Jumbunna Indigenous House of Learning Research Unit

Briefing Paper No: 7

Review of Aboriginal Land Titles

September 2005

Nicole Watson

for

Jumbunna Indigenous House of Learning Research Unit
University of Technology, Sydney
Level 17, Tower Building, City Campus
PO Box 123
BROADWAY, NSW 2007.
Phone: (02) 9514 1902 Fax: (02) 9514 1894

Introduction

Since the earliest days of the occupation Indigenous people have fought for the land that is oxygen to our existence. The stalwarts of our civil rights movement, Vincent Lingiari, Eddie Mabo and John Koowarta, each had an indomitable thirst for land justice. Rather than cherish their legacies however, we face losing them to a foe more powerful than Lord Vestey and surely as cantankerous as Bjelke-Petersen - the Howard Government.

Recently, the Prime Minister foreshadowed reform of Indigenous land titles:

> I believe there is a case for reviewing the whole issue of Aboriginal land title, in the sense of looking more towards private recognition … I certainly believe that all Australians should be able to aspire to owning their own home and having their own business.[1]

This paper will argue that Howard's comments are an invitation to use our bootstraps, not as a lifeline from poverty, but as a noose. Promises of a stake in the Australian dream are a ruse for his sinister agenda to render Indigenous people powerless against those desirous of exploiting our lands.

This paper will be divided into three parts. Part one will discuss the importance of land to the black political movement. Today's communal lands resulted not from the benevolence of Australian governments, but the unwavering demands of generations of Indigenous activists. Their legacies must be jealously guarded.

Part two will provide an historical snapshot of privatisation. It will be argued that rather than raise living standards the absence of communal land title enfeebles Aboriginal people, vis-à-vis governments and industry. This point will be demonstrated by reference to the United States of America and Queensland.

Part three will expose Howard's ideological jigsaw that has the erosion of Indigenous land ownership as its lynchpin. The stratagem has already been executed through the 'Ten Point Plan' and inequalities in the administration of the native title system. Privatisation is merely the latest piece of his assimilation puzzle.

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[1] ANTaR, 'Land rights under threat', 20 April 2005, http://www.antar.org.au.

Part One: The Pre-eminence of Land

As Indigenous people our relationships with land sustain us, provide the foundations for our social order and define our identity. It follows that land is the enduring anchor of the black political movement.

The history of the land rights struggle has been conspicuously absent from recent discussions, implying that communal lands were gifts from the colonial state, arising independently of black agency. In reality however, each community's title deed carries the indelible blood stains of our ancestors.

Our early freedom fighters resisted the Europeans' thirst for land, giving rise to violent conflict. Of one Queensland district it was written that 'every acre of land … was won from the Aborigines by bloodshed and warfare'.[2]

Survivors of the frontier wars were herded onto reserves at the turn of the twentieth century.[3] In spite of living under penal conditions, Indigenous people mobilised to form political organisations.

While such groups were necessarily shaped by local influences, the demand for land featured in each raft of claims. For example, in 1927 the Australian Aborigines Progressive Association ('AAPA') petitioned Premier Lang for 'reasonable repatriation' of their land.[4] The AAPA through their newspaper, *Australian Abo Call*, also expressed concerns about the dissipation of Aboriginal reserve lands:

> The position here is that the A.P. Board [Aborigines Protection Board], as trustees for 14,000 acres of land reserved for Aborigines, has in its wisdom seen fit to lease many of these reservations, wholly or in part, to white men for grazing purposes … we think it inequitable that land reserved for Aborigines should be leased to white men, and we intend to investigate the position thoroughly, bringing it before the notice of the Crown Lands Department, and other authorities, who may be able to advise us whether the A.P. Board has exceeded its powers …'[5]

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[2] Dawn May, *Aboriginal Labour and the Cattle Industry* (1994) 26.
[3] For an analysis of the management of Queensland's Aboriginal reserves see Rosalind Kidd, *The way we civilise* (1997).
[4] Bain Attwood and Andrew Markus, *The struggle for Aboriginal rights* (1999) 66.
[5] Ibid 95.

The activism of the AAPA is remarkable in light of protectionism, a regime that stifled the exercise by Indigenous people of fundamental human rights.[6] Political leaders of their generation often carried the risks of removal to punitive reserves and separation from kin.[7]

Three decades later the AAPA's call for land justice found resonance in the Gurindji strike. The strikers were employed on the Wave Hill station in the Northern Territory, by the British consortium, Vesteys.

Like other Indigenous pastoral workers, the Gurindji people were excluded from the *Cattle Station Industry (Northern Territory) Award 1951*.[8] On 23 August 1966 their leader, Vincent Lingiari, demanded a wage of $25 per week.[9] When Vesteys' manager refused the Gurindji people walked off the property.

Although the strike was sparked by an industrial dispute, its primary goal was repatriation of traditional lands. As Vincent Lingiari declared to Lord Vestey, 'You can keep your gold. We just want our land back.'[10]
Spanning over seven years, the Gurindji strike catapulted the issue of Indigenous land rights into the public domain. It also galvanised a pan-Aboriginal movement, culminating in the Aboriginal Tent Embassy.

On Australia Day in 1972 Prime Minister McMahon stated that his Government would not recognise Indigenous land rights.[11] In response a small group of Koori activists established the 'Aboriginal Embassy' on the lawns of Parliament House.

The motivations of the Embassy evolved primarily around land justice. Their five-point plan demanded Aboriginal ownership of all existing reserves and preservation of sacred sites.[12]

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[6] Kidd, above n 3.
[7] For example, political agitators in Queensland were forcibly removed to Palm Island, earning it the name 'Prison Island'.
[8] William Deane, 'Some Signposts From Daguragu' (Paper presented at the Inaugural Lingiari Lecture, Darwin, 22 August 1996).
[9] Ibid.
[10] Minoru Hokari, 'From Wattie Creek to Wattie Creek: An oral historical approach to the Gurindji Walk-Off' (2000) 24 *Aboriginal History* 98, 101.
[11] Scott Robinson, 'The Aboriginal Embassy: an Account of the Protests of 1972' (1994) 18 *Aboriginal History* 49, 50.

Despite its peaceful inception, the Embassy met a violent end on 20 July 1972 when federal police razed the tents, creating a melee that resulted in eight arrests and numerous casualties.[13] By then however, the Embassy was firmly embedded in Indigenous history.

Later activists continued their pursuit of land justice in the courts, generating the watershed decisions of *Koowarta v Bjelke-Petersen*[14] and *Mabo v The State of Queensland*.[15] While much has been written about the circumstances behind the *Mabo* litigation,[16] less attention has been given to the *Koowarta* case, in which the High Court affirmed the validity of the *Racial Discrimination Act 1975* (Cth).

The decision arose from John Koowarta's campaign to regain his traditional lands within the Archer River cattle station. In the late 1970s the Aboriginal Land Fund Commission successfully negotiated the purchase of the property. However, the racist Queensland Government blocked the transfer of the lease, decrying it as 'land rights by the back door.'[17]

Despite tasting victory in the High Court, Koowarta's attempt to return home was ultimately thwarted by his nemesis. Reading the writing on the wall, the Queensland Government converted the lands into the Archer Bend National Park.[18]

After John Koowarta's death in 1991 his relatives persevered with the struggle for justice, leading to the historic decision of *Wik Peoples v The State of Queensland*.[19] Scenes of Wik woman, Gladys Tybingoompa, dancing outside the High Court in 1996 epitomised the indomitableness of the land rights movement.

It is self-evident from the above summary that today's Indigenous lands were not charitable gestures by the State, but rare concessions to the demands of generations of activists. Prior

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[12] Ibid 52.
[13] Ibid 56.
[14] (1982) 153 CLR 168.
[15] (1992) 175 CLR 1.
[16] See Bryan Keon-Cohen, 'The Mabo Litigation: A Personal and Procedural Account' (2000) 24 *Melbourne University Law Review* 893.
[17] John Woodley, 'John Koowarta – Mabo of the Mainland' (1998) 17(2) *Social Alternatives* 26.
[18] Ibid.
[19] [1996] HCA 40.

to the distortion of their legacies, the possible consequences of dismantling communal land titles must be scrutinised.

Those consequences can be gleaned from the historical experiences of Indigenous people in the US and Queensland. In both jurisdictions the absence of communal land title did not stimulate economic development. Instead, it rendered communities vulnerable to the brute force of governments anxious to broker land deals.

Part Two: A Historical Snapshot of Privatisation of Indigenous lands

The US Experience

Throughout the United States of America today are Indian reservations, the ownership of which resembles a checkerboard. Title to the land is divided between an array of interests comprising tribes, individual Indians, governments and non-Indian entities.
By way of example, almost half of the Swinomish reserve in Washington State is held under non-Indigenous ownership. Such lands are subject to the jurisdiction of the local authority outside the reservation.[20]

Related to this phenomenon is one of the largest lawsuits ever filed in the United States, *Cobell v Norton* ('Cobell'). The class action on behalf of up to 500,000 Indigenous Americans evolves around the claim that the Department of Interior defrauded them of billions.[21]

Both the checkerboard effect and the mammoth litigation have their genesis in the *General Allotment Act of 1887*. There were five planks to the Act:

- The carving up of Indian reservations into individual parcels of varying sizes depending on the age of the grantees;
- The vesting of a fee simple title in Indian grantees, to be held on trust by the Government for 25 years, during which time the land could not be sold;

[20] Mark Moran, 'Technology and health in Indigenous communities: USA, Canada, Australia' (Report for the Winston Churchill Memorial Trust of Australia, 1997) 21.
[21] John Files, 'U.S. is ordered to tell Indians before selling trust property', *New York Times* (New York), 4 October 2004, 17 http://proquest.umi.com.

- Indians who did not make their selections within four years would be granted selections made by the Government for them;
- Citizenship for those who maintained their allotments and embraced a 'civilized' way of life; and
- The selling of surplus lands by Government.[22]

The official rationale for the carving up of communal lands was assimilation. Arguably, the sentiments of the former Commissioner of Indian Affairs, T. Hartley Crawford, find resonance in Howard's dogma:

> Unless some system is marked out by which there shall be a separate allotment of land to each individual … you will look in vain for any general casting off of savagism. Common property and civilization cannot co-exist.[23]

Rather than cast off 'savagism' however, allotment entrenched the poverty of Indigenous communities. By the time that Congress abandoned allotment in 1934, the Indians had lost almost two thirds of their lands.[24] They saw not only the contraction of their land base, but also the squandering of their wealth.

As a result of allotment the Federal Government reaped billions from the sale of natural resources and farming leases over Indian lands.[25] The proceeds were to be distributed to Individual Indian Money ('IIM') accounts, managed by the Bureau of Indian Affairs within the Department of Interior. However, throughout the twentieth century the Department allowed the IIM accounts to be dissipated through slipshod management.

Since the *Cobell* litigation began in 1996, Judge Lamberth of the Federal District Court has been scathing of the Department of Interior. He described its supervision of Indian monies as 'the gold standard for mismanagement by the federal government for more than a century'.[26]

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[22] Gary C Anders, 'Social and economic consequences of Federal Indian policy: A case study of the Alaska Natives' (1989) 37 *Economic Development and Cultural Change* 285, 292.
[23] John Byrne and Steven M Hoffman, 'A 'Necessary Sacrifice': Industrialization and American Indian lands' in John Byrne, Leigh Glover and Cecilia Martinez (eds) *Environmental Justice: Discourses in International Political Economy* (2002) 97, 102.
[24] N Bruce Duthu, 'Overcoming jurispathic law: The challenge for American Indian tribal governments' (1999) 4(23) *Indigenous Law Bulletin* 12, 13.
[25] Ros Kidd, 'Abuse of trust: The government as banker in Queensland and the United States' (2003) 5(26) *Indigenous Law Bulletin* 13, 14.
[26] John Files, 'US is ordered to tell Indians before selling trust property', *The New York Times* (New York) 4 October 2004, 17 http://proquest.umi.com.

It is a standard that has prevailed, in spite of judicial scrutiny. Thus far Judge Lamberth has fined the Interior Secretary and the Treasury Secretary more than $600,000, for failing to disclose the destruction of documents bearing on the case.[27]

In 1999 the Court appointed an investigator, Alan Balaran, to examine the finances of Indian beneficiaries. Last year Balaran resigned and accused the Department of unethical practices.[28] As bureaucrats continue to flounder Indian communities are left to grapple with the legacies of allotment - dispossession and poverty.

It would be drawing a long bow to suggest that Indigenous monies would be dissipated if the allotment model were applied to Australia today. However, the nexus between the absence of communal land title and entrenchment of Indigenous disadvantage has parallels in Australia. For example, Aboriginal communities in Queensland were completely defenceless against the Bjelke-Petersen Government when mineral deposits were discovered in Cape York in the 1950s.

The Queensland Experience

As distinct from the US, Indigenous people in Queensland did not enjoy title to communal lands until the closing decades of the twentieth century. Historically, the lands within Aboriginal settlements were reservations of Crown land that could be de-gazetted at the whim of the Governor-in-Council.[29]

As in the US, the absence of communal land title did not result in Indigenous people raising themselves by their bootstraps out of penury. Instead, it turned them into road kill trapped underneath the semi trailer of the Queensland Government.

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[27] 'United States: A long-overdue scalping; Justice for Indians', *The Economist* (London) 23 March 2002. 52 http://proquest.umi.com.
[28] John Files, 'Indian fund investigator angrily quits', *The New York Times* (New York) 7 April 2004, 15 http://proquest.umi.com.
[29] Frank Brennan, *Land Rights Queensland Style* (1992) 81.

The powerlessness of Indigenous people was brought into stark relief when bauxite deposits were discovered in Cape York in the 1950s. In 1957 the Queensland Government decided to close the Mapoon Aboriginal Reserve, in order to make way for the mining company, Comalco.[30]

In an attempt to coerce the people to leave, the State froze expenditure on infrastructure and food subsidies later using the poverty it had induced as leverage to remove the church administration.[31] As the community's tenacity became more apparent the Department of Native Affairs intercepted the adults' welfare payments, at the same time warning them that their children would be subject to removal orders due to neglect.[32] Despite a heroic campaign to remain, the people of Mapoon were overwhelmed by an armed police contingent in 1963. The sight of families being marched away while their homes burnt to the ground was eloquently described by one observer as, 'like a mob of cattle with nowhere to go'.[33]

Four years earlier the Weipa Aboriginal Reserve had also been sacrificed for Comalco. In one foul swoop the Queensland Parliament reduced the community's land base from 354,000 hectares to a paltry 124.[34] Despite losing the vast majority of their lands, the community was offered no compensation.

Throughout the 1970s Bjelke-Petersen continued to steamroll Aboriginal communities who lacked title to their lands. The notorious *Aurukun Associates Agreement Act 1975* (Qld) conferred a 42-year mining lease over much of the Aurukun Aboriginal Reserve to the mining company, Tipperary.[35] The Act was rushed through the Parliament after only two discussions between the Director of Aboriginal and Islanders Advancement, Patrick Killoran, and the Aurukun Council.[36]

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[30] Ros Kidd, above n 3, 216.
[31] Ibid 217.
[32] Ibid 221.
[33] Ibid 222.
[34] Brennan, above n 29, 87.
[35] Tim Rowse, 'Out of hand – The battles of Neville Bonner' 54-55 (1997) *Journal of Australian Studies* 96, 103.
[36] Kidd, above n 3, 288.

It was not until the prospect of international criticism injuring the grandeur of the Brisbane Commonwealth Games that Indigenous people were finally granted communal title to reserve lands.[37] In 1982 the Queensland Parliament amended the *Land Act 1962* (Qld),[38] to enable the vesting in Aboriginal Councils of Deeds of Grant in Trust ('DOGIT').

It is submitted that three lessons can be deduced from allotment in the US and the fragility of Aboriginal land tenure in Queensland. Firstly, the mere opening up of Indigenous lands to resource development is no guarantee that Indigenous people will partake of its fruits. Secondly, in the absence of communal land title Indigenous people are completely vulnerable to governments anxious to serve powerful industries.

Lastly, in both jurisdictions the promise of prosperity was used to disguise the aim of facilitating white land grabs, at the expense of Indigenous people. Part three of this paper will argue that the same goal lies behind Howard's suggestion of privatisation of communal lands as a cure-all for black disadvantage.

Part Three: Howard's Plan to Annihilate the Indigenous Land Base

When we reflect on the 1996 federal election most of us can still remember the image of John Howard and his map of Australia, warning the electorate of an imminent black conquest. Likewise, memories of Tim Fisher's promise of 'bucket loads of extinguishment' are still fresh.

Such rhetoric was the first punch in the Liberal Party Government's nine-year assault on the Indigenous land base. The second was the 'Ten Point Plan', given life through the *Native Title Amendment Act 1998* (Cth). [39]

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[37] Ibid 329.
[38] *Land Act (Aboriginal and Islander Land Grants) Amendment Act 1982* (Qld)
[39] For a comprehensive analysis see Paul Burke, 'Evaluating the Native Title Amendment Act 1998' (1998) 3 *Australian Indigenous Law Reporter* 333.

The *Native Title Amendment Act 1998* (Cth) and the High Court's subsequent chiselling down of native title have generated a plethora of academic texts. However, less attention has been given to Howard's ongoing covert war on black communities; fought in the murky arena of native title policy.

The Commonwealth's Racist Administration of the Native Title System

Built like a telephone book and spawning legal decisions of a similar mass, the *Native Title Act 1993* (Cth) ('NTA') is steeped in complexity. It is also mired in ridiculous fantasies of virgin landscapes and wanton natives. Legalese and exoticism have created a veil of secrecy largely impenetrable by those outside the white male lawyers who dominate the native title industry.

The veil hides not only their wealth but also the racism that infuses the Commonwealth's administration of the NTA. Throughout Howard's reign he has tied one millstone after the other around the necks of Indigenous actors on the native title stage – native title representative bodies ('NTRBs').

NTRBS

NTRBs are a diverse range of organisations, each having been shaped by its unique history and responsibilities under a matrix of State, Territory and Commonwealth legislation. Despite their lack of commonality most were created during the land rights struggle.

For example, the Northern and Central Land Councils had their genesis in the recommendations of the 1974 Aboriginal Land Rights Commission.[40] Likewise, the

[40] Jon Altman and Diane Smith 'Funding Aboriginal and Torres Strait Islander representative bodies under the *Native Title Act 1993*' (Issues Paper No 8, Australian Institute of Aboriginal and Torres Strait Islander Studies, 1995) 2.

Kimberley Land Council was established in 1978 as part of the mobilisation of Aboriginal people dislocated from their homelands.[41]

With the advent of native title many of these community organisations acquired the status of NTRBs. They are obliged to perform numerous functions under the NTA, including preparing native title determination applications.[42]

As the bodies responsible for advancing the rights of native title holders, the wearing down of NTRBs is vital to Howard's plan to strip Indigenous people of all bargaining power vis-à-vis industry. In this endeavour the Commonwealth has used a doubled edged sword - starving NTRBs of funds while simultaneously drowning them in soaring workloads. The final nail in the NTRB coffin will be the emasculation of their political voice.

Starving and Drowning

After two centuries of suffering the lie of terra nullius Indigenous people embraced the promise of *Mabo*, thrusting enormous responsibilities on the shoulders of NTRBs. Thanks to government tightfistedness, managing the expectations of their constituents has moved beyond the reach of many NTRBs.

Ever since the commencement of the NTA, NTRBs have been short-changed by the Commonwealth. In 1994 the inaugural Aboriginal and Torres Strait Islander Social Justice Commissioner voiced his concern that the functions of NTRBs were being hampered by a lack of funding.[43]

The following year a paper published by the Australian Institute of Aboriginal and Torres Strait Islander Studies suggested that the Commonwealth had underestimated the costs of

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[41] Wayne Bergmann, 'Our Struggle as Kimberley Aboriginal peoples, is for the recognition of inherent and fundamental rights, interests and responsibilities in land' (2003) 23 *Studies in Western Australian History* 39.
[42] NTA s 203B.
[43] Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report* (1994) http://www.austlii.edu.au.

implementing the NTA.[44] Whereas the total amount requested by NTRBs from ATSIC was $38 million, only $14 million was made available.[45]

Three years later NTRBs were hit by the tsunami that was the *Native Title Amendment Act 1998* (Cth). The more onerous registration test required NTRBs to sink their resources into 'vast amounts of technical drafting', in order to preserve the procedural rights of their clients.[46]

The trickling of Commonwealth money was inadequate to meet the new administrative load. For example, the Kimberley Land Council estimated the cost of re-registering native title claimants to be $1 million. The Commonwealth obliged with $300,000.[47]

NTRBs also endured a burdensome re-recognition process. Despite the native title system being in its infancy, NTRB boundaries were re-drawn and they were forced to meet new criteria in order to receive the Minister's recognition.[48]

Another punch in Howard's assault was the singling out of NTRBs for onerous reporting requirements. As a result of the 1998 amendments NTRBs were compelled to develop three-year strategic plans for Ministerial approval. Together with annual reports, the strategic plans are tabled in Parliament.[49]

NTRBs were weighed down by a multitude of new responsibilities in the absence of additional resources. An independent review of NTRBs, the 'Love-Rashid Report', found that funding of NTRBs from 1997 to 1998 was only 70 percent of what was required for them to fulfil their statutory functions. [50]

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[44] Jon Altman and Diane Smith, above n 40, 10.
[45] Ibid.
[46] David Ritter, 'So, what's new? Native title representative bodies and prescribed bodies corporate after Ward.' (2002) 21 *Australian Mining and Petroleum Law Journal* 302, 304.
[47] Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report* (1999) 77.
[48] See Lisa Strelein, 'Moving the boundaries: Native title representative bodies and the re-recognition process (1999) *Indigenous Law Bulletin* 54.
[49] Julie Finlayson, 'Managing competing agendas: Strategic partnerships across the native title operational environment' (2001) 5(9) *Indigenous Law Bulletin* 4.
[50] ATSIC, *Review of Native Title Representative Bodies* (1999) 72.

The report also contained the following warning:

'If NTRBs are not adequately funded they will not merely 'under perform'. They will spiral down into a cycle of immediacy:

- Deferring strategic decisions;
- Externalizing costs;
- Forgoing opportunities for negotiation and settlement; and
- Only dealing with that which demands attention at any given moment; and
- Take on roles which deliver achievements as best they can.[51]

Six years later the dire prophesy has been fulfilled. Many NTRBs are now so impoverished that they are forced to beg project proponents for money, so that they can represent their clients at the negotiating table.

The Executive Director of the Kimberley Land Council explained the invidious position that NTRBs are in:

> We are left in the position of having to ask those resource companies to provide the funds in order for us to fulfil our statutory obligations … That is just not right in that, on the one hand, we are dealing with a company on a commercial basis to talk about settling an agreement and, on the other hand, our hands are tied behind our backs…[52]

The meagre resources of NTRBs have been stretched even further by the Commonwealth's refusal to fund prescribed bodies corporate ('PBCs'), the entities that represent the interests of native title holders after a determination has been made that native title exists. In the case of the Torres Strait Regional Authority, this has meant expending 34 percent of its annual budget on supporting fledgling PBCs.[53]

With breathtaking arrogance the former Attorney General, Phillip Ruddock, expressed 'a strong preference' for the establishment of PBCs prior to the formal recognition of native title.'[54] However, in the same speech he disavowed Commonwealth responsibility for

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[51] Ibid 3.
[52] Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund, *Report of Inquiry into Indigenous Land Use Agreements* (2001) 95.
[53] Alison Murphy, 'Prescribed bodies corporate in the post-determination landscape' (2002) 5 *Balayi: Culture, Law and Colonialism* 162, 165.
[54] Commonwealth Attorney General, Phillip Ruddock, 'The Government's Approach to Native Title', Native Title Representative Bodies Conference 2004, Adelaide, South Australia, <http://www.nttf.gov.au/agd/www/MinisterRuddockHome.nsf>

funding PBCs, claiming that there was 'a very sound case for parties to look beyond the Government' for funding.[55]

Destroying the Political Voice of NTRBs

Having starved NTRBs into dysfunction, Howard intends to sanitise them of their advocacy role and transform them into non-partisan service delivery providers. His aspirations for NTRBs were revealed by the Office of Indigenous Policy Coordination ('OIPC'), in its submission to the *Inquiry into the Capacity of Native Title Representative Bodies to Discharge their Duties under the Native Title Act 1993*.[56]

The OIPC claimed that the current NTRB system was, 'not delivering a sufficiently professional, reliable and effective service' to Indigenous communities.'[57] The cure was not additional resources but, 'increased flexibility in arrangements for the delivery of native title services.'[58] While most of the 38-page submission is cast in vacuous language, there is the occasional clue as to what 'increased flexibility' will mean in practice.

Firstly, the OIPC has a preference for the use of alternative service providers incorporated under the *Corporations Act 2001* (Cth), as opposed to NTRBs.[59] Alternative service providers have already replaced NTRBs in New South Wales ('NSWNTS') and Victoria (NTSV').

The allure of alternative service providers lies in governance mechanisms that discourage the traditional advocacy roles of NTRBs. For example, the constitution of NTSV expressly prohibits the corporation from engaging in political lobbying.[60]

As distinct from bodies incorporated under the *Aboriginal Councils and Associations Act 1976* (Cth), the membership of both corporations is small and not drawn directly from the

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[55] Ibid.
[56] Office of Indigenous Policy Coordination, *Submission to the Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund, Inquiry into the Capacity of Native Title Representative Bodies to Discharge their Duties under the Native Title Act 1993* (2004).
[57] Ibid 2.
[58] Ibid.
[59] Ibid 7.
[60] Ibid 15.

native title holders in each jurisdiction.[61] Consequently, members and directors are 'at arms length from their clientele.'[62]

This paper does not suggest that those within NSWNTS or NTSV have conspired with Howard in his attempt to emasculate NTRBs of their political voice. Furthermore, the writer respects the autonomy of Indigenous communities to shape their own models of service delivery.

However, the writer does take issue with the OIPC's assertion that the underperformance of NTRBs springs from their identity as black community organisations, as opposed to grossly inadequate funding. Just as Indigenous land titles must be assimilated, so too must our organisations. Meanwhile, the Commonwealth's responsibilities to our communities disappear.

Also foreshadowed by the OIPC was a 're-accreditation process', reducing the number of NTRBs and the opening up of native title services to competitive tender.[63] Another suggestion was legislative amendment to make it easier for the Minister to withdraw the recognition of NTRBs.[64]

As NTRBs languish underneath Howard's boots, the National Native Title Tribunal ('NNTT'), the Federal Court and respondent parties accumulate greater shares of the Commonwealth's native title money. Financial superiority has given them a license to advance their objectives at the expense of NTRBs.

The NNTT

The NNTT was the centrepiece of the original NTA - the body that would resolve native title claims in an informal and non-adversarial manner.[65] The High Court decision of

[61] Ibid 16.
[62] Ibid.
[63] Ibid 19.
[64] Ibid 20.
[65] For an early critique of the NNTT see Richard Bartlett, 'Dispossession by the National Native Title Tribunal' (1996) 26(1) *Western Australia Law Review* 108.

Brandy v HREOC[66] and the *Native Title Amendment Act 1998* (Cth) saw the Federal Court replace the Tribunal as the engine room of native title. Nonetheless, mediation remains the NNTT's primary function.[67]

Unlike the malnourished NTRBs the NNTT consistently receives the lion's share of native title money. Despite being a small organisation of approximately 200 staff, the NNTT spent $25, 334, 000 in 2001; a figure that represented more than half of the funds allocated to all NTRBs.[68] At the same time the Tribunal's budget rose by almost $36 million over four years.[69]

Testament to the NNTT's affluence is its patronage of the Native Title Studies Centre within the James Cook University. According to the University's website, the Centre 'conducts research into the day to day practicalities of co-existence rather than the intricacies of legal decision-making'.[70]

In 2002 the Tribunal pledged an annual contribution to the Centre of $50,000 for five years.[71] Arguably, the 'practicalities of co-existence' would be better served by the Tribunal's surplus funds going to NTRBs.

The NNTT's affluence has not only attracted the ire of those at the coalface. State Governments and the mining industry alike have called for a redistribution of funds from the NNTT to NTRBs.

In its submission to the *Inquiry into the Effectiveness of the National Native Title Tribunal*, the South Australian Government suggested that funding to the NNTT be adjusted in

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[66] [1995] HCA 10.
[67] NTA s 108 lists the functions of the NNTT.
[68] Bruce Harvey, Chief Advisor Aboriginal and Community Relations, Rio Tinto Ltd, *Submission to the Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund, Inquiry into the Effectiveness of the National Native Title Tribunal* (2002) [1.7].
[69] David Ritter, 'You get what you pay for' (2001) 5(9) *Indigenous Law Bulletin* 14, 15.
[70] Website of Native Title Studies Centre, James Cook University, www.jcu.edu.au, accessed 23 March 2005.
[71] Ibid.

favour of increased resources for the Aboriginal Legal Rights Movement.[72] Its sentiments were mirrored by the submission of the New South Wales Government.[73]
The mining giant, Rio Tinto has also advocated for equity between the NNTT and NTRBs:

> Representative Bodies drive the NTA processes that the NNTT facilitate – without that drive there is nothing for the NNTT to facilitate. It is essential that the current imbalance between the funding of the NNTT and of Representative Bodies be rectified.[74]

As the Tribunal's stake in the native title bonanza has increased, its level of Indigenous representation has diminished. Of the NNTT's 14 members only two are Indigenous.

The 12 members who have the carriage of the majority of mediated claims are invariably drawn from industries historically opposed to the recognition of Aboriginal land rights. Among them are a former Director and General Counsel of Shell Australia and a former National Executive Director of the Cattleman's Union of Australia.[75]

This paper does not suggest that any of the current members of the Tribunal have ever acted unethically in the performance of their duties. Nonetheless, all individuals are shaped by their career experience. With the removal of the Keating appointments the NNTT has evolved from an innovative mediator into a 'legalistic' bureaucracy.[76]

The cultural shift is evident in the NNTT's restrictive approach to objections to the 'expedited procedure'. In essence, this procedure excludes the right to negotiate in cases where mining activity does not impinge upon the rights of native title parties. Where a

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[72] Kevin Foley MP, Acting Premier, South Australia, *Submission to the Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund, Inquiry into the Effectiveness of the National Native Title Tribunal* (2002) 16.
[73] R B Wilkins, Director General, The Cabinet Office, New South Wales Government, *Submission to the Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund, Inquiry into the Effectiveness of the National Native Title Tribunal* (2001).
[74] Bruce Harvey, Chief Advisor Aboriginal and Community Relations, Rio Tinto Ltd, *Submission to the Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund, Inquiry into the Effectiveness of the National Native Title Tribunal* (2002) [2.1].
[75] The Website of the National Native Title Tribunal, http://www.nntt.gov.au accessed 11 March 2005.
[76] See Paul Hayes, 'National Native Title Tribunal: Effective mediator or bureaucratic albatross? A user's perspective' (2002) 5(18) *Indigenous Law Bulletin* 4.

Government has notified native title parties that a proposed activity attracts the 'expedited procedure', the native title parties must lodge an objection with the NNTT if they are desirous of exercising the right to negotiate.

In 2001 the Tribunal issued its *Guidelines on Acceptance of Expedited Procedure Applications*. The Guidelines required objection applications to contain detailed information beyond what was necessitated by the NTA,[77] increasing the burdens on struggling NTRBs.

Although the Guidelines were subsequently revised, the NNTT still claimed to lack any discretion to accept applications that did not strictly comply with the NTA and the Regulations.[78] Such a narrow approach constricts the exercise of Indigenous procedural rights and is contrary to the terms of the NTA.[79]

The Federal Court

As a consequence of the *Native Title Amendment Act 1998* (Cth) the management of native title applications was transferred from the NNTT to the Federal Court. In practice this meant the transition of almost 800 applications into Federal Court proceedings, generating significant implications for the Court's workload.[80]

In 1999 the Court reported to the Australian Law Reform Commission that there were 300 contested native title claimant applications outstanding. Each case was expected to take between six and eight months for a judge to determine.[81] The Registrar told the Commission that:

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[77] Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report* (2001).
[78] Ibid.
[79] Ibid.
[80] Susan Phillips, 'Like something out of Kafka: the relationship between the roles of the National Native Title Tribunal and the Federal Court in the development of native title practice' (Issues Paper No. 14, Native Title Research Unit, Australian Institute of Aboriginal and Torres Strait Islander Studies, 2002) 3.
[81] Australian Law Reform Commission, *Managing Justice: A review of the Federal Civil Justice System'* Report No 89 (1999) [7.54].

> If we just went ahead and listed all of these, it would follow that nearly all of our judges across Australia would be dealing with long native title trials at the one time. It is impossible to allow that to happen because there is a whole lot of other work that has to be done.[82]

Despite the Court's predictions of a crisis it should be remembered that the above comments were made before the High Court delivered its judgments in test cases such as *Ward*[83] and *Yorta Yorta*[84]. Those decisions are expected to significantly reduce the Court's workload in coming years.[85]

Nonetheless, the Commonwealth has increased funding to the Federal Court out of recognition of the burdens of the 1998 amendments to the NTA. In 2001 the Court received an additional $17 million over four years, to be devoted to native title cases.[86]

In itself the idea of the Federal Court being adequately resourced is not objectionable. However, the funding boost has enabled the Court to increase the pressure on forlorn NTRBs by adopting a timeframe of three years for the disposal of native title cases.

Given that the cost of litigating one native title case hovers between $500,000 and $1.5 million and the annual budgets of NTRBs range from one to two million dollars, the consequences of litigation for NTRBs are disastrous.[87] For one NTRB, representing claimants in litigation meant selling assets and retrenching a fifth of its staff. [88]

Darryl Pearce, Chief Executive Officer of the Noongar Land Council, has described the catch-22 position of NTRBs:

> … the extra money that has come in has encouraged the federal court to start to increase their case loads and bring their cases on earlier. So when rep bodies go in and say, 'We don't have the resources to be able to do what we are required to do in the period of time. Can we get an adjournment or can we now mediate interstate?' the courts say, 'No, you will go to court at the

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[82] Ibid.
[83] *Western Australia v Ward* [2002] HCA 28.
[84] *Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58.
[85] Australian Law Reform Commission, above n 81, [7.55].
[86] Ritter, above n 69.
[87] Finlayson, above n 49, 5.
[88] Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund, above n 52, 92.

same time.' A federal court is very comfortable because it actually has millions of dollars extra in resources. The rep bodies do not have the same money, even though they are required to be there.[89]

Respondents

Pursuant to s 183 NTA the Commonwealth Attorney-General's Department may provide financial assistance to non-Indigenous respondents to native title proceedings. Initially, legal aid was conditional upon proof that respondents would suffer hardship if assistance were refused. In November 1998 the Attorney-General approved new guidelines, a key feature of which was the removal of the hardship test.[90]

Since the guidelines came into effect, legal aid to respondents has soared. From 2002-2003 they received over $10 million in assistance from the Attorney-General's Department.[91]

It is inconceivable that any Australian legal aid commission would ever remove the means test as a condition for legal representation in areas such as criminal and family law. The public purse simply isn't deep enough to cover the legal expenses of anyone other than the most disadvantaged members of society. But if you are a peak industry group, you are free to participate in native title cases at the taxpayer's expense.

The guidelines are inequitable not only because of the relative wealth of some respondents. It should also be born in mind that the 1998 amendments to the NTA and recent High Court decisions have stemmed the growth of native title, rather than result in the encroachment of non-Indigenous property rights.

Consequently, some legally aided respondents have no stake whatsoever in the outcome of native title cases. For example, the Queensland Seafood Industry Association was funded by the Attorney-General's Department to be a party to all land claims in the Torres Strait, despite the Association having no interest above the high water mark.[92]

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[89] Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report* (2001).
[90] Attorney-General's Department, 'Financial assistance by the Attorney-General in native title cases http://www.ag.gov.au accessed 11 March 2005.
[91] Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report* (2003) 156.
[92] Ibid 158.

One does not have to possess the genius of Rumpole to grasp the possibility that the generous flow of legal aid may encourage litigious behaviour. Despite the risk of protracted litigation and the Commonwealth's professed desire for negotiated outcomes, the guidelines have never been subject to review.

Such a lax approach smacks of hypocrisy given that the Howard Government has held NTRBs captive to its microscope for the greater part of the last nine years. It also represents another millstone on fatigued black shoulders. With each new legally aided respondent, an NTRB must engage in yet another round of negotiations, possibly counter new legal arguments and spend scarce funds.

The Cape York Land Council in its submission to the *Inquiry into the Effectiveness of the National Native Title Tribunal* articulated the frustration of NTRBs:

> Of serious concern to the CYLC is the seemingly unlimited funding that is available to the non-Indigenous parties to mediation despite, at times, the relatively insignificant nature of their interest. For example, a fossicking society has recently become a party to many native title claims in Cape York Peninsula and they have fully funded legal representation. As another example, although the CYLC and NNTT, and even the State has each complained during the protracted Eastern Kuku Yalanji negotiations of the demands upon their limited resources. *Not one* of the Attorney-General's funded local government bodies, utilities, or grazing interests has ever complained during mediation that their legal representation is threatened or inadequate.[93]

Having beaten NTRBs into a coma Howard has been biding his time, waiting for an opportunity to turn off the life support machine. Now that the Government has control of the Senate his longstanding goal will finally be realised. Recent comments by his Liberal Party colleagues and the hand picked members of the National Indigenous Council ('NIC') indicate that inside Howard's bunker, are the battle plans for his next ambush of the NTA.

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[93] Richie Ahmat, Executive Director, Cape York Land Council, *Submission to the Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund, Inquiry into the Effectiveness of the National Native Title Tribunal* (2003) 7.

The Next Attack on the NTA

At the time of the enactment of the *Native Title Amendment Act 1998* (Cth) independent senator, Brian Harradine, held the balance of power. Senator Harradine negotiated the removal of some of the most draconian elements of the Ten Point Plan, namely, a proposed sunset clause requiring all claims to be filed within six years and the dilution of the right to negotiate. Now that the Government has control of the Senate, one wonders how long it will be before the outstanding parts of the Ten Point Plan become a reality?

At the recent National Reconciliation Planning Workshop, the Prime Minister stated that 'communal interest in and spiritual attachment to land is fundamental to indigenous culture.'[94] He also pointed out that:

> … the Government does not seek to wind back or undermine native title or land rights. Rather we want to add opportunities for families and communities to build economic independence and wealth through use of their communal land assets …[95]

However, less than a month after Howard's nebulous assurances, the Finance Minister, Senator Minchin, endorsed a motion of the Liberal Party's federal council, advocating amendment of the NTA. Describing the Act as a 'brake on exploration', Senator Minchin urged the Government to 'look back and examine [the concessions made] during the Harradine negotiations.'[96]

Contemporaneously with these developments was the release of a document, *Indigenous Land Tenure Principles* ('The Principles'),[97] by a government appointed advisory body, the NIC. The brief document calls for a 'mixed system of freehold and leasehold interests'.[98]

Most concerning is Principle Four:

Effective implementation of these principles requires that:

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[94] The Hon John Howard MP, 'Address at the National Reconciliation Planning Workshop' (Presented at Old Parliament House, Canberra, 2005).
[95] Ibid.
[96] John Breusch and Lenore Taylor, 'Minchin moves to water down claims, *The Financial Review*, 27 June 2005.
[97] National Indigenous Council, *Indigenous Land Tenure Principles* (Working Document, 2005).
[98] Ibid.

- the consent of the traditional owners should not be unreasonably withheld for requests for individual leasehold interests for contemporary purposes; and
- involuntary measures should not be used except as a last resort and, in the event of any compulsory acquisition, strictly on the existing basis of just terms compensation and, preferably, of subsequent return of the affected land to the original owners on a leaseback system basis…[99]

The Principles arrived at the tail end of ill-considered remarks by individual members of the NIC. In particular, Warren Mundine has cloaked the dismantling of communal land titles as a panacea for black disadvantage:

> … I think what we've got to start doing is looking at the communal ownership situation where people can start buying and owning their own home… talking about economic development, democracy and all those things, and how the history tells us how land is used and how societies move forward go hand in hand. So if we use land for housing, we use it for business and enterprise development and stuff like that, then also our communities move forward, and better health services, better education, better democratic systems, and also better leadership as well.[100]

Along with the absence of references to research into the causes of Indigenous poverty, was any acknowledgement of the responsibility of governments to provide essential services in areas such as health and education. Likewise, Mundine failed to explain how the commercial exploitation of communal lands would rectify his perceived crisis in Indigenous leadership.

Unsurprisingly, Indigenous leaders around the country have voiced criticism of the Principles and Principle Four in particular. The NIC responded by disavowing its support for compulsory acquisition of Indigenous lands.[101] At the same time the NIC's Chairperson, Sue Gordon, suggested that concerns over compulsory acquisition were superfluous, claiming that governments can currently 'acquire any land they want'.[102]

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[99] Ibid.
[100] Michael Duffy, interview with Warren Mundine, Selling Native Title, Radio National (24 January 2005) www.abc.net.au.
[101] 'Whodunnit? The mystery surrounding the NIC's black land advice to government', *National Indigenous Times* (Canberra) 7 July 2004 www.nit.com.au.
[102] Sue Gordon, Letter to the Editor, *National Indigenous Times* (Canberra) 13 July 2005.

Leaving the dubious credibility of the NIC aside, a number of question marks hang over the Principles. Firstly, Gordon is incorrect when she asserts that governments can currently 'acquire any land they want'.

The power of compulsory acquisition is generally confined to public purposes. Given that compulsory acquisition is an extreme measure the courts have hemmed in its exercise. The power must be exercised in good faith and an injunction may be granted to restrain an authority from acquiring land for an unauthorised purpose.[103]

A proposal for governments to acquire Indigenous lands for private purposes is a radical step, one that does not apply to non-Indigenous property holders. Furthermore, it is cast in general language, such as 'contemporary purposes'. In the absence of precise definition, contemporary purposes could mean open slather, diminishing the power of Indigenous people to resist activities such as mining and tourism.

Arguably, implementation of Principle Four would enliven s 10(1) *Racial Discrimination Act 1975* (Cth). Section 10(1) provides:

> If, by reason of, or of a provision of, a law of the Commonwealth or of a State or Territory, persons of a particular race, colour or national or ethnic origin do not enjoy a right that is enjoyed by persons of another race, colour or national or ethnic origin, or enjoy a right to a more limited extent than persons of another race, colour or national or ethnic origin, then, notwithstanding anything in that law, persons of the first-mentioned race, colour or national or ethnic origin shall by force of this section, enjoy that right to the same extent as persons of that other race, colour or national or ethnic origin.

The subsection was considered by the High Court in the *Native Title Act Case*:

> If a law of a State provides that property held by members of the community generally may not be expropriated except for prescribed purposes or on prescribed conditions (including the payment of compensation), a State law which purports to authorise expropriation of property characteristically held by the 'persons of a particular race' for purposes additional to those generally justifying

[103] *Clunies-Ross v Commonwealth* (1984) 155 CLR 193.

> expropriation or on less stringent conditions (including lesser compensation) is inconsistent with s 10(1) of the [RDA].[104]

Arguably legislation that authorised the compulsory acquisition of Indigenous lands for private as distinct from public purposes, would amount to the 'expropriation of property characteristically held by … 'persons of a particular race' for purposes additional to those generally justifying expropriation'.

It follows that s 109 Constitution would operate to invalidate state legislation implementing Principle Four. While commonwealth legislation implementing Principle Four would not be similarly invalid, it would represent yet another compromise of the *Racial Discrimination Act 1975* (Cth).

Why would the NIC, already reeling from allegations that it is a 'rubber stamp' for the Howard Government,[105] put its name to a controversial document that may not even be legally sound? When considered together with Senator Minchin's comments and their timing, that is, on the eve of Government control of the Senate, the irresistible conclusion is that the Principles are a smokescreen for Howard's next assault on the Indigenous land base.

Conclusion

As a relatively young individual, the writer usually cringes upon hearing the phrase 'They don't make them like they used to.' However, when I compare the warriors of the land rights movement with the members of the NIC, I suddenly find those very words rolling off my tongue, littered with expletives.

The courageous freedom fighters of the AAPA, the Gurindji strike and the Tent Embassy may have managed to only claw back the remnants of our stolen lands. But those lands are ours and the price exacted for them, the blood and sweat of our forebears, demands that we jealously guard them.

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[104] (1995) 183 CLR 373 at 437 per Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ.
[105] National Indigenous Times, above n 101.

The *Cobell* litigation and horrific images of the families of Mapoon being marched at gunpoint as their homes burned, are testament to one historical reality. The absence of communal land title leaves Indigenous people completely exposed to the brute force of governments and powerful industries, anxious to broker land deals that do not include us.

It is no coincidence that in his mantra, John Howard has not referred to one concrete example of an Indigenous people whose destitution was cured by the carving up of communal land titles. They don't exist.

Why does John Howard want to 'review the whole issue of Aboriginal land title'? The answer can be gleaned from his nine-year assault on the Indigenous land base. In 1996 the Coalition revealed the first stage of its scheme to blow native title into smithereens - the 'Ten Point Plan'.

While some elements of the Ten Point Plan found reflection in the *Native Title Amendment Act 1998* (Cth), the Senate was not prepared to allow Howard to completely lobotomise the NTA. The Senate's obstruction forced the Liberal Government to change its strategy.

Legislative amendment was momentarily left to the side, with policy the new battlefront. Overnight NTRBs became sinking ships, with only a child's pail to bail the storm of the *Native Title Amendment Act 1998* (Cth). Not content with its own tightfistedness, the Commonwealth armed the other components of the native title system to hasten the demise of NTRBs.

Howard stacked the membership of the NNTT with conservatives, transforming a non-adversarial tribunal into a legalistic bureaucracy, intent on constricting native title holders in the exercise of their procedural rights. Buttressed by increased funding and consumed by the quest for efficient judicial administration, the Federal Court joined in the melee, creating an impossible timeframe for the disposal of native title claims. Lastly, respondents were armed to the hilt with legal aid in order to wreak havoc on battle weary NTRBs.

The timing of Howard's comments on privatisation is no mere coincidence. With the Government taking control of the Senate, Howard is now free to amend the NTA and destroy the little sanctuary that it has provided to Indigenous communities.

As the clouds of darkness gather around Canberra, at least Indigenous people will be able to draw strength from the reality that native title was not of our design, but a poor compromise from the colonial legal system. In fact, native title is only the latest chapter of the struggle fought at Wave Hill and Mapoon. When Howard closes this chapter, history assures us that the black political movement will begin the next.