Native Title: Issues in Australia

*J R Forbes**

The High Court Paves the Way 2
An Anatomy of the NTA 3
"Past Acts" 4
The Right to Negotiate 5
Title Claims and Compensation 7
The Tribunal 8
The Role of the Federal Court 8
The Land Fund 10
Does the NTA Cover the Field? 10
Mabo Extended 10
Offshore Areas 11
Title Brokers 11
Registers of Titles 12
"Non-Extinguishment" 12
Renewal of Mining Titles 12
Negotiation: A Significant Addition 13
State and Territory Responses 14
Queensland 15
Western Australia 17
South Australia 18
Other States 18
Proving Native Title 18
Who Shall Decide? 19
Issues in Native Title Cases 20
Access to Evidence: Are Some Parties More Equal than Others? 22
Lay or "Traditional" Evidence 22
Expert Evidence 25
Is Pseudo-Litigation Efficient or Conciliatory? 31

I am well aware that since the programme for this Conference was settled months ago great reservoirs of ink have been poured over the *Native Title Act*. Heaven forbid that I be seen as attempting a ready answer to any and every question about this egregious legislation. My modest plan is to present a bird's-eye view of the Act, to comment on

* Reader in Law, University of Queensland.

a few of its more intriguing features, to glance at the responses of some of the States and to accept the organisers' invitation to dwell on practical aspects which seem important to me.

THE HIGH COURT PAVES THE WAY

From 1847[1] (at the latest) till June 1992[2] it was an axiom of Australian law that all rights to land depended directly or indirectly upon a Crown grant. Early treaties or constitutional arrangements modified that proposition in some other English colonies.[3]

The Australian axiom was swept aside by *Mabo v Queensland (No 2)*[4] ("*Mabo*"), and that judicial legislation is confirmed and extended by the *Native Title Act* 1993 (Cth) ("NTA"). Now we know that holders of surviving native titles have rights which are independent of a Crown grant and do not fit into the familiar categories of "freehold", "leasehold" and so on. Just what the new-found rights *do* amount to is by no means clear; the content of a native title is a matter for "traditional" evidence in every particular case.

The "pure" *Mabo* doctrine[5] was probably unworkable. The workability of the legislation remains to be seen. Perhaps the court's decree was really meant to force the national government to legislate—or to give it an excuse to do so. Indeed the vision of *Mabo* as a none-too-subtle impulse to *normal*[6] legislation is enhanced by a remarkable dictum of Chief Justice Mason soon after the event. (One wonders what the reaction would have been if the dissenting judge, Dawson J, had toured the country expounding ***his*** view of the proper limits of judicial power.) In the course of defending judicial legislation in general and *Mabo* in particular—without any mention of the difference between gradual, incremental change and a sudden volte face—Sir Anthony declared:

> "I think that in some circumstances governments . . . prefer to leave the determination of controversial questions to the courts rather than [to] . . . the political process. Mabo is an interesting example."[7]

Unfortunately we are not told how the legislative judge knows when government has "left it" to him. But can the unspoken thought process be other than this?: "Parliament has not legislated. I think it should have. So I will."

1. *Attorney-General v Brown* (1847) 1 Legge 312 at 316.
2. *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141.
3. See, eg, *United States v Mitchell (No 2)* (1983) 463 US 206 and *Guerin v The Queen* (1984) 13 DLR 4th 321; Canadian Constitution s 35; *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641.
4. (1992) 175 CLR 1.
5. *Mabo* without the NTA.
6. Ie, parliamentary as distinct from judicial legislation.
7. "Putting Mabo in Perspective" (July 1993) 28 *Australian Lawyer* 23. See also "Chief Justice Defends Ruling as Lawful" *The Australian*, 2 July 1993, p 2.

AN ANATOMY OF THE NTA

The immediate rationale of the NTA is to resolve doubts about the validity of normal titles, especially those created since October 1975, when the federal *Race Discrimination Act* ("RDA") — the cornerstone of *Mabo* — became law. However, the NTA is much more than a validating Act and in certain respects[8] it ventures beyond the common law revealed in *Mabo* itself. (See "Mabo Extended", below, p 10.) *Mabo* itself had almost nothing to say about mining rights; there is just a throwaway line to the effect that grants of freehold and Crown leasehold extinguish native title "but not necessarily . . . lesser interests (for example, authorities to prospect for minerals)".[9]

The Act begins with almost three pages of didactic, not to say tendentious, Preamble. This drafting fashion, formerly quite foreign to our legislation, acquired a certain vogue in the 1970s. It is reminiscent of the "manufacturing letter"—a threadbare device for generating self-serving statements in letters between litigation solicitors. Insofar as the Act embodies "reverse discrimination" it relies upon s 8 of the RDA and *Gerhardy v Brown*.[10]

The professed objects of the Act are to recognise and protect[11] native title, to provide ways of proving it, to regulate future dealings with it, and to validate (and allow States to validate) "past acts" which have affected it.[12] Henceforth native title can be extinguished only in accordance with the Act.[13]

The NTA purports to bind the States as well as the Commonwealth[14] and to extend to offshore areas.[15] It affects the RDA only so far as is necessary to allow the validating provisions to operate.[16] It does not affect the *Aboriginal Land Rights (Northern Territory) Act* 1976 (Cth).[17]

No attempt is made to codify the broad and prolific High Court dicta in the landmark case. The NTA picks up the law of *Mabo* — whatever that turns out to be — and makes it a law of the Commonwealth.[18] The expression "native title" means "communal, group or individual rights and interests of indigenes in relation to land or waters recognised by the common law of Australia".[19]

Section 13 foreshadows adjudications upon native title by a National Native Title Tribunal ("NNTT") and the Federal Court. We have to walk quite a distance through the Act in order to learn more about these institutions and their functions, which are considered below.

8. See "Mabo Extended", below, p 10.
9. (1992) 175 CLR 1 at 69 per Brennan J.
10. (1985) 159 CLR 70.
11. See also s 10.
12. NTA, s 3.
13. NTA, s 11.
14. NTA, s 5.
15. NTA, s 6.
16. NTA, s 7.
17. NTA, s 210.
18. NTA, s 12.
19. NTA, s 223.

The Act then turns to the task of validation—a permissible way[20] of extinguishing native title. "Past acts" of the Commonwealth itself are validated forthwith[21] and the States and Territories are authorised[22] to validate theirs to the extent allowed by the Commonwealth. Federal or State laws may confirm public ownership of natural resources, fisheries, beaches and public places[23] but native title holders are not affected by licences or prohibitions touching their areas and which the general public must observe.[24]

"PAST ACTS"

It is time to look more closely at the concept of a "past act". Subject to glosses to be noted later,[25] a "past act" is an act by the Commonwealth, a State or a Territory which occurred before 1 January 1994 (or before 1 July 1994 if it be a legislative act[26]) and which may have been invalid because of its interference with a native title.[27]

There are four classes of "past acts":[28]

1. **Category "A"** comprises public works, freehold titles, and commercial, agricultural, pastoral[29] or residential leases effected before 1 January 1994 *and still extant* on that day.[30] Generally these extinguish any native title with which they may have come into conflict, but in the case of a pastoral lease this is without prejudice to Aborigines "who reside on or who exercise access" over the area.[31] Pastoral leases cover about one third of Western Australia[32] and concern was caused by news that the NNTT would consider applications for native title over such leases, Category "A" notwithstanding.[33] The exact status of those leases concerns not only pastoralists but also miners for whom they are "background titles". (Subsequently the Tribunal issued "guidelines" indicating that claims over pastoral leases would be considered only if the leases themselves contained reservations in favour of Aborigines.[34]) Pastoral leases which have been granted to native

20. NTA, s 11(2).
21. NTA, s 14.
22. NTA, s 19.
23. NTA, s 212.
24. NTA, s 211.
25. See note 112 below and related text.
26. This provision is aimed at the Western Australian legislation discussed below, p 17.
27. NTA, s 228.
28. Defined in ss 229-232.
29. However, a grant of a pastoral lease to native title claimants does not extinguish any native title over the land: NTA, s 47.
30. NTA, s 229(1)(2)(i).
31. NTA, s 15(2).
32. M W Hunt, "Is the Native Title Legislation Practical, Efficient and Workable for the Mining and Petroleum Industries?" Mimeo, Centre for Commercial and Resources Law, Perth, June 1994, p 2.
33. "Warning on Land Claims", *Sunday Mail* (Brisbane), 26 June 1994, p 3, reporting discussions between the Tribunal President and the National Farmers' Federation.
34. "Register to Native Title Claims Issued", *Courier Mail* (Brisbane), 9 September 1994, p 13.

title holders do not extinguish native title and can be converted to that tenure.[35] The very limited value of native title as security[36] will probably discourage conversions.

2. **Category "B"** comprises leases other than mining leases and Category "A" leases, granted before 1 January 1994 and still extant on that day. They extinguish native title to the extent of any inconsistency.
3. **Category "C"** comprises mining leases granted before 1 January 1994.
4. **Category "D"** includes any other concession granted by a government before 1 January 1994.

"C" and "D" class grants suspend but do not extinguish any relevant native title.[37]

Compensation for native titles which have been extinguished since the RDA came into effect is payable by the government concerned.[38]

THE RIGHT TO NEGOTIATE

Henceforth Commonwealth and State legislation relating to land must treat native title holders no less favourably than other proprietors;[39] for example it must afford them similar rights in the event of compulsory acquisition.[40]

In future, extinguishment may occur[41] only under an agreement to surrender[42] or by compulsory acquisition for public purposes.[43] In return for voluntary surrender a native title holder may receive a grant of freehold.[44] It is not clear how or whether a proper balance will be kept between the value of the title surrendered and the property which is given in return.

Surrender and compulsory acquisition apart, "permissible future acts" are subject to a "right to negotiate". Formally this right lies against the government proposing to do the act unless it is exempted from the negotiation process by Ministerial decree.[45] In practice, of course, the right to negotiate will also concern a developer such as an applicant for a mining lease. Notice of the proposed act must be given to Aboriginal organisations.[46]

35. NTA, s 47.
36. Cf NTA, s 56(5).
37. NTA, s 15(1)(d).
38. NTA, ss 17, 18 and 20.
39. NTA, s 235(2).
40. NTA, ss 23(6) and 253.
41. NTA, s 11.
42. NTA, s 21.
43. NTA, s 23(3). However, acquisitions which are made in order to "confer rights . . . on persons other than the government party" are subject to a "right to negotiate": s 26(2)(d).
44. NTA, s 21(3).
45. NTA, s 26(3).
46. NTA, ss 29-30.

In the absence of agreement between the objectors and other parties the National Native Title Tribunal (or a State authority approved by the Commonwealth[47]) conducts an arbitration.[48]

But first the government must negotiate in good faith with any holder *or claimant* of native title who has lodged an objection, and any party may ask the Tribunal to "mediate".[49] A claim for a share of profits may be used as a bargaining counter[50] but the Tribunal may not make such benefits a condition of its approval.[51] (A representative of the Jawoyn people boasted of using *Mabo* as a "big stick" to secure a joint venture interest in a mine in the Northern Territory.[52]) It seems strange that someone who has not proved a title (and who may never do so) has locus standi to delay a "future act" for a lengthy period and to seek a "deal", no matter how slender the alleged title may be. After all, the content of a native title may range down from something like freehold to a mere right of passage or occasional visitation.

When an exploration licence is sought over land which is (or is claimed to be) subject to native title there is a moratorium of four months, or six months when a Crown lease is in contemplation.[53] In theory objectors have no veto but it remains to be seen whether that is true in practice. After the negotiation period has expired without agreement the Tribunal must "take all reasonable steps" to reach a decision within another four (or six) months, as the case may be.[54] The answer may be "yes" or "no", or "yes, subject to conditions".[55] The criteria for deciding development applications include native and environmental concerns, the economic significance of the proposal and the public interest.[56] Compensation for future acts may be made the responsibility of the developer.[57] Compensation awarded to a mere claimant of native title is held in trust until the claim to title is established[58] and is refundable if the claim fails.[59] However, no recompense is available for delay and expense caused by a person whose claim to native title eventually fails.

47. NTA, s 43.
48. NTA, s 27.
49. NTA, s 31. Mediation is now a very fashionable term for traditional "without prejudice" negotiations assisted by a supposedly expert third person.
50. NTA, s 33.
51. NTA, s 38(2).
52. "From Bula to Boardroom", *The Australian*, 16-17 April 1994, p 34, quoting Mr Ah Kit: "He warned that if Dominion discovered a viable ore body it might also find previously unregistered sacred sites in the same area." Despite the recent revival of Rousseau's romantic State of Nature and claims of mystical attachment to land, there are distinct signs that commercial considerations will enliven "rights to negotiate". See, eg, "Aboriginal Leader Calls for Mine Joint Ventures", *Courier Mail*, 23 March 1994, p 23. In the Northern Territory the Jawoyn and Dominion Mining Ltd have become joint venturers, as have Mount Isa Mines Ltd and an ATSIC subsidiary in the much larger McArthur River project: "Aborigines, MIM in Giant Joint Venture", *Courier Mail*, 23 April 1994, p 39.
53. NTA, s 35.
54. NTA, s 36.
55. NTA, s 38.
56. NTA, s 39.
57. NTA, s 23(5).
58. NTA, ss 41(3), 52.
59. NTA, ss 52(1)(a), 52(2).

How will conventional valuation evidence—often "rubbery" at the best of times—place a monetary value on native titles? Apart from the uncertainty and infinite variability of their content they are inalienable; there is no market to measure their monetary value.

The Commonwealth or State Minister may overrule or modify an award of the Tribunal within two months of its delivery on public interest grounds.[60] An exercise of this power is apt to generate much political heat, and one suspects that major interventions will seldom occur.

TITLE CLAIMS AND COMPENSATION

There are three types of application, namely: (1) applications to determine the existence or non-existence[61] of native title; (2) applications for revision of a title determination; and (3) compensation applications.[62] They must all be commenced in the Tribunal[63] although later they may go to the Federal Court. The Minister designates organisations to assist claimants.[64] These "native title brokers"[65] are likely to influence not only those who succeed but also the choice of those who are encouraged to apply.

Somewhat mysterious is the application for "revision". Section 13 of the NTA states that an application may be made "to revoke or vary an approved determination of native title on the grounds . . . (a) that events have taken place since the determination was made that have caused the determination no longer to be correct; or (b) that the interests of justice require the variation or revocation of the determination". The President of the Native Title Tribunal has recently observed:[66]

> "[It] would seem . . . to refer to events other than the mere discovery of evidence of matters which might have led to a different determination. There may therefore be little room for a 'fresh evidence' approach . . . Abandonment of the land by the native title holders at some time after a determination is made could be a [relevant event]."

The expression "interests of justice" is apt to let in allegations of fraud or undue influence. The President agrees that it is wide but he adds that before any existing arrangement is disturbed ". . . the 'interests of justice' do require a consideration of the steps that people

60. NTA, s 42.
61. "Non-claimant" applications are possible.
62. Where native title is extinguished compensation is to be on "just terms": NTA, ss 17, 20 and 51. Where impaired (eg by mining lease) compensation is to be assessed as for freeholders: ss 17, 20 and 51(3) and s 240. Where title is impaired by an act which could not have been done over freehold the test is "just terms": ss 17, 20, 51.
63. NTA, s 61.
64. NTA, ss 202-203.
65. "Crocodile Caught in Jaws of Dispute", *The Australian*, 21 February 1994, p 11.
66. Justice French, "Working With the Native Title Act", address delivered at Sydney, 16 May 1994, National Native Title Tribunal, mimeo, 41 pages at 10-11.

may have taken in reliance upon the determination which it is sought to revoke or vary and the inconvenience and detriment which might flow from re-opening it". The degree of uncertainty which these provisions add to the NTA cannot be predicted at this stage. "Final" property settlements under the *Family Law Act* became a different proposition when it became possible to have them re-opened on the basis that they had become "impracticable".[67] Decisions on the proliferating rules which allow extensions of time to begin legal action or to lodge appeals tend to pay much more attention to the interests of concession-seekers than to the detriment to the other party when "dead" litigation is suddenly revived by judicial fiat.

THE TRIBUNAL

Membership of the National Native Title Tribunal is governed by s 110. It consists of one or three members according to the importance of the case.[68] Questions of law are decided by the presiding member and questions of fact by a majority.[69] The NNTT processes unopposed claims[70] and rules upon objections to "future acts". Generally its hearings are open to the public but evidence may be suppressed[71] when Aborigines so require and in other circumstances.[72] Cross-examination is by leave of the Tribunal only.[73]

When the Tribunal approves title or compensation cases which are unopposed or settled, its decrees are registered in the Federal Court and become orders of the court.[74] Appeals on points of law may be taken to the Federal Court.[75]

THE ROLE OF THE FEDERAL COURT

If a title or compensation matter is not settled it must be referred to the Federal Court.[76] Insofar as one may speak of tradition in a court of limited jurisdiction created less than 20 years ago, the set-up of the Federal Court for present purposes is most unusual. It is told to proceed "informally" and it is not bound by the rules of evidence.[77] This is normal in a tribunal but extraordinary in a court. Further, the court is assisted by super-witnesses, styled "assessors",[78] who must "so far as

67. *Family Law Act* 1975 (Cth), s 87(8), as amended in 1984.
68. NTA, ss 123, 124.
69. NTA, s 144.
70. NTA, s 70.
71. NTA, s 155.
72. NTA, s 154.
73. NTA, s 156.
74. NTA, ss 165, 167.
75. NTA, s 169.
76. NTA, s 74.
77. NTA, s 82.
78. NTA, s 83.

is practicable" be Aborigines or Torres Strait Islanders.[79] The court's infrastructure offers a good deal of congenial employment; the Registrar may also engage "consultants".[80] These provisions are seen as an undue advantage to claimants[81] and a commensurate handicap to others:

> "[They give] rise to the suspicion that the system is being weighted against development interests and in favour of native title claimants; why should not [they] be subject to the same standard of proof . . . as are other Australians for similar claims?"[82]

However, a single judge of the Federal Court has held that the principles of bias do not extend to advisers,[83] and in view of difficulties which non-claimant parties are likely to meet in the quest for evidence the composition or disposition of the court may not make much practical difference.

The assessor is to preside at any settlement conference which the parties are directed to attend.[84] The court may, and doubtless will, treat reports and recommendations of assessors as evidence.[85] The court is specifically told to take native customs into account.[86] The purpose of this order is not clear; if it merely means that attention must be paid to *evidence* of such customs it is superfluous. But perhaps it is meant to create a special and unusually potent kind of judicial notice, which is normally a very limited source of evidence.[87]

In its orders[88] the court may take account of claimants' requests for non-monetary compensation, such as transfers of property or the provision of goods and services.[89]

Apart from the NTA, issues affecting State land would be within the jurisdiction of our most experienced courts, the Supreme Courts of the States. Perhaps it is still possible for them to retain jurisdiction in these cases which are, after all, property cases at common law.[90] The Supreme Courts are still properly described as our superior courts of general jurisdiction. They have judicial traditions of 100 to 150 years; the Federal Court's history scarcely occupies two decades. The Supreme

79. NTA, s 218.
80. NTA, s 132.
81. The Electoral and Administrative Review Commission (Qld) has recently rejected the principle of "representative" tribunals (on which sectional interests are represented): *Report on Tribunals*, September 1993, p 55. Of such bodies it was well said: "The result is in practice, as we all know, that a (representative) is a partisan and an advocate rather than a judge . . . It is not easy to imagine a less satisfactory tribunal, viewed as judicial body": *Re Skene's Award* (1904) 24 NZLR 591, 597-598 per Denniston and Chapman JJ.
82. AMPLA *Submission on the Native Title Bill 1993* (1994) 13 *AMPLA Bulletin* 41 at 48.
83. *Preston v Carmody* (1993) 44 FCR 1.
84. NTA, s 88.
85. NTA, s 86. Compare the extraordinary influence of "counsellors" in the Family Court.
86. NTA, s 82.
87. *Holland v Jones* (1917) 23 CLR 149, 153; *R v Dodd* [1985] 2 Qd R 277; *Gordon M Jenkins & Associates Pty Ltd v Coleman* (1989) 87 ALR 477.
88. NTA, s 94.
89. NTA, s 79.
90. NTA, s 12.

Courts are not confined to a piecemeal statutory charter and they handle State *and* federal criminal matters in which the law of evidence is most exacting. Appointments to Supreme Courts are more visible to the legal profession and are not made by one central government which may hold the power of patronage for many years.

THE LAND FUND

Section 201 of the NTA paves the way for a "National Aboriginal and Torres Strait Islanders' Land Fund". At the time of writing the details of this scheme await further legislation. It will be a substantial addition to existing aid to Aborigines, particularly those who cannot obtain land rights under the NTA. If it is funded as generously as expected, no complex judicial process may be needed.

DOES THE NTA COVER THE FIELD?

In *Mabo* there is a minority opinion[91] that fiduciary principles may be used to remedy "past acts" which extinguished native title even before the RDA existed. In *Coe v Commonwealth* Mason CJ[92] did not approve this view but he recognised that a constructive trust in favour of Aborigines might arise in particular circumstances which are independent of *Mabo*. The NTA preserves all legal and equitable rights held by Aborigines apart from native title.[93]

But even if it transpires that there has been a duty upon all Australian governments since 1788 to protect native title there would be a question whether the NTA now "covers the field". An answer may emerge from the case of the Wik people against Comalco Ltd and the State of Queensland.[94]

MABO EXTENDED

In what respects does the NTA go beyond the *Mabo* decision?

A most significant addition so far as taxpayers are concerned is the land acquisition fund, an addition to the very large sums already devoted to Aboriginal advancement. The federal Minister's rationale is that only about 5 per cent of Aborigines and Islanders are likely to secure a "Mabo title".[95] An amount of $200 million was allocated in

91. (1992) 175 CLR 1 at 199ff per Toohey J.
92. *Coe v Commonwealth* (1993) 68 ALJR 110 at 116-117.
93. NTA, s 16.
94. Federal Court (Brisbane Registry), Application No QG 104 of 1993.
95. "Coalition to Oppose Land Fund Proposal", *The Australian*, 22 April 1994, p 2, quoting Mr Tickner. See also, "Foray into Mabo's Forbidden Territory: What profit is there in Fitzroy Crossing entitlements for residents of Redfern?", *The Australian*, 11 November 1993, p 11. A supplementary land fund was foreshadowed months before the legislation passed the Parliament: "Mabo Mess Leaves PM High and Dry", *Courier Mail*, 12 June 1993, p 33; "New Fund to Help Aborigines Buy Land", *The Australian*, 9 August 1993, p 1.

the 1994 budget, to be followed by nine annual allocations of $121 million indexed to 1994 money values.[96] ATSIC, which failed to gain complete control of the Fund,[97] argues that it should not be confined to purchases of rural land but should be used to acquire community centres and sports grounds in urban areas.[98] So far it has not been presented as a supplement to urban housing schemes. At the time of writing it is still embroiled in political controversy.[99]

OFFSHORE AREAS

Mabo, as finally presented to the High Court, did not involve a claim to offshore areas. However, the NTA expressly extends to "the coastal sea of Australia . . . and to any waters over which Australia asserts sovereign rights".[100]

TITLE BROKERS

The identification of eligible claimants is very vague in *Mabo*. The Act seeks to remedy this by means of approved corporations.[101] Power will tend to be centripetal and from time to time it may be doubted whether the "brokers" are duly representative. Groups in the Northern Territory have challenged the hegemony of the Central and Northern Land Councils[102] and in one instance[103] the Federal Court ordered a Council to assist a group of which it did not approve. It is to be hoped that the distribution of benefits to *all* beneficiaries will be just and efficient although recent history is not particularly encouraging.[104] There is a question whether emoluments absorbed by a labyrinth of "representative" corporations and sub-corporations leave sufficient

96. "PM Introduces Land Fund Bill", *The Australian*, 1 July 1994, p 3.
97. "ATSIC Faces Reduced Role on Land Fund", *The Australian*, 31 March 1994, p 4.
98. "ATSIC Warns Against Curbs on Land Fund", *The Australian*, 11 April 1994, p 1.
99. In 1993, at least, land rights, let alone a land fund, were supported by less than 25 per cent of respondents to a public opinion poll: "Support for Land Rights Weak: Poll", *Courier Mail*, 30 March 1993, p 2.
100. NTA, s 6.
101. NTA, s 56-58.
102. "Tribal Guide Through a Legal Maze", *The Australian*, 11 February 1993, p 13; "How to Kill the Golden Goose", *Sunday Mail*, (Brisbane), 7 March 1993, p 57; *Pareroultja v Tickner* (1993) 117 ALR 206.
103. *Majar v Northern Land Council* (1991) 37 FCR 117.
104. "ATSIC Urges Tighter Control of Funds", *The Australian*, 30 August 1993, p 2; "Auditor Slams Land Council", 15 December 1993, p 4; "Black Agency Collapse Spurs Inquiry" 29 December 1993, p 3; "Staff Squander Black Funds on Luxury Goods", 22 April 1994, p 1; "Millions Wasted: Auditor", *Courier Mail* (Brisbane), 2 December 1993, p 1; "Black Leaders Should Tighten Finances: Goss", 4 December 1993, p 5; "Shape Up or Be Sacked, Warner Warns Black Councils", 26 February 1994, p 11; 20 April 1994, p 1; "Prosecutions May Follow Investigation", *Sun-Herald* (Sydney) 20 February 1994, p 5; "Homes Company Crashed After Boss's Property Deals", *Sunday Mail* (Brisbane), 19 June 1994, p 113.

funds to those for whom the elaborate structure has been erected.[105] If only an oligarchy prospers, the self-reliance to which everyone looks forward will once more be postponed.

REGISTERS OF TITLES

Mabo naturally provided no registration system for native titles. This is remedied in Parts 7 and 8 of the Act, which seem unlikely to be controversial.

"NON-EXTINGUISHMENT"

The only judge in *Mabo* who referred specifically to mining leases indicated that they, in common with other Crown leases, would extinguish native title.[106] However, the Act singles out mining leases for the application of a "non-extinguishment principle".[107] Consequently when these leases come up for renewal over native title land special care must be taken to see that they stay within the extended definition[108] of a "past act". The Prime Minister argued in Parliament that when a mining lease expires the prior title holder is entitled to re-occupy the land.[109] Why, then, does the NTA allow other Crown leases to extinguish native title?[110]

RENEWAL OF MINING TITLES

A renewal or extension after 1 January 1994 is *not* subject to the "right to negotiate" if it is made "under an option or right of . . . renewal created by the lease, contract, or other thing [that] created the right to mine".[111] It is very doubtful that a renewal *at the discretion*[112] of a State mining authority is within this proviso. More promising for miners is a gloss upon the definition itself[113] which states that a renewal is a "past act" if: (a) the renewed rights vest in the original grantee or his

105. See, eg, "Darwin Sentiment May Yet Pay Off", *The Australian*, 18-19 June 1994; "Fourth World Shame", *Courier Mail* (Brisbane), 25 May 1994, p 6, quoting a woman with "25 years experience in indigenous health care" to the effect that "crumbs (are received) at grass root level" while too much public money is "gobbled up in administration".
106. *Mabo* 175 CLR 1 at 69 per Brennan J.
107. NTA, ss 232, 238.
108. See note 112 below and related text.
109. *Hansard* (House of Representatives) 16 November 1993 at 2880.
110. NTA, s 15(1)(c).
111. NTA, s 26(2)(c).
112. Mining legislation is usually careful to emphasise that neither an original grant nor a renewal is an enforceable legal right (as "options" and "rights" normally are). See, eg, *Mineral Resources Development Act* 1990 (Vic), s 31(2); *Mining Act* (NSW) 1992, s 114(1); *Mining Act* 1978 (WA), s 78(2); *Mineral Resources Act* 1989 (Qld), s 7.43.
113. NTA, s 228(4).

or her assignee; (b) they are over the area (or part of the area) covered by the original grant; (c) there is no time gap between the renewal and the original term; and (d) the renewal is confined to "activities of a similar kind to those permitted" by the original grant. A variation to allow "similar mining for another mineral" is within this proviso,[114] but if land not covered by the original lease is included there is a "variation" which *is* subject to the "right to negotiate".[115] The conversion of an exploration licence to a mining lease (or to an intermediate title such as a mineral development licence[116]) is *not* a mere renewal.[117]

A renewal which amounts to a "past act" raises a fresh right to compensation. When the mining legislation itself recognises such a right[118] the "similar compensable interest" test[119] would probably be satisfied.

NEGOTIATION: A SIGNIFICANT ADDITION

From a miner's viewpoint a major addition to *Mabo* is the "right to negotiate"—a right to suspend the development application for at least four or six months[120] before an NNTT arbitration which (later still) may prohibit the development altogether. (The Western Australian response to *Mabo*[121] and the mining laws of other States[122] allow landowners to negotiate but the process is less elaborate, time limits are shorter and there are fewer opportunities for obstruction.)

It is too early to assess the effects of the "right to negotiate" on mining. Possible delays of 12 months or more[123] and the risk of running the "negotiation" gauntlet whenever a right is upgraded are causing serious concern.[124] Government spokespeople stress that the

114. NTA, s 228(5)(a).
115. NTA, s 26(2)(b).
116. See, eg, *Mineral Resources Act* 1989 (Qld), Part 6.
117. NTA, s 228(6), (7).
118. See, eg, *Mineral Resources Act* 1989 (Qld), s 7.43(3).
119. NTA, ss 51(3), 240.
120. NTA, s 35.
121. *Land (Titles and Traditional Usage) Act* 1993 (WA), s 45 and Schedule 1, amending the *Land Act* 1933 and the *Mining Act* 1978.
122. See, eg, *Mineral Resources Act* 1989 (Qld), s 7.19: owner may request conference with applicant for mining lease within seven days of receiving notice of the application (or such longer period as a mining registrar allows).
123. It is true that the Tribunal, if required to arbitrate, may hand down a decision in favour of development in less than four or six months, but on the other hand there may be delays in getting a hearing, and the Tribunal is only required to "take all reasonable steps" to stay within its time limits. They are not strictly binding: NTA, s 36. For a suggestion that it may be years, see M W Hunt, "Is the Native Title Legislation Practical, Efficient and Workable for the Mining and Petroleum Industries?" (mimeo, Centre for Commercial and Resources Law, Perth, June 1994), p 7.
124. "Mabo Holdups to Drive Mining Dollars Offshore", *The Australian*, 11-12 December 1993, p 31; "Mabo Mine Issues Remain" *Courier Mail*, 10 December 1993, p 29 (reporting a lecture by Brisbane lawyer Mr Ken McDonald); "Native Title Act an Ominous Cloud Over Resource Development" (May 1994) *Australian Journal of Mining*, p 5; "Mining Chiefs Renew Mabo Fears", *The Australian*, 8 February 1994, p 39.

much-criticised veto in the Northern Territory Act[125] is no part of the NTA, but will this turn out to be a distinction without a real difference? Aboriginal interests are still pressing for a veto strictu sensu.[126] It is reported[127] that the President of the NNTT will advise Canberra to allow immediate referral of claims to the court if no settlement is likely. But presumably this would not apply to "negotiation" cases as they begin and end in the Tribunal.

The President has been quick to point out that "mediation" and compromise offer a speedy escape[128] but some critics claim that the "right to negotiate", like the Northern Territory veto, is apt to become an "instrument of blackmail".[129] At all events payouts to objectors will be passed on to consumers or taxpayers by one means or another.

The Act should be amended to require matters which are unlikely to settle to be sent to the Federal Court forthwith.

STATE AND TERRITORY RESPONSES

Casual observers of the *Mabo* debate may not appreciate that "land rights" commenced earlier than 1992. Great tracts of freehold land have been entrusted to indigenes under the *Aboriginal Land Rights (Northern Territory) Act* 1976 and several States have similar general[130] or specific[131] provisions which preceded *Mabo*. Naturally they are based on the premise that all land titles emanate from the Crown. In Queensland native reserves have been converted to trust lands with a minimal formality and in May 1994 claims to 2.1 million hectares based on the *Aboriginal Land Act* (not *Mabo*) were awaiting adjudication.[132]

125. *Aboriginal Land Rights (Northern Territory) Act* 1976 (Cth). Ten years elapsed before the first approval of a mining concession was granted, by which time no fewer than 168 applications were in limbo: *Sydney Morning Herald*, 4 August 1986. In 1984 the federal Minister himself described Canberra's legislative gift to the Territory as "a disaster for everyone": *Sydney Morning Herald*, 29 September 1984 (Mr Clyde Holding). According to the Northern Territory Chamber of Mines 4433 out of 7031 applications for mining concessions over non-Aboriginal land were granted to 28 February 1994 while in the same period only 46 out of 1132 applications relating to Aboriginal land had some measure of success: *Aboriginal Employment in the Northern Territory Mining Industry*, Darwin, November 1993 (Addendum).
126. "Miners Warn Against Black Push", *The Australian*, 17 January 1994, p 2; "Keating Refuses to Strike Mabo Rights Off Agenda", 27 January 1994, p 2; "Keating Confirms Stance on Veto", 28 January 1994, p 4.
127. "Warning on Land Claims", *Sunday Mail* (Brisbane), 26 June 1994, p 3.
128. Justice French, "Introductory Notes for Mediation Conference" 14 May 1994 (Wiradjuri claim to Wellington Common), NNTT mimeo, 9 pp at 4; "Working With the Native Title Act", address at Sydney 16 May 1994, National Native Title Tribunal, mimeo, 41 pages at 5.
129. "Doubts Over Promised Land", *The Australian Financial Review*, 8 April 1993, p 15.
130. Eg *Aboriginal Land Rights Act* 1983 (NSW); *Aboriginal Land Act* 1991 (Qld); *Aboriginal Lands Trust Act* 1966 (SA).
131. *Aboriginal Lands Act* 1970 (Vic); *Aboriginal Lands Act* 1991 (Vic); *Pitjantjatjara Land Rights Act* 1981 (SA) (which gave rise to an authority on "good discrimination": *Gerhardy v Brown* (1985) 159 CLR 70; *Maralinga Tjarutja Land Rights Act* 1984 (SA).
132. *Courier Mail*, 18 May 1994, p 2, quoting the Minister for Lands.

In September 1993 it was said that 14 per cent of the Australian land mass was already dedicated to Aborigines[133] and that 38 per cent of Northern Territory land was in their hands.[134] Unattractive as some of these areas may be to ordinary Australians, they often contain valuable mineral deposits.

Queensland

At the time of writing (June 1994) not all States had responded to the Commonwealth's request for "co-operative" legislation. However, the *Native Title (Queensland) Act* 1993 ("NT(Q)A") received Royal assent on 17 December 1993—one week before the federal Act. It is yet to be proclaimed; the State is seeking an agreement with the Commonwealth on three points: federal assistance to pay compensation for which the State is primarily liable; a possible exemption of exploration licences from the negotiation procedure; and approval of State tribunals in place of the NNTT and the Federal Court. Meanwhile mining transactions over potential native title land have been suspended[135] and it is said that "many of the [miners'] original fears might have been well-founded".[136] The government asserts that only 5 per cent of the State is affected.[137]

The Preamble to the NT(Q)A is less pretentious than the federal version. It records "the intention of the Parliament that Queensland should participate in the national scheme proposed by the Commonwealth government". The legislation validates all past acts attributable to the State[138] and extinguishes native title to the same extent as the NTA.[139] The State's ownership of natural resources and the public's access to beaches and other "common" places is confirmed.[140] (State ownership of minerals and petroleum[141] was asserted long before the advent of the RDA.) Private rights under compulsory acquisition laws now apply to native title holders[142] and they are "owners" for the purposes of the mining laws.[143]

An interesting feature of the NT(Q)A is its choice of tribunals to replace the NNTT *and* the Federal Court,[144] namely the Mining Warden's Court[145] and a Queensland Native Title Tribunal

133. "Black Land", *Courier Mail*, 20 September 1993, p 9.
134. "Final Reconciliation Just the Beginning", *The Australian*, 24 November 1993, p 12. In February 1994 it was said to be 42 per cent: "NT Seeks Compensation in Land Challenge", *The Australian*, 23 February 1994, p 3.
135. "Mabo Threat Slows Mining", *Sunday Mail*, 26 June 1994, p 11.
136. "Mabo Mines", *Courier Mail*, 27 June 1994, p 8 (editorial).
137. "Mining Unaffected: Goss", *Courier Mail*, 27 June 1994, p 2.
138. NT(Q)A, s 8.
139. NT(Q)A, ss 10-12.
140. NT(Q)A, ss 17, 18.
141. *Petroleum Act* 1923 (Qld), s 5; *Mining Act* 1968 (Qld), ss 6 and 110.
142. NT(Q)A, s 150.
143. NT(Q)A, s 152; cf *Mineral Resources Act* 1989 (Qld), s 1.8 ("owner") and *Petroleum Act* 1923 (Qld), s 3 ("occupier").
144. NT(Q)A, Parts 5, 7, 8 and 9.
145. See *Mineral Resources Act* 1989 (Qld), Part 10 Division 2.

("QNTT").[146] Subject to approval from Canberra the QNTT will handle not only unopposed claims and "negotiations" about future acts but also contested applications for native title and compensation.[147]

The President of the QNTT is to be a District Court judge, or the chairman of the Tribunal set up by the *Aboriginal Land Act* 1991 (Qld) (the "ALA"), or a Presidential member of the NNTT, or an ex-judge or a "lawyer of at least five years standing".[148] As law schools pullulate, the last-mentioned category, already capacious, will rapidly expand. However, it is likely that the chairman of the ALA tribunal will be the first President of the QNTT. At present the ALA tribunal is headed by a gentleman who was an assistant to Northern Territory Land Commissioner Toohey before the latter was translated to the High Court, and produced a most expansive version of *Mabo*.

While there is no right to employ a lawyer in the ALA tribunal[149] there will be one in the NT(Q)A.[150] The QNTT will normally be open to the public.[151]

The State Act reproduces the paraphernalia of mediation, compulsory conferences and assessors (preferably Aborigines or Torres Strait Islanders).[152]

The arrangements for appeals from the QNTT are peculiar. Appeals will not go to the Supreme Court but to a tribunal of limited and rather recondite jurisdiction called the Land Appeal Court.[153] Normally it hears appeals concerning rents for Crown lands, and from decisions of the Valuer-General which govern rates and land taxes and miscellaneous questions under the *Land Act*.[154] It is extraordinary that a native title bureau, which will have the power to veto large developments, and to confer (or, if you will, confirm) title to enormous tracts of land, should be legally inferior to another tribunal of limited and historically rather obscure jurisdiction. The Land Appeal Court comprises a Supreme Court judge and two members of the Land Court.[155] Only the President of the Land Court has to be a lawyer, at least "on paper", for five years before his or her appointment.[156] With due respect to the incumbent judge the business, personnel and courtiers of the Land Appeal tribunal are remote from the legal mainstream. It is true that a party dissatisfied with a decision of the Land Appeal Court can finally reach the Supreme Court on a point of law[157] but the path to the superior court is tortuous and expensive. Besides, as in most litigation, once the first decision maker "finds the facts", the die will usually be cast.

146. NT(Q)A, ss 26, 27.
147. NT(Q)A, ss 72-74.
148. NT(Q)A, s 95.
149. *Aboriginal Land Act* 1991 (Qld), s 8.19.
150. NT(Q)A, s 56.
151. NT(Q)A, s 66.
152. NT(Q)A, s 123(3).
153. NT(Q)A, s 78.
154. *Land Act* 1962 (Qld), s 40.
155. *Land Act* 1962 (Qld), s 44.
156. *Land Act* 1962 (Qld), s 30(2).
157. *Land Act* 1962 (Qld), s 45.

Western Australia

The contrast between the Queensland and Western Australian responses to *Mabo* could hardly be more pronounced. Western Australia and the Commonwealth are now locked in cross-claims of unconstitutional action. The *Land (Titles and Traditional Usage) Act* 1993 (WA) ("the Western Act") came into effect on 2 December 1993, prompting the federal government to back-date NTA restrictions on legislative "past acts" to 1 July 1993.[158]

The Preamble to the Western Act recites that citizens have always acted in good faith upon the principles of land law which existed for at least 150 years before *Mabo*. There are consequential amendments to the laws of mining, Crown lands, public works, fisheries and pearling. The Act declares that all titles granted after the RDA and before the Western Act are valid subject to compensation for titles extinguished in that period.[159]

Section 7 purports to extinguish all native titles extant in Western Australia on 2 December 1993 and to substitute "rights of traditional usage . . . equivalent in extent to the rights and entitlements that they replace". That "extent" depends upon "the Aboriginal traditions that continue to be observed . . . in relation to that land". No judgment is needed to confirm "traditional usage"[160] but parties who are in doubt may seek an appropriate declaration in the Supreme Court.[161]

Rights of "usage" do not include any title to minerals, petroleum and other natural resources.[162] However, provision has been made for objections to proposed developments and three months' consultation.[163]

I have no crystal ball to reveal the future of the Western Act. One does admire the fortitude of a State which takes an inter se question to the High Court today. The court may offer some consolation to the State[164] but is unlikely to abandon its offspring.

Western Australia issued about 500 mining concessions between December 1993 and June 1994[165] despite a Prime Ministerial warning that they are likely to be invalidated by judges in Canberra.[166] The State's attitude is that even if the High Court found in favour of the

158. NTA, s 228(2)(a)(i).
159. Western Act, s 5.
160. Western Act, s 8.
161. Western Act, s 10.
162. Western Act, s 18.
163. Western Act, s 45 and Schedule 1, amending the *Land Act* 1933 and the *Mining Act* 1978.
164. As in *New South Wales v Commonwealth* ("The Corporations Case") (1990) 169 CLR 482 where the States received a small consolation prize—the residual power to confer corporate status.
165. "PM Warns Court on Mining Leases", *The Australian*, 14 June 1994, p 1, quoting Mr Peter Eggleston of the Western Australia Chamber of Mines and Energy.
166. Ibid.

Commonwealth the concessions will be valid unless and until conflicting native titles are established, case by case.[167]

The peculiar difficulties of miners in Western Australia are discussed in a recent paper by Mr Michael Hunt.[168]

South Australia

Twenty per cent of South Australia is now Aboriginal land; 7 per cent is Crown land and 40 per cent is subject to pastoral leases.[169] If the State government is unable to negotiate suitable amendments to the NTA it may challenge the Act in the High Court.[170] Some causes of dissatisfaction are: (1) the failure of the Commonwealth to state clearly that pastoral leases granted prior to the RDA have extinguished native title; (2) cumbersome negotiation procedures; (3) the absence of criteria for assessing compensation; and (4) delays affecting "many millions of dollars worth of mineral exploration".[171]

Two Bills[172] now before the State Parliament would: (1) declare that a grant of freehold or of a pastoral lease or of any right of exclusive possession before the federal RDA came into effect extinguished native title; (2) make native title holders "owners" for the purposes of the mining laws; (3) confirm Crown ownership of minerals; and (4) vest the "arbitral" functions of the NNTT in the State Environment Resources and Development Court.

Other States

New South Wales has produced legislation which generally follows the "validating" pattern of the NTA. Similar legislation is before the Tasmanian Parliament.[173]

PROVING NATIVE TITLE

Contributors to this conference are invited to select an aspect of the *Mabo* phenomenon for special comment. Wonderful ingenuity and much ink have been expended on the speculative theory of native title.

167. "Court Vows to Defy Mabo Ruling", *The Australian*, 23 June 1994, p 2. Some 40 objections were lodged to the Western Australia grants and only 11 were seriously pursued. Those were all dismissed on the ground that native title (if any) had long since been extinguished: "The Native Title Act—An Introduction" (June 1994) *Native Title News* 3.
168. M W Hunt, "Is the Native Title Legislation Practical, Efficient and Workable for the Mining and Petroleum Industries?" (mimeo, Centre for Commercial and Resources Law, Perth, June 1994).
169. Statement by South Australian Premier, Adelaide 21 April 1994, mimeo, 7 pp at 2.
170. Ibid at 3.
171. Ibid at 4.
172. *Mining (Native Title) Amendment Bill* 1994 and *Environment, Resources and Development Court (Native Title) Amendment Bill* 1994.
173. *Native Title (NSW) Act* 1994 (NSW); *Native Title (Tasmania) Bill* 1994; "The Native Title Act—An Introduction" (June 1994) *Native Title News* 4; "Recent Legislation", ibid at 7.

But to my mind problems of proof in native title cases are an eminently practical and surprisingly neglected topic.

How difficult (or easy) will it be to prove native title in practice—frivolous claims aside? Will claimants and non-claimants have equal access to evidence? Will respondent governments seriously scrutinise claims in the public interest or will they be as passive as the Commonwealth in *Mabo* itself? Will other respondents find costs, delay, lack of access to witnesses or political pressure so burdensome that the examination of claims will be less careful than it ought to be?

Theoretically native title claimants have the burden of proof when:

1. compensation is claimed for extinguishment or impairment between 1975 and 1 January 1994; or
2. it is claimed that native title still exists over Crown land; or
3. it is claimed that native title has survived a "Category C" or "Category D" past act; or
4. the "right to negotiate" is invoked against a "future act".

But in practice proof will only be required if the claim or objection does not yield to "mediation" or "negotiation". For settlement purposes all that is required is a claim which is not hopeless on its face.[174] Then comes the possibility of surrender or inaction by a complaisant government or a payout by private interests under pressure of costs or delay. In a word, native title can be obtained either by proving it or inducing others to concede it. Will more titles be created by "mediation" than by adjudication?

A native title conceded by respondents and rubber-stamped by the NNTT will be no less secure than one established in a contested hearing. It may then be exchanged for some other form of title,[175] possibly of much greater value.

WHO SHALL DECIDE?

Australian politicians have a deep and abiding belief that their subjects will more readily defer to bureaux headed by someone styled "Justice". But whether arbitrators be called courts or tribunals they fall into two broad categories, generalist or specialist. The latter sometimes function in a politicised atmosphere and are staffed by converts to a cause. A former High Court judge was wont to say that the main qualification for appointment to some modern tribunals is the approved form of bias. A barrister with relevant experience observes that ". . . a lot of people who take these jobs are starry eyed . . . they've got a strong sense of mission and they do their best to get applicants up".[176] In these circumstances the process of legislation does not cease when the Act in question receives the Royal assent. Consistent with the Mason dictum[177] the *Family Law Act* quickly and quietly accrued judicial

174. NTA, s 63.
175. NTA, s 21.
176. Sydney barrister, interview with author, 3 June 1994.
177. See note 7 above, and related text.

amendments which parliamentarians could not achieve, did not contemplate, or were not prepared to sponsor.

Even in relatively apolitical areas special-purpose tribunals engender a "club" spirit which constrains advocates to argue within narrow bounds of "correctness". The perennial tension between advocates' long-term relationship with the judges and their short-term duty to clients is more acute when they are dealing with a special-purpose tribunal: "You have to go easy, you can't lose your credibility [scil influence] as counsel especially when you have to appear before the same commissioner for three years or more."[178]

The staff of the NNTT have been advised that the "stated objective of [the NTA] is to provide for the recognition and protection of native title . . . nobody should be a member of or on the staff of the Tribunal who does not accept the legitimacy of that objective".[179]

The founding President has advertised the Tribunal's anxiety to "mediate" and to sponsor settlements: "[It] is not a court of law . . . [its] main function . . . is to provide a means by which you . . . may reach a fair and reasonable agreement."[180] Potential clients are assured, in terms reminiscent of early advertisements for the *Family Law Act*, that NNTT mediation is "not a win/lose process".[181] Whether or not a claim could be established in the court an agreement registered in the Tribunal can "provide . . . for a plan of management which would allow for Aboriginal involvement in the management of the [land] and guaranteed rights of use and development [by] Aboriginal communities".[182] But alas, if no agreement is reached the parties face "a court case with no certainty about the outcome and all the costs and tensions that court cases generate".[183] (In reality costs are unlikely to trouble claimants or sponsor corporations.) "One form of agreement might involve a concession of . . . native title with an agreement involving the Commonwealth, State or Territory government, under which it is exchanged[184] for other forms of statutory title or benefit."[185] Here, then, are broad hints that titles or compensation may be secured by pressure rather than proof.

ISSUES IN NATIVE TITLE CASES

The NTA "does not dispense with problems"[186] arising from the very broad, not to say nebulous criteria in *Mabo*. It makes no attempt at codification.

178. Ibid.
179. Justice French, President of the NNTT, "Working With the Native Title Act", Sydney, 16 May 1994, National Native Title Tribunal, mimeo, 41 pages at 19.
180. "Introductory Notes for Mediation Conference", 14 May 1994 (Wiradjuri claim to Wellington Common), NNTT mimeo, 9 pp at 2.
181. Ibid.
182. Ibid at 4.
183. Ibid at 7.
184. Cf NTA, s 21(3). Conceivably the conventional title received in exchange may be more marketable, and more valuable than the original acquisition.
185. Justice French, "Working With the Native Title Act", Sydney, 16 May 1994, Sydney, NNTT, mimeo, 41 pages at 25.
186. Ibid at 2.

First, the proper claimants must be identified. In *Mabo* the High Court wandered to and fro among "indigenous inhabitants", "clan or group", "people", "community", "family, band or tribe" and several other expressions.

The next step is to establish a sufficient connection between the claimants and a specific[187] tract of land. This is a question of "presence amounting to occupancy" from a time "long prior" to the "point of inquiry".[188] Plainly these tests leave room for creative jurisprudence, particularly when the rules of evidence and normal court procedure do not apply. A romantic tendency to exaggerate the extent of surviving tribal life pervades the *Mabo* judgments. It is no objection that native customs at the time of European settlement are "incompletely known or imperfectly comprehended".[189] It does not matter that a custom did not exist at the time of British settlement or even 100 years ago because native customs may continue to evolve up to the time of litigation. It is enough that "any changes do not diminish or extinguish the relationship between a particular tribe . . . [and] particular land"[190] and that "the people remain as an identifiable community".[191] According to Toohey J this concept of continuity is sufficiently elastic to survive European influences such as the "profound" effects of Christianity, the use of schools and other modern facilities and (in the case of the Murray Islanders) a change from gardening, fishing and barter to a cash economy substantially dependent upon government allowances.[192] These are elusive targets for any opponent and it appears that arguments based on uncertainty or discontinuity of alleged customs can expect a rough passage,[193] not least in special tribunals. Even in the Murray Islands case—as Deane and Gaudron JJ conceded—the evidence exhibited "areas of uncertainty and elements of speculation".[194] "There may be difficulties of proof of boundaries or of membership of the community . . . but those difficulties afford no reason for denying the existence of a proprietary community title . . .[195] A court may have to act on evidence which lacks specificity . . .".[196] *Mabo* suggests that claimants' evidence will be treated gently.

Then the *nature and extent* of the subject title have to be determined. There are no a priori answers; potentially every case is unique: "The content of the traditional native title . . . must . . . be determined by reference to the pre-existing native law or custom . . . [It] will, of course, vary . . . It may be an entitlement . . . to a limited special use of land in a context where notions of property in land and distinctions between ownership, possession and use are all but unknown."[197] The

187. *Coe v Commonwealth* (1993) 68 ALJR 110.
188. *Mabo* (1992) 175 CLR 1 at 188-189.
189. Ibid at 99 per Deane and Gaudron JJ.
190. Ibid at 110 per Deane and Gaudron JJ.
191. Ibid at 61 per Brennan J; see also at 70.
192. Ibid at 192 per Toohey J.
193. Ibid.
194. Ibid at 115.
195. Ibid at 51-52 per Brennan J.
196. Ibid at 62 per Brennan J.
197. Ibid at 88 per Deane and Gaudron JJ; see also at 61 per Brennan J.

rights may range down from something akin to freehold to occasional rights of passage.

ACCESS TO EVIDENCE: ARE SOME PARTIES MORE EQUAL THAN OTHERS?

This article is not intended to question the wisdom of dispositions of land and money which governments have increasingly made to Aborigines and Islanders in recent years. This section simply makes these points: (1) judicial forms of government are suitable only when all parties have reasonably equal access to relevant evidence; (2) there are apparently well-informed statements by lawyers and anthropologists to the effect that non-claimant parties will not have equal access to appropriate lay or expert evidence; and (3) *if* these statements are substantially correct the redistribution should not be presented to the public as a judicial process. (However, there is one type of case in which there will be "hard evidence" open to all concerned, free from self-serving hearsay or politicised social science, namely one which turns on an issue of extinguishment. This is precisely the sort of "construction" case which the State Supreme Courts have always handled. It requires no special court or tribunal.)

The following is not a discussion of technical rules of evidence. Learned papers have been written upon the admissibility of evidence in these cases[198] but with due respect their relevance is not obvious. Even if the rules of evidence applied here (which they do not) they could formally be satisfied by reference to some obscure exceptions to the rule against hearsay.[199]

But hopeless claims aside, it will be easy to mount a prima facie case of native title and very difficult to contest it if all or most of the vital witnesses are at the beck and call of the claimants. Much of the evidence in these cases will come from members of the claimant group narrating what they claim to have been told by others. There will also be "expert" evidence from anthropologists or other social scientists. Evidence of that kind will often depend upon what past or present members of the claimant group have said to the witness or to his or her professional colleagues.

LAY OR "TRADITIONAL" EVIDENCE

Hearsay upon hearsay aside, opponents may have to cope with "recent invention" of what purports to be ancient history. A government lawyer states: "Anthropologists and lawyers for claimants stay with the

198. Eg G McIntyre, "Proving Native Title" (mimeo, 50 pp, Centre for Commercial and Resources Law, Perth, June 1994).

199. Statements as to pedigree and statements as to public or general rights: *Simon v R* [1985] 2 SCR 387 (Canada SC); *Milirrpum v Nabalco Pty Ltd* (1971) 14 FLR 141 at 154; P Gilles, *Law of Evidence in Australia* (2nd ed), pp 307, 313.

people concerned and work up their evidence with them."[200] Graham Hiley QC gives an interesting account of his experience in Northern Territory cases.[201] He describes a remarkable procedure of "group evidence" which "enables collaboration and concoction". He proceeds: "[I]t is difficult to identify precisely which person knows what and which knows nothing . . . Reading the transcript [afterwards] one could . . . assume that all of the members of that group had that knowledge."[202] Hiley adds that leading questions and the paraphrasing of indistinct answers are common in the Territory tribunal.[203] A former Supreme Court judge with more trial experience than several members of the High Court says that customs "are likely to be recalled in a manner favourable to the claimants which is, after all, simply human nature".[204]

When cross-examination is allowed[205] it will be hard to test direct evidence, let alone hearsay, if a non-claimant party has little or no access to alternative versions. "Land Councils treat old and unsophisticated people who are the nominal claimants as their personal property. It is all oral hearsay. Land Councils have unlimited access to them, others have none."[206] Evidence of the kind which Hiley describes is extremely difficult to cross-examine or critically assess, even if it be "correct" to attempt such an exercise in the club atmosphere which special tribunals engender. In dealing with assertions of unwritten traditions a standard technique of cross-examiners—reference to prior inconsistent statements—will rarely be available. Claimants' evidence may self-levitate by finding its way into assessors' reports.[207]

It is uncertain whether the special adjudicators will take long-established precautions with assertions which are easy to make and well nigh impossible to check,[208] and with "experts" whose scientific status or impartiality is questionable. Certainly they were taken by Moynihan J, the Supreme Court judge who actually saw and heard the *Mabo* witnesses, but the High Court paid remarkably little attention to his pointed comments on matters of credit. (Perhaps an enigmatic remark that the primary findings "unavoidably contain areas of uncertainty"[209] marks the burial place of those comments.) No doubt some of the traditional evidence in *Mabo* was strong; the area claimed was compact, well-defined, and the people were non-nomadic. It was a very carefully selected, possibly unique "test case". However, some of the trial judge's comments possess wider relevance. Moynihan J

200. Government lawyer "A", Darwin, to author, 1 June 1994.
201. G Hiley, "Aboriginal Land Claims Litigation" (1989) 5 Aust Bar Rev 187.
202. Ibid at 195.
203. Ibid at 194-195.
204. "Native Title Decision Bogus", *Courier Mail*, 14 September 1993.
205. In the Tribunal cross-examination requires leave: NTA, s 156(5).
206. Government lawyer "B", Darwin, interview with author, 1 June 1994.
207. NTA, s 86. Another view is that assessors, however pro-claimant they may be, will receive no co-operation if they do not belong to the native tribe or people involved in the litigation: Government lawyer "B", Darwin, to author, 1 June 1994.
208. Such as self-serving claims against deceased estates.
209. *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 115 per Deane and Gaudron JJ.

suspected that evidence of certain "immemorial customs" owed a good deal to "The Drums of Mer", a travelogue by a popular writer of the 1940s.[210] He questioned a lavish use of interpreters: "On a number of occasions I soon gained the impression that the witness both understood and could speak English . . . The arrangement gave the opportunity to . . . hear the question twice and time for the witness to collect his or her thoughts and to collaborate . . . on an answer."[211] Moynihan J was "not impressed with the creditability of Eddie Mabo" who seemed "quite capable of tailoring his story to whatever shape he perceived would advance his cause".[212] A most careful perusal of the High Court judgments will not alert the reader to these comments by the only judge who saw and heard the witnesses.

A barrister with experience in "land rights" cases states:[213]

> "It's not the same tradition when you speak to every one of the Aborigines. Quite often you find that there are *huge* discrepancies between what the claimants, or some of them, are now saying and what the anthropologist may have written in his report. They say 'Our law never changes' but internally they're highly political, and there are struggles for control of land all the time. You can often go back in the history books and find out that people who are claiming a connection from time immemorial only go back to 1930."

However, the nearest approach to primary facts in this type of litigation is what claimants say they have been told and believe about territories and territorial "connections". A judge in Western Australia enthusiastically accepts this position:[214]

> "In claims touching on native title the best evidence lies in the hearts and minds of . . . the Aboriginal people themselves. Expert evidence from anthropologists and others is of significance . . . [but] it seems to me that the full story lies in the hearts and minds of the people. It is from there that it must be extracted."

At a "land rights" conference in Queensland last year a federal government adviser urged delegates to go forth and research their "rights" without delay. One need not presume that the word "research" was used as a euphemism for something more creative but the scope for reliable reconstruction seems quite limited. Maps of tribal areas which can still be recalled are hotly disputed, even when they are based on years of field research.[215] Scholars in this field have observed

210. Findings of Moynihan J of the Queensland Supreme Court delivered 16 November 1990, entitled "Determination Pursuant to a Reference of 27 February 1986 by the High Court of Australia to the Supreme Court of Queensland to hear and determine all issues of fact raised by the pleadings", Supreme Court, Brisbane, Vol I (mimeo, 227 pp), 60.
211. Ibid at 66. See to the same effect *R v Burke* (1858) 8 Cox CC 44 at 47 and *Filios v Moreland* (1963) 63 SR (NSW) 331 at 332-333.
212. Ibid at 79.
213. Sydney barrister to author, 3 June 1994.
214. *Ejai v Commonwealth* (unreported, Sup Ct of WA, Owen J, 18 March 1994).
215. "Tribal Guide Through a Legal Maze", *The Australian*, 11 February 1993, p 13 (map by Dr Stephen Davis showing that the tribal lands which can be established do not agree with the boundaries drawn by ATSIC and Land Councils); "Government Hits Tribal Map", *Courier Mail*, 2 April 1994, p 14.

that Land Councils "have the resources, contacts and influence to . . . establish the extent of traditional territories in [their] regions" but they and their lawyers find it convenient "to negotiate claims without any self-imposed limits".[216] One of them recommends that native title issues be settled without "re-inventing knowledge or elaborating traditions that are imperfectly known".[217]

EXPERT EVIDENCE

"Land rights" litigation has created a new expert witness industry. Anthropologists, hitherto rarely seen in a witness box, are now as much in demand in these cases as are neurologists and orthopaedic specialists in personal injury cases.[218] Independent practitioners seem to be as rare in "land" cases as they are common in the latter type of case, although it should be said that over the years lawyers and medical men, in the public interest or for some other reason, have made personal injury claims easier and easier to prove. However, "experts" called by native title claimants are commonly employees of the Land Council which sponsors the claim[219] and usually they have spent long periods in close association with those for whom they testify. In normal litigation this would certainly not enhance an expert's credit but special tribunals develop cultures of their own. Judicial doubts about "experts" who thrive on forensic appearances and practise advocacy from the witness box are not so candidly expressed today, but Sir George Jessel's ruminations are still worth considering:[220]

> "[I]n matters of opinion I very much distrust expert evidence, for several reasons. In the first place, although the evidence is given upon oath . . . the person knows he cannot be indicted for perjury, because it is only evidence as to a matter of opinion . . . But that is not all. Expert evidence . . . is evidence of persons who sometimes live by [testifying]."

Similar doubts still surface now and then[221] but they tend to be unfashionable. Noting the proliferation of dubious "disciplines" an English judge observed: "In the lush pastures of the common law a number of sacred cows graze. One answers to the name 'expert evidence'. . . Properly cared for it could provide good progeny, but some strains are not worth encouraging."[222] An Australian

216. S L Davis and J R V Prescott, *Aboriginal Frontiers and Boundaries in Australia* (Melbourne University Press, 1992), p 2.
217. *The Australian*, 16 February 1993, p 10 (letter, J R Prescott).
218. "The content of the land rights legislation itself has largely been engineered by anthropologists in concert with lawyers": P Sutton, "Anthropology Outside the Universities in Australia", *American Anthropological Society* ("AAS") *Newsletter* (15 June 1982), 12, 21.
219. K Maddock, *Your Land Is Our Land* (Penguin Books Aust, 1983), p 153.
220. *Lord Abinger v Ashton* (1873) LR 17 Eq 358 at 373-374 per Jessel MR.
221. See, eg, *Lynch v Lynch* (1966) 8 FLR 433 and *R v Turner* [1975] QB 834 (psychology/psychiatry) and generally *Newark Pty Ltd v Civil & Civic* (1987) 75 ALR 350 at 351 per Pincus J. Some guarded scepticism about "social work" and evidence-gathering appears in *Taylor v L; Ex parte Taylor* [1988] 1 Qd R 706.
222. Quoted in V D Plueckhan, "Legal Dilemmas in the Use of Expert Medical Evidence" (1982) 14 *Australian Journal of Forensic Science* 40.

psychologist with long clinical and teaching experience has bravely written:[223] "It is time academics admitted that the whole of modern psychology is not so much a coherent discipline as a ramshackle collection of quasi-scientific annexes under constant renovation. It simply does not hang together . . . Dozens of ingenious laboratory gimmicks do not add up to a single good theory." However, the legal culture is less confident these days; judges sense that hell hath no fury like a "social science" scorned and they are reluctant to subject debatable claims of expertise to a searching voir dire.[224] They are unlikely to change tack here. But surely the new "expert evidence industries" are no less open to temptation or error than the old? On the contrary, the vaguer a purported science the greater the room, in the heat of litigation, for fallacy—conscious or unconscious, well or ill-intentioned.

Before they act upon expert evidence courts usually look for scientific reliability and professional impartiality. The first question is whether a sufficiently reliable body of special knowledge exists. It is normally a useful exercise to expose the foundational facts and then the theories which are used to draw the disputed deductions from them. A barrister with experience in cross-examining the regular "experts" in land-claim cases says: "There are very few empirical facts when you're dealing with anthropologists. They repeat what they say someone has told them. The hearsay of claimants is fed through an anthropologist and emerges as 'expert evidence'. The 'facts' of an anthropologist are commonly what a client or study-subject told them."[225]

The next question is whether equal access to the relevant science is enjoyed by claimants and respondents alike. Most of the long-established species of expert evidence are available to all, have little ideological content and do not suffer the censorship which is called, in current patois, "political correctness". Published material on this delicate point is naturally in short supply. However, Hiley QC records his impression that an anthropologist-witness who fails to support, let alone criticises, a "land rights" claim risks the "resentment of, and possible alienation from his peers".[226]

Elsewhere the same barrister observes:[227]

> "To the best of my recollection an expert anthropologist has never been called to give evidence in a land claim except on behalf of the claimants or by counsel assisting the Land Rights Commissioner . . . It seems that parties other than the claimants usually find some difficulty in retaining an anthropologist who has the appropriate

223. Ronald Conway, "Integrity Attack Ignores Fruit of Freud's Genius", *The Australian*, 22 June 1994, p 25. The writer was formerly a senior lecturer at a Victorian university and claims 30 years' practice at a Melbourne hospital.
224. A preliminary inquiry to see whether evidence is admissible—in a case of purported expert evidence, and inquiry whether the professed "science" really exists as such: *Clark v Ryan* (1960) 103 CLR 486; *Fisher v Brown* [1968] SASR 66.
225. Sydney barrister to author, 3 June 1994.
226. G Hiley, "Aboriginal Land Claims Litigation" (1989) 5 Aust Bar Rev 187 at 191.
227. G Hiley, "Aboriginal Land Rights in the Northern Territory" [1985] *AMPLA Yearbook* 491, 505-506.

> experience . . . and who is willing and able to positively testify against the claim . . . During the Jawoyn claim, when counsel assisting did in fact seek to call an anthropologist who had some experience with the Jawoyn people the attempt to call him was met with repeated and strenuous objections . . . There has been an understandable reluctance by anthropologists to be seen to be advising parties other than Aborigines."

Hiley QC adds that access to primary materials (that is, what an anthropologist claims to have been told or shown by his or her clients) is difficult to obtain. The Tribunal may prohibit the disclosure of evidence[228] but presumably natural justice will require it to disclose to all parties any material which it collects for itself from sources mentioned in s 146 of the NTA. Natural justice would also require disclosure of any native customs of which it may take judicial notice.[229]

Considering the delicacy of the subject there is a remarkable amount of evidence to support Hiley QC and some of it is in the impressive form of admissions by members of the relevant profession.

Another barrister with experience in Northern Territory cases states:

> "I was involved in an Aboriginal land claim and I rang round various universities to try and get an expert witness and no one would be in it. They were worried about their promotion. A couple of them said that they would *never ever* get a permit to go on to any Aboriginal land again to do work, and they would be effectively blackballed in their profession. And that's a real problem that respondents face in these applications."[230]

A government lawyer in Darwin adds:

> "Land Councils have a mortgage on anthropologists, particularly in the areas which they have selected for claims. The government has never produced an anthropologist. They are terrified of bringing their career to an abrupt end."[231]

But now what of admissions? In March 1993 the President of the Australian Anthropological Society was reported as follows: "Most anthropologists are more comfortable working for Aborigines than in some situation where they could be construed as working against their interests."[232] In 1991, at the Kakadu inquiry, an anthropologist in the employ of the Northern Land Council declared that the primary duty of

228. NTA, s 155. Cf Justice French, "Working With the Native Title Act", address on 16 May 1994, Sydney, National Native Title Tribunal mimeo, 41 pages at 24: "Following acceptance of an application two files will be created, one to be designated an 'open file' . . . There will also be a 'confidential file' . . . at the discretion of the Registrar.

229. See NTA, s 82. On judicial notice and natural justice see *Keller v Drainage Tribunal* [1980] VR 449; *R v Paddington and St Marylebone Rent Tribunal; ex parte Bell London and Provincial Properties Ltd* [1949] 1 All ER 720; *Angaston & District Hospital v Thamm* (1987) 47 SASR 177.

230. Sydney barrister to author, 3 June 1994.

231. Government lawyer "B", Darwin, interview with author, 1 June 1994.

232. "The Mabo Factor—Learning from the Past", *The Australian*, 5 March 1993, p 23, quoting Mr Nic Peterson.

his profession is "to represent the people they work with". The inquiry chairman asked him whether he and his colleagues would use their professional position to offer false or incomplete evidence. Obliquely the witness replied that he would lose his job if he questioned causes sponsored by his employers.[233] In such circumstances there need not be positive falsehood; embarrassing information may simply be suppressed. The admissions of Mr Peterson and his colleague are in keeping with the *Revised Principles of Professional Responsibility* of the American Anthropological Association, to which many Australian anthropologists belong:

> "Anthropologists' first responsibility is to those whose lives and cultures they study. Should conflicts of interest arise, the interests of these people take precedence over other considerations . . . Anthropologists . . . must consider carefully the social and political implications of the information they disseminate."[234]

It would be difficult to find a more open confession of the expert witness-cum-advocate. Apparently no exception is made for occasions when sworn evidence is required. Scepticism about land claims would not only conflict with these commands; it would also expose the sceptic to prejudice in the public sector upon which social scientists heavily depend for employment—universities, government departments, land councils and kindred organisations in which pressures to be "correct" tend to be strong. One who breaks ranks will probably be denied access to the very people and places he or she must visit in order to prosper in his or her calling and to be an influential expert witness. It is hardly surprising that "as a rule" anthropologists "do not make their services available to objectors to a claim".[235]

But imagine the state of personal injury litigation if the medical profession sent to Coventry any of its members who dared to give evidence on behalf of defendants. Out-of-court "agreements" would certainly be as common as President French hopes they will be in the NNTT, but would they commonly be free and fair?

Dr Peter Sutton acknowledges that "the closed ranks of anthropologists [are] denying [miners] access to . . . scientific expertise".[236] His colleague Professor Maddock is more specific:

> "The suspicion that anthropologists who give evidence for Aboriginal claimants are hopelessly biased is strengthened by the difficulty objectors to land claims have in getting anthropological advice. The defence lawyers in the Gove case, for example . . .

233. Ron Brunton, "Down to Earth" *IPA Review*, (1992) Vol 45 No 1, 51.
234. *AAS Newsletter*, June 1990, 44.
235. K Maddock, *Your Land Is Our Land* (Penguin Books Aust, 1983) p 83. Any access which non-claimants do gain to relevant facts, opinions or counter-legends will be expensive. The going rate for a consultant anthropologist is said to be about $500 a day, and influential "lay" witnesses with indigenous associations command between $100 and $200 a day: "The Mabo Factor—Learning from the Past", *The Australian*, 5 March 1993, p 23.
236. P Sutton, "Anthropology Outside the Universities in Australia", *AAS Newsletter*, 15 June 1982, 12, 21.

> ended up with nothing better than a retired missionary. In the Alligator River claim, the mining company Peko-EZ strongly contested parts of the claim, but the research on which they relied was carried out by a solicitor who apparently had no training in anthropology."[237]

Maddock frankly says that bias "arises from the nature of anthropological research"[238] and Dr Sutton adds:

> "The problem with a sociological diagnosis, as opposed to a medical one, is that in our culture a medical diagnosis has very little to do with a physician's politics, while a sociological diagnosis can have quite a lot to do with an anthropologist's politics."[239]

These admissions and professional experiences suggest that the comments of a senior journalist should not be dismissed out of hand:

> "Most of the people who have undertaken the study of anthropology in relation to Australian Aborigines have been people who . . . tend to believe that their subjects have a grievance and they sympathise with it . . . So when it comes to the giving of evidence on land claims it is going to be difficult to find trained anthropologists . . . who are not strongly biased in favour of the claims . . . [S]ome individuals with a clear political agenda have been active and influential in these matters for many years. [Likewise] there are historians who believe that any invention is justified in the service of what they see as the Aboriginal cause."[240]

In some 18 months since that article appeared this writer has seen no denial of its substance, let alone a reasoned refutation. And immediately after the present paper was delivered a Perth anthropologist replied that most of his colleagues worked with Aborigines and obviously that was where their loyalties would lie as witnesses. He added: "That does not mean their findings are wrong or biased."[241] One may readily accept the confession but reject the avoidance. After all, the best assurance that witnesses are not "wrong or biased" is to give the other party a fair chance of checking what they say.

Will proof of title, in any but frivolous cases, really be the "arduous process" that one interested historian[242] predicts, or will rebuttal be the harder part? How often will the existence and content of native title be based on ex parte evidence of a claimant's anthropologist? A spokesman for the mining industry predicts that "under the tribunal system . . . [there] will develop a loose interpretation of the *Mabo*

237. K Maddock, "Involved Anthropologists" in E Wilmsen, ed, *We Are Here* (University of California Press, 1989) pp 155, 167.
238. Ibid, p 168.
239. P Sutton, "Anthropology Outside the Universities in Australia" *AAS Newsletter*, 15 June 1982, 12, 22.
240. P P McGuinness, "Strict Assay is Needed on This Mother Lode," *The Australian*, 8 December 1992, p 40.
241. "Fear on Mabo Testimony", *West Australian*, 12 August 1994, p 9.
242. "The Spirit of Mabo in Danger of Extinction", *The Australian*, 11 October 1993, p 11.

decision and certainly the federal legislation provides room for that . . . if claims are made they will tend to be granted".[243] This is consistent with Maddock's survey of Northern Territory cases in the 1980s: "[I]t has been usual for the Commissioner to recommend that most or all of the land claimed be granted."[244] It also accords with the experience of a Sydney barrister who handles such cases; he recalls only one claim which was rejected, although a small minority of claims resulted in awards of substantially less than the area claimed.[245] (Presumably "ambit claims" do occur even in this jurisdiction.) The high success rate is hardly surprising when one hears of the overwhelmingly ex parte nature of the "traditional" and anthropological evidence. Even the most impartial of tribunals must hesitate before it rejects an uncontradicted "expert".[246]

Perhaps the best prospects of obtaining rebuttal evidence will be in cases where several groups compete for the same area. The Wik claim at Weipa faces competition[247] as do some other cases brought in Mabo's name.[248] In these instances the experts may not be *quite* so sure where their "first responsibility" lies and the lay witnesses will not be univocal. But evidence which seeks to displace one alleged native title in favour of another will not usually bring much joy to non-claimants. In the end there may simply be a compromise division of spoils rather than absolution for respondents or taxpayers.

Governments and claimants have unlimited funds for litigation of this kind but even governments meet brick walls when it comes to evidence: "Some of the claims are no doubt genuine but there is no way of testing the evidence of the traditional witnesses or the experts,"[249] a Darwin lawyer complains. Besides, it would be naive to suppose that all governments will rigorously test claims made under the NTA. Governments have political agendas and popularity with special interest groups to consider and they are better placed than other litigants to make the country pay for their compromises. It deserves to be better known that the Commonwealth was not a zealous guardian of the common weal in *Mabo*, as Sir Anthony Mason himself has noted.[250] Connolly QC puts it plainly: "The Commonwealth, instead of defending the interests of Australians generally, ran dead."[251]

243. "Mabo's Land", *The Australian*, 8 Febuary 1994, p 43 (quoting P Ellery).
244. K Maddock, *Your Land Is Our Land* (Penguin Books Aust, 1983), p 83. Cf government lawyer "A", Darwin, to author, 1 June 1994: "Most applications end in favourable recommendations."
245. Interview with author, 3 June 1994.
246. *Taylor v The Queen* (1978) 22 ALR 599; *Mabon v Osborne* [1939] 2 KB 14.
247. "Tribes in Land Tussle", *Courier Mail*, 24 August 1993, p 1; "More Land Claims Over Weipa Leases" (December 1993), *Australian Journal of Mining*.
248. "Aboriginal Tensions Erupt Over Land Rights", *The Australian*, 5 January 1993, p 3; "Tribal Guide Through a Legal Maze", *The Australian*, 11 February 1993, p 13 (some Land Council boundaries disregard tribal areas); "Perkins Hits Out Over Mabo Claims", *Sydney Morning Herald*, 5 June 1993.
249. Government lawyer "B", Darwin, to author, 1 June 1994.
250. "Putting Mabo in Perspective", Vol 28 *Australian Lawyer* (July 1993) at 23.
251. P D Connolly, "Should the Courts Determine Social Policy?" in *The High Court of Australia in Mabo* (Assn of Mining and Exploration Companies Inc, Perth, 1993), p 18.

Non-claimant parties may have their best prospects when an application turns on an extinguishment issue. Partisan evidence on other issues will not avail a claimant[252] if extinguishment occurred before the RDA arrived. (Of course extinguishment after that event may call for compensation.) An extinguishment issue will let in "harder" and more accessible evidence than "traditional" or anthropological material, and according to Mason CJ claimants bear the onus of proving that extinguishment has *not* occurred.[253]

IS PSEUDO-LITIGATION EFFICIENT OR CONCILIATORY?

If the wisdom of our rulers requires greater assistance to Aborigines (rather than more efficient distribution of present funding) is it necessary to dress a minor part of it up as complex litigation? The Land Fund,[254] the 1976 Northern Territory Act and similar State laws will probably produce more "native title" than *Mabo* or NTA applications ever will.[255] If access to evidence in native title cases is nearly so unequal as well-informed critics predict, would it not be cheaper, quicker, more honest and no less conducive to "reconciliation" to dispense with tribunals, "assessors" and so on in favour of a simpler administrative system within the country's capacity to pay? While it may be politically expedient to depict the fruits of the NNTT as carefully crafted "judgments" it seems that many cases will be pseudo-litigation producing what are really ex parte orders of a very expensive kind—whether this be due to governmental complaisance, non-access to evidence, or (in the case of private respondents) legal costs or exasperating delays.

A frankly administrative scheme may be better for all concerned—tribunalists, expert witnesses and land rights lawyers excepted—than a litigious facade to legitimise a fraction of the increased allocation of public assets.

252. Under the NTA at least; of course "reconciliation" may come from the Land Fund.
253. See *Coe v Commonwealth* (1993) 68 ALJR 110 at 119 per Mason CJ.
254. National Aboriginal and Torres Strait Islander Land Fund: NTA, ss 17(4), 23(5), 24(2), 25(2), 54 and Part 10.
255. Minister Tickner's guess is that Mabo title will benefit only 5 per cent of the vaguely defined class of beneficiaries: "Dispossessed Aborigines Get 1.4 Billion for Land", *The Australian*, 11 May 1994, p 19.