



National
Native Title
Tribunal



Native title: is it a means of overcoming Indigenous disadvantage?

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1 Introduction¹

Let me begin with an acknowledgement and a statement of thanks.

First, I acknowledge that we are meeting on the traditional country of the Bunurong People whose representative welcomed you last night.

Second, thank you for inviting me to speak at this conference. I am honoured and delighted to be with you. I want to use this opportunity to thank again Rotary International for supporting Rotary Exchange Students program. In 1971 it was my great privilege to be a Rotary Exchange student for a year in Grinnell, Iowa in the Midwest of the United States of America. That was an enjoyable and stimulating year, from which I benefited greatly. I was able to travel from California to New York, Illinois to Texas, and many places in between. I met a range of people, had many new experiences and formed friendships that have continued over the succeeding thirty six years. I encourage you to continue to support this program. If others gain half as much as I did from the experience, then your investment will continue to be worthwhile.

The topic of my presentation is, quite appropriately, in the form of a question: Native title: is it a means of overcoming Indigenous disadvantage?

Let me work toward answering it by setting out a framework with two key components:

- First, I want to outline some key features of native title – what it is (and what it is not), where it might exist, how native title claims are decided and what types of outcomes can be achieved for Indigenous Australians.
- Second, I will summarise some key demographic information about Indigenous Australians, and will note some (but by no means all) social and economic indicators that identify areas where Indigenous Australians are often at a disadvantage compared with many other Australians.

Having done that, I will attempt to answer whether native title is a means of overcoming Indigenous disadvantage. By that stage it will, I hope, be clear why I say ‘attempt’ to answer the question.

2 Native title

(a) *What is native title?*

I could start the story as early as 40,000 years ago or as recently as 1788, but will leap ahead to 1992 when, in the historic *Mabo (No 2)* judgment, the High Court of Australia ruled, by a majority of six to one, that:

¹ I thank various National Native Title Tribunal employees who assisted in the research of material for this paper, prepared it in this format or offered comments on the final draft of it: Rita Farrell, Kathy Wright, Kathryn Neville, Tina Djohanli and Stephen Sparkes.

the common law of this country recognises a form of native title which, in the cases where it has not been extinguished, reflects the entitlement of the Indigenous inhabitants, in accordance with their laws and customs, to their traditional lands.²

The decision in the *Mabo* case was the first time that an Australian court recognised the entitlements of Indigenous people to their traditional lands under their traditional laws. It followed ten years of legal proceedings.³ The judgment was controversial, as was the passage of the *Native Title Act 1993* (Cth) to provide a process for the recognition of native title in various parts of Australia.⁴

Origins in traditional laws and customs: Underpinning the scheme of the Native Title Act is the concept of native title. In the lead judgment in the *Mabo (No 2)* case, Justice Brennan⁵ stated that:

The term ‘native title’ conveniently describes the interests and rights of indigenous inhabitants in land, whether communal, group or individual, possessed under the *traditional laws* acknowledged by and the *traditional customs* observed by the indigenous inhabitants. ... Native title has its origin in and is given its content by the *traditional laws* acknowledged by and the *traditional customs* observed by the indigenous inhabitants of a territory. The nature and incidents of native title must be ascertained as a matter of fact by reference to *those laws and customs*.⁶ (emphasis added)

The Federal Parliament used the common law description of native title as the basis of the definition of ‘native title’ in the Native Title Act. The starting point in describing native title, and dealing with native title rights and interests, is now that Act rather than the common law.

The definition of ‘native title’ in section 223 of the Act states that native title rights and interests are ‘possessed under the traditional laws acknowledged, and the traditional customs observed’, by the relevant Aboriginal peoples or Torres Strait Islanders. Those people have a connection with the land or waters ‘by those laws and customs’.

The scope of the statutory definition has been considered in numerous High Court and Federal Court judgments. Much information has been exchanged in the course of negotiations, and much evidence has been adduced in trials, to establish whether and to what extent traditional laws and customs survive and are observed in relation to particular areas of land and waters. Claimant and compensation applications have succeeded or foundered accordingly.

² *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 15.

³ For a detailed history of the litigation, see BA Keon-Cohen, “The Mabo litigation: a personal and procedural account”, (2000) 24 MULR 893-951.

⁴ For an account of the political context in which the *Native Title Act 1993* was enacted, see D Watson, *Recollections of a bleeding heart*, 2000, Random House Australia. For a discussion of the Mabo case and its consequences, including legislating native title, see PH Russell, *Recognizing Aboriginal Title: the Mabo case and Indigenous resistance to English-settler colonialism*, 2005, University of Toronto Press.

⁵ With whom Chief Justice Mason and Justice McHugh agreed.

⁶ *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 57, 58.

In recent years, increasing attention has been given to the issue of whether Aboriginal customary law should be taken into account in the administration of various aspects of the Australian legal system. It may be appropriate to reiterate the central role of customary law in the continuation of native title. As the High Court has stated, the 'underlying existence of the traditional laws and customs is a necessary pre-requisite for native title'.⁷

Different from common law real property: It is clear that native title rights and interests of a group in respect of an area of land may bear little resemblance to property rights as recognised in Anglo-Australian property law. Indeed, the High Court clearly stated in *Mabo (No. 2)* that the common law can recognise a native title right or interest even if there is no equivalent or analogous legal right or interest.⁸ To establish that native title exists, it is not necessary to show that the interests in land are the same as, or of a kind familiar to, interests in land at common law such as a lease or freehold title. In the opinion of Justices Deane and Gaudron, the 'preferable approach' to determining the content of common law native title is 'to recognise the inappropriateness of forcing the native title to conform to traditional common law concepts and to accept it as *sui generis* or unique'.⁹

In essence, because native title rights and interests come from traditional laws and customs, the content of those rights and interests will not necessarily equate to other forms of property under the general law. For the same reason, native title rights and interests may vary from place to place and group to group around Australia.¹⁰

⁷ *Fejo v Northern Territory* (1998) 195 CLR 96 at [46] per Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ.

⁸ For example, see *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 58 and 70 per Brennan J. So, for example, Justice Brennan noted that the "general principle that the common law will recognise a customary title only if it be consistent with the common law is subject to an exception in favour of traditional native title." (at 59). Justices Deane and Gaudron, acknowledged that "pre-existing native interests with respect to land ... were not confined to interests which were analogous to common law concepts of estates in land or proprietary rights." (at 85). They accepted that it is correct to 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'" (at 85).

⁹ *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 89. Their Honours stated (at 89) that "prior occupation or use under the common law native title is explained by the common law's recognition of prior entitlement under the earlier indigenous law or custom". See also *Western Australia v Commonwealth* (1994-1995) 183 CLR 373 at 492, per Dawson J; *Wik Peoples v Queensland* (1996) 187 CLR 1 at 215, 141 ALR 129 at 257, see also 256; *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 178-179, 187, 195 per Toohey J; *Fejo v Northern Territory* (1998) 195 CLR 96 at 130 [53], 152[108]; *Western Australia v Ward* (2002) 191 ALR 1 at 161 [578] per Kirby J. For further examples of judicial recognition of the *sui generis* nature of native title see *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 133 per Dawson J; *Ward v Western Australia* (1998) 159 ALR 483 at 498, 499, 505, 582 per Lee J; *Western Australia v Strickland* (2000) 99 FCR 33 at 53 per Beaumont, Wilcox and Lee JJ; *Commonwealth v Yarmirr* (2001) 184 ALR 113 at 183 per Kirby J; *Western Australia v Ward* (2002) 191 ALR 1 at 161 per Kirby J, 280 per Callinan J; *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 194 ALR 538 at 589 per Callinan J.

¹⁰ See *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 89 per Deane and Gaudron JJ; *Yanner v Eaton* (1999) 201 CLR 351, 166 ALR 258 at 278 [72] per Gummow J. See also *Commonwealth v Yarmirr* (2001) 184 ALR 113 at

These native title rights and interests have been described as a 'bundle of rights' which might, at their most extensive, be the right to 'possession, occupation, use and enjoyment of the lands'¹¹ and in other places comprise individual rights (such as the rights to hunt and gather, conduct ceremonies, camp and be buried on the land).

Recognised not granted: Native title is not 'title' to land or a form of tenure. Rather, it is the recognition by the general law of existing rights and interests in relation to land under the relevant traditional laws and customs. It is not granted by the Crown, because it is not the Crown's to grant.

(b) Where does native title exist?

Native title exists over areas of land and waters where it has not been extinguished and where Indigenous people have maintained their traditional connection with those areas, substantially uninterrupted since the date when the Crown first asserted sovereignty (1788 or later, depending on where in Australia a claim is made).

Extinguishment of native title: Native title rights can be extinguished, in part or in whole, by various acts of the Crown - in particular by statute, by a valid Crown grant of an estate inconsistent with the continued right to enjoy native title, or by the Crown's appropriation and use of land inconsistently with the continued enjoyment of native title. The Native Title Act lists numerous examples of what extinguishes native title.¹²

Native title may be extinguished totally or partially. Such extinguishment is permanent, though it may be disregarded in certain limited circumstances.¹³ Native title cannot revive or be recognised over areas where it has been extinguished – even if people retain their traditional links to that land.

Some native title rights can survive alongside, but subject to, the rights of others in certain areas.¹⁴

Many court decisions have shaped the law about extinguishment in recent years. One decision that marked a high tide point for Indigenous Australians was the judgment in the *Wik* case.¹⁵ The High Court decided that certain pastoral leases (leases for grazing cattle) did not necessarily extinguish native title. Pastoral leases cover large areas of inland Australia. Some have been held to extinguish all native title.¹⁶

121-122 [11]-[16] per Gleeson CJ, Gaudron, Gummow and Hayne JJ, 183 [258] per Kirby J; *Western Australia v Strickland* (2000) 99 FCR 33 at 53 per Beaumont, Wilcox and Lee JJ; *Ward v Western Australia* (1998) 159 ALR 483 at 498-499, 582 per Lee J.

¹¹ See *Mabo v Queensland (No 2)* (1992) 175 CLR 1.

¹² *Native Title Act 1993* s249C, Schedule 1.

¹³ See *Native Title Act 1993* ss47, 47A, 47B.

¹⁴ See *Native Title Act 1993* s44H.

¹⁵ *Wik Peoples v Queensland* (1986) 187 CLR 1, 141 ALR 129.

¹⁶ See the Western Land Division leases in New South Wales considered by the High Court in *Wilson v Anderson* (2002) 213 CLR 401.

The 'tide of history' and loss of native title: Native title can also disappear where a group has lost its links to the land in respect of which its forebears held native title. In the *Mabo (No 2)* case, Justice Brennan¹⁷ noted that, 'since European settlement of Australia, many clans or groups of indigenous people have been physically separated from their traditional land and have lost their connexion with it.'¹⁸ He also said that 'when the tide of history has washed away any real acknowledgment of traditional law and any real observance of traditional customs, the foundation of native title has disappeared.'¹⁹

The best known case on this point was the native title claim by the Yorta Yorta people to land along the Murray River in south-eastern Australia. The trial judge decided that, as a result of the tide of history, native title had ceased to exist.²⁰ That decision was confirmed on appeal.²¹

(c) *Who holds native title?*

Native title is essentially communal in origin, though there can be communal, group or individual rights.²² It derives from the traditional laws and customs of the relevant people, who in turn are united in their acknowledgement and observance of a body of laws and customs. That body of people, sometimes described as a 'normative society', must have continued to exist as a body since sovereignty was asserted by the Crown until the present, and must have acknowledged and observed those laws and customs in a substantially uninterrupted fashion since that date.

Native title claims are made on behalf of a 'native title claim group' who are 'all the persons ... who, according to their traditional laws and customs, hold the communal or group rights and interests comprising the particular native title claimed'.²³ Groups may be constituted and described in various ways, depending on the relevant traditional laws and customs governing membership of the group that holds native title. One way of describing some groups is by reference to descendants of certain named ancestors.

¹⁷ With whom Mason CJ and McHugh J agreed.

¹⁸ *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 59 per Brennan J.

¹⁹ *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 59-60 per Brennan J. In their joint judgment, Justices Deane and Gaudron also referred to native title rights being 'lost by the abandonment of the connexion with the land or by the extinction of the relevant tribe or group'. Their Honours found it unnecessary for the purposes of *Mabo (No 2)* to consider the question whether those rights will be lost by the abandonment of traditional customs and ways. Their view was that, at least where the relevant tribe or group continues to occupy the land, they will not be lost: *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 110.

²⁰ *Members of the Yorta Yorta Aboriginal Community v Victoria* [1998] FCA 1606

²¹ *Members of the Yorta Yorta Aboriginal Community v Victoria* (2001) 110 FCR 244, 180 ALR 655; *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422; 194 ALR 538.

²² *Native Title Act 1993* s223(1). See e.g. judgments in *De Rose v South Australia (No 2)* (2005) 145 FCR 290; *Harrington-Smith on behalf of the Wongatha People v Western Australia (No 9)* [2007] FCA 31.

²³ *Native Title Act 1993* ss61(1), 253.

One purpose of native title mediation is to assist the parties to agree on ‘who holds ... the native title’,²⁴ and a determination that native title exists will record ‘who the persons, or each group of persons, holding the common or group rights comprising the native title are’.²⁵

Where such a determination is made, the Native Title Act requires that there be a determination about whether or not the native title rights and interests are to be held by a prescribed body corporate in trust on behalf of the common law holders of native title.²⁶

Where the prescribed body corporate is registered as holding the native title rights and interests on trust, that body is legally described as the ‘native title holder’.²⁷ In other cases, the ‘native title holder’ comprises the person or persons who hold the native title,²⁸ and the prescribed body corporate acts as their agent.

Good governance is relevant to the conduct and resolution of native title claims. Native title claim groups need to organise themselves internally in order to negotiate an outcome with respondent parties (sometimes including neighbouring groups with disputed overlapping claims) or to argue the case in the Court. Where there is a determination that they have native title, the legal options about prescribed bodies corporate need to be considered carefully.

Importantly for the group and for those who may wish to negotiate with them, clear governance structures need to be in place so that the procedural and other benefits conferred on native title holders can be enjoyed.

Other governance issues arise once native title has been determined to exist over an area of land. The native title holders assume specified procedural rights under the Act in relation to certain types of future acts, such as the right to negotiate about the proposed acquisition of land by the government for the benefit of third parties or the grant of mining interests. One governance issue for some communities is how to define the role of people who, although native title holders, live far away from their traditional land. What part should they have in decision-making about the land and how can they exercise their rights in a timely and effective way?

In most (perhaps all) communities, people with historical links to the land (sometimes for long periods of residence) live alongside the native title holders. One challenge facing governments, the resources sector and Indigenous communities in the current minerals boom is how to deliver sustainable economic special benefits to Indigenous communities in a region, particularly where native title claims are unresolved and the communities include both native title holders and people who are not native title holders.

There can be tension about the governance of land, where the balance of decision-making power has shifted to the native title holders, or may have shifted within the native title holding group.

²⁴ *Native Title Act 1993* s86A(1)(b)(i).

²⁵ *Native Title Act 1993* s225(a).

²⁶ *Native Title Act 1993* ss55-57.

²⁷ *Native Title Act 1993* s224(a).

²⁸ *Native Title Act 1993* s224(b).

Arrangements may need to be negotiated within the community to reflect the new legal reality while accommodating the interests of others with longstanding links to the community and the area. People from outside the community may need to adjust how they deal with the community.

(d) How are native title claims decided?

Procedures for deciding where native title exists: The Native Title Act sets up a process for determining where native title exists or does not exist.

The process involves groups of Aboriginal people or Torres Strait Islanders making a native title application to the Federal Court of Australia. After various administrative steps are followed, the people whose interests are affected have been notified, and parties to the claim have been determined, the application is usually sent to the National Native Title Tribunal.

The Tribunal's main role is to mediate the application. The purpose of mediation is to see if the parties can agree on whether or not native title exists, and, if it does exist:

- who the native title holders are
- what the native title rights and interests are
- what other peoples' interests in the area are
- the relationship between the various rights and interests
- whether there are exclusive native title rights over any of the area.²⁹

The mediation process also enables parties to reach a range of agreements about land use and access.

The Tribunal conducts multi-party, cross-cultural mediation using a primarily interest-based model in a rights-based context. There are many unusual features to such mediation (including the involvement sometimes of hundred of parties and three levels of government) and the Tribunal has had to develop practices to make such mediation effective.

If agreement is reached, the outcome might include a determination that native title exists. If agreement cannot be reached, the Federal Court can conduct a trial.

Although there are occasions when going to trial may be necessary to resolve an issue of fact or law, experience has shown that complete trials of native title claims are often lengthy, expensive, stressful, usually adversarial and sometimes do not resolve key native title issues.

It should also be acknowledged that, as judges have noted, proving a native title claim to the legal standard required is a difficult task, particularly in areas where there has been a long history of social disruption and competing land use. Litigation of claims can lead to unpredictable outcomes. A finding that native title does not exist can have 'devastating consequences for the claimant community'.³⁰

²⁹ *Native Title Act 1993* ss86A(1), 225.

³⁰ *Rubibi Community v Western Australia (No 7)* [2006] FCA 459 at [167].

Most claims are resolved by agreement.

Settlement packages: Negotiated agreements are not confined to determinations that native title does or does not exist. Options that have been agreed or considered as, or part of, the settlement of claimant applications are outlined below:

- grants of estates or interests in, or rights in relation to, land, for example grants of freehold title, a perpetual lease or other tenure to a claim group or incorporated body;
- roles in managing what happens on the land, for example joint management or co-management of some national parks or other conservation areas or Crown reserves;
- symbolic recognition of traditional affiliations with the land, for example signage indicating that the area is the traditional country of a named group of people or a building that is constructed on that group's traditional country;
- employment and other economic opportunities in relation to the land, for example employment and training, scholarship and education opportunities, and business arrangements (such as equity participation) in relation to commercial enterprises on the land, or the right to conduct business (such as eco-tourism) on the land;
- financial payments or grants to the group, for example assistance for capital works on the land (such as the construction of a cultural centre or keeping place), or assistance to enable the group to administer the land.

One example of a settlement package can be found in the negotiated outcome of native title claims in the Wimmera region of north-west Victoria. More than 400 parties agreed to the consent determinations of native title and an agreement package that delivers benefits to the native title holders. A formal sitting of the Federal Court took place at Horseshoe Bend, Little Desert National Park to give formal effect to the agreement.

The key features of that settlement included:

- finalisation of the claim over 9,642 square kilometres of land and waters in the Wimmera region;
- recognition of non-exclusive native title rights to hunt, fish, gather and camp in Crown reserves totalling 269 square kilometres along the banks of the Wimmera River;
- non-recognition of native title over the remaining area but recognition of the claim groups' close cultural ties to a larger area than that where native title was found to exist;
- signage recognising the claimant groups' cultural ties to this larger area;
- a process for the Victorian Government to consult with the Barengi Gadjin Land Council Aboriginal Corporation (the prescribed body corporate) before proceeding with certain types of development;
- active involvement of the native title holders in the co-operative management of national park and wilderness areas;
- streamlined processes for the approval of licences and permits to the native title holder to hunt, fish, gather and conduct cultural events;
- grant of freehold title to three parcels of land totalling 45 hectares;

- funding to support the administrative and funding costs of the Barengi Gadjin Land Council Aboriginal Corporation.

(e) *How extensive can native title outcomes be for Indigenous Australians?*

Indigenous Australians are seeking recognition as the people for their traditional country and a say in what happens on that country, and they will use whatever legal regime is available to obtain that recognition (be it native title laws, cultural heritage laws, land rights laws and so on).

In light of experience of negotiations and litigation under the Act, there is an increased acceptance of the following four propositions as the context in which native title claims are resolved:

- some groups of Aboriginal people will find it difficult, if not impossible, to prove their ongoing connection to their traditional country to meet the criteria in the statutory definition of 'native title' as interpreted by the High Court in the *Yorta Yorta* case;
- some groups of Aboriginal people who can prove their connection to that standard will find that, because of past extinguishment, there are few areas of land or waters in their traditional country where native title could be recognised;
- in areas where non-exclusive native title rights could be recognised, the extent of those rights and their exercise will be limited as a result of past dealings with land or current tenures and land use;
- in many areas, the resources spent on intensive connection research and tenure research will be inversely proportional to the native title outcome that might be achieved (whether by agreement or after trial). In other words, the more that is spent, the smaller the native title outcome. It should also be acknowledged that the costs of the process are not only monetary. There are significant emotional, cultural, social and other costs in the native title process.

It is clear however, that the operation of the native title system over the past decade has influenced thinking and attitudes at a community and sectoral level. There has been widespread adoption of positive attitudes toward native title negotiation rather than litigation, resulting in a steady increase in parties seeking to settle matters by agreement, and an increasing proportion of native title claims being resolved by consent. As the law has become clearer, legal uncertainty is no longer as much of a barrier to parties entering native title negotiations and reaching agreements.

The trend towards finalising claimant applications by negotiated agreement is illustrated by the determinations of native title registered under the Act since the Act commenced.

Of the 99 native title determinations made and registered between 1 January 1994 and 22 March 2007, 65 were determinations that native title exists in all or part of the determination area. Most of the determinations that native title exists were made by consent of the parties.

The scale and significance of these determinations can be considered from different perspectives. Some areas are large. The determination in favour of the Martu people of Western Australia

covers an area of 136,200 square kilometres, an area greater than that of Greece³¹ and many other European countries. The determination in favour of the Nganawongka, Wadjari and Ngarla peoples of Western Australia covered 47,540 square kilometres. The determination in favour of the Kiwirrkurra people covers an area of 42,860 square kilometres. Some determination areas are much smaller, measured in hectares rather than square kilometres, reflecting the extent of the traditional country of the Indigenous community or group, and the area where the general law recognises native title once account is taken of previous dealings with land in the region.

Whatever the size of the determination area, the number of Indigenous people who benefit from each determination is relatively small, usually hundreds or thousands.

It must also be acknowledged that much work remains to be done. There are currently 590 native title applications in the system, 17 of them in Victoria.

Areas of land granted and where native title determinations have been made: The statutory land rights schemes, enacted in the 25 year period between 1966 and 1991, have resulted in the grant of title over significant areas of land to Aboriginal and Torres Strait Islander communities in many parts of Australia. Some of the areas are large. The Pitjantjatjara and Maralinga lands comprise respectively 10.4 per cent and 7.7 per cent of South Australia.³² The total area of grants under various Commonwealth, state and territory statutes is 1,102,000 square kilometres or 14.3 per cent of the area of Australia.

3 Indigenous disadvantage

(a) *Indigenous population distribution*

In order to assess the potential significance of the recognition of native title for Indigenous Australians, it is useful to look at how many Australians are identified as Aboriginal people or Torres Strait Islanders (or both) and where they live.

The 2006 census data has not been published but information obtained from the 2001 census and subsequent analyses give some useful indications. In summary, the following features are apparent.

The estimated resident Indigenous population of Australia at 30 June 2001 was 458,500 people or 2.4 per cent of the total population.³³

The number of people identified as Aboriginal and/or Torres Strait Islander in the 2001 census represented an increase of 16 per cent since the 1996 census (and similarly large increases between previous censuses)³⁴ as compared with an increase of 4 per cent in the count of

³¹ Greece has an area of 130,800 square kilometres.

³² The Pitjantjatjara land is 102,630 km² and the Maralinga land is 76,420 km².

³³ Australian Bureau of Statistics 2003, *Population Characteristics: Aboriginal and Torres Strait Islander Australians 2001*, Cat No 4713.0, p15.

³⁴ Increases of 17 per cent between 19869 and 1991, and 33 per cent between 1991 and 1996.

non-Indigenous persons between the 1996 and 2001 censuses. About three quarters of the intercensal increase over the five years to 2001 can be explained by demographic factors (birth and deaths), with the remaining increase attributable to other factors (such as improvements in census collection methods and an increase propensity to identify as Indigenous).³⁵

Persons of 'Aboriginal origin only' comprised about 90 per cent of the estimated residential Indigenous population. Persons of 'Torres Strait Islander origin only' comprised 6 per cent, and those with dual Aboriginal and Torres Strait Islander origin comprised 4 per cent.³⁶

Over half of the estimated resident Indigenous population lived in either New South Wales (29 per cent) or Queensland (27 per cent) with 14 per cent in Western Australia and 12 per cent in the Northern Territory. Approximately 6 per cent of Indigenous Australians live in Victoria.³⁷

Although both Indigenous and non-Indigenous people tend to live predominantly in the major cities and regional areas, a much higher proportion of the Indigenous population live in remote and very remote areas (26.4 per cent of Indigenous people compared to 2.0 per cent for non-Indigenous people).³⁸

As a proportion of the population within each state and territory, the Northern Territory has the highest proportion of Indigenous people (28.8 per cent), with Victoria having the lowest (0.6 per cent).³⁹

As a result of these differences in population distribution, the Indigenous proportion of the total population rose with increasing geographic remoteness, from 1 per cent of the total population living in major cities to 45 per cent in very remote areas. In the Northern Territory, 81 per cent of the Indigenous population live in remote and very remote areas.⁴⁰ As one researcher has noted, 'despite national minority status and increasing urbanisation ... the demography of large tracts of remote Australia is effectively the demography of Indigenous inhabitants. In particular ... the Indigenous share of the resident outback population continues to rise and many former mission and government settlements are growing to become sizeable country towns'.⁴¹ He also observed

³⁵ Australian Bureau of Statistics 2003, *Population Characteristics: Aboriginal and Torres Strait Islander Australians 2001*, Cat No 4713.0, p15.

³⁶ Australian Bureau of Statistics 2003, *Population Characteristics: Aboriginal and Torres Strait Islander Australians 2001*, Cat No 4713.0, p15.

³⁷ Australian Bureau of Statistics 2003, *Population Characteristics: Aboriginal and Torres Strait Islander Australians 2001*, Cat No 4713.0, pp16, 19.

³⁸ Steering Committee for the Review of Government Service Provision 2005, *Overcoming Indigenous Disadvantage: Key Indicators 2005 Report*, A3.2.

³⁹ Steering Committee for the Review of Government Service Provision 2005, *Overcoming Indigenous Disadvantage: Key Indicators 2005 Report*, A3.3.

⁴⁰ Australian Bureau of Statistics 2003, *Population Characteristics: Aboriginal and Torres Strait Islander Australians 2001*, Cat No 4713.0, p16.

⁴¹ Taylor, J. 2006, *Population and Diversity: Policy Implications of Emerging Indigenous Demographic Trends*, Centre for Aboriginal Economic Policy research Discussion Paper No 283/2006, p1.

that 'Indigenous people and their institutions predominate over the bulk of the continental land mass'.⁴²

Many Indigenous people in remote areas reside close to or on customary lands that they own and their attachment to such places is reflected in a relative lack of migration away from there.⁴³

Projections of the Indigenous population indicate a rapidly growing population in regions such as Cape York Peninsula, west Arnhem Land and the Gulf country of the Northern Territory, and sustained growth in the east Kimberley region of Western Australia and across the arid zone.⁴⁴

Many discrete Aboriginal communities are distant from the nearest town with banking, shopping and other services, and do not have a modern economic base.⁴⁵

The Indigenous population has a significantly different structure to the non-Indigenous population. It tends to be younger, with 39.3 per cent of the Indigenous population being 14 years or under, compared with 20.4 per cent for the non-Indigenous population.⁴⁶ The proportion of the Indigenous population over the age of 65 years is only 3 per cent, compared with 13.6 per cent for the rest of the population.⁴⁷

In 2001 the median age of the Indigenous population (the age at which half the population was older and half was younger) was 20.5 years, compared with 36.0 years for the non-Indigenous population. The relatively young age structure of the Indigenous population was due to higher fertility and mortality rates than those experienced in the non-Indigenous population.⁴⁸

⁴² Taylor, J. 2006, *Population and Diversity: Policy Implications of Emerging Indigenous Demographic Trends*, Centre for Aboriginal Economic Policy research Discussion Paper No 283/2006, p5. Taylor also stated that although remote Indigenous communities are highly mobile, they are far less migratory than elsewhere. As a result, across much of the outback the Indigenous population is rising as a share of the total because indigenous net migration loss from the bush is much lower than that recorded for the non-Indigenous population: at p12. See also Steering Committee for the Review of Government Service Provision 2005, *Overcoming Indigenous Disadvantage: Key Indicators 2005 Report*, pp9.22-9.27.

⁴³ Taylor, J. 2006, *Population and Diversity: Policy Implications of Emerging Indigenous Demographic Trends*, Centre for Aboriginal Economic Policy research Discussion Paper No 283/2006, p45.

⁴⁴ Taylor, J. 2006, *Population and Diversity: Policy Implications of Emerging Indigenous Demographic Trends*, Centre for Aboriginal Economic Policy research Discussion Paper No 283/2006, pp45-48.

⁴⁵ Taylor, J. 2006, *Population and Diversity: Policy Implications of Emerging Indigenous Demographic Trends*, Centre for Aboriginal Economic Policy research Discussion Paper No 283/2006, pp48-52.

⁴⁶ Steering Committee for the Review of Government Service Provision 2005, *Overcoming Indigenous Disadvantage: Key Indicators 2005 Report*, A3.1.

⁴⁷ Australian Bureau of Statistics 2003, *Population Characteristics: Aboriginal and Torres Strait Islander Australians 2001*, Cat No 4713.0, p17. See also Steering Committee for the Review of Government Service Provision 2005, *Overcoming Indigenous Disadvantage: Key Indicators 2005 Report*, A3.1.

⁴⁸ Australian Bureau of Statistics 2003, *Population Characteristics: Aboriginal and Torres Strait Islander Australians 2001*, Cat No 4713.0, p17.

The very young age composition of the Indigenous population compared to the old age composition of the Australian population is projected to continue because of the large numbers of Indigenous women moving into child bearing age combined with high adult mortality.⁴⁹

With the different demographic trends, there is a widening gap between the focus and purpose of social and economic policy. As the Australian population is increasingly concerned with the effects and implications of aging and funding retirement, the Indigenous Australians are concerned about raising families, education, housing and jobs.⁵⁰

(b) Social indicators

Recent statistics suggest that for both males and females, life expectancy at birth in the Indigenous population is 17.2 years less than in the total Australian population (for males born between 1996 and 2001 it is 59.4 years compared with 76.6 years, and for females it is 64.8 years compared with 82 years).⁵¹

As well as being a fundamental indicator in its own right, life expectancy is highly correlated with employment and overall economic wellbeing as well as being an indicator of long-term health and well being of Indigenous people.⁵²

A range of factors can influence life expectancy including income and education levels, lifestyle factors (such as the consumption of tobacco and excessive alcohol, poor nutrition, and lack of exercise) and environmental factors (such as lack of clean drinking water and adequate sanitation,⁵³ overcrowding of households,⁵⁴ and limited access to health professionals and services).⁵⁵ Overcrowding is most common in very remote areas.⁵⁶

Indigenous people suffer from markedly higher rates of potentially preventable chronic health conditions than the rest of the population.⁵⁷

⁴⁹ Taylor, J. 2006, *Population and Diversity: Policy Implications of Emerging Indigenous Demographic Trends*, Centre for Aboriginal Economic Policy research Discussion Paper No 283/2006, pp6-7.

⁵⁰ Taylor, J. 2006, *Population and Diversity: Policy Implications of Emerging Indigenous Demographic Trends*, Centre for Aboriginal Economic Policy research Discussion Paper No 283/2006, p7.

⁵¹ Steering Committee for the Review of Government Service Provision 2005, *Overcoming Indigenous Disadvantage: Key Indicators 2005 Report*, pp3.3-3.5.

⁵² Steering Committee for the Review of Government Service Provision 2005, *Overcoming Indigenous Disadvantage: Key Indicators 2005 Report*, p3.2.

⁵³ Steering Committee for the Review of Government Service Provision 2005, *Overcoming Indigenous Disadvantage: Key Indicators 2005 Report*, pp10.9-10.11.

⁵⁴ Steering Committee for the Review of Government Service Provision 2005, *Overcoming Indigenous Disadvantage: Key Indicators 2005 Report*, pp10.11-10.18.

⁵⁵ Steering Committee for the Review of Government Service Provision 2005, *Overcoming Indigenous Disadvantage: Key Indicators 2005 Report*, pp3.2-3.3, chapter 10.

⁵⁶ Steering Committee for the Review of Government Service Provision 2005, *Overcoming Indigenous Disadvantage: Key Indicators 2005 Report*, pp10.12, 10.17.

⁵⁷ Steering Committee for the Review of Government Service Provision 2005, *Overcoming Indigenous Disadvantage: Key Indicators 2005 Report*, p9.14-9.22.

Most Indigenous people barely reach retirement age and the lower life expectancy, as well as relatively high morbidity rates commencing in young adulthood and rising throughout the prime working ages, illustrate a pattern of physical constraints on the ability of many in the Indigenous community to engage in meaningful and sustained economic activity. That has implications for income earning, savings, superannuation and other economic matters.⁵⁸

Although the proportion of Indigenous people completing years 10 or 12 at high school has increased in recent years, Indigenous students are about half as likely to continue to year 12 as non-Indigenous students.⁵⁹

Geographic location has an impact on the level of schooling completed by Indigenous people, with those living in remote areas being less likely to have completed year 12 than those in non-remote areas.⁶⁰

Increasing proportions of Indigenous people are participating in post secondary education, with variations in success rates across jurisdictions.⁶¹

(c) Economic indicators

Both household and individual incomes of Indigenous people are lower on average than for other people.⁶²

Indigenous people are more likely to live in larger households with large numbers of dependants and smaller incomes. Indigenous people, especially those living outside the cities, may live in households with resource commitments to their extended families living elsewhere.⁶³

Although there has been an increase in Indigenous employment rates in recent years, this is attributable to increases in part-time employment rather than full-time employment, with indications of underemployment of people who would like to work longer hours.⁶⁴

⁵⁸ Taylor, J. 2006, *Population and Diversity: Policy Implications of Emerging Indigenous Demographic Trends*, Centre for Aboriginal Economic Policy research Discussion Paper No 283/2006, pp8-11.

⁵⁹ Steering Committee for the Review of Government Service Provision 2005, *Overcoming Indigenous Disadvantage: Key Indicators 2005 Report*, pp3.14-3.20.

⁶⁰ Steering Committee for the Review of Government Service Provision 2005, *Overcoming Indigenous Disadvantage: Key Indicators 2005 Report*, p3.15. See also Australian Bureau of Statistics 2003, *Population Characteristics: Aboriginal and Torres Strait Islander Australians 2001*, Cat No 4713.0, p49.

⁶¹ Steering Committee for the Review of Government Service Provision 2005, *Overcoming Indigenous Disadvantage: Key Indicators 2005 Report*, pp3.21-3.28. See also Australian Bureau of Statistics 2003, *Population Characteristics: Aboriginal and Torres Strait Islander Australians 2001*, Cat No 4713.0, pp47-50.

⁶² Steering Committee for the Review of Government Service Provision 2005, *Overcoming Indigenous Disadvantage: Key Indicators 2005 Report*, p3.39, see generally pp3.38-3.46.

⁶³ Steering Committee for the Review of Government Service Provision 2005, *Overcoming Indigenous Disadvantage: Key Indicators 2005 Report*, p3.42.

⁶⁴ Steering Committee for the Review of Government Service Provision 2005, *Overcoming Indigenous Disadvantage: Key Indicators 2005 Report*, pp11.3-11.5.

Community Development Employment Projects (CDEP) provide a significant proportion of Indigenous employment, especially in remote and very remote areas.⁶⁵

Among people in mainstream employment and CDEP employment, Indigenous incomes on average were considerably lower than non-Indigenous incomes, reflecting differences in skill levels and occupations between the two populations. Even within occupational categories, Indigenous persons tend to earn lower incomes than non-Indigenous persons.⁶⁶ In 2001, a much larger share of Indigenous persons were in the two lowest income quintiles (72 per cent) and a smaller share were in the highest quintile (5 per cent).⁶⁷

4 Social recognition, economic development and native title

Having outlined a range of features of native title, and summarised information about the population of Indigenous Australians and various social and economic indicators that identify aspects of their disadvantage compared with many other Australians, I turn to consider those aspects of native title that can provide social recognition and potential for economic development for at least some Indigenous Australians.

To put those matters in context it is useful to consider the objects and policy of the Native Title Act.

(a) *The objects and policy of the Native Title Act*

The preamble to the Native Title Act sets out in some detail ‘policy considerations taken into account by the Parliament of Australia in enacting’ the Act.⁶⁸ The preamble also shows the balancing exercise. It recites, for example:

- the intention ‘to rectify the consequences of past injustices’ by ‘special measures ... for securing the adequate advancement and protection of Aboriginal peoples and Torres Strait Islanders’

⁶⁵ Steering Committee for the Review of Government Service Provision 2005, *Overcoming Indigenous Disadvantage: Key Indicators 2005 Report*, pp11.11-11.15.

⁶⁶ Australian Bureau of Statistics 2003, *Population Characteristics: Aboriginal and Torres Strait Islander Australians 2001*, Cat No 4713.0, pp84-85.

⁶⁷ Australian Bureau of Statistics 2003, *Population Characteristics: Aboriginal and Torres Strait Islander Australians 2001*, Cat No 4713.0, p83.

⁶⁸ As one Federal Court judge has observed: ‘Parliament has taken the unusual step of providing an extensive preamble to the Act so that the purposes of the Act may be clearly revealed. Consideration of the preamble is not a source of restriction of general provisions of the Act but is an aid to understanding the purpose and object of such a provision. The preamble is part of the context in which the provisions of the Act are construed.’ *Brownley v Western Australia (No 1)* (1999) 95 FCR 152 at 160 per Lee J citing *North Galanjanja Aboriginal Corporation v Queensland* (1996) 185 CLR 595 at 614 per Brennan CJ, Dawson, Toohey, Gaudron and Gummow JJ, 637 per McHugh J; *Wacando v Commonwealth* (1981) 148 CLR 1 at 23 per Mason J.

- the intention ‘to ensure that Aboriginal peoples and Torres Strait Islanders receive the full recognition and status within the Australian nation to which history, their prior rights and interests, and their rich and diverse culture fully entitle them to aspire’
- the importance of ensuring that ‘native title holders are now able to fully enjoy their rights and interests’ by supplementing their rights and interests under the common law with a scheme for future acts ‘to be validly done’, preferably by securing ‘the agreement of the native title holders through a special right to negotiate’, and
- the importance of providing ‘the broader Australian community ... with certainty that such acts may be validly done’.

The Act, along with other legislative and policy initiatives, was ‘intended to further advance the process of reconciliation among all Australians’.

The objects of the Act, as originally enacted, were:

- (a) to provide for the recognition and protection of native title; and
- (b) to establish ways in which future dealings affecting native title may proceed and set standards for those dealings; and
- (c) to establish a mechanism for determining claims to native title; and
- (d) to provide for, or permit, the validation of past acts invalidated because of the existence of native title.⁶⁹

Those objects also provide an indication of the balancing exercise that the Parliament went through in enacting the new scheme.

Whether the right balance was struck was, and to some extent continues to be, a matter for debate. But more than 13 years down the track, we are much more experienced in how the scheme operates and what outcomes can be achieved, often by agreement.

(b) Social benefits

Statistics about the areas covered by successful native title claims tell only part of the story. People are involved at every stage in the proceedings. The process of negotiating native title agreements can result in the creation or strengthening of relationships that can be as valuable as the agreements reached.

One should not underestimate the social and psychological benefits for a group of Aboriginal people or Torres Strait Islanders of being recognised as the people for a particular area by the Australian legal system and, through those formal processes, by the rest of Australia.

For some groups who have received native title recognition, the social and psychological benefits to them are profound, irrespective of any economic benefits.

⁶⁹ *Native Title Act 1993* s3. One of the objects was amended in 1998 to read: ‘to provide for, or permit, the validation of past acts, and intermediate period acts, invalidated because of the existence of native title,’: *Native Title Act 1993* s3(d).

This is land where the rights of a specific group have been recognised by others for the first time in more than two hundred years. So far as the broader community is concerned it has gone from being *terra nullius* – no one's land – to the land where a living, identifiable community or group has rights and interests.

As a result of the native title process, the broader community has, through its legal institutions, recognised belatedly what the local Indigenous people have always known – that this is their traditional country. They can now stand tall.

Yvonne Stewart, an Arakwal woman from Byron Bay in New South Wales, said:

No-one cared about the traditional owners of Byron Bay before native title. We weren't even invited to be involved in the land management decisions before. It took native title to open their eyes because Byron Bay has never really seen a big Aboriginal community before. They didn't have to deal with it before.

Our mob is walking around much prouder with their heads up. People smile much more now. There's worth put back into our people. There was never any respect before. Mabo made us believe it was possible. That gave us the right to speak. There was no other way before that.

Terry Waia, chairperson of the Torres Strait Regional Authority, expressed his people's response in these terms:

knowing that our native title rights have been legally recognised, is a good feeling. When people saw the official documents signed off and that our native title rights were legally recognised, it gave people a good feeling. To the old people it is like a dream come true.

As a result of the native title process in parts of Australia, some groups have renewed relationships with each other and have strengthened their cultural ties to areas of traditional land.⁷⁰

Nor does the tide of history only flow one way. Although, after lengthy court proceedings, the Yorta Yorta people failed to prove their native title, they have since negotiated ways of working in partnership with the State. Less than two years after the High Court ruled against them, they entered an agreement with the State of Victoria to be formally involved in the management of designated areas of their traditional lands and waters.

The State recognised that the Yorta Yorta peoples are the 'traditional owners of and have a unique inherent relationship with and responsibility to their country'. The State and the Yorta

⁷⁰ In an early land rights case, Justice Brennan observed: 'As Aboriginal tradition within a local descent group is eroded or renewed with the passing of time, so the strength of the group's spiritual affiliations to sites on their land and their spiritual responsibility for those sites and for that land may wane or wax.' *R v Toohey; Ex parte Meneling Station Pty Ltd* (1982) 158 CLR at 359, 44 ALR 63 at 89.

Yorta Nation of Peoples agreed to work together to ensure the Yorta Yorta Peoples' informed consent and long term participation in land and water management over Yorta Yorta country. Each party agrees to adopt a 'flexible and learning approach' to each other.

(c) Economic benefits

Where native title exists, or people have a registered native title claim, the relevant group of Aboriginal people or Torres Strait Islanders acquire various procedural rights, including the right to negotiate with those who want to mine on the land.

Although native title itself is not 'title' and may not be an economically valuable commodity, significant economic benefits as well as heritage protection and other outcomes are being secured by groups as a by-product of native title processes. One benefit from those procedural rights can be the capacity to negotiate training, employment and business opportunities in relation to enterprises on particular areas of land, engagement in cultural heritage programs, and employment in national parks and other conservation areas.

People are using their procedural rights under the Act and other legislation to negotiate agreements before, after, and independently of a determination of native title. In a broader sense, some Aboriginal people and Torres Strait Islanders are involved in negotiations about matters, in ways and with people that could not have been imagined a decade ago. There has been a change in the mindset of many Australians, particularly in key industries, so that it is increasingly part of day-to-day business to engage in discussions or negotiations with Indigenous people about a range of land use matters.

Many of those negotiations proceed irrespective of whether the group has proved or can prove that it has native title. Indeed, many agreements (including Indigenous Land Use Agreements or ILUAs) are made long before native title is shown to exist and, potentially at least, with groups who could not prove that they have native title. Business can then proceed without the delay of waiting for claims to be resolved, Indigenous groups can benefit from the agreements, and relationships can be created or strengthened.

Some sectors have moved beyond strict compliance with the law to try to establish sustainable partnerships with local Indigenous communities.

The Minerals Council of Australia (MCA) has noted that 60 per cent of minerals operations in Australia are neighbours with Indigenous communities. The MCA has also noted that with Indigenous populations in remote regions growing at nearly three times the national average, 'there are significant potential challenges and opportunities for both companies and communities'. The most significant opportunities for mineral companies will be made through increasing recognition of the common ground existing between mineral companies operating in remote locations, and their neighbouring Indigenous communities seeking socio-economic development opportunities'.⁷¹ According to the MCA:

⁷¹ Minerals Council of Australia, *Indigenous Relations Strategic Framework*, December 2004, p3.

Contributing to socio-economic outcomes for remote communities is not only a key part of the industry's policy for reasons of equity and regional sustainability, but it is critical to the on-going effective operations of minerals companies through the proactive management of community risk.⁷²

The change in outlook is reflected in various statements on behalf of the mining industry. The Memorandum of Understanding signed by the Mineral Council of Australia and the Australian Government in June 2005 provides for a partnership between them 'to work together with Indigenous people to build sustainable, prosperous communities in which individuals can create and take up social, employment and business opportunities in mining regions'. Among the outcomes that the activities under the MOU are meant to deliver are increased employability and jobs for Indigenous people, increased business enterprises for them, and prosperous Indigenous individuals and families, and communities that endure beyond the life of mining in the relevant regions.

For some industries, particularly the resources sector, a resident community with strong traditional ties to an area may provide a stable source of employees or business contractors. That in turn depends on such factors as the size of the community, the age range of members of the community and whether the people have sufficient health, education and relevant skills for the purpose. In other words, there may be real opportunities for economic development in a community of native title holders so long as people have or can acquire the relevant knowledge and skills.

Australia, particularly the minerals and energy sector of the economy, is experiencing a substantial and growing demand for resources from trading partners. That demand creates the need for employees, including people who are educated and trained across a wide range of relevant professional and technical disciplines.

The resources boom also encourages the development of associated infrastructure. These and other works create potential employment and business opportunities for Indigenous groups, including those who live on or near the land where these activities occur. The challenge is to grasp the opportunities presented by the current global demand for Australia's natural resources and provide opportunities for real, and long term, economic advancement of Indigenous people.

In Victoria, a set of model agreements about native title and mining have been negotiated between representatives of the resources sector, Native Title Services Victoria and the Victorian Government.

Using those model agreements, the Minerals Council of Australia's Victorian branch and the Dja Dja Wurrung people developed an ILUA over 16,820 square kilometres in central Victoria. Another ILUA was developed between the Minerals Council of Australia's Victorian branch and the Wamba Wamba, Barapa Barapa and Wadi Wadi peoples over 12,028 square kilometres in the Swan Hill area.

⁷² Minerals Council of Australia, *Indigenous Relations Strategic Framework*, December 2004, p5.

Both ILUAs set out standard terms and conditions that explorers seeking a tenement grant can choose to adopt, rather than enter into negotiations with traditional owners on a tenement by tenement basis.

These terms and conditions include the payment of financial benefits to native title claimants, cultural heritage management procedures, the establishment of a liaison committee and requirements to keep the native title party informed of certain developments such as the lodgement of work plans.

If an exploration or mining company seeking a new exploration licence is happy to comply with the terms and conditions they can simply sign a deed of assumption that binds them to the terms of the ILUA.

Employment and business opportunities for native title claimants or holders can arise in a range of other activities. For example, an ILUA between Mildura Rural City Council and the Latji Latji People, witnessed by Victorian Premier Steve Bracks, gives the Latji Latji access to employment and training opportunities during the development of the marina, a shop in the marina site, space for a cultural display in the Alfred Deakin Centre in Mildura and formal acknowledgement of Latji Latji as traditional owners at council events and signage throughout Latji Latji country.

An ILUA registered in May 2006 in relation to a proposed golf course and resort development in Creswick in rural Victoria, provides employment and training opportunities for the Dja Dja Wurrung people, a commitment to display and sell local Indigenous art, and signage around the golf course and resort to explain Dja Dja Wurrung cultural heritage to resort guests. Cultural management plans have been developed under the ILUA which also delivers financial benefits to the Dja Dja Wurrung people.

5 Conclusion

I have often expressed the view that far too great a weight of expectation has been put on native title to deliver what it was not capable of delivering. Native title was never going to provide extensive outcomes for all Indigenous Australians. There are substantial areas of Australia where native title will not be recognised. That much was clear from the High Court's judgments in *Mabo (No 2)* and is apparent from the Preamble to the Act which states, among other things:

It is important to recognise 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...

On that basis the Preamble recites that 'a special fund needs to be established to assist them to acquire land'. Subsequently, the Aboriginal and Torres Strait Islander Land Fund and the Indigenous Land Corporation were established to do, in part at least, what native title laws would not and could not achieve.

Yet native title can provide real outcomes for many Indigenous Australians, and can provide the platform for negotiating other outcomes. In his judgment at the end of the long-running Rubibi native title litigation, Justice Merkel drew to the attention of at least the state parties and the Indigenous parties 'the desirability of seeing the resolution of native title claims as a means to an end, rather than an end in itself'. As his Honour stated:

Achieving native title to traditional country can lead to the enhancement of self respect, identity and pride for Indigenous communities. However, native title can also be seen as a means of Indigenous people participating in a more effective way in the economic, social and educational benefits that are available in contemporary Australia. Obtaining a final determination of native title, where that is achievable, can be a stepping stone to securing those outcomes but cannot, of itself, secure them.⁷³

Such statements reflect an increasing trend to see native title within a broader social, economic and legal context.

Is native title a means of overcoming Indigenous disadvantage? The answer is a qualified yes.

Although native title will not be recognised over much of the land mass of Australia, especially in those areas where most Indigenous Australians live, it has been recognised over substantial areas in remote Australia and some pockets of more densely populated regions. More determinations that native title exists are expected in the future, many of them by agreement of the parties. Those determinations give formal recognition to traditional links to country which Indigenous Australians have always known, but which others have sometimes failed to see or been slow to acknowledge. That recognition can give local groups of Indigenous Australians a reason to stand tall on their traditional country, and can enable strong relationships to be built with the broader community.

Although native title is not itself a tradeable commodity, registered native title claims or determinations that native title exists provide the basis for identified groups of Indigenous Australians to negotiate with others who wish to use those areas of land. From those negotiations can flow further recognition, training, employment and other economic opportunities.

More broadly, the recognition and acceptance of native title as part of the legal, social and business landscape of Australia has meant that enterprises big and small, and governments at all levels, are engaging with local groups of Indigenous Australians in ways that did not occur a decade or so ago – and whether or not they are legally obliged to do so. Many Indigenous Australians have a seat at the negotiating table and so can have a say about what happens on their traditional country. Indigenous businesses are being created and groups are playing a more significant part in the mainstream economy.

Native title never was and never will be a panacea for all or even most of the sources of Indigenous disadvantage. But it has provided a platform for recognising and respecting

⁷³ *Rubibi Community v Western Australia (No 7)* [2006] FCA459 at [166].

Indigenous Australians and, as a by-product, is creating economic and other opportunities for some groups.

The primary purpose of the National Native Title Tribunal is to work with people to resolve native title issues over land and waters.⁷⁴ We are heartened by what has been achieved to date, and we are challenged daily to help people negotiate just and enduring outcomes so that, in various ways, and we not only address at least some of the issues facing Indigenous Australians but we 'advance the process of reconciliation among all Australians'.⁷⁵

⁷⁴ National Native Title Tribunal, *Strategic Plan 2006-2008*.

⁷⁵ *Native Title Act 1993* preamble.