Mabo: A Judicial Revolution

The Aboriginal Land Rights Decision and Its Impact on Australian Law

Edited by M.A. Stephenson and Suri Ratnapala

University of Queensland Press

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Foreword

The Right Honourable Sir Harry Gibbs GCMG AC KBE
formerly Chief Justice of the High Court of Australia

Many decisions of the High Court have resulted in controversy, but few, if any, have given rise to such a diversity of responses, ranging from euphoria to deep anxiety, as *Mabo v. Queensland.*

The case raises a number of questions of great public importance. Did the Court carry judicial activism too far in departing from principles that were thought to have been settled for well over a century, on the ground that those principles were contrary to international standards and the fundamental values of the common law? In doing so, the Court applied what some of its members perceived to be current values and the further question arises whether in fact those values are widely accepted in the community and whether, assuming that they are, it is right to apply contemporary standards to overturn rules formulated at a time when community values were not necessarily the same. These issues become all the more significant if the decision has a wider operation than merely in relation to the title to, and use of, land and if it provides authority for the acceptance of Aboriginal customary law in relation to other matters - in respect of crime for instance. The further questions arise whether the decision casts any doubt on the rights of such persons as pastoral lessees, holders of mining leases and occupation licences and trustees of public reserves and whether the Crown is able to recover for itself, or provide for others, the unencumbered possession, occupation, use or enjoyment of lands long believed to be Crown lands without payment of compensation to persons not yet identified. A final question, of a practical, or perhaps moral, rather than a legal kind, is whether on the whole it will prove more beneficial for the Aboriginal people that they should be provided with what may be an uncertain basis for making legal claims which are likely to result in protracted controversy and litigation, rather than leaving it to the political process to do justice to them.

The authors of this special edition of the University of Queensland Law Journal have provided a comprehensive and balanced discussion

of these important issues. The edition is to be welcomed as a valuable contribution to this important subject.

There is one matter which has puzzled me a little. In the judgments in *Mabo*, and in much public discussion which has followed, there are frequent references to the doctrine of *terra nullius*, which the Court is said to have rejected. The question whether land was *terra nullius* is relevant at international law in deciding whether a state has acquired sovereignty by attempted occupation. So far as I am aware, it was not the question asked at common law to determine whether a colony, admittedly under the sovereignty of Great Britain, was acquired by settlement. Indeed the expression '*terra nullius*' seems to have been unknown to the common law. I have found no trace of it in legal dictionaries ranging from *Cowel's Interpreter* (1701 ed.) to *Stroud's Judicial Dictionary* (1986 ed.). It is not mentioned in *Tarring's Law relating to the Colonies* (1913 ed.) which in its day was regarded as authoritative. It may have been thought that the expression was synonymous with the common law rule that if Englishmen establish themselves in 'an uninhabited or barbarous country' the colony will be regarded as acquired by settlement but that ignores the fact that it was enough to satisfy the common law that the land was 'barbarous', by which was meant not under civilised government. Australia was certainly not unoccupied in 1788 but it is another thing to say that the social organisation of the Aboriginal inhabitants was of a kind which the nations of Europe in the eighteenth and nineteenth centuries recognised as civilised. Of course, the High Court understood the full extent of the common law principles but public understanding is not assisted when those principles are described by a phrase which is misleading and perhaps emotive.

Introduction

The High Court of Australia has decided that British colonisation in Australia did not *ipso facto* erase Aborigines' rights relating to land; in *Mabo v. Queensland* (1992) 66 A.L.J.R. 408 the *terra nullius* idea was discarded. The extent of 'native titles', the places where they exist (beyond the islands with which *Mabo* was directly concerned) remain open and intriguing questions. But a fundamental point of principle, so long closed, is now open to debate and to further litigation. What happened in the Murray Islands could affect much greater tracts of Crown property on the mainland. *Mabo* has inspired copious legal and other writings and will do so for a long time to come. It may have consequences not yet foreseen for the law of property generally, and even for the High Court itself. The proper limits of judicial law-making are now being discussed in Australia as they have long been debated in America.

On 20th May 1982 Eddie Mabo and four other Torres Strait Islanders, inhabitants of the Murray Islands, began action for a declaration of native title to their traditional lands, and for other orders. The matter was remitted by the High Court to the Supreme Court of Queensland for the resolution of issues of fact. In 1987 Moynihan J., of the latter Court, began a special hearing on the Murray Islands. Aspects of his eventual decision are reported as *Mabo v. State of Queensland* [1992] 1 Qd. R. 78. Supreme Court proceedings were suspended while the High Court considered the validity of the *Queensland Coast Islands Act* 1985, which could have aborted the *Mabo* claim. However, the Act was declared to be incompatible with federal race discrimination laws: *Mabo v. Queensland (No 1)* (1988) 166 C.L.R. 186. Moynihan J. then completed his inquiry and on 3rd June 1992, just over ten years after the issue of the writ, the High Court delivered the remarkable decision which is the *fons et origo* of this book. The history and content of *Mabo v. Queensland* are more fully treated below.

Professor Darrell Lumb traces the constitutional history of the Torres Strait Islands and their annexation to Queensland in the nineteenth century. He suggests that the High Court might have concentrated, according to judicial tradition, on the precise issues in the instant case, thus limiting the 'fallout' of wide *obiter dicta*: 'Basically it is a question whether the legislature should modify laws ... to confer rights on disadvantaged groups or whether the court

should disturb a legal understanding which has existed for over 150 years ...'.

Fr Frank Brennan examines the implications of *Mabo* for Torres Strait Islanders and Aborigines, and submits that the High Court's recognition in principle of 'native title' fortifies the case for legal recognition of many other tribal customs and traditions. He observes that in future 'developers, pastoralists and miners will have to deal with Aborigines on an equal footing [and] government will have to treat with them to effect workable compromises'.

From a jurisprudential viewpoint Associate Professor Moens asks whether *Mabo* crosses the traditional line between judicial exegesis of pre-existing rules of law and the political arena. Dr Robin O'Hair summarises imperial and local approaches to Australian land law in the colonial period and the difficulties of grafting native title to long-standing principles of real property. He takes up a point touched on by Margaret Stephenson and Dr Forbes: 'Native land, such of it as remains, should be founded on property concepts applicable to all, namely the fee simple.'

However, the immediate focus of *Mabo* is on land. An Aboriginal voice, Noel Pearson, attempts to locate the *Mabo* decision within the historical and political context of modern land rights. He considers not only the issues *Mabo* has brought to the fore for Australia but also the issues that will need to be confronted both legally and politically within the country. Margaret Stephenson explains our established system of land tenure and considers how *Mabo* might be reconciled with it. She suggests that the statutory trust titles which are already available in several Australian jurisdictions are in several respects superior to the numinous '*Mabo* title'.

An urgent question is the effect of *Mabo* on Crown lands subject to pastoral leases or licences, particularly in Queensland and Western Australia. Historian Henry Reynolds examines the official policies concerning Crown leases in the past 150 years. In his view the position is obscure: 'Was the Aboriginal interest in the sprawling pastoral lands of Australia ever validly extinguished? If not, the presumption must be that pastoral leases all over the country are encumbered by an unextinguished Aboriginal right of use and occupancy.' He urges governments to provide a just, clear and speedy resolution.

Associate Professor Kamal Puri re-examines the intellectual property rights of Aborigines in their artistic and religious creations, in the light of *Mabo*. Mr Kerry Mulqueeny deals with the question:

Should the application of the criminal law to Aborigines be modified under the influence of *Mabo*, and if so, in what respects?

Bryan Keon-Cohen, counsel appearing in the *Mabo* case, addresses the evidentiary problems involved in bringing the action itself. He especially considers how to deal with the hearsay rule and traditional evidence and its admissibility, particularly by way of charts. He provides information valuable to prospective litigants who are considering pursuing a *Mabo* type native title claim.

Precisely because sequels to *Mabo* are likely to affect remote areas in which large-scale resource developments occur, the decision is of enormous interest to the minerals and petroleum industries. Dr John Forbes summarises early responses of Aboriginal spokesmen, miners and government to *Mabo*. Whether or not *Mabo* is 'judicial legislation', is it workable? He submits that Crown ownership of minerals is secure but miners will have to accommodate incidents of native title where it is proved to exist. In litigation to that end what will the issues be? How reliable the evidence, and how rigorously will it be examined? Legislation, he suggests, is no panacea for '*Mabo* problems'. Extinction involves compensation, and compensation turns on proof of native title according to the elusive *Mabo* criteria.

The essays are based on material available to the writers on 1 November 1992, or as indicated.

The Mabo Case - Public Law Aspects

R.D. Lumb[*]

1. The Torres Strait Islanders and Australian Aborigines

It is well known that the annexation of islands off the Queensland coast was accomplished in two stages: first, by Letters Patent issued in 1872 which annexed islands within 60 miles of the coastline and secondly, by Letters Patent of 1878 which extended the boundaries of Queensland to include all islands of the Barrier Reef and in the Torres Strait. The 1878 Letters Patent were to take effect only after the Queensland Legislature had passed an act providing for the absorption of the islands into the Colony. This Act, the *Queensland Coast Islands Act*, was passed in 1879 and the islands were declared by a proclamation of the Governor to become part of Queensland as from the 1st August 1879.

There were conflicting views amongst the Law Officers expressed in various opinions given in the second part of the 19th century as to how boundaries originally set under or pursuant to imperial legislation could be changed.[1] One opinion was that the prerogative could not be exercised where a representative legislature had been set up except with the consent of that legislature. This was the prevailing view in 1878 when the procedure of letters patent and local legislation was adopted. Another view, however, was that where the boundaries had been established under imperial legislation, only the imperial parliament could amend such boundaries. Queensland's boundaries had been established by an order in council made under the New South Wales *Constitution Act* 1855, an imperial act. Furthermore, certain changes were made to those boundaries by

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the *Australian Colonies Act* 1861 (Imp.). There was authority in that Act for effecting future changes to Australian colonial boundaries. In *Wacando v. Commonwealth of Australia*[2] there was a difference of opinion as to the effect of these provisions. In any case, doubts surfaced after the annexation of the Torres Strait Islands to Queensland and it was considered necessary to pass imperial legislation ratifying boundary changes that had been made by the exercise of the prerogative assented to by the local legislature. Thus the *Colonial Boundaries Act* 1895 is regarded as ratifying any irregularities which may have occurred in the procedures of incorporating the Torres Strait Islands into Queensland in the 1870s.[3]

The other point to note is that in the schedule to the *Queensland Coast Islands Act* all islands within the boundaries of the Barrier Reef, starting at Sandy Cape are included. It was recognised at the time that the Barrier Reef was a continuum of a reef structure over a thousand miles in length which started off the coast of Queensland and ended in the northern Torres Strait region, near New Guinea. Whether the islands of the Barrier Reef adjacent to the eastern coast of Queensland could properly be described as lying between Australia and New Guinea is a question which has never been analysed. However, it must be taken that as from 1895, at the latest, all those islands were validly annexed to Queensland.

As to islands outside the Barrier Reef, the question of sovereignty and jurisdiction was never fully determined in the nineteenth century. Certainly an extensive maritime jurisdiction existed under the early commissions given to Governor Phillip, but the larger maritime claims were retracted by the middle of the nineteenth century. There was a view that New South Wales continued to exercise jurisdiction over at least some of these islands.[4] Whatever the historical claims between Queensland and New South Wales and the original claims of Great Britain based on voyages of discovery and some acts of jurisdiction (for example, the issuing of licences to extract guano), the Commonwealth claimed the islands as a new territory, the Coral Sea Islands Territory, under legislation enacted in 1969.[5] They are therefore now Commonwealth territory.

As to the Torres Strait Islands, it would appear that prior to 1879 Britain had an inchoate title to these islands through acts of discovery and voyages undertaken by British navigators pursuant to Admiralty instructions in the eighteenth and nineteenth centuries.[6] The islands were visited by Cook in 1770, Bligh in 1792 and Flinders in 1803. Other activities of British navigation were by

Blackwood and Dukes in 1844-5. Although all the islands may not have been visited, in terms of international law these acts of visitation would have set up the foundation of a title unless some other European nation exercised more effective authority through administrative acts. This did not happen.

In 1863 and 1869, letters patent had been issued empowering the Governor of New South Wales to make leases of islands 'belonging to our heirs and successors' being within the limits described in those Letters Patent covering a wide area of the Western Pacific but which were not within the jurisdiction of any colonial government. Licences were issued to applicants from the Australian colonies and from Great Britain in relation to a number of islands in the Western Pacific.[7] One of these was Bramble Cay situated to the north of the Murray Islands. It appears that no licences were issued in relation to those islands which were inhabited, presumably because this would have led to ill-feeling on the part of the native inhabitants and possible violence. A degree of control was exercised over the Torres Strait Islands from the 1870s onwards under the *Pacific Islanders Protection Acts* of 1872 and 1875 which established the jurisdiction of the High Commissioner for the Western Pacific, but only over British subjects on the islands of the Western Pacific. There was no claim made to sovereignty over the islands under that legislation.[8]

Obviously it was convenient for the islands of the Torres Strait to be annexed to Queensland even though there were later views that the annexation should not have included the northerly islands near New Guinea. New Guinea had not been claimed by the British Crown nor brought within British protection at that time and it was appropriate that full jurisdiction should be exercisable by Queensland over all the islands. There were interests of fishing, navigation, protection of British shipping and shipwrecked crews and, most importantly, the need to preserve law and order.[9] There were incursions by 'blackbirders' as well as violence and island raiding by various islanders *inter se* and from outside the Torres Strait e.g. Solomon Islands and other adjacent islands. Thus, Queensland's proposal for annexation was accepted by the British authorities. The Police magistrate at Thursday Island, Mr H.M. Chester, organised an informal law and order system on the Murray Islands in 1878. Previous to that, in 1871, the London Missionary Society had arrived and its headquarters had been established in the Murray Islands in 1877.[10] In *Mabo*, Brennan J. stated: 'it was a significant influence in keeping the peace among the Meriam people and in modifying some of their customs. It appears that, prior to the arrival of the

London Missionary Society, elaborate funeral ceremonies and the collection and preservation of human heads were features of life in the Murray Islands'.[11] After annexation, a school teacher, J. S. Bruce, took up an appointment on the islands in 1892 and remained there for a number of years. He helped to organise a system of self-government on the Murray Islands, including the establishment of an island court. In 1898, an anthropological expedition from Cambridge compiled a detailed report on aspects of life in the Torres Strait Islands, particularly the Murray Islands, and referred to the native land structure.[12] Members of this expedition commented to the effect that native land holdings had not been terminated by Queensland Government authority. There was no common land and each resident made his own garden on his land.[13]

It appears that in 1882 the Queensland Government reserved Murray Island for native inhabitants under the *Crown Lands Act*. Strangely, there is no record of the reservation. A special lease of two acres on Murray Island was also granted by the Queensland Government to the London Missionary Society which had a role to play in the secular life of the Island. Brennan J. pointed out that after the reserve was created a number of trespassers were removed from the Island by government authorities at the request of the Meriam people. In 1912, the Governor in Council acting under the *Land Act* 1910 reserved the Murray Islands 'for the use of the Aboriginal inhabitants of the State'. This was the form used for other islands in the Torres Strait, although of course a distinction was made in Queensland legislation between the two groups, i.e. Aboriginals and Torres Strait Islanders. It was obvious therefore that apart from issuing special leases, the Queensland Government did not intend to disturb the traditional occupational rights of the Murray Islanders, or for that matter the rights of other Torres Strait Islanders.

It can be seen, therefore, that the High Court in *Mabo*, in the light of the historical and sociological facts, could have restricted the scope of its reasoning to the area in question i.e. the small area of not more than nine square kilometres which constituted the Murray Islands. Certainly, the case involved a dispute between a small number of the Islanders and the State of Queensland. However, all the Justices considered that the matter should be determined in the light of the common law applicable in 1788 and therefore as part of the law applying to Aboriginals on the mainland as well as to the Torres Strait Islanders. This approach can be criticised (a) from the point of view of the non-representation of other States in terms of submissions on the similarity or otherwise between the Torres Strait Islanders, a Melanesian race, and the Aboriginal race and (b) in terms of the identification of the factual components of a claim made or right established by the two groups. In particular the sociological distinction would appear to be important in terms of conclusions reached as to native title. The Murray Islanders are gardeners while the Aborigines are classified as hunter/food-gatherer people. Being nomadic their relationship with land was quite different from that of the Murray Islanders. What seemed to motivate the majority in not making this distinction is that it would have involved the acceptance by the court of degrees of social organisation amongst native peoples. In particular Brennan J.[14] rejected the dictum in the judgment of Lord Sumner in *Re Southern Rhodesia*[15] where it was stated: 'the estimation of the rights of Aboriginal tribes is always inherently difficult. Some tribes are so low in the scale of social organisation that their usages and conceptions of rights and duties are not to be reconciled with the institutions or the legal ideas of civilised society. Such a gulf cannot be bridged. It would be idle to impute to such people some share of the rights known to our law and then to transmute it into the substance of transferable rights of property as we know them'. Brennan J. implicitly rejected the notion that the Court should inquire whether the Meriam people were higher in the scale of social organisation than the Australian Aborigines.[16] Of course, with respect to claims of possession, the claims of groups which had gardened the land would be more sustainable in terms of a native title than those which had moved over a very large area of land or had moved off that land completely. In the mind of Brennan J. the overwhelming reason for not making such a distinction would appear to be that it would seriously offend the values of justice and human rights such as equality before the law, which were described as 'aspirations of the contemporary Australian legal system'.[17]

This of course raises the philosophical question of judicial activism versus judicial objectivism and reminds one of the battles fought in the United States Supreme Court in recent years. Basically, it is the question whether the legislature should modify laws or create new laws to confer rights on disadvantaged groups or whether the court should disturb a legal understanding which has existed for over 150 years by recognising such rights. The historical approach which emphasises fidelity to precedent, (although in this case there was no *binding* precedent) jostles with the reformist approach where rules are utilised by the application of twentieth century concepts of justice and equality to produce a particular result.

The influence of international law principles and judgments of the International Court of Justice are significant in the judgments of the majority, particularly that of Brennan J.[18] Of importance is the decision of the International Court in the *Advisory Opinion on Western Sahara*[19]. This is cited as showing that the doctrine of *terra nullius* was rejected as applying to an area colonised by Spain - the western Sahara in the northern part of the African continent. The passage cited indicates that the International Court of Justice was referring to the state practice of the relevant period i.e. the second part of the nineteenth century not to the eighteenth century. The International Court expresses it in this way: 'The state practice of the relevant period indicates that the territories inhabited by tribes or peoples having a social and political organisation were not regarded as *terra nullius*'.[20] It went on to state that in those territories the acquisition of sovereignty was not generally considered as effected unilaterally through occupation of *terra nullius* by original title but through agreements reached with local rulers.[21]

One would have preferred to have seen more analysis of what is meant by the concept of a 'social and political organisation' which characterises particular tribes, in that case Bedouin tribes, and also of the type of agreements which were concluded and whether they could have been concluded in other parts of the world, particularly Australia, with Aboriginal tribes, clans and groups. In the end result therefore, if one is to base a legal concept of Aboriginal title on a factual sociological basis, it would have been better for the High Court to have proceeded on a case by case basis in determining whether a particular group had sustained its claim on a legal and factual foundation. There were no Aboriginal plaintiffs in *Mabo* and therefore the distinct features of an Aboriginal claim to land were not in the evidence before the Court.

2. Sovereignty, Settlement and Land Ownership

As we have seen previously, the Torres Strait Islands were annexed to the existing colony of Queensland which itself had been separated from New South Wales in 1859. References are made in the judgments of Brennan J.[22] and of Deane and Gaudron JJ.[23] as to the legality of the acquisition of sovereignty over the territory of New South Wales in the eighteenth century. The members of the court recognise that it was not necessary to decide this question because of the Act of State doctrine. Brennan J. cites previous authority to the effect that whether a territory has been properly

acquired by the Crown is not justiciable before the municipal courts. He goes on to discuss the international law position saying that international law recognised conquest, cession and occupation of territory which was *terra nullius* as three of the effective ways of acquiring sovereignty. Thus under international law in the eighteenth century, discovery followed by occupation was a basis for acquisition. However, specifically in relation to the Murray Islands he has some doubts as to whether international law which allowed uncultivated lands to be acquired by settlement would have applied to those islands as they were already under cultivation.[24]

As to New South Wales, Deane and Gaudron JJ. imply some criticism of recognising the acquisition of sovereignty by settlement where 'the territory was not unoccupied and the process of settlement involved negotiations with and/or hostilities against the native inhabitants'. They also comment that, possibly, Captain Cook's discovery in 1770 was not sufficient to establish sovereignty but had to be completed by the settlement by Governor Phillip in 1778. As to the Commissions given to Phillip which included the whole area of the continent except Western Australia, they express some doubt as to whether the settlement at Sydney could have been the basis for occupation of the vast areas of the hinterland. However, none of these matters was relevant in a municipal court as an Act of State could not be challenged in a British court[25].

As to the classification of Australian colonies, the Court does not attempt to overturn the traditional understanding that Australia fell within the concept of the settled colony. Leaving aside the concept of conquest (for it cannot be admitted that the Aboriginal people, although disturbed in their possession, were conquered in the traditional sense of that term) important questions arise as to the method of acquiring territory by way of settlement as compared with cession. *Cooper v. Stuart*[26] and *Milirrpum v. Nabalco Ltd*,[27] accept that settlement was an appropriate method for colonising Australia because the country lacked settled inhabitants. Blackstone in his *Commentaries* refers to the distinction as follows: 'plantations or colonies in distant countries are either such where the lands are claimed by right of occupancy only by finding them desert and uncultivated and peopling them from the mother country; or where, when already cultivated, they have been either gained by conquest or ceded to us by treaties'.[28] Thus it would appear that the concept of being a settled indigenous people implies some presence in areas of land which have been put under cultivation by the indigenes. Where a people is nomadic i.e. falls within the anthropological classification

of being a hunter - gatherer group, the area would be an appropriate area for settlement under the Blackstonian classification.

Where, however, there is an organised society and land has been occupied and cultivated in some manner, then, under the Blackstonian classification, the appropriate method for acquisition of sovereignty would be by way of cession. The essential feature of cession is consent or agreement on behalf of the native occupants to the transfer of sovereignty subject to rights set out in the treaty of cession. However, this classification has been criticised in modern times and reference is often made to the International Court of Justice decision in *Western Sahara*. There, the concept of *terra nullius* came under strong criticism. The significant portion of the judgment was as follows:

> Whatever difference of opinion there may have been among the jurists, the state practice of the relevant period indicates that the territories inhabited by tribes or peoples having a social and political organisation were not regarded as *terra nullius*. It shows that in the case of such territories the acquisition of sovereignty was not generally considered as effected unilaterally through occupation of *terra nullius* by original title but through agreements concluded with local rulers. On occasion, it is true, the word "occupation" was used in a non-technical sense denoting simply acquisition of sovereignty; but that did not signify that the acquisition of sovereignty through such agreements with authorities of the country was regarded as an occupation of *terra nullius* in the proper sense of these terms. On the contrary such agreements with local rulers, whether or not considered as an actual cession of the territory, were regarded as derivative roots of title, and not original titles obtained by occupation of *terra nullius*.[29]

This practice is reflected in relation to a number of the Pacific Islands. Samoa, Fiji and Tonga were acquired pursuant to treaties of cession.

The problem of the Australian Aborigines is that their groupings did not amount to an organised society and because of their mobility it was, from a practical point of view, very difficult to make agreements with them. Where such arrangements were made as in the 1930s by Batman, they were overruled by Government. For Australia to have been ceded, it would have been necessary for agreements to have been made with a great number of tribes/clans in a piecemeal manner. On occasions, it would not have been clear to the early authorities whether the elders of a tribe had sufficient authority to make the cession and if so, over what boundaries. The territorial system was therefore distinguishable from an area such as the Sahara

which was desert country where tribes could be more readily identified.

Of course, it could be said that this feature is not an essential basis for distinguishing between the Aboriginal tribes and the Bedouin tribes of North Africa or the Melanesian or Polynesian tribes of the Pacific. But it appears that settlement was regarded as a practicable method of acquiring territory in the eighteenth and nineteenth century over Australia and parts of the African continent. As to the Torres Strait Islands, different considerations might have applied if it were possible to treat each island as an organised society under its own chief. There has always been ambiguity as to the distinction between 'chiefs' and 'head men' but it would appear that the Torres Strait Islands did not have chiefs or paramount chiefs as did the Maoris of New Zealand and the other Pacific Island groups. Indeed there is an interesting precedent in relation to New Guinea which is treated as a colony acquired by settlement. Law officers' opinions were to the effect that there were no native leaders capable of representing sovereign rights in that country and therefore capable of ceding the territory.[30]

The picture in the Torres Strait Islands in the 1870s may well have presented a similar situation, namely, the prevalence of a variety of different groups, some pacific, some hostile. The need for establishing either British or Australian colonial sovereignty over those islands was urgent. There was no recognised authority over the whole of the islands nor indeed over individual islands which could have ceded them. Discussions on a treaty (even if that was practicable) would have taken perhaps many years. The islands were adjacent to the colony of Queensland and the British Crown had an inchoate title to them. What better method than to proceed by way of annexation and attachment to the colony of Queensland? The setting up of government authority in the islands (for they were never settled in the literal sense of the term) was accompanied by an improvement in many respects of the conditions of the Murray Islanders, particularly in the establishment of an island court to settle disputes. Certainly, Mr Bruce established amicable relations with the Islanders. In the end result therefore, the acquisition would fall within the nineteenth century concept of peaceful settlement.

If there were any doubts as to the status of the Torres Strait Islands in 1879, those doubts would have been overridden by their incorporation into the colony of Queensland. Roberts-Wray[31] refers to a situation where areas such as those in the colony of the Gold Coast were acquired in different ways, some by settlement, some by

cession. In the West African Court of Appeal case of *R v. Kojo Thompson*[32] the court held that where there existed a patchwork of different areas, the whole area could take its status from the main type of acquisition. Thus, it could be argued that the attachment of the Torres Strait Islands to Queensland, made that area part of the settled colony of Queensland, even if they were acquired by a method different from that by which the continent of Australia was acquired. The colony of Queensland is regarded as a settled colony in as much as it was originally a part of the settled colony of New South Wales.

Writing in 1926, Lindley in his book *The Acquisition and Government of Backward Territory in International Law*[33] points to the diversity of publicists' opinions on the question of obtaining sovereignty over territory occupied by native people. His own view is as follows:

> While international law should and does recognise the rights of independent backward races to the extent of distinguishing those territories to which title may be acquired by the legally and morally legitimate method of occupation from those which, in the absence of consent on the part of the inhabitants, can only be obtained by conquest or through prescription - it does not at present go further and say that an acquisition by conquest is not legitimate.[34]

It is difficult to find in Lindley's treatment of the topic any disapproval of the method used in relation to the Torres Strait Islands. Certainly, international pressure in the nineteenth century was forcing a reconsideration of acquisition of territory on the African continent without the consent of the native peoples but it is obvious that in the 1870s no such prohibition had been established under customary international law or by treaty.

3. Settled Colonies and Crown Title to Land

Under the Blackstonian distinction, the effect of characterising a colony as settled on one hand or ceded on the other was that in the former type of colony, British law applied so far as it was applicable to the circumstances of the colony. In a ceded colony, however, pre-existing law applied until changed by the British or colonial authorities. A fundamental part of British law which would apply would be the law relating to tenure (apart from those peculiar tenures that were associated with British institutions). Thus, from the time of settlement, the British Crown had a full title to the land; no native rights survived unless recognised by legislation or executive act of

the Crown or by a course of dealing. That this was the legal position in the eighteenth century and the legal understanding of most judges and jurists is well established. Cases from *Attorney-General (N.S.W.) v. Brown*[35] to *Cooper v. Stuart*[36] to *Rutledge's* case[37] to *William's* case[38] and finally to *Milirrpum*,[39] all accepted this concept of British law. The thesis is expressed in this way. The Crown acquired a radical title to land in the territory which it had occupied by settlement from the time of settlement. It could reserve the land for a public purpose or it could alienate the land in fee simple or by lease. There was no attribution of native beneficial ownership to land which had become Crown Land and was referred to as waste lands of the Crown or vacant Crown Land. Any right to occupancy of Aboriginals could be protected by way of reservation of the land for the use and enjoyment of Aboriginals.

In *Mabo*, however, this understanding based on precedent and judicial history of over 150 years is overthrown. In terms of title to land, the court recognises that there is no distinction in legal effect between land acquired by cession and land acquired by settlement. In both cases pre-existing native rights continue. Thus the common law of other Commonwealth countries is utilised to establish the new doctrine as to the effects of settlement in Australia. Precedents from other areas of the world colonised by Britain are utilised to bring about this refashioning of the law - from Africa, India, Canada and New Zealand. New Zealand, of course, had been recognised as being a ceded country and the Treaty of Waitangi was recognised as the source of Maori rights. In India there were different types of acquisition of territory and the precedents there have always been regarded as conflicting in nature.

The emphasis in the Court's judgment is on two major cases, one from Africa and the other from Canada. In so far as the African decisions relate to a ceded colony their authority is not on all fours with Australia. One case stands out from the African authorities - *Amodu Tijani v. Secretary, Southern Nigeria*.[40] As to Canada the relevant case is *Calder v. Attorney-General of British Columbia*.[41] Earlier cases decided by the Privy Council in relation to Canada had recognised a native title in respect of those areas covered by the Royal Proclamation of 1763. This was a source of recognition of native rights. Indians in the vast area covered by that Proclamation were given rights in areas reserved to them. The existence of native title can therefore be sustained under the recognition doctrine. It was a recognition of usufructuary rights which were a burden on the radical title of the Crown. The Crown had ownership, the natives had

rights of use. Such rights of use could be extinguished by grant to settlers and others. But there were areas on the north American continent to which the Royal Proclamation may not have extended. In *Calder* one of the questions was as to whether the Nishga Indians of British Colombia had rights arising under that Proclamation.[42] The Canadian Supreme Court was evenly divided on the question. Even on the assumption that the area was not within the area covered by the Royal Proclamation and therefore was to be treated on a par with a settled colony, there was an implicit recognition of a doctrine of aboriginal rights and this was followed in other cases. In *Mabo*, the High Court cites *Calder* with approval and states that at common law in a settled colony Aboriginal rights which existed at settlement survived without any act of recognition.[43]

The reasoning of the judges in *Mabo* appear to have been influenced by a thesis written by Dr G.S. Lester, entitled *The Territorial Rights of the Inuit of the Canadian North West Territory*.[44] The Inuit are Eskimo people who fall within the hunter/gatherer classification of anthropologists. The territory of the Inuit was *outside* the geographical area of the Royal Proclamation of 1763. Therefore, in order to sustain the existence of Aboriginal rights in this area, an argument based on pre-existence of these rights under the common law is necessary. In place of the doctrine of recognition, Lester propounds a doctrine of *continuity* which he defines as follows:

> The doctrine of continuity holds that a mere change of sovereignty is not to be presumed as meant to disturb private rights. The cases and opinions discussed in previous chapters demonstrate that it is theoretically possible that the Aboriginal inhabitants of a settled colony may be said to have legal rights of occupation and possession arising under their *lex loci*, and that they can have a *lex loci* of a class that can be presumed to have survived the acquisition of territorial sovereignty by the Crown. Simply because the territory is now classified as having been acquired by settlement and not by conquest or cession, does not mean that the Aboriginal inhabitants are disqualified from the benefit of presumption of survival.[45]

(It is to be observed, however, that Lester is here referring to private rights not to a communal right.)

In *Guerin v. The Queen*[46] there is general approval of the thesis that the common law recognised Aboriginal rights. In the judgment of Dickson J. which was concurred in by Beetz, Chouinard and Lamer JJ., there is an acceptance of an 'assumption implicit in *Calder* that Indian title is an independent legal right which although recognised by the Royal Proclamation of 1763 nonetheless predates it'. The view of Dickson J. is that in *Calder's* case both Judson and Hall JJ. were in agreement that Aboriginal title existed in Canada (at least where it had not been extinguished by appropriate legislative action) independently of the Royal Proclamation of 1763.[47] Dickson J. states:

> In recognizing that the Proclamation is not the sole source of Indian title the *Calder* decision went beyond the judgment of the Privy Council in *St Catherine's Milling and Lumber v. The Queen*(1888), 14 App. Cas. 46. In that case Lord Watson acknowledged the existence of aboriginal title but said it had its origin in the Royal Proclamation. In this respect *Calder* is consistent with the position of Chief Justice Marshall in the leading American cases of *Johnson and Graham's Lessee v. M'Intosh* (1823) 8 Wheaton 543, and *Worcester v. State of Georgia* (1832), 6 Peters 515, 31 V.S. 530, cited by Judson and Hall JJ. in their respective judgments. In *Johnson v. M'Intosh* Marshall C.J., although he acknowledged the Royal Proclamation of 1763 as one basis for recognition of Indian title, was none the less of opinion that the rights of Indians in the lands they traditionally occupied prior to European colonization both predated and survived the claims to sovereignty made by various European nations in the territories of the North American continent. The principle of discovery which justified these claims gave the ultimate title in the land in a particular area to the nation which had discovered and claimed it. In that respect at least the Indians' rights in the land was obviously diminished; but their rights of occupancy and possession remained unaffected.[48]

The majority judgments in *Mabo* accept this principle as applicable in Australia and therefore that Aboriginal rights existed at common law prior to Captain Cook's discovery of the continent and settlement by Governor Phillip in 1788 and that Torres Strait Islanders rights existed in the Murray Islands prior to 1879. The nature of those rights however, are qualitatively different, as herein argued.

The recognition of a common law native title creates problems of a jurisprudential and practical nature. If there is no act of recognition of rights (as in a treaty of cession) how is one to determine the content of a native law? Specifically, in relation to Australia there would be grave problems in determining whether a system of customs varying from tribe to tribe and clan to clan constituted law in the sense of a body of ascertained rules which could be applied by courts. Anthropological evidence would be necessary and even the anthropologists may not have the capacity to determine whether a system of practices amounted to customary law as compared with mere custom. In the Northern Territory, the recognition of land

claims is based on Commonwealth legislation supplemented by Territory legislation. Thus, it is a form of *recognised* title. The courts would be faced with considerable difficulties in determining a common law right to occupation of land which has the necessary historical foundation, without the intervention of the legislature. If the legislature intervened that would appear to make it a statutory title or a statutorily recognised right.

In the United States, the difference between recognised and unrecognised title is clear. The taking of recognised land is subject to the just terms requirement of the US Constitution but the taking of non-recognised title (i.e. common law title) is not subject to those requirements.[49] The reason appears to be that the nature of the title of Indians on the North American continent has sometimes been described as an occupancy at the permission of the Crown. Both American and Canadian courts have described native title as only a 'personal' right, i.e. attaching to individuals forming part of a group, or a usufructuary right, i.e. a right to take the benefit of certain traditional interests such as hunting, food gathering and fishing. Being such a right it was a tenuous one in the sense that it could be lost either through aggrandisement by a neighbouring group ejecting the former occupants from the land or by the Government extinguishing the right. Indeed, the practice of the American authorities in making arrangements with the Indians as to the use of lands was to extinguish the Indian title by purchase through a treaty. A treaty in this sense was not a treaty governing the relations between fully sovereign nations but a treaty having effect as a conferral of rights within the U.S. domestic legal system.

Certainly, the judgment of the court in *Mabo* does not regard the Australian native rights as equivalent to rights of property under the Australian system of land tenure. In the brief judgment of Mason C.J. and McHugh J.,[50] agreeing with the reasons for judgment of Brennan J. in relation to the right of natives whose interests have been extinguished to claim compensation, there is a rejection of the requirement of paying compensation. Reference is made to the dissenting judgment of Dawson J. as supporting a form of permissive occupancy at the will of the Crown (as distinct from a common law native title).[51] Termination of this interest is not compensable as the majority recognised that title can be extinguished under colonial or state legislation without a claim for damages being vested in the native occupants. Common law title must therefore be of a lesser quality than that of a statutory title. In the end result, therefore, and in so far as it is accepted that native title is not alienable, it is unclear whether there is any significant difference between the rights recognised under a continuity doctrine or under a recognition doctrine.

The question of reserves being established under colonial legislation becomes all important in this respect. Crown land legislation of Queensland, replicated in some of the other colonies, recognised that land could be reserved for various public purposes including the purpose of use by the Aboriginal inhabitants of the Colony.[52] Section 4 of the *Land Act* 1910 (Qld) defined Crown land as:

> ... all land in Queensland except land which is, for the time being -
> (a) lawfully granted or contracted to be granted in fee simple by the Crown; or
> (b) reserved for or dedicated to public purposes; or
> (c) subject to any lease or licence lawfully granted by the Crown: Provided that the land held under an occupation licence shall be deemed to be Crown land.

'Public purposes' were defined in terms of an exhaustive list of objects and purposes set out in the section which includes 'Aboriginal reserves'. Further, section 180 of the *Land Act* provided:

> (1) The Governor in Council may, from time to time, grant in trust, or by Order in Council reserve from sale or lease, either temporarily or permanently, any Crown land which, in the opinion of the Governor in Council, is or may be required for public purposes.
> (2) ....
> (3) All land heretofore reserved or set apart for any public purpose and the fee simple whereof has not been granted by the Crown, shall hereafter be deemed to be a reserve for public purposes under this Act, and deemed to have been so reserved under this section.

On the 14th November 1912, an order in council was made whereby the Murray Islands were reserved under this Act.[53] The order in council was subtitled 'Reserves for the use of the Aboriginal inhabitants of the State' and further subtitled 'Torres Strait'.

Dawson J. considered that the reservation of the Murray Islands under this legislation meant that the area was subject to a permissive occupancy under the Crown.[54] In *Milirrpum*, Blackburn J. put the principle as follows: 'in a settled colony a legislative and executive policy of treating the land of the colony as open to grant by the Crown together with the establishment of native reserves operates as an extinguishment of Aboriginal title if that ever existed'.[55] Some academics have disputed this statement of the law. Bartlett states:

'the creation of very large reserves in the more remote regions of Australia might be suggested to have extinguished the Aboriginal title in adjacent areas but a better explanation is that the creation of such reserves merely affirmed and protected the Aboriginal title'.[56] Bartlett is of the view that the management and control of reserve lands by the Crown does not abridge the right of occupancy of traditional inhabitants under Aboriginal title.

The majority in *Mabo* consider that the reservation of the Murray Islands constituted an affirmation of common law title.[57] Unlike many of the Aboriginals on the mainland, the occupation by the Murray Islanders had not been disturbed since 1879 although subject to management controls under later legislation. This reserve legislation, as Dawson J. pointed out, had precedents in the allocation of land by Governors Macquarie and Brisbane for the use of Aboriginals.[58] Dawson J.'s conclusion which is diametrically opposed to that of the majority is as follows:

> In my view, the conclusion is inevitable that, assuming the native inhabitants of the Murray Islands to have held some sort of right in the land immediately before the annexation of those islands, the Crown in right of the Colony of Queensland, on their annexation, exerted to the full its rights in the land inconsistently with and to the exclusion of any native or aboriginal rights. It did so under the law which it had brought with it. It did so from the start by acting upon the assumption (which was also the assumption lying behind the relevant legislation) that there was no such thing as native title and that the Crown was exclusively entitled to all lands which had not been alienated by it: lands which were designated as Crown lands. In making provision for the reservation of land for public purposes, in particular the welfare of the aboriginal population, the relevant legislation and the action taken pursuant to it disclose no intention to preserve native rights in the land: they were simply thought not to exist.[59]

Brennan J., however, considered native title was not extinguished by the creation of the reserves nor by the mere appointment of trustees to control a reserve where no grant of title was made. Such reservation indeed amounted to an affirmation of the rights of the Murray people to occupy the land.[60] He paid particular attention to the reservation of the Murray Islands for the use of Aboriginal Inhabitants of the State. It is probable that this reservation referred to all the Aboriginal inhabitants of the State whether mainland Aboriginals or Torres Strait Islanders. This might have indicated an intention to disturb the traditional title and to throw the islands open to *all* Aboriginals and Torres Strait Islanders. However, Brennan J. said that 'if the creation of a reserve of land for Aboriginal

Inhabitants of the State who have no other rights or interest in that land confers a right to use that land, the right of user is necessarily subordinate to the right of user consisting in legal rights and interests conferred by native title. Of course, a native title which confers a mere usufruct may leave room for other persons to use the land either contemporaneously or from time to time'.[61] Thus, in the view of Brennan J. and other judges of the majority, while the reserve legislation constituted a recognition of common law title, it did not transform that title to a different type of title which might be described as a reserve title. However, the title would be affected by the management powers vested in the trustees of a reserve.

4. Extinguishment

The most crucial question in relation to native land title is the power of a colonial or State Parliament to extinguish that title. In Canada it is recognised that such a title could be voluntarily surrendered to the Crown. *A fortiori*, the Canadian legislatures with appropriate power could extinguish such title but they must evince a clear and plain intention to do so. This rule is adopted by Brennan J. He distinguishes between a law which extinguishes title and a law which merely regulates title such as activities on Indian land.[62]

The Queensland *Constitution Act* empowers the Crown to grant an interest in land. Under the specific powers of ss.30 and 40, the Crown has power to deal with the waste lands of the Crown. Those sections of course were valid under the power of the Queensland Parliament to make laws for the peace, welfare and good government of the colony.

Any obstacle to the exercise of that power over Crown land which might be occupied by native groups could only be found in Imperial legislation or some other binding source (apart from Commonwealth legislation). If the Queensland legislation was repugnant to Imperial legislation extending to the colony either by express force or necessary implication, section 2 of the *Colonial Laws Validity Act* would have operated (until its repeal in relation to the Australian States by the *Australia Acts* 1986). However, no such legislation existed. Furthermore, there was in the case of Queensland no proclamation or other executive act creating such Aboriginal rights emanating from the Monarch similar to the Royal Proclamation affecting native lands and title, nor was there a treaty such as the Treaty of Waitangi in New Zealand affecting Crown land.

Some reference is made to the Admiralty instructions to Captain Cook which read: 'You are ... with the consent of the natives to take possession of convenient situations in the country in the name of the King of Great Britain; or, if you find the country uninhabited take possession for His Majesty by setting up proper marks and inscriptions as first discoverers and possessors'. Such instructions cannot have the force of law. They were prepared for a voyage to the vast regions of the Pacific Ocean and without any detailed knowledge of the types of societies Cook might encounter in his voyage of discovery. Instructions of this nature cannot be said to have impressed upon any land so discovered a sacred trust or any recognition of usufructuary rights which would inhibit imperial or colonial legislative power over land acquired.

As to the Royal Instructions to the Governors of the colonies, including the instructions to Governor Bowen of Queensland and his successors, some reference has been made to the obligation cast upon the governor 'to promote religion and education among the native inhabitants of our said colony or of the lands and islands thereto adjoining and especially to take care to protect them in their persons and in the free enjoyment of their possessions ...'. Such instructions could not be regarded as creating a legal duty cognisable by a court of law as a recognition of such rights. Indeed, the reference to possessions would not indicate a proprietary or possessory interest in *land*. The Instructions were directory and were a personal matter between the monarch and the Governor.

When Queensland and the other states federated in 1901, ss 107 and 108 of the Commonwealth Constitution became relevant. Section 107 provides for the continuation of State legislative power unless the power has been exclusively vested in the Commonwealth, while section 108 provides for the continuation of State laws. The consequence was that from federation State Parliaments had power to extinguish title to Aboriginal land (if it had not already been extinguished pursuant to colonial legislation in the 19th century). In so far as any native rights were common law rights they were not protected from legislative extinguishment and they were not entrenched in any way in the Queensland Constitution. The referendum of 1967 gave the Commonwealth a concurrent power over Aborigines and Torres Strait Islanders as being members of a 'race'. Under s.51(xxxi), the Commonwealth would have power to acquire Aboriginal reserve land, subject of course to the requirement to pay compensation under s.51(xxxi) of the Constitution. Such

legislation would prevail over Queensland legislation under s.109 of the Constitution. However, no such legislation has been passed.

In an earlier *Mabo* case [63] decided on by the High Court, it was held that the *Queensland Coast Island Declaratory Act* 1985 (Qld) purporting to extinguish interests in land in the Torres Strait Islands was invalid. The ground of the decision was that such legislation was inconsistent with s.10 of the *Racial Discrimination Act* (Cth). That section prohibited, *inter alia*, discrimination on racial grounds which denied fundamental rights and freedoms to persons of a racial or ethnic group. The fundamental right which would have applied in that case was that listed in a schedule to the Act: the right to own property alone or in association of others. Presumably, Aboriginal 'ownership' does not amount to a fee simple but is a usufructuary title. This interest was considered by the Court as coming within that specified right. Although the legislation had not singled out Torres Strait Islanders but applied generally, the Court held that its operative effect impacted upon the rights of those peoples that existed in 1879.

Thus, from 1975 (the date of the enactment of the racial discrimination legislation) a new factor must be taken into account. Any act of extinguishment by a State Parliament post-1975 which amounts to a denial of an existing right would appear to conflict with the earlier *Mabo* decision. Such land is not inviolate from State acquisition for public purposes. Hence, the relevance of the *Acquisition of Land Act* (Qld) must be considered. This Act provides for compensation for acquisition of land. Toohey J. puts it in this way:

> The question here is whether extinguishment of the traditional title of the Meriam people without the compensation provided for in the *Acquisition of Land Act* 1967 (Qld) means that, by reason of a law of Queensland, persons of a particular race, colour or national or ethic origin, do not enjoy a right that is enjoyed by persons of another race, colour or national or ethnic origin, or enjoy a right to a more limited extent than those persons. If the traditional title of the Meriam people may have been extinguished without compensation, they do not enjoy a right that is enjoyed by other title holders in Queensland or, at the least, they enjoy a right to a more limited extent. A law which purported to achieve such a result would offend s 10(1) of the *Racial Discrimination Act* and in turn be inconsistent with the Act within the meaning of s 109 of the Constitution. The *Racial Discrimination Act* would therefore prevail and the proposed law would be invalid to the extent of the inconsistency.[64]

In relation to *pre-1975* acquisitions, the majority of the court was not prepared to accept that compensation was payable for acts of extinguishment from the time of settlement or in the case of the Murray Islands from the time of annexation.[65] This view was opposed by Deane and Gaudron JJ. in their joint judgment and by Toohey J.[66] Deane and Gaudron JJ. considered that extinguishment which amounted to wrongful dispossession of Aboriginal groups was subject to the payment of compensation. They did allow, however, for defences to such an action based on laches and statutes of limitation.[67]

Brennan J. set out some of the circumstances in which Aboriginal title in Crown land might not have been extinguished. These would include vacant Crown land which had not been put to any use, and land which had been appropriated for public purposes but where the use of the land by the Crown for public purposes may not be inconsistent with the continuing concurrent enjoyment of native title over the land. He mentions specially land set aside as a national park.[68]

A central question is the effect of amendments to reserve legislation which impact upon the incidents of use and enjoyment of the land, including the grant of freehold title to Aboriginal and Torres Strait Island groups under the *Aboriginal Land Act* 1991 (Qld). In particular, the question arises as to whether this transforms traditional title into a statutory title and if so whether compensation would be payable in these circumstances. It is difficult to see, despite arguments to the contrary, how the two titles, that is a statutory and a common law title, can co-exist. Brennan J. considers that the resolution of this problem lies in the operation of section 8(1) of the *Racial Discrimination Act* which provides an exemption from the operation of section 10 of that Act for 'special measures' (otherwise described as reverse discrimination).[69] In other words, if the amending Aboriginal legislation can be characterised as granting special benefits to the Aboriginal occupants of land which is the subject of a deed of grant in trust or grant of freehold title, it could be sustained under section 8(1) of the *Racial Discrimination Act* even though it replaces the incidents of the common law title with new rights. In those circumstances it would appear that compensation would not be payable. However, that would depend upon the technicalities of the *Acquisition of Land Act*.

5. Conclusion

The *Mabo* case constitutes the high point of judicial activism by the High Court. Aspirations of the Australian people and international law standards are proposed as bases for revising and overthrowing the old understandings as to the effects of Australia being characterised as a settled colony. International law standards, of course, are not binding under constitutional doctrine unless incorporated by way of legislation into the Australian legal system. The aspirations of the Australian people relating to common law title are unknown. Certainly, the Australian people would welcome the protection of the Aboriginal use of land areas in the States with which they have had a traditional connection. However, the methods by which this can be achieved, such as a common law title or a deed of grant in trust or a freehold title are not the subject of clear acceptance by the Australian people. Common law title is vague and difficult to prove in those areas of the continent where Aboriginal groups have moved or have lost their connection with the land but are camping on 'outstations'. It is recognised that in these circumstances the continuity of the claim may be fractured. But there will be various areas, particularly in the State of Western Australia, which constitute vacant Crown land where Aboriginal groups still retain a traditional affiliation or relationship with the land. The *Mabo* case will allow these claims to proceed. However, the type of evidence which was available and was used by Moynihan J. in the Supreme Court[70] in relation to the Murray Islanders may not be forthcoming in other cases.

Although one would have preferred a narrower focus, that is a focus concentrating on the Torres Strait Islands, the Court decided to adopt the 'broad brush' approach. Australia remains a settled colony although the moral indignation of some of the judges such as Gaudron and Toohey JJ. suggests that they have doubts as to whether the settlement involving the acquisition of land should have proceeded in the way that it did. However that is a *fait accompli*. The questions which will arise in the future may require the determination of what Aboriginal customary law is, and whether there are many sets of these laws conferring different types of rights of use and inheritance. The problem of conflicting claims or concurrent use of some areas will also need to be determined.

There is one further unanswered question. The judgment is confined to the questions of land title and land use but if a system of Aboriginal customary law is recognised as founding such claims,

why should it not be extended to the whole area of Aboriginal social life? This opens up a Pandora's Box. If the Court were later to extend the concept of pre-existing rights and rules to cover other areas such as the criminal law, the understanding that Australia is a settled colony would become a mere fiction.

Notes

1. See R.D. Lumb, 'The Torres Strait Islands: Some Questions relating to their Annexation and Status' (1990) 19 *Federal Law Review* 154, 160-61.
2. (1981) 148 C.L.R. 1; Lumb 1990, 165-66.
3. *Id.* 164.
4. R.D. Lumb, *The Maritime Boundaries of Queensland and New South Wales* (Occas. Pap. St. Lucia: University of Queensland Press, 1964), 9-12.
5. *Coral Seas Islands Act*, No. 58 of 1969.
6. Lumb, 1964, n.4, 10-11.
7. *Id.* 7.
8. *Pacific Islanders Protection Act*, 1875, 38&39 Vict. c.51 s.7.
9. *Mabo v. Queensland* (1992) 66 A.L.J.R. 408, 413 per Brennan J.
10. (1992) 66 A.L.J.R. 408, 411.
11. (1992) 66 A.L.J.R. 408, 411-12.
12. See A.C. Haddon, *Reports of the Cambridge Anthropological Expedition to Torres Strait* (Cambridge University Press, 1971).
13. (1992) 66 A.L.J.R. 408, 414.
14. (1992) 66 A.L.J.R. 408, 421.
15. [1919] A.C. 211, 233-34.
16. (1992) 66 A.L.J.R. 408, 422.
17. (1992) 66 A.L.J.R. 408, 417.
18. (1992) 66 A.L.J.R. 408, 422.
19. [1975] I.C.J. Rep. 12.
20. [1975] I.C.J. Rep. 12, 39.
21. *Ibid.*
22. (1992) 66 A.L.J.R. 408, 417-18.
23. (1992) 66 A.L.J.R. 408, 438, 445-47.
24. (1992) 66 A.L.J.R. 408, 420
25. (1992) 66 A.L.J.R. 408, 438, 445.
26. (1889) 14 App. Cas. 286, 291.
27. (1970) 17 F.L.R. 141.
28. Blackstone, *Commentaries on the Laws of England*, Book 1, c.4, 106-8.
29. [1975] I.C.J. Rep. 39.
30. Lumb, 1990, n.1, 167-68.
31. K. Roberts-Wray, *Commonwealth and Colonial Law* (London: Stevens, 1966), 110-11.
32. (1944) 10 W.A.C.A. 201.
33. The book contains an analysis of views expressed by international lawyers in previous centuries.
34. M.F. Lindley, *The Acquisition and Government of Backward Territory in International Law* (London and New York: Longmans, Green & Co., 1926), 47.
35. (1847) 1 Legge 312, 316-18.
36. (1889) 14 App. Cas. 286, 291.
37. *Randwick Municipal Council v. Rutledge* (1959) 102 C.L.R. 54, 71.
38. *Williams v. A.G. (N.S.W.)* (1913) 16 C.L.R. 404, 439.
39. *Milirrpum v. Nabalco Pty Ltd* (1970) 17 F.L.R. 141.
40. [1921] 2 A.C. 399.
41. [1973] 34 D.L.R. (3d) 145.
42. See R.D. Lumb 'Aboriginal Land Rights: Judicial Approaches in Perspective', (1988) 62 A.L.J. 273, 281 for an analysis of the Canadian authorities.
43. (1992) 66 A.L.J.R. 408, 429.
44. G.S. Lester, *Territorial Rights of the Inuit of the Canadian North West Territories* (Ottawa: York University, 1981).
45. *Id.* 859.
46. (1984) 13 D.L.R. (4th) 321.
47. (1984) 13 D.L.R. (4th) 321, 335.
48. (1984) 13 D.L.R. (4th) 321, 335-36.
49. *Tee-Hit-Ton Indians v. United States* (1954) 348 U.S. 272.
50. (1992) 66 A.L.J.R. 408, 410.
51. (1992) 66 A.L.J.R. 408, 480.
52. *Land Act* 1910 (Qld) ss.4, 180.
53. (1992) 66 A.L.J.R. 408, 432.
54. 66 A.L.J.R., 408, 480.
55. (1970) 17 F.L.R. 141, 223.
56. R.H. Bartlett, 'Aboriginal Land Claims at Common Law' (1983) 15 *University of Western Australia Law Review* 293, 338.
57. (1992) 66 A.L.J.R. 408, 433, 455.
58. (1992) 66 A.L.J.R. 408, 465.
59. (1992) 66 A.L.J.R. 408, 474.
60. (1992) 66 A.L.J.R. 408, 433.
61. *Ibid.*
62. (1992) 66 A.L.J.R. 408, 432, citing *R. v. Sparrow* (1990) 70 D.L.R. (4th) 385.
63. (1988) 166 C.L.R. 186.
64. (1992) 66 A.L.J.R. 408, 498.
65. (1992) 66 A.L.J.R. 408, 410.
66. (1992) 66 A.L.J.R. 408, 456, 498.
67. (1992) 66 A.L.J.R. 408, 443.
68. (1992) 66 A.L.J.R. 408, 434.
69. (1992) 66 A.L.J.R. 408, 436.
70. By reference from the High Court.

Mabo and Its Implications for Aborigines and Torres Strait Islanders

Frank Brennan S.J.[*]

A. Overview of the Case

Eddie Mabo was a member of the Meriam people, the traditional owners of Murray Island and surrounding islands and reefs in the Torres Strait. The islands in the strait were annexed as part of the colony of Queensland in 1879. In 1982, Mabo and four other Islanders commenced action in the High Court of Australia seeking a declaration of their traditional land rights. They claimed that the islands had been continuously inhabited and exclusively possessed by their people who lived in permanent settled communities with their own social political organisation. They conceded that the British Crown became sovereign of the islands upon annexation but claimed continued enjoyment of their land rights until those rights had been extinguished by the sovereign. Further, they claimed that their rights had not been validly extinguished and that their rights continued to be recognised by the Australian legal system.

The State of Queensland attempted to defeat the claim by the passage of the *Queensland Coast Islands Declaratory Act* 1985 which was intended 'to allay doubts that may exist concerning islands forming parts of Queensland'. The Act declared that, upon the islands being annexed, they were 'vested in the Crown in right of Queensland freed from all other rights, interests and claims of any kind whatsoever'. It provided that no compensation would be paid for rights retrospectively taken away.

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In 1988, the High Court ruled that this Act was contrary to the Commonwealth's *Racial Discrimination Act* 1975.[1] On 3 June 1992, the High Court upheld the Islanders' claim, ruling by six to one that the lands of this continent were not *terra nullius* or 'practically unoccupied' in 1788.[2] The fiction of *terra nullius* had allowed the European community of nations to expand their colonial horizons with minimal concern for indigenous peoples. In the eighteenth century, the common law took its lead from international law. In *Mabo v. State of Queensland*, three judges acknowledging their law-making role said: 'it is imperative in today's world that the common law should neither be nor be seen to be frozen in an age of racial discrimination'.[3] The Court ruled that the Crown's acquisition of sovereignty could not be challenged in Australian courts. Though the Crown acquired a radical title to land within its territory, native title[4] to land continued unaffected until it was extinguished by a valid exercise of sovereign power inconsistent with the continued right to enjoy native title.

Where the Crown has granted freehold or land leases to others, native title is extinguished. Where land has remained Aboriginal reserve, vacant Crown land, stock route, or national park, native title continues if the local system of traditional law recognises present owners or managers. Under the Constitution, the Commonwealth could not extinguish native title except on payment of just compensation. Under the *Racial Discrimination Act* 1975, a State cannot extinguish native title without compensation unless it can prove that it is not acting in a racially discriminatory way against Aboriginal or Islander landholders.

B. The Implications

1. Sovereignty

Mabo does not facilitate the pursuit by Aborigines of the issue of separate sovereignty in Australian courts. In *Mabo*, Justice Brennan (with Mason C.J. and McHugh J. concurring) took as his starting point the principle stated by Justice Gibbs in the *Seas and Submerged Lands Case*:[5] 'The acquisition of territory by a sovereign state for the first time is an act of state which cannot be challenged, controlled or interfered with by the courts of that State'. Justice Brennan went on to say, 'The recognition is accorded simply on the footing that such a prerogative act is an act of State the validity of which is not justiciable in the municipal courts'.[6] Justices Deane and

Gaudron said, 'The assertion by the Crown of an exercise of that prerogative to establish a new colony by "settlement" was an act of State whose primary operation lay not in the municipal arena but in international politics or law. The validity of such an act of State (including any expropriation of property or extinguishment of rights which it effected) could not be challenged in British courts'.[7] They went on to say, 'The result is that, in a case such as the present where no question of constitutional power is involved, it must be accepted in this Court that the whole of the territory designated in Phillip's Commissions was, by 7 February 1788, validly established as a "settled" British Colony'. Justice Toohey said, 'A sovereign can, by a positive act, seize private as well as public property in the act of acquiring sovereignty and the seizure is non-justiciable'.[8]

The statement of claim in *Utemorrah and Others v. The Commonwealth of Australia and the State of Western Australia* (the Kimberley Land Claim) asserts, 'The Sovereignty of the Western Australian Government was thus extended to the said lands by no valid act - neither by conquest, nor cession, nor purchase, nor by settlement of empty land'.[9] Such an assertion is unarguable in Australian courts. Neither will it be put by any party with standing before the International Court of Justice. The claim to Aboriginal sovereignty is a political claim, not a justiciable legal claim in either international or domestic courts.

Some Aboriginal groups have questioned how the High Court can reverse the law on *terra nullius* while saying it is incompetent to review the act of state which asserted British sovereignty over the continent. No municipal court could question the sovereignty by which it is, itself, constituted.

Mr. Michael Mansell, National Secretary of the Aboriginal Provincial Government, while welcoming the Court's overruling of the *terra nullius* doctrine, has said:

> The Court was silent on the equally unjust use of the doctrine to deny sovereignty. The Court refused to follow precedent on the issue of *terra nullius* for to do so would be to maintain a legal fiction based on political convenience. Yet the very same convenience was relied on by the Judges to shut the door to any Aboriginal hopes for arguing Aboriginal sovereignty in the courts.[10]

Before the *Mabo* decision was handed down, Mr. Paul Coe, Chairman of the National Aboriginal and Islander Legal Services Secretariat, wrote to the Secretary-General of the United Nations seeking an advisory opinion from the International Court of Justice on the right to self-determination of the Aboriginal people of

Australia and the rights to their land and culture. He made his application on behalf of the Aboriginal people of the Wiradjuri, Ngunawal and Arrente nations, wanting to determine their independence, integration or association with the colonising power. Representatives of 'Aboriginal nations' have no capacity to seek an advisory opinion directly from the International Court of Justice. Though UN institutions can request such advisory opinions, no opinion would be sought and given unless the affected state consented. Aboriginal sovereignty is not a justiciable issue. It will be sterile ground to continue the debate on categorisation as to whether sovereignty was asserted by settlement, conquest, cession or prescription. British sovereignty was not effectively asserted over the whole Australian land mass in one magical action by the erection of a Union Jack. Some parts were settled, others conquered and some may even have been ceded. In time, the assertion of sovereignty was complete and, two centuries later, is beyond question in any court.

2. *Self-Determination*

Having established the existence and continuation of traditional native land title, the majority of the High Court went on to enunciate the common law's recognition of traditional Aboriginal law for determining the owners of various lands. If the common law is to recognise Aboriginal land law, there is a strengthened argument for recognition by statutory or other means of other aspects of traditional Aboriginal law. An indigenous community living within the nation state and enjoying recognition of its legal system by the legal system of the nation is a community entitled to more than self-management. It is entitled to self-determination within the life of the nation.

Since 1982, many indigenous groups have been pressing the UN Working Group on Indigenous Populations (WGIP) to recognise their entitlement to self-determination within the legal framework of the nation states built on their dispossession without consent and without compensation. The abiding concern of indigenous people in the international forum, since the establishment of the WGIP, has been the issue of self-determination. Both the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights proclaim: 'All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development'.

In international law, self-determination has come to have technical meaning in the decolonisation process. When a colonial power is

withdrawing from a territory, the people of the territory are to be assured a free choice in determining their political future. By a 1960 resolution of the General Assembly, the UN made a 'Declaration on the Granting of Independence to Colonial Countries and Peoples' which proclaims the right of all peoples to determine freely their political status and pursue freely their economic, social and cultural development.[11] In recent years, indigenous representatives and their advocates have attempted to argue by analogy that their people are 'peoples' in the international law sense who also have the collective right to determine their future whether as part of the nation state in which they presently live or even as a separate state or entity enjoying international recognition. This analogical argument has had little appeal to governments which are prepared to concede only internal self-determination which would allow indigenous groups more autonomy as of right in the domestic political arrangements of the nation. They are not prepared to recognise external self-determination which carries the right to separate nationhood and autonomous sovereignty.

There is now a domestic meaning of self-determination which connotes more than self-management. It incorporates the notion that indigenous organisations and representatives should be able to shape policy for their people and not simply manage government programmes, run co-operative enterprises and administer local government functions for communities which happen to be indigenous. This political term has no guaranteed legal content. Continued attempts by Aboriginal leaders to extend it to self-determination in the international law sense take no account of the provision in the UN resolution which provides:[12]

> Any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purpose and principles of the Charter of the United Nations.

A racially or ethnically distinct group does not necessarily constitute a 'people' in international law. In the *Western Sahara Case*, the International Court of Justice found that the principle of self-determination had broadened since 1960 to include 'the need to pay regard to the freely expressed will of peoples'. Having reviewed various instances where the General Assembly had dispensed with the need for consultation with the inhabitants of a territory, it found that there had been cases where the group did not constitute a 'people' entitled to self-determination or where consultation was unnecessary, presumably because the people had been absorbed, for

so long as part of the state or were not in a territorially separate area.[13]

At the ninth meeting of the WGIP held in Geneva in August 1991, participants revised, amended and improved various provisions of the draft Declaration on Indigenous Rights. The draft proclaims:

> Indigenous people have the right to self-determination, in accordance with international law. By virtue of this right, they freely determine their relationship with the states in which they live, in a spirit of co-existence with other citizens, and freely pursue their economic, social, cultural and spiritual development in conditions of freedom and dignity.

The draft declaration concedes that the right is to be exercised 'in accordance with international law'. Furthermore indigenous people who are part of a state are not completely free 'to determine their political status'. But they are 'to freely determine their relationship with the states in which they live, in a spirit of co-existence with other citizens'.

At the tenth meeting of the WGIP in July 1992, the Australian Government delegation reaffirmed its support for the inclusion of self-determination language in the draft declaration. Considering that 'indigenous peoples are among those groups which may have to overcome barriers inhibiting their full democratic participation in the political process by which they are governed so that the full range of human rights are theirs to enjoy', the delegation thought 'specific recognition of the right of self-determination for indigenous peoples, as separate and distinct peoples, will assist them to overcome the barriers to full democratic participation'.[14] Though precluding choice of separate status as an independent state, the delegation thought there was scope for a collective entitlement to self-determination, provided it did not impair the territorial integrity or political unity of existing sovereign states.

3. *Compensation*

Under the *Racial Discrimination Act* 1975, a state government cannot extinguish native title without compensation unless other forms of title could be so extinguished in similar circumstances. All states now provide consultation and adequate compensation for property owners in the event of compulsory acquisition. (See *Public Works Act* 1912 (NSW), s.104; *Land Acquisition and Compensation Act* 1986 (Vic), s.80; *Acquisition of Land Act* 1967 (Qld), s.26; *Public Works Act* 1902 (WA), s.47A; *Land Acquisition Act* 1969 (SA), s.23; *Lands Resumption Act* 1957 (Tas), s.40). Unless that principle was to be forfeited, Aboriginal traditional landowners will now enjoy

similar benefit and protection. Like all property holders, Aboriginal traditional landowners enjoy constitutional protection from Commonwealth acquisition of their land without just compensation. If the *Racial Discrimination Act* were to be repealed, four members of the court (Mason C.J., Brennan, Dawson and McHugh JJ.) would tolerate extinguishment of Aboriginal title without compensation provided that there was a clear statutory intent in the enabling state legislation. The three other members of the court (Deane, Gaudron and Toohey JJ.) would read down any such statute or imply if they possibly could an intention to pay just compensation for the extinguishment of any title on the ground that any such purported extinguishment by the Sovereign would be wrongful. Justice Toohey would even see it as a breach of fiduciary duty.

Political claims to compensation by dispossessed Aboriginal groups will be buttressed by the acknowledgment in Justice Brennan's judgment that the nation 'obtained its patrimony by sales and dedications of land which dispossessed its indigenous citizens and that, to the extent that the patrimony has been realised, the rights and interests of the indigenous citizens in land have been extinguished'.[15] Justices Deane and Gaudron conceded the Crown had power wrongfully to extinguish native title by inconsistent grant but that 'any liability of the Crown to pay compensatory damages for such wrongful extinguishment will be unaffected'.[16] Justice Toohey said the Crown has an obligation 'to ensure that traditional title is not impaired or destroyed without the consent of or otherwise contrary to the interests of the titleholders'.[17]

4. The Existence of Native Title

If there be land in which no other citizen has an interest and which the Crown has not used for other purposes, traditional Aboriginal owners will continue to enjoy their rights to the land.

In 1972, the Commonwealth's Aboriginal Land Rights Commission was established and chaired by Justice A.E. Woodward. The government having decided to recognise land rights of Aborigines in the Northern Territory, Woodward was asked to design a process. He set out his assumptions of the aims underlying the recognition of land rights including 'the doing of simple justice', the promotion of social harmony and stability, the provision of land as a first essential to people who are economically depressed and who have no real opportunity of achieving a normal Australian standard of living, the maintenance and improvement of Australia's standing amongst the world's community of nations and 'the preservation, where possible, of the spiritual link with his own land which gives each Aboriginal his sense of identity and which lies at the heart of his spiritual beliefs'.[18]

Under the legislation which resulted, Aborigines claiming to have a traditional claim to land which is unalienated Crown land outside town or city boundaries can apply to a commissioner who may then recommend to the minister that a land grant be made. A traditional land claim can be made only by traditional Aboriginal owners who constitute 'a local descent group of Aboriginals who have common spiritual affiliations to a site on the land, being affiliations that place the group under a primary spiritual responsibility for that site and for the land, and are entitled by Aboriginal tradition to forage as of right over that land.'[19]

There has been much anthropological ink spilt over this definition. The legislative history is clear. Justice Woodward provided drafting instructions for proposed legislation which included a definition of traditional Aboriginal owners almost identical to that which resulted in the legislation. The definition reads:

> 'Traditional Aboriginal owners' means in respect of an area of land, a local descent group of Aborigines who have common spiritual affiliations to a site or sites within that area of land, which affiliations place the group under a primary spiritual responsibility for that site or sites and for that land, and who are entitled by Aboriginal tradition to forage over that land.[20]

He based his draft substantially on the Northern Land Council's final submission drafted by F.G. Brennan QC (now Justice Brennan) which included a specially commissioned paper by R.N. Berndt on the 'Relationship of Aborigines to their land, with reference also to sacred and/or traditional sites'. Berndt submitted that the personal and spiritual linkage of Aborigines with land is expressed through membership of what can be called a local descent group.[21] The local descent group would be defined most typically in relation to patrilineal descent:

> A local descent group is associated with a stretch of country within which special sites are located. Possession of that country is validated through mytho-ritual statements. The sites within it contain the deathless and eternal spiritual manifestations of the mythic characters: just as the members of such a unit are living manifestations of those land-based (spiritually speaking) mystic beings.[22]

Australia's most experienced land commissioner, Justice Toohey, conducted a review of the *Land Rights Act* in 1983. At that stage, there had been fifteen land claim reports published each of which

had discussed the elements of the definition of Aboriginal owners. The concept had not been confined to an exogamous descent group which is patrilineal and whose members exercise a primary spiritual responsibility for a clan estate. A local descent group could be matrilineal or even ambilineal, including managers as well as owners of land. Though there was a good case for broadening the definition, Toohey J. concluded that it had been interpreted in a way that allowed sufficient flexibility while retaining 'the advantage of identifying with some precision those who answer the description'.[23] He recommended that the existing definition of traditional Aboriginal owners remain.[24]

The Daly River (Malak Malak) Land Claim is revealing. In response to the Malak Malak claim to traditional ownership there was a claim by other Aborigines to Kamu country. In his report of field work in 1932, the anthropologist, Professor W.E.H. Stanner reported the presence of members of 11 tribal groups. Seven other tribal groups including the Kamu formerly were in contact with the settlement but, according to Stanner, were either extinct or the few survivors had drifted into the sidings or stations such as Pine Creek, Katherine, and Adelaide River. At the land claim hearing fifty years later, Father John Leary who had re-established the mission at Daly River in 1955 said, 'I have never heard an Aborigine talk about that group. I have some faint recollection of Bill Stanner talking about the group, but was absolutely puzzled as to where they fitted in. I got the impression that they had died out many, many years before.'[25] At the time of the land claim, there was only one elderly member surviving, Mrs Pan Quee, and she had indicated a willingness to pass on her traditional rights to the active claimants of the Malak Malak-Madngele group. In evidence she lamented:

> Kamu country all been finished up. Nobody alive here, nothing. No old men, old men, my old man, nothing - me ...Let him have it. Malak Malak, this country. My country all been finished. I might give him this mob, Malak Malak. But for hunting I can come up here and camp here and go back here like that, you see. I bring all the children and we camp here and go back again. I give him Malak Malak this country now because old men, old men, been die. I can't have it - no good health.[26]

Toohey J. observed, 'Although it may once have been Kamu country, it has for many years been thought of as Kamu and Malak Malak. Once the Kamu died out or were thought to have died out, the situation was more one of surviving co-owners. In my view it does insufficient justice to the evidence to describe the Malak Malak as simply looking after Kamu sites.'[27] In the end, Toohey J. was satisfied that the Malak Malak claimants had common spiritual affiliations to the relevant sites placing them under a primary spiritual responsibility for those sites and that land.

Kamu descendants, mostly resident in Darwin, in recent years have agitated their claim with the Northern Land Council for some entitlement to land in the Daly River area. The local community has been happy to share country by the river bank with these Kamu descendants but they have shown no willingness to share country on which the community is built. It is not a question of spiritual relationship with land, rather a question of power. The local community wants to determine its own living arrangements without interference by persons wishing to be absentee landlords or wishing to displace present occupants so as to reconstitute on their ancestors' country when the last surviving traditional owner had indicated the transfer of the land under tradition to another Aboriginal group. Given the history of dispersal, dispossession, and establishment of missions and stations, many links with country have been severed and not just in favour of migrants and their descendants; often other Aboriginal groups have taken over country with encouragement from church, government and pastoralists. In *Mabo*, Justice Toohey expressed the view that 'alienability itself is a relative concept and there was evidence in at least one of the claims made under the *Land Rights Act* of land being "given" by the few remaining survivors of one group to another group'.[28]

It is an evidentiary matter whether or not there is still a group of Aborigines having traditional claims to land. Western Australia is the state having the largest area of public land including vacant Crown land, national parks, nature conservation reserves and forestry reserves which may still be subject to native title. In 1983-4, Mr Paul Seaman conducted the Aboriginal Land Enquiry in Western Australia. He found the Woodward Report a useful starting point. But he did observe, 'The great majority of people of Aboriginal descent in Western Australia can make the case that they or their forebears were forcibly dispossessed of traditional lands. Many would be unable to obtain any land under a process which demanded proof of Aboriginal tradition'.[29] He found 'a range of interests from traditional relationships based on spiritual, residential, economic and historical factors to contemporary relationships based on association with settlements, pastoral stations and urban areas'.[30] He could see no value in Western Australian conditions in basing the right to claim land upon a definition of traditional owner similar to that contained in the Northern Territory legislation.[31] If Seaman be

right, it will be no easy matter even in remote parts of Western Australia for Aborigines to establish traditional title. In the south-east of the continent and in Tasmania, it will be almost impossible for Aborigines to establish a claim.

5. Native Title Continues

National parks, nature conservation reserves, forestry and marine reserves, defence land, many public purpose reserves, and vacant Crown land, including foreshores between the high and low water marks and the banks and beds of rivers, are areas of land in relation to which there may still be the existence of traditional native title. Where Crown land has not been granted to a third party (such as a church) which has simply been made trustee of the land for the benefit of Aborigines, native title could still continue. A grant of freehold or a lease to another person will be sufficient to extinguish native title. A provision excluding Aborigines from traditional access to and use of national parks may also be sufficient to extinguish native title. However, where there are reservations in a lease allowing continued Aboriginal access there is doubt about the continuation of traditional title. There will be a need to scrutinise various types of exploration licences and even mining leases, especially those relating only to sub-surface minerals, to determine whether the miner has the power to exclude traditional owners from traditional use and occupation of the land.

Four members of the court were of the view that a provision that a lessee 'not in any way obstruct or interfere' with the traditional use of gardens and plantations would be sufficient to extinguish native title. This issue is relevant to pastoral leases in Western Australia, South Australia and Northern Territory where pastoral leases contain reservations of Aboriginal interests. Justice Dawson expressed the view that there had been some pastoral leases in Queensland which had contained clauses reserving to the Aborigines 'free access to the said parcel of land' or to any portion of it including the trees and water which would 'enable them to procure the animals, birds, fish and other foods on which they subsist.'[32] He quoted Henry Reynolds as his source.[33] However, I am unaware of any Queensland pastoral leases containing such clauses of reservation.

In *Mabo*, twenty year leases had oeen granted over some areas of land for the purpose of establishing a sardine factory. There was evidence that the Islanders had been seeking continued and unrestricted entry to these areas but the chief protector of Aborigines had indicated that the Islanders could proceed only for gardening

purposes. Justice Brennan expressed the view that if the leases were validly granted, 'the limited reservations in the special conditions are not sufficient to avoid the consequence that the traditional rights and interests of the Meriam people were extinguished. By granting the lease the Crown purported to confer possessory rights on the lessee and to acquire for itself the reversion expectant on the termination of the lease. The sum of those rights would have left no room for the continued existence of rights and interests derived from Meriam laws and customs'.[34] The test is whether the rights granted to another party and the reservations expressed in any lease leave room for the continued existence of traditional rights and interests. If so, there is no reason to assume the Crown has acquired for itself the reversionary interest freed from the incidents of native title.

6. Pastoral Leases

In the Northern Territory, South Australia and Western Australia there are pastoral leases containing reservations for continued Aboriginal access to pastoral lands. In the Northern Territory, any pastoral lease is subject to a reservation in favour of the Aboriginal inhabitants of the Northern Territory, permitting them to enter and be on the leased land, to take and use the water from the natural waters and springs on the leased land and, subject to any other law in force in the Territory, to take or kill for food or for ceremonial purposes animals *ferae naturae*, and to take for food or ceremonial purposes vegetable matter growing naturally, on the leased land.[35] Since 1978, only Aborigines who are inhabitants of the leased land and those who, in accordance with Aboriginal tradition, are entitled to inhabit the leased land may avail themselves of the benefit of the reservation. But it does not apply to leased land within two kilometres of a homestead. Justice Toohey when reviewing the *Aboriginal Land Rights (Northern Territory) Act* 1976 in 1983 expressed the view that the right to enter and be on the leased land fell short of 'an entitlement to reside or to construct dwellings' but did entitle Aborigines having the benefit of the reservation, to remain on land for any purpose short of residence.[36] Toohey J. said the Northern Territory reservation provided Aborigines with substantial rights of access.[37] The Aboriginal land councils had been critical of the fact that rights of access were not guaranteed by statutory recognition. While seeing force in such arguments, Toohey J. concluded that if 'all pastoral leases contain the appropriate reservation, the same result is achieved'.[38] Though the Northern Territory Crown lands legislation extends the benefit of the

reservation not only to traditional owners but also to Aborigines actually inhabiting the leased land, this extension, of itself, need not work an extinguishment of native title. While native title may be extinguished within two kilometres of a homestead, it arguably exists on all other areas of pastoral leases in the Northern Territory.

South Australian pastoral leases contain a standard form reservation reserving 'to Aboriginal inhabitants of the said state and their descendants full and free access into, upon, over and from the said land except such parts as improvements have been erected upon and in to the springs and surface waters thereon and to make and erect wurlies and other native dwellings and to take and use for food birds and animals *ferae naturae* as if this lease had not been made'. There were moves in 1984 to restrict such broad Aboriginal access to pastoral lands. The government rejected such a proposal and confirmed its policy to 'maintain existing Aboriginal rights without either extension or curtailment thereof'.[39] Once again this reservation leaves room for the continued existence of rights and interests derived from traditional Aboriginal law.

In Western Australia, pastoral leases are subject to the 'right of any person to pass over any such land which may be unenclosed, or enclosed but otherwise unimproved .... on all necessary occasions' and is subject to the further provision 'the Aboriginal natives may at all times enter upon unenclosed and unimproved parts of the land the subject of a pastoral lease to seek their sustenance in their accustomed manner' (s.106(2) of the *Land Act* 1933). The Australian Law Reform Commission opined that, on a liberal interpretation, 'use for ceremonial purposes might perhaps be described as "sustenance"'.[40] During the Seaman Aboriginal Land Enquiry, pastoralists and graziers submitted that such a reservation was an anachronism but Mr. Seaman, rejecting their submission, recommended that Aboriginal groups 'should be able to seek access to pastoral leases by virtue of traditional association with or long association by residents on or use of the land concerned'. He also recommended that they should be able to seek access so as to hunt, fish and forage on public lands.[41] Given that Aboriginal access in Western Australia is now restricted to the seeking of sustenance, traditional rights of access presumably have been limited because the grant of a pastoral lease is at least partially inconsistent with the continuing right to enjoy native title. However, the native title is not completely extinguished. It is extinguished only to the extent of the inconsistency. According to traditional law, traditional owners would be entitled to have access to land for sustenance and other purposes.

Hence, in Western Australia, the right of traditional owners to continued access to pastoral leases may be considered to be a partial continuation of native title.

When pastoral leases in western Australia, Northern Territory, and South Australia have run their term, such lands will, if only for an instant, once again be vacant Crown land but still subject to native title. When consideration is given to the renewal of such leases, it would be necessary to consider also the question of continuing Aboriginal rights to the land.

7. *Mining*

At common law, minerals were owned by the landholder. In all Australian jurisdictions since the nineteenth century, there has been a reservation in all Crown grants whereby the Crown holds title to minerals. Mining legislation nowadays contains general provisions stating that minerals are the property of the Crown. The only exceptions are in relation to land alienated in fee simple by the Crown pursuant to legislation passed last century. For example, in Queensland, the *Mineral Resources Act* 1989 (s.1.9) provides that gold on or below the surface of the land is the property of the Crown. Coal is the property of the Crown except where 'land was alienated by the Crown before 1 March 1910 and the grant of that land did not contain a reservation to the Crown of the property in that coal'. All other minerals are the property of the Crown except minerals on land alienated in fee simple by the Crown pursuant to various provisions of Crown lands legislation passed between 1860 and 1872. Such general provisions, with express exceptions, make it clear that even if native title carried with it the incident of ownership and control of minerals, that incident has been extinguished and native title does not carry with it any ownership or control of minerals other than that granted by mining legislation.

Most mining legislation draws a distinction between public and private land. For a miner to gain access to private land, there will be a need for the owner's consent or a permit to enter. There will also be special provisions for compensation for damage as a result of mining. In recent years, mining legislation or government policy has ensured that similar consent and compensation provisions apply in relation to land in which Aborigines have been granted a statutory title. However, in future, miners seeking access even to vacant Crown land will have to enquire whether or not there are traditional owners of the land continuing to enjoy native title. If so, those native title holders will be entitled to be treated as owners for the purpose

of mining legislation. If there were to be an interference with the traditional owners' traditional use of the country, compensation would have to be paid. Consent provisions, consistent with those applying to ordinary freeholders and leaseholders, would have to apply. Otherwise, there would be the prospect of litigation pursuant to s.10 of the *Racial Discrimination Act* 1975.

There are no grounds for Western Mining Chairman Mr. Hugh Morgan's assertion that 'the immediate consequence (of the *Mabo* decision) is that all exploration leases are less secure today than they were prior to 3 June'.[42] However, in future, miners seeking exploration leases will have to be more attentive to the traditional owners, if any, of vacant Crown land.

8. Statutory Aboriginal Title

The plaintiffs in *Mabo* had sought an injunction against the State of Queensland proceeding with the issue of a deed of grant in trust over their traditional land. When such deeds have been issued, the land in question has previously been Aboriginal reserve. The Governor in Council has de-gazetted the reserve, rendering the land vacant Crown land. The Governor in Council has then issued a deed of grant of an estate in fee simple to an elected community council representing the Aboriginal inhabitants of the area, that council being trustee of the land for the Aboriginal or Islander inhabitants of the State. The deed of grant is then revocable only by Act of Parliament. The mere reservation of land 'for the use or benefit of the Aboriginal inhabitants' does not effect an extinguishment of native title. In fact, it guarantees undisturbed enjoyment of the land by such inhabitants. The appointment of trustees to manage a reserve similarly does not work an extinguishment. As Justice Brennan said, 'There was no disposition of the reserve lands which was inconsistent with the continued right of the Meriam people to enjoy their native title'.[43] Justices Deane and Gaudron said, 'the placing of the lands of the Murray Islands under the control of trustees must likewise be construed as intended to safeguard rather than extinguish those existing rights'.[44] Justice Brennan said, 'to appoint trustees to control a reserve does not confer on the trustees a power to interfere with the rights and interests in land possessed by indigenous inhabitants under a native title'. He further stated, 'if the creation of a reserve of land for Aboriginal inhabitants of the State who have no other rights or interest in that land confers a right to use that land, the right of user is necessarily subordinate to the right of user consisting in legal rights and interests conferred by native title. Of course, a native title which confers a mere usufruct may leave room for other persons to use the land either contemporaneously or from time to time'.[45]

The Court made no determination whether or not the issue of a deed of grant in trust would have had the effect of extinguishing the rights of the Murray Islanders under common law native title. Provided the beneficiaries of such a grant in trust were the Aboriginal inhabitants generally, or a class of persons including all traditional owners, the statutory title, rather than being inconsistent with the continuation of native title, could act as a protective husk around such title provided the traditional owners with a greater capacity to utilise the land in contemporary circumstances in full accordance with traditional law. Statutory Aboriginal land titles would be inconsistent with native title only when the beneficiaries were a class of persons excluding traditional owners and including persons having no interest in the land according to Aboriginal tradition.

Under the *Aboriginal Land Act* 1991 (Qld), those enjoying highest priority to a claim are groups claiming on the ground of traditional affiliation. The land tribunal in such a case has to be satisfied that the members of the group 'have a common connection with the land based on spiritual and other associations with, rights in relation to, and responsibilities for, the land under Aboriginal tradition'.[46] In making such a determination, the tribunal has to consult with and consider the views of the persons recognised under Aboriginal tradition as the elders of the group of Aboriginal people. Aboriginal tradition is defined as 'the body of tradition, observances, customs and beliefs of Aboriginal people generally or of a particular group of Aboriginal people, and includes any such traditions, observances, customs and beliefs relating to particular persons, areas, objects or relationships'.[47]

The statutory land claims process, properly administered, need not be inconsistent with continued recognition of native title. No deed of grant issued pursuant to the *Aboriginal Land Rights (Northern Territory) Act* 1976 could conceivably be inconsistent with the continuation of native title because s.71(1) states: 'Subject to this section, an Aboriginal or a group of Aboriginals is entitled to enter upon Aboriginal land and use or occupy that land to the extent that entry, occupation or use is in accordance with Aboriginal tradition governing the right of that Aboriginal or group of Aboriginals with respect to that land, whether or not those rights are qualified as to place, time, circumstances, purpose, permission or any other factor'.

However, a question may arise in relation to land which a land trust has leased to a Government, a public authority, or a mission.[48]

In Queensland, the trustees of transferred land have a wider power to grant leases not only to Aborigines particularly concerned with the land or to the Crown, but also to other persons. Presumably, the grant of a lease to a person who has no rights to the land under Aboriginal tradition would extinguish native title in relation to that land. It may even be argued that the vesting of such a leasing power in the trustees is sufficient to extinguish native title even though the power has not been exercised. Trustees may choose to place a reservation in any lease allowing continued traditional Aboriginal use of land. Alternatively, the Queensland Parliament could consider a provision similar to s.71 of the Commonwealth land rights legislation.

9. Immediate Enjoyment of Native Title

It will not be necessary for Aboriginal groups claiming native title to obtain a court declaration to such effect. Enjoying those rights, they can simply assert them here and now. It will then be for the State to challenge the existence of those rights in legal proceedings. Thus, it will be advisable for State jurisdictions to set up a lands claims process to regularise Aboriginal claims and to provide adequate statutory recognition of the proposed title.

Given that native title exists, traditional owners asserting their rights ought now be eligible for immediate Aboriginal and Torres Strait Islander Commission (ATSIC) funding for the building of out-stations and the provision of services. Once such construction commences, there may be conflicts between States and traditional owners about the existence of such rights.

10. Revision of Statutes

There are many statutes, even those beneficial to Aboriginal interests such as the *Aboriginal Land Act* 1991 (Qld), which have been drafted on the presupposition that there is no such thing as native land title. There will be a need to revise various statutory provisions such as s.2.13(1) of the Queensland Act which permits the Crown to gazette land available for claim, provided it is 'land in which no person other than the Crown has an interest'. This would preclude gazettal of land subject to native title, the prime land intended for claim under the statutory scheme.

There are other statutes which confer special rights on land owners and which define 'owner' but with no reference to those holding

[illegible] Resources Act 1989 (Qld) from [illegible] *Discrimination Act* 1975 such that traditional owners will enjoy the rights and incidents of ownership in their dealings with miners as would any other owner as defined in s.1.8.9.

The mining legislation in each jurisdiction will have to grant traditional owners the same or equal recourse to compensation and consultation relating to mining on their land.

11. Extinguishment through Change of Lifestyle

The court has ruled that native title to particular land, its incidents and the persons entitled to land are ascertained 'according to the laws and customs of the indigenous people who, by those laws and customs, have a connection with the land'.[49] It is immaterial that the laws and customs have undergone change 'provided the general nature of the connection between the indigenous people and the land remains'. According to three of the judges, native title can be extinguished if the clan or group, by ceasing to acknowledge its laws and to observe its customs, loses its connection with the land.[50] Justices Deane and Gaudron, having observed that traditional law or custom is not frozen, said, 'Provided any changes do not diminish or extinguish the relationship between a particular tribe or other group and particular land, subsequent developments or variations do not extinguish the title in relation to that land'.[51] They were of the view 'that, at least where the relevant tribe or group continues to occupy or use the land', the members would not lose their rights through 'the abandonment of traditional customs and ways'. Justice Toohey said, 'so long as occupation by a traditional society is established now and at the time of annexation, traditional rights exist. An indigenous society cannot, as it were, surrender its rights by modifying its way of life'.[52]

12. International Law

The common law has now recognised traditional native title, keeping pace with developments in international law, particularly those covenants recognising human rights. It will be interesting to see whether developments in international law and Commonwealth statutes implementing international obligations such as the *Sex Discrimination Act* militate against continuation of traditional native title under Aboriginal law when, for example, such law precludes equal access in all circumstances by women to succession in title.

Though the Commonwealth *Sex Discrimination Act* does not preclude sex discrimination 'in relation to a disposal of an estate or interest in land by will or by way of gift', there may be situations when a traditional owner or group of traditional owners want to dispose of an interest in land to other members of their group, including women. Other members of the group may claim that traditional law forbids the vesting of such title in a group including women. Such attempts to uphold the traditional law may be contrary to s.24(1) of the Commonwealth legislation. Such discrimination may pass muster under s.80 of the *Anti-Discrimination Act* 1991 (Qld) which provides:

> It is not unlawful to discriminate on the basis of sex, age, race or religion .... if the discrimination is in accordance with the culture concerned or the doctrine of the religion concerned, and is necessary to avoid offending the cultural or religious sensitivities of people of the culture or religion.

13. The Symbolism of Native Title

Even though native title provides less security and fewer rights than a statutory title which grants inalienable freehold (ie. title with all the incidents of freehold except that the owners cannot sell it or give it away and the Crown cannot extinguish title except with specific statutory approval), there are many Aborigines and Torres Strait Islanders attracted by the symbolism of native title as recognised by the High Court. For them, it is important that the title is not granted or given by the Crown but is recognised by the courts as having preceded colonisation and as having survived the assertion of sovereignty by foreigners. This symbolism could be forfeited if the Crown were to insist on the surrender or extinguishment of native title prior to the grant of inalienable freehold. A provision such as s.3.06(1) of the *Aboriginal Land Act* 1991 (Qld) could avoid symbolic extinguishment:

> If transferable land was, immediately before becoming Aboriginal land under this Division, subject to an interest (other than an interest in favour of the Crown), the interest continues in force.

14. Fiduciary Duty

Inevitably, Aboriginal groups will attempt to expand the ideas espoused by Justice Toohey relating to possessory title and the Crown's fiduciary obligation towards indigenous people. Justice Toohey was the only one of the majority to find that extinguishment of native title 'would involve a breach of a fiduciary obligation owed by the Crown to the Meriam people'.[53] Justice Brennan showed no

interest in any expansive role for an ongoing fiduciary duty. He postulated only one restrictive case: 'If native title were surrendered to the Crown in expectation of a grant of a tenure to the indigenous title holders, there may be a fiduciary duty on the Crown to exercise its discretionary power to grant a tenure in land so as to satisfy the expectation'.[54] Justices Deane and Gaudron were a little more expansive, stating: 'The circumstances of a case may be such that, in a modern context the appropriate form of relief is the imposition of a remedial constructive trust framed to reflect the incidents and limitations of the rights under the common law native title'.[55] However, this is a far cry from finding an ongoing fiduciary duty owed by the Crown to all traditional landowners.

C. A Guide to Reading the Judgments

Within the majority of six, Justice Toohey explored more widely the submissions put for the plaintiffs. His remarks about the Crown's fiduciary duty to traditional owners will command great support from Aboriginal groups. But there is little support for his view in the other judgments. On most issues, especially compensation, Justice Brennan's judgment is more restrictive than the joint Deane/Gaudron and Toohey judgments. His judgment on such questions carries support from Chief Justice Mason, Justice McHugh and Justice Dawson who was in dissent on the primary question of the recognition of native title. On most ambiguous questions, the Brennan judgment can be relied upon as the minimal exposition of Aboriginal rights enjoying majority support from the present High Court. For this reason, Justice Brennan's own nine point summary is a useful exposition of the limits of native land title:[56]

> 1. The Crown's acquisition of sovereignty over the several parts of Australia cannot be challenged in an Australian municipal court.
> 2. On acquisition of sovereignty over a particular part of Australia, the Crown acquired a radical title to the land in that part.
> 3. Native title to land survived the Crown's acquisition of sovereignty and radical title. The rights and privileges conferred by native title were unaffected by the Crown's acquisition of radical title but the acquisition of sovereignty exposed native title to extinguishment by a valid exercise of sovereign power inconsistent with the continued right to enjoy native title.
> 4. Where the Crown has validly alienated land by granting an interest that is wholly or partially inconsistent with a continuing right to enjoy native title, native title is extinguished to the extent of the inconsistency. Thus native title has been extinguished by grants of estates of freehold or of

leases but not necessarily by the grant of lessor interests (e.g., authorities to prospect for minerals).

5. Where the Crown has validly and effectively appropriated land to itself and the appropriation is wholly or partially inconsistent with a continuing right to enjoy native title, native title is extinguished to the extent of the inconsistency. Thus native title has been extinguished to parcels of the waste lands of the Crown that have been validly appropriated for use (whether by dedication, setting aside, reservation or other valid means) and used for roads, railways, post offices and other permanent public works which preclude the continuing concurrent enjoyment of native title. Native title continues where the waste lands of the Crown have not been so appropriated or used or where the appropriation and use is consistent with the continuing concurrent enjoyment of native title over the land (eg, land set aside as a national park).

6. Native title to particular land (whether classified by the common law as proprietary, usufructuary or otherwise), its incidents and the persons entitled thereto are ascertained according to the laws and customs of the indigenous people who, by those laws and customs, have a connection with the land. It is immaterial that the laws and customs have undergone some change since the Crown acquired sovereignty provided the general nature of the connection between the indigenous people and the land remains. Membership of the indigenous people depends on biological descent from the indigenous people and on mutual recognition of a particular person's membership by that person and by the elders or other persons enjoying traditional authority among those people.

7. Native title to an area of land which a clan or group is entitled to enjoy under the laws and customs of an indigenous people is extinguished if the clan or group, by ceasing to acknowledge those laws, and (so far as practicable) observe those customs, loses its connection with the land or on the death of the last of the members of the group or clan.

8. Native title over any parcel of land can be surrendered to the Crown voluntarily by all those clans or groups who, by the traditional laws and customs of the indigenous people, have a relevant connection with the land but the rights and privileges conferred by native title are otherwise inalienable to persons who are not members of the indigenous people to whom alienation is permitted by the traditional laws and customs.

9. If native title to any parcel of the waste lands of the Crown is extinguished, the Crown becomes the absolute beneficial owner.

D. Conclusion

Increasingly, developers, pastoralists and miners will have to deal with Aborigines on an equal footing. Governments will have to treat with them to effect workable compromises for land use according to Aboriginal law and the common law.

The High Court has removed the legal basis for the continued dispossession of Aborigines and Islanders retaining traditional affiliations with their lands. The Court did not undo the injustices of the past. It has set the foundations for just land dealings in the future. Three of the five applicants died before determination of their claim. Their victory has changed the law of the land.

It will be appreciated that *Mabo* raises just as many questions as it answers. It is imperative that all State jurisdictions now set up a statutory land claims procedure and revise their legislation and practices to ensure that the holders of native title enjoy their property rights 'to the same extent' as holders of property rights of any other race, colour or national or ethnic origin. At the very least, each jurisdiction will have to provide a system for notification and registration of traditional title. Otherwise, uncertainty and delay will plague any attempts to negotiate joint land use between miners and pastoralists and those claiming to be traditional owners.

At the 1992 session of the United Nations Working Group on Indigenous Populations, Mr George Mye, MBE, Commissioner for the Torres Strait on the Aboriginal and Torres Strait Islander Commission (ATSIC) said the *Mabo* case 'has not quenched our thirst for unconditional justice. The fire that burns within our people is still alight and our struggle will now be continued from a new and more sturdy political horizon'. He said the High Court's decision 'infused the Aboriginal and Torres Strait Islander people of Australia with a new sense of pride and purpose'. Miss Lois O'Donoghue CBE, AM, chairperson of ATSIC told the Working Group that the landmark decision was 'of great significance and is likely to set a completely new agenda for the national debate on indigenous land rights'. Particularly in the desert areas in Australia, there is now a need for a more considered balance of conflicting claims especially when pastoral leases have run their term and when miners come for the first time exploring other people's country.

Notes

1. *Mabo & anor. v. The State of Queensland & anor.* (1988) 166 C.L.R. 186.
2. (1992) 66 A.L.J.R. 408, 541 (Deane and Gaudron JJ). The case is also reported at (1992) 107 A.L.R. 1.
3. *Id.* 422 (Brennan J., Mason C.J. and McHugh J. concurring).

4. Understandably, some Aborigines and Torres Strait Islanders have found 'native title' a pejorative term, but it is the term which is most commonly used in cases arising from disputes in Africa and the Americas. Brennan J. uses 'native title'; Deane and Gaudron JJ., 'common law native title'; and Toohey J., 'traditional title' which he distinguishes from 'common law Aboriginal title' which he sees as a possessor title acquired on annexation.
5. (1975) 135 C.L.R. 337, 388.
6. (1992) 66 A.L.J.R. 408, 417.
7. (1992) 66 A.L.J.R. 408, 438.
8. (1992) 66 A.L.J.R. 408, 484.
9. Paragraph 9, No. P18 of 1991, High Court of Australia, Registry, Perth Office.
10. M. Mansell, 'The Court gives an inch but takes another mile' (1992) Vol. 2 No. 57 *Aboriginal Law Bulletin* 4,5.
11. Resolution 1514 (XV), s.2, 14 December 1960, GAOR, 15th Sess., Supp. 16, 66.
12. *Id.* s.6.
13. 1975 I.C.J. 12, 33.
14. C. Milner, 'Statement on Behalf of the Australian Delegation,' Working Group on Indigenous Populations, Tenth Session, 24 July 1992, 3.
15. (1992) 66 A.L.J.R. 408, 427.
16. (1992) 66 A.L.J.R. 408, 452.
17. (1992) 66 A.L.J.R. 408, 493.
18. A.E. Woodward, *Aboriginal Land Rights Commission 2nd Report* (Canberra: AGPS, 1974), 2.
19. See sections 50(1)(a) and 3, *Aboriginal Land Rights (Northern Territory) Act* 1976.
20. Woodward, 156-57.
21. Aboriginal Land Rights Commission, Submission by the Northern Land Council, January 1974, 20.
22. *Id.* 21.
23. J. Toohey, *Seven Years On* (Canberra: AGPS, 1984), 38.
24. *Id.* 39.
25. J. Toohey, *Daly River (Malak Malak) Land Claim* (Canberra: AGPS, 1982), 25.
26. *Id.* 27.
27. *Id.* 31.
28. (1992) 66 A.L.J.R. 408, 489.
29. P. Seaman, *The Aboriginal Land Enquiry* vol 1, Sept 1984, 24, Para 3.8.
30. *Id.* 30, para. 3.23.
31. *Id.* 115, para. 7.24.
32. (1992) 66 A.L.J.R. 408, 466.
33. H. Reynolds, *The Law of the Land* (Australia: Penguin, 1987), 144.
34. (1992) 66 A.L.J.R. 408, 436.
35. s.24(2) *Crown Lands Act* (N.T.). See Australian Law Reform Commission, *The Recognition of Aboriginal Customary Laws* (Australia: AGPS, 1986), 154-55.
36. Toohey 1984, 15.
37. *Id.* 14.
38. *Id.* 15.
39. Australian Law Reform Commission, *The Recognition of Aboriginal Customary Laws*, Vol 2, 157.
40. *Id.* 158.
41. P. Seaman, *The Aboriginal Land Enquiry*, Perth 1984, Para 11.11.
42. *News Weekly*, 29 August 1992, 12.
43. (1992) 66 A.L.J.R. 408, 435.
44. (1992) 66 A.L.J.R. 408, 455.
45. (1992) 66 A.L.J.R. 408, 433.
46. s.4.09(1)
47. s.202(3).
48. See ss.19(3) and s.71(2), *Aboriginal Land Rights (NT) Act* 1976.
49. (1992) 66 A.L.J.R. 408, 435, Brennan J. (Mason C.J. and McHugh J. concurring).
50. (1992) 66 A.L.J.R. 408, 435.
51. *Id.* 452.
52. *Id.* 488.
53. *Id.* 494.
54. *Id.* 430.
55. *Id.* 453.
56. *Ibid.*

Mabo and Political Policy-Making by the High Court

Gabriël A. Moens[*]

1. Introduction

In 1990, in his inaugural lecture at the University of Queensland, Professor Kenneth Wiltshire described Australia's record in treating Aborigines as 'a national disgrace' which 'significantly jeopardises our standing in the world community'.[1] Wiltshire cited many ignoble instances of discrimination against Australia's original inhabitants and urged the recognition of Aboriginal rights. On 3 June, 1992, the High Court decided *Mabo v. State of Queensland*.[2] The Court, as if heeding Wiltshire's advice, considered the question of the rights of natives to their ancestral lands and their recognition by the common law.

The main issue in *Mabo* was whether the annexation of the Murray Islands and their incorporation into Queensland in 1879 had extinguished the Islanders' native land title. In a number of previous court decisions, it had been held that annexation effected the extinction of pre-existing native title.[3] These decisions involved, in some form, the application of the *terra nullius* doctrine according to which the acquisition of new lands by the Crown vested their absolute ownership in the Crown. The Crown's absolute ownership thereby precluded another person possessing a proprietary right or interest in the land. Although the *terra nullius* doctrine was initially applied to uninhabited lands, it was gradually extended to inhabited lands populated by natives, who were considered by colonial governments, to have been primitive by European standards.

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In a momentous decision, the High Court held in *Mabo* that, although the Crown's sovereignty over the Murray Islands could not be tested in a court of law since the acquisition of sovereignty is an Act of State, 'the consequences of an acquisition' of sovereignty are open to question as a matter of municipal law.[4] In a six to one decision, the Court opined that acquisition of, or extension of sovereignty to, an inhabited island did not, of itself, extinguish native title. The High Court concluded 'that the common law of this country recognises a form of native title which ... reflects the entitlement of the indigenous inhabitants ... to their traditional lands and that ... the land entitlement of the Murray Islanders in accordance with their laws or customs is preserved, as native title, under the law of Queensland'.[5]

The High Court conceded that extinguishment of native title had been within the power of the Queensland Parliament, at least until the Commonwealth's adoption of the *Racial Discrimination Act* 1975 (Cth). In 1985, the Queensland parliament adopted the *Queensland Coast Islands Declaratory Act* 1985 (Qld) which aimed at extinguishing, retrospectively, any native land rights which might have survived annexation in 1879. This law, to the extent that it purported to extinguish the Islanders' native title, was declared by the High Court, in the earlier *Mabo* decision, to be inoperative under s.109 of the Commonwealth Constitution because it was inconsistent with the *Racial Discrimination Act* 1975 (Cth).[6]

The lengthy opinions of the judges in *Mabo* purport to concentrate on a legal analysis of the relevant common law. The Court's decision in favour of the Murray Islanders was, however, not based on a mechanical consideration and application of common law precedent. Instead, the inquiry involved consideration of the novel question whether the common law could validly be based on, and supported by, premises which are *now* regarded as discriminatory both by the international community and Australians. As will be argued in this essay, a recurring theme which permeates the opinions of the judges is that the dispossession which followed the annexation of the Murray Islands is a sordid example of discrimination which blatantly violates values embraced by the civilised world. This essay, in focussing on this underlying theme, seeks to demonstrate that the Court's decision, while it may command moral respect, involves a revisionist view of the applicable common law and constitutes an example of political, as opposed to judicial, policy-making.

In this essay, I am not questioning the political and social outcomes or the moral justification of the *Mabo* decision. Rather, the

object of the essay is to explain my concern that the judicial reasoning which the Court followed in reaching its decision, may have profound negative implications for the constitutional position of the judiciary and, indeed, for the administration of the law of the land. My concern is based on two aspects of the judicial reasoning. Firstly, in my view, the majority departed from the traditional common law approach of responding cautiously to changes in community values and attitudes. In overturning long standing precedents, the majority acted on insufficient evidence of current community attitudes to the problem at hand, taking their cues from international treaties ratified or accepted by Australia's political leaders. Secondly, in reversing long standing precedents, the Court retrospectively altered legal relations established by those precedents, thereby potentially defeating legitimate expectations founded on them.

2. A Question of Discrimination

The colonial authorities justified the dispossession of the natives' rights on the ground that, in accordance with the common law, full legal and beneficial ownership of acquired lands vested in the Crown. The continuing validity of this proposition was examined in every opinion in *Mabo*.

Brennan J.

In an attempt to answer the question whether the common law recognised the existence of native rights and interests in land, Brennan J. revisited the concept of *terra nullius*. He said:

> If the international law notion that inhabited land may be classified as terra nullius no longer commands general support, the doctrines of the common law which depend on the notion that native peoples may be 'so low in the scale of social organisation' that it is 'idle to impute to such people some shadow of the rights known to our law' ... can hardly be retained. If it were permissible in past centuries to keep the common law in step with international law, it is imperative in today's world that the common law should neither be nor be seen to be frozen in an age of racial discrimination.

The doctrine of *terra nullius* is largely discredited with regard to inhabited islands. In fact, the doctrine has been controversial for a long time. Even Blackstone exhorted his readers to consider whether the *terra nullius* doctrine, when applied to 'countries already peopled' is 'consonant to nature, to reason, or to christianity'.[7] The

doctrine's demise is probably due to our present-day understanding that an inhabited island cannot, for the purposes of legal acquisition, be treated as an uninhabited island simply because its indigenous population is 'primitive' by European standards. Brennan J. implicitly indicated that the testing of the customs of indigenous peoples in the light of European standards was a particularly odious form of ethnocentrism based on the presumed or alleged superiority of European culture. Indeed, as Brennan J.'s statement indicated, he concluded that common law rules which, like the *terra nullius* doctrine, were based on the same discredited notion of ethnocentrism, should equally be discarded.

By implication at least, Brennan J. concedes that the means by which indigenous peoples were subjugated by the Crown were a fiction predicated within the purview of a 'policy which has no place in the contemporary law of this country'.[8] For him the common law must be compatible with progressive, non-discriminatory developments in international law and practice. In other words, the common law, if it gives credence to past discriminatory practices, should be changed. He remarked:

> Whatever the justification advanced in earlier days for refusing to recognise the rights and interests in land of the indigenous inhabitants of settled colonies, an unjust and discriminatory doctrine of that kind can no longer be accepted. The expectations of the international community accord in this respect with the contemporary values of the Australian people. The opening up of international remedies to individuals pursuant to Australia's accession to the Optional Protocol to the International Covenant on Civil and Political Rights ... brings to bear on the common law the powerful influence of the Covenant and the international standards it imports ... A common law doctrine founded on unjust discrimination in the enjoyment of civil and political rights demands reconsideration.[9]

Brennan J. advocates a modification to the relevant Australian common law because the non-recognition, by European colonial authorities, of native land title is *now* regarded as an odious form of discrimination by the international community. His Honour's reasoning may be morally laudable. It involves, however, a dubious proposition, namely, if a practice which was acceptable in the context of 19th century mores is *now* found to be reprehensible, then, the present value system of the High Court as influenced by international covenants must prevail over such earlier practice. Thus, if the common law is discriminatory in that, for example, it is based on past practices *now* regarded as morally obnoxious, then, the

common law must be modified to expunge such practices from the legal landscape.

There are problems associated with Brennan J.'s reasoning. It is inappropriate to characterise non-recognition of native title as discriminatory simply because it is, in the light of contemporary knowledge, development and international mores, reprehensible. Certainly, much of the colonial actions and statements would be unacceptable and impracticable today, but given their contemporary history, colonialists may have considered themselves as enlightened. In his judgment, Brennan J. advocates the replacement of one relative value system for another. Its replacement will surely be superseded in the fullness of time and not necessarily, by a set of values which are morally superior. Brennan J.'s statement resolves itself into the assertion that the common law is obsolete, outmoded and no longer valid if it embodies practices which are *now* viewed by the international community as discriminatory. Clearly, Brennan J.'s judgment signifies that the international community's mores and moral dictates may substitute for those in Australian common law. While there may be difficulty in ascertaining the mores of the international community and their relevance to Australia, his Honour's statement carries with it the corollary that the common law, itself, has the necessary elasticity to reject outmoded authority and substitute appropriate prescriptions.

The common law, by definition, responds to the aspirations and expectations of the Australian people. Thus, the common law consists of a constantly changing and evolving set of rules which is moulded by the values, aspirations and expectations of the community. Typically, changes in the common law are gradual and incremental in nature rather than radical. On this understanding of the common law, court decisions are merely declaratory of the common law rules which evolve following changes in community values. Brennan J.'s confident assertion that the non-recognition of native rights and interests in land is an 'unjust and discriminatory doctrine'[10] which can no longer be accepted, needs to be tested in the light of this traditional understanding of the common law.

It is clear that Brennan J. regards the dispossession of the indigenous Meriam people as a lengthy episode of discrimination by the colonial authorities. His Honour describes the 19th century as 'an age of racial discrimination'[11] the values of which have been decisively repudiated by the international community. According to Brennan J., it is imperative that the common law keeps in step with international mores and expectations. He surmises that the 'expectations of the international community accord ... with the contemporary values of the Australian people'.[12] Thus, his Honour's argument is based on the unarticulated assumption that the values of the Australian people (however defined) must and do accord with the expectations of the international community. It is at this point that Brennan J.'s argument loses much of its force. Indeed, in assuming that the contemporary values of the Australian people accord with the expectations of the international community, his Honour conveys the impression that the common law, as declared by him, is merely an appropriate and desirable response to changes occurring in the Australian community. The common law certainly responds to the changing values of the people, but, to the extent that the changed nature of these values has not been established satisfactorily (and is, therefore, posited rather than established), Brennan J.'s pronouncement on the applicable common law is based more on his Honour's own preferred values rather than on the real acceptance by the Australian people of these values. More importantly, for that reason it is possible to say that Brennan J.'s reasoning in *Mabo* indicates that his judgment is, in essence, a political decision and that the Meriam peoples' claim was one primarily based in the political arena.

Brennan J. refers in his opinion to Australia's accession to the Optional Protocol to the International Covenant on Civil and Political Rights and the existence, in international law, of universal human rights. The importance of this reference lies in the fact that the acceptance, by Australia, of international conventions embodying universal human rights, may be regarded by legal commentators as sufficient proof of the existence of the changed values of the Australian people which, in turn, would justify an adjustment to the common law. Thus Brennan J.'s judgment conveys the message that, somehow, the common law is affected by Australia's ratification of, or accession to, these international human rights conventions. Certainly, Australia's ratification of international documents may result, over time, in a noticeable change in the values and expectations of the Australian people, thereby justifying an adjustment to the common law. But, the mere acceptance, by Australia, of these international documents, by itself, does not guarantee any changes in the community's values, aspirations and expectations.

In the light of these comments, it is fair to suggest that Brennan J.'s judgment at its crux is a political statement clothed in the language of the common law. It reflects no more than that which

Brennan J. adjudges to be his and contemporary Australian society's values. The substitution for one set of values (19th century colonial) of another contemporary set (contemporary and relevant) is effected by the employment of judicial power as a political policy-making tool. Such use of judicial power opens (but does not resolve) the profound related debate into the nature and purpose of the judicial function in modern Australian society. Brennan J.'s minute exposition of the common law position taken with respect to the recognition by the Crown of native or indigenous peoples' interests in land, which occupies most of his Honour's judgment, tends to lull the reader into the false belief that this matter is indeed one which can be adequately dealt with in terms of legal principle. As already observed, Brennan J.'s rejection of the rigidity of the common law's attitude to the recognition of the rights of native peoples is substantially influenced by the international instruments to which the learned judge refers. By implication at least, his Honour accepts that political policy, rather than law, is the determinant in this matter.

His Honour's treatment of the concept of 'common law' sits uneasily with his statement, made in a recent address, that 'radical changes must be mandated by substantial non-ephemeral shifts in community values or by palpable defects in existing legal doctrine'.[13] His statement implies that the role of common law judges is limited to the identification, articulation or declaration of common law which responds to changing values of the Australian people.

Deane and Gaudron JJ.

The concern with discrimination is also apparent in the judgment of Deane and Gaudron JJ. But, rather than considering the relevant common law rule as discriminatory because of its failure to come to grips with contemporary international mores, their Honours make the bold assertion that the 'strong assumption of the common law was that interests in property which existed under native law or customs were not obliterated by the Act of State establishing a new British Colony but were preserved and protected by the domestic law of the Colony after its establishment'.[14] This statement is surprising in view of the fact that the authorities adverted to by the judges themselves do not at all sing with one voice about the preservation of native rights in the terms contended for by them.[15] The relevant jurisprudence clearly points to the diversity of the judicial approaches to these issues in common law systems in the 19th and 20th centuries. However, their Honours rejected that restrictive and narrow line of common law authority relating to the survival of, and respect for, pre-existing native rights which was predicated on notions of racial, societal and military superiority. In particular, Deane and Gaudron JJ. reject 'any proposition to the effect that the common law native title recognised by the law of a British colony was no more than a permissive occupancy which the Crown was lawfully entitled to revoke or terminate at any time regardless of the wishes of those living on the land or using it for their traditional purposes'.[16] For them, there is no longer unconditional recognition of all colonial acts which are inconsistent with pre-existing native rights to land.

The common law referred to by their Honours is discussed by them in the light of the principle to be derived from *Adeyinka Oyekan v. Musendiku Adele*,[17] where it was stated by Lord Denning, speaking for the Privy Council, that the 'courts will assume that the British Crown intends that the rights of property of the inhabitants are to be fully respected'.[18] According to Deane and Gaudron JJ., this guiding principle should be accepted as a correct general statement of the common law because it 'accords with fundamental notions of justice'.[19] It may be argued that this statement is no more than a value judgment made by their Honours as to what is, in contemporary Australia, morally appropriate or acceptable. The views expressed in their judgment may be politically commendable, but whether they are legally tenable is another question. As with the implications of Brennan J.'s propositions, these relative values may be supplanted by others with the effluxion of time. Deane and Gaudron JJ. seek to bolster the elevation of their value judgment to a rule of law on the ground that it is necessary to right past wrongs.[20] In seeking to right the wrongs of the past, Deane and Gaudron JJ. reject the applicable common law rule upon a basis which is itself no more than a bare assertion of political policy contrary to English and Australian precedent.

The judges, toward the end of their judgment, state that the propositions 'that the continent was unoccupied for legal purposes and that the unqualified legal and beneficial ownership of all the lands .. vested in the Crown'[21] can no longer be accepted *because* of the dispossession of Australian Aborigines. Thus, the association between these two propositions, coupled with the fact of dispossession precludes the two propositions from 'acquiring the legitimacy which their acceptance as a basis of the real property law of this country for more than a hundred and fifty years would otherwise impart'.[22] Thus like Brennan J., Deane and Gaudron JJ.,

in essence, effected a political solution to a political problem through the guise of legal analysis. Their Honours implicitly understood the issue in *Mabo* to revolve around political questions even though they expressed their rationale in terms of language of the common law with a fundamentally revised view of past authority.

Toohey J.

Toohey J., in his opinion, notes that the effect of the annexation of the Murray Islands and their incorporation into Queensland in 1879 has to be considered. He squarely faces the proposition that, in a contemporary light, the annexation raises some uncomfortable issues and appears to reject the good intentions of the colonial authorities. In his discussion, his Honour injects his own moral commentary, like that offered by Justices Deane and Gaudron. But, Toohey J. prefers the line of authority which includes *Amodu Tijani*[23] and rejects the reasoning of Blackburn J. in *Milirrpum v. Nabalco Pty Ltd*[24] where it was decided that indigenous peoples have such rights only as were recognised by the Crown.[25] Thus, he provides a legal analysis in support of his conclusion about the recognition of native rights on annexation. Toohey J. approves of the more recent North American authority which recognises and jealously protects native rights when he says that 'traditional title has a common law existence because the common law recognises the survival of traditional interests and operates to protect them'.[26] The fact that earlier Commonwealth authority was not so protective emphasises the difference in the value systems applied at different times. The rejection of the Commonwealth authorities in favour of recent American authority amounts to an essentially political decision. The discriminatory colonial view that recognition would be accorded those indigenous institutions and concepts which resemble most nearly English societal structures, is rejected by his Honour because of its presumed incompatibility with the common law. He is emphatic that 'apart from a prohibition against discriminatory treatment of some indigenous societies, an inquiry into the kind of society from which rights and duties emanate is irrelevant to the existence of title'.[27]

3. The Dissenting Opinion

Within the legal framework posited by him, the dissenting judge, Dawson J., looks to various statutory and other legal instruments to determine whether native rights were preserved. He concludes that 'none of these Acts ... adverts to any native interests in the reserved land'.[28] In other words, Dawson J. can find no legal response to the Meriam peoples' claim which would enure to their benefit. In fact, on the premise that the law is able to provide a solution to the question before the Court, he found that the reverse was true in that the history of the matter and legal instruments pointed to the extinction of native title.

Dawson J. expressly characterises the main issue in *Mabo* as political in nature:

> There may not be a great deal to be proud of in this history of events. But a dispassionate appraisal of what occurred is essential to the determination of the legal consequences ... The policy which lay behind the legal regime was determined politically and, however insensitive the politics may now seem to have been, a change in view does not of itself mean a change in the law. It requires the implementation of a new policy to do that and that is a matter for government rather than the courts.[29]

Dawson J. is accurate in describing the nature of the Meriam peoples' claim before the High Court. For him, any major policy change is a matter for the political process.

In his dissenting opinion, Dawson J. insisted that the issues raised in *Mabo* require a genuine political solution rather than a political solution cloaked in legal analysis. It may be argued that Dawson J.'s judicial restraint perhaps involves too narrow a conspectus of the proper functions of the courts for contemporary Australian society. In essence, his Honour suggests that judges are mere observers, interpreters and, within these narrow confines, decision-makers. In the final analysis, Dawson J. rebelled against the substitution, by the majority in *Mabo*, of the international community's values for the established common law. In contrast, the majority take a more generous view of the nature and extent of the judicial function. The majority's use of international mores is certainly not the first such invocation by the Australian courts of matters of policy, nor will the result in *Mabo* be *res nova* for the international community. It is not suggested that whenever a sensitive policy matter presents itself to the High Court, judges should abstain or resile from their duty to resolve the matter and, instead, leave it for determination through the political process, particularly where the only political choice involved is a choice between two solutions which are legally tenable. In such a case, policy may justifiably play an important role without exposing the court to the charge of arrogating to itself a political role. The common law abounds with examples where courts have dealt with political issues presented as questions of law. Indeed, as

illustrated by the wealth of diverse authority referred to in *Mabo*, it is well-established in the English common law tradition that the judicial function encapsulates, with facility, the power to determine *political* questions.

4. The Issue of Compensation

The political nature of *Mabo* may also be ascertained by focussing on the disagreement, among the members of the majority, regarding the propriety of paying compensation to the dispossessed Meriam people.

Mason C.J. and McHugh J. agreed with the reasons for the judgment of Brennan J. and the order which he proposed, but they saw fit to note that the 'main difference between those members of the Court who constitute the majority is that ... neither of us nor Brennan J. agrees with the conclusion to be drawn from the judgments of Deane, Toohey and Gaudron JJ. that, at least in the absence of clear and unambiguous statutory provision to the contrary, extinguishment of native title by the Crown by inconsistent grant is wrongful and gives rise to a claim for compensatory damages'.[30]

These sentiments do not accord with the common law if tested in the light of the conclusion reached by the majority. The majority view, as set out above, recognises a form of 'native title which ... is preserved ... under the law of Queensland'.[31] Since this is so, then, in the light of the findings by the majority, the common law would recognise an entitlement to compensatory damages if there has been an infringement of that title. What other conclusion may be reached if the extinguishment of the 'native title' by the Crown is wrongful? As Toohey J. pointed out, the extinguishment of native title without the payment of compensation would offend the *Racial Discrimination Act* 1975 (Cth) which provides for compensation in cases involving violations of that law.[32] It is further submitted that neither Mason C.J. and McHugh J., nor the sole dissentient judge Dawson J., are able to substantiate their non-recognition of a compensatory mechanism.

5. A Case of Political Policy-making?

The majority in *Mabo* overlay their respective judgments with emotive language which has the effect of demonstrating that denial of native title is incompatible with mores and values extant, or to be recognised, in Australia. For example, Deane and Gaudron JJ., commenting on the dispossession of Aborigines of most of their traditional lands, assert that the 'acts and events by which that dispossession in legal theory was carried into practical effect constitute the darkest aspect of the history of this nation' and that the 'nation as a whole must remain diminished unless and until there is an acknowledgment of, and retreat from, those past injustices'.[33]

The majority in *Mabo*, in imputing to the Australian people values which are compatible with international mores and expectations, and in using this imputation as evidence of changed values which necessitate a corresponding change in the common law, overstepped the limits of the judicial function. The function of the courts, when declaring the common law, is to follow cautiously community values and to translate changed values into rules of law. Thus, courts are responsible for an incremental and gradual development of the common law. In *Mabo*, however, the majority arrogated to themselves the role of leaders, with responsibility for discarding common law rules that are not in accord with international mores. In the ultimate analysis, the majority were involved in an exercise of political policy-making, involving a significant alteration to the common law without having established that they are responding to *real* (as opposed to imagined or perceived) changes in the values and aspirations of the Australian people. As argued before, Australia's accession to international human rights conventions does not, by itself, constitute sufficient evidence of the existence of changes in the values and aspirations of the people. At best, the acceptance of these conventions by Australia is evidence of the support given by our political leaders to the rights enshrined in these documents. It is, however, inappropriate to use the political leaders' support as a substitute for genuine popular support, which would be indicative of real changes in the values of the people. The majority, in fashioning a radical alteration of the common law, disregarded the traditional (non-political) role of the High Court.

The Court's decision also clearly changes the law with retrospective effect. It not only resurrects rights which over a long period of time were regarded as extinguished but, as is clear from the opinion of Deane and Gaudron JJ., deems them never to have been extinguished. The opinion that these rights were extinguished was legitimately held by persons who were guided by the authoritative judicial pronouncements on the question. By overruling these pronouncements the Court rendered unlawful, actions predicated upon them. In practical terms, the retrospective modification of the law brought about by the *Mabo* decision may not

cause much prejudice to persons. However, the propriety of this type of judicial reasoning must be evaluated in the light of its potential for defeating legitimate expectations. The prejudice can indeed be substantial in many situtations.

Proponents of judicial activism are likely to argue that retrospective amendment is inevitable in the process of common law development. They may argue that every modification of the law by the courts has the effect of defeating some expectation. But, there is a world of difference between the effects caused by incremental or reactive change to the law, on the one hand, and radical or proactive change to the law, on the other hand. As pointed out before, traditionally, the common law responded to changes in expectations brought about by changes which had already occurred in the community. In other words, the law kept pace with changes in the consensus. Such changes are generally anticipated and their occurrence relied upon by members of the community. On the contrary, radical judicially engineered changes to the law precede consensus, hence, have potential to defeat reasonably held expectations.[34]

6. Conclusion

Mabo poses the issue of the 19th century colonial discrimination for consideration and determines that the colonial legacy is no longer acceptable. In resolving this issue, the High Court - except for Dawson J. - embarked on a political journey, traversing the well-trodden path of the applicability of international mores to the Australian common law. By reason of the manner in which their Honours approached the issue for determination, the High Court revealed its preference for a philosophy of judicial activism.

The High Court, to the extent that it was involved in political policy-making, created a precedent enabling future judges to take into account policy considerations which properly belong to the political process. For that reason too, the importance of *Mabo* cannot be underestimated. But, while one may agree with the result of the judgment, its reasoning calls into question the proper role of judges in this common law jurisdiction. No doubt, the Court was aware of the fact that the issue was charged with profound political consequences, not least because other indigenous groups would see the implications of this judgment as supporting them in their quest for controversial land rights. The decision does tend to give

unqualified support to the proposition that politics are a valid and necessary judicial tool.

As was recently argued by Mark Gregory, the *Mabo* decision 'marks a paradigm shift in the underlying legal and moral assumptions of European colonisation, and should provide an impetus for political resolution whether that be reconciliation, treaty or other outcome'.[35] The judgment in *Mabo* will undoubtedly be welcomed by Professor Wiltshire who forcefully argued for an activist judiciary that casts aside 'blind reliance on precedents, fundamentalist interpretation of clauses, phrases, words and punctuation marks, and to be more accessible, more social, *even more political*'.[36]

Notes

1. K. Wiltshire, *Tenterfield Revisited: Reforming Australia's System of Government for 2001* (St Lucia: University of Queensland Press, 1991), 27.
2. (1992) 66 A.L.J.R. 408.
3. See e.g. *New South Wales v. The Commonwealth* (1975) 135 C.L.R. 337, 438-439; *Attorney-General v. Brown* (1847) 1 Legge 312, 316.
4. (1992) 66 A.L.J.R. 408, 417 per Brennan J.
5. (1992) 66 A.L.J.R. 408, 410 per Mason C.J. and McHugh J.
6. *Mabo v. Queensland* (1988) 166 C.L.R. 186.
7. Sir William Blackstone, *Commentaries on the Laws of England* (14th ed., London: Strachan 1803), Bk. II, Ch.1, 7.
8. (1992) 66 A.L.J.R. 408, 422.
9. *Ibid.*
10. *Ibid.*
11. *Ibid.*
12. *Ibid.*
13. The Hon Sir Gerard Brennan, 'Opening Address (to the JCL Conference)' (1990) 3 *Journal of Contract Law* 85, 86.
14. (1992) 66 A.L.J.R. 408, 440.
15. See, e.g. *Winfat Ltd v. Attorney-General of Hong Kong* (1985) A.C. 733; *Administration of Papua New Guinea v. Daera Guba* (1973) 130 C.L.R. 353; *Milirrpum v. Nabalco Pty Ltd* (1970) 17 F.L.R. 141; *Madzimbamuto v. Lardner-Burke* (1969) 1 A.C. 645; *Adeyinka Oyekan v. Musendiku Adele* (1957) 1 W.L.R. 876; *Sobhuza II v. Miller* (1926) A.C. 518; *Vajesingji Joravarsingji v. Secretary of State for India* (1924) L.R. 51 Ind. App. 357; *Amodu Tijani v. Secretary, Southern Nigeria* (1921) 2 A.C. 399; *In re Southern Rhodesia* (1919) A.C. 211; *Secretary of State in Council of India v. Kamachee Boye Sahaba* (1859) 7 Moo. Ind. App. 476 (19 E.R. 388); *The Case of Tanistry* (1608) Davis 28 (80 E.R. 516).

16. (1992) 66 A.L.J.R. 408, 443.
17. (1957) 1 W.L.R. 876.
18. *Id.* 880.
19. (1992) 66 A.L.J.R. 408, 440.
20. (1992) 66 A.L.J.R. 408, 451.
21. (1992) 66 A.L.J.R. 408, 456.
22. *Ibid.*
23. (1921) 2 A.C. 399.
24. (1970) 17 F.L.R. 141.
25. (1992) 66 A.L.J.R. 408, 448.
26. (1992) 66 A.L.J.R. 408, 486.
27. *Ibid.*
28. (1992) 66 A.L.J.R. 408, 472.
29. (1992) 66 A.L.J.R. 408, 467.
30. (1992) 66 A.L.J.R. 408, 410.
31. *Ibid.*
32. (1992) 66 A.L.J.R. 408, 498.
33. (1992) 66 A.L.J.R. 408, 451.
34. Cf. P. Devlin, 'Judges and Lawmakers' (1976) 39 *Modern Law Review*, 1, 2.
35. M. Gregory, 'Rewriting history 1: *Mabo v. Queensland*: the decision' (1992) 17 *Alternative Law Journal* 157, 161.
36. Wiltshire, 26 (emphasis added).

Mabo and Land Rights - Searching for a Golden Thread

R.B. O'Hair

Whig principles were broadly against Empire. They were certainly against forcible dispossession of native peoples.[1] The Whig agenda of Peace, Retrenchment and Reform, namely, practical pacificism, reduction in the expense of government and extension of the vote as well as the elimination of legal barriers to enterprise, firmly pointed to non-intervention and free trade. Colonies were regarded as a waste of taxpayers' money. Colonies were likely to increase the political pressure for protectionism and favoured entry to British markets. Colonies inclined to the entrenchment of the militarisation of society because of the need for naval protection, for instance.

On the other hand, Empire was very popular with Tories,[2] because, in part, of their traditional military support, with protectionists, because it created an Empire trading block and with those generally in favour of the growth of government and its expenditure. This was a very wide coalition encompassing Tories, radicals and socialists, in particular Sidney and Beatrice Webb.[3]

Owing to the fact that those engaged in an enterprise of their own free will are seldom against it, Whig principles carried little sway in those colonies whose very existence would be questioned by them.[4] Accordingly, New Zealand and Australia were never strongly attached to Peace and Retrenchment and whilst Reform was popular, it was not reform according to the Whig agenda.[5]

South Australia and New Zealand were settled under Wakefield principles, at least in part, which kept land artificially scarce to keep social stratification in society. Needless to say that did not last long

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in an Antipodean setting, but even to this day Adelaide and Christchurch are more 'English' in their feel - no matter how remotely.

The net result of all this is that when Westminster relinquished control of wasteland to local assemblies, the natives could not expect much consideration and certainly no tender mercies.[6]

Within this setting, it is clear that any Westminster Government determination, let alone legislation allowing the dispossession of natives in Australia, was unlikely to be acceptable politically. Accordingly, the common law ended up being the touchstone of native rights. Indeed, this was the time in Britain of the crusade against slavery.[7] In 1836-1837 a select committee of the House of Commons in London recognised the right of the Australian natives to their land. Responsible government came to New South Wales in 1855.

Unfortunately, the most liberal of doctrines to preserve the rights of English settlers, the settled colony doctrine, was pressed in aid of an illiberal result, namely, the destruction of native claims. The settled colony doctrine was to the effect that the settlers entered as free Englishmen and Englishwomen and accordingly carried their customs with them including the common law and the right to a deliberative assembly before the changing of the law or the imposition of taxation could occur and even then (before 1865 Imperial legislation) fundamental freedoms could not be overturned. The doctrine also accepted that there was to be no integration with what cultures were already in the colony.[8]

The alternative was the doctrine applicable to conquered and ceded colonies. It gave dictatorial powers to the Crown. It allowed rule by decree. It was predicated on the acceptance of an existing foreign legal system as the root of rights within the colony, to the extent the Crown did not obliterate those rights either as an Act of State or by legislative decree.[9]

The settled colony doctrine - which is clearly applicable to Australia's current circumstances - is that we brought our English culture and law with us. We did not accept native culture and law. We do not live under it. The problem is, however, that instead of being seen as tests for the relation between Crown and subject, the settled colony doctrine is seen by some as a measure of the relation between Crown and native.

Almost 'by definition', some may say that if it was a settled colony it could not be a colony in which there were inhabitants. This, however, is plainly wrong, because the settled colony doctrine

related to the internal structure of the colony - its very 'Englishness' - as opposed to the justice of native claims. Marshall C.J. of the Supreme Court of the United States well understood this.[10] However, not even the prestige of his office and his manifest brilliance could stand in the way of Jacksonian democracy's desire to take native lands, as well as break down the strength of the federal restraints on the States which protected contracts and grants from retro-active dispossession.[11]

It would be a grave error to think that rough treatment was simply meted out to natives. Everyone suffered.[12]

Supposedly for the benefit of natives, the settled colony doctrine was used to justify a rule that private individuals could not buy land direct from natives, but had to proceed by Crown grant. This idea was founded on one of the least attractive features of English law, the feudal imperative that all grants should be immediately or mediately from the Crown.[13]

In what was to become the United States of America, the feudal rule was not a great problem because colonies had been established by charter or by grant to feudal overlords, for example Lord Penn, each of whom was keen to dispose of land freely.[14] That was their purpose. With the exception of the strange tenure experiments which failed in Georgia, America was as Marx noted,[15] plainly open to settlement.

However, New South Wales started life as a gaol. It was a colony established on a commission basis. It had a governor and the governor was really the governor of a prison. Such authorities could not be expected to be particularly keen on widespread free settlement. The purpose of a prison is coercion and control. The purpose of transportation was to rid England of people who were not wanted. It was to isolate them from civil society - not to let them found a new one.

In the result, free settlement in Eastern Australia was not what the colony was supposed to be about.[16] Accordingly, official Australia felt it ought to be restricted, controlled and monitored and people like John Batman were a problem, not a help. Squatters were also to be discouraged.

In the name of helping natives, it was provided that only the Crown could grant their land to settlers with government supposedly to control the process. However, what really happened was:

(1) a powerful monopsonist - the Crown - was created which ended up paying for no land;

(2) competition between private parties to buy native land was ruled out as no title could be had; and

(3) squatting in defiance of natives and the Crown became *de rigeur* and the natives were not paid for their land, and the land was not improved because there was no security of tenure.

In the result, land policy in New South Wales was a mess and the natives lost out at every turn.

To justify such a mess in terms of any recognisable principles is not legally easy. Any attempt to do so is likely to be unconvincing or not to fit all the facts. We commence trying to work out, contrary to the traditions of the English speaking peoples, the title to a gaol. We end with the situation where the gaolers are trying to hamstring free settlers to the point where the only persons interested in acquiring land would be those who are willing to risk their life's work without proper title to land and without legal ability to bargain with natives (as opposed to shooting them).[17] It is also no wonder that our land system since then saw free selection too late and also unwound 'titles' acquired by possession - for example by squatters - to the prejudice of establishing settled proprietary expectations.[18]

What principles are available to explain such a mess? One approach is simply to say all title is derived from the Crown, so that the squatters and the natives have no title. The net effect of this is that the minute the Crown enters the scene, the natives have no rights.

The problem with this approach is that it runs counter to one of the great strengths of the common law, namely, the respect for private property. By adopting unreconstructed feudalism as the land title system, one really is accepting that a system which rose out of a conquest, the Norman Conquest in 1066, should provide the template for settled colonies. Sir William Blackstone was obviously very uncomfortable with this.[19]

What all this comes down to is that in the native title area, the key to understanding can only be achieved with a scrupulous regard to the facts of each case, as the Crown's land practice, far from being clear and principled, is a confused response to political concerns that are very remote from the core political concerns which animated political debate in London. Simply put - a gaoler does not make a good civil governor.

What is wrong with the High Court judgment in *Mabo v. State of Queensland*[20] is that the majority decision is composed of two approaches which in their generality do not accord with the facts or the law.

The judgment of Sir Daryl Dawson seeks effectively to apply a settled colony doctrine to deny native title when there are no settlers. The facts of *Mabo v. State of Queensland*[21] have been set out very clearly elsewhere in this book. In the result, the natives on an island in Torres Strait peaceably annexed by the Crown and void of white settlement end up owning nothing even as they farm the land they have always farmed since the indefinite past.

The judgment of Sir Gerard Brennan tries to generalise from native title issues applicable to a gaol in 1788 to land in Torres Strait over two hundred years later. Whilst, with respect, no one can fairly doubt Sir Gerard's sincerity, the judgment suggests that the Torres Strait Islanders on Meriam Island have the same title as natives on the mainland would have had, say, near Melbourne. It then goes onto say that if the Crown made a grant to anyone today, it would destroy the native title and the natives are protected from this, possibly, by the anti-discrimination provisions of the *Racial Discrimination Act* 1975 (Cth). Moreover, with respect, the judgment reaches the strange conclusion that native title is sufficiently strong to lead to an implication to read down section 91 of the *Land Act* 1962 (Qld) which prohibits people staying without a Crown grant or licence on Crown lands, but insufficiently strong to stop a grant in the teeth of the native title.

The best way to solving these problems is to stick with the facts, rather than trying to achieve an overarching synthesis. It is to adopt as Sir Owen Dixon said, 'a strict and complete legalism'.[22]

When the natives were first met in New South Wales, they were aliens. They were not wanted as prisoners. They were certainly not wanted as cultural models. What land was wanted was taken from them as an Act of State. The gist of an Act of State is that the Crown, as the government, is entitled to do virtually anything it wants to foreigners living outside the realm or who are a hostile force within the realm. Only subjects have legal rights and duties. Why should a native who does not acknowledge the Crown's right to rule be guilty of treason in revolt? The claim of the east coast by the British Crown was also an Act of State. It is clear, with respect, that Sir Gerard Brennan's theory of ownership of the radical title, the root, rather than a full and true ownership better fits the facts, than some suggestion that the Crown could have been suing people for trespass, who did not even know the Crown had claimed the east coast till almost one hundred years later. Our property law has always emphasised possession. True Crown ownership, the right to

exclude, surely does not correctly reflect either fact or reality in Cape York in 1771 or 1789.

When the natives resisted their dispossession from time to time, then where that was done prior to various dates which would need to be the subject of evidence not conjecture, it was no doubt done by them as alien enemies. Far from being alien friends within the Crown's protection, they were alien enemies. Settlers acting under Crown grants were, in legal analogy, like the Royal Navy officers acting to destroy a Spanish slavers' compound in *Buron v. Denman*,[23] their conduct, if not authorised by the Crown, was ratified by it.

The killing of natives, not British subjects, was plainly enough not murder under English law because it was an Act of State to the extent authorised or ratified by the Crown. Buying real estate from alien enemies was also pointless. The legal system has *no* application to these matters, no matter how appalling or otherwise the behaviour.

Once the Crown unequivocally accepted natives into protection, as by passing various native 'protection' bills, and once the natives accepted their new and diminished lot, it not only became an offence to murder them, but, in principle, their native title should also be recognised. Unfortunately, the supposedly paternalistic legislation 'protecting' natives, destroyed their occupation of land as they were removed to other places. Since that was authorised by legislation, it was not challengeable. Indeed, the probable reason it could even be attempted was the *Colonial Laws Validity Act* 1865 (Imp) which allowed legislation in defiance of common law principles of justice. Moreover, the way that it was felt natives could be rounded up and put on reservations shows that their position was truly that of alien enemies who, under English law, were not entitled to their liberty, because unlike alien friends and subjects, they may not seek *habeas corpus* against the Crown.

In the result, if native land holding remarkably survived all these vicissitudes, then, any attempt to take it by Crown grant or otherwise should give rise to a common law obligation to pay compensation. It seems clear that the legal status of the natives changed from alien enemy to English subjects, as the natives accepted British rule.

Removal to reserves, since it was indirect, may not give rise to compensation if one takes, with respect, the niggardly view of acquisition taken by Sir Gerard Brennan in the *Tasmanian Dams* case,[24] but, in reality, a more generous approach is called for. British subjects ought to be compensated. However, most likely, the bulk of these claims are statute barred, even if the claimants are identifiable. Moreover, the dollar amounts are likely to be small. On Meriam Island, seventy-five dollars, for instance, goes a long way. It may well be that even that view is incorrect, as removal of alien enemies would not appear to give rise to any rights in the alien enemies. On the other hand, it was settled during The Great War that internment implied Crown protection, so, on that view, the title would be protected once the natives were interned.[25]

The net result of the above is that native proprietary rights are recognised and the Crown as monopsonist is an unnecessary excrescence on a native title doctrine.

It should be recognised that the status of particular Australian natives at particular times is a matter for detailed factual assessment. Many individuals, for example, the Native Police, joined white society or at least became 'fellow travellers' with it. They became British subjects or at least alien friends. They became denizens by implicit consent. They enjoyed most, in a legal sense, if not all the rights and were subjected to all the duties of a British subject. Much rests on where the frontier was at any particular time.

If a time line is wanted, then the following can be offered:[26]

(a) In November 1789, Governor Phillip captured two natives and held them in custody effectively to observe them. This is not something one can do to British subjects. It is something one can do to alien enemies, and the seizure would be an Act of State.

(b) 1799 to 1805, there is 'The Black War' with settlers on the Hawkesbury and near Parramatta. One does not war with British subjects. One tries them as criminals.

(c) In 1804, settlers in Van Diemen's Land were authorised by Lieutenant Moore to shoot about fifty natives and the war did not stop until the natives were rounded up and interned.

(d) In August 1824, Governor Brisbane declared martial law in the Bathurst district after seven whites were killed. This was ended in December.

(e) In October 1830, Governor Arthur in Van Diemen's Land failed in his first attempt at interning the natives.

(f) In October 1834, Governor Sterling was backing a reprisal against natives for killing a white.

(g) In 1835, Governor Bourke in Victoria repudiated John Batman's contract with members of the Ditigalla band of a native tribe.

(h) 1838 was a turning point in that whites were successfully convicted, albeit illegally, as in denial of the right against double jeopardy, for killing natives in NSW on the frontier.

(i) 1840, Governor Gipps was stating that natives lost the land until they set up their own government and only the Crown could take their land.

(j) 1860 saw the establishment of a board for the Protection of Aborigines in Victoria. This shows the glimmerings of the natives becoming part of white culture, but in 1861, whites and natives were still fighting it out as warriors in Queensland. The frontier had shifted.

One thing is clear, the natives on Meriam Island, in 1878, were not alien enemies or alien friends, they were British subjects immediately they accepted protection from the Crown. They were peaceful. Their land rights were and are those of British subjects. However, this is not readily seen as the case, in say, the Hawkesbury River situation in 1799 to 1805.

Moreover, whilst a Crown monopsony in a settled colony on land purchased from natives may be tolerated, if they are not British, it makes no sense otherwise. All British subjects are necessarily equal before the law. Why should their tenure be non-transferable?

Compensation

At day's end, where does this leave compensation issues? The most attractive judgment in *Mabo* is that of Toohey J. His Honour also decides the least of all the judges and neither seeks to condemn, nor justify Australia's history.

Toohey J. says that in the context of the *Mabo* case, compensation is owing where native land has been granted by the Crown to others, subject only to the relevant *Limitation Act*. The further caveat is needed that it is subject to the Crown's not having extinguished the title by Act of State, before the natives became alien friends or British subjects, but in fairness to Toohey J, that was not an issue in *Mabo*, because the Islanders readily accepted the practical effects of British rule. It was wholly a friendly transaction.

Moreover, Toohey J. does not rule out fee simple title for the Islanders, albeit His Honour does hold there is definitely native title. His Honour also leaves open the alienability point. *Mabo* seems to have definitely ruled out alienability for native title land and the grant of fees simple.

Unfortunately, the best result consistent with legal principle and history is now, seemingly, out of reach. It is simply to assimilate the title to all other titles in the State and hold it to be a fee simple. The plurality opinion, with respect, in retaining restrictions on alienability and a requirement of continued adherence to native customs means that Australian law still continues to bifurcate society into black and white. Why should people on Meriam Island not be able to sell up and get out, simply because of the colour of their skin? If these people could sell their land, they may one day get enough for it to put their sons or daughters through University and, perhaps, have a High Court judge in the family.

In English law, even a serf's title, copyhold, became transferable to freemen. If the Islands had retained their independence, then, no doubt, the local law, perhaps after soul searching, would have allowed disposal to strangers in some circumstances, at least.

Toohey J. also adopts the position that the implication that the Crown is not to take private property without compensation also applies with full force to native title. This is something the plurality judgment rejects. It says a Crown grant is enough to defeat native title.

In 1992, if any native can show continuous title to his land, he should plainly, with respect, as a British subject be entitled to compensation if the land is granted inconsistently by the Crown. However, in 1788, as an alien enemy, no such native or his descendants could legally expect to be compensated for an Act of State in Sydney, in setting up a gaol for criminals with a garrison. Between 1788 and 1992, there are a range of possibilities.

Unfortunately, the High Court majority persists in giving natives second rate title, which, whilst better than no title, is still, with respect, not good enough. Why should the natives have worse title than ordinary grantees of the society that replaced them? If natives wish to give up their traditional lifestyle, what right has the legal system to block them?

In truth, native land is still open to despoliation for the simple reason that so long as it is second rate title, it is worth very little. Only a full fee simple would afford a fair measure of protection.

Why?

Why has it taken so long to recognise native land rights? Partly, it was the absence of a suitable case. Partly, it was the need for European-Australian opinion to become more disinterested by not being involved in the actual settlement of the country and the taking of it from natives. Partly, also because, as the natives have slowly become familiar to us and have adopted European lifestyles in major cities and towns, it is hard to dismiss them as 'not like us'. Partly,

also because what land there is left to bicker over is not regarded as particularly valuable to the bulk of the population. Even if this view is mistaken, that is how people feel.

Moreover, the fall of Marxism also has helped. Whilst it has been maintained, whether rightly or wrongly, in many quarters over many years that the Communist Party for its own subversive reasons was in favour of hijacking the land rights movement, one thing is clear - such expedient reasons apart - the whole temper of Communism was and is opposed to private property, justifies its seizure without compensation and further in treating technological innovation as some sort of touchstone of social development, regards the seizure of native land as a necessary part of the necessarily bloody road to true Communism.[27] Marx was glad of the efforts of the bourgeoisie. Such 'principles' of history meant many German Communists favoured Hitler, as his chancellorship was regarded as the zenith of monopoly capitalism whose fall would usher in true Communism.[28] It is sad to think that such normally fair minded Fabians as W. Pember Reeves could be so gullible as to endorse 'principles of historical materialism' to build a 'rack' upon which to 'stretch' native land rights to breaking point, in the name of progress. It is very sad stuff. Without the Marxist apology for 'progress', justice would have come earlier and more simply from politics than law.

With the wall down in Berlin and the German people again united, it is time for Australia to be re-united too. Native land, such of it as remains, should be founded on property concepts applicable to all, namely the fee simple. If natives make a lot of money out of that, then, so be it. If natives sell their heritage for a mess of potage - then so be it. It is time that black Australia is accorded equal rights - no less favourable than those enjoyed by white Australia. Any paternalistic justification is also spent. If natives do not understand whites by now, they never will. Indeed, they could be excused for being cynical.

Notes

1. The Hon. W.E. Gladstone spoke against colonising New Zealand in the House of Commons and expressed his fears for the future of the Maoris. See William Pember Reeves, *The Long White Cloud - Ao Tea Roa*, (4th ed., London: George Allen & Unwin, 1950), 140.

2. It is noteworthy that Colonel Wakefield, on behalf of the New Zealand Company, was sent in the ship 'Tory', to establish a settlement in New Zealand against British Government policy. *Id.* 141. However, even colonising New Zealand was too much for that High Tory, the Duke of Wellington. *Id.* 130.
3. *The Long White Cloud* referred to in the above notes is a classic book on colonisation. The Hon. William Pember Reeves was on intimate terms with Sidney and Beatrice Webb and in 1908 was appointed Director of the London School of Economics and Political Science. See introduction by Sir James Hight. *Id.* 5.
4. This was the case with William Pember Reeves, whose father was classified as 'a staunch Liberal of the mid-nineteenth century type'. *Id.* 5. He himself was attracted to Fabianism in particular and socialism in general. *Id.* 6. Reeves, generally acknowledged as a man of great sensitivity, wrote this of the Maoris and the British resident representative in New Zealand, Mr Busby.

   'In 1835 he drew up a federal constitution for the Maori tribes, and induced thirty-five of the northern chiefs to accept it. This comical scheme would have provided a congress, legislation, magistrates, and other machinery of civilization for a race of savages, still plunged in bloodshed and cut asunder by innumerable feuds and tribal divisions.' *Id.* 133.
5. The greatest defender of native treaties and titles was probably Marshall C.J. of the Supreme Court of the United States. He even held in favour of the Cherokee and did not describe their system of government as a joke, unlike Reeves's description of Maoris. Marshall C.J. was also a persistent defender of proprietary rights and freedom of enterprise. As Paul Johnson puts it in his *The Birth of the Modern-World Society 1815-1830*, (London: Weidenfeld & Nicholson, 1991), 857:

   'If one man can be said to have wedded the United States indissolubly to the capitalist system, it was John Marshall (1755-1835), appointed Chief Justice of the Supreme Court in 1801, a post he held for 34 years.'
6. Sir Keith Sinclair, *A History of New Zealand*, (Revised & Enlarged ed., Auckland: Pelican, 1988), 140-145.
7. Johnson, *op. cit.* 323-326.
8. M.J. Detmold, *The Australian Commonwealth - A Fundamental Analysis of Its Constitution*, (Sydney: Law Book Company, 1985), 63.
9. *Sammut v. Strickland* [1938] A.C. 678.
10. *Worcester v. Georgia* 31 U.S. 515 (1832).
11. *Fletcher v. Peck* 6 U.S. 87 (1810).
12. Australian juries throughout the 1820's and the 1830's would not convict a white for killing a black. *The Sydney Morning Herald* wrote: '... let a man or a family be sufficiently **unpopular** with the aristocracy and the prison population of the colony **conjoined** ... and their murder will pass unheeded.' Quoted in Johnson, *op. cit.* 264.

13. Sir Kenneth Roberts-Wray, *Commonwealth and Colonial Law*, (London: Stevens, 1966), 632, attacks the narrow confines of the Crown as feudal monopsonist doctrine.
14. *Worcester v. Georgia* 31 U.S. 515 (1932).
15. K. Marx, *Capital*, (F. Engels, ed., Chicago: 1952), 383.
16. Johnson, 1991, *op. cit.* 258-259.
17. It is noteworthy that Nathanial Lowe of the Fortieth when defended by his counsel, Dr Robert Wardell, was acquitted by a NSW jury after argument that since aborigines were not allies, subjects or enemies of the king of England, they were not human beings and killing them was not murder. Indeed, Wardell quoted a German anthropologist to the effect that Christians had a moral right to kill cannibals including Australian aborigines. Johnson *op. cit.* 263.
18. Marshall C.J. and his court stood against this in the United States. *Fletcher v. Peck* 6 U.S. 87 (1810).
19. Quoted in *Mabo v. Queensland* (1992) 66 A.L.J.R. 408, 418.
20. (1992) 66 A.L.J.R. 408.
21. *Ibid.*
22. Sir Owen Dixon's speech on being sworn in as Chief Justice of Australia, (1952) 85 C.L.R. xi, at xiv.
23. (1848) 2 Exch. 167.
24. *Commonwealth v. Tasmania* (1983) 158 C.L.R. 1.
25. *Schaffenius v. Goldberg* [1916] 1 K.B. 284.
26. B. Fraser, ed., *The Macquarie Book of Events*, (Sydney: Macquarie Library, 1983), 38-40.
27. K. Marx and F. Engels, *Manifesto of the Communist Party*, (Chicago: 1952), 421.
28. A. Bullock, *Hitler and Stalin - Parallel Lives*, (London: Harper-Collins, 1991), 409.

204 Years Of Invisible Title

From The Most Vehement Denial Of A People's Rights To Land To A Most Cautious And Belated Recognition

Noel Pearson•

> The judgment was based on a particular set of circumstances that do not apply to other areas... The Murray Islands had a system ot title to clearly define properties which had been handed down generation to generation before there was any European settlement.[1]
>
> *Wayne Goss, Premier of Queensland*
>
> And there may be other areas of Australia where native title has not been extinguished and where an Aboriginal people, maintaining their identity and their customs, are entitled to enjoy their native title.[2]
>
> *Justice Brennan, High Court of Australia*

1. From moral claim to legal right as the basis of Aboriginal claims to land

The negative result in the now infamous case of *Milirrpum v. Nabalco*[3] *(Milirrpum)* in which Blackburn J. in the Supreme Court of the Northern Territory held that the common law of Australia was not cognisant of native title, gave rise to a political response to Aboriginal needs for land. The Whitlam Labor Government appointed the Woodward Royal Commission[4] which recommended a statutory land rights scheme which was enacted by the Fraser Liberal Government in the form of the *Aboriginal Land Rights (Northern Territory) Act* 1976 (Cth). In the absence of Aboriginal people having rights to land as a matter of law, the Federal Parliament acted to *create* 'rights' under statute and presumed to *grant* land to Aboriginal traditional owners. Therefore Aboriginal 'rights' to land emanated from the same source as the land tenure held by non-Aboriginal Australians, that is by virtue of Crown grant. The indigenous people possessed no inherent or pre-existing legal rights to land. Other

• The Organiser, Cape York Land Council

Parliaments were slower and less willing to act, and despite having constitutional ability to create similar statutory regimes for the States, the Commonwealth was only willing to act in relation to the Territories, principally the Northern Territory.[5] Statutory land rights schemes were eventually established in South Australia,[6] New South Wales[7] and Queensland[8] with varied, and mostly unsatisfactory, results. The recommendations of the Seaman Enquiry[9] for a statutory scheme in Western Australia were not taken up by the State Labor Government which succumbed to an intense opposition campaign from the mining lobby which also saw the Commonwealth's attempt at a National Land Rights scheme come to grief because of a failure of political will.[10] Tasmania has refused to enact even the most modest of measures. The fact that the initiatives taken by governments to date have been woefully inadequate is recognised in the recommendations of the Roval Commission into Aboriginal Deaths in Custody in respect of the land needs of Aboriginal people.[11]

Twenty years after the decision in *Milirrpum*, the High Court has now decreed that the common law of Australia recognises a native title which arises from the traditions and customs of its indigenous people. This title existed at the time of white 'settlement' and survived the acquisition of sovereignty by the Crown. This title has been extinguished in many areas but potentially remains intact in many remote areas of Australia. The entitlement of Aboriginal people to land in Australia is no longer a matter of charitable policy addressing 'land needs'[12] or a form of moral redress, but must now proceed from the basis of rights which are recognised by the imported laws of the white 'settlers'. Australians are now confronted with the fact that land rights in the 1990s, in contrast with the 1970s, now proceed from the basis of indigenous *rights* still held or rights lost without compensation. Clearly statutory schemes such as Queensland's *Aboriginal Land Act* 1991 fall far short of the principles enunciated by the High Court in the *Mabo* case. Furthermore, the Northern Territory *Aboriginal Land Rights Act* 1990 fails to provide for Aboriginal rights in relation to pastoral leases in the Territory, where it is clear that native titles still subsist.[13] What implications will this positive finding by the Court have on future policy in relation to Aboriginal claims to land?

2. The persistence of Legal Darwinism

One of the most remarkable features of the period following the High Court's handing down of its decision in *Mabo* was the contrast between the public pronouncements of politicians and the plain words of members of the Court. Although the majority of the High Court took deliberate steps to abandon the practice of characterising particular societies and cultures according to whether they possessed any recognisable notions of property in land, the Premier of Queensland insisted on perpetuating these outdated remnants of Legal Darwinism, by asserting the 'more nomadic' nature of social organisation on the mainland as a reason why the Court's decision in *Mabo* would have no effect on other Queensland land claims. The Sydney Morning Herald reported:

> They [the Murray Islanders] showed how they had an effective system of title which saw individual lots of land handed down from generation to generation", said Mr Goss, who is a former Aboriginal Legal Service lawyer. "That is very different from the nomadic situation which existed on the mainland.[14]

This was in contrast to the judgment of Brennan J. (with whom Mason C.J. and McHugh J. agreed) who stated as follows:

> The common law of this country would perpetuate injustice if it were to continue to embrace the enlarged notion of terra nullius and to persist in characterising the indigenous inhabitants of the Australian colonies as people too low in the scale of social organisation to be acknowledged as possessing rights and interests in land.[15]

and the view of Deane and Gaudron JJ. :

> It is unnecessary for the purposes of this judgment, and probably now impracticable, to seek to ascertain what proportion of the lands of the continent were affected by such common law native titles. Obviously, the proportion was a significant one. Conceivably, it was the whole.[16]

Obfuscation of the Court's decision was not only characteristic of politicians, but indeed legal commentators such as Hunt[17] and van Hattem[18] expressed the view that it was unlikely that native title would be established in respect of regions such as Western Australia, because *inter alia* Aboriginal people, unlike Murray Islanders, did not cultivate land for gardens and, rather than having a 'tenacious' sense of individual (private) ownership of land, had concepts only of public or community ownership. Presumably, the reason why native title is often referred to as a 'communal native title' is precisely because the title is capable of being held by a group rather than by defined individuals.[19] The fact that these commentators still disparage the nature of Aboriginal social organisation and relationships to land illustrates their failure to appreciate the Court's analysis and application of important prescriptions made by the International Court of Justice in the *Western Sahara Case*.[20] It shows how deeply embedded such social Darwinist notions have been in the real property law of Australia and in the minds of its practitioners and apologists. For these people, the Aboriginal relationship to land was

indeed *sui generis;* Aboriginal people had absolutely no conception of ownership of land, such was their lack of sophistication and level of 'civilisation' that they were (and are) as animals roving over the landscape having no sense of property in the soil. The High Court has clearly rejected this type of analysis and the common law now presumes that all humankind in occupation of land must have some sense of ownership which ought to be recognised and respected.[21]

Brennan J. stated that membership of the indigenous people entitled to native title 'depends on biological descent'.[22] Does this, as Mansell suggests, reduce 'the test of survival of Aboriginal rights to land to "strains of blood"', and does it once again class Aborigines as having their entitlement accorded with their degree of 'original blood'.[23] Whilst he posits sound reasons for the Court's doing so, Mansell correctly observes that the problem lies in conceiving of Aboriginal people as a race rather than as a polity (a nation in Mansell's words) or society that has nothing to do with biology. Any equation of entitlement with genetics must be contrary to the Court's insistence that the content of native title is to be ascertained by reference to the traditional laws and customs of the native titleholders.[24] It is well established in anthropology that Aboriginal customary laws are cognisant of rights of adoption and incorporation of non-biological successors to landowning groups. Indeed, the Aboriginal Land Commissions in the Northern Territory have accepted the entitlements of people with non-Aboriginal ancestry through 'social' or step-parents as consistent with the prevailing customary laws.[25] If most societies have recognised systems of adoption and entitlement to land through other forms of incorporation, it is hoped that the curious use of the words 'biological descent', rather than the normal formula of 'Aboriginal descent', is not intended by his Honour to prohibit Aboriginal people from equal recognition of their own forms of adoption and incorporation under their customary laws.

A further criticism of the Court's decision identified by Mansell is in relation to the form of title recognised:

> The Court justified the existence of native title on the basis that the Aboriginal relationship to land was "no less clear, substantial and strong than were the interests of the Indian tribes and bands of North America...". The Court decided that accordingly the common law should recognise the same interests in land for the Murray Islanders as has been recognised for indigenous people in North America - an interest which amounts only to a right to occupy. The analogy drawn with other native people and not whites reinforces the view that indigenous peoples' interests in land are something less than the interests of Europeans, a racist position indeed.[26]

Members of the Court clearly grappled with the nature of the 'title' with confusing results, variously referring to the title as a personal rather than proprietary right. This aspect of the judgment is discussed below in the context of the nature of native title and the respectful suggestion in this article that the Court failed to properly conceptualise the *relationship* between the concepts of possessory title and native title.

3. The nature of native title and the relevance of possessory title

Brennan J. clearly conceived of native title as including proprietary rights when he stated that 'the title may be protected by such legal or equitable remedies as are appropriate to the particular rights and interests established by the evidence, whether proprietary or personal and usufructuary in nature...'.[27] Toohey J. observed that, 'the weight of authority rather suggests that Aboriginal title is of its nature also non-proprietary and carries with it little if anything more than usufructuary rights'.[28] Deane and Gaudron JJ. described the title as being only a personal right which therefore does not constitute a legal or beneficial estate or interest in the actual land and which is *sui generis* or unique.[29]

This imprecise characterisation of native title led members of the Court to resort to its unique nature as a means of avoiding pressing questions about how the title might be recognised by the common law,[30] that is, recognition of the rights which are attendant upon that title. It is one thing to describe the origin of the title as *sui generis*, however, the critical question remains, how will courts translate this title into concepts, bundles of rights, which are understood and enforceable by them? How will native title rank in comparison with comparable non-Aboriginal forms of title? Of what value is the title?

Whilst reference to the traditional laws and customs must be the correct way of ascertaining intra-group rights, surely the most convenient means of characterising native title as against the whole world (where it has not been extinguished) is to recognise it as constituting at least the equivalent of the fullest estate known to the common law, a fee simple estate.[31] The Court's present formula for the recognition of (1) the content of the title by reference to traditional laws and customs, and (2) that these laws and customs are amenable to change and evolution, is uncertain and presents a legal minefield for the future. How are courts going to determine whether the content of a title is as asserted by Aboriginal title-holders, or whether their social organisation and traditions have evolved and changed to the extent that they have lost their entitlement? Whilst the Court assumes that the relevant laws and customs

are not frozen in some immutable past,[32] it is not clear whether the content of the traditional title is limited to 'traditional rights',[33] that is, those rights enjoyed by Aboriginal people at the time of white 'settlement'.[34]

Toohey J. was the only member of the Court who discussed Aboriginal possessory title (common law Aboriginal title) which was comprehensively described in Professor McNeil's treatise[35] cited in the judgments and his Honour concluded that the title, if made out, would amount to a fee simple.[36] The position of Australian common law concerning native title, referred to by Toohey J. as traditional title, on the one hand, and possessory title on the other, and whether these are, as Toohey J. assumes, separate bases for Aboriginal title, is not made clear in the judgments of the majority.[37] On Toohey J.'s analysis, some groups who could establish a native title may establish a possessory title at law, and be entitled to recognition of an estate in fee simple.[38] Furthermore, some groups may possibly be entitled to recognition of a possessory title whilst being unable to establish a native title for any of the reasons given by the Court. There may be situations where possessory title may have been lost and only native title rights, such as certain usufructuary rights, remain, for example, where a right of residence is denied but rights of hunting and gathering are preserved.

This leads to the suggestion that the Court has not fully appreciated the *relationship* between possessory and native title. Entitlement to a declaration of possessory title was advanced by the plaintiffs in *Mabo;* however, only Toohey J. ventured to respond to these submissions. His Honour stated that:

> English land law, in 1879 and now, conferred an estate in fee simple on a person in possession of land enforceable against all the world except a person with a better claim. Therefore, since the Meriam people became British subjects immediately on annexation, they would seem to have then acquired an estate in fee simple.[39]

and furthermore:

> [The] Meriam people may have acquired a possessory title on annexation. However, as I have said, the consequences here are no more beneficial for the plaintiffs and the argument having been put as an alternative, it is unnecessary to reach a firm conclusion.[40]

A declaration as to entitlement to a fee simple arising from a possessory title would indeed have been more beneficial for the plaintiffs in *Mabo*. Why was it not conceivable for both titles to be recognised by the Court? Certainly Toohey J.'s analysis does not preclude this result and it is regrettable that his Honour did not extend the analysis further to

discuss the relationship between the two titles. It is suggested that a concurrent finding of common law possessory title and native title would have allowed for a relatively easy translation of Aboriginal rights to land into the common law. Toohey J. intimates that in terms of extinguishment, possessory title may be more robust than native title when he states '[it] may have been too great a concession that a fee simple arising from possession is "extinguishable" in the same way as traditional title'.[41] Certainly, the principles governing rights to compensation for extinguishment may be quite different for loss of possessory title from that for loss of native title. Professor Bartlett concludes that the Court in *Mabo* has offered a rationale 'which recognises native title as a more substantial interest than in other jurisdictions'.[42] This article merely aims to put forward some ideas in the hope that further development and clarification may be provoked in this critical area of law.

Brennan J. cited with approval the Privy Council's judgment in *Amodu Tijani v. Secretary, Southern Nigeria*[43] where it was conceded that a usufructuary title could amount to full ownership.[44] Similarly Deane and Gaudron JJ. stated that in some contexts the 'community title ...[might be] practically "equivalent to full ownership"'.[45] However, the retention of the notion of the 'variable nature' of native title[46], which has clear support in precedent, could still see courts making determinations on the nature of a particular indigenous group's title and in so doing *ranking* certain groups as having a title consisting of full beneficial ownership as understood by the common law, and others having lesser interests. Having abandoned the pitfalls of persisting in characterising certain groups 'as people too low in the scale of social organisation to be acknowledged as possessing rights and interests in land', there is a grave danger that courts *will* persist in characterising certain groups as possessing *particular kinds* of rights and interests in land, presumably in accordance with the nature of their particular social organisations. How far really has the Court in *Mabo* made obsolete the problematical type of analysis undertaken by Blackburn J. in *Milirrpum?*

Brennan J.'s succinct assertion that, 'the ownership of land within a territory in the exclusive occupation of a people must be vested in that people: *land is susceptible of ownership, and there are no other owners*',[47] [emphasis added] should have led to the conclusion that unless there has been any qualification of the title, by partial extinguishment, the full beneficial ownership must be presumed to be held by the indigenous titleholders. But his Honour did not conclude thus, and it is therefore not known how future courts will characterise the title

that is now recognised under the common law and what enforceable rights are inherent in the title. In the *Mabo* case the Court declared the Meriam people were 'entitled as against the whole world to possession, occupation, use and enjoyment'[48] of their traditional lands. The Court's omission of 'ownership' from their characterisation of the Meriam people's entitlements, must be cause for some concern, implying as it does that their title is not comparable to the fullest ownership recognisable by the law.[49]

4. Some legal issues raised in the judgment

(a) *Sovereignty*

In overturning the doctrine of *terra nullius*, the Court established that the correct position of the common law was that the Crown's acquisition of radical title over the lands of Australia did not automatically extinguish traditional title to land held by the indigenous people.[50] These titles survived the acquisition of sovereignty by the British Crown and its successors, until such time as they were extinguished by inconsistent grant and generally by the process of murder. dispossession, dispersal and removal of the native titleholders through history. The High Court in *Mabo* confirmed the position of *Coe v. Commonwealth*[51], that questions concerning the acquisition of sovereignty are not justiciable in a municipal court.[52] This aspect of the judgment has been the subject of criticism from the Aboriginal community,[53] and it has been argued that the validity of the British Crown's acquisition of sovereignty is open to legal question.[54]

Whatever the merits of the criticisms, clearly it is now settled law that no Australian court will entertain any review of the acquisition of sovereignty by the Crown.[55] If such a review is to take place, it must be a matter of international law for determination by an international forum. However, Frank Brennan S.J. discusses the feasibility of this issue ever being aired before the International Court of Justice in the following terms:

> The only circumstance in which the ICJ could conceivably be asked to adjudicate on Australian sovereignty would be if there were a dispute over Australian territory between sovereign states that are members of the UN. There is no way that Aborigines will ever be able to ask the International Court to adjudicate or advise on the British assertion of sovereignty over Australian territory and peoples in 1788...
> Coe's valiant attempt established that Aboriginal sovereignty is not a matter that can be successfully challenged in Australian courts. Neither will it ever be adjudicated by the ICJ. Aboriginal sovereignty is at best a political claim.[56]

Whilst *Mabo* was not directly concerned with the issue of sovereignty, a finding by the Court that the indigenous people possessed traditional title to their lands, which title pre-dated white 'settlement', arguably raises the issue of their original sovereignty. If the law now accepts that the land was not uninhabited prior to 1788, then clearly, in this writer's view, a *sovereign* indigenous people occupied and owned Australia at one time and it is questionable whether this original sovereignty was validly extinguished. The municipal law of Australia can only *assume* that it has. Even if it has been extinguished as a matter of international law, the question which *Mabo* raises still remains. What then of the original sovereignty of Australia's first nation or nations and what does this mean for the position of these indigenous people within the Australian nation?

(b) *Compensation*

The reported judgment in *Mabo* is a vast document which has demanded a wide-ranging survey of a large field of jurisprudence. This decision questioned and overturned many long-held legal assumptions with potentially far-reaching implications for the law of real property. Members of the Court strove to bring Australian common law into line with the jurisprudence of other jurisdictions, particularly judgments of the Privy Council in relation to other British colonies, and judgments of courts in North America. The members of the Court have also been conscious, if not anxious, to confirm existing property rights and the validity of their acquisition whilst couching their reasoning in precedent. However, without joining those who urged the view that the Court had invented the notion of native title in a fit of judicial activism[57] there are aspects of the judgments, particularly in the leading judgment, where, with greatest respect, Brennan J. has waivered in his rigorous logic and application of precedent. One of these instances is in respect of the issue of compensation for extinguishment of native title.

The majority in *Mabo* held that extinguishment of native title did not give rise to a right of compensation (Brennan J. with whom Mason C.J. and McHugh J. concurred). Deane, Gaudron and Toohey JJ. held that, at least in the case where there was no statutory authority to extinguish without compensation, there was a general right of compensation . Dawson J. in dissent, clearly supports the Brennan view.

In respect of the general proposition that the acquisition of sovereignty over a territory did not mean that rights of the indigenous people were disturbed, Brennan J. sought support from a passage of Denning L.J. as

he then was, in *Adeyinka Oyekan v. Musendiku Adele*[58] where his Lordship said:

> In inquiring...what rights are recognised, there is one guiding principle. It is this: The courts will assume that the British Crown intends that the rights of property of the inhabitants are to be fully respected. Whilst, therefore, the British Crown, as Sovereign, can make laws enabling it compulsorily to acquire land for public purposes, *it will see that proper compensation is awarded to every one of the inhabitants who has by native law an interest in it: and the courts will declare the inhabitants entitled to compensation according to their interests*, even though those interests are of a kind unknown to English law.[59] [emphasis added]

Despite the fact that his Honour immediately followed the above passage with the gloss that: '[we] are not concerned here with compensation for expropriation',[60] no authority is advanced in support of the conclusion that there is no right of compensation for extinguishment of title by the Crown. This conclusion is more *implicit* in Brennan J.'s judgment, rather than being explicitly asserted, as Mason C.J. and McHugh J. chose to do, on the first page of the judgment.[61] There is no direct analysis in Brennan J.'s judgment in relation to compensation for extinguishment, and his Honour does not canvass any authorities in favour of or against the right. The position against compensation appears to amount to no more than bare assertion.

Brennan J.'s analysis is confined to demonstrating the absolute power of the Crown to extinguish native title, which power, it must be observed, is also held by the Crown in relation to lands subject to other tenures, such as Crown grants. Whilst this paramount power might be conceded, how is it that the right of compensation is not available in respect of native titles but is available in respect of Crown grants, excepting in this regard the *Racial Discrimination Act* 1975 (Cth)? Apparently critical to Brennan J.'s rationale is his conclusion on common law presumptions relating to derogation from the two forms of title. His Honour offers the following reasoning:

> As the Crown is not competent to derogate from a grant once made...a statute which confers a power on the Crown will be presumed (so far as consistent with the purpose for which the power is conferred) to stop short of authorising any impairment of an interest in land granted by the Crown or dependent on a Crown grant. But, as native title is not granted by the Crown, there is no comparable presumption affecting the conferring of any executive power on the Crown the exercise of which is apt to extinguish native title.[62]

Again, there appears to be no support for this conclusion. The accepted position is that legislation for the expropriation of property must demonstrate a clear and plain intention to extinguish title.[63] Of course the Crown's power to extinguish native title must be distinct from its liability to pay compensation where it effects extinguishment. The crucial point of difference between Brennan J. and Deane, Gaudron and Toohey JJ. is not whether the Crown has the ability to extinguish native title, but whether extinguishment without consent of the titleholders or without clear statutory authorisation ruling out compensation, imposes the legal obligations on the Crown to the titleholders. Such obligations could range from compensation for wrongful extinguishment discussed by Deane, Gaudron and Toohey JJ. to fiduciary obligations discussed by Toohey J. Brennan J.'s insistence on the 'paramount power'[64] of the Crown renders the title to the status of a permissive occupancy in the sense conceived of by Dawson J. rather than being a potentially full proprietary title referred to elsewhere in his judgment.[65]

Given that the compensation issue is a critical point of difference between members of the majority, there is no case law advanced in support of the proposition that no right of compensation exists in the event of extinguishment, such as the explicit statements by Denning L.J. in *Adeyinka* cited above, in support of the right.

With respect, this does not appear to be a well developed aspect of the schema constructed by Brennan J., and the paucity of supporting law belies its essential foundation in policy. Whilst it was incumbent upon members of the Court to describe as fully as possible the nature and characteristics of native title, it seems that Mason C.J. and McHugh J. were too ready in their support of a poorly justified negative position on compensation, especially since any conclusions on compensation would necessarily be *obiter*, and indeed compensation was not a critical issue before the Court and could well have been left, as were many other aspects of native title, for determination on another day.

Denning L.J.'s proposition in *Adeyinka* which was cited with approval by Brennan J.,[66] that is, 'the British Crown intends that the rights of property of the inhabitants are to be *fully respected*'[67] [emphasis added] and, was taken up by Bartlett who makes the following point:

> But if rights to land are to be 'fully respected'... surely the rights should be presumed to be subject to extinguishment only upon the payment of compensation.[68]

If Brennan J.'s position represents the final word on compensation,[69] other than entitlement by operation of the *Racial Discrimination Act* 1975 (Cth), then the general question of compensation for loss of title by Aboriginal groups throughout the country is an issue which will provide continuing debate. This is particularly so for the great majority of

Aboriginals who now have absolutely no prospect of regaining their traditional lands. This is further discussed below.

(c) *Leases and native title*

In his summary of the legal principles governing native title Brennan J. states as follows:

> Where the Crown has validly alienated land by granting an interest that is wholly or partially inconsistent with a continuing right to enjoy native title, native title is extinguished to the extent of the inconsistency. Thus native title has been extinguished by grants of estates of freehold or of leases but not necessarily by the grant of lesser interests (e.g., authorities to prospect for minerals).[70]

Elsewhere, his Honour states that 'the exercise of a power to extinguish native title must reveal a clear and plain intention to do so, whether the action be taken by the Legislature or by the Executive'.[71] The Court discussed the circumstances of the islands of Dauar and Waier where a lease was granted under the *Land Act* 1910-1930 (Qld) over the whole of the islands for a period of twenty years for the purpose of establishing a sardine factory. The special conditions of the lease contained the following provisions:

> The Lessees shall not in any way obstruct or interfere with the use by the Murray Island natives of their tribunal [sic] gardens and plantation of the leased land.
>
> The Lessees shall not in any way obstruct or interfere with the operations of the Murray Island natives who fish around the reefs adjacent to the leased land for Beche-de-mer, Trochus etc.[72]

Despite the plain words saving the Islanders' rights to undertake most, if not all, of the activities which they would have enjoyed under their traditional title, Brennan J. is still able to suggest that their title has been extinguished by operation of the lease. His Honour reasons as follows:

> If the lease of Dauar and Waier were validly granted, the limited reservations in the special conditions are not sufficient to avoid the consequence that the traditional rights and interests of the Meriam people were extinguished. By granting the lease, the Crown purported to confer possessory rights on the lessee and to acquire for itself the reversion expectant on the termination of the lease. The sum of those rights would have left no room for the continued existence of rights and interests derived from Meriam laws and customs.[73]

This is a curious interpretation of what would seem to be plain words disclosing plain intentions. Apart from the fact that his Honour fails to find *any* aspect of native title surviving the grant of the leases (a finding of extinguishment of some aspects of the native title would have been

consistent with his notion of partial extinguishment), his Honour has, with greatest respect, failed to correctly apply his own clear principle, that is, *native title is extinguished only to the extent of the inconsistency.* If Brennan J.'s application of the principle is to be followed, a very high standard indeed has been set for the saving of native title within leaseholds. One is left to wonder if the sardine factory lease conditions were insufficient to save native title, then what is required?

The argument that the Crown acquires the reversion on the termination of the lease is not altogether convincing. If one finds the special conditions preserve the Islanders' customary rights in relation to the islands, then is not the underlying radical title of the Crown still burdened by the native title during the term of, and at the conclusion of the lease? Furthermore, a corollary of his Honour's clear statement that the Executive can extinguish native title where a clear and plain intention is revealed, must be that the Executive can reveal a clear and plain intention to save the title. Obviously the Executive cannot legislate to save native title but it can place conditions in any lease created within the exercise of its power. And this the Executive did in relation to the sardine factory - which availed nothing in Brennan J.'s view. The view of Deane and Gaudron JJ. must surely be the correct one:

> This lease recognised and protected usufructuary rights of the Murray Islanders and was subsequently forfeited. It would seem likely that, if it was valid, it neither extinguished nor had any continuing adverse effect upon any rights of Murray Islanders under common law native title.[74]

5. Some conclusions about the policy implications of Mabo

After *Mabo* the indigenous people of Australia are faced with the proposition that they possessed legal rights at common law, the benefits of which they have been denied for up to 204 years, and that they have been unable to assert these rights in protection of their economy and livelihood. It will be tiresome for those who regret the Court's decision in *Mabo* to contemplate that Aboriginal people have hitherto been trespassers on their own land by virtue of the fact that their rights under the laws of white settlers have been obscured for two centuries.

That the invisibility of native title in Australia prior to *Mabo* was not some tragedy of legal history but the result of *a deliberate obfuscation* of truths which were well-known but not well-accepted by the settlers on Australian frontiers, is evidenced in Professor Henry Reynolds' landmark book *The Law of the Land*.[75] Professor Reynolds demonstrates that native title was recognised by the Imperial Government in the nineteenth

century and respect for this title was supposed to govern colonial 'settlement' in Australia. Reynolds shows how the colonists contrived to deny these rights. This denial underpinned all subsequent acts of dispossession. It formed part of the popular understanding of Aboriginal people concerning land. Popular notions of social Darwinism assisted in the justification and rationalisation of the denial. This denial was incorporated into real property law, and two of these fundamental assumptions of Australian land law are identified by Deane and Gaudron JJ. as having played a key role in the 'dispossession and oppression of the Aborigines'.[76] These are (1) that the land was *terra nullius* and (2) that full legal and beneficial ownership vested in the Crown unaffected by Aboriginal title. Their Honours stated as follows:

> Those propositions provided a legal basis for and justification of the dispossession. They constituted the legal context of the acts done to enforce it and, while accepted, rendered unlawful acts done by the Aboriginal inhabitants to protect traditional occupation or use. The official endorsement, by administrative practice and in judgments of the courts, of those two propositions provided the environment in which the Aboriginal people of the continent came to be treated as a different and lower form of life whose very existence could be ignored for the purpose of determining the legal right to occupy and use their traditional homelands.[77]

Perhaps the telling difference between the judgments of Brennan J. and Deane and Gaudron JJ., in their respective surveys of Australian history, is the difference of emphasis on whether it was the action of governments in extinguishing native titles or the law and its courts in sanctioning and compounding this extinguishment, which contributed most to Aboriginal dispossession. Brennan J. clearly lays responsibility with governments when he states:

> Aboriginal rights and interests were not stripped away by operation of the common law on first settlement by British colonists, but by the exercise of a sovereign authority over land exercised recurrently by Governments...Aborigines were dispossessed of their land parcel by parcel, to make way for expanding colonial settlement. Their dispossession underwrote the development of the nation.[78]

and his Honour felt that it is appropriate to:

> ...dispel the misconception that it is the common law rather than the action of governments which made many of the indigenous people of this country trespassers on their own land.[79]

In contrast, Deane and Gaudron JJ. pointed to the role played by the law and particularly the two propositions of land law mentioned above:

> Long acceptance of legal propositions, particularly legal propositions relating to real property, can of itself impart legitimacy and preclude challenge. It is their association with the dispossession that, in our view, precludes those two propositions from acquiring the legitimacy which their acceptance as a basis of the real property law of this country for more than a hundred and fifty years would otherwise impart.[80]

Implicit in the leading judgment is the conclusion that it was governments who dispossessed Aboriginal people, and therefore the moral onus is on governments to provide reparation. In identifying the role played by the law and the courts in Aboriginal dispossession, Deane and Gaudron JJ. are more amenable to providing redress at law. The different conclusions reached by the majority on the question of compensation reflect the way in which their Honours have perceived the historical process.

It is now almost trite to say that *Mabo* represents a turning point in the history of Australia since white 'settlement'. *Mabo* compels the nation to confront fundamental issues concerning the indigenous people of Australia, issues which have been largely avoidable to date. These are, (1) that as a consequence of their ownership of Australia prior to 1788, sovereignty inhered in the indigenous people, which sovereignty is still continuing or of which they have been deprived without any form of settlement, and (2) that Aboriginal people had ownership of the entire country recognisable under the common law, of which they were deprived without compensation or any opportunity of protecting their ownership.

As a matter of policy *Mabo* has laid the basis for non-Aboriginal Australians to finally sit down with indigenous people, and the unavoidable subject matter for negotiation must at the least be (1) indigenous rights to land (2) rights to compensation and restitution (3) jurisdictional rights. The Prime Minister's statement that *'Mabo* establishes a fundamental truth and lays the basis for justice',[81] and his intelligent appraisal of the same history surveyed by members of the Court, may well signal the Commonwealth's preparedness to address these issues. The attitude of the regional governments and whether the Commonwealth would be prepared to fulfil its national responsibilities to treat Aboriginal claims as now both a legal and moral claim, remains to be seen. The remedies available at law to assert and protect Aboriginal ownership of land are valuable rights. However, it is clear that this belated recognition has come far too late in the day for the great majority of Aboriginal people who remain fringe-dwellers in their own land.[82] *Mabo* is no less compelling as a moral and historical statement of truth that can be denied no longer, and provides the strongest justification yet for the claims of those who remain dispossessed.[83]

To illustrate the dilemma which now faces those who would still refuse to concede the correctness of Aboriginal claims to their traditional lands, it is instructive to consider the response of one legal commentator, Hunt, and the sole dissenting Judge, Dawson J., in the light of the decision reached by the six Judges. In lamenting the Court's decision, Hunt states as follows:

> Professor Nettheim has argued that...the Mabo case's "timing is perfect" and permits a fundamental reassessment of the Aboriginal/non-Aboriginal relationship. This seems to be a plea for new Aboriginal land legislation. Having been involved in the 1985 Western Australian exercise of drafting a Bill with which all interest groups were basically prepared to live and then having seen it defeated by political influence, I am cynical enough to believe that we won't be seeing this sort of legislation in Western Australia in the foreseeable future.
>
> Professor Nettheim concluded that the "High Court has provided an impressive lead". My conclusion is that I wish they'd kept out of it and followed the view of Dawson J. (467) - "However insensitive the politics may now seem to have been, a change in view does not of itself mean a change in the law. It requires implementation of a new policy to do that and that is a matter for government rather than the courts."[84]

In concluding that the question of Aboriginal rights should have been left to governments, the above author fails to appreciate his own observation that reliance upon the political process has given no hope for a solution. The kind of reasoning advanced by Dawson J. is in fact no more than a prescription to preserve the *status quo*. The fact is, however, that legal rights under *Mabo* may now compel the government and people of Western Australia to accord the Aboriginal traditional owners of that State those rights which they have been unwilling to provide for in legislation to this time. To paraphrase Brennan J., there may well be other groups throughout the country who are also entitled to rely upon these rights.

Notes

1. *Sun Herald*, 7 June 1992.
2. *Mabo v. Queensland* (1992) 66 A.L.J.R. 408,434.
3. (1971) 17 F.L.R. 141.
4. A.E. Woodward, *Aboriginal Land Rights Commission First Report* (Canberra: A.G.P.S., July 1973). A.E. Woodward, *Aboriginal Land Rights Commission Second Report* (Canberra: A.G.P.S., April 1974).
5. The Commonwealth has also legislated in relation to land at Jervis Bay with the *Aboriginal Land Grant (Jervis Bay Territory) Act* 1986.

6. *Pitjantjatjara Land Rights Act* 1981 (SA); *Maralinga Tjaruatja Land Rights Act* 1984 (SA).
7. *Aboriginal Land Rights Act* 1983 (NSW).
8. *Aboriginal Land Act* 1991 (QLD).
9. P. Seaman, *The Aboriginal Land Enquiry*, Perth, September 1984.
10. For an account of this process see F. Brennan S.J., *Sharing the Country* (Australia: Penguin, 1991), 63-75. See also T. Rowse, 'Equal yet Different: Commonwealth Australia, Aboriginal Affairs Policies since 1967 in Cultural Context', (unpublished, Menzies School of Health Research, Alice Springs, January 1991).
11. Commonwealth of Australia, *Royal Commission into Aboriginal Deaths in Custody National Report* (Canberra: A.G.P.S., 1991).
12. Significantly 'land needs' is the language of the reports of the *Royal Commission into Aboriginal Deaths in Custody* which preceded the decision in *Mabo*. An unofficial reason advanced for the Commission's use of the term 'needs' instead of 'rights' was that the idea of land 'needs' would be more palatable to non-Aboriginal people and provoke a more positive response by regional governments to the Commission's recommendations. Clearly in the light of *Mabo* this reasoning is no longer justifiable.
13. Aboriginal rights of occupation and use within pastoral leases in the Northern Territory have been reserved in legislation since 1850 to the present.
14. Premier Wayne Goss, *Sydney Morning Herald*, 9 June 1992.
15. (1992) 66 A.L.J.R. 408, 429 per Brennan J.
16. *Id.* 448 per Deane and Gaudron JJ.
17. M. W. Hunt, 'Panel Discussion: The Legal Implications of Mabo for Resource Development' *Proceedings of the Resource Development and Aboriginal Land Rights Conference* (The Centre for Commercial and Resources Law of the University of Western Australia and Murdoch University, Perth, 28 August 1992), 2-3.
18. P.C.S. van Hattem, 'Panel Discussion: The Legal Implications of Mabo for Resource Development' *Proceedings of the Resource Development and Aboriginal Land Rights Conference* (The Centre for Commercial and Resources Law of the University of Western Australia and Murdoch University, Perth, 28 August 1992),1-2.
19. See Brennan J. (1992) 66 A.L.J.R. 408, 431. For a discussion of the title see R. Bartlett 'The Source, Content and Proof of Native Title at Common Law' *Proceedings of the Resource Development and Aboriginal Land Rights Conference* (The Centre for Commercial and Resources Law of the University of Western Australia and Murdoch University, Perth, 28 August 1992), 24-32.
20. *Advisory Opinion on Western Sahara* [1975] I.C.J.Rep. 12. Considering the great weight attributed in *Mabo* to developments in international law and particularly the *Western Sahara* case in the judgment of Brennan J., with whom Mason C.J. agreed, it is interesting to note the Chief Justice's earlier

view in *Coe v. The Commonwealth* (1978) 52 A.L.J.R. 334, 336, when his Honour rejected submissions based on the *Western Sahara* case as being of no relevance to the domestic or municipal law of Australia.

21. 'The Meriam people are in culturally significant ways different from the Aboriginal peoples of Australia, who in turn differ from each other. But, as will be seen, no basic distinction need be made, for the purposes of determining what interests exist in ancestral lands of indigenous people of Australia, between the Meriam people and those who occupied and occupy the Australian mainland. The relevant principles are the same.'(1992) 66 A.L.J.R. 408, 482 per Toohey J.
22. *Id.* 435 per Brennan J.
23. M. Mansell, 'The Court gives an inch but takes another mile' (1992) Vol. 2. No.57 *Aboriginal Law Bulletin*, 4-6.
24. See (1992) 66 A.L.J.R. 408, 455 per Deane and Gaudron JJ., 429 per Brennan J.
25. See G. Neate, *Aboriginal Land Rights Law in the Northern Territory Volume 1* (Australia: Alternative Publishing Co-operative, 1989), 56-61, and particularly see Toohey J., *The Report on the Finnis River Land Claim* (Canberra: A.G.P.S., 1981).
26. Mansell, 6.
27. (1992) 66 A.L.J.R. 408,430.
28. *Id.* 474 per Toohey J.
29. *Id.* 442-443 per Deane and Gaudron JJ.
30. Decisions of the Supreme Court of Canada have been similarly reticent in defining the nature of the title other than to confirm its unique character. See Bartlett,10-18.
31. Would it not be discriminatory for the common law to presume that the title is any less than that recognised as the fullest estate at common law according to the maxim: *'cuius est solum eius est usque ad coelum et ad inferos'*? Bartlett argues as follows: 'If the rationale is the need to fully respect the property rights of Aboriginal people, it might properly be asserted that the content should embrace the full beneficial ownership of the land'. Bartlett, 8.
32. (1992) 66 A.L.J.R. 408, 435 per Brennan J., 452 per Deane and Gaudron JJ., 448 per Toohey J.
33. Some commentators assume that native title rights are restricted to those rights enjoyed by the titleholders prior to European contact. see van Hattem, 2. This view has some support in lower court Canadian decisions: *Attorney General of Ontario v. Bear Island Foundation* (1985) 49 O.R. (2d) 353, *Delgamuukw v. British Columbia* (1991) 79 D.L.R. (4th).
34. Bartlett prefers dicta of the Supreme Court of Canada in *R v. Sparrow* [1990] 1 S.C.R. 1075 in relation to Aboriginal rights affirmed under the Canadian Constitution (including traditional title rights) which urged that 'a flexible interpretation [of Aboriginal rights] should be adopted so as to permit their evolution over time and such that they might be exercised in a contemporary manner'. Bartlett, 13.
35. K. McNeil, *Common Law Aboriginal Title* (Oxford: Clarendon Press, 1989).
36. (1992) 66 A.L.J.R. 408, 482 per Toohey J.
37. Brennan J. did not deal with the possessory title claim as a distinct issue, nor did Deane and Gaudron JJ. The suggestion has been made that Aboriginal possessory title does not constitute a separate basis for Aboriginal title. It may be that the two concepts are merged within the common law as aspects of the one title. Query Brennan J., 431 whether his Honour is referring to an Aboriginal possessory title equivalent to that discussed by Toohey J., when he speaks of 'indigenous people...in possession or...entitled to possession under a proprietary native title'. However note his Honour's view (429) that he considered that there were 'substantial difficulties' in the possessory title argument advanced by the plaintiffs.
38. '...[P]rima facie all indigenous inhabitants in possession of their land on annexation are presumed to have a fee simple estate', 1992 66 A.L.J.R. 408, 495-496 per Toohey J.
39. (1992) 66 A.L.J.R. 408,496 per Toohey J.
40. *Id.* 497 per Toohey J.
41. *Ibid.* However possessory title might well be vulnerable. See Toohey J., 496. '...a person's title arising from prior possession can be defeated...by a defendant showing adverse possession against the person for the duration of a limitation period'
42. Bartlett, 4.
43. [1921] 2 A.C. 399.
44. (1992) 66 A.L.J.R. 408, 426 per Brennan J.
45. *Id.* 442 per Deane and Gaudron JJ.
46. *Id.* 425 per Brennan J.
47. *Id.* 426 per Brennan J.
48. *Id.* 437.
49. Brennan J.'s reasoning (437) as to why he chose to refuse the plaintiff's application for a declaration as to their ownership of the Murray Islands is, with respect, not persuasive. How can Brennan J. (422) justify confining the concept of ownership to titles derived from Crown grants or common law tenures, particularly in the light of the avowal that the common law should not 'be seen to be frozen in an age of racial discrimination'?
50. (1992) 66 A.L.J.R. 408,429 per Brennan J.,439 and 454 per Deane and Gaudron JJ., 483- 485 per Toohey J.
51. (1979) 24 A.L.R. 118.
52. (1992) 66 A.L.J.R. 408, 417 per Brennan J. and 445 per Deane and Gaudron JJ.
53. Mansell, 5.

54. See for example J. Cassidy 'The significance of the classification of a colonial acquisition: the conquered/settled distinction' (1988) I *Australian Aboriginal Studies* 2-17, for a discussion of these arguments. Simon Blackshield has put forward a cogent critique of the Court's refusal to declare competence to review the validity of the acquistion of sovereignty in Australia. See S. Blackshield National Aboriginal and Islander Legal Services Secretariat (unpublished paper).
55. Brennan J. (417) qualifies the Court's general incapacity to review matters relating to the acquisition of sovereignty when his Honour states that the 'courts have jurisdiction to determine the consequences of an acquisition under municipal law'. See also Deane and Gaudron JJ. (445) where they assert that it is incumbent upon the courts 'to determine whether, as a matter of domestic law, the act of State did have that extended operation'. Query whether a limited form of Aboriginal sovereignty survives as a burden on the Crown's ultimate sovereignty. Arguments asserting such 'jurisdictional' rights of Aboriginal titleholders are being advanced in the Canadian litigation: *Delgamuukw v. British Columbia* (1991) 79 D.L.R. (4th) 165 (on appeal). Logically,as native title is not sourced in the Crown but in the laws of the Aboriginal titleholders, (which laws govern the content, nature and enjoyment of the title), then it follows that jurisdictional rights inhere in the titleholders independently of the Crown. The constituent elements of land, law, institutions and recognition are all present. Therefore, providing the Crown has not proscribed the exercise of any rights or activities enjoyable under customary laws emanating from the native title, then arguably a form of sovereignty (not necessarily in the international law sense) is 'carved out of' or 'survives within' the Crown sovereignty. These questions and the implications of recognising indigenous laws and customs as a source of law, need to be investigated in the Australian context.
56. Frank Brennan S.J., 18-22.
57. It is arguable that no other judgment of the Court has been the subject of such apoplectic accusations of invention. Charges that members of the Court contrived to recognise native title in *Mabo* were laid by public commentators and indeed by lawyers. See, for example, Dr C. Howard Q.C., 'A Nation within a Nation' *Sydney Morning Herald,* 14 September 1992. (This article was commissioned by the Australian Mining Industry Council.)
58. [1957] 1 W.L.R. 876, 880.
59. Cited by Brennan J. (1992) 66 A.L. J. R. 408, 428-429 and also cited by Deane and Gaudron JJ., 440.
60. *Id.* 429 per Brennan J.
61. *Id.* 410.
62. *Id.* 432.
63. *Ibid.* See *Paul v. Canadian Pacific* (1984) 2 D.L.R. 408,429.
64. (1992) 66 A.L.J.R. 408,429.

65. This observation finds some support in the judgment of Deane and Gaudron JJ.(444) where their Honours said, 'The Privy Council judgment in *Amodu Tijani* is also inconsistent with the notion that the common law native title was merely a permissive occupancy which the Crown could terminate at any time without any breach of its legal obligations to the traditional occupants.'
66. *Id.* 428-429.
67. *Adeyinka Oyekan v. Musendiku Adele* [1957] 1 W.L.R 876, 880.
68. Bartlett, 2
69. Query whether Mason C.J. and McHugh J.'s statement that '...neither of us nor Brennan J. agrees with the conclusion to be drawn from the judgments of Deane, Toohey and Gaudron JJ. that, at least in the absence of clear and unambiguous statutory provision to the contrary, extinguishment of native title by the Crown by inconsistent grant is wrongful and gives rise to a claim for compensatory damages' would still allow the right of compensation where extinguishment of title occurs illegally. However, considering the powers which Brennan J. accords to the Crown to extinguish title it is difficult to conceive of any circumstance where any inconsistent grant could be held illegal, other than by virtue of the *Racial Discrimination Act* 1975 (Cth).
70. (1992) 66 A.L.J.R 408, 434 per Brennan J.
71. *Id.* 432
72. *Id.* 435.
73. *Id.* 436.
74. *Id.* 455
75. H. Reynolds, *The Law of the Land* (Australia: Penguin, 1987). See also H. Reynolds, *The Other Side of the Frontier* (Australia: Penguin, 1982).
76. (1992) 66 A.L.J. R. 408, 451.
77. *Ibid.*
78. (1992) 66 A.L.J.R. 408, 434, per Brennan J.
79. *Ibid.*
80. (1992) 66 A.L.J.R. 408, 456.
81. Hon P.J. Keating M.P, 'The Redfern Park Statement', Australian Launch of the International Year for the World's Indigenous People, Redfern, 10 December 1992.
82. See Mansell, 6.
83. I should say 'strongest justification' in the eyes of non-Aboriginal Australians, because it is the law of the white settlers which recognises indigenous rights to land, and it is *their law* which has stated that the dispossession of the Aboriginal people underwrote the development of the nation (per Brennan J. 434) and that this left 'a national legacy of unutterable shame' (per Deane and Gaudron JJ. 449).
84. Hunt, 6. See G. Nettheim, 'As Against the Whole World'(1992) Vol 27 No.6 *Australian Law News* 9.

Mabo - A New Dimension to Land Tenure - Whose Land Now?

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1. Introduction

The High Court in *Mabo*[1] has added a different dimension to land holding in Queensland. The High Court has ruled that native title is recognised by the common law of Australia and that indigenous inhabitants do have 'rights' to their traditional lands in accordance with their laws and customs. To reach this decision, the High Court has challenged some aspects of the doctrine of tenure which has provided the historical basis of title to land both in Australia and in England.

This article will examine the land holding before the High Court decision in *Mabo*, including a brief history of the examination of the doctrine of tenure, and the acquisition of title to land by the Crown. An examination will also be made of the reasoning which lead to the conclusion that native title is now recognised by the common law, the concept and status of this native title and the impact and effect of the *Mabo* decision on land holding in Queensland today.

2. The Law Pre Mabo

(a) The Doctrine of Tenure

The term tenure indicates the mode of holding or occupying land. The doctrine of tenure on which land holding in Australia is based, dates to the time of feudalism in England. Interestingly, the feudal system of land holding was developed in England after another

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'invasion' - that of the Norman conquest of an Anglo-Saxon England.[2]

In 1066 when William the Conqueror (Duke of Normandy, later William I) came to England, by conquest the lands vested in him as monarch under feudal law. William did not grant the English lands absolutely to his followers but he granted the land subject to the fulfilment of certain conditions. He established complex feudal ties so that the land given was never granted to the grantee lords as owners, but as tenants with continuing obligations to the king. The original grantee was referred to as a 'tenant-in-chief' and he could make further smaller grants, subject to similar obligations, to his followers.[3] Thus a feudal pyramid was established with the king clearly at the top, and those overlords in the middle both giving and receiving service and those in actual occupation and working the land at the base of the pyramid.[4]

Land was generally granted in return for services rather than for monetary payment. The type of service required was known as tenure as it indicated the terms on which the land was held. For example, the tenant-in-chief might be granted land on condition that he sent a quota of knights, or paid for the upkeep of knights, to serve in the king's army for a certain number of days each year. That tenant could then grant part of his land to another in return for the service of several knights. This process continued down the hierarchy.[5]

Different requirements were imposed on the tenants and these were classified according to the type of service required. The obligations became referred to as incidents of tenure. Free tenures[6] were *frankalmoin*, *military service*, *serjeanty* and *free socage*. Land held by ecclesiastics for churches was held by *frankalmoin* tenure requiring spiritual service, for example that the donee sing a mass once a year.[7] *Knight service* or *military tenure* required service in the king's army or a payment in lieu. Grand *serjeanty* tenure was held in exchange for personal service, for example, carrying the king's sword at his coronation. Tenure in *socage* was tenure that was neither spiritual, military nor involving service. It originally covered the case where the tenant's obligations were nominal, for example, to give a rose each year to the lord.[8] Tenures which imposed nominal obligations, were categorised under the heading of *socage*. Eventually they were called *free socage* with no obligations attached. Socage ultimately became the only non-spiritual surviving tenure. As the doctrine of tenure is still applicable today, all land must be held in some form of tenure, and therefore any Crown grants of land that are made today, are made in free socage. Unfree tenures gave no

'rights' to the land. Such tenures included the *villein* tenant or labourer who worked on the land on behalf of his lord. This form of tenure was later called *copy hold tenure*.

Under the scheme of tenure all land belonged to the Crown. No transfer of the actual ownership of the land could be made under this system.[9] No person could own land absolutely. A person merely held land directly from the Crown, as a tenant of the Crown, and thus the person who was in possession of land was simply a 'tenant'. The manner of holding is called tenure. The doctrine is described by Maitland in the following words:[10]

> Every acre of English soil and every proprietary right therein have been brought within the compass of the single formula which may be expressed thus:
>
> *tenet terram illam de ... domino Rege*. The king himself holds land which is in every sense his own; no one else has any proprietary right in it; but if we leave out of account this royal demesne, then every acre of land is held of the king.

The feudal system was applied totally, universally and perfectly in England so that all land in England was incorporated into this system. Land that was not incorporated into the feudal system was termed allodial land which meant that an individual could own it absolutely. No allodial land existed in England, although allodial land can be found in both Europe and Scotland, as these areas were never totally included in the feudal system of ownership. The feudal law became the common law of England; it was never a special law restricted to any one class of people.[11]

The doctrine of tenure has long been regarded as the foundation of the law of the land in Australia. The Privy Council in the case of *Attorney General v. Brown*[12] affirmed that the feudal doctrine of tenure was the basis of land law and therefore the ultimate owner of all land in Australia was the Crown. Thus land in Australia was regarded as a royal *demesne* - that is, the Crown was the absolute beneficial owner of all colonial land. This view was further supported by *Randwick Corporation v. Rutledge*[13] and *NSW v. The Commonwealth (Seas & Submerged Lands Case)*[14]. These decisions meant that anyone owning land in Australia is holding land of the Crown. This position has been maintained by the *Property Law Act* 1974 (Qld) s.21.

When Australia was settled the only remaining freehold tenure in England was *free and common socage* and it was this tenure which was imported into Australia by the early settlers.[15] The *Property Law Act* 1974 (Qld) s.20(1) further confirms that tenures granted by the Crown will be granted in free and common socage, that is, freehold tenure without surviving incidents or obligations. Freehold tenure of a fee simple property is as close to absolute ownership as is recognised by law.[16] It means that an owner holds land today without any payment or service attaching to the tenure. Unfree tenure was never part of the law of Australia. The doctrine of tenure itself continues to exist and the feudal system still has influence today in that no one can 'own' land in a technical sense since all land is held by the Crown.[17] It is this doctrine of tenure that applied to land holdings in Australia before *Mabo*.

(b) Acquisition of title to land in Australia by the Crown

When the Crown acquired sovereignty over the territory in Australia did it also become the absolute owner of all the land in Australia? The precise nature of those rights to land which were acquired by the Crown with sovereignty depended on (i) the body of law to be applied in the new colony (ii) how sovereignty was acquired and (iii) whether rights of native title continued.

(i) Did the doctrine of tenure become part of the common law of Australia?

The manner of colonisation, that is, the manner of acquiring sovereignty, determined the type of law applicable in the newly acquired territory and thus determined whether English law was applicable in the colony.

If a colony was acquired by conquest then the existing laws of that country continued in force until they were altered by the conqueror. A similar rule applied to ceded colonies. However, a different rule applied to the settlement of a territory that was *terra nullius*, which is a land belonging to no one, or in the language of Blackstone 'desert and uncultivated'. When an uninhabited country was discovered and settled by English subjects, all the English laws would be immediately enforced in the new colony.[18] The hypothesis here was that there was no local law in existence in the new territory. Blackstone stated:

> [I]f an uninhabited country be discovered and planted by English subjects, all the English laws then in being, which are the birth-right of every subject, are immediately there in force.[19]

Blackstone acknowledged that certain restrictions did apply to the laws to be 'imported' from England. The colonists could introduce only so much of the English law, as was applicable to their own situations and the conditions of the infant colony.[20]

Blackstone thus set out the parameters for the basic principles by which English laws were to apply.[21] Thus English settlers brought with them the law of England, and the law of England, including the common law, became the law of the colony (in so far as it was locally applicable).

From the earliest days of colonisation Australia has been regarded as a settled and not a conquered or ceded colony. This view has been consistently followed by the courts, although historically it has been in dispute. In *Milirrpum v. Nabalco Pty. Ltd.*[22] Blackburn J. stated that it was a question of law to which category a particular colony belonged. He found that this matter could not be questioned on a reconsideration of the historical fact.

The common law became the common law of all subjects within the colony and all subjects, including the indigenous people, acquired the status of British subjects. Therefore, the Australian Aborigines became British subjects and subject to the common law and applicable statutes. The introduction of English law to New South Wales was confirmed by the *Australian Courts Act* 1828 (Imp) s.24. (The laws of New South Wales became the laws of Queensland on separation of the two colonies in 1859.)

If the common law of England, including the feudal doctrine of land tenure, was 'imported' into Australia as a complete body of law, then the Crown would acquire property rights to all Australian land.[23] In a number of cases, the *Attorney General v. Brown*;[24] *Randwick Corporation v. Rutledge*[25] and *NSW v. The Commonwealth* (*Seas and Submerged Lands Case*),[26] it was affirmed that the feudal doctrine of tenure was part of the common law of Australia.

(ii) Doctrine of Sovereignty

When a nation, such as England, acquired sovereignty of a colony, such as Australia, this meant that ownership of the territory of that colony had been acquired. But, ownership of a country is a different thing from ownership of land. As Roberts-Wray[27] explains:

> The ownership of the country is radically different from the ownership of land: the former can belong only to a sovereign, the latter to anyone. Title to land is not, per se, relevant to the constitutional status of the country: the land may have become vested in the Queen, equally in a Protectorate or in a colony...[28]

Existing authorities, however, supported the proposition that when the Crown assumed sovereignty over the Australian colony, it became the universal and absolute and beneficial owner of all the land, that is, it acquired the colonial land as a royal *demesne*.[29]

Thus, in Australia prior to *Mabo*, Crown sovereignty was equated with Crown ownership of land.

(iii) Does the common law extinguish the 'beneficial' rights of native title?

Did the body of law applying in Australia allow for recognition of the traditional rights of the indigenous inhabitants, that is, traditional native title, or were such traditional rights extinguished on settlement? The common law governing colonisation was that the pre-existing customary rights and interests in land were abolished upon colonisation of inhabited territory unless those rights were expressly recognised by the new sovereign. The common law could recognise the customary title only if it was consistent with the common law.[30] In Australia no treaties had been signed, nor was there constitutional or legislative protection of Aboriginal rights to land. In *Milirrpum v. Nabalco*[31] the Court found that the doctrine of tenure allowed no room for recognition of common law native title as the Crown was the owner of all land in Australia, so that the pre-*Mabo* view was that the common law did extinguish any form of native title.

3. The Mabo Interpretation

(a) Tenure - Mabo Interpretation

The High Court acknowledged that the doctrine of tenure is an essential principle of land law in Australia, and that it is too late to contemplate an allodial or other system of land ownership.[32] However, it appears that the High Court has applied a 'modified' version of the doctrine of tenure.

This is illustrated by the very slightly different approach to the doctrine of tenure that was considered by Brennan J.[33] He distinguished the rule that all land is *held of* the Crown, from the notion that all land is *owned by* the Crown. He found that medieval lawyers never adopted the theory that the king 'owned' all land; they regarded the king as the supreme lord of all tenants in the realm. Under this view the Crown was not automatically the 'owner' of all the land even though the Crown had sovereignty over the territory. However, the Crown could be recognised as having 'rights' to land as the supreme lord.

Accepting that the doctrine of tenure (although modified) applied in Australia, the High Court found that the Crown must be invested with such a title to land as would invest the sovereign with the character of paramount lord. Therefore, the Court found that in Australia the Crown was attributed with a title adapted from feudal theory, which was called a radical, ultimate or final title.[34] This is a bare title to land. The radical title does not confer on the Crown an absolute beneficial ownership of the land. The radical title underlies the Crown's fundamental right to administer the country. Under the radical title the Crown has power to grant interests in the land. This is because the sovereign has a supreme legal authority in and over a territory and has the power to prescribe what land should be enjoyed by others.

Therefore, the Court found that the doctrine of tenure would apply to every grant of an interest in land that was made by the Crown. However, it would not apply to rights and interests which did not owe their existence to a Crown grant, such as the rights and interests of the indigenous inhabitants. This view allowed the interpretation that someone else may have a claim to ownership or rights in the land.

(b) Acquisition of title to land in Australia by the Crown - Mabo interpretation

(i) Did the doctrine of tenure become part of the common law of Australia?

The High Court in *Mabo* accepted that the feudal doctrine of tenure was introduced by the colonists from England and did become part of the law in Australia.

However, the High Court found that the theory which supported the introduction of the common law of England becoming the law of Australia was untenable. The 'barbarian theory' that provided the basis of *terra nullius* was wrong and Australia was not without settled inhabitants. Thus, as the foundation of the common law's reception to Australia was false, there was no warrant to apply the rules of English common law.[35]

An interesting question is raised by this conclusion. If, as it appears, the High Court is challenging the view that the common law of England was *fully* imported into Australia at the time of settlement, what implications will this have in relation to other laws?

(ii) Doctrine of Sovereignty

The High Court in *Mabo* considered that in 1788 Australia became a settled colony of England and therefore the Crown assumed sovereignty over that colony. The Court found that[36] the actual acquisition of sovereignty by the Crown is an Act of State and is therefore unable to be challenged in an Australian court. Thus Australia's status as a settled colony continues.

Crown sovereignty in Australia had been acquired under the enlarged notion of *terra nullius* whereby territory that was inhabited was treated as 'desert, uninhabited country'. Such acquisition of sovereignty was equated with the Crown's ownership of land. By rejecting the *terra nullius* hypothesis as being a false and unacceptable proposition in contemporary law, the Court was able to overrule the existing authorities and review and reconsider the notion that sovereignty meant ownership of the land.[37] It was only by the notion of *terra nullius*, and the importation of the standard common law doctrine of tenure, that the Crown could claim ownership of the land in a colony which was occupied by indigenous inhabitants. Therefore, the High Court found that the acquisition of sovereignty where a territory was inhabited, conferred on the Crown a radical title only and not the absolute and beneficial ownership.

(iii) Recognition of Pre-existing native title - Mabo interpretation

The High Court in Mabo found that pre-existing native title could be recognised by the common law whether sovereignty was acquired by cession, conquest or settlement.[38] Brennan J.[39] noted that the English legal system would recognize rights and interests derived from the occupation of land in a territory over which sovereignty was acquired, without the necessity of a Crown grant of an interest in land. Here, he referred to the *Case of Tanistry*.[40] In that case, it was found that native inhabitants and their heirs could hold title without any grant or confirmation by the conqueror.

In the case of *Amodu Tijani*,[41] the Privy Council acknowledged the possibility of recognition of *usufructuary* rights (which is a mere right of user of the land) and also of interests in land vested not in an individual, nor in a number of identified individuals, but in a community. The term *usufruct* originates in Roman law. It is explained by Cumming and Mickenberg:[42]

> The *usufruct* developed as a form of trust, often created by will. It has been defined as:

> a right of enjoying a thing, the property of which is vested in another, and to draw from the same all the profit, utility in advantage which it may produce, provided it be without altering the substance of the thing.... [I]t is apparent that the term had been applied by courts dealing with Aboriginal title ... as a guide or analogy rather than by strict definition.

A *usufructuary* right or 'title' would indicate that there is *no proprietary right* in or ownership of the land itself. It seems to indicate that there is simply a right of use.

The Court[43] considered that if it is necessary to categorise an interest as proprietary, that is, an interest in the property of the land, for it to survive a change in sovereignty then the interest claimed by a community which is in exclusive possession of land must be proprietary in nature as there is no other proprietor. It is possible to recognise a proprietary title that is derived from a community's laws and customs and that is held by a community. The fact that *individual* members of the community enjoy non-proprietary *usufructuary* rights does not prevent the recognition of a proprietary *community* title. Such community proprietary interests are a burden on the radical title which the Crown acquires. Therefore, the Court found that pre-existing customary rights and interests in land, that is native title, would survive the Crown's acquisition of sovereignty without the necessity of an express act of recognition by the new sovereign.

Summary

In conclusion, the High Court has confirmed Australia's status as a settled territory. But, by finding that Australia was not *terra nullius*, that is unoccupied land, and by finding that different legal consequences follow, Australia has in real terms now been placed in a new category. Its status now, which is a settled inhabited colony, closely resembles that of a conquered or ceded colony.[44]

This is evidenced in several ways. Firstly, the theory to support the common law of England becoming the law of Australia was based on an uninhabited Australia. As this theory was false, the rules of English common law did not necessarily apply. Secondly, it followed that the doctrine of tenure need not therefore fully apply in Australia. It was thus possible to bring a modified version of tenure to Australia. Under this doctrine of tenure the Crown is not the absolute owner of the land, it is only a supreme lord. Thirdly, while the acquisition of sovereignty over the territory, under the notion of *terra nullius*, could be equated with Crown ownership, because there

was no other proprietor, it did not follow that where a country was actually occupied, and not *terra nullius*, that the Crown acquired ownership of the land when it acquired sovereignty. The effect in reality is that Australia's position is paralleled to the situation where sovereignty was obtained by conquest. In effect, the High Court has found that rules of native title, as pre-existing rules, continue until they are extinguished as happens in a conquered or ceded territory.

Certainly, the consequence of finding that Australia was not *terra nullius* when settled, is that Australia is governed by different international rules concerning the manner and consequences of the acquisition of sovereignty, from rules that would have applied if it were truly a 'settled' colony that was *terra nullius*.

4. Post Mabo

(1) What is Left of the Notion of the Doctrine of Tenure after Mabo?

Several conclusions can be drawn from the judgment. First, the doctrine of tenure still operates but only in a limited way. Secondly, the Crown holds a radical title. It can become the 'beneficial or absolute owner' of land but only after an exercise of its rights, for example, by reserving land to itself, by granting a fee simple or by granting a lease. Upon exercise of its rights (where such exercise does extinguish native title) the land holdings become as they were under the feudal system. Thirdly, the notion of feudal tenure has now been extended by the recognition of native title. Native title is a burden on, and a legal right that attaches to the Crown's radical title.

(2) The Effect of Mabo on Land Holding in Queensland

It can be confidently asserted that in Queensland the types of land holdings that existed prior to *Mabo* continue to exist.

In relation to Crown land, the term as defined by the *Land Act* 1962 (Qld) s.5, probably has a different meaning from what it did prior to *Mabo*. This is not because the definition of Crown land has changed. It is still land that has *not*, (a) been granted in fee simple, (b) been reserved or dedicated to public purposes, or (c) been subject to any lease or licence granted by the Crown (although land held under a licence is deemed to remain Crown land). But Crown land is different now, as it is held by the Crown under a radical title subject to the existence of non-extinguished native title. Crown land is categorised as 'waste land' or 'unalienated Crown land' and the

Crown's power to deal with such land is contained in the *Land Act* 1962 (Qld) s.6. The Crown may continue to exercise its powers over this unalienated land, for example, it may make grants in fee simple, or for a term of years or otherwise deal with this land as it did before *Mabo*. These dealings are subject to possible compensation claims for extinguishment of native title.[45]

In relation to native title, it is recognised by the common law but not by the doctrine of tenure.[46] Native title is valid against the Crown, except where native title has been appropriately extinguished.

(3) *The Concept of Native Title*

(1) The Nature and Content of Native Title

(a) 'Rights'. The content of native title, that is, the rights which relate to the use of the land and its resources, must be ascertained by reference to the laws and customs of the particular group or tribe. Such laws and customs will be recognised provided they are not repugnant to natural justice, equity and good conscience. The Court acknowledged that such ascertainment may pose considerable difficulties, particularly as these laws and customs are oral and vary from tribe to tribe. Who should determine what land rights are in accordance with traditional laws and customs? It seems that the establishment of an Aboriginal Tribunal to deal with these matters would be appropriate.

The Court has also accepted that traditional laws and customs can be those as currently acknowledged and observed.[47] It is implicit in the judgment that the laws and customs may have undergone changes over the years, yet may still be accepted as traditional ways. Therefore, the issue of how much change is permissible, before the laws are no longer classified as traditional laws and customs, may be raised.

(b) Communal Title. Aboriginal native title is communal and the rights under it are communal rights enjoyed by the whole tribe.[48] A problem that arises here is how to identify the community. The High Court has not endeavoured to define what is necessary to constitute a community or clan or group. However, Brennan J. indicated that it was possible to recognise individual rights that are derived from the community laws and customs and that are dependent on the community title. Such an individual interest could, of course, be held only if it is consistent with traditional laws and customs.

(c) Proof of Title. To show traditional community native title to land, it is necessary that the group's traditional connection with the land has been substantially maintained. The High Court has not specified a time period during which the connection needs to be maintained. As the crucial date in the judgment regarding settlement, *terra nullius* and sovereignty is 1788, one would think that the group's connection with the land would have to have been in existence at that time. After all, how could a burden on the Crown's radical title develop if it were not there in 1788? Toohey J.'s judgment provides some support for this view.[49] The implication is that recent occupation or modern user will not qualify; clans could not occupy land now for the first time and claim a 'connection with the land'.

If all real acknowledgment of traditional law and any real observance of traditional customs have ceased then native title has also ceased, as traditional connection with the land could not then have been maintained. Once traditional native title has been lost it cannot be revived for contemporary recognition.[50]

(d) Transferability of Title. Native title is usually not transferable; it cannot be sold, or leased. The reason for this restriction is that native title is not based in the common law but only recognised by the common law. The question of its transferability depends on the laws from which it is derived,[51] and those laws have traditionally forbidden alienation. Thus native title cannot be transferred to people outside the traditional group, unless pre-existing laws and customs of the tribe permit this. Similarly, native title could not be bequeathed on the death of a holder to non-Aboriginals.

Native title can only be owned by the people traditionally entitled to the land and that is those who could prove a traditional connection with the land. The Court found that the rights and interests which constitute native title can be possessed only by indigenous inhabitants and their biological descendants. Mutual recognition of a particular person's membership in the clan must be given by the elders in authority.

Customs are not immutable. It is the nature of customs that they change to adapt to new circumstances. Could it be argued that alienation to outside the clan could become part of the culture and customs? The thrust of the High Court's decision suggests this.

Native title may be surrendered to the Crown. The authority for this derives from the Crown's right of pre-emption.[52] This

restriction on the transferring of Aboriginal title, distinguishes it from the fee simple which can be freely transferred to anyone.[53]

(2) Recording of Native Title

A further aspect of native title that will require resolution is whether records will need to be maintained of areas over which native title exists or is claimed to exist. Land Offices in Australia. already recording dealings with Crown lands may possibly undertake this responsibility. One would imagine that there might be insuperable problems of defining boundaries and identifying communities involved and the duration and extent of usufructuary rights.

(3) Status of Native Title

(a) Type of Interest Created. The High Court acknowledged that a wide variety of views had been taken regarding pre-existing native rights and interests.[54]

The High Court found that the rights conferred by native title did not constitute an interest in the land.[55] It was indicated that the rights of native title are personal or *usufructuary* rights of user (of the land) only.[56] However, the Court did recognise that these rights constitute legal rights.[57] Apart from Toohey J. none of the judges in the High Court was prepared to recognise native title as a fee simple.[58]

From the above statements it does not appear that the rights are classified as proprietary rights amounting to an interest in property. It does not matter how these rights are classified or characterised if the Crown can extinguish them. However, the classification of the rights could make a difference to compensation issues.

Deane and Gaudron JJ.[59] considered that though the rights were of a personal nature they could constitute valuable property. This statement appears to conflict with their view that the rights did not amount to an interest in land. In finding that such rights constituted property then it was possible to find that such rights must be compensated if compulsorily acquired by the Crown.[60]

The reference to the term *usufructuary* right further suggests that native title is not an interest in property. However, Brennan J. indicated that the fact that *individual* members of the community enjoy only *usufructuary* rights that are non-proprietary, would not prevent the recognition of a traditional proprietary *community* title.[61] These views are difficult to reconcile. If the community title is proprietary then one would expect that it confers an interest in the land itself.

Native title can not be easily categorised. The best approach is to note that it is outside our known system of land law. It is *sui generis* (the only one of its kind or peculiar to itself).

(b) The Enforcement and Protection of Native Title. Personal rights of use and occupation conferred by the customary native title are not illusory. Native title is now recognised by the common law as a legal right and can be protected by legal or equitable remedies that are appropriate to the particular rights and interests held. This would be so whether those rights are proprietary or personal and *usufructuary* in nature and whether they are owned by a community, a group or an individual.[62]

Protection would be available for infringement of rights, for example, to prevent trespass on the land. The native title holders could request an injunction, which is an equitable remedy, to prevent continuing trespass. However, the protection of native title by such remedies would not be available to prevent extinguishment of the interest by the Crown.

Brennan J. further indicated that possession of land held under native title could be protected and enforced by a representative action brought on behalf of the native title holders.[63]

(4) Extinguishment of Native Title

A further limitation on native title is that it is liable to extinguishment by the Crown. The judgment revealed differences of opinion on this issue. All judges agreed that native title can be extinguished by statutory authority, that is legislation.[64]

Brennan J.[65] with whom Mason C.J. and McHugh J. concurred, found that extinguishment could occur by executive as well as legislative action. Executive action would, for example, include action under the *Land Act* 1962 (Qld), which is undertaken by the Governor-in-Council. Such action could include reservations of land and alienations.[66] It could arguably extend to action under the *Contaminated Land Act* 1991 (Qld). Deane, Gaudron and Toohey JJ.[67] accepted that non-statutory extinguishment by executive action would be effective to extinguish native title. The exercise of the power of extinguishment of native title, whether undertaken by legislative or by executive action must show a clear and plain intention.

In the majority view in *Mabo* native title can be lost or extinguished by Crown grant of an interest pursuant to statutory authority which is inconsistent with the continued right to enjoy

native title. If the Crown grant is only partially inconsistent with a continuing right of native title, the native title will be extinguished to the extent of the inconsistency.[68] A law which simply controls the use of native title will not extinguish native title as it does not reveal a clear and plain intention to extinguish native title, for example, enviromental protection legislation.[69] Extinguishing native title does not depend on the actual intention with which the grant was made but on the effect which the grant has on the right to enjoy native title, that is whether the Crown grant is inconsistent with the right to enjoy native title in that land.[70]

Native title can be extinguished as follows:

(i) By grants of freehold titles, that is, a fee simple.

(ii) By grants of leases. Brennan J.[71] found that if a lease is granted, the tenant acquires possession and the Crown acquires the reversion at the expiration of the term. Thus the Crown's title is expanded from a mere radical title and on the expiry of the lease, becomes a *plenum dominium* (full ownership). Deane and Gaudron JJ. also found that native title is extinguished by an unqualified grant of a lease conferring the right to exclusive possession.[72]

(iii) Native title may not be extinguished by lesser interests, for example, an authority to prospect for minerals (as distinct from a mining lease).[73]

(iv) Where the Crown has appropriated land to itself, native title will be lost to the extent of any inconsistency. Factors which would prevent native title continuing would include the dedication, reservation or setting aside of lands used for roads, railways, post offices or other permanent works.

In the case where the use is consistent with the continuation of native title such native title will exist concurrently. The example given by Brennan J.[74] was that of national parks. However, it is arguable whether traditional native rights of hunting or fishing or fire lighting are compatible with, or even permitted in, the national parks. If the Crown has not granted an interest in land or reserved and dedicated land inconsistently with the right to the continued enjoyment of native title by the indigenous inhabitants, native title will survive and will be enforceable.

(v) If the native title was surrendered to the Crown voluntarily.[75]

(vi) If native tribes ceased to acknowledge their laws and customs, or lost their connection with the land[76].

(vii) Extinguishment could also occur on the death of the last member of the group or clan.[77]

In relation to pastoral leases, do these leases extinguish native title? It should be noted that the *Lands Act* 1962 (Qld) does not contain any requirements for reservation of Aboriginal rights.

If a lease is granted then native title is extinguished. This would be the case for most pastoral leases in Queensland which are grants of exclusive possession to the tenant, with no qualifications regarding Aboriginal rights of user. In this respect why should a pastoral lease differ from any other lease? The High Court[78] has clearly stated that the granting of a lease, which requires granting of exclusive possession of the land to the tenant, does mean the extinguishment of native title. It should be noted that while most pastoral leases contain reversions to the Crown at the expiration of the term, many such leases are also convertible into fees simple.[79] Where, however, the lease is granted, but the rights of Aboriginal title are reserved in the lease document, for example, if the lease itself said that it reserved to Aboriginal inhabitants free access to the land and to the trees and water thereon as well as access to enable them to procure birds, fish and other foods, then the situation would be different, and native title may not be extinguished completely. It would be extinguished only to the extent of the inconsistency. This would depend on the terms and wording of the reservation. Therefore, it would be possible that some aspects of native title might survive, for example, the right to use the land for food and shelter.[80]

(5) Compensation for Extinguishment of Native Title

On the question of compensation the Court exhibited very different views. The majority considered no compensation claim would be available on the extinguishment of native title.[81]

Deane and Gaudron JJ.[82] found that compensatory damages would be payable where native title was extinguished, without legislative authority where the intention to extinguish native title was not illustrated in clear and unambiguous words. This was referred to as 'wrongful extinguishment'.

If native title was extinguished by Commonwealth action this would be subject to the Commonwealth Constitution s.51(xxxi) which requires that laws regarding acquisition of *property* must provide 'just terms'. Deane and Gaudron JJ. interpreted '*property*' to include the legal rights of native title.[83] This is arguably inconsistent with the interpretation that native title does not amount to an interest in the land and thus can not constitute an interest in property. Their Honours appeared to regard native title as a property

right that should be given the same status as other property rights regarding compensation for infringement.[84]

There is an additional restriction on the power of extinguishment. State laws must be consistent with valid Commonwealth laws. Section 109 of the *Commonwealth Constitution* would render State legislation invalid in the event of any inconsistency. Inconsistency would include inconsistency with the *Racial Discrimination Act* 1975 (Cth).[85] Any attempt by a State to extinguish native title would be subject to the *Racial Discrimination Act*, although the High Court did not determine the inconsistency issue. If native title is a personal right and not a proprietary right then the extinguishment of such right would not be subject to the *Acquisition of Land Act* (1967) (Qld) as no compensation rights are available on the taking of personal property. Would the taking of personal property be a breach of the *Racial Discrimination Act* 1975 (Cth)?[86]

A very different approach was taken by Toohey J. who found that a trust or fiduciary relationship was created between the Crown and Aboriginals. His Honour[87] considered that the Crown's power to extinguish native title was subject to this fiduciary duty to ensure that native title was not dealt with in a manner that was contrary to the native title holder's interests. While his Honour did not actually deal with the compensation question he did consider that compensation might be payable for breach of this fiduciary duty. For example, if the Crown sold land for developmental purposes and this was without native title holder's consent the Crown would be in breach of its fiduciary duty[88] and subject to a damages claim.

Deane and Gaudron JJ. found that compensation claims would be subject to the relevant limitation periods being observed. These limitation periods would generally have expired by now and any claim would be statute barred.[89] In most cases no action could be brought against the Crown regarding granting of land in Australia.

Dawson J. did not recognise the right to compensation at all. His Honour's view was that native title was permissive occupation at the Crown's discretion. Thus a notional majority of four have held that Aboriginals were not entitled to compensation for extinguishment of native title. As Deane, Gaudron and Toohey JJ. considered most compensation claims would be out of time, the differences of opinion may have very little practical effect.

(6) Title by Possession

A new method of claim for native title was mentioned by Toohey J. and that is title by possession.[90] His Honour found that a tribe's long occupation (in law possession) of land would be sufficient to establish native title. This type of occupation does not require a permanent settlement. Visits over a period of time may be sufficient to establish occupation. If this approach were applied it may not be essential to prove that the land belongs to the Aboriginal community by traditional customs or practices. However, Toohey J. was definitely in a minority in this area.

5. Effect of the Mabo Judgment on the Aboriginal Land Act 1991

In Queensland Aboriginals can obtain title to certain lands under the *Aboriginal Land Act* 1991 (Qld) and the *Torres Strait Islander Land Act* 1991 (Qld). The lands that are claimable are vacant Crown lands, including national parks, that have been gazetted as available for claim, and also D.O.G.I.T. (Deed of Grant in Trust)[91] lands and Aboriginal and Torres Strait Island reserved land. The basis of a claim will be on grounds of either traditional affiliation, historical association or cultural or economic viability. These general grounds are broadly consistent with those under the *Mabo* test.

A claim for title to land made under the *Aboriginal Land Act* appears to have several advantages over a '*Mabo*' title claim. Firstly, if a claim under the *Aboriginal Land Act* is successful then a statutory title, which under the Act is a fee simple, will be granted. If the title claim under *Mabo* is successful, then the title gained will be native title only. This is a non- registrable, non-transferable title and a title that is liable to extinguishment by Crown action. Secondly, a 'Mabo' title claim requires a long connection with the land in order to establish proof of title - possibly a connection that has existed since 1788. Under the *Aboriginal Land Act* 1991 (Qld) a much shorter connection need be shown. Thirdly, other difficulties and problems associated with proof of native title, for example, proof of customs or proof of membership of a particular clan, will be avoided in a claim under the *Aboriginal Land Act.*

It seems that a *Mabo* claim will be a precursor to an action under the *Aboriginal Land Act* and where such a claim fails under a '*Mabo*' type case then an action will be brought under the *Aboriginal Land Act.* Perhaps one solution to the uncertainties involved in a *Mabo* title would be to make all native titles claimable under legislation such as the *Aboriginal Land Act* 1991 (Qld) and grant a statutory registerable title.

The effect of the *Mabo* decision on grants to be made under the *Aboriginal Land Act* has yet to be fully determined. This Act has been based on the assumption that Aboriginal title can be created by Crown grant. No reference was made to the *Aboriginal Land Act* in the *Mabo* judgment, therefore it must be assumed that the legislation itself does not extinguish native title. However, a grant of a fee simple under the *Aboriginal Land Act* would extinguish native title.

6. Conclusion

The *Mabo* decision is about land and rights in relation to land. The effect of the judgment itself is not restricted to the Murray Islanders but the principles apply to the whole of Australia. The High Court decision in *Mabo* was not made in relation to individual blocks of land on the Murray Islands but was given in relation to a native community and their rights to land. It is in this sense that the principles in relation to native title for the Murray Islanders can be applied to all native title in Australia.

We have seen in the *Mabo* judgment a re-examination of the source of ownership and of land holding in Australia and a re-examination of the doctrine of tenure. The doctrine of tenure is simply one system of landholding. It is a scheme that provides definite rules regarding the holding and ownership of land. The High Court in *Mabo* has provided a new dimension to our legal system for landholding; a scheme in response to current notions of equality and justice in Australia.

The author thanks Carolyn Sappideen for her valuable assistance in the preparation of this article.

Notes

1. (1992) 66 A.L.J.R. 408.
2. See A.A. Preece 'The Origins of Tenure; Some Historic Parallels' (unpublished, Faculty of Law, University of Queensland, 1992).
3. See M.A. Neave, C.J. Rossiter and M.A. Stone, *Sackville & Neave Property Law Cases and Materials* (4th ed., Australia: Butterworths, 1988), 148-150.
4. R. Megarry & H.W.R. Wade, *The Law of Real Property* (4th ed., London: Stevens & Sons Limited, 1975), 13.
5. A.W.B. Simpson, *A History of The Land Law* (2nd ed., Oxford: Clarendon Press, 1986), 5-7.
6. Tenures were classified as free or not free.
7. F. Pollock and F.W. Maitland, *The History of English Law* Vol. 27. (2nd ed., Cambridge: University Press, 1968), 240.
8. Pollock and Maitland, 229.
9. The statute of *Quia Emptores Terrarum* 18 Edw. 1. (1290) permitted free men to sell their land holding, subject to the purchaser, holding from the same lord and by the same services of whom and by which the vendor held. Pollock & Maitland, 337.
10. Pollock & Maitland, 232.
11. Pollock & Maitland, 235.
12. (1847) 2 S.C.R. (NSW) 312.
13. (1959) 102 C.L.R. 54, 71.
14. (1975) 135 C.L.R. 337, 438-439.
15. The decline of the feudal system of land holding commenced with the passage of the statute *Quia Emptores Terrarum* 18 Edw. 1.(1290). This statute prohibited the creation of any conditions of tenure between the grantee of the land and the grantor. This meant that the feudal system gradually decayed. By the sixteenth century the system had generally become one of tenants-in-chief, holding directly from the Crown. By 1660 feudal incidents of tenure, too, were abolished. These had mostly been changed to monetary payments. (See Preece, 3.)
16. See K. Gray, *Elements of Land Law* (London: Butterworths, 1987), 58.
17. See Sackville and Neave, 149.
18. Blackstone, *Commentaries on the Laws of England* Book 1, c.4, 108-112. See A.C. Castles, *An Australian Legal History* (Australia: The Law Book Company Limited, 1982), 9-13.
19. See Blackstone, 111.
20. See Blackstone, 111. See also Castles, 11-13.
21. See Castles, 13.
22. (1971) 17 F.L.R. 141, 202, 242-244.
23. K. Roberts-Wray, *Commonwealth & Colonial Law* (London: Stevens & Sons, 1966), 626.
24. (1847) 1 Legge 312, 316.
25. (1959) 102 C.L.R. 54.
26. (1975) 135 C.L.R. 337, 438-439.
27. See Roberts-Wray, 625.
28. Other writers have taken a similar view. They also have made distinctions between the acquisition of a territory and the Crown's acquisition of property. See *Salmond on Jurisprudence* (7th ed., 1924, Appendix 'The Territory of a State', 554) and D.P. O'Connell, *International Law*, (2nd ed., London: Sweet & Maxwell, 1970), 378, who note that the acquisition of territory is the province of international law, while the acquisition of property is the province of the common law.
29. The Supreme Court of New South Wales, in *Attorney-General v. Brown* (1847) 1 Legge 312, 316-317 found that 'the waste lands of this Colony are, ... in the Sovereign's possession', because 'The territory of New South Wales, and eventually the whole of the vast island of which it forms a part, have been taken possession of by British subjects in the name of the Sovereign. They belong, therefore, to the British Crown. ...' This doctrine

of exclusive Crown ownership of all land in Australia was also confirmed in *Randwick Corporation v. Rutledge* (1959) 102 C.L.R. 54, 71 and in *New South Wales v. The Commonwealth* (*The Seas and Submerged Lands Case*) (1975) 135 C.L.R. 337, 438-439. See also Isaac J. in *Williams v. The Attorney-General for New South Wales* (1913) 16 C.L.R. 404, 439-440.

30. See *Vajesingi Joravarsingji v. Secretary of State for India* (1924) L.R.51 Ind. App. 356,360.
31. (1971) 17 F.L.R. 141.
32. (1992) 66 A.L.J.R. 408,425.
33. (1992) 66 A.L.J.R. 408, 423.
34. (1992) 66 A.L.J.R. 408, 425. See B. Keon-Cohen, 'Case note on Eddie Mabo and Ors v. The State of Queensland' (1992) Vol 56: No 2 *Aboriginal Legal Bulletin* 22.
35. (1992) 66 A.L.J.R. 408, 421, Brennan J.
36. (1992) 66 A.L.J.R. 408, 417.
37. (1992) 66 A.L.J.R. 408, 421, 424 Brennan J.
38. (1992) 66 A.L.J.R. 408, 428-429.
39. (1992) 66 A.L.J.R. 408, 425.
40. (1608) Davies 28 [80 E.R. 516].
41. [1921] 2 A.C. 399, 403-404.
42. Cumming & Mickenburg (1972) *Native Rights in Canada* (2nd ed., Toronto: Indian - Eskimo Anoi. of Canada, 1972), 40, as cited in H. McRae, G. Nettheim & L. Beacroft, *Aboriginal Legal Issues* (Australia: The Law Book Company, 1991), 112.
43. (1992) 66 A.L.J.R. 408, 426.
44. The majority views on tenure prevail, that is Brennan J. with whom Mason C.J. and McHugh J. agreed. Deane and Gaudron JJ. also in the majority took a similar view on the question of tenure. Toohey J. found an additional argument; that is, that native title existed by reason of the community's long occupation (in law possession) of the relevant land. While his Honour's views do not form the law in this case they are never the less persuasive. Dawson J. dissented and he took the traditional view that native title, where it exists, is an occupation at the Crown's discretion.
45. Refer p.111 of this article.
46. Under the common law doctrine of continuity, rights of native title continue, until extinguished, despite a change in sovereignty. Under the standard doctrine of tenure title to all land vests in the Crown. Thus, the concept of the existence of native title can be said to be recognised by the common law. See (1992) 66 A.L.J.R. 408, 430.
47. (1992) 66 A.L.J.R. 408, 431, Brennan J.
48. (1992) 66 A.L.J.R. 408, 452, Deane and Gaudron JJ.
49. (1992) 66 A.L.J.R. 408, 485-6. Toohey J. cited the case of *Hamlet of Baker Lake* v. *Minister of Indian Affairs and Northern Development* ((1979) 107 D.L.R. (3rd) 513, 542) where the court noted that one of the elements the plaintiff must prove was that occupation was an established fact at the time sovereignty was asserted by England.

50. (1992) 66 A.L.J.R. 408, 429-431, 435, Brennan J.
51. (1992) 66 A.L.J.R. 408, 430.
52. See M. Gregory, 'Re-Writing History 1 Mabo v. Queensland: the Decision' (1992) Vol.17: No.4 *Alternative Law Journal*, 157.
53. See McRae, Nettheim and Beacroft, 111.
54. (1992) 66 A.L.J.R. 408, 440, Deane and Gaudron JJ.
55. (1990) 66 A.L J.R. 408, 452, Deane and Gaudron JJ.
56. (1992) 66 A.L.J.R. 408, 425, 452. It is because common law native title is only a personal right which is not supported by a Crown grant of an interest in land that such rights can be extinguished by the Crown.
57. (1990) 66 A.L.J.R. 408, 452, Deane and Gaudron JJ., 433, Brennan J.
58. It is not entirely clear to which aspects of the fee simple his Honour was referring; was he suggesting that native title was capable of continuing forever? If His Honour accepted that native title could be extinguished, how consistent is this with the fee simple?
59. (1992) 66 A.L.J.R. 408, 452-453.
60. This would include acquisition under Commonwealth or State legislation e.g. the *Acquisition of Land Act*. The Commonwealth of Australia *Constitution Act* s.51 (xxxi) permits the Commonwealth to acquire *property* on just terms for any purpose in respect of which Parliament has power to make laws. The term 'property' seems wider than the term 'land' under the *Acquisition of Land Act*. If native title is not an 'interest in property' then should it be compensated?
61. (1992) 66 A.L.J.R. 408, 426, Brennan J.
62. (1992) 66 A.L.J.R. 408, 430
63. (1992) 66 A.L.J.R. 408, 431. The five individual plaintiffs sought declarations as to their entitlements and that of the Meriam people as a whole to three Torres Strait Islands, Murray Island, Dauar and Waier. By the end of the hearing, one plaintiff, Mr Mabo, no longer asserted any claim on his own behalf. The declaration sought to give primacy to the rights of the Meriam people rather than to those of the individual plaintiffs.
64. (1992) 66 A.L.J.R. 408, 431-432, Brennan J., 452, Deane and Gaudron JJ., 489-490, Toohey J.
65. (1992) 66 A.L.J.R. 408, 432.
66. Under the *Land Act* 1962 (Qld) the Governor-in-Council may by executive action grant or demise C own land, s.6.(1) (2) & (6), may issue additional areas for certain leases, s 269, may issue development leases, s.214(1), may purchase land for the Crown, s.10, & may set apart town & suburban land, s.17(2).
67. (1992) 66 A.L.J.R. 408, 452, Deane and Gaudron JJ., 489-490, Toohey J.
68. (1992) 66 A.L.J.R. 408, 434, Brennan J.
69. (1992) 66 A.L.J.R. 408, 433. J. Malbon, 'The implications of Mabo v. Queensland (No.2)' (1992) 57:2 *Aboriginal Law Bulletin* 7.
70. (1992) 66 A.L.J.R. 408, 434.

71. (1992) 66 A.L.J.R. 408, 434-436. Brennan J. found that the sardine factory lease over Dauar & Waier Islands did extinguish native title despite the special condition that 'the lessees shall not in any way obstruct or interfere with the use by the Murray Island natives of their tribunal [sic] gardens and plantations of the leased land'. Ultimately this lease was forfeited. But should the leases on the Islands revert to reserves when such leases were forfeited? His Honour further found that the leases granted to the Missionary society also had the effect of extinguishing native title.
72. (1991) 66 A.L.J.R. 408, 452, Deane and Gaudron JJ.
73. (1992) 66 A.L.J.R. 408, 434.
74. *Ibid.*
75. (1992) 66 A.L.J.R. 408, 435, Brennan J.
76. *Ibid.*
77. *Ibid.*
78. (1992) 66 A.L.J.R. 408, 434, 452.
79. Pastoral leases can be granted in freeholding tenure, in that while the tenant receives a lease for usually up to 50 years, the rent paid can be deductible from the purchase price of the freehold estate. *Land Act* 1962 (Qld), s.53. s.123 to s.132. Leases which were granted as perpetual leases in perpetuity could be converted to freehold tenures *Land Act* 1962 (Qld), s.131, s.132.
80. (1992) 66 A.L.J.R., 434. See H Reynolds, 'Native Title and Pastoral Leases' 119, 128.
81. (1992) 66 A.L.J.R. 408, 410. See W.D. Duncan & A.E. Wallace, *Property Law & Practice in Queensland* (Australia: The Law Book Company Limited) 572/11.
82. (1992) 66 A.L.J.R. 408, 453.
83. *Ibid.* Refer p.108 of this article.
84. See Gregory, 159.
85. *Ibid.* (1992) 66 A.L.J.R. 408, 435-436, Brennan J., 452-453, 456, Deane and Gaudron JJ. and 497-498, Toohey J.
86. The argument that no breach of the *Racial Discrimination Act* 1975 (Cth) occurred would have to be considered in the light of the High Court decision in *Mabo v. Queensland (No 1)* (1988) 166 C.L.R. 186.
87. (1992) 66 A.L.J.R. 408, 491-495.
88. See Keon-Cohen, 22.
89. (1992) 66 A.L.J.R. 408, 453.
90. *Id.*
91. D.O.G.I.T.s were established by the *Land Act (Aboriginal & Islander Grant) Amendment Act* 1982 (Qld). Here reserved Crown land was transferred by a deed of grant in trust (D.O.G.I.T.) to the Aboriginal community residing on it, and was held by the elected Aboriginal Councils as trustees. The grants were of inalienable freehold.

Native Title and Pastoral Leases

Henry Reynolds[*]

In the *Mabo* decision the High Court determined that at the time when sovereignty was asserted the Aborigines and Islanders were in possession of their land, that the common law recognised that possession, and that the Crown subsequently extinguished the native title in a piecemeal fashion over a long period of time. It will require considerable legal and historical research to determine if, when, and in what manner extinguishment was effected in any particular part of the country. While not pursuing the question of extinguishment for any distance - after all, native title had not been extinguished on Murray Island - the Court outlined some of the principles involved.

Brennan J. determined that the Crown validly extinguished Aboriginal land rights when it granted an interest 'that is wholly or partially inconsistent with a continuing right to enjoy native title'. Native title was extinguished by 'grants of estates of freehold or of leases'. Justices Deane and Gaudron argued that the Aboriginal interest was nullified by an 'unqualified grant of an inconsistent estate', such as a grant in simple fee 'or a lease conferring the right to exclusive possession'. It could also be terminated:

> by other inconsistent dealings with the land by the Crown, such as appropriation, dedication, or reservation for an inconsistent purpose or use, in circumstances giving rise to third party rights or assumed acquiescence.[1]

There is no question, then, that where freehold tenure has been granted, native title has ceased to exist. However, no such certainty can be assumed in respect of leases of Crown land. Indeed, this is a

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matter of major legal - and political - importance considering that about half the continent, and practically all the range lands, are held under leasehold. We are dealing with much land, large industries, and powerful interests.

The Court signalled that the native title must be considered to have been extinguished over this leased land. But, before that can be accepted, it is necessary to examine the history of Australian land law in the light of the principles of extinguishment enunciated in *Mabo*. We must consider whether the use of leasehold land - overwhelmingly for pastoralism - is now, and was in the past, 'wholly or partially inconsistent with a continuing right to enjoy native title'; whether pastoral leases represented an 'alienation of land by the Crown inimical to the continuance of traditional title', or conferred 'the right to exclusive possession'. Beyond that, we must examine whether pastoral occupation, by itself, was ever considered to be 'inconsistent with a continuing Aboriginal interest'.[2]

The historical roots of the problem cannot be understood without investigating the development of policies relating to Australian land which evolved in the Colonial Office between 1846 and 1850. But, to gain a full understanding, we must reach even further back and look at the political and legal opinions about the nature and status of indigenous land rights which developed during the 1830s.

Native rights became an important issue on the British political agenda immediately after abolition of the slave trade in 1833 and were promoted by such major figures of that crusade as Thomas Buxton. In July, 1834 the House of Commons gave unanimous support to an Address to the King moved by Buxton and seconded by Spring-Rice, the Secretary of State for the Colonies, on the question of indigenous rights throughout the empire. There is no doubt that Buxton was concerned principally with land rights and believed that, in this respect, Australia was no different from any other part of the Empire. In private correspondence earlier that year Buxton had outlined the principles which motivated him. He wrote:

> It appears to me that we ought to fix and enforce certain regulations and laws, with regard to the natives of all countries where we make settlements. Those laws must be based on the principles of justice. In order to do justice we must admit -
>
> 1st. That the natives have a right to their land.[3]

Similar principles were enunciated in the report of the House of Commons Select Committee on Aborigines (British Settlement) of 1837. It was written by Buxton in close consultation with senior

Colonial Office officials. Once again, the principles of native title were clearly stated:

> It might be presumed that the native inhabitants of any land have an incontrovertible right to their own soil: a plain and sacred right, however, which seems not to have been understood.[4]

The growing political importance of indigenous land rights in the 1830s and 1840s - developments which inspired the Treaty of Waitangi - is fairly well known. Less well understood is the contemporary legal status of native title. In examining this theme we are fortunate that, in 1836, the Port Phillip Association sought legal advice when the Colonial Office rejected Batman's infamous treaty with Aboriginal clans in southern Victoria. Four eminent legal figures of the period provided opinions and, in so doing, spelt out the current understanding of the status of native title in the common law of the Empire.

It is necessary to briefly consider the men in question before turning to their ideas. The most important opinion was written by William Burge, the leading contemporary authority on colonial law. He had been the Attorney-General of Jamaica and in 1838 wrote his *Commentaries on Colonial and Foreign Law* which remained in print throughout the 19th century. His opinion was supported by Sir William Follett, who, in 1836, had already served as Solicitor-General in one ministry and was to become Attorney-General in another one, and by Thomas Pemberton who was the leader of the Chancery bar and who later sat on the Judicial Committee of the Privy Council for 20 years. The fourth lawyer was Stephen Lushington, a leading figure in both law and politics who, in 1838, became a judge of the Admiralty Court.

The joint opinion of Burge, Pemberton and Follett was a classic enunciation of the doctrine of native title - the indigenous people had a form of tenure based on prior occupation which was recognized by the common law. The Crown had the exclusive right of pre-emption but until it acted the natives retained their use and occupancy rights. The opinion stated:

> It had been a principle adopted by Great Britain as well as by other European states, in relation to the settlement on the continent of America that the title which discovery conferred on Government ... was that of ultimate dominion in and sovereignty over the soil, even whilst it continued in the possession of the aborigines. This principle was reconciled with humanity and justice towards the aborigines, because the dominion was qualified by allowing them to retain, not only the rights of occupancy, but also a restricted power of alienating those parts of the

territory which they occupied ..... The restriction imposed on their power of alienation consisted in the right of pre-emption of these lands by that state, and in not permitting its own subjects or foreigners to acquire a title by purchase from them without its consent. Therein consists the sovereignty of a dominion or right to the soil asserted, and exercised by the European government against the aborigines, even while it continued in their possession.[5]

Lushington did not directly address the question of native title in his opinion, but we know from other evidence that he fully accepted the doctrine and was a firm believer in 'the right of the aborigines in the soil'.[6]

In the mid-1830s, four leading legal figures strongly affirmed that native title was part of the common law of the Empire and that Australia was no different in that respect from any other colony. What is more, we know that Burge's opinion was studied approvingly and accepted as authoritative by Lord Glenelg, the Secretary of State for the Colonies, and his Under-Secretary James Stephen.[7] It seems that in 1837, the Colonial Office gave copies of the opinions to Governor Arthur, who had just returned from Tasmania, and to Governor Gipps, who was about to sail for New South Wales. Arthur's copy of the document was headed: 'Legal opinion of rights of native chiefs to their own lands.'[8] We are even clearer about Gipps's view of the matter. He referred extensively to Burge's opinion in a debate in the New South Wales Legislative Council in 1840, on the New Zealand *Claims to Land Bill*. He explained that Burge and his two colleagues were 'three of the most eminent living lawyers', while Burge was 'in all matters of colonial law ... one of the first authorities now living'. In the course of his speech, Gipps outlined in some detail, the doctrine of native title, arguing that the principles were 'fully admitted, and indeed received, as political axioms'.[9] Gipps's interpretation was commended when read later in the Colonial Office.[10]

It is beyond doubt, then, that the doctrine of native title was well known and understood in leading legal and political circles in the 1830s and the 1840s. Moreover, it was 'fully admitted' to be part of the colonial common law which applied throughout the Empire. But, it is necessary to see how, in the 1840s, this principle was reconciled with the rapid pastoral expansion in Australia.

The British government attempted to provide a legislative framework for Australian settlement in the Australian *Waste Land Acts* of 1842 and 1846. However, widespread agitation during 1846, in both Australia and the United Kingdom, forced the Colonial Office to give greater security of tenure for the squatters in the famous Order-in-Council of March 1847. It was a great victory for the pastoral interests. But, these developments were watched with growing alarm by the Chief Protector of Aborigines at Port Phillip, George Augustus Robinson.

Robinson had been concerned about the expulsion of Aboriginal clans from traditional lands from the time of his arrival in Melbourne in 1839. In a letter to the Superintendent of the settlement, he wrote:

> Many of the squatters with their twenty and forty square miles of country absurdly imagine that a ten pound license to squat confers on them the power to expel the primitive inhabitants from the land of their forefathers. It was a common occurrence but a short time since for these people to be coerced and chased by horsemen from their homes and native fires.[11]

His foreboding increased after a Supreme Court case in Melbourne in 1841, which greatly strengthened the hand of the squatters. A settler named Bolden was arraigned for whipping and shooting at Aborigines to drive them from his station. The presiding judge, Justice Willis, declared that:

> if a party receives a licence from Government to occupy a run, and any person white or black come on my run for the purpose of stealing my property, I have a right to drive them off by every lawful means in my power ... The blacks have no right to trespass unless there is a special clause in the license from the Government.[12]

Robinson's concern intensified during 1846 as a result of the vociferous campaign to grant the squatters security of tenure on their runs. He outlined the problem as he saw it in his annual report of that year. It evoked no response in Australia but started alarm bells ringing when it eventually reached the Colonial Office. He wrote:

> The claims of Aborigines to a reasonable share in the soil of their fatherland has not, I regret to say, been recognized in any of the discussions which for so great a length of time, have agitated the public mind on the question of rights of the Squatters, to the occupancy of the lands of the Crown ..... the duty devolves on me to bring this Claim under the notice of Her Majesty's Government for a reasonable share in the soil of their fatherland.[13]

One of the Colonial Office officials who read the report stressed the importance of the subject matter, underlining in pencil and placing asterisks in the margin beside those key phrases about Aboriginal claims to 'a reasonable share in the soil of their fatherland'. The intra-office memos were equally revealing. Herman Merivale noted that Governor Fitzroy's attention 'must be drawn' to the question. 'It would, of course,' he wrote, 'be most unjust that the

Natives should be extruded in the manner described ... from the soil of which till recently, they were the sole occupants'. Secretary of State Earl Grey commented that the Governor 'must be instructed to take care that they are not driven off all that country which is divided into grazing [stations] let under the recent regulations'. Grey considered the matter one of the greatest importance. In a brief memo he explained why Aboriginal rights must be affirmed. It was a matter of life and death. Action must be taken '*with a view* to their *preservation from being exterminated*'.[14]

The resulting dispatch, sent to Sydney in February 1848, outlined a well developed proposal which aimed to remedy the situation outlined in Robinson's report. Fitzroy's attention was drawn to the material which he had earlier submitted to the Colonial Office without comment. Grey quoted back to the Governor a passage taken from observations of Assistant-Protector E.S. Parker enclosed in the Chief Protector's report. Parker had written:

> Another subject deeply affecting the future condition of the Aborigines is the probability that unless suitable reserves are immediately formed for their benefit, every acre of their Native soil will shortly be so leased out and occupied as to leave them, in a legal view, no place for the sole of their feet. If the occupation of Crown Lands is to be settled by The Crown granting leases for Years, the Natives will be deprived of all legal right to hunt over their own Native Lands, and, according to the dicta of certain high legal authorities, may be forcibly excluded by the Lessee from the tract of Country so leased.[15]

Grey referred to the suggested creation of large reserves by way of compensation for the impairment of native title. He argued that whereas such a scheme was appropriate elsewhere in the world, the nature of Australia's geography and settlement patterns demanded a different answer. The dryness of the continent and the need for extensive grazing rights called for a peculiarly Australian solution. In fact:

> the very difficulty of thus locating the Aboriginal Tribes absolutely apart from the Settlers renders it more incumbent on Government to prevent them from being altogether excluded from the land under pastoral occupation. I think it essential that it should be generally understood that leases granted for this purpose give the grantees only an exclusive right of pasturage for their cattle, and of cultivating such Land as they may require within the large limits thus assigned to them; but that these leases are not intended to deprive the natives of their former right to hunt over these Districts, or to wander over them in search of subsistence, in the manner to which they have been heretofore accustomed, from the spontaneous produce of the soil.[16]

The Colonial Office had been forced to examine some of the same issues which exercised the mind of the High Court in the *Mabo* case. The officials considered whether pastoral occupation was 'wholly or partially inconsistent with a continuing right to enjoy native title' and concluded that it certainly was not. They were adamant that pastoral leases did not confer 'a right of exclusive possession'. The pastoralist's exclusive right of pasturage co-existed with the Aboriginal right of use and occupancy. They were 'mutual rights'.[17] One was not superior to the other. On the contrary, the Colonial Office accepted that when the land was enclosed and cultivated, the usage was inconsistent with a continuing Aboriginal interest although, whether that interest revived if the land went out of cultivation, is not clear.

Earl Grey was even more emphatic on these points in another intra-office memo written in March 1849 when he noted that it had to be assumed that the Imperial government 'did not intend ... to exclude the natives' from land held under lease. What is more, he believed that the Australian *Waste Lands Act* had provided the government 'no power'[18] to extinguish customary rights. Grey provided no authority for this observation. He may have been thinking along lines taken up in *Mabo*, that for extinguishment of the native interest to take place, the intention of the legislature must be clear and plain. The political reality was that any British legislation which took that step would have evoked the vociferous opposition of the powerful humanitarian lobby and would have faced almost certain defeat.

What, then, was to be done to protect the Aboriginal interest? Colonial Office officials were clear about what they wanted to achieve, namely,'the reservation in Leases of Pastoral Land of the rights of the Natives'. It was not a case of creating new rights but the recognition of existing ones and the shaping of an instrument to ensure the 'continuance of their rights'.[19] They clearly interpreted a reservation in the precise legal sense of retaining or holding back some right, power or privilege. Equally, when they wrote of 'rights', they referred not to moral, but to *legal* rights. And the term 'right' was employed over and over again in the official correspondence of the time. It was used twice by Earl Grey in his initial dispatch on the subject in February 1848[20] and again by the New South Wales Executive Council when, in July that year, it considered the dispatch and the measures required to secure to the Aborigines the right' of use and occupancy 'notwithstanding the leasehold tenure under which such land may be placed'. For its part, the Council advised the Lands

Department to insert in the leases being prepared 'a provision securing the right adverted to by Earl Grey'.[21] A year later, the Council returned to the subject, informing the Colonial Office that members 'fully recognise the justice and expediency ... of securing for the Aboriginal inhabitants the right of wandering as heretofore in quest of food' on all lands leased for pastoral purposes.[22] The Colonial Office referred the whole matter to the Colonial Land and Emigration Office seeking advice on 'the measures necessary for securing to the Aborigines ... the right of securing their subsistence over lands leased for pastoral purposes'.[23]

The term 'right', then, was used in departmental memos in the Colonial Office, in official correspondence between London and Sydney, in the proceedings of the Executive Council in Sydney, in instructions relayed to the Lands Department and in correspondence between the Colonial Office and the Colonial Land and Emigration Office. The New South Wales Attorney General and Solicitor General were the only officials who avoided using the word 'right' when referring to Aboriginal use of leased land. Clearly recognizing the legal potence of the term, they wrote of means to secure 'this privilege' for the Aborigines.[24]

How was the matter finally resolved? The New South Wales Law Officers, on receiving the initial instruction to provide for a 'continuance' of Aboriginal rights, argued that the matter could not be pursued without additional authority provided by an Order-in-Council. The Colonial Office accepted the advice and referred the correspondence to the Colonial Land and Emigration Office. The officials there were acutely aware of the political sensitivities so soon after the colonial agitation of 1846 and suggested a form of words which disguised the specific purpose of the Order-in-Council which eventually was signed by the Queen on 18 July 1849 to 'have the force and effect of law' in all the Australian colonies. The preamble of the Order-in-Council read in Part:

> And whereas it is expedient that all such pastoral leases should contain such conditions, clauses of forfeiture, exceptions, and reservations, as may be necessary for securing the peaceable and effectual occupation of the land comprised in such leases, and for preventing the abuses and inconveniences incident thereto.[25]

The Order-in-Council attracted the attention of Justice Blackburn in *Milirrpum v. Nabalco* and Justice Dawson in *Mabo*. With respect, both Judges may have, arguably, misinterpreted its meaning and intention. Consequently the importance of the British government's commitment to the preservation of the Aboriginal interest may not

have been fully appreciated. Dawson J. accepted the opinion of the 19th century historian G.W. Rusden that the Order-in-Council was of little importance and that after its publication it was a safe prediction that 'as the Earl [Grey] refused to declare that the native rights deserved respect, they would not be respected'. Dawson J. concluded on the basis of Rusden's writings that:

> the policy of the Imperial Government during this period is clear: whilst the aboriginal inhabitants were not to be ill-treated, settlement was not to be impeded by any claim which those inhabitants might seek to exert over the land.[26]

However, Rusden was, in the writer's opinion, mistaken. He had no access to the archival material in Britain available to the modern scholar and therefore could only have been guessing as to the intentions of the Colonial Office.

The deliberate imprecision of the Order-in-Council does require comment. It concerned the Colonial Office's Australian specialist, Gordon Gairdner. In a minute to Earl Grey on the draft Order-in-Council received from the Land and Emigration Commission he scrawled: 'The entire extent of the access of the natives must surely be defined'. With an eye to the politics of the situation, Grey replied that the Order would 'be sufficient' as long as it was accompanied by an 'explanatory dispatch'.[27] So, the true meaning of the measure was to be found less in the Order-in-Council, which was a public document published in the New South Wales Government Gazette, and more in the dispatch which was only for official eyes. In that correspondence Grey re-emphasised the substance of his original dispatch of 11 February 1848 and re-iterated that there could be 'little doubt that the intention of the Government was ... to give only the exclusive right of pasturage in runs, not the exclusive occupation of the land, as against the Natives using it for ordinary purposes'. To underline his commitment to the issue, the Secretary of State told the Governor that, if necessary, he was to use discretionary powers under the Act to force squatters who had received leases prior to the publication of the Order-in-Council to accept the new conditions if they were 'disposed to insist on an unreasonable construction of their right of occupation'.[28]

When, in the middle of 1847, the Colonial Office officials read of G.R. Robinson's concern about the expulsion of Aborigines from their land they set out to create a legal instrument which would convey 'to the Natives the continuance of their rights' and provide statutory recognition for Aboriginal native title. That plan was brought to fruition two years later in the Order-in-Council of July

1849. The extent of that concern was never publicly declared. There was no hint in any correspondence sent to Australia that what motivated the Colonial office was the fear that without legal recognition of use and occupancy rights nothing would 'preserve' the Aborigines 'from being exterminated'.

With this in mind, we are in a better position to understand why, on the eve of colonial self-government, the British Government locked the Aboriginal interest into future land legislation of the fledgling colonial governments. In 1855, the Imperial parliament passed the *Repeal of Colonial Waste Land Act* which gave the colonies the power to legislate for the disposal of Crown lands and to repeal, alter or amend any of the Orders-in-Council under the 1846 *Waste Land Act* providing however for the 'preservation and fulfilment of contracts, promises and engagements made by or on behalf of Her Majesty with respect to land'.[29] The same restraint was placed on Queensland after its separation from New South Wales in 1859 and was embodied in the *Constitution Act* 1867.[30]

It was this legislation which accounted for the recognition of Aboriginal use and occupancy rights in pastoral leases issued by the various colonial governments in the second half of the 19th century. Left to themselves, the colonial governments would have ignored the Aboriginal interest.

By and large, the colonial leases fulfilled the intentions of the Imperial government expressed in 1847-49. Queensland leases reserved 'to the Aboriginal inhabitants ... such free access to the said parcel of land ..... and to the trees and water thereon, as will enable them to procure the animals, birds, fish and other foods on which they subsist'.[31] Western Australia recognized the 'full right' of the Aborigines 'at all times to enter upon any ... unimproved' leasehold land for the purpose of 'seeking their subsistence in their accustomed manner'.[32]

South Australian leases were even more explicit:

> Reserving nevertheless and excepting out of the said demise to Her Majesty ... for and on account of the present Aboriginal Inhabitants of the Province and their descendants ... full and free right of ingress egress and regress into upon and over the said Waste Lands of the Crown ... and in and to the Springs and surface water thereon ... and to make and erect and to take and use for food birds and animals ferae naturae in such manner as they would have been entitled to if this demise had not been made.[33]

So, what happened to the Aboriginal right of use and occupancy and the British recognition of native title? They were ignored, unenforced and apparently never tested in the colonial courts. What their status is today urgently needs clarification. The Aboriginal interest has apparently survived in South Australian and Northern Territory pastoral leases or had done so until quite recently. The situation in Queensland and Western Australia is unclear and unresearched.

Given the lack of basic information, the most productive approach appears to be to consider the whole question in relation to the principles of extinguishment of native title as outlined in the *Mabo* judgment. Such an investigation must begin with a clear appreciation that what we are dealing with is a significant legal interest, for, as Justices Deane and Gaudron observed, 'the rights of occupation and use under common law native title can themselves constitute valuable property'.[34] The fact that generations of Australian politicians, pastoralists and jurists ignored, or were ignorant of the fact, is beside the point.

While the High Court had no doubt that the Crown could exercise its power to extinguish native title, the action so taken by the legislature or by the executive had to 'reveal a clear and plain intention to do so', a requirement which flowed from 'the seriousness of the consequences to indigenous inhabitants of extinguishing their traditional rights and interests in land'.[35]

However, what we are dealing with in the present case is native title which was recognized and legally strengthened by both executive intent and action and by statute. The test for valid extinguishment in these circumstances is even more rigorous because, as Justice Brennan noted, 'an interest validly granted by the Crown, or a right or interest dependent on an interest validly granted by the Crown cannot be extinguished by the Crown without statutory authority'.[36] The same point was driven home by Justices Deane and Gaudron who observed:

> The ordinary rules of statutory interpretation require that clear and unambiguous words be used before there will be imputed to the legislature an intent to expropriate or extinguish valuable rights relating to property without fair compensation.[37]

So, the question remains. Was the Aboriginal interest in the sprawling pastoral lands of Australia ever validly extinguished? If not, the presumption must be that pastoral leases all over the country are encumbered by an unextinguished Aboriginal right of use and occupancy. Given the importance of the question it is essential that the relevant governments either confirm the survival of that interest or explain how, when and by what means the Aborigines' rights were extinguished. If the interest was extinguished, then, the issue of

compensation should be considered. To do otherwise would clearly suggest that Australian governments are, at least in this case, less scrupulous in respect of Aboriginal legal rights than the English aristocrats who administered the Empire a century and a half ago.

Notes

1. *Mabo v. Queensland* (1992) 66 A.L.J.R, 408, 452.
2. *Ibid.*
3. C. Buxton (ed.), *Memoirs of Sir Thomas Fowell Buxton*, (London: John Murray, 1848), 361. These issues are discussed in my book, *The Law of the Land* (Ringwood: Penguin, 1987). See chapter VI, 81-102.
4. House of Commons Papers, 1837, 7, no. 425, 5.
5. Colonial Office, file no. C.O./201/255, 196-8 (referred to hereafter by file number).
6. See the letter of Mercer to Robertson, 6 February 1837, Port Phillip Association Papers, La Trobe Library, MS:11230.
7. C.O./201/260.
8. G. Arthur Papers, 33, 323-5, Mitchell Library, MS.A2193.
9. Correspondence Relative to New Zealand, 1835-42, *British Parliamentary Papers*, 311, vol XVII, 1841, 68.
10. *Id.* 63.
11. Robinson to La Trobe, 12 December 1839, G.R. Robinson Papers, vol.25, ML.MSS.A7035.
12. *Port Phillip Gazette*, 4 December 1841.
13. C.O.201/382.
14. *Ibid.*
15. *Historical Records of Australia*, Series 1, 26, 224.
16. *Id.* 225.
17. *Ibid.*
18. See comments on the dispatch of Fitzroy to Grey, 11 October 1848, C.O.201/400.
19. Memo on dispatch, Fitzroy to Grey, 11 October 1848, C.O.201/400.
20. *Historical Records of Australia*, series 1, 26, 225.
21. See enclosures in dispatch, 11 October 1848, C.O.201/400.
22. C.O.201/416.
23. C.O.201/422.
24. Letter of Attorney-General, 20 August, 1848.
25. *Sydney Gazette*, 29 April 1850, 685-6; C.O.201/400.
26. (1992) 66 A.L.J.R. 408, 466; *Milirrpum v. Nabalco* (1970) 17 F.L.R. 141, 261.
27. Memo on letter of Colonial Land & Emigration Office, 17 April 1849, C.O.201/422.

28. Glen to Fitzroy, 6 August 1849, Dispatches to the Governor of New South Wales, Mitchell Library, MS.A1308.
29. 18 & 19 Vic. c.56.
30. Queensland *Constitution Act*, 1867, s.30.
31. Queensland State Archives, LAN/01, 35/1213.
32. West Australia Colonial Secretary Office, C.S.O.2315/88.
33. Quoted by Blackburn J. in *Milirrpum v. Nabalco*, (1970) 17 F.L.R. 141, 260.
34. (1992) 66 A.L.J.R. 408, 453.
35. (1992) 66 A.L.J.R. 408, 432.
36. *Ibid.*
37. (1992) 66 A.L.J.R. 408, 452. Note, however, the majority view (Mason C.J., McHugh J. and Brennan J.) was that, subject to the operation of the *Racial Discrimination Act* 1975 (Cth), no compensation claim would arise on the extinguishment of native title.

Copyright Protection for Australian Aborigines in the Light of Mabo

Kamal Puri *

I. Australian Aborigines

Out of the estimated 15,000 cultures remaining on earth today, Australian Aborigines represent the world's oldest extant culture.[1] Scientific data indicates that they have lived in this vast island continent for more than 40,000 years.[2] Their population before British occupation in 1788 was around one million people. Two hundred years later, out of the total Australian population of 16 million, there are approximately 300,000 Aborigines representing about 1.8 percent of the total population.[3] It appears that unless the Australian Government takes a responsible stance in safeguarding Aboriginal culture, in the near future, the chapter of the Aboriginal race could be closed for ever.

Although Aborigines have a long history, it was only in 1770 that the first European observations of Aboriginal civilisation and its rich cultural store were made. In that year, the legendary Captain Cook noted in the Endeavour Log Book the innocence and contentment of the indigenous people before the British invasion:

> Being wholly unacquainted not only with the superfluous but the necessary conveniences so much sought after in Europe, they are happy in not knowing the use of them. They live in a tranquillity not disturbed by the inequality of condition: the Earth and Sea of their own accord furnishes them with all things necessary for life, they covet not magnificent houses, household stuff and similar; they live in a warm and fine climate and enjoy a very wholesome air.[4]

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A telling illustration of the change of attitudes in the first hundred years of European settlement is provided by the contrast between what Captain Cook wrote in the Endeavour Log Book in 1770 and what Captain Wharton FRS wrote as editor of a transcription of the Log Book in 1893, describing Aborigines 'as wild beasts to be extirpated'.[5]

From the very beginning, European governors have undermined Aboriginal laws, society, folklore and religion - a process which continues unabated even today. Aborigines have been viewed as primitive, if not sub-human, a view which reveals underlying disregard for Aboriginal culture. Two Aboriginal authors have summed up the sentiment thus: 'To Anglo-Europeans, Aborigines have been and still are perceived as savage, dirty, worthless, pitiful and animalistic, "sons of ham" and therefore not party to divine creation'.[6] This is a damning criticism, but, this contempt for the Australian Aborigines is still evident.

In spite of their very long occupation of Australia and their rich cultural background, Aborigines have long been treated as unequals and trespassers in their own land. On the positive side though, it should be stated that in the recent years, certain steps have been taken to right the past wrongs. For example, in 1967, Aboriginal people were given a right to vote at federal elections.[7]

To Europeans, Aborigines appeared to live a nomadic life. But behind this apparently primitive facade, they lived a well-organised life with an intricate kinship relationship based on well developed customs. Each family was a self-sufficient economic unit with members having well-defined responsibilities. Sophisticated systems of beliefs which found their expression in oral literature, songs, art, dances, paintings and social relationships, kept Aboriginal society together.[8]

The British colonisers treated Australia as a land without owners (*terra nullius*), without a system of government and with no recognisable commerce. The classification of Australia as a settled colony, rather than as conquered or ceded, meant that the new settlers brought with them the general body of English law, including common law pertaining, for example, to intellectual property. Applying British law to Aborigines has produced special difficulties in the recognition of their land rights and proprietary rights in folklore.[9] Aboriginal people have been subjected fully to Australian law which does not recognise the Aboriginal customary law. However, the recent *Mabo* decision points to the demise of the *terra*

nullius doctrine. The impact of this decision will be discussed later in this paper.

II. Folklore[10]

In plain English 'folklore' means 'knowledge of the people'.[11] The Australian Working Party which prepared a comprehensive report in 1981 on the protection of Aboriginal folklore, defined Aboriginal folklore to mean 'the body of traditions, observances, customs and beliefs of Aboriginals as expressed in Aboriginal music, dance, craft, sculpture, painting, theatre and literature'.[12] In its widest sense, therefore, folklore refers to the lore of the indigenous people, i.e. their traditions which after a passage of time are generally designated as culture.

For any society, culture gives a sense of self-respect and adds meaning and significance to life, creating the feeling that one is doing what one's ancestors did before. It plays a vital role in an age like ours, which has witnessed great social and political changes. For the Aboriginal people, traditions and folklore are very important because these create a sort of 'social cement' to bind them together. Folklore is seen as one means of asserting their political and cultural identity. In other words, folklore gives them a chance for creative self-expression through music, song, dance, speech and many other cultural manifestations. When one thinks deeply about the various ways in which folklore manifests itself, one is really overwhelmed by its profoundness and wide sweeping encompassing customs and customary behaviour. Thus, folklore consists of *verbal expressions* (which are chiefly poems, rhymes, slangs, proverbs, myths, legends, folktales, language, literature, rituals, and the like), *musical expressions* (chiefly songs and instrumental music of the people), *bodily expressions* (chiefly drama and dances of the people, games, and artistic expressions of rituals), and *tangible expressions* (chiefly works of folk art, also comprising drawings, paintings, sculpture, pottery, woodwork, metal objects, jewellery, clothing, crafts, costumes, musical instruments, architectural works).

Aboriginal peoples' concerns about folklore

Because folklore is fundamentally based on oral traditions, it is extremely fragile and runs the risk of being lost. Further, because of its mortal nature, there is a fear that it will be exploited indiscriminately. Folklore is the religious embodiment of Aboriginal culture. Most Aboriginal designs, music, dance, stories and paintings

have their roots in Aboriginal religion. A dance or drama may form part of a sacred ceremony; a rock painting may depict an ancient myth at a sacred site. Resultantly, certain works of folklore are regarded as either sacred in their own right or are so closely associated with sacred places that they cannot be shown, nor the themes in them disclosed, except to those few who have been admitted to knowledge of ritual secrets and mysteries by undergoing initiation or other special ceremonies.

Works created by Aboriginal people for traditional purposes form part of the continuing heritage. Contemporary Aborigines are the current 'trustees' of the traditions which are passed on to successive generations. Some of these works of folklore hold a special status because of their usage in sacred-secret ceremonies. Only initiated Aborigines are supposed to have access.

Western laws do not recognise the cultural and religious significance attached to many forms of Aboriginal art, dance and music. Inevitably, this results in inadequate protection for Aboriginal folklore, particularly traditional art. The *Copyright Act* 1968 primarily concerns itself with economic exploitation. It takes no account of the religious significance of an art form since moral rights are as yet not protected under the Australian copyright law.

Many Aboriginal objects and paintings depict myths and totemic figures which have significance not only to the individual artist but to some or all members of the group to which the artist belongs. The selling or giving away of Aboriginal paintings or sacred objects without tribal permission or Aboriginal artists' assent usually involves a serious breach of Aboriginal customary laws, yet under the existing Australian law such transfers may be perfectly valid.

Furthermore, the accelerating development of technology, especially in the fields of sound and audio-visual recording, broadcasting, cable television, and cinematography has assisted improper exploitation of Aboriginal folklore. Expressions of folklore are being commercialised by such means on a world-wide scale without any respect for the cultural or economic interests of the communities in which they originate and without conceding any share in the returns from such exploitations to the creators of folklore. In connection with their commercialisation, expressions of folklore are often distorted in order to make them more marketable. This is an area which is becoming more popular with the emergence of growing interest in oral history. The availability of high quality, unobtrusive recording and filming equipment makes it easy to obtain information without making subjects aware that a recording and

filming is taking place. This practice, however, raises serious ethical implications as unobtrusive filming can be another form of exploitation, by ignoring Aboriginal peoples' wishes and invading their privacy.

Many Aboriginal creators are in a particularly vulnerable position. A vast majority of them live in remote areas and have hardly any access to professional advice and assistance. The situation is exacerbated by the Western legal system which is primarily concerned with the economic exploitation of works. The Western laws do not recognise the cultural and religious significance attached to many forms of Aboriginal art, dance and music. Inevitably, this results in inadequate protection for Aboriginal folklore, particularly traditional art.

Indiscriminate mutilation, destruction, debasement or export of items of folklore causes offence to the indigenous peoples and results in permanent loss to the Aboriginal race of their cultural heritage. According to many Aboriginal artists, stiff punishments ought to be provided for destruction or desecration of such cultural resources since these acts cannot be put right by the award of monetary damages.

The Aboriginal people share a central ethos which is the basis of all Aboriginal art and culture and this is usually explained by the religious concept of Dreamtime. The term 'Dreamtime' refers to a complex value system which binds Aboriginal people. Dreamtime is the source of customary rules by which they live, according to which there is a permanent linkage between land and religion. To Aboriginal people, land is the living record of all significant events dating from the Dreamtime, whereas in Western culture, land is viewed as personal property. This sort of affinity is foreign to European culture. Dreamtime is embodied in myths, visual designs, ritual drams, songs and dances, which affirm and register codes of behaviour and rights to property of different Aboriginal groups and individuals. Dreamtime has the force of the higher law or divine law, hence one begins to appreciate the religious significance of their folklore.

Folklore is living heritage

In spite of its antiquity, ageing has not made folklore extinct. To Australia's Aboriginal peoples, folklore is a testimony of the past without which the present would have no future. They have deep spiritual and emotional attachment to folklore and regard it as their communal 'property'. Folklore is mortal. Aborigines fear that their

folklore will be repeatedly exploited. Their desire is to preserve and transmit the most positive values of their civilization in order to maintain the characteristic features of their cultural identity.

Litigation

For many creative Aborigines, traditional artworks - bark paintings, handicrafts, and wood carvings - are their bread and butter. There are numerous instances of Aboriginal artworks being reproduced on T-shirts and other tourist oriented items without authorisation or licence. In some cases, the artists concerned have simply stopped painting in protest.

Cultural parameters rarely affect mainstream artists but they are significant for the Aboriginal arts community in Australia. A Northern Territory artist, Terry Yumbulul, commenced proceedings against the Reserve Bank of Australia for infringement of copyright arising from the reproduction of his artwork, *The Morning Star Pole*, on $10 plastic currency notes issued to celebrate the Australian Bicentenary in 1988.[13] The artist claimed that the bank had not obtained his permission before reproducing his artwork. The dispute was, however, settled out of court. In *Balun Balun v. Nejlam Pty Ltd*,[14] the Aboriginal artist, John Balun Balun, succeeded in having a manufacturer of T-shirts withdraw the T-shirts from sale. In 1987, the defendant had reproduced one of the artist' s paintings, known as *'At the Waterhole '*.

In a 1985 case, an Aboriginal artist had commenced an action for copyright infringement against a fabric designer-cum-manufacturer and the proprietor of a retail shop. The artist claimed that his copyright in the original bark painting, captioned *'Long necked fresh water tortoises by the fish trap at Gaanam'* had been infringed by the defendants. The case was settled out of court in favour of the plaintiff. The case raised some interesting issues. Was the plaintiff really the author of the painting within the meaning of the copyright law? He had learnt to paint the story which was depicted in the painting from another older Aboriginal painter who, according to Aboriginal customary law, also had the right to the story of the painting. Although the arrangement of the elements and the expressions on the figures may vary between painters of the story, certain features such as the cross hatching and panelling and the way the figures are placed are always the same. The concept of original authorship is somewhat inappropriate in this context. Could it be asserted that the plaintiff, an Aboriginal person, was not the author of the painting because the painting was, in effect, a copy and was

not totally original? Alternatively, could the painting be a work of co-authorship?

The case also raises questions relating to the assessment of damages. What weight should be given to certain Aboriginal customs which make the act of infringement particularly distressing and insulting to Aboriginal people? As has been noted, some traditional Aboriginal paintings are sacred and belong to the land. Some paintings, used in ceremonial grounds ('secret and sacred' paintings), are only for the eyes of initiated Aborigine men. How would the court assess damages for copyright infringement of a 'secret-sacred' painting by the manufacturer of tea-towels or table napkins? Further, in accordance with the Aboriginal customary law, the cross hatching and panelling and the way figures are placed in a painting are usually the same. Similarly, geometric patterns signify social and ancestral relationships. In the case referred to above, the defendant, fabric designer, had made some changes to these elements, changes which in the designer's opinion enhanced its aesthetic appeal, but which offended Aboriginal customs and beliefs.

The problems in pursuing litigation

Only a very small fraction of Aboriginal creators are willing or able to assert their intellectual property rights since litigation is fraught with the risks and uncertainties of the legal process. Most of the unauthorised commercial exploitation of Aboriginal folklore stands only because it is never challenged by litigation in the courts. However, when such a case does arise, there occurs an out of court settlement.

Commercial aspects

In the present day, there is widespread commercial exploitation of Aboriginal designs which are used, for example, on tea towels, T-shirts, postcards, a range of souvenirs, wall hangings, posters, interior decorating and in the fashion industry. Aboriginal artists are concerned about the unfair competition they face from non-Aboriginal producers of bogus 'Aboriginal' products and the affront this causes to their cultural identity.

Market forces, particularly those of the tourist market, are influencing the type of work being produced and this might lead to negative stereotyping of particular Aboriginal art styles. Most tourists prefer 'suitcase-sized' paintings. Some artists feel obliged to adapt their craft to the tastes of customers, e.g. to 'scale down' the size of traditional handcrafted items. The general misconception among non-Aboriginals is that Aboriginal people are running after 'a quick buck'. But as the reaction of many Aboriginal groups has shown, the indigenous people are not willing to compromise the age-old standards of traditional craftsmanship. An example is the refusal by Maruku Arts and Crafts at Uluru National Park to 'scale down' spears to make their art portable. Aboriginal art is essentially generated by cultural imperatives that exist independently of the market. Aboriginal people take pride in being artists and their art is testimony to their great cultural heritage.

The Aboriginal customary law relating to intellectual property matters contained stringent provisions forbidding plagiarism but with the intrusion of English common law and disregard of Aboriginal customary law under the doctrine of *terra nullius*, those self-sufficient laws and safeguards have dissipated .

III. Legal Protection of Folklore

The issues for protecting Aboriginal folklore need to be divided into two categories. Firstly, should non-Aborigines practise Aboriginal traditional folklore, e.g. paint pictures with Aboriginal themes, and mass produce Aboriginal art, often in overseas factories using cheap labour and materials to satisfy market demand. This involves issues concerning monopolies or expropriations which raise questions pertaining to use of sacred-secret works. Furthermore, it could perhaps be argued that marketing of articles featuring Aboriginal motifs, e.g. T-shirts, under the name 'The Aboriginals' is deceptive and misleading under section 52 of the *Trade Practices Act* 1974 (Cth). Some Aboriginal artists have already argued that this causes not only an economic but also a cultural and psychological threat to authentic practitioners of Aboriginal arts and to the Aboriginal peoples whose values those arts and crafts express. For example, the Muyinda Aboriginal Corporation has pointed out that any 'mechanisation' of artefact production would carry with it a loss of cultural integrity and that the Aboriginal community's strongest motivation for the production of artefacts was to pass on their traditions and culture to the young Aboriginal people.

Secondly, there are issues which concern the protection of the economic interests of Aborigines in their works. Today, protection of folklore is a question of economic survival for many Aborigines. But what kind of legal protection is most appropriate for Aboriginal folklore? Among the several branches of intellectual property (viz., patents, copyright, trade marks, designs, trade secrets, confidential

information, reputation and goodwill, unfair competition, and the like), the most obvious mould is the one provided by the copyright system. But as soon as one invokes copyright protection, the following issues come to the fore.

(i) Ownership. Some commentators argue that the copyright law is ill-suited to the protection of folklore because the former is wedded to the concept of individual property rights arising from individual creativity.[15] A work protected by copyright generally bears the distinctive imprint of its author. But the works of folklore are the creation of groups of people and should generally be considered as falling in the public domain. This makes the copyright system incompatible with the Aboriginal customary law as regards conferment of exclusive rights.

One result of this approach, which in fact exemplifies the present position, is that works of folklore fall easy prey to enterprising persons who use these works without constraint. Further, since the Australian law does not yet protect moral rights, exploiters of Aboriginal folklore can even distort the essence of the works of folklore and destroy their authenticity with impunity. Like commercial goods and services, such works are likened to consumer goods.

(ii) Authorship. Next, it is argued that because of its anonymous nature, folklore does not fit the copyright mould. It is true that most works of folklore are the product of the community or group as a whole, and not the creation of individuals. However, it is conceivable that folklore, say a folk song, may owe its origin to a single author, although it does not acquire its folklore character until it is submitted to the reworkings and reformulations of the community to which the author belongs.[16]

There is another view that cultural phenomena are, generally speaking, individual creations, even if they have undergone modification and have been absorbed by a community to the extent of becoming its own cultural property.[17] This view advocates limits to the 'collectivization' of creative activity. It asserts that the making of a judgment, and the combining in a single act of the design and planning of the whole work can indeed be the work of only a single thinking being, which no creative group could ever replace.

(iii) Originality. The third barrier for copyright protection is said to be the lack of originality in the works of folklore. Since folklore is usually drawn upon pre-existing tradition and results from a constant and slow impersonal process of creative activity exercised through consecutive imitation within a traditional community, it is

argued that the condition of originality under the copyright law is not met.[18]

It is true that many works of folklore are produced from traditional themes derived from the Dreamtime but the degree of variations in transmission of these themes varies greatly from one group to another and from one medium to another.[19] Transmission requires creative reinterpretation of themes by individual artists. Evidently, nowhere is an Aboriginal artist merely a robot or automaton.[20] Nor are new themes completely ruled out. Inevitably, changes occur in depicting the same stories in various artistic forms. These changes often imbibe each artist' s individuality, hence giving the work its 'originality' in the copyright sense.

It should be also remembered that the requisite level of originality or creativity under the copyright law is extremely low; even a slight amount usually suffices. The vast majority of works make the grade quite easily, as they possess some creative spark, 'no matter how crude, humble or obvious' it might be.[21] Hence the requirement of originality under the copyright law is satisfied.

(iv) Duration of protection. Fourthly, it is said that many works of folklore will not get protection because of their antiquity. Under the *Copyright Act* 1968, the duration of copyright in literary, dramatic, musical and artistic works is generally 50 years after the death of the author of the work.[22] It is significant to note that the Working Group on the Intellectual Property Aspects of Folklore Protection, established under the joint auspices of UNESCO and WIPO, felt that the duration of protection of folklore should not be limited in time.[23] Moreover, perpetual protection for works of folklore may be justified because the protection of the expression of folklore is not for the benefit of individual creators but for a community whose existence is not limited in time.

(v) Fixation. Finally, copyright protection is not considered viable because folklore works are not in a tangible or material form. The *Copyright Act* 1968 precludes oral works (ideas and themes) from having copyright protection. Under the *Copyright Act* fixation is a pre-condition for protection. Section 22(1) provides that copyright will subsist from the time when 'the work was first reduced to writing or to some other material form'. In other words, fixation is a condition of protection. There is a lack of material fixation in the case of spoken or performed works.

In most cases, expressions of folklore are handed down orally through the generations without ever having been reduced to a permanent form. The oral nature of much folklore does not,

therefore, appear to agree with this condition of copyright. One of the fundamental principles of copyright law is that ideas and themes are not protected; the form and not the substance is protected. Nor, are artistic styles and techniques protected as such. This means, for example, that the acrylic dot style which Aboriginal painters commonly use is not protected by copyright. However, a remedy may be available under the *Trade Practices Act* 1974 or through the common law action of passing off, e.g. if the use of the style would mislead the public about the identity of the artist. Similarly, the copyright law will not prevent non-Aboriginal persons from taking traditional themes and using them for their own works. However, if someone reproduces a painting or a piece of music which is based on, say, The Dreaming, then permission from the owner of copyright will usually be required.[24]

The fixation requirement is justified on the ground that unless a work takes a material form, one cannot say whether it has passed the 'idea' phase. Apparently, this need for a material form leads to difficulties in protecting some forms of Aboriginal folklore, e.g. music, dance and stories. Since these are not recorded (e.g. on tape, video or film), they are not protected. There would be difficulties in protecting visual art as well since it is not usually in a tangible form (e.g. body painting and ground painting).

The need for material form can, however, be overcome by making sound recordings or films of performances of music or dance. If that is done, the act of recording the work would be the technical determinant of the time of the making of the work and hence, copyright protection would be available, assuming the work meets the other copyright requirements.[25]

It should be stated in passing that unlike in the countries following the Anglo-Saxon legal tradition, in countries which follow the continental legal system (e.g. Germany), there is no pre-condition of fixation provided sufficient evidence is available regarding the creation of the work. It is submitted that the fixation requirement should not apply to works of folklore. Such works form part of the cultural heritage of indigenous peoples and their very nature lies in their being handed on from generation to generation orally or in the form of dances whose steps have never been recorded. It is worth noting that the *Tunis Model Law on Copyright* 1976 made an exception to the fixation rule for, if this requirement were sustained, the copyright in such works might well belong to the person who took the initiative of fixing them, a result which would be inequitable.[26]

Furthermore, in Australia, unlike Germany and France, the law does not protect moral rights. Exploiters of Aboriginal folklore, therefore, can distort the essence of the work and its authenticity with impunity. Under the *Copyright Act* 1968, there is no obligation to acknowledge the creator of an artwork when the work is displayed in public or a reproduction is published, although sections 189 to 195 of the Act do require that works not be attributed incorrectly to a person other than the artist or author. It should be noted that the Copyright Law Review Committee (CLRC) recently considered the question whether the Australian copyright system should incorporate moral rights. In its much-criticised report published in January 1988, the CLRC recommended by a 5 to 4 majority against the adoption of moral rights in Australia 'at this time'.[27]

Attempts at reform

The analysis reveals the inadequate and inconsistent application of the present *Copyright Act* to the subject of Aboriginal folklore. Several committees at national and international levels have enquired whether copyright was the right framework for folklore protection. The Australian Working Party of 1981 concluded that it was essential to protect the Australian Aboriginal folklore which was a national resource deserving protection both in the interests of Aborigines and of the general public.[28] The Committee found that the present Australian copyright and design laws offered inadequate protection, and that mere amendment of the *Copyright Act* was an unsatisfactory solution.

The Working Party recommended that there be special, *sui generis*, legislation, i.e. an Aboriginal Folklore Act which should provide for (i) prohibition on non-traditional uses of sacred-secret material; (ii) prohibitions on debasing, mutilating or destructive uses; (iii) payments to traditional owners of items being used for commercial purposes; (iv) a system of clearances for protective users of items of folklore; (v) an Aboriginal Folklore Board to advise the Minister on policy matters; and (vi) a Commissioner for Aboriginal Folklore to issue clearances and negotiate payments. The report suggested a mechanism for the examination by the Aboriginal Folklore Board of proposed uses of items of folklore by non-customary users on a case-by-case basis. The Working Party's recommendations amounted to an acceptance of a notion akin to the moral rights concept in copyright law of certain countries of the world, particularly those with the civil law background, e.g. Germany.

It is most unfortunate that this report has been collecting dust for the last ten years. No special legislation has so far been enacted. Instead, the issue of the protection of Aboriginal folklore has been debated, albeit in passing, by three other inquiries since the 1981 report.[29]

IV. Mabo - A Legal Revolution

In an historic decision in June 1992, the High Court of Australia by a majority of 6 to 1 (Dawson J. dissenting) held that the common law of Australia recognised a form of native title of the indigenous inhabitants which was not extinguished upon the assumption of sovereignty by the Crown over the Murray Islands at the time of annexation in 1879.[30] The Court unequivocally recognized the prior legal occupation by indigenous peoples of the Murray Islands in the Torres Strait. As a result, the Meriam people, who inhabited the Islands for centuries before the first European contact, were granted occupation, use and enjoyment of their native lands in accordance with their indigenous laws or customs. The Court ruled that white colonisation had not extinguished the traditional land rights of the indigenous people. Further, native title had not been extinguished by the creation of a reserve,[31] nor by the mere appointment of 'trustees' to control a reserve where no grant of title was made. This landmark ruling, which ended a decade-long legal battle initiated by Eddie Mabo of the Murray Islands (who died in January this year), has established a major precedent for future land rights and arguably for intellectual property cases opening the way for a sui generis legislation for the protection of Aboriginal folklore.

The plaintiffs contended that the Meriam people had a strong sense of identity with their Islands. They were in occupation of the Murray Islands before first European contact and had continued to occupy these Islands to the present day. They retained a strong sense of affiliation with their society and culture and had enjoyed their traditional land rights since time immemorial. The Queensland Government reacted to the filing of the case by enacting the *Queensland Coast Islands Declaratory Act* 1985 (Qld) which amongst other things declared that upon annexation, the Murray Islands were vested in the Crown in right of Queensland, freed from all other rights. In *Mabo v. Queensland,*[32] the High Court held, by a majority of 4 to 3, that the Act was invalid by reason of its inconsistency with s 10(1) of the *Racial Discrimination Act* 1975 (Cth) to the extent that it purportedly extinguished any traditional native title of the Murray Islanders.[33]

The primary issue in the second *Mabo* case was whether the annexation of the Murray Islands and their incorporation into Queensland in 1879 had the effect of vesting in the Crown absolute ownership of all land in the Islands. Put another way, whether previous interests in the land survived the effect of annexation. It is important to note at the outset that the defendant State of Queensland, while denying the existence of native title, conceded that any native title to the occupation and use of lands in the Murray Islands which survived the assumption of sovereignty had not been extinguished by subsequent legislation.[34]

The High Court's decision

The High Court has declared that the Crown did not purport to extinguish native title to the Murray Islands when the Islands were annexed in 1879.[35] Nor did they ever become Crown land under the *Land Act* 1962 (Qld). The Court found that the Australian common law recognised a native title which, in the cases where it had not been extinguished by the Crown, reflected the entitlement of the indigenous inhabitants, in accordance with their laws or customs, to their traditional lands. The notion that when the Crown acquired sovereignty over territory it thereby acquired the absolute beneficial ownership of the land therein was rejected.[36] Furthermore, the Court rejected the idea that common law native title was no more than permissive occupancy which the Crown could revoke at will.

The State of Queensland argued that pre-existing rights could not continue after annexation unless they were recognised by positive executive or legislative acts.[37] In the absence of such acts, the legal consequence of the annexation was that the Meriam people were no longer entitled without the consent of the Crown to continue to occupy their lands. Likewise, on first settlement (the event which conferred sovereignty on the Imperial Crown) the common law of England so far as applicable to colonial conditions, became the law of the colony. The common law conferred on the Crown absolute beneficial ownership of all land in the territory. Resultantly, the colony became the Crown' s demesne and no right or interest in any land in the territory could thereafter be possessed by any other person unless granted by the Crown. The State of Queensland relied on three cases in support of this proposition, *Attorney-General v. Brown,*[38] *Randwick Corporation v. Rutledge*[39]and *New South Wales v. The Commonwealth* (the Seas and Submerged Lands Case).[40]

The Crown did not become the absolute owner of all the land

Brennan J., critically examining the validity of this proposition, stated that if the conclusion derived in the above-cited trilogy of cases be correct, the interests of indigenous inhabitants in colonial land were extinguished as soon as settlement took place, though the native inhabitants had neither ceded their lands to the Crown nor suffered them to be taken as the spoils of conquest. Moreover, the legal effect of these pronouncements seemed to be that the common law itself took from indigenous inhabitants any right to occupy their traditional land, exposed them to deprivation of the religious, cultural and economic sustenance, vested the land effectively in the control of the Imperial authorities without any right to compensation, and made the indigenous inhabitants trespassers in their own homes and begging for a place to live. His Honour commented that, judged by any civilised standard, such a law was unjust and could not be considered as part of the common law of Australia. He went on to hold that the common law of Australia rejected the notion that, when the Crown acquired sovereignty over Australia, it thereby acquired the absolute beneficial ownership of the land therein.[41] However, Brennan J. acknowledged that the High Court was not free to adopt rules that accorded with contemporary notions of justice and human rights if their adoption would fracture the skeleton of principle which gave the Australian common law its shape and internal consistency.

The demise of terra nullius

Mabo has heralded the demise of the long-established concept of *terra nullius*.[42] Until this decision, upon European settlement in 1788, Australia was presumed to have been an empty uninhabited land in the strict legal sense. Under the doctrine of *terra nullius*, when the territory of a settled colony became part of the Crown' s dominions, the common law of England, insofar as it was applicable to colonial conditions, became the law of the colony. By that law, the Crown acquired the absolute beneficial ownership of all land in the territory so that the colony became the Crown's demesne and no right or interest in any land in the territory could thereafter be possessed by any other person unless granted by the Crown.[43] This led to Britain's refusal to recognize in law that Aborigines had occupied Australia prior to 1788 and hence blocked the recognition of Aboriginal rights at law for two centuries .

Terra nullius, is a well-established concept of the common law. The law in force in a newly-acquired territory depends on the manner of its acquisition by the Crown. There are three ways of acquiring sovereignty over a new territory - by conquest, cession, or occupation. For the purposes of identifying the law of a new British colony, the English common law has traditionally made a distinction between colonies where British sovereignty was established by cession or conquest and colonies where sovereignty was established by settlement or 'occupancy'. In cases of cession and conquest, the local laws of the relevant territory remained intact but the new Sovereign could subsequently legislate by proclamation pending local representative government.

On the other hand, in the case of a settled colony, the common law, as was reasonably applicable to the circumstances of the new territory, was introduced, after making appropriate adjustments.[44] According to Deane and Gaudron JJ. this process of adjustment left room for the continued operation of some local laws or customs among the native inhabitants. Their Honours concluded: 'the adjusted common law was binding as the domestic law of the new Colony and, except to the extent authorised by statute, was not susceptible of being overridden or negatived by the Crown by the subsequent exercise of prerogative powers'.[45]

Expansion of the doctrine of terra nullius

Initially, the doctrine of *terra nullius* was applied to new territory which was desert and uninhabited. However, the doctrine was gradually extended to justify acquisition of inhabited territories by occupation or settlement if the land was uncultivated or its indigenous inhabitants were not 'civilized' or not organised in a society that was united permanently for political action.[46] The indigenous people of a settled colony were thus taken to be without laws, without a sovereign, and primitive in their social organization. The result was that the law of England, including the common law, became the law of the Colony (so far as it was locally applicable) as though it was an uninhabited country discovered and now cultivated by English subjects.[47] This was irrespective of the fact that, in 1879 when sovereignty over the islands was acquired by the Crown, the Meriam people were settled on their land and their territory was being tilled and constituted traditional homelands or hunting grounds.[48]

Inhabited territory versus uninhabited territory

Brennan J. expressly disapproved of the application of the concept of *terra nullius* to an inhabited country.[49] In support he cited Blackstone, according to whom the English law became the law of a territory outside England either upon first settlement by English colonists of a 'desert uninhabited' country or by the exercise of the Sovereign's legislative power over a conquered or ceded country.[50] The High Court's majority, therefore, refused to follow the approach which equated the settlement of an inhabited territory with settlement of an uninhabited territory in ascertaining the law of the territory on colonisation.

Conformity with contemporary notions of justice and human rights

It is noteworthy that Brennan J., with whom Mason C.J. and McHugh J. agreed, remarked that, 'judged by any civilized standard, such a law is unjust and its claim to be part of the common law to be applied in contemporary Australia must be questioned'.[51] And further, 'no 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'.[52] His Honour warned that the common law of Australia would perpetuate injustice if it were to continue to embrace the enlarged notion of *terra nullius* and to persist in characterising Aborigines as people too low in the scale of social organisation to be acknowledged as possessing rights and interests in land. Brennan J. concluded that the legal system could be modified to bring it into conformity with contemporary notions of justice and human rights.[53]

Existing authorities overruled

Brennan J., rejecting the authority of the earlier cases which had advocated the enlarged notion of *terra nullius*, said that the theory that the indigenous inhabitants of a 'settled' colony had no proprietary interest in the land was based on a discriminatory denigration of indigenous inhabitants, their social organisation and customs. He added that as the basis of that theory was false in fact and unacceptable in contemporary Australian society, there was a choice of legal principle to be made. The Court could either apply the existing authorities and proceed to inquire whether the Meriam people were higher 'in the scale of social organisation' than the Australian Aborigines whose claims had been utterly disregarded by

the existing authorities, or, the Court could overrule the existing authorities, discarding the distinction between inhabited colonies that were *terra nullius* and those which were not. Following the Canadian approach,[54] and recognising that the notion that inhabited land may be classified as *terra nullius* no longer commanded general support in international law,[55] his Honour stated that it was imperative in today's world that the common law should neither be nor be seen to be frozen in an age of racial discrimination.[56]

Radical title different from beneficial ownership

It was not disputed that upon the settlement of the colony of New South Wales in 1788, the radical title to (or ultimate ownership of) all land vested in the Crown. This vesting, according to Deane and Gaudron JJ., did not preclude the preservation and protection, by the domestic law of the new colony, of any traditional interests in land which had existed under native law or custom at the time the colony was established.[57] If the land was truly *terra nullius* (empty of inhabitants), the Crown would take an absolute beneficial title (an allodial title) since there would be no other proprietor. But if the land were occupied by the indigenous inhabitants and their rights and interests in the land were recognised by the common law, the radical title which was acquired with the acquisition of sovereignty could not, itself, be taken to confer an absolute beneficial title to the occupied land.

Ways to extinguish native title

Brennan J. further observed that unless the sovereign power had been exercised in one or other of the following ways, there was no reason why land within the Crown's territory could not continue to be subject to native title. The two ways are (i) when the Crown has exercised its sovereign power to grant an interest in land, and (ii) when the Crown has exercised its sovereign power to appropriate to itself ownership of parcels of land within its territory. His Honour observed that it was only the fallacy of equating sovereignty and beneficial ownership of land that had given rise to the notion that native title was extinguished by the acquisition of sovereignty. His Honour concluded that the native title of indigenous inhabitants was to be treated as a burden on the radical title which the Crown acquired. In the absence of express confiscation or subsequent expropriatory legislation, the new sovereign had respected the pre-existing rights and interests in land.[58]

Native title - its nature and incidents

The High Court held that native title survived the Crown's acquisition of sovereignty. Native title had its origin in and was given its content by the traditional laws acknowledged by, and the traditional customs observed by, the indigenous people of a territory. It 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'.[59] Toohey J. stated that traditional or native title was communal and the rights it generated belonged to the group as a whole.[60]

Conditions to be fulfilled

Brennan J. stated that the conditions which indigenous inhabitants would need to fulfil to obtain recognition of their native title included (i) continuous acknowledgment of the laws or customs and (so far as practicable) adherence to the customs based on the traditions of the relevant clan or group, and (ii) a substantial maintenance of the traditional connection with the land. Where a clan or group met with these conditions, the common law could, by reference to the traditional laws and customs of indigenous people, identify and protect the native rights and interests to which they give rise. However, when the tide of history had washed away any real acknowledgment of traditional law and any real observance of traditional customs, the foundations of native title would disappear. Further, a native title which had ceased with the abandoning of laws and customs based on tradition could not be revived for contemporary recognition. Once native title expired, the Crown's radical title expanded to a full beneficial title, for then there was no proprietor other than the Crown.[61] Brennan J. recognised that in time laws and customs of any people will change and the rights and interests of the members of the people among themselves will change too. But, so long as people remained as an identifiable community living under its own laws and customs, the communal native title would survive.

Thus, where a group has continued to acknowledge the laws and (so far as practicable) to observe the customs based on the traditions of the group, whereby their traditional connection with the land has been sufficiently maintained, the traditional community title of that group can be said to remain in existence. On the other hand, a native title which has ceased with the abandoning of laws and customs based on tradition cannot be revived for contemporary recognition.[62] Such laws and customs, however, must not be repugnant to natural justice, equity and good conscience. Once these tests are satisfied, native title, being recognised by the common law, may be protected by such legal or equitable remedies as are appropriate to the particular rights and interests established by the evidence, whether proprietary or personal and usufructuary in nature.[63]

Extinguishment of title

The judgments recognised the right of government to extinguish the native title by legislation or by executive action, as long as any exercise of that power was not inconsistent with the laws of the Commonwealth, including the *Racial Discrimination Act* 1975 (Cth).[64] However, the divergence of views among the various judges on this point should be noted. Mason C.J. and McHugh J.[65] along with Brennan J.[66] did not agree with the conclusion to be drawn from the judgments of Deane, Toohey and Gaudron JJ. that, in the absence of a *clear and unambiguous statutory provision* to the contrary, the extinguishment of native title by the Crown by inconsistent grant was wrongful and gave rise to a claim for compensatory damages.[67] On the other hand, Deane, Toohey and Gaudron JJ. took the stricter view that native title could only be extinguished by clear and unequivocal action so that, in effect, specific legislation was required. Their Honours asserted that the rights and interests of indigenous people could not be extinguished by manifest policy on the part of the Crown. Further, in their joint judgment, Deane and Gaudron JJ. emphasised that the rights under the common law native title were true legal rights and any wrongful interference by the Crown would give rise to a claim for compensation, provided, the proceedings for recovery were instituted within the period allowed by the relevant statute of limitations.[68]

Constraints on legislative power

Deane and Gaudron JJ. also drew attention to the important constraints on the legislative power of Commonwealth, State and Territory Parliaments to extinguish or diminish common law native titles. Insofar as the Commonwealth was concerned, there was the requirement of s.51 (xxxi) of the Constitution that a law with respect to the acquisition of property must provide 'just terms'. This would have the consequence that any legislative extinguishment of those rights would constitute an expropriation of property for the purposes of the constitutional requirement. Another restriction upon legislative

powers emanated from the paramountcy of valid Commonwealth legislation over what would otherwise be valid State and Territory legislation. As was demonstrated in *Mabo v. Queensland*,[69] the provisions of the *Racial Discrimination Act* 1975 (Cth) represented an important restraint upon State or Territory legislative power to extinguish common law native title.

Not a permissive occupancy

Deane and Gaudron JJ. stated that the weight of authority and considerations of justice supported their rejection of any proposition that native title was no more than a permissive occupancy which could be revoked or terminated at any time at the whim of the Executive, however unjust. Their Honours rejected the notion that native title was no more than a shadowy entitlement to occupy or use the relevant land until the Crown saw fit to terminate it.[70]

Clear and plain legislative or executive action would suffice

Brennan J. thought that because of the seriousness of the consequences which flow from extinguishment, the exercise of a power to extinguish native title must reveal a clear and plain intention to do so, whether the action be taken by the legislature or by the executive.[71] Where the Crown had validly alienated land by granting an interest that was wholly or partially inconsistent with a continuing right to enjoy native title, native title was extinguished to the extent of the inconsistency. Thus, native title had been extinguished by grants of estates of freehold or of leases but not necessarily by the grant of lesser interests, e.g authorities to prospect for minerals. Similarly, native title continued where the waste lands of the Crown had not been appropriated for permanent public works (e.g. for roads, railways, post offices) which precluded the continuing concurrent enjoyment of native title.[72]

Creation of reserves

His Honour added that a clear and plain intention to extinguish native title was not revealed by a law which merely regulated the enjoyment of native title,[73] or which created a regime of control that was consistent with the continued full enjoyment of native title.[74] *A fortiori*, a law which reserved or authorised the reservation of land from sale for the purpose of permitting indigenous inhabitants and their descendants to enjoy their native title worked no extinguishment.[75] However, native title could be effectively extinguished by an inconsistent dealing by the Crown with the land,

e.g. a reservation or dedication for an inconsistent use or purpose, in circumstances where third party rights intervened, or where the actual occupation or use of the native title-holders was terminated.[76] Although the majority of the judges were divided, it is submitted that the Court's comments on this important question were *obiter dicta* since the plaintiffs had not sought compensation or damages in respect of any past interference with the rights and interests of the Meriam people in the Islands.

Fiduciary duty

The plaintiffs had also requested the Court to declare that the State of Queensland was under a fiduciary duty to the Meriam people to recognise and protect their rights and interests in the Murray Islands. Such a duty arose, the plaintiffs argued, by reason of annexation, over which the Meriam people had no choice. The plaintiffs, however, did not seek any specific relief for a breach of fiduciary duty.

Only Toohey J. dealt with this issue at some length. His Honour referred to certain kinds of relationships which necessarily entailed fiduciary obligations, i.e. where one party is in a position to exercise a discretion capable of detrimentally affecting the legal position of the other, e.g. trustee and beneficiary, company director and shareholder, principal and agent. His Honour found that the Crown in right of Queensland was under a fiduciary obligation because it had the power to extinguish the Meriam people's native title and the result of extinguishment would be the loss of their traditional rights and interests. Furthermore, the Meriam people's power to deal with their native title was restricted insofar as it was inalienable, except to the Crown. His Honour added that the fiduciary obligation on the Crown was in the nature of the obligation of a constructive trustee. It followed that the obligation on the Crown was to ensure that traditional title was not impaired or destroyed contrary to the interests of the title-holders. While a fiduciary obligation on the Crown did not limit the legislative power of the Crown, any such legislation would be a breach of that obligation if its effect was adverse to the interests of the native people, or, if the process it established did not take account of those interests.[77]

Dissenting opinion of Dawson J.

Dawson J., who wrote a dissenting opinion, took the view that as far as the issue relating to the preservation of native title was concerned, the case turned upon the application of accepted principles rather

than upon the ascertainment of the principles themselves. After tracing the history of events, his Honour stated that all through the period of English settlement the Crown dealt with the land upon the basis that, where not retained or reserved for public purposes, it was available for settlement without regard to any claim on the part of the Aboriginal inhabitants. His Honour added that a dispassionate appraisal of what occurred indicated to him that the policy which lay behind the legal regime was determined politically and, however insensitive the policies might now seem to have been, a change in view did not of itself mean a change in law.[78]

His Honour asserted that native title was an occupancy which the Crown, as absolute owner, permitted to continue at its discretion. From the inception of the colony of New South Wales, the Crown treated all land in the colony as unoccupied and afforded no recognition to any form of native interest in the land. All the dealings with the land by the Crown were quite inconsistent with any recognition, by acquiescence or otherwise, of native title.[79]

According to his Honour, the circumstances which accompanied the creation of reserves clearly indicated the Crown's exercise of rights of absolute ownership. The creation of reserves was, therefore, inconsistent with the preservation of native title. The people of the Murray Islands had, since annexation, been permitted to occupy, use and enjoy lands, but they had been permitted to do so, not in recognition of any traditional land rights, but as occupants of a reserve created by the Crown pursuant to legislation.

It is submitted that Dawson J.'s assertion is not supported by any authority, nor is it justified by history. Furthermore, his Honour distinguished the two United States cases on this point on most unconvincing grounds. In those cases the courts had stated that creation of a reserve was not necessarily inconsistent with the continued existence of native title.[80] Again, his Honour's reference to the creation of Aboriginal reserves elsewhere in Australia, in order to imply the negation of communal title in the Murray Islands, is unpersuasive and factually erroneous.

No room for fiduciary obligation

His Honour acknowledged that the initial annexation of the Murray Islands was motivated by a desire on the part of the Crown in right of the Colony of Queensland to protect the native inhabitants and the Queensland legislative policy was one of protection of native inhabitants' welfare and preservation of their traditional way of life. His Honour, however, asserted that the measures taken in furtherance of that policy in no way related to native interests in land and could not be used to found a fiduciary duty upon the Crown to deal with land in a particular way.

This is in contrast to the views of the other six members of the Court that the fundamental propositions upon which the defendant's case was based were, in the light of contemporary society, and in the light of the equally fundamental principles of human rights and justice, no longer acceptable and upon re-examination should be rejected.[81] It is not surprising therefore that Dawson J. observed that the concept of *terra nullius* was not in issue, although his Honour did admit that 'there was a consciousness that the occupation of the land by white men was deprivation of the Aborigines ...'.[82] Further, Dawson J. held that the plaintiffs had failed to establish any custom by which they could be said to have inherited rights over the claimed lands.[83] Not surprisingly, therefore, Dawson J. concluded that the responsibility, both legal and moral, to recognize native title to traditional land, lay with the legislature and not with the courts.[84]

Ramifications of Mabo

The *Mabo* case was designed to test Blackburn J.'s ruling in *Milirrpum v. Nabalco* Pty *Ltd*,[85] which was the only reported Australian decision directly dealing with the merits of an Aboriginal claim to particular traditional tribal or communal lands. There Blackburn J. stated that the doctrine of common law native title had no place in a settled colony except under express statutory provisions. Further, the pre-existing native rights claimed by the plaintiffs were foreign to the 'rights of private property' giving rise to a title under the English common law and were therefore not recognisable. Relying on the authority of four important Australian cases where it had been held that the unqualified legal and beneficial ownership of all land in the colony vested in the Crown,[86] Blackburn J. concluded that the doctrine of common law native title had never formed part of the law of Australia.

Previous cases overruled

Deane and Gaudron JJ., while doubting the correctness of these cases, pointed out that in none of them was the question of Aboriginal entitlement directly involved and no argument in support of Aboriginal entitlement was advanced on behalf of any party. Be that as it may, their Honours challenged the validity of the two broad propositions espoused by these four cases, namely, that the territory of New South Wales was, in 1788, *terra nullius* in the sense of being

unoccupied or uninhabited for legal purposes, and that full legal and beneficial ownership of all the lands of the colony vested in the Crown.

Their Honours remarked that these two propositions had provided the environment in which the Aboriginal people came to be treated as a different and lower form of life, whose very existence could be ignored for the purpose of determining the legal right to occupy and use their traditional homelands. Further, they had provided the legal basis for the dispossession of the Aboriginal peoples of most of their traditional lands.

> The acts and events by which that dispossession in legal theory was carried into practical effect constitute the darkest aspect of the history of this nation. The nation as a whole must remain diminished unless and until there is an acknowledgment of, and retreat from, those past injustices. In these circumstances, the Court is under a clear duty to re-examine the two propositions .... that re-examination compels their rejection. The lands of this continent were not *terra nullius* or 'practically unoccupied' in 1788. The Crown's property in the lands of the Colony of New South Wales was, under the common law which became applicable upon the establishment of the Colony in 1788, reduced or qualified by the burden of the common law native title of the Aboriginal tribes and clans to the particular areas of land on which they lived or which they used for traditional purposes.[87]

Interests unknown to the common law are protectible

Following the authority of the Privy Council cases,[88] their Honours took the view that the traditional interests of native inhabitants were to be respected even though those interests were of a kind unknown to the common law. In other words, the relationship of Aborigines to their land need not accord with common law notions of property, provided that their occupation was exclusive.[89] Their Honours observed that for the purposes of the Meriam people's claim, although it was impossible to identify any precise system of title, rules of inheritance, or methods of alienation, there was undoubtedly a local native system under which the established familial or individual rights of occupation and use were of a kind which far exceeded the minimum requirements necessary to found a presumptive common law native title.[90]

Impact of the decision on Australian Aborigines

Although the High Court was careful to point out that the *Mabo* decision applied only to the Murray Islands under certain conditions, the Court recognised that the legal issues fell to be determined according to fundamental principles of common law and colonial constitutional law applicable throughout Australia. The Court appreciated that the Meriam people were culturally different from the Aboriginal people of Australia. Even so, for the purposes of determining what interests might exist in the ancestral lands of indigenous peoples of Australia, the Court chose to make no distinction between the Meriam people and those indigenous people who occupied and occupy the Australian mainland.

For this reason, it is submitted that the case has far wider ramifications and raises a wide range of legal issues. Provided the general nature of the connection between the indigenous people and their customs remains,[91] it is immaterial that the laws and customs of the indigenous people have undergone some change since the Crown acquired sovereignty. Brennan J. remarked that, 'there may be other areas of Australia where native title has not been extinguished and where an Aboriginal people, maintaining their identity and their customs, are entitled to enjoy their native title'.[92] Likewise, Toohey J. observed that 'no basic distinction need be made, for the purposes of determining what interests exist in ancestral lands of indigenous peoples of Australia, between the Meriam people and those who occupied and occupy the Australian mainland'.[93] Thus, in theory, any other tribe or clan fulfilling the requisite conditions could equally claim the recognition of their native title, as was accorded to the Murray Islanders.

Protection of Aboriginal folklore

Brennan J. saw no reason why the common law should not recognise novel interests in land which, not depending on Crown grant, were different from common law tenures.[94] This reasoning could be applied to rights or interests not related to land and perhaps to sacred objects, ceremonies or customs, which could be recognized at law even though they do not stem from the common law, as long as they were not inconsistent with fundamental principles of the common law. For example, if it could be established that Aborigines had their own laws relating to the protection of intellectual property, i.e. customs which have existed since time immemorial, then arguably

those customary laws should apply to matters such as Aboriginal folklore, by analogy with the recognition of Aboriginal land rights.

V. Conclusion

It is submitted that the decision of the High Court in Mabo is most significant for all Aboriginal people because the highest court of the land has, for the first time, examined (and rejected) the validity of the two fundamental propositions which have been endorsed by long-established authority and which have been used as a basis of the real property law in Australia for more than one hundred and fifty years. These propositions are:

(i) that the territory of Australia was, in 1788, *terra nullius* in the sense of 'unoccupied or uninhabited' for legal purposes; and

(ii) that full legal and beneficial ownership of all the lands of this continent vested in the Crown, unaffected by any claims of the Aboriginal inhabitants.[95]

According to the High Court, these propositions which have provided a legal basis for, and justification of, the dispossession of Aborigines are no longer valid.[96] Brennan J.'s statement that in the present day and age it was imperative that 'the common law should neither be nor be seen to be frozen in an age of racial discrimination'[97] is most significant and is a clear pointer to the judicial approach in matters involving Aboriginal rights in the 1990s and beyond. This sentiment was reinforced by Deane and Gaudron JJ. who observed:

> The acts and events by which that dispossession in legal theory was carried into practical effect constitute the darkest aspect of the history of this nation. The nation as a whole must remain diminished unless and until there is an acknowledgment of, and retreat from, those past injustices.[98]

European invasion of Australia brought about the dispossession and dispersal of Aboriginal people from their lands and destruction of much of their unique culture. Of all the injustices done to them, expropriation of their traditional land and the flagrant exploitation and destruction of their intellectual property rights are losses they feel most keenly. In the context of the general consensus amongst the various government committees and academic writers on the need for sufficient protection of Aboriginal peoples' rights,[99] the *Mabo* decision is a significant positive step in the direction of legislative activity on the issue. As Professor Nettheim, a leading authority on this subject, has recently observed; 'the time is highly propitious for a fundamental reassessment of the Aboriginal/non-Aboriginal relationship'.[100] It is submitted that the judgment can be broadened beyond the realm of real property rights and extended to intellectual property rights, provided that there has been a continued observance of Aboriginal customary laws despite the existence of the common law.

Various solutions have been suggested, ranging from a *sui generis* protection to all-out protection under the copyright law. However, what is remarkable to note is that everyone involved has been unanimously supporting the grant of protection to Aboriginal folklore. This *consensus ad idem* should be enough by itself to instigate some legislative activity in this matter of national and global significance.

History is a witness to shameful miseries inflicted on this culturally profound and non-violent race in the past 200 years. It will be very sad if non-Aboriginal Australians did not recognise the legitimate claim of the indigenous people, if for no other reason, then at least as a gesture of repentance for the past wrongs.

Notes

1. E. Linden, 'Lost Tribes, Lost Knowledge', (1991) 138:12 *Time International*, 1, (1991) 138:12 50.
2. D.J. Mulvaney, *The Prehistory of Australia* (Australia: Penguin, 1975), 52.
3. 1986 Census.
4. *Aboriginal Culture* (Australia: Department of Foreign Affairs and Trade, March 1990).
5. See *Mabo v. Queensland* (1992) 66 A.L.J.R. 408, 450 (per Deane and Gaudron JJ.).
6. See P. Dudgeon and D. Oxenham, 'The Complexity of Aboriginal Diversity: Identity and Kindredness' (1990) 1 *NGULAIG* , 3. See also *Mabo* (1992) 66 A.L.J.R. 408, 449 where Deane and Gaudron JJ. observed: 'An early flash point with one clan of Aborigines illustrates the first stages of the conflagration of oppression and conflict which was, over the following century, to spread across the continent to dispossess, degrade and devastate the Aboriginal peoples and leave a national legacy of unutterable shame'.
7. *Commonwealth Electoral Act* 1962.
8. R. Bell, 'Protection of folklore: the Australian experience' (1985) XIX *Copyright Bulletin* 4.
9. See the Law Reform Commission's report *The Recognition of Aboriginal Customary Laws* (Canberra: AGPS, 1986), 54-55.

10. See generally on Aboriginal folklore, K. Puri *Australian Aboriginal People And Their Folklore* NGULAIG Monograph 9 (St. Lucia: The University of Queensland, 1992) and 'Aboriginal Folklore' (1992) 7 *Australian Folklore* 125.
11. J. Kuckertz, 'Points of view and questions regarding the definition of folklore' (1979) 4 INTERGU Yearbook 259.
12. *Report of the Working Party on the Protection of Aboriginal Folklore* (Canberra: AGPS, 1981), para 1201.
13. *The Weekend Australian* 3-4 November 1990, 11.
14. Unreported, Federal Court of Darwin.
15. A. Jabbour, 'Folklore Protection and National Patrimony: Developments and Dilemmas in the Legal Protection of Folklore' (1983) XVII *Copyright Bulletin* 10, 13. See also, J.G. Weiner 'Protection of Folklore: A Political and Legal Challenge', (1987) 18 IIC 56, 85.
16. B.F. Klarman, 'Copyright and Folk Music - A Perplexing Problem' (1965) 12 *Bulletin of the Copyright Society of the USA* 277, 278. See also S. Ricketson, *The Berne Convention for the Protection of Literary and Artistic Works: 1886-1986* (London: Kluwer, 1987), 313.
17. M. Niedzielska ,'The Intellectual Property Aspects of Folklore Protection' [1980] *Copyright* 339, 344.
18. See C. Masouyé, 'La protection des expressions du folklore' (1983) 115 *Revue Internationale Du Droit D'Auteur* [RIDA] 3, 10.
19. J. Riedel, 'Folklore of the Americas' (1979) 4 INTERGU Yearbook 239, 144-145 appears to support this: '[F]olk music, in order for it to be truly that, must be kept alive through continuous transmission and reception ... If a song is created and performed only once, such a song is not a folksong. ... One of the tests of the validity of any given folk song is the existence of varying versions in oral circulation.'
20. *Report of the Working Party on the Protection of Aboriginal Folklore* (Canberra: AGPS, 1981), para 505.
21. See *Fiest Publications, Inc v. Rural Telephone Service Co. Inc.*(1991) 41 BNA's *Patent, Trademark and Copyright Journal* 453, 454. For a comment on this case, see M. Schwarz, 'Copyright in Compilations of Facts' [1991] 5 EIPR 178.
22. Section 33, *Copyright Act* 1968 (Cth).
23. *Working Group on the Intellectual Property Aspects of Folklore Protection* [1981] *Copyright* 111, 113. For a good summary of the model provisions, which have been formulated to assist national governments to draft laws for the protection of folklore, see E.P. Gavrilov 'The Legal Protection of Works of Folklore' [1984] *Copyright* 76, 78.
24. Australian Copyright Council, *Aboriginal Arts and Copyright* (Bulletin 75, 1991), 5.
25. See Bell *supra* Note 8, 9.
26. See section 1(5bis), *Tunis Model Law on Copyright for Developing Countries* (Unesco-WIPO 1976), reproduced in [1976] *Copyright* 165, 167.
27. Copyright Law Review Committee, *Report on Moral Rights* (Canberra: AGPS 1988). See generally, P. Anderson and D. Saunders (eds) *Moral Rights Protection in a Copyright System* (Brisbane: Griffith University, 1992).
28. *Report of the Working Party on the Protection of Aboriginal Folklore* (Canberra AGPS, 1981).
29. See *Report on the Recognition of Aboriginal Customary Laws* (Canberra: AGPS, 1986), 27; *Report on Folklife* (Canberra: AGPS, 1987), 16; and *Report on the Aboriginal Arts and Crafts Industry* (Canberra: Dept. of Aboriginal Affairs, 1989), 296.
30. *Mabo* (1992) 66 A.L.J.R. 408. The Full Court of the High Court handed down this very lengthy decision on 3 June 1992, containing four different judgments. The Court comprised Mason C.J., Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ.
31. In 1882, in purported exercise of powers conferred by the *Crown Lands Act* 1876 (Qld), the Murray Islands were reserved from sale. That Act was repealed by the *Crown Lands Act* 1884 (Qld), which took its place. In 1912, a proclamation was made pursuant to s 180 of the *Land Act* 1910 (Qld) which 'permanently reserved and set apart' the Murray Islands 'for use of the Aboriginal Inhabitants of the State'.
32. (1988) 166 C.L.R. 186.
33. It should be noted that section 10(1) of the *Racial Discrimination Act* represents an important restraint upon State or Territory legislative powers to extinguish or diminish common law native title.
34. (1992) 66 A.L.J.R. 408, 482 (Toohey J.), 457 (Dawson J).
35. (1992) 66 A.L.J.R. 408, 432. The Murray Islands were annexed to Queensland on 21 July 1879. The acquisition of beneficial ownership of land by the Crown did not appear to have been among the purposes of the annexation entertained by either the Queensland or the Imperial Government. See *Wacando v. The Commonwealth* (1981) 148 C.L.R. 1, 10 (*per* Gibbs C.J.), cited in *Mabo* (1992) 66 A.L.J.R. 408, 413 (Brennan J.). Note that the Queensland Government had reserved the Murray Islands for native inhabitants in 1882.
36. See Deane and Gaudron JJ. in *Mabo* (1992) 66 A.L.J.R. 408, 444, where their Honours' observation seems to convey the idea that the Crown's legal title had been qualified or reduced by common law native title.
37. This submission was supported by a line of authority including *Vajesingji Joravarsingji v. Secretary of State for India* (1924) L.R. 51 Ind. App. 357; *Secretary of State for India v. Bai Rajbai* (1915) L.R. 42 Ind. App. 229; *Asrar Ahmed v. Durgah Committee, Ajmer* (1947) 34 A.I.R. 1 (P.C.); and *Tee-Hit Ton Indians v. United States* (1955) 348 U.S. 272.
38. (1847) 1 Legge 312, 316.
39. (1959) 102 C.L.R. 54, 71.
40. (1975) 135 C.L.R. 337, 438-439.

41. Toohey J. stated that the High Court should declare such a result 'to be an unacceptable consequence, being at odds with basic values of the common law'. (1992) 66 A.L.J.R. 408, 484.
42. This Latin expression literally means a land belonging to no-one or a land empty of inhabitants.
43. Support for this principle has been found in the following cases where it was held that, on settlement, land vested in the Crown: *Attorney-General v. Brown* (1847) 1 Legge 312, 316; *Randwick Corporation v. Rutledge* (1959) 102 C.L.R. 54, 71; *New South Wales v. The Commonwealth* (1975) 135 C.L.R. 337, 438-439 (the *Seas and Submerged Lands Case);* and *Mabo v. Queensland* (1988) 166 C.L.R. 186, 236.
44. See *Cooper v.Stuart* (1889) 14 App. Cas. 286, 291.
45. (1992) 66 A.L.J.R. 408, 439.
46. See Brennan J.'s judgment in *Mabo* (1992) 66 A.L.J.R. 408, 421, where his Honour described the 'absence of law' or 'barbarian' theory which underpinned the colonial reception of the common law of England. See also at 438 where Deane and Gaudron JJ. point out that the colony of New South Wales did not qualify as a 'settled' territory even in the extended sense under the international law of that time.
47. It is important to note what Deane and Gaudron JJ. stated in *Mabo* at 439, in the context of native law or customs: 'The common law so introduced was adjusted in accordance with the principle that, in settled colonies, only so much of it was introduced as was 'reasonably applicable to the circumstances of the Colony'. This left room for the continued operation of some local laws or customs among the native people and even the incorporation of some of those laws and customs as part of the common law'. This statement could be significant where other rights or interests based on customary law are claimed, facilitating the recognition of other customary rights or interests.
48. See Deane and Gaudron JJ. in *Mabo* (1992) 66 A.L.J.R. 408, 441.
49. (1992) 66 A.L.J.R. 408, 418-419. See also, the joint judgment of Deane and Gaudron JJ., 438.
50. Blackstone, *Commentaries on the Law of England* (London: Strachan, 17 ed., 1830), Bk II, Ch 1, 7.
51. (1992) 66 A.L.J.R. 408, 416.
52. (1992) 66 A.L.J.R. 408, 417.
53. *Ibid.*
54. *Calder v. Attorney-General of British Columbia* [1973] S.C.R. 313, 416 *per* Hall J.
55. See *Advisory Opinion on Western Sahara* [1975] I.C.J.R. 12, 39.
56. (1992) 66 A.L.J.R. 408, 422.
57. (1992) 66 A.L.J.R. 408, 439, 454.
58. (1992) 66 A.L.J.R. 408, 428, citing *In re Southern Rhodesia* [1919] A.C. 211, 233 and *Adeyinka Oyekan v. Musendiku Adele* [1957] 1 W.L.R. 876, 880.
59. (1992) 66 A.L.J.R. 408, 429. See also 441 and 452 for Deane and Gaudron JJ.'s definition of native title.
60. (1992) 66 A.L.J.R. 408, 482, citing, among others, *Amodu Tijani v. Secretary, Southern Nigeria* [1921] 2 A.C. 399, 403-404.
61. (1992) 66 A.L.J.R. 408, 430.
62. *Ibid.*
63. (1992) 66 A.L.J.R. 408, 431.
64. (1992) 66 A.L.J.R. 408, 437.
65. (1992) 66 A.L.J.R. 408, 410.
66. (1992) 66 A.L.J.R. 408, 429.
67. Deane and Gaudron JJ. in *Mabo* (1992) 66 A.L.J.R. 408, 452. Toohey J. pointed out that to extinguish traditional title without compensation, as provided for in the *Acquisition of Land Act* 1967 (Qld), would mean that the Meriam people would not enjoy a right which is enjoyed by persons of any other race, colour, or national or ethnic origin, or they would enjoy a right to a more limited extent than such persons. This result would offend section 10(1) of the *Racial Discrimination Act* 1975 (Cth), a result which would make the proposed law invalid. Therefore native title could not be extinguished by the Crown without the payment of compensation (1992) 66 A.L.J.R. 408, 488-489, 498).
68. See also Toohey J. at 490, where his Honour stated 'Where there has been an alienation of land by the Crown inimical to the continuance of traditional title, any remedy against the Crown may have been lost by the operation of limitation statutes. And nothing in this judgment should be taken to suggest that the titles of those to whom land has been alienated by the Crown may now be disturbed'.
69. (1988) 166 C.L.R. 186.
70. (1992) 66 A.L.J.R. 408, 443-444, citing several cases in support, but in particular *Attorney-General for Quebec v. Attorney-General for Canada* [1921] 1 A.C. 401, 406.
71. (1992) 66 A.L.J.R. 408, 432, citing with approval *Calder v. Attorney-General of British Columbia* [1973] S.L.R. 313, 404 and *Te Weehi v. Regional Fisheries Officer* [1986] 1 N.Z.L.R. 680, 691-692.
72. (1992) 66 A.L.J.R. 408, 434.
73. *R v. Sparrow* [1990] 1 S.C.R. 1075, 1097.
74. *United States v. Santa Fe Pacific Railroad Co* (1941) 314 U.S., 353-354.
75. (1992) 66 A.L.J.R. 408, 432.
76. (1992) 66 A.L.J.R. 408, 443 (Deane and Gaudron JJ.).
77. (1992) 66 A.L.J.R. 408, 491-493.
78. (1992) 66 A.L.J.R. 408, 467.
79. (1992) 66 A.L.J.R. 408, 465.
80. (1992) 66 A.L.J.R. 408, 472, referring to *United States v. Santa Fe Pacific Railroad Co* (1941) 314 U.S., 353 and *Gila River Pima-Maricopa Indian Community v. United States* (1974) 494 F. 2d 1389-1392.
81. (1992) 66 A.L.J.R. 408, 417, 422, 429 and 430 (per Brennan J.); 451 (per Deane and Gaudron JJ.); and 483-484 (per Toohey J.).

82. (1992) 66 A.L.J.R. 408, 469.
83. (1992) 66 A.L.J.R. 408, 474.
84. (1992) 66 A.L.J.R. 408, 481.
85. (1970) 17 F.L.R. 141.
86. The cases are *Attorney-General v. Brown* (1847) 1 Legge 312; *Cooper v. Stuart* (1889) 14 App. Cas. 286; *Williams v. Attorney-General for New South Wales* (1913) 16 C.L.R. 404 and *Randwick Corporation v. Rutledge* (1959) 102 C.L.R. 54. Blackburn J. also relied on a line of authority represented by the three Privy Council cases where it had been held that previously existing aboriginal interests in ancestral lands did not continue after annexation unless they had been positively recognised by the new sovereign.
87. (1992) 66 A.L.J.R. 408, 451.
88. *Adeyinka Oyekan v. Musendiku Adele* [1957] 1 W.L.R. 876, 880; *Sunmonu v. Disu Raphael* [1927] A.C. 881, 883-884; and *Sakariyawo Oshodi v. Moriamo Dakolo* [1930] A.C. 667, 668-669.
89. (1992) 66 A.L.J.R. 408, 441.
90. (1992) 66 A.L.J.R. 408, 454.
91. (1992) 66 A.L.J.R. 408, 435. See also 452 (Deane and Gaudron JJ.).
92. (1992) 66 A.L.J.R. 408, 434.
93. (1992) 66 A.L.J.R. 408, 482.
94. (1992) 66 A.L.J.R. 408, 425.
95. (1992) 66 A.L.J.R. 408, 451 (Deane and Gaudron JJ.).
96. The application of the doctrine of *terra nullius* to Australia has also been strongly criticised in H. Reynolds *The Law of the Land* (Australia: Penguin, 1987).
97. (1992) 66 A.L.J.R. 408, 422.
98. (1992) 66 A.L.J.R. 408, 451.
99. See K. Puri *Australian Aboriginal People and Their Folklore supra* note 10.
100. G. Nettheim 'The Mabo case - As Against the Whole World' (1992) 27(6) *Australian Law News* 9, 14.

Folk-law or Folklore: When a Law is Not a Law. Or is it?

*K.E. Mulqueeny**

> The High Court in *Mabo* has ... rejected the view that Australia was "terra nullius". As the common law presently stands ... apart from indigenous customary title to land, it does not *yet* recognise or adopt Aboriginal customary law ... *as part of Australian law*. Whether the High Court will continue to take this approach into the future is uncertain.[1]

Introduction

The doubt expressed in the statement of the Sessional Committee quoted above, marks the point of departure for the ensuing discussion. It is already clear that the significance of Aboriginal law and custom implicit in the leading judgment of Brennan J. in *Mabo*[2] has wider ramifications than those related to Meriam land rights or even land rights of Aboriginal peoples generally.[3]

That *Mabo* may bear more extensive implications for the recognition of Aboriginal law and custom in the criminal sphere is not dependent upon characteristics peculiar to the law in its application to that area. The conclusions drawn, if sustainable, would apply generally to subsisting Aboriginal laws. The criminal law justifies singular treatment, however, in as much as in that field, important difficulties[4] and conflicts[5], as well as some notable attempts at accommodation[6] have occurred.

Quite apart from its significance as a ground-breaking precedent domestically, *Mabo* may resound in Aboriginal attempts to pursue their interests in the international arena.[7] The decision is auspiciously timed[8] to facilitate pursuance in appropriate international forums of claims to at least limited aspects of

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sovereignty[9] within areas of traditional occupation. At the same time, the decision may provide renewed impetus to intra-national initiatives directed toward self-management and self-government by Aboriginal groups, based on state and federally legislated mandates over tribal lands.[10]

The leading judgment of Brennan J., in which Mason C.J. and McHugh J. concurred, gives judicial recognition to the continuing existence of Aboriginal law and custom as the legal basis of those traditional rights and interests, which subsist in Aboriginal land.[11] There appears to be no compelling reason *a priori*, why a distinction should be drawn between Aboriginal laws recognised for the purposes of thus ascribing traditional title[12] and other types of Aboriginal laws. Before elaborating this point further, it will be convenient to briefly consider some of the factors which make the link between Aboriginal law and custom on the one hand and criminal law and its administration on the other hand, of particular relevance as a touchstone of both past and possible future developments.

The Criminal Law Dimension

The most comprehensive investigation directed towards establishing the potential recognition of Aboriginal customary law took place as the result of a reference to the Australian Law Reform Commission in 1977. The Commission tendered its report and recommendations in 1986 after a decade of intensive and comprehensive examination of the issues involved. The primacy of criminal law concerns is apparent from the basic terms of reference directed to the Commission:[13]

> TO INQUIRE INTO AND REPORT UPON whether it would be desirable to apply either in whole or in part Aboriginal customary law to Aborigines, either generally or in particular areas or to those living in tribal conditions only and, in particular:
> (a) whether, and in what manner, existing courts dealing with criminal charges against Aborigines should be empowered to apply Aboriginal customary law and practices in the trial and punishment of Aborigines;
> (b) to what extent Aboriginal communities should have the power to apply their customary law and practices in the punishment and rehabilitation of Aborigines; and
> (c) any other related matter.
> IN MAKING ITS INQUIRY AND REPORT the Commission will give special regard to the need to ensure that no person should be subject to any treatment, conduct or punishment which is cruel or inhumane.

It is apparent from these terms that a major area of interest covers what may be described as criminal or quasi-criminal aspects of customary law. As to problems associated with the interaction of criminal law and Aboriginal law the Commission reported that the general application of Australian law to Aborigines had not really been disputed in any evidence or submission placed before them. But, there was a common perception that the general law and those charged with its enforcement had failed to allow proper scope for Aboriginal customary laws and traditions to operate and were, thereby, obstructing Aboriginal communities in their efforts to maintain order.[14] Conflicts between the general criminal law and Aboriginal customary law were perceived as diverse in kind. In contrast with the general law, seen as composed of proscriptions in the form of rules with attached penalties, Aboriginal laws were typified as patterns or guides structuring the way in which conflicts and responses to conflict occur and are resolved, often in an on-going manner.[15] Many aspects of Aboriginal customary law were subject to secrecy[16] and Aboriginal communities were jealous in maintaining authority and control over their laws, customs, rituals and traditions.[17] These factors among others militated toward the Commission's conclusion that no general scheme for the legislative incorporation or recognition of Aboriginal customary law should, or indeed could, be recommended.

A number of specific observations upon particular matters were however made; aspects of the substantive criminal law such as those dealing with *mens rea*,[18] procedural and evidentiary modification of general law rules[19] and criminal justice machinery adaptations[20] were all the subject of recommendations for reform. However, little if any, action appears to have been taken by the Federal Government to implement the recommendations. It is into this *lacuna* that *Mabo*, emphasising as it does the continued legal significance of extant Aboriginal laws and customs comes as a judicial portent of social and legal change.

The Enforcement of Criminal Justice

The differential and discriminatory impact of the criminal justice system upon Aborigines is a concern which has vied with the land rights question as an issue of pre-eminent importance to Aboriginal people. The Report of the Royal Commission into Aboriginal Deaths in Custody[21] is but the latest, if most substantial, of a litany of documentation[22] which substantiate this concern. Nevertheless, it

has frequently been observed that the roots of the problem lie far deeper than the operation of police, courts and prisons. They tap the institutionalised demographic and sociological disabilities associated with systemic and endemic deprivation among Aboriginal communities.[23]. While it has been recognised that giving greater recognition to Aboriginal laws and customs will have little direct bearing on the resolution of such problems,[24] indications of an emerging pan Aboriginal ethos[25] give some ground for optimism that reforms in disparate fields may synergise advances of a higher order than they might otherwise attain separately. *Mabo* may be no more than 'one brick in the wall' in rebuilding Aboriginal self esteem and cultural integrity, but in establishing a legal bridge-head it presages a quantum leap in the potential for innovative political and legal polemics. The symbolic role of *Mabo* in facilitating a more robust 'world-view' among Aborigines and in particular Aboriginal leaders cannot be discounted.

Implications from *Mabo*

There appears no reason in principle for a distinction drawn between laws and customs recognised for the limited, if significant, purpose of supporting subsisting rights in land and the recognition of Aboriginal customary laws of other descriptions. The leading judgment of Brennan J., in which Mason C.J. and McHugh J. concurred, and also that of Toohey J. are clearly more supportive of this conclusion than is the joint judgment of Gaudron and Deane JJ., although there are indications of support for the general thesis, even in the latter.[26]

The judgment of Brennan J. holds (as does that of Toohey J.) that native title *survived*[27] the Crown's acquisition of sovereignty and proceeds to explain that the term 'native title' conveniently describes rights under the *traditional laws*[28] acknowledged by the indigenous inhabitants.[29] The judgment of Toohey J. makes little more than oblique reference to the position of Aboriginal laws, before going on to base its reasoning squarely upon 'occupancy'[30] and the assumption of an underlying social order.[31] In contrast, the joint judgment of Gaudron and Deane JJ. is admittedly inconsistent with the idea of the survival of native title. In their view, rights and interests subsisting under the 'pre-existing' (Aboriginal) law were extinguished by the assumption of sovereignty but concommitantly 'reignited' by the introduced common law to henceforth comprise a 'common law native title'.[32] Despite the fact that in adopting this

approach the introduced common law is perceived as having become the domestic law of the whole colony[33] there are indications that the premise is not anathematic to the common law's revivification of certain Aboriginal *laws* perhaps momentarily extinguished by the act of State assuming sovereignty.[34]

Like the leading judgment, that of Toohey J. is based upon a finding that traditional native title *survived* the acquisition of sovereignty. It places some initial emphasis upon the finding of Blackburn J. in *Milirrpum* v. *Nabalco*[35] that:

> The evidence shows a subtle and elaborate system highly adapted to the country in which the people led their lives, which was remarkably free from the vagaries of personal whim or influence. If ever a system could be called "a government of laws, and not of men" it is that shown in the evidence before me.[36]

The threshold question of whether native title exists at all is, then, distinguished from the issue of the specific nature of the rights and interests encompassed by that title. Having become enmeshed in travails encountered in answering the latter question, Blackburn J. had 'missed the wood for the trees'. Toohey J. eschews consideration of Aboriginal law in answering the threshold question, preferring to found his decision upon the concept of 'occupancy' and judicial analogues based upon that concept in North American jurisdictions. Aboriginal law is relegated (or perhaps elevated) to a matter of judicial notice, it being held sufficient to show that the Aboriginal occupancy was not random or capricious to assume the existence of an underlying social order.[37]

Brennan J. recognises the role of Aboriginal law as the historical *and continuing* basis of traditional title. Although, in referring to the findings of Moynihan J.,[38] the observation is made that Meriam society is shown to have been regulated more by custom than by law,[39] the judgment proceeds to adopt the previously quoted views of Blackburn J. expressed in *Milirrpum*[40] and to generalise them to the situation of traditional Aboriginal societies throughout Australia.[41]

The crucial feature of the judgment is the conclusion that, as there is no longer a warrant to apply rules of the English common law founded upon such misconceived paradigms as 'absence of law' and 'barbarism', it is no longer tenable[42] to make the distinction between inhabited colonies designated 'terra nullius' in the extended sense and those not so designated.

The Court was thus brought to the position where it had squarely to face the issue of abolishing the common law distinction between

the acquisition of sovereignty on the one hand by settlement, or on the other by cession or conquest. The *Western Sahara* decision[43] illustrates that in the international arena even the pure doctrine of 'terra nullius' is now largely discredited. The confounding of confusion in the common law's equation of land occupied by inhabitants 'low on the scale of social organisation'[44] with 'terra nullius' in the strict sense emphasises the shaky foundations of the conventional division between settled and conquered or ceded territories.

However, Brennan J. is not prepared to abandon the doctrine of extended 'terra nullius' if to do so would be incompatible with the fundamental common law doctrine of tenure or the principles relating to the extinguishment of native rights and interests in the aftermath of an accession to sovereignty. 'A fracture of the skeleton of principle' is not to be countenanced.[45] The *coup de grace* is thus postponed pending an examination of these common law doctrines.

The conclusion that the acquisition of sovereignty confers a radical title upon the Crown rather than creating a Crown *demesne*[46] and that the former is the true fount of the common law land system of tenure accommodates the first doctrine. The second is reconciled with the abandonment of extended 'terra nullius' by assimilating the consequences in all three varieties of accession to sovereignty, conquest, cession and settlement.[47] Accordingly, the rule that pre-existing rights and interests survive unless specifically abolished or extinguished by the new sovereign prevails. This result is realised by a finding that the view of Lord Dunedin to the contrary in *Vajesingji Joravarsingji* v. *Secretary of State for India*[48] is against the weight of authority as expressed by Lord Sumner in *In re Southern Rhodesia*[49] and by Viscount Haldane in *Amodu Tijani* v. *Secretary, Southern Nigeria*.[50] The last mentioned case was followed in *Sobhuza II* v. *Miller*.[51] The judgment of Hall J. in *Calder* v. *AG of British Columbia*[52] is called in support, as is the fact that Lord Dunedin himself, apparently later resiled from the position he had earlier taken.[53]

It is only after finding that the 'preferable rule' equates the indigenous inhabitants of a settled colony with the inhabitants of a conquered colony (or presumably of a ceded colony), in respect of their rights and interest in land,[54] that Brennan J. proceeds to overrule cases which had held that the enlarged doctrine of 'terra nullius' applied to Australia. Dispossession of Aborigines from their lands resulted, not from the failure of native title to survive the acquiring of sovereignty, but rather from the exercise, from time to

time, of paramount executive or legislative power, which may have had the effect of expressly or tacitly extinguishing such title.[55]

However, where it has not been extinguished, traditional title is given content by the traditional Aboriginal laws in which it has its origin and the nature and incidents of that title must be ascertained by reference to those laws.[56] The idea that there was no prior law nor sovereign law-makers in settled colonies is described as a legal fiction and likewise inhabited territory which became a settled colony is declared to have been no more a legal desert than it was an uninhabited desert.[57] Native title, though recognised by the common law, is not, (*pace* Gaudron and Deane JJ.) an institution of the common law.[58] Australian law can protect the interests of members of an indigenous clan or group, only in conformity with the traditional laws and customs and only where members acknowledge those laws and, in so far as practicable, observe those customs.[59] The point is made that rights cannot be acquired by anyone who does not acknowledge the laws of the Aboriginal community and unless the acquisition is consistent with the laws and customs of the group. Outside those laws and customs, such rights can only be acquired by the Crown.[60] Equitable and legal remedies are available to protect rights and interests incident to native title provided that laws and customs from whence they spring and by which they are regulated are not so repugnant to natural justice, equity and good conscience that they cannot be sanctioned under the common law.[61] The mutability of traditional laws and customs over time is not inconsistent with their recognition, so long as the relevant community persists as an identifiable group living under currently acknowledged traditional laws.[62]

The case holds that sovereignty carries with it the power to extinguish traditional Aboriginal title. However, the exercise of such a power, in accordance with municipal constitutional law, must reveal a clear and plain intention to do so, a requirement which follows from the serious consequences to Aboriginals of extinguishing their traditional rights[63] (and it could be argued with equal force, of abolishing their traditional laws and social order). Therefore, a law which is consistent with the continued existence of Aboriginal traditional law or which merely regulates the enjoyment of rights under such law would not, it appears, reveal a plain intention to abolish such laws.[64] Sovereignty is not an attribute possessed only by an internationally recognised sovereign[65] and the power to extinguish native title to land is not a matter of international concern.[66] State parliaments retain a legislative power

to extinguish native title subject to the Constitution and to restrictions imposed by valid laws of the Commonwealth.[67]

Unextinguished native traditional title may be enjoyed in areas of Australia by an Aboriginal people, maintaining their identity and their customs.[68] Membership of the indigenous people depends on biological descent from the indigenous people and on mutual recognition of a particular person's membership by that person and by the elders or other persons enjoying traditional authority amongst those people.[69]

It appears then, that so much of Brennan J.'s judgment as relates to the legal survival of rights and interests (themselves secondary concepts, dependent for their existence, upon the particular Aboriginal laws and customs which give them content) would apply *a fortiori* to those primary phenomena embodied in the Aboriginal laws themselves. It seems implicit in the judgment, that some[70] Aboriginal laws and customs may exist as part of the law of the nation, clearly not of general application, but as much entitled to recognition within their sphere of operation as, for example, the by-laws or regulations of statutory authorities or councils are recognised within the area and scope of their powers. Accordingly, it may be argued that it would be more appropriate, in those areas where Aborigines satisfy the criteria elaborated in the judgment, to consider the enactment of declaratory legislation in recognition of existing Aboriginal customary law[71] and of land rights, rather than pretending to *grant* such recognition and such rights. This approach would better accord with current aims of affording due respect to the rightful dignity of the Aboriginal peoples of Australia. It may be thought to add insult to injury to assume the role of offering charity by *granting* land rights and pontificating over whether or not to recognise as law, rules which have never been 'extinguished' (abolished).[72]

If, as the judgment holds, there is no longer any warrant for distinguishing between conquered, ceded and settled lands for the purpose of according the survival of native[73] interests and, further, if there be no requirement that the Crown by positive act recognise such rights and interests, then it would seem logical to conclude that the native[74] law also survives in certain enclaves and among particular traditional groups without any necessity for formal recognition by legislative adoption or otherwise.

The Relevance of the ALRC Report

Seven years on, the recommendations of the Australian Law Reform Commission have not been implemented. If the implications of *Mabo* are recognised, it is arguably not strictly necessary to do so in relation to many of those Aboriginal customary laws which impinge (*inter alia*) upon the criminal law. The role of legislation might best be described as merely declaratory and clarificatory of a subsisting *de jure* situation.

That threshold observation is not, however, to deny the Commission's Promethean achievement in investigating and ascertaining the nature and scope of the operation of Aboriginal customary law in Australia, particularly in the theatre of criminal jurisdictions.[75] Reform of criminal justice machinery provisions formed an important plank of the Commission's Report.[76] These reforms would be particularly significant in the context of those further recommendations toward self-management and self-determination for local communities made in both the Law Reform Commission's Report[77] and that of the recent Royal Commission into Aboriginal Deaths in Custody.[78]

Among areas of major concern which the Law Reform Commission's Report identified in the sphere of substantive criminal law, were those relating to the relevance of Aboriginal customary law in proving criminal intent, its relation to certain categories of exculpatory matter and, as well, with respect to sentencing.

Aspects of *mens rea* may be informed by taking due account of any relevant Aboriginal law or customs. So, for example, the Commission's Report instanced intent,[79] provocation,[80] duress or compulsion,[81] lawful authority or superior orders,[82] self-defence[83] and criminal negligence.[84] While some of these are likely to be affected by considerations more appropriately categorised as custom, others such as duress, lawful authority and superior orders, could clearly raise conflict of law issues. Aboriginal laws which require compliance with the dictates of traditional authorities in the community, who themselves may be acting in accordance with customary laws, are relevant to issues of *mens rea* pertaining to such exculpatory factors. The element of reasonableness in self-defence (and negligence) is clearly susceptible to being coloured by the influence of either traditional law or custom in the situational context in which the particular offence occurred.[85] A further area where Aboriginal customary law may well impinge upon the substantive

criminal law is in the defences of reasonable mistake of fact and honest claim of right.[86]

The most extensive accommodation of the general criminal law to take account of existing Aboriginal laws, however, appears to have taken place in respect of the infliction of traditional sanctions for breaches of Aboriginal laws. This bending of the normal rules has occurred at two levels: the exercise of enforcement and prosecutional discretion to avoid bringing the full forces of justice to bear upon those carrying out the dictates of Aboriginal laws in the imposition of traditional sanctions,[87] and at the judicial level, by taking account of such punishments when tailoring sentences to the circumstances of particular Aboriginal offenders.[88]

The Special Situation of Sentencing Strategies

So far as recognition of traditional punishments is concerned, judicial approaches reveal a certain degree of ambiguity. Courts tread a wary line between acknowledging the social reality of Aboriginal pay-back and accommodating that fact in sentencing, while at the same time taking pains not to condone those varieties which they deem to be repugnant to principle or unduly harsh and oppressive. The courts have chosen not to exercise discretionary powers to avoid the operation of customary law processes.[89] Aboriginal customary laws are usually taken as relevant in that, in providing for traditional punishments, their operation will tend to mitigate the general law penalty.[90] However, the availability of a traditional punishment under Aboriginal customary law may, in some cases operate as an 'aggravating' factor in so far as it indicates certain conduct was blameworthy in both cultures and thus negate a plea in mitigation based on subjective blamelessness.[91]

Spearing and other assaults used as sanctions by traditional communities often do not result in charges being laid.[92] The communities and the police thus give *de facto* recognition to this aspect of Aboriginal customary law. In the view of the Australian Law Reform Commission, such laws were already recognised to a considerable degree by the courts of South Australia, Western Australia and particularly of the Northern Territory, where Aborigines comprise more than a quarter of the population.[93] Thus, superior courts have been willing to take the existence of Aboriginal laws regarding sanctions into account when sentencing, generally without taking the further step of incorporating aspects of Aboriginal punishment into the formal sentencing process.

In general, the courts take account of past and even contemplated future imposition of Aboriginal sanctions when deciding upon an appropriate sentence. This is done in order to avoid the possibility of an Aborigine from a traditional community undergoing double punishment.[94] It is also influenced by recognising that, in Aboriginal customary law, the role of the sanction frequently has wider salving effects in healing the rupture caused to the social fabric than merely penalising the crime itself.

The Judge at first instance in the recent case of *Minor*[95] expressed the point thus in fixing an early release date.

> I have particularly in mind (the) desirability that payback - not condoned, but recognised as inevitable - should be given effect to as soon as possible in order that the community may put the whole episode behind them and get on with the more positive aspects of their lives.

The Federal Court of Australia in *Jadurin*,[96] in a Full Court decision, recognised that the sentencing court was obliged to take into account the implications for a convicted Aboriginal within his own society. That Court stated that 'to acknowledge that some form of retribution may be exacted by an offender's own community, is not to sanction that retribution'.

An Aboriginal accused, who was refused bail by a committing magistrate, was granted it by the Supreme Court in *Jungari*,[97] upon grounds that included the necessity of inflicting a consensual spearing and banishment to abate community hostility and discord ensuing from the offence.

In *Minor* itself, Mildren J., after outlining the judicial history of traditional penalties, set recognition upon three bases. First, that considerations of fairness and justice require a sentencing court to have regard to all material facts, including those facts which exist only by reason of the offender's membership of an ethnic or other group.[98] Second, the important principle of the common law, that a person should not be punished twice for the same offence,[99] and third, that mitigating factors which are related to or associated with a particular offender's membership of the Aboriginal race such as social, economic and other disadvantages[100] should be given full consideration and allowance made for ethnic, environmental and cultural factors.[101]

He went on to observe that grievous bodily harm is not intended when tribal spearings sanctioned by Aboriginal law occur. Consensual spearings not intended and not likely to cause grievous bodily harm[102] do not amount to assaults and as such were not, in his view, unlawful. Even if unlawful, the aforesaid three basic

principles[103] would require that such traditional sanctions be accorded recognition as relevant factors in sentencing. The Federal Court had, in fact, taken punishment into account which was the result of anger rather than Aboriginal law.[104] However the judgment distinguishes between the Court on the one hand recognising the inevitability of tribal punishment, lawful or otherwise, and therefore taking it into account when sentencing, and on the other, actually facilitating the imposition of a customary form of punishment, unlawful by the standards of the general law. The former is considered legitimate while the latter is not.

It seems then that, independently of *Mabo*, the courts and law enforcement agencies have effected a degree of recognition of Aboriginal laws in the areas of traditional sanctions and sentencing. However, the problematic nature of the relationship between the judiciary and traditional authorities is illustrated by a recent case[105] in which the court faced the task of sentencing a number of Aborigines, including a respected elder, who, in accordance with tribal law, had too zealously applied a regime of corporal punishment which it was alleged had resulted in the death of their victim. The accused who had been charged with causing death were in the result convicted of the lesser offence of recklessly committing a dangerous act and received a relatively lenient penalty.[106]

It is not difficult to discern a degree of judicial discomfort in the role thrust upon the courts, in trying to achieve a *de facto* mesh of the disparate types of sanction entrained under the separate systems. Thus, for example, in *Minor*, comfort was taken from the fact that there was no *evidence*[107] to show that the spearing contemplated in that case was to be effected with other than a single sharpened steel point easily retrieved.[108] In the same case, Asche C.J. stated 'I do not believe the court could countenance any really serious bodily harm ... In some cases the payback is purely symbolic',[109] while Martin J. reserved for further consideration in the light of the facts of a particular case whether such an activity was unlawful.[110]

The ambivalence felt by the judiciary in coming to terms with an alien system is exemplified by the continuing ambiguity in the terminology used.[111] In the face of compelling anthropological evidence[112] and in the context of the contemporary retreat from epistemological constructs based in culturally imperialistic paradigms,[113] judges and commentators alike have increasingly supplemented the more patronising and perhaps demeaning concept of native 'custom' with recognition of 'laws and customs' or even the hybrid 'customary law'. The equivocality, so long as it remains uncrystallised by reference to definitional criteria, retains and disguises a degree of operational flexibility in facilitating judicial rejection of what are deemed socially and culturally repugnant practices, as mere customs. Rules of behaviour which fail to threaten the values of the dominant society then can be labelled laws in less problematic fashion with whatever consequences that may entail.

Conclusions

While it appears that the criminal laws of the non-code states are not necessarily inconsistent with a variety of Aboriginal customary laws, that position is more difficult to maintain in those jurisdictions where a Code is expressed to be the sole law with respect to criminal matters.[114] An interesting position arises in the Northern Territory, however, where a defence to criminal liability is specifically related to situations in which the accused has acted in accordance with the *laws* of the Territory.[115] It might be open, in view of the judgment of Brennan J. in *Mabo*, to interpret this provision as encompassing any relevant territorially constrained Aboriginal law which has militated, dictated or motivated that conduct of the accused, which is subsequently called in question in a court administering the criminal law.

Under the Codes generally, liability ensues if the act, omission or conduct concerned is unlawful; that is, not authorised justified or excused. As has been instanced,[116] the courts have already given rein to the consideration of custom and law in the areas of justification and excuse. It remains to be seen whether *Mabo* may presage development of greater judicial willingness to recognise Aboriginal law as a source of *authorisation* for conduct. The scope for such development appears greatest in the Northern Territory where the meaning of authorisation is spelled out[117] as (*inter alia*) acting or omitting to act in exercise of a right granted or recognised by law or in obedience to the order of a competent authority whom the person is bound by *law* to obey unless the order is manifestly unlawful.[118] Despite the fact that 'manifest unlawfulness' is, itself, a question of law,[119] the enhanced relevance of rights established under Aboriginal laws and hence the elevated status of such laws, themselves, appears capable of influencing the course of decisions in at least those cases which involve property offences,[120] customary rights or the infliction of traditional punishments.

A similar approach might be taken under the provisions of those other Codes where a defence of lawful authority is provided[121] or

where the ubiquitous element of unlawfulness is defined as being fulfilled by conduct which is neither excused, justified or *authorised*.[122]

The *Mabo* decision, particularly the leading judgment of Brennan J., implies, as has been detailed, a greater recognition of the content and the significance of Aboriginal law. It is nonetheless also true, particularly in the field of the interaction of criminal and Aboriginal laws, that courts, as has been indicated, have already accommodated the evolution from 'customs' to 'laws and customs', without in any real sense according *legal*, as distinct from factual, substance to those 'laws' so-called. Thus, the High Court, while impelled by the inevitable logic of *Mabo* toward the recognition of land rights in areas such as Arnhem Land,[123] Centralia and the Northwest may yet baulk at recognising, without legislative mandate, Aboriginal law as an independent and autochthonous system of legally enforceable rules, surviving the assumption of sovereignty.

Perhaps, at the end of the day, the key remains, as at the outset, in the true nature of rules, judicially labelled as laws. Might one then ask or, with a doff of the cap to Gertrude Stein, declaim[124] - 'Law is a law, is a law, is a law' —— or is it?

Notes

1. Northern Territory, Legislative Assembly, Sessional Committee on Constitutional Development, 'Discussion Paper No. 4, Recognition of Aboriginal Customary Law', 16 (emphasis added).
2. *Mabo v. Queensland* (1992) 66 A.L.J.R. 408 (hereinafter refered to as *Mabo*).
3. The juridical foundations of the leading judgment of Brennan J. are explicitly made generally referable to those sectors of the Australian Aboriginal population still living according to traditional laws and customs on their ancestral lands. *Id.* 415.
4. As to which ,the recent report of the Royal Commission into Aboriginal Deaths in Custody bears extensive testimony. Commonwealth of Australia *National Report of the Royal Commission into Aboriginal Deaths in Custody* (Canberra: AGPS, 1991). See particularly in this respect, Vol. 1, Part B, 185-227, Vol. 2, Chs. 13 and 14, and Vol. 3, Ch. 25, 301-4.
5. See for example ,the approach adopted by the Queensland courts in cases such as *Young* [1957] Qd.R. 599, *Callope* [1965] Qd.R. 456 and, more recently, *Watson* [1986] 22 A.Crim.R. 308. See also *Ngatayi* (1980) 30 A.L.R. 27.
6. Commonwealth of Australia, Law Reform Commission, Report No. 31, *The Recognition of Aboriginal Customary Laws*, (Canberra: AGPS, 1986). See particularly, Vol. 1, 302-12. See also e.g. *Rankine* [1966] Q.W.N. 16 and *Muddarubba* [1956] N.T.J. 317.
7. The General Assembly of the United Nation's legislative sub-committee for human rights issues, the Commission on Human Rights established its Working Group on Indigenous Populations in 1982. A prominent spokesperson for the Aboriginal rights movement, Mr Mick Dodson, has recently been appointed co-chairperson of that Working Group.
8. It co-incides with the proclamation of the International Year of the World's Indigenous People which has been set for 1993.
9. See, Paul Coe, 'Sovereignty: a paper delivered to NAIHO Conference 1985' in Barbara Hocking, ed. *International Law and Aboriginal Human Rights* (Sydney: Law Book Co., 1988), 141-2. Note also that the leading judgment in *Mabo* rests upon an 'assumption' ((1992) 66 A.L.J.R. 408, 415 C) that Mer was acquired as a settled colony, an assumption seemingly arrived at by default in lieu of any other more appropriate category from the three available, and singularly at variance with the fact that no actual settlement, in the relevant sense, ever occurred. Annexation by Letters Patent is recognised as an Act of State not justiciable in the municipal courts ((1992) 66 A.L.J.R. 408, 417 D)) but not even as eminent a commenatator as Blackstone was able to advance any authority or justification for the proposition that the laws of England became the laws of territory which was not 'terra nullius' ((1992) 66 A.L.J.R. 408, 418 E. See also, R.L. Barsh, 'Indigenous Peoples and the Right to Self-determination in International Law' in Barbara Hocking ed., *op.cit.*, 68. See further, Royal Commission into Aboriginal Deaths in Custody, *op.cit.*, Vol. 5, 3-10, particularly in this respect 36.1, paras. 18, 19.
10. The slow-down in such initiatives which had occurred pre-*Mabo* is instanced in, Garth Nettheim, 'Justice or Handouts? Aboriginals, Law and Policy' in Kayleen M Hazlehurst, *Ivory Scales: Black Australia and the Law*, (Kensington: N.S.W. University Press, 1987), 8. Of course, the various factors, municipal, international, legal and political, can not realistically be considered as operating independently of one another.
11. (1992) 66 A.L.J.R. 408, 429 E.
12. Although the term 'title' may be inapt to describe the special relationship between Aboriginal peoples and their ancestral lands, it is used as in *Mabo* itself, as a label of convenience.
13. A.L.R.C. Report No. 31, op.cit.
14. *Id.*, Vol. 1, 287.
15. A.L.R.C. Report No. 32, *op. cit.*, 360. Compare also the Yolngu concept of *Rom* described in Nancy M Williams, *Two Laws, Managing Disputes in a Contemporary Aboriginal Community* (Canberra: A.I.A.S., 1987), 107-10.
16. Report No. 31, Vol. 1, 87, *Sydney Williams* [1976] 14 S.A.S.R. 1.
17. A.L.R.C. Report No. 31, Vol. 1, 87, 322, 331.
18. *Id.* 299-310.

19. *Id.* 504-507. See now, *Crimes (Investigation of Commonwealth Offices)* 1991, introducing Part 1 c into the *Crimes Act* 1914 (Cth).
20. A.L.R.C. Report No. 31, Vol. 2, 71-95 and discussed generally in Vol. 1, 48-52.
21. *Supra*, note 4.
22. A.L.R.C. Report No. 31, Vol. 1, 279-287.
23. D. Parker, 'The Administration of Justice and its Penal Consequences' in Kayleen M Hazlehurst ed., *op.cit.*, 136.
24. Commonwealth of Australia, Law Reform Commission 'Reference on Aboriginal Customary Law, Research Paper No. 6', 5-15. However, *cf. Royal Commission into Aboriginal Deaths in Custody op.cit.* Vol. 5, 118, recommendation 219.
25. *National Report of the Royal Commission into Aboriginal Deaths in Custody, op.cit.*, Vol. 2, 143. However *cf.* at 527 *ff.*
26. See text *infra* related to note 34.
27. (1992) 66 A.L.J.R. 408, 429 E.
28. It is not germane to give specific consideration to the extent to which custom is differentiated from laws in this context. It is sufficient to observe that Aboriginal *laws* as well as customs (whatever the differentiation might be) are acknowledged as the source of rights. A.L.R.C. Report No. 31 sidesteps the issue to some extent by consolidating both concepts in the hybrid term Aboriginal customary laws.
29. (1992) 66 A.L.J.R. 408, 429 D.
30. (1992) 66 A.L.J.R. 408, 486 B-G.
31. *Id.* E-F
32. (1992) A.L.J.R. 408, 439B, 440G, 442B, 443F.
33. (1992) 66 A.L.J.R. 408, 439E.
34. *Id.* 439B In either of the alternative ways instanced.
35. (1970) 17 F.L.R. 141, 267.
36. (1992) 66 A.L.J.R. 408, 485D.
37. (1992) 66 A.L.J.R. 408, 486B,F, 487B.
38. The case had been remitted by the High Court to the Supreme Court of Queensland for a determination as to the facts.
39. An observation that would indicate an *a fortiori* application of the underlying rationale to Aboriginal ancestral domains in such places as Arnhem land, the Kimberleys and much of the Central and Western regions of Australia. In those areas, traditional groups would have ready recourse to available anthropological authentication of the quasi-legal aspects of the established social order. See further note 112 *infra*.
40. (1970) 17 F.L.R. 141, 267.
41. (1992) 66 A.L.J.R. 408, 421C.
42. *Id.* 421F.
43. (1992) 66 A.L.J.R. 408, 421 E-G, 422 A-G.
44. (1992) 66 A.L.J.R. 408, 422 G-A.
45. (1992) 66 A.L.J.R. 408, 423B, 424C.
46. (1992) 66 A.L.J.R. 408, 427A.

47. (1992) 66 A.L.J.R. 408, 428E-F.
48. (1924) L.R. 51 Ind. App. 357, 360-1.
49. [1919] A.C. 211, 233.
50. [1921] 2 A.C. 399, 407.
51. [1926] A.C. 518.
52. [1973] S.C.R. 313, 416.
53. *Sakariyawo Oshodi v. Moriamo Dakolo* [1930] A.C. 667, 668.
54. (1992) 66 A.L.J.R. 408, 429D.
55. *Id.* 429C
56. *Id.* 429E.
57. *Id.* 429G.
58. (1992) 66 A.L.J.R. 408, 430A.
59. *Id.* 430 G-A.
60. *Id.* 430B.
61. *Idewu Inasa v. Oshodi* [1934] AC 99, 105.
62. (1992) 66 A.L.J.R. 408, 431, B-C.
63. (1992) 66 A.L.J.R. 408, 432A.
64. *Ibid.*
65. *New South Wales v. The Commonwealth* (1975) 135 C.L.R. 337, 373.
66. (1992) 66 A.L.J.R. 408, 434B. However, the Working Group on Indigenous Populations, particularly under its current co-chairperson, may beg to differ as to this conclusion. See also, on this point, note 9 *supra* and references therein mentioned.
67. *Mabo v. Queensland* (1988) 166 C.L.R. 186.
68. (1992) 66 A.L.J.R. 408, 435. Subject to succeeding rights not having been created by the exercise of paramount political power, either executive or legislative, extinguishing pre-existing Aboriginal rights.
69. (1992) 66 A.L.J.R. 408, 435B.
70. See *Adeyinka Oyekan v. Musendiku Adele* [1957] 1 W.L.R. 876, 880 recognising the continuing operation of native law. See also Pat Dodson, 'Laws of the Black People - 1985' in Barbara Hocking ed., *op.cit.* 137, 139 and further *Ngatayi* (1980) 30 A.L.R. 27, 34 (*per* Gibbs, Mason and Wilson JJ.) 36-7 (*per* Murphy J.).
71. Subject perhaps to the usual 'repugnancy' proviso; see text related to note 61 *supra*. Bernard Narakobi, Chairperson of the Papua New Guinea Law Reform Commission describes the use of the term 'repugnant' as itself odious. A.L.R.C. Report No. 31, *op.cit.*, 294. Perhaps, its replacement by a more emotionally neutral term would be preferable.
72. U.N. Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, Working Group on Indigenous Populations, Draft Declaration on the Rights of Indigenous Peoples, Preamble, Part II, Operative para 8, Part III operative para 16. See also Part V draft operative para 21 declaring the right of an indigenous people to have 'their specific character duly reflected in the legal system ... of the State'. The Commission by resolution 1992/44 of March 3, 1992

124. Gertrude Stein, 'Sacred Emily', in *Geography and Plays* (Boston: Four Seas, 1922), 187 The line, 'Rose is a . . . etc' transmuted to aphorism was dragooned by a once fashionable existentialist ontology. Regarding the hybrid 'customary law' the inverted floral methaphor, pressed, could with a nod to The Bard, relevantly translate 'A law by any other ...'?

Some Problems of Proof: The Admissibility of Traditional Evidence

*B.A. Keon-Cohen**

1. Introduction

The finding of facts in the *Mabo* case involved a range of difficultics.[1] Here, one aspect only is focused upon: admissibility problems. To properly understand the issues involved, it is necessary to sketch in some background. The issues were defined by the pleadings - being the much amended statement of claim originally filed in May 1982, several volumes of particulars and further particulars, and the amended defences of Queensland and the Commonwealth. The pleadings thus exceeded 1,000 pages and incorporated, by way of particulars, a range of historical, anthropological and Queensland Department administrative materials. Of special interest are the Murray Island Court Reports, being transcribed accounts of over 100 cases concerning land disputes heard by the Murray Island Community Court between the 1890s and the 1980s. In their much amended statement of claim, the plaintiffs alleged essentially that they enjoyed traditional native title, usufructuary rights, and ownership by custom in their respective lands, that these various interests in land had not been extinguished or impaired by executive or legislative conduct of the defendants, and that the defendants owed fiduciary and trust duties to the plaintiffs in regard to dealing with the claimed land.

The issues to which a large body of evidence was addressed thus focused upon firstly, the existence and nature of the system of traditions, customs and practices administered by the Meriam people on the Murray Islands concerning dealings with land, that is, use and

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enjoyment, inheritance, disposition etc., and secondly the existence and nature of traditional rights claimed by the various plaintiffs within this system in forty-six identified areas of lands, seas, fishtraps and reefs located in and around the Murray Islands.[2] At the time of issuing the statement of claim, 20th May 1982, five plaintiffs claimed such rights and interests on their own behalf 'and on behalf of the members of their respective family groups'. This was finally amended to include a claim on behalf of the Meriam people as a whole.[3] By the time of delivery of the final judgment of the Full Bench of the High Court on 3rd June,1992, two plaintiffs Celuia Mapo Salee and Eddie Mabo, had died; while a third, Sam Passi, who had withdrawn from the proceedings, and who had given evidence on behalf of the plaintiffs, had also died. This left two remaining plaintiffs, David Passi, an Anglican priest, and James Rice, a primary school teacher.

On 26th February 1986, Gibbs C.J. ordered that all issues of fact raised by the pleadings, and further particulars be remitted for hearing and determination to the Supreme Court of Queensland.[4] It should be remembered that pursuant to the terms of the limited remitter, ultimate legal questions were reserved for the High Court[5]. During the early part of the trial, however, an argument arose as to whether the trial Judge, Moynihan J., sitting in the Supreme Court of Queensland exercising federal jurisdiction, was empowered to make rulings as to the admissibility of evidence, and amendment of pleadings, especially the addition or removal of parties. Thus, on 2nd May 1989, the trial was adjourned for two days to allow the parties to appear before Toohey J. in Canberra to seek clarification and rulings. After argument Toohey J. ruled that 'the Supreme Court of Queensland may make orders and give directions for amendment of the parties and the pleadings and for the giving of further particulars in respect of the pleadings in the action'. The Commonwealth and Queensland had sought rulings to the opposite effect, that is, that the trial Judge was not enabled to make orders to add parties or to amend the statement of claim. The trial proceeded accordingly with parties being readmitted[6] and struck-out, and amendments to the pleadings and questions of admissibility of evidence being determined by the trial Judge. However, the limitations inherent in the terms of the remitter, whereby the trial Judge was confined essentially to a fact-finding role only, were considered 'unsatisfactory and unsatisfying' by the trial Judge[7] and were opposed by the defendants.

Half way through the trial, the plaintiffs abandoned claims to offshore seas and reefs extending to the Great Barrier Reef, through lack of evidence; whereupon the Commonwealth, was struck out as a defendant by order of Moynihan J., on 5th June 1989.

A large volume of evidence was presented to Moynihan J. in a trial which lasted sixty-seven sitting days.[8] The trial commenced on 13th October 1986, and was adjourned part-heard on 17th November 1986. Counsels' estimates had been somewhat hopeful! It became apparent that the fact finding exercise required by the remitter would be much more difficult, especially given the many objections to much of the evidence, and would occupy a much longer period than previously anticipated. The plaintiffs had already filed a demurrer on 19th June 1985, challenging the validity of the *Queensland Coast Islands Declaratory Act* 1985,[9] upon which Queensland relied in its amended defence. These demurrer proceedings were now brought on, and were heard by the High Court in March 1988. On 8th December 1988 judgment was delivered in the plaintiffs' favour. The High Court, by a narrow 4 to 3 majority, allowed the demurrer. Thus those paragraphs of Queensland's amended defence which relied upon the 1985 Act as retrospectively extinguishing all of the plaintiff's claimed traditional rights were struck out.[10] Had the plaintiffs lost that proceeding, the entire action, with its part-heard trial, would have stopped there and then.

The hearing of the remitter thus recommenced in Brisbane on 2nd May 1989. Evidence was taken in Brisbane, on Murray Island including a view, and at Thursday Island, with the vast bulk of sitting days being in Brisbane. The parties presented lengthy written submissions in August 1989, with short addresses concluding on 6th September 1989. Judgment, being a *'Determination of Facts'* in three volumes plus annexures was delivered by the trial Judge on 16th November 1990. To complete the sequence, on 20th March 1991, after argument by Queensland as to whether the facts as found, were sufficient to base argument about the ultimate legal issues,[11] Mason C.J. ordered questions to be reserved for consideration of the Full Court pursuant to s.18 of the *Judiciary Act* 1903 (Cth). Argument was heard before the Full Bench of the High Court during the period from 28th to 31st May 1991, and final judgment was delivered on 3rd June 1992.[12]

2. The Evidence

(a) Oral

Oral evidence was given for the plaintiffs concerning the system of customs and traditions dealing with land, and the claims of the various plaintiffs to particular portions of lands and seas. This evidence was given by twenty-four Islanders and three other witnesses, including an anthropologist, Dr Jeremy Beckett. On these questions, Queensland also called nine Islander witnesses to contest, not so much the existence of the traditional 'system', but the entitlement of various plaintiffs to particular portions of land, for example, through disputed inheritance, and the metes and bounds of various claimed portions of land.[13] Five non-Islander witnesses (expert and other) were also called by Queensland. These included an historian, a genealogist, a compiler of myths and legends, an official from the Lands Department, and a retired senior officer of the relevant Queensland department. The Commonwealth called no evidence, having been struck-out as a party prior to the completion of the plaintiffs' evidence.

(b) Documents

A large volume of documentary evidence was tendered, in the form of 313 exhibits. These generated much argument concerning admissibility, weight, and relevance. This material included historical works dealing with first contact in the Torres Straits and subsequent activities of sailors and bech-de-mer fishermen; archival notes[14] and five published volumes of an English anthropological expedition to Murray Island in the 1890's, led by Professor A.C. Haddon; forty-two volumes of Queensland departmental files dealing with the entire historical administration of the Island; two large bound volumes of the Murray Island Court Reports; many maps, drawings, diagrams and photos detailing the Murray Islands and the particulars of land, sea and reef portions claimed; a large work of genealogy concerning the Meriam people; and many official Queensland government documents (orders, proclamations, leases, correspondence, acts and regulations) recording over 100 years of dealings by Queensland authorities with, inter alia, various portions of land on the Islands.[15] This material related especially to the plaintiffs' allegation that Queensland had not extinguished, but had 'recognised' by its official conduct the plaintiffs' claimed traditional rights and interests in the Murray Islands.[16]

3. Proof of Traditional Native Title

(a) Judicial tests

What must be found, on properly admissible evidence, in order to establish that an individual, family group or community, enjoys traditional native title?[17] The *Mabo* judgment has, ironically, established criteria at a level of generality which develops prior common law principles, and which probably renders much of the lengthy and detailed evidence of customs and practices addressed in *Mabo* no longer necessary. However, every case must be assessed on its own facts, and in its own context. Brennan J. stated his criteria thus:[18]

> Where a clan or group has continued to acknowledge the laws and (so far as practicable) to observe the customs based on the traditions of that clan or group, whereby their traditional connection with the land had been substantially maintained, the traditional community title of that clan or group can be said to remain in existence. The common law can, by reference to the traditional laws and customs of an indigenous people, identify and protect the native rights and interests to which they give rise. However, when the tide of history has washed away any real acknowledgment of traditional law and any real observance of traditional customs, the foundation of native title has disappeared. A native title which has ceased with the abandoning of laws and customs based on tradition cannot be revised for contemporary recognition.

As to pre-*Mabo* law, (which governed the trial) Mahoney J. in *Hamlet of Baker Lake v. Minister of Indian Affairs and Northern Development*[19] set out a four point test for the proof of Aboriginal title:

(i) that (the claimants) and their ancestors were members of an organised society;
(ii) that the organised society occupied the specific territory over which the claimants assert the aboriginal title;
(iii) that the occupation was to the exclusion of other organised societies;
(iv) that the occupation was an established fact at the time sovereignty was asserted by England.

Recent Canadian decisions[20] have stressed the necessity to be wary of imposing an unnecessarily or unrealistically high burden on plaintiffs in cases involving evidence of customary and traditional

land tenure. In *Baker Lake* Mahoney J. at the trial, said that on some disputed questions of fact the evidence was:[21]

> ... so meagre that in other circumstances I should feel that the burden of proof had not been discharged. The meagreness of the evidence is however, inherent in its subject matter.

The meagreness of the evidence in that case was caused by a number of factors - the events occurred beyond living memory, there were no written records, and the houses and tools of the Inuit were bio-degradable and hence there were no remains. However, Mahoney J. concluded that 'two or three witnessed incidents may well reflect a reality of countless unwitnessed incidents'.[22] Further, in dealing with the admissibility of a list of the claimants' places of origin compiled by the Mayor of Baker Lake, Mahoney, J. held that the oral verification by admissible evidence of other Inuit witnesses of a sample of the list's contents (otherwise hearsay) was sufficient to have the whole list admitted.[23] In *Simon v. R*[24] a question arose as to whether the appellant was covered by a treaty signed by the Micmac Indian tribe in 1752. The evidence showed that the appellant was a Micmac Indian, living in the same area of Nova Scotia as the original tribe, and he asserted he was a direct descendant of that original tribe. Dickson C.J.C. said, on appeal:[25]

> 'This evidence alone, in my view, is sufficient to prove the appellant's connection to the tribe originally covered by the treaty. True, this evidence is not conclusive proof that the appellant is a direct descendant of the Micmac Indians covered by the Treaty of 1752. It must, however, be sufficient, for otherwise no Micmac Indian would be able to establish descendancy. The Micmacs did not keep written records. Micmac traditions are largely oral in nature. To impose an impossible burden of proof would, in effect, render nugatory any right to hunt ... based on this treaty.'

In *Mabo*, substantial evidence was led concerning the existence of the alleged traditional land system, and individual claims within that system. The problems of inadequacy referred to by Mahoney J. and Dickson C.J.C. did not arise in the same way. If there are any elements of the case from which inferences may be drawn, the Canadian authorities provide appropriate guidelines.

(b) Possession

This article concentrates on admissibility issues of oral evidence relating to proof of native title. However, it is important in determining the admisibility of this evidence to consider what matters go to proof of native title, inparticular the relevance of

'possession' as a root of native title. The Court was asked to receive evidence of, inter alia, statements made by the witnesses in the context of an indigenous oral culture where dealings concerning land are not recorded or evidenced in writing, but in words. Thus such words and the fact of their being uttered take on added and special meaning, and this background, in turn, affects admissibility questions. As to possession, the plaintiffs made the following submissions to the trial Judge when arguing for the admissibility of such 'hearsay' in this case:

> Attention is especially drawn to the principle that ownership of land does not exist at all in English law. A "landowner" has an "estate" in land of one kind or another. The original notions of feudalism still permeate our land law. The "estate" is a bundle of rights, held as a tenure of a liege lord, or in modern terms, held of the Crown. This set of legal fictions has significant effects upon the development of the legal mechanisms by which the common law system handles issues of land "ownership" which come before the Courts. Ultimately the key to proof of "ownership" in Anglo-Australian law is proof of possession. Possession of land leads, again by way of legal fiction, to an inference that the possessor has "seisin", and is thus the person holding the relevant bundle of rights and obligations which go to make up an interest in land. The importance of these ideas even in today's world, is illustrated by *Minister of State for the Army v. Dalziel* (1944) 68 C.L.R. 261.

In a case of this type - an action alleging that the plaintiffs enjoy an interest in land, being traditional native title, at common law - the plaintiffs need not demonstrate a 'good root of title' by reference to a Crown grant or other derivative title, held of the Crown. The fact of possession, and all of the acts and circumstances going to constitute the fact of possession, are themselves evidence of the fact of 'ownership', or the fact of a bundle of 'rights' held by a party, founded on possession. In *Perry v. Clissold*[26] the Privy Council stated:

> It cannot be disputed that a person in possession of land in the assumed character of owner and exercising peaceably the ordinary rights of ownership has a perfectly good title against all the world but the rightful owner. And if the rightful owner does not come forward and assert his title by process of law within the period prescribed by the provisions of the Statute of Limitations applicable to the case, his right is forever extinguished, and the possessory owner acquires an absolute title.[27]

Once it is appreciated that possession may form the basis of title then a claimant seeking to litigate rights in land is entitled to bring

all of the evidence going to prove possession. This will inevitably include statements made by the claimant, by neighbours, or by predecessors in title, to the claimant or to others; all of which go to establish the fact of the oral conduct in relation to the land. Such conduct may constitute evidence of possession by the claimant.

4. Admissibility

(a) *'My father told me that ...'*

Many evidential questions going to relevance, admissibility, weight and so on, arose during the trial. This article focuses solely upon the question of the admissibility of oral evidence where the witness wishes to depose in the general form: 'My father told me that ... for example, when he died, this land would be mine'. For variations on this theme, taken from the transcript, and for a summary of the plaintiffs' submissions to the trial Judge as to admissibility in respect of each, see *Chart A* that follows. Such words may be statements, which amount to oral conduct, for example, an oral disposition equivalent to a soldier's will; statements which amount to a verbal part of, or give meaning to, some other act or conduct, for example, 'This is the boundary of our land' said while pointing to a mound or tree or post; or statements which amount to circumstantial evidence of some other act or event, for example, 'I heard Eddie Mabo's father say his land was to go to his son Eddie' said by a third party in support of Eddie's claim to possession, and hence of his claim to rights within the traditional system.[28] During the trial, Moynihan J. provisionally admitted such statements, subject to final rulings as to admissibility, and considerations of weight. In his final ruling, Moynihan J. admitted these statements into evidence.[29] That ruling was not appealed by Queensland.[30] Thus, in *Mabo*, the technical question of whether and how such evidence is admissible was never argued in the High Court. The question has, however, been discussed in regard to other common law jurisdictions, especially Canada,[31] some African States,[32] and Papua New Guinea.[33]

During the trial, Queensland objected on many occasions[34] to the reception of such statements, on a variety of grounds, for example, ultimate conclusion; a prior inconsistent statement, similar fact evidence; hearsay upon hearsay; mere assertion; and frequently, hearsay. It is not useful to examine all of these objections, and the plaintiffs' arguments in response to each, in detail. Suffice to say that at trial, three broad arguments were advanced in support of admissibility: first, such statements are directly admissible, as not hearsay at all; second, such statements are admissible as an exception to the hearsay rule, on one or more of a variety of well-established grounds; third, such statements are admissible under a head of evidence yet to be comprehensively ruled upon in Australia, that is, 'traditional evidence'. Only this third point is discussed here. For a summary of the plaintiffs' submission to the trial Judge dealing with exceptions to the hearsay rule, see *Chart B* which follows.

(b) *Traditional evidence*

Traditional or historical evidence, is evidence as to rights existing beyond living memory which may be admitted to prove title[35], particularly title to family land where oral tradition is the only evidence available. Traditional evidence 'can properly be given by persons who are supposed by native custom to be cognisant of such matters'.[36] 'Tradition' in this context comprises the observances, customs and beliefs applied within a society. Tradition is highly flexible, with a perceived continuity from past to present. It comprises the beliefs which a people currently have about themselves. It is not something static or frozen in time as it existed in Australia before European contact.[37] Traditional evidence may comprise evidence of history,[38] moral obligation,[39] legend and mythology,[40] religion,[41] an organised society,[42] personal assertion of descent,[43] cultural artefacts and an explanation of their significance,[44] customs,[45] territory,[46] the traditions of family ownership, its acquisition, succession and divestiture, title or interests in family lands[47] and boundaries to family land.[48]

A summary of the plaintiffs' argument presented to the trial Judge concerning various grounds of admissibility of 'my father told me ...' statements, including 'tradition', have been set out at *Chart A*. The concept of 'traditional evidence' has specifically been dealt with by the High Court of Australia and is not unknown to Australian law. In *Administration of Papua New Guinea v. Daera Guba* Barwick, C.J. said:[49]

> By traditional evidence I understand statements of a witness who claims either to have been the repository of the folk lore of a primitive community or to have been told relevant facts by some of his forefathers who had an important place in that community, a standing which was likely to have made them knowledgeable in relevant respects.

The admissibility of such evidence is now well established in various African States.[50] For example, Adamus-Bessman J. in *Poh v.*

Konamba & Ors[51] said in relation to a West African case concerning succession to property, and involving adoption:

> True, the basic evidence was not of eye witnesses but hearsay evidence; as the trial native court themselves were careful to observe. But it is now common knowledge that the type of evidence usually designated as "traditional evidence" is widely admissible in support of cases in the courts involving the history and traditions of families, clans and tribes in this country. Thus Hayes-Redwar (in *Comments on Gold Coast Ordinances* at p.86) -
>
> > "In cases relating to pedigree, inheritance, boundaries of land, hearsay evidence or evidence of common reputation is admissible, and it was held in *Bura and Amonoo v. Ampima* that a much greater latitude is permissible in these matters than is allowed in English law, because of the absence of written memorials in a country where everything, the native law itself included, depends on oral tradition. Besides, evidence as to declaration of deceased members of a family, hearsay, statements of linguists and of other persons with presumable knowledge of the matters in question was admitted."

This category of evidence, it is suggested, satisfies the tests of necessity and competent knowledge 'to prove rights affecting a large number of persons'.[52] As the editor notes in reporting the case of *Oblee v. Armah and Affipong*:[53]

> The exact scope of the rule that permits the admission of traditional evidence and as an exception to the hearsay rule has yet to be defined. Possibly it is no wider than the accepted exception which allows evidence of general reputation.

It may be noted that Blackburn J. in *Milirrpum v. Nabalco*[54] used a 'traditional evidence exception' approach in the way in which he rationalised the application of the general reputation rule, to admit evidence of a traditional land tenure system and clan claims. His Honour did this while nevertheless rejecting 'traditional evidence' as 'a special field of law of evidence, not part of the common law as it is understood in Australia'.[55] This special body of law, Blackburn J. stated, related only to the highly developed system of rules enabling proof of the detailed matters of native law and custom proved on the Gold Coast, Papua New Guinea and New Zealand, sometimes with the assistance of statutory provisions.[56] Blackburn J. rejected that 'special body of law' after considering an article by A.N. Elliot,[57] and considering *Angu v. Atta*.[58] However, that article and that case dealt essentially with the process by which custom became transformed from a matter about which evidence was heard, to the stage where, acting on the precedent of prior decisions already giving recognition to particular customs, judicial notice would be taken of them. Blackburn J. took the view that traditional evidence was only admissible or 'applicable' after, or if, native title was recognised. Blackburn J. thus proceeded on the assumption that in 1971, Australia was different from West Africa, Papua New Guinea, or New Zealand, since it was not a jurisdiction in which native title existed. His Honour found in *Milirrpum* that such title did not exist in Australia.[59] However, the High Court in *Mabo* has now firmly ruled that that conclusion was wrong at law. Thus, it is now inappropriate for any court, in dealing with such issues of fact, to make findings of fact based on an exclusion of traditional evidence. To do so would involve necessarily making an assumption, or effectively ruling, perhaps *sub silentio*, that the kinds of interests for which the particular Aboriginal or Islander plaintiffs contend, do not exist at law.

Difficulties can arise when traditional evidence is in conflict. This question can arise in two ways. The oral evidence may conflict as between two witnesses; or the oral evidence may conflict with contemporaneous written documents. The case of *Adjeibi Kojo II v. Bonsi*[60] indicates the correct approach to be taken by a fact finding tribunal if there is a conflict of traditional history which has been handed down by word of mouth. The Privy Council held that one party or the other may be mistaken, yet both may be honest in their belief. Lord Denning, speaking for the Board, stated:[61]

> In such a case demeanour (of the witnesses) is little guide to the truth. The best way is to test the traditional history by reference to the facts in recent years as established by the evidence and by seeing which of the two competing histories is the more probable.

The question of the way in which to treat traditional evidence, if in conflict with contemporaneous written documents was also dealt with by the Full Court of the Supreme Court of Papua New Guinea (Frost S.P.J., Clarkson and Prentice JJ.) in *Gaya Nomgui v. The Administration of the Territory of Papua and New Guinea.*[62]

(c) Rulings

Moynihan J. dealt with these issues in Chapter 5 of his *Determination of Facts*. As to 'traditional' evidence as a basis of admissibility, his Honour finally ruled:[63]

> So far as the category of traditional evidence is concerned, as I have already said, I accept that the plaintiffs seek to prove rights to land outside the generally recognised concepts of Australian law which have to date been accepted as founding such rights. It was submitted that traditional evidence was "evidence as to rights existing beyond living

memory which may be admitted to prove title"; (*Stool of Abinabina v. Chief Kojo Enyimadu* (on behalf of the Stool of Nkasawura) (1953) 2 W.L.R. 261). The evidence was said to be particularly applicable when proving title to family land where "oral tradition is the only evidence" *Commissioner of Lands v. Kidiri Adagun Privy Council* 1874-1928 Judgments of the Privy Council on appeal from Gold Coast (Chana) 1874-1928, 200.

Reference was also made to *Daera Guba*[64]....

I am not certain that the plaintiffs' contentions in respect of so-called traditional evidence do not reflect a blurring of a distinction between what is to be proved and the means by which it is to be proved. In other words, it may be accepted that if it is relevant to prove the role of custom it may be proved by admissible evidence; that is by evidence not excluded by some accepted exclusory rule or within some recognised exception to such a rule.

The Privy Council in *Kobina Angu v. Cudjoe Attah* (1916) Judgments of the J.C. of the P.C. on appeal from the Gold Coast Colony 1874-1928, 43 at p. 44 said:-

> "The land law in the Gold Coast colony is based on native custom. As is the case with customary law, it is to be proved in the first instance by calling witnesses acquainted with the native customs until the particular customs have, by frequent notorious proof in the courts, become so notorious that the Courts take judicial notice of them. In the Gold Coast colony the principle customs as to the tenure of land have now reached the stage which the court directly recognises them, and the law has thus become crystallised."

At p.158 of *Milirrpurm v. Nabalco Pty. Ltd.* (ante) Blackburn J. said this:-

> "It is clear that there is (or perhaps one should say there was) an accepted body of law in the British colonies in Africa, whereby native law and custom could be proved in the courts by assertions of native tradition, often, though not always, by persons who were in effect native experts in native law or tradition."

He went on to hold that this category of right and means of proof does not apply in Australia although of course it did elsewhere. See also the analysis in Professor Elliot's article "The Judicial Ascertainment of Customary Law in British Africa" (1957) 20 MLR 244.

There is of course no question of the latter stage spoken of in *Kobina Angu* (supra) applying here but I accept that the plaintiffs can lead evidence which satisfies the requirements of the first. In this context appropriate acquiescence is not established by mere assumption or assertion.

Given the issues in this case and the nature of the remitter I have no difficulty in receiving evidence directed to prove custom in terms relevant to the issues in the sense in which it is used in the cases and articles to which I have referred. That does not, however, have the consequence that

> the plaintiffs have succeeded in proving such customs or the rights for which they contend or that any such rights should be recognised as the plaintiffs contend. The difficulty I have is rather with the effect to be given to such evidence rather than with its admissibility. That is an issue I address later in various parts of this Determination.

5. Conclusion

It is suggested that insofar as the content of traditional evidence, for example, legend, history, mythology, etc, are not matters of public or general rights, or incidental to the proof of public or general rights as defined by Phipsone,[65] or do not fall within the general reputation postulates of Wigmore,[66] such statements form a separate category of admissible evidence, relevant to common law land claims and known as 'traditional evidence', admissible in relation to cultural groups with a traditional oral history.

Much of this article is based upon research undertaken in the preparation of the plaintiffs' submissions to the trial Judge. I record my indebtedness to those also involved, being Ron Castan Q.C. and Greg MacIntyre, Barrister and Solicitor. Valuable assistance was also provided by Professor Garth Nettheim's 'Aborigines and the Law' students at UNSW Law School during first semester 1989. See especially S. Beckett 'Evidentiary Problems in the Proof of Aboriginal Customary Title: the Mabo Case' (unpublished, research paper, June 1989). Any errors remain my own.

Notes

1. See Moynihan J. *Determination of Facts*, Supreme Court of Queensland, 16th November 1990, 227 plus annexures (unreported).
2. Three islands are involved: Murray, plus Dauar and Waier, being smaller islands, located one kilometre offshore Murray Island.
3. This group includes approximately 5,000 'expatriates' living on the mainland, mainly in Townsville, all of whom as members of 'the Meriam people' now enjoy title to the islands in accordance with their various interests under the system of traditional land holdings contended for.
4. See (1986) 64 A.L.R. 1.
5. It cannot be assumed that similar future cases involving a claim based on traditional native title, issued in the original jurisdiction of the High Court, will be remitted to another Court in this limited way. See eg. *Utemmorah v. The Commonwealth* (1992) 108 A.L.R. 225, (Kimberley Land Claim) where Toohey J. remitted the entire action to the West Australian Supreme

Court, rejecting the plaintiff's application that the case be remitted for trial to the Federal Court. *Mabo* et.al. made the same application to Gibbs C.J. in 1986; i.e., that issues of fact only be remitted to the Federal Court.

6. Father David Passi filed a Notice of Discontinuance in 1988 prior to the resumption of the part-heard trial at the same time as his elder brother and co-plaintiff, Sam Passi. However, David Passi applied to be rejoined when the trial reconvened, and, after much argument, Moynihan J. so ordered. This ruling was not appealed.
7. See Moynihan J. *Determination of Facts*, 227. His Honour stated 227 '... the process is unsatisfactory because a remitter restricted - however widely it is expressed - to issues of fact has the consequence that the ultimate issues in the action are not really addressed either in the course of hearing the remitter or in its determination. As I understand it, and have experienced it, the role of a Judge at first instance is to determine the issues of fact and law in the action - and hence the action. They seem to me inextricably interwoven. The experience has been unsatisfying because it seems to me that is the very thing the terms of the remitter have prevented me from doing.'
8. See generally N. Sharp, 'Contrasting Cultural Perspectives in the Murray Island Land Case' (1990) 8 *Law in Context*, 1.
9. This two page Act, aimed directly at the *Mabo* case, purported to extinguish without compensation any alleged traditional rights to land in the Torres Straits, with retrospective effect to 1879. See second reading speech, 2nd April 1985 by the Hon. W Gunn, Deputy Premier, Queensland, 398 *Queensland Parliamentary Debates (Hansard)*, 1985, 4740.
10. See (1988) 166 C.L.R. 186.
11. It is perhaps worth recording that *Mabo* very nearly failed at a variety of points in its 10 year history, this being merely one of them. See further a strike-out application heard before Deane J. in October 1982; the *Demurrer* proceedings of 1986-1988; the withdrawal or death of four of the five plaintiffs with the re-admission of David Passi over strenuous objection; the rulings about admissibility discussed herein. Further, and ironically, Eddie Mabo's claims to thirty-six portions of land and seas all failed at trial. These adverse findings by Moynihan J. were not appealed by the plaintiffs, and thus no submissions were made on Mabo's behalf before the High Court touching upon his particular claims. In the result, after nine years of litigation, two only of the five original plaintiffs argued the ultimate legal issues based on findings of fact. (Further, on one view, only about six of forty-six originally claimed portions of land were successful at trial.)
12. See *Mabo v. Queensland* (1992) 175 C.L.R. 1.
13. These Islander witnesses called by Queensland included a brother of one of the plaintiffs.
14. Procured by Queensland researchers from Cambridge University, England.
15. For example, land leased to the Anglican church, and land utilised or purchased for the airstrip, a medical aid post, the council chambers, a recreation reserve, a public telephone box, school areas and the like.

16. See for lists of these materials Moynihan J. *Determination of Facts*, Ch.5.
17. See R. Bartlett, 'The Source, Content and Proof of Native Title at Common Law' *Proceedings of the Resource Development and Aboriginal Land Rights Conference* The Centre for Commerical and Resources Law of the University of Western Australia and Murdoch University, Perth, 28th August 1992; R. Bartlett, 'Aboriginal Land Claims at Common Law' (1983) 15-16 *U.W.A.L. Rev.* 293, 309-330; J.R.Crawford, A.L.R.C., 'The Proof of Aboriginal Customary Title', Research Paper No. 14, *Australian Law Reform Commission Reference* on *Aboriginal Customary Law* (Sydney, 1983); *Angu v. Attah* (1916) P.C. 1874-1928, 43,44 (Ghana): *Eleko v. Officer Administering the Government of Nigeria* (1931) A.C. 662, 673 per Lord Atkin.
18. See *Mabo v. Queensland* (1992) 175 C.L.R. 1, 59-60; see also 184-188 per Toohey J.
19. (1979) 107 D.L.R. (3rd) 513, 542.
20. See in addition to cases discussed below *Re Paulette v. Registrar of Titles* (1973) 42 D.L.R. (3rd) 8; *Kruger and Manuel v. the Queen* (1977) 75 D.L.R. (3rd) 434.
21. (1979) 107 D.L.R. (3rd) 513, 540.
22. *Ibid.*
23. *Id.* 539.
24. (1985) 24 D.L.R. (4th) 390.
25. *Id.* 407.
26. [1907] A.C. 73, 79 (on appeal from the High Court of Australia).
27. See also Williams J. in *Minister of State for the Army v. Dalziel* (1944) 68 C.L.R. 261, 298.
28. See Wigmore, Vol. 6, *Evidence* Chadbourn (ed.) (1976) 249-328 especially 267-304 where the author discusses 'Utterances Forming a Verbal Part of an Act' with emphasis upon 'possessor's declarations'.
29. See Moynihan J. *Determination of Facts* Ch. 5 for rulings, discussed *infra.*
30. An adverse ruling would have rendered about 80 percent of the plaintiffs' lay evidence inadmissible. Whether the remaining 'expert' anthropological evidence would nevertheless have been sufficient to obtain positive findings concerning 'the system' and the plaintiffs' various individual claims, we shall never know.
31. See for example, cases cited below.
32. See for example, A.N. Elliot 'The Judicial Ascertainment of Customary Law in British Africa' (1957) 20 *Modern Law Review* 244; A. St. J. Hannigan, 'Native Custom, its Similarity to English Conventional Custom and Its Mode of Proof' (1958)2 *Journal of African Law* 101; J.M. Sarbah, *Fanti Customary Laws* (3rd ed., Frank Cass & Co, 1968) and cases reported therein; *Stool of Abinabina v. Chief Kojo Enyimadu* (1953) 2 W.L.R. 261; A. Allott, *New Essays in African Law* (London: Butterworths, 1970); *Kimani v. Gikanga* [1965] E.A.C.A. 735 and *Mawanda v. Kaba's Government* [1965] E.A.C.A. 455, both excerpted in W B Harvey,

Introduction to the Legal System in East Africa, (Nairobi East African Literature Bureau, 1975); and cases cited below. This jurisprudence has emerged particularly from Kenya, Nigeria, and Ghana (formerly the Gold Coast), and to a lesser extent from Uganda and Zimbabwe (formerly Rhodesia).

33. See *Administration of Papua New Guinea v. Daera Guba* (1972-74) 130 C.L.R. 353; and *Gaya Nomgui v. The Administration of the Territory of Papua and New Guinea*. [1974] P.N.G.L.R. 349.
34. For example, Eddie Mabo, the first witness, gave evidence-in-chief spread over 10 days which was recorded in 536 pages of transcript. His evidence attracted 289 objections from Queensland.
35. *Stool of Abinabina v. Chief Kojo Enyimadu* (1953) 2 W.L.R. 261.
36. *Myarko v. Abunyawah* (1956) W.A.L.R. 137, 140.
37. See *Mabo v. Queensland* (1992) 175 C.L.R. 1, 57-58 per Brennan J. See also Maurice J. *Waramungu Land Claim Report* (Canberra: A.G.P.S., 1990), para 43.1.12; Kearney J. *Jawoyn (Catherine area) Land Claim Report* (Canberra: A.G.P.S., 1988); and Australian Law Reform Commission *The Recognition of Aboriginal Customary Laws* (Canberra: A.G.P.S., 1986). Report No. 31, especially Chs. 3, 4 and 5.
38. *Delgamuukw v. R in Right of British Columbia* (1987) 40 D.L.R. (4th) 685 Here, the claimants were the fifty-two chiefs of seventy houses of the Gitskan and Wet'suweten people. They claimed aboriginal title over 22,000 square miles of northern British Columbia. In seeking to satisfy the four-point test in Baker Lake, the claimants wished to introduce into evidence the oral history, legends and genealogy of their peoples. This included the 'adaawx',or oral tradition of a house; its chiefly names and customs; and the crests, totem poles and blankets of a house with an explanation of their significance. See also, for later litigation, *Delgamuukw (Muldoe) v. R in Right of British Columbia* (1991) 79 D.L.R. (4th) 185, where McEachern C.J. confirmed his views of the admissibility of such evidence, 242-252.
39. *Kruger and Manuel v. R* (1977) 75 D.L.R. (3rd) 434.
40. *Delgamuukw v. R in Right of British Columbia* (1987) 40 D.L.R. 4th 685.
41. *Ibid.*
42. *Hamlet of Baker Lake v. Minister of Indian Affairs and Northern Development* (1979) 107 D.L.R. (3rd) 513, 524.
43. *Simon v. R* (1985) 24 D.L.R. (4th) 390, 439.
44. *Delgamuukw v. R in right of British Columbia* (1987) 40 D.L.R. 4th 685.
45. *Ibid.*
46. *Ibid.*
47. *Commissioner of Lands v. Kadiri Adagun* (1937) 3 W.A.C.A. 206.
48. *Kuma v. Kuma* (1936) 5 W.A.C.A. 4 (Privy Council).
49. (1973-74) 130 C.L.R. 353, 374.
50. Custom is accepted as part of the general law in many states. See *Evidence Act* 1945 (Nigeria) s.14(1); *Evidence Act* (1964 Revision) Kenya s.60(1); Judicature Act 1967, s.3(2).
51. (1975) W.A.L.R. 74, 79.
52. See Hayes Redwar A.J. in *Bura and Amonoo v. Ampima* (1891) reported in J.M. Sarbah, *Fanti Customary Laws*, 214-219.
53. (1958) W.A.L.R. 484.
54. (1971) 17 F.L.R. 141, 151-159.
55. *Id.* 159.
56. *Ibid.*
57. A.N. Elliott, 'The Judicial Ascertainment of Customary Law in British Africa' (1957) 20 *Modern Law Review* 244.
58. (1916) Gold Coast P.C. Judgments (1874-1928) 43; See *Milirrpum v. Nabalco* 17 F.L.R. 141, 158-159.
59. See 17 F.L.R. 141, 262.
60. (1957) 1 W.L.R. 1223, on appeal from the West African Court of Appeal.
61. *Id.* 1227.
62. (1974) P.N.G.L.R. 410, 446-7. Clarkson J. stated:

"On a review of the oral and documentary evidence the trial Judge (Kelly J.) found the subject land not to be ownerless in 1900 because, firstly, there was evidence of some gardens, although no evidence of any settlement, and secondly, because although there was no direct evidence of a claim to ownership by native custom being asserted in 1900 there was body of evidence from which it might properly be inferred that this was so.

I should say at once that I think the trial Judge reached this position by overlooking the peculiar value which in disputes such as the present, attaches to official reports made at the same time as the events under consideration occurred.

... It would be quite wrong for social groups with no written history or written records to be bound to the same methods of proof as are permitted to those who use writing. (cf. *Milirrpum* 17 F.L.R. 141, 151 et seq.) Where traditional histories conflict, the courts test each against known facts *Adjeibi Kojo II v. Bonsi*, (1957) W.L.R. 1223, 1227; *Chief Ebiassa v. Tweika Ababio* (1946) 12 W.A.C.A. 106. But where traditional history conflicts with contemporary official records, the latter must receive special weight. (*Tolilibe & Anor v Director of Native Affairs* (1955-66) P.N.G.L.R. 12, 22.) The contemporary record reflects the facts as then seen by the recorder; no subsequent event can change what has been written; the only point at which the accuracy of the record can be challenged is at the time of recording.

Traditional history, on the other hand, is in addition liable to corruption as a result of the self-interest, pride, misunderstanding or mere forgetfulness of any narrator or listener.

If special weight were not given to contemporary records, there is the danger that they would with the passage of time and the disappearance of collateral supporting evidence be discarded in favour of traditional history as propounded by the last listener with the result that claims based on traditional history which would have failed when all the facts were known would succeed where knowledge of most of the facts had been lost."

See also, generally, Frost SPJ., 427.

63. Moynihan J. *Determination of Facts*, 39-41.
64. Reference to (1973-4) 130 C.L.R. 353, 374 per Barwick C.J., (as cited above) omitted.
65. See *Phipson on Evidence* (11th ed., London: *Sweet and Maxwell*, 1970), 405-419; See also *Cross on Evidence* (3rd Aust. ed., Sydney: Butterworths 1986), 798-803.
66. Wigmore Vol.5, *Evidence* Chadbourn ed., (2nd. ed., Sydney: Butterworths, 1974), 543-561, dealing with 'Land Boundaries and Land Customs'.

CHART A: SAMPLES OF 'HEARSAY' AND BASES OF ADMISSIBILITY SUBMITTED BY PLAINTIFFS TO TRIAL JUDGE

Key:
C = Custom
V = Verbal Parts of Acts
M = Material Utterances
R = Reputation
T = Tradition
P = Pedigree

	Evidence	Base of Admissibility
(i)	'My (deceased) father told me that he owned this land for his family.'	CVMRT
(ii)	'My (deceased) father told me that he owned this land.'	CVMRT
(iii)	'My (deceased) father told me that the boundaries of this land run from this post to that rock.'	CVMRT
(iv)	'My (deceased) father told me that this land came to him from his father's father's mother who received it as a wedding gift from her father.'	CVMRT
(v)	'My (deceased) father told me that he appointed Mr Day-Day to be the caretaker of his land at Deimi.'	CVMT
(vi)	'My (deceased) father told me when he dies I will own his land for the family.'	CVMRT
(vii)	'My (deceased) father told me the story of Zogo-le (priests) and the story of the coming of Bomai and Malo (cult figures) to Murray Islands.'	MRT
(viii)	'Malo-Zogo was the principal meeting place of the head man of that cult.'	CT
(ix)	'It is generally known within the community that eight tribes have existed from traditional times.'	CT
(x)	'My (deceased) father told me that the traditional customs of our people forbid me to walk on or take yams from other people's lands.'	CT

(xi) 'My mother said to me: 'I will beat you, if I see you taking fish out of there (the fish trap in front of Ulag) because we've got no claim on it (the fish trap)".' (T.286)	CMT
(xii) 'My (deceased) father told me that I am his adopted son and the natural son of his brother.'	CMRTP
(xiii) 'My (deceased) father told me the names of his ancestors the names of each of his pieces of land and the ancestors from whom he got each piece of land.'	CVMRTP
(xiv) 'I heard Benny (now deceased) tell Eddie that Eddie would take Benny's lands when Benny died.'	CMRT
(xv) 'Maiga (now deceased) told me that Eddie was her adopted son.'	CMRTP
(xvi) 'I was at the community meeting. At first some people objected that they would lose their gardens if the proposed airstrip was built. Eventually the people agreed to the airstrip proposal.'	VM
(xvii) 'In 1968, James Rice told me (Margaret Lawrie) that he owned land at Dadamud on Dawar Island and showed me the land.'	CVMRT
(xviii) In 1970, I (Jack Wailu) was told by my next door neighbour at Las, Eddie Mabo, that the land at Korkor which he gardened was his land.'	CMT
(xix) 'I (Eddie Mabo) said to him (Eddie Mabo Jr.) that the land (at Las) was previously occupied by my father and that I have inherited it from him after his death, and it was my grandfather before that who occupied the same blocks and, of course, my great grandfather before that.' (T.316)	CMT
(xx) 'I (Islander witness) knew that Wailu Gibas was eligible to be a caretaker of Jimmy Wailu's portion of Las according to Miriam tradition.' (T.307)	CT
(xxi) 'I (Islander witness) heard Tom Dow ask my father for permission to build a house at Ulag. My father agreed.' (T.331)	CMT

CHART B: 'HEARSAY' EVIDENCE : SUMMARY OF PLAINTIFFS' SUBMISSIONS FOR ADMISSIBILITY BASED ON EXCEPTIONS TO HEARSAY RULE PRESENTED TO TRIAL JUDGE

Exception	Reputation	Pedigree	Tradition
NECESSITY	Ancient rights incapable of direct proof	A genealogy question in issue	Oral evidence is the only available evidence
COMPETENCE	Competent knowledge of Declarant conversant with the neighbourhood	Declarant related to person whose pedigree is in issue by blood or marriage	A knowledge-able forefather with standing in the community
PRE-CONDITIONS	Deceased declarant Declaration made before dispute arose	Deceased declarant Declaration made before dispute arose	
SUBJECT MATTER	Public or general rights: land boundaries, land customary rights, verdicts in litigation, general history, character, marriage, family history.	Pedigree / genealogy	History, legend, politics, culture, society, mythology, religion, customs, family ownership, title, interest in and boundaries to lands.
FORM OF	General evidence of rights, not particular facts.	General declaration	Account of forefather

Mabo and the Miners

*J.R.S. Forbes**

The dust of *Mabo v. Queensland* (No 2)[1] is still settling. This article does not try to determine how the new law came to be. Perhaps *Mabo* flows from the application of ordinary legal reasoning to the precedents displayed. If so, all courts which accepted the *terra nullius* doctrine, including the High Court,[2] were wrong, although two justices felt 'compelled to acknowledge' the profound influence of that doctrine in Australian law.[3] (Worse, the previous courts fell short of 'any civilised standard'.[4]) The new dispensation may have something to do with Brennan J.'s[5] intuitions of the 'expectations of the international community' and of the 'contemporary values of the Australian people'. Perhaps it was inspired by the vision of Deane and Gaudron JJ., in some crisis of cultural confidence, of 'the darkest aspect of the history of this nation'[6]. However, we have their Honours' assurance that despite their resort to 'unusually emotive' language they did not 'trespass' *a la mode* 'into ... attribution of moral guilt'.[7] The same judges relied not only on 'material placed before us by the parties' but also upon 'researches of many [unspecified] scholars',[8] without explaining how the latter became admissible evidence in a court of law.

In a case concerning three small and special[9] islands in Torres Strait there are *dicta* on one issue after another which are extraordinarily open-ended. The 'leading cases' of this High Court unsettle rather than settle the law. It was decreed that '... the common law of Australia rejects the notion that, when the Crown acquired sovereignty over ... Australia it thereby acquired the

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absolute beneficial ownership of the land therein'[10] and it was broadly hinted that native title exists on the mainland as well. The question is not so much whether *Mabo* is judicial legislation but whether it is workable legislation; an answer is attempted below.

All that *Mabo* actually decides is that native title covers most of the Murray Islands known as Mer, Dauer and Waier. In 'mainland' cases, if the High Court were so disposed, *Mabo* could probably be 'distinguished' to a shadow of its present self. But in the first flood of *Mabo* commentaries remarkably little attention has been paid to the following points: (1) The area of the Murray Islands is about nine square kilometres, while claims of native title on the mainland may cover hundreds, even thousands, of square kilometres. (2) From the earliest days of European rule the Murray Islands have been clearly and repeatedly reserved for the long-established inhabitants.[11] (3) A close and unbroken connection between the claimants and the islands was clearly shown. The same people lived for many generations on specific plots of land -- *not* held in common -- and used by them for gardening.[12] These are not practices for which mainland Aborigines are especially well known. The Murray Islanders could not possibly be described as nomads living by open range hunting and the gathering of naturally occurring foods. (Brennan J. carefully prescinded from any question whether they are 'higher 'in the scale of social organisation' than the Australian Aborigines'[13]). (4) There was no competing occupancy; indeed strangers were deported.[14]

Yet upon the following *dicta* (Thespians call them throwaway lines) joy, dismay and confusion have arisen:

> [T]here may be other areas of Australia where native title has not been extinguished and where an Aboriginal people, maintaining their identity and their customs, are entitled to enjoy their native title.[15]

What does this mean for the law of natural resources? In attempting some early answers this article refers mainly to Queensland enactments but its principal points, if well made, apply to other Australian jurisdictions as well. 'Natural resources' is not a term of legal art. It includes minerals, water, forestry, fishing, agricultural and pastoral assets. It should not be difficult to adapt the *Water Resources Act* 1989 (Qld) or the laws regulating the fishing and forestry industries to any native titles on the mainland. The *Fisheries Act* 1976 (Qld) does not affect the 'taking' of marine produce by Aborigines residing on reserves or trust lands,[16] and legislation which is gradually replacing that Act[17] enables 'community licences' to be granted to Aborigines. The *Forestry Act*

1959 (Qld) envisages State forests and reserves producing 'timber and associated products in perpetuity' and protecting watersheds.[18] Forest products on Crown lands are *prima facie* the property of the Crown.[19] The lighting of fires in reserves is strictly controlled.[20] It is an offence to interfere with forest products in, or to 'occupy' such areas.[21] (However, a suggestion that a similar law excluded native title was brushed aside in *Mabo*.[22]) It seems unlikely that Aboriginal history will reveal extensive use of timber resources but of course food-gathering, fishing or hunting practices might impinge on forestry areas. There would then be a question whether the relevant reservation is inconsistent with native rights in the area.

Nervous graziers and farmers (other than freeholders, who seem to be immune from *Mabo*[23]) should look to the *Land Act* 1962 (Qld) and to the terms of their concessions. (Ironically, the very question of native title could never have arisen if, prior to 1975,[24] such Acts had clearly asserted Crown ownership of all non-freehold lands.[25] But, in view of the long-standing *terra nullius* doctrine it no doubt seemed pointless to do so.) The *Land Act* provides for the creation[26] of tenures such as pastoral holdings,[27] occupation licences,[28] agricultural farms,[29] grazing homestead perpetual leases,[30] special leases,[31] environmental parks[32] and reserves for public purposes.[33] 'Public purposes' includes Aboriginal reserves and other dedications of Crown land for 'the Benefit of Aboriginal and Islander inhabitants'.[34]

Where intensive agriculture or grazing is carried on, it should be not be difficult to establish that the activities authorised by the Crown are inconsistent with native title, if any. But, in the absence of remedial legislation, this is a matter of evidence and construction of documents in every case, applying *Mabo's* vague criteria. Crown concessions involving little development or non-intensive use of the land (a description which may apply to many grazing enterprises in Queensland, Western Australia, N.S.W. and the Northern Territory) are more open to doubt. While the *Land Act* (Qld) does not contain the reservation of Aboriginal rights which is to be found in its Western Australian counterpart,[35] close attention may have to be paid to special conditions attached to some concessions in this State. Of course, express reservations are ideal from an Aboriginal point of view but it does not necessarily follow that a Crown lease or licence which is silent on the point of native rights is inconsistent with their survival. *De facto* access by natives to Crown leaseholds may be some evidence of compatibility between those holdings and native title although it could not create an estoppel to defeat a contrary legislative intention.[36] Questions of native title cannot be resolved simply by appealing to section 372 of the *Land Act*, which declares trespassing on Crown lands to be an offence. In *Mabo*, Brennan J. declared that it would be 'truly barbarian' to apply this provision to 'indigenous inhabitants'.[37]

Brennan J. suggests[38] that a reservation of Crown land as a National Park *would* be consistent with the survival of any native title in the area. No doubt this would be so if the park were created (as some recently have been) to recognise and protect Aboriginal interests.[39] It is less obviously so where legislation forbids the lighting of fires,[40] interference with 'forest products'[41] or the taking of flora or fauna.[42]

Mining Titles

While *Mabo* holds mysteries for other primary producers[43] the mining industry is the most perturbed; it involves enormous investments and is vital to Australia's ailing balance of trade. Beyond the hyperbole of some miners' press releases, there are serious questions to be considered. One of the few certitudes in *Mabo* is that freehold is immune to native title, but about 85 per cent of Australian land is *not* in that category.[44] In relation to mining, it is pointless to say that *Mabo* casts doubt only upon 'less desirable' or sparsely populated parts of the country.

Miners were restless even before *Mabo* appeared.[45] 'Some lawyers expect that the High Court, radicalised by the appointments of judges such as Justices Mary Gaudron and Michael McHugh, will decide that the original inhabitants of Australia "owned" the country before 1788. [T]he entire system of land tenure ... could be threatened ...'.[46] There were fears -- yet to be proved baseless -- that native title might entail the delays, vetos, and even opportunities for extortion which miners rightly or wrongly associate with the *Aboriginal Land Rights (Northern Territory) Act* 1976, particularly before its amendment in 1987.[47] By 1986, that Act applied to 32 per cent of land in the Territory, and another 12 per cent was then subject to claims.[48] Ten years elapsed before the first approval of a mining concession was granted, by which time no fewer than 168 applications were in limbo.[49] In 1984, the federal Minister himself described Canberra's legislative gift to the Territory as 'a disaster for everyone'.[50] Complaints of ill-balanced interests and legal uncertainty continue.[51]

When the *Mabo* judgments emerged from twelve months' gestation,[52] there was much excitement on each side.[53] A mining executive complained that the High Court had ensured under-employment for miners and over-employment for the most deserving of all professions: 'The whole structure of property rights in the greater part of the Australian continent is now unclear ... the High Court has made work for high-priced lawyers for many years.'[54] An Aboriginal Legal Service spokesman likened *Mabo* to New Zealand's Treaty of Waitangi, overlooking (or seeking?[55]) the statutory support which gives that compact legal effect.[56]

The miners' anxiety was heightened by reports of new 'Mabo' claims in Western Australia, Queensland and the Northern Territory. In Queensland, *Rosendale and Costello v. Minister for Family Services and Aboriginal and Islander Advancement*[57] relates to land in the Laura district of Cape York and raises native title as well as issues under the *Aboriginal Land Act* 1991. On 25 June 1992, an interlocutory injunction was granted in that case, restraining the Minister from creating statutory 'land rights' in the area pending trial, which can hardly occur before the end of 1993. Another Cape York claim was initiated on 4 September 1992.[58] It may be mere coincidence that the Cape is well-endowed with minerals[59] but litigious interest in mining there has been evident for some time.[60] The Northern Territory claim, involving a large part of Arnhem Land, is specifically concerned with mineral rights.[61] Symbolically, it relates to the very development at Gove which inspired the *Milirrpum*[62] action in 1971. The *Racial Discrimination Act* did not then exist[63] but of course the Commonwealth's duty to pay 'just terms'[64] was already established.

It is too early for confident predictions about *Mabo* and natural resources. The High Court grandly displayed its new discovery with one hand but indicated with the other many ways in which native title may be extinguished. Indeed some Aboriginal spokesmen contend that far too much is being made of *Mabo*. One complained that 'vested interest groups' were 'panicking the nation' and that the proportion of Australian land open to claims will be 'fairly minimal'.[65] The federal Minister has issued similar assurances[66] and the Queensland Premier has warned that 'some groups on both sides are already exaggerating the potential for ... some sort of land acquisition windfall'.[67] Perhaps, sedative measures should go beyond the principal contenders. In these recessionary times some lawyers may take a special interest in a potential growth area; the vaguer the law, the greater the scope for litigious business.[68] Legal

writers, for their part, may find a certain fascination in a subject which lends itself to a display of modish opinions and speedy if not always original publications.

Mabo itself was not concerned with mining; there is but a fleeting reference to it in the judgment of Brennan J.:

> Where the Crown has validly alienated land by granting an interest that is wholly or partially inconsistent with a continuing right to enjoy native title, native title is extinguished to the extent of that inconsistency. Thus native title has been extinguished by grants of estates of freehold or of leases but *not necessarily by the grant of lesser interests (e.g., authorities to prospect for minerals)*.[69]

This Delphic passage suggests that a mining *lease* would be incompatible with native title. Normally, such a concession confers exclusive possession upon the lessee; it is an offence to enter the subject land and even a private owner of the land requires the miner's permission to do so.[70] But, a similar provision in the *Land Act* was brushed aside[71] and at present it is possible that a native title may co-exist with a mining lease which involves only a small proportion of surface of the subject land.[72] A Queensland mining lease is not a species of real property.[73] At all events, it is clear that miners may encounter claims of native title at the exploration stage.

Ownership of Minerals

Mabo instructs us that there is a vital distinction between the Crown's 'radical title' and beneficial ownership.[74] 'Radical title' is merely *potential* ownership which does not affect native title unless and until a further act of dominion occurs, as in granting freehold. But, while the Queensland Crown may not have assumed ownership of all non-freehold lands in the State it has clearly asserted title[75] to all minerals and petroleum.[76] It is true, as we now know, that any extinction of native title without compensation would be invalidated by the *Racial Discrimination Act* 1975,[77] but, in Queensland (if not in all States), the Crown's appropriation of minerals occurred long before 'anti-discrimination' laws were heard of. It was not the *Mineral Resources Act* 1989 which made minerals the property of the Crown; 'royal minerals' aside,[78] that was done in 1909,[79] in 1923,[80] and again in 1968.[81] Section 1.9 of the 1989 Act simply repeats the old formulae of ownership. One ventures to suggest that these cannot be dismissed so summarily as the 'anti-trespass' provisions of the *Land Act*.[82] However, this is academic

if native title does not include mineral rights. While *Mabo* leaves the content of native title an open question it seems highly unlikely that mineral rights are part of Aboriginal lore.[83]

Nevertheless, native title (other than mineral rights) may exist on land affected by a mining concession. If any such concession created since 1975 impinges on native title there would be a case for compensation.[84] Thereafter, validating legislation could dispose of any suggestion that compensation cannot, retrospectively, cure a breach of the federal 'race' law. The *Mineral Resources Act* should be amended to bring native title holders within its definition of 'owner'[85] so that its normal compensation criteria[86] cover any such cases in future. The assessment of compensation for non-transferable[87] and perhaps very limited rights may be left to the magic of valuation evidence. If a grant of a mining title is so clearly inconsistent with native title as to extinguish the latter, the measure of compensation may, to that extent, be increased.[88]

The position, then, appears to be this: Where native title still exists, it does not include mineral rights, either because it never did so, or because the Crown has converted its 'radical title' to minerals into beneficial ownership. Accordingly, the Crown may grant mining concessions in native title areas subject to compensation for any interference with such titles. No unlawful discrimination would be involved in mining concessions *per se* because all other forms of private property are equally subject to mining and petroleum laws. The power to grant mining rights now relates to 'land' *simpliciter*,[89] national and environmental parks alone excepted[90] (and even national parks are within the ambit of oil and gas developments).[91] Of course, if native title does not include ownership of minerals, no compensation would be payable on that account; the same applies to all landowners in the State.[92]

Issues and Evidence in Doubtful Cases

There is little point in exegesis which ignores the manner in which native title may be proved (or rebutted) or which glosses over difficulties likely to arise in contested cases. In the final analysis, what evidence suffices to establish native title outside the Murray Islands? It would be absurd to isolate *Mabo* theory from the practical issue of how difficult (or easy) it will be to establish it in reality. Ultimately, rights of claim are no better than the evidence led to support them, and rights of defence are no more effective than scrutiny of the evidence is allowed to be.

Proper Parties - Who Can Claim?

The first step in litigation is to choose the parties correctly. A distinguished student of Aboriginal history estimates that there were five hundred tribes in Australia at the time of British settlement, each comprising related but dissimilar sub-groups.[93] It will probably be a rare case in which claimants exhibit the compact, long-settled and non-nomadic character of the Murray Islanders. Must they represent discrete tribes, or are smaller groups competent to apply? If so, which groups? In *Mabo*, there is a great deal of movement between terms such as 'indigenous inhabitants,'[94] 'indigenous people',[95] 'clan or group',[96] 'people',[97] 'native peoples',[98] 'community',[99] 'group',[100] 'clan',[101] 'family, band or tribe',[102] 'tribe or other group',[103] 'tribe or clan',[104] 'relevant group'[105] and 'society'.[106] How slight must Aboriginal ancestry be before an individual ceases to belong to an eligible class? If the new law is not made more precise, substantive inquiries may be rendered even more expensive of time and money by interlocutory issues about rights of representation, joinder and misjoinder.

A Sufficient Connection with the Land

If and when eligible claimants are identified, the next step is to establish a sufficient connection between them and a particular tract of land. This is a question of 'presence amounting to occupancy' from a time 'long prior' to the 'point of inquiry'.[107] Plainly, these tests leave room for creative jurisprudence, particularly when it is remembered that the standard of proof is the civil standard, namely the balance of probabilities.

Where Do the Boundaries Lie?

If a claim succeeds, there must be some acceptable method of identifying the subject land in future. Will the court fix boundaries comprehensible to surveyors and land registries by its own decree?

What Incidents of Title?

This depends on the customs of the claimant group. 'The content of the traditional native title ... must ... be determined by reference to the pre-existing native law or custom ... [It] will, of course, vary ... It may be an entitlement ... to a limited special use of land in a

context where notions of property in land and distinctions between ownership, possession and use are all but unknown.'[108] Claimants may be tempted to invent or exaggerate differences so as to improve their chances of separate *locus standi*. (See 'Proper Parties', above.) Conceivably, the entitlements in some places may be no more than rights of passage, or rights to fish in a certain stream or waterhole.

Customs - How and When Ascertained?

Affirmative evidence will normally come from members of the claimant group and selected expert witnesses. Apparently it will be no obstacle that the state of native customs at the time of European settlement is still 'incompletely known or imperfectly comprehended'.[109] Further, it may not matter that a custom did not exist at the time of British settlement or in the last century because, as we are told, native customs may continue to evolve up to the time of the claim. It is enough that 'any changes do not diminish or extinguish the relationship between a particular tribe ... [and] particular land'[110] and that 'the people remain as an identifiable community'.[111] According to Toohey J. this concept of continuity is sufficiently elastic to survive European influences such as the 'profound' effects of Christianity, the use of schools and other modern facilities and (in the case of the Murray Islanders) a change from gardening, fishing and barter to a cash economy substantially dependent upon government allowances.[112] This theory of evolution is a slippery concept for an opponent to handle and it appears that arguments based on uncertainty or discontinuity of alleged customs can expect a rough passage.[113]

Presumably, there is *some* point at which 'development' of native customs ends and discontinuity occurs. Would it be plausible to treat recent awareness of the mining industry and mining royalties as an organic development of tribal lore? After due allowance for the notion that customary evolution did not stop short during the cultivated court of good King George the Third, an affirmative answer requires some suspension of disbelief.

Has Native Title, if Any, Been Abandoned?

'Of course, since European settlement of Australia, many clans or groups ... have been physically separated from their traditional land ... when the tide of history has washed away any real acknowledgment of traditional law and any real observance of traditional customs, the foundation of native title has disappeared.'[114] At first sight, it seems that what the Court has bestowed with one hand it is about to remove with the other. In the next breath, however, we are told that a 'substantial' connection may still exist where claimants have continued '(so far as practicable) to observe the customs of that clan or group'.[115] The meaning of this is yet to be revealed.

Has Native Title, if Any, Been Extinguished?

Where the Crown has dealt with land other than by a grant of freehold title, the provisions of the enabling legislation and the terms of the particular grant (including special conditions) will require close study. At present, in the absence of an express reservation of native rights, there is room for unpredictable findings that a Crown concession is not 'wholly inconsistent' with a native title just recognised. Two further questions then arise. Can some 'strands' or 'layers' of a native title survive when others have perished? If a competing use of *part* of the land is inconsistent with native title, can such a title survive over other parts thereof? Precisely what did Brennan J. mean by extinction '*to the extent* of ... inconsistency'?[116]

Evidentiary Hazards

Even if the principles of native title were made clearer, serious difficulties of proof (or rebuttal) would remain. They will be practical rather than technical. It is clear that oral histories or legends of Aboriginal customs can be made admissible by subsuming them to the category of 'declarations as to pedigree' -- a well-established exception to the hearsay rule.[117]

The evidence may seldom be so clear as in the Murray Islands case. Likely sources are members of the claimant group narrating what they have heard from others, and the opinions of anthropological or other experts, whose evidence may in large measure depend upon what past or present members of the claimant group have said to them or to professional colleagues. Even in relation to the Murray Islands - as Deane and Gaudron JJ. conceded -- the evidence exhibited 'areas of uncertainty and elements of speculation'. However, their Honours hastened to add that it was a 'sound basis' for a very large award.[118] There are other places in *Mabo* where problems of proof are glossed over: 'There may be

difficulties of proof of boundaries or of membership of the community ... but those difficulties afford no reason for denying the existence of a proprietary community title ...'.[119] And again: 'A court may have to act on evidence which lacks specificity ...'.[120] *Mabo* leaves a distinct impression that, even if the investigation of native title remains in the ordinary courts, claimants' evidence will be treated gently -- *a fortiori* if it is moved to special tribunals.[121]

Hearsay upon hearsay aside, opponents may have to cope with 'recent invention' of what purports to be ancient history. Hiley Q.C. gives an interesting account of his experience in Northern Territory cases.[122] He describes a remarkable procedure of 'group evidence' which 'enables collaboration and concoction'. He proceeds: '[I]t becomes rather difficult to identify precisely which person knows what and which person knows nothing ... Reading the transcript [afterwards] one could ... assume that all of the members of that group had that knowledge'.[123] (Compare advantages which witnesses sometimes enjoy when speaking 'through' interpreters in general litigation, such as slowing down cross-examination and occasional help with replies.) Hiley adds that 'leading' questions and the paraphrasing of indistinct answers are common in the Territory's tribunals.[124] These are not petty cases in which insistence on strict proof is unreasonable. Yet *Mabo* offers few assurances that claimants' evidence will be closely scrutinised. Perhaps, it will be less invidious to demand strict proof when there are several Aboriginal contenders for the same native title -- an event which may not be rare.[125]

Another practical concern is the reliability of expert evidence. 'Land rights' litigation has bred a new class of 'professional expert witnesses'. Anthropologists, rarely seen in a witness box until lately, are now as much in demand in these cases as neurologists and orthopaedic specialists have long been in personal injury cases. Judicial doubts about 'professional experts' are not so candidly expressed today as in times past, but Sir George Jessel's ruminations are still worth considering:

> [I]n matters of opinion I very much distrust expert evidence, for several reasons. In the first place, although the evidence is given upon oath ... the person knows he cannot be indicted for perjury, because it is only evidence as to a matter of opinion ... But that is not all. Expert evidence ... is evidence of persons who sometimes live by [testifying] ... .[126]

Similar doubts still surface now and then[127] but they tend to be unfashionable. The legal culture is less confident these days and judges sense that hell hath no fury like a 'social science' scorned.

But are new 'expert evidence industries' any less open to temptation or error than the old? In the heat of litigation, the vaguer a purported science, the greater the room for fallacy, conscious or unconscious, ill or well-intentioned. An English judge noted the proliferation of new classes of experts from 'disciplines' less than precise and remarked: 'In the lush pastures of the Common Law a number of sacred cows graze. One answers to the name "expert evidence"... Properly cared for it could provide good progeny but, some strains may not be worth encouraging.'[128] Of course, the categories of expert evidence are not closed but the courts now seem very reluctant to subject new claims of expertise to a searching *voir dire*.[129] They are unlikely to do so in the present circumstances.

The first question, then, is whether a relevant and sufficiently reliable body of special knowledge exists. The next is whether impartial access to that knowledge is reasonably assured to claimants and opponents alike. In a word, what will be the quality of evidence which determines the meaning of *Mabo* in practice? The old-established forms of expert evidence have little ideological content, and normally they do not encounter the rising censorship[130] which current *patois* calls 'political correctness'. If the position here is at all different, an opponent of a native title claim would be handicapped in seeking evidence in rebuttal, in cross-examining claimants' witnesses, and in addressing the court with the candour which good advocates normally manifest. Naturally, public comment on this delicate point is in short supply. However, Hiley Q.C. bravely records his impression that an anthropologist-witness who fails to support, let alone criticises in depth a 'land rights' claim or the evidence in support of it, risks the 'resentment of, and possible alienation from his peers'.[131] A quiet comment which may be profound.

Legislation or Scriptural Exegesis?

If courts do not recognise that certainty is of the essence of justice according to law, legislators may feel bound to intervene. The Chief Justice of New South Wales recently observed: 'The modern law seems ... to be caught up in a ... trend away from broadly stated rules with fairly predictable ... consequences, towards greater refinement and responsiveness to the facts and circumstances of each individual case ... [But] a legal system that forces people to litigate in order to find out what their rights and liabilities are is ... capable of operating with great practical oppressiveness.'[132] Judicial

inquiries based on the very broad criteria in *Mabo* would be enormously expensive.[133] With due respect, it is difficult to believe that so loose-textured a statement of common law was really expected to be suitable for normal judicial processes. Perhaps, the Court's underlying hope is that its Delphic *dicta* will be a catalyst for legislation, although the Commonwealth and several States already offer statutory 'land rights'.

The current debate may yet be overtaken by political events. A State government may decide that it would be best for all concerned if a new Act enabled native title to be established within a limited time, and then exchanged for compensation or a *statutory* title. (In the first case there should be reliable means of distributing compensation to *all* concerned -- a point which has received, in the present context, remarkably little attention.) Alternatively, as a quicker and 'cleaner' solution, any surviving native titles could be extinguished by one legislative *fiat*, subject to compensation in keeping with the *Racial Discrimination Act* 1975 (Cth). But, the States may hesitate to go where angels fear to tread. The Premier of Queensland has called for 'strong leadership' from the federal government so that uncertainty can be quickly resolved, adding that an attempt to penetrate the mysteries of *Mabo* by further litigation 'could take years if not decades'.[134] The federal Minister has indicated that Commonwealth legislation may follow some publicly funded test cases in which *Mabo* could become a little clearer: 'The last thing anyone ... would want is open slather in the courts.'[135] However, some Aboriginal spokesmen object that a 'select list' would amount to favouritism and the Queensland government has similar reservations.[136] Taxpayers may have views of their own.

Federal legislation based on the 'race' or 'external affairs' powers could provide for: (1) acquisition (on just terms) after proof of title; (2) conservation, prohibiting extinction by State action;[137] or (3) special 'consultation and permission' rules for mining applications touching native title, similar to those in the oft-debated *Aboriginal Land Rights (Northern Territory) Act* 1976. The second and third of these possibilities may produce a familiar, if not wholly pleasant *frisson* in mining circles.

Can Mabo Be Legislated Away?

No legislative 'tidying up' can eliminate the possibility of compensation claims. Before compensation is allowed (save by way of surrender or as a *placebo*) it has to be shown that there is

something requiring compensation. Here, compensation depends on proof of native title, and that depends on whatever Mabo means in practice; once again we are at the entrance to the maze. Probably, all that legislation can do is to make all *Mabo* issues a direct responsibility of government. Serious opposition to native title claims may be as invidious for governments as for others but the uncertainties of rural land holders, resource industries and investors could thus be allayed.

Meanwhile, claimants of native title in Queensland may prefer to seek a statutory title under the *Aboriginal Land Act* 1991.[138] Here the process, even if seriously opposed, is apt to be simpler, quicker and perhaps less critical of applicants' evidence than the regular courts. National parks, whatever their status under *Mabo*, may be declared open, on special terms, to claims under the Act.[139]

Postscript: Shortly after this article was completed federal proposals resembling suggestions made here were publicised: a special tribunal and statutory title to replace native title: Australian 30 November 1992,1.

Notes

1. (1992) 66 A.L.J.R. 408.
2. *Randwick Corporation v. Rutledge* (1959) 102 C.L.R. 54, 71; *Wade v. New South Wales Rutile Mining Co Pty Ltd* (1969) 121 C.L.R. 177, 194; *New South Wales v. The Commonwealth* (1975) 135 C.L.R. 337, 438.
3. (1992) 66 A.L.J.R. 408, 451 per Deane and Gaudron JJ.
4. (1992) 66 A.L.J.R. 408, 416 per Brennan J.
5. (1992) 66 A.L.J.R., 408, 422.
6. (1992) 66 A.L.J.R., 408, 451. Cf. *Australian*, 17-18 October 1992, 2: 'Costly Complications of Land Ownership Issue'. The writer of that article suggests (not to put too fine a point on it) that the High Court simply made up the new law '... however tortuous the arguments it uses to pretend it is building on tradition'.
7. (1992) 66 A.L.J.R., 408, 456.
8. *Ibid.*
9. See the points of 'distinction' below: note 11 and adjacent text.

10. (1992) 66 A.L.J.R. 408, 429 per Brennan J.
11. As noted, (1992) 66 A.L.J.R. 408, 413-414, 433, 435.
12. (1992) 66 A.L.J.R. at 408, 413-414. At 413 Brennan J. speaks of 'small properties which have been handed from father to son from generation to generation'.
13. (1992) 66 A.L.J.R., 408, 421.
14. (1992) 66 A.L.J.R., 408, 430.
15. (1992) 66 A.L.J.R., 408, 434 per Brennan J.
16. *Fisheries Act* 1976 (Qld) s.5(1)(d).
17. *Fishing Industry Organisation and Marketing Act* 1982 (Qld) s.31. See also *Torres Strait Fisheries Act* 1984 (Qld) s.7 which recognises traditional fishing rights.
18. *Forestry Act* 1959 (Qld) ss.25, 28, 33.
19. *Id.* s.45.
20. *Id.* ss.62, 67.
21. *Id.* ss.39, 53, 54, 73.
22. See note 37 and text.
23. (1992) 66 A.L.J.R. 408, 434.
24. When the *Racial Discrimination Act* (Cth) came into force. As to the significance of this Act for present purposes see note 73 and text.
25. Cf. *Mabo* (1992) A.L.J.R. 408, 433-434 per Brennan J.
26. *Land Act* 1962 (Qld) s.6(1); see also *Constitution Act* 1867 (Qld) ss.30, 40; *Cudgen Rutile (No 2) Ltd v. Chalk* [1975] A.C. 520.
27. *Land Act* 1962 (Qld) s.56ff.
28. *Id.* s.75ff.
29. *Id.* s.83ff.
30. *Id.* s.127.
31. *Id.* s.198ff.
32. *Id.* s.334A.
33. *Id.* s.334.
34. *Id.* s.5.
35. Cf. *Land Act* 1933 (WA) s.106(2): '... Aboriginal natives may at all times enter upon any unenclosed and unimproved parts ... of a pastoral lease to seek their sustenance in their accustomed manner.' Queensland Crown leases *formerly* contained a similar proviso: Queensland State Archives File LAN/01, 35/1213. A form used under the *Pastoral Act* 1936 (SA) goes further than WA in reserving 'to Aboriginal inhabitants of the said State and their descendants full and free access into ... the said land except such parts as improvements have been erected upon and in and to the springs and surface waters thereon and to make and erect wurlies and other native dwellings and to take and use for food birds and animals *ferae naturae* as if this lease had not been made' quoted in A.L.R.C. Report No. 31, *The Recognition of Aboriginal Customary Laws* Vol. II (Canberra: AGPS 1986) 157.

36. *Attorney-General (N.S.W.) v. Quin* (1990) 170 C.L.R. 1, 17; *Roma Electric Light & Power Co Ltd v. Hair* [1955] St.R.Qd. 311; *Commonwealth of Australia v. Hamilton* [1992] 2 Qd.R. 257.
37. (1992) 66 A.L.J.R. 408, 433.
38. (1992) 66 A.L.J.R. 408, 434.
39. This comment applies to several national parks in the Cape York area, some of which have been declared open to claims under the *Aboriginal Land Act* 1991 (Qld). *Australian*, 12 November 1992, 3: 'Aborigines may claim 13 parks'.
40. *National Parks and Wildlife Act* 1975 (Qld) s.41.
41. *Id.* s.34.
42. *Fauna Conservation Act* 1974 (Qld) s.40. Section 78 of the former *Fauna Conservation Act* 1952 (Qld) did except the killing by Aborigines of native birds and animals for food.
43. *Sydney Morning Herald*, 16 October 1992, 11: 'Mabo Case Gives Squattocracy the Terrors', referring to 'some 30 to 40 per cent' of WA grazing lands.
44. *Ibid.*: 'In the west, it is a narrow skirt along part of the West Australian seaboard around Perth. In the south-east, it is the great bulk of Victoria and the 40 per cent of N.S.W. on the pacific side of the State. ... In Queensland, most of the State's south is freehold, and a coastal strip which narrows as it goes north. There is almost no other ... freehold apart from the area immediately around Darwin.'
45. On 3 June 1992.
46. *Courier Mail*, 20 April 1991 (Editorial): 'Race on for land rights'. At this stage there seems to have been a belief that the enactment of the *Aboriginal Land Act* 1991 (Qld) would forestall any possibility of native title in the State.
47. *Aboriginal Land Rights (Northern Territory) Act Amendment Act* 1987, which modified trustees' powers to veto applications for mining concessions in the Territory. The Commonwealth's plenary 'territories' power made it unnecessary to rely upon the 'race' or 'external affairs' powers to enact the Territory's 'land rights' law. Like the *Aboriginal Land Act* 1991 it provides for statutory titles.
48. *Courier Mail*, 4 March 1986.
49. *Sydney Morning Herald*, 4 August 1986.
50. *Id.* 29 September 1984 (Mr C. Holding).
51. *Courier Mail*, 28 November 1991, quoting a 'mining and resources lawyer' on interference with approved mining projects by 'dynamic non-static' claims concerning sacred sites.
52. The hearing concluded on 31 May 1991; judgment was delivered on 3 June 1992.
53. See e.g. 'Land Rights versus Miners' *Business Review Weekly*, 7 August 1992 46 . In fact, much of this article relates not to *Mabo*, but to pre-

existing limits on mining developments imposed under the *Mining Act* (W.A).

54. Quoted in the *Australian*, 17-18 October 1992, 2: 'Costly Complications of Land Ownership Issue'.
55. See below, 'Legislation or Scriptural Exegesis?'
56. Cf. *Mabo* (1992) 66 A.L.J.R. 408, 464.
57. Sup. Ct. of Qld. Appln. No. 504 of 1992.
58. *Sun-Herald* (Sydney), 6 September 1992, 6: 'Aboriginal Land Push'. The representative applicant was said to be Vincent Mark Mundraby.
59. T.J. Denaro and L.G. Culpeper, 'The Diverse Mineral Resources of Cape York Peninsula' (1992) 93 *Queensland Government Mining Journal* 28. Bauxite, silica sand, kaolin, gold, tin, tungsten, molybdenum and antimony have been mined in the area.
60. *Hopevale Aboriginal Council v. Cape Flattery Silica Mines Pty Ltd*, unreported, Qld. Court of Appeal, 23 March 1992; noted (1992) 11 *AMPLA Bulletin* 67. This was some two months before the decision in *Mabo*; the case turned upon sections of the *Aboriginal Land Act* 1991 and native title did not arise.
61. *Australian*, 16 October 1992, 5:'Land Council Foreshadows Arnhem Land Native Title Claim'.
62. *Milirrpum v. Nabalco Limited* (1971) 17 F.L.R. 141.
63. As to the significance of this Act for present purposes see note 75 and text.
64. Commonwealth Constitution s.51 (xxxi).
65. *Australian*, 11 August 1992, 5: 'Aborigines to Allay Land Claim Fears' (Dodson).
66. *Courier Mail*, 23 October 1992, 2: 'Mabo Decision Not Big Win for Blacks'. See also *Weekend Australian*, 14-15 November 1992, 24: 'The Mabo decision will not be of direct practical benefit to most Aboriginal people' (Tickner).
67. *Courier Mail*, 31 October 1992, 7: 'Goss wants land tenure out of court'.
68. See the comments of Gleeson C.J., note 130 and text.
69. (1992) 66 A.L.J.R. 408, 434, emphasis added.
70. *Mineral Resources Act* 1989 (Qld) s.11.18.
71. See note 35 and text.
72. Cf. *Mabo* (1992) 66 A.L.J.R. 408, 434 per Brennan J.: '... a right to continued enjoyment of native title may be consistent with the specified purpose -- at least for a time...'.
73. *Mineral Resources Act* 1989 s.1.11.
74. (1992) 66 A.L.J.R. 408, 427 per Brennan J.
75. With immaterial exceptions relating to freeholds created under certain Acts long since repealed: *Mineral Resources Act* 1989 s.1.9(3).
76. *Mineral Resources Act* 1989 s.1.9; *Petroleum Act* 1923 s.5.
77. *Mabo v. Queensland* (1988) 166 C.L.R. 186; *Mabo v. Queensland* (1992) 66 A.L.J.R. 408, 435, 452, 497.

78. *Case of Mines* (1567) 1 Plowd, 310.; *Attorney-General of British Colombia v. Attorney-General of Canada* (1889) 14 App. Cas. 295.
79. Section 6 of the *Mining on Private Land Act*, after making specific provision for gold, silver, copper and coal, proceeded: 'All other minerals on or below the surface of all land which is not alienated in fee simple from the Crown at the commencement of this Act [1 March 1910] are the property of the Crown'. In 1925 sub-section 21A(3) was added, asserting that gold and all minerals (with exceptions not now material) on or in all lands in the State 'whether alienated in fee simple or not so alienated, and if so alienated, whensoever alienated, are ... the property of the Crown'.
80. *Petroleum Act* 1923 (Qld) s.5.
81. *Mining Act* 1968 (Qld) ss.6 and 110.
82. Cf. note 35 and text.
83. See below, 'Customs, How and When Ascertained'.
84. *Mineral Resources Act* ss.3.12, 4.33, 5.17, 6.12 and 7.36; *Petroleum Act* 1923 s.61.
85. *Mineral Resources Act* s.1.8.
86. Items recognised under the *Mineral Resources Act* are not recoverable under the general law. *Id.* s.11.30.
87. (1992) 66 A.L.J.R. 408, 435.
88. Private lands revert to the owner at the termination of a mining lease, but lengthy terms of 12-20 years are regarded for compensation purposes as outright acquisition of the land affected: *Smith v. Cameron* (1986) 11 Q.L.C.R. 64; *Newage Metals Pty Ltd*, unreported, Mining Warden's Court Brisbane, June 1992.
89. *Mineral Resources Act* ss.3.3 (prospecting permits), 4.1 (mining claims), 5.2 (exploration permits), 7.1 (mining leases).
90. *Id.* s.1.8.
91. *Petroleum Act* s.3, definition of 'land'.
92. *Mineral Resources Act* s.7.38(4)(b); *Petroleum Act* s.61(1).
93. A.P. Elkin, *Australian Aborigines* (4th ed., 1964), 56.
94. (1992) 66 A.L.J.R. 408, 410, 415, 423, 429.
95. (1992) 66 A.L.J.R. 408, 431.
96. (1992) 66 A.L.J.R. 408, 431.
97. (1992) 66 A.L.J.R. 408, 411, 413.
98. (1992) 66 A.L.J.R. 408, 422.
99. (1992) 66 A.L.J.R. 408, 426.
100. (1992) 66 A.L.J.R. 408, 427, 429, 430, 487.
101. (1992) 66 A.L.J.R. 408, 430.
102. (1992) 66 A.L.J.R. 408, 442 .
103. (1992) 66 A.L.J.R. 408, 452.
104. (1992) 66 A.L.J.R. 408, 452.
105. (1992) 66 A.L.J.R. 408, 480.
106. (1992) 66 A.L.J.R. 408, 487.
107. (1992) 66 A.L.J.R. 408, 486-487.

108. (1992) 66 A.L.J.R. 408, 442 per Deane and Gaudron JJ.; see also 430 per Brennan J.
109. (1992) 66 A.L.J.R. 408, 447 per Deane and Gaudron JJ.
110. (1992) 66 A.L.J.R. 408, 452 per Deane and Gaudron JJ.
111. (1992) 66 A.L.J.R. 408, 431 per Brennan J.; see also at 435.
112. (1992) 66 A.L.J.R. 408, 488 per Toohey J.
113. *Ibid.*
114. (1992) 66 A.L.J.R. 408, 430 per Brennan J.
115. *Ibid.*
116. (1992) 66 A.L.J.R. 408, 434, emphasis added.
117. *Simon v. R* [1985] 2 S.C.R. 387 (Canada SC); *Milirrpum v. Nabalco Limited* (1971) 17 F.L.R. 141, 154.
118. (1992) 66 A.L.J.R. 408, 454.
119. (1992) 66 A.L.J.R. 408, 426 per Brennan J.
120. (1992) 66 A.L.J.R. 408, 431 per Brennan J.
121. Generally the rules of evidence do not apply to quasi-judicial tribunals: *Maclean v. The Workers Union* [1929] 1 Ch. 602; *T A Miller Ltd v. Minister for Housing and Local Government* [1968] 1 W.L.R. 992, 995; J.R.S. Forbes, *Evidence in Queensland*, (Australia: Law Book Co., 1992), 32-33. A former High Justice has suggested that a principal qualification for appointment to some contemporary tribunals is possession of the bias approved by the promoters thereof.
122. G. Hiley 'Aboriginal Land Claims Litigation' (1989) 5 *Aust. Bar. Rev.* 187.
123. *Id.* 195.
124. *Id.* 194-195.
125. *Courier Mail*, 24 October 1992, 8: 'Tribes in feud over Cairns land claim': 'A spokesman for a group within the Yidinji Aboriginal tribe yesterday labelled the rival group's claim for land around Cairns as "absurd" ... It's a Johnny-come lately group ... formed a couple of months ago when they got the smell of land rights'." See also *Australian*, 16 October 1992, 5: 'Land Council foreshadows Arnhem Land native title claim': Since 1972 Nabalco has paid royalties to the Council, but a tribe known as the Yolngu claim that the Council, dominated by a group called the Gumatj, have been giving them a 'raw deal' for years. Compare the attitude of an Aboriginal Legal Service (WA) officer, who could 'not define exactly what is wanted because the demands of individual groups vary so much': 'Land Rights versus Miners' *Business Review Weekly*, 7 August 1992, 46.
126. *Lord Abinger v. Ashton* (1873) L.R. 17 Eq. 358, 373-374 per Jessel M.R.
127. See e.g. *Lynch v. Lynch* (1966) 8 F.L.R. 433 and *R v. Turner* [1975] Q.B. 834 (psychology/psychiatry) and generally *Newark Pty Ltd v. Civil & Civic* (1987) 75 A.L.R. 350, 351 per Pincus J. Some guarded scepticism about 'social work' and evidence-gathering appears in *Taylor v. L; ex parte Taylor* [1988] 1 Qd.R. 706.
128. Quoted in V.D. Plueckhan, 'Legal Dilemmas in the Use of Expert Medical Evidence' (1982) 14 *Australian Journal of Forensic Science* 40.

129. A preliminary inquiry to see whether evidence is admissible -- in a case of purported expert evidence, and inquiry whether the professed 'science' really exists as such: *Clark v. Ryan* (1960) 103 C.L.R. 486; *Fisher v. Brown* [1968] S.A.S.R. 65.
130. Control of pornography or cruelty as 'entertainment' is censorship. Suppression of many other things is merely 'political correctness'.
131. Hiley, *loc. cit.* 191.
132. *Financial Review*, 15 October 1992, 4 quoting Gleeson C.J. of N.S.W.
133. See *Courier Mail*, 31 October 1992. 7: 'Goss wants land tenure out of court'.
134. *Ibid.*
135. *Australian*, 28 October 1992, 2: 'Tickner will fund land rights test cases'.
136. ABC Radio News, 29 October 1992: 'every case is potentially different'; *Courier Mail*, 31 October 1992, 7.
137. Would this amount to acquisition requiring 'just terms' to be paid to the State? Probably not in the view of the present High Court. Cf. J.R. Forbes, 'Towards a Realistic Definition of "Acquisition"' (1991) 10 *AMPLA Bulletin* 111.
138. See J.R. Forbes, 'Queensland's Aboriginal Land Act 1991' (1992) 11 *AMPLA Bulletin* 16. In the first seven months after the Act came into operation two millions hectares were added to the Crown land initially open to claims. *Australian*, 12 November 1992, 3: 'Aborigines may claim 13 parks'.
139. *Aboriginal Land Act* 1991 ss.2.8, 5.20.

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