THE BIRTHPLACE OF NATIVE TITLE – FROM *MABO* TO *AKIBA*

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> '[T]he Meriam people are entitled as against the whole world to possession, occupation, use and enjoyment of the lands of the Murray Islands.'[1]

On 3 June 1992, with those words, it is said that the High Court freed Australia from the concept of 'terra nullius'.[2] Over two hundred years after Captain Arthur Phillip planted the British flag at Sydney Cove and 'took possession' of the colony of New South Wales, *Mabo* held that the common law in Australia recognised Indigenous rights to land which could be enforced and protected. This was truly a watershed moment in Australian legal history, shifting the foundation of land law on which British claims to possession of Australia were based.

In *Wik*,[3] Justice Gummow explained the shift as follows:

> Thus, it was appropriate to declare in 1992 the common law upon a particular view of past historical events. That view differed from the assumptions, as to [the] extent of the reception of English land law, upon which basic propositions of Australian land law had been formulated in the colonies before federation. To the extent that the common law is understood as the ultimate constitutional foundation in Australia, there was a perceptible shift in that foundation, away from what had been understood at Federation.[4]

But that shift did not come without limitation. This limitation was the exposure of native title, which had survived the Crown's acquisition of sovereignty, to extinguishment by a valid exercise of sovereign power inconsistent with the continued right to enjoy native title. Where the Crown grants interests in land to others, or appropriates land to itself for its own purposes, native title will be extinguished to the extent of any inconsistency.[5]

Thus, even though the High Court confirmed that native title existed at the time Australia was settled and that native title rights persisted after the assumption of sovereignty, the gradual dispossession of Indigenous people from their land by expanding settlement of the Australian continent was confirmed.[6]

It is clear that Justice Brennan, when writing the lead judgment in *Mabo* on the recognition of native title, considered that its susceptibility to extinguishment meant that there were limited prospects for the assertion of native title in Australia. He wrote:

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[1] *Mabo v Queensland [No 2]* (1992) 175 CLR 1 ('*Mabo*'), 217, also 76 (Brennan J).

[2] The doctrine of *terra nullius* is not a concept of the common law, nor is it justiciable in municipal courts; its common law counterpart is the 'desert and uncultivated' doctrine, recognised by Blackstone 23 years before the British acquired sovereignty over Australia: William Blackstone, *Commentaries on the Laws of England: of the Rights of Persons (1765)* 17th ed (1830) Bk 1, 106-108 – discussed in *Mabo,* 34-37 (Brennan J); *Western Australia v Commonwealth* (1983) 183 CLR 373, 427.

[3] *Wik Peoples v Queensland* (1997) 187 CLR 1.

[4] Ibid 182.

[5] Ibid 63-71, 75-76 (Brennan J); 89-90, 110-112, 116-118 (Deane and Gaudron JJ); 192-198 (Toohey J).

[6] Ibid 68-69 (Brennan J).

> there may be other areas of Australia where native title has not been extinguished and where an Aboriginal people, maintaining their identity and their customs are entitled to enjoy their native title. Even if there be no such areas, it is appropriate to identify the events which resulted in the dispossession of the indigenous inhabitants of Australia, in order to dispel the misconception that it is the common law rather than the action of governments which made many of the indigenous people of this country trespassers on their own land.[7]

Justice McHugh held a similar view, expressed plainly during argument in *Fejo v Northern Territory*,[8] a case concerning extinguishment of native title by an historic freehold grant:

> So far as I was concerned, my view was that native title would apply basically to only unalienated Crown land. If, for example, I thought it was going to apply to freehold, to leaseholds, I am by no means convinced that I would have not joined Justice Dawson, and it may well be that that was also the view of other members of the Court.[9]

Because his Honour thought that native title would only affect 'basically unalienated Crown land' he considered that 'the position was, in one sense, the same as it was in 1788'.[10]

But there was a critical difference after *Mabo,* even ignoring the limitation of extinguishment. This difference was expressly acknowledged by Justice McHugh in extra-judicial writing, referring to *Mabo* as an example of a High Court decision where 'the relevant interests are historically accommodated by precepts, but political and ethical ideas have changed'.[11]

That change is voiced most clearly by Justice Brennan:

> The fiction by which the rights and interests of indigenous inhabitants in land were treated as non-existent was justified by a policy which has no place in the contemporary law of this country.[12]

To understand how momentous that change was, requires some critical consideration of the mindset of the early settlers and the attitudes that prevailed in Christian Europe in the 17th and 18th centuries during the expansion of the British Empire into the Americas, and then into Asia and Africa. The British understanding of the relationship between property rights and land was profoundly influenced by the work of John Locke,[13] whose labour theory of property was used as a basis to justify colonial expropriation of land.

Locke's *Two Treatises of Government* were published in 1689.[14] The Second Treatise contains an influential account of the nature of private property. A deeply religious man, Locke's starting point was that God gave humans the world and its contents to have in common, but they were unable to benefit from it until they had expended their

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[7] Ibid 69 (Brennan J).
[8] *Fejo v Northern Territory* (1998) 195 CLR 96.
[9] *Fejo and Anor v Northern Territory of Australia and Anor* [1998] HCATrans 247 (22 June 1998).
[10] Ibid.
[11] Justice Michael McHugh, 'The Judicial Method' (1998) 73 *Australian Law Journal* 37, 40-1.
[12] *Mabo* (1992) 175 CLR 1, 42 (Mason CJ, McHugh J agreeing); 109 (Deane and Gaudron JJ); 182-4 (Toohey J).
[13] John Locke (1632-1704) was one of the most famous philosophers and political theorists of the 17th century.
[14] References in this paper are to John Locke, *Two Treatises of Government* (Cambridge University Press, 1960).

own labour on it.[15] For a hunter-gatherer, the benefit of labour is ownership of the food obtained from the land but not the land itself.[16] But the 'farmer' who alters the land through their labour, appropriates it to their private property.[17]

The implications from Locke's labour theory of property became clear in Emmerich de Vattel's 1758 *Law of Nations*,[18] which stated that new territories could be claimed by occupation if the land were uncultivated, for Europeans had the right to bring lands into production if they were left uncultivated by the indigenous inhabitants.[19] The doctrine of terra nullius established in international law is based on the ideas of Vattel, and its enlargement to treat territory (though inhabited) as 'desert uninhabited', is similar to Blackstone's common law counterpart of 'desert and uncultivated' doctrine, recognised by Blackstone 23 years before the British acquired sovereignty over Australia.[20]

Thus Locke's labour theory of property, translated through Vattel into the expanded doctrine of terra nullius in international law, and through Blackstone into the 'desert and uncultivated' (legally uninhabited) doctrine at common law was a foundational tenet of British colonial land policy, which was deployed to justify indigenous dispossession from land, not only in Australia, but also in North America.

The instructions given to Captain Cook in August 1768 when he sailed for the Pacific were as follows:

> With the Consent of the Natives to take possession of Convenient Situations in the country in the Name of the King of Great Britain; or, if you find the Country uninhabited take Possession for his Majesty by setting up Proper Marks and Inscriptions, as first discoverers and possessors.[21]

The picture painted by Captain Cook of Australia was of an immense tract of land, sparsely populated. The Indigenous people were not only few in number, but they were primitive, unclothed, with only rudimentary shelter, and most important of all 'the Natives know nothing of Cultivation'; they were not farmers, they were hunter-gatherers who wandered about 'in small parties from place to place in search of Food'.[22] Yet, despite (or perhaps because of) his observations about the 'Natives of New Holland', Cook 'took possession' of the east coast of Australia at Possession Island on 22 August 1770.

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[15] Ibid [25]-[27].
[16] Ibid [30]: 'Thus this law of reason makes it the case that the Indian who kills a deer owns it; it is agreed to belong to the person who put his labour into it, even though until then it was the common right of everyone.'
[17] Ibid [32]: 'A man owns whatever land he tills, plants, improves, cultivates, and can use the products of. By his labour he as it were fences off that land from all that is held in common.'
[18] Emmerich de Vattel (1714-1767) was a Swiss philosopher and legal expert whose theories laid the foundation of modern international law and political philosophy.
[19] Emmerich de Vattel, *Law of Nations* (1797) Bk 1, 100-101, referred to in *Mabo* (1992) 175 CLR 1, 33 (Brennan J).
[20] See discussion at above n 2.
[21] John Bennett and Alex Castles (eds), *A Source Book of Australian Legal History* (The Law Book Company, 1979) 254.
[22] James Cook, *The Journals of Captain James Cook on his Voyages of Discovery: Volume I, The voyage of the Endeavour 1768-1771 / edited by J.C. Beaglehole* (Cambridge University Press, 1955) 213, 393, 396; James Cook, *The Journals of Captain James Cook on His Voyages of Discovery: Volume II, The Voyage of the Resolution and Adventure 1772-1775 / edited by J.C. Beaglehole* (Cambridge University Press, 1955) 735.

Captain Arthur Phillip's instructions, nineteen years later, were very different. He was ordered to:

> immediately upon your landing after taking Measures for securing Yourself and the people who accompany you, as much as possible from any attacks or Interruptions of the Natives of that Country … proceed to the Cultivation of the Land …[23]

Thus Lockean notions of property, and international law notions of terra nullius were put into practice as soon as the First Fleet landed on Australian soil. The British took whatever land they wished to use, expended their labour on it and appropriated it as their private property, using force to defend it from the Indigenous inhabitants.

In the United States, the argument that Indigenous people acquired no title to the full extent of their lands because they had not cultivated it was rejected by Chief Justice Marshall in a series of landmark judgments of the United States Supreme Court in the 1820s and 1830s.[24] In summary, the reasoning in the decisions was that Indigenous Americans did not exist in a 'Lockean' state of nature but were divided into separate independent nations with law and governments of their own, and had always been legally recognised as such by the United States. The basis for the entitlements of European settlers was therefore conquest, not agricultural labour.[25]

However, in Australia, in the very few legal cases where the issue of 'native title' arose peripherally,[26] the possibility was rejected under the Lockean inspired international law theory of Vattel. These cases effectively held that the land of Australia was to be considered 'practically unoccupied' at settlement so that the Crown became the beneficial owner of the lands.

In *Cooper v Stuart*[27] the Privy Council said:

> There is a great difference between the case of a Colony acquired by conquest or cession, in which there is an established system of law, and that of a Colony which consisted of a tract of territory practically unoccupied, without settled inhabitants or settled law, at the time when it was peacefully annexed to the British dominions. The Colony of New South Wales belongs to the latter class.[28]

Given the history of conflict between the early settlers and Indigenous people in Australia, it is doubtful that Lord Watson's assumption of 'peaceful' annexation was correct. That aside, the other assumption, that the colony of New South Wales was

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[23] See http://www.foundingdocs.gov.au/resources/transcripts/nsw2_doc_1787.pdf 4.

[24] *Johnson v M'Intosh* 21 US 543 (1823) held that private citizens could not purchase land from Native Americans; *Cherokee Nation v Georgia*, 30 US 1 (1831) ruled that the Cherokees where a dependent nation, with a relationship to the United States like that of 'ward to its guardian'; in *Worcester v Georgia*, 31 US 515 (1832) it was stated, in dicta, that the federal government was the sole authority to deal with Indian nations, laying the foundations for the doctrine of tribal sovereignty in the United States.

[25] It is reported that Justice Story wrote to his wife on 4 March 1832: 'Thanks be to God, the Court can wash their hands clean of the iniquity of oppressing the Indians and disregarding their rights.' See Charles Warren, *The Supreme Court in United States History, Volume 1: 1789-1821* (Little, Brown, and Co, 2nd ed, 1926) 757.

[26] See *Attorney General v Brown* (1847) 1 Legge 312 (NSW); *Randwick Corporation v Rutledge* (1959) 102 CLR 54; *New South Wales v Commonwealth* (1975) 135 CLR 337. These cases are discussed in *Mabo* (1992) 175 CLR 1, 26-28 (Brennan J). See also *Williams v Attorney-General (NSW)* (1913) 16 CLR 404.

[27] (1889) 14 App Cas 286.

[28] Ibid 291 (Lord Watson).

'without settled inhabitants or settled law' was clearly wrong, as was pointed out in 1971 by Justice Blackburn in *Milurrpum v Nabalco Pty Ltd*:

> The evidence shows a subtle and elaborate system highly adapted to the country in which the people led their lives, which provided a stable order of society and which 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 shown in the evidence before me.[29]

Nevertheless, Justice Blackburn considered himself bound by the Privy Council decision in *Cooper v Stuart* and earlier Australian cases to proceed on the basis that New South Wales was 'a colony acquired by settlement or peaceful occupation, as being inhabited only by uncivilized people' as a 'matter of law'.[30] It followed that 'from the moment of foundation of a settled colony English law, so far as it was applicable, applied in the whole of the colony'. The question then to be answered by Justice Blackburn was whether 'English law, *as applied to a settled colony,* included, or now includes, a rule that communal native title where proved to exist must be recognized'. His Honour came to the conclusion, on consideration of the authorities, that 'the doctrine [of recognition] does not form, and never has formed, part of the law of any part of Australia'.[31]

In 1992, the High Court came to a different result, concluding that a mere change of sovereignty did not extinguish native title to land and the common law will recognize and protect native title rights, except if the recognition were to 'fracture a skeletal principle of our legal system'.[32] In so doing, the Court rejected the 'enlarged notion of terra nullius' which had underpinned land law in Australia for over 200 years, and had justified the dispossession of Indigenous people from their lands. The rejection of that notion, 'clear[ed] away the fictional impediment to the recognition of indigenous rights and interests in colonial land'.[33]

However, in rejecting the 'unjust and discriminatory doctrine' that refused 'to recognize rights and interests of the indigenous inhabitants of settled colonies'[34] the Court remained 'curiously dependent on Lockean assumptions'.[35] As Kane points out in his article, 'Man the Maker *versus* Man the Taker', the claim of the Meriam people was that they had valid title to land which they and their ancestors had cultivated for generations.[36] That they were gardeners, not hunter-gatherers, is expressly made clear in the factual findings of Justice Moynihan set out in Justice Brennan's reasons.[37] These were precisely the conditions that Locke's labour theory of property would have regarded as title to land that British settlers were obliged to recognize and protect.

Justice Brennan, in his leading judgment, argued the injustice of dispossession of land at sovereignty based upon past misunderstandings of the reality of Indigenous law and lifestyle, overruling cases based on those wrong assumptions. His Honour then extended the principle to mainland Australia, where Indigenous people had been, for

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[29] (1971) 17 FLR 141, 267.
[30] Ibid 244 and 249.
[31] Ibid 244-245.
[32] *Mabo* (1992) 175 CLR 1, 43 (Brennan J).
[33] Ibid 45 (Brennan J).
[34] Ibid 42 (Brennan J).
[35] John Kane, 'Man the Maker versus Man the Taker: Locke's Theory of Property as a Theory of Just Settlement' (2007) 3 *Eighteenth Century Thought* 235.
[36] Ibid.
[37] *Mabo* (1992) 175 CLR 1, 17-18 (Brennan J): 'Gardening was of the most profound importance to the inhabitants of Murray Island at and prior to European contact.'

the most part, hunter-gatherers, not farmers and where there was an expectation by at least some of the judges of the Court, that there would be very limited prospects for establishing native title. Kane argues:

> So powerful was the Lockean theory … that its eventual rejection in Australia had to be founded on its plausibility.[38]

Still, there were now 'possibilities' for Indigenous people in Australia which had previously been closed to them by the crushing burden of 'terra nullius'.

In June 1993, the Prime Minister announced that the federal government would respond to *Mabo* by legislation to facilitate validation of existing land titles, define native title, establish a system of tribunals to register and determine land claims and set parameters for compensation for Indigenous people whose native title rights had been extinguished contrary to the *Racial Discrimination Act 1975* (Cth) ('RDA').[39]

After a period of intense negotiations between governments, representatives of Indigenous groups, pastoralists and the mining industry, the *Native Title Act 1993* (Cth) ('NTA') was passed in late 1993 and came into effect on 1 January 1994. It is a legislative framework dealing with past and future implications of *Mabo*.

However, there were a number of legal issues left unclear after *Mabo* and the NTA, which found their way to the High Court. From 1996 to 2002, the Court delivered seven significant native title decisions: *Wik*[40]*; Fejo v Northern Territory*[41]*; Yanner v Eaton*[42]*; Commonwealth v Yarmirr*[43]*; Western Australia v Ward*[44]*; Wilson v Anderson*[45]*; and Yorta Yorta v Victoria*[46]. All of these cases involved areas of 'mainland' land or sea, distinct from the land and sea of the Torres Strait region.[47]

One of the first and most prominent issues to be resolved after *Mabo* was the relationship between native title and pastoral leases. The answer to this question would, in large part, determine the scope for native title on mainland Australia.

Wik was a test case dealing with the issue of pastoral leases and native title. The case was decided in the High Court by a bare majority of 4:3 deciding that Queensland pastoral leases did not necessarily extinguish native title. This was significant as it meant that native title could co-exist with other interests. In one sense, *Wik* was at least as important as *Mabo* for the future of native title as it opened up the possibility of native title existing over vast swathes of Australia where it was previously thought to have been extinguished.[48]

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[38] Kane, above n 35, 253.
[39] John Gardiner-Garden, 'The Mabo Debate: A Chronology' (Department of the Parliamentary Library, 1993) 14.
[40] (1996) 187 CLR 1.
[41] (1998) 195 CLR 96 (*Fejo*).
[42] (1999) 201 CLR 351 (*Yanner*).
[43] (2001) 208 CLR 1 (*Yarmirr*).
[44] (2002) 213 CLR 1 (*Ward*).
[45] (2002) 213 CLR 401 (*Wilson*).
[46] (2002) 214 CLR 422 (*Yorta Yorta*).
[47] The term 'Indigenous' is used in Australia to refer to both Aboriginal people who have traditional connections to the land and waters of mainland Australia, and Torres Strait Islander people who come from the islands of the Torres Strait. Torres Strait Islanders are of Melanesian origin and have a distinct identity, history and cultural traditions separate from Aboriginal people.
[48] Pastoral leases covered 38% of Western Australia, 42% of South Australia, 41% of New South Wales, 54% of Queensland and 51% of the Northern Territory: Richard Bartlett, *Native Title in Australia* (Lexis Nexis Butterworths, 2000) 273.

The ferocious political and industry backlash to *Wik* put the Commonwealth Government under increasing pressure to introduce legislation to extinguish native title on pastoral leases. Such legislation would have left the Commonwealth (and accordingly the taxpayers) with a massive compensation bill. Instead the government came up with the Ten Point Plan which included a number of provisions that either extinguished native title in particular circumstances or significantly diminished the rights recognised at common law and protected by the NTA as it stood. It delivered what was described as 'bucket loads of extinguishment'[49] and significantly decreased the area over which native title might exist. In commenting on the 1998 *'Wik'* amendments, the Aboriginal and Torres Strait Islander Social Justice Commissioner said:

> The legislative response to the Wik decision which proffered a basis for the sharing of interests has been lost, at least for the present. Both the process and the substance of the amendments have been destructive of the most valuable resource we have in working towards reconciliation: trust.[50]

The next importance case was *Fejo* in 1998. *Mabo* having foreshadowed that freehold extinguishes native title,[51] the conclusion of permanent extinguishment in *Fejo* was, perhaps, unremarkable. The disappointing aspect of the case for Indigenous groups was the reinforcement of the inherent vulnerability of native title and the superiority of non-Indigenous titles.

Extinguishment was revisited in *Yanner* in 1999, where the majority of the High Court held that a native title right to hunt crocodile was regulated but not extinguished by the Queensland *Fauna Conservation Act 1974*. The Court's reasoning in *Yanner* was centred on the concept of native title as recognised by the common law. The joint judgment put forward an understanding, which would prove in contrast to future decisions, that 'Aboriginal ownership is primarily a spiritual affair rather than a bundle of rights'.[52] The judgment went on to state:

> 'an important aspect of the socially constituted fact of native title rights and interests that is recognised by the common law is the spiritual, cultural and social connection with the land.'[53]

Two years later the connection with the sea was the focus of *Yarmirr.*[54] The claim for exclusive rights in the sea and seabed were thwarted, at the first post, by the 'skeletal principle' of freedom of the seas and tidal waters.[55] This principle derived from the idea that the sea, by its nature, is the property of all – an assumption of Grotius (1583-1645), a 17th century Dutch legal scholar and philosopher acknowledged as the father of

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[49] Aboriginal and Torres Strait Islander Social Justice Commissioner, 'Native Title Report 1997' (Human Rights and Equal Opportunity Commission, 1997) 36.
[50] Aboriginal and Torres Strait Islander Social Justice Commissioner, 'Native Title Report 1998' (Human Rights and Equal Opportunity Commission, 1998) 9.
[51] (1992) 175 CLR 1, 89, 110.
[52] Ibid [37] citing Brennan J in *R v Toohey; Ex parte Meneling Station Pty Ltd* (1982) 158 CLR 327, 358.
[53] Ibid [38].
[54] The original *Mabo* case included a sea claim, but the portion of the claim relating to the sea was not pursued to the High Court for technical legal reasons.
[55] *Yarmirr & Ors* v *The Northern Territory & Ors* (1998) 82 FCR 533 ('*Yarmirr FC*'), 592, 593 (Olney J); *Commonwealth v Yarmirr* (1999) 101 FCR 171 ('*Yarmir FCAFC*'), 228-226 [238]-[239] (Beaumont and von Doussa JJ); 300-301 [570]-[572] (Merkel J).

modern international law. Grotius influenced Locke in developing his labour theory of property.[56]

While preferring to stay with concepts of inconsistency, rather than resorting to the metaphorical 'skeletal principle', the High Court in *Yarmirr* agreed that exclusive rights in the sea could not stand with inconsistent common law public rights of navigation and fishing, as well as the right of innocent passage.[57]

The western perspective emphasising the difference between the land and the sea was at the heart of the legal dispute. This contrasts with the Indigenous perspective where, generally, no elemental distinction is made between the land and the sea.[58]

Justice Kirby, writing in strong dissent, acknowledged the difference of approach between the common law, drawing distinctions between the land and the sea, and traditional law, which does not.[59] Justice Kirby's resolution of this difference in approach would have allowed for native title rights in the sea with elements of exclusivity, even if they were qualified by the public rights to navigate and statutory fishing licences.[60] His Honour explained:

> They yield their rights in their 'sea country' to rights to navigation, in and through the area, allowed under international and Australian law, and to licensed fishing, allowed under statute. But, otherwise, they assert a present right under their own laws and customs, now protected by the 'white man's' law, to insist on effective consultation and a power of veto over other fishing, tourism, resource exploration and like activities within their sea country because it is theirs and is now protected by Australian law. [61]

In 2002, *Ward* gave the High Court the opportunity to clarify the concept of extinguishment after a 'rather disparate collection of concepts and judicial terminology' had developed in native title cases to that point.[62] In holding that native title was not entirely extinguished by Western Australian pastoral leases, the majority gave primary regard to the NTA, and not *Mabo* and *Wik,* saying that 'inconsistency' was the mandated test[63] and that partial extinguishment was also mandated.[64] The extinguishment doctrine emerging from *Ward* was destructive for native title holders. In accepting partial extinguishment and the inconsistency of incidents test, the High Court rejected a view that communal native title could be equated with 'ownership' in Western law.[65]

The effect on native title of the decision in *Ward* was profound. It confirmed that prior grants and interests could extinguish native title in part, which extracted particular

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[56] For Grotius property and ownership had to be 'wrested away from early ownership in common'. The ancient commons were divided into two groups: things that are public (the property of people) and things that are private (the property of individuals). Property came into being through acts of occupation and possession. Because the sea could not be occupied it could not be the property of anyone and it belonged to everyone.
[57] (2001) 208 CLR 1, 68 [98].
[58] Sue Jackson, The Water is not Empty: Cross-Cultural Issues in Conceptualising Sea Space (1995) 26(1) *Australian Geographer* 87, 89.
[59] (2001) 208 CLR 1, 110-111 [245].
[60] Ibid 125 [281], 126 [283].
[61] Ibid [320].
[62] Sean Brennan, 'Native Title in the High Court of Australia a decade after Mabo' (2003) 14 *Public Law Review* 209, 211.
[63] (2002) 213 CLR 1 [76].
[64] (2002) 213 CLR 1 [9].
[65] (2002) 213 CLR 1, 69 [25], 65 [16].

rights and interests from native title permanently and left a patchwork of extinguishment across Australia.[66]

Wilson was handed down the same day as *Ward*. It raised the question of whether leases conferred for grazing purposes in the Western Lands Division in New South Wales extinguished all or any native title. Unlike the Queensland and Western Australian pastoral leases with which native title could co-exist, the majority held that the New South Wales grazing leases granted in perpetuity extinguished native title entirely. The rationale behind the 'paradoxical perpetual lease'[67] was to strengthen the class of tenure to ensure that lessees could obtain adequate finance on the security of their lease. By aligning the perpetual lease with freehold in the sense of permanency, and ignoring its limitations in respect of use, the majority made a 'presumption of inconsistency in line with freehold'[68] leading to the conclusion that native title had been extinguished with effect from the grant of the lease.[69] With that conclusion, *Wilson* further confined native title rights in Australia and arguably eroded the principles for protection of native title established in *Mabo* and *Wik*.[70]

More impediments were put in place shortly after, by the decision in *Yorta Yorta,* a case concerned with extinguishment of native title by non-acknowledgment and non-observance of traditional laws and customs. *Mabo* had created a perception that (putting aside questions of extinguishment by inconsistent grant) native title could be recognised 'provided the general nature of the connection between the indigenous people and the land remains'.[71] Justice Brennan also observed that:

> …when the tide of history has washed away any real acknowledgment of traditional law and any real observance of traditional customs, the foundation of the native title has disappeared. A native title which has ceased with the abandoning of laws and customs based on tradition cannot be revived for contemporary recognition.[72]

Yorta Yorta tested those perceptions in relation to land and waters in the south east corner of Australia where Aboriginal people had experienced seven or eight generations of intensive non-Indigenous presence and activity.[73]

The Full Federal Court (by majority) upheld the trial judge[74] and the High Court (by majority) upheld the decision of the Full Court,[75] confirming the finding of the trial judge that native title had been washed away by the 'tide of history'. The decision had strong implications for future native title claims, particularly in urbanised areas, with the expectation that few, if any, would be successful.

Despite the optimism engendered by *Mabo* in 1992, and the possibilities of empowerment of, and benefits for, Indigenous people, the 2001-2002 test cases in the

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[66] Lisa Strelein, *Compromised Jurisprudence* (Aboriginal Studies Press, 2006) 77.
[67] (2002) 213 CLR 401 [8].
[68] (2002) 213 CLR 401 [71]-[73].
[69] (2002) 213 CLR 401 [119].
[70] (2002) 213 CLR 410 [169]-[170] (Kirby J in dissent).
[71] (1992) 175 CLR 1, 70, 110.
[72] (1992) 175 CLR 1, 60.
[73] Brennan, above n 62, 213.
[74] *Yorta Yorta v Victoria* (2001) 110 FCR 244.
[75] *Yorta Yorta* (2002) 214 CLR 422.

High Court[76] set 'a strong judicial tone of retrenchment and the prospects for socioeconomic development from native title took a battering'.[77]

But in 2013, the High Court delivered judgment in *Akiba v Commonwealth*[78] creating a renewed sense of optimism for native title reaching the broader potential promised after *Mabo*. The *Akiba* litigation[79] returned the attention of the Court to the Torres Strait, the birthplace of native title recognition in Australia. Over twenty years after *Mabo* and its legislative response – the NTA – the Torres Strait Islanders secured recognition of their native title right to take marine resources for commercial purposes, as part of their non-exclusive rights in the sea. The extensive and comprehensive legislative controls on commercial fishing were held to regulate the rights rather than extinguish them. It could be said that the rights were lifted out of the bucket of legislative extinguishment into the realm of regulation and co-existence.

Akiba marked a turning point in native title extinguishment law, towards a greater moderation and realism with the High Court seeming now to regard extinguishment as a 'legal conclusion of last resort'.[80]

Two other High Court cases following swiftly after *Akiba* continued the trend away from the harshness of extinguishment in earlier cases. *Karpany v Dietman*[81] involved the successful use of a native title defence to a prosecution for possession of undersized abalone, with the State arguing that the native title right to fish had been extinguished by the *Fisheries Act 1971* (SA). The High Court again found that the legislative regime was regulatory, not extinguishing. Not long after, in *Western Australia v Brown*,[82] the High Court unanimously favoured co-existence over extinguishment, this time in relation to an expired mining lease in the Pilbara.

The Torres Strait cases of *Mabo* and *Akiba* respectively mark the birth and maturing of native title recognition in Australia. The confirmation that native title rights can have a commercial aspect in *Akiba* and the emphasis on coexistence over extinguishment, evident in *Akiba, Karpany* and *Brown,* re-awakens the promise of *Mabo,* and creates a renewed sense of optimism for native title reaching the broader potential envisioned in 1992.

[76] *Yarmirr, Ward, Wilson and Yorta Yorta.*
[77] Sean Brennan, 'The Significance of the Akiba Torres Strait Regional Sea Claim' in Sean Brennan et al (eds), *Native Title from Mabo to Akiba: A Vehicle for Change and Empowerment?* (Federation Press, 2015) 29.
[78] *Akiba on behalf of the Torres Strait Regional Seas Claim Group v Commonwealth of Australia* (2013) 250 CLR 209.
[79] *Akiba v Queensland (No 3)* (2010) 204 FCR 1; *Commonwealth v Akiba* (2012) 204 FCR 260.
[80] Brennan, above n 77, 38-39.
[81] (2013) 252 CLR 507.
[82] (2014) 253 CLR 507.