Aboriginal Law Does Now Run in Australia

Reflections on the *Mabo* case: from *Cooper v Stuart* through *Milirrpum* to *Mabo*

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With its judgment in *Mabo v the State of Queensland*[1] on 3 June 1992, the High Court has taken Australia from a backward and incorrect legal position on the land ownership of its indigenous peoples, to the forefront of the law in this area in the common law world. In the *Mabo* decision, the law that had previously been misinterpreted in *Milirrpum v Nabalco and the Commonwealth*[2] (hereafter *Milirrpum*) has been put right, and at the same time, "a national legacy of unutterable shame"[3] has been acknowledged and a grave injustice overturned. Before the decision in *Mabo*, the common law was racist in its application for it refused to uphold traditional land ownership. However, since *Mabo*, it can be said that racial equality before the law is now part of the common law of Australia, thereby complementing the decision in *Mabo v Queensland and the Commonwealth (No1)*[4] which held, pursuant to the Commonwealth *Racial Discrimination Act* 1975, that it is part of our statute law. Moreover, Australia will never again be exposed to derogation in other common law courts[5] for failing to understand and correctly apply the law concerning common law traditional native title.[6] Indeed, it can confidently be anticipated that the judgments will become classics, and *Mabo* will be a leading case in all common law jurisdictions dealing with native title.

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1 (1992) 175 CLR 1, 66 ALJR 408; 107 ALR 1 (hereafter *Mabo (No 2)* with (1992) 107 ALR 1 referred to for page refereneces). The Commonwealth was originally one of the defendants but was no longer a party by the time of the final hearing, for the two remaining active plaintiffs did not pursue claims to titles to areas of seas and sea-beds. Consequently, the Commonwealth did not oppose their claims to land titles.

2 (1971) 17 FLR 141. This case was heard in the Northern Territory Supreme Court by Blackburn J.

3 Above n1 at 79 per Deane and Gaudron JJ.

4 *Mabo (No1)* (1988) 166 CLR 186; (1989) 63 ALJR 84; (1988) 83 ALR 14 (hereafter *Mabo (No1)*).

5 See *Calder v Attorney-General British Columbia* [1973] SCR 404 at 416; (1973) 34 DLR 3d) at 218, per Hall J.

6 The justices unfortunately adopted the following three expressions: "native title" (per Brennan J), "common law native title" (per Deane and Gaudron JJ), and "traditional title" (per Toohey J). Dawson J, dissenting, referred to "traditional native title". Hereafter "native title" — it is well-defined by Brennan J, above n1 at 42.

1. *Terra Nullius*

All of the justices overruled the legal nonsense that had been perpetrated in Australia since the decision in *Milirrpum*. In that case Blackburn J found that, at the time of first settlement by Britain in 1788, there were inhabitants in Australia with a "government of laws".[7] Despite this finding, however, he held that as a matter of law Australia was vacant, uninhabited land belonging to no one, that is, *terra nullius*. In *Milirrpum*, Blackburn J corrected the mistakes of fact that had been made by Lord Watson of the Privy Council in *Cooper v Stuart*;[8] nonetheless, he failed to recognise that, because of these different facts, he should then have distinguished *Cooper v Stuart* and made the findings of law that have now been laid down in *Mabo*. Lord Watson, in the often quoted obiter dicta in *Cooper v Stuart*, had asserted that Australia was "a tract of territory practically unoccupied, without settled inhabitants or settled law" in 1788 and was thus in law "an uninhabited country ... discovered and planted by English subjects".[9] If Lord Watson had had his facts right, it could have been argued that his legal obiter dicta were correct. His use of phraseology taken from *Blackstone's Commentaries* dealing with this topic and his own work in other cases involving native title, indicate that he was well aware of the significance of the difference between inhabited and uninhabited colonies.

One of the interesting divergences between *Mabo* and *Milirrpum* lies in the findings of fact and of law. *Milirrpum's* findings of fact were outstanding, but *Mabo's* findings of fact concerning the traditional land ownership of the Murray Islanders were so deficient that they were virtually ignored by the High Court, and the plaintiff Eddie Mabo actually lost his claim.

Nevertheless, the law laid down in *Mabo* is a watershed not only in Australian law but also throughout common law jurisdictions. In *Milirrpum*, however, the law was misinterpreted and grievously wrong. Yet, in so far as *Milirrpum* corrected the egregious factual errors found in *Cooper v Stuart*, it constituted an intermediate point in the legal chain that has, with *Mabo*, culminated in the correct application of long-established principles and doctrines of the common law, already applied throughout the rest of the ex-colonial common law world, to the factual situations of Australia and of the Murray Islands. Lord Watson would, no doubt, have given the same advice as the High Court has now given, had he known that, as a matter of fact, Australia was not "practically unoccupied" in 1788 but was, like the North American, African and other Pacific colonies, already inhabited by "settled inhabitants" with "settled law".

Brennan J points out that in *Milirrpum* Blackburn J (who adverted to the limits imposed on him by his sitting as a mere judge at first instance rather than as an authoritative higher court) was faced with the authority of the Privy Council precedent of *Cooper v Stuart* that contradicted the evidence that he had found.

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7 Above n2 at 267.

8 *Cooper v Stuart* (1889)14 App Cas 286. The advice of the Privy Council was handed down by Lord Watson.

9 Id at 291 per Lord Watson.

In *Milirrpum*, Blackburn J stated that "if ever a system could be called 'a government of laws, and not of men', it is that shown in the evidence before me".[10] He did not distinguish *Cooper v Stuart*, as the legal concepts involved required, but held instead that it was "beyond [his] power ... to decide otherwise than that New South Wales came into the category of a settled or occupied country".[11]

Blackburn J was correct in holding that New South Wales was a settled colony but incorrect in holding that it was also a country acquired by occupation, that is, terra nullius.[12] Here lies the heart of the supposed legal problem that *Mabo* has clarified. It has commonly been thought, following Blackburn J, that in order to fit the law with the facts, Australia's categorisation as "settled" would have to be changed to a colony acquired either by cession or by conquest. This however is not so. There was no need to change Australia's status as a settled colony. It was necessary only to understand the principles and doctrines involved and to apply them properly — thereby holding that Australia, like Canada, the United States, New Zealand, and New Guinea, was, being already inhabited, a settled colony but was not *terra nullius.*

In 1975, the International Court of Justice (hereafter ICJ) in its advisory opinion on the *Western Sahara*[13] outlined the law concerning the time-honoured legal doctrine of *terra nullius* and thus eliminated any possible misconceptions as to its scope. The Court stated that only uninhabited vacant land belonging to no-one is *terra nullius*, that is, a territory that "belonged to no-one in the sense that it was then open to acquisition through the legal process of 'occupation'".[14] It followed that Australia could not have been *terra nullius* either in fact or law. According to *Mabo*, it was an enlarged notion of *terra nullius* that had been adopted by Blackburn J and such an extension of the doctrine can have no operation in Australia (per Toohey J), for it is both racist (per Brennan J) and wrong in law (Deane and Gaudron JJ). Blackburn J's mistaken equation of a settled colony with an occupied one in *Milirrpum* resulted not only in the law being wrong but also in injustices, misunderstandings and confusions that have been laid to rest at last.

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10 Above n2 at 267.

11 Id at 244. Blackburn J should have distinguished the Privy Council precedent of *Cooper v Stuart*, for he had found the facts to be different, thus the legal position was also different. See comments in Hocking, B, "Does Aboriginal Law Now Run In Australia?" (1979) 10 *Fed LR* 161 and Brennan J in above n2 at 31.

12 "Occupation" is a legal term of art deriving from the Roman doctrine of "occupatio" denoting the acquisition, by way of first possession, of first title to land belonging to no-one, being "desert" (as in deserted), waste, uninhabited or vacant, ie *terra nullius*. This is the only form of original title, succeeding titles are, of course, derivative ones.

13 [1975] ICJR 1.

14 Id at 39. The general rule of the common law was that ownership could not be acquired by occupying land that was already occupied by another. See too *Blackstone's Commentaries*, Book II, Ch1, at 8: "occupancy is the thing by which the title was in fact originally gained; every man seizing such spots of ground as he found most agreeable to his own convenience, provided he found them unoccupied by anyone else." It is known as alladial land.

2. *Prior Title*

Since *Mabo*, although Australia remains a settled colony, it is now regarded as one that had prior owners like New Zealand, New Guinea, Canada and the United States. It is now decided that, when an inhabited colony has been settled rather than ceded or conquered, those principles of land law relevant to vacant land are inapplicable. The British Crown acquired only the radical (that is, the constitutional) title to land when it extended sovereignty over territory that was already occupied. The argument that both radical and beneficial (that is, property) title vested in the Crown was only appropriate in the case of truly uninhabited territory such as Antarctica. *Mabo* correctly interprets and applies principles of the common law concerning constitutional and property titles that stretch as far back as Roman law and which have recently been confirmed anew in the civil law world by the ICJ in the *Western Sahara* case. There is no possibility of confusion between the sovereign's constitutional radical title to a territory and the title to property in that territory in civil law countries, because the doctrine that all property titles must ultimately be vested in the sovereign is a feudal fiction found only in the common law; it does not exist outside ex-British colonies. Thus, in ex-German New Guinea, in the High Court case of *Gaya Nomgui v Administration the Territory of Papua and New Guinea* (re Lae Administration land),[15] the indigenous people had a title to their lands that was a good root of title to subsequent title holders. The doctrine known as the sovereign's right of pre-emption[16] is found only in the common law world. Its function is to accommodate the principles being discussed here by ensuring that all property titles stem from the sovereign once the prior native title has been acquired or dealt with by the sovereign. Until then, the prior existing native title remains in existence qualifying or burdening the title of a common law sovereign.

In a settled colony, the common law was in immediate operation and protected the interests of all British subjects, including the indigenous inhabitants, for they too, at least in theory, became British subjects. As Toohey J said, "the real question is whether the rights of the Meriam people to the Islands survived annexation"[17] by a common law sovereign. This question does not even arise at a theoretical level in civil law systems, for the acquisition of sovereignty over territory affects only administrative and jurisdictional functions appropriate to constitutional doctrine. Property interests remain unaffected since there is no doctrine of tenures fictionally vesting all property in the sovereign.

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15 [1974] PNGLR 349.

16 The common law doctrine of the Crown's right of pre-emption means that native title can only be acquired by the Crown. Native title holders cannot dispose of their interest to anyone other than the Crown. Thus, after this acquisition, the radical constitutional title of the sovereign to the territory is united with the sovereign as the source of all property title: so it followed that the feudal doctrine of tenure was not fractured by recognition of native title in the common law. See the judgment of Brennan J above n1 at 43, where he also adverts to the consequent possibility of the creation of a fiduciary duty on the Crown towards the indigenous title holders.

17 Above n1 at 142 per Toohey J; and at 140 — "the distinction between sovereignty and title to or rights in land is crucial".

The High Court closely examined the relevant doctrines and many precedents on the law in this area and accepted that the fictional doctrine of tenures was the basis of property law in Australia and could not now be changed. Without disturbing the titles granted since 1788, the High Court elaborated on the legal theory in detail and held, in accord with principle and precedent, that the doctrine of tenure was quite compatible with the survival of prior existing native title. The survival had its own special form, for the doctrine of the sovereign's right of pre-emption applied, and the traditional proprietary community title, arising from the possession of indigenous people in occupation of their territory, burdens the Crown's radical title when a change in sovereignty occurs.

Because Australia's indigenous peoples had been denied legal existence their native title had not been accorded legal status in the common law. The racism inherent in such an outcome was adverted to by Brennan J when he referred to the requirements of the *International Covenant on Civil and Political Rights* 1966 to which Australia is a signatory. Blackburn J's mistakenly enlarged notion of *terra nullius* in *Milirrpum* equated an inhabited and occupied colony (in the legal sense of title having already been acquired by the indigenous people) with a territory that had been vacant and uninhabited at the time of settlement. The denial of legal status to indigenous interests made it possible to claim that the Crown became not only the sovereign constitutional owner of the territory (the radical title holder) but also the beneficial owner of the land, there being legally no other property owner already there. This fallacious reasoning was followed when the two different concepts of sovereign title to a territory and property title or beneficial ownership of the land therein were confused; the doctrine constituted the legal context of the dispossession and oppression of the Aboriginal inhabitants of Australia — they were the people who were not there: *populus nullus* as well as *terra nullius*. They were "treated as a different and lower form of life whose very existence could be ignored for the purpose of determining the legal right to occupy and use their traditional homelands."[18] The Court's duty to re-examine the propositions that provided the legal basis for this dispossession and also to expound the common law of Australia was unequivocally clear to all of the justices. Clear, too, were the mistaken interpretations of the law in Australia that purported to underlie these propositions. Demonstrating an outstanding capacity for judicial reasoning, the justices carried out their function to lay down the law by correcting the past misinterpretations that had so bedevilled the recognition of native title in the common law of Australia, while at the same time the tenurial based system of land law remained undisturbed, because it was held to be perfectly compatible with native title. As Toohey J found, there were two questions: at the time of colonisation, did the land belong to no-one, and, if not, did the rights (in this case of the Meriam people) survive annexation?[19]

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18 Above n1 at 82 per Deane and Gaudron JJ. Yet, they were accorded the status of British subjects.

19 Above n1 at 142 per Toohey J.

3. *Prior Sovereignty*

The High Court's achievement in *Mabo* is as remarkable as that of Marshall CJ of the Supreme Court of the United States some 170 years ago, when these doctrines were first dealt with in that jurisdiction.[20] Marshall CJ married the civil and common law systems, the different levels of laws and the legal concepts involved and the several levels of titles. On the one hand, he held that the American Indians were the original title holders, as between themselves and the nation-states extending sovereignty over their territories. On the other hand, he held that as between the colonising nation-states, one would be the first discoverer of the Indian territories — thus being the *originai* (first) internationally recognised nation-state to hold the radical title to the territory — known as first discoverers and possessors. Marshall CJ also held that this nation-state had the first right to acquire the title to the land from its Indian owners, who could sell or transfer their title only to the Crown (its right of pre-emption). Marshall CJ's doctrine of the new sovereign's right to acquisition of property title from the native title holders did not of course rely on the existence of *terra nullius*. On the contrary, it relied on the prior existence of locally sovereign peoples (domestic dependent nations) who owned their lands. Thus, only European nation-states could be first discoverers of the territory in this sense.

The Royal Instructions to Captain (then Lieutenant) Cook incorporated the same legal principles from which the Marshall doctrine was later developed. Cook was instructed to take possession of the land "with the consent of the natives". If he found the country uninhabited, however, he was to take possession "as first discoverers and possessors".[21] Marshall CJ's was a brilliant and little understood resolution of potential theoretical conflict. While it may seem somewhat esoteric to analyse it here, its importance lies in the High Court's adoption of the same stream of judicial reasoning in *Mabo*, which overturned the previous misinterpretation, legal nonsense and associated injustice that had become established as the law of Australia. Brennan J held that native title may be surrendered, by purchase or voluntarily, only to the Crown, not for the theoretical reason analysed above, but because no-one other than the Crown can acquire a right or interest outside those laws and customs constituting the native title. As a result, the system of law giving rise to native title can be said to be equated with the common law legal system and native title is seen to be a unique form of land ownership comparable to that found in the common law.

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20 "The Marshall Court reconciled the different methods of acquiring sovereignty in a way that accommodated original titles with the Crown's ultimate title, by establishing the principle that the internationally recognised nation-state making the first discovery of a territory previously unclaimed and/or unknown as between such nation-states, acquired the right of acquisition of the original [native] title to the territory, as between themselves": Hocking, B, "Aboriginal Land Rights: War and Theft" (1985) 20 *Aust L News* vol 9, 22 at 24. See the leading US cases: *Fletcher v Peck*, 6 Cranch 87 (1810), *Johnson v McIntosh*, 8 Wheat 543 (1823), *The Cherokee Nation v The State of Georgia*, 5 Pet 1 (1831), *Worcester v Georgia*, 6 Pet 515 (1832).

21 "Royal Instructions to Lieutenant Cook, Cook's Journal 1768-79, Selected Extracts", Price, A G (ed), *Captain James Cook in the Pacific* (1971).

Most significantly, it has now been held that there was a change in sovereignty in Australia in 1788, a phrase Brennan J used throughout his judgment. The acquisition of sovereignty by Britain from the prior native sovereigns had no effect on the native title to land which continued to exist until it was acquired or extinguished in some way by the new sovereign. There is a well-known common law principle that private property rights survive a change in sovereignty; the High Court has long followed and applied this principle in cases dealing with inter se questions. Because a mere change in sovereignty does not extinguish title, including native title, there did not have to be an act of recognition of that native title by the new sovereign for it to survive and be legally unaffected by the change in sovereignty. To hold otherwise would have been to render Australia's Aborigines and Torres Strait Islanders, and, in particular, the people of the Murray Islands, trespassers on the lands and islands they had inhabited since time immemorial, a result unacceptable to the common law and the values inherent in it. On the contrary, there is a doctrine of continuity and, when native title is proven, an annexing act of state does not extinguish it, and it "is presumed to continue unless and until lawfully terminated".[22] Nevertheless, it was not the common law but the political exercise of paramount power by the new sovereign that dispossessed the indigenous inhabitants, for until *Mabo*, the common law had failed to provide the protection it should give to those for whom it supposedly was "a birthright and inheritance".

Mabo held that there was a change in sovereignty with the acquisitions of the radical title to the territory of Australia and to the islands of the Torres Strait. It follows that the indigenous peoples had had sovereignty over their lands; however, they were not internationally recognised sovereign nation-states for the purposes of international law, even though they were locally sovereign peoples recognised in international law as the sovereign owners of their territories. After *Mabo*, it can be said that Australia's indigenous peoples were both local sovereigns and owners of their traditional lands before settlement or annexation by the Crown. Sovereignty changed when Britain extended its own sovereignty over their territories. Because Britain was an internationally recognised nation-state, it was a corollary of its nationhood that not only the local but also the international sovereignty over Australia was established either originally or derivatively, by way of change from the already existing local sovereignty. On one interpretation there can be said to have been a change in sovereignty at the local level but an original (first) acquisition of sovereignty at the international level. The majority in *Mabo* held that the constitutional sovereign radical title to the territory changed, but the native title to land ownership was unaffected.

Mabo has provided the answers to the dual claims that have been made by the Aborigines and Torres Strait Islanders, namely, to the ownership of their traditional lands and to their sovereignty over the territory of Australia before its acquisition by Britain. It will likely be argued that there remain areas and communities, such as the Murray Islanders themselves, where this local sovereignty has not been extinguished, although nation-state sovereignty has been established over the territory by the Crown. Furthermore, taking

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22 Above n1 at 144 per Toohey J.

into account the relevant Commonwealth statutes,[23] it can also be argued that a mere change in sovereignty has not extinguished the right of local communities to self-government and/or self-determination. The fascinating theoretical questions are those posed by the multi-layered nature of the various sovereignties involved here and too, the question whether the prior sovereignty acknowledged by the High Court could amount to that of a "nation" for the purposes of "standing" in the International Court of Justice, the jurisdiction of which is limited to "nations".

If the advice of the ICJ in the *Western Sahara* case is followed, there is an implied cession of territory by indigenous people when a nation-state extends its sovereignty over the area. In theory, the sovereignty acquired by the nation-state is derivative, not original, because it derives from the original sovereignty of the indigenous inhabitants by way of the change in sovereignty that takes place. The recognition as a sovereign of international status was simply a concomitant of Britain's nation-statehood, and the sovereignty over Australia can therefore be said to have been derivative, originating from the existence of prior sovereignty in the local communities. This is the equivalent of the "first discovery" doctrine adapted by the Marshall court and the Canadian courts in order to accommodate the civil law doctrines of international law (the radical constitutional title to territory of the sovereign) with the common law fiction of the Crown's ultimate title to property (the doctrine of tenure).

4. *Settled Doctrine*

The various common law jurisdictions have now arrived at virtually the same exposition of the law in this area, acknowledging that an inhabited territory which became a settled colony was not a legal desert. The High Court's analysis is the preferable one, it has applied the long-standing common law principles together with the present position in international law in the most straight forward manner,[24] while understanding and correctly expounding the legal position in settled colonies. The recognition by the common law of native title reconciles customary law with "civilised" society's legal ideas and institu-

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23 See, eg, *Aboriginal and Torres Strait Islander Councils and Associations Act* 1975 (Cth).

24 Above n1 Brennan J at 18, took care not to "fracture the skeleton of principle which gives the body of our law its shape and internal consistency". Nevertheless, the injustice and racism inherent in "the proposition that, when the Crown assumed sovereignty over an Australian colony, it became the universal and absolute beneficial owner of all the land therein", underpinned his re-examination of the proposition. As he said, "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". A similar approach was taken by other justices see, for eg, Deane and Gaudron JJ at 82 and Toohey J at 143-4. Professor McNeil has argued in his book *Common Law Aboriginal Title*, advanced by the plaintiffs in *Mabo* as one of their alternative arguments, that a possessory title arises from indigenous possession after annexation of sovereignty. This seems to be an artificial method of reasoning and would mean that there had been no change in sovereignty or, if there were, that the native title had not survived the change (not a result in accord with the common law rule). Such a line of reasoning had already been rejected in Canada and was unsuccessful in *Mabo*. As Toohey J pointed out, any such title would not be as worthwhile as native title. The author of this article has written extensively in support of the arguments now adopted by the High Court in *Mabo*.

tions. It does not conflict with the doctrine of tenure but is actually the non-racist application of legal concepts, principles, doctrines, rules and innumerable precedents stretching back throughout all of the common law former colonial jurisdictions.

Further analysis on this subject is necessary because of the great significance and outstanding legal analysis of the judgments and because of some questionable initial responses. Prior to the last of the many *Mabo* hearings, Lumb R D, had written opposing any correction of the law.[25] Although he recognised the incorrect exposition of the law after *Milirrpum* and acknowledged its injustice to the indigenous owners, he preferred the continuation of the status quo. Although understanding the principles and doctrines involved, his analysis led him, as it had Blackburn J, to the mistaken conclusion that the categorisation of the nature of the acquisition of sovereignty by Britain over the territory of Australia as "settled" *terra nullius* would have to be changed (not simply clarified) to either ceded or conquered. In his opinion, so fundamental a change after so long would not be justified. Fortunately the High Court held otherwise. Mindful of the legal wrong borne for so long by the indigenous people, the High Court corrected the errors of the past. But it was not something done lightly, and the depth of research and understanding demonstrated by the judgments is impressive.

In eighteenth century international law, a State extended sovereignty over new territory by cession, conquest or settlement (occupation of *terra nullius*). Initially the concept of settlement applied only to unoccupied territory; however, it was extended to include newly "discovered" territory inhabited by native people not under the jurisdiction of a European State and such "discovery" entitled the State to establish sovereignty by settlement. In British "discoveries", the common law was introduced, whereas in conquered or ceded colonies, the pre-existing laws were presumed to continue. In all these colonies, the radical title vested in the Crown. Accordingly, this did not preclude an applicable, corresponding assumption by the introduced common law which preserved and protected prior native title in discovered inhabited settled colonies. There are many precedents in the Privy Council, African, Canadian, USA, New Zealand, New Guinea, the Solomon Islands and other cases in the long line of authority bearing on this point relied on in the *Mabo* judgments, all holding that the Crown's radical title is subject to (burdened, reduced, or qualified by) the prior interests.[26]

Two types of settled colonies have emerged. First, those that were truly *terra nullius*, being both legal and uninhabited deserts, and secondly, those that were already inhabited by indigenous communities with prior existing laws and interests in land.

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25 See, eg, Lumb, R D, "Aboriginal Land Rights: Judicial Approaches in Perspective" (1988) 62 *ALJ* 273 and "Is Australia Occupied or Conquered?" (1984) *Qld B News*. It is neither, of course. Indeed, following the advice of the ICJ in the *Western Sahara Case*, technically it would seem to be a settled colony acquired by means of an implied cession.

26 See *Amodu Tijani v Secretary, Southern Nigeria* [1921] 2 AC 399 and generally Deane and Gaudron JJ, above n1.

5. *The Nature of Native Title*

A further illustration of the depth of the common law principles and precedents followed and applied by the High Court is found in the expositions of the nature of native title. For the theoretical reasons explained above, in common law jurisdictions native title can only be alienated to the Crown; it is a personal right analogous to the property rights of the common law, and it can be extinguished only by the Crown with clear intent. All these characteristics have been established in the series of cases from other common law jurisdictions previously mentioned. Additionally, it is ascertained by evidence that refers to "the traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants of a territory".[27] The requirements for proof of native title will be examined later.

Despite the findings of fact made by Moynihan J, and the ruling of dissenting Dawson J that these indicated the absence of a customary system of land law, there is no doubt that since time immemorial on the Murray Islands, there has actually been a complex system of land ownership regulated by orally transmitted knowledge and observed by the Murray Islanders. One of the longstanding, frequent activities of the community has been land disputes, for example, with neighbours over boundaries and relatives over inheritances. Since time immemorial the problems have always been resolved by the respected senior members of the community, based on the knowledge orally and visually transmitted to the landowning family members by their ancestors and given as evidence at dispute resolution hearings. The Queensland government estabished a local court system, and since then, the traditional system has continued to operate through this structure. As a result, there are now written records of the land disputes heard in the Murray Islands' court, and those that survive provide an irreplaceable historical record of the traditional land system of the Murray Islands that is comparable to the invaluable material recorded by the Northern Territory Land Rights Tribunal.

Murray Islanders are renowned gardeners. The three Islands are divided into marked plots of land, either for gardens or for houses; villages and building lots may be found along the coastal strips and beachfronts where it is coolest. There is also ownership of reef and sea areas, for the Murray Islands are surrounded by fringing reefs on which fishtraps, cray houses, and clam gardens are built and which are then harvested by the Islanders. The system is a typical Polynesian land-use, well adapted for utilising the resources of a populated, small, tropical island.

6. *Leased Areas*

On the small islands of Dauer and Waier, a purported 20 year lease for a project to run a sardine factory had been granted by the Queensland government in 1932. This lease recognised and protected usufructuary rights of the Murray Islanders and was subsequently forfeited and returned to the area of the reserve. The rights of the Islanders were respected and remained undisturbed. Therefore, as is set out in the judgment of Deane and Gaudron JJ (Toohey J

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27 Above n1 at 42 per Brennan J.

pointed out that it was not necessary to say whether this lease had any effect on the Islanders' native title), it would seem likely that it neither extinguished nor had any continuing adverse effect on Islanders' native title rights. The requisite clear and plain intention to extinguish native title was not present here and the leased land, with the co-operation of the Crown, reverted to the traditional owners after the failure and collapse of the project. It seems to be arguable that the total conduct of the Crown has to be one of the factors taken into account by a court when examining the question of whether a lease has extinguished native title. In this case, on the ground, the native title continued unaffected by the short-term leasehold episode. Brennan J, while making no finding concerning the leased area, did answer that this lease may have extinguished native title. Nevertheless, this particular leased area was specifically excluded from the declarations he made.

The leases to the London Missionary Society, that are now held by the Island Churches, have extinguished the native titles of the traditional Islander owners.

7. *Effects*

Australia now joins a long and clear line of authority in its application of the law on native title; however, commentators such as Professor Colin Howard and Meagher J of the NSW Court of Appeal, have claimed that this is not the case. Professor Howard has twice commented on the ABC that *Mabo* "invented a wholly new form of land ownership", implying that it had no foundation in precedent. Meagher J insultingly and wrongly claimed that Brennan J "invented new law", instead of "applying the existing legal authorities". These commentators appear to have ignored the wealth of authorities and cases cited in the judgments. If, however, they are not familiar with them, then their comments are both inexcusable and misleading. Interestingly, Howard made the same mistake as Lumb and Blackburn J before him, misunderstanding the legal consequences of the proper application of the doctrine of *terranullius*. His comments were directed to the effect on "mining interests" being "particularly badly affected" by *Mabo* because "the net result is confusion" over "permits to prospect and mine".[28] These comments are also misleading since the result is not confusion at all.

It may be unpalatable to some, that those traditional owners whose native title has not been extinguished (and, as the High Court pointed out, not so very many of them have survived the dispossession that followed AngloEuropean settlement) can now claim native title where it is still in existence. The non-extinguishment and the continued existence of the native title will have to be proved, and it is preferable that a tribunal and not a court will be the forum for such hearings in the future. If the questions of fact and law are heard in a tribunal, such as the Northern Territory Land Rights Tribunal with an extended jurisdiction, it would overcome part of the objection that such cases would consume astronomical sums of money, for the costs

28 Howard, C, lawyer, ABC "Notes on the News", 27 July and 4 November 1992; also Prescott, V, Professor of Geography, Melbourne University, ABC "Notes on the News" 20 November 1992. Meagher J, *Herald-Sun* Report, 21 November 1992. See contra, Sir Ronald Wilson, 22 November 1992: "the decision is hinged on the common law of Australia ... in line with the best traditions of the common law".

of tribunal hearings are much less than those of superior court hearings.[29] In late 1992, the Federal Government announced that a high-level committee of interested parties chaired by the Prime Minister would examine and reconcile the situation arising from the recognition in Australian law of the form of land tenure known as native title, and that selected test cases will be heard in order to clarify particular points of law not decided in *Mabo*.

The sea of change that has occurred at the political level is well-illustrated by this top-level commitment. Deane and Gaudron JJ recognised that in the first years of white settlement the native inhabitants, although in theory entitled to protection at common law, in practice "were in an essentially helpless position if their title was wrongfully denied or extinguished or their possession was wrongfully terminated by the Crown".[30] The government deserves support in so far as it upholds the judgment of the High Court on the legal position of native title in Australia. Of course, the enactment of the *Racial Discrimination Act* 1975 (Cth), combined with the "just terms" placitum of the Constitution, the earlier judgment of the High Court in *Mabo (No 1)*, and Australia's accession to the Optional-Protocol to the *International Covenant on Civil and Political Rights*, all combine to bring "to bear on the common law the powerful influence of the Covenant and the international standards it imports".[31] Together with the disturbing possibility of substantial claims for damages, "just terms", compensation, and/or individual pursuance of embarrassing international remedies should any government fail to recognise and uphold the remaining rights and interests in land of Australia's indigenous inhabitants now that the High Court has done so. The common law is no longer racist in its application since the *Mabo* decision because traditional land ownership is now upheld in Australia.

8. *Extinguishment*

The mining and Northern Territory pastoral industries have agonised over the *Mabo* decision. Their self-interest is only to be expected and reflects the perceived impact of the findings of the High Court concerning survival and extinguishment of native title. For extinguishment to have taken or to take place, there has to be "a clear and plain intention" by the Crown to alienate validly

> land by granting an interest that is wholly or partially inconsistent with a continuing right to enjoy native title, ... (which) is extinguished to the extent of the inconsistency. Thus native title has been extinguished by grants of estates of freehold or of leases but not necessarily by the grant of lesser interests (for example, authorities to prospect for minerals)[32]

> ... clear and unambiguous ... act or declaration [such as] an unqualified grant of an inconsistent estate in the land by the Crown, such as a grant in fee or a lease conferring the right to exclusive possession ... other inconsistent dealings with the land by the Crown, such as appropriation, dedication or

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29 Above n1 at 70 per Deane and Gaudron JJ.

30 A constructive first step would be the establishment of a register of native title claims that would give notice to interested parties and provide the basis for the formal delineation of areas of native title as soon as possible.

31 Id at 29 per Brennan J; and at 167-9 per Toohey J.

32 Id at 46-50 per Brennan J.

> reservation for an inconsistent public purpose or use, in circumstances giving rise to third party rights or assumed acquiescence[33]

"... and the intention .... must ... appear plainly and with clarity."[34]

The only possibility of confusion would seem to be in the case of leases not having exclusive possession that could arguably be either consistent or inconsistent with native title. Lesser interests of the sort commonly granted to the mining industry do not necessarily extinguish native title and the consequent prospect of the rights of the indigenous owners to royalties from mining seems to be opposed by that industry, at least until it becomes reconciled to the negotiation processes involved, as has already been done with regard to traditional land owners pursuant to the operation of the *Aboriginal Land Rights (Northern Territory) Act* 1976 (Cth) and in other countries such as New Zealand, New Guinea, Canada and the United States.

9. *Compensation*

The justices were, however, divided on the question of compensation and/or damages for past dispossession to native title holders. Deane and Gaudron JJ declared: "The rights under ... common law native title are true legal rights" that, when such title is

> wrongfully extinguished (for example, by inconsistent grant [and possible inconsistency with the provisions of the *Racial Discrimination Act* 1975 (Cth)] without clear and unambiguous statutory authorisation, found proceedings for compensatory damages.[35]

Toohey J, in his judgment, declared: "The traditional title of the Meriam people to the land in the Islands ... may not be extinguished without the payment of compensation or damages to the traditional title holders of the Islands."[36]

Although the final declaration of Brennan J did not refer to any rights to compensation or damages, it did declare that the Parliament and Governor of Queensland have power to extinguish the title of the Meriam people "by valid exercise of their respective powers, provided any exercise of those powers is not inconsistent with the laws of the Commonwealth". He had already made it clear that the power of the Crown to alienate is subject

> to the statutes of the State in force from time to time. The power of alienation and the power of appropriation vested in the Crown in right of a State are also subject to the valid laws of the Commonwealth, including the *Racial Discrimination Act*.[37]

Uniting Brennan J's statement with Toohey J's analysis of the operation of this Act:

> The question here is whether extinguishment of the traditional title of the Meriam people without the compensation provided for in the *Acquisition of Land Act* 1967 (Qld) means that, by reason of a law of Queensland, persons

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33 Id at 84-5 per Deane and Gaudron JJ.
34 Id at 153 per Toohey J.
35 Id at 84 per Deane and Gaudron JJ.
36 Id at 196 per Toohey J.
37 Id at 52 per Brennan J.

> of a particular race, colour or national or ethnic origin do not enjoy a right that is enjoyed by persons of another race, colour or national or ethnic origin or enjoy a right to a more limited extent than those persons. If the traditional title of the Meriam people may be extinguished without compensation, they do not enjoy a right that is enjoyed by other title holders in Queensland or, at the least, they enjoy a right to a more limited extent. A law which purported to achieve such a result would offend s10(1) of the *Racial Discrimination Act* and in turn be inconsistent with the Act within the meaning of s109 of the Constitution. The *Racial Discrimination Act* would therefore prevail and the proposed law would be invalid to the extent of the inconsistency.[38]

This exposition of the law represents the findings of the majority of the High Court in *Mabo (No 1)*, a majority that included Brennan J. However, in the concurring comments made by Mason CJ and McHugh J, it is pointed out that the main difference between the majority is:

> subject to the operation of the *Racial Discrimination Act* 1975 (Cth), neither of us nor Brennan J, agrees with the conclusion to be drawn from the judgments of Deane, Toohey and Gaudron JJ that, at least in the absence of clear and unambiguous statutory provision to the contrary, extinguishment of native title by the Crown by inconsistent grant is wrongful and gives rise to a claim for compensatory damages. We note that the judgment of Dawson J supports the conclusion of Brennan J and ourselves on that aspect of the case since his Honour considers that native title, where it exists, is a form of permissive occupancy at the will of the Crown.[39]

Despite the disclaimer by the High Court found in these concurring remarks, it appears that the position with regard to an entitlement to compensation is at least controlled by the operation of the *Racial Discrimination Act* 1975. The difference between the members of the Court concerns the question of a claim for compensatory damages if wrongful extinguishment has taken place and this is not necessarily the same question as one arising under the *Racial Discrimination Act*. Indeed, the words of the disclaimer illustrate this.

10. Proof

Finally, for future claimants of native title, the matters that will have to be proved in order to establish its continued existence, can be found in the sections in the various judgments on the nature, incidents, limitations, proof and extinguishment of traditional, common law, native title. The origin and content are found in "the traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants of a territory".[40] After some obiter dicta on the possibility of "a fiduciary duty on the Crown" in some circumstances, Brennan J relied on the facts that, in the instant case:

> The Meriam people asserted an exclusive right to occupy the Murray Islands and, as a community, held a proprietary interest in the Islands. They have maintained their identity as a people and they observe customs which are traditionally based ... Of course in time the laws and customs of any people will change and the rights and interests of the members of the people among themselves will change too. But so long as the people remain as an

38 Id at 169 per Toohey J.
39 Id at 7 per Mason CJ and McHugh J.
40 Id at 42 per Brennan J.

> identifiable community, the members of whom are identified by one another as members of that community living under its laws and customs, the communal native title survives to be enjoyed by the members according to the rights and interest to which they are respectively entitled under the traditionally based laws and customs, as currently acknowledged and observed. Here, the Meriam people have maintained their own identity and their own customs. The Murray Islands clearly remain their home country. Their land disputes have been dealt with over the years by the Island Court in accordance with the customs of the Meriam people.[41]

Every claim will be different, of course, and *Mabo* does not mean that its particular facts must be established in other claims.

The requirements are put in general terms as follows:

> Whatever be the precision of Meriam laws and customs with respect to land, there is abundant evidence that land was traditionally occupied by individuals or family groups and that contemporary rights and interests are capable of being established with sufficient precision to attract declaratory or other relief. Although the findings made by Moynihan J do not permit a confident conclusion that, in 1879, there were parcels of land in the Murray Islands owned allodially by individuals or groups, the absence of such a finding is not critical to the final resolution of this case ... by applying the rule that the communal proprietary interests of the indigenous inhabitants survive the Crown's acquisition of sovereignty, it is possible to determine, according to the laws and customs of the Meriam people, contests among members of the Meriam people relating to rights and interests in particular parcels of land.[42]

Brennan J found, that there may be, "other areas of Australia where native title has not been extinguished and where an Aboriginal people, maintaining their identity and their customs, are entitled to enjoy their native title."[43]

In the joint judgment of Deane and Gaudron JJ, the same points were made to the effect that: it is necessary to refer to the "traditional law or custom. [This] is not, however, frozen as at the moment of establishment of a Colony". Further, their "present view" was that as long as the land was still occupied or used by the claimant tribe or group, then "abandonment of traditional customs and ways" did not result in the loss of the rights arising under common law native title.[44]

From his background as the first of Australia's Aboriginal Land Rights (Northern Territory) Commissioners, Toohey J outlined in detail the requirements for proving traditional title. He drew attention to the "distinction between the existence of traditional title and the nature of the title."[45] When proof of the nature of such title is being established, there have been different requirements laid down in the English, Australian and North American authorities. These have included "that the interests said to constitute title be proprietary and that they be part of a certain system of rules",[46] and satisfy the four elements set out in *Hamlet of Baker Lake v Minister of Indian Affairs*

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41 Id at 44 per Brennan J.
42 Id at 45 per Brennan J.
43 Id at 50 per Brennan J.
44 Id at 83 per Deane and Gaudron JJ.
45 Id at 145 per Toohey J.
46 Ibid.

and Northern Development.[47] Toohey J prefers the approach adopted by the North American authorities. Analysing these decisions, he demonstrated that:

> inquiries into the nature of traditional title ... and the kind of society ... are essentially irrelevant to the existence of title, because it is inconceivable that indigenous inhabitants in occupation of land did not have a system by which land was utilised in a way determined by that society. There must, of course, be a society sufficiently organised to create and sustain rights and duties, but there is no separate requirement to prove the kind of society, beyond proof that presence on land was part of a functioning system ... requirements that aboriginal interests be proprietary or part of a certain kind of system of rules are not relevant to proof of traditional title [since the requirements of its proof] are a function of the protection the title provides(562). It is the fact of the presence of indigenous inhabitants on acquired land which precludes proprietary title in the Crown and which excites the need for protection of rights. Presence would be insufficient to establish title if it was coincidental only or truly random, having no connection with or meaning in relation to a society's economic, cultural or religious life. It is presence amounting to occupancy which is the foundation of the title and which attracts protection, and it is that which must be proved to establish title. Thus traditional title is rooted in physical presence. That the use of land was meaningful must be proved but it is to be understood from the point of view of the members of the society.[48]

Toohey J clearly distinguished occupancy as a factor in proof of traditional title from the different legal concept of possession. The findings of fact made by Moynihan J, although they "do not allow the articulation of a precise set of rules and ... are inconclusive as to how consistently a principle was applied in local law [do] not determine the question of traditional land rights". This is because: "Traditional title arises from the fact of occupation, not the occupation of a particular kind of society or way of life. So long as occupation by a traditional society is established now and at the time of annexation, traditional rights exist."[49]

As far as the law on this question is concerned then, it did not matter that Moynihan J's findings of fact were so disappointing. Nor did it matter as far as the Murray Islanders are concerned because the Court's declaratory relief is restricted to the native (common law) title of the Meriam people, for which the plaintiffs have the necessary interest to support the action. But for all the plaintiffs and, in particular, for Eddie Mabo, the disastrous findings of fact changed the situation to such an extent that their statement of claim had to be amended during the final hearing so that the relief sought was restricted to seeking declarations in general terms relating to the title of the Meriam people. Even the reserved questions relating to the rights and interests claimed by the surviving plaintiffs, David Passi and James Rice, in specified blocks of land on Mer (as the Murray Islands are now known), could not be answered, for the findings of fact were not sufficient to satisfy the Justices of their respective interests. Therefore the statement of claim was appropriately amended so as to enable these two plaintiffs to seek and to obtain more general declaratory relief against the State of Queensland. "No such claim

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47 (1979) 107 DLR (3d) 513 at 542, cited in *Mabo* at 146–47 per Toohey J.
48 Above n1 at 146–7 per Toohey J.
49 Ibid.

[for rights and interests in specified blocks of land on Mer] was made before this Court by the plaintiff Eddie Mabo."[50] This was a direct result of the findings of fact made by the Supreme Court of Queensland, findings that, according to Toohey J, it was not necessary to try to obtain in order to prove the claim. So it seems that the requirements of proof of the nature of native title may not be onerous, although prudence will dictate that claimants include all material that could arguably assist their claims.

In the original statement of claim, the Commonwealth of Australia was one of the defendants. By the time the final hearing took place, the Commonwealth was no longer a party. As a result, the question of the relationship between native title and Commonwealth sovereignty over off-shore territory and waters from the low tidemark, which would have had a bearing on indigenous claims to fishing grounds and perhaps to under-sea mineral rights, was unfortunately not decided in Mabo, save in so far as it can be deduced from the general findings of principle determined by the High Court in the judgments.

11. Dissent

I do not propose to analyse the dissenting judgment of Dawson J. However, I would like to point out that the British Columbia Supreme Court decision in *Delgamuukw v British Columbia*[51] cited in his judgment, is presently on appeal to the Supreme Court of Canada. Also, it is submitted that, Dawson J misinterpreted the legal principles involved and applied throughout the ex-colonial common law world, wherever pre-existing native title is to be found. His minority judgment held that:

> [A]ny traditional land rights which the plaintiffs may have had were extinguished upon the assumption of sovereignty by the Crown over the Murray Islands and any fiduciary or trust obligation that might otherwise have existed in relation to such rights is precluded by the terms of the relevant legislation. Accordingly, if traditional land rights (or at least rights akin to them) are to be afforded to the inhabitants of the Murray Islands, the responsibility, both legal and moral, lies with the legislature and not with the courts.[52]

Happily for the indigenous peoples of Australia, for the common law and for the international standing of this country, no other member of the High Court made such incorrect and outdated legal findings.

12. Conclusion

As Brennan J recognised in his judgment:

> 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. It is not possible, a priori, to distinguish between cases that express a skeletal principle and those which do not, but no case can command unquestioning adherence if the rule it expresses seriously offends the values of justice and human rights (especially equality before the law) which are aspirations of the contemporary Australian legal system.[53]

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50 Id at 55 per Brennan J.
51 (1991) 79 DLR (4th) 185.
52 Id at 136 per Dawson J.

After demonstrating how the enlarged notion of *terra nullius* led to the equation of the Crown's sovereignty over a territory with Crown ownership of the lands, only by means of "a discriminatory denigration of indigenous inhabitants, their social organisation and customs", Brennan J held that "the theory is false in fact and unacceptable in our society ... it is imperative in today's world that the common law should neither be nor be seen to be frozen in an age of racial discrimination." Thus the court overruled the existing authorities in so far as they "utterly disregarded" the prior existing claims of indigenous peoples in Australia to sovereignty and ownership and "discarded the distinction between inhabited colonies that were *terra nullius* and those which were not."[54] The Justices rightly held that inhabited colonies were not *terra nullius*.

Australia, as Deane and Gaudron JJ held, "must remain diminished unless and until there is an acknowledgement of, and retreat from, these past injustices." In these "unique circumstances", the Court was "under a clear duty to re-examine the two propositions" concerning *terra nullius* and the Crown's beneficial ownership of already occupied land. They found that a "re-examination compels their rejection."[55] Finally, when referring to the "startling ... consequence that, immediately on annexation, all indigenous inhabitants became trespassers on the land on which they and their ancestors had lived", Toohey J held: "That was not a consequence the common law dictated; if it were thought to be, this Court should declare it to be an unacceptable consequence, being at odds with basic values of the common law."[56]

After *Mabo* it is clear that there are three types of settled colonies — that is, colonies into which the common law is introduced on settlement or common law colonies:

Terra nullius (occupation). This occurs only when a territory is genuinely uninhabited, such as Antarctica or the Island of Las Palmas,[57] or, of course, abandoned by a previous owner.[58]

Implied cession. The common law is introduced into a territory with prior local owners (both as sovereigns and as landowners) where, although the sovereignty changes, there has been no formal cession of this sovereignty. Australia, New Guinea (area of Papua only), British Columbia and the Western Sahara (a civil law jurisdiction) are examples of this situation.

Formal cession. The common law is introduced into a territory with prior local owners (both as sovereigns and as land owners) and there is a formal cession of sovereignty from the local people. Examples of this situation are New Zealand with the Treaty of Waitangi and many parts of North America. For many years, there were theoretical arguments as to whether the sovereignty over these areas of territory had actually been acquired by conquest, until it was finally agreed that they were settled (common law) colonies.

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53 Id at 19 per Brennan J.

54 Id at 27-29 per Brennan J. Racism would have been inherent in the common law if the denial of traditional land ownership had been perpetuated — see Hocking, B (ed), *International Law and Aboriginal Human Rights* (1988) Ch 1.

55 Id at 82 per Deane and Gaudron JJ.

56 Id at 143-4 per Toohey J.

57 See the *Islands of Palmas Case (Netherlands v USA)*, 2 RIAA 829 (1928) at 831.

58 As Britain maintains was the case in the Falkland Islands.

Both the sovereignty and the land ownership in the second and third cases are derivative, as they are in the types of territorial acquisitions known as ceded and conquered. In these latter two, there is no Anglo-European settlement accompanied by the automatic introduction of the common law. Fiji, India, Hong Kong, and many of the African territories were examples of these sorts of acquisitions of sovereignty. However, there are examples of colonies that do not fit the pattern such as Rhodesia and South Africa, that seem to have been combinations of both settled and conquered.

Ultimately, *Mabo* has neither created new law, nor overturned old. On the contrary, it has corrected a past misinterpretation in Australia of well-established common law doctrines. Once it is realised that the chain of cases running from *Cooper v Stuart*, through *Milirrpum* to *Mabo*, had the defective legal link analysed above, it can be seen that the common law of Australia would have become racist in theory as well as in application if the law concerning the recognition of the prior native title of the Aborigines and Torres Strait Islanders to Australia had not at last been correctly interpreted and applied. The common law has again adapted not only to changing fact situations but also to developments in the law.[59] It is a living law that can adapt to changing circumstances, especially in those cases that involve fundamental basic "values of justice and human rights (especially equality before the law)"[60] of the societies of which it is a part. Fortunately, it has done so in this case, and, significantly, both collective and individual human rights have been upheld by the two *Mabo* cases.

The foundation for future development in secondary aspects of this area of the law has been well established by this decision. It can be anticipated that questions such as whether there is a governmental fiduciary duty to indigenous people; whether native title to claimed lands has been or is being extinguished; whether it is still in existence; when, if at all, there is any right to compensation or damages; what the parameters of the nature of native title are and the consequences of an implied cession of sovereignty in the context of evolving international attitudes towards the rights of indigenous people to self-government: these questions will be among those to be decided.

In many ways, the *Mabo* decision has made legal history. With the enshrinement of the human right and basic value of racial equality as a fundamental part of both the common law and the statute law of Australia, the law itself has won a significant victory, and one could be excused for thinking that all of the plaintiffs, too, had been successful. However, this was, in fact, not so, for the case has also illustrated the devastating paradoxes of the law. Although the scales of justice are properly balanced now and, to paraphrase Martin Luther King Jr, Australia is "just, at last"; nevertheless, by the time the case finally came to an end, the plaintiff Eddie Mabo had lost both his land and his life.[61]

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59 See the analysis to this effect in Hocking, B, "Native Land Rights in the Common Law" (1970) LLM thesis Monash University.

60 Above n1 at 19 per Brennan J.

61 Consequently, at the costs hearing on 8 December 1992, the High Court did not award any costs to the plaintiff Eddie Mabo, ruling only that the Queensland Government pay half the costs of the plaintiffs David Passi and James Rice.