

## JUDICIAL REVOLUTION OR CAUTIOUS CORRECTION? *MABO v QUEENSLAND*

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### I. INTRODUCTION

The general outlines of the High Court of Australia's 1992 decision in *Mabo v Queensland (No 2)*<sup>1</sup> are now reasonably widely known: that the Court, in its first ever opportunity to address the issue directly, decided by a 6:1 majority<sup>2</sup> that pre-existing land rights ('native title') survived the extension of British sovereignty over Australia and may still survive today provided (a) that the relevant Aboriginal or Torres Strait Islander people still maintain sufficient traditional ties to the land in question; and (b) that the title has not been extinguished as a consequence of valid governmental action.

The decision has attracted considerable attention, not only in the legal profession but in the wider community. Attention is justified because the case is one of the

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1 (1992) 175 CLR 1.

2 Brennan J, with whom Mason CJ and McHugh J concurred in a brief joint judgment; Deane and Gaudron JJ; Toohey J; Dawson J dissenting.

most fundamental ever decided by the High Court - fundamental in the sense of going to the juridical foundations of the Australian nation. But some of the widespread commentary that the decision has generated has bordered on hysteria and even paranoia. The following extracts represent a selection.

It is no mean feat, even for a High Court, to turn the settled, established, widely understood law on title to land in Australia, into a situation where every piece of eminent, costly legal advice, has a different view on what the law with respect to land title, let alone title to mining tenements, now is. The law of property is now in a state of disarray....<sup>3</sup>

The invention, for that is what it is, of native land title is not just the introduction of a new legal concept. It is a fundamental change in the law of property that cannot be reconciled with title to land as previously developed by the common law over nearly a millennium.<sup>4</sup>

There is no judicial tradition or precedent to justify the Mabo judgment, which overthrew the 'established doctrine' of land claims of indigenous people.<sup>5</sup>

I defy anyone to justify the so-called Mabo decision last June, when Justice Toohey and five colleagues overturned 145 years (at least) of settled property law in this country on the basis of the most emotional and 'political' arguments ever uttered by the court.<sup>6</sup>

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 recognizing such rights.<sup>7</sup>

The *Mabo* decision has also generated an academic industry. At least two Law School journals are devoting special issues to aspects of the decision.<sup>8</sup> The title of the University of Queensland Law Journal special issue is *Mabo: A Judicial Revolution*.<sup>9</sup> The purpose of this article is to examine the extent to which the decision does, indeed, represent a judicial revolution and to suggest, instead, that it represents a cautious correction to Australian law.

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3 HM Morgan "Mabo Reconsidered" The Joe and Enid Lyons Memorial Lecture 1992, Australian National University at 5.

4 Dr C Howard "The Fall-Out from Mabo" in a paper for the Australian Mining Industry Council (AMIC) at 1.

5 PP McGuinness *The Australian* 2 September 1992.

6 John Stone *Financial Review* 22 October 1992.

7 Professor RD Lumb "The Mabo Case - Public Law Aspects" in M A Stephenson and Suri Ratnapala (eds) *Mabo: A Judicial Revolution* (1993) p 5.

8 *University of Queensland Law Journal*, *Sydney Law Review*. This special issue of the *University of New South Wales Law Journal* is on indigenous legal issues generally.

9 Note 7 *supra*.

## II. AUSTRALIAN PRECEDENTS

Amazingly, there had been only one prior Australian case in which the issues had been fully argued: *Milirrpum v Nabalco Pty Ltd and the Commonwealth*<sup>10</sup> (the *Gove Land Rights Case*). In this decision, Blackburn J of the Northern Territory Supreme Court held that the claim by the plaintiffs that the land was still theirs failed. He held that the common law does not accommodate 'communal native title' in a colony acquired by settlement (as distinct from conquest or cession), at least if there has been no governmental action recognising such title in some such form as a treaty or the Royal Proclamation of 1763 in North America, or by statute.<sup>11</sup> He held also that, even if 'customary aboriginal title' might be accommodated by common law, it would only be accommodated if the particular interest being asserted sufficiently resembled proprietary interests as generally understood in European legal systems.<sup>12</sup> And he held that, even if the plaintiffs' interests had been such as to have survived the extension of British sovereignty, they would have been extinguished by Crown lands legislation authorising the grant of interests in land to non-Aboriginal people, and also by later governmental acts including the Commonwealth's lease of the land in question to Nabalco and the legislation approving that lease.<sup>13</sup>

The decision of Blackburn J in the *Gove Land Rights Case*, as it is widely known, was never taken on appeal. It was, however, subject to considerable critical comment.<sup>14</sup>

Key elements in the reasoning of Blackburn J found support in *Mabo v Queensland (No 2)* only in the judgment of Dawson J, and have been clearly rejected by the rest of the High Court.<sup>15</sup>

It should be acknowledged that Justice Blackburn's freedom of action, as a single judge of the Northern Territory Supreme Court, had been limited. There had been fairly unequivocal statements in several earlier cases in and for Australia supporting the proposition that Australia's indigenous peoples did not have possession or tenure of the lands they occupied and, in particular, asserting that the Crown had acquired, with sovereignty, the full beneficial ownership of every

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10 (1971) 17 FLR 141.

11 *Ibid* at 198-199, 244-245.

12 *Ibid* at 167, 264-273.

13 *Ibid* at 198, 223, 252-255.

14 For summary and references, see H McRae, G Netheim and L Beacroft *Aboriginal Legal Issues: Commentary and Materials* (1991) ch 4.

15 See, in particular note 1 *supra* at 101-102 per Deane and Gaudron JJ.

square inch of Australia which it was free to grant or use as it saw fit. In none of these cases, however, had indigenous peoples been parties.<sup>16</sup>

The most weighty of these earlier cases was the opinion of the Judicial Committee of the Privy Council in *Cooper v Stuart*.<sup>17</sup> In deciding a dispute as to whether a reservation in an 1823 Crown grant of land in New South Wales offended the rule against perpetuities, the Judicial Committee needed to decide whether, and to what extent, the rule against perpetuities and the laws of England in general applied in the colony prior to the commencement in 1828 of the statute 9 Geo IV c 83 s 24. They held that applicable laws of England had been received at the date of first settlement, 1788, on the basis that New South Wales was to be considered a 'settled colony' in terms of Sir William Blackstone's classic formulation from earlier decisions about the state of law in newly acquired British settlements. In a colony acquired by conquest or cession, according to Blackstone, existing law continued to operate unless and until displaced by the Crown: by contrast, in a colony acquired by settlement, all the laws of England were immediately introduced to the extent that they were applicable to the situation and condition of an infant colony.<sup>18</sup> The Judicial Committee held that New South Wales belonged to the latter class being "a tract of territory practically unoccupied without settled inhabitants or settled law at the time it was peacefully annexed to the British dominions".<sup>19</sup>

As Brennan J pointed out,<sup>20</sup> the English common law as to the legal regime operating within new colonies had closely followed international law concerning acquisition of European sovereignty over colonies. International law had recognised several bases on which a European State might acquire sovereignty over

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16 *Attorney-General (NSW) v Brown* (1847) 1 Legge 312; *Cooper v Stuart* (1889) 14 App Cas 286; *Williams v Attorney-General (NSW)* (1913) 16 CLR 404; *Randwick Corporation v Rutledge* (1959) 102 CLR 54. Deane and Gaudron JJ considered these to be the four most important of the earlier cases providing "general statements of great authority" at 102. Brennan J at 26-28 also referred to *New South Wales v The Commonwealth* (1975) 135 CLR 337 (the *Seas and Submerged Lands Case*) at 438-439 per Stephen J; *Mabo v Queensland (No 1)* note 94 *infra* at 236 per Dawson J.

17 (1889) 14 App Cas 286.

18 *Commentaries on the Laws of England* (1765) Bk 1 ch 4 pp 106-108. Of course, to say that English law is received in a colony for the purposes of the English settlers does not necessarily connote that indigenous laws - and indigenous rights under those laws - are immediately extinguished. Detmold has suggested that the Australian colonies could properly be regarded both as settled, from the point of view of the needs of the settlers, and as conquered, from the point of view of Aborigines: M Detmold *The Australian Commonwealth. A Fundamental Analysis of its Constitution* (1985) pp 62-66. Significant 19th century Australian decisions also contemplated retention of Aboriginal rights under an overall British sovereignty - see the discussion of the cases of *R v Jack Congo Murrell* and *R v Bonjon* in J Hookey "Settlement and Sovereignty" in P Hanks and B Keon-Cohen (eds) *Aborigines and the Law* (1984) p 1.

19 Note 17 *supra* at 291.

20 Note 1 *supra* at 32-34. See also at 77-78 per Deane and Gaudron JJ.

other lands including conquest and cession, and including, also, occupation and settlement. The latter clearly applied to uninhabited lands (*terra nullius*) but came to be extended to lands inhabited by “backward peoples”.<sup>21</sup> Such peoples may not have exercised ‘sovereignty’ in the forms understood by European nations (that is, by being “organized in a society that was united permanently for political action”)<sup>22</sup> but invariably they had a very strong sense of their territorial rights. In terms of the consequences in English law of an extension of sovereignty over lands inhabited by such peoples, to pretend that they did not have ownership or even possession of their lands did violence to the facts. The late Justice Murphy said of *Cooper v Stuart*:<sup>23</sup> “The statement by the Privy Council may be regarded either as having been made in ignorance or as a convenient falsehood to justify the taking of Aborigines’ land”.<sup>24</sup>

In *Coe v Commonwealth*<sup>25</sup> the plaintiff claimed both Aboriginal rights of sovereignty and land rights. Technically the High Court did not decide the case; all it did decide, by majority, was to refuse leave to amend the statement of claim. All the justices indicated that they would be prepared to listen to argument on the land rights issues in a properly presented case.<sup>26</sup> While Gibbs J (with whom Aickin J agreed) declared that: “It is fundamental to our legal system that the Australian colonies became British possessions by settlement and not by conquest”, citing *Cooper v Stuart*,<sup>27</sup> Jacobs J suggested that *Cooper v Stuart* could not be regarded as a decision on the critical issues.<sup>28</sup> Murphy J simply pointed out that the Privy Council’s “view” was no longer binding on the High Court.<sup>29</sup> Other straws in the wind, as to possible High Court thinking about ‘native title’ could perhaps have been gleaned from earlier remarks of Barwick CJ in *Administration of Papua v Daera Guba*,<sup>30</sup> an appeal from Papua New Guinea, and from a statement by Deane J in *Gerhardy v Brown*<sup>31</sup> when, in referring to Justice Blackburn’s decision in the *Gove Land Rights Case*,<sup>32</sup> he said:

If that view of the law be correct, and I do not suggest that it is not, the common law of this land has still not reached the stage of retreat from injustice which the law of Illinois and Virginia had reached in 1823 when Marshall CJ in *Johnson v*

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21 MF Lindley *The Acquisition and Government of Backward Territory in International Law* (1926).

22 *Ibid* chs III and IV; note 1 *supra* at 32 per Brennan J.

23 Note 17 *supra*.

24 *Coe v Commonwealth* note 25 *infra* at 412.

25 (1979) 53 ALJR 403

26 *Ibid* at 408 per Gibbs, Aickin JJ; at 411 per Jacobs J; at 412 per Murphy J.

27 *Ibid* at 408.

28 *Ibid* at 411.

29 *Ibid* at 412.

30 (1973) 130 CLR 353 at 397.

31 (1985) 159 CLR 70 at 149.

32 Note 10 *supra*.

*McIntosh* (1823) 8 Wheaton 543 at 574 accepted that, subject to the assertion of ultimate dominion (including the power to convey title by grant) by the state, the "original inhabitants" should be recognised as having "a legal as well as just claim" to retain the occupancy of their traditional lands.

As noted earlier, six of the seven Justices in *Mabo v Queensland (No 2)* rejected what Deane and Gaudron JJ described as "the broad propositions that New South Wales had been unoccupied for practical purposes and that the unqualified legal and beneficial ownership of all land in the Colony had vested in the Crown...".<sup>33</sup> Deane and Gaudron JJ noted that in each of the four cases from Australia that had appeared to endorse those propositions, the reasoning:

...consists of little more than bare assertion. The question of Aboriginal entitlement was not directly involved in any of them and it would seem that no argument in support of Aboriginal entitlement was advanced on behalf of any party. In three, and arguably all, of them the relevant comments were obiter dicta.<sup>34</sup>

They went on, however, to note that

...the authority which the four cases lend to the two propositions is formidable. Indeed, the paucity of the reasoning tends to emphasize the fact that the propositions were regarded as either obvious or well-settled. Certainly, they accorded with the general approach and practice of the representatives of the Crown in the Colony after its establishment.<sup>35</sup>

Brennan J, also, was concerned about departing from propositions regarded as obvious or well-settled, saying that "recognition by our common law of the rights and interests in land of the indigenous inhabitants of a settled colony would be precluded if the recognition were to fracture a skeletal principle of our legal system".<sup>36</sup>

So, whether obiter dicta or not, the earlier judicial statements from Australia were not lightly abandoned, notwithstanding assertions to the contrary by several critics of the decision.<sup>37</sup> Rather, the common law as expounded in and for Australia was treated, not as a closed system, but as an offshoot of the much more ancient common law of England<sup>38</sup> which had to address the effect on prior land rights of extensions of sovereignty over Wales and Ireland, over British settlements in Africa and Asia, and in the Americas and the Pacific. On the basis of that broader and deeper analysis, 'the settled, established, widely understood law' in

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33 Note 1 *supra* at 103.

34 *Ibid* at 103-104.

35 *Ibid* at 104.

36 *Ibid* at 43; also at 29-30.

37 See text for notes 3-7 *supra*.

38 "Australian law is not only the historical successor of, but is an organic development from, the law of England": note 1 *supra* at 29 per Brennan J.

Australia was shown to represent an aberration. As Henry Reynolds had put the matter in 1987:

This was surely the distinctive and unenviable contribution of Australian jurisprudence to the history of the relations between Europeans and the indigenous people of the non-European world. It was not to provide justification for conquest or cession of land or assumption of sovereignty - others had done that before Australia was settled - but to deny the right, even the fact, of possession to people who had lived on their land for 40,000 years.<sup>39</sup>

### III. OTHER CASES, OTHER PLACES

The reported cases surveyed went back at least as far as the early 17th century<sup>40</sup> but themselves built on doctrines tracing back to medieval and feudal times. One of those feudal doctrines conflated the Crown's sovereign authority with the notion of the Crown's ultimate or 'radical' title to the land and carried with it the 'fiction' (as Blackstone conceded it to be)<sup>41</sup> that all titles to land must have derived directly or indirectly from a Crown grant.

In his judgment Brennan J spent considerable time distinguishing between Crown title to colonies and Crown ownership of land, and in exploring the feudal basis of the proposition of Crown ownership.<sup>42</sup> His Honour accepted that the doctrine of tenure is a "basic doctrine of the land law...which could not be overturned without fracturing the skeleton which gives our land law its shape and consistency".<sup>43</sup>

The doctrine of tenure had been extended to the Australian (and other) colonies as the basis for titles actually granted by the Crown. "The radical title is a postulate of the doctrine of tenure and a concomitant of sovereignty" he said.<sup>44</sup> Brennan J continued:

The notion of radical title enabled the Crown to become Paramount Lord of all who hold a tenure granted by the Crown and to become absolute beneficial owner of unalienated land required for the Crown's purposes. But it is not a corollary of the Crown's acquisition of title to land in an occupied territory that the Crown acquired absolute beneficial ownership of that land to the exclusion of the indigenous inhabitants. If the land were desert and uninhabited, truly a terra nullius, the

39 Henry Reynolds *The Law of the Land* (1987) pp 3-4.

40 For example, *Calvin's Case* (1608) 7 Co Rep 1a; 77 ER 377; *Case of Tanistry* (1608) Davis 28; 80 ER 516 (affirming prior land rights after the conquest of Ireland); *Witrong and Blany* (1674) 3 Keb 401; 84 ER 789 (affirming prior land rights after the conquest of Wales).

41 *Commentaries on the Laws of England* (17th ed, 1830) Bk II ch 4, pp 50-51.

42 Note 1 *supra* at 43-52. See also at 180 per Toohey J.

43 *Ibid* at 45. See also per Deane and Gaudron JJ at 80-81.

44 *Ibid* at 48.

Crown would take an absolute beneficial title (an allodial title) to the land for the reason given by Stephen CJ in *Attorney-General (NSW) v Brown*.<sup>45</sup> there would be no *other* proprietor. But if the land were occupied by the indigenous inhabitants and their rights and interests are recognised by the common law, the radical title which is acquired with the acquisition of sovereignty cannot itself be taken to confer an absolute beneficial title to the occupied land. Nor is it necessary to the structure of our legal system to refuse recognition to the rights and interests in land of the indigenous inhabitants. The doctrine of tenure applies to every Crown grant of an interest in land, but not to rights and interests which do not owe their existence to a Crown grant. The English legal system accommodated the recognition of rights and interests derived from occupation of land in a territory over which sovereignty was acquired by conquest without the necessity of a Crown grant.<sup>46</sup>

The Court examined a number of cases from various parts of the world establishing the survival of prior land rights in territories over which sovereignty had been acquired *by conquest*. Part of the problem in relation to indigenous land rights in Australia is the general acceptance of the proposition that the several Australian colonies had been acquired *by settlement*. If a settled colony is, in fact, uninhabited, no question of pre-existing rights arises. But the question becomes critical if the concept of settlement is applied to territories which are in fact inhabited by peoples who are deemed to lack the characteristic of being "organized in a society that is united permanently for political action".<sup>47</sup> If the lack of this characteristic (whatever it means)<sup>48</sup> may be used to deny to such people their sovereignty, does it follow that it may be used to deny their land rights?

Two interrelated questions arise: (1) How critical to the recognition of indigenous land rights is the supposed dichotomy between conquered (and ceded) colonies, on the one hand, and settled colonies, on the other? (2) Do indigenous land rights themselves have to accord reasonably closely in their nature to the proprietary rights recognised by European nations in order to warrant recognition? Is there simply an assumption that a people who lack European-like governmental structures will also lack recognisable interests in relation to land?

#### IV. SETTLED COLONY, CONQUERED COLONY

Blackstone's primary concerns in postulating the distinction were with identifying two matters: (1) the legal regime operating in a colony in the immediate

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45 (1847) 1 Legge 312 at 317-318.

46 Note 1 *supra* at 48-49.

47 See text accompanying note 22 *supra*.

48 For one thing, it is clear that the concept of being united 'permanently' for political action seems to imply an element of fixity in national boundaries which may be unrealistic. Consider the recent reconstitution of States in the former USSR and the former Yugoslavia.



aftermath of acquisition by Britain - the pre-existing law or English law; and (2) the Imperial authority empowered to alter that regime - King-in-Council (executive action) or King-in-Parliament (legislation). The question of survival of prior land rights was not of immediate concern in his discussion of these points,<sup>49</sup> and his references to colonies acquired by settlement were to lands which were “desert and uncultivated” or “uninhabited”.<sup>50</sup>

Detmold has argued persuasively that the two categories of colony do not necessarily represent a dichotomy and are not necessarily mutually exclusive.

The doctrines did not arise together. At the time of *Calvin's Case*...<sup>51</sup> only the conquest doctrine was generally recognised... The settled colony doctrine arose later, partly in response to the perceived constitutional need of the 17th century to check the power of the King that the old doctrine implied. Since the doctrines did not arise together whence comes the dichotomy?<sup>52</sup>

On Detmold's analysis, the Australian colonies were properly treated as ‘settled’ for the purpose of the legal needs of the settlers but should also be regarded as ‘conquered’ in terms of indigenous rights,<sup>53</sup> subject, of course, to the sovereign powers of the British authorities.

In the *Gove Land Rights Case* Blackburn J, after an examination of decisions from courts in the United Kingdom, the United States, Canada, India, Africa and New Zealand, came to the conclusion that in a settled colony, as distinct from a conquered (or ceded) colony, “no doctrine of communal native title has any place...except under express statutory provisions”.<sup>54</sup>

In *Mabo v Queensland (No 2)* Dawson J effectively agreed with Justice Blackburn's analysis that some act of executive or legislative recognition was required for the continuance of indigenous land rights.<sup>55</sup> All other members of the High Court rejected the proposition, thus, on this aspect too, declaring Australian

49 Indeed, as Professor Reynolds has pointed out, other passages in Blackstone's writing “could have been used to provide powerful arguments for the contention that the Aborigines were in possession, that they and not the settlers were the first occupants with all the legal potency surrounding that condition”. Note 39 *supra* at 27.

50 Note 18 *supra* at Bk I ch 4 pp 106-108, cited by Brennan J note 1 *supra* at 34-35.

51 *Calvin's Case* note 40 *supra*.

52 M Detmold note 18 *supra* pp 62-66.

53 Deane and Gaudron JJ suggested that the principle that, in settled colonies only so much of the laws of England was introduced as was reasonably applicable to the circumstances of the Colony “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” note 1 *supra* at 79.

54 Note 10 *supra* at 244. This view has been expressly rejected by courts in Canada and the United States; see for example *Calder v Attorney-General (British Columbia)* (1983) 34 DLR (3d) 145 at 152, 200; *Hamlet of Baker Lake v Minister of Indian Affairs and Northern Development* [1980] 1 FC 518 at 556-557; *Guerin v The Queen* (1985) 13 DLR (4th) 321 at 335-337; *County of Oneida v Oneida Indian Nation* (1985) 470 US 226 at 233-236.

55 Note 1 *supra* at 123-129.

common law in terms substantially in accord with the common law as pronounced by the preponderance of judicial decisions in other jurisdictions.<sup>56</sup>

As Brennan J put it:

The preferable rule, supported by the authorities cited, is that a mere change in sovereignty does not extinguish native title to land... The preferable rule equates the indigenous inhabitants of a settled colony with the inhabitants of a conquered colony in respect of their rights and interests in land and recognises in the indigenous inhabitants of a settled colony the rights and interests recognised by the Privy Council in *In Re Southern Rhodesia* as surviving to the benefit of the residents of a conquered colony.<sup>57</sup>

## V. THE CHARACTER OF NATIVE TITLE

One issue said to be relevant to the question whether the common law accommodates native title relates to the character of the particular interests being asserted. In particular, do such interests need to resemble the sorts of proprietary interests familiar to English law? Blackburn J had held that such a threshold needed to be met, and was not met by the interests proved by the plaintiffs in the *Gove Land Rights Case*.<sup>58</sup>

In *Mabo v Queensland (No 2)* Brennan J considered either that no such requirement existed; or, alternatively that it may be established by proof of exclusive possession even if the indigenous community does not treat land as alienable.<sup>59</sup>

The joint judgment of Deane and Gaudron JJ expressed the matter even more liberally on the basis of a number of the Privy Council opinions from Africa and Canada:

On that approach, the pre-existing native interests with respect to land which were assumed by the common law to be recognised and fully respected under the law of a newly annexed British territory were not confined to interests which were analogous to common law concepts of estates in land or proprietary rights. Nor were they confined by reference to a requirement that the existing local social organization conform, in its usages and its conceptions of rights and duties, to English or European modes or legal notions. To the contrary, the assumed recognition and protection extended to the kinds of traditional enjoyment or use of land which were referred to by the Privy Council in *Amodu Tijani*. ...What the common law required was that the interest under the local law or custom involve an

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56 *Ibid* at 54-57 per Brennan J (with whose judgment Mason CJ and McHugh J agreed); at 81-83 per Deane and Gaudron JJ; at 182-184 per Toohey J.

57 *Ibid* at 57. Also at 182 per Toohey J.

58 Note 10 *supra* at 167, 264-273.

59 Note 1 *supra* at 51-52.

established entitlement of an identified community, group or (rarely) individual to the occupation or use of particular land and that that entitlement to occupation or use be of sufficient significance to establish a locally recognised special relationship between the particular community, group or individual and that land.<sup>60</sup>

Similarly Toohey J held:

It is the fact of the presence of the indigenous inhabitants on acquired land which precludes proprietary title in the Crown and which excites the need for protection of rights. Presence would be insufficient to establish title if it was coincidental only or truly random having no connexion with or meaning in relation to a society's economic, cultural or religious life. It is presence amounting to occupancy which is the foundation of title and which attracts protection, and it is that which must be proved to establish title.<sup>61</sup>

## VI. OTHER ARGUMENTS

### A. LOCAL LEGAL CUSTOM

The case for recognition by Australian law of the interests asserted by the *Mabo* plaintiffs was based on several alternative arguments. That which persuaded the majority was an argument, in effect, that the common law leaves space for, and provides protection to, pre-existing interests in relation to land which are, otherwise, extrinsic to the common law.

Alternative arguments were advanced from within common law. Brennan J said:

One argument raised the presumption of a Crown grant arising from the Meriam people's possession of the Murray Islands from a time before annexation; another was the existence of a title arising after annexation in accordance with a supposed local legal custom under the common law whereby the Meriam people were said to be entitled to possess the Murray Islands. There are substantial difficulties in the way of accepting either of these arguments, but it is unnecessary to pursue them.<sup>62</sup>

Toohey J, more expansively, also saw difficulties in the argument based on local legal customary rights and found it unnecessary to pursue it.<sup>63</sup> Dawson J rejected the argument based on ownership by custom on the basis of his assessment of Justice Moynihan's findings of fact, and also on the basis of non-recognition of ownership by Queensland.<sup>64</sup>

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60 *Ibid* at 85-86.

61 *Ibid* at 188 and, generally at 184-192.

62 *Ibid* at 57.

63 *Ibid* at 176-177.

64 *Ibid* at 160-163.

## B. COMMON LAW ABORIGINAL TITLE

Toohy J did devote considerable attention to the argument from within the common law based on presumptions of title arising from possession of the plaintiffs' predecessors. He designated this basis for claim as 'common law aboriginal title' as distinct from 'traditional title' or 'native title' which was the basis accepted by the majority. Toohy J distinguished the two arguments as follows:

The two kinds of interest claimed by the plaintiffs have different sources and different characteristics, though the two overlap in some ways and the same set of circumstances, it is said, may give rise to either title. The first interest, traditional title, has been the most commonly argued in lands rights cases; its origin lies in the indigenous society occupying territory before annexation. This title is one recognised by the common law (though what is required to establish that recognition is a matter of contention) but its specific nature and incidents correspond to those of the traditional system of law existing before acquisition of sovereignty by the Crown. The second kind of title, common law aboriginal title, has no existence before annexation since it is said to arise by reason of the application of the common law. Not only its existence but its nature and incidents are determined entirely by principles of common law. 'Title' is a title based on possession and the consequences of that status at common law. It would, if made out, amount to a fee simple.<sup>65</sup>

Dawson J summarised the argument as follows:

This argument is heavily based on a theory advanced by Professor McNeil in his book *Common Law Aboriginal Title* (1989). The starting point is that the plaintiffs' predecessors in title have been in occupation of the land since beyond living memory. Upon annexation, the common law was introduced into the Murray Islands as part of the law of Queensland. Under the common law, occupation is prima facie proof of possession and possession carries with it a possessory title, which is good against those who cannot show a better title in themselves. Indeed, mere possession of land is prima facie evidence of a seisin in fee. Thus, say the plaintiffs, since they were allowed to remain in possession of their lands and since no one can assert a better title against them, they must be taken to hold their land by way of an estate in fee simple.<sup>66</sup>

Toohy J, in his considered treatment of the argument,<sup>67</sup> found much in English property law to support it:

In sum, 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

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<sup>65</sup> *Ibid* at 178, citing K McNeil *Common Law Aboriginal Title* (1989) chs 6 and 7.

<sup>66</sup> *Ibid* at 163. Dawson J went on to reject the argument on the basis of his overall holding that the Crown, on annexation, acquired the beneficial ownership. Deane and Gaudron JJ did not address this separate argument and, perhaps confusingly, referred to the argument which they did accept as "common law native title". Brennan J, as noted, simply mentioned "substantial difficulties in the way of accepting the argument". He did not identify those difficulties.

<sup>67</sup> *Ibid* at 206-214.

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.<sup>68</sup>

But this was subject to the question whether the Crown had a better title. He differed from Dawson J in holding that, on annexation, the Crown acquired only the radical title. He concluded that

...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. In any event, it is unlikely that a firm conclusion could be reached since some matters, the creation of the reserve for example, were not fully explored.<sup>69</sup>

With respect, a holding that Aboriginal peoples or Islanders hold possessory title in accordance with established principles of Anglo-Australian property law could differ in significant ways from a finding that they hold 'native title' recognised and protected by, but extrinsic to, the common law. Some of those differences could be beneficial to particular claimants, some possibly not.

## VII. COMMON LAW ABORIGINAL TITLE VERSUS NATIVE TITLE

### A. PROOF

Proof of a possessory title could be easier than proof of 'native title'. To prove the latter the claimant group needs to show not only continuing occupation of the land by them and their predecessors but also continuing ties to the land based on indigenous laws and customs, according to Brennan J:

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 connexion with the land has 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 revived for contemporary recognition. Australian law can protect the interests of members of an indigenous clan or group, whether communally or individually, only in conformity with the traditional laws and customs of the people to whom the clan

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68 *Ibid* at 211.

69 *Ibid* at 214.

or group belongs and only where members of the clan or group acknowledge those laws and observe those customs (so far as it is practicable to do so). Once traditional native title expires, the Crown's radical title expands to a full beneficial title, for then there is no other proprietor than the Crown.<sup>70</sup>

Deane and Gaudron JJ appear to be a little more flexible on this issue:

The traditional law or custom is not, however, frozen as at the moment of establishment of a Colony. 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.

...[The rights] can...be lost by the abandonment of the connexion with the land or by the extinction of the relevant tribe or group. It is unnecessary, for the purposes of this case, to consider the question whether they will be lost by the abandonment of traditional customs and ways. Our present view is that, at least where the relevant tribe or group continues to occupy or use the land, they will not.<sup>71</sup>

Toohy J, after consideration of a number of cases from India, Africa and North America, indicated that:

In general the approach taken in the North American authorities is to be preferred. So, what is required to prove title?

The requirements of proof of traditional title are a function of the protection the title provides. It is the fact of the presence of indigenous inhabitants on acquired land which precludes proprietary title in the Crown and which excites the need for protection of rights. Presence would be insufficient to establish title if it was coincidental only or merely random, having no connexion with or meaning in relation to a society's economic, cultural or religious life. It is presence amounting to occupancy which is the foundation of the title and which attracts protection, and it is that which must be proved to establish title. Thus traditional title is rooted in physical presence. That the use of the land was meaningful must be proved but it is to be understood from the point of view of the members of the society.<sup>72</sup>

On the analysis of Toohy J, and on that of Deane and Gaudron JJ, there may not be significant advantage to indigenous claimants, who are still in occupation, in proving their claim on either basis. However, on Justice Brennan's analysis (Mason CJ and McHugh J concurring) even a group that is still in possession of land would not be able to claim 'native title' if their traditional ties to the land had been eroded too much; by contrast, the mere fact of continuing possession would be sufficient to establish 'common law aboriginal title' in the absence of someone who could show a better title.

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70 *Ibid* at 59-60.

71 *Ibid* at 110.

72 *Ibid* at 188.

## B. NATURE OF TITLE

Another possible benefit of basing a claim on 'common law aboriginal title' would be to clarify the nature of the title. It would be a fee simple under common law. By contrast the nature of 'native title', simply accommodated by common law, would depend on proof of the particular relationships of the people to the land and might vary from a title virtually tantamount to fee simple, at one extreme, to mere usufructuary rights at the other.<sup>73</sup>

## C. SOURCE OF TITLE

Some groups may not be happy with a fee simple title based on Australian law for several reasons. For one thing they may wish to insist (as plaintiffs in *Mabo* insisted) that Australian law should recognise the source of title as deriving from indigenous law, not 'settler law'. They may also prefer to have the nature of that title attuned to the complexity of rights and interests under indigenous law rather than be forced into the uniform mould of fee simple. In particular, they may be particularly antipathetic to one of the incidents of fee simple title, namely, its alienability.

## D. EXTINGUISHMENT

One possible additional benefit of 'common law Aboriginal title', however, relates to 'extinguishment'. All judges acknowledged that 'native title' is subject to extinguishment as a result of action by the Crown in its capacity as sovereign and radical title holder. Brennan J<sup>74</sup> and Deane and Gaudron JJ<sup>75</sup> treated this as a particular vulnerability of 'native title' - if so, 'common law aboriginal title', being fee simple, would appear to be less vulnerable. Toohey J, however, seemed to regard the extinguishment of 'native title' as generically indistinct from the Crown's powers to resume or compulsorily acquire any legal title.<sup>76</sup>

In his book *Common Law Aboriginal Title*,<sup>77</sup> Professor McNeil, after a detailed analysis of English property law from ancient times to the present, noted that the common law presumption of a fee simple title based on possession had been applied in a variety of contexts where British sovereignty had been extended, at least where the prior inhabitants were European. Examples in modern times included Belize and Pitcairn Island. He then posed the question why the same principles had not been applied in regard to non-European inhabitants of colonies

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73 *Ibid* at 58-63 per Brennan J; at 86-95 per Deane and Gaudron JJ.

74 *Ibid* at 64.

75 *Ibid* at 89-90.

76 *Ibid* at 193-195.

77 K McNeil *Common Law Aboriginal Title* (1989).

settled by Britain, necessitating, instead, the development in North America in particular of a separate doctrine of 'native title'. He came to the conclusion that the only apparent reason was racial discrimination.<sup>78</sup>

### VIII. INTERIM SUMMARY

There were, thus, several long established common law doctrines, amply supported by precedents, under which pre-existing land rights in newly acquired British territories received protection under British law - the continuity of existing law in colonies acquired by conquest or cession, the accommodation of 'native title' in settled colonies, and possessory title within the central doctrines of English property law.

Naturally, the precedents, spanning several centuries and several continents, did not speak with one voice. There were judicial statements to support the propositions accepted by Blackburn J in the *Gove Land Rights Case*<sup>79</sup>, and those dicta from Australia appeared to deny completely any possibility of indigenous land rights surviving the extension of British sovereignty. But, with the exception of Dawson J, all six majority justices in *Mabo v Queensland (No 2)* held that the preponderance of the precedents supported the conclusion that indigenous rights were capable of surviving unless and until validly extinguished. This, it is submitted, was no 'judicial revolution' but a careful and scholarly application of established common law principles and methods.

### IX. HUMAN RIGHTS

The vehemence of some of the critical commentators seems to be motivated, if not by economic interest, at least by astonishment at the result. Even those who one would expect to have read the judgments have written of the judges inventing new law or overturning established law. Some have fastened on references in some of the judgments to human rights standards.

Brennan J, in referring to precedents which denied indigenous land rights on the basis that the people had no law,<sup>80</sup> or lacked the quality of social organisation regarded as an essential precondition to recognition of their rights,<sup>81</sup> went on to say:

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78 *Ibid* chs 5 and 9.

79 Note 10 *supra* at 141. The propositions are summarised in text accompanying notes 11-13 *supra*.

80 One proposition which Blackburn J emphatically rejected in the case of the plaintiffs in *Milirrpum v Nabalco Pty Ltd* note 10 *supra* at 267.

81 *In re Southern Rhodesia* [1919] AC 211 at 233-234 per Lord Sumner.



The theory that the indigenous inhabitants of a 'settled' colony had no proprietary interest in the land thus depended on a discriminatory denigration of indigenous inhabitants, their social organization and customs. As the basis of the theory is false in fact and unacceptable in our society, there is a choice of legal principle to be made in the present case. This Court can either apply the existing authorities<sup>82</sup> and proceed to inquire whether the Meriam people are higher 'in the scale of social organization' than the Australian Aborigines whose claims were 'utterly disregarded' by the existing authorities or the court can overrule the existing authorities, discarding the distinction between inhabited colonies that were terra nullius and those which were not.<sup>83</sup>

He went on:

The common law does not necessarily conform with international law, but international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights. A common law doctrine founded on unjust discrimination in the enjoyment of civil and political rights demands reconsideration. It is contrary both to international standards and to the fundamental values of our common law to entrench a discriminatory rule which, because of the supposed position on the scale of social organization of the indigenous inhabitants of a settled colony, denies them a right to occupy their traditional lands.<sup>84</sup>

But as noted, Brennan J declared that recognition of such rights "would be precluded if the recognition were to fracture a skeletal principle of our legal system".<sup>85</sup> After analysing the suggested rationales for non-recognition to be found in the precedents from elsewhere, he was able to proceed to overrule the Australian statements.<sup>86</sup> Deane and Gaudron JJ, after analysing the same materials from the Privy Council and elsewhere, also felt able to abandon the earlier Australian statements holding that they were dicta<sup>87</sup> and noting they lay at the very basis of the history of Aboriginal dispossession.<sup>88</sup> In dissent, Dawson J also noted that "[t]here may not be a great deal to be proud of in this history of events"<sup>89</sup> but, on his assessment, "the weight of overseas authority" was against the plaintiffs' case.<sup>90</sup>

Essentially, the majority judges' decision was based on their assessment that "the weight of overseas authority" supported the plaintiffs' case, their major concern was with the prior judicial statements (arguably, obiter dicta) from Australia, and their decision to reject them was simply facilitated by acknowledging that their

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82 His Honour was referring to the several authorities from Australia referred to in text to notes 16-17 *supra*.

83 Note 1 *supra* at 40.

84 *Ibid* at 42.

85 *Ibid* at 43.

86 *Ibid* at 58.

87 *Ibid* at 104.

88 *Ibid* at 104-109.

89 *Ibid* at 145.

90 *Ibid* at 138.

basis lay in factual error and in attitudes which were quite opposed to contemporary Australian and international standards concerning racial discrimination.

Former Chief Justice, Sir Harry Gibbs, has asked:

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.<sup>91</sup>

With respect, this misstates the basis for the majority decision, placing too much emphasis on the Court's reference to international standards and fundamental values and giving too little weight to the careful analysis of a wealth of precedential material. And, insofar as the common law may have left room for doubt on the question whether pre-existing land rights in a settled colony can survive annexation,<sup>92</sup> it is entirely legitimate for a court to resolve such doubt by reference to contemporary standards of international law.<sup>93</sup> The particular contemporary standards in question were those against discrimination on the grounds of race in the enjoyment of such civil and political rights as "the right to own property alone as well as in association with others" and "the right to inherit".<sup>94</sup> Those standards have been accepted by Australia in the terms of the *Racial Discrimination Act* 1975 (Cth) (the Racial Discrimination Act) implementing obligations arising from Australia's ratification of the *International Convention on the Elimination of All Forms of Racial Discrimination*. Quite apart from treaty commitment, it seems that the norm against racial discrimination has become part of international customary law<sup>95</sup> so as to become automatically part of Australian law except to the extent that legislation provides otherwise.

As suggested earlier, the decision represents a 'judicial revolution' only to those who had perceived Australian common law as a closed system with no connections to the longer history and wider span of the common law. Within that larger body of common law the decision represents merely a correction of a local anomaly.

It will also be argued that it was a cautious correction.

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91 "Foreword" in MA Stephenson and Suri Ratnapala (eds) note 7 *supra* p xiii.

92 The North American cases indicate that there is no doubt on the matter.

93 MD Kirby "The New World Order and Human Rights" (1991) 18 *Melbourne University Law Review* 209. See also Commonwealth Secretariat *Developing Human Rights Jurisprudence, Vol 2. A Second Judicial Colloquium on the Domestic Application of International Human Rights Norms* (1989).

94 *Mabo v Queensland (No 1)* (1988) 166 CLR 186.

95 *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168 at 220-221 per Stephen J; at 234-235 per Mason J.

## X. DISTINGUISHING MELANESIANS FROM ABORIGINES

It could, admittedly, have been more cautious. The High Court could have confined its reasoning, as well as its actual decision, to the circumstances of the Murray Island group on the Torres Strait as Professor Lumb suggests:

It can be seen, therefore, that the High Court in *Mabo*, in the light of the historical and social facts, could have restricted the scope of its reasoning to the area in question ie 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.<sup>96</sup>

Professor Lumb is mistaken in his point (a) concerning non-representation of other states. During the ten year span of the *Mabo* litigation, from the filing of the statement of claim in May 1982 to final judgment in June 1992, all Australian governments had notice of the proceedings and the opportunity to be heard. In *Mabo v Queensland (No 1)*<sup>97</sup> oral argument was submitted by both Queensland and the Commonwealth (which was also a defendant at that time) and by the Northern Territory. Other states kept a close eye on the proceedings. Governments other than that of Queensland simply chose not to present argument in *Mabo v Queensland (No 2)*,<sup>98</sup> presumably because they felt that any matters they might wish to raise would be adequately dealt with by Queensland. Queensland, as well as the plaintiffs, presented extensive written submissions in advance of the four day hearing before the High Court in May 1991, and these were available to other governments.

It would have been possible for the Court, in accordance with Professor Lumb's point (b), to have left the previous erroneous understanding of Australian law partially undisturbed simply by distinguishing Meriam patterns of land use from those of Aboriginal peoples but not even the dissenting Justice Dawson proposed such an approach.<sup>99</sup> And acceptance of the Meriam claims alone would still have required re-assessment of the fundamental propositions relating to the survival of land rights in a 'settled' colony. All Justices preferred to go back to basic principle

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96 Note 7 *supra* pp 4-5.

97 Note 94 *supra*.

98 Note 1 *supra*.

99 *Ibid* at 26 per Brennan J; at 77 per Deane and Gaudron JJ; at 179 per Toohey J.

- not surprising, given the fact that the High Court had never had the opportunity to address the issues, and also because of the recognition that the general understanding of Australian law was so demonstrably out of line with the common law developed elsewhere.

However, in reviewing and declaring the law applicable to all parts of Australia, the High Court majority was able to do so in terms that considerably limit the potential fall-out from the decision.

## XI. SOVEREIGNTY

For one thing it was made perfectly clear that the acquisition by the Crown of sovereignty over Australia was not open to question. Brennan J cited Gibbs J in the *Seas and Submerged Lands Case*:

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.<sup>100</sup>

And he cited other High Court statements<sup>101</sup> to similar effect that the acquisition of territory by the Crown is not justiciable in Australian courts.<sup>102</sup>

There was no necessity for the judges to make this point. The *Mabo* plaintiffs did not contest Australian sovereignty and, indeed, their only argument relevant to sovereignty was an argument that the power to extinguish 'native title' lay only with the 'international' sovereign - formerly Britain, now the Commonwealth, but never Queensland. The argument was rejected.<sup>103</sup>

The restatements of the proposition that Australian sovereignty is not justiciable in Australian courts may have been simply a part of the overall review of the legal consequences of 1788 (and the relevant later dates for South Australia, Western Australia and the outlying Torres Strait Islands). They may also have been included for reassurance.

Further elements of reassurance lie in the prerequisites for proof of native title, the powers of governments to extinguish native title, and the holdings on compensation.

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100 *New South Wales v Commonwealth* note 16 *supra* at 388.

101 *Wacando v Commonwealth* (1981) 148 CLR 1 at 11 per Gibbs CJ; at 21 per Mason J; *Coe v Commonwealth* note 25 *supra* at 410 per Jacobs J.

102 Note 1 *supra* at 31-32, 69 per Brennan J; see also at 78-79, 113-114 per Deane and Gaudron JJ; at 121 per Dawson J.

103 *Ibid* at 67 per Brennan J; at 110-111 per Deane and Gaudron JJ. The judgments of Dawson J and Toohey J generally agreed that a power to extinguish native title belonged to state governments.

## XII. ESTABLISHING AND EXTINGUISHING NATIVE TITLE

Reference has already been made to what the judgments had to say about the prerequisites to proof of native title, in possible contrast to the simple fact of continuing possession which may be sufficient to establish 'common law aboriginal title'.<sup>104</sup> Brennan J (with whom Mason CJ and McHugh J agreed) held that, to succeed, a claimant group needed to show continuity with their predecessors not only in terms of occupancy of the land but also in terms of traditional ties to the land.<sup>105</sup>

The judgments also accepted the proposition which the plaintiffs did not dispute, that the Crown has a power to extinguish native title either by making grants of interests to others or by setting aside land for public purposes. In either case the Crown action must demonstrate a "clear and plain intention" that native title be extinguished; this will be established if the interest granted or public use is clearly inconsistent with the continuation of native title.<sup>106</sup>

These doctrines leave limited prospects at the end of the 20th century for the assertion of native title.

As the Governments of the Australian colonies and, latterly, the Governments of the Commonwealth, States and Territories have alienated or appropriated to their own purposes most of the land in this country during the last two hundred years, the Australian Aboriginal peoples have been substantially dispossessed of their traditional lands. They were dispossessed by the Crown's exercise of its sovereign powers to grant land to whom it chose and to appropriate to itself the beneficial ownership of parcels of land for the Crown's purposes. 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. To treat dispossession of the Australian Aborigines as the working out of the Crown's acquisition of ownership of all land on first settlement is contrary to history. Aborigines were dispossessed of their land parcel by parcel, to make way for expanding colonial settlement. Their dispossession underwrote the development of the nation. But if this be the consequence in law of colonial settlement, is there any occasion now to overturn the cases which held the Crown to have become the absolute beneficial owner of land when British colonists first settled here. Does it make any difference whether native title failed to survive British colonization or was subsequently extinguished by government action? In this case, the difference is critical: except for certain transactions next to be mentioned, nothing has been done to extinguish native title in the Murray Islands. There, the Crown has alienated only part of the land and has not acquired for itself the beneficial ownership of any substantial area. And there may be other areas of

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104 See Part VII of this text.

105 Note 1 *supra* at 59-60, set out in text accompanying note 70. See also at 110 per Deane and Gaudron J, set out in text accompanying note 71 *supra*; at 188 per Toohey J, set out in text accompanying note 72 *supra*.

106 *Ibid* at 63-71, 75-76 per Brennan J; at 89-90, 110-112, 116-118 per Deane and Gaudron JJ; at 192-198 per Toohey J.

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. Even if there be no such areas, it is appropriate to identify the events which resulted in the dispossession of the indigenous inhabitants of Australia, in order 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.<sup>107</sup>

Brennan J clearly contemplated that the acknowledgement of native title would have minimal, if any, impact on existing titles and land use under Australian law.

### XIII. JUDICIAL PROTECTION AND COMPENSATION

Deane and Gaudron JJ also referred to the difficulties that Aboriginal and Torres Strait Islander people would have faced in asserting their 'native title' in past times, quite apart from vulnerability of native title to extinguishment. These difficulties included "the inherent unlikelihood of such title-holders being in a position to institute proceedings against the British Crown in a British Court", the historic immunity of the Crown from court proceedings, and limitations on the time within which court action may be brought.<sup>108</sup> These hurdles would have diminished in respect of action adverse to native title in more recent times, and all majority judges considered that the common law could protect native title.

Deane and Gaudron JJ considered also that action taken by the Crown to extinguish native title might be wrongful so as to create an obligation on the Crown to provide compensation.<sup>109</sup> Toohey J is said to have supported a similar proposition, but his discussion of the issue<sup>110</sup> does not clearly suggest that an exercise of the Crown's power of extinguishment as such would give rise to a right to compensation. To the extent that his judgment supports a right to compensation, it may stem from his analysis of the argument based on a fiduciary duty owed by the Crown.<sup>111</sup> More likely, it arises from his analysis of the effect of the Racial Discrimination Act in conjunction with the *Acquisition of Land Act 1967* (Qld); the latter act, like similar legislation for other jurisdictions, conditions the Crown's power to acquire compulsorily land for public purposes by a requirement that compensation or just terms be paid.<sup>112</sup>

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107 *Ibid* at 69 per Brennan J.

108 *Ibid* at 93-94, 100, 112.

109 *Ibid* at 93-95; 100-101; 110-113.

110 *Ibid* at 192-195.

111 *Ibid* at 199-205.

112 *Ibid* at 214-216.

Brennan J scarcely discussed compensation and, on Justice Dawson's analysis, the issue did not arise. But, in their brief judgment expressing their general agreement with Brennan J, Mason CJ and McHugh J said:

...The main difference between those members of the Court who constitute the majority is that, subject to the operation of the *Racial Discrimination Act 1975* (Cth), 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. We note that the judgment of Dawson J supports the conclusion of Brennan J and ourselves on that aspect of the case since his Honour considers that native title, where it exists, is a form of permissive occupancy at the will of the Crown.

We are authorized to say that the other members of the Court agree with what is said in the preceding paragraph about the outcome of the case.<sup>113</sup>

#### XIV. WHAT GAINS?

Published comments by Aboriginal lawyers in the aftermath of the decision expressed widespread disappointment at how little the decision offered to Aboriginal people, particularly in the longer settled parts of Australia.<sup>114</sup>

Mick Dodson on behalf of the Northern Land Council told the United Nations Working Group on Indigenous Populations:

The *Mabo* decision does not recognise equality of rights or equality of entitlement: it recognises the legal validity of Aboriginal title until the white man wants that land. ...

For the vast majority of indigenous Australians the *Mabo* decision is a belated act of sterile symbolism. It will not return the country of our ancestors, nor will it result in compensation for its loss.<sup>115</sup>

Noel Pearson comments

...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.<sup>116</sup>

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113 *Ibid* at 15-16.

114 M Mansell "The Court Gives an Inch but Takes Another Mile" 2(57) *Aboriginal Law Bulletin* 4.

115 ATSIC *The Australian Contribution. UN Working Group on Indigenous Populations 10th Session, 20-31 July 1992, Geneva Switzerland* (1992) p 35. See also, Paul Coe *Statement on Behalf of the National Aboriginal and Islander Legal Services Secretariat* p 69.

116 N Pearson "204 Years of Invisible Title. From the Most Vehement Denial of a People's Right to Land to a Most Cautious and Belated Recognition" in MA Stephenson and Suri Ratnapala (eds) note 7 *supra* p 89.

Those relatively few indigenous people who still retain traditional links with their land sufficient to constitute native title, and whose native title has not been extinguished during the past two centuries may now be able to assert those rights in various ways with the support of the Australian courts. But governments retain the right unilaterally to extinguish native title without any obligation to provide compensation. The only check against further use of this power of extinguishment so as to complete the history of Aboriginal dispossession is the Racial Discrimination Act.

## XV. THE RACIAL DISCRIMINATION ACT

The Act is relevant in at least two ways. One, as noted by Toohey J, is relevant to the issue of compensation for extinguishment of native title which, on his analysis, is equivalent to the Crown's power to compulsorily acquire any interests in land. While only the Commonwealth Parliament is subject to a constitutional obligation to provide 'just terms' when acquiring property for public purposes, all jurisdictions have lands acquisition legislation conditioning such acquisition on the payment of just terms. Therefore, acquisition/extinguishment of lands subject to native title without compensation would discriminate on the basis of race so as to contravene the Racial Discrimination Act.

While this proposition appears to provide cogent support for a right to compensation, it depends on the equating of extinguishment of native title with compulsory acquisition which only Toohey J mentioned. In addition, it may not extend a right to compensation when the action taken to extinguish title is not the use of land for public purposes but the grant of interests in land to other parties.

The more fundamental relevance of the Racial Discrimination Act goes to the validity of State or Territory action to extinguish native title on either basis. The decision in *Mabo v Queensland (No 1)*<sup>117</sup> is clear authority for the proposition that state legislation to extinguish native title will be ineffective if title deriving from state law is left intact, by virtue of s 10 of the Racial Discrimination Act. This effect of the Act dates back to the commencement of its operation on 31 October 1975. It is arguable that any action taken by state or territory governments since that date which would otherwise have the effect of extinguishing native title may be ineffective. If so, it follows that any grant of interests in land by state or territory governments since that date may be ineffective.

It is that possibility that has produced a volume of criticism of *Mabo v Queensland (No 2)* from a variety of sources led by spokesmen for the mining

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117 Note 94 *supra*.



industry, and an insistence that the Commonwealth Government should immediately legislate to roll back its Racial Discrimination Act, at least to the extent necessary to confirm the grant of mining tenements, pastoral leases and other interests in land. The Commonwealth Government has refused to take immediate action, preferring to proceed with the process of consultation announced by the Prime Minister on 27 October 1992 and scheduled to conclude with a report to Parliament in September 1993.<sup>118</sup>

## XVI. CONCLUSION

There are problems of uncertainty created by the *Mabo* decision. There is uncertainty as to whether particular Aboriginal people will be able to establish continuing 'native title' to particular areas of land. (Experience of land claims under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) indicates that establishing traditional ownership usually takes considerable time).<sup>119</sup> There may be uncertainty as to whether past actions of Governments have served to extinguish native title. And there may be room to doubt whether or not a contemporary grant of a pastoral lease<sup>120</sup> or a mining lease<sup>121</sup> would necessarily be so inconsistent with continuing native title as to extinguish it.

As noted earlier, however, the areas of land likely to be subject to native title today are likely to be very limited. In those areas, many Aboriginal or Torres Strait Islander owners may already hold title under land rights legislation and be content to continue holding title under Australian law; where the land rights legislation inadequately accommodates indigenous interests, it would be a relatively simple task to improve the legislation.

While the resource industries may have some genuine concerns it would be unfortunate for their spokespeople to maintain a full-blooded confrontation with the government and Aboriginal and Torres Strait Islander organisations. Australia has spent two centuries not recognising indigenous land rights. If the task of

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118 For discussion of these moves see G Nettheim "The Consent of the Natives: *Mabo* and Indigenous Political Rights" (1993) 15 *Sydney Law Review* 223.

119 G Neate *Aboriginal Land Rights Law in the Northern Territory* (1989).

120 Henry Reynolds "Native Title and Pastoral Leases" in MA Stephenson and Suri Ratnapala (eds) note 7 *supra* p 119.

121 JRS Forbes "Mabo and the Miners" in MA Stephenson and Suri Ratnapala (eds) note 7 *supra* p 211. See also papers from the *Resource Development and Aboriginal Land Rights Conference* (The Centre for Commercial & Resources Law, University of Western Australia and Murdoch University, 28 August 1992): G McIntyre "Retreat from Injustice" at 20-23; PCS van Hattem "The Extinguishment of Native Title (And Implications for Resource Development)" esp at 17-22; MW Hunt "The Legal Implications of *Mabo* for Resource Development" at 9-11.

establishing processes for reconciling native title with non-Aboriginal economic interests needs to take a year or so, it is far better that the time be taken to get it right than to proceed to blanket legislation which further extinguishes native title.

1993, after all, is the International Year for the World's Indigenous Peoples.