Chapter 3
Selected native title cases: 2007-08

> Resolving native title is not simply about land, it is an historic opportunity for the State and Commonwealth to turn a new page in history...[1]

Federal Court decisions between 2007-08 continue to evidence how the opportunity to turn the pages of history is rarely realised.

The strong, vibrant and committed Noongar peoples of the South West corner of Australia had their native title determination over Perth returned to square one. The Full Federal Court found that the first judge had made a number of errors in his decision and have sent the case back for consideration by a new judge, leaving the Noongar peoples uncertain about the future of their rights over the land. This is despite the Western Australian government openly acknowledging the Noongar peoples as the Traditional Owners of the land.

The High Court ruled that the Ngaliwurru and Nungali peoples of the Timber Creek area in the Northern Territory could have their native title rights and interests compulsorily acquired for the benefit of private business. Although the case went all the way to the High Court, because of a change of Government since the case began, the native title interests were never actually acquired. However, the Griffiths case makes it clear that the Northern Territory Government can acquire native title rights and interests for any purpose whatsoever, including for the private benefit of a third party.

Considering the results of court decisions of the past few years, one can't help but consider the Yaruwu peoples of the area surrounding Broome to be lucky that none of the opposing parties found a point of law that could deny the Yaruwu peoples their native title rights on appeal. However, to have their rights protected, the matter has been extensively litigated with a number of decisions delivered by the trial judge and a lengthy judgment in the Full Court appeal. There may also be more litigation to come, with the Western Australian government seeking leave to appeal to the High Court. The Yaruwu peoples will continue the long haul to have their rights recognised, but as the federal Attorney-General himself has said:

> …there will sometimes not be clear cut legal answers or the court's decision will not be entirely predictable. So unless participants want to risk an all or nothing legal throw of the dice, there must be a will on both sides to devise workable solutions.[2]

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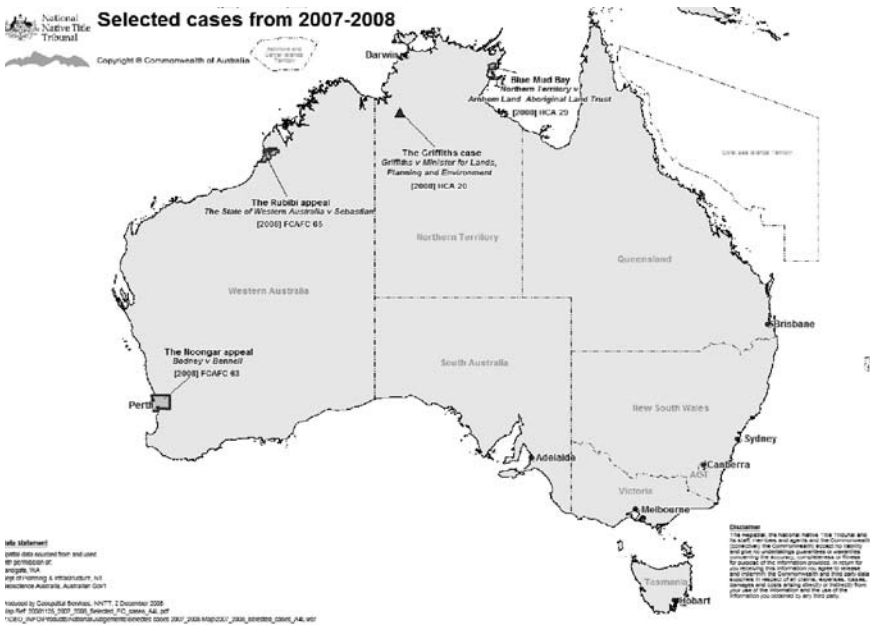
1 South West Aboriginal Land and Sea Council, *The single Noongar claim,* Fact Sheet. At: http://www.noongar.org.au/documents/SNC_fact.pdf (viewed August 2008).

2 Attorney-General, *Speech* (Speech delivered at the Negotiating Native Title Forum Brisbane, 29 February 2008). At: http://www.attorneygeneral.gov.au/www/ministers/RobertMc.nsf/Page/Speeches_2008_29February2008-NegotiatingNativeTitleForum (viewed March 2008).

While native title continues to be determined excruciatingly slowly through the parties' resolution of numerous and complicated issues, the Northern Territory's coastal Aboriginal population has one very good reason to celebrate this year. The High Court recognised that the Northern Territory's land rights regime (the *Aboriginal Land Rights (Northern Territory) Act 1976*), the strongest Aboriginal or Torres Strait Islander land rights law in the country, provides exclusive possession rights to the intertidal zone. The intertidal zone contains stocks of barramundi, mud-crab and trepang. With access along 80 percent of the Territory's coastline now dependent on permission from the Traditional Owners, Aboriginal Territorians are well placed to share in the lucrative commercial fishing industry carried on close to shore.

Map 1: Selected cases from 2007-2008



1. Other Court decisions

There were many Federal Court hearings throughout the year that considered native title issues. A number of these were a direct result of the changes made to the system in 2007.[3]

In summary, between 1 July 2007 and 30 June 2008, ten determinations of native title were made[4] and eight claims were struck out by the Federal Court.[5]

3 See T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2007,* Australian Human Rights Commission (2008) and the Native Title Act Amendment Bill 2007 for details of the changes.

4 See Appendix 1 for more information on the determinations that were made throughout the year.

5 J Eaton, Native Title Registrar, Federal Court of Australia, Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 21 August 2008.

2. Bodney v Bennell – the Noongar appeal

In my *Native Title Report 2007*, I summarised the Federal Court decision which held that the Noongar people have native title rights and interests in the southwest corner of Australia, including Perth.[6] However, in April 2008 the Full Federal Court found that Justice Wilcox had erred in his judgment in that case.[7] Allowing the appeal, the Full Federal Court held that in some respects Justice Wilcox had strayed from the questions and evidence that *Yorta Yorta* required him to address. The Full Court was not prepared to substitute its own answers on the issues of continuity and connection, and ultimately they could not determine whether or not native title rights and interests exist. The case was sent back to a new judge to decide how the matter should proceed.[8] The parties have agreed to negotiate the claim.

Once again, the decision highlights how the Native Title Act and its procedures for a determination often result in unjust outcomes. These outcomes are not only out of step with the intent of Parliament in passing the Act, but they go against the government's policies of acknowledging past injustices and encouraging reconciliation.

2.1 The case

In *Bennell v Western Australia*[9] (the first Noongar decision), the Federal Court held that the Noongar people, comprising 400 family names, held native title rights and interests over the Perth metropolitan area.

In the case, Justice Wilcox accepted that a single Noongar society existed in 1829 and that it continued through to today as a body united by its observance of some of its traditional laws and customs. In his decision, Justice Wilcox conceded the enormous impact of European settlement and the cessation of observance of many traditional laws and customs. Nevertheless, consciously referring back to words used by the High Court in *Yorta Yorta,*[10] he said that the Noongar normative system was:

> much affected by European settlement; but it is not a normative system of a new, different society.[11]

The modifications to traditional law and custom that Justice Wilcox observed were, in his view, within the parameters of acceptable change, and so the story of the Noongar was one of continuity and adaptation.[12]

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6 The decision at first instance was *Bennell v Western Australia* (2006) 230 ALR 603. This decision was discussed in T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2007*, Australian Human Rights Commission (2008), pp 146-150. The appeal decision is *Bodney v Bennell* [2008] FCAFC 63.

7 *Bennell v Western Australia* (2006) 230 ALR 603.

8 *Bodney v Bennell* [2008] FCAFC 63, 210 (Finn, Sundberg and Mansfield JJ).

9 *Bennell v Western Australia* (2006) 230 ALR 603. See T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2007,* Australian Human Rights Commission (2008) pp 146-150 for more information on the case at first instance.

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

11 *Bennell v Western Australia* (2006) 230 ALR 603, para 791 (Wilcox J), quoting *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422.

12 S Brennan, *Recent Developments in Native Title Case Law* (presentation at the Human Rights Law Bulletin Seminar, Australian Human Rights Commission, Sydney, 4 June 2007).

The decision of Justice Wilcox in the first Noongar case was appealed by the Western Australian and Commonwealth governments and other parties. The Full Federal Court allowed the appeal,[13] deciding that Justice Wilcox had failed to consider two matters that the Noongar claimants were required to establish under s 223 of the Native Title Act if they were to be successful in proving their native title.

The first was that Justice Wilcox hadn't properly considered whether there had been continuous acknowledgment and observance of the traditional laws and customs by the Single Noongar Society from sovereignty until today.

The second was that Justice Wilcox hadn't properly considered whether the Noongar people had proven a connection with the specific area before the court. The area the Noongar people were claiming native title over in this case was the Perth Metropolitan Area. This area was labelled 'part A' of a broader claim area called the Single Noongar Claim, which had earlier been split in to part A and part B. The Full Federal Court considered that Justice Wilcox had wrongly taken the view that it was enough that the claimants had established a connection with the broader area of the Single Noongar claim (part A and part B combined). Some aspects of the decision have broader implications for native title and are of concern.

2.2 Successful appeal ground 1 – Continuity

There were a number of aspects of the requirement for continuity that the Full Federal Court commented on in the Noongar appeal. The Full Federal Court considered that Justice Wilcox had erred by asking whether the community survived, rather than whether the laws and customs in relation to land continued from sovereignty to the present:

> Instead of enquiring whether the laws and customs have continued to be acknowledged and observed substantially uninterrupted by each generation since sovereignty, [Justice Wilcox] asked whether the community that existed at sovereignty continued to exist over subsequent years with its members continuing to acknowledge and observe at least some of the traditional 1829 laws and customs relating to land.[14]

The Full Federal Court also considered that Justice Wilcox did not give enough regard to whether the Noongar people had observed their law and customs 'generation by generation between sovereignty and the present time'.[15] They considered that in deciding whether there had been continuity of observance, Justice Wilcox should have considered whether 'for each generation since sovereignty, acknowledgment and observance of the Noongar laws and customs have continued substantially uninterrupted'.[16]

As it has been stated in many native title reports, providing such evidence generation by generation, while being subject to the strict rules of evidence, is a herculean task for people of an oral culture with a history of dispossession and generations of

13 *Bodney v Bennell* [2008] FCAFC 63.

14 *Bodney v Bennell* [2008] FCAFC 63, 73 (Finn, Sundberg and Mansfield JJ), original emphasis.

15 *Bodney v Bennell* [2008] FCAFC 63, 89 (Finn, Sundberg and Mansfield JJ).

16 *Bodney v Bennell* [2008] FCAFC 63, 95 (Finn, Sundberg and Mansfield JJ).

children that were removed from their parents. It is also contrary to Australia's human rights obligations.[17]

In his decision, Justice Wilcox was careful to follow the precedent on what constitutes continuity, as set down by the High Court in *Yorta Yorta*. Despite this, the Full Federal Court did not agree with the manner in which he framed his application of the principles to the Noongar.

Although the Court considered that Justice Wilcox had focused on the continuity of society rather than continued acknowledgement and observance of laws and customs,[18] they went on to consider Justice Wilcox's discussion of those traditional laws and customs. They then criticised Justice Wilcox for what they considered to be giving little consideration, as required by *Yorta Yorta*, to the level of adaptation and change that was acceptable.[19]

Finally, the Full Federal Court also criticised Justice Wilcox's failure to have regard to anthropologists' evidence which could have assisted him in considering whether there had been continuous observance of traditional laws and customs.[20]

(a) The effects of white settlement?

The law provides that native title does not require strict proof of continuous acknowledgement and observation of traditional law and custom. In *Yorta Yorta* the High Court made it clear that there must not be *substantial* interruption of that observance, nor should there be too much adaptation or change to the content of the law and custom.[21] That is, there is some, albeit very limited, room for traditional laws and customs to have changed since sovereignty and still be recognised by the law as it stands.

In the first Noongar decision, Justice Wilcox referred to the effects that white settlement have had on the Noongar people and their traditional laws and customs. However, as I noted above, he concluded that the modifications to traditional law and custom that he observed were within the parameters of acceptable change and adaptation.[22]

The Full Federal Court did not agree with this reasoning. It held that Justice Wilcox had made too much allowance for the changes inflicted upon Noongar society by European settlement. The Full Federal Court stated that Justice Wilcox should have simply been examining whether the change meant that the law or custom was no longer traditional:[23]

> [A]cknowledging that the change from home areas to boodjas is a significant change, his Honour says at [78] that the change is readily understandable because it was forced

17 See below for a discussion about section 223 of the *Native Title Act 1993* (Cth) and the right to culture. See W Jonas, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2002*, Australian Human Rights Commission (2003), p 31 onwards. At: http://www.humanrights.gov.au/social_justice/nt_report/index.html#2002; W Jonas, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2003*, Australian Human Rights Commission (2004), p 149. At: http://www.humanrights.gov.au/social_justice/nt_report/ntreport03/index.htm.

18 *Bodney v Bennell* [2008] FCAFC 63, 76 (Finn, Sundberg and Mansfield JJ).

19 *Bodney v Bennell* [2008] FCAFC 63, 79 (Finn, Sundberg and Mansfield JJ).

20 *Bodney v Bennell* [2008] FCAFC 63, 95 (Finn, Sundberg and Mansfield JJ).

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

22 *Bennell v Western Australia* (2006) 230 ALR 603, 774-791.

23 *Bodney v Bennell* [2008] FCAFC 63, 79-82 (Finn, Sundberg and Mansfield JJ).

> on the Aboriginal people by white settlement. The reason for such an important change is irrelevant: *Yorta Yorta HC* at [89].[24]

The Court considered that the law's requirement that the continuous acknowledgment and observance of traditional laws and customs be '*substantially* uninterrupted' as opposed to 'uninterrupted' is the mechanism for taking in to account the impact of European settlement on the community:

> …But if, as would appear to be the case here, there has been a substantial interruption, it is not to be mitigated by reference to white settlement. The continuity enquiry does not involve consideration of *why* acknowledgment and observance stopped. *If this were not the case, a great many Aboriginal societies would be entitled to claim native title rights even though their current laws and customs are in no meaningful way traditional…* In reaching his conclusion that Noongar laws and customs of today are traditional, his Honour's reasoning was infected by an erroneous belief that the effects of European settlement were to be taken in account – in the claimants' favour – by way of mitigating the effect of change.[25]

I do not agree with what the court is implying. An Indigenous person who revitalises their culture and practices their laws and customs is still traditional, and also has the right to practice their culture, law and customs and have those rights recognised, acknowledged and protected.[26]

However, this finding and the words of the Full Federal Court do not only deny Indigenous peoples their rights, but it will limit any future judge's willingness to comment and give due recognition to the devastating impact of colonisation on Australia's Indigenous peoples. More concerning though, is that it also encourages claimants to deny the catastrophic impacts that colonisation and other white policies had on them and on their ancestors. At the Native Title Conference in June 2008, Chief Judge Joe Williams, the Chief Judge of the Maori Land Court put it as:

> In Australia the surviving title approach to transitional justice requires the Indigenous community to prove in a court or tribunal that colonisation caused them no material injury. This is necessary because, the greater the injury, the smaller the surviving bundle of rights. Communities who were forced off their land lose it. Those whose traditions and languages were beaten out of them at state sponsored mission schools lose all of the resources owned within the matrix of that language and those traditions. This is a perverse result. In reality, of course, colonisation was the greatest calamity in the history of these people on this land. Surviving title asks aboriginal people to pretend that it was not.[27]

2.3 Successful appeal ground 2 – Connection

The Full Federal Court also held that the Noongar claimants had not proven connection to the Perth Metropolitan area specifically. The court held that Justice Wilcox had erred by not inquiring into whether connection to that particular area by the laws and customs had been substantially maintained.[28]

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24 *Bodney v Bennell* [2008] FCAFC 63, 81 (Finn, Sundberg and Mansfield JJ).

25 *Bodney v Bennell* [2008] FCAFC 63, 97 (Finn, Sundberg and Mansfield JJ) (emphasis added).

26 See below for a discussion on s223 of the *Native Title Act 1993* (Cth) and the right to culture. See T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2007,* Australian Human Rights Commission (2008), chapter 8, for a discussion on the revitalisation of culture.

27 J Williams, *Confessions of a native judge – reflections on the role of transnational justice in the transformation of indigeneity*, (Speech delivered at the Native Title Conference, Perth, 5 June 2008).

28 *Bodney v Bennell* [2008] FCAFC 63, 167 and 185 (Finn, Sundberg and Mansfield JJ).

The Full Court noted Justice Wilcox's assessment that, statistically, a biological connection between some members of the wider Noongar community today and the occupants of the Perth area at sovereignty was likely. It said that even if that were correct, it did not show a present connection by those Noongar people specifically to the Perth area.

The conclusion reached by the Court raises questions about how strategies for running a native title case can be employed by governments and non-claimant parties to contest a native title claim. In the Noongar case, the State had initially suggested that the Single Noongar Claim be split in to two parts. This decision shows that a 'segmentation' strategy by respondents to whole of country native title claims may actually be rewarded by the kind of reasoning adopted by the Full Federal Court in this case. That is, if there are uneven levels of sub-group connection within a diverse claim area, a more built-up area could be hived off from what would otherwise possibly be a positive determination of native title. Yet again, this interpretation privileges a technical and legalistic approach to assertions of country, over holistic ones based in Indigenous cultural norms.

2.4 The future of the Noongar peoples' claim

The future of the Noongar peoples' claim is uncertain. The Full Federal Court refused to determine whether native title existed in the area.[29] The court remitted the question of whether native title rights and interests exist over part A (the Perth Metropolitan Area) to the docket judge, but left it to that judge to decide whether to determine part A separately or whether to consolidate it with a hearing over the remaining part B.[30]

At the time of the decision, Glen Kelly, the chief executive of the South West Aboriginal Land and Sea Country (SWALC), the Native Title Representative Body for the region, said '[w]hat this decision means is back to square one, absolutely back to the beginning of proceedings'. But, he said, it was not a loss for the Noongar people. 'They didn't go so far as to make a ruling that native title does not exist.'

SWALC Chairman Ted Hart said that while they were ready to negotiate with the governments, the State's 'very aggressive' appeal had been insulting to Noongar people. However, after appealing the decision rigorously, the Western Australian government said that:

> Native title agreements have the capacity to deliver much, much more if together we can demonstrate the courage, persistence and flexibility to make now big decisions with long term implications.[31]

And it has stated that it:

> [Respects] the special relationship of Noongar people with land in the South-West and we look forward to continuing our negotiations with them. With this decision, we now have a clear and consistent understanding of the law, one that will give both the Government and Noongar people a solid platform for negotiations.'

29 *Bodney v Bennell* [2008] FCAFC 63, 210 (Finn, Sundberg and Mansfield JJ).

30 *Bodney v Bennell* [2008] FCAFC 63, 211 (Finn, Sundberg and Mansfield JJ).

31 E Ripper, *Keynote address,* (Speech delivered at the AIATSIS Native Title Conference, Perth, 5 June 2008).

The federal Attorney-General also signalled his preference for negotiating an outcome.[32]

All parties have since agreed to meditate the claim. The mediation is limited to part A of the claim, and the parties have agreed that part B will be deferred. The parties will consider what areas of the claim will not be considered (that is, over which the Noongar peoples' rights have effectively been extinguished) and negotiate the six underlying regional claims asserted by the small distinct groups that form the single Noongar population.[33]

While the outcome of the negotiations may take many more years, there appears to be increased and better engagement from all sides. The Western Australian Government is taking an active part in the negotiations, with the Australian Government and other respondents taking a minor role:[34]

> [The Western Australian government and Noongar peoples] have endeavoured to thaw what was previously a frosty relationship.[35]

Since this time, the Western Australian government has changed, and I hope that the new government will approach the negotiations with a willingness and commitment to achieving a just outcome.

3. Western Australia v Sebastian – the Rubibi appeal

During the year, the Yawuru peoples' native title determination was confirmed by the Full Federal Court.[36]

The State of Western Australia and a competing claimant appealed different aspects of the first instance decision of Justice Merkel[37] that determined that the Yawuru people held native title rights and interests over areas in and around the Western Australian coastal town of Broome. The Full Federal Court upheld Justice Merkel's findings in relation to communal native title, but overturned some of the findings on extinguishment, holding that there were more extensive native title rights than Justice Merkel had found. The decision paves the way for a slightly strengthened native title determination, amidst wider negotiations between the State and Rubibi over native title, compensation and heritage.

Although the Yawuru peoples were ultimately successful in having their native title rights and interests recognised, the case has taken far longer than it should have.

Justice Merkel resolved the basic 'native title issues' in 'interim' judgments delivered in 2005 and 2006. Even earlier, in 2001, he determined the Yawuru to be the communal native title holders to adjacent territory, an Aboriginal law ground on the outskirts of Broome. Yet respondents continued to argue the native title issues on appeal. The fact that the State has sought special leave from the High Court to re-agitate some

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32 Attorney-General, 'Single Noongar decision', (Media Release, 23 April 2008). At: http://www.attorneygeneral.gov.au/www/ministers/robertmc.nsf/Page/MediaReleases_2008_SecondQuarter_SingleNoongarDecision-23April2008 (viewed May 2008).

33 R Hickson, Principle Legal Officer, South West Aboriginal Land and Sea Council, *Telephone interview with the Native Title Unit of the Australian Human Rights Commission for the Native Title Report 2008*, 20 November 2008.

34 R Hickson, Principle Legal Officer, South West Aboriginal Land and Sea Council, Telephone interview with the Native Title Unit of the Australian Human Rights Commission for the Native Title Report 2008, 20 November 2008.

35 R Hickson, Principle Legal Officer, South West Aboriginal Land and Sea Council, Telephone interview with the Native Title Unit of the Australian Human Rights Commission for the Native Title Report 2008, 20 November 2008.

36 The State of Western Australia v Sebastian [2008] FCAFC 65.

37 The first instance decision was Rubibi Community v State of Western Australia (No7) [2006] FCA 459.

extinguishment issues again shows how litigious behaviour frustrates outcomes, long after the 'right people' with whom to settle matters have been identified. This approach is contrary to the less litigious approach that all governments have now committed to.

3.1 The case

The background to the case is complicated, with multiple Federal Court decisions handed down since the application was made in early 1994. Some of the earlier decisions dealt with preliminary issues, such as who was an appropriate party to the litigation. Unusually, the judge's final conclusions on the native title application were spread across two 'interim' sets of published reasons as well as the final judgment and determination delivered in April 2006.

There were two competing native title groups in relation to the land and waters in and around the township of Broome in Western Australia.

The first claim, referred to as the 'Yawuru claim', was made by 12 applicants on behalf of the Yawuru community. The claim area includes three sub-areas: the Yawuru, the Walman Yawuru, and the Minyirr clans' claim areas.

The second competing claim, the 'Walman Yawuru claim' was made by three applicants on behalf of a subset of the Yawuru community – being the Walman Yawuru clan. The Walman Yawuru applicants were opposed to the assertion of communal native title, arguing that native title in the area is clan-based rather than communal.

Both of the claims were opposed by the State of Western Australia, the Commonwealth, and the Western Australian Fishing Industry Council (WAFIC).

The Western Australian and federal governments argued 'that neither claim group could demonstrate that it possessed rights and interests in any land or waters in the Yawuru claim area under a normative system of traditional laws and customs which has had a continuous existence and vitality since sovereignty'.[38] They disputed several aspects of the Yawuru claimants' case, and argued that in the northern portion of the claim area native title right and interests were traditionally held by a separate society, the Djugan people.

On 28 April 2006, Justice Merkel made a native title determination in favour of the Yawuru community.[39] In that decision, Justice Merkel found that the traditional laws and customs of the Walman Yawuru claimants were the same as those of the Yawuru community. Consequently, the Walman Yawuru claim was dismissed, with Justice Merkel finding that they did not have separate native title rights and interests, but shared in the communal native title as a sub-group of the Yawuru community.

All parties appealed different aspects of the decision, and the court heard 16 consolidated issues together. These were divided into issues which went to the heart of the findings of native title rights and interests and those which went to extinguishment.

38 *The State of Western Australia v Sebastian* [2008] FCAFC 65, 5 (Branson, North and Mansfield JJ) citing *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422. Sovereignty was asserted in 1829.

39 *Rubibi Community v State of Western Australia (No7)* [2006] FCA 459.

The Full Federal Court dismissed the aspects of the appeal relating to the content of the native title rights and interests. They clarified who held native title, finding that it is held by the Yawuru claimants as communal native title rights and interests in the whole of the claim area. They dismissed the appeal of the Walman Yawuru, upholding Justice Merkel's finding that they are a sub-group of the Yawuru community, and do not have any separate native title rights or interests in their capacity as clan members.

With regard to the aspects of the appeal dealing with extinguishment, the Full Federal Court upheld some findings but agreed that Justice Merkel had erred in respect of others. The net result was that native title had not been extinguished in some areas Justice Merkel considered it had been.

3.2 Content of native title rights and interests

The State appealed (unsuccessfully) on several issues that have featured many times before in Federal Court litigation. I offer three examples to illustrate the point I wish to make.

First, the State argued that Justice Merkel was wrong to find that a Yawuru individual's entitlements as a native title holder could derive from the mother's side and not just the father's side (that is, under a cognatic system rather than a patrilineal one). The objection is that cognatic systems in the contemporary era show a lack of continuity with the pre-sovereignty era and that is sufficient to defeat a native title claim. It is an objection that has been made in trials and appeals repeatedly by respondents in recent years,[40] and is mostly unsuccessful, as it was here in the *Rubibi* case.

Secondly, the State objected in various ways to the characterisation of Yawuru entitlements as a "communal" native title. As with other cases where similar objections have been made (also unsuccessfully),[41] this was allied to arguments that highlighted allegedly distinct sub-group identities. The purpose of such arguments is to defeat the assertion of a communal native title on behalf of a regional grouping.

Thirdly, respondents have attempted several times to argue that declaration of a township is sufficient to defeat the beneficial operation of section 47B. This section allows past extinguishment to be disregarded, but its effect is nullified where the area is covered by a proclamation that "the area is to be used for public purposes or for a particular purpose". The argument that declaring a township precludes reliance on section 47B has now been rejected by a Full Court on at least three occasions.[42]

This repeated litigation of issues designed to thwart native title recognition, despite several rebuffs at trial and appellate level, illustrates the litigious mindset that has dominated native title in Australia.

I hope that the new flexible and less technical approach to native title that each government has committed to will mean that we see a lot fewer of these arduous and technical appeal grounds raised at every point of the determination.

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40 See also, for example, *Bodney v Bennell* [2008] FCAFC 63, 98-122; *Griffiths v Minister for Lands, Planning and Environment* [2008] HCA 20, 129-146; *De Rose v State of South Australia (No 1)* [2003] FCAFC 286, 260-268; cf *Jango v Northern Territory* (2007) 159 FCR 531 and *Jango v Northern Territory* (2006) 152 FCR 150 (trial).

41 See, for example *Northern Territory v Alyawarr, Kaytetye, Warumungu, Wakaya native title claim group* [2005] FCAFC 135, 71, 79-85; *Bodney v Bennell* [2008] FCAFC 63, 132-159.

42 See for example, *The State of Western Australia v Sebastian* [2008] FCAFC 65, 226; *Northern Territory v Alyawarr, Kaytetye, Warumungu, Wakaya native title claim group* [2005] FCAFC 135, 187; *Griffiths v Minister for Lands, Planning and Environment* [2008] HCA 20; and see also *Moses v State of Western Australia* [2007] FCAFC 79, 170.

(a) Descent system

Justice Merkel had found that while the descent system of the Yawuru community was traditionally patrilineal, their traditional law and custom had 'contingency provisions', which allowed others to lawfully become members of the group. He accepted that, by an evolutionary process, classical patrilineal rules for landholding had melded with these contingency provisions into a cognatic or ambilineal system.[43]

The Western Australian Government argued that the primary judge erred in this finding. They argued that in fact the traditional law at the time of sovereignty was always patrilineal descent and therefore the current system is proof of a lack on continuity of traditional law and custom.

The Full Federal Court examined the evidence and dismissed this ground. In doing so they upheld Justice Merkel's finding that:

> …whatever the precise structure and traditional definition of the Yawuru people at sovereignty might have been, a change from a community similar to a patrifileal clan-based community at or before sovereignty to a cognatic or ambilineal based community is a change of a kind that was contemplated under the 'contingency provisions' of those traditional laws and customs.[44]

(b) Succession

The Full Federal Court upheld Justice Merkel's primary finding that the Djugan shared a common normative system with the Yawuru at sovereignty and that the Djugan, heavily impacted by colonisation, had been absorbed into the wider Yawuru community. The State also appealed against the primary judge's alternative finding on the issue. This was that if, on appeal, the Djugan were shown not to be a sub-group of the Yawuru community at sovereignty, then any rights and interests that the Djugan may have had in the northern area of the claim area had passed to the Yawuru community in accordance with traditional rules of succession.

Justice Merkel had considered that the evidence from the Yawuru elders showed that principles of succession formed part of the traditions practiced in the Yawuru claim area.

However, the State argued that, while the judgment in *Yorta Yorta* recognised rules for the transmission of native title rights, the comments were directed to the intergenerational transmission of rights and interests within the claim group – rather than between claim groups. The State argued that 'succession is not an acceptable basis for a finding of native title in circumstances where the purported succession of rights involves groups having different normative systems at sovereignty',[45] and disagreed that the evidence in the *Rubibi* trial supported succession between tribes.

The Full Federal Court found that while the evidence on transmission rules was slight, it was sufficient to sustain Justice Merkel's conclusion. The Full Court noted that there were only two practical possibilities: that the Yawuru have 'imperialistically' taken over the Djugan areas or that, in accordance with the common traditional laws and customs of the two clans, the Yawuru have succeeded to the northern part of the Yawuru claim area over time, as the Djugan have reduced in numbers.[46] The Full Court was prepared to accept that the evidence existed to support the latter conclusion.

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43 *The State of Western Australia v Sebastian* [2008] FCAFC 65, 108 (Branson, North and Mansfield JJ).

44 *Rubibi Community v Western Australia (No 5)* [2005] FCA 1025, 363.

45 *The State of Western Australia v Sebastian* [2008] FCAFC 65, 96 (Branson, North and Mansfield JJ).

46 *The State of Western Australia v Sebastian* [2008] FCAFC 65, 104 (Branson, North and Mansfield JJ).

3.3 Extinguishment of native title rights and interests

Various grounds of appeal also dealt with Justice Merkel's findings about where native title has been extinguished and how that had occurred.

Both applicants and respondents argued, for instance, that Justice Merkel had incorrectly applied s 47B of the NTA. This section says that past extinguishment can be ignored if, at the time of claim, the land is essentially unallocated and unused except that it is 'occupied' by the native title holders.[47] Its net effect is that recognition of 'exclusive possession' native title becomes a much stronger possibility in the relevant area.

In relation to the extinguishment issues before the Full Federal Court, a number of appeal grounds were dismissed, but some were successful. The Full Federal Court overturned some of Justice Merkel's findings:

- The Yawuru people had proven that they had occupied some small areas at Kennedy Hill, in and around Broome, at the time the native title application was lodged (enabling past extinguishment to be disregarded).
- Reserve 631 was not validly created because the purpose for its creation was too broad and it didn't comply with the necessary regulatory requirements at the time it was created.
- The trial judge wrongly assumed that the Broome cemetery reserve had been vested in trustees, but the Western Australian government had not discharged the evidentiary onus to show this had actually occurred.

These findings mean that native title may exist in some areas it was previously thought not to, and that some native title rights may now be exclusive in areas where it was previously thought to be non-exclusive.

The Western Australian government has sought leave to appeal to the High Court in relation to the establishment of Reserve 631 for a public purpose and the alleged vesting of the cemetery reserve in appointed trustees.[48]

3.4 The future of the Yawuru peoples' claim

In his first instance decision, Justice Merkel stated:

> The determination of native title that is now able to be made brings to an end an epic struggle by the Yawuru people to achieve recognition under Australian law of their traditional connection to, and ownership of, their country.[49]

However this is unfortunately not the end, with the Western Australian government effectively refusing to recognise the breadth and existence of the Yawuru peoples' rights. After the lengthy Full Federal Court appeal, the WA government is seeking leave to appeal to the High Court. In the meantime, the parties continue to negotiate over native title, heritage and compensation.

47 See section 47B of the *Native Title Act 1993* (Cth).

48 G Hiley, M McKenna and G Denisenko (eds), (2008) 8(10) *Native Title News* p 168.

49 *Rubibi Community v State of Western Australia (No 7)* [2006] FCA 459, 159 (Merkel J).

However the claim, which began over a decade ago, has proceeded through various attempts at mediation, the majority of which have failed and so the matter continues to come before the courts.[50] The parties have many significant issues to grapple with, including finalising extinguishment issues and considering liability to pay compensation or whether other remedies are available.[51]

4. Griffiths v Minister for Lands, Planning and Environment (Northern Territory)

On 15 May 2008, the High Court handed down the Griffiths[52] decision. The case was an appeal by Alan Griffiths and William Gulwin on behalf of the Ngaliwurru and Nungali peoples, the Traditional Owners and native title holders for land around the town of Timber Creek in the Northern Territory (NT). The Traditional Owners were challenging the Northern Territory government's power to compulsorily acquire their native title rights and interests under the *Lands Acquisition Act 1989* (NT) (the LAA). The land was then going to be granted to private third parties for their commercial use.

The High Court found that the legislative provision to acquire land 'for any purpose whatsoever',[53] including native title, provided the power for the Minister to acquire the land. In exercising this power, the Minister legitimately extinguished the native title rights and interests in the land under the Native Title Act. In effect, the legal system had finally recognised the Ngaliwurru and Nungali peoples' native title rights and interests, only to confirm that at any time they can be taken away once again for the benefit of another person who wanted to use their land.

The government of the Northern Territory changed during the case. The new government changed the existing policy and decided not to proceed with the acquisition. The case demonstrates the tenuous protection of the relevant native title rights and interests under the law. Only the policy position of an incumbent government saves them. It also raises a more significant question about the extension of compulsory acquisition powers for the benefit of private interests and the appropriate application of these powers to Indigenous land rights.

4.1 The case

The land around Timber Creek in the Northern Territory was vacant crown land that had previously been subject to pastoral leases which had lapsed.

In 1997, a private individual applied under the *Crown Lands Act 1989* (NT) (the CLA) to purchase one of the Lots.[54] Over the next few years, the Northern Territory Minister for Lands, Planning and the Environment (the Minister) considered the individual's and subsequent other private developers' plans for the surrounding Lots.

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50 For a history of the claims see *Rubibi Community v State of Western Australia (No 7)* [2006] FCA 459, 159-165.

51 J Turfrey, Yawuru Native Title Holders (RNTBC), *Telephone interview with the Native Title Unit of the Australian Human Rights Commission for the Native Title Report 2008*, 24 November 2008.

52 *Griffiths v Minister for Lands, Planning and Environment* [2008] HCA 20.

53 Section 43(1) of the *Lands Acquisition Act 1989* (NT).

54 Section 9 of the *Crown Lands Act* (NT) empowers the Minister, by instrument in the appropriate form, to grant an estate in fee simple in or lease of vacant Crown land.

The Minister issued notices proposing to acquire all the interests in the land, including the native title rights and interests.[55] The government then intended to grant the land as Crown leases to the private entities which had submitted development plans. The notices were unsuccessfully appealed by the Traditional Owners to the Northern Territory Lands and Mining Tribunal. They then proceeded to the Supreme Court, which found in favour of the Traditional Owners. The Northern Territory Government successfully appealed the Supreme Court decision to the Court of Appeal, and the Traditional Owners sought leave to appeal to the High Court.

During this time, the Traditional Owners lodged native title claims over the area. Their native title was determined in August 2006 by the Federal Court who recognised that 'the Ngaliwurru and Nungali peoples had maintained their long-standing connection with the Timber Creek district in spite of early violent contact with European settlers…'[56] The Full Federal Court later varied the native title determination in the Traditional Owners' favour, holding that they hold their native title rights and interests exclusively.[57]

The Traditional Owners, who held native title interests that were now formally recognised, appealed to the High Court, challenging the Northern Territory Government's compulsory acquisition on two alternative grounds:

1. That the compulsory acquisition of native title rights and interests *only* is not a valid extinguishment of native title under the Native Title Act. Section 24MD(2) of the NTA provides that extinguishment of native title by compulsory acquisition is only valid when all interests in the land are compulsorily acquired. They argued that the word 'all' requires that other, non-native title rights and interests must also be acquired; in this case there were no such interests, consequently the extinguishment was invalid.[58]
2. That the LAA did not give the Minister the power to acquire land from one person to enable it to be sold or leased for the private use of another.[59]

However, Justice Kirby put the ultimate question before the court as being:

> … the particular problem that is now before this Court, namely a suggested deprivation and extinguishment of hard-won native title interests of [I]ndigenous Australians for the immediate private gain of commercial interests of other private interests, without needing the consent of the indigenous owners and their satisfaction with the price to be paid for the peculiar value to them of their native title interests.[60]

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55 In order for the Lots to be 'vacant', and therefore able to be alienated by the Territory through sale or lease for private use (under the CLA), there must be no other interests held in the land. Consequently, the Minister must acquire all the interests in the land under the *Lands Acquisition Act* (NT) (the LAA). Section 4 of the LAA defines interests in land to include native title rights and interests. Section 43(1) of the LAA empowers the Minister to compulsorily acquire land 'for any purpose whatsoever' by publishing a notice in the Gazette declaring the land to be acquired (after certain pre-conditions are met). Section 5A(1) of the LAA provides that acquiring native title rights and interests constitutes an 'act' under the *Native Title Act 1993* for the purposes of s 24MD(6A) and (6B) of that Act. This triggers the same procedural rights as those that holders of 'ordinary title in the land' would have had.

56 *Griffiths v Minister for Lands, Planning and Environment* [2008] HCA 20, 60-61 (Kirby J), citing Griffiths v NT (2007) 243 ALR 72.

57 *Griffiths v Northern Territory* (2007) 243 ALR 72.

58 *Griffiths v Minister for Lands, Planning and Environment* [2008] HCA 20, 20 (Gummow, Hayne and Heydon JJ).

59 *Griffiths v Minister for Lands, Planning and Environment* [2008] HCA 20, 19 (Gummow, Hayne and Heydon JJ).

60 *Griffiths v Minister for Lands, Planning and Environment* [2008] HCA 20, 117 (Kirby J).

In May 2008, the High Court handed down its decision allowing for the acquisition and extinguishment of the native title rights and interests held by the Ngaliwurru and Nungali peoples.

4.2 Ground 1: Acquiring native title only, where no other interests in the land exist

The High Court unanimously held that section 24MD of the Native Title Act allows for compulsory acquisition that would result in the extinguishment of native title when no other interests in the land exist, as well as when native title rights co-exist with other interests:[61]

> All of the judges agreed that 'all' should be understood as 'any and all'. Any other reading, they suggest, would have an arbitrary result. Gleeson CJ pointed out that the key purpose of the provision of the NTA is to avoid racial discrimination...[62]

The Court indicated that it was artificial to interpret the power of acquisition as confined only to situations where native title co-existed with other interests in the acquired land.

4.3 Ground 2: Acquiring land for the benefit of a third party

When considering the extent of the powers given to the Minister under the *Lands Acquisition Act*, the court was split five judges to two. The majority (Justices Gummow, Hayne, Heydon, with Chief Justice Gleeson and Justice Crennan agreeing) held that the LAA allowed for the compulsory acquisition of land, including native title rights and interests in that land, for any purpose whatsoever. Justices Kirby and Kiefel gave separate dissenting judgements.

The majority examined section 43 of the LAA, which empowers the Minister to compulsorily acquire land 'for any purpose whatsoever'. They agreed that, whether or not there were any ultimate limits on the broad phrasing of section 43, the power at least includes acquisition 'for the purpose of enabling the exercise of powers conferred on the executive by another statute of the territory'. In this case, section 9 of the *Crown Lands Act* provides that the Minister may grant estates in fee simple or lease Crown Land.

The case raised 'a central question of the power of the Crown to acquire the private rights of one citizen (or group of citizens) for the immediate benefit of another private citizen'.[63] However, the majority considered that the NT legislation rendered previous cases which establish 'a clear line of authority against local governments interfering with the private title of A for the private benefit of B'[64] inapplicable.

However, the two dissenting judges considered that the LAA did not grant the Minister the power to acquire land for the private benefit of a third party.

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61 *Griffiths v Minister for Lands, Planning and Environment* [2008] HCA 20, 48-49 (Gummow, Hayne and Heydon JJ), 7 (Gleeson CJ), 76 (Kirby J) and 156 (Kiefel J).

62 L Strelein, AIATSIS, 'Compulsory Acquisition powers: Griffiths v Minister for Lands Planning and Environment [2008] HCA (15 May 2008)', *Native Title Research Unit Resource Page*. At: http://ntru.aiatsis.gov.au/research/griffiths/compulsory_acquisition_griffiths.pdf, p 1 (viewed July 2008).

63 L Strelein, AIATSIS, 'Compulsory Acquisition powers: Griffiths v Minister for Lands Planning and Environment [2008] HCA (15 May 2008)', *Native Title Research Unit Resource Page*. At: http://ntru.aiatsis.gov.au/research/griffiths/compulsory_acquisition_griffiths.pdf, p 1 (viewed July 2008).

64 L Strelein, AIATSIS, 'Compulsory Acquisition powers: Griffiths v Minister for Lands Planning and Environment [2008] HCA (15 May 2008)', *Native Title Research Unit Resource Page*. At: http://ntru.aiatsis.gov.au/research/griffiths/compulsory_acquisition_griffiths.pdf, p 1 (viewed July 2008).

Justice Kiefel considered there must be read in to section 43(1) of the LAA a requirement that the acquisition be for a public purpose. She considered this on the basis of previous case law and the wording of the LAA. Specifically, she considered that section 43 requires that the acquisition be for a purpose which is connected with the Minister's act of acquiring the land. That is, that there should be a government purpose. In this case she found that:

> It is abundantly clear that in the present case no use by the Minister or the Territory is proposed…the exercise of the power stands as no more than a clearing of native title interests in order to effect leases and grants of the land for private purposes. [65]

Justice Kirby's lengthy dissent took a holistic approach, considering a number of key principles, including the importance of native title and its position in the Australian legal system. He found that in order the government to acquire private interests for the benefit of a private third party to be valid under the LAA, it must be enabled by a specific and unambiguous provision of the Act[66] and that, unless such an unambiguous provision exists, 'the well-established principles of the common law that are here invoked…on behalf of the Aboriginal native title holders', should be upheld.[67]

4.4 Justice Kirby's dissenting judgment

Justice Kirby's dissent should be examined carefully as it raises a number of significant issues that the government and the broader public should consider. In his dissent, Justice Kirby considered the interpretation of the LAA through examining legal authority, legal principles and legal policy which 'demand respect for the legal rights to property of private individuals in Australia generally, and in particular the legal rights of Aboriginal Australians…'[68] He focused on the general principle of common law which requires that legislation depriving individuals of established legal rights must be clear and unambiguous:[69]

> Insisting upon this interpretation of the LAA is not to be regarded as denying the attainment of the constitutionally valid purposes of legislation, enacted in concededly broad terms. Instead, it is a course adopted out of respect for:
>
> – the legislature's normal observance of great care in the deprivation of the basic rights of individuals, whoever they may be
> – the special care to be attributed and expected (in light of history) to deprivation by a legislature of the native title rights of Aboriginal and other indigenous communities
> – the serious offence which the opposite construction of the LAA does to common or hitherto universal features of legislative compulsory acquisition in our legal tradition.[70]

He went on to consider a number of other legal principles, including the exceptional nature of any compulsory acquisition:

65 *Griffiths v Minister for Lands, Planning and Environment* [2008] HCA 20, 181 (Kiefel J).
66 *Griffiths v Minister for Lands, Planning and Environment* [2008] HCA 20, 57 (Kirby J).
67 *Griffiths v Minister for Lands, Planning and Environment* [2008] HCA 20, 58 (Kirby J).
68 *Griffiths v Minister for Lands, Planning and Environment* [2008] HCA 20, 57 (Kirby J).
69 *Griffiths v Minister for Lands, Planning and Environment* [2008] HCA 20, 109 (Kirby J).
70 *Griffiths v Minister for Lands, Planning and Environment* [2008] HCA 20, 151 (Kirby J).

> From the earliest days of compulsory acquisition legislation in England and Australia, statutory provisions affording powers to governments or their agencies to acquire the property interests of individuals have been interpreted with considerable vigilance to protect those affected against abuse.[71]

He considered that this principle has greater significance when the acquisition is being used to benefit or advantage another person's private interests. He referred to United States Supreme Court decisions which interpret the Constitution as precluding the legislature from having the power to take property off one person for the sole purpose of transferring it to another. Justice Kirby also referred to British legal commentary that states:

> [T]he assertion of a private form of eminent domain – the 'one-to-one transfer of property' for private rather than public benefit – remains anathema in most legal traditions. This is so even though the taking is coupled with an offer of full monetary compensation. It seems wrong that the coercive power of the state should be used to force an unconsented transfer from A to B where the operation of the open market has failed to generate the required bargain by means of normal arm's length dealing.[72]

Justice Kirby did not think that these common law presumptions had been overridden by the general language of the LAA that allowed for acquisition 'for any purpose whatsoever':

> Although a court's usual obligation is to give effect to the purpose of the legislature derived from the statutory text, when important values appear to have been overlooked, a court is entitled to conclude that apparently broad language does not, in law, achieve departure from those values, without an explicit indication to this effect in the text.[73]

Particularly relevant for this Report are Justice Kirby's comments on the application of these principles to native title. Justice Kirby recognised that the general principles on the exceptionality of acquisition were even more significant in this case because of the nature of the rights being acquired, that is, because they were acquiring native title.

He considered that native title, which is not of the same origin or character as other property interests is 'more than an interest of an ordinary kind':[74]

> Thus a fundamental distinction between the acquisition of ordinary interests in land and the existence of interests giving rise to native title in Australia is the special spiritual relationship that exists between the native title owners in the land...[75]

He referred to the various High Court cases in Australia that had recognised this special connection and relationship with the land.[76] Consequently, approaching Indigenous interests in the land in the same way as approaching non-Indigenous interests in land would be:

> to miss the essential step reflected in the belated legal innovation expressed in *Mabo*. That new legal principle accepted that the common law of Australia would give recognition to native title without altering that title or imposing on it all of the characteristics of other interests in land derived from the different … law of land tenures inherited by Australian law from English law upon settlement.[77]

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71 *Griffiths v Minister for Lands, Planning and Environment* [2008] HCA 20, 115 (Kirby J).

72 *Griffiths v Minister for Lands, Planning and Environment* [2008] HCA 20, 128 (Kirby J), citing Professor K Gray, 'There's No Place Like Home!', (2007) 11(1) *Journal of South Pacific Law* 73, pp 74-75.

73 *Griffiths v Minister for Lands, Planning and Environment* [2008] HCA 20, 137 (Kirby J).

74 *Griffiths v Minister for Lands, Planning and Environment* [2008] HCA 20, 90-93 (Kirby J).

75 *Griffiths v Minister for Lands, Planning and Environment* [2008] HCA 20, 94 (Kirby J).

76 *Griffiths v Minister for Lands, Planning and Environment* [2008] HCA 20, 95-99 (Kirby J).

77 *Griffiths v Minister for Lands, Planning and Environment* [2008] HCA 20, 102 (Kirby J).

To pretend that native title in the Northern Territory 'is no more than another interest in land … would be to ignore both legal and social reality… Importantly, it would needlessly involve a failure of our law to live up to the promise of *Mabo*':[78]

> Nevertheless, against the background of the history of previous non-recognition; the subsequent respect accorded to native title by this Court and by the Federal Parliament; and the incontestable importance of native title to the cultural and economic advancement of indigenous people in Australia, it is not unreasonable or legally unusual to expect that any deprivations and extinguishment of native title, so hard won, will not occur under legislation of any Australian legislature in the absence of provisions that are unambiguously clear and such as to demonstrate plainly that the law in question has been enacted by the lawmakers who have turned their particular attention to the type of deprivation and extinguishment that is propounded. In *Mabo* Brennan J cited authorities from Canada, the United States and New Zealand that support the contention that 'native title is not extinguished unless there be a clear and plain intention to do so'.[79]

In conclusion, he found that if the legislature wants to modify or abolish native title, it must expressly address that outcome in the legislation.[80] 'In the absence of such legislative particularity, any impugned law will be interpreted protectively and construed in favour of Indigenous land rights':[81]

> Australian legislatures, on this subject, must be held accountable to the pages of history. If they intend deprivation and extinguishment of native title to occur, reversing unconsensually despite the long struggle for the legal recognition of such rights, then they must provide for such an outcome in very specific and clear legislation that unmistakably has that effect.[82]

4.5 The outcome of the case – disposable native title

Justice Kirby acknowledged the disappointing fact that had the private individual not made the application to purchase the land (triggering the first and then subsequent acquisition notices), then the 'inference is inescapable that the Ngaliwurru and Nungali peoples, living in and near Timber Creek, would have continued to use the land in harmony with the activities of the [private individual's] interests…':[83]

> …Whether it was actually necessary, in order to procure the economic benefits, to acquire the interests of the Ngaliwurru and Nungali peoples by compulsion rather than by free negotiation in the open market, depriving them of rights of entrepreneurship that would otherwise belong to them by reason of their native title, is a matter of speculation.[84]

Yet this is the path that the Northern Territory government (at the time) chose to take; easily disposing with Indigenous land rights without agreement or discussion, as it suited them.

In the end however, after years of litigation and this High Court decision, the Northern Territory government did not acquire the native title. This is because in 2001 the Northern Territory voted in a new government, with a different policy towards Indigenous land and native title. It is of course positive that the government changed its tune; however, the protection of native title and the respect for Indigenous land

78 *Griffiths v Minister for Lands, Planning and Environment* [2008] HCA 20, 103 (Kirby J).
79 *Griffiths v Minister for Lands, Planning and Environment* [2008] HCA 20, 105 (Kirby J).
80 *Griffiths v Minister for Lands, Planning and Environment* [2008] HCA 20, 106 (Kirby J).
81 *Griffiths v Minister for Lands, Planning and Environment* [2008] HCA 20, 106 (Kirby J).
82 *Griffiths v Minister for Lands, Planning and Environment* [2008] HCA 20, 107 (Kirby J).
83 *Griffiths v Minister for Lands, Planning and Environment* [2008] HCA 20, 66 (Kirby J).
84 *Griffiths v Minister for Lands, Planning and Environment* [2008] HCA 20, 147 (Kirby J).

rights should not be left to the whim of the Government of the day, but should be protected by law.

This issue is not unique to the Northern Territory but applies across the country.

How native title is and can be acquired by governments differs in each state and territory. Each jurisdiction has separate laws providing for the compulsory acquisition of native title rights and interests and if relevant, the land granted to Aboriginals or Torres Strait Islanders under land rights regimes. These laws provide different procedural requirements for acquiring land, including when and how to give notice, how and when agreements can try and be reached and appeal procedures. They also differ in the reasons for which native title, or any other property rights, can be acquired.

In his dissenting judgment in Griffiths, Justice Kirby outlined the *sui generis* nature of native title, and the history of Indigenous land rights in Australia as reasons why the acquisition of native title should be treated differently to other interests in land. This approach is supported by the international human rights framework. I recommend that governments pursue a human rights based response which is consistent across state, territory and federal legislation.

(a) A human rights response

(i) The international human rights framework

From as early as 1995 Aboriginal and Torres Strait Islander Social Justice Commissioners have raised the human rights implications of a failure to negotiate or gain the consent of Traditional Owners before their native title rights are taken away once again.[85]

As the then Social Justice Commissioner, Mick Dodson, said in 1995, international human rights standards require negotiation and consent before interference with vested rights can legitimately occur. Interference with property without even negotiating with the owner would interfere with property in a manner contrary to Article 17 of the *Universal Declaration of Human Rights*.[86] Consistent with the *International Convention on the Elimination of All Forms of Racial Discrimination* (the CERD),[87] Indigenous peoples are entitled to enjoy our property rights free from discrimination.[88]

In general comment 23 to the Committee on the Elimination of All Forms of Racial Discrimination specifically provides for this situation, calling on State parties to:

> … recognise and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources and, where they have been deprived of their lands and territories traditionally owned or otherwise inhabited or used without their free and informed consent, to take steps to return these lands and territories…[89]

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85 See M Dodson, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report July 1994-June 1995*, Australian Human Rights Commission (1995), p 142.

86 Article 17 of the Universal Declaration of Human Rights provides the following: (1) everyone has the right to own property alone as well as in association with others, (2) no one shall be arbitrarily deprived of his property.

87 Australia ratified the *Convention on the Elimination of All Forms of Racial Discrimination* on 30 September 1975.

88 See M Dodson, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report July 1994-June 1995*, Australian Human Rights Commission (1995), pp 142-143.

89 Committee on the Elimination of Racial Discrimination, *General Comment No. 23: Indigenous peoples*, UN Doc A/52/18, annex V (1997). At: http://www.unhchr.ch/tbs/doc.nsf/0/73984290dfea022b802565160056fe1c?Opendocument (viewed July 2008).

The Committee also recommends that states:

> Ensure that … no decisions directly relating to [Indigenous peoples'] rights and interests are taken without their informed consent.[90]

The specific rights of Indigenous peoples with regards to their land have been further entrenched in the Declaration on the Rights of Indigenous Peoples. Article 28 requires that Indigenous peoples give their free, prior and informed consent before the approval of any project affecting our lands.

In the *Native Title Report 1997*, the compulsory acquisition of native title for the benefit of third parties was discussed in light of the Wik 10 point plan.[91] The original NTA passed by Parliament provided for negotiation between the government, the registered native title party and other stakeholders in relation to any compulsory acquisition. Part of the Wik 10 point plan amendments, was to remove the right to negotiate for the acquisition of native title for the benefit of third party private interests when the land involved is inside a town or city.[92] The amended Act reduced the right to negotiate to a much lesser procedural right to object.[93] In the *Native Title Report 1997*, the Social Justice Commissioner Mick Dodson raised concerns that state or territory legislation (none of which provided for acquisition for the benefit of a third party interest at this stage) would be amended to allow acquisitions for private purposes. Even though any such amendments would have to apply to all land in the jurisdiction to avoid breaching the *Racial Discrimination Act 1975*, Dodson considered that introducing state or territory laws with such powers in response to the Wik amendments, and therefore primarily for the purpose of acquiring native title, would in fact be discriminatory.

In the same year, the *Lands Acquisition Act* was amended. Although the compulsory acquisition power was already broadly worded, stating that 'the Minister may, under this Act, acquire land', it was amended in 1998 to include the words 'for any purpose whatsoever'. After this point, the Northern Territory government has issued 82 compulsory acquisition notices, and on every occasion the land was claimed or claimable by Aboriginal people.[94] Dozens of these have been town lands, and were therefore acquired without a right to negotiate the acquisition.[95]

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90 Committee on the Elimination of Racial Discrimination, *General Comment No. 23: Indigenous peoples*, UN Doc A/52/18, annex V (1997). At: http://www.unhchr.ch/tbs/doc.nsf/0/73984290dfea022b802565160056fe1c?Opendocument (viewed July 2008).

91 In response to the *Wik* case, the Australian Government amended the *Native Title Act*. The amendments, which are known as the Wik 10 point plan, reduced the right to negotiate so that it only applies to mining activities and some compulsory acquisitions; validated leases granted by governments that were thought to be invalid because of native title, and confirmed the extinguishment of native title on a range of leases and other land tenures, such as freehold land; upgraded pastoral leaseholds by increasing the activities that could take place under the lease without having to negotiate with native title holders; made it more difficult to register native title applications and introduced 'Indigenous Land Use Agreements' (ILUAs) which provide native title groups with an opportunity to negotiate voluntary but binding agreements with others, including pastoralists and mining companies, about their lands and waters. The 1998 amendments to the Native Title Act were referred to the United Nations Committee for the Elimination of Racial Discrimination (CERD) and found to be in breach of Australia's international human rights obligations. CERD has since twice reaffirmed its findings and continues to criticise the Australian Government for their failure to address this breach.

92 See M Dodson, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report July 1996-June 1997*, Australian Human Rights Commission (1997), pp 96-100.

93 S Brennan, 'Compulsory acquisition of native title land for private use by third parties' (2008) 19 *Public Law Review* 179.

94 S Brennan, 'Government expropriation for private profit hits Aboriginal land hardest' 7(6) *Indigenous Law Bulletin* 2.

95 S Brennan, 'Compulsory acquisition of native title land for private use by third parties' (2008) 19 *Public Law Review* 179, p 184.

(ii) Consent as a traditional law and custom

The Native Title Act attempts to translate Aboriginal and Torres Strait Islanders' traditional laws and customs into a form of western legal property right. In doing so, it unwittingly destroys many of the *sui generis* characteristics of the very laws and customs it was apparently designed to recognise and protect. One of these characteristics is the notion of controlling access to and activities on traditional estates, which is a consistent feature of Indigenous law. It is 'what a Pitjantjatjara man once defined as "the first law of Aboriginal morality – always ask"'.[96]

The cultural underpinning of a right to negotiate was presented in the evidence in the Croker Island case.[97] In that case Mary Yarmirr stated that the members of a Yuwurrumu (an estate group) had the right to make decisions about all aspects of the estate including a right to be asked and to apply conditions to entry:

> In respect of my law and my culture, as I have respect for another culture, I'd ask them to come towards us and ask permission.
>
> Q: All right. And if they ask permission, what rights would you have by your law in the way that you responded to their request?
>
> A: As a yuwurrumu holder I would then sit down and negotiate and come to a settlement.
>
> Q: Would you be able to say by your law 'No' to them?
>
> A: Yes I have done that on numerous occasions.
>
> Q: In respect of what?
>
> A: In respect to oil exploration at Summerville Bay.
>
> Q: So there have been requests for oil exploration at Summerville Bay?
>
> A: That is correct.
>
> Q: And what has happened on these occasions?
>
> A: On those occasions, because they identify where they like to explore and it was on some of our sacred areas, we said to them due to respecting our old traditional laws and our culture we'd ask you to reconsider, maybe looking at another to avoid those sacred areas, which they did.
>
> Q: All right. If the area was a suitable area as far as your yuwurrumu was concerned would you have the right to say not 'no' but 'yes'?
>
> A: Yes.
>
> Q: And you have spoken [of] negotiation. Would you have the right to say yes but subject to conditions?
>
> A: That's correct.

There is no doubt in Mary Yarmirr's mind that according to her yuwurrumu there was a right in her people to control entry onto their seas and to apply conditions to that entry.[98]

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96 M Dodson, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report July 1995-June 1996*, Australian Human Rights Commission (1996), p 18.

97 *Yarmirr v Northern Territory* (1998) 156 ALR 370.

98 Z Antonios, Acting Aboriginal and Torres Strait Islander Social Justice Commissioner, Native Title Report 1998, Australian Human Rights Commission (1999), p 101 citing *Yarmirr v Northern Territory* (1998) 156 ALR 370 (the Croker Island case). At: http://www.humanrights.gov.au/pdf/social_justice/native_title_report_98.pdf.

This right was even recognised in the Griffiths native title decision. In the native title determination for the Ngaliwurru and Nungali peoples,[99] the Full Federal Court found that the Traditional Owners held their native title rights and interests exclusively because of the evidence presented about their control of the land:

> The indigenous witnesses designated as 'yakpalimululu', someone who would deny others access to certain foraging areas…If a white person wished to go on the land that person would be expected to ask permission first. The purpose of the request would be to enable important sites to be identified presumably so that they might be protected.[100]

When the Native Title Act was first passed by Parliament, there was some protection from compulsory acquisition through a right to negotiate. This protection was considered by many to have had its origins in traditional law and custom. It has been said by previous Social Justice Commissioners that the right to negotiate provisions (as they were originally enacted) were not a 'windfall accretion' or gift of government, but an intrinsic component of native title to the land.[101]

The control of entry to land is not an 'add on'; it is fundamental to the protection and maintenance of country:

> Ownership of country and knowledge is manifested through rights to be asked. While Aboriginal people rarely say 'no', provided that the request is in keeping with what is appropriate for a given place or use, they insist upon the right to be asked, and hence upon their right to say either 'yes' or 'no'.[102]

As was pointed out in the *Native Title Report 1996*, Justice Woodward recognised this in his report, which led to the enactment of the Northern Territory's land rights regime, when he said that to deny Aboriginal owners the power to control access and activities on their land was 'to deny the reality of their land rights under traditional law'.[103]

The fact that the right to control access is an intrinsic right of native title has been forgotten as the procedural rights attached to native title have been amended or removed. Now native title rights are considered to be in the most precarious position of all Australian property rights.

(iii) Protection of native title rights

Native title is not simply another property right, but is *sui generis* in character, and should be protected in unique ways to recognise this. It is not good enough for governments to disregard native title, compulsorily acquiring it and extinguishing it as it sees fit, sometimes using the poor justification that it could possibly do the same to other property interests in land:

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99 See box below on the Griffiths native title determination.

100 *Griffiths v Northern Territory* (2007) 243 ALR 72, 104 (French, Branson and Sundberg JJ).

101 M Dodson, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report July 1995-June 1996,* Australian Human Rights Commission (1996), p 19.

102 M Dodson, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report July 1995-June 1996*, Australian Human Rights Commission (1996), p 22.

103 M Dodson, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report July 1995-June 1996*, Australian Human Rights Commission (1996), p 22. The Northern Territory land rights regime is enshrined in the *Aboriginal Land Right Act (Northern Territory) 1974*.

> It is misconceived to look to the title-rights of another genus of title and to use those rights as a benchmark of equal treatment where detriment results. This approach ignores the substantive difference in the source and character of a sui generis title. It fails to provide substantive equality of protection to native title.[104]

Similarly, it is not good enough for governments to simply have a policy of acquiring native title rights as a last resort.[105] Native title rights and interests and other Indigenous land rights require greater protection by law.

The *Native Title Report 1998* included a discussion on the right to negotiate, rebutting the argument that it would be unfair if native title holders had a right to negotiate in relation to certain compulsory acquisitions while other holders of property rights do not:

> [where] you have a situation where other Australians are sharing the land, we do believe— and we hold this view from the basis of a fundamental philosophical position— that procedural rights should be the same.[106]

The arguments for distinct protection of Indigenous land rights that were put forward in the *Native Title Report 1998,* the *Native Title Report 1996* and Justice Kirby in his dissent in the Griffiths decision, all apply:[107]

> This notion of equal protection, accorded through holding exactly the same procedural rights as others, determinedly sets its face against the fact that the titles of others do not derive their nature and incidents from Indigenous law. The right to control and mediate access to traditional estates is not some sterile right of prohibition. It is integral to our manifold traditional rights and obligations to land which embrace social, cultural and spiritual life, as well as access to resources.[108]

Differentiation is integral to the rights and freedoms which the human rights system seeks to protect. Two categories of non-discriminatory differentiation protected within a human rights framework are the right to express one's cultural identity, referred to variously as minority rights or cultural rights,[109] and the provision of measures by governments to facilitate the advancement of members of certain racial groups who historically have been disadvantaged by discriminatory policies.[110] This latter category is commonly referred to as special measures – a principle which has been

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104 M Dodson, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report July 1995-June 1996*, Australian Human Rights Commission (1996), p 22.

105 Many governments state, or have in the past stated, that compulsory acquisition of native title is a last resort. For example, see the Australian Local Government Association, *Compulsory acquisition of native title and compensation: Issues for local government,* Issues paper No.7. At: http://www.alga.asn.au/policy/indigenous/nativeTitle/issuesPapers/issuePaper07.php (viewed July 008). However, as I have stated in this Report, these policies are subject to change at the whim of government. There are recent reports of such disregard for native title in Western Australia, where it has been reported that the government considers native title as a 'hurdle' to new development and has stated that it will use compulsory acquisition powers to ensure that the government can pursue policies that are 'unashamedly pro-development'. See A O'Brien, 'I'll take West Australian native title land: Barnett', *The Australian,* 11 December 2008. At: http://www.theaustralian.news.com.au/story/0,25197,24782899-5013945,00.html (viewed December 2008).

106 Z Antonios, Acting Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 1998,* Australian Human Rights Commission (1999), p 94, citing Senator the Hon. Nick Minchin.

107 Z Antonios, Acting Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 1998*, Australian Human Rights Commission (1999), pp 84-116.

108 M Dodson, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report July 1995-June 1996*, Australian Human Rights Commission (1996), p 21.

109 See chapter 4 for more information on the right to culture. Article 27 of the *International Covenant on Civil and Political Rights* is the primary source of Indigenous peoples' rights to culture in Australia.

110 *Convention on the Elimination of All Forms of Racial Discrimination,* opened for signature 7 March 1966, 660 UNTS 195 (entered into force 4 January 1969. Australia ratified the convention on 30 September 1975).

applied to both native title rights and interests and other Indigenous land rights.[111] Both the recognition and protection of distinct cultural rights, and special measures, are justified by their objective of ensuring the genuine, substantive enjoyment of common human rights.

The very concept of rights to culture in international human rights instruments recognises that people enjoy their rights in a culturally specific way. A classic example of a human right which is culturally specific and non-discriminatory is native title. The failure to recognise native title before the Mabo decision in 1992 can be seen, as it was in that case, as the failure to give equal respect and dignity to the cultural identity of Aboriginal and Torres Strait Islander peoples; to be racially discriminatory; and a violation of Aboriginal and Torres Strait Islander people's human rights:

> Whatever the justification advanced in earlier days for refusing to recognise the rights and interests in land of the indigenous inhabitants of settled colonies, an unjust and discriminatory doctrine of that kind can no longer be accepted. The expectations of the international community accord in this respect with the contemporary values of the Australian people. The opening up of international remedies to individuals pursuant to Australia's accession to the Optional Protocol to the International Covenant on Civil and Political Rights brings to bear on the common law the powerful influence of the Covenant and the international standards it imports. The common law does not necessarily conform with international law, but international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights. A common law doctrine founded on unjust discrimination in the enjoyment of civil and political rights demands reconsideration. It is contrary both to international standards and to fundamental values of our common law to entrench a discriminatory rule which, because of the supposed position on the scale of social organisation of indigenous inhabitants of a settled colony, denies them a right to occupy their traditional lands.

The Human Rights Committee has commented that article 27 of the International Convention on Civil and Political Rights (which encompasses Indigenous peoples' right to culture) requires the following:

> …article 27 relates to rights whose protection imposes specific obligations on States parties. The protection of these rights is directed to ensure the survival and continued development of the cultural, religious and social identity of the minorities concerned, thus enriching the fabric of society as a whole… States parties, therefore, have an obligation to ensure that the exercise of these rights is fully protected.

As I have established, the right to give permission and consent is an expression of cultural rights by Indigenous peoples across Australia.

In order to achieve an outcome that is consistent with Australia's human rights obligations, I recommend that the Attorney-General pursue a consistent legislative protection of the rights to give consent and permission. A best practice model would be to legislatively protect the right of native title holders to give their consent to any proposed acquisition.

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111 See the *Native Title Act 1993* (Cth), and the amendments made to that Act in 1998. See also the legislation that made up the Northern Territory Emergency Response. However, see M Dodson, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report July 1995-June 1996,* Australian Human Rights Commission (1996), p 23: Special protection of native title rights and interests from compulsory acquisition would not constitute a special measure in and of itself as the NTA attempts to achieve substantive equality through recognising and accommodating the inherently different character of native title.

A second best option would be to reinstate the right to negotiate for all compulsory acquisitions of native title, including those that take place in a town or city. That is, amend section 26 of the Native Title Act.

Text Box 1: Full Federal Court decision in Griffiths v Northern Territory (2007) 243 ALR 72[112]

In November 2007, the Full Federal Court found that the Ngaliwurru and Nungali peoples held their native title over the area surrounding Timber Creek to the exclusion of all others. The decision was significant because it explained what is required for claimants to prove they hold exclusive possession native title.

The Court was of the view that:

- It is not a necessary condition of exclusivity that the native title holders should, in their testimony, frame their claim as some sort of analogue of a proprietary right.
- It is not necessary that the native title claim group should assert a right to bar entry on the basis that it is 'their country'.
- If control of access to country flows from spiritual necessity, because of the harm that 'the country' will inflict upon unauthorised entrants, that control can nevertheless support a characterisation of native title as exclusive. The relationship to country is essentially a 'spiritual affair'.
- It is also important to bear in mind that traditional law and custom, so far as it bore upon relationships with persons outside the relevant community at the time of sovereignty, would have been framed by reference to relations with Indigenous people.
- The question of exclusivity depends upon the ability of the native title holders to effectively exclude from their country people not of their community.
- If, according to their traditional law and custom, spiritual sanctions are visited upon unauthorised entrants, and if they are the gatekeepers for the purpose of preventing such harm and avoiding injury to the country, then the native title holders have what the common law will recognise as an exclusive right of possession, use and occupation.
- The status of the native title holders as gatekeepers in this case was reiterated in the evidence of most of the Indigenous witnesses and by the anthropological report which was ultimately accepted at first instance.
- It is not necessary to exclusivity that the native title holders require permission for entry onto their country on every occasion that a stranger enters, provided that the stranger has been properly introduced to country by them in the first place.
- Exclusivity is not negatived by a general practice of permitting access to properly introduced outsiders.[113]

The Court concluded that 'the appellants, taken as a community, had exclusive possession, use and occupation of the application area.'[114]

112 See National Native Title Tribunal, *Native title hot spots* (2008) 27, pp 33-40 for a summary of the case.

113 *Griffiths v Northern Territory* (2007) 243 ALR 72, 127 (French, Branson and Sundberg JJ).

114 *Griffiths v Northern Territory* (2007) 243 ALR 72, 128 (French, Branson and Sundberg JJ).

5. Blue Mud Bay – Northern Territory v Arnhem Land Aboriginal Land Trust

In my *Native Title Report 2007*, I summarised the Full Federal Court decision in Blue Mud Bay.[115] In that case, the court held that the Traditional Owners of Aboriginal land granted under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) have the right to control access to, and use of, the tidal areas that are part of their land. The Northern Territory Government and others appealed the decision to the High Court.

On 30 July 2008, the High Court held that the *Fisheries Act* (NT) did not authorise or permit entry for fishing on Aboriginal land.[116] The result is that in order to fish in intertidal waters (both coastline and river mouths) on Aboriginal land, an outsider needs the permission of the Traditional Owners.[117]

The case, which applies to all Northern Territory Aboriginal land,[118] starkly contrasts with recent native title cases which have shown the extraordinarily difficult process that each claimant group must go through to have any native title right and interest recognised, let alone a right or interest which allows the claimants to control the use of and access to their land or waters.

However the case was not easily won. Djambawa Marawilli, one of the Traditional Owners said:

> Our struggle was almost for 20 years. Now we had this right now. We had rights since 2000 years ago. Today it's been given to us in the eyes of most Australian people.[119]

That struggle was finally won and the Blue Mud Bay case, applying to 80 percent of the coastline in the Northern Territory, is the most significant land rights case in Australia for many years. It will have broader implications however, and will pressure other governments to similarly realise the rights of their Indigenous populations.

> The Blue Mud Bay decision from the High Court stands as one of the most significant affirmations of Indigenous legal rights in recent Australian history … The High Court's decision gives Australia the opportunity, belatedly, to catch up with Canada and New Zealand in building co-operative structures between government, business and Indigenous peoples in commercial fisheries…[120]

I congratulate the Traditional Owners and the Northern Land Council for their dedication over the past decades to have the Australian legal system recognise rights that they always knew were theirs.

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115 The decision of the Full Federal Court was *Gumana v Northern Territory of Australia* (2005) 218 ALR 292. This decision was summarised in T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2007*, Australian Human Rights Commission (2008), pp 227-229. At: http://www.humanrights.gov.au/social_justice/nt_report/ntreport07/index.html.

116 *Northern Territory v Arnhem Land Aboriginal Land Trust* [2008] HCA 29. The court was split 5 judges to 2. Gleeson CJ, Gummow, Hayne and Crennan JJ Kirby J agreeing; Kiefel and Heydon JJ dissented.

117 Under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth), the relevant Land Council (in this case, the Northern Land Council) for any Aboriginal land, can grant permission for people to enter and remain on the land.

118 ALRA land is land that has been granted to an Aboriginal Trust under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) to be held for the benefit of the Aboriginal Traditional Owners.

119 M McLaughlin, 'Traditional owners win control of waters', *The 7.30 Report,* 30 July 2008. At: http://www.abc.net.au/7.30/content/2008/s2319497.htm (viewed August 2008).

120 S Brennan, 'Wet or Dry, It's Aboriginal Land: The Blue Mud Bay Decision on the Intertidal Zone' (2008) 7(7) *Indigenous Law Bulletin* 6.

5.1 The case

In 1980 the Governor-General, under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) (the ALRA), granted two areas of land to the Arnhem Land Aboriginal Land Trust.[121] The land is inalienable freehold which is held by the land trust for the benefit of the Traditional Owners. The land grants cover areas on the mainland and islands, and all grants extend to the low water mark.[122]

The Traditional Owners of the land, which covers part of North East Arnhem Land including Blue Mud Bay, sought to clarify whether the Northern Territory *Fisheries Act* meant that the Northern Territory Government had the power to grant another person a licence to fish in waters that were within the boundaries of Aboriginal land.

The High Court considered the central issue:

> [as] whether, without permission from the Land Trust, a person holding a licence under the Fisheries Act can fish in the intertidal zone within the boundaries of either the Mainland Grant or the Islands Grant, or in the tidal waters within those boundaries.[123]

The main joint judgment considered the following.

1. Does the common law public right to fish apply? The court took note of earlier High Court authority that because the 'common law right of fishing in the sea and in tidal navigable rivers is "a public not a proprietary right, [it] is freely amenable to abrogation or regulation by a competent legislature".'[124] On this basis, the court looked to the *Fisheries Act* to see whether that common law right had been abrogated and found that it had.[125]
2. Does the *Fisheries Act* provide that a person may enter and fish in waters that lie within Aboriginal land? The court found that '[n]either the licence itself nor any provision of the *Fisheries Act* confers any permission upon the holder to enter any particular place or area for the purpose of fishing… the *Fisheries Act* does not deal with where persons may fish. Rather, the Fisheries Act provides for where persons may *not* fish.'[126]
3. Does the ALRA, and the grants made under it, permit the Land Trust to exclude persons who hold a licence under the *Fisheries Act* from entering waters that lie within the boundaries of the grants?[127] The court found that the grants made under the ALRA relate to defined geographical areas (as opposed to only the dry land or soil within those areas). The provisions of the ALRA that allow the Land Trust to control entry apply to the whole area within those boundaries and those boundaries extend to the low water mark.

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121 In the case, the two areas are referred to as the Mainland Grant and the Islands Grant.

122 *Northern Territory v Arnhem Land Aboriginal Land Trust* [2008] HCA 29, 1-8 (Gleeson CJ, Gummow, Hayne, Crennan JJ).

123 *Northern Territory v Arnhem Land Aboriginal Land Trust* [2008] HCA 29, 8 (Gleeson CJ, Gummow, Hayne, Crennan J).

124 *Northern Territory v Arnhem Land Aboriginal Land Trust* [2008] HCA 29, 22 (Gleeson CJ, Gummow, Hayne, Crennan J).

125 *Northern Territory v Arnhem Land Aboriginal Land Trust* [2008] HCA 29, 27-28 (Gleeson CJ, Gummow, Hayne, Crennan J).

126 *Northern Territory v Arnhem Land Aboriginal Land Trust* [2008] HCA 29, 33 and 36 (Gleeson CJ, Gummow, Hayne, Crennan J).

127 *Northern Territory v Arnhem Land Aboriginal Land Trust* [2008] HCA 29, 41 (Gleeson CJ, Gummow, Hayne, Crennan J).

They considered:

> The asserted distinction between dry land and the land in the intertidal zone when covered by water should not be drawn.[128]

In conclusion, the court ordered that:

> Sections 10 and 11 of the *Fisheries Act* (NT) do not confer on the Director of Fisheries (NT) a power to grant a licence under that Act which licence would, without more, authorise or permit the holder to enter and take fish or aquatic life from areas within the boundary lines described in the … grant made under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth).[129]

The result is that in order to fish in an area within Aboriginal land, permission must be given by a Land Council to enter and remain on the land.[130]

Justice Kirby generally agreed with the joint reasons, but he gave a separate judgment in which he discussed many of the principles of statutory interpretation which supported his reasoning in *Griffiths* (see above). Once again he highlighted his preference for a consistent approach to Indigenous peoples' traditional rights that operates on the premise that they can not be taken away without clear and express authority. He supported the joint decision because it is consistent with other principles he thinks applied. Namely, that:

- It preserves the Aboriginal interests concerned as a species of valuable property rights not to be taken away without the authority of a law clearly intended to have that effect.
- It does this against the background of the particular place that such Aboriginal rights now enjoy, having regard to their unique character as legally *sui generis*, their history, their belated recognition, their present purposes and the moral foundation…for respecting them.
- It ensures that, if the legislature of the Northern Territory wishes to qualify, diminish or abolish such legal interests it must do so clearly and expressly, and thereby assume full electoral and historical accountability for any such provision…[131]

5.2 The impact of the National Apology

A significant element of Justice Kirby's judgment was his consideration of the National Apology[132] and its impact on legislative interpretation. Reflecting on the Apology, he considered it appropriate for the High Court 'to take judicial notice' of it:

> The Court does not operate in an ivory tower. The National Apology acknowledges once again, as the preamble to the *Native Title Act* 1993 (Cth) already did, the wrongs done in earlier times to the indigenous peoples of Australia, including by the law of this country. Those wrongs included the non-consensual denial and deprivation of basic legal rights which Australian law would otherwise protect and uphold for other persons

128 *Northern Territory v Arnhem Land Aboriginal Land Trust* [2008] HCA 29, 55 (Gleeson CJ, Gummow, Hayne, Crennan J).

129 *Northern Territory v Arnhem Land Aboriginal Land Trust* [2008] HCA 29, 62 (Gleeson CJ, Gummow, Hayne, Crennan J).

130 *Northern Territory v Arnhem Land Aboriginal Land Trust* [2008] HCA 29, 61 (Gleeson CJ, Gummow, Hayne, Crennan J). The Northern Territory legislation that provides for the Land Council's powers and responsibilities as trustee of the land is the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth).

131 *Northern Territory v Arnhem Land Aboriginal Land Trust* [2008] HCA 29, 67-69 (Kirby J).

132 Commonwealth, *Parliamentary Debates,* House of Representatives, 13 February 2008, pp 167-173 (The Hon Kevin Rudd MP, Prime Minister). See chapter 1 of this Report.

> in the Commonwealth. In the case of traditional Aboriginals, these right included rights to the peaceful enjoyment of their traditional lands and to navigate and to fish as their ancestors had done for aeons before British sovereignty and settlement.[133]

Justice Kirby acknowledged that although the National Apology had bipartisan support and 'reflects an unusual and virtually unprecedented parliamentary initiative, it does not, as such, have normative legal operation…Yet it is not legally irrelevant to the task presently in hand. It constitutes part of the factual matrix or background against which the legislation in issue in this appeal should now be considered and interpreted. It is an element of the social context in which such laws are to be understood and applied, where that is relevant. Honeyed words, empty of any practical consequences, reflect neither the language, the purpose nor the spirit of the National Apology.'[134]

5.3 The future of fishing in the NT

The decision affects all coastline in the Northern Territory that is part of Aboriginal land granted under the ALRA. In total Aboriginal land constitutes over 80 percent of the coastline of the Northern Territory. Most of the remaining 20 percent of the coastline is subject to an Aboriginal land claim, some of which has already been heard and recommended for grant.[135] I hope that the decision in this case does not affect the granting of the remaining land back to its Traditional Owners.

On a practical level the case has implications for all those who seek to access and use the intertidal zone.

For the past year, between the Full Federal Court and the High Court decisions, the Northern Land Council, which represents the Traditional Owners in the case, has been issuing free permits to commercial fishermen to use the inter-tidal zone. The Council has continued to issue temporary permits while they negotiate a long term system.[136] Those negotiations are now taking place between the Traditional Owners of all the Aboriginal land on the coastline, the government and the fishing industry.[137] But with the High Court's findings, the Traditional Owners participate in the negotiations from a position of great strength.

The Traditional Owners have indicated that they will negotiate:

> [The] Land Council has indicated that they will be looking to negotiate an outcome that will be workable for Aboriginal people, for recreational fishers and for commercial fishing interests. But the reality is that they if you like, Indigenous people, hold all the power and the levers in these negotiations and that's what's fundamentally different; and that's the significance of this case.[138]

133 *Northern Territory v Arnhem Land Aboriginal Land Trust* [2008] HCA 29, 70 (Kirby J).

134 *Northern Territory v Arnhem Land Aboriginal Land Trust* [2008] HCA 29, 71 (Kirby J).

135 C Graham, 'Bay of plenty', *National Indigenous Times,* 7 August 2008. At: http://nit.com.au/News/story.aspx?id=15760 (viewed August 2008).

136 M McLaughlin, 'Traditional owners win control of waters', *The 7.30 Report,* 30 July 2008. At http://www.abc.net.au/7.30/content/2008/s2319497.htm (viewed August 2008).

137 R Levy, Principal Legal Officer, Northern Land Council, *Telephone interview with the Native Title Unit of the Australian Human Rights Commission for the Native Title Report 2008*, 20 November 2008.

138 A Kirk, 'Tidal rights decision, 'extraordinarily significant': academic', *The World Today,* 30 July 2008 quoting J Altman. At: http://www.abc.net.au/worldtoday/content/2008/s2318855.htm (viewed August 2008).

As Ms Watson, an Indigenous lawyer has commented:

> If it's [the Traditional Owner's] wish to negotiate so be it. Personally, I think there's a lot of bravery in that approach as well… sitting down at the negotiating table with people who have a history of not respecting your rights. I think that's brave and it demonstrates a lot of foresight. They're not only thinking of themselves, but of their children…[139]

The outcome of these negotiations will have significant implications for the Traditional Owners, who have identified a number of different benefits that can be achieved through their newly recognised rights.

(a) Potential economic benefits

The intertidal zone is economically significant, being home to Barramundi, Mud Crab and Trepang (otherwise known as *Beche-de-mer*). All up, the value of these industries is in the hundreds of millions of dollars per year.

> Djambawa Marawilli, a traditional owner involved in the case, says the decision opens up money-making opportunities for Indigenous people. 'It can be like crabbing, fishing and other economic things in the sea,' he said. 'This is the time to talk with each other now, this is the time for the Government and the balanda [non-Aboriginal people] to talk and make real smooth process to plan for the future.'[140]
>
> [The case is an] extraordinarily significant outcome for Indigenous people because it gives them, effectively a commercially valuable property right which is really unprecedented in the Australian context.[141]

(b) Controlling access

The decision also ensures that Traditional Owners have the ultimate control over their country. They can determine who enters all of their land and waters and what they do there. As I discussed in detail above, control of the land is a traditional law and custom of many Indigenous Australians, and in this case was one of the reasons the Traditional Owners instigated the case in the first place.[142]

That is not to say that the Traditional Owners will exclude the hundreds of commercial operators and tens of thousands of recreational fisherman in the region.[143] Aboriginal leaders have pledged to negotiate in good faith with the government and fishermen.

> The country is for everybody, the sea and the land,' Yolngu leader Djambawa Marawilla said yesterday. 'Fishermen, they are allowed to come to fish around in our country but through the permit and through the right communication.[144]

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139 C Graham, 'Bay of plenty', *National Indigenous Times,* 7 August 2008, quoting Nicole Watson. At: http://nit.com.au/News/story.aspx?id=15760 (viewed August 2008).

140 Australian Broadcasting Corporation, 'Compensation for Blue Mud Bay decision unlikely: Macklin', *ABC news,* 30 July 2008. At: http://www.abc.net.au/news/stories/2008/07/30/2319441.htm (viewed August 2008).

141 A Kirk, 'Tidal rights decision, 'extraordinarily significant': academic', *The World Today,* 30 July 2008, quoting J Altman. At: http://www.abc.net.au/worldtoday/content/2008/s2318855.htm (viewed August 2008).

142 M McLaughlin, 'Traditional owners win control of waters', *The 7.30 Report,* 30 July 2008. At: http://www.abc.net.au/7.30/content/2008/s2319497.htm (viewed August 2008); Northern Territory v Arnhem Land Aboriginal Land Trust [2008] HCA 29, 10-11 (Gleeson CJ, Gummow, Hayne, Crennan J).

143 C Graham, 'Bay of plenty', *National Indigenous Times,* 7 August 2008. At: http://nit.com.au/News/story.aspx?id=15760 (viewed August 2008).

144 N Robinson and P Karvelas, 'Land rights reach into the sea', *The Australian,* 31 July 2008. At: http://www.theaustralian.news.com.au/story/0,25197,24104643-2702,00.html (viewed August 2008).

Recognising this, the chairman of the Northern Territory Seafood Council Rob Fish, voiced his confidence about the negotiations,[145] a sentiment echoed by the Prime Minister, Kevin Rudd.[146]

(c) Looking after country

In previous native title reports I have emphasised the importance that looking after country has for the health and wellbeing of Aboriginal and Torres Strait Islanders. This decision will allow the Traditional Owners the power to look after their sea country:

> Robert Browne, a senior Larrakia man, said the High Court judgment would mean rangers such as Danny Raymond and Keith Sailor could do more to look after their traditional lands and sea.[147]

Finally, now that the case is completed, the Traditional Owners will have to consider one further question. Will the Traditional Owners decide to claim compensation for the 30 years of commercial and recreational fishing on Aboriginal land?

5.4 Implications of the case on native title and other land rights regimes

Strictly speaking, the Blue Mud Bay case only applies to Northern Territory Aboriginal land granted under the ALRA, and has no application to native title or other states' land rights regimes. However, the decision of the High Court may have moral or political suasion for future native title claims or claims for commercial rights over the sea:

> …I think morally other Aboriginal people would now be able to argue that if these sorts of rights are being provided to Aboriginal people in the Northern Territory, they should be extended elsewhere… And given that the overarching aim of government policy is to close the gap between Indigenous and other Australians, a number of commentators including myself have said that this can only happen if you also provide Indigenous people with the commercially valuable property rights that they have historically missed out on in Australia.[148]

Sean Brennan, a senior law lecturer, also considers this to be a new opportunity for all Indigenous land rights, including native title:

> The broader policy answer is that it's a great opportunity for a new government which says it wants to take a more flexible and less litigious approach to native title and land issues, to do exactly that. To date, off-shore native title claims have not progressed very far in the courts, or in mediation.[149]

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145 Australian Broadcasting Corporation, 'Compensation for Blue Mud Bay decision unlikely: Macklin', *ABC news,* 30 July 2008. At: http://www.abc.net.au/news/stories/2008/07/30/2319441.htm (viewed August 2008).

146 Australian Broadcasting Corporation, 'Compensation for Blue Mud Bay decision unlikely: Macklin', *ABC news,* 30 July 2008 citing the Hon Kevin Rudd, Prime Minister: 'We are encouraged by the positive and constructive attitude which has been demonstrated thus far by organisations such as the Northern Territory Lands Council in terms of ensuring that there are flexible and sensible arrangements, negotiated arrangements put in place which can properly balance the rights and interests of fishers both commercial and recreational'.

147 N Robinson and P Karvelas, 'Land rights reach into the sea', *The Australian,* 31 July 2008. At: http://www.theaustralian.news.com.au/story/0,25197,24104643-2702,00.html (viewed August 2008).

148 A Kirk, 'Tidal rights decision, 'extraordinarily significant': academic', *The World Today,* 30 July 2008 quoting J Altman. At: http://www.abc.net.au/worldtoday/content/2008/s2318855.htm (viewed August 2008).

149 C Graham, 'Bay of plenty', *National Indigenous Times,* 7 August 2008, citing S Brennan. At: http://nit.com.au/News/story.aspx?id=15760 (viewed August 2008).

We may not need to wait long to see whether this case, or the Government's new approach to native title will have any impact. The native title sea claim over the Torres Strait, which is being heard by the Federal Court in late 2008, may be influenced by the decision:

> …the decision…has given heart to Torres Strait Islanders embroiled in a long-running claim for control of the vital seaway between the northernmost tip of Australia and Papua New Guinea…Torres Strait Islanders are already investigating the implications of the Blue Mud Bay ruling for their own long-running regional sea claim…They now hope the ruling will help their claim, vastly more complex because of issues involving the law of the sea, a boundary treaty with PNG, and Queensland law.[150]

The strong and unequivocal protection of rights that was recognised in the Blue Mud Bay decision stands in stark contrast to the native title decisions of the courts over the last few years.

6. Conclusion

A change of government and a commitment to a new approach to native title (as detailed in chapter 1 of this Report) offer important opportunities. To avoid another round of disappointed hopes and expectations, this impetus needs to be converted into tangible change in the short and medium term. There are two levels on which the Commonwealth can work with Indigenous organisations and other key participants in the system in order to restore a greater sense of justice for Indigenous peoples in the native title system:

- policy and administration
- the law of native title.

I have discussed in this Report and others ways in which Commonwealth policy leadership can improve the fairness and quality of the native title system. Above all else, it is the main financier of a system that consumes hundreds of millions of dollars. The Commonwealth initiates national policy objectives in health, education, competition reform and many other fields of social and economic policy using the power of the purse-strings. It must use this power, and all other persuasive tools at its disposal, to convert the welcome rhetoric of all governments at the Native Title Ministers Meeting in July 2008, into action. For example, for many years the Commonwealth has notionally allocated compensation funds to meet State and Territory liabilities. Given the complete absence of formal compensation determinations there must surely have been a build-up of funds which could be sensibly reallocated from past projected compensation to creative forms of recognition in the present day.

A primary focus for potential legal reform lies in the area of proving native title. The appeal decisions affecting the Larrakia in 2007[151] and the Noongar in 2008 show that the law about continuity of traditional connection needs to be brought back into line with the overall logic of *Mabo*. Justice Brennan in *Mabo* focused on the 'general nature of the connection between the indigenous people and the land' and the need for connection to be 'substantially maintained'. The High Court in *Yorta Yorta* embarked on an analysis of continuity that has been widely criticised for its abstraction from the realities of how cultures continue to grow and develop and the realities of Australian history. Their test of continuity set a very high bar for native title

150 G Ansley, 'The right to fish', *New Zealand Herald,* 2 August 2008. At: http://www.nzherald.co.nz/world/news/article.cfm?c_id=2&objectid=10524843 (viewed August 2008).

151 See chapters 7 and 8 of T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2007,* Australian Human Rights Commission (2008).

claimants. A few Full Federal Court decisions since *Yorta Yorta* in 2002 have shown some latitude exists, to recognise the impacts of colonisation. But the cases of the Larrakia and the Noongar demonstrate that strong vibrant contemporary Indigenous communities with strong roots in the pre-colonial past may be deemed insufficiently 'traditional' to qualify for native title recognition.

While further legislative intervention at this point into an already complicated legal regime is not straightforward, the Commonwealth Parliament must consider ways of realigning the proof of native title with the original ethos of *Mabo*.

6.1 Section 223

As the dust on native title has settled in recent years, commentators who have intimate knowledge of the system are becoming increasingly vocal about their concerns that the system is unjust, cruel, disappointing and even dangerous.[152]

> The perversity lies in the reality that after two hundred years of valiantly and defiantly withstanding waves of colonisation the legislation that delivered some hope might in fact be the tsunami that dashes all hope.[153]

The section that is identified as the major source of these problems is section 223 of the NTA – the definition of native title. As I highlighted in the *Native Title Report 2007*, the interpretation of section 223 clearly breaches Australia's human rights obligations.[154] The United Nations Human Rights Committee and the Committee on the Elimination of Racial Discrimination have both confirmed this in their comments on Australia.[155] Given the lack of significant progress or change to native title in recent years, I suspect these bodies will once again report that Australia has breached its international human rights obligations in their upcoming comments on Australia's member reports to the Human Rights Committee and the Committee on the Elimination of Racial Discrimination.

The practical impact of section 223 on communities is tangible. Its interpretation by the courts has resulted in more than one occasion where a court has recognised that the people who are before them are the same people who occupied the land at sovereignty, yet their native title rights were denied because they couldn't prove continuity under section 223.[156] As Justice Wilcox said:

> Here's the government of the country and Parliament passing statutes which seem to promise so much and yet when the claim is brought they just can't get there and then they get nothing, not even recognition.[157]

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152 B Smith and F Morphy (eds), *The social effects of native title: recognition, translation, coexistence* (2007), p 2.

153 K Smith, *Proving native title; discharging a crushing burden of proof,* (Speech delivered at the Judicial Conference of Australia National Colloquium, Gold Coast, 10 October 2008).

154 See T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2007,* Australian Human Rights Commission (2008); T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2006*, Australian Human Rights Commission (2007). At: http://www.humanrights.gov.au/social_justice/nt_report/ntreport06/index.html; T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2005*, Australian Human Rights Commission (2005). At: http://www.humanrights.gov.au/social_justice/nt_report/ntreport05/index.html.

155 Committee on the Elimination of Racial Discrimination, *Concluding observations of the Committee on the Elimination of Racial Discrimination: Australia,* UN Doc CERD/C/AUS/CO/14 (2005); Human Rights Committee, *Concluding observations of the Human Rights Committee: Australia*, UN Doc A/55/40, paras 498-528.

156 M Wilcox, former Justice of the Federal Court of Australia, *Telephone interview with the Native Title Unit of the Australian Human Rights Commission for the Native Title Report 2008*, 23 July 2008.

157 M Wilcox, former Justice of the Federal Court of Australia, *Telephone interview with the Native Title Unit of the Australian Human Rights Commission for the Native Title Report 2008*, 23 July 2008.

Section 223 requires the native title claimants prove continuous observance and acknowledgement of traditional laws and customs since the date of sovereignty. Chief Justice French has summarised it as requiring the following:

> Determination of the existence of traditional laws and customs requires more than a determination of behaviour patterns. They must derive from some norms or a normative system. Because there is a requirement that the rights and interests be recognised at common law, the relevant normative system must have had 'a continuous existence and vitality since sovereignty'. A breach or interregnum in its existence causes the rights or interest derived from it to cease beyond revival. It is on this point in particular that great difficulty can arise. These requirements impose the burden of determining continuity of existence of their native title rights and interests upon the applicants at least by inference or extrapolation from various kinds of evidence… If by accident of history and the pressure of colonisation there has been dispersal of a society and an interruption of its observance of traditional law and custom, then the most sincere attempts at the reconstruction of that society and the revival of its law and custom seem to be of no avail.[158]

The burden of this task, for a culture that has been subject to a history such as ours, is virtually impossible. As Justice Wilcox said there is 'absolutely no question that proving continuity as the main barrier to native title.'[159]

We have come to a time where fixing the dysfunctional operation of section 223 must be tackled head on by government. Even the Chief Justice of the High Court of Australia has implied that this problem requires legislative amendment:

> …In the absence of a national land rights statute, the rules for the determination and definition of native title rights set out in the [Native Title] Act cannot seem to shake off the logistical difficulties imposed by the requirement for proof of connection.[160]

What these amendments entail should be determined in consultation with Indigenous people, however many suggestions have already been put forward from a variety of stakeholders.[161]

6.2 Presumption of continuity

As I have outlined in this chapter and in previous native title reports, the burden of proving continuity is too great. The requirement that the Indigenous claimants prove that 'each successive generation' has acknowledged and observed laws and customs from sovereignty until today,[162] is extraordinarily difficult, even if the court can make inferences about the content of the law and customs at earlier times.[163] It is unjust to impose such an obligation on our Indigenous peoples who were the innocent subjects of colonisation and various subsequent policies which continue to have devastating impacts on communities.

158 R French CJ, *Rolling a rock uphill? – native title and the myth of Sisyphus,* (Speech delivered at the Judicial Conference of Australia National Colloquium, Gold Coast, 10 October 2008).

159 M Wilcox, former Justice of the Federal Court of Australia, *Telephone interview with the Native Title Unit of the Australian Human Rights Commission for the Native Title Report 2008*, 23 July 2008.

160 R French CJ, *Rolling a rock uphill? – native title and the myth of Sisyphus* (speech delivered at the Judicial Conference of Australia National Colloquium, Gold Coast, 10 October 2008).

161 See also S Young, *The trouble with tradition* (2008); R French CJ, *Rolling a rock uphill? – native title and the myth of Sisyphus,* (Speech delivered at the Judicial Conference of Australia National Colloquium, Gold Coast, 10 October 2008); and Justice Merkel in *Rubibi Community v State of Western Australia (No 7)* [2006] FCA 459.

162 See for example, *Bodney v Bennell* [2008] FCAFC 63, 75 (Finn, Sundberg and Mansfield JJ).

163 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, 27.

As a result, a number of people have considered whether:

> …statutory changes to s223 would help considerably. Presumptions of continuity would be a good start.[164]

The Queensland government has similarly suggested to me that the Attorney could consider 'amending the requirements in the [NTA], as they are interpreted, for the need to establish continuity of connection for there to be a finding of native title. This could also consider, for example, whether a rebuttable presumption in favour of continuity of connection would assist…'.[165]

A presumption of continuity would require more than the non-claimant party simply being able to throw doubt on the case made by the claimants, but that the non-claimant would have to prove, on the balance of probabilities, that there has been a 'substantial interruption' to the observance of law and custom by the claimants.

Depending on the policies that the Traditional Owners of the land had been subject to over the past 200 years, such a presumption could, at times, be reasonably easily disproven. Consequently, a presumption of continuity would not do away with any other reforms that are necessary to ensure the native title system operates fairly and justly. However, it could modestly reduce the onerous burden of proof on the applicants and could have a substantive impact in some cases.

Finally, it should be noted that although such a change in the law would raise a number of difficult questions in itself, including what will give rise to the application of a presumption, I do consider that the benefits would be such that it is worthy of serious consideration by the Attorney-General.

6.3 Capacity of the court to take into account reasons for change

Another issue that has arisen in the cases this year, and that I commented on in last year's native title report as well, is the court's consideration for the reasons for an interruption in the continuity of observance of traditional law and custom. The court in *Yorta Yorta* stated that:

> But the inquiry about continuity of acknowledgement and observance does not require consideration of why, if acknowledgement and observance stopped, that happened.[166]

This rule is applied strictly. For example in the Noongar appeal discussed above, Justice Wilcox's reflections on the effects of white settlement were commented on by the Full Federal Court as being substantially irrelevant.

However, although the law considers the reasons for interruption in continuity to be irrelevant, those reasons are not irrelevant to the impact and outcomes that the native title system achieves today, nor to the Indigenous people who were subject to decades of policies which were aimed at destroying their culture.

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164 K Smith, *Proving native title; discharging a crushing burden of proof,* (Speech delivered at the Judicial Conference of Australia National Colloquium, Gold Coast, 10 October 2008).

165 J McNamara, Executive Director, Indigenous Services, QLD Department of Natural Resources and Water, Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 18 September 2008.

166 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, 90.

The law today is also inconsistent with the Australian Government's approach to reconciliation and partnership with the Indigenous population. The new Government started its term with a National Apology to the Stolen Generations, an act that acknowledged the impact of previous Government policies on Indigenous peoples today.

In the Apology, the Prime Minister stated:

> … We apologise for the laws and policies of successive Parliaments and governments that have inflicted profound grief, suffering and loss on these our fellow Australians.
>
> We apologise especially for the removal of Aboriginal and Torres Strait Islander children from their families, their communities and their country.
>
> And for the indignity and degradation thus inflicted on a proud people and a proud culture, we say sorry. We the Parliament of Australia respectfully request that this apology be received in the spirit in which it is offered as part of the healing of the nation.
>
> …
>
> We today take this first step by acknowledging the past and laying claim to a future that embraces all Australians.
>
> A future where this Parliament resolves that the injustices of the past must never, never happen again.
>
> A future where we harness the determination of all Australians, Indigenous and non-Indigenous, to close the gap that lies between us in life expectancy, educational achievement and economic opportunity.
>
> A future where we embrace the possibility of new solutions to enduring problems where old approaches have failed.
>
> A future based on mutual respect, mutual resolve and mutual responsibility.
>
> A future where all Australians, whatever their origins, are truly equal partners, with equal opportunities and with an equal stake in shaping the next chapter in the history of this great country, Australia.[167]

In order to bring the Native Title Act into line with this Government's new approach to acknowledging the past and creating a fairer and respectful relationship, this part of the native title system should be amended.

One way of doing this would be to consider an amendment to the Native Title Act which addresses the court's inability to consider the reasons for interruption in continuity. Such an amendment could state:

> In determining a native title determination made under section 61, the Court shall treat as relevant to the question whether the applicant has satisfied the requirements of section 223:
>
> - whether the primary reason for any demonstrated interruption to the acknowledgment of traditional laws and the observance of traditional customs is the action of a State or Territory or a person who is not an Aboriginal person or Torres Strait Islander

167 Commonwealth, *Parliamentary Debates,* House of Representatives, 13 February 2008, p. 167 (The Hon Prime Minister Kevin Rudd MP). As I stated in chapter 1 of this Report, the policies of removing children from their homes cannot be separated from native title, as in many cases, this removal of children may have broken their connection to their land and in doing so, denied them their native title rights under the Native Title Act.

- whether the primary reason for any demonstrated significant change to the traditional laws acknowledged and the traditional customs observed by the Aboriginal peoples or the Torres Strait Islanders is the action of a State or Territory or a person who is not an Aboriginal person or Torres Strait Islander.

6.4 Revitalisation of culture

The United Nations Human Rights Committee has emphasised that the protection of the right to culture in article 27 of the ICCPR includes a protection of not only traditional means of livelihood, but their adaptation to modern times.

> The right to enjoy ones culture cannot be determined in abstracto but has to be placed in context. In this connection, the Committee observes that article 27 does not only protect traditional means of livelihood of national minorities, as indicated in the State party's submission. Therefore, that the authors have adapted their methods of reindeer herding over the years and practice it with the help of modern technology does not prevent them from invoking article 27 of the Covenant.[168]

Although the case law in Australia provides that native title rights and interests can be adapted, there are questions over the extent to which traditional laws and customs may change before they cease to be 'traditional'.[169]

The level of adaptation generally allowed under s 223 of the NTA has been interpreted quite narrowly,[170] retaining a romanticised image of how Aboriginal Australians ought to live in order to be 'cultural' or 'traditional'. Section 223 has been said to hold Indigenous people to an '[i]mpossible standard of authentic traditional culture.'[171]

Yet there is 'an increasing body of research highlighting that reinterpretation, reinvention and in some cases revival of cultural practice are integral elements to the maintenance and assertion of tradition…revitalisation of the celebration of ANZAC day as an example that would not meet the test of 'continuing tradition' as applied by the NTA'.[172]

The question is how the Australian law can reflect the rights of Indigenous peoples to revitalise their culture?

Currently, section 223 is inadequate in fulfilling Australia's international human rights obligations in this regard:

> [the law is unable] to deal adequately with the issue of cultural change over time. In order to overcome these new problems of injustice, we need to approach the issue of cultural change over time more seriously, and not necessarily equate change with a loss of identity or authenticity.[173]

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168 M Scheinin, *Indigenous peoples' land rights under the International Covenant on Civil and Political Rights,* (Paper for Torkel Oppsahls minneseminar, Oslo, 28 April 2004), citing Ilmari Lansman et al v Finland (Communication 511/1992).

169 See T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2007,* Australian Human Rights Commission (2008), p 54 for revitalisation of culture.

170 T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2007,* Australian Human Rights Commission (2008).

171 M Barcham, 'The limits of recognition' in B Smith and F Morphy (eds), *The social effects of native title: recognition, translation, coexistence* (2007), p 209.

172 B Scambary, '"No vacancies at the Starlight Motel": Larrakia identity and the native title claims process', in B Smith and F Morphy (eds), *The social effects of native title: recognition, translation, coexistence* (2007), pp 152-153.

173 M Barcham, 'The limits of recognition' in B Smith and F Morphy (eds), *The social effects of native title: recognition, translation, coexistence* (2007), p 203.

This necessarily leads us to the question of whether the Native Title Act should be amended so that the s 223 definition of 'traditional' is redefined to be whether the culture 'remains identifiable through time'. Some commentators suggest that amendment to the Act may not be necessary, but that *Yorta Yorta* would need to be overturned:

> [the Yorta Yorta] approach to the recognition of native title was dependent upon the existence of an authentic form of aboriginal culture – an argument which can be seen to flow from the original Mabo ruling which argued that 'native title has its origins in and is given its content by the traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants of a territory'. However, this original argument in no way negates the possibility that cultures, and so too a society's lore, norms and traditions, can change over time… However, as Lisa Strelein has argued 'the radical title of the Crown at the time of the acquisition of sovereignty was burdened not by native title rights and interests then existing, but was burdened by the fact of the existence of native title'. And so, in the Australian case at least, problems associated with the inability of the native title process to adequately deal with questions of change stem not from the law itself but rather from its interpretation.[174]

However, another alternative would be to tie in rights to revitalisation of culture with another form of recognition of Traditional Ownership, as discussed in chapter 2 of this Report. This would not necessarily require amending s 223 of the Native Title Act, but creating a second tier of recognition with different rights attached.

6.5 Recognition and healing

As I highlighted earlier in this chapter and in chapter 2 of this Report, recognition of Traditional Owners rights to their country are essential. The strict application of section 223 of the NTA plays a significant role in the strength and healing of a community and in doing so can provide psychological benefits:

> I don't want to dismiss or understate the value of the achievements to date. Achievements that have not only resulted in tangible economic and cultural benefits from having native title recognised but important intangibles; being, the emotional and psychological strengthening of Indigenous people individually and collectively…[175]

In his judgment in Rubibi No 7, Justice Merkel recognised that '[a]chieving native title to traditional country can lead to the enhancement of self respect, identity and pride for indigenous communities.'[176] However, he also recognised the flip side of the effects if native title is denied.

> It is also important that indigenous communities appreciate the risk, which recent experience reveals is far from hypothetical, of failure in a native title claim. Where that occurs, it can have devastating consequences for the claimant community… native title may prove to be yet another of the prospects held out to indigenous communities where the realisable gain falls short of that originally expected as a result of the decision in *Mabo v Queensland (No 2)* (1992) 175 CLR 1.[177]

174 M Barcham, 'The limits of recognition' in B Smith and F Morphy (eds), *The social effects of native title: recognition, translation, coexistence* (2007), p 211.

175 K Smith, *Proving native title; discharging a crushing burden of proof,* (Speech delivered at the Judicial Conference of Australia National Colloquium, Gold Coast, 10 October 2008).

176 *Rubibi Community v State of Western Australia (No 7)* [2006] FCA 459.

177 *Rubibi Community v State of Western Australia (No 7)* [2006] FCA 459.

Some of the ongoing impacts of the policies of forcibly removing children from their families, and other policies have ongoing effects on communities that also affect their native title claims. The need for healing within groups and the resolution of intra-Indigenous dispute is essential:[178]

> I think if you're going to be talking about different land holding or different ways of recognising people, you also have to deal with the pain of dispossession and 200 years of that impact, and you're not going to get there spontaneously, you have to get there through a process…[179]

The Attorney-General stated that 'being unable to meet the required standard for a determination of native title at a particular point in history does not mean those Indigenous people do not have strong relationships with the land and with each other.'[180] The Larrakia case, which I considered in last year's report, is an example of this connection, even though native title wasn't recognised by the courts. However, the current legal system operates in such a way that if the strict, technical legal requirements of native title are not met, there is nothing to ensure that Traditional Owners rights are formally recognised. The lack of any recognition is discussed in chapter 2 of this Report.

However, it is important that when the government considers the benefits and broader role of native title and how it can be improved, that the psychological impacts of recognition (or being denied recognition) are considered. Such impacts will greatly effect the government's commitment to reconciliation and improving the life chances of Indigenous peoples.

Recommendations

3.1 That the Australian Government pursue consistent legislative protection of the rights of Indigenous peoples to give consent and permission for access to or use of their lands and waters. A best practice model would legislatively protect the right of native title holders to give their consent to any proposed acquisition. A second best option would be amend s 26 of the Native Title Act to reinstate the right to negotiate for all compulsory acquisitions of native title, including those that take place in a town or city.

3.2 That the Australian Government amend the Native Title Act to provide a presumption of continuity. This presumption could be rebutted if the non-claimant could prove that there was 'substantial interruption' to the observance of traditional law and custom by the claimants.

3.3 That the Australian Government amend the Native Title Act to address the court's inability to consider the reasons for interruption in continuity. Such an amendment could state:

178 For more information on healing, see T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2008*, Australian Human Rights Commission (2009).

179 K Smith, CEO, Qld South Native Title Services Ltd, *Telephone interview with the Native Title Unit of the Australian Human Rights Commission for the Native Title Report 2008*, 19 September 2008; T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2008*, Australian Human Rights Commission (2009) for more on healing.

180 Attorney-General, *Speech,* (Speech delivered at the Negotiating Native Title Forum, Brisbane, 29 February 2008). At: http://www.attorneygeneral.gov.au/www/ministers/RobertMc.nsf/Page/Speeches_2008_29February2008-NegotiatingNativeTitleForum (viewed March 2008).

In determining a native title determination made under section 61, the Court shall treat as relevant to the question whether the applicant has satisfied the requirements of section 223:

- whether the primary reason for any demonstrated interruption to the acknowledgment of traditional laws and the observance of traditional customs is the action of a State or Territory or a person who is not an Aboriginal person or Torres Strait Islander
- whether the primary reason for any demonstrated significant change to the traditional laws acknowledged and the traditional customs observed by the Aboriginal peoples or the Torres Strait Islanders is the action of a State or Territory or a person who is not an Aboriginal person or Torres Strait Islander.

3.4 That the Australian Government amend the Native Title Act to define 'traditional' for the purposes of s 223 as being satisfied when the culture remains identifiable through time.