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THE DEVELOPMENT OF
COEXISTING PROPERTY RIGHTS
IN THE
NATIVE TITLE CONTEXT

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Introduction

In preparing this paper, my attention was caught by the cover article of the Australian Property Journal of May 2002 asking, “What is property?”. The article dealt with property as an investment class and hence might not seem to be relevant when considering native title and coexisting property rights, but the lead-in question, “What is property?” was answered as follows:

In the popular press, property means your house. In investment circles property can mean listed property, indirect property, direct property, unlisted property, trusts or syndicates to name but a few. Many of the terms tend to be used interchangeably.¹

Why is the answer relevant to the topic here? What attracted my attention was that the term ‘property’ can mean different things to different people and, in particular, that ‘property’ in the ‘popular press’ means ‘your house’, whereas to a broker, it means a whole range of investment concepts. It isn’t the dollar value that influences my perception of the term ‘property’, rather, it is the level of my emotional attachment.

The same issue is at the heart of explaining the concept of coexisting property rights when dealing with native title and other property interests. What am I getting at? In the context of this paper, property rights and coexisting property rights, specifically native title and ordinary land interests, must be understood by those involved in the process. Emotional attachment is a perfectly legitimate consideration.

A pastoralist who has inherited a property from perhaps her/his parents or grandparents before that, may have an entirely different view of her/his property rights compared to a large pastoral firm which holds the property purely as an investment. To the former, it is home, a business, a way of life – all of these features as well as the legal document that is called ‘the lease’; while to the other it is a business that is managed and requires consideration only in regard to the marketable value of the asset that is held and the income it can generate.

Likewise for the traditional owners: their concept of property rights and interests can be entirely different and difficult for other people to grasp. Whilst access to the land and the ability to hunt and gather may appear to be readily understood, the spiritual attachment, the custom and tradition passed down through generations, the meaning and emotion which attaches to all features of their country, is difficult for those who are not traditional owners to understand.

In essence, this paper deals with concepts which, whilst there is a legal basis and legal points that must be discussed and debated, are very much perceived and understood in terms of personal involvement or lack of personal involvement in the particular aspects of particular cases. If we are not emotionally involved, either as a traditional owner of land seeking to have rights and interests recognised, or the holder of an ordinary title upon which the law has determined native title may coexist, it is easy for us to imagine that we are acting rationally. However, if we have not addressed the personal and emotional issues involved, we have probably overlooked a fundamental aspect of coexistence on the ground.

Captain Cook

The potential for recognition of coexisting property rights existed from the beginning, as

James Cook, when he sailed to Australia, carried with him the following instructions:

“...to observe the Genius, Temper, Disposition and Number of the Natives, if there be any and endeavour by all proper means to cultivate a Friendship and Alliance with them... Shewing them every kind of Civility and Regard; ... You are also with the Consent of the Natives to take Possession of Convenient Situations in the Country in the Name of the King of Great Britain: Or: if you find the Country uninhabited take Possession for His Majesty by setting up Property Marks and Inscriptions, as first discoverers & possessors.”

It is clear that the country was not uninhabited. But the consent of the natives was neither sought nor given when possession of the land was taken for the Crown. In the legal theory of the formative years, Australia was regarded as terra nullius – no man’s land. According to that doctrine, the colony was “desert uninhabited” or “practically unoccupied” or “desert and uncultivated”, a term which includes “territory in which live uncivilised inhabitants in a primitive state of society.” The claims of Australian Aborigines and Torres Strait Islanders were “utterly disregarded” by the law.2

Because of James Cook’s failure to recognise the existing rights and interests of the country’s Indigenous people,

More than two centuries later, Eddie Mabo sought to remedy for the Meriam people at least some of the consequences of James Cook not acting in accordance with his instructions.3

In his book, Black Hills White Justice – The Sioux Nation Versus the United States, 1775 to the Present, Edward Lazarus makes the following observation in relation to a treaty signed between the United States Government and the Sioux Indians:

In signing a treaty with the western tribes establishing tribal domains and guaranteeing the borders of Indian country, the United States affirmed formally that Indians possessed personal and property rights, including rights in their lands, and (as Chief Justice John Marshall had written in the 1830 Supreme Court case Worcester v. Georgia) that Indian tribes were “distinct, independent, political communities” who retained at least limited rights of self-government. At a minimum, these recognised tribal rights established a legal benchmark against which the government’s actions might be measured in the future, and distinguished Indians from the country’s other racial minority, the blacks, to whom the law accorded essentially no rights at all ...4

Referring to the rights of pastoralists and third parties or pastoral leases, the Aboriginal and Torres Strait Islander Commission (ATSIC), in its publication dealing with the Native Title Amendment Bill 1997, comments on the “…potential significant loss of native title property rights.”5

Clearly, the recognition of Indigenous rights as both personal and property rights has long been recognised in English common law and legal systems based on it.

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2 G. Neate, Musings on the Mabo Case – Four Challenges for Today’s Graduates, Occasional address at the Graduation Ceremony for the Faculty of Law, Business and the Creative Arts, James Cook University, Townsville, 23.3.2002, p2.
3 ibid., p2.
Definitions and concepts

At the outset, I would like to consider definitions of the following key terms: ‘coexist’, ‘property’ and ‘rights’.

The National Native Title Tribunal in its publication of Fact Sheets has defined:

**Coexist:**

…in the context of native title as: the existence and exercise of native title rights alongside the rights of others to areas of land or waters. For example, native title rights to go onto the land or to hold ceremonies on it may coexist with the rights of a pastoral leaseholder to graze cattle on the same land. Coexistence is about sharing the land in a way that recognises everyone’s rights and interests in the area.  

The Macquarie dictionary defines ‘coexist’ as: “to exist together or at the same time”.  

This seems fairly straight-forward but, as noted above, the perception can be coloured by personal, emotional and spiritual involvement in the particular case.

**Property:**

In Butterworths Australian Legal Dictionary the term ‘property’, amongst other things, is defined as:

a word which can be used to describe every type of right (that is, a claim recognised by law), interest, or thing which is legally capable of ownership, and which has value;… Colloquially, ‘property’ is used to refer to the thing itself,…  

Significantly, it later states:

Assignability (transferability) of the right, interest, or thing is a consequence of its being property, not a definitive test as to whether or not it is property:…  

The fact that property by legal definition has value but that property need not necessarily be transferable by the same legal definition, is an important point when considering native title as a property right. The perceived value of the native title right in the mind of the non-traditional owner is often diminished by the fact that native title is not a saleable property right on the open market.

This, however, does not mean that the value is lessened in the eyes of the native title holder. For example, in the Australia Institute’s 1998 Discussion Paper, Indigenous Property Rights, Sheehan and Wensing note that:

There has been a general view by commentators that most claims for Indigenous property rights if ultimately successful would probably be achieved in a form of tenure that would be demonstrably less than freehold. It is considered by such commentators that the bundle of property rights that may comprise a particular native title may amount to little more than an easement or a profit a prendre. Indeed, the Australian Institute of Valuers and Land Economists’ submission on the Native Title Amendment Bill 1996 followed this line of reasoning.

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6 National Native Title Tribunal, Native Title Facts Sheet – List of terms, August 2000. P.O. Box 9973 Your Capital City, Freecall 1800 640 501, website: www.nntt.gov.au
9 ibid., p940.
The article later quotes Clark in his observation: “…that indigenous property rights as an interest in land is problematic, and is currently incapable of ‘being registered on any parcel’…”  

The paper goes on to suggest that further court decisions would clarify and define, to a much greater extent, the proposition that native title is in fact a valuable property right:

Both Australian and Canadian judgements have clear implications for legal interpretation of Indigenous property rights in Australia, given the growing interplay of Australian and Canadian law, especially in relation to native title jurisprudence. Both jurisdictions have indicated that Indigenous rights are not frozen in time and can evolve. This evolution is however, subject to the caveat that the broad nature of connection is still evident through the maintenance, for example, of established traditional practices.  

I found the 1998 Paper contained valuable information and forecasting which was subsequently borne out in relation to a range of legal decisions, some of which are discussed in this paper.

**Right:**

The term ‘right’ is defined in *Butterworths Australian Legal Dictionary* as:

Generally, a *benefit or claim entitling a person to be treated in a certain way*. More exact definitions vary according to the theoretical frameworks of the jurisprudential schools. The most frequently used definitions are those of Wesley Newcombe Hohfeld, who drew a distinction between rights and liberties; Ronald Dworkin, who developed a theory of rights in *Taking Rights Seriously* (1977); and the natural law theorist John Finnis, particularly as formulated in his *Natural Law and Natural Rights* (1980). The major cleavage between the schools is whether rights are natural or divinely ordained (and as such, universal and immutable or whether they exist merely by convention (in which event they are relative to changing cultural and social norms). The United States Constitution contains a Bill of Rights. In Canada there exists a Charter of Rights. The High Court of Australia has begun to imply the existence of certain rights in the Commonwealth Constitution: *Theophanous v Herald & Weekly times Ltd* (1994) 124 ALR 1. See Also Bill of Rights, Dworkin, Ronald; Finnis, John; Freedom of communication; Hohfeld, Wesley Newcombe; Law of nature; Martain, Jacques. 

Both native title and potentially coexisting granted interests clearly are, “…a benefit or claim entitling a person to be treated in a certain way.”

**Ward decision**[14] – The nature of native title rights

A significant difficulty in preparing this paper at this point in time is the anticipation of the High Court’s decision in the Ward case which is expected in the very near future. The questions to be resolved by the High Court are wide-ranging and will have a significant impact on the legal understanding of the nature of native title rights and their coexistence with other interests. The question of whether or not native title rights are partially extinguished and remain so, or whether those rights may be suppressed for a time but are not partially extinguished in any sense will also be clarified. The question revolves around the understanding of native title as a ‘bundle of rights’ that can be partially extinguished or native title as personal rights which cannot be partially extinguished.

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Beaumont and Doussa JJ’s majority decision

The following quotations, taken from Justices Beaumont and von Doussa’s majority decision in the Federal Court of Appeals in the State of Western Australia v Ward [2000] FCA 191 (159 ALR) illustrate the current understanding of the law in regard to the nature of the native title rights and interests that are recognised by the Australian legal system.

90 The notion that the rights and interests of indigenous people, conveniently described as native title, constitute a bundle of rights appears to fit comfortably with the principle set in Mabo [No 2] by Brennan J at 69, that where the Crown has validly alienated land by granting an interest that is wholly or partially inconsistent with a continuing right to enjoy native title “native title is extinguished to the extent of the inconsistency”. The postscript to the judgment of Toohey J in Wik at 132 also accords with this description, where his Honour said with the concurrence of Gaudron, Gummow and Kirby JJ that:

“If inconsistency is held to exist between the rights and interests conferred by native title and the rights conferred under the statutory grants, those rights and interests must yield to that extent, to the rights of the grantees.” …

91 These statements of principle would suggest that if particular rights and interests of indigenous people in or in relation to land are inconsistent with rights conferred under a statutory grant, the inconsistent rights and interests are extinguished, and the bundle of rights which is conveniently described as “native title” is reduced accordingly …

92 However, the trial judge rejected an argument to that effect urged by the appellants. His Honour held (at ALR 508) that:

“Native Title at common law is a communal ‘right to land’ arising from the significant connection of an indigenous society with land under its customs and culture. It is not a mere ‘bundle of rights’: see Delgamuukw v British Columbia (1997) 153 DLR (4th) 193 per Lamer CJ at 240-1. The right of occupation that is native title is an interest in land: see Mabo (No 2) per Brennan J at CLR 51. There is no concept at common law of ‘partial extinguishment’ of native title by the severance ‘extinguishment’ of one or more components of a bundle of rights. It follows that there cannot be a determination under the Act that native title exists but that some, or all, ‘native title rights’ have been ‘extinguished’.

Strict regulation of the rights parasitic upon native title by suspension, suppression, curtailment or control of those rights by legislation or by acts of the Crown which may thereby involve a grant of rights of use of Crown Land to third parties may impair native title but strict regulation of the exercise of such rights of itself, will not mean that native title has been extinguished.”

and later his Honour added (at ALR 510):

“Fundamental inconsistency between the exercise of rights granted to third parties by act of the Crown and the exercise of any right that attaches to native title may show an intention by the Crown to extinguish native title, but inconsistency with the exercise of some only of those rights will not. Native title will remain a right to the land under which other native title rights may be enjoyed.”

93 The expression “fundamental inconsistency” is not one used in the test of inconsistency propounded in the judgments in Wik. Nor in any of the judgments of the High Court does the notion of parasitic or dependent rights flowing from native title find expression. That is a notion which his Honour appears to have derived from Canadian authorities. However, as Gummow J pointed out in Wik at 182, in Canada the
basic legal framework developed quite differently. In *Fejo* the joint judgment at 130 expressed doubt that much direct assistance is to be had from decision in other common law jurisdictions, and Kirby J at 148-149 said that **care must be exercised in the use of authorities from other former colonies and territories, noting that the position in Canada (and New Zealand) had followed a different course**. Canadian jurisprudence owes much to s 35(1) of the *Constitution Act 1982* (Can) …

97 To describe native title as a bundle of rights is not to deny the possibility that in a particular case the rights and interests may be so extensive as to be in the nature of a proprietary interest in land, a possibility recognised by Brennan J in *Mabo [No 2]* at 51 and Gummow J in *Wik* at 169. Moreover, it is not inaccurate to describe proprietary interests as a “bundle of rights”: *Minister of State for the Army v Dalziel* (1944) 68 CLR 261 at 285 per Rich J and *Yanner* at 264 …

98 As earlier observed, in *Yanner*, the question whether there could be an extinguishment of some only of the rights and interests constituting native title, in consequence of inconsistency arising from a legislative prohibition on the exercise of a particular right, was left open by Gleeson CJ, Gaudron, Kirby and Hayne JJ The respondent's argument was however addressed by Gummow and Callinan JJ. Callinan J would have dismissed the appeal on the ground that the native title right relied on by the appellant had been extinguished by the legislation. At 288-289 Gummow J considered the issue of extinguishment and at paragraph 112 posed the narrow question for decision as "whether the creation of certain statutory rights, conditioned upon the exercise of power conferred by the statute, abrogated the exercise of the native title right or incident to hunt". His Honour concluded that the statute, properly construed, did not have that effect. However, his discussion of the extinguishment issue supports the notion of a partial extinguishment. The remaining member of the Court, McHugh J, held that s 7(1) of the *Fauna Conservation Act* had vested in the Crown the right to deal with fauna (which included estuarine crocodiles), and took away from everyone else all existing rights to take fauna (at 271). The practical effect of that conclusion was to deny any present right to the appellant (or his community) to take estuarine crocodiles, but it does not necessarily follow that such a right was permanently extinguished, as opposed to being merely suspended. In *Yanner*, therefore, **four members of the Court expressly left open the question of partial extinguishment, one member of the Court did not deal with the question, and the reasoning of two members of the Court supports the notion of partial extinguishment** …

99 In the joint judgment in *Yanner*, four members of the High Court at 269-270 made the following observations in relation to the topic of alleged inconsistency arising from the statutory regulation or prohibition of rights or interests that may be exercised, and native title rights and interests:

"...in deciding whether an alleged inconsistency is made out, it will usually be necessary to keep well in mind that native title rights and interests not only find their origin in Aboriginal law and custom, they reflect connection with the land. As Brennan J said in *R v Toohey; Ex parte Meneling Station Pty Ltd*, ´Aboriginal ownership is primarily a spiritual affair rather than a bundle of rights‘ but ´[t]raditional Aboriginal land is not used or enjoyed only by those who have primary spiritual responsibility for it. Other Aboriginals or Aboriginal groups may have a spiritual responsibility for the same land or may be entitled to exercise some usufructuary right with respect to it.‘

Native title rights and interests must be understood as what has been called ´a perception of socially constituted fact‘ as well as ´comprising various assortments of artificially defined jural right‘. (K Gray and S F Gray, *The Idea of Property in Land*, in Bright and Dewer (eds), *Land Law: Themes and Perspectives*, 1998, 15 at 27). And an important aspect of the socially constituted fact of native title rights and interests that is recognised by the common law is the spiritual, cultural and social connection with the land. **Regulating particular aspects of the usufructuary relationship with traditional land does not sever the connection of the Aboriginal peoples concerned with the land (whether or not prohibiting the exercise of that relationship altogether might, or might to**
some extent). That is, saying to a group of Aboriginal peoples, 'You may not hunt or fish without a permit', does not sever their connection with the land concerned and does not deny the continued exercise of the rights and interests that Aboriginal law and custom recognises them as possessing.”... 

109 In our opinion the rights and interests of indigenous people which together make up native title are aptly described as a "bundle of rights". It is possible for some only of those rights to be extinguished by the creation of inconsistent rights by laws or executive acts. Where this happens "partial extinguishment" occurs. In a particular case a bundle of rights that was so extensive as to be in the nature of a proprietary interest, by partial extinguishment may be so reduced that the rights which remain no longer have that character. Further, it is possible that a succession of different grants may have a cumulative effect, such that native title rights and interests that survived one grant that brought about partial extinguishment, may later be extinguished by another grant … 

677 In the event, we have come to conclusions, on some of the matters argued, that differ from the trial judge. In essence, the applicants have succeeded before us on the "connection" issues, but have been, on the whole, unsuccessful on the extinguishment issues …

North J's view

As the matter has been appealed to the High Court of Australia, the conceptual differences in understanding put forward in the Federal Court of Appeals as a minority view are relevant. Justice North took a different position to the majority (Justice Beaumont and Justice von Doussa) in relation to the concept of native title rights and partial extinguishment of those rights. Some of these views are illustrated in the following quotations from the Ward case:

772 Regulation, including severe restriction of the exercise of the rights or interests dependent on native title, short of complete abolition does not extinguish native title because the degree of interference with the enjoyment of the rights or interests dependent on native title is not sufficient either in scope or duration to demonstrate that the Crown intended to destroy native title forever. The majority explained the situation at 269-270 as follows:

"... But in deciding whether an alleged inconsistency is made out, it will usually be necessary to keep well in mind that native title rights and interests not only find their origin in Aboriginal law and custom, they reflect connection with the land. As Brennan J said in R v Toohey; Ex parte Meneling Station Pty Ltd, 'Aboriginal ownership is primarily a spiritual affair rather than a bundle of rights' but '[f]or the land is not used or enjoyed only by those who have primary spiritual responsibility for it. Other Aboriginals or Aboriginal groups may have a spiritual responsibility for the same land or may be entitled to exercise some usufructuary right with respect to it'.…

782 In Mabo [No 2] Brennan J said at 58:

"Native title has its origin in and is given its content by the traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants of a territory." ...

783 The proper characterisation of native title thus depends on aboriginal law and custom. The matter must be viewed from the aboriginal perspective …

784 Whilst the nature and content of native title in a particular case are matters of fact which must be found by the Court, it is possible to provide a general description of native title without reference to fact findings in a particular case. This was done in Mabo [No 2] itself: see Brennan J at 59. Since then the several native title cases which have come before the

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15 ibid.
Courts have extended and refined the general understanding of the nature of native title. The comprehensive and detailed examination of the nature of native title in the present case provides a clear idea of some general features of native title. From this examination Lee J concluded that native title is a right to the land itself. That conclusion reflects the traditional law of the aboriginal people. It reflects the fact of aboriginal law translated into the language of the Australian legal system. What is involved is a characterisation of the relationship between aboriginal people and the land translated into terms which have meaning for Australian law. As a characterisation of the relationship, the notion that native title is a right to the land itself conforms more closely to the traditional aboriginal law than the notion that native title consists of a bundle of rights. That latter notion suggests a number of separate rights which are individual, capable of standing alone and recognised by traditional law as standing alone. The unifying factor which creates the bundle is the feature that all the rights relate to the land. However, the relation to the land arises only by reason of the practical necessity that the exercise of the rights depends on the existence of the land. Thus, a "right" to hunt is meaningless without a place to hunt. But aboriginal traditional law does not treat the "rights" as stand-alone rights. The incidents of native title depend upon the connection of the aboriginal people with the land. The underlying connection is the foundation for the exercise of various rights. The land is not just the place to hunt. Rather the right to hunt follows as a result of the significance of the land as the centrepiece in aboriginal law and culture. It is for this reason that the proper question to ask when seeking to ascertain whether native title has been extinguished is whether the Crown has shown a clear and plain intention to abolish the underlying connection with the land. It is for the same reason that there cannot be partial extinguishment of native title by the restriction or even abolition of some or all of the rights or interests dependent upon the existence of native title …

785 In characterising native title as a right of aboriginal people to the land itself Lee J at ALR 507 cited a passage from the judgment of Lamer CJ of the Supreme Court of Canada in Delgamuukw v British Columbia (1997) 153 DLR (4th) 193. In Canada the concept of native title is to be distinguished from "aboriginal rights" which are recognised by the Constitution Act 1982 (Can). In the passage cited by his Honour, Lamer CJ addressed the difference between the two concepts. The discussion is enlightening in relation to the distinction sought to be made in the present case between native title as a right to the land and native title as a bundle of rights. Lamer CJ rejected the concept that native title was simply an aggregation of separate rights to conduct activities on the land. Lamer CJ concluded at 252 that "[w]hat aboriginal title confers is the right to the land itself...[t]hose activities are parasitic on the underlying title." …

786 The same dependence of usufructuary rights upon an underlying title was accepted by Brennan J in Mabo [No 2] at 51: "Where a proprietary title capable of recognition by the common law is found to have been possessed by a community in occupation of a territory, there is no reason why that title should not be recognized as a burden on the Crown's radical title when the Crown acquires sovereignty over that territory. The fact that individual members of the community, like the individual plaintiff Aborigines in Milirrpum (1971) 17 FLR 141, at p 272, enjoy only usufructuary rights that are not proprietary in nature is no impediment to the recognition of a proprietary community title. Indeed, it is not possible to admit traditional usufructuary rights without admitting a traditional proprietary community title." …

787 In Yanner the majority said at 269-270 in a passage extracted earlier in these reasons: "But in deciding whether an alleged inconsistency is made out, it will usually be necessary to keep well in mind that native title rights and interests not only find their origin in Aboriginal law and custom, they reflect connection with the land. As Brennan J said in R v Toohey; Ex parte Meneling Station Pty Ltd, 'Aboriginal ownership is primarily a spiritual affair rather than a bundle of rights' but '[f]rational Aboriginal land is not used or enjoyed only by those who have primary spiritual responsibility for it. Other Aboriginals or Aboriginal groups may have a spiritual responsibility for the same land or may be entitled to exercise some usufructuary right with respect to it.'
Native title rights and interests must be understood as what has been called 'a perception of socially constituted fact' as well as 'comprising various assortments of artificially defined jural right'. And an important aspect of the socially constituted fact of native title rights and interests that is recognised by the common law is the spiritual, cultural and social connection with the land. Regulating particular aspects of the usufructuary relationship with traditional land does not sever the connection of the Aboriginal peoples concerned with the land (whether or not prohibiting the exercise of that relationship altogether might, or might to some extent). That is, saying to a group of Aboriginal peoples, 'You may not hunt or fish without a permit', does not sever their connection with the land concerned and does not deny the continued exercise of the rights and interests that Aboriginal law and custom recognises them as possessing."

788 In my view this passage reflects the concept that native title is a right to land based on an established aboriginal connection to that land. Native title may continue despite the regulation, even amounting to prohibition, of rights or interests which depend on the existence of native title …

789 An understanding of this passage is assisted by some knowledge of the meaning of the expressions "a perception of socially constituted fact" and "various assortments of artificially defined jural right". The expressions are used in a chapter entitled "The Idea of Property in Land" by Kevin Gray and Susan Francis Gray in Susan Bright and John Dewar (eds), *Land Law: Themes and Perspectives* (1998) 15 at 27. The expressions relate to two different concepts of property in the jurisprudence of property law. The context of the discussion in which they are explained is described at 18 as follows:

"The task of the present chapter is to outline the various ways in which English law - and perhaps, more generally, common law jurisprudence - handles the idea of property in land. It will be argued that our dominant models of property in land fluctuate inconsistently between three rather different perspectives. It will be suggested that this doctrinal uncertainty - this deep structural indeterminacy - explains the intractable nature of some of land law's classic dilemmas, whilst simultaneously impeding constructive responses to the more immediately pressing challenges of twenty-first century land law. The common law world has never really resolved whether property in land is to be understood in terms of empirical facts, artificially defined rights, or duty-laden allocations of social utility. Although these three perspectives sometimes interact and overlap, it remains ultimately unclear whether the substance of property resides in the raw data of human conduct or in essentially positive claims of abstract entitlement or in the socially directed control of land use. In short, the idea of property in land oscillates ambivalently between the behavioural, the conceptual, and the obligational, between competing models of property as a fact, property as a right, and property as a responsibility." ...

790 The first concept "Property as a Fact" is described at 18-19 as follows:

"Much of the genius of the common law derives from a rough-and-ready grasp of the empirical realities of life. According to this perspective, the identification of property in land is an earthy pragmatic affair. There is a deeply anti-intellectual streak in the common law tradition which cares little for grand or abstract theories of ownership, preferring to fasten instead upon the raw organic facts of human behaviour. This perspective is preoccupied with what happens on the ground rather than with what emerges from the heaven of concepts. Accordingly, the crude empiricism of this outlook leaves the recognition of property to rest upon essentially intuitive perceptions of the degree to which a claimant successfully asserts de facto possessory control over the land. On this view property in land is more about fact than about right; it derives ultimately not from 'words upon parchment' but from the elemental primacy of sustained possession. Property in land is thus measurable with reference to essentially behavioural data; it expresses a visceral insight into the current balance of human power relationships in respect of land. And it is, indeed, the psycho-social nature of this understanding of property which serves to discriminate between many of the hypothetical variants of the property question posed earlier in this chapter.
Concealed within this behavioural notion of property is, inevitably, some primal perception of the propriety of one's nexus with land. To have 'property' in land is not merely to allege some casual physical affinity with a particular piece of land, but rather to stake out some sort of claim to the legitimacy of one's personal space in this land. It is to assert that the land is 'proper' to one; that one has some significant self-constituting, self-realizing, self-identifying connection with the land; that the land is, in some measure, an embodiment of one's personality and autonomy. To claim 'property' in land is to arrogate at least a limited form of sovereignty over the land and to allege that one has some emotion- or investment-backed security in it. To have 'property' in land connotes, ultimately, a deeply instinctive self-affirming sense of belonging and control; and it is precisely this sense of possessory control which identifies the two proprietary estates acknowledged today in English law, the fee simple absolute (or freehold estate) and the term of years absolute (or leasehold estate)."

791 The second concept "Property as a Right" is described at 27 as follows:

"The foregoing analysis of the law of real property has concentrated on property in land as a perception of socially constituted fact. A rather different - and not entirely consistent - focus is provided by the competing assessment of property in land as comprising various assortments of artificially defined jural right. On this view, the law of real property becomes distanced from the physical reality of land and enters a world of conceptual - indeed some would say virtually mathematical - abstraction. In sharp contrast to the crudely empirical foundations of property as a fact, the vision of property as a right rests upon a complex calculus of carefully calibrated 'estates' and 'interests' in land, all underpinned by the political theory implicit in the doctrine of tenure. All property relationships with land are, accordingly, analysed at one remove - through the intermediacy of an estate or interest in land." ... [Bold emphasis added]

792 The passage from Yanner referred to in paragraph 787 is a discussion about the nature of inconsistency which will lead to extinguishment. It seeks to explain the nature of native title for the purposes of defining those elements against which inconsistency might be found to exist. At the beginning there is reference to the fact that native title has its origin in aboriginal law and custom and reflects connection with the land. The "perception of socially constituted fact" is a reference to the spiritual, cultural and social connection claimed by the aboriginal people to the land. The passage emphasises that this aspect must be understood as the basis of native title. That is to say native title is not comprised only of the "artificially defined jural rights" such as the right to hunt or fish. The primacy of the underlying right to the land is confirmed by the observation that the regulation of the "artificially defined jural rights" does not sever the connection with the land, and as a consequence native title continues to exist even in the face of such regulation ...

793 The notion of partial inconsistency seems to have been first referred to by Brennan J in Mabo [No 2] at 69 in a summary of the discussion concerning extinguishment. He said:

"Where the Crown has validly alienated land by granting an interest that is wholly or partially inconsistent with a continuing right to enjoy native title, native title is extinguished to the extent of the inconsistency. Thus native title has been extinguished by grants of estates of freehold or of leases but not necessarily by the grant of lesser interests (e.g., authorities to prospect for minerals)." ...

794 Shortly before this summary his Honour explained at 69 that the dispossession of the aboriginal people from their land did not result from the acquisition of ownership of all the land upon first settlement but rather:

"Aborigines were dispossessed of their land parcel by parcel, to make way for expanding colonial settlement." ...

795 In the context of the discussion the reference to partial extinguishment probably referred to the extinguishment of native title parcel by parcel, that is to say, extinguishment
of one piece of aboriginal land from a larger whole rather than the extinguishment of some rights in the one piece of land. Lee J explained at ALR 509 the reference as follows:

"At all times his Honour was speaking of extinguishment of native title and the nature of acts of the Crown from which an intent to extinguish native title may be inferred and the words 'extinguish to the extent of the inconsistency' refer to the extinguishment of native title to the extent that there is land in respect of which inconsistent rights have been granted by the Crown with the intent of extinguishing native title. It is not a statement by his Honour that if the degree of inconsistency is not sufficient to show a clear and plain intention by the Crown to extinguish native title, native title continues in respect of that land but a specific aboriginal right which depends upon the existence of native title for its exercise nonetheless may be 'extinguished.'"

796 Partial extinguishment in the sense of the destruction of a part of native title in respect of a piece of land is thus not supported by the reference in Mabo [No 2]. Further, such a notion is inconsistent with the view that native title is a right to the land itself. The right to exercise certain rights is parasitic upon the holding of the underlying title, but the abrogation of the right to enjoy some of those incidents does not extinguish native title…

In summary, a crucial matter to be clarified by the High Court is whether native title rights are in the nature of a ‘bundle of rights’ that can be partially extinguished and remain so. Alternatively, there is a view that native title rights are personal rights that may be suppressed but are not extinguished unless totally extinguished. The question is important when considering whether native title may ordinarily revive. The High Court in Fejo confirmed that total extinguishment of native title rights by a freehold grant is permanent.

Sui generis

Note: Care must be taken in attempting to define native title within the narrow understanding of ordinary State-granted titles. The courts have recognised native title as sui generis, which is defined as: “belonging to a species all of its own; unique”.

Justice Kirby in Wik also notes that: “Pastoral leases give rise to statutory interests in land which are sui generis.”

Recognition space

Craig Jones, in his paper dealing with the ‘conflict resolution domain’, develops the thought that there is a ‘recognition space’ within which native title, as the law understands it, is recognised. In his development of this concept, Jones acknowledges the previous work of Mantziaris & Martin and also acknowledges Noel Pearson as the source of the concept of ‘recognition space’.

The High Court’s Mabo decision in 1992 and the Wik decision in 1996 created the potential for native title to exist across virtually the whole continent (Holmes, 2000: 237) and led to the declaration that terra nullius was dead. The killing of terra nullius was of course not the end of colonialism. Native title has become an element of Australian common law and statute law. Native title is not Aboriginal law, rather it is the

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16 ibid.
17 Fejo v Northern Territory (1998), High Court of Australia, 156 ALR 721.
18 Nygh & Butt, op. cit., p1132.
19 Wik Peoples v State of Queensland (1996) 187 CLR 1; High Court of Australia, p216.
recognition of elements of Aboriginal law and custom by the Australian legal system. To some extent it is also a cultural recognition of indigenous Australians by non-indigenous Australians albeit a contested recognition. The intersection of the two systems of law and custom can be seen as the “recognition space” (imagine a Venn diagram – two overlapping circles: see Diagram 1) (reproduced from Mantziaris and Martin, 2000:9). It is in this recognition space that the NTA [Native Title Act 1993] operates and where native title determination applications are lodged.

Diagram 1. The Recognition Space

The mediation of native title matters also occurs in the recognition space. 21

The level of understanding and recognition of the laws and customs of Australia’s Indigenous people within the Australian legal system continues to evolve.

While the legal system may provide definitive pronouncements or points of law, the policy decisions of governments, as reflected in statute law and policy implementation, are also important. Further, the attitudes that the holders of potentially coexisting interests and their professional advisers bring to the negotiating table have a significant effect on the extent of recognition and its practical application.

Professional advisers have a real opportunity and a responsibility to understand the issues and influence the direction of dealings and negotiations, both within the legal recognition space, and across the boundary.

Revival of native title - Sections 47, 47A and 47B of the Native Title Act 1993

With regard to the revival of native title, whilst the question of partial extinguishment and revival is still to be determined in the Ward case by the High Court, the Native Title Act 1993 provides for the revival of native title in certain circumstances whether or not there has been previous partial or complete extinguishment or suppression of native title.

Sections 47, 47A and 47B deal with the revival of native title as follows:

- Section 47 provides that prior extinguishment is disregarded in the case where native title holders own a pastoral lease and seek to have recognition of their native title on the area of the pastoral lease. It is important to note that recognition of the prior extinguishment does not affect the validity of the lease itself or any current interests of the Crown or public works, etc.

• Section 47A deals with a similar concept: that prior extinguishment is disregarded in
the case where native title is claimed over reserves that are granted for the benefit of
Aboriginal people, such as community leases and DOGITs (Deeds of Grant in
Trust). The grants themselves remain valid.

• Section 47B similarly deals with the disregarding of prior extinguishment in the case
where vacant Crown land is occupied by the native title holders who are seeking
recognition of their native title.

The full sections 47, 47A and 47B are given as Attachment 1.

Important case summaries

The decision of the High Court in *Ward* is awaited and is expected to help further clarify
exactly what native title aspects are recognised in the Australian legal system. The
understanding of what is recognised has changed as various decisions have been made,
from the *Mabo [No 2]* decision of the High Court through to the *Wik* and *Yanner* decisions.

Useful summaries to illustrate the development of legal understanding of both traditional
owners and coexisting interest holders are provided below.

*Ward*

As the appeals and cross appeals to the High Court seek judicial clarification on a wide
range of points of law, I have included a summary of the main grounds of appeal in this
case. The decision of the High Court is awaited at his time.

The summary has been provided by the National Native Title Tribunal’s legal staff and is
given in two formats for your convenience: (i) shows the grounds of appeal grouped by
type of issue; and (ii) the grounds of appeal grouped by the party appealing the matter. 22

The summary of the questions asked and the party appealing the issue provides a very
succinct and illuminating overview of where our understanding of the law is at at this
point in time.

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22 National Native Title Tribunal, op. cit., Legal Department. This information is provided for general
information purposes only. The Commonwealth, the NNTT, its staff and officers accept no liability for
any use of this information or reliance placed upon it. Professional advice should be sought in relation to
particular circumstances.
### MAIN GROUNDS IN WARD HIGH COURT APPEAL

<table>
<thead>
<tr>
<th>Nature of native title</th>
<th>By*</th>
<th>Outcome</th>
</tr>
</thead>
<tbody>
<tr>
<td>Finding native title is a bundle of rights</td>
<td>NTP</td>
<td></td>
</tr>
<tr>
<td>Finding that unspecified common law public rights prevail over native title</td>
<td>NTP</td>
<td></td>
</tr>
<tr>
<td>Holding that native title can be recognised without evidence of presence upon, or use of, the area concerned by the claimants</td>
<td>SWA</td>
<td></td>
</tr>
<tr>
<td>Holding that the common law cannot recognise and protect the right to protect cultural, religious and spiritual knowledge as a native title right</td>
<td>NTP</td>
<td></td>
</tr>
<tr>
<td>Finding that a spiritual connection is sufficient for proof of native title</td>
<td>SWA</td>
<td></td>
</tr>
</tbody>
</table>

**Extinguishment**

<table>
<thead>
<tr>
<th>Principles</th>
<th>By*</th>
<th>Outcome</th>
</tr>
</thead>
<tbody>
<tr>
<td>Interpretation of the requirement for clear and plain intention to extinguish</td>
<td>NTP</td>
<td></td>
</tr>
<tr>
<td>Application of the inconsistency of incidents test</td>
<td>NTP</td>
<td></td>
</tr>
<tr>
<td>Finding that inconsistency leading to extinguishment need not be permanent</td>
<td>NTP</td>
<td></td>
</tr>
<tr>
<td>Finding native title can be partially extinguished, eg by statutory controls or grants to 3rd parties</td>
<td>NTP</td>
<td></td>
</tr>
</tbody>
</table>

**Effect of enclosure or improvement of WA pastoral lease**

| Finding that native title is totally extinguished by enclosure or improvement of pastoral leases in WA and that ‘enclosure’ means ‘fenced’. | NTP  |           |

**Effect of resumptions**

| Holding that native title was extinguished over areas resumed but not yet used for the Ord River irrigation project. | NTP  |           |
| Finding that resumption of land for the Ord irrigation project under the Rights in Water and Irrigation Act 1914 (WA) wholly extinguished native title. | NTP  |           |
| Holding that resumptions leading to the vesting of an estate in fee simple wholly extinguished native title | NTP  |           |

**Minerals, petroleum and other resources**

| Confining the native title right to resources to traditional resources.          | NTP  |           |
| Finding that native title to minerals and petroleum extinguished by statute.    | NTP  |           |
| Finding that the Argyle Diamond project wholly extinguished native title.       | NTP  |           |
| Finding that the grant of a mining or general purpose lease under 1978 WA legislation wholly extinguished native title. | NTP  |           |

**Effect of creation of a national park**

| Holding that the native title holders had the right to make decisions about the use and enjoyment of a national park. | NTG  |           |
| Holding that native title continued to exist over parts of a national park where improvements had been made. | NTG  |           |

**Application of the NTA**

| Failing to apply s. 47B to certain vacant Crown lands.                           | NTP  |           |
| Failing to apply certain provisions of the NTA (eg. s. 44H)                     | NTP  |           |
| Holding that the public right to fish is an interest within the scope of s 225(c) and s. 253 of the NTA and that such a right extinguished exclusive native title rights to fish in the inter-tidal zone. | NTP  |           |

**Application of the RDA**

| Finding that the creation of native reserves and wildlife sanctuaries under WA legislation after the RDA commenced is racially discriminatory. | SWA  |           |
| Failing to consider the effect of the RDA on the Argyle Diamond project        | NTP  |           |
| Failing to consider the effect of the RDA on certain resumptions that lead to the vesting of an estate in fee simple | NTP  |           |

* NTP = native title parties; SWA = State of Western Australia; NTG = Northern Territory Government.
There are also several cross-appeals in relation to some of the grounds. For further details, see summary on [High Court's home page](https://www.hcourt.gov.au).
The above table is presented below in a newspaper-column type format showing grounds of appeal grouped by the party appealing the matter:

(ii) MAIN GROUNDS IN WARD HIGH COURT APPEAL

It is alleged that the Full Federal Court was in error in relation to the following

Native title parties

1. Interpretation of the requirement for clear and plain intention to extinguish.
2. Application of the inconsistency of incidents test.
3. Finding that inconsistency leading to extinguishment need not be permanent.
4. Finding native title can be partially extinguished, including by introduction of statutory controls or grants to 3rd parties.
5. Finding native title is a bundle of rights.
6. Finding that express reservations in favour of Aboriginal people contained in pastoral leases, certain nature reserves and national park leases, and the absence of same in other leases, manifests an intention to extinguish native title and defines the scope of any remaining native title.
7. Finding that native title is totally extinguished by enclosure or improvement of pastoral leases in WA and that ‘enclosure’ means ‘fenced’.
8. Holding that native title was extinguished over areas resumed but not yet used for the Ord River irrigation project.
10. Holding that resumptions leading to the vesting of an estate in fee simple wholly extinguished native title and failing to consider the application of the Racial Discrimination Act 1975 (Cwlth) (RDA) in the circumstances.
11. Failing to apply s. 47B to certain vacant Crown lands.
12. Finding that native title to minerals and petroleum extinguished by statute.
13. Confining the native title right to resources to traditional resources.
14. Finding that the Argyle Diamond project wholly extinguished native title and failing to consider the effect of the RDA.
15. Finding that the grant of a mining or general purpose lease under WA legislation wholly extinguished native title.
16. Holding that the public right to fish is an interest within the scope of s 225(c) and s. 253 of the NTA and that such a right extinguished exclusive native title rights to fish in the inter-tidal zone.
17. Finding that unspecified common law public rights prevail over native title.
18. Holding that the common law cannot recognise and protect

State of WA

1. Finding that the creation of native reserves and wildlife sanctuaries under WA legislation after the RDA commenced is racially discriminatory.
2. Holding that native title can be recognised without evidence of presence upon, or use of, the area concerned by the claimants.
3. Finding that a spiritual connection is sufficient to ground a determination that native title exists.

Northern Territory Government

1. Holding that the native title holders had the right to make decisions about the use and enjoyment of a national park.
2. Holding that native title continued to exist over parts of a national park where improvements had been made.

NB: There are also several cross-appeals in relation to some of the grounds. For further details, see summary on High Court's home page.
Ward – Full Bench of the Federal Court

A brief summary of the Ward determination as it stands at present is useful for our understanding of the issues:

Western Australia v Ward (2000) 99 FCR 316; 170 ALR 159, 3 March 2000

In Ward v Western Australia (1998) 159 ALR 483, Lee J found (amongst other things) that:

- the Miriuwung and Gajerrong people, as a composite identifiable community, held native title to those parts of the determination area (situated in the East Kimberley and adjacent parts of the Northern Territory) where native title was not extinguished. The Balangarra people were found to have concurrent native title over part of the determination area – p 541 to 542, 551;
- native title is a communal right to land, not a bundle of rights, and it cannot be partially extinguished – p 509 to 510;
- an interest which is inconsistent with native title must be permanent before extinguishment occurs – p 508 to 510 and, eg. 622-625;
- over most of the area claimed, native title existed concurrently with non-native title interests;
- the exercise of native title rights may be regulated, controlled, curtailed, restricted, suspended or postponed either by operation of legislation or by the nature and extent of other interests created by the Crown but those rights are not extinguished by any of these things – p 500, 508 & 557;
- the connection required for proof of native title can be substantially maintained without physical presence on the land.

Several appeals against Justice Lee's decision were heard by the Full Bench of the Federal Court. The Full Court (Beaumont, von Doussa and North JJ) were unanimous in upholding Lee J's finding that the claimants held native title to those parts of the determination area where native title was not extinguished: see [200] & [201], [222] to [280] and [682]. The Full Court also agreed with many of his Honour’s findings as to what is required to prove native title: see [229] to [238], [246] & [247], [682].

However, a majority of the judges (Beaumont and von Doussa JJ) overturned Lee J in relation to the nature of native title and the manner in which it may be extinguished, holding (amongst other things) that:

- native title is made up of a bundle of rights, only some of which are recognised at common law, and it may be partially extinguished - – see [88] to [112] and [109];
- the common law only recognises native title rights and interests that involve physical use and enjoyment of the land. Purely religious or spiritual relationships with land are personal rights that cannot be recognised or protected - [106] to [108]; or extinguished by legislation or executive act – 170 ALR 159 [666];
- there is no requirement that an inconsistent grant be permanent before extinguishment occurs. Even short term interests may permanently extinguish native title to the extent of any inconsistency between those interests and native title – at [85] & [633];
- pastoral leases granted under both the Western Australian and Northern Territory legislation permanently extinguish any exclusive native title rights (eg. the right to possess, use, occupy and enjoy the land to the exclusion of all others) - -- see [282] to [292];
- in Western Australia, any remaining native title would be permanently extinguished over areas of the lease that were enclosed (eg, fenced) or improved (eg. where a stock yard was built), provided the lease was granted after 1934. This was because of the terms of the reservation in favour of Aboriginal people found in the Western Australian
leases. For leases granted prior to 1933, when the reservation was worded differently, native title rights and interests would not be extinguished unless the area concerned was both enclosed (eg. fenced) and improved – [319] to [329];

- operational inconsistency, which extinguishes native title, may arise after a grant is made. For example, if something is done under a power or obligation that is part of the grant (for example, building a fence, a dam or an airstrip on a pastoral lease), that is inconsistent with the continuation of native title, then native title will be extinguished to the extent of that inconsistency - – [73];

- State and Territory legislation had extinguished any native title to minerals and petroleum - [512] to [545];

- acts done to establish the Argyle diamond mine and the Ord River project extinguished native title – [546] to [575] and [416] to [422], [428] to [443], [452];

- the grant of a mining or general purpose lease extinguishes native title – [576] to [592];

- the native title to take fauna was extinguished in nature reserves and wildlife sanctuaries created before the Racial Discrimination Act (1975) (Cwlth) commenced – see [504];

- conservation legislation, the creation of stock routes, the proclamation of an irrigation district and the dedication of reserves that create rights in the public that are inconsistent with native title all partially extinguish native title - [506] to [508], [469], [396] to [406], [386] to [391];

- any exclusive native title rights to fish in the intertidal zone was extinguished by the common law public right to fish, dig bait, take shellfish and worms and navigate in tidal waters -[216] and [660].

This decision is subject to several appeals to the High Court, which challenge, amongst other things, many the findings listed above. In addition, there is a challenge to the finding that the continuing connection to country native title claimants are required to establish can be substantially maintained without physical presence on the land eg by maintaining spiritual or religious practices and by continuing to acknowledge and pass on law and custom: see, for example, [240] to [263].

The appeals were heard in March 2001. Judgement is yet to be delivered.\textsuperscript{23}

\textit{Mabo (No 2)}

The original decision of the High Court that recognised the continuing existence of native title rights in the Australian legal system still provides the fundamental framework of our understanding. The following is taken from Richard Bartlett’s publication, \textit{Native Title in Australia}:

\textbf{Mabo (No 2): The recognition of native title}

\textbf{The facts}

[2.16] In \textit{Mabo v Queensland} (1988) 166 CLR 186; 83 ALR 14 the High Court had not decided the question of native title at common law, but if it existed, had established that it was under a form of constitutional protection. Unilateral state action could not extinguish native title except upon the conditions imposed by the Racial Discrimination Act 1975 (Cth).

\footnote{ibid.}
The substantive hearing on the remitter referred to in [2.5] before the Supreme Court of Queensland resumed on 2 May 1989. On 16 November 1990, Moynihan J delivered the court’s determination of the issues of fact raised by the pleadings. It included the following:

- The Murray Islands were probably first inhabited by people of Melanesian origin from Papua New Guinea. It was ‘impossible’ to say with precision when the Murray Islanders arrived but ‘it seems likely that at the time of early European contact the Islands had been settled for some generations’.
- Prior to European contact the Islanders were part of an evolving social organisation in which the position of the individual was determined by ‘complex and intricate collections of interrelated groupings’, that is, the village, the district, the cult, and the animal ceremonial group.
- Village land and garden was divided into plots owned by individuals or family groups.
- The relationship of the Meriam people to land and sea was ‘not a religious spiritual relationship of the kind which emerged…in Milirrpum v Nabalco’ but was nevertheless ‘strong’ and ‘enduring’.
- Gardening was of profound importance to the Murray Islanders at and prior to European contact. The development of a cash and welfare economy, education and migration for work had significantly diminished the importance of gardening.

On these facts the case was argued for four days before the High Court commencing on 28 May 1991. The court reserved its decision.

The decision

[2.18] The High Court decision in Mabo v Queensland (No 2) (1992) 175 CLR 1; 107 ALR 1 was handed down on 3 June 1992. Five judgments were delivered in the High Court, by Brennan J, Deane J and Gaudron J, Toohey J, Dawson J, and Mason CJ and McHugh J. The judgement of Mason CJ and McHugh J is a brief explanation of their concurrence with Brennan J and of the effect of his decision.

[2.19] All of the judges, except Dawson J, agreed that:

- there was a concept of native title at common law;
- the source of native title was the traditional connection to or occupation of the land;
- the nature and content of native title was determined by the character of the connection or occupation under traditional laws or customs; and
- native title could be extinguished by the valid exercise of governmental powers provided a clear and plain intention to do so was manifest.

A majority of judges, Brennan J (Mason CJ and McHugh J concurring) and Dawson J, concluded that extinguishment by inconsistent grant by the Crown was not wrongful, nor was compensation payable, at common law. However, all of the judges, except Dawson J, considered that extinguishment was subject to the obligation imposed by the Racial Discrimination Act 1975 (Cth).

[2.20] The order of the court was a declaration that the Meriam people were ‘entitled as against the whole world to possession, occupation, use and enjoyment of the lands of the Murray Islands’, subject to the powers of Queensland to extinguish that title, provided any exercise of those powers was not inconsistent with the laws of the Commonwealth. The
declaration put to one side and did not deal with lands which had been leased or which had been reserved for administrative purposes …

Holding

[2.37] Mabo v Queensland (No 2) (1992) 175 CLR 1; 107 ALR 1 is the landmark case on native title at common law in Australia. It brought Australian law into line with the rest of the common law world. The findings of the justices of the High Court may be expressed numerically as follows:

<table>
<thead>
<tr>
<th>Finding</th>
<th>In favour</th>
<th>Against</th>
</tr>
</thead>
<tbody>
<tr>
<td>The Crown acquired sovereignty and radical title upon settlement</td>
<td>6</td>
<td>1</td>
</tr>
<tr>
<td>Native title exists at common law as a burden on the radical title</td>
<td>6</td>
<td>1</td>
</tr>
<tr>
<td>The origin of native title is the societal connection to the land under traditional laws and customs</td>
<td>6</td>
<td>0</td>
</tr>
<tr>
<td>The nature and content of native title is determined by the character of the traditional connection</td>
<td>6</td>
<td>0</td>
</tr>
<tr>
<td>Extinguishment of native title requires manifestation of a clear and plain intention to extinguish</td>
<td>7</td>
<td>0</td>
</tr>
<tr>
<td>General public lands legislation does not itself extinguish native title</td>
<td>6</td>
<td>1</td>
</tr>
<tr>
<td>Inconsistent grants and dispositions extinguish native title having manifested a clear and plain intention</td>
<td>7</td>
<td>0</td>
</tr>
<tr>
<td>Extinguishment of native title is subject to compliance with the Racial Discrimination Act 1975 (Cth)</td>
<td>6</td>
<td>1</td>
</tr>
<tr>
<td>No consent to extinguish or compensation for extinguishment is required, even in the absence of legislation</td>
<td>3 (or 4 including Dawson J)³</td>
<td>3</td>
</tr>
</tbody>
</table>

a. Dawson J did not, of course, accept the concept of native title at common law.

Implications

[2.38] The immediate implications of the decision in 4 (No 2) (1992) 175 CLR 1; 107 ALR 1 were:

- the validation of the dispossession of Aboriginal people ‘parcel by parcel’ from 1788 to 31 October 1975 without consent or compensation;
- the recognition by the common law and the giving of effect to the surviving remnants of the traditional relationship of Aboriginal people to land; and
- the protection by the Racial Discrimination Act 1975 of the surviving remnants from legislative impairment or extinguishment in accordance with the standard of equality before the law since 31 October 1975 …

²⁴ R. Bartlett, Native Title in Australia, Butterworths, Canberra, 2000, pp22-31.
The Wik decision provides the fundamental conceptual framework that has greatly expanded our understanding with regard to potentially coexisting interests and their interaction with native title rights and interests. The following information has been provided by the Legal Department of the National Native Title Tribunal:

**Wik Peoples v State of Queensland, Thayorre Peoples v State of Queensland** (1997) 187 CLR 1; 141 ALR 129

1. **Background**

On 30 June 1993 the Wik Peoples commenced proceedings in the Federal Court of Australia against the State of Queensland, the Commonwealth and other respondents. They claimed Aboriginal title rights over an area of land in Queensland. The Thayorre People claimed Aboriginal title over part of the land the subject of the Wik claim. The Thayorre were therefore joined to the proceedings. The land claimed by the Wik and Thayorre Peoples included land over which pastoral leases had been granted: the Mitchellton Pastoral leases and the Holroyd River Pastoral leases. The land also included areas that had been the subject of special bauxite mining leases issued under the Commonwealth Aluminium Corporation Pty Limited Agreement Act 1957 (Qld) and the Aurukun Associates Agreement Act 1975 (Qld).

**Holroyd River Holding Lease**
These leases cover land within that claimed by the Wik Peoples. The leases were first granted in 1943 under the Land Act 1910 (Qld) (the 1910 Act) for pastoral purposes for a term of 30 years. The lease was surrendered on 31 December 1973 and a new lease was granted under the Land Act 1962-1974 (Qld) (the 1962 Act) for a term of 30 years, commencing on 1 January 1974. That lease was current at the time of the proceedings. The land contained within this lease had never been permanently occupied or fenced. Aboriginal people were still in occupation of the area at the date of the hearing.

**Mitchellton Pastoral Holding Lease**
These leases cover land within that claimed by both the Wik and Thayorre Peoples. This lease was first granted under the 1910 Act for a term of 30 years. The lease was forfeited on 20 July 1918 for non payment of rent. On 14 February 1919 a second pastoral lease was granted over the same area for a term of 30 years. Since 12 January 1922 the area has been reserved for the use of “Aboriginal inhabitants of Queensland”. Aboriginal people were in continuous occupation of the area during this period and up to the date of the hearing.

2. **Earlier Proceedings**

On 29 January 1996, Drummond J held that the claims of the Wik and Thayorre peoples could not succeed over the land which had been or was subject to the grant of a pastoral lease because the effect of such a grant was to extinguish native title.

3. **High Court Appeal**

Drummond J’s decision was appealed to the Full Federal Court. The appeal was removed to the High Court pursuant to s. 40(1) of the Judiciary Act 1903 (Cwlth). The questions put to the Court on were:

i. does a pastoral lease granted under Queensland land Acts confer rights to exclusive possession on the lessee? If the answer to this question is “yes”, then;

ii. did the creation of the pastoral leases in question confer on the lessee rights wholly inconsistent with the concurrent and continuing exercise of any rights or interests
which might comprise such Aboriginal title or possessory title of the Wik and Thayorre peoples and their predecessors in title which existed before the *New South Wales Constitution Act 1855* (Imp) took effect in the Colony of New South Wales?

iii. did the grant of these pastoral leases necessarily extinguish all incidents if Aboriginal title or possessory title of the Wik and Thayorre peoples in respect of the land demised under the pastoral lease?

4. **High Court decision**

A majority (Toohey, Gaudron, Gummow and Kirby JJ) allowed the appeal in part, answering “no” to the first question. Therefore, ii and iii did not arise. However, the majority found that, although part iii did not, strictly speaking, arise, it was properly answered “no”. A minority (Brennan CJ, with McHugh and Dawson J concurring) held that the answer to question i was yes. Therefore, Drummond J was correct i.e. the claims fail because native title was extinguished on the issue of the pastoral leases.

**Extinguishment of native title**

The Court held that it is mere inconsistency of rights, not factual inconsistency in the exercise of those rights that extinguishes native title (see, for example, Toohey J at 183-84, Gaudron J at 193, Gummow J at 226 and Kirby J at 285). As Toohey J stated:

“Inconsistency can only be determined, in the present context, by identifying what native title rights in the system of rights and interests upon which the appellants rely are asserted in relation to the land contained in the pastoral leases...Those rights are then measured against the rights conferred on the grantees of the pastoral leases; to the extent of any inconsistency the latter prevail.” (At 275).

All seven judges agreed that if the rights conferred on the lessee of a pastoral lease are inconsistent with a continued right to enjoy native title, the rights of the pastoral lessee prevail over native title rights and interests to the extent of the inconsistency.

**Did the grant of the pastoral leases necessarily extinguish native title?**

In determining whether the pastoral leases extinguished native title, the majority considered what is involved in a grant of a leasehold, the proper construction of the 1910 and 1962 *Land Acts* and the terms of the grants of pastoral leases.

**Concepts Relating to the Grant of Leasehold**

At common law, a lease carries with it the right of exclusive occupation. This is one of the main features which is used to decide whether the grant of a particular estate is a lease or not. In this case, the Court looked at the significance of the use of the word ‘lease’ to describe a pastoral lease: did this give the right of exclusive possession, as it would under a common law lease, or was there something different about pastoral leases? The majority decided that pastoral leases could not be equated with common law leases (see Toohey J at 174, Gaudron J at 204, Gummow J at 224 and Kirby J at 266). Gaudron J, for example, found that pastoral leases are not creations of the common law and that the case law indicates that pastoral leases are “entirely anchored in statute law.” It was argued that the use of the word lease meant that the legislature intended that pastoral lessees be granted exclusive possession. The majority observed that the question was whether exclusive possession was an incident of every arrangement which bears the title of a lease.

**The 1910 and 1962 Land Acts**

The majority having determined that a pastoral lease does not equate to a common law lease turned to the statutes conferring the leasehold interest to determine what those interests were.
The Respondents relied in particular on s. 204 of the 1910 Act and s. 373 of the 1962 Act to establish that the grant of a pastoral lease conferred the right of exclusive possession of the land on the pastoralist. Those sections created an offence of trespass on Crown land and allowed persons so trespassing to be removed from the land. Toohey, Gaudron and Gummow JJ held that these provisions do not render Aboriginal people trespassers liable to removal from the land on either Crown land or on land comprising a lease or licence from the Crown: Toohey J at 180, Gaudron J at 202, Gummow J at 237.

Reservations
Statutory provisions in the 1910 and 1962 Acts created reservations that allowed people to enter onto the land for specific activities. For example, there was a reservation in favour of the Crown of a right of access to search for or work gold and minerals. Rights were conferred on persons to enter upon the land to remove timber, stone, gravel, clay or other material.

Justice Toohey held that the lessee must yield to these reservations stating:

“The lessee’s right to possession must yield to those reservations. There is nothing in the statute which authorised the lease, or in the lease itself, which conferred on the grantee rights to exclusive possession, in particular possession exclusive of all rights and interests of the indigenous inhabitants whose occupation derives from their traditional title. In so far as these rights and interests involved going on to or remaining on the land, it cannot be said that the lease conferred on the grantee party rights to exclusive possession…[T]here is nothing in the statute or grant that should be taken as a total exclusion of the indigenous people from the land, thereby necessarily treating their presence as that of trespassers or at best licensees whose licence could be revoked at any time.” (At 181)

Justices Gaudron and Gummow observed that these reservations indicated that the pastoral leases were not leases in the traditional common law sense because they did not confer a right of exclusive possession.

Reversion
On assumption of sovereignty, the Crown acquires radical title, not absolute and beneficial Crown ownership. The respondents contended that the grant by the Crown of a lease necessarily involved the acquisition by the Crown of the reversion upon the expiry of the term. This argument was rejected and as Toohey J stated:

"To speak, in relation to the Crown, of a reversion expectant on the expiry of the term of a lease as expanding the Crown’s radical title to a plenum dominium is…to apply the concept of reversion to an unintended end. To say this in no way detracts from the doctrine of sovereignty; the Crown may thereafter deal with the land as is authorised by statute…In the present case, once a pastoral lease came to an end, the land answered the description of “Crown land”...The invocation of reversion and plenum dominium, as those expressions are usually understood, does not lie easily with the position of the Crown under the relevant statutes.” (At 186-187)

"The proposition that it is the radical title of the Crown with which we are concerned and that, on the expiration or other termination of a pastoral lease, it is still the radical title that must be considered in relation to native title rights, does not minimise the sovereignty of the Crown. Nor does it undermine the principle that native title rights depend on their recognition by the common law. That recognition carries with it the power to extinguish those rights. But it requires a very clear act to do so. To contend that there is no room for the recognition of native title rights, is …to read too much into the Crown’s title. Furthermore, if it is the reversion which carries with it beneficial title, why is that title not there in the first place? And if it is the existence of that beneficial title which extinguishes native title rights, why were those rights
not extinguished before the grant of the pastoral lease? There is a curious paradox involved in the proposition.” (at 187)

Gaudron J held that because the Mitchellton leases were not true leases in the common law sense there was no basis for the argument that the Crown obtained a reversionary interest and she stated:

“As a reversionary interest only arises on the vesting of a leasehold estate, there is no basis for the contention that, on the grant of the Mitchellton Leases, or, more accurately, on the grant of the first Mitchellton Lease, the Crown acquired a reversionary interest, as that notion is understood by the common law, and its radical title was thereby expanded to full beneficial ownership.” (at 209).

Gummow J also rejected this argument stating: “The [1910 Act] maintained a legal regime where, in respect of what it identifies as leases, there was no need for the creation in the Crown of a reversionary estate out of which lesser estates might then be granted.” His Honour makes similar arguments regarding s. 6(2) and s. 135 as did Gaudron J:

“It is apparent that the term “revert” is used [in s. 135] in the particular sense of the reassumption of the character of “Crown land” liable to further disposition under s. 6...Accordingly, I would reject the submission for the State that the scheme of the 1910 Act and the 1962 Act is such that, with respect to the grant of limited interests thereunder by the Crown, the necessary consequence is the acquisition by the Crown of a reversion expectant on the cesser of that interest, thereby generating for the Crown that full and beneficial ownership which is necessarily inconsistent with subsisting native title.” (At 236-237)

**Non-Entry into Possession**

At common law, a lessee who had not entered into possession could not maintain an action for trespass and no reversion expectant on the termination of the leasehold interest arose until possession. The Thayorre people argued that the Mitchellton leases had never gone into possession and had not therefore had the interest granted.

This submission was rejected, with the Court holding that s. 6(2) of the 1910 Act provided that it was the making of a grant in the prescribed form which operated to convey and vest the interest granted: Toohey J at 188, Gaudron J at 207, Gummow J at 236, Kirby J at 278 and Brennan CJ at 150.

**Terms of the Pastoral Lease**

Leases granted under the 1910 Act were expressed to be for “pastoral purposes only”, which included the raising of livestock other incidentals such as establishing fences, yards, bores, mills and accommodation. Justice Gaudron found that, because the grants were expressed to be made “for pastoral purposes only”, they went against any intention that pastoral leases should confer a right of exclusive possession. Similarly Gummow J observed:

“Even upon this broader interpretation, it cannot be said that there have been clearly, plainly and distinctly authorised activities and other enjoyment of the land necessarily inconsistent with the continued existence of any of the incidents of native title which could have been subsisting at the time of these grants of the pastoral leases.” (at 245).

**Conclusion**

The majority held that there was no necessary extinguishment of native title rights by reason of the grant of pastoral leases under the 1910 and 1962 Land Acts. Toohey J stated:

“It is too simplistic to regard the grant by the Crown of a limited interest in land as necessarily extinguishing native title rights. It is a large step indeed to conclude that, because there has been a grant of a “lease” of many square miles for pastoral purposes, all rights and interests of indigenous people in regard to the land were intended thereby to be brought to an end.” (At 188.)
Similarly, Gaudron J stated:

“Whilst the grant of a pastoral lease under the 1910 Act certainly conferred the right to occupy land for pastoral purposes and...to bring action for the removal of persons in unlawful occupation, a pastoral lease did not operate to extinguish...native title rights, as would have been the case, had it conferred a right of exclusive possession.” (At 209.)

Gummow J reached a similar conclusion holding:

“None of the grants clearly, plainly and distinctly authorised activities and other enjoyment of the land which necessarily were inconsistent with the continued existence of any of the incidents of native title which could have been subsisting at the time of these grants.” (At 222.)

Kirby J held:

“When the Acts are examined, clear language of extinguishment is simply missing. On the contrary, there are several indications which support the contention of the Wik and the Thayorre that the interest in land which was granted to the pastoralists was a limited one: for “grazing purposes only”, as the leases stated.” (At 279.)

Yanner

The Yanner case assists our understanding with regard to regulatory regimes that interact or coexist with native title rights and interests. The issues of coexistence are applicable to a much wider sphere of influence than grants of leases and licences by governments to third parties. The following information is again supplied by the National Native Title Tribunal’s Legal Department:

Yanner v Eaton (1999) 201 CLR 351; 166 ALR 258

Held

By a 5:2 majority, the High Court allowed the appeal and held that the Fauna Conservation Act 1974 (Fauna Act) did not extinguish the appellant’s native title rights and interests. By operation of s. 211(2) of the Native Title Act 1993 (Cwlth) (the NTA) and s. 109 of the Commonwealth Constitution, the Fauna Act did not prohibit or restrict the appellant, as a native title holder, from hunting or fishing for the crocodiles he took for the purpose of satisfying personal, domestic or non-commercial communal needs.

In construing the meaning of the word ‘property’ in s. 7 of the Fauna Act, the majority looked to both the purpose of the legislation as a whole and the Parliament’s intention. The minority judgements considered the natural and ordinary meaning of the word ‘property’ in s 7(1).

Facts

The appellant, Murrandoo Yanner, was charged under s 54(1) of the Fauna Act in relation to the taking of two estuarine crocodiles without a licence, permit, certificate or other lawful authority as required by s 54(1)(a) of that Act. Mr Yanner relied upon s. 211 of the NTA as a defence. He argued that s. 54(1) of the Fauna Act is inconsistent with s. 211(2) of the NTA and that s. 109 of the Constitution renders s. 54(1) invalid to the extent of the inconsistency.

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25 National Native Title Tribunal, op.cit.
The Magistrates Court of Queensland accepted this argument i.e. that the Fauna Act did not prohibit or restrict Mr Yanner, as a native title holder, from hunting or fishing for the crocodiles that he took for the purposes of satisfying personal, domestic or non-commercial communal pursuant to s. 211 of the NTA. This decision was appealed to the Queensland Court of Appeal, which, by majority, set aside the order of the Magistrates Court. Mr Yanner then sought and was granted special leave to appeal to the High Court.

The respondent contended that any native title right or interest to hunt crocodiles in Queensland had been extinguished prior to the commencement of the NTA by s. 7(1) of the Fauna Act which provided that:

“All fauna, save fauna taken or kept otherwise than in contravention of this Act during an open season with respect to that fauna, is the property of the Crown and under the control of the Fauna Authority.”

Therefore, the respondent argued, the NTA had no operation in this case because the native title rights and interests had been extinguished before the NTA was enacted.

The question for the High Court was: what effect did the vesting of some fauna in the Crown under s 7(1) of the Fauna Act have on the appellant’s native title rights and interests?

MAJORITY JUDGEMENTS

Gleeson CJ, Gaudron, Kirby and Hayne JJ:

The meaning of ‘property’

Their Honours were of the view that an analysis of s. 7(1) of the Fauna Act in light of the legislation as a whole was required in order to understand what is meant by the use of the word ‘property’ in that subsection. Their Honours looked to the purpose of the legislation and the intention of the legislature. They gave four reasons in support of their conclusion that the ‘property’ conferred on the Crown under the Fauna Act is not full beneficial or absolute ownership:

• It is difficult to identify what fauna is owned by the Crown. This is highlighted when considering migratory birds – does the Fauna Act purport to give the Crown ownership of migratory birds only as they pass through Queensland, or does it purport to give ownership to the Crown of every bird that has ever crossed the Queensland border?;
• Wild animals at common law were the subject of very limited property rights. The subject matter dealt with by the Fauna Act is, with limited exceptions intended always to remain outside the possession of, and beyond the disposition by, humans;
• The Fauna Act provides for exceptions to the property in fauna being conferred on the Crown. During open season, fauna taken that would otherwise be the property of the Crown ceases to be so. There are also sections in the Fauna Act dealing with forfeiture of fauna to the Crown. These sections (and others) tend to suggest that the property in the Crown is less than full beneficial ownership.
• Property in only some fauna was vested in the Crown. The intention of the legislation may have been to confer property in fauna on the Crown so as to set up a royalty system. There may also have been a perceived need to differentiate the levy imposed by successive Queensland fauna statutes from an excise. It may have been thought to make the levy similar to such things as royalties for taking minerals or timber.
In other words, they found that, when you look at the purpose of the legislation, an intention not to confer full beneficial ownership of fauna on the Crown is discernible. In their Honour’s view, the statutory vesting of ‘property’ in the Crown is nothing more than:

“a fiction expressive in legal shorthand of the importance to its people that a State have power to preserve and regulate the exploitation of an important resource”.

That is, the vesting of ‘property’ in the Crown is really about resource management and revenue collection rather than full beneficial ownership.

**Extinguishment**

Their Honours took the view that regulating the way in which the rights and interests may be exercised is not inconsistent with their continued existence. In fact, regulating the way in which a right may be exercised presupposes that the right exists. However, they noted that the line between regulation and prohibition may be difficult to discern.

In establishing inconsistency, their Honours pointed out the need to remember that native title rights and interests not only find their origin in Aboriginal law and custom, they reflect connection with the land, referring to Brennan J in *R v Toohey; Exparte Meneling Station Pty Ltd* (1982) 158 CLR 327 at 358:

“Aboriginal ownership is primarily a spiritual affair rather than a bundle of rights [but] [t]raditional Aboriginal land is not used or enjoyed only by those who have a primary spiritual responsibility for it. Other Aboriginals or Aboriginal groups may have a spiritual responsibility for the same land or may be entitled to exercise some usufructuary rights with respect to it.”

The majority held that regulating particular aspects of the usufructuary relationship with traditional land does not sever the connection of the Aboriginal peoples concerned to the land. This is supported by s. 211 NTA.

**Gummow J**

**Common law native title**

Gummow J distinguished between title and incidents of title i.e. the native title of a community of indigenous Australians is comprised of the collective rights, powers and other interests of that community which may be exercised by particular sub-groups or individuals in accordance with that community’s traditional laws and customs. Each collective right, power or other interest is an “incident” of that community’s native title – in this case, it was the native title or ‘incident’ to hunt estuarine crocodiles exercised by the Mr Yanner. His Honour refers to the exercise of these rights or incidents of native title as “the exercise of privileges of native title”, noting that these will vary in accordance with the traditional laws and customs of the community. Native title and native title rights and interests, whilst recognised by the common law, arise independently of the common law tenurial system.

**Meaning of the term ‘property’**

Gummow J was of the view that the term ‘property’, as used in s. 7(1) of the Fauna Act, should be construed as referring to the aggregate of legal relations between the Crown and fauna. His Honour noted that not all fauna is the ‘property of the Crown’ under s. 7(1). Fauna which is taken or kept during an open season is not the ‘property of the Crown’. Therefore, the acts of taking or keeping “perform a threshold distributive function in determining whether ‘property’ is vested in the Crown”.

28
His Honour found that:

- Subsection 7(1) should be constructed so that the legal relations described in s. 7 as the ‘vesting’ of ‘property’ arise only if a person ‘takes’ or ‘keeps’ fauna. If the fauna is taken or kept during an open season with respect to it, ‘property’ does not vest in the Crown;
- The word ‘Crown’ in s 7(1) is used in two senses. Firstly, the section says that fauna is the property of the Crown and, secondly, fauna is under the control of the Fauna Authority (basically defined as the “Minister and subject to the Minister the Under Secretary and the Conservator”);
- Subsection 7(1) therefore places control of fauna in a persona designata of the Crown ie. a Minister of the Crown in right of Queensland. In contrast, the reference in s. 7(1) to fauna being the ‘property of the Crown’ must be taken to be a reference to that body politic which is the State of Queensland;
- The main reference to the ‘Crown’ as the State of Queensland is found in the royalty provisions of the Fauna Act. Essentially s 7(1) provides a basis for the operation of a royalty system. This is the relevant legal interest of the Crown – not the physical possession of fauna.
- The second implicit reference in the Fauna Act to the Crown, as the State of Queensland, is found in the enforcement provisions – they impose penalties upon persons who contravene the statutory proscriptions supporting the royalty regime.

Gummow J concluded that the State of Queensland had two interests conferred by the Fauna Act – the recovery of royalties and the recovery of penalty sums under the various enforcement provisions.

**Extinguishment**

According to Gummow J:

- When considering the extinguishment of native title, it is unnecessary for the statutory regime and the native title to be wholly inconsistent.
- Rather, the issue is one of identifying the extent of the inconsistency. Whether, in any given case, native title rights and interests have been extinguished is a question of law. The test is inconsistency. The continued subsistence of native title will turn upon the extent of the inconsistency;
- It is first necessary for there to be factual findings to establish the ambit of the native title right as defined by the traditional laws and customs of the relevant indigenous community. The ambit of the native title is then a finding of law – this must be placed against the statutory rights which are said to abrogate it;
- The question is: do the statutory rights necessarily curtail the exercise of the native title right such that the conclusion of the abrogation is compelled or whether to some extent the title survives or whether there is no inconsistency at all? A statute may regulate the exercise of the native title right without in any degree abrogating it.

His Honour was of the view that two questions arose in the appeal:

- When does the inconsistency arise?
- What is the effect of the statutory rights on the exercise of the native title right to hunt?

In relation to the first question, Gummow J found that the Crown’s ‘property’ in the fauna only arose upon a ‘taking’ or ‘keeping’. Any question of inconsistency arises upon, but not before, a ‘taking’ or ‘keeping’ of fauna. In relation to the second question, his Honour was of the view that the exercise of the native title right to hunt was a matter within the control of Mr Yanner’s community. The regulation of that control by the Fauna Act (by requiring a permit) did not abrogate the native title right. Rather, the regulation was consistent with the continued existence of that right.26

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26 ibid.
Understanding the issues relating to native title and potentially coexisting rights

The concept of native title in the Native Title Act 1993: Sections 223, 224 and 225

An important source of information on the concept of property rights and how native title may coexist with other rights is the Native Title Act 1993’s itself. The elements to be determined in native title applications (claims) and acts of various kinds are set out in Division 2 of the Native Title Act 1993. See Attachment 2 for the full text of sections 223 to 225 of this Act.

Section 223 deals with some fundamentals of native title. It deals with common law rights and interests; hunting, gathering, fishing; statutory rights and interests; and areas where native title does not apply, in particular, those that fall within the ambit of land rights and grants which are made by governments.

Section 224 deals with the definition of native title holder.

Importantly, section 225 sets out the matters that must be determined by the Court when making a determination of native title.

In summary, the matters that the Court must consider when determining a native title application are as follows:

- Firstly, whether or not native title exists; then
- If the Court determines that native title does exist, the details that must also be determined are -
  a) how to describe the group of persons who hold native title;
  b) the nature and extent of the native title rights and interests;
  c) the nature and extent of any other interests – this includes leases, licences, permits, government regulation, etc;
  d) critically, the relationship between the native title rights and other interests in the land; and
  e) whether native title is exclusive or non-exclusive.

Irrespective of the technical legal debate over the nature of property rights as far as native title is concerned, the elements that must be determined have a similar flavour or are of the same nature as property rights granted by the State and held by individuals, groups or companies. The common elements are a determination of who holds the interests, where they are located, and what those rights and interests entitle the holder to do in a practical sense.

Justice Toohey’s postscript in Wik

Justice Toohey’s postscript to the High Court’s Wik decision is an important conceptual statement concerning coexisting native title rights and other interests. The postscript is at Attachment 3. The two key points from the postscript that I wish to highlight here are that, “…there was no necessary extinguishment of those rights by reason of a grant of
pastoral leases under the acts in question.”

The second is that, “…if inconsistency is held to exist between the rights and interests conferred by native title and the rights conferred under statutory grants, those rights and interests must yield, to that extent to the rights of the grantees.”

In other words, there can be coexisting rights and interests and, in the event that there is any clash or inconsistency between those two sets of rights and interests, those granted by the State government, in this case, take precedence over the native title rights and interests that are recognised by the law.

Where might native title coexist and where is native title extinguished?

It is essential that land managers have a clear grasp of this issue. The fact that native title has not been claimed does not mean that native title does not exist and, whether claimed or not, it is fully protected in the law if it does exist. Alternatively, native title may not exist, ultimately, where it has been claimed, because of extinguishment. Native title may be determined by the Court to exist or to have been extinguished.

A proper understanding of the effect of private freehold grants and scheduled exclusive possession leases is necessary for any informed consideration of where native title may or may not still exist. The extinguishing effect of public works and the definition of ‘public works’ under the Native Title Act 1993 is also highly relevant to informed decision-making.

For further detail on these questions, see Attachment 4 which includes:

i) Sections 23A to 23JA
ii) Queensland Scheduled Interests
iii) Queensland tenure map
iv) Percentage of Queensland by area subject to various tenures: Pie chart
v) Tenure Hierarchy – Queensland tenures
vi) Statistics on Exclusive Tenures in Queensland
vii) Statistics on Non-exclusive Tenures in Queensland

The attachment (i) and (ii)) provides the full text of the sections of the Native Title Act 1993 that deal with these issues, (sections 23A to 23JA (Division 2B)), and the Queensland Scheduled Interests (at Part 3 of the Act). Similar information needs to be understood by professionals working in the States and Territories.

Clarification of agricultural and pastoral rights under the Native Title Act 1993

At Attachment 5 I have included copies of

- the full section of 24GB which deals with acts permitting primary production on non-exclusive agricultural or pastoral leases;
  - This section clarifies the activities that are recognised by the Commonwealth’s native title legislation as being primary production-related and therefore clarified in regard to native title. There is, of course, still the necessity for State legislation to permit any such activities in accordance with the lease.
• 24GD – acts permitting off-farm activities directly connected to primary production activities; and
  o This section recognises the fact that a number of activities that occur off the farm are essential to its operation. For example, activities such as obtaining water from an adjacent stream or grazing stock on a reserve or stockroute that it is impractical to fence are recognised as being permissible activities in terms of native title when considering the rights of the primary producer.

• 24GE – granting rights to third parties on non-exclusive agricultural or pastoral leases.
  o This deals with the permits that third parties may be granted to remove resources under government permit or licence, such as the cutting and removal of timber and the extraction of sand, gravel, rocks and soil from a pastoral lease or other leasehold land.

Also at Attachment 5 is a copy of section 24HA of the Native Title Act 1993 which deals with the government’s right to regulate water and air space. This is of particular relevance to primary producers when it comes to water harvesting permits for stock or domestic use or irrigation from adjoining water courses or underground sources.

Clarification of native title rights that may coexist

Section 211 of the Native title Act 1993

In addition to the above, section 211 of the Native Title Act 1993 clarifies a significant issue with regard to coexisting rights in land and resources. Section 211 (see Attachment 6) allows for native title holders to retain access to resources – flora and fauna – for the purposes of satisfying their personal and domestic or non-commercial communal needs or in exercising their native title rights and interests, irrespective of other regulatory schemes applying to the community at large. The section defines the class of activity in the following terms:

a) hunting,
b) fishing,
c) gathering,
d) a cultural or spiritual activity, and
e) any other kind of activity prescribed for the purpose of this paragraph.

The Yanner decision summarised above provides explanation and illumination on this particular aspect of native title. The majority of High Court judges held that the Fauna Conservation Act 1974 did not extinguish native title rights and interests.

Bioprospecting

While the Yanner case has helped to define our understanding of the concept of native title rights and how those rights can be exercised, the concepts are yet to be fully explored. A current example of the thinking on this topical issue is an article in the Western Australian Aboriginal Native Title Working Group WAANTWG Newsletter dealing with bioprospecting. The newsletter states that:
Bioprospecting is set to become an area of increased focus for the Indigenous community of Western Australia.

Put simply, bioprospecting is the search for new chemical and genetic properties in living things that have the potential to be developed into a commercial application. These applications can and have included the development of medicines, bush tucker, pesticides and a variety of other products...

There are a number of basic principles developed that may be helpful in the development of this area including:

- The acknowledgement of Traditional Owners as access providers to land – this would require bioprospectors to enter into agreements with Traditional Owners prior to accessing land.

- The principle of prior informed consent for the use of knowledge. This is valid for whether a bioprospector is accessing land or working with collections of material that are remote from the land it has been collected from.

- The principle of benefit sharing – there must be a share or benefit from the use of knowledge returned to the Indigenous community from which it originated...

Why mention the subject of bioprospecting here? Bioprospecting is but one of many issues that may or may not currently be included in Jones’s ‘recognition space’ but which is likely to gain prominence in the near future. It is also a subject which has both cultural importance and the potential for economic advantage for traditional owners.

It could conceivably involve the development of bioprospecting as a commercial activity coexisting with pastoral interests wishing to diversify, to the mutual advantage of both – almost like the symbiotic relationship between, for example, the coral and its algae which together make up the reef or the birdnest fern and the tree on which it is anchored. On-farm tourism could be another example of a mutually beneficial venture.

**Interaction between State and Tribunal databases when dealing with potentially coexisting property rights**

An important issue that is receiving attention and being progressed is the ability for ready reference between potentially coexisting grants of State interests and the recognition of native title which is dealt with under Commonwealth legislation.

The issue to date has been that the Commonwealth legislation recognizing native title and the ability to claim native title requires registers to be kept for those claims and determinations. On the other hand, State governments deal with grants of interests that may coexist with and/or affect native title in various ways, authorise developments and carry out public works themselves which may affect native title, but there is no ready link for practitioners to determine where interests may coexist.

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29 Reaching Agreement – A Newsletter from the Western Australian Aboriginal Native Title Working Group, Issue No 3, April 2002. The full article and newsletter is at Attachment 7.
The issue of interaction between the two sets of databases will become increasingly critical as time goes on for two reasons.

Firstly, the ability to search at one point for all interests that may be determined to exist or are claimed to exist, as well as the agreements that relate to the interaction between native title and ordinary interests, would seem to be highly desirable. At present, it is usually necessary to search both the State and the Commonwealth’s (National Native Title Tribunal’s) records to gain the full picture of the interests that exist or coexist in any given instance.

Secondly, it will become more important over time to be able to demonstrate the validity, in terms of native title, of the actions and activities of the State. For example, in time, as leases are renewed or granted or developments carried out, the question may subsequently be asked: On what basis was the approval given validity in terms of native title? A range of determinations and registered Indigenous land use agreements, for example, may provide that validity and may be able to be reconstructed or searched, but with difficulty, given the present lack of relationship between the two systems.

A key issue here is to consider the Commonwealth’s role, through the National Native Title Tribunal, in registration of native title matters under the Native Title Act 1993. The Tribunal registers native title interests within a national system as opposed to each State and Territory government having its own system for registering and recording its grants, approvals and activities. State and Territory governments are primarily concerned with lot-on-plan descriptors of title while the native title legislation deals with claims and determinations that may not follow the State’s/Territory’s cadastral boundaries but may follow topographic features or a mixture of lot-on-plan and topographic features.

Additionally, the Tribunal’s registers for both determinations of native title and agreements are fixed in time, while State and Territory registries deal with a dynamic system of titles and plans.

A positive development in this regard has been an amendment by the New South Wales government to its Real Property Act 1900 in November 2001 where the Registrar-General now has the ability to “…record in the register approved determinations of native title made under the law of this State or of the Commonwealth and any other matters relating to native title rights and interests that the Registrar-General considers appropriate.”[30] (See Attachment 8 for the full details of the amendment.)

Other State and Commonwealth jurisdictions are considering how to better integrate the information contained in the registers dealing with the two sets of rights and interests at both the Commonwealth and State levels.

Rights v Relationships / Litigation v Agreements

The litigation option

Coexisting rights and interests and the relationship between them can be worked out in one of two ways, particularly with regard to native title and other potentially coexisting interests. The Native Title Act 1993 sets out two clear paths to the recognition of native

title. The first is litigation and, yes, it is true that claims for recognition of native title are applications to the Federal Court for recognition and hence are matters before the Court. However, thereafter the issues can be resolved in a litigious atmosphere by trial in Court, or they can be resolved through mediation, ordinarily conducted by the National Native Title Tribunal. Issues that are resolved in mediation are then presented to the Federal Court of Australia as a consent determination that recognises both native title and other coexisting rights and interests which may potentially coexist.

Section 225 of the *Native Title Act 1993* outlines the requirements for a determination of native title. The section requires that both the native title rights and interests are determined as well as other interests that may coexist, and the relationship between those interests. This can deal with the minimum requirement, such as the principles outlined in the determination in the *Wik* matter. The essential points that were determined in that case were that native title may coexist with a pastoral lease and that the rights established by the pastoral lease prevail where there is a clash of rights between native title and pastoral lease rights.

What is not ordinarily defined in a litigated determination is how these coexisting rights will be translated into day-to-day practicalities and incorporated into relationships. Pastoralists, typically, are concerned with carrying out the operation of the pastoral property and are interested in preventing impediments to same. Issues of possible concern to them include gates, fences, water, fire and communications. Native title holders are concerned with having the ability and the authority to carry out their native title activities in a private and free manner, without unnecessary restrictions or permissions.

**The mediation or agreement option**

In practice, these matters are best dealt with by side agreement, protocols, and discussions. There is a range of potential types of agreements that can be entered into with appropriate consultation and discussion between the two sets of interest-holders. The *Native Title Act 1993* provides for parties to enter into Indigenous land use agreements (‘ILUAs’ - see Attachment 9) which can, amongst other things, provide the opportunity to have formally binding agreements that regulate day-to-day activities and how these activities will occur. As with any agreement, they are voluntary and, depending on the relationship between the Indigenous people and the pastoral interest-holder, may or may not be necessary or appropriate. An ILUA is a tool that is available to deal with the on-the-ground practicalities of coexistence.

There are benefits and risks involved in agreement-making. Each of the parties who seek to enter into the agreement must consider what is best for them in the short-term and longer term. Professional advisers need to be able to provide sound advice and also understand their client’s point of view, which may legitimately involve deeply emotional thinking and short- and/or long-term goals.

In their book, *Beyond Machiavelli*, the authors Fisher, Kopelman and Schneider, state that:

> For us to be able to improve the way the system works, we will need to follow our own advice much further. We need to understand why a decisionmaker is not already acting as we would like. We will want to step into the shoes of a decisionmaker… The
currently perceived choice of such a person might well look like that suggested in Chart 36. If so, it should be no surprise that he or she is not actively changing the system.

This is where you come in. Having formulated the purpose of improving the system, and now understanding perhaps more clearly why the system, with all its drawbacks and limitations, continues as it does, we all have a basis for further work. We will, for example, want to focus on a point of choice, generate fresh ideas, formulate advice, and present someone with a yesable proposition that meets their interests as well as our own. Although we describe ways of using all these ideas, nowhere do we suggest that writing a book – or reading one – is enough. While having on hand a systematic approach to influencing others should help, there is a lot left to be done.

<table>
<thead>
<tr>
<th>36. Currently Perceived Choice</th>
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</thead>
<tbody>
<tr>
<td><strong>Case:</strong> Official faced with a suggestion to change his/her approach to coping with conflict</td>
</tr>
<tr>
<td><strong>“Shall I now decide to do things differently…?”</strong></td>
</tr>
<tr>
<td><strong>Consequences if I say YES</strong></td>
</tr>
<tr>
<td>- I will have no peer support.</td>
</tr>
<tr>
<td>- They may laugh at my jargon about BATNAs and Yesable propositions.</td>
</tr>
<tr>
<td>- I really don’t know just how to do it; I would not know how to start.</td>
</tr>
<tr>
<td>- I take on even more work on top of my existing overload.</td>
</tr>
<tr>
<td>- It would be quite risky to try out some of these ideas.</td>
</tr>
</tbody>
</table>

In considering whether agreements are possible or appropriate, each party needs to think through the questions that are important to them with regard to the benefits they will achieve by entering into an agreement – especially in terms of on-the-ground workability – and the negatives that will follow, especially from their peers, who will focus on the trade-offs.

Trade-offs and benefits often possess an emotional element for those involved and also for others with similar interests who are wary of a precedent being set. By nature, agreements contain trade-offs and hence it is possible to focus on the negatives rather than the balance between the positives and negatives which presents an overall picture and an appreciation of why an agreement is appropriate or desirable.

**Which option will best enhance or maintain the value of the asset?**

One of the questions to be answered with regard to entering into agreements such as ILUAs, as opposed to seeking only a determination that there are or are not coexisting interests, is that of enhanced value. For example, the professional advisers to the holders of a potentially coexisting interest, such as a pastoral lease, need to consider whether the value of the asset is greater when the issues are resolved, documented, recorded and registered, in the form of, say, an Indigenous land use agreement, as opposed to not having the agreement. The risk is that in a determination of native title where practical day-to-day issues have not yet been resolved, negotiation will still be required on procedures and their implementation so that coexistence can become a reality.

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Are there benefits in early dialogue?

It may be very difficult to enter into constructive negotiations after a confrontational litigated outcome. As with any other sphere of coexisting interests, whether it be in families, clubs, churches, community groups, or other institutions, relationships are generally best progressed with early and frequent dialogue in an open and voluntary atmosphere.

The questions of communication and resolution of issues in advance of them becoming issues – which is largely the purpose and ideally the outcome of ILUAs – is well understood in the wider context, outside the native title sphere, and yet is questioned by many in the native title context. The reality is that, often when people sit down to talk things through and deal genuinely with their issues and concerns, relationships are formed that result in powerful alliances, to the benefit of each party.

Agreements may be helpful, especially ahead of any possible litigation. This requires that native title be considered and appropriately dealt with, and is more readily accommodated in a positive atmosphere of dialogue and exchange rather than one of obstruction and negativity. History has told us that, at some point in the future, there will be a need for coexisting interest holders to talk, even if that can be avoided in the short-term.

A further potential benefit of the existence of a positive relationship between traditional owners and coexisting interest holders is the powerful influence that a joint approach usually has with policy-makers. A joint approach on a mutually beneficial proposal will ordinarily be seen much more positively than separate, uncoordinated proposals.

The determination of native title is merely a step along the path of coexistence which recognises existing rights and interests that are held by the native title holders. As noted above, it does not create these rights and interests. The point at which the coexisting non-native title holder requires the agreement of the native title holder, is the point at which the potential for a positive relationship and a positive understanding of each other’s rights and interests is greatest. If this ensues, it will make for a much smoother transition and a much easier path for the resolution of issues.

It is not readily understood by many parties with non-native title potentially coexisting interests that, where the rights granted under the lease are to be enhanced at the expense of native title rights and interests, the right to negotiate regime under the Native Title Act 1993 will apply.

Land rights

As mentioned above, land rights – which are grants of title as a policy choice of government – are distinctly different to native title, even where those land rights grants are made to or on behalf of native title holders. Whilst it is the case that land rights grants do not extinguish native title or take away native title rights, many people do not distinguish between the rights granted by government and the native title rights that are recognised by the law. There is an important distinction: that native title, when recognised and determined, is a recognition that rights already exist in the land and are held by the native title holders. Land rights may involve land where native title still exists or where native title has been
extinguished. There are a range of policy considerations for governments when deciding whether to make grants under land rights legislation.

There are also interesting policy considerations for Indigenous people, whether native title holders or not, when considering the potential application of land rights policy. Land rights grants may be a tool used by governments to secure native title agreements.

I am not dealing with land rights in this paper and merely mention the distinction in passing.

**Cultural heritage**

Indigenous cultural heritage issues are commonly confused with native title. From the native title holders’ perspective, cultural heritage is one of those aspects which is recognised by the law but not recognised within the native title ‘recognition space’ specifically, as it is dealt with under separate legislation using separate procedures and is therefore a matter of separate legal rights. Cultural heritage protection applies to all tenures and activities on all tenures, irrespective of native title;

Again, I am not dealing with cultural heritage in this paper and merely mention the distinction in passing.

**Valuing land subject to native title**

Returning to the theme of the course this week. What is the main issue with regard to the valuation of land subject to native title and possibly coexisting rights and interests as it stands in the law at this time? What is needed, as with any other valuation of land issue, is, wherever possible, to compare like with like. In this regard, comparing the sales of pastoral leases, which may be subject to a native title claim – whether that claim has been lodged or not – is the most appropriate basis for the valuation of a subject parcel which is also a pastoral lease which may or may not be subject to the current native title claim.

I stress again that, with pastoral leases, the issue is not so much whether a claim has been made but rather whether or not a claim, if made, would be accepted, registered and ultimately successful. Pastoral leases are not scheduled exclusive possession interests that extinguish native title in themselves and hence, native title is an issue to be considered. If the basis has a similar standing in the law, then it is safe to compare similar tenures for the purpose of valuation. The question which needs to be considered is whether or not the understanding of native title within the community of potential purchasers of the land is such that they will distinguish between a pastoral lease that already has a native title claim filed and registered over the pastoral lease as opposed to a pastoral lease that has no claim.

The next issue is whether or not the marketplace will pay a premium or will consider the benefits of having the issues of practical day-to-day coexistence resolved in the form of an agreement as opposed to having a similar property with similar issues and no such agreement.

One aspect where there may be some impact on people’s perception of the value of their asset with regard to a coexisting interest is in the previously accepted practice of continually evolving upgrades of rights and terms of tenure over the past 100 to 150 years. It had become routine to enhance rights by expanding permitted activities and extending the length of tenure simply in order to ensure that the pastoral industry as a whole was able to adapt.
and change as and when it chose. Where a native title claim may exist, whether claimed, determined or not, lessees may now be required to obtain the consent of the claimants to such enhancements.

In John Holmes’s paper, *Diversity and Change in Australia’s Rangelands: A Post-productivist Transition with a Difference?*, Holmes notes that:

“All Australia’s rangelands, and the people who live and work in them are facing many pressures and uncertainties. Concerns about the ecological condition of the area, and about the social and economic sustainability of its industries, have been building for some time.” *(Australia 1996, 4)*

He goes on to say:

*The changing role of pastoral leases*  Until as recently as the 1970s Australian governments assiduously fostered land settlement and rural development, using lease tenures as policy instruments towards these goals *(Heathcote 1965; Williams 1975; Holmes 2000a).* Agriculture and pastoralism were given absolute priority in land allocation, while limited-term leases provided a vehicle for progressive subdivision of large squatters’ runs into family-based living areas, with conditions on required numbers of livestock, fencing, water and other improvements. As recently as 1951 a Queensland Royal Commission could insist as follows:

> “The soundest land policy is that which will create the greatest number of permanently resident families, consistent with a reasonable way of life, and only closer settlement can offer this. In short, the welfare of the inland is to be measured by the number of families it can be brought to support…Large properties do not, and have yet to demonstrate that they can, offer to more than a few of their employees the opportunity to fulfil man’s natural destiny of marriage, home and family …” *(Queensland 1951, 10)*

As in the United States, once the momentum towards land settlement subsided, land administrators inevitably lapsed into client capture, serving the interests of lessees. A policy vacuum enabled lessees to enhance their rights and minimize their responsibilities. Lease tenures were increasingly seen as an anachronism. The many-sided arguments in support of freeholding would certainly have prevailed, had it not been for the belated emergence of diverse constituencies of amenity-oriented interests seeking to influence decisions on allocation, management, use and access rights…

With regard to traditional owners’ rights, Holmes comments,

*Aboriginal interests: now being heard.* The most significant shift in power-relations, emerging only over the last 25 years, has been the transformation of the role of remote Aboriginal people. Formerly powerless, Aboriginal people are now involved in resource decisions over extensive areas, while also achieving a substantial degree of community self governance…

Accompanying these outward signs of power has been widespread anticipation of cultural and social revival, directed towards: caring for country; renewal of place identity; culturally appropriate Aboriginal enterprises in the arts, tourism, pastoralism and harvesting of natural products; and community maintenance through self managed education, health, welfare and policy activities…

33 ibid. See also Table II at Attachment 10: Changing Directions in land ownership and property rights in Australia’s rangelands.
34 ibid.
What advice will you give to your client with regard to dealing with potentially coexisting native title?

As the recognition of native title is a recognition of rights that already exist and the rights of the granted coexisting interest (eg, pastoral lease) prevail, can the value of the asset be affected by native title? The question may be one of perception as to whether a presumed course of action becomes a presumed right with value in the marketplace. The two presumptions that have perhaps been overturned are:

i) the presumption of the exclusive nature of pastoral and similar interests; and
ii) the ability to upgrade pastoral tenures without reference to native title.

Does the market suggest a change in asset values post-Wik?

What can you influence?

Don’t underestimate your influence. Professionals involved in the property field are well-placed to influence decision-making and thinking in regard to how to deal with native title and coexisting non-native title interests. People with coexisting interests will look to professionals in the field to provide advice on the way forward. Native title is one of those fields where everyone has an opinion but the question is whether the opinions are based on sound knowledge and accurate information.

In the book, Beyond Machiavelli, Fisher, Kopelman and Schneider note that:

"The practical task of generating advice allows us individually and collectively to consider ideas with greater precision. We can clarify different objectives and analyse the best ways of meeting them. If two physicists spend their time predicting what kind of an airplane a manufacturer is going to build, their talents are not being well used. And they will end up knowing far less about aerodynamics than if they spent their time figuring out what advice they would give to the manufacturer that would allow him to build at low cost, for example, a cargo plane which could land and take off from a short runway. Even if the airplane manufacturer does not follow the advice of our two physicists, it is still valuable for them to spend their time generating good advice as a tool for their own research. Focusing on the task of producing hypothetical or real advice provides us with criteria for relevance – our advice has to be relevant to somebody for some purpose.

Most people are not CEOs or secretaries of state, but many people, in the course of their daily work, make decisions with the potential to change the world – a little. More of us could make a difference by first defining a manageable problem and then formulating a process for handling it. Working through our professional contacts, elected representatives, or volunteer agencies, perhaps we could offer advice to an influential person in the role of an informal adviser. Certainly we could all improve our skill at acting as our own Machiavelli in coping with situations where we ourselves have a decision to make, whether local or global. The goal of generating the best possible professional advice is even more relevant when we are generating advice to ourselves…"  

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35 Fisher, Kopelman, Schneider, op. cit., pp7-8
Provision of sound advice and influence on policy directions

One of the real positives to be gained from involvement in courses such as the one we have here this week, is for practitioners in the field to improve understanding and ask the questions which clients will be asking of them so that you can provide informed and appropriate comment and advice upon which our clients will act. Issues to consider are: whether negotiating early, ahead of being forced into a negotiating position, is worth the time and effort and relationship-building which will follow, or whether leaving matters until there is no option but to negotiate is a better course of action. There are, as pointed out above, options to litigate or negotiate: Which of these options is the best for you and/or your client in the short- and long-term? It is true that negotiations of native title matters take time and effort. The question is whether the return, in terms of relationship-building and long-term security in having the issues resolved, is worth the effort.

We must also understand that to fail to make a decision is actually a decision in itself. It is a decision to allow matters to run until the issues themselves demand attention. In this regard, associates of the Property Institute have a significant amount of influence on the process and, in providing advice to others with whom they interact, they will also help shape developments. The Institute is, of course, to be commended for considering these matters in a serious way by convening the course this week.

Again, from the book Beyond Machiavelli, the writers note that as professionals you will have, not only the opportunity to provide reliable advice based on accurate and sound knowledge, you will also have the opportunity to influence the choices made by a decision-maker. Fisher explains it this way:

A focus on influencing the choice of a decisionmaker reminds us that even the most global changes we can imagine will involve some individual deciding to do a particular thing differently tomorrow morning. By getting into the shoes of somebody facing a decision, we are also likely to be reminded of the importance of nonquantifiable human factors. We do not let deterministic predictions limit the scope of our choice or become self-fulfilling prophecies. We reconcile the reality of constraints with the possibility of choice…

Conclusion

In conclusion, what are the implications for valuing land subject to native title? The issue for you to consider is, I believe, essentially one of timing. Early engagement or delayed engagement with the process will largely determine the level of certainty or uncertainty which exists. Sooner or later there will be a need to talk and to discuss issues of coexisting rights and interests, whether that is through a professional adviser such as a lawyer in terms of determinations of native title, or at the time that the pastoralist wishes to upgrade or extend the tenure at the expense of native title.

When is the correct time to engage potentially coexisting interest-holders in the process of dealing with their native title? Is the timing different for the holder of the interest who is an individual with emotional attachment to the asset, compared with a company with only financial obligations to its shareholders? Does your advice depend on whether it is purely an

36 ibid., pp10-11
economic question or whether there is an emotional attachment involved in the consideration? Does the lessee have a long-term desire to stay in the industry or not?

Answers to fundamental questions such as the following will assist in getting the timing right:

- Can you determine where native title may coexist?
- Do you understand the difference between native title, cultural heritage and land rights grants?

If I could close by going back beyond even Captain Cook and his failure to recognise coexisting property rights: different world views and competition for resources have existed since the dawn of time. Various mechanisms have been developed to deal with them including dialogue, consensus, litigation, oppression and war. I think you’ll agree that an amicable resolution, where possible, is always the preferred option.

The same applies to native title: I believe that the best way forward is for people to talk in an atmosphere of goodwill about each other’s rights and interests in an effort to resolve any matters of concern. The parties can expect that these talks will result in practical, workable arrangements that meet their needs.
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