

THE MABO CASE: A RADICAL DECISION?

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Abstract / Resume

This article discusses the *Mabo* decision, the landmark Australian case on Native title. It sets the decision in an historical context of race relations and reviews issues such as the separation of powers doctrine, *terra nullius*, and sovereignty, as well as the source, nature and extinguishment of Native title. It also briefly surveys the *Native Title Act* (Cth) 1993. It concludes that although the decision could be possibly regarded as evolutionary and correctional in nature it could not be regarded as radical.

La High Court of Australia fit une décisions dans le cas de *Mabo and others v. The State of Queensland (Mabo No 2)* en juin 1992. On croyait les effets d'être d'une portée considérable, la Cour suprême du Canada citant le cas. Il provoqua les émotions, mais l'auteur suggère que la décision n'est ni radicale en termes de droit ni dramatique en termes de conséquences pratiques. Grâce à ce cas, les problèmes des Aborigènes se placent sur l'agenda national, et il se peut qu'il en résulte de la réconciliation entre des peuples aborigènes et d'autres Australiens.

Introduction

On 3rd June 1992 The High Court of Australia handed down its decision in *Mabo and Others v. The State of Queensland (Mabo No 2)*.¹ There was little public interest before the decision was handed down but once decided interest escalated to the extent that the decision received daily press and media coverage. Almost everyone had a view on the merits of the decision despite the fact that few had read the 204 page judgment.

The decision has had a far-reaching impact. Indeed the *Canadian Native Law Reporter* devoted a whole special edition to the judgment and Aboriginal Law courses throughout the world—and particularly in Canada—include the case in their materials,² as do many Native Studies programs. Recently the case received the further attention of lawyers, students and scholars when it was affirmed and liberally quoted in the Supreme Court of Canada's, new, landmark decision on Aboriginal rights, *R. v. Van der Peet* ([1996] SCJ No 77).

When *Mabo (No 2)* was handed down it touched the Australian national psyche, giving rise to intense emotional responses. In such a context its revisiting of established law was variously seen as both refreshing and alarming. The predominant and popular view, however, was that the decision was radical.

This paper seeks to examine whether in fact the decision was radical. In so doing it traces the stuttering and tortured path of the litigation through the courts and briefly examines the history of race relations between Aboriginal and non-Aboriginal people in Australia in order to explain why the decision evoked such passionate and fervent responses. The paper suggests that in the historical context of Australian race relations it was predictable that any revision of established land holding would be greeted with extreme reaction.

Now, however, five years after the decision was handed down, it is possible to review that decision with greater acuity. A calm, albeit a temporary one, reigns and ebullition and volatility are presently directed elsewhere. However, given the government response to the *Wik* decision (*The Wik Peoples v. The State of Queensland* 141 ALR 129) which would markedly reduce the incidents of Native title, together with the tabling of The Human Rights Commission report on the Stolen Generation [of Aboriginal children] entitled *Bringing Them Home*, it is unlikely that this calm will remain.

In analyzing the *Mabo (No 2)* decision this paper devotes attention to the issue of the separation of powers as between the judiciary, legislature and executive because critics of the decision have cited disregard for this doctrine as evidence of judicial arrogance culminating in an unmatched

radicalism. This paper, however, suggests that a strict adherence to the separation of powers doctrine had lost support generally prior to this decision. Hence rather than radical, the decision might more aptly be regarded as evolutionary.

Attention is also given to the doctrine of *terra nullius* upon which, among other things, the procedures for the acquisition of law for the new colony of New South Wales were based. Having overturned *terra nullius* this seminal decision cleared the path for recognition of Aboriginal rights in land and for a complete review of the consequences of the denial of *terra nullius*. This latter opportunity was not taken up. For example, the decision did not re-examine sovereignty in the light of *terra nullius* having been overturned. The failure to seize that opportunity is discussed in this paper.

The paper then proceeds to review the Court's findings in regard to the source, nature and extinguishment of Native title.

Finally, it offers a brief discussion of the *Native Title Act* (Cth) 1993 which itself had a difficult passage through Parliament. Partly because it is beyond the scope of the paper and partly because there is so much uncertainty surrounding the preservation of the *Native Title Act* (Cth) 1993 in its present form, discussion of the Act is necessarily limited.

The Finding

The majority of the High Court (with Dawson J dissenting) held that:

1. The Meriam people (Natives of the islands of Mer, Dauar and Waier, known as the Murray islands) were entitled as against the whole world to the possession, occupation, use and enjoyment of the Murray Islands and;
2. that the title of the Meriam people could be extinguished by a valid exercise of power of the Parliament of Queensland, or the Governor in Counsel of Queensland. Any such exercise of power could not be inconsistent with the laws of the Commonwealth ([1992] 175 CLR at 76).

The decision gripped the nation like few other non-criminal cases have done.

History of the Litigation

The litigation had been approximately ten years in gestation and even its conception had proved a very difficult process. By the mid-20th century it was a generally held view that Native title was not part of the Australian common law. The cases of *Attorney-General NSW v. Brown* ([1847] 1

Legge 31z) *Cooper v. Stuart* ([1889] 14 App Cas 286) seemed to confirm this view although their subject matter did not directly concern the issue of Native title.

This view was confirmed, when the issue was raised directly in *Milirrpum v. Nabalco Pty Ltd.* ([1971] 17 FLR 141). Blackburn J categorically stated "the doctrine of [Native title] does not form, and never has formed, part of the law of any part of Australia" (*Ibid.*:244-245). He also went on to re-state what was accepted as established law when he said "(O)n the foundation of New South Wales... every square inch of territory in the colony became the property of the Crown" (*Ibid.*:198).

Despite the fact that, according to Blackburn J, "the evidence show[ed] a subtle and elaborate system highly adapted to the country in which the people led their lives, which provided a stable order of society and was remarkably free from the vagaries of personal whim or influence" (*Ibid.*) and despite the fact that Blackburn J thought that "if ever a system could be called 'a government of laws, and not of men', it [was] that shown in the evidence before [him]..." he was unable to conclude that the Yolngu people from Yirrkala on the Gove Peninsula of the Northern Territory held proprietary rights. According to Blackburn J, the claims of the Yolngu did not sufficiently resemble recognised understandings of property for those claims to be so categorised. The decision was much criticised for being culturally monocular and Hall J, Laskin and Spence JJ in the Canadian case of *Calder et al. v. Attorney-General for British Columbia* declared that some of Blackburn J's propositions were "wholly wrong" ([1977] SCR 313; [1973] 34 3DLR [3rd] 145).

That the High Court was willing to review the law on the existence of Native title became clear in cases such as *Administration of Papua v. Dera Guba* ([1973] 130 CLR 353:397), *Coe v. Commonwealth* ([1979] 53 ALJR 403). Indeed in *Gerhardy v. Brown*, Deane J stated that Australia was not yet in the same position as America where there had been a "retreat from injustice" brought about by the acknowledgment and recognition of Native title ([1985] 57 ALR 472, 532).

Nevertheless, perhaps deterred by the decision in *Milirrpum v. Nabalco* ([1971] FLR 141) the Aboriginal community focused its attention over the next eleven years on the issue of land rights legislation (an area of scholarship which is beyond the scope of this paper).³

It was not until 1982 that the Native title issue began to be litigated again in Australian courts. Along with other Indigenous people, Eddie Mabo commenced proceedings against the State of Queensland on behalf of the Meriam people. The plaintiffs sought an order declaring that the Meriam people held Native title to Mer. They claimed since time immemorial to have

had an on-going connection with the islands. Further they claimed to have had established and continued to live by their own social and political structures. Although two acres of the islands were leased to a missionary, the rest of the islands were set aside for the use of the Indigenous peoples under the *Land Act* 1910. Whilst sovereignty of the Crown was not disputed the plaintiffs claimed rights based on their Native customs; their original ownership of the islands; and their present possession, occupation, use and enjoyment. To ignore those rights, it was said, would involve a breach of fiduciary duty on the part of the State of Queensland. It was also submitted that compensation should flow from such a breach.

The litigation suffered a chequered course. On 27 February, 1986 it was remitted to the Supreme Court of Queensland to determine all issues of fact raised by the pleadings and in November, 1986 the litigation was adjourned so that the High Court could consider the plaintiffs' demurrer to the State of Queensland's defence which claimed the *Queensland Coast Declaratory Act* 1985 had effectively extinguished any Native title rights which might have existed. Had the *Queensland Coast Declaratory Act* 1985 been found valid it would have proved fatal to the plaintiffs' case because it attributed to the Queensland Parliament (legislature) an intention to extinguish Native title at the same time as sovereignty was acquired.

Fortunately, for the plaintiff, that Act (although demonstrating a "clear and plain" intention to extinguish Native title) was held by the High Court to be inconsistent with s.10(1) of the *Racial Discrimination Act* 1975 (Cth). The *Racial Discrimination Act* 1975 (Cth), being a Commonwealth Act, prevailed to the extent of the inconsistency, over the State Act, pursuant to s.109 of the Constitution (*Commonwealth of Australia Constitution Act* [as altered to 31 October, 1986]).

In November, 1990 Moynihan J of the Queensland Supreme Court handed down his findings concerning the issues of fact. Among other things he affirmed that the Meriam people were the original inhabitants; were people with evolving social organisations; and were people with a "strong" and "enduring" relationship to the land. The hearing in the High Court, did not, however, determine whether the Meriam people had rights over the land. This was left up to *Mabo (No 2)*.

The litigation was often confused and laboured. Partly because of a clash of cultures lawyers were, according to Brennan, "left perplexed as to what it [was] they were being asked to recognise or register" (Brennan, 1994:34). There were both individual and community claims to land and there was a myriad of anthropological evidence. The litigation ran from 1982 until 1991.

Concept of Native Title

In such circumstances one is left to ask whether the concept of Native title was new and therefore foreign or radical? Did its modernity help account for its laboured path through the courts?

Certainly, in the Australian context Native title was an untried phenomenon but internationally its credentials and indeed existence were long established.

Both the law and policy of the United States have been based on the concept of Native title for some years (Bartlett, 1993a:183). In 1823, the Marshall court in *Johnson v. McIntosh* ([1823] 8 Wheat 543) settled the question of conflicting claims between Aboriginal people and settlers on the basis of Native or Aboriginal title at common law. The Court found a grant by the United States defeated the claim of an individual who had privately purchased the same land from local Indians. Although the interests of the Indians were defeated in the case, the Court clearly acknowledged that the Indians were the rightful occupants of the land and that they had a valid legal claim to retain possession of it. However, the Court found that their rights to complete sovereignty had been diminished and burdened. They no longer had the right to freely dispose of the land to whomsoever they chose because exclusive title was vested in the discoverer (*Calder v. Attorney-General of British Columbia* [1973] SCR 313:416; [1973] 34 DLR (3rd) 145:218-219; contra per Judson J at 328-330; DLR 156-158).

Hence when the Australian High Court looked for Native title models, the United States experience presented it with examples that inherently accepted the triumph of ordinary common law rights over Native title rights. It reinforced the view that in a competition between the two, ordinary common law rights would prevail. The US and Canadian experiences also helped set the parameters for Australia in regard to issues such as the extinguishment of rights (a subject to be discussed later). Perhaps not surprisingly *Mabo (No 2)* seems to echo Marshall J's words that "the Crown had an absolute title... to extinguish [Native title]" and could "grant the soil, while yet in possession of the Natives" (*ibid.*:574; 588).

Further, although Australia has not gone the path of treaties and agreements the Canadian use of treaties and agreements in the settlements of Ontario and Western Canada which were founded on the notion of Native title has informed the development of Australian law (Bartlett, 1993a:183). Decisions recognising the fight date back to 1888 (St Catherine's Milling Cov R. [1889] 14 App Cas 46).

In New Zealand, *R. v. Symonds* ([1847] NZ PCC 387 at 390) relied on the notion of Native title as did the Treaty of Waitangi to which the case referred.

Hence the concept of Native title was far from new. It was part of established law throughout the common law world yet even when the comprehensive judgment was handed down in Australia there was a predilection to see it as radical, novel and extreme.

It is my contention that the decision is none of these. It certainly attempted to be reformist and correctional in nature but radical it has not been.

Popular Reactions to the Decision

Certainly immediate reactions to the decision were diverse and often passionate. Some individual non-Indigenous Australians feared that the decision would cause loss of ownership of private dwellings and land, ie that the prized quarter acre block would be subject to Native title claims.⁴ Others like Hugh Morgan, representing the Western Mining Corporation, claimed that six High Court Justices "created a legal, political and constitutional crisis [which] [w]e now have to resolve... in such a way as to restore international and domestic confidence in our judicial and legal institutions" (Morgan, 1993). His views seem to encapsulate the alarmist reaction that the High Court had acted injudiciously and irresponsibly. Such a position did not take account of (a) the international experience where endeavours to redress the inequities of colonisation on Indigenous people were already well underway (as, for example, in Canada, New Zealand and Fiji) and (b) the Aboriginal experience, that is an experience of deprivation, exclusion and marginalisation, which had already left the nation clearly quite divided in terms of political power, and wealth and resource distribution, for example.

Although, opposition to *Mabo (No 2)* from mining companies often had as its core, concern that the companies would no longer be able to exploit the earth because the relevant land would be the subject of successful Native title claims, this concern was sometimes veiled. Whilst at times it was expressed openly, at other times it took the form of vitriolic criticism directed towards the High Court's performance, that performance having been described for example as "naive adventurism" and as demonstrating a lamentable failure in one of the Court's most important duties [ie] the legal and public defence of property in Australia (*Ibid.*). These responses reflect a failure to grasp both the objectives and functions of the High Court as the ultimate appellate court, which like all courts must balance the rights and interests of parties. They also reflect a failure to appreciate the circumspection, deliberateness and carefulness of the Court as reflected in Brennan J's words:

Although this court is free to depart from English precedent which was earlier followed as stating the common law of this country, it cannot do so where the departure would fracture what I have called the skeleton of principle... The peace and order of Australian society is built on the legal system. It can be modified to bring it into conformity with contemporary notions of justice and human rights, but it cannot be destroyed (*Mabo [No 2]* [1992] 175 CLR 1; Bartlett, 1993:19).

Other critics included pastoralists who held their interests in land by virtue of pastoral leases. Many such people feared that they would partly or totally lose rights created by those leases in favour of Native title rights.

Often the fear, anxiety and prejudice of the critics was turned on the Court itself. The following words encapsulate the tenor of public feeling:

The idea that modern Australia has to atone for actions authorised by a British government over two centuries ago is difficult enough in itself. If it is then classified as a legal question proper for the decision of a court, a fundamental constitutional change has occurred.

The High Court appears to have given no thought to the possible consequences of a sudden injection of enormous wealth and not inconsiderable bargaining power to a tiny segment of the population unprepared for either (Howard, 1993:8).

As these words suggest, the question for many was how could a non-elected body, such as the High Court, disregard precedent (such as terra nullius findings, and the consequences of sovereignty, for example) and then go on to orchestrate a total revision of rights in land?

Alternatively, in progressive liberal circles, *Mabo (No 2)* was greeted enthusiastically as a long overdue step towards reconciliation. It was seen as a decision which restored dignity to Indigenous people and paved a positive path for future relations.⁵ However, in other quarters still, it was felt from the outset that the decision did not go far enough.⁶ Accordingly, it was viewed as the jurisprudence of compassion whereby Aboriginal destiny was determined by White willingness to sympathise with and accommodate Aboriginal concerns. Proponents of this analysis suggest that "loyalty to [W]hites" and "their institutions and forms of justice" (Mansell, 1992:6) remain intact after the decision. They suggest that the decision binds Aboriginal hopes to the maintenance of loyalty to non-Aboriginal institutions and forms of justice (*Ibid.*). If inherent in this latter analysis is the view that the decision also denies opportunities for self-determination, I would have to disagree with the analysis. Despite the decision's weaknesses, I would

suggest, that *Mabo (No 2)* does offer, albeit in a limited sense, avenues of self-determination, avenues which will be explained later in this paper.

One might well ask, why the reactions to *Mabo (No 2)* were so diverse, emotional and fervent? What caused the Australian psyche to be so touched? Put colloquially, why did *Mabo (No 2)* hit such a raw nerve? The answer to this is complex but the fact that the case indirectly re-examined the relationship of Aboriginal people to the wider non-Aboriginal community, using the issue of much-coveted property as a pivot, is part of the explanation. Further, given the Australian historical context (where inequities between Indigenous and non-Indigenous Australians have been institutionalised) the subject of rights in land was predictably volatile.

Historical Account

In order to appreciate the passionate and diverse reactions to *Mabo (No 2)*, it is helpful to consider briefly the history of Aboriginal/non-Aboriginal relations in Australia. Australia was first visited by James Cook in 1770. Cook had been issued with specific Admiralty instructions and was told that "with the consent of the natives... [he was to] take possession of convenient situations in the country in the name of the King of Great Britain."⁷ Although he found Natives Cook did not seek their consent before claiming the east coast of Australia for Britain.

When Arthur Phillip arrived in Australia with the First Fleet in 1788 his instructions omitted any reference to the seeking of Aboriginal consent for actions. The instructions were, however, quite clear in their recognition of Native existence; in their desire to achieve harmonious coexistence; and in their application of punitive consequences for crimes and wrong-doings.⁸

European trespass and occupation of Aboriginal land appears initially to have been tolerated by Aboriginal people not so much out of consent, but rather out of cultural differences which precluded a real understanding of foreign, European conduct (Reynolds, 1982:64). "Unless forewarned Aborigines probably had no appreciation of the European's determination to stay indefinitely and 'own' the soil" (*Ibid.*). As Littlebear also points out this was true in the Canadian context. European style ownership was a foreign concept, anathema to a people whose connection with the land was so sufficiently spiritual as to provide them with a sense of identity.⁹ European attitudes to land seemed to be based on exclusivity while Aboriginal attitudes to land emphasised reciprocity and, perhaps not surprisingly, as the new settlers' conduct began to encroach on traditional life styles and patterns, resistance became more pronounced. Aboriginal tolerance was then short-lived.

Some historians have suggested that Aborigines conducted a guerilla campaign which lasted approximately 160 years involving the targeting of cattle and sheep (Roberts, 1981). At other times, however, warfare between Aboriginal and non-Aboriginal Australians was more direct even though the Aborigines were severely disadvantaged by their unsophisticated supply of munitions.

Aboriginal civil liberties were given scant regard from the very early days of the Colony when Phillip ordered the kidnapping and detention of two Aborigines so that he could ascertain from them if their people posed a threat to the colony and further to ascertain if they could be "civilised" (*Ibid.*).

Despite being decimated by colonists' attacks and the spread of smallpox and venereal disease, Aboriginal resistance to the colonists grew. In 1795, violent conflict took place along the Hawkesbury (Deerubbun) as Aborigines resisted being forced off their land. They responded with spears, clubs and attacks on the settlers' camp. This opposition, as was commonly the case, met with violence. Troops were despatched under order "to destroy as many as they could... and in the hope of striking terror, to erect gibbets in different places, whereupon the bodies of all they kill[ed] might be hung" (*Ibid.*:14).

Race relations had begun poorly and a vindictive retributive approach had been inculcated into the conduct of the authorities. One of the high-water marks of such conduct can be seen in the thinking which permitted the daring but finally captured Aboriginal leader, Pemulwy's head to be pickled and sent back to Sir Joseph Banks, the botanist, who had accompanied James Cook to Australia (*Ibid.*).

Violence continued to characterise relations and while resistance was quelled in one area it rose again in another. The Myall Creek Massacre is probably one of the best known examples of lawlessness that Australia has seen. It resulted in mass Aboriginal death.¹⁰ Indeed the Aboriginal population suffered so badly that by 1861, the Board for the Protection of Aborigines estimated the surviving Victorian Aboriginal population to be 2,341.¹¹ In 1897, the State of Queensland passed "protection" legislation, permitting the removal of Aboriginal people from their land and their placement in institutions and Reserves (Gumbert, 1984:15).

Reserves were often parcels of arid and infertile land perceived as valueless, and which could accommodate significant numbers of Aboriginal people far from the environs of non-Aboriginal people. Once deposited in Reserves, Aboriginal people, along with their civil liberties, were severely reduced. Yet despite this adversity the Aboriginal population would not

disappear. Indeed after World War II the population was no longer in decline.¹²

In 1951, Australia formally embarked on a policy of assimilation. The Federal Minister for Northern Development announced that:

Assimilation means, in practical terms that, in the course of time, it is expected that all persons of Aboriginal birth or mixed blood in Australia will live like white Australians do" (Hasluck, quoted in Gumbert, 1984).

Some scholars have suggested that the assimilationist policy was adopted in the 1950s because of an increasing awareness of the value of mineral deposits on Reserve lands and that a plan needed to be orchestrated in order to remove Aboriginal people from Reserves so that mineral deposits could be exploited (*ibid.*). Whatever the motivation, the outcome of assimilation was indisputable. It was a form of genocide.

Indeed, many policies of this era enforced subjugation and led to Aboriginal people being separated from their families so that they could, for example, be trained for lives of domestic servitude. Little regard was given to the significance of kinship relations. Aboriginal people were to blend into mainstream life. Children and mothers were sometimes separated never to be seen again.¹³

In rural Western Australia inequities came to a head over the issue of equal pay for equal work in the pastoral industry. The awards of the Conciliation and Arbitration Commission discriminated against Aboriginal people and Aboriginal people sought to have this rectified when in 1965 the North Australian Workers' Union mounted a campaign on their behalf. Whilst the Commission found that equal award wages should be paid to Aboriginal people it created an escape provision exempting the payment in the case of "slow workers".

Partly in response to this disappointment, the workers (Gurindji people) at Wave Hill Station, (a cattle property owned by the Englishman, Lord Vestey) withdrew their labour for approximately one year. The Gurindji re-took their traditional lands, which were partly situated on Lord Vestey's land, and the site became known as Daguragu. After a long struggle and a change of government, Daguragu was eventually purchased by the government for the Gurindji.

To some extent the Wave Hill strike had highlighted the Aboriginal position and when the issue of Aboriginal enfranchisement was raised in the 1967 Referendum, 92% of Australians voted to remove the exclusive power of the States to legislate for Aborigines and to permit Aborigines to be counted in any census of the Australian population. Although an Aboriginal consciousness was being awakened as was seen by the creation of

a Tent Embassy on the lawn of Parliament house, there remained strong resistance amongst non-Indigenous Australians to the empowering of the Aboriginal community. The willingness to address overt racism identified in the referendum did not translate into an era of contrition, reform or remediation. The findings of the Royal Commission into Aboriginal Deaths in Custody are testimony to this. They clearly demonstrated that violence and injustice continued to be perpetrated against Aborigines.¹⁴

The Toomelah Report, which surveyed the living conditions of 500 Aboriginal people, also found that they did not have equal access to services and facilities. It found people

endure[d] appalling living conditions which amount[ed] to a denial of the most basic human rights [being] taken for granted by most other groups in society, and by other Australian communities of similar size (McRae, Nettheim and Beacroft, 1991:35).

It went on to say "their treatment by government at all levels has been insensitive and uncaring" (*Ibid.*). It is against this background that the *Mabo (No 2)* decision was handed down.

Arguably, it is only in a tokenistic sense that *Mabo (No 2)* confirmed Aboriginal people's rights. Nevertheless it has been a symbolically powerful gesture. It confirmed that Aboriginal people have rights and interests which predate those of non-Aboriginal Australians and it indirectly highlighted the Aboriginal political and social profile.

The decision asserted that Australia was *terra* Aborigine, not *terra nullius*. Indeed, *Mabo (No 2)* had the effect of making many non-Aboriginal Australians re-evaluate their values, morality and identity. *Mabo (No 2)* also caused a re-evaluation of the justification for property. Essential questions such as: "why is this my property and not your property?" or "on what basis can I claim this property and assert rights?" had to be faced. Some of the questions *Mabo (No 2)* posed, therefore, raised legal issues but many raised fundamental moral, political, social or economic issues. Hence it is not surprising that confrontation with such issues divided the nation.

The High Court as Law Maker

Yet even in anticipation of a passionate response the Court in *Mabo (No 2)* proceeded in its challenge to re-set the course of Indigenous/non-Indigenous legal relations. Its approach has drawn much criticism from those who adhere to the *Boilermakers'* school on the separation of powers doctrine that case having delineated the boundaries between the legislature and the judiciary by holding that Parliament could not legislate to confer

both judicial and non-judicial functions on a federal court (*The Queen v. Kirby; Ex parte Boilermakers' Society of Australia* [1956] 94 CLR 254). Yet it should be recalled that the *Boilermakers'* (*Ibid.*) case was decided at a time when the declaratory theory of judicial function was à la mode. That theory has now lost currency and a more realistic approach to judicial function which acknowledges that judges both declare and make law, has gained acceptance in the judicial fraternity if not among politicians and within the community at large.

In the light of this attitudinal change to judicial function Justice Michael Kirby¹⁵ was able to say:

Powerful media interests and others have resisted reforms; Parliament has shown itself spineless. Little wonder people are now turning to the courts to extract from the Constitution the fundamental rights which Parliament has been ineffective to protect.¹⁶

It is on this Kirby-style willingness to see creativity as a *requirement* of the High Court, that the Mason court¹⁷ in *Mabo (No 2)* relied. Clearly, if a court in a common law jurisdiction chose not to push the boundaries of judicial creativity then it would by-pass the ability to adapt to change. Nations would be locked into an adherence to "bad" law merely because "bad" law went before. Such a proposition poses serious challenges for the proponents of natural law. Further, it would be difficult to conceive of a court which did not seek to expound or uphold natural law, or to use Deane and Gaudron JJ's words, to "uphold fundamental notions of justice" (*Mabo [No 2]* CLR, 1992:83; Bartlett, 1993:61). One is led to ask whether morally or ethically, the Mason Court could have acted otherwise, in regard to the separation of powers issue and the reviewing of precedent, if in fact the legislature had refused for over 150 years to remedy adequately or redress continuing inequities and injustice? Could the court have chosen to ignore legal, historical, anthropological and political imperatives or did it have to seek to reconcile them?

Whilst it is arguable that the effect of the *Mabo (No 2)* decision has not been very radical and that the decision has not yielded much improvement in the plight of Aboriginal people one must also ask was it wrong to even try to reconcile fact and law when in the words of Deane and Gaudron JJ the process of dispossession "constitute[s] the darkest aspect of the history of this nation" and "until there is an acknowledgment of, and retreat from, those past injustices" "the nation as whole must remain diminished" (*Ibid.*:82)?

Irrespective of whether one concurs with the stance of the Court, in regard to the separation of powers issue, the decision remains seminal in

the area of Indigenous rights in land. It is, therefore, important to examine some of the key legal issues raised by *Mabo (No 2)* such as: the *terra nullius* doctrine, sovereignty of the Crown and absolute beneficial ownership; Aboriginal sovereignty; the source and nature of Native title; extinguishment; and the *Native Title Act*.

Terra Nullius

According to Blackstone's commentaries three methods of acquisition were available to colonisers. He said:

Plantations, or colonies in distant countries, are either such where the lands are claimed by right of occupancy, 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 (Blackstone, 1793(I):107-108; Maddock, 1983:9).

To be colonised on the basis of occupancy or settlement as it came to be called, a nation had to be unoccupied ie *terra nullius*. From a strictly evidentiary point of view Australia could not be classified as such. Sir Joseph Banks, the botanist, reported in his journal that the east coast of Australia was "thinly inhabited even to admiration" (Reynolds, 1987:31). That is, he observed a Native population, albeit a small one. Yet, mistakenly and rather illogically he went on to assert that "we may have liberty to conjecture that [the country] is totally uninhabited" (*Ibid.*).

His conjecture was according to anthropological and historical evidence incorrect. However, Australia was accorded the status *terra nullius* and, therefore, could be regarded as having been acquired by virtue of occupation or settlement. This, in turn, had implications for which law would apply in the colony. Again according to Blackstone

if an uninhabited country be discovered and planted by English subjects, all the English laws are there immediately in force. For as the law is the birthright of every subject, so wherever they go they carry their laws with them. But in conquered or ceded countries, that have already laws of their own, the King may alter and change those laws; but, till he does actually change them, the ancient laws of the Kingdom remain (Blackstone, 1793(I):107-108).

How could Australia have been both thinly inhabited and at the same time its soil void of inhabitants? The answer to that question would appear to be strongly dependent on a racist analysis of Aboriginal people which categorised them as insufficiently significant to be counted.

By revisiting Blackstone's words, "desert and uncultivated", the Privy Council in *Cooper v. Stuart* ([1889] 14 App Cas 286) was able to expand the doctrine of *terra nullius* (*Ibid.*:291). It re-interpreted "'desert and uncultivated" to mean "practically unoccupied" and in so doing characterised Aboriginal people as physically present but legally insignificant and immaterial. If they did not legally exist it also followed that they could not have any customary or Native law by which they lived.

By the time Blackburn J decided *Milirrpum v. Nabalco* in 1971 ([1971] 17 FLR 141) there was a growing awareness and acceptance of not only the long term existence of Aboriginal communities but of an established system of law. No longer could those realities be denied and no longer could judicial officers retreat behind the phrase "practically unoccupied". Faced with the logically irreconcilable polarities of factual reality on one hand, and legal precedent on the other, Blackburn J was left in the invidious position of having to perform legal contortions. He finally found that the rights demonstrated by the Yolngu had insufficient indicia of recognised proprietary interests to be termed "proprietary". Yet despite this temporary reprieve for those seeking to avoid the crucial question surrounding acquisition there was no escaping that even the expanded notion of *terra nullius* was pathetically inadequate to explain the acquisition of Australia.

It is, therefore, fascinating to observe Gibbs J's judgment in *Coe v. Commonwealth*¹⁸ where he sought to reconcile legal (as per *Milirrpum v. Nabalco* [(1971) 17 FLR 141]) historical and anthropological evidence with the legal precedent of *terra nullius*, by further expanding the doctrine, arguing that settlement or occupation could occur "in a territory which, by European standards, had no civilised inhabitants or settled law" ([1979] 24 ALR 118:129). In the light of international law where the doctrine of *terra nullius* was shrinking, Gibbs J's judgment was both curious and timid.¹⁹

By the time the issue of *terra nullius* was raised again in *Mabo (No 2)*, the question really became was its rejection radical or inevitable?

Could the court resist squarely facing and displacing the *terra nullius* issue any longer? It found it could not. Such a response was radical in a strictly legal sense. Precedent is the stable, reassuring hand-rail of the common law, and here it was being wrenched out of the wall. Yet the decision to overturn precedent cannot be regarded by serious commentators as totally unexpected. Nor can it from a contextual perspective, which takes account of history, anthropology and politics, be regarded as surprising. Factual reality and legal precedent were on a serious collision course. Not to have reset the course would have been a failure to redress serious ontological issues. Further, it could have well brought the court into disrepute and may even have jeopardised the legitimacy of the Court's decisions.

The rejection of *terra nullius* did not, however, mean that the court was prepared to reexamine all aspects of law consequent on the mode of acquisition. Put simply, Australia's acquisition did not occur by virtue of settlement/occupation. Nor was there a treaty of cession. Therefore, by deduction, acquisition could only have occurred as a result of conquest but the Court was not prepared to overtly state this nor was it prepared to declare that the procedures relating to the reception of as much of the common law as was relevant to the circumstances, were legally inapplicable. (If acquisition were by conquest modern international law suggests that local law would continue until abrogated by the new sovereign or alternatively local law would continue if actively acknowledged by the new sovereign.) Instead, the Mason Court decided on a hybrid approach that acknowledged Australia was not occupied or settled but that the legal consequences appropriate to this mode of acquisition should remain untouched.²⁰ The Court's review of *terra nullius* was not carried to its logical conclusion. While the Court was not prepared to leave Australian jurisprudence "frozen in age of racial discrimination" (*Mabo [No 2]* CLR; Bartlett, 1993:28) it was also not prepared to take the logically necessary further step of review presumably because either it feared fracturing "the skeleton of principle which gives the body of our law its shape and internal consistency" (*Ibid.*:29) or because it was convinced that to revisit the consequences of the mode of acquisition (ie which law would apply—Aboriginal law or the common law) would make no practical difference.

Some legal scholarship goes as far as asserting that the over-turning of *terra nullius* itself, made no real difference to the issue of the recognition of Native title (Ritter, 1996:5). This argument suggests that whilst the rejection of *terra nullius* was emotionally and presumably symbolically significant, legally it was irrelevant because as the original colonists did not ever contemplate that Aboriginal people had any land rights, there was no necessity to find a doctrine, application of which, would permit the denial of land rights (*Ibid.*:6).

Such an interpretation is very generous towards the settlers because it removes issues of deliberate deprivation, malice or denial from the agenda. Instead it depicts Anglo occupiers as innocents, so propelled by their own cultural definitions, that they were unable to even contemplate that Aboriginal people had a system(s) of social organisation and interests in land. Certainly, it is true that Aboriginal peoples' association with the land was in many ways dissimilar from that of the occupier, but given historical accounts such as Lieutenant Bradley's in 1780 (quoted in Roberts, 1981:13) which demonstrates that Aboriginal people were upset, when the British took large amounts of fish from the waters, one cannot easily escape the suggestion

that Indigenous people directly demonstrated to the settlers how keen they were to protect their rights in fish, and more generally in the seas and streams.²¹ Hence from an evidentiary view it is somewhat difficult to accept this thesis.

Further given that in other parts of the world, the English acknowledged Indigenous rights in land by paying for the land (nb the English Puritans purchased land from the Indians, an act which was commended by Blackstone in 1860 and copied by William Penn in Pennsylvania) it is somewhat surprising that the English in Australia would have thought the situation to be so vastly different as to be unable even to entertain the notion of Aboriginal people having interests to protect.

Sovereignty

Whilst the Court found that Australia was not *terra nullius* in relation to issues of property it refused to apply this new conclusion to the issue of sovereignty; sovereignty being the over-arching right which allows countries to make laws (ie a jurisdictional matter involving international and constitutional law). Sovereignty denotes the "basic international legal status of a state that is not subject, within its territorial jurisdiction, to the governmental, executive, legislative, or judicial jurisdiction of a foreign state or to foreign land other than public international law" (Steinberger, 1987:408;414). The Court claimed that the question of the Crown's sovereignty was not justiciable. If the decision were truly radical it is arguable that sovereignty would have also been reviewed as an extension of the denial of the *terra nullius* doctrine.

The Court offered two main inter-linked reasons for finding sovereignty nonjusticiable. They were concerned with international law and the act of State doctrine. Sovereignty was proclaimed an animal of international law and, therefore, not justiciable in municipal courts. The act of State doctrine was relied upon to assert that the acquisition of territory is a prerogative of the Crown and is not reviewable by courts.

Similarly it can be noted that in Canada, although the *Royal Proclamation of 1763* (RSC 1985, App. 11(1):4-6) reserved to Indigenous people all land outside established colonies in North America and outside any grants to the Hudson's Bay Company, it still affirmed the view that sovereignty and legislative power, as well as underlying title to the lands vested in the Crown. Sovereignty was not justiciable (see, for example, *Calder et al. v. Attorney General of British Columbia* [1973] SCR 313 [SCC] per Judson J at 156; Hall J at 195, 208).

In response to dependence on the act of State doctrine in *Mabo* and in the context of the reconstruction of legal history some scholarship has

(correctly, I think) suggested that refuge in the doctrine might well come at the price of forfeiting moral authority and at the price of having courts act as "the passive instrumentalities of colonial rule" (Slattery, 1992:158-159). In that context the act of State doctrine has been described as "mischievous" and in need of modification (*Ibid.*).

It is perhaps not just the general dependence on the act of State doctrine that is questionable but the decision, in regard to the non-justiciability issue, arguably contains internal inconsistencies which lead to contradictions. For example, how can it be the case that on one hand, the act of State doctrine establishing a new Colony is unable to be challenged in municipal courts, but the question of whether the act of State establishing a Colony excluded what would otherwise be a rule of the common law, is able to be challenged? In those circumstances the domestic courts are able to determine whether as a matter of domestic law the act of State did have an extended operation (Bartlett, quoted in Hunter, 1993:100). Such inconsistency or ambivalence leads us to wonder if the application of the act of State doctrine was the result of a genuine commitment to it or a question of expedience. Perhaps the doctrine just conveniently blocked issues of domestic dependent nations and continued Aboriginal sovereignty being raised; notions which, if supported, in the Court's reasoning, might, on some analyses have shattered the skeleton of principle.

If, however, Australia were not *terra nullius* and the Aboriginal people whose presence the court acknowledged did have sovereignty,²² how did that sovereignty disappear when the judgment does not admit that conquest or cession occurred (a view shared by Reynolds, 1996:10)? It would seem that *Mabo (No 2)* has not really absorbed the view that Aboriginal sovereignty existed prior to 1788 although it has absorbed the view that there was indeed an Aboriginal community. How can these notions be reconciled? It would seem that this is only possible by positing that Aboriginal people were so unsophisticated that they were no more than savages and hence were incapable of exercising sovereignty. This, however, is inconsistent with the anthropological evidence (Maddock, 1983; Reynolds, 1996).

In this regard *Mabo (No 2)* appears judicially incomplete. It rejected *terra nullius* in relation to the ownership of land but not in regard to sovereignty. Accordingly, Australian law on Indigenous issues cannot be yet said to have reached the position of American law where in 1831 *The Cherokee Nation v. Georgia* ([1831] 5 Pet 1; 30 US 178) acknowledged the existence of Indian domestic dependent nations which exercised rights of self-government, their sovereignty having not been abrogated by the sovereignty of the United States government (see Reynolds, 1996).

It is difficult then to construe this aspect of the *Mabo (No 2)* decision as revolutionary or radical because it has attempted to preserve the *status quo* and failed to resolve the tension between justice and stability which surrounds the issue of sovereignty.

Indeed, shortly after *Mabo (No 2)* was handed down, some Aboriginal people called upon any future Federal Aboriginal Affairs Minister to take the step which *Mabo (No 2)* had failed to take. They sought a ministerial declaration that "the Aboriginal people are the rightful owners of this country and have an historical law that governed this country."²³ Such a step involved the assertion of Aboriginal sovereignty.

Not all Aboriginal people concur with this approach. Some Aboriginal activists, such as the lawyer Noel Pearson, have opted not to pursue the sovereignty issue (while not conceding it either), instead regarding preoccupation with it as hapless and arguing that negotiating key issues such as Indigenous land rights, compensation and jurisdictional rights is a pragmatic, and therefore more fruitful, exercise (Pearson, 1993 (30:61):14-17).

The Aboriginal Peace Plan which Aboriginal and Torres Strait Islander Social Justice Commissioner, Mick Dodson, and Pearson, helped formulate in the aftermath of *Mabo* also did not take up the issue of the justiciability of sovereignty. Whilst the Plan did not reject the acquisition of British Crown sovereignty, Dodson in his comments focused on the coexistence of unextinguished Native rights and those interests granted by the Crown.²⁴

Alternatively, Aboriginal lawyer Michael Mansell (1992:6) and the Aboriginal and Islander Legal Services Secretariat (Coe, quoted in Nettheim, 1993:229) have questioned British sovereignty over Australia and its relationship to asserted Aboriginal sovereignty. The cases of *Wacando v. Commonwealth and Queensland* ([1981] 148 CLR 1) and *Coe v. Commonwealth* ([1979] 24 ALR 118) unsuccessfully argued the question of sovereignty, yet still the issue emerges. The Coe-type argument alleged all of Australia was subject to Aboriginal sovereignty. This view, as discussed earlier, was forthrightly rejected by the court. A milder version of the Aboriginal sovereignty argument alleges, as per the US jurisprudence (e.g., *The Cherokee Nation v. Georgia* [1831] 30 US 178:5 Pet 1), that a subordinate form of Aboriginal sovereignty exercised by particular Indigenous nations exists within the broader boundary of British Crown sovereignty. (*R. v. Murrell* [(1836) Legge 72] unsuccessfully raised this approach in the criminal jurisdiction whereas *Bonjon* [Nettheim, 1993] accepted the proposition. See "Papers Relative to the Aborigines, Australian Colonies" 1844 British Parliamentary Papers, at 146ff).

It would seem then that the High Court in *Mabo (No 2)* was faced with an opportunity to further explore the issues of (a) the existence of Aboriginal

sovereignty and (b) its continuance and coexistence with Crown sovereignty, but the Court chose to close the door on the issue of the recognition of Aboriginal sovereignty (either limited or extended) because it feared fracturing the skeleton of principle to which Brennan J alluded.

One is left with the impression that not applying the denial of *terra nullius* and the concomitant anthropological evidence about the "civilised" nature of Aboriginal people, to the issue of sovereignty, has led to a sense of incompleteness, a sense of not having followed something through to its logical conclusion. The result may well be that the poor skeleton of principle now has a propensity to develop a touch of osteoporosis, if not to fracture completely, albeit for a different reason than that feared by Brennan J.

It is worth noting that even in the arena of international law, a body of law which is based on practice, and *opinio juris*—hardly the breeding ground for radicalism—there is an important place for self determination, a fundamental notion which is at the heart of Aboriginal sovereignty.

In Canada, too, there has been an important place for self determination. The Canadian experience demonstrated that an informed and on-going discussion and negotiation of the issue could be conducted successfully. Indeed the issue of self-government was raised as early as 1975 when the Dene Nation led the march in the assertion of Aboriginal nationhood in Canada (Zlotkin, 1984:4). The following year, Inuit Tapirisat, an organisation representing Inuit interests, continued the march by proposing a land claim settlement which included an Inuit-governed area known as "Nunavut" (*Ibid.*). Further, self-government became a key agenda item in the 1983 and 1984 Constitution Conferences. The then Prime Minister, Mr. Trudeau, in opening the Conferences, stated that Aboriginal governments would be permitted to take different forms in the various regions of Canada (*Ibid.*:10). Although absolute sovereignty was rejected a very positive tone regarding self-government was set at the conferences, and Aboriginal self government became the main issue (*Ibid.*:11). Further in the *Report of the House of Commons Special Committee on Indian Self-Government* (usually just called the Penner Report), a recommendation was made that: the federal government establish a new relationship with the Indian First Nations and that an essential element of this relationship be recognition of Indian self-government. In fact, the discussion around self-government continues today in Canada as the Gitsan—Wet suwet'en peoples continue to couch their claim in terms of a right to self-government. Paragraph F of the recitals of the 1995 agreement between the Wet suwet'en and Her Majesty the Queen in right of Canada asserts that the Wet suwet'en govern themselves and have always governed themselves pursuant to their inherent right of self-government.²⁵ The debate and

negotiation, although at times heated, continues without the very fabric of Canadian society being harmed.

Perhaps the Charter of the United Nations and the International Covenant on Civil and Political Rights, together with the International Covenant on Economic, Social and Cultural Rights, provide some hope for those seeking to uphold self determination. They all state that "All peoples have the right of self determination" (Nettheim discusses this, 1993:232). Interestingly—and perhaps surprisingly given other aspects of *Mabo (No 2)*—limited forms of self determination have already been incorporated into the decision. For example, self determination is inherent in the way the Court has decided Native title is to be defined. This aspect of the decision will be discussed a little later.

Sovereignty and Absolute Beneficial Ownership/Radical Title

Historically, Australian case law relied on the notion that sovereignty and absolute beneficial ownership of the land travelled in tandem. It was believed that when a colonising nation acquired sovereignty it also acquired absolute beneficial ownership of the land. The sovereign was the ultimate owner of the land and s/he therefore had the ultimate power to govern that land (McNeil, 1989:108). According to the doctrine of tenure feudal lords and others held their estate "of" the Crown in return for the fulfilment of feudal dues.

Despite the differences in the post feudal age of land holding patterns in both England and Australia, land in each country could be granted or leased by the Crown while at the same time persons could acquire proprietorship of it (Edgeworth, 1994:397). That is to say, in practical terms, sovereignty and proprietorship were capable of being seen as two distinct legal concepts.

The Court in *Mabo (No 2)* teased out this separation. It found that sovereignty did give rise to an ultimate or radical title but that sovereignty did not automatically give rise to absolute beneficial ownership. If there were no other proprietors of the land, the Crown could acquire absolute beneficial ownership but where Indigenous people had rights in land independent of Crown grants, their rights continued to coexist alongside the common law interests in land of the colonisers which had been created by the Crown. To find otherwise, would have deprived Aboriginal people of their cultural, religious and spiritual lifeblood.

On this analysis sovereignty and proprietorship were separated and "radical title" did not conflict with Native title. Radical title was the tool by which the doctrine of tenure (albeit arguably in a different form from the English version) could be transposed into the Australian system. Radical

title provided the framework and mechanisms so land could be held "of the Crown".

Mabo (No 2) attributed to the Crown a radical title, that is something less than absolute ownership of land, and it was this form of title that allowed persons to hold immediately (or mediately) of the Crown. By relying on the existence of "radical title" the Court could permit the Crown to remain the source of derivative titles which had been granted since settlement/invasion without denying a place for Native title. Further by allowing the degree of beneficial ownership to be determined by the amount of Native title still in existence, the Court was left with an expanding and contracting phenomenon which could be conveniently applied.²⁶ (Only when there was no Native title in existence would radical title support absolute beneficial ownership by the Crown.)

Was such an approach to radical title, radical? The initial response to this is affirmative because sovereignty and absolute beneficial ownership seemed so comfortably fused and it appeared creative to assert that radical title was a concomitant of sovereignty rather than asserting absolute beneficial ownership was a concomitant of sovereignty. However, consideration of cases such as *Amodu Tijani v. Secretary, Southern Nigeria* ([1921] 2 AC 399) and consideration of the *dominium directum* (ultimate property) as discussed by Blackstone and Coke²⁷ suggest that the concept of radical title rather than absolute beneficial ownership being concomitant on sovereignty was not particularly startling. Certainly it was not new. Unfortunately, a detailed discussion of this point is beyond the scope of this paper.

Source of Native Title

The source of Native title is the Aboriginal peoples' occupancy of and/or connection with the land. According to Toohey J, physical presence is required and that physical presence must be connected with the Indigenous society's economic, cultural or religious existence. Further use of the land must be meaningful and use must have pre-dated the acquisition of sovereignty by the Crown.

Occupation is not regarded as synonymous with possession at common law. Further, the physical attributes of the land could mean that it is sparsely occupied. The Court, according to Toohey J, also held that a nomadic lifestyle would not necessarily preclude a finding of occupancy, while Brennan J held that occupancy or connection needed to be related to a community or society's system of laws and customs. He coined the phrase "traditional connection" but the requirement of physical presence is not

raised in his nine point summary of the judgement. Deane and Gaudron JJ spoke of "occupation or use."

Interestingly, Aboriginal people themselves do not require physical presence in order to be connected to the land. Aboriginal people cannot conceive of the land being unowned even if the traditional owners are not physically present on the land (Gregory, 1995:20). Anthropologists have even recorded how rights have been asserted and ceremonies performed at a distance (Gregory [1995:20] quotes Palmer, 1983:175). Hence what we observe is the common law suggesting that Native title may be extinguished if the traditional owners leave the land and are not physically present, but Native law itself does not recognise the lack of physical presence as being sufficient to sever connection and ties with the land (*Ibid.*). Given Australia's history it is perhaps not surprising that to date such a clash has been resolved in favour of the common law, yet this resolution does not sit comfortably with the Brennan J's words:

Native title has its *origins in* and is given its content by the *traditional laws* acknowledged by and the traditional customs observed by the [I]ndigenous inhabitants of a territory (*Mabo [No 2]* CLR, 1992:58; Bartlett, 1993:42).

Further, given that the Court expresses concern about Aboriginal dispossession, describing the process as "the darkest aspect of the history of this nation" (*Mabo [No 2]* CLR, 1992:109 [per Gaudron J]; Bartlett, 1993:82 [per Gaudron J]) and claiming that "although our law is the prisoner of its history, it is not now bound by decisions of courts in the hierarchy of an Empire then concerned with the development of the colonies" (*Mabo [No 2]* CLR:29 [per Brennan; Bartlett, 1993:18 [per Brennan J]) it is somewhat bewildering that the Court (per Brennan J) is prepared to say "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" (*Mabo [No 2]* CLR:60; Bartlett, 1993:43). Disturbingly, such a conclusion does not seem to take account of the historical role of non-Indigenous people and laws in contributing to the loss of the foundation of Native title. Those Aboriginal people who were physically removed from their land, by the assimilationist policies of the 1950s and 1960s²⁸ face double hardship as a result. Firstly they suffered the trauma of separation and then under *Mabo (No 2)*, their imposed separation may be used to preclude a claim based on continuing connection with the land.

This unfortunate result would appear to be the case unless Toohey J's reference to presence amounting to occupation can be construed as the need for traditional occupation at the time of annexation and thereafter a continuing connection but not necessarily a physical one.²⁹ One of the

benefits of this latter interpretation lies in its ability to logically avoid the extinguishment of Native title by virtue of changing traditional customs and law.³⁰ (These issues will be considered more closely in the section on Extinguishment.)

Nature of Native Title

Although potential claimants of Native title need to be able to demonstrate an on-going occupation, use or connection with land they also need to demonstrate that the society from which they are descendant had a set of traditional customs and laws.³¹ Without these customs and laws there is no basis for the title and further there is no definition of the nature of that title, it being defined by reference to those laws and customs (*Mabo [No 2]* CLR:88; Bartlett, 1993:65). We can observe that the definition then is fluid and determined by the application of customs in their contemporary form.

As laws and customs can vary between groups it is necessary to focus on the customs and laws of the various Aboriginal groups to decide what represents Native title at any given time (*Ibid.*).

In regard to whether individuals or communities can hold Native title interests, Deane and Gaudron JJ held that

[Native title] may be an entitlement of an individual through his or her family, band or tribe, to a limited or special use of the land and distinctions between ownership, possession and use are all but unknown. In contrast, it may be a community title which is practically "equivalent to full ownership" (*Ibid.*:65).

Further they held that

The title preserves entitlement to use or enjoyment under the traditional law or customs of the relevant territory or locality, the content of the rights and the identity of those entitled to enjoy them must be ascertained by reference to that traditional law or custom (*Ibid.*:83).

Unlike common law proprietary rights which need to be vested in a person or corporation, Native title vests in the whole community and constituents of that community are determined in accordance with customary law. Naturally as some members die and others are born the community changes. This aspect of the decision, therefore, relies on a form of self-governance, which in turn suggests that the decision at least in this area, has gone beyond the hide-bound approach demonstrated towards Indigenous people, by local officials, administrators and the judiciary in earlier times.

Rather than containing them within the known categories of the common law the preferred way of recognising Native title rights is as *sui generis*.

They may reflect aspects of established common law rights, however, they are not "of" the common law. They are nevertheless, recognised by the common law. Native title rights are grounded in traditional use of the land but common law interests in land, at least theoretically, are the result of Crown grants and are, therefore, held "of" the Crown.

In being defined by and dependent on traditional use, it is suggested that Native title intrinsically involves some degree of self-determination on the part of the Aboriginal community. Not only does the Aboriginal community (rather than the dominant non-Aboriginal community) determine customs, practices and laws but it is also responsible for when and how these customs, practices and laws change, thus preventing Native title from remaining static.

Although perhaps this is a restricted form of the concept of self-determination it can be conceived of as a somewhat radical approach to the issue of Aboriginal interests in land, given Australia's bleak history of Aboriginal relations; a history which as stated previously permitted/encouraged the forced removal of Indigenous children from their parents and involved the denial, until 1967, of Aboriginal enfranchisement.

Dawson J (CLR:136; Bartlett, 1993:104) in dissent, found that Native title created "a right of occupancy" (*Tee-Hit-Ton Indians v. US* [1995] 348 US 272 at 279). Mason CJ and McHugh J (CLR:15; Bartlett, 1993:7) held that in some circumstances Native title rights may be proprietary but that they could simultaneously accommodate "a personal and usufructuary right" (*St Catherine's Milling Co v. The Queen* [1888] 14 AC 46 at 54 [PC]). Deane and Gaudron JJ preferred to see them as rights of a personal nature which did not create any legal or equitable interest in the land. Thus Native title bore some resemblance to a "mere equity" mere equities giving rise to a kind of entitlement to use or occupy the land of another (*Mabo [No 2]* CLR:88-89; Bartlett, 1993:66). At first blush the failure to characterise Native title as a right giving rise to fully fledged proprietary interests might appear to create something of a lesser right, however it should be noted, that the usual imperative for characterising a right as personal or proprietary, for example, was rendered much less significant in the context of Native title. This is so because the realm of enforceability of the right was not held to be dependent on its characterisation. The judgment itself spelled out the sphere of enforceability and therefore made that enforceability independent of whether the interest is characterised as contractual and therefore *prima facie*, restricted by the "privity" doctrine, or is characterised as proprietary and therefore enforceable against the world at large. Instead, the Court detailed the basis of the right's enforceability and held Native title could be protected by both legal and equitable remedies.

In considering what would constitute Native title, the Court looked to international legal authority. It suggested that the right to use land for food by hunting, fishing and gathering had long been accepted as an exercise of Native title. In particular, the important Canadian authority on Native title, *Calder v. Attorney-General of British Columbia* ([1973] SCR 313) referred to "a right to occupy the lands and to enjoy the fruits of the soil, the forest and of the rivers and streams". The Privy Council in *St Catherine's Milling and Lumber Co v. The Queen* ([1889]14 AC 46) also referred to a right "to the fruits and produce of the lands and to hunt and fish thereon". Deane and Gaudron JJ affirmed these cases while Brennan J relied on *Amodu Tijani v. Secretary, Southern Nigeria* ([1912] 2 AC 399:403, 404, 407) which refers to a "communal usufructuary occupation" which could effectively burden radical title, to the extent that it left the sovereign with only limited rights of administrative interference. This interpretation allowed radical title to be construed as potentially akin to full ownership.

Hence Native title rights were created relative to, and by reference to, use of the land, and whilst the Court (as per Brennan J) found it was

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 land remains

a translation of these words has proved difficult. We are left a little uncertain as to how radical Brennan J's words actually are. Would for example, the commercial mining of ochre, a substance used traditionally, be regarded by the Court as a case of laws and customs having undergone some change but as having retained the general nature of connection?

At this stage there appears to be little Australian jurisprudence on this issue and we have been left to seek the guidance of overseas decisions such as *Delagamuuku v. Queen* ([1993] 5 WWR 97) which takes quite a restrictive approach; denying mining rights and commercial trapping (and presumably logging) on the basis that they are post annexation activities. Activities can be modernised over time says *Delagamuuku* but new, post annexation activities will not give rise to Native title rights. Such an approach would appear to create the same sorts of difficulties as does the repair/replacement tension in a leasing context. When is an act a modification or a repair and when is it something new altogether?

Further, the recent Canadian case *R. v. Van der Peet* ([1996] SCJ No 77) which restricted Aboriginal rights to those practices, customs and activities integral to a distinctive culture of an Aboriginal people prior to European contact, does not offer very liberal guidance to the Australian

courts. Restricting the right to connection with a precontact activity severely limits the value of the right.

If Australia chose to follow a restrictive approach limiting Native title by defining it by reference to an exercise of traditional customs and laws perhaps the nation could be accused of further promoting Aboriginal oppression, because the effect would be that Aboriginal people had either the choice of moving into the commercial arena but losing the basis of what could make that transition effective (ie the commodities—ochre, trees, etc on the land) or alternatively having their Native title interests upheld only to find themselves trapped by customs, laws and patterns which were not necessarily compatible with coexistence in a developed late 20th century nation, such as Australia.

Yet such concerns might well prove irrelevant if Australian jurisprudence chooses to take a more liberal approach on this issue than the approach taken in the Canadian cases here cited. However, neither Australian case law nor the *Native Title Act* ([1993] Cth, which commenced operation on 1 January 1994) yet offers much assistance.

Irrespective of the Court's attitude to commercial exploitation of resources and the effect that such exploitation would have on the maintenance of connection, there is another significant limitation placed on the nature of Native title and that is, the denial of the characteristic of free alienability outside the group.³² It would seem that this characteristic remains applicable even if Aboriginal law itself permitted such an act. Hence, the limitation on alienability could act as a limitation on the self-governance aspect of the decision.

By comparison and perhaps tangentially, in present day Canada it is unlikely that any Aboriginal legal system would permit the alienation of land, however, historically Canadian land was often acquired by virtue of treaties, i.e. alienated pursuant to an agreement. In this context the issue of alienation takes on a very interesting tenor. If Indigenous people have no traditional concept of land ownership, but rather see their association with the land as caretakers, who were responsible for its well-being, to what were the treaties agreeing? Certainly not "sale". Aboriginal people could hardly have been "selling" or "relinquishing" ownership. Perhaps they were merely agreeing to "share" the role of caretakers.

Historically, and perhaps even ironically the restriction's original aim, it has been said, was to prevent private citizens from directly purchasing land from Indigenous owners, as Batman tried to do in Victoria, thus protecting Aboriginal people from bargaining away their land without gaining adequate consideration or compensation. That is perhaps why some scholarship

suggests that the restriction on free alienability outside the group developed more as a matter of policy than as a legal principle (McNeil, 1989:221; 235).

The inalienability phenomenon is clearly not unknown. Indeed statutory title under Aboriginal land rights legislation is usually inalienable. The *Aboriginal Land Rights (Northern Territory) Act 1996* (Cth) is an example, it having employed the concept, (in s.19(1)), on the basis of strong Aboriginal submissions favouring a special form of inalienable freehold title. That Act provided that lesser forms of title (eg leases and licences) could be carved out of the inalienable statutory freehold title and could be granted by a Land Trust, at the direction of a Land Council, provided there was appropriate consultation, Indigenous consent and usually Ministerial consent, as well.

Despite its common acceptance, the inalienability of the interest has meant that it cannot be sold for profit, and this in turn, raises the issue of whether it, therefore, could be said to constitute an inferior right compared with a common law proprietary right. One is left to ask does the lack of free alienability smack of paternalism because ultimately it together with restrictions on the way the land is used, lock Indigenous people into customary (perhaps substitute "primitive"—depending on the resolution of the extent of change in customs that is tolerated) ways? For example, if Indigenous people either via self determination or otherwise attempted to internalise the paradigms of non-Indigenous Australians by becoming entrepreneurial and alienating their land with a view to profit making, the transactions would most probably be construed, in terms of *nemo dat quod non habet*. Native title cannot be transferred to non-members; it can only be surrendered to the Crown.

Extinguishment

In Canada, British colonialism in the guise of the *Royal Proclamation of 1763* (RSC 1985, App. 11, No 1) discussed the alienation and extinguishment of Aboriginal rights. In Australia, the issue was not spelled out until 1992 because the rights themselves were unrecognised until that time. In Australia, the Court held that Native title could be extinguished by: a valid exercise of legislative or executive power evidencing a clear or plain intention;³³ a loss of connection with the land; a failure to acknowledge customary laws; the death of the last member in the Indigenous community holding Native title or surrender of the interest to the Crown. The objectives behind these methods of extinguishment were to affect a compromise between Indigenous interests and non-Indigenous interests. At times that compromise seems heavily weighted in terms of pragmatism and expediency rather than fairness.³⁴ Much discourse surrounding extinguishment

seems to take have accepted an uneven playing field—and hence its outcomes are capable of being seen as repugnant or at least unpalatable. For example, in few areas of property law is an on-going connection with the land significant in the maintenance of that very interest. The law relating to adverse possession could perhaps be considered one of these areas. In the state of New South Wales, an owner has twelve years to bring an action to recover possession and prevent forfeiture of his/her title to the land in circumstances where another's possession of the land is "open, not secret"; peaceful, not by force; and adverse (*Mulcahy v. Curramore Pty Ltd* [1974] 2 NSWLR 464-475 per Bowen CJ in Eq). Hence the re-taking of possession within a twelve year period is sufficient to rekindle the owner's interest, at the expense of the adverse possessor. Yet in the context of Native title, once a connection with the land has been lost, by virtue of the abandonment of customs, laws and practices or use, it cannot be resuscitated. It is dead and gone forever. This seems to suggest a significant disparity between common law proprietary interests in land and Native title interests. One requires possession of no special nature whereas the other requires a connection which is inextricably linked to customs, beliefs and laws. One type of right therefore seems to permit a greater freedom in regard to the manner in which the land is used, than does the other. One type of right seems more onerous to retain than the other.

One might well ask why Indigenous people should be forced to satisfy the burdensome requirement of perpetual demonstration that an on-going (albeit naturally evolving or changing) connection continues to exist? Would not recognition of pre-existing Indigenous rights to the land which endured long after the original or even, altered, connection creating those rights was lost, coupled with a freedom of alienation, have resulted in fuller and more valuable rights in land? Perhaps it is possible that an affirmation of this view was not pursued because the Court sought to temper a truly equitable result by reference to expediency, which in turn sought to ensure Native title did not impinge too severely on the rights of the colonisers. The outcome then was a compromise premised on the unequal bargaining power of the two parties concerned as well as on a view that in any final showdown one party's rights are intrinsically more deserving of protection than the other's.

In regard to extinguishment by loss of connection with the land, Brennan J held that

since European settlement in Australia, many clans or groups of Indigenous people have been physically separated from their traditional land and have lost their connection with it (*Mabo [No 2]* CLR; Bartlett, 1993:43).

Yet his judgment did not go on to create exceptions or offer compensation if the invaders'/settlers' political, social and economic policies were responsible for that loss of connection or the washing away of traditional law. Hence Aboriginal people, compulsorily removed from their land and placed in institutions or on Reserves away from their own spiritual places, lost connection with the land and hence lost Native title. Meanwhile non-Aboriginal people compulsorily removed from their land for periods of incarceration no longer find their property escheats to the Crown and nor do soldiers in war time, compulsorily removed from the land to fight elsewhere, find they have automatically lost all rights to and interests in their land on their return. In this respect *Mabo (No 2)* would appear neither bold nor radical because it attempts to acknowledge rights but in the same breath it attempts to contain, limit and "neutralise" them.³⁵

Further there is an arguable tension between any professed intention of wishing to protect Aboriginal interests in land for future generations by construing it inalienable, and at the same time, allowing interests in land to be so readily extinguished by acts and circumstances which are not applicable to common law interests. Such a tension again raises issues concerning the point at which such disparate objectives and the Court's difficulty in reconciling them, will cause the legitimacy of judicial decision-making to come under review.

Another significant method of extinguishment other than loss of connection with the land by physical separation or abandonment of traditions and customs is, as previously mentioned, by a valid exercise of sovereign power. This means that if the Crown, at any time, has dealt with land in a manner that is inconsistent with the maintenance of Native title, then Native title is extinguished. Brennan J, places a restriction on this exercise of sovereign power to extinguish when he says it

must reveal a clear and plain intention to do so, whether the action be taken by the Legislature or by the Executive (*Mabo [No 2]* CLR 1992:64; Bartlett, 1993:46).

He suggests it is necessary to demonstrate a "clear and plain intention" as opposed to intention to merely regulate the enjoyment of Native title, because of "the seriousness of the consequences to [I]ndigenous inhabitants of extinguishing their traditional rights and interests in land" (*Mabo [No 2]* CLR 1992:64; Bartlett, 1993:46). Similar limitations have been placed on extinguishment by this method in both Canada (*Calder v. Attorney-General of British Columbia* [1973] SCR 313:404; [1973] 34 DLR (3rd) at 145:210; *R. v. Sparrow* [1990] 1 SCR 1075 at 1094) and New Zealand (*T Weehi v. Regional Fisheries Officer* [1986] 1 NZLR 680 at 691-692).

Yet again there seems to be some tension, perhaps even inconsistency, between the Court's concern to *protect* Indigenous rights in land by introducing safeguards that prevent a thoughtless or general exercise of sovereign power resulting in the serious consequence of extinguishment, and the overt right of the Crown to actually extinguish Aboriginal interests. On one hand the Court emphasises the importance, gravity and value of Native title by requiring "a clear and plain intention" and by affirming that any assumption that Native title should be recognised and protected was to be seen as a "guiding principle" of the law according with fundamental notions of justice (*Mabo [No 2]* CLR:82; Bartlett, 1993:61). Hence the protection of Native title is elevated to the preservation of a moral right, but on the other hand the Court simultaneously holds that this moral right can be extinguished by a "valid" exercise of sovereign power. One is led to ask what exercise of sovereign power to extinguish could be regarded as valid? How is it possible to *validly* extinguish a moral right when Deane and Gaudron JJ even state that if the Crown made an "unqualified grant of inconsistent estate" or if it reserved or dedicated land for some inconsistent public purpose or use, Native title would be extinguished and

the Crown would have infringed the legal rights of traditional inhabitants and would have acted *wrongfully*.³⁶

What it appears is being suggested, is that wrongful acts (although not giving rise to compensation) which have infringed highly prized and valued rights (which can be regarded as having been elevated to the position of moral rights) can be legitimised if the "wrongful" act is not *ultra vires*. Should there be an exercise of legislative power which is authorised by constitutional authority along with a demonstration of a clear intention then the "wrongful" act extinguishing the moral right can be sanctioned.

If this is the case one is led to conclude that such jurisprudence resonates with ambivalence and expediency. The message which such an analysis reinforces is that if the legislation for example, does not breach Constitutional requirements and has been passed by Parliament the Court will validate an otherwise "wrongful", or reprehensible act—(ie the extinguishment of a moral right).³⁷ Further such an exercise of sovereign power according to the majority of the Court, did not give rise to compensation, whereas an exercise of power pursuant to s.51(xxx) of the Australian Constitution provides that the Commonwealth Parliament has the power to make laws with respect to "the acquisition of property on *just terms* from any State or person for any purpose in respect of which Parliament has power to make laws."³⁸ Hence Commonwealth confiscation, supported by a clear and plain intention, to extinguish will give rise to compensation, in regard to ordinary property rights but Native title "confiscation" will not.

Although many Indigenous people believe no amount of money could ever compensate the loss they have suffered it would seem somewhat unfair to deny them the opportunity altogether for monetary compensation. As in other areas of the law, eg pain and suffering in personal injury cases, compensation can never be commensurate with the loss suffered. The loss suffered is immeasurable in monetary terms but given that there appears to be few other methods available to redress the wrong such a method should not be totally denied.

How far the Court is prepared to press the issue of extinguishment by an exercise of executive power rather than by legislative power, was litigated in the *Wik* case,³⁹ where one of the key issues was whether the granting of a pastoral lease would extinguish Native title. Although common law leases confer exclusive possession, the majority in *Wik* found that a pastoral lease was *sui generis* and hence the granting of it did not automatically extinguish Native title. It is possible for Native title and pastoral leases to co-exist. Given that approximately 42.1% of the Australian land mass is held under Crown leaseholds (which are mainly pastoral) a lot rested on the outcome of this decision.⁴⁰

In regard to the surrender aspect of extinguishment, the Canadian experience suggests that Indigenous people regret having surrendered significant land to the Crown, in order to facilitate the negotiation of broader land claims. Surrender has been used as a trade off for the recognition of other and different interests in land and it is now felt that the price has been too high (Royal Commission on Aboriginal Peoples, 1995, 1(1) AILR 102). Such a trend of negotiated agreements is, however, gaining favour in Australia, eg the Mount Todd agreement⁴¹ in which the Jawoyn agreed to surrender Native title rights, over an area which Zapopan NL sought to mine, in return for freehold title over nearby areas.⁴² While one line of argument suggests that self-governance is to be encouraged in this sphere like all others, and if money is wasted and interests are lost, so be it (non-Indigenous politicians and bureaucrats as well as others mismanage already), another line of argument suggests that this approach is only reasonable if Indigenous and non-Indigenous people begin at an equal starting point or if there are in built safety nets to assist "learner" negotiators. Otherwise, what is framed as self-governance merely translates into another exercise in the exploitation of Aboriginal people. It takes advantage of lesser developed bargaining and negotiating skills and results in further marginalisation for Aboriginal people.

Native Title Act

Following the handing down of the *Mabo(2)* decision, Native title legislation was passed. It finally took the form of the *Native Title Act* (Cth) 1993—(hereafter the NTA). Such legislation was considered necessary by non-Indigenous Australians in order to validate grants made and actions taken without reference to the existence of Native title. For example, if a fiduciary duty had been breached by the Crown when it granted interests in land or if grants of leasehold or freehold etc. offended the *Racial Discrimination Act* 1975 (hereafter RDA) those grants were probably invalid. Hence non-Indigenous Australians felt it necessary to protect their interests through title validation. They also favoured the introduction of legislation because they thought there was a need for a secure process for future dealings and a means of establishing with certainty and without constant litigation, whether or not land would be the subject of Native title.

Aboriginal people, on the other hand were more content to rely on the judgment itself as establishing when and if Native title existed in regard to specific areas of land. Presumably if there were disagreements resolution would have been sought through mediation or the Courts.

Although space here does not permit detailed discussion an interesting comparison can be drawn between the NTA with the *Canadian Constitution Act* 1982 (enacted by the *Canada Act*, 1982 [U.K.]). For example, each impacts on the issue of extinguishment. In Canada, section 35 means that the state's ability to extinguish Aboriginal rights is subject to constitutional (which can nevertheless be whittled away) constraints because in the words of the provision "existing Aboriginal and treaty rights of the Aboriginal peoples of Canada "are... recognised and affirmed". However, in Australia, no constitutional protection is afforded and the NTA spells out the categories of past and future acts which will extinguish Native title.

It is also beyond the scope of this paper to examine a broad range of the provisions which were eventually embodied in the NTA legislation. It is, however, worth highlighting that the NTA largely leaves the definition of Native title to the common law, which in turn left it in the hands of the relevant Indigenous groups. Hence on one level the legislation preserves some elements of self-governance and determination.

The Act also sets up mechanisms for establishing whether Native title exists. It creates a Native Title Registrar (ss.95-106) who maintains a Register of Native Title (ss.192-198) and a National Native Title Tribunal (NNTT) (ss.107) which makes determinations, while the Federal Court exercises jurisdiction under ss.80-92 of the Act.

It was intended that the Act deal with land claims in a less adversarial mode than litigation might, however, since *Brandy v. Human Rights and*

Equal Opportunity Commission ([1995] 127 ALR 1) doubt has been cast on whether the NTA processes which permit the registration of and enforcement of unopposed or agreed determinations made by the NTT, are valid. If they are not valid, and parties must invoke the jurisdiction of the Federal Court, surely one of the key reasons for developing Native title legislation disappears.

Of course, one of the other rationales for the legislation is satisfied by s.14 which validates past acts of the Commonwealth since the arbitrary date of 1/1/94 or before 1/7/93 in regard to legislation. If, however, parties must formally litigate over Native title rights, validation could perhaps be achieved by simpler legislation which does not attempt to set in place complex machinery for the resolution of rights.

In regard to the role of the States and Territories (of the Commonwealth) it is the case that land which is affected by Native title is also at risk of being made invalid by the operation of the RDA. Hence the NTA allows States and Territories to validate their past acts pursuant to s.19. States and Territories, however, can only rely on s.19 of the NTA to validate their past acts if those States' and Territories' legislation adopts the NTA's scheme governing when Native title is extinguished by past Acts. If a State or Territory's legislation purports to validate past acts without following the NTA's scheme then that validation can be rendered ineffective as contrary to the RDA.

Further inherent in the NTA is a right of Indigenous people to negotiate in various circumstances. It is this right which has been the subject of much recent discussion because the present government has mooted its abolition or at least its reduction.

The future of the NTA legislation is extremely uncertain at present. Criticism has come from many sources including the NTT's President, French J, from the Coalition government and some members of the Aboriginal community. Whatever its future, its statistical past is clear. No successful Native title claims have been lodged. As at 21 March, 1996, 216 Indigenous applications for Native title determinations had been lodged. Of these 67 had not been accepted; 135 had been accepted and were still with the NTT while four had been referred to the Federal Court and five had been rejected. A further five had been withdrawn.

Ninety-four non-claimant applications had been lodged for determinations that Native title does not exist. Of these, 53 had been accepted, five had not been accepted, 13 had been dismissed, 15 had been withdrawn and eight had been determined (Statistics for National Native Title Tribunal, *Timeline*, 21 March 1996).

To this point the great fear held by many non-Indigenous Australians that *Mabo (No 2)* would unleash a severe assault on the post 1788 pattern of land holdings has not been realised through the NTA.

Conclusion

In conclusion it is suggested that generally *Mabo (No 2)* is not a particularly radical decision although elements of it can be construed as radical in the Australian context, because they permit forms of self-determination and self-governance. For example, the source and definition of Native title are inextricably linked to the customs and law of the Indigenous group concerned. No attempt to impose a non-Indigenous definition of Native title has been employed but notably and perhaps ironically due deference has not been afforded to all Indigenous customs even in the context of the nature of Native title. There is the potential to override some customs. If, for example, an Indigenous group customarily disposed of property outside the group, the common law would override this right, asserting that Native title was inalienable outside the group. Hence such a conflict would appear to be resolved in favour of dominant non-Aboriginal common law. It is, therefore, in this light, somewhat difficult to perceive of the decision as being particularly radical.

Further, in regard to the issue of extinguishment, the requirement that an on-going connection with the land must remain for the maintenance of Native title, seems fairly onerous. It is not a requirement imposed (at least to the same extent) on non-Native title seekers. It is also not a requirement easily fulfilled given that political policies in Australia resulted in the forced removal of Aboriginal people from their land, and the destruction of Aboriginal sacred places. Further the spread of diseases and alcoholism led Aboriginal people to move away from spiritually significant places.

The fact that the *Native Title Act* ([Cth] 1993) which was a response to the decision, has generated no successful Native title claims leads one to conclude that the decision has not had very radical consequences. That, however, does not mean even from a liberal standpoint, that the decision is undeserving of praise. What the decision has done is put Aboriginal issues on the national agenda and paved a path for reconciliation, a path which former Prime Minister Keating alluded to in his Redfern address (quoted in McRae at p. 220). At this stage it is very uncertain how far this path of reconciliation will be trodden by his successor, Prime Minister Howard.

Notes

1. (1992) 175 CLR 1; see Bartlett (1993) for a commentary and full text of the decision. The case is called *Mabo (No 2)* cf *Mabo v. State of Queensland (No 1)* [1988] 83 ALR 14.
2. To name but a few institutions where *Mabo (No 2)* is included in courses: Osgoode Hall (York University); the University of Ottawa; the University of Saskatchewan; the University of Alberta and the University of British Columbia. The case also receives considerable treatment in the newest edition of Ziff (1996).
3. *The Aboriginal Land Rights (Northern Territory) Act 1976* (Cth); *The Pitjantjatjara Land Rights Act 1981* (SA); *The Maralinga Tjarutja Land Rights Act (1984)* (SA); *The Aboriginal Land Trusts Act 1966* (SA); *The Aboriginal Land Rights Act (1983)* (NSW); *Land Act 1962* (Qld); *Local Government (Aboriginal Lands) Act 1978* (Qld); *Aboriginal Land Act 1991* (Qld); *Torres Strait Islander Land Act 1991* (Qld); *Land Act 1933* (WA); *The Aboriginal Affairs Planning Authority Act 1972* (WA).
4. *The Weekend Australian*, 10-11 June, 1993:3; *The Australian* 1 September, 1993:5; *The Sun Herald*, 13 June, 1996:19; *The Sunday Telegraph*, 20 June, 1996:2.
5. As cited by the December 10, 1992 Redfern Address of Paul Keating, then the Prime Minister. See *Land Rights News*, December 1992:2.
6. This is the view initially by Mansell, 1992:6.
7. Specific instructions to Cook from the Admiralty, issued in 1768 (McRae, Nettheim and Beacroft, 1991:10). The irony of the juxtaposition of the words "consent" and "take" seems to have escaped the Admiralty.
8. See Arthur Phillip's instructions quoted in Britain, 1989:481; 483; 485 and 486. "You are to endeavour, by every possible means, to open an intercourse with the natives, and to conciliate their affections, enjoining all our subjects to live in amity and kindness with them. And if any of our subjects shall wantonly destroy them, or given them any unnecessary interruption in the exerciser of their several occupations, it is our will and pleasure that you do cause such offenders to be brought to punishment according to the degree of the offence."
9. From the anthropological evidence put forward by A. E. Woodward, QC. Counsel for the plaintiffs in *Milirrpum v. Nabalco* (1971) 17 FLR 141, 198.
10. Gipps to Glenelg, *Historical Records of Australia*, 19 December, 1838, Series I, Volume 19:701.

11. Roberts, 1981:13. Note that in 1861 Melbourne's non-Indigenous Aboriginal population numbered 540,000. For other accounts see Critchett (1990); Rowley (1970); Hasluck (1970); Ryan (1981).
12. In New South Wales *The Aboriginal Protection Act, 1909* (NSW) granted a Board power over Aboriginal children (Gumbert, 1984:18-20).
13. The validity of such actions was under review by the Human Rights Commission. Its Report into The Stolen Generation entitled *Bringing Them Home* was tabled in Federal Parliament on 27th May, 1997.
14. *Royal Commission into Aboriginal Deaths in Custody, 1989*, Commissioner Hal Wootten.
15. Formerly President of the New South Wales Court of Appeal and presently of the High Court of Australia.
16. Kirby, M., (then President of the Court of Appeal) SMH, 26 October, 1993, quoted in Coorey, 1993:87. *Trident General Insurance Co Ltd v. McNeice Bros Proprietary Ltd* (1988) 136 CLR 529; *McKinney v. The Queen* (1991) 171 CLR 468 are but two examples of the shift.
17. Sir Anthony Mason was the Chief Justice of the High Court of Australia when *Mabo (No 2)* was decided.
18. *Coe v. Commonwealth of Australia and the Government of the United Kingdom of Great Britain and Northern Ireland* (1979) 24 ALR 118. Note that Mason J in *Coe* refused the application on the ground that the claim was based upon vague or untenable claims.
19. In the *Western Sahara* case, the International Court of Justice in 1975 rejected the expanded versions of *terra nullius*.
20. Simpson, 1993 (19):195 shares the author's concern that the High Court by-passed an opportunity to review the jurisprudence comprehensively, electing instead to follow a piece-meal approach.
21. If the British had applied the common law to the situation they might have construed themselves as purportedly exercising a *profit a prendre* and Aboriginal people as denying that a profit had been granted.
22. Blackburn J in *Milirrpum v. Nabalco* (1971) 17 FLR 141 and Murphy J in *Coe v. Commonwealth* (1979) 24 ALR 118 agreed that Aboriginal sovereignty existed before European occupation.
23. Recommendation of "Aboriginal Justice Issues" conference organised by the Australian Institute of Criminology, June 1992, quoted in Gray, 1993:39.
24. For a discussion of this see Rowse, 1993.

25. A framework agreement to negotiate a Treaty 1, 13th July, 1995, between the Wet suwet'en and The Queen. Internet reference: <http://www.tbc.gov.bc.ca/aaf/negotiat/tables/wesuwet/wetsuwet.htm>
26. Rogers (1995:183) analyses the nature of radical title similarly and further argues that no legal explanation was given by the Court for attribution of such title to the Crown, other than that there was no other owner. She then examines Brennan's J's discussion of the meaning of the term.
27. Rogers (1995:185) analyses radical title in the light of the views of "famous institutions of the past."
28. See Gumbert (1984:18-20) for a discussion of some of these policies. See also Cummings, 1990.
29. Mansell, 1993:171. Fortunately *Pareroultja v. Tickner* (1993) 4 FLR 32 and *Mason v. Tritton* (1994) 34 NSWLR 575 are cases dealing with Native title where the Court has tended to down-play the importance of physical presence.
30. This is the conclusion Toohey J wished to arrive at: *Mabo (No 2)* 175 CLR 1:192; Bartlett, 1993:150. *Pareroultja v. Tickner* (1993) 42 FLR 32:39, which was decided in a lower court, plays down the issue of physical presence.
31. *Milirrpum v. Nabalco* (1971) 17 FLR 141 demonstrated that the Aboriginal society in question, the Yonglu, had a complex system of laws and customs.
32. *Mabo (No 2)* 175 CLR 70; Bartlett, 1993:51. Note that Brennan (in Bartlett, 1993:42) recognises that Indigenous people could alienate land to strangers if it were a pre-sovereignty practice when he says "Unless there are pre-existing laws of a territory over which the Crown acquires sovereignty which provide for the alienation of interests in land to strangers, the rights and interests which constitute a [N]ative title can be possessed only by [I]ndigenous inhabitants." Given the anthropological evidence of Aboriginal peoples' associations with the land it is difficult to conceive of this being a practical concern.
33. McNeil (1996) in a draft paper for the Indigenous Law Reporter (14 February) notes that executive powers arise from two sources: a) Royal prerogative, and b) statutes authorizing members of the Executive to exercise executive powers for the purposes of legislation. He says the distinction between the two is not always clear, but it would seem delegated legislative powers involve "law-making functions 'instanced by rules, regulations, orders and other forms of

subordinate legislation' whereas executive powers are either political or administrative in nature, and 'range from the determination and implementation of matters of high policy to an extensive array of individual acts and decisions, such as placing government contracts, making grants, loans and compulsory purchase orders, and issuing permits and licences.'"

34. Bartlett (1995:282) among others seems to explore and share this view.
35. See Noel Pearson, an Aboriginal lawyer and former director of the Cape York Land Council, in his comments in a November, 1993 address to the Canberra Press Club, cited in Poynton, P., *Aboriginal Australia: Land Law and Culture* 1994.
36. *Mabo (No 2)* 175 CLR:94; Bartlett, 1993:70. This point is expounded in Hunter (1993:100).
37. *The State of Western Australia v. The Commonwealth* (1995) 128 ALR 1 (HC) is an example of litigation concerning legislative Acts extinguishing Native title. Here the High Court found the Western Australia Act, which attempted to extinguish Native title and replace it with a lesser form of statutory title was inconsistent with the Commonwealth Acts, namely the *Racial Discrimination Act* (1975 Cth) and the *Native Title Act* 1993. By virtue of s.109 of the Constitution, the Commonwealth Acts prevailed.
38. By contrast, if States, through legislation, confiscate/resume land, they are not liable to pay compensation.
39. *Wik Peoples v. State of Queensland & Ors* (1996) 141 ALR 129.
40. The Australian Surveying and Land Information Group's (AUSLIG) Land Tenure Map (1993) and AUSLIG figures, 1994.
41. For such a surrender of Native title in return for freehold title, see the section on the nature of Native title.
42. Indigenous Social Justice. Regional Agreements, Volume 2, Submission to the Commonwealth Parliament in the Social Justice Package from the Aboriginal and Torres Strait Islander Social Justice Commission (April, 1995).

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