In North America, many hundreds of native title cases have come before the courts since the 1820s when the Supreme Court first defined the concept. It is not surprising, then, that Australian courts have considered numerous native title cases since 1992 relating to matters not directly relevant to the Mabo judgment itself or only treated at the time in a general way. For his part, Eddie Mabo was intensely interested in claiming his traditional rights to the waters surrounding the Murray and Darnley islands and the related question of fishing and hunting among the offshore reefs and rocky outcrops. They were not pursued in his own case, but were taken up by other individuals and communities later in the 1990s.

In October 1999 the High Court delivered its judgment in the case of Yanner v. Eaton which related to the traditional right to hunt and the extent to which it was controlled by state (in this case, Queensland’s) fauna protection legislation. How the case reached the High Court can be quickly outlined. Murandoo Yarmer, a Ganggalida man from Queensland’s Gulf Country, went hunting late in 1994 with members of his Gunnamulia clan. On two separate occasions the party took juvenile crocodiles from Cliffdale Creek, ate some of the meat and took both meat and skins home to put them in their freezers. Yarmer’s house was raided by Queensland police officers and he was charged before the Mount Isa Magistrates Court with having taken the crocodiles while not holding a licence or permit issued under the authority of the Fauna Conservation Act.

Perhaps to the surprise of many people the magistrate dismissed the charge. He concluded that Yanner’s clan had been hunting crocodiles from before the time that the common law was introduced in Queensland and that the taking of juveniles had totemic significance, The Fauna Act did not prohibit or restrict native title holders from gaining access to the land or waters for the purpose of satisfying their personal, domestic or non-commercial communal needs and in exercise or enjoyment of their native title rights and interests.

The Queensland government took the case to the state’s Court of Appeal and won. The matter was remitted back to the Magistrates Court. Before this took place Yanner was given special leave to appeal to the High Court, where he won by a five to two majority.

During the proceedings many critical questions relating to the nature of native title were discussed. The Queensland and Commonwealth governments argued that the Fauna Act gave the Crown full, beneficial and
absolute ownership of all wild fauna and had therefore extinguished any pre-existing native title rights. The majority of judges took the view, common in similar cases in Canada and New Zealand, that legislation which regulated fishing and hunting could not be construed as extinguishing native title rights as recognised by the Native Title Act, which passed through the Federal Parliament in

There was a similar result when the question of sea rights came before the High Court in the case of *The Commonwealth v. Yarmirr* in October 2001. It concerned the waters surrounding a group of small islands of which Croker is the largest lying off the coast of northwest Arnhem Land, roughly 200 kilometers from Darwin. The local estate groups or Yurwurrumu had received title to their land under the 1976 Northern Territory Land Rights Act. They now wanted their native title recognised over adjacent waters, much of it coming within the three nautical mile limit, asserting exclusive rights of ownership, occupancy, possession and use of the area in question.

Like other ‘saltwater people’ the Croker Islanders regarded the adjacent seas as much their property as the land. The leading academic authority on the subject, Nonie Sharp, explained that the ‘rich and diverse sea traditions and beliefs’ of the saltwater people of tropical Australia share a number of common themes. Property in the sea is inherited from ancestors. The tenures are clan-owned, extending across the foreshore to home reefs and lagoons. Mary Yarmirr, the first respondent in the Croker Island case, told the court that her clan’s sea territory extended ‘as far as my eyes can see’. Spiritual inheritances from the sea itself link living saltwater peoples with the Creator Spirit Beings, sea deities and culture heroes whose sea journeys mark out sea territories and who remain ongoing presences. The saltwater people have comprehensive knowledge of the maritime territory — of tides and currents, reefs and channels, fish and shellfish and mammals.

1993. Queensland’s Fauna Act did not prohibit Yanner from ‘hunting or fishing for the crocodiles he took for satisfying personal, domestic or non-commercial communal needs’? Unless native title had been explicitly extinguished, it had survived.

In their submission to the Federal Court, anthropologists retained by the Croker Islanders listed the rights and interests, which were claimed. They included the right of senior members of the Yurwurrumu to:

- be recognised as the traditional owners of the estate, including the seabed, the water and all life within it
- transmit all the inherited rights, interests and duties to subsequent generations, and to exclude or restrict others from entering any area of the estate
• control the use of and access to the subsistence and other resources, including the ritual resources, of the
estate by all people including younger members of the Yurwurrumu and to engage in the trade and
exchange of estate resources
• close off areas of the estate on the death of members and to decide when they shall be reopened to use
• speak for and make decisions about the significant places in
• the estate
• receive, possess and safeguard the cultural and religious knowledge associated with the estate and . . . to
pass it on to the
• younger generation
• speak for and make decisions about the State’s resources, and
the use of those resources, and the right and duties to safeguard them.

The Croker Islanders lodged a native title claim in November 1994 and it was heard in the Federal Court in
1997. Justice Olney accepted that native title existed over all the areas of the sea and the seabed as claimed
and in doing so rejected the contention of the Commonwealth that because the common law only applies as far
as low water mark there could be no native title beyond that point. But the title was limited in a number of
important ways. Use of the traditional areas was restricted to personal, domestic or non-commercial fishing for
subsistence or cultural purposes, and to protecting places of cultural and spiritual knowledge.

But most significantly the court rejected any claim to exclusive possession or occupation of the sea because
such power of exclusion would fly in the face of the right recognised universally in international law of so-
called ‘innocent passage’ and of ancient common law rights to navigate and to fish. It was a result, which
satisfied neither side of the argument. The Commonwealth and Northern Territory governments asked the full
Federal Court to strike down native title - the Croker Islanders to strengthen it. But the case emerged from the
court in much the same way that it had entered it. A final appeal to the High Court brought little change. The
bench split in three ways. Justices Callinan and McHugh found for the Commonwealth and would have struck
down native title. Justice Kirby believed that native tide rights should be considerably strengthened while still
co-existing with rights to fish and right of passage. ‘The result I favour in this case,’ he wrote, ‘is scarcely a
surprising one’:

Indeed it appears a reasonable and just one. In the remote and sparsely inhabited north of Australia is a group
of Aboriginal Australians living according to their own traditions. Within that group, as the primary judge
[Justice Olney] accepted they observe their traditional laws and customs as their forebears have done for
untold centuries before Australia’s modern legal system arrived. They have ‘a sea country’ and claim to possess it exclusively for the group. They rely on, and extract, resources from the sea and accord particular areas spiritual respect. The sea is essential to their survival as a group. In earlier times, they could not fight off the ‘white man’ with his superior arms; but now the ‘white man’s’ laws have changed to give them, under certain conditions, the superior arms of legal protection. They yield their rights in their ‘sea country’ to rights to navigation, in and through the area, allowed under international and Australian law, and to licensed fishing, allowed under statute. But, otherwise, they assert a present right under their own laws and customs, now protected by the ‘white man’s’ law, to insist on effective consultation and a power of veto over other fishing, tourism, resource exploration and like activities within their sea country because it is theirs and is now protected by Australian law. If that right is upheld, it will have obvious economic consequences for them to determine — just as the rights of other Australians, in their title holdings, afford them entitlements that they may exercise and exploit or withhold as they decide. The situation of this group of Indigenous Australians appears to be precisely that for which Mabo was decided and the Act enacted. The opinion to the contrary is unduly narrow.  

But Kirby’s eloquent appeal won no converts on the bench. The majority judgment of justices Gleeson, Gaudron, Gummow and Hayne upheld the Federal Court findings that there was a fundamental inconsistency between the asserted native title rights and interests and the common law public rights of fishing and navigation. ‘These two sets of rights,’ they declared, ‘cannot stand together’, 6

A central question in all discussion of native tide is that of extinguishment. In Mabo the High Court determined that Aborigines and Islanders were in possession of the continent when at various times the British claimed sovereignty over the land mass. The incoming common law gave protection to native title but over a long period of time it was gradually extinguished in favour of the incoming settlers. How and when extinguishment happened is an important question for Indigenous people, jurists and historians alike. It has been considered in a number of cases that have reached the High Court, notably Fejo and Mills v. The Northern Territory, Western Australia v. Ward, and The Yorta Yorta Aboriginal Community v Victoria.

Yorta Yorta

The Yorta Yorta case was initiated in February 1994 when the community lodged an application with the Native Title Tribunal. It was accepted and in September a mediation process was initiated, beginning with a conference in the Shepparton Town Hall followed by meetings in other towns in the region. Wayne Atkinson,
a leading member of the Yorta Yorta community, recalled the opening of the Shepparton meeting:

The Yorta Yorta presentations went to the heart of what it is to be Yorta Yorta. We raised the big issues about land care and management and spoke of the degrading treatment of the waterways, and the loss of plant and animal life. Some of the elders spoke of the land, and of the ancient forests looking tired and in need of rest. In hindsight, it felt as though the tide of history was at least turning in our favour. It felt as though we were on the edge of a new start. ¹

But the mediation process broke down and in May 1995 the claim was referred to the Federal Court.

The Yorta Yorta claim related to scattered areas of crown land within the traditional ancestral territory straddling the Murray River, including the Barmah and Moira state forests and land around the Goulburn and Ovens rivers. The case attracted intense interest. It was the first one to relate to native title within an area of close settlement. Many individuals and interest groups ranged up against the Yorta Yorta claim. In all, 470 opponents came forward including cattlemen, water users, timber millers, recreational fishermen, beekeepers, municipal councils and state governments. The case was also the first one to be mounted by a community that had been dispossessed of much of its land by the middle of the nineteenth century.

For seven years *The Yorta Yorta Aboriginal Community v. Victoria* made its way through three hearings — before a single judge in the Federal Court, the full Federal Court and finally the High Court, which handed down its decision in December 2002. In all, eleven judges considered the question. Only one of the three judges in the full Federal Court and two of seven in the High Court were willing to accept that the community had made a valid native title claim. Though criticised in detail by his colleagues, the original trial judge, Justice Olney, put his stamp on the case from the beginning.

He argued that the claimant group had failed what he termed the ‘test of occupation’, a state of affairs which had existed for over a century for notwithstanding the genuine efforts of members of the claimant group to revive the lost culture of their ancestors, native title rights and interests once lost are not capable of revival. Traditional native title having expired, the Crown’s radical title expanded to a full beneficial title.

The point was driven home in numerous related passages, all of which doomed the Yorta Yorta quest for native title. Olney declared that the evidence did not support a finding that the descendants of the original inhabitants of the claimed land have occupied the land in the relevant sense since 1788 nor that they have...
continued to observe and acknowledge, throughout that period, the traditional laws and customs in relation to land of their forebears. The facts in this case led inevitably to the conclusions that before the end of the nineteenth century the ancestors through whom the claimants claim title had ceased to occupy their traditional lands in accordance with their traditional laws and customs. The tide of history has indeed washed away any real acknowledgement of their traditional laws and any real observance of their traditional customs. The foundation of the claim to native title in relation to land previously occupied by those ancestors having disappeared, the native title rights and interests previously enjoyed are not capable of revival.’

Olney’s judgment faced some criticism as it was considered in the higher courts. It was thought that he applied conditions which made it almost impossible to prove cultural continuity; that he privileged European written accounts over Aboriginal oral testimony; and that he did not focus sufficiently on current laws and customs as required by the Native Title Act which, Justice Kirby pointed out, related to the question of whether the YortaYorta people ‘now acknowledge and observe traditional laws and customs by which they have a connection with the land and waters claimed by them’. But, if anything, the fact that the original judgment was upheld despite accompanying criticism emphasised how emphatic the defeat of the Yorta Yorta was and how significant it was in relation to any future native title claims to emerge from areas of early European settlement. As if to emphasise the critical point, Justice Olney referred four times to the impact of ‘the tides of history’ washing away any hope that many communities had that they could achieve recognition of their land rights by following a path through the courts blazed by Eddie Mabo and his legal team. Those groups who had felt the impact of settlement most severely and for the longest period of time were the very ones who could expect least from the native title process. That was the inescapable conclusion following the High Court’s rejection of the Yorta Yorta claim by a five to two majority in December 2002.

The Larrakia people of the Darwin area suffered a similar defeat in the High Court in September 1998 in *Fefo v. The Northern Territory*. They had sought to establish their native title over land within the Darwin metropolitan area and to prevent its subdivision by the territory government. The land in dispute had been granted in fee simple by the South Australian government in 1882 but had been compulsorily acquired by the Commonwealth in 1927. It was not used as planned and in 1980 it once again became vacant crown land. In December 1997 the Larrakia people sought a declaration from the Federal Court recognising their native title.

There were, then, only two substantial issues to be considered by the High Court when the case was presented. The first was whether a grant of freehold extinguishes native title so that no form of native title can co-exist with freehold title. The second was whether extinguishment was permanent and absolute or if it was possible
for native title to revive or be re-recognised when the land returned to the Crown. The court’s answer was both simple and emphatic. Six judges provided a joint judgment. Justice Kirby wrote one of his own. But all were of one mind. Native title was completely extinguished by the grant of a freehold estate. No co-existing or concurrent rights could survive, not because of the actual use of the land in question but because of the legal rights conferred by the respective titles. The grant of freehold extinguished native title permanently, regardless of the land being held by the Crown in the future. Native title cannot revive after the grant of a freehold title even if the Indigenous society in-question and Indigenous law survives.

Most interest attached to the individual judgment of Justice Kirby, the most liberal member of the bench. However, if anything, his arguments were more emphatic than those of his colleagues. He argued that there were two basic considerations in the court’s decision. The first was that a court should not destroy or contradict an important and settled principle of the legal system. The second, that in every society rights in land which afford an enforceable entitlement to exclusive possession were basic to social peace and order ‘as well as to economic investment and prosperity’. There was a fundamental inconsistency between fee simple and native title. Kirby explained that the inconsistency lies not in the facts or in the way the land is actually used. It lies in a comparison between the inherently fragile native title right, susceptible to extinguishment or defeasance, and the legal rights which fee simple confers.”

These principles were not affected by the actual use of the land — by the facts on the ground. Unused, unoccupied land held under freehold title could wipe out native title even while traditional owners continued to live there and an absentee title holder didn’t. ‘Doubtless,’ Kirby observed, ‘the bundle of interests we now call native title would continue, for a time at least, within the world of Aboriginal custom’. He conceded that such Aboriginal interests might ‘still do so’. But all to no avail. In his peroration he declared

Legal history, authority and principle therefore combine. But they are also supported by considerations of legal policy Native title is extinguished by a grant in fee simple. This statement of law must be taken as settled. It does not admit of qualification.

Rather than bringing the debate to an end, Kirby’s determination to see the whole matter as settled raises more questions than it answers. What, for instance, are the unexplained ‘considerations of legal policy’? Are we to assume this is a roundabout way of referring to politics? Was the High Court reacting to the uproar that followed the Wik judgment still at its height when the Fejo case was being considered — to the twp-pronged attack on the court’s so-called ‘judicial activism’ and the widely expressed, sedulously fanned fears about sub-
urban backyards?

It was as though the need to allay land owners’ insecurities led to a policy of isolating native title from any outside source of jurisprudential support — either from the common law or from native title traditions in comparable countries. The critical question at hand was whether a freehold title could be encumbered by an unextinguished native tide. The political sensitivity of the question in the late 1990s scarcely needs emphasising. But the common law has innumerable devices directly relevant to the matter. Titles can be, and are, encumbered with easements, rights of way, profits and a whole range of unwritten customary rights, which do not derive from legislation. English property law allows for many situations where competing or complementary rights can co-exist. The fact that native title had its origins outside the common law does not seem to provide a convincing case for how it should be protected once it comes within it. This was surely true of a vast array of customary law and of land titles in the Celtic fringe of the United Kingdom that were quite different from fee simple — titles in Ireland, the Isle of Man, and the Shetland and Orkney islands, for instance. Kirby argues as though the extraordinary flexibility of British property law lost its character when it was brought to Australia. The very flexibility that was the product of the slow expansion of English power throughout the British Isles failed to operate when the same process of colonisation took place at the Antipodes. It is pertinent that the pastoral leases were created by Colonial Office officials steeped in British legal traditions.

Having insisted that British property law had no relevance to an understanding of the characteristics of native title, the High Court then turned its attention to the jurisprudential traditions of other settler societies. Here too any external buttress to native title was to be taken away. Kirby explained that care must be exercised in the use of judicial authorities of other former colonies and territories of the Crown ‘because of the peculiarities which exist in each of them arising out of historical and constitutional developments, the organisation of the indigenous people concerned and applicable geographical or social considerations’.

Kirby’s colleagues cut more quickly to the chase, declaring that

No guidance in these issues can be gleaned from comparative law. The position of indigenous peoples in Australia is distinguished from those in other common law jurisdictions.

What are we to make of this declaration of jurisprudential autarchy? If Australian conditions are so distinctive that native title law in other settler societies has no relevance, surely the same must be true of international human rights law?
And for anyone who has read the Mabo judgement, the pronouncement appears even stranger. The whole point of that judgment was that the bench reached beyond Australian law to consider cases from the United States, Canada and New Zealand and colonial cases, which reached the Privy Council. There could have been no judgment without this broadening out of Australian jurisprudence and the opening of it to native title traditions of the other settler societies. Do the remarks in the Fejo case suggest that this process is now at an end? That, having emerged from its provincial shell, Australian law is to retreat into isolation because other jurisdictions provide Indigenous people with rights, and protection of those rights, which would be politically embarrassing?

The difficulties inherent in the court’s position can be seen most clearly in relation to the question of the extinguishment of native title. Justice Kirby observed that the concept of extinguishment of Indigenous land rights as a result ‘of the advancing claims to legal title of the settlers’ originated in the decision Johnson v. McIntosh. ‘But what went unremarked was that American law demanded a far more rigorous test before extinguishment could be allowed and that it was quite possible for freehold title to be burdened by an unextinguished Indigenous interest. The principles involved were most clearly enunciated by Justice Douglas in the 1941 Supreme Court case United States v. Santa Fe Railway Co. The case arose from circumstances familiar in Australia. In 1866 a railway company was granted land occupied by the Walapai Indians, who held native title to the area. But because there was no extinguishment of the Indian interest, it remained as an ‘encumbrance’ on the fee simple, despite a change of ownership, and was still an encumbrance in 1941. The principle at stake has been reaffirmed in later cases. In Edwardson v. Morton the courts declared that Indian use and occupancy rights can be extinguished only by the United States acting through Congress, and until they are extinguished they remain as an encumbrance on the fee simple regardless of who holds it.’

Native title in North America seems to be a tougher form of tenure than the one the High Court has bestowed on Australia and can survive a grant of fee simple in a way not accorded the feeble Antipodean strain. Or perhaps fee simple is more voracious in Australia than anywhere else in the world. Justice Kirby enthusiastically proclaimed the feebleness of native title in Australia. ‘So fragile is native title,’ he declared, and so susceptible is it to extinguishment that the grant of a freehold tide ‘blows away the native title forever’.

That is a most convenient doctrine for a settler society to implant in its jurisprudence. If you can no longer sustain terra nullius in the face of world opinion, an ‘inherently fragile’ native title is the next thing. Having
given birth to native title, the High Court decided to bind its feet before it could develop any jurisprudential strength and mobility. The conquest and dispossession had to be confirmed, put beyond question. Nothing must be permitted to ‘cast doubt upon the validity of fee simple throughout Australia’ ~20

But the existence of a fragile title which can be blown away forever by the Crown has implications that have never been examined by the courts — and understandably so. A fragile tide inescapably implies a far from fragile, all-powerful sovereign — a Leviathan — who has powers to deal with the subjects’ property which would have warmed the heart of King John. In dealing with Indigenous subjects the Australian judiciary has accorded the Crown powers that have not been exercised in Britain for centuries. One of the fundamental aspects of the common law was the long developed capacity it provided to strictly limit the power of the Crown to diminish the property interest of the subject. Centuries of tradition have been cast aside in order to define a form of tenure, which the Crown can blow away forever. It should come as no surprise then that the High Court has advocated the use of blinkers to prevent litigants from looking beyond Australia, declaring that no guidance could be gleaned from comparative law when the matter of tenures comes up for review. It would not be entirely perverse to look back nostalgically to the days when appeals could be taken to the Privy Council which, by its very nature, has to consider comparative law.

The difficulty began with Mabo. This has been cogently argued by Kent McNeil, one of the world’s leading scholars in the field and whose book *Common Law Native Title* was widely consulted while the Mabo case was proceeding through the courts. His 1996 article, ‘Racial Discrimination and Unilateral Extinction of Native Title’, 2’ is a powerful *tour de force*. His argument is straightforward and considers the way in which the High Court dealt with the extinguishment of native title in the Mabo judgment.

McNeil begins with the axiomatic principle that the Crown can extinguish the title of the subject provided it has been effected by legislation and has been done in a clear and plain way. Where he takes issue with the court is in relation to the assumption that native title can be extinguished by the grant of a competing interest in land. Grounding his case in British legal precedent, he establishes that the Crown cannot extinguish the real property rights of its subjects by granting theft lands to others, unless it has unambiguous statutory authority to do so. In fact this ‘fundamental limitation on the Crown’s power’22 is the central theme of the paper. The Australian judges have argued that because native title is not a creature of the common law it is more susceptible to extinguishment than a title that is. McNeil argues and establishes that the protection of the common law ‘clearly extends to all pre-existing rights regardless of their source’ • 23 Consequently Justice Brennan’s assertion that native title can be extinguished by inconsistent crown grant because the tide does not
originates from a crown grant ‘is simply wrong’ 24 At common law, McNeil demonstrated the Crown does not have the power to extinguish any rights of its subjects, whatever theft source, by grant for hundreds of years the common law has provided the same protection to land titles which are not derived from grants as it has to titles that are.25

Because the High Court determined that native title could be extinguished in a way in which no other tenure was susceptible, McNeil concluded that the Mabo decision was highly discriminatory. His challenge is important and needs to be read at length:

We have seen that the majority in Mabo No. 2 decided that native title could be extinguished by unilateral executive action without any legal obligation to pay compensation. We have examined the explanations given for that decision, and found them to be wanting. Moreover, we have seen that the decision violates fundamental common law principles and conflicts with case law of high authority. Clear and plain statutory authority apart, the Crown simply does not have the power to extinguish legal rights to land, except for defence purposes in time of war, in which case compensation must be paid. Were the law otherwise private rights would be exposed to arbitrary executive action. The Crown would be able to commit what would amount to acts of state against its own subjects, and the rule of law would cease to be effective to protect property rights.

While these fundamental principles, which have been well established in the common law since at least the seventeenth century, are clearly part of Australian law, the majority in Mabo No. 2 chose not to apply them to Aborigines and Torres Strait Islanders. In doing so, the Court treated the indigenous people differently from other Australians. Where indigenous land rights are concerned, the Court created an exception to the rule that, statutory authority and wartime conditions apart, the Crown cannot derogate from existing rights by inconsistent grant or appropriation. This is clearly discriminatory.

Another striking and discriminatory feature of the Mabo judgment was the decision that the extinguishment of native title did not create any obligation to pay compensation. Once again this flies in the face of long-settled principles of the common law and ‘violates fundamental constitutional protections of the rights of subjects going back to Magna Carta’ ~27 The principal of compensation had been affirmed in African cases brought before the Privy Council - in much more recent times. In the 1957 case of Adeyinka Oyekan v. Musendiku Adele Lord Denning considered what he called the ‘guarding principles’ of British colonial law, remarking that in inquiring. . . what rights are recognised, there is one guiding principle. It is this: The courts will assume
that the British Crown intends that the rights of property of the inhabitants are to be fully respected. Whilst, therefore, the British Crown—as Sovereign, can make laws enabling it compulsorily to acquire land for public purposes, it will see that property compensation is awarded to every one of the inhabitants who has by native law an interest in it: and the courts will declare the inhabitants entitled to compensation according to their interests, even if those interests are of a kind unknown to English law. 18

The High Court’s decision to effectively pre-empt any attempt to seek compensation for historic injustice and the failure of government to provide alternative means to the same end can be contrasted to the situation in Canada, the United States and New Zealand.

In each country it was decided that contemporary standards demanded that all previous dealings with the Indigenous people should be open to scrutiny and, where necessary, compensation should be paid. Each set up a form of judicial tribunal to hear cases and assess the behavior of the past by the standards of today — the Americans in the 1940s, the Canadians in the 1970s, and the New Zealanders in the 1980s.

This process was undertaken despite the fact that in all three countries treaties had been negotiated and land had normally been purchased by the state. Indians and Maoris have been able to bring cases forward to prove that treaties and agreements in the past were unfair, or not fulfilled, or obtained by trickery or duress. New Zealand inquiries go back to 1840, American to 1790 and Canadian to the middle of the eighteenth century. Despite the inherent difficulties of the situation, the arguments in these countries have been about legal or quasi-legal documents, negotiated at a particular point in time with specific conditions, which can be reassessed and renegotiated. In North America hundreds of cases are involved. During its thirty-two-year life from 1946 to 1978, the United States Indian Claims Commission heard over 500 cases.

Many of them related to treaties signed in the nineteenth century, but by no means all of them. The Congress first faced the problem of Indians who had not signed treaties in the 1930s. In 1935 a number of Special Jurisdiction Acts were passed, which allowed Indian tribes to proceed in the Court of Claims against the United States in order to seek compensation for the loss of native title. The court was given power to hear, examine, adjudicate and enter judgment on all claims, which the Indians may have against the United States for lands taken from them by the United States without compensation, or from theft failure or refusal of the United States to protect the interest of the Indians in their lands or other property. 29

In 1946 Congress established the Indian Claims Commission to hear claims for compensation or restitution in
cases where treaties were unfair or had been violated and, more significantly for the Australian case, where the Indians had only moral claims on the state — ‘claims based upon fair and honorable dealings that are not recognised by any existing rule of law or equity’ 30

The phrase ‘fair and honorable’ dealing in the Indian Claims Commission Act played an important role in a variety of court cases that are of great relevance to the situation of the Aborigines in the Australian legal system. The vexed question of forced removal from traditional lands came before the courts in the 1967 case of Lipan Apache Tribe v The United States. The Apaches claimed that they had been driven from their lands in 1858—59 by United States forces acting in concert with Texan settlers. The Court of Claims concluded that if the facts of the matter could be established, the Indians would have a legitimate claim for compensation.31

Similar standards were applied in other cases where Indian tribes had lost their land in the absence of a treaty and without compensation. In 1946 the Oregon Alcea Band of Tillamooks took the United States to court, claiming compensation for the loss of their land in the 1850s. The Supreme Court concluded that taking original Indian title without compensation and without consent does not satisfy the ‘high standards and fair dealing’ required of the United States in controlling Indians Affairs. The Indians have more than a moral claim for compensation.32

Developments have followed a similar course in Canada. Since the early 1970s, Indian communities have been able to take claims to a Special Claims Branch of the Department of Indian Affairs when they have a grievance relating to the treaties signed with colonial and federal governments. In 1991 a specific claims commission was established to speed up the process of research and negotiation. But of more interest to Australians is the comprehensive claims process, which since 1973 has dealt with Indian and Inuit communities in the Yukon, North West Territories and northern Quebec, where treaties were never negotiated.

This process was set in motion by the Supreme Court’s judgment in the Calder case in 1973. It had strong similarities with the Mabo case. Six of the seven judges concluded that native title had existed in British Columbia, despite the absence of treaties in the province. Three of the six believed that native title persisted, while three argued that it had been extinguished at some point after European settlement by assorted legislative and executive actions of the colonial government. Prior to this judgment it had been widely believed that Indian rights only existed if they had been recognised by treaty. The Calder decision clearly suggested that unextinguished native title existed, not just in British Columbia, but right across the north of the
country as well.

The Canadian federal government responded to the decision six months after it was handed down. The intention was to enter into a series of agreements that, after negotiation, would see the Indians and Inuit agree to a ‘release of the general and undefined native tide’ in return for freehold title to a proportion of the land in question; compensation, hunting and fishing rights. In a policy statement, the Minister for Indian Affairs declared:

The Government is now ready to negotiate with authorised representatives of these native peoples on the basis that where their traditional interests in the lands can be established, an agreed form of compensation or benefit will be provided to native peoples in return for their interest.  

Since then the process of modern treaty-making has dealt with Indian, Inuit and Metis communities in British Columbia, Quebec and right across the north. Settlements have dealt with much more than land and have included compensation, hunting and fishing rights, resource development, environmental protection, service delivery and self-government.

New Zealand’s Waitangi Tribunal was established in 1975 to determine whether or not the Crown had complied with its obligations under the Treaty of Waitangi of 1840. For the first ten years the tribunal was restricted to the investigation of contemporary claims, but in 1985 the relevant Act was amended to allow for retrospective grievances to be examined, extending the brief to include all actions and policies of the Crown since 1840. Understandably the tribunal has been overwhelmed with hundreds of claims. The attendant frustration has affected the standing of the tribunal but among many things it has commissioned large-scale historical research of a kind that in Australia has been reserved for military history. Several large settlements have been reached which should be much better known in Australia. The Tainui tribe of the Waikato district sought redress for thousands of hectares of land confiscated after the New Zealand Wars of the 1860s. The settlement of 1995 included a cash payment of NZ$70 million and the return of 19000 hectares of land worth approximately NZ$100 million. As part of the settlement the Crown issued a formal apology for historic wrong doing which read in part:

1. The Crown acknowledges that its representatives and advisers acted unjustly and in breach of the Treaty of Waitangi in its dealings with the Kiingitanao and Waikato in sending its forces across the Mangataawhiri in July 1863 and in unfairly labelling Waikato as rebels.
2. The Crown expresses its profound regret and apologises unreservedly for the loss of lives because of the hostilities arising from its invasion, and at the devastation of property and social life, which resulted.

3. The Crown acknowledges that the subsequent confiscations of land and resources under the New Zealand Settlements Act 1863 . . . were wrongful, have caused the Waikato to the present time to suffer feelings in relation to their lost land akin to those of orphans, and have had a crippling impact on the welfare, economy and development of the Waikato.34

**Conclusion**

As I write it is almost eleven years since the High Court handed down its decision in the Mabo case. I often wonder what Eddie Mabo would have thought of the judgment and the subsequent developments. Many years ago, before the case began, I used to jokingly tell him that he would one day become famous. I’m sure neither of us imagined that his name would become known not just in Australia but overseas, and that his case would be regarded as a symbol of the global struggle for Indigenous peoples’ rights. Some aspects of his fame would have delighted him: in particular, I think of the T-shirts that were worn by Murray Islanders for years after the case concluded. They bore a picture of Eddie along with the slogan: ‘Captain Cook Stole Our Land - Eddie Mabo Got it Back’.

He would also have been pleased that following his lead, the native title process has made more progress in the Torres Strait than anywhere else in the country. In 1999 and 2000 there were seven consensual determinations of native title on Moa, Saibai, Dauan, Mabuiag and Coconut islands, and the York Islands. He would have strongly supported Murando Yanner’s right to carry out traditional hunting practices and would have celebrated his win in the High Court. The Croker Island decision would have angered him with its limited recognition of sea rights, and he would have been deeply frustrated that so little progress has been made towards the creation of an autonomous self-governing region in the Torres Strait on the model of Norfolk Island.

Having devoted the last ten years of his life to the long campaign through the courts — back and forth between the Queensland Supreme Court and the High Court — Eddie would not have been entirely surprised that everything has taken so long; that so little has been achieved despite the huge investment in time and
money. No doubt the eleventh anniversary will lead to many critical assessments of the native title process, the lack of progress, and the hundreds of outstanding claims.

What will have been achieved by then? A handful of cases where native tide has been affirmed in the courts; some agreements outside them; a few land-use agreements and negotiated contracts between native tide holders and resource companies. Their significance should not be underestimated. But it is so much less than many people hoped for and expected in those heady days in June 1992.

Native tide itself, whether achieved under the aegis of the federal Native Title Act of 1993 or the earlier Northern Territory legislation of 1986, has not necessarily improved conditions in land-holding communities. In some places they may have deteriorated. The Canadian way of proceedings seems now to have been preferable, where land tenure was settled alongside all those other questions which determine the viability of usually remote communities — service delivery, local government, funding, resource development.

Having lived most of his adult life in north Queensland, Eddie would not have been surprised by the vehemence of opposition to native tide. The Queensland government legislated to extinguish all property rights of Torres Strait Islanders in 1986 and would have succeeded if the High Court hadn’t stepped in and struck down the Coastal Lands Declaratory Act by a slim majority. And the determined opposition of governments continued. They have fought — often in league with one another — almost every attempt to broaden the meaning of native tide. In the process they have extended the time needed for settlement and greatly increased the cost of litigation. And, for the last eleven years, federal and state ministers, leaders of commerce and industry, and prominent conservative intellectuals have railed against the Mabo and Wik decisions and the judges who made them. The reaction to the Wik decision in 1996 was symptomatic. From the start a vociferous campaign was launched by the federal government, by the Prime Minister and his deputy and powerful industry bodies to extinguish or curtail the very limited rights, which had unexpectedly survived the brutal process of colonisation.

The Mabo judgment was so much more important than its immediate objective — deciding who owned a small group of islands in the farthest corner of the country. It presented Australia with the opportunity to come to terms with a great historic injustice. And that opportunity was taken up by many people. The prime minister at the time, Paul Keating, some of the state premiers and parliaments, the churches and thousands of individuals expressed their regret, demonstrated their commitment to reconciliation and signed sorry books.
But there has been no officially funded campaign to fully account for past injustice; none of the research programs that were part of the work of the Indian Claims Commission in the United States and of the Waitangi Tribunal in New Zealand. The decision by the courts to dismiss any hope of seeking compensation for lost land closed off one avenue that might have led to a rigorous assessment of the past. The two royal commissions into deaths in custody and taking of children had a major impact on the community and indicated that there was a hunger for large-scale investigative research.

Eleven years ago the Aborigines and Islanders that I knew were both burdened with and vivified by a profound sense of historic injustice. Despite Mabo and Wik, Yanner and Croker Island, despite the Land Rights Act and the Land Fund, despite a decade-long process of reconciliation, I suspect that sense of injustice remains. A great opportunity created by the Mabo judgment has been squandered. The response has too often been grudging and legalistic. It is symptomatic that Australian courts have quite consciously rejected the idea that the Crown had a duty of care — a fiduciary relationship — towards the Indigenous people. That has been accepted in the United States since the nineteenth century and has more recently been incorporated in the law in Canada and New Zealand. It is not that the Australian judiciary is unaware of this. They have decided not to walk in that direction. But the idea that the process of colonisation itself and the concomitant extinguishment of Aboriginal title created lasting obligations is not a new one in Australia. It was forcefully put by Earl Grey, the Secretary of State for the Colonies, who in 1850 declared that in ‘assuming their Territory the Settlers in Australia have incurred a moral obligation of the most sacred kind. . . “It is a message that many people still don’t want to hear.