



## The doctrine of tenure in Australia post-*Mabo*: Replacing the ‘feudal fiction’ with the ‘mere radical title fiction’ — Part 2

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*Until the decision of the High Court in **Mabo**, the universal acceptance and application of the English doctrine of tenure in Australia led to the view that all titles, rights and interests in land had to be the direct consequence of some grant of the Crown. In **Mabo**, however, six justices of the High Court agreed that the common law, as it had been previously understood, should be changed to recognise native title rights to land; rights which do not derive from a Crown grant. The common law device adopted by the High Court to effect this change, and thereby reconcile the doctrine of tenure and native title when the Crown acquired sovereignty of Australia, was ‘radical title’.*

*This two-part article examines how the **Mabo** High Court redefined the English doctrine of tenure, or, more accurately, defined the Australian doctrine of tenure, by developing the concept of radical title. It will be seen that in order to achieve this redefinition, the court had to clarify two interrelated aspects of the common law: the applicability of the English (feudal) doctrine of tenure in Australia and the legal effect of the classification of Australia as settled. Part 1 lays the foundation for this analysis by examining the genesis of the doctrine of tenure in pre-Conquest England and the pre-**Mabo** effect of the colonisation of Australia and the reception of English land. The question posed in Part 2 is twofold: first, how and why the Australian doctrine of tenure, with radical title as its postulate, diverges from the doctrine of tenure in English land law. Secondly, what are the implications, beyond recognition of native title, of the redefined doctrine of tenure for Australian real property law? Crucially, it will be seen that the implications of the Australian doctrine of tenure are suggested by either pre-feudal forms of landholding or the traditional exceptions to the feudal doctrine of tenure, which both include allodial landholding. In particular, it will be seen that the High Court’s restatement of the common law provides a basis upon which ‘Aboriginal customary law title’ can be a valid source of non-derivative common law title to land and thus an alternative to native title.*

### 1 Introduction

In Part 1 we saw that, pre-*Mabo*, the universal acceptance and application of the English doctrine of tenure in Australia precluded recognition of rights in land which were not derived from Crown grant. We also saw, however, that within strict feudal theory, title to land can and does exist both independently of any grant (as in the case of allodial landholding, ecclesiastical tenures, title by occupancy of a vacant *pur autre vie* estate and title by adverse possession)

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and independently of the present sovereign's grant (as in the case of tenure in ancient demesne). Nevertheless, because the fictional explanation of the universality of feudal tenure encompasses Crown grants as well as original Crown ownership, the relevant grant is deemed in law to have been made.<sup>1</sup> Because the very essence of allodial landholding is that the land is held of no superior, allodial title and the concept of lord paramount<sup>2</sup> are, by definition, mutually exclusive. Allodial title is, therefore, the only true exception to the feudal doctrine of tenure.<sup>3</sup>

Nevertheless, because of the designation of Australia as 'settled' for the purpose of the common law doctrine of reception, the feudal doctrine of tenure was regarded as applicable to describe the legal nature of landholding in Australia. It followed, therefore, that the concept of radical title was simply regarded as inapplicable in the Australian land law context: upon settlement, the Crown acquired absolute beneficial ownership of all land in Australia. Since the Crown was regarded as the absolute beneficial owner of all land in Australia, there was no room for any concept of radical title. The Crown's radical title had, however, been recognised in cases decided in other colonial jurisdictions and, significantly, by the Australian High Court when considering the legal effect of the British annexation of Papua New Guinea.<sup>4</sup> Crucially, it will be seen in this Part that, post-*Mabo*, with radical title as its postulate, the Australian doctrine of tenure is very different from the doctrine of tenure in English land law. Indeed, it will be seen that many of the implications of the Australian doctrine of tenure are suggested by either pre-feudal forms of landholding or the traditional exceptions to the feudal doctrine of tenure, which both include allodial landholding. In particular, it will be seen that the High Court's restatement of the common law provides a basis upon which Aboriginal customary law can amount to an independent source of non-derivative *common law* title to land.

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1 K McNeil, *Common Law Aboriginal Title*, Clarendon Press, Oxford, 1989, p 82; K McNeil, 'A Question of Title: Has the Common Law been Misapplied to Dispossess the Aboriginals?' (1990) 16(1) *MonLR* 91 at 106.

2 See Part 1, text accompanying n 129.

3 The parallels between allodial land as a true exception to the doctrine of tenure and the High Court's identification of native title as an interest that does not owe its existence to a Crown grant, actual or presumed, are examined by U Secher, *A Conceptual Analysis of the Origins, Application and Implications of the Doctrine of Radical Title of the Crown in Australia: an Inhabited Settled Colony*, Unpublished Doctoral Thesis, UNSW, 2003, Ch 9.

4 See Part 1, text accompanying n 231. For a detailed analysis of the cases decided in other colonial jurisdictions before *Mabo* in which the Crown's 'radical title' had been recognised, see U Secher, 'The Meaning of Radical Title: the Pre-*Mabo* Authorities Explained — Part 1' (2005) 11(3) *APLJ* 179 and 'The Meaning of Radical Title: The Pre-*Mabo* Authorities Explained — Part 2' (2005) 11(3) *APLJ* 209.

## 2 The Australian doctrine of tenure: Radical title as the postulate of the doctrine of tenure<sup>5</sup>

### A The *Mabo* decision

Since the plaintiffs in *Mabo* did not deny the Crown's sovereignty over the Murray Islands nor the Crown's radical title to the land, the principal question in *Mabo* was whether the annexation of the Murray Islands to the colony of Queensland in 1879 vested '... absolute ownership of, legal possession of and exclusive power to confer title to, all land in the Murray Islands' in the Crown.<sup>6</sup> The defendant claimed that several common law doctrines, which supported exclusive Crown ownership of all land in the Australian colonies, were inconsistent with the recognition of native title; the most important basis for ownership asserted being the doctrine of tenure.<sup>7</sup> It was argued that because the doctrine of tenure was the basis of all legal title to land in Australia, the ultimate owner of all land in Australia was the Crown. Accordingly, anyone holding land in Australia was holding land of the Crown.<sup>8</sup> Since the plaintiffs' native title did not derive from any Crown grant, its recognition was inconsistent with the common law.<sup>9</sup>

Although the court was unanimous in confirming that the doctrine of tenure is an essential principle of land law in Australia,<sup>10</sup> the majority rejected the argument that recognition of native title was inconsistent with the Crown's radical title and the doctrine of tenure. On analysis, it will be seen that, in reaching this decision, the majority judges defined the Australian doctrine of tenure and, consequently, retrospectively modified the doctrine of tenure as understood in English law.

The six majority justices agreed that the Australian doctrine of tenure is fundamentally different from its English counterpart. Nevertheless, the judgments reveal two distinct approaches vis-à-vis the circumstances in which

<sup>5</sup> This section is adapted from, and expands upon, Part III of the author's article: U Secher, 'Aboriginal Customary Law Versus Native Title: the *Mabo* Decision — Preserving the Distinction between "Settled" and "Conquered or Ceded" Territories' (2005) 24 (1) *UQLJ* 35.

<sup>6</sup> *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 25 per Brennan J; 107 ALR 1 (*Mabo*). Brennan J summarised the defendant's argument (at CLR 26) to be that:

when the territory of a settled colony became part of the Crown's dominions, the law of England so far as applicable to the colonial conditions became the law of the colony and, by that law, the Crown acquired the absolute beneficial ownership of all land in the territory . . . and no right or interest in land in the territory could thereafter be possessed by any other person unless granted by the Crown.

<sup>7</sup> *Mabo*, *ibid*, at CLR 31–2 per Brennan J; see also 59–60 per Deane and Gaudron JJ. The three other bases for ownership asserted by the defendant were: the expanded doctrine of *terra nullius* pursuant to which absolute beneficial ownership flowed automatically from sovereignty because there was 'no other proprietor' (which is discussed by Secher, above n 3, Ch 4); the patrimony of the nation basis; and the royal prerogative basis. The court examined and rejected all three: see text accompanying nn 45ff below.

<sup>8</sup> See Part 1, section headed 'The Norman Conquest: Establishment of Feudal Tenure', text accompanying nn 104ff.

<sup>9</sup> This position was supported by the decision in *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141; [1972-73] ALR 65 which is discussed in Part 1, text immediately following nn 220ff.

<sup>10</sup> *Mabo*, above n 6, at CLR 45–52 per Brennan J; 80, 81, 102–4 per Deane and Gaudron; 180 per Toohey J; 122–3 per Dawson J.

the Australian doctrine operates: four justices, Brennan J (as he then was), with whom Mason CJ and McHugh J agreed, and Toohey J, attributed a narrow sphere of operation to the Australian doctrine of tenure, while two justices, Deane and Gaudron JJ, suggested a broader application. Consequently, it will be seen, that Brennan and Toohey JJ's version of the Australian doctrine of tenure represents a more radical departure from the English doctrine of tenure than Deane and Gaudron JJ's version. Furthermore, notwithstanding the similar approaches adopted by Brennan and Toohey JJ, there is an important difference between their judgments: while Brennan J's conclusion on the role of the doctrine of tenure in Australia is express, Toohey J's is implied.

As Brennan J's reasons were adopted by Mason CJ and McHugh J, his leading judgment represents a fundamental restatement of the doctrine of tenure as it applies in Australia.<sup>11</sup> Noting that the land law of England is based on the doctrine of tenure<sup>12</sup> and that the fiction of royal grants underlies this English doctrine,<sup>13</sup> Brennan J accepted that the doctrine of tenure is a basic doctrine of Australian land law<sup>14</sup> and that Crown grants are the foundation of that doctrine.<sup>15</sup> Consequently, Brennan J considered it 'an essential prerequisite that the Crown have such a title to land as would invest the Sovereign with the character of Paramount Lord in respect of a tenure created by grant and would attract the incidents appropriate to the tenure . . .'.<sup>16</sup> Accordingly, the 'Crown was treated as having the radical [ultimate or final] title to all land in the territory over which the Crown acquired sovereignty'.<sup>17</sup> This radical title, adapted from feudal theory, had two limbs: it was both 'a postulate of the doctrine of tenure and a concomitant of sovereignty'.<sup>18</sup> Brennan J reasoned that as a postulate of the doctrine of tenure, the notion of radical title 'enabled the Crown to become Paramount Lord of all who hold a tenure granted by the Crown'. As a concomitant of sovereignty, the notion of radical title 'enabled the Crown 'to become absolute beneficial owner of unalienated land required for the Crown's purposes'.<sup>19</sup>

According to Brennan J, therefore, the two limbs of the Crown's radical title simply enabled the English doctrine of tenure to be applied, and the Crown's plenary title to be acquired, in colonial Australia. Consequently, Brennan J emphasised that 'it is not a corollary of the Crown's acquisition of a radical

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11 See also Part 4 'Post-*Mabo* Developments', text accompanying n 176 below.

12 *Mabo*, above n 6, at CLR 46.

13 *Ibid*, at CLR 47. The development of the fiction of original Crown grant (and fiction of original Crown ownership) is examined in Part 1, text accompanying n 104 ff.

14 *Mabo*, above n 6, at CLR 45. Brennan J's consideration of '[t]he feudal basis of the proposition of absolute Crown ownership' was prefaced with the following caution: 'A basic doctrine of the land law is the doctrine of tenure . . . and it is a doctrine which could not be overturned without fracturing the skeleton which gives our land law its shape and consistency'. See also *Commonwealth v Yarmirr* (2001) 208 CLR 1; 184 ALR 113 at [178], where McHugh J observed that the doctrine of tenure 'is the basis of the land law of England and Australia'.

15 *Mabo*, above n 6, at CLR 47.

16 *Ibid*, at CLR 47–8.

17 *Ibid*, at 48.

18 *Id*.

19 *Id* (emphasis added).

title to land in an occupied territory that the Crown acquired absolute beneficial ownership of that land to the exclusion of the indigenous inhabitants'.<sup>20</sup> By drawing a distinction between the title to land which the Crown acquires upon acquisition of sovereignty and the rights to the use and benefit of that land which might be vested in some person or entity other than the Crown, Brennan J concluded that '[t]he doctrine of tenure applies to every Crown grant of an interest in land, but not to rights and interests which do not owe their existence to a Crown grant'.<sup>21</sup>

In this way, Brennan J articulated the limited role of the doctrine of tenure in Australian land law. Only when the Crown exercises its power to grant an estate in land is such land brought within the regime governed by the doctrine of tenure.<sup>22</sup> This is critical and represents the essential point of divergence between the Australian and English versions of the doctrine of tenure. Under the Australian doctrine of tenure, the two-fold feudal fiction of original Crown ownership of all land and original Crown grant no longer applies.<sup>23</sup> The fiction of original Crown grant has been rendered otiose and the fiction of original Crown ownership has been replaced with the 'fiction of original Crown ownership of land which has actually been granted by the Crown'.

This is crucial and has significant implications for the rule that the King can only grant to or take from a subject by record.<sup>24</sup> The object of this rule is to 'support the fundamental principle of English law, that the King may not enter upon or seize any man's possessions upon bare surmises, without the intervention of a jury'.<sup>25</sup> Thus, unless the Crown's possession and title are original, for the Crown to be in possession in the first place, it must have a recorded title.<sup>26</sup> That is, the Crown has possession because it has title, not vice versa.<sup>27</sup> Where a record of the Crown's title was lacking, one of the prerogative procedures devised for providing redress for the Crown against a

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20 Id.

21 Ibid, at 48–9.

22 See also text accompanying n 98 below; *Wik Peoples and Thayorre People v Queensland* (1996) 187 CLR 1 at 91 per Brennan CJ (Dawson and McHugh JJ concurring); 141 ALR 129 (*Wik*); Secher, above n 3, Ch 4, p 129.

23 The two-fold fiction accompanying the English (feudal) doctrine of tenure is discussed in Part 1, esp text accompanying nn 111–126.

24 J Chitty, *A Treatise on the Law of the Prerogatives of the Crown and the Relative Rights and Duties of the Subject*, Joseph Butterworth & Son, London, 1820, pp 389–91. The principle on which this rule rests is 'that the King cannot enter onto a subjects possessions on bare surmises, without the intervention of a jury': G S Lester, *The Territorial Rights of the Inuit of the Canadian Northwest Territories: A Legal Argument*, D Juris Thesis, York University, Toronto, 1981, p 977.

25 Chitty, above n 24, p 247; Lester, above n 24, p 977; W Blackstone, *3 Commentaries on the Laws of England: Of Private Wrongs*, A Facsimile of the First Edition, The University of Chicago Press, Chicago, 1979, p 259. This rule may have developed as a consequence of Ch 29 of the *Magna Carta* which provides that '[n]o Freeman shall . . . be disseised of his Freehold . . . but by the lawful Judgement of his Peers, or by the law of the Land': (1225) 9 Hen III.

26 The author has shown elsewhere that the Crown did not acquire title to all land in Australia by occupancy: Secher, above n 3, Ch 7, text accompanying nn 41ff. Cf McNeil, *Common Law Aboriginal Title*, above n 1, p 135.

27 McNeil, *Common Law Aboriginal Title*, above n 1, p 106. Although McNeil treats the foreshore and the territorial sea-bed as an exception to this rule (pp 103–5), see discussion by Secher, above n 3, Ch 5.

subject in possession was the inquest of office or office. Chitty defined inquest of office as:

an inquiry made (through the medium of an indefinite number of jurors summoned by the sheriff); by the King's officer, his sheriff, coronor, or escheator, *virtute officii*, or by writ to them sent for that purpose, or by commissioners specially appointed, concerning any matter that entitles the King to the possession of lands or tenements, goods or chattels.<sup>28</sup>

The general rule was that an office of inquest was necessary in all cases where a common person cannot have a possession, neither in deed nor in law, without an entry.<sup>29</sup> That is, in the absence of other record of the Crown's title, an office was necessary to give the Crown possession whenever lands were in the possession of a subject when the Crown's title accrued.<sup>30</sup> According to Blackstone, an office was employed:

to enquire whether the king's tenant for life died seised, whereby the reversion accrues to the king: whether A, who held immediately of the crown, died without heirs; in which case the lands belong to the king by escheat: whether B be attained of treason; whereby his estate forfeited to the crown: whether C, who has purchased lands, be an alien; which is another cause of forfeiture: whether D be an idiot *a nativitate*; and therefore together with his lands, appertains to the custody of the king.<sup>31</sup>

An office was not, however, necessary when the Crown's title already appeared '*in any shape of record*'.<sup>32</sup> In this context it has been stated that there are two exceptions to the general rule that the Crown cannot have possession without an office or other record in all cases where a common person cannot have a possession in deed or in law without an entry. The first exception arises as follows:

Like law hath been used where his Highness is to seize lands of priors, aliens within this realm *ratione guerre*, his Highness doth it without any office, for in both these cases the King's title is notorious enough although it appear not of record. But yet in these cases his Highness must seize ere he can have any interest in his lands, because they be penal towards the party.<sup>33</sup>

Thus, although an office is unnecessary in the case of lands of aliens forfeited, *ratione guerre*, the Crown is not considered as entitled until there is an actual seizure. The more important exception for present purposes is that:

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28 Chitty, above n 24, p 246. Chitty had adopted Blackstone's definition: Blackstone, above n 25, p 258. For a detailed discussion of the inquest of office, see Secher, above n 3, Ch 7, text accompanying nn 122ff.

29 Chitty, above n 24, p 249: 'in all cases where a common person can not have a possession neither in deed nor in law without an entre'. See also McNeil, *Common Law Aboriginal Title*, above n 1, p 96 and Lester, above n 24, p 273.

30 McNeil, *Common Law Aboriginal Title*, above n 1, p 96.

31 Blackstone, above n 25, p 258; W S Holdsworth, *10 A History of English Law*, 1st ed, 3rd Impression, Methuen & Co Ltd and Sweet and Maxwell, London, 1975, p 343. Cf Chitty, above n 24, p 249; McNeil, *Common Law Aboriginal Title*, above n 1, pp 96–7.

32 Chitty, above n 24, p 248.

33 *Ibid*, p 249, quoting William Stanford, *Prerogativa Regis*.

if possession in law or a freehold, be cast upon the King, as it may be on a common person, there as the freehold ought not to be in suspense, the King is entitled and may seize without any office.<sup>34</sup>

Thus, if possession in law is cast upon the Crown, no office is necessary. Importantly, this exception presupposes that the King originally had title to all land and that title passed from the King to the grantee or that the King was acquiring derivatively as beneficiary under a will.<sup>35</sup> Under the post-*Mabo* Australian doctrine of tenure, however, the fiction of original Crown ownership no longer applies before a tenure has been created by Crown grant.<sup>36</sup> Post-*Mabo*, therefore, possession is only cast upon the Crown in limited circumstances: namely, where there has in fact been a grant of an interest in land, and then only for the duration of the grant.<sup>37</sup> In such circumstances, the fiction of original Crown ownership is brought into play so that the Crown can pass derivative title to the grantee. Importantly, however, the effect of the doctrine of tenure in this context is not to give the Crown title to the land. The fictional explanation merely justifies the feudal concept of Paramount Lordship. The Crown's fictional possession is, however, no longer as fictional as it was under the feudal doctrine of tenure. Since this fictional possession only applies where there has been an actual Crown grant, the redefined doctrine of tenure has some factual justification: as the grantee will invariably be in actual possession of the land, the Crown can be regarded as vicariously in possession of the land.

By rejecting the 'feudal fiction'<sup>38</sup> in favour of the more limited 'radical title fiction' for the purpose of the Australian doctrine of tenure, the Crown's initial rights over land, although still fictional, are no longer as fictional as under feudal theory. On the basis of his examination of the doctrine of tenure as it applies in Australia, therefore, Brennan J found that the Crown's acquisition of a radical title to all land upon assumption of sovereignty<sup>39</sup> was consistent with the recognition of native title to land:

for radical title, without more, is merely a logical postulate required to support the doctrine of tenure (when the Crown has exercised its sovereign power to grant an

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34 Id. See also Sir John Comyns, *A Digest of the Laws of England*, 5th ed, A Strahan, London, 1822, reproduced in Lester, above n 24, p 274.

35 Lester, above n 24, p 274.

36 Indeed, even where land has been brought within the doctrine of tenure, if the land is subject to native title and the particular Crown dealing with the land is ineffectual to extinguish all the native title interest, the fiction applies only partially; it does not confer absolute beneficial ownership on the Crown or the particular Crown grantee: see discussion at text immediately following n 188 below.

37 See, generally, Secher, above n 3, Ch 4.

38 At least partially.

39 *Mabo*, above n 6, at CLR 45–52, esp at 48. Brennan J also thought that the 'English legal system accommodated the recognition of rights and interests derived from occupation of land in a territory over which sovereignty was acquired by conquest without the necessity of a Crown grant': at 49. He relied on the *Case of Tanistry* (1608) Davis 28; 80 ER 516 and *Witrong v Blany* (1674) 3 Keb 401; 84 ER 789, as precedent for this view. This is significant: the *Case of Tanistry* is authority for the proposition that the Crown cannot be said to be in actual possession of land unless it appears by some record that such land was appropriated to the Crown as its own demesne: see Secher, above n 3, Chs 4 and 7.

interest in land) and to support the plenary title of the Crown (when the Crown has exercised its sovereign power to appropriate to itself ownership of parcels of land within the Crown's territory).<sup>40</sup>

Thus, rather than holding that 'the dispossession of the indigenous inhabitants of Australia' was worked by 'a transfer of beneficial ownership when sovereignty was acquired by the Crown', Brennan J reasoned that this dispossession was achieved 'by the recurrent exercise of a paramount power to exclude the indigenous inhabitants from their traditional lands as colonial settlement expanded and land was granted to colonists'.<sup>41</sup> Brennan J concluded that it was only the fallacy of equating sovereignty and beneficial ownership of land that had given rise to the notion that native title was extinguished by the acquisition of sovereignty;<sup>42</sup> the 'notion that feudal principle dictates that the land in a settled colony be taken to be a royal demesne upon the Crown's acquisition of sovereignty is mistaken'.<sup>43</sup>

This aspect of Brennan J's reasoning clearly supports the proposition that radical title is merely a bare legal title to land, investiture of which creates no automatic beneficial entitlement to the land to which it relates. Radical title merely supports the doctrine of tenure and the Crown's acquisition of a plenary title to particular land. On this analysis, radical title is a power of alienation which enables the Crown to invest persons, including itself, with beneficial ownership of land. That is, as 'a concomitant of sovereignty', radical title confers power on the Crown to grant land in every part of Australia so that the doctrine of tenure (with radical title as its 'postulate') may apply to that land. Until the Crown exercises its sovereign power to create interests in land in itself or others, neither the Crown nor any person claiming a derivative title from the Crown, has any interest in the land.<sup>44</sup>

Support for this interpretation of radical title is also evident in Brennan J's

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40 *Mabo*, above n 6, at CLR 50.

41 *Mabo*, above n 6, at CLR 58 per Brennan J; see also 103–9 per Deane and Gaudron JJ. See also *Western Australia v Commonwealth* (1995) 183 CLR 373 at 433–4 per Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ; 128 ALR 1:

since the establishment of the colony [of Western Australia] native title in respect of particular parcels of land has been extinguished only parcel by parcel. It has been extinguished by the valid exercise of power to grant interests in some of those parcels and to appropriate others of them for the use of the Crown inconsistently with the continuing right of Aborigines to enjoy native title.

42 On the legal implications of confusing sovereignty and ownership, see also Secher, above n 3, Ch 1, pp 25, 37. Accordingly, Brennan J concluded that the native title of the indigenous inhabitants was to be treated as a burden on the radical title which the Crown acquired.

43 *Mabo*, above n 6, at CLR 52. See also Brennan J's observations at 45:

It was only by fastening on to the notion that a settled colony was *terra nullius* that it was possible to predicate of the Crown the acquisition of ownership of land in a colony already occupied by the indigenous inhabitants. It was only on the hypothesis that there was nobody in occupation that it could be said that the Crown was the owner because there was no other. If that hypothesis be rejected, the notion that sovereignty carried ownership in its wake must be rejected too.

It will be seen, in Part 3 below 'The Reception of Land Law into the Australian Colonies Revisited', that the High Court redefined the constitutional status of Australia: see text immediately following n 115 below.

44 Thus securing the Crown as the original source of all derivative title to land for the purposes of the Australian doctrine of tenure. 'Land in Australia which has been granted by the Crown is held on a tenure of some kind and the titles acquired under the accepted land law cannot



treatment of two of the three alternative bases advanced, by the defendant in *Mabo*, to establish the proposition of absolute Crown ownership: the patrimony of the nation basis and the royal prerogative basis.<sup>45</sup>

Considering the 'royal prerogative' basis, Brennan J observed that the passing of the management and control of the waste lands of the Crown to the Colonial Governments, by Imperial legislation, was not a transfer of title, but rather a transfer of political power or governmental function.<sup>46</sup> Importantly, Brennan J expressly confirmed that the requirement that the Crown take further steps to become owner of land is not limited to land in respect of which pre-existing native title exists, for:

if the Crown's title is merely a radical title — no more than a logical postulate to support the *exercise* of a sovereign power within the familiar feudal framework of the common law — the problem of vesting of the absolute beneficial ownership of colonial land does not arise: absolute beneficial ownership *can be acquired, if at all, by an exercise of the appropriate sovereign power.*<sup>47</sup>

Brennan J's analysis of the 'patrimony of the nation' basis for the proposition of absolute Crown ownership also indicates that radical title is merely in the nature of a governmental power, enabling the Crown to create interests in land in itself and others, rather than a proprietary right.<sup>48</sup> Although Brennan J agreed that 'it is right to describe the powers which the Crown . . . exercised with respect to colonial lands as powers conferred for the benefit of the nation as a whole',<sup>49</sup> he did not agree that it followed that those powers were proprietary as distinct from political powers.<sup>50</sup> Furthermore, despite acknowledging that the 'nation obtained its patrimony by sales and dedications of land',<sup>51</sup> Brennan J observed that this did not mean 'that the patrimony was realised by sales and dedications of land owned absolutely by

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be disturbed': per Brennan J in *Mabo*, above n 6, at CLR 47. The author has shown elsewhere that the two limbs of radical title (ie, the 'concomitant of sovereignty' limb and the 'postulate of the doctrine of tenure' limb), whether in their application per se or in conjunction with one another, do not, without more, invest the Crown with beneficial ownership of any land: Secher, above n 3, Chs 3, 4 and 5. See also Secher, 'Part 1', above n 4 and 'Part 2', above n 4, where the author explains that, contrary to the received view, cases decided in other colonial jurisdictions before *Mabo* which had recognised the Crown's 'radical title' are not authority for the proposition that the Crown has a present proprietary estate underlying any aboriginal title, nor the proposition that the Crown's radical title is necessarily a full and present proprietary estate in respect of land not subject to pre-existing rights.

45 The other basis for ownership asserted by the defendant was the 'no other proprietor' basis: see n 56 below. Although Brennan J concluded that none of the grounds advanced for attributing to the Crown universal and absolute ownership of colonial land were acceptable (at CLR 54), his treatment of the 'no other proprietor' principle was clearly confined to land which was unoccupied at settlement: see text accompanying n 56 below and Secher, above n 3, Ch 4, p 190.

46 *Mabo*, above n 6, at CLR 53 citing *Williams v Attorney-General (NSW)* (1913) 16 CLR 453 at 456.

47 *Mabo*, above n 6, at CLR 54.

48 *Ibid*, at CLR 52–3.

49 *Ibid*, at CLR 52, citing *R v Symonds* [1847] NZPCC 387 at 395.

50 *Mabo*, above n 6, at CLR 52.

51 *Ibid*, at CLR 52–3 (emphasis added).

the Crown'.<sup>52</sup> Brennan J clarified that what the Crown acquired was 'a radical title to land and a sovereign political power over land, the sum of which is not tantamount to absolute ownership of land'.<sup>53</sup>

In addition to the above aspects of Brennan J's judgment which clearly support an interpretation of radical title as no more than a bare legal title to land, Brennan J adopted the Privy Council's treatment of radical title in *Amodu Tijani v Secretary, Southern Nigeria*;<sup>54</sup> a decision which is authority for the proposition that there is no necessary equivalence between the Crown's radical title and a full beneficial estate.<sup>55</sup> Nevertheless, there are four aspects of Brennan J's decision which, prima facie, suggest a more generous interpretation of radical title. Not only does Brennan J suggest that in the case of unoccupied lands at settlement, the Crown would be the absolute beneficial owner of the land because 'there would be no *other* proprietor',<sup>56</sup> he also attributes to the Crown an 'automatic expansion of radical title' in three other situations: where native title expires, where native title is surrendered to the Crown and on the expiration of the term of a lease which has been granted by the Crown (the 'reversion expectant' argument).<sup>57</sup>

Thus, it was not unequivocally clear whether Brennan J regarded radical title as a bare title sufficient merely to support the doctrine of tenure and the Crown's acquisition of a plenary title, or as conferring full and unfettered beneficial rights except to the extent of native title.<sup>58</sup> However, since the issues of property in uninhabited unalienated land and residuary rights to land which has previously been alienated, did not arise directly for determination in *Mabo*, Brennan J's comments in this context are merely obiter. Moreover, the crucial point is that Brennan J expounded the 'no other proprietor' and 'automatic expansion of radical title' rationales for attributing absolute beneficial ownership of land to the Crown in the context of 'unalienated land', that is, land which has not been brought within the regime governed by the doctrine of tenure or which, having been brought within the tenurial regime by Crown grant, has ceased to be within it because the relevant Crown grant has expired. This is important in terms of Brennan J's articulation of the two limbs of radical title: although radical title, as a concomitant of sovereignty, enables the Crown to grant an interest in land, until a tenure is actually created by Crown grant, radical title does not support the doctrine of tenure or its fictional explanation. Thus, since the postulate of the doctrine of tenure limb of radical title only applies to 'alienated land', it is not an incident of that limb whereby the Crown acquires beneficial ownership of land in the four circumstances suggested by Brennan J.<sup>59</sup>

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<sup>52</sup> Ibid, at CLR 53.

<sup>53</sup> Id.

<sup>54</sup> [1921] 2 AC 399 (PC): ibid, at CLR 49–50 per Brennan J; see also *Mabo*, above n 6, at CLR 87 per Deane and Gaudron JJ and references to *Amodu Tijani* by Toohey J at 186, 195, 184.

<sup>55</sup> See Secher, 'Part 1', above n 4, text accompanying nn 59ff. See also, Secher, above n 3, Ch 2, esp pp 57–61.

<sup>56</sup> *Mabo*, above n 6, at CLR 48. Brennan J was referring to the reason given by Stephen CJ in *Attorney-General (NSW) v Brown* (1847) 1 Legge at 317–18. See also above n 37. The Crown would, therefore, have an allodial title to the land.

<sup>57</sup> *Mabo*, above n 6, at CLR 60, 68.

<sup>58</sup> Cf *Mabo*, above n 6, at CLR 48, 50.

<sup>59</sup> That is, although radical title is the postulate of the doctrine of tenure, the fiction of original

The other majority judges in *Mabo* were also able to redefine the English doctrine of tenure as a result of their treatment of the origin and meaning of the concept of radical title. Indeed, like Brennan J, Justice Toohey thought that the distinction between sovereignty and title to land was crucial when considering the consequences of the annexation of the Murray Islands.<sup>60</sup> Noting that the position of the Crown as the holder of radical title had always been accepted and was not in issue, Toohey J stressed that what was in issue was the consequences that flowed from radical title.<sup>61</sup> He considered that the ‘blurring of the distinction between sovereignty and title to land’<sup>62</sup> obscured the fact that the acquisition of sovereignty did not necessarily involve acquisition of title.<sup>63</sup> Toohey J explained that the distinction between sovereignty and title was blurred in English law because the sovereignty of the Crown over England derived from the feudal notion that the King owned the land of that country.<sup>64</sup> It was the legal fiction ‘that all land was, at one time, in the possession of the King who had granted some of it to subjects in return for services’<sup>65</sup> that produced the theory of tenures.<sup>66</sup> However, Toohey J also observed that ‘fictions in law are only acknowledged “for some special purpose”’.<sup>67</sup> Thus, because the effect of the fiction of past possession was to secure the ‘Paramount Lordship or radical title of the Crown which [was]

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Crown ownership no longer applies to land which has not been brought within the doctrine of tenure by appropriate Crown grant (unalienated land, even if unoccupied at settlement). Indeed, even if this fiction was excluded only in respect of land which is both subject to pre-existing native title and which has not been brought within the doctrine (unalienated and occupied land), the effect of the fiction (in the context of unalienated and unoccupied land) is not to give the Crown title to land: see Part 1, text accompanying nn 104ff, esp n 122. See also Secher, above n 3, Ch 1, pp 24–5, 32. Furthermore, although Brennan J’s dictum concerning the Crown’s ‘reversion expectant’ on a lease granted by the Crown suggests that when previously unalienated land is brought within the regime governed by the doctrine of tenure by the Crown grant of a lease, the effect of the fiction of original Crown ownership is to confer a beneficial reversionary interest, this argument was rejected by the High Court, in the context of the statutory grant of a pastoral lease, in *Wik*, above n 22. See text accompanying nn 189ff below and see Secher, above n 3, Ch 4, pp 215ff. Although radical title as ‘a concomitant of sovereignty’ confers power on the Crown to grant unalienated land in every part of Australia (whether occupied or unoccupied) so that the doctrine of tenure (with radical title as its ‘postulate’) may apply to that land, the author has shown elsewhere that the ‘concomitant of sovereignty’ limb of radical title, whether in its application per se or in conjunction with the ‘postulate of the doctrine of tenure’ limb of radical title, does not, without more, invest the Crown with beneficial ownership of any land: see above n 44.

60 His Honour observed that the distinction between sovereignty and title to land is that ‘[the] former is mainly a matter of jurisdiction, involving questions of international and constitutional law, whereas the latter is a matter of proprietary rights, which depend for the most part on the municipal law of property. Moreover, acquisition of one by the Crown would not necessarily involve acquisition of the other’: *Mabo*, above n 6, at CLR 180, citing McNeil, *Common Law Aboriginal Title*, above n 1, p 108.

61 *Mabo*, above n 6, at CLR 180.

62 *Id.*

63 *Id.*

64 *Id.*

65 *Ibid.*, at CLR 212.

66 *Id.*

67 *Id.*, citing *Needler v Bishop of Winchester* (1614) Hob 220 at 222; 80 ER 367 at 369; *Mostyn v Fabrigas* (1774) 1 Cowp 161 at 177; 98 ER 1021 at 1030; Anon, *Considerations on the Law of Forfeitures for High Treason*, 4th ed, 1775, pp 64–5; cited by McNeil, *Common Law Aboriginal Title*, above n 1, p 84.

necessary for the operation of [the doctrine of tenure]',<sup>68</sup> the fiction should be given no wider application than is necessary for the doctrine to operate.<sup>69</sup>

For Toohey J, therefore, there was no foundation for concluding that by annexation the Crown acquired a proprietary title or freehold possession of occupied land in Australia. It acquired a radical title only.<sup>70</sup> Since the acquisition of sovereignty was effected, at common law, by the acquisition by the Crown of radical title, Toohey J observed that no more was *required*, and, with respect to occupied land, no more was possible.<sup>71</sup> Accordingly, the Crown did not acquire a proprietary title to any territory which was in fact inhabited. As a result of Toohey J's recognition of interests in land which do not owe their existence to a Crown grant, therefore, so far as the doctrine of tenure is concerned, the fiction of original Crown ownership required no more than to enable the Crown to become Paramount Lord of all who hold a tenure granted by the Crown. On this approach, although the fiction that land was originally owned by the Crown still operates in Australia, it does so in a limited way: it applies only to land that has, in fact, been granted or alienated by the Crown;<sup>72</sup> it does not apply to land which remains unalienated by the Crown. Although Toohey J's conclusion is not as explicit as Brennan J's, the result is the same: the Australian doctrine of tenure applies to every Crown grant of an interest in land, but not to rights and interests which do not owe their existence to a Crown grant.<sup>73</sup>

Thus, like Brennan J, Toohey J's judgment supports the proposition that, as a postulate of the doctrine of tenure, radical title does not confer an automatic beneficial entitlement to the land to which it relates. Although it enables the Crown to become Paramount Lord of all who hold a tenure created by Crown grant, it is not required to support the doctrine of tenure unless the Crown has exercised its sovereign power to grant an interest in land. Nevertheless, Toohey J's obiter comment that '[t]he Crown did not acquire a proprietary title to any territory *except that truly uninhabited*',<sup>74</sup> suggests a more generous interpretation of radical title; namely, as conferring full beneficial ownership except to the extent of native title. This dictum is, however, analogous to Brennan J's suggestion that the Crown acquired absolute beneficial ownership of all unoccupied land because there was 'no other proprietor'. Both dicta refer to unalienated land and both Justices have made it clear that the postulate of the doctrine of tenure limb of radical title is irrelevant to the question of beneficial ownership of unalienated land.<sup>75</sup>

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<sup>68</sup> *Mabo*, above n 6, at CLR 212.

<sup>69</sup> Id. Cf S Hepburn, 'Disinterested Truth: Legitimation of the Doctrine of Tenure Post-*Mabo*' (2005) 29(1) *MULR* 39, text accompanying n 121.

<sup>70</sup> *Mabo*, above n 6, at CLR 182, 211.

<sup>71</sup> *Ibid*, at CLR 182.

<sup>72</sup> *Ibid*, at CLR 48 per Brennan J.

<sup>73</sup> *Ibid*, at CLR 48–9 per Brennan J. Thus, Toohey J observed (at 182) that: '[i]mmediately on acquisition [of sovereignty] indigenous inhabitants became British subjects whose interests were to be protected in the case of a settled colony by the immediate operation of the [modified] common law'. Toohey J did in fact adopt Brennan J's reasoning relating to both the postulate of doctrine of tenure and concomitant of sovereignty limbs of radical title in *Wik*, above n 22, at CLR 127.

<sup>74</sup> *Mabo*, above n 6, at CLR 182 (emphasis added). See also 211–12.

<sup>75</sup> See also above n 44.

Although Toohey J's conclusion on the Australian doctrine of tenure was sufficient to dispose of the defendant's arguments,<sup>76</sup> Toohey J nevertheless considered what the legal position would be if the English (and thus feudal) doctrine of tenure applied; that is, if the Crown was deemed to have acquired full beneficial ownership rather than a mere radical title upon acquisition of sovereignty. He indicated that if the fictitious possession of all land by the Crown was to be applied, it may be that it could not operate without also according fictitious lost grants to the present possessors. This would protect people in possession of land where no grant had been made, as the grant would be deemed in law to have been made.<sup>77</sup> Indeed, in this context, Toohey J adopted Kent McNeil's 'common law Aboriginal title' theory.<sup>78</sup> Nevertheless, since this theory is inconsistent with the judgments of the other members of the majority in *Mabo*, it does not represent the law.<sup>79</sup>

Significantly, both Brennan and Toohey JJ's analysis of 'radical title' as a postulate of the Australian doctrine of tenure has the consequence that native title is sourced outside the doctrine of tenure. Although recognition of native title is a result of the Australian common law doctrine of tenure which applied upon settlement of Australia, native title is neither a 'common law tenure',<sup>80</sup> nor an institution of the common law. Rather, native title exists independently of the doctrine of tenure: indeed, its existence is possible only because of the limited role of the doctrine of tenure in Australia.<sup>81</sup> Although Deane and Gaudron JJ also viewed the recognition of native title as a consequence of the received doctrine of tenure, which is different from the English version, their conception of the Australian doctrine of tenure, while narrower than the English doctrine, is nevertheless broader than Brennan and Toohey JJ's.

Like the other members of the majority, Justices Deane and Gaudron recognised that the 'basic tenet' of English common law principles relating to real property is that all land was owned by the Crown.<sup>82</sup> Noting that by 1788 the practical effect of the doctrine of tenure was confined to the Crown's ownership of escheat and forfeiture rights, their Honours nevertheless emphasised that:

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<sup>76</sup> *Mabo*, above n 6, at CLR 211.

<sup>77</sup> *Ibid*, at CLR 212.

<sup>78</sup> See above n 1.

<sup>79</sup> B Edgeworth, 'Tenure, Allodialism and Indigenous Rights at Common Law: English, United States and Australian Land Law Compared after *Mabo v Queensland*' (1994) 23(4) *Anglo-American L Rev* 397 at 422. Edgeworth has also pointed out that Toohey J's conclusion that dealings between the Crown and Aborigines give rise to a fiduciary duty on the part of the Crown is 'at odds with the English concept of tenure: the Crown as Lord Paramount in England has absolute title to the land untrammelled by general fiduciary duties to a group or groups of subjects': *ibid*, at 420-2.

<sup>80</sup> Indeed, Brennan J (*Mabo*, above n 6, at CLR 61) expressly stated that native title is not a 'common law tenure'. See also *Fejo v Northern Territory* (1998) 195 CLR 96; 156 ALR 721; 72 ALJR 1442 at [46] per Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ citing Brennan J: 'Native title is neither an institution of the common law nor a form of common law tenure but it is recognised by the common law'.

<sup>81</sup> The Australian doctrine of tenure and native title are not, however, mutually exclusive because of the concept of co-existence: see text accompanying n 189 below and Secher, above n 3, Part 2 of Ch 4.

<sup>82</sup> *Mabo*, above n 6, at CLR 80.

the underlying thesis of the English law of real property remained that the radical title to (or ultimate ownership of) all land was in the Crown and that the maximum interest which a subject could have in the land was ownership not of the land itself but of an estate in fee in it.<sup>83</sup>

They did not, however, consider that the existence of radical title in the Crown precluded the ‘preservation and protection, by domestic law of the new Colony, of any traditional native interests in land’ existing under native law or custom at the time the Colony was established.<sup>84</sup>

For Deane and Gaudron JJ, the consequence of radical title to all land in Australia vesting in the Crown was that:

If there were lands . . . to which no pre-existing native interest existed, the radical title of the Crown carried with it a full and unfettered proprietary estate. Put differently, the radical title and the legal and beneficial estate were undivided and vested in the Crown. . . . On the other hand, if there were lands . . . in relation to which there was some pre-existing native interest, the effect . . . would not be to preclude the vesting of radical title in the Crown. It would be to reduce, qualify, or burden the proprietary estate in land which would otherwise have vested in the Crown, to the extent which was necessary to recognise and protect the pre-existing native interest.<sup>85</sup>

Although Deane and Gaudron JJ adopt the view that, upon settlement, radical title confers rights of beneficial ownership except to the extent of native title, their Honours’ acknowledge, in conformity with the other members of the majority, that there is a distinction between radical title and beneficial title and that the practical effect of the vesting of radical title in the Crown ‘was merely to enable the English system of private ownership of estates held of the Crown to be observed in the Colony’.<sup>86</sup>

Deane and Gaudron JJ’s departure from the reasoning of the other majority justices begins with their explanation of the rationale underlying the Australian doctrine of tenure. Rather than focusing on the distinction between sovereignty and title to land as Brennan and Toohey JJ did, they emphasised a strong common law assumption that the act of State establishing a new colony did not extinguish the pre-existing native interests in lands in the colony but that such interests were preserved and protected by the domestic law of the colony after its establishment.<sup>87</sup> The effect of this assumption was not ‘to preclude the vesting of radical title in the Crown’<sup>88</sup> but was to ‘reduce, qualify or burden the proprietary estate in land which would otherwise have vested in the Crown, to the extent necessary to recognise and protect the pre-existing native interest’.<sup>89</sup>

Thus, rather than concluding that the Australian doctrine of tenure does not

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83 Id.

84 Id.

85 Ibid, at CLR 86–7.

86 Ibid, at CLR 81.

87 Ibid, at CLR 82.

88 Ibid, at CLR 86.

89 Ibid, at CLR 86–7. Their Honours also noted (at 102–4) that the four Australian cases which supported the proposition that the legal and beneficial ownership of all land in the colony had vested in the Crown did not involve the question of Aboriginal entitlement to land. Thus, although the Justices conceded that the authority which these cases lent to the proposition was formidable, they dismissed the relevant comments as obiter dicta: at 104.

apply to rights and interests in land which do not owe their existence to a Crown grant, as Brennan and Toohey JJ do, Deane and Gaudron JJ suggest that the doctrine of tenure applies, prima facie, to all land in Australia but yields to a specific common law assumption vis-à-vis native title. According to this analysis, native title appears to be no more than another exception to the doctrine of tenure as understood in English law. However, since the justices do not refer to any deemed grant in favour of native title holders in these circumstances, it appears that native title is analogous to the allodial title exception to the doctrine of tenure: a true exception rather than a circumstance giving rise to a deemed grant.<sup>90</sup>

A significant implication of such an interpretation is that native title is sourced within the common law and is thus a creature of the common law rather than merely being recognised by it. Indeed, Deane and Gaudron JJ use the term 'common law aboriginal title' to designate respected and protected pre-existing native interests.<sup>91</sup> Nevertheless, like the other majority justices, Deane and Gaudron JJ distinguish between the radical title to and the beneficial ownership of land in circumstances where the relevant assumption applies. Consequently, they too redefine the doctrine of tenure that was received as part of the law of the Australian colonies upon settlement. Deane and Gaudron JJ's redefinition is not, however, as narrow as Brennan and Toohey JJ's redefinition.<sup>92</sup>

Although it appears that Deane and Gaudron JJ attribute beneficial ownership of unalienated and unoccupied land to the Crown as an incident of the postulate of the doctrine of tenure limb of radical title, their judgment is equivocal. Having acknowledged that the practical effect of radical title being

<sup>90</sup> See Part 1, text accompanying nn 129ff. See also, Secher, above n 3, Ch 1, pp 26–7, 32.

<sup>91</sup> For example, see *Mabo*, above n 6, at CLR 86. Furthermore, they conclude (at 87) that the recognition and protection of a pre-existing native title interest 'of a kind unknown to the English law' requires 'either a transformation of the interest into a kind known to the common law or a modification of the common law to accommodate the new kind of interest'.

<sup>92</sup> Although Deane and Gaudron JJ's modified doctrine of tenure does not go as far as Brennan and Toohey JJ's, their approach is not as restrictive as that of the dissenting judgment of Dawson J, which reflects a different understanding of the effect of annexation at common law. His Honour agreed (*Mabo*, above n 6, at CLR 162) with the majority judges that the acquisition of radical title ('though not actual possession of' all the land) by the Crown was a necessary consequence of the exertion of sovereignty, and that this result stemmed from the system of law which the Crown brought with it: at 122. Dawson J's departure from the majority, however, begins with his universal application of the doctrine of tenure. His Honour observed that according to the common law that the Crown brought with it, land was not the subject of absolute ownership other than by the Crown. Although noting that this notion is of 'historical rather than practical interest' for most purposes, Dawson J considered it fundamental in any consideration of the acquisition of territory: at 122. His Honour was therefore compelled to conclude that 'upon annexation of the Murray Islands the Crown became the absolute owner of the land and such rights as others might have in it must be derived from the Crown and amount to something less than absolute ownership': at 122. For Dawson J, therefore, annexation brought with it a radical title which amounted to an absolute title. And, since any interest in land must derive from the Crown, any pre-existing native title would require some act of executive or legislative recognition by the Crown to continue. As a result of his Honour's examination of North American, African and New Zealand authorities, Dawson J found that, as a matter of general legal principle, the native inhabitants of those places held title only of the Crown.

vested in the Crown is to enable the Crown to become Paramount Lord of all who hold a tenure created by Crown grant, their conclusion in respect of land that has not been brought within the doctrine of tenure and is not, therefore, held of the Crown, unnecessarily perpetuates the fiction of absolute Crown ownership upon settlement. Mere radical title, as a bare legal title, a power to create interests in land, is sufficient to invest the Crown with the character of Paramount Lord in respect of a tenure created by grant. Alternatively, if Deane and Gaudron JJ's suggestion that radical title carried with it a full and unfettered proprietary estate where land was not subject to some pre-existing native interest is correct, then their Honours' observation that it was 'conceivably' the whole of the lands of Australia that were affected by native title,<sup>93</sup> would deny automatic acquisition of beneficial ownership of any land in Australia upon settlement.

### B Summary and implications for Aboriginal rights to land

Each substantive judgment in *Mabo* deals with the question of the effect of annexation upon the feudal basis of land law differently. Nevertheless, all majority judges viewed the recognition of native title as a consequence of the Australian doctrine of tenure which was received as part of the law of the Australian colonies upon settlement. Mason CJ and McHugh J agreed with Brennan J that the operation of the Australian doctrine of tenure was limited to land that had been granted by the Crown. The tenor of Toohey J's judgment appears to support Brennan J's approach.<sup>94</sup> While Deane and Gaudron JJ appear to suggest that the doctrine of tenure applies universally in Australia,<sup>95</sup> they conclude that the Australian doctrine of tenure is subject to a common law assumption in favour of native title holders.

Essentially, therefore, all the majority justices agreed that the doctrine of tenure, which applied upon settlement of Australia, is different from the English feudal counterpart: the Australian doctrine of tenure does not apply automatically to all land. The main point of divergence between the majority justices relates to the extent to which this Australian doctrine of tenure applies to land which has not been granted by the Crown. Nevertheless, all the majority justices were able to redefine the doctrine of tenure because they drew a distinction between the title to land which the Crown acquires upon acquisition of sovereignty, and the rights to the use and benefit of that land which might be vested in some person or entity other than the Crown.<sup>96</sup> As a result, the orthodox assumption that sovereignty conferred on the Crown not only radical title to, but also absolute beneficial ownership of, all land was rejected: the majority held that the Crown acquired only a radical title to all land.<sup>97</sup>

93 *Mabo*, above n 6, at CLR 101. However, their Honours considered it 'unnecessary for the purposes of [their] judgment, and probably now impracticable, to seek to ascertain what proportion of the lands of the continent were affected by such common law native title': id.

94 Toohey J's consideration of whether the doctrine of tenure created a tenurial relationship between the Crown and the indigenous occupiers was merely obiter.

95 And, thus, prima facie appear to agree with Dawson J, see above n 92.

96 Thus, the majority distinguished between Crown title to colonies and Crown ownership of land.

97 For almost 150 years Australian courts had held that on acquisition of sovereignty over the



The separation of radical title to, and beneficial ownership of, land thus allows the doctrine of tenure, whether based on a narrow or a broad interpretation, to apply to land in Australia without precluding the existence of interests in or over land, such as native title, that do not owe their existence to a Crown grant. Thus, the Crown's radical title, as a postulate of the doctrine of tenure, simply enabled the English doctrine of tenure to be applied in colonial Australia. Significantly, however, four members of the majority agree that the modified doctrine of tenure, and its subsequent recognition of land title, applies only to land that has been granted or alienated by the Crown.<sup>98</sup> This conclusion represents a fundamental departure from the English doctrine of tenure: the two-fold feudal fiction underlying the English doctrine of tenure no longer applies in the Australian context; instead, the 'fiction of original Crown ownership of land which has actually been granted by the Crown' applies.

What is, therefore, the effect of the High Court's restatement of the common law doctrine of tenure on the legal status of unalienated land; land in respect of which the Crown does not have Paramount Lordship? That is, what are the Crown's rights in relation to land which has neither been brought within the doctrine of tenure by Crown grant of an interest in the land nor appropriated to the Crown such that the Crown has acquired a plenary title to the land where the land is not subject to judicially recognised and, thus, enforceable native title (unalienated land not subject to native title)?<sup>99</sup> By suggesting, in *Mabo*, that the Crown must be the absolute beneficial owner of unoccupied and unalienated lands because there is 'no other proprietor', Brennan J, with whom Mason CJ and McHugh JJ concurred, recognised that not all unalienated land in Australia is subject to native title. The land is unoccupied because *neither* the Crown nor Aboriginal people (in their capacity as native title holders) occupy it.<sup>100</sup> However, if there is a legal explanation to the question of property rights in unalienated and unoccupied land, there is no

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Australian colonies, the Crown acquired absolute beneficial ownership of 'every square inch' of land: *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141 at 245 per Blackburn J; [1972-73] ALR 65. His Honour was referring to *Attorney-General v Brown* (1847) 1 Legge 312; 2 SCR (NSW) (App) 30; *Williams v Attorney-General for New South Wales* (1913) 16 CLR 404 and *Council of the Municipality of Randwick v Rutledge* (1959) 102 CLR 54; [1960] ALR 66. In none of these cases except *Milirrpum*, however, did the issue of the Crown's title arise in a context not involving claims by aboriginal people.

<sup>98</sup> *Mabo*, above n 6, at CLR 48 per Brennan J.

<sup>99</sup> Although this article focuses on the 'postulate of the doctrine of tenure' limb of radical title, the issue of the juridical nature of the Crown's radical title requires consideration of both limbs of radical title before it can be conclusively determined: see above n 44.

<sup>100</sup> In the context of the feudal doctrine of tenure, see *Saddler's Case* (1588) 4 Co R 54b at 58a-58b; 76 ER 1019-20:

this difference was taken and agreed; when the King's tenant dies in possession without heir, so that in such case *possessio est vacua*, and in nobody, there the law will adjudge the King (in whom no *laches* shall be reckoned) in actual possession immediately; but when another is in seisin and possession at the time of the escheat so that possess 'plena est et non vac', there the King shall not be adjudged in possession till this seisin and possession is removed, as if the King's tenant is disseised and dies without heir; or if an alien born, or the King's villein, or the alienee in mortmain is disseised, and all this is by office, in these cases the King shall not be in possession till the possession and seisin of the terre-tenant is removed . . .

This issue is further explored by Secher, above n 3, Ch 7.

need to resort to a new legal fiction: the ‘no other proprietor’ fiction. Indeed, the High Court has not had the opportunity to authoritatively determine this issue.

Although, pre-*Mabo*, acquisition of title by occupancy was severely restricted by the fiction that all lands were originally possessed, and accordingly, owned, by the Crown,<sup>101</sup> since *Mabo*, this fiction only applies in respect of a tenure created by Crown grant.<sup>102</sup> Accordingly, the fiction of original Crown ownership, or any rule dependent upon it, can no longer, of itself, exclude acquisition of first title to unalienated and uninhabited real property in Australia.<sup>103</sup> There is, therefore, the potential to accommodate sources of title in addition to Crown grant or native title within Australian land law post-*Mabo*.

Indeed, as shown in Part 1, the feudal theory that all lands are held mediately or immediately of the Crown was always tempered by a number of antithetical factors. In addition to the possible acquisition of title by virtue of occupancy of a vacant *pur autre vie* estate, was the existence of allodial land and the acquisition of land rights by adverse possession and by virtue of customary law predating the tenurial scheme.<sup>104</sup> The crucial point is that these ‘exceptions’ to strict feudal theory can now be accommodated within Australian land law as redefined by the High Court. Although radical title secures the Crown as one source of derivative title to land, it does not preclude the existence of interests in land that do not derive from Crown grant.

This has significant implications for Aboriginal people occupying unalienated land, whether such occupation satisfies the definition of native title<sup>105</sup> (and, thus, confers native title rights) or not. Indeed, although it is clear that unalienated land is capable of supporting a native title application, native title is not an institution of the common law.<sup>106</sup> Nevertheless, native title is currently the only non-Crown derived title recognised by Australian courts which may burden the Crown’s radical title. The High Court’s restatement of the Australian doctrine of tenure, however, provides a further basis for rights as against the Crown to unalienated lands occupied by Aboriginal people: a basis upon which Aboriginal customary law can be a valid source of *common*

101 See McNeil, *Common Law Aboriginal Title*, above n 1, p 11 and authorities cited in n 19. See also comments by Stephen CJ in *Hatfield v Alford* (1846) 1 Legge 330 at 337.

102 See text accompanying nn 22ff above.

103 See Secher, above n 3, Ch 7.

104 See Part 1, text immediately following n 26. See also Secher, above n 3, Ch 1, esp pp 26–33.

105 Cf Hepburn, above n 69, esp text accompanying n 110 and ‘Feudal Tenure and Native Title: Revising an Enduring Fiction’ (2005) 27 *SydLR* 49, where the author argues that, in order to promote a pluralist property culture, the complete abolition of the feudal doctrine of tenure and its replacement with an allodial system of landholding is necessary.

106 Indeed, the unique status of native title in terms of its vulnerability to extinguishment flows from the fact that it is not an institution of the common law: the High Court has, by implication, made it clear that the rule that the Crown cannot take or grant but by record does not apply to native title holders. Although native title holders are in possession before the Crown, the Crown has the power to unilaterally extinguish native title rights by inconsistent grant per se: see U Secher, ‘The Reception of Land Law into the Australian Colonies Post-*Mabo*: The Continuity and Recognition Doctrines Revisited and the Emergence of the Doctrine of ‘Continuity Pro-Tempore’ (2004) 27(3) *UNSWLJ* 703, text accompanying nn 123ff.

law title to land and thus an alternative to native title.<sup>107</sup>

Because native title does not originate in English property law, it remains an autonomous body of law that is merely accorded recognition by the common law where a continuing relationship with the land can be proven.<sup>108</sup> That is, 'the common law recognises a set of rights coming from Aboriginal law', but 'anglo-Australian law does not recognise Aboriginal law as law. It is recognised merely as a fact, to be proved as to its existence and content by evidence'.<sup>109</sup> However, recognition of a common law Aboriginal title

107 That is, in addition to possible native title rights, Aboriginal people would be able to establish title to land upon proof that they have a title by virtue of their own customary laws whether the existence of such title arose before or after acquisition of sovereignty: for a detailed examination of customary law as a source of non-derivative common law title to land, see Secher, above n 3, Ch 9, pp 514ff. Although the 'ownership by custom' basis was advanced in *Mabo* as an alternative argument to support the rights and interests of the plaintiffs to their traditional land, as a result of the High Court's finding that native title survived the Crown's acquisition of sovereignty, this argument was not examined. Furthermore, although the High Court in *Fejo v Northern Territory*, above n 80, rejected an argument that native title was analogous to rights recognised in English land law like rights of common or customary rights, the court only distinguished common law rights which find their origins in actual or presumed grant; the court failed to address common law rights which have their origins in custom and therefore exist independently of any such grant. That is, the High Court failed to make a critical threefold distinction between i) incorporeal hereditaments proper, for example easements, ii) customary rights in the nature of incorporeal hereditaments and iii) customary rights predating sovereignty: see Secher, above n 3, Ch 9, pp 516ff.

108 The common law definition of native title has been codified in s 223(1) of the Native Title Act 1993 (Cth) (NTA). The legislative definition refers to 'the rights and interests . . . possessed under the traditional laws acknowledged, and the traditional customs observed by the [indigenous claimants]': s 223(1)(a). As a result of the High Court's decision in *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422; 194 ALR 538, the meaning of 'traditional' for the purposes of s 223(1)(a) of the NTA has been narrowly defined by Gleeson CJ, Gummow and Hayne JJ at [56]–[47]:

'traditional' is a word apt to refer to a means of transmission of law or custom. A traditional law or custom is one which has been passed from generation to generation of a society, usually by word of mouth and common practice. But in the context of the Native Title Act, 'traditional' carries with it two other elements in its meaning. First, it conveys an understanding of the age of the traditions: the origins of the content of the law or custom concerned are to be found in the normative rules of the Aboriginal and Torres Strait Islander societies that existed before the assertion of sovereignty by the British Crown. It is only those normative rules that are 'traditional' laws and customs. Secondly, and no less importantly, the reference to rights or interests in land or waters being possessed under traditional laws acknowledged and traditional customs observed by the peoples concerned, requires that the normative system under which the rights and interests are possessed (the traditional laws and customs) is a system that has had a continuous existence and vitality since sovereignty. If that normative system has not existed throughout that period, the rights and interests which owe their existence to that system will have ceased to exist. And any later attempt to revive adherence to the tenets of that former system cannot and will not reconstitute the traditional laws and customs out of which rights and interests must spring if they are to fall within the definition of native title.

See also n 112 below.

109 V Kerruish and J Purdy, 'He "Look" Honest — Big White Thief' (1998) 4(1) *Law Text Culture: Special Edition 'In the Wake of Terra Nullius'* 146 at 153. This point has been expressed in clear terms by the High Court in *Fejo*, above n 80, at [46] per Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ: Native title has its origins in the traditional laws acknowledged and the customs observed by the indigenous people who

(Mark II)<sup>110</sup> based upon Aboriginal people's own customary systems of law has the consequence that customary law is adopted directly into the substantive law of Australia.<sup>111</sup> Accordingly, although a particular native title claim to land or water may not be supported, a customary land law claim to the same land or water may be.

Indeed, Moynihan J's conclusion, in *Mabo v Queensland (No 1)*,<sup>112</sup> that the plaintiffs' claim to seas and reefs was not supported by the evidence and in fact their rights to these areas had in fact been lost because rights must be exercised to keep them alive provides a useful example. As Dr Amankwah has observed, 'it is possible for a people to abandon their land if the abandonment is accompanied by *animus diserandi et relinquandi*; but their custom does not vanish until the people . . . become extinct'.<sup>113</sup> Thus, although proof that a traditional connection with land has been substantially maintained is essential in the context of a native title claim,<sup>114</sup> the concept of continuous connection with land may be avoided in the context of a customary title claim. That is, another legal right, that of 'Aboriginal customary law title holder', is available to Aboriginal people as a result of the Australian doctrine of tenure.

It will be seen in the next section, however, that the applicability of the redefined doctrine of tenure and its supporting postulate, radical title, was only possible because the High Court rejected the common law concept of 'desert and uncultivated'<sup>115</sup> territory for the purpose of the common law doctrine of reception.

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possess the native title (citing Brennan J in *Mabo*, above n 6, at CLR 58). Native title is neither an institution of the common law nor a form of common law tenure but it is recognised by the common law (citing Brennan J in *Mabo*, above n 6, at CLR 59–61). There is, therefore, an intersection of traditional laws and customs with the common law. The underlying existence of the traditional laws and customs is a *necessary* pre-requisite for native title but their existence is not a sufficient basis for recognising native title.

110 'Common Law Aboriginal Title Mark II' is used to describe the author's conception of Aboriginal customary law as a source of non-derivative common law title to land in order to distinguish it from the concept of 'Common Law Aboriginal Title' originally developed by McNeil, *Common Law Aboriginal Title*, above n 1.

111 See Secher, above n 3, Ch 9.

112 (1988) 166 CLR 186; 83 ALR 14. See also the High Court's decision in *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422; 194 ALR 538 and above n 108.

113 H A Amankwah, 'Post-*Mabo*: The Prospect of the Recognition of a Regime of Customary (Indigenous) Law in Australia' (1994) 18(1) *UQLJ* 15 at 32.

114 *Mabo*, above n 6, at CLR 59–60 per Brennan J; *Ward v Western Australia* (1998) 159 ALR 483 at 500, 544 per Lee J.

115 Blackstone uses this term: Blackstone, *1 Commentaries on the Laws of England: Of the Rights of Persons*, A Facsimile of the First Edition, The University of Chicago Press, Chicago, 1979, p 104; 15th ed, Reprint, Professional Books Limited, Oxon, England, 1982, p 107. After citing the relevant passage from Blackstone, Brennan J adopts the phrase 'desert uninhabited': *Mabo*, above n 6, at CLR 35.

### 3 The reception of land law into the Australian colonies revisited

#### A Constitutional status of Australia: An 'inhabited' settled colony<sup>116</sup>

It was explained in Part 1 that although the manner in which a sovereign acquires a new territory is a matter of international law, the system of law applicable in a newly-acquired territory is determined by the common law.<sup>117</sup> Thus, the doctrine of *terra nullius* is relevant at international law in deciding whether a State has acquired sovereignty by purported occupation,<sup>118</sup> but it is not relevant at common law in determining the law which is to govern the new possession.<sup>119</sup> The doctrine of *terra nullius* is, however, broadly analogous to the common law concept of colonial acquisition by 'settlement' of a 'desert and uncultivated'<sup>120</sup> country pursuant to which the common law of England became the law of the colony in so far as it was applicable to colonial conditions.<sup>121</sup>

Until *Mabo*, therefore, when sovereignty of a territory was acquired under the enlarged notion of *terra nullius* for the purpose of international law, that

116 This section is adapted from Part III of the author's article: U Secher, 'The Reception of Land Law into the Australian Colonies Post-*Mabo*: The Continuity and Recognition Doctrines Revisited and the Emergence of the Doctrine of '*Continuity Pro-Tempore*' (2004) 27(3) *UNSWLJ* 703. This article also examines the status of the 'continuity' and 'recognition' doctrines in Australia post-*Mabo* and the distinction between the scope of the Crown's prerogative powers in inhabited settled colonies (like Australia), on the one hand, and in conquered or ceded colonies, on the other. Crucially, the author's argument that, as a result of the High Court's restatement of the common law in *Mabo*, there is a new doctrine prescribing the system of law that applies upon settlement of an inhabited territory: a modified doctrine of reception, which includes the doctrine of *continuity pro tempore* (a merged version of the continuity and recognition doctrines), has been cited with approval by the Federal Court: *Gumana v Northern Territory* (2005) 141 FCR 457; 218 ALR 292 at [121].

117 See Part 3, section headed 'The Reception of Land Law into the Australian Colonies', text accompanying nn 169ff. See also Secher, above n 3, Ch 1, esp pp 35–9.

118 The Commonwealth Government acknowledged this in its written response to the Draft United Nations Declaration on the Rights of Indigenous Peoples in 1989, stating that '[t]erra nullius is a concept of public international law; it would be inappropriate to use it in the context of domestic land claims': cited by G Simpson, '*Mabo*, International Law, Terra Nullius and the Stories of Settlement: An Unresolved Jurisprudence' (1993) 19 *MULR* 195 at 210.

119 Sir Harry Gibbs, former Chief Justice of the High Court of Australia, has observed that the 'expression "*terra nullius*" seems to have been unknown to the common law. I have found no trace of it in legal dictionaries ranging from Cowel's *Interpreter* (1701 ed) to Strouds *Judicial Dictionary* (1986 ed). It is not mentioned in Tarring's *Law Relating to the Colonies* (1913 ed) which in its day was regarded as authoritative': Foreword in M A Stepenson and S Ratnapala (Eds), *Mabo: A Judicial Revolution — The Aboriginal Land Rights Decision and Its Impact on Australian Law*, University of Queensland Press, Queensland, 1993, p xiv.

120 See Part 1, text accompanying nn 193ff. See also Secher, above n 3, Ch 1, pp 37–9.

121 *Mabo*, above n 6, at CLR 35 per Brennan J; Blackstone, *1 Commentaries on the Laws of England*, above n 115, A Facsimile of the First Edition, pp 104–5; 15th ed, p 107; accord *Forbes v Cochrane* (1824) 2 B & C 448 at 463; 107 ER 450 at 456. English law would become the law of a territory outside England either upon first settlement by English colonists of a 'desert and uncultivated' country or by the exercise of the Sovereign's legislative power over a conquered or ceded territory.

territory was treated as ‘desert and uncultivated’ country for the purpose of the common law because there was an absence of ‘settled inhabitants’ and ‘settled law’.<sup>122</sup> According to pre-*Mabo* orthodoxy, if an inhabited territory was *terra nullius* for the purpose of acquisition of sovereignty, it was assumed that there could be no sufficiently organised system of native law and tenure to admit of recognition by the common law. In such circumstances, since the indigenous inhabitants and their occupancy of land were ignored when considering title to land in the settled colony, the Crown’s sovereignty over the territory was equated with Crown ownership of the lands therein because there was ‘no other proprietor of such lands’.<sup>123</sup> Accordingly, the classification of territory as ‘desert and uncultivated’ has been a basis for attributing absolute beneficial ownership of all land in Australia in the Crown. In this respect, therefore, the ‘occupation of’ and the ‘settlement of’ an inhabited territory were equated with the ‘occupation of’ and the ‘settlement of’ an uninhabited territory for the purpose of legitimising the acquisition of sovereignty in international law and in ascertaining the law of the territory on colonisation at common law respectively.<sup>124</sup>

In *Mabo*, it was conceded by all parties and accepted by the court that the Crown had acquired sovereignty of Australia by occupancy under international law. Furthermore, all members of the High Court concluded that, at common law, irrespective of the original presence of the Aboriginal inhabitants, Australia was a territory acquired by settlement.<sup>125</sup> Accordingly, the question before the court was whether or not native title was part of the common law of a settled territory.<sup>126</sup> However, notwithstanding that the classification of inhabited territory as uninhabited for legal purposes served different functions in international law and at common law, in rejecting the proposition that the common law of a settled colony did not recognise native title, one of the most contentious aspects of the High Court’s decision has been

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122 *Cooper v Stuart* (1889) 14 App Cas at 291 per Lord Watson.

123 *Attorney-General v Brown* (1847) Legge 312 at 319 per Stephen CJ; also cited in *Mabo*, above n 6, at CLR 40 per Brennan J.

124 ‘Occupation’ and ‘settlement’ are used interchangeably in respect of both the common law and the international law doctrines relating to the classification of inhabited land as uninhabited. However, and notwithstanding that the term ‘settlement’ has often been preferred by Australian judges and writers when referring to the international law method of acquisition known as ‘occupation’ (see, eg, *Coe v Commonwealth* (1979) 24 ALR 118 at 129 per Gibbs J), as the common law term is ‘settlement’ (see *Mabo*, above n 6, at CLR 33 per Brennan J, Mason CJ and McHugh J concurring), ‘occupation’ will be employed to refer to the international law doctrine.

125 *Mabo*, above n 6, at CLR 37–8, 57 per Brennan J; 79–80 per Deane and Gaudron JJ; 182 per Toohey J; 138–9 per Dawson J. *Terra nullius* was not mentioned in any of the plaintiffs’ submissions, and was not referred to at all during the four days of substantive argument before the High Court of Australia: High Court of Australia: *Transcript of Proceedings, Mabo v Queensland*, 28–31 May 1991. It is also worth noting at this juncture that a proposal by the Australian Law Reform Commission to reclassify Australia as ‘conquered’ was not formally adopted: Australian Law Reform Commission, *The Recognition of Aboriginal Customary Laws*, Report No 31, 1986, Vol 1, Ch 5.

126 Counsel for the plaintiffs made it clear that their submissions were not directed towards arguing that Australia had not been ‘settled’: High Court of Australia: *Transcript of Proceedings, Mabo v Queensland*, 28–31 May 1991, at 146. Counsel merely argued that, irrespective of the mode of acquisition of a colony, native interests inland were preserved as a burden upon the title of the Crown: *ibid*, at 3.

its treatment of the international law doctrine of *terra nullius*.<sup>127</sup>

Accepting that Australia was not, in fact, *terra nullius* in 1788, yet legally unoccupied for the purpose of acquisition of sovereignty, the High Court equated occupation of an inhabited territory with occupation of an uninhabited territory. Sovereignty was, therefore, acquired under the enlarged notion of *terra nullius*. Despite this conclusion, however, the majority of the High Court expressly disapproved of the application of the concept of *terra nullius* to an inhabited country and recognised that the notion that inhabited land may be classed as *terra nullius* no longer commanded general support in international law.<sup>128</sup> Although the court challenged the classification of Australia as a

127 See, eg, D M Austin, 'Mabo: Sorting the Fact from Fiction' (1993) 7(4) *CLQ* 13 at 15; M Brabazon, 'Mabo, The Constitution and the Republic' (1994) 11 *Aust Bar Rev* 229 at 232 et seq; F Brennan, 'Implications for Aborigines and Islanders' in M A Stephenson and S Ratnapala (Eds), *Mabo: A Judicial Revolution*, University of Queensland Press, St Lucia, Queensland, 1993, p 26; P Butt, 'Native Land Rights in Australia: The Mabo Case' (1995) *The Conveyancer and Property Lawyer* 33 at 34–5; J R S Forbes, 'Mabo and the Miners — Ad Infinitum?' in M A Stephenson (Ed), *Mabo: The Native Title Legislation — A Legislative Response to the High Court's Decision*, University of Queensland Press, St Lucia, Queensland, 1995, p 51; M Gregory, 'Rewriting History 1: Mabo v Queensland: The Decision' (1992) 17(4) *AltLJ* 157; B Hocking, 'Aboriginal Law Does Now Run in Australia' (1993) 15 *SydLR* 187 at 188–9; G McGinley, 'Indigenous Peoples' Rights: Mabo and Others v State of Queensland — The Australian High Court Addresses 200 Years of Oppression' (1993) 21(2) *Denver Jnl of Int Law and Policy* 311 at 318 et seq; G D Meyers and J Mugumbwa, 'The Mabo Decision: Australian Aboriginal Land Rights in Transition' (1993) 23 *Environmental Law* 1203 at 1213; K Puri, 'Mabo — A Legal Revolution?' in *Mabo — A Critical Review: Proceedings of the University of Queensland TC Bernie School of Law Annual Symposium*, Hilton International Hotel, Brisbane, Friday, 6 November 1992, University of Queensland, Brisbane, 1992, p 19; H Reynolds, *The Law of the Land*, Penguin Books, Victoria, 1992, pp 186, 195–6; G Simpson, 'Mabo, International Law, Terra Nullius and the Stories of Settlement: An Unresolved Jurisprudence' (1993) 19 *MULR* 195 at 205 et seq; Cf R H Bartlett, 'The Mabo Decision' (1993) *APLJ* 236 at 241; H Gibbs, 'Foreward' in M A Stephenson and S Ratnapala (Eds), *Mabo: A Judicial Revolution*, University of Queensland Press, St Lucia, Queensland, 1993, p xiv; G Nettheim, 'Native Title and International Law' in M A Stephenson (Ed), *Mabo: The Native Title Legislation — A Legislative Response to the High Court's Decision*, University of Queensland Press, St Lucia, Queensland, 1995, p 37; P O'Connor, 'Aboriginal Land Rights at Common Law: Mabo v Queensland' (1992) 18(2) *MonLR* 251 at 255; D Ritter, 'The "Rejection of Terra Nullius" in Mabo: A Critical Analysis' (1996) 18(3) *SydLR* 5; Hepburn, above n 69, and above n 105.

128 Four of the majority judges expressly relied upon the critical examination of the theory of *terra nullius* by the International Court of Justice in its *Advisory Opinion on Western Sahara* (1975) ICJR 12 to reject the doctrine of *terra nullius* as a basis for the colonial acquisition of inhabited territories: at 40–1 per Brennan J (with whom Mason CJ and McHugh J concurred); 141–2 per Toohey J. It was not until 1975 that an international tribunal raised doubts about the question whether land occupied by indigenous people could be considered *terra nullius*: *Advisory Opinion on Western Sahara* (1975) ICJR 12. Although the separate opinion of Vice President Ammoun considered that the concept of *terra nullius* had been employed at all periods to justify conquest and colonisation and as such stood condemned (at 86), the majority thought that territory was not *terra nullius* if it were occupied by people having 'social and political organisation': at 39. The majority view appears to indicate that territory inhabited by people not having such organisation is *terra nullius*. Further, the High Court failed to note that the International Court of Justice actually applied the inter-temporal rule: see above n 106. 'The question was whether the territory was *terra nullius* according to the international practice of 1884, the date of Spain's colonisation. . . . The relevant date was 1884, not 1974 (when the dispute arose) or 1975 (when the court wrote its opinion)': R L Sharwood, 'Aboriginal Land Rights: Further Reflections' (1995) 93 *Victorian Law News*

territory acquired by occupation and, therefore, the legal foundation for the Crown's assertion of sovereignty, the court's unanimous view that the acquisition of sovereignty is not justiciable before municipal courts,<sup>129</sup> precluded any review of this classification.<sup>130</sup> Municipal courts have, however, jurisdiction to determine the consequences of an acquisition of sovereignty: thus, it was open to the High Court to determine the body of law that applied in the newly acquired territory of Australia.

Since the enlarged doctrine of *terra nullius* had ceased to command acceptance under international law,<sup>131</sup> the court found that its broadly analogous application in the common law of property was brought into question. In contradistinction to their conclusion on the issue of acquisition of sovereignty, the majority refused to follow the 'orthodox' approach which equated the settlement of an inhabited territory with settlement of an uninhabited territory in ascertaining the law of a territory on colonisation. The rejection of this approach was, substantially, on three grounds. In addition to the fact that its analogue in international law no longer commanded general support,<sup>132</sup> the factual premise underpinning the colonial reception of the common law of England was not only false,<sup>133</sup> but also manifestly unjust.<sup>134</sup>

Thus, and the crucial point is that, although the High Court accepted that Australia was a settled territory, six justices changed the law that applies to a colony acquired by settlement where the colony was not previously uninhabited.<sup>135</sup> Under the common law pre-*Mabo*, the necessary result of the

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41 at 45–6. See also D J Harris, *Cases and Materials on International Law*, 3rd ed, Sweet and Maxwell, London, 1983, pp 165–7; N L Wallace-Bruce, 'Two Hundred Years on: A Reexamination of the Acquisition of Australia' (1989) 19 *Georgia Jnl of International and Comparative Law* 87 at 88.

129 This principle was stated by Gibbs J in *New South Wales v Commonwealth (The Seas and Submerged Lands case)* (1975) 135 CLR 337 at 388; 8 ALR 1 in the following terms: 'The acquisition of territory by a sovereign state for the first time is an act of state which cannot be challenged, controlled or interfered with by the courts of that State'. It precludes 'any contest between the executive and the judicial branches of government as to whether a territory is or is not within the Crown's dominions': *Mabo*, above n 6, at CLR 31 per Brennan J. See also *Post Office v Estuary Radio Ltd* [1968] 2 QB 740 at 753 per Diplock LJ; [1967] 3 All ER 663; *Wacando v Commonwealth* (1981) 148 CLR 1 at 11 per Gibbs J; 21 per Mason J; 37 ALR 317.

130 The court's approach in relation to this aspect of the case also accords with inter-temporal law. The inter-temporal rule is an established rule of international law and provides that where 'the rights of parties to a dispute derive from legally significant acts . . . very long ago . . . the situation in question must be appraised . . . in the light of the rules of international law as they existed at the time, and not as they exist today': Harris, above n 128, pp 165–7. In the *Island of Palmas Case* 2 RIAA 829, the rule was stated thus: 'judicial fact must be appreciated in the light of the law contemporary with it, and not of the law in force at the time when a dispute in regard to it arises or falls to be determined.'

131 *Mabo*, above n 6, at CLR 41 per Brennan J.

132 *Ibid*, at CLR 40–1 per Brennan J (relying on the *International Court of Justice Advisory Opinion on Western Sahara* (1975) 1 ICJR 12 at 39; 182 per Toohey J.

133 *Mabo*, above n 6, at CLR 17–18, 21–2 per Brennan J; 99–100 per Deane and Gaudron JJ; 182 per Toohey J.

134 *Ibid*, at CLR 42 per Brennan J; 109 per Deane and Gaudron JJ.

135 Pre-*Mabo*, however, the common law determining the law which was to govern a new possession had two limbs, one general and one specific. The general limb consisted of a doctrine prescribing the law (whether English or local) that applied in the newly-acquired territory (in the case of settlements, the doctrine of reception). The specific limb consisted



categorisation of a colony as settled (whether uninhabited in fact or 'legally uninhabited') was that English law, including the feudal doctrine of tenure, applied *ipso jure* throughout the colony. However, by ascribing to Australia the status of a new colony, a settled yet inhabited colony, the *Mabo* High Court was free to prescribe (and indeed had to prescribe because there was no law on point) a doctrine relating to the law that applied in the colony: a modified doctrine of reception. In this context, there were three different approaches from the six judges: one from Brennan J, one from Deane and Gaudron JJ and one from Toohey J. Indeed, it will be seen that although Brennan J's treatment of the doctrine of reception departs significantly from the received view, Deane and Gaudron JJ's more conservative approach accords more with the conventional view. Toohey J's treatment of the doctrine of reception is, however, equivocal. While he examined the effect of the law that applied in Australia upon settlement, he failed to explain why, in light of the doctrine of reception, this particular law applied.

For Deane and Gaudron JJ, the fact that New South Wales was validly established as a 'settled colony', meant that so much of the common law of England as was 'reasonably applicable to the circumstances of the colony' was introduced.<sup>136</sup> Although suggesting that '[i]f the slate were clean, there would be something to be said for the view that the English system of land law was not, in 1788, appropriate for application to the circumstances of a British penal colony',<sup>137</sup> their Honours accepted as 'incontrovertible' that the common law applicable upon the establishment of the colony of New South Wales included that general system of land law.<sup>138</sup>

Nevertheless, the principle that only so much of the common law was introduced as was 'reasonably applicable to the circumstances of the Colony',<sup>139</sup> 'left room for the continued operation of some local laws or customs among the native people and even the incorporation of some of those laws and customs as part of the common law'.<sup>140</sup> Deane and Gaudron JJ suggested that if Crown officers had been aware of the numbers of Aboriginal inhabitants of the Australian continent and the sophistication of their laws and customs, they would not have considered the territory unoccupied.<sup>141</sup> Furthermore, their Honours distinguished the line of Australian cases<sup>142</sup> which supported one or both of the broad propositions that New South Wales

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of a doctrine prescribing the effect of a change in sovereignty on pre-existing rights to land (the doctrine of continuity or the recognition doctrine). Although the English common law, as it was understood in Australia pre-*Mabo*, appeared certain with respect to determining whether a colony was deemed to be settled, conquered or ceded, and whether English law was automatically introduced or local laws retained (see Part 1, text accompanying nn 195ff), the common law with respect to the effect of Crown acquisition of territory on pre-existing rights to land was not so clear: see Secher, above n 116.

136 *Mabo*, above n 6, at CLR 79.

137 *Ibid*, at CLR 81.

138 *Id*, citing *Deloherty v Permanent Trustee Co of NSW* (1904) 1 CLR 283 at 299–300; *Williams v Attorney-General (NSW)* (1913) 16 CLR 404.

139 *Mabo*, above n 6, at CLR 79, citing *Cooper v Stuart* (1889) 14 App Cas 286 at 291.

140 *Id*.

141 *Ibid*, at CLR 99–100.

142 *Ibid*, at CLR 102–3. In particular, Deane and Gaudron JJ considered (at 103) that one of these cases, *Cooper v Stuart* (1889) 14 App Cas at 291, had subsequently been seen as 'authoritatively establishing that the territory of New South Wales had, in 1788, been *terra*

had been unoccupied for practical purposes and that the unqualified legal and beneficial ownership of all land in the colony vested in the Crown, as obiter.<sup>143</sup> Accordingly, their Honours concluded that the application of settled principle to current understanding of the facts compelled the result that ‘the common law applicable to the colony in 1788, and thereafter until altered by valid legislation, preserved and protected the pre-existing claims of Aboriginal tribes . . . to particular areas of land’.<sup>144</sup>

Thus, although applying the received view of the doctrine of reception, the new element introduced by Deane and Gaudron JJ was the express adjustment of the applicable common law to include a strong assumption that native title interests were respected and protected by the domestic law of the colony after its establishment. In this way, the common law acknowledged that Australia, while settled, was not legally uninhabited. For Deane and Gaudron JJ, therefore, the colonial law determining that a colony was settled and that English law was automatically introduced (the doctrine of reception) included the doctrine of continuity. Although Brennan and Toohey JJ also reconcile the two limbs of the common law determining the system of law applicable upon colonisation, their reasoning is fundamentally different.<sup>145</sup>

According to Justice Toohey, although the Murray Islands were ‘settled’<sup>146</sup> by Britain for the purposes of acquisition of sovereignty, ‘it did not follow that [common law] principles of land law relevant to the acquisition of vacant land [were] applicable’.<sup>147</sup> His Honour emphasised that the ‘idea that land which is in regular occupation’ should be regarded as *terra nullius* is unacceptable in law as well as fact.<sup>148</sup> Applying current information regarding Aboriginal people to show that the land was in fact occupied on settlement, his Honour observed that upon acquisition of sovereignty, indigenous inhabitants became British subjects and, in the case of a settled colony like Australia, their interests were to be protected by the immediate operation of the common law. Toohey J explained that because the real question was whether the rights of the Meriam people to the Islands survived acquisition of sovereignty, common law dicta which, although acknowledging that, on settlement, land vested in the Crown, was not made in the context of the question of Aboriginal entitlement to land was irrelevant.

It is clear that Toohey J considered the received view of the doctrine of

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*nullius* not in the sense of unclaimed by any other European power, but in the sense of unoccupied or uninhabited for the purposes of the law’.

143 *Mabo*, above n 6, at CLR 101–4.

144 *Ibid*, at CLR 100.

145 It is suggested that it is because Deane and Gaudron JJ’s analysis preserves the distinction between the doctrine of reception and the doctrine of continuity, that their Honour’s conception of radical title (unlike Brennan and Toohey JJ’s) confers beneficial ownership to land not subject to native title (as was the view under the conventional doctrine of reception).

146 Or ‘occupied’ to use the term of international law.

147 *Mabo*, above n 6, at CLR 182.

148 *Id*. His Honour also considered that the proposition that land which is not in regular occupation is *terra nullius* required greater scrutiny: there may be good reason why the occupation is irregular. He did, however, confirm that the doctrine of *terra nullius* had no application to the present case.

reception as inapplicable to the Australian situation.<sup>149</sup> Rather than English law applying as though the territory was uninhabited, the doctrine of continuity applied automatically to protect native rights to land. Although Toohey J states the result of a different rule for prescribing the law that applied upon settlement of Australia, he fails to explicate this alternative rule — an explication comprehensively proffered by Brennan J.

Brennan J observed that the common law had had to ‘march in step with international law in order to provide the body of law to apply in a territory newly acquired by the Crown’.<sup>150</sup> His Honour found, however, that the acquisition of territory by way of the enlarged doctrine of *terra nullius* raised difficulties in determining what law was to be applied when inhabited territories were acquired by occupation (or ‘settlement’, to use the term of the common law).<sup>151</sup> Brennan J thus transposed the concept of *terra nullius* into the Australian common law by suggesting that the operation of the international law principles governing acquisition of territory had created an anomaly for the domestic law. Although the enlarged doctrine of *terra nullius* allowed Australia to be acquired by occupation, even though it was inhabited, Brennan J noted that Blackstone<sup>152</sup> was unable to expound any rule by which the common law of England became the law of a territory which was not uninhabited when the Crown acquired sovereignty over the territory by occupation.<sup>153</sup> Consequently, the common law had to prescribe a doctrine relating to the law to be applied in such colonies. Pre-*Mabo*:

The view was taken that, when sovereignty of a territory could be acquired under the enlarged notion of *terra nullius*, for the purposes of municipal law that territory (though inhabited) could be treated as ‘desert uninhabited’ country. The hypothesis being that there was no local law already in existence in the territory, the law of England became the law of the territory (and not merely the personal law of the colonists).<sup>154</sup>

Thus, the theory advanced to support the application of English law to colonial New South Wales was that because the indigenous inhabitants were regarded as ‘barbarous or unsettled and without a settled law’, the law of England, including the common law, became the law of the colony as though it was an uninhabited colony.<sup>155</sup> The result was that ‘the settlement of an inhabited territory [was] equated with settlement of an uninhabited territory in ascertaining the law of the territory on colonisation . . .’.<sup>156</sup>

Although contemporary law accepted that the laws of England, so far as

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149 And thus accords with Brennan J’s approach.

150 *Mabo*, above n 6, at CLR 32. This was because the manner in which a sovereign acquires new territory is a matter of international law and, by the common law, the law in force in a newly-acquired territory depends upon the manner of its acquisition by the Crown.

151 *Mabo*, above n 6, at CLR 33.

152 Blackstone, above n 25, (Facsimile of the First Edition), p 104; (15th ed), p 107.

153 *Mabo*, above n 6, at CLR 33–4.

154 *Ibid*, at CLR 36.

155 *Ibid*, at CLR 37–8.

156 *Ibid*, at CLR 37. Moreover, because the indigenous inhabitants of a settled colony and their occupancy of colonial land were ignored in considering the title to land, the ‘Crown’s sovereignty over a territory which had been acquired under the enlarged notion of *terra nullius* was equated with Crown ownership of the lands therein’: *Mabo*, above n 6, at CLR 40.

applicable, became the laws of New South Wales and of the other Australian colonies, Brennan J considered that the theory advanced to support the introduction of the common law could be abandoned. Because the present understanding and appreciation of the facts<sup>157</sup> ‘do not fit the “absence of law” or “barbarian” theory underpinning the colonial reception of the common law of England’,<sup>158</sup> Brennan J found that there was no warrant for contemporary law to continue to apply English legal propositions which were the product of that theory.<sup>159</sup>

Brennan J also considered that the theory advanced to justify depriving indigenous inhabitants of a proprietary interest in the land, was unacceptable as it was ‘unjust’<sup>160</sup> and ‘depended on a discriminatory denigration of indigenous inhabitants, their social organisation and customs’.<sup>161</sup> His Honour strongly criticised the discriminatory doctrine formulated by the Privy Council in *In re Southern Rhodesia*<sup>162</sup> which had been applied to the detriment of the plaintiffs in *Milirrpum v Nabalco Pty Ltd*.<sup>163</sup> In classifying systems of native law for the purpose of determining whether rights under it are to be recognised at common law, the Privy Council implied the existence of a natural hierarchy of societies, some being ‘so low in the scale of social organisation that their usages and conceptions of rights and duties are not to be reconciled with the institutions or the legal ideas of a civilised society’.<sup>164</sup> Accordingly, if the inhabitants of a colony had no meaningful or recognisable system of land tenure, the colony was considered ‘desert uninhabited’ territory for legal purposes.<sup>165</sup> For Brennan J, the court was faced with two options:

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157 His Honour’s conclusion was supported by evidence demonstrating the existence of a complex and settled relationship of rights and obligations between the indigenous people and their land: the findings of Moynihan J are summarised at CLR 17–18, 21–2, 24. See also Blackburn J’s findings on the evidence presented in *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141 at 267: ‘The evidence shows a subtle and elaborate system highly adapted to the country in which the people led their lives, which provided a stable order of society and was remarkably free from the vagaries of personal whim or influence. If ever a system could be called “a government of laws, and not of men”, it is that shown in the evidence before me’. Thus, faced with a contradiction between the authority of the Privy Council in *Cooper v Stuart* and the evidence, Blackburn J concluded that the class to which a colony belonged was a question of law, not of fact: *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141 at 244; [1972-73] ALR 65, see also *Mabo*, above n 6, at CLR 39 per Brennan J.

158 *Mabo*, above n 6, at CLR 39.

159 *Ibid*, at CLR 38, 39.

160 *Ibid*, at CLR 42.

161 *Ibid*, at CLR 40. See also 42.

162 [1919] AC 211.

163 (1971) 17 FLR 141; [1972-73] ALR 65.

164 [1919] AC 211 at 233–4.

165 This theory suggested a possible ground of distinction in the case of settled territories and led to detailed analysis of the legal and social systems of the plaintiffs in *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141; [1972-73] ALR 65 and in *Mabo*. If accepted, this distinction could conceivably have seen a distinction drawn between the rights of the Meriam people and other Aboriginal and Islander people on the basis that some were more ‘civilised’ than others. Brennan J clearly repudiated the *In re Southern Rhodesia* doctrine to the extent that it dismissed a priori the claims of native inhabitants of settled colonies: see *Mabo*, above n 6, at CLR 40 et seq.

the court could either apply the existing authorities and proceed to inquire whether the Meriam people [were] higher 'in the scale of social organisation'<sup>166</sup> than the Australian Aborigines whose claims were 'utterly disregarded' by the existing authorities or the court [could] overrule the existing authorities, discarding the distinction between inhabited colonies that were *terra nullius* and those that were not.<sup>167</sup>

Observing that the notion that inhabited land may be classified as *terra nullius* no longer commands general support in international law,<sup>168</sup> Brennan J chose the latter option. Since Australia was in fact inhabited at the time of colonisation, it could not, at common law, be considered uninhabited for legal purposes. Consequently, the conventional doctrine of reception could not apply to the colony. Effectively, therefore, Brennan J (and thus the majority) identified Australia as a new class of settled colony at common law: one over which sovereignty had been acquired via occupation of territory that was *terra nullius*; yet one acquired, at common law, by settlement of territory that was not legally uninhabited.<sup>169</sup> Consequently, Brennan J had to prescribe a new doctrine relating to the law that applied in the colony. This allowed him to find, retrospectively, that the common law that applies in inhabited settled colonies presumptively recognises native title rights to land.<sup>170</sup> In finding that prior native rights in land were presumed to be recognised, his Honour followed Blackstone<sup>171</sup> and regarded occupation as the natural law basis of ownership rather than the attainment of any particular degree of civilisation.<sup>172</sup>

In reaching this conclusion, Brennan J equated 'the indigenous inhabitants of a settled colony with the inhabitants of a conquered colony in respect of

166 With respect, this was the theory advanced to justify the extension of the doctrine of *terra nullius* to the acquisition of inhabited territories by occupation under international law, and not to determine what system of law would be applied and what proprietary rights would be recognised in settled colonies: see *In re Southern Rhodesia* [1919] AC 11 at 233–4.

167 *Mabo*, above n 6, at CLR 40. His Honour's reference to *terra nullius* merely acknowledged that when sovereignty of a territory was acquired under the enlarged doctrine of *terra nullius*, it followed that for the purposes of the common law that such territory was treated as 'desert and uninhabited' although it was inhabited: at 36.

168 Relying on the International Court of Justice *Advisory Opinion on Western Sahara* (1975) 1 ICJR 12 at 39, 85–6.

169 A division of ceded territories into two classes, those acquired by an act of cession from some sovereign power and those ceded by the general consent of the inhabitants, was suggested by the respondent in *Sammut v Strickland* [1938] AC 678 at 699–701. The Privy Council, however, rejected this contention as they interpreted it to mean that British possessions acquired by voluntary cession would, in effect, be British settlements: at 700. Observing that 'until the present case no one seems to have distinguished or divided cessions to the Crown in the way suggested', they nevertheless noted that cases of voluntary cession are rare and urged that the case had been neglected by text-book writers and had not been noticed by the Legislature: at 700–1.

170 This finding reconciled the two strands of the common law that, pre-*Mabo*, determined the system of law applicable upon colonisation: see Secher, above n 116, text immediately following n 35 and nn 145–151.

171 W Blackstone, *2 Commentaries on the Laws of England: Of the Rights of Things*, A Facsimile of the First Edition, The University of Chicago Press, Chicago, 1979, p 8.

172 *Mabo*, above n 6, at CLR 45. His Honour observed that:

It was only by fastening on the notion that a settled colony was *terra nullius* that it was possible to predicate of the Crown the acquisition of ownership of land in a colony already occupied by indigenous inhabitants. It was only on the hypothesis that there was

their rights and interests in land'.<sup>173</sup> This comparison has a critical implication: it limits the practical consequences of Brennan J's reasoning to rights to land.<sup>174</sup>

According to Brennan J's analysis, the effect of a change in sovereignty in the context of the inhabited settled colony of Australia, was not that *English land* law immediately applied (as would have been the case in a settled uninhabited territory), but that the *local land* law continued until replaced by the new sovereign (like the legal position in a conquered territory).<sup>175</sup> The crucial point is that, as a result of the High Court's restatement of the effect of the colonisation of Australia and reception of English law, the legal consequences that flow from the feudal character of the English doctrine of tenure no longer apply *ipso jure* in Australia: rather than acquiring absolute beneficial ownership of all land, the Crown acquired only a radical title to all land. Although the 'postulate of the doctrine of tenure' limb of radical title continues to assure the Crown of its Paramount Lordship over tenures created by Crown grant, it does so in new, limited circumstances. Only when the Crown exercises its power to grant an estate in land is such land brought within the tenurial regime.

## 4 Post-*Mabo* developments

### A High Court decisions

Although there have been a number of important High Court decisions on native title since *Mabo*, the correctness of the decision in *Mabo* and the fundamental principle which it establishes, namely that, contrary to the previous understanding of the law, native title survived the Crown's acquisition of sovereignty in Australia, has not been challenged. Similarly, it has not been contested that the Crown, as Sovereign, had the power, in accordance with law, to deal with land in every part of Australia and to the extent that it did so in a way which was inconsistent with native title, native title was extinguished.<sup>176</sup> Following the High Court decisions in *Western*

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nobody in occupation that it could be said that the Crown was the owner because there was no other. If that hypothesis be rejected, the notion that sovereignty carried ownership in its wake must be rejected too.

<sup>173</sup> *Mabo*, above n 6, at CLR 57. Cf n 189 below. Thus recognition of pre-existing rights was limited to rights in land. See also Secher, above n 3, Ch 9, esp pp 510–13.

<sup>174</sup> See also Secher, above n 5, where the author argues that similar recognition of Aboriginal customary laws beyond those relating to land cannot be based upon the *Mabo* principle.

<sup>175</sup> Although the foregoing analysis suggests that the classification of a colony as either conquered, ceded or 'inhabited settled' determines the scope of the sovereign's power to extinguish pre-existing rights, it does not explain the legal basis for such a distinction. Why did Brennan J treat the sovereign's power of extinguishment in an inhabited settled colony as greater than the sovereign's power of extinguishment in conquered or ceded colonies? The explanation is found in the distinction between the scope of the Crown's prerogative powers in inhabited settled colonies, on the one hand, and in conquered or ceded colonies, on the other: see Secher, above n 116, cited with approval by the Federal Court in *Gumana v Northern Territory* (2005) 141 FCR 457; 218 ALR 292 at [121].

<sup>176</sup> See nn 189ff below.

*Australia v Commonwealth*,<sup>177</sup> *Wik*,<sup>178</sup> *Fejo v Northern Territory*,<sup>179</sup> *Yanner v Eaton*,<sup>180</sup> *Commonwealth v Yarmirr*,<sup>181</sup> *Western Australia v Ward*,<sup>182</sup> *Wilson v Anderson*<sup>183</sup> and *Members of the Yorta Yorta Aboriginal Community v Victoria*<sup>184</sup> it is also clear that the majority of Brennan J's reasoning in *Mabo* has been accepted by the High Court as the fundamental statement of the recognition and extinguishment of native title by the Australian common law.<sup>185</sup> Moreover, members of the currently constituted High Court have expressed views on the 'increasingly questioned fiction of tenure',<sup>186</sup> 'radical

177 (1995) 183 CLR 373 at 422–3, 439, 452 per Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ; 492, 493–5 per Dawson J; 128 ALR 1.

178 (1996) 187 CLR 1 at 84–5 per Brennan CJ (with whom McHugh and Dawson JJ agreed: 167 and 100 respectively); 135 per Gaudron J; 175–6 per Gummow J; 213–14, 250 per Kirby J. Toohey J noted (at 129) that '[w]hile nothing in the judgments of the court, in particular those in *Mabo (No 2)*, point with any certainty to the answers demanded of the court in the present proceedings, that decision is a valuable starting point because it explores the relationship between the common law and the "law" which evidences native title rights'. For a detailed examination of the *Wik* High Court's treatment of the two limbs of radical title, see Secher, above n 3, Chs 3 and 4.

179 (1998) 195 CLR 96; 156 ALR 721; 72 ALJR 1442 at [46]–[49] per Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ; [95]–[105] per Kirby J. This decision is considered in the context of the two limbs of radical title by Secher, above n 3, Ch 4.

180 (1999) 201 CLR 351; 166 ALR 258 at [35] per Gleeson CJ, Gaudron, Kirby and Hayne JJ; [60], [72] per Gummow J. In *Yanner v Eaton*, a majority of the High Court held that legislation regulating the keeping and taking of estuarine crocodiles did not extinguish native title. Thus, the High Court simply decided that there was no extinguishment of native title in this case.

181 (2001) 208 CLR 1; 184 ALR 113 at [46], [48] per Gleeson CJ, Gaudron, Gummow and Hayne JJ; [117], [161], [178] per McHugh J; [293] per Kirby J; [324] per Callinan J. For a detailed examination of this case in the context of radical title as a concomitant of sovereignty, see Secher, above n 3, Ch 5.

182 (2002) 213 CLR 1; 191 ALR 1. In this case, the court emphasised that the extinguishment of native title was governed by the NTA; that is statute lay at the core of the litigation: at [2], [1]. Indeed, the High Court distinguished the decisions in *Mabo*, *Wik*, *Fejo* and *Yanner v Eaton* as not having been given in respect of applications under the NTA: at [2]. Consequently, the only relevance of those decisions was for 'whatever light they cast on the NTA: at [25]. For a detailed examination of this case in the context of the two limbs of radical title, see Secher, above n 3, Ch 4.

183 (2002) 213 CLR 401; 190 ALR 313. Although the majority of the High Court in this case (like the court in *Western Australia v Ward* (2002) 213 CLR 1; 191 ALR 1) resolved the issues before them by reference to the NTA rather than the common law, they emphasised that the 'common law' test of extinguishment is 'exemplified in *Wik*': at [47]. For a detailed examination of this case in the context of the two limbs of radical title, see Secher, above n 3, Ch 4.

184 (2002) 214 CLR 422; 194 ALR 538 at [133] per Gleeson CJ, Gummow and Hayne JJ; [172] per Callinan J.

185 See also B Selway QC, 'The Role of Policy in the Development of Native Title' (2000) *FLR* 403 at 415.

186 *Wik*, above n 22, at CLR 177–84 per Gummow J; 205–7 per Toohey J; 243, 244 per Kirby J; *Fejo v Northern Territory* (1998) 195 CLR 96; 156 ALR 721; 72 ALJR 1442 at [108] per Kirby J; *Commonwealth v Yarmirr* (2001) 208 CLR 1; 184 ALR 113 at [212] per McHugh J. See also *Western Australia v Ward* (2000) 99 FCR 316; 170 ALR 159 at [805]ff, where North J suggests that the doctrine of tenure should continue to be modified, and *Lansen v Olney* (1999) 100 FCR 7; 169 ALR 49 at [42], where French J noted that: '[s]tatutory reforms in England, many of them mirrored in Australia, have substantially suppressed the practical consequences of tenure but they have not struck at the root of the theory of tenure itself'.

title as a postulate of the doctrine of tenure'<sup>187</sup> and the 'extent of the reception of English *land law*'<sup>188</sup> which support the *Mabo* court's redefined doctrine of tenure.

Significantly, in *Wik*, a reconstituted High Court reviewed the implications of *Mabo* for Australian real property law. By considering the consequences of pastoral leases for native title, the High Court had a second opportunity to assess the applicability of English land law in the Australian context. The essence of the decision in *Wik* lies in saying that a pastoral lease, being a special measure to provide for Australian conditions, is not a lease as understood in English land law. For the majority, therefore, a pastoral lease does not confer a right of exclusive possession on the grantee and, consequently, the grant of a pastoral lease will not necessarily extinguish native title rights and interests that may exist in or over the subject land. Nevertheless, the majority made it clear that, to the extent that the rights of the grantee of a pastoral lease were inconsistent with the continued enjoyment of native title, the native title interest must yield.<sup>189</sup>

More importantly, however, one of the main legal arguments in *Wik* (based on Brennan J's 'reversion expectant' theory espoused in *Mabo*),<sup>190</sup> was whether the mere grant of a pastoral lease, or for that matter of any leasehold interest in land, changed the underlying title of the Crown by creating a reversion expectant, thereby converting the underlying title of the Crown from mere radical title to full beneficial title, such that upon expiry of the term of the interest full beneficial ownership would revert to the Crown. The majority denied that the Crown acquired a beneficial reversionary interest upon the grant of the relevant pastoral leases, with the result that the underlying title of the Crown continued to be mere radical title.<sup>191</sup>

The minority, on the other hand, adopted Brennan J's dictum in *Mabo* that the doctrine of tenure was brought into play as soon as the Crown granted an interest in land<sup>192</sup> and concluded that:

187 *Wik*, above n 22, at CLR 186 per Gummow J; 128 per Toohey J (expressly approving of Brennan J's statement of principle in *Mabo*, above n 6, at CLR 50); *Commonwealth v Yarmirr* (2001) 208 CLR 1; 184 ALR 113 at [49], [70], [71], [75] per Gleeson CJ, Gaudron, Gummow and Hayne JJ; [178], [212] per McHugh J.

188 *Wik*, above n 22, at CLR 182 per Gummow J.

189 *Wik*, above n 22, at CLR 133 (postscript contained in Toohey J's reasons and added with the concurrence of the other majority judges).

190 In *Mabo*, above n 6, Brennan J discussed how native title can be extinguished by a Crown grant which vests in the grantee an interest in land which is inconsistent with the continued right to enjoy a native title in respect of the same land, stating at CLR 68: '[i]f a lease be granted, the lessee acquires possession and the Crown acquires the reversion expectant on the expiry of the term. The Crown's title is thus expanded from a mere radical title and, on the expiry of the term, becomes a plenum dominium.' See also 49. In *Wik*, above n 22, Brennan CJ, as author of the minority judgment, reiterated these comments (at CLR 154). For a detailed discussion of the 'reversion expectant' theory, see Secher, above n 3, Ch 4, Part 2.

191 *Wik*, above n 22, at CLR 128, 129 per Toohey J; 155 per Gaudron J; 189 per Gummow J; 244–5 per Kirby J. The implications of the *Wik* decision for the Crown's title on the grant of any interest in land are examined by Secher, above n 3, Ch 4.

192 *Mabo*, above n 6, at CLR 48–9.



once land is brought within [the doctrine of tenure], it is impossible to admit an interest which is not derived mediately or immediately from a Crown grant or which is not carved out of an estate or the Crown's reversionary interest.<sup>193</sup>

For the minority, therefore, it was necessary to treat the Crown, on exercise of the power of alienation of an estate, as having the full legal reversionary interest. The minority also relied upon traditional property law authorities to characterise the pastoral leases issued under statute as common law leases conferring a right to exclusive possession.

The divergence between the majority and minority judgments in *Wik* can be summarised in terms of differing approaches taken towards the utility of conventional English land law concepts once the Australian doctrine of tenure has been brought into play. The crucial point, however, is that the majority's decision questions the applicability of the Australian doctrine of tenure notwithstanding the grant of an interest in land by the Crown, at least in the case of the grant of a pastoral lease.<sup>194</sup> That is, although the fiction of original Crown ownership is brought into play, to ensure the Crown its rights as Paramount Lord, whenever the Crown exercises its sovereign power to grant an interest in land, it is clear that this fiction does not confer a beneficial reversionary title on the Crown.<sup>195</sup>

The *Wik* High Court rejected the beneficial reversion expectant argument specifically in the context of the statutory grant of an interest not given its content by the common law. Although the majority of the High Court in *Western Australia v Ward*<sup>196</sup> (*Ward*) subsequently held that a common law lease extinguished native title, this was based solely on the court's formulation and application of the inconsistency of incidents test for the purposes of the NTA, rather than on an expansion of the Crown's radical title at common law. Indeed, since the *Ward* High Court did not address the issue of the nature of the Crown's reversion, if any, upon the grant of the lease, there is no authoritative decision on the legal implications for the Crown's title of the

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193 *Wik*, above n 22, at CLR 93.

194 The role of the Australian doctrine of tenure on the grant of any lease, including a common law lease, will be discussed in Part 4. Bhuta and McDermott have both argued that the decision in *Wik* emphasised that the feudal notions of tenure are inappropriate to modern Australia: N Bhuta, 'Mabo, Wik and the Art of Paradigm Management' (1998) 22 *MULR* 24 at 32-7; P M McDermott, 'Wik and the Doctrine of Tenures: A Synopsis' in G Hiley (Ed), *The Wik Case: Issues and Implications*, Butterworths, Sydney, 1997, pp 37-9. See also *Western Australia v Ward* (2000) 99 FCR 316; 170 ALR 159 at [805]ff where North J suggests that the doctrine of tenure should continue to be modified; cf *Wik*, above n 22, at CLR 89-91 per Brennan CJ; *Fejo v Northern Territory* (1998) 195 CLR 96; 156 ALR 721; 72 ALJR 1442 at [112] per Kirby J; Selway, above n 185, esp pp 421, 431. In *Fejo v Northern Territory* (1998) 195 CLR 96; 156 ALR 721; 72 ALJR 1442 at [112], Kirby J attempts to reconcile the approaches, stating that the better position is that *Wik* did not reject the doctrine of tenure as it applies in Australia. Rather, the majority simply viewed the pastoral leases examined in that case as 'falling outside traditional land law'. They were to be viewed as creatures of the Australian legislature with features distinguishing their legal character from common law leases and thus they did not attract some of the attributes of a common law lease in accordance with the doctrine of tenure.

195 Indeed, it is clear that since radical title, as a concomitant of sovereignty, confers power on the Crown to grant unalienated land (whether occupied or unoccupied) in every part of Australia, that the Crown's power of alienation is divorced from the assumption that the Crown is the original proprietor of all land

196 (2002) 213 CLR 1; 191 ALR 1 (*Ward*).

grant of a common law lease from the High Court.<sup>197</sup> Accordingly, *Wik* continues to be authoritative not only in the context of the nature of the Crown's title at the expiration of a lease, but also in the context of the common law doctrine of extinguishment.<sup>198</sup> What emerges from the *Wik* majority's reasoning is a further 'Australianisation' of the land law lexicon.

## 5 Conclusion

The High Court's conception of the Australian doctrine of tenure, with radical title as its postulate, was only possible because the court clarified the doctrine of reception as it applied to Australia.<sup>199</sup> In this context, the High Court rejected the *common law* classification of inhabited land as 'desert and uncultivated', or 'legally uninhabited', for the purpose of determining the

197 It is clear that, as a result of the NTA, the grant of such leases extinguish native title. Indeed, the High Court's decision in *Western Australia v Ward* (2002) 213 CLR 1; 191 ALR 1 at [369]–[372] has confirmed this. There is also High Court obiter to this effect at common law: see, eg, *Mabo*, above n 6, at CLR 68 per Brennan J; 110 per Gaudron and Deane JJ. Gaudron J (at 155) also proceeded on this assumption in *Wik* and Gummow J expressed this view in *Yanner v Eaton* (1999) 201 CLR 351; 166 ALR 258 at [108]. Although there was argument, in *Mabo*, about whether the lease of a sardine factory and a lease to the London Missionary Society extinguished native title, the declaration made by the court did not determine these issues. Notwithstanding the suggested legal implications for the Crown's title of the grant of a common law lease, however, there is no authoritative decision on the issue from the High Court: although the majority of the High Court in *Western Australia v Ward* held that a common law lease extinguished native title, this was based on the court's application of the inconsistency of incidents test for the purposes of the NTA, rather than on an expansion of the Crown's radical title at common law. Nevertheless, even if the grant of an exclusive possession lease has the effect, at common law, of extinguishing native title, since any such extinguishment occurs as a result of inconsistency between the lessee's rights under the lease and the native title rights, and not as a result of the Crown's acquisition of a beneficial title on making the grant, such extinguishment does not, of itself, have any significance for the Crown's title. Thus, the question is: do any residuary rights to the land in respect of which the lease was granted automatically lie with the Crown? In other words, is native title extinguished by the grant of a common law lease because of an expansion of the Crown's radical title or because of inconsistency between the interest granted and the continued enjoyment of native title? In this context, the author has argued that the rationales underlying the individual judgments in *Wik* indicate how the justices might resolve the legal implications, for the Crown's title, of the statutory grant of interests in land other than pastoral leases, including the grant of a true common law lease. Indeed, the author has shown that (i) the grant by the Crown of a common law lease relying upon its radical title does not result in an expansion of radical title to a beneficial title and (ii) there is judicial support for the proposition that, at common law, the grant of an exclusive possession lease does not effect an extinguishment of native title but merely suspends it for the duration of the grant: see U Secher, 'A Common Law Doctrine of Suspension of Native Title? Judicial Interpretations of the "Reversion Expectant Argument" and the concept of "Operational Inconsistency": Part 1' (2005) 12(3) *APLJ* 1 and 'A Common Law Doctrine of Suspension of Native Title? Judicial Interpretations of the "Reversion Expectant Argument" and the concept of "Operational Inconsistency": Part 2' (2005) 12(3) *APLJ* 26.

198 That is, the majority of the High Court in both *Western Australia v Ward* (2002) 213 CLR 1; 191 ALR 1 and *Wilson v Anderson* (2002) 213 CLR 401; 190 ALR 313 resolved the issues before them by reference to the NTA rather than the common law. Indeed, the majority of the *Wilson* High Court emphasised that the 'common law' test of extinguishment is 'exemplified in *Wik*': at [47].

199 For the pre-*Mabo* and post-*Mabo* legal position in this context see Part 1, text accompanying nn 180ff and Part 2, text accompanying nn 116ff respectively. See also Secher, above n 3, Ch 1, pp 33–40 and Ch 3, pp 137–59 respectively.

system of law applicable upon settlement. The High Court did not, however, re-classify Australia as 'conquered' or 'ceded' rather than 'settled'. That is, by proceeding within a framework of general principles of municipal law, the court rejected the legal doctrine classifying inhabited land as uninhabited in its application to questions of property at common law, but not in its application to the establishment of English sovereignty in international law.<sup>200</sup> Nevertheless, and the crucial point is that, although the High Court accepted that Australia was a settled territory, six justices changed the law that applies to a colony acquired by settlement where the colony was not previously uninhabited.

Under the common law pre-*Mabo*, the necessary result of the categorisation of a colony as settled (whether uninhabited in fact or 'legally uninhabited') was that English law, including the feudal doctrine of tenure, applied *ipso jure* throughout the colony. However, by ascribing to Australia the status of a new colony, a settled yet inhabited colony, the *Mabo* High Court was free to prescribe (and indeed had to prescribe because there was no law on point) a doctrine relating to the law that applied in the colony: that is, a modified doctrine of reception.

The application of the new doctrine of reception to Australia meant that, like other settled territories, the common law of England applied as far as applicable;<sup>201</sup> but unlike other settlements, English common law principles relating to *land* did not immediately apply. In particular, rather than acquiring absolute beneficial ownership of 'every square inch of land',<sup>202</sup> the Crown acquired only a radical title to all land. Rejection of the conventional approach undermined the dual feudal fiction which is fundamental to the English doctrine of tenure.

Indeed, it was the rejection of the fiction of original Crown ownership of all land that facilitated the High Court's redefinition of the foundational doctrine of tenure, which would otherwise have applied as universally as it does in England.<sup>203</sup> As a result of the Australian version of the doctrine of tenure, with radical title as its postulate, common law recognition of rights in land created

200 See text accompanying nn 127ff above.

201 *Blankard v Galdy* (1693) Holt KB 341; PC Memorandum (1722) 2 P Wms 75; *R v Vaughan* (1769) 4 Burr 2494 at 2500; *Forbes v Cochrane* (1824) 2 B & C 448 at 463; *Kielley v Carson* (1843) 4 Moo PC 63 at 84–5; *The Lauderdale Peerage* (1885) 10 App Cas 692 at 744–5; *Cooper v Stuart* (1889) 14 App Cas 286 at 291–2. The situation that English law accompanied the colonists to the extent that it was applicable to local circumstances in settled territories, had the result that, apart from statute, the Crown had no legislative authority: *Jennings v Hunt* (1820) 1 Nfld LR 220 at 225; affd sub nom *Hunt v Jennings* (1827) PC, no reasons: see Privy Council, 'Printed Cases in Indian and Colonial Appeals Heard in 1827', 333 at 362; G S Lester, 'Primitivism versus Civilisation' in C Brice-Bennett (Ed), *Our Footprints are Everywhere*, 351 at 371 n 77 cited by McNeil, *Common Law Aboriginal Title*, above n 1, p 115 n 27; *Kielley v Carson* (1843) 4 Moo PC 63 at 84; *Sammut v Strickland* [1938] AC 678 at 701; H V Evatt, 'The Legal Foundations of New South Wales' (1938) 11 ALJ 409 at 421–2. Thus, although the Crown had power to establish courts of justice and constitute a representative assembly, the British Settlements Acts (6 & 7 Vict, c 13; 23 and 24 Vict, c 121; 50 & 51 Vict, c 54, amended 9 Geo VI, c 7) were passed to give the Crown legislative authority over settlements not within British legislative jurisdiction: *Sabally & N'Jie v Attorney-General* [1964] 3 WLR 732 at 744–5.

202 *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141 at 245 per Blackburn J; [1972-73] ALR 65.

203 See Part I, text accompanying nn 104ff.

outside the doctrine of tenure is possible. This is because the ‘postulate of the doctrine of tenure’ limb of radical title ensures that the common law regime governing the Australian doctrine of tenure is only brought into play when the Crown grants an interest in land.<sup>204</sup>

Thus, the doctrine of tenure has a limited role in Australian land law. Title to land is no longer exclusively derivative; all titles to land can no longer, theoretically, be traced back to a Crown grant. Only when the Crown *exercises* its power to grant an estate in land is such land brought within the tenurial regime. This is crucial and represents the essential point of divergence between the Australian and English versions of the doctrine of tenure. Contrary to the position in England, under the Australian doctrine of tenure the two-fold feudal fiction of original Crown ownership of all land and original Crown grant no longer applies.<sup>205</sup> The fiction of original Crown grant has been rendered otiose and the fiction of original Crown ownership is no longer of universal application, having been replaced with the ‘fiction of original Crown ownership of land which has actually been granted by the Crown’.<sup>206</sup> By substituting the ‘feudal fiction’ with the more limited ‘mere radical title fiction’, regardless of the demographics of a territory, the Crown’s initial rights over land in Australia are no longer as fictional as under feudal theory.

Nevertheless, when the Crown has in fact exercised its sovereign power to grant an interest in land, radical title allows the surviving, albeit no longer ubiquitous, fictional explanation of the doctrine of tenure, that the Crown originally owned all land, to apply to ensure the Crown of its feudal rights. In this way, radical title as the postulate of the doctrine of tenure enables the Crown to become Paramount Lord of all who hold a tenure granted by the Crown. Under the Australian doctrine of tenure, however, the fiction of original Crown ownership is excluded in respect of land which has not been the subject of an appropriate Crown grant (unalienated land, even if unoccupied at settlement).<sup>207</sup> Indeed, even if this fiction is excluded only in respect of land which is both subject to pre-existing native title and which has not been brought within the doctrine (unalienated and occupied land), the effect of the fiction in the context of unalienated and unoccupied land is not to give the Crown title to land.<sup>208</sup> The fictional explanation merely justifies the feudal concept of Paramount Lordship.<sup>209</sup>

204 To borrow Brennan J’s words: it enables the common law regime governing the Australian doctrine of tenure to apply ‘to every Crown grant of an interest in land, but not to rights and interests which do not owe their existence to a Crown grant’: *Mabo*, above n 6, at CLR 48–9 per Brennan J.

205 The two-fold fiction accompanying the English (feudal) doctrine of tenure is discussed in Part 1, text accompanying nn 104ff. See also Secher, above n 3, Ch 1, esp pp 22–6.

206 See text immediately following n 23 above.

207 The fiction also no longer applies in *toto* where land has been brought within the doctrine of tenure but the particular Crown dealing with the land is ineffectual to confer absolute beneficial ownership of the land on the Crown or a particular Crown grantee (eg, the grant of a pastoral lease): see text accompanying n 189 above and Secher, above n 3, Ch 4.

208 This proposition is fully explored by Secher, above n 3, Ch 4, Part 2.

209 It was noted in Part 1, however, that the only two incidents of socage tenure that have been of any practical importance in Australia, a rental payment in the form of a ‘quit rent’ reserved to the Crown in early Crown grants and escheat, have been abolished by statute: see

In this context, the *Wik* High Court has made it clear that even when previously unalienated land is brought within the regime governed by the doctrine of tenure by the Crown grant of a pastoral lease, the effect of the fiction of original Crown ownership is not to confer a beneficial reversionary interest. That is, the Crown's well established right of reversion on the grant of a lease does not confer a beneficial title where the Crown did not have a beneficial title before the grant. Thus, as Edgeworth has suggested, the Australian doctrine of tenure 'can be seen to have more in common with allodial systems where citizens . . . receive out-and-out transfers of land'.<sup>210</sup>

The High Court's restatement of the common law of Australia also makes it clear that, in the case of unalienated land in respect of which pre-existing native title exists, the Crown must exercise its sovereign power before its underlying radical title converts to full beneficial ownership (the Crown must acquire a plenary title to unalienated and occupied land by appropriating to itself ownership of the land). Thus, in contradistinction to the Crown's feudal title, which is a denial of the distinction between public and private law,<sup>211</sup> the Crown's radical title recognises the distinction between questions of sovereignty and land law but 'operates as a linking concept between the . . . public law notion of sovereignty on the one hand, and the private law of proprietary rights on the other'.<sup>212</sup>

The legal principles are clear, therefore, in respect of the presence of the Crown's Paramount Lordship over land which has been brought within the doctrine of tenure (alienated land) and the absence of the Crown's Paramount Lordship over land which has not been brought within the doctrine of tenure and which is subject to pre-existing native title (unalienated land subject to native title). The legal principles are also clear in respect of the Crown's beneficial ownership of land which has been subject to pre-existing native title where the Crown has effectively exercised its sovereign power to appropriate the land to itself (alienated land subject to native title).

These principles, however, leave a crucial issue unresolved:<sup>213</sup> what are the Crown's rights in relation to land which has neither been brought within the doctrine of tenure by the Crown grant of an interest in the land nor appropriated to the Crown such that the Crown has acquired a plenary title to the land, where the land is not subject to pre-existing native title (unalienated

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above n 175. In any event, the Crown's well established prerogatives to escheat, reversion and forfeiture do not confer automatic title on the Crown: see Secher, above n 3, Chs 4 (pp 209–11) and 7 (pp 425–9).

210 Edgeworth, above n 79, p 419.

211 F Pollock and F W Maitland, *1 The History of English Law Before the Time of Edward I*, 2nd ed, Cambridge University Press, Cambridge, 1968, pp 230–1.

212 Edgeworth, above n 79, p 415.

213 These principles are only entirely clear where the Crown has validly alienated land by granting an interest that is wholly inconsistent with the continuing right to enjoy native title or where the Crown has validly appropriated land to itself and the appropriation is wholly inconsistent with a continuing right to enjoy native title. Where the Crown alienates land by granting an interest that is partially inconsistent with a continuing right to enjoy native title, and where the Crown has validly appropriated land to itself and the appropriation is partially inconsistent with a continuing right to enjoy native title, the issue of extinguishment (and thus, where beneficial ownership lies) is more complicated: see Secher, above n 3, Ch 4, Part 2.

land not subject to native title)? In other words: what is the effect of the High Court's restatement of the common law on the legal status of land in respect of which the Crown does not have Paramount Lordship and which is not subject to native title?

Although there is High Court obiter suggesting that unalienated and unoccupied land belongs to the Crown because there is 'no other proprietor',<sup>214</sup> the High Court has not had the opportunity to authoritatively determine this issue. Indeed, by suggesting, in *Mabo*, that the Crown must be the absolute beneficial owner of unoccupied and unalienated lands because there is 'no other proprietor', Brennan J, with whom Mason CJ and McHugh JJ concurred, recognised that not all unalienated land in Australia is subject to native title. The land is unoccupied because *neither* the Crown nor Aboriginal people (in their capacity as 'native title' holders) occupy it.<sup>215</sup> Indeed, although unalienated land is capable of supporting a native title application, native title is not an institution of the common law. If, however, there is a legal explanation to the question of property rights in unalienated land that is not subject to enforceable native title, there is no need to resort to a new legal fiction: the 'no other proprietor' fiction.

Indeed, since it is clear that the Australian doctrine of tenure is only brought into play when the Crown grants an interest in land, the critical question is: what law applies to the land prior to this? The Crown no longer necessarily represents the only source of title to land. Although radical title as the postulate of the Australian doctrine of tenure secures the Crown as one source of derivative title to land (when the Crown has alienated land), it does not preclude the existence of other interests in land which do not owe their existence to a Crown grant. It has been seen that although, pre-*Mabo*, acquisition of title by occupancy was severely restricted by the fiction that all lands were originally possessed, and accordingly, owned, by the Crown,<sup>216</sup> since *Mabo*, this fiction only applies in respect of a tenure created by Crown grant.<sup>217</sup> Accordingly, the fiction of original Crown ownership can no longer, of itself, exclude acquisition of first title to unalienated and uninhabited real property in Australia. There is, therefore, the potential to accommodate sources of title in addition to Crown grant or native title within Australian land law post-*Mabo*. Thus, while native title is currently the only non-Crown derived title recognised by Australian courts which may burden the Crown's radical title, the Australian doctrine of tenure has significant implications for Aboriginal people occupying unalienated land in circumstances where the occupation does not satisfy the definition of native title.<sup>218</sup>

Moreover, it has been seen that the feudal theory that all lands are held mediately or immediately of the Crown was always tempered by a number of antithetical factors: in addition to the possible acquisition of title by virtue of occupancy of a vacant *pur autre vie* estate, was the existence of allodial land

214 This basis for attributing absolute beneficial ownership on the Crown is further examined by Secher, above n 3, Ch 4.

215 See above n 100.

216 See McNeil, *Common Law Aboriginal Title*, above n 1, p 11 and authorities cited above n 19. See also comments by Stephen CJ in *Hatfield v Alford* (1846) 1 Legge 330 at 337.

217 See text accompanying n 23 above.

218 See above n 108.

and the acquisition of land rights by adverse possession and by virtue of customary law predating the tenorial scheme.<sup>219</sup> The crucial point is that these 'exceptions' to strict feudal theory can now be accommodated within Australian land law as redefined by the High Court and, therefore, provide a common law basis for rights as against the Crown to unalienated land occupied by Aboriginal people.

Indeed, because the fiction of original Crown grant is no longer relevant in the Australian context, does this mean that titles previously acquired pursuant to grants which were deemed in law to have been made under the feudal doctrine of tenure and, therefore, regarded as 'exceptions' to the doctrine of tenure as there was no actual alienation by the Crown, now have a legal explanation, including allodial landholding and the recognition of customary law pre-dating the tenorial scheme?<sup>220</sup> Alternatively, does English law relating to pre-feudal landholding apply; that is, the law relating to folkland, an allodial system of customary landholding?<sup>221</sup> In either case, the Australian doctrine of tenure can accommodate Aboriginal customary law as an independent source of non-derivative *common law* title to land. That is, as a result of the High Court's restatement of Australian real property law, 'Aboriginal customary law title' can be a valid common law alternative to native title.

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219 See Part 1, text immediately following nn 126ff.

220 See Part 1, text accompanying nn 129 and 139.

221 See Part 1, text immediately following nn 16ff.