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Aboriginal Land Rights in Transition**

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ARTICLE

THE *MABO* DECISION: AUSTRALIAN ABORIGINAL LAND RIGHTS IN TRANSITION

BY
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In Eddie Mabo and Others v. The State of Queensland, the High Court of Australia recognized the existence of native title to lands hitherto annexed under Imperial Authority. In so doing, the Court rejected the fiction of terra nullius and found that native title was not inconsistent with the Crown's radical title over its acquired lands. The existence of native title, the Court held, does not depend upon positive acts of recognition, rather it arises from proof that a group has a right to use or occupy particular land—including uses tied to the community's traditional lifestyle. In drawing upon international law to bolster its conclusions, the High Court ushers in a new era for aboriginal land claims and portends new directions for Australian jurisprudence.

I. INTRODUCTION

No English words are good enough to provide a sense of the link between an Aboriginal group and its homeland. Our word 'home,'

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warm and suggestive though it is, does not match the Aboriginal word that may mean 'camp,' 'hearth,' 'country,' 'everlasting home,' 'totem place,' 'life source,' 'spirit centre.' Our word 'land' is too spare and meagre. We can now scarcely use it except with economic overtones unless we happen to be poets. The Aboriginal would speak of 'earth' and use the word in a richly symbolic way to mean his 'shoulder' or his 'side'. I have seen an Aboriginal embrace the earth he walked on. To put our words 'home' and 'land' together into 'homeland' is a little better but not much. A different tradition leaves us tongueless and earless towards this other world of meaning and significance.¹

In perhaps its most important and historically far reaching decision,² the High Court of Australia in *Eddie Mabo and Others v. The State of Queensland*,³ confirmed the existence of native title to lands occupied by the Aboriginal peoples of Australia. The Court, by a six to one majority,⁴ rejected the doctrine of *terra*

1. WILLIAM EDWARD HANLEY STANNER, *WHITE MAN GOT NO DREAMING* 230 (A.N.U. Press, 1979).

2. See, e.g., Garth Nettheim, *As Against the Whole World*, AUSTRALIAN L. NEWS, July 1992, at 9 ("The decision in *Eddie Mabo and Others v. The State of Queensland* on 3 June 1992 represents one of the most fundamental cases that the High Court of Australia has ever had to consider—fundamental in the sense that the central issues go to the historical and juridical foundation of the Australian nation"); Robert Blowes, *Settlement of Australia Phase II: Aboriginal Land Rights in Australia After Mabo v. The State of Queensland*, AUSTRALIAN L. NEWS, Sept. 1992, at 36 ("3 June 1992 will go down in history as the beginning of phase II of the settlement of Australia. Phase I commenced on or about 26 January 1788 and continued for over 200 years upon a basis that the High Court now says was unacceptable in law as well as in fact"); Bryan Keon-Cohen, *Case Notes: Eddie Mabo and Others v. The State of Queensland*, 2 (no. 56) ABORIGINAL L. BUL. 22 (1992), who notes that the *Mabo* case presented the High Court with its first opportunity since its establishment in 1901 to confront the "central question" of the existence of native title in Australia; and Gordon Brysland, *Rewriting History 2: The Wider Significance of Mabo v Queensland*, 17 (No 4) ALTERNATIVE L. J. 162, 165 (1992) (The case "represents a turning point for the High Court and adoption of a more American-style approach . . . usually called 'judicial activism' [which] gives judges a much freer hand to adapt law to changing norms, circumstances and needs in society In years to come, *Mabo v Queensland* will be seen as one of the real milestones in the High Court's evolutionary development.").

3. 107 A.L.R. 1 (Austl. 1992) [hereinafter *Mabo*]. The case is also reprinted in 66 A.L.J.R. 408 (1992).

4. See judgments of Justice Brennan (Chief Justice Mason and Justice McHugh agreeing), *id.* at 41-42; Justices Deane and Gaudron, *id.* at 82-83; and Justice Toohey, *id.* at 142. Justice Dawson was the Court's lone dissenter, taking the

nullius which had effectively deprived Aboriginal peoples of any form of legal recognition.

Justice Brennan noted in the principle majority opinion that international law recognizes three main ways that a colonizing nation can acquire sovereignty over new lands: "conquest, [voluntary] cession, and occupation of territory that was *terra nullius*."⁵ Initially, the doctrine of *terra nullius* was applied to the "discovery and occupation of uninhabited lands by the Colonial powers."⁶ However, as exploration and colonization continued, Europeans began settling in lands already occupied, and the doctrine of *terra nullius* was expanded by agreement among the European powers to include lands occupied by indigenous populations considered too primitive to have an organized society. This occurred despite early commentators' inability to justify such expansion.⁷

In *Mabo*, the Australian High Court unequivocally rejected the doctrine of *terra nullius* and paved the way for natives to assert title to traditional homelands. The *Mabo* decision applies throughout the country, not just to the Meriam Islands.⁸ A recent

view that for native title to traditional lands to survive colonization the Crown must affirmatively recognize that title. *Id.* at 93-96.

5. *Id.* at 21 (Brennan, J., concurring).

6. 6. Brysland, *supra* note 2, at 157.

7. As Justice Brennan notes,

[T]he enlarging of the concept of *terra nullius* of international law to justify the acquisition of an inhabited territory by occupation on behalf of the acquiring sovereign raised some difficulties in the expounding of the common law doctrines as to the law to be applied when inhabited territories were acquired by "occupation" or "settlement", to use the term of the common law. Although Blackstone commended the practice of "sending colonies (of settlers) to find out new habitations", he wrote: "So long as it was confined to the stocking and cultivation of desert uninhabited countries, it kept strictly within the limits of the law of nature. But how far the sizing on countries already peopled, and driving out or massacring the innocent and defenceless natives, merely because they differed from their invaders in language, in religion, in customs, in government, or in colour; how far such a conduct was consonant to nature, to reason, or to Christianity, deserved well to be considered by those, who have rendered their names immortal by thus civilising mankind."

Mabo, 107 A.L.R. at 21-22 (quoting 2 WILLIAM BLACKSTONE, COMMENTARIES *7).

8. Justice Brennan notes,

The validity of the propositions in the defendant's chain of argument cannot be determined by reference to circumstances unique to the Murray Islands; they are advanced as general propositions of law applicable to all

Commonwealth government report indicates that as much as "[ten] per cent of Australia's land mass, mostly in Western Australia, could be affected by new Aboriginal land claims resulting from the High Court's historic *Mabo* decision."⁹

The *Mabo* decision has set in motion a chain of events involving all sectors of Australian political, social, and economic life. The decision prompted Prime Minister Keating to announce an eleven-month Commonwealth consultation process with landowners, indigenous groups, natural resource industry associations, and state and territory governments to attempt to bring order to the post-*Mabo* debate.¹⁰ This consultation effort ties in with an ongoing, statutorily initiated consultation process designed to "reconcile" Aboriginal and non-Aboriginal Australian societies.¹¹ The decision also resulted in the first appointment of a Minister for Aboriginal Affairs by the Northern Territory government;¹² a move characterized by some as less an attempt at reconciliation than a means of decreasing the influence of the Northern Land Council by fostering breakaway local Aboriginal councils more willing to negotiate with the government.¹³

Reactions to *Mabo*, both positive and negative, have been predictable. Positive political responses include the possibility of a constitutional referendum to assure the permanency of the *Mabo* ruling,¹⁴ and suggestions for a land rights tribunal to assist

settled colonies. Nor can the circumstances which might be thought to differentiate the Murray Islands from other parts of Australia be invoked as an acceptable ground for distinguishing the entitlement of the Meriam people from the entitlement of other indigenous inhabitants to the use and enjoyment of their traditional lands. As we shall see, such a ground of distinction discriminates on the basis of race or ethnic origin for it denies the capacity of some categories of indigenous inhabitants to have any rights or interests in land.

Mabo, 107 A.L.R. 1, 15-16 (Austl. 1992).

9. Deanie Carbon & Peter Wilson, *10pc of Land Up for Mabo Claims*, WEEK-END AUSTRALIAN, Dec. 5-6, 1992, at 1.

10. Peter Wilson, *Tickner to Consider Land Rights Tribunal*, AUSTRALIAN, Nov. 30, 1992, at 1 [hereinafter Wilson 1].

11. See *infra* note 204 and accompanying text; see also Amanda Hurley, *Native Title Rights May be Extended*, W. AUSTRALIAN, Nov. 30, 1992, at 3.

12. David Nason, *NT to Appoint First Aboriginal Affairs Minister*, AUSTRALIAN, Nov. 30, 1992, at 3.

13. *Id.*

14. Peter Wilson, *Mabo Doubts May Spark Referendum*, AUSTRALIAN, Dec. 1, 1992, at 2 [hereinafter Wilson 2].

with settling land claims.¹⁵ For the Meriam people and other Torres Strait Islanders, the outcome may include increased attention and an enhanced form of self-government for their nineteen inhabited islands.¹⁶ And of course, the initiation of new land claims already has begun.¹⁷

In contrast, some responses exacerbate, rather than resolve, the differences between the Aboriginal and non-Aboriginal communities of Australia. Some opponents have argued that *Mabo* will create separate "Black" states in Australia, despite the fact that sovereignty was never an issue in the case.¹⁸ Aboriginal activists have also exaggerated the implications of *Mabo*.¹⁹ The Northern Territory's Northern Land Council has asserted a claim to mineral rights under forty percent of the Territory's land—land it administers on behalf of the region's Aboriginal peoples.²⁰ The claim has sparked mining industry's urgent concern.²¹ Hardly foolish or ridiculous, as some government representatives believed,²² it is nonetheless unlikely to succeed given the Crown government's long-standing title claim to all minerals.²³

15. Wilson 1, *supra* note 10.

16. Deanie Carbon, *Islanders Push for Self Government*, AUSTRALIAN, Dec. 4, 1992, at 4.

17. See Cyril Ayris, *The Gathering Storm*, W. AUSTRALIAN, June 13, 1992 (Big Weekend section), at 2; Liz Tickner, *Kimberley on Collision Course with the Future*, W. AUSTRALIAN, June 13, 1992, (Big Weekend section), at 2; Dennis Schulz, *After Mabo: Claiming the Kimberley Coast*, 114 BULL. 22 (1992); Liz Tickner, *Frustration Drives Kimberley Claim*, W. AUSTRALIAN, Nov. 17, 1992, at 11; Libby Gosden, *New Group in Kimberley land Battle*, W. AUSTRALIAN, Nov. 30, 1992, at 13.

18. Peter Wilson, *The Lies of the Land*, WEEKEND AUSTRALIAN, Nov. 14-15, 1992, at 24.

19. *Id.*

20. Wendy Pryer, *Battle Lines Drawn on Mineral Rights*, W. AUSTRALIAN, Dec. 5, 1992, at 26.

21. David Mason & Deanie Carbon, *Talks on Mabo Case Urgent, Say Miners*, AUSTRALIAN, Dec. 8, 1992, at 2. Unfortunately, some of the concern has been incendiary rather than reasoned. For example, Hugh Morgan, Director of Western Mining, recently contended that *Mabo* plunged property law into chaos and gave substance to the ambitious of Australian Communists for a separate Aboriginal State. He went on to reinforce the eighteenth century perception of Aboriginal peoples as too primitive to be worthy of rights to their traditional lands. Lenore Taylor, *Mining Chief Slams Land Rights Ruling*, THE AUSTRALIAN, Oct. 13, 1992, at 3.

22. Pryer, *supra* note 20; Mason & Carbon, *supra* note 21.

23. See *infra* text accompanying notes 126-29.

There will be and should be debate on the best and most equitable means for resolving competing land claims, as well as both the known and unknown outcomes of *Mabo*. Existing attitudes, particularly those of White Australians who have had it all their way for 200 years, will need to change. Peaceful change is best assured, however, without the incendiary contributions to the debate by some mining and agricultural interests or a few Aboriginal rights activists more interested in preserving perceived advantage than resolving this important debate.

This Article is meant to contribute constructively to the debate revolving around the *Mabo* decision and its impact on Australian society. Following a brief look at the *Mabo* litigation's background, this Article will review the central themes the High Court develops in its judgment. Section I examines the Court's discussion of recognition of native title. Section II focuses on the "content" of native title, that is, its nature and extent. Section III discusses the methods of extinguishing native title. Section IV explores the question of whether any compensation or other remedy is due for extinguishment of Aboriginal rights. A recurring theme throughout the Article will be the importance of international law and foreign cases as sources used by the High Court in informing its decision. In parting, the Article considers the future of Aboriginal rights in Australia and considers the effect of *Mabo* on Australian constitutional jurisprudence and common law.

II. BACKGROUND

Eddie Mabo and Others v. The State of Queensland has a long, interesting, and tragic history. Over its ten-year span the case visited the High Court on two occasions and the plaintiff, Eddie Mabo, died six months before the Court delivered its historic decision on June 3, 1992.²⁴ However, the events leading to the decision occurred long before this.

In 1879, using Imperial Authority, England's colony of Queensland annexed the Murray Islands thereby proclaiming them subject to English law.²⁵ These Islands, located in the

24. Bryan Keon-Cohen, *supra* note 2; David Solomon et al., *Aborigines Rejoice as High Court Ends Terra Nullius*, AUSTRALIAN, June 4, 1992, at 1.

25. See U.K. Letters Patent dated October 10, 1878; The Proclamation of 18 July 1879; Queensland Government Gazette, July 21, 1879; as referenced in the

Torres Strait, were home to the Meriam people.

In 1982, the Meriam people as plaintiffs on their own behalf brought an action in the High Court against the Queensland Government seeking a declaration that they were the owners by custom of, the holders of traditional rights in, and holders of usufructuary rights over the Murray Islands. Before the High Court heard the matter, the Queensland Parliament attempted to buttress the government's defense by enacting the Queensland Coast Islands Declaratory Act of 1985. The Act declared that, upon the annexation of the Murray Islands, title to the land vested in the Crown free of all prior claims. The Act retroactively validated all dispositions of land. Officially, the enactment was made "to remove doubts" as to the legal status of the Islands' land title. It was asserted that the Act would save money otherwise spent on limitless research and costly court proceedings.²⁶

The attempt to abort the judicial proceedings failed. The High Court ruled the Act void as a violation of the Racial Discrimination Act of 1975 (Commonwealth) because it purported to extinguish the plaintiff's traditional legal rights in a discriminatory manner.²⁷ This decision assumed, without actually deciding the issue, that the Islanders' alleged rights existed and were recognized under Australian common law. The case was remanded to the Supreme Court of Queensland to make findings of fact as to the nature of the plaintiffs' title and ways of life at the time of annexation. In November 1990, Justice Moynihan provided these findings to the High Court and it issued its decision on the points of law a year later.

Prior to *Mabo*, the issue of Aboriginal land claims in Australia had only arisen in court once. In *Milirrpum v. Nabalco Pty Ltd.*,²⁸ Justice Blackburn rejected Aboriginal land rights claims except where created by statute.²⁹ Though only a single judge's

Queensland Coast Islands Act 1879 (QLD).

26. See Second reading of the Queensland Coast Islands Declaratory Bill, Queensland State Parliamentary Reports 1985, 4741, 4932-33.

27. *Mabo v. State of Queensland*, 83 A.L.R. 14 (Austl. 1988).

28. 17 F.L.R. 141 (1970) (Austl.).

29. *Id.* at 244, 262. Justice Blackburn reasoned:

The question whether English law, as applied to a settled colony included, or now includes, a rule that communal native title where proved to exist must be recognised, is one which can be answered only by an examination of what has happened in the laws of the various places where English law

decision, it had profound effect on the matter of Aboriginal land claims. Inevitably, the Gove land rights case, as the *Milirrpum* case is sometimes called, featured prominently in counsels' arguments in *Mabo* and in all the judgments.

III. RECOGNITION OF THE EXISTENCE OF ABORIGINAL TITLE

In *Mabo*, the plaintiffs and defendants agreed that Australia was a settled colony and that the manner of its acquisition was not justiciable in the municipal courts. Nor was it contended that, upon annexation, the common law of England did not apply automatically.³⁰ Instead the dispute centered upon the application of the common law doctrines to the plaintiffs' land rights existing prior to annexation. The plaintiffs adduced a theory that these rights continue and become a dimension of the "common law native title." Consequently, they argued that they enjoy those land rights enjoyed by their ancestors over the Murray Islands, though the Crown has not made a grant or recognition of these rights. The manner in which sovereignty was established over their territory had no relevance to their claim.³¹

The defendant State of Queensland argued that if the plaintiffs' traditional land rights claimed ever existed, they had not survived annexation of the territory. Upon annexation, the Crown acquired absolute beneficial ownership of all land so that the colony became the Crown's demesne to the exclusion of any other rights. In consequence, any land rights of the native people must

has been applied. I have examined carefully the laws of various jurisdictions which have been put before me in considerable detail by counsel in this case, and, as I have already shown, in my opinion no doctrine of communal native title has any place in any of them, except under express statutory provisions. I must inevitably therefore come to the conclusion that the doctrine does not form, and never has formed, part of the law of any part of Australia.

Id. at 244-45. This statement has been widely criticized. See generally Richard H. Bartlett, *Aboriginal Land Claims at Common Law*, 15 U.W. AUSTRALIAN L. REV. 293 (1983); John Hookey, *The Gove Land Rights Case; A Judicial Dispensation for the Taking of Aboriginal Lands in Australia?* 5 FED. L. REV. 85 (1972) (Austl.).

30. *Mabo*, 107 A.L.R. 1, 70 (Austl. 1992) (Deane & Gaudron, JJ., concurring); see also *id.* at 93-94 (Dawson, J., dissenting).

31. *Milirrpum*, 17 F.L.R. at 201 (Blackburn, J., holding that the continuity of pre-annexation rights only applied in ceded or conquered territories but not in settled colonies).

be derived from the Crown by grant or express recognition.³²

A. Terra Nullius

The defendant's argument was partly based on the premise that Australia was peacefully annexed to the British dominion as *terra nullius*—a territory not inhabited for legal purposes. Therefore, in the eyes of the law, either there were no pre-annexation proprietary rights or, if there were, they were extinguished immediately upon annexation. This argument was supported by several decisions of the Privy Council and Australian courts.³³

Justice Brennan, in particular, examined in detail the basis of the defendant's argument. He observed that the notion of *terra nullius* originally referred to a territory which was "desert and uninhabited." Under international law the nationals of a European power could occupy and thus acquire such a territory.³⁴ With greater competition for colonies among European nations, the fact that native inhabitants occupied a territory no longer barred annexation. The manner of annexation depended upon the degree to which the colonizing power perceived them as "civilized." If the natives were civilized, sovereignty could be acquired by conquest or cession. Justice Brennan agreed that in eighteenth century international law and practice, the concept of *terra nullius* was enlarged to include territories inhabited by "backward people" and that sovereignty to these territories could be ac-

32. *Mabo*, 107 A.L.R. at 16.

33. The leading authority is Lord Watson's statement in the Privy Council in *Cooper v. Stuart*, [1889] App. Cas. 286, 291 (P.C.) (appeal taken from N.S.W.). He said that the colony of New South Wales "consisted of tract of territory, practically unoccupied, without settled inhabitants or settled law, at the time when it was peacefully annexed to the British dominions". See also *Council of the Municipality of Randwick Corp. v. Rutledge*, 102 C.L.R. 54 (Austl. 1959). In *Milirrpum*, Blackburn described as hopeless an attempt to distinguish *Cooper* on the basis that it was decided on wrong historical facts. 17 F.L.R. at 242. His Honour felt that the legal theory it established was more important than the historical facts. In *Coe v. Australia*, Justices Gibbs and Aickin held that it was fundamental to the Australian legal system that Australia became a British colony by settlement and not by conquest. 53 A.L.J.R. 402, 408 (Austl. 1979). In contrast, Justice Murphy in the same case, described Lord Watson's statement as either "having been made in ignorance or as a convenient falsehood to justify the taking of aborigines' land." *Id.* at 412.

34. *Mabo*, 107 A.L.R. at 21.

quired by occupation rather than conquest.³⁵ Historically, Australia had been treated as such a territory.

Acquisition of a territory is a matter of international law and cannot be questioned in the municipal courts. However, it is within the municipal courts' jurisdiction to determine the common law in force in the colony.³⁶ At common law, the manner in which sovereignty was established determined the body of the applicable law. Generally, in a ceded and conquered territory, the local laws continued to apply unless actually modified or replaced by the Crown.³⁷ Justice Brennan observed that the enlargement of the concept of *terra nullius* raised difficulties for ascertaining the appropriate common law doctrine to apply to the territories. In Australia, an inhabited territory acquired under the enlarged meaning of *terra nullius* may be treated for municipal law purposes as "desert and uninhabited." The law of England thus became the applicable law.³⁸ As a corollary, sovereignty in Australia was equated with full beneficial ownership of all the land therein because technically and legally there was no other proprietor of the lands. In consequence the indigenous people's land rights were ignored.³⁹

That municipal law followed in the footsteps of international law in perpetuating the fiction of *terra nullius* is not surprising. At the forefront of colonialism, Britain's main objective was to acquire land for settlement. Treating select colonies as deserted or uninhabited provided a convenient legal and moral rationale

35. *Mabo*, 107 A.L.R. at 21 (Brennan, J., concurring). Various justifications for the acquisition of these territories were advanced. They ranged from a self-proclaimed desire to spread Christianity and "Civilisation" among "backward people" to a claim of divine right to bring into production uncultivated land.

36. *Id.* at 20.

37. *Mabo*, 107 A.L.R. 1, 23 (Austl. 1992). See also *Amodu Tijani v. The Secretary, Southern Nigeria* [1921] 2 App. Cas. 399 (P.C.) (appeal taken from Nig.); *In re Southern Rhodesia* [1919] App. Cas. 211 (P.C. 1918).

38. *Mabo*, 107 A.L.R. at 24.

39. In 1937, a select committee on Aborigines reported to the House of Commons that the Australian Aborigines were "barbarians and so entirely destitute . . . of the rudest forms of civil polity, that their claims, whether as sovereigns or proprietors of the soil, have been utterly disregarded." *Mabo*, 107 A.L.R. at 27 (Brennan, J., concurring). Justices Deane and Gaudron pointed out that until the 1967 constitutional amendment, the Aboriginal population was excluded from the census of the nation and state populations by section 127 of the Commonwealth Constitution. *Id.* at 80.

for dispossessing indigenous people of their land. Justices Deane and Gaudron remarked that in the very early days of settlement, the colonists may not have perceived the Aborigines' use and claim over particular land, but that explanation is not plausible with regard to expropriation of Aboriginal land in later years. Historical evidence established that the colonists were fully aware of the Aborigines' claims to particular lands but the expropriation continued.⁴⁰

The British Privy Council and Australian courts endorsed the colonial settlement policy by upholding the fiction of *terra nullius* as fundamental to the legal system and evidence of contrary historical facts could not dispose of it.⁴¹ In the Privy Council, judicial support of the policy was overt. For example, in *In re Southern Rhodesia*, the status of Southern Rhodesia (Zimbabwe) was under consideration. In response to the argument that the indigenous people owned the land long before the Crown, the Privy Council stated that "the maintenance of [natives'] rights was fatally inconsistent with white settlement of the country, and yet white settlement was the object of the whole forward movement."⁴²

In *Mabo*, the Court held that the notion that Australia was *terra nullius* at the time of its annexation was unacceptable and had to be rejected. The majority agreed that the past policies justifying the fiction no longer meshed with the contemporary values of the people of Australia.⁴³ The Court also noted that the International Court of Justice discredited the enlarged notion of *terra nullius* in its *Advisory Opinion On Western Sahara*.⁴⁴ Justice Brennan commented that if the doctrine no longer commanded support in international law, it could hardly be retained under

40. *Mabo*, 107 A.L.R. at 81 (Deane & Gaudron, JJ., concurring).

41. See, e.g., *Cooper v. Stuart* 1889 App. Cas. 286 (P.C.) (appeal taken from N.S.W.); *Milirrpum v. Nabalco Pty Ltd.*, 17 F.L.R. 141, 202-03 (1970) (Austl.).

42. *In re Southern Rhodesia*, [1919] App. Cas. 211, 234 (P.C. 1918).

43. *Mabo*, 107 A.L.R. 1, 29 (Brennan, J., concurring). Justice Toohey commented that, "[t]he idea that land which is in regular occupation may be *terra nullius* is unacceptable, in law as well as in fact." *Id.* at 142. Justices Deane and Gaudron said that the notion of *terra nullius* has played a substantial role in perpetuating racial discrimination against the Aborigines. *Id.* at 82. Justice Dawson declined to comment on *terra nullius* because he did not consider it to be in issue. *Id.* at 106.

44. [1975] 1 C.J.R. 12.

the common law.⁴⁵ He noted that while the common law does not automatically conform with international legal norms:

[I]nternational law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights. A common law doctrine founded on unjust discrimination in the enjoyment of civil and political rights demands reconsideration. It is contrary both to international standards and to the fundamental values of our common law to entrench a discriminatory rule which, because of the supposed position on the scale of social organisation of the indigenous inhabitants of a settled colony, denies them the right to occupy their traditional lands.⁴⁶

Justice Brennan concluded that if *terra nullius* was rejected, the notion that upon annexation the Crown acquired beneficial ownership of all land must also be rejected,⁴⁷ and that the rejection of the hypothesis would not fracture a skeletal principle of the Australian legal structure.⁴⁸

B. Radical Title and the Doctrine of Tenure

The rejection of *terra nullius* cleared only one obstacle for the plaintiffs' case. The Court understood it would be impossible for the common law to recognize native title if the basic notions of the common law were inconsistent with such recognition.⁴⁹ The defendants asserted that several common law doctrines were inconsistent with this recognition, the most important being the

45. *Mabo*, 107 A.L.R. at 28.

46. *Id.* at 28-29 (Brennan, J., concurring and noting that if in past centuries it was permissible for the common law to follow international law "it is imperative that the common law should neither be nor be seen to be frozen in an age of racial discrimination"). Justices Deane and Gaudron warned that Australia as a whole will remain diminished unless there is a retreat from past injustices. *Id.* at 83.

47. *Id.* at 31, 34 (Brennan, J., concurring). *Id.* at 82 (Deane and Gaudron, JJ., concurring). *Id.* at 142 (Toohey, J., concurring).

48. Justice Brennan uses the term "skeletal principle" to refer to the basic doctrines of the common law which give "the body of our [Australian] law its shape and internal consistency". *Mabo*, 107 A.L.R. 1, 18 (Austl. 1992). Justice Brennan stressed that the High Court in discharging its duty to declare the common law "is not free to adopt rules that accord with contemporary notions of justice and human rights if their adoption would fracture the skeletal principle. . . ." *Id.*

49. *Id.* at 31 (Brennan, J., concurring).

doctrine of tenure.⁵⁰ This principle is based on a legal fiction that because land in England was "originally" beneficially owned by the Crown, all titles or interests thereafter were the direct consequence of Crown grant.⁵¹ In the colonies this meant that upon annexation, the Crown acquired the radical title to every inch of land in a colony.⁵² Because the plaintiffs' native title did not derive from any Crown grant, the defendants argued, its recognition was inconsistent with the common law.⁵³

The Court was unanimous in confirming that this unique fiction of English law is part of the common law of Australia.⁵⁴ But the majority rejected the argument that recognition of native title was inconsistent with the Crown's radical title and the doctrine of tenure. They concluded that the Crown's radical title is a legal fiction which supports the operation of the doctrine of tenure (when the Crown has exercised its sovereign power to grant an interest in land) and to support the plenary title of the Crown (when the Crown has exercised its sovereign power to appropriate to its use parcels of land within the colony.)⁵⁵ However, Justice Brennan noted,

[B]ut it is not a corollary of the Crown's acquisition of a radical title to land in an occupied territory that the Crown acquired absolute beneficial ownership of that land to the exclusion of the indigenous inhabitants. If the land were . . . truly terra nullius, the Crown would take an absolute title . . . to the land [because] . . . there would be no *other* proprietor. But if the land were occupied by the indigenous inhabitants and their rights and interests are recognised by the common law, the radical title which is acquired with the acquisition of sovereignty cannot itself be taken to confer an absolute beneficial title to the occupied land.⁵⁶

50. *Id.* at 31-32; *see also id.* at 59-60 (Deane & Gaudron, JJ., concurring).

51. *Id.* at 32-33.

52. *Id.* at 16-18, 32-34.

53. This position was supported by several Australian cases. *See, e.g.,* Attorney General v. Brown, 2 N.S.W.S. Ct. Cas. 80 (1847); Williams v. Attorney General for N.S.W., 16 C.L.R. 404 (Austl. 1913); Council for the Municipality of Randwick v. Rutledge, 102 C.L.R. 54 (Austl. 1959); Milirrpum v. Nabalco Pty. Ltd., 17 F.L.R. 141 (1970) (Austl.).

54. *Mabo*, 107 A.L.R. 1, 33-32 (Brennan, J., concurring); *id.* at 60 (Deane & Gaudron, JJ., concurring); *id.* at 140 (Toohey, J., concurring).

55. *Id.* at 33-34 (Brennan, J., concurring); *id.* at 60 (Deane & Gaudron, JJ., concurring).

56. *Id.* at 34 (Brennan, J., concurring). *See also id.* at 60 (Deane & Gaudron, JJ., concurring). Justice Toohey explained that the radical title was equated with

Thus, the doctrine of tenure only applied to estates which were granted by the Crown, not to native titles.⁵⁷ In consequence, traditional titles "burden the proprietary estate in land which would otherwise have vested in the Crown."⁵⁸

The Court's majority also rejected the defendants' alternative argument—that continuation of native title under the new sovereign depended upon positive executive or legislative acts. While ample authority supported the defendants' line of argument, the majority found "more persuasive" another line of authority holding that native title continues regardless of positive recognition.⁵⁹ Justice Toohey questioned the idea that native rights somehow disappeared upon annexation and reappeared immediately after they were recognized. Even more startling, he added, was the consequence that upon annexation the Aborigines became trespassers in their own country.

By accepting that Australia's common law recognized Aboriginal title, the Court effectively reversed Justice Blackburn's holding in *Milirrpum* that native title does not form part of the Australian law unless by statutory recognition.⁶⁰ Arguably Justice Blackburn's statements were dicta because Aboriginal title was not directly involved in the case and no argument was advanced.⁶¹ Justices Deane and Gaudron agreed the case was a formidable authority and was consistent with the general practice of the Crown's representatives in the Australian colony. If *Mabo* was an ordinary case, their Honours said, there would be no justification

beneficial ownership because of the application of the principles of terra nullius to inhabited territories. *Id.* at 141.

57. *Id.* at 34 (Brennan, J., concurring).

58. *Id.* at 64-65 (Deane & Gaudron, JJ., concurring).

59. The cases which supported the defendants' argument were mainly from Indian states. The most prominent of these was *Vajesingji Joravarsinji v. Secretary of State for India*, 51 I.A. 357 (P.C. 1924) (India). The line of authority the majority found persuasive is represented by *In re Southern Rhodesia*, [1919] App. Cas. 211, 233 (P.C. 1918) (matter specifically referred to the Judicial Committee); *Amodu Tijani v. Secretary Southern Nigeria*, [1921] 2 App. Cas. 399, 407 (P.C.) (appeal taken from Nig.); and *Guerin v. The Queen*, [1984] 2 S.C.R. 335 (Can.).

60. *Milirrpum*, 17 F.L.R. at 244-245. Several writers have criticized Blackburn's decision. They argue he misconstrued the Canadian and U.S. cases on which he purported to base his judgement. In any case, subsequent Canadian decisions since *Milirrpum* clearly indicate that the common law did recognize native titles. See generally Hookey, *supra* note 29; Bartlett, *supra* note 29.

61. *Mabo*, 107 A.L.R. 1, 78 (Austl. 1992) (Deane & Gaudron, JJ., concurring).

to reconsider the legal position so historically accepted.⁶²

With an obvious touch of emotion, Justices Deane and Gaudron found that the acceptance of *terra nullius* and the Crown's full beneficial ownership "provided the environment in which the Aboriginal people of the continent came to be 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."⁶³ Justices Deane and Gaudron warned that, "the nation as a whole must remain diminished unless and until there is an acknowledgment of, and retreat from, those past injustices. In these circumstances, the Court is under a clear duty to reexamine the two propositions."⁶⁴ After its reexamination, the Court rejected them.⁶⁵

C. Establishment (Proof) of Title

Having decided that native title may arise at common law, the Court considered the common law's rules for establishing title. In *Milirrpum*, Justice Blackburn determined that if the doctrine of common law native title did exist, it required proof that the Aboriginal interests were of a proprietary nature recognizable at common law.⁶⁶ He identified the three most common characteristics of property: the right to use or enjoy, the right to exclude others, and the right to alienate. On the facts of the case before him, Justice Blackburn found that the plaintiffs' use of the subject land for communal religious rituals did not satisfy the criteria of property.⁶⁷

In *Mabo*, the majority rejected the *Milirrpum* criteria for establishing native title. They held that the title was not limited to interests which were analogous to common law concepts of estates

62. *Id.* at 82 (Deane & Gaudron, JJ., concurring).

63. *Id.*

64. *Id.* In contrast, Justice Dawson commented that the fact that the law was shaped by (according to present standards) politically insensitive policies is not a ground for the Court to change the law. In his view the matter should be left to the legislature. *Id.* at 130.

65. *Id.* at 82 (Deane & Gaudron, JJ., concurring).

66. *Milirrpum v. Nabalco Pty. Ltd.*, 17 F.L.R. 141, 198 (1970) (Austl.).

67. *Id.* This aspect of the *Milirrpum* case has been a subject of much criticism. See Upendra Baxi, *The Lost Dreamtime; Now Forever Lost. A Critique of the Gove Land Rights Decision* (1972) (unpublished paper, on file with author).

in land or proprietary rights, nor was it determined by reference to European legal usages alien to native societies.⁶⁸ As Justice Toohey noted, "to superimpose European concepts of property on Aboriginal concepts of land would merely defeat the purpose of protection and recognition of native title."⁶⁹

Justice Brennan stated that to establish a common law native title, a community need only prove that none but its members have a right to use or occupy particular land, and that it matters not that individual members of the group enjoy rights which are not of proprietary nature.⁷⁰ His Honour acknowledged that there could be difficulties with proof of boundaries or membership of the group, but that did not affect recognition of the title.⁷¹ Justices Deane and Gaudron said that the common law requirements were satisfied merely by proof that a group or an individual has an entitlement to use or occupy particular land in accordance with local laws or custom, but that the entitlement must be of sufficient significance to be locally recognized.⁷² Justice Toohey said that the key element is "presence" on particular land which is not random or coincidental, but which has sufficient economic, cultural, or religious connection with it. The purpose for which the land is used has to be meaningful, but this must be understood by reference to the demands of the land in question and the traditional lifestyle of the people concerned.⁷³ Thus the use of land for spiritual purposes, which was rejected in *Milirrpum*, would constitute "presence" which establishes a common law title.⁷⁴ In addition, Aboriginal peoples leading nomadic lifestyles would be able to establish presence over the vast areas of land they traditionally wander in search of food. Justice Toohey stressed that the use or occupation need not be exclusive to one

68. *Mabo*, 107 A.L.R. 1, 36 (Austl. 1992) (Brennan, J., concurring); *id.* at 63-64 (Deane & Gaudron, JJ., concurring); *id.* at 146 (Toohey, J., concurring).

69. *Id.* at 146 (Toohey, J., concurring).

70. *Id.* at 136 (Brennan, J., concurring).

71. *Id.* at 36 (Brennan, J., concurring).

72. *Id.* at 64 (Deane & Gaudron, JJ., concurring).

73. *Mabo*, 107 A.L.R. 1, 144-50 (Austl. 1992). Justice Toohey based his judgment on the Canadian case of *Hamlet of Baker Lake v. Minister of Indian Affairs and Northern Development*, 107 D.L.R.3d 513 (Can. 1979).

74. The presence of a spiritual connection without actual physical occupation is bound to be a source of controversy in the future. See L.M. Strelein, *Aboriginal Land Claims in Western Australia - The Implications of Mabo v Queensland* (Nov. 1992) (unpublished paper, on file with author).

group or community.⁷⁵ Thus, several communities may assert separate and different titles over the same land.

The rejection of European-based rules for establishing native title leaves the door open for Aboriginal communities to assert diverse claims. However, it is necessary that the use or occupation of the land by the community was already in place at the time of annexation.⁷⁶ Moreover, there must be a continuity of connection between the group and the particular land, hence the title must not have been extinguished.⁷⁷

IV. THE NATURE AND EXTENT OF ABORIGINAL TITLE

It may seem unremarkable that under English common law, title to particular land depends on occupation of it, and that with occupation comes possession of the land.⁷⁸ In many respects the *Mabo* Court's judgment on the nature and extent of aboriginal title amounts to no more than a restatement of this general rule.⁷⁹

75. *Mabo*, 107 A.L.R. at 148 (Toohey, J., concurring). There seems to be some divergence of opinion between Justice Toohey and Justice Brennan on the question of exclusive use. The latter seems to say that the use has to be exclusive to constitute cognizable title. See *supra* text accompanying note 75.

76. *Mabo*, 107 A.L.R. at 64 (Deane & Gaudron, JJ., concurring). See also *id.* at 148 (Toohey, J., saying it is not necessary to prove occupation since time immemorial).

77. The rules for proof of title are similar to those announced by the courts in the United States and Canada. See Richard H. Bartlett, *The Source, Content, and Proof of Native Title At Common Law*, in Richard H. Bartlett (ed.), RESOURCE DEVELOPMENT AND ABORIGINAL LAND RIGHTS IN AUSTRALIA, 35-60 (The Centre for Commercial and Resources Law, University of Western Australia and Murdoch University) (1993) [hereinafter, *Resource Development*]. The notion that the difficulties inherent in proof of title should not be confused with the question of existence in title has been previously considered. See, e.g., *United States v. Santa Fe Pac. R.R. Co.*, 314 U.S. 339, 345 (1941) (Justice Douglas noting that the "[o]ccupancy necessary to establish Aboriginal possession is a question of fact to be determined as any other question of fact.").

78. See generally KENT MCNEIL, COMMON LAW ABORIGINAL TITLE 73-78, 196-208 (Clarendon Press 1989); *Mabo*, 107 A.L.R. 1, 36 (Austl. 1992) (Brennan, J., noting that, "[t]he ownership of land within a territory in the exclusive occupation of an indigenous people must be vested in that people.").

79. See *Mabo*, 107 A.L.R. at 43 (Brennan, J., noting that, "Where a clan or group has continued to acknowledge the laws (and so far as practicable) to observe the customs based on the traditions of that clan or group, whereby their traditional connection with the land has been substantially maintained, the traditional community title of that clan or group can be said to remain in existence."). As Justice Toohey notes, the courts in Canada and the United States have taken the

The matter is not so simple, however, as indigenous peoples either do not conceive of land as something that can be possessed,⁸⁰ or would define possession in starkly different terms than modern society. At the same time, land use—such as hunting, fishing, and gathering—is inherently part of Aboriginal cultures.⁸¹

The general rule regarding the nature and extent of native title emerges from a long and reasonably uniform line of cases in former British colonies. As Justices Deane and Gaudron stated:

[C]ommon law native title is a communal native title [though as noted earlier in this opinion, this communal title may include provision for individual title] since the title presumes entitlement to use or enjoyment of lands under the traditional law or custom of the relevant territory [that is, native group], the contents of the rights and the identity of those entitled to enjoy them must be ascertained by reference to the traditional law or custom. Traditional law or custom is not however frozen at the moment of establish-

view that establishing native title essentially requires proof of two elements: first, that the tribe was an organised society; and second that it exercised exclusive rights to occupy and use the lands in question. *Id.* at 145-48. *See, e.g., Hamlet of Baker Lake v Minister of Indian Affairs and Northern Development*, 107 D.L.R.3d 513, 542 (Can. 1979); *United States v. Santa Fe Pac. R.R.*, 314 U.S. 339, 345 (1941).

80. *See, e.g., Gary D. Meyers, Different Sides of the Same Coin: A Comparative View of Indian Hunting and Fishing Rights in the United States and Canada*, 10 U.C.L.A. J. ENV'T. L. & POL'Y 67 (1991); Darlene M. Johnston, *Native Rights as Collective Rights: A Question of Self Preservation*, 2 CAN. J. L. & JURISPRUDENCE. 19, 32 (1989); Scott Hardt, *The Sacred Public Lands: Improper Line Drawing in the Supreme Court's Free Exercise Analysis*, 60 U. COLO. L. REV. 601, 603 (1989); PETER MATHIESSEN, *INDIAN COUNTRY* 119 (Viking Press 1984); R.M. Berndt, *Traditional Concepts of Aboriginal Land*, in *ABORIGINAL SITES, RIGHTS AND RESOURCE DEVELOPMENT* 1-11 (R.M. Berndt ed., Univ. of Western Austl. Press 1982).

81. *See generally* Johnston, *supra* note 80. *See also*, Marji Hill, *Tradition-Oriented Cultures in BLACK AUSTRALIA: AN ANNOTATED BIBLIOGRAPHY AND TEACHERS GUIDE TO RESOURCES ON ABORIGINES AND TORRES STRAIT ISLANDERS* 28-29 (Marji Hill & Alex Barlow eds., Austl. Inst. of Aboriginal Studies, Canberra/Humanities Press Inc. 1978) (noting, "[t]he key to understanding tradition-oriented cultures in Australia is to realise the significance of the relationship between religious ideology, the land, and man. The land has both religious and economic significance, and it is important that these two be distinguished for an understanding to be reached. In its religious significance it gives a group identity whilst economically it provides the group with a livelihood."); Randy Kapasheist & Murray Klippenstein, *Aboriginal Group Rights and Environmental Protection*, 36 MCGILL L.J. 925, 955-56 (1991).

ment of a colony; subsequent developments or variations [in customary uses] do not extinguish native title.⁸²

Justice Brennan agreed,⁸³ noting that while proof of title may be problematic this does not subtract from the essentials of native title.⁸⁴

Perhaps Professor McNeil provides the clearest statement on the nature and extent of Aboriginal title. He writes that:

occupation is relative, depending on all the circumstances including the nature and custom on the land, and the condition of life, habits and ideas of people living there. On this basis, nomadic hunters and gatherers have been found to be in occupation of lands in the United States and Canada. Moreover, even in England, fishing in bodies of water and hunting on land are evidence of occupation. Thus it is clearly not necessary for lands to be cultivated, fenced, built on or the like to be occupied.⁸⁵

Justice Toohey essentially adopts Professor McNeil's position.⁸⁶

Justices Deane and Gaudron⁸⁷ and Justice Brennan⁸⁸ provide opinions summarizing the essentials of native title. They are:

- 1) title is based on the customary usage by the group as evidenced by a continuous connection to or use of the land;
- 2) title is alienable only to the Crown, and;
- 3) title is qualified by the Crown's right to limit, regulate, or extinguish it.⁸⁹

If nothing new has been said about the nature and extent of native title in Australia, why is it so important? The reason emerges when one considers conflicts between existing and poten-

82. *Mabo*, 107 A.L.R. at 83.

83. *Mabo*, 107 A.L.R. 1 42-45 (Austl. 1992) (Brennan, J., concurring).

84. *Id.* at 42.

85. Kent McNeil, *A Question of Title: Has the Common Law Been Misapplied to Dispossess the Aborigines*, 16 MONASH U. L. REV. 90, 103-04 (1990).

86. *Mabo*, 107 A.L.R. at 166 n.658 (Toohey, J., concurring); McNeil, *supra* note 85.

87. *Mabo*, 107 A.L.R. at 83 (Deane & Gaudron, JJ., concurring).

88. *Mabo*, 107 A.L.R. 1, 42-45 (Austl. 1992) (Brennan, J., concurring).

89. *Cf. Johnson and Graham's Lessee v. McIntosh*, 21 U.S. (8 Wheat.) 543, 572-73 (1823) (U.S. Supreme Court summarized the identical principles of native title as outlined in the *Mabo* case when the United States had acquired the same land by treaty and did not consent to the transfer). *See also Meyers, supra* note 80, at 71.

tial uses of land subject to Aboriginal title, including lands used for grazing, mining, or National Park or reserve land.⁹⁰ Protection of sacred or historical sites; access rights for gathering food, hunting, or fishing; and areas for cultural and religious ceremonies are all encompassed under the term native title.⁹¹ Where the Crown has not reserved or granted any interest that conflicts with other uses, Aboriginal rights should be protected under the rationale of *Mabo*.⁹² To the extent that native title is inconsistent with an ex-

90. See generally Schulz, *supra* note 17, at 22-24; Tim Treadgold, *Land Rights Versus Miners*, 14 Bus. Rev. Wkly. 46 (Aug. 7, 1992) (Austl.); Tim Stevens & Deanie Carbon, *Farmers Seek to Block Land Claim*, THE AUSTRALIAN, Oct. 30, 1992, at 3.

91. As the various judgments note, the extent of aboriginal title and the use of land encompassed in that title depend upon the historical and customary uses of the aboriginal community claiming title. *Mabo*, 107 A.L.R. at 43-45. The Miriam People on the Murray Islands are a gardening people. Gardening assumes a prominent role in the cultural, religious and social life of the people as well as serving economic and food provision needs. The Miriam People live in small villages along the shore, but generally their garden plots are located inland on higher ground and are identified by reference to a named geographic locality coupled with the name of the relevant "owners." *Id.* at 9. Justices Deane and Gaudron noted that, "[t]he contents of the right . . . must be ascertained by reference to that traditional law or custom." *Id.* at 83. Justice Toohey writes that:

[t]here must of course be a society sufficiently organized 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 It is the fact of presence of indigenous inhabitants on acquired land which precludes proprietary title in the Crown *Presence would be insufficient to establish title if it was coincidental only or truly random having no connection with or meaning to a society's economic, cultural or religious life.* It is presence amounting to occupancy which is the foundation of title Thus traditional title is rooted in physical presence. *That the use of the land was meaningful must be proved but it is to be understood from the point of view of members of the society.*

Id. at 146-47. (emphasis added).

For cases in the United States, Canada, and New Zealand upholding aboriginal hunting, fishing, and gathering rights as incidents of native title, see, e.g., *Menominee Tribe of Indians v. United States*, 391 U.S. 404 (1968); *Lac Courte Orielles Band of Lake Superior Chippewa Indians v. Voigt*, 700 F.2d 341 (7th Cir. 1983); *United States v. Winans*, 198 U.S. 371 (1905); *Regina v. White and Bob*, 50 D.L.R.2d 613 (B.C. Ct. App. 1964), *aff'd*, 52 D.L.R.2d 481 (Can. 1965); *Simon v. The Queen*, 2 S.C.R. 387 (Can. 1985); *Sparrow v. The Queen*, [1990] 3 C.N.L.R. 160 (Can.); *R. v. Joseph*, [1992] 2 C.N.L.R. 128 (Yukon Terr. Ct. 1992); *Te Weehi v. Regional Fisheries Officer*, 1 N.Z.L.R. 682 (P.C. 1986).

92. *Mabo*, 107 A.L.R. at 49-50 (Austl. 1992) (Brennan, J., concurring).

isting use, native rights are extinguished.⁹³ However if native rights were established prior to a proposed use, they may be compensable if inconsistent with that use and rightfully extinguished. At a minimum, *Mabo* may require cooperative management of National Parks and other reserves in traditional Aboriginal lands.⁹⁴

V. EXTINGUISHMENT OF NATIVE TITLE

A common law native title existing at the time of annexation continues until lawfully extinguished. There are four modes of extinguishing native title: surrender, abandonment, death, and executive or legislative action.⁹⁵

A. *Surrender, Abandonment, and Death*

The first three methods of extinguishment were not at issue in *Mabo*. Despite this, Justice Brennan mentioned the possibility of voluntary surrender of native title by those entitled to enjoy it. Surrender only extinguishes native title when it is made to the Crown, since native title is not alienable outside the subject community.⁹⁶ This manner of extinguishment is probably more theoretical than real as several legal and practical difficulties exist, such as determining a people's authority to surrender title.⁹⁷ Surrender in exchange for some other rights could be used to amicably resolve disputes, such as those between aborigines and mining

93. *Id.* at 51.

94. On the effectiveness of and problems associated with native/white natural resource comanagement regimes, see generally Gail Oshernko, *Can Co-management Save Arctic Wildlife*, 30 ENV'T 6-13, 29-34 (July-Aug. 1988); Michael Asch, *Wildlife: Defining the Animals the Dene Hunt and the Settlement of Aboriginal Rights Claims*, 15 CAN. PUB. POL'Y 205 (1989); David S. Case, *Subsistence And Self-Determination: Can Alaska Natives Have A More Efficient Voice?* 60 U. COLO. L. REV. 1009 (1989). For insight into comanagement-like regimes in Australia, see generally Graham A. Yapp, *Wilderness in Kakadu National Park: Aboriginal and Other Interests*, 29 NAT. RESOURCES J. 171 (1989); John Toohey, *Aboriginal Land*, 15-16 FED. L. REV. 159 (1985-86) (Austl.).

95. *Mabo*, 107 A.L.R. at 51 (Brennan, J., concurring); *id.* at 83 (Deane & Gaudron, JJ., concurring).

96. *Id.* at 51-52 (Brennan, J., concurring).

97. See P.C.S. van Hattem, *The Extinguishment of Native Title And Implications For Resource Development*, in *Resource Development*, *supra* note 77 at 61, 63-4.

companies.⁹⁸

When the title-holding group becomes extinct, abandons its right, ceases to acknowledge its customary law, or loses its connection with the land, the title is lost.⁹⁹ The Crown then becomes the absolute beneficial owner of the land. Justice Brennan stressed that a title extinguished in this manner cannot be revived by another group moving into the area and purporting to exercise rights over the abandoned land.¹⁰⁰ Evidentiary problems are bound to arise in determining whether a group abandoned its right or if all members of the group are extinct. Problems will also foreseeably arise where groups were forced to abandon their lands. Can they reassert rights they were forced to abandon, where the rights have not otherwise been extinguished? Litigation is very likely in this area.

B. Crown Action

Crucial to the plaintiffs' case in *Mabo* was the defendant's argument that even if plaintiffs' title survived annexation, it was subsequently extinguished when the Crown exercised its sovereign powers. The defendant relied on various statutory provisions and executive actions whereby the Murray Islands were, from inception, reserved from sale and put under trust for the use of the Aboriginal inhabitants of Queensland.¹⁰¹ Defendant argued that the act of reserving the islands for Aborigines (irrespective of whether or not they were the native inhabitants) without their prior consent was inconsistent with the existence of native title and therefore constituted an extinguishment of title.

The Court unanimously held that native title, like any other private property interest, could be extinguished by valid State or Commonwealth legislation, or by executive action pursuant to legislation,¹⁰² provided a "clear and plain intention" to extinguish native title existed. This requirement arises because of the serious

98. *Id.*

99. *Mabo*, 107 A.L.R. at 52 (Austl. 1992) (Brennan, J., concurring); *id.* at 150 (Toohey, J., did not agree that modification of traditional way of life would lead to loss of title: "Traditional title arises from the fact of occupation, not the occupation of a particular kind of society or way of life.").

100. *Id.* at 52 (Brennan, J., concurring).

101. *Id.* at 47-48 (Brennan, J., concurring).

102. *Id.* at 47, 84, 152.

consequences of extinguishing the native people's title.¹⁰³ The majority held this intention to extinguish was not evidenced where a law or an executive act merely regulated the enjoyment of native title or reserved land for indigenous people.¹⁰⁴ Nor does reservation of land for public purposes extinguish native rights over the subject land unless the land is actually used in a manner inconsistent with the enjoyment of the native right.¹⁰⁵ For example, land reserved for future use as a road or school does not extinguish native title until it is actually used for that particular purpose.¹⁰⁶ Similarly, reservation or dedication of land for national parks, forests or wild life does not necessarily extinguish native title unless the traditional use of the land is inconsistent with the objectives of the reservation or dedication of the land.¹⁰⁷

In contrast, a clear and plain intention to extinguish native title is evidenced when the Crown grants interests in land inconsistent with the continued enjoyment of traditional land rights. The grant's effect upon the native title is the critical factor, not the Crown's actual intent to extinguish traditional land rights.¹⁰⁸ The clearest example of such a conflict is a grant of a freehold estate in fee simple. This is the largest estate at common law, and in Australia is usually granted unqualified as to purpose and without reservation, except over minerals. Grant of a fee simple estate is inconsistent with the continued enjoyment of the native rights.¹⁰⁹ Other grants which can be made by the Crown include leases and licenses for grazing and mineral prospecting. The

103. *Id.* at 46 n.133, 147 n.138. Justice Brennan declared he was following the approach in Canadian and U.S. cases including: *Calder v. Attorney-General of British Columbia* [1973] S.C.R. 313, 404; *United States v Santa Fe Pac. R.R. Co.*, 314 U.S. 339, 353-54 (1941). See also *Mabo*, 107 A.L.R. at 153 (Toohey, J., concurring). Justices Deane and Gaudron said that since extinguishment is expropriation of property, "the ordinary rules of statutory interpretation require that clear and unambiguous words be used before there will be imputed to the legislature intent to expropriate or extinguish." *Id.* at 84.

104. Brennan reasoned that "[t]o reserve land from sale is to protect native title from being extinguished by alienation under power of sale". Brennan, 107 A.L.R. at 48.

105. *Id.* at 51 (Brennan, J., concurring).

106. *Id.* at 50.

107. *Id.*

108. *Id.* at 51. His Honour presumably was foreshadowing possible arguments that the Crown could not have intended to extinguish native titles since it was generally believed at common law that Aborigines had no titles.

109. *Id.* at 49, 83, 153.

Court was not unanimous on whether a grant of a lease is sufficient by itself to extinguish the native title over the subject land. Justice Brennan said a grant of a lease would extinguish native title because "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 dominium."¹¹⁰ Justice Toohey was noncommittal.¹¹¹ Justices Deane and Gaudron held that an "unqualified" lease, giving exclusive possession, would constitute evidence of clear and plain intention to extinguish native title.¹¹² This implies that not all leases would extinguish native title.¹¹³

Arguably, the approach suggested by Justices Deane and Gaudron is preferable. There are a wide range of leases which the Crown can grant subject to diverse conditions. Whether land subject to a lease extinguishes native title ought to depend upon the terms of the lease and the native right claimed. For example, under the Western Australian Land Act of 1933, pastoral leases are usually granted subject to a condition that "[t]he aboriginal natives may at all times enter upon any unenclosed and unimproved parts of the land the subject of a pastoral lease to seek their sustenance in their accustomed manner."¹¹⁴ The provision, therefore, preserves native rights over any part of the leased land that remains unenclosed and unimproved. If such a position were adopted nationally, customary native rights to camp, hunt wild animals, gather food, or use specific sacred sites for religious purposes would continue over the unimproved or unenclosed part of the land. In contrast, rights inconsistent with the pastoral lease would be extinguished.¹¹⁵

110. *Mabo*, 107 A.L.R. 1, 49 (Austl. 1992) (Brennan, J., concurring).

111. *Id.* at 154 (Toohey, J., concurring).

112. *Id.* at 83 (Deane & Gaudron, JJ., concurring).

113. One of Australia's foremost historians, Henry Reynolds, argues that Aboriginal access to all pastoral leases is a right historically acknowledged by the British Imperial government in Australia. He states that, "[t]he Aboriginal interest on all pastoral land held under lease is far older and/or more potent than has commonly been realised. It has to be treated very seriously in the negotiation and litigation which will follow in the wake of the *Mabo* decision." Henry Reynolds, *Mabo And Pastoral Leases*, 2 ABORIGINAL L. BULL. 10, 8-10 (Dec., 1992).

114. Western Australia Land Act of 1933 § 106.

115. For discussion of the effect of other types of leases, see Van Hattem, *supra* note 97, at 16-18.

There is bound to be significant controversy regarding leases, particularly pastoral and mining leases not expressly saving native rights. On the other hand, the courts will not likely hold that license grants are sufficient to extinguish native rights, except to the extent that rights granted under specific licenses are inconsistent with the exercise of traditional rights.¹¹⁶ For example, it is arguable that a license to prospect for minerals is not inconsistent with traditional title based on a spiritual connection or usage because the license does not give exclusive possession of the land to the licensee. This argument, however, is likely to be strongly contested, especially by the mining companies.¹¹⁷

C. Legislation

Similar rules apply to the interpretation of legislation. General legislation relating to "Crown land" cannot be construed, absent clear wording, as Parliament's intent to extinguish native title.¹¹⁸ Thus, legislation authorizing the Governor to dispose of Crown lands¹¹⁹ is construed as asserting sovereign power not inconsistent with continued enjoyment of native title until the power to alienate is actually exercised with reference to particular land. Interpreting legislation dealing with natural resources is much more complicated. States' legislation prescribes that all minerals and petroleum products in their natural state existing on or below the surface of any land are the "property of the Crown."¹²⁰ The question is whether these provisions are plainly inconsistent with any native claim to ownership. Van Hattem submits that the language "the property of the Crown" in the Mining Acts intends the Crown be beneficial owner of minerals rather than an assertion of its radical title to them. Support for this argument exists in the Mining Act's which make mining without statutory authority an offense.¹²¹

116. *Mabo*, 107 A.L.R. 1, 51 (Austl. 1992) (Brennan, J., concurring).

117. Van Hattem argues that rights conferred under a mining prospecting licence (such as to excavate, remove mineral or soil sample etc) are inconsistent with some or all of the incidents of native title relating to a particular parcel of land). See *supra* note 97, at 75-6.

118. *Mabo*, 107 A.L.R. at 84 (Deane & Gaudron, JJ., concurring); *id.* at 153 (Toohey, J., concurring).

119. See, e.g., Land Act, 1962-88, § 5, 6 (Queens.).

120. Van Hattem, *supra* note 97, at 68.

121. *Id.* at 68.

Arguably this legislation could not have been aimed at the Aborigines' common law native title since at that time such title did not exist. This argument does not likely advance Aborigines' land rights claims because the legislation's effect, not its intent, controls. Thus if the legislation is construed as inconsistent with native title, native rights will be extinguished.¹²² Claimants of mineral rights will have a difficult time showing that under customary law they owned or had a right to minerals. This complicated issue is likely to cause the greatest controversy. Legislation is urgently required to clarify the legal position.¹²³

In light of *Mabo's* implications, the Commonwealth and states may attempt to legislate to diminish or extinguish the common law native title. However, their power to legislate is subject to constitutional constraints. The Commonwealth is bound by the requirement of section 51(xxxi) of the Australian Constitution, providing for just compensation for expropriation of property.¹²⁴ State legislation, on the other hand, is subject to overriding provisions of Commonwealth statutes such as the Racial Discrimination Act.¹²⁵ Apart from legal considerations are political ones. It would require tremendous political insensitivity, however, to legislate away legal rights which the Aboriginal people have won through the Court after two hundred years.¹²⁶

VI. COMPENSATION FOR LOSS OF NATIVE TITLE

In the short summary appearing before the various opinions, Chief Justice Mason and Justice McHugh say:

122. *Mabo*, 107 A.L.R. 1, 49 (Austl. 1992) (Brennan, J., concurring).

123. Apart from mineral legislation, there are several other statutes relating to land management and conservation. Controversy is likely over whether these acts extinguish native title. See generally *supra* note 97. In contrast to minerals, one conflict of potential significance that could be resolved in favour of Aboriginal peoples concerns the use of timber resources or the rights to the income from use of timber lands.

124. See discussion *infra* part VI.

125. *Mabo*, 107 A.L.R. at 84 (Deane & Gaudron, JJ., concurring). See generally *supra* note 97, at 70-2.

126. It is significant that both sides of the Commonwealth Parliament have undertaken not to use legislation to extinguish rights of the Aboriginal people declared by the High Court. See Lenore Taylor, *Mining Chief Slams Land Rights Ruling*, AUSTRALIAN, Oct. 13, 1992, at 3.

We agree with the reasons for judgment of Brennan J. and with the declaration which he proposes The main difference between those members of the court who constitute the majority is that, subject to the operation of the Racial Discrimination Act 1975 (Cth), neither of us nor Brennan J. agrees with the conclusion to be drawn from the judgments of Deane, Toohey, and Gaudron JJ, that, at least in the absence of clear and unambiguous statutory provision to the contrary, extinguishment of native title by the Crown by inconsistent grant is wrongful and gives rise to a claim for compensatory damages.

We are authorised to say that the other members of the court agree with what is said in the preceding paragraph about the outcome of the case.¹²⁷

The difficulty with this statement is that nowhere in his opinion does Justice Brennan expressly state that compensation is not required for extinguishment of native title.¹²⁸ He does, however, make a number of comments with respect to the legal enforceability of native title.¹²⁹ Alluding to the general common law rule that the British Crown fully respected prior native property rights in its colonies,¹³⁰ he cites with approval Lord Denning's statement in *Adeyinka Oyekan v. Musindiku Adele*:¹³¹

In inquiring . . . what rights are recognised, there is one guiding principle. It is this: The courts will assume that the British Crown intends that the rights of property of the [indigenous] inhabitants are to be fully respected. *Whilst, therefore, the British Crown, as Sovereign, can make laws enabling it compulsorily to acquire land for public purposes, it will see that proper compensation is*

127. *Mabo*, 107 A.L.R. 1, 7 (Austl. 1992) (Mason & McHugh, JJ., concurring).

128. One other commentator has noted that "[t]he source of the difference over the issue of compensatory damages between Brennan J on the one hand, and Toohey, Deane and Gaudron JJ, on the other, is not entirely clear". Mark Gregory, *Rewriting History I — Mabo v Queensland: The Decision*, 17 ALTERNATIVE L. J. 157, 159 (1992).

129. Justice Brennan notes, for example, that, "[n]ative title, being recognized by the common law . . . may be protected by such legal or equitable remedies as are appropriate to the particular rights and interests established by the evidence, whether proprietary or personal and usufructuary in nature" *Mabo*, 107 A.L.R. at 44. He also notes that, "[w]here an indigenous people . . . are in possession or are entitled to possession of land under a proprietary native title, their possession may be protected or their entitlement to possession may be enforced by a representative action brought on behalf of the people" *Id.*

130. *Id.* at 38-41.

131. [1957] 1 W.L.R. 876, 880 (P.C.) (appeal taken from Nig.).

awarded to every one of the inhabitants who has by native law an interest in it."¹³²

In fact, Justice Brennan goes on to say, "We are not concerned here with compensation for expropriation."¹³³ Because compensation was not at issue in the case, the Justices' comments on this issue arguably are dicta. The law regarding compensation will need to be developed in future cases.¹³⁴ However, because of the future impact of this issue, its treatment by three members of the Court, and possible guidelines to be drawn from cases on which the Court relied, it is worth examining the judgments that discuss the compensation issue.

Justice Brennan's additional comments are also worth considering and shed light on the future of compensating Aborigines for loss of title. Justice Brennan notes that when, under the common law, the Crown acquires sovereignty over a territory, that sovereignty encompasses "the capacity to accept a surrender of native title."¹³⁵ Further, transfer of title may be surrendered by purchase or voluntarily.¹³⁶ This implies that the Crown may only use two methods to acquire full fee title over native title lands—a fair purchase or voluntary relinquishment of that native title. Justice Brennan mentions no other methods, such as forcible ejection. Thus, Justice Brennan recognizes that native title creates legally enforceable rights to property.

In contrast to Justice Dawson's dissenting opinion, which asserts that there is no general rule, either in law or in history, favoring compensation for loss of native title,¹³⁷ one leading commentator notes the common law generally shields Aboriginal peoples in former British colonies from a taking of their native lands

132. *Mabo*, 107 A.L.R. 1, 40 (Austl. 1992) (emphasis added).

133. *Id.*

134. Brysland notes that it was common ground among the majority judgments that extinguishment of aboriginal title must be exercised subject to the Commonwealth Constitution, which requires acquisition of property on "just terms". He also notes that Justice Brennan failed to refer directly to the compensation issue, and concludes from those factors, "[t]he door is now open for a majority of the High Court to declare at least limited rights to compensation". See *supra* note 2, at 164-65.

135. *Mabo*, 107 A.L.R. at 43 (Brennan, J., concurring).

136. *Id.* at 43.

137. *Mabo*, 107 A.L.R. 1, 96 (Austl. 1992) (Dawson, J., dissenting).

without compensation.¹³⁸ The exception is the case of American Indians, where only native title confirmed by treaty or executive agreements, is protected from uncompensated taking.¹³⁹

Justices Deane and Gaudron accept that common law native title to Aboriginal lands does "not constitute an estate or interest in the land itself."¹⁴⁰ Instead, native title confers personal rights of use and occupation subject to extinguishment by the sovereign. However, the rights conferred by native title are not illusory. "They are legal rights which are infringed if they are extinguished, against the wishes of the native title holders . . ."¹⁴¹ Though extinguishable, there are "important constraints on the legislative power of Commonwealth, State or Territory Parliaments to extinguish or diminish the common law native title."¹⁴² With respect to the Commonwealth, section 51(xxxi) of the Australian Constitution imposes a requirement that acquisition of private property provide "just terms."¹⁴³ Because native title provides legal rights, "any legislative extinguishment of those rights would constitute an expropriation of property for the purposes of Section 51 (xxxi)."¹⁴⁴

Justices Deane and Gaudron write that the paramountcy of valid Commonwealth legislation,¹⁴⁵ such as the Racial Discrimination Act 1975 (Commonwealth), over conflicting State or territorial legislation represents an important restraint on the Government's power to extinguish or diminish common law native

138. See *supra* note 78, at 248-49.

139. See *supra* note 79 and accompanying text. In contrast, Canada treats rights attendant to aboriginal title as unique interests in land that are independently justiciable and compensable. *Id.* at 71-72.

140. *Mabo*, 107 A.L.R. at 83 (Deane & Gaudron, JJ., concurring).

141. *Id.* (emphasis added).

142. *Mabo*, 107 A.L.R. 1, 84 (Austl. 1992).

143. *Id.*

144. *Id.* To the extent that aboriginal title may be extinguished involuntarily, albeit with the possibility of future compensation, the rights guaranteed Australian aboriginal peoples are less than those guaranteed their Canadian counterparts, but more than those guaranteed native peoples in the United States. See *supra* note 80. In Canada on the other hand, enactment of Section 35 of the Constitution Act of 1982 preserves existing treaty and aboriginal rights insulating them from extinguishment except by voluntary cession to the Canadian government. *Id.* at 72-73. See also *supra* note 81, at 215.

145. Section 109 of the Australian Constitution provides that, "[W]hen a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid."

title.¹⁴⁶ Justices Deane and Gaudron, however, go further than Justice Brennan's and Justice Toohey's finding that either a constitutional or statutory basis exists for compensation. They find a general duty under the common law to compensate native title-holders for loss of these rights.¹⁴⁷ They note that during the early years of colonization, native peoples were "essentially helpless" and unable to protect their rights, partly because it was unlikely that they would be able to assert those rights in colonial courts and partly because the Crown was immune from such proceedings.¹⁴⁸ However, as legislative reforms increasingly subjected the Crown to expanded court jurisdiction and liability for compensatory damages, Justices Deane and Gaudron conclude that "if common law native title is extinguished by the Crown . . . compensatory damages can be recovered."¹⁴⁹ Justices Deane and Gaudron's determination that native title rights are true legal rights that can be vindicated, protected, and enforced by proceedings in the ordinary courts, leads them to conclude that a full range of remedies are available to protect those rights or remedy violations of those rights, including declaratory judgments and equitable relief such as injunctions, or imposition of a remedial constructive trusts.¹⁵⁰

Justice Toohey's judgment on the compensation issue is more complex.¹⁵¹ Initially, Justice Toohey seems to agree with Justices Deane and Gaudron. He asks, "in what way is [the power to extinguish native title] different from the power of the Crown to

146. *Mabo*, 107 A.L.R. at 186 (Deane & Gaudron, JJ., concurring). See also *Mabo v. Queensland*, 166 C.L.R. 186 (1988) (holding, if one assumed aboriginal land rights exist, the Queensland government's attempt to retroactively extinguish all aboriginal land rights in that state was invalid because it conflicted with the Commonwealth Racial Discrimination Act of 1975).

147. *Mabo*, 107 A.L.R. 1, 84-86 (Austl. 1992) (Deane and Gaudron, JJ., concurring).

148. *Id.* at 85. Justice Brennan states that: [a]ccording to the cases, the common law itself took from indigenous inhabitants any right to occupy their traditional land, exposed them to deprivation of the religious, cultural and economic sustenance which the land provides, vested the land effectively in the control of the Imperial authorities without any right to compensation and made [them] intruders in their own home and mendicants for a place to live.

Id. at 18.

149. *Id.* at 85, 90 (Deane & Gaudron, JJ., concurring).

150. *Id.* at 85-86.

151. See Nettheim, *supra* note 2, at 12.

compulsorily acquire any interest in land? Is it compensable?"¹⁵² Justice Toohey verifies the Crown's power to extinguish title, but goes on to note that there is considerable support "for the proposition that consent is required."¹⁵³ He notes that both the United States and New Zealand precedents support this proposition.¹⁵⁴ For example, he cites *Worcester v. Georgia*,¹⁵⁵ in which Chief Justice Marshall characterized the sovereign's title as comprising "the exclusive right of purchasing such lands as the natives were willing to sell."¹⁵⁶ Justice Toohey also cites with approval the following passage from the seminal New Zealand case,¹⁵⁷ in which Justice Chapman stated:

Whatever may be the opinion of jurists as to the strength or weakness of Native title . . . it cannot be too solemnly asserted that it is entitled to be respected, that it cannot be extinguished (at least in times of peace) otherwise than by the free consent of the Native occupiers.¹⁵⁸

While Justice Toohey acknowledges some support that the Crown may unilaterally extinguish native title,¹⁵⁹ he concludes that the bases for these assertions do not justify a finding against compensation.¹⁶⁰ These bases include "a concomitant of an assertion of sovereignty"; a policy of protection of the indigenous peoples interests; and the inherent nature of title as a personal or

152. *Mabo*, 107 A.L.R. 1, 150 (Austl. 1992) (Toohey, J., concurring).

153. *Id.* at 150-51.

154. *Id.* at 151.

155. 31 U.S. (6 Pet.) 515 (1832).

156. *Id.* at 545. See also *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831) (noting that "the Indians are acknowledged to have an unquestionable, and heretofore unquestioned right to the lands they occupy, until that right shall be extinguished by a voluntary cession to our government."), *Tee-Hit Ton v. United States*, 348 U.S. 272 (1955).

157. *The Queen v. Symonds*, [1847] N.Z.P.C.C. 387, 390.

158. *Mabo*, 107 A.L.R. 1, 151 (Austl. 1992) (Toohey, J., concurring). See also *Nireaha Tamaki v. Baker* [1901] N.Z.P.C.C. 371, 384 (approving Justice Chapman's comments on the respect due traditional native title). For a general discussion on the protection of Maori land and resources rights, particularly aboriginal fishing rights in New Zealand, see Michael C. Blumm, *Native Fishing Rights and Environmental Protection in North American and New Zealand: A Comparative Analysis Of Profits A' Prendre And Habitat Servitudes*, 8 WIS. INT'L L.J. 1, 29-48 (1989).

159. *Mabo*, 107 A.L.R. at 151 (Toohey, J., concurring).

160. *Id.* at 151-53.

usufructuary right.¹⁶¹ Justice Toohey uses international case law to show that, by assuming sovereignty over native lands, the Crown assumes a fiduciary relationship to native peoples to protect their interests.¹⁶² Justice Toohey relies principally on *Guerin v. The Queen*,¹⁶³ a case the Canadian Supreme Court decided in 1984.¹⁶⁴

In *Guerin*, the Court considered whether a private lease of tribal lands, which the government negotiated under less favorable terms than the tribe sought, entitled the tribe to compensation. The Canadian Supreme Court reinstated the trial court's award of ten million dollars in damages, which the federal appeals tribunal reversed. The Court noted that the Canadian government and natives' relationship was "trust-like," imposing a fiduciary duty on the Government to protect native interests.¹⁶⁵ Justice Dickson wrote:

The fiduciary relationship between the Crown and the Indians has its roots in the concept of aboriginal, native, or Indian title. The fact that the Indian Bands have a certain interest in lands does not, however, in itself give rise to a fiduciary relationship between the Indians and the Crown. The conclusion that the Crown is a fiduciary depends upon the further proposition that the Indians' interest in the land is inalienable except upon surrender to the Crown.¹⁶⁶

In a more recent case, *Sparrow v. The Queen*,¹⁶⁷ the Canadian Supreme Court upheld *Guerin*, formalizing a fiduciary status similar to that adopted in the United States.¹⁶⁸

161. *Id.*

162. *Id.* at 156-59.

163. [1984] 2 S.C.R. 335 (Can.).

164. *Mabo*, 107 A.L.R. 1, 158-59 (Austl. 1992) (Toohey, J., discussing the nature and content of the fiduciary duty owed by the Crown to aboriginal peoples).

165. *Guerin*, [1984] 2 S.C.R. at 375-76. See Meyers, *supra* note 80, at 91-93.

166. *Guerin*, [1984] 2 S.C.R. at 376.

167. [1990] 3 C.N.L.R. 160, 180 (Can.).

168. For comments on the *Sparrow* case, see Meyers, *supra* note 80, at 91, 93, 110-14; Michael Asch & Patrick Macklem, *Aboriginal Rights And Canadian Sovereignty: An Essay On R.v. Sparrow*, 29 ALBERTA L. REV. 498 (1991).

The fiduciary relationships between the United State government and United States Indian Tribes comes out of the nature of the Tribes as a "domestic dependant nation," a doctrine first announced by Chief Justice Marshall in *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 16-7 (1831). The duty requires the United States to act in the best interest of Indian Tribes; arises equally out of treaties,

The general fiduciary duty owed aboriginal peoples is, Justice Toohey notes, founded upon the Crown's ability to extinguish Aboriginal title.¹⁶⁹ This obligation "is to ensure that traditional title is not impaired or destroyed without the consent of or otherwise contrary to the interests of the titleholders."¹⁷⁰ Moreover, the Crown's fiduciary obligation requires it to act for the benefit of the Aborigines.¹⁷¹ While the nature of the fiduciary duty varies according to the circumstances and rights at issue, Justice Toohey concludes that the Crown is liable for any breach of that fiduciary duty.¹⁷²

Justice Toohey could have ended his consideration of liability at this point. However, Justice Toohey also suggests that, when state or territorial legislatures fail to provide just terms for the acquisition of lands subject to native title, compensation might be required under the Racial Discrimination Act of 1975 (Commonwealth).¹⁷³ In so concluding, he relies upon domestic enforcement of international obligations to declare that the Commonwealth Act requires compensation.¹⁷⁴

congressional action, or executive order; and imposes exacting standards of conduct upon the federal government. See Meyers, *supra* note 80, at 89-91.

169. *Mabo*, 107 A.L.R. 1, 158 (Austl. 1992) (Toohey, J., concurring).

170. *Id.* at 160.

171. *Id.* at 159.

172. *Id.* at 159-60.

173. Garth Nettheim, *It's No Time for Hasty Responses*, FIN. REV. (Austl.), June 10, 1992, at 12. See *Mabo*, 107 A.L.R. at 167-69 (Toohey, J. concurring).

174. Section 10 of the Racial Discrimination Act reads as follows:

(1) If, by reason of, or of a provision of, a law of the Commonwealth or of a State or Territory, persons 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 persons of another race, colour or national or ethnic origin, then, notwithstanding anything in that law, persons of the first-mentioned race, colour or national or ethnic origin shall, by force of this section, enjoy that right to the same extent as persons of that other race, colour or national or ethnic origin.

(2) A reference in subsection (1) to a right includes a reference to a right of a kind referred to in Article 5 of the Convention.

(3) Where a law contains a provision that:

- (a) authorizes property owned by an Aboriginal or a Torres Strait Islander to be managed by another person without the consent of the Aboriginal or Torres Strait Islander; or
- (b) prevents or restricts an Aboriginal or a Torres Strait Islander from terminating the management by another person of property

Justice Toohey notes that, "rights referred to in article 5 of the International Convention on the Elimination of all Forms of Racial Discrimination,¹⁷⁶ the Convention referred to in section 10(2) [of the Act] include '(d)(v) the right to own property alone as well as in association with others; [and] (vi) the right to inherit'.¹⁷⁶ He finds that "[t]he right to be immune from arbitrary deprivation of property is a human right and falls within section 10(1) of the Act"¹⁷⁷ If a state or territory extinguishes Aboriginal title without compensation, then the native title holders do not enjoy the right other title holders share. He concludes, "a law which purported to achieve such a result would offend section 10(1) of the Racial Discrimination Act and in turn be inconsistent [with] section 109 of the Constitution . . . and the proposed law would be invalid."¹⁷⁸ In either event, whether by application of common law or by application of Commonwealth legislation coupled with constitutional power, Justice Toohey concludes that Aboriginal title may not be extinguished without payment of compensation.¹⁷⁹

Reconciling the three majority judgments' discussion of the compensation issue is difficult unless the issue is considered as two distinct questions. First, is compensation required for the past dispossession of Australia's Aboriginal peoples from their lands? Second, is compensation required for any future extinguishment of aboriginal rights associated with native title?

Essentially, all of the judgements conclude that, with respect to the historical dispossession of many Aboriginal peoples, the past is the past and cannot now be undone. Thus, Justices Deane and Gaudron are able to write that, "[i]f common law native title

owned by the Aboriginal or Torres Strait Islander; not being a provision that applies to persons generally without regard to their race, colour or national or ethnic origin, that provision shall be deemed to be a provision in relation to which subsection (1) applies and a reference in that subsection to a right includes a reference to a right of a person to manage property owned by the person.

Racial Discrimination Act, 1978 (Commw.), Secs. 10(1)-(3) (a) and (b)

175. International Convention on the Elimination of All Forms of Racial Discrimination, *opened for signature*, Mar. 7, 1966, S. TREATY DOC. No. 2, 95th Cong., 2d Sess., 660 U.N.T.S. 195.

176. *Mabo*, 107 A.L.R. 1, 168 (Austl. 1992) (Toohey, J., concurring).

177. *Id.* at 169.

178. *Id.*

179. *Id.* at 169-70.

is wrongfully extinguished by the Crown, the effect of [legislative reforms removing Crown immunity from court proceedings] is that compensatory damages can be recovered *provided those proceedings for recovery are instituted within the period allowed by applicable limitations provisions.*"¹⁸⁰ Justice Toohey similarly notes that compensation for loss of native rights or recovery of possession of native lands is subject to statutory limitations of actions.¹⁸¹

Confining Justice Brennan's judgment, and thereby the Mason-McHugh concurrence,¹⁸² to the proposition that compensation is unavailable for past extinguishment of aboriginal title, harmonizes it with the Justices Deane and Gaudron and Justice Toohey's judgments. These limit the availability of compensation to unlawful government action that occurs within time periods set by legislative statutes of limitation.¹⁸³ This reading is also compatible with Justice Brennan's assertion that domestic courts cannot review the issue of acquiring sovereignty over territory. He notes that while "the question whether a territory has been acquired by the Crown is not justiciable before municipal courts, those courts have jurisdiction to determine the consequences of an acquisition under municipal law."¹⁸⁴

More telling to the proposition that Justice Brennan's judgment can be fairly read to distinguish between past and present abrogations of native title is his discussion of the enforceability of native title,¹⁸⁵ coupled with his examination of the nature of na-

180. *Id.* at 85 (Deane & Gaudron, JJ., concurring) (emphasis added).

181. *Mabo*, 107 A.L.R. 1, 167 (Austl 1992). Justice Toohey also notes, however, that in the instant case the plaintiffs did not seek any compensation for past interference with their asserted aboriginal rights. *Id.* at 160-61.

182. *See supra* note 127.

183. Such a formulation does not necessarily release the Commonwealth from its moral obligations to redress by legislation or otherwise, the wrongful dispossession of Aboriginal groups from their lands.

184. *Mabo*, 107 A.L.R. at 20 (Brennan, J., concurring). *See also id.* at 58 (Deane & Gaudron, JJ., noting "[acquisition of sovereignty] . . . could not be challenged in British Courts"). *Cf.* *Johnson v. McIntosh*, 21 (8 Wheat.) U.S. 543, 588 (1823) (Chief Justice Marshall notes in regard to European assertion of sovereignty over American Indians, "[C]onquest gives a title which the Courts of the conqueror cannot deny, whatever the private and speculative opinions of individuals may be, respecting the original justice of the claim which has been successfully asserted.").

185. *See supra* notes 132-35, 138-40 and accompanying text.

tive title and its extinguishment.¹⁸⁶ He notes that:

the common law can, by reference to the traditional laws and customs of an indigenous people, identify and protect the native rights and interests to which they give rise. However, when the tide of history has washed away any real acknowledgment of traditional law and any real observance of traditional custom [that is, occupation of land], the foundation of native title has disappeared. A native title which has ceased with the abandoning of laws and customs based on a tradition cannot be revived for contemporary recognition. . . . Once traditional native title expires, the Crown's radical title expands to full beneficial title, for then there is no other proprietor than the Crown.¹⁸⁷

The tide of history may wash away compensation of certain groups due to their lost occupation of their homelands, but it does not wash away that of groups retaining their customary occupation of traditional homelands. Therefore, history ought not bar recovery for the wrongful extinguishment of existing native title. In this context, Justice Brennan's conclusion, that existing native title can be protected by legal or equitable remedies and representative actions,¹⁸⁸ and the Mason-McHugh concurrence make sense.

In sum, the Court could have been clearer on the compensation issue. Perhaps, because the question was not at issue, there was less reason to offer comments on compensation. At the same time, because of its importance and its treatment in dicta, the issue will likely be addressed in future cases. However, the twin-pronged approach for interpreting the various judgments resolves any inconsistencies on the issue of compensation among the majority judgments. But, it does not rule out Parliamentary action to find means of compensating those Aboriginal peoples whose historical dispossession from their lands and way of life is complete.¹⁸⁹

186. *Mabo*, 107 A.L.R. 1, 43 (Austl. 1992) (Brennan, J. concurring).

187. *Id.*

188. *Id.* at 44.

189. The Aboriginal and Torres Strait Islander Commission has recently urged the government to set up a fund to enable dispossessed Aboriginal Communities to purchase land. The Minister for Aboriginal Affairs reaction might be characterized as cautiously optimistic. See Amanda Hurley & Liz Tickner, *Land Fund Urged to Offset Mabo*, W. AUSTRALIAN, Dec. 1, 1992, at 31.

VII. CONCLUSION

Mabo v. Queensland is a watershed in the jurisprudence of the Australian High Court. It signals a new era in the relationship between the descendants of Australia's colonizers and its indigenous peoples. Time, the goodwill of all Australia's people, and most importantly, the political will of government to reach accommodation with native Australians are crucial for determining how the relationship will evolve.¹⁹⁰

There is much to be learned from the experience of Australia's common law relatives. New Zealand, Canada, and the United States have all struggled to fashion accords accommodating their respective native peoples, while simultaneously maintaining cohesive, pluralistic democracies. Each was faced with the Anglo-European majority's historic mistreatment and disenfranchisement of indigenous populations. Land claims settlements in Canada,

190. Even prior to the Mabo decision, Australia initiated a ten-year process of reconciliation with its Aboriginal peoples to commemorate the centenary of federation in the year 2002. See James Button, *Healing Wounds*, TIME (Austl.), Oct. 26, 1991, at 42-43. In late 1991, Parliament passed the Council for Aboriginal Reconciliation Act 1991 (Cth.) (CAR), which established a twenty-five member Council (fourteen Aboriginal or Torres Strait Islander members and eleven non-Aboriginal members) representing a broad cross section of Australia including the main political parties, as well as representatives from major sectors of the public including the mining industry, pastoralists and farmers, trade unions and the media. *Id.* at 42.

The purpose of the CAR is "to promote a process of reconciliation between Aborigines and Torres Strait Islanders and the wider community." Sec. 5, Council for Aboriginal Reconciliation Act 1991 (Cth). But the CAR does not mandate substantive changes, rather its functions are advisory, *i.e.*, to consult with affected groups and report to the Minister for Aboriginal Affairs regarding the views of Australians on the desirability of a treaty or other agreements, or in the words of the Act, ". . . a formal document or formal documents of reconciliation . . ." *Id.* at § 6 (g)-(h).

Views from both the Aboriginal and Torres Strait Islander communities and non-Aboriginal Australians are mixed regarding the potential for success of the CAR driven process. A treaty has long been sought and has been official policy of the Australian Labor Government since at least 1988. While optimism may be appropriate, and while *Mabo* may provide additional impetus to this effort, ten years is not a long time to achieve results in the face of 200 years of resistance to those results. See generally Button, *supra* this note; David Lavery, *The Council for Aboriginal Reconciliation: When the CAR Stops on Reconciliation Day Will Indigenous Australians Have Gone Anywhere?*, 2 ABORIGINAL L. BULL. 7-8 (1992). See also Eugene Reid, *Aboriginal Pain is Whites' Fault*, W. AUSTRALIAN, Dec. 11, 1992, at 1.

particularly the recent agreement reached to establish Nunavut as a semi-self-governing homeland for the Inuit people of the Northern Territory, demonstrate possible innovation.¹⁹¹ But each of those countries has made serious mistakes¹⁹² and has advanced and retreated from different attempts to respect, assimilate, or isolate its native populations from majoritarian society. Australia can use *Mabo* to make a clean break with the past and learn from the successes and failures of countries sharing a significant cultural and legal bond.

Accurately predicting the exact contours of Aboriginal land rights in Australia is difficult at best. However, the *Mabo* judgments provide guidance to the likely future of these interests and rights that will be protected under the umbrella of aboriginal or native title to traditional lands. The extensive reliance upon decisions in sister common law countries, such as *Calder*, *Guerin*, and *Sparrow* in Canada; *Tee-Hit-Ton* and *Worcester* in the United States; and *Symonds* in New Zealand, indicate that most of the panoply of rights attendant with native title will likely be recognized in future decisions. The rights these other countries protect include the right to occupy traditional homelands; rights to mineral, timber, and wildlife resources; and rights to secure wildlife resources from specifically designated reserves.¹⁹³ Through recognizing environmental servitudes, these rights may extend to protect resources from degradation or overuse by citizens.¹⁹⁴ Austra-

191. See Bryan Boswell, *Natives Fight a Winning Battle*, AUSTRALIAN, July 1, 1992, at 13.

192. See Mark Allen, *Native American Control of Tribal Natural Resource Development in the Context of the Federal Trust and Tribal Self Determination*, 16 B.C. ENVTL. AFF. L. REV. 857, 860 (1989); George C. Coggins & William Modrcin, *Native American Indians and Federal Wildlife Law*, 31 STAN. L. REV. 375, 380-81 (1979); Bradford Morse, *Government Obligations, Aboriginal Peoples and Section 91(24) of the Constitution Act, 1867*, in ABORIGINAL PEOPLES AND GOVERNMENT RESPONSIBILITY 64-80 (D.C. Hawkes ed., Carleton Univ. Press 1989); THE QUEST FOR JUSTICE: ABORIGINAL PEOPLES AND ABORIGINAL RIGHTS 4-5 (Menno Boldt et al. eds., 1985); Blumm, *supra* note 158, at 29-42.

193. See Meyers, *supra* note 80, at 94, 102-09. See also Blumm, *supra* note 158, at 38-46. See generally Allen, *supra* note 192.

194. This right is still unclear in the United States. See *United States v. Winans*, 198 U.S. 371, 384 (1905) (holding that access rights reserved to accustomed fishing areas impose a servitude on the government to protect those rights on lands ceded to the government). But see *United States v. Washington*, 694 F.2d 1374 (9th Cir.), *vacated in part*, 759 F.2d 1353 (9th Cir. 1982). See Gary D. Meyers, *United States v. Washington (Phase II) Revisited: Establishing an Environ-*

lian Aborigines remain tied to certain identifiable lands which involve religion, ceremony, and even identity.¹⁹⁶ Moreover, given this special relationship of Australia's Aboriginal peoples with the land, a relationship unique even among the native peoples of North America and New Zealand, aboriginal title in Australia is likely to and should include special protection of culturally significant sacred sites.¹⁹⁶

mental Servitude Protecting Treaty Fishing Rights, 67 OR. L. REV. 771 (1988).

In Canada and New Zealand, imposition of environmental servitudes to protect native resource rights is more recent. See *Bolton v. Forest Management Inst.*, 21 D.L.R.4th 242, 248-49 (B.C. Ct. App. 1985), where the appeal court in reinstating the appellant's claim for an injunction to restrain herbicide spraying in an area where the native appellant had a registered game trapline, characterized the trapline as a *profit a prendre*, a right which includes protection from interference by others; *Claxton v. Saanichton Marina*, [1989] 3 C.N.L.R. 46 (Can.) (affirming an injunction halting construction of the marina to avoid damaging fish habitat in which the natives held a right to carry on fishing activities). See also Blumm, *supra* note 158, at 47-48, who notes that New Zealand courts have not directly addressed the servitude question, but that recent precedent "leaves little doubt that there is such a right."

195. See *supra* notes 2, 80-81, and accompanying text.

196. The Australian Aboriginal relationship with land is physical, spiritual, geographical and topographical. Land is law, it unites families, defines rights of use and defines inter-clan and other social and economic relationships. Land is music and its ways are told in dreams. As one commentator describes the relationship:

According to Aboriginal people and Torres Strait Islanders themselves, they have always been an integral part of their country: land, law and people united in a single view of the world

Australia's indigenous land ethic is found in indigenous law and religious belief, often represented through what non-indigenous people often call the 'dreaming stories.' Aboriginal law describes and relives the process of the land's creation, when ancestral beings travelled across the land, forming and naming its physical and living features. These acts of creation are connected by the routes of the creators, tracks or dreaming paths.

Each part of the dreaming paths is the responsibility of a group of people, who must maintain it by respecting significant and sacred sites and reliving the creation events through ceremonial songs and dances— even those attached to sites known in the last ice age, since disappeared under rising seas (Neidjie et al. 1985). These responsibilities are interconnected with those of other communities who share sections of the same paths— spiritual neighbours, regardless of physical distance. The result is an interconnected network of sites and routes of significance, developed over thousands of years, that stretch throughout Australia.

A. J. BROWN, *KEEPING THE LAND ALIVE: ABORIGINAL PEOPLE AND WILDERNESS PROTECTION IN AUSTRALIA* 3-4 (Environmental Defenders Office Ltd. 1992). See also BRUCE CHATWIN, *THE SONGLINES* (1988).

Subsequent litigation will shape, in part, the future content of and approaches to protecting aboriginal rights in Australia. In fact, the perceived threat, whether actual or illusory, of such litigation may stimulate other efforts at reform. Litigation, however, need not be the dominant approach to defining the relationship between the Aboriginal peoples and the rest of Australia and native title to lands. Protection may follow other examples set in the United States, Canada, and New Zealand. Creating reserves, designating homelands with limited sovereignty, comanaging lands and other resources, negotiating treaties or other agreements, and adopting federal legislation are all possibilities.

Nonetheless, litigation may be required to address two important issues *Mabo* left unresolved. First, whether compensation for future extinguishment of aboriginal title will be required. Second, the exact quality of the relationship between the Crown and Australia's Aboriginal peoples.¹⁹⁷ As Justices Deane and Gaudron make clear, the country cannot hide from its past reliance on the two erroneous propositions originally leading to the dispossession of aboriginal land rights.¹⁹⁸

197. *Mabo*, 107 A.L.R. 1, 60-62 (Austl. 1992) (Brennan, J., concurring). See *id.* at 109 (Deane & Gaudron, JJ., concurring). *Id.* at 166-67 (Toohey, J., concurring). See also Greg McIntire, *Mabo v. The State of Queensland: Retreat From Injustice*, in RESOURCE DEVELOPMENT, *supra* note 78, at 21, 23. The author notes that in *Mabo*, "[t]here was no finding as to the consequence of extinguishment of native title [T]he disparate views in relation to extinguishment of title are apparently obiter dicta." He also notes that Justice Toohey was the only justice to embark on a detailed discussion of the Crown's fiduciary duty, that Justice Brennan notes the possibility of such a duty in certain circumstances, and that Justices Deane and Gaudron "provide the benefit of . . . [an] advisory view."

198. *Mabo*, 107 A.L.R. at 82 (Deane & Gaudron, JJ., concurring). And at the end of their opinion Justices Deane and Gaudron write that, "[w]e are conscious of the fact that, in those parts of this judgment which deal with the disposition of Australian Aboriginals, we have used language and expressed conclusions which some may think to be unusually emotive for a judgment in this court. We have not done that in order to trespass into the area of assessment or attribution of moral guilt. As we have endeavoured to make clear, the reason which has led us to describe, and express conclusions about, the dispossession of Australian aboriginals in unrestrained language is that the full facts of that dispossession are of critical importance to the assessment of the legitimacy of the propositions that the continent was unoccupied for legal purposes and at the end qualified legal and beneficial ownership of all the land of the continent vested in the Crown. Long acceptance of legal propositions, particularly legal propositions relating to real property, can of itself impart legitimacy and preclude challenge. It is their association with the dispossession that, in our view, precludes those two propositions from acquir-

Neither can Australians establish a new relationship with the Aboriginal peoples without remembering the past. The *Mabo* case has provided an opportunity and stimulus to recreate that relationship based on new understanding. If multi culturalism is to mean anything in Australia, it must begin by recognizing the unique status of its "first peoples," and by an effort by all levels and branches of government to involve all citizens in an equal and equitable relationship between Australia and its Aboriginal peoples. Rather than waiting for and relying upon the courts, that effort requires not mere political action, but statesmanship on the part of the country's civic, business, and political leaders of all races.¹⁹⁹

The *Mabo* case has more far-reaching implications than setting the compass for the future development of Aboriginal land rights. It portends the emergence of a new Australian jurisprudence. Not since its early history has the High Court engaged in such a searching, wide-ranging review of precedent from other jurisdictions to illuminate the context of Australian law.²⁰⁰ Moreover, the judgments indicate a new activism to shape the law of Australia.²⁰¹ The outcomes of this process are harder to predict than the future direction of Aboriginal land rights.

The High Court's willingness to use international law, particularly international human rights law,²⁰² to inform the content of the Australia's common law augurs greater change for its consti-

ing legitimacy which their acceptance as a basis of the real property law of this country for more than 150 years would otherwise impart."

199. *Mabo*, 107 A.L.R. at 82 (Deane & Gaudron, JJ., concurring).

200. Professor William Rich of Washburn University Law School noted that in its first twenty years, the Australian High Court often looked to other courts, particularly decisions of the U.S. Supreme Court, for guidance on constitutional jurisprudence. Prof. Rich notes that in the 1920s under the leadership of Justice Sir Isaac A. Isaacs, the High Court moved away from this tradition to an interpretive model characterized as "legalism" and linked to strong nationalist sentiments. William Rich, *Approaches to Constitutional Interpretation*, Address at the Murdoch University School of Law 3-4 (Nov. 6, 1992) (on file, Dean's Office, Murdoch Univ. School of Law).

201. In a speech, Justice Toohey stated that the High Court could interpret the Australian Constitution in such a way as to imply a bill of rights to guarantee fundamental individual freedoms. Peter Wilson & David Nason, *Activist High Court May Set Own Rights Bill*, AUSTRALIAN, Oct. 6, 1992, at 3.

202. See *supra* note 175. See also *Mabo*, 107 A.L.R. at 167-69.

tutional jurisprudence.²⁰³ Already, the Court has found a right to political free speech guaranteed Australians by the Constitution, even though no such right is specifically enumerated in any of its provisions.²⁰⁴

As in other contexts, such as environmental protection and resource conservation, Australia's ratification of international conventions triggers the Commonwealth power to implement domestically those treaty obligations.²⁰⁵ To the extent that treaties²⁰⁶ to which Australia is a party, such as the International

203. As Justice Brennan notes:

Whatever the justification advanced in earlier days for refusing to recognize the rights and interests in land of the indigenous inhabitants of settled colonies, an unjust and discriminatory doctrine of that kind can no longer be accepted. The expectations of the international community accord in this respect with the contemporary values of the Australian people. The opening up of international remedies to individuals pursuant to Australia's accession to the optional protocol to the International Covenant on Civil and Political Rights brings to bear on the common law the powerful influence of the covenant and the international standards it imports. The common law does not necessarily conform with international law, but international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights. A common law doctrine founded on unjust discrimination in the enjoyment of civil and political rights demands reconsideration. It is contrary both to international standards and to the fundamental values of our common law to entrench a discriminatory rule which, because of the supposed position on the scale of social organisation of the indigenous inhabitants of a settled colony, denies them a right to occupy their traditional lands.

Mabo, 107 A.L.R. 1, 29 (Austl. 1992).

204. In two separate cases brought under the High Court's original jurisdiction, plaintiffs challenged the validity of a Commonwealth Law that prohibited broadcasting of political advertisements during election periods. The Court held in a four to three decision authored by Chief Justice Mason that, at a minimum, freedom of speech and Communication in the context of public affairs and political discussion, is so fundamental to the accountability and efficacy of Australian constitutional democracy, that such freedom is necessarily implied in the Constitution's provision for a representative Government. *Australian Capital Television Pty. Ltd. v. Commonwealth*, 66 A.L.J.R. 214 (Austl. 1992).

205. AUSTRALIAN CONSTITUTION § 51.

206. See *Commonwealth v. State of Tasmania*, 57 A.L.J.R. 450 (Austl. 1983). In the process of upholding section 9 of the World Heritage Properties Conservation Act 1983 (Cth), No.5 (1983), as a valid means for preventing construction of a dam in an area in Tasmania listed under the U.N. Convention for the Protection of the World Cultural and Natural Heritage, the High Court noted in a judgment by then Justice Mason:

Human Rights Convention, impose obligations to protect basic human rights, the Court is likely to sustain Commonwealth legislation protecting those rights. Further, the Court may imply these rights as a function of Australia's constitutional democracy necessary to protect individuals from government action—even when no legislation confers them directly. The *Mabo* Court may have signaled a willingness to look to both contemporary international law and to other common law jurisdictions to outline the content of those protections.

Eddie Mabo and Others v. The State of Queensland is an important first step in redrawing the physical, political, and sociocultural map of Australia's landscape, and for refashioning the relationship between Anglo-European and Aboriginal Australians. It may well also be an important step in redrawing the features of Australian jurisprudence.

VII. POSTSCRIPT

This article was originally completed, submitted, and accepted for publication in late January, 1993. Final revisions were completed in August, 1993. In the intervening months, there have been a number of interesting developments that affect the resolution of the various issues raised by *Mabo*.

In one form or another, issues related to *Mabo* have been reported on an almost daily basis in Australia's newspapers during the last six months. One commentator has in fact suggested that the media has played a divisive role through its reporting on *Mabo* related issues.²⁰⁷ As we suggested when this article was first completed, the High Court's decision has been particularly con-

If the carrying out of, or the giving effect to, a treaty or convention to which Australia is a party is a matter of external affairs, and so much is now accepted, it is very difficult to see why a law made under 51(XXIX) . . . should be limited to the implementation of an obligation . . . [However] [t]he law must conform to the treaty and carry its provision into effect. *Tasmania*, 57 A.L.J.R. at 488-89. See also *Richardson v. Forestry Commission*, 164 C.L.R. 261 (Austl. 1988) (upholding Commonwealth legislation which implements interim protection for an area under study for listing under the World Heritage Convention).

207. Richard Bartlett, *Native Title: Universal, Long-Established and a Boon to Resource Development*, 1-19, in Conference Proceedings, *INDIGENOUS RIGHTS: A BEGINNING* 1-19 (The Foundation for Aboriginal and Islander Research Action, Brisbane, Queensland, April 26-27, 1993).

troversial; and unfortunately, all sides have contributed to the ongoing controversy. In some respect, the controversy is exacerbated by recent State elections which have pitted the West Australian conservative Liberal government against a re-elected Labor party government for the Commonwealth.²⁰⁸

On the positive side, the Commonwealth government released a discussion paper in June of 1993 regarding proposals for resolving land rights issues raised by *Mabo*.²⁰⁹ That discussion paper is far too lengthy to comment on in detail, however, it canvasses the legal position of the Government vis-a-vis various Aboriginal groups, the processes for identifying native title, the processes for identifying and categorizing existing grants and future grants of land title, the issue of negotiation and consent with Aboriginal peoples, other land management issues, and the question of justice and economic development for Aboriginal peoples, as well as the ongoing process of reconciliation.²¹⁰ Most importantly, it sets a framework for Commonwealth legislation regarding the identification and stability of all land titles in Australia, including native title. However, the discussion paper itself proved controversial at a meeting of the Prime Minister and the State Premiers held in July of this year.²¹¹

Finally, the Commonwealth is in the process of developing draft legislation to deal with the issues raised by *Mabo*. That legislation is not yet available. However, a summary of some of the provisions has been reported.²¹² The key features of the legislation are: provisions to facilitate validation of existing land titles; a

208. See *Court Draws Line in Sand*, W. AUSTRALIAN, July 7, 1993, at 5; and Editorial: *Mr. Court's Divisive Proposals*, AUSTRALIAN, July 13, 1993, at 10.

209. *Mabo: The High Court Decision on Native Title* (Discussion Paper, Commonwealth of Australia, Australian Government Publishing Service, June, 1993).

210. *Id.*, at 1-9; and see also, *Mabo Principles: First Steps on a Difficult Road*, W. AUSTRALIAN, June 7, 1993, at 6.

211. See Kate Cole-Adams, *Mabo Bridge is Falling Down*, TIME (AUSTR.), June 21, 1993, at 36-7; Grace Meertens and Simon Dowding, *Premier Crusades Against Land Rights*, W. AUSTRALIAN, June 7, 1993, at 1; Tom Salmon, *Lone Wolf Finds Degree of Support*, W. AUSTRALIAN, June 9, 1993, at 5; Randall Markey, *Bravado Fails to Muster Support*, W. AUSTRALIAN, June 9, 1993, at 5; *Court's Answer to Federal Offer*, W. AUSTRALIAN, June 11, 1993, at 6; and Amanda Hurley, *Compensation Not Ruled Out*, W. AUSTRALIAN, June 11, 1993, at 6.

212. Jamie Walker, *Keating Tells States of Mabo Legislation Plan*, WEEKEND AUSTRALIAN, June 19-20, 1993, at 3.

system of tribunals to register and determine Aboriginal land titles; a framework for defining land uses; and means of addressing compensation for loss of native title.²¹³ Again, these features are somewhat controversial in that State governments and industry, particularly the mining industry, still have concerns regarding the security of individual titles.²¹⁴ Moreover, the various Aboriginal communities are particularly concerned that the legislation does not provide for veto power for Aboriginal communities over proposed mining on land subject to native title.²¹⁵

In conclusion, we must reiterate that the process of resolving the issues related to *Mabo* is extremely complicated. As we suggested, the goodwill of all parties will be needed to make the reconciliation process work. Unfortunately, as of this writing, goodwill on all sides appears to be lacking.

213. *Id.*

214. See Roy Eccleston, *Goss Call Revives Fear for Backyards*, WEEKEND AUSTRALIAN, August 14-15, 1993, at 11; Tony Parkinson, *What's in it for Kennett's Backyard*, AUSTRALIAN, July 21, 1993, at 2; Amanda Hurley and Liz Tickner, *Caution Urged on New Titles*, W. AUSTRALIAN, August 4, 1993, at 6; Randal Markey, *Miners Put Bill "to End Mabo Morass"*, W. AUSTRALIAN, August 3, 1993, at 4; Karen Brown and Wendy Pryer, *Mabo a Threat Offshore: Court*, W. AUSTRALIAN, August 2, 1993, at 5; and Amanda Hurley, *Mabo Debate Raises Forest Industry Fears*, W. AUSTRALIAN, August 5, 1993, at 27.

215. See David Nason and Laura Tingle, *Aborigines Rebuff PM on Mabo*, AUSTRALIAN, August 6, 1993, at 1; and David Nason, *Blacks to Demand Veto on Mining*, AUSTRALIAN, August 3, 1993, at 1.