The Wentworth Lecture
Native title: the beginning or the end of justice?

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Introduction

To deliver a public lecture named after William Charles Wentworth is no easy task. It must do justice to an extraordinary Australian and do so in a way that reflects some of his special attributes. Wentworth was born in 1907. Before achieving political office, he was an active advocate of Aboriginal advancement. It was his initiative, as a member of the House of Representatives in 1960, that led to the passage of legislation establishing the Australian Institute of Aboriginal Studies [since 1989, the Australian Institute of Aboriginal and Torres Strait Islander Studies]. That Institute has become a leading national resource in developing an Australian understanding of indigenous peoples and their culture and history and some appreciation of the colonising holocaust which has overtaken them for the last two centuries.

Wentworth was the first person to be appointed as a federal minister with sole responsibility for Aboriginal Affairs, being appointed to that portfolio in February 1968. He held that office until May 1971 and the office of Minister for Social Services until December 1972. During that time he was responsible for the Council for Aboriginal Affairs, which provided government with advice on Aboriginal issues. He was also responsible for the Office of Aboriginal Affairs, an administrative unit which evolved into a separate department. It is a matter of record that Wentworth's passions and interests went well beyond Aboriginal advancement. In what he believed, and how he spoke of it, he represented some of the most open and endearing elements of Australian political discourse.

It is a privilege to deliver this lecture, both because of the great Australian it honours and because of the Institute which sponsors it. My subject is native title and justice. It is framed as a question —Native Title: The Beginning or the End of Justice? The question so posed refers both to the decision of the High Court in *Mabo v The State of Queensland [No 2]* (1992) and to the enactment and application of the *Native Title Act 1993*. It raises the general issues: what is the context and content of

the search for justice for Australia's indigenous people; how is that justice advanced, if at all, by what the High Court said in 1992 and by what the Commonwealth parliament said in 1993; and what are its future directions?

Discussion of these issues involves exposition and exhortation. In this area it is not possible to say anything that does not involve the recognition of a need for further action. In this area each of us is confronted with the concept of personal responsibility, once explained by Jewish theologian Martin Buber as the answer we give to the questions which our time in history and our place in the world pose for us.

Justice—an empty vessel

One does not have to have read Plato's *Republic* to accept the proposition that opinions about justice vary. Casual scanning of daily newspapers will demonstrate it amply. The contents of those opinions in their applications to Aboriginal and Torres Strait Islander people are defined by individual life experiences and the wider culture and sub-cultures in which they have been formed and developed. The views of indigenous Australia about what constitutes justice for Aboriginal and Torres Strait Islander people will also vary. As expressed by their leading proponents, they develop out of perspectives about their relationship with the land and the colonial and post-colonial history of this country that are largely inaccessible to non-indigenous Australians. There appears to be scope for a more developed theoretical framework from which a concept of land rights as an expression of social justice can be derived. Moral, pragmatic and natural law or human rights elements can be detected in various approaches to this question. Each may lead to different responses. Proponents of the recognition of land rights may appeal to concepts of fairness by reference to a history of gross unfairness in the treatment of indigenous people and their dispossession from their country. Sometimes, however, the appeal is to pragmatic considerations of social order and sometimes to inherent or fundamental human rights, a kind of underlying natural law argument.

The Woodward Royal Commission which led to the enactment of the *Land Rights (Northern Territory) Act 1976* (Cwlth) identified a mixture of bases for recognising land rights including justice to people who had been dispossessed without consent or compensation, the promotion of social harmony and stability, the provision of an economic base, the preservation of the spiritual link giving each Aboriginal person his or her sense of identity and the maintenance and improvement of Australia's international standing. The practical implications of land rights were emphatically stated by HC Coombs in 1983: 'Quite simply, if Aborigines are going to benefit from health, welfare, education or any other programs, then they need the mental, spiritual and physical sustenance and support of being on their own land' (Coombs et al 1983).

In a 'Letter from Black to White', Galarrwuy Yunupingu wrote:

> The land is my backbone. I only stand straight, happy, proud and not ashamed about my black colour because I still have land. The land is the art. I can paint, dance, create and sing as my ancestors did before me. My people recorded these things about our land this way, so that I and all others like me may do the same. I think of the land as the history of my nation. It tells us how we came into being and what system we must now live...My land is my foundation...Without land I am nothing. (1976, 9)

The distinctions between justice as fairness, as pragmatism and as natural law or inherent human rights are not bright line distinctions. All of these modes of expression have persuasive power according to their setting, their proponents and their audiences. Guilt is somewhat unfashionable as a foundation for a response to the wrongs of the past. Australians generally cannot, however, fail to be struck by the immense damage that the colonising process of their forebears has inflicted on Aboriginal societies, and the equanimity with which some fellow Australians will accept it as part of the price of progress. It may be, in the end, that the search for any coherent theory to give content to the concept of justice for indigenous people will give way to the more immediate need to make real gains. Campaigns in that direction may be informed by a harsh pragmatism of the kind referred to by Pearson:

> People in situations like ours must make do with the tools which are on hand. We must be adept and quick footed, indeed schizophrenic, in the employment of strategies. White guilt, pity, their sense of injustice may be tools which may be used, may be co-opted and used by us to secure results...But as much as these tools may make us want to spew sometimes, the utilisation of white post-colonial guilt and sense of injustice, which may not be as real and as profound as we would like it to be, is most fruitfully tapped sometimes by moderate strategies. (1994, 157)

Whatever approach is adopted, no search for just objectives by and for indigenous people, or resort to justice arguments as a tool of political action, can fail to take account of the historical context in which wider community attitudes have been formed and developed.

The historical perspective

The historical attitudes of colonial Australia to indigenous people have their resonances in contemporary discourse and in the range of views about what justice for indigenous people demands of us today. There is ample evidence of those historical attitudes in parliamentary debates, newspaper articles, writings and texts of colonial, post-federation and modern Australia. A militant paternalism which denied autonomy and human dignity to Aboriginal people came out of the nineteenth century, stretched well into this century and still informs some strands of contemporary opinion.

A succinct characterisation of white Australia's attitudes to Aboriginal people at the end of the First World War was set out by Manning Clark, who wrote: 'Extinction was their destiny. The Aborigines were a dying race. The only thing that could be done for them was to make their passing easier' (1987, 157). His references were taken from Arthur Mee's *Children's Encyclopedia* (Clark 1987, fn 66). Protective legislation in five of the Australian states and the Commonwealth then provided that no Aborigine could work for wages, or marry or live with a non-Aboriginal person without the permission of the state. Any person other than an Aborigine who cohabited with Aborigines, or cohabited with a female Aborigine, was liable to prosecution. Any person who supplied, or caused or permitted to be supplied, to an Aborigine any fermented or spirituous liquors or opium could be prosecuted.

As Clark (1987, 158) observed, the Aborigine was regarded as a permanent child. He should be civilised, because his own practices and beliefs were barbarous, but, paradoxically, he could not be civilised. The Aborigines must be trained to become persons of 'economic utility' in the white man's society. They could be given opportunities to rise to the top in the professions, the business world, entertainment and sport. But the white man must decide. The missionaries, the scientists and the secular humanists had not conceded to the Aborigines the right to decide for themselves how they would live and what they would think. Children had no such rights.

Under the *Native Administration Act 1936* (WA), which remained in force until 1954, the Commissioner of Native Affairs was the legal guardian of every Aboriginal child until such child attained the age of 21, notwithstanding that the child had a parent or relative living. The property of Aboriginal people was not their own. The Act empowered the commissioner to undertake 'the general care, protection and management of the property of any native' and to 'expend or apply any money in possession of any native for his maintenance, education, advancement or benefit'. It has been suggested that there were many instances, particularly in the southwest of Western Australia, where the farming properties owned by Aboriginal people were taken away and sold (Lee 1994, 17–18).

Alongside these paternalistic and protective attitudes, there is evidence of hostility and, indeed, murderously punitive attitudes on the part of some settlers and commentators of the nineteenth and early twentieth centuries. In May Vivienne's book, *Travels in Western Australia,* published in 1901, she tells the story of a posse of settlers from the Bunbury area seeking an Aboriginal man who had killed a white settler after a dispute over damper. This genteel middle-class lady's account of the incident, which occurred in the 1840s, and her comments on it make chilling reading. The settlers attempted to track the suspect but found many difficulties on the way as none of the Aboriginal people would lead them to his tracks. She observed: 'They however tracked him as well as they could and to frighten the tribe they shot down every native they came across'. She commented:

> The shooting of blacks, although it seems cruel, was the means of showing them that the white man was their master and after this no more trouble arose with the various tribes. Had it not been done the tables would have been turned and all the white settlers may have been murdered. (1901,114)

Battye's *History of Western Australia,* published in 1924, refers to an incident in 1872 in which a settler, Burges, was convicted of the manslaughter of an Aboriginal person and sentenced to five years' imprisonment, later reduced to one year by direction of the Colonial Secretary. Governor Weld had suspended the magistrate who initially heard the case, because of partiality to the accused who came from an influential family. The magistrate had reduced the charge of murder to shooting with intent to kill. Weld sent the settler for trial at the Supreme Court, where alternative verdicts of murder or manslaughter were left to the jury by Judge Burt. Of particular interest is the comment made by Battye, an indication of the attitudes of a leading Western Australian historian in the 1920s:

> The wisdom of punishing Burges at all may be doubted. Although in the settled districts little trouble was caused by the natives, they were still hostile in the North-West, and murders of white settlers caught napping were not infrequent. Men who undertook the burdens of pioneering and went out into unknown districts carried their lives in their hands, and to shoot quickly was often their only safe guard. Such men may have been technically guilty of murder, but even that was

> preferable to being stalked like game and treacherously slain. (1924, 304–05)

The visibility of punitive and floridly paternalistic strands of thought is greatly attenuated in contemporary Australia, although disturbing reflections of some of these attitudes are still to be encountered in particular locations. There is no doubt, however, that indigenous action, and advocacy by indigenous leaders of the need to redress injustices of the past, have led to a general shift away from some of the more primitive concepts of that past.

Punitive attitudes may have been inspired in part by the resistance of Aboriginal people to dispossession from their traditional country. Conflict over country started from the early days of the British annexation of New South Wales. There are many recorded accounts of the ways in which Aboriginal people resisted the taking of their land. These included armed conflicts, the spearing of livestock, squatting on small areas of traditional country and employment on pastoral leases which enabled access to country. Some native title applications presently before the National Native Title Tribunal are part of an ongoing history of assertion of rights to country which can be traced back to early periods of contact.

Physical resistance evolved into political action. Non-violent political action included passive resistance, public protests, occupation of country, political lobbying and the formation of representative organisations to promote the recognition of indigenous people's rights. Public demonstrations and protests against policies and practices of dispossession have been heightened particularly in the second half of this century. Notable examples include such events as the Yirrkala bark petition (1963), the Gurindji walk-off at Wave Hill (1967), the homeland/outstation movement, the Gove Peninsula land rights dispute (1971), the Tent Embassy (1972) and the Barunga statement (1988), all of which attracted national attention. As Berndt observed:

> Public protest is one way through which much can be achieved—if negotiations between the relevant parties break down, or overriding injustices are ignored or sidetracked by those who could do something about them. Public protest, in such circumstances, represents the only forum of the expression of free speech, for the presentation of a case. And, as we have seen, it *can* bring positive results. (1977, 42)

Other modes of action have included the use of land rights and heritage legislation, the acquisition of country through purchase and lease arrangements, the use of common law action, the pursuit of negotiated management and commercial agreements with government agencies and private developers, and other strategies aimed at cultural revival and the celebration of Aboriginal identity. Significant changes in community and political attitudes were evidenced by the development of statutory land rights regimes that predated the *Mabo* decision.

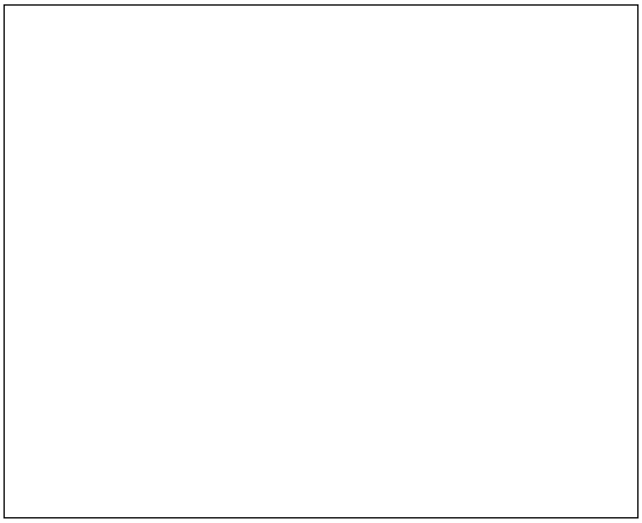

Plate 1
Justice French with Mr Yilbie Warrie and Mr David Daniel at Hearson Cove on the Burrup Peninsula, discussing the Ngaluma/Indjibandi native title claim, 25 August 1996 (photo courtesy *West Australian*)

The evolution of statutory land rights

Statutory provision for the granting of land rights to indigenous people in the Northern Territory and various of the Australian states has involved a recognition of the injustice of non-consensual and uncompensated dispossession. The Woodward Royal Commission which led to the enactment of the *Land Rights (Northern Territory) Act 1976* set out the aims underlying the recognition of land rights in the Territory as follows:

> 1. The doing of simple justice to a people who have been deprived of their land without their consent and without compensation.
>
> 2. The promotion of social harmony and stability within the wider Australian community by removing, so far as possible, the legitimate cases of complaint of an important minority group within that community.
>
> 3. The provision of land holdings as a first essential for people who are economically depressed and who have at present no real opportunity of achieving a normal Australian standard of living.
>
> 4. The preservation, where possible, of the spiritual link with his own land which gives each Aboriginal his sense of identity and which lies at the heart of his spiritual beliefs.

5. The maintenance and, perhaps, improvement of Australia's standing among the nations of the world by demonstrably fair treatment of an ethnic minority.

In 1979 in New South Wales, a joint parliamentary committee of inquiry was established by the Wran government. It examined various aspects of Aboriginal conditions but agreed to make land the priority area of concern. In 1981 it recommended that land rights legislation be implemented in New South Wales. The government did not accept all the recommendations of the report; however, the *Aboriginal Land Rights Act 1984* was enacted. It was primarily concerned with providing Aboriginal communities with access to an economic land base.

In 1983 Mr Paul Seaman, subsequently to become a judge of the Supreme Court of Western Australia and now a member of the National Native Title Tribunal, was commissioned to consider means of implementing land rights legislation in that state. His report recommended the transfer of reserve and mission lands to Aboriginal ownership, pastoral excisions and a scheme for acquiring and returning pastoral leases to local Aboriginal communities, as well as a land claim process. Land rights legislation was introduced into the parliament in 1985 but was defeated in the Legislative Council.

In Queensland, the *Land Act (Aboriginal and Islander Land Grants) Amendment Act 1982* established a Deed of Grant in Trust land-holding scheme for Aboriginal communities. The *Aboriginal Land Act 1991* and the *Torres Strait Islander Land Act 1991* transferred all existing Deeds of Grant in Trust reserve lands and the Aurukun and Mornington Island shire leases to Aboriginal trust ownership. Under these Acts, vacant crown land is able to be claimed on the basis of traditional association, historical association or on an economic or cultural viability needs basis. Land granted is to be held and administered by land trusts as community title in non-saleable fee simple. There is no acquisition fund provided for in these Acts.

Specific-purpose, as distinct from general, land rights legislation was enacted in South Australia, being the *Pitjantjatjara Land Rights Act 1981*, under which 100,000 sq km of freehold title were returned to traditional owners, and the *Maralinga Tjarutja Land Rights Act 1984*, under which 76,420 sq km of freehold title were returned to traditional owners.

Specific Commonwealth land rights legislation includes the *Aboriginal Land Grant (Jervis Bay Territory) Act 1986*, which provided for the Jervis Bay territory to become Aboriginal land vested in the Wreck Bay Aboriginal Community, together with some vacant crown land surrounding it. The community council has freehold title to the land. The *Aboriginal Land (Lake Condah and Framlingham Forest) Act 1987* was passed by the Commonwealth government on the request of the Victorian government to grant freehold title to a corporation of elders who had proven their clan's traditional relationship to the land. There is, however, no provision for ongoing Aboriginal land claims in Victoria.

There is no land rights legislation in Western Australia or Tasmania.

The impact of land rights legislation in the various states can be seen by reference to the percentages of the area of each state or territory converted to Aboriginal freehold. In the Northern Territory, this figure in 1993 was 33.7 per cent against an Aboriginal population representing 22.6 per cent of the population of the Territory. In South Australia, 1.2 per cent of the population was Aboriginal and held some 18.8 per cent of the state under the land rights legislation. In Queensland, Aboriginal people comprised 2.4 per cent of the population in 1993 and had 2.1 per cent of the land under inalienable freehold. In Western Australia, where there is no land rights legislation, Aboriginal people comprise 2.6 per cent of the population and hold less than 0.1 per cent of the land area (Altman 1994, 64).

Contemporary attitudes to land rights and native title

Although gains made by indigenous people in the enactment of land rights legislation and other areas represented a significant political shift, they could lead to community backlash. Special measures for indigenous advancement were construed by various groups as equivalent to apartheid or as undermining democracy or the Australian concept of a 'fair go'. Rowley has observed that

> it would indeed be naive to assume that the gains by Aboriginal groups over the last two decades have not reinforced the prejudices of a general public that is well meaning but seriously ill informed about both the plight and the opportunities of Aborigines. To be fair, one must take into account that for nearly two centuries certain systems and principles of land ownership and government land management not only became firmly established but were developed free from any real understanding of or influence by the dispossessed Aboriginal owners. Self interest is a firm basis for beliefs and mores in us all, and one can at least understand the shocked disbelief turning to wrath as miners and pastoralists now hear what they claim as their legal rights questioned, or see them restricted. (1986, 84)

The general validity of that observation is supported by reaction to the *Mabo* decision and the passage of the *Native Title Act 1993*.[1]

Negative attitudes to indigenous Australia today often seem to be informed by a notion of fairness or justice which sees Aboriginal and Torres Strait Islander people as the recipients of benefits not available to other sections of the community. There is a degree of cynicism about the uses to which such benefits are put. For some white Australians, the availability of four-wheel drive vehicles to Aboriginal communities has become a symbol of unjust enrichment to which they attach the metaphoric designation 'Toyotas'. In this setting, native title is regarded by some as just another unearned benefit conferred upon people who have done nothing more than other sections of the community to deserve it. When native title claims are seen as impacting upon property values, pastoral and mining activities, and economic opportunities for the wider community, negative attitudes can quickly escalate to outright hostility. For people bearing these attitudes, justice is enunciated as formal equality of opportunity which discounts the legacies of history to which it is applied.

A somewhat more encouraging, but nevertheless in some respects troubling, picture was painted by the results of a survey of public attitudes to Aboriginal issues published by the Institute in 1994. The public attitudes which were surveyed prior to the *Mabo* decision indicated high popular support for the general proposition that Aboriginal aspirations should be recognised. This support, however, diminished significantly when specific issues were addressed. And, at the time of the survey, the partisan divide, particularly on issues of land rights, was quite marked. Professor Brian Galligan, who wrote a report on the outcome of the survey, observed that popular attitudes are not cast in stone but are very much tied up with symbolic issues. Perhaps more set was the sharp divide between the political attitudes. It was necessary, in his view, for Aboriginal people to confront negative political views where they existed and to make their case: 'Any proposals for constitutional change clearly need bipartisan support, as do the continuation of settled policies such as land rights' (Galligan 1994, 101).

While his message was not one of pessimism, Professor Galligan pointed out that the political opinion of Australians was not running in favour of Aboriginal people on some of the key issues. Since then, of course, there has been acute debate both about the *Mabo* decision and the Native Title Act and its application and operation. In some segments of the community there will have been a firming or shift to negative attitudes on the land rights question. In other areas, the process of native title claims and the dialogue which they mandate have a positive effect. The survival of some of these negative attitudes was reflected in limited aspects of the federal election, particularly in North Queensland.

It is fair to say, however, that at the political level there appears to be bipartisan recognition of the impact that the history of dispossession and social and cultural dislocation has had upon the Aboriginal people of Australia. And now there is no shortage of articulate, well-informed and politically sophisticated exponents of new visions of justice for indigenous people in this country. In their various ways they are contributing, and have contributed, to a greater community understanding of the special relationship between Aboriginal and Torres Strait Islander people and their land, the path that that relationship plays in their culture, their sense of identity and the development of the indigenous communal supports necessary to enable pressing issues of health, mortality, education, housing and employment to be addressed properly.

The *Mabo* decision

The decision of the High Court in *Mabo [No 2]* marked a significant development in the relationship between Australia and its indigenous people. For the first time the common law of Australia recognised indigenous relationships to land and derived from them legal rights which could be enforced by Australian courts. This was not an Act of executive grace and favour. Nor was it an *ex gratia* legislative bounty. It did not involve the creation of new rights but the recognition of rights which, according to the legal doctrine underpinning the majority judgments, had existed all along.

The common law of Australia prior to *Mabo* had rejected the concept of indigenous ownership of traditional country. The recognition of that ownership was a dramatic interaction between two systems of law and culture. One was first brought to the colonies from the United Kingdom 200 years ago. The other has developed over at least 40,000 years of human habitation of the Australian continent. The decision was not only a judicial landmark but a singular point in the history of the relationship between Australia and its indigenous people. It has been the catalyst for political and legislative action and the reordering of the place of indigenous people in our society. From that process, for all its difficulties, as well as its promise, there can be no turning back. Indigenous people can assert legal rights on country as a matter of right, and not as a matter of grace and favour. There are uncertainties about the new doctrine and its application to the Australian mainland, but there is undeniably a new psychology affecting discussions which centre on rights rather than applications for executive grants.

The principles enunciated by the High Court in the *Mabo* decision define the general nature of native title. Native title will be recognised where a community has maintained its connection with land and where that connection can be traced back to a time prior to colonisation. The content of native title in any particular case is determined by the traditional laws and customs of the community asserting it. The title is inalienable, although it can be surrendered to the Crown. Native title may be transmitted in accordance with indigenous laws and custom, but the range of cases in which that transmission can occur and its operation in modern times are open questions. Laws and customs which define the relationship of a people to their society and to their land are not static. A living culture is a dynamic thing which responds to external influences. Law and custom may have changed in response to the impact of colonisation and rural settlement, but that does not mean that the connection with country, necessary to sustain native title, is abandoned. The *Mabo* case involved a clear physical connection to the country but the essence of that connection is seen from the indigenous perspective as spiritual. It is said that the removal of people from their country does not of itself involve a loss of that spiritual connection. The contention that a spiritual connection can sustain common law native title is therefore open. That is not to say that it has been established.

The *Mabo* decision also involved the proposition that sovereignty resides in the Crown—sovereignty, in this context, meaning the authority to deal with the land. Pursuant to that authority, the Crown can extinguish common law native title by legislative action and, as it seems, by lawful executive action. Before extinguishment is to be inferred, there must be found or imputed a clear intent to destroy indigenous property rights. A test for that intent seems to be the existence of a clear inconsistency between the way in which the Crown has dealt with the land in question and the survival of native title rights. Revival of native title once it has been extinguished is not contemplated by the common law.[2]

The doctrine does, however, appear to be consistent with a notion of partial extinguishment or impairment of native title in some cases, and it may be that this will extend to temporary impairment, for example, by virtue of a short-term lease or licence. Again, these are open questions. From an Aboriginal perspective, the justice achievable through the *Mabo* decision may be seen to end with the doctrine of extinguishment. It is seen as a theory that ratifies the dispossession and loss of property rights over the past 200 years. From an Aboriginal perspective, it makes no sense and has no meaning. A community's country remains its country irrespective of the common law. To demonstrate the extinguishment of native title is not to dispense with the just claims of indigenous ownership, the demands for recognition and respect, and the need to respond to them. Some of the history of indigenous assertions of ownership over country that predated *Mabo* demonstrate the point.

The doctrine of extinguishment has been legislatively fettered since 1975 by the *Racial Discrimination Act 1975* (Cwlth). Destruction of indigenous property rights in ways which would not apply to non-indigenous rights can constitute discrimination on the grounds of race.[3] Legislative acts of states or territories and executive acts transgressing the Racial Discrimination Act may be invalid for that reason by virtue of s109 of the Commonwealth constitution. Unless the Commonwealth were to pass a law expressly or by implication amending the Racial Discrimination Act, indigenous property rights, even without the Native Title Act, are unlikely to be destroyed or injured in the future, as they have been in the past, without regard to procedural justice or entitlement to compensation. Any attempt to amend the Racial Discrimination Act to create an exemption for laws or executive acts that would otherwise be unlawful would have significant domestic and international consequences.

The proposition, coming out of the *Mabo* litigation, that the Racial Discrimination Act supported the protection of native title raised a question about the validity of laws and Acts that may have adversely affected native title. This pointed to a new political imperative. Australia, at long last, had to do business with its indigenous people as the possessors of legal rights. The *Mabo* decision has been criticised by indigenous commentators as limited in its scope, involving a political compromise and protective of vested non-indigenous interests at the expense of indigenous concerns. The doctrine of extinguishment, as presently enunciated, limits the scope of the outcomes achievable under the common law. Nevertheless, the decision opened up a new direction in the search for justice for Australia's indigenous people. However, the practical sequelae of the decision and the legislative response to it indicate that it is wrong to characterise it as defining the end point of justice for indigenous people.

The Native Title Act

The *Native Title Act 1993* provides for the recognition and protection of native title, the validation of past Acts which may have been invalid because of their impact on native title, compensation in respect of those Acts, a regime to govern future grants and Acts

affecting native title and tribunal and court processes for determining claims to native title and for negotiation and decisions on proposed grants over native title land.

The legislative progenitors of the Act seem to have considered that it would have a limited area of application and would deliver only limited benefits, hence the Indigenous Land Fund and the Social Justice Package. Criteria for acceptance of claims in the original Bill authorised the Registrar of Native Title to reject an application if she considered that native title in relation to any part of the area under claim had been extinguished or if the application did not contain 'sufficient information' about any physical connection that might be required by the common law concept of native title to exist or to have existed between the applicant and any of the applicant's ancestors and the land or waters covered by the application. The reference in the Second Reading Speech to rigorous, specialised and accessible tribunal and court processes for determining claims to native title, and for negotiation and decisions on proposed grants over native title land, contemplated a different process from that which has turned out to be the fact.

The original vision evidently encompassed a substantial preparation for the lodgment of claims, a screening process applied by the National Native Title Tribunal, a conference to see whether agreement could be reached about the application, determinations of unopposed or agreed applications by the tribunal, and referral of contested claims to the Federal Court. Despite drafting inconsistencies, the scheme of the Act was also consistent with the proposition that registration of a claim and the right to negotiate and arbitrate mining grants and acquisitions were tied to the acceptance of applications. As for intra-indigenous conflict, that was a matter to be resolved by representative bodies of Aboriginal people, designated as such by the minister. Amendments to the Act in the Senate and subsequent decisions of the High Court and Federal Court have led to different outcomes.[4]

The lodgment of applications gives rise immediately to the right to be placed on the Register of Native Title Claims and to invoke the compulsory negotiation and arbitration provisions of the Act in relation to the grant of mining tenements and compulsory acquisitions. There is virtually no substantive assessment of applications in deciding whether to accept them. The tribunal's power to make effective determinations has been seriously compromised by the High Court's *Brandy* decision. Mediations are longer, more complex processes than originally thought. All of them involve an interface between Aboriginal people and their state or territory government in an area where governments are as yet developing their policies about native title, where governments change and new governments formulate new policies.

The demands placed upon indigenous groups to come to grips with the issues, to marshal resources and expertise, to develop community consultation processes, to manage internal conflict, to effectively negotiate and to deal with the pressures of non-indigenous agendas are huge. There are also significant pressures, albeit on a narrower base, placed on many other parties to respond to the process in the face of legal uncertainty and indigenous agendas which are evolving in the course of mediation. The existence of these pressures and the difficulties posed by the unexpected directions in which the process has been taken will be addressed in time by the precedent guidance of negotiated agreements, the resolution of legal issues by the courts and by amendments to the legislation.

In the meantime Australia has experienced, on the part of its indigenous peoples in the space of two short years, an extraordinary flowering of cultural identity accompanied by a drive to take control of indigenous history and a drive to justice informed by many visions. Some applications will be found to have been misconceived. They will eventually falter and fall away. But whatever the success rate in terms of native title outcomes, the assertion of rights over country is itself a consciousness-raising exercise which is, for the most part, irreversible.

An indication of what is happening is given by the figures for applications lodged with the National Native Title Tribunal. At the end of the first six months of its existence, there were fourteen applications; after twelve months, there were forty-three. Eighteen months into the life of the tribunal, there were eighty-two and, at 31 December 1995, two years after its inception, there were 168. By 10 April 1996, there were 232.

Native title mediation

A significant number of cases are now in the process, or about to commence the process, of mediation. For the tribunal, as for the parties, mediation of native title claims poses unique challenges. And while there are some voices in favour of earlier referral of matters to the Federal Court, the time and expense involved in judicial proceedings are such that, while parties are prepared to negotiate in a way that may lead to a narrowing of issues or a reduction in the number of parties, the tribunal is reluctant to force them into court on the demand of one party or sub-group of parties. So far, four applications have been referred to the Court. One was referred in February 1995; it

seems unlikely that it will come to trial before March 1997. The administrative cost to the Court, and therefore to the taxpayer, of conducting such proceedings may run as high as $200,000 without taking account of the cost of judicial and staff salaries.

A number of the claims which have been made will not be funded because they lack the support of the relevant representative body. If these matters are unable to be resolved consensually, there will be real difficulties for other parties and for the Court in dealing with them adequately. Excessive faith should not be placed in the power of the Court to decide threshold questions of law or fact on strike-out motions or by preliminary hearings. Courts are generally reluctant to deny litigants their day in court. The success rate of strike-out motions is low. In one case where the Court has been asked to determine issues of pastoral lease extinguishment as a preliminary question, it has declined to do so.[5]

These difficulties cannot readily be legislated away. So long as the common law of native title stands, the choice of response to native title claims will lie between litigation and negotiation. Mediation about indigenous land ownership is a process that has few, if any, parallels in other areas of dispute resolutions. We are developing unique approaches in that regard. The processes and outcomes have been described in more detail elsewhere (French 1996).

It is useful when considering the native title mediation process in Australia to have in mind international experience in dealing with indigenous land claims. The Treaty Commission process for negotiating agreements with First Nations in British Columbia was set up in 1991. Forty-seven statements of intent had been filed by First Nations to December 1995. No final agreements have yet been reached within the process. Only four framework agreements have been signed in that time. One negotiation has reached agreement in principle five years after the signing of a framework agreement.

The Waitangi Tribunal in New Zealand was established under the *Treaty of Waitangi Act 1975*. It has the power to make recommendations to the Crown but no power to make binding decisions. Describing the role of that tribunal, its Chief Judge has said:

> The Tribunal arranges its workload according to historic claims, resource claims and claims in respect of current crown policy. The current policy claims cover diverse areas from education to issues of intellectual property. The Tribunal is assisted by a combination of legal, lay, Maori and Pakeha members. Where a case is well founded the Tribunal recommends to Government the action needed to remove or alleviate the prejudice complained of, and the steps necessary to prevent that prejudice from arising again. In the case of historic claims however, the Tribunal has the additional power to make 'binding recommendations' to transfer substantial former crown properties to Maori ownership, these ranging from commercial buildings to farms and State forests. The name 'binding recommendations' is, of course, a contradiction in terms but effectively it amounts to an order. (Durie 1994, 25)

To date, 571 claims have been registered with the Waitangi Tribunal; fifty-eight have either been settled or are the subject of report to government. These references are not made for the purpose of drawing direct comparisons, as the operating systems differ both in British Columbia and in New Zealand from that which has been established in Australia. They do, however, indicate the difficulty and time-consuming nature of identifying indigenous land rights and related issues everywhere.

Native title and country

The issues raised by native title applications extend well beyond the existence or non-existence of common law native title. Underlying most, if not all, applications is the demand for recognition and respect for the first owners of this country. The particular visions of the ways that recognition and respect can be given practical effect are various. They may involve recognition of native title which is exclusive or non-exclusive. They may involve other forms of land interest being transferred to applicant groups. They may involve compensation. They may involve joint management of publicly owned land and provision for visible symbols of indigenous connection to the country. The range of responses is only limited by the creativity of those who negotiate with each other. What the map of Australia today tells us is just how much of this process is going on now. And the message is clear: native title may come or go, but country is here to stay.

Conclusion

The history of indigenous agitation about country and related human rights that has been discussed in this lecture illustrates that the *Mabo* decision and the Native Title Act take their place as landmarks in the broad sweep of an evolving relationship between indigenous and non-indigenous Australia. An understanding by all Australians that *Mabo* and the Act are part of a much larger process has important practical implications. For then there can be an understanding that, even if native title is swept aside by the law, country and its concerns remain. And then, too, there can be an understanding that native title represents neither the beginning nor the end of justice.

NOTES

1. For an account of contemporary responses to *Mabo*, see Meyers and Muller (1995).

2. Yuin Council of Elders Corporation v State of New South Wales (unrep. Federal Court, Lockhart J, 23/10/95).

3. *Mabo v State of Queensland [No 1]* (1988) 166 CLR 186.

4. *Brandy v Human Rights and Equal Opportunity Commission* (1995) 127 ALR 1; *Northern Territory v Lane* (unrep. Federal Court, O'Loughlin J, 24/8/95); *Kanak v National Native Title Tribunal* (1995) 132 ALR 329; *North Ganalanja Aboriginal Corporation v State of Queensland* (High Court, 21/3/96).

5. *Ben Ward & Others v State of Western Australia* (unrep. Federal Court, Lee J, 14/12/95).

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