

# PUBLIC LAW REVIEW

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## ARTICLES

### **Native title in the High Court of Australia a decade after *Mabo* – *Sean Brennan***

When Parliament enacted the *Native Title Act 1993* it left fundamental questions to be resolved by the judiciary. High Court decisions in three test cases in 2002 have substantially defined the potential of native title. Proceeding on a mistaken view of Parliament’s intention, the court confirmed a doctrine of extinguishment highly destructive of the original rights enjoyed by Indigenous Australians. The court treated native title as an accumulation of rights, in which the unifying notion of a title plays a weak and uncertain role. It defined tradition, continuity and connection in ways that make native title extremely difficult to establish and which artificially limit the kind of rights that may be recognised. Several intersections with constitutional law require further exploration, including the possible application of s 116 of the *Constitution* and when the just terms guarantee applies to the extinguishment of native title. Native title holders, already denied basic common law presumptions due to the belated recognition of their rights, now confront further inequality in the way the law protects their property rights.

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### **Review of executive action and the rule of law under the Australian Constitution – *Duncan Kerr and George Williams***

The decision of the High Court in Plaintiff S157/2002 v Commonwealth of Australia is an important landmark in our understanding of review of executive action and the rule of law under the Australian *Constitution*. This article explores the extent to which, after that decision, some form of judicial review of executive action is entrenched in the *Constitution*. We find that it is beyond the power of Parliament to remove the capacity for such review, at least on the ground of jurisdictional error. As a consequence, a privative clause that removes the prospect of judicial review of the legality of executive action on the ground of jurisdictional error will be unconstitutional.....219

**Methodologies of constitutional interpretation in the High Court of Australia –  
Justice Brad Selway**

There is now a consensus that the *Constitution* is to be interpreted as a statute, albeit of a specialised kind. It is also accepted that the text governs the interpretation. Beyond that there are differences in approach. Taking the court as constituted before Gaudron J retired, there is the approach of Kirby J that the *Constitution* should be interpreted in a contemporary meaning and there is the approach of McHugh J that the *Constitution* should be interpreted “purposively”. The remaining judges (the flexible five) declined to adopt a single approach to constitutional interpretation. Instead they have taken different approaches to the interpretation of different provisions. This approach is flexible, but is not unprincipled. The approach can be justified, at least in terms of retaining public confidence in the Constitution and the institutions it creates.....234

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Editorial inquiries:

**Tel: (02) 8587 7000**

### HEAD OFFICE

100 Harris Street PYRMONT NSW 2009

Tel: (02) 8587 7000 Fax: (02) 8587 7100



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