SO, WHAT'S NEW? NATIVE TITLE REPRESENTATIVE BODIES AND PRESCRIBED BODIES CORPORATE AFTER *WARD* [*]

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1. INTRODUCTION (OR, 'AS THE SMOKE CLEARS…')

The burden of Indigenous expectation after the *Mabo* decision and the passage of the *Native Title Act* fell most squarely on the light frames of native title representative bodies. These organisations, some of which were born because of the *Native Title Act*, others of which predated native title and had representative body status thrust upon them, have struggled with the load. In the hazy aftermath of the High Court's *Ward*[1] decision (handed down with almost theatrical proximity to the tenth anniversary of the *Mabo* decision), the challenges that face native title representative bodies are not fresh, so much as all too well known. Joining the representative bodies in facing these trials are the new corporate citizens of Indigenous representation, native title prescribed bodies corporate. These infant organisations enjoy an ambiguous relationship with native title representative bodies and face their own unique dilemmas. This article seeks to comment on some of the trends in Indigenous native title representation, tendencies that have simply continued in the wake of *Ward*.[2]

2. WHEN ARE WE OUT OF THE RAPIDS?

The High Court's decision in *Ward* is simply the latest in a decade of shocks to native title aspirants and their representatives, that have come fast, furious and frightening.[3] A survey of events demonstrates that the maligned 'native title system' has never really been allowed to settle down. In June 1992, *Mabo* - itself a 'revolution'[4] - established a corpus of law that Aboriginal groups and their advisers could set about beginning to understand in order to determine whether their traditional title might be recognised. At that stage, of course, there were no 'native title

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[*] This article is dedicated to the staff and constituents of the Yamatji Land and Sea Council/Pilbara Native Title Service with whom it is my honour and pleasure to be in common cause. The views in this article are those of the author alone and are not necessarily shared by the author's employer.

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1 [2002] HCA 28 (8 August 2002).

2 My own initial response to *Ward* is at Ritter, D., "Fin de Siecle: *Ward v Western Australia*", *Native Title News*, 5(10), 2002.

3 The phrase is pinched from Robert Skidelsky describing a much broader and earlier crisis of a liberal system: Skidelsky, R., "Lessons of Suez", in Bogdanor, V., *The Age of Affluence*, London, 1970 at 163.

4 Stephenson, M.A. and Ratnapala, S., *Mabo: A Judicial Revolution*, University of Queensland Press, St Lucia, 1993. Or alternatively, a 'cautious correction': Nettheim, G., "Judicial Revolution or Cautious Correction?", *University of New South Wales Law Journal*, 1993 (16), 1. My preferred characterisation is *Mabo* as a revolution manqué.

representative bodies' and the task of representation fell to the Aboriginal legal services and existing land councils.[5] This process of understanding was engulfed by a protracted and bitter public debate about the legitimacy of native title.[6] The *(Commonwealth) Native Title Act (*1993) was conceived in the midst of this rancorous wrangling as an intricate set of rules to regulate native title, establishing new bureaucracies to regulate the existences of Aboriginal people including the native title representative bodies and the National Native Title Tribunal.[7] The legislation was denounced as often as it was applauded, not least for its opaqueness.[8] The constitutionality of the NTA was challenged in 1994 and confirmed in 1995,[9] although collateral litigation about comparable legislation showed that parts of it would be unconstitutional.[10] All the while, the new native title representative bodies struggled, with only vague statutory guidance,[11] to meet the rising expectations of Aboriginal people.

The years 1995-1997 saw a swift succession of changes to the rules, including the seismic *Wik* decision,[12] that "dramatically increased the workload of NTRBs"[13] and the defeat of the Keating government in March 1996 presaged the beginning of a long battle over possible amendments to the legislation. In a familiar dilemma, NTRBs were caught between the call to respond to national affairs threatening local consequences and actually dealing with local issues. An exhausting campaign was waged by the national (and local) Indigenous leadership to ameliorate the *Native Title Amendment Act* 1998 prior to its enactment, legislation seen by many in the Indigenous sector as the vengeful excesses of the long political arm of organised colonial capital. Indeed, 1998 was something of a watershed: the NTA was amended and the first Federal Court decisions on native title claims under the NTA were handed down with each of them changing the law (and the barometer of recognition of Indigenous interests) yet again. The bright possibilities of *Ward* were tempered by the meanness of *Yorta Yorta* and the limitations of *Croker Island*.[14]

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5 See Parker, G. (et al), *Review of Native Title Representative Bodies*, ATSIC, Canberra, 1995, ch.3.

6 See Meyers, G.D. and Muller, S.C., *Through the Eyes of the Media: A Brief History of the Political and Social responses to Mabo v Queensland*, Murdoch University, Perth, 1995 and Goot, M. and Rowse, T., *Make a Better Offer: The Politics of Mabo*, Pluto Press, Leichardt, 1994.

7 In relation to the initial recognition of NTRBs, see Parker, G. (et al), *Review of Native Title Representative Bodies*, ATSIC, Canberra, 1995, ch.3.

8 It contained at least one reference to a subsection that did not exist and a number of procedural anomalies: see French, J., *Discussion Paper on Proposed Amendments to the NTA*, National Native Title Tribunal, 14 March 1995. Nevertheless, the NTA is best applauded as a fine effort in the circumstances – and one, perhaps, that is amenable to an intentionalist view of history, given the personal role of the Prime Minister. See Watson, D., *Recollections of a Bleeding Heart A Portrait of Paul Keating PM*, Knopf, Sydney, 2002.

9 *WA v Commonwealth* (1995) 183 CLR 373; (1995) 128 ALR 1; (1995) 69 ALJR 309; (1996) 1 AILR 14.

10 *Brandy v HREOC* (1995) 69 ALJR 191; (1995) 183 CLR 245; (1995) 127 ALR 1. See also *Fourmile v Selpam* (1998) 152 ALR 294; (1998) 80 FCR 151.

11 Parker, G. (et al), *Review of Native Title Representative Bodies*, ATSIC, Canberra, 1995, 5-7.

12 *Wik v Queensland* (1997) 2 AILR 35; (1996) 141 ALR 129; (1996) 71 ALJR 173 and (1996) 187 CLR 1.

13 Senatore Brennan Rashid & Corrs Chambers Westgarth, *Review of Native Title Representative Bodies*, 1999 (aka 'the Love Rashid Report') at 17. Described informally at the time by staff of the NNTT (in a contemporary joke that may now leave the reader scratching) as 'semi', 'demi' and 'full' 'denkos' after the literary imbroglio surrounding Helen 'Demidenko' of 1995.

14 *Yarmirr v Northern Territory* (1998) 156 ALR 370 ('*Croker Island*'); *Ward v Western Australia* (1998) 159 ALR 483 and *Yorta Yorta Aboriginal Community v State of Victoria* [1998] 1606 FCA (18

The introduction of the amended NTA – much longer and more complicated than its predecessor[15] – ensured that the current did not abate. There was a bewildering array of new future act procedures[16] and the mandatory application of a registration test to native title claims, an 'administrative avalanche' requiring vast amounts of technical drafting to take place in a very short period of time, with native title claim groups left almost as disillusioned spectators as lawyers did what they had to do to preserve their clients' rights.[17] Part of this process was the arduous task of negotiating the combination of disentangling overlapping claims.[18] The NTA also ushered in a new regime for native title representative bodies[19] and 1998-1999 saw each NTRB having to battle for its ongoing statutory status and funding – a campaign that no extra resources were provided to fight.[20] The re-recognition process dragged into 2000,[21] with that year also marking the activation of stringent new reporting and accountability requirements on NTRBs.[22] Many NTRBs also found themselves administering vast new areas as a consequence of the re-recognition process.[23]

A fifteen-month period from December 1999 to February 2001, also saw a trio of disappointments in the Full Court of the Federal Court (and the law changing again) in *Ward, Yorta Yorta* and *Croker Island*.[24] The year 2000 was also punctuated by the bleak anti-win of the vast *Smith*

December 1998). I mean these remarks with respect - I am seeking merely to invoke perceptions of them.

15 Though printed on thinner paper.

16 Including introducing '24MD(6B)' to the lexicon of every resource lawyer and that catchiest of defined terms 'permissible lease etc renewal'. See the various articles contained in *Australian Mining and Petroleum Law Journal*, 17(3) October 1998.

17 See McIntyre, G., Ritter, D. and Sheiner, P., "Administrative Avalanche: The Application of the Registration test under the NTA 1993 (Cth)", *Indigenous Law Bulletin*, 4(20) April/May 1999, 8

18 In this respect the capacity under the amended NTA to combine claims was crucial: s 64(2) NTA. See *Adnyamathanha People v SA* [1999] FCA 402; *Champion v WA* [1999] FCA 581; and *Martu v WA* [2002] FCA 849.

19 See Part 11, NTA. See Butterworths' *Native Title Service*, General Commentary – Representative Aboriginal/Torres Strait Islander Bodies.

20 See *Procedures relating to Application for Recognition as a Native Title Representative Body*, ATSIC, May, 1999, Ritter, D. and Flanagan, F.N.A., "The Application Process for Recognition of Native Title Representative Bodies under the Amended Native Title Act" (1999) 4(4) *Native Title News 75*; Flanagan, F.N.A., "ATSIC Native Title Representative Bodies Recognition Update", (2000), 4(10) *Native Title News* 181; and *Pilbara Aboriginal Land Council v Minister for Aboriginal and Torres Strait Islander Affairs* (2000) 175 ALR 706.

21 See Flanagan, F.N.A., "ATSIC Native Title Representative Bodies Recognition Update", (2000), 4(10) *Native Title News* 181. Indeed, for some, it is still not finished. At the time of writing there is no recognised NTRB for NSW or Victoria. In the Pilbara in Western Australia there is ongoing litigation in respect of an alleged failure to return clients materials by the derecognised Pilbara Aboriginal Land Council.

22 Including annual reporting and strategic planning. The most instructive source of information about the obligations incumbent on NTRBs is contained in the *Native Title Services Guide* available online at http://www.ntrb.net/ntsg/guide.htm.

23 The South Australian Aboriginal Legal Rights Movement, the Ngaanytjarra Council and the Yamatji Land and Sea Council (for example) all picked up vast new areas.

24 *Cwth v Yarmirr* (1999) 168 ALR 426; *WA v Ward* (2000) 170 ALR 159; *Yorta Yorta Aboriginal Community v State of Victoria* [2001] FCA 45 (8 February 2001).

determination.[25] Perhaps most insidiously though, the period following the transferrance of the administration of native title claims to the Federal Court marked the growth of an ideological idolatry of speed in determining native title. The Federal Court contemplated a 'three-year disposition' rate for native title claims.[26] Judicial pressure on Aboriginal people and native title representative bodies to 'get a shuffle on' mounted. Throughout most of the decade too, the native title claims process has been paralleled by future act notices, issued in a "flood."[27] Giant future use negotiations such as those in relation to the Burrup Peninsula industrial land acquisition or the Century Zinc mine have placed incredibly heavy demands on NTRBs, but equally, dealing with the multitude of small matters - prospecting licences, heritage surveys, opportunities to comment, consultations – is a massive burden. 'Successful' future act negotiations, of course, merely give rise to more work in the nature of monitoring and implementation. In light of this potted account,[28] it is clear that the newest High Court decisions of *Croker Island*[29] and *Ward* – and the unexpected debacle of *Wilson v Anderson*,[30] have come to NTRBs as new blows to already staggering combatants.

3. 'EXPLAINING' (OR APOLOGISING FOR?) *WARD*

The rules of the native title system have been changed – from 'above' – umpteen times, its various Damoclean devices being raised and lowered and raised again.[31] Each major change to the rules has been accompanied by concomitant visits of bureaucrats and advisers to Aboriginal groups, attempting to explain why the rules had changed (yet again) and what it meant for them. Press releases, stickers, posters, explanatory guides, new explanatory guides and all the paraphernalia

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25 *Clarrie Smith and others v State of Western Australia and others* [2000] FCA 149 (29 August 2000). Described as a 'win' on the cover of WA's daily newspaper, the *Smith* determination in fact substantially reduced the rights of the native title holders. See Riley, M., "Speaking Notes", annual Native Title Representative Bodies Conference, *Outcomes and Possibilities*, Geraldton, Western Australia, September 3-5, 2002; Ritter, D. "*The Long Spoon: Reflections on Two Agreements with the State of Western Australia*, The Past and Future of Land Rights and Native Title, Native Title Representative Bodies Conference, Townsville, August 27-31, 2001; and Ritter, D.L. and Flanagan, F.N.A., "The Difference between Lawyers and Rats: recasting the role of Lawyers in the Native Title Process and Critical Legal Theory as a Possible Framework for Inter-Disciplinary Understanding" conference paper delivered at *Crossing Boundaries*: *Anthropology, Linguistics, History and Law in Native Title*, September 19-20, 2000**,** University of Western Australia (publication in a Melbourne University Press anthology pending). But cf Gishubl, G., "Land Access Issues as part of Resolving Claimant Applications", *Negotiating Country - National Native Title Tribunal Conference*, Brisbane, 1-3 August, 2001. Esbenshade, H., "The Pastoralists' Perspective on Mediating Native Title Claims", *BLEC Native Title Conference*, Hyatt regency Hotel, Perth, 7-8 August, 2001;**,** Brunton, R., "Landmark Native Title Agreement an Eye-opener**",** *Courier Mail*, 9 December 2000; Humphrey, C., "Clarrie Smith and Ors v state of Western Australia and Ors", *Australian Mining and Petroleum Law Journal*, (2000) 19 259.

26 Federal Court of Australia, *Annual Report 1999-2000*, 11.

27 Senatore Brennan Rashid & Corrs Chambers Westgarth, *Review of Native Title Representative Bodies*, (1999) 43 (aka 'the Love Rashid Report') at 19.

28 It is also, of course, necessarily incomplete..

29 *Commonwealth Ors v Yarmirr & Ors* [2001] 56 HCA (11 October 2001)

30 [2002] HCA 28. Wiping out, as it did, any surviving native title in much of NSW. See Hughston, V., "Case Note – Wilson v Anderson", *Native Title News*, 5(10) 2002, 171.

31 The (probable) law of extinguishment on pastoral leases has, for instance, changed half a dozen times or so in the last decade. The same uncertainty has existed in respect of other tenures.

that falls under the rubric of the 'community liaison' line-item, has built up in stacks in cupboards.[32] Indeed, one of the great challenges for native title representative bodies is their education and liaison function.[33] This function is personalised when staff of native title representative bodies are called upon to explain the law of native title (or, more usually, the latest change to the law of native title) to their constituents/clients.

In relation to *Ward*, for example, how does one explain a decision of 472 pages in which certain judges ("who are these judges anyway?") chronically disagree with each other; which is at so many levels of abstraction from an individual native title claim, let alone any particular Aboriginal groups' connection with their country; that each time a Court has considered the Miriuwung and Gajerrong peoples' native title claim for their country, that the law has in effect changed for the whole of Australia. How does one explain the concept of 'a bundle of rights'? Who won the *Ward* decision before the High Court? In a situation where numerous Aboriginal groups in Western Australia were faced with their native title being wiped out by extinguishment in *Ward* but nobody was expecting native title to be extinguished over national parks, how does one 'rate' the result? How do you answer the question "so what does it mean for us?"

These questions can be answered, but the answer will often be misleading, intangible, a thing of clumsy analogies and further contingencies and abstractions. It is perhaps to early to reach a conclusion about the effects of *Ward* on the Indigenous body politic, but what *Ward* has not done is provide a catharsis. It has just made everything more complicated and the (illusion of) simple justice that seemed (wrongly) to be suggested by *Mabo* appears (problematically) further distant. One way of approaching the *Ward* decision is to ask whether it creates more opportunities for Aboriginal people than it forecloses upon. The answer (as is usual in native title) is both mixed and ambiguous. The point here though, is that the satisfaction of Indigenous aspirations – the imperative behind the *Mabo* litigation in the first place – seems no closer at hand.

4. PRISONERS IN THE PENAL COLONY[34]: MORE WORK/FEWER RESOURCES

Much simpler to explain is the mathematics of an organization bearing an onerous mandatory requirement to produce an expanding array of outputs, with a severe logistical resources deficit, where other factors in the system are fixed. It is now trite to recognise that native title representative bodies are chronically under funded. It has been independently verified by consultants, accepted by politicians, commented upon by Queens Counsel and Judges, and felt bitterly by Aboriginal people denied resources and by those with whom they are negotiating, who must wait patiently (and some times interminably) for a response.[35] Yet notwithstanding the

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32 Both literally and figuratively.

33 NTA s 203BJ (c)-(e) inclusive.

34 The comment was initially made by then Deputy Prime Minister Tim Fisher in 1997, but was appropriated and its use turned around by the redoubtable Susan Phillips in Phillips, S., "'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", *Land, Rights, Laws: Issues of Native Title*, 2 (14), April 2002. Kafka's *The Penal Colony* concerns a penal colony, a punishment machine, its operation and use.

35 See for some examples Senatore Brennan Rashid & Corrs Chambers Westgarth, *Review of Native Title Representative Bodies*, 1999; T North, 'From the Internet to the Outback – A World Class Court' in

awareness, lack of resources remains a crippling – potentially terminal – problem facing NTRBs.[36] There is ample evidence that NTRBs are experiencing the 'spiral down into a cycle of immediacy', bleakly forecast in 1999.[37] If anything, *Ward* has made matters worse with the Court foregoing a simple notion of a unitary title in favour of what appears to be a more complex (and therefore more resources-intensive to demonstrate) bundle of rights approach. In a very real sense, native title representative bodies are faced with a workload that is literally, a mission impossible.[38] Importantly though, for any non-Indigenous parties who are misguided enough to see overwhelmed NTRBs as some kind of 'win' for them, the overwhelming experience is that a lack of resources creates further delays and problems, it does not assuage them. In that sense, a player losing heavily from the appalling under-funding of NTRBs is the resources-sector.

5. SPLIT PERSONALITIES: COMMUNITY ORGANISATION OR STATUTORY BODY?

The confusing and dysfunctional nature of the organisational character of NTRBs is a significant complicating factor. NTRBs are institutions that are compulsorily required to undertake a wide variety of acutely specialised activities under intense external scrutiny.[39] Yet, NTRBs must also be community organizations, meaning that NTRBs are subject to the kind of political volatility that besets all community organisations.[40] There is an inherent contradiction in this, between being a statutory body with arbitrary functions and being a community organisation requiring a high degree of reflexivity to local community needs and politics.[41] The contradiction is further complicated by the lawyer-client relationships that are inherent in the system, whereby lawyers

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Keon-Cohn, B., (ed), *Native Title in the New Millennium* (2001) 28-9; Sosso, J., 'The Role of the Tribunal and the Federal Court', paper delivered *Negotiating Country*, a forum held by the National Native Title Tribunal at Customs House, Brisbane, 3 August 2001 available online at <http://www.nntt.gov.au>; Keon-Cohen, B., 'Introduction' in B Keon-Cohn (ed), *Native Title in the New Millennium*, AIATSIS, Canberra, 2001, xii; Jonas, W., *Native Title Report 2001*, Human Rights and Equal Opportunities Commission, Sydney, January, 2002, Chapter Two and sources cited therein. My own 'stirring' (as it is called therein) is Ritter, D., "You get what you pay for", *Indigenous Law Bulletin*, 5(9) July, 2001, 14.

36 It is crippling – and the Love and Rashid Report is unequivocal in this respect. Terminal, because a native title representative body can potentially lose its status as such under s 203AH of the NTA if it fails to satisfactorily perform its functions.

37 Senatore Brennan Rashid & Corrs Chambers Westgarth, *Review of Native Title Representative Bodies*, 1999 at 43.

38 Some years ago I refereed an article in which the (anonymous) author had described the task of the NTRBs as 'impossible'. In my report I suggested that this was not helpful and thought the article might benefit from the comment's removal. In hindsight, I am sorry that was my assessment because I have changed my view: it is a Mission Impossible and where successes are achieved it is because of measures of sacrifice and lateral thinking, not because there are enough resources in the system.

39 NTRBs are scrutinised by the Cwth Minister, ATSIC and the Registrar of Aboriginal Corporations.

40 See s 201B NTA.

41 See Stacey. B., "Institutional Arrangements of Native Title", annual Native Title Representative Bodies Conference, *Outcomes and Possibilities*, Geraldton, Western Australia, September 3-5, 2002.

employed by native title representative bodies are nevertheless acting in their own capacity for the clients of the NTRB's.[42]

The ambiguities and tensions in the system necessarily are centered on the individuals playing key roles within NTRBs: including the staff and the executive committee. In order to have any chance of working, the system requires all the players to be respectful of one another and of a variety of conventions governing the operation of the NTRB. However, in an environment where power, resources and identity are at stake and where the resources necessary to reinforce the system simply are not there,[43] the capacity for these contradictions to be bloodily exposed, with severe consequences for the provision of services, are great indeed.

6. "IT'S A BIT BLOODY LATE"[44]: THE PBC CRISIS

Once upon a time, there was a cosy assumption that when an Aboriginal group had its native title determined, it would establish a prescribed body corporate that would have its own office, its own professional staff, its own dedicated leadership and probably its own stickers. This body corporate would act both as an effective interface with the non-Indigenous world and yet would remain true to the laws and customs of those that it faithfully sought to represent. It would at once be both the expression of the unique culture from whence it sprang, its protector and the facilitator of its interaction with the outside world…

In hindsight, that such fancies ever developed seems extraordinary. The reality today is grim. Prescribed bodies corporate are saddled with a difficult array of complex administrative and legal functions.[45] They do not have staff or assets because, in simple terms, they have no funding at all and no capacity whatsoever to generate funding themselves.[46] Anecdotal evidence suggests that such prescribed bodies corporate as exist across Australia at present are in complete disarray and in breach of their operational obligations.[47] For their part, NTRBs (although forbidden from

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42 This subject has not, to my knowledge, been explored beyond the limited guidance contained in Division 3 of Part 11 of the NTA. The legal profession at large has an interest in protecting the profession per se and it is to be hoped that there is work done on this subject.

43 See part 4, above.

44 The off-the-cuff assessment of funding for PBCs made by Dr Carmen Lawrence in her presentation "Address to Native Title Representative Bodies Conference" annual Native Title Representative Bodies Conference, *Outcomes and Possibilities*, Geraldton, Western Australia, September 3-5, 2002.

45 See Part 2, Division 6 of the NTA. For a more human description, see Riley, M., "Speaking Notes", annual Native Title Representative Bodies Conference, *Outcomes and Possibilities*, Geraldton, Western Australia, September 3-5, 2002.

46 If a set of common law native title holders has retained a right to negotiate, it may be able to use that right to obtain negotiated payments for developers – but that is hardly guaranteed and the common law holders are not to be confused with the PBC in any event. Native title itself, given its inalienability, cannot be used by security.

47 Happily, this anecdotal evidence will soon be complemented by the findings of a comprehensive study commissioned by ATSIC ('the PBCs Project'). ATSIC is to be commended on this initiative.

conducting the administration of prescribed bodies corporate),[48] are still required to provide representation in relation to native title matters.[49]

The administration of determined native title is a fundamental question of government and policy. It appears likely that the majority of Australia's land and waters will eventually become the subject of native title determinations. Yet there does not seem to be any abiding government vision at all for what it is meant to look like. That is, beyond weasel words like 'fairness', 'certainty' and 'workability', how does government want dealings in land between Indigenous and non-Indigenous interests to operate in the future? This a question at the heart of funding for PBCs, and a question which has been made more acute by *Ward* for two reasons. Firstly, the High Court's views on extinguishment mean that in most of Western Australia native title has not been extinguished. Secondly the High Court's views on the content of native title being fact-specific, render the difference between different determinations likely to be more pronounced. There are compelling arguments to suggest that simply providing government funding to PBCs is not a long term solution and that there needs to be the capacity for PBCs to generate a surplus that they can spend on their own governance. A variety of ideas have been floated to achieving this end, but it appears that as yet none has been subject to real government consideration. There is also a strong case to suggest that a proliferation of PBCs is never likely to provide effective administration and governance and that larger structures are required. This is not the forum for detailed consideration of the possibilities. The point made is simply that this is an area of significant public policy that is in crisis.

7. 'A ROAD TRAIN GOING NOWHERE'[50]

Sometimes, it seems that there is little to be positive about in the world of native title from a native title representative body perspective: there is mounting work with less resources, in an increasingly unsympathetic environment. Government is impatient, the Courts are impatient, the resources sector is impatient and Aboriginal people themselves seem to be experiencing a fatigue. If the conference that was held to commemorate the twenty year anniversary of the commencement of the *Mabo* litigation was characterised by an almost self congratulatory atmosphere, a fond remembrance of litigation past,[51] the conference held earlier this year in Geraldton to commemorate the first decade of native title since the *Mabo* decision was a more desperate affair, with delegates evincing ennui or a grim realism.[52] Nowhere has this pessimism of the intellect been more plainly expressed than by McHugh J in *Ward* when his Honour stated that "redress can not be achieved" by the present system.[53]

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48 Under their grant conditions

49 NTA ss 203 BB.

50 Cribbing from Midnight Oil here. The track is 'Truganini' off the 1993 album 'Earth and Sun and Moon'.

51 Day one of *The Past and Future of Land Rights and Native Title*, Native Title Representative Bodies Conference, Townsville, August 27-31, 2001 was wholly commemorative.

52 See particularly Lee, T, "The Natives are Restless- A Personal Reflection on 10 Years of Native Title", annual Native Title Representative Bodies Conference, *Outcomes and Possibilities*, Geraldton, Western Australia, September 3-5, 2002

53 [2002] HCA 28 (8 August 2002) at 561.

8. CONCLUSION: THE BEST OF TIMES

Measured pessimism must not be confused with despair.[54] Aboriginal people will only ever be able to redress the power imbalances against them in Australian society to the extent that they have political force that can be exerted on wider society. Notwithstanding its faults, its disappointments and its rococo intricacies, the common law doctrine of native title and its statutory expression remain a source of power for Aboriginal people. In the aftermath of *Ward*, the rules may have fluctuated somewhat, but native title in the hands of the representative institutions of Aboriginal people remains a fecund tool for coercing the institutions of non-Indigenous Australia into affording Aboriginal people a better deal in society. It may not be 'justice',[55] it may not have the standing of a 'treaty',[56] it may be only begrudgingly supported by some of the nations' elites, it may have its skewering limitations, but in pragmatic terms it can be still skilfully utilised in order to achieve Indigenous aspirations. In this sense, the aftermath to *Ward* is redolent of longer continuities in settler-relations in Australia: Indigenous people have always been better served by a critical and pragmatic engagement with non-Indigenous authority than by faithful observance of its liturgies, or trust in the substantive equity of its principles.

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54 Another finding of the Love and Rashid Report was that "NTRB's are made up of dedicated staff" at 3. My personal experience is to that effect in the strongest possible terms. The Yamatji Land and Sea Council has in my experience been staffed by an incredibly committed and desperate group of people who soldier on against the odds in the service of their clients, working absurd hours, looking out for one another with a splendid esprit de corps.

55 Whatever that means. I don't think – to Aboriginal people – it 'feels like' justice.

56 See for instance Clark, G., Ten Years After Mabo: An Indigenous Reform Agenda, *Address to the Unfinished Business Conference*, Melbourne, 3rd June 2002, 7.