

# A Note: *Eddie Mabo v the State of Queensland*

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## 1. Introduction

In *Eddie Mabo v the State of Queensland*<sup>1</sup> the High Court handed down a decision of wide-ranging significance. To establish its long term consequences may require considerable litigation, or perhaps federal legislative interpretation. The case is of enormous import to the future of Aboriginal land rights in Australia.<sup>2</sup> It also contains dicta by the justices of the High Court addressing the impact of European settlement in Australia. That settlement is not reviewed in terms of the various eighteenth and nineteenth century common and international law "fictions" which sanctioned the acquisition of sovereignty by European countries via their colonisation of many parts of the world. Settlement is defined in terms which attempt to accommodate contemporary understandings of the real consequences of the English occupation of Australia for the indigenous people, within the existing framework of the common law.

In the course of reconciling the concept of land tenure which has prevailed in Australia until this decision with the concept of native title, the judgments deal, inter alia, with fundamental tenets of property ownership, international law, administrative law, and equity, and implicitly pose constitutional issues which remain to be tested.

## 2. Background

Before the decision in *Mabo (No 2)* the position regarding land rights in Australia lagged significantly behind the progress made in other countries. The controversial decision of Blackburn J in *Milirrpum v Nabalco Pty Ltd and the Commonwealth of Australia*<sup>3</sup> was taken to represent the common law regarding native title. In that decision Blackburn J made erroneous<sup>4</sup> assumptions about the development at law of native title claims in the United States, New Zealand, Canada, and what amounted to a misplaced reliance on decisions of the Privy Council regarding African and Indian land title disputes involving indigenous citizens.<sup>5</sup> He concluded that a claim for native title was outside the

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1 *Mabo (No 2)* (1992) 66 ALJR 408 (hereafter *Mabo (No 2)*).

2 See, eg, "The Mabo Case", *Aboriginal L Bull Special Briefing Paper*, (1991) and Vols 56, 57 of the *Aboriginal L Bull*.

3 (1970) 17 FLR 141 (hereafter *Milirrpum*).

4 See the responses of the Canadian courts, as expressed for example in *Calder v Attorney-General of British Columbia* (1973) 34 DLR (3d) 145 SC where the decision was criticised.

5 Bartlett, R, "Aboriginal Land Claims at Common Law" (1983) 15 *UWALR* 293 provides a

common law of title to land in Australia. The High Court expressed reservations about this decision in *Coe v Commonwealth of Australia*<sup>6</sup> and made full use of the opportunity in *Mabo (No 2)* not only to correct the position expressed in *Milirrpum*, but to abandon the concept of *terra nullius* on which it was founded.

The concept of *terra nullius* enabled colonisers to apply the law of their home country to newly settled areas where there was not a system of law in place which was capable of recognition. Meaning literally "empty land", it avoided the technicalities required when territory was acquired by conquest or treaty. In these latter situations the laws of the territory, in force until sovereignty was acquired by the colonial power, were deemed to survive where they were not inconsistent with either the terms of the treaty ceding the territory, or the laws applied after conquest as and when circumstances required.

### 3. The Case

In May 1982, an action was commenced by five residents of the Murray Islands in Torres Strait in the original jurisdiction of the High Court seeking a declaration that, upon annexation to Australia, pre-existing land rights were not lost. The impetus for the action had come from the wish of the Murray Islanders, the Meriam people, not to participate in the Queensland land rights scheme, which consisted of the declaration of a deed of grant in trust for the residents of certain lands. Deeds of grant in trust, while conferring protection of their occupancy of land on many communities, are subject to regulation by the Minister and the Queensland Parliament. To the plaintiffs in this case, the deed of grant in trust would impose a legislative intercession between themselves and the land they had held under systems of ownership recognised within their community, long before annexation to Queensland. The plaintiffs in this action sought recognition of their traditional rights as individuals as well as members of their communities. The action was remitted to the Queensland Supreme Court for findings of fact.

In 1985 the Bjelke-Petersen Government attempted to defeat the chances of a successful action by passing the *Queensland Coast Islands Declaratory Act 1985* (Qld). In an action before the High Court, *Mabo v Queensland*,<sup>7</sup> the Queensland Act was declared inconsistent with the *Racial Discrimination Act 1975* (Cth) and the proceedings in the Queensland Supreme Court resumed. After the findings of fact, delivered by Moynihan J in November 1990, Mason CJ directed the plaintiffs and defendant, the Crown Solicitor for the State of Queensland, to file written submissions before the High Court. In May 1991, the Court heard arguments on questions of law relating to rights to land at common law. The decision of the Court was handed down on 3 June 1992. Ironically, Eddie Mabo's claim was unsuccessful. The right he claimed to land he farmed and tended was not recognised and sadly he

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comprehensive analysis of decisions in this area and responses to the judgment of Blackburn J in *Milirrpum*.

6 (1979) 53 ALJR 403 at 408, see also *Wacando v Commonwealth of Australia* (1981) 148 CLR 1.

7 (1988) 83 ALR 14 (hereafter *Mabo (No 1)*).

and two other of the original five plaintiffs died before the decision was handed down.

#### 4. *The Decision*

In a six to one majority, the Court held that the people of the Murray Islands retained a native title to their land which was not extinguished by the annexation of the Islands to the colony of Queensland in 1879, nor by subsequent legislation. In reaching this decision the Court abandons the concept of *terra nullius*, which is so offensive to Aboriginal and Torres Strait Islanders<sup>8</sup> and, in great detail, establishes within common law principles a form of native title largely unrecognised before in Australia.<sup>9</sup>

The joint judgment of Mason CJ and McHugh J briefly delivers the agreed statement of the Court as to the effect of the decision, agreeing in all other respects with the reasons, judgment and proposed declaration of Brennan J. Deane and Gaudron JJ deliver a joint judgment with which Toohey J in his separate judgment is in general agreement. Dawson J is the sole minority judge, in dissent because he finds the issue of the rights of indigenous people to their land more appropriately dealt with by government than the courts.

Three of the justices, Deane, Gaudron and Toohey JJ, held that native title holders could claim compensation for wrongful extinguishment of their title by inconsistent Crown grant. Mason CJ, McHugh and Brennan JJ were joined by the dissentient, Dawson J, to the effect that no compensation was payable.

#### 5. *The Leading Judgment: Brennan J*

##### A. *The Facts*

In a precise and measured judgment Brennan J draws extensively on the findings of fact of the trial judge in the Queensland Supreme Court, Moynihan J. He lists features of the present Murray Islanders which he later draws on to validate the continuity of their title to their land:

- the present inhabitants are direct descendants of the original population;
- there has been no permanent immigrant population;
- there is little foreign ancestry;
- the present Meriam people have retained a strong affiliation with their forebears, their culture and society.

He reviews the steps by which Queensland acquired sovereignty over the Murray Islands finding that the purpose of annexation of the Islands did not vest beneficial title to the Islands in the State of Queensland.<sup>10</sup>

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<sup>8</sup> See above n2.

<sup>9</sup> Historical material reflecting the concerns of Australian colonial administrators that access to and use of land be retained for the indigenous inhabitants is collected in Reynolds, H, *The Law of the Land* (2nd edn, 1992).

In 1882 the Murray Islands were reserved for native inhabitants by the Queensland Government which assisted with the removal of non-Island trespassers at the request of the Meriam people. References from contemporary reports refer to the native people as having tenure of "the land they own".<sup>11</sup>

The concession by the plaintiffs that the Crown in fact had sovereignty over the Murray Islands was a crucial point of distinction between this case and earlier cases relating to land claims by traditional owners. In *Milirrpum, Coe, and Wacando*<sup>12</sup> the plaintiffs stated their claims in terms which disputed the sovereignty of the Crown. As will be seen, the structure which the Court finds exists within the common law to allow recognition of the survival of native title, is the split between radical and beneficial title. Sovereignty is with the Crown because it has radical title. Native title is beneficial title which, where it is found to exist, is within and separate from radical title.

Brennan J finds that, despite a distinguishing feature of the claim of the Meriam people being their cultural and racial homogeneity, he must reject a defence submission that this is a ground for distinguishing their claim from the land rights claims of other indigenous people. To do so would, in his view, erroneously ground land rights claims on racially and ethnically discriminatory grounds,<sup>13</sup> leading to a denial of the capacity of other indigenous inhabitants to claim traditional ownership of land. In this and other dicta throughout the judgments, it is clear that the entire bench is conscious of the implication that this decision will have for other claimants to their traditional lands.

### B. *The Defence*

The defendant's argument is couched in terms of general application to all British colonial territories.<sup>14</sup> The defence submission is that once territory became a colony of the Crown, the Crown's ownership was such that no interest or rights to land could exist except by Crown grant. This approach not only relied on Australian colonial cases and dicta<sup>15</sup> but dicta of Stephen J in *New South Wales v The Commonwealth (Seas and Submerged Lands Case)*<sup>16</sup> where he affirmed that all unalienated or waste lands in the colonies were owned by the Crown. This proposition, that the acquisition of sovereignty made the Crown universal and absolute beneficial owner of all colonial land, for Brennan J, required critical examination. The consequences of such a proposition would have been that, although the indigenous inhabitants had neither ceded their land in treaties nor been conquered, any interest in the land they occupied was extinguished when radical title vested in the Crown.

Brennan J finds the assumption made in these cases, that the common law itself took from the indigenous inhabitants any right of occupation to their

10 Above n1 at 412-413.

11 Ibid, citing the 1886 report of the Acting Government Resident at Thursday Island to the Chief Secretary of Queensland.

12 See above nn3 and 5.

13 Above n1 at 415.

14 Ibid.

15 *Attorney-General v Brown* (1847) 1 Legge 312 at 316 followed by Windeyer J in *Randwick Corporation v Rutledge* (1959) 102 CLR 54.

16 (1975) 135 CLR 337 at 435-436, 438-439.

traditional lands, grossly inappropriate. In eloquent language he depicts the consequences of this interpretation of the common law for the people already here when the first British settlers arrived. They were exposed to:

deprivation of the religious, cultural and economic sustenance which the land provides ... and made intruders in their own homes and mendicants for a place to live. ... Judged by any civilised standard, such a law is unjust and its claim to be part of the common law to be applied in contemporary Australia must be questioned.<sup>17</sup>

In Brennan J's view, the task before the Court in this matter was to determine whether at common law the Meriam people had lost all rights to their land at the moment when the Murray Islands were annexed to Queensland.

### *C. The Skeleton of Principle*

Brennan J, in careful terms, outlines why his judgment will not be a radical departure from principles on which the Australian legal system is based but instead will seek a solution within the existing legal framework. Through explication, the remedy for the Meriam people will have a context which would render it accessible to plaintiffs seeking to rely on it in the future. Brennan J defines the function of the Court, in discharging its duty of declaring what is the common law position in Australia as restrained from merely declaring contemporary standards of justice and human rights, "if their adoption would fracture the skeleton of principle which gives the body of our law its shape and internal consistency".<sup>18</sup>

He explains the importance of adapting the legal principles which underpin Australian society to the values of justice and human rights to which it aspires. Should these values be departed from by too inflexible an adherence to earlier decisions the Court risks offending the very concepts it seeks to uphold. The question the Court must consider is whether the rule at issue is:

an essential doctrine of our legal system and whether, if the rule were to be overturned, the disturbance to be apprehended would be disproportionate to the benefit flowing from the overturning.<sup>19</sup>

Brennan J is cautious and thorough in the extensive analysis he offers of the theories of sovereignty and the interpretations of those theories which have informed earlier decisions defining interests in land in Australia. In this way he demonstrates the path by which integration of the concept of native title may be reconciled with common law in Australia. Had he not done so, the maintenance of the skeleton of principle he sees as crucial to the stability of society would have been forfeited and the concept of native title he proposes would seem beyond the principles of common law as expressed in the earlier judgments. This concept is bedded in the distinction he draws between radical and beneficial title.

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<sup>17</sup> Above n1 at 416, (emphasis added).

<sup>18</sup> *Ibid.*

<sup>19</sup> *Id* at 417.

### D. Radical Title and Beneficial Ownership

Brennan J refers to the concept which accommodates the rights claimed by the Meriam people as "beneficial ownership". It is this ownership which the plaintiffs claim was not acquired by the Crown when the Murray Islands were annexed in 1879. The plaintiffs agree with two of the defendant's propositions, that the Crown acquired sovereignty over the Murray Islands, and that sovereignty brought with it radical title.<sup>20</sup> However it is the last "link in the chain", the issue of the vesting of the beneficial title, which is disputed between the parties.

Brennan J refers to radical title as a "postulate of the doctrine of tenure and a concomitant of sovereignty".<sup>21</sup> This means that radical title is the form of title which gives the sovereign paramount power to create interests in land by grant of tenure. It is supreme legal authority so that the Crown can retain for itself such land as it wishes. Where the land is acquired through conquest or treaty, existing interests are retained, whilst the radical title is vested in the Crown. Where that land is truly unoccupied (literally *terra nullius*)<sup>22</sup> and unalienated, the Crown acquires beneficial as well as radical title. Land which is already occupied by indigenous inhabitants does not confer the beneficial ownership on the Crown, as asserted in the earlier cases, where the possibility of the indigenous inhabitants retaining an interest in their land was barely considered and when raised was dismissed in denigrating observations.<sup>23</sup>

The plaintiffs' submission that the radical title did not include beneficial ownership is upheld by Brennan J. In so doing, he looks at the theoretical underpinnings of the acquisition of sovereignty, the reception of the common law, and different forms of Crown ownership and title.

#### i Terra Nullius Abandoned

In the course of Brennan J's excursus, the theory that Australia, at the time of British settlement, was without settled inhabitants or law, thus *terra nullius*, is discarded. The single case in an Australian court in which the issue of *terra nullius* was contested as part of the ratio of the case was *Milirrpum*.<sup>24</sup> This case was heard in the Northern Territory Supreme Court by Blackburn J. His decision is expressly disapproved in *Mabo (No 2)*. The initial pleading by the plaintiffs in *Milirrpum* of possessory title<sup>25</sup> was changed during the course of proceedings, at the suggestion of the judge, to one of customary native title. Blackburn J, feeling bound by precedent, held, despite evidence before him of a highly developed system regulating the society and its relationship to the land,<sup>26</sup> that a form of native title could not be found to exist

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<sup>20</sup> Ibid.

<sup>21</sup> Id at 425

<sup>22</sup> Antarctica before exploration and claim by various states is an example.

<sup>23</sup> See the 1837 Report of a Select Committee on Aborigines to the House of Commons cited above n1 at 421.

<sup>24</sup> Above n3.

<sup>25</sup> Possessory title was the basis of the claim by the plaintiffs in the Canadian decision *Calder v A-G of British Columbia* (1973) 34 DLR (3d) 145 (SC) (referred to in all judgments in *Mabo (No 2)*) in which the judgment in *Milirrpum* was criticised and where the decision of the court on a similar claim, was to the opposite effect.

in Australia. In view of the evidence before him, this had to be a finding of law, not fact.<sup>27</sup>

Brennan J finds the assumption that Australia was *terra nullius* to be based on the discriminatory and denigrating view of the indigenous inhabitants which permeated the colonial administration. The push by the emerging class of pastoralists for more and more land allowed, in practice, little observation of measures for the protection of indigenous land users which were promulgated by colonial governors.<sup>28</sup> He finds the application of the theory of *terra nullius* to Australia "false in fact and unacceptable in our society".<sup>29</sup>

In support of this view, Brennan J cites the *Advisory Opinion on Western Sahara* by the International Court of Justice<sup>30</sup> where historical grounds justifying the doctrine are condemned. The abandonment of the concept in international law, to which that decision attests, indicates to Brennan J that it can hardly be retained.<sup>31</sup> Whilst acknowledging the constitutional principle, that until standards of international law are enacted into municipal legislation they are not municipally justiciable, Brennan J finds it imperative that the common law should not be, nor be seen to be, "frozen in an age of racial discrimination".<sup>32</sup> Where the values of contemporary Australian society accord with the standards of the international community, international law will be a legitimate and important influence on the development of the common law.

Nevertheless, such recognition as the international standard demands must remain within our "skeleton of principles". Sufficient recognition at common law of the place of *terra nullius* in our system of land tenure had occurred in past decisions<sup>33</sup> for Brennan J to consider in which way the common law could now recognise indigenous rights and interests to land.<sup>34</sup> Despite the dicta in his judgment that common law contained the capacity to recognise native title, it is perhaps at this point in the judgment that the question can fairly be raised whether the concept of "beneficial ownership" under discussion is really a new form of title.

Clearing away the fictional impediment of *terra nullius* enabled the common law to recognise indigenous rights and interests in colonial land. Brennan J could then review other reasons for past disregard of native interests lest there remain common law doctrines inconsistent with their recognition.

He is able to establish that native title as beneficial ownership is consistent with the common law by drawing a distinction between Crown title to colonies and Crown ownership of colonial land. The distinction is partly based on an analysis of feudal tenure which, in Brennan J's view, was not a de-

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26 Above n3 at 267.

27 *Id* at 244.

28 Examples are cited by Reynolds, H, "Mabo and Pastoral Leases" (1992) 59 *Aboriginal L Bull*, 8-10 and his book above n8.

29 Above n1 at 421.

30 [1975] *ICJ Reports* 39

31 Above n1 at 422.

32 *Ibid*.

33 *A-G v Brown* (1847) 1 *Legge* 312, *Williams v A-G for New South Wales* (1913) 16 *CLR* 404.

34 Above n1 at 423.

scription of a tenant's relationship with the land but with the lord by whom the land was held. Both the lord and the tenant had an interest in the land, but the nature of the tenant's interest was dictated by the tenant's standing in relation to the lord. Bound by this concept, interests in land in the colonies were created, taking many forms, depending on the circumstances surrounding the interest.<sup>35</sup>

The defendant's position was based on the assumption that the radical title of the Crown included beneficial ownership. In the view of Brennan J it did not. He finds that because Australia was not without indigenous inhabitants, the doctrine of *terra nullius* is inapplicable. Upon acquisition of sovereignty over the colony of New South Wales, the Crown took its radical title subject to the beneficial title of the indigenous inhabitants. This title did not owe its existence to the Crown, the Crown took its interest burdened by the native title.<sup>36</sup>

Having established that native title can survive colonial acquisition, Brennan J also rejects an argument advanced by the defendant that the survival of the rights are dependent on subsequent recognition by the Crown. This point is supported by considerable authority and forms one of the bases of the dissenting judgment of Dawson J. Brennan J held, however, that the consequence of such a rule "would create or compound chaos"<sup>37</sup> and such losses of rights and interests as did occur were a result of action by the Crown. The dispossession which occurred was not caused by the acquisition of beneficial ownership by the Crown but by the exercise of its power, under its radical title, to grant interests inconsistent with the continued enjoyment of the native title. Loss of native title was not caused by the Crown's failure to recognise such title but by the creation of new interests and rights to the land of the indigenous inhabitants<sup>38</sup> which extinguished the native title.

## ii Extinguishment of title

Brennan J goes on to deal with the circumstances in which native title has been and may still be extinguished. There are two bases to extinguishment, either by inconsistent Crown grant, or by loss of connection with the land whether by physical separation or the abandonment of traditional laws and customs. It is in contesting the second ground that Brennan J's judgment may prove most controversial for Aboriginal communities seeking to rely on this decision.<sup>39</sup>

According to Brennan J the interest represented by native title must conform with the traditional laws and customs of the clan of people holding the

35 "Most urban land is held on freehold tenure, much rural land is held on lease or licence. In particular pastoral lands have been held on limited tenure ... leases could be annual, for a term of years ... or even perpetual ... rather than adapt general forms of tenure to special situations ... often the new forms reflected peculiar local situations." Bradbrook, A J, MacCallum, S V, Moore, A P, *Australian Real Property Law* (1991) at 759.

36 Above n1 at 426, authorities cited include *The Case of Tanistry* (1608) Davis 28, *Amodu Tijani v Secretary, Southern Nigeria* (1921) 2 AC 399.

37 Above n1 at 428.

38 See also *Calder v Attorney-General of British Columbia* above n23.

39 Mansell, M, "The Court Gives an Inch but Takes Another Mile" (1992) 57 *Aboriginal L Bull* 4.



title. That clan of people must also observe and acknowledge the traditional laws and customs. Where the traditions linking the people to the land have ceased to be observed, or the holders of the traditions have died out, then the native title expires and the Crown's radical title expands to include the beneficial title. The Crown becomes the sole proprietor of the land.<sup>40</sup> This will also occur where there is a voluntary surrender or sale of their interest to the Crown by the native title holders. Brennan J briefly discusses a point (explored at length by Toohey J), of whether, where the surrender of title has been in expectation of the grant of tenure in the land, there is a fiduciary duty in the Crown to grant an interest in the land to the traditional title holders. He finds it unnecessary to consider the existence or extent of such a duty in this case.<sup>41</sup>

It is the ability of the Meriam people to satisfy the criteria of no inconsistent Crown grant of the particular land in question and their continuation of traditional ways and customs which enables the Court to recognise their title to the Murray Islands. Their assertion of exclusive rights of occupancy, assisted by nineteenth and twentieth century relocations by the Queensland government of trespassers, helped preserve their identity as a community and a people.

Brennan J finds that the native title of the Meriam people is a proprietary interest attracting appropriate equitable and legal remedies.<sup>42</sup> Such remedies may be sought in protection of their rights and interests by individuals dependent on the communal title or representatives of the community.<sup>43</sup>

The beneficial ownership which Brennan J finds survives acquisition by the Crown nevertheless remains exposed to extinguishment by valid exercise of legislative or executive power, where a clear intention to do so is expressed. This may be either a question of law, fact, or both. Where land subject to native title is granted to a use or purpose inconsistent with the title, it is extinguished to the extent of the inconsistency. The possibility remains that where the use is not inconsistent with use by the indigenous people their title remains legally enforceable. Examples given are reservations for future public purposes such as schools or public office construction, or as land set aside for a national park.<sup>44</sup>

In explicit terms, Brennan J describes the stripping away of the native title of the Aborigines during 200 years of European settlement. In his judgment the depredations are attributable to the exercise of the sovereign power of the Crown, not by the operation of the common law. This conclusion is possible through distinguishing and disapproval of earlier cases. Brennan J's emphasis of this distinction points to the difficulty future claimants may face in establishing survival of native title where there may have been many government transactions affecting the land at issue.

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40 Above n1 at 430 citing *St Catherine's Milling & Lumber Co v The Queen* (1888) 14 AC 55.

41 Above n1 at 430.

42 *Id* at 431.

43 *Ibid*.

44 *Id* at 434.

### E. *Summation*

Brennan J sets out a nine point summation of the position of the common law in Australia with regard to native titles following this case.<sup>45</sup>

1. Acquisition of sovereignty by the Crown is not municipally justiciable.
2. On acquisition of sovereignty the Crown acquired a radical title.
3. Native title is unaffected by the Crown's radical title but is exposed to risk of extinguishment by a valid exercise of sovereign power intended to extinguish the native title.
4. Extinguishment is to the extent of any inconsistency where an interest is granted, it may thus survive the grant of an interest less than freehold.
5. The Crown may validly appropriate land to itself which may preclude the coexistence of native title, extinguished to the extent of any inconsistency.
6. Native title is determined according to the laws and customs of the people connected with the particular land. Membership of the clan is dependent upon biological descent and recognition by traditional authority.
7. Native title is extinguished when the group otherwise entitled ceases observation of the laws and customs that bind them to the land, or on the death of the last member of the clan.
8. Native title may be surrendered to the Crown, but is otherwise inalienable.
9. If native title is extinguished, the Crown becomes the absolute owner.

Brennan J concludes his judgment with consideration of the reasons for Meriam resistance to the Queensland land rights scheme of deeds of grant in trust. Had the Murray Islanders participated in the scheme, as many other Torres Strait Islanders have elected to do, their title would vest *not* in themselves but in the Council of the Islands, where it would be subject to ministerial and parliamentary regulation. Although some of the plaintiffs had been councillors, trusteeship by their Council represented an interference with the relationship of the plaintiffs and their families to the land they had occupied and farmed, sold, inherited, and exchanged for centuries according to their laws, which the plaintiffs found untenable.<sup>46</sup>

### 6. *The Joint Judgment of Deane and Gaudron JJ*

This judgment proceeds along substantially similar lines to that of Brennan J with an extensive analysis of the concepts of tenure and their application to the colony of New South Wales, from which Queensland was separated in 1859. A distinction is drawn between the existence of native title and the earlier cases, relied on as authority by the defence, in which the possibility of the existence of native title, where not discounted, is ignored completely.<sup>47</sup> Rather

<sup>45</sup> Id at 434-435.

<sup>46</sup> Id at 436.

<sup>47</sup> *Williams v Attorney-General (NSW)* (1913) 16 CLR 404, *Cooper v Stuart* (1889) 14 App Cas 286 and cases cited above n14.

than actually considering the possibility of a native title, these cases concern the relationship of the plaintiffs to the Crown. In each case the plaintiffs do not assert any source of tenure other than the Crown. For these reasons the authority of the earlier decisions may more readily be distinguished from the issue under consideration in *Mabo (No 2)*.

In descriptive terms Deane and Gaudron JJ trace the steps by which the Aboriginal inhabitants were dispossessed of the land they had traditionally occupied, leading to: "the conflagration of oppression and conflict which was, over the following century, to spread across the continent to dispossess, degrade and devastate the Aboriginal people and leave a national legacy of unutterable shame."<sup>48</sup> This dispossession appeared so complete to the framers of the Australian Constitution that the two references to Aborigines contained therein removed them from the competence of the Commonwealth Parliament to make laws affecting them or from including them in population reckonings.<sup>49</sup>

There are grounds of difference between this judgment and that of Brennan J. While substantially in agreement with Brennan J about the nature of native title, its existence and definition, for the present they conclude that the title will not necessarily be lost if traditional ways are abandoned but the tribe or group continues to use and occupy the land held under native title.<sup>50</sup> The point at which the judgments diverge is the issue of compensation for wrongful extinguishment of native title.

#### A. *Compensation for Wrongful Extinguishment of Title*

Deane and Gaudron JJ recognise that the native title can be either expropriated or extinguished by a valid exercise of legislative or executive power by any of the State, Territorial or Commonwealth Governments in which land subject to traditional ownership is situated. Where the legislation has the effect of extinguishment, that intention must be clearly expressed in order to achieve extinguishment which does not attract a liability to pay compensation. The Crown still has the power to extinguish the native title by granting an inconsistent interest in the land without expressing the intention to do so. Deane and Gaudron JJ define this as a wrongful extinguishment and find that the Crown will be liable, in these circumstances, to pay compensation.<sup>51</sup>

This liability to pay compensation is supported, in their view, by s51(xxxi) of the Constitution, which gives the Commonwealth Parliament the power to acquire property on just terms. Rights to native title under the common law constitute true legal rights and thus may be considered property protected from acquisition without compensation by s51(xxxi). Section 109 of the Constitution ensures the prevalence of Commonwealth legislation over inconsistent state laws. State measures which would have the effect of extinguishing native title would be subject under this section to the Commonwealth provisions of the *Racial Discrimination Act 1975* (Cth).<sup>52</sup>

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48 Above n1 at 449.

49 *The Constitution of the Commonwealth of Australia*, s51(xxvi) and s127 since amended, above n1 at 450.

50 Above n1 at 452.

51 *Ibid.*

### B. *Personal Not Proprietary Right*

Deane and Gaudron JJ emphasise that native title is a personal not proprietary right. This classification raises several difficulties. One of the grounds on which it would appear that the right is not seen as proprietary is because it may be extinguished, without compensation, where there is an express legislative intention to do so. However all proprietary rights in the community are subject to legislative extinction, but not without just compensation. The native title is proprietary in nature against all the world except against a valid exercise of power by the Crown. There seems little merit in describing the native title as personal simply on the basis that either State, Territory or Federal Government can extinguish it, without compensation, merely by declaring that to be its intention.<sup>53</sup>

Compensation referred to in the judgment of Deane and Gaudron JJ (also that of Toohey J) is payable for wrongful extinguishment only. Compensation is not payable on any ground in the other judgments. An outcome of this distinction appears to be that native title functions as a proprietary interest but remains personal because amongst other grounds it may be extinguished without compensation.

Other features restricting the nature of native title to a personal right are that native title is not assignable outside the group of people entitled to that particular land; native title can be lost by abandonment of the connection to the land; title will be subsumed to the Crown when the last member of a group entitled dies.

Brennan J allows that native title can amount to a proprietary interest or right and refers to proprietary native title,<sup>54</sup> the incidents of which are defined by the group connected to the land. The characteristics of the title must accord with the traditions of the group, but where they contradict the common law they will be void.<sup>55</sup> The ability to characterise the interest as proprietary may be open to the Court on the facts.

These restrictions on the nature of native title are what, in the view of Deane and Gaudron JJ, confine the scope of native title to a personal right.

### C. *Right to Claim Native Title*

Another difficulty arising as a corollary of the concept of native title described in the leading and joint judgments is that the form the native title will take will be defined by the traditional laws and customs of the people entitled as traditional occupants of that land. It is acknowledged that these laws are not fixed but may evolve within the dictates of the relevant tradition.<sup>56</sup> Each title which is acknowledged will differ, a priori, from other native titles. The radical title possessed by the Crown, described as burdened ab initio by the

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<sup>52</sup> Above n7.

<sup>53</sup> This aspect of the case supports the approach taken in response by Michael Mansell, above n36, that despite the emotive language of the judgments, the Court is perpetuating a scheme of second class rights where Aboriginal interests are concerned, by confining traditional title to a personal right not proprietary

<sup>54</sup> Above n1 at 431.

<sup>55</sup> *Id* at 430, see *The Case of Tanistry* above n36.

<sup>56</sup> Above n1 at 452.

native titles, will be subject to beneficial ownerships which each take a different and unique form.

A unique feature of this form of native title is a criterion described as biological descent<sup>57</sup> or tribal, clan or group membership.<sup>58</sup> The Justices allow for the group themselves to decide eligibility for inclusion as traditional owners. This leaves open the prospect that possession of native title may be a fairly uncertain or vague attribute for groups less definitively constructed than the Meriam people. There are many such groups. Inhabitants of reserves dedicated by the various governments for Aboriginal occupation may represent many different clans and tribal groups resident together without regard for their traditional ties. Many of these people are entitled to claim land under the different State and Territorial land rights schemes. Such claims may well be open to reassertion of native title by different individuals than those entitled under the State scheme. Whether this may be a consistent use, so that neither title is necessarily extinguished by the other or requires exclusion of the other, seems one of a myriad of scenarios which may arise.

The problem with Brennan J's biological requirement is that it excludes effectively all urban Aborigines and may well be offensive to groups who have had to reconstruct their identity and reforge shattered links to the land. To set standards of legitimacy to claims based on genetics surely cannot be pursued. The difficulty of proving biological descent, or constructing an appropriate test would make this criterion difficult to implement.<sup>59</sup> The "fall back" position of group self-selection would, one hopes, offer sufficient integrity to satisfy those responsible for assessing the merits of claimants to native title.

#### D. Wrongful Extinguishment of Title

An area of uncertainty which would have benefited from a more detailed analysis by the High Court as to the circumstances in which extinguishment of the native title may be lawful and those in which it is wrongful. As noted already,<sup>60</sup> three of the seven Justices allow for compensation when executive or legislative acts of the Crown wrongfully extinguish native title. Despite the powerful descriptions of the circumstances in which titles were lost and stolen, there is little which is sufficiently prescriptive to serve as guidelines in the future. As pointed out by commentators such as Netheim: "dispossession and disturbance is not just a matter of nineteenth century history but continues to this day in a multitude of locations — Arnhem Land, Weipa, Aurukun, Roxby Downs, Noonkanbah, Yirrkala and elsewhere."<sup>61</sup>

To the extent to which Deane and Gaudron JJ define wrongful extinguishment, it is described as being an exercise of its sovereign power by the

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57 Id at 435 per Brennan J.

58 Id at 442 per Deane and Gaudron JJ.

59 One of the difficulties the plaintiffs in *Milirrpum* faced was the issue of proving their relationship to the people who had occupied the Gove lands since time immemorial. See the "Interview with Greg McIntyre", solicitor in both *Milirrpum* and (*Mabo No 2*) in above n2. Despite the Aboriginal and anthropological evidence tendered, Blackburn J found the proof tendered insufficient to meet common law requirements. See above n5.

60 Above at 132.

61 Netheim, G, "Major Test Case — Mabo Action Begins" above n2 at 5.

Crown to create an interest in land, which has the effect of extinguishing native title without expressing the intention of effecting extinguishment. No examples are given of an exercise of power where the intention to extinguish native title was expressed.<sup>62</sup> This leads to the logical conclusion that all interests granted over native lands, which have had the effect of extinguishing native title due to inconsistency, may vest in the Government creating the interest a liability to compensate the people dispossessed.

### *E. Equitable Concepts*

Deane and Gaudron JJ, amongst their concluding remarks, refer to a remedy which may be available to the plaintiffs, should circumstances warrant — declaration of a remedial constructive trust.<sup>63</sup> The concept of equitable relief and duties is taken up at greater length in the judgment of Toohey J as one of the safeguards of native title. It does not form part of the judgments of Brennan J, nor of Deane and Gaudron JJ despite, particularly by Brennan J, integration of the concept of native title into the common law as that of beneficial owner. If the interest is a non-proprietary<sup>64</sup> beneficial right to occupy land, good against the whole world except the Crown in bona fide exercise of its sovereignty, it remains to be determined which incidents of equitable rights, if any, support the title.

Reconciling equitable principles of priorities, for example, with a beneficial ownership which burdens the Crown's radical title from the moment of creation of interests in land in the colonies seems an impossible or futile task. Native title may be better expressed as being analogous to a "beneficial" right, title or interest good against the Crown, which is shaped completely by its own internal structure.<sup>65</sup> Adaptation of the rules of the Australian legal system to the existence of *sui generis* native titles cannot be so blythely assumed.

The judgments lack description of how the concept of native title fits within the "skeleton of principle", particularly in view of the use of equitable concepts. It would appear that describing native title as a form of beneficial right, title, or interest, brings it within the purview of Equity in its ancient role as the avenue for redress from the rigidity of the common law. Analysis of the attributes of native title as beneficial yet personal interest as described in the judgments would seem to reveal it as a unique type of interest in land not yet truly integrated within the system in which it is newly recognised.

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62 In the judgment of Brennan J, above n1 at 432, the position in Canadian, United States and New Zealand jurisdictions is found firmly to be, that an intention to extinguish native title by an exercise of sovereignty, must be clearly and plainly stated in the executive or legislative action.

63 Above n1 at 453.

64 It has been noted above at 132 that Brennan J describes native title as proprietary in many circumstances, but the nature of native title and its limitations, as described in his judgment, would appear to create a new category of proprietary right within Australian common law, specific to traditional land holders.

65 Above n1 at 452, per Deane and Gaudron JJ; at 435, per Brennan J.

## F. Conclusion

It is in their final paragraph<sup>66</sup> that Deane and Gaurdon JJ set out the possible limits of what the case can hope to achieve as an initial but crucial step in the quest of the Aboriginal people for land rights — that *terra nullius* is not a valid foundation for the Crown's acquisition of sovereignty and therefore it did not acquire beneficial ownership of lands in the colony with its radical title. It is worth citing part of that paragraph to demonstrate the intensity which is apparent in the judgments in this remarkable case.

We have used language and expressed conclusions which some may think to be unusually emotive for a judgment in this Court. We have not done that in order to trespass into the area of assessment or attribution of moral guilt. As we have endeavoured to make clear, the reason which has led us to describe, and express conclusions about, the dispossession of the Australian Aborigines in unrestrained language is that the full facts of that dispossession are of critical importance to the assessment of the legitimacy of the propositions that the continent was unoccupied for legal purposes and that the unqualified legal and beneficial ownership of all the lands of the continent vested in the Crown. Long acceptance of legal propositions particularly ... relating to real property can of itself impart legitimacy which their acceptance as a basis of the real property law of this country for more than one hundred and fifty years would impart.<sup>67</sup>

## 7. The Judgment of Toohey J

This judgment comes to the same conclusion as the joint judgment outlined above but relies on two bases given only incidental reference by the antecedent judgments:

- that the relationship between the Crown and the Meriam people with respect to their traditional title gives rise to a fiduciary obligation on the part of the Crown; and
- that the failure to compensate the people for interference with their traditional title gives rise to a claim for compensation under the *Racial Discrimination Act 1975* (Cth).

### A. Fiduciary Relationship

Toohey J explores the nature of fiduciary relations, the definition of which has "nowhere (been) exhaustively defined" and the categories of which are not closed.<sup>68</sup> He lists aspects of fiduciary obligations, which in his view, arise between the Crown and the Meriam people:<sup>69</sup>

- The scope of one party to exercise a discretion capable of affecting the legal position of the other.

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<sup>66</sup> Id at 456.

<sup>67</sup> Ibid.

<sup>68</sup> Id at 491 per *Hospital Products v United States Surgical Corp* (1984) 156 CLR 41, 68, 96-97, 141-142.

<sup>69</sup> Above n1 at 491-492.

- The special opportunity of one party to abuse the interests of the other.
- The discretion being an incident of the first party's office or position.
- The undertaking to act on behalf of, and the power to detrimentally affect, another may arise from an outside source, may be gratuitous and "officially assumed without request".

Two aspects of the relations between the parties satisfy the criteria outlined above. The Crown has the power to affect the interests of the Murray Islanders adversely which Toohey J sees as a vulnerability which gives rise to the need for the application of equitable principles.<sup>70</sup> The other ground is the policy of 'protection' of the Murray Islanders engaged in by the Queensland Government after annexation. As mentioned, non-Islanders were removed, reserves created, a school teacher and advisor were appointed in 1892, and other administrative activities to support the Meriams took place.<sup>71</sup> Supporting these executive actions, Toohey J finds there was a general presumption that the British Crown would respect the rights of indigenous peoples.<sup>72</sup> On the basis of these two factors, Toohey J finds that, in the circumstances of the relationship between the parties, there is a fiduciary obligation.

The power of the Crown to alienate land which had always been subject to the traditions of ownership of the Meriam people thus destroying their interest is an "extraordinary" power, "sufficient to attract regulation by Equity to ensure that the position is not abused".<sup>73</sup> The fiduciary relationship arises out of the power of the Crown to extinguish native title, not out of an exercise of that power. Toohey J goes on to express the view that, even if the factors outlined were insufficient to give rise to the obligation, on the basis of the course of dealings between the parties since annexation, the obligation is certainly created.

While this view obviously incorporates equitable concepts to a far greater degree than the judgments already discussed, there is no discussion of the consequences recognition of the duty brings, yet the ramifications would appear to be far-reaching.

### ***B. Racial Discrimination Act 1975 (Cth)***

Toohey J finds that interference by the defendant with the rights of the Meriam people to the use and enjoyment of their Islands, which was not done on just terms, would be a breach of provisions of the *Racial Discrimination Act 1975 (Cth)* ss9 and 10. The Act provides, amongst other things, that there may not be any distinction on the basis of race or ethnic origin which impairs the enjoyment of any human rights s9. Section 10 provides specifically that any authority which allows a person to deal with the land of Torres Strait Islanders and Aborigines without their consent, shall not be valid, unless it applies to all persons irrespective of race and/or origin. Toohey J, in reliance on

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<sup>70</sup> Ibid.

<sup>71</sup> The judgment of Brennan J gives a thorough description of these measures, above n1 at 411-414.

<sup>72</sup> Id at 492.

<sup>73</sup> Id at 493.



s10(2), includes the right to be immune from the arbitrary deprivation of property, as a human right.

He finds that if the Meriam people were deprived of their traditional title to their land without compensation, they would not enjoy a right enjoyed by other Queenslanders. A law enacted to achieve such a purpose would be contrary to ss9 and 10 of the *Racial Discrimination Act* and would be struck down as inconsistent under s109 of the Constitution.

### C. Possession

An aspect of the plaintiffs' claim not dealt with in the other judgments was the claim to a possessory title of the type initially claimed in the *Gove Land Rights Case*.<sup>74</sup> Toohey J finds that, at English law, a person in possession of land has a title presumed to be lawful, good against the whole world except a person with a better claim. The plaintiffs relied on the findings of fact by Moynihan J to prove their ancestors were in possession of particular lands at the time of the annexation of the Islands to the colony of Queensland.<sup>75</sup>

While Toohey J refrains from expressing a firm opinion about this aspect of the plaintiffs' claim,<sup>76</sup> he examines the principles relating to this area of the law. He raises the important distinction that the radical title of the Crown is not of itself, proprietary.<sup>77</sup> This may allow for Brennan J's description of the beneficial native title as proprietary. Where the radical title does not vest as a proprietary title, then, where there is a beneficial title of a proprietary nature, it may have the characteristics of a proprietary title.

### 8. The Dissenting Judgment of Dawson J

Dawson J takes a very straightforward look at the consequences of acquisition of land by the Crown. He finds that the consequence of the acquisition of sovereignty by the Crown is the vesting of radical or absolute title in the Crown.

Dawson J finds that where an interest in land, such as native occupation, continues after acquisition by the Crown, there may be tacit or implicit acts of recognition by the Crown in not interfering, or acting contrary to those interests, which amount to recognition of their existence. Where there are no such acts of recognition, the interest is extinguished.<sup>78</sup> This view of sovereignty allows the doctrine of *terra nullius* to remain in place.

According to Dawson J, recognition of an interest in land by virtue of prior occupation is not recognition of an earlier title. It is an act which brings into being a new title or interest.<sup>79</sup> This interest is therefore held of the

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<sup>74</sup> *Milirrpum* above n3.

<sup>75</sup> Blackburn J felt the plaintiffs in *Milirrpum* were not able to prove this point in a way acceptable to the common law.

<sup>76</sup> Above n1 at 496-497.

<sup>77</sup> *Id* at 496.

<sup>78</sup> *Id* at 459.

<sup>79</sup> *Id* at 460.

Crown in common with any other tenure. Appearance of undisturbed occupancy belies the altered state of right entitling the occupants to possession.

Dawson J delivers an extensive analysis of the different paths offered by Canadian, United States and New Zealand dealings with the land rights of their indigenous peoples.<sup>80</sup> Many of the decisions are referred to in the majority judgments. The conclusion reached, in this judgment, is that unless there have been specific acts of recognition, for example, treaties or protective legislation, native title in those countries was also basically a right of occupancy subject to extinguishment by the sovereign authority, thus within the common law framework.

Dawson J also traces the history of settlement in Australia, finding at every stage complete disregard of any claim or right to remain on land which may have been held by the indigenous people. In his view this amounts to the non-recognition which prevents reliance on native title by indigenous Australians. As is clear in the following extract from his judgment, it is fundamental to the approach taken by Dawson J that retrospective adjustment of history to accommodate the standards of justice prevalent in our society is not a function of the Court.

There may not be a great deal to be proud of in this history of events. But a dispassionate appraisal of what occurred is essential to the determination of the legal consequences, notwithstanding the degree of condemnation which is nowadays apt to accompany any account. The policy which lay behind the legal regime was determined politically and, however insensitive the politics may now seem to have been, a change in view does not of itself mean a change in the law. It requires the implementation of a new policy to do that and that is a matter for government rather than the courts. In the meantime it would be wrong to attempt to revise history or to fail to recognise its legal impact, however unpalatable it may now seem. To do so would be to impugn the foundations of the very legal system under which this case must be decided.<sup>81</sup>

The result of Dawson J's view, that native title was extinguished upon acquisition by the Crown, means that legislation which seeks to confer land rights does not risk invalidity should it appear to contravene the *Racial Discrimination Act 1975* (Cth), nor does any State, Territory or Federal legislative act which adversely affects native occupancy rights. The native title exists at the pleasure of the Crown. It is permissive, therefore there is not an extinguishment of an interest should the Crown act executively with respect to certain lands in a way which affects the occupancy of indigenous people. Based on Dawson J's view therefore, the fact that there is no traditional title means any legislation which affects native land renders the traditional occupants as subject to the legislation as all other citizens. There is not discrimination on the basis of race.

Dawson J concludes that such rights as the Meriam people have enjoyed over their land, which have been good against the whole world, are rights in place by virtue of the declarations protecting their occupancy promulgated

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<sup>80</sup> Id at 461-464.

<sup>81</sup> Id at 467.

by the Crown.<sup>82</sup> This means that no fiduciary obligation, such as discussed by Toohey J, arises.

### 9. Constitutional Issues

All judgments acknowledge the power of the Crown in right of the State of Queensland to act, either executively or legislatively, so as to extinguish native title. However if there is a fiduciary duty owed by the Crown to native title holders not to adversely affect their interest, how can it be reconciled with the power to extinguish? The Commonwealth Government has power under the Constitution to make laws with respect to "the people of any race for whom it is deemed necessary to make special laws", s51(xxvi). There appears to be a potential area of conflict between a State Government's ability to adversely affect native title and the onus of the fiduciary duty on the one hand, and in this instance, the role of the Commonwealth's power to legislate to protect indigenous interest on the other.<sup>83</sup> This section, since the 1967 amendment, has not received the broad interpretation to which it might be subject in a challenge to any Federal initiative by a State Government over native title claims. To be effective the head of power granted to the Commonwealth in s51(xxvi) would have to be characterised as a valid head of power with respect to land rights issues.

The Crown in right of the Commonwealth also has power to extinguish native title, despite the complications of disagreement amongst the Justices over whether compensation is payable, per s51(xxxi), the just terms provision. Legislation with respect to land rights is already extensively enacted throughout the States and the Northern Territory. The possibility may arise of state laws being affected by s109 invalidity should the Commonwealth enact legislation on this issue with which state laws are inconsistent.

It goes without saying that any Commonwealth legislation relating to land rights will only be valid if it can be enacted under a valid head of power. However extensive and somewhat controversial use has been made in this respect of the external affairs power, s51(xxix).<sup>84</sup> There is not scope here to outline the development of the power to the point where Commonwealth legislation, with internal ramifications which would not otherwise be valid, can be enacted. There may not be deliberate participation in a treaty to effect this purpose. However following decisions such as *Mabo (No 1)*, where the inconsistency of the *Queensland Coast Island Declaratory Act 1985 (Qld)* with the *Racial Discrimination Act 1975 (Cth)* rendered the State legislation invalid, it can be seen that Commonwealth legislation which is valid under the external affairs power may have significant internal effect. The point to be borne in mind is that the Commonwealth may need to enact legislation to create a national structure to support the integration of native title into the legal system. This will only be possible if there is a valid head of power. That head of power could be s51(xxvi), providing land rights legislation can

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<sup>82</sup> Id at 480.

<sup>83</sup> See particularly the judgment of Deane J in *Commonwealth v Tasmania, The Tasmania Dams Case*, (1983) 158 CLR 1.

<sup>84</sup> *Seas and Submerged Lands Act Case* above n16, *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168, *Tasmania Dams Case* above n83.

be characterised as laws with respect to the people of any race for whom it is deemed necessary to make special laws. There can be no doubt that this would be challenged by the States. There is every indication however, that s9 and s10 of the *Racial Discrimination Act 1975*(Cth) may provide the basis of the validity. It too may be vulnerable to challenge as too wide an interpretation of the legislation, if it is beyond the terms of the original treaty obligation which brings the legislation within the external affairs power.

The difficulties outlined above were the reasons for the dissent of Dawson J. He felt only the government was competent to resolve the problems inherent in common law recognition of native title.

Resolution of the difficulties raised by recognition of what is, in substance, either a new interest in land or a newly recognised interest in land, will be in terms inter alia, of the following principles:

- Later enacted federal law overrides earlier federal law. Any Commonwealth legislation enacted to regulate land rights pursuant to this decision will override provisions which are inconsistent with it in earlier legislation. Therefore terms of the *Racial Discrimination Act 1975* (Cth) may well be repealed if there is any inconsistency.
- Consequences for state law may include repeal to the extent of inconsistency with the new federal law.
- Enacted legislation over-rides common law principles. The weight to be given to Toohey J's concept of a fiduciary duty would therefore be resolved. While such a proposition by a single judge from a bench of seven may not seem, at first, very persuasive it must be recalled that Mason CJ and McHugh J adopted Brennan J's judgment. Brennan J's interpretation of native title was as beneficial ownership within the scheme of equitable principles. It could be argued that there is implicit among six of the judges' decisions the concept of fiduciary duty as described by Toohey J.
- A distinction must be drawn between acquisition of land and extinguishment of title. Further, different principles apply whether the acquisition is by a State or the Federal Government. Any legislative acquisition by the Commonwealth attracts s51(xxix) of the Constitution, ipso facto just terms. There are valid takings of land by the Commonwealth outside s51(xxix), for example, confiscation. The Commonwealth cannot exercise eminent domain, as a State government can, independently of its own powers. The issue of compensation therefore will be governed by s51(xxix) where there is a legislative acquisition of land. Where extinguishment of title occurs pursuant to an inconsistent grant of interest by executive act it is beyond the scope of the just terms provision.
- State governments are not bound by just terms but may be affected by the provisions of the *Racial Discrimination Act 1975* (Cth) ss9 and 10 when they act, within their power, in a way which affects native title.
- International law has no impact in Australia until it is enacted into municipal law. Brennan J finds that it has only a persuasive influence on the common law. Therefore, despite treaties or conventions entered into

by Australia, they will have no impact on the interpretation of land rights unless enacted. It is salutary to bear in mind this decision occurred on the eve of the International Year of Indigenous Persons. It remains within the province of Parliament, not the Court, to give to Australia's international commitments, the force they are to take municipally.

- It is arguable that Federal legislation on land rights would appear to be a valid exercise of Federal power under s51(xxvi) of the Constitution.
- Land rights legislation may also be valid under s51(xxix), external affairs, where it is a true and faithful enactment of treaty or convention obligations.
- It remains to be settled whether there is now an onus on the Crown to investigate the existence of native title when legislative or executive acts which may extinguish native title are contemplated. The Crown has the power to extinguish where there is an express intention to do so. This seems to indicate a degree of investigation as to the existence of native title in order to validly express the intention. If the Crown acts in a way which incidentally extinguishes, does that disturb the legitimacy of the act to render it wrongful, the grounds for compensation in the view of Deane, Gaudron and Toohey JJ? Principles of administrative law would require establishing guidelines where the exercise of sovereignty will be effective against native title. Whether a hearing procedure, review and appeal mechanism will be established are all matters which may be deemed within the province of existing administrative structures and principles or may require legislation to be properly defined. This case may mean arbitrary governmental acts will be subject to greater scrutiny and accountability where adverse consequences to native title are a possibility.

## 10. Conclusion

There is obviously a need for the input of Federal Parliament to act to integrate native title legislatively into the basic structure of Australian society so as to render it accessible to communities who might otherwise be outside some of the tests for eligibility suggested in the judgments. Parliament could also regulate the way in which those native titles, which have survived, should be protected from further extinguishment by State, Territorial or Federal Executive act. This would not, in the Federal context, prevent later legislation over-riding enacted provisions. There is an obvious advantage if such legislation could be enacted during or pursuant to the International Year of Indigenous Persons when political sensibilities are heightened and the prospect of international embarrassment may curb otherwise recalcitrant members of parliament.

This case has been greeted by enthusiasm in many quarters committed to Aboriginal land rights. A few have been cautious in response. For some, the case represents a long overdue catch-up with the position with regard to indigenous land rights current in like jurisdictions; for them, *Mabo (No 2)* seems to go barely far enough. A closer inspection of the case shows that it raises many issues requiring resolution before its legacy can bear fruit. Should the Court or Parliament resile from this responsibility, *Mabo (No 2)* risks being confined to its facts, to the despair and no doubt political difficulty of

the incumbent government, a little in the manner of *Waltons Stores v Maher*<sup>85</sup>, serving as a beacon to individuals in similar circumstances to the Meriam plaintiffs but remaining a unique situation almost impossible to replicate. It was this concern which prompted the care taken by Brennan J to avoid founding the rights of the Meriam people to their Islands on their history of remaining largely free from intrusion by non-Islanders. Other communities of indigenous people in Australia will, no doubt, quickly put *Mabo (No 2)* to the test and the issues raised here and many other aspects of the case will be explored.

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85 (1988) 164 CLR 387.