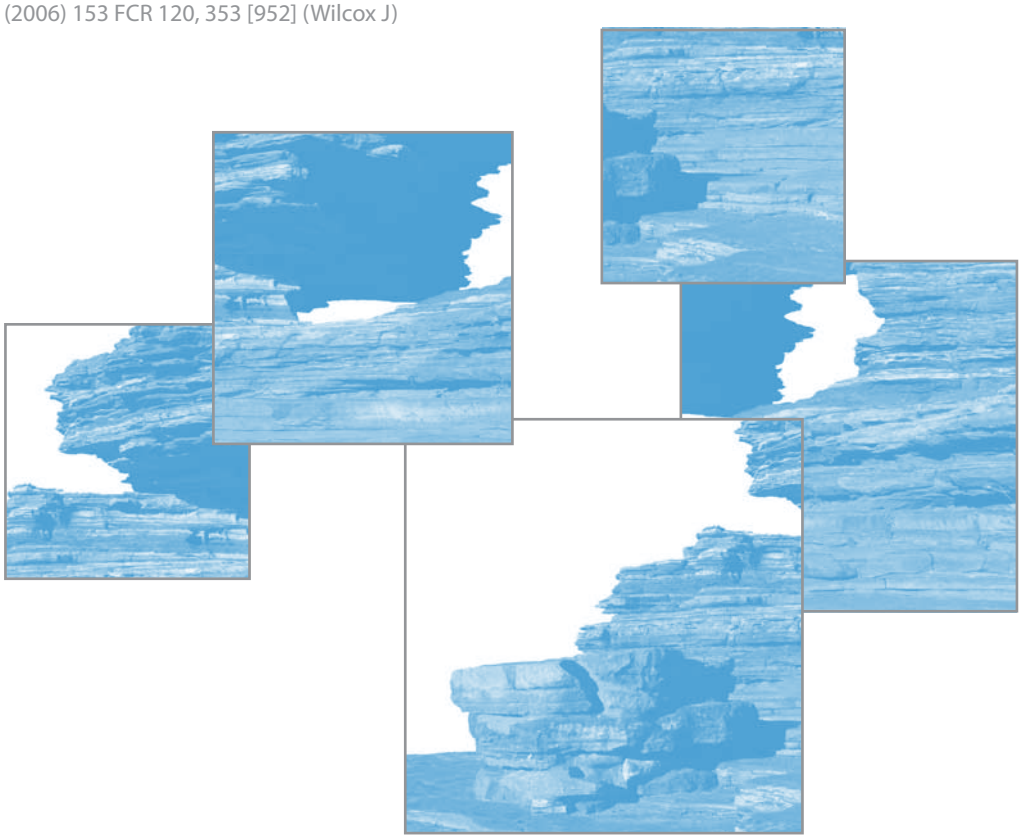
CHAPTER 4

Extract from

Indigenous Australians and the System of Law and Justice

'This is litigation, and litigation is normally adversarial. However, this litigation is not a private squabble about money. It is litigation that deals with matters of great importance to the indigenous people of South-west Western Australia and, indeed, to all Western Australians. This litigation has significant implications for what has recently been called "reconciliation" between indigenous and non-indigenous Australians. It ought not be conducted like a game, where one side must triumph over the other.'

Bennell v Western Australia
(2006) 153 FCR 120, 353 [952] (Wilcox J)



Introduction

4.1

As discussed in the previous chapter, on settlement, Australia adopted English laws and subsequently evolved a legal and justice system in the common law tradition. The views of the Indigenous population were not sought, and the pre-existing body of customary laws followed by the Indigenous peoples of Australia was ignored. In this chapter we consider in more detail how the Australian common law system of law and justice has treated Indigenous Australians. We examine the late recognition of the Indigenous Australians' interests in land, both at common law and under **native title** legislation. We consider how the *Commonwealth Constitution* discriminated against Indigenous Australians, at least until its amendment in 1967. Understandably, the dispossession, discrimination and social disadvantage suffered by the Indigenous people has resulted in higher levels of criminality, but the Australian criminal justice system has struggled to find a response that has not worsened the situation. In the early 20th century, many Australian governments sought to address the various difficulties presented by Indigenous Australians through protection regimes in which Chief Protectors took control over all aspects of the lives of Indigenous people. This paternalistic discriminatory response fell out of favour in the second half of the century with growing appreciation of Indigenous rights. However, the Commonwealth Government has recently returned to paternalism with its Northern Territory Intervention. The final section in this chapter considers whether the rights of Indigenous people and human rights generally would be better protected if Australia were to adopt a bill of rights.

native title: a right or interest over land or waters that may be owned, according to traditional laws and customs, by Aboriginal peoples and Torres Strait Islanders

Native Title

4.2

As discussed in **3.4**, the fact that Australia was considered to be a settled rather than a conquered colony meant that the only legally-recognised scheme of land ownership was that recognised by the common law. Reflecting its origins in the law of **feudalism**, English property law is predicated on the principle that ultimate — or '**radical**', as it is termed — title to all land belonged to the Crown, all subsequent ownership being derived from an original grant from the monarch. The traditional Aboriginal concept of land ownership was totally disregarded by the new settlers. Unsurprisingly, this had a destructive effect on the Aboriginal population, the traditional custodians of the land whose way of life was so foreign to that of the newcomers.

feudalism: a strongly hierarchical system of social and economic organisation with the Crown at the head

radical title: the ultimate ownership rights over land, vested in the Crown

MABO AND THE *NATIVE TITLE ACT 1993* (CTH)

4.3

It is only quite recently that attempts have been made to address the effects of this dispossession. The first major affirmative step to recognise and preserve the strong Aboriginal connection with the land was the passage of the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth), which allowed blocks of land in the Northern Territory to be granted to land trusts if traditional Aboriginal land ownership could be proven. This was a response to the decision in *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141 that, although there were traditional customs and laws regulating the relations of Indigenous people with the land, such laws were not recognised by Australian common law.

A major development in the common law's approach to land rights took place in 1992 with the High Court's landmark decision in *Mabo v Queensland [No 2]* (1992) 175 CLR 1. The *Mabo* litigation had begun in 1982, when Mr Eddie Mabo, a Torres Strait Islander, and a group of other Islanders, began a battle to have their traditional land ownership recognised. In its decision, the High Court did not question that Australia was a settled colony, or that English law came with the settlers in accordance with Blackstone's formulation. Nor did it question that the radical title to all land in Australia was vested in the Crown (either in right of the Commonwealth or one of the states). It did, however, observe that in reality, Australia was not terra nullius — it was not an empty land. Influenced by developing notions about human rights, the Court held that it was appropriate to change the common law rule to recognise that the Crown's radical title co-existed with a beneficial native title. If a group of Aborigines or Torres Strait Islanders could show that they had exercised traditional rights over land since before British colonisation, the law would recognise those traditional rights. But if the Crown had exercised its title to the land, either by using it itself or by selling or granting it to someone else, the native title would be extinguished.

4.4 In *Mabo* the High Court recognised that beneficial native title could co-exist with radical Crown title. However, whether native title exists in relation to a particular parcel of land raises difficult questions of fact. First, has the Crown or have its successors in title used the land inconsistently with native title, so as to bring about extinguishment? Second, have the native title claimants maintained their connection with the land? To clarify and simplify the process by which Aboriginal and Torres Strait Islander groups could make land claims, the Commonwealth Parliament passed the *Native Title Act 1993* (NTA). Consistently with *Mabo*, the Act defines native title in s 223 in terms of 'rights and interests … possessed under the traditional laws … and the traditional customs [of] Aboriginal peoples or Torres Strait Islanders [who], by those laws and customs, have a connection with the land or waters'. These include 'hunting, gathering, or fishing, rights or interests'. Section 225 requires the Federal Court, when making a native title determination, to specify a number of matters including the determination area, the persons or group holding the rights, the nature and extent of the rights, and whether or not the native title holders have 'possession, occupation, use and enjoyment of that land or waters … to the exclusion of all others'. Depending upon the traditional relationship of the claimants with the land, native title may be either exclusive or non-exclusive.

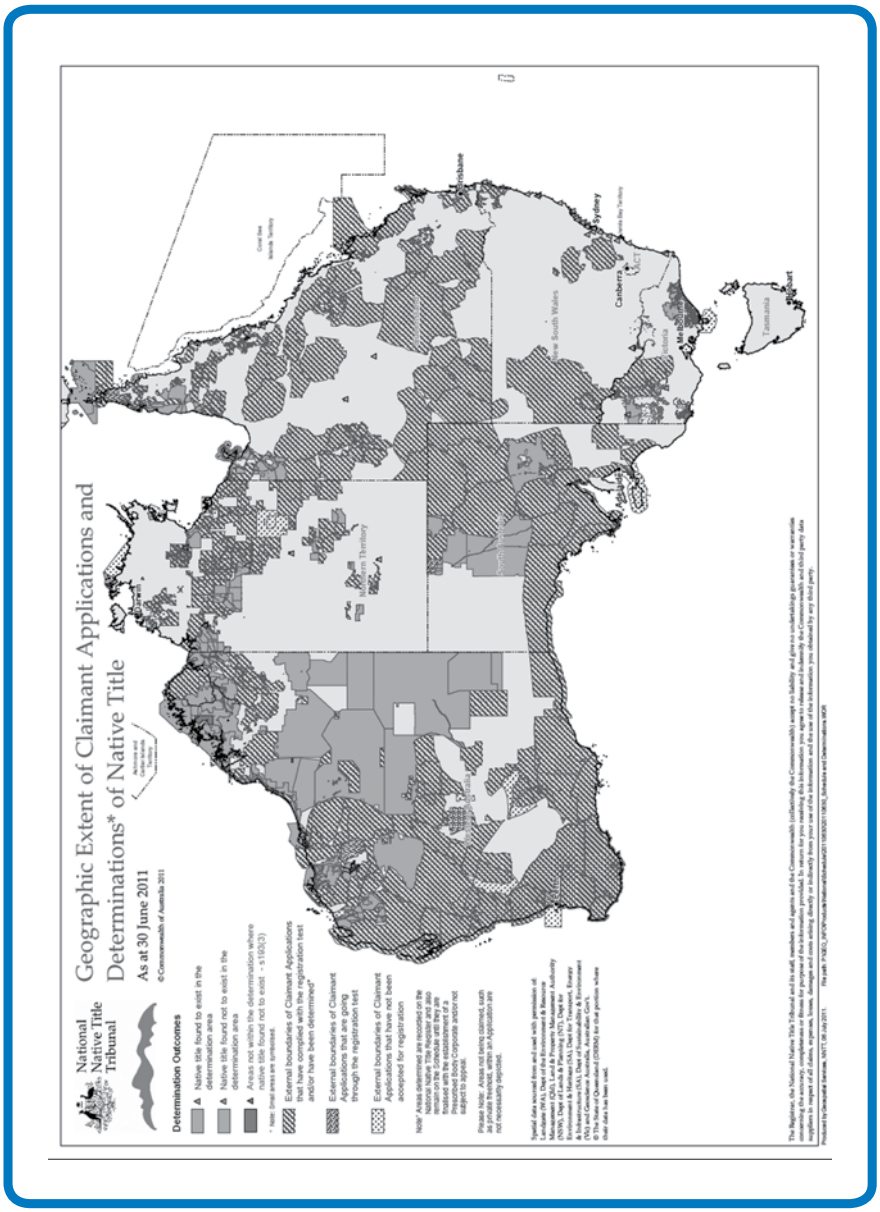
future act: An act authorised by Government after the commencement of the *Native Title Act 1993* which impacts on an area the subject of a native title claim, such as the granting of an agricultural or mining lease

A primary goal of the 1993 Act was to provide a mechanism for the effective and efficient implementation of the common law as laid down in *Mabo*. While the Federal Court is the body empowered to make native title determinations, the Act also set up the National Native Title Tribunal to mediate native title disputes and otherwise assist in the resolution of land claims, and to make recommendations to government on issues of use of contested lands (pt 4 div 4). The Act also required state governments and other parties to negotiate in good faith with native title holders and claimants in respect of '**future acts**' – such as the future exploitation of the land by mining and agricultural interests (pt 2 div 3 sub-div P).

WIK AND THE *NATIVE TITLE AMENDMENT ACT 1998* (CTH)

4.5

The significance of the *Mabo* decision was underlined by *Wik Peoples v Queensland* (1996) 187 CLR 1, where a majority of the High Court held, contrary to the expectations of many, that native title could co-exist over land covered by pastoral leases. Native title was not necessarily extinguished by the lease, as the terms of the lease may allow the two to co-exist. This decision extended considerably the geographical area over which native title potentially could be recognised.



This map, produced by the National Native Title Tribunal, shows the geographical extent of native title claims. Different shading indicates whether or not the claims were successful, and also the claims that are still working their way through the system. By permission of the National Native Title Tribunal.

The large number of claims that appeared possible under *Wik* generated uncertainty and unease in some segments of Australian society. Indeed, some states had already granted mining leases over land susceptible to native title claims under *Wik* without respecting the right to negotiate provided by the NTA. The Australian Government responded with the *Native Title Amendment Act 1998* (Cth). Unlike the original 1993 legislation, which sought to implement the law as stated in *Mabo* and provide protection for native title holders and claimants, the 1998 Act modified and restricted common law native title, strengthening the position of pastoralists and mining companies who wished to exploit land over which native title might be held. Among other things the amending Act downgraded or eliminated the right to negotiate in respect of certain mining grants (ss 26A–26D) and allowed states to validate mining leases and certain other grants that might have been inconsistent with *Wik* (pt 2 div 2A).

Wik established that native title may extend to land notwithstanding the existence of pastoral or mining leases over the land. Decisions subsequent to *Wik* extended the scope of native title in another direction — out to sea: *Commonwealth v Yarmirr* (2001) 208 CLR 1. For example, in *Northern Territory of Australia v Arnhem Land Aboriginal Land Trust* (2008) 236 CLR 24, the High Court held that the native title holders in northeast Arnhem Land had rights over the tidal waters in Blue Mud Bay, and had the power to exclude non-title holders that wished to fish in those waters. While this was an area that had been commercially fished for many years, the Court held that, on the facts of this case, the permission of the native title holders would be required, even by persons holding a fishing licence.

THE COMPLEXITY OF NATIVE TITLE CLAIMS

4.6 While *Wik* and *Arnem Land Aboriginal Land Trust* displayed the potential breadth of native title interests, other decisions have highlighted the restrictions and obstacles affecting native title claims. In *Bennell v Western Australia* (2006) 153 FCR 120, Wilcox J upheld the Noongar community's claim of native title over a large portion of Western Australia including the Perth metropolitan area. This was the first case in which native title had been upheld in respect of a capital city. Wilcox J emphasised that the claim excluded any areas over which native title had been extinguished by past acts of Commonwealth or state governments, effectively excluding all freehold and probably most leasehold land. He noted that resolving disputes about extinguishment could potentially require hundreds of thousands of land tenure searches, and recommended that the parties seek to minimise such costly disputes. However, in a statement accompanying his judgment, he pointed out that native title 'cannot take away people's back yards. The vast majority of private landholders in the Perth region will be unaffected by this case': (2006) 230 ALR 603, 612. Wilcox J also emphasised that native title would not constitute a 'pot of gold' for the claimants. 'A native title determination recognises the traditional association of the claimant community with particular land … [It] does not give to the claimant community a right that enables them to sell or lease the land or to develop or use it for any non-traditional purpose': at 612.

Despite the limits on native title noted by Wilcox J, in April 2008, the Full Federal Court upheld the appeals of Western Australia and the Commonwealth: *Bodney v Bennell*

(2008) 167 FCR 84. The Court held that Wilcox J had not applied a sufficiently stringent test in recognising the native title claim. It was not enough that the Noongar community had maintained a continuity of society since sovereignty. It was necessary that there be continuous observance of a body of laws and customs in which the native title is founded. Further, it was not sufficient that the community demonstrated a continuous connection with an area including Perth. A continuous connection with Perth itself must be demonstrated. The Full Court sent the matter back to the trial court so the proper tests could be applied.

4.7 The *Bennell* decisions illustrate a number of issues that continue to create difficulties for the native title system. One is the sheer complexity of the litigation to which native title can give rise, in terms of the number of affected parties, and the number and nature of the factual issues. At trial there were dozens of named parties. And, as Wilcox J observed (at 609):

> The Court took evidence over a period of 20 days. On eleven of those days, the Court sat 'on-country' at eight different locations: Jurien Bay, Albany, Toweringup Lake near Katanning, Dunsborough near Busselton, Kokerbin Rock and Djuring in the Kellerberrin district and, in Perth, at Swan Valley and in Kings Park. The Court heard evidence from 30 Aboriginal witnesses and five expert witnesses: two historians, two anthropologists and a linguistic expert. A considerable volume of written evidence was also received.

The trial judge's decision was 952 paragraphs long, almost 240 pages long in the *Federal Court Reports*. However, it dealt with only a few preliminary issues. Wilcox J added: 'Litigation over native title in the Perth area has gone on for a long time. It has undoubtedly cost much money — mostly taxpayers' funds. Unless the parties make a determined effort otherwise, it will absorb a lot more money, before it is finished' (at 612). Of course, there was then the 60 page appeal sending the parties back to the drawing board on many issues. Negotiations continue.[1]

Native title cases are among the most complex that the courts face. Even appeal decisions, where issues are more confined, and the focus is on principle rather than factual minutiae, are inordinately long. *Western Australia v Ward* (2002) 213 CLR 1 runs to 400 pages of the *Commonwealth Law Reports*, *Wik* is 266 pages. In the native title area, as elsewhere, there is a strong appreciation of the cost savings that can be made by parties settling their dispute out of court. As noted above, the National Native Title Tribunal provides parties with **mediation** as a mandatory part of the process. The NTA makes provision for the Federal Court to make determinations without a full trial by **consent of the parties** (s 87). Most determinations have been by consent.[2] The Act also makes provision for the registration of Indigenous Land Use Agreements (ILUA), which do not require a Federal Court determination (pt 2 div 3 sub-div's B–E). ILUAs outnumber

mediation: Negotiations between parties in an attempt to resolve a dispute, with the assistance of a neutral third party

consent determinations: Orders of a court to end litigation where the content of the orders is agreed upon by the parties rather than imposed by a judge. Consent determinations may avoid the need for a full hearing

1 See, eg, South Western Aboriginal Land and Sea Council <http://www.noongar.org.au/>; National Native Title Tribunal, South West Region <http://www.nntt.gov.au/native-title-in-australia/western-australia/pages/south-west.aspx>.

2 Native Title Research Unit, *Native Title Determinations Summary*, Australian Institute of Aboriginal and Torres Strait Islander Studies (1 July 2011) <http://www.aiatsis.gov.au/ntru/docs/resources/issues/Determinationsummary.pdf>.