earning lawyers and professionals".[56] Recently several communities accepted special government aid in return for promises of self-help to improve health and educational conditions in their areas. Last December the senior journalist Paul Kelly tested the breeze and wrote:

> "There is no better example of the transformation of our politics than the new position of Patrick Dodson and Noel Pearson that accepts mutual obligation ... [and acknowledges] the failure of the progressive Left's policy agenda over a generation. ... This represents probably the most sweeping rethink since the 1967 referendum [on Aborigines]. The aim is to terminate passive welfare delivery and substitute 'shared responsibility agreements' between local communities and government".[57]

But Mundine's proposal met immediate opposition from land council functionaries and other Aboriginal bureaucrats. While the present forms of native title – statutory and *Mabo*-style – are nominally communal, they are really fiefdoms of an oligarchy well insulated from the poverty of their brethren. The proliferation of these bodies under a special companies law is staggering. In June, 2002 there was a network of 2,709 Aboriginal corporations,[58] all drawing expenses from the public purse, more or less honestly and efficiently.

Naturally the oligarchs are horrified to think that their domains may gradually return to the normal law of property. The Queensland government's signs of sympathy for a "new deal" were condemned as "appalling" by a well-known local activist. However, Chaney of the Native Title Tribunal supports Mundine:

> "I have met a lot of Aboriginal people who would like to own their own home. That is how most Australians are able to build their security ... It is unfair that Aboriginal people cannot do that too".[59]

The federal Minister for Aboriginal Affairs, Senator Vanstone, has also expressed interest in a "quiet revolution" in Aboriginal affairs:

> "Being land rich, but dirt poor, isn't good enough ... There's a huge portion of [Aboriginal] land ownership and there doesn't seem to be anywhere near enough wealth being generated".[60]

She sees individual land titles for Aborigines as a "major policy area", ripe for reform.[61]

How to begin?

Understandably the plan is sketchy at this stage. It would be sensible to begin with a pilot programme based on statutory titles, such as those based on the Northern Territory Act. They would provide a much more secure and less complicated foundation for individual titles than tenures of the *Mabo* kind. A fundamental difficulty with *Mabo* is that every such title is a unique "bundle of rights" based on a determination (or agreement) about local native customs. Many do not confer exclusive possession, which is the only feasible basis for "privatisation".

No doubt the federal minister had these things in mind in February this year, when she spoke of making the Northern Territory Act "more workable by providing greater choice ... about what [Aborigines] might do with their land ... for example, more direct dealings between traditional owners and companies".

In the Territory the Commonwealth could act without the co-operation of the States, and there would be fewer land councils to contend with than elsewhere. But whatever scheme is adopted, there remains the fundamental, ever-evaded question of who is, and who is not, an "Aborigine".

Freehold or leasehold?

At this stage the Mundine plan envisages a leasehold system.[62] Both Mundine and the Minister have expressed reservations about tenures that would be freely alienable. However, fetters upon alienation would be somewhat at odds with the letter and spirit of private property and self-reliance. On one hand, the Minister wants to give Aborigines "the capacity to get some commercial benefit out of land"; on the other, she does not think that they should "necessarily [be] able to dispose of it". There is a difficult balance to be struck between the integrationist desire for greater independence and the lingering separatist belief that Aborigines should not have the same freedom to deal with their property as other owners or lessees.

No doubt restrictions could be imposed, by statutory or contractual conditions requiring the approval of some overarching authority before property is sold, mortgaged or sub-leased. But who would that authority be? The Minister for Aboriginal affairs, or the Aboriginal corporation in which the block was previously vested? Might not the corporation be opposed to a "privatised" scheme, and, if so, would it be unduly obstructive?

Would it be an inflexible condition that sales or mortgages be confined to other Aborigines? That would tend to make borrowing difficult, so perhaps the restraint on alienation would apply to sales only, leaving mortgages to the discretion of the individual? But then there would be a risk, if loan repayments fell into arrears, of forfeiture to the mortgagor. In that event, would the lender be prevented from re-selling it to anyone but an Aborigine? If so, another deterrent to lenders would arise. And in the matter of sales, would Aboriginal proprietors faced with a willing buyer and an attractive offer always be faithful to an "Aborigines only" regime? The definition of "Aborigine" is already stretched, and in such cases might it not be further extended?

It is quite likely that restraints on alienation would be criticised as "paternalistic" and "discriminatory" by some of the very people who now oppose the Mundine plan. That could present a political difficulty, because "anti-discrimination" laws have gained a *quasi*-constitutional status, so that "discrimination" is no longer an ordinary, neutral word, but a self-proving indictment of wrongdoing. But as a matter of law, restrictions would probably pass muster as "good discrimination"[63] under s. 8 of the *Racial Discrimination Act* and the Convention to which the Act refers:

> "Special measures ... for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms ... provided, however, that such measures ... shall not be continued after the objectives for which they were taken have been achieved".

If leaseholds, who will be lessor?

The obvious, but perhaps not the best answer, is: "The Aboriginal body holding the communal title to the land from which the lease was excised". This

predicates a friendly disposition in such bodies to the creation of, and dealings in, separate titles. Could that be relied on in the present state of Aboriginal politics, and if so, would the practices of the many councils and corporations be reasonably efficient, predictable and uniform?

If Aboriginal bodies are *not* to be the landlords, the Crown will have to fill the vacancy. There are two ways of achieving that result. Compulsory acquisition of communal land is one of them. Initially only small portions of communal holdings need be involved, and in the remoter areas their value would not be high. (Should there be maximum areas for "privatised" titles in urban and rural areas respectively?) Of course compensation would be payable, despite the difficulty of applying conventional "market value" concepts to native title of any kind.[64] Rents paid by lessees could be used for that purpose.

A second possibility is to borrow a technique from the law of mining leases. All such leases are granted by the Crown, whether the subject land is Crown land or land privately owned. By the same token it is the Crown, not the private owner, which has the discretion to allow or disallow dealings with a lease. Once again, rents could be directed to the Aboriginal body concerned in whole or partial compensation for the overriding grant.

If the communal titles underpinning leases *are* retained by Aboriginal corporations, better supervision of their financial affairs is highly desirable. As Mundine says, the financial records of many "indigenous" bodies and their controllers are spotty, to say the least. Although the media are generally indulgent towards them, reports of financial abuses are as common as reports of effective remedial action are rare.

In December, 2001 *The Sydney Morning Herald*, usually deferential in these matters, carried an article headed "Aboriginal Gravy Train Off the Rails", claiming that the NSW Aboriginal Land Council had frittered away more than $520 million in a decade of mismanagement and poor investments. Tony Koch of the Brisbane *Courier Mail*, a perennial apologist for Aboriginal money managers, admits that "Australia is awash with hundreds of millions of dollars of taxpayer funds distributed by ATSIC for which there is little or no accountability".[65] The Aboriginal academic Marcia Langton, usually quick to castigate any critic of "indigenous" affairs, told ATSIC in 2002 that Aboriginal communities were being "cleaned out" by corruption and that "a lot of Aboriginal money is going AWOL".[66]

An ATSIC Commissioner for South Australia, Brian Butler, believes that in some communities most of the "leaders" are bribed, and calls for "zero tolerance" of graft, to save communities (taxpayers?) from being "robbed" of large amounts of money.[67] In 2003 a government investigator found that the NSW Land Council had paid an insider named Coe thousands of dollars for legal advice, despite the fact that, several years earlier, he was struck off the barristers' roll after complaints that he drew thousands of dollars from the Aboriginal Legal Service while he and his family holidayed abroad. Soon afterwards the Service collapsed with debts of $2 million. A few weeks ago Coe's dismissal from another six-figure sinecure was recommended by legal advisers of the land council concerned.

In July, 2002 two Queensland ATSIC commissioners, Thompson and O'Shane, called for an independent inquiry into Deputy Chairman Ray Robinson's purchase of a home, and his alleged use of housing company funds for personal expenses.[68] No more has been heard of that, but in March, 2004 an audit of a Toowoomba corporation headed by Robinson disclosed that he had written cash cheques for more than $1 million in one financial year. Other "leaders" poured ATSIC money

into trips to Geneva to tell the United Nations about the evils of Australia and to campaign for Canadian-style treaties. ATSIC chairman Clark spent $31,000 on a 17-day trip to Ireland with his wife for a week-long conference that he attended for two days.

Freehold titles?

In remote or unattractive areas there would probably be little demand for freehold. In view of its capital cost, many people would probably find leases at modest rents a more attractive proposition. But in places where land values are higher, freeholds as well as leases could be made available. Some of the most expensive blocks might be in the tribal domain of the Sydney Metropolitan Land Council, whose holdings in the Warringah district are said to have a developmental value of more than $1 billion, thanks to the Land Acquisition Fund.

It is true that restrictions on dealings with freehold would be more difficult to reconcile with normal land law principles than restrictions on leaseholds. But that is not a self-evident reason for allowing Aborigines who are prepared to pay the higher initial price a choice of freehold title. A little lateral thinking suggests a way of creating freeholds without compulsory acquisition of existing Aboriginal land, or some other politically sensitive action by government. Adaptation of an old piece of co-ownership legislation could achieve a result even more congenial to self-determination than a leasehold scheme. The Partition Acts – as they were originally called[69] – enable a co-owner, who cannot persuade fellow owners to let him have a separate title, to seek a court order for severance or sale of the property as a whole. For present purposes the sale option should be excluded. The usual order here would be for severance of a specified part of the communal land, and registration of it in the applicant's name.

Alternatively, the leases could include an option to purchase after a certain period of time, or after improvements to a certain value were made. Provisions of that kind have existed in Crown Lands Acts and pastoral leases for many years.

Continuing rights

It would be naïve to suppose that if some version of Mundine's plan succeeds, the separate system of Aboriginal land law will soon disappear. Communal titles controlled by close corporations will be with us for years to come. Notwithstanding gradual excisions of individual portions, large parts of communal holdings – statutory trusts and a few quasi-freehold *Mabo* titles – will remain. There are people within and without the "indigenous community" with large financial, emotive or ideological investments in the *status quo*. The arrival of "private" land rights will not prevent Aboriginal corporations from making new applications for communal titles according to *Mabo* or existing land rights legislation. The *statutory* sources of titles could be gradually closed down, but only large-scale resumptions, or natural death by *ennui* could see the *Mabo* species vanish. It is to be hoped that the proposed private titles will not be liable to future *Mabo* claims, at the risk of setting "private" Aboriginal owners against "communal" brethren.

Minor (non-exclusive) titles may fade away, particularly those that were claimed merely to make a political point or to keep Aboriginal affairs in the headlines. Gradually they may be forgotten, as old mining tenures and ghost towns – and the rights of the Yalanjis – have been forgotten. The urban drift of Aborigines is not likely to be reversed. But sites associated with true believers, or

prospects of financial gain, will live while the adherents or prospects survive.

Nevertheless, the novelty of judge-made titles seems to be wearing off, even in circles which would not tolerate the slightest criticism of them a few years ago. Does it follow, then, that the Mason Court's adventure was a failure, as some admirers now believe? If its real purpose was to create a useful form of ownership for many Aborigines, the answer is probably "Yes". But if its real aims were to provide a fashionable display of judicial power, publicity for an already outmoded version of land rights, and to force politicians to legislate, the answer is "No". A few judges, invincibly persuaded that "in some circumstances governments prefer to leave such things to [us]", decided to force the legislative hand, "and they did".

It remains to be seen whether the judicial reversion to Rousseau is eclipsed by Mundine's vision of individual owners with secure personal holdings. Who knows, we may live to see native title lawyers beating their swords into ploughshares, and trudging back to the tranquil fields of conveyancing.

Endnotes:

1. *Milirrpum v. Nabalco Pty Ltd* (1971) 17 FLR 141.
2. [1986] HCA 8.
3. *The Australian*, 1 May, 2002.
4. *Aboriginal Heritage Act* 1972 (WA); *Aboriginal Lands Act* 1995 (Tas); *Aboriginal Land Rights Acts* 1983 and 1998 (NSW); *Aboriginal Lands Acts* 1971 and 1991 (Vic); *Aboriginal Land Act* 1991 (Qld); *Aboriginal Lands Trust Act* 1966 and *Maralinga etc Land Rights Act* 1984 (SA).
5. I Hunter, *Native Title – Acts of State and the Rule of Law*, in Goot and Rowse (eds), *Make a Better Offer – The Politics of Mabo*, Pluto Press, Sydney, 2000, 107.
6. *The Australian*, 2 July, 1993: *Chief Justice Defends Ruling as Lawful*.
7. *D'Orta-Ekenaike v. Victoria Legal Aid* [2005] HCA 12.
8. *Yanner v. Eaton* (1999) 166 ALR 258 at [72] per Gummow J.
9. *De Rose v. South Australia* (2003) 133 FCR 325.
10. *Fejo v. Northern Territory* (1998) 195 CLR 96, at 25.
11. *Courier Mail*, 1 June, 2002.
12. Original epithet bowdlerised in deference to polite company.
13. *Courier Mail*, 5 November, 2004.
14. *The Australian*, 5 November, 2004.
15. Quoted in T Rowse, *The Principles of Aboriginal Pragmatism*, in Goot and Rowse (eds), *op. cit.*, 189.
16. *Courier Mail*, 22 April, 2003.
17. *Smith v. Tenneco Energy Queensland Pty Ltd & Others*, Drummond J, Federal Court, 2 May, 1996.
18. *Mason v. Tritton* (1994) 34 NSWLR 572.
19. *The Wik Case* (1996) 187 CLR 1.

20. *Nulyarimma v. Thompson* (1999) FCR 153.
21. *Fejo v. Northern Territory, loc. cit.*.
22. *The Australian*, 20 November, 2000, *Title Victory Squandered.*
23. *Kartinyeri v. Commonwealth* (1998) 72 ALJR 722.
24. *Hayes v. Northern Territory* (1999) 97 FCR 32.
25. *The Weekend Australian*, 16-17 December, 2000, *The Traditional Owner Next Door.*
26. *Rubibi Community v. Western Australia* [2001] FCA 607.
27. *Ngalaken People v. Northern Territory* [2001] FCA 654.
28. *The Australian*, 7 November, 2000.
29. *Ibid.*, 7 June, 2001, *Judicial Revolution Written in the Sand.*
30. R Flanagan, *The Lost Tribes*, in *The Sydney Morning Herald*, 17 October, 2002.
31. R H Bartlett, *Native Title in Australia*, 2nd edition, Butterworths, 2004, 82.
32. *Wilson v. Anderson* (2002) 190 ALR 313.
33. *Lawson v. Minister assisting the Minister for Natural Resources (Lands)* [2004] FC AFC 308.
34. *Lardil Peoples v. State of Queensland* [2004] FCA 298.
35. *Gumana v. Northern Territory* [2005] FCA 50.
36. *The Weekend Australian*, 1-2 June, 2002.
37. R H Bartlett, *op. cit.*, 536-538.
38. S Doenau, *Native Title and Negotiated Agreements*, Law Foundation of NSW, 1999.
39. *Native Title in Australia, op. cit.*, Chapter 6.
40. *The Weekend Australian*, 1-2 June, 2002.
41. *The Sydney Morning Herald*, 14 March, 2002.
42. *Ibid.*, 1-2 June, 2002.
43. *The Australian*, 7 June, 2002 (Paul Toohey).
44. *Courier Mail*, 14 August, 2002.
45. *The Weekend Australian*, 1-2 June, 2002, *Mabo Ten Years On.*
46. *Ibid.*.
47. *Ibid.*, 15-16 January, 2005.
48. *The Australian*, 27 June, 2002.
49. *Ibid.*, 16 December, 2004.
50. J R Forbes, *Proving Native Title*, in *Upholding the Australian Constitution*, Proceedings of The Samuel Griffith Society, Volume 4 (1994), 48 ff.
51. *Gumana v. Northern Territory* [2005] FCA 50 per Selway J.
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53. H Hughes and J Warin, Centre for Independent Studies , quoted in *The Weekend Australian*, 5-6 March, 2005.

54. *The Australian*, 18 February, 2005.
55. *Ibid*..
56. *The Weekend Australian*, 12-13 June, 2004.
57. *The Australian*, 8 December, 2004.
58. *The Sydney Morning Herald* (*Good Weekend* supplement), 15 June, 2002.
59. *The Weekend Australian*, 19-20 February, 2005.
60. *The Australian*, 24 February, 2005.
61. ABC Radio, *PM* programme , 23 February, 2005.
62. *The Australian*, 18 February, 2005.
63. *Gerhardy v. Brown* (1985) 159 CLR 70.
64. B Horrigan, *Practical Implications for Financiers, Land Dealers, Investors and Professional Advisers*, in B Horrigan and S Young (eds), *Commercial Implications of Native Title*, Federation Press, 1997, 228.
65. *Courier Mail*, 31 August, 2002.
66. *The Australian*, 27 March, 2002.
67. *Ibid*..
68. *Courier Mail*, 27 July, 2002.
69. They survive in all our jurisdictions under various modern names.