Remarks by the Hon Justice Andrew Greenwood
On the launching of Dr William Isdale's book entitled
Compensation for Native Title

First, can I acknowledge the first and traditional owners of this land, and pay my respects to their Elders, those who have spoken for the land in the past and those who do so today.

Second, can I say what a great pleasure it is to speak in celebration of this excellent book by Dr Isdale, who I will refer to by the familiar name, William.

Dr Jonathan Fulcher is also here and we are both pleased to have been on this journey with William as supervisors of this work for the degree of Doctor of Philosophy by thesis at the University of Queensland.

We have read each version of the thesis as it emerged, discussed the concepts with him and we have seen him defend the thesis orally. We have seen the awarding of the Doctorate and the awarding of the prestigious Holt Prize sponsored by Federation Press. Although we celebrate the fine quality of William's contribution to this important topic of approaches to compensation for extinguishment of native title rights and interests, we also celebrate the University of Queensland's commitment to excellence in research by Higher Degree and Federation's commitment to the publication of works of excellence in the discipline.

All of these things are important.

This timely book by William provides a careful analysis of a critically important and new and thus undeveloped area of the law.

Everything has a beginning.

In a culture as ancient as the culture of the Aboriginal and Torres Strait Islander peoples, we have come to learn, just a little, of some of the powerful spirit and Dreamtime stories that explain the origin of life, why features of the land and waters are the way they are and stories of the stars and the universe. We have tried to understand *something* of the *singular* nature of the *connection* Aboriginal and Torres Strait Islander peoples have with the land and waters of their *place*, and aspects of the traditional laws acknowledged, and customs observed by, the peoples of *that place* that give *character* and *depth* to their connection with place.

The various conceptions of how we might understand and seek to go about determining compensation, on just terms, for any loss, diminution, impairment or other effect of the relevant act of extinguishment upon native title rights and interests, has its *very own beginning* on 3 June 1992.

That is so because there can be no question of compensation in the absence of a *determination*, at some point, either before the making of the compensation claim, or as part of the compensation application, of the *existence* of native title rights and interests in the claimant group seeking compensation, and then, of course, questions arise about the *character* of the *infringing act*.

The profoundly influential voice in that beginning on 3 June 1992 is the voice of the Hon Sir Gerard Brennan, a man recently described by Noel Pearson as one of our "most revered judicial elders".

His Honour died late in the evening of Wednesday, 1 June 2022 shortly before the 30 year anniversary on Friday, 3 June this year, of the High Court's majority decision on 3 June 1992.

Clearly enough, his Honour's judgment was profoundly influential in the determination of the majority view, with only one of the justices dissenting.

The decision established that certain indigenous rights and interests related to land and water and "rooted in traditional law and custom" survived the Crown's acquisition of sovereignty and radical title (that is, ultimate beneficial title) in Australia, and it was *this* pre-sovereignty native title that was recognised by the common law: *Mabo v Queensland (No 2)* (1992) 175 CLR 1; see the judgment of Brennan J generally, but also his Honour's remarks at p 30 and pp 56-58.

In 2002, the High Court, in *Yorta Yorta* (*Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 2014 CLR 422, Gleeson CJ, Gummow and Hayne JJ at [75]), emphasised that the term "recognised" is pivotal because the "bundle of rights and interests" comprising native title is not a "creature" of the common law, whether the *Imperial* common law, as that existed at the time of sovereignty and first settlement, or the *Australian* common law as it exists today, but rather, "has its origins in and is given content by the traditional laws acknowledged by, and the traditional customs observed by", the particular indigenous peoples of a place. Their Honours also observed that it is *this* native title, recognised by the common law, so rooted in traditional law and custom, which is now recognised and protected by s 10 of the *Native Title Act 1993* (Cth) and which, by s 11 of the Act, cannot be extinguished contrary to the Act.

In framing the principle at the core of Sir Gerard Brennan's judgment is the proposition (in *Mabo (No 2)* at p 30) that "no [judicial authority]/case can command unquestioning adherence *if* the rule it expresses seriously offends the *values* of justice and human rights (especially equality before the law) which are aspirations of the contemporary Australian legal system. If a postulated rule of

the common law expressed in earlier cases seriously offends those contemporary values, the question arises whether the rule should be maintained and applied".

The answer to that question in the context of native title rights and interests was that the former rule could not be maintained and applied.

His Honour's judgment reflects the reasoning of a man with a great sense of humanity and justice. In another branch of the law, critical to the proper working of a constitutional democracy under the rule of law, Justice Brennan (both as a Justice and then as Chief Justice of the Court) recognised that the growth in the machinery of government and the expansion in the complexity of Executive Government had meant that the principles upon which the High Court grants remedial relief in the form of the constitutional writs to ensure that the repository of power remains within the limits of the conferred power, had become *fundamental* to the rights of the citizen.

In an address given by his Honour on 7 August 1990 to the Law Society of the Australian Capital Territory, entitled *Courts, Democracy and the Law*, two years before his judgment in *Mabo*, his Honour emphasised the importance of what he described as the "original function" of the Courts of "standing between the government and the governed". The *values* of justice, human rights and equality before the law expressed by his Honour in the *Mabo* judgment, can be seen *also* in his Honour's decisions in this branch of the law concerned with the exercise of *public power* by the Executive Government.

The expression "native title rights and interests" is now given meaning by s 223(1) of the Act in terms largely derived from the reasoning in his Honour's judgment in *Mabo*. Those rights and interests are the communal, group or individual rights and interests of the relevant peoples in land or waters where

those rights and interests are possessed under traditional laws acknowledged, and traditional customs observed by, the relevant peoples, where connection remains and where the rights so rooted are recognised by the common law of Australia.

The *Native Title Act* which commenced on 1 January 1994 was the Parliament's response to the challenge of enabling by statute a coherent overall framework for addressing native title rights, their recognition, questions of extinguishment, the validation of acts and the relationship between the *Native Title Act* and the *Racial Discrimination Act 1974* (Cth) (the "RDA"). It also addressed, importantly, consequential compensation on just terms for particular acts of infringement.

The High Court's decision in 1996 in *The Wik Peoples v Queensland* (1996) 187 CLR 1 had held by majority, that pastoral leases (in Queensland) did not necessarily extinguish native title. Consistent with his undoubted intellectual honesty, Sir Gerard Brennan was in the minority, taking the view that the leases in question *did extinguish* native title. The uncertainty arising as a result of the decision (and other issues) were addressed by the 1988 amendments to the Act. They provided for the validation of certain acts done after 1 January 1994; confirmation of complete or partial extinguishment by particular tenures; identification of the content of the "future acts" regime and other matters. The amendments also introduced into the Act s 51A which places a limit on compensation in relation to compensation claims where native title has been extinguished because of the validation of past acts and where future acts may have an extinguishing effect. These are not easy provisions to construe and apply. The Hon Robert French AC has observed that the Act was never easy to read and the 1988 amendments had not made it any easier.

By reason of s 51A, the total compensation must not exceed the amount that would be payable if the act of extinguishment were instead a compulsory acquisition of a freehold estate in land or waters.

Dr Isdale will speak about the various issues associated with compensation under the Act (both as a matter of method and approach and I do not want to trespass on his observations to be made in a moment), but *one aspect* of the difficulty is the unique relationship Aboriginal and Torres Strait Islander people have with place, as earlier mentioned. The noted anthropologist, Professor W.E.H. Stanner, put it this way in his *Boyer* lectures in 1968:

> *No English words are good enough to give a sense of the links between an Aboriginal group and its homeland. Our word "home" ... does not match the Aboriginal word that may mean "camp", "hearth", "country", "everlasting home", "totem place", "life source", "spirit centre" and much else all in one. Our word "land" is too spare and meagre. We can now scarcely use it except with economic overtones unless we happen to be poets. The Aboriginal would speak of "earth" and use the word in a richly symbolic way to mean his "shoulder" or his "side". I have seen an Aboriginal embrace the earth he walked on. ... A different tradition leaves us tongueless and earless towards this other world of meaning and significance. When we took what we call "land" we took what to them meant hearth, home, the source and locus of life, and everlastingness of spirit. At the same time it left each local band bereft of an essential constant that made their plan and code of living intelligible ... They had no stable base of life; every personal affiliation was lamed; every group structure was put out of kilter; no social network had a point of fixture left.*

How then, on just terms, is compensation for such loss, diminution or impairment to be measured?

In the High Court's *Timber Creek* decision (*Northern Territory v Griffiths* (2019) 269 CLR 1), the plurality at [44] characterised s 51(1) of the Act as recognising two aspects of native title rights and interests identified in s 223(1) as the

"physical or material aspect" (the right to do something in relation to land or waters) and the "cultural or spiritual aspect" (the connection with land). Thus, the two aspects of compensation involve quantifying economic loss as a result of being deprived of the right to do something in relation to land and quantifying non-economic or spiritual loss, diminution or impairment. I will leave it to William to develop his thesis about the preferred method.

The Court expects there to be a large number of compensation cases. As at today, 30 June 2022, there have been 559 judicial determinations by this Court of native title rights. There are 146 applications pending and there are 14 outstanding applications for compensation. Many more will be filed.

Thus, Dr Isdale's book is a critically important contemporary analysis of an undeveloped area of inquiry. Dr Isdale examines the structure of the Act generally and the unique character of native title rights; the relationship between s 223(1), s 51(1) and s 51A and just terms more generally; the approach to construing the proper application of s 51A; whether a *sui generis* approach to determining compensation is necessary or whether learning derived from an orthodox approach to assessing value in circumstances of compulsory acquisition can usefully inform an approach to compensation under the Act. Perhaps, an *adapted* approach which recognises the orthodoxy of other valuation methodologies and seeks to reflect a sense of *equality of treatment* is warranted and useful. Perhaps a "reinstatement approach" to compensation remains open having regard to the judgments in the *Timber Creek* decision. Apart from these matters, Dr Isdale examines the judgments of the High Court in the *Timber Creek* decision and respectfully expresses some observations on the approach of their Honours and the method reflected in those judgments.

Dr Isdale has also contributed significantly to our understanding of these issues in relation to the general law.

Dr Fulcher and I take the view that this chapter alone is worthy of detailed examination by readers interested in the intersections of the various branches of the law which are affected by the advent of native title.

This is an important and timely book. Compensation for native title loss and diminution may have significant financial and therefore political implications for the Commonwealth of Australia and its constituent States and Territories. Other issues, like COVID19, natural disasters and climate change have stolen the limelight in recent political and economic debates. Compensation for native title has received relatively little attention. However, it may of necessity take a more prominent place in the political landscape in the near future. Dr Isdale's *suggested approach* of *similitude* in addressing any loss, diminution or impairment suffered by the native title holders, according more weight than hitherto to existing valuation methodologies, is likely to enter that debate as a principled approach to simplifying compensation for native title loss. It is therefore a book worthy of the attention of all keen observers of politics and economics interested in understanding the legal and constitutional framework within which these questions will be addressed in Australia.

These issues are important for the nation as a whole but particularly for Aboriginal and Torres Strait Islanders. Almost all of the issues discussed by Dr Isdale will be ventilated in the forthcoming cases. We regard the work as a careful, thoughtful and excellent analysis. Views may well differ about aspects of the analysis and some of the ultimate conclusions but that circumstance is simply a feature of the demands of an inquiring mind in an evolving area of the law.

We are very pleased to launch this book on its journey.

The Hon Justice Andrew Greenwood
Federal Court of Australia
30 June 2022