

**Presentation at the NSW State Conference of the
Council of Australasian Tribunals
14 September 2012**

“Government of Laws not of Men”

Statutory interpretation through the prism of native title

Introduction

In a recent lecture on statutory interpretation¹ the Chief Justice observed the following:

Power may be conferred on officials or public authorities in broad terms limited only by the requirements of good faith and the scope, purpose and subject matter of the statute under which the power is conferred. On the other hand, official powers may be conferred subject to prescribed conditions. If the conditions are not met then the power cannot be exercised. Judicial review of decisions in such cases may involve questions of statutory interpretation. For if the decision-maker has misconstrued the condition upon which the exercise of his or her power depends, then the purported exercise of the power may be invalid for jurisdictional error. The more words that are used in conditioning the exercise of an executive power, the more scope there can be for debate about what they mean and therefore about the circumstances in which the power can be exercised.

The Chief Justice considered the decision making task which is an essential part of the provision of justice and drew guidance about this essential function for decision makers from Sir Frank Kitto who wrote:

[T]he delivery of reasons is part and parcel of the open administration of justice. It is not enough that the hearing of a case has been in public. The process of reasoning which has decided the case must itself be exposed to the light of day, so that all concerned may understand what principles and practice of law and logic are guiding the courts, and so that full publicity may be achieved which provides, on the one hand, a powerful protection against any tendency to judicial autocracy and against any erroneous suspicion of judicial wrongdoing and, on the other hand, an effective stimulant to high judicial performance.²

In considering this challenge to decision makers and their duty to interpret a myriad of statutes, regulations and by-laws which govern the performance of this task I draw upon the development of the laws governing native title in Australia hoping attendees may find this perspective illustrative of matters of general application.

¹ Sir Frank Kitto Lecture, University of New England, “What were they thinking? Statutory Interpretation and Parliamentary Intention” Chief Justice Robert French AC, 23 September 2011, Armidale (available through the High Court website) p 10.

² FW Kitto, 'Why Write Judgments?' (1992) 66 *Australian Law Journal* 787, 790, French CJ above p3.

In a now oft quoted passage from *Milirrpum v Nabalco*³ Blackburn J observed of the evidence given about Yolgnu people and their relationship to their country:

‘If ever a system could be called “a government of laws, and not of men”,⁴ it is that shown in the evidence before me.’⁵

Despite the evidence his Honour felt constrained, by his understanding of precedents that were binding upon him, to find that at common law there was no doctrine of communal title which would apply where a colony was established by settlement and occupation. Therefore, despite the plaintiffs establishing that they lived in accordance with a normative system of laws and customs which bound the Yolgnu people to each other and their land, they did not have a proprietary interest in their land that the Court would recognise.

Two hundred and four years after Arthur Phillip claimed possession of New South Wales for the King of Great Britain, the understanding expounded in *Milirrpum* was set aside in the *Mabo*⁶ decision where the High Court found that the common law did recognise “a form of native title which, in the cases where it has not been extinguished, reflects the entitlement of the indigenous inhabitants, in accordance with their laws or customs to their traditional lands.”⁷ Within 19 months of the *Mabo* decision the Commonwealth Parliament passed the *Native Title Act 1993* (Cth) (‘NTA’) creating a statutory regime to provide a means by which *inter alia* those seeking recognition of their native title rights and interests in their traditional land could access a “special procedure...for the just and proper ascertainment of native title rights and interests.”⁸

In the Australian context the *Mabo* decision and the NTA created a new legal arrangement where other systems of law were held to pre-date, survive and subsequently, to the extent of their consistency with each other, co-exist with the law which arrived with the acquisition of sovereignty, eventually over all of Australia, by the British from 1788. The co-existence of legal

³ *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141 (‘*Milirrpum*’) Blackburn J, Supreme Court of the Northern Territory, the context in which the quote occurs is as follows:

I am very clearly of the opinion, upon the evidence, that the social rules and customs of the plaintiffs cannot possibly be dismissed as lying on the other side of an unbridgeable gulf. The evidence shows a subtle and elaborate system highly adapted to the country in which the people led their lives, which provided a stable order of society and was remarkably free from the vagaries of personal whim or influence. If ever a system could be called “a government of laws, and not of men”, it is that shown in the evidence before me. (at 266 – 267.)

⁴ The phrase is usually attributed to John Adams who helped draft the Massachusetts Constitution (1780). The term appears in Part the First, art XXX...”to the end it may be a government of laws and not of men.”

⁵ *Milirrpum* at 267.

⁶ *Mabo & Ors v State of Queensland (No 2)* (1992) 107 ALR 1; (1992) 175 CLR 1 (‘*Mabo*’).

⁷ *Ibid* 107 ALR at 7.

⁸ Preamble to the *Native Title Act 1993* (Cth), p2.

codes from different sources of law is a fairly common situation in many other nations. Legal systems such as Belgium, Sweden and Hong Kong are examples. The passage of the NTA brought Australia into line with the jurisprudence on the survival of indigenous interests in land with New Zealand, Canada and the United States amongst others. This new legal 'arrangement' required adjustments in attitude, thinking and approach by the institutions charged with implementing the new system no less than the people whose various interests were likely to be affected by recognition of native title.

The adjustment has been awkward with debates occurring at every level about issues formerly the province of the academic, the jurist and the philosopher. Questions such as the very entitlement of the High Court to arrive at such a decision,⁹ questions about what judges are doing when they provide a judgment,¹⁰ questions about how different systems of laws can co-exist in one nation are not usually the topic of broadsheet headlines and nightly TV news bulletins. At times during the post-*Mabo* debates they have been.

What has added to both the passion and puzzlement of participants in these debates are factors which can be difficult to articulate but are deeply felt - people's relationship to land and each other; the destabilisation of ideas, formerly seen as certain, defining ownership and belonging; the development of more nuanced understandings about the effects of colonisation on the colonised. At the heart of these debates, and frequently as their cause, have been judgments in relation to native title by the Federal and High Courts, handing down decisions about issues which seem to import the political as much as the legal, the personal and philosophical as much as the jurisprudential. Commentators have observed that the decisions can appear policy driven.¹¹

The Australian jurisprudence surrounding recognition of indigenous rights and interests in land has developed along distinct lines with the scope of the recognition provided by the *Mabo* decision becoming ever more restricted as the Courts and the parties interpret indigenous rights,

⁹ For example then Premier of WA Richard Court, through the press offered the people of WA a referendum in response to the *Mabo* decision so that un-elected judges could not 'dictate' to the people of WA; Senator Bronwyn Bishop also quipped in response to the Premier's suggestion "What's wrong with a bit of democracy?" – ABC news coverage July 1992.

¹⁰ Geoffrey Blainey's articles in The Age newspaper in 1993 for example 'High Court Playing Politics' 26 June 1993 and in News Weekly 'Vital Facts Need Explaining in High Court's *Mabo* Judgment' 4 December 1993.

¹¹ See for example Strelein, L, *Compromised Jurisprudence, Native Title Cases Since Mabo* 2006 Aboriginal Studies Press, AIATSIS Canberra p9; Pearson, N, "Where We've Come From and Where We're At with the Opportunity that is *Koiki Mabo's Legacy to Australia*" *Mabo Lecture*, AIATSIS Native Title Representative Bodies' Conference, Alice Springs 3 June 2003.

interests and relationships to land, within the framework of applications made under the provisions of the NTA.

Since the passage of the NTA it has appeared to those involved on the indigenous side, that the courts', no less than the State's and Commonwealth's responses to native title have tended to restrict recognition of native title rights and interests to as narrow a compass as possible. A variety of legal techniques seem relied upon to achieve that objective but, despite the supportive and rhetorical statements that are published when native title *is* recognised,¹² the political and jurisprudential response has been to retreat from an expansive and/or beneficial reading of native title and create as technical and narrow a reading as text and policy can support. Noted commentators such as Noel Pearson, and the annual reports of the Social Justice Commissioners about native title and social justice issues, indicate an incipient racism within non-indigenous culture and institutions which, even where not consciously racist, cannot regard indigenous issues and perspectives on an equal footing with non-indigenous. Recognition of surviving native title rights and interests under the NTA is shaped and measured by legal standards and language of no relevance to or compatibility with the information being provided which demonstrates who the people are and the nature of the laws and customs still observed, under which the people are connected to the land, holding cognisable rights and interests in it.

Legalism and realism

There are two schools of legal theory which provide a means of analysing the outcomes of the Courts' and parties' efforts to try to 'bed down' native title within the broader Australian social, political and legal structures - legalism and realism.

At different times the Courts' efforts have moved to and fro along a spectrum of modes of constructing and interpreting law in the context of native title. *Mabo* is seen as the common law's high point at one end of the spectrum.¹³ *Ward*¹⁴ and *Yorta Yorta*¹⁵ swing heavily in the opposite direction purporting a strict statutory construction of the NTA with no room left for a common

¹² Judicial statements in determinations praising the parties for reaching agreement such as those of Black CJ in *Anderson on behalf of the Spinifex People v State of Western Australia* [2000] FCA 1717 at [7] – [8] and in *Andrew Passi on behalf of the Meriam People v State of Queensland* [2001] FCA 697 [9] – [11]. Also see the press releases of various relevant State or Federal members of Parliament and/or Ministers in press releases upon consent determinations being made eg the most recent statement by the Federal Attorney General following the Nyangumarta determination (*Hunter v WA* [2009] FCA 254), 11 June 2009.

¹³ Pearson, N, "Land Is Susceptible Of Ownership", High Court Centenary Conference, Canberra 9-11 October 2003.

¹⁴ *Western Australia v Ward* (2002) 213 CLR 1.

¹⁵ *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422.

law interpretation. Critics of the Courts' application of the NTA write of disillusioned hope and lost opportunity.¹⁶ Following the *Ward* and *Yorta Yorta* decisions Noel Pearson marked the end of 'Ten years in the sunshine of the Rule of Law (that) was all that black Australians were fated to enjoy'.¹⁷

Interspersed between the judgments resolving contested determinations of native title are the decisions where the parties to a native title application have reached agreement about the form of orders to be made recognising the applicant's native title rights and interests - consent determinations.¹⁸ Here too a wide variety of judicial approaches are demonstrated in the reasons given by the Court for its decision to give effect to the parties' agreed outcomes.¹⁹

The parties, even when intent on reaching a consent determination, negotiate those outcomes within the developing (if not shifting) interpretations of the legislation. Mediations of native title determination applications conducted until 1 July 2012 by the National Native Title Tribunal – since then now entirely by the Federal Court - which typically take many years, can often be punctuated (if not set back) by decisions handed down determining contested applications. Describing where in the spectrum these decisions are situated, between the *Mabo* decision and *Yorta Yorta*, may assist observers of native title issues, and practitioners seeking to apply the NTA, to more effectively consider or pursue outcomes under the Act.

Legalism

Legalism constructs the judicial task of interpreting and applying the law as being about discovering the law which exists prior to and external to the judicial decision and applying it to the

16 Teahan, M, "A hope disillusioned, an opportunity lost? Reflections on common law native title and ten years of the *Native Title Act*" [2003] MULR 19.

¹⁷ Pearson, N "Native title's days in the sun are over", *The Age*, 28 August 2002; see also Pearson, N "The High Court's abandonment of 'the time-honoured methodology of the common law' in its interpretation of native title in *Mirriuwung Gajerrong and Yorta Yorta*" 2003 Sir Ninian Stephen Lecture, Law School, University of Newcastle, 17 March 2003.

¹⁸ Of the 161 determinations made by a Court that native title exists, 150 of them are consent determinations, see the National Native Title Tribunal web site, www.nntt.gov.au/applications_and_determinations.

¹⁹ For example Justice North in *Karajarri (Nangkiriny v WA 2002 and 2004)*, *Mirriuwung Gajerrong #4 (Ward v WA 2006)* and the recent *Nyangumarta (Hunter v WA 2009)* consent determinations emphasises evidence of the agreement of the parties as the determinative factor for the Court to make the orders sought; Justice Allsop in *Western Yalanji (Riley v Queensland 2006)* and later *Eastern Kuku Yalanji (Walker v Queensland 2007)* consent determinations emphasised the historical and anthropological information supporting the application for determination by consent; Justice Emmett in the *Gungarri* consent determination (*Munn v Queensland 2001*) emphasised the role of the State in vetting the application and the significance of the parties being legally represented through the proceedings. Justice Dowsett refused to make a consent determination for the *Girramay People (Muriata v Queensland 2008)* despite being so requested by all parties including the State because he was not satisfied about the consistency of description of the native title claim group between the application, the prescribed body corporate and the proposed determination.

facts of the case. Under this approach the law is independent of the Court and judge who discovers and applies it; "Courts are the mere instruments of the law and can will nothing".²⁰

In the *Uniform Tax Case* Latham CJ held:

..the controversy before the Court is a legal controversy, not a political controversy. It is not for this or any court to prescribe policy or to seek to give effect to any views or opinions upon policy. We have nothing to do with the wisdom or expediency of legislation. Such questions are for Parliaments and the people. But the Court is not authorized to consider whether the Acts are fair and justthese are arguments to be used in Parliament and before the people. They raise questions of policy which it is not for the Court to determine or even to consider."²¹

The great exponent of legalism in Australia was Sir Owen Dixon, Chief Justice of the High Court from 1952 to 1964. In his address upon taking office his Honour said:

"Close adherence to legal reasoning is the only way to maintain the confidence of all parties in federal conflicts. It may be that the Court is thought to be excessively legalistic. I should be sorry to think that it is anything else. There is no other safe guide to judicial decisions in great conflicts than a strict and complete legalism".²²

Whilst the function of the judge under this theory is to declare, not 'make' the law, the judicial function is still an interpretive act where implications can be drawn, where they are inherent in the language and structure of the text requiring interpretation.²³

Legalism suggests that the law is to be found "within the body of the authoritative legal materials as correctly understood".²⁴ Those materials comprise, primarily, previous judicial decisions on point (*stare decisis*) any relevant statutory text and common law principles. Under this theory there is no room for policy considerations which are of themselves political and therefore a matter for parliament.²⁵

²⁰ *Osborn v Bank of the United States* (1824) 22 US 9 Wheat. 738 per Marshall CJ, United States Supreme Court at p 866:

"Judicial power, as contradistinguished from the power of the laws, has no existence. Courts are the mere instruments of the law, and can will nothing. When they are said to exercise a discretion, it is a mere legal discretion, a discretion to be exercised in discerning the course prescribed by law; and, when that is discerned, it is the duty of the court to follow it. Judicial power is never exercised for the purpose of giving effect to the will of the judge, always for the purpose of giving effect to the will of the legislature; or, in other words, to the will of the law."

²¹ *South Australia v Commonwealth* ("First Uniform Tax case") (1942) 65 CLR 373 at 408 – 409.

²² Sir Owen Dixon, *Address upon taking the oath of office in Sydney as Chief Justice of the High Court of Australia on 21st April, 1952*, in *Jesting Pilate and Other Papers and Addresses*, ed. Woinarski J, Melbourne (1965), p.247; also at (1952) 85 CLR xi at xiii-xiv.

²³ Gageler, *S Legalism* Oxford Guide to the High Court, 2001, OUP p 429.

²⁴ *Ibid.*

²⁵ Brennan, G, AC KBE, "The Parliament, The Executive and The Courts: Roles and Immunities" School Of Law, Bond University Saturday, 21 February 1998.

The High Court, as the institution concerned with interpreting the Constitution, was long seen as a bastion of legalism and appropriately conservative in technique. Many regard the advent of the Mason Court as the point at which the High Court veered towards the other end of the spectrum becoming, in keeping with other Courts of final appeal such as the United State Supreme Court, more realist in approach.²⁶ Native title decisions are an interesting marker of how far the Mason Court went down the (so-called) realist path and how far the Gleeson Court then came back the other way.

Realism

Realism as a legal theory regards judges as *making* law each time they make a decision. Under this theory the judicial exercise is based on a variety of factors, such as the context and purpose of the relevant statutory provisions and common law principles, as well as taking into account the judge as human being with personal perspectives subject to individual environments which have a bearing on his/her interpretation of the law. Realism holds that by looking at “the sources of legal rules and of their effects in practice”²⁷ these contexts provide the ‘real’ reason for the particular judicial decision. This view of judging is not new²⁸ but came into focus as a response to the strictures of legalism during the mid twentieth century, most strongly in the United States.²⁹ Late in the twentieth century the Mason Court in Australia was regarded as quite promptly ‘abandoning’ legalism in favour of approaches that took greater account of context, purpose and the constitutional intent.³⁰

In many quarters this shift of interpretive mode was criticised as judicial creativity and undemocratic.³¹ Phrases such as ‘judicial activism’ have become pejorative terms to malign so called ‘judge-made law’ as illegitimate law-making resulting from conduct which has no political mandate.³² This concern is often raised in the context of discussions about politico/legal

²⁶ Gageler, S “The death knell for legalism was sounded (at least in its traditional form) in a series of decisions notably *Cole v Whitfield* (1988), *Mabo* (1992) and *Dietrich v R* (1992) in which the High Court, while continuing to apply analytical and conceptual techniques, more openly acknowledged the choices being made” supra n19.

²⁷ Fraser, D, *What a long strange trip it's been: Deconstructing Law from Legal Realism to Critical Legal Studies* (1988-9) 5 AJLS 35, quoting Schlegel.

²⁸ “The life of the law has not been logic; it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, even the prejudices which judges share with their fellow men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed.” Oliver Wendell Holmes, Jr *The Common Law* (Boston 1881) pp 1-2.

²⁹ Roosevelt, F D, “the decisions of the courts on economic and social questions depend on their economic and social philosophy”, quoted in *The American Doctrine of Judicial Supremacy* Haines, C G, (1959) New York, p 46.

³⁰ Dillon, M and Doyle, J *The Mason Court Oxford Guide to the High Court*, 2001, OUP p 462.

³¹ The furore that surrounded the High Court after the *Wik* decision in 1996 is a case in point.

³² Sackville, R, *Judicial Activism Oxford Guide to the High Court*, 2001, OUP p 6-7.

decisions such as whether or not Australia should have a Bill of Rights and was at the forefront of criticism of the Court following the *Mabo* and *Wik*³³ decisions.³⁴

The theories can be applied as a means of understanding how the Court or particular judges function in the context of new legal challenges such as recognising the survival of rights and interests in land of indigenous peoples, and the role played by the Courts as indigenous peoples try to 'achieve' that recognition. The theories however cannot be uniformly applied to any one Court for a particular period. For example in the 1930s when H V Evatt sat on the High Court³⁵ his mode of decision making sat more within the realist school.³⁶ Murphy J in the Barwick and Gibbs Courts was a frequent dissenter impatient with rigid application of *stare decisis* who believed in 'silent constitutional principles' informing the operation of the constitution in a democratic society.³⁷ Kirby J in the Gleeson Court has been, markedly, a judge for whom contemporary mores provide relevant considerations.

Nor in the Mason Court did all members always fit within the realist school. For example before he left office as Chief Justice of the High Court, in relation to the adoption of a Bill of Rights Sir Gerard Brennan cautioned:

A Bill of Rights is necessarily drawn in open-textured terms. In essence it requires the Courts to apply values rather than rules to the solution of concrete problems and to attribute to values that are in competition a priority as between themselves. Thus if liberty and equality were both proclaimed in a Bill of Rights, priority might have to be determined, for liberty is antipathetic to equality when the protagonists are of unequal strength. A Bill of Rights invites, indeed, compels the Courts to assume a degree of political power. This would require a radical change in the judicial mind set which currently prides itself on its apolitical function. To be sure, a jurisprudence develops to guide its exercise, but the United States and Canadian experience shows that a Bill of Rights transfers considerable power from the political branches of government to the Judiciary. A public expectation is fostered that the Courts, rather than the Parliament, will be the ultimate protector of the public good and of individual freedoms and interests.³⁸

³³ *Wik Peoples v Queensland* (1996) 187 CLR 1.

³⁴ Then Deputy Prime Minister Tim Fischer's now notorious remarks about appointing a 'Capital C conservative to the High Court' and his party's intention to produce 'bucket loads of extinguishment' through legislation in response to the High Court's *Wik* decision are well known examples.

³⁵ 1930 – 1940.

³⁶ Evatt came to the bench with a political background and a strong advocacy practice on behalf of trade unions. In matters heard by the High Court during Evatt's term of office, Evatt upheld employee's arguments in 27 of the 29 cases dealing with employer-employee relations, Wesley-Smith, P, *Herbert Vere Evatt and the High Court of Australia* (1969) unpublished thesis, University of Adelaide.

³⁷ Williams, J, *Murphy, Lionel Keith Oxford Guide to the High Court*, 2001 OUP at 485.

³⁸ Brennan G, *supra* n23, p 13.

Applying interpretive theories to native title jurisprudence

Mabo

Whilst the *Mabo* decision is seen as a radical break from the past and a decision set within the context of community expectations of justice and human rights,³⁹ the decisions of the majority, provide very scholarly examinations of the principles of the common law which provide for the survival of local (indigenous) law to the extent of its consistency with the law which arrived with the acquisition of sovereignty by the British.

Brennan J set out nine elements of what he held to be the common law of Australia, by which the Court could recognise the entitlement of the Meriam People to possession, occupation, use and enjoyment of their islands.⁴⁰ His Honour emphasises in his judgment that the common law could not recognise native title rights and interests if to do so would fracture the skeleton of principle⁴¹ “which gives our land law its shape and consistency.”⁴² Brennan J’s decision looks at the history of the development of tenure and includes some reflection on the task of the High Court itself when determining matters brought before it.⁴³ His Honour demonstrates how the pathway to recognition of indigenous peoples’ rights to land lies in a complete reading of the common law to reveal those principles which exist and therefore make the recognition possible. Brennan J explains that although those mechanisms were not perceived in prior decisions, they persist, they were part of the law which arrived with the British colonists, to provide the mechanism by which native title can be recognised despite acquisition of sovereignty by a foreign power and, in many places, the imposition of layers of other interests. Where those interests are consistent with the rights and interests of native title holders, under the common law native title may not be extinguished; elsewhere, absent adverse interests, native title may survive to its fullest extent.

Justices Deane and Gaudron jointly and Justice Toohey also demonstrate how, according to existing common law principles which arrived in Australia with the acquisition of sovereignty by the British, the rights of the Meriam people to the islands of Mer, Dauar and Weier survived the acquisition of radical title over them by the Crown.

³⁹ *Mabo* above n4 at p19.

⁴⁰ *Id* p51.

⁴¹ *Id* p19.

⁴² *Id* p32.

⁴³ *Mabo* n4 at 18.

Despite the language of the decision, which has so often been quoted for the candour with which the Court spoke of issues which appear beyond the usual province of the Court,⁴⁴ the decision is fundamentally conservative in technique and effect. It preserves the status quo. The effect of the decision is that if the State has granted interests inconsistent with native title then native title is extinguished. Native title only survives in areas where no adverse interests have been granted – in a sense everyone keeps what they've got and if through the grant of exclusive possession interests, the capacity to recognise native title has been extinguished, it cannot be restored when the adverse interest ceases.⁴⁵ Also, in a 4:3 majority the Court held that there is no right to compensation for any extinguishment prior to the passage of the *Racial Discrimination Act 1975* (Cth).

By technique, in many respects the *Mabo* decision is legalist. The decisions of Brennan, Deane, Gaudron and Toohey JJ are studies in the common law as it existed when sovereignty was acquired and as it persisted until 'revealed' in 1992. By outcome, and breadth of issues addressed as relevant to the judgment, it is realist – context, history and community expectations play a part in the reasons.⁴⁶ Also, it has been suggested, the fact that two of the majority judges (Brennan and Toohey JJ) had been Northern Territory Land Commissioners under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) lent experience to the High Court bench of the reality of indigenous traditional law and custom surviving intact into the twentieth century despite the effects of colonisation.

Native Title Act Case⁴⁷

The first test of the *Native Title Act* came when Western Australia passed a law which purported to extinguish native title wherever it may have survived in the State and replace it with a statutory title, the *Land (Titles and Traditional Usage) Act 1993* (WA). The law was similar in purpose to earlier Queensland legislation which was also held to be unconstitutional in the first *Mabo* decision.⁴⁸ In the *Native Title Act Case* the High Court held that even though parliament had the

⁴⁴ Justices Deane and Gaudron's observation about the "conflagration of oppression and conflict to dispossess, degrade and devastate the Aboriginal peoples and leave a national legacy of unutterable shame" are a striking example. *Mabo* n4 at p79.

⁴⁵ See Mansell, M, 'The Court gives an Inch but takes Another Mile' (1992) ALB vol 2 No 57, p4.

⁴⁶ *Mabo* supra n4 at p19.

⁴⁷ *Western Australia v Commonwealth* (1995) 183 CLR 373 ('the *Native Title Act Case*').

⁴⁸ The *Queensland Coast Islands Declaratory Act 1985* (Qld) was legislation passed, following the commencement of the *Mabo* proceedings, by the Queensland parliament purporting to thwart any capacity of the courts to recognise native title, through declaring the effect of the annexation of the off shore islands as extinguishing of all other rights

power to extinguish native title it could not do so, following the passage of the *Racial Discrimination Act 1975* (Cth) ('RDA'), on a basis that the RDA "... precludes both a bare legislative extinguishment of native title and any discrimination against the holders of native title which adversely affects their enjoyment of their title in comparison with the enjoyment by other title holders of their title."⁴⁹

Of interest to the present discussion of judicial method was the Court's finding that s 12 in the *Native Title Act* as passed was invalid. Section 12 NTA provided as follows:

Subject to this Act, the common law of Australia in respect of native title has, after 30 June 1993, the force of a law of the Commonwealth.

The Court made findings - or expressed its view (depending on whether one is being legalist or realist) about why s 12 could not make the common law a law of the Commonwealth. The Court described the indeterminate nature of the common law. It also used the platform provided by the case of explaining its own functions and processes,⁵⁰ one cannot help but think, in response to the reactions to *Mabo (No 2)*:

Section 12 does not in terms make a law in the sense of creating rights or imposing obligations. It takes the common law as an entirety and purports to invest it with the force of a law of the Commonwealth. If s.12 be construed as an attempt to make the common law a law of the Commonwealth, the attempt encounters some constitutional obstacles. ... the common law is not found in a text; its content is evidenced by judicial reasons for decision. Isaacs J explained⁵¹ ...that it is the declaratory nature of a judgment ... that allows for the evolution of the common law:

"A prior decision does not constitute the law, but is only a judicial declaration as to what the law is. The declaration, unless that of a superior tribunal, may be wrong, in the opinion of those whose present function is to interpret and enforce the law".

In *Giannarelli v. Wraith*⁵² Brennan J said:

" In the view of a court sitting at the present time, earlier decisions which are not binding upon it do not necessarily represent the common law of the earlier time, though they record the perception of the common law which was then current."

... The common law relating to native title is not regulatory; it is substantive law the content of which is declared from time to time by the courts. **Mabo (No.2) is a dramatic**

and interests. It was held to be invalid in *Mabo v. Queensland (No 1)* (1988) 166 CLR 186 also due to the protective effect of the *Racial Discrimination Act 1975* (Cth).

⁴⁹ The *Native Title Act Case* supra n45 at [2].

⁵⁰ Id at [146] – [149].

⁵¹ In *Australian Agricultural Co. v. Federated Engine-Drivers and Firemen's Association of Australasia* (1913) 17 CLR 261 at 275-276.

⁵² (1988) 165 CLR 543 at 584.

example of how the declaration of the common law relating to native title can change when a new judicial examination is made of the basic legal principles which underlie a proposition earlier accepted. *Ex hypothesi*, when a court declares a change in the common law, the Parliament has not considered whether it is necessary to make that change as a special law for the people of a race. The content of the common law will, in the ordinary course of events, change from time to time according to the changing perceptions of the courts. And the changes occur without reference to the Parliament in which is reposed the power to make special laws for the people of a race as the Parliament deems necessary.⁵³ (*emphasis added*)

It is of interest in the Court's response to see the extent to which their honours describe the technical undertaking of the Court itself, as being to reveal and declare law which is external to itself – classic legalism. It is also interesting to note the explanation of how this evolving process is legitimate without reference to the Parliament.

The two *Mabo* cases⁵⁴ and the *Native Title Act* case were the only decisions concerning native title handed down by the Mason Court.

North Galanja

The next opportunity the Court had in relation to development of native title under its new Chief Justice Brennan CJ was to examine the application of the *Native Title Act* in practice. In *North Galanja Aboriginal Corporation v Queensland*⁵⁵ special leave to appeal was sought on three bases: the first challenged the procedure adopted by the Native Title Registrar in refusing to register a claim; the second sought a ruling in relation to whether or not a pastoral lease issued in 1904 extinguished native title;⁵⁶ the third challenged the capacity of the State of Queensland to authorise the grant of leases which would extinguish native title. Leave to appeal was granted in relation to the procedural issue only.

Even though the case examined only a procedural issue, in this decision the Court reverts to the more impassioned approach seen in *Mabo*. McHugh J refers to the significance of the procedural rights that accrued to applicants once their claims were registered. His Honour refers to considerations of legal principle and public policy⁵⁷ and states:

But one matter is beyond speculation. The refusal of the Tribunal to accept the claim of the Waanyi People deprived them of the statutory rights that the Act conferred upon

⁵³ *Native Title Act Case* supra n45 at [149].

⁵⁴ *Mabo v. Queensland (No 1)* (1988) 166 CLR 186 and *Mabo & Ors v State of Queensland (No 2)* (1992) 175 CLR 1.

⁵⁵ (1996) 185 CLR 595 ('*North Galanja*').

⁵⁶ Resolved later that year by the *Wik Case*, supra n21.

⁵⁷ *North Galanja* supra n 52 at [15].

them. That refusal was a serious injustice to them. In my view, this Court could not add another injustice to the long history of injustices to the Aboriginal people by refusing to vindicate the legal rights of the Waanyi People - even if vindicating those rights meant that the effect of pastoral leases on native title was to remain unresolved by this Court.

To ignore the procedures of the Act and to determine the extinguishment issue before the Waanyi People had had an opportunity to utilise their rights under the Act would be both a breach of the Act and an injustice to the Waanyi People. To refuse to correct that breach, because to do so would serve the social or economic interests of other persons, would be a step calculated to undermine the rule of law in our community. The community will quickly lose confidence in the courts of justice if a perception arises that the courts are ready to ignore the legal rights of individuals whenever intervening governments or litigants urge that public or private convenience requires such rights to be by-passed.⁵⁸

The five members of the High Court issuing a joint judgment⁵⁹ expressed their views on the value and importance of agreed outcomes in native title cases:

If it be practicable to resolve an application for determination of native title by negotiation and agreement rather than by the judicial determination of complex issues, the court and the likely parties to the litigation are saved a great deal of time and resources. Perhaps more importantly, if the persons interested in the determination of those issues negotiate and reach an agreement, they are enabled thereby to establish an amicable relationship between neighbouring occupiers.⁶⁰

This theme has been constantly repeated in determinations of native title. The carriage of mediations and negotiation of native title applications has been an interesting tussle between the Federal Court and the National Native Title Tribunal. The Court has increasingly expressed its frustration with the protracted mediation of native title claims by the NNTT and increasingly provided more and more Court involvement in mediation of claims aided by the coercive power of the Court to compel parties to participate and comply. Amendments to the *Native Title Act* in 2007 bolstered the Tribunal's mediation function and endeavoured to circumvent multiple streams of mediation developing in native title applications between the institutions. Amendments in 2009 swung the pendulum the other way boosting the Court's mediation functions in the interests of greater 'efficiency and timeliness'.⁶¹ Full effect was given to these amendments with the Attorney General's announcement that from 1 July 2012

⁵⁸ Id supra n52 at [48] – [49].

⁵⁹ Brennan CJ, Dawson, Toohey, Gaudron and Gummow JJ.

⁶⁰ Id supra n52 at [26].

⁶¹ Attorney-General Media Release - *Government Improvements To Native Title System* 17 October 2008, 102/2008 Attorney-General Robert McClelland today announced that the Rudd Government has approved changes to the Federal Court to improve the operation of the native title system. Under the changes, the Federal Court of Australia will assume a central role in managing all claims. The new approach is aimed at encouraging more negotiated

Wik

*Wik Peoples v Queensland*⁶² was the only other native title case to come before the High Court during Chief Justice Brennan's term. It concerned the question whether pastoral leases granted exclusive possession to the pastoral lessee and, depending on the answer, the question of co-existence ie the extent to which native title rights and interests could survive and co-exist with the interests granted under a pastoral lease. It also concerned the validity of the grant of some bauxite mining leases in the area. At first instance Drummond J sought to deal with the question of the extinguishing effect of the pastoral leases as a preliminary question. His Honour concluded that pastoral leases conferred exclusive possession therefore extinguished native title. Due to the significance of the issues, on appeal the matter was referred straight to the High Court.

The Court found that the pastoral leases in question did not confer rights of exclusive possession but interests in the land that were limited to pastoral purposes only. In light of this finding it was possible, depending on the nature of the native title rights and interests which would need to be demonstrated by the Wik and Thayorre Peoples, for native title to co-exist with the pastoral interests. In the event of any inconsistency, the pastoral interests would prevail.

In *Wik* Gummow J addressed what is happening when an "explicit change of direction" occurs. His Honour opined that such a change may become necessary where previous understanding about common law principles are shown to be insupportable. Gummow J explained⁶³:

There have been few adherents in recent times to a declaratory theory in an absolute form. For one thing, the principles and doctrines of equity were never "like the rules of the Common Law, supposed to have been established from time immemorial"; rather, they were "established from time to time - altered, improved, and refined from time to time".....

Here is a broad vision of gradual change by judicial decision, expressive of improvement by consensus, and of continuity rather than rupture. Yet much of the common law is subjected to statutory modification, often drastic. The task of the courts then is to construe that statutory change to the common law, employing common law methods and techniques of interpretation and adjudication.

settlements of native title claims. "The Court has significant alternative dispute resolution experience and has achieved strong negotiated results in past native title matters by taking a strong and active role in the mediation process," Mr McClelland said. "This change will give the Court control over all native title claims brought before it from start to end. Having one body control the direction of each case means that the opportunities for resolution can be more readily identified." The change will contribute to the Government's vision for a native title system that is more flexible and one that produces broad benefits to Indigenous people and certainty to stakeholders.

⁶² (1996) 187 CLR 1 ('*Wik*').

⁶³ *Wik* at p182 ff, footnotes omitted.

Movement also may plainly be perceptible, and there may be an explicit change of direction, where, in the perception of appellate courts, a previously understood principle of the common law has become ill adapted to modern circumstances. it may emerge that the rationale of a particular cause of action is the product of a procedural fiction ... which should no longer be supported after the demise of the old forms of action....*Mabo [No 2]* was not such a decision. Nor did it rest upon the rejection of a particular common law rule by reason of its basis in particular conditions or circumstances which, whilst once compelling, since have become ill adapted to modern circumstances. **Rather, the gist of *Mabo [No 2]* lay in the holding that the long understood refusal in Australia to accommodate within the common law concepts of native title rested upon past assumptions of historical fact, now shown then to have been false.** (emphasis added)

The Gleeson Court – return to legalism

Following these initial and foundational cases there have been six more High Court decisions directly concerning the relationship between native title and other rights and interests. All arose for consideration by the Gleeson Court. The approach taken by the Court appeared increasingly one of strict statutory interpretation with an explicit rejection of any role to be played by the common law once the NTA was enacted.⁶⁴ Despite this emphasis the Court effectively introduced additional requirements for native title applicants to satisfy, to those imposed by the NTA. It did this through its efforts to interpret what must be established in order to demonstrate the survival of native title. To many commentators these additional layers to s 223 NTA seemed to implement the political imperative underpinning the 10 Point Plan amendments of the NTA, that of providing a means for **judicial** extinguishment of native title. For many others it led to a call for reform of the Act in some fundamental respects.

- *Fejo on behalf of the Larrakia People v Northern Territory*⁶⁵

The Court held that the extinguishment effected by the grant of fee simple was permanent and could not be revived. This was in circumstances where the local traditional owners had not left the area and had continued to reside on and observe their laws and customs for that area. This decision is at odds with, for example, Canadian jurisprudence which allows, in certain circumstances, for revival of aboriginal title once an exclusive possession act has

⁶⁴ See in particular *Ward and Yorta Yorta*.

⁶⁵ (1998) 195 CLR 96.

ceased and incorporates understanding of the need for reconciliation between the two systems of law – indigenous and non-indigenous.⁶⁶

- *Yanner v Eaton*⁶⁷

The Court held that regulation by the State affecting hunting, fishing and gathering did not extinguish those rights.

- *Commonwealth v Yarmirr*⁶⁸

The Court recognised that native title could exist in off shore areas but only as a non-exclusive right. The common law public rights to fish and to safe passage were held to prevent recognition of any exclusive rights to off shore areas.

- *Western Australia v Ward*⁶⁹

This decision elected the ‘bundle of rights’ approach to native title rather than opting for native title as the fullest interest in land that can be recognised diminished only by grant of adverse interest. The Court added to the impact of *Fejo* and focused on the principles for determining extinguishment. It also emphasised the primacy of s 223 over the common law and outlined the statutory criteria that must be satisfied to prove the survival of native title.

French J observed in a paper following the *Ward* decision⁷⁰

There is a movement in the exegesis of native title law in Australia reflected in two legal milestones, being the judgements of the High Court in *Mabo v State of Queensland (No 2)* and in *Western Australia v Ward*. To a degree that movement is nothing more than the necessary development of native title law from the broad principles set out in *Mabo (No 2)* through their more detailed delineation and implementation in subsequent cases. *Ward* however reflects a shift to a more conservative approach to underlying principle and a greater emphasis on ‘black letter’ law. That is evidenced by the emphasis placed upon the words of the *Native Title Act 1993* (Cth) (‘the Act’) in determining what will constitute native title or native title rights and interests. The judgment is indicative of judicial restraint in fleshing out the law and a focus on particularity rather than generality....it can be said that the decision:

- foreshadows limited development of the common law of native title;
- accords the provisions of the Act primary importance in identifying the content of native title;

⁶⁶ See for example, *R v Van der Peet* [1996] 2 SCR 507 at [42], [49] – [50]; *Delgamuukw v British Columbia* [1997] 3 SCR 1010 at [81] – [82].

⁶⁷ (1999) 201 CLR 351.

⁶⁸ (2001) 208 CLR 1.

⁶⁹ (2002) 213 CLR 1.

⁷⁰ French J, *Western Australia v Ward: Devils (and Angels) in the Detail*, [2002] AILR 38.

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- eschews analysis of the metaphors of ‘recognition’ and ‘extinguishment’ which lie at the heart of the common law of native title;
 - favours a statute based characterisation of native title as a bundle of rights;
 - holds that native title, as a bundle of rights, may be extinguished in part or incrementally...
- *Wilson v Anderson*⁷¹

The Court again considered the effect of the grant of a lease for pastoral purposes. The lease in question had been granted under the *Western Lands Act 1901* (NSW) and had many features in common with the leases considered under *Wik*. The full Federal Court had found the leases were not extinguishing of native title. On appeal to the High Court by the pastoralist Mr Wilson, this time the Court found that the nature of the lease as one in perpetuity fell within the extinguishment provisions of the NTA and was thus characterised as a previous exclusive possession act.

- *Members of the Yorta Yorta Aboriginal Community v Victoria*⁷²

This decision had the most (devastating) impact on both mediation and negotiation of native title and judicial determination of native title. Its convoluted explication of what must be established in order to demonstrate ongoing observation of traditional law and custom and its confirmation that ‘the tide of history’ can wash away the nexus between the past and the present has rendered more complex, technical and artificial the production of credible evidence of descent and connection.

A full exploration of the elements of *Yorta Yorta* is beyond the scope of this paper. However its requirement that applicants demonstrate in what way they are members of a society united by its ongoing observation of traditional laws and customs derived from a pre-sovereignty normative legal system has become the focus of the most intricate, time consuming and difficult evidence adding substantially to the cost of native title applications.

There have been calls for legislative reform to lessen the burden of this requirement, notably from French CJ⁷³ in his contribution to the Australian Law Reform Commission’s recent Report

⁷¹ (2002) 213 CLR 401.

⁷² (2002) 214 CLR 422.

⁷³ French CJ, “*Lifting the Burden of Native Title, Some modest proposals for reform*”, *Reform* infra n73 at pp10-13.

on Native Title.⁷⁴ The suggestion has been made that continuity of connection be presumed, to lift some of the burden of proof from applicants by amendment of s 223.⁷⁵

Consequences and speculations

Following the outcome of the Gleeson Court's application of the NTA to native title proceedings we have been left with many areas of speculation. The cases have led us into an exploration of concepts which do not directly appear in the NTA and are in part anthropological, sociological, historical and philosophical (to name a few) calling for a diverse range of skills as part of the judicial task as well as the challenge of mediating such complex evidentiary material. Questions such as

- what comprises a society;
- what is a normative system of laws and customs;
- how many concepts of descent can be recognised when groups form themselves by including members by adoption and incorporation;
- when can sub groups be distinct from and also form part of a broader social unit;
- when do activities carried out on traditional lands cease to have a nexus with a pre-contact normative system;
- how much adaptation and change is tolerable before a practice no longer has traditional law and custom as its source;

have become part of the matrix of issues for consideration by the Court whether in contested or consented determinations.

The French Court

No native title cases have yet come before the French Court. There is some interest in the perspective that will be brought to bear on any native title matters that come before the Court due to French CJ's presidency of the National Native Title Tribunal during its establishment and first five years (from 1994 to 1999) as well as his contribution to the literature which has endeavoured to explain and guide the development of native title practices.

⁷⁴ *Reform, Native Title 2009* A Journal of National and International Law Reform, Issue 93 ALRC

⁷⁵ This proposal was addressed at the Native Title Representative Bodies Conference hosted by AIATSIS in Melbourne June 2009 – particularly in a paper by Justice A M North and T Goodwin, *Disconnection – The Gap Between Law And Justice In Native Title, A Proposal for Reform*. It was also the subject of a s223 Workshop hosted by the University of Melbourne, AIATSIS and the ATNS in May 2009 – papers to be published.

In one of the first decisions to be handed down by the French Court there is an interesting insight into the Chief Justice's approach to the methodology by which the Court should handle departure from precedent and the development of the common law.⁷⁶

Wurridjal involved a challenge to the *Northern Territory National Emergency Response Act 2007* (Cth). It called for the Court to consider whether to overrule an earlier decision in *Teori Tau v The Commonwealth*.⁷⁷ In deciding that *Teori Tau* ought not be followed French CJ held:⁷⁸

It is apparent from the authorities that the question whether the Court will overrule one of its earlier decisions is not to be answered by the application of a well-defined rule. Nor is it simply to be answered by the application of such visceral criteria as "manifestly" or "clearly" wrong. Rather it requires evaluation of factors which may weigh for and against overruling. That evaluation will be informed by a strongly conservative cautionary principle, adopted in the interests of continuity and consistency in the law, that such a course should not lightly be taken. As Gibbs J said in the *Second Territory Senators Case*, no Justice of the Court is entitled to ignore the previous decisions and reasoning of the Court and arrive at his or her own judgment as though the pages of the law reports were blank....

Although decisions of this Court about overruling its own prior decisions have referred to the identification of "error" in the previous decision, it does not follow that it is always necessary to make a finding that a prior decision was erroneous in order to justify overruling it. In many cases of interpretation of the Constitution, constructional choices are presented. To say that, upon a consideration of text, context, history and attributed purpose, one choice is to be preferred to another, is not necessarily to say that the choice rejected is wrong. Reasonable minds may differ on a point of constitutional interpretation. It may be that in some cases subsequent decisions have made clear that the decision which the Court is asked to overrule not only stands isolated but has proven to be incompatible with the ongoing development of constitutional jurisprudence. Dixon CJ once spoke of the possibility that an earlier decision had been "weakened" by subsequent decisions or in the light of experience. This does not require the taxonomy of "truth" and "error". It may reflect an evolving understanding of the Constitution albeit subject to the conservative cautionary principle referred to earlier.
(footnotes omitted)

Whilst it is too early to judge the trend of the Court under the leadership of French CJ the contextualisation offered by his Honour's statements on this issue provide an interesting indication of his approach.⁷⁹

⁷⁶ *Wurridjal v Commonwealth* [2009] HCA 2 ('*Wurridjal*').

⁷⁷ (1969) 119 CLR 564.

⁷⁸ *Wurridjal* at [70] – [71].

⁷⁹ In speeches given early in his Honours term as Chief Justice, French CJ has reflected on the role of a judge. In *Conference on Judicial Reasoning: Art or Science*, Opening Address at the National Judicial College of Australia and Australian Forensic Science, ANU, 7 February 2009; *Science and Judicial proceedings – Seventy-Six Years On*, address to the Medico Legal Society of Victoria, 2 May 2009 and *Don't you know who I am? – Ego and Identity in the Administration of Justice*, speech to the Bench and Bar Dinner, NSW Bar Association, 8 May 2009.

Perhaps fittingly some parting thoughts from Kirby J in his last decision as a High Court judge indicate the tension between the two theories and the push and pull of considerations which have a bearing on the judicial role. In *Minister Administering the Crown Lands Act v NSW Aboriginal Land Council*⁸⁰ Kirby J tried (again) to explain the role of the Court and the preferred approach to be taken to statutory interpretation:⁸¹

This Court has repeatedly admonished decision-makers in other courts (and this is now reflected in general legal and administrative practice) to look beyond the words of the text and to consider the statutory and social context so as to understand those words more clearly. Giving weight to the beneficial and remedial purposes of the Land Rights Act is part of that operation. Only this approach will give effect, in such a context, to the beneficial and remedial purposes of Parliament in preference to a view of the text that might tend to frustrate, narrow or limit the attainment of such purposes.

It is important for this Court to expose and apply the principles of statutory interpretation consistently in a case such as the present. That is the explanation for my separate reasons, notwithstanding that I reach the same result as the joint reasons. A court must be consistent in what it says and does in its approach to interpretation (whether of the Constitution, or of a statute, contract, or other document). Otherwise, the court will expose itself to criticism that its inconsistent *approaches* produce inconsistent *outcomes*. Concerns will then be expressed that judicial dispositions represent little more than intuitive opinions of judges based on a reading of words in contested texts as viewed through their own narrow verbal lens. The search for consistent approaches to statutory interpretation is part of an endeavour by the courts to introduce elements of the rule of law into this most common and important contemporary judicial function. To encourage that endeavour is a proper objective of a court such as this Court. (*italics in original, footnotes omitted*)

The theories of legalism and realism appear to offer divergent poles of thought to explain what judges do when they are judging. As the examples explored above demonstrate the techniques evaluated by the theories are not mutually exclusive but do represent the pull between the objective and the subjective, the personal and the political. Native title decisions at times dramatically illustrate that tension and have revealed more starkly than most juridical issues the interplay of law and policy, judge and text.

⁸⁰ [2008] HCA 48, 2 October 2008.

⁸¹ *Id* at [9] – [10].

AUTHORITIES

- Anderson on behalf of the Spinifex People v State of Western Australia* [2000] FCA 1717
- Andrew Passi on behalf of the Meriam People v State of Queensland* [2001] FCA 697
- Australian Agricultural Co. v. Federated Engine-Drivers and Firemen's Association of Australasia* (1913) 17 CLR 261
- Cole v Whitfield* (1988) 165 CLR 360
- Commonwealth v Yarmirr* (2001) 208 CLR 1
- Dietrich v R* (1992) 177 CLR 292
- Fejo on behalf of the Larrakia People v Northern Territory* (1998) 195 CLR 96
- Giannarelli v. Wraith* (1988) 165 CLR 543
- Hunter v WA* [2009] FCA 254
- Mabo & Ors v State of Queensland (No 2)* (1992) 107 ALR 1; (1992) 175 CLR 1
- Mabo v. Queensland (No 1)* (1988) 166 CLR 186
- Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422
- Milirrpum v Nabalco* (1971) 17 FLR 141
- Minister Administering the Crown Lands Act v NSW Aboriginal Land Council* [2008] HCA 48, 2 October 2008
- Munn for and on behalf of the Gunggari People v State of Queensland* (2001) 115 FCR 109
- Muriata for the Girramay People v Queensland* 2008
- Nangkiriny v Western Australia* [2002] FCA 660 (Area A)
- Nangkiriny v Western Australia* [2004] FCA 1156 (Area B)
- North Ganalanja Aboriginal Corporation v Queensland* (1996) 185 CLR 595
- Osborn v Bank of the United States* (1824) 22 US 9 Wheat. 738
- Riley for the Western Yalanji People v Queensland* 2006
- South Australia v Commonwealth ("First Uniform Tax case")* (1942) 65 CLR 373
- Teori Tau v The Commonwealth* (1969) 119 CLR 564
- Walker for the Eastern Kuku Yalanji People v Queensland* 2007
- Ward v Western Australia* [2006] FCA 1848 ('Miriuwung-Gajerrong #4')
- Western Australia v Commonwealth* (1995) 183 CLR 373 ('the Native Title Act Case')
- Western Australia v Ward* (2002) 213 CLR 1
- Wik Peoples v Queensland* (1996) 187 CLR 1
- Wilson v Anderson* (2002) 213 CLR 401
- Wurridjal v Commonwealth* [2009] HCA
- Yanner v Eaton*, (1999) 201 CLR 351.

LEGISLATION

Aboriginal Land Rights (Northern Territory) Act 1976 (Cth)

Land (Titles and Traditional Usage) Act 1993 (WA)

Native Title Act 1993 (Cth)

Northern Territory National Emergency Response Act 2007 (Cth)

Queensland Coast Islands Declaratory Act 1985 (Qld)

Racial Discrimination Act 1997 (Cth)

BIBLIOGRAPHY

Australian Law Reform Commission, *Reform, Native Title 2009* A Journal of National and International Law Reform, Issue 93 ALRC

Blainey, G, articles in The Age newspaper in 1993 for example ‘*High Court Playing Politics*’ 26 June 1993 and in News Weekly ‘*Vital Facts Need Explaining in High Court’s Mabo Judgment*’ 4 December 1993.

Brennan, G, AC KBE, “*The Parliament, The Executive and The Courts: Roles and Immunities*” School Of Law, Bond University Saturday, 21 February 1998.

Dillon, M and Doyle, J *The Mason Court Oxford Guide to the High Court*, 2001, OUP p 462.

Dixon, O, *Address upon taking the oath of office in Sydney as Chief Justice of the High Court of Australia on 21st April, 1952*, in *Jesting Pilate and Other Papers and Addresses*, ed. Woinarski J, Melbourne (1965), p.247; also at (1952) 85 CLR xi

Fraser, D, *What a long strange trip it’s been: Deconstructing Law from Legal Realism to Critical Legal Studies* (1988-9) 5 AJLS 35

French J, *Western Australia v Ward: Devils (and Angels) in the Detail*, [2002] AILR 38

French CJ, *Conference on Judicial Reasoning: Art or Science*, Opening Address at the National Judicial College of Australia and Australian Forensic Science, ANU, 7 February 2009; *Science and Judicial proceedings – Seventy-Six Years On*, address to the Medico Legal Society of Victoria, 2 May 2009; *Don’t you know who I am? – Ego and Identity in the Administration of Justice*, speech to the Bench and Bar Dinner, NSW Bar Association, 8 May 2009
Lifting the Burden of Native Title, Some modest proposals for reform, Reform ALRC, Issue 93
Sir Frank Kitto Lecture, University of New England, “What were they thinking? Statutory Interpretation and Parliamentary Intention”, 23 September 2011

Gageler, S *Legalism Oxford Guide to the High Court*, 2001, OUP

Kitto, FW 'Why Write Judgments?' (1992) 66 *Australian Law Journal* 787, 790

Mansell, M, *'The Court gives an Inch but takes Another Mile'* (1992) ALB vol 2 No 57, p4.

North, Justice A M and Goodwin, T, *Disconnection – The Gap Between Law And Justice In Native Title, A Proposal for Reform* AIATSIS NTRB Conference, Melbourne, June 2009

Pearson, N *"Native title's days in the sun are over"*, *The Age*, 28 August 2002

Pearson, N *"The High Court's abandonment of 'the time-honoured methodology of the common law' in its interpretation of native title in Mirriuwung Gajerrong and Yorta Yorta"* 2003 Sir Ninian Stephen Lecture, Law School, University of Newcastle, 17 March 2003.

Pearson, N, *"Land Is Susceptible Of Ownership"*, High Court Centenary Conference, Canberra 9-11 October 2003.

Pearson, N, *"Where We've Come From and Where We're At with the Opportunity that is Koiki Mabo's Legacy to Australia"* Mabo Lecture, AIATSIS Native Title Representative Bodies' Conference, Alice Springs 3 June 2003.

Roosevelt, F D, in *The American Doctrine of Judicial Supremacy* Haines, C G, (1959) New York, p 46.

Sackville, R, *Judicial Activism* Oxford Guide to the High Court, 2001, OUP p 6-7.

Strelein, L, *Compromised Jurisprudence, Native Title Cases Since Mabo* 2006 Aboriginal Studies Press, AIATSIS Canberra p9;

Tehan, M, *"A hope disillusioned, an opportunity lost? Reflections on common law native title and ten years of the Native Title Act"* [2003] MULR 19.

Wendell Holmes Jr, O, *The Common Law* (Boston 1881) pp 1-2.

Wesley-Smith, P, *Herbert Vere Evatt and the High Court of Australia* (1969) unpublished thesis, University of Adelaide.

Williams, J, *Murphy, Lionel Keith* Oxford Guide to the High Court, 2001 OUP at 485.