Introduction

> The God Malo says to you as he says to me, and has said to the rest of the world: *Tag Mauki mauki, Teter mauki mauki …* your hands and your feet must not take you to steal what is other people's.
> David Passi, Murray Island Plaintiff[1]

The decision of the High Court of Australia in *Mabo v Queensland [No. 2]*[2] (*Mabo*) has had a profound impact on the legal, social and political reality of Indigenous–non-Indigenous relations in Australia. The result in the case was a recognition by the Australian legal system that the Meriam people hold rights to their land under their own system of law, and that those rights should enjoy the protection of the Australian law. The nature of that recognition and the extent of protection has been the subject of significant legal, policy and social debate. In each of these spheres there is significant reluctance to disturb the colonial inheritance of two hundred years of denial of the rights of Indigenous peoples.

The decision in *Mabo* was heralded as an abandonment of the 'terra nullius' myth, although this may be an overstatement of the reform that took place.[3] It was described as a 'judicial revolution' and, while bringing Australian law belatedly into line with other common law countries, attracted criticism of the High Court for taking an activist role in transforming Australian law.[4] The legal recognition of continued rights of Indigenous peoples to land in Australia plays to what is perhaps one of the country's greatest fears. Extreme public and policy responses to the recognition of native title have plagued the early years of the development of native title law.

Perhaps not surprisingly, the *Mabo* decision provoked diverse responses from industry and from pastoral and political groups; it engendered great public interest and undoubtedly some confusion. The most vocal opponents were those in the resource sector who anticipated greater constraints on their access to land for exploration and mining.[5] The hostility of the state governments was epitomised in Western Australia's resolve to 'use whatever means [they] have to nullify the effects of the decision'.[6]

The decision in *Mabo,* while it made particular directions as to the rights of the Meriam, was not restricted in its application. In reaching their conclusions, the judges relied on general propositions of common law applicable to any 'settled' colony.[7] Of greater significance was the 'declaratory' nature of the decision; that is, the High Court defined what the common law of Australia is, and therefore had always been, even if this had not been recognised until this case. This meant that not only would future dealings with Indigenous peoples' land have to change but a comprehensive review of past treatment and possible illegality was also required.

THE LAW BEFORE *MABO*

The colonial law by which Australia was annexed to the British Empire, and the reception of the common law into the colonies, rested on the legal presumption that the Indigenous inhabitants had no right to the land. This presumption had been justified on the basis that there was 'no settled law' that required the respect of the colonising power.[8] As Justice Brennan explained:

> The view was taken that, when sovereignty of a territory could be acquired under the enlarged notion of terra nullius, for the purposes of the municipal law that territory (though inhabited) could be treated as a 'desert uninhabited' country. The hypothesis being that there was no local law already in existence in the territory … *Ex hypothesi*, the indigenous inhabitants of a settled colony … were thus taken to be without laws, without a sovereign and primitive in their social organisation.[9]

As a result, there was seen to be no need to wrest sovereignty from the Indigenous peoples through conquest or cession; rather, the territory could be annexed by 'peaceful' settlement.[10] Until the *Mabo* decision this assumption had been upheld in Australian law and provided the basis upon which the laws of the Commonwealth and the states were drafted.

The first case in which Indigenous peoples presented evidence to challenge the notion that the continent was without law was *Milirrpum v Nabalco Pty Ltd*, which arose from a claim by the Yirrkala people of the Gove Peninsula who sought to halt mining in the area.[11] Justice Blackburn of the Supreme Court of the Northern Territory heard evidence from the Yirrkala people about their relationship to the land and their law. His Honour observed:

> 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.[12]

Despite the evidence before the court, Justice Blackburn felt bound by the decision of the Privy Council in *Cooper v Stuart* in 1889 to conclude that no doctrine of communal title ever existed in the common law.[13] The judge therefore chose to treat the question of whether the colony was settled as a matter of law, not of fact.[14] There was no appeal from this judgment or any challenge to the law for some time. This may be partly explained by the subsequent development of land rights legislation in various states and territories. The most comprehensive legislative regime was introduced by the Commonwealth Government in the Northern Territory, under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth).[15]

In the years after *Milirrpum,* the High Court of Australia appeared to be open to a challenge to the presumption that the acquisition of sovereignty automatically vested the ownership of land in the Crown, to the detriment of Indigenous people. Members of the Court in *Coe v Commonwealth* noted that the existence of communal title constituted an arguable question if properly raised.[16] Justice Deane had lamented in *Gerhardy v Brown* that 'the common law of this land has still not reached the stage of retreat from injustice which the Law of Illinois and Virginia had reached in 1823'.[17] Later, in *Northern Land Council v Commonwealth*, the High Court described the debate about fiduciary duties that might arise from Crown dealings with Indigenous land as of fundamental importance.[18] The impetus lay with the High Court to reassess the authorities with respect to the application of the common law to Australia and its implication for Indigenous peoples' law and their land.

The *Mabo* decision did not revisit the mode or validity of the acquisition of sovereignty, but did reconsider how the law was received in the new colonies and the consequences for the 'private rights' of the Indigenous inhabitants. The High Court rejected a domestic doctrine founded on principles of ethnocentricity that justified the 'more advanced people' in dispossessing the 'less advanced', although not entirely.[19] In so doing, the High Court rejected the assumptions upon which Australia's land law had been based and created the impetus for a review of existing legislation and statutory interpretation. In accepting responsibility for recognising the rights of Indigenous peoples to land as a part of Australian law, the High Court entered upon the considerable task of determining the extent to which law and property interests were to be affected by the recognition of native title and the extent to which the law would protect the title now recognised.

THE LEGISLATIVE RESPONSES

There were immediate calls for the implementation of a statutory or administrative scheme to deal with the uncertainties of land tenure that were unearthed by the *Mabo* decision but resolution of the issues was not conducive to a simple or quick

solution. During the course of the *Mabo* litigation, the Queensland Government had sought to pre-empt the outcome of the case by passing the *Queensland Coast Islands Declaratory Act 1985* (Qld), which deemed complete beneficial ownership of all of Queensland to be in the Crown regardless of whether native title now or had ever existed.[20] The High Court declared that, should it be proved that native title in fact existed, the Queensland legislation would violate the *Racial Discrimination Act 1975* (Cth) (RDA).[21]

Putting to one side for the moment the discriminatory treatment of native title by the common law, once title had been recognised in *Mabo* the impact of the RDA put a cloud of invalidity over any dealings with land since 1975, including legislation passed concerning land management, grants made over land, especially to miners, and government activity such as public works and reservations, even the creation of national parks and townships. Over the next eighteen months, the Commonwealth Government sought to reach agreement on a legislative package that would support the recognition of native title by the courts and provide the common law title with greater protection in future dealings, while validating dealings with land prior to the recognition of native title.[22]

In December 1993, after one of the longest debates in parliamentary history, the *Native Title Act 1993* (Cth) (NTA) was introduced with the following objects:

(a) to provide for the recognition and protection of native title; and
(b) to establish ways in which future dealings affecting native title may proceed and to set standards for those dealings; and
(c) to establish a mechanism for determining claims to native title; and
(d) to provide for, or permit, the validation of past acts, invalidated because of the existence of native title.[23]

The Commonwealth also promised a measure of redress for the past dispossession through provision of a land fund for the acquisition of further land, as well as a social justice package. The land fund and an administering body, the Indigenous Land Corporation, were established by the NTA, but the social justice package has not been delivered.

In opposition to the Commonwealth's national regime, the Western Australian state government had maintained its commitment to 'nullify' the *Mabo* decision. It passed the *Land (Titles and Traditional Usage) Act 1993*, which provided for the compulsory acquisition of all native title in Western Australia and for native title to be replaced by a statutory grant of rights to access for traditional use. A constitutional challenge between the state and the Commonwealth was inevitable. The resulting decision of the High Court in *Western Australia v Commonwealth* (1995) (*Native Title Act case*) confirmed the validity of the Commonwealth legislation as being within the legislative powers of the Commonwealth to make laws for the 'persons of any race' under s 51(xxvi) of the Constitution.[24] The

case also reconfirmed the decision in *Mabo v Queensland [No. 1]* (1988) (*Mabo [No. 1]*) concerning the effect of the RDA.[25] Under s 109 of the Constitution, Commonwealth legislation (enacted within power) prevails over any inconsistent state legislation. The High Court explained in the *Native Title Act case* that:

> The two-fold operation of s 10(1) [of the RDA] ensures that [Indigenous peoples] who are holders of native title have the same security of enjoyment of their traditional rights over or in respect of land as others who are holders of title granted by the Crown and that a State law which purports to diminish that security of enjoyment is, by virtue of s 109 of the Constitution, inoperative.[26]

In the result, the Court held that provisions of the *Land (Titles and Traditional Usage) Act* 1993 (WA) that purported to extinguish native title were invalid. The states were therefore bound by the Commonwealth regime and could not take an inconsistent approach.

THE *NATIVE TITLE ACT 1993*

The first object of the NTA, to 'recognise and protect native title', was thought to have been met by the statutory declaration under s 11 to the effect that native title 'is not able to be extinguished contrary to this Act'.[27] By virtue of this provision, the NTA establishes an exclusive code for extinguishment that constrains the executive and state legislatures. In the *Native Title Act case,* the High Court explained that:

> The Act removes the common law defeasibility of native title, and secures the Aboriginal people and Torres Strait Islanders in the enjoyment of their native title subject to the prescribed exceptions which provide for native title to be extinguished or impaired. There are only three exceptions: the occurrence of a past act that has been validated, an agreement on the part of the native title holders, or the doing of a permissible future act.[28]

Much is made of this 'beneficial' aspect of the NTA, but as *Mabo [No. 1]* and the *Native Title Act case* show, common law native title enjoyed significant protection against defeasibility, or extinguishment, under the RDA.[29] The primary objective of the 'protection' regime under the NTA could be argued to be the clarification of the 'exceptions'. The perceived 'vulnerability' of native title was illustrated by the treatment of the RDA by the Commonwealth Parliament in order to achieve the validation imperative. The operation of the RDA was suspended to allow the validation of past acts of extinguishment by the Commonwealth and to allow state governments to pass similar validation legislation.[30] The NTA provides for compensation but not for consent and negotiation. The effect of validation

provisions was to build upon the discriminatory aspects of the common law by removing the protection of equality before the law under the RDA for the period up to the passing of the NTA.[31]

The urgency with which the Commonwealth wanted to 'resolve' native title was also evident in the objective 'to establish a mechanism for determining claims to native title'.[32] The NTA established a substantial process and infrastructure for the methodical identification of native title, including who holds it, where it exists and what it entails. Thus, potential common law native title holders were invited to seek a 'determination' that native title exists.[33] To manage this process, the National Native Title Tribunal was established with the aim of providing an environment for native title to be determined by agreement through mediation. But the process sets native title applicants in the position of having to 'explain' their claims, to assert legitimacy and to ask for recognition from potentially hundreds of 'interested' parties and often recalcitrant state governments. [34]

The remaining object of the Act, 'to establish ways in which future dealings affecting native title may proceed', is implemented through the 'future act' regime.[35] The NTA introduced the notion of 'permissible' and 'impermissible' future acts in order to meet the requirements of the RDA; that is, an act is only permissible if native title holders are treated with the same procedural rights as if they held any ordinary title, such as freehold. The provisions of the NTA in 1993 were directed primarily to the impact on the granting of mining leases, thus the future act regime provided for a 'right to negotiate' (although no right to say 'no') with governments over mining activity, within a specified period, in order to reach agreement to the doing of the act.[36]

WIK AND THE TEN-POINT PLAN

Within a year of the operation of the NTA, it was clear that there were still many aspects of the law that were unclear. One of the largest issues to be resolved was the relationship between native title and pastoral and mining leases. The balancing of these interests would determine the scope of native title on the mainland. Chapter 2 shows that the High Court determined that, in most cases, such interests should be able to coexist.[37] Of course, the decision of the High Court in *Wik Peoples v Queensland* (1996) (*Wik*) outraged pastoralist and farming industry groups, who were seeking greater 'certainty' in their tenures, which meant minimal interference with their enjoyment of property.[38] With the election of the Liberal–National Party coalition government in March 1996, these concerns found a receptive audience. The incoming federal government had already begun to implement its pre-election promise to reform the NTA to provide greater 'workability' before the *Wik* decision was handed down.[39] In response to the High Court decision in *Wik*, the government proposed a 'Ten-

Point Plan' that built upon the 'workability' proposals.[40] The plan promised to deliver 'bucket loads of extinguishment'.[41]

The resulting *Native Title Amendment Act 1998* (Cth) (the Amendments) reduced the protection afforded by the common law, the RDA and the 1993 NTA with a series of substantial reforms:

- validating new grants by state governments since the introduction of the NTA (without regard to the future act regime);[42]
- validating 'renewals' of leases issued before 1994;[43]
- 'confirmation' that extinguishment is permanent;[44]
- 'confirmation' of extinguishment in relation to freehold, leasehold and other tenures;[45]
- 'confirmation' of government authority over water and airspace;[46]
- expanding the rights of pastoralists to undertake agricultural activities;[47]
- raising the threshold for registration of applications (and thereby limiting access to procedural rights);[48]
- diminishing or removing the right to negotiate and introduction of more limited rights to notification and comment in relation to various classes of acts;[49] and
- the suspension of the RDA again to achieve this.[50]

The 1998 Amendments also introduced a detailed scheme of Indigenous Land Use Agreements that allowed greater certainty for non-Indigenous parties through the creation of binding agreements. These provisions were generally seen to be a positive element of the 1998 package but they were not enough to avoid international criticism for the discriminatory treatment of native title holders in favour of non-Indigenous interests.[51]

Further amendments to the legislation in 2007 and 2009 sought to avoid the political battles of earlier legislative interventions, focusing instead on technical and procedural reforms. During this period, the respective roles of the Federal Court and the National Native Title Tribunal were under critical review as the process for achieving settlement of native title claims continued to be time and resource intensive.

RELATIONSHIP BETWEEN THE COMMON LAW AND THE LEGISLATION

The legislature was seen to assert its role in the development and management of native title law and policy through the passing of the NTA in 1993, and particularly in light of the amendments passed in 1998. But the courts retain a central role in how native title has developed and what it could achieve. In recognising native title in the *Mabo* case, the courts took primary responsibility for determining the fundamental nature of the recognition and protection afforded to native title. The NTA incorporated common law concepts in a way

that continued to require clarification of the relationship between the common law and the statute. This book examines the courts' response to this role as much as it investigates the legal concepts and contests in the jurisprudence of native title.

The primary focus of this book is the theoretical foundations of native title. The past seventeen years have been formative in terms of the evolution of the legal concept of native title from uncertain foundations to a more detailed, though arguably compromised, jurisprudence.

In this book I trace the development of the courts' thinking on the concept of native title, from the watershed decision in *Mabo* through to the significant High Court decisions in 2002 in *Western Australia v Ward* (*Ward*) and *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) (*Yorta Yorta*) and the subsequent implementation of those cases by the Federal Court in cases such as *De Rose v South Australia* (*De Rose*) *[No. 2]* (2005) and *Bodney v Bennell* (2008) (*Bennell*). Each chapter contains a discrete analysis of the most significant cases during this period, providing a timeline of events. The book concludes with a substantial overview of the legal concept of native title that identifies the underlying themes and contradictions in the law. As we will see, there are important elements of native title law that are yet to be fully realised, most significantly the issue of compensation. Moreover, the idea that the law is now 'settled' belies the number of compromises that still exist in the jurisprudence, which suggest that, while the doctrine may now be more comprehensive, it has not necessarily reached a just outcome.

A number of themes emerge when examining the development of native title jurisprudence through the twin lenses of 'recognition' and 'protection'. Perhaps most significant is the way in which the courts grapple with the notion of Indigenous societies as makers and keepers of law. Native title confronts assumptions of legal and political sovereignty that are enshrined in the law and in the thinking of lawyers and judges. A second significant observation from both the writing and the structure of this book is that the courts have made significant policy choices that have limited the potential for native title. Despite attempts to reject the continuing capacity of Indigenous peoples to make law and govern themselves, there are unavoidable acknowledgments of Indigenous society present in the reasoning of native title cases that undermine the carefully constructed doctrinal denial.