Rethinking Mabo as a clash of constitutional languages

by
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This thesis is presented for the degree of Doctor of Philosophy
of Murdoch University, 2006
I declare that this thesis is my own account of my research and contains as its main content work which has not previously been submitted for a degree at any tertiary education institution.

Stephen William Robson
Abstract

The 1992 decision of the High Court of Australia to uphold the claim of the Meriam people was welcomed as beginning a new era where the unique status of Aboriginal and Torres Strait Islander peoples would gain recognition. Intense debate and activity ensued with federal parliament adopting a legislative framework to recognise native title and the Council for Aboriginal Reconciliation considering its broader constitutional implications. Fourteen years on though much of the promise of Mabo lies unfulfilled.

This thesis draws upon the work of Canadian philosopher James Tully. He writes of contemporary constitutionalism in Western society and its inability to give more than superficial recognition to cultural difference. He locates the problem as lying with the dominant language of modern constitutionalism. This language provides for two main forms of recognition: the equality of self-governing nation states and the equality of individual citizens. Tully locates a way forward through the presence of another constitutional language. Common constitutionalism has enabled an accommodation of cultural differences guided by its three conventions of mutual recognition, continuity, and consent. Moreover, it is beneficial to analysing other studies about the ability of common law to recognise the claims of Indigenous people.

Tully’s contribution is applied to an examination of the Mabo events in a way that takes account of Australia’s constitutional traditions. The aim is to clarify the languages employed by the representatives of Australia’s institutions of governance and whether this places obstacles in the way of recognising Aboriginal and Torres Strait Islander peoples. The inquiry considers the events prior to the High Court’s decision, the Keating government’s response, and the Howard Government’s native title changes. Other chapters examine the constitutional language used by Aboriginal and Torres Strait Islander peoples and the significance of the Council of Aboriginal Reconciliation.

The central argument of this study is that once it is accepted that the claims of Indigenous people in Australia are constitutional, it becomes possible to appreciate that these were largely voiced through the language of human rights and common constitutionalism. In contrast, when the claims were considered by the High Court and federal parliament significant aspects were articulated through the modern constitutional language. Another thread running through the events was a desire to confront and overcome the influence of the language of White Australia. The thesis concludes by considering the significance of the findings for a settlement between Aboriginal and Torres Strait Islander peoples and other Australians.
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Acknowledgements

In acknowledging those who have assisted in the creation of this project, chronologically it commenced with the selection of the topic. Its seeds were planted by two conversations at Murdoch University. Sometime before my Honours year, Janice Dudley advised me to broaden my interests beyond environmental issues and eventually I began to examine the native title debate. The other conversation occurred when Peta Bowden supervised a component of my Honours study and introduced me to James Tully’s *Strange Multiplicity*. The reading of it had an immediate resonance and from this book, the comparisons with Australia’s circumstances originate.

To my supervisor Ian Barns I owe a very special thanks. He has been there from the beginning when the thesis topic was a mere germ of an idea. His thoughtful questioning, engagement and empathy has been invaluable in its fruition.

I also need to thank those who provided valuable comments along the way. Christabel Chamarette specifically commented on the parliamentary debate, highlighting many of the issues of concern. Janice Dudley drew my attention to the contrast between constitutionalism in Canada and Australia. Gary Meyers provided invaluable insight into the constitutional implications of native title. Teresa Szunejko, Veronica Vann and Juanita Doorey were all involved with proof-reading, with Juanita also reading an early draft on the methodology. Frank Noakes was kind enough to undertake a final edit to try and make it ‘less clunky’.

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I need to thank the caring friends who intruded into what at times felt like an eternal hermit-like existence with an inquiring telephone call and work colleagues who provided social contact after intense days in front of the home computer. In March 2003 in his own way my father had cause to remind me that there is more to life than completing a PhD.

Lastly though, I need to thank Julia Lester and Jo Mason for they were able to continually touch my soul and engender an atmosphere where the words could flow.
Chapter 1:

Mabo and the claims for recognition

The beginnings

The genesis for this thesis occurred in the latter part of 1999 when the 10 year endeavour of the Council for Aboriginal Reconciliation (the Council) was coming to an end. The following May the Council launched the *Australian Declaration Towards Reconciliation* and over the following months in one city after another hundreds of thousands of Indigenous and non-Indigenous Australians joined together to give the Declaration life and meaning.¹

The document built on two important steps along the road to reconciliation: the 1967 changes to the Australian Constitution and the High Court’s 1992 Mabo decision.² The changes to Australia’s Constitution in 1967 were widely interpreted as a referendum affirming the equality of Indigenous people.³ Carried overwhelmingly, the referendum changed the Constitution by deleting the words ‘other than the aboriginal race in any State’, thus allowing a

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federal government to enact special laws on their behalf; and deleting s 127 so that Australia’s Indigenous peoples could in future be counted in a census.  

The second step was the High Court’s 1992 Mabo decision.  

Widely, but not unanimously welcomed, the decision was considered to break with the past and gave a positive sign of things to come. The post-Mabo era had arrived. Aboriginal leaders considered the decision provided an opportunity to establish a ‘Long Term Settlement Process for the benefit of all Aboriginal and Torres Strait Islander peoples’. Reinforcing the significance of the decision Prime Minister Paul Keating’s speech at Redfern Oval in December 1992 gave voice to and fanned the hopes of many. ‘Mabo establishes a fundamental truth and lays the basis for justice’, Keating told the audience. Continuing this theme he explained:

Mabo is an historic decision – we can make it an historic turning point, the basis of a new relationship between Indigenous and non-Aboriginal Australians. The message should be that there is nothing to fear or to lose

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5 Mabo v Queensland (No 2) (1992) 107 ALR 1.
9 Paul Keating cited by Frank Brennan, One land, one nation: Mabo: Towards 2001, (St Lucia, Qld: University of Queensland Press, 1995), 42.
in the recognition of historical truth, or the extension of social justice, or the deepening of Australian social democracy to include indigenous Australians.

Keating invited Indigenous people to participate in forging a new relationship with other Australians.

The claims

Participate they did. Aboriginal and Torres Strait Islanders identified claims necessary for any settlement. Some concerned native title, and the federal government enacted native title legislation that came into effect in January 1994.\textsuperscript{10}

Other claims with far-reaching ramifications were also made. One claim was for a treaty or agreement. At the time of the Declaration, the Aboriginal and Torres Strait Islander Commission (ATSIC) signalled its desire to place a treaty back on the Australian political agenda. Chair Geoff Clark told those gathered on the steps of Sydney’s Opera House that a treaty was essential to reconciliation.\textsuperscript{11} Expanding on this theme later he explained that a treaty ‘means recognising we possess distinct rights arising from our status as first people, our relationships with our territories and waters, and our own systems of law and governance.’ Clark described post-\textit{Mabo} as marking ‘a new era of informed

\begin{flushleft}
\textsuperscript{11} Steketee and Saunders, above n 1, 1.
\end{flushleft}
constitutional consent’ that would have to address the circumstances that gave rise to ‘no treaties, no formal settlements [and] no compacts.’ Continuing this theme, he said ‘We are not mentioned in the Constitution. We are well behind developments in other countries.’

Other constitutional proposals were more specific. Leading up to the November 1999 referendum on a republic, Indigenous spokespeople sought to include references to their custodianship of the country in the Constitution’s preamble. Instead, the Howard government proposed a preamble ‘[h]onouring Aborigines and Torres Strait Islanders, the nation’s first people, for their deep kinship with their lands …’ Prominent Indigenous figures slammed the statement as the result of minimal consultation with Indigenous people. At the November referendum the proposal for a republic failed and along with it the Howard government’s draft preamble.

The Council also sought to remove s 25 from the federal Constitution and ‘introduce a new section making it unlawful to adversely discriminate against any people on the grounds of race.’ The clause spells out the consequences of disqualifying ‘all persons of any race’ from voting. If activated, and it has not been so since 1967, ‘then, in reckoning the number of

12 Geoff Clark, ‘A treaty was always our aim’, The Australian 30 May 2000, 13.
people of the State or of the Commonwealth, persons of that race resident in that State shall not be counted’.\textsuperscript{15} The clause countenances the possibility of disenfranchising citizens on a racial basis, reflecting the influence of what has become known as the White Australia policy.\textsuperscript{16} While it remains in the Constitution the ‘provision allows States to deprive citizens of the right to vote and take part in the government of their State on the basis of their race’ and so ATSIC argued for its removal.\textsuperscript{17}

Yet another claim was for the allocation of special seats in Parliament to Indigenous people. In June 2000 Australian Democrats senator and prominent Aboriginal Aden Ridgeway called for ‘two seats in each house of parliament to be set aside for Aboriginal politicians’. The proposal had been raised by ATSIC chair Geoff Clark and ‘backed by’ Charles Perkins and Lowitja O’Donoghue.\textsuperscript{18} This proposal was also raised the following month by ATSIC in a submission to the United Nation’s Working Group on Indigenous Populations.\textsuperscript{19} The idea draws inspiration from the New Zealand experience where special seats in parliament have been provided to Māori since the 1850s, Inuit ‘home rule’ in Greenland and Sami parliaments in Finland, Norway and Sweden.\textsuperscript{20}

\textsuperscript{15} The Australian Constitution, above n 5, s 25.
\textsuperscript{16} Commonwealth Government, Response to the Council for Aboriginal Reconciliation Final Report - Reconciliation: Australia’s Challenge, (Canberra: Office of Aboriginal and Torres Strait Islander Affairs, Department of Immigration and Multicultural and Indigenous Affairs, September 2002), 20.
\textsuperscript{17} Aboriginal and Torres Strait Islander Commission, Treaty: let’s get it right!, (Canberra: Aboriginal and Torres Strait Islander Commission, 2001), 11.
Another claim focused on those children who had been forcibly separated from their natural families through intervention by government authorities, missions and other institutions. In the early 1990s, action around this coalesced as the Royal Commission into Aboriginal Deaths in Custody demonstrated a strong correlation between deaths and forced separation. Forty-three of the 99 deaths investigated had experienced childhood separation. Following discussions with ATSIC and the Aboriginal and Torres Strait Islander Social Justice Commissioner, in May 1995 the Keating government announced a national inquiry into the forcible separation would be undertaken by the Human Rights and Equal Opportunity Commission (the Human Rights Commission).\(^21\) ATSIC made a submission to the inquiry that included a call for governments and ‘relevant non-government agencies [to] acknowledge that separation policies were unjust and apologise to all Indigenous Australians for the harms to Indigenous communities, families and individuals.’ It also called for an examination of ‘current laws, practices and policies with respect to the placement and care of Aboriginal and Torres Strait Islander children and advise on any changes required taking into account the principle of self-determination ...’\(^22\) Headed by the Human Rights Commission president, and former High Court judge the late Sir Ronald Wilson, the *Bringing Them Home* Report was released in May 1997. Among its many recommendations, the report called on

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the federal government to formally apologise to Aboriginal and Torres Strait Islander peoples.23

Focus

Now 14 years after the High Court’s Mabo decision, the time of the Declaration with hundreds of thousands marching for reconciliation in cities across the country is receding from public memory. How has this situation come about? What happened to the settlement process? Why is it that the proposals for a treaty have not been acted upon? Why have the high hopes of Mabo been met with frustration and disappointment for many claimants?

It will be demonstrated here that the constitutional language in which the debate over the claims was conducted had a significant influence on this outcome. The claims were adjudicated through concepts (e.g. the people, nationhood, sovereignty, self-determination, recognition and constitutional) inherited from the European tradition. As a consequence of this adjudication, the first peoples of Australia were not necessarily heard in their own voices. Rather, the ‘prevailing assumptions of modern legal and political theory’ were brought to bear.24

Just what the prevailing assumptions of the participants in the legal and political debates were and the ways in which these influenced its outcome is the focus of this inquiry. The aim is to bring to the fore the issues that arise when Aboriginal and Torres Strait Islander peoples voice their claims in a language that centres upon the recognition of their distinct cultures and yet the language of the dominant response overlays another view of recognition. So different are these ways of thinking about relations with Aboriginal and Torres Strait Islanders that they are best understood as distinct constitutional languages, each with their own rules and ‘self-contained practice’.25

Here the Canadian scholar James Tully’s work on cultural recognition and constitutional languages is invaluable. Tully surveys the past 400 years of European and non-European constitutionalism. He identifies modern constitutionalism as the principal constitutional language influencing Western thought. In its shadow he rediscovers another language – common constitutionalism with three conventions: mutual recognition, continuity and consent. From his examination, Tully suggests the latter language can guide contemporary practice. It lends itself to the conciliation of the claims for recognition through constitutional dialogues in which agreement is reached so that cultural differences are accommodated in a just way.26 While his work is principally a contribution to moral and political philosophy it intersects with the

26 Tully, above n 24, cover.
concerns of others in disciplines that have been variously described as legal pluralism,
language and legal discourse, and jurisprudence.

Tully is concerned with constitutional norms, how they come into being, their main features and how these interact with the norms of other cultures. Two specific themes resonate throughout his work. One is the clash between the norms of Western colonising powers and those of Indigenous peoples. He argues that American Aboriginal peoples speak through a common constitutional language whereas the institutions of governance in the West are inherited from the age of European imperialism. Another theme concerns the lessons learnt from the replacement of the ancient constitutional relations with modern constitutionalism. His studies lead him to conclude that these lessons have shaped the popular understanding of constitutionalism itself.

Claims and methods

This inquiry concentrates on two themes: the native title developments and the debate around reconciliation. The latter debate involves discussion of the claims of a treaty, altering the preamble to the Constitution and the removal

27 Tully describes legal pluralism as a ‘new interdisciplinary field of anthropology, history, law and political philosophy’ that was established ‘in the 1980s’. See ibid. 101. For a text in this field see Sally Falk Moore, Law as process, (London: Routledge & K. Paul, 1978).
29 Jurisprudence means the philosophy of law and this ‘concerns itself with questions about the nature of law and the concepts that structure the practice of law’. See Blackburn, above n 25, 213.
30 Tully, above n 24, 95-96.
31 Ibid. 209-212.
of s 25 from the Constitution. The selection of these two themes provides a basis to examine the treatment of at least four of the claims identified earlier.

There are two important reasons to focus on the developments around native title. One is that the High Court’s *Mabo* decision is almost universally judged as a watershed, indeed the subsequent claims were premised upon this view. A thorough examination of the *Mabo* decision would help in better understanding the impact of the language used in this decision upon the other claims. Another reason is that the debate over the native title legislation has already revealed the existence of different perspectives, particularly concerning the Howard government amendments in 1998.32 The examination here will look at how these differences are connected to the languages used by the participants.

The High Court and federal parliament play crucial and distinct roles in Australia’s governance. Federal parliament has the power to enact legislation for the whole of the country and the High Court is charged with interpreting the Constitution and other laws and applying these to individual cases.33 Nevertheless, state jurisdictions are also being affected by and responding to native title developments. Since federal parliament enacted native title legislation and Australia’s Constitution directs that federal legislation should ‘prevail’ over any inconsistent state laws34 a focus on the federal decisions was more of a priority for this examination than those made by the states.

32 *Native Title Act* 1993 (Cth); *Native Title Act* 1993 [Consolidated 1998] (Cth).
34 *The Australian Constitution*, ibid. s 109.
The timeframes for the material examined around native title starts with the 1992 Mabo decision and finishes with the adoption of the Native Title Amendment Bill in July 1998 (NTAB). By this time, the defining features of how native title will be recognised are apparent: the decision to legislate was taken, the bill drafted, passed by federal Parliament and implemented, and subsequently amended by the new Howard government.35

This thesis uses a documentary analysis of High Court and federal parliamentary decision-making as its primary research method. This provides a way to accurately record the participants’ views rather than the interpretation of others. It is also publicly available. This method also provides insights into the thinking of some of Australia’s most influential decision-makers and offers a means to directly engage with their ideas.

Two different time periods are crucial to the reconciliation debate, the first dates from when the claims were first brought forth in the aftermath of the Mabo decision and the other is from late 1999 when the Council provided its recommendations and the Howard government responded.

**The argument unfolds**

The discussion of these ideas unfolds through highlighting the distinctive influence of the constitutional languages on the Mabo events and how these influences affected the outcome. Chapter 2 focuses on ‘the politics of

35 House of Representatives *Weekly Hansard* No 10, 1998, 6151 (15 July 1998); *Native Title*
cultural recognition’ and why Western constitutionalism has difficulty accommodating their claims. Included under the umbrella of the politics of cultural recognition are a wide and diverse group of claims: nationalists; supra-national associations; linguistic and ethnic minorities; immigrants, exiles and refugees; feminist demands to modify institutions of governance; the demands of Indigenous people; and those of same-sex couples. The contemporary Western world has difficulty accommodating these claims because the legal and political vocabulary in everyday use rests upon assumptions incompatible with recognition. The dominant vocabulary, labelled by Tully as modern constitutionalism, originated around two main forms of recognition: the nation state and the individual citizen. Its seven features presume that culture is homogenous and this goes to the heart of problem. The claims noted earlier directly challenge the premise of homogeneity.

Chapter 3 examines the alternative approach to constitutionalism presented by Tully in *Strange multiplicity*. This alternative is based on a view that considers culture as ‘overlapping, interactive and internally negotiated’. This view directly challenges the presumption that constitutionalism is uniform. Indeed, once this presumption is abandoned the influence of cultural diversity upon constitutions comes to light. One of the sites where a ‘hidden constitution’ has been found is with the common law in Commonwealth countries. Out of the examination of common law, a contrast between the attitudes toward custom in the ancient and modern constitution provides the first strand for the alternative approach. Another strand is provided by contrasting the seventeenth century

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*Act 1993 [Consolidated 1998] (Cth).*
moral reasoning of Sir Matthew Hale with that of Thomas Hobbes. A third strand lies with the long tradition of moral reasoning in European history with its preference for dialogue over monologue and practical experience of particular cases over abstract theorising. The fourth strand is the practical reasoning outlined by Ludwig Wittgenstein in *Philosophical Investigations*. From the latter, Tully develops an analogy between language and constitutionalism. Applying this, Tully argues that contemporary constitutionalism is better understood as ‘akin to an assemblage of languages’. On these alternative premises, he considers it is possible to reconceive constitutionalism as a form of activity.

Chapter 4 concentrates on the language of common constitutionalism and its application to the claims of Indigenous people. At the heart of this language are the three conventions of mutual recognition, consent and continuity. Specific examples are discussed where each of the three conventions were applied to common law decisions. This alternative approach is also compared to the works of two scholars who write about common law’s ability to recognise the claims of Indigenous people. One of these is *Common law aboriginal title* by Canadian scholar Kent McNeil; the other by American Indian scholar Robert Williams (Jr) concentrates on the *American Indian in Western legal thought*. This chapter also compares the suitability of the three

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36 Tully, above n 24, 10.
38 Tully, above n 24, 36.
conventions to the United Nations Draft Declaration on the Rights of Indigenous Peoples.\textsuperscript{41}

To successfully translate the ideas that Tully lays out in \textit{Strange multiplicity} from a Canadian context to an examination of the Mabo events, it is necessary to consider Australia’s constitutional traditions. It is not simply a matter of whether a constitution can recognise and accommodate cultural diversity. It also concerns whether there are sufficient experiences with the conventions of common constitutionalism to embrace the language as \textit{the} answer to relations between Aboriginal and Torres Strait Islander peoples and other Australians.

Chapter 5 outlines why the examination emphasises gaining an understanding of the influence of the languages on the Mabo debates. This contrasts with Tully’s stress on advocating common constitutionalism as \textit{the} solution to the most difficult conflicts. Unlike the Canadian circumstances, Australia lacks experience with treaty constitutionalism and the mutual recognition of peoples. Moreover, these are compelling reasons to concentrate on identifying the distinct constitutional languages influencing the Mabo events. It is beneficial to understanding what has happened and to assist in determining how to move forward.

\textsuperscript{41} The United Nations Draft Declaration on the Rights of Indigenous Peoples was developed by the UN Working Group on Indigenous Populations ‘in full consultation with Indigenous peoples from around the world’. It has ‘not yet been adopted by the General Assembly’ but ‘can be described as the most coherent and comprehensive articulation of the aspirations of the world’s Indigenous peoples’. See Garth Nettheim, Gary D. Meyers & Donna Craig, \textit{Indigenous peoples and governance structures: a comparative analysis of land and resource management rights}, (Canberra: Aboriginal Studies Press for the Australian Institute of Aboriginal and Torres Strait Islander Studies, 2002), 21.
A separate chapter discusses the impact of colonisation and identifies the influences of various constitutional languages in the years preceding the 1992 decision. In addition to the initial attitudes toward the existing inhabitants, Chapter 6 also discusses the impact of several early legal cases, the provisions of the federal Constitution and the shift to anti-discrimination from the 1960s and how this affected the claims for recognition. The chapter concludes by tracing the beginnings of the Mabo claim and the hurdles it confronted before the claim for recognition was considered by the High Court. As well as confirming the existence of the constitutional languages discussed by Tully, modern and common, the presence of another language - White Australia - is also found. More generally it validates the view that Australia’s constitutional tradition is more complex than is usually acknowledged.

Three chapters consider the Mabo decision and the subsequent responses from Australia’s institutions of governance. Chapter 7 focuses exclusively on the High Court’s Mabo decision, considering in detail the differing judgements and their impact on the recognition of native title. It brings the influence of modern constitutionalism on shaping the Mabo events to the fore. It demonstrates that while the High Court majority sought to end common law’s association with the language of White Australia, it recoiled from its practical implications. This compromise comprises elements from the modern and common constitutional languages. Furthermore, in introducing Australia-wide rules for extinguishment, the Court presumed it could speak for Indigenous people.
Two chapters focus on the legal and political responses to *Mabo*. Chapter 8 explores the post-*Mabo* decisions until the adoption of Native Title Act (*NTA*) in December 1993.\textsuperscript{42} Included in this is a detailed examination of the Keating government’s response to *Mabo*, its Native Title Bill\textsuperscript{43} and the subsequent parliamentary debate. Rejecting the idea of establishing a settlement process, a body of mutual recognition, to address native title was one of the Keating government’s most crucial decisions. It embraced the High Court’s approach with a few, relatively minor, modifications. A key feature of its legislation was establishing rules to extinguish native title; so its compromise, mixing recognition with extinguishment, involved elements of modern and common constitutionalism.

Chapter 9 begins with two High Court decisions: the Western Australian government challenge to the federal legislation\textsuperscript{44} and the *Wik* decision in December 1996.\textsuperscript{45} The former confirmed most aspects of the native title regime, and the *Wik* decision concerned the impact of native title claims on pastoral leases. The High Court majority emphasised that the particulars of a claim should be considered; the minority sought to establish Australia-wide rules for the extinguishment of native title in relation to pastoral leases. This chapter also considers the Howard government’s 10-Point Plan, its draft legislation and the subsequent parliamentary debate. It shows that modern constitutionalism increasingly eclipsed the initial concerns with a settlement and the recognition of Indigenous peoples.

\textsuperscript{42} *Native Title Act* 1993 (Cth).
\textsuperscript{43} *Native Title Bill* 1993 (Cth).
\textsuperscript{44} *Western Australia v Commonwealth* (1995) 183 CLR 373.
If mutual recognition between Aboriginal and Torres Strait Islander peoples and other Australians is to occur, then it must surely start with hearing the claims of Indigenous peoples. Chapter 10 discusses the views of ATSIC, two crucial meetings in 1993 and the views of four prominent Indigenous people: Noel Pearson, Pat Dodson, Michael Dodson and Larissa Behrendt. It demonstrates that Aboriginal and Torres Strait Islander peoples spoke about the Mabo events in the language of common constitutionalism and human rights. It also shows that they considered that the convention of consent should have been applied in relation to any proposals to extinguish native title.

Chapter 11 centres on the work of the Council and examines the impact of the High Court decision, the discussion in federal Parliament about reconciliation, the Council’s final report and the response of the Howard government. As part of its work the Council considered the claims for a treaty or agreement. Concerning the Constitution, it considered a re-rewriting of the preamble and the removal of s 25. The Council employs the convention of mutual recognition with its final report and reflects the language of common constitutionalism. By contrast, the Howard government’s response spoke in the language of modern constitutionalism.

The inquiry into Mabo and constitutional languages is sketched over six chapters. Summing up the findings, Chapter 12 considers their significance for achieving a settlement between Aboriginal and Torres Strait Islanders peoples.

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45 Wik Peoples v Queensland (1996) 141 ALR 129.
and other Australians. The most important finding is the discord concerning the language employed to adjudicate the Mabo claims. Australia’s First Peoples voice their claims in the language of human rights and common constitutionalism, but Australia’s institutions of governance arise out of a modern constitutional tradition. The challenge is to take the practical steps to resolve this paradox.
Chapter 2:
The politics of cultural recognition and modern constitutionalism

.... the dominant constitutional norm that every nation should be recognised as an independent state [misidentifies] … the phenomenon of cultural diversity we are trying to understand

James Tully¹

Recognition of a people’s customs and practices by the international community is one of the oldest and most cherished desires of humanity. Why then do many peoples who cherish this as a goal still find it elusive or tenuous? This chapter will discuss the different sorts of claims that are advanced for recognition, examine their common features and consider why modern constitutionalism really only provides an unqualified recognition in the case of independent states. The key obstacle to the progress of the other claims is located in how modern constitutionalism conceives cultural diversity. Before we can consider how to move forward it is necessary to understand how this current situation came about and what characterises the general features of the modern constitutionalism.

Material for this chapter is drawn principally from Tully’s *Strange multiplicity*. A few words though about the other authors engaged with in this discussion. Charles McIlwain’s authoritative study on *Constitutionalism: ancient and modern* is drawn on for the discussion of Anglo-Saxon constitutionalism. Michael Foley looks at *The silence of constitutions: gaps, ‘abeyances’ and political temperament in the maintenance of government* with a particular reference to the experience of the United States. This examination also draws upon many of the individual contributions in *The Cambridge history of political thought, 1450-1700*.

**The politics of cultural recognition**

Tully speaks of ‘the politics of cultural recognition’ to denote the umbrella of struggles where peoples seek recognition for their distinct cultures. He identifies six different types of claims:

- the claims of nationalist movements;
- the ‘pressures to recognise and accommodate larger, supra-national associations with powerful cultural dimensions’ (eg the European Union and the North American Free Trade Agreement);

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2 Ibid.
6 Tully, above n 1, 1-2.
7 Ibid. 4-5.
• the claims of those caught between the nationalist movements and the pressures for federations and confederations, such as ‘linguistic and ethnic minorities’ (eg the Romany in Europe);

• the “multicultural or ‘intercultural voices’ of hundreds of millions of citizens, immigrants, exiles and refugees” competing ‘for forms of recognition and protection of their cultures’;

• the demands of the feminist movement to modify institutions of governance to ‘accommodate women’s culturally distinct ways of speaking and acting’; and,

• the demands of the ‘250 million Aboriginal or Indigenous peoples of the world for the recognition and accommodation of their twelve thousand diverse cultures, governments and environmental practices’.

A further type of claim can be added with the recent rise of a movement calling for the recognition of same-sex relationships. With South Africa’s recent Constitutional Court decision directing its parliament to amend the current marriage laws to ‘permit same-sex marriage’ the country will join The Netherlands, Spain, Belgium and Canada in recognising same-sex marriage. The United Kingdom has followed a different path by providing legal recognition of ‘civil partnerships for same-sex couples’ from 21 December 2005.8

These different types of claims raise three distinct obstacles for existing constitutional arrangements. One is that a people’s desire for cultural recognition is intimately bound up with self-determination since ‘demands for

cultural recognition’ are ‘aspirations for appropriate forms of self-government’.⁹ Some peoples strive to achieve this through establishing their own political institutions. Others seek it through participating within existing institutions of a dominant society in ways that ‘recognise and affirm ... their culturally diverse ways of thinking, speaking and acting’. Nevertheless, what they all share ‘is a longing for self rule: to rule themselves in accord with their customs and ways’, the ‘oldest political good in the world’."¹⁰ Yet, when the different claims are compared, only the independent nation state is readily associated with self-determination.

Another obstacle faced by these claims is that ‘the basic laws and institutions of modern societies, and their authoritative traditions of interpretation, are unjust in so far as they thwart the forms of self-government appropriate to the recognition of cultural diversity’. Thus, if the ‘sovereignty of a people is in some way denied and suppressed’ rather than affirmed and expressed by an existing form of governance, then the day to day politics is also unfair.¹¹

A third challenge that arises from these claims is that ‘culture is an irreducible and constitutive aspect of politics’. That is, the diverse ways in which people think about, speak, act and relate to others in a constitutional association are always to some extent the expression of their different cultures. Existing constitutions ‘can seek to impose one cultural practice, one way of rule following’ or ‘it can recognise a diversity of cultural ways’ of participating.

⁹ Tully, above n 1, 4.
¹⁰ Ibid. 4-5.
However, regardless of the decision, a constitution ‘cannot eliminate, overcome, or transcend, this cultural dimension of politics’.\textsuperscript{12}

Therefore, despite the myriad of forms of struggle, each different type of claim is a struggle for liberty: the quest for freedom from domination and for self-rule. Tully locates these contemporary struggles within a familiar tradition. “From the struggles of the Italian city states for liberties against imperial rule during the Renaissance, to the European and American revolutions for liberty in the early modern period, and to the national liberation movements of the twentieth century, ‘liberty’ has meant freedom from domination and of self-rule.” There is an important difference with the past though: ‘What is distinctive of our age is a multiplicity of demands for recognition at the same time; the demands are for a variety of forms of self rule; and the demands conflict violently in practice’.\textsuperscript{13}

Comparing these seven types of claims for cultural recognition is unusual. Modern constitutionalism usually serves as the normative backdrop to the actual examination of a claim and so each of these struggles are usually treated as ‘different in kind and [to be] studied by different specialists’.\textsuperscript{14} For instance, usually a different academic field studies nationalist struggles from those who consider the claims of linguistic and ethnic minorities. Similarly, those who examine feminist struggles do not typically compare these to the claims advanced by Aboriginal peoples. For these reasons, the common

\textsuperscript{11} Ibid. 5.  
\textsuperscript{12} Ibid. 5-6.  
\textsuperscript{13} Ibid. 6.  
\textsuperscript{14} Ibid. 1.
challenges these claims pose for the modern constitution are not often addressed.\textsuperscript{15}

**Difficulties in accommodating the claims**

The difficulty that the contemporary Western world has in accommodating these claims arises because the legal and political vocabulary in everyday use rests upon assumptions forged around the ‘norm of independent nation states’ and these are incompatible with their recognition. One key assumption underpinning the normative outlook is the idea that ‘cultures worthy of recognition should be nations’. Another assumption is the idea that ‘nations should be recognised as states’. So influential are these two assumptions that basic concepts such as ‘popular sovereignty, citizenship, unity, equality, recognition and democracy all tend to presuppose the uniformity of a nation state with a centralised and unitary system of legal and political institutions’.\textsuperscript{16}

Tully shows that the ‘inherited normative vocabulary’ originated with seventeenth century European thought. The modern constitutional vocabulary (Tully abbreviates this to ‘modern constitutionalism’) has developed over four centuries around two main forms of recognition: ‘the equality of independent self-governing nation states, and the equality of individual citizens’.\textsuperscript{17}

Modern constitutionalism is a short-hand reference to a tradition often taken for granted. Examining this tradition and considering some of its different

\hspace{1cm} \textsuperscript{15} Ibid. 6
\hspace{1cm} \textsuperscript{16} Ibid. 9.
aspects, one of the most important ideas is that the dominant collective form of recognition revolves around nation-states. The pre-eminence of the nation-state has long been accepted in political thought. For instance, in introducing his own work on the recognition of states, Thomas Grant firmly locates it within these boundaries when he writes that recognition ‘is a procedure whereby the governments of existing states respond to certain changes in the world community’. Confirmation can also be found in Steven Curry’s *Indigenous sovereignty and the democratic project*. In a separate chapter on the ‘State and Nation’ he described the long journey of the ‘modern European nation’ as it evolved from ‘strictly tribal legal authority’ into a nation-state premised on ‘territorial authority’. He noted that ‘the explorers and settlers who established colonies’ around the world ‘employed the language of the nation’ to ‘avoid the implications of recognizing only territorial kinds of authority’.

Prominent thinkers in European thought embraced the idea that the nation-state was sovereign, though disagreeing over other aspects of its employment. For instance, Pufendorf and Bodin saw sovereignty as ‘the soul of the state’. This attitude set the scene for what Walker described as ‘a collective universe in which claims to autonomy can be intelligible’, pointing to the principles of the treaties of Westphalia in 1648, Utrecht in 1714, the

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17 Ibid. 15.
20 Ibid. 77.
21 Samuel Pufendorf was born in Saxony (now in Germany) in 1632 and studied theology and philosophy. He became professor of law of nature and nations at Heidelberg. See Burns, above n 5, 690.
22 Jean Bodin was born in 1529 at Angers (in France). He studied civil law and argued for religious toleration. See Burns, above n 5, 663.
Congress of Vienna in 1814-15 and the Charter of the United Nations in 1945 as all building ‘upon an account of the essential coherence of a system of states’.\(^{24}\)

Likewise, the recognition of individual citizens originates squarely within modern European thought. Observing that the ‘handbooks or official proclamations … of this ethical heritage … are intractably universalist’, John Dunn cited Samuel Pufendorf’s *De Officio Hominis et Civis*, the American Declaration of Independence of 1776, the French Declaration of the Rights of Man and of the Citizen in 1789 and the United Nations Charter. All consider ‘individual human beings … as their fundamental ethical units …’\(^{25}\) Similarly, Charles Taylor observed that the ‘politics of equal dignity is based on the idea that all humans are equally worthy of respect’,\(^{26}\) locating its emergence in ‘western civilization’ with Kant and Rousseau.\(^{27}\) In his writings the French writer and politician Benjamin Constant observed a contrast between the ‘liberty of the ancients’ and the ‘liberty of the moderns’. He said: ‘If this is what the ancients call liberty, they admitted as compatible with this collective freedom the complete subjugation of the individual to the authority of the collectivity.’\(^{28}\)

\(^{23}\) Alfred Dufour, ‘Pufendorf’ in Burns, above n 5, 574; Curry, above n 19, 47-50.


\(^{27}\) Ibid. 237; The German philosopher Immanuel Kant lived from 1724 to 1804 and wrote of knowledge, reason and ethics. The French philosopher and writer Jean-Jacques Rousseau lived from 1712 to 1778, his work *The Social Contract* having a significant influence on the French Revolution. See The Wordsworth *Dictionary of Biography*, (Ware, Hertfordshire: Wordsworth Editions Ltd, 1994). 234, 373

Indeed, the recognition of the modern state and the individual are often considered intertwined. Such a view was expressed by the Dutch political and theological thinker Hugo Grotius. In the eyes of later political thinkers such as Pufendorf, Grotius was the one who ‘broke the ice’ and provided ‘a new theory of natural law’. Examining the fundamental rules in Grotius’ *De Iure Praedae* the third rule states that ‘What each individual has indicated to be his will, that is law with respect to him’ and the next is ‘What the Commonwealth had indicated to be its will, that is law for the whole body of citizens’. The link binding these two rules is the idea of government by consent of the people. Heywood affirms its contemporary currency, explaining that governments exist ‘to fulfil the needs and protect the rights of its citizens, who therefore consent or agree to be governed’.

Tully also writes of modern constitutionalism exhibiting an anti-imperialist feature. He has in mind its opposition to the Holy Roman Empire. Robert Kingdom describes this opposition as arising from a new type of Protestantism – Calvinism that was to take hold from the mid-sixteenth century onwards in several ‘free cities in what is now southern Germany and Switzerland’. The following century was to see the resistance to imperial authority exploded into the Thirty Years War from 1618-48 across Western Europe and the revolt of the Calvinist Puritans against royal power in England from 1640-60. Eventually, as it gained adherents among the nobles and gentry

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29 Richard Tuck, ‘Grotius and Selden’ in Burns, above n 5, 499.
30 Ibid. 505-6.
32 Robert M. Kingdom, ‘Calvinism and resistance theory, 1550-1580’ in Burns, above n 5, 193.
33 Ibid. 218.
it led to a ‘radical transformation of the balance of political power in the State’.  

**Features excluding cultural diversity**

Tully’s argument that the modern forms of recognition are centred on the state and the individual is not new. Nor is the view that modern constitutionalism had an anti-imperial edge. However, Tully does introduce the idea that modern constitutionalism has seven distinct characteristics that ‘serve to exclude or assimilate cultural diversity’.  

The first feature concerns the ways in which popular sovereignty is conceived and is directly related to the individual and the state as the dominant forms of recognition. Tully identified three different variations of popular sovereignty: ‘as a society of undifferentiated individuals, a community held together by the common good or [as] a culturally defined nation’ associated with liberalism, communitarianism and nationalism. Each of these variations presumes the ‘sovereign people’ to be ‘culturally homogenous’. Adherence to this presumption then leads to the idea that cultural diversity is a non-constitutional matter. Benjamin Constant took this thought significantly further in 1819 when he suggested that Europeans were ‘essentially homogeneous in their nature’.  

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35 Tully, above n 1, 62.  
37 Tully, above n 1, 41, 63.  
38 Constant, *Political Writings*, above n 28, 313.
The writings of others on government confirm that the presumption that
the people are culturally homogenous is more broadly acknowledged, or is
effectively applied when constitutional matters are under consideration. For
instance, in his introductory work on political ideologies, Andrew Heywood
wrote that ‘democratic theorists often imply’ that ‘the people’ is a ‘single,
homogenous entity, which acts collectively and is bound together by a common
interest’. While arguing this is not so, Heywood explains that any differences,
presumably also including cultural differences, are resolved through the
majority asserting itself and claiming the ‘right to speak for all’.\footnote{Heywood, above n 31, 275.}
Ernest Gellner arrives at a similar juncture, though by a different course, when he
writes of the rise of nationalism and ‘the organization of human groups into

A second feature of modern constitutionalism is the way in which it
typically deals with custom. The modern constitution is favourably contrasted
with ancient or earlier constitutions. In the latter category are the pre-modern
European constitutions and the customs of non-European societies.\footnote{It is not so
much that adherents of modern constitutionalism see a constitution as
completely independent of custom. Rather, they consider as their starting point
‘that it is appropriate to, and results from a self-conscious reflection on, the
customs, manners, and civilisation of modern societies …’ This approach rests
upon a ‘stages’ view of human history that was used by the ‘classic theorists’ in
order to ‘map, rank and thereby comprehend the great cultural diversity

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encountered by Europeans in the imperial age’. 42 Supporting this conclusion are the comments of the English seventeenth century philosopher John Locke when he wrote that modern constitutions only come into being because of this development among ‘those who are counted the Civiliz’d part of Mankind’. 43

Concerns about what sort of relationship custom should have to the laws of modern political society were the subject of vigorous debate in the seventeenth century. In his review on constitutionalism Lloyd describes this debate. 44 Some, like the Parisian legislist Etienne Pasquier, considered custom should always give way to law because ‘law being made by the prince and custom by the people, a custom which runs directly counter to law is never admissible’. 45 However, this view was challenged by others, including Pierre Rebuffi who argued that ‘laws that ran counter to custom endangered the community’s well being – the end of political society, and of law itself’. 46 Lloyd explains that one way of ‘avoiding confrontation between law and custom lay in assigning each to a distinct sphere’. 47 As Louis Charondas Le Caron explained, in the public sphere are the matters ‘which concern the condition of the commonwealth (l’estate de la république) and not of each one in particular’. 48 And so in the division between public and private, constitutional matters were privileged to the extent that if there were a conflict between custom and constitution, the former was to give way.

41 Tully, above n 1, 64.
42 Id.
45 Etienne Pasquier, cited by Lloyd, ibid. 268.
46 Pierre Rebuffi, cited by Lloyd, ibid. 269.
47 Lloyd, ibid. 269.
Tully says that the ‘stages’ view of human history presumed that as the processes of colonisation and modernisation spread around the world from Europe, what they viewed as the ‘lower peoples’ in the colonies will ‘become objects of the causal process of improvement, gradually shedding their primitive customs and ways appropriate to their lower level of development’. It was expected that these peoples either would be ‘assimilated into modern nations within a European imperial structure or into independent modern constitutional nation states’, or they would be cast aside by the ‘march of progress’.49 The widespread prevalence of this outlook among European scholars was also confirmed by David Maybury-Lewis. He explained that ‘evolutionary theorists invariably placed tribal societies at the bottom of the ladder of development’.50 With such an outlook it was presumed that whatever choices were to be made, these were best made by drawing upon Western knowledge. As Williams noted, the ‘Western colonizing nations of Europe’ were ‘sustained by a central idea: the West’s religion, civilization, and knowledge are superior to the religions, civilizations, and knowledge of non-Western peoples’.51

Tully goes on to make the point that those who favourably contrasted modern constitutionalism over the ancient typically understood culture as ‘separate, closed, internally uniform, and relative to a stage of economic development’.52 He explained that it was considered that humans reason ‘within

48 Louis Charondas Le Caron, cited by Lloyd, ibid. 269.
49 Tully, above n 1, 65.
52 Tully, above n 1, 65.
the bounds of the cultures of which they are members …’ In such a spirit, Locke was to write:

Had you or I been born at the Bay of Soldania, possibly our Thoughts, and Notions, had not exceeded those brutish ones of the Hotentots that inhabit there: and had the Virginia King Apochancana, been educated in England, he had, perhaps, been as knowing a Divine, and as good a Mathematician, as any in it. The difference between him, and a more improved English-Man, lying barely in this, That the exercise of his faculties was bounded within the Ways, Modes, and Notions of his own Country, and never directed to any other, or farther Enquiries (sic).\textsuperscript{53}

Another feature of modern constitutionalism is that its uniformity is considered a virtue and is often favourably contrasted to the irregularity of the ancient constitution. Tully explains that because the latter ‘is the incorporation of varied local customs, an ancient constitution is a motley mix of overlapping legal and political jurisdictions, a kind of \textit{jus gentium}\textsuperscript{54} common to many customary jurisdictions as in the Roman republic or common law of England’. In a similar way, he says, ‘the assemblages of laws, customs and institutions of Europe prior to the 1648 Peace of Westphalia were seen as the paradigm of the ancient constitutions’. The modern constitution was considered to have overcome the irregularity and been able to ‘establish a constitution that is


\textsuperscript{54} \textit{Jus gentium} - Latin words referring to the ‘“law of nations’, the concept in Roman law of those provisions which are shared by the legal codes of all countries...”’. See John Ayto, \textit{Dictionary of Foreign Words in English}, (Hertfordshire, UK: Wordsworth Editions Ltd, 1995, 168-9). In contemporary times, the words are also taken to refer to international law, the “system of law regulating the interrelationship of sovereign states and their rights and duties with regard to one another”. See Elizabeth A. Martin (Ed), \textit{A Dictionary of Law}, Fourth Edition, (Oxford: Oxford University Press, 1997), 240.
legally and politically uniform: a constitution of equal citizens who are treated identically rather than equitably, of one national system of institutionalised legal and political authority rather than many, and a constitutional nation equal in status to all the others’. Tully’s collaborator on a study of seventeenth century European political thought, Richard Tuck, brought out the psychological impetus within Hobbes’ political theory. This involved finding ‘peace and security’ by ‘subordinating their own wills, desires and beliefs to those of their sovereign’.

Other writers on constitutionalism have also noted how the ancient constitution is portrayed as being irregular and unfavourable when compared with the uniformity of the modern form. For instance, Michael Foley writes that ‘By reputation’ the Stuart constitution in England ‘was a moribund arrangement of government containing an unsustainable mixture of royal absolutism, Parliamentary power and common law rights’. Developing a contrast with the United States constitution, he says the latter ‘appears to be everything the Stuart constitution was not’. Foley makes the point though that the Stuart constitution was ‘a highly developed and sophisticated constitutional order …’ Furthermore, ‘from the evidence gathered’, he says ‘it can be argued that the stability of the American constitution has been due not so much to its settled character or to its internal consistency, but to its anomalies and disjunctions being effectively held in abeyance by a constitutional order extraordinarily well equipped, and well disposed, to do so’.

55 Tully, above n 1, 66.
57 Michael Foley, above n 4, xii.
Tully identifies the perceived virtue of uniformity as arising from the lessons classical theorists drew from the events leading up to 1648. The Thirty Years’ War was considered a war about sovereignty, arising because of the ‘conflicting jurisdictions and authorities of the ancient constitutions’. McIlwain identifies a more general weakness of ‘medieval constitutionalism’: its inability to provide ‘any effective sanction for … legal limits to arbitrary will’ and ‘its failure to enforce any penalty … against a prince who actually trampled under foot those rights of his subjects which undoubtedly lay beyond the scope of his legitimate authority’. To these problems, classical theorists responded by advocating that ‘authority had to be organised and centralised by the constitution in some sovereign body’. Tully states that a consequence of this outlook was that ‘the plurality of existing ancient authorities was eliminated by construing the people as the single locus of authority and their aim as the constitution of a uniform system of government’. Other writers confirm the historical shift to the single locus. Richard Tuck traces the rise of the ‘distinctive notion of the sovereign and autonomous agent’ and the view that the ‘survival of the state was of such overriding importance’.

Tully distinguishes a fourth feature of modern constitutionalism as the ‘recognition of custom within a theory of progress’. He explains that the reason why a uniform constitutional system of government was established was not that they disregarded the ‘plurality of ancient customs in the process of

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58 Tully, above n 1, 67.
59 McIlwain, above n 3, 91, 93.
60 Tully, above n 1, 67.
consolidation and centralisation of modern constitutional states’. He points to the writings of Smith, Sieyès, and Constant as supporting the view that the ‘unintended historical progress of economic and social conditions gradually undermines the ancient constitution of customs and ranks’. This led to the creation of a society of one ‘estate’ or ‘state’ of ‘equal and legally undifferentiated individuals’ with similar ‘manners’. That is, it is based on the presumption that the modern constitution is merely responding to and recognising the transformed character of modern society.\textsuperscript{62}

The writings of Constant confirm the belief that commerce ‘brought nations closer’ and ‘has given them customs and habits which are almost identical’.\textsuperscript{63} Gellner also writes of the centralising tendencies of modern societies, not so much from commerce per se, but from the nature of industrial society ‘in which political and cultural boundaries are on the whole congruent’.\textsuperscript{64}

Tully identifies a fifth feature with a ‘specific set of European institutions’ whereby the ‘people alienate or delegate political power to government in these institutional forms’. Here he has in mind the assumptions about how governance should be ordered: representative government, separation of powers, rule of law, individual liberty, standing armies and a public sphere. These definitive constitutional institutions in turn comprise the modern

\textsuperscript{61} Richard Tuck, \textit{The rights of war and peace: political thought and the international order from Grotius to Kant}, (Oxford: Oxford University Press, 1999), 226-227.
\textsuperscript{62} Tully, above n 1, 67.
\textsuperscript{63} Constant, above n 28, 325.
\textsuperscript{64} Gellner, above n 40, 110.
sovereign state, demarcating it ‘from lower, stateless, irregular and ancient societies’.\textsuperscript{65}

The idea that these institutions are associated with contemporary constitutionalism is hardly controversial. Foley identified the ‘status of the separation of powers and of the associated checks and balances as the government’s chief structural and operational characteristic’.\textsuperscript{66} In his political primer, Heywood also explained that representation is a cornerstone of democracy ‘in the modern world’.\textsuperscript{67} The separation of powers, the belief that the ‘legislative, executive and judicial powers of government should be exercised by three independent institutions’, he too associates with ‘liberal constitutionalism’.\textsuperscript{68} He also cited Hobbes and Locke to demonstrate that in the modern state the rule of law is intertwined with freedom. Locke, for instance, said ‘where there is no law there is no freedom’.\textsuperscript{69}

Tully says that another feature of modern constitutionalism is the attribution of a specific individual identity of a ‘nation’ to the constitutional state. He explains that while ‘the nation is interpreted differently in each society, as Anthony Smith and Benedict Anderson have shown, it engenders a sense of belonging and allegiance by means of the nation’s individual name, national historical narrative and public symbols’. By naming the constitutional association and giving it a historical narrative, ‘the nation and its citizens possess a corporate identity or personality’. Tully observes that from Pufendorf

\textsuperscript{65} Tully, above n 1, 67-8.
\textsuperscript{66} Foley, above n 4, 36.
\textsuperscript{67} Heywood, above n 31, 277
\textsuperscript{68} Ibid. 30.
onwards, this corporate identity has been seen as necessary to the unity of a modern constitutional association.\textsuperscript{70} Pufendorf viewed the state as a ‘compound moral person whose will, intertwined and united by the pacts of a number of men, is considered the will of all’.\textsuperscript{71}

While Anderson makes the point that nationalism engenders a sense of belonging, it also brings with it ‘amnesias’. He points to the rise of the ‘new nationalisms’ in Europe where ‘almost immediately’ they ‘began to imagine themselves’ as ‘awaking from sleep’.\textsuperscript{72} He observed that part of the need for ‘a narrative of identity’ is to help forget ‘the [preceding] ruptures’.\textsuperscript{73}

The view that the modern constitution can be associated with the identity of the nation was also noted by Michael Foley when writing of the US Constitution. He explained that it is ‘venerated because of its role in the nation’s historical and political development’. Taking it a step further than Tully, he noted that the US Constitution ‘assumes the identity of the nation itself’. He said that it ‘has come to represent’, for example, ‘the lifeblood of the American nation, its supreme symbol and manifestation … so intimately welded with the national existence itself that the two have become inseparable’.\textsuperscript{74}

Tully notes a seventh feature of modern constitutionalism as the idea that a ‘constitution comes into being at some founding moment and stands

\textsuperscript{69} Locke, cited by Heywood, ibid. 27.
\textsuperscript{70} Tully, above n 1, 68.
\textsuperscript{71} Pufendorf cited by Alfred Dufour, ‘Pufendorf’ in Burns, above n 5, 567.
\textsuperscript{72} Anderson, above 36, 195.
\textsuperscript{73} Ibid. 205.
\textsuperscript{74} H. Kohn cited by Foley, above n 4, 37.
behind - and provides the rules for - democratic politics’. As Tully said, this feature is reinforced by the popular images of the American and French revolutions as great founding acts performed by founding fathers at the threshold of modernity.\(^75\) Like Tully, McIlwain noted that key figures associated with modern constitutionalism view a constitution in this way. Indeed, McIlwain related that the English-born Thomas Paine went further and following his participation in the American Revolution stated that ‘a true constitution is always *antecedent* to the actual government in a state’.\(^76\) This is further entrenched by the presumption that the modern constitution is universal, something that the people agreed on at some time, but for all time. ‘This image is enhanced by the myths of the single lawgiver in the republican tradition, the original consensus of the community or nation in the nationalist tradition and the original or hypothetical contract, to which all citizens today would consent if they were rationale, in the liberal tradition’. Thus, the modern constitution appears as a ‘precondition for democracy, rather than a part of democracy’.\(^77\)

Foley also wrote about this matter in his comparison of the American and British constitutions, though with a slightly different emphasis. He pointed to how the founding moment is considered as justification to leave the constitution unchanged: ‘The constitution is often portrayed as having been bequeathed in its final form from the moment of its inception.’\(^78\)

\(^{75}\) Tully, above n 1, 69.
\(^{76}\) McIlwain, above n 3, 11 (emphasis in original).
\(^{77}\) Tully, above n 1, 69-70.
\(^{78}\) Foley, above n 4, 37.
Connecting theory to practice

These features now influence contemporary thinking about governance around the world. The norm of one nation, one state serves to impose a set of pre-conditions on the responses provided when a claim for cultural recognition is advanced. Its starting point is the presumption that the governing institutions transcend culture. This is why a claim for cultural recognition faces such difficulties in being heard, let alone being accommodated.

To show how the ‘inherited normative vocabulary’ misrepresents cultural diversity, Tully points to some examples current when he wrote his book. Many of these claims were unleashed by the disintegration of the Soviet Union: ‘the Ukraine, the Baltic states, the Caucasus, central Asian, Russia and the former Yugoslavia’. He observes that the separation into one nation-state after another seemed as endless as ‘overlapping minority cultures within, as well as nationals left without the new boundaries in turn immediately demanded recognition as nations’. At that time the tragedies of Bosnia-Herzegovina and Rwanda were at the forefront of attention. Tully explains that these were only the most recent examples ‘of the policies and wars of repression, assimilation, exile, extermination and genocide that compose the long and abhorrent history of attempting to bring the overlapping cultural diversity of contemporary societies in line with the norm of one nation, one state’. 79

There is another example: a current flashpoint on Australia’s doorstep was ignited by the claims of the people of West Papua for refugee status in
response to violations of human rights. Some contributing to Australia’s public discourse portray such claims as threatening the unity of Indonesia and the stability of Australia’s relations with that country.\textsuperscript{80} Underpinning this reaction is a presumption that self-determination can only occur through a separate nation-state. The Australian government has yet to acknowledge the possibility that the people of West Papua are oppressed and do not have the freedom to exercise their distinct culture.\textsuperscript{81} The claim of the people of West Papua for cultural recognition is re-described through the features of the modern constitution. It is taken as a given that the people of Indonesia are homogenous or should become so in the interests of modernity, that the recognition of difference is a threat to the unity of the state and that unity can only be achieved around a nation-state. No consideration is given to modifying the allocation of powers within the state to accommodate the claims of Papuan self-determination.

Generalising then, the problem in accommodating claims for cultural recognition originated with the way the modern constitution is conceived. The difficulty arises from the shift in emphasis away from the idea that authority is guided by custom and is replaced by the notion that a constitution precedes the establishment of the government of a state and should remain unchanged regardless of the claims advanced. Such diverse claims as those advanced by nationalists, linguistic and ethnic minorities, immigrants, exiles and refugees all come up against the idea that the constitution should be unmovable. Only out of

\textsuperscript{79} Tully, above n 1, 10.
\textsuperscript{80} Paul Kelly, ‘Concessions needed in dealing with Indonesia’, \textit{The Australian}, 19 April 2006, 12.
\textsuperscript{81} Sian Powell, ‘Mistrust again sails our way’, \textit{The Australian} 10 April 2006, 13.
crises arising from wars or sustained mass protest does it become possible for modifications to occur to the governance of a state.

The claims of Indigenous people throughout the world for recognition have similarly proved difficult to reconcile with modern constitutionalism. It is these historical experiences that provide a backdrop to the Mabo events and the claims of Aboriginal and Torres Strait Islander peoples.
Chapter 3: Constitutional languages and cultural diversity

A contemporary constitution can recognise cultural diversity if it is reconceived as …. a ‘form of accommodation’ of cultural diversity. A constitution should be seen as a form of activity, an intercultural dialogue …

James Tully, *Strange multiplicity*¹

Tully outlines an alternative approach in *Strange multiplicity*. The starting point in the development of this alternative lies with the philosophical question: What constitutional framework is required to recognise and accommodate cultural diversity?

Tully begins his explanation by examining the meaning of cultural diversity. Consistent with modern constitutionalism, accounts provided by anthropologists earlier in the twentieth century considered culture as something akin to a ‘billiard-ball’ as though it fitted neatly into clearly delineated boundaries. Now, some anthropologists have replaced this earlier view with one that sees culture as ‘overlapping, interactive and internally-negotiated’.²

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² Ibid. 10.
Tully employs this newer explanation of culture in his study of constitutionalism. He refers to sites where ‘hidden constitutions’ have been rediscovered, challenging the idea that constitutionalism has a universal template. One of these sites, ‘common constitutionalism’, is located in the common law, the judge-made law originating in ancient England. Because of its significance, its origins are discussed in some detail. The alternative approach to recognition is also associated with a different type of reasoning that can be contrasted with scientific reasoning. This debate over reasoning can also be set into a longer historical context when the moral reasoning based upon case studies is examined. Another dimension to the alternative approach arises from the application of Wittgenstein’s ideas about language games to constitutionalism.

Since the focus of this chapter is to outline Tully’s alternative approach, his Strange multiplicity is the primary reference point throughout. This is particularly so when discussing the sites of ‘hidden constitutions’ and the reasons he advances for viewing constitutionalism as a language game. The discussion of anthropology and culture will focus on the sources Tully principally relies upon to build his argument. These texts are Why humans have cultures: explaining anthropology and social diversity by the British social and cultural anthropologist Michael Carrithers and Europe and the people without history by Eric R. Wolf. The brief sketch on the ‘common law mind’ is based on an updated edition of John Pocock’s 1957 study on the Ancient constitution

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3 Ibid. 99-182.
5 Eric R. Wolf, Europe and the people without history, (Berkeley: University of California Press, 1982).
and the feudal law.\textsuperscript{6} McIlwain’s study on ancient and modern constitutions locates the changes to constitutionalism in a historical context.\textsuperscript{7} Since the debate over constitutionalism between Thomas Hobbes and Matthew Hale captures the contrasting languages, the writings of both scholars are also directly referred to.\textsuperscript{8} Additional to Tully’s work this discussion draws upon Quentin Skinner’s \textit{Reason and rhetoric in the philosophy of Hobbes}.\textsuperscript{9} The section on dialogical reasoning draws on Albert Jonsen and Stephen Toulmin’s work on the \textit{Abuse of casuistry}.\textsuperscript{10} The discussion of Wittgenstein’s ideas principally relies upon his work in \textit{Philosophical Investigations}.\textsuperscript{11}

**A different approach**

In asking whether a constitution can recognise cultural diversity, Tully also considers if the language in which the enquiry proceeds is itself just, whether it is capable of giving all the participants their due. Certainly, one of the frequent charges made about how contemporary claims are addressed is that the people making the claim are ‘not recognised in their own cultural language or voice’. Frequently, the language in which claimants are obliged to present their

\textsuperscript{8} Thomas Hobbes was born in England in 1588 and is best known for his political writings; Sir Matthew Hale was born in 1609 in England, chaired a law reform commission and wrote a history of the common law. See J. H. Burns, edited with the assistance of Mark Goldie, \textit{The Cambridge history of political thought, 1450-1700}, (Cambridge, UK: Cambridge University Press, 1991), 677-8.
claims is the ‘language of the master: masculine, European or imperial’. The significance of this observation is far-reaching because it suggests the injustice occurs from the beginning, in the authoritative language employed to discuss the particular claims.

Often the language ‘functions as a promissory note or ceremonial display before constitutional negotiations begin in both theory and practice’. Its use in determining claims to recognition ‘continues to stifle cultural differences and impose a dominant culture, while masquerading as culturally neutral, comprehensive or unavoidably ethnocentric’. So in striking out on a different path from the prevailing norm, one should be guided by the ‘ethical watchword’ to always ‘listen to the voices of others’ and to abide by the principle of ‘self-identification’. While this ethic has a contemporary resonance it also has a long tradition. The Latin phrase *audi alteram partem*, always listen to the other side, is associated with the humanism of the Renaissance. Here the emphasis is on the ‘civic dignity’ of speaking in one’s own cultural voice. Conversely, an indignity will arise if one speaks on behalf of others or if one is compelled to speak in another language and tradition of discourse.

Guided by this ethic, in *Strange multiplicity* Tully carefully avoids developing further theory to be imposed on the claimants. Instead, he undertakes a survey of the language used in the debate over recognition to bring

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12 Tully, above n 1, 34.
13 Ibid. 35.
14 Ibid. 34-5; Skinner, above n 9, 15.
to light the shared conventions that render it problematic and give rise to conflicting solutions. In other words, he considers ‘both sides’ of the debate. In addition to considering how the modern constitution deals with recognition, he examines cases where claims are approached differently, relating historical examples from Aboriginal and common law systems.\(^\text{15}\)

Tully also has some direct experience with practitioners of this method as it was applied by scholars he worked with at Cambridge University. He explains that it is adapted from the ‘form of historical critique developed in Cambridge over the last three decades by Quentin Skinner, John Dunn and their many students’. He describes this as ‘the application of Wittgenstein’s method of dissolving philosophical problems … not by presenting yet another solution’, but through a survey that ‘brings to critical light’ the unexamined conventions that govern the language games ‘in which both the problem and the range of solutions arise’.\(^\text{16}\)

**Respecting cultural diversity**

As noted earlier in this chapter, Tully bases his approach upon revisions anthropologists have made to the explanation of cultural diversity. He says that the claims for the recognition of particular cultures ‘constitute one of the most dangerous and pressing problems of the present age’ since ‘racial, linguistic, national, ethnic and gender tensions’ are exhibited in almost all social relations in contemporary societies. Culture is so central to these social relations that the

\(^{15}\) Tully, above n 1, 35.

\(^{16}\) Id.
idea of treating it in isolation is dismissed as fanciful. It affects the way humans relate to others through the myriad of interactions in which they are engaged. It is also affects whether we follow or challenge a particular social rule. Culture provides a dimension to all social relations from the slur in the workplace to the breakdown in relations between two nations.17 As the English political philosopher Thomas Hobbes perceptively notes, the cause of political conflict can be ‘a word, a smile, a different opinion, and any other signe of undervalue, either direct in their persons, or by reflexion in their Kindred, their Friends, their Nation, their Profession, or their Name’ (sic).18 Those with an eye on contemporary events would probably add that even a newspaper cartoon can create an international dispute.19

In examining cultural diversity, Tully introduces ideas presented by two anthropologists who convey a new way of explaining the relationship of culture to society. Michael Carrithers wrote his book Why humans have cultures with two purposes in mind: to introduce a new audience to the discipline of anthropology and to ask why humans have such diverse cultures and ways of life.20

According to Carrithers, anthropologists are moving away from telling a story about human diversity in one particular way and recasting it otherwise. He says the earlier version was ‘well established before the Second World War’. It was ‘largely ahistorical in … perspective’, was the result of ‘long periods of

17 Ibid. 14-15.
20 Carrithers, above n 4, ‘Preface’.
fieldwork in remote regions’ and articulated a viewpoint that emphasised the present tense. Citing examples where anthropologists invoked analogies of sea-shells and cups to represent a particular culture, Carrithers suggests that the theoretical frame of the earlier version was to present ‘the human world’ as ‘composed of separate, distinguishable entities: one society and culture might be dominant, but it is still only one separate variant among equals’.

Eric Wolf’s *Europe and the people without history*, is also important in stimulating this new version about the story of culture. Published a decade earlier than Carrithers’ work, Wolf demolishes one of the myths promoted by the earlier explanation of cultural diversity. He shows ‘region by region throughout the world, the ways in which apparently isolated, apparently local and unaffected, groups of people were in fact already deeply entwined in a growing world system of commerce, colonization, and the exercise of imperial power’. He concludes that by ‘endowing nations, societies, or cultures with the qualities of internally homogeneous and externally distinctive and bounded objects, we create a model of the world as a global pool hall in which the entities spin off each other like so many hard and round billiard balls. Thus it becomes easy to sort the world into differently colored balls.’

Instead of emphasising their separateness, Wolf ‘stresses the relationship between peoples or populations’. He states:

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21 Ibid. 11.  
22 Ibid. 16.  
23 Carrithers, above n 4, 25.  
24 Wolf, above n 5, 6.  
25 Carrithers, above n 4, 26.  
26 Wolf, above n 5, 3.
The central assertion of this book is that the world of humankind constitutes a manifold, a totality of interconnected processes, and inquiries that disassemble this totality into bits and then fail to reassemble it falsify reality. Concepts like ‘nation’, ‘society’, and ‘culture’ name bits and threaten to turn names into things. Only by understanding these names as bundles of relationships, and by placing them back into the field from which they were abstracted, can we hope to avoid misleading inferences and increase our share of understanding.

Reflecting upon the change in focus from the earlier to the later version of this story, Carrithers sees it as moving ‘from the centre of cultures and societies to their peripheries and the relations between them; and from a more or less static description of their characteristics to a dynamic one of processes in which they are involved’. 27 Wolf defines societies as ‘changing alignments of social groups, segments and classes, without either fixed boundaries or stable internal constitutions’. 28 Like Carrithers, Wolf develops a view of culture that is very different from the earlier view that conceives society as akin to a static object. Instead, both authors see culture as ‘more like an event or series of events’. 29

Wolf views culture in a similar way to society, describing it as ‘a series of processes that construct, reconstruct, and dismantle cultural materials’. 30 Carrithers points to examples of cultural materials: ‘social values or ways of

27 Carrithers, above n 4, 26-7.
28 Wolf, above n 5, 387
29 Carrithers, above n 4, 27.
30 Wolf, above n 5, 387.
categorising the world’. There is also a shift in the imagery from the older version to the new. If the earlier images were akin to ‘objects in a museum’, then the newer version is more like ‘a cinematic … movie-goer’s imagery’.\textsuperscript{31}

Wolf does not jettison the work based on the earlier version of the story. After all, the goal of anthropology remains the same: to understand. But he thinks the disassembling undertaken by those guided by the earlier version also needs to be reassembled so we see societies as ‘open systems ... inextricably involved with other aggregates, near and far, in weblike, netlike connections’.\textsuperscript{32} Hence, a reassembled system is therefore a system of relationships that ‘possess force in their own right’.\textsuperscript{33}

Wolf explains:\textsuperscript{34}

Relationships subject human populations to their imperatives, drive people into social alignments, and impart a directionality to the alignments produced. The key relationships … empower human action, inform it, and are carried forward by it.

\textbf{Three features of cultures}

Drawing upon the way that Carrithers and Wolf explain cultural diversity, Tully identifies cultures as ‘overlapping, interactive and internally negotiated’. This new understanding contrasts with the earlier approach to

\begin{itemize}
\item \textsuperscript{31} Carrithers, above n 4, 27.
\item \textsuperscript{32} Alexander Lesser, quoted by Wolf, above n 5, 19.
\item \textsuperscript{33} Carrithers, above n 4, 27.
\item \textsuperscript{34} Wolf, above n 5, 386.
\end{itemize}
culture underpinning the ‘inherited normative vocabulary’ of contemporary legal and political thought.\textsuperscript{35} Clifford Geertz made a similar point. He observed that theorists tend to continue to uphold variations of the old view inherited from the age of European imperialism, of humans situated in independent, closed and homogeneous cultures and societies, and so generate the familiar accompanying dilemmas of relativism and universalism.\textsuperscript{36}

Underpinning the norm of ‘one nation, one state’ are two assumptions. One is the idea that all ‘cultures worthy of recognition should be nations’; the other that ‘nations should be recognised as states’.\textsuperscript{37} Together these assumptions promote the nation-state as the solution for those seeking recognition. Furthermore, since the nation-state is the ‘primary unit’ governing international relations,\textsuperscript{38} then these relations also rest upon the validity of these two assumptions. Yet as noted in the last chapter, recent history demonstrates that forcing overlapping cultures to conform to the ‘one nation, one state’ norm has led to many tragedies.

In his second feature, Tully insists that cultures are ‘interactive … overlap geographically and come in a variety of types’. Furthermore, they are ‘densely interdependent in their formation and identity’. He observes that our contemporary times should be understood as ‘intercultural rather than multicultural’ because of the massive migrations of the past century. Therefore,

\begin{footnotesize}
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\item\textsuperscript{35} Tully, above n 1, 10.
\item\textsuperscript{36} Geertz, cited by Tully, ibid. 14.
\item\textsuperscript{37} Tully, ibid. 9.
\item\textsuperscript{38} Iain McLean (Ed), \textit{The concise Oxford dictionary of politics}, (Oxford: Oxford University Press, 1996), 331.
\end{itemize}
\end{footnotesize}
citizens are members of ‘more than one dynamic culture’ and the experience of ‘crossing’ cultures is ‘normal activity’.\(^\text{39}\)

In his third feature, Tully notes that cultures are ‘not internally homogeneous’. Rather they are ‘continuously contested, imagined and reimagined, transformed and negotiated, both by their members and through their interaction with others’.\(^\text{40}\)

Lastly, Tully observes that if we accept that cultures have three features, then ‘the experience of cultural difference is internal to a culture’.\(^\text{41}\) Hence, he concludes that the meaning of any culture is ‘aspectival rather than essential ...’\(^\text{42}\) He acknowledges that this is probably the ‘most difficult aspect of the new concept of culture to grasp’. Contrasting it with the ‘older, essentialist view’ (Carrithers describes it as an ‘older version’), Tully explains that the ‘other’ and the ‘experience of otherness were by definition associated with another culture’. In this older version, one’s own culture ‘provided an identity in the form of a seamless background or horizon against which one determined where one stood on fundamental questions’ (whether this identity was ‘British’, ‘modern’, ‘woman’ or whatever). The newer explanation of culture acknowledges that ‘cultural horizons’ change ‘as one moves about, just like natural horizons’. Hence, Tully concludes that the ‘experience of otherness is internal to one’s own identity’.\(^\text{43}\)

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\(^{39}\) Tully, above n 1, 11.
\(^{40}\) Ibid. 11.
\(^{41}\) Ibid. 13. [Italics in original]
\(^{42}\) Ibid. 11.
\(^{43}\) Ibid. 13.
A recent example from Australia helps to illustrate the differences between the older, essentialist view of culture and the newer acknowledgment that culture is aspectival and based on relationships. In mid-August 2005, a 55-year old Aboriginal man from a remote community in the Northern Territory was found guilty of sexually abusing a 14 year old Aboriginal child. The elder told the court that the child had been ‘promised to him as a wife under Aboriginal law’ at the age of four. The Northern Territory Supreme Court was told that ‘after rumours the teenager had sex with her boyfriend, the man hit her with a boomerang and had sex with her’. Before the court he pleaded guilty to aggravated assault and having sex with a child. Chief Justice Brian Martin said: ‘It is always difficult when Northern Territory law is in conflict with traditional Aboriginal law, but you and other members of your community, and other Aboriginal communities throughout Australia, must understand Northern Territory law is the law that must be obeyed by everyone, including Aboriginal men who have grown up under traditional law.’ He added that ‘I hope these proceedings today, and that the sentence I will impose upon you, will get the message through to all members of the community that what you did to the young child was wrong.’ According to the report in The Australian newspaper, when sentencing the elder to ‘24 months in prison, suspended after one month’, Chief Justice Martin is also reported to have said that he had a ‘great deal of sympathy’ for the offender and the ‘difficulties he had in moving between traditional culture and Territory law’.44

The following day a number of prominent Aboriginal women rejected the one-month jail sentence. Boni Robertson said it was ‘no deterrent whatever’

to men who thought they could violate women’. Robertson, an academic, headed a 1998 inquiry into violence in Indigenous communities in Queensland. ‘How many times have our women to be rejected by the courts – to have horrendous crimes committed against them – with the perpetrators claiming it is a cultural right?’, Ms Robertson asked. ‘Nobody has a right to violate a young girl, physically or sexually. This man knew he was doing wrong and he should be sentenced appropriately’.

Prominent New South Wales Aboriginal and State Labor MP Linda Burney said that ‘[a]ll cultures change and adapt with time and circumstance and, in my view, underage sex of promised girls is one area where Aboriginal culture needs to change.’ Continuing this theme, she added, that ‘[w]e can’t want, on one hand, our fundamental human rights respected and, on the other hand, force a 14-year-old girl into a sexual relationship.’

According to the accounts in *The Australian*, the court defence advanced on behalf of the elder argued his actions were in accordance with traditional law and this should be considered a mitigating factor. Applying Tully’s view about culture, the defence appears to be premised on the older, essentialist idea that Aboriginal culture remains static and unchanged. In contrast, the responses of Boni Robertson and Linda Burney show that among Aboriginal people there is no one view of what their law should be today. Furthermore, Burney explicitly contests the essentialist view, considering that the adoption of a human rights perspective should have a profound effect in modifying traditional law.

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46 Ibid. 4.
Hidden constitutions

If modern constitutionalism is underpinned by an essentialist view of culture, then what sort of constitutionalism rests upon the idea that culture is ‘overlapping, interactive and internally negotiated’? Challenging the belief that diversity is only a contemporary experience, Tully relates that as the presumption of a universal constitutional form is abandoned ‘a vast undergrowth of cultural diversity and its partial recognition in constitutions has begun to come to light …’ He identifies two sites where ‘hidden constitutions’ have been discovered in recent times. The first is in the ‘writings and constitutional arrangements of the agents of justice who have sought to come to terms with powerful, non-European cultures, immigrants, women and national minorities fighting for cultural survival’. The second is in the ‘applications of constitutional law in particular cases, especially but not exclusively in the common law of Commonwealth countries and international law’. 47

So while the modern constitution comprises features that place obstacles in the way of recognising cultural claims, it is important not to presume this to be synonymous with the contemporary constitutional language. Rather, contemporary constitutionalism is a ‘composite of two dissimilar languages’: a “dominant, ‘modern’” language and a “subordinate, ‘common-law’ or simply ‘common language’”. Tully says the latter language is also connected to other non-European languages of constitutionalism. 48

47 Ibid. 99-100.
48 Ibid. 30-1.
Hence, while a tendency toward uniformity has dominated European thinking, there have also been instances of ‘subordinate areas of constitutional theory and practice’ that ‘have been open to the recognition and accommodation of different cultures …’ These ‘hidden constitutions of contemporary societies’ have been concealed by the dominance of the language of modern constitutionalism ‘and the narrow use of its central terms’.\textsuperscript{49} Tully cites two examples: the ‘earlier varieties of whiggism and civic humanism’.\textsuperscript{50}

**The ancient constitution of England**

The common language has been located in the common law, the judge-made decisions originating in ancient England prior to the twelfth century.\textsuperscript{51} It has also been associated with a particular way of thinking about English history as well as guiding responses to day-to-day events. In his 1957 study on the *Ancient constitution and the feudal law*, John Pocock focused on seventeenth century thinking in the debates over the significance of common law. He

\textsuperscript{49} Ibid. 37, 99.

\textsuperscript{50} The term ‘Whig’ was originally used to refer to a Scottish Presbyterian opponent of Anglican government, but was used in 1679 to refer to those who opposed the succession of James II to the throne and supported the subordination of the Crown to Parliament. See McLean (Ed), above n 38, 529.

\textsuperscript{51} The dating of the origins of common law is contested by contemporary scholars. For instance, Martin dates the origins of the common law as arising after the Norman Conquest of 1066. See Elizabeth A. Martin, (Ed), *A Dictionary of Law*, Fourth Edition, (Oxford: Oxford University Press, 1997), 86. However, Weston implies that common law existed prior to the Norman Conquest. See Corinne C. Weston, ‘England: ancient constitution and common law’ in Burns, above n 8, 376.
explained that the adherents of what he calls the ‘Common-law Mind’ presumed that:  

The common law was the only law their land had ever known, and this by itself encouraged them to interpret the past as if it had been governed by the law of their own day; but in addition the fact that the common law was a customary law, and that lawyers defined custom in a way which heavily emphasised its immemorial character, made even more radical the English tendency to read existing law into the remote past.

The principal source for information about the ancient constitution and common law is Sir Edward Coke whose Reports were published in eleven parts over 15 years from 1600 and whose Institutes of the Laws of England were published from 1628 to 1644. Indeed, as Pocock observed, Coke ‘did more than any other man to summarize it and make it authoritative’. In Coke’s time the ancient constitution was taken as a short-hand reference to the ‘whole body of English law – including the customs of the high court of parliament’. Writing about this topic, Corinne C. Weston described Coke as the ‘oracle’ of ‘common law and statutory law’. While both influenced political thought, ‘it was common law that gave ancient constitutionalism its distinctive flavour’.

Coke explained that customs ‘attain force of law by title of prescription’. Weston observes that this principle ‘became conspicuous in Stuart discourse

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52 Pocock, above n 6, 30-1.
53 Weston, above n 51, 375.
54 Pocock, above n 6, 38.
55 Ibid. 233.
56 Weston, above n 51, 376.
when it was applied to ancient customs embodying rights and liberties’. Before customs ‘could be deemed prescriptive … they had to have existed before (or beyond) time of memory without written record to the contrary’. Usually the date of Richard I’s coronation, September 1189, was considered the divider between memory and those decisions that were made before the ‘time of memory’. In order to be deemed prescriptive, it was necessary for the customs to be ‘exercised regularly and constantly before and after 1189; usage must have been long, continued, and peaceful without the interruption, for example, of a Norman conquest’. 57

This meant that the whole body of English law, including the customs of the high court of parliament, could be represented as immemorial. 58 As Pocock observed in the Ancient constitution and the feudal law, the ‘belief in the antiquity of the common law encouraged belief in the existence of an ancient constitution, reference to which was constantly made, precedents, maxims and principles from which were constantly alleged, and which was constantly asserted to be in some way immune from the king’s prerogative action’. 59

In the seventeenth century, this outlook came under sustained challenge. Leading this challenge was Thomas Hobbes, the political philosopher, mathematician and linguist. 60 He sought to ‘make men believe, that the Kings of England were absolute monarchs … the Parliaments of England merely nothing

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57 Id.
58 Pocock, above n 6, 233.
59 Ibid. 46.
60 Burns, above n 8, 678.
but shadows’. He devoted the greater part of his *Dialogue of the Common Laws* and much of *Behemoth* to refuting the idea that the ‘law is law because it is immemorial custom’. He also sought to discredit ‘artificial reason’, the idea advanced by Coke to describe ‘the accumulated and refined wisdom of many generations, which none but a professional could comprehend and no individual intellect, however great, could have produced’.

Hobbes argued that the law was two things: it was the ‘dictate of a perfectly simple and universal natural reason’, which ‘enjoined those things which were good for our self-preservation’; and that laws were made ‘by the command of the sovereign, not because he possessed greater or less natural reason, but because he had been instituted by men in the state of nature to enforce a certain mode of living which natural reason enjoined’.

Hobbes used the following logic: ‘law may be custom, but custom alone has no binding force; for custom to become law requires that there should already exist an authority capable of making law by his injunctions. Therefore no law can be immemorial; before there can be law there must be a sovereign; and every law must have been made at a particular point in time.’

The lawyer and judge Sir Matthew Hale wrote a detailed response to the argument that a sovereign existed prior to decisions upon laws. Hale’s

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62 Pocock, above n 6, 162-3.
63 Ibid. 163.
64 Id.
Reflections was written sometime before 1675 and several years before Hobbes’ work was published. It is presumed that Hale gained access to Hobbes’ arguments through the circulation of the latter’s unpublished manuscript.\footnote{F. Pollock cited by Holdsworth, ibid. vol v, 500.}

Hobbes’ points were politically controversial, since it had long been known that King James I considered ‘that all laws, customs and privileges were derived ultimately from his will’. Pocock observed that this polarisation opened up ‘an ideological gap … which could not be easily bridged’. The ‘ancient constitution became alternative to and incompatible with the sovereignty of the king’.\footnote{Ibid. 234.}

Reasoning

Hobbes and Hale also differed over the reasoning they applied to constitutionalism. Hobbes suggested that constitutionalism was based on universal and essential rules. Thus, he said if people expect their constitutional association to be anything other than a ‘crasie building, such as hardly lasting out their own time’, then it must be built with ‘the help of a very able Architect’.\footnote{Hobbes, above n 18, 221; Tully, above n 1, 114.} Continued this theme, he said: ‘The skill of making and maintaining Common-wealths consisteth in certain Rules, as doth Arithmetique and Geometry; not (as Tennis play) on Practice onely.’\footnote{Hobbes, ibid. 145.}
Hale countered this argument by stating that ‘men are not borne Cōmon Lawyers, neither can the bare Exerciss of the Faculty of Reason give a man a Sufficient Knowledge of it, but it must be gained by the habituateing and accustomoeing and Exerciseing that Faculty by readeing, Study and observation to give a Man a compleate Knowledge thereof’ (sic).\(^{70}\) Hale argued that:\(^{71}\)

> it is not possible for men to come to the Same Certainty, evidence and Demonstration touching them as may be expected in Mathematicall Science, and they that please themselves w\(^{th}\) a perswasion that they can w\(^{th}\) as much evidence and Congruitie make out an unerring Systeme of Laws and Politiques equally applicable to all States and Occasions as Euclide demonstrates his Conclusions, deceive themselves w\(^{th}\) Notions w\(^{ch}\) prove ineffectual, when they come to particul' application (sic).

Tully sums up Hale’s reply as ‘the skill of making and maintaining a constitutional commonwealth is not a matter of a solitary, clever person deducing general rules from essential definitions. Rather it is a practical skill …\(^{72}\)

In his ‘radical reappraisal of the political theory of Hobbes’,\(^{73}\) Quentin Skinner explains that when Hobbes first developed his views about *scientia civilis* in the late 1630s, it was above all against the humanist ‘cast of thought that he sought to define himself and his project’.\(^{74}\) Skinner says the initial view

\(^{70}\) Hale, above n 65, 505.  
\(^{71}\) Ibid. 502.  
\(^{72}\) Tully, above n 1, 114.  
\(^{73}\) Skinner, above n 9, Cover.  
\(^{74}\) Ibid. 10.
that Hobbes articulated was that humanity’s ‘aim should be to argue deductively in such a way that any rationale person who accepts our premises will feel compelled to endorse the conclusions we derive from them’. Hobbes developed his approach as a solution to the disunity and irregularity he considered was promoted by adherence to the ancient constitutions.

The views articulated by Hale were typical of the Renaissance humanist culture. As mentioned earlier, the reasoning associated with this culture embraced the watchword of audi alteram partem. Skinner translates this as ‘always listen to the other side’. He says in moral and political debates, this ‘commitment stems from the belief that … it will always be possible to speak in utramque partem’, that is ‘arguing on both sides’. This outlook presumes it ‘will never be possible to couch our moral or political theories in deductive form’. On these premises, Skinner says the ‘appropriate model will always be that of a dialogue’ where there is a ‘willingness to negotiate over rival intuitions concerning the applicability of evaluative terms’. Thinking about the implications of this outlook for the study of recognition, Tully reasons it is always possible to speak on the other side because the criteria used for the application of moral and philosophical concepts ‘are so various and circumstantial, rather than essential and universal’ that any particular case

75 Ibid. 15.
76 Tully, above n 1, 113-4.
77 Ibid. 115.
78 Skinner, above n 9, 15, 466.
79 Ibid. 15.
80 Ibid. 15-16.
examined is ‘always open to more than one description and evaluation’ through using comparisons and contrasts with other cases.\(^{81}\)

While Hobbes subsequently modified his views,\(^{82}\) his initial views were taken as a model by the ‘theorists of modern constitutionalism’. Tully says one aspect of this model of reasoning is its reliance on the monological contributions of individuals. Typically, with this form of reasoning the set piece keynote monologue or written contribution is used to address issues in dispute and are considered as a way to move forward. Listening is not valued by this form of reasoning as the presumption is to ‘win’ people to a rational view. Furthermore, it does not provide the experiences to engage in cultural negotiations. Such skills must come from elsewhere.

Another feature of monological reasoning is its propensity to seek ‘essential definitions and deducing general rules that any rational person would be compelled to accept’.\(^{83}\) Elements of such an outlook are typically seen in constitutional contests about which definition will dominate. Its downside is its sidelining of the full range of uses for a concept and how it is practiced elsewhere by focussing on defining its essential characteristics.\(^{84}\) In other words, definition-forming can become a substitute for engaging in dialogue with others about how they can be recognised by contemporary society.

\(^{81}\) Tully, above n 1, 115.
\(^{82}\) Skinner, above n 9, 15.
\(^{83}\) Tully, above n 1, 115.
\(^{84}\) Wittgenstein, above n 11, s 208.
The debate over changes to the federal *Marriage Act* is a case in point. It is an example of how adherents of modern constitutionalism can actively use language to block claims for recognition. In 2004, the Howard Government redefined marriage to clarify that it only applied to a man and a woman. The act now says that marriage ‘means the union of a man and a woman to the exclusion of all others, voluntarily entered into for life’. With some attention now on why Australia is not following Britain’s path and legalising same sex unions, Howard justified his government’s action on nothing more than a personal belief that ‘marriage is for men and women’. Nick Miller characterised it as irrational argument covering ‘Blind stubborn conservatism and unadmitted homophobia.’ Hence, the recognition of same sex marriage was blocked by a prime minister who used his powerful position to modify an act of parliament.

In light of Hobbes’ argument that scientific reasoning should be applied to constitutionalism, Tully considers scientific practice. While essentialist approaches are not applicable to constitutionalism, they also do not accurately capture all the activities undertaken by scientists. As Tully notes, there are examples of natural scientists studying individual cases, advancing partial and competing sketches, drawing analogies with other cases as well as discussing their findings with as many colleagues as possible. Thus, it may be argued that both forms of reasoning are used within the natural sciences.

85 *Marriage Act* 1961 (Cth), s 5(1); Annabelle McDonald, ‘Howard won’t budge on same-sex marriage’, *The Australian*, 23 December 2005, 3.
87 Tully, above n 1, 185.
The philosophy of constitutionalism articulated by Hobbes early in his life, along with the contributions of many others, eventually overwhelmed the humanist philosophy exemplified by Chief Justice Hale. Skinner argues the Hobbes/Hale debate is the ‘historical juncture’ for this shift from a ‘dialogical to a monological style of moral and political reasoning’. 88 Tully notes the irony that ‘successive monological theories’ have been accompanied by debates and disagreements ‘that only the humanist approach can explain’. 89

Casuistry

The dialogical form of reasoning may not have a high profile, but it certainly has a long pedigree under the label casuistry. Casuistry comes from the Latin word *casus*, or case. It is described as an approach to ethical problems ‘in which the circumstances of cases affect the cases of general rules’. 90 In their history of moral reasoning, Jonsen and Toulmin explain that those who originally practiced this activity looked to theologians and jurisprudents for ‘theoretical justification’. An explicit methodology was not formulated, so Jonsen and Toulmin explain that only a study of the casuists’ actual practice ‘reveals the steps they consistently took but seldom reflected on’. 91

Jonsen and Toulmin identify six steps as ‘noteworthy for an understanding of the casuistic method’. 92

88 Skinner, above n 9, 16.
89 Tully, above n 1, 116.
90 Blackburn, above n 50, 56.
91 Jonsen and Toulmin, above n 10, 250-1.
92 Ibid. 251.
• the ‘reliance on paradigms and analogies’;

• The ‘appeal to maxims’;

• An ‘analysis of circumstances’;

• ‘[D]egrees of probability’;

• The ‘use of cumulative arguments’; and,

• The ‘presentation of a final resolution’.

If the examples of common law cases are considered, it is possible to see that these provide lessons, not just about their outcome, but also about the method of arriving at the decision. Jonsen and Toulmin argue that ‘those philosophers who study the common law have always been familiar with the power that legal claims derive from historical precedents’. They also point out that if ‘we go back even to Coke or Clarendon, the history of Anglo-American common law has never despised case studies’.93 Looking at the area of personal injury, they say ‘one can scarcely make sense of the evolution or the meaning of tort concepts’94 without tracing the key cases by which equitable resolution of personal injury suits gave rise, successively, to concepts of negligence, and concepts of strict liability’. Following the study of anthropological and historical documents Jonsen and Toulmin ask:95

How far have current paradigmatic, or ‘type’ cases, of, say, benefit and injury, veracity and falsehood, changed down the centuries?

93 Ibid. 2-3.
94 Tort comes from the Latin word tortus, meaning twisted or crooked. Now is used to refer to a ‘wrongful act or omission for which damages can be obtained in a civil court by the person wronged, other than a wrong that is only a breach of contract’. See Martin, above n 51, 467.
95 Jonsen and Toulmin, above n 10, 303.
In what respects, if any, do such taxonomic changes refine people’s moral conceptions and improve their moral discrimination? (Attitudes toward the treatment of children or animals are fruitful topics for such case studies.) To what extent are the variations in the conception of honor, say, from nation to nation to be found in other moral conceptions also? Or are some shared ideas about, for example, loyalty and treachery or cruelty and kindness within the family more widespread in the actual practices of different peoples?

While they believe that there will be philosophers who adopt a ‘tough-minded’ anti-historical stance and say ‘these issues are irrelevant to their inquiries’, anyone who ‘feels the force of the historical links and rhetorical parallels between the arguments of common morality and common law, can find in the riches of the various casuistical traditions a valuable and largely untapped source of material for philosophical reflection and historical analysis’.  

Jonsen and Toulmin add some specific comments on the practical form of reasoning, explaining that:

If general, abstract theories in moral philosophy are read against their historical and social backgrounds, they will need to be understood not as making comprehensive and mutually exclusive claims but, rather, offering us limited and complementary perspectives on the whole broad complex of human conduct and moral experience, personal relations, and ethical reflection. So, interpreted, none of these theories tells us the whole truth … Instead, each of them gives us part of the larger picture.

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96 Id.  
97 Ibid. 293. Italics in original.
Influenced by these ideas, Tully says ‘like many practical activities that are mastered by examples more than by rules, understanding a general concept consists in being able to give reasons why it should or should not be used in any particular case by describing examples with similar or related aspects, drawing analogies or disanalogies of various kinds, finding precedents and drawing attention to intermediate cases so that one can pass easily from familiar cases to the unfamiliar and see the relation between them’. Guided by this approach, for instance, the last chapter considered seven different types of recognition. Tully says that he brought these claims together to highlight ‘three similarities among them’. 98

Applying this view of moral reasoning in *Strange multiplicity*, Tully undertakes a survey of the historical formation of modern constitutionalism, identifying features that ‘exclude or to assimilate cultural diversity’. 99 He contends these features are found in the writings of contemporary political and constitutional theorists, 100 and he engages with the ideas of Thomas Paine, John Locke, Thomas Hobbes, Immanuel Kant and Samuel Pufendorf among others theorists. 101 He outlines a series of examples in the Aboriginal and common–law

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98 Tully, above n 1, 108.
99 Ibid. 62.
101 Thomas Paine was born in Norfolk, England in 1737 and was active in both the French and American revolutions; The English philosopher John Locke was born in 1632 and wrote a number of books on knowledge, education and governance; The German philosopher Immanuel Kant was born in 1724 and his writings covered knowledge, physics and theology. See Wordsworth, *Dictionary of Biography*, (Ware, Hertfordshire, UK: Helicon Publishing Ltd, 1994), 234, 263, 330; Burns, above n 8, 678, 682, 690.
traditions where the three conventions have been applied.\(^\text{102}\) He discusses the stance expressed by English Chief Justice Hale, the 1832 judgement of United States Chief Justice of Supreme Court John Marshall in \textit{Worcester v Georgia}\(^\text{103}\) and the 1664 Two Row Wampum Treaty of the \textit{Haudenosaunee} in America.\(^\text{104}\)

An additional chapter focuses on examples where ‘diverse federalism’ has been adopted. Here Tully discusses the confederation of the provinces leading to the formation of Canada in 1867, the Québec Act of 1774, linguistic minorities in Québec, and the English-language provinces of Canada.\(^\text{105}\)

\textbf{Wittgenstein}

The writings of the Austrian twentieth century philosopher Ludwig Wittgenstein are also relevant when thinking about language and constitutionalism.\(^\text{106}\) His \textit{Philosophical Investigations} introduces an analogy between language and an ancient city to illustrate how people acquire understanding. It is a ‘maze of little streets and squares, of old and new houses, and of houses with additions from various periods; and this surrounded by a multitude of new boroughs with straight regular streets and uniform houses’. He asks if ‘our language is complete’ and implies it may never be so when he considers whether it was complete ‘before the symbolism of chemistry and the

\(^{102}\) See Chapter 4: ‘The historical formation of common constitutionalism: the rediscovery of cultural diversity, part I’ in Tully, above n 1, 99-139.
\(^{103}\) \textit{Worcester v Georgia} 31 US (6 Pet) 515 (1832).
\(^{105}\) See Chapter 5: ‘The historical formation of common constitutionalism: the rediscovery of cultural diversity, part II’ in Tully, above n 1, 140-182.
\(^{106}\) Wittgenstein first postulated his ideas about language in \textit{Tractatus Logico-Philosophicus} published in 1922. He taught at Cambridge University, United Kingdom in the 1930s and 1940s. His \textit{Philosophical Investigations} was published posthumously. See Wordsworth, above n 101, 449.
notation of the infinitesimal calculus were incorporated in it’. These are, ‘so to speak’, the ‘suburbs of the language’.¹⁰⁷ As Tully observes, ‘like a city’, language grows up in ‘a variety of forms through long use and practice, interacting and overlapping in many ways in the endless diversity and strife of human activities’.¹⁰⁸

Like a city, words can have multiple meanings and considering the different kinds of sentences, Wittgenstein continues:¹⁰⁹

Say assertion, question, and command? – There are countless kinds: countless different kinds of use of what we call ‘symbols’, ‘words’, ‘sentences.’ And this multiplicity is not something fixed, given once and for all; but new types of language, new language-games, as we may say, come into existence, and others become obsolete and get forgotten.

Wittgenstein uses the term ‘language-game’ to promote the idea that the speaking of language is part of an activity, or of a form of life’.¹¹⁰ Just as a guide can point to diverse housing styles within a city, so we can find overlapping language additions from other periods.¹¹¹

Others who study Wittgenstein’s ideas make similar points. For instance, Monk describes Wittgenstein reflections in the Philosophical Investigations about an earlier work he and the celebrated mathematician Bertrand Russell had

¹⁰⁷ Ibid. s 18.
¹⁰⁸ Tully, above n 1, 104.
¹⁰⁹ Wittgenstein, above n 11, s 23.
¹¹⁰ Ibid. s 23. Italics in original.
¹¹¹ Tully, above n 1, 104.
undertaken on language. Monk said they were ‘misled, by concentrating on one type of language, the assertoric sentence, into trying to analyse the whole of language as though it consisted of nothing but that type, or as though the other uses of language could be analysed as variations on that basic theme’. Monk comments that Wittgenstein and Russell ‘had had too rigid a notion of proposition, and the purpose of the language-game method was, so to speak, to loosen such notions’. Similarly, McGinn writes that ‘Wittgenstein’s concept of a language-game is clearly to be set over and against the idea of language as a system of meaningful signs that can be considered in abstraction from its actual employment. Instead of approaching language as a system of signs with meaning, we are prompted to think about it in situ, embedded in the lives of those who speak it.’

**Application to constitutionalism**

While Tully’s presentation of Wittgenstein’s language games in *Strange multiplicity* is not new, his view that constitutionalism is best understood as a language is original. Earlier we saw that Tully describes contemporary constitutionalism as comprising both modern constitutionalism as well as other languages that have been ‘elbowed aside’ so that they are hidden from the attention of many of the participants in contemporary societies. Tully applies Wittgenstein’s ideas about language to constitutionalism, observing that ‘it is the language that has been woven into the activity of acting in accordance with

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114 Tully, above n 1, 99-100.
and going against modern constitutionalism’. Thus, it involves the meaning of
terms such as constitutionalism and other associated terms such as ‘sovereignty,
people, self government, citizen, agreement, rule of law, rights, equality,
recognition and nation’.115

Explaining why constitutionalism is like a language, Tully uses
Wittgenstein’s analogy of language and city. He writes that like a city
contemporary constitutionalism has evolved with a ‘variety of forms’ that
through ‘long use and practice’ have gained authority. Like a city,
constitutionalism does not have a ‘uniform constitution imposed by a single
lawgiver’. However, like a city, there are also ‘areas of it that have been made
regular by reforms, just like some newer neighbourhoods of a city’.116

Tully also says like a language, constitutionalism cannot be understood
through a singular comprehensive theory, but ‘is woven into the practices and
institutions of contemporary societies’. He notes that a language ‘is too
multiform to be represented in a theory or comprehensive rule that stipulates the
essential conditions for the correct application of words in every instance’. He
argues this is analogous with a city since ‘there is no such comprehensive view
of the constitution of a city’.117 Wittgenstein made a similar point when he
describes language as ‘a labyrinth of paths’ where you ‘approach from one side
and know your way about; you approach the same place from another side and

115 Ibid. 36.
116 Ibid. 104.
117 Id.
no longer know your way about’. On this basis then, ‘like a constitutional association, language is aspectival’.

Such an approach contrasts with the normative political and legal vocabulary. In Western thought, constitutionalism is often defined in ways that do not take account of the breadth of contemporary claims for recognition. In *Strange multiplicity* Tully uses constitutionalism in a broader sense to encompass all these types of claims and to discuss those features involved in constituting ‘modern political associations’. Referring then to the claims of the nationalist movements, he describes these as movements ‘seeking to be constitutionally recognised as either independent nation states or as autonomous political associations within various forms of multinational federations and confederations’. Compare this to the meaning expressed in the *Oxford Dictionary of Politics*. Here ‘constitution’ is described as the ‘set of fundamental rules governing the politics of a nation or subnational body’. Tully’s approach is broader on two counts. While constitutionalism certainly includes rules, it does not stop there. Character, conventions, outlook, vision and culture are also encompassed by ‘constitutionalism’. Nor does he restrict constitutional recognition to the claims of nationalists. To the extent that the other types of claims seek modifications to or an independent political association, Tully considers they too are constitutional demands. Because the concern here is to examine the diverse claims for recognition and protection, constitutionalism will also be used in this broad sense.

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118 Wittgenstein, above n 11, s 203. Italics in original.
119 Tully, above n 1, 104.
120 Ibid. 3.
121 Ibid. 2.
122 McLean, above n 38, 107-8.
From Tully’s perspective, constitutionalism has a ‘labyrinth of terms and their uses from various periods’ and their use could be considered analogous to negotiating our way around Wittgenstein’s city. Tully explains that the ‘theorists and citizens who inhabit these modern suburbs are accustomed to their straight and narrow ways, characteristic forms of thought and relatively stable uses, and they tend to presume that their ways should determine the whole’. They presume that a modern constitution should consist of ‘some combination’ of the ‘seven essential features’. Tully says modern theorists do not see it as one possible arrangement about how a neighbourhood might be organised, but as a ‘comprehensive rule by which all political associations’ should be guided. \(^{123}\)

Among the modern theorists, the ‘terms and uses of those terms’ associated with modern constitutionalism have ‘come to be accepted as the authoritative political traditions of interpretation of modern constitutional societies’. It is within this frame that descriptions, reflections, criticisms, changes, and indeed the replacement of constitutions, has occurred over the past few hundred years. \(^{124}\)

Tully gives the ‘craving for generality’ of modern constitutionalism as another reason for drawing his analogy. Wittgenstein considered that one source of this craving lies with ‘our preoccupation with the method of science’ and he suggested this is accompanied by a ‘contemptuous attitude toward the particular case’. \(^{125}\)

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\(^{123}\) Tully, above n 1, 104-5.

\(^{124}\) Ibid. 36.

finding ‘the common element of all its applications’ is one that has ‘shackled philosophical investigation’. Not only had this ‘led to no result’, but it had also ‘made the philosopher dismiss as irrelevant the concrete cases, which alone could have helped … to understand the usage of the general term’. Drawing out the analogy between the ‘image of an ancient city’ and language, Tully says this craving ‘overlooks and generates a contemptuous attitude toward the irreducible multiplicity of concrete usage’.

The craving for generality is reflected in the essentialist quest to determine the ‘right’ definition rather than a focus on what different perspectives are attempting to achieve. This quest for generality can lead to an examination of the term ‘constitutionalism’ where this is undertaken without any reference to other claims for recognition. Once this method is adopted disagreements are confined to ‘the interpretation and application of this great map … This map is then projected over the whole, hiding the diversity beneath.’ This method does not bring us closer to resolving problems but creates obstacles in the way of their resolution. Instead, Wittgenstein (as well as Tully) emphasises that the different uses of the term can become apparent once participants engage in a dialogue about the constitutional association they seek.

Tully also discusses how knowledge of a general rule is gathered, drawing upon Wittgenstein’s analogy between rules and sign-posts. Arguing that the ‘application of a word is not everywhere bounded by rules’ Wittgenstein asks, ‘Does the sign-post leave no doubt open about the way I have to go?’

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127 Tully, above n 1, 105.
128 Id.
Continuing this theme, he probes further: ‘Does it shew (sic) which direction I am to take when I have passed it; whether along the road or the footpath or cross-country?’ Developing this logic, Wittgenstein concludes that ‘the sign-post does after all leave no room for doubt. Or rather: it sometimes leaves room for doubt and sometimes not. And now this is no longer a philosophical proposition, but an empirical one.’ A recent visit to England’s North Yorkshire Moors brought this analogy home to me. A friend and I travelled down many narrow country lanes over a few days. In addition to the frequent sign-posts, we were assisted by a small-scale ordinance survey map providing lots of detail of the villages of the region. Did the assistance provided by both sets of ‘rules’ ensure that we were never lost? Well, yes, most of the time it did, but not always. Fortunately though, we weren’t lost for too long.

Wittgenstein argues that ‘there is a way of grasping a rule which is not an interpretation’, but which is exhibited in what is called ‘obeying the rule’ and ‘going against it’ in actual cases. Moreover, in discussing his use of the term ‘interpretation’, Wittgenstein says it is not helpful to say that ‘every act according to the rule is an interpretation’, rather restricting its use to circumstances where it is substituted for another ‘expression of the rule’.

Drawing upon this analogy, Tully comments “If I am in doubt about how to interpret and follow the rule, or if I can interpret it in endless ways, then the rule and its interpretation ‘do not determine meaning’.” Nevertheless, the analogy is still well made, for the meaning about rule-following does not only

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130 Ibid. s 201. Italics in original.
come from a study of the rules. This is why driving tests always have a written component about ‘the rules’ and a practical component where the learner demonstrates their skill in driving the vehicle. That is, the meaning of rule-following also comes from practice. Indeed, when it comes to constitutionalism, as Tully says, ‘even if a theorist could provide a theory which specified the exhaustive conditions for the interpretation and application of the general terms of constitutionalism in every case, as modern theorists … have sought to do’ this will not enable us to fully understand constitutionalism. There will always be ‘interpretative disagreements’ that will arise about how to apply and follow the conditions.\textsuperscript{131}

On this basis Tully advances an alternative approach to that articulated by modern constitutional theorists. He describes the understanding of a general term as ‘nothing more than the practical activity of being able to use it in various circumstances’. He says such ‘a grasp is not the possession of a theory, but the manifestation of a repertoire of practical, normative abilities, acquired through long use and practice, to use the term and go against customary use in actual cases’.\textsuperscript{132}

In discussing his analogy of the sign-post, Wittgenstein also noted that custom is an element of how we proceed when we arrive at a road junction. He explains that when a person uses a sign-post to guide them on their journey, it presumes they are acquainted with the idea of using sign-posts. Describing the circumstances where ‘obeying a rule’ occurs, he observed that it is ‘not possible

\textsuperscript{131} Tully, above n 1, 106.
\textsuperscript{132} Id.
that there should have been only one occasion on which someone obeyed a rule’. Similarly, it ‘is not possible that there should have been only one occasion on which a report was made, an order given or understood’. Hence, to obey a rule or to carry out other activities such as making a report, playing a game of chess ‘are customs (uses, institutions)’. Similarly, Tully makes the point that the ‘uses of general terms’ are ‘intersubjective’ practices or ‘customs’, like tennis or the ‘practice’ of law.

As has been implied throughout the discussion of Wittgenstein’s description of language as a game, Tully also considers that contemporary constitutionalism to be ‘a game in which the participants alter the conventions as they go along’. Indeed, it is through this path that women succeeded in challenging their exclusion from many aspects of society. For instance, the campaign to extend franchise to women challenged and succeeded in modifying the norm that participation in elections was the province of men only. The change was achieved through emphasising that the restriction to male only voting was inconsistent with adherence to the idea of equality.

Because the game does not occur in an idealised situation, but within the authoritative traditions of interpretation, it can be distorted by those who seek to use their ‘instrumental power’ to exclude claims from public discussion or to reframe them in ways that suit a particular interpretation. Thus, the language of

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134 Tully, above n 1, 106.
135 Ibid. 40.
136 Ibid. 39.
modern constitutionalism ‘holds in place a picture of a modern constitution that consists of seven features’.\(^\text{137}\)

**Contemporary constitutionalism**

The analogy between constitutionalism and language also significantly enriches a general understanding of contemporary constitutionalism. Tully describes contemporary constitutionalism as ‘exceedingly complex’, ‘comprising a vast network of conventions and ways of employing terms developed over hundreds of years’. He says a ‘relatively narrow range of familiar uses of these terms’ have come to be accepted as authoritative in the political traditions of contemporary societies. He identifies three of the most important Western ‘traditions of interpretation’ as liberalism, nationalism and communitarianism. When a demand for constitutional recognition is judged by those in authority ‘to contradict the norms of constitutionalism’, Tully says what they mean is that it is ‘incompatible with the range of normal usage’ for these terms in their tradition of interpretation of contemporary constitutionalism.\(^\text{138}\)

Tully advocates a different approach to constitutionalism. He explains that the ‘apparent incompatibility can be dissolved simply by pointing to distinctions and uses in the language of contemporary constitutionalism’ that the influence of the traditions of interpretation ‘causes us to overlook, yet which are perfectly justifiable’.\(^\text{139}\) Indeed this is the approach he adopts in discussing the

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\(^{137}\) Ibid. 41.  
\(^{138}\) Ibid. 36.  
\(^{139}\) Ibid. 37.
rediscovery of cultural diversity. Here he shows that the prevailing language of these traditions of interpretation ‘has elbowed aside entire areas of the broader language of constitutionalism … which provide the means of recognising and accommodating cultural diversity’.

While contemporary use may suggest constitutionalism is narrowly defined, Tully argues that despite the wishes of the traditional interpreters, constitutionalism is much more complex and ‘is neither exclusively imperial nor exclusively European’. While its modern features ‘were developed in the age of European imperialism’, it is ‘also the language in which anti-imperial struggles’ have been fought inside and outside Europe over the same period. Similarly, the struggles of women for constitutional recognition have been articulated through this language and Tully points to the work of Mary Wollstonecraft as an example.

Hence, Tully considers it a ‘misrepresentation’ to view the language of contemporary constitutionalism as a ‘monolithic masculine, European and imperial structure’ that must somehow be swept away ‘if the first step of recognition is to be just’. Instead, he views contemporary constitutionalism as composed of complex sites ‘of interaction and struggle’ within Europe, but also with non-European peoples and cultures. He says the language of constitutionalism has been shaped by these contests ‘and formed by other cultures in ways that European imperial writers would find unrecognisable’,

140 See Chapter 4 discussing examples from Aboriginal and common-law systems, ibid. 99-139 and Chapter 5 discusses diverse federalism, ibid. 140-182.
141 Ibid. 37.
142 Ibid. 179; In her 1789 work A Vindication of the Rights of Women Mary Wollstonecraft examines women’s subordinate role in society, contrasting these to Enlightenment principles of rationality and equality. See McLean, above n 38, 532.
citing Eric Wolf and Edward Said in support of this contention.\textsuperscript{143} Said, for example, observed that if ‘we look back at the cultural archive, we begin to reread it not univocally but \textit{contrapuntally}, with a simultaneous awareness both of the metropolitan history that is narrated and of those other histories against which (and together with which) the dominant discourses act’.\textsuperscript{144}

If the notion that contemporary constitutionalism has a monological tradition is to be successfully challenged, then it is necessary to reflect upon the origins of constitutional languages. People gain their constitutional traditions through long use and practice. When writing about norms, Tully says they ‘gradually gain their authority by acts in conformity with them and by appeals to them by both sides, as warrants of justification, when they are transgressed’\textsuperscript{145} While these comments are specifically made about the language of common constitutionalism, modern constitutionalism too gained authority in European/American thought through similar processes. As was considered in Chapter 2, this language gained authority so that a ‘picture’ is held ‘in place … consisting of seven main features’.\textsuperscript{146}

When writing about the long use of constitutional traditions, Tully clearly had in mind at least several hundred years since the tensions between modern and common constitutional languages originated over four hundred years ago.\textsuperscript{147} While he locates the origins of modern constitutionalism in the seventeenth century, the beginnings of common constitutionalism occurred

\begin{itemize}
\item \textsuperscript{143} Tully, above n 1, 37-8.
\item \textsuperscript{144} Edward Said, \textit{Culture and imperialism}, (New York: Knopf, 1993), 51.
\item \textsuperscript{145} Ibid. 116.
\item \textsuperscript{146} Ibid. 41.
\item \textsuperscript{147} Ibid. 99-100.
\end{itemize}
much earlier. Coke identified the customs of common law as existing before the ‘time of memory’. Writing in the early part of the seventeenth century, Coke identified customs that ‘could be deemed prescriptive’ because they existed longer than four hundred years ‘without written record to the contrary’.  

Contemporary constitutionalism, as distinct from modern constitutionalism, exhibits features that both reflect its flexibility and adaptability while other aspects point to its enduring stability and ‘its power to exclude and assimilate’. Tully points out how court judgements exhibit regularity in their ‘use of the terms of constitutionalism’ and that these frame public discussions of a constitutional society. While those in a discussion may or may not agree to use these terms in the ways used in a particular judgement, their agreement and disagreement with the judgement rest upon some sort of ‘implicit agreement’ about the usage of the terms. Wittgenstein makes a similar point in the *Philosophical Investigations* when in response to the question ‘So you are saying that human agreement decides what is true and what is false?’ he says ‘It is what human beings say that is true and false; and they agree in the language they use. That is not agreement in opinions but in form of life’.  

The constitutional language is not just held in place by agreement in the use of terms, but also by the regular activities of a modern constitutional society. Parliaments, the courts, other aspects of bureaucracy, police, election voting and even protests, each have their common modes of operating and these

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148 Weston, above n 51, 376.
149 Tully, above n 1, 38-9.
150 Wittgenstein, above n 11, s 241. Italics in original.
serve to contribute to stabilising the way in which claims are dealt.\footnote{151}{Tully, above n 1, 40.} The myriad of small decisions these organisations make contributes to stabilising the institutional framework.

When the familiar terms are used as a backdrop to a claim for constitutional recognition, they serve as a normative foundation for a public discussion in two distinct ways. For instance, if in an a priori sense the only legitimate concept of a nation is defined as that being associated with a state,\footnote{152}{McLean, above n 38, 331.} then those who seek to have their distinct culture recognised as a nation, such as Indigenous people, may have their claims rejected on the grounds that this conception is incompatible with the nation-state. The claimants are then obliged to redescribe their claims in the ‘prevailing language of constitutionalism’. As Tully observes, this is not the end of the matter though because the redescribed claim is then ‘critically adjudicated’ with conventional criteria for particular terms being used to test the claim. For instance, terms such as ‘nation’, a ‘right of self-determination’ and ‘sovereignty’ each function to provide the normative grounds that provide the basis to evaluate a particular claim. While the language of modern constitutionalism has some distinct features, within this frame different schools of thought in the liberal, nationalist and communitarian traditions interpret the claim slightly differently and will jockey for position.\footnote{153}{Tully, above n 1, 39.}

Another tendency exhibited by modern constitutionalism is a preference to view constitutionalism as an imposition or explicit agreement favourably contrasted to customary forms of association. The contrast between the ‘new’
‘modern’ constitution and the ‘older traditional view’ is discussed by McIlwain. He says that traditionally the term ‘constitution … was applied only to the substantive principles to be deduced from a nation’s actual institutions and their development’, that is taking account of its custom and practice.\footnote{154} This is reflected in the classical definition advanced by Bolingbroke in 1733 where he described a constitution as the ‘assemblage of laws, institutions and customs, derived from certain fixed principles of reason, directed to certain fixed objects of public good, that compose the general system according to which the community hath agreed to be governed.’\footnote{155} Hence, this definition can embrace the ‘conscious formulation by a people’ as well as their custom and practice.\footnote{156}

Tully says that Bolingbroke’s definition has a strong historical foundation. The Greek meaning for constitutional law, \textit{nomos}, embraced both ‘what is agreed by the people’ and ‘what is customary’. Tully employs Sophocles’ \textit{Antigone} to dramatise this contrast. Creon defends the constitutional laws of Thebes ‘since they had been deliberately imposed by men’. Antigone though protests that the constitution ‘fails to recognise the underlying assemblage of customs of family, hearth and burial, to which the people are subject’. Haemon tries to persuade Creon, unsuccessfully as it turns out, that ‘both aspects of a constitution must be conciliated if justice is to be served’.\footnote{157} Tully argues it is false to develop the contrast between imposition and custom and that both can reflect the consent of a free people. Relating his point to Bolingbroke’s definition, he explains that ‘the reason why the customary ways

\footnote{154} McIlwain, above n 7, 3.  
\footnote{156} McIlwain, above n 7, 2-3.  
\footnote{157} Tully, above n 1, 60.
of the people have the authority of constitutional law’ is that they are the expression of the ‘agreement of the people’.\textsuperscript{158} Thus, recalling the debate between Hale and Hobbes referred to earlier in this chapter, the stance taken by Hobbes reflected a view that limited constitutionalism to the imposition of the king (and not of a free people), whereas Hale emphasised constitutionalism arising from long use and practice.

For this reason, when people seek to have their claims recognised they are also wishing to broaden the meaning of constitutionalism so they are included. That is, they wish to have their customs and practices recognised. For instance, when Aboriginal people at the United Nations demand recognition as ‘nations’ with a ‘right to self determination’ they are arguing that the prevailing criteria and the terms employed should be revised so that they are included. From the outline presented by Tully about constitutional languages, it becomes possible to see that the demands of Aboriginal people are part of the umbrella of demands for cultural recognition that he writes about.\textsuperscript{159}

\textbf{Conclusions}

While Tully’s approach to constitutionalism may appear at first glance to be completely new, it actually rests firmly on four distinct themes. The first of these is its support for the continuity of custom. This is brought out in the contrasting attitudes between the ancient and modern constitutionalism as noted by Bolingbroke and McIlwain. On one side is an emphasis on the continuity of

\textsuperscript{158} Ibid. 61.
\textsuperscript{159} Id.
ancient laws and customs; on the other was the idea of founding a new constitutional basis. Another theme is based upon practical skills honed by experience. Hale was the exemplar in articulating the seventeenth century response to Hobbes’ picture of the expert with an a priori knowledge. A further theme arises from the long tradition of moral reasoning in European history that Jonsen and Toulmin locate as existing from the time of Aristotle onwards. They emphasise the particularity developed from case examples rather than general abstract theory. The fourth theme comes from Wittgenstein’s writings on language games. From the latter’s work Tully establishes the analogy between language and constitutionalism. Together though these themes hold the promise of addressing contemporary constitutional problems by a very different method than that proposed by modern theorists. In *Strange multiplicity*, Tully weaves these strands together in a convincing fashion that provides a persuasive and innovative contribution to the debate over constitutionalism.

Thus constitutionalism is not advanced through the development of new theories but is achieved through a ‘humble and practical dialogue’ in which the participants exchange ‘limited descriptions of actual cases, learning as they go along’.

Tully builds both upon the anthropological work of Carrithers and Wolf and the Cambridge tradition of examining historical moral and political theory. He determines that he would ‘survey the language employed in the current debate over recognition in order to identify the shared conventions (the distinctions, concepts, assumptions, inferences and assertability warrants that

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160 Ibid. 185.
are taken for granted in the course of the debate) which render recognition problematic and give rise to the range of conflicting solutions’.\textsuperscript{161}

To the question: ‘Can a modern constitution recognise and accommodate cultural diversity?’, Tully answers in the affirmative and says this can occur if constitutionalism is reconceived as a form of activity where cultural diversity can be accommodated. Abandoning the presumption of constitutionalism as monolithic and viewing it instead as an extremely complex network of conventions it becomes possible to identify the influence of different constitutional languages upon contemporary thought.

Some possible challenges can be anticipated to the application of Tully’s alternative approach to the events around Mabo. It is unlikely that the examination in the last chapter in identifying the features of modern constitutionalism will be contentious. After all, the descriptions are familiar to those engaging with both historical as well as contemporary political thought. Nor is it likely that relating the historical clashes between those who embraced modern constitutionalism and those who defend common constitutionalism will be controversial, except perhaps among those who specialise in ancient history.

One area though that is likely to be controversial is Tully’s application of Wittgenstein’s views on language to the study of constitutionalism. Another theme that may be challenged is its specific application to the examination of the claims of Indigenous people in North America. One reason for such objections is that at first glance Tully’s approach appears inconsistent with the

\footnote{\textsuperscript{161} Ibid. 35.}
particular difficulties that Indigenous peoples in Commonwealth countries have experienced in gaining recognition in the twentieth century. It is, therefore, a reasonable request that a more specific examination be undertaken where the conventions of common constitutionalism can be considered in order to assess their basis to recognise and accommodate the claims of Indigenous people. This should also help to clarify the differences between ideas elaborated by Tully and those of other scholars writing about Indigenous claims at common law. This task is the focus of the next chapter.
Chapter 4:

Common constitutionalism and the claims of Indigenous peoples

[The] philosophy and practice of constitutionalism [is] informed by the spirit of mutual recognition and accommodation of cultural diversity … [consists] … in the negotiation and mediation of claims to recognition in a dialogue governed by the conventions of mutual recognition, continuity and consent.

James Tully, *Strange multiplicity*¹

Having outlined the core ideas underpinning an alternative approach to understanding constitutionalism, this chapter focuses on the language of common constitutionalism and its application to the claims of Indigenous peoples. An explanation will be provided as to why Tully argues that common constitutionalism is able to provide a just basis to the recognition of Indigenous peoples through the guidance of its conventions. As mentioned in Chapter 3, Tully indicates that this language was expressed on several occasions at sites of the common law of Commonwealth countries.² In this chapter some of the applications of this language will be considered and specific examples are discussed about how the three conventions guide a number of the common law

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² Ibid. 100.
decisions. In addition, the three conventions will be compared to the works of two scholars who have also considered common law’s ability to recognise the claims of Indigenous peoples. Contributing further evidence as to the suitability of the three conventions a comparison between this alternative language and the United Nations Draft Declaration on the Rights of Indigenous Peoples is also undertaken.³

Tully’s ideas are compared to those outlined in Common law aboriginal title by Canadian scholar Kent McNeil. McNeil uses legal doctrine to demonstrate the precedence for recognising ‘outstanding aboriginal land claims in any territory originally made British by settlement’.⁴ Another scholar, Robert A. Williams (Jr), concentrates on American Indian in Western legal thought and draws very different conclusions. He concluded that a ‘will to empire proceeds most effectively under a rule of law’. Describing the common law as a ‘discourse of conquest’, he charges that it has denied ‘fundamental human rights and self-determination to indigenous tribal peoples’.⁵ Unlike Tully and McNeil, Williams does not elaborate a distinct way forward for common law. Rather, he contends that the ‘West’s vision’ can only be modified once a vision has been articulated and defined by ‘contemporary tribalism’.⁶

³ The United Nations Draft Declaration on the Rights of Indigenous Peoples was developed by the UN Working Group on Indigenous Populations ‘in full consultation with Indigenous peoples from around the world’. It has ‘not yet been adopted by the General Assembly’ but ‘can be described as the most coherent and comprehensive articulation of the aspirations of the world’s Indigenous peoples’. See Garth Nettheim, Gary D. Meyers & Donna Craig, Indigenous peoples and governance structures: a comparative analysis of land and resource management rights, (Canberra: Aboriginal Studies Press for the Australian Institute of Aboriginal and Torres Strait Islander Studies, 2002), 21.
⁶ Ibid. 328.
The conventions of common constitutionalism

Tully explains that the three conventions of common constitutionalism have become ‘authoritative’ over centuries of constitutional practice, ‘including criticism and contestation of that practice’. They gradually gained their authority through acts being taken ‘in conformity with them and by appeals to them by both sides, as warrants of justification, when they are transgressed’.7

Mutual recognition is a short-hand phrase referring to each party recognising the other party on their own terms. Hence, it cannot simply be the ‘recognition of each culture in the same constitutional form’.8 Instead, mutual recognition is based upon conceiving constitutionalism as an activity, an ‘intercultural dialogue’, where ‘culturally diverse sovereign citizens … negotiate agreements on their forms of association over time in accordance with the three conventions …’9

The classic formulation about how to achieve mutual recognition was provided by John Marshall, the first Chief Justice of the Supreme Court of the United States in his judgement on US-Aboriginal relations in the 1832 case Worcester v the State of Georgia.10 The case concerned Samuel Worcester, a citizen of the state of Vermont who entered the land of the Cherokee Nation with their permission to carry out missionary work. The state of Georgia indicted him because he entered the state without a licence or a permit from its

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7 Tully, above n 1, 116.
8 Ibid. 8.
9 Ibid. 30.
10 Ibid. 117.
Governor. Charged for the absence of a permit he was sentenced to four years hard labour. Worcester subsequently appealed to the US Supreme Court.\footnote{11 \textit{Worcester v Georgia} 31 US (6 Pet) 515 (1832).}

In considering the appeal, Chief Justice Marshall stated that:\footnote{12 Ibid. at 542-3.}

\begin{quote}
America, separated from Europe by a wide ocean, was inhabited by a distinct people, divided into separate nations, independent of each other and the rest of the world, having institutions of their own, and governing themselves by their own laws. It is difficult to comprehend the proposition, that the inhabitants of either quarter of the globe could have rightful original claims of dominion over the inhabitants of the other, or over the lands they occupied; or that the discovery of either by the other should give the discoverer rights in the country discovered, which annulled the pre-existing rights of its ancient possessors.
\end{quote}

That is, he considered that the ‘Indian nations have always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil from time immemorial …’\footnote{13 Ibid. at 559.} His decision affirmed the recognition of the Cherokee Nation, finding that the laws of Georgia had no force and that the citizens of Georgia had no right to enter the Cherokee Nation ‘but with the assent of the Cherokees themselves …’ For this reason, he found that the act under which Worcester was found guilty should not have been applied.\footnote{14 Ibid. at 561.}
Tully observes though that ‘if the Aboriginal peoples of America’ are recognised as ‘independent nations’, as Marshall argues, ‘the initial conditions of constitutional theory and practice in North America’ do not reflect any of the formulations identified with the language of modern constitutionalism. Instead, the approach adopted by the Cherokee Nation and the British in their negotiations was to agree on a ‘form of mutual recognition’.\footnote{15} In this example, it involved both parties recognising the other as independent, self-governing nations, or in the words of Marshall, they are ‘asserted by one, and admitted by the other’.\footnote{16} Tully argues that the ‘initial reason’ why the Crown negotiators ‘recognised the Aboriginal peoples as nations is that they did not redescribe the Aboriginal peoples in the forms of recognition constructed by the armchair European theorists’.\footnote{17}

For instance, William Johnson, the chief Crown negotiator, told the Lords of Trade in 1763 that the ‘Indians of the Ottawa Confederacy ... and also the Six Nations ... all along considered the Northern parts of Northern America, as their sole property from the beginning; and although the conveniency of Trade, (with fair speeches and promises) induced them to afford both us and the French settlements in their Country, yet they never understood such settlement as a Dominion, especially as neither we, nor the French ever made a conquest of them’. Summarising their attitude, Johnson states that the ‘Indians ... are not subject to our Laws and they consider themselves as a free people’\footnote{18}.

\footnote{15} Tully, above n 1, 117-8.  
\footnote{16} \textit{Worcester v Georgia} 31 US (6 Pet) 515, 544 (1832).  
\footnote{17} Tully, above n 1, 119.  
\footnote{18} William Johnson, cited by Tully, ibid. 119.
Some general comments about the forms of mutual recognition may be of assistance. The form chosen is guided by the initial identification of those seeking cultural recognition. Two distinct aspects are involved. One arises from using the ethic of self-identification, so that those seeking recognition can speak ‘in one’s own cultural voice’ and identify how they wish to be described. This is crucial to establishing cultural respect and ‘civic dignity’.19 The other aspect concerns the practical steps considered necessary to achieve the recognition of a particular culture. As discussed in Chapter 3, in this respect constitutionalism has a broader meaning than its association with a particular constitution. In some cases, it is possible that mutual recognition may be established through legislative changes that do not involve changes to a constitution. For instance, the recognition of same-sex relationships may take the form of legislative amendments to establish the basis for recognition. With other claims, however, it will be crucial to modify a constitution if mutual recognition is to be achieved.

**Consent**

As a concept consent has a long presence in common law. In his book on the subject, Young said it is a ‘very ancient idea in our law that a person was deemed to have consented …’20 Today it plays a central role in the relations between individuals and between individuals and corporations. For instance, a marriage or a contract where a party does not consent is usually considered invalid. Likewise, rape is deemed to have occurred if consent was not given to

19 Tully, above n 1, 34.
sexual intercourse. Moreover, consent must be given freely, ‘without duress or
deception’.21

Consent has also been integral to relations between states since the 1648
Peace of Westphalia.22 Moreover, it is generally considered that lawful
government is based upon the consent of the people.23 It has also been applied
to relations between peoples under some form of common protection. For
example, it was relevant to the Worcester v Georgia case that treaties were
made between the Cherokee Nation and the United States government. Part of
the terms was for the government of the United States of America to extend
protection to the Cherokee Nation. The treaties were made in 1735 at Hopewell,
in 1791 at Holston as well as several at Philadelphia and Washington City, ‘all
of which ... [were] duly ratified by the Senate of the United States of
America’.24 Respecting these treaties, the boundaries between the United States
and Cherokee Nation were to be ‘described ... by mutual consent’.25

Chief Justice Marshall considered that while European governments
possessed a right of ‘discovery’ over part of America, this ‘could not affect the
rights of those already in possession ...’ Thus, Marshall said that ‘discovery’
only provides an exclusive right against other European nations to settle and
acquire land from the Aboriginal occupants. It was an ‘exclusive principle’ that

Press, 1997), 97, 380-1.
22 Hermann Kinder & Werner Hilgemann, The Penguin Atlas of World History: Vol 1: From the
Beginning to the Eve of the French Revolution, Translated by Ernest A. Menze, with maps
designed by Harald and Ruth Bukor, (Ringwood, Victoria: Penguin, 1974), 255; Tully, above n
1, 8.
23 Andrew Heywood, Political Ideologies: An Introduction, (Basingstoke, Hampshire: The
24 Worcester v Georgia 31 US (6 Pet) 515, 538 (1832).
25 Ibid. 555.
'shut out the right of competition among those who had agreed to it: not one which could annul the previous rights of those who had not agreed to it'. Thus, while it provides an ‘exclusive right to purchase’, it is not founded upon ‘a denial of the right of the possessor to sell’.26

Chief Justice Marshall also rejected other theoretical approaches not based upon consent such as those that treated Aboriginal people either as individuals or as cultural minorities within sovereign European-type institutions. After reviewing the content of the Treaty of Peace signed with the Cherokee Nation, Marshall stated that these ‘articles are associated with others, recognizing their title to self-government. The very fact of repeated treaties with them recognizes it; and the settled doctrine of the law of nations is that a weaker power does not surrender its independence – its right to self-government, by associating with a stronger and taking its protection.’27

Generalising from this experience, Tully argues that the form of consent should always be tailored to the form of mutual recognition of the people involved.28 In this case, Chief Justice Marshall noted this form was the treaty system made between the Indian nations and the British, which the United States inherited following the war of independence. Marshall noted the ‘treaty, in its language, and in its provisions, is formed as near as may be, on the model of treaties between the crowned heads of Europe’.29 Tully notes that on this approach, the ‘Crown negotiated, and continues to negotiate, with the First

26 Ibid. 543-4; Tully, above n 1, 123.
28 Tully, above n 1, 123.
Nations to purchase territory from them, to gain their recognition of Crown government in America, and to work out various relations of protection and co-operation over time’. He considers that in ‘one of the most generous acts of recognition and accommodation in history, the Aboriginal nations in turn negotiated, and continue to negotiate, to cede land and settle boundaries, recognise the legitimacy of Crown governments and work out relations of protection and co-operation’.  

Thus, consent is based upon the Crown governments, and their successors, respecting the equal and prior sovereignty of the Aboriginal nations on the territories they reserve to themselves.

**Continuity**

The convention of continuity expresses a respect for the cultural identities of each party. Tully argues the convention to continue a people’s customary ways and forms of government into new forms of constitutional associations with others is the ‘oldest in Western jurisprudence’. Conversely, to discontinue them without their explicit consent would breach the convention of consent. In early modern law of nations this convention held even in the case of conquest. ‘If the conqueror recognises them, either expressly or by long acceptance, then his imperial right to discontinue them must yield to continuity’.

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30 Tully, above n 1, 123.
31 Ibid. 125.
Commenting on the ‘settled doctrine of the law of nations’, Chief Justice Marshall observed:\(^{32}\)

A weak State, in order to provide for its safety, may place itself under the protection of one more powerful, without stripping itself of the right of government, and ceasing to be a State. Examples of this kind are not wanting in Europe. ‘Tributary and feudatory states,’ says Vattel, ‘do not thereby cease to be sovereign and independent states so long as self-government and sovereign and independent authority are left in the administration of the state’.

Chief Justice Marshall upheld this approach and the convention when he considered relations between the Cherokee Nation and the United States government. Examining the terms of the Treaty of Holston he observed the ‘relation was that of a nation claiming and receiving the protection of one more powerful, not that of individuals abandoning their national character, and submitting as subjects to the laws of a master’. On these grounds, it was ‘equally inconceivable’ that the Cherokee Nation would have ‘devested [sic] themselves of the right of self government on subjects not connected with trade’.\(^{33}\)

History shows though that the convention of continuity has frequently not been respected. Tully explains that when Norman law was introduced following the conquest of England by William in the eleventh century, it held the view that a ‘new constitutional association’ discontinues or ‘extinguishes’

\(^{32}\) *Worcester v Georgia* 31 US (6 Pet) 515, 561 (1832).

\(^{33}\) Ibid. 554-5.
the ‘pre-existing customs and ways of a people’. Thomas Hobbes presented the classical defence of constitutional discontinuity in *Leviathan*, arguing that a modern constitution should have precedence over the irregularity of the former customs. Considering the circumstances where a ‘Soveraign of one Common-wealth ... subdue a People that have lived under other written Lawes’, he argued that they would be governed by ‘Civil Lawes of the Victor, and not of the Vanquished Commonwealth’. For instance, ‘where there be divers Provinces, within the Dominion of a Common-wealth, and in those Provinces diversity of Lawes, which commonly are called Customes of each severall Province, we are not to understand that such Customs have their force, onely from Length of Time; but that they were antiently Lawes written, or otherwise made known, for the Constitutions, and Statutes of their Soveraigns; and are now Lawes, not by vertue of the Praescription of time, but by the Constitutions of their present Soveraigns’. Hobbes asserted that the principle to be followed is that ‘all Lawes, written, and unwritten, have their Authority, and force, from the Will of the Common-wealth; that is to say, from the Will of the Representative’ [sic]. As Tully observes, this view denies the provinces autonomy and lacking ‘the authority to enter into constitutional negotiations’. Rather, authority is derived ‘from the imperial Crown’.

Tully is particularly mindful of the applicability of the three conventions to minority cultures since they ‘seek recognition and accommodation within the institutions they share with members of the majority cultures of contemporary

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34 Tully, above n 1, 125.  
36 Tully, above n 1, 145.
societies’. He notes they are ‘more vulnerable because they cannot claim their own political institutions to protect their cultures’.

As noted earlier, he says the ‘many-splendoured voices’ of women deserve to be ‘heard and recognised in appropriate and equitable ways’. Moreover, he says these claims test the credentials of the language of common constitutionalism. For if the three conventions do not support the ‘just demands of women and cultural minorities to amend these imperial institutions, they are useless ...’ However, he demonstrates by a series of examples that indeed the conventions ‘can be adapted to these complex cases and applied analogously to recognise and accommodate the cultural diversity of these citizens in just ways’.  

The conventions and common law

Tully has a different approach to constitutionalism than McNeil in Common law aboriginal title and Williams in The American Indian in western legal thought. It is therefore important to determine the attitudes of the latter two scholars toward the three conventions.

McNeil does not consider the significance of recognition to Indigenous people, nor does he reflect upon its meaning in the context of a native title doctrine. Instead, its significance, and McNeil’s support for recognition, is implied by the logic of the argument he develops that under British colonial law
Indigenous peoples are entitled to claim similar rights to those available to non-Indigenous peoples. His concluding comments summarise his goal:  

All too often these people [Indigenous people] have been unfairly dealt with in the past because it was thought that their claims did not have a legal basis. A major aim of this book has been to dispel this false impression by showing even by the colonizers’ own rules indigenous people did – and in some cases, no doubt still do – have title to lands occupied by them. With this kind of legal argument behind them, indigenous people should be in a position to negotiate from strength. One can only hope that the result will be a just resolution of claims which have been ignored or denied for far too long.

However, McNeil’s comments on the acquisition of territory do inform us about common law policy toward recognition. He says that the European powers had no guidance in the principles to apply. He writes that at the ‘dawn of the colonial era towards the end of the fifteenth century, there were no set rules of the acquisition of territories which were not already within the jurisdiction of a recognized sovereign’. This opinion differs from Tully’s in two respects. Tully argues there is evidence to show that guidance was available to the European countries on how to proceed in its relations with other peoples. The second difference is the presumption underpinning McNeil’s examination is to treat the Indigenous land claims as non-constitutional. That is, and drawing an analogy with Tully’s investigation, McNeil’s work is written in the language of modern constitutionalism. This is partly because of the nature of his enquiry,

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39 McNeil, above n 4, 305-6.
40 Ibid. 110.
which is principally ‘doctrinal rather than jurisprudential’. However, it also reflects the context in which his discussion of Indigenous claims is located. Hence, as McNeil acknowledges, the ‘morality of the colonization process, the justice of applying English law in this context, and related ethical issues are generally not discussed’.41

McNeil is explicit though in discussing the convention of continuity and refers to Brian Slattery’s thesis, *The Land Rights of Indigenous Canadian Peoples as Affected by the Crown’s Acquisition of Their Territories*. McNeil agrees that, “whatever the constitutional status of a colony (whether conquered, ceded, or settled), pre-existing private property rights would continue by virtue of what Slattery termed the ‘doctrine of continuity’, in the absence of seizure of privately-held lands by act of state during the course of acquisition of territorial sovereignty by the Crown, or subsequent confiscation by legislation”.42 That is, his argument, based upon his examination of legal doctrine, is a diluted form of the continuity as explained by Tully. Legal doctrine states that continuity is to be subordinated to the ‘right’ of the sovereign to seize privately held lands. However, the norm of consent has almost no presence in McNeil’s work.43

Like McNeil, Williams does not explicitly discuss recognition. Nevertheless, his support for the convention is implied throughout his book both

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41 Ibid. 5.
42 Ibid. 3.
43 McNeil does make two brief references to consent. One arises in his discussion of New Zealand when he cites from *The Queen v. Symonds* concerning customary land rights. In this case, Chapman J. states that Maori title ‘is entitled to be respected … [and] cannot be extinguished (at least in times of peace) otherwise than by the free consent of the Native occupiers’. See ibid. 190. The other is in relation to Indian title in the United States. However, this is not discussed as a convention or as a matter of principle but as a passing reference to US Congress power to extinguish Indian title ‘despite dicta that Indian consent to extinguishment is required’. See ibid. 259.
from his critique of the ‘discourse of conquest’ to his promotion of an alternative vision embodied in the principles of Gus-Wen-The (also known as the Two Row Wampum Treaty). As he observes of this vision, at its core ‘is the idea that freedom requires different peoples to respect each other’s vision of how their respective vessels should be steered’. The imagery of two ships travelling side by side down a river also permeates Tully’s work as he conveys the idea of ‘recognising and negotiating cultural diversity in a post-imperial age’. A direct engagement with the ideas of recognition could have strengthened Williams’ thesis, allowing him to develop a contrast between the English stance articulated in the 1763 Proclamation and the eventual course that was adopted.

The main reason why Williams and McNeil do not highlight the conventions of common constitutionalism is because they are not key to their respective theoretical frames. This is not to suggest the consent of Indigenous peoples is unimportant to the authors. Indeed, McNeil suggests ‘just solutions to aboriginal land claims can best be achieved through compromise [that] is a product of negotiation’.  

**Common law not uniform**

Neither McNeil nor Williams stress the contingent nature of common law, but present the experience of common law as either uniform or failing that, deficient. In the discussion of the 1832 *Worcester v the State of Georgia* case

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44 Williams, above n 5, 327.
45 Tully, above n 1, 201-2.
46 McNeil, above n 4, 305.
Chief Justice Marshall articulated British relations with American Indians through the language of common constitutionalism, but McNeil only briefly refers to this decision, dismissing it as ‘inconsistent with Marshall’s earlier decisions … and …. [in conflict] with later authority’.\(^{47}\) This dismissal probably follows from McNeil’s main purpose, as noted earlier. Similarly, while Williams discusses a number of Chief Justice Marshall’s judgements, the *Worcester v the State of Georgia* case is not mentioned.

Williams’ presumption that common law is uniform is also linked to the purpose of his work: to identify the main factors shaping the unjust seizure of the lands occupied by American Indians. Unlike Tully, he does not see any significance in the language of those colonists who challenged the dominant outlook. This becomes apparent when comparing the respective attitudes of Tully and Williams toward Samuel Wharton. Wharton was a participant in the treaty negotiations with the American Indians and wrote *Plain facts: being an examination into the rights of the Indian nations of America to their respective territories*.\(^{48}\)

Tully notes that while Locke argued the convention of consent ‘did not apply to Aboriginal peoples’ Wharton used the ‘Two treaties to defend their property and government’.\(^{49}\) Tully notes that in *Plain Facts* Wharton also provided an account of the treaty system between British North America and the Aboriginal nations.\(^{50}\)

\(^{47}\) Ibid. 265.
\(^{48}\) See Tully, above n 1, 118.
\(^{49}\) Ibid. 152.
\(^{50}\) Ibid. 118.
Williams acknowledges Wharton’s ‘remarkable document’ as providing ‘perhaps the most radical statement on the topic of Indian rights in the Revolutionary era’. However, he also dismisses Wharton and his collaborators’ motives: these ‘speculators in Indian land grants never regarded themselves primarily as crusaders for a racially neutral form of American egalitarianism that demanded recognition of the Indians’ title to their lands’. Instead, since land was the most important commodity for the colonists, he says they engaged with ‘Indian land rights’ as a ‘fungible commodity’.

Williams traces the revolutionary-era struggle between those who shared Wharton’s outlook and the other two competing discourses: ‘the centralising feudal discourse of the Crown’s right of conquest of Indian lands’ and the “charter-based discourse of the ‘landed’ colonies”. He concludes that the idea of ‘defending the right of Indians to own and freely sell their lands … failed to retain currency in American colonizing discourse’ by the time the ‘new Constitution was signed’ in 1787. Moreover, in demonstrating the doctrine of discovery was unjust to American Indians for Williams it was not crucial to consider whether Wharton articulated a different constitutional language.

Coke and colonialism

Likewise, when Williams links the ‘English Conquest of Virginia’ with the writings of the Italian Protestant exile Alberico Gentili and the English common law chronicler Sir Edward Coke to illustrate the ‘basic themes of

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51 Williams, above n 5, 298.
52 Ibid. 279-280.
53 Ibid. 307.
English colonizing discourse’ he is not concerned with examining the writings of those English lawyers who spoke in an anti-colonial language.\textsuperscript{54} Thus, Hale’s rejoinders to Hobbes’ ideas, discussed in the last chapter, are not mentioned in Williams’ book.

Williams skilfully traces the emergence of the idea of the ‘West’s mandate to conquer the earth and to examine its inaugural applications in the New World’.\textsuperscript{55} It would be a mistake though to infer from his work that the common law is a priori a colonialist instrument whose attitude can be pre-determined. While Williams makes the case that common law in America was used as a colonist instrument against American Indians, this should not be generalised to conclude this was the case throughout the common law world. As Tully shows by describing a number of cogent examples in \textit{Strange multiplicity}, the common law can reflect the influence of more than one constitutional language. To determine whether space exists for the recognition of the distinct customs of a people it is necessary to examine the specific jurisdictional experience.

\textbf{Distinction between common law and common constitutionalism}

Comparing the works of McNeil and Williams to Tully’s does provide an appreciation of the distinction between common law and common constitutionalism. Tully tends to use common law and common constitutionalism interchangeably. At first glance then, because Tully locates

\textsuperscript{54} Williams, above n 5, 221.
\textsuperscript{55} Ibid. 6.
the expression of another language in common law, it may be thought he is attributing something unique to the common law as an institution. However, if the task is to identify the influence of particular languages on decisions, it is not possible a priori to presume that all countries where the common law exists will necessarily reflect the language of common constitutionalism. These are particular experiences that may or not arise elsewhere. A strength of Williams’ book is to demonstrate that in the United States the general trend in the common law was to embrace the ‘Doctrine of Discovery’. This doctrine was used to justify the conquest and colonisation of American Indians. Tully concurs when he writes that as ‘the settlers gained the upper hand in the nineteenth century, the Aboriginal and common-law system was overwhelmed by the theory and practice of modern constitutionalism’.

Another reason to make a distinction between common law and common constitutionalism is because there are many inconsistencies among the countries where common law has been embraced. McNeil brings this out in his thorough discussion of the application of the ‘Doctrine of Common Law Aboriginal Title’. Comparing the United States, Canada and Australia in 1989, he emphasises that ‘the judiciaries of the three common law jurisdictions’ have ‘approached the matter in different ways’. Hence, it is only through comparing the principles applied in each jurisdiction that one can assess the influence of particular constitutional languages.

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56 Tully, above n 1, 37.
57 Ibid. 136.
58 McNeil, above n 4, 304.
Human rights and Indigenous peoples

A further reason for the distinction between common law and common constitutionalism is that this language can be applied to circumstances independent of the specific applications at common law. For instance, the language can be compared to the human rights conventions, particularly those that focus on the rights of Indigenous peoples. While Tully does not discuss human rights in any detail in *Strange Multiplicity*, he does mention that ‘hidden constitutions have been discovered … in international law’.  

The first point about the human rights conventions is that they have profoundly shaped contemporary constitutionalism. While support for the concept of human rights arose before the Second World War, it was the colossal human destruction in that war that ensured the central role of human rights in the Charter of the United Nations and the adoption of the *Universal Declaration of Human Rights* in 1948. Article 1(3) of the Charter identifies that a key purpose of the United Nations is ‘in promoting and encouraging respect for human rights and for fundamental rights for all without distinction as to race, sex, language, or religion’. For Western countries today, the words ‘human rights’ are shorthand for a set of values that are both aspirational as well as a yardstick to judge the practices of governments. It has resulted in an additional qualification being placed upon the activity of sovereign governments. The spectre of mass popular support for the rise of Nazism and Adolf Hitler in 1930s Germany brought home to the world that binding the convention of consent to

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59 Ibid. 100.
sovereignty was not sufficient to guide just relations between peoples.\footnote{Renée Otmar, (Ed), \textit{SBS World Guide}, 8th edition, (South Yarra, Vic: Hardie Grant Publishing, 2000), 292.} Additional conventions were also needed to ensure that a majority do not persecute individuals and minorities and to provide international standards to guide the practice of states.\footnote{Martin, above n 21, 219; Nettheim, Meyers & Craig, above n 3, 9.}

Since the adoption of the \textit{Universal Declaration of Human Rights}, two international covenants have been ratified concerning Civil and Political Rights and Economic, Social and Cultural Rights. Considerable work has also been done on a \textit{Draft Declaration on the Rights of Indigenous Peoples}.\footnote{Nettheim, Meyers & Craig, above n 3, 9-26.} Additionally, the General Assembly adopted a Declaration on the Granting of Independence to Colonial Countries and Peoples. Together these initiatives and standards mark a shift in contemporary constitutionalism and provide a new context for Indigenous peoples. Dias says this implies that Indigenous peoples should be able to join with ‘all the other peoples that make up the State on mutually-agreed upon and just terms’. While not explicitly discussing constitutionalism, Dias echoes many of the themes discussed by Tully when she says this ‘process does not require the assimilation of individuals, as citizens like all others, but the recognition and incorporation of distinct peoples in the fabric of the State … on mutually-agreed and just terms’.\footnote{EI Dias, ‘Some Considerations on the Right of Indigenous Peoples to Self-Determination’ in Transitional law and Contemporary Problems, 3(1), 1993 reprinted in Tony Blackshield & George Williams, \textit{Australian constitutional law and theory: commentary and materials}, Third Edition, (Leichhardt, NSW: The Federation Press, 2002), 231.}

Comparing the \textit{Draft Declaration on the Rights of Indigenous Peoples} to the language of common constitutionalism suggests the former is guided by the
three conventions of continuity, consent and mutual recognition. The
*Declaration* is explicitly based upon an acknowledgement of the right of
‘Indigenous peoples … to self-determination’. Moreover, just as Tully says
mutual recognition must be adapted to a form that meets the needs of both
cultures,\(^65\) so too the *Declaration* provides for Indigenous peoples to exercise a
‘right to autonomy or self-government in matters relating to their internal and
local affairs …’\(^66\) Article 39 also talks of conflict resolution occurring through
‘mutually acceptable and fair procedures’ that consider the ‘customs, traditions,
rules and legal systems of the indigenous peoples concerned’.\(^67\) The convention
of continuity also underpins the *Declaration*. Article 4, for instance, states
Indigenous peoples have the ‘right to maintain and strengthen their distinct
political, economic, social and cultural characteristics, as well as their legal
systems, while retaining their rights to participate fully, if they so choose, in the
political, economic, social and cultural life of the State’.\(^68\) Consent is also
explicitly mentioned in Articles 10, 20, 27 and 30.\(^69\) Article 10 states that
Indigenous peoples shall not be ‘forcibly removed from their lands or
territories’ and that no relocation shall take place without the ‘free and informed
consent of the indigenous people concerned and after agreement on just and fair
compensation, and, where possible, with the option of return’.\(^70\)

\(^{65}\) Tully, above n 1, 8.
\(^{66}\) *Draft Declaration on the Rights of Indigenous Peoples*, Article 31, reprinted in Nettheim,
Meyers & Craig, above n 3, 24.
\(^{67}\) *Draft Declaration on the Rights of Indigenous Peoples*, Article 39, reprinted in Nettheim,
Meyers & Craig, above n 3, 24.
\(^{68}\) *Draft Declaration on the Rights of Indigenous Peoples*, Article 4, reprinted in Nettheim,
Meyers & Craig, above n 3, 21.
\(^{69}\) *Draft Declaration on the Rights of Indigenous Peoples*, Articles 10, 20, 27 & 30, reprinted in
\(^{70}\) *Draft Declaration on the Rights of Indigenous Peoples*, Articles 10, reprinted in Nettheim,
Meyers & Craig, above n 3, 21.
Conclusions

This chapter has focussed on the language of common constitutionalism, considering its applicability to the claims of Indigenous peoples. It commenced by looking in some detail at the three conventions in order to demonstrate that together they provide a just basis for relations between peoples. Together these conventions also provide a guide to negotiating constitutional change.

Comparing Tully’s work to the studies undertaken by McNeil and Williams demonstrates that rather than challenging his findings, Tully’s ideas provide a way to understand the claims of Indigenous peoples independent of their framing within a modern constitutional language. McNeil and Williams only partially embrace the common constitutional conventions and their works reflect tendencies to present the common law tradition as uniform which obscure the clashes over the recognition of the claims of Indigenous peoples. Moreover, if the starting point is to examine the particular experiences of a country it is necessary to differentiate between the common law as an institution and the language of common constitutionalism. Indeed, looking at constitutionalism in this way helps to appreciate that those identifying with the Draft Declaration on the Rights of Indigenous Peoples, seek to modify the language of contemporary constitutionalism so that the Draft Declaration’s ideas are heard and accommodated.

Tully argues that a modern constitution can recognise and accommodate cultural diversity ‘if it is conceived as a form of accommodation of cultural diversity’. This conclusion is not a mere abstract hypothesis, but supported by
the actual presence of an alternative language. Thus, the contemporary language of constitutional thought and practice does not need to be totally abandoned. It does not need to be ‘defended against any claim of cultural recognition’. Nor though should it be totally rejected ‘for its male, imperial and Eurocentric bias’.\(^{71}\) Rather, it can be modified so that unjust aspects of modern constitutionalism that violate the three common conventions can be amended or abandoned.\(^{72}\)

When Tully developed his alternative understanding of constitutionalism, leading him to pose the question about whether a constitution can recognise and accommodate cultural diversity, it arose out of particular cultural experiences. The North American experiences with the claims made by Aboriginal people of America and the French-speaking minority and the initial responses of the British colonial authorities and now by contemporary American and Canadian governments have informed his thinking. Indeed his book is full of examples of the claims for cultural recognition of Aboriginal people and the French-speaking minority where the common constitutional conventions have been applied or rejected. No doubt the richness of these experiences has played a part in convincing Tully to embrace this language to overcome some of the most ‘irreconcilable conflicts of the present’.\(^{73}\)

If these ideas are to assist in understanding the Mabo events, we must be convinced that a constitution can recognise and accommodate cultural diversity and whether there is sufficient experience with the conventions of common

\(^{71}\) Tully, above n 1, 31, 37.

\(^{72}\) Ibid. 184.

\(^{73}\) Ibid. 211.
constitutionalism to embrace the language as the answer to Indigenous and non-Indigenous relations in Australia. The next chapter focuses on reconciling the alternative understanding of constitutionalism with Australia’s constitutional experiences.
Chapter 5:

Australia’s European and Indigenous constitutional traditions

Laying the ground work for the examination of the Mabo events the past three chapters have analysed various aspects of Tully’s philosophy contrasting the languages of modern and common constitutionalism. In a way this chapter provides a bridge between the ground work and the examination proper. What will be undertaken here is to outline a way of applying this understanding of constitutionalism to take account of Australia’s experiences of constitutional relations with Aboriginal and Torres Strait Islander peoples.

In assessing whether this understanding of constitutionalism is applicable to Australia, four aspects of its constitutional experience are discussed. Concerning Australia’s dominant constitutional tradition, the aim is to clarify whether this tradition reflects the influence of modern constitutionalism. Another matter is to ascertain how the cultures of Indigenous people are presented by contemporary constitutional scholars. A third matter to consider is Australia’s experience with treaty making with Indigenous peoples. If indeed experience is an important ingredient to building good relations between non-Indigenous and Indigenous peoples then does the overall absence of treaty-making preclude the possibility that common constitutionalism has been embraced in this country? Related to the absence of treaty-making is the lack of experience in implementing the convention of mutual recognition.
Several works about constitutional and governance in Australia are engaged with to discuss these matters. Tony Blackshield and George Williams have prepared several editions on *Australian constitutional law and theory: commentary and materials*. In this chapter the third edition has been used.\(^1\) Cheryl Saunders, the Director of Comparative Constitutional Studies at the University of Melbourne has written a work designed to make the Constitution accessible to a broader audience. The second edition of *It’s your Constitution: Governing Australia today* was published in 2003.\(^2\) Over a thirty year period Peter Hanks has been involved with several editions considering Australian constitutional law. In the latest edition of the series his colleagues are Patrick Keyzer and Jennifer Clarke. This edition contains a chapter specifically looking at “‘Indigenous’ People and Constitutional Law”.\(^3\) Melissa Castan and Sarah Joseph provide a ‘contemporary view’ of ‘Federal constitutional law’. A significant part of their final chapter on ‘contemporary themes in federal constitutional law’ considers ‘Indigenous people and the Constitution’.\(^4\)

**Constitutional traditions**

The discussion of Australia’s constitutional traditions begins by briefly reviewing the general points Tully made about constitutionalism. Chapter 3

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brought to the fore the view argued by Tully that constitutionalism has a more inclusive meaning than usually acknowledged in contemporary writings.\textsuperscript{5} Other constitutional scholars such as McIlwain agree. They argued that constitutionalism includes not only the ‘conscious formulation of the people’ but also their custom and practice.\textsuperscript{6}

Tully contrasts this understanding to the way constitutionalism is presented by the ‘prevailing schools of modern Western constitutionalism’. Adherents of the modern constitutional language tend to focus exclusively on agreements, often overlooking other important constitutional experiences arising from custom and practice or through incorporating and transforming these experiences into the ‘classic theories of modern constitutions’.\textsuperscript{7}

Therefore, it is not surprising that Australia has at least two distinct constitutional traditions. One is inherited from British colonisation and such principles of English law as might be applicable to the colonies\textsuperscript{8} and whose influence is found in the adoption of a written constitution: the ‘conscious formulation of the people’.\textsuperscript{9} The other originates with the customs and practices of Australia’s first inhabitants, the Indigenous peoples.

\begin{footnotesize}
\begin{enumerate}
\item James Tully, \textit{Strange multiplicity: constitutionalism in an age of diversity}, (Cambridge, UK: Press Syndicate of the University of Cambridge, 1997), 60.
\item Tully, above n 5, 61.
\item See T. D. Castle & Bruce Kercher (Eds), \textit{Dowling's Select cases, 1828 to 1844: decisions of the Supreme Court of New South Wales}, (Sydney : Francis Forbes Society for Australian Legal History, 2005) for the reception of English law in early nineteen century cases in the colony of New South Wales.
\end{enumerate}
\end{footnotesize}
What support is there among other constitutional commentators for such a conceptual view? Many contemporary texts suggest a general agreement that Australia has a constitutional tradition similar to other modern Western democracies. Nevertheless, only a few contemporary Australian writers on constitutional law discuss this tradition in any detail, which suggests it is largely taken as a given, rather than arising as a reflection of contested ideas. However, Blackshield and Williams do describe this tradition of ‘civil and political’ liberalism, defined as ‘the liberty of individuals to engage in activities important for self-expression or political participation and … [seeking] constitutional arrangements to protect those activities from excessive state intervention’. This tradition is also confirmed indirectly through the influence on the ‘Founding Fathers’ in drawing on the United States model to frame Australia’s constitutional federation.

Blackshield and Williams also noted this ‘broad orientation’ is compatible with a very wide range of political theories and practices. They go on to publish an extract from Cranston on Liberalism where English, French, German and American varieties of liberalism are discussed and compared.

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11 Blackshield & Williams, above n 1, 27.


13 Blackshield & Williams, above n 1, 28-30.
On the basis of this assumption, it is reasonable to expect that a detailed examination of Australian events will locate examples where the influence of modern constitutionalism is apparent. It is also possible this inquiry will identify some differences in the expression of this language unique to Australia. That is, just as it is possible to identify American, German and French varieties of liberalism, it is likely that Australia has its own distinct characteristics.

However, much more needs to be understood about this inherited tradition than is discussed in the texts on constitutionalism. Compared to the life of an individual 218 years may appear a long time, but compared to the thousand plus years of English common law it is but a brief interlude. Some questions can challenge the assumption that all matters about this tradition can be taken for granted. Did Australia inherit the English constitutional tradition and all its conventions and precedents? Or is what is presented in the name of this tradition actually a narrower and one-sided appreciation of something much richer and more complex? Another series of questions concern the White Australia policy, its origins and impact on constitutionalism. In the latter half of the twentieth century, international declarations and conventions have focussed on human rights, cultural rights and Indigenous peoples. What has been the impact of these developments upon Australia?

It is important to apply a constitutional languages thesis to the Mabo events because none of the answers to these questions can be determined a priori ‘through the use of reason’, but only through gaining empirical

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14 In a recent article about the debate among historians about terra nullius Wilfred Prest also makes a similar point. See ‘History cries out for more charity’, The Australian, 18 January 2006, 25.
knowledge.\textsuperscript{15} Furthermore, the questions cannot be answered just by examining the 1992 decision\textsuperscript{16} and subsequent events. It is necessary to consider the British acquisition of Australia, the attitude expressed by the courts in embracing the doctrine of \textit{terra nullius}, Federation, the 1967 referendum and the 1988 High Court decision that allowed the Meriam People’s claim for recognition to be examined by the courts.\textsuperscript{17}

\textbf{Indigenous traditions}

Clarification is also necessary on what the scholars of contemporary constitutionalism have to say about the distinct traditions of Indigenous people in Australia. Many explicitly acknowledge the existence of an Indigenous tradition. For instance, Blackshield and Williams observe that ‘the legal and governmental structures’ in the United States have accommodated continued recognition of the ‘legal and governmental structures of the native American tribes’. They consider whether such an accommodation is possible in Australia and whether reconciliation between Indigenous and non-Indigenous Australia is possible without it. They argue these are questions fundamentally important for the theory and practical politics of ‘Australian constitutionalism’.\textsuperscript{18}

Cheryl Saunders looks at the origins of Australia’s constitutional history in her 2003 book \textit{It’s your Constitution: Governing Australia today} and notes that most of us ‘tend to think of Australia’s constitutional history as beginning

\begin{itemize}
\item \textsuperscript{15} Simon Blackburn (Ed), \textit{The Oxford dictionary of philosophy}, (Oxford: Oxford University Press, 1996), 119
\item \textsuperscript{16} \textit{Mabo v Queensland} (No 2) (1992) 107 ALR 1.
\item \textsuperscript{17} \textit{Mabo v Queensland} (1988) 166 CLR 186.
\item \textsuperscript{18} Blackshield & Williams, above n 1, 176.
\end{itemize}
in 1770 …’ She says that over time Aboriginal people ‘developed their own rules to govern themselves, as all communities do’.\textsuperscript{19} Hanks, Keyzer & Clarke speak of ‘indigenous legal systems’, which implies going beyond an acknowledgment of these norms to consider the need to recognise their continued existence.\textsuperscript{20}

It is also apparent that Blackshield and Williams are mindful that constitutionalism also includes Indigenous custom and practice. They noted that ‘the pattern of colonial settlement and expansion unfolded against the background of an older, perhaps competing, source of constitutive normative order for Australia: namely, the diverse patterns of normative belief and authority expressed through the various traditions and practices of the indigenous Australian peoples’.\textsuperscript{21} Moreover, they also caution against presuming that Australia’s Indigenous peoples have a singular tradition. They write that ‘it is clear that’ Australia’s Indigenous peoples ‘have severally the kind of cultural identity which might entitle them, under emerging norms of international law, to rights of self-determination’.\textsuperscript{22} Blackshield and Williams, however, do not back up their comments with a detailed examination of parliament’s response to the High Court’s decision.

It is not clear from the remarks of the other scholars that they consider constitutionalism inclusive of Indigenous custom and practice. For instance, Hanks, Keyzer and Clarke describe constitutionalism as ‘concerned with ways

\begin{flushleft}
\textsuperscript{19} Saunders, above n 2, 13.
\textsuperscript{20} Hanks, Keyzer & Clarke, above n 3, 76.
\textsuperscript{21} Blackshield & Williams, above n 1, 175.
\textsuperscript{22} Ibid. 204.
\end{flushleft}
in which the power of the state is organised and applied, with the relationship
between the different institutions which exercise the power of the state and with
the relationships between those institutions and other individual and social
interests’.  

This definition does not quite convey a sense that this also includes
Aboriginal customary law. It also contrasts with statements by prominent
Indigenous people that they consider the inclusion of customary law is posed by
Mabo. For instance, prominent Cape York leader Noel Pearson says that ‘[o]ne
of the implications of the decisions in Mabo is that Aboriginal law and custom
is now a source of law in this country’.  

The general lack of attention to examining the constitutional
perspectives of Indigenous people and its significance for settlement is another
reason to use a philosophy of constitutional languages to examine the Mabo
events. The results of such an endeavour are likely to provide further knowledge
about the nature of these traditions.

Treaty constitutionalism

The third issue that needs clarifying is Australia’s history of treaty-
making with Indigenous people. Tully uses ‘treaty constitutionalism’ to describe
the pattern of treaty-making and emphasise the significance of this form of
mutual recognition to constitutional developments. Indeed, the treaty can be
seen as its classical form, which is why Tully drew upon the case of Worcester v

23 Hanks, Keyzer & Clarke, above n 3, 10.
24 See Noel Pearson, ‘From remnant title to social justice’ in Murray Goot & Tim Rowse (Eds),
Make a better offer: the politics of Mabo, (Leichhardt, NSW: Pluto Press Australia Ltd, 1994),
181-182.
Tully related that ‘hundreds of treaty negotiations’ occurred between the ‘agents of the Crown and the Aboriginal nations from the 1630s to 1832’. The *Worcester v Georgia* court case reviewed this history of treaty making. Tully also notes that treaty-making was revived in Canada in the early 1970s when the ‘first contemporary treaty constitution was negotiated between Cree, Naskapi and Inuit nations and the Québec and Canadian governments’.

Australia does not have anything like this sort of tradition of treaty constitutionalism. There is only one reference to a treaty with Aboriginal people in Australia and recent examinations of the 1835 treaty between John Batman and Aboriginal people have led scholars to challenge its authenticity. This agreement involved deeds over two tracts of land: one around Port Phillip Bay; the other around the Bellarine Peninsula (near Geelong). Hanks, Keyzer and Clarke say of the agreement:

> It purported to cede land – half a million acres – in exchange for an initial payment, plus a ‘yearly rent or tribute’, of blankets, tomahawks, knives, scissors, looking glasses, handkerchiefs, flour and clothing.

Nevertheless, the agreement was not recognised, with Governor Burke proclaiming all such treaties void since ‘only the Crown could enter such treaties’. Furthermore, there is more than an element of doubt about whether the

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25 Tully, above n 5, 117-8; *Worcester v Georgia* 31 US (6 Pet) 515 (1832).
26 Ibid. 118, 136.
28 Hanks, Keyzer & Clarke, above n 3, 79.
treaty was actually made. Hanks, Keyzer and Clarke suggest that it was ‘almost certainly a fraud’. After closely examining the deeds and other records about the events, Campbell also challenges its authenticity. He concluded it was a ‘charade’ that had ‘evidently [been] fabricated’ and described the deeds as ‘fraudulent’.

The absence of treaty constitutionalism is one reason why constitutional scholars do not make extensive comments about the implications flowing from accommodating another constitutional tradition or provide an explanation for the difficulties involved in its achievement. Nevertheless, this should not be taken to indicate that the language of common constitutionalism will also be absent from the Mabo debate. While undoubtedly Tully’s findings about the presence of common constitutionalism relate to the treaty constitutionalism tradition, the two are distinct elements. Indeed, it is demonstrated in later chapters that there is a great deal of evidence for the existence of common constitutionalism.

**Mutual recognition**

Australia also lacks experience with mutual recognition. Chapter 3 discussed a number of examples where Tully explains the concept of mutual recognition. At its heart, mutual recognition is about a dialogue between partners where each negotiator participates in ‘his or her language, mode of

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29 Id.
30 Campbell, above n 26, 103, 106.
31 Hanks, Keyzer & Clarke, above n 3, 78.
32 Tully, above n 5, 117-124.
speaking and listening, form of reaching agreement, and way of representing the people, or peoples, for whom they speak’.33 Neither the High Court nor federal Parliament readily provides a basis for mutual recognition between Indigenous and other Australians since internally neither has a basis to provide for the distinct representation of Indigenous people. Importantly though, while the Australian Constitution does not provide such a basis,34 it does not preclude the federal parliament from legislating for the establishment of commissions or councils that can provide distinct representation of Indigenous peoples.

Furthermore, neither the federal parliament nor the High Court is structured for an intercultural dialogue. Chapter 3 discussed the contemporary tendency to rely on monological contributions to drive change. While informally within the High Court, there may well be some scope for an intercultural dialogue between parties, in its formal judgements the High Court usually issues one (if the bench is of a singular view) or more monological statements. Likewise, while the federal parliament provides some informal opportunities for dialogue, its emphasis is on the individual contribution by its members. Thus, if dialogue is to formally address the claims of Indigenous people in Australia, direct negotiations must be initiated and new bodies established to hear the voices of Indigenous people.

33 Ibid. 129.
Conclusions

Summarising the matters examined in this chapter, the first concerned the dominant, non-Indigenous, constitutional influence. It was noted that while it is accepted that Australia shares its constitutional tradition with other ‘modern Western democracies’ the constitutional texts do not discuss the tradition in the detailed way required to determine the influence of specific constitutional languages. Furthermore, while constitutional scholars engage in some discussion of Indigenous traditions few explicitly acknowledge that the custom and practice of Indigenous people is part of constitutionalism. The lack of attention to the detail of Indigenous and non-Indigenous traditions in the constitutional texts is a compelling reason to undertake an examination to discover the influences of constitutional languages on Australian events.

Where the traditions of treaty constitutionalism and mutual recognition have been absent, using a philosophical approach to examine the Mabo events needs consideration. Given this absence and the lack of discussion about why Australia’s constitutional frame faces difficulties in accommodating the claims of Indigenous people, the emphasis of any examination must favour detection over advocacy. This is because unless there is evidence that the language of common constitutionalism is used by Aboriginal and Torres Strait Islander peoples, it is hardly wise to advocate such a language as the solution to the difficulties they face in gaining recognition. After all, the first step in finding a solution to recognition is to use the ‘ethical watchword of the post-imperial
An explanation of the constitutional languages used in the debates over the claims may also help to focus attention on how recognition, culture and constitutionalism are conceived and how Australia can accommodate cultural differences. Before you can move forward, you first must understand what is happening around you.

Additionally, such an inquiry needs to examine a number of other related aspects: whether various constitutional languages were influential around the events leading up to Mabo, in the High Court’s decision, and in the subsequent debates about native title and treaty and reconciliation. This will help to determine whether a similar tension exists in Australia between the languages of modern constitutionalism and common constitutionalism as described by Tully about Canada. Such an enquiry will also discuss the relationship between the politics of Mabo and the constitutional languages; the constitutional influence of the White Australia policy; how support for human rights covenants has impacted on the events; and whether Australia’s dominant institutions of governance embrace the language of modern constitutionalism.

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35 Tully, above n 5, 34.
Chapter 6:

The languages before *Mabo*

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 ...

Admiralty Instructions to Captain Cook¹

This thesis seeks to discern the influences of constitutional languages on relations with Aboriginal and Torres Strait Islander peoples around *Mabo*. This chapter begins the investigation, commencing with the events prior to that decision and reviewing the two hundred plus years since Britain colonised the country. The aim in this chapter is not to provide a comprehensive narrative, but to identify the influences of the languages on key events. For convenience these are discussed chronologically.

The works of several historians help our enquiry. Henry Reynolds, the prolific Australian writer, has produced many books about Indigenous peoples in early Australia. His material was cited in one of the High Court judgements about the social and political organisation of Indigenous peoples.² *Law of the land*, first published in 1987 discusses the legal and social relations affecting...

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² *Law of the land*
land from the time of English occupation until contemporary times. Aboriginal sovereignty was produced after the Mabo decision and details how the Court dealt with this concept. Stuart Macintyre’s *A Concise history of Australia* was helpful for the events under discussion. A 1993 article by Pat Stretton and Christine Finnimore focuses on Aborigines and the Commonwealth franchise, providing invaluable detail on these developments. In his work on Australia’s race relations, Andrew Markus reviews their evolution from the time of colonisation until 1993. This is particular helpful in discussing both trends and the detail of changes. A more recent book by Bain Attwood, Andrew Markus, and others focuses on the 1967 referendum, addressing the common misconception that this event itself accorded franchise to Indigenous peoples.

John Summers prepared a research paper for the Parliamentary Library focussing on the relationship of federal parliament to Indigenous peoples from the time of Federation until the 1967 referendum.

Nonie Sharp’s *No ordinary judgment* provides a cross cultural perspective on the Mabo claim. In placing this into a broader context, Sharp also

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8 Bain Attwood, Andrew Markus et al, *The 1967 referendum, or, When Aborigines didn’t get the vote*, (Canberra: Aboriginal Studies Press for the Australian Institute of Aboriginal and Torres Strait Islander Studies, 1997).

considers two earlier court cases in detail: the 1971 *Milirrpum v Nabalco Pty Ltd*\(^{10}\) case and *Mabo (No 1)*.\(^{11}\) Several other works present a legal analysis of the events. Bartlett’s *Native title in Australia* contains two particularly relevant chapters, one concerning the common law history of native title before the Mabo decision.\(^{12}\) The other chapter focuses on the constitutional framework of native title, particularly relevant to the discussion of Federation, the 1967 referendum, and the *Racial Discrimination Act* 1975 (the RDA).\(^{13}\) A legal paper by Bryan Keon-Cohen focuses on the ‘*Mabo* litigation’, drawing upon his personal involvement with the cases.\(^{14}\) Chapter 3 of McNeil’s *Common law aboriginal title* concerns ‘The Acquisition of Territorial Sovereignty by the Crown’. Here he summaries the history of these principles in English law.\(^{15}\) *Australian constitutional law and theory: commentary and materials* by Tony Blackshield and George Williams contains a chapter on ‘Indigenous Peoples and the Question of Sovereignty’,\(^{16}\) a matter directly pertinent to the events studied in this chapter. Lastly, Garth Nettheim discusses Captain Cook’s instructions in the context of considering consent and Indigenous political rights after the *Mabo* decision.\(^{17}\)

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\(^{10}\) *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141 (SC(NT)) (“*Milirrpum v Nabalco*”).

\(^{11}\) Nonie Sharp, *No ordinary judgment: Mabo, the Murray Islanders’ land case*, (Canberra: Aboriginal Studies Press for the Australian Institute of Aboriginal and Torres Strait Islander Studies, 1996), 171-186; *Mabo v Queensland* (1988) 166 CLR 186 (“*Mabo v Queensland*”).


\(^{13}\) Ibid. 83-91; *Racial Discrimination Act* 1975 (Cth).


Rights of acquisition dependent upon consent

This examination begins by considering the attitudes expressed toward the acquisition of Australia. Tully says that one of the norms of common constitutionalism is that existing constitutional relations should be upheld, even in cases where countries are conquered. Thus, a conqueror has ‘no rights over the prevailing system of property and form of government unless the people consent to its alteration’. Clearly, British Admiralty instructions to Captain Cook before his departure were consistent with this norm:

You are likewise 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, making them presents of such trifles as they may value, inviting them to traffick, and shewing them every kind of civility and regard: taking care however not to suffer yourself to be surprized by them, but to be always on your guard against any accident [sic].

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 proper marks and inscriptions as first discoverers and possessors.

17 Nettheim, above n 1, 103-126.
18 Chapter 7 will undertake a more thorough examination of the High Court’s attitude to the acquisition of settled territory.
Captain Phillip’s Second Commission establishing the Colony of New South Wales was written in a similar vein. He was directed to ‘endeavour by every possible means to open an intercourse with the natives, and to conciliate their affections, enjoining all our subjects to live in amity and kindness with them’. Justices Deane and Gaudron later observed that the ‘act of State establishing the Colony’ indicated two important things: it was envisaged that ‘some lands within the Colony would become Crown lands and be available both for the establishment of the penal settlement and for future grants of Crown land to emancipated convicts and new settlers’; and ‘the native inhabitants ... would be protected ...’ They would not be subjected to ‘any unnecessary interruption in the exercise of their several occupations’. That is, there was nothing in the instructions contrary to the common constitutional norm of continuity that ‘pre-existing native interests in lands in a Colony were [to be] respected and protected’. The Instructions also confirm that the Admiralty sought to follow the convention of consent.

The presumption of an empty land

The Instructions were not implemented. Captain Cook ‘neither sought nor obtained’ the consent of the ‘natives’ to ‘British assertions of sovereignty and ... settlement’. Instead, the territory now known as Australia was treated as thought it was empty. It was deemed to have been ‘acquired by settlement’, a classification of English common law usually applied to territories that were

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20 British Admiralty Instructions to Captain Cook, cited by Nettheim, above n 1, 103.
21 Second Commission Instructions, cited in Mabo v. Queensland (No 2), above n 2, 73 (Deane and Gaudron JJ).
22 Mabo v. Queensland (No 2), above n 2, 71-2 (Deane and Gaudron JJ).
‘unclaimed and uninhabited’. Members of Cook’s expedition observed ‘Indians’, but concluded that the interior was ‘totally uninhabited’ [sic].

The courts subsequently gave effective support to Cook’s approach. Instead of respecting the consent of the original inhabitants, several Australian court cases embraced what Tully describes as a ‘doctrine of discontinuity’ where the ‘pre-existing customs and ways of the people’ are discontinued or ‘extinguished’. These reinforced the view that the ‘denial of native title and the dispossession of the Aboriginal people afforded no wrong in law’.

Feudal principles were cited as the authority in several of these cases. While this may have been a short-hand reference to a system of tenure treating all lands as held ultimately ‘of the King’, the lack of differentiation between title to territory and title to land was used to justify the acquisition of all lands including that occupied by Indigenous peoples. That is, it was both presumed that title to ‘territory and title to lands went hand in hand’ and that the land was vacant. In other words, as McNeil notes, Australia though inhabited when ‘acquired by settlement, was treated as though it were vacant and the land there were waste’. The attitude that the Crown has the right on acquisition to seize

23 Nettheim, above n 1, 103.
24 McNeil, above n 15, 113, 121.
26 Tully, above n 19, 125.
27 Bartlett, above n 12, 2; see also Keon-Cohen, above n 14, 899.
28 In Chapter 7, discussion will also occur about the view that the ‘king holding title to all lands’ is largely fictional rather than factual.
29 McNeil, above n 15, 135, n 5; Bartlett, above n 12, 1.
any land it so chooses can be readily associated with the doctrine of discontinuity and the modern constitutional language.\textsuperscript{30}

In some of these cases the inhabitants were described as nomadic, which suggests that this was another factor in the failure to reconsider the basis for settlement. For instance, a nomadic reference occurred in the 1833 case, \textit{Macdonald v Levy}.\textsuperscript{31} Justice Burton wrote that New South Wales should be considered an uninhabited country at the time of its settlement. The reason he advanced was that the ‘wandering tribes of its natives, living without certain habitation and without laws were never in the situation of a conquered people’.\textsuperscript{32}

Nomadism was an idea attributed to Vattel at the end of the eighteenth century in \textit{The Law of Nations}. He asked ‘if a nation may lawfully take possession of a part of vast country, in which they are found none but erratic nations, incapable, by the smallness of their numbers to people the whole?’ He answered that their ‘removing their habitations through these immense regions, cannot be taken for a true and legal possession’. This, he said, justified ‘the people of Europe … finding land of which these nations are in no particular want, and of which they make no actual and constant use, may lawfully possess it, and establish colonies there’.\textsuperscript{33} This attitude reflected modern constitutionalism and a ‘stages view of human history’, where failure to

\textsuperscript{30} Tully, above n 19, 125.
\textsuperscript{31} \textit{Macdonald v Levy} (1833) 1 Legge 39.
\textsuperscript{32} Justice Burton, cited by McNeil, above n 15, 121.
\textsuperscript{33} Emmerich de Vattel, cited by Reynolds, \textit{Aboriginal sovereignty}, above n 4, 53; \textit{Mabo v. Queensland (No 2)}, above n 2, 21.
cultivate land was considered adequate justification to deny rights that Europeans would seek for themselves.34

**Support for continuity of native title**

While some presumed the land empty, a number of officials spoke the common constitutional language and sought to recognise the continuity of native title. During negotiations between the Colonial Office in London and the South Australian Colonization [sic] Commission in 1835, Lord Glenelg expressed concern over the extent of the proposed colony. For this ‘would extend very far into the interior of New Holland, and might embrace in its range numerous tribes of People whose Proprietary Title to the Soil we have not the slightest grounds for disputing’.35 Though ultimately ineffective, the Letters Patent of 1836 sought to protect ‘the rights of any Aboriginal Natives [of South Australia] to the actual occupation or enjoyment in their own persons or in the persons of their descendants of any land therein now actually occupied or enjoyed by such Natives’.36 Moreover, comments by the permanent head of the Imperial Colonial Office, James Stephen, noted on a dispatch he received from South Australia in 1841 suggest he adhered to the norm of continuity. He wrote it is ‘an important and unexpected fact that these tribes had proprietary rights in the Soil - that is, in particular sections of it which were clearly defined or well understood before the occupation of their country’.37 Western Australia provided for a right to access land where pastoral leases were issued. An Order-

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34 Tully, above n 19, 64-5, 126.
35 Lord Glenelg, cited by Reynolds, *The law of the land*, above n 3, 42.
in-Council was issued in 1850 to provide for the ‘full right to the Aboriginal natives of the said Colony at all times to enter upon any unenclosed or enclosed, but otherwise unimproved part of the said demised premises for purposes of seeking their subsistence therefrom in their accustomed manner ...’.\footnote{1850 Order-in-Council, Western Australia, cited by Bartlett, above n 12, 347.}

Some settlers also respected this norm. Reynolds noted that by the 1830s ‘well-informed settlers knew that Australia was a patchwork of clearly defined tribal territories and that local blacks defended their territory against both Europeans and traditional enemies’.\footnote{Reynolds, \textit{The law of the land}, above n 3, 35.} The Methodist missionary Joseph Orton said that the Aborigines had a ‘right of property in the lands of their birth right’.\footnote{Joseph Orton, cited in ibid. 72.} George Robinson thought they were ‘the legitimate proprietors of the soil’ because it was ‘the land of their forefathers’.\footnote{George Robinson, cited in id.} A South Australian pioneer argued the ‘rights of the original possessors’ were ‘not at all affected by Acts of Parliament or Commissioner’s instructions: their right rests upon principles of justice’. The pioneer said that it is ‘impossible to deny the right which the natives have to the land on which they were born, from which age after age they have derived support and nourishment, and which had has received their ashes’.\footnote{‘South Australian Pioneer’, cited in ibid. 73.} Around this time these issues were debated in a variety of books, newspapers, speeches, letters and diaries.\footnote{Ibid. 72-3.}
Federation and Indigenous peoples

The creation of the Commonwealth Federation in 1901 marked a new stage in relations with Indigenous peoples. The movement leading to its creation begins in the 1840s. Over the next few decades, the British parliament enacted constitutions as each colony gained representative government, the last being Western Australia in 1889. In the 1890s proposals for a federation were pursued in earnest and in 1901 the six colonies came together to establish the Commonwealth of Australia. The new governing structure did not end the powers of the colonies. Rather, the Commonwealth was prescribed specific powers, while the colonies, now called states, retained and continued to exercise the remainder.

This movement has a feature that can be identified with the language of common constitutionalism. Each of the colonies freely consented by referenda of the people to join the proposed federation. This was explicitly reinforced in the new constitution with a clause stating every ‘power of the Parliament of a Colony which has become or becomes a State, shall ... continue as at the establishment of the Commonwealth ...’

44 Macintyre, above n 5, 92; Bartlett, above n 12, 86, n 13.
45 Western Australia agreed to join the Commonwealth after the passage of the Commonwealth of Australia Constitution Act, but prior to Federation on 1st January 1901. See P. Parkinson, ‘Tradition and Change in Australian Law’ in Blackshield and Williams, above n 16, 147.
47 Women were only able to participate in the referenda in South Australia and Western Australia. See D Cass and K Rubenstein, ‘Representation of Women in the Australian Constitutional System’ reprinted in Blackshield and Williams, above n 16, 64.
48 P. Parkinson, ‘Tradition and Change in Australian Law’ in Blackshield and Williams, above n 16, 147.
49 The Australian Constitution, above n 46, s 107.
The convention of consent though was not extended to Indigenous peoples. Indeed, they were specifically excluded from participating in the referenda in Queensland and Western Australia. In Queensland s 6 of the Elections Act 1885 states that no ‘aboriginal native of Australia, China, or of the South Sea Islands ...’ other than freehold owners of land can vote. In Western Australia, a similar disqualification was imposed by s 12 of the Constitution Amendment Act 1893. While the other colonies did not formally exclude Indigenous peoples from a right to vote, it appears that few exercised their vote.50 Also influencing Indigenous peoples’ voting entitlements in New South Wales was ‘anyone receiving aid from the State or charitable institutions was not entitled to be enrolled’.51 This was also the case in Victoria.52

Moreover, the lack of participation of Indigenous peoples was no doubt influenced by prevailing attitudes. A prominent vocal opponent of extending franchise to Aborigines was Isaac Isaacs, later a High Court judge. He told the House of Representatives that he thought Aborigines had not the ‘intelligence, interest or capacity’ to vote.53 Another prominent individual, Henry Higgins, thought it ‘utterly inappropriate to grant the franchise to the aborigines or ask them to exercise an intelligent vote’.54 One year after Federation, the new Commonwealth Parliament adopted the Franchise Act. Following debate, this was amended to include a provision stating that no ‘aboriginal native of Australia, Asia, Africa or the islands of the Pacific, except New Zealand, shall be entitled to have his name placed on the electoral roll, unless so entitled under

50 Id.; Stretton and Finnimore, above n 6, 522.
51 Stretton and Finnimore, above n 6, 522, n 4.
52 Summers, above n 9, 3.
53 Isaac Isaacs, cited by Stretton and Finnimore, above n 6, 526.
Section 41 of the Constitution’. Section 41 states that no ‘adult person who has or acquires a right to vote at elections for the more numerous House of the Parliament of a State shall, while the right continues, be prevented …’ from voting in federal elections. That is, the exclusionary provision was modified only to accommodate those already on a state roll.

The new constitution specifically barred federal parliament from legislating on behalf of Indigenous peoples. Section 51 (xxvi) made provision to legislate on behalf of the ‘people of any race, other than the aboriginal race in any State, for whom it is deemed necessary to make special laws’. However, it did let the Commonwealth legislate for other ‘racial minorities’. Sir Robert Garran, a leading constitutional expert in the first half of the twentieth century, considered the ‘real subject-matter of the section was meant to be introduced races, like the kanakas in Queensland, for whom special laws might be necessary’. Attwood and Markus suggest that Melanesians were the main political focus for its inclusion. Melanesians began to be recruited to Australia from the mid-1860s to provide field labour for the Queensland sugar industry. The power was in parallel with immigration legislation, the aim being to achieve uniformity between states. Nevertheless, despite not being the primary focus of this provision there was also ‘no view that indigenous peoples … should be included’ in the federal constitution. That is, it was based upon a view that supported racial discrimination. A statement by Sir Edmund Barton,

54 Henry Higgins, cited by Stretton and Finnimore, ibid. 525.
55 Cited by Stretton and Finnimore, above n 6, 525; Blackshield and Williams, above n 16, 176; Summers, above n 9, 4-8.
56 The Australian Constitution, above n 46, s 41.
57 Ibid. s 51, c 26.
Australia’s first Prime Minister, and one of the High Court’s first judges, also confirms this. He told the 1898 Constitutional Convention that the clause was necessary to let the Commonwealth ‘regulate the affairs of the people of coloured or inferior races who are in the Commonwealth’.  

The second exclusionary reference to Aboriginal people concerned the national census. Section 127 stated that in ‘reckoning the numbers of people of the Commonwealth or of a State or other part of the Commonwealth, aboriginal natives shall not be counted’.  

When this was discussed at the Constitutional Convention before 1901, South Australian delegate Dr John Cockburn protested that the provision would exclude Aborigines from the vote. Alfred Deakin and Edmund Barton ‘assured him that his fears were groundless’. Richard O’Connor, a lawyer from New South Wales, reminded him that a clause had already been passed to safeguard their right to vote. However, this was not so since he was referring to what became s 41, addressing the relationship between state and commonwealth franchise.  

Scholars agree on the ‘best evidence available, the main purpose’ of the section relates to the ‘apportionment of funds – to formulas for the distribution of government revenues on the basis of population – and the apportionment of parliamentary seats’. Attwood & Markus argue the clause rests on an assumption, unchallenged at the time, that Aboriginal people were ‘inferior’ and ‘not the equal of European citizens’. This was used to justify that they should not ‘expect the same level of government...
expenditure or to participate in the political process’.63 These negative references reflected prevailing attitudes. Attwood & Markus suggest that they were ‘included to limit the scope of measures which would otherwise apply to them’.64

The states retained powers concerning land and Indigenous peoples. As Britain established colonial governments, these were invested with ‘the entire management and control of the waste lands belonging to the Crown ... including all royalties, mines and minerals’.65 As Bartlett observes, this power was ‘always ... exercised as though it empowered the States to deny, diminish or extinguish Aboriginal and Torres Strait Islander rights to traditional land’.66 The states could obtain land whenever they required as no legal impediments existed to stop its seizure.67

The events surrounding Federation reflect a mixture of three constitutional languages. The view that the consent of the settlers to joining the Federation should be sought by referendum reflects the language of common constitutionalism. Federation itself though is identified with a specific set of institutions associated with the language of modern constitutionalism. Blackshield & Williams write that the ‘constitutional laws, traditions and practices ... were ... overwhelmingly British (and especially English)’. This influence is responsible for the ideas of representative and responsible government. The United States heavily influenced the ‘modelling of the

63 Attwood, Markus et al, above n 8, 2.
64 Ibid. 1.
65 Ibid. 66.
66 Bartlett, above n 12, 86.
67 Ibid. 66.
proposed system of government’, and the ‘concepts of federalism, separation of powers and judicial review’. A further link to modern constitutionalism says Federation is the founding moment of democratic politics in Australia. It is this event that represents the ‘mythical agreement between the people’; Federation marked the beginning of the ‘imagined community’ called the Australian nation, to which we all ‘belong ... and enjoy equal dignity as citizens’.70

This imagined community did not extend to Indigenous peoples. In failing to respect the continuity of their cultures in the governing relations for the Federation, the Founding Fathers effectively embraced the doctrine of discontinuity. The exclusionary stance was premised on the view that Indigenous peoples were racially inferior, nomadic and unworthy of being accorded rights associated with civilised peoples. In this respect it reflects another constitutional language: White Australia. This differs from the modern constitutional language because, rather than emphasising cultural uniformity among all inhabitants, it is based on the perceived racial superiority of Europeans.

The campaign for federal power

Inevitably, the push for the Indigenous right to vote became intertwined with moves to give the Commonwealth the power to legislate on their behalf. As early as 1910 a proposal for the Commonwealth to assume this power was

67 Ibid. 11.
68 Blackshield and Williams, above n 16, 2.
raised when the Commonwealth assumed responsibility for governing the Northern Territory (previously held by South Australia). Attwood and Markus write that at the time ‘it was the hope of the small minority of white Australians who took an interest in Aboriginal welfare that the Commonwealth government, representing all white Australians and with the resources of the nation at its disposal, would set an example for the states in its treatment of Aborigines’. A Royal Commission on the Constitution was held between 1929 and 1931.\textsuperscript{71} A minority of the commissioners recommended that the federal Government assume responsibility for Aboriginal Affairs. The federal Government accepted the majority view to maintain the status quo.\textsuperscript{72}

In the 1930s the campaign for constitutional change intensified when humanistic, scientific and feminist organisations were joined by Aboriginal activists. The secretary of the Australian Aborigines’ League, William Cooper, argued for a uniform national policy equitably financed by all taxpayers. In January 1938, an Aboriginal ‘Day of Mourning’ was held in Sydney to protest the sesquicentennial celebrations of Captain Cook’s landing in 1788. Cooper’s organisation and the Aborigines Progressive Association, led by Jack Patten and Bill Ferguson, requested a new deal for Aborigines. They demanded ‘a National Policy for Aborigines’ and ‘Commonwealth Government control of all Aboriginal Affairs’ as well as a Commonwealth Ministry for Aboriginal Affairs.

\textsuperscript{70} Tully, above n 19, 68.
\textsuperscript{71} Sawer states that the Royal Commission was held between 1927 and 1929. See ‘The Australian Constitution and the Australian Aborigine’ in \textit{Federal Law Review}, Vol 2, 1966, 18.
\textsuperscript{72} Attwood, Markus et al, above n 8, 5-8.
to ‘raise all Aborigines throughout the Commonwealth to full Citizen Status and civil equality with the whites in Australia ...’

During the Second World War, the federal Government sought the power to legislate for Aborigines. In 1942, a constitutional convention called by the Curtin Labor Government recommended that some powers be transferred to the Commonwealth for five years following the war. Because not all states passed the necessary legislation, the Government held a referendum in 1944. The proposal concerning Aborigines was one of 14 designed to enable the Commonwealth to begin post-war reconstruction without legislative restriction. Attorney-General H.V. Evatt said that the Aboriginal initiative was influenced by Australia’s new responsibility for New Guinea and the role it expected to play in the South-West Pacific and to head off any ‘likelihood of international criticism of Australia’s treatment of its own indigenous people’. The referendum was supported by 2 million of the 4.3 million votes cast, with a majority vote achieved in only two states. Its defeat was partly attributed to the requirement that electors approve all 14 changes in one package, rather than vote on each individual measure.

The push for federal control of Aboriginal affairs re-emerged in public discourse during the 1950s. The campaign for another referendum was launched in April 1957 at an Aboriginal-Australian Fellowship meeting held in the Sydney Town Hall attended by more than 1500 people. Feminist, labour activist and executive member of the London-based Anti-Slavery Society, Jessie

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73 Ibid. 8, (italics in original); see also ibid. 78-9; Summers, above n 9, 30.
74 Attwood, Markus et al, above n 8, 11; see also ibid. 12.
Street, returned to Australia in December 1956 and plunged into the campaign. Street, the secretary of the Australian Council for Civil Liberties, Brian Fitzpatrick, and Christian Jollie Smith drafted a petition supporting ‘human rights’ for Aborigines and calling for changes to two aspects of the Commonwealth Constitution. One was to delete the words ‘other than the aboriginal race in any State’ from s 51 (xxvi) of the Constitution; the other to delete s 127 excluding Indigenous people from the census. The Aboriginal-Australian Fellowship established in Sydney by Pearl Gibbs, Bert Groves and Faith Bandler also became involved.\(^\text{75}\) The following year a national organisation to coordinate the campaign was established, which eventually became known as the Federal Council for the Advancement of Aborigines and Torres Strait Islanders (FCAATSI). In the three months to September 1958, 25,988 signatures were collected and presented to parliament but Territories Minister Paul Hasluck was unmoved. He stated the ‘practical task of advancing [Aboriginal] welfare and aiding their assimilation was of far more importance at the present time than taking fine points regarding the meaning and intention of an obscure section of the Constitution’.\(^\text{76}\) Indeed, his department said that the ‘Commonwealth and State Governments agree that the only future for Australia’s 74,000 aborigines is assimilation’ (sic).\(^\text{77}\)

However, the campaign continued to gain momentum with a parliamentary joint committee recommending the repeal of s 127 and the ALP

\(^{75}\) Ibid. 21.
\(^{76}\) Ibid. 24.
federal conference adopting the two constitutional changes as policy.78 The Liberal-Country Party Government ‘agreed’ that s 127 ‘should be removed’ but argued that removing s 51(xxvi) ‘would be a move in the wrong direction’.79 An equal pay case that sought to extend the award conditions in the Northern Territory cattle station industry to Aborigines began in 1965,80 the same year as the Freedom Ride throughout country New South Wales exposed a degree of racial discrimination unlike any previous protest. Several months later the Menzies Government introduced a bill to provide for a referendum to repeal s 127,81 which was passed by federal Parliament but deferred. Prime Minister Robert Menzies considered several possibilities including the repeal of the whole head of power, but decided against this because it was thought that s 51(xxvi) might be needed in future.82 In January 1966, when Harold Holt replaced Menzies as Prime Minister, his Attorney-General Billy Snedden recommended amending s 51(xxvi), but Cabinet did not agree. However, following the lodgement of another FCAATSI petition in February 1967, the Government reversed its position83 and the subsequent referendum on the two changes recorded 90.77 per cent support,84 a resounding yes, widely interpreted as affirming the equality of Indigenous peoples.85

With the success of the constitutional changes, the Commonwealth won the power to make special laws with respect to Indigenous people, although the

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78 Summers, above n 9, 62.
79 Ibid. 63.
80 Ibid. 48-50.
81 Attwood, Markus et al, above n 8, 31; see also Summers, above n 9, 64-6.
82 Summers, above n 9, 64.
83 Attwood, Markus et al, above n 8, 33.
84 Attwood, Markus et al, above n 8, 55-7.
85 See ibid. x-xi; Summers, above n 9, 3.
decision to amend rather than remove s 51(xxvi) still defined people in terms of ‘race’. However, the changes gave federal Parliament the power to legislate for the people of any ‘race for whom it is deemed necessary to make special laws’.\(^{86}\) Before the referendum, Holt had also overhauled Australia’s racially discriminatory ‘White Australia’ policy and signed the United Nations \textit{International Convention for the Elimination of All Forms of Racial Discrimination (CERD)}.\(^{87}\) The convention rejects ‘any doctrine of superiority based on racial differentiation’ as ‘scientifically false, morally condemnable, socially unjust and dangerous’. The parties to it resolved to adopt ‘all necessary measures for speedily eliminating racial discrimination in all its forms and manifestations, and to prevent and combat racist doctrines and practices in order to promote understanding between races and to build an international community free from all forms of racial segregation and racial discrimination’. It also imposes obligations on parties to prohibit racial discrimination.\(^{88}\)

The changes around this time indicated an evolution away from the idea of a culturally homogeneous Australia. No longer was it possible to limit entry to Europeans, ‘White Australians’ as they were called in the language of race. From the mid-1960s onwards, overt measures of discrimination against Aborigines were removed and in 1962 they gained the right to vote in Commonwealth elections, and access to pension, unemployment and maternity allowances.\(^{89}\)

\(^{86}\) \textit{The Australian Constitution}, above n 46, s 51 (xxvi).
\(^{87}\) Attwood, Markus et al, above n 8, 33.
\(^{89}\) Markus, above n 7, 172, 177; Blackshield and Williams, above n 16, 759; Sawer, above n 71, 24.
In terms of constitutionalism, this was the beginning of a differentiation between a constitutional frame established to recognise European interests and one that was prepared to remove racial background from its gatekeeping role on citizenship. The referenda marked a shift away from the language of White Australia: Indigenous people were to be accorded equality. The changes also reflected the influence of the language of human rights on campaigners for the referendum. John Chesterman emphasises the crucial role of the participants and particularly the Indigenous contribution to this struggle in his recent book.90

The Yirrkala land case

Three years after the referendum a land claim used the constitutional changes as the basis for its legal argument. The campaign by the Yolngu People based at Yirrkala in north-eastern Arnhem Land, which began several years earlier, protested their exclusion from consultation regarding the federal Government’s grant of mining rights. The grant provided bauxite mining company Nabalco Pty Ltd use of land the Yolngu People regarded as their own. The Yolngu people sent a petition painted on bark to the Commonwealth Parliament seeking a hearing for their views. While a committee was established and ‘accepted’ some of their arguments, the Government proceeded with its mining agreement.91 Legal action eventually commenced in Darwin, a region then under federal administration, challenging the right ‘to grant a mining lease

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90 John, Chesterman, Civil Rights: how Indigenous Australians won formal equality, (St Lucia, Qld: University of Queensland Press, 2005), 18-19.
91 Summers, above n 9, 47; see also Scott Bennett, Aborigines and political power, (North Sydney: Allen & Unwin, 1992), 12; Nancy M. Williams, The Yolngu and their land, (Canberra: Australian Institute of Aboriginal Studies, 1986), 1-3.
without the approval of the inhabitants of the Aboriginal Reserve’. The Court
found that the Commonwealth was not obliged to obtain approval.92 A second
case, known as the Yirrkala land case or Gove Land Rights Case, relied upon
the 1967 changes to the Australian Constitution.93 It was argued that the federal
Government could only acquire property on ‘just terms’.94 Therefore, a failure
to observe this constitutional limitation would invalidate the issuing of the
grant.95

While the claim failed, Justice Blackburn rejected the idea that
Indigenous people were too backward to have a system of laws in place. In
doing so, he abandoned a key argument associated with the language of White
Australia. He found that the evidence shows a,96

subtle and elaborate system highly adapted to the country in which the
people led their lives, which provided a stable order of society and was
remarkably free from the vagaries of personal whim or influence. If ever a
system could be called ‘a government of laws, and not of men’ it is that
shown in the evidence before me.

Australian law now rejected the idea that the first inhabitants of the
country were socially backward, but was not yet prepared to totally abandon the
doctrine of terra nullius. Justice Blackburn rejected the claim for recognition on
factual and legal grounds. He was ‘not satisfied, on the balance of probabilities,

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92 Summers, above n 9, 48.
93 Milirrpum v Nabalco, above n 10.
94 The Australian Constitution, above n 46, s 51 (xxxi).
95 Bartlett, above n 12, 10.
that the plaintiffs’ predecessors had in 1788 the same links to the same areas of land as those which the plaintiffs now claim’. He determined that the claimants had failed to establish that ‘the relationship of the clan to the land [was] proprietary’, despite the claimants putting forward abundant evidence to show they had a proprietary interest in land. According to Williams, this outcome occurred because Justice Blackburn presumed that economics was the basis of proprietary interest. Williams reasons that since the claimants’ beliefs were external to economics, these were not relevant in establishing a proprietary interest. This indicates that Justice Blackburn used a feature of modern constitutionalism when he addressed the claim: he presumed that the European emphasis on economics and property was the only legitimate basis to demonstrate proprietary interests. He was unable to find a way for two culturally distinct sets of laws to coexist.

In looking at the legal basis to the claim, Blackburn examined other common law jurisdictions colonised by the British, in particular the United States, Canada and New Zealand. He concluded that ‘no doctrine of communal native title has any place in any of them, except under express statutory provisions’. On this basis he concluded that the ‘doctrine does not form, and has never formed, part of the law of any part of Australia’. Commenting on this statement, Bartlett noted that the ‘wealth of authority recognising native title at common law is so considerable as to render Justice Blackburn’s assertion ...
almost incomprehensible’. In rejecting a basis for communal native title, Justice Blackburn effectively rejected the convention of continuity. He continued to uphold the legal presumption that treated Australia as unoccupied when colonised.

He also felt bound by the series of statements made obiter dicta where earlier court rulings had assumed that the Australian colonies could be classified as settled. These earlier cases included *Cooper v Stuart* (1889), *Attorney-General v Brown* (1847), *Williams v Attorney-General (NSW)* (1913), and *Randwick Municipal Council v Rutledge* (1959). Blackshield and Williams note though that in all of these cases the relationship of ‘any indigenous system’ to the ‘transplanted British system of Crown grants, reservations and dedications of land’ was ‘never in issue’.

**Aboriginal Land Rights Commission**

The failure of the claim in *Milirrpum v Nabalco* fuelled legislative action around land rights and for the first time one of the common constitutional conventions was articulated around Indigenous people. In February 1973, the

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101 Bartlett, above n 12, 11; see also *Mabo v Queensland (No 2)*, above n 2, 76-7 (Deane and Gaudron JJ).

102 Obiter dicta are references to remarks made in passing, and therefore not essential to a judgement. These are usually considered not to create any binding precedence, though it ‘may be cited as persuasive authority in later cases’. See Elizabeth A. Martin (Ed), *A Dictionary of Law*, Fourth Edition, (Oxford: Oxford University Press, 1997), 314. Commenting on the approach taken by Justice Blackburn, Blackshield and Williams write that ‘Even if the Privy Council’s pronouncement in *Cooper v Stuart* was merely obiter, it may be understandable that Blackburn J, in 1971, regarded himself as bound to follow it. But clearly, in 1992, the High Court was not so bound. Without overruling any actual decisions, it was open to the Court to hold that the classification of the Australian colonies as ‘settled’ had always been a misapplication of Blackstone’s categories, and had never been an accurate statement of the true effect of common law’. See Blackshield and Williams, above n 16, 178.

103 Blackshield and Williams, above n 16, 204.
newly elected Whitlam Government appointed Justice Woodward to head up an Aboriginal Land Rights Commission. This marked the first time that the recognition of Indigenous land rights was explicitly considered. Its Second Report, delivered in April 1974, outlined broad objectives to achieve the ‘recognition of land rights for Aborigines’. While its aim was ‘preserving and strengthening all Aboriginal interests in land and rights over land which exist today, particularly all those having spiritual importance’, the report did not recommend recognising land claims of those dispossessed. Instead, it proposed some ‘basic compensation in the form of land’ be provided for those ‘irrevocably deprived of the rights and interests which they would otherwise have inherited from their ancestors, and who have obtained no sufficient compensating benefits from white society’. The report also proposed that the norm of consent generally be respected, at least for those still occupying their lands. It stated that Aboriginal interests in land should not be further ‘whittled away without consent, except in those cases where the national interest positively demands it - and then only on terms of just compensation’.

The Aboriginal Land Rights Commission spurred legislative action by the Whitlam Labor Government, and the Fraser Coalition Government continued this initiative. Initial legislation addressed Queensland discriminatory laws and established a legal basis for the work of Aboriginal Councils and Associations, and land rights in the Northern Territory. Preceding the election of the Whitlam Government, South Australia adopted lands rights legislation in

104 Aboriginal Land Rights Commission: Second Report, cited by Blackshield and Williams, above n 16, 180 (paragraph identification omitted).
1966. Other states followed in the subsequent three decades, except Western Australia, the largest geographically, which made no legislative provision in this matter.\textsuperscript{107}

Land rights legislation adopted by the federal parliament to apply to the Northern Territory represented a high water mark. The Whitlam Government introduced the legislation before it was dismissed in November 1975, but the Fraser Government drafted a new bill that left out some important provisions.\textsuperscript{108} Under the \textit{Aboriginal Land Rights (Northern Territory) Act} 1976 (Cth), Aboriginal Land Commissioners were appointed to hear claims on behalf of traditional Aboriginal owners, and Land Councils were established to manage their interests. The Act stipulated that the Land Councils had to be satisfied that the traditional owners of the land understood the nature and purpose of a proposed exploration licence grant and ‘as a group ... consent to it’.\textsuperscript{109} While the Act was significantly amended in 1987, consent of the traditional owners to mining was retained although it was required before an exploration licence was granted rather than ‘after exploration had been undertaken’.\textsuperscript{110}

\textsuperscript{106} Aboriginal Land Rights Commission: \textit{Second Report}, cited by Blackshield and Williams, id. (paragraph identification omitted).
\textsuperscript{109} \textit{Aboriginal Land Rights (Northern Territory) Act} 1976 (Cth), ss 21, 48(a), 50.
Racial discrimination legislation

In 1975 legislation prohibiting racial discrimination was enacted by the Commonwealth government to give effect to CERD.\textsuperscript{111} Three sections of the RDA are particularly significant. Section 9 ‘proscribes the doing of an act’,\textsuperscript{112} which makes it unlawful to racially discriminate. This covers any act that involves a ‘distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing of any human right or fundamental freedom in the political, economic, social, cultural or any other field of public life’.\textsuperscript{113}

Section 10 relates to the enjoyment of a right and is not limited to existing legal rights.\textsuperscript{114} It covers laws within Australia to ensure that ‘persons of a particular race, colour or national or ethnic origin ... enjoy that right to the same extent as persons of that other race, colour or national or ethnic origin’.\textsuperscript{115} It is comparative and as Justice Deane was later to observe, it provides ‘a moral entitlement to be treated in accordance with standards dictated by the fundamental notions of human dignity and essential equality which underlie the international recognition of human rights ...’\textsuperscript{116} The provision is explicitly linked to Article 5 of the Convention, which states that the rights to be protected

\begin{itemize}
\item Kauffman, above n 108, 22.
\item \textit{Racial Discrimination Act} 1975 (Cth).
\item \textit{Mabo v Queensland}, above n 11, 216 (Brennan, Toohey & Gaudron JJ).
\item \textit{Racial Discrimination Act} 1975 (Cth), S 9(1).
\item Ibid. S 10(1); See also \textit{Mabo v Queensland}, above n 11 at 216.
\item \textit{Racial Discrimination Act} 1975 (Cth), S 10(1).
\item \textit{Mabo v Queensland}, above n 11, 229.
\end{itemize}

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are broader than property rights and include political, civil, economic, social and cultural rights.\textsuperscript{117}

Section 8 exempts ‘special measures’ provided for in Article 1, Paragraph 4 of the Convention. This article defines special measures as those ‘taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved’.\textsuperscript{118}

The \textit{RDA} originates from the language of human rights and can be used to provide a degree of protection of Indigenous rights. Sections 9 and 10 of the \textit{RDA} provide protection to economic, social and cultural rights. In stipulating that the ‘recognition, enjoyment or exercise’ of human rights be unimpaired, Section 9(1) comes closest to acknowledging the need to recognise the distinct cultures of each people.\textsuperscript{119} Tully says that mutual recognition ‘cannot be simply the recognition of each culture in the same constitutional form’,\textsuperscript{120} but while the \textit{RDA} does not specifically refer to the right of people to have a constitutional form of their own choice, it does not preclude this possibility. However, the

\textsuperscript{117} \textit{International Convention on the Elimination of all Forms of Racial Discrimination}, reprinted in \textit{Racial Discrimination Act 1975 (Cth), Schedule, Article 5.}
\textsuperscript{118} Ibid. Article 1(4).
\textsuperscript{119} \textit{Racial Discrimination Act 1975 (Cth), s 9(1).}
RDA is silent upon the historical continuity of a people’s culture or on the need to gain their consent over matters affecting them (‘what touches all should be agreed to by all’).\textsuperscript{121} The Convention is more expansive on these matters. Article 2 obliges a government to protect ‘certain racial groups ... for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms’. In addition, Article 5 specifies a ‘right’ of everyone to enjoy economic, social and cultural rights, including the right to ‘equal participation in cultural activities’.\textsuperscript{122}

\textit{Coe v Commonwealth}

Eight years after the Northern Territory Supreme Court ruling on the Yirrkala land case, another claim for recognition came before the High Court. Unlike the earlier case involving a specific area of land, this was more far-reaching and extended across the continent. In \textit{Coe v Commonwealth}, Aboriginal barrister Paul Coe sought recognition of the sovereignty of the ‘Aboriginal community and nation of Australia’. On their behalf, he sought declarations and relief ‘in respect of the occupation, settlement and continuing dealing in the lands comprising the Australian continent ...’\textsuperscript{123} In his statement of claim, Coe noted that from ‘time immemorial prior to 1770 the aboriginal

\footnotesize\textsuperscript{120} Tully, above n 19, 8.
\footnotesize\textsuperscript{121} Ibid. 122.
\footnotesize\textsuperscript{122} International Convention on the Elimination of All Forms of Racial Discrimination, reprinted in Racial Discrimination Act 1975 (Cth), Schedule, Articles 2 & 5; also see Article 27 of the International Covenant on Civil and Political Rights, specifying that ‘In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language’. [Available at \url{www.unhchr.ch/html/menu3/b/a_ccpr.htm}, accessed 01/10/2006]. The Covenant was ratified by Australia in 1980. See Blackshield & Williams, above n 16, 1190.
\footnotesize\textsuperscript{123} \textit{Coe v Commonwealth} (1979) 24 ALR 118 (‘Coe v Commonwealth’).
nation had enjoyed exclusive sovereignty over the whole of the continent now
known as Australia’.\textsuperscript{124} He later sought leave to amend the statement of claim.
Justice Mason dismissed the application when it came before him. Coe then
appealed to the Full Court.\textsuperscript{125}

In a 2-2 decision, Justices Gibbs and Aickin dismissed the appeal, their
opinion prevailing pursuant to the \textit{Judiciary Act} 1903 (Cth). They described the
proposed amended statement of claim as containing ‘allegations and claims that
were quite absurd and so clearly vexatious as to amount to an abuse of the
process of the court’.\textsuperscript{126} Justice Gibbs stated that the ‘aboriginal [sic] people of
Australia ... had no legislative, executive or judicial organs by which
sovereignty may have been exercised’.\textsuperscript{127} His comments suggest a belief that
sovereignty could only be expressed via such institutions. That is, he associated
sovereignty with a particular set of European institutions, an indication of the
influence of the language of modern constitutionalism on his thinking.\textsuperscript{128} In his
dissenting judgement, Justices Jacobs also rejected the claim for sovereignty. He
considered that the ‘part of the proposed amended statement of claim’ disputing
the ‘validity of the British Crown’s and now the Commonwealth of Australia’s
claim to sovereignty’ was ‘embarrassing and could not be allowed’. It was not
‘cognizable in a municipal court’ since sovereignty implied an exclusive
concern with ‘matters of the law of nations’.\textsuperscript{129} From these comments, it might

\textsuperscript{124} Reynolds, \textit{Aboriginal sovereignty}, above n 4, 4.
\textsuperscript{125}\textit{Coe v Commonwealth}, above n 123, 118.
\textsuperscript{126} Id.
\textsuperscript{127} Ibid. 119 (Gibbs J).
\textsuperscript{128} Tully, above n 19, 67-8.
\textsuperscript{129}\textit{Coe v Commonwealth}, above n 123, 119 (Jacobs J).
appear that the decision simply affirmed a modern constitutional view of sovereignty.\textsuperscript{130}

However, the case also produced the first signs within the High Court of preparedness to use the language of common constitutionalism. Justices Jacobs and Murphy, dissenting on the issue of the dismissal of the appeal, argued that ‘it states matters which raise a question which ought to be determined’.\textsuperscript{131} They drew a distinction between those matters dealing with sovereignty and those concerning the doctrine of \textit{terra nullius}. In the statement of claim, Coe argued that the country was conquered and Justices Jacobs and Murphy considered this part of the claim should be tested in court.\textsuperscript{132} Justice Murphy also addressed the view expressed by the Privy Council in \textit{Cooper v Stuart} that Australia was peacefully annexed. He observed that Indigenous people ‘did not give up their lands peacefully, they were killed or removed forcibly from the lands by the United Kingdom forces or the European colonists in what amounted to attempted (and in Tasmania almost complete) genocide’. Regarding the statement of the Privy Council, he described this as either ‘made in ignorance’ or a ‘convenient falsehood to justify the taking of aborigines’ land’. Justice Murphy considered that Coe was ‘entitled to endeavour to prove that the concept of \textit{terra nullius} had no application to Australia’ and that ‘the lands were acquired by conquest’. Indicating his reasoning on where this may lead Justice Murphy said it ‘may rely, in the alternative, on common law rights which would arise if there were peaceful settlement’. Furthermore, regardless of whether it

\textsuperscript{130} For further discussion of sovereignty and the case see Nettheim, above n 1, 108-112 and Reynolds, \textit{Aboriginal sovereignty}, above n 4, 4-7, 11, 37-8, 95,155.

\textsuperscript{131} \textit{Coe v Commonwealth}, above n 123, 118 (Jacobs and Murphy JJ).

\textsuperscript{132} Ibid. 118 (Jacobs and Murphy JJ).
‘was acquired by conquest or peaceful settlement’, the plaintiff is ‘entitled to argue that the sovereignty acquired by the Crown did not extinguish’ ownership rights and that ‘they have certain proprietary rights (at least in some lands) and are entitled to declaration and enjoyment of their rights or compensation’.133

Retreating from injustice

In the 1985 *Gerhardt v Brown* case,134 Justice Deane added some comments that indicated his opposition to the doctrine of *terra nullius*. ‘[T]o the extent that one can generalize’, he said, the society of Aboriginal people in Australia was not ‘institutionalized and drew no clear distinction between the spiritual and the temporal. The core of existence was the relationship with and the responsibility for their homelands.’ This was neither individual nor clan ‘owned’ in a European sense but which provided ‘identity of both in a way which the European settlers did not trouble to comprehend’. Furthermore, the ‘imposed law, based on an assertion of terrae nullius, failed completely to acknowledge, let alone protect’ (sic).135 This candid and critical observation placed the legal doctrine into a broader cultural context.

Citing *Milirrpum v Nabalco* as a reference, Justice Deane noted that almost two centuries on, the ‘generally accepted view remains that the common law is ignorant of any communal native title or other legal claim of the Aboriginal clans or peoples even to ancestral tribal lands on which they still

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133 Ibid. 138 (Murphy J) (Italics in original).
134 *Gerhardt v Brown* (1985) 159 CLR 70 (“*Gerhardt v Brown*”).
135 Ibid. 149 (Deane J).
live’. He also contrasted the Australian doctrine with the common law in the United States. He observed that the,\textsuperscript{136}

common law of this land has still not reached the stage of retreat from injustice which the law of Illinois and Virginia had reached in 1823 when Marshall CJ, in \textit{Johnson v McIntosh}, accepted that, subject to the assertion of ultimate dominion (including the power to convey title by grant) by the State, the ‘original inhabitants’ should be recognized as having ‘a legal as well as just claim’ to retain the occupancy of their traditional lands.

While careful to avoid any suggestion that the law in \textit{Milirrpum v Nabalco} was incorrect\textsuperscript{137} Justice Deane’s statement implying acceptance of the continuity of Indigenous occupancy was the first to be made by a member of the High Court.\textsuperscript{138}

\textit{Mabo protected by RDA}

The message from some of the judges in the \textit{Coe v Commonwealth} case that it was reasonable to test the application of the doctrine of \textit{terra nullius} was probably not lost on potential claimants.\textsuperscript{139} Given that the judges considered the origins of private property were not exclusively tied to the actions of the Crown, it was now possible that native title could be considered to have survived a

\textsuperscript{136} Ibid. 149 (Deane J); \textit{Johnson v McIntosh} 21 US (8 Wheat) 543 at 574 (1823).
\textsuperscript{137} \textit{Gerhardy v Brown}, above n 134, 149 (Deane J).
\textsuperscript{138} Significantly, Justice Dean preferred to cite \textit{Johnson v McIntosh} and not \textit{Worcester v Georgia} where Chief Justice Marshall observes that “the Indian nations had always been considered as distinct, independent political communities” [31 US (6 Pet) 515 at 559 (1832)].
\textsuperscript{139} Keon-Cohen states that at the land rights conference in 1981 the barrister Barbara Hocking implied that it was timely for an Aboriginal group to consider making a High Court challenge to Queensland legislation. See Keon-Cohen, above n 14, 906-7.
change of sovereignty. Here was an opportunity to test whether this path could lead to recognition. Within three years of the *Coe v Commonwealth* case, the Mabo claim was lodged in the High Court against the state of Queensland. Its genesis began with informal meetings among the Meriam People in 1981 where plans were made to begin a court case to gain recognition.\(^{140}\) They claimed rights to three islands at the northern end of the Great Barrier Reef in the Torres Strait. The Meriam People had lived on the islands for generations before the first European contact. The naming of these islands as the Murray Islands originated with the captain of the *Pandora* in 1791. In the Meriam Mir language of the inhabitants, the islands are known as Mer, Dauar and Waier. Mer is the largest.\(^{141}\) In their claim, the Meriam People said they had ‘inhabited and exclusively possessed the islands, since time immemorial, and that they had land rights over them’. The claim stated that the islands were annexed in 1879 and ‘had become part of the Colony of Queensland’. However, it also went on to claim that the ‘Crown’s sovereignty was subject’ to their land rights and ‘based upon local custom and traditional native title’. The Meriam People sought declarations regarding the existence of their land rights and injunctions restraining Queensland from impairing them.\(^{142}\)

In response, the Queensland government denied the existence of the land rights claimed. Its defence was modified in 1985 following its action in the Queensland parliament to adopt the *Queensland Coast Islands Declaratory Act* (the *Coast Islands Act*). This legislation specifically sought to cover the islands

\(^{140}\) Ibid. xxiii. Keon-Cohen who identifies a land rights conference in Townsville in August 1981 as the ‘immediate trigger’ for the proceedings. See Keon-Cohen, above n 14, 905.

\(^{141}\) Ibid. xix. The enormous political and legal attention to the case contrasts with the geographical size of the islands. The largest Mer is only 2.8 km long and 1.65 km across. See above n 2, 8.
claimed by the Meriam People. It retrospectively declared that every ‘disposal
of the island or part thereof ... in pursuance of Crown lands legislation ... shall
be taken to have been validly made ...’ Section 5 of the Coast Islands Act
declared that no ‘compensation was or is payable to any person ... in respect of
any right, interest or claim alleged to have existed prior to the annexation of the
islands ...’143 In his second reading speech, the Queensland minister declared
that the objective of the legislation was to extinguish ‘traditional legal rights’.144

Responding to this, the plaintiffs put forward three broad reasons as to
why the act could not extinguish their claim. Firstly, ‘if the Act was within the
power of the Queensland Parliament it was ineffective to extinguish native title
because it did not expressly so provide’. Secondly, it was ‘wholly inconsistent’
with the RDA and was therefore ‘inoperative by reason of the Commonwealth
Constitution s 109’. Thirdly, it was beyond the power of the Queensland
Parliament, because ‘only the Commonwealth Parliament was empowered to
extinguish native title’.145

In February 1986, Chief Justice Gibbs of the High Court ordered that the
‘issues of fact raised in the case’ be remitted to the Supreme Court of
Queensland. By the end of that year, Justice Moynihan began to hear evidence
from the Meriam People.146 With the common law claim now hinging on a legal
ruling, the High Court considered the impact of the legislation, bringing down

142 Mabo v Queensland, above n 11, 188-9; Bartlett, above n 12, 16.
143 Queensland Coast Islands Declaratory Act cited in Mabo v Queensland, above n 11, 210,
(Brennan, Toohey and Gaudron, JJ); Gary D. Meyers & John Mugambwa, ‘The Mabo Decision:
144 Mabo v Queensland, above n 11, 214 (Brennan, Toohey and Gaudron, JJ).
145 Bartlett, above n 12, 17.
146 Sharp, above n 11, xi; Blackshield and Williams, above n 16, 203.
its decision in December 1988. Before the High Court decision, the plaintiffs agreed that if the *Coast Islands Act* was upheld they would refrain from pursuing their claim. At stake then was the recognition of native title and with it the possibility of using the common constitutional language to articulate a change to the relationship with Indigenous peoples. If the Court found the Queensland legislation lawful it would provide a legal basis to extinguish the traditional rights of the Meriam People and put an end to the claim.

In its decision the High Court focused principally upon the role of the *RDA* in protecting Indigenous land claims from unilateral state government action. In a 4-2 decision, the Court found that the Queensland legislation did not comply with the *RDA* and s 107 of the Commonwealth Constitution made it inoperable to the extent of its inconsistency. In support of the majority position were two separate judgements.

Justices Brennan, Toohey and Gaudron in their majority judgement focussed on s 10 of the *RDA*, which relates to ‘the enjoyment of a right’. They noted that this concerns human rights rather just legal rights. In particular, they referred to Article 17 of the *Universal Declaration of Human Rights*, which states that no one shall be ‘arbitrarily deprived of his property’ and that arbitrarily was interpreted to mean not only ‘illegally’ but also ‘unjustly’.

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147 *Mabo v Queensland*, above n 11, 186.
148 Sharp, above n 11, 43.
149 Bartlett, above n 12, 17.
150 *Mabo v Queensland*, above n 11, 217.
Against this background, the judges asked whether the ‘Meriam people enjoy the human right to own and inherit property - a right which includes an immunity from arbitrary deprivation of property - to a more limited extent than other members of the community’. They determined that by ‘extinguishing the traditional legal rights’ of the Meriam People the Coast Islands Act ‘abrogated the immunity of the Miriam people from arbitrary deprivation of their legal rights in and over the Murray Islands’. It ‘impaired’ their ‘human rights’ while leaving unimpaired the corresponding human rights of those whose rights ‘in and over the Murray Islands’ came from elsewhere.\(^{151}\)

Justice Deane provided the other judgement. Like his colleagues in the majority, he too focussed on s 10 of the RDA, which he considered involved the protection of human rights.\(^{152}\) He found that the,\(^{153}\)

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\text{purpose, operation and effect of the [Coast Islands] Act would, on the confined construction which I would give it, be to extinguish traditional proprietary rights and interests of the Torres Strait Islanders which survived annexation to the extent that their existence would invalidate or render ineffective subsequent dealings or acts ‘purporting to be in pursuance of Crown lands legislation’.
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Since this deprived the Meriam People of a right enjoyed by other persons, he found it amounted to ‘discriminatory treatment’ and was inconsistent with s 10(1) of the RDA.\(^{154}\)

\(^{151}\) Ibid. 217-8 (Brennan, Toohey and Gaudron JJ).
\(^{152}\) Ibid. 229.
\(^{153}\) Ibid. 231 (Deane J).
Justice Wilson, dissenting from the conclusions of the four justices, did not find that the *Coast Islands Act* discriminatory, denying its ‘practical effect’ was to ‘create an inequality’. He reasoned that since the ‘plaintiffs were alone in the enjoyment of traditional rights’ its effect is to ‘remove a source of inequality’. Henceforth, the Meriam People ‘will enjoy the same rights with respect to ownership of property and rights of inheritance as every other person in Queensland of whatever race’.

Justice Dawson did not decide on the matter. He considered that whether or not s 10(3) protected the plaintiffs could only be addressed once ‘questions of fact [around the claim] are determined’. Chief Justice Mason ‘expressed no opinion’ on these matters. While not finding the *Coast Islands Act* discriminatory, he considered it dependent upon determining ‘the precise nature and extent’ of their native title, a matter not yet considered by the Court.

This decision revealed two very different approaches toward the application of the *RDA* to native title. The first, adopted by Justices Brennan, Toohey, Gaudron, and Deane, presumed that two culturally different, but equal land laws could co-exist, reflecting the language of human rights. While Justice Wilson identified uniqueness in native title, Sharp says he was more ‘formally logical’, but that behind this ‘formality lies the assumption that there is only one law - English law’. Justice Dawson and Chief Justice Mason followed a similar logic. Their views centred on the need to ‘determine the equivalence or otherwise of the rights claimed by the Murray Islanders’. By applying this

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154 Ibid. 231-2 (Deane J).
155 Ibid. 206 (Wilson J).
156 Ibid. 243 (Dawson J), see also 187; Bartlett, above n 12, 17.
method, the protection of the RDA could only occur if the ‘rights of ownership were equivalent to the rights of ownership enjoyed by others’. This implied the uniqueness of native title would be a barrier to its protection. Unspoken, but underpinning the three judgements was the view that only European law was worthy of protection. As Sharp observed, the ‘hypothesis in all three minority judgements is that the cultural difference to which the Meriam plaintiffs gave expression carries an intrinsic cultural inferiority ...’ The judgements reflected the language of modern constitutionalism where culture is discounted, which reveals a disrespect for a non-English culture. The first approach of the High Court provided a basis to protect culturally different land relations; the latter rendered the RDA useless for this purpose.

Having found the Queensland legislation inconsistent with the RDA, the majority did not need to examine whether it was within the power of the Queensland parliament to extinguish native title. Instead, they followed the ‘assumption that the plaintiffs could establish the land rights claimed’.

However, the minority judges had to examine this matter if they were to consider all the arguments made by the plaintiffs for protection. Justice Wilson declared, and Chief Justice Mason and Justice Dawson agreed, that the Queensland legislature:

- was ‘not limited in its power to deal with the waste lands of the Crown’;

158 Sharp, above n 11, 56; Mabo v Queensland, above n 11, 243 (Dawson J).
159 Tully, above n 19, 63.
160 Mabo v Queensland, above n 11, 187 (Mason CJ, Wilson, Brennan, Dawson, Toohey & Gaudron JJ); Bartlett, above n 12, 17-8.
was empowered to ‘deprive a person of property without compensation ...’;

and,

did not interfere with the ‘judicial process’ by extinguishing the rights of those who sought to assert them.

Queensland Supreme Court - gains and losses

The High Court’s decision that the Queensland legislation did not extinguish traditional land rights meant the claim could proceed. When initially lodged, the Mabo claim also included sea rights, but this aspect was withdrawn in 1989. The Commonwealth government then withdrew from the legal proceedings leaving the Queensland government to stand alone in disputing the land claims.162 The claim proceeded and the Supreme Court of Queensland resumed its hearings in May 1989.163

When the original claims came before the Court, the individuals brought them forth on their and their family groups’ behalf. The Supreme Court heard evidence over 67 days in Brisbane in 1986, at Mer and Thursday Island in 1989 and again in Brisbane in 1989. Much of the evidence comprised oral testimony

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161 Ibid. 188 (Mason CJ, Wilson and Dawson JJ); 201-2 (Wilson J); Bartlett, above n 12, 18-9.
162 Initially the Commonwealth Government was also sued since some of sea claimed was outside Queensland’s jurisdiction. The claim to sea rights was withdrawn in 1989. Keon-Cohen says this was because the ‘evidence, as it then stood, was too thin and because the “remote sea claims were the only areas of interest” to the Commonwealth. Justice Moynihan’s Determination also rejected the sea claims. See Keon-Cohen, above n 14, 937 & footnote 321. Sharp, citing McIntyre, states that the decision was taken for ‘strategic reasons’ to avoid unnecessarily antagonising the Commonwealth it was decided to ‘focus on the main question: to establish the existence of common law title’. See Sharp, above n 11, 202. See also Frank Brennan, One land, one nation: Mabo: Towards 2001, (St Lucia, Qld: University of Queensland Press, 1995), 11
163 Sharp, above n 11, xii.
from Meriam witnesses, and was not a claim for ‘communal native title’, as considered by Justice Blackburn in *Milirrpum v Nabalco*. During the Supreme Court hearings the Meriam claimants made clear there is ‘no concept of public land owned by the community in Meriam society ...’ They presented the Court with ‘the boundaries of their village and garden lands’. They claimed usufructuary rights, rights for the use and enjoyment of property. They also cited ‘Murray Island law’, which many of them identified explicitly as ‘Malo’s Law’ as authority for how they ‘cultivate and conserve the land and its produce and to keep their hands and feet off land belonging to other Murray Islanders’. 

Malo’s Law is a ‘set of religiously sanctioned rules’ to which the people ‘feel bound to observe’. The eight clans ‘occupy clan territories facing and extending across the sandbeaches’. Allotments of ‘land, foreshore and reef flats’ are owned by the ‘eldest son on behalf of the lineage or family ...’ Sharp noted that the plaintiffs argued that contemporary ‘Meriam culture is ongoing and developing, not frozen in tradition’. However, there is also ‘an essential continuity in the system of land tenure, in other institutions and beliefs’. Their link to land is ‘two-sided: they both own land and belong to it, a dual relation of right and responsibility’. When they initially formulated their claim, they ‘unanimously reaffirmed their wish for inalienable freehold tenure’.

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164 Ibid. 149.
165 Ibid. 79.
166 Ibid. 153.
167 Ibid. 6-7 (Italics in original).
168 Ibid. 8.
169 Ibid. 9 (Italics in original).
The dispute over the claim had features familiar from earlier struggles between those already in occupation and a new colonising force. In this case, the Meriam witnesses explained that the local court established by the Queensland administration ‘was a new vehicle for the exercise of their traditional law’, which provided a basis for the continuity of their traditional title. Disputing this, the Queensland government argued that the ‘court system constituted a decisive break with the past’, echoing those who have emphasised discontinuity as evidence for their authority.\textsuperscript{171}

In November 1990, Justice Moynihan delivered the determination of the Court.\textsuperscript{172} In relation to the ‘continuity of a land tenure system’, he drew three main conclusions:\textsuperscript{173}

- the evidence established that the Meriam ‘recognise the continuance of claims to garden plots’;
- traditional rules of ‘inheritance continue for village residential land’; and,
- the evidence revealed ‘no notion of title by vacant possession, and no notion of relinquishment of title by abandonment’.

However, Justice Moynihan also rejected the claim ‘to the operation of a system of indigenous law’. Sharp says this was ‘fatal to the process of understanding Meriam social life, Meriam meaning systems and the character of

\textsuperscript{170} Ibid. 38.
\textsuperscript{171} Ibid. 9; Tully, above n 19, 125.
\textsuperscript{172} Bartlett, above n 12, 21-2; Sharp, above n 11, 149.
\textsuperscript{173} Sharp, above n 11, 152.
the Meriam people’.\textsuperscript{174} In particular, it neglected the significance of Malo law ‘as a belief system and as a moral-legal order’.\textsuperscript{175} Comparing this with the 
*Milirrpum* case Sharp says that this neglect occurred because the ‘interrelationships with the land’ were reduced ‘to the economic dimension’.\textsuperscript{176} This aspect continued a theme expressed in the earlier court case in which there was undue focus on economic relations as an a priori basis to recognition.

**Conclusions**

This chapter has traced the main contours affecting the relationship with Indigenous peoples from the time of colonisation of Australia and concluding with the Queensland Supreme Court decision on the Meriam claim. Relating this to the findings about language and games in Chapter 3, participants as diverse as a clerk in the Colonial Office, an attendee at a constitutional convention, or an Aboriginal representative seeking equality have acted in a language game to shape and re-shape constitutionalism. Summarising the events, they have revealed elements from three distinct languages.

An idea associated with the language of White Australia was the perception that non-Europeans were inferior. Another idea was the view that Indigenous people were too backward to have a system of governance. The presumption that the land is empty upon colonisation was a thread that guided a series of court cases as well as influencing Federation. The idea that the land was empty upon colonisation is one that the languages of both White Australia

\textsuperscript{174} Ibid. 154.
\textsuperscript{175} Ibid. 158.
and modern constitutionalism share. Or to put it another way, at least two
distinct rationales were advanced for the seizure of the lands of the Aboriginal
and Torres Strait Islander peoples. The White Australia perspective draws this
conclusion from its attitudes about racial inferiority. Associated with the
modern constitutional perspective is the absolutist view that when the Crown
acquired territory it also gained ownership to all lands. Certainly, as discussed
earlier, Tully presents evidence of ‘many modern theorists’ upholding the
‘doctrine of discontinuity’.\textsuperscript{177} The establishment of a federal government,
particularly the governance relations was also reflective of influence of modern
constitutional thinking.

Since the distinction between the White Australia and modern
constitutional languages is introduced in this chapter, a bit more should be said
about why White Australia is not treated as a variant of modern
constitutionalism. The central feature of White Australia is not based upon the
justification of cultural uniformity, as is modern constitutionalism. Rather, it
emphasises perceived racial differences between Europeans and other peoples.
Through controls on immigration and policies toward Indigenous people, non-
Europeans were effectively excluded from the Australian nation. In this respect,
this outlook is not based on one of the main forms of recognition associated
with modern constitutionalism. Equality of individual citizens was not accorded

\textsuperscript{176} Ibid. 164.
\textsuperscript{177} Tully, above n 19, 125.
to non-Europeans.\textsuperscript{178} Or, to put it another way, ‘Racial discrimination was more acceptable’.\textsuperscript{179}

On several occasions the language of common constitutionalism was expressed: consent in the Admiralty Instructions to Captain Cook and the Second Commission of Captain Phillip as well as by some members of the Colonial Office and individual settlers. Consent was also reflected in the view that referenda in each colony were required to establish the Federation. But consent was not actually exercised in relation to Aboriginal and Torres Strait Islander peoples.

The language of human rights was increasingly influential after World War II. It was significant in the campaign for the changes to the 1967 referendum and the High Court’s decisions about the Queensland legislation. Ideas associated with the language of White Australia were abandoned. For instance, the courts eventually rejected the idea that Indigenous people were inferior. From the 1960s onwards, government policy shifted. The White Australia policy was abandoned, as migration from throughout the world was belatedly deemed acceptable. There were signs that various jurisdictions were inclined to provide a form of legal recognition of Indigenous land titles. The high point of this shift was the Northern Territory legislation and its adherence to the convention of consent. This trend was also reflected in the High Court, with some judges encouraging the submission of claims for recognition.

\textsuperscript{178} Ibid. 15.
The last event examined in this chapter was the early stages of the Meriam claim. Two points are particularly relevant. The comments of the High Court minority in Mabo No 1 regarding the power of a parliament to extinguish native title signaled that this would be a key issue when the recognition of native title was directly considered. The other point is that the Queensland Supreme Court’s determination indicated some of the difficulties faced by the Australian legal system in recognising ‘Interests of a Kind Unknown to English Law’.\(^{180}\) While the Meriam claim made significant progress, the failure to respect Malo Law was an indication of the enduring pressure to make sense of another culture by drawing upon concepts from a more familiar constitutional language.

How the constitutional languages are reflected in the High Court’s decision concerning the Meriam People’s claim for recognition is the focus of the next chapter. It was undisputed that the Meriam People had occupied Mer Dauar and Waier islands in the Torres Strait for ‘generations before the first European contact’. However, the Queensland Government contested their claim for recognition that they were entitled to the islands as either ‘owners … possessors … occupiers … or … as persons entitled to use and enjoy the lands’.\(^{181}\)

\(^{180}\) See Sharp, above n 11, xxii.
\(^{181}\) *Mabo v Queensland (No 2)* (1992) 107 ALR 1, 2.
Chapter 7:

The High Court’s *Mabo* decision

The breaking of the silence on 3 June 1992 may be of a different order to those breaks which have gone before: gradually everyone had to listen to the voice of the High Court, even though by no means everyone wished to do so. As the news of the decision reverberated across the world, it began to break apart the assumption of an Australian nation without Aborigines and Islanders, a reality that had been consolidated ever since federation in 1901.

Nonie Sharp

In her chronicle tracing the lengthy and complex path leading to the eventual success of the claim brought by Eddie Mabo and the Meriam People, Nonie Sharp captures the extraordinariness of the High Court’s judgement and sounds a caution about its provisional character. In examining the claim and initial developments Chapter 6 showed that from the 1960s onwards there was a retreat from the doctrine of *terra nullius* and a desire to place relations on a different footing. When the case came before the Queensland Supreme Court, Justice Moynihan noted a ‘Meriam sense’ of ‘an enduring relationship with land’ and ‘deeply ingrained attitudes of respect for the property and land boundaries of others’. 

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This chapter focuses on the languages employed in the *Mabo* decision itself. In engaging with the complexities of legal theory the intention is not to consider the legal merits of the decision. Rather, this detailed examination is undertaken to demonstrate how the influence of the modern constitutional language suppressed the possibility that the three conventions could be respected. The examination proceeds by following the logic the High Court judges themselves employed in examining the subject matter. The different themes considered are the High Court’s attitude toward:

- Australia’s original inhabitants;
- sovereignty;
- settlement and occupation;
- radical title;
- whether pre-existing interests survive an act of State;
- the claims for recognition;
- the impact of grants upon recognition;
- the attitude toward gaining the consent of Indigenous land holders;
- whether a fiduciary obligation arose to protect Indigenous land holders;
- the impact of the Racial Discrimination legislation;
- the consequences arising from embracing a wrong doctrine; and,
- compensation for unilateral extinguishment of native title.

\[2\] Ibid. 171.
Literature for this examination draws upon several sources. Chapter 9 of Nonie Sharp’s *No ordinary judgment* provides a cultural perspective on the High Court decision.\(^3\) Two works by Kent McNeil are used, one being his foundational work *Common law aboriginal title*.\(^4\) The other is his 1996 critique of the *Mabo* decision.\(^5\) I am greatly indebted to his analysis in helping to clarify some of the legal assumptions involved, particularly the Court’s attitude toward the unilateral extinguishment of native title. Another reference point for its legal basis is Richard Bartlett’s *Native title in Australia*. Chapter 2 on the protection and recognition of native title in the *Mabo* decisions and Chapter 8 concerning its constitutional framework are particularly relevant.\(^6\) In their 1993 publication, Gary D. Meyers and John Mugambwa review the central themes of the *Mabo* decision.\(^7\) Tony Blackshield and George Williams review the decision in Chapter 5 on ‘Indigenous Peoples and the Question of Sovereignty’\(^8\). In a contribution to an assessment of the initial federal legislation, Garth Nettheim considers the relationship between native title and international law.\(^9\) Lastly, but by no means least, were the separate judgements of the High Court decision. Based on the short statement provided by Chief Justice Mason and Justice

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\(^3\) Ibid. 171-186.


\(^5\) See Kent McNeil, *Emerging justice?*, (Saskatchewan, Canada: Native Law Centre, University of Saskatchewan, 2001), (“Emerging justice?”), 357-408 for reprint of ‘Racial Discrimination and Unilateral Extinguishment of Native Title’. The article was originally published in 1996 in the Australian Indigenous Law Reporter. All references in this thesis are to *Emerging justice?*.


\(^9\) Garth Nettheim, ‘Native Title and International Law’ in Margaret A. Stephenson, (Ed), *Mabo: the native title legislation*, (St Lucia, Qld: University of Queensland Press, 1995), 36-48 (“Native Title and International Law”).
McHugh, it is presumed that on the aspects discussed below they agreed with the propositions put forward by Justice Brennan.\textsuperscript{10}

**Attitudes toward original inhabitants**

This part of the inquiry begins by considering the attitude of the High Court toward the original inhabitants. A majority of the Court rejected the proposition that Indigenous people were too backward to be organised and so rejected a key element of the language of White Australia. In rejecting this proposition, they were obliged to engage with two key themes considered by Justice Blackburn in the 1971 *Milirrpum v Nabalco* case (*Milirrpum*).\textsuperscript{11} While concurring with Justice Blackburn on the first theme, the rest of the bench disagreed with him on the second.

The first theme concerned whether a system of laws was in existence before British acquisition. Six of the seven judges affirmed this point. Given that the judges were prepared to acknowledge the distinct culture of the Indigenous inhabitants, this suggests an adherence to an aspect of the language of common constitutionalism. Justice Brennan cited the judgement of Justice Blackburn in *Milirrpum* to the effect that the evidence shows a ‘subtle and elaborate system highly adapted to the country in which the people led their lives ...’ Justice Toohey commented that it was ‘inconceivable that indigenous inhabitants in occupation of land did not have a system by which land was utilised in a way determined by that society. There must, of course, be a society

\textsuperscript{10} *Mabo v Queensland (No 2)* (1992) 107 ALR 1, 7 ("Mabo v Queensland (No 2)").

\textsuperscript{11} *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141 (SC (NT)).
sufficiently organised to create and sustain rights and duties, but there is no separate requirement to prove the kind of society, beyond proof that presence on land was part of a functioning system.’ Likewise, Justices Deane and Gaudron rejected the idea that Australia’s ‘Aboriginal people’ should be ‘treated as a different and lower form of life whose very existence could be ignored for the purpose of determining the legal right to occupy and use their traditional homelands’.12

Unlike his colleagues, Justice Dawson was not prepared to acknowledge the distinct culture of the Indigenous inhabitants. He does refer to ‘a system’ applying on the Murray Islands, not in discussing Justice Moynihan’s Supreme Court comments, he also said it was not of a standard that could be described as customary:13

A system, such as that which apparently existed prior to annexation, whereby the control and disposition of land depended on what was acceptable in terms of social harmony and on the capacity of the individual to impose his will on the community, does not seem to me to amount to any sort of custom, whether or not characterised as a system of laws, regarding the control and disposition of land.

The second theme concerns whether the lands were either socially and/or legally empty before colonisation.14 In the 1889 case of Cooper v Stuart Lord

12 Mabo v Queensland (No 2), above n 10, 26 (Brennan J), 82 (Deane and Gaudron JJ), 146 (Toohey J, Italics in original).
13 Ibid. 125 (Dawson J).
14 Richard Bartlett argues that the High Court ‘did not reject the concept of terra nullius in international law as applicable to Australia’. This view is not central to the scope of thesis and is therefore not examined. See above n 6, 23.
Watson declared Australia was ‘practically unoccupied’ and ‘without settled inhabitants or settled law’.\(^\text{15}\) Rejecting this proposition, and linking it to the language of White Australia, Justice Brennan said the ‘facts as we know them today’ do not fit the ‘absence of law’ or ‘barbarian’ theory ‘underpinning the colonial reception of the common law of England’.\(^\text{16}\) Justices Deane and Gaudron also rejected the idea advanced in the four earlier legal cases that ‘New South Wales had been unoccupied for practical purposes’ when colonised.\(^\text{17}\) Justice Toohey acknowledged the lands were inhabited and therefore considered that the doctrine of \textit{terra nullius} had no authority. Confining his comments on this matter to the Murray Islands, Justice Toohey categorically stated: ‘One thing is clear ... The Islands were not terra nullius.’\(^\text{18}\) Later, he said that the ‘operation of the notion’ of \textit{terra nullius} ‘only arises in the present case because of its theoretical extension to the Islands. But clearly it can have no operation’.\(^\text{19}\) Justice Dawson did not state the lands were unoccupied when colonised. However, he did consider earlier court declarations of land occupied by Indigenous people as ‘waste land’ as strongly defendable in legal doctrine,\(^\text{20}\) thereby affirming another aspect associated with the language of White Australia.

The judges recognising the Meriam claim were acutely aware that continuing adherence to a doctrine factually flawed and linked to theories long...

\(^\text{15}\) \textit{Mabo v Queensland (No 2)}, above n 10, 141 (Toohey J), citing Justice Watson.
\(^\text{16}\) Ibid. 26.
\(^\text{17}\) Ibid. 78 (Deane and Gaudron JJ).
\(^\text{18}\) Ibid. 141.
\(^\text{19}\) Ibid. 142.
\(^\text{20}\) Ibid. 93, 115 (Dawson J).
discredited risked undermining the authority of the common law. Justice Brennan was the most expansive on this point:

… the international law notion that inhabited land may be classified as terra nullius no longer commands general support, the doctrines of the common law which depend on the notion that native peoples may be ‘so low in the scale of social organisation’ that it is ‘idle to impute to such people some shadow of the right known to our law’ can hardly be retained. If it were permissible in past centuries to keep the common law in step with international law, it is imperative in today’s world that the common law should neither be nor seen to be frozen in an age of racial discrimination.

Sovereignty

By accepting that a system of laws existed before the British acquired Australia, the majority of the judges implied the Indigenous inhabitants were sovereign peoples. However, the judges did not explore this matter further, and so carefully kept within the bounds of modern constitutional language and its interpretation of sovereignty as tied to territory acquired by a nation. It appears that they were guided in this respect by the prevailing legal doctrine concerning the acquisition of territory. Legal doctrine now divides such claims for recognition between two distinct branches (and by inference into different jurisdictions), which makes it exceedingly difficult for any new sovereignty claims to succeed. McNeil explains that territorial sovereignty is considered to

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21 Nettheim, above n 9, 38.
22 Mabo v Queensland (No 2), above n 10, 28 (Brennan J).
involve ‘questions of international and constitutional law’ whereas title to land is considered a ‘matter of proprietary rights, which depends for the most part on the municipal law of property’. McNeil also noted that the ‘municipal law criteria for determining whether territorial sovereignty has been acquired are not necessarily the same as those of international law’. For instance, in the case of English law, power to acquire new territory is assigned to the Crown ‘as part of its prerogative’, and held ‘that a declaration of sovereignty by the Crown, even if inconsistent with international law, is conclusive’. Therefore, international law cannot be used ‘in English law courts ... to invalidate a positive assertion of sovereignty by the Crown’. 

Following these principles, the Court said it was precluded from examining the validity of an act of state concerning the acquisition of Australia. For instance, Justice Brennan affirmed the statement by Justice Gibbs in the Sea and Submerged Lands case that the ‘acquisition of territory by a sovereign state for the first time is an act of state which cannot be challenged, controlled or interfered with by the courts of that state’. Following English law, he considered that a prerogative act was a legitimate ‘act of state’. Since the Murray Islands were ‘annexed by an exercise of the prerogative evidenced by the Letters Patent’, he said this was a ‘mode of acquisition recognised by the common law as a valid means of acquiring sovereignty over foreign territory’. He also observed that adherence to this principle ‘precludes any contest between the

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23 Ibid. 2 (Brennan J, Mason CJ and McHugh concurring).
25 Ibid. 111.
executive and judicial branches of government as to whether a territory is or is not within the Crown’s Dominions’. 26

Similarly, Justices Deane and Gaudron noted that under ‘British law in 1788, it lay within the prerogative power of the Crown to extend its sovereignty and jurisdiction to territory over which it had not previously claimed or exercised sovereignty or jurisdiction’. They considered that the ‘exercise of that prerogative ... was an act of State whose primary operation lay not in the municipal arena but in international politics or law’. The ‘validity of such an act of State (including any expropriation of property or extinguishment of rights which it effected) could not be challenged in the British courts’. Expressing the opinion that the Meriam claim did not involve any ‘question of constitutional power’, they had no doubt that the High Court must accept ‘that the whole of the territory’ was ‘validly’ established as a ‘settled’ British colony. Justice Dawson also considered the annexation of the Murray Islands ‘an act of state’ which remains ‘legally effective’. Justice Toohey, the seventh member of the Court, did not explicitly comment on this matter, but implied agreement with his colleagues.27

The precise wording of the claim suggests the claimants were mindful of the prevailing constitutional language on sovereignty. The Meriam People did not challenge the proposition that the Crown acquired sovereignty to the Murray Islands. Indeed, their claim is premised on the assumption that the British

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26 Mabo v Queensland (No 2), above n 10, 20 (Brennan J).
27 Ibid. 58 (Deane and Gaudron JJ), 91-2 (Dawson), 140 (Toohey J).
Crown acquired sovereignty of the islands. Nor did they claim nationhood. Instead, they concentrated on asserting only those aspects of the language of common constitutionalism necessary to gain recognition of their claim. If they had sought recognition of their sovereignty or nationhood, it is possible a fuller explanation from the Court would have been forthcoming. In the absence of an explicit claim around sovereignty, interpretations of the Court’s view and the possibilities available diverge. Tully suggests an ‘inherent right of self-government comes along with native title’, which means an assessment of the decision must at least consider the Court’s attitude toward circumstances where legislative and executive extinguishment occurs without the consent of the native title holder. These matters will be considered later in this chapter.

**Settlement and occupation**

Now the Court’s attitude toward settlement and occupation will be considered. McNeil writes that at one time ‘the only means of acquiring territorial sovereignty recognised by common law were the derivative modes of descent and conquest’. He added that the latter ‘probably’ encompassed ‘cession’, in reference to the transfer of sovereignty over territory by way of a treaty. In conquered and ceded territories it was presumed that local laws and

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28 See ibid. 92 (Dawson), 138 (Toohey J).
30 Tully, A Fair and Just Relationship, above n 29, 160.
customs, ‘unless unconscionable or incompatible with the change in sovereignty’ would remain in force until altered or replaced by the Crown.\textsuperscript{32} Tully draws attention to the norm that in such circumstances existing constitutional relations should be upheld. ‘The customs and ways of a conquered people continue until the conqueror expressly discontinues them.’\textsuperscript{33} Tully does not refer to the qualifications ‘unconscionable’ or ‘incompatible’, suggesting that these have arisen from subsequent legal cases. McNeil refers to further modification, no doubt to take account of the democratisation of sovereignty. For instance, the Crown only held the power ‘to make laws not contrary to fundamental principles until a representative legislative assembly was promised or created’.\textsuperscript{34}

In the case of settled territories, McNeil says legal doctrine considers English law ‘accompanied the colonists to the extent that it was applicable to local circumstances’. As a consequence, in such circumstances the Crown ‘had no legislative authority’ apart from statute,\textsuperscript{35} but did have the ‘power to set up courts of justice and constitute a representative assembly’. McNeil says these general rules were ‘well settled before the end of the eighteenth century’, although their practical application led to some adjustments later.\textsuperscript{36} For instance, in conquered and ceded territories where ‘local law was unsuitable for Europeans, the colonists were held to be subject to English law instead’.\textsuperscript{37} In settled territories with Indigenous populations, ‘the importation of English law

\textsuperscript{32} McNeil, \textit{Common law aboriginal title}, above n 4, 113.
\textsuperscript{33} James Tully, \textit{Strange multiplicity: constitutionalism in an age of diversity}, (Cambridge: Press Syndicate of the University of Cambridge, 1997), 125 (“\textit{Strange multiplicity}”).
\textsuperscript{34} McNeil, \textit{Common law aboriginal title}, above n 4, 113-4.
\textsuperscript{35} Ibid. 114-5.
\textsuperscript{36} Ibid. 115.
by the settler community did not necessarily abrogate pre-existing customary law’. Therefore, McNeil observed, the ‘extent to which English law was introduced and local law retained was thus a variable depending on the circumstances of each particular colony’.38

As was seen in the last chapter, several court determinations declared Australia ‘practically unoccupied’ when settlement was established. In considering the claim of the Meriam People, the High Court was obliged to revisit this matter. Six judges followed accepted legal doctrine and drew a distinction between the categories of conquest and settlement. For instance, Justices Deane and Gaudron said in ‘cases of cession and conquest, the pre-existing laws of the relevant territory were presumed to be preserved by the act of State constituting the Colony but the Crown, as new Sovereign, could subsequently legislate by proclamation pending local representative government’. However, in the case of a ‘settled Colony’, this was ‘quite different’: ‘Where persons acting under the authority of the Crown established a new British Colony by settlement, they brought the common law with them’. It was considered that only ‘so much of it was introduced’ as was ‘reasonably applicable to the circumstances of the Colony’. Justices Deane and Gaudron said that this ‘left room for the continued operation of some local laws or customs among the native people and even the incorporation of some of those laws and customs as part of the common law’.39

37 Id.
38 Ibid. 115-6.
39 Mabo v Queensland (No 2), above n 10, 22-25 (Brennan J), 58 (Deane and Gaudron JJ).
These judges affirmed that ‘once the establishment of the Colony was complete ... the English common law, adapted to meet the circumstances of the new Colony, automatically applied throughout the whole Colony as the domestic law ...’ Retrospectively bringing the Indigenous inhabitants individually under the protection of common law, Justices Deane and Gaudron noted that from that time ‘both the Crown and its subjects, old and new, were bound by that common law’. In doing so, the judges embraced one of the cornerstones of the language of modern constitutionalism in treating the Indigenous inhabitants as individuals in a unitary state. They did not consider whether the Indigenous inhabitants wished to embrace different constitutional norms.

The judges did not review whether settlement was an appropriate classification, instead they presumed it was essential to sever its link with the idea that the country was uninhabited. Justice Brennan expressed their view on this matter when he said the ‘settlement of an inhabited territory is equated with settlement of an uninhabited territory ...’ at least as far as ‘ascertaining the law of the territory on colonisation’. The nature of the claim may have been a factor in this. Justice Toohey comments that the ‘plaintiffs accept that the Islands were settled by Britain rather than conquered or ceded’. Moreover, the judges appear to have considered the matter of classification largely historical since the rights of Indigenous inhabitants could continue under settlement.

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40 Ibid. 59 (Deane and Gaudron), see also 25-6 (Brennan J), 142 (Toohey J).
41 Tully, Strange multiplicity, above n 33, 15.
42 Mabo v Queensland (No 2), above n 10, 25 (Brennan J), 60 (Deane and Gaudron JJ), 142 (Toohey J).
43 Ibid. 142 (Toohey J).
44 Some legal commentary has suggested the court should have considered classification. Richard Bartlett argues that settlement is the ‘analogous doctrine at common law’ of the
Justice Dawson does not examine the distinctions between conquest and settlement. While he accepted that common law applied throughout the colony, he saw ‘no need to classify the Murray Islands as conquered, ceded or settled territory’. He considered the islands annexed by the application of ‘the law of Queensland’. Nevertheless, it is also apparent that he applies this more broadly than the Murray Islands. Since he treated ‘all land in the colony as unoccupied’ prior to European settlement, he therefore considered any review of the classification issues unnecessary.

Radical and beneficial titles

As was seen in the last chapter, in several earlier court decisions affecting relations with Indigenous people in Australia it was presumed that when the British colonised Australia it also gained ownership to all lands. Citing Thomas Jefferson, Tully relates that the idea that ‘all lands in England were held either mediately or immediately of the crown’ was ‘first introduced by William, the Norman’. This was an attempt by ‘Norman lawyers’ to impose further ‘feudal burdens’ on the common-law property of ‘free born Englishmen under the guise of the Norman fiction of discontinuity.’ It appears that English law eventually embraced these ideas and extended them internationally so they are

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international classification terra nullius. This implies that he considered that conquest was the only appropriate way to classify the acquisition of Australia (since there is no evidence of cession occurring). See above n 6, 22-3. Blackshield and Williams also comment that in “correcting the terra nullius error without fully working out the consequences for the ‘conquered’/‘settled’ distinction, the Court may have left its historical re-analysis incomplete”. See above n 8, 205.

45 Mabo v Queensland (No 2), above n 10, 106 (Dawson J).
46 Ibid. 6 (Dawson J).
47 Thomas Jefferson, cited by Tully, Strange multiplicity, above n 33, 153.
now fundamental to the doctrine of tenures. McNeil acknowledged as much, though in slightly different words. He states that ‘[a]ll lands in the hands of subjects are held of some lord, ultimately the Crown, who is lord paramount over every parcel of non-Crown land in the realm’ and this ‘fundamental principle is the basis of the doctrine of tenures’.48 Significantly, this principle is today also acknowledged as ‘mainly a fiction of law’49 and not a statement of fact about the situation immediately preceding the Norman invasion.50 McNeil argues this fiction cannot be employed by the Crown to ‘require a person who is in possession of land to prove his right by producing a royal grant, for in most cases no grant exists’.51

However, what is English law does not necessarily apply elsewhere. Indeed, in Scotland the King was not deemed paramount lord of all land; but the ‘English view favoured a universal application of the doctrine of tenure’.52 This highlights that propensity in Western constitutionalism to universalise what was essentially a unique experience.53 From this has developed the maxim that the doctrine of tenures was concomitant to the introduction of the common law to a settled colony.54

If it was fiction that the Crown owned all lands, then how was it that the earlier court cases in Australia considered the Crown had gained ownership of all lands? McNeil considers the ‘medieval’ experience ‘obscured’ the

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48 McNeil, Common law aboriginal title, above n 4, 79.
49 Ibid. 84.
50 See ibid. 83.
51 Ibid. 84.
52 Mabo v Queensland (No 2), above n 10, 32 (Brennan J).
53 Tully, Strange multiplicity, above n 33, 69.
'fundamental distinction between territorial sovereignty and title to land’. He says these are two quite distinct powers. The former is mainly a ‘matter of jurisdiction, involving questions of international and constitutional law’. The latter refers to the ownership and title to land. This depends for the ‘most part on the municipal law of property’. He noted that regardless of whether one continues to adhere to the fiction of the sovereign’s original ownership of all lands, it is ‘not a prerequisite to sovereignty in English law’ that all lands are possessed and owned by the sovereign. In other words, he argues that English law continued to affirm the norm of continuity that existing rights to land are maintained even when a country is conquered.

In *Mabo*, six of the judges differentiated between territorial sovereignty and title to land. Such a step was crucial to create space for acknowledging the continuity of ‘pre-existing customs and ways’ of Indigenous people. Justice Brennan, for instance, used radical title to describe territorial sovereignty and beneficial title for ownership of land. He said that ‘it is not a corollary of the Crown’s acquisition of a radical title to land in an occupied territory that the Crown acquired absolute beneficial ownership of that land to the exclusion of indigenous inhabitants’. Similarly, Justices Deane and Gaudron considered that ‘upon the establishment of the Colony, the radical title to all land vested in the

55 Ibid. 108.
56 Ibid. 109.
57 Tully, *Strange multiplicity*, above n 33, 125.
58 It is beyond the scope of this thesis to examine this point further. However, Edgeworth considers the extent to which its application in Australia differs from that applied in England, concluding that the doctrine of tenure, “to the extent that it applies in Australia, is but a shadow of its English self”’. See Brendan Edgeworth, ‘Tenure, allodialism and indigenous rights at common law: English, United States and Australian land law compared after *Mabo v. Queensland*’, *Anglo-American Law Review*, 1994, Vol 23 No 4, Oct-Dec, 397-434.
59 Tully, *Strange multiplicity*, above n 33, 125.
Crown’. Its ‘practical effect ... was merely to enable the English system of private ownership of estates held of the Crown to be observed in the Colony’. Justice Toohey also observes that ‘the distinction between sovereignty and title to or rights in land is crucial’.\textsuperscript{60} In doing so, the judges embrace a premise consistent with the common constitutional doctrine of continuity: it is possible to maintain title to land even if the sovereignty of a territory changes.

In considering the impact of wrongly presuming that sovereignty also provides ownership to all lands. Justice Brennan points out that it was ‘only by fastening on the notion that a settled colony was terra nullius that it was possible to predicate of the Crown the acquisition of ownership of land in a colony already occupied by Indigenous inhabitants. It was only on the hypothesis that there was nobody in occupation that it could be said that the Crown was the owner because there was no other’.\textsuperscript{61} Justices Deane and Gaudron pointed to two cases, \textit{Attorney-General v Brown}\textsuperscript{62} and \textit{Cooper v Stuart}\textsuperscript{63} that supported the proposition ‘that New South Wales had been unoccupied for practical purposes’. Justice Toohey also observed that it ‘was only with the colonising of territories that were uninhabited or \textit{treated as such} that settlement came to be recognised as an effective means of acquiring sovereignty ...’\textsuperscript{64}

Justice Dawson did not follow his colleagues in modifying the theoretical understanding of the introduction of the doctrine of tenure. Looking

\begin{footnotesize}
\textsuperscript{60} \textit{Mabo v Queensland (No 2)}, above n 10, 34 (Brennan J), at 60 (Deane and Gaudron JJ), 140 (Toohey J).
\textsuperscript{61} Ibid. 31 (Brennan J).
\textsuperscript{62} \textit{Attorney-General v Brown} (1847) 1 Legge 312.
\textsuperscript{63} \textit{Cooper v Stuart} (1889) 14 App Cas 286.
\textsuperscript{64} \textit{Mabo v Queensland (No 2)}, above n 10, 77-8 (Deane and Gaudron JJ), 141 (Toohey J, italics added).
\end{footnotesize}
specifically at the claim, he reasoned that ‘upon annexation, the ultimate title to
the lands comprising the Murray Islands vested in the Crown’. He considered
that this a ‘necessary consequence of the exertion of sovereignty by the Crown
for, under the system of law which the Crown brought with it, the ultimate title
to land - sometimes called the absolute or radical title - resides in the Crown’.
He added ‘that upon annexation of the Murray Islands the Crown became the
absolute owner of the land and such rights as others might have in it must be
derived from the Crown and amount to something less than absolute
ownership’.65 That is, his position echoes that advanced by Norman law: that the
sovereign held absolute power and was proprietor of all lands.66

Pre-existing interests

In order for a native title claim to succeed, the judges would have to
consider one more potential obstacle arising from an act of state: its effect upon
the ‘pre-existing interests’, the rights ‘held under local law prior to the Crown’s
acquisition of a territory’.67 McNeil identifies two legal perspectives on whether
the Crown must provide explicit acknowledgment to protect the private property
of local inhabitants. One perspective is known as the recognition doctrine, the
irony of the label apparently escaping its adherents.68 In this view, any rights
existing before the acquisition by a new sovereign depend on an explicit
acknowledgement by the Crown. This perspective has its precedents in several

65 Ibid. 93 (Dawson J).
66 Tully, Strange multiplicity, above n 33, 125.
68 McNeil, above n 4, 165-171.
decisions of the Privy Council and Australian courts. Other cases cited in its support include *Vajesingji Joravarsingji v Secretary of State for India, Secretary of State v Bai Rajbai, Asrar Ahmed v Durgah Committee, Ajmer* and *Tee-Hit-Ton Indians v United States*. McNeil noted that the practical implications of this perspective extend beyond the Crown acquiring all lands to render inhabitants ‘trespassers in their own homes’ and their ‘personal possessions’ ‘Crown property’. Like the Norman view, this perspective follows the norm of discontinuity.

The other perspective draws on a line of authority that presumes private property rights continue after a change of sovereignty. Where inhabitants can continue local laws and property rights without the Crown’s intervention, any recognition of their rights would be unnecessary. No matter which classification of acquisition in international law, these laws and rights presume to continue. This presumption is called the doctrine of continuity. Cases cited in its support include *Re Southern Rhodesia, Amodu Tijani, Guerin v R, Calder v A G British Columbia* and *Delgamuukw v British Columbia*. McNeil argued that the first perspective arose because of the ‘unfortunate misinterpretation of a few isolated decisions’.

Both of these perspectives are subordinate to the Crown’s prerogative powers because they assume when the Crown acquires territory through

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69 Meyers & Mugambwa, above n 7, 1211.
70 *Mabo v Queensland (No 2)*, above n 10, at 142-3 per Toohey J.
72 Tully, *Strange multiplicity*, above n 33, 125.
73 Ibid. 191-2.
74 *Mabo v Queensland (No 2)*, above n 10, 143 (Toohey J).
exercising an act of state it can do as it pleases toward the local inhabitants. As such, legal arguments that support the continuity of private property after a change of sovereignty depend on the Crown not seizing such property. However, and significantly for this inquiry, they also reflected the struggles between the two languages Tully refers to. The ‘recognition doctrine’ echoes the Norman assertion of discontinuing pre-existing interests and also considers the act of state as foundational and beyond the challenge of the courts. In this sense, it echoes the seventh feature of modern constitutionalism by rendering the act of state above question and backgrounding democratic politics. Such an approach also has a strongly imperialistic flavour and is inconsistent with contemporary democratic principles and respect for popular sovereignty.76

The presumption private property continues with a change of sovereignty is a hybrid comprising elements of both the languages of modern constitutionalism and common constitutionalism. From modern constitutionalism, it takes the idea that the new sovereign through an act of state can seize private property. From the language of common constitutionalism comes the presumption that private property rights continue after acquisition if their seizure is not exercised. While Tully argues for a modern constitution ‘trimmed of’ features that ‘violate the three conventions’,77 contemporary legal doctrine turns this on its head. The common conventions are ‘trimmed’ to be consistent with the language of modern constitutionalism.

75 Ibid. 161-2.
77 Tully, Strange multiplicity, above n 33, 184.
In *Mabo*, the plaintiffs argued on behalf of the Meriam People that ‘the interests their predecessors enjoyed in the Islands prior to annexation survived acquisition by the British Crown and became a dimension of common law’. In other words, they argued that the norm of continuity applied to their circumstances. Rejecting this view, the Queensland government argued ‘pre-existing customary rights and interests in land are abolished upon colonisation of inhabited territory, unless expressly recognised by the new sovereign’. This echoes the view expressed in Norman law that a new constitutional arrangement discontinues or extinguishes pre-existing customs or ways of a people.

Six of the judges agreed the survival of these rights were not dependent upon the explicit recognition of the Crown. Justice Brennan observed that 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 recognised as a burden on the Crown’s radical title when the Crown acquires sovereignty over that territory’. On this basis, he embraced the ‘preferable rule ... that a mere change in sovereignty does not extinguish native title to land’. This ‘equates the indigenous inhabitants of a settled colony with the inhabitants of a conquered colony in respect of their rights and interests in land ...’ Justice Toohey considered the ‘so called doctrine of continuity’ is ‘more persuasive and should be followed’. He cited Lord Sumner in the Privy Council in *Re Southern Rhodesia* that ‘... upon a

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78 *Mabo v Queensland (No 2)*, above n 10, 137 (Toohey J).
79 Ibid. 38-9 (Brennan J).
80 Tully, *Strange multiplicity*, above n 33, 125.
81 *Mabo v Queensland (No 2)*, above n 10, 36 (Brennan J).
82 Ibid. 41 (Brennan J).
83 *Re Southern Rhodesia* (1919) AC, 233.
conquest it is to be presumed, in the absence of express confiscation or of subsequent expropriatory legislation, that the conqueror has respected [private property rights] and forborne to diminish or modify them’. Moreover, he considered that ‘seizure of private property by the Crown in a settled colony after annexation has occurred would amount to an illegitimate act of state ...’

Justices Deane and Gaudron preferred the ‘guiding principle’ expressed in *Adeyinka Oyekan v Musendiku Adele*\(^84\) where the Privy Council held that the ‘assumption that pre-existing rights are recognised and protected under the law of a British Colony’ as it ‘accords with fundamental notions of justice’.\(^85\)

Justice Dawson was the only judge to support the so-called recognition doctrine, arguing that any rights to land did not survive annexation. Referring to the conclusion of Justice Hall in the 1973 Canadian case of *Calder v Attorney-General of British Columbia*\(^86\) he said ‘if what Hall J meant was that traditional native title somehow survived the exertion of sovereignty by the Crown independently of any recognition of it by the Crown ... I am unable to agree’.\(^87\) Thus, if any connection to land survived, Justice Dawson reasoned it could only be ‘an occupancy which the Crown, as absolute owner, permits to continue’.\(^88\)

The act of state is inconsistent with the common constitutional conventions because it holds that a new sovereign can unilaterally extinguish the rights of those inhabiting a country. The doctrine is one thing, but its particular application is something else again. Because no evidence was

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\(^84\) *Adeyinka Oyekan v Musendiku Adele* (1957) 1 WLR 876; 2 All ER 785.

\(^85\) *Mabo v Queensland (No 2)*, above n 10, 61 (Deane and Gaudron JJ), 143 (Toohey J).

\(^86\) *Calder v Attorney-General of British Columbia* (1973) DLR (3d) 145.

\(^87\) *Mabo v Queensland (No 2)*, above n 10, 99 (Dawson J).
forthcoming to demonstrate that when Australia was acquired Britain had to extinguish any of the rights of the existing inhabitants, then native title rights could survive the British acquisition of sovereignty even though the court upheld the act of state. Thus, Justice Brennan decided that ‘the antecedent rights and interests in land possessed by the indigenous inhabitants of the territory survived the change in sovereignty’. Likewise, Justice Toohey determined that ‘traditional title may exist after annexation because it is not precluded by Crown ownership of occupied lands and because it arose regardless of the positive recognition by the Crown ...’\(^89\)

**Claims for recognition**

In deciding that pre-existing interests may survive the British acquisition of the territory, the Court majority proceeded to consider whether a basis exists for common law recognition of native title. At the end of the last chapter, Justice Moynihan’s findings that established the continuity of the Meriam People’s land tenure system were noted. These findings were provisional because they depended on the Court deciding the central question around recognition.

The particular claim before the Court centred on the statement lodged on the Meriam People’s behalf that they ‘have been since prior to annexation by the British Crown, entitled to the Islands: (a) as owners; (b) as possessors; (c) as

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\(^88\) Ibid. 106 (Dawson J).
\(^89\) Ibid. 41 (Brennan J), 61-2 (Deane and Gaudron JJ), 144 (Toohey J).
occupiers, or (d) as persons entitled to use and enjoy the Islands’. According to Justice Toohey, the plaintiffs ‘put their claim on three bases’:\footnote{Ibid. 137-8 (Toohey J.)}

- ‘That the interests their predecessors enjoyed in the Islands prior to annexation survived acquisition by the British Crown and became a dimension of the common law ...’;
- that ‘their predecessors acquired a possessory title as a consequence of the operation of the common law in the new colony’; and,
- that ‘they could establish, as of today, local legal customary rights’. The plaintiffs said, ‘legal customs exercised by the Meriam people today, though different from common law, should prevail so long as certain conditions are met. The customs must be certain; they must have been exercised since ‘time immemorial’ without interruption; they must be reasonable and not oppressive at the time of their inception; they must be observed as of right and not pursuant to any licence or permission granted by another; and they must not be inconsistent with any statute law.’

Relevant to the Court’s thinking on how to address the claim was that work had already been done on articulating a common law basis to recognise native title. In *Common law aboriginal title* McNeil demonstrated two ways that Indigenous people can gain recognition of their traditional rights via legal doctrine. One way is to prove the existence of their customary laws at the time the Crown acquired sovereignty, relying upon the presumption that those rights continued. However, McNeil considered significant obstacles may arise to such an approach because in ‘territories which lack a history of judicial ascertainment...’
of indigenous systems of land tenure, the problems of proving relevant customs may be insurmountable’.\(^9\) Another way is to claim exclusive occupancy at the time of acquisition and ‘claim title thereto by virtue of the common law’ applies ‘in the settlement from that moment on’. McNeil considered such a claim for common law Aboriginal title is easier since legal doctrine generally considers occupation is prima facie proof of possession.\(^9\)

In considering the claim, Justice Toohey engaged with McNeil’s work. He differentiates between ‘two kinds of interest’ the plaintiffs’ can claim.\(^9\) One, traditional title, was similar to what McNeil describes as customary law.\(^9\) Its origin ‘lies in the indigenous society occupying territory before annexation’. Its ‘specific nature and incidents correspond to those of the traditional system of law existing before acquisition of sovereignty by the Crown’. Adding a note of caution, he said it was ‘important to appreciate that, particularly with respect to traditional title’ the use of the term ‘title’ is ‘artificial and capable of misleading’. He observed that the rights ‘claimed by the plaintiffs ... do not correspond to the concept of ownership as understood by the land law of England developed since feudal times, and by the later land law of Australia’. Title ‘is no doubt a convenient expression and has the advantage that, when recognised by the law of Australia ... it fits more comfortably into the legal system of the colonising power.’\(^9\) Placing this in a cultural context Toohey said this is ‘a special collective right vested in an Aboriginal group by virtue of its

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92 Ibid. 241.
93 Kent McNeil cited in *Mabo v Queensland (No 2)*, above n 10, 139 (Toohey J).
95 *Mabo v Queensland (No 2)*, above n 10, 139 (Toohey J).
long residence and communal use of land or its resources’. Justice Toohey also said that this type of title was previously argued in ‘land rights cases ...’ This is recognised by the common law, ‘though what is required to establish that recognition is a matter of contention’. After reviewing the issues surrounding annexation, he concluded, ‘traditional title to land ... is presumed to continue unless and until lawfully terminated’. Since he was referring to the ‘indigenous inhabitants’ of Australia as a whole, it is arguable that he found a basis for common law to recognise all customary claims and not just for the claim of the Meriam People.

The second form, common law Aboriginal title, ‘has no existence before annexation since it is said to arise by reason of the application of common law’. Justice Toohey explained that not only the ‘existence’ of this form, but also ‘its nature and incidents are determined entirely by principles of common law’. Since Justice Toohey accepted that claims for possession can be made at common law, it is also clear that he presumes the existence of this form of recognition. This presumption is confirmed by his statement that at ‘common law conduct required to prove occupation or possession will vary according to the circumstances ...’ When he examines the grounds for the existence of common law native title, he found that ‘prima facie all indigenous inhabitants in possession of their land on annexation are presumed to have a fee simple

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97 Mabo v Queensland (No 2), above n 10, 139 (Toohey J).
98 Ibid. 144 (Toohey J).
99 Ibid. 139 (Toohey J).
100 Ibid. 166 (Toohey J).
estate’. Moreover, Justice Toohey observed that the ‘proposition that possession of itself gives rise to a right in the plaintiff to recover possession, if lost, is supported by principle’. That is, without ‘evidence to the contrary’, the ‘presumption arising from proof of the plaintiff’s possession’ stands. On this reasoning a ‘title arising from prior possession can be defeated either by a defendant showing that he or she ... has a better, because older, claim to possession or by a defendant showing adverse possession against the person for the duration of a limitation period’.

When considering the basis to recognise traditional title (as he called native title), Justice Toohey directly addressed the view expressed by Justice Blackburn in *Milirrpum* that recognition is dependent upon ‘proof ... that the Aboriginal interests be proprietary’. He noted that in ‘English and Australian decisions two requirements have emerged: that the interests said to constitute title be proprietary and that they be part of a certain kind of system of rules’. Looking elsewhere for guidance, Justice Toohey turns to the ‘North American courts’. Analysing the 1980 Canadian case, *Hamlet of Baker Lake v Minister of Indian Affairs and Northern Development*, he observed that ‘[u]ltimately, traditional title has a common law existence because the common law recognises the survival of traditional interests and operates to protect them’. He added that ‘it would defeat the purpose of recognition and protection if only those existing rights and duties which were the same as, or which approximated

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101 Ibid. 164 (Toohey J).
102 Ibid. 164 (Toohey J).
103 Ibid. 165 (Toohey J).
104 Ibid. 145 (Toohey J).
105 Ibid. 144 (Toohey J).
to, those under English law could comprise traditional title’. He concludes that ‘inquiries into the nature of traditional title are essentially irrelevant’ to determining ‘the existence or non-existence of traditional title’. Rejecting Justice Blackburn’s view, he determined that ‘requirements that Aboriginal interests be proprietary or part of a certain kind of system of rules are not relevant to proof of traditional title’.107

However, the other five judges held that pre-existing interests survived the British acquisition of Australia and were not guided by either of McNeil’s approaches. Justice Brennan began his comments on the ‘nature and incidents of native title’ by clarifying the general relationship of native title to common law. He noted that native title has ‘its origins in and is given its content by the traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants of a territory’. Furthermore, given its distinct origins, it is ‘not an institution of common law’.108 Thus, where Indigenous people ‘have a connection with the land … its incident and the persons entitled thereto are ascertained’ according to the ‘laws and customs of the indigenous people who … have a connection with the land’.109 He does not make a general prescription about its nature instead he considered the ‘nature and incidence of native title must be ascertained as a matter of fact by reference’ to ‘laws and customs’.110 Thus, its nature may vary with some native title being ‘classified by the

106 See Hamlet of Baker Lake v Minister of Indian Affairs and Northern Development 107 DLR (3d) 513.
107 Mabo v Queensland (No 2), above n 10, 145-6 (Toohey J).
108 Ibid. 42 (Brennan J).
109 Ibid. 51 (Brennan J).
110 Ibid. 42 (Brennan J).
common law as proprietary, usufructuary or otherwise’. Justice Brennan is also reluctant to confer the term ‘ownership’ on native title. When discussing the claim for the Murray Islands, he said ownership is ‘a term which connotes an estate in fee simple or at least an estate of freehold’. He said that this ‘may be confusing’ since it ‘is not a title created by grant nor is it a common law tenure ...’

Justice Brennan referred to cases that dealt with the conquest of Ireland and Wales for precedent in the recognition of land relations that originate outside common law. He observed that in both cases it was ‘held that the inhabitants who had been left in possession of land needed no new grant to support their possession under the common law and they held their interests of the King without a new conveyance’. While in these cases the Courts ‘were speaking of converting the surviving interests into an estate of a kind familiar to the common law’, he saw ‘no reason why the common law should not recognise novel interests in land, which not depending on Crown grant, are different from common law tenures’. A little later, commenting on the 1608 Case of Tanistry he said that the ‘Irish custom of tanistry’ was held to be void because it was founded in violence and because the vesting of title under the custom was uncertain’. For these reasons, he said the common law did not recognise the Irish custom of tanistry because its perceived inconsistency ‘precluded the recognition of the custom by the common law’. He observed that at ‘this

111 Ibid. 51 (Brennan J).
112 Ibid. 55-6 (Brennan J).
113 Ibid. 34-5 (Brennan J).
114 Tanistry is described as a ‘Celtic mode of tenure according to which a lord’s successor was chosen from his family by election’. See H.W. Fowler & F.G. Fowler (Eds), The concise Oxford dictionary of current English, Fifth Edition, (London: Oxford University Press, 1969), 1323.
115 Mabo v Queensland (No 2), above n 10, 42-3 (Brennan J).
stage in its development, the common law was too rigid to admit recognition of a native title based on other laws or customs, but that rigidity has been relaxed, at least since the decision of the Privy Council in [the 1921 case of] Amodu Tijani’. Despite the relaxation, Justice Brennan finds consistency in principle between the 1608 case and the Mabo claim. He stated the common law has a ‘general principle’ that it will ‘recognise a customary title only if it is consistent with the common law’. 116 That is, recognition should be subordinated to the language of modern constitutionalism.

Applying this general principle to Australia, Justice Brennan considered that ‘traditional native title’ is not consistent with common law, but that it should be treated as ‘an exception’ and recognised. Nevertheless, he considered that some limitations must be placed upon the recognition of native title. He observed that ‘recognition by our common law of the rights and interests in land of the indigenous inhabitants of a settled colony would be precluded if the recognition were to fracture a skeletal principle of our legal system’. 117 Later, he said that he considered the ‘doctrine of tenure’ central to ‘land law’ and this ‘could not be overturned without fracturing the skeleton which gives our land law its shape and consistency’. 118 Added to this are comments that ‘Crown grants should be seen as the foundation of the doctrine of tenure’ and ‘is an essential principle of our land law’. He observed that it is ‘far too late in the day to contemplate an allodial or other system of land ownership’. 119 Moreover, land in Australia ‘has been granted by the Crown’ and is ‘held on a tenure of some

116 Ibid. 43 (Brennan J).
117 Ibid. 29 (Brennan J).
118 Ibid. 31-2 (Brennan J).
kind and the titles acquired under the accepted land law cannot be disturbed’.  

Hence in several respects, Justice Brennan considered that the common law recognition of native title should be restricted by the application of the doctrine of tenure.

However, Justice Brennan opposed limiting native title to familiar common law concepts. He cited the 1921 case *Amodu Tijani* where the Privy Council drew attention to the tendency to ‘render [native] title conceptually in terms which are appropriate only to systems which have grown up under English law’.  

He also considered it ‘wrong ... to point to the inalienability of land’ by a community and, by ‘importing’ definitions of ‘property’ which ‘require alienability under the municipal laws of our society, to deny that the indigenous people owned their land’. Somewhat reluctantly he conceded that if ‘it be necessary to categorise an interest in land as proprietary in order that it survive a change of sovereignty, the interest possessed by a community that is exclusive possession of land falls into that category’.

Unlike McNeil, Justices Deane and Gaudron did not consider native title a customary right, but restricted their attention to any post-act of state circumstances. They say ‘any claim by the Aboriginal inhabitants to such lands by reason of possession or occupation after the establishment of the Colony must be justified by ordinary common law principles or presumptions which apply and (at least theoretically) applied indifferently to both native inhabitants

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120 *Mabo v Queensland (No 2)*, above n 10, 33 (Brennan J).

121 Privy Council in *Amodu Tijani*, cited by Justice Brennan, ibid. 35.
and Europeans (eg possessory title based on a presumed lost grant). Later, they observed that the ‘content’ of ‘common law native title’ will ‘vary according to the extent of the pre-existing interest of the relevant individual, group or community’. It ‘may be an entitlement of an individual through his or her family, band or tribe, to a limited special use of land in a context where notions of property in land and distinctions between ownership, possession and use are all but unknown’. In contrast, it may be ‘a community title’ which is practically ‘equivalent to full ownership’.

Like Justice Brennan, Justices Deane and Gaudron also favourably cite *Amodu Tijani*, including the advice that this ‘tendency’ must be ‘held in check closely’ since ‘[a]s a rule, in the various systems of native jurisprudence throughout the Empire, there is no such full division between property and possession as English lawyers are familiar with’. They also indicated that they do not believe recognition should be limited to what can be strictly defined as ‘rights of property’. That is, it should not be ‘confined to interests which were analogous to common law concepts of estates in land or proprietary rights’. Citing authority from *Amodu Tijani* and *Adeyinka Oyekan v Musendiku Adele*, they noted that these ‘assume’ that the traditional interests of the native inhabitants are to be so respected ‘even though those interests are of a kind unknown to English law’. Not only is that view ‘supported by other authority’,

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122 *Mabo v Queensland (No 2)*, above n 10, 36 (Brennan J).
123 Ibid. 64 (Deane and Gaudron JJ).
124 Ibid. 65-6 (Deane and Gaudron JJ).
125 Ibid. 62 (Deane and Gaudron JJ).
but also by ‘compelling considerations of justice. It should be accepted as correct’.126

However, Justices Deane and Gaudron argued that even where it approaches ‘full ownership’ native title ‘is subject to three important limitations’. The first relates to alienation. The judges described this as resulting from a ‘right of pre-emption in the Sovereign’. This precluded ‘alienation outside that native title system otherwise than by surrender to the Crown’. A second limitation was that native title is ‘only a personal ... right’ and therefore ‘it does not constitute a legal or beneficial estate or interest in the actual land’. The third limitation was that it is ‘susceptible of being extinguished by an unqualified grant by the Crown of an estate in fee [sic] or of some lesser estate which was inconsistent with the rights under the common law native title’.127 On these grounds, they determined it ‘does not found an assumption of a prior lost grant ...’128 Thus, like Justice Brennan, the judges considered the quality of native title limits the ability of common law to provide recognition, but these rights are not ‘illusory’ or ‘no more than a permissive occupancy’.129 Rather, these can ‘approach the rights flowing from full ownership at common law’. Thus, they think it inappropriate to force native title ‘to conform to traditional common law concepts’ and instead ‘accept it as sui generis or unique’.130

While Justice Dawson held the survival of any pre-existing interests depended on the explicit recognition by the Crown, he presumed there was no

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126 Ibid. 63 (Deane and Gaudron JJ).
127 Ibid. 66-7 (Deane and Gaudron JJ).
128 Ibid. 67 (Deane and Gaudron JJ).
129 Ibid. 83 (Deane and Gaudron JJ).
evidence of this occurring. Without the existence of any native title rights, he held that any connections to land could be no more than a permissive occupancy of the Crown. In justifying this view, he advanced a theoretical model ascribing rights to land as proprietary. He contrasted these with usufructuary rights, which he considered were ‘by definition, not proprietary in nature’. Having established this contrast, he said that the ‘separate claims made by the plaintiffs to Aboriginal title and usufructuary rights would appear to be based upon the notion that Aboriginal title is proprietary in nature’. Since his a priori model is inconsistent with the common law protecting usufructuary rights, he rejects the claim. He said that the ‘weight of authority rather suggests that Aboriginal title is of its nature also non-proprietary and carries with it little if anything more than usufructuary rights’.

In summing up the various judgements, while six of the judges considered the acquisition of sovereignty did not prohibit the continuity of pre-existing interests in Australia they were divided on the extent to which those interests can be recognised post-acquisition. However, these differences did not preclude the recognition of the claim of the Meriam People. Justice Brennan finds that this was a ‘communal title’ and they are ‘entitled as against the whole world to possession, occupation, use and enjoyment of the island of Mer ...’. In particular, it is ‘effective as against the State of Queensland’.

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130 Ibid. 66-7 (Deane and Gaudron JJ).
131 Ibid. 6 (Dawson J).
132 Ibid. 124 (Brennan J). An examination of the protection accorded by common law to usufructuary rights is beyond the scope of this thesis. A starting point though is that McNeil notes that ‘Where Crown grants of land are concerned, the protection of the common law clearly extends to all pre-existing rights and interests, whatever their source’. See McNeil, *Emerging Justice?*, above n 5, 373, 390.
133 *Mabo v Queensland (No 2)*, above n 10, 55 (Brennan J).
134 Ibid. 56 (Brennan J).
Deane and Gaudron found that the ‘common law native title of the Murray Islanders in relation to land in the Murray Islands survives’, apart from that involving specific leases issued prior to the lodgement of the claim. After examining the legislative and executive acts carried out following the separation of Queensland from New South Wales, they found that none of these ‘had the effect of extinguishing the existing rights of Murray Islanders under common law native title’. Justice Toohey considered the possibility that the interests of the claimants survive annexation and that their predecessors acquired a ‘possessory title as a consequence of the operation of the common law in the new colony’. In considering the first form, said that the ‘traditional title of the Meriam people survived the annexation of the Islands ...’ Examining the grounds for common law aboriginal title, he reasons that ‘since the Meriam people became British subjects immediately on annexation, they would seem to have then acquired an estate in fee simple’. He considered that the onus then lies with the defendant to show that the Queensland Government has a better claim. While he determined that the Meriam People ‘may have acquired a possessory title on annexation’, he does not ‘reach a firm conclusion’ since not all matters are ‘fully explored’. Justice Dawson is the only judge to reject the claim completely. Citing the creation of a reserve as evidence of the ‘exertion by the Crown of its rights over the Murray Islands’, he concluded ‘any
usufructuary rights in the land stemming from occupancy before annexation, have been extinguished’.\textsuperscript{143}

The impact of legislation and grants upon native title

Earlier in this chapter I referred to leases affecting the recognition of the Meriam claim. Leases over two different areas were involved. Following the annexation of the Murray Islands by Queensland a special lease of two acres on Mer was granted to the London Missionary Society in 1882. In later years, further leases were granted to the same piece of land. Subsequently, the lease was transferred to the Australian Board of Missions, and then to trustees of the Board. Another lease was ‘purportedly granted’ in May 1931 to two lessees who were not members of the Meriam People under the \textit{Land Act 1910-1930} (Qld). The 20 year lease involved the whole of the islands of Dauar and Waier in the establishment of a sardine factory.\textsuperscript{144} Thus, bound up with the question of recognition of the claims was the status of these leases, the power of the Crown to issue leases and to legislate about land that was now claimed by the Meriam People.

The claimants did not directly challenge the Crown’s right to extinguish native title, instead they argued that this had not been exercised (a point agreed by the Queensland Government) and, furthermore, that with this right the Crown held fiduciary obligations to provide protection.\textsuperscript{145} That is, they did not

\textsuperscript{143} Ibid. 124 (Dawson J).
\textsuperscript{144} Ibid. 52 (Brennan J).
\textsuperscript{145} \textit{Mabo v Queensland (No 2)}, above n 10, 138, 150 (Toohey J); McNeil comments that ‘executive extinguishment was not a major concern for the plaintiffs in Mabo No 2, and so there
seek to overturn the view associated with the language of modern constitutionalism that the Crown has a general right to extinguish native title. Instead, it appears they hoped that if their argument succeeded, protection would be provided through the upholding of a fiduciary obligation by the Crown.

McNeil argued that authority for the executive to extinguish titles arises in two ways. If valid legislation ‘unambiguously conferred authority on the Executive to extinguish’ a title, then it has the legal power to carry this out if it acts ‘in accordance with statutory authority’. Alternatively, this authority can be provided by royal prerogative. On these grounds, he argued that if ‘valid legislation in an Australian jurisdiction unambiguously conferred authority on the Executive to extinguish native title, whether legislatively or executively … the Executive would have the legal power to carry out the extinguishment if it acted in accordance with the statutory authority’. This reflects the influence of modern constitutionalism in that it presumes government can act on behalf of all the people regardless of their cultural background.

So what did the Court have to say about the impact of legislation and grants upon native title? The six judges recognising the Meriam claim affirmed that the ‘exercise of a power to extinguish native title must reveal a clear and plain intention to do so’ if such an action is taken by a parliament. Justice Brennan adds this ‘requirement … flows from the seriousness of the consequences to indigenous inhabitants of extinguishing their traditional rights

was no reason for their counsel to argue generally against it’. See McNeil, *Emerging justice?*, above n 5, 408.

and interests in land ...’ Justice Toohey argued that this is ‘subject to a consideration of the implications that arise in the case of extinguishment without the consent of the titleholders’, a matter examined later in this chapter.

Justice Brennan also commented on the Court’s limitations in challenging a decision of a legislature. He said that the ‘sovereign power may or may not be exercised with solicitude for the welfare of indigenous inhabitants but, in the case of common law countries, the courts cannot review the merits, as distinct from the legality, of the exercise of sovereign power’.148

However, the judges supporting recognition of native title divided over whether issuing of grants meant its extinguishment. Chief Justice Mason and Justices McHugh, Brennan, Deane and Gaudron (as well as Justice Dawson) generally agreed that native title ‘can be extinguished either by a grant of a freehold or lesser estate or by appropriation by the Crown, to the extent the grant or appropriation is inconsistent with the continuing enjoyment of native title’.149 Justice Toohey ‘did not find it necessary to decide whether the Crown at common law could extinguish traditional title (as he called native title) by grant or appropriation’. Moreover, he was critical of the proposition that traditional title ‘could be extinguished by unilateral executive act without the consent of the native titleholders’ (his views on consent is discussed in detail later in this chapter).150

147 The Court’s view of the Crown’s fiduciary obligations is discussed later in this chapter.
148 Mabo v Queensland (No 2), above n 10, 46 (Brennan J); see also 84 (Deane and Gaudron JJ), 152-3 (Toohey J).
149 McNeil, Emerging justice?, above n 5, 369; Mabo v Queensland (No 2), above n 10, 49-51 (Brennan J), 7 (Mason CJ & McHugh J), 67 (Deane and Gaudron JJ).
150 McNeil, Emerging justice?, above n 5, 397-398; Mabo v Queensland (No 2), above n 10, 5, 152-153 (Toohey J).
In his review of the decision, McNeil observed that the majority view was based on the idea that the Crown can grant freehold title without first demonstrating that it had acquired title to the land. He described this view as inconsistent with the general principle of common law ‘where the Crown claims a title to land it must prove its title like anyone else’. McNeil charged that Justice Brennan provided ‘virtually no legal authority for his rules of extinguishment’, but instead adopted ‘a pragmatic rather than a principled approach’. The Court majority provided a different treatment for native title from other titles. McNeil argued the ‘rules of extinguishment’ created by ‘the majority … are racially discriminatory’ and ‘destroy the equality of the Indigenous peoples before Australian law’. In other words, in terms of constitutional languages, he charged the Court has embraced the language of White Australia.

A particular claim, but general rules

The claim made on behalf of the Meriam People only addressed those aspects of the Crown’s power to extinguish traditional title directly involved with their claim. The impact of the doctrine adopted by the Court majority does not wholly deny the claim of the Meriam People. They (with Justice Toohey agreeing) set aside the lands where leases had been issued for future

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152 Ibid. 406.
153 Ibid. 405-406.
That is, not all aspects of the claim were resolved by this decision and the impact of the new legal framework was not fully tested.\textsuperscript{155}

But while the claim was particular, the Court majority adopted general rules applicable Australia-wide.\textsuperscript{156} Some of these rules rejected aspects of the language of White Australia: the ‘enlarged notion of terra nullius’ and the characterisation of ‘indigenous inhabitants as people too low in the scale of social organisation to be acknowledged as possessing rights and interests in land’.\textsuperscript{157} Some principles facilitate native title claims being brought forward. Others though establish a national basis to extinguish any native title deemed inconsistent with Crown grants.\textsuperscript{158}

Aboriginal and Torres Strait Islander Social Justice Commissioner Michael Dodson said extinguishment is wrong as it provides a legal basis to dispossess a people of their traditional connections to land.\textsuperscript{159} In embracing recognition and extinguishment the judges mixed together elements of both common and modern constitutionalism. On behalf of the European-originating constitutional association, the High Court was prepared to unilaterally impose an ‘accommodation’ and declare a national basis to limit recognition of native

\textsuperscript{154} ‘Putting to one side the islands of Dauar and Waier, the parcel of land leased to the Trustees of the Australian Board of Missions and any other parcels appropriated for use for administrative purposes inconsistent with native title...’ the judges declared that ‘the Meriam people are entitled, as against the whole world, to possession, occupation, use and enjoyment of the lands of the Murray Islands’. See \textit{Mabo v Queensland (No 2}, above n 10, at 2 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ).

\textsuperscript{155} The Meriam People eventually obtained a consent determination of native title in respect of the formerly leased lands on Dauar and Waier Islands in June 2001. See \textit{Passi v Queensland} (2001) FCA 697.

\textsuperscript{156} \textit{Mabo v Queensland (No 2}, above n 10, 3 (i) (Brennan J), 3 (xv) (Deane and Gaudron JJ).

\textsuperscript{157} Ibid. 2 (iii) (Brennan J). See also ibid. 2 (xxv) (Deane & Gaudron JJ).

\textsuperscript{158} Ibid. 3 (xiii) (Brennan J), 4 (xx) (Deane & Gaudron JJ).

While recognition is identified with common constitutionalism, extinguishment is associated with the doctrine of discontinuity. Furthermore, the decision to create national rules for extinguishment draws on the modern constitutional tradition. Moreover, if McNeil is correct, then by not applying the same rules in relation to grants and native title as applied to other titles, the Court also drew upon the legacy of White Australia by not providing the protection to Indigenous people accorded to other Australians.

**Absence of consent**

As mentioned earlier, Justice Toohey did not agree with the theoretical framework adopted by his colleagues. However, he did not feel obliged to elaborate principles on executive power that were to be applicable Australia-wide.\(^{160}\) He found that generally traditional title ‘is capable of extinguishment by clear and plain legislation or by an executive act authorised by such legislation’.\(^{161}\) However, in the absence of this authority he was critical of the reasons advanced to justify the use of an extraordinary power by the executive to extinguish traditional title without the consent of titleholders.

He examined three rationales frequently advanced to justify such action. One was that it was a ‘concomitant of an assertion of sovereignty’. He noted that this rationale was advanced in the 1823 *Johnson v M’Intosh*\(^ {162}\) case on the relationship between Indian title to land and the US government’s power.

\(^{160}\) *Mabo v Queensland (No 2)*, above n 10, at 5-6 (xxxiii)-(xxxix). It appears a typographical error was made since these points were not attributed to Justice Toohey. However, they do accurately summarise the views he developed in his judgment.

\(^{161}\) Ibid. 160 (Toohey J).

\(^{162}\) *Johnson v M’Intosh* 21 US (8 Wheat) 543 (1823).
However, he observed that linking this to sovereignty does not itself demonstrate how this is different to other titles: this power ‘is subject to constitutional statutory or common law restrictions to terminate any subject’s title to property by compulsorily acquiring it’.163 In other words, this authority does no more than demonstrate the general power of the Crown to extinguish titles; it does not justify why the executive should have a special power in relation to traditional title.

Another rationale is that it is part of British colonial policy to protect the interests of Indigenous inhabitants. Justice Toohey observed that this rationale considers the Crown’s power is ‘the corollary of the general inalienability of title, which itself constituted a means of protecting aboriginal people from exploitation by settlers’.164 However, this rationale blurs Crown power with the inalienability of title rather than properly considering them as distinct issues. He noted the contention that native title is inalienable was the subject of debate, but he observes that ‘in any event, a principle of protection is hardly a basis for a unilateral power in the Crown, exercisable without consent’.165

The third rationale for the extraordinary power comes from an ‘inherent quality’ in traditional title. Those who embrace this rationale often characterise the title as a ‘personal and usufructuary right’ and draw its distinction from proprietary rights. It is argued that the former is ‘inherently weaker and more

163 *Mabo v Queensland (No 2)*, above n 10, 151 (Toohey J); McNeil, *Emerging justice?*, above n 5, 398.
164 *Mabo v Queensland (No 2)*, above n 10, 151 (Toohey J).
susceptible to extinguishment’. However, as Justice Toohey noted, the Privy Council in 1921 ‘cautioned against attempting to define aboriginal rights to land by reference to the English law notion of estates’. He also noted that this warning was ‘heeded in recent cases’. He rejected the idea that unilateral extinguishment is deduced from the nature of the traditional title. He describes such an inquiry as ‘fruitless and ... unnecessarily complex’. Rather, he considered that the ‘specific nature of such a title can be understood only by reference to the traditional system of rules’. Furthermore, he concluded that the ‘nature’ of the title ‘will not determine the power of the Crown to extinguish the title unilaterally’. Therefore, McNeil observed, Justice Toohey rejected ‘Deane and Gaudron JJ’s primary justification for the Crown’s power of extinguishment, namely that native title is merely a personal right’.

Justice Toohey did not fully elaborate an alternative approach. He considered this unnecessary since ‘this is not a matter the court was asked to consider ... [e]xcept in the context of the lease to the London Missionary Society and the lease granted over Dauer and Waier’. However, he added some words to amplify his approach:

Where there has been an alienation of land by the Crown inimical to the continuance of traditional title, any remedy against the Crown may have been lost by the operation of limitation statutes. And nothing in this

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166 Mabo v Queensland (No 2), above n 10, 152 (Toohey J).  
167 Id.; McNeil, Emerging justice?, above n 5, 399.  
169 Justice Toohey prefers to spell it as Dauer, but notes that it ‘also spelt Dauar and Dawar’. See Mabo v Queensland (No 2), above n 10, 137 (Toohey J).  
170 Mabo v Queensland (No 2), above n 10, 153 (Toohey J); McNeil, Emerging justice?, above n 5, 399-400.
judgement should be taken to suggest that the titles of those to whom land has been alienated by the Crown may now be disturbed.

While not a fully elaborated position, the stance of Justice Toohey provides more favourable conditions for the expansion of common constitutionalism. He argued the Crown is obliged to prove its acquisition of title. In the context of the Meriam claim he said that the Crown ‘could not have acquired original title by occupancy as a matter of fact because it had no presence in the colony before settlement and occupation of land by Indigenous inhabitants would have excluded occupancy by the Crown after annexation, except in land truly vacant’. Moreover, Justice Toohey made plain that he rejected any basis to unilateral executive extinguishment. Furthermore, referring to the doctrine of tenure he considered that if the ‘fiction of original Crown ownership’ is to be maintained, then it would be answered by ‘the fiction of a lost Crown grant’ to be accorded ‘to the indigenous occupiers’. He attempted to apply the ‘enlarged doctrine consistently’ and adopts an approach not prima facie ‘racially discriminatory’.

Fiduciary duty

It was noted earlier that the Meriam People claimed that the Crown holds a particular fiduciary obligation to them arising from several factors.

171 Mabo v Queensland (No 2), above n 10, 153 (Toohey J).
172 Ibid. 165 (Toohey J).
173 Ibid. 153 (Toohey J).
174 Ibid. 166 (Toohey J).
175 Edgeworth, above n 58, 432.
176 McNeil, Emerging justice?, above n 5, 404.
177 Mabo v Queensland (No 2), above n 10, 156.
• annexation over their land to which they did not consent;

• the relative positions of power of the Meriam People and the Crown in right of Queensland in regard to their interests in the islands; and,

• the history of relations between the Crown and the Meriam People since annexation.

The fiduciary claim was based on court decisions in the United States and Canada that found that a fiduciary relationship exists between the government and Indian tribes. Crown responsibilities to Maori people ‘in the nature of fiduciary duties’ were also recognised in New Zealand.178

Justice Toohey was the only judge to undertake a detailed examination of this matter. He noted that the Queensland government argued that ‘there is no source for any obligation on the Crown to act in the interests of traditional titleholders and that, given the power of the Crown to destroy the title, there is no basis for a fiduciary obligation’. He responded on two grounds. Firstly, ‘it is, in part at least, precisely the power to affect the interests of a person adversely which gives rise to a duty to act in the interests of that person, the very vulnerability gives rise to the need for the application of equitable principles’. Secondly, the defendant’s argument was ‘not supported by the legislative and executive history of Queensland in particular and of Australia in general’. In

support he cites the policy of ‘protection’, ‘creation of reserves, [and] removal of non-Islanders from the Islands in the 1880s’.179

Looking at the specifics of the claim of the Meriam People, he observed that their ‘power to deal with their title is restricted in so far as it is inalienable, except to the Crown’. This ‘power to alienate land the subject of the Meriam people’s traditional rights and interests and the result of that alienation is the loss of traditional title’ and their ‘corresponding vulnerability’ gives rise to a fiduciary relationship.180 He also observed that the ‘fiduciary obligation on the Crown’ is ‘rooted in the extinguishability of traditional title’ and ‘is in the nature of the obligation of a constructive trustee’. The nature of the obligation arising, he said, ‘may be tantamount to saying that the legal interest in the traditional rights is in the Crown whereas the beneficial interest in the rights is in the indigenous owners’.181 The content of this obligation ‘will be tailored by the circumstances of the specific relationship from which it arises. But, generally, to the extent that a person is a fiduciary he or she must act for the benefit of the beneficiaries.’182 A fiduciary obligation on the Crown ‘does not limit the legislative power of the Queensland Parliament, but legislation will be a breach of that obligation if its effect is adverse to the interests of the titleholders, or if the process it establishes does not take account of those interests’.183 Later in his judgement, he made plain he considered that the obligation extends further than ensuring traditional title is not extinguished. He explains that ‘[a]nything done by the defendant [the Queensland Government]

179 *Mabo v Queensland (No 2)*, above n 10, 156-7 (Toohey J).
180 Ibid. 158 (Toohey J).
181 Ibid. 159 (Toohey J).
182 Ibid. 159 (Toohey J).
constituting interference with that title would, on the view I have taken, be a breach of a fiduciary obligation...’\textsuperscript{184}

In taking this stance, Justice Toohey specifically acknowledged that the Crown gains a power to extinguish traditional title with annexation. Conversely, the Meriam People are restricted in the exercise of that title. Embedded then in this obligation is a recognition that the Meriam People did not consent to the annexation of the Murray Islands. In this way, Justice Toohey sees a fiduciary obligation on the Crown because of the absence of consent, that is, the Crown has to take responsibility for its wrongful actions. His approach is reflective of the language of common constitutionalism,\textsuperscript{185} and, furthermore, by providing a unique protection to native title it provides a practical way of respecting a title with origins outside the common law.

However, the other justices did not share his view. Justice Dawson noted the suggestion that in ‘Canada, as in the United States, the Crown in fact has a broader responsibility to act in a fiduciary capacity with respect to its Aboriginal peoples’. However, he reasoned that ‘once it is accepted, as I think it must be, that Aboriginal title did not survive the annexation of the Murray Islands, then there is no room for the application of any fiduciary or trust obligation ...’\textsuperscript{186}

\textsuperscript{183} Ibid. 160 (Toohey J).
\textsuperscript{184} Ibid. 167 (Toohey J).
\textsuperscript{185} A response in a Canadian context has been to argue that a fiduciary relationship is ‘demeaning and as legitimising and maintaining an hierarchical and paternalistic relationship between the Crown and Aborigines’ (Macklem cited by Di Marco at 890). It is pertinent though to emphasis that it was the Meriam People who initiated this aspect of the claim and it therefore must be presumed that they did not consider such a relationship as hierarchical and paternalistic. An exploration of this and the issue of fiduciary obligation more generally is beyond the scope of this study. For discussion of these issues, see Lisa Di Marco, ‘A critique and analysis of the fiduciary concept in Mabo v Queensland’, Melbourne University Law Review, Vol 19, 1994, 868-892.
\textsuperscript{186} Ibid. 129 (Dawson J).
Justice Brennan briefly addressed the matter, indicating that if ‘native title were surrendered to the Crown in expectation of a grant of a tenure to the indigenous title holders, there may be a fiduciary duty on the Crown to exercise its discretionary power to grant a tenure in land so as to satisfy the expectation ...’ Since the Meriam People were not alienated from their land he considered it ‘unnecessary to consider the existence or extent of such a fiduciary duty in this case’.\(^\text{187}\) Justices Deane and Gaudron do not directly discuss the issue.

**Racial Discrimination**

Justice Toohey was the only judge to consider whether Queensland legislation contravened the Commonwealth’s *Racial Discrimination Act* (the *RDA*).\(^\text{188}\) He considered whether a breach of fiduciary obligation is inconsistent with the *RDA*. If, for instance, the Queensland Government sought to interfere with the Meriam People’s enjoyment of the islands, and failed to provide compensation on just terms, would this ‘be in contravention of s 9 or s 10’ of the *RDA*? He argued that this needs consideration in the context that ‘[o]rdinarily land is only acquired for a public purpose on payment of just terms ...’\(^\text{189}\) Referring to *Mabo No 1*,\(^\text{190}\) Justice Toohey noted that s 10 of the *RDA* relates to the ‘enjoyment of a right, not to the doing of an act and the right referred to in s 10(1) need not be a legal right’. He also drew attention to Article 5 of the *International Convention on the Elimination of All Forms of Racial Discrimination*.

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\(^{187}\) Ibid. 43-4 (Brennan J).

\(^{188}\) *Racial Discrimination Act 1975* (Cth) (“*RDA*”).

\(^{189}\) *Mabo v Queensland* (No 2), above n 10, 167 (Toohey J).

Discrimination. The article states that the rights to be protected are far broader than property rights and include political, civil, economic, social and cultural rights. Justice Toohey then commented that the ‘right to be immune from arbitrary deprivation of property is a human right, if not necessarily a legal right, and falls within s 10(1) of the Act, even if it is not encompassed within the right to own and inherit property to which Art 5 refers’.

He then specifically considered,

whether extinguishment of the traditional title of the Meriam people without the compensation provided for in the Acquisition of Land Act 1967 (Qld) means that, by reason of a law of Queensland, persons of a particular race, colour or national or ethnic origin do not enjoy a right that is enjoyed by persons of another race, colour or national or ethnic origin or enjoy a right to a more limited extent than those persons.

Citing grounds that the Meriam People’s claim for declaratory relief is of a ‘general nature’, Justice Toohey elaborates his approach similarly. He found that traditional title ‘may not be extinguished without the payment of compensation or damages to the traditional titleholders of the Islands’. He also ordered that while traditional title is ‘subject to the power of the Parliament of Queensland and the power of the Governor in Council of Queensland to

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191 Mabo v Queensland (No 2), above n 10, 168 (Toohey J).
193 Mabo v Queensland (No 2), above n 10, 169 (Toohey J).
194 Ibid. 169 (Toohey J).
extinguish that title’, such an exercise should not be ‘inconsistent with the laws of the Commonwealth’.

Consequences of wrong policy

While they did not examine whether the Crown held a fiduciary obligation to native title holders, Justices Deane and Gaudron did comment that ‘at the time the Murray Islands were annexed to the Colony, it was a doctrine of the domestic law of Queensland ... that pre-existing native interests in relation to land were preserved and protected’. This comment was made in the context of a thorough examination of the consequences of implementing a policy that served to dispossess Indigenous people of their land.

Reviewing their approach to determine its significance to the respective languages, as discussed earlier, Justices Deane and Gaudron presumed that the acquisition of Australia was classified as occurring by settlement at common law, as distinct from conquest or cession. They noted, however, that ‘this left room for the continued operation of some local laws or customs among the native people and even the incorporation of some of those laws and customs as part of the common law’. Moreover, they held that the Court has a responsibility to consider whether the act of state excluded native title rights which would ‘otherwise exist under the domestic law ...’

195 Ibid. 169-170 (Toohey J).
196 Ibid. 87 (Deane and Gaudron JJ).
197 Ibid. 59 (Deane and Gaudron JJ).
198 Ibid. 71 (Deane and Gaudron JJ).
Hence, in considering the claim of the Meriam People, the justices were obliged to consider the effect of acquisition upon the local laws and customs of the traditional inhabitants of the Murray Islands. They noted that common law was introduced into New South Wales when Captain Philip ‘caused his second Commission to be read and published ...’\textsuperscript{199} The laws of this colony became the laws of Queensland on the separation of the two colonies in 1859. By the terms of the \textit{Coast Islands Act} and the Governor’s Proclamation, the Murray Islands were annexed and became subject to Queensland law. So, at this time the Meriam People became, at least in theory, British subjects entitled to common law rights and privileges.\textsuperscript{200}

Turning to the particulars, the justices noted that Captain Cook’s activities or the Royal Instructions ‘were in no way directed to depriving the native inhabitants of the ownership of any land in which they had an interest under their law or custom’. Likewise, the subsequent Royal Instructions to Governor Phillip in 1787 were unambiguous:\textsuperscript{201}

\begin{quote}
You are to endeavour by every possible means to open an intercourse with the natives, and to conciliate their affections, enjoining all our subjects to live in amity and kindness with them. And if any of our subjects shall wantonly destroy them, or give them any unnecessary interruption in the exercise of their several occupations, it is our will and pleasure that you do cause such offenders to be brought to punishment according to the degree of the offence.
\end{quote}

\begin{footnotes}
\item\textsuperscript{199} Ibid. 72 (Deane and Gaudron JJ).
\item\textsuperscript{200} Ibid. 86-7 (Deane and Gaudron JJ).
\item\textsuperscript{201} Ibid. 72-3 (Deane and Gaudron JJ).
\end{footnotes}
They then proceeded to examine the cases affecting native title, comparing these decisions with the Royal Instructions. They noted that *Milirrpum v Nabalco Pty Ltd*\(^\text{202}\) was the only reported decision ‘directly dealing with the merits of an Aboriginal claim to particular traditional tribal or communal lands’. Justices Deane and Gaudron identify its two essential features: that the ‘doctrines of common law native title had no place in a settled Colony except under express statutory provisions’;\(^\text{203}\) and the approach of *Re Southern Rhodesia*\(^\text{204}\) is followed where “pre-existing native interests are not assumed to be recognised ... unless they fall within the category of ‘rights of private property’”. While rejecting both these propositions, they noted that the decision of Blackburn J is also based on ‘some general statements of great authority’ of the four earlier Australian cases.\(^\text{205}\) These are *Attorney-General v Brown*,\(^\text{206}\) *Williams v Attorney-General*,\(^\text{207}\) *Randwick Corp v Rutledge*\(^\text{208}\) and *Cooper v Stuart*.\(^\text{209}\)

Their analysis finds that in each of these four cases ‘the reasoning supporting one or both of the broad propositions that New South Wales had been unoccupied for practical purposes and that the unqualified legal and beneficial ownership of all land in the Colony had vested in the Crown, consists

\(^{202}\) *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141 (SC (NT)).
\(^{203}\) *Mabo v Queensland (No 2)*, above n 10, 76 (Deane and Gaudron JJ).
\(^{204}\) *Re Southern Rhodesia*, cited in *Mabo v Queensland (No 2)*, above n 10, 77 (Deane and Gaudron JJ).
\(^{205}\) *Mabo v Queensland (No 2)*, 77 (Deane and Gaudron JJ).
\(^{206}\) *Attorney-General v Brown* (1847), 1 Legge, 312.
\(^{207}\) *Williams v Attorney-General* (1913) 16 CLR 404.
\(^{208}\) *Randwick Corp v Rutledge* (1959) 102 CLR 54.
\(^{209}\) *Cooper v Stuart* (1889), 14 App Cas 286.
of little more than bare assertion’. They determined that while a re-
examination of the validity of these propositions would not normally be
‘justified’, they considered the two propositions to be extraordinary since they
‘provided the legal basis for the dispossession of the Aboriginal peoples of most
of their traditional lands’. Noting their significance the justices comment:

The acts and events by which that dispossession in legal theory was
carried into practical effect constitute the darkest aspect of the history of
this nation. The nation as a whole must remain diminished unless and until
there is an acknowledgment of, and retreat from, those past injustices.

Rejecting these two propositions, the justices found that the common
law ‘recognised and protected ... the traditional Aboriginal rights in relation to
the land’. This was in accordance ‘with the basic principles of English
constitutional law applicable to a settled Colony’. Moreover, the ‘sovereignty of
the British Crown did not, after the act of State establishing the Colony was
complete, include a prerogative right to extinguish by legislation or to disregard’
these rights ‘by executive act’.

They then proceeded to note that a failure to observe the directions of
the act of state will ‘involve a wrongful infringement by the Crown of the rights
of the Aboriginal title-holders’. Justices Deane and Gaudron considered this
situation had come about through the combined effect of three factors: the
‘personal nature’ of native title; the ‘absence of any presumption of a prior grant

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210 Mabo v Queensland (No 2), above n 10, 78 (Deane and Gaudron JJ).
211 Ibid. 82 (Deane and Gaudron JJ).
to the Aboriginal title-holders’; and that the ‘applicable principles of English land law was that native title would be extinguished by a subsequent inconsistent grant of the relevant land by the Crown ...’\footnote{213} Thus, they found that an obligation arising out of the introduction of common law rests upon the Crown to recognise and protect native title.

The approach Justices Deane and Gaudron adopted is significant in terms of the two languages. While not directly challenging the language of modern constitutionalism and its view that sovereignty cannot accommodate the recognition of Indigenous peoples in Australia, they found a constitutional basis at common law to recognise and protect native title. As with the view expressed by Justice Toohey, their approach rests on the convention of consent, that is, the absence of consent gives rise to an obligation on the part of the Crown. So, while Justice Toohey and Justices Deane and Gaudron differed over its nature, they share a common view that the Crown has a specific obligation not to extinguish native title without the consent of the title holders.

Compensation

Justices Deane and Gaudron trace the common law presumption against extinguishing without the consent of the titleholder to the act of state. This envisages ‘the native inhabitants of the Colony would be protected and not subjected’ to ‘any unnecessary interruption in the exercise of their several

\footnote{213} Mabo v Queensland (No 2), above n 10, 76 (Deane and Gaudron JJ).
occupations’. Having identified this obligation, they considered it infringed if native title were extinguished ‘against the wishes of the native title-holders’. If ‘common law native title is wrongfully extinguished by the Crown ... compensatory damages can be recovered’. When Justice Toohey examined the particular claim of the Meriam People, he finds that their traditional title was not extinguished and that they did not ‘seek compensation or damages in respect of any past interference’ with their rights and interests. However, he also found that if extinguishment had occurred, it ‘would involve a breach’ of the fiduciary obligation of the Crown. Hence, we can determine that the two judgements find that compensation arises from a breach of the obligation to protect native title. To this, though, should be added an important caveat: both judgements also note that the practicalities of gaining compensatory damages may be affected by statute of limitation provisions. Furthermore, when specifically considering the impact of legislation upon native title, the three judges preferred the norm of continuity. Citing Lord Atkinson, Justice Toohey said ‘an intention to take away the property of a subject without giving to him a legal right to compensation for the loss of it is not to be imputed to the Legislature unless that intention is expressed in unequivocal terms’.

Justice Brennan did not express an explicit view on Crown obligations to native title holders. However, a brief judgement by Chief Justice Mason and Justice McHugh states that ‘subject to the operation of the ... [RDA] ... neither of

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214 Ibid. 73 (Deane and Gaudron JJ).
215 Ibid. 83 (Deane and Gaudron JJ).
216 Ibid. 85 (Deane and Gaudron JJ).
217 Ibid. 160 (Toohey J).
218 Ibid. 85 (Deane and Gaudron JJ), 167 (Toohey J); Meyers & Mugambwa, above n 7, 1237.
219 Mabo v Queensland (No 2), above n 10, 85 (Deane and Gaudron JJ).
us nor Brennan J agrees with the conclusion to be drawn from the judgements of Deane, Toohey and Gaudron JJ that, at least in the absence of clear and unambiguous statutory provision to the contrary, extinguishment of native title by the Crown by inconsistent grant is wrongful and gives rise to a claim for compensatory damages’. They also added: ‘We are authorised to say that the other members of the Court agree with what is said in the preceding paragraph about the outcome of the case’.221 Thus, among the six justices recognising the Meriam People’s claim they divided 3-3 over whether to respect the convention of consent. In other words, they divided on ‘whether native title could be extinguished without consent or compensation in the absence of legislative authority’.222 Presumably to emphasise that a majority of the Court opposed compensation, Chief Justice Mason and Justice McHugh added an additional sentence. ‘We note that the judgement of Dawson J supports the conclusion of Brennan J and ourselves on that aspect of the case since his Honour considers that native title where it exists, is a form of permissive occupancy at the will of the Crown.’223

Conclusions

This chapter has assessed different aspects of the *Mabo* decision against the common constitutional conventions, showing the particular influence of different constitutional languages. These concluding comments will ascertain the overall character of the High Court’s decision.

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220 Lord Atkinson cited by Justice Toohey, ibid. 152-3 (Toohey J).
221 Ibid. 7 (Mason CJ and McHugh J).
222 Bartlett, above n 6, 29.
223 *Mabo v Queensland (No 2)*, above n 10, 7 (Mason CJ and McHugh J).
Recalling the discussion about mutual recognition in Chapter 4, Tully describes how in *Worcester v the State of Georgia* Chief Justice Marshall of the United States Supreme Court acknowledged that the Cherokee people considered themselves a distinct nation. In this case, Chief Justice Marshall also noted that the ‘Indian nations have always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil from time immemorial ...’

Compared to the approach taken by Chief Justice Marshall in *Worcester v the State of Georgia*, the consequences arising from the *Mabo* decision do not concern just one claim. As discussed earlier in this chapter, the Court extended the principles it adopted in relation to the Meriam People Australia-wide. But in deciding to extend these principles they also pre-empt the courts hearing the voices of other Indigenous peoples speak about its impact on their particular laws and customs. The Court majority presume that the compromise constructed in relation to the Meriam People’s claim is appropriate for all other Indigenous people throughout the country without first gaining their consent. Put another way, the Court behaved in an important respect as though this was a ‘normal’ case where it could treat the Australian population as homogenous. It unilaterally imposed a solution on behalf of Indigenous and non-Indigenous people alike. In this respect, it acted in a modern constitutional way.

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225 *Worcester v the State of Georgia*, above n 223, 559.
So the key question posed by Chief Justice Marshall in *Worcester v the State of Georgia* was not voiced in the High Court. What forms of recognition do Indigenous peoples wish to have? Only Justice Toohey was cautious enough to avoid developing general rules concerning the extinguishment of ‘traditional title’ beyond those that arose from the ‘clear and plain intention’ of legislation.226 In contrast, the Court majority set the ground-rules for the extinguishment and recognition of claims across the country. As Blackshield and Williams noted, the Court ‘recognised the customary laws and entitlements of indigenous peoples only to the extent that the norms of the constitutionally established nation allowed or required such recognition’.227

If an analogy is made with a ship,228 then the Court effectively said ‘we agree that a ship of recognition is launched, but we’re going to unilaterally determine who is going to board the ship’. Indeed, the Court applied an approach to a host of other decisions about for instance, commerce, state and federal relations or immigration. Furthermore, while cultural recognition is very different to each of these matters, by acting unilaterally the Court treated it as similar and did not limit its decision so the prior agreement of Indigenous peoples throughout the country could be sought as to who could board the ship and what would be its cargo. In such circumstances, Aboriginal and Torres Strait Islanders were obliged to support the ship’s launch and work within the

226 *Mabo v Queensland (No 2)*, above n 10, 5 (Toohey J).
227 Blackshield & Williams, above n 8, 176.
228 I am indebted to Tully’s use of the black bronze canoe sculptured by Bill Reid as a metaphor for his story which I have adapted to describe the particular circumstances in Australia. Tully explains that Reid is a ‘the renowned artist of Haida and Scottish ancestry from the Haida nation of *Haida Gwaii* (the Queen Charlotte Islands) off the northwest coast of Great Turtle Island (North America)’. See Tully, above n 33, 17.
modern constitutional restrictions if they wished to pursue the recognition of native title.

Furthermore, the majority adopted three features that significantly limited the number of passengers able to board the ship since recognition of native title could only occur in narrowly defined circumstances. Each of these restrictions reflects the influence of the language of modern constitutionalism:

- the ability of the legislature to extinguish native title if specified by a clear and plain intention;
- that native title will be extinguished by executive acts that are inconsistent with its existence; and,
- there is no requirement to pay compensation in either circumstances.

Another consequence of this unilateralist approach was that any claims for recognition as a distinct nation would likely be blocked. In other words, when some Indigenous people responded by saying ‘we want to add some more conceptual cargo to the ship’, the Court said ‘no, we’re going to determine what goes on the ship, no one else’. Indeed, this was confirmed the year after the Mabo decision when Chief Justice Mason ruled against a claimant charged with an offence under the laws of New South Wales and who sought to be tried instead by the Bandjalung Nation. Chief Justice Mason said such an approach offended ‘the principle that all people should stand equal before the law’, 229 that

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is, ‘recognition of an independent sovereignty in Aboriginal peoples is unlikely to be accepted by the courts’. 230

In the context of its unilaterally-imposed compromise, the Court rejected theories associated with language of White Australia. This is illustrated by the Court’s rejection of the idea the lands were terra nullius before colonisation and its acceptance that a system of laws were in existence before British acquisition.

In rejecting the language of White Australia the Court was guided by aspects of the language of human rights. This influence is demonstrated when it:

- considered the doctrine was factually incorrect and out of step with international law;
- modified legal theory to differentiate between radical and beneficial titles; and,
- rejected the idea that pre-existing interests necessarily end with a change of sovereignty.

The minority judgements also had the potential to fill the ship with a more robust basis to recognise native title. These include:

- Justice Toohey’s finding that a fiduciary obligations exists on the part of the Queensland Government to the Meriam People;
- the finding of Justices Deane and Gaudron that it would be wrong to extinguish native title without the consent of the titleholder;

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230 Blackshield & Williams, above n 8, 228.
together these positions provided a basis that obliges the Crown to compensate for wrongful extinguishment; and,

• the finding by Justice Toohey that the Crown was obliged to prove its right to acquire title.

With the conclusion of the *Mabo* decision, the focus effectively shifted to federal parliament. Questions were thus posed for that body. Should the ship’s cargo be expanded so that the ship became a broader vehicle for cultural recognition? Or should it continue to provide a more limited service focussing on native title? Another related question was who should steer the ship? Should Indigenous and non-Indigenous people jointly steer the ship? How the Keating government responded to these challenges is the focus of the next chapter.
Chapter 8:

The Keating Government’s response to

Mabo

Mabo is an historic decision - we can make it an historic turning point, the basis of a new relationship between indigenous and non-Aboriginal Australians. The message should be that there is nothing to fear or to lose in the recognition of historical truth, or that the extension of social justice, or the deepening of Australian social democracy to include indigenous Australians. There is everything to gain. Even the unhappy past speaks for this.

Paul Keating, Prime Minister, Redfern Oval, December 1992

In the last chapter an analogy with a ship was introduced to make some points about the High Court’s approach to the recognition of native title. It was argued that the Court effectively determined who and what was allowed on to the ship. This chapter will consider why the Keating government did not convert the native title ship into a ship of reconciliation, but affirmed that the cargo and passengers on the Mabo ship should remain basically as established by the High Court. Also, while the Keating government occasionally allowed some say by

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1 Prime Minister Keating cited by Frank Brennan, One land, one nation: Mabo: Towards 2001, (St Lucia, Qld: University of Queensland Press, 1995), 42.
Indigenous people in the direction of the ship, it did not change the rules of steerage.

The period to be examined covers the time from the Court’s June 1992 decision to the adoption of native title legislation in December 1993. The following issues and events are considered in chronological order:

- the significance the Keating government placed on the *Mabo* decision;
- its response to *Mabo*;
- the decision to introduce native title legislation;
- the June 1993 Council of Australian Government (COAG) meeting of state and federal governments;
- Labor’s approach to the involvement of Aboriginal and Torres Strait Islander peoples in crafting the legislation; and,
- party attitudes to *Mabo*, federal/state relations and to the legislation.

A crucial primary source to understanding the attitudes expressed by the different parties is the Hansard weekly transcripts of parliamentary proceedings of both chambers of federal parliament. The Senate debate was richer than that in the House of Representatives because the Senate comprises more parties. It was noticeable that senators from the Australian Democrats and Greens (WA) aired some very different concerns from their counterparts in the major parties. These differences were particularly pronounced when the legislation reached the committee stage and amendments proposed by the minor parties were considered. The detailed examination that unfolds in this chapter is essential to
gaining an understanding of both the differing party philosophies as well as how each sought to influence the outcome of the decision. Sometimes, a contribution by a particular individual also drew attention to this or to a disagreement with their own party. The transcripts also provided the detail of each amendment proposed and the arguments articulated for and against its adoption. A brief inquiry into the draft legislation was undertaken by the Senate Standing Committee on Legal and Constitutional Affairs (Senate Standing Committee). The committee could not agree on its recommendations and so both Majority and Dissenting Reports were produced as well as a personal statement from Australian Democrats Senator Sid Spindler.2

Several official publications also assist with this examination. One is a government discussion paper (the Discussion Paper) released in June 1993. Its writers cautioned that it is not a ‘statement of Government policy or its legal advice’, but ‘an analysis of the issues’.3 However, it can be taken as indicative of the thinking of those developing the government’s policy. Its general approach and principles did form the basis of the native title legislation. A specific chapter concerns negotiation and consent.4 An appendix to the Discussion Paper also contains *A Framework of Principles5* and this had ministerial approval as a focus for a ‘discussion of the next steps’.6 The Native

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4 Ibid. 60-9.


6 *Mabo: The High Court Decision on Native Title*, above n 3, 99.
Title Bill and two explanatory memorandums are also crucial to a description of the government’s response.\(^7\) When the Senate completed its changes to the Native Title Bill, a schedule of the amendments as well as a supplementary explanatory memorandum was produced.\(^8\) Following the adoption of the amended Bill in December 1993, the federal Attorney-General’s Department produced the legislation with commentary.\(^9\) The first operational report on native title by the Aboriginal and Torres Strait Islander Social Justice Commissioner also examines the legislation and its impact ‘on the exercise and enjoyment of human rights of Indigenous Australians’.\(^10\)

Other material specifically considered the legislation or provided general background material that is relevant to the analysis of specific issues. Justice Toohey’s review of the *Aboriginal Land Rights (Northern Territory) Act 1976* focuses on the implementation of the act, a chapter specifically discussing ‘Land Councils and Group Consent’.\(^11\) The year following the legislation’s adoption Murray Goot and Tim Rowse edited a collection of material around the Keating government’s ‘waking up’. This referred to the realisation that ‘it was time for non-indigenous Australians to make a better offer’ than that provided by the

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\(^8\) The Senate, *Native Title Bill 1993: Schedule of the amendments made by the Senate*, (Canberra: Commonwealth of Australia, 1993); Senate, *Native Title Bill 1993: Supplementary Explanatory Memorandum*, (Canberra: Commonwealth of Australia, 1993).  
Hawke Labor government in the 1980s. Frank Brennan’s *One land, one nation: Mabo: Towards 2001* contains two chapters that discuss the events around the legislation as well as its content. Tony Blackshield and George Williams provide a specific chapter on ‘Indigenous Peoples and the Question of Sovereignty’ in *Australian constitutional law and theory: commentary and materials*. Richard Bartlett’s *Native title in Australia* also contains a chapter considering the ‘Political and Legislative Responses to Mabo’. *Mabo: The Native Title Legislation* comprises another useful compilation of material focussed on the legislative response to the High Court’s decision. Lastly, Robert Tickner’s *Taking a stand* is invaluable in providing detailed information about disputes within the government over the crafting of the legislation.

The significance of *Mabo*

The initial reaction of the Keating government to the *Mabo* decision indicates that they too shared many of the presumptions of the High Court majority in *Mabo*. Like the six judges recognising the Meriam People’s claim, the government rejected the idea that the Indigenous people present in the country before annexation were not sovereign. In October 1992, the Prime Minister welcomed the High Court decision as ‘historic’ and ‘a threshold and

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17 Tickner, above n 5.
positive one for the nation’. The following year, when introducing native title legislation to Parliament, he spoke of the ‘pernicious legal deceit of terra nullius’. Minister of Aboriginal Affairs Robert Tickner later described the previous doctrine as ‘discredited’ and a ‘legal fiction that provided the justification for the dispossesssion of Aboriginal and Torres Strait Islander people ...’

Like the High Court majority, federal Labor did not consider the decision implied the recognition of all traditional connections to the land. Reviewing the High Court’s decision the authors of the June 1993 Discussion Paper noted that there ‘was general acceptance by the majority that extinguishment will have resulted from the valid grant of freehold title ...’ Relying on this view, they concluded that for ‘areas of land in Australia held under valid grants of freehold title the decision in Mabo (No. 2) offers no prospect of a successful assertion of native title’. From this they determined the ‘decision itself does not support a proposition that native title has legal primacy over statutory titles’. The rejection of this proposition was taken as a given by the authors. Unlike Justice Toohey, they did not examine whether this conformed to common law precedents or was an appropriate norm to implement.

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18 A Framework of Principles, reprinted in Mabo: The High Court Decision on Native Title, above n 3, Appendix, 98.
20 Tickner, above n 5, 83.
21 Mabo: The High Court Decision on Native Title, above n 3, 16.
22 Ibid. 20.
Commenting on consent rights, the authors of the Discussion Paper considered *Mabo* ‘made clear that, like other legal rights, including property rights, native title can be dealt with, extinguished or expropriated by valid acts of the Crown’. From this, they concluded ‘the legal position’ was that ‘native title holders would not have an absolute right of consent over such actions by the Crown’. The analysis of this issue was at best cursory. Particularly noticeable is that the authors did not engage with, or even acknowledge, the position of Justice Toohey, which is a serious gap since he conducted the only extensive examination in *Mabo* of the general principles pertaining to consent and unilateral extinguishment.

When the Discussion Paper authors considered whether the Crown holds a fiduciary obligation to native title holders, they were more thorough in their summary of the Court decision. They commenced by noting the Meriam People’s claim that the Crown held a fiduciary responsibility to recognise and protect their traditional interests had its basis in prior US, Canadian and New Zealand decisions. They observed that Justice Brennan said ‘recognition of the power of the Crown to extinguish native title without compensation is inconsistent with the existence of the general fiduciary duty asserted by the plaintiffs’. They also acknowledged that Chief Justice Mason and Justice McHugh agreed with this view. Furthermore, they accepted that in ‘rejecting any rights to compensation’ Justice Dawson ‘would not support the existence of a fiduciary duty’. On this basis, they determined that a majority ‘seems to

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23 Ibid. 62.
24 Ibid. 19.
reject any general fiduciary duty’. The *Framework of Principles* did not mention the issue, which suggests that the Keating government did not think it a priority.

The authors also acknowledged the minority Court views about the fiduciary obligations of the Crown. They noted that Justice Toohey was the ‘only Justice to accept unequivocally the plaintiffs’ argument’. They also observed that while Justices Deane and Gaudron ‘recognised the power of the Crown to extinguish native title’ the judges “concluded that extinguishment would be ‘wrongful’ and a right to compensation would exist unless excluded by clear and unambiguous legislative provision”. The Discussion Paper authors noted that it ‘is arguable that the basis of their view of this right to compensation is the operation of ordinary common law rules concerning acquisition of property so that its existence gives no support to the existence of a fiduciary duty’. Nevertheless, the reference to ‘wrongful’ extinguishment could be ‘relied upon as reflecting the existence of such a duty’.26

**Response to the Mabo decision**

The announcement in October 1992 of a 12-month consultation period about the consequences of *Mabo* marked the first step in the Keating government’s response to the decision.27 State and territory governments were specifically consulted, as were the Aboriginal and Torres Strait Islander

25 Ibid. 20.
26 Ibid. 19.
27 Tickner, above n 5, 92; Bartlett, above n 15, 33.
Commission (ATSIC), the Land Councils and the peak industry bodies. An early government discussion paper prepared in October 1992 suggested several ways to proceed, including a statutory framework to codify native title as well as a specialist statutory tribunal to adjudicate claims. It also canvassed the option of ‘negotiation of settlements between governments and indigenous people’, as carried out in Canada. The paper stated this could be achieved by either complementary Commonwealth, state and territory legislation or alternatively by Commonwealth legislation based solely on the Commonwealth’s constitutional powers. Thus, it appeared that Indigenous people could be directly involved in negotiating a settlement.

The government signalled that it would proceed slowly, listen carefully, and generally encourage the view that a new order was forthcoming. Setting a tone for its response, Prime Minister Paul Keating spoke at Sydney’s Redfern Park on 10 December 1992. The event marked the launch of the United Nations International Year of the World’s Indigenous People. Keating told the audience the ‘starting point’ to ‘find just solutions to the problems which beset the first Australians ... might be to recognise that the problem starts with us non-Aboriginal Australians. It begins ... with that act of recognition. Recognition that it was we who did the dispossessing. We took the traditional lands and smashed the traditional way of life.’ Keating described the Mabo judgement as ‘an historic decision - we can make it an historic turning point, the basis of a new relationship between indigenous and non-Aboriginal Australians’.

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28 Mabo: The High Court Decision on Native Title, above n 3, 10-1.
29 Bartlett, above n 15, 33.
30 Tickner, above n 5, 95; see also Brennan, above n 1, 41-2.
The government, though, was preoccupied with the implications of possible land claims and addressing business concerns for urgent action about the possibility that acts after the *Racial Discrimination Act* (the RDA) came into force would now be invalid. There was also concern that clear guidelines were needed for future acts by governments. In January 1993, the interdepartmental committee of government officials (IDC) recommended against adopting a ‘North American approach’ to ‘negotiating regional settlements of native title’, a stance eventually adopted because such an approach would entail ‘a very long and difficult negotiation’ that was ‘not … practicable … dealing with immediate land management issues’.  

Compared to the perspective of the language of common constitutionalism, this effectively rejected the possibility of establishing a federal process for mutual recognition. While the native title boat was to continue it was to be kept separate from the already existing boat of reconciliation. Hence, this was one of the most significant decisions of the Keating government. As noted in Chapter 5, Australia does not have a tradition of mutual recognition. Nevertheless, a federal government does have the legal authority to put in place the institutional arrangements to achieve such a relationship, something not considered available to the High Court. For instance, it has the ‘power to make laws … with respect to external affairs’ and is a respondent to several international human rights conventions and

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31 *Racial Discrimination Act* 1975 (Cth).
covenants that could provide the necessary authority.\textsuperscript{34} In the absence of a process of mutual recognition where the claims could be heard on their own terms, Aboriginal and Torres Strait Islander peoples were obliged to engage in language games to ensure that concepts adopted did not further erode their position.

Native title legislation

Instead, the Keating government proposed to introduce federal native title legislation;\textsuperscript{35} thus separating the resolution of native title claims from the other claims. The Discussion Paper authors gave three reasons for this. In their opinion, issues such as ‘self-determination (including greater autonomy and cultural integrity) are not well understood in the wider community …’ Other issues such as self-government and new constitutional arrangements ‘are not yet defined’. They ‘would require further development before being given detailed consideration’. They note that resolving these ‘wider, longer term issues … will not be easy. The issues are complex, sensitive, and sometimes emotive. There is no doubt that they will require extensive discussion by governments, as well as by the indigenous and wider Australian community’. A second reason was the expectation that the Council for Aboriginal Reconciliation would discuss these issues ‘particularly in the major conferences and consultation program it has developed’. Their third reason was that the ‘immediate land management

\textsuperscript{34} Australia accepts the \textit{Universal Declaration of Human Rights} and has ratified the \textit{International Covenant on Economic Social and Cultural Rights} and the \textit{International Covenant on Civil and Political Rights} and the \textit{International Convention on the Elimination of All Forms of Racial Discrimination}. See Garth Nettheim, ‘Native Title and International Law’ in Margaret A. Stephenson (Ed), \textit{Mabo: the native title legislation}, (St Lucia, Qld: University of Queensland Press, 1995), 40.

\textsuperscript{35} Brennan, above n 1, 42.
challenges’ raised by *Mabo* ‘can and should be addressed quickly …’ 36 Robert Tickner provided a fourth reason. He noted that some prominent Indigenous representatives advocated a treaty or negotiated agreement between government and Indigenous people. However, he said the state and territory governments ‘lacked the maturity and respect for indigenous people’ to take up any of these options.37

Comparing the proposal to legislate with the language of common constitutionalism, suggests it is based on an assumption that eliminates ‘cultural diversity as a constitutive aspect of politics’. 38 To put it another way, and highlight its contrast with the language of common constitutionalism, the use of legislative solutions marginalises the idea that the government and Aboriginal and Torres Strait Islander peoples will negotiate a settlement.

**Recognition and ‘land management’**

Another indication of the influence of modern constitutionalism on the government’s thinking was its tendency to describe its legislation as ensuring ‘certainty for land management’. In the public discussion over the draft legislation, the government frequently emphasised its priority to ensure this was met. For instance, the Discussion Paper authors wrote that in ‘the national interest, it is necessary in light of the Mabo decision - which recognises an interest in land after more than 200 years of failure to do so - to consider

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36 *Mabo: The High Court Decision on Native Title*, above n 3, 96-7.
37 Tickner, above n 5, 110.
carefully how future land management would best be conducted ...’39 This emphasis skewed the discussion away from considering the significance of recognition and the cultural distinctness of native title toward managing its implications for existing title holders.

Noel Pearson, then the director of the Cape York Land Council, rejected this characterisation of the legislation. He argued that to ‘treat Aboriginal title as a land management issue ... ignores the question of the right to self-determination in accordance with the laws and customs the court has explicitly said gives the title its particular form’. He said ‘Aboriginal people see Mabo as essentially about the recognition of indigenous human rights’ and the ‘treatment of Mabo should be located within concepts of indigenous human rights being developed internationally’. Pointing to the experiences in Canada, the US and New Zealand, he observed that ‘Aboriginal people will take significant account of the standards applied to indigenous people in those countries where recognition of aboriginal title has a much stronger history when assessing the Commonwealth’s response’.40

The term ‘land management’ is associated with the language of modern constitutionalism, the features of which are discussed in some detail in Chapter 3 and is alluded to here as a task associated with arrangements adopted by a ‘modern sovereign state’.41 Hence, when Noel Pearson objected to the use of this term and sought to focus on the right of self-determination he was also making a general point about the language of the debate: that it should be

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39 *Mabo: The High Court Decision on Native Title*, above n 3, 39.
41 Tully, above n 38, 67-68.
discussed in the common constitutional language and not in modern constitutionalism.

The RDA and past grants

Another issue where both modern constitutional and human rights languages were influential was the protection accorded to native title by the RDA and its impact on past grants. Chapter 6 discussed how the High Court’s 1988 decision considers the RDA provided partial protection to native title against unilateral extinguishment, so a state government cannot unilaterally extinguish native title in a racially discriminatory manner. The human rights language had placed a caveat on the actions of state governments. Therefore, the enactment of the RDA provided a degree of protection for the continuity of native title.

Citing the 1988 decision, a claim could be made at common law that native title was protected against the issuing of grants in a discriminatory way. Following the 1992 decision the Keating government appeared increasingly concerned at the possibility of this arising. Advice provided to the government by the Attorney-General’s Department in October 1992 ‘briefly’ canvassed ‘a potential difficulty relating to land which has been the subject of a grant since the RDA was passed’. The following February, the Australian Mining Industry Council (AMIC) produced a paper on the issue. It argued that the combined effect ‘of the RDA and the High Court decision in Mabo No. 1 is to place at risk

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42 Mabo v Queensland (1988) 166 CLR 186 (“Mabo v Queensland No 1”).
43 Tickner, above n 5, 101.
some existing titles, including mining interests ... gained after the passage of the RDA in what would otherwise have been native title land.\textsuperscript{44} That is, they used the modern constitutional language to undermine any protection accorded by the RDA. Their concern is also reflected in the June 1993 Discussion Paper. The authors of this paper wrote that the effect of finding the issuing a grant was discriminatory could have ‘two possible results’:\textsuperscript{45}

- That ‘the RDA protects native title from extinguishment and renders the relevant legislation or acts under that legislation wholly or partly invalid’; or
- That ‘the RDA operates so as to provide a right of compensation for the extinguishment of native title’.

In February 1993, the Department of Prime Minister and Cabinet advised that to avoid the first possibility arising, ‘the Commonwealth will need to legislate to make clear that nothing in the RDA is inconsistent’.\textsuperscript{46} Hence, one motive for the federal government’s introduction of native title legislation was to block the possibility of native title gaining RDA protection.

At the end of May, the Chief Minister of the Northern Territory said he had sought and received federal government cooperation to secure mining leases at McArthur River.\textsuperscript{47} This was advocated as a way to ensure that existing grants were validated and protected against being declared racially discriminatory.\textsuperscript{48} Tickner noted that Aboriginal and Torres Strait Islander people were ‘outraged’,

\begin{itemize}
\item \textsuperscript{44} Ibid.100.
\item \textsuperscript{45} Mabo: The High Court Decision on Native Title, above n 3, 24.
\item \textsuperscript{46} Tickner, above n 5, 103 (italics in original).
\item \textsuperscript{47} Ibid. 118-9.
\item \textsuperscript{48} Ibid. 117.
\end{itemize}
partly because it proposed to suspend the application of the *RDA* for the leases.\(^{49}\) Eventually though, the Prime Minister provided reassurances that Labor was not going down the suspension path. At a media conference, Keating said the government was ‘not going to be forced into validation, by suspending ... [it], discriminatory actions carried out in the past, and in so doing remove from ... Aboriginal Australians, a right which all other Australians have to litigation in the courts’.\(^{50}\) However, this did not completely close off the possibility of circumventing the *RDA*’s protection of native title. When AMIC advised that legislative action should be taken to undermine the protection of the *RDA*, it also ‘suggested that the validation of titles’ could occur ‘as a special measure under the *RDA*’. AMIC Chair Peter Burnett said ‘legislation could be framed to represent a ‘special measure’ under section 8’ of the *RDA*.\(^{51}\) While this was presented as a benign or ‘legally creative way’ to proceed,\(^{52}\) it can be used to nullify the protection accorded by the *RDA* and it was used in this way with respect to past acts.

At a media conference, Prime Minister Keating said grants issued before *Mabo* were not wrongful since they were carried out in ignorance. In justifying this view, he made a distinction between ‘innocent discrimination’ and a ‘wilful disregard of people’s interests’.\(^{53}\) In response to this characterisation, Noel Pearson noted that its ‘underlying rationale is that because Aboriginal title was not recognised then, their conduct was innocent’. Pearson said this ‘obscures the

\(^{49}\) Ibid. 119.

\(^{50}\) Prime Minister Keating, cited by Ticker, ibid. 159.

\(^{51}\) Peter Burnett, cited by Ticker, ibid. 102, (italics in original).

\(^{52}\) Ibid. 191; Michael Bachelard, *The great land grab: what every Australian should know about Wik, Mabo and the ten-point plan*, (South Melb: Hyland House Publishing Pty Ltd, 1998), 18.

\(^{53}\) Prime Minister Keating, cited by Tickner, above n 5, 159.
truth’, and that many of these titles ‘were obtained in extremely unconscionable circumstances and were the subject of legal appeals (which, before Mabo, were mostly unsuccessful)’. Also, the ‘title takers frequently knew of traditional Aboriginal interests. In many cases they rode roughshod over Aboriginal objections.’ He implied that the government’s stance did not accord with Indigenous wishes and that a process of mutual recognition was needed. Pearson said that the ‘onus is on the Prime Minister to translate his vision for a new national identity for Australia into a principled and just resolution of indigenous claims’. Observing that ‘[y]ou cannot force reconciliation, nor can you impose solutions,’ he said that the legislation ‘must receive the endorsement of Aboriginal groups if the historic opportunity of Mabo is to be seized’.54

**Consent**

Consent was another concept of the common language discussed by the authors of the Discussion Paper. They indicated that in the government-initiated consultation opinions reflected two distinct positions. Characterising their own view as adhering to ‘the principle of non-discrimination’, they said that ‘native title holders should be treated no less favourably than holders of other comparable interests in land’. Hence, ‘to the extent a comparable title holder has a right of consent over an activity affecting the land, so would the native title holder’. The writers also observed that the ‘same would apply to rights of negotiation on a proposed activity affecting the land’.55 Therefore, in comparing Indigenous people’s claims to land to that of existing title holders, they focussed

54 Pearson, above n 40, 11.
55 Mabo: The High Court Decision on Native Title, above n 3, 60.
on a dimension that did not take into account the significance of the cultural aspect of the claims. The problem they created was thus similar to the one noted earlier when they described native title as a land management issue.

The Discussion Paper authors also raised a second position that considered the non-discrimination position inadequate and that viewed native title as sui generis, ‘an interest in land in its own right with its own characteristics’. The authors acknowledged the ‘special attachment of Aboriginal and Torres Strait Islander people to land is beyond doubt, and is of profound significance’. Another aspect of this argument was ‘not that native title is equivalent to such other interests - rather that it is, in its own right, no less important or deserving of protection’.\(^{56}\)

Pearson criticised the shortcomings of simply applying the ‘the principle of non-discrimination’ to native title. He explained that this was ‘treating Aboriginal title as analogous to a freehold or other interest derived from the Crown’. He said this was ‘not appropriate’ since ‘[s]o much has been lost ... in the past 200 years [that] Aboriginal people are entitled to expect special protection for what remains’. The ‘loss or impairment of that title’ was ‘not simply a loss of real estate. It is a loss of culture.’ Challenging the approach advocated in the Discussion Paper he said equating their titles with ‘normal’ titles ‘obscures the very nature of Aboriginal title’. Since this ‘arises out of the customs and laws of the Aboriginal titleholders ... nothing in mainstream titles is comparable’. Instead, Indigenous people were ‘entitled to expect special

\(^{56}\) Ibid. 60.
protection for what remains’. Tickner also observed that “while dealings on a ‘non-discriminatory basis’ have a superficial appeal, they are a denial of any right of negotiation or control by Aboriginal people of what could happen on their lands, especially in relation to mining.”

Pearson also pointed out that to ‘treat Aboriginal title ... like normal titles’ is to adopt a ‘fallacy’. He explained that ‘strict adherence to the notions of formal equality compounds inequality because it fails to acknowledge the legitimacy of difference, particularly of culturally distinct minorities’. He said the IDC embraced a notion of formal equality, and that to treat native title in this way ‘obscures the very nature of Aboriginal title’. He noted in the case of Gerhardy v Brown that Justice Brennan warned of these dangers. On that occasion, Justice Brennan said,

Human rights and fundamental freedoms may be nullified or impaired by political, economic, social, cultural or religious influences in a society as well as by the formal operation of its laws. Formal equality before the law is an engine of oppression destructive of human dignity if the law entrenches inequalities ‘in the political, economic, social, cultural or any other field of public life’.

A position based on the application of formal equality to native title also presumes cultural uniformity. It is like treating native title as if its

57 Pearson, above n 40, 11.
58 Tickner, above n 5, 145.
59 Pearson, above n 40, 11.
60 Gerhardy v Brown (1985) 159 CLR 70.
61 Ibid. 129 (Brennan J).
distinctiveness could be put to one side. Drawing on the modern constitutional language, it presumes native title is reducible to what is shared with other titles. By contrast, Pearson sought to assert the uniqueness of native title and a desire to have this recognised and protected. In doing so, he challenged the modern idea that cultural diversity can be eliminated ‘as a constitutive aspect of politics’.62

Discussion Paper response

In responding to the sui generis position, the Discussion Paper authors identified three areas requiring a response:63

- ‘future grants of interest in land’;
- the ‘validation of mining interests granted since ... the Mabo decision’; and,
- the ‘validation of mining titles issued between 1975 and June 1992’.

They began their examination of these issues by rejecting a general application of the norm of consent. In support of their view they cited the Mabo decision that ‘like other legal rights, including property rights, native title can be dealt with, extinguished or expropriated by valid acts of the Crown’. From this, they determined that ‘the legal position is that native title holders would not have an absolute right of consent over such actions by the Crown’.64 However, this rationale blurs the boundaries between the situation at the time of writing

62 Tully, above n 38, 63.
63 Mabo: The High Court Decision on Native Title, above n 3, 61.
64 Ibid. 62.
and what they considered it should be. That is, they collapsed the normative concerns into what was considered legally permissible. This indicated they followed a presumption of the modern constitutional language and considered a parliament should treat native title like other matters.65 However, because federal Parliament can create and extinguish rights to property, if it so desired it could legislate to protect consent rights. Furthermore, to adopt a course of respecting consent has precedent in the 1976 Northern Territory land rights legislation.66 Moreover, the authors did not address the call made in the Aboriginal Peace Plan at the end of April 1993 to uphold the norm that ‘Aboriginal and Torres Strait Islander Title [is] not to be extinguished or impaired unilaterally without consent.’67

In rejecting the principle of consent rights, the authors did not advance any reasons in support of their stance. It appears though that the Keating government opposed imposing on miners a process similar to that existing in the Northern Territory. Following enactment of the legislation in 1976, the mining industry was strident in campaigning to have consent rights overturned. It claimed that the Act frustrated Australia’s ‘special responsibility to make its resources available to the world community on equitable terms’.68 While ALP policy at the time of Mabo formally supported this right of veto by Aboriginal people over mining and other activities on their land, Robert Tickner said there was ‘zero chance of Cabinet support for such a policy’.69 He also wrote that the

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65 Tully, above n 38, 68.
66 Aboriginal Land Rights (Northern Territory) Act 1976 (Cth).
67 The Aboriginal Peace Plan, reprinted in Goot & Rowse, above n 12, 218.
68 AMIC, cited by Scott Bennett, Aborigines and political power, (North Sydney: Allen & Unwin, 1992), 55.
69 Tickner, above n 5, 131.
Prime Minister ‘had already ruled out Aboriginal people having any kind of veto in line with the NT Land Rights Act ...’ \(^{70}\) He said that officials from the Queensland Premier’s Department were ‘adamant that Aboriginal people should have no rights of consent additional to those exercised by other landowners’. \(^{71}\) Tickner said that because of the general lack of sympathy in the government for the consent principle, he ‘argued for modified consent rights’. \(^{72}\)

Having rejected consent as a general principle, the writers of the Discussion Paper considered some grounds where ‘additional rights of consent’ for native title holders could be provided in relation to actions affecting their land. However, they confined their examination to the impact of future actions on native title. Effectively their position placed on the table limited future circumstances where a qualified right of consent may apply. These would include: \(^{73}\)

- ‘additional protection against compulsory acquisition by governments’; and,
- the ‘special attachment to the land could also be reflected in enhanced requirements for negotiation ...’

The writers noted that a qualified right of consent could be enshrined in legislation by three different approaches: \(^{74}\)

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\(^{70}\) Ibid. 146.
\(^{71}\) Ibid. 117.
\(^{72}\) Ibid. 131.
\(^{73}\) Mabo: The High Court Decision on Native Title, above n 3, 63.
\(^{74}\) Ibid. 64.
• an inclusive approach specifying the circumstances where this would apply;
• an exclusive approach where it is presumed that consent applies and exceptions are listed; and,
• a hybrid of the above approaches.

A similar approach was outlined in the *Framework of Principles* where the Ministers included three points that address the ‘Right of Consent’. Point 12 specified a native title holder ‘should not have a right of veto over grants of interest in land existing as at 30 June 1993 and the rights conferred by those grants should not be required to be re-negotiated’. Point 13 stated that the ‘principle of non-discrimination’ will apply to ‘a future grant of interest over native title land ... [where] ... a right of consent is enjoyed by other comparable title holders’. Point 14 stated that ‘in recognition of the special attachment’ to their land, ‘including especially protection of sacred sites ... there could be additional rights of consent for native title holders ...’

The Keating government’s initial position (it changes after the COAG meeting) on consent indicated this was a hybrid solution, not respecting the convention of consent, but making some concessions in that direction.

**Compensation**

The Keating government’s attitude toward the payment of compensation for the extinguishment of native title will now be considered. In developing its

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attitude toward this matter, the Keating government could not simply apply the view expressed by the High Court majority in *Mabo* regarding the impact of grants. They were also obliged to consider the 1988 decision protecting native title from state-initiated racially discriminatory legislation. The authors of the Discussion Paper noted that ‘it would be technically possible to extinguish or impair native title either with or without compensation’. They indicated that this would involve amending the federal *RDA* legislation as well as state legislative changes, which implied the consent of state governments was necessary. However, they also indicated some of the political and legal obstacles to this course of action. The authors judged that it ‘would be unacceptable to Aboriginal and Torres Strait Islander people and to others in the community at large.’ It would also ‘probably put Australia in breach of its international obligations’ under the International Convention on the Elimination of All Forms of Racial Discrimination (CERD). To ensure compliance with the ‘RDA and Australia’s international obligations’, the authors advocated the payment of compensation ‘in relation to extinguishment or impairment of native title’. The *Framework of Principles* followed a similar approach stating that legislation ‘should establish parameters for compensation when a grant is made over native title land, rather than leaving this for resolution by the courts.’ In the *Framework of Principles*, the Ministers added that the ‘holders of existing grants should not be required to pay retrospective or prospective compensation

76 *Mabo v Queensland No 1*, above n 42, 186.
77 Nettle in Stephenson, above n 16, 38.
78 *Mabo: The High Court Decision on Native Title*, above n 3, 47.
79 Ibid. 47-8.
80 Ibid. 48.
as part of the validation process.’ Instead, this ‘burden should be borne by the Commonwealth and the State/Territories’.\textsuperscript{81}

The government presumed that compensation was an adequate response to the unilateral extinguishment of native title where grants were issued before the \textit{Mabo} decision. The draft native title legislation stipulated that in instances of a ‘category A past act’ covering grants ‘made before 1 January 1994’, native title holders were ‘entitled to compensation for the act’.\textsuperscript{82} It said justice ‘requires that, if acts that extinguish native title are to be validated or to be allowed’, the government was obliged to provide ‘compensation on just terms ... and with a special right to negotiate its form’.\textsuperscript{83} It appeared this was based on extending the application of s 51(xxxi) concerning the ‘acquisition of property on just terms’ to cover the extinguishment of native title.\textsuperscript{84}

In part this approach indicated a culturally sensitive response to Indigenous peoples. When the High Court majority made its 1988 decision, the term property was interpreted in a broad sense, taking account of Article 5 of CERD. The human rights specified included the ‘right to own and inherit property’. Article 17 of the Universal Declaration of Human Rights states: ‘Everyone has the right to own property alone as well as in association with others.’ On this basis Justices Brennan, Toohey and Gaudron noted that while ‘the human right to own and inherit property (including a human right to be immune from arbitrary deprivation of property) is not itself a legal right, it is a

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\item \textsuperscript{81} \textit{A Framework of Principles}, Point 18, reprinted in \textit{Mabo: The High Court Decision on Native Title}, Appendix, ibid. 104-5.
\item \textsuperscript{82} Native Title Bill 1993 (Cth), s 16, s 214.
\item \textsuperscript{83} Ibid. Preamble.
\item \textsuperscript{84} \textit{The Australian Constitution}, above n 33, s 51(xxxi).
\end{itemize}
\end{flushright}
human right the enjoyment of which is peculiarly dependent upon the provisions and administration of municipal law. By following this approach, the federal government was culturally sensitive and adhered to the language of common constitutionalism.

However, the position they advocated on compensation was not dependent on gaining the support of the traditional owners; their consideration of compensation for the extinguishment of native title was not based upon the convention of consent. They were silent about whether they thought it wrong to extinguish native title and so they differed from Justices Deane, Gaudron and Toohey in Mabo who found that the unilateral extinguishment of native title would be wrongful.

**Future grants**

The Keating government drew an important distinction between past actions and future grants. In the case of future grants, it considered there was a ‘need to recognise native title’. Thus, the authors of the Discussion Paper wrote it was ‘unacceptable that the situation be allowed to persist whereby grants of interests in land which may impact on native title interests and be inconsistent with the RDA can continue to be made with an assurance of retrospective validation’. Nevertheless, their words should not be taken to imply they

85 Mabo v Queensland No 1, above n 42, 186, 217.  
86 Mabo: The High Court Decision on Native Title, above n 3, 52.
supported the norm of recognition being applied more generally to future grants. Rather, they considered two ‘broad options’ are available:87

- changing ‘existing laws and procedures governing dealings in land in order to take account of common law native title’; or
- converting native title ‘into statutory title in order to bring it within the purview of existing laws. This would involve extinguishing native title and providing the native title holder with statutory title. This could be either as part of a compulsory regime, or through negotiation’.

Under the first option, they outlined its general parameters:88

- grants ‘do not of themselves extinguish native title rights’;
- native title rights ‘are, however, subject to or restricted by a grant for the period of the grant’;
- the grant ‘must be made in a non-discriminatory manner, and with compensation for the restriction’;
- pre-existing native title rights ‘revive at the expiry of the grant’; and,
- in ‘exceptional’ cases, where it would be ‘necessary to extinguish native title this should only be done by negotiation or compulsory acquisition’.

The authors identified four arguments in favour of converting native title to statutory title:89

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87 Ibid. 52-3.
88 Ibid. 53-4.
89 Ibid. 56.
it ‘would automatically bring the titles within the purview of existing law and would be a simpler task than amending legislation...’;

the ‘content of the title - the set of rights involved would be clear and familiar’, compared to the ‘many questions unanswered’ following the High Court decision;

by ‘equating native title with familiar statutory title(s), the task of determining ... compensation where some grant over land is made would be eased’; and,

if ‘the approach was allied with a reasonable time limit for claims to be made, at the end of that period there would be a finite, manageable situation’.

In government circles there was debate about proposals to convert native title to statutory title. Differences concerned whether the norm of consent was applicable or not. The authors of the Discussion Paper were at best ambiguous about whether conversion should happen without consent. They identified a possible objection that Indigenous peoples may ‘see a title grounded in common law as more secure than statutory title’. However, rather than considering the relevance of consent, the authors merely observed the current legal situation. They implied that since the then current situation already left Indigenous people vulnerable to ‘legislative extinguishment ... if the legislature was so minded’ such objections would not be warranted.90

However, in their Framework of Principles the Ministers explicitly rejected the idea of compulsory conversion. They stated: a ‘Codification of

90 Ibid. 56-7.
Mabo or compulsory conversion of common law native title to statutory title(s) are not acceptable options.91 They added, though, ‘voluntary conversion is acceptable i.e. if this is desired by the native title holder’.92 The Ministers’ general approach was that statutory land rights ‘should be complementary to, rather than a substitute for, recognition of common law native title’.93

Elsewhere in the Framework of Principles, the Ministers indicated that they envisaged exceptional situations where ‘... all or part of a native title needs to be extinguished’. They said ‘this should only be done by negotiation or compulsory acquisition ...’ The rationale advanced in support of this was that ‘at a minimum ... in an equivalent way and in the same circumstances as another title holder’s rights could be extinguished’.94 This statement echoed the dispute mentioned earlier over the term land management. Discussion of the attitudes within the government to future grants does demonstrate the influence of the modern constitutional language and a drift away from common constitutionalism.

COAG and the parliamentary strategy

The next key development in post-Mabo events was the June 1993 COAG meeting, the regular gathering of heads of state and commonwealth governments. An examination of the debate at this meeting provides an opportunity to compare the Keating government’s response to those emanating

91 A Framework of Principles, Point 18A, reprinted in Mabo: The High Court Decision on Native Title, Appendix, ibid. 102.
92 A Framework of Principles, Point 19, ibid, 103.
93 Point 20, ibid. 103.
94 Point 11, ibid. 101.
from the state governments. At the beginning of May that year Prime Minister Keating confirmed that his government would ‘develop a position’ on *Mabo* that it would take to COAG.95

Differences between the state and federal governments were to some extent influenced by different perceptions of their constitutional responsibilities and the languages in which these were expressed. Before Federation, the colonies (the name was changed to states at this time) were invested with the entire management of land, which they retained.96 The states also retained powers over the ‘aboriginal race’. The Commonwealth was specifically denied this power, although it could legislate for the people of ‘any [other] race’. As noted in Chapter 6, this clause was amended by the 1967 referendum so that the Commonwealth could enact ‘special laws’ regarding Indigenous peoples,97 and from this time this power was used to pass laws for the ‘protection of Aboriginal people’. There have been several instances where this power was used to ensure federal legislation was adopted to outlaw discrimination in Queensland and protect community self-management.98

Another power available to federal parliament is the ‘external affairs’ power.99 In 1966, Australia signed the United Nations CERD.100 To meet its obligations to this convention, the federal Parliament adopted the *RDA* in 1975.

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95 Tickner, above n 5, 115.
96 Bartlett, above n 15, 86.
97 *The Australian Constitution*, above n 33, s 51 (xxvi).
98 Bartlett, above n 15, 88.
99 *The Australian Constitution*, above n 33, s 51(xxix).
In the 1982 case, *Koowarta v Bjelke-Petersen* a High Court majority affirmed the *RDA* fitted the constitutional description of the ‘external affairs’ power.101

The relationship between state and federal legislation is specifically addressed in the federal Constitution. The ‘inconsistency of laws’ power specifies that where ‘a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid’.102 Chapter 6 discussed how in the 1988 *Mabo No 1* case the High Court found that Queensland legislation that sought to deny Indigenous rights to traditional land by extinguishment without compensation was racially discriminatory. Since the *RDA* has precedence over state legislation, the High Court found the state legislation invalid to the extent of its inconsistency.103

Two factors suggested cooperation between the states and Commonwealth on native title. One was the possibility that existing titles in both jurisdictions could be found discriminatory. Since the *RDA* was federal legislation, state legislation alone on native title could be vulnerable to further challenges similar to the 1988 case. Another factor was the desire to enact national standards and avoid marked differences in native title regimes across jurisdictions. Two other factors, though, pulled in a very different direction. The 1967 referendum was widely interpreted as a referendum in favour of extending

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102 *The Australian Constitution*, above n 33, s 109.
103 *Mabo v Queensland No 1*, above n 42, 187.
equality to Indigenous people.104 The enactment of the RDA in 1975 added to political and legal expectations that a federal government would act to protect native title from state government threats of unilateral extinguishment.

Before Mabo, state governments saw nothing wrong in dispossessing Indigenous people of their land.105 Following the Aboriginal Land Rights Commission some state governments adopted land rights legislation, but Queensland, Western Australia and the Northern Territory attended to the protection of mining and pastoral interests to which any recognition of native title was thought a threat.106 As was seen in Chapter 6, the state government in Queensland opposed the Meriam People’s claim and Western Australia was the only state not to enact land rights legislation.107 Moreover, the defeat of the Lawrence Labor government in Western Australia in March 1993 ushered in a government hostile to Mabo.108 In such circumstances, an agreement without the direct participation of Indigenous people was likely to involve significant compromises at their expense.109

At the COAG meeting, Keating sought agreement with the states, having ‘consistently made it clear’ in Mabo Ministerial Committee meetings that ‘it was a prime objective ... to get the states on board’.110 Keating conceived the native title legislation as meeting ‘twin goals’: ‘to do justice to the Mabo decision in protecting native title and to ensure workable, certain, land

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104 Attwood, Markus et al, above n 100, x-xi, 66-69.
105 Bartlett, above n 15, 2.
106 Ibid. 36-7; Tickner, above n 5, 91; Brennan, above n 1, 40, 43.
107 Bennett, above n 68, 152.
108 Tickner, above n 5, 123.
109 Ibid. 106.
110 Ibid. 126.
management’. Viewing *Mabo* in this way, and since the ‘bulk of dealings in land is done by the states and territories’, Keating presumed it was essential for their participation.\(^{111}\) Tickner also indicated that the Keating thought ‘if the states and territories could be persuaded to come on board then the Mabo outcome would result in a deeper and more substantive shift in the nation’s consciousness’.\(^{112}\)

Following the *Mabo* decision, some states had argued against enacting any federal legislation. The Western Australian government was the most belligerent in this respect. The premier of that state argued that the states should ‘decide questions of native title arising out of the Mabo judgment’.\(^{113}\) Some such as Queensland and New South Wales supported working with the Commonwealth to develop a ‘consistent national approach’.\(^{114}\) Some opposed specific proposals of the Keating government. For instance, the Victorian Premier opposed the establishment of a tribunal, arguing that it would kill new investment.\(^{115}\) The premiers of South Australia and Queensland and the chief minister of the Australian Capital Territory were seen as more supportive of the federal government’s approach.\(^{116}\)

At the meeting, there was no indication from the state governments that they perceived native title as a constitutional matter. Indeed, they provided less

\(^{112}\) Tickner, above n 5, 126.
\(^{113}\) Geoffrey Barker and Margaret Easterbrook, ‘Premiers ready to say no’, *The Age* 8 June 1993, 1.
\(^{114}\) Lenore Taylor and Jamie Walker, ‘Mabo sparks battle over States’ rights’, *The Australian* 7 June 1993, 1.
\(^{115}\) Barker and Easterbrook, above n 113, 1.
room for the accommodation of Indigenous culture than the federal government. The premiers of Victoria, Western Australia and Tasmania told the meeting that ‘governments should legislate to extinguish native title’; presumably regardless of the attitudes of Aboriginal and Torres Strait Islanders affected. At the end of the meeting, a statement indicated they had accepted the ‘High Court judgment in mabo [sic] that there is native title’. Putting these bland words to one side, the meeting did not even agree to the partial recognition of native title. Almost immediately afterwards, four states announced their own plans to legislate. Their actions effectively scuttled any immediate prospects of a common position between the federal and state governments. The Keating government then declared it would ‘legislate to establish national minimum standards regardless of whether it reached agreement with the states’.

The COAG meeting also divided over what attitude to take toward future acts. The Victorian premier proposed that where land was needed for mining or other developments, the ‘state would provide the necessary title’. If, however, Indigenous people sought ‘possessory title’ and ‘if title were proven, compensation, not land would be provided’.

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117 Taylor, above n 116, 1.
118 Council of Australian Government’s statement on Mabo, reprinted in Goot & Rowse, above n 12, 226.
120 Bartlett, above n 15, 37; see also Lenore Taylor, ‘PM plans to impose Mabo law on States’, The Australian 10 June 1993 1, 4.
121 Tickner, above n 5, 128.
Furthermore, there were sharp divisions over consent. It was reported that Keating ‘alarmed many premiers ... by suggesting that the power of veto should extend to sacred sites, areas of cultural significance and living areas’, but ‘sources said a compromise was being negotiated’. Another report spoke in similar terms, adding that Queensland joined the ‘Liberal States in voicing strong reservations about the extent of Aboriginal veto under Canberra’s proposals’. The Victorian Premier concerned that the power of veto would be extended declared it ‘the thin edge of the wedge’. These reactions were in response to the Keating government’s proposal to provide limited consent ‘where a right of consent is enjoyed by other comparable title holders’. Reportedly, the states were ‘unanimously opposed to the Commonwealth’s view that there should be ‘qualified consent and negotiation rights’ because of this special attachment’.

Later, Keating argued that his government’s draft legislation was one that any reasonable state government could support. He said that states and territories ‘that wish to see a national system with proper recognition of their land management responsibilities and with fairness to Aboriginal and Torres Strait Islander people, will find it in this bill. We will be happy to cooperate with them.’ Contrasting the federal legislation with the legislation from Western Australia, he rejected the view that no space should be provided to recognise

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122 Taylor, above n 116, 2.
125 Tickner, above n 5, 128.
native title. He went on to explain that ‘we cannot accept Western Australian style legislation involving’.\textsuperscript{126}

- ‘compulsory, wholesale extinguishment of native title - a title embodied in the common law, and the inherent right of Aboriginals and Torres Strait Islanders who meet the criteria’;

- ‘the mandatory replacement of this by a statutory title - a title only conferred at the pleasure of government, and which can be extinguished in particular cases virtually at a minister’s whim’; and,

- a ‘land management regime which provides only the flimsiest protections for Aboriginal people - protections far less than other land-holders enjoy’.

\textbf{COAG and Aboriginal and Torres Strait Islander peoples}

This chapter commenced by highlighting the Keating government’s emphasis on creating ‘a new relationship with indigenous and non-Aboriginal Australians’.\textsuperscript{127} Events around the COAG meeting were also helpful in clarifying the extent a new relationship was established with the Commonwealth and state governments.

The federal government had another opportunity to include Aboriginal and Torres Strait Islander representatives in negotiations with the states when this was proposed in the lead up to the COAG meeting. Pat Dodson, chair of the Council for Aboriginal Reconciliation, wrote to Keating proposing meetings

\textsuperscript{126} House of Representatives \textit{Weekly Hansard} No 11, 1993, 2879 (16 November 1993).

\textsuperscript{127} Prime Minister Keating cited by Brennan, above n 1, 42.
occur with ‘representatives of the broader indigenous community’. He also argued for the establishment of a sub-committee that could facilitate a dialogue between industry groups and Indigenous people.\textsuperscript{128} It appears the Keating government did not act upon this proposal.\textsuperscript{129}

At the COAG meeting, a group of Indigenous people protested outside to draw attention to their exclusion and to their demands.\textsuperscript{130} Their complaints about lack of access to the meeting drew a response from the Prime Minister’s office. He invited Aboriginal Provisional Government representatives Michael Mansell and Geoff Clarke to share their concerns with him. While rejecting their proposal to address the meeting, he accepted a letter outlining their concerns about the federal government’s draft \textit{Mabo} response.\textsuperscript{131} Thus, the historical spectre of Indigenous people ‘being liable to be dispossessed at the whim’ of executive government again loomed large.\textsuperscript{132} Tickner thought there could be ‘nothing worse than the heads of government stitching up a deal in a closed room to shape the future rights, or lack of them, of indigenous Australians’.\textsuperscript{133} This spectre was only avoided when negotiations between the states and Commonwealth broke down.

The COAG events indicate the influence of various constitutional languages. As discussed in Chapter 5, Noel Pearson considered \textit{Mabo} meant

\begin{itemize}
  \item \textsuperscript{128} Tickner, above n 5, 110.
  \item \textsuperscript{129} Ibid. 126.
  \item \textsuperscript{130} Tom Ormonde, ‘Blacks protest outside talks’, \textit{The Age} 9 June 1993, 7.
  \item \textsuperscript{131} Jamie Walker and Scott Henry, ‘Tickner attacks Mabo-style claims’, \textit{The Australian} 9 June 1993, 2.
  \item \textsuperscript{132} \textit{Mabo v Queensland (No 2)} (1992) 107 ALR 1 at 67 per Deane and Gaudron JJ.
  \item \textsuperscript{133} Tickner, above n 5, 128-9.
\end{itemize}
'that Aboriginal law and custom is now a source of law in this country'. Yet, there was no indication that this was heard by the federal and state governments. This contrasts with the situation in Canada and the view that constitutional space exists for Aboriginal self-government. To proceed along such a path would have indicated an embracing of the language of common constitutionalism. Conversely, the failure to expand the COAG meeting to include Indigenous peoples in the decisions about the legislation or establish a new body for that purpose indicated the influence of modern constitutional thinking.

However, Labor was to consult with Indigenous peoples. Speaking of relations between ‘Aboriginal and non-Aboriginal Australians’ when introducing the native title legislation to Parliament, Keating said joint work had ‘extended the frontier of our mutual understanding’. The ‘most outstanding, but by no means the only, example of this has been the participation of representatives of the combined Aboriginal and Torres Strait Islander Organisation Working Party in the unprecedented negotiations leading to this legislation’. Rowse later observed that the ‘supposition that certain Aboriginal people did speak for a nation-wide indigenous constituency became essential to the Prime Minister’s management of the consultations leading up to the presentation of the Native Title bill’.

134 Noel Pearson, ‘From remnant title to social justice’ in Goot & Rowse, above n 12, 181.
137 Tim Rowse, ‘The principles of Aboriginal pragmatism’ in Goot & Rowse, above n 12, 193 (italics in original).
Nevertheless, there were instances where Labor clearly did not pursue consultation. The most prominent example was over the McArthur River mine. When they became aware that the Northern Territory and federal governments had reached agreement at the end of June to validate the leases covering the McArthur River Mine without their participation, Tickner said ‘Aboriginal people were outraged and openly accused the Prime Minister of betrayal’. He recounted that although he was Minister for Aboriginal and Torres Strait Islander Affairs, he too was not ‘consulted about this decision’.138 This starkly drove home the point that while the Keating government consulted with Indigenous people more than some governments, this did not demonstrate adherence to the convention of consent, but reflected a shift toward the language of modern constitutionalism and away from the exclusionary approach of White Australia that characterised Federation.

While Indigenous representatives had meetings with the federal government about the legislation, some Aboriginal groups were concerned the process marginalised them. The Senate Standing Committee noted this when they conducted a round of public hearings about the federal legislation in early December 1993. Hearings were held in Brisbane, Darwin, Perth and Canberra.139 The ‘Majority View’ presented by Victorian Labor Senator Barney Cooney noted that a ‘number of Aboriginal groups and some individuals argued that the Aboriginal negotiating team was unrepresentative of them’. They were critical of this team “for ‘doing a deal’ with the Prime Minister without authority and without satisfactory consultation”. This report, though, also noted

138 Tickner, above n 5, 119. See also Tim Rowse, ‘How we got a Native Title Act’ in Goot & Rowse, above n 12, 121.
139 Senate Report on Native Title Bill 1993, above n 2, 6.
the ‘negotiating team made it clear that they negotiated only on their own behalf of the people they represented directly’.\textsuperscript{140} The report also noted that a ‘number of Aboriginal and Torres Strait Islander spokespersons said that the government should not legislate until Aboriginal and Islander people had a full understanding of the rights revived by the High Court decision’.\textsuperscript{141}

**Party attitudes to Mabo**

**The High Court decision**

Now considered will be the attitudes expressed within federal Parliament to \textit{Mabo}. Many ALP members spoke only positively about the High Court’s decision, raising no concerns that it might provide an inadequate basis for recognition. For instance, the member for the Queensland seat of Morton, Mr Gibson, told the House of Representatives the Court had followed common law precedent ‘consistent with British common law ...’\textsuperscript{142} Another Queensland representative, the member for Oxley Mr Les Scott, told the same chamber that the \textit{Mabo} judgement ‘laid the foundation for justice’.\textsuperscript{143} The comments of Senator Beahan suggested he was unaware that English common law can provide a basis for people dispossessed to reclaim their land. He told his colleagues that ‘[m]ost Aboriginal people have ceased to enjoy any traditional relationship with their former land’ and ‘any native title interests were

\textsuperscript{140} ‘Majority View’, ibid. 11.

\textsuperscript{141} ‘Majority View’, ibid. 16; see also ‘Dissenting Report’, ibid. 59-60, and 106-7.

\textsuperscript{142} House of Representatives \textit{Weekly Hansard} No 12, 1993, 3421 (23 November 1993).

\textsuperscript{143} Ibid. 3429 (23 November 1993).
extinguished long ago’. The only ALP member to dissent from his party’s approach was Graeme Campbell, the ALP member for the rural Western Australian seat of Kalgoorlie. He considered the High Court ruling ‘irresponsible’ and the work of ‘a rogue High Court’. In his view only one judge, ‘Mr Justice Dawson, got it right.’

The Liberal Party was divided in its attitude toward *Mabo*. South Australian MP Christopher Pyne supported the decision and said it had ‘righted a 200-year-old wrong’. His colleague, Ms Trish Worth was more expansive. She said the ‘moral way is that course of action which will best enable Aboriginal and Islander Australians to craft their own future free from disadvantage and discrimination and in a state of harmony with other Australians which is founded on an honest appreciation of our shared history’. She said ‘[f]undamental to this approach is an acknowledgment of native title and the legitimacy of the Mabo decision’. Opposition Leader Dr John Hewson was lukewarm and formalistic. He told the House of Representatives: ‘We on this side of the House accept the existence of native title as declared by the High Court, and we recognise the equal right of indigenous people as Australian citizens to the enjoyment and protection of their rights.’ His guarded comments framed recognition within the modern constitutional language.

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146 Ibid. 3513 (24 November 1993).
147 Ibid. 3574 (24 November 1993).
148 Ibid. 3405 (23 November 1993).
149 Tully, above n 38, 15.
Many other Liberals though voiced strident opposition to the decision. South Australian Senator Nick Minchin, later to become the minister responsible for negotiating the Howard government’s Native Title Amendment Bill through federal Parliament, described the High Court decision as ‘probably the most controversial and revolutionary decision ... in its history’. He said it had ‘upset a very long tradition of evolution, not revolution, in the development of the common law in this country’. Minchin said ‘ordinary Australians instinctively sense that in that judgment the High Court went way beyond what is the norm for that court. I think the High Court and the government are quite out of step with public opinion.’\textsuperscript{150} In a similar fashion, South Australian MP Ian McLachlan spoke of ‘the discrimination inherent’ in the High Court decision and the draft legislation.\textsuperscript{151}

Nationals parliamentary leader Tim Fischer supported the doctrine of terra nullius. He said ‘Aboriginal dispossession was sad but inevitable’, the result of the ‘social Darwinism which pervaded white colonial culture and the expansionary competitiveness of the European superpowers’. Terra nullius ‘as a concept meant that the native inhabitants did not intensely utilise their land, as much as simply traversing it, living as a nomadic people’. He also rejected the Court’s view that a system of laws was in existence before British acquisition. He said the ‘reason no treaties were made does not represent a denial of Aboriginal existence but, rather, that there was no leadership or cultural structure with which to negotiate’.\textsuperscript{152} Others were more guarded. The National leader in the Senate, Senator Boswell, formally noted that the High Court ‘ruled

\textsuperscript{150} Senate \textit{Weekly Hansard} No 15, 1993, 4650 (15 December 1993).
\textsuperscript{151} House of Representatives \textit{Weekly Hansard} No 12, 1993, 3440 (23 November 1993).
\textsuperscript{152} Ibid. 3425 (23 November 1993).
that native title exists’ but interpreted the decision as limited, so that ‘Aborigines and Islanders can [only] claim unalienated crown land’.153

Like the ALP, the Australian Democrats welcomed Mabo. Party leader Cheryl Kernot spoke of the ‘lie of terra nullius’ defended ‘only by relying on an archaic and Eurocentric view of the world which denied responsibility for our real history’.154 Kernot said the decision ‘should have meant the recognition of bare legal rights for Aboriginal peoples and some attempt to provide redress for the 90 per cent of indigenous people who will not benefit from Mabo’.155

The Greens (WA) were the only party to express concerns that Mabo did not provide an adequate basis to recognise native title. Senator Christabel Chamarette noted the High Court decision ‘held some good news for Aboriginal people, which was that it recognised the legal lie of terra nullius and acknowledged the existence of native title and prior occupancy of Australia by Aboriginal people’. She then went on to speak of ‘the bad news ... from the point of view of justice for Aboriginal people’ was that the ‘High Court decision also said that valid acts of state and federal governments were able to extinguish native title and, of course, had done so for 200 years’.156

154 Ibid. 4625 (15 December 1993).
155 Ibid. 4626 (15 December 1993).
156 Ibid. 5061 (16 December 1993).
Federal/state relations

Earlier it was noted that the Labor government did not support Indigenous people participating in direct negotiations with the state and federal governments about native title. For the Liberal-National Coalition, the essential question was agreement between the federal and state governments and the failure to achieve this was cited as the reason they refused to support the Native Title Bill. Dr Hewson claimed ‘the bill ignores the responsibility of the states and territories under the constitution for land management. This legislation is simply a grab for Canberra to increase its control over the constitutional responsibility of the states and territories in the area of land management.’\textsuperscript{157} Likewise, Tim Fischer said the ‘government had not attempted serious negotiation … with the states’\textsuperscript{158}

In their attitude to federal/state relations, both parties followed one of the premises of modern constitutionalism by presuming that \textit{Mabo} had no implications for these relations and that COAG should proceed as normal. In this respect they treated Federation as almost above democracy, or as Tully noted, a ‘modern constitution thus appears as the precondition of democracy, rather than a part of democracy’. This is in contrast with a democratic spirit where a constitution is adjusted ‘as the customs and circumstances changed’.\textsuperscript{159}

\textsuperscript{157} House of Representatives \textit{Weekly Hansard} No 12, 1993, 3408 (23 November 1993).
\textsuperscript{158} Ibid. 3426 (23 November 1993).
\textsuperscript{159} Tully, above n 38, 69.
The draft legislation

The draft native title legislation was introduced to federal Parliament on 16 November 1993. Reflecting the influence of the language of human rights, the preamble stated the ‘Australian Government has acted to protect the rights of all of its citizens, and in particular its Indigenous peoples, by recognising international standards for the protection of universal human rights and fundamental freedoms’. In support of this assertion it pointed to Australia’s ‘ratification of the International Convention on the Elimination of All Forms of Racial Discrimination and other standard-setting instruments such as the International Covenants on Economic, Social and Cultural Rights and on Civil and Political Rights’, the ‘acceptance of the Universal Declaration of Human Rights’ and the ‘enactment of legislation such as the Racial Discrimination Act 1975 and the Human Rights and Equal Opportunity Commission Act 1986’.

The preamble also went someway to accommodate the distinct culture of Aboriginal and Torres Strait Islander people when it stated that ‘where appropriate, the native title should not be extinguished but revive after a validated act ceases to have effect’. While it does not express support for the convention of consent, the preamble did propose a compromise between the languages of modern constitutionalism and common constitutionalism when it states: ‘Justice requires that, if acts that extinguish native title are to be validated

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160 ‘Commentary on the Native Title Act 1993’ in Native title: legislation with commentary, above n 9, C8.
161 Native Title Bill 1993 (Cth), Preamble.
or to be allowed, compensation on just terms, and with a special right to negotiate its form, must be provided to the holders of native title.\(^{162}\)

As noted, in its initial response to the *Mabo* legislation about past acts, the Keating government used a mix of the languages of common and modern constitutionalism. One of the ‘main objects’ of the bill was the recognition of native title which fits with the language of common constitutionalism. However, the legislation also provided for the extinguishment of native title, specifying that ‘native title is not able to be extinguished contrary to this Act’.\(^{163}\) In doing so, the bill used the language of modern constitutionalism. The bill identified four different categories of past acts.\(^{164}\) For instance, a ‘past act consisting of the grant of freehold estate’ is a ‘category A past act’ where it ‘was made before 1 January 1994 ...’ While some other qualifications were provided, essentially it covered all past grants of freehold estates except those granted ‘only to or for the benefit of Aboriginal peoples or Torres Strait Islanders’. This category also included grants of ‘a commercial lease, an agricultural lease, a pastoral lease or a residential lease’ before 1 January 1994. A similar qualification excluded those leases granted for the benefit of Aboriginal people or Torres Strait Islander people.\(^{165}\) If a grant was deemed part of this category, then ‘the act extinguishes the native title concerned’.\(^{166}\)

As noted earlier, when examining the approach expressed by the authors of the Discussion Paper, the need to validate certain past acts arose because of

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\(^{162}\) Ibid.
\(^{163}\) Ibid. s 10.
\(^{164}\) Ibid. s 14.
\(^{165}\) Ibid. s 214.
\(^{166}\) Ibid. s 14(a).
concern that the RDA could leave existing titleholders vulnerable to claims of discrimination. The bill’s explanatory memorandum stated that the ‘Commonwealth has examined these concerns and regards the invalidity of some past acts as a legal possibility’. Because of the possibility of this arising, ‘in particular by the operation of ... [the RDA] and also potentially by other laws, the Commonwealth has therefore decided to include in its legislation provisions for the validation of such past acts, in order to remove any doubt’.167

However, a measure that went some way to ameliorate the effect of extinguishment on native title holders was the bill’s intention to establish a ‘National Aboriginal and Torres Strait Islander Land Fund’. Its purpose was to ‘assist Aboriginal peoples and Torres Strait Islanders ... acquire land ... and to manage the acquired land in a way that provides economic, environmental, social or cultural benefits’ to them.168 The government explained that this initiative was based on recognising that ‘many Aboriginal and Torres Strait Islander people will be unable to secure native title and to benefit directly from the High Court decision’.169

Future acts

A difference between the government’s pre and post-COAG views was a changed boundary between categories of past and future acts. As noted, the initial rationale held that those who ‘innocently’ acquired titles before Mabo would be protected. At COAG, the federal government proposed that grants

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167 Explanatory Memorandum Part A, above n 7, 2.
168 Native Title Bill 1993 (Cth), s 192.
169 Explanatory Memorandum Part A, above n 7, 2.
until the end of June 1993 would be validated. By the time the bill was introduced to Parliament, the cut-off date was shifted to 1 January 1994 for acts and grants. The boundary between past and future was further blurred as the bill would also ‘validate, and enable validation, of some acts which will take place in the future, where these acts are linked to acts done in the past’. This included the exercise of options and the extension or renewal of grants made in the past, which excluded the revival of native title in these instances.

The aim of the bill was to provide a framework for general recognition where native title can only be ‘extinguished by agreement with the native title holders’. This application of the ‘non-extinguishment principle’ would provide native title holders with rights similar to other title holders. It also addressed other exceptional, McArthur River-type, circumstances by providing for the compulsory acquisition of native title land and ‘nothing ... prevents the acquisition from extinguishing the whole or the part of those rights and interests’. The authors of the Discussion Paper argued it should be limited to ‘exceptional cases’, but the bill let the government of the day determine the extent of these exceptional cases. While there was some ambiguity about the boundary between the future act provision and the application of the non-extinguishment principle, the bill failed to provide full protection against any adverse effects of a future act upon native title.

171 Explanatory Memorandum Part A, above n 7, 3.
172 Ibid. 5.
173 Ibid. 1.
174 Mabo: The High Court Decision on Native Title, above n 3, 53-4.
175 Native Title Bill 1993 (Cth), s 22(3).
Modern constitutional language also influenced the federal government’s thinking about future acts. For instance, the draft legislation aimed to accommodate native title into the ‘national land management system’. A process would be established ‘to allow for grants and actions over native title land ... to continue in the future’ in order to treat native title claimants like existing title holders.\textsuperscript{176} Hence, the explanatory memorandum stated that these permissible future acts would apply ‘in the same way to the native title holders concerned as it would if they instead held ordinary title to the land’. It was claimed the effect of such an act on native title would not ‘cause the native title holders to be in a more disadvantageous position at law than they would be if they instead held ordinary title to the land’.\textsuperscript{177}

Consent and the right to negotiate

A significant change to consent occurred between the pre-COAG position of the Keating government and the introduction of the draft legislation. Instead of qualified consent being applied, the government replaced this with a right to negotiate. Following the COAG meeting, consent rights was again raised at a cabinet meeting at the end of July. According to Tickner, the drafting instructions prepared by the Department of Prime Minister and Cabinet on future grants stated these must ‘proceed on a non-discriminatory basis: that is, grants, crown acts, extinguishment etc. can happen in relation to native title land

\textsuperscript{176} Explanatory Memorandum Part A, above n 7, 5.
\textsuperscript{177} Native Title Bill 1993 (Cth), s 220(2).
as they can in relation to other private interests in land’. These principles were
to be passed on to parliamentary draftspeople to prepare the Native Title Bill.178

A lengthy cabinet meeting on 27 July 1993 resolved that the bill held ‘a
disposition to accord to native title holders a right to be consulted on proposed
actions affecting their land, with arbitration by the native title tribunal where
agreement is not reached, with both consultation and arbitration to be within
strict time limits, and for there to be a capacity for a crown (Commonwealth or
State) override of a tribunal decision in the national interest’. The meeting made
clear these rights were not of veto, but of negotiation where the ‘existence of
native title had been established’.179 Tickner considered this was the ‘best
outcome that could have been achieved’ in a context where a right of veto was
‘decisively and irrevocably ruled out by the Prime Minister’.180

In the case of future acts, the bill provided ‘special rights of negotiation’
for ‘registered native title holders and registered claimants’. However, these
were only for ‘some permissible future acts’, such as those relating to mining,
the compulsory acquisition by government of native title for the purpose of
making a grant to a third party and other acts approved by the federal
minister.181 For mining, the negotiation rights covered the creation of a right to
mine, its variation, or extension of the period of its effect mining leases.

178 Drafting Instructions cited by Tickner, above n 5, 145.
179 Cabinet decision, cited by Tickner, ibid. 149.
180 Ibid. 151.
181 Explanatory Memorandum Part A, above n 7, 5.

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However, the minister could also restrict the applicability of the right to negotiate provisions where it had ‘minimal effect’ on any native title.\textsuperscript{182}

So, by the time the bill was introduced to Parliament, qualified consent rights were transformed into special negotiation rights, which signified a further retreat from the norm of consent. Therefore, if a dispute were to occur, native title holders would have to rely on moral and political persuasion rather than legal protection to ensure the continuity of their cultural practices.

\textbf{Party attitudes to the Native Title Bill}

\textbf{Recognition}

The attitudes expressed in parliament to the draft legislation will now be considered. Most ALP members presumed the proposed native title regime and recognition were one and the same. If they had misgivings, they did not raise these in Parliament. The Member for Moreton, Mr Gibson, declared the bill would ‘restore the rights of Aboriginal and Torres Strait Islander Australians to possession of their land’.\textsuperscript{183} Mr Snowdon said the bill was ‘not about taking away anyone’s rights’ since it validated ‘invalid grants, thereby ensuring certainty of title ...’ His words implied the legislation would have no impact upon native title claimants.\textsuperscript{184} Mr Elliot said the bill gave ‘unambiguous recognition and protection of native title’.\textsuperscript{185} The Member for Franklin, Mr

\begin{flushleft}
\textsuperscript{182} Native Title Bill 1993 (Cth), s 25.
\textsuperscript{183} House of Representatives \textit{Weekly Hansard} No 12, 1993, 3421 (23 November 1993).
\textsuperscript{184} Ibid. 3452-3 (23 November 1993).
\textsuperscript{185} Ibid. 3511 (24 November 1993).
\end{flushleft}
Harry Quick, said the bill was ‘not about telling Aboriginal people - or finding out from non-indigenous Australians what they think - what is right for them’. 186 Campbell was again an exception, he said it would be ‘entirely equitable to extinguish it [native title] completely and agree to pay the compensation’. 187

While the Liberals divided over *Mabo*, they were united in opposition to the legislation. Dr Hewson rejected it ‘because we believe it is neither a just nor a workable response to the ... Mabo decision’. 188 He identified ‘two challenges’: that the ‘High Court has formally recognised that Aboriginal people occupied Australia before it was settled by Europeans’; and that ‘We also need to reaffirm the validity of existing land titles that were negotiated in good faith and in accordance with the law of the land as it then stood’. He explained that in ‘meeting these two challenges what is needed is a sensitive, delicate and realistic balance’. However, the bill provided ‘no such balance’. 189 While recognising the need for federal legislation, he said it should be confined to facilitating ‘the validation of past grants’. 190 To Ms Worth, the government’s bill was ‘not ... a just or workable response’. 191

Their National partners were concerned that the legislation did not protect pastoral leases. They accepted legal advice from the National Farmers Federation (NFF) to the effect that ‘the valid grant of a pastoral lease is almost

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186 Ibid. 3579 (24 November 1993).
187 Ibid. 3753 (25 November 1993).
188 Ibid. 3405 (23 November 1993).
189 Ibid. 3407 (23 November 1993).
190 Ibid. 3411 (23 November 1993).
191 Ibid. 3575 (24 November 1993).
certain at common law to extinguish native title’, 192 Fischer was concerned to stop the matter being tested in court. Therefore, he said pastoral leases ‘must be fully validated without qualification’. 193 In a similar vein, Queensland Senator Bill O’Chee said the Nationals ‘recognise and accept the High Court decision’. 194 His speech to the Senate was overwhelmingly concerned with the failures of the legislation to ‘protect’ pastoralists from native title claims. Likewise, he was concerned the fishing industry was not provided ‘certainty’ because of claims ‘in respect of ... waters’. Furthermore, he considered the bill did ‘nothing to provide certainty for the forestry industry’ because the ‘forestry leases … do not extinguish native title’. 195

Australian Democrats leader Ms Cheryl Kernot generally supported the bill. She made this clear before it was introduced to Parliament when she moved that the Senate commends the ‘Prime Minister for … setting a positive direction for the proposed Mabo legislation and … negotiating for a just outcome ...’ 196 However, the Australian Democrats’ support was ‘contingent upon extensive social justice measures being instigated by the Government’ to address those Indigenous people ‘who will not directly benefit from native title legislation’. 197 They proposed 35 amendments to the Standing Committee. 198 Victorian Senator Sid Spindler said these were necessary ‘to make certain that this Bill becomes the basis of a just relationship between Aboriginal people and the rest of the

192 National Farmers Federation, cited by Tim Fischer, ibid. 3427 (23 November 1993).
193 Ibid. 3428 (23 November 1993).
195 Ibid. 4620 (15 December 1993).
198 Ibid. 43-51; Senate Weekly Hansard, No 15, 1993, 5007 (16 December 1993).
Some of the amendments sought to improve the protection accorded to native title claimants. For instance, amendment No 10 called for a new sub-clause to clause 45 of the bill (concerning pastoral leases held by native title claimants). The Australian Democrats also proposed to clarify the meaning of traditional connection so that ‘Aboriginal properties which have been purchased after a period of forced absence to have native title reasserted where traditional ownership can be established’. Amendment No 25 sought changes to clause 197 of the bill to ensure ‘that there is no discrimination against hunting and fishing rights’. By 16 December 1993, Labor had agreed to incorporate these measures into the bill. The Democrats were now amenable to its passage before Christmas.

The two Greens (WA) senators supported extending recognition of native title further than provided for by the bill. They supported the ‘greatest possible recognition of native title in Australian society generally, and more specifically by the legal system’. Gary Corr, who did research work for the two senators, explained that their priority was about ‘maintaining the physical basis for the continuing existence of native title’. Before the parliamentary debate, they identified a ‘bottom line’ that would need to be met for them to give

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200 Senate Report on Native Title Bill 1993, above n 2, 45. Despite the desire of the Australian Democrats and Greens (WA) senators to amend clause 45 of the bill so that native title holders had more protection, they did not gain the support of the Government. See Senate Weekly Hansard No. 15, 1993, 5346-5355 (20-21 December 1993).
201 Senate Report on Native Title Bill 1993, above n 2, 48. When this clause was discussed in the Senate the Australian Democrats supported a Greens (WA) amendment to insert a new clause before clause 197 addressing the ‘Preservation of certain native title rights and interests’. The amendment also gained the support of the Government and was agreed to by the Senate. See Senate Weekly Hansard No. 15, 1993, 5440-5457 (21 December 1993).
203 Ibid. 4627, 4640-1 (15 December 1993); Brennan, above n 1, 74-5.
support to the bill. This included opposition to the suspension of the RDA, support for a federal tribunal, validation to involve coexistence with pastoral leases rather than extinguishment of native title, a veto over mining for native title holders and a social justice package for those who could not access native title. While they were mindful of the ramifications of not supporting the legislation, they ‘needed a moral stance to support’ it. During the debate, Senator Chamarette said that the bill contained ‘many provisions’ that ‘restrict native title more than the High Court ruling does’. The Greens (WA) were critical of the Bill’s framework. They took ‘exception’ to the link in the Bill between validation and extinguishment of native title. Instead, they sought the ‘coexistence of native title and valid leases’.

The right to negotiate

There was no discussion around the norm of consent. The right to negotiate did not gain much attention either, although the Prime Minister did add some comments that clarified his view of fairness. He said the right to negotiate provided a ‘fair test’ ‘founded directly on a principle of non-discrimination’. He said the ‘emphasis on Aboriginal people having a right to be asked about actions affecting their land accords with their deeply felt attachment to land. But it is also squarely in line with the principle of fair play. It is not a veto.’ It was apparent that Keating had in mind two instances of unfairness: that not to ask the opinion of Aboriginal people was unfair; and that for Indigenous peoples to exercise a right of consent would be unfair to miners and pastoralists.

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He spoke of ‘acquiring land for public purposes such as infrastructure development’ from ‘native title holders, just as they can from other land-holders ...’ He said that the ‘integrity of the land management system will thus be maintained. But we insist this be achieved in a way which respects the profound Aboriginal connection to the land and provides appropriate protections.’

Many Coalition MPs expressed concerns that not enough consultation had occurred with Indigenous people over the legislation. Dr Hewson said another ‘great myth that the Prime Minister has created is that this Mabo Bill represents a national outcome of consultation - consultation with and examination by the Aboriginal people’. Dr Hewson questioned the basis for the bill. He said the Prime Minister ‘has told us that there is Aboriginal consensus and agreement on this bill, but, when we look at the detail, the hollowness of this claim is soon revealed’.

However, the Coalition’s concern that consultation with Indigenous people was inadequate should not be taken as support for the right to negotiate provisions. Instead, they translated this into the familiar language of modern constitutionalism. For instance, New South Wales Senator Sandy MacDonald described the right to negotiate provisions as a ‘de facto right of veto’ that would ‘impede economic development in this country’. In opposing a veto, they often focussed on the Northern Territory land rights legislation. For instance, NT Senator Grant Tambling characterised the legislation as providing

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210 Aboriginal Land Rights (Northern Territory) Act 1976 (Cth).
‘an open-ended loop in the process of negotiation that constantly goes on’. 211 Likewise, Queensland National Party Senator Ron Boswell described the ‘right of veto’ as ‘nothing more than a disaster for Australia’. 212 Then Liberal deputy leader Michael Wooldridge indicated a desire to change the rules. He advised Parliament to ‘admit the shortcomings of our political process attempting to negotiate with people who, by and large, think only locality’. He said, ‘[q]uite frankly, there must be a better way than what has happened over the last 16 months’. 213

The Australian Democrats generally supported the right-to-negotiate procedures. However, there were instances in the debate where it had a difference of opinion with the ALP. When the ALP proposed to amend its own bill on the renewal and extension of certain acts it said this was necessary to provide ‘certainty’ to ‘existing property holders’. 214 This amendment would exclude native title holders from accessing the right to negotiate measures until the conclusion of the leases’ renewal, a situation confirmed by ALP Senator Gareth Evans. 215 He indicated that ‘Aboriginal groups ... would like this amendment not to proceed’. Senator Ker not considered this tipped the balance ‘too far one way’. She cited an example of a 42-year lease with a 42-year option. ‘During that time, native title holders will have absolutely no say in what happens on their land. They will have no entitlement to approach the

212 Ibid. 5274 (20 December 1993).
214 Native Title Bill 1993 (Cth), s 24; Senate Weekly Hansard No 15, 1993, 5209-10 (18 December 1993).
mining company to seek any form of negotiation.\textsuperscript{216} The Greens (WA) senators joined the Democrats to vote against the measure. The Coalition appeared in a dilemma: inclined to support the government’s amendment, but not wanting to appear to be supportive of the bill. The result was a rare division among their ranks over the bill with three National Party senators, McGauren, Macdonald and O’Chee, voting with the government. Nevertheless, the opposition to the amendment was still strong enough to ensure that it failed.\textsuperscript{217}

The Greens (WA) expressed concerns that the right-to-negotiate provisions did not give sufficient control to Indigenous people. Senator Chamarette pointed to international conventions concerning human rights as well as the UN \textit{Draft Declaration on the Rights of Indigenous Peoples} as grounds to support native title holders having ‘control over development’ and access to ‘royalty sharing’.\textsuperscript{218}

\textbf{Conclusions}

Following the High Court decision, the most significant government decision was to not proceed along a ‘North American approach’ to begin ‘negotiating regional settlements of native title’. The government rejected the idea of transforming the native title ship into a more far-reaching ship of reconciliation. Furthermore, while the Keating government allowed Indigenous people to occasionally get involved in deciding the direction of the ship, it did not propose to change the rules to institutionalise a new way forward.

\textsuperscript{216} Ibid. 5211 (18 December 1993).
\textsuperscript{217} Ibid. 5214 (18 December 1993).
\textsuperscript{218} Senate \textit{Weekly Hansard} No 15, 1993, 5262-5263 (20 December 1993).
Other events demonstrating the ship’s cargo was influenced by modern constitutionalism were:

- the tendency to transform native title into a ‘land management issue’;
- the application of formal, rather than substantive, equality to native title: the ‘principle of non-discrimination’;
- its inclination to suspend the RDA to protect grants and leases; and,
- the shift from consent to right to negotiate;

Nevertheless, it was also apparent that the language of human rights had some influence on the outcome. This was reflected in the following:

- the Keating government’s rejection of the language of White Australia;
- the preamble to the legislation; and
- the creation of a National Aboriginal and Torres Strait Islander Land Fund.

However, the Keating government also followed a view of human rights that did not embrace the three conventions of common constitutionalism. Its legislation was not fully consistent with a number of the articles in the Draft Declaration on the Rights of Indigenous Peoples. Support for the extinguishment of native title where grants for freehold title were issued did not meet its Article 26, which stated that Indigenous peoples had a ‘right to the full recognition of their laws, traditions and customs, land-tenure systems and
institutions for the development and management of resources, and the right to effective measures by States to prevent any interference with, alienation of or encroachment upon these rights’. Nor did it meet Article 27’s principle that ‘Indigenous peoples have the right to the restitution of the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, occupied, used or damaged without their free and informed consent’. In its defence, the Keating government would probably have argued that full restitution could not be achieved and that it had complied with the next sentence that states: ‘Where this is not possible, they have the right to just and fair compensation. Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources equal in quality, size and legal status.’219 The key point though is that whatever steps were taken they should have respected the convention of consent. In this respect, the legislation was inconsistent with this convention.

The examination in this chapter also indicates that the state governments were less inclined to support the launch of the native title boat. They sought to block its launch and scuttle its supplies. This is reflected in the views expressed at COAG that all native title should be extinguished.

The developments that impacted upon native title as a result of subsequent court cases and the Howard government legislative amendments will complete the examination of how this claim was treated by the High Court and federal parliament. This is the task undertaken in the next chapter.

Chapter 9:

High Court developments and the Howard Government reaction

The agreement reached between the government and Senator Brian Harradine if given effect to by this House and by the Senate will at long last deliver to the people of Australia a resolution of an extraordinarily difficult issue. It will provide the basis of fairly resolving an issue which has caused doubt and uncertainty and which over a period of almost five years has engendered a deterioration and not an improvement in relations between indigenous people and other Australians.

Prime Minister John Howard, 3 July 1998

The Howard government claimed its amendments corrected shortcomings in the federal native title legislation adopted in December 1993. In completing the examination of the native title debate, and continuing the analogy with the launch of a ship, this chapter will show that the Howard government sought to further limit the cargo on the native title ship and affirmed that Indigenous people would not be involved in its steerage. The period examined covers the time following the adoption of the native title legislation at the end of 1993 until the Howard government’s amendments were adopted in July 1998.

The analysis undertaken here will cover a number of major developments:

- the March 1995 High Court decision on the Western Australian government’s challenge to the *Native Title Act 1993* (Cth) (*the NTA*);  
- the December 1996 High Court *Wik Peoples v Queensland* decision (*Wik*);  
- the political reactions to *Wik*;  
- the Ten Point Plan, released in May 1997;  
- the draft legislation, introduced in September 1997;  
- party attitudes toward the legislation  
- the parliamentary debate; and,  
- the Indigenous influence on the parliamentary debate;

As in the last chapter, the main source for the parliamentary debate comes from the Hansard transcripts of parliamentary proceedings. In late 1997 a Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund (Parliamentary Joint Committee) considered the Howard government's legislative agenda. The divided committee produced majority and minority reports. The four ALP senators on the committee and Australian Democrats Senator Woodley supported the minority report. Senator

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2 *Native Title Act 1993* (Cth).


Woodley also provided an Addendum qualifying his support for the minority report.\(^5\)

The Howard government’s Native Title Amendment Bill (NTAB) evolved over several versions. The version cited here was produced at the beginning of 1998, following the conclusion of the first of three rounds of debate.\(^6\) An explanatory memorandum to these changes is helpful, particularly Chapter 2 where the connections between the schedule of amendments and the Ten Point Plan are referenced.\(^7\) In early 1998 the Special Minister of State, Senator Nick Minchin released *Fairness and Balance*, a summary of the Howard government’s response to the High Court’s *Wik* decision.\(^8\) Following the adoption of the Howard government’s amendments in July 1998, a second updated edition of the legislation was produced with commentary.\(^9\)

During 1996, a series of workshops to develop a position on the proposed amendments to the native title legislation led to the formation of the National Indigenous Working Group on Native Title (NIWG). The workshops brought together various Native Title Representative Bodies established under the *NTA*, Aboriginal and Torres Strait Islander Commission (ATSIC), the Indigenous Land Corporation, the Aboriginal and Torres Strait Islander Social


\(^6\) Native Title Amendment Bill 1997 (Cth).


\(^8\) Senator, the Hon Nick Minchin, *Fairness and Balance: The Howard Government's Response to the High Court's Wik Decision*, (Canberra: Special Minister of State, 1998).

Justice Commissioner and the National Aboriginal and Islander Legal Services Secretariat. From these meetings, a position paper was developed - *Coexistence - Negotiation and Certainty*.\(^{10}\)

Other material considered the legal impact of the two High Court decisions and the Howard government changes. The WA government enacted its *Land (Titles and Traditional Usage) Act* on 2 December 1993.\(^{11}\) This legislation was the subject of the challenge heard in the *WA v Commonwealth* case before the High Court.\(^{12}\) Richard Bartlett’s *Native title in Australia* contains several relevant chapters, focusing on the WA challenge, pastoral leases and Wik, and the Ten Point Plan.\(^{13}\) In a 2001 article, Gary Meyers and Sally Raine discuss the right to negotiate provisions in detail.\(^{14}\) Some material provided broader commentary on the legal and political events. Frank Brennan’s *One land, one nation: Mabo: Towards 2001*, provides an analysis of the High Court’s 1992 *Mabo* decision\(^{15}\) and the subsequent Commonwealth native title legislation.\(^{16}\) Journalist Michael Bachelard traces the debates over native title from *Mabo* through to the Howard government’s Ten Point Plan.\(^{17}\)

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\(^{10}\) National Indigenous Working Group on Native Title (NIWG), *Coexistence - Negotiation and Certainty*, 1997 (“Coexistence - Negotiation and Certainty”).


\(^{12}\) *WA v Commonwealth*, above n 3, 373.

\(^{13}\) Bartlett, above n 11, Chapters 3-5, 33-64.

\(^{14}\) Gary D. Meyers & Sally Raine, *Australian Aboriginal land rights in transition (Part II): the legislative response to the High Court’s Native Title decisions in Mabo v Queensland and Wik v Queensland*, (Tulsa Journal of Comparative & International Law, Fall 2001, 9 No 1), 95-167. [Accessed 8/05/2002].

\(^{15}\) *Mabo v Queensland (No 2)* (1992) 107 ALR 1 (“Mabo v Queensland (No 2)”).


WA High Court Challenge

The Western Australian government launched a long anticipated legal challenge to the NTA that claimed the federal native title legislation was racially discriminatory and therefore contrary to the Racial Discrimination Act (the RDA). Meanwhile, the Wororra Peoples and the Yawuru Peoples separately sued the State of Western Australia in the High Court for relief from the enactment of that state’s legislative response to Mabo. The High Court heard all three cases together.

The WA legislation extinguished all surviving native title throughout the state, and the substituted ‘rights of traditional usage’. The act established a ‘common procedure whereby grants and other interests or acquisition would override rights of traditional usage’. Furthermore, traditional usage could be ‘subject to extinguishment or suspension by Ministerial notice’.

When it came before the High Court, the WA government supported its legislation using arguments to those voiced by prominent Liberals in federal Parliament during the 1993 debate over the Native Title Bill. For instance, in its submission the WA government argued that native title was:

racially discriminatory in that it permits or requires the doing of acts which are based upon a distinction between people of the Aboriginal race and

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18 Racial Discrimination Act 1975 (Cth).
20 Ibid. 376; Bartlett, above n 11, 42.
people of other races; or it confers benefits on people of the Aboriginal race to the exclusion of all other races.

Their submission also argued that the act should not be seen as a ‘special measure’ under the *International Convention on the Elimination of All Forms of Racial Discrimination (CERD)*. Rather its ‘purpose and effect is to maintain and entrench permanently the concept of separate rights which may be held only by the members of one racial group’. Since the provision only provides for temporary special measures, if it were identified as permanent it would fall outside the Convention. Furthermore, the submission argued, there were ‘no human rights or fundamental freedoms which the Act assists people of the Aboriginal race to enjoy or exercise’.  

The Wororra Peoples’ submission, argued the WA case was ‘untenable because implicit in it is an attempted revival of the notion of terra nullius’. It observed that if the WA legislation were declared valid, then ‘Aboriginal people of Western Australia do not enjoy the right to inherit and own property comprising native title or immunity from arbitrary deprivation of property which is enjoyed by persons of other races.’ The submission claimed the WA legislation ‘treats native title in a way that no other person or group is treated’. It argued the ‘rights of traditional usage’ in the WA legislation were ‘not equivalent to the rights exercisable under native title or are at the very least a

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22 *WA v Commonwealth*, above n 3, 390.
23 Ibid. 392.
24 Ibid. 407.
25 Ibid. 408.
26 Ibid. 408-9.
substantially impaired version of native title’.\textsuperscript{27} Responding to the charge that native title does not represent a basic human right, the submission stated that native title ‘has been accorded the status of a property right’.\textsuperscript{28}

The High Court rejected the WA government assertions that native title and the \textit{NTA} were racially discriminatory, and instead found against the WA legislation. The Court unanimously concluded that the WA legislation ‘was inconsistent’ with s 10 of the \textit{RDA} and the \textit{NTA}.\textsuperscript{29} However, the Court did not consider all the arguments raised about racial discrimination, because it judged that in the light of its finding against the WA legislation it was unnecessary to answer the other matters.\textsuperscript{30}

The judges specifically considered the impact of the \textit{NTA} on the recognition and protection of native title. Noting that this is stated as the Act’s ‘first object’ they said this was “achieved by a statutory declaration ... that native title ‘is not able to be extinguished contrary to this Act’”. The judges considered the provisions that ‘permit the extinguishment or impairment of native title constitute an exclusive code’. Hence: ‘Conformity with the code is essential to the effective extinguishment or impairment of native title.’ Therefore, the \textit{NTA} ‘governs the recognition, protection, extinguishment and impairment of native title’.\textsuperscript{31}

\begin{itemize}
\item \textsuperscript{27} Ibid. 410.
\item \textsuperscript{28} Ibid. 409-10.
\item \textsuperscript{29} Ibid. 490-1 (Mason CJ, Brennan J, Deane J, Toohey J, Gaudron, J, McHugh, J); 495 (Dawson J).
\item \textsuperscript{30} Ibid. 491 (Mason CJ, Brennan J, Deane J, Toohey J, Gaudron, J, McHugh, J); 499 (Dawson J); Bartlett, above n 11, 43.
\end{itemize}
The judges did not examine the inconsistencies in trying to reconcile the recognition and protection of native title with the contrary objects of unilateral extinguishment or impairing of that title. As the above comments imply, they considered this should be left to the discretion of federal Parliament. They did note, however, the High Court held in *Mabo (No 1)* 32 that ‘native title was substantially protected against extinguishment’ by the *RDA* ‘on and after 31 October 1975’. The *NTA* though “expressly makes ‘valid’ ... certain ‘past acts’ that affect native title to the exclusion of the protection extended by” the *RDA*. It also stated the *RDA* will not ‘affect the validation of past acts by or in accordance with this Act’. 33 So while not explicitly acknowledging the point, the analysis by the judges indicated the protection accorded to native title by the *RDA* before the enactment of the *NTA* was now no longer available where certain past acts were concerned.

When noting the changed impact of the *NTA* upon the protection of native title, the judges observed that it ‘secures the Aboriginal people and Torres Strait Islanders in the enjoyment of their native title subject to the prescribed exceptions which provide for native title to be extinguished or impaired’. They noted three exceptions. In addition to the validation of past acts, as noted above, these included ‘an agreement on the part of the native title holders’ and ‘the doing of a permissible future act’. 34
The use of ‘exception’ to describe the impact of extinguishment upon native title warrants further consideration. This view is bound up with the earlier presumption of the High Court majority in *Mabo* that native title was extinguished throughout most of Australia as a consequence of decisions by various state, territory and commonwealth governments. This approach was also affirmed in the preamble to the *NTA* where it stated that ‘many Aboriginal peoples and Torres Strait Islanders, because they have been dispossessed of their traditional lands, will be unable to assert native title rights and interests …’ However, McNeil has argued that at common law those wrongfully dispossessed should be able to launch ‘an action for the recovery of land, against a defendant who cannot show a better title …’ This general approach is subject to the caveat that the ‘present-day holders of lands which may have been unlawfully taken’ are not ‘protected by statutes of limitation and registry or land titles Acts’. That is, ‘exception’ can only be applied if it is presumed that native title cannot be claimed where the Crown has issued past grants of freehold title.

Justice Dawson dissented from the majority judgement but not for the reasons he had advanced in the *Mabo* decisions. He also indicated that in *Mabo* while ‘more than one course was pursued in the majority judgements, the reasons for judgement of Brennan J, with whom Mason CJ and McHugh J agreed, departed least from what I regarded as established law and, for my present purposes, may be accepted as containing the basic principles for which

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35 *Mabo v Queensland (No 2)*, above n 13, 50 (Brennan J).
36 *Native Title Act 1993* (Cth), Preamble.
38 Ibid. 305.
Mabo [No 2] now stands as authority’. He said that he still preferred the view expressed by Justice Wilson and himself in Mabo No 1 that extinguishing native title was not a denial of ‘enjoying the right to own property to a lesser extent than those of another race or ethnic origin’. However, he said the ‘decisions in Mabo [No 1] and Mabo [No 2] must be followed in the interests of adherence to the doctrine of precedent and certainty in the area of property law.’ On these grounds, he concluded that ‘the intention of those who settled Western Australia that Crown lands should be generally available for sale without regard to native title did not have the consequence that native title was extinguished’. He explained that for this to happen, ‘it was necessary for the Crown to exercise its right, which Mabo [No 2] held to arise from its radical title, to alienate the land or to appropriate it to itself in a manner inconsistent with native title’.

The Court essentially upheld the framework established by the NTA and the compromise between the language of modern and common constitutionalism; it also protected those who could claim under this legislation from state actions that occurred without the consent of the Indigenous peoples affected.

39 WA v Commonwealth, above n 3, 492 (Dawson J).
40 Ibid. 493 (Dawson J).
41 Ibid. 374 (Dawson J).
42 Ibid. 494-5 (Dawson J).
The *Wik* decision

Just before Christmas the following year the High Court brought down its *Wik* decision concerning pastoral leases.\(^{43}\) As noted in the last chapter, the majority in *Mabo* said that native title ‘can be extinguished either by a grant of a freehold or a lesser estate or by appropriation by the Crown, to the extent the grant or appropriation is inconsistent with the continuing enjoyment of native title’.\(^{44}\) However, on that occasion the High Court set aside any decision concerning the impact of leases on native title. Thus, the *Wik* case clarified the Court’s approach to pastoral leases. One course open to the Court was to take into account the general characteristics of pastoral leases, the particulars of the leases involved and the specifics of the claim. For instance, some pastoral leases contained a clause that protected traditional Aboriginal rights of access. Furthermore, as Bartlett noted, their legislative history did not suggest ‘an intention to exclude Aboriginal people from their traditional land’.\(^{45}\) This implied that an a priori rule that declared all pastoral leases inconsistent with native title was inappropriate. The *Wik* people laid claim to an area of land subject to the Mitchellton and Holroyd leases, both of which are limited to pastoral use. Neither the Mitchellton, nor the Holroyd lease had an express reservation in favour of Aboriginal people.\(^{46}\) The Thayorre People claimed land the subject of the Mitchellton lease.\(^{47}\)

\(^{43}\) *Wik*, above n 4, 129.
\(^{44}\) Kent McNeil, *Emerging justice?*, (Saskatchewan, Canada: Native Law Centre, University of Saskatchewan, 2001), 369; See also above n 13, 49-51 (Brennan J), 7 (Mason CJ and McHugh J), 67 (Deane and Gaudron JJ).
\(^{45}\) Bartlett, above n 11, 29.
\(^{46}\) Ibid. 45.
\(^{47}\) *Wik*, above n 4, 166 (Toohey J).
In considering the claim, the Federal Court had found that the ‘each lease conferred rights to exclusive possession on the grantee’ and that this ‘necessarily extinguished all incidents’ of native title concerning ‘land demised under the relevant pastoral lease’. When the Wik Peoples and the Thayorre People appealed to the High Court against this decision they advanced two main arguments. One was that ‘their native title was not extinguished by the granting of the pastoral leases’. If their claims for recognition of native title were upheld, they ‘coexisted with the interests of the lessees’. The Wik Peoples also ‘claimed declarations’ that challenged ‘the validity of special bauxite mining leases’ granted by the Queensland government.48

The majority of the High Court, comprising Justices Gummow, Kirby, Toohey and Gaudron, took into account the general relationship between pastoral leases and native title as well as the particulars involved in the claim. The minority of Chief Justice Brennan and Justices McHugh and Dawson adopted an a priori rule that the issuing of pastoral leases extinguished native title.49 Their view was primarily expressed through the judgement of Justice Brennan.50 Justice Dawson provided a brief statement that indicated he had followed the court’s majority judgements in both Mabo decisions and had ‘nothing which I wish to add’ to his support for Chief Justice Brennan’s judgement ‘in these matters’.51

48 Ibid. 131.
49 Ibid. 132-3.
50 Ibid. 133.
51 Ibid. 164 (Dawson J).
Justices Gummow, Kirby, Toohey and Gaudron emphasised that a clear and plain intention was needed to extinguish native title.\(^{52}\) Furthermore, unless expressly stipulated by legislation they considered it presumed that native title would not be extinguished. This flowed from the application of a general rule of common law ‘applicable to all interests’,\(^{53}\) which presumed against the expropriation or extinguishment of ‘valuable rights relating to property without fair compensation’.\(^{54}\) In contrast, the minority placed its emphasis on the consequences that flowed from the issuing of pastoral leases. In this context, they considered that to adopt a presumption against expropriation unless expressly stated in legislation was redundant. Hence, Chief Justice Brennan said the claims failed ‘because native title was extinguished’ when the leases were first issued.\(^{55}\) He said that ‘it would be erroneous, after identifying the relevant act as the grant of a pastoral lease … to inquire whether the grant of the lease exhibited a clear and plain intention to extinguish native title’.\(^{56}\)

Those who considered granting a pastoral lease extinguished native title proposed that ‘such a grant conferred exclusive possession of the land on the grantee and that entitlement to exclusive possession is inconsistent with the continuance of native title rights’. Justice Toohey noted: ‘Expressed with that generality, the proposition tends to conceal the nuances that are involved.’\(^{57}\) At the end of his decision, he found that such an approach reduced to ‘straightforward propositions what are in truth complex issues of law and of

\(^{52}\) Ibid. 208, 218 (Gaudron J), 182-3, 188 (Toohey J), 220, 233 (Gummow J), 279, 283-4 (Kirby J); Bartlett, above n 11, 46.

\(^{53}\) Bartlett, above n 11, 46 (italics in original).


\(^{55}\) *Mabo v Queensland (No 2)*, above n 3, 133 (Brennan CJ).

\(^{56}\) Ibid. 153 (Brennan CJ); Bartlett, above n 11, 46.
He also noted the Preamble to the NTA had read ‘too much’ into the judgements in Mabo by extending the application of inconsistency from freehold to ‘leasehold estates’. Justice Gummow agreed. He considered ‘the posing of the question’ in terms of ‘whether the respective pastoral leases’ conferred ‘rights to exclusive possession on the grantee … may have distorted the essential issues’.60

Chief Justice Brennan said the lessees had a ‘right of exclusive possession and that right was inconsistent with native title (except for non-accessory rights, if any)’. Additionally, expressing a view on the relation of common law to native title, he said common law ‘could not recognise native title once the Crown alienated a freehold or leasehold estate under the 1910 Act’ of Queensland. Consequently, the common law ‘was powerless to recognise native title as reviving after the determination of a pastoral lease’ under the 1910 Act.61 Therefore, by definition this view excluded the possibility of native title and pastoral leases coexisting.62

The immediate issues before the Court in the Wik decision reflected a clash between common and modern constitutionalism. The majority focussed on the particulars of the case using a method associated with a case-by-case approach and practical reasoning as discussed in Chapter 3. The application of this method created space for the legal recognition of native title to coexist with

57 Mabo v Queensland (No 2), above n 3, 170 (Toohey J).
58 Ibid. 188 (Toohey J).
59 Ibid. 183; Native Title Act 1993 (Cth), Preamble.
60 Wik, above n 4, 170 (Gummow J). See also Bartlett, above n 11, 56.
61 Wik, above n 4, 133; Bachelard, above n 15, 54-8.
the leaseholder, that is, ‘coexistence’ conveyed a spirit of mutual recognition where the Indigenous culture can be recognised alongside the culture of other Australians. The minority, though used a method associated with modern constitutionalism, which embraced an a priori rule to be applied to all pastoral leases. This method quashed the coexistence of pastoral leases and native title. The minority presumed that pastoral leases created by the Crown under public lands legislation discontinued native title. Nevertheless, the premises that underpinned the decision, and to which the Court majority considered it bound, also reflected the language of modern constitutionalism. For instance, where inconsistency between a pastoral lease and native title occurs, the latter would be extinguished. As Justice Toohey candidly observed, the appellants were obliged to work with the ‘language of extinguishment’, but sought to limit its effect.

The reactions to Wik

Political and legal factors

The Howard government was elected in March 1996, nine months before Wik. Five political and legal factors fuelled the movement to modify the native title legislation. One was the widely held perception that with Mabo the High Court had declared that the recognition of native title would have no impact on leasehold land. It was therefore expected that Wik would affirm this

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62 The High Court minority view in Wik was cited in later cases to identify a unique susceptibility to extinguishment by inconsistent grant of native title. See Wik, above n 4, 151-2; Bartlett, above n 11, 207.
63 Bartlett, above n 11, 354.
64 Ibid. 166 (Toohey J).
view. Following *Mabo*, both Labor and Coalition alike promoted this perception. Moreover, from 1994 the Queensland government continued to issue leases on land that was, or had been, covered by pastoral leases, ignoring the ‘future act provisions’ of the *NTA* that obliged it to notify and seek to negotiate with the Indigenous groups concerned. Journalist Michael Bachelard estimated the leases at 800. Actually, as was seen in Chapter 7, the judges set aside that aspect of the Meriam People’s claim concerning the impact of leases. Thus, when the High Court in *Wik* found the issuing of leases did not automatically extinguish native title, it left many pastoral leaseholders shocked and uncertain about their status and the Queensland government facing likely legal action.

Also, pastoralists’ organisations considered the *Wik* solution of coexistence detrimental to their interests. Bachelard later wrote that the National Farmers Federation (NFF) ‘conducted a vicious campaign in country areas to convince the average farmer that extinguishment was the only reasonable outcome’. The leadership of the NFF had changed since the discussions over the 1993 *NTA* and the new team ‘demanded nothing less than exclusive occupancy for pastoralists’. Moreover, pastoral leases were a significant element in Australian land administration since over 40 per cent of the mainland was subject to these leases at the time of *Wik*.

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65 Bachelard, above n 15, 122.
66 Ibid. 52-3.
67 House of Representatives Weekly Hansard No 11, 1993, 2879-80 (16 November 1993); *Native Title Act* 1993 (Cth), Preamble; Minchin, above n 8, 2.
68 Bachelard, above n 15, 74-5; *Native Title Act* 1993 (Cth), Division 3 - Future acts and native title.
69 Ibid. 75.
70 Ibid. 77-8.
71 Bartlett, above n 11, 346; Bachelard, above n 15, 23-5.
A further factor that brought pressure for change was the rise of One Nation. The party was formed in the lead up to the March 1996 election around the disendorsed Liberal candidate for the seat of Oxley, Pauline Hanson. Hanson initially sat in the House of Representatives as an independent, but later established One Nation. Following her election to federal parliament she portrayed Australia as subject to ‘a type of reverse racism ... by those who promote political correctness and those who control the various taxpayer funded ‘industries’ that flourish in our society servicing Aboriginals, multiculturalists and a host of other minority groups’. She stated that ‘[p]resent governments are encouraging separatism in Australia by providing opportunities, land, moneys and facilities available only to Aboriginals.’ She said she was ‘fed up to the back teeth with the inequalities that are being promoted by the government and paid for by the taxpayer under the assumption that Aboriginals are the most disadvantaged people in Australia’. Hanson considered Australia was ‘being divided into black and white, and the present system encourages this’. On these grounds, she called for the abolition of ATSIC. ‘Reconciliation is everyone recognising and treating each other as equals, and everyone must be responsible for their own actions’, she said. Hanson’s meetings attracted significant numbers of enthusiastic National Party supporters across the country. The Liberals and Nationals responded to Hanson’s rhetoric by embracing her concerns, whilst trying to marginalise Hanson and One Nation.

An additional factor was the failure of the Western Australia government’s legal challenge to the NTA, which had important implications for

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those who wanted to restrict the recognition of native title further than provided for by the federal legislation. If the legislation was valid, as the High Court found in 1995, then the only course open to those who wanted further restrictions was to amend it. Furthermore, while the legal challenge had failed, its political impact was another matter. The court case and other actions by WA Premier Richard Court were intended to spoil the implementation of the NTA and reinforce the perception that it had major practical shortcomings. For instance, the Western Australian government claimed, with Senator Nick Minchin’s encouragement, that by late 1997 a backlog of 7,000 mining titles had arisen, with 1,900 titles ‘caught up’ in the ‘right to negotiate’ process. This was a ‘problem’ Senator Minchin said that was ‘getting worse with no real prospect of improvement’.

Lastly, a broader legitimacy for amending the NTA arose as a result of court clarifications about the way the National Native Title Tribunal (NNTT) administered claims. Far more claims were accepted for mediation than originally anticipated, which provided fuel for those who argued the system was clogged. One case was the October 1994 Brandy decision where the High Court held that provisions of the RDA on the enforcement of determinations by the Human Rights and Equal Opportunity Commission (HREOC) were invalid. The decision hinged on clarifying the differences and overlap between judicial and administrative power. Since the NTA empowered the NNTT to

74 Bachelard, above n 15, 83.
75 Minchin, above n 8, 4.
76 Bachelard, above n 15, 16.
make determinations about native title on the HREOC model, the latter body was also directly affected by this decision. Practically, it curtailed the NNTT’s power with the Federal Court making subsequent native title determinations.

Two other court cases were also relevant. The *NTA* specifies the form and the information contained in the applications lodged for a native title determination and the basis for its acceptance. In the 1996 judgement on the *Waanyi* case the High Court found the president and registrar of the NNTT had acted beyond their power by rejecting a claimant’s application for a native title determination, which the High Court said was ‘fairly arguable’. A further matter occurred in *Northern Territory v. Lane* when the Federal Court declared once a claim was registered with the NNTT the claimant had the right to negotiate provisions and to notification about permissible future acts. Following the court decisions, the ALP also acknowledged the need to amend the *NTA*. In November 1995, the Keating government introduced a Native Title Amendment Bill into federal Parliament. However, its bill was not enacted before the March 1996 election and lapsed when Parliament was prorogued.

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78 *Native Title Act 1993* (Cth), s 166; *NTAB Explanatory Memorandum*, above n 6, 27-8.
79 Bachelard, above n 15, 16.
80 *Native Title Act 1993* (Cth), s 62, s 63; *NTAB Explanatory Memorandum*, above n 7, 27-8.
The Coalition’s initial proposals

Before their campaign for election the Coalition’s comments about changes to native title were muted. During the 1996 federal election campaign, their policy included amending the NTA to ‘ensure its workability’. It also sought an ‘early resolution’ of pastoral lease ‘uncertainties’. Following the election, Senator Nick Minchin was appointed as parliamentary secretary for native title and constitutional change. Minchin conducted consultations over two months and produced an outline of draft legislation entitled Towards a More Workable Native Title Act. The Coalition now shifted onto the offensive, promoting the necessity of significant change to the act, which culminated in the amendment of the NTA. It was only then that native title disappeared from the front pages of national newspapers.

In June 1996, the Howard government introduced the Native Title Amendment Bill (NTAB) to parliament. The bill addressed legal matters arising from the court cases and also sought to convert pastoral leases from fixed term to perpetual. The government also wanted to broaden the range of permissible activities for pastoral leases, tighten the registration criteria of claims, and deny native title holders a right to negotiate over mineral exploration. In October 1996, the government put forward additional amendments on the right to negotiate. ATSIC chair Lois O’Donoghue pointed out that the NTA itself was

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83 Ibid. 4; Meyers and Raine, above n 12, 6.
84 Bartlett, above n 11, 52.
85 Bachelard, above n 15, 33.
86 Ibid. 34-5.
87 Minchin, above n 8, 9; Aboriginal and Torres Strait Islander Commission, Proposed Amendments to the Native Title Act 1993, (Canberra: Aboriginal and Torres Strait Islander Commission, 1996), 14-18 (“Proposed Amendments to NTA 1993”).
the product of compromise and called on the government to ‘commence serious negotiation’. Following Wik this bill lapsed. However, the matters it raised were subsequently incorporated into the NTAB.

It is noticeable that the government’s amendments did not address or take into account the need to recognise Indigenous land claims. Indeed, they were not concerned to allow space for the existence of common language norms, but instead were preoccupied with protecting pastoral lease holders. Moreover, as observed by ATSIC, by only enhancing the status of pastoral leases as against native title holders, they were inconsistent with the RDA’s non-discrimination principles.

Reactions and responses to Wik

Extinguishment became the watchword of the reaction to Wik as opposition to the recognition of native title gathered momentum. Despite Wik occurring just a few days before Christmas 1996, a traditionally quite political time, the response was swift and vocal. On Christmas Eve 1996, Prime Minister Howard described the High Court’s decision as ‘disappointing’. He complained that the judgement ‘appears to have overturned one of the fundamental principles on which the community’s understanding of native title had proceeded’. He said the decision raised ‘ambiguities and questions which must

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89 Minchin, above n 8, 9.
90 See ibid. 9-10; NTAB Explanatory Memorandum, above n 7, 23-31.
91 Proposed Amendments to NTA 1993, above n 84, 15.
be addressed and resolved’ and called for talks with all stakeholders.92 In early January federal and state officials were told that, because of Wik, ‘more than 70 per cent of Australian land - everything but freehold - was now open to claim’.93

Throughout January 1997 Western Australian Premier Richard Court, Queensland’s Rob Borbidge and Northern Territory Chief Minister Shane Stone made called for the extinguishment of native title. The three leaders began to act as a bloc and organised several meetings around the issue. On 5 February 1997, the three leaders released a joint discussion paper that outlined their political agenda. In return for extinguishment, they proposed to legislate, if necessary, to provide land access rights to Indigenous people, a proposal that fell well short of title or ownership rights. From early March 1997 their campaign was accompanied by an aggressive media advertising campaign funded by the NFF portraying Wik as a black versus white conflict.94

The three leaders garnered valuable federal support. Over the holiday period Acting Prime Minister, and National Party Leader Tim Fischer proposed legislative changes to guarantee ‘absolute certainty’ to pastoralists.95 Later Fischer made his infamous promise to pastoralists to ensure the government delivered ‘bucketloads of extinguishment’.96 A May 1997 public meeting in the Queensland town of Longreach symbolised the federal government’s agenda. Here Howard and Fischer committed to providing ‘certainty’ to the ‘farming

92 Prime Minister Howard cited by Bachelard, above n 15, 73.
93 Bachelard, ibid. 73-4.
94 Ibid. 73-8.
95 Tim Fischer, cited by Bachelard, ibid. 73.
community’. The modern constitutional language of extinguishment now dominated, and silenced any discussion of recognition.

Following Wik, John Howard established a ‘Wik Taskforce’ within his department to provide advice and assistance for its negotiations with the states, territories and industry. By the end of March 1997, Howard outlined his legislative plan to a meeting of state and territory leaders. At this point though, state premiers were still holding out for full extinguishment of native title. The NIWG threatened to withdraw from negotiations, as the detail of the plan became clearer. By early April, the government released a ‘Seven Point Plan’. Queensland Premier Rob Borbidge still keeping up the political pressure, tabled legislation to allow 3000 leaseholders to convert 22 million hectares to freehold on 1 May 1997: this would extinguish native title. The Borbidge government was in a minority in the unicameral Queensland Parliament and relied on independent Liz Cunningham for support. However, Cunningham rejected the proposed legislation and the government shelved it. Adding to the political pressure, the Western Australian government said it would introduce its own land title bill.

In mid-April, the NIWG released a detailed response to the Wik decision called Coexistence - Negotiation and Certainty. Its position was based upon several key principles: non-discrimination, no extinguishment without the informed consent of native title holders, continuing protection of native title

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98 Bachelard, above n 15, 84-6.
provided under the NTA, and no de facto extinguishment through, for instance, ‘unreasonable threshold’ or ‘physical connection’ tests.\textsuperscript{100}

**Ten Point Plan**

In early May 1997, the federal government released its Ten Point Plan to amend the NTA.\textsuperscript{101} Four months later, the draft legislation was introduced into the House of Representatives.\textsuperscript{102} Significantly, neither document addressed whether the proposed changes recognised and protected native title, as the NTA demanded.\textsuperscript{103} By itself, this indicated that the issues were articulated almost exclusively in the modern constitutional language.

A closer examination of the Ten Point Plan reinforces this deduction. Point 1 sought to validate all ‘intermediate period acts … in relation to non-vacant crown land’. This period referred to acts between the NTA’s commencement of operation on 1 January 1994 and the Wik decision on 23 December 1996. That is, compared to the 1993 legislation it sought to move the boundary between past and future acts up to Wik. It also sought to extinguish native title in all cases where governments had acted on or about land. This proposal went further than simply protecting pastoral leases, to cover freehold grants, non-mining leases and public works.\textsuperscript{104} In most cases, the effect of validation was to extinguish and ‘in all cases override … native title’.\textsuperscript{105}

\textsuperscript{100} Bachelard, above n 15, 101; *Coexistence - Negotiation and Certainty*, above n 10, 3.
\textsuperscript{101} *NTAB Explanatory Memorandum*, above n 7, 19.
\textsuperscript{102} Tenth Report, above n 5, 7.
\textsuperscript{103} *Native Title Act* 1993 (Cth), s 10.
\textsuperscript{104} Minchin, above n 8, 12.
\textsuperscript{105} Bartlett, above n 11, 55.
justifying the provision the government paid no attention to the merit of recognising native title, instead it presumed extinguishment was the only justified response.

Similarly, Points 2 and 4 left no space for the existence of the language of common constitutionalism. Point 2 sought to confirm that “‘exclusive’ tenures such as freehold, residential, commercial and public works” in existence before the operation of the NTA would ‘extinguish native title’. 106 The government supported this move as consistent with ‘the common law as it now stands’. 107 Point 4 sought to extinguish permanently any native title rights over ‘current or former pastoral leases and any agricultural leases not covered’ under Point 2 ‘to the extent that those rights are inconsistent with those of the pastoralist’. The government wished to allow all “activities pursuant to, or incidental to, ‘primary production’ ”. Thus, in these circumstances there would be no requirement to negotiate with native title interests. 108 As noted earlier, the High Court majority in Wik considered that a clear and plain intention to extinguish native title was necessary in order for a grant to have that effect. The impact of short term leases, for instance, only suspended native title and revived it at the expiration of the lease. However, the Howard government sought to override these ambiguities and permanently extinguish all native title covered by these leases. 109 In doing so, the government dealt with these issues exclusively through the language of modern constitutionalism.

106 Minchin, above n 8, 12.
107 Ibid. 13.
108 Ibid. 15.
109 Bartlett, above n 11, 55-6.
The future act regime of the *NTA* equated native title a status equivalent to that of freehold title holders, and therefore, native title holders could access certain procedural rights.\(^{110}\) The Ten Point Plan sought to vary this. In Point 3 concerning ‘government services’,\(^ {111}\) the government proposed that native title holders would have the same procedural rights ‘as other land holders’.\(^ {112}\) However, Bartlett noted that the leases held by these other landholders ‘have always been an inferior form of tenure, much junior to freehold’.\(^ {113}\) This indicated that if this course were followed, the status of native title under future acts would be inferior to that of other interests.

Point 9 also specified that a ‘sunset clause’ would be introduce that limited to six years the time ‘within which new claims would have to be made ...’\(^ {114}\) The Howard government said setting such a limit would ‘encourage claims to be brought forward for resolution in the interests of clear and stable land management’.\(^ {115}\) However, the process of making a claim could entail considerable research of the pre-colonial relationship of a particular group of people to the land, subsequent developments and changes to the land tenure over that period. For these reasons, Bartlett argued the time limit potentially placed an ‘increased ... burden on applicants’.\(^ {116}\)

Point 5 provided statutory access rights to pastoral lease land for traditional Indigenous activities (eg hunting, fishing, camping, gathering and

\(^{110}\) Ibid. 58-9.
\(^{111}\) *NTAB Explanatory Memorandum*, above n 7, 19.
\(^{112}\) Ibid. 135.
\(^{113}\) Bartlett, above n 11, 59.
\(^{114}\) *NTAB Explanatory Memorandum*, above n 7, 22; Minchin, above n 8, 20.
\(^{115}\) Minchin, above n 8, 20.
ceremonies). However, the government proposed to make these rights dependent on the progress of a lodged claim and thus lasting only until claim determination. As Bartlett observed, this right was ‘in substitution of all native title rights over the land, and is subject to the rights of the lessee, or any person with non-native title rights’. Potentially, traditional groups could be worse off than before Mabo - denied the physical access to their lands and denied legal recognition to native title.\textsuperscript{117} Thus, this provision entailed risks with broader ramifications than the recognition of native title: it raised the prospect that traditional practices would also be endangered.

The Plan also proposed to alter significantly the right to negotiate provisions by seeking to remove its applicability to several categories of future acts including:\textsuperscript{118}

- primary production on land with non-exclusive pastoral and agricultural leases, estimated to cover ‘up to one half of the mainland’;
- reserved land, specifically including Aboriginal reserves; and,
- acts relating to land or waters within a town or city.

Additionally, various forms of mining grants could be excluded from the right to negotiate if the responsible federal minister determined they were an ‘approved exploration etc. act’. To be so determined, five conditions were to be

\textsuperscript{116} Bartlett, above n 11, 62.
\textsuperscript{117} Ibid. 61-2 (italics in original); see also NTAB Explanatory Memorandum, above n 7, 20, 157-61.
\textsuperscript{118} Bartlett, above n 11, 59-60; see also NTAB Explanatory Memorandum, above n 7, 21, 180, 189-190.
met, including consideration that it is ‘unlikely to have a significant impact on the land or waters concerned’.\textsuperscript{119} Any renewal, regrant or extension of a right to mine or explore is excluded from the right to negotiate where the original tenement was granted after complying with the right to negotiate requirements. It was intended to apply regardless of whether there was a right to an additional tenement.\textsuperscript{120}

**Party attitudes to the legislation**

**Recognition**

The various attitudes expressed in parliament toward the legislation will now be examined. The parliamentary Liberal and National parties were united in support of the government’s proposals. They presumed that recognition of native title should at best be limited to ‘vacant crown land’. Prime Minister Howard indicated as much when he told the House of Representatives that this was the ‘original basis’ of the 1993 legislation.\textsuperscript{121} Queensland National Party Senator Bill O’Chee provided a similar view at the conclusion of the debate over the NTAB in July 1998. He said it was ‘perfectly reasonable’ for the ‘people of the Murray Islands’ to have their claim accepted for these were “basically

\textsuperscript{119} Bartlett, above n 11, 60. The five conditions are: a) ‘the act relates to mining but only allows exploration, prospecting, fossicking or quarrying’; b) ‘the act is unlikely to have a significant impact on the land or waters concerned’; c) ‘consideration of views of representative Aboriginal Torres Strait Islander bodies [sic] and the public about determination’; d) ‘procedural rights of native title holders and claimants and representative Aboriginal Torres Strait Islander bodies [sic]’; and e) ‘for the purpose of minimising the impact of the act on the exercise of native title rights and interests, there must be either: i) a legal right for all relevant native title bodies corporate and registered native title claimants to be consulted appropriately, unless they indicate that they do not want to be consulted... or procedures in place so that such persons or bodies will be appropriately consulted’. See *NTAB Explanatory Memorandum*, above n 7, 181-2.

\textsuperscript{120} Bartlett, above n 11, 60-1; see also *NTAB Explanatory Memorandum*, above n 7, 188.

\textsuperscript{121} House of Representatives *Weekly Hansard* No 5, 1998, 2961 (9 April 1998).
farmers who had ‘tenements’ in the legal sense of the word”. He said by ‘occupation and usage, they were theirs, and they were perfectly capable of being recognised in the common law’. However, ‘the problem becomes more difficult when one tries to impose that concept of land ownership on the mainland ...’ where ‘farming of the land was not a traditional practice ... and where many people ... were nomadic’. The government also sought to confirm ‘exclusive possession’ on 60,000 existing leases covering about 7.7 per cent of Australia. Senator Minchin argued this was necessary in order to avoid ‘case-by-case’ court determinations.

The government maintained that its amendment bill was respectful of native title. For instance, Attorney-General Daryl Williams said when introducing it to the House of Representatives that the government’s strategy was ‘built upon four key features: respect for native title; a careful balance among the interests of native title holders, pastoralists, resource developers and other Australians; reduced uncertainty; and improved workability of this vital piece of Australian legislation’. Nevertheless, some MPs were less than ‘respectful of native title’. Mr Wakelin, the Member for Grey in South Australia, described Wik as ‘disastrous’ and claimed the 1993 legislation would lead to a ‘shutdown of minerals and resource development’.

The Nationals likewise supported the bill. The Leader of the National Party in the Senate, Queensland Senator Ron Boswell, said the bill was ‘based

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on the principle of non-extinguishment and fitting within the parameters of the High Court *Wik* decision*.\(^\text{127}\) Despite this statement, Senator Boswell clearly favoured extinguishing native title where pastoral leases and freehold title were concerned. He opposed to coexistence between pastoralists and native title holders; he argued that farming families had ‘lost what they were told they had in 1993 - exclusive ownership. They must now struggle with a two-title system on one piece of property.’\(^\text{128}\)

The ALP supported the amendment of the original legislation, largely to address shortcomings in the existing processes. For instance, WA Member for Perth Stephen Smith told the House of Representatives that the original act ‘has seen some good outcomes and some bad outcomes’. He said the ‘worst aspect’ of the act had ‘seen only one out of 500 claims proceed through the tribunal’.\(^\text{129}\)

The changes the ALP supported were identified with a ‘broad consensus’ around:\(^\text{130}\)

- amendments in response to the Brandy decision ‘are necessary’;
- a ‘workable registration’ test needs to be reintroduced following court decisions ‘reading it down’;
- provision should be made to address overlapping and multiple native title determination applications; and,

\(^{126}\) Ibid. No 15, 1997, 8901 (1 October 1997).
\(^{128}\) Ibid. 9422 (25 November 1997).
• ‘Pastoralists’ rights need to be ‘particularised and confirmed’.

However, the ALP considered that the NTAB ‘goes well beyond such requirements’ and had ‘significant moral ramifications’. They said it ‘declares wholesale extinguishment, with consequent massive entitlement to compensation and threats to the Bill’s constitutionality ...’ The ALP also said the bill:131

• rode ‘roughshod over issues currently before the courts and provides resolutions that uniformly favour the respondents in those cases’;
• denied ‘procedural fairness to indigenous people who proceed to a court resolution of their claims’;
• made ‘wholesale assertions about permanent extinguishment ...’;
• was ‘incompatible with both the spirit and the letter of the ...’ RDA; and,
• through the sunset clause, ‘in concert with the proposed blanket validation of so called intermediate period past acts’, has the ‘potential to deprive native title holders of their title rights without their knowledge and therefore their capacity to seek compensation’.

The ALP’s approach supported common law continuing to determine claims for recognition of native title. They criticised the government for being ‘prepared to accept the risk that its own legislation extinguishes native title where the common law provides that native title may have survived’. Thus the Minority Report of the Parliamentary Joint Committee recommended: ‘[u]ntil

131 Ibid. 3.
the question whether native title is permanently extinguished or merely
suppressed is conclusively determined by the High Court, the government must
not assume that the common law provides for more than the suppression of
native title during the term of an inconsistent grant of interest. 132

The two Greens senators, Dee Margetts from Western Australia and Bob
Brown from Tasmania, opposed the bill. Margetts described it as ‘an exercise in
deception, discrimination and ultimately dispossession’. 133 Margetts said the
debate as ‘characterised by an inability on the part of the government to
recognise the distinct and unique relationship between Aboriginal people and
the land’. She noted the debate had, 134

been characterised by a government that views native title purely as an
inconvenient property right to be read down in line with the narrowest
possible interpretation of common law. There is one word for a policy
approach which seeks to absorb Aboriginal cultural imperatives. That
word is ‘assimilation’ and assimilation is really only a euphemism for
cultural genocide.

Senator Brown moved that the bill be ‘withdrawn until full and adequate
consultation has taken place’. He said the lack of consultation and negotiation
with Aboriginal and Torres Strait Islander peoples and concern that the bill
would ‘further diminish’ their ‘native title rights and … [would] greatly impede

132 Ibid. 76.
134 Ibid. 9425 (25 November 1997).
the process of reconciliation and healing ... 135 The motion was defeated with all other senators, except Senator Margetts, voting against. 136 The Greens then proposed to separate the bill into two, the first to deal with Indigenous land use agreements and procedures in response to the High Court’s Brandy decision and the second to deal with the rest of the issues in the bill. The aim was to allow the ‘non-contentious’ matters to be considered quickly while a ‘proper consultation’ occurred on the rest. 137 During discussion of the motion, Senator Margetts ‘put on record’ that the NIWG ‘preferred’ that the Senate ‘reject’ the bill. However, this proposal was overwhelmingly defeated with only the Australian Democrats giving it support. 138

The Australian Democrats modified their response to the bill as the debate moved from an inquiry to the committee stage. Queensland Senator John Woodley was a last minute inclusion on the Parliamentary Joint Committee following the resignation of the Australian Democrat’s parliamentary leader Cheryl Kernot. 139 An addendum to the committee’s report provided by the Australian Democrats stated that the bill’s ‘primary purpose appears to be establishing a framework which achieves the maximum extinguishment possible of native title ... ’140 At the second reading stage of the debate, Senator Woodley called on ‘all senators to use every ounce of intelligence, conscience and resolve that they have in coming weeks to change the 10-Point Plan into a plan of

135 Ibid. 9761 (28 November 1997).
136 Ibid. 9764-5 (28 November 1997).
137 Ibid. 9765-6, (28 November 1997).
138 Ibid. 9768-9 (28 November 1997).
139 Kernot resigned from the Senate and Australian Democrats in October 1997 and joined the ALP. See Bachelard, above n 15, 129.
140 ‘Australian Democrats Addendum’ in Tenth Report, above n 5.
fairness, equity and justice and not pass a bill based on discrimination and injustice’.  

The solutions proposed by the Greens and the Australian Democrats were also frequently at odds with those of the ALP. Their amendments sought to protect rights articulated by the NIWG. For instance, on the amendments to the management of water and airspace Margetts characterised the government's position as,  

‘let’s not have this and let’s make it clear’. The ALP says, ‘Let's take out the subdivision and leave it to the courts.’ The Greens, Democrats and the NIWG are saying ‘Let’s clarify it now to avoid the situation of future act provisions that we will have to come back to at some stage. Let’s clarify it and say that native title is not extinguished over water and airspace.’

Tasmanian independent senator Brian Harradine said the legislation needed ‘substantial amendment before it passes this chamber’. Furthermore, he thought it necessary to ‘look carefully at this legislation to assess whether it contains any discriminatory provisions and any decisions which would arbitrarily extinguish native title’. Senator Harradine had voted for the 1993 legislation, but indicated he was ‘open to honourable compromise’. ‘I do hope that at the end of the day we come up with some piece of legislation-we have

142 Ibid. No 21, 1997, 10169 (2 December 1997).
got to have something-which, whilst it will not satisfy all the stakeholders, nevertheless will be a piece of legislation that they can live with’, he said.144

Commenting on the Howard government’s legislation, Hanson spoke of the ‘impractical, discriminatory and stupid notion of land rights, and special treatment for so-called minorities at the expense of everyone else’.145 Warning of the danger of emulating the creation of the Nunavut Province in Canada, Hanson thought it,146 imperative that the Australian people know and understand the international forces driving the Aboriginal industry and the flawed and divisive concept of native title. It is crucial to realise that the underlying blueprint and inspiration behind the creation of a separate indigenous nation within Canada and the impending creation of an Aboriginal nation within our own country is the United Nations Draft Declaration of the Rights of Indigenous Peoples.

Right to negotiate

The right to negotiate provisions were at the centre of the debate over the Howard government’s amendments. The Coalition presented these measures as essentially concerning procedural rights. For instance, Senator Nick Minchin began a contribution in December 1997 by indicating he considered that one of the ‘key issues that had to be addressed was: what procedural rights should

144 Ibid. 9437 (25 November 1997).
146 Ibid. 8899 (1 October 1997).
attach to the common law right to native title?’ This implied the right to negotiate was confined only to procedures and is not itself a question of substance.147 A similar characterisation was also provided in the Commentary produced by the government following the adoption of the NTAB.148

Other participants considered the provisions concerned far more than procedures: their comments indicated that they saw it as bound up with culture and empowerment rather than just property. For instance, ALP deputy leader Gareth Evans told the House of Representatives there were ‘two very obvious reasons for the legitimacy’ of these provisions ‘being retained in our legislative package and made available on a continuing basis to people in relation to pastoral leases just as much as on vacant crown land’. The ‘first is that it amounts to a legitimate form of economic empowerment of a group of Australians who have been spectacularly denied respect and a capacity to advance themselves economically through just about the whole 200-plus years of Australian history’. The second reason is ‘much more hardheaded’. He explained that ‘if you do not allow the retention of that right to negotiate, you tilt out of balance the whole shape and structure of this legislation and make it unequivocally legislation for non-indigenous interests, legislation which does not protect and respect and advance the interests of indigenous people’.149 South Australian ALP Senator Nick Bolkus said: ‘We are not talking about a right of veto; we are talking about a right that provides protection of native title as well as a fair process for resource development in Australia. The basis of the right is

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147 Senate Weekly Hansard No 21, 1997, 10409 (4 December 1997).
a fair balance of interest between the need to protect native title and the culture that underlies that title, and to provide for compensation and the needs of resource developers. Additionally, the ALP argued the bill’s provisions went ‘very much to the question of physical impact. It disregards the cultural nature of native title and the spiritual attachment of native titleholders to land. It is based on, we believe, long discredited theories of assimilation.’

The Greens also thought that the right-to-negotiate concerned matters of substance and was linked to the essence of recognition. Senator Dee Margetts noted that the NIWG considered that a ‘proper interpretation’ of CERD and the RDA ‘requires that native title holders be accorded substantive and effective equality rather than formal equality’. Margetts went on to argue that on ‘the basis of that test, the right to negotiate may be a necessary element of legislation recognising native title, if that legislation is not to be inconsistent with the principles underpinning’ the RDA. Margetts added that this should ‘appropriately be seen as a recognition of the importance to native title holders of the power to control access to and activities on their land’.

Australian Democrats Senator John Woodley described the provisions as ‘recognition of the special attachment that indigenous people have to their land’. He observed the ‘right to negotiate is not a veto’, but ‘merely a mechanism to include indigenous people’. He said the ‘essence of native title, and indeed the

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151 Ibid. 10408 (4 December 1997).
152 Ibid. 10414 (4 December 1997).
153 Ibid. 10414 (4 December 1997).
future act regime’ in the *NTA* is this ‘principle of inclusiveness’. Without the right to negotiate, it would be ‘just window dressing for pseudo-reconciliation’.

Senator Brian Harradine also considered what was at stake was more than formal procedures. Specifically referring to the right to negotiate measures he said: ‘I have always insisted that true equality of treatment requires that the unique nature of native title be taken into account when governments are considering whether mining should be permitted on pastoral leases. The interests of the pastoralists and native title holders are often very different.’ ‘Formal equality, therefore’, was not ‘sufficient’. ‘There must be essential equality.’ He said that the amendment he had agreed with the government to include in the *NTA* addressed the ‘state scheme’ and sought to ‘improve’ it through ‘certain strict criteria’.

Senator Nick Minchin sought to present his approach to the right to negotiate in terms of ‘non-discrimination’. He compared and contrasted the 1998 amendments to the 1993 legislation. With the 1993 legislation it was decided ‘to equate it [native title] to freehold for the purposes of a legislative framework’. Minchin added that in 1993 “parliament went one step further ... and attached a greater right than would normally attach to freehold and described it as ‘the right to negotiate’”.

Concerning ‘pastoral lease land’ Minchin argued native title rights ‘cannot amount to the same bundle of rights

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154 Ibid. 10418 (4 December 1997).
155 Ibid. 10419 (4 December 1997).
as it can on vacant crown land or Aboriginal land’. ‘Therefore’, he said, ‘a different approach to procedural rights’ was ‘appropriate’ and this sought a ‘balance between appropriate procedural processes with respect to native title holders and the question of mining’.  

However, those who opposed the government’s proposed changes saw no need to balance the right to negotiate against mining interests. Rather they considered the right to negotiate flowed from a requirement to recognise native title. That is, they saw it as linked to the convention of consent. ALP Senator Nick Bolkus compared the proposed amendments to the RDA and suggested they were contrary to the convention and left the legislation ‘open to constitutional challenge’. Senator Margetts also referred to the RDA and the requirement that ‘native title holders be accorded substantive and effective equality rather than formal equality’. She said ‘the right to negotiate may be a necessary element of legislation recognising native title’.

Another area of disagreement was the breadth of the legislation’s application. The Coalition wanted to limit the right to negotiate to ‘vacant Crown land and Aboriginal land’. The Minister for Aboriginal and Torres Strait Islander Affairs Senator Herron told his colleagues the government proposed to ‘remove the right to negotiate where it is inappropriate because of the nature of the rights to be granted ...’ He said this right would ‘generally remain on vacant crown land’, but the bill would ‘enable a State or Territory to apply its own regime in relation to mining’ and to other areas ‘where native title holders do

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158 Ibid. 104011 (4 December 1997).
159 Ibid. 10407-8 (4 December 1997).
not enjoy a right to exclude others from the land or waters ...’ Two reasons were advanced as justification. One was that this was in keeping with the *Mabo* decision and the original legislation. Howard said ‘the original basis of the legislation was that you could only make a native title claim over vacant crown land’. The other reason, advanced by Senator Minchin, was that a distinction should be made between native title on Crown land and other circumstances. In the former, where this could be ‘up to exclusive possession’ it would be left intact. Elsewhere, though, was a different matter. He considered that native title rights ‘are only what rights survive after you take into account of [sic] the rights granted to the pastoralist based on the *Wik* judgment’. Minchin said ‘native title on a pastoral lease cannot amount to the same bundle of rights as it can on vacant crown land or Aboriginal land. Therefore, a different approach to the procedural rights issue is appropriate.’

The ALP supported the maintenance of the right to negotiate on pastoral leases and rejected the government’s distinction between vacant Crown land and pastoral leases as unimportant to its application. Deputy Leader of the Opposition Gareth Evans said ‘the onus must be on those who would want to take away the right to negotiate from those with credible common law claims to native title ...’ Evans observed that the right to negotiate was ‘critical ... to the justice and morality of this package’. He supported its retention for ‘mining on

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160 Ibid. 10414 (4 December 1997).
161 Ibid. No 18, 1997, 8785 (11 November 1997).
pastoral leases’ as legislated in 1993. However, the ALP did not favour the right to negotiate on freehold or ‘full commercial leasehold’.

The Greens argued that the right to negotiate should be broadly accessible to native title holders. Greens Senator Bob Brown said Indigenous people should have access to a right to negotiate on all the ‘enormous changes’ affecting their lives. Following the first round of the parliamentary debate, he described the amended bill as ‘one of dispossessing indigenous people of their right to negotiate about the land’. He explained that they ‘cannot negotiate in respect of the massive changes involving agriculture, dams, canals, the cutting of native vegetation and mineral exploration camps. In the off-shore region ... coastal indigenous people have no right to negotiate when it comes to the application of fishery developments, mining exploration, jetties, ports and other wholesale changes’. This implied the Greens supported a much wider application of the right to negotiate than legislated in 1993.

Another area of disagreement was on the origins of the right to negotiate provisions. The Coalition said it was solely a creation of the NTA, and had no basis in common law. For instance, South Australian Liberal Senator Hedley Chapman contended that the ‘right to negotiate was not a common law right’. He said it was ‘not a right enjoyed by all Australians. It is in fact a right based on race given by the previous government ...’ Prominent Western Australian Liberal Wilson Tuckey described the provisions in the original legislation as ‘an invention of the Keating government’, which he said was ‘fundamental to the

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opposition of most people in Australia’. He said ‘it was never a common law right; it could never be challenged under common law principles if this parliament chooses to change it’.\(^{167}\) Likewise, National Party Senator Bill O’Chee said it was not created by the High Court, ‘but by the previous government’s legislation ...’\(^{168}\)

Senator Harradine also shared these views on its origins. He told the Senate the right to negotiate ‘enshrined’ in the \textit{NTA} was ‘not a native title right’, but rather a ‘statutory right achieved as a consequence of ... negotiations on the Native Title Bill’.\(^{169}\) Harradine clearly considered ‘negotiation rights’ different from ‘native title rights’, which are ‘common law rights’. However, he also said ‘native title rights are worth very little without negotiation rights’.\(^{170}\) That is, unlike the Liberals and Nationals Harradine supported the ‘right of native title holders to negotiate’.\(^{171}\)

However, others argued the origins of the right to negotiate preceded the \textit{NTA}. Senator Bolkus said it was about ‘the cultural nature of native title and the spiritual attachment of native title holders to land’. He considered that ‘indigenous Australians ... got these rights through the common law’ and this was linked to the ‘concept of native title’.\(^{172}\) Likewise Senator Woodley argued it was a common law right.\(^{173}\)

\(^{166}\) Ibid. No 20, 1997, 9727-8 (27 November 1997).
\(^{169}\) Ibid. No 21, 1997, 10420 (4 December 1997).
\(^{170}\) Ibid. 9916 (1 December 1997).
\(^{171}\) Ibid. 10421 (4 December 1997).
\(^{172}\) Ibid. 10408 (4 December 1997).
\(^{173}\) Ibid. 10419 (4 December 1997).
A rare comparison to the Northern Territory Aboriginal Land Rights legislation did occur, though. ALP Senator Bob Collins made the point that ‘for decades Aboriginal people have had a real veto’ which can ‘only be disturbed by ... a declaration of the Governor-General in the national interest’. He also noted the latter ‘had never been exercised’. There were no further comparisons with this legislation except to offer reassurances that native title legislation would not provide a veto. Nor was there discussion about whether the right to negotiate provides a better basis to allow Aboriginal people to control their land.

The above comments suggest that differing perspectives were articulated about the right to negotiate provisions. At one pole was the position expressed by the Coalition representatives. They ignored the importance the right to negotiate provision had to culture and empowerment. Instead, they emphasised property rights and comparisons with other title holders. At the other pole the Greens, the Australian Democrats and the ALP representatives argued the right to negotiate had a common law basis.

**Parliamentary debate**

The first round of the Senate’s debate occurred in November and December 1997 when the chamber made 217 amendments to the original bill. The ALP and Senator Harradine joined the Coalition in support, and the Greens

174 Ibid. 10417 (4 December 1997).
and Australian Democrats voted against the amended bill.\footnote{175} Following this decision, the government rejected some of the Senate’s amendments.\footnote{176} Two further rounds of debate occurred, in April and July 1998 because the government did not get a bill it deemed acceptable. On 9 April 1998, Howard identified the amendments with which the government disagreed, and raised similar objections to those made at the conclusion of the first round of the debate about the right to negotiate provisions, the registration test, the application of the \textit{RDA}, and the sunset clause.\footnote{177}

In the first two rounds Senator Colston was absent and so Senator Harradine alone exercised a ‘balance of power’. If he voted with the ALP, Democrats and Greens he could ensure a government amendment failed. Following the April round, the government again rejected some of the Senate’s amendments\footnote{178} but support for the legislation eventuated in July 1998 when agreement was reached between the government and the two independent senators.\footnote{179} Following agreement between Senator Harradine and the

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\begin{itemize}
\item \textit{NTAB Explanatory Memorandum}, above n 7, 3; \textit{Senate Weekly Hansard} No 21, 1997, 10596 (4 December 1997).
\item \textit{House of Representatives Weekly Hansard} No 20, 1997, 12334, 12352-3 (6 December 1997).
government, the legislation was reintroduced to the House of Representatives before being forwarded to the Senate. However, the Senate did not consider any amendments because the Howard-Harradine agreement was tested on a motion not ‘to insist on its amendments disagreed to by the House of Representatives and agrees to the amendments made by the House of Representatives’.  

According to Senator Faulkner, the ALP strategy over the three rounds of the debate was to propose amendments ‘designed to effect a real compromise’. ALP Senator Bolkus complained there was still ‘much in the government’s legislation that we regard as unjust, legally uncertain and likely to be unworkable in practice’. But the ALP voted for the bill, because it was ‘convinced that everyone wants this issue to be resolved as quickly as possible and with as much balance and certainty as possible between the competing interests’. The ALP’s parliamentary tactics sought to maximise Senate support to apply leverage on the government. Hence, they supported the bill as amended by the Senate and voted for the amended bill in the House of Representatives against government steps to disagree with some of the Senate’s amendments.

This approach also marked a retreat from their earlier opposition to the Ten-Point Plan. As already noted when the Parliamentary Joint Committee examined native title, the ALP supported a common law determination of

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claims over pastoral leases. In December 1997 and April 1998, they voted in favour of the NTAB as amended by the Senate even though it overturned this provision. The Deputy Leader of the Opposition Gareth Evans acknowledged the shift in its stance. He said on ‘the validation issue, the government got what it wanted with ALP support. On the issue of confirmation of past extinguishment, the government got everything it wanted with a couple of comparatively small exceptions’.

The ALP leader in the Senate John Faulkner said it considered a compromise was necessary. He said the ALP ‘could quite easily have adopted a destructive approach to the bill. We could have simply tried to vote this piece of legislation down. We have not taken that path.’ Rather, the ALP’s amendments were ‘designed to affect a real compromise’. The Greens and the Australian Democrats opposed the ALP’s approach. At the end of the first round of the debate, Senator Margetts called on the ALP and Senator Harradine to ‘seriously consider the implications of exposing indigenous land rights to this bill’.

Australian Democrats Senator Woodley summarised the debate as a ‘battle between the Democrats and the Greens on one side and Labor and Independent Senator Brian Harradine on the other, on how the Senate should handle the ... Ten Point Plan’. The Australian Democrats and Greens were at odds with the ALP and the Coalition over the validation of intermediate acts - Point 1 of the Ten Point Plan. The intermediate period referred to the time

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184 ‘Minority Report’ in Tenth Report, above n 5, 76.  
188 Ibid. 9429 (25 November 1997).
between the implementation of the NTA at the beginning of 1994 and continued until the Wik decision in December 1996. Senator Woodley said the Queensland Labor government had issued about 1,500 of the 2,000 ‘unlawful’ leases in this period, avoiding the processes of the NTA. He said this was why ‘the ALP supports legalising unlawful leases’ and that the differences between the ALP and the Coalition on this matter ‘were only a hair’s breath away’.190

Tasmanian Senator Brian Harradine was not wholly supportive of the government’s proposed changes to procedural rights and past acts and he also opposed the six-year sunset clause on the lodgement of claims.191 He said the latter would likely ‘achieve the undesirable goal of propelling new claims into the court processes’. Harradine said ‘it would offend native title holders’ and in ‘the name of reconciliation, I believe that is unjustifiable’. Expressing his passion on the matter, he said after ‘more than 200 years of dispossession, we would in effect be saying to indigenous people that no provision will be made to allow claims be submitted for mediation after an arbitrary date’.192

When the bill returned to the House of Representatives, the government accepted 100 amendments its senators had initiated and 25 non-government amendments.193 The government reintroduced the bill to the House of Representatives the following March. When it moved to the Senate, the government threatened to call simultaneous elections for both chambers if the

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190 Senate Weekly Hansard No 21, 1997, 10343 (4 December 1997).
191 Bartlett, above n 11, 56-7, 59, 62.
192 Senate Weekly Hansard No 21, 1997, 9916 (1 December 1997).
193 NTAB Explanatory Memorandum, above n 7, 3.
Senate adopted unacceptable amendments,\textsuperscript{194} an option it had available to it in
the federal Constitution.\textsuperscript{195}

The ALP’s approach in this round was probably influenced by this fear.
The Democrats’ John Woodley told the Senate that ‘all of us were chastened
today when we saw the indigenous people leave this parliament in tears. They
were in tears because they knew that they were not going to get a fair and just
outcome.’\textsuperscript{196}

\textbf{Indigenous influence}

Indigenous influence on the outcome of the amended bill was far less
than occurred around the 1993 legislation. A feature of the Howard
government’s approach was to exclude and marginalise their participation. The
NIWG involved ATSIC, Native Title Representative Bodies and ‘other key
indigenous stakeholders’ and the collaboration developed following the Howard
government’s announcement in early 1996 that it intended to amend the
legislation. However, the NIWG said it found it difficult to negotiate with the
government since the latter preferred to ‘merely consult’ with them about its
proposed changes ‘rather than negotiate’.\textsuperscript{197}

\textsuperscript{194} Rebecca Rose, ‘Government set to risk all for Wik Bill’, \textit{The West Australian} 30 March
1998, 6; Editorial, ‘Facing the ugly truth of a race poll’, \textit{The Weekend Australian} 4-5 April
\textsuperscript{195} Commonwealth of Australia, \textit{The Australian Constitution}, (Canberra: Australian
\textsuperscript{196} Ibid. 2493 (8 April 1998).
\textsuperscript{197} \textit{Coexistence - Negotiation and Certainty}, above n 10, 5.

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In these circumstances, the NIWG concentrated on influencing the senators from the ALP, Greens and the Australian Democrats. In the first two rounds of the debate, the latter two parties moved a number of amendments supported by the NIWG. At the conclusion of the second round of the debate, Djerrkura\textsuperscript{198} and Geoff Clark issued a statement on behalf of ATSIC that described the compromise reached by the Senate as ‘unacceptable to Aboriginal and Torres Strait Islander people’ and ‘should be voted down’. They described it as ‘unfair, unjust and discriminatory’, and pointed to the ‘considerable extinguishment of our native title property rights in a way that goes far beyond the common law’\textsuperscript{199}. Queensland Australian Democrats Senator Woodley said his party would not ‘support extinguishment of native title rights which may co-exist with pastoralist rights on leasehold land’.\textsuperscript{200} The Australian Democrats and the Greens had ‘co-sponsored ... the working group’s position in total’. Consistent with this position, both parties opposed the amended bill. Senator Woodley explained to the Senate that ‘it is in accordance with the wishes of indigenous people and in accordance with our sense of fairness, justice and humanity that the Australian Democrats will oppose’ the bill.\textsuperscript{201}

At the conclusion of the third round of the debate, the NIWG complained they had ‘not been consulted in relation to the contents of the current Bill’ or about the final agreement. They said they ‘had not given consent to the Bill in any form which might be construed as sanction to its passage into Australian law’. Furthermore, the group insisted the amended \textit{NTA} ‘can no

\textsuperscript{198} The former chair of ATSIC has recently died and during the mourning period a first name is not mentioned.
\textsuperscript{199} Senate \textit{Weekly Hansard} No 5, 1998, 2495 (8 April 1998).
\textsuperscript{200} Ibid. 2493-4 (8 April 1998).
longer be regarded as a fair law or a law which is of benefit to the Aboriginal and Torres Strait Islander Peoples’. The statement also said Indigenous ‘ownership … derives from our ancient title which precedes colonisation of this continent and our ownership must continue, in Australian law, to be recognised in accordance with our indigenous affiliation with the land, waters and environment’.202 They considered native title a constitutional matter and spoke in the language of common constitutionalism.

Responding to the statement from the NIWG, Senator Minchin declared it an ‘extraordinary proposition … that somehow we are meant to assume that legislation affecting Aboriginal people can pass this parliament only if it is consented to by the Indigenous Working Group’. ‘To suggest that any group should have any veto over legislation passed by the duly elected parliament of this country is quite obnoxious’, he said.203 This confirmed that the government had rejected the idea of negotiation with Indigenous people, but presumed to legislate on their behalf in the language of modern constitutionalism.

**Outcome**

Eventually the government got the breakthrough it sought. Senator Harradine indicated a preparedness to break the stalemate between the two houses of Parliament and negotiations commenced in late June 1998 with the Prime Minister and the NFF. He said he wanted to ‘avert the divisive double dissolution race based election’ in which he believed ‘blind prejudice,
intolerance and hatred would reign’. The successful outcome of the negotiations was finally announced on 1 July 1998. Senator Harradine said this provided an ‘opportunity to build a national consensus over native title that will help to heal divisions and to build reconciliation’. The impact of their agreement was to deliver the votes of Harradine and Colston to the government, thus ensuring a majority of 39 votes in the Senate. Eighty-eight amendments were agreed to, including redefining the relationship between the RDA and the NTA, changes to the impact of past acts on native title, primary production, the right to negotiate provisions and the registration test.

The bill was revived in the House of Representatives and the amendments agreed to on 3 July 1998. The ALP voted against the proposal. When this version of the bill was introduced to the Senate, the Special Minister of State Senator Minchin moved that ‘the committee does not insist upon its amendments disagreed to in the House and agrees to the amendments made by the House’. Since no further amendment process was possible, the debate between 6 and 8 July 1998 was considerably shorter than with the two earlier rounds. The Greens and the Australian Democrats opposed the bill, as did the ALP. In the case of the ALP, this was a marked change from their approach to the earlier rounds. The Senate Leader of the Opposition Senator John Faulkner

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203 Ibid. 5183 (7 July 1998).
204 Ibid. 4961 (6 July 1998).
207 Ibid. 5196 (8 July 1998).
209 Ibid. 6025-6, 6063 (3 July 1998).
said that in the previous two rounds their amendments produced ‘a more acceptable piece of legislation that at least had some chance of survival in the High Court’. However, Faulkner said the legislation as agreed between Senator Harradine and Howard contained ‘elements that will lead to its collapse’.212

In pursuing its amendments, the government was determined to change the right to negotiate. Howard praised the agreement with Senator Harradine as a state-based regime that provided ‘equivalent procedural treatment to both Indigenous and non-Indigenous Australians’. He said this restored the ‘principle that all Australians should be equal before the law’ and rebutted ‘special rights’.213 Howard used the language of modern constitutionalism to exclude culture from the notion of equality.

The ALP, Greens and Australian Democrats understood the outcome differently. In attempting to amend the bill the three parties said that ‘indigenous people were not consulted in the recent negotiations on the bill and notes ... that indigenous people do not consent to the bill in its current form and have not endorsed the bill in any previous form’. This amendment was defeated when the Coalition combined with senators Harradine and Colston to vote it down.214 The parliamentary process was formally completed on 15 July 1998 when the House of Representatives received a message indicating the Senate had agreed to its amendments.215 Senator Harradine argued the amendments to the NTAB had ‘radically altered’ the ‘purpose and effect of the bill’. He claimed

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the legislation upheld and preserved the ‘common law native title rights of indigenous people and provides the mechanism for the practical realisation, the efficient realisation of those rights in a way that also provides fairness and certainty to other stakeholders, particularly for the miners and the pastoralists’.\textsuperscript{216} He said the amended bill rather than extinguishing native title over pastoral leases simply ‘suspends them until the lease ceases’.\textsuperscript{217}

While many amendments were made to the original bill the government succeeded in getting the substance of its Ten Point Plan adopted. Significant changes were made to:

- Point 6, with restrictions on native title access to, and modifications to, right to negotiate provisions concerning mining;\textsuperscript{218}
- Point 7, with restrictions on native title access to, and modifications to, right to negotiate provisions concerning commercial development; and,\textsuperscript{219}
- Point 9, with partial amendments including the abandonment of the sunset clause and modification of the registration test;\textsuperscript{220}

\textsuperscript{218} NTAB Explanatory Memorandum, above note 7, 20-1; Native Title Act 1993 [Consolidated 1998] (Cth), Part 2, Division 3, Subdivision P, [88-126]; Part 2, Division 3, S 24IC [67-9]; Part 7, S 190B-C [240-244].
\textsuperscript{219} NTAB Explanatory Memorandum, above note 7, 20-1; Native Title Act 1993 [Consolidated 1998] (Cth), Part 2, Division 3, S 24GE [64-5]; Part 2, Division 3, Subdivision J, [70-3]; Part 2, Division 3, Subdivision P, [88-126]; Part 7, S 190B-C [240-244].
Conclusions

This chapter has shown that the outcome of this phase of the debate was that the recognition of native title was further restricted. The possibility that native title could coexist with pastoral leases was thrown overboard. Unlike the 1993 debate, the government spoke exclusively in the language of modern constitutionalism. Their concern was with the impact of the legislation upon miners and pastoralists. No acknowledgement was made of the common conventions or the distinct culture of Indigenous people. It was presumed appropriate for the Crown to extinguish native title without the consent of the title holder. However, the argument over the right to negotiate provisions did highlight differences not aired in the 1993 debate. The Howard government’s view that it could amend the legislation without seeking the agreement of Indigenous people brings into starker relief its differences with the other parties. The Howard government spoke of the right to negotiate provisions in modern constitutional terms as though it did not concern the distinct culture of Indigenous people. While the ALP, Greens and Australian Democrats recognised the right to negotiate provisions were linked to culture and empowerment, using the language of common constitutionalism, they did not explicitly link their provision to the convention of consent.

If the constitutional language employed to consider the native title claims was increasingly framed in terms of modern constitutionalism, did Aboriginal and Torres Strait Islander peoples concur? As was discussed in

220 NTAB Explanatory Memorandum, above note 7, 22; Native Title Act 1993 [Consolidated 1998] (Cth), Part 7, S 190B-C [240-244].

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Chapter 2, an assumption unpinning modern constitutionalism is its universal applicability. But an inquiry into constitutional languages in the *Mabo* debate cannot take this for granted. An explicit study of the language employed by Aboriginal and Torres Strait Islander people to articulate their claims is therefore required. This crucial aspect will be the subject that is addressed next.
Chapter 10:

Aboriginal and Torres Strait Islander peoples and Mabo

In Chapter 1 the different claims that were advanced by Aboriginal and Torres Strait Islander peoples following Mabo were identified: native title, a treaty or agreement, a rewriting of the Constitution’s preamble, the removal of s 25 of the Constitution, special seats in parliament, and an apology and compensation for the unjust separation of children from their parents. This chapter will concentrate on showing that the language employed by Aboriginal and Torres Strait Islander peoples around Mabo exhibited features of common constitutionalism. Another task undertaken here is to specifically examine the attitudes of Indigenous people to extinguishment and recognition. This will help in contrasting their stance with the positions adopted by the High Court and the federal government.

This chapter will begin by examining the views expressed by the Aboriginal and Torres Strait Islander Commission (ATSIC) about Mabo and the views expressed several years after the decision around a treaty.¹ This will be

¹ While the Howard Government’s April 2004 decision to abolish ATSIC has far-reaching consequences for the self-determination of Indigenous peoples in Australia, it is outside the scope of this thesis. When he announced that his government would introduce legislation to abolish ATSIC Prime Minister Howard stated that ‘We believe very strongly that the experiment in separate representation, elected representation, for indigenous people has been a failure’. The programs managed by ATSIC were to be ‘mainstreamed’. The government also announced that it would ‘appoint a group of distinguished indigenous people to advise the Government ... in relation to aboriginal affairs’. See The Hon John Howard, Prime Minister,
followed by an examination of the two meetings held in 1993, the first being the
Red Centre meeting in April that year resulting in the Aboriginal Peace Plan.\textsuperscript{2} The second meeting was held in Eva Valley in the Northern Territory in early August and was attended by 400 people to ‘see if it was possible to adopt a common Aboriginal position on native title’.\textsuperscript{3} The Eva Valley Statement drawn up at the meeting was subsequently presented to the Prime Minister.\textsuperscript{4} Then the views expressed by four prominent Indigenous leaders will be considered: Noel Pearson, Patrick Dodson, Michael Dodson and Larissa Behrendt. During 1993, Pearson was the director of the Cape York Land Council, and continues to be associated with this region located in the far north of Queensland.\textsuperscript{5} Patrick Dodson is a Yawuru man from Broome, Western Australia. He was the former director of the Central Lands Council and from 1991 was the inaugural chairperson of the Council for Aboriginal Reconciliation (the Council).\textsuperscript{6} His brother Michael Dodson was the Aboriginal & Torres Strait Islander Social Justice Commissioner and responsible for monitoring the operations of the \textit{Native Title Act 1993} (Cth).\textsuperscript{7} Larissa Behrendt is Professor of Law and Indigenous Studies and Director of the Jumbunna Indigenous House of Learning at the University of Technology, Sydney.\textsuperscript{8}


4 Ticker, above n 2, 153-154.
6 Tickner, above n 2, 39.
Literature for this chapter comes from a variety of sources. In *No ordinary judgment* Nonie Sharp considered the significance of ‘native title in the reshaping of Australian identity’. The year after the High Court’s decision, ATSIC produced an assessment of the judgement. Following the decision of the Howard government to amend native title legislation, in 1997 ATSIC responded to the proposals. About a year later, when the Native Title Amendment Bill was introduced to Parliament ATSIC produced an assessment of the bill. The final ATSIC document referred to here is *Treaty: let’s get it right!* This was published around the time the Council for Aboriginal Reconciliation was finalising its work in 2001. The *Aboriginal Peace Plan* and the *Eva Valley Statement* are taken as reprinted in Murray Goot and Tim Rowse’s *Make a better offer: the politics of Mabo*. 

In discussing the ideas expressed by the four Indigenous leaders a variety of presentations, talks, reports and books have been drawn on. Four talks and two articles written by Noel Pearson are discussed. In 2002, he delivered

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10 Aboriginal and Torres Strait Islander Commission, *Current Issues: The MABO judgement*, (Canberra: Aboriginal Torres Strait Islander Commission, 1993).
11 Aboriginal and Torres Strait Islander Commission, *Proposed Amendments to the Native Title Act 1993*, (Canberra: Aboriginal and Torres Strait Islander Commission, 1996).
12 Native Title Amendment Bill 1997 (Cth).
13 Aboriginal and Torres Strait Islander Commission, *Native Title Amendment Bill 1997 - Issues for Indigenous Peoples*, (Canberra: Aboriginal and Torres Strait Islander Commission, 1997).
14 Aboriginal and Torres Strait Islander Commission, *Treaty: let’s get it right!* (Canberra: Aboriginal and Torres Strait Islander Commission, 2001) (“Treaty: let’s get it right!”).
the fifth Annual Hawke Lecture at Adelaide Town Hall.\textsuperscript{16} He also gave a presentation to the University of Sydney’s Centre for Peace and Conflict Studies in March 1994.\textsuperscript{17} Two speeches that Pearson gave in 2003 are also referred to here. The first in June was at the Conference of the Native Title Representative Bodies;\textsuperscript{18} the second to the High Court Centenary Conference on native title.\textsuperscript{19}

Two articles are also examined, the first being an intervention in the native title debate in 1993;\textsuperscript{20} the second following the High Court’s decision on the Miriuwung-Gajerrong claim.\textsuperscript{21} Two speeches given by Patrick Dodson are discussed. The first, titled ‘Reconciliation at the crossroads’ was given at the National Press Club in April 1996.\textsuperscript{22} The second was given in Canberra around four years later as part of the Wentworth Lecture series.\textsuperscript{23} The first piece of material examined from Michael Dodson is his first report as Aboriginal and Torres Strait Islander Social Justice Commissioner and published a year after the Mabo decision.\textsuperscript{24} The following year he delivered the Ninth Frank Archibald


\textsuperscript{17} Noel Pearson, ‘From remnant title to social justice’ in Goot and Rowse, above n 15, 179-184.

\textsuperscript{18} Noel Pearson, \textit{Where we’ve come from and where we’re at with the opportunity that is Koiki Mabo’s legacy to Australia}, Mabo Lecture, Alice Springs, 3 June 2003. [Accessed www.capeyorkpartnerships.com, 03/11/2005].


\textsuperscript{20} Noel Pearson, ‘Law must dig deeper to find land rights’, \textit{The Australian} 8 June 1993, 11.


\textsuperscript{22} Patrick Dodson, \textit{Reconciliation at the crossroads}, Address to the National Press Club, April 1996, (Canberra: Council for Aboriginal Reconciliation, 1996) (“Reconciliation at the crossroads”).


Memorial Lecture at the University of New England, Armadale.\(^{25}\) In 1995, his second report as Commissioner was produced and covered the first six months of the implementation of the *Native Title Act*.\(^{26}\) In *Achieving Social Justice: indigenous rights and Australia’s future* Larissa Behrendt outlined the case for achieving Indigenous social justice, considering the ‘seemingly paradoxical claims’ of Aboriginal people seeking ‘equality within the Australian state’ and ‘defining themselves as a separate entity’.\(^{27}\)

Lastly, a number of other sources assist in providing context and analysis for the events discussed. Robert Tickner’s *Taking a stand* relates his years as a minister in the Keating Government and focuses on ‘six crowded years in the struggle for the right of the first Australians’.\(^{28}\) A Discussion Paper prepared by the Keating Government on the Mabo decision includes a number of references to the views of Aboriginal and Torres Strait Islander representatives.\(^{29}\) Another source of information about Indigenous responses is provided in Murray Goot & Tim Rowse’s *Make a better offer: the politics of Mabo*.\(^{30}\) A piece by Tim Rowse considered the ‘principles of Aboriginal pragmatism’.\(^{31}\) Also drawn on is John Gardiner-Garden’s chronology of the


\(^{27}\) Behrendt, above n 8, 14.

\(^{28}\) Tickner, above n 2.


\(^{30}\) Goot and Rowse (Eds), above n 15.

‘The Mabo debate’. This is included in the federal Parliamentary Library collection.32

**ATSIC**

Considering the attitude of ATSIC to Mabo, it is noted that this body was established by federal legislation in 1990, and came into existence in March that year. ATSIC was empowered ‘to make executive budgetary and policy decisions about expenditure in the indigenous affairs budget’,33 and self-determination.34 Reflecting the self-identification of the Indigenous peoples throughout Australia the organisation’s name refers to Aboriginal peoples living on the mainland and Tasmania and the Torres Strait Islander peoples, who democratically elected representatives to its regional councils.35 This provided the organisation’s authority in post-*Mabo* negotiations.

A proposal made by ‘Aboriginal and Torres Strait Islander representatives’ to the federal government following *Mabo* sought to establish a basis for mutual recognition. It sought to involve ‘Commonwealth and Aboriginal and Torres Strait Islander representatives’ in a ‘Settlement Process’ where they would ‘determine how all matters concerning Aboriginal and Torres Strait Islander people’s interests and rights will be resolved to enhance self

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33 Tickner, above n 2, 49
34 Ibid. 48.
determination’ and ‘to ensure’ that Indigenous people ‘can take responsibility for their own future’.  

Framed in the common constitutional language, issues included:  

- funding;
- new Land Councils where none exist at present;
- a land acquisition fund;
- compensation, financial or otherwise;
- ownership and management of resources;
- hunting, fishing and gathering rights;
- ownership and control of cultural and intellectual property rights and human remains;
- inter-relationship with existing land rights legislation;
- new constitutional arrangements;
- Aboriginal and Torres Strait Islander people’s self-government; and,
- resolution of land alienations since 1975.

ATSIC embarked on a campaign for a treaty from around the time of the mass rallies from May 2000. The following year it produced a booklet on the subject in which ATSIC’s chair Geoff Clark explained that a ‘treaty would fundamentally change the relationship between Aboriginal and Torres Strait

36 Mabo: The High Court Decision on Native Title, above n 29, 95.
37 Ibid. 95-96.
Islander peoples and non-Indigenous Australians’.  

It was stated that ATSIC was ‘not negotiating a treaty’, but rather ‘promoting discussion about a treaty – its benefits, its difficulties, its form and its content’. 

The treaty proposal based on a convention of consent exercised between Aboriginal and Torres Strait Islander peoples and other Australians reflects the language of common constitutionalism. Making a point similar to the one made by Tully in *Strange multiplicity* about the North American treaties the booklet states:

> when these treaty documents were negotiated, Indigenous peoples were recognised as separate and sovereign peoples who had their own laws, and were capable as nations and tribes of forming and breaking their own alliances with others (including the colonial powers).

The booklet acknowledged that it used the term ‘treaty’ in a different way to that specified in the 1969 *Vienna Convention on the Law of Treaties*, which defines a treaty in terms of ‘two or more nation states … imposing binding obligations on themselves and governed by international law’. The booklet, however, argued that while ‘treaty’ is ‘most often used in the international law context, it can also be used to describe any agreement or contract between parties’.

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38 Geoff Clark ‘Introduction’ in *Treaty: let’s get it right!*, above n 14, 1.
39 *Treaty: let’s get it right!*, ibid. 24.
41 *Treaty: let’s get it right!*, above n 14, 3.
42 *Treaty: let’s get it right!*, above n 14, 3.
43 *Treaty: let’s get it right!*, above n 14, 3.

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The language of common constitutionalism is also used to highlight the lack of consent by the Indigenous peoples to Britain’s acquisition of Australia. The booklet states: ‘Australia has never formally recognised the Aboriginal and Torres Strait Islander peoples by way of a treaty or treaties’. Despite instructions to Captain Cook that consent be sought, Cook ‘disregarded his official instructions’ and ‘did not take possession of Australia with the consent of Indigenous peoples’. The booklet also implied that the convention of consent was ignored when the Howard government amended the native title legislation. Discussing the possibility that a treaty ‘may take the form of legislation’ the booklet’s writers expressed concern that a ‘treaty can be amended by further legislation’. While ‘this may provide flexibility when new issues arise … it also means that some provisions can be … overridden by the Government without the support of the Indigenous peoples’. The authors complained that the NTA was ‘amended in 1998 with no consultation with Indigenous peoples’ and that these amendments were ‘later considered discriminatory by the United Nations Committee on the Elimination of Racial Discrimination’.

The booklet argued for recognition of Aboriginal and Torres Strait Islander peoples’ cultures. It said a treaty might be ‘one way to address the original failure to recognise the presence of Indigenous peoples’ to recognise ‘past injustices’ and provide ‘legal recognition of Indigenous rights’.

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44 Ibid. 6.
45 Native Title Amendment Bill 1997 (Cth).
46 Treaty: let’s get it right!, above n 14, 19.
Additionally, it ‘may also affirm and protect Indigenous rights’, something the ‘Constitution has not yet done’.47

The treaty booklet also briefly referred to Aboriginal sovereignty. It described this as ‘the ability of Indigenous peoples to act as a nation’ including ‘the ability to be self-determining and to exercise self-government’. The booklet stated: ‘Even though Australian governments and courts have never recognised Indigenous sovereignty, many Indigenous peoples believe that sovereignty has never been given up and it is retained, even if it has not been recognised by the Australian state.’48

Aboriginal Peace Plan

Before the introduction of native title legislation to federal parliament in April 1993 Aboriginal groups met in Alice Springs to produce a statement of principles known as the Red Centre Statement. A delegation from this meeting then drew up an ‘Aboriginal Peace Plan’ and presented this to a meeting with the Mabo Ministerial Committee, the body that organised the Keating Government’s consultations with other interests. The Plan ‘joined together a special relationship with land and the right to legal recognition of native title’.49 The members of the Mabo Ministerial Committee included the Prime Minister and ‘other key ministers’.50 Participants in the meeting with the Mabo Ministerial Committee included Noel Pearson, representing the Cape York Land

48 Ibid. 21.
49 Sharp, above n 9, 219.
50 Tickner, above n 2, 92.
Council, Patrick Dodson, Wenten Rubuntja from the Council for Aboriginal Reconciliation and Michael Dodson as Aboriginal and Torres Strait Islander Social Justice Commissioner.51

The Peace Plan contained an aspect that at first glance reflects the language of modern constitutionalism: the push for ‘[o]ver-riding Commonwealth legislation’.52 Legislative solutions form part of the language of modern constitutionalism because parliaments form part of modern government: ‘a specific set of European institutions’ are associated with the modern constitution. Tully says these include ‘representative government, separation of powers, the rule of law, individual liberty, standing armies and a public sphere’.53 Furthermore, legislative solutions presume an underlying unity because they are enacted on behalf of all people within a country. Because a government is not bound to directly consult with Indigenous peoples about legislation affecting them, legislative solutions do not usually provide a basis for mutual recognition.

However, since the Commonwealth is a signatory to a number of international covenants including the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights and the international Convention on the Elimination of All Forms of Racial Discrimination,54 calls on it to exercise its power under these covenants reflect human rights and the

51 Ibid. 112-113; see also Gardiner-Garden, above n 32, 153-4.
52 The Aboriginal Peace Plan, above n 15, 218.
53 Tully, above n 40, 67-8.
54 Aboriginal and Torres Strait Islander Social Justice Commissioner, Native Title Report – January – June 1994, above n 7, 12.

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language of common constitutionalism. Clearly, a number of prominent Indigenous people argued the Australian government had obligations under these conventions. For instance, the first Aboriginal and Torres Strait Islander Social Justice Commissioner, Michael Dodson, argued these ‘international instruments are relevant to native title in that they protect property against arbitrary and discriminatory interference and they provide rights to the free exercises of culture’. He also said the ‘international community’ has an ‘expectation … that Australia will comply with these standards in its treatment of the property rights of Indigenous peoples’.55

One particular element that deals with the legislation clearly associates the Red Centre Statement with the language of common constitutionalism. The Statement proposed that Aboriginal and Torres Strait Islander peoples’ representatives were to ‘participate as members of the drafting team for all legislation’.56 If implemented such an approach would overcome the problems with the modern constitutional view that legislation can be initiated without respect for the distinct cultures of Indigenous peoples.

This point was reinforced sharply at the meeting with the Mabo Ministerial Committee when the late Rob Riley cautioned the Prime Minister:57

55 ld.
56 The Aboriginal Peace Plan, above n 15, 219.
57 Rob Riley cited by Ticker, above n 2, 114.
streets. We will go to international forums. The one thing you, your
colleagues, the miners, pastoralists, and the Australian people have to
accept is that the law of the land has changed and we are going to exercise
our rights.

The Peace Plan also had many elements readily associated with the
common constitutional language. The name itself implies a ‘Settlement Process’
and that the parties to a resolution are the First Peoples of the country and other
Australians. The meeting said legislation should provide for a ‘Longer Term
Settlement Process for [the] benefit of all Aboriginal and Torres Strait Islander
peoples’ and called for negotiations with ‘Aboriginal and Torres Strait Islander
peoples towards Constitutional acknowledgment of Aboriginal and Torres Strait
Islander rights’. Furthermore, the convention of consent was advanced in the
call not to extinguish or impair ‘Aboriginal and Torres Strait Islander Title
unilaterally without consent’.58

Eva Valley Statement

Another national meeting of Aboriginal and Torres Strait Islander
Peoples was held at Eva Valley in the Northern Territory on the 3 and 4 August
1993 to ‘formulate a response to the High Court decision on Native Title’.59
Prior to this meeting, the Keating government had released its Discussion
Paper60 and A Framework of Principles to ‘guide’ its policy response.61

58 The Aboriginal Peace Plan, above n 15, 218.
59 Eva Valley Statement, above n 15, 233.
60 See Mabo: The High Court Decision on Native Title, above n 29.
Although, the draft legislation had not been released, by this time state governments, including the Goss Labor government in Queensland, had formally met with the federal government at a June 1993 meeting of the Council of Australian Governments. The state governments were ‘unanimously opposed’ to granting native title claimants ‘qualified consent and negotiation rights’.

The Eva Valley meeting rejected the approach taken by the Keating government up to that point of seeking agreement from the state governments (and the exclusion of Indigenous people from the State/Commonwealth dialogue). In other words, the meeting did not believe that native title should be addressed via the modern constitutional language. Instead, they proposed a form of mutual recognition where the federal government would reach agreement about the legislation with Aboriginal and Torres Strait Islander Peoples. It sought a negotiating process to achieve a ‘lasting settlement with and for the benefit of all Aboriginal and Torres Strait Islander Peoples’. In preparation for this a ‘representative body’ was nominated to ‘put forward our position … including the necessity to consult and negotiate with Aboriginal and Torres Strait Islander Peoples about these principles’.

Consent underpinned the Red Centre Statement and indicated the support of participants for the common constitutional convention of consent. It stated that the government should only move on native title with the ‘support of

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62 An outline of the legislation was released on 2 September 1993. See Ticker, above n 2, xxii.
63 Ibid. 127-128.
64 Eva Valley Statement, above n 15, 233.
65 Ibid. 234.
Aboriginal and Torres Strait Islander Peoples’ and that the ‘development of any legislation’ would ‘need the full and free participation and consent of those People concerned’. 66

The Statement also contained a vision that reflected the common law convention of continuity. In the second principle it called on the Keating government to ‘acknowledge that Aboriginal and Torres Strait Islander Title cannot be extinguished by grants of any interest’. Furthermore, there should be recognition and protection of ‘Aboriginal and Torres Strait Islander Rights’. 67 The Statement called on the moral authority of human rights with the first dot point a call on the federal government to ‘honour its obligation under International Human Rights Instruments and International Law’. 68

**Comments by Indigenous leaders**

**Noel Pearson**

Examining the views articulated by prominent Indigenous leaders, this begins by considering those of Noel Pearson. Pearson discussed *Mabo* in the human rights language. He rejected the view that the decision was largely one of ‘land management’ and argued it should be ‘treated as a question of indigenous human rights’. It should also be ‘located within concepts … being developed internationally’, and pointed to the ‘courts and governments in Canada, the United States and New Zealand’. Seen through this language it followed that the

66 Id; Sharp, above n 9, 221-3.
67 Ibid. 233.
68 Id.
federal government should ‘take primary responsibility’ because this was ‘required’ by Australia’s ‘international treaty obligations and the responsibility it assumed with the 1967 constitutional referendum to make laws with respect to Aboriginal people’. Pearson said ‘Aboriginal people will take significant account of the standards applied to indigenous people in those countries where recognition of aboriginal title has a much stronger history’. 69

Pearson also embraced concepts from the common law language. In discussing the recognition of Aboriginal customary law, he noted the Australian Law Reform Commission ‘back in 1986 recommended a whole range of proposals for the recognition of customary laws’. Pearson argued one of the implications of Mabo was that Aboriginal law and customs had become ‘a source of law in this country’. Since ‘native title arises out of Aboriginal law and custom’ it also dictated the ‘way people will be allowed to conduct themselves on the land’. Even if the High Court determined that the Crown has sovereignty over the whole of Australia, he said ‘there remained an ‘inherent right to jurisdiction because our laws constitute our title and also constitute the society – whose title it is’. 70

Pearson also discussed sovereignty and Mabo. In 1994 he said that ‘Aboriginal people, as far as I have heard them, have never conceded sovereignty, it’s still very much part of the Aboriginal political agenda at a philosophical level’. 71 He noted though that ‘Mabo effectively dismisses

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70 Noel Pearson, ‘From remnant title to social justice’ in Goot and Rowse, above n 15, 181-182.
71 Ibid. 183.
Aboriginal sovereignty’. That is, Aboriginal claims are framed in a moral language that has not yet been heard by ‘most other Australians’.72

Pearson was mindful of the language that Indigenous people used around Mabo and that political considerations influence when and how they are advanced. In response to the thesis advanced by the historian Henry Reynolds73 that ‘the land rights cause has been weakened by conflating sovereignty with land ownership’, Pearson said it is claimed ‘that a consequence of recognising Aboriginal land ownership is the creation of black states and apartheid and ceding sovereignty back to Aboriginal people’. He said that he was ‘concerned … after Mabo … that our opponents would conflate sovereignty with land ownership and so force us to bat not only against the opposition to us having land title but also against the spectre of black nations’.74

Pearson cautioned about the timing that ideas associated with the common law language were placed on the political agenda occurred. He said that ‘to extract the best result from the [Mabo] decision – in terms of putting land under people’s feet – we needed to think about confining our agenda, at this stage, to land ownership’.75 That is, he acknowledged that the language articulated by Indigenous people was not yet on the agenda and had to concentrate on the key aspect that is being recognised – native title. He was mindful of the dominant constitutional language: ‘I copped some flak for

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72 Id. Italics in original.
74 Noel Pearson, ‘From remnant title to social justice’ in Goot and Rowse, above n 15, 183-184.
75 Ibid. 184.
advocating that we get land as part of our citizenship of Australia’, he said. He clearly placed Mabo into a longer-term philosophical agenda when he said that the ‘more difficult questions of self-government and jurisdictional rights – sovereignty issues – need to be ventilated after we’ve nailed the land under our feet’.

Pearson also made two points about the failure of the colonisers to respect the language of common law. Drawing on the work of Henry Reynolds he observed that ‘there’s very strong evidence of recognition of Aboriginal title during the early nineteenth century’. ‘Since then there’s been a deliberate obfuscation of English law in this country – a denial of the very law that the settlers were supposed to have brought with them on January 26, 1788 – that is, the English common law’s respect for Aboriginal title.’ He said the ‘denial of that law and the failure to get colonial society to take cognisance of the instructions being given from the Colonial Office to the settlers out here were betrayals of Aboriginal people. English people betrayed Aboriginal people and abandoned respect for their own law in favour of frontier violence and the forcible acquisition of land from traditional owners.’

Patrick Dodson discussed continuity, a convention of the language of common law. In a speech delivered to the National Press Club in April 1996 he

76 Id.
77 Id.
78 Ibid. 180.
told ‘a story to draw a picture’. He explained his grandfather had ‘taught me how to think about relationships by showing me places’. Dodson related that:

He showed me where the creeks and rivers swirl into the sea. The fresh water meet the salt, the different worlds of ocean and river are mixing together. He showed me the foam and the turbulence, pointed to the eddies, and swirling mud, the colours intermingling. And he showed me where it was always good to put a line into the water and wait for a feed.

The river is the river and the sea is the sea. Salt water and fresh, two separate domains. Each has its own complex patterns, origins, stories. Even though they come together they will exist in their own right.

My hopes for reconciliation are like that.

His view was that Aboriginal cultures should be able to continue and not be discontinued by colonisation. Those from different cultures and backgrounds could achieve reconciliation. Those coming from far away across the sea over the past two hundred or so years could reconcile with the Aboriginal and Torres Strait Islander peoples who were the ‘original inhabitants of this vast continent’ with traditions built up over tens of thousands of years. Later on in the same speech, Dodson argued that reconciliation meant ‘respecting each other’s cultures’.

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79 Patrick Dodson, *Reconciliation at the crossroads*, above n 22, 5.
80 Id.
81 Ibid. 3.
82 Ibid. 14.
Dodson embraced concepts from the language of common law and like Tully considered constitutionalism needed to be conceived in a way to accommodate the claims of Indigenous people: ‘We need to think through ways to accommodate the rights of indigenous people in Australian law and to make the conceptual link required to change the way decisions are made and business is done.’

He said *Mabo* would ‘fundamentally change Australia’. ‘*Mabo* put indigenous people back into the picture that for too long we were painted out of’.

Dodson outlined what an accommodation would entail:

Above all it must mean some form of agreement that deals with the legacies of our history, provides justice for all, and takes us forward as a nation. In the words of our council’s [Council for Aboriginal Reconciliation] vision we should walk together towards a united Australia which respects this land of ours; values the Aboriginal and Torres Strait Islander heritage; and provides justice and equity for all.

Dodson emphasised that dialogue was needed to move things forward. While he noted that ‘our media, our constitution, our courts, our parliaments, our laws, serve most Australians fairly well’ he said they did not serve Indigenous people well: ‘All these national institutions would better serve indigenous people and the process of reconciliation, and the shaping of our nation, if we created more effective channels for their voices to be heard.’ He

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83 Ibid. 14.
84 Ibid. 12-13.
85 Ibid. 6. Emphasis in original.
said there needed to be ‘more talking with, and less talking about, Aboriginal people in all these forums. More sitting down together and less shutting out.’  

Dodson emphasised the methods the need for ‘communication, mediation and negotiation’, so ‘common ground’ could be found to build agreements and ‘where everybody has a place, a home and respect’.  

**Michael Dodson**

Michael Dodson was appointed as Aboriginal and Torres Strait Islander Social Justice Commissioner by the Keating government in 1993. He too used concepts from the common law language. In his first report he posed a question ‘never been put to our people: Do you consent?’ He commented: ‘Ironically the likelihood of an affirmative answer is directly proportional to the faith held by the Aboriginal and Torres Strait Islander peoples that the Australian State will respect our right to self-determination: and this faith is inversely proportional to the fact that the question has never been asked.’

Dodson said there was no equal sign between the legal decisions on native title and the views and practices of Indigenous peoples, and pointed out that ‘native title exists whether it is recognised by the common law or not’. Common law recognition ‘does not alter the form of that title, it only alters its enforceability in Australian courts’. He warned that to ‘pigeon-hole native title’ and ‘analogise it to western concepts of land tenure is paradoxical to the

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86 Ibid. 3.  
87 Ibid. 4.  
recognition of a title based on our laws and customs’. That is, ‘Indigenous ownership’ must be recognised on ‘Indigenous terms’. 89

Dodson placed the distinctions between Indigenous concepts and the legal decisions within the broader context of human rights. A separate chapter on this subject was contained in the first report on the operation of the Native Title Act 1993 (Cth) (the NTA). 90 It was within this context that he assessed the native title legislation. He argued it was ‘essential’ that the primary objectives of the NTA were ‘only approached from a perspective of ensuring full respect for the human rights of Indigenous peoples’ and that the ‘broad definition’ used in Section 223(1) to define ‘native title’ and ‘native title rights and interests’ was ‘both appropriate and necessary’. 91

Dodson observed that for ‘indigenous peoples’ self-determination ‘has been held up … as the pre-eminent right of peoples’, but argued this ‘becomes an empty concept … unless we are free and supported to live according to the values, practices and systems which we have created for ourselves.’ 92

Larissa Behrendt

In her compact and powerful outline of the need for institutional change, Larissa Behrendt argued the ‘tensions between Indigenous Australians and the

90 ‘Chapter 2’ in Aboriginal and Torres Strait Islander Social Justice Commissioner, above n 7, 51-74.
91 Aboriginal and Torres Strait Islander Social Justice Commissioner, Native Title Report – January – June 1994, above n 7, 53-4; Native Title Act 1993 (Cth), s 223(1).
92 Michael Dodson, Cultural Rights, above n 25, 7.
dominant culture are wrapped up in identity: how Australians see themselves, how they see others and how they want society to respect who they are'.

Behrendt emphasised the interconnection between personal identity and community, and advocated the principles of ‘substantive equality’ and ‘effective participation’, which lent themselves to a ‘different kind of liberalism, an outcome-based liberalism’.

Behrendt argued that contemporary Australia had been locked in a debate between ‘two forms of liberalism: a difference-blind liberalism and multicultural liberalism’. She said the former was based on the image of Australian identity as ‘monocultural, white Australia’ while the latter believed that recognition of difference was the ‘only way to counter the problems of formal equality’.

Behrendt wrote of two ‘ubiquitous’ goals: the claims for the recognition of ‘Aboriginal sovereignty’ and ‘self-determination’. She said the meaning Aboriginal people place on sovereignty was ‘different’ from how it was used in an international legal context. Behrendt explained that the ‘key to understanding … is to unlock what it is that Aboriginal people are describing when employing’ the terms ‘Aboriginal sovereignty’ and ‘self-determination’. She said what was ‘most striking’ about the ‘use of the word sovereignty by Indigenous people’ was it included ‘an aspiration to greater community autonomy’ but that this fell ‘short of advocating a separation from the Australian state’. That is it

93 Behrendt, above n 8, 76.
94 Ibid. 76-80.
95 Ibid. 83.
96 Ibid. 172.
97 Ibid. 18.
captured the ‘essence of both a separate cultural entity and historical disposssession and the exclusion and lack of consent involved in the creation of the modern Australian state’.98 She noted there was a ‘spectrum of rights that are included in the recognition of sovereignty and the exercise of self-determination’.99

Behrendt described the agenda she outlined as expressions of ‘political aspirations’ that challenged the ‘institutions of Australian society’ and sought to ‘expose and erode the dominant, seemingly neutral, ideological base of institutional frameworks’. Her use of the word ‘politics’ to explicitly advocate an alternative set of norms to organise its governance relations comes very close to an alternative constitutional language. The breadth of her constitutional agenda is evidenced in the title of her first chapter: ‘Why question the rules?’100

**Extinguishment and recognition**

In his role as Aboriginal and Torres Strait Islander Social Justice Commissioner Michael Dodson provided a distinct perspective on extinguishment, distinguishing between legal and moral dimensions of Mabo. He made the point that extinguishment of ‘native title was a breach of Indigenous human rights’. He said the Keating government he said that the ‘clearly believed that this breach was a necessary compromise in balancing the competing interests’ whereas Dodson maintained ‘that extinguishment … should be kept to a minimum’. However, the ‘most important consideration in

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98 Ibid. 102.
99 Ibid. 116.
100 Ibid. 18-19.
working out the issues around extinguishment is the people who may be dispossessed as a result of the way the legal principles develop’. Their views, ‘the legitimacy of the extinguishment of native title can only be determined by native title holders themselves’. ¹⁰¹ He drew a distinction between the language of common law and respect for the distinct cultural traditions of Indigenous people and the language of modern constitutionalism, which typically seeks the resolution of differences by parliament imposing a solution that ‘balances competing interests’.

In his comments about co-existence he embraced concepts of common constitutionalism. He wrote that co-existence ‘between native title and other interests should be given effect where possible and native title should be understood to revive after the expiry of a granted interest’. ¹⁰²

Dodson also made the case that the extinguishment of native title was not ‘simply the removal of a right to land’ but could have the ‘effect of destroying traditional, social, economic, cultural, political and religious systems’. This would be ‘in contravention of the protection of human rights’ in Article 18 of the Universal Declaration of Human Rights, Article 27 of the International Covenant on Civil and Political Rights, Article 15 of the International Covenant on Economic, Social and Cultural Rights and Article 30 of the International Convention on the Rights of the Child. He also pointed out that this was contrary to Article 14 of the International Labor Organisation

¹⁰² Ibid. 13.
Dodson’s view has particular significance for the recognition of native title. First, he drew a distinction between traditional practices and its possible recognition by the Australian governing and legal system, which Tully calls a constitutional association. Secondly, extinguishment is wrong because it represents a denial of recognition and protection of the customs and laws of Aboriginal and Torres Strait Islander peoples. This idea resonates with those expressed by Tully’s in *Strange multiplicity*, where he describes the circumstances of a governing and legal system, a ‘constitutional association’ that “discontinues or ‘extinguishes’ the pre-existing customs and ways of the people” as a ‘doctrine of discontinuity’. Dodson’s approach also has practical implications for how we think about extinguishment and recognition. His advice suggests the way forward is to base a solution on the coexistence of Indigenous and non-Indigenous peoples. The claimant can sit down and mediate a solution with the current owners of the land so that as much of the traditions of the claimants can be accessed and given legal protection. Where traditional practices cannot presently be accessed or protected because of the existence of a ‘granted interest’ these can be revived when that interest expired. Tully describes such a process as mutual recognition, where the parties engage in a

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105 Tully, above n 40, 125.
dialogue to mediate claims for recognition and accommodate their cultural differences.\textsuperscript{106}

The view that Aboriginal and Torres Strait Islander people support a practical dialogue based on the conventions of mutual recognition, consent and continuity is also supported by the specific comments included in the Aboriginal Peace Plan in April 1993 and the Eva Valley Statement in August that year. The Aboriginal Peace Plan calls for ‘[o]ver-riding Commonwealth legislation’ that ensures ‘Aboriginal and Torres Strait Islander Title’ is ‘not to be extinguished by grants’ and this title shall ‘not ... be extinguished or impaired unilaterally without consent’.\textsuperscript{107} That is, it is based on the ‘co-existence’ of native title with those derived from the Crown’s grants with the ‘revival’ of further native title rights when these grants expire. In a similar way, the Eva Valley Statement asserts: ‘No grant of any interest on Aboriginal and Torres Strait Islander Titles can be made without the informed consent of all relevant title holders nor can they extinguish this Title.’\textsuperscript{108}

Conclusions

In this chapter the evidence pointing to the existence of a distinct Indigenous perspective on the Mabo events and voiced in a human rights and common constitutionalism language has been outlined. The consistency of this expression is there in the statements from ATSIC, the two meetings in 1993 leading up to the adoption of the native title legislation and the comments of

\textsuperscript{106} Ibid. 209.
\textsuperscript{107} The Aboriginal Peace Plan, above n 15, 218.
\textsuperscript{108} Eva Valley Statement, above n 15, 233-234.
several prominent Indigenous leaders. There are concepts and ideas around the recognition of their distinct cultures independent of the modern constitutional language.

The significance of the call for a treaty comes from the perspective of the common constitutional language. Its basis is a form of mutual recognition where both parties accept the distinct cultural background of the other and agree on how to move forward.

Furthermore, the discussion about extinguishment and recognition brings to the fore that Aboriginal and Torres Strait Islander peoples have a distinct perspective about these issues that cannot be resolved by the ‘normal’ rules of governance. It identifies a basis to move forward concerning native title – where the parties engage in a dialogue to mediate the claims for recognition and accommodate their differences. That is, Aboriginal and Torres Strait Islander peoples sought to co-determine along with non-Indigenous representatives who could board and what cargo would go on the ship and its direction.

Having determined that Aboriginal and Torres Strait Islander peoples have a distinct constitutional perspective, the next chapter will centre on the work undertaken by the Council for Aboriginal Reconciliation and will consider the treatment of three of the other claims raised around Mabo.
Chapter 11:  

The significance of the Council for Aboriginal Reconciliation

As we walk the journey of healing, one part of the nation apologizes and expresses its sorrow and sincere regret for the injustices of the past, so that other part accepts the apologies and forgives.

_Australian Declaration Towards Reconciliation_¹

Following _Mabo_ Aboriginal and Torres Strait Islander peoples called for a treaty or agreement, a rewriting of the Constitution’s preamble and the removal of s 25 of the Constitution and this chapter will consider these claims. Each of the claims was addressed by the Council for Aboriginal Reconciliation (the Council) in its final report on its work, _Reconciliation: Australia’s challenge_, and formally presented to the Howard government. It was produced on the eve of the centenary of Federation and presented to federal parliament in December 2000.² While established several months prior to the High Court’s June 1992 decision,³ much of the Council’s work was in the post-Mabo environment. In September 2002, the Howard government formally responded

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¹ Council for Aboriginal Reconciliation, _Australian Declaration Towards Reconciliation_, (Canberra: 2000) (“Declaration”).
³ Council for Aboriginal Reconciliation Act 1991 (Cth).
to the Council’s report and recommendations. In examining these documents, and other material, this chapter will consider how the different constitutional languages were reflected in the debate over reconciliation.

This chapter will examine:

- the impact on the Council of *Mabo*;
- the discussion in federal parliament about reconciliation;
- the Council’s final report; and,
- the Howard government response.

Additional to the final report other material issued by the Council referred to in this chapter includes its statement issued on *Mabo*, excerpts from its submission to the Mabo Ministerial Committee and two documents that were ‘ceremonially’ handed to the Prime Minister at Corroboree 2000 in Sydney in May that year: the *Australian Declaration Towards Reconciliation* and the *Roadmap for Reconciliation*. The latter comprises four national strategies respectively addressing the reconciliation process, the promotion of

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7 Declaration, above n 1.
recognition of Aboriginal and Torres Strait Islander rights, overcoming
disadvantage and the achievement of economic independence.8

Robert Tickner’s *Taking a stand* is also helpful. Since Tickner was the
minister responsible for Indigenous affairs in both the Hawke and Keating
Labor Governments from shortly after the establishment of the Aboriginal and
Torres Strait Islander Commission (ATSIC) in 1990 until the defeat of the
Keating government in March 1996 his work is invaluable in providing detailed
information about reconciliation.9 The discussion of attitudes of the parties in
Parliament is drawn from the Hansard Weekly transcripts.

**The Council and mutual recognition**

When established in 1991 the Council comprised 25 members (14
Aboriginal or Torres Strait Islander members and 11 non-Aboriginal
members).10 It was established by an act of parliament11 and was unanimously
supported in the House of Representatives by Labor and the Liberal-National
Party Coalition.12 The legislation specified the Council’s chairperson ‘must be
an Aborigine’ and ‘at least 12 members … must be Aborigines and at least 2
must be Torres Strait Islanders’, it would include the chairperson and deputy
chairperson of ATSIC and it would include a person ‘nominated by the Leader
of the Opposition in the House of Representatives’.13 The first chair was Patrick

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10 Ibid. 38.
12 Tickner, above n 9, 38.
Dodson, a Yawuru man with lengthy experience on land councils and a former Aboriginal and Torres Strait Islander Deaths in Custody Commissioner, and his deputy was prominent former High Court judge Sir Ronald Wilson.14

The Council was a unique body stepping outside the language of modern constitutionalism and establishing a basis for mutual recognition where a cultural dialogue between representatives of Aboriginal and Torres Strait Islander People and other Australians could discuss how best to achieve reconciliation. Similar to the examples cited by Tully, here was a body where by ‘listening to the different stories others tell, and giving their own in exchange, the participants come to see their common and interwoven histories together from a multiplicity of paths’.15 Its main object was ‘to promote a process of reconciliation between Aborigines and Torres Strait Islanders and the wider Australian community … based on an appreciation by the Australian community as a whole of Aboriginal and Torres Strait Islander cultures and achievements and of the unique position of Aborigines and Torres Strait Islanders as the indigenous peoples of Australia’.16 Both cultural traditions came together to undertake ‘initiatives for the purpose of promoting reconciliation’, to ‘promote, by leadership, education and discussion, a deeper understanding by all Australians of the history, cultures, past dispossession and continuing disadvantage of Aborigines and Torres Strait Islanders and of the need to

16 *Council for Aboriginal Reconciliation Act 1991* (Cth), s 5.
redress that disadvantage’ and ‘provide a forum for discussion by all Australians of issues relating to reconciliation …’17

In the context of the establishment of the Council, the term reconciliation conveyed a meaning of peoples that is in the spirit of the common constitutional language. Reconciliation became associated with the work of the Council and its 10-year process of mutual recognition. The term acknowledged that the people were from two distinct cultural traditions and came together to ‘harmonise’ and ‘make compatible’18 so the injustice and disadvantage faced by Australia’s first peoples could be overcome. That is, reconciliation was ‘about addressing past grievances and about forging a new foundation for future relations between indigenous and non-indigenous Australians’.19

The Council’s post-Mabo submission

At the beginning of October 1992 the Council issued a statement on the significance of the High Court’s Mabo decision. Several aspects in the statement suggest the impact of the decision modified its work. One was the view that ‘the decision has dramatically changed the legal principles of Australian traditional land ownership’. Another was the announcement that it had decided to ‘begin an active process of communication and consultation about the issues it has raised, especially the recognition of the rights of Aboriginal and Torres Strait Islander people’. The Council would ‘listen to a range of views and come to a national

17 Ibid. s 6(1)(a), (b) & (d).
consensus on the best way of recognising the rights of Australia's indigenous people’. Further modification was the establishment of a Consultative Committee to ‘assess whether reconciliation would be advanced by a formal document or documents of reconciliation and to examine legal and constitutional options for any document or documents’.

The Council also made a submission to the Keating government’s post-\textit{Mabo} consultation along similar lines. Its association with the language of common constitutionalism is suggested by its call to reconsider the ‘relationship between Aboriginal and Torres Strait Islander people and government at all levels of law, policy and practice’, the ‘recognition of customary law’, support for ‘Aboriginal and Torres Strait Islander languages and cultures’, ‘a vision of self-determination’ and the ‘possible recognition of a formal relationship in a document of reconciliation’. The submission embraced the convention of consent when it stated that ‘in many areas the past actions of the Crown have dispossessed’ Aboriginal and Torres Strait Islander peoples ‘without negotiation or compensation, leading to social, cultural and economic hardship …’

\textbf{Parliament and reconciliation}

Looking at how the various parties in federal parliament considered reconciliation in the light of \textit{Mabo}, the Liberal and National parties moved away from the views they held when the Council was first established. Now they disconnected reconciliation from native title, in keeping with the modern

\begin{footnotesize}
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\item \begin{footnotesize}20 \end{footnotesize} ‘Council looks at High Court decision’, above n 5.
\item \begin{footnotesize}21 \end{footnotesize} \textit{Mabo: The High Court Decision on Native Title}, above n 6, 94.
\end{itemize}
\end{footnotesize}
constitutional language. Then Coalition leader Dr Hewson charged that the bill ‘confuses settlement of land management issues arising from the High Court’s judgement ... with the wider issue of reconciliation with the Aboriginal and Islander communities’. That is, he suggested Mabo was about land management and not a process of mutual recognition.

Making a similar criticism, the Member for Adelaide, Trish Worth described it as ‘reckless to intermingle issues relating to reconciliation which are sociological with issues relating to the Mabo judgement which are legal and administrative. We cannot legislate for good race relations, and to try to incorporate reconciliation and legal reform into the one process could jeopardise both.’ Senator Boswell, the leader of the National Party in the Senate, said the High Court decision was ‘limited to unalienated crown land’. Contrasting this with the government’s approach he stated that the ‘Prime Minister has taken that decision and extended it to include land management, reconciliation, mining leases, pastoral leases, stock routes and tourist leases’. Therefore, the ‘Pandora’s box has been well and truly opened’.

By contrast, the ALP considered recognition of native title as bound up with reconciliation and in this respect stepped outside the modern constitutional language. Its approach was reflected in the Framework of Principles, issued by the government in June 1993. The last of its principles explained that the ‘Mabo decision is an opportunity. The commitment to reconciliation should be reaffirmed. The reconciliation process is especially important in the light of

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23 Ibid. 3575 (24 November 1993).
Mabo. There would be serious consequences for reconciliation if there was an inadequate response to Mabo. In introducing the legislation to parliament, Prime Minister Keating linked it to the establishment of a land acquisition fund. He spoke of the situation facing ‘Aboriginal communities’ where ‘native title has been extinguished or lost without consultation, negotiation or compensation’: ‘Their dispossession has been total, their loss has been complete’. He said the government shared the ‘view of ATSIC, Aboriginal organisations and the Council for Aboriginal Reconciliation, that justice, equality and fairness demand that the social and economic needs of these communities must be addressed as an essential step towards reconciliation’.

The Australian Democrats were represented on the Council because of their Senate membership and supported reconciliation. In 1993, Cheryl Kernot, the party’s representative on the Council, told the Senate that ‘we cannot separate native title from reconciliation’, since it ‘is an ongoing process’ and how ‘we respond to an understanding of special attachment to land is a measure of how we are performing our partnership as we move towards reconciliation’.

The Greens (WA) too supported reconciliation, but were concerned that the Keating government’s legislation would fall short of this goal. Senator Christabel Chamarette said it was crucial ‘that we have to acknowledge the truth of the historical injustice’ and until ‘we acknowledge it, then no healing or reconciliation is possible’. She linked native title and reconciliation and said if

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25 A Framework of Principles, Point 33, reprinted in *Mabo: The High Court Decision on Native Title*, Appendix, above n 6, 106; see also Tickner, above n 9, 125.


28 Ibid. 4626.
‘this legislation fails to at least protect existing native title rights, based on the High Court’s decision, it is unacceptable to the Greens’. 29

The final report

The Council’s final report sought to remove the language of White Australia from the Constitution. It proposed to ‘remove section 25 of the Constitution’ and introduce a new section ‘making it unlawful to adversely discriminate against any people on the grounds of race’ 30 Clause 25 provides for voting in federal elections where a ‘law of any State’ deems that ‘all persons of any race are disqualified from voting’. 31 The effect of the Council’s proposal was to block the impact of state laws on voting in federal elections and stated that it was inappropriate to continue to allow a state to disqualify a race from voting.

The other recommendations though were framed in the common constitutional language. The Council proposed: ‘The Commonwealth Parliament prepare legislation for a referendum’ to ‘recognise Aboriginal and Torres Strait Islander peoples as first peoples of Australia in a new preamble for the Constitution’. 32 This reflected the guidance of the convention of continuity. The Constitution as currently worded does not acknowledge or take into account the tradition of the inhabitants present when the country was colonised. It follows the doctrine of discontinuity whereby ‘a new constitutional association

30 Reconciliation: Australia’s challenge, Chapter 10.
32 Ibid.
… discontinues or ‘extinguishes’ the pre-existing customs and ways of the people’. In response, the Council said the Constitution needed correcting to acknowledge both Indigenous and non-Indigenous traditions can be acknowledged.

This proposal was also guided by the convention of consent. Non-Indigenous people throughout Australia ensured the ‘new system of government … was not imposed … by the British Parliament’. However, the ‘Founding Fathers’ failed to ensure that the new structure of governance was not imposed on Aboriginal and Torres Strait Islander people. Thus, in its referendum proposal the Council did not just indicate the mechanism necessary for constitutional change but was also guided by the convention of consent. This signalled that the Council wished to move forward with the consent of both Indigenous and non-Indigenous peoples. That is why it also proposed that governments throughout Australia recognised that the land and its waters were ‘settled as colonies without treaty or consent and that to advance reconciliation it would be most desirable if there were agreements or treaties’.

It also recommended that draft legislation be introduced to federal parliament. While it was acknowledged that this did not represent ‘an expert drafting exercise’ the Council considered it ‘an impetus to pursue the legislation for those who support the Council’s vision’ and that it indicated ‘how the first

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33 Tully, above n 15, 125.
35 Reconciliation: Australia’s challenge, above n 2, Chapter 10.
steps may be taken toward resolving the issues that stand in the way of reconciliation. ³⁶

The legislation provided the main form for the continuity of the mutual recognition process that began with the establishment of the Council in 1991. This was apparent from the preamble to the bill where the first of its six principles concerns ‘the status of Aboriginal and Torres Strait Islander peoples as Australia’s first peoples’. Two other principles referred to reconciliation as ‘an on-going process’ that would address ‘unresolved’ issues.³⁷ A further reason to view this as a mutual recognition process was that Part 4 of the draft bill established a ‘process that allows Aboriginal and Torres Strait Islander peoples and government to reach agreement on a framework for negotiation of unresolved issues for reconciliation as these issues relate to outcomes at a national level’.³⁸

In addition, Part 2 of the legislation specifically sought to ‘recognise the unique status of Aboriginal and Torres Strait Islander peoples’. This part of the legislation also incorporated the Declaration. Most poignant in conveying the imaginary of mutual recognition was the clause that called on Indigenous and other Australians to ‘walk the journey of healing’ and those who represented the European tradition of governance to apologise and express ‘sorrow and sincere regret for the injustices of the past’, and for Aboriginal and Torres Strait Islander peoples to accept these apologies and offer forgiveness.³⁹

³⁶ Ibid. Chapter 7, p 6.
³⁷ Ibid. Appendix 3, p 2.
³⁸ Ibid. Appendix 3, p 4.
³⁹ Declaration, above n 1.
ATSIC advanced a claim for a treaty in 2001 in the common constitutional language because it provided for another form of mutual recognition between Indigenous and other Australians. The final report recommended that ‘to advance reconciliation it would be most desirable if there were agreements or treaties’.40

Its inclusion flowed from the experiences already reached between ‘parties’ at various levels. The final report noted that the Council had ‘promoted agreements between parties at the local, regional and sectoral levels as a key part of the reconciliation process’. Furthermore, these were seen as empowering. ‘Negotiated sectoral and regional agreements enable Aboriginal and Torres Strait Islander peoples to have greater control over their destinies.’41

Howard government response

Now the language of the Howard government response to the Council’s final report will be examined. Before the Council presented its final report, but after Howard was ceremonially presented with ‘national reconciliation documents at Corroboree 2000,42 the Minister Assisting the Prime Minister for Reconciliation was asked by the Council to ‘provide information about the Commonwealth Government response’ to these documents. The final report said these responses indicated a ‘significant level of action by government departments that [would] …. address many of the issues that currently stand as

40 Reconciliation: Australia’s challenge, above n 2, Chapter 8 ‘Recommendations’ (1 of 1).
41 Ibid. Chapter 7 ‘Documents – Putting it in Writing’ (4 of 7).
impediments to reconciliation’. The Howard government formally responded to the recommendations in September 2002.

Unlike the Council, the Howard government did not interpret s 25 as totally reflecting the language of White Australia. It noted that the clause was linked to another clause that outlined the formula for determining the membership of the House of Representatives. It argued that since s 25 was a ‘limitation on the previous section’ its ‘clear intention’ was to ‘discourage discrimination by the states on the basis of race’. However, the government also said it recognised this section anticipated ‘State provisions to disenfranchise citizens on the basis of race’ and that had ‘no role to play in the governance of the modern nation’. In terms of constitutional languages, the Howard government appeared to consider that while the clause partially reflected the language of White Australia its purpose was non-discriminatory.

In response to the fifth recommendation that proposed that ‘Each Government and Parliament … Recognise that this land and waters were settled as colonies without treaty or consent’, the Howard government ‘affirmed that Indigenous people were the original custodians of this land and its waters and that they were settled as colonies without treaty or consent’. Thus, in one respect the government acknowledged the convention of consent. However, it was silent on whether it considered it necessary for contemporary Australia to

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43 Ibid. Chapter 8, 5.
44 Response to Reconciliation, above n 4.
45 Ibid. 20.
46 Ibid. 22.
have the consent of Aboriginal and Torres Strait Islander peoples to its governance arrangements.

The government’s stance toward a new preamble was indicative of its attitude toward the continuity of the culture and practices of the first peoples in this country. The government argued that it has already ‘put forward a proposed preamble to the Constitution at a referendum in November 1999’ with a similar intent to that of the Council and since it was ‘not approved by the Australian people’ it ‘respected ... this decision’. It said the proposed wording ‘honoured Aboriginal and Torres Strait Islanders’ as the ‘nation’s first people, for their deep kinship with their lands and for the ancient and continuing cultures which enrich the life of our country’.

However, it is not at all clear that the government respected Aboriginal and Torres Strait Islander peoples when it put the referendum forward. There is certainly evidence that the wording was hastily compiled with only limited consultation and no consent. A report in *The West Australian* the day after the vote on the wording for the referendum noted that former Council of Aboriginal Reconciliation chair Pat Dodson, then Aboriginal and Torres Strait Islander Commission chairperson Djerrkura and Kimberley Land Council executive direction Peter Yu had slammed the wording as ‘drafted behind closed doors without any meaningful consultation with the Australian people, indigenous and non-indigenous’.

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47 Ibid. 20.
48 The former chair of ATSIC has recently died and during the mourning period a first name is not mentioned.
The government also rejected the need for any post-Council formal process where Indigenous and other Australians would mutually recognise the culture of each party and engage in a dialogue about how Australia’s governance arrangements could be corrected to recognise the contribution of Aboriginal and Torres Strait Islanders peoples. It specifically rejected the proposed draft legislation, arguing that this ‘would impose a potentially divisive, protracted (at least 12 years) and inconclusive process on the nation’.

The government defined reconciliation through its own image. It did not countenance the possibility that Indigenous people might want their culture recognised in ways different to those achieved by non-Indigenous Australians. Instead of listening to the voices of Aboriginal and Torres Strait Islander people, reconciliation would be non-constitutional and restricted to matters of economic and social disadvantage. It judged progress as Indigenous Australians enjoying ‘the same opportunities and standards of treatment as other Australians’ and pointing to ‘better health, better education, and a better standard of living’.

Confirmation of the government’s approach was reinforced by the differences between its revised declaration presented on 11 May 2000 and the Declaration. The government’s revision accepted six of the 11 principles that guided the Declaration. Instead of declaring that ‘we respect and recognise continuing customary laws, beliefs and traditions’ the revised version stated that ‘we respect the cultures and beliefs of the nation’s firsts people and recognise the place of traditional laws within these cultures’. Behind the subtle word

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50 Response to Reconciliation, above n 4, 18.
51 Ibid. 2.
changes was a significant difference. The Howard government revision did not recognise ‘continuing customary laws …’ Instead it effectively expressed an acknowledgement that traditional laws were important to Aboriginal and Torres Strait Islander people. Similarly, the ‘one part of the nation apologies ... as we walk the journey of healing’ was replaced by ‘Australians express their sorrow and profoundly regret the injustices of the past …’ The ‘respect ... the right of Aboriginal and Torres Strait Islander peoples to self-determination’ was removed and replaced by ‘respect for the right of Aboriginal and Torres Strait Islander peoples, along with all Australians to determine their own destiny’. The last principle of the Declaration expressed the ‘hope ... for a united Australia that respects this land of ours; values the Aboriginal and Torres Strait Islander heritage; and provides justice and equity for all’ was completely removed in the revised declaration. Each of the culturally distinct aspects Aboriginal and Torres Strait Islander people sought to have recognised were removed. Thus, the revised declaration was not a document of mutual recognition that reflected a common constitutional language, but a statement that transformed the Declaration into the modern constitutional language.

The government’s rejection of a treaty was framed through the prism of the modern constitutional language. It said it had rejected a treaty because ‘such a legally enforceable instrument, as between sovereign states would be divisive’ and ‘would undermine the concept of a single Australian nation ...’\(^{52}\) Given that the proposal advanced by the Council reflected a meaning of ‘treaty’ entirely different to this view, the government either did not listen closely to what the Council said or would not countenance the possibility that any other

\(^{52}\) Ibid. 23.
meaning could exist. For instance, the ‘unresolved issues for reconciliation’ were premised on a close working relationship developed within the Australian nation to achieve reconciliation: ‘effective political participation’, ‘protection of Aboriginal and Torres Strait Islander culture, heritage and intellectual property’ and ‘constitutional reform to enable the recognition of Aboriginal and Torres Strait Islander peoples and the protection of their rights’. Furthermore, the Declaration expressed its ‘hope … for a united Australia’ and spoke of ‘Our nation’. Not the words of people who sought a separate state, but of those who want to change relationships within the current state.

Conclusions

In concluding an examination of material concerning reconciliation, three things stand out. First, there were serious differences among the parliamentary parties, with the Coalition rejecting the idea that native title was connected to reconciliation. Instead, it characterised native title as a land management issue, an idea associated with the modern constitutional language.

Secondly, the Council was a body of mutual recognition and so, despite Australia’s lack of experience of treaty constitutionalism, this was not an insurmountable barrier to embracing a new ethical frame. The principle reason for this is that this frame has a practical basis and is developed out of listening to, and working closely with, Aboriginal and Torres Strait Islander peoples.
Thirdly, the Council spoke in the language of common constitutionalism whereas the Howard government responded in the language of modern constitutionalism.

In concluding this chapter, the examination of the *Mabo* claims that was outlined in Chapter 1 has now been completed. The remaining task is to connect together the findings outlined over this and the previous five chapters and provide an overall prognosis of *Mabo*. This purpose will be addressed next.
Chapter 12:

Constitutional languages and Australia’s first peoples

This thesis has concentrated on the Mabo events, focussing on how the claims of Australia’s Indigenous peoples were treated by Australia’s governing institutions. The claims are linked to a contemporary problem: the difficulties people have in gaining recognition for their distinct cultural practices under the modern constitution. As was discussed in Chapter 2, among the claims for cultural recognition are those by nationalists, immigrants, exiles, refugees, women, Indigenous peoples and same-sex relationships. While these culturally diverse claims share the common aspiration of self-determination, with the exception of those made in the name of nationalism, the claims are usually treated as falling outside the concerns of Western constitutionalism.

However, if an analogy is drawn between constitutionalism and language it is possible to appreciate why contemporary societies tend to act toward the claims in this way. Desiring to be treated differently, claimants come up against the modern constitutional language and its premise that the people are homogenous. So a paradox arises between the aspirations of claimants and the language in which their claims are judged.

A general resolution to this paradox exists in a much older, common constitutional, language that provides a basis to respect cultural diversity. The
contrast with the older language helps to highlight the concomitants of modern constitutionalism. Unlike the common language, modern constitutionalism is not based on the long-held customs of the people. Instead, its adherents advocate a complete break with the past, proposing a new foundation based upon a set of ‘modern’ European institutions. While the struggles in the sixteenth and seventeenth centuries eventually eclipsed common constitutionalism, its existence demonstrates the Western constitutional tradition is not indivisible. Rather, constitutionalism is better understood as comprising multiple languages where particular sites become the focus of interaction and struggle for influence. Indeed, when the presumption that constitutionalism is indivisible is discarded and contemporary sites of struggles are examined for signs of the influence of particular constitutional languages, as James Tully did in a North American context, it is possible to identify the existence of more than one language.

A methodology that views constitutionalism as analogous to language is unusual because current theoretical preferences are skewed to seeking solutions elsewhere. When considering the theoretical approach to apply to examine the Mabo events it was tempting to select from the familiar cache of political and legal theories used to examine society. Usually such theories place emphasis on the individual, the community, or the nation.1

However, to adopt any one of these theories would have meant presuming the problem laid outside the constitutional language used to judge the

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claims. More than likely the result of such an enquiry would have suggested the modification of some aspect of current theory to better accommodate the claims of Indigenous peoples in Australia. When this method was put to one side, it was possible to concentrate on the processes involved in the debates and highlight the influence of conflicting constitutional languages. Identifying the influence of the languages was essential because the influence of a particular constitutional language was hidden by discussion about the myriad of legal and political issues in arriving at decisions. Once this difficulty was appreciated it was possible to identify patterns in the language used by the decision-makers.

Indeed as was observed in Chapter 4, so all-pervasive is the influence of the modern constitutional language on current thinking that even those who seek to challenge the exclusion of Indigenous peoples from contemporary societies often do so from within the frame of modern constitutionalism. Its influence is apparent in the approaches used by Kent McNeil in *Common law aboriginal title* and Robert A. Williams (Jr) in *The American Indian in western legal thought: the discourses of conquest*. Both these authors challenge the treatment of Indigenous land claims at common law and propose alternative solutions, but when taken against the backdrop of constitutional languages both authors miss crucial aspects. Events where other constitutional perspectives are articulated remain unexamined or are put to one side because they lack consistency with the dominant trend. In another case, suspicion of the motives of colonial dissidents leads to the dismissal of ideas echoing the common constitutional

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language. As to the exclusion of Indigenous peoples from contemporary society, there remains little examination of whether the central presumptions of the modern constitutional language are part of the problem.

In Chapter 4, the related point is also made that it is important to differentiate between common law as an institution and the constitutional languages spoken by participants. There is no equal sign between judge-made law and the language of common constitutionalism. The degree to which they overlap is not determined a priori; it is only answered by an examination of the actual practice.

Application to Australia

Applying the analogy of constitutionalism to language to examine how Indigenous Australians are presented by constitutional scholars, Chapter 5 demonstrates that while most scholars pose the need for an accommodation with Indigenous people, they do not explicitly acknowledge Indigenous customs and laws as constitutional. Their position results from the influence of modern constitutionalism and its presumption that all speak a universal constitutional language.

A detailed examination of the Mabo events directly challenges this assumption. Despite the absence of treaty-making in Australia’s constitutional tradition, when these events are investigated it exposes a great deal about the influence of particular constitutional languages. While often an element of this or that convention rather than a rounded articulation of an alternative
perspective, the evidence suggests unmistakeably the presence of another language. In addition to modern constitutionalism, another language, labelled in this thesis as human rights and common constitutionalism, guides the thinking of some key participants.

Applying the common constitutional language to the Mabo events poses a strategic challenge on how to move forward with a new awareness that it was wrong to dispossess Indigenous people of their lands or to treat them as though they had no laws and customs. The most significant point arising from Tully’s study is to overcome oppression, recognition must be mutual. Recognition cannot be restricted to constitutional forms selected by the dominant culture. The Mabo events pose a key question: Through which constitutional language do Indigenous peoples in Australia express their claims?

Neither the High Court nor federal parliament discussed this question. Instead, presuming the constitutional language universal, these bodies chose those aspects of the claims that could be heard and advanced. Unsurprisingly, then they provided monological ‘solutions’. These solutions were not exclusively expressed in the language of modern constitutionalism. Viewed from the common constitutional perspective, the debate was an eclectic mixture that incorporated elements of the conflicting ethical frames. Advances were made on some aspects, problems created on others. Only through a detailed examination is it possible to take apart the elements of each language to understand its impact and to help move forward.
The key question still needs to be answered. Significantly, Aboriginal and Torres Strait Islander peoples advanced their claims in the human rights and common constitutional language. This provides the *raison d’être*\(^3\) for the study. Looking back to the time when the thesis topic was originally conceived, after reading Tully’s *Strange multiplicity* the initial response about the Mabo events was that the claims advanced by Australia’s first peoples were not heard on their own terms by the institutions of governance. This general presumption provided a motivation to focus the study on the constitutional languages expressed in the events. While the investigations undertaken in this thesis may also be viewed as independent contributions to knowledge, and therefore important in their own right, any finding that the claims were expressed in the dominant constitutional language would have directly challenged the initial hypothesis.

Some may consider that the human rights and common constitutional language are two distinct languages because each component has differing origins: one in ancient custom, the other in the twentieth century. Nevertheless, the examination undertaken in Chapter 4 shows these components overlap. The *Draft Declaration on the Rights of Indigenous Peoples* is guided by the three common conventions. If human rights and common constitutionalism are two distinct languages it is difficult to say where one language begins and the other one ends. Moreover, and significantly, as discussed in Chapter 10 in the Mabo debates Aboriginal and Torres Strait Islander peoples use concepts that associated with both human rights and common constitutionalism. That they are conceptually intertwined is reflected in Noel Pearson’s declaration, for instance,

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\(^3\) The ‘raison d’être of something is the ... justification for its existence’. See John Ayto (Ed), *The Wordsworth dictionary of foreign words in English*, (Hertfordshire, UK: Wordsworth Editions Ltd, 1995), 256.
that Mabo is ‘essentially about the recognition of indigenous human rights’.\textsuperscript{4} Since the aim of this study is to identify how the languages were employed \textit{in situ},\textsuperscript{5} the fact that key participants embrace the language in this way is the paramount reason to treat it as singular. Whether such treatment holds for other debates is open to discovery.

The claims for recognised of their customs and practices by Aboriginal and Torres Strait Islander peoples involved four constitutional forms. One is to have Australia’s Constitution recognise their unique cultures and to remove its discriminatory provisions. Another is to have all their connections to land recognised and protected from extinguishment. The August 1993 meeting at Eva Valley proposed a form of mutual recognition whereby the ‘Commonwealth Government’ was to reach agreement about the legislation with ‘Aboriginal and Torres Strait Islander Peoples’. The initial federal legislation on native title adopted in 1993 did not provide this basis. Instead, the parliament selected the criteria by which to determine those claims for recognition that would proceed and those which would be extinguished. Another form was sought was a treaty or agreement between non-Indigenous and Indigenous people. The fourth claim arose from the \textit{Bringing Them Home} Report released in May 1997.\textsuperscript{6} A body of mutual recognition between Indigenous and non-Indigenous people is needed to consider the work already done by bodies like the Council for Aboriginal Reconciliation and to mediate the solutions to each of these forms.

\textsuperscript{4} Noel Pearson, ‘Law must dig deeper to find land rights’, \textit{The Australian} 8 June 1993, 11.

Constitutionalism and Indigenous peoples

Reviewing the evidence unearthed from this examination, to recap it began by looking at those events preceding the High Court’s 1992 decision. As was discussed in Chapter 6, when established Australia’s Constitution included only negative references to its Indigenous peoples. Considered from the standpoint of recognising the distinct cultures of peoples, the Federation reflected the influence of three constitutional languages: White Australia, modern and common. Reflecting the language of White Australia it voiced two exclusionary references that barred the federal government from legislating on behalf of Indigenous peoples. Signalling the influence of the modern constitutional language, Australia’s Federation was viewed as the founding moment, establishing European-type institutions. The new framework provided no basis to respect the continuity of the customs and practices of Indigenous peoples. However, in its relations with Britain, the Federation contained an anti-imperial feature: the assertion that the people of Australia should consent to the new constitutional arrangements.

The influence of the language of White Australia on constitutionalism should not come as a complete surprise. After all, the power and influence of the White Australia policy has been well documented in recent years by scholars such as Henry Reynolds, Andrew Marcus and Bain Attwood. However, White

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Australia is better understood as a distinct constitutional language. Chapter 6 identified the most prominent of the arguments advanced through this language are the idea that non-Europeans were inferior to those from Europe and the view that Indigenous peoples were too backward to have a system of governance. This language was reflected in idea that the land was empty upon colonisation. It influenced a series of court cases based on this presumption as well as Federation itself.

A cultural recognition perspective also helps reflection on the 1967 referendum. To those who embraced the modern constitutional perspective, the removal of the influence of the language of White Australia made Australia’s Constitution more consistent with the modern project. Viewed from the common constitutional perspective though, the referendum did not provide cultural recognition for Indigenous peoples. The 1967 referendum left the business of cultural recognition unfinished. However, it did take a very significant step forward. The removal of the influence of the language of White Australia was always a necessary task in order to achieve recognition.

It is also noticeable that the movement to remove the exclusionary provisions from the Constitution used the language of human rights. Indeed, many of the changes to relations with Indigenous peoples from the 1960s onwards used this language: the removal of the system of permits, the ending of racial exclusion from clubs, the right to vote, introduction of various state-based land rights legislation and the enactment of the *Racial Discrimination Act* (the

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*Aborigines didn’t get the vote*, (Canberra: Aboriginal Studies Press for the Australian Institute of Aboriginal and Torres Strait Islander Studies, 1997).
The 1967 referendum reflected the language of human rights in two senses. It motivated the participants in the movement for social change. It also reflected actual constitutional amendments that considered it wrong to exclude Indigenous people from decision-making. Moreover, it was likely that the substantial issues around recognition of the Mabo claim itself would not have occurred after 1988 if not for the enactment of the \textit{RDA} and the influence of human rights on the High Court majority’s thinking.

When the Meriam people sought recognition of their traditional connections to the lands they had occupied from time immemorial, a new stage in the struggle of Indigenous people for cultural recognition commenced. The High Court was obliged to confront the influence of the language of White Australia on common law. The majority explicitly rejected the proposition that the lands were empty before colonisation and affirmed that the Indigenous inhabitants were guided by an elaborate system of laws and customs.

Theory is one thing though, its practical implications something else. When the common law rejected the language of White Australia after more than 200 years significant practical implications inevitably arose. After all, this language guided a myriad of government and court decisions that systematically dispossessed Indigenous people of their lands. Justice Brennan explained this dispossession more eloquently in \textit{Mabo} as the ‘recurrent exercise of a paramount power to exclude the Indigenous inhabitants from their traditional lands as colonial settlement expanded and land was granted to the colonists’.\footnote{\textit{Mabo v Queensland (No 2)} (1992) 107 ALR 1, 41-42 (Brennan J).}

\footnote{\textit{Racial Discrimination Act} 1975 (Cth).}
The rejection of the language of White Australia masks the existence of two constitutional perspectives available to guide the High Court. One path was modern constitutionalism; the other with the human rights and common constitutionalism. The High Court majority (and subsequently also federal parliament) baulked at the practical implications of rejecting the White Australia language and proceeded along another path that privileged modern constitutionalism.

In his 1996 article on ‘Racial Discrimination and Unilateral Extinguishment of Native Title’, McNeil compared the High Court decision to common law precedent. The challenge faced by the Court majority was that if it followed common law precedent it could open the door to widespread claims by Indigenous people who sought title to lands from which they had been wrongful dispossessed. As discussed in Chapter 8, advice provided to the Keating government argued the introduction of *RDA* strengthened the likely success of such claims. McNeil explained that normally the Crown could only grant interests where it had title and the Crown cannot ‘extinguish existing interests in land by grant’. However, since the Crown had ignored this precedent when it embraced the language of White Australia, it was unlikely it could show it held valid interests when Indigenous people were dispossessed of their land. Instead of following this course, McNeil said that it ‘thus appears that the judges were influenced by unarticulated practical considerations’. McNeil observed that there could be ‘no doubt that the High Court’s position on

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10 See Kent McNeil, *Emerging justice?*, (Saskatchewan, Canada: Native Law Centre, University of Saskatchewan, 2001), 357-408.
11 Ibid. 369.
12 Ibid. 406-407.
extinguishment … [had] been influenced by the fact that virtually all private, non-native title land titles in Australia would be vulnerable if grants did not extinguish or suspend native title to the extent that the two were inconsistent'.

In response to their dilemma, the High Court majority introduced a new inconsistency. While it sought to reject the language of White Australia, in practice it preserved the consequences that arose from long adherence to the language. It did so by introducing a rule that native title was to have inferior protection from the Crown than other titles and so was liable to extinguishment ‘by the Crown by inconsistent grant or appropriation’.

Having decided upon this course, the High Court majority did not consider the alternative path of common constitutionalism. Through its introduction of rules that provided native title with inferior protection, the High Court majority was also obliged to reject common law precedent to fully respect ‘the rights of property of the inhabitants of an area’. Instead, it declared the extinguishment of native title could occur by issuing grants without the consent of the title-holders. Effectively, Mabo retrospectively validated dispossession that made way for ‘expanding colonial settlement’.

Another analogy with a contemporary resonance may assist in drawing out the significance of this stance. If native title was analogous to a car, then the High Court majority acknowledged that many cars had been stolen from their rightful owners. The language of White Australia was equivalent to a stolen car

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13 Ibid. 415.
14 Ibid. 404.
racket. The cars were granted to settlers and registered. In 1992, the High Court considered it too late for the original owners of the vehicles to lodge claims for unlawful dispossessio
n. Instead, the High Court ruled that only those original inhabitants still in possession of their cars had a possibility of getting registration.

When parliament considered its response to *Mabo*, it too substantially followed the majority’s direction. It adopted legislation that validated grants of freehold estate issued before 1994 and extinguished the native title concerned. As Bartlett observed, the parliamentary process ‘did not contemplate any negotiations or agreement with respect to the validation of past grants’. In such circumstances the possibility of Indigenous people succeeding in having a system established where all of their connections to land could be recognised was impossible. Furthermore, when parliament reconsidered the native title legislation it became increasingly clear that the Howard government’s concern lay almost exclusively with non-Indigenous interests and not with the recognition and protection of the native title of Aboriginal and Torres Strait Islander peoples.

Nevertheless, while the High Court and parliament saw no need to overcome the injustice of assigning inferior protection to native title, the elements of an alternative approach were discernable from the stance of others. As discussed in Chapter 7, Justice Toohey rejected the majority’s view that the Crown should not have to prove its right to acquire title. In this respect he did

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16 Ibid. 28-9.
17 Ibid. 40.
no more than upholding common law precedent. The gulf between Justice Toohey’s position and that adopted by the High Court majority and federal parliament is stark. Justice Toohey correctly identified an injustice that arose from providing native title with inferior protection. The majority view, however, envisaged the practical problems that were likely to arise if existing title-holders were threatened with dispossession. Though not explicitly stated it appears the Court considered dispossession of existing title-holders was unjust. In order to address this matter, the Court imposed a modern constitutional ‘solution’ unjust to Indigenous peoples.

A just resolution to this dilemma lies with the convention of consent. Native title can be given the protection accorded to other titles and the practical problems for existing titleholders can also be addressed. The solution becomes apparent when one examines the impact of extinguishment upon native title. It is for this reason that Chapter 10 included a specific discussion on this subject. Summed up, Aboriginal and Torres Strait Islander Social Justice Commissioner Michael Dodson expressed it most clearly when he said that ‘as long as our laws and customs are being observed and practiced, the only manner in which our title can be validly extinguished is through consent’.\footnote{Aboriginal and Torres Strait Islander Social Justice Commissioner, \textit{Native Title Report – January – June 1994}, (Canberra: Australian Government Publishing Service, 1995), 81.} If the convention is to be successfully embraced it will need the creation of new institutions of mutual recognition where Indigenous and non-Indigenous people can discuss and decide how practical problems arising from 200 years of the dispossession of Indigenous peoples can be resolved.
The National Native Title Tribunal (NNTT) is not that institution. This body is obliged to implement the native title legislation, and as was discussed in Chapters 8 and 9, the legislation comprises elements of recognition and extinguishment. While it may still mean that particular claimants can successfully make a claim, others come up against the injustice of unilateral extinguishment. This is apparent from recent figures provided by the NNTT. As of 10 April 2006, 25 of the 81 determinations made thus far have found that ‘native title does not exist’.19

The Council for Aboriginal Reconciliation was an institution of mutual recognition. Established several months prior to *Mabo* by federal parliament, as the discussion in Chapter 11 shows this body had many unique features. As a model of a way forward for relations between Aboriginal and Torres Strait Islander peoples and other Australians, it provided a powerful example of the philosophy and practice of common constitutionalism. It also showed that despite the absence of a strong tradition of this language in Australia, this philosophy was not so elusive that it remained undiscovered. Direct experience with Indigenous people in a dialogue was crucial to appreciating a distinct Indigenous perspective. Its constituents, recommendations, draft legislation and the Australian *Declaration Towards Reconciliation* exhibited the features of a body that sought to bring peoples from two different traditions together so that they could move forward together. Nothing captured that spirit better than the statement: ‘As we walk the journey of healing, one part of the nation apologises and expresses it sorrow and sincere regret for the injustices of the past, so the


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other part accepts the apologies and forgives. Another example suggests that direct experience working with Indigenous people is a crucial ingredient to embracing the language of common constitutionalism and human rights. In Chapter 7 it was found that Justice Toohey, too, embraced a position more favourable to the recognition of native title; perhaps because of his experience as the first Aboriginal Land Commissioner.

The analysis provided in this thesis has concentrated on bringing to the fore the strategic concerns about whether or not the claims of Indigenous people have been adjudicated in a language that is just to their claims. A detailed examination of the Mabo events demonstrates that the amendments adopted by federal parliament in 1998 did not provide a just basis to recognise all native title claims. The conventions of human rights and common constitutionalism were trimmed of their authority to limit any inconsistency with the modern constitutional language. In the words of Blackshield and Williams: both ‘Mabo (No 2) and the Wik Case took care to avoid any tendency to undermine the formal constituent structures of national independence’. They observed that the Court ‘recognised the customary laws and entitlements of indigenous peoples only to the extent that the norms of this constitutionally established nation allow or required such recognition’. They also comment that concerning ‘other aspects of the laws of the indigenous peoples, it may be that not even this degree of accommodation-on-sufferance can be achieved’.

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Questions

Several questions were posed in Chapter 5 and having concluded the investigations, responses to these can now be provided. Concerning the significance of *Mabo* the examination undertaken in this thesis suggests that its significance is language-dependent. The High Court removed the language of White Australia so that contemporary common law was no longer associated with the dispossession of Indigenous people. But the High Court’s decision also opened the door to a range of other claims – many for the first time. Viewed from the common constitutional perspective it opened a new chapter in cultural recognition; a story not yet completed.

Concerning the extent to which the constitutional languages expressed in Australia are more similar to those described by Tully about the North American circumstances, the findings of the thesis suggest that it is more complex. In addition to the tension between the two constitutional languages of modern and common constitutionalism, is the long standing influence of the language of White Australia. Nevertheless, the repudiation of the White Australia language by the Mabo decision if anything brings Australia closer to the classical tension between the two languages as described by Tully.

The settlement process was the talk of 1993. As was noted earlier, the June 1993 Discussion Paper reported that the Keating government received a proposal from ‘Aboriginal and Torres Strait Islander representatives concerning a ‘Settlement Process’ that would ‘determine all matters concerning Aboriginal and Torres Strait Islander people’s interests and rights will be resolved to
enhance self determination and to ensure that indigenous people can take responsibility for their own future.23

Reviewing the debates from 1992 through to 1998 suggests settlement was pushed off the agenda because the conversations about Mabo increasingly took place in the modern constitutional language. This language is premised on the idea that settlement has already happened: Federation. Through that process, the colonial settlers negotiated a just relationship for themselves with Great Britain. They participated in a popular vote on new relations of governance. A major shortcoming of this process though was its unjustness toward Aboriginal and Torres Strait Islander peoples. Rectifying this is a task that remains.

Why is it that proposals for a treaty have not yet succeeded? The examination undertaken earlier suggests the reason the government has not yet acted on treaty proposals is because the term treaty is not part of a ‘normal negotiation among members of a culturally diverse society over how they are going to recognise and accommodate differences and similarities over time ...’24 Instead, it is presumed the concept can only be applied to sovereign states. The comments from the Howard government’s response to the Council for Aboriginal Reconciliation’s final report support this conclusion: ‘such a legally enforceable instrument, as between sovereign states would be divisive, would undermine the concept of a single Australian nation’.25 This reflects a mind-set

24 Tully, above n 1, 58.
on the meaning of the term treaty that holds the government captive and unable to find a way forward.

As to whether Australia inherited the English constitutional tradition and its conventions and precedents, judging by the examination that has been undertaken in relation to Aboriginal and Torres Strait Islander peoples, there is little appreciation the conventions of mutual recognition, consent and continuity are part of the English common law tradition. Nor though is there appreciation of common law precedent for those dispossessed reclaiming title to land. Whether the lack of appreciation has arisen from the influence of particular conjunctural views that were embraced in Australia’s political and legal tradition requires further inquiry.

Theory and practice

The thesis will conclude with a few more words about the theory and practice of the philosophy of common constitutionalism. The Australian experience with the Mabo events reinforces the conclusion that the modern constitutionalism language is unable to accommodate claims for recognition with the partial exception of those claims presented in the normative nation-state model. This model presumes claims for cultural recognition are non-constitutional and responds accordingly. Tully demonstrates that just as the claim of the settlers in the United States for independence from Britain can be

Strait Islander Affairs, Department of Immigration and Multicultural and Indigenous Affairs, September 2002), 23.

When I say partial I have in mind that the framing of a claim in terms of the nation-state model, while echoing the norm followed by many European peoples, is no guarantee of easy
characterised a struggle for self-determination, so too are the claims of ethnic minorities, migrants, women and Indigenous peoples. He outlines the features of a constitutional philosophy and practice where through a dialogue the claims are conciliated over time to achieve an accommodation of their cultural differences. Moving beyond the current circumstances is likely to be difficult because of the ambitious nature of the project. Any philosophical approach that implies the institutions of governance need modification for reconciliation to succeed with Aboriginal and Torres Strait Islander peoples is a major task.

In order to carry out this inquiry it was also necessary to put to one side any pre-conceived notions of what constitutionalism should or should not be. The dominant language uses constitutionalism in a way that does not take account of the customary law of Aboriginal and Torres Strait Islander peoples; this explains the inclination to overlay the claims within the current constitutional frame. But such an approach resolves nothing – at least from the perspective of the claimants. As Wittgenstein says: ‘A picture held us captive. And we could not get outside it, for it lay in our language and language seemed to repeat it to us inexorably.’

At one level, the story that has been told over the past few chapters does not have a particularly complex message. In the end, it is necessary to listen to the voices of Indigenous peoples as a guide to achieving reconciliation.

acceptance. A solemn reminder of this lesson is the struggle of the Timorese people for independence.

Why were Australia’s decision-makers not guided by this ethic? One reason is that the influence of the modern constitutional language has stamped its legacy on the day-to-day decision-making of federal parliament. For instance, when a decision is taken to legislate, it is now institutionalised through a plethora of steps, with each step being carefully codified. Such embedded practice needs to be critically questioned and significantly modified to accommodate Aboriginal and Torres Strait Islander peoples in decision-making. Implementing this will take awareness and sustained effort. Another reason is the pressure certain interests bring to bear on federal parliament. Concerning native title, business interests made it clear to the Keating government it wanted ‘certainty’ for existing grants. The Keating government was clearly influenced by this and determined to resolve the ‘immediate land management challenges … quickly’.  

Constitutional dialogue is a very old way of resolving problems ‘in which citizens reach agreements on appropriate forms of accommodation of their cultural differences’. The way forward from this position does not lie with constitutional scholars ‘solving’ contemporary problems through identifying weaknesses in current theory. Rather, it is through engaging in a dialogue that hears Indigenous peoples express their claims on their own terms and with non-Indigenous resolved to achieve a constitutional accommodation. What has attempted to be demonstrated in this thesis is that elements of this philosophical approach are already being practiced, but the lessons of these experiences are not necessarily well appreciated and need wider discussion.

28 Mabo: The High Court Decision on Native Title, above n 8, 97.
29 Tully, above n 1, cover.
Since this is overwhelmingly a practical philosophy, awareness is a key ingredient. This study’s findings will be enriched by feedback from Indigenous peoples on whether they believe an understanding of the Mabo events is helped by looking through the prism of constitutional languages and whether the study has accurately captured the distinct features of their perspective.
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