THE ABORIGINAL LAND WHICH MAY BE CLAIMED AT COMMON LAW: IMPLICATIONS OF *MABO**

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If native title to land was not extinguished by 31 October 1975, the land is subject to an Aboriginal claim at common law. Native title could have been extinguished only by a legislative or executive act which revealed a "clear and plain intention" to extinguish. In ascertaining the existence of such an intention, regard must be had to the relationship of the government to the Aboriginal people, their history and circumstances. This paper suggests that native title was not extinguished in substantial areas of Australia, particularly Western Australia, prior to 31 October 1975 and in consequence large areas of land are subject to Aboriginal claim at common law.

On 31 October 1975, the Commonwealth Government of Australia imposed a freeze upon the disposition of land. Thereafter land could not be disposed of in disregard of native title at common law. The freeze in Australia followed just over two hundred years after a similar freeze was imposed in North America under the Royal Proclamation of 1763. The declaration of the land freeze imposed in Australia is found in the Commonwealth Racial Discrimination Act 1975 ("the Racial Discrimination Act"). This Act confers an immunity from "arbitrary deprivation of property". In *Mabo v State of Queensland [No 1]*,[1] decided in 1988, the High Court held that the Racial Discrimination Act would protect native title at common law *if* such a concept existed in Australia. In 1992, in *Mabo v State of Queensland [No 2]*[2] ("*Mabo*"), the High Court held that the concept of native title at common law

* See generally: R Bartlett "Aboriginal Land Claims at Common Law" (1983) 15 UWA L Rev 293; M J Kaplan "Proof and Extinguishment of Aboriginal Title to Indian Lands" (1979) 41 ALR Fed 425.

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1. (1988) 166 CLR 186.
2. (1992) 66 ALJR 408.

was indeed part of Australian law. In a decision of considerable complexity, Justice Brennan wrote the judgment that commanded the most support from the members of the Court.

The effect of the land freeze is to require the provision of some form of compensation or settlement. But only land to which native title had not been extinguished prior to 31 October 1975 is subject to claim. This paper seeks to examine the rationale and purpose of the concept of extinguishment and in particular the degree to which legislation, grants and dealings in interests in land may have extinguished native title.

RATIONALE

The High Court founded the concept of native title at common law on the equation of the rights of "the indigenous inhabitants of a settled colony with the inhabitants of a conquered colony" and on the proposition that "the British Crown intends that the rights of the property of the inhabitants are to be fully respected". Justices Deane and Gaudron declared that this "guiding principle accords with fundamental notions of justice".[3] This rationale suggests, prima facie, that native title at common law should be respected and protected in the same manner as any other interest in land.

Such respect for the rights to land of Aboriginal people does not deny the power of the Crown to extinguish native title in the exercise of its sovereignty. Justice Brennan explained that "[s]overeignty carries the power to create and to extinguish private rights and interests in land within the [s]overeign's territory".[4] Justices Deane and Gaudron emphasised the equal protection to be accorded to native title and to all other interests in land, in explaining the power of extinguishment:

> Like other legal rights, including rights of property, the rights conferred by common law native title and the title itself can be ... extinguished by valid Commonwealth, State or Territorial legislation operating within the State or Territory in which the land in question is situated.[5]

But Justice Brennan relied upon Canadian and United States jurisprudence which has not protected native title to the same extent as other interests in land.

The difference in rationale is significant. The North American jurispru-

3. Ibid, 440.
4. Ibid, per Brennan J, 431; Dawson J, 462-464.
5. Ibid, 452. Toohey J pointed out "to say that, with the acquisition of sovereignty, the Crown has the power to extinguish traditional title does not necessarily mean that such a power is any different from that with respect to other interests in land": ibid, 488-489.

dence is founded on the decision of the United States Supreme Court in *Johnson & Graham Lessee v William McIntosh* ("*Johnson & Graham Lessee*").[6] Chief Justice Marshall adopted a compromise between the rights of settlers and Aboriginal people derived from the practice of European nations in relation to North America. The Court rejected the application of the "law which regulates ... the relations between the conqueror and the conquered" and declared that the circumstances required "resort to some new and different rule, better adapted to the actual state of things".[7] The Court declared a rule that, in its own words, "impaired ... the rights of the original inhabitants":

> While the different nations of Europe respected the rights of the natives, as occupants, they asserted the ultimate dominion to be in themselves; and claimed and exercised, as a consequence of their ultimate dominion, a power to grant the soil, while yet in possession of the natives.[8]

The Court asserted that "[a]ll our institutions recognize the absolute title of the Crown, subject only to the Indian right of occupancy, and recognize the absolute title of the Crown to extinguish that right".[9]

The Supreme Court ascribed the power to extinguish to sovereignty but, like the majority of the High Court, did not respect or regard native title in the same way as other interests in land. Distinct principles have been applied as to the manner of extinguishment of native title and in the determination of when extinguishment has taken place. The United States Supreme Court has held that there is no presumption that compensation is payable upon the extinguishment of native title. In *Tee-Hit-Ton Indians v United States*,[10] the Court rejected a claim for compensation for the taking of lands subject to native title. The Court declared that native title was "a right of occupancy which the sovereign grants and protects against intrusion by third parties but which right of occupancy may be terminated and such lands fully disposed of by the sovereign itself *without* any legally enforceable obligation to compensate the Indians".[11] The Court expressly ascribed[12] this principle to *Johnson & Graham Lessee*.[13] The denial of compensation indicates the pragmatic compromise adopted by Chief Justice Marshall in *Johnson &*

6. (1823) 21 US 681.
7. Ibid, 693.
8. Ibid, 689.
9. Ibid, 692.
10. (1955) 348 US 272.
11. Ibid, 279 (emphasis added).
12. Ibid, 284-285.
13. Supra n 6.

Graham Lessee. But in response to the denial of remedy to the Aboriginal people, and the nature of the relationship between them and the government, the Supreme Court demanded, in *United States v Sante Fe Pacific Railroad Company*[14] a "clear and plain indication" of intention to extinguish. The Court explained that "an extinguishment *cannot be lightly implied* in view of the avowed solicitude of the Federal Government for the welfare of its Indian wards ... [T]he rule of construction recognized for over a century has been that 'doubtful expressions, instead of being resolved in favour of the United States, are to be resolved in favour of a *weak and defenceless people, who are wards of the nation, and dependent wholly upon its protection and good faith*'".[15]

The Canadian Supreme Court has adopted both the criterion declared in *United States of America v Sante Fe Pacific Railroad Company* and its rationale. In the landmark 1990 case of *R v Sparrow*,[16] the Court held that the Canadian Fisheries Act and the regulations thereunder respecting fishing rights, which made express provision for Indian fishing, did not demonstrate a "clear and plain intention to extinguish the Indian aboriginal right to fish". The Court declared, "The test of extinguishment to be adopted, in our opinion, is that the Sovereign's intention must be clear and plain if it is to extinguish an aboriginal right".[17]

The majority of the High Court in *Mabo* favoured the criterion and rationale declared in the United States and Canadian jurisprudence. Justice Brennan expressly rejected the suggestion that the criterion is derived from a presumption that a statute will not be construed so as to derogate from or impair an interest in land.[18] Rather, he relied upon the North American jurisprudence and explained that the limits upon the manner in which native title might be extinguished flowed "from the seriousness of the consequences to indigenous inhabitants".[19] These consequences gave rise, in his view, to the requirement that "the exercise of a power to extinguish native title must

14. (1941) 314 US 339.
15. Ibid, (emphasis added).
16. [1990] 1 SCR 1075. See also *Calder v AG of British Columbia* ("*Calder*") [1973] SCR 313, at 344 and 404.
17. Ibid, [1990] 1 SCR, 1099. The need for a "clear and plain intention" was an aspect of the US rule that "doubtful expressions" were to be resolved in favour of the Indians. The Supreme Court of Canada expressly adopted the US rule in 1983 in *Nowegijick v R* [1983] 1 SCR 29, when Dickson J (as he then was) declared for the Court at 36, "treaties and statutes relating to Indians should be liberally construed and doubtful expressions resolved in favour of the Indian".
18. Supra n 2, 432.
19. Ibid, 432.

reveal a clear and plain intention to do so".[20] He declared it to be "patently the right rule".[21] Justices Dawson[22] and Toohey[23] also declared such a requirement and cited Canadian and United States authority in support.

Unlike Justice Brennan, Justice Toohey did not consider that native title stood in a "special position" and regarded the requirement of a "clear and plain intention" to extinguish as being equally an aspect of the common law regard for rights of property and an aspect of the principles developed in the North American jurisprudence.[24]

Contrary to the opinion of Justice Toohey, it is suggested that the basis of the criterion used to determine if extinguishment has taken place does make a difference. The majority of the High Court favours a rationale that pays due regard to the *relationship of the government and the Aboriginal people and their history and circumstances* in a context where the "serious consequence" of finding extinguishment to have taken place is to deny the Aboriginal people a remedy at common law. Extinguishment will not lightly be found. The majority position places an onerous burden upon a party seeking to establish extinguishment because regard must be had to the historic protective and paternalistic relationship of the government to the Aboriginal people.[25] The majority position also favours substantial regard for the jurisprudence developed in the United States and Canada.

EXTINGUISHMENT BY LEGISLATION

All members of the High Court in *Mabo* agreed that legislation would only extinguish native title if a clear and plain intention to do so could be found. Such an intention is not revealed by a law which merely "regulates the enjoyment of native title" or which creates a "regime of control that is consistent with the continued enjoyment of native title".[26] The concept of

20. Ibid.
21. Ibid.
22. Ibid, 464.
23. Ibid, 489-490.
24. Ibid, 489. Deane and Gaudron JJ make almost no reference to the US jurisprudence and the only reference that is made is in connection with a proposition that they reject: Ibid, 443. They declare that native title should be treated "[l]ike other legal rights" and "ordinary rules of statutory interpretation require...that clear and unambiguous words be used before there will be imputed to the legislature an intent to expropriate or extinguish valuable rights relating to property without compensation": Ibid, 452.
25. Ibid. The rationale of the criterion favoured by Deane and Gaudron JJ merely stresses the absence of compensation and the need for "clear and unambiguous" language.
26. Ibid, Brennan J, 432; citing *R v Sparrow* supra n 15, 1097; *United States of America v Sante Fe Pacific Railroad Company* supra n 14, 353-354.

native title recognises nothing inconsistent in native title being held by an Aboriginal group and at the same time the underlying radical title being vested in the Crown. Legislation must go much further than merely recognising the underlying title of the Crown. Legislation need not, however, specifically provide for extinguishment. If its principal object is extinguishment it will be given that effect. In *Mabo v State of Queensland (No 1)*,[27] the High Court concluded that the statutory declaration that:

> [T]he islands were vested in the Crown in right of Queensland freed from all other rights, interests and claims of any kind whatsoever...

where the Minister explained on second reading that the object of the Queensland Coast Islands Declaration Act was the extinguishment of native title, and the statute was passed to seek to deny a claim to native title, was effective to achieve that end. But it is rare that it can be said that the principal object of Australian legislation was the extinguishment of native title. Indeed the questions that need to be resolved in Australia concern the effect to be given to legislation respecting land, resources and Aboriginal affairs, where no consideration whatever was given to the existence of native title at common law. The concept of the extinguishment of native title demands a result in law that is consistent with the history and reality of the settlement and development of Australia. Its application will be considered in the context of Western Australia on the supposition that this is the State where issues of native title are most pressing.

The mere declaration of the underlying radical title of the Crown and its power to dispose of Crown lands is not sufficiently clear and plain to extinguish native title.

> To treat the dispossession of Australian Aborigines as the working out of the Crown's acquisition of ownership of all land on first settlement is contrary to history. Aborigines were dispossessed of their land parcel by parcel, to make way for expanding colonial settlement".[28]

The High Court in *Mabo* held that legislation providing for the disposition of the public lands in the State of Queensland did not evince a clear and plain intention to extinguish native title. The various Land Acts empowered the Crown to grant interests, including a fee simple, with respect to "all land in Queensland" not already subject to Crown grant or reservation. The legisla-

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27. Supra n 1.
28. Supra n 2, Brennan J, 434. In *Gila River Pima-Maricop Indian Community v United States* (1974) 494 F 2d 1386 the US Court of Claims declared at 1391 that "[t]he expectation of future parcel-by-parcel settlement would not, alone, extinguish Indian ownership".

tion was, in the words of Justice Brennan, founded on the "belief, which has been current since *Attorney General v Brown*,[29] that the absolute ownership of all land in Queensland is vested in the Crown".[30] But that assumption and the passage of legislation declaring powers of disposition of land and resources, founded on that assumption, was not sufficient to extinguish native title. The Aboriginal people of Australia were not dispossessed by such legislation: "They were dispossessed by the Crown's *exercise* of its sovereign power to grant land to whom it chose and to appropriate to itself the beneficial ownership of parcels of land for the Crown's purposes".[31] All members of the Court, except Justice Dawson, agreed with that conclusion.[32] Justices Deane and Gaudron explicitly considered Imperial, Colonial and State legislation in reaching that conclusion. The conclusion that the legislation is ineffective to extinguish native title is of general application throughout Australia and throughout its history.

Nor is the conclusion denied by provisions of public lands legislation that declare it to be an offence for any unauthorised person to enter upon Crown land. If such provisions of the Queensland legislation had been applied to the Meriam people in *Mabo,* and had denied them the right to remain in occupation, "there would have been an indication that their native title was extinguished".[33] But Justice Brennan declared that such a result "would make nonsense of the law", and that to apply the provisions to the Meriam people "would be truly barbarian".[34] His Honour expressed agreement with Justice Hall of the Supreme Court of Canada in *Calder*:

> Any reasoning that would lead to such a conclusion must necessarily be fallacious. The idea is self-destructive. If trespassers, the Indians are liable to prosecution as such, a proposition which reason itself repudiates.[35]

Justice Brennan concluded that "such provisions should be directed to those who were or are in occupation under colour of a Crown grant or without any colour of right; they are not directed to indigenous inhabitants who were

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29. (1847) 2 SCR (NSW) (App) 30.
30. Ibid, Brennan J, 433; Dawson J 474:

> [The Crown] did so from the start by acting upon the assumption (which was also the assumption lying behind the relevant legislation) that there was no such thing as native title and that the Crown was exclusively entitled to all lands which had not been alienated by it ...

31. Ibid, Brennan J, 434.
32. Ibid, Deane and Gaudron JJ, 452; Toohey J, 490; Brennan J, 432-434.
33. Ibid, Brennan J, 433.
34. Ibid.
35. Supra n 16, [1973] SCR 313, 414.

or are in occupation of land by right of their unextinguished native title".[36] Justice Brennan's language and his conclusion affirms an adherence to the rationale of the requirement of a "clear and plain intention" to extinguish that looks to the nature of the relationship between the government and the Aboriginal people and their history and circumstances.

1. Public lands

The application of the decision in *Mabo* to the Western Australian Land Act is relatively straight forward. Neither the predecessor ordinance and legislation nor the Act currently in effect extinguished or extinguish native title.[37] Section 7 of the Imperial Australian Waste Lands Act 1855 provided that the Crown might by instruction "regulate the sale, letting, disposal and occupation of waste lands of the Crown". Regulations were made in 1882 authorising the Governor to dispose of Crown lands in fee simple or any lesser estate in the manner and on the conditions prescribed by the Regulations. The Land Acts of 1898 and 1933 enacted by the Western Australian Parliament have affirmed that power in much the same form. "Crown lands" are defined as "all lands of the Crown vested in Her Majesty", except land already subject to grant or reservation.[38] The legislation declares it to be an offence for any person to use, occupy or remove anything growing on Crown lands.[39] The rationale and the conclusion of the *Mabo* decision dictate that such provisions do not evince any "clear and plain intention" to extinguish native title. The Regulations and the legislation were no doubt enacted upon the assumption of absolute ownership and the non-existence of native title, but the declaration of such powers in the Crown, founded on such assumption, does not indicate a sufficiently "clear and plain intention" to extinguish. The petty trespass provisions are another aspect of that mistaken assumption. Moreover, their application to Aboriginal people in the State with respect to their traditional land would, in the words of Justice Brennan, be "barbarian."

2. Minerals and petroleum

Legislation respecting minerals in Western Australia has generally not extinguished native title at common law. The legislation is, of course,

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36. Supra n 2, Brennan J, 433 Deane and Gaudron JJ, 454.
37. See (WA) Land Act 1933; (WA) Land Act 1898; Land Regulations 1882, made under the (Imp) Australian Waste Lands Act 1855.
38. Ibid, (WA) Land Act 1933 s 3(1).
39. Ibid, s 164.

founded on the assumption of the initial absolute ownership of the Crown of all minerals. Initially, Crown grants of interests in land included the minerals. It was not until the 1882 Regulations[40] that a reservation of gold and silver was declared, and not until the Western Australian Land Act 1898[41] that other minerals were reserved in Crown grants. The reservations included an express right to work. The Western Australian Mining Act 1904[42] ("the Mining Act") recognised the pattern of reservation in declaring that all minerals, other than gold and silver, *not alienated by the Crown before 1January 1899*, were "the property of the Crown". It has been suggested that the reference to the "property of the Crown" is sufficient to extinguish native title.[43] The suggestion was supported by reference to the provision of the Mining Act that declares it to be an offence[44] to mine without authority under the Act.

> [T]he language used in the Mining Acts is more consistent with the intention that the Crown be the beneficial owner of minerals, rather than merely having radical title to minerals.[45]

But the intention to extinguish native title must be "clear and plain". Having regard to the rationale of the requirement declared in *Mabo*, it is not considered that such intention is present. The Mining Act provisions merely reflect the assumption of residual Crown ownership of minerals remaining after reservation of minerals come into effect under the Land Act 1898. The provision of the Mining Act declaring it to be an offence to mine without authority under the Act does not extinguish native title. It merely provides for the application of the procedures and requirements of the Mining Act. The Mining Act acknowledges and provides for minerals which are privately owned.[46] The requirement of authority under the Mining Act to mine such minerals does not deny such ownership. The legislation, in the words of Justice Brennan, merely "regulates the enjoyment of native title".

Native title to gold and silver and petroleum is more problematic. Gold and silver were reserved in Crown grants under the first regulations made in

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40. Supra n 37, Land Regulations 1882 schedule 2.
41. Supra n 37, (WA) Land Act 1898 s 15.
42. (WA) Mining Act 1904 s 138. Legislation in Qld uses similar language: see (Qld) Mining and Private Land Act 1909 ss 6 and 21A.
43. P Van Hattem "The Extinguishment of Native Title (and Implications for Resource Development)" in R Bartlett (ed) *Resource Development and Aboriginal Land Rights* (Centre for Commercial and Resources Law: Univ of W Aust, Perth, 1993).
44. Supra n 37, (WA) Land Act 1898 s 15.
45. Supra n 43.
46. Supra n 44, ss 37-39.

Western Australia. Gold and silver can, in any event, only pass under grants by express words or necessary implication.[47] The Western Australian Mining Acts 1904 and 1978 provided that all gold and silver was "the property of the Crown" whether alienated by the Crown or not. The declaration may merely reflect the assumption of initial absolute Crown ownership inasmuch as gold and silver were not generally granted in Western Australia, but to the extent that they were, the declaration would seem to contemplate the denial of inconsistent interests granted by the Crown.

Petroleum is a mineral that did pass with Crown grants prior to 1899.[48] But in 1936, the State enacted the Petroleum Act, section 9 of which declared that notwithstanding any other Act or grant, and irrespective of whether land was alienated in fee simple or not so alienated, petroleum "is and shall be deemed always to have been the property of the Crown". The intention of the provision was clearly to deny all interests that had been previously granted by the Crown. It goes beyond merely an assumption of Crown ownership. But is it sufficient to extinguish native title? A "clear and plain" intention to extinguish native title must be shown. It may be argued that Parliament merely intended to cancel the grants of petroleum that the Crown had previously made; it did not contemplate nor consider the question of native title. This suggestion is to be preferred. It properly recognizes the rationale of the majority in *Mabo* that demands a "clear and plain" intention having regard to the circumstances of the Aboriginal people, and gives effect to the requirement that doubtful expressions should be resolved "in favour of a weak and defenceless people ... dependent wholly upon [the nation's] protection and good faith".[49]

North American jurisprudence supports this conclusion. In the *United States v Northern Paiute Nation*,[50] the seven member United States Court of Claims confronted the issue of whether the mineral element of native title was extinguished by mining legislation. Separate pieces of legislation declared that:

> We [the Crown] reclaim, resume and incorporate in ourself in our crown and patrimony, all the Mines ... [W]e will that the said mines shall and may henceforth ... belong to our said Crown and patrimony ... [and] ... [m]ines are the property of my Royal Crown.[51]

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47. *Woolley v Attorney General of Victoria* (1877) 2 AC 163.
48. See *Midland Railway Company of Western Australian Ltd* v *State of Western Australia* [1956] 3 All ER 272.
49. Supra n 15.
50. (1968) 393 F 2d 786.
51. Ibid, 793.

The unanimous Court concluded that the language did not show the required "clear and plain indication" of intention to extinguish the Indians' rights to the sub-surface minerals.[52] General public lands legislation has not been held to extinguish native title and mining laws have not been distinguished from public lands legislation in this respect. Circuit Judge Ross in *McFadden v Mountain View Mining Co*[53] declared that "[t]he general laws applicable to the disposition of public lands embrace those relating to mining claims, as well as those relating to pre-emption, homestead, and other entries".[54]

Justice Brennan adopted a position consistent with the North American jurisprudence in *Mabo*. He, like all the other members of the Court, emphasized that the Aboriginal people were dispossessed of native title by the *exercise* of the sovereign powers to grant land, *not* the assumption of such powers. But Justice Brennan alone considered the exercise of powers under the mining legislation. He offered the opinion that "authorities to prospect for minerals" (the form of exploration tenement granted under the Queensland Mining Act) would not have extinguished native title.[55] Implicit in this opinion is the conclusion that the mining legislation per se had *not* already extinguished native title.

3. Parks and forests

The legislation respecting parks and forests in Australia has generally provided for administration and disposition by the Crown upon an assumption of Crown absolute ownership. The Western Australian legislation respecting parks, the Parks and Reserves Act 1895, the National Parks Authority Act 1976 and the Conservation and Land Management Act 1984, follows that pattern. It provides for the vesting of control and management of lands reserved under the Western Australian Land Act 1898 in various Boards and agencies. Similarly, forests were initially governed by regulations under public lands legislation. Specific legislation respecting forests, such as the Western Australian Forest Act 1918, provided for administration by a Department of Forestry upon the same assumption of absolute Crown ownership. Indeed, the legislation specifically declared that "forest produce

52. Ibid.
53. (1899) 97 Fed 670. See also *Hamlet of Baker Lake v Minister of Indian Affairs and Northern Development* (1979) 107 DLR (3d) 513; F Cohen *Handbook of Federal Indian Law* (Reprint University of New Mexico Press, 1940) 313.
54. Ibid, 680.
55. Supra n 2, 434.

... remains the property of the Crown".[56] The pattern of powers of administration and the declaration of the "property of the Crown" upon the assumption of Crown ownership are not, upon the analysis of *Mabo*, considered sufficient indication of a "clear and plain intention" to extinguish native title. Justice Brennan implicitly affirmed that opinion insofar as he declared the setting aside of a national park might not extinguish native title.[57] The declaration, of course, indicates that his Honour did not consider that legislation generally providing for the administration, control and management and assumption of Crown ownership extinguished native title.

What of the provision that the removal of forest produce,[58] the hunting or snaring (trapping) of indigenous animals or birds, or occupation of lands in parks or forests, without authority, is an offence?[59] These provisions would make Aboriginal people trespassers on traditional lands of which they had remained in occupation, and proscribe their traditional activities. It would seem that Justice Brennan would consider such application to be "barbarian", the provisions seemingly being analogous to those of the Queensland Land Act 1962. Moreover, regard for a "clear and plain intention", where "doubtful expressions are to be resolved in favour" of Aboriginal people, having regard to their history and circumstances, might well construe native title as affording "authority from the Crown". But it is not necessary to determine that the provisions are inapplicable to conclude that native title has not been extinguished. The provisions, if applicable, merely regulate, and do not extinguish, native title. The matter was forcefully argued in *R v Sparrow*[60] before the Supreme Court of Canada. The Government argued that the detailed regulation of the fishery *and* the Indian right to fish had the effect of extinguishing any native title to fish. The unanimous Court rejected the argument:

> There is nothing in the Fisheries Act or its detailed regulations that demonstrates a clear and plain intention to extinguish the Indian aboriginal right to fish. The fact that express provision permitting the Indians to fish for food may have applied to all Indians ... in no way shows a clear intention to extinguish.[61]

Justice Brennan in *Mabo* expressly approved this reasoning.[62]

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56. (WA) Forests Act 1918 s 60; now see (WA) Conservation and Land Management Act 1984 s 117.
57. Supra n 2, 434.
58. Supra n 56, s 45; now see (WA) Conservation and Land Management Act 1984 s 103.
59. Supra n 56, s 49; now see (WA) Conservation and Land Management Act 1984 s 106.
60. Supra n 16.
61. Ibid, Dickson CJ, 1099.
62. Supra n 2, 432.

4. Resource development agreement Acts

Legislation ratifying agreements between a State and a resource developer has been used quite commonly in Australia. Such resource development agreement Acts continue in common use in Western Australia and Queensland. The legislation usually ratifies and gives legislative effect to an agreement that provides a comprehensive regime for a particular resource development project. The agreement will usually include the grant of a resource tenement. In an analogous circumstance in *Milirrpum v Nabalco Pty Ltd*,[63] Justice Blackburn considered the effect of the Northern Territory Mining (Gove Peninsula Nabalco Agreement) Ordinance 1968. The Ordinance was made by the Commonwealth to ratify and give effect to an agreement reached with developers of a bauxite deposit. The Ordinance provided for the grant of a mining lease and special purpose leases for the establishment of a township and for purposes ancillary to mining. The Ordinance expressly declared that "any...lease has effect according to its items".[64] Justice Blackburn concluded that those words of the Ordinance were "impossible to construe otherwise than as an abrogation pro tanto of whatever rights the plaintiffs had".[65] The legislation would seem to have established a regime with respect to particular land that was inconsistent with the continued enjoyment of native title. Such a conclusion is little different from the recognition that inconsistent Crown grants extinguish native title "parcel by parcel".

5. Legislation respecting aboriginal affairs and land rights

The traditional forms of "native welfare" legislation adopted in Australia did not extinguish native title. The legislation established a regime of segregation, control and protection upon reserves set apart for Aboriginal people. The creation of reserves and the imposition of such a regime does not extinguish native title with respect to that land. Justice Brennan observed in *Mabo*:

> Native title was not extinguished by the creation of reserves nor by the mere appointment of "trustees" to control a reserve where no grant of title was made ... To appoint trustees to control a reserve does not confer on the trustees a power to interfere with the rights and interests in land possessed by indigenous inhabitants under a native title.[66]

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63. (1971) 17 FLR 141.
64. (NT) Mining (Grove Peninsula Nabalco Agreement) Ordinance 1968 s 6(2).
65. Supra n 2, 292.
66. Supra n 2, 433.

Justices Deane and Gaudron commented that the imposition of control on reserve lands should be "construed as intended to safeguard rather than extinguish"[67] native title. The High Court decisively rejected the contrary position. The lone dissenter, outweighed by all the other members of the Court, was Justice Dawson:

> The reservation of land for the use of the Aboriginal population was in the exercise of a benevolent jurisdiction whereby the land was to be controlled by the Crown in accordance with a legislative scheme which was inconsistent with the exertion of native rights, communal or otherwise, in the land.[68]

In Australia, only Western Australia maintains legislation largely unchanged from the forms of "native welfare". *Mabo* would suggest that neither the legislation, the regime of administration it establishes, nor the creation of reserves thereunder, extinguishes native title in the State.

Legislation in South Australia and Victoria has granted title to former reserves to Aboriginal groups: the South Australian Aboriginal Land Trust Act 1966 and the Victorian Aboriginal Land (Lake Condah and Framlingham Forest) Act 1987. The legislation did not extinguish native title to other lands in the State, albeit the grant of title may have been effective to extinguish native title to the land itself.[69]

The most significant factor in the consideration of whether native title has been extinguished would seem to be whether the legislation has ratified an agreed settlement or imposed a settlement of native title. The South Australian Pitjantjatjara Land Rights Act 1981 and the South Australian Maralinga Tjarutja Land Rights Act 1984 are said to have ratified an *agreed* settlement of Aboriginal land claims. Such has long been considered effective, in United States jurisprudence, to extinguish native title to other lands.[70] A unilaterally imposed settlement may also be effective, as was held in *United States v Atlantic Richfield Company*[71] with respect to the Alaska Native Claims Settlement Act. This is particularly true if compensation is provided for the

67. Supra n 2, 455; also see Toohey J, 490-491.
68. Ibid, 474.
69. Any conclusion of this question would require an analysis of the legislation which cannot be undertaken in a general paper of this nature. This preamble of the legislation in Victoria declares it to be "expediant to acknowledge, recognise and assert the traditional rights of Aboriginals" to the land and "the continuous association they have with the land". The language would suggest that the legislation did not extinguish native title to the granted land.
70. See *United States of America v Sante Fe Pacific Railroad Company* supra n 4; *Sac and Fox Tribe of Indians of Oklahoma v United States* (1967) 383 F 2d 991; *Absentee Shawnee Tribe v Kansas* (1985) 628 F Supp 1112.
71. (1977) 435 F Supp 1009.

extinguishment of native title lands.[72] Land rights legislation passed in the Northern Territory, New South Wales and Queensland[73] may have extinguished native title, subject to the question of the Racial Discrimination Act. Each statute sought to provide a final settlement of Aboriginal land claims in each State. All three provided a claims mechanism limited to certain lands. The New South Wales statute also provided moneys by way of compensation. All of the Australian legislation that might be said to have imposed a settlement of native title was enacted after 31 October 1975 and the commencement of the Racial Discrimination Act. The legislation is accordingly subject to consideration as to whether it complied with the standards of protection set by that Act.

EXTINGUISHMENT BY EXECUTIVE ACTION

The extinguishment of native title in Australia has occurred, to the extent it has occurred, "parcel by parcel", as the Crown exercised its powers of disposition.[74] But "the exercise of a power to extinguish native title must reveal a clear and plain intention to do so, whether the action be taken by the Legislature or *by the Executive*".[75] A "clear and plain intention" to extinguish must entail an intention inconsistent with native title.[76] All members of the High Court agreed that a disposition or appropriation that was fully or partially inconsistent with native title would, to the extent of the inconsistency, extinguish native title.[77] Justice Brennan explained that "[t]he extin-

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72. See *United States v Dann* (1985) 470 US 39, 45 where the Supreme Court gave effect to and emphasized that the chief purpose of the Indian Claims Commission Act was "to dispose of the Indian claims problem with finality"; *United States v Gemmill* (1976) 535 F 2d 1145; *Ute Indian Tribe v Utah* (1983) 716 F 2d 1298.

73. (Cth) Aboriginal Land Rights (Northern Territory) Act 1976; (NSW) Aboriginal Land Rights Act 1983; (Qld) Aboriginal Land Act 1991. Any conclusion of this question must consider any general protection extended to existing interests or special protection extended to native title. Ss 2.12 and 3.06 (Qld) Aboriginal Land Act, appear to provide such protection. Conclusions as to the relationship of the legislation to native title requires an analysis of the legislation which cannot be undertaken in a general paper of this nature.

74. See supra n 2, Brennan J 434; in *Re Southern Rhodesia* [1919] AC 211, 234; *Simon v The Queen* (1985) 24 DLR (4th) 390, 406.

75. Supra n 2, Brennan J, 432 (emphasis added); Toohey J, 490:

> It need hardly be said that when an executive act is relied upon to extinguish traditional title, the intention of the legislature that executive power should extend this far must likewise appear plainly and with clarity.

76. Ibid, Brennan J 432. See R Bartlett "Aboriginal Land Claims at Common Law", (1983) 15 UWAL Rev 293, 331.

77. Supra n 2 Brennan J, 433-434, Toohey J, 490, Deane and Gaudron JJ, 452, Dawson J, 473.

guishing of native title does not depend on the actual intention of the Governor in Council (who may not have adverted to the rights and interests of the indigenous inhabitants or their descendants), but on the *effect* which the grant has on the right to enjoy the native title".[78] The rationale of the majority with respect to the requirement of a "clear and plain intent" to extinguish demands that the history and circumstances of the Aboriginal people be considered in determining the existence of such an inconsistency.

1. Grants in fee simple and leases

> Where the Crown has validly alienated land by granting an interest that is wholly or partially inconsistent with a continuing right to enjoy native title, native title is extinguished to the extent of the inconsistency.[79]

Freehold grants to settlers, that is, grants in fee simple and leases conferring exclusive possession are considered to extinguish native title.[80] Freehold grants to settlers and homesteaders have always been acknowledged as extinguishing native title. Such was the result of the landmark case in *Johnson v McIntosh*.[81] As the court explained in *United States v Atlantic Richfield Company*,[82] in an action by the Inuit inhabitants of Alaska for trespass to native land prior to the passage of the Alaska Native Claims Settlement Act:

> [A]boriginal title ... is legally extinguishable when the United States makes an otherwise lawful conveyance of land pursuant to federal statute. Congressionally authorised conveyance of lands from the public domain demonstrates the requisite intent to extinguish the Indian right of exclusive use and occupancy to those lands. Thus as the United States acknowledges, when the Secretary of the Interior issued a patent to a homesteader in Alaska, aboriginal title was extinguished with respect to the patented land.[83]

Leases are more problematic. Justice Brennan offered this explanation as to why the grant of a lease extinguishes native title:

> If a lease be granted, the lessee acquires possession and the Crown acquires the reversion expectant on the expiry of the term. The Crown's title is thus expanded from the mere radical title, and on the expiry of the term, becomes a plenum dominion.[84]

Justice Brennan appears to take the position that, irrespective of the terms

78. Ibid, Brennan J, 433-434 (emphasis added).
79. Ibid, per Brennan J, 434.
80. Ibid, Deane and Gaudron JJ, 443 and 452; Brennan J, 434. See Appendix A.
81. Supra n 6. See also *Marsh v Brooks* (1852) 14 How 513; 14 L Ed 522.
82. Supra n 71.
83. Ibid, 1020.
84. Supra n 2, 434.

of a "lease", including special conditions directed to the protection of native title, the mere granting of a "lease" will necessarily extinguish native title. The explanation focuses upon the expansion of the Crown's interest *not* that of the lessee. But it is suggested that the Crown may not intend to expand its interest at the partial or total expense of native title, and such intention may be evident in the terms of the "lease". Moreover, the terms of a "lease" may not grant an interest to the lessee that is inconsistent with native title. An instrument described as a "lease" may grant an interest, the exercise of which does not in "effect" impair the enjoyment of native title.

It is tempting to criticize the failure of Justice Brennan in his general analysis to allow for the significance of particular terms in a "lease" which reserve and protect native title. But it is suggested that his analysis is indeed correct if one adopts the proper technical understanding of a lease, that is, an interest that confers "exclusive possession". Such was the limitation explicitly declared by Justices Deane and Gaudron.[85] If an instrument upon an examination of all its terms confers exclusive possession, and accordingly is properly termed a lease, its grant would seem inconsistent with native title. But if such examination reveals terms that reserve and protect native title, it would seem neither to be inconsistent with native title nor to be a true lease. This would suggest the need for an examination of all the terms of instruments to determine if inconsistency exists. In *Mabo*, one lease was a special lease of two acres to the London Missionary Society with no consideration of rights to the Aboriginal people. The other lease was for twenty years over the whole of two islands for the purpose of establishing a sardine factory. Factory buildings and houses were erected. The lease was subject to conditions that the lessees would not interfere with native use of their gardens or plantations on the land nor with native fishing on adjacent reefs. The lease was construed to restrict entry except for gardening purposes.[86] Justice Brennan considered that:

> [T]he limited reservations in the special conditions are not sufficient to avoid the consequence that the traditional rights and interests of the Meriam people were extinguished. By granting the lease, the Crown purported to confer possessory rights on the lessee and to acquire for itself the reversion expectant on the termination of the lease. The sum of those rights would leave no room for the continued rights and interests derived from Meriam laws and customs.[87]

85. Ibid, 452.
86. Ibid, 435.
87. Ibid, 436.

Justice Dawson agreed.[88] Justices Deane and Gaudron took the contrary view:

> This lease recognized and protected usufructuary rights of the Murray Islanders and was subsequently forfeited. It would seem likely that ... it neither extinguished nor had any continuing adverse effect upon any rights of Murray Islanders under common law native title".[89]

Justice Toohey expressed no opinion.[90]

Justice Brennan appeared to consider that that instrument granted exclusive possession, inconsistent with native title, and accordingly indicated a sufficiently "clear and plain" intention to extinguish native title. His analysis of the terms of the instrument does not seem to have any regard for the fundamental rationale of the need for a "clear and plain intention" to extinguish. But the special conditions relating to native use were, in the language of Justice Brennan, "limited" in scope.

The reservation of the rights of Aboriginal people in pastoral leases throughout Australia are not so limited. Imperial instructions were given to the Governor of New South Wales in 1848 that pastoral leases were to "give the grantees only an exclusive right of pasturage for their cattle, and of cultivating such land as they may require" but that the leases were not intended "to deprive the natives of their former right to hunt over these Districts or to wander over them in search of subsistence, in the manner to which they have been heretofore accustomed, from the spontaneous produce of the soil, except over land actually cultivated or fenced in for that purpose".[91] Clauses were accordingly introduced in pastoral leases protecting those rights and incidents of native title. A pastoral lease under consideration in *Milirrpum v Nabalco Pty Ltd* provided:

> Reserving nevertheless and excepting out of the said demise to Her Majesty...for and on account of the present Aboriginal Inhabitants of the Province and their descendants ... full and free right on ingress, egress and regress into upon and over the said Waste Lands of the Crown ... and in and to the Springs and surface water thereon and to make and erect such wurlies and other dwellings as the said Aboriginal Natives have been heretofore accustomed to make and erect and to take and use for food birds and animals ferae naturae in such manner as they would have been entitled to if this demise had not been made.[92]

Pastoral leases in Western Australia have included the following provi-

88. Ibid, 473.
89. Ibid, 455.
90. Ibid, 490.
91. Supra n 63, 259-261.
92. Ibid, 260.

sions:

> Except and always reserved ... full right to the Aboriginal natives of the said Colony at all times to enter upon any unenclosed or enclosed, but otherwise unimproved part of the said demised premises for purposes of seeking their subsistence therefrom in their accustomed manner.[93]

In 1934, Aboriginal rights on pastoral leases were the subject of a statutory declaration in the main body of the Western Australian Land Act 1933. Section 106 declared:

> The aboriginal natives may at all time enter upon any unenclosed and unimproved parts of the land the subject of a pastoral lease to seek their sustenance in their accustomed manner".[94]

In *Milirrpum v Nabalco Pty Ltd*, Justice Blackburn did not decide upon the effect of such a clause, beyond making the observation that "a lease *without* such a clause must then be effective to extinguish" native title.[95]

It is suggested that the inclusion of a clause protecting the right of Aboriginal people to enter upon the lands subject to a pastoral "lease" to seek "their subsistence in their accustomed manner" denies a "clear and plain intention" to extinguish native title. The clauses spring from Imperial and historic concern to protect the Aboriginal people in the traditional use of their land; and a regard for their history and circumstances is likely to deny the requisite intention. An ordinary construction of the clauses and the rights held under a pastoral "lease" will likely not find any inconsistency.[96] Support for that construction may be found in *United States v Dann*,[97] where the issue of ten year grazing licences was held not to effect an extinguishment of native title. It lacked a sufficiently clear expression of intent, even in the absence of a clause specifically protecting rights to the Aboriginal people as found in Australian pastoral leases.

2. Mineral and petroleum tenements

It has been suggested that the general legislation providing for the disposition of minerals and petroleum does not, of itself, extinguish native

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93. Supra n 37, (WA) Land Act 1898 s 92 and 24th Schedule. See Appendix B.
94. Supra n 37, (WA) Land Act 1933 s 106 amended by (WA) Land Act Amendment Act 1934 s 11.
95. Supra n 63, 261.
96. Supra n 43.
97. See (1983) 706 F 2d 919; (US) Taylor Grazing Act 1934 43 USCS s 315. For an analogous result see under the (Cth) Aboriginal Land Rights (Northern Territory) Act 1976; *R v Toohey; Ex Parte Meneling Station Pty Ltd* (1982) 158 CLR 327.

title. But tenements may be issued under such legislation that indicate a "clear and plain intention" to extinguish and are inconsistent partially or totally with native title. The necessary inquiry will consider the "effect which the grant has on the right to enjoy native title".[98]

In *Milirrpum v Nabalco Pty Ltd*, Justice Blackburn considered that mining leases and special purposes leases granted for the operation of a bauxite mine would extinguish native title to the extent of inconsistency.[99] In *Hamlet of Baker Lake v Minister of Indian Affairs and Northern Development*,[100] the Court examined the impact of exploration activity under prospecting permits upon traditional Aboriginal hunting practices. The Court concluded that exploration had not been a significant factor in the decline of the caribou population, but observed that "the harassments that may arise out of mining activity beyond the exploration stage might well be sufficiently sustained to result in behavioral changes detrimental to the hunt".[101] Thus, the Court did not consider that the issue of prospecting permits barred the grant of a declaration that the lands were subject to native title. But it did observe that "to the extent it does diminish the rights comprised in an aboriginal title, it prevails".[102]

The conclusion that general prospecting permits would not have extinguished native title was followed by Justice Brennan in *Mabo*.[103] Production tenements in the form of mining leases or oil and gas production licences are likely to be considered to have extinguished native title.[104]

Determination of whether or not the grant of mining or petroleum tenements has extinguished native title will, of course, depend upon a consideration of the particular instrument in the particular circumstances. In some instances an exploration permit may have brought about extinguishment in a part of the permit where activity was substantial, for instance, at the site of the drilling of an exploration well.

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98. Supra n 2, 434.
99. Supra n 63, 254 and 292.
100. Supra n 53.
101. Ibid, 532.
102. Ibid, 537.
103. Supra n 2, 434.
104. Although oil and gas production licences may not create a significant inconsistency with native title if exclusive possession is not conferred and there is minimal surface disruption. Mining leases are likely to entail more significant surface disruption and may confer exclusive possession.

3. Reserves including aboriginal reserves, national parks and forest reserves

> Where the Crown has validly and effectively appropriated land to itself and the appropriation is wholly or partially inconsistent with a continuing right to enjoy native title, native title is extinguished to the extent of the inconsistency.[105]

An appropriation for a particular purpose does not, of itself, extinguish native title. The administration and use of the lands must be inconsistent with native title, if it is to be considered to have extinguished native title. Justice Brennan offered the following example:

> A reservation of land for future use as a school, a courthouse or a public office will not by itself extinguish native title: construction of the building, however, would be inconsistent with the continued enjoyment of native title which would thereby be extinguished.[106]

When lands, which have been appropriated for a special purpose, are in due course put to use, it may be that the use is consistent with the continuing enjoyment of native title. Justice Brennan suggested that a national park might entail such use.[107] In the result, a reserve or appropriation by the Crown will only extinguish native title where the *use* of lands under the appropriation is inconsistent with native title.

Clearly, the establishment of a reserve for the Aboriginal inhabitants would not indicate an intention to extinguish native title with respect to that land. As Justice Brennan declared: "Far from extinguishing the native title of the Meriam people, the reservation of the Murray Islands from sale left them in undisturbed enjoyment of their land".[108] The reservation and administration of lands in Aboriginal reserves was for the protection, rather than the extinguishment, of Aboriginal rights to use the land.[109] Indeed, according to Justice Toohey, the State of Queensland did not even contend that the establishment of the reservation extinguished native title.[110]

The creation of reserves or the grant of land is not, of itself, sufficient to extinguish native title to other areas. United States jurisprudence has recognized that "there is no Procustean rule that the creation of a reservation rightly

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105. Supra n 2, Brennan J, 434.
106. Ibid, 434.
107. Ibid, 434.
108. Ibid, 435. See Appendix C.
109. Ibid, Deane and Gaudron JJ, 455; see also Toohey J, 490-491.
110. Ibid, Toohey J, 490-491; Dawson J did not find that the reservation extinguished native title, but neither did he find that the reservation was intended to preserve native rights in the land; ibid, 474.

stamps out Aboriginal rights to other lands".[111] Justice Dawson accepted this proposition and the United States authority to that effect in *Mabo*.[112] The creation of reserves is merely one circumstance which, taken in conjunction with circumstances of forceable expulsion, use of the lands for other purposes, provision of compensation, and land settlement arrangements may indicate a "clear and plain intention" to extinguish. In *Gila River Pima-Maricopa Indian Community v United States*,[113] no such intention was found when it was not considered that the creation of the reservation was intended to cut off "the Indians from the additional lands used for hunting, foraging and grazing." In *United States v Sante Fe Pacific Railroad Company*,[114] the acceptance of a reserve as a quid pro quo for giving up claims to other lands was held to extinguish native title.

In considering whether the establishment of a reserve for a specified purpose has extinguished native title, regard must necessarily be had to the circumstances of the disposition, the scheme of administration, the use to which the land is put and the extent to which Aboriginal people are in fact prevented from making use of the land. In this area particularly, it must be emphasised "that there is no fine spun or precise formula for determining the end of aboriginal ownership".[115] National parks may well have been administered and used in a manner that is consistent with native title. Justice Brennan was clearly of such opinion.[116] Uluru national park affords an obvious statutory instance of such compatibility of use.[117]

Similarly the declaration and administration of lands as forest or grazing reserves may not, without more, extinguish native title. Extinguishment by such action has been found, but only (1) where other lands have been set aside for the Aboriginal people, and grants and mineral claims have been issued;[118] or (2) where reserve lands have been set aside for the Aboriginal people and

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111. *Gila River Pima-Maricopa Indian Community v United States* (1974) 494 F 2d 1386, 1390. See also *United States of America v Sante Fe Pacific Railroad Company* supra n 14.
112. Supra n 2, 472.
113. Supra n 111.
114. Supra n 14.
115. *United States v Pueblo of San Ildefonso* (1975) 513 F 2d 1383, 1390.
116. Supra n 2, 434.
117. See (Cth) Aboriginal Land Rights (NT) Act 1976 as amended: supra n 97.
118. Supra 115. For the regime governing forest reserves, see 16 USCS ss 471-541. The regime provides primarily for forest development, but also allows for resource development and recreation. It does not permit use of the reserves except under such regime: *United States v Henrylyn Irr Co* (1912) 205 Fed 970.

compensation has been paid for the taking of the lands in question;[119] or (3) where the Aboriginal people were forcibly expelled from the area and compensation was paid. In *United States v Gemmill*[120] it was observed:

> Any one of the actions, examined in isolation, may not provide an unequivocal answer to the question of extinguishment. However the activity of the federal government, beginning with the ambiguous Act of 1851 and culminating in the payment of the compromise settlement, has included expulsion by force, inconsistent use [in a forest reserve], and voluntary payment of compensation agreement. This century-long course of conduct amply demonstrates that the Pit River Indian title has been extinguished.

In *United States v Dann*,[121] the Court emphasised that the mere inclusion of lands in a grazing district would not extinguish native title. Any such conclusion would demand more in the "combination of circumstances" indicative of a "clear and plain intention" to extinguish.

THE LAND SUBJECT TO CLAIM

The concept of extinguishment is in accord with the pragmatic underpinnings of the concept of native title at common law. It contemplates the right of the sovereign unilaterally and without compensation to extinguish native title "parcel by parcel". But until such extinguishment or settlement of native title, that title continues with respect to the remaining lands. The Racial Discrimination Act "froze" the lands subject to native title as at 31 October 1975. After that date agreed compensation or some other form of compliance with the Act must be provided in order to extinguish native title.

The area of land subject to claim, where native title was not extinguished as of 31 October 1975, is substantial. Those areas comprising national parks, nature reserves, forest reserves, Aboriginal reserves, unalienated Crown land, and land subject only to exploration tenements, are all subject to claim. Up to 55 per cent of Western Australia falls into those categories.[122] In addition, much of the area of pastoral leases may be also subject to claim. Pastoral leases comprise 35 per cent of Western Australia. The settled urban and agricultural lands of Australia are not subject to claim.

The differentiation between settled and urban areas which are not subject to claim, and the unsettled, undeveloped and more remote areas, which are

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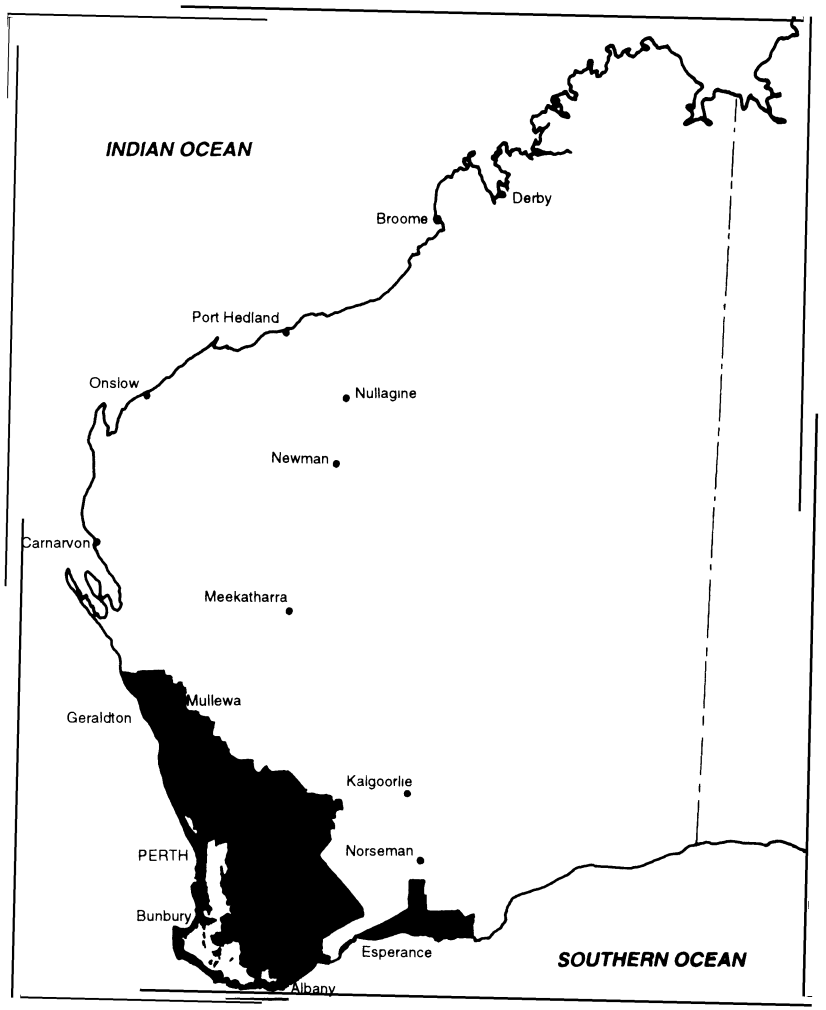
119. *Ute Indian Tribe v State of Utah* supra n 72; *United States v Kent* (1987) 679 F Supp 985; *Havasupai Tribe v United States* (1990) 752 F Supp 1471.
120. Supra n 72, 1149.
121. Supra n 97, 9331.
122. Department of Mines, December 1991. See Appendices A, B, C, D.

subject to claim, is the essence of the pragmatic compromise dictated by the concept of native title at common law. It recognises both existing interests of settlers and the residual interests of Aboriginal people. It is a compromise not driven by principle but by pragmatism. It is the common law's response to the historic conflict between, and claims of, settlers and Aboriginal people.

Some commentators have viewed the recognition of the concept of native title with alarm. The Business Review Weekly of 7 August 1992, under a cover story entitled "Land Rights versus Miners", declared that "Aborigines are now restricting access to so much land in Australia that the mining industry fears for its future". Yet the same article declares that Canada and the United States are the most favoured countries in the world for mineral exploration. It was with respect to those countries that the first land freeze was imposed in 1763. Following that land freeze native title was settled by agreement and the provision of compensation. Many parts of Australia are subject to a claim of native title at common law, but that is not a cause for alarm except amongst those who refuse to contemplate compensation or a settlement that is in accord with the Racial Discrimination Act. In Canada and the United States resource developers and settlers have long ago acknowledged that requirement. So have most jurisdictions in Australia. Western Australia, however, continues to deny such a requirement strenuously. As a result the area subject to claim in this State is substantial.

APPENDIX A



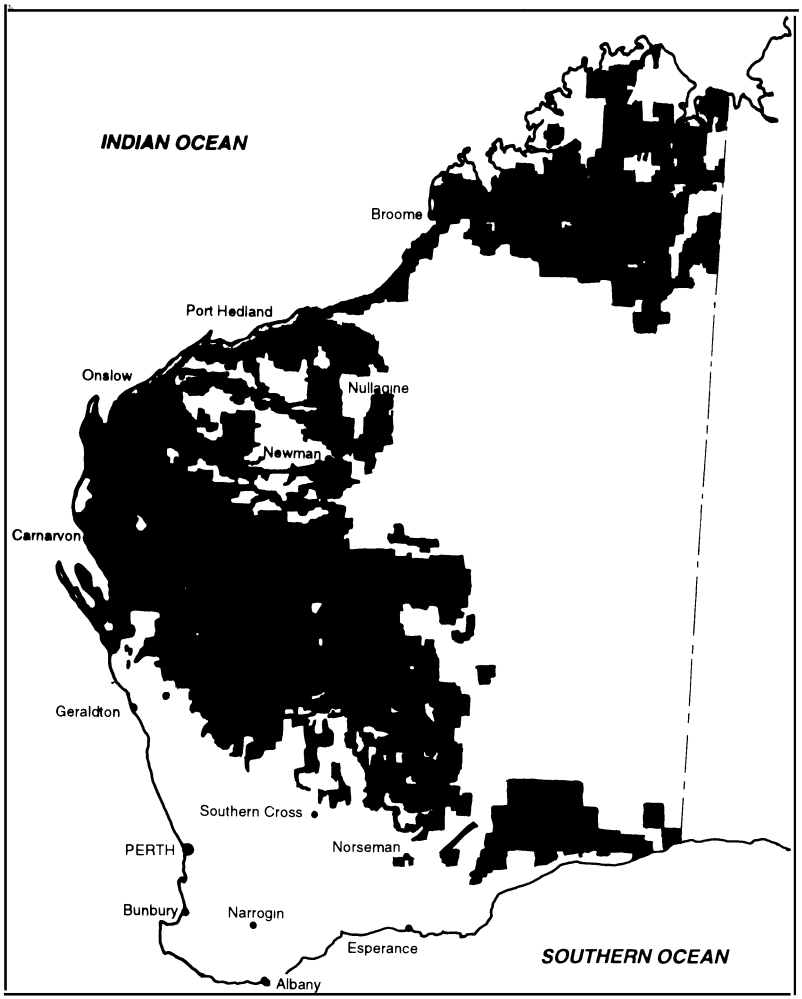
FREEHOLD LAND

(The Freehold Area includes numerous small reserves and the map does not show freehold areas in towns)

1982

After Land & Surveys Dept (WA) 1982; *The Aboriginal Land Inquiry* (Chair: Commissioner Paul Seaman) (Perth: Government Printer, 1984). All maps reprinted with permission of the Western Australian Government.

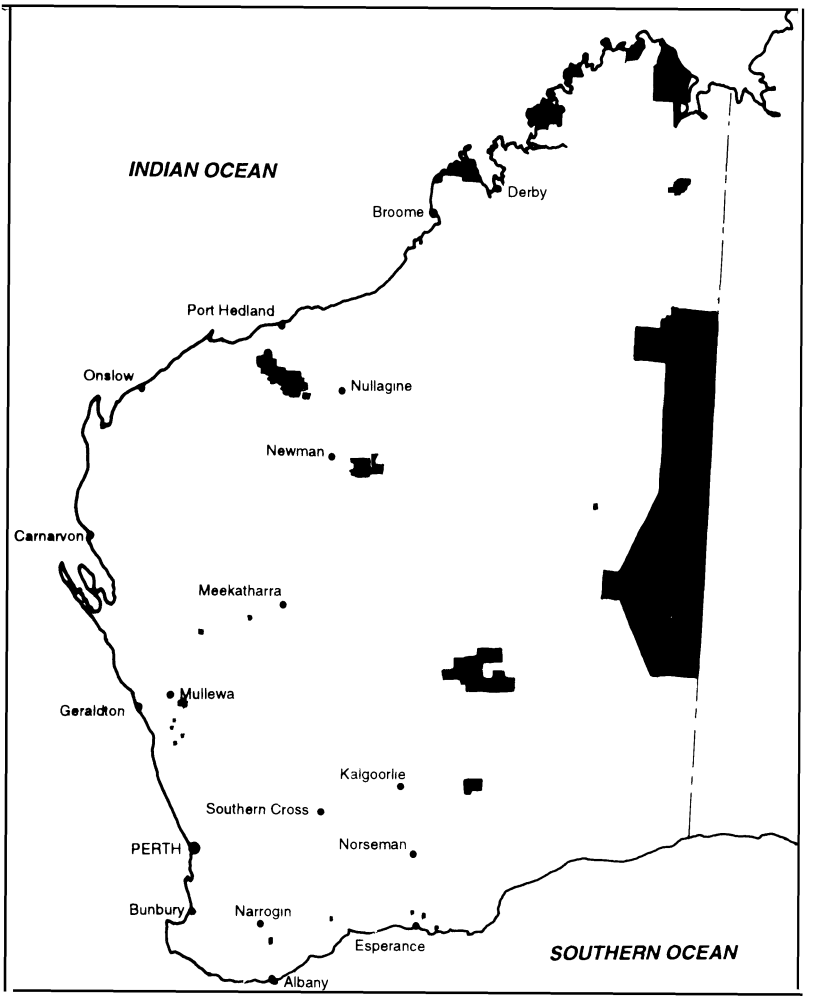
APPENDIX B



PASTORAL LEASES

1982

APPENDIX C

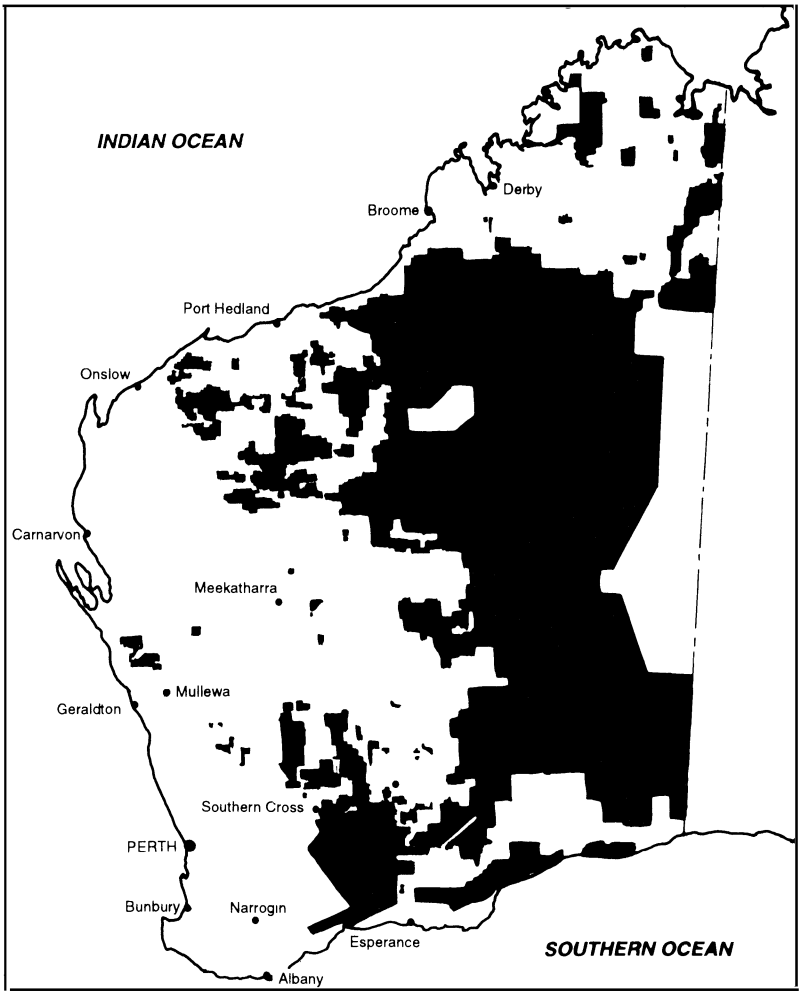


ABORIGINAL RESERVES

(Not including town reserves and reserves less than 1 000 hectares)

1982

APPENDIX D



UNALLOCATED CROWN LAND

(Including mineral exploration tenements)

1982