



Articles

The legal nature of the Crown's title on the grant of a common law lease post-*Mabo*: Implications of the High Court's treatment of the 'reversion expectant' argument — Part 1

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*It is trite law that, upon the grant of a pastoral lease which is indistinguishable from the pastoral leases examined in **Wik**, the Crown does not acquire a beneficial reversionary interest, with the result that the underlying title of the Crown continues to be mere radical title. This does not, however, resolve the legal position with respect to other leases: in particular, the **Wik** High Court made it clear that the pastoral leases in question were not leases in the common law sense. This two-part article, therefore, examines the legal implications of the High Court's treatment of the reversion expectant argument for common law leases. Although the High Court's decision in **Ward** has confirmed that, as a result of the Native Title Act 1993 (Cth), the grant of such leases extinguish native title, does this necessarily mean that any residuary rights to the land in respect of which the lease was granted automatically lie with the Crown? Part I begins by examining whether, on general principles, the High Court's identification of radical title as both a postulate of the doctrine of tenure and a concomitant of sovereignty support or undermine Brennan J's reversion expectant dictum. The relevance of traditional English interpretations in determining the meaning of radical title and reversion expectant, in light of Brennan J's dictum, is also analysed.*

*In Part II it will be seen that the rationales underlying the majority judgments in **Wik** indicate how 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, might be resolved. The question examined in Part II is twofold: does the Crown grant of a common law lease based upon its radical title mean that the Crown acquires the reversion expectant on the expiry of the term? And, if it does, is such reversion expectant sufficient to convert the Crown's radical title into beneficial ownership of the land? Put another way, is the traditional common law definition of 'reversion' relevant when a lease is granted out of land in respect of which the Crown has mere radical title? Further light is thrown on this question by examining the common law doctrine of extinguishment by freehold grant and the common law concepts of partial extinguishment and suspension.*

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Introduction

One of the main legal arguments in *Wik Peoples and Thayorre People v Queensland*¹ was based on Brennan J's 'reversion expectant' theory espoused in *Mabo v State of Queensland (No 2)*:² namely, whether the grant of a pastoral lease over land subject to native title changed the underlying title of the Crown by creating a reversion expectant, thereby converting the Crown's underlying title from mere radical title to full beneficial title, such that upon expiry of the term of the pastoral lease, full beneficial ownership would revert to the Crown. It is trite law that the majority of the *Wik* High Court rejected this argument; 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.³

Nevertheless, the majority in *Wik* also made it clear that the rights of the grantee of a pastoral leasehold estate could be inconsistent with the continued enjoyment of native title and, to the extent of the inconsistency, the native title interest must yield. Thus, although a reversion expectant did not apply to confer beneficial ownership upon the Crown in respect of the pastoral leases, any native title in respect of the relevant land might be extinguished on the ground of inconsistency with the grantee's title. This conclusion did not, however, resolve the legal position with respect to other leases: in particular, the *Wik* High Court made it clear that the pastoral leases in question were not leases in the common law sense.

What are the implications, therefore, of the High Court's treatment of the reversion expectant argument for common law leases? To date, there is no authoritative decision on the issue from the High Court. Indeed, although the majority of the High Court in *Western Australia v Ward*⁴ 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 Native Title Act 1993 (Cth) (NTA), rather than on an expansion of the Crown's radical title at common law. Furthermore, in *Fejo v Northern Territory*,⁵ although reference was made in argument to the reversion expectant theory, this theory was not

1 (1996) 187 CLR 1; 141 ALR 129 (*Wik*).

2 (1992) 175 CLR 1; 107 ALR 1; 66 ALJR 408 (*Mabo*). In *Mabo*, 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 that (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 CLR 49. In *Wik*, above n 1, Brennan CJ, as author of the minority judgment, reiterated these comments (at CLR 154). For a detailed discussion of the 'reversion expectant' theory, see 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, Part 2 of Ch 4.

3 *Wik*, above n 1, 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 is examined by the author: Secher, above n 2, Ch 4.

4 (2002) 213 CLR 1; 191 ALR 1 (*Ward*).

5 (1998) 195 CLR 96; 156 ALR 721; 72 ALJR 1442 (*Fejo*). In that case, the subject land included land in respect of which the Northern Territory had granted Crown leases containing a condition that permitted the lessee, on completion of development in

addressed by the court, as the question in that case concerned an earlier grant in fee simple, not the later lease of the land. Thus, the High Court did not have to consider whether the Crown's title became a *plenum dominium* upon the lease coming to an end.⁶

This two-part article, therefore, examines the legal implications for the Crown's title of granting a true common law lease? Although it is clear that, as a result of the NTA,⁷ the grant of such leases extinguish native title, does this necessarily mean that 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? It will be seen, in Part II, 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 question examined in Part II is twofold: does the Crown grant of a common law lease (whether pursuant to statute or at common law) based upon its radical title⁸ mean that the Crown acquires the reversion expectant on the expiry of the term? And, if it does, is such reversion expectant sufficient to convert the Crown's radical title into beneficial ownership of the land? Put another way, is the traditional common law definition of 'reversion' relevant when a lease is granted out of land in respect of which the Crown has mere radical title? Does the grant by the Crown of a common law lease relying upon its radical title confer beneficial title to the leased land or does it merely confer a nominal proprietary interest sufficient to support the lease? Moreover, since all powers of alienation of interests in land in Australia are now governed by statute,⁹ the critical question becomes: what is the role, if any, of the concept of reversion expectant in the context of a grant by the Crown made pursuant to statute?

accordance with the terms of the lease, and payment of any sum owing to the Territory, to surrender the lease in exchange for a freehold title at no further cost.

6 *Fejo*, *ibid*, at [55]: '... there is no question of the Crown becoming entitled to both ownership and possession of the land upon the lease coming to an end. ... The questions about leasehold interests that were considered in [*Wik*] do not arise'.

7 Under Div 2B of Pt 2 of the NTA, a 'previous exclusive possession act' attributable to the Commonwealth or a State or Territory is confirmed as extinguishing native title totally: ss 23C and 23E. In determining what grants constitute a previous exclusive possession act, the legislature adopted a two-fold approach. First, the NTA provides that certain general types of grants have extinguished native title: ss 23B(2)(c)(ii)–(viii), ss 23B(3) and (7). In this context, the NTA lists any lease that confers a right of exclusive possession as a previous exclusive possession act: s 23B(2)(c)(viii). Secondly, a Schedule to the NTA contains certain specific types of grants which the relevant governments considered, on the basis of the common law, had conferred exclusive possession and had therefore extinguished native title: ss 23B(2)(c)(i), 249C and Sch 1. The Schedule primarily contains reference to residential, commercial, community purpose and agricultural leases. It includes leases granted under State or Territory law since as early as 1829. See also corresponding State and Territory legislation.

8 That is, in respect of land not part of the Crown's demesne.

9 *Cudgen Rutile (No 2) Pty Ltd v Chalk* [1975] AC 520 at 533; 4 ALR 438; *Wik*, above n 1, at CLR 91 per Brennan CJ; 189 per Gummow J.

Answering these questions involves a consideration of the implications, for the Crown's title on the grant of a common law lease, of the High Court's treatment in *Wik* of the reversion expectant theory and Brennan CJ's further suggestion in *Wik* that the grant of any estate in land necessarily confers full beneficial ownership on the Crown. It also involves an examination of how the subsequent decisions of *Western Australia v Ward*¹⁰ and *Wilson v Anderson*¹¹ have interpreted *Wik* and applied the propositions from *Wik* to common law leases and leases granted in perpetuity respectively. The fundamental questions in these later cases were framed in terms similar to those considered in *Wik* and consequently focused on whether the leases conferred a right of exclusive possession and, if they did, whether native title rights were extinguished or suspended. Inherent in the examination of these later cases, therefore, is a consideration of the common law doctrine of extinguishment by Crown grant. In particular, it will be seen that the common law concepts of partial extinguishment and suspension and the test for extinguishment by freehold grant suggest that upon the grant of any estate (including a common law leasehold estate), the Crown does not acquire a beneficial reversionary interest.

Before examining these specific issues, however, Part I begins by examining whether, on general principles, the High Court's identification of radical title as both a postulate of the doctrine of tenure and a concomitant of sovereignty support or undermine Brennan J's reversion expectant dictum. Since all members of the *Wik* High Court discussed Brennan J's dictum and, in doing so, reviewed the relevance of traditional English interpretations in determining the meaning of radical title and reversion expectant, Part I also analyses this aspect of the *Wik* decision.

Part 1: Common law implications of the 'reversion expectant' argument: General principles

A The two limbs of radical title:

1 Radical title as the postulate of the doctrine of tenure: a bare legal title

Although Brennan J's reversion expectant dictum has been interpreted to suggest that the grant of a common law lease extinguishes native title, it in fact refers to the Crown's title, on becoming a plenum dominium, as having the extinguishing effect.¹² Accordingly, it is not the title acquired by the lessee which affects native title. The majority of the High Court in *Wik* have, however, made it clear that, although the Crown's radical title does not expand into full beneficial ownership upon the statutory grant of a pastoral leasehold estate, the rights of the grantee of such a leasehold estate can nevertheless be

10 At trial and appellate levels: (1998) 159 ALR 483 (trial); (2000) 99 FCR 316; 170 ALR 159 (FC); (2002) 213 CLR 1; 191 ALR 1 (HC).

11 At trial and appellate levels (1999) 156 FLR 77 (trial); (2000) 97 FCR 453; 171 ALR 705 (FC); (2002) 213 CLR 401; 190 ALR 313 (HC).

12 See *North Ganalanja Aboriginal Corp v Queensland* (1995) 61 FCR 1 at 29; 132 ALR 565 at 591. See also *Gurubana-Gunggandji People Determination* (1995) 123 FLR 462 at 475–6 and R H Bartlett, *Native Title in Australia*, Butterworths, Sydney, 2000, p 269.

inconsistent with the continued enjoyment of native title and, to the extent of the inconsistency, the native title interest must yield. Significantly, however, it will be seen that the majority judges in *Wik* were split 2:2 on the question of whether the Crown actually acquired a reversionary interest upon the grant of a pastoral lease.¹³

Nevertheless, the majority's conclusion that radical title did not confer a beneficial reversionary interest is consistent with the fundamental common law role, as declared by the majority of the *Mabo* High Court,¹⁴ of radical title as the postulate of the Australian doctrine of tenure. The *Mabo* High Court made it clear that the practical effect of radical title being vested in the Crown is to enable the system of private ownership of estates held of the Crown to be observed.¹⁵ The system of private ownership of estates held of the Crown, however, rests not only on the doctrine of tenure but also on the doctrine of estates.¹⁶ As a legal concept, the doctrine of estates explains the interests of those who hold from the Crown, not the title of the Crown itself.¹⁷ Accordingly, the rights conferred on a grantee by a particular estate may be inconsistent with native title notwithstanding that the Crown does not have, and never had, any beneficial title to the granted land.

That is, although the Crown's radical title does not confer a beneficial title on the Crown in respect of land subject to native title, it does allow derivative title to pass to the grantee. In this way, the rights that a particular estate confers on a Crown grantee may be inconsistent with the continuance of any native title rights and, to the extent of the inconsistency, extinguish the native title rights. Thus, native title is extinguished as a result of the operation of the doctrine of estates, not the doctrine of tenure. Put another way, native title is extinguished by the real title of the grantee, not the fictional title of the Crown. Significantly, this conclusion is consistent with the decision in *Mabo*: since the essence of that decision lies in saying that the Crown's fictional title cannot preclude the existence of native title, it logically follows that such fictional title cannot, of itself, extinguish native title.

Accordingly, Brennan J's 'reversion expectant' dictum contradicts his own, as well as the rest of the *Mabo* High Court's, explanation of the legal origins and purpose of radical title.¹⁸ According to Brennan J's analysis, the effect of radical title as a postulate of the doctrine of tenure is to give the Crown a paramount lordship over all who hold a tenure granted by the Crown. The effect of radical title as a concomitant of sovereignty is twofold: first, it enables the Crown, in exercise of its sovereign power, to grant an interest in land to be held of the Crown and, secondly, it enables the Crown to acquire

13 See section on 'Wik, Radical Title and the Reversion Expectant': text immediately following n 45 below.

14 See generally Secher, above n 2, Ch 3.

15 Ibid: Ch 3, esp p 135.

16 Brennan CJ has described these two doctrines as the 'interlocking doctrines of tenure and estates': *Wik*, above n 1, at CLR 90.

17 See *Wik*, above n 1, at CLR 128 per Toohey J.

18 See Secher, above n 2, pp 202–3. It will also be seen that Brennan J's dictum contradicts his own views on the common law doctrine of extinguishment of native title by Crown grant: see section on 'Extinguishment of Native Title by Crown grant', text commencing immediately before n 130 below.

land for the Crown's demesne.¹⁹ The Crown's paramount lordship, therefore, constitutes the feudal aspect of radical title, whereas the Crown's general power of alienation constitutes the sovereignty aspect of radical title. Importantly, it is the sovereignty aspect of radical title that links the two limbs: as a concomitant of sovereignty, the Crown's radical title confers power to grant land in every part of Australia, including land subject to interests not deriving from Crown grant. In this way, radical title as a postulate of the doctrine of tenure has the potential to give the Crown a paramount lordship over all land.

Indeed, it was in order to assure the Crown the rights attached to its paramount lordship that the dual fiction that the Crown was originally in possession, and therefore owner, of all land and that all titles to land were derived from Crown grant, was invented.²⁰ Accordingly, the doctrine of tenure is concerned primarily with feudal relations. In the context of the postulate of the doctrine of tenure limb of radical title, the fiction of original Crown ownership was invented to explain how the feudal relationship arose. That is the fiction's purpose. Indeed, all members of the *Mabo* High Court recognised that the purpose of radical title was to enable the doctrine of tenure to apply in Australia.²¹ The extent of radical title as a postulate of the doctrine of tenure should, therefore, be limited to the minimum necessary to support the doctrine of tenure. The effect of the doctrine is to create a tenurial relationship between the Crown and the grantee; where there is no grant by the Crown, no feudal relations exist. Thus, the Crown's radical title cannot be used to claim its rights as paramount lord over land in respect of which the Crown has not exercised its sovereign power to grant an interest in land.

Similarly, in the context of the concomitant of sovereignty limb of radical title, although the Crown's general power of alienation supports the plenary title of the Crown, such a result is only possible 'when the Crown has exercised its sovereign power to appropriate to itself ownership of parcels of land within the Crown's territory'.²² Thus, this limb cannot be used to claim land in respect of which the Crown has not exercised its sovereign power in this way.

Pre-*Mabo*, of course, it is clear that, as a result of the universality of the fiction of original Crown ownership, the law was able to justify the Crown's feudal claim to a paramount lordship over all lands by deeming all holdings by subjects to be derived from royal grants. Nevertheless, the effect of the feudal fiction was simply to give the Crown its rights as feudal lord. Although all land was deemed to be held of the Crown, feudal theory never adopted the

¹⁹ *Mabo*, above n 2, at CLR 48 per Brennan J. In the case of land subject to native title, the right to acquire property rights takes the form of an exclusive right of pre-emption: see Secher, above n 2, Ch 2, p 96; Ch 3, pp 170–1.

²⁰ At common law, if the King was not in possession, he could not grant the land. At best he had a right to acquire possession of it, assuming he had such a right, and then only expressly: *Winchester's Case* (1583) 3 Co R 1a at 4b–5a. This issue is explored further by the author: Secher, above n 2, Ch 7.

²¹ *Mabo*, above n 2, at CLR 48 per Brennan CJ; 212 per Toohey J; 80 per Deane and Gaudron JJ.

²² *Mabo*, above n 2, at CLR 50 per Brennan J.

theory that the Crown 'owned' all the land.²³ The Crown was seised of the land, not in demesne but in service; that is, the seisin of the Crown was in law rather than in deed. This sort of seisin was also attributed to a reversioner, who was in reality a lord with a tenant below him.²⁴

Indeed, seisin in law, being a mere technical seisin, has never been sufficient, without more, to vest possession in and thus confer beneficial ownership on the Crown.²⁵ Crucially, however, in the context of leases, an estate in reversion does automatically vest in possession as soon as the term of the lease expires.²⁶ For present purposes, therefore, the question that needs to be addressed is whether the grant by the Crown of a common law lease relying upon its radical title requires the creation of a reversion and, if it does, whether the reversion, when ultimately vested in possession, confers a beneficial title. It will be seen that the answer to the question differs according to whether it is resolved in the context of the pre-*Mabo* feudal doctrine of tenure or the post-*Mabo* redefined doctrine of tenure.

It is clear that once the Crown has exercised its sovereign power, at common law, to grant an interest in land not part of its own demesne, the land is brought within the regime governed by the doctrine of tenure and the fiction of original Crown ownership is invoked. Consequently, when the Crown grants a leasehold estate out of land in respect of which the Crown has mere radical title (that is, before the Crown has acquired an actual title to the land), the common law vests a reversionary interest in the Crown in order to support and enforce the relationship of landlord and tenant. Although this reversionary interest will be supplied by virtue of the application of the fiction of original Crown ownership, the fiction is only invoked to achieve the intended grant, it does not apply to confer title on the Crown.²⁷

When the Crown's radical title is merely a right of reversion,²⁸ it has merely a right to acquire or regrant title when the grantee's estate comes to an end.²⁹ That is, although the Crown effectively loses its radical title for the duration

23 A W B Simpson, *A History of the Land Law*, Clarendon Press, Oxford, 1986, pp 1, 47.

24 F Pollock and F W Maitland, 2 *The History of English Law Before the Time of Edward I*, 2nd ed, Cambridge University Press, Cambridge, 1968, p 39.

25 See Secher, above n 2, Ch 7, pp 426–9.

26 K E Digby, *An Introduction to the History of the Law of Real Property*, Clarendon Press, Oxford, 1875, p 186. See also Secher, above n 2, Ch 7, text accompanying n 147.

27 See Secher, above n 2, Ch 3, text accompanying n 308; see also Ch 1, p 25. While this was strictly also the position under feudal theory, where the Crown granted a lease over unalienated land pre-*Mabo*, the fiction of original Crown ownership was deemed to confer a full beneficial reversionary interest: see text in paragraph immediately before n 37 below.

28 When land has been granted to a subject, the Crown's radical title is merely a right of reversion or a right to acquire title in accordance with its well established prerogative rights to escheat, *bona vacantia* and forfeiture. These rights are part of the sovereign's *jura regalia* and fall to the Crown as part of his prerogative title: *Attorney-General of Ontario v Mercer* (1883) 8 App Cas 768 at 778 (PC). This concept is further examined by Secher, above n 2, Ch 7, pp 425–9.

29 On the question of the Crown's title where land escheats to the Crown, see W Blackstone, 2 *Commentaries on the Laws of England: Of the Rights of Things*, The University of Chicago Press, Chicago, 1979, p 245; Secher, above n 2, Ch 7, pp 425–30. Cf K McNeil, *Common Law Aboriginal Title*, Clarendon Press, Oxford, 1989, p 218, Ch 3, n 60 and accompanying text to the effect that the doctrine of tenure can result in an actual title where land escheats to the Crown.

of the grant (but retains its power of eminent domain),³⁰ it has a right to acquire or regrant title when the grant determines. This right to acquire or regrant title does not, however, mean that the Crown is seised in demesne: indeed, since the reversion expectant is vested in interest, the right to possession, seisin in demesne, arises in the future.³¹ Furthermore, although the fiction of original Crown ownership supports the reversionary interest at common law, once the term of the lease expires, the fiction is spent. Thus, the Crown's fictional reversionary interest does not automatically vest in possession.³² Rather, once the grant determines, the nature of the Crown's title returns to its essential character before the fiction of original Crown ownership applied; the Crown's right which returns to it does not lose its essential character: it has always been dominium minus plenum or *nuda proprietas*.³³ It is, therefore, the Crown's radical title that automatically vests in possession. Indeed, this is simply another way of saying that unless the Crown's possession and title are original, the Crown only has possession because it has title.³⁴

Thus, for the Crown to acquire a plenary title upon the expiration of the lease (that is, for a beneficial interest to vest in possession) there must be an appropriate exercise of sovereign power. Although the rights that a particular lease confers upon a lessee might be inconsistent with native title and, to that extent, extinguish it, this does not affect the proposition that radical title, without more, does not allow the Crown to assume ownership of any residuary rights to the land. Indeed, even in the case of escheat, the Crown's technical seisin had to be completed by entry in order for the Crown to acquire actual possession and thus title.³⁵ This required entry or, if the land was vacant, an office entitling the Crown to possession was sufficient without entry.³⁶ Under the doctrine of escheat, therefore, the Crown simply took back what it had

30 For a discussion of the Crown's eminent domain, see Secher, above n 2, Ch 5, pp 390–6.

31 See Secher, above n 2, Ch 7, pp 428–30.

32 In any event, the fiction of original Crown ownership never conferred title on the Crown: see above n 23. Nevertheless, as a result of the fiction of original Crown ownership applying and the grantee being in possession, the Crown arguably has a form of vicarious possession for the duration of the grant: see Secher, above n 2, Ch 7, p 425. Cf the situation where the Crown has acquired beneficial ownership of land before the grant of a leasehold estate. In such a case, the Crown's reversionary interest would, on the expiration of the lease, automatically vest in possession.

33 That is, the interest will 'come back': Pollock and Maitland, above n 24, p 21. It is worth noting that the grant of seisin determines whether an estate is held in possession, remainder or reversion, and leasehold estates were not recognised as affecting seisin under the feudal system of land tenure: *De Gray v Richardson* (1747) 3 Atk 469; 26 ER 1069 (Ch); *Wakefield and Barnsley Union Bank Ltd v Yates* [1916] 1 Ch 452 (CA). Although this is undoubtedly correct in theory, 'in practice "leases have long since achieved the status of estates, and therefore it is common and correct to speak of a landlord's reversion"': Megarry and Wade, *The Law of Real Property*, 5th ed, Stevens and Sons Ltd, London, 1984, p 237.

34 This concept is explored by Secher, above n 2, Ch 7.

35 See Secher, above n 2, Ch 7, pp 425–9.

36 As the right of forfeiture also requires the right of re-entry to be exercised (A J Bradbrook, S MacCallum and A P Moore, *Australian Real Property Law*, LBC Information Services, Sydney, 1997, at [12.54]–[12.57]; P Butt, *Land Law*, LBC Information Services, Sydney, 1996, pp 368ff) and is cited by Blackstone as an example of when an office of inquest was necessarily employed (Blackstone, above n 29, p 258: see also Secher, above n 2, Ch 7, text accompanying n 130), the same conclusion with respect to escheat would apply to forfeiture.

before the intervening, but now ceased, rights of the tenant: that is, its radical title; *a fortiori* the reversion expectant.

Thus, unless the Crown has full beneficial ownership of leased land immediately prior to the grant of the lease, the estate in reversion which the Crown acquires does not automatically confer beneficial ownership when the lease determines; the Crown's interest which vests in possession upon the expiration of the lease is the same interest which the Crown had immediately prior to the grant of the lease: radical title. Put another way, although an estate in reversion is vested in interest, it is nevertheless an existing interest.

Pre-*Mabo*, of course, irrespective of whether a leasehold estate was granted out of the Crown's demesne or out of land in respect of which it is now clear that the Crown had a mere radical title, conventional legal theory attributed a full beneficial reversionary interest to the Crown. That is, where necessary the fiction of original Crown ownership was deemed to confer a full beneficial reversionary interest. This result was, no doubt, because, pre-*Mabo*, the feudal doctrine of tenure did not distinguish between a lease granted out of the Crown's demesne land and a lease granted out of land in respect of which the Crown had mere radical title. Post-*Mabo*, however, the traditional common law definition of reversion, based on the assumption that sovereignty conferred absolute beneficial ownership of all land upon the Crown, is only relevant in the context of a leasehold estate granted out of land forming part of the Crown's demesne. Where the Crown grants a lease based upon its radical title, the fiction of original Crown ownership only supplies a nominal proprietary interest to support the lease granted for the duration of its term. That is, the meaning of reversion in this context is different from the traditional common law meaning: reversion means the resumption of radical title.

2 Radical title as a concomitant of sovereignty: No legal requirement for a reversion expectant to support a lease by the Crown³⁷

Although a private individual who carves out an estate (whether in a term of years or any other interest in land) must do so out of a larger estate and the larger must be sufficient to support the creation of the lesser, these limitations do not apply to the sovereign power exercising sovereignty. Thus, although a reversion expectant is implied by law when the holder of a freehold estate grants only part of that estate,³⁸ the Crown's radical title is sufficient to create

³⁷ There is another basis for denying any legal requirement for a reversion expectant to support a lease: namely, because a lease is a chattel interest. Leasehold tenure played no part in the scheme of tenures which existed at common law. Having developed relatively late, it stood outside the feudal system, and thus is both historically and legally separate: Megarry and Wade, above n 33, p 14 n 7. Cf J Williams, *Principles of the Law of Real Property*, Re-arranged and partly rewritten by T Cyprian Williams, 23rd ed, Sweet & Maxwell, London, 1920, p 364: 'So in the case of a lease for years, the lessee upon entry becomes tenant to the lessor, and the relation of the one to the other is also called a tenure; although . . . this relation was treated as lying outside the law of *free* tenure'. There is only one feudal tenure left today, namely socage, now called freehold. The one field in which the rules derived from tenure remain of practical importance is, however, paradoxically leasehold.

³⁸ It was assumed that a fee simple had been created: Blackstone, above n 29, p 175.

an interest for a term of years without requiring the creation of a reversion expectant. Indeed, the High Court has made it clear that, contrary to the pre-*Mabo* view, the exercise by the Crown of the right to grant tenure in land is not dependant upon the Crown's beneficial ownership of the land. Unless the Crown has more than mere radical title to the land, therefore, the Crown does not have, nor need, a freehold estate when a lease is created.³⁹ Since the Crown's radical title is an aspect of its sovereignty, it is sufficient to create an interest in land without requiring a beneficial interest in the land.

Thus, where the Crown does not enjoy beneficial ownership of land when a lease is created by the Crown, upon the expiration of the lease the land reverts to its previous legal status, land over which the Crown has a mere radical title, and the Crown once again has the capacity to grant interests in that land.⁴⁰ The Crown does not require a beneficial interest to create an interest and the creation of an interest which has subsequently expired does not alter that position. There is no legal requirement for a reversion expectant to support a Crown lease where the land leased was not, immediately before the lease was created, part of the Crown's demesne, and none is created.

3 Summary

While it appears that the two limbs of radical title contradict one another, at common law the two limbs are not mutually exclusive when land has been alienated: both limbs apply contemporaneously. Thus, although the postulate of the doctrine of tenure limb dictates that a reversion is created upon the grant of a leasehold estate, the concomitant of sovereignty limb dictates that such reversion merely confers a nominal proprietary interest sufficient to support the lease for its duration. Thus, the High Court's identification of radical title as both a postulate of the doctrine of tenure and a concomitant of sovereignty provides two legal bases for denying, on general principles, that the Crown acquires a beneficial reversionary interest upon the grant of any lease. By definition, therefore, the High Court's conception of radical title is inconsistent with Brennan J's 'reversion expectant' dictum.

Importantly, however, while radical title supported the Crown's sovereign powers at common law to grant interests in land to itself and others, these prerogatives have since been displaced by statutory powers.⁴¹ Accordingly, the legislative regimes for regulating the alienation of interests in Australian land now constitute a sufficient source of the same power. This is crucial because the consequences of radical title as a postulate of doctrine of tenure may be irrelevant to the grant of an interest pursuant to statute. Indeed, it will be seen that at least two members of the majority in *Wik* considered that where the grant of leases is regulated by statute, notions of the common law apt for

³⁹ Cf Blackstone, above n 29, pp 165–6.

⁴⁰ Indeed, for the duration of the grant the Crown retains the power to deal with the land pursuant to its right of eminent domain, another attribute of its sovereignty. The concept of eminent domain is examined by Secher, above n 2, Ch 5.

⁴¹ The provisions in the various State and Territory Crown Lands Acts take away the prerogative right of the Crown to grant land: *Attorney-General v Cochrane* (1970) 91 WN (NSW) 861 at 865 per Jacobs JA. See also Secher, above n 2, Ch 4, text accompanying n 295.

tenurial holdings under the Crown should not be introduced.⁴²

Thus, although it has been demonstrated, in the context of the postulate of the doctrine of tenure limb of radical title, that a reversion is a present interest which gives a future right to seisin and cannot, therefore, create a new and different interest in the reversioner, this conclusion may be otiose in the context of the statutory grant of a lease. Instead, the concomitant of sovereignty limb of radical title may dictate that the Crown can create an interest for a term of years without requiring the creation of a reversion expectant. This is crucial: while the new common law definition of reversion, in the context of the grant of a lease based upon radical title, as a nominal proprietary estate sufficient to support the lease granted, rejects feudal notions and thus embraces the less fictional role of the redefined doctrine of tenure in Australian land law,⁴³ the conclusion that no reversion is necessary to support the statutory grant of any lease by the Crown represents a rejection of the role of the redefined doctrine of tenure. Nevertheless, whether a reversion, consisting of a nominal proprietary estate, is created or no reversion is created, the result is the same: in either case, upon the expiration of a lease, the Crown's interest in the land does not lose its essential character; it continues to be a mere radical title.

Although this is the legal position based on general principles deduced from the High Court's identification of the two limbs of radical title, it will be instructive to examine how the High Court in *Wik* specifically dealt with Brennan J's reversion expectant dictum and his further suggestion (as Chief Justice and author of the minority judgment in *Wik*) that the grant of any estate in land necessarily confers full beneficial ownership on the Crown. Indeed, it will be seen that notwithstanding the High Court's subsequent decision in *Western Australia v Ward*,⁴⁴ *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.⁴⁵

B *Wik*, radical title and the reversion expectant

The concept of radical title arose for reconsideration in *Wik* as a result of the court's examination of the consequences for native title of the expiration of a pastoral lease, namely, whether native title rights were thereby extinguished permanently or whether such rights were merely suspended.⁴⁶ One of the specific legal arguments in *Wik* was based on Brennan J's 'reversion expectant' theory espoused in *Mabo*. All members of the High Court, therefore, discussed Brennan J's dictum and, in doing so, reviewed the relevance of traditional English interpretations in determining the meaning of radical title and reversion expectant.

42 Gummow and Kirby JJ: see text accompanying nn 76–89; 90–96 below.

43 In particular, ensuring that the fiction of original Crown ownership does not operate to confer beneficial ownership on the Crown when it exercises the right to grant a leasehold estate based upon its radical title.

44 Above n 4.

45 That is, the majority of the High Court in both *Ward*, above n 4 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].

46 N Bhuta, 'Mabo, Wik and the Art of Paradigm Management' (1998) 22 *MULR* 24 at 33.

1 Majority judgments

(a) *Toohey J*

Toohey J approved of Brennan J's explanation, in *Mabo*, of the content of radical title as being a bare nominal title only; essentially a power of alienation. In support of this approach, Toohey J cited with approval the following passage by Brennan J in *Mabo*:

Recognition of radical title of the Crown is quite consistent with recognition of radical title to land, for the 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 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).⁴⁷

Consequently, Toohey J found it difficult to accept the argument based upon Brennan J's 'reversion expectant' dictum. To support his decision to reject this aspect of Brennan J's approach, Toohey J referred to both limbs of radical title. In the context of the concomitant of sovereignty limb, Toohey J declared that although it was clear from the judgments in *Mabo* that the attribution of radical title to the Crown was a necessary concomitant of its sovereignty over Australia and thus empowered the Crown to grant interests in land,⁴⁸ 'radical title does not of itself carry beneficial ownership'.⁴⁹ Accordingly, the grant of an estate in land does not require the Crown to assume beneficial ownership of the land. Nor was such a result dictated by the relevant legislation.⁵⁰ Thus, although the radical title lies with the Crown immediately before the grant of a pastoral lease, Toohey J questioned the relevance of speaking of the Crown acquiring the 'reversion' in such a case and of the Crown's title becoming a 'plenum dominium'.⁵¹

As a postulate of the doctrine of tenure, however, radical title enables the Crown to become Paramount Lord of all who hold a tenure created by Crown grant: the common law, therefore, vests a reversionary interest in the Crown in order to support and enforce the relationship of landlord and tenant. Nevertheless, Toohey J found that the invocation of reversion and plenum dominium, as those expressions are usually understood, did not lie easily with the position of the Crown under the relevant statutes.⁵² His Honour referred to the traditional definition of a reversion as 'the interest which remains in a grantor who creates *out of his own estate* a lesser estate'.⁵³ Toohey J noted, however, that the 'doctrine of estates is a feudal concept in order to explain the interests of those who held from the Crown, not the "title" of the Crown itself'.⁵⁴ Accordingly, Toohey J was of the view that to speak, in relation to the

47 *Wik*, above n 1, at CLR 128, citing *Mabo*, above n 2, at CLR 50 per Brennan J.

48 *Wik*, above n 1, at CLR 127.

49 *Id.*

50 *Id.* See also Kirby at CLR 244 and *North Ganalanja Aboriginal Corp v Queensland* (1995) 61 FCR 1 at 29; 132 ALR 565 at 591 per Lee J.

51 *Wik*, above n 1, at CLR 128.

52 *Ibid.*, at CLR 129.

53 *Ibid.*, at CLR 128, citing B A Helmore and G W Millard, *The Law of Real Property in New South Wales*, 2nd ed, Law Book Co, Sydney, 1966, p 227 (emphasis added).

54 *Wik*, above n 1, at CLR 128.

position of the Crown under the relevant statutes, of a reversion expectant on the expiry of the term of the lease as expanding the Crown's radical title to a plenum dominium was to apply the concept of reversion to an unintended end.⁵⁵

In Toohey J's view, therefore, to argue that the Crown, on granting a lease, acquires a 'beneficial reversionary interest' in the land, which 'ensures that there is no room for the recognition of native title rights, is . . . to read too much into the Crown's title'.⁵⁶ His Honour referred to the 'curious paradox' involved in the proposition enunciated by Brennan J in *Mabo*:

if it is the reversion which carries with it beneficial title, why is that title not there in the first place? And if it is the existence of that beneficial title which extinguishes native title rights, why were those rights not extinguished before the grant of a pastoral lease?⁵⁷

Toohey J reasoned that if the Crown never possessed the beneficial title, *a fortiori*, there could be no reversion of such title to it. Accordingly, the 'reversion' was not a reversion of the kind normally associated with leases. 'Reversion' was, therefore, distinguished from its traditional common law meaning⁵⁸ and held to connote the resumption of the character of 'Crown Land'.⁵⁹

Toohey J reconciled the two limbs of radical title by emphasising that such a result in no way detracted from the doctrine of sovereignty as the Crown could, upon determination of the lease, deal with the land as authorised by statute.⁶⁰ In the context of the relevant statutes, Toohey J observed that 'once a pastoral lease came to an end, the land answered the description of "Crown Land" and might be dealt with accordingly'.⁶¹ Thus, on the expiration or other termination of a pastoral lease, it is still the radical title of the Crown that must be considered in relation to native title rights.⁶² According to this analysis, the meaning of 'Crown Land' in the relevant statutes is merely land which the Crown has radical title to.

Although Toohey J's decision was made in the context of a statutory lease not given its content by the common law, because his analysis is based on the initial nature of the Crown's title, that is, its radical title, rather than the nature of the interest granted, there is no reason why it would not apply to any lease granted pursuant to statute, including a common law lease. Indeed, this aspect of Toohey J's reasoning represents the main point of departure from Gaudron J's judgment.

(b) Gaudron J

Although approaching the issue from a different perspective, Gaudron J adopted a view of radical title similar to Toohey J's. Unlike Toohey J, however, Gaudron J did not address the common law position; her Honour

⁵⁵ Id.

⁵⁶ Ibid, at CLR 129.

⁵⁷ Id.

⁵⁸ Ibid, at CLR 128.

⁵⁹ Ibid, at CLR 128–9.

⁶⁰ Ibid, at CLR 128.

⁶¹ Ibid, at CLR 128–9.

⁶² Ibid, at CLR 129.

referred specifically to provisions of the Land Act 1910 (Qld).⁶³ In particular, s 135 of the 1910 Act provided for a statutory reversion in the event of “determinat[ion] by forfeiture or other cause before the expiration of the period or term for which it was granted”, [and specified] that in that event it should “revert to His Majesty and become Crown land”, able to be dealt with under [the] Act accordingly’.⁶⁴ In Gaudron J’s view, the effect of this provision was to ‘assimilate’, in the event of forfeiture or early determination, the previously alienated land to land which had not been alienated.⁶⁵ Thus, the previously alienated land became once more ‘Crown Land’, which Gaudron J defined as ‘land in respect of which the Crown had radical title, and not land in respect of which [the Crown] had beneficial ownership’.⁶⁶ Accordingly, Gaudron J also suggests that both prior to alienation of any land in Australia and upon early determination of a pastoral lease, the Crown has only a radical title to the land without any beneficial interest.

Gaudron J concluded that the relevant pastoral leases were not true leases in the traditional common law sense because they did not confer a right to exclude native title holders and, thus, did not confer a right of exclusive possession.⁶⁷ For Gaudron J, therefore, it followed that the pastoral leases did not operate to vest a leasehold estate. Consequently, since a reversionary interest only arises on the vesting of a leasehold estate, there was no basis for the contention that, on the grant of the leases, the Crown acquired a reversionary interest which operated to expand its radical title to full beneficial ownership.⁶⁸

Thus, Gaudron J denied the applicability of the concept of a common law reversion to interests created by statute where those interests are not given their content by the common law. Instead, her Honour found that the statutory reversion which applied in such cases entitled the Crown to radical title only; not to any beneficial interest in the land. Although Gaudron J reached the same conclusion on the facts as Toohey J, the underlying rationale of her decision was based not on the nature of the Crown’s radical title but on the character of the particular grant. Thus, since the relevant pastoral lease did not operate to vest a leasehold estate, a statutory rather than a common law reversionary interest applied.

This analysis bears a very close resemblance to an argument advanced by Lee J in *North Ganalanja v Queensland*.⁶⁹ Although noting that ‘the exercise by the Crown of the right to grant tenure in land based upon a radical title does not, in itself, require the expansion of radical title to a full beneficial estate’,⁷⁰ Lee J nevertheless considered when the grant by the Crown of any interest in land would require the Crown to assume beneficial ownership of that land to make the grant. He explained that:

63 Hereafter referred to as the 1910 Act.

64 *Ibid*, at CLR 156.

65 Or reserved or dedicated for public purposes.

66 *Wik*, above n 1, at CLR 156.

67 *Ibid*, at 155.

68 *Id*.

69 (1995) 61 FCR 1 at 29; 132 ALR 565, esp at ALR 591–2.

70 *Ibid*, at FCR 29; ALR 591.

Whether the Crown has so acted depends upon whether the character of the estate or interest granted by the Crown is dependent upon, and can flow from nothing less than, absolute beneficial ownership by the Crown. It may be said that the grant of a lease for pastoral purposes over waste lands does not require that the estate as granted must proceed from a Crown title of absolute beneficial ownership. It is not the equivalent of the grant of a lease by the holder of a freehold estate. An unqualified grant of a leasehold estate in closely settled land in which the delivery of exclusive possession is fundamental to the purpose of the grant of the lease, may bring different considerations.⁷¹

According to Gaudron and Lee JJ's analysis, therefore, although all land in Queensland, and indeed in Australia, is regulated by statute, so that all interests in land are granted by the Crown pursuant to legislation, where the interest granted is equivalent to an interest recognised by the common law, the common law doctrine of reversion may apply.

Furthermore, while addressing the terms of the Land Act 1962 (Qld),⁷² Gaudron J observed that s 299 (2) required that, on forfeiture or early termination, the lessee of a pastoral holding was to give possession to the Crown.⁷³ Her Honour concluded that 'the terms of s 299(2), requiring that possession be given to the Crown, point in favour of a statutory interest on forfeiture or early termination extending beyond radical title'.⁷⁴ Radical title, therefore, emerges as an 'elastic concept' which expands or retracts depending on the intention of the Crown as discerned from the statutory provisions regulating the creation of interests in land. Thus, Gaudron J's decision has important implications for the title of the Crown where the interest granted pursuant to legislation is given its content by the common law.⁷⁵

Significantly, in this context, it appears that Gaudron J's (and indeed Lee J's) concept of a common law reversion has its traditional common law meaning. This is because although Gaudron J distinguished between a common law reversion and a statutory reversion, her concept of a statutory reversion only connotes something different from a common law reversion where the particular interest granted is not given its content by the common law. Thus, unlike Toohey J, Gaudron J does not distinguish between a traditional common law reversion and a reversion in the context of the Crown's mere radical title (whether statutory or common law). Indeed, it has been seen that it is because Toohey J makes this distinction that his analysis is relevant to any interest granted by the Crown where the Crown has a mere radical title immediately before the grant.

71 Id.

72 Hereafter referred to as the 1962 Act. Which applied to the Holroyd lease.

73 *Wik*, above n 1, at CLR 162.

74 *Ibid*, at CLR 165.

75 Gaudron J noted that although ss 135 and 299 of the 1910 and 1962 Acts respectively appear to have provided exhaustively for the situation obtaining on forfeiture or early determination of a pastoral lease, there was no equivalent provision providing for the situation where a lease determined at the expiration of the term for which it was granted: *Wik*, above n 1, at CLR 146. In such circumstances, however, the definition of 'Crown Land' in the Acts was apposite. Because the definition of Crown land excludes land which is 'for the time being' subject to a lease, it followed that upon the expiration of the term of the lease, the land reassumed the character of Crown Land; that is, land in respect of which the Crown has radical, rather than beneficial, title: s 4(c) of the 1910 Act. This would, therefore, appear to mirror the common law position.

Nevertheless, both Toohey and Gaudron JJ held that although a reversion was created, it did not confer full beneficial ownership. In this way, they distinguished a statutory reversion from the traditional common law meaning of reversion. Significantly, Gaudron J's suggestion that a statutory reversion can, in some circumstances, have the traditional common law meaning results from the rationale underlying her approach; a rationale which differs from that underlying Toohey J's approach. On one hand, the rationale underlying Toohey J's approach combines arguments based upon the two limbs of radical title. Thus, although radical title as a concomitant of sovereignty does not require the creation of a reversion, as a postulate of the doctrine of tenure, it does. In such circumstances, however, reversion necessarily has a meaning which differs from the traditional common law definition. On the other hand, the rationale underlying Gaudron J's approach is not based on the nature of radical title but on the character of the particular Crown grant. Since a pastoral lease is an interest created by statute and not given its content by the common law, it does not operate to vest a leasehold estate. Consequently, the concept of a common law reversion (within the traditional pre-*Mabo* meaning or the post-*Mabo* meaning) was simply inapplicable. Instead, a statutory reversion entitling the Crown to radical title only applied.

The crucial point, however, is that although their reasoning differed, both Toohey and Gaudron JJ held that a reversion was created by the grant of the relevant pastoral leases. This is in stark contrast to Gummow and Kirby JJ who held that no reversion was created at all in the context of statutory grants. It will be seen that although the rationale underlying the approach of these Justices is based exclusively on the concomitant of sovereignty limb of radical title, there is an important difference between their judgments: while the rationale is expressly stated in Gummow J's judgment, it is only implied in Kirby J's.

(c) Gummow J

Gummow J's conclusion on the meaning and content of radical title is similar to that expressed by both Toohey and Gaudron JJ. In particular, Gummow J adopts Brennan J's common law interpretation of radical title as a 'bare nominal title' only and not as an underlying estate conferring beneficial ownership except to the extent of the rights attaching to native title. For Gummow J, radical title is "a postulate to support the exercise of sovereign power within the familiar feudal framework of the common law" . . . [including] the doctrine of tenures'.⁷⁶ Upon this analysis, '[a]bsolute and beneficial Crown ownership, a plenum dominium, [is] established not by the acquisition of radical title but by subsequent exercise of the authority of the Crown'.⁷⁷

For Gummow J, however, the contention that the grant of a lease by the Crown necessarily involved the acquisition by the Crown of the 'reversion which is expectant upon the expiry of the term' broke down when applied to the statutory scheme for the disposition of Crown lands established by the 1910 Act. Gummow J noted that the phrase '[a]ll land in Queensland' in s 4 of the 1910 Land Act Qld was apt to include land in respect of which the

⁷⁶ *Wik*, above n 1, at CLR 186.

⁷⁷ *Id.*

Crown held radical title, and that by the two limbs of radical title, 'the common law enabled the Crown to grant interests in land to be held of the Crown and to become absolute beneficial owner of unalienated land required for the purposes of the Crown'.⁷⁸ However, since all powers of alienation of interests in land in Australia are now governed by statute, the State had to justify its argument based on Brennan J's reversion expectant dictum by its adaptation to the statutory system for the disposition of land.

Thus, it was in the context of the statutory scheme for the disposition of land that the postulate of the doctrine of tenure limb of radical title was, for Gummow J, rendered otiose. The statute maintained a legal regime where, in respect of what it identified as leases, there was no need for the creation in the Crown of a reversionary estate out of which lesser estates might then be granted.⁷⁹ Rather, when the lease expired, the land again answered the definition of 'Crown Land'⁸⁰ and was liable to be further dealt with by the Crown.⁸¹ Gummow J also referred to the statutory provisions which abrogated the common law requirement of entry for the creation of a reversion.⁸² Not only did the statute operate effectively to vest interests granted under it in advance of and without dependence upon entry,⁸³ it also provided that, in the case of forfeiture or other premature determination of a lease, the land would revert to the Crown and become Crown land.⁸⁴ For Gummow J, the fact that the statute proceeded on a basis which was at odds with the common law principles with respect to leases confirmed the conclusion that the term 'revert' in the statute was used to denote the 'reassumption of the character of "Crown Land" liable to further disposition'.⁸⁵

It is important to note that while both Gaudron and Gummow JJ rejected the notion that the interest acquired by the Crown at the expiration of the term of the pastoral leases conferred beneficial ownership and was thus inconsistent with native title, it is clear from Gaudron J's judgment in *Mabo*⁸⁶ and Gummow J's judgment in *Yanner v Eaton*⁸⁷ that both justices regard the grant of a common law lease as effecting the extinguishment of native title. Nevertheless, it will be seen in the section on the 'Implications for the legal nature of the Crown's title on the statutory grant of a common law lease',⁸⁸ that while the grant of a common law lease may extinguish native title on the ground that the rights created by grant are inconsistent with native title rights,

⁷⁸ *Ibid.*, at CLR 188.

⁷⁹ *Ibid.*, at CLR 189.

⁸⁰ Section 4.

⁸¹ Under s 6: *Wik*, above n 1, at CLR 189.

⁸² Section 6(2) and s 135: *Wik*, above n 1, at CLR 189, 198, 199.

⁸³ Section 6(2).

⁸⁴ Section 135. The expression 'the land shall revert to His Majesty and become Crown Land, and may be dealt with under this Act accordingly' is used in s 135 in respect of determination of either a pastoral lease or a licence before the expiration of the period or term of the grant. Under the common law, however, determination of a licence would not ordinarily be described as bringing about a reversion of the land to the licensor. See *Wik*, above n 1, at CLR 199 per Gummow J.

⁸⁵ *Wik*, above n 1, at CLR 189.

⁸⁶ *Mabo*, above n 2, at CLR 110.

⁸⁷ (1999) 201 CLR 351; 166 ALR 258 at [108].

⁸⁸ See Part II, text accompanying n 6ff.

this does not have any significance for the Crown's title.⁸⁹

(d) Kirby J

Although not expressly referring to the concomitant of sovereignty limb of radical title, Kirby J's treatment of the 'reversion expectant' theory is consistent with Gummow J's. Referring to the critical passage in the reasoning of Brennan J in *Mabo*, Kirby J observed that Brennan J implied that it was not the grant of the lease which had the effect of expanding the Crown's title 'from mere radical title' to a 'plenum dominium', but the acquisition of the reversion expectant on the expiry of the leasehold term.⁹⁰ Kirby J explained, however, that the grant of leases is regulated by the Land Acts⁹¹ and that these Acts do not expressly confer on the Crown the estate necessary to grant a lease.⁹² The historical reason for this was clear: the enactments were based upon the assumption that the Crown exclusively enjoyed the power to grant leasehold and other interests simply as an attribute of its sovereignty. Since *Mabo*, however, it was clear that with sovereignty came no more than radical title which was burdened with native title.⁹³

Consequently, Kirby J was of the view that to:

invent the notion, not sustained by the actual language of the Land Acts, that the power conferred on the Crown to grant a pastoral leasehold interest was an indirect way of conferring on the Crown 'ownership' of the land by means of the reversion expectant [involved] a highly artificial importation of feudal notions into Australian legislation.⁹⁴

According to Kirby J, therefore, rather than inventing such a purpose, by a new legal fiction, and retrospectively attributing it to the Queensland Parliament so that it could be read into the Land Acts in order to afford the estate out of which the Crown might grant a pastoral lease, the fact that the parliament had said that the Crown's power to make such a grant existed was sufficient.⁹⁵ Kirby J was of the view that to import into the Land Acts notions of the common law apt for the tenurial holdings under the Crown and attribute them to the Crown itself 'piles fiction upon fiction' and, unless expressed in the legislation, should not be introduced.⁹⁶ Thus, like the other members of the majority, Kirby J equates Crown land under the Land Acts with mere radical title.

(e) Summary

Three distinct approaches vis-à-vis the role and content of a reversion in the context of statutory grants emerge from the majority judgments in *Wik*: one from Toohey J, one from Gaudron J, and one from Gummow and Kirby JJ. These approaches correspond with the underlying rationales adopted by these

⁸⁹ Ibid, text accompanying nn 13–17.

⁹⁰ *Wik*, above n 1, at CLR 235. This required legal analysis of the consequences of the exercise of sovereign rights in respect of each dealing in land.

⁹¹ Ibid, at CLR 244.

⁹² Id.

⁹³ Id.

⁹⁴ Id.

⁹⁵ Ibid, at CLR 244–5.

⁹⁶ Ibid, at CLR 245.

judges. Furthermore, the rationales underlying the judges' decisions reflect their views on the role of the redefined doctrine of tenure in the context of statutory grants.

By combining arguments based upon the two limbs of radical title, Toohey J accepts that the redefined doctrine of tenure applies in the context of statutory grants. That is, although a reversion is implied as a result of the fiction of original Crown ownership, such reversion does not confer full beneficial ownership. In contrast, by focusing exclusively on the concomitant of sovereignty limb of radical title, both Kirby and Gummow JJ deny that the redefined doctrine of tenure has any role in the context of statutory grants. That is, the fiction of original Crown ownership is not invoked to supply a reversionary interest.

Although Gaudron J also rejects a narrow approach based upon the application of the doctrine of tenure on the facts of *Wik*, she nevertheless suggests that the doctrine of tenure might apply to confer beneficial ownership in respect of interests created by statute where those interests are given their content by the common law. Significantly, unlike the other members of the majority, the rationale underlying Gaudron J's decision was not based on either or both limbs of radical title. Indeed, instead of focusing on the nature of the Crown's title, it was based upon the nature of the interest granted.

To date, there has not been any binding High Court decision on the implications for the Crown's title of the grant of a common law lease.⁹⁷ It is in this context, therefore, that the rationales underlying the judges' decisions are crucial. Although the High Court was dealing with the statutory grant of an interest not given its content by the common law, it will be seen, in Part II,⁹⁸ that these rationales indicate how the justices might resolve the legal implications, for the Crown's title, of the grant of other interests in land, including the grant of a true common law lease. Although Kirby and Gummow JJ's approach represents a majority of the majority in *Wik* and the most radical departure from the doctrine of tenure in the context of statutory grants, the minority's analysis remains potentially influential. This is because the concept of radical title (and its expansion or otherwise) arose for reconsideration in *Wik* as a result of the court's examination of the consequences for native title of the expiration of a pastoral lease, namely, whether native title rights were thereby extinguished permanently or whether such rights were merely suspended.⁹⁹ Because of their finding that native title had survived the grant of the pastoral leases, this question was not strictly necessary for the majority to decide. Brennan CJ's interpretation of radical title and the results of its exercise were, however, decisive to his conclusion,

⁹⁷ Although the majority of the High Court in *Ward*, above n 4, at [369]–[372] held that a common law lease extinguished native title, this was based upon the court's application of the inconsistency of incidents test for the purposes of the NTA, rather than upon an expansion of the Crown's radical title at common law. Thus, the question of the nature of the Crown's reversion, if any, was not addressed: see Part II, text accompanying nn 57–61, 136–148.

⁹⁸ See Part II, text accompanying n 6ff.

⁹⁹ *Wik*, above n 1, at CLR 132–3 per Toohey J's postscript added with the concurrence of the other three majority judges. See also Bhuta, above n 46, p 33.

on behalf of the minority, that the grant of a statutory leasehold interest extinguished native title.¹⁰⁰

It will be seen that, in contradistinction to Kirby and Gummow JJ and Gaudron J's decision on the facts, the minority, like Toohey J, unequivocally assert that the doctrine of tenure does apply in the context of statutory grants. Nevertheless, the minority treat a reversion in this context as equivalent to a traditional common law reversion. This is, of course, one of the possible consequences of Gaudron J's suggestion that the doctrine of tenure might apply to confer beneficial ownership in respect of interests created by statute where those interests are given their content by the common law.

2 Minority judgment: Brennan CJ (Dawson and McHugh JJ concurring)

Notwithstanding the different rationales adopted by the members of the majority, they nonetheless rejected the reversion expectant argument, whereas the minority unequivocally embraced it. Indeed, Brennan CJ's reasoning, as author of the minority judgment in *Wik*, is logically consistent with his dictum in *Mabo* concerning the Crown's 'reversion expectant' on a lease granted by the Crown.

Nevertheless, following *Mabo* it was not clear whether Brennan J regarded radical title as merely a 'bare title' sufficient to support the doctrine of tenure and the Crown's acquisition of a plenary title, or as conferring rights of beneficial ownership except to the extent of native title.¹⁰¹ In his endeavour to sustain the reversion expectant theory in *Wik*, however, Brennan CJ suggested that the view that radical title is essentially 'a power of alienation controlled by statute'¹⁰² cannot be accepted.¹⁰³ His comments were, however, confined to an examination of land that had been brought within the doctrine of tenure.¹⁰⁴ In particular, his comments relate to the creation of a leasehold tenure. Accordingly, not only is the Chief Justice's judgment irrelevant to the question of the meaning and content of radical title in respect of land which has *not* been brought within the doctrine of tenure, since it represents the minority view in *Wik* it is not authoritative in the context of land which has been brought within the doctrine of tenure as a result of the grant of a pastoral lease by the Crown.¹⁰⁵

Nevertheless, the Chief Justice made some general observations on the fundamental doctrine of tenure. His Honour asserted that by exercise of a statutory power to alienate an estate in land, the Crown creates a tenure between the Crown and the alienee and brings the land within the regime

100 Dawson and McHugh JJ concurring.

101 Cf *Mabo*, above n 2, at CLR 47–8 and 50–1. See also Secher, above n 2, Ch 3, p 126.

102 *Wik*, above n 1, at CLR 94.

103 Id. Cf comments by Bartlett, above n 12, p 151. Cf also *Wik*, above n 1, at CLR 127, 128 per Toohey J (referred to in text accompanying n 49 above); 156 per Gaudron J (referred to in text accompanying n 66 above) and 186, 189 per Gummow J (referred to in text accompanying n 77 above); and see Kirby J at text accompanying n 96 above.

104 *Wik*, above n 1, at CLR 91.

105 The implications for the Crown's title on the grant of a common law lease are considered in Part II.

governed by the doctrines of tenure and estates.¹⁰⁶ For Brennan CJ it followed that:

Once land is brought within [the] regime [governed by the doctrines of tenure and estates], it is impossible to admit an interest which is not derived mediately or immediately from a Crown grant or which is not carved out from either an estate or the Crown's reversionary title.¹⁰⁷

Thus, the creation of a tenure, however limited the estate in the particular parcel of land may be, establishes exhaustively the entire proprietary legal interests which may be enjoyed in that parcel of land. If the interests alienated by the Crown do not exhaust those interests, the remaining proprietary interest must, therefore, be vested in the Crown.¹⁰⁸ It has, however, already been seen that, even under the feudal doctrine of tenure, the Crown was not in fact the proprietor of all land for which no subject could show a title: where a freehold in land became unowned because the tenant *pur autre vie* died before the *cestui que vie*, the estate went to the first person to enter as occupant rather than the Crown.¹⁰⁹

Nevertheless, Brennan CJ declared that in Australia, 'the Crown takes either by reversion on expiry of the interest granted or by escheat on failure of persons to take an interest granted'.¹¹⁰ Noting that all powers of alienation of interests in land in Australia are now governed by statute,¹¹¹ Brennan CJ asserted that, by exercise of a statutory power to alienate an estate in land, the Crown creates a tenure in the strict common law sense of the term between the Crown and the alienee. It followed, therefore, that 'where a leasehold estate is the only proprietary interest granted by the Crown in a parcel of land and the lessee is in possession, a legal reversionary interest is the necessary foundation for the existence of a right to forfeit for breach of condition'.¹¹² Then comes his crucial passage:

It is only by treating the Crown, on exercise of the power of alienation of an estate, as having the full legal reversionary interest that the fundamental doctrines of tenure and estates can operate.¹¹³

Brennan CJ also referred to the provisions of the Land Act 1910 (Qld)¹¹⁴ in order to support the Crown's acquisition of a beneficial title on reversion. He explained that at the time of the Act's enactment, the common understanding was that Crown grants were made out of the Crown's proprietary title to all

¹⁰⁶ *Wik*, above n 1, at CLR 91.

¹⁰⁷ *Id.*

¹⁰⁸ *Ibid.*, at 90–1.

¹⁰⁹ See Secher, above n 2, Ch 1, pp 29–30. Although an ordinary reversioner would have to enter to merge the *pur autre vie* estate with his own, there was an exception where the Crown was the reversioner: see the authorities cited by McNeil, above n 29, p 12 n 20; see also p 80 n 4.

¹¹⁰ *Wik*, above n 1, at CLR 91.

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Ibid.*, at CLR 93.

¹¹⁴ Pursuant to which pastoral leases had been granted by the Crown in 1915 and 1919. Corresponding provisions appeared in the Land Act 1962 (Qld).

land in the colony.¹¹⁵ No recognition was accorded by Australian courts to the existence of native title in or over land in Australia.¹¹⁶ Consequently, the provisions of the Act did not admit of any interest in land subject to a pastoral lease being held by any person other than the Crown, the lessee and persons taking an interest under the lease.¹¹⁷ It was, therefore, impossible that the parliament might have intended that any person other than the Crown should have any reversionary interest in such land.¹¹⁸ Although dealing with a statute, Brennan CJ was of the view that the Act treated the Crown as having not only the power to grant a lease, but as having the full beneficial reversionary interest which, under the feudal doctrines of the common law, a lessor had to possess in order to support and enforce the relationship of landlord and tenant.¹¹⁹

3 Summary

For Brennan CJ, it was only by treating the Crown, on exercise of the power of alienation of an estate (statutory or otherwise), as having the full legal reversionary interest that the fundamental doctrines of tenure and estates could operate.¹²⁰ This is significant because it indicates not only the point of divergence between his decision and both Gummow and Kirby JJ's decision and Gaudron J's decision on the facts, but also the point of possible reconciliation between his decision and both Toohey J's decision and Gaudron J's suggestion that the doctrine of tenure might apply in some circumstances in the context of statutory grants.

By focusing on the creation of a tenure by exercise of a power to alienate an estate in land, Brennan CJ's explanation, like that of the majority, accepts that the doctrine of tenure, in its application to land in Australia at common law, only applies to every Crown grant of an interest in land. As a corollary, the fiction associated with the doctrine of tenure also only applies to every Crown grant of an interest in land. It would appear, therefore, that all the members of the High Court in *Wik* agree that, at common law, where a leasehold estate is the only proprietary interest granted by the Crown in a parcel of land, a legal reversionary interest must be vested in the Crown in order to support and enforce the relationship of landlord and tenant.¹²¹ Where the Crown does not have an actual title to the relevant land, such reversionary interest will be supplied by virtue of the application of the fiction of original Crown ownership in respect of the particular Crown grant.

Although this would be the effect of investiture of radical title at common law,¹²² Gummow and Kirby JJ considered that such a fictional reversionary interest was unnecessary in the case of a statutory alienation; that is, the fiction of original ownership is otiose in the context of statutory grants. Gaudron J's decision on the facts of *Wik* also rejected a common law reversionary interest.

¹¹⁵ *Wik*, above n 1, at CLR 92.

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Ibid.*, at CLR 93.

¹²⁰ *Id.*

¹²¹ *Ibid.*, at CLR 91, 93.

¹²² See text accompanying nn 23–27 above.

This aspect of Gaudron J's decision and the position taken by Gummow and Kirby JJ is, therefore, the very antithesis of Brennan CJ's decision. On the other hand, Gaudron J's suggestion that the common law doctrine of reversion might apply in respect of interests created by statute where those interests are given their content by the common law, and Toohey J's treatment of the doctrine of tenure in the context of statutory grants, are not too dissimilar to the Chief Justice's analysis: for all three judges a reversion was created.

Nevertheless, Brennan CJ's analysis departs from that of Toohey J by attributing to the Crown a reversionary interest which conferred full beneficial ownership. In this way, it appears that the Chief Justice's decision aligns most closely with Gaudron J's obiter. However, apart from disagreeing with Gaudron J's decision on the facts, Brennan CJ's decision also departs from Gaudron J's by focusing on the expansion of the Crown's interest rather than the interest granted. Indeed, by transposing the doctrine of tenure into the law relating to statutory grants, the rationale underlying Brennan CJ's decision is analogous to that underlying Toohey J's decision. Unlike Toohey J, however, Brennan CJ failed to distinguish between the effect of the fiction of original Crown ownership under the feudal and redefined doctrines of tenure. Thus, 'the "received idea of feudalism" continues to exert the force of law, in abstracto, over Brennan CJ's judgment'.¹²³

Indeed, while the majority reject a narrow approach based upon the feudal notion that the grant by the Crown of an interest in land upon its radical title is dependent upon, and can flow from nothing less than, absolute beneficial ownership by the Crown,¹²⁴ the minority accept (or at least appear to accept) such an approach. Although the four members of the majority in *Wik* adopt three distinct approaches when examining Brennan J's 'reversion expectant' dictum, they were essentially of the view that either the fiction of original Crown ownership did not apply in the context of statutory grants or, if it did, it conferred no more than a nominal proprietary interest sufficient to support the lease. Furthermore, despite Gaudron J's suggestion that a statutory reversion can, in some circumstances, have the traditional common law meaning, it is clear that the majority were of the view that the Crown's undoubted power of alienation of land is not dependent upon beneficial ownership of the land. Thus, for the majority, the grant of a pastoral lease was no more than an exercise of statutory power conferring statutory rights, having no significance for the Crown's beneficial interest in the land granted.

Although the majority's decision emphasised the statutory nature of the relevant pastoral leases, at least two members of the majority (Toohey and Gummow JJ)¹²⁵ were of the view that a similar result would be achieved by reference to the common law. That is, since they regarded radical title as not,

¹²³ Bhuta, above n 46, p 35.

¹²⁴ Indeed, it has been seen that although this was Gaudron J's decision on the facts in *Wik*, she nevertheless suggested that a reversion conferring beneficial ownership might apply in respect of interests created by statute where those interests are given their content by the common law. Thus, in such circumstances, Gaudron J, like the minority, accepted the view that an interest granted by the Crown is dependent upon and can flow from nothing less than absolute beneficial ownership by the Crown.

¹²⁵ See text accompanying nn 49 and 77 above respectively. Kirby J is also, arguably, of this view: see text accompanying n 96 above.

of itself, carrying beneficial ownership, the analysis, based upon general common law principles, of the High Court's identification of the two limbs of radical title is apposite: post-*Mabo*, the meaning of reversion in the context of a leasehold estate granted out of land in respect of which the Crown has a mere radical title means the resumption of mere radical title.¹²⁶

For the minority, however, the application of the doctrine of tenure in the context of an exercise of the statutory, or common law, power of alienation of a pastoral leasehold estate meant that the fiction of original Crown ownership not only supplied a reversionary interest but also conferred beneficial ownership.

Although Brennan CJ's decision and Gaudron J's obiter appear to support the orthodox, albeit incorrect, understanding of the notion of radical title as declared by the Privy Council, viz the view that the Crown's ownership of all land subject to the burden of native title vested upon settlement,¹²⁷ it is by no means so clear. There is an important objection to their approach: they misconstrue the effect, at common law, of the doctrine of tenure and its associated fiction of original Crown ownership. While the Crown's fictional reversionary interest, supplied by the fiction of original Crown ownership, was deemed to confer beneficial title under the feudal doctrine of tenure, under the redefined doctrine of tenure, such a 'fictional' reversionary interest, although still supplied by the fiction of original Crown ownership, only supplies a nominal proprietary interest to support the lease granted for the duration of its term.¹²⁸

It is because the minority's decision and Gaudron J's obiter treat the Crown's 'fictional' reversionary interest as continuing despite the expiration of the lease that their reasoning coheres with the traditional meaning given to 'reversion'.¹²⁹ Thus, it is suggested that both judges adhere to the interpretation of radical title as a bare legal title sufficient to support the doctrine of tenure and the Crown's acquisition of a plenary title: the conclusion that, on the grant of a leasehold estate based on the Crown's radical title, the Crown acquires a traditional common law reversionary interest, is simply the result of applying the fiction associated with the doctrine of tenure beyond its purpose.

Indeed, it will be seen in the next section, that Brennan CJ's approach, as well as that adopted by all members of the majority, in relation to the extinguishment of native title by Crown grant is inconsistent with the view that simply because the fiction of original Crown ownership applies whenever the Crown grants an interest in land relying upon its radical title, the Crown thereby acquires beneficial ownership of the land. Indeed, there is a distinction between the effect on native title of a real title and the effect on native title of the Crown's fictional title.

126 See section headed 'The Two Limbs of Radical Title: Common Law Implications for the "Reversion Expectant" Argument', text accompanying n 12 above.

127 See, generally, U Secher, 'The Meaning of Radical Title: The Pre-*Mabo* Authorities Explained — Part I' (2005) 11 (3) *APLJ* 179–208.

128 See text accompanying nn 25–27 and paragraph immediately before n 37 above.

129 See, generally, *Re Mercer v Moore* (1880) 14 Ch D 287, esp at 295. See also *In re Strathblaine Estates Ltd* [1948] Ch 228 at 231 per Jenkins J.

C Extinguishment of native title by Crown grant

1 Brennan CJ (as author of the minority)

The conclusion that the Crown did acquire a beneficial reversion was one reason which led the minority in *Wik* to reject the argument that native title rights and interests had been suspended for the term of the pastoral leases. That is, the holding that a legal reversionary interest must be vested in the Crown, was reached in the context of examining the question whether the issuing of the relevant pastoral leases extinguished native title permanently or merely suspended it for the duration of the leases.¹³⁰ This was because Brennan CJ had already held that the grant of the leases had extinguished the native title: since they conferred a right of exclusive possession on the lessees which was inconsistent with native title, the lessees' rights prevailed over the rights of the holders of native title.¹³¹ In other words, pursuant to the common law doctrine of extinguishment by Crown grant, the grant of the leases had the extinguishing effect on native title.

By focusing on the expansion of the Crown's title, rather than the interest granted, however, both Brennan CJ's reversion expectant dictum and his dictum to the effect that the Crown grant of any estate in land confers full beneficial ownership on the Crown, suggest that the grant of *any* estate, and in particular any lease, necessarily extinguishes native title, irrespective of whether or not the grant of the interest is otherwise inconsistent with native title.¹³² This produces an anomaly: if the Crown's title necessarily expands from radical to beneficial title whenever the Crown exercises the right to grant tenure in land (on the ground that the grant of any interest in land is dependent upon and can flow from nothing less than full beneficial ownership), then native title is necessarily extinguished by the grant of any interest in land and there is no need for an independent test of extinguishment based upon inconsistency between the grantee's rights and native title rights.

Although the relevant leases did, in Brennan CJ's view, confer exclusive possession and were therefore inconsistent with native title, Brennan CJ's reasoning blurs the distinction between extinguishment of native title because of inconsistent Crown grant (that is, because the grantee's title is inconsistent with any native title) and extinguishment of native title because of Crown acquisition of beneficial ownership (that is, because the Crown's radical title has expanded into a plenum dominium). In this context, Brennan CJ observed that '[native] title is liable to be extinguished by laws enacted by, or with the authority of, the legislature or by the act of the executive in exercise of powers conferred upon it'.¹³³ He then classified the laws or acts which are capable of extinguishing native title as belonging to one of three categories:

- (i) laws or acts which simply extinguish native title; (ii) laws or acts which create rights in third parties in respect of a parcel of land subject to native title which are

¹³⁰ *Wik*, above n 1, at CLR 88.

¹³¹ *Id.*

¹³² *Ibid.*, at CLR 89; cf 92.

¹³³ *Ibid.*, at CLR 84.

inconsistent with the continued right to enjoy native title; and (iii) laws or acts by which the Crown acquires beneficial ownership of land previously subject to native title.¹³⁴

Extinguishment by pastoral lease came within the second of Brennan CJ's categories. For Brennan CJ, once the relevant act which is said to effect extinguishment of native title is identified as a pastoral lease, '[t]he question is . . . whether the right to exclusive possession conferred by the leases on the pastoral lessees was inconsistent with the continued right of the holders of native title to enjoy that title'.¹³⁵ Thus, Brennan CJ's formulation of the test for extinguishment presupposes that the pastoral lessee acquired a right to exclusive possession at the latest when the lease was issued, and, therefore, that there was an inconsistency between that right and the right of any other person to enter or to remain on the land demised without the lessee's consent.¹³⁶ Where access to the land is an essential aspect of the native title asserted, therefore, inconsistency arises because the rights of the lessee and the rights of the native title holders cannot be fully exercised at the same

¹³⁴ *Ibid*, at CLR 84–5.

A law or executive act which, though it creates no rights inconsistent with native title, is said to have the purpose of extinguishing native title, does not have that effect 'unless there be a clear and plain intention to do so'. Such an intention is not to be collected by inquiry into the state of mind of the legislators or of the executive officer but from the words of the relevant law or from the nature of the executive act and of the power supporting it. The test of intention to extinguish is an objective test.

Ibid, at CLR 85:

A law or executive act which creates rights in third parties inconsistent with a continued right to enjoy native title extinguishes native title to the extent of the inconsistency, irrespective of the intention of the legislature or the executive and whether or not the legislature or the executive officer adverted to the existence of native title. . . . Third party rights inconsistent with native title can be created by or with the authority of the legislature in exercise of legislative power but, as the power of the State and Territory legislatures is now confined by the Racial Discrimination Act 1975 (Cth), a State or Territory law made or an executive act done since that Act came into force cannot effect extinguishment of native title if the law or executive act would not effect the extinguishment of a title acquired otherwise than as native title.

Id. In respect of his third category, Brennan CJ said that the Crown may acquire a full beneficial ownership that extinguishes native title by the acquisition of native title by or under a statute: *Id*. In such a case, the 'question is simply whether the power of acquisition has been validly exercised': *ibid*, at CLR 85—6. Alternatively, *id*:

[T]he Crown, without statutory authority, may have acquired beneficial ownership simply by appropriating land in which no interest has been alienated by the Crown. (Such an acquisition by the Crown in the right of a State or Territory would have occurred, if at all, before the Racial Discrimination Act came into force). In the latter case, the appropriation of the land gives rise to the Crown's beneficial ownership only when the land is actually used for some purpose inconsistent with the continued enjoyment of native title: for example, by building a school or laying a pipeline. Until such a use takes place, nothing has occurred that might affect the legal status quo. A mere reservation of the land for the intended purpose, which does not create third party rights over the land, does not alter the legal interests in the land, but the Crown's exercise of its sovereign power to use unalienated land for its own purposes extinguishes, partially or wholly, native title in or over the land used.

¹³⁵ *Wik*, above n 1, at CLR 86.

¹³⁶ *Id*.

time.¹³⁷ Where, however, a native title holder has only a non-accessory right, there may be no inconsistency between that right and the right of the pastoral lessee.¹³⁸

According to Brennan CJ, the question of extinguishment of native title by a grant of inconsistent rights must be resolved as a matter of law, not of fact.¹³⁹ While the law can attribute priority to one right over another right in respect of the same parcel of land, it cannot recognise the co-existence in different hands of two rights that cannot both be exercised at the same time.¹⁴⁰ For the purpose of enabling the law to determine the priority of rights in respect of the same parcel of land, the test of inconsistency must be between the rights themselves and not the manner of their exercise.¹⁴¹ For Brennan CJ, therefore, inconsistency will arise, or not, from the moment a pastoral lease is granted.¹⁴²

Although Brennan J's reversion expectant dictum in *Mabo* suggests that the Crown acquires a 'plenum dominium' when the term of a lease expires, it has been seen that a reversion is an existing interest, albeit vested in interest, and thus any plenary title would have to exist at the start of the lease.¹⁴³ Indeed, Brennan CJ's further comments in *Wik* suggesting that the Crown grant of any estate in land confers beneficial ownership on the Crown treats the Crown as having a full legal reversionary interest on exercise of the power of alienation of an estate. Thus, the legal position with respect to the Crown's title upon the grant of any estate in land (in particular a lease) renders his test for extinguishment by Crown grant obsolete: if the Crown has beneficial ownership from the moment a pastoral lease is granted, any native title rights would necessarily be extinguished and there can be no question of inconsistency between the lessee's rights and native title rights.

Furthermore, although there are a number of ways in which the Crown can acquire beneficial ownership of land within the third category of laws liable to extinguish native title identified by Brennan CJ, a full beneficial reversion on the grant of a lease under the doctrine of tenure (feudal or redefined) would be supplied by the fiction of original Crown ownership. It would not, therefore, be a real title. This is crucial; when considering the effect, at common law, of the two limbs of radical title, the question was raised: since the essence of *Mabo* lies in saying that the Crown's fictional title cannot preclude the existence of native title, why could such a fictional title extinguish native title?¹⁴⁴ It was submitted that native title is only liable to be extinguished by a real, not fictional, title. Indeed, although the fiction of original Crown ownership does not confer a beneficial title on the Crown, it does allow derivative title to pass to the grantee.

In this way, although the rights that a particular estate confers on a Crown

137 Id.

138 Ibid, at CLR 87.

139 Id.

140 Id.

141 Id. Otherwise the law would be incapable of settling a dispute between the holders of the inconsistent rights prior to their exercise.

142 Id: 'If the rights conferred on the lessee of a pastoral lease are, at the moment when those rights are conferred, inconsistent with a continued right to enjoy native title, native title is extinguished'.

143 See text accompanying n 28ff above.

144 See text accompanying n 16ff above.

grantee may be inconsistent with the continuance of any native title rights and, to the extent of that inconsistency, extinguish the native title rights, the invocation of the fiction of original Crown ownership whenever the Crown grants an interest in land cannot affect native title. Native title is, therefore, extinguished as a result of the operation of the doctrine of estates, not the doctrine of tenure.¹⁴⁵ Where the Crown appropriates land to itself, however, the Crown's acquisition of a beneficial title will have the effect of extinguishing native title; in such a case, the beneficial title of the Crown is real, it is not supplied by virtue of the fiction of original Crown ownership.

As already noted, the nature of the Crown's reversionary title was considered in the context of the question whether extinguishment of native title by the grant of the leases meant that the native title ceased permanently or was merely suspended during the currency of the lease.¹⁴⁶ That is, although the native title had been extinguished as a result of the application of the doctrine of extinguishment by Crown grant, the nature of the Crown's reversion established whether extinguishment was permanent or temporary. In rejecting the argument that native title can revive upon the determination of a pastoral lease, Brennan CJ rejected the contention that a pastoral lease is merely a bundle of statutory rights¹⁴⁷ which has no significance for the Crown's beneficial interest in the land granted so that, when the lease determines, the Crown has no reversionary interest but only its original radical title burdened by the native title.¹⁴⁸ His Honour suggested that if this were not correct, then the underlying or residual common law title (beneficial interest in the land) would presumably subsist in the holders of native title.¹⁴⁹ Such a theory would, however, be inconsistent with the fundamental doctrines of the common law and 'it would equate native title with an estate in fee simple which, *ex hypothesi*, it is not'.¹⁵⁰ Brennan CJ concluded, therefore, that 'where a leasehold estate is the only proprietary interest granted by the Crown in a parcel of land . . . a legal reversionary interest must be vested in the Crown'.¹⁵¹

The important point for present purposes is that, for Brennan CJ, the effect of the reversionary interest was that any native title which had been extinguished by the grant of a pastoral lease ceased permanently and could not

145 See text in paragraph immediately following n 17 above. See also Secher, above n 2, pp 207–8.

146 The appellants argued that the grant of a pastoral lease was no more than an exercise of a statutory power conferring statutory rights, having no significance for the Crown's beneficial interest in the land demised. Viewed in this way, it was open to contend that native title is merely suspended during the currency of a lease and, when the lease is determined, the Crown has no reversionary interest but only its original radical title burdened by the native title: *Wik*, above n 1, at CLR 89.

147 *Wik*, above n 1, at CLR 89. Brennan CJ observed that if pastoral leases were regarded as 'bundles of statutory rights' rather than an estate held of the Crown, 'it would be equally correct to treat a "grant in fee simple" not as the grant of a freehold estate held of the Crown but merely as a larger bundle of statutory rights . . . '.

148 *Wik*, above n 1, at CLR 89.

149 *Ibid*, at CLR 89–90.

150 *Ibid*, at CLR 90. Indeed the majority of the High Court in *Ward* has made it clear that 'native title rights and interests are allodial': above n 4, at [331] per Gleeson CJ, Gaudron, Gummow and Hayne JJ (Kirby J substantially agreeing with the joint judgment).

151 *Wik*, above n 1, at CLR 91.

be revived. His Honour did not suggest that any unextinguished native title was extinguished as a result of the reversionary interest. In light of the suggestion that native title is only liable to be extinguished by a real, rather than fictional, title, Brennan CJ's reasoning indicates that there is distinction between initial extinguishment by a real title and non-revival of extinguished title by a fictional title. That is, although a fictional title can prevent extinguished title from reviving, it cannot extinguish native title *per se*.¹⁵²

Indeed, it will be seen that, in light of their conclusion on the reversion expectant argument, the *Wik* majority's treatment of the doctrine of extinguishment by Crown grant leaves open the possibility that native title might be temporarily suspended, rather than permanently extinguished, as a result of the grant of a lease.¹⁵³ That is, where the Crown grants a leasehold estate based upon its radical title, although native title may be 'extinguished' on the ground of inconsistency with a particular lessee's rights, since the reversion, if a reversion applies at all, does not confer beneficial ownership on the Crown, the Crown does not automatically assume beneficial ownership of the land when the lease expires. Put another way, although native title in respect of land is necessarily extinguished if the Crown's radical title to that land is converted into beneficial ownership, it does not automatically follow that the Crown acquires a plenary title to the land if native title is extinguished on the ground of inconsistency with the lessee's statutory rights.¹⁵⁴

Nevertheless, because the trial judge had not made any findings as to the rights making up native title, the majority were unable to determine whether the native title rights and the rights granted under the pastoral leases were inconsistent. Accordingly, they held that native title was not necessarily extinguished by the grant of the pastoral leases. Although the individual majority judgments had made it clear that because of this decision they did not need to consider the question of suspension, the postscript to Toohey J's judgment confirmed this.¹⁵⁵ The point of present importance, however, is the majority's conclusion that the Crown did not acquire a full beneficial reversion

152 Furthermore, it is suggested that, in the event that native title to certain land is extinguished, the former native title holders might be able to prove a customary law title to the land which, like other common law titles, is not as vulnerable to extinguishment by executive act as native title: see Secher, above n 2, Ch 9. For a discussion of the difference between native title and common law title in terms of vulnerability to extinguishment, see Secher, above n 2, Ch 3, pp 164–6 and Ch 7, pp 421–2.

153 Indeed, it will be seen in Part II, that there is considerable judicial support for a common law concept of suspension of native title rights on the grant of a lease. In particular it will be seen that in *Ward*, the trial judge, Lee J (1998) 159 ALR 483 and the dissenting Federal Court judge on appeal, North J (2000) 99 FCR 316; 170 ALR 159 interpreted the majority judgments in *Wik* to support a common law concept of suspension of native title rights on the grant of a lease. Although the *Ward* High Court rejected any common law doctrine of suspension, it will be seen that the court's treatment of this issue is merely obiter.

154 It is in this context that Toohey J's comments, in particular, question the generally accepted view that extinguishment connotes a permanent cessation of rights or at least that they are permanently rendered unenforceable. It will be seen, in Part II, that although the majority of the High Court in *Ward*, above n 4, rejected a common law doctrine of suspension, such rejection was merely obiter. Furthermore, while the *Ward* High Court acknowledged that the NTA embodies a statutory concept of suspension, the reason given for distinguishing a common law doctrine of suspension from its statutory counterpart is, with respect, erroneous and thus open to criticism.

155 *Wik*, above n 1, at CLR 133: 'Once the conclusion is reached that there is no necessary

upon the grant of a pastoral lease based on its radical title.

Nevertheless, the High Court in *Wik* made it clear that the pastoral leases in question were not leases in the common law sense. What are the implications, therefore, for the Crown's title, of the High Court's treatment of the reversion expectant argument in the context of the grant of a common law lease? It is to this issue that we turn in Part II.

extinguishment by reason of the grants, the possibility of the existence of concurrent rights precludes any further question arising in the appeals as to the suspension of any native title rights during the currency of the grants'.