The High Court, Human Rights, and the New Jurisprudence of Denial.

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For those of us who hoped that white Australia's reconciliation with its past would finally result in fulsome recognition of the rights of indigenous Australians to their traditional lands, the recent High Court native title cases are yet another low point. But more than that, it seems the Gleeson High Court has worked to deny the transformative impact of the *Mabo* case, particularly the attempt in *Mabo* to find an appropriate legal remedy for the dispossession of Indigenous peoples from their lands.

The Australian judiciary, and particularly the High Court have largely failed to embrace an approach toward Native Title, and indeed many other issues of indigenous law, in a manner that engages the standards, and values of international human rights. This lack of engagement in the discourse of human rights law has contributed to the paucity of and fragility of indigenous property rights. Since the *Mabo* case recognised that property rights held by indigenous people are capable of being recognised and protected under the Common Law, we expected a beneficial and just form of jurisprudence would lead to a positive outcomes for Indigenous people engaged in the dominant anglo Australian legal system. Instead we now confront a legal system, both at the Parliamentary, executive and judicial levels which appears set on reducing protection and respect for human rights standards. (and not just in respect of indigenous people)

In particular I have argued that the decision in the *Yorta Yorta* [1] case is a statement by white Australia's highest judicial institution that the aspirations of indigenous people are again to be disappointed.[2] Indeed, the failure of the High Court to find for the Yorta Yorta people at appeal is more than simply a rejection of their specific claims for native title, and the denial of the Yorta Yorta's traditional ownership of the lands that their ancestors occupied from time immemorial. The decision in *Yorta Yorta* epitomises the jurisprudence of denial.[3]

In *Mabo*, and indeed in a number of cases since, High Court Justices have emphasised the appropriate role for International Human Rights Law standards in the construction of legal doctrine in Australia.

Lets turn then, to some of the Human Rights Instruments, relating to Indigenous people, to which Australia is a party:

Article 27 and related standards.

Article 27 of the ICCPR states that

> *In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.*

The aim of article 27 … is directed 'towards ensuring the survival and continued development of the cultural, religious and social identity of the minorities concerned, thus enriching the fabric of society as a whole'.[4]

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[1] *Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58, (12 December 2002).See M Castan & S Kee 'The Jurisprudence of Denial' 28 (2) 2003 *Alternative Law Journal* 83
[2] see for eg Clark J 'Why it's (almost) not worth lodging a native title claim.' http://www.onlineopinion.com.au/2003/Jan03/Clarke.htm
[3] Castan & Kee above n1 at 83.
[4] Human Rights Committee General Comment 23, para 9. For full exploration of Art. 27's application to Indigenous Peoples see Chapter 24, Joseph, Schultz & Castan *The ICCPR; Cases, Commentary and Materials* (2nd edn forthcoming, OUP)

Indigenous peoples are deemed by the Human Rights Committee as a 'minority' for the purposes of the application of article 27.[5]. Indeed, most article 27 cases have concerned indigenous peoples' minority rights.[6]

The special nature of the role of land within Indigenous cultures, and the need for recognition and protection of land rights, as a form of Human Rights has been recognised by the Human Rights Committee in General Comment 23: (at paragraphs 3.2 and 7):

> *The enjoyment of the rights to which article 27 relates does not prejudice the sovereignty and territorial integrity of a State party. At the same time, one or other aspect of the rights of individuals protected under that article — for example, to enjoy a particular culture — may consist in a way of life which is closely associated with territory and use of its resources. This may particularly be true of members of indigenous communities constituting a minority.*
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> *With regard to the exercise of the cultural rights protected under article 27, the Committee observes that culture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous peoples. That right may include such traditional activities as fishing or hunting and the right to live in reserves protected by law. …*

The Human Rights Committee has also recognised the importance of land to culture & identity , and the interrelationship of land to the obligation to accord self-determination. Article 1 ICCPR sets out the obligation to accord all peoples the right of self-determination, and although there are limitations on seeking a determination

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[5] This is irrespective of assertions by some indigenous peoples that they are not 'minorities' but in fact have a different and special status under international law. Whilst some modern instruments such as the draft Declaration on Indigenous Rights, the ILO Convention Concerning Indigenous and Tribal Peoples in Independent Countries (No 169), and the Convention on the Rights of the Child, address indigenous people as discrete groupings, separate from minorities in general, the HRC has not adopted this analysis. (see General Comment 23 & *Kitok v Sweden* (197/85), *Ominayak v Canada* (167/87), and the *Länsman* cases (511/92 and 671/95)

[6] In addition to the wide-ranging analysis provided by S J Anaya *Indigenous Peoples in International Law* (OUP 1996), see R. Barsh 'Indigenous Peoples in the 1990s: From Object to Subject of International Law? (1994) 7 *Harvard Human Rights Journal* 33, I. Brownlie, *Treaties and Indigenous Peoples* (Clarendon Press, Oxford, 1992), J Crawford (ed) *The Rights of Peoples* (Clarendon Press, Oxford, 1988), S. Pritchard (ed) *Indigenous Peoples, the United Nations and*

on this Article, under the Optional Protocol, Article 1 remains a standard of considerable importance. The right of self determination requires, amongst other things, that all peoples must be able to freely dispose of their natural wealth and resources and that they may not be deprived of their own means of subsistence (Art 1, para 2). The HRC has also emphasised that the practice of extinguishing inherent aboriginal rights be abandoned as incompatible with article 1 of the Covenant. [7]

Article 27 should be read in light of similar comments issued by other treaty bodies, such as the CERD. Turning to the Convention on the Elimination of All forms of Racial Discrimination: CERD's General Recommendation 23 emphasises the role of Indigenous peoples entitlements to their traditional lands and waters in the context of extinguishment of rights to Land: (Para 5)

> *The Committee especially calls upon State parties to recognise and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources and, where they have been deprived of their lands and territories traditionally owned or otherwise inhabited or used without their free and informed consent, to take steps to return these lands and territories. Only when this is for factual reasons not possible, the right to restitution should be substituted by the right to just, fair and prompt compensation. Such compensation should as far as possible take the form of lands and territories.*

And recall the scathing reports the CERD issued to Australia in 1999 and 2000 regarding the impacts and outcomes of the 1998 amendments to the Native Title Act, as a result of the Howard government's 10 point plan, and the decimation of the value of the native title rights capable of being accorded under that amended Act:[8]

> ¶ ***6*** *The Committee, having considered a series of new amendments to the Native Title Act, as adopted in 1998, expresses concern over the compatibility of the Native Title Act, as currently amended, with the State party's international obligations under the Convention. While the original Native Title Act recognizes and seeks to protect indigenous title, provisions that extinguish or impair the exercise of indigenous title rights and interests pervade the amended Act.* ***While the original***

Human Rights (Zed Books, London, 1998), and the University of Minnesota's study guide for the *Rights of Indigenous Peoples* at http://www1.umn.edu/humanrts/edumat/studyguides/indigenous.html

[7] See for eg the HRC's concluding comments on Canada (1999) UN doc. CCPR/C/79/Add. 105 [8]

[8] Decision 2 (54) on Australia: (1999) UN doc. A/54/18, para.21(2). See also S. Hoffman, 'United Nations Committee on the Elimination of Racial Discrimination: Consideration of Australia under its Early Warning Measures and Urgent Action Procedures', (2000) 6 *Australian Journal of Human Rights* 13.

> ***1993 Native Title Act was delicately balanced between the rights of indigenous and non-indigenous title holders, the amended Act appears to create legal certainty for Governments and third parties at the expense of indigenous title. …***
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> *¶ **11**. The Committee calls on the State party to address these concerns as a matter of utmost urgency. Most importantly, in conformity with the Committee's general recommendation XXIII concerning indigenous peoples, the Committee urges the State party to suspend implementation of the 1998 amendments and reopen discussions with the representatives of the Aboriginal and Torres Strait Islander peoples with a view to finding solutions acceptable to the indigenous peoples and which would comply with Australia's obligations under the Convention.*

There are many more international instruments and bodies that deal with, and comment on Indigenous Peoples human rights. A few selected instruments and bodies follow:

The draft Declaration on Indigenous Peoples Rights is slowly making its way through the UN processes.[9]

The ILO Indigenous and Tribal Peoples Convention (ILO Convention 169 of 1989) was the first international convention to address the specific needs for Indigenous Peoples' human rights, setting out the responsibilities of governments in promoting and protecting the human rights of Indigenous Peoples.

The Convention on the Rights of the Child, contains regulations and suggestions relevant to Indigenous Peoples Article 30 states that children of minorities or indigenous origin shall not be denied the right to their own culture, religion or language.

The work of the UN Working Group on Indigenous Populations, a subsidiary organ of the Sub-Commission on the Promotion and Protection of Human Rights, concerns the human rights of Indigenous Peoples. It reviews national developments concerning

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[9] Drafted in 1985 by the Working Group on Indigenous Populations, the world's largest human rights forum, the draft Declaration was adopted by the United Nations Sub-Commission on the Promotion and Protection of Human Rights in 1994. The draft was submitted to the Commission on Human Rights, which established the Working Group on the draft Declaration on the Rights of Indigenous Peoples, who's. aim is to facilitate the General Assembly's adoption of the Declaration by 2004, at the conclusion of the International Decade for the World's Indigenous Peoples. This aim seems unlikely to be met.

the promotion and protection of Indigenous Peoples' human rights and develops international standards for Indigenous Peoples' human rights and freedoms.

The newest body is the Permanent Forum on Indigenous Issues, it considers a wide range of issues affecting Indigenous Peoples. The most recent meeting was May, 2003.[10]

Co-operating with those two bodies is the UN Special Rapporteur on the Situation of the Human Rights and Fundamental Freedoms of indigenous peoples, who was appointed as the first Special Rapporteur in April 2001.[11]

All these international instruments, bodies and forums, have drawn the explicit connection between the preservation of culture and identity, with land and resources.[12]

2. Other countries responses to Intl Human Rights Standards

How have other countries responded to these HR obligations?

Whilst the *Mabo* decision had a resonating effect on real property doctrines considered fundamental to the structure of legal principles applied by Australian courts,[13] the rights recognised in *Mabo* were seen as a normal part of the common law in every other nation state that had emerged from British colonial heritage in the 19th

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[10] The Permanent Forum serves as an advisory board to the Economic and Social Council, discussing Indigenous issues relating to economic and social development, culture, the environment, education, health, and human rights. The Forum provides expert advice and recommendations to the Council, raising awareness of Indigenous issues within the UN system, and disseminates information on Indigenous issues

[11] The Rapporteur's mandate covers gathering information on violations of human rights and fundamental freedoms of Indigenous Peoples, formulating recommendations to prevent and remedy such violations and working with other experts of the UN Commission on Human Rights and of the Sub-Commission on the Promotion and Protection of Human Rights. The Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance also reports annually to the United Nations Commission on Human Rights (CHR). The 2001 report details his mission to Australia undertaken in 2001 (see UN Doc: E/CN.4/2002/24/Add.1).

[12] See the overview of the interrelationship of the various international standards and bodies in the HREOC Social Justice Commissioner's *2001 Social Justice Report* at http://www.hreoc.gov.au/social_justice/sjreport_02/

[13] Cf. AJ Bradbook, S V MacCallum and A P Moore, *Australian Real Property Law* (LBC, 2nd edition, 1996) [7-2].

& 20th Century. It has been pointed out by Noel Pearson that 'the *Mabo* case in the United States happened in 1823. New Zealand 1859. Canada 1971'[14]

In the last decade, in our post Mabo era, our common law cousins have made some considerable advances in the recognition of indigenous rights to land; not all of these are expressed as being reflections of International human rights law standards, although they amount to that;

Some examples are as follows

In Canada, at the political and constitutional level, Indigenous rights are protected within the 1982 Constitution, and the Canadian Charter of Rights and Freedoms, those developments mark the point where Canadian society renounced the 'old rules of the game' and called for a just settlement for Aboriginal peoples. [15]

Since then a series of negotiated settlements have proceeded, including the creation of a new Canadian Territory of Nunuvut in 1999, as part of a comprehensive settlement of Inuit land claims in the Northwest Territories giving the Inuit peoples a high level of self determination, self governance, and access to land and mineral resources. [16]

In judicial terms the *Delgamuukw* decision (1997 153 DLR) explained the nature of unextinguished Aboriginal title in British Columbia, and established the means by which that title can be proven, including the weight and importance of oral histories and the role of tradition. Those standards, for proof of tradition, using the oral

[14] Noel Pearson 'The Coalition Government, Mabo and Wik' 9.11 1997, available at http://home.vicnet.net.au/~ajds/Pearson.htm
[15] per R v Sparrow [1990] 1 SCR 1075
[16] See http://www.gov.nu.ca/Nunavut/

testimony of Aboriginal witnesses, is much more flexible, and generous than the current standards applied by the Australian courts. [17]

In New Zealand the reinvigoration of the Treaty of Waitangi led to a number of changes in the political and judicial treatment of Maori claims. One example was the Sealord Settlement over commercial fisheries, in which the crown agreed to fund Maori into a joint venture with commercial fishing interests, as well as granting greater representation of Maori on statutory bodies on fisheries management. [18]

The recent Marlborough Sounds case has recognised the 'native title' aspects of New Zealand settlement.[19] The Chief Justice of the NZ Court of Appeal found that Maori rights to the foreshore and seabed had never been clearly extinguished, and thus may still exist. These rights predate colonisation and are not dependant on rights accrued under the treaty.

In the USA, where many Native American Tribes have 'domestic dependant nation' status, self governance in certain matters of civil and property law have resulted in financial and political empowerment for many tribes, including those displaced during the previous centuries, and moved onto barren lands in the central and south west states. Access to land and financial independence thru casino development, sales tax exempt status, and tourism have lead to some spectacular improvements in education, health and cultural revival, together with political influence unimagined in this country. Numerous cases at state and federal level in the US confirm this status.[20]

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[17] The test that an Aboriginal nation must prove, in order to establish Aboriginal title, is whether their ancestors had exclusive occupation of their lands at the time when the Crown asserted sovereignty (in British Columbia this was 1846). The significance of this test is apparent when compared to that applied by the High Court in Yorta Yorta.

[18] This settlement has been the subject of an HRC decision *Mahuika v New Zealand* (547/93), the authors claimed that their traditional rights to fish were abrogated by the *Treaty of Waitangi (Fisheries Claims) Settlement Act* 1992 (NZ) in contravention of article 27. The HRC concluded that the State party by engaging itself in the process of broad consultation before proceeding to legislate, and by paying specific attention to the sustainability of Maori fishing activities, had taken the necessary steps to ensure that the Fisheries Settlement and its enactment through legislation, were compatible with article 27. See Joseph, Schultz & Castan, above n 4.

[19] *Ngati Apa, et al v AG & Ors* 19 June 2003 NZ Court of Appeal

[20] See http://thorpe.ou.edu/supreme.html for a comprehensive list of these materials

In the *Richtersveld* decision the South Africa Constitutional Court identified pre colonial indigenous rights to land as being capable of recognition in the contemporary legal system.[21] The Constitutional Court returned the land and mineral rights assumed to be owned by State diamond company Alexor, to the Richtersveld community, who had been forcibly dispossessed in the 1920s.

The Court agreed with the lower courts finding that that 1) that the Community's right survived annexation by the British Crown in 1847; (2) that the Richtersveld Community had a right in the land at 1913; and (3) that the Community was dispossessed of the land through racially discriminatory laws or practices.

3. Australian responses to the Human Rights benchmarks

Turning now to Australia. The details of the socio political and legal responses to the challenges offered by the *Mabo* case are beyond the scope of this short paper. But turning to the judiciary, the story is simple; the High court has generally ignored the applicability or relevance of the comparative common law jurisprudence of native, Maori or Aboriginal title. Similarly little mention is made of the international standards I outlined earlier. Instead the High Court has simply engaged with the issue of Native Title as if it is solely a question of statutory interpretation, the is no law of native title save that set out in the Amended Native Title Act (1998). [22]

The decision in *Mabo* recognised the existence of native title, a title not granted by the Crown, but which is *sui generis* in nature, and

> conveniently describes the interests and rights of indigenous inhabitants in land, whether communal, group or individual, possessed under the traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants.[23]

The doctrine of tenure was therein dramatically attenuated and transformed in conformity with Australian history:[24] the common law was found to be able to

[21] available at http://www.concourt.gov.za/
[22] See extensive exploration of this by Noel Pearson 'Land is susceptible of ownership' *High Court of Australia Centenary Conference* 10 October 2003.
[23] Mabo v Qld (1992) 175 CLR 1 at 57, 59 (Brennan J).
[24] ibid. 58 (Brennan J).

accommodate 'native' customary title as something in existence prior to the acquisition of sovereignty by the British Crown. The recognition of native title has since extended to encompass non-exclusive native title rights over Australian territorial seas.[25]

Recent High Court jurisprudence

There are a number of Native title cases that the Federal and High Court handed down in the last 18 months, which served to 'settle' the jurisprudence of Native tile as understood in Australia.

In *Ward* the High Court adopted the view that Native title is not a special 'sui generis' proprietary right at all, rather it is a 'bundle of property rights, which may be analogised to common Australian forms of tenure, ranging from exclusive possessory rights, to mere visitation rights.

The difficulty with this conception of Native Title is that such a bundle may be readily dismantled, piece by piece, right by right. If the High Court had followed the *Mabo* Court's conception of native title as a *sui generis* form of tenure, then it would be less susceptible to piecemeal incidental extinguishment. Lets not forget that Native title can only apply to remnant lands, no 3rd parties rights can be compromised by these claims, non indigenous titleholders are completely secure in their vested rights. [26] Treating native title as a sui generis right would not diminish any other title holders rights, but it would give more security to Indigenous titleholders. The Court explicitly rejected this possibility.

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[25] *Commonwealth v Yarmirr* (2000) 184 ALR 113.
[26] *Wik* confirmed that lesser forms of tenure such as pastoral leases could coexist with Native title, but the title derived from the crown (ie the farmer or miner's titles) prevailed over native title in the event of inconsistency.

Yorta Yorta is the latest case the High Court has considered. As first evidenced in *Ward*,[27] the court has unambiguously endorsed the NTA as the focus for examination of a claim for determination of native title because these claims are now treated as creatures of the Act rather than the Common Law..[28]

The most crucial question in the Yorta Yorta case, when it came before the High Court, seems relatively simple: did native title rights and interests exist for the Yorta Yorta peoples, in accordance with the definition in section 223(1) of the *Native Title Act*? The High Court found in the Negative.

In *Yorta Yorta* the High Court confirmed that any interruption to the enjoyment and practice of traditional law and customs would be fatal to a claim of native title. The majority determined that section 223(1)(a) of the Native Title Act requires native title claimants to prove the traditional laws and customs of their ancestors in 1788, and that they have continued ever since, substantially uninterrupted:

> To that end it must be shown that the society, under whose laws and customs the native title rights and interests are said to be possessed, has continued to exist throughout that period as a body united by its acknowledgment and observance of the laws and customs.29 Any substantial interruption to the enjoyment of native title and associated traditions by an Aboriginal group would deprive their descendants of native title rights:
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> [I]t is necessary to demonstrate that the normative system out of which the claimed rights and interests arise is the normative system of the society which came under a new sovereign order when the British Crown asserted sovereignty, not a normative system rooted in some other, different, culture.[30]

But proof methodology for such 'continuity' is now at an impossibly difficult standard. [31]In endorsing the Trial Justices assessment of the evidence of Yorta Yorta traditions, the High Court has set the bar too high. Justice Olney at 1st instance clearly

[27] *The State of Western Australia v Ben Ward & Ors* [2002] HCA 28 8 August 2002] (Gleeson CJ, Gaudron, Gummow and Hayne JJ). ¶[25

[28] *Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58] (Gleeson CJ, Gummow and Hayne JJ). ¶[9

[29] ibid [89].

[30] Ibid].

[31] The High Court acknowledged this when Gleeson CJ, Gummow and Hayne JJ said *In many cases, perhaps most, claimants will invite the Court to infer, from evidence led at trial, the content of traditional law and custom at times earlier than those described in the evidence. Much will, therefore turn on what evidence is led to found the drawing of such an inference … demonstrating the content of pre-sovereignty laws and customs may be especially difficult in cases, like this, where it is recognised that the laws and customs now said to be acknowledged and observed are laws and customs that have been adapted in response to the impact of European settlement. In such cases, difficult questions of fact and degree may emerge, not only in assessing what, if any, significance should be attached to the fact of change or adaptation but also in deciding what it was that was changed or adapted. It is not possible to offer any single bright line test for deciding what inferences may be drawn or when they may be drawn, any more than it is possible to offer such a test for deciding what changes or adaptations are significant*. ibid [81][82][83]

weighted the written evidence of contemporary white settlers far higher than the current evidence of Yorta Yorta witnesses.[32] This methodology inevitably renders indigenous people at a huge disadvantage in proving claims.

To ensure article 27 and other international human rights law standards are properly honoured the correct task for a court would have been to analyse first what Indigenous peoples say today, about their connections to people and lands by way descent, and then compare that body of evidence with properly analysed and contextualised historical written records. Modern manifestations of culture and tradition would still be capable of demonstrating the requisite 'continuity' with the pre settlement laws and tradititons. [33]This appears to be the approach adopted in Canada, following *Delgamuukw*.[34] Of course, written accounts by non-Indigenous observers should remain relevant to proving a native title claim in contested litigation. But if article 27 of the ICCPR and related comments by other treaty bodies like the CERD were properly taken into account by the High Court, the settled law of Australia would undoubtedly be quite different to the law as it now stands.

It is open to now argue that the Australian legal system is in breach of (at least) article 27 of the ICCPR regarding the protection of indigenous human rights. In particular the requirement in Australian law (as confirmed in the Yorta Yorta decision) of substantial non-interruption of traditional customs, coupled with the proof methodology used by Justice Olney and subsequently endorsed by the High Court, results in the Yorta Yorta peoples being unable to enjoy their culture in accordance with article 27, and other international Human rights law standards.

I should point out that the process of bringing a complaint before the HRC under the ICCPR is not without its problems; some articles, such as Article 1, are not

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[32] Castan & Kee, above at note 1.
[33] The HRC accepted this aspect of modern practices still evidencing traditions in *Mahuika.* See Joseph, Schultz & Castan, above n 4
[34] although See *Benoit* decision, where the checks and balances regarding oral evidence were found lacking. (June 11 2003, Federal Court of Appeal, Canada.)

susceptible to the OP. In many of the complaints, the HRC has not found in favour of the Author, for reasons that may seem opaque and unfair from the indigenous complainants point of view.[35]

What is apparent to me is that the now settled jurisprudence of native title proof requirements appears to raise unreasonable if not unattainable obstacles to the success of native title determination applications. The result is an inability for indigenous communities to fully and properly enjoy their culture as required under article 27, and envisaged by *Mabo*.

Some historians, and politicians still dispute the nature of the relationship which unfolded between Indigenous Australians and the non-Indigenous settlers: but I have no doubts that it remains a relationship that is the most sensitive and seemingly irretrievable blight on social, legal and human justice in Australian society. The *Mabo* judgment, and the cases that followed might have offered some antidote.

However, now, years of overt and covert *Mabo* bashing have combined with criticisms of undue judicial activism. The High Court appears to have beaten a hasty retreat. A combination of events, personalities, circumstances and politics has had the effect of successfully dismantling the remaining sheds of value that the *Mabo* case might have offered.

The standard of protection of the human rights of Australia's indigenous people seem in many respects worse than ever; before we were blinded by false doctrines of *terra nullius*, and social Darwinism. But now we are not blind; our leaders, both political and judicial, simply do not want to see.

[35] Its worth noting that one cannot seek a finding by the Human Rights Committee that an indigenous community do in fact enjoy native title rights in accordance with article 27. The HRC is not in a position to make such findings of fact, especially in view of its inability to hear oral evidence. See *Johanssen* case in Joseph, Schultz, Castan, above n 4. The Committee will not act as a court of 4th instance