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ABORIGINAL TITLE IN AUSTRALIA

Steven Tishco

I. INTRODUCTION

The law regarding Aboriginal title in Australia is in the midst of a revolution. From the time Australia was settled by the British in 1788, until the High Court of Australia's 1992 decision in Mabo v. Queensland, Aborigines had no title rights to land whatsoever. In the decade since the Mabo decision, which finally recognized the potential for significant Aboriginal claims to already-possessed land, there have been enough cases decided, statutes enacted and amended and Aboriginal title claims filed to throw the issue of native title into a state of chaos.

The High Court of Australia hoped to clarify the numerous unsettled native title issues of the previous decade in its August 8, 2002 decision in Western Australia v. Ward. However, the decision, despite being over 200 pages long, may ultimately fail to provide the desired stability in Australian

99 See Australia in 1 WORLD BOOK ENCYCLOPEDIA 895 (A. Richard Harmet et al. eds., 1984).
101 Id.
102 See Gary D. Meyers & Sally Raine, Australian Aboriginal Land Rights in Transition (Part II): The Legislative Response to the High Court's Native Title Decisions In Mabo v. Queensland and Wik v. Queensland, (pt. 2), 9 TULSA J. COMP. & INT'L L. 95 (2001) (Discussing the general uncertainty and state of flux that issues of Aboriginal title have endured since 1992 and the various legislative attempts by the Australian government to clarify matters since that time).
103 Western Australia v. Ward (2002) 76 ALJR 1098 (This case is also known as the Miriuwung-Gajerrong case, named after the Aboriginal group who brought the initial claim. “Ward” refers to Miriuwung-Gajerrong elder and claimant Ben Ward).
property law. While most observers are in agreement that the ruling has significantly limited native title rights, especially with respect to lands claimed by the mining industry pursuant to valid leases, there are actually very few issues that the decision has definitively resolved. In fact, the precise outcome of the case remanded most issues back to the Full Court of Australia to decide them based on the new criteria for determining native title questions that the High Court established in its opinion. Also, based on the continuous state of change that Aboriginal title rights have gone through in the last decade, even issues that the decision seems to have definitively resolved may once again have to be revisited and changed.

This note begins with an assessment of the state of native title in Australia prior to the August 8, 2002 decision. This assessment includes an examination of the total lack of aboriginal land rights prior to 1992 as well as the decade of great activity and development in this field beginning in 1992 and leading up to August 8, 2002. It then proceeds into an analysis of the decision and the specific issues the High Court addressed. This analysis will include the standards the Court established for determining questions of native title as well as an emphasis on the decision's effect on the mining industry in Australia compared to the indigenous population and the rights to minerals and other natural resources that the decision established. Next, the note will look beyond the decision and attempt to assess how it will affect the future of native title in Australia and whether the decision will prove ultimately beneficial in ending the longstanding battle between Indigenous groups and the mining industry. Finally, this note will conclude with an overall evaluation of the decision and will take the position that it will ultimately be problematic, require further legislative intervention and will provide less clarity than the High Court of Australia and Australian government hoped to attain. This note will also take the position that the most efficient result may be to forego the court system altogether in resolving native title issues and instead, it may be best for both sides to work together to establish a system of mediation and negotiation to create land use agreements through that process.

II. THE SITUATION PRIOR TO WESTERN AUSTRALIA V. WARD

A. From Settlement to the Mabo Decision

From the time Australia was settled until 1992 Aboriginal land rights (or lack thereof) were defined by the doctrine of terra nullius – a legal fiction assuming that Australia was unoccupied and that all title to all lands

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belonged to the British Crown upon settlement. As a result, the possibility of Aboriginal title was never even considered throughout the development of Australian property law. This doctrine became obsolete in other former British colonies, including the United States, relatively early in those nations' settlement histories. Each former colony recognized at least some degree of native rights to land. However, *terra nullius* remained the status quo in Australia for over 200 years.

All Australian settlers benefited from *terra nullius* to some degree. Perhaps no group benefited more than those obtaining leases to mineral-rich lands often inhabited by Aborigines. The Australian Constitution was amended in 1970 and limited the federal government of Australia to acquiring property on "just terms." In the case of *Milirrpum v. Nabalco Pty. Ltd.*, Aboriginal groups tried to use this constitutional limitation almost immediately in an attempt to invalidate a mining lease granted on traditional lands. However, in speaking for a majority of the Court, Justice Blackburn refused to invalidate the lease and characterized native entitlement to land as primarily "spiritual." This characterization "led him to conclude that the rights asserted by the plaintiffs were not proprietary in nature, and so incapable of recognition as interests in land." This validation was a huge economic victory for holders of mining leases, won at the expense of native title rights. The mining industry in Australia held on to these benefits vigorously and aggressively campaigned against any native title recognition for as long as it could. The campaign was successful for a long time. Needless to say, the complete lack of recognition for any Aboriginal rights thus became deeply entrenched throughout all of Australian society, making

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106 See Patricia Lane, *Native Title – The End of Property As We Know It?*, 8 AUSTR. PROP. L.J. 1, 2 (1999).
107 Richard H. Bartlett captured the essence of the situation:
*The local colonial governments disregarded any concept of native title from their inception. Traditional lands were granted to settlers without any agreement with, or payment of compensation to, Aboriginal people. Dispossession was initiated and maintained by force. This dispossession was such that almost no traditional land remains in the possession of Aboriginal people anywhere in the settled and urban regions of Australia.*

108 See Johnson v. M'Intosh 21 U.S. 543 (1832); See also Meyers & Raine, *supra* note 4, at 96 (Discussing Chief Justice John Marshall's articulation, in *Johnson v. M'Intosh*, of what eventually became known as the Native Title Doctrine, stating that indigenous inhabitants retain rights to own land and resources until the new sovereign takes affirmative steps to extinguish those rights).
112 *id.* at 167.
113 Lane, *supra* note 8, at 50.
114 LIBBY, *supra* note 11, at 55-85 (detailing the specific 1980s campaign the mining industry launched in Western Australia against native land rights and its general success in preventing the establishment of any sort of native rights with respect to land ownership).
what was to come all the more controversial and subject to vigorous opposition.

B. The Mabo Decision and the 1993 Native Title Act

The highly controversial change that did in fact come, was a 1992 decision by the High Court of Australia and legislation, passed in 1993 in response to the decision, whereby Aborigines finally gained the hope of obtaining some rights to their native land. In Mabo six of the seven justices on Australia’s High Court found that native title existed at common law, although four justices (a majority) also held that title could be extinguished by an inconsistent government grant of land without any compensation to, or consent from, Aborigines. Despite this qualification, the decision was seen as a positive beginning for the recognition of Aboriginal property rights.

The decision required asking three broad questions to determine the validity of indigenous claims to land: (a) does native title extend to the relevant land; (b) has native title in that land been extinguished; (c) if native title has not been extinguished, will the action comply with the Racial Discrimination Act of 1975? In general, “native title is considered to extend in accordance with the laws and customs of indigenous people where those people have maintained their connection with the land and where their title has not been extinguished by acts of Imperial, Colonial, State, Territory or Commonwealth governments.” The decision allowed for the extinguishing of a great deal of native title, but certainly not all. The existing potential for Aborigines to acquire title to valuable land was made clear by Justice Brennan, who stated that native title is extinguished “where the Crown has validly alienated land by granting an interest that is wholly or partially inconsistent with a continuing right to enjoy native title, native title is extinguished to the extent of the inconsistency. Thus native title has been extinguished by grants of estates of freehold or of leases but not necessarily by the grant of lesser interests (e.g., authorities to prospect for minerals).”

It is important to note that in instances where native title has not been extinguished, any taken action with respect to land must comply with the Racial Discrimination Act of 1975 (RDA). The Act generally prohibits race-based discrimination and entitles Aborigines to the same rights as all Australians. With respect to native title, attention would have to be paid to

116 Native Title Act, 1993.
117 See Bartlett, supra note 9, at 412-14 (analyzing Mabo and the various approaches taken by the justices).
119 Id.
120 See Mabo (1992) 175 CLR 1.
121 Section 9(1) of the statute provides:
the effect of the action on native title, the compensation paid for that effect and the procedures accorded to native title-holders.\textsuperscript{122}

Obviously, the government had to set up a system to apply the Court’s holding in \textit{Mabo} and to administer the explosion of native claims that was forthcoming. Its response was the 1993 Native Title Act (NTA). The NTA addressed many issues, but for the purposes of this note, the most significant were that the NTA:

- Provided for the validation of past acts which may be invalid because of the existence of native title;
- Provided for a future regime in which native title rights are protected and conditions imposed on affecting native title; and
- Provided a process by which native title rights can be established and compensation determined, and by which determinations can be made as to whether future grants can be made or acts done over native title.\textsuperscript{123}

The Act also created the National Native Title Tribunal (NNTT) to receive native title applications, to notify parties to those applications and to assist applicants and parties to reach negotiated settlements.\textsuperscript{124} Where agreements could not be reached, applications were referred to Federal Court for hearings. Most importantly, one should note “[t]he tribunal’s primary function was as a mediation service.”\textsuperscript{125} It is sufficient at this point to note that the 1993 NTA was considered as broad and providing for many possible

\textit{Racial Discrimination Act, 1975, §§ 9(1) and 10(1).}

\textsuperscript{122} See Australian Government Solicitor, \textit{supra} note 17; \textit{see also} Mabo v. Queensland [No 2] (1992) 175 CLR 1, 61 (stating that native title “may be protected by such legal or equitable remedies as are appropriate to the particular rights and interests established by the evidence...”); Western Australia v. Ward (2002) 76 ALJR 1098 (noting that the preceding statement in \textit{Mabo} has not yet been developed by decisions and case law defining appropriate remedies).


\textsuperscript{124} \textit{Id.}

\textsuperscript{125} \textit{Id.}
opportunities for the native population of Australia. The 1998 amendments changed the law drastically and the Act's amendments will be examined below.

C. The Wik Case and the 1998 Amendments to the 1993 NTA

The NTA provided a systematic way for the government to deal with the implications of Mabo. However, interpretation of the Act was still necessary and questions of how exactly it would work were yet to be determined. Cases brought seeking interpretation of the NTA, particularly the Wik case, led to the government's decision to drastically change the original NTA by enacting amendments, which took effect in 1998 and severely limited the potential rights of the indigenous people of Australia.

In Wik, the High Court reaffirmed its decision in Mabo, recognizing the existence of native title at common law. "More importantly, the Court reaffirmed its view that native title was an interest in land that was capable of co-existing with other interests in land." Specifically in terms of pastoral leases, the High Court held that the granting of pastoral leases to private parties did not extinguish Aboriginal rights insofar as the exercise of Aboriginal rights could continue alongside authorized grazing. In the Wik case, the Court found that native title was not extinguished by the granting of a pastoral lease under a 1910 Queensland statute. The decision was obviously controversial since it directly pit Aboriginal rights against those of pastoral leaseholders. It also involved a great deal of land, since approximately 42% of the proprietary interest in Australia consists of pastoral leases. Justice Toohey retreated somewhat from the seemingly broad implications of the majority decision by adding that:

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126 See Bartlett, supra note 9, at 414-23 (discussing the general equality sought and achieved by Mabo, Wik and the 1993 NTA and countering that notion of expanding Aboriginal rights with the 1998 amendments, which favored workability over equality).
29 See infra Part II.C.
31 See Australians for Native Title & Reconciliation, The 'Ten Point Plan' and the 1998 Native Title Act Amendments at http://www.antar.org.au/1998amend.html (confirming the fact that the amendments were in direct response to Wik and calling the amendments "alarmist and discriminatory, predicated on winding back native title rights previously recognized by [Wik]").
32 Land Act, 1910 (Queensl.).
whether there was extinguishment can only be determined by reference to such particular rights and interests as may be asserted and established. If inconsistency is held to exist between the rights and interests conferred by native title and the rights conferred under the statutory grants, those rights and interests must yield, to that extent, to the rights of the grantees.\(^\text{134}\)

Despite this statement, *Wik* was generally considered an expansion of *Mabo* and the NTA and beneficial for Aborigines seeking to establish land rights.\(^\text{135}\)

Calls for change came almost immediately. Pastoral leaseholders feared *Wik* would result in their property rights being significantly devalued.\(^\text{136}\) Similarly, the mining industry feared that native title rights could stymie legitimate mining development.\(^\text{137}\) Even the Australian government felt the original NTA may have gone too far and the government desired a “more workable” Native Title Act.\(^\text{138}\) As a result, years of negotiations finally led to the enactment of the Native Title Amendment Act (NTAA), which was originally conceived as the Australian Government’s “Ten Point Plan” in response to the *Wik* case, and went into effect in 1998.

One major change the NTAA created was the significant limitation placed on Aborigines’ so-called right to negotiate, “a procedural right which gives native title holders the opportunity to negotiate on proposed developments (future acts) affecting native title land.”\(^\text{139}\) First, Section 43 of the NTAA allows states and territories to eliminate the right to negotiate by creating minimum standards well below the original NTA. Specifically, Section 43 provides:

(1) If: (a) a law of a State or Territory provides for alternative provisions to those contained in this Subdivision

\(^{37}\) See Bartlett, *supra* note 28 and accompanying text.

\(^{38}\) See, Meyers, *supra* note 4, at 113.

\(^{39}\) Id. at 115.

\(^{40}\) See E3 International, *Aboriginal Property Rights & the Australian Mining Industry* at www.ethree.com.au/old/pdf/B_P_No_20_Aboriginal_Property_Rights_and_the_Mining_Industry.pdf . E3 International (Environment Economics & Ethics) is a self proclaimed “hybrid organization dedicated to making the business case for sustainable development.” The author of the cited paper discussed the government’s reasons for proposing the NTA amendments:

The amendments set out to remove some of the uncertainty surrounding native title legislation in Australia and purport to balance the views of industry against indigenous interests. The amendments do have a pragmatic focus on statutory and administrative practicalities, however, the public debate has been marred by controversy and no small mount of bigoted debate, with scare tactics very much to the fore.

\(^{50}\) See id.

\(^{139}\) See Australians for Native Title & Reconciliation, *supra* note 31.
in relation to some or all acts to which this Subdivision applies that are attributable to the State or Territory; and (b) the Commonwealth Minister determines in writing that the alternative provisions comply with subsection (2); then, while the determination is in force, the alternative provisions have effect instead of this Subdivision. ¹⁴⁰

A second controversial aspect of the NTAA involved so-called intermediate acts. From the time the original NTA was enacted (1993) until the Wik decision (1996), the question of whether pastoral leases extinguish native title was unclear. As a result, many Australian states and territories granted pastoral leases under the assumption that native title was extinguished. Wik decided that native title was not necessarily distinguished by these leases. ¹⁴¹ The NTAA provisions ¹⁴² remedy this conflict by providing that all rights and interests over pastoral leaseholds granted during that three year period "would undergo blanket validation and extinguish native title whether or not they would do so at common law." ¹⁴³ Aborigines were particularly upset about these provisions since they rewarded states who ignored the NTA at the expense of Indigenous groups. ¹⁴⁴ Similar provisions abound throughout the NTAA, generally making it much more difficult for Indigenous groups to obtain land rights that seemed obtainable following Wik. The entire process was made more difficult for Aboriginal groups, from application for title all the way to final resolution. ¹⁴⁵

The passage of the NTAA immediately met criticism from Aboriginal groups, who argued that it went too far the other way and eliminated too many of the rights that Aborigines had gained since 1992. Many groups, including the United Nations Committee to Eliminate Racial Discrimination (CERD), even found the Australian government in violation of its international human rights obligations via the amendments. ¹⁴⁶ What angered pro-Aboriginal groups from the outset was that the entire Act was "drawn up without the consent of, or consultation with, Indigenous people." ¹⁴⁷ Therefore, while the NTAA provided some clarity at the expense

¹⁴⁰ Native Title Amendment Act, 1998, §43.
¹⁴¹ See Wik (1996) 141 A.L.R 129; see also Bartlett, supra note 28 and accompanying text.
¹⁴² See Native Title Amendment Act, 1998, Div. 2A.
¹⁴³ See Meyers, supra note 4, at 118.
¹⁴⁵ For a concise summary of the Ten Point Plan and its highlights see Michael Legg, Indigenous Australians and International Law: Racial Discrimination, Genocide and Reparations, 20 BERKELY J. INT’L L 387, 406 (2002) (generally standing for the proposition that the Ten Point Plan was a negative, rather than a positive step, for native title rights).
¹⁴⁷ See Australians for Native Title & Reconciliation, supra note 31.
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of Aboriginal rights, there were still many left angered by the Act. Also, the new Act still required further development, clarification and interpretation through case law.

D. Leading up to the Ward Decision: Years of Uncertainty

While the NTAA may have been detrimental to the rights of Indigenous people, it did not clarify many issues regarding native title for either side of the debate. In a 2001 speech to the Cairns Chamber of Commerce, Attorney General Daryl Williams acknowledged that “despite the legislative response to the Mabo decision, the original Native Title Act and the 1998 amendments, many native title issues remain unresolved. And a range of practical difficulties remain in reaching agreements between Indigenous groups, miners, pastoralists, the fishing industry and governments.”

The actual state of the law remained so uncertain that Attorney General Williams urged both sides to reach agreements over land use through mediation rather than costly, expensive and time consuming litigation. Of course, not all land use disputes could have possibly avoided litigation and it seemed inevitable that the courts, just as they had with Mabo and Wik, would again play a pivotal role in the determination of Indigenous land rights.

III. THE AUGUST 8, 2002 DECISION

A. Background of the Claim

In April 1994, the Miriuruwung and Gajerrong people filed an application with the NNTT seeking recognition of their native title rights over an area of approximately 8,000 square kilometers located partly in the East Kimberley region of Western Australia and partly in the Northern Territory. Mediation between the Aboriginal groups and various business interests proved unsuccessful, so the case was referred to the Federal Court in 1995. On November 24, 1998 Justice Lee ruled that the Miriruwung and Gajerrong people held native title to a large portion of the claimed area.


149 See id. Attorney General Williams added, and the general consensus remains, that one of the most beneficial changes brought about by the NTAA was the provision for creating Indigenous Land Use Agreements (ILUAs) and thus avoiding litigation.

150 National Native Title Tribunal, Background: Miriuruwung and Gajerrong Case at www.nntt.gov.au.

151 See generally Ward v. Western Australia (1998) 159 A.L.R. 483 overruled by Western Australia v. Ward (2002) 191 A.L.R. 1; see also National Native Title Tribunal, supra note 52, summarizing Justice Lee’s major findings including that:

- native title is not a bundle of rights but a right to land arising from connections with the land;
A variety of different business and government groups appealed the decision on over 100 grounds and yet another decision was issued by the Full Bench of the Federal Court on March 3, 2000. In that appeal, all three judges upheld Justice Lee’s finding that the Miriuwung and Gajerrong people held native title to those parts of the claimed area where native title was not extinguished. However, “by a 2:1 majority Justice Lee’s findings in relation to the nature of native title and the way it may be extinguished were overturned. Their decision resulted in a significant reduction in the area over which native title was recognized.”

On August 4, 2000 the High Court granted leave to appeal on more limited grounds than the parties had sought. The hearing began on March 5, 2001 and lasted nine days. The decision of the High Court, which was delivered on August 8, 2002, came 17 months after hearing the case and eight years after the initial claim was made at an estimated cost of $10 million. It was clear that there were many controversial issues the High Court had to resolve, and before the High Court delivered its decision in the case “the case was heralded as one of the most important cases since Mabo and Wik. It was expected that the decision in the case would go some way towards clarifying the nature and scope of native title.” All that was left for the Court to do was validate the advanced billing of the case – a task that ultimately proved extremely difficult.

Lee also found that, among other things, where native title was recognized, the Miriuwung and Gajerrong people had a right to:

- possess, occupy, use and enjoy the area;
- make decisions about the use and enjoyment of the area;
- access the area;
- control the access of others to the area;
- use and enjoy resources of the area;
- receive a portion of any resources taken by others from the area;
- maintain and protect places of importance under traditional laws, customs and practices in the area.

153 Id.
154 Id.
155  National Native Title Tribunal, supra note 52.
156  Id.
B. Highlights of the Ward Decision

Prior to even beginning any native title analysis, the High Court was faced with the initial issue of what law to apply. Relevant legislation (including the NTA, RDA and various legislation of Western Australia and the Northern Territory) was amended in some respects between the time of the original application (1994) and the decision of the Full Court (2000). The Full Court refused to incorporate various state laws that had already been enacted at the time of the appeal, into its decision. The Full Court based this decision on two older Australian cases, standing for the proposition that the Full Court must “consider and apply the law as it stood at the date of the hearing at first instance, and not at the date of hearing of the appeal.” The High Court overruled the precedent of Duralla and Petreski in determining what law to apply. It stated that the Full Court erred in concluding that it could not take account of the State Validation Act and the NTAA. The Court added that an appeal to the Full Court of the Federal Court is not an appeal in the strict sense and the relevant State and Territory law should apply. As a result, the more recent State and Territory legislation would apply, along with the NTAA and the RDA.

Upon resolution of the initial issue of what law applies in the case, the Court proceeded to announce the central issues of the case, which Chief Justice Gleeson described as “whether there could be partial extinguishment of native title rights and interests, and what principles should be adopted in determining whether native title rights and interests have been extinguished in whole or in part.” Obviously, these issues are framed extremely broadly, and they touch upon virtually every issue related to native title and Aboriginal rights to land. It is clear from this framing why the decision was so highly anticipated.

Before it could turn to the specific issues in the Ward case, the Court also felt compelled to clarify the confusion with regard to analyzing native title cases generally. It focused on two points of clarification: the proper criteria for determining whether native title exists and the proper
criteria in determining whether there has been extinguishment of that native title. In determining whether native title exists, the Court first applied the definition of native title, as set out by the NTA. This was done out of the Court's concern for both parties' reliance on case law as opposed to the NTA, in arguing their claims. The statutory definition focuses on traditional laws and customs in finding the existence of native title rights and interests in land.

The Court emphasized that the NTA, not the common law, is the source of relevant native title rights and interests and added that common law is given its appropriate importance in subsection (c) of §223 in determining whether native title exists. With this seemingly broad definition of native title in hand, the Court added that native title may cease to exist in circumstances where traditional customs clash with general goals of societal safety and preservation, or where native title has been deemed extinguished, based on the criteria for extinguishment the Court sets forth below. The main purpose of this first clarification by the Court was to emphasize that the NTA, and not the statements made by judges via the case law, would rule the day in native title analysis.

The second clarification the Court felt compelled to make was one involving the appropriate test to apply in determining whether native title, having been established, was ultimately extinguished. The Court acknowledged that "before the changes made by the 1998 Act, which came into effect after the institution of the present litigation, the NTA itself otherwise indicated little about what was involved in the notion of extinguishment of native title." The 1998 amendments to the NTA go somewhat further by distinguishing between complete, permanent

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166 Section 223 of the NTA defines native title and the language is identical under the NTAA:

(1) The expression "native title" or "native title rights and interests" means the communal, group or individual rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to land or waters, where:

(a) the rights and interests are possessed under the traditional laws acknowledged, and the traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders; and

(b) the Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters; and

(c) the rights and interests are recognised by the common law of Australia.

(2) Without limiting subsection (1), "rights and interests" in that subsection includes hunting, gathering, or fishing, rights and interests.

See Native Title Act, 1993, §223; See also Ward (2002) 76 ALJR 1098, 1109 (where the Court elaborated on the NTA definition by adding that the "cultural knowledge in question may be possessed under the traditional laws acknowledged and traditional customs observed by the relevant peoples. The issue which then arises is whether, by those laws and customs, there is 'a connection with' that land or waters in question.").


70 "The word 'extinguish', in relation to native title, means permanently extinguish the native title. To avoid any
extinguishment of native title and partial inconsistency. The arguments of both sides focused upon questions of extinguishment and not whether native title existed in the first place. This fact necessitated that the High Court address, modify and clarify the various tests applied in the lower courts, which yielded vastly different results.

The Court expressly rejected Justice Lee’s (recall that he was the first judge to hear the case, at the Federal Court level) use of the adverse dominion test in determining extinguishment, which resulted in Lee’s recognition of native title rights over a great deal of the claimed area. The test had been mentioned as a possibility in a dissenting opinion of an earlier Canadian case, but had never been endorsed by the Australian courts. Nonetheless, Justice Lee applied the test, which consisted of three requirements:

First, that there be a clear and plain expression of intention by parliament to bring about extinguishment in that manner; secondly, that there be an act authorized by the legislation which demonstrates the exercise of permanent adverse dominion as contemplated by the legislation; and thirdly, unless the legislation provides the extinguishment arises on the creation of the tenure inconsistent with an aboriginal right, there must be actual use made of the land by the holder of the tenure which is permanently inconsistent with the continued existence of aboriginal title or right and not merely a temporary suspension thereof.

This test is obviously a very difficult one for non-aboriginal leaseholders in land to meet and it is easy to see why, based on this test for extinguishment, Justice Lee reached the extremely pro-aboriginal decision that he did. On appeal to the Full Court, the majority rejected the adverse dominion test and found that native title rights over most of the claimed area had been wholly or partially extinguished.

For the most part, the High Court, in its decision, agreed with the test the Full Court used and severely criticized the adverse dominion test as
applied by Justice Lee. Plaintiffs in the case had argued that the adverse dominion test is really nothing more than a different way to phrase an extinguishment test that was essentially the existing law in Australia. The High Court even conceded the fact that native title cases often refer to the “need for those who contend that native title has been extinguished to demonstrate a ‘clear and plain intention’ to do so.” However, the Court refused to accept the plaintiffs’ construction of the adverse dominion test and proceeded to apply the inconsistency of incidents test, as articulated by the Full Court, as the appropriate test in determining extinguishment.

As stated by the majority of the Full Court, the inconsistency of incidents test “requires a comparison between the legal nature and incidents of the statutory right which has been granted and the native title rights being asserted. The question is whether the statutory right is inconsistent with the continuance of native title rights and interests.” The High Court felt this comparative test more accurately accounted for the comparative rights being asserted and was the most just way to determine extinguishment. However, while the Full Court applied the inconsistency of incidents test to hold that much of the native title rights asserted had been extinguished, the High Court, applying the same test, was not necessarily willing to go so far. Specifically, the Court’s application of the test to mining leases and natural resources resulted in a more middle ground approach and will be addressed later in this note.

The High Court also disagreed with the articulation of the inconsistency of incidents test as stated by Justice North, a dissenting justice of the Full Court who applied a variation of the test. He reached a different result than the majority by saying the degree of inconsistency in the case was not sufficient to extinguish native title. North refused to accept the fact that “a minor or insignificant inconsistency between the rights or interests created and native title could not lead to such a far reaching consequence as total abrogation of native title.” The High Court refused to accept this approach. The majority felt that there was no such thing as degrees of inconsistency. “Two rights are inconsistent or they are not. If they are inconsistent, there will be extinguishment to the extent of the inconsistency; if they are not, there will not be extinguishments ... Questions of suspension of one set of rights in favor of another do not arise.” The essential requirement should be to identify and compare one set of rights deriving

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174 See infra Part III. A-B.
176 See id. (Justice North giving an example of how to apply his version of the inconsistency of incidents test by saying that where native title is a permanent right to land, only a law that has permanent adverse consequences to the existence of a right to land would extinguish native title).
177 See Ward (2002) 76 ALJR 1098, 1124.
from traditional law and custom with another set of rights deriving from the exercise of sovereign authority that came with settlement. Therefore, the High Court adopted the test as articulated by the majority of the Full Court.

It is evident from the preceding discussion that, in determining whether native title exists or has been extinguished, there must be a factual inquiry made into what constitutes “traditional laws and customs.” It is an essential inquiry both in examining the statutory definition of native title and in applying the inconsistency of incidents test in determining extinguishment. The High Court seized the opportunity presented by the *Ward* case to clarify proper application of traditional knowledge as well. At issue specifically was the determination made by Justice Lee at the Federal Court level, designated as paragraph 3(j). In that determination, Justice Lee found that a native title right included “a right to maintain, protect and prevent the misuse of cultural knowledge of the common law holders associated with the determination area.” This determination and great recognition for traditional knowledge of aboriginal groups was a key contributing factor in his generally broad granting of native title rights.

Once again, the Full Court took a radically different approach than Justice Lee. In fact, the majority of the Full Court omitted any section resembling 3(j), holding that:

although the relationship of Aboriginal people to their land has a religious or spiritual dimension, we do not think that a right to maintain, protect and prevent the misuse of cultural knowledge is a right in relation to land of the kind that can be the subject of a determination of native title.

The restoration of 3(j) was one of many grounds for plaintiffs’ appeal, however, since Justice Lee’s determination was based on a test for extinguishment that the Full Court refused to accept (the adverse dominion test discussed earlier in this section), the Full Court was reluctant to reinstate 3(j) on that basis.

The primary criticism of Justice Lee’s ruling was that it was too broad, over-inclusive and did not truly adhere to the more narrow parameters of the NTA. The High Court, in agreeing with the Full Court, felt that native title rights protected by section 223 of the NTA are rights related to land or water and where aboriginal groups, through traditional laws and customs, have a connection to the land or water in question. However, the rights asserted by the plaintiffs in this case and recognized by Justice Lee in 3(j) go

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178 Id.
beyond the scope of section 223 "to something approaching an incorporeal right akin to a new species of intellectual property to be recognized by the common law under §223(1)(c)." The right asserted included reference to viewing or reproduction of secret ceremonies, artwork, songs and narratives, and such matters, according to the Full Court, go beyond issues establishing a connection to the land. It is essential to acknowledge that a fundamental principle of the Australian legal system is that the ownership of land and ownership of artistic works are separate statutory and common law institutions, with the latter cases being more appropriately dealt with under copyright and intellectual property case law, as opposed to native title case law. This analysis by the Full Court clarifies that issues of traditional knowledge and customs are to be limited to matters affecting connection to the land.

That is not to say that there is universal agreement with the High Court’s treatment of these “intellectual property” matters as separate entities having nothing to do with connection to the land. In his concurring opinion, Justice Kirby felt that according to aboriginal beliefs, cultural knowledge is sufficiently related to the land for purposes of the NTA and is within the scope of section 223. According to Justice Kirby, the critical question is whether there is a right “in relation to” land or water. That phrase is obviously very broad. He felt the majority did not sufficiently consider aboriginal tradition and the well-established principle that native title is unique and should not be restricted to rights with precise common law equivalents. Despite this highly plausible articulation by Justice Kirby, the more narrow view by the majority was ultimately accepted.

All of these clarifications, which the High Court felt were necessary, resulted in a variety of tests, applications and definitions that had not previously been used. All that remained was for the Court to apply these newly announced principles. As a result, rather than apply the principles themselves, the Court decided to remand most issues back to the full court for further consideration. Still, the High Court’s statements, as related to

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183 See id; see also Foster v. Mountford and Rigby Ltd. (1976) 14 A.L.R 71.
184 See Ward (2002) 76 ALJR 1098, 1212 (Justice Kirby referring to the broad application of the phrase “in relation to” as applied in prior Australian cases. Specifically, he referred to O’Grady v. Northern Queensland Co. Ltd. (1990) 92 A.L.R 213, at 221 where the phrase was held to require a relevant relationship, having regard to the scope of the act. This is obviously a very broad construction of the phrase).
185 Id at 1192.  
186 In its "Orders and Further Proceedings" section, the High Court stated: the whole of the order of the Full Court made on 11 May 2000 and the determination of native title made on 11 May 2000 should be set aside and the matters remitted to the Full Court for further hearing and determination. It will be necessary for the Full Court to consider the various questions. 
some specific matter such as mining leases and petroleum rights, did allow for some partial clarity on those highly controversial issues.

C. Specifics of Mining Leases

All of the general areas of native title analysis that the Court addressed and established allowed it to apply the general principles it had just announced to some specific areas of dispute in the case, including the highly controversial battle over mining leases. The High Court’s specific rulings pertaining to mining leases, at least on the surface, seem like a victory for Indigenous land rights. However, when coupled with its ruling on ownership and control of natural resources, the mining rulings are actually very minor victories, if victories at all. The dispute over mining rights in Ward involved fifty-two mining leases, which were granted over land within the claim area, and all of the leases in question were granted pursuant to a Western Australian mining statute. There were various specific leases involved in the case, however the Court decided to initially examine the extinguishing effect (if any) of the mining leases in general before deciding whether any different result should be reached with respect to certain specific leases.

In general, the High Court ruled that the Mining Act granted exclusive possession for mining purposes only: "That is, they grant a right to exclude others from mining. This does not give the leaseholder the right to exclude native title holders from access to and use of the land." This stance was essentially a middle ground between the Federal Court ruling, which held that no native title rights were extinguished, and the ruling by the Full Court, which held that all native title rights with respect to land held by mining leases were extinguished. The High Court added that the full extinguishment granted by the Full Court “misconstrues the principles respecting extinguishment by grant of inconsistent right.” The High Court

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187 The grant by the Crown of a mining lease has been described as “really a sale by the Crown of minerals reserved to the Crown to be taken by the lessee at a price payable over a period of years as royalties.” See Wade v. New South Wales Rutile Mining Co. Pty. Ltd. (1969) 121 CLR 177, at 192.
188 See infra Part III.D.
190 Mining Act, 1978 (W. Austl.).
192 See Strelein, supra note 59, at page 6.
193 See Ward (1998) 159 A.L.R at 580 (Justice Lee held that “it cannot be said that in granting this interest the Crown did not evince a clear and plain intention to extinguish native title.”).
194 See Ward (2000) 170 A.L.R at 301 (The majority held that the statutory scheme in question “establishes a regime which has an intended operation which, in the absence of explicit provision to the contrary (and none is relevantly to be found here) is inconsistent with the use or occupation of the lands leased by any other person”).
felt that neither view properly interpreted or applied the criteria for extinguishment, and therefore, neither was an accurate statement with respect to the mining leases in question.

The Court refused to accept the fact that a valid mining lease necessarily extinguished all native title in the area. The majority acknowledged that "the grant of exclusive possession for mining purposes is directed at preventing others from carrying out mining and related activities on the relevant land." It did not follow, according to the Court, that this granted exclusive possession to the entire lease area. Of course, using the land for "mining activities" is a broad concept and includes activities that go beyond merely taking minerals out of the ground. The general nature of the rulings by both lower courts with respect to mining leases made it impossible for the High Court to come up with specific rulings as to the extent of native title rights that have been extinguished on the disputed mining areas. The Court ruled that more findings had to be made in accordance with the new criteria for extinguishment set forth (including how broadly to interpret whether land is being used for "mining purposes"), before definitive rulings could be made with respect to where native title rights have or have not been extinguished. There was one exception to this ruling, in an area where the Court was able to find that all native title had been extinguished — the area was native title right to control access to the land. The Court found that such a right "is inconsistent with the rights of access arising under the mining lease." This finding seems to make sense because a right to mine on a parcel of land is worthless if access to that land could be denied.

Despite a native right to control access being denied, the general finding by the Court, that native title is not necessarily inconsistent with mining leases and those leases do not extinguish all rights, was a positive one for Indigenous groups. The Court seems to have acknowledged Indigenous rights to land and a right of Aborigines to maintain their spiritual and cultural connection with the land, even in the face of mining projects commencing around them. They are permitted to continue to use and enjoy the land without interference and holders of mining leases have no right to remove Aboriginal groups holding valid native title from the land. While this is certainly a start, it is far from all that Aboriginal groups were hoping for from the ruling.

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196 See supra Part III.B.
200 Id.
D. Ownership and Control of Natural Resources

The Court’s rulings relating to Aboriginal ownership and control of resources significantly limits the rights that Aboriginal groups may have won with respect to mining leases generally. Once again, the High Court was forced to find some common ground between the Federal Court’s holding that native title included the right to use and enjoy minerals,201 and the Full Court holding that native title with respect to minerals had been completely extinguished.202 The Court’s ultimate holding on the matter was twofold: (a) that native title rights to minerals were never established and thus never existed; and (b) even if native title rights had existed, those rights were extinguished by relevant state legislation. Either way, the end result was that Indigenous groups were not entitled to any ownership rights in minerals or petroleum on those lands where mining leases had been granted and native title had not necessarily been extinguished.

In answering these questions, the main piece of legislation the Court looked to was the Mining Act of 1904. Section 117 provides:

Subject to the provisions of this Act and the regulations—
(1) Gold, silver, and other precious metals on or below the surface of all land in Western Australia, whether alienated or not alienated from the Crown, and if alienated whensoever alienated, are the property of the Crown.
(2) All other minerals on or below the surface of any land in Western Australia which was not alienated in fee simple from the Crown before the first day of January, One thousand eight hundred and ninety-nine, are the property of the crown.203

Similar language was used in legislation related to petroleum.204 Before examining whether or not there was extinguishment of title, the Court

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201 See Ward (1998) 159 A.L.R at 639 (holding that native title holders have “the right to use and enjoy resources of the area, the right to control the use and enjoyment of others of resources of the area, the right to trade in resources of the area and the right to receive a portion of any resources taken by others”).

202 See Ward (2000) 170 A.L.R at 290 (holding that the interests in minerals and petroleum in this case amounted to “full beneficial ownership, and that accordingly any native title that may have existed in relation to minerals or petroleum has been extinguished”).

203 Mining Act, 1904, §117 (1)-(2).

204 The relevant part of the Petroleum Act provides that:

Notwithstanding anything to the contrary contained in any act, or any grant, lease, or other instrument of title, whether made or issued before or after the commencement of this act, all petroleum on or below surface of all land within the State, whether alienated in fee simple or not so alienated from the Crown is and shall be deemed always to have been property of the Crown.

reasoned (as they had earlier with all issues of extinguishment in general), that there must first be an inquiry into, and attempt to identify, any native title right or interest that is at issue. The claimants alleged that they had dug for and used stones, ochres and minerals on and from the land and that they shared and traded resources from the land, thereby establishing a cultural connection with the land. Despite these claims, the Full Court had held:

that there was no evidence of any traditional Aboriginal law, custom or use relating to petroleum either in the state or in the territory. Nor, assuming ochre is not a mineral, was there any evidence of any traditional Aboriginal law, custom or use relating to any of the substances dealt with in either the Mining Act 1904 or the WA Mining Act (No party contended that ochre fell within the relevant definitions).

The High Court, in applying its examination of cultural connection to the land prior to even addressing the extinguishment issue, essentially agreed with the Full Court's assessment. Based on the claims made by the Miriuwung and Gajerrong people, the Court held that no question of extinguishment even arose in this matter, since "no relevant native title right or interest was established."

Criticism about this aspect of the decision came almost immediately. The Court's reasoning has been referred to as "troubling" and has been questioned as to why this was the "only foray the Court took into discussing the proof of particular rights and interests." The specific criticism has been that the Court failed to look at the rights from the Indigenous groups' perspective. The failure to do so, it has been argued, takes too narrow a view of native rights and customs so that the Court could only validate very old State legislation. It is unclear what the Court's motivation was on this

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206 See WEBSTER'S NEW WORLD COMPACT DICTIONARY 297 (1st ed. 1995) (defining ochre as "a yellow or reddish-brown clay containing iron").
207 See Ward (2000) 170 A.L.R at 290 (discussing the various claims made by the Miriuwung and Gajerrong in "pretrial particulars").
211 See Strelein, supra note 59.

211 According to Dr. Strelein:

The Court has taken a very narrow view of the subject matter to which laws and customs apply. A general native title right to use the resources of the land, whether on or below the surface, was not considered sufficient to establish a right to minerals. It is one thing to resolve a conflict in relation to a specific interest asserted by the Crown by confirming that no native title right to minerals can survive. However, it is another to require that such an assessment legitimizes the finding of a particular law in relation to particular sub-surface minerals.
matter. It is indeed curious that the issue of minerals (and petroleum) was the only one in which the Court played an active role in examining specific proof problems that the Miriuwung and Gajerrong had in establishing traditional rights. Perhaps, as the cynic would argue, it was solely an affirmation of interests that the mining industry held in order to provide some clarity to an industry that is a major part of the Australian economy. Or, perhaps the Court felt that the mining legislation and the lack of evidence presented by the Indigenous groups combined to justify its closer look into native title rights with respect to minerals. Whatever the Court’s motivation may have been, the end result was a blow to native title rights.

In any event, the Court tried to soften the blow of its controversial ruling by saying that a finding of native title rights would have made no difference with respect to the claims made. The Court used the Mining Act of 1904 in conjunction with the Petroleum Act of 1936 to hold that even if some native title rights to minerals were established, those rights would be extinguished. The right of the state of Western Australia to establish its own policies as to the disposal of minerals was established early on, in its state constitution. According to the Court, reserving the minerals to the Crown, as property, had two consequences: “(a) First, upon alienation of land, all minerals under the land would remain vested in the Crown; and (b) the Crown could deal with minerals separately from the land and could grant separate rights to search for and recover them.” The Court held that native title was extinguished under these facts and distinguished this case from *Yanner v. Eaton*, where the High Court held that Queensland fauna legislation, which gave the State an ownership right to wildlife, did not extinguish native title rights to the wildlife. Unlike that fauna legislation, the Court here felt that:

The vesting of property in minerals was no mere fiction expressing the importance of the power to preserve and exploit these resources. Vesting of property and minerals was the conversion of the radical title to land which was taken at sovereignty to full dominion over the substances in

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212 See infra Part IV.B.
213 The relevant provision states that: “the entire management and control of the waste lands of the Crown in the colony of Western Australia, and of the proceeds of the sale, letting, and disposal thereof including all royalties, mines, and minerals, shall be vested in the legislature of that colony,” W. AUSTL. CONST. ACT, §3 (1890) (emphasis added).
216 See id; see also Meyers, *supra* note 4, at 109 (noting that “the Court held that such legislation did not intend to assert more than the State’s paramount public interests in its wildlife nor did it thereby express a clear intention to assume all beneficial interests in that wildlife and consequently extinguish any native title”).
question no matter whether the substances were on or under alienated or unalienated land.\textsuperscript{217}

On this distinction, the Court found native title, with respect to minerals and petroleum, would be extinguished.

The distinction drawn seems tenuous. Both statutes seem to similarly grant ownership rights in resources (minerals v. fauna) to the Crown. It seems difficult to call one piece of legislation granting ownership a "fiction," and another a legitimate ownership right. Nonetheless, the tenuous distinction is purely hypothetical and less controversial than the earlier ruling that extinguishment never even arose as a question. In any event, the main point is that no Indigenous rights to minerals and petroleum exist. Obviously, this is a major economic victory for the mining industry and a severe blow to the cultural and potentially great economic opportunities for Indigenous groups. More specific analysis of the effects of the Court's ruling with respect to mining will be addressed below.\textsuperscript{218}

IV. THE FUTURE OF NATIVE TITLE: WHAT THE DECISION WILL MEAN

A. Initial Reaction to the Decision

Initial reaction to the ruling by the Australian news media has been one of disappointment over the decision and has involved a focus on the rights lost by Aborigines. A common belief throughout the media seems to be that "while superficially supporting the case that native title rights can co-exist with pastoral and mining leases, in practical terms the ruling excludes traditional owners from exercising significant land-use or ownership rights in these circumstances."\textsuperscript{219} Most observers in the media feel the ruling was a major blow to the high hopes of aborigines following the \textit{Mabo} decision just 10 years earlier. As one newspaper column put it: "to the extent that Aboriginal people allowed themselves to hope that native title might pry open the treasure trove of Australia's mineral wealth, those hopes are gone."\textsuperscript{220} In addition to criticizing the decision for its seemingly unjust treatment of aboriginal groups, media complaints also focused on the failure of the native title process as a whole and the High Court's inability to clarify anything through its ruling.\textsuperscript{221} Despite the fact that the decision provided

\textsuperscript{217} See Ward (2002) 76 ALJR 1098, 1179.
\textsuperscript{218} See infra Part IV.B.
\textsuperscript{221} See \textit{A Better Way Needed on Native Title Claims}, \textit{THE AGE (MELBOURNE)}, Aug. 12, 2002, at 10 ("the process for determining native title is costly, slow and unwieldy and ... the process has so far failed
some legal clarifications, following the seemingly polar opposite rulings of the two lower courts, it still was not considered “a ringing endorsement for the way the native title regime has been conducted over the past decade – with years of protracted litigation costing many hundreds of millions of dollars in real costs and millions more in lost opportunities.”

The media is hardly the only group that has voiced its opinions. Initial reaction to the decision by parties with specific interest in the case has been mixed. Aborigines and those sympathetic to their cause have generally expressed confusion and extreme disappointment. Ben Ward, the Miriuwung elder and leader of the plaintiffs was obviously disappointed, saying the government and courts continue to confuse matters and that the entire native title regime in Australia needs to be reexamined. Others, such as Aden Ridgeway, the only Aborigine Senator in the Federal Parliament, stressed that the decision was not only bad for Aborigines, but also hurt the mining industry, despite the industry’s overall praise of the ruling. Many legal analysts were also critical of the Court for failing to provide the clarity that seemed inevitable when the case first reached the High Court. Based on the outcome of the decision, the type of disappointment and frustration expressed by those sympathetic to aboriginal causes can hardly be considered surprising.

On the other hand, the Australian government and various industrial interests, specifically the mining industry, have seen the decision as mostly positive, but still had some reservations about it, especially its overall confusion and lack of clarity. For example, the Honorable Geoff Gallop, Premier of Western Australia, called the ruling a “significant case and the findings of the High Court go a long way toward clarifying the nature and

to deliver certainty to indigenous people, many of whom are still waiting to reap the benefits they believed would flow from a recognition of their rights).

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222 See Rintoul, supra note 122.
223 See Metherell, supra note 58 (Ward complaining that “the government should make it more simple for people to live more simply in the bush because we pay the tax too”); see also, e.g., Press Release, Dr. Carmen Lawrence, Minister for Reconciliation, Aboriginal & Torres Strait Islander Affairs (Aug. 9, 2002) available at www.aiatsis.gov.au/rsrch/ntru/news_and_notes/miriuwung-gajerrong/miriuwung-gajerrong.htm (“on the face of it, these decisions appear to further limit native title, confirming the reduction of the strength and extent of such rights. They represent a significant erosion of the title envisaged in the original Native Title Act”).
224 See Metherell, supra note 58. (Senator Ridgeway stating that the ruling has “provided certainty to no one and far too much energy and money had been spent trying to constrain and restrict the application of native title”).
225 Dr. Strelein lamented that:

Rather than espouse a coherent theory of native title, the Court instead concentrated on the complex web of statute law that now frames native title and articulated the process for determining the relationship between native title and other interests. The Court concentrated on the intricacies of determining the extinguishing effects of 200 years of dealing with Indigenous peoples’ land without consideration of property rights.

See Strelein, supra note 59.
extent of native title." Prime Minister John Howard, speaking for the Australian Government, expressed similar satisfaction with the ruling. The mining industry was pleased for the most part as well. The Minerals Council of Australia welcomed the decision as a key precedent confirming that minerals and petroleum in the ground are the property of the Crown, providing some certainty for the mining industry in its dealings with indigenous groups. However, not everyone in the industry shared the Council's enthusiasm. For example, the Queensland Mining Council agreed that the decision provided some clarity but added that it would do nothing to resolve the issue of more than 1000 back logged exploration permit applications and those issues will have to be resolved in separate litigation. Others benefiting from the ruling, like Pastoralists and Graziers Association President Barry Court, actually felt the decision did not go far enough, and were upset that the High Court left open any possibility of native title existing. Still, the prevailing mining industry reaction to the decision was a positive one.

B. Ward's Effect on the Future

All of these vastly different reactions to the historic ruling have left affected Australians asking "where do we go from here?" The answer, of course, is that no one really knows. While the High Court found mining leases under relevant Western Australian legislation to have extinguished native title in the case before it, that ruling does not necessitate that native title with relation to other mining leases pursuant to different statutory language would yield an identical result. As Maureen Tehan, a professor at Melbourne University Law School and native title expert puts it, the practical result of the decision in relation to mining issues is that it "will require Courts to be much more detailed in terms of findings about the specific nature of each and every Native Title right in relation to a piece of land."
So while the *Ward* decision was a good result for the mining industry, its true precedential value remains unclear. In general, the ruling has certainly made it difficult to definitively determine what the future holds for native title in Australia, particularly with respect to the mining industry.

Nevertheless, after all of the preceding analysis, some educated predictions about the future can be made. In general, the best solution for all parties concerned seems to be a greater attempt at mediation and negotiation of treaties regarding various rights and interests as opposed to resorting to further litigation. As the *Ward* decision made clear, attempts to further litigate sensitive and close questions of native title will only result in more confused, costly and controversial litigation that would not likely resolve matters as easily or as coherently as an established system of negotiation would. The encouraging news, at least during the immediate fallout from the High Court's ruling, seems to be that all sides involved seem to agree that further litigation will prove futile and a system of agreements and treaties regarding native title may be the appropriate solution. Of course, both sides have rather different hopes for how the negotiation process would work, which may ultimately prove to be an obstacle to reaching agreements through negotiation.

Most people, even those in the mining industry who have benefited from, or were pleased with the result of the litigation, agree that it is not an efficient way to deal with these issues. As Attorney General Williams has stated: "mining is one of Australia's key industries. About 40% of Australia's merchandise exports come from the minerals sector. The growth of the sector depends on continued exploration and the opening up of new reserves." That being said, Attorney General Williams has blamed the recent decline in mining exploration in Australia, at least in part, on the uncertainty created by all of the contested native title issues. Even as far

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disputed land had been extinguished. For an analysis of the decision see the Australian law firm of Allens Arthur Robinson's comments available at www.aar.com.au/pubs/nat/tonatdec02.htm ("Native title claimants will now be required to focus on proof of their traditional rights and customs - dating back to before the time that sovereignty was acquired by Great Britain").

232 Perth lawyer George Irving, who has worked closely with aboriginal groups on native title issues, feels that:

[L]itigation generally is a last resort. If things can be negotiated between disputing parties, then clearly that's a better outcome. The problem with going to court of course, is that you lose the power to negotiate an outcome, and you have an umpire ... that ultimately makes a decision, and it may not please everyone.

See Interview, supra note 133.

233 See Williams, supra note 50 (Attorney General Williams quoted a specific statistic to emphasize his point. In the 1996/1997 fiscal year, when expenditures on exploration activities in Australia reached their peak, total expenditure reached $506 million. By the 1999/2000 fiscal year that amount had dropped all the way down to $344 million and Williams only expected further declines; see also, McCarthy, supra note 131 (Queensland Mining Council blaming the 67% drop in exploration funding from 1996 – 2001 on the "inability of mining companies to get a speedy, cost effective and equitable access to land").

234 See Williams, supra note 50 ("It is also clear that native title issues are having a discernible [sic] impact on exploration levels").
back as a year before the Court handed down its decision, Williams was well aware of the problems of litigation and urged parties to settle things through agreements, saying that “the Howard Government has long recognised that agreements provide a practical solution for native title issues in the interests of all parties.” In the wake of the Ward ruling, most mining industry leaders agree and also warn that continued uncertainty through litigation will not only discourage exploration spending but would also harm aborigines by blocking their ability to obtain jobs and improved infrastructure.

If the apparent “winners” in the litigation were not pleased with the uncertainty of the ruling, it should come as no surprise that Aboriginal groups are equally displeased and urge a different approach. They are clearly upset with the loss of potentially huge economic opportunities in terms of mineral ownership that they have been denied, while at the same time having their rights to their land acknowledged. As a result, indigenous groups hope to reach some common ground with the mining industry, allowing them to somehow benefit from government wealth located on aboriginal land. Wayne Bergman, spokesman for the Kimberly Land Council, has summed up the general feelings and frustrations in the aboriginal community:

    I see that Native Title, dealing with it through the Courts, is not going to put food on our people’s plates, build houses, make them healthier. Native Title is far more complicated than that, in the justice we want to achieve for our people. I think today’s decision is a demonstration as to why we should not go to Court, in terms of not being able to resolve these issues quickly. I think the better way is that industry, people who are affected by Native Title who require our land for development, need to come and consult with us and work with us. And those principles need to be developed with all governments, both State and Federal.

It seems that using the courts as a mechanism to resolve native title disputes has not been satisfactory to anyone involved, making negotiation the best possible approach.

While both sides may have soured on litigation following the High Court’s ruling and agree that mediation or negotiation may be the best approach, the fairness of the negotiation process is being intensely debated. The Howard Government, as well as the mining industry has expressed an interest in utilizing the negotiation framework established by the NTAA. It

235 Id.
236 See Goldsmith, supra note 6.
237 See Interview, supra note 133.
already exists and is fairly simple. However, as discussed earlier in this note, many pro-aboriginal groups feel that the NTAA in general, and the negotiation system specifically, do not sufficiently account for aboriginal interests in the process.\footnote{See supra Part II.C.} As one newspaper put it, the mining industry prefers the use of “native title agreements achieved through one-sided negotiations within a framework in which real Aboriginal land rights have already been ruled out.”\footnote{See Iverson, supra note 121.} Aboriginal groups would obviously prefer at least a return to a 1993 NTA regime, where they had some greater leverage in negotiation as well as greater general recognition of their rights. Negotiations that are one-sided will ultimately prove just as futile as litigation. Therefore, for any sort of meaningful agreements to be reached, a new negotiation system must be established that fairly and evenly represents the interest of both sides. Such a system seems as though it would be ultimately beneficial to the mining industry as well. This is because until a fair system of negotiation is created, the best hope for aboriginal groups to obtain any native title rights may be through costly, time-consuming litigation – a path that both sides have expressed disfavor towards.

V. CONCLUSION

As is often the complaint following lengthy and costly litigation, it seems that “lawyers were the biggest winners in the long-running Ward case.”\footnote{See “A Better Way,” supra note 123.} When the case first reached the High Court of Australia, many hoped that it would clarify the decade long chaos that existed in the area of native title law. The chaos began with the famous Mabo decision in 1992, which recognized the possibility of native title rights for the first time in Australia’s history and was expanded by Wik four years later. No one disputes that the law as it stood before the Mabo decision was grossly unfair in its complete disregard for aboriginal land rights. However, it was certainly clear – Indigenous people in Australia had no rights to land. This was certainly fine with the mining industry in Australia, who only needed an appropriate government permit to explore potentially mineral-rich areas located on aboriginal land. Mabo added the fear of possibly having to go through litigation to determine the true ownership of the land. The mining industry hoped that Ward would continue the work of the 1998 NTAA and allay its fears by declaring native title to be extinguished.

Aborigines, on the other hand, hoped the High Court would treat Mabo as only a beginning of long overdue recognition and would seize the opportunity presented by Ward to expand upon the rights of aborigines. They hoped that the policy behind Mabo – the recognition of aboriginal rights – would similarly limit the force of the NTAA, perhaps ultimately
leading to further amending. Court acknowledgment of aboriginal rights to ownership of minerals on native land would have meant an economic windfall for the Aborigines and, more importantly, a valuable tool with which to negotiate.

As is often the case in lengthy and complex litigation that stretches over many years, neither side was completely happy and the true practical outcome was a tremendous bill to the Australian taxpayer. The mining industry was pleased with the specific result but disappointed in the fact that it could be narrowly construed as applying only to the disputed land before the Court, leaving open the possibility for further litigation. Aborigines were also upset with the result, which denied them rights to natural resources on their land but did allow them to continue to stay on the land and acknowledged their spiritual connection to the land. It is evident from the long frustrating process of the Ward case that further litigation benefits no one and the best remedy would be for the sides to negotiate a series of land use agreements or treaties. Of course, this can only be done through a truly fair system of mediation and negotiation, unlike the system established by the NTAA, which favors government and mining interest over those of aborigines. Once that system is created, there may be hope for resolving some of these very controversial issues. The real frustration is that native title law is so new and in the midst of such constant development in Australia, that "it's not easy to get certainty in a hurry, 241 and a truly just system of negotiation and actual solutions to these complex problems, may be years away.

241 See Interview, supra note 133.