INDEX

Badu (Badualgal) people, 206, 208, 212 Brennan J, and Mabo v Queensland [No.2], Ballardong claimant application, 199 79, 117, 130–131, 133–134, 137, Bar-Barrum people, 196 184-185 Bardi people, 143, 209 colonial law concepts, 2, 9-10 Barron Gorge National Park, 204 communal native title, 108-109; cited in Bartle Frere, 220 Bennell, 108, 109 Batchelor township, 224 connection with land, 11, 12, 63 Beattie on behalf of Western Wakka Wakka extinguishment, 16-18, 19-21, 30; Peoples v State of Queensland, 214-215 acquisition of sovereignty and, 16, 40, Beaumont J, 56-57, 140 128-129; cited in Wik, 27, 28; freehold, 37 beneficial construction, 84, 118, 119, 121, 122, 125, 196 inalienability, 14 leases, 27; cited in Wik, 27 beneficial interest, 14, 27, 31 Bennell v State of Western Australia skeletal principles, 10, 18, 40, 52, 131 (2006), 210traditional law and customs, 10-11, 15, see also Bodney v Bennell 16, 17, 109, 135, 138 Billy Patch & Others on behalf of the typology of rights and interests, 109 Birriliburu People v State of Western British Columbia, 148-149 Australia and Others, 222 Broome, 114, 198-199, 225-226 Binhthi people, 187 Bropho v Western Australia, 192 biological descent, 198 Brown (on behalf of the Ngarla People) v State Birriliburru people, 222 of Western Australia, 215 Black J, 124 Brown v State of South Australia, 228 Blackburn J, 2-3, 9, 184 Brown v Western Australia, 196 Blackstone, William, 135 Brue Reef, 209 Buck v New South Wales, 187 Blue Mud Bay, 208, 225 see also Northern Territory of Australia v Arnhem Land Bulun Bulun, 64-65 Aboriginal Land Trust Bundjalung people, 197 bodies corporate, prescribed see prescribed bundle of rights concept, 119 bodies corporate Fejo, 38-39, 41, 42-43 Bodney v Bennell, 97-115, 124, 125, 137, Ward, 55-57, 58, 61-63, 121, 194, 202 138, 140-142, 144, 222 Wik (Brennan J), 26, 136 communal title, 107-114 Yanner, 44-45, 48 connection with land, 112-114, 141 see also coexistence continuity and change, 99-106, 140 Butchulla People v State of Queensland, 210 distinction between common law native Byron Bay, 197 title and statutory native title, 115 Bodney v Westralia Airports Corporation Callinan J, 37, 45, 48, 73, 121 Pty Ltd, 192 Calvin's case, 135 Boigu people, 205, 208 Campbell Island, 206 Brandy v Human Rights and Equal Canada, 13, 14, 15, 39, 84, 85, 148-149 Opportunity Commission, 186 Cap Islet, 204 Branson J, 75-76, 78-79 Cape York Land Council, 211 Brennan J, 26-27, 121 Cape York Peninsula, 212, 221 see also Wik Wik Peoples v Queensland, 28, 30, 117; Peoples v Queensland bundle of rights concept, 26, 136; capital cities, 97 see also Perth metropolitan enforceability, 145; extinguishment, 31-32, 33-35 Central Desert, Western Australia, 225

Chapman v Queensland, 215	law pre-Mabo, 3
Clarke on behalf of the Wotjobaluk, Jaadwa,	South Africa, 127
Jadawadali, Wergaia and Jupagulk Peoples	Ward, 56, 62
v Victoria (Wotjobaluk determination),	Yarmirr, 142
139–140, 149, 207	'community', 98, 101, 107 see also
clear and plain intent, 17-18, 32, 53, 69,	traditional societies
72, 84–86, 118, 123, 132, 146 see also	compensation, 19-21, 59-61, 118,
statutory construction/interpretation	147–148, 191, 205 see also Racial
Clissold v Perry, 83	Discrimination Act 1975
Clunies Ross v The Commonwealth, 83	compensation claims, 218
coastal waters see sea country	compulsory acquisition, 4, 19, 82–86
Coe v The Commonwealth, 3, 184, 185	conflict of laws, 126–127
coexistence, 22-35, 118	Congoo v Queensland, 196
with freehold title, 38-39, 41	connection with land, 11, 16-18, 43, 73,
with land rights grant, 185	75, 78–79, 139–141, 205
with pastoral leases, 191	Bennell, 99-100, 107, 108, 112-114,
with sea country, 50	124
Ward, 55–59, 71–72	De Rose, 87-89, 90-91, 95, 140-141,
see also partial extinguishment	200, 207
Collier J, 226	Gumana , 141
colonial law, 2-3, 9-10, 14, 41, 42,	Ward, 56, 61, 63-65, 93, 121, 125, 140
118, 148	Yanner, 44, 46–48
Queensland, 24-25, 28-29	Yorta Yorta [1997], 188
South Australia, 92, 218	consent determinations
see also sovereignty	New South Wales, 187, 197, 221
combination of applicant claims, 190	Northern Territory, 202-203, 206,
see also groups and group claims	219, 220
commercial agreements, 148	Queensland, 187, 189, 195, 196–197,
Commonwealth of Australia Constitution,	204, 206, 207, 221, 224, 229–230;
4, 5, 19, 20–21, 46, 186, 216	Torres Strait, 191, 192, 194, 197, 198,
Commonwealth v Yarmirr (2001), 49–54,	204, 205, 209
66, 131, 132–133, 136–137, 142,	South Australia, 222, 227–228
148, 196	Victoria, 149, 207, 219
enforceability, 54, 144–145	Western Australia, 192, 193, 196,
Kirby J, 53–54, 120, 148	198–199, 200, 206, 208, 218, 222, 224,
sovereignty, 50-52, 119-120, 127, 128,	225, 229
129–130, 132–133	conservation of wildlife/natural resources,
traditional customs and law, 49-50, 54,	18, 44–48, 188, 191
126–127	Constitution of Australia, 4, 5, 19, 20–21,
Ward discussion of non-exclusive,	46, 186, 216
differences between, 66	continuity test, 99-106, 135, 141
Yorta Yorta, 76	presumption of continuity, 141
Commonwealth v Yarmirr (1999), 54, 190	Cooper v Stuart, 3, 184
communal claims, 89, 94–96 see also Bodney	Cox on behalf of the Yungngora People v State
v Bennell; groups and group claims	of Western Australia, 215
communal title, 12–13, 15, 46–47, 78, 116,	Coyne v State of Western Australia, 228–229
137, 138, 142–143, 213	Crennan J, 223
Bennell, 107–114	Croker Island region, 49, 142, 189

Crown Lands Act 1992 (NT), 83 Crown Lands Alienation Act 1876 (Old), 28 cultural knowledge, protection of, 64-65, 75, 88-89, 105 see also traditional societies cultural survival, threat to, 74, 85 Curr (squatter), 75 customary practices see traditional law and customs

Daintree National Park, 221 Dale v Moses, 215 damages see compensation Damuth people, 193 Danggalaba clan, 212, 220 Daniel v Western Australia, 190, 192, 200, 203, 207, 211 Dann on behalf of the Amangu People v State of Western Australia, 211 Darug people, 205 Dauan people, 208 Dauan People v Queensland, 192 David on behalf of the lama People and Tudulaig v Queensland, 204 De Rose v South Australia [2002], 87–94, 96, 200 De Rose v South Australia [No. 1] (2003),

92-94, 124, 125, 138, 203 De Rose v South Australia [No. 2] (2005), 87-96, 124-125, 139, 140-142, 143, 144, 207–208 Bennell and, 97, 110 Sebastian and, 114-115

Deane J, 3

Mabo v Queensland [No.2], 10-15, 27, 109, 127; extinguishment, 14-15, 17, 19, 20, 21, 38, 40, 131-132

Deeral v Charlie, 187

defeasibility see extinguishment

Delgamuukw v British Columbia, 148-149

derogation, 138, 145

Derschaw v Sutton, 188

determination, 135, 143, 149, 194-195 compliance with s 225, 49-50, 62, 142, 192, 201

National Native Title Tribunal powers,

non-claimant, 200, 226-227

town areas, 193, 204, 209, 218-219 see also applications; consent determinations Dharrpa people, 187 Dillon v Davies, 188 Dingaal people, 187 discrimination, perpetuation of,

147-148, 149 divestiture of title, 16

under s 55, 189

Djabugay People v Queensland, 204

Djaigween v Douglas, 185

doctrine of estates, 27

Doolan v Native Title Registrar, 216

Doolboong people, 214

Dowsett J, 217

Drummond J, 23, 119

Dunghutti people, 187

East Arnhem Land, 208 Eastern Guruma people, 218 Eastern Kuku Yalanji people, 221 education, 90 Ejai v Commonwealth, 184 employment, 74, 88, 89, 90, 91 enforcement, 33, 54, 67, 76, 144-145 Eringa No. 1 Native Title Claim v South Australia, 216

Eringa, Eringa No. 2, Wangkangurru/ Yarluyandi and Irrwanyere Mr Dare Native Title Claim Groups v The State of South Australia, 222

Erub Island, 205

estate groups, 108, 113, 142, 143-144, 214, 215, 216

estates, doctrine of, 27

Euahlayi-Dixon clan, 72 see also Wilson v Anderson

evidence, 185, 187, 188, 192, 193, 199, 204

Bennell, 98, 99, 105–106, 114

De Rose, 89-90, 91

Yorta Yorta, 74-75, 79-80

see also witnesses

Evidence Act 1995 (Cth), 192

exclusion of parties, 188, 204

exclusive possession, 23–24, 26–30, 121,

122, 125, 132, 137–138, 147

Native Title Act 1993 provisions, 58,	Sebastian see State of Western Australia v
62, 109	Sebastian
pastoral leases, 22-30, 32, 192	Ward, 55-57, 62, 63, 66, 69, 70, 78, 140
sea country, 49–54, 208	Wilson, 192
Ward, 56, 57, 62–63, 65–70, 147	Yarmirr, 49-50, 52, 54, 137, 190
Wilson, 72	Yorta Yorta, 74-76, 78-79, 80-81,
Yarmirr, 190	123–124
see also freehold land (fee simple estates)	Federal Court of Australia Act 1976 (Cth)
executive power to acquire land see	s 46, 216
compulsory acquisition	s 53A, 190
expert witnesses, 91, 188	fee simple estates see freehold land (fee
extinction of title, 16	simple estates)
extinguishment, 15, 16–21, 37, 52–53,	Fejo v Northern Territory, 36–43, 73, 118,
79, 116, 118–119, 125, 131–133, 138,	119, 133–134, 146, 188
144–148	bundle of rights concept, 38-39,
clear and plain intent, 17–18, 32, 53, 69,	41, 42–43
72, 84–86, 118, 123, 132, 146	intersection of traditional law and
De Rose, 92, 207–208	non-Indigenous law, 39–40, 41–43
Fejo, 41–43, 119	Yanner judgment, 47, 48
Lardil, 197	Yarmirr, and, 53
Native Title Act 1993 provisions, 5–6	fiduciary duties, 3, 20, 23, 117, 192
Ngalakan People, 198	Finn J, 100, 219, 220
North Ganalaja, 23–24	Fish Resources Management Act 1994
Ward see Western Australia v Ward	(WA), 191
Wik, 27, 30–35, 118	Fisheries Act 1988 (NT), 225
	fishing and hunting, 44-48, 119, 120, 132
Wilson, 72, 192, 202	Adnyamathanha, 227–228
<i>Yanner</i> , 45–48, 119	Bennell, 100, 104, 109
see also freehold land; inconsistency;	De Rose, 88, 89, 92
leases; partial extinguishment; <i>Racial</i>	Derschaw, 188
Discrimination Act 1975	Dillon, 188
E	Gumana, 208
Fauna Conservation Act 1974 (Qld),	Lardil, 205
44–48, 191	Mason, 185
Federal Court of Australia, 36, 68, 115,	methods used, 78
118, 124–125, 195	Native Title Act provisions, 49–50
Bennell see Bodney v Bennell	Wilkes, 191
Bulun Bulun, 64–65	Yanner, 191
De Rose see De Rose v South Australia	Yarmirr, 49, 51-54, 190, 196
jurisdiction, 185, 189, 198	Flinders Ranges National Park, 227–228
Neowarra see Neowarra v Western	FMG Pilbara Pty Ltd v Cox, 229
Australia	free passage see innocent passage, right of
North Ganalanja see North Ganalanja	'freehold equivalence' tests, 84, 85
Aboriginal Corporation v Queensland	freehold land (fee simple estates), 18, 30,
powers, 185, 186, 190, 227	82, 83, 86, 188, 192
procedures, 185, 191, 193, 197, 206,	Fejo v Northern Territory, 36–43, 118,
215, 230 see also evidence	119; cited in Yanner, 46
Risk , 140	intertidal land, 189–190

Grey, Earl, 25-26 French J, 106, 112, 141, 143, 200, 209, 214, 221 Griffiths v Minister for Lands, Planning and future acts, 6, 60, 148, 191, 193, 197, 199 Environment, 82-86, 125, 146, 222-223 future generations, 16-18 Griffiths v Northern Territory, 82, 211, 216 groups and group claims, 12-13, 110-111, Gabba Island, 206 112, 113, 138-139, 141-144 Gadura people, 49 Adnyamathanha People, 190, 227–228 Gajerrong people, 37, 55-56, 61, 142, Bennell, 97-115 143, 189, 202-203, 214 see also Western De Rose, 87, 94-96, 141-142, 144 Australia v Ward Gale, 205 Gale on behalf of the Darug People v Minister Harrington-Smith, 218 for Land and Water Conservation for New Ngalakan People, 198 South Wales, 205 Northern Territory v Alyawarr, 209 Rubibi see Rubibi v Western Australia Gamaay people, 187 Gamogab v Akiba, 216 Ward, 195 Gangalidda people, 44, 125, 142, 193, 197 Gudjala People 2 v Native Title Registrar, Gascoigne, 193-194 217, 223-224 Gaudron J, 37, 50, 55 Guerin, 14 Mabo v Queensland [No 2], 10-15, 27, Gumana v Northern Territory, 106, 141, 109, 127; extinguishment, 14-15, 17, 19, 208, 217 20, 21, 38, 40, 131-132 Gummow J, 37, 50, 55, 76, 78, 223 Wik Peoples v Queensland, 22-23, 31; Griffiths, 86 Wik Peoples v Queensland, 24, 28, 30, 32, exclusive possession, 26-27, 28, 29-30, 32 118, 136 Yorta Yorta v Victoria, 76, 78, 200 Yanner v Eaton, 46-48, 78 Gebara Island, 206 Gunditjmara people, 149, 219 gender restrictions, 188, 204, 216 Gunnamalla clan see Yanner v Eaton 'generation by generation' test, 105–106, Guruma people, 218 141 see also 'continuity' test Haldane, Viscount, 129 see also traditional law and customs Hamlet of Baker Lake v Minister of Indian Affairs and Northern Development, 13 genocide, 191 Gerhardy v Brown, 3, 60-61 Harrington-Smith v Native Title Registrar, Gibbs J, 185 217 Gibson Desert, 196 Harrington-Smith v Western Australia [No. 9] Gibuma on behalf of the Boigu People v (2007), 125, 218 Queensland, 205 Harris v Great Barrier Reef Marine Park Gija people, 214 Authority, 193 Githabul people, 221 Hatches Creek, 204, 209 Gleeson CJ, 37, 50, 55, 72, 76, 78, 86, Hayes v Northern Territory (Alice Springs determination), 54, 142, 146, 191, 193 122, 223 Gnaala Karla Booja claim group, 199 Hayne J, 37, 50, 55, 76, 78, 86, 223 Gordon Charlie v Cape York Land Council, Hazelbane v Doepel, 224 hearsay evidence, 192 heritage preservation, 12, 75, 93, 207 see Gove Peninsula see Milirrpum v Nabalco Pty Ltd also traditional law and customs Great Sandy Desert of Western Australia, Heydon J, 86, 223 High Court of Australia, 3, 135 220

Fejo see Fejo v Northern Territory Indigenous Land Use Agreements, 7, Griffiths see Griffiths v Minister for Lands, 149, 197 Planning and Environment Indigenous law and customs see traditional Mabo v Queensland [No. 1] (Racial law and customs Discrimination Act 1975 decision), 4, 5, Indigenous nation, 184, 185 Indigenous title Mabo v Queensland [No. 2] see Mabo v Canada, 39, 85 Queensland [No. 2] New Zealand, 85 Native Title Act case see Western Australia Indigenous witnesses see witnesses v Commonwealth Indjibarndi people, 207 North Ganalanja see North Ganalanja see also Yindjibarndi people Aboriginal Corporation v Queensland inherent vulnerability, 40-41, 48 Ward see Western Australia v Ward inheritance, 17, 60, 72, 108, 138 Wik see Wik Peoples v Queensland Injibandi people, 203 Wilson v Anderson, 72, 118, 122-123, injunctions, 185, 197 innocent passage, right of, 51-54, 132, 196 Yanner see Yanner v Eaton intellectual property, incorporeal, 64 Yarmirr see Commonwealth v Yarmirr intent see 'clear and plain intent' Yorta Yorta see Yorta Yorta v Victoria interlocutory relief, 197 Holroyd River Holding pastoral leases, international law, 51, 52, 53-54, 127, 132, 24, 29-30, 32 see also Wik Peoples v 133, 135 Queensland intertidal zone, 189-190, 195-196, Hopevale, 187 208, 217 Hughes (on behalf of the Eastern Guruma People) v State of Western Australia, 218 Jaadwa people, 207 Human Rights and Equal Opportunity Jack Billy on behalf of the Poruma People v Commission, 186 Queensland and Others, 208 Hunter v State of Western Australia, 229 Jacobs J, 128 hunting see fishing and hunting Jadawadali people, 207 James v Western Australia (Martu Iama people, 204, 209 determination), 73, 200, 203 inalienability of native tide, 13-14 Jango v Northern Territory of Australia, inconsistency, 10, 18, 37-38, 46, 84, 118 211, 218 Anderson, 192 Jawi people, 143, 209 De Rose, 96 Jeaka Island, 204 Fejo, 38, 40 Jones v Queensland, 189 Guerin, 14 judicial functions, 186 Ward, 55-59, 62, 71, 96, 146, 194; Jupagulk people, 207 inconsistency of incidents test, 68-69, 194, 202 Kabi Kabi people, 221 Western Australian v Commonwealth, 38 Kaidilt people, 125, 142, 193, 197 Wik, 22-23, 26, 27, 33-35, 118, 146 Karajarri people, 229 Wilson, 72, 122-123 Katz J, 75-76, 78-79 Yanner, 45-48 Kaurareg People v Queensland, 197 Yarmirr, 50, 51-54, 132-133 Kaytetye people, 204, 209 see also inconsistent grant, compensation for, 19-21 Northern Territory v Alyawarr, Kaytetye, incorporeal intellectual property, 64 Warumungu, Wakay Native Title Claim

Indigenous Land Corporation, 4, 224

Group

Keep River National Park, 70 1973 (WA) see Western Australia v Kelly on behalf of the Byron Bay Bundjalung Commonwealth People v New South Wales Aboriginal Land Lands Acquisition Act 1978 (NT), 82-83, Council, 197 Kennedy v Queensland, 200 language and linguistic groups, 13, 74, 87, Keyn's case, 51 97, 98, 100 Kiefel J, 83, 84, 215, 223 Lapthorne v Indigenous Land Corporation, Kimberley region, 209, 214, 215 see also Neowarra v Western Australia Lardil, Kaidilt, Yangkaal and Gangalidda King v Northern Territory of Australia, People v Queensland, 125, 142, 193, 197 218-219 Lardil Peoples v Queensland, 191, 205 Lardil, Yangkaal, Gangalidda & Kaiadilt Kirby I Fejo, 38, 39, 40, 119; extinguishment, Peoples v State of Queensland, 224 Larrakia people, 36-37, 41, 44, 97, 212, 37, 38, 40, 42-43 220 see also Fejo v Northern Territory Griffiths, 84-85, 223 law and customs see traditional law and Ward, 71, 85, 202 Wik, 24, 25, 26, 27, 28, 119; enforceability, 127; extinguishment, 31, law-making power, 4-5, 19, 20-21, 46, 32, 33-35 Wilson v Anderson, 122 effect of Racial Discrimination Act 1975 Yarmirr, 53-54, 120, 148 (RDA), 60-61 Yorta Yorta, 76, 78, 200 see also normative law systems Kite v State of South Australia, 219 Lawson v Minister for Land and Water Kiwirrkurra people, 196 Conservation, 205 Koara People v State of Western Australia, 211 leases, 6, 18, 26-27, 69-72, 82, 86, Kokatha Native Title Claim v State of South 121 - 122licences and, 28-29 Australia, 212 in perpetuity, 122-123 Kokatha people, 220 Kokatha People v State of South Australia, see also pastoral leases Lee J, 55–56, 57, 65, 68, 78, 147, 189, Kuku Yalanji people, 221 194, 214 Kulka people, 206 legislative extinguishment, 19-21 see also Racial Discrimination Act 1975 (Cth) Kuruma Marthudurara Native Title legislative power see law-making power Claimants, 225 Kuuku Ya'u People v State of Queensland, Leslie Hayes & Ors on behalf of the Thalanyji 229-230 People v The State of Western Australia and Others, 224 Lake Victoria, 205 licences, 25, 26, 28-30 Lamer CJ (Supreme Court of Canada), 39, to hunt or fish, 44, 46, 53 148-149 Lindgren J, 217-218 Little Sandy Desert, Western Australia, 222 land, 2–3 see also connection with land; Liyartu-Walamarnta group, 219 ownership local governments, 83, 223 Land Act 1910 (Qld), 22-35 Land Act 1933 (WA), 70 Long Island, 209 Lovett on behalf of the Gunditjmara People v Land Act 1962 (Qld), 15, 22-35 State of Victoria, 219 Land Councils, 211, 230 land rights, 3, 49, 132 low watermark, 51, 100, 189 Lower Southern Arrente people, 222 Land (Titles and Traditional Usage) Act

Mabo v Queensland [No.1] (Racial Members of the Yorta Yorta Aboriginal Discrimination Act 1975 decision), 4, 5, Community v Victoria see Yorta Yorta v 20, 60, 184 Victoria Mabo v Queensland [No.2], 1-2, 9-21, 91, Meriam people, 1-2, 9, 184, 198 see also 116-117, 122, 147-148, 149, 184-185 Mabo v Queensland colonial law concepts, 2-3, 9-10 Merkel J, 54, 93, 137, 139-140, 141, 199, communal title, 12-13, 15, 108, 142 225-226 construction principles, 31-32 Mervyn and Others on behalf of the Peoples Court membership, 121 of the Ngaanyatjarra Lands v Western extinguishment, 15, 16-21, 37, 40, 84, Australia, 208 132, 147-148; Ward, 57, 65, 148 Milirrpum v Nabalco Pty Ltd, 2-3, 9, inconsistency, 84, 131-132, 133 53, 184 legislative responses, 3-7, 62, 142 see also Minaga people, 49 Native Title Act 1993 (Cth) (NTA) Mineralogy Pty Ltd v Kuruma Marthudunera sovereignty, acquisition of, 13, 128-130, Native Title Claimants, 225 131-132, 145; Yarmirr, 50, 51, 119-120 minerals, 15, 30, 62-63, 194, 198 traditional law and customs, 78, 79, 126, Mining Act 1978 (WA), 61 130-133; De Rose, 144; Fejo, 39, 43, mining leases, 6-7, 18, 71, 121 133-134; Wik, 33-34 Miriuwung people, 37, 55-56, 61, 120, see also Brennan J, and Mabo v 142, 143, 189, 202-203, 214 see also Queensland [No.2] Western Australia v Ward (2002) Mabuiag people, 208 Mitchellton pastoral leases, 24 see also Wik Mabuiag People v Queensland, 193 Peoples v Queensland McHugh J, 37, 45, 77 Moses v State of Western Australia (2007), Mabo v Queensland [No.2], 12, 138, 219 19-20, 117 Mualgal people, 189, 191, 212 Ward, 58, 73, 121 Mualgal People v Queensland, 191 Yarmirr, 51, 126, 130-131 Mualgal v Queensland, 189 McNeil, Kent, 137, 145 Mukar (Mugquar) Islet, 204 Mahoney J, 13 Mulgrave River, 212 Maiyalaniwung estate group, 216 Munn v Queensland, 198, 201 Makalamayi estate group, 216 Muran people, 49 Malanda, 220 Murranjayi group, 219 Manas v State of Queensland, 212 Murray Islands, 9, 198 see also Mabo v Mandilarri-Ildugij people, 49 Queensland Mandingalbay Yidinji people, 212 Mye on behalf of the Erubam Le Mangalara people, 49 v Queensland, 205 Mansfield J, 100, 105, 208, 212, 216, 224, 227-228 Nambucca Heads Local Aboriginal Land Marra people, 194, 206 Council v Minister for Lands, 230 Martu determination (James v Western Nangkiriny v Western Australia, 201, 206 Australia), 73, 200, 203 National Native Title Tribunal (NNTT), 6, Masig and Damuth People v Queensland, 193 186, 187, 195, 199, 229 Masig people, 193, 210 national parks and reserves, 18, 70, 73, 121, Mason CJ, 12, 18-21, 60, 117, 185 Mason v Tritton, 185 198-199, 204, 222, 227-228 Mayorram people, 49 Native Title Act 1993 (Cth) (NTA), 4-6, mediation, 6, 190, 195, 199, 212, 215, 22, 36–37, 98, 115, 117–119, 120–123, 222, 229 126, 142, 146

acquisition of land processes (NT) and, s 190(4), 217 83, 84 s 190A, 185, 223–224, 226 expedited procedures, 187 s 190C, 226 extinguishment provisions, 5-6, 57-59, s 211, 46, 191 68-71, 72, 79, 146, 147; compensation, s 213(2), 185 59, 61 s 223, 118, 124–125, 126, 135, 141, 'freehold equivalence' tests, 84, 85 144, 149, 190; Bennell, 100, 107, Part 2 Division 2, 57 108–109, 110, 112–114, 210, 222; De Part 2 Division 2A, 57-58 Rose, 94-95, 141, 142, 144, 200, 207; Part 2 Division 2B, 57, 72 Gumana, 141; Neowarra, 143, 204; Part 3, 190 Risk, 212; Rubibi, 141; Ward, 61, 62, preamble, 135, 196 63-64, 194, 202; Yarmirr, 50, 51, 76; s 7, 60 Yorta Yorta, 76-77, 79, 100-101, 123, s 11, 5, 57 197-198, 200-201 s 12, 186 s 225, 49–50, 62, 142, 192, 201, 219, s 13, 190, 195 224; Bennell, 109-110, 111 s 15, 57, 58-59 s 237, 199 s 23A, 58 s 237A, 58, 96 s 23B, 72 s 238, 59 s 23C, 57 s 248B, 70 s 23G, 57 s 251B, 210 s 23I, 59 s 253, 199 s 24HA, 191, 193 Native Title Act case see Western Australia v s 24MD, 85, 86, 223 Commonwealth s 24NA, 191 Native Title Amendment Act 1998 (Cth), 7, s 38, 229 80, 115, 119, 120, 121, 148 s 45, 61 Native Title Registrar, 185, 214, 216, 217, s 47, 195 221, 223–224, 226 nature conservation, 18, 70, 73, 204 s 47A, 119, 195, 198, 199, 208, 213 s 47B, 59, 73, 119, 209, 213 wildlife, 44-48, 188, 191 s 55, 189 navigation, 52-54, 132, 190, 196 s 56, 189, 193, 229 necessary inconsistency see inconsistency s 57, 189, 193 negotiation, 187 see also mediation s 61, 190, 216, 224, 227, 228 Neowarra v Western Australia, 137, 138, s 62, 190, 215 141, 142, 143, 146–147, 203–204 Bennell and, 113 s 66, 192 s 66B, 199, 200, 201, 215, 224, 228–229 final determination, 206 s 66C, 221 Yorta Yorta and, 125 s 67, 212 New South Wales Public Works Act 1912, s 82, 188, 192, 204, 216 s 84(5), 195, 201, 226–227 New South Wales v Commonwealth (1975), s 84C, 219, 220, 228 s 86, 212 New South Wales Western Lands Act 1901, s 86EN, 195 122, 192, 202 s 86G, 200 New Zealand, 85 s 87, 224, 227, 229 Newcastle Waters township, 219 s 87A, 227, 229 Newie on behalf of the Gebaralgal v s 94C, 221 Queensland, 206

Ngaanyatjarra Lands, 208, 225 Northern Territory Crown Lands Act Ngadjon-Jii People v State of Queensland, 220 1992, 83 Ngalakan people, 194, 198, 201, 206 Northern Territory Lands Acquisition Act Ngalakan People v Northern Territory, 1978, 82-83, 84 Northern Territory of Australia v Arnhem 198, 201 Ngaliwurru people, 211, 216 Land Aboriginal Land Trust, 132, 225 Ngalpil v Western Australia, 198 Northern Territory Supreme Court, 2 Northern Territory v Alyawarr, Kaytetye, Ngaluma/Injibandi people, 203 Warumungu, Wakay Native Title Claim see also Ngarluma people Group, 97, 101, 107-108, 113, 115, 124, see also Yindjibarndi people 125, 144, 209 Ngarinyin people, 142 see also Neowarra Nugal people, 187 v Western Australia Nungali people, 211, 216 Ngarla people, 193-194, 215 Nyangumarta people, 229 Ngarluma people, 138, 203, 207, 215, 219 Nyangumarta Warrarn Aboriginal Ngayndjagar people, 49 Corporation, 229 Nguraritja see De Rose v South Australia Nyungar people, 37 Ngurrara people, 200 Ngururrpa people, 220 occupancy, 10, 12-14, 17 Nguurruumungu people, 187 Bennell, 112 Nharnuwangga people, 193-194 De Rose, 88-89, 90-91, 93, 207 Nicholson J, 192 Pearson on, 135, 138 Nigeria, 129 Ward, 62, 63, 93, 135, 194-195 non-claimant determination, 200, 226-227 Yorta Yorta, 74-76, 78 non-recognition, 130-133 see also connection with land non-statutory extinguishment of title, 19 offshore see sea country Nona and Manas v State of Queensland, 212 Oilnet, 36 Nona on behalf of the Badulgal v Queensland, Olney J, 54, 139, 140, 146 206 Yarmirr, 49-50, 52, 189-190 Nona on behalf of the Saibai, Dauan, Yorta Yorta, 74-75, 78, 80-81, Mabuiag, Badu and Boigu Peoples v 123-124, 189 Queensland, 208 O'Loughlin J, 87-94, 96, 124 Noongar community, 97-110, 111, 124, Ord River project, 120 210, 228 see also Bodney v Bennell overlapping claims, 190, 218, 224, 226 Noonkanbah pastoral lease, 215 overseas precedents, 39 normative law systems, 39-43, 53-54, 125, see also aboriginal title (Canada) 126-127, 133-135, 147, 149 ownership, 3, 4, 23-24, 91, 137-138 Bennell, 101-106 Mabo v Queensland [No. 2], 10, 13-15 Yorta Yorta, 76-81, 133-134; De Rose Queensland Coast Island Declaratory Act distinguished from, 93 1985 (Qld), 4 normative society, 78, 80, 98-101, 107, Ward, 62, 65 123, 139-144, 203-204, 209, 210 see see also sovereignty also groups and group claims ownership of resources, 15, 62-63, 198 North America, 12, 15, 18, 39, 84, ownership of sea country, 51 148-149 North Ganalanja Aboriginal Corporation v Papua New Guinea nationals, 216 Queensland, 23, 27, 186-187 Pareroultja v Tickner, 185 North J, 56-57, 147, 148, 194, 201 parks and reserves, 18, 70, 73, 121,

Northern Land Council v Commonwealth, 3

198-199, 204, 222, 227-228

partial extinguishment, 147	proof, 10–16, 114–115, 116, 117, 124,
De Rose, 92, 96	125, 140, 141, 149
Ward, 55-59, 71-72, 120-121, 146,	De Rose, 95–96
147, 194, 202	Derschaw, 188
see also bundle of rights concept;	Ngalakan People, 198
coexistence; inconsistency	Pearson on, 135
Passi on behalf of Meriam People v	Ward, 61, 187
Queensland, 198	Yorta Yorta, 74-81, 139-140
past acts, 57-58, 59, 60	see also evidence
pastoral leases, 18, 38	property law, 44–45, 60, 64, 109, 136–137
Alyawarr, 204	proprietary interests, 14–15, 27, 56, 90,
Cox , 215	109, 121, 137
Daniel, 203	fauna, 44–45
De Rose see De Rose v South Australia	minerals, 15
Hayes, 191	protection limits, 144-148 see also
King, 218–219	extinguishment
North Ganalanja Aboriginal Corporation,	public purpose, 83–84
23, 27, 186	public rights see fishing and hunting
Northern Territory v Alyawarr, 209	Public Works Act 1912 (NSW), 205
Ten-Point Plan, 6–7	Pula Nguru/Spinifex People, 192
Wandarang, 206	
Ward, 58, 69–70, 71–72, 121, 122	Quall v Northern Territory of Australia, 230
Wik [2004], 207 see also Wik Peoples v	Queensland Coast Island Declaratory Act
Queensland	1985 (Qld), <i>Mabo [No.1]</i> decision, 4, 5,
Wilson , 72	20, 184
Wilson, 122–123, 202	Queensland Court of Appeal, 44
see also inconsistency	Queensland Crown Lands Alienation Act
Patta Warumungu People v Northern Territory	1876, 28
of Australia, 220	Queensland Fauna Conservation Act 1974,
Payi Payi & Ors on behalf of the Ngururrpa	44–48
People and State of Western Australia, 220	Queensland Land Act 1910, 22–35
Pearce Cay, 206	Queensland Land Act 1962, 15
Pearson, Noel, 68, 133, 135, 137, 138	Queensiand Lumi 110 1902, 19
Perth metropolitan area, 97, 107, 108,	Racial Discrimination Act 1975 (Cth), 137,
112–114, 210, 222	145, 147–148
petroleum see minerals	Griffiths, 86
Pilbara, 200, 203, 207, 215, 218, 224, 229	impact on state legislation, 60–61
Pinkakujarra group, 219	Mabo v Queensland [No.1] and
Pitjantjatjara people, 87 see also De Rose v	Queensland Coast Islands Declaratory Act
South Australia	1985 (Qld), 4, 5, 20
Poruma people, 208, 209–210	Mabo v Queensland [No.2], 16, 19, 20
possessory title, 117, 135 see also occupancy	Native Title Act 1993 suspension
prescribed bodies corporate, 189, 193, 203,	
206, 211	provisions, 5 Native Title Act case, 5, 186; see also
previous acts, 57–58, 59, 60	Western Australia v Commonwealth (1995)
private benefit, 83–84	(Native Title Act case)
private rights to land, grants of, 17–18, 82	Native Title Amendment Act 1998
see also freehold land; leases	
Privy Council, 3	suspension provisions, 7

Ward, 57, 59–61, 121, 202	settlement, 2–3, 10, 13–14, 24–25, 99,
Yanner, 46	101–102, 105–106, 140
radical title, 13, 14, 27, 50-51, 104, 119-	traditions and customs at time of see
120, 129	traditional law and customs; traditional
Real Property Act 1886 (SA), 218	societies
recognition, 9-21, 51-53, 54, 59, 85,	see also sovereignty
126–150	shipping, 52–54, 132, 190
withdrawal of recognition, 68	Single Noongar Claim, 97, 98, 210 see also
'recognition level', 108, 125, 141-144, 203	Bodney v Bennell; Noongar community
Reeves J, 230	skeletal principles, 10, 18, 40, 52, 131,
regulation of rights and interests, 45-48	132, 133
Reid v State of South Australia, 220	Smith on behalf of the Gnaala Karla Booja
rents, 25, 29	People v Western Australia, 199
reports, copying or disclosure of, 198–199	Smith v Western Australia, 193–194
reserves and parks, 18, 70, 73, 121,	'society', concept of, 100-101, 107, 143
198–199, 204, 222, 227–228	see also traditional societies
resources, ownership of, 15, 62-63,	South Africa, 127, 135
194, 198	Southern Nigeria, 129
resources, use/taking of, 30, 63, 189-190,	'Southern Noongar claim', 228
196 see also fishing and hunting	sovereignty, 13, 72, 76-77, 119-120, 123,
resumption as vacant Crown land, 36-43	128–130, 132, 134–138, 148–149,
reversion to Crown, 23, 27–29	184, 185
revival, 41-43, 119, 146	Bennell, 98, 100, 103–104
rights and interests, 'typology' of, 109-111	<i>Mabo</i> , 10, 15, 17, 128–130, 131–132,
Riley v State of Queensland, 212	145; time of acquisition, 13
Risk v Northern Territory, 97, 99, 105, 115,	pre-Mabo law, 2-3, 9-10, 184
124, 125, 140, 212, 220, 230	Yarmirr, 50-52, 119-120, 127, 128,
root title see coexistence	129–130, 132–133
Rubibi appeal, 97, 114–115, 143	see also normative law systems
Rubibi v Western Australia, 138, 141,	speak for country, right to, 73
198–199, 201, 204, 213	Bennell, 100
rules of interpretation, 82–86	Neowarra, 138
	<i>Ward</i> , 62–63, 65, 67
Sackville J, 93, 200, 211	special purpose leases, 70
Saibai people, 208	Spender J, 216
Saibai People v Queensland, 191	Spinifex People, 192
St Vidgeon's claim, 194	spiritual connection with land, 12, 39, 141
Sale of Waste Lands Act 1842 (Imp), 25	De Rose, 88–89, 90
Sampi v Western Australia, 125, 143–144,	<i>Ward</i> , 64, 121
209	<i>Yanner</i> , 46–48
Sassi Island, 209	St Vidgeon's claim, 194
sea country, 49–54, 100, 132–133, 142,	Stanley Mervyn, Adrian Young, and
189–190, 196	Livingston West and Ors, on behalf of the
Gumana, 208	People of the Ngaanyatjarra Lands v The
Jones, 189	State of Western Australia and Ors, 225
see also Commonwealth v Yarmirr	state legislation <i>see</i> law-making power
Seas and Submerged Lands case, 51, 128	State of Western Australia v Sebastian, 97,
Selway J, 106, 141, 208	114–115, 124, 125, 143, 225–226

statutory construction/interpretation, 118, extinguishment, 16, 19, 20 119, 121, 125, 146 Wik Peoples v Queensland, 25, 30, 34, in Wik, 25-26, 31-32 120; exclusive possession, 26, 27, 31–33 see also bundle of rights concept; Native Torres Strait, 191, 192, 193, 194, 197, 198, Title Act 1993 204, 205, 206, 209, 212 statutory land rights title, 115, 122, 185 town areas see Alice Springs determination statutory leases, 22-35, 70-72 see also (Hayes); Broome; Hatches Creek; Perth pastoral leases metropolitan area; Tennant Creek; Yulara Stephen on behalf of the Ugar People v township Queensland, 206 trade, 189-190, 196, 209 Stephens Island, 206 tradition, 74, 76, 78-79, 100, 105, 125 Strathgordon Mob, 221 traditional law and customs, 8, 10-15, 116, sub-surface resources, 15, 62-63, 229 133-135, 140-141 sui generis character, 11, 14, 30, 32, 39-40, Bennell, 98-106, 109-111 64, 67, 85, 109, 137, 147 continuity and change, 99-106 Sundberg J, 100, 138, 141, 142, 143, De Rose, 87-91, 92-96, 138, 139, 146-147 140-141, 144 Supreme Court of the Northern Territory groups and group claims, 138-139, see Northern Territory Supreme Court 143-144 surrender of title, 16-17 inheritance, acquisition or succession of suspension, 58, 119, 146, 188 title under, 17, 138 intersection with non-Indigenous law, Ten-Point Plan, 6–7 76–77, 104, 108, 110–111, 118, 123, Tennant Creek, 220 125-127, 134, 147 terra nullius, 1, 2 see also sovereignty Lardil, 205 territorial waters see sea country law pre-Mabo, 2-3 Territory Parks and Wildlife Conservation Act Neowarra, 141 (NT), 70non-recognition in Australian law, 33-34, Tha people, 187 39-40, 41-43, 126, 135 Thaiday on behalf of the Warraber, Poruma Ward, 61, 62-65, 67-68, 112 and Iama Peoples v Queensland, 209 Yanner, 46-47 Thalanyji people, 224 Yarmirr, 49-50, 54, 126-127 Thayorre people, 22-23, 27, 33 see also Wik Yorta Yorta see Yorta Yorta v Victoria Peoples v Queensland see also connection with land; normative Thiithaarr people, 187 law systems; sovereignty Thorpe v Kennett, 191 traditional owners see De Rose v South Thudgari people, 224 Australia traditional societies, 11-14, 80, 139-140, Thuubi people, 187 tidal waters, 132, 206, 207 see also intertidal 141, 205 see also Bodney v Bennell; Yorta zone Yorta v Victoria Timber Creek township, Northern Territory, traditional use see fishing and hunting 82, 211, 216, 222-223 trespass, 28, 31 Timothy James Malachi on behalf of the Trevor Close on behalf of the Githabul People Strathgordon Mob v State of Queensland, v Minister for Lands, 221 Trinity Inlet, 212 221 Toohey J, 121 Tudu Island, 204 Turrbal People v State of Queensland, 226 Mabo v Queensland [No 2], 11-12, 13, 15, 109, 117; cited in Yorta Yorta, 79; Turrutpa-Jalapirri group, 219

Wardenybeng people, 214

COMPROMISED JURISPRUDENCE

Two Brothers Island, 206 typology of rights and interests, 109–111

Ugar Island, 206 underlying title *see* coexistence uniqueness *see sui generis* character United States, 3, 13 unopposed applications, 200, 230 Upper Murchison and Gascoigne, 193–194 use of land, 63–67, 78 use of resources, 30, 62–63, 92, 189–190, 202 *see also* fishing and hunting usufructuary rights/interests, 14–15, 56, 109, 129

Van Hemmen on behalf of the Kabi Kabi People #3 v State of Queensland, 221 vesting, 45, 70, 121 von Doussa J, 56–57, 140 'vulnerable title', 40–41, 48, 71, 117, 119, 147, 149

Waanyi case see North Ganalanja Aboriginal Corporation v Queensland Wagyl Kaip claim group, 228-229 Wajarri people, 193-194 Wakaman People #2 v Native Title Registrar and Authorised Delegate, 214 Wakay people, 204, 209 Walker on behalf of the Eastern Kuku Yalanaji People v State of Queensland, 221 Walley v Western Australia, 187 Walman Yawuru clan, 213 Wandarang, Alawa, Marra and Nagalakan Peoples v Northern Territory, 206 Wandarang v Northern Territory, 194 Wangkangurru people, 222 Wanjina-Wunggurr community, 142, 143 see also Neowarra v Western Australia Wantawul estate group, 216 Warburton Range stock route, 208 Ward on behalf of the Miriuwung and Gajerrong People v Western Australia, 55-56, 65, 189 Ward v Northern Territory, 201–202 Ward v Western Australia (1996), 187

Ward v Western Australia (Miriuwung

Gajerrong #4 Determination) [2006], 214

Warraber people, 209 Warrabur and Poruma People v Queensland, Warria on behalf of the Kilkalgal v Queensland, 206 Warria on behalf of the Poruma and Masig Peoples v Queensland, 210 Warumungu people, 204 water resources, 201, 202, 204, 205, 207-208, 229 see also sea country Webb v State of Western Australia, 221 Wellesley Island, 142 Wergaia people, 207 West Kimberley, 209 Western Australia v Commonwealth (Native Title Act case), 4-5, 24, 117, 118, 186 extinguishment, 38, 50, 128-129 sovereignty, 128-129, 132 validity of Commonwealth law, 4-5 validity of other acts, 60-61 Western Australia v Ward (1997), 143, 188 Western Australia v Ward (2000), 56-57, 140, 147, 148, 194-195 Western Australia v Ward (2002), 55-73, 109, 117-125, 135, 146, 147, 202, 203 abandonment, 62-63, 79, 89 Bennell and, 110-111 bundle of rights concept, 55-57, 58, 61-63, 121, 194, 202 connection with land, 56, 61, 63-65, 93, 112 De Rose judgment and, 89, 92, 93, 96 extinguishment, 121 Griffiths judgment and, 85 Kirby J, 71, 85 leases, 69-70, 92, 121-122 Miriuwung and Gajerrong relationship, 142, 143 policy setting of common law development, 148 possessory title, 117, 147 use of resources, 62-63, 96 Wilson judgment and, 72, 122 Yorta Yorta judgment and, 78-79 Western Australian Fish Resources Management Act 1994, 191

Western Australian Fishing Industry Wiri People v Native Title Registrar, 226 Witjira National Park, South Australia, 222 Council, 211 witnesses, 75, 88-89, 91, 99, 106, 143 Western Australian Land Act 1933, 70 gender, 188, 204 Western Australian Land (Titles and Wonggoo-tt-oo people, 215 Traditional Usage) Act 1973 see Western Worimi Local Aboriginal Land Council v Australia v Commonwealth Minister for Lands for the State of New Western Australian Mining Act 1978, 61 South Wales, 226 Western Desert cultural bloc, 218 Wororra people, 37, 142, 186 see also Western Desert Lands Aboriginal Corporation Neowarra v Western Australia v State of Western Australia and Others, Wotjobahlk People v Victoria, 191 226 Wotjobaluk determination, 139-140, Western Desert peoples, 87, 90, 93-95, 149, 207 wrongful extinguishment, 19-21, 59-60 144, 214 see also Bodney v Bennell; Wunambal people, 142 see also Neowarra v De Rose v South Australia Western Australia Western Lands Act 1901 (NSW), 72, 122, Wunjaiyi estate group, 216 192, 202 Western Wakka Wakka people, 214-215 Yalanji peoples, 189, 212 Western Yalanji people, 212 Yam Island, 204 Western Yalanji Peoples v Pedersen, 189 Yangkaal people, 125, 142, 193, 197 Wik Peoples (McNaught Ngallametta) v Yankunytjatjara/Antakirinja Native Title Queensland, 195 Claim Group v The State of South Wik Peoples v Queensland, 22-35, 73, Australia, 214 Yanner v Eaton, 44-48, 51, 118, 119, 120, 117-121, 146, 187 137, 191 bundle of rights construction, 26, 136 fishing method, 78 content of title, 136 Ward judgement and, 63 Court membership, 121 Yanturi estate group, 216 enforceability, 127, 145 Yarmirr v Northern Territory, 188, 189-190, Fejo judgment, 38 195-196 see also Commonwealth v Yarmirr legislative response, 6–7 Yarrabah, 212 Ward judgment and, 57, 63, 69 Yarriambiak Creek, 207 Wilson judgment, 72, 122 Yawuru community, 141, 198-199, 213 Yanner judgment, 45 see also Rubibi v Western Australia Yarmirr judgment, 53 Yindjibarndi people, 138, 215, 219 Yirrkala people, 2-3 Wik Peoples v Queensland [2004], 207 Yolgnu people, 225 Wilcox J, 93, 97–108, 112–114, 124, 140, Yorta Yorta people, 37 Yorta Yorta v Victoria (1996)], 186 wildlife conservation, 44-48, 188, 191 Yorta Yorta v Victoria [1997], 188 see also national parks and reserves Yorta Yorta v Victoria [1998], 74–75, Wilkes v Johnsen, 191 78, 189 Wilkes v Western Australia, 204 Yorta Yorta v Victoria (2001), 75-76, 78-79, Williams v Grant, 226 80-81, 197-198 Wilson v Anderson, 72, 118, 122–123, Yorta Yorta v Victoria (2002), 74-81, 117, 192, 202 120, 123-125, 133-134, 139-140, Wimmera River, 207 200-201, 203

Compromised Jurisprudence 2nd Edition index

COMPROMISED JURISPRUDENCE

Bennell and, 97, 98, 99, 100–104, 105 concept of 'society', 100–101

De Rose circumstances distinguished from, 93

Ward judgment and, 143

Yulara township, 211

Yungngora people, 215

Yunkunytjatjara people, 87, 89, 90 see also

De Rose v South Australia

Zagai Island, 204