



Mabo and Native Title: Origins and Institutional Implications

Edited by W. Sanders



Centre for
Aboriginal
Economic
Policy
Research

The Australian National University



Research Monograph No. 7



Mabo and Native Title:
Origins and Institutional
Implications

Edited by
W. Sanders

**Centre for Aboriginal Economic Policy Research
Australian National University, Canberra**

**Research Monograph No. 7
1994**

First published in Australia 1994.

Printed in Australia by Goanna Print, Fyshwick, ACT.

© Centre for Aboriginal Economic Policy Research, Australian National University.

This book is copyright. Apart from any fair dealings for the purpose of private study, research, criticism or review as permitted under the *Copyright Act 1968*, no part may be reproduced by any process without written permission. Inquiries should be directed to the publisher, Centre for Aboriginal Economic Policy Research, Australian National University, Canberra ACT 0200, Australia.

National Library of Australia
Cataloguing-in-publication entry

Sanders, William G. (Editor), 1956- .
Mabo and Native Title: Origins and Institutional Implications

ISBN 0 7315 2008 4.

[1] Aborigines, Australian - Land tenure. [2] Torres Strait Islanders - Land tenure. [3] Land tenure - Economic aspects - Australia. [4] Land tenure - Law and legislation - Australia. I. Sanders, Will. II. Australian National University. Centre for Aboriginal Economic Policy Research. (Series: Research Monograph (Australian National University. Centre for Aboriginal Economic Policy Research); no. 7).

333.20899915

Foreword

In early 1993, the Faculty of Arts established close links with the Research School of Social Sciences (RSSS) Reshaping Australian Institutions (RAI) Towards and Beyond 2001 Project with the jointly-funded appointment of Dr Will Sanders to head the Reshaping the Institutions of Aboriginal Australia Strand of the Project. Dr Sanders immediately sought to strategically establish the significance of the Strand with a high profile and very topical seminar series Mabo and the Recognition of Native Title: Origins and Implications for the Institutions of Aboriginal Australia. In convening the series, Sanders opted to invite academics either working at, or visiting, the Australian National University (ANU) under the auspices of the RAI Project (Frank Brennan and Garth Nettheim), other visitors (Jeremy Beckett and Henry Reynolds) and Jon Altman from the Faculty of Arts. He was fortunate that Marcia Langton, Chair of the Australian Institute of Aboriginal and Torres Strait Islander Studies and employee of the Cape York Land Council who was a member of the indigenous team negotiating native title legislation was able to provide a seminar while in Canberra.

The series, while planned early in 1993, could not have been better timed, in terms of debate about the formulation of Australian public policy. It ran during November 1993 when the native title legislation was in the process of negotiation and drafting. Three seminar givers (Nettheim, Langton and Altman) were fortunate to have the Native Title Bill released prior to their presentations. The topicality of the series was evidenced by its popularity; some seminars attracted very large audiences.

There was a great deal of interest in the seminar series from outside the Australian National University and it is partly for this reason that a commitment was made to publish available written versions of the seminars as quickly as practicable in the Centre for Aboriginal Economic Policy Research Monograph series. We hope that this volume can further inform and advance the very young debate in Australia about native title, an issue that the RAI Project will no doubt re-examine in future years.

Jon Altman, Faculty of Arts
John Braithwaite, RSSS
ANU, Canberra

May 1994

Acknowledgments

Numerous people and organisations have assisted with the production of this monograph. I would like to thank the authors for prompt submission of papers, Krystyna Szokalski and Linda Roach for sub-editing, Hilary Bek, Belinda Lim and Jon Altman for proofreading and the Australian Government Publishing Service for assistance with referencing styles. The latter proved a particular challenge as we attempted to marry legal and social scientific styles. I trust the outcome is adequate, if not perfect.

I also wish to acknowledge the financial support of the Reshaping Australian Institutions Project for some speakers' travel costs and the Centre for Aboriginal Economic Policy Research for production costs.

Will Sanders
CAEPR

May 1994

Contents

Foreword by Jon Altman and John Braithwaite	iii
Acknowledgments	iv
Abbreviations and acronyms	vi
1. Introduction <i>W. Sanders</i>	1
2. The Murray Island land case and the problem of cultural continuity <i>J. Beckett</i>	7
3. Origins and implications of <i>Mabo</i> : an historical perspective <i>H. Reynolds</i>	25
4. <i>Mabo</i> : options for implementation - statutory registration and claims processes <i>F. Brennan</i>	31
5. <i>Mabo</i> and Aboriginal political rights: the potential for inherent rights and Aboriginal self-government <i>G. Nettheim</i>	46
6. Economic implications of native title: dead end or way forward? <i>J.C. Altman</i>	61
References	78
Contributors	83

Abbreviations and acronyms

ABTA	Aboriginals Benefit Trust Account
ABTF	Aborigines Benefits Trust Fund
ALJR	Australian Law Journal Reports
ALR	Australian Law Reports
ATSIC	Aboriginal and Torres Strait Islander Commission
AUSLIG	Australian Surveying and Land Information Group
CERD	Convention on the Elimination of All Forms of Racial Discrimination
CAEPR	Centre for Aboriginal Economic Policy Research
CAT	Committee Against Torture
CLR	Commonwealth Law Reports
CTP	Community Training Program
DLR	Dominion Law Reports (Canada)
FLR	Federal Law Reports
ICC	Islander Co-ordinating Council
ICCPR	International Covenant on Civil and Political Rights
ISECSR	International Covenant on Economic, Social and Cultural Rights
LMS	London Missionary Society
NLC	Northern Land Council

Referencing

The papers in this monograph contain references to legal, social scientific and more general sources. Footnotes at the end of each paper contain comprehensive listings of authors' sources. The references at the end of the monograph list published articles and books and some legal material, but not legal case judgements or newspaper articles.

1. Introduction

W. Sanders

The High Court's recognition of native title in Australia by a majority of six to one in the *Mabo* judgements of June 1992 was referred to, in one earlier collection, as a 'judicial revolution'.¹ The implications of this revolutionary change in the common law were potentially vast. Not surprisingly, the Commonwealth Government sought fairly quickly to consider its position on native title. A committee of Commonwealth ministers, chaired by the Prime Minister and assisted by a high-level interdepartmental committee, was established to look at the issues in October 1992.

It was, in principle, open to the Commonwealth Government to leave matters arising from the recognition of native title to the courts and the common law. A series of *Mabo*-style claims could have proceeded, refining and developing the common law without Commonwealth Government action. However, as 'consultations' between the Government committees and interested parties progressed, this course of action seemed less and less a possibility. The *Mabo* case had established some basic features of native title, but had left unanswered many finer points of law. Community uncertainty about the implications of native title seemed to be feeding on and magnifying this legal uncertainty. The Government began to take the view that the identification of native title and its implications needed to be expedited and clarified by statutory mechanisms.

These developments of late 1992 and early 1993 occurred without great media attention or public debate. Indeed the Commonwealth election campaign of February-March 1993 was notable for its lack of attention to the native title issue. This, however, changed dramatically in June 1993 when the Commonwealth Government released a discussion paper outlining what it saw as the key issues arising from the *Mabo* decision and setting down a framework of principles for further discussion.²

The Commonwealth wanted to maintain the common law of native title, but expedite the identification of where it existed and clarify its relationship to other interests in land. It wanted to establish a system of specific tribunals for these purposes and to resource these tribunals and claimants before them in a manner which would allow issues to be settled quickly. It also wanted to validate past grants of land that might be held in law to be invalid now that native title had been recognised. This, in effect, involved the possible extinguishment of some native title, but the Government saw this as necessary in order to address the uncertainty of non-native title landholders. The Government also indicated that it wanted to address the situation of indigenous Australians who would not benefit directly from the recognition of native title.

All this the Government wanted to achieve quickly, in order to reduce uncertainty. It initially suggested that a bill to achieve these ends would be in Parliament by September 1993. However, negotiations to refine this proposed package and set it in legislation proved extremely difficult. The States, Aboriginal, mining and pastoral interests, were all consulted and each had strong views and concerns. All the Commonwealth Government could produce by September was an outline of the proposed legislation, while negotiations continued. Stances were taken and modified as bargains were gradually struck. Barely a day went past without the proposed native title legislation being headline news.

By early November 1993 a package of proposed native title legislation had been worked out. None of the interests consulted by the Commonwealth Government were entirely satisfied. Most, however, were willing to go along with the Commonwealth's proposed legislation, if somewhat reluctantly. The exception was the Western Australian State Government which had decided to pursue legislation of its own, wanting nothing to do with the Commonwealth package.

When the Native Title Bill was introduced to the Commonwealth Parliament, a further round of negotiations ensued, this time involving the minor parties in the Senate as well. A Senate Select Committee conducted a brief inquiry into the Bill. Debate over the Bill was vigorous and for a while it looked as though the legislative process might drag on into 1994. However, in the final Parliamentary sitting days before Christmas 1993, the *Native Title Act 1993* was passed into law. The Commonwealth Government had achieved a legislative outcome within six months of the release of its original discussion paper. Among those consulted, only the Western Australian State Government remained adamantly opposed and totally dissatisfied to the end. It had passed its own legislation some three weeks before the Commonwealth and was pursuing a somewhat different model and set of priorities.

The new Commonwealth legislation respected the common law concept of native title and it provided for a National Native Title Tribunal to hear and determine native title claims. It provided for the validation of past land grants which might otherwise be held to be invalid and for a future regime of rights and procedures applying to native title holders. It also included the establishment of a National Aboriginal and Torres Strait Islander Land Fund to acquire land for indigenous Australians who would not benefit directly from the recognition of native title.³

It was during this period of intense public debate from June 1993 that the Centre for Aboriginal Economic Policy Research and the Institutions of Aboriginal Australia Strand of the Reshaping Australian Institutions Towards and Beyond 2001 Project at the Australian National University decided to convene a seminar series looking at both the origins and implications of the recognition of native title. The seminars were open to the public, free of charge, and were given during the month of November 1993 at the Australian National University. The papers

presented here derive from those seminars. Some are presented much as given at the time, and still refer to the Native Title Bill and the events of November 1993. Others have been reworked by the authors in the early weeks of 1994 following the passage of the *Native Title Act 1993*.

In the opening paper, anthropologist Jeremy Beckett, who has worked on Torres Strait Islander issues for 35 years, gives some cultural, historical and local political background to the Murray Island case. He informs us that it was not until the early 1980s that Torres Strait Islanders became aware that the land they lived on was, in the government view, not legally theirs and that following this realisation, it was only the Murray Islanders, at the initiative of Koiki Mabo, who decided to pursue a legal challenge. Mabo, Beckett notes, had been living in Townsville for many years and had been influenced in his thinking by sympathetic non-Islanders. Two of our contributors, Reynolds and Nettheim, receive a mention in Beckett's paper as being among those who influenced Mabo. Beckett also informs us that Mabo's long absence from the Murray Islands left his own claim to land with some strategic weaknesses and that he recruited other plaintiffs in order to strengthen the case.

Beckett then focuses on the 1989 hearings of the Queensland Supreme Court convened at the direction of the High Court in order to determine issues of fact raised in the *Mabo* case. The hearings before Justice Moynihan revealed much about the Murray Islanders' land system, including its relative flexibility, points of internal conflict and potential for change over time. Moynihan found, Beckett notes, that the Murray Islanders did 'succeed in conveying a strong sense of the observation of propriety in relation to land' and thus laid the factual foundation for the return of the claim to the High Court for the determination of issues of law.

Beckett was himself an expert witness in those 1989 hearings, and as the final paragraphs of his essay demonstrate, the experience and the judge's findings clearly gave him cause to reflect both on his past work as an anthropologist and on the legal process. He argues that both lawyers and anthropologists still have trouble coming to grips with the idea of a changing, but still authentic, indigenous culture.

The second contributor, Henry Reynolds, gives historical background to the *Mabo* case of a rather different kind. He is concerned with the way in which traditional interpretations of Australian history and jurisprudence, which denied native title, have long complemented and supported each other. Reynolds has, over the last 20 years, been the leading proponent of an alternative interpretation of Australian history, which was referred to directly in at least one of the *Mabo* judgements and which clearly underpinned the new jurisprudence recognising native title. In this paper Reynolds is concerned to show that both British common law and international law of the 18th century allowed for, even encouraged, the recognition of native title. The purpose of this argument is to rebut claims, implicit in the dissenting *Mabo* judgement of Justice Dawson and elsewhere, that the new jurisprudence involves bad history. It was, in

Reynolds view, rather the old jurisprudence which involved both bad history and bad law. The new jurisprudence, he argues, is already 'a major contribution to Australian historiography'.

The third contributor, Frank Brennan, is more concerned with the contemporary legal implications of the native title decision than its historical or jurisprudential origins. He discusses the findings of the *Mabo* judgements in comparison with those of the 1970 Gove land rights case. He is particularly concerned with their discussion of the proprietary or non-proprietary nature of native title, which leads him into a more lengthy discussion of options for implementation now that native title has been recognised.

Brennan's paper, it should be noted, has not been re-written since the time of the seminars in November 1993. It talks of the Commonwealth Native Title Bill and the Western Australian package of legislation intended to extinguish native title and replace it with statutory 'rights of traditional usage'. The paper reflects the degree of breakdown in cooperation between the Commonwealth and Western Australian Governments that had occurred by November 1993. Brennan defends the Commonwealth's approach to establishing a registration and claims process. He criticises the Western Australian model on many grounds and concludes that it would prolong, rather than reduce, uncertainty. It should perhaps be noted in passing here that the Western Australian State Government is now challenging the constitutional validity of the Commonwealth *Native Title Act 1993* and two Aboriginal groups in Western Australia are in turn challenging the validity of the State Government's legislative package. Both challenges are to be heard in the High Court in September 1994.

The fourth contribution in the seminar series came from Marcia Langton of the Cape York Land Council. Unfortunately, due to the pressure of other commitments, Langton was not able to provide us with a written paper. Her talk emphasised that she and others from the Cape York Land Council, who were then participating in negotiations with the Commonwealth Government over the Native Title Bill, were doing so as local and regional representatives. Indeed she noted that the Aboriginal negotiating team was in many ways going against two national meetings of Aborigines which had resolved not to negotiate with the Government over the proposed native title legislation, but to continue to pursue claims under the existing common law through the courts. However, Langton and others took the view that if the Government was intent on passing legislation, then they had to negotiate what they could for their constituents. Although Cape York is a remote area, it contains, Langton pointed out, very little unalienated Crown land that would be clearly claimable under the common law of native title. Most of the Cape area consists of pastoral leases and claims over these were unlikely to succeed. Langton therefore thought it a considerable achievement that the Aboriginal negotiation team had been able to have included in the native title legislation provision for the

National Aboriginal and Torres Strait Islander Land Fund. She also put great store on the fact that pastoral leases, if acquired by Aborigines through purchase, could, under the proposed legislation, still be claimed after purchase by disregarding prior extinguishment of native title under the lease.⁴ She saw these provisions of the proposed legislation as a substantial win for the Aboriginal negotiating team and particularly for Aborigines in pastoral areas. The certainty of these provisions was seen as preferable to the uncertainty of the common law.

The next contributor, Garth Nettheim, is concerned with the potential political implications of the recognition of native title. Now that a system of native title to land has been recognised, he argues, there is also the potential to recognise more wide-ranging systems of native governance. This idea is referred to as the potential for inherent rights of Aboriginal self-government. It is explored by Nettheim in relation not only to the findings of the *Mabo* case, but also in the light of developments in international law and in other settler majority societies, such as Canada. Nettheim clearly sees considerable potential to take further the 'unfinished business' of the 'legal/political relationships' between indigenous and non-indigenous Australians. He suggests numerous avenues for further exploring and expanding Aboriginal political rights.

The final contributor, Jon Altman, examines the potential economic implications of native title. He identifies the amount of land held as Aboriginal freehold under land rights regimes which preceded the recognition of native title and assesses how much more land might be recognised under native title. Although the amount of land in question certainly is significant - possibly up to 20 per cent of Australia - it is almost exclusively in the remote north and centre of the continent, particularly Western Australia. The majority of indigenous people who live in southern Australia towards the coasts will not benefit directly from recognition of native title, except perhaps through the National Aboriginal and Torres Strait Islander Land Fund established under the *Native Title Act 1993*. Even for the minority of indigenous Australians who might benefit directly, Altman argues, on the basis of past experience of land rights regimes, that the economic implications of the recognition of native title are fairly limited. Altman discusses issues relating to property rights, transaction costs and factor endowments and suggests that the economic benefits of native title and other statutory land rights for indigenous Australians have often been overstated. These benefits are more potential than real and will often depend on indigenous Australians negotiating with mining developers. A couple of important instances of such negotiation have already occurred since the recognition of native title and Altman points to these as possible positive indicators for the future.

Altman concludes that there will be no 'sudden *Mabo*-led economic take-off for Australia's indigenous population', but also notes in passing that there will be no '*Mabo*-instigated collapse of the mining industry'. His position on the economic implications of native title is somewhere in the

middle ground between the indigenous salvationists and the mining doomsayers. The 'judicial revolution', it would appear, is unlikely to produce an economic revolution.⁵

I trust this collection of papers will prove a useful and informative addition to the growing literature on the recognition of native title in Australia. This has been an important episode in our history as a nation and it deserves much consideration and debate. These papers will most certainly not be the last word on native title. Indeed, one of the aspects of the *Native Title Act 1993* which has gone almost unnoticed thus far is that it directs the Commonwealth Parliament to establish a Joint Committee on native title comprising five Senators and five members of the House of Representatives. This body is 'to consult extensively about the implementation and operation' of the Native title Act and to report to the Parliament after two years of the Act's operation.⁶ This process will ensure further debate on the recognition of native title in the not too distant future.

Notes

- 1 Stephenson, M.A. and Ratnapala, S. (eds) 1993. *Mabo: A Judicial Revolution*, University of Queensland Press, St Lucia.
- 2 Commonwealth of Australia 1993. *Mabo: The High Court Decision on Native Title*, Discussion Paper, Australian Government Publishing Service, Canberra.
- 3 Commonwealth of Australia 1994. *Native Title Legislation with Commentary by the Attorney-General's Legal Practice*, Australian Government Publishing Service, Canberra.
- 4 See s.47 of the *Native Title Act 1993*.
- 5 Stephenson and Ratnapala, op cit.
- 6 See ss.204-6 of the *Native Title Act 1993*.

2. The Murray Island land case and the problem of cultural continuity

J. Beckett

Over the last year the media and the politicians have put a new word into circulation: since the High Court handed down its decision on the case brought by Edward Koiki Mabo and three other Murray Islanders, 'Mabo' has come to stand for the whole issue of Aboriginal land rights, as in 'Mabo law', 'Mabo deal', 'Mabo show' and, of course, 'Mabo madness'; if it has not already become a verb, it soon will. There is a certain poignancy in all this, since Mabo, the principal litigant in the case that put indigenous land rights on the front page of the newspapers throughout 1993 and resulted in the passing of national land rights legislation, died before the High Court reached its decision. There is also the irony that Mabo's credibility came under question and his own claim was dropped in the final stages of the case. The High Court's finding in favour of the plaintiffs, not just as Murray Islanders but as indigenous Australians, has overshadowed *Mabo's* fate, and indeed the long drawn-out proceedings in the Supreme Court of Queensland, which the High Court directed to determine matters of fact in relation to Murray Island.

The hearings in the Queensland Supreme Court have not been quite forgotten, however. Some of the critics of the '*Mabo* Bill' have argued that the High Court's decision was flawed, either because it was based on a misreading of 'the facts', or because the process by which the High Court directed that 'the facts' be determined was unsatisfactory. Thus a former Queensland Governor, Sir Walter Campbell, has been reported as saying that a decision having major implications for mainland Australia should not have been based on a case concerning Murray Islanders, who were not Aborigines, but Melanesians, and not nomads but cultivators. Sir Walter quoted former Queensland judge, Peter Connolly QC, to the effect that the Murray Islanders were 'millennia ahead of the palaeolithics (Stone Age people) [i.e. Aborigines] in terms of social organisation'.¹ Along different lines, a Reader in Law at the University of Queensland, Dr John Forbes, has suggested that evidence brought by the plaintiffs in support of their claim was unsatisfactory in a number of respects.² Some of these criticisms have been reproduced for readers in a scurrilous booklet by Tim Hewat entitled *Who Made the Mabo Mess?*³ Both works begin from certain misgivings expressed by Queensland Supreme Court Justice Martin Morynihan in his report on the facts to the High Court.⁴

Koiki Mabo's case had been well and truly won when the *Native Title Act 1993* was passed on December 21; but since the legitimacy of the High Court's decision and the new Act is still contested, it may be as well to respond to these criticisms, and in the process to review a case which

stands apart from the rest of Australian land rights litigation. I do so not as a lawyer but as an anthropologist, who has spent many months on Murray Island over more than 30 years, who advised the counsel for the plaintiffs in the later stages of the hearings, and who appeared in the Supreme Court as an expert witness. Briefly, I shall attempt to illuminate some aspects of the case which seem to be problematic, by viewing them in the context of Meriam culture and history. I will also take the opportunity to reappraise the standing of Koiki Mabo whose credibility Justice Moynihan, and in turn Dr Forbes and Tim Hewat, have called into question.

The 'difference' between Torres Strait Islanders and Aborigines

There is some substance to the argument that there are cultural differences between Aborigines and Torres Strait Islanders, the group to which the Murray Islanders or Meriam belong. Indeed, before the High Court handed down its decision, it seemed to me possible that it would find in favour of the Meriam, limiting its decision to their island, or perhaps to Torres Strait. Islanders certainly regard themselves as different from Aborigines. However, it seems that the differences are not so great as to render the two groups incomparable; what counts in the final analysis is that Aborigines and Islanders are both Australian indigenous minorities with distinctive kinds of interest in land.

The Meriam are related physically, linguistically and culturally, to the people of southern Papua, and have maintained regular trading relations with them over centuries. Although they drew more on marine resources than these neighbours, they were also agriculturalists, growing much the same kinds of crops.

The adoption of agriculture has assumed a critical place in the theory of cultural evolution. In Torres Strait, it appears less an historic watershed, than an option to which certain communities may have been led by - although we can only speculate - such factors as soil fertility, predictable rainfall and population pressure. The sedentary settlements and the substantial houses that the agricultural option facilitated, provided European observers with the grounds for rating the Islanders more advanced (that is, more like themselves) than Aboriginal people, though scarcely for transposing the difference to the grand evolutionary scale and situating them 'millennia ahead'.

The difference in terms of social organisation is not all that striking. Both societies were organised in terms of kinship relations, and were further differentiated in terms of age and gender. Like both Papuans and Aborigines, the Islanders lacked hereditary chiefs; however senior men gained power through leadership in certain religious cults, membership of which was hereditary. These cults were Papuan in character rather than Aboriginal, featuring the use of masks and drums, the cult of Malu-Bomai on Murray Island being among the most important in the Strait. Within Meriam society, the cult seems to have conferred status on certain groups

(though it was by no means the only cult), and to have taken political form at least to the extent of sending out masked men to terrorise women by night, and killing women who discovered their secrets. The importance and character of this cult became contentious issues in the case and I shall have to return to it.

Whatever the original differences between Aborigines and Islanders may have been, they were increased through the form of colonisation in the Strait. In particular, the Islanders (with the exception of those living around Thursday Island) were never displaced. Until the second half of the century, Europeans used the Strait only as a seaway. When they established a permanent presence, it was to protect shipping and to exploit the region's marine resources, principally pearl shell and trepang, activities for which they needed only enough land to repair their boats and process their catch. European seafarers used the Islanders as labourers, but returned them to their gardens and boats when no longer required. Thus it suited the authorities to reserve most of the Islands for the use of the Islanders, taking only small lots for the building of churches, schools and stores.

The administration of the Strait also took an unusual form. Queensland did not annexe the outer islands until 1879 and did not establish effective control until the mid-1880s. In the interim it left law and order to the London Missionary Society (LMS), which had arrived in 1871, directing it to work through the government chiefs (called *mamoose*). The LMS, coming out of the Congregationalist tradition, encouraged Islanders to participate in the running of the church in the form of deacons and church councillors. When the Queensland Government took charge, it was under the aegis of a former premier, the Hon. John Douglas, who established an idiosyncratic benevolent despotism, very different from the regimes to which Aborigines were subjected. Regarding the Islanders as superior to the Aborigines, he instituted a system of government that was unique in the Pacific at that time, including elected island councils. These councils advised resident European magistrates (who were also teachers) and served as assessors in the island court. After 1939, they assumed a major part of the work of local government.⁵ The continuity in indigenous control of community affairs was a major issue in the case.

Murray Island, or to use its Meriam name, Mer, had as its teacher-magistrate one John Bruce, who had lived there for several years before his appointment in 1885, and who remained in the job until 1922. It seems that he acquired a grasp of the Meriam language and a considerable knowledge of Meriam custom, which he put at the disposal of the anthropologist A.C. Haddon, and the Cambridge University Anthropological expedition of 1898.⁶ He also brought this expertise to the hearing of many land disputes that came before the island court, attempting it would seem, to implement, though perhaps also to regularise, indigenous rules about inheritance and local knowledge about boundaries. The court books, which record the decisions that he and later the island councils reached on these matters, were major exhibits in the Queensland hearings.

Enjoying unimpeded access to their islands enabled the Islanders to believe that they still owned them. The Queensland Government encouraged them in this belief because until the 1960s it wanted to prevent them from moving to the mainland. Thus, they saw little reason to join the Aboriginal clamour for land rights in the 1970s. It was only in the early 1980s that they became aware that the land they lived on was reserved for their use, but belonged to the Crown.⁷ The island councils, by that time formed into an Island Coordinating Council, greeted this discovery with dismay: unanimously rejecting the Premier's offer of a 30-year lease, they demanded inalienable freehold title. However, having had more than 40 years experience of dealing with the State Government, they entered into negotiation, eventually settling for a modified version of a Deed of Grant in Trust, which gave them indefinite occupancy of their ancestral lands, reversible only by the Governor in Council. The Mer Council was the only one to refuse, awaiting the outcome of the so-called *Mabo* case, which had been brought in 1982.

The origins of the case

That it was Mer that held out was consistent with the island's strong attachment to land. Apart from the economic value of land for the Meriam, it was a source of individual and family prestige, and thus of conflict. Its economic importance had been somewhat reduced by the 1980s as the Meriam increased their dependence on the welfare economy, but it remained important for residential purposes, in a village that was becoming increasingly crowded. Mer's stand was also consistent with its long struggle to preserve its autonomy. However, it had no experience of legal proceedings, and would probably not have undertaken them had it not been for the initiative of Koiki Mabo, a Meriam long resident on the mainland.

Koiki Mabo, like many of his generation, had left the Strait at the beginning of the 1960s in search of work, adventure and freedom from government controls. Unlike them, however, he had moved outside Islander circles, meeting radical unionists on the North Queensland waterfront, Aboriginal activists, and academics with an interest in indigenous matters such as Henry Reynolds and Noel Loos at James Cook University. These contacts came to the notice of the Queensland authorities, who advised the Mer Council to bar him from the island. Reports that he had rejected Christianity would have strengthened the council in this. He was not able to return until mid-1977.

Mabo had not been part of the legal action by Carlemo Wacando and others to challenge the 1879 annexation of Darnley Island.⁸ He was, however, well informed about it, since the Torres United Party was based in Townsville. In 1980 Mabo attended a conference on land rights in Townsville, and it was there, in discussion with an anthropologist Dr Nonie Sharp, Dr H.C. Coombs, and Professor Garth Nettheim, that the plan was

laid. Also present was the Anglican priest, Father David Passi. Greg McIntyre and Barbara Hocking, who were also present at the conference, became the barrister and solicitor during the early stages of the case.

Mabo became the first plaintiff, but he did not proceed alone. To do so would have been to put his claim on a shaky footing, since the Mer Council had resolved at one time that those who left the island forfeited their land. The Council did not adhere to this position in the case of anyone wishing to return, but the attitude lingered, some even referring to emigrants as 'ex-Islanders'. It was therefore necessary to recruit Mer residents. Mabo's father's sister, Celuia Salee, who was caretaking the family land, was an obvious choice. Father Passi persuaded the family head, Sam Passi to become a plaintiff on the family's behalf. The two later withdrew, partly because of Queensland Government pressure and partly through annoyance at a newspaper report, suggesting that Koiki Mabo expected to become 'King of Murray' when he won the case. David Passi returned to the case in 1989. The fourth plaintiff, James Rice, was an island councillor.

The Passis were of particular importance as descendants of one of the hereditary leaders of the Malu-Bomai cult. Mabo claimed descent from another line, though as we shall see, his claim was contested. Nevertheless, the identity of the litigants provided substance to claims of continuity between the pre-colonial and colonial societies.

The statement of claim argued not merely that the plaintiffs and their forbears had been in continuous occupation of the island - a fact that was never contested - but that a system of ownership had existed 'from time immemorial', having been maintained within the framework of a mode of government. The supposed absence of such a system was a key assumption of the *terra nullius* doctrine.

The Queensland hearings

Although the case began in 1982, the determination of facts in the Supreme Court did not begin until 1989. The intervening time was taken up by a variety of delays, including Queensland's attempt to abort the case by passing retrospective legislation, which the High Court overturned by a narrow margin on the grounds that it was in conflict with the *Racial Discrimination Act 1975*.

There had been no previous case of this kind before a Queensland court and Justice Moynihan had to improvise when it came to hearing Islanders' evidence. Statements such as, 'My father showed me the boundary', or 'My mother told me that this place belonged to her father', would normally have been regarded as hearsay, and as such, not acceptable evidence. This provided the Queensland counsels with endless opportunities to interrupt the plaintiffs' case, until the judge ruled that he would take their objections as heard, and decide the matter later.

Meriam evidence lasted many days and at one stage the court moved to Mer, hearing witnesses too old to leave the island, and visiting some of the places referred to in the hearings. The film *Land Bilong Islanders* records this visit. Once the 'hearsay' question had been resolved, the witnesses seem to have been given respectful attention, although judge, lawyers and reporters must at times have had difficulty in following them. Even though I am familiar with Torres Strait English and the matters that were being discussed, I have found sections of the transcripts incomprehensible.

Forbes, by quoting selectively, manages to convey the impression that Justice Moynihan was concerned about the use of interpreters and perhaps suspected some kind of manipulation of evidence.⁹ Explaining that he granted an interpreter when this was requested, the Justice observes: 'On a number of occasions I soon gained the impression that the witness both understood and could speak English ...'.¹⁰ This rather loses sight of the possibility that the witnesses might have some acquaintance with English, but given the importance of the proceedings, might not want to risk misunderstanding or make fools of themselves (a matter on which Islanders are sensitive). While Mabo and Passi spoke fluent, idiomatic English, most Meriam over 50 were comfortable only in Meriam and Torres Strait pidgin (*kriol* or *broken*). However, Justice Moynihan did not attribute a sinister intent to the resort to interpreters, suggesting that the witness may have 'desired the opportunity to collaborate with the interpreter as a form of social support. The arrangement also gave an opportunity to, in effect, hear the question twice and time for the witness to collect his or her thoughts and to 'collaborate' with an interpreter on an answer. I do not suggest that this process necessarily rendered the evidence unreliable, on occasion it may have enhanced its reliability, but it has to be borne in mind'.¹¹

Forbes also puts a sinister interpretation on the Justice's observation that some witnesses (only one is named) may have been 'under some sort of constraint or pressure'. However, this is followed by a recognition that this was due either to culturally based considerations, or an unwillingness to be seen to take sides.¹² When witnesses are members of a tightly-knit community, it does not take a conspiracy for them to feel this way. However, it was not the case that all the evidence went in the plaintiffs' favour. The elderly gentleman who speaks in the film (and who gave evidence) is complaining that Koiki Mabo has misstated the boundary between their properties.

The land claims

The claim that the Meriam people had been in some kind of continuous occupation of their islands 'from time immemorial' could not be contested (although it was argued that they were not the sole occupants). This provided a solid foundation for the High Court's decision that '... the

Meriam people are entitled as against the whole world to possession, occupation, use and enjoyment of the lands of the Murray Islands'.¹³ However, Koiki Mabo and his fellow plaintiffs did not make their claim on behalf of the whole community. Rather, each claimed particular parts of the total land area; and while from the perspective of the land rights struggle they might be said to be standing for all Meriam land owners, in the Meriam context they were acting for themselves. Thus, while all Meriam subscribed to the principle of traditional ownership, some contested these particular claims. Mabo's own claims proved particularly contentious; indeed some could see his case only in terms of self-aggrandisement.

Anyone who believed that custom was a matter of calm consensus would have been disappointed by this response; but it was entirely characteristic of the Meriam. The Murray Island court books bear witness to the contested nature of Meriam land tenure over almost a hundred years. There are various grounds for dispute. One of these is the location of boundaries which, given the tiny areas involved and the kinds of uses to which they are put, need to be exact. But, while some are defined by fixed topographical features such as creek beds, others are marked by stones, stakes or mounds, which can be moved, or by trees which can die or become confused with other trees, particularly when the land has not been cleared for a long time. Prolonged absences from the island may also leave owners uncertain as to where the boundaries lie. Since the area is divided into small, often tiny parcels, each owner having a number, sometimes on the nearby island of Dauar as well as Mer, there is considerable scope for disagreement and perhaps cheating. Other disputes arise over inheritance.

Land almost invariably passes from parents to children, whether natural or adopted, or if there are none to the next of kin. Beyond this, practice has been variable. Understanding Meriam practice is complicated by the rhetorical use of normative statements. For example, it is often asserted, as it was in the court hearings, that male kin are preferred over female kin (who may receive nothing more than a marriage portion), and that the eldest son should receive the largest share, if not all. But for the period covered by the court books, female children often inherited a share and brothers often inherited more or less equally. In the case of the Passi family, the eldest, Sam, held land on behalf not only of his siblings, but of first cousins as well. However, this was a somewhat unusual case, since several of the other members were unmarried, while others (including David) lived away from the island for long periods. Moreover, there was no question that the other members were not entitled to the use of land. The High Court found this case difficult to construe, partly because David Passi explained the situation in terms of customary principle rather than contingency. The usual practice was either for parents to divide the land among their children, or for the children to do so after their parents' death; for cousins to hold land undivided was unusual.

The inconsistency between customary precept and practice was sometimes explained away as a consequence of change. Certainly, the move, in the 1930s and 1940s, from the traditional villages around the circumference of Mer and on Dauar, to one compact village near the church, school and store, had been achieved by a variety of irregular means, including purchase. (The death of many of the original owners, around the turn of the century, had created the space for outsiders to come in.) Garden land was not subject to radical changes of this kind, but the pressure on land had certainly varied over the years, with fluctuations in population, and the degree of dependence on 'bush tucker' as against store foods; studies on Melanesian land tenure suggest that such factors affect the strictness with which rules are followed.

Contrary to the normative assertions of witnesses, however, the evidence suggests that practice was always fairly flexible. According to the *Cambridge Reports*, owners seemed to exercise a good deal of discretion, to the extent of disinheriting sons, and in the sharing out of the various plots among heirs.¹⁴ In later years, the council encouraged them to write wills, but often the determination of a deceased owner's intention depended on oral testimony.¹⁵

The widespread practice of adoption proved a particularly potent source of dispute. In principle, an adopted child - who ought to be of the same 'blood' as one of the adopting parents - acquired the same rights as natural children, simultaneously forfeiting any claim on its natural parents. In practice, the entitlements of the adopted child were liable to challenge in the absence of a written will. It might be alleged that the arrangement had been for fostering rather than adoption, or that the adoption arrangement had been aborted and the child returned to its parents. Some natural parents seem to have tried to entice their children back when they began earning. Some children ended up without an assured place in either family.

No one openly challenged the claims of Salee, Rice or Passi, though they might have done, particularly in the case of Passi. But many challenged Mabo's claim. Firstly, it was alleged that he had misstated the boundaries. Having left Mer at the age of fifteen and been absent for many years, it is easy to suppose that he had been guessing at them, or simply making them up; but his account was detailed and circumstantial, and he could give an accurate account of the places from memory. More seriously, it was alleged that he was not the adopted son, or had been disinherited. For the record, I had heard his adoptive parents refer to him as their son in 1958, and a senior man who had helped me put together genealogies had also described him as adopted. It seems possible that, as some alleged, his adoptive father had disinherited him when he was dying, since Koiki had not been home for many years; but this allegation came from a witness who had an interest in the matter. There was also a suggestion that he and his natural father had resumed a relationship, when as a boy he stayed with the family over six months. When the government paid out supplementary wages to Islanders who had served in the army during World War II, or

their heirs, Koiki Mabo had claimed from this man rather than his adoptive father, both by then dead. That he did so while the case was in progress, led some to allege that he was knowingly misleading the court; since Australian courts did not recognise customary adoption at that time, he may have concluded that this was the wiser course.

The challenges to Mabo's own claim were serious, but they must be understood in the agonistic environment from which they came. In private conversation, I found the Meriam expansive in their claims for land, and dismissive of the claims of others. Only occasionally did they test these claims in the island court. This may have been because the contestants were not sufficiently sure of their facts to come out with them, or because they suspected that the court, because of its composition, would be partial to the other side. For their part, the court members may have been unwilling to decide against a large and influential family. An examination of the court books shows that, once the teacher ceased to participate in hearings, the court's decisions became less concerned with consistency and more responsive to the complex of facts. Suggestive of political nervousness, they defer more cases, and refer more to the Queensland administration.

As in mainland Australia, though more manifestly so, the Meriam legal system was politically embedded. In this respect, Mabo was in a weak position compared with the other plaintiffs, having been absent for many years and having few close kin on the island. As such, he was an easy target, particularly since the advancement of his claim through an Australian court looked to some like an attempt to by-pass the island court, thus threatening Meriam self-determination. His claims were no more expansive than those of some other Meriam, but he seemed to have made them without an appreciation of his lack of clout and the resistance he would encounter.

The question of continuity

The statement of claim makes repeated use of the phrase, 'from time immemorial', representing the plaintiffs as descendants and heirs of the original inhabitants of Mer, the land tenure system as at least continuous with, if not the same as, what had been practiced before the arrival of Europeans, and the contemporary culture and society as being in significant respects traditional. At a later stage, the counsel for the plaintiffs spoke of their rights 'flowing along a continuum of a dynamic and flexible culture'. Continuity of course is not an all or nothing affair, and it leaves hanging the question of whether what survives remains important, rather than mere folkloric curiosity. Moreover, the old institutions may survive, but assume a different character in a colonial context. Tradition, a term that also appears in the statements of claim and of the facts, is no less tricky. Such subtleties can scarcely be risked in adversarial statements, and are hazardous in the court room situation, yet

they are bound to arise. I had explored them in my book¹⁶ and was called upon to comment on various statements I had made when I was giving evidence; but I think they would have arisen anyway. Certainly Justice Moynihan gave extended consideration to them in his finding, choosing to emphasise the extent of change and the centrality of institutions such as the island court introduced as a result of colonisation.

The *Mabo* case raised a set of questions rather different from those arising in Aboriginal land cases. There was no question that the present day occupants of Mer were the direct descendants of those who had lived there when the missionaries arrived in 1871, but their 'occupation' now included the supervision of inheritance and the settlement of disputes by an island court which, though manned by Islanders, was established and maintained by the Queensland Government. The defence argued that this constituted a substitution of indigenous practice rather than a continuation of it. The plaintiffs argued that the decisions of the court were informed by Meriam custom, but it was another matter to prove that the system of land ownership was 'the same' as that existing a hundred and more years ago. A document of 1826 stated that there were boundaries between lots, but said nothing about the mode of inheritance. Strictly speaking, one could only argue that there must have been some kind of land tenure system, or life would have become intolerable. One could refer the court to numerous accounts of similar systems of land tenure in Papua New Guinea. Such systems were subject to change in response to such endogenous factors as shifting population pressure and warfare, but were nevertheless regarded by the colonial authorities and the Papua New Guinea Government as customary. The defence nevertheless argued that the Meriam system had been radically changed as a result of external influences, at one stage, proposing that since Melanesian inheritance was always patrilineal, the inclusion of female heirs was evidence of Polynesian influence.

This argument is anthropologically wrong, but if one wishes to be rigorous, as Justice Moynihan was inclined to be, it has to be admitted that specific evidence as to what land tenure was like on Mer before the 1890s is thin. The first written account, by the missionary Hunt, contradicted in a number of respects, the information included in the *Cambridge Reports* which was closer to the plaintiffs' version.¹⁷ The account in the *Cambridge Reports* was based mainly on information obtained from the teacher, John Bruce, who it will be recalled, knew the language and had a deep interest in the culture. However, this source cannot be regarded as wholly objective, since Bruce, as administrator, claimed to have brought regularity to Meriam land tenure. Might he not, like many colonial administrators, have changed it in the process, believing that he understood the system better than the Meriam did, or attempting to make it more 'fair'? Since the court's decisions were now backed by the power of the State, Bruce could also be said to have changed the system from tribal anarchy to western law.

In 1912, Bruce reported that he had eliminated the use of 'club law' in the settlement of disputes. Justice Moynihan gave some weight to this

statement, as perhaps indicating that before the arrival of Europeans disputes had been settled by force rather than by law. My own understanding is informed by the accounts of settlement disputes in segmentary societies. I have come to regard law in these societies as something that operates subject to (and is in greater or lesser degree influenced by) political relations. However, the statement of claim argued in terms of a system of arbitration, if not adjudication.

In the same document, several of the plaintiffs are described as descendants of the traditional leaders known as the 'Aiets' of the Meriam people. The statement of facts asserts that: 'Before annexation, disputes concerning land were resolved traditionally by referring them to the Aiets, being the religious and political leaders of the Meriam people, and to the heads of disputing families, for adjudication and decision according to traditional law. If no resolution was thereby achieved, the dispute could lead to feuding and open fighting'.

The reference to the 'Aiets' caused some discussion, since none of the 19th century accounts refers to it. I had not heard it until Mabo mentioned it to me in the late 1970s. However, Ion Idriess's novel *The Drums of Mer*, refers to Aet as one of the three leaders of the Malu Bomai cult.¹⁸ Despite his lurid and romantic story, Idriess made a serious attempt at ethnographic accuracy; he is unlikely to have made the name up, but may have heard it from Passi, whom his descendants refer to as Aet.¹⁹ Whether or not it was a title rather than a name,²⁰ there is no doubt that the leaders of the various Meriam cults were referred to as *zogo le*, meaning those associated with supernatural power. What is less clear is the extent and nature of their authority, particularly in the case of the *zogo le* of Malu Bomai, which was the most important cult.

As compared with nineteenth century accounts, those of latter day Meriam place greater emphasis on the idea of hierarchy and formal authority, including terms such as 'chief', 'high priest' and even 'king'. Moreover, the Statement of Claim, refers to only two *zogo le* or *aets*, of whom Mabo and Passi are said to be the descendants, whereas Haddon's account of the cult distributes the *zogo le* role among a larger number of descent lines, all of whose members had the right to wear the sacred masks.²¹ Idriess's novel by contrast refers to a 'big *zogo-zogo le*' who is also a big sorcerer,²² and since the book has been circulating in the Strait for many years, it is possible that his 'heroic' view of Islander society may have influenced latter day Meriam perspectives on what is now a remote past. *Drums of Mer* is also the only documentary source to mention a 'Council of *zogo le*' hearing land disputes.²³ Whether Idriess was told about such a council, or whether he inferred its existence we do not know.

The question of how many *zogo le* there were and whether their powers were great or small, can be separated from the further question as to whether the Malu-Bomai cult regulated social relations, rather than merely being a source of amoral supernatural power. Some confirmation for the first alternative comes from a series of injunctions couched in

archaic language and known as *Malu-ra gelar*. The word *gelar* is itself significant since it has the connotation of a rule or law. Identified with the cult it assumes a supernatural sanction. The gist of *Malu-ra gelar* is that people should not trespass on one another's land or take one another's crops, practices that were also prohibited by forms of tapu. However, if both parties to a dispute believed that they were the rightful owners, they may have supposed that the prohibitions only applied to the adversary. What the injunctions indisputably affirm, however, is the idea of ownership over land and crops.

Justice Moynihan questioned whether Malu's law had survived the eclipse of the cult, suggesting that it had been rediscovered when Meriam accessed the *Cambridge Reports* through me in 1959. Although I heard it from several old men before the book arrived, I do not think it was widely known among younger folk until the court case. George Passi, in his evidence for the defence suggested that this was the case, an opinion that was corroborated by a friend of mine who said that he did not hear of Malu's law until he found it in a book of folktales, published in 1970. Nevertheless the principle was generally understood and, I think, observed into the 1960s, as long as gardening remained important. By this time, however, the council and the island police were the agents of law and order, and the question as to whether, notwithstanding the ending of the cult, a belief in Malu was a factor in social practice, is not easy to establish.

The statement of claim suggested that the 'Aiets' were still respected in the community, but it was not clear to me that membership of the two descent lines commanded respect in its own right. Members of the Passi family had held positions of prominence over three generations. Passi had been appointed *mamoose* soon after colonial rule was established; one of his sons was a highly regarded priest of the Church of England, though the other sons held no office. Three of his grandsons had been councillors, one a long-serving chairman. However, the other line remained in obscurity until the court case. Koiki Mabo's claim to be a 'king', reported probably in an exaggerated form in *The Australian* newspaper, was not well received in a community that dealt harshly with tall poppies and resented know-it-alls from the mainland.²⁴

The argument in the statement of claim that the Malu Bomai cult remained important for Meriam in the 1980s also proved difficult to sustain, although in my judgement it was not altogether misconceived. The problem was that the Meriam had been at least nominal Christians from the 1870s, and from the time I knew them at least were ardent churchgoers. Differences over competing brands of Christianity had divided the community on a number of occasions. One of the plaintiffs, it will be recalled, was a priest of the Church of England. Early on the missionaries had destroyed the Malu-Bomai shrine and burned one of the sacred objects; the sacred mask was said to have been buried by the officiants, and thus still on Mer, but the only surviving object was one of two sacred drums, which was used in church. Some of the songs and dances were also

preserved in a modified form. They were occasionally performed as late as the 1970s for fundraising. Women and children and outsiders were not excluded, as they had once been, and no account was taken of the hereditary roles. Looking back, it seems to me that these performances were more than just entertainment, if less than religious ceremonies: they were perhaps commemorations of the Meriam past and of a vanished autochthonous power.

During my first periods of field work, between 1958 to 1961, the Meriam spoke of Malu and Bomai in the rhetoric of the mission as 'heathen - or idol - gods'. But they did not think of them as illusions. Although they had left the island, they had once existed and had real powers. It was said that Jesus Christ and God were more powerful, though I noticed that some invoked Malu-Bomai in magical spells in connection with areas of life not covered by Christianity. Father David Passi, in the film *Land Bilong Islanders* and before the court, proposed that Malu was sent by God as a precursor of the Gospel.²⁵ I did not hear any such idea during my first round of field work, though it is possible that its seeds were there, waiting for a more liberal climate such as the 1980s offered. The fact remains that by this time, it was Christianity in one of a number of forms that engaged people's attention. The Pentecostal preacher in *Land Bilong Islanders* expressed no such regard for Malu. People perhaps talked more about the old cult, and a memorial in the church yard included the octopus - the form Bomai took in landing on Mer, and symbolising the eight Meriam tribes - but the dances have rarely been performed in recent years.

The credibility of Koiki Mabo

Justice Moynihan recognised the credibility of Rice and Passi, even though he did not always accept what they said. But he was harsh in his judgement of Mabo: 'I was not impressed with the creditability of Eddie Mabo. I would not be inclined to act on his evidence in a matter bearing on his self-interest (and most of his evidence was of this character in one way or another) unless it was supported by other creditable evidence'.²⁶ The Justice also suggested that Mabo was 'quite capable of tailoring his story to whatever shape he perceived would advance his cause in a particular forum'.²⁷ Reading between the lines, I get the impression that Justice Moynihan did not regard Koiki Mabo as a real Meriam, but rather as an urbanised political activist, who seeing the main chance, made up for his lack of roots by reading books. Compared with the oral tradition, such knowledge was inauthentic and the feeding back of printed information into the oral tradition was destructive of its original character.

I think that some of the claims that Mabo made but the Justice disbelieved, could have been confirmed, for example, relating to his exclusion from Mer, and the belief that the Bomai mask had been buried at Las.²⁸ I have already indicated that I believe that he had indeed been

adopted by Benny and Maiger Mabo, and that the doubts hanging over the continuation of this relationship were not unusual in such cases. I have suggested that his land claims were over-expansive and politically ill-advised, but the bases on which he made them were well within the Meriam canon. Nor was his use of particular arguments, such as the rights of the first born son, more opportunistic than that of other Meriam in a similar situation; the difference was that he had to make all his claims at once, whereas normally people made their claims one at a time.

I first met Koiki Mabo in 1967, and met him occasionally, from the mid-1970s. We talked a lot about Meriam culture, listened to my recordings of Meriam music and at one point worked together on an article about dancing. On his first visit home, in 1977, he took me to his village, Las, and showed me the place where the shrine of Malu Bomai had stood. I have to admit that I was surprised that someone who had left Mer around the age of fifteen and had scarcely been back until his forties knew as much as he did. Some of it may indeed have come from the *Cambridge Reports* or from Idriess's novel. But much of it did not. He had, for example, an extensive knowledge of plants, including those used for various dance ornaments and implements, which was not to be found in print. Nor could he have got from books, the vivid, detailed mind picture of the land which he presented to the court. The genealogy he recounted went back further than could be found in the *Cambridge Reports*.

Koiki Mabo may, as his own testimony suggests, have been a particularly attentive child and he may have spent more time with his grandfather than small Meriam boys usually do. However, it would be a mistake to think that by leaving Mer he was forever cut off from the oral tradition. Although he said he was isolated during his early years on the mainland, by the mid-1970s there were many elderly Meriam living in or passing through Townsville. On several occasions he and I interviewed such people in search of information. In the long run, I suspect, what he had heard as a child, what he heard in Townsville, and what he read in books at the university, became part of a single web of traditional knowledge. Inasmuch as many of the things included in the *Cambridge Reports* had been forgotten by the time he was growing up, he 'knew' more than other Meriam about their past. At the same time, he 'knew' it in a different way, not as something that had come to him just in the course of growing up on Mer, but as knowledge that he had searched for. At the same time, because much of this knowledge came from a vanished past, and because it was not constantly tested against everyday experience, it could feed his imagination. It led to him challenging the Queensland Government in the High Court. His dream of being an 'Aet' and a big landowner foundered; but he won the recognition of Meriam title. The Meriam will say that they knew this all the time, but now that he is dead they wear the tee-shirt with his face against the map of the island.

Moynihan's conclusions

While Justice Moynihan declared himself dissatisfied with the confused and contested evidence supporting the plaintiffs particular claims, his valedictory words to the Meriam community, recorded in *Land Bilong Islanders*, indicate that he was impressed by the strength of what one might call their culture of territoriality. In his findings, he states that the Meriam 'succeed in conveying a strong sense of the observation of propriety in relation to land. ... The knowledge of boundaries is important in respect of those concepts of propriety and of the social behaviour respecting them. ... Such attitudes are rooted in the precontact past ...'²⁹ However the Justice seems inclined to see these as something less than law: 'The attitudes I have mentioned are ingrained in the culture of the people ... are a part rather than objectively laid down and enforced by some distinct agency - rather like our (or more likely another age's) concept of good manners. ... In this context, so far as the evidence reveals, I have little difficulty in accepting that the people of the Murray Islands perceive themselves as having an enduring relationship with land on the islands and the seas and reefs surrounding them'.³⁰ Later Justice Moynihan concedes that 'the evidence establishes that Murray Islanders recognise the continuance of claims to garden plots and recognise or dispute claims of entitlement by individuals in respect of those plots'.³¹

However, Justice Moynihan seems to understand the process of inheritance and the decisions of the island court primarily as arrangements to distribute resources and avoid social conflict, characterised by some tendency to consistency. The implication seems to be that this process does not amount to law as it is understood in Australian society. He also prefers to suspend judgement on the question of the degree of continuity from a largely unknown pre-colonial culture and the present, and is sceptical of the suggestion that the 'Aets' or any other authority decided land disputes in the old days, or that the island courts have been consciously applying Malu's law in more recent times.³²

The authenticity question

Although Justice Moynihan's findings enabled the High Court to overturn the *terra nullius* doctrine, they tend to confirm - intentionally or not - the reproach of inauthenticity that hangs over so many Aboriginal claims on the mainland.³³ This is starting to cloud the expertise of anthropology.

In part this situation stems from the difficulty for anthropologists in handling the question of cultural continuity. At different times, evolutionary and functionalist anthropologists, as well as those of a political economy tendency, have represented 'primitive culture' as irreparably transformed by contact with 'civilisation'. According to another view, such cultures survive against all odds, encompassing alien influences, yet somehow remaining essentially themselves. But if the first

view underestimates the resilience of indigenous cultural reproduction, the second tends to a romantic essentialism which short circuits the understanding of cultural dynamics. This kind of essentialism conceals processes such as cultural revival and the invention of tradition and so converges with those for whom anything less than the pristine primitive is inauthentic.³⁴

As people become aware of the presence and the possibility of cultural alternatives, consciousness of their own culture becomes reflexive and their customs and traditions become reified, even fetishised. What were flexible principles become immutable laws which, ironically, become the screens behind which individuals and groups advance new interests.

These remarks apply in some degree to the Meriam. After more than a century of exposure to missionaries, school teachers and government officials, they cannot but have a relativistic view of their culture. Moreover, their sense of the past has been influenced in complex ways by the experience of being studied by a succession of anthropologists and others, and - particularly in recent years - by reading what the researchers have written.³⁵ (It is ironic that while anthropologists become credible expert witnesses by writing, 'natives' render themselves inauthentic by reading: tainted with literacy it seems they can't go home again!)

But, to take one instance, even if it is true that the Meriam only rediscovered Malu's Law in the *Cambridge Reports*, does not render their proclamation of it inauthentic. It was not seized upon opportunistically in the course of preparing the land claim. Its rediscovery (or, as I suspect, return to currency) occurred in the early 1960s, long before the *Mabo* case was conceived. The visits of three researchers in quick succession - myself, Wolfgang Laade, and Margaret Lawrie - may have rekindled an interest in the Meriam past, but the interest would have been ephemeral had it not resonated with contemporary Meriam experience.

The experience I refer to is summed up by the term 'occupation', in the sense of living on Mer among Meriam people. It refers less to the precepts and traditions by which Meriam sometimes represent themselves and their culture, than to the sensuous everyday experience of being there. When I first lived in Mer, occupation included a steady round of gardening and harvesting, for prestige as well as subsistence, on land that had been inherited from ancestors, known and unknown, and which bore witness to one's relatedness to those who held adjacent lots. This occupation was in crisis, however, as the younger men, unable to earn money at home, looked to a new life among white people on the mainland. Those who still valued island custom (itself by that time a self conscious mix of Meriam South Sea and European practices) could no longer take it for granted, but must defend it. It was at this moment, in Walter Benjamin's words, that they 'seized hold of a memory as it flashed up at a moment of danger'.³⁶ Twenty years later, gardening had lost much of its former importance, but when the Meriam discovered that it was the Crown that owned their islands, and all the government would offer them was a 50-year lease, land became the

material condition for the community's survival. Meanwhile, for those on the mainland, the dream of modernity had faded and many had begun to think of going home, or if that was not a possibility, to worry about their land. To be an Islander - even on the mainland - one must have an island, and to have an island, one must own a piece of it. Once again they grasped their past as it flashed by, and went to law.

Notes

- 1 *The Australian* 27 October 1993.
- 2 Forbes, J. 1993. 'Mabo decision leaves some vital queries on evidence unanswered', *The Australian Financial Review* 30 June 1993.
- 3 Hewat, T. 1993. *Who Made the Mabo Mess?*, Wright Books, Brighton, Victoria.
- 4 Moynihan, M. 1990. Determination Pursuant to Reference of 27 February, 1986, by the High Court of Australia to the Supreme Court of Queensland to hear and determine all issues of fact raised by the pleadings, particulars and further particulars in High Court Action B12 of 1982.
- 5 Beckett, J. 1987. *Torres Strait Islanders: Custom and Colonialism*, Cambridge University Press, Cambridge and Sydney, pp. 45-60.
- 6 Haddon, A.C. 1908. *Sociology, Magic and Religion of the Eastern Islanders: Reports of the Cambridge Anthropological Expedition to Torres Strait, Volume VI*, Cambridge University Press, Cambridge.
- 7 Beckett, op. cit., pp. 190-91.
- 8 Sharp, N. 1993. *Stars of Tagai: The Torres Strait Islanders*, Aboriginal Studies Press, Canberra, p. 279.
- 9 Forbes, op. cit.
- 10 Moynihan, op. cit., p. 66.
- 11 Ibid.
- 12 Forbes, op. cit.
- 13 *Mabo v Queensland*, no. 2, 1992. 175 CLR, p. 2.
- 14 Haddon, op. cit., pp. 163-68.
- 15 I suspect that some parents delayed making a will in order to maintain control over their children.
- 16 Beckett, op. cit.
- 17 Hunt, A.E. 1899. 'Ethnographical notes on the Murray Islands, Torres Strait', *Journal of the Royal Anthropological Institute*, Vol. XXVIII: 5-18; Haddon, op. cit., pp. 163-68.

- 18 Idriess, I.L. 1938. *Drums of Mer*, Angus and Robertson, Sydney, p. 7.
- 19 Idriess also consulted Rev. William MacFarlane, an Anglican priest who collected anthropological material in the Strait between the wars, and wrote an introduction to the book.
- 20 Since hereditary titles are generally absent from Torres Strait, it may be that Aet was a personal name, owned - like other names - by certain descent lines associated with the cult of Malu Bomai. From such a practice it is a short step to the idea of title.
- 21 Haddon, op. cit., p. 286.
- 22 Idriess, op. cit., p. 6.
- 23 Ibid., p. 33.
- 24 Beckett, op. cit., p. 112.
- 25 Sharp, op. cit., pp. 108-110.
- 26 Moynihan, op. cit., p. 71.
- 27 Ibid., p. 70.
- 28 I heard this story as early as 1958, and indeed it is probable that the custodians of the sacred mask would have attempted to conceal it from the missionaries.
- 29 Moynihan, op. cit., p. 157.
- 30 Ibid.
- 31 Ibid., p. 178.
- 32 Ibid., pp. 191-93.
- 33 See for example, Jacobs, J.M. 1988. 'The construction of identity', in J. Beckett (ed.) *Past and Present: The Construction of Aboriginality*, Aboriginal Studies Press, Canberra.
- 34 Sharp, N. 1993. 'No ordinary case: reflections upon Mabo No. 2', in *Essays on the Mabo Decision*, Law Book Company, Sydney, p. 30. Sharp's stress on 'Malu's law' in her attempt to 'spiritualise' Meriam land tenure, is perhaps an instance of this tendency.
- 35 Apart from the Cambridge Expedition in 1898 and the work of the missionary, William MacFarlane in the 1920s, at least twelve researchers have visited Mer since my visits in 1958-1961.
- 36 Benjamin, W. 1969. *Illuminations*, Shoken Books, New York, p. 255.

3. Origins and implications of *Mabo*: an historical perspective

H. Reynolds

In the *Mabo* judgement the High Court buried the doctrine of *terra nullius*. In its time it held sway over both history and jurisprudence. Each discipline underpinned the other. Blackburn's Gove land rights judgement of 1971 rested on his interpretation of history as much as on his assessment of the law.¹

It is equally true that traditional interpretations of both law and history ride in tandem through the dissenting *Mabo* judgement of Justice Dawson. Many of those attacking the High Court over *Mabo* have turned to the interpretations of history implicit in the judgement. Bad history, they argue, produces bad law. Given the importance of these questions it is necessary to examine some of the many ways in which jurisprudence and historiography are woven through the judgement.

Sovereignty and property

Traditional accounts of both law and history invariably fuse the two distinct legal concepts of sovereignty and property. This is true of Blackburn's judgement of 1971 and of the influential article by Allan Frost 'New South Wales as *Terra Nullius*' published ten years later.² Both judge and historian slide continuously and unconsciously from one concept to the other. Like generations of Australian historians and jurists, they fail to distinguish between the radical title which stems from sovereignty and the beneficial ownership of the land. It is this conflation of concepts which underpinned *terra nullius*. Justice Brennan put his finger on the problem, remarking that:

It is only the fallacy of equating sovereignty and beneficial ownership of land that gives rise to the notion that native title is extinguished by the acquisition of sovereignty. ... What the Crown acquired was a radical title to land and a sovereign political power over land, the sum of which is not tantamount to absolute ownership of land.³

***Terra Nullius* and land use**

None of the six judges who upheld *Mabo's* claim gave any consideration to the view frequently propounded by historians that Australia was a *terra nullius* because the Aborigines did not use the land properly or have a political system based on chiefs. As a result this issue was at the centre of

much of the conservative criticism of the High Court. A common view is that while native title might legitimately apply to the Murray Islanders, it should not be extended to mainland Australia because the Aborigines had a nomadic life-style and could not therefore establish a claim to the land. A variation of this argument is that whatever contemporary opinion might be now, in the late 18th century there was no recognition of property rights of hunters and gatherers. The High Court therefore projected onto the past the attitudes and values of the present day. In getting their history wrong they misinterpreted the law.

The critics of the Court are wrong about both the jurisprudence and the practice of the 18th century. North American Indians were considered to hold native title to their lands regardless of their pattern of land use. In his classic study *The Acquisition and Government of Backward Territory in International Law*, Lindley summed up the established practice:

Indian possession or occupation was considered with reference to their habits and modes of life; their hunting grounds were as much in their possession as the cleared fields of the whites, and their rights to its exclusive enjoyment in their own way and for their own purposes were as much respected, until they abandoned them, made a cession to the government, or an authorised sale to an individual.⁴

The rights of hunters and gatherers had support in the international law of the late 18th century and especially in the law of possession. Both the English common law and international law gave great strength to those who were the original possessors of a tract of land. In his book *The Law of Nations*, first published in 1788 von Martens argued that:

If possession be immemorial; if there exists no possession anterior to it; it is undoubtedly sufficient to set aside all the pretensions of others ... it is the consequence of the natural impossibility for any other to prove a right better than that of possession.⁵

In his judgement Brennan made a similar observation. The ownership of land in the exclusive occupation of a people, he argued 'must be vested in that people: land is susceptible of ownership and there are no other owners'.⁶

Eighteenth century law was also able to recognise the land tenure of tribal people who lived by hunting and herding. The most eminent legal scholar of the age, Christian Wolff, determined that such groups had what he called a mixed community holding over their land. The fact that they moved about their territory did not effect their tenure. Families who 'wandered through uncultivated places' used their lands in 'alternation'. But their ownership was not lost 'by non-user'. He explained that

if the families have no settled abode, but wander through the uncultivated wilds, in that case, nevertheless, they are understood to have tacitly agreed that the lands in that territory in which they change their abode as they please, are held in common, subject to the use of individuals, and it is not to be doubted but that

it is their intention then they should not be deprived of it by outsiders. Therefore they are supposed to have occupied that territory as far as concerns the lands subject to their use, and consequently to have jointly acquired the ownership of those lands, so that the use of them belongs to all without distinction.⁷

Colonial common law

The assenting judges determined that at the time of Australian settlement there was a common law of the Empire which embodied the principles of native or Indian title. It recognised a form of tenure based on prior occupation which was protected by law in a colony of settlement because the indigenous people became subjects from the assumption of sovereignty. Justices Deane and Gaudron believed that the strong assumption of the common law was that any pre-existing native interests were protected under the law of the Colony once established. 'It follows', they argued

from what has been said in earlier parts of this judgement that the application of settled principle to well-known facts leads to the conclusion that the common law applicable to the Colony in 1788, and thereafter until altered by valid legislation, preserved and protected the pre-existing claims of Aboriginal tribes or communities to particular areas of land with which they were specially identified, either solely or with others, by occupation or use for economic, social or ritual purposes. Under the law of the Colony they were entitled to continue in the occupation or use of those lands as the holders of a common law native title which was a burden upon and reduced the title of the Crown.⁸

Deane, Gaudron and Brennan all refer to the important 1957 judgement by Lord Denning in the Privy Council in which he enunciated the general principles which had underlined the property rights of indigenous people in all parts of the British Empire.

In inquiring ... what rights are recognized, there is one guiding principle. It is this: The courts will assume that the British Crown intends that the rights of property of the inhabitants are to be fully respected. Whilst, therefore, the British Crown, as Sovereign, can make laws enabling it compulsorily to acquire land for public purposes, it will see that proper compensation is awarded to every one of the inhabitants who has by native law an interest in it: and the courts will declare the inhabitants entitled to compensation according to their interests even though those interests are of a kind unknown to English law.⁹

What happened in 1788?

The High Court was adamant that the Crown did not become the beneficial owner of all the land in Eastern Australia as a result of the claim of sovereignty in 1788. There was no apocalyptic act of state dispossessing the indigenous people over half a continent. 'We know what was done', Deane and Gaudron noted, 'and it is plain that what was done (did not) constitute a specific expropriation of pre-existing native interests in the

lands of the Colony'. The claim of sovereignty over the northern Torres Strait did not extinguish the property rights of the Meriam people nor did the comparable claims of sovereignty in 1788, 1824 and 1829 expropriate the indigenous people of mainland Australia. Indigenous rights ran on into European Australia. But the question which follows is how and when did extinguishment take place?

Why was native title not respected in 1788?

It was a question which the Court had to address. It was tackled by Justices Deane and Gaudron. The great problem is the absence of specific instructions about Aboriginal land. The surviving documents tell us little one way or another. Deane and Gaudron argue that the absence of clear instructions strongly suggest that the common law traditions continued. Silence suggests continuity rather than the reverse. It was, they argue,

unlikely that there was any actual but unexpressed intent on the part of the Crown that the act of State establishing the colony should reverse the assumption of the common law or extinguish existing native interests.¹⁰

Given the lack of detailed instructions, they argue even more strongly,

it seems to us to be simply not arguable that there was anything in the act of State establishing the Colony which constituted either an expropriation or extinguishment of any existing native interests in the vast areas of land in the new Colony or a negation or reversal of the strong assumption of the common law that such native interests were respected and protected under the law of the colony after its establishment.¹¹

Extinguishment of native title

If indigenous property rights survived the various claims of sovereignty how were they actually extinguished? The Court was quite clear that native title, like any other form of title, could be extinguished by the Crown exercising sovereign power. But the intention to extinguish had to be clear and plain and effected under the power of some statute. In actual practice the dispossession of the Aborigines may often have been 'wrongful' in the words of Deane and Gaudron. They explain that:

Notwithstanding that the rights of use or occupancy under a common law native title recognized by the law of a settled British Colony were binding upon the Crown, the native inhabitants of such a Colony in the eighteenth century were in an essentially helpless position if their title was wrongfully denied or extinguished or their possession was wrongfully terminated by the Crown or those acting on its behalf. In theory, the native inhabitants were entitled to invoke the protection of the common law in a local court (when established) or, in some circumstances, in the courts at Westminster. In practice, there is an element of the absurd about the suggestion that it would have even occurred to

the native inhabitants of a new British Colony that they should bring proceedings in a British court against the British Crown to vindicate their rights under a common law of which they would be likely to know nothing.¹²

The extinguishment of Aboriginal rights did not take place when sovereignty was claimed, but gradually and in a piecemeal fashion over the whole span of Australian history since 1788. Justice Brennan determined that:

As the Governments of the Australian Colonies and, latterly, the Government of the Commonwealth, States and Territories have alienated or appropriated to their own purposes most of the land in this country during the last 200 years, the Australian Aboriginal peoples have been substantially dispossessed of their traditional lands. They were dispossessed by the Crown's exercise of its sovereign powers to grant land to whom it chose and to appropriate to itself the beneficial ownership of parcels of land for the Crown's purposes. Aboriginal rights and interests were not stripped away by operation of the common law on first settlement by British colonists, but by the exercise of a sovereign authority over land exercised recurrently by Governments. To treat the dispossession of the Australian Aborigines as the working out of their Crown's acquisition of ownership of all land on first settlement is contrary to history. Aborigines were dispossessed of their land parcel by parcel, to make way for expanding colonial settlement. Their dispossession underwrote the development of the nation.¹³

Survival of native title

The Court concluded that the property rights of the Meriam people survived the claim of sovereignty in 1879 and everything else the Queensland Government had done since then. The implication was clear. Where Aboriginal communities continue to live on unalienated land their native title must be presumed to exist. The onus is on the Crown to prove the contrary, to show how and when extinguishment took place. Justice Toohey explained that

previous interests in the land maybe said to survive *unless* it can be shown that the effect of annexation is to destroy them. That is, the onus rests with those claiming that traditional title does not exist.¹⁴

The Court gave several answers to the question of what is required to establish the continuity of native title. Justice Brennan argued the need for a group to have maintained their connection with the land, to acknowledge the laws and to observe the customs based on the traditions of the clan. Justice Toohey based his view of native title on the actual possession of the land rather than the observation of particular customs or traditions. Modification of traditional society in itself, he explained,

does not mean traditional title no longer exists. Traditional title arises from the fact of occupation, not the occupation of a particular kind of society or way of life. So long as occupation by a traditional society is established now and at the time of annexation, traditional rights exist. An indigenous society cannot, as it were, surrender its rights by modifying its way of life.¹⁵

History and law underpinned the doctrine of *terra nullius*. A radical re-interpretation of history carried through during the last 20 years provided critical underpinning for the legal resolution ushered in by *Mabo*. In turn the judgement itself is also a major contribution to Australian historiography which will influence the way history is taught and researched. In reaching to many parts of the old Empire and the United States for their precedents, the High Court judges have given a salutary reminder to historians to look beyond Australia when seeking to understand what took place here on our own continent.

Notes

- 1 *Milirrpum v Nabalco*, 1971. 17 FLR, pp. 141-294.
- 2 Frost, A. 1981. *Historical Studies*, 19, p. 77.
- 3 *Mabo v Queensland*, no. 2, 1992. 175 CLR, pp. 51-53.
- 4 Lindley, R.F. 1928. *The Acquisition and Government of Backward Territory in International Law*, London, p. 34.
- 5 von Martens, G.F. 1829. *The Law of Nations*, Translated from French by W. Cobbett, 4th ed., W. Cobbett, London, p. 64.
- 6 1992. 175 CLR, p. 51.
- 7 Wolff, C. 1934. *Jus Gentium Methodo Scientifica Pertractatum* (1764), Clarendon Press, Oxford, p. 158.
- 8 1992. 175 CLR, p. 100.
- 9 *Ibid.*, pp. 56, 82.
- 10 *Ibid.*, p. 99.
- 11 *Ibid.*, p. 98.
- 12 *Ibid.*, pp. 93, 94.
- 13 *Ibid.*, p. 68.
- 14 *Ibid.*, p. 183.
- 15 *Ibid.*, p. 192.

4. Mabo: options for implementation - statutory registration and claims processes

F. Brennan

The background: the Gove land rights case

Anthropological evidence

Describing the anthropological preparations for the Gove land rights case, W.E.H. Stanner recalled:

We were then taken by the hand and led towards the singing. As we walked we were asked to look only at the ground and not to raise our heads until told to do so. We went into a patch of jungle, and then were given a sudden command to look. At our feet were the holy *rangga* or emblems of the clan, effigies of the ancestral beings, twined together by long strings of coloured feathers. I could but look: it was not the time or place to start an inquisition into these symbols. A group of dancers, painted - as far as I could see - with similar or cognate designs, then went through a set of mimetic dances. When it was over I heard Mathaman say: 'now I can die'. One of the men said to me: 'now you understand'. He meant that I had seen the holy *rangga* which, in a sense, are the clan's title-deeds to its land, and had heard what they stood for: so I could not but 'understand'. The Rirratjinga and the Gumaitj, the main plaintiff clans, intend to take their *rangga* into Darwin to show the court. They think the court will then 'understand'. I had the sense that, although they have been warned, they cannot conceive the possibility that the court will not understand.¹

As we know, the court did not understand. Later in his article 'The Yirrkala land case 1970', W.E.H. Stanner predicted that the anthropological evidence would come under very severe attack. He said, 'I have found widely in official life both hostility and derision towards the work and opinions of anthropologists and I expect court tactics designed to make us appear mere wafflers of vocables and to make the facts appear either uninterpretable or misinterpreted. The particular claims of the two main clans and their interlocking with those of the nine other clans will have to be determined and I expect artificial confusions to be added to the real ones'.² This was an accurate prediction prior to the first major land rights case in the country.

Sir Richard Blackburn thought he had to decide whether the plaintiffs maintained the same linkages with the same areas of land as their ancestors to their country in 1935 after the production of the first map of tribal areas and even back to 1788 at the assertion of British sovereignty. When he finally gave his very lengthy decision, he said, 'This question of fact has been for me by far the most difficult of all the difficult questions of fact in the case. I can in the last resort, do no more than express that degree of conviction which all the evidence has left upon my mind and it is this: that I am not persuaded that the plaintiffs' contention is more probably correct than incorrect. In other words, I am not satisfied on the balance of

probabilities that the plaintiffs' predecessors had in 1788 the same links to the same areas of land as those which the plaintiffs now claim'.³ According to Blackburn's test, to establish native title, it would be necessary to show that your ancestors were the ones who had the same rights and interests over the same area of land with the same boundaries in 1788 or 1879, or whatever the relevant date was for the assertion of sovereignty, as you now presently enjoyed. This was a very fixed, some might say frozen, notion of traditional rights and interests in land. In *Mabo*, the judges were prepared to accept the possibility that rights and interests could be varied within a group according to traditional law over time.

The nature of native title rights

The other issue which arose in the 1970 Gove case, and which is the key legal political issue for any legislators considering a registration and claims system of native title, is whether or not the described Aboriginal rights and interests in land are simply rights and interests to have some access and use of land. Or are they what we would call proprietary rights? Sir Richard Blackburn said, 'The next question is whether the proved relationship of the plaintiffs to their defined areas of land is a relationship which ought be described as proprietary, either in a general sense or in a special sense which may be required by the Lands Acquisition Act'.⁴ He looked at a number of submissions which had been put by Mr Woodward QC who appeared for the Aboriginal plaintiffs. Woodward put forward four submissions. First that the Aboriginal people 'think and speak of the land as being theirs, as belonging to them'. His second submission was that others who have access to the land also speak of the land as being owned by the particular clan groups. His third argument was that there were various myths which you could point to which told the story of the ownership of the land. And finally he looked to the way in which the clans dealt with their land.

In conclusion, Sir Richard Blackburn said, 'I think this problem has to be resolved by considering the substance of proprietary interests rather than their outward indicia. I think property in its many forms generally implies the right to use or enjoy, the right to exclude others, and the right to alienate. I do not say that all these rights must co-exist before there can be a proprietary interest, or deny that each of them may be subject to qualifications. But by this standard, I do not think that I can characterise the relationship of the clan to the land as proprietary'.⁵

Implementation

That having been the decision reached by Justice Blackburn on the evidence, first that he could not be convinced on the balance of probabilities that these people enjoyed the rights and interests in the land as their ancestors had, and second, whatever interests they had were not proprietary, the judgement went against the plaintiffs on the evidence and on the law. Upon election in 1972, the Whitlam Government set up the

Aboriginal Land Rights Commission. Woodward who had been counsel in the case, then sat as the Commissioner, and heard the relevant evidence from anthropologists and others. The key anthropological evidence once again came from Professor Berndt who had given evidence with Stanner in the Gove case.

There was a key document put in the submission by the Northern Land Council (NLC) in January 1974 to the Woodward Royal Commission, which contained an anthropological survey by Professor Berndt on 'The Relationship of Aborigines to Their Land, With Reference to Sacred and/or Traditional Sites'. Focussing on the local descent group, he said:

- (a) There is definite ownership of land, through membership of a specific kind of group.
- (b) Persons belong to it through birth and through spiritual linkage.
- (c) Specific territories relevant to local descent groups can be delineated and stipulated in relation to their major and minor sites.
- (d) Possession of that land is ratified through the performance of land sustaining rites.
- (e) Both men and women have rights in that land.
- (f) The charter of land-possession rests in the Dreaming, expressed through myth and ritual.
- (g) Such land is not transferable, it is inalienable.

The Berndt description would seem to satisfy most of the tests of being a proprietary interest.

Woodward then put forward a set of definitions which came from the suggested drafting instructions for proposed legislation drawn up by the Counsel for the NLC. The NLC's legal team was headed by Mr F.G. Brennan QC who, as a High Court Justice, went on to write the lead judgement in the *Mabo* decision eighteen years later. What we have in those drafting instructions, which appear as Appendix D of Woodward's Second Report, is a definition of traditional owners. Justice Toohey, who also sat as a High Court Justice on the *Mabo* case in 1992 and had presided earlier as the Northern Territory Aboriginal Land Commissioner, said in 1983 in his report *Seven years on*⁶ that these provisions should be maintained as a workable definition for determining rights and interests in land.

Mabo

Anthropological evidence

It is against that background we come to the *Mabo* proceedings and the matters raised in discussion at Jeremy Beckett's seminar. (Beckett's

seminar provoked much discussion about the nature of native title rights particularly their communal or individual character - ed.) Lawyers engaged in cases such as *Mabo* have always been left perplexed as to what it is they are being asked to recognise or to register? What is being treated as a proprietary interest? In the *Mabo* proceedings, there were claims that there was a communal system of land title but also that there were individual rights and interests in land. As the proceedings dragged on from 1982 until 1991, Chief Justice Mason ordered that very specific questions be referred to the Full Court. The first two questions which were put to the Full Bench in the second *Mabo* case were: 'Is the plaintiff David Passi, the owner of rights and interests recognised by and enforceable under Australian law in stipulated areas of land?'⁷ Counsel for the plaintiffs were submitting that they had evidence of one individual being the owner of particular areas of land. The second question related to the plaintiff James Rice being the owner of rights and interests in land. By the time these questions have been formulated, any notions about communal ownership had been abandoned, and any particular claim by Eddie Mabo had also been abandoned because of the adverse findings Justice Moynihan made on Eddie's evidence.

During the course of the hearing, the plaintiffs abandoned their claim to individual rights and interests. I want to quote a little from the transcript of the proceedings of 28 May 1991. Justice Brennan said to Mr Castan QC, 'I am still at a loss to understand the nature of the interest which you say burdens what you conceive to be, as I understand, the Crown's radical title. Is it a case where you say the Crown's title is burdened with an interest held by the Meriam people and that interest, in itself, is divisible amongst the individual members of the Meriam people, or do you say that the Crown's title is burdened directly with an interest held by particular Meriam people?'⁸ Castan was being asked if the plaintiffs' case was based on the assertion and evidence of underived individual rights that people like David Passi and James Rice had or whether such individual rights were derived from some sort of communal title to land.

There was considerable discussion about this until the Chief Justice said, 'I do not follow from the pages that you have referred us to that the findings of Mr Justice Moynihan support this individual ownership claim that you are making because essentially his Honour seems to be finding that the land in question is held pursuant to a group holding arrangement'. After the case had been running for ten years with the services of competent and experienced anthropologists and lawyers, it was really quite extraordinary to have this critical question being raised in the High Court before the full bench. Chief Justice Mason then said, 'Mr Castan, it may be that our consideration of this would be advanced if we could induce you to descend from the general to the particular. Could you isolate for us what you consider to be the best individual claim that you can put forward, perhaps in relation to Rice to, as it were, one block of land, so that we can see how the general principles on which you rely actually manage to produce a specific claim, individual ownership of the kind that you are

contending for?'⁹ More discussion ensued as the Bench attempted to have counsel set out the best case scenario for an individual native title. Finally Chief Justice Mason said, 'Well now, let's take one block Bazmet for example. ... What are the elements of the rights that James Rice has in relation to Bazmet?'¹⁰ Then Justice Deane took the bit between his teeth and said, 'Mr Castan, if I can just take up what the Chief Justice said, regarding the Bazmet findings being: 'It is garden land which James Rice has not used over ten years. The land is said to have been a wedding gift'. He and his father, at some stage, used it. Now, on the basis, as I understand it, of that being the only evidence, we are asked to answer a question, 'Does James Rice own this land or interests and title in this land and what precisely are they?'¹¹ This culminates in complete exasperation from the bench when Justice Deane says 'Well, then, can you just come to Bazmet and tell me how you get the basis for this Court to make a finding that James Rice owns in relevant terms Bazmet from the finding that it is garden land which he has not used for ten years, that it is said by unidentified people that it was a wedding gift and that he and his father used it years ago'.¹² Finally Justice Deane says 'Well, I do not want to take it further. Mr Castan, it is not of great help to your case if these are the best examples you can give of individual ownership of land. I do not think that you simply disregard the relevance of it by saying, 'Well, there it is'. I mean, if you cannot point to a better example than these of an individual owning land, in terms of actual findings after all this period, it is not completely irrelevant to the larger issues involved in this case'.¹³

On the last day of the proceedings, counsel for Passi and Rice sought an amendment of the relief which they were seeking from the Court. They no longer sought to establish individual ownership of land by Passi and Rice but rather sought a finding and ruling by the Court that there was an interest in land held by the Meriam people and that whatever individual rights and interests might exist would be subject to the local law and custom, the content of which would require further evidence being adduced. The court's declaration was that 'the Meriam people are entitled as against the whole world to possession, occupation, use and enjoyment of the land of the Murray Islands'.

Many commentators have made the mistake of thinking that the Court thereby made a finding that the native people of the Murray Islands held the equivalent of a freehold title. The Court did no such thing. The Court having determined that there was no evidence before it of individual land titles took one step back. Having enunciated the common law of Australia relating to native title, the judges could do no more than declare that there was a group of people who had rights and interests in land. The content of those rights and interests, especially of Meriam people among themselves, awaited further determination and clearer anthropological evidence which could be heard and determined before a Court.

In the first instance, it was as if Mr Castan and his legal team were asking the High Court to look at the particular places on the Monopoly

board (the Murray Islands), and to determine that David Passi owned this block, and James Rice owned that block, and so on. Whereupon the High Court said there was not sufficient evidence of such holdings even though the case had been proceeding for ten years. The court then stepped back and affirmed that the Murray Islands were akin to a Monopoly board. There are players and they have rules which determine rights and interests in land. But the court was not in a position to inquire into those rules and their application. The court was simply saying that the common law of this country recognises that there is a Monopoly board, there are native players, they are playing according to their own rules, and may continue to do so until the sovereign within power comes in and upsets the Monopoly board. The rights and interests that exist on that Monopoly board are determined by the local system of law and custom.

The nature of native title rights

The most critical issue is not whether the squares on native Monopoly boards are held individually or communally, but whether the native players have rights to ownership and control of squares on the board and not just a right to be on the board. These are not just academic questions, because they highlight the very diametrically different approaches proposed by the Western Australian and Commonwealth Governments. Can native title rights ever be proprietary?

When it comes to giving more than just common law recognition and setting up a system of statutory registration and claims, a critical question arises whether or not the rights and interests are rights and interests to land, or, as I would put it in simple language, simply the right to be on land so as to do various things, like a beekeeper having access to land in order to keep hives. Do native title holders simply have the right to be on land to go hunting and fishing and to visit sacred sites? Or do they have rights and interests in the land permitting them the powers of an owner able to exclude others? That becomes a critical question in that it determines what sort of system you set up for registration of rights and interests.

The High Court was split on the proprietary nature of native title rights. The High Court ruled by six to one that the Meriam people enjoyed rights and privileges under native title such that they were entitled to a declaration 'that as against the whole world' they were entitled 'to possession, occupation, use and enjoyment of the lands of the Murray Islands'. Justice Dawson in dissent, held that the Meriam people had only the privilege of permissive occupancy at the pleasure of the Crown. Justices Deane and Gaudron, unlike other members of the majority, were explicit in ruling that 'the rights of an Aboriginal tribe or clan entitled to the benefit of a common law native title are personal only'. They went on to say, 'The personal rights conferred by common law native title do not constitute an estate or interest in the land itself'.¹⁴ Other Justices left open the question of whether or not native title rights were proprietary. Justices Deane and Gaudron were insistent nonetheless that the personal rights of

use and occupation conferred by common law native title were not illusory: 'They are legal rights which are infringed if they are extinguished, against the wishes of the native title holders, by inconsistent grant, dedication or reservation and which, subject only to their susceptibility to being wrongfully so extinguished, are binding on the Crown and a burden on its title'.¹⁵ In those instances where the majority of the High Court may find native title rights to be truly proprietary, the substitution of native title with rights of traditional usage would not be an adequate replacement of the same, and would be contrary to the *Racial Discrimination Act 1975*.

There would be instances where native title rights would be held by the majority of the High Court to be proprietary. Justice Brennan, with concurrence from Chief Justice Mason and Justice McHugh, recognised that native title could be protected by such legal or equitable remedies 'as are appropriate to the particular rights and interests established by the evidence, whether proprietary or personal and usufructuary in nature and whether possessed by community, a group or individuals'.¹⁶ According to Justice Brennan:

If it be necessary to categorise an interest in land as proprietary in order that it survive a change in sovereignty, the interest possessed by a community that is in exclusive possession of land falls into that category. Whether or not land is owned by individual members of a community, a community which asserts and asserts effectively that none but its members has any right to occupy or use the land has an interest in the land that must be proprietary in nature: there is no other proprietor. ... The ownership of land within a territory in the exclusive occupation of a people must be vested in that people: land is susceptible of ownership, and there are no other owners.¹⁷

Justice Toohey was not only convinced that native title rights could be proprietary. He even found that the Meriam people could have acquired a possessory title on annexation of the lands by the Crown. Justice Toohey was a little ambiguous in this area. For him, the use of the term 'title' with respect to traditional title is 'artificial and capable of misleading'. He said, 'At the forefront of the argument is the issue whether such rights in land as were held by indigenous groups survived annexation. There are of course evidentiary problems that will arise in this regard, but they do not affect the principle involved. If the matter is seen strictly in terms of Aboriginal 'title', it is perhaps not surprising that a court may reject such a claim as not giving rise to a title recognised by the common law. That was the approach taken by Justice Blackburn in *Milirrpum v Nabalco*. But in truth, what the courts are asked to recognise are simply rights exercised by indigenous people in regard to land, sufficiently comprehensive and continuous so as to survive annexation'.¹⁸ Over against that, you can look at other statements made by Justice Toohey where he even suggests that the rights and interests that Aboriginal groups may have, could be virtually equivalent to freehold and an inalienable freehold.¹⁹

Justices Deane, Gaudron and Dawson would be of the view that in all instances native title is never the equivalent of a proprietary right. For

Justices Brennan, Mason and McHugh there would be instances when native title holders had proprietary rights and you have to look at the local system of Aboriginal law to determine the incidence of title. You then have the view of Justice Toohey, which has it that on the one hand it might not be appropriate to speak of it as title; but, on the other hand he suggests that many of the incidences of this so called native title could be equivalent to freehold. The majority of the High Court would be of the view that in some instances these rights to land could be proprietary.

Implementation

The Commonwealth Government has now concluded a one year consultation process with major stakeholders regarding the implementation of the High Court's *Mabo* decision. With undoubted constitutional power and with an ongoing political commitment, the Commonwealth has committed itself to four objectives:

- i A national standard for the hearing and registration of native title claims.
- ii A national bottom line for the conduct of developers seeking access to native title land, requiring Aboriginal consent, tribunal approval or State Government agreement.
- iii The validation of all Crown grants made over native title lands since the *Racial Discrimination Act 1975* came into force guaranteeing Aborigines freedom from racial discrimination by State Governments and Parliaments.
- iv A lands acquisition fund which will be available to Aborigines dispossessed of their lands and unable to regain land through existing land rights regimes, including a letter of the law implementation of the High Court's *Mabo* decision.

The Honourable Peter Durack QC, who as Federal Liberal Attorney General negotiated the Offshore Constitutional Settlement between the Commonwealth and States following the *Seas and Submerged Lands* case, has said, 'The outline of the Federal Government's proposed legislation on native title deserves to be seriously considered not so much for its merits (many of which are commendable) but for the fact that, taken by itself, the scheme is a coherent, constructive, and national solution to a most intractable problem'.²⁰ Though having reservations about the Commonwealth's proposal, Durack concluded, 'The Federal Government has faced up to a difficult task with its outline. It is one of the more reasonable and well crafted responses which have been made to the challenge of the *Mabo* decision. It is not without flaws and it should be amended to rectify these. There is a urgent need for Federal/State co-operative legislation to be in place, and the parliamentary process to achieve this will provide a good opportunity for amendments to be made'.²¹

Mr Court's legislation bears no hallmarks of a Federal/State co-operative approach. It does not accept that the Commonwealth Government is entitled to set a bottom line or national standard for the registration of claims and the ongoing relationships between Aborigines and developers. The Commonwealth has undoubted constitutional power to do so. On present indications, it also has the political will. In his second reading speech, Mr Court has said, 'This State is not going to have divided territory. It is not going to have divided laws'. The Commonwealth's outline proceeds on the basis that States can set up their own tribunals for determining native title claims and for arbitrating disputes between Aborigines and developers. The Western Australian Court legislation will not set up any such system of tribunals. The result will be that the Commonwealth will fill the gap. Thus there will be more Commonwealth intervention in Western Australia than in any other State, requiring the Commonwealth to become expert in land management. This Commonwealth intervention would be largely avoidable in day to day land negotiations at State level if Western Australia were prepared to run a reputable tribunal system complying with national guidelines. National standards are nothing new in the Australian marketplace. The 1967 referendum underpins the legitimacy of the Commonwealth's insistence that there be national standards for recognition and treatment of native title lands.

Western Australia is the only mainland State without any land rights legislation vesting inalienable freehold title in local Aboriginal communities enjoying ownership and control of their traditional lands. Prior to *Mabo*, much land in Western Australia could be classified as vacant Crown land. Some of that land may be native title land. If the Court legislation passes it will be land subject to statutory rights of traditional usage. However, the State legislation does not contemplate an exhaustive system for hearing and registering such claims. The need for registration of these rights will only arise when there is conflict between the Aboriginal group and other potential land users. Inevitably this will bring the registration system into disrepute even though there is recourse to the Supreme Court. In the long term, developers would be far better served by a system which ensures the registration of native title interests or traditional usage rights prior to development or any suggestion of it.

For the next few years, the uncertainties will be even greater. Every time a developer wants access to so-called vacant Crown land, there will be a constitutional challenge to the Western Australian and Commonwealth regimes regarding development access to such lands in Western Australia. There will also be attempts to comply with both the State and Commonwealth requirements.

The Court legislation extinguishes all native title rights and replaces such rights with 'rights of traditional usage' which are to be 'equivalent in extent to the rights and entitlements that they replace'. Without a claims and registration process, it will be difficult to determine the extent of these

rights and entitlements. However, the legislation is drafted such that these rights would be more akin to permissive occupancy than native title. These rights will be so subject to ministerial discretion which in turn will be non-reviewable in the Courts that they may be classed simply as liberties or privileges accorded by Government at the Minister's pleasure. From an Aboriginal perspective the Western Australian legislation is a minimalist reading of the High Court decision, more consonant with Justice Dawson's dissent than the majority's establishment of native title. It takes the minimalist position from each of the judgements.

The universal extinguishment of all native title in Western Australia is a symbolic assault on Aborigines who have expressed pride and satisfaction that the High Court has recognised native title rights pre-existing colonisation, surviving colonisation, and being recognised, as part of the common law of Australia. The extinguishment of such rights by the Parliament with automatic statutory recognition of equivalent rights requires some explanation. Presumably the government advisers have expressed caution that in time to come, the High Court may develop some of Justice Toohey's thinking on fiduciary duty which is grounded in notions of native title. Presumably the abolition of native title would also undercut any prospect of expanding the arguments about fiduciary duty. No fiduciary duty could be based on a statutory right of use terminable at the will of the Crown.²²

There has been an ongoing legal debate about the validity of Crown grants issued since 1975. Some have suggested the need for retrospective procedural fairness. I have argued the only outstanding question is compensation. But if procedural fairness for the extinguishment of native title since 1975 is an issue it will not be satisfied by Clause 27 of the Western Australian Bill which permits the passage of regulations providing for the manner in which the rules of natural justice are to be applied to the extinguishment of native title. Only the Commonwealth Parliament has power to restrict the application of the general principle of non-discrimination.

The proposed Western Australian amendments to the Mining Act, the Petroleum Act, and the Petroleum (Submerged Lands) Act set out a regime which is designed to ensure that the statutory rights of traditional usage in no way interfere with mining development projects enjoying Government approval in much the same way as they did prior to the *Mabo* decision. The Commonwealth has rightly insisted on the need for a three-stage process involving consultation, independent tribunal review, and ultimate Government decision.

The Western Australian Government has decided to omit any involvement by an independent tribunal and to ensure, as far as possible, that Ministerial discretions are not reviewable in the Courts. This is to be achieved by requiring the Commissioner for Aboriginal Planning to determine if there is an Aboriginal group having an interest in land for development purposes. This responsibility has to be cast upon the

Commissioner because the Government is opposed to a universal registration and claims system. Presumably some judicial review of the Commissioner's decision to include and exclude Aborigines from the interested group would be possible. The Commissioner then reports to the Minister to whom the administration of the *Land (Titles and Traditional Usage) Act 1993* is committed. That Minister then makes a recommendation to the Minister for Mines. This dual ministerial role has been designed to ensure, as far as possible, that the Courts could never interfere with what is seen to be a purely political decision and which in no way allows an affected Aboriginal group judicial review on the basis of denial of natural justice.

It is the measures designed to ensure the exclusion of judicial review which reveal the underlying policy of the Western Australian regime. The rights of traditional usage, unlike native title rights are not to be reviewable by Courts. These rights are to be enjoyed at the Government's pleasure. The mining provisions of each Act contain a provision that 'any advice or recommendation of the responsible Minister is not liable to be challenged, reviewed or called in question by a Court on account of anything which the responsible Minister has done or failed to do for the purposes' of the Act. The Minister for Mines even has the power to shorten the statutory period allowed the responsible Minister to perform his or her functions. The legislation stipulates that mining wardens are 'not concerned with rights of traditional usage that may be claimed in respect of land to which an application for a mining tenement relates'. As if this were not enough protection for the politicians making non-reviewable decisions regarding rights of traditional usage by Aborigines, the Minister for Mines has power to declare that the responsible Minister has no role whatever to play in determining an application for a particular kind of mining tenement, in respect of an area of Crown Land, as well as in relation to an application for a particular mining tenement.

The statutorily guaranteed non-reviewability of ministerial decisions about mining leases on Aboriginal traditional land make the legislation totally unacceptable. It should be noted that Peter Durack QC, when dealing with the question of mining and other economic interests in his consideration of the Commonwealth's outline expressed some reservations about time limits and the right to negotiate. But he did say, 'Despite the level and heat of the controversy about the form of any legislation, I remain convinced that legislation is the right course, and if anything, the controversy has only made the need for legislation more urgent. Therefore, as I am about to make some criticisms of the form of the Government's outline as it affects these economic interests, I think it would be better to implement now a less than perfect solution than to let this debate rage on for much longer'.²³

Miners are not going to be assisted by a State regime which not only falls short of the national standard but also which is crafted to ensure that Aborigines would not even have access to the ordinary Mining Warden's

Court to agitate questions about their entitlements to ongoing land use. Such provisions will fall foul of the *Racial Discrimination Act 1975*, exacerbating uncertainty for all concerned.

Without a universal claims and registration system which is activated prior to potential conflict between Aborigines and developers, and without some judicial supervision or arbitration of applications for conflicting land use between Aborigines and developers, the Western Australian legislation not only falls short of Mr Keating's national bottom line; it also fails to implement the spirit of the *Mabo* decision. It stands as a State parliamentary attempt to negate the High Court's decision in so far as this is possible under the Commonwealth's *Racial Discrimination Act 1975*. Given the Commonwealth's responsibility and commitment, Mr Court, having set the bottom line far too low, will fail in his stated objective that 'This State is not going to have divided territories. It is not going to have divided laws'. There will now be a need for more Commonwealth legislation and more Commonwealth machinery regarding land management in Western Australian than in any other State of the Commonwealth. This will follow because Western Australia has declined to legislate for land rights. It has also failed to embark on a cooperative Federal/State approach to resolving the ongoing conflict between Aborigines and miners. It has also taken insufficient account of the operation of s.10 of the *Racial Discrimination Act 1975*.

The substitution of native title rights with so-called rights of traditional usage betrays a complete misunderstanding of how transformative the *Mabo* judgement is in recognising, that within strict confines, Aborigines actually have rights to land which inhere, which require protection, and which invite certainty for the benefit of all parties, including developers. Mr Court and his advisers have treated native title as if it were simply the entitlement of a group of Aborigines to hunt for kangaroos on nondescript, unused pieces of land. This attitude is most clear in his second reading speech when he deals with the question of compensation for loss of native title for rights of traditional usage. He says, 'Once the entitlement is established, there will be negotiations with the Minister, who will be empowered to offer grants of freehold land, or rights of traditional usage over other land, or money, or social services, or other such benefits as are agreed'. The drafters need to understand that rights of traditional usage, being in their own legislation 'equivalent in extent to the rights and entitlements that they replace', are not rights which are simply transferable to other land which is not already subject to such rights of traditional usage.

Given the residue of Government discretion and the exclusion of so much judicial review, it can be no consolation to Aboriginal native title holders (which is what they presently are according to the High Court decision) that upon their dispossession they will be entitled to an additional ten per cent solatium for loss or interference to special attachment or spiritual or cultural connection with their land. Though ten per cent

solatium for the householder at Dalkeith may be significant, it would be inconsequential even if doubled for the Aboriginal group living in the Gibson Desert. Twenty per cent of nothing or very little is no improvement on ten per cent of the same. Despite Mr Court's claims, the new mining regime does not ensure that Aboriginal people claiming traditional usage rights receive procedural fairness.

It remains to be seen whether the total Western Australian legislative scheme will comply with the *Racial Discrimination Act 1975* or other valid enactments of the Commonwealth including the forthcoming Native Title Bill. Ironically this elaborate piece of legislation which is designed to ensure that the courts do not interfere with ministerial discretions regarding developers' access to Aboriginal traditional lands will in the present Federal/State context require ongoing litigation at the highest levels. There will be no immediate return to certainty in the marketplace. There is every risk that Commonwealth interference with land management in Western Australia will be greater than in jurisdictions where the Governments have cooperated with the Commonwealth and complied with the bottom line particularly through amendment of their existing land rights legislation. As Peter Durack QC has said, 'Unilateral state enactments will almost certainly be void without Federal cooperation, at least in regard to any future grants of right to land'. I agree with him when he says that it is not only the *Racial Discrimination Act 1975* which requires Federal/State cooperation on this issue. He says, 'There is another most important reason why a national solution is required. Aboriginal issues have not been purely State issues since the Constitution was amended in 1967 to give the Federal Parliament the power to make laws with respect to the people of any race for whom it is deemed necessary to make special laws'.²⁴

Though I regard some of the concerns expressed about the ambit of the *Racial Discrimination Act 1975* to have been inflated both by government, and Aboriginal and mining groups, there is no way that the Commonwealth Government and Commonwealth Parliament could regard the Western Australian legislation as a sufficient response to the *Mabo* decision. If this is the Western Australian Parliament's response to *Mabo*, then gone are the days when there will be a 'single system of Western Australian law' which Mr Court claims to provide 'fair and sensible procedures, and fair and proper compensation'. The procedures envisaged are not fair because they are postulated on the notion that native title holders never have proprietary interests in land. The procedures are not sensible because they even deny developers the certainty they need in order to invest.

Part 5 of the Western Australian Bill is to be welcomed. It is refreshing that for the first time the Western Australian Parliament is to legislate to enable the Minister to make arrangements with Aboriginal groups for title to land. For that power to be exercised in the interests of all groups, there will be a need for a claims system, a registration system, and a development regime to strike the right balance between Aboriginal title

holders and developers. The other parts of the Bill fail on each of these counts.

One could be forgiven for thinking that the Court Government has decided to implement Justice Dawson's dissenting opinion in *Mabo* where he spoke of the right of permissive occupancy rather than the views of the six member majority who upheld the claims to native title. Those enjoying statutory rights of traditional use will be like the Aborigines of earlier days who were permitted to occupy, use and enjoy lands gazetted as reserves. Such permission being accorded not in recognition of any traditional land rights, but as a benign exercise of the pleasure of the Crown. As a nation we have moved on from this way of thinking. As a federation, we have options as to which level of government makes the adjustment. But change must come. A system of native title registration exercisable at the option of native title holders, before the prospect of conflict with developers, is essential if the property rights of indigenous communities are to be sufficiently protected while guaranteeing the certainty required by developers seeking foreign investment. Governments, like courts and anthropologists, need to be taken by the hand and led towards the singing so they might see and understand.

Notes

- 1 Stanner, W.E.H. 1979. 'The Yirrkala land case: dress rehearsal', in Stanner, W.E.H. (ed.), *White Man Got No Dreaming: Essays 1938-73*, Australian National University Press, Canberra, pp. 278-9.
- 2 *Ibid.*, pp. 291-2.
- 3 *Milirrpum v Nabalco*, 1971. 17 FLR, p. 198.
- 4 *Ibid.*, p. 268.
- 5 *Ibid.*, p. 272.
- 6 Toohey, J.L. 1984. *Seven Years On: Report by Mr Justice Toohey to the Minister for Aboriginal Affairs on the Aboriginal Land Rights (Northern Territory) Act 1976 and Related Matters* (December 1983), Australian Government Publishing Service, Canberra.
- 7 *Mabo v Queensland*, no. 2, 1992. 175 CLR, p. 6.
- 8 Transcript of Proceedings, 28 May 1991, p. 42.
- 9 *Ibid.*, pp. 47-8.
- 10 *Ibid.*, p. 52.
- 11 *Ibid.*, p. 53.
- 12 *Ibid.*, p. 54.

- 13 Ibid., p. 57.
- 14 1992. 175 CLR, p. 110.
- 15 Ibid.
- 16 Ibid., p. 61.
- 17 Ibid., p. 51.
- 18 Ibid., p. 179.
- 19 Ibid., p. 211.
- 20 Durack, P. 1993. 'Legal and political matters', *IPA Environmental Backgrounder*, No. 17, p. 2.
- 21 Ibid., p. 7.
- 22 Originally the statutory usage rights were never to be proprietary. But now the content of the rights will depend on the local law of native title. Clause 19(1) of the original Bill which stated 'The existence of rights of traditional usage in relation to land does not create any proprietary rights in, on, above or below the land' has now been omitted. Withdrawing the clause, Premier Court told Parliament on 18 November 1993: 'As I have stated repeatedly, the primary intention of the Bill is to ensure that the substance of the native title rights is not diminished in the conversion from the common law rights to statutory rights. In this regard, whether the rights are legally categorised as common law or statutory, proprietary or personal is not the issue; it is the content, the substance of the rights which is the essential issue. The High Court recognised this. The six majority judges could not agree whether native title rights held by the Meriam people were proprietary or personal, but they nevertheless agreed on the substance of those rights'.
- 23 Durack, op. cit., p. 4.
- 24 Ibid., p. 2.

5. *Mabo* and Aboriginal political rights: the potential for inherent rights and Aboriginal self-government¹

G. Nettheim

Territory and Government

Let me take as my text the Admiralty's 1768 instructions to Lieutenant James Cook. Those instructions included the following paragraphs:

You are likewise to observe the genius, temper, disposition and number of natives, if there be any, and endeavour by all proper means to cultivate a friendship and alliance with them, making them presents of such trifles as they may value, inviting them to traffick, and shewing them every kind of civility and regard; taking care however not to suffer yourself to be surprized by them, but to be always on your guard against any accident.

You are also with the consent of the natives to take possession of convenient situations in the country in the name of the King of Great Britain, or, if you find the country uninhabited take possession for His Majesty by setting up proper marks and inscriptions as first discoverers and possessors.²

Cook found (but did not 'discover') the eastern coast of Australia. He also encountered 'natives' but neither sought nor obtained their consent to British assertions of sovereignty and British settlement. Aboriginal and Torres Strait Islander people continue to argue that they should regain powers of control over matters that concern their essential interests, and that 'the consent of the natives' is a necessary prerequisite to decision-making on matters such as resource development or cultural heritage that affect their peoples. The issue is one involving the legal/political relationship between indigenous peoples and the non-indigenous society.

When British colonies were planted in New South Wales in 1788 - and later elsewhere - the British acquired sovereignty. They also acquired what the High Court judges in *Mabo v Queensland* (No. 2)³ described as the 'radical title' to land.

As we now know, they did not automatically acquire the 'beneficial title' to the land. According to the majority judges, the process by which non-indigenous people acquired the beneficial title was a post-settlement process of 'parcel by parcel' dispossession.

Much of our efforts over the past year and a half have been directed to:

- i coming to terms with the revelation that the residual indigenous interest in land is a legal interest, not merely a moral claim;
- ii developing processes for accommodating that interest in the future in the Australian legal landscape; and

- iii clarifying the status of interests granted to others in recent years over land which may have still been subject to native title.

Overall, our preoccupation in this country has been with issues concerning land (and waters) and their resources - with territory. There has been little discussion about governance.

Yet issues of autonomy, self-government and self-determination, have been regarded as central matters for attention in the relationship between indigenous peoples and settler societies during the 1993 United Nations International Year of the World's Indigenous Peoples. This has certainly been the case in comparable societies which have been less preoccupied than we have been with issues of territory.

It has been the case in international fora, too, including the Vienna World Conference on Human Rights and the 11th Session of the United Nations Working Group on Indigenous Populations.

In Australia indigenous lawyers such as Michael Mansell and Paul Coe have posed the awkward question: if Australia was not *terra nullius* in terms of land ownership, how could it have been *terra nullius* in terms of sovereignty?

By what claim of right did Britain take from the indigenous peoples their long-standing right to govern themselves?

Where do we find an answer?

The Marshall cases

The common law of native title, applied to Australia in 1992, was articulated in the United States in the 1820s and 1830s in a series of cases known as 'the Marshall cases' after the first Chief Justice of the Supreme Court. John Marshall was clearly conscious that the fundamental questions related both to territory and governance. The following extracts are as obviously applicable to Australia as to North America.

America, separated from Europe by a wide ocean, was inhabited by a distinct people, divided into separate nations, independent of each other and of the rest of the world, having institutions of their own, and governing themselves by their own laws.

The Chief Justice continued:

It is difficult to comprehend the proposition that the inhabitants of either quarter of the globe could have rightful original claims of dominion over the inhabitants of the other, or over the lands they occupied; or that the discovery of either by the other should give the discoverer rights in the country discovered, which annulled the pre-existing rights of its ancient possessors.⁴

Various European powers had, however, asserted claims of dominion over the Americas, usually on the basis of assumptions of European superiority.

To quote again from Chief Justice Marshall:

the character and religion of (North America's) inhabitants afforded an apology for considering them as a people over whom the superior genius of Europe might claim an ascendancy. The potentates of the old world found no difficulty in convincing themselves that they made ample compensation to the inhabitants of the new, by bestowing on them civilization and Christianity, in exchange for unlimited independence.⁵

Marshall was, of course, in no position (even if he so desired) to dispute the sovereignty of the United States. But, within that overall sovereignty, he held that Indian nations retained their original sovereignty, albeit in a subordinate form. '(T)ribes which reside within the acknowledged boundaries of the United States can ... be denominated domestic dependant nations.'⁶

Such First Nations were entitled to enjoy continuing rights both to territory and to self-government. While the United States had a superior and ultimate sovereignty, and constituted the sovereign authority in international relations, the United States itself was under a trust obligation to the Indian nations.

The jurisprudence of 'the Marshall cases' formed the basis for United States law relating to Native Americans over the following century and a half. Much of that jurisprudence also characterises Canadian law.

It was also part of the discourse of the common law in Australia in the first half of the 19th century⁷ but was soon forgotten. Australia instead, despite repeated attempts at intervention by the Imperial authorities, proceeded on the basis of denying 'the pre-existing rights of its ancient possessors'. The Marshall cases were very much in the mind of Justice Deane of the High Court of Australia when he considered the pre-*Mabo* proposition, supported by the decision in the Gove land rights case,⁸ that Aboriginal pre-existing rights in respect of land were not recognised by Australian law:

If that view of the law be correct, and I do not suggest that it is not, the common law of this land has still not reached the stage of retreat from injustice which the law of Illinois and Virginia had reached in 1823 when Marshall CJ in *Johnson v McIntosh* ... accepted that, subject to the assertion of ultimate dominion (including the power to convey title by grant) by the state, the 'original inhabitants' should be recognized as having 'a legal as well as just claim' to retain the occupancy of their traditional lands.⁹

Subsequently Justice Deane formed part of the majority of the High Court which held that the common law of Australia should be read in the same sense as that of the United States so as to recognise the right of the original inhabitants (subject to the powers of government) to retain the occupancy of their traditional lands.¹⁰ Nothing was said in that case, however, on the other aspect of 'the Marshall cases' referred to, namely the question whether Aboriginal peoples in Australia retained any of their original powers of self-government.

The takeover of sovereignty

The one Australian case to have challenged Britain's acquisition of sovereignty over Australia was *Coe v Commonwealth* in which land rights arguments were also raised. There was no ultimate decision on these issues because the High Court disposition of the case was to affirm the decision of Justice Mason at first instance to refuse leave to amend the statement of claim.

Two of the Justices spoke on the more extensive version of the sovereignty argument, that which asserted that sovereignty in respect of Australia still resided in an Aboriginal nation.

Justice Gibbs rejected the argument in terms of its tenability as well as its justiciability.

The annexation of the east coast of Australia by Captain Cook in 1770, and the subsequent acts by which the whole of the Australian continent became part of the dominions of the Crown, were acts of state whose validity cannot be challenged. ... If the amended statement of claim intends to suggest either that the legal foundation of the Commonwealth is insecure, or that the powers of the Parliament are more limited than is provided in the constitution, or that there is an Aboriginal nation which has sovereignty over Australia, it cannot be supported.¹¹

Justice Jacobs also rejected the 'claim based on a sovereignty adverse to the Crown' saying that such issues 'are not matters of municipal law but of the law of nations and are not cognisable in a court exercising jurisdiction under that sovereignty which is sought to be challenged ...'¹² (The difficulties in asserting such a claim in the International Court of Justice are also formidable.¹³)

No such argument was raised in *Mabo* but members of the High Court took the opportunity to reiterate that the majority recognition that 'native title' could continue after the assertion of British sovereignty did not carry with it any basis for challenge to that sovereignty.¹⁴

The correctness in the particular context of the proposition developed, particularly by Justice Gibbs, that the acquisition of sovereignty over Australia is non-justiciable has been questioned by Tasmanian Aboriginal lawyer Michael Mansell¹⁵ and by the National Aboriginal and Islander Legal Services Secretariat.¹⁶ While Henry Reynolds advanced the view that the 'British claim of sovereignty over the whole of Australia between 1788 and 1829 was not surprising given the attitudes of European powers'¹⁷ throughout the 19th century, it is possible to develop a cogent argument that the acquisition of British sovereignty over Australia without 'the consent of the natives' was, even in the context of the time, contrary to both international and British law.¹⁸ The problem remains one of finding a forum before which such an argument can be effectively asserted at this time.

'Domestic dependant nations'

The alternative form of the sovereignty argument does not dispute the overall sovereignty of the Australian state but argues that the traditional powers of Aboriginal and Torres Strait Islander peoples to govern themselves continue as a form of sovereignty (albeit subordinate) within the overall Australian sovereignty. This derives directly from 'the Marshall cases' decided by the United States Supreme Court.¹⁹ The proposition was accepted by Justice Willis in *Bonjon*²⁰ but rejected by the Full Supreme Court of New South Wales in *R v Murrell*.²¹ In *Murrell* Justice Burton did not follow the United States authorities because he took the view 'that the Aborigines had not attained such a degree of institutional and political development as to justify the degree of recognition accorded to the Indian tribes'.²² In the words of Justice Burton:

Although it be granted that the Aboriginal natives of New Holland are entitled to be regarded as a free and independent people, and are entitled to the possession of those rights which as such are valuable to them, yet the various tribes had not attained at the first settlement of the English people amongst them to such a position in point of numbers of civilisation and to such a form of government and laws, as to be entitled to be recognized as so many sovereign states governed by laws of their own.²³

The suggested contrast between the institutional sophistication of native American tribes and Australian Aboriginal peoples was echoed in *Coe v Commonwealth* by Justice Gibbs in rejecting the subordinate form of the sovereignty argument:

In fact, we were told in argument, it is intended to claim that there is an Aboriginal nation which has sovereignty over its own people, notwithstanding that they remain citizens of the Commonwealth; in other words, it is sought to treat the Aboriginal people of Australia as a domestic dependant nation, to use the expression which Marshall CJ applied to the Cherokee Nation of Indians: *Cherokee Nation v State of Georgia* (1831) 5 Pet 1, at 77. However, the history of the relationship between the white settlers and the Aboriginal peoples has not been the same in Australia and in the United States, and it is not possible to say as was said by Marshall CJ, at 16, of the Cherokee Nation, that the Aboriginal people of Australia are organized as a 'distinct political society separated from others', or that they have been uniformly treated as a state. The Aboriginal people are subject to the laws of the Commonwealth and of the States or Territories in which they respectively reside. They have no legislative, executive or judicial organs by which sovereignty might be exercised. If such organs existed, they would have no powers, except such as the laws of the Commonwealth, or of a State or Territory, might confer upon them. The contention that there is in Australia an Aboriginal nation exercising sovereignty, even of a limited kind, is quite impossible in law to maintain.²⁴

Several comments may be made about this statement. One is that it responded to the statement of claim which had talked about an Aboriginal nation (singular), and rejected the proposition. It is not known whether the plaintiff, Coe, had the agreement of the various Aboriginal nations (plural)

or peoples to the assertion of sovereignty in a single Aboriginal nation. The United States cases recognise sovereignty as belonging to particular Indian nations (Cherokee, Navajo, and so on) and do not postulate any pan-Indian entity.

A second point to note in the extract from Justice Gibbs is his reliance on the absence of 'legislative, executive or judicial organs by which sovereignty might be exercised'. This suggests that powers of self-government would only be recognised in the case of an Aboriginal 'nation' which had institutional arrangements roughly comparable to those of modern European states. Clearly, even individual Aboriginal nations did not use such institutions. But nor did their relationships to land resemble those familiar to English property law: this was one reason for Justice Blackburn's rejection of the land rights claim in *Milirrpum v Nabalco*.²⁵ Justice Blackburn's approach on this aspect was clearly rejected by the High Court in *Mabo*,²⁶ and it would be open to the Court to decide that forms of governance, too, do not need to resemble British models as a pre-requisite to recognition.

Another point made by Justice Gibbs in the extract from his judgement in *Coe* was that, if Aboriginal governmental organs did exist, they would have no powers except those conferred on them by Commonwealth, State or Territory laws. Again, the *Mabo* judgements suggest that this might be open to reconsideration insofar as the High Court accepted that the continuance of pre-existing rights requires no formal grant or act of recognition by the new sovereign.²⁷

It is suggested, then, that the approach taken by the majority of the High Court in *Mabo* in regard to land rights is at least capable of being applied to acknowledge some forms of sovereignty or inherent powers of self-government in Aboriginal or Torres Strait Islander peoples that retain a sufficient degree of social cohesion. Recognition of such self-government rights would not challenge the overall sovereignty of the Australian state, and would not require the abandonment of traditional methods of social ordering in favour of 'Western' models.

The Canadian experience is illuminating. In *R v Sioui*²⁸ Justice Lamer for the Supreme Court affirmed the historical acceptance by both Great Britain and France of the sovereign autonomy of Indian nations. A current land claim action in British Columbia asserts, in addition, the inherent right of self-government of the Gitskan-Wet'suwet'en peoples.²⁹ Since 1982 the Canadian Constitution has recognised and affirmed 'existing Aboriginal and treaty rights'. Efforts on behalf of Aboriginal peoples since then have been directed to reaching agreement with federal, provincial and territory governments on a formulation of an inherent Aboriginal right of self-government. Agreement was reached in October 1992 in The Consensus Report on the Constitution as part of a wider package of constitutional amendment proposals which, however, were rejected at referendum.³⁰ Canada's Royal Commission on Aboriginal Peoples is giving continuing attention to the issue.³¹

Self-determination: international law

In the meantime, indigenous peoples are placing continuing emphasis on the concept of self-determination under international law. The concept is relatively new but clearly encompasses a right to regain sovereignty or powers of self-government lost to colonial or other dominant nations. Assertion of a right to self-determination has been described as less problematic than invocations of sovereignty as a means by which Aboriginal peoples may regain some control over their own affairs.³²

The right of self-determination finds expression in the Charter of the United Nations and in the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. Both Covenants have an identical Article 1 which commences: 'All peoples have the right to self-determination. By virtue of that right they freely pursue their economic, social and cultural development ...'

United Nations practice has been virtually to confine the right to self-determination to peoples in the 'classic' colonial context of governance from a distant European power. For such peoples, self-determination came to be regarded as virtually synonymous with independence. Partly for this reason, national governments appear reluctant to extend the right of self-determination to other peoples, including indigenous peoples within independent states, for fear that acknowledgment of a right to self-determination would threaten the territorial integrity of established states.³³

But self-determination is a *process* and to concede a right to self-determination does not necessarily require that it lead to one particular *outcome* of that process namely independence. The critical thing is the right of a people to make a free choice about their political-legal relationship with a State. A variety of other relationships may meet the needs of the indigenous people, from full integration to a variety of forms of autonomy within the State.³⁴ Full independence is likely to be sought only by peoples whose essential interests and human rights are not respected by the State.

The concept of self-determination is beginning to impinge on emerging international instruments relating to indigenous peoples. In 1989 the International Labour Organisation completed revision of its earlier 1957 Convention No. 107. The new Convention, No. 169, is called *The Convention Concerning Indigenous and Tribal Peoples in Independent Countries*. It treated the question of self-determination with great caution and even qualified the titular reference to 'peoples' by Article 1(3):

The use of the term 'peoples' in this Convention shall not be construed as having any implications as regards the rights which may attach to the term under international law.

The language of the Convention is in procedural terms of 'consultation' of indigenous peoples or of their 'participation' in decisions affecting them. It stops short of acknowledging their right to 'control' such matters or even to

require their 'consent', in other words, 'self-determination'. It has been subject to strong criticism from many indigenous peoples' organisations as inadequate to meet indigenous aspirations.³⁵

The United Nations Working Group on Indigenous Populations, comprising five members of the expert Sub-Commission on Prevention of Discrimination and Protection of Minorities,³⁶ is nearing completion of its most important mandate, the drafting of a Universal Declaration of the Rights of Indigenous Peoples. Its annual meetings in July in Geneva now involve large numbers of Government 'observer delegations', non-government organisations, and indigenous organisations, individuals and other experts. Some 600 people attended the 11th session in 1993.

Not surprisingly, one of the most contentious issues concerns the draft language on self-determination. Many indigenous people demand that the right should be recognised. Many governments oppose it or at least insist on a qualifying reference that it does not extend to encompass any right to secession to sovereign independence.³⁷ The Working Group's final draft is likely to be subject to very close consideration by representatives of governments at higher levels of the United Nations system on its way to the General Assembly.³⁸

Self-determination: Australia

At Geneva, the Australian Government has been reasonably supportive of Aboriginal and Torres Strait Islander claims to self-determination, albeit within Australia. The Government has also drawn attention to the establishment of the Aboriginal and Torres Strait Islander Commission (ATSIC) as an exercise of self-determination, though Aboriginal non-government organisations tend to dispute this claim.³⁹ Within Australia, too, Government ministers are becoming less hesitant about the language of self-determination.⁴⁰

The Royal Commission into Aboriginal Deaths in Custody in its final report placed considerable emphasis on self-determination as a means of addressing the underlying issues, devoting two chapters to exploring the concept within the Australian context. The meaning attributed to the concept in the introduction to Chapter 20 was that 'what is involved is empowering Aboriginal people to make many of the decisions affecting their lives and to bring parties to meaningful negotiation about others'.⁴¹

While much of the discussion in recent times has proceeded at the national level, many of the problems in relationships between Aboriginal peoples and governments have traditionally arisen at State level, and indeed, at local government level. While positive responses may be sought from the Commonwealth Government, they can also be usefully sought from State and Territory Governments. Two examples of possible developments will suffice.

Queensland has long had the reputation of being Australia's 'deep north' because of its discriminatory laws and oppressive reserve regimes.⁴²

Change began in the 1980s with legislation providing forms of land title for Aboriginal and Torres Strait Islander Community Councils. These were complemented by enactment of the *Community Services (Aborigines) Act 1984* (Queensland) and the *Community Services (Torres Strait) Act 1984* (Queensland).⁴³ The Goss Government, elected in 1989, secured enactment of the *Aboriginal Land Act 1991* (Queensland) and the *Torres Strait Islander Land Act 1991* (Queensland), which improved the land rights regime. It also set up a Legislation Review Committee of five Aboriginal and Torres Strait Islander people to review the community services legislation.

The Legislation Review Committee's final report recommended a system of community self-government providing communities with choices at various levels. They may continue to operate under the Community Services Act or they may choose to adopt a constitution under proposed new legislation. If they pursue the latter option, a community may also choose to assume responsibility for any selection from a list of significant governmental functions and may choose to negotiate with State or local government for the performance of others.⁴⁴

An even more far-reaching proposal from the Islander Co-ordinating Council (ICC) representing Torres Strait Islander communities in far North Queensland contemplates negotiation with both Commonwealth and State Governments to establish a regional level of government absorbing the ICC, the ATSIC Regional Council and the Torres Shire Council.⁴⁵

In the Northern Territory the Government participated in a recent negotiated agreement with representatives of the Jawoyn people in respect of land for which a *Mabo* land claim was being proposed. The agreement provides Northern Territory freehold title to some of the land, allows a major mining development to proceed, and addresses a number of other issues.⁴⁶ In addition, the Northern Territory Legislative Assembly's Sessional Committee on Constitutional Development has been proceeding for several years to lead discussion on the evolution of a Territory constitution which, it is suggested, would provide some recognition and protection for essential Aboriginal interests.⁴⁷ Presumably, such provision will need to be negotiated with representatives of Aboriginal communities.

Litigation, negotiation, reconciliation

If Canadian experience is indicative, it is likely that a number of potential native title claims or proposals for development on native title land will be resolved by negotiation. It is also likely that the settlements will address not only issues of land title and control of resources but also economic, social, environmental and a range of other considerations.⁴⁸ They will, indeed, be treaties under another name. Modern Canadian 'comprehensive land claim settlements', including those yet to be negotiated, are treated as analogous to treaties so as to receive the constitutional protection accorded to 'Aboriginal and treaty rights'.⁴⁹

The Council for Aboriginal Reconciliation, comprising indigenous and non-indigenous Australians, is to perform a variety of tasks in the decade prior to the centenary of the Australian federation and is asked, among other things, to report whether reconciliation would be advanced by a formal document or documents.⁵⁰ While it would be difficult to devise a single nation-wide instrument to meet the legitimate aspirations of the wide variety of Aboriginal and Torres Strait Islander communities, it is possible to contemplate a succinct statement of principles which would then be fleshed out in more detailed negotiations across the country. By these means 'the consent of the natives' might finally be obtained.

Conclusion

The developments canvassed in this paper relate to unfinished business concerning legal/political relationships between Aboriginal and Torres Strait Islander peoples and non-indigenous Australia. The *Mabo* decision did not deal with those relationships beyond the important issues of land rights. Many of these developments were also proceeding prior to, and independently of, the *Mabo* decision.

Mabo, however, contributes to a resolution of outstanding issues at the legal/political level in a number of ways:

- i There are, as noted, aspects of the *Mabo* judgements on land rights which are capable of supporting judicial recognition of a subordinate level of sovereignty or an inherent right of self-government within Australia.
- ii The possibility of 'native title' existing in strategic parts of Australia is likely to strengthen immeasurably the bargaining position of some indigenous peoples and to lead to negotiated settlements in various parts of Australia which meet many important indigenous aspirations. The Mt Todd Agreement is an early example. It also strengthens the clout of Aboriginal and Torres Strait Islander peoples at the national level in such exercises as the Reconciliation process.
- iii Commonwealth, State and Territory governments will be under some pressure to improve their legislation on land rights, cultural heritage, mining, fisheries and so on, if they wish Aboriginal and Torres Strait Islander peoples to work within that legislation rather than resorting to claims based on native title.
- iv The traditional reluctance of Australian governments to 'let go' of Aboriginal communities and to allow them to run their own affairs (and even to make their own mistakes and waste money, as State Governments have been known to do) may need to be moderated by the possible right of indigenous self-government.

- v Lastly, the developments in international law are of great potential significance. Even if governments manage to 'fillet' the draft Universal Declaration of the Rights of Indigenous Peoples, there are sufficient elements in other international human rights instruments ratified by Australia to support important Aboriginal aspirations. In *Mabo* the International Convention on the Elimination of All Forms of Racial Discrimination (CERD) was an influential element in the decision of the majority to prefer, from among conflicting precedents, cases which did not involve racial discrimination.⁵¹ There are provisions in other Conventions ratified by Australia relevant to the position of indigenous peoples - the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Convention on the Rights of the Child and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

The High Court has, in *Mabo* and other cases, shown its readiness to consider such material in resolving uncertainties about common law and statutory law. The fact that Australians now have a right of individual communication to the Human Rights Committee (under ICCPR), the Committee on the Elimination of Racial Discrimination (under CERD) and the Committee Against Torture (CAT) can only serve to strengthen the willingness of Australian courts to listen to arguments based on the provisions of international human rights instruments.

It is unlikely that a single court decision will achieve for indigenous aspirations of self-government what the *Mabo* decision achieved for indigenous land rights. But the *Mabo* decision, coming at the time that it did, makes a significant contribution to moves occurring at a number of levels to address and to resolve the legal and political relationship between Aboriginal and Torres Strait Islander peoples and Australia. If resolution is achieved, it should be incorporated in the Commonwealth constitution (possibly in time for its centenary) but also, usefully, in State and Territory constitutions. The issues are, after all, constitutional in the sense of going to the juridical foundations of the Australian nation.

An effective resolution will require what the British Government required as long ago as 1768 - 'the consent of the natives'.

Notes

- 1 Some of the material has been published in 1993 in an earlier form under the title "'The consent of the natives": Mabo and indigenous political rights', *Sydney Law Review*, 15 (2): pp. 223-46.
- 2 McRae, H., Nettheim, G. and Beacroft, L. 1991. *Aboriginal Legal Issues: Commentary and Materials*, Law Book Company, Sydney, p. 10.

- 3 *Mabo v Queensland*, no. 2, 1992. 175 CLR, pp. 1-217.
- 4 *Worcester v Georgia*, 1832. 31 US (6 Pet), pp. 542-43.
- 5 *Johnson v McIntosh*, 1832. 21 US (8 Wheat), p. 573.
- 6 *Cherokee Nation v Georgia*, 1832. 30 US (5 Pet), p.17.
- 7 Hookey, J. 1984. 'Settlement and Sovereignty', in P. Hanks and B. Keon-Cohen (eds) *Aborigines and the Law*, George Allen and Unwin, Sydney.
- 8 *Milirrpum v Nabalco*, 1971. 17 FLR, pp. 141-294.
- 9 *Gerhardy v Brown*, 1985. 159 CLR 70, p. 149.
- 10 1992. 175 CLR, pp. 1-217.
- 11 *Coe v Commonwealth*, 1979. 53 ALJR, p. 408.
- 12 *Ibid.*, pp. 409-10.
- 13 Balkin, R. 1988. 'International law and sovereign rights of indigenous peoples', in B. Hocking (ed.) *International Law and Aboriginal Human Rights*, Law Book Company, Sydney, pp. 32-6.
- 14 *Mabo v Queensland*, no. 2, 1992. 107 ALR, pp. 20 and 51, Justice Brennan; pp. 59 and 71, Justices Deane and Gaudron; p. 92, Justice Dawson.
- 15 Mansell, M. 1992. 'The court gives an inch but takes another mile', *Aboriginal Law Bulletin*, 2 (57), p. 4.
- 16 Coe, P. 1992. 'Statement on behalf of the National Aboriginal and Islander Legal Services Secretariat', in *United Nations Working Group on Indigenous Populations Tenth Session, 20-31 July 1992, Geneva, Switzerland. The Australian Contribution*, Aboriginal and Torres Strait Islander Commission, Canberra, p. 69.
- 17 Reynolds, H. 1987. *The Law of the Land*, Penguin, Ringwood, pp. 12-13.
- 18 Wallace-Bruce, N.L. 1989. 'Two hundred years on: a re-examination of the acquisition of Australia', *Georgia Journal of International and Comparative Law*, 19 (1), p. 87.
- 19 Notably *Worcester v Georgia*, 1832. 31 US, p. 515.
- 20 'Papers relative to the Aborigines, Australian colonies', 1844 British Parliamentary Papers, pp. 146ff; Irish University Press, Colonies, Australia, vol. 8, cited in Hookey, op. cit.
- 21 1832. Legge 72.
- 22 Hookey, op. cit., p. 4.
- 23 Cited in Hookey, op. cit.
- 24 1979. 53 ALJR, p. 409.
- 25 1971. 17 FLR, pp. 268-273.

- 26 1992. 107 ALR, pp. 36-37, Justice Brennan; pp. 62-64, Justices Deane and Gaudron; p. 97, Justice Dawson; pp. 144-145, 146-150, Justice Toohey.
- 27 *Ibid.*, pp. 38-42, Justice Brennan; pp. 76-77, Justices Deane and Gaudron; pp. 142-144, Justice Toohey; *contra* Justice Dawson, generally.
- 28 *R v Sioul*, 1990. 70 DLR (4th), p. 427.
- 29 *Delgamuukw v Queen*, 1991. 3 WWR, p. 97. For comment see *Aboriginal Law Bulletin*, 1987, 1 (29), p. 15 and *Aboriginal Law Bulletin*, 1991, 2 (53), p. 7. While the action largely failed at first instance leave was given to re-open the appeal hearing to permit the parties to address arguments based on the *Mabo* decision from Australia. The appeal was only partly successful in the British Columbia Court of Appeal and appears to be on its way to the Supreme Court of Canada. The claim to self-government or 'jurisdiction' has not yet won acceptance. For comments and analysis see *Aboriginal Law Bulletin*, 1993, 3 (64), pp. 13-15, 27-28, 30.
- 30 Sanders, D. 1992. 'Towards Aboriginal self-government: an update on Canadian Constitutional reform', *Aboriginal Law Bulletin*, 2 (58), p. 12.
- 31 Royal Commission on Aboriginal Peoples 1992. *The Right of Aboriginal Self-Government and the Constitution. A Commentary*, February, Canada Communication Group, Ottawa. Royal Commission on Aboriginal Peoples 1993. *Partners in Confederation. Aboriginal Peoples, Self-Government and the Constitution*, Canada Communication Group, Ottawa.
- 32 Barsh, R.L. 1988. 'Indigenous peoples and the rights to self-determination in International law', in B. Hocking (ed.) *International Law and Aboriginal Human Rights*, Law Book Company, Sydney, p. 68. For a summary overview of International Law on the right of self-determination for indigenous peoples see Pritchard, S. 1992. 'The right of indigenous peoples to self-determination under international law', *Aboriginal Law Bulletin*, 2 (55), p. 4.
- 33 There is an extensive literature on these issues. Recent examples by Australian-based scholars are Cass, D.Z. 1992. 'Re-thinking self-determination: a critical analysis of current international law theories', *Syracuse Journal of International Law and Commerce*, 18, p. 21 and Iorns, C.J. 1992. 'Indigenous peoples and self-determination: challenging state sovereignty', *Case Western Reserve Journal of International Law*, 24 (2): 199-348.
- 34 Hurst, H. 1990. *Autonomy, Sovereignty and Self-Determination. The Accommodation of Conflicting Rights*, University of Pennsylvania Press, Philadelphia, United States of America.
- 35 Nettheim, G. 1992. 'International law and indigenous political rights: yesterday, today and tomorrow', in H. Reynolds and R. Nile (eds) *Indigenous Rights in the Pacific and North America: Race and Nation in the late Twentieth Century*, Sir Robert Menzies Centre for Australian Studies, Institute of Commonwealth Studies, University of London, p. 13; Berman, H.R. 1988. 'The International Labour Organization and indigenous peoples: revision of ILO Convention No. 107 at the 75th Session of the International Labour Conference 1988', *The Review* (International Commission of Jurists), 41, p. 48; Swepston, L. 1989. 'Response to Review 41 article in ILO Convention 107', *The Review* (International Commission of Jurists), 42, p. 43.

- 36 Sanders, D. 1989. 'The United Nations Working Group on Indigenous Populations', *Human Rights Quarterly*, 11, p. 406.
- 37 Milner, C. 1992. 'Statement on behalf of the Australian delegation', in *United Nations Working Group on Indigenous Populations Tenth Session, 20-31 July 1992, Geneva, Switzerland. The Australian Contribution*, Aboriginal and Torres Strait Islander Commission, Canberra, p. 80; also O'Donohue, L. CBE, AM, 'Statement on behalf of the Aboriginal and Torres Strait Islander Commission', p. 84.
- 38 See Pritchard, S. 1993. 'Declaration on rights of indigenous peoples. Drafting nears completion in the United Nations Working Group', *Aboriginal Law Bulletin*, 2 (60), p. 9; Iorns, C.J. 1993. 'The draft declaration on the rights of indigenous peoples' and Simpson, T. 1993. 'Update on the Working Group on Indigenous Populations', *Aboriginal Law Bulletin*, 3 (64), pp. 4-6.
- 39 For a useful compilation of statements made by Australians at the 1992 session of the Working Group, see *UN Working Group on Indigenous Populations Tenth Session, 20-31 July 1992 Geneva, Switzerland. The Australian Contribution*, Aboriginal and Torres Strait Islander Commission, Canberra.
- 40 Hand, G. 1987. *Foundations for the Future*, Australian Government Printing Service, Canberra.
- 41 Commonwealth of Australia 1991. *Royal Commission into Aboriginal Deaths in Custody, National Report* (Commissioner E. Johnston), Australian Government Publishing Service, Canberra, chapters 20 and 27. See also Report of the House of Representatives Standing Committee on Aboriginal Affairs 1990. *Our Future, Our Selves: Aboriginal and Torres Strait Islander Community Control Management and Resources*, Australian Government Publishing Service, Canberra; Brennan, F. 1992. 'Aboriginal self-determination. The 'new partnership' of the 1990s', *Alternative Law Journal*, 17 (2), p. 53.
- 42 Nettheim, G. 1981. *Victims of the Law. Black Queenslanders Today*, George Allen and Unwin, Sydney. The reputation for 'deepness' in the context of Government and community attitudes to Aboriginal people would seem more appropriately attached, since 1984, to Western Australia.
- 43 The political evolution is traced and the legislation analysed in Brennan, F. 1992. *Land Rights Queensland Style. The Struggle for Aboriginal Self-Management*, University of Queensland Press, St Lucia.
- 44 Queensland Legislation Review Committee, 1991. *Inquiry into the Legislation Relating to the Management of Aboriginal and Torres Strait Islander Communities in Queensland, Final Report* (November). J. Huggins and L. Beacroft 1992. 'The final report: recommendations of the legislation review committee', *Aboriginal Law Bulletin*, 2 (55), p. 8.
- 45 Lui, G. Jnr. 1994. 'A Torres Strait Perspective', in Australian Broadcasting Commission (ed.) *Voices from the Land: 1993 Boyer Lectures*, Australian Broadcasting Commission Books, Sydney.
- 46 Nason, D. and AAP, 'Blacks drop title claim to share gold mines riches', *The Australian*, 11 January 1993.

- 47 Legislative Assembly of the Northern Territory 1993. Sessional Committee on Constitutional Development, *Discussion Paper No. 6*, Aboriginal Rights and Issues - Options for Entrenchment (July).
- 48 Keon-Cohen, B. and Morse, B.W. 1984. 'Indigenous land rights in Australia and Canada', in P. Hanks and B. Keon-Cohen *Aborigines and the Law*, George Allen and Unwin, Sydney, p. 74.
- 49 *Constitution Act* 1982, s.35(3).
- 50 *Council for Aboriginal Reconciliation Act 1991* (Cth). The Council issued a useful information kit in November 1992 which included, among other things, the Minister's Second Reading Speech, a paper 'Aboriginal Reconciliation - An Historical Perspective' and an extract from Chapter 38 'The Process of Reconciliation' from the Final Report of the Royal Commission Into Aboriginal Deaths in Custody. For a detailed study of the underlying concept, see Brennan, F. 1991. *Sharing the Country: The Case for an Agreement between Black and White Australians*, Penguin, Ringwood.
- 51 1992. 175 CLR, pp. 29-30, 39-43, 57-58, Justice Brennan; pp. 82-86, Justices Deane and Gaudron.

6. Economic implications of native title: dead end or way forward?¹

J.C. Altman

From a governmental perspective, land rights has always incorporated the goal of socioeconomic improvement for indigenous Australians as a central tenet. From the 1930s, when Commonwealth Government policy shifted to assimilation, Aboriginal reserves began to be regarded as potential vehicles for economic advancement. This became very evident from the early 1950s; if mining occurred on reserves, all royalties raised were earmarked exclusively for Aboriginal use. Similarly, in the early 1970s, the Woodward Aboriginal Land Rights Commission identified the 'provision of land holdings as a first essential for people who are economically depressed and who have at present no real opportunity of achieving a normal Australian standard of living'.²

Despite this economic policy component of land rights debates over the past two decades, the major focus of recent academic discussion about the High Court's *Mabo* judgement has been on legal and anthropological issues, as evident in earlier chapters in this volume. The absence of an economic contribution could be linked to the fact that, to date, academic and professional economists have been very reluctant to enter the *Mabo* debate owing to uncertainty about the exact nature of legislation. A major exception has been those economists who participated in the recent *Australian Economic Review's* Policy Forum on *Mabo* in October 1993.³

In this chapter, a number of broad issues in relation to the economic implications of native title are raised. First, I briefly outline the areas of land that might conceivably be held under native title. Second, I discuss the issue of property rights under native title both in relation to trading that land and in relation to resources on that land. The key issue here is how clearly are property rights defined? Will property rights on land held under native title be so ill-defined as to result in inefficiency and resource underutilisation? I would then like to shift the discussion to issues of transactions costs associated primarily with the potential development of land that might be held under native title and the effectiveness of the institutional mechanisms that are proposed in the Keating Government's legislation. The discussion is then broadened somewhat to focus on the issue of factor endowments. I will discuss an understated economic element of the *Native Title Act 1993*, the National Aboriginal and Torres Strait Islander Land Fund (henceforth the National Land Fund), which I believe will end up being one of the most politically contentious and difficult parts of the legislation to operationalise effectively. I will also discuss some existing models for purchasing land for indigenous Australians and some of their pitfalls.

At the outset, it is important to position this contribution both in time and intellectually. It was originally delivered in late November 1993 after the release of the Native Title Bill, but prior to the passage of the *Native Title Act 1993* in December.⁴ This chapter remains true to the seminar presentation which reflected an attempt to enter discourse with participants about the economic implications of native title. Throughout 1993, two extreme economic positions in the *Mabo* debate were presented. On the one hand, indigenous interest groups articulated a view that native title would be a potentially powerful vehicle for economic development. On the other hand, the mining industry primarily through its peak lobby group the Australian Mining Industry Council, emphasised that *Mabo* would be extremely detrimental to the Australian mining industry. The approach taken here attempts to steer a course between these two extremes by making reference to some theoretical economic issues raised in the *Australian Economic Review's* Policy Forum on *Mabo*. To some extent, this results in an overfocus on economic issues, without due consideration given to indigenous cultural and political priorities. This approach is justified by the requirement for analytical focus. My major conclusion that we will not see a *Mabo*-led economic take-off of the indigenous sector Australia-wide, is directed at the Aboriginal and Torres Strait Islander Affairs policy community rather than the mining industry. But it is also my view that we will not see a *Mabo*-instigated collapse of the mining industry.

Native title and land rights laws

The *Native Title Act 1993* is a direct result of the High Court *Mabo* judgement. The legislation is an attempt by the Commonwealth to strategically balance a very wide spectrum of interests, ranging from indigenous interests to mining and pastoral interests, while maintaining the overall spirit of the High Court judgement.

The native title legislation, as currently constituted, is a potentially workable framework. It is very complex, but this merely reflects the complexities of the myriad of State and Territory land laws that the Commonwealth is attempting to accommodate in one statute. It also reflects additional complications created by the existing array of Commonwealth and State land rights statutes and precedents that it attempts to accommodate without undue compromise. The *Native Title Act 1993* contains a number of key elements from existing Commonwealth and State land rights laws, especially the Commonwealth's *Aboriginal Land Rights (Northern Territory) Act 1976*, the South Australian *Pitjantjatjara Land Rights Act 1981* and the New South Wales *Aboriginal Land Rights Act 1983*.

One can vacillate somewhat in arguments about whether native title legislation is national land rights in another form. The current Act certainly

has little in common with the 1985 preferred national land rights model proposed by the second Hawke Government. Whether it is about land rights or not largely depends on one's perspective. For Aboriginal people in the Northern Territory it is an inferior form of title to that established by the *Aboriginal Land Rights (Northern Territory) Act 1976*, whereas for Aboriginal people in Western Australia it is obviously a potentially superior form to non-existent land rights in that State: one can ponder whether the *Native Title Act 1993* would have been so contentious if the recommendations of the Seaman Inquiry⁵ had been successfully enacted by the Burke Government in 1985.

One cannot question though that the experience gained in implementing land rights law will be of great relevance for the implementation of native title law. This is especially so with respect to the Northern Territory experience, where a claims process based on proving traditional ownership of unalienated Crown land (and Aboriginal-owned pastoral stations) has operated since 1976. Furthermore, a compensatory royalty regime has also operated in the Northern Territory, initially with respect to Aboriginal reserves (for the period 1952-78) and then with respect to Aboriginal land. The institutions established to manage these mining monies, the Aborigines Benefits Trust Fund (ABTF) and then the Aboriginals Benefit Trust Account (ABTA), and their operational styles could provide important lessons in managing any compensation paid under the auspices of native title legislation. There are also important similarities between the proposed National Land Fund and compensatory payments made under the New South Wales *Aboriginal Land Rights Act 1983*.

Land rights regimes have been established in most States and Territories. In chronological order, legislation has been passed as follows: South Australian *Aboriginal Land Trust Act 1966-75*; Victorian *Aboriginal Land Act 1970*; Commonwealth *Aboriginal Land Rights (Northern Territory) Act 1976*; South Australian *Pitjantjatjara Land Rights Act 1981*; New South Wales *Aboriginal Land Rights Act 1983*; South Australian *Maralinga Tjarutja Land Rights Act 1984*; Commonwealth *Aboriginal Land Grant (Jervis Bay) Act 1986* (with respect to the Australian Capital Territory); Commonwealth *Aboriginal Land (Lake Condah and Framlingham Forest) Act 1987* (with respect to Victoria); and Queensland *Aboriginal Land Act 1991* and the *Torres Strait Land Act 1991*.

These statutes have resulted in highly variable outcomes. This is demonstrated, at the State/Territory level, in Table 1, although the table obviously does not reflect intrastate variability. Column 1 indicates the proportion of each State currently held under inalienable freehold title by indigenous Australians, column 2 indicates each State's share of the nearly 677,000 sq kms held under such inalienable title, column 3 provides the proportional representation of indigenous Australians in each State, and column 4 indicates the distribution of the total indigenous population (265,465) across all States and Territories. It can be seen, for example, that while 15 per cent of Australia's indigenous population resides in the

Northern Territory, it accounts for 67 per cent of land held under Aboriginal freehold title. And while in aggregate Aboriginal people account for 23 per cent of the Northern Territory population, land held under inalienable title accounts for 34 per cent of Northern Territory land.

Table 1. Aboriginal freehold land ownership and population, by State and Territory, and land rights regimes.

State/Territory	Aboriginal freehold (inalienable freehold)		Aboriginal population		Land rights regime	
	Proportion of State (1)	Australian share (2)	Proportion of State (3)	Australian share (4)	Cwlth (5)	State (6)
Northern Territory	33.7%	67.2%	22.6%	15.0%	Yes	No
South Australia	18.8%	27.3%	1.2%	6.1%	No	Yes
Queensland	2.1% ^a	5.4%	2.4%	26.4%	No	Yes
Australian Capital Territory	0.2%	<0.1%	0.6%	0.7%	Yes	No
New South Wales	<0.1%	<0.1%	1.2%	26.4%	No	Yes
Victoria	<0.1%	<0.1%	0.3%	6.3%	Yes	Yes
Western Australia	<0.1%	<0.1%	2.6%	15.7%	No	No
Tasmania	<0.1%	<0.1%	2.0%	3.3%	No	No
Total	8.3%	100.0%	1.6%	100.0%		

a. Assuming all trust areas are transferred to indigenous ownership.

Source: Land holdings at June 1993, Australian Surveying and Land Information Group; Aboriginal population at August 1991, 1991 Census of Population and Housing, Australian Bureau of Statistics.

These statutes also provide highly variable mineral and royalty rights. To generalise, mineral rights remain with the Crown in the right of the Commonwealth, State or Territory. The interesting exception is the New South Wales legislation that bestows Aboriginal interests with a right to all subsurface minerals other than gold, silver, coal and petroleum. Royalty rights are reserved for indigenous interests under a number of statutes, but in practice it is only in the Northern Territory where significant royalty payments (actually their equivalents from Commonwealth consolidated revenue) have been paid.

How much land?

The majority of the High Court concurred that the common law of Australia recognises a form of native title where indigenous people have maintained traditions and customs associated with the land and where title has not been extinguished. This in turn has been generally interpreted to

mean that a two-way test will need to be applied under *Mabo* principles to identify native title over land. An initial technical question is whether title has been extinguished by the grant of another interest. The second, and more discretionary, issue is whether claimants can demonstrate continuous occupation and use (economic and/or religious) of such land. It is proposed that claimants will appear before tribunals in much the same way as claims over unalienated Crown land in the Northern Territory are heard before the Aboriginal Land Commissioner.

Any attempt to rigorously assess the amount of land that might be identified as subject to native title or the time that tribunals may take to hear claims is, at present, speculative. In relation to land ownership, the Australian Surveying and Land Information Group (AUSLIG) divides the Australian continent into 14 categories, missing out, interestingly, the new category 'native title' that has been recognised since June 3 1992, perhaps because of its current spatial insignificance (officially-recognised native title presently only covers 9 sq kms). At present, of the total area of Australia, 20.5 per cent is privately owned and immune from native title claim; about 13 per cent is held under some form of Aboriginal title (freehold, leasehold and reserve) and 43 per cent is pastoral leasehold. The most likely land for native title claim is vacant Crown land that accounts for 13 per cent of Australian land, and leasehold and reserve land held by, or for indigenous interests that accounts for another 5 per cent; much of which is remote, uninhabited desert. Table 2 indicates that while vacant Crown land accounts for a significant portion of a number of States, between them, Western Australia (90 per cent) and the Northern Territory (9 per cent) account for almost all such land in Australia.

Table 2. Vacant Crown land in Australia, by State, 1993.

State/Territory	Sq kms (000s)	Vacant Crown land Per cent of State/Territory	Per cent of total
Northern Territory	82.8	6.2	8.6
South Australia	8.3	0.8	0.9
Queensland	0.6	0.0	0.1
Australian Capital Territory	-	0.0	0.0
New South Wales	1.4	0.2	0.2
Victoria	-	0.0	0.0
Western Australia	863.3	34.2	89.9
Tasmania	4.3	6.3	0.5
Total	960.7	12.5	100.0

Source: AUSLIG, March 1994.

Other means have been developed under the *Native Title Act 1993* that will allow the claiming of land beyond vacant Crown land. The National Land Fund will allow the purchase of land on the open market. Of particular interest is the national distribution of pastoral properties (see Table 3), because under s.47(2) of the legislation prior extinguishment of native title over certain pastoral lands will be overridden and purchased lands could be converted to native title if the above mentioned two-way test is successful.⁶

Table 3. Pastoral leasehold land in Australia, 1993: a summary.

State/Territory	Pastoral stations number	Pastoral leasehold land		
		sq kms (000s)	Per cent of State	Per cent of total
Northern Territory	227	679.6	50.5	20.6
South Australia	331 (270) ^a	430.8	43.8	13.1
Queensland	1557 ^b	950.2	54.9	28.8
Australian Capital Territory	None	0	0.0	0.0
New South Wales	Not known ^c	306.0	38.2	9.3
Victoria	None	0	0.0	0.0
Western Australia	568 (520) ^a	934.7 ^d	37.0	28.3
Tasmania	None	0	0.0	0.0
Total	2,683	3,301	43.0	100.0

- a. Figures in parentheses refer to pastoral stations; those outside refer to pastoral leases.
- b. Other than pastoral leases, there are also occupational licenses, grazing homesteading freeholding leases and grazing homesteading freeholding Brigalow leases.
- c. No-one, from AUSLIG to the New South Wales Department of Environment and Land Management, is able to accurately estimate the number of pastoral stations in New South Wales. The New South Wales case is illustrative of the complexities in Australian land tenure regimes.
- d. The Pastoral Board of Western Australia estimates the area under pastoral lease at 949,244 sq kms.

Source: AUSLIG, June 1993; Queensland Department of Lands; Northern Territory Department of Lands and Housing; South Australian Department of Land and Environment; New South Wales Department of Environment and Land Management; Pastoral Board of Western Australia.

The bulk of pastoral land is in Queensland, Western Australia, the Northern Territory and South Australia. It must be emphasised though that there is no means to compulsorily acquire pastoral properties under the Native Title Act, and there will be limits to the financial resources in the proposed Land Fund available to purchase properties. This issue will be discussed further below.

A combination of Tables 1 to 3 indicates that for the majority of indigenous Australians, and certainly those residing in urban areas in New South Wales, Queensland, Victoria and Western Australia, any land benefit will not be linked to the *Native Title Act 1993*, but to the compensatory

social justice package currently being finalised by the Commonwealth Government.

Property rights

Economists, in examining property rights, establish theoretical models against which imperfect reality can be compared. Property issues that emanate from the *Native Title Act 1993* can be broadly divided in two: property rights in land and property rights with respect to resources on, or below, that land. From a resource economics perspective, land held under native title should be tradeable and preferably owned by individuals or clearly defined corporate groups: this would allow the market to determine optimal use of the land via the pricing mechanism. Economists in the past have been critical of the inalienability of land under statutory land rights regimes, although it is unclear how land is truly inalienable, even in the Northern Territory, if it can be leased in perpetuity (under s.19 of the *Aboriginal Land Rights (Northern Territory) Act 1976*). Williams suggests that inalienability will be a feature of native title imposed by the High Court decision as customary land ownership did not countenance alienation.⁷

The *Native Title Act 1993* both addresses this concern and runs counter to a static customary law view of inalienability. Woodward emphasised that 'any scheme for recognition of Aboriginal rights to land must be sufficiently flexible to allow for changing ideas and changing needs among Aboriginal people over a period of years'.⁸ The legislation attempts to accept a dynamic view of customary title that is flexible and that addresses economists' concerns about inalienability: 'agreement to surrender provisions' in s.20 allow native title holders to dispose of property to government. Also, as noted above, native title will largely be extended over land already held under indigenous statutory title, or else vacant Crown land in which there is no present real-estate market.

With respect to property rights in resources, economists stipulate that ownership in these should be clearly defined. However, a distinction is often made in practice between immobile non-renewable resources, like minerals, and renewable, potentially sustainable, but highly mobile resources, like fisheries.⁹ To focus on the former, there is a view that efficiency considerations should allow private ownership, by both individuals and corporate groups, of all sub-surface minerals. This was an option recommended by the Industry Commission in its report on mining and mineral processing in Australia; it is also the current resource ownership regime in north America.¹⁰

This is a complex issue. On the one hand, minerals in Australia are almost exclusively owned by the Crown, with one interesting exception, mentioned above, being in New South Wales under land rights legislation. On the other hand, there are some real doubts about the efficiency gains

associated with private mineral ownership: the bulk of mining in the United States of America, for example, occurs on Federal and State lands, not private land.

The Northern Territory land rights regime contains a right to veto exploration over Aboriginal land and this provides Aboriginal traditional owners with a de facto (or indirect) mineral right. Since passage of this legislation in 1976, the mining industry has argued that this provision results in underutilisation of resources and that the exploration veto should be removed. In total opposition to this, the Industry Commission recommended that this de facto right should be strengthened by a de jure right in minerals (that is, full indigenous mineral ownership).¹¹ This recommendation was based on the argument that clearly-defined property rights in minerals would result in a greater incentive for traditional owners to allow exploration and mining on their land.

The *Native Title Act 1993* provides native title holders with no special rights over minerals beyond the negotiation and appeal rights available to other land owners in Australia.¹² Strict time frames are specified in the legislation to expedite such negotiation. If economic principles indicate that full ownership of minerals is ideal, then provisions in the *Native Title Act 1993* fall short of such ideals. However, the ability of the institutional framework to expedite exploration on land held under native title will need to be empirically tested, and in time, compared with such activity on land in Australia held under other forms of title.

One of the innovative mechanisms in the *Native Title Act 1993* is contained in the proposed negotiation procedures with respect to future acts on native title land. Because Crown ownership of minerals is maintained, s.38(2) emphasises that the value of minerals cannot be taken into account by an arbitral body in determining compensation. (This is in contrast to the Northern Territory where compensation to traditional owners and/or groups residing in areas affected by a resource development project is set at a minimum of 30 per cent of mining royalty equivalents.) However, the Act encourages miners and native title holders to come to an agreement prior to arbitration without any restrictions on the financial provisions of such agreements: the signal here to miners is to expedite proceedings by making reasonable, even generous, offers to native title holders; the signal to native title holders is not to use the right of negotiation as a de facto right of veto because an arbitral body will, in all likelihood, offer less compensation than might be negotiated direct with mining companies. An incentive structure is established to encourage all parties to settle 'out of court'. Whether this occurs will depend on many factors including the need to hasten mineral extraction, the type of mine and the size and financial resources of mining companies. There are already clear indications, evident at Mount Todd and McArthur River in the Northern Territory, that where mining companies and indigenous interests are willing to negotiate, with governments mediating, positive outcomes for all parties can occur.

Transactions costs

One of the concerns that has been articulated by a variety of interest groups, especially the mining industry, has been the potential inefficiencies of the tribunal system. This has been linked in part to the protracted nature of the Northern Territory land claims process and to delays, for a variety of reasons, in the processing of exploration licence applications.¹³ According to economic principles, negotiations, especially for mining, should occur instantaneously and without cost. But again this is not reality, with respect to resource development on all land in Australia, not just Aboriginal land or any land that will be held in future under native title.

The *Native Title Act 1993* does attempt to provide institutional arrangements that will minimise delays in making claims for native title, negotiating for the use of such land by developers, and for assessing compensation. For example, time frames are stipulated in the legislation (four months exploration, six months for mining and then the same again if disagreement requires a tribunal determination). There is a heavy emphasis on 'alternative dispute resolution' and associated attempts to avoid costly appeals litigation in the Federal Court and an emphasis on informal arrangements between parties that will be formalised in agreements. There are also so-called 'expedited' procedures that will quicken negotiations (maximum of two months), national interest and other override provisions, and the potential to undertake 'low impact future acts' if native title is not determined.

Ultimately, there are many unknowns here. A minimisation of transactions costs will only occur with a degree of goodwill from all parties. The fact that negotiation will need to occur with 'land trusts' and corporate groups is potentially problematic. On the other hand, given the High Court judgement, mechanisms have been established to facilitate negotiation and the system is to be largely funded by the Commonwealth: one only needs to consider the enormous financial costs that would eventuate, for both private sector interests and Australian taxpayers, in the absence of such statutory structures if all disputes ultimately needed to be adjudicated by the High Court.

National Land Fund

The key means available in the *Native Title Act 1993* to expand the indigenous land base beyond those lands where native title has not been extinguished and might be established is via the National Land Fund (s.201). The *Native Title Act 1993* does not specify how much will be paid to this fund and this issue, will in my opinion, become very contentious in the first half of 1994 in the run-up to the 1994-95 Budget. A number of speculative estimates from a variety of interest groups have appeared in the news media: ranging from a maximum \$150 million per annum over 20 years and \$200 million per annum over five years to a minimum \$40 - \$80

million per annum over five years. A figure of \$100 million per annum over ten years is currently popular.

The National Land Fund will allow the expansion of the indigenous land base in two ways: via the purchase of pastoral leases that can subsequently be converted to native title (prior extinguishment under s.47(2) will be disregarded) and via the purchase of other freehold or leasehold land. Versions of both avenues have been, and continue to be, utilised under land rights legislation in the Northern Territory and New South Wales.¹⁴

In the Northern Territory, the ABTA has received nearly \$300 million (in nominal terms) in royalty equivalent payments between 1978-79 and 1992-93. This income is used to finance the administrative expenses of land councils (nominally 40 per cent of ABTA revenue, but sometimes more); to pay to communities and associations in areas affected by mining (30 per cent); and in grants to Aboriginal communities and groups throughout the Northern Territory (up to 30 per cent), with the balance retained as accumulated reserves. Of these moneys, a large proportion has been used by land councils to finance the indigenous land claims process. It has been estimated elsewhere that for a maximum of \$500 per sq km (assuming all land council administration expenses were used to claim land which they were not), the Aboriginal land base in the Northern Territory has been expanded by over 200,000 sq kms as a result of the land claims process.¹⁵ A much smaller amount of \$20 million has been used to purchase seven pastoral properties, which under the *Aboriginal Land Rights (Northern Territory) Act 1976* can, if successfully claimed, be converted to inalienable freehold title. Two of these stations have now been claimed.¹⁶

The major problem with the ABTA model is that there is a perception that it has not accumulated sufficient reserves, which currently stand at about \$25 million (or 8 per cent of total income). However, it can be readily argued that land claims and purchases are a far more strategic longer-term investment, given a 1997 deadline on lodgement of claims, than cash accumulation.

In New South Wales, the State Aboriginal Land Council receives 7.5 per cent of the State land tax for the 15-year period 1983 to 1998. To date, in the region of \$350-400 million (in nominal terms) has been received. Since legislative amendment in 1986, there has been a statutory requirement that 50 per cent of this income is saved and invested. This has resulted in \$280 million currently being in an investment fund with an additional \$30 million being held in investment property. It is estimated that by 1998, \$500 million will be held in the investment fund.

As in the Northern Territory, these compensation moneys are used to both purchase land and to fund the claims process. Since 1984, 117 properties have been purchased with land tax revenues. At the same time, 763 parcels of land have been granted to local Aboriginal land councils pursuant to land claims provisions of the New South Wales *Aboriginal*

Land Rights Act 1983.¹⁷ Interestingly, statistics from New South Wales indicate that for indigenous interests the claims process provides a more cost-effective means to expand the land base. In 1992-93, for example, every dollar expended on land claims (\$651,000) generated \$35 in value of land granted (\$23 million). The ratio for land purchases is dollar for dollar; in 1992-93, \$2 million was expended on land purchases with the value of these properties remaining static.¹⁸ A major issue faced in New South Wales is that a considerable proportion of annual expenditure is allocated to finance the administration of an extremely complex land council network: there are 118 local Aboriginal land councils, 13 regional Aboriginal land councils and one peak State Aboriginal land council. While land councils operate as effective representative structures, it is debatable whether they should be financed from compensation payments.

A key issue that will need to be addressed by the National Land Fund is how to target compensatory resources to indigenous people who reside in major cities. It could be argued, for example, that housing loans to individuals, at concessionary rates, and grants to housing associations that have been made over the past twenty years are a form of compensation. Particular attention will need to be paid to the trade-off between land purchase as income-generating investment and land purchase for individuals and groups in genuine need.

Factor endowments

Much of the foregoing discussion has the ultimate aim of asking what difference the *Native Title Act 1993* might make to the economic status of indigenous Australians. The key factor endowments that might flow from the legislation are: native title to additional tracts of land, mainly unalienated Crown land and land to be purchased; additional capital, from negotiations, resource exploitation or compensation; and possibly, some additional employment generated by the need to administer the legislation. It is my view that each of these avenues and their combination, has limited potential to influence the overall (national) economic wellbeing of indigenous Australians, although in regional contexts native title might make a considerable difference, if not to today's generation of native title holders then certainly to tomorrow's.

An important caveat that should be noted is that the link between factor endowments and economic status cannot be easily made in the Aboriginal and Torres Strait Islander context. This is primarily because official statistics to make this correlation are not available in sufficient detail or else are inappropriate to the particular circumstances of indigenous land owners. For example, an increase in subsistence activities associated with return of land to indigenous Australians will not necessarily be reflected in standard social indicators.¹⁹

This proviso aside, there is little evidence in official statistics that land ownership increases the economic status of indigenous Australians.²⁰

Indeed, if anything, available statistics indicate a possible inverse relationship. Analysis of census data by section-of-State from both the 1986 and 1991 Censuses indicates that indigenous Australians in rural situations have the lowest employment and income status, irrespective of land ownership status.²¹ This is hardly surprising because most of the land indigenous people own is of marginal commercial value, hence the reason that it was unalienated prior to claim. It is also held communally as wealth rather than by individuals as potential income. It is possible that if native title was granted over all vacant Crown land in Australia and the indigenous land base expanded to 26 per cent of Australia (current freehold, leasehold and reserve plus all vacant Crown land) there would be little improvement in overall economic status, if only because few indigenous Australians live on such lands and if native title encouraged a migration back, paradoxically indigenous economic status, as measured by standard social indicators, would probably decline rather than improve.

A similar observation can be made with respect to Aboriginal-owned pastoral stations. Many are marginal when purchased and a recent assessment by ATSIIC²² indicates that its land acquisition program has been a failure, if success is measured in commercial terms. The reasons for the failure of such enterprises are complex: because many cannot be alienated there is little incentive to effect improvements in them via investment, as capital gains cannot be realised. Also, the lack of alienation options means that stations cannot be used as collateral, making owners dependent on government, rather than on the commercial banking sector, for venture capital. The ownership of stations by 'corporate groups' can also be very problematic because there is evidence that many are established for a range of cultural and social objectives that can conflict with commercial considerations: groups can often be divided about which objective is given priority.

A concern with stations that will need to be addressed when the National Land Fund is operationalised in 1994 is that they frequently need ongoing financial subvention just to meet statutory covenant requirements (these will remain even if native title over stations is recognised). Additional financial resources will also be needed for land management and land development. The financial implications of purchasing stations will require careful consideration. Not only is there a trade-off between resources committed to land purchase versus land management, but consideration also needs to be given to the possibility that scarce capital will be diverted from more needy groups or more worthwhile enterprises.

It remains uncertain just what capital the *Native Title Act 1993* might generate for native title holders. One possible source of funds is from compensation that will be payable for vacant Crown land that has been alienated, without compensation paid for native title extinguishment, since the passage of the *Racial Discrimination Act 1975*. The *Native Title Act 1993* recognises a liability to compensate native title holders in such situations, but it is unclear how many such leases might exist Australia-

wide. Nor is it clear how 'just terms' compensation will be assessed in the absence of a lively market in native title real-estate. Compensation payments might need to be arbitrarily determined. This could happen in a 'politically acceptable' way, like the formula-based 7.5 per cent of land tax over 15 years under the New South Wales *Aboriginal Land Rights Act 1983*.²³ Or it could be determined with reference to official land valuations that, in the case of unproductive desert, could be very low.

A more likely source of funds is from negotiated or determined compensation from resource development projects on land held under native title. An analogy exists here with compensation payments (called 'areas affected' moneys) made in the Northern Territory under current land rights legislation. The effective utilisation of such resources to establish regional economic bases for indigenous Australians has been variable. Some groups, like the Gagudju Association in Kakadu National Park, have expended such funds on productive long-term investments like hotels and commercially-viable businesses.²⁴ Other groups, like the Kunwinjku Association in western Arnhem Land, use such money for consumption purposes, rather than to generate regional economic development.²⁵

As already noted, there is potential for the generation of capital via agreements negotiated with developers prior to lodgement of a development proposal with the arbitral body (s.36(2) of the *Native Title Act 1993*). The *Mabo* High Court judgement has already provided a degree of leverage to indigenous interests that has provided access to factor endowments in one situation.²⁶ In what is generally called the Mt Todd Agreement signed in 1993 between the Aboriginal Jawoyn Association, a gold mining company (Zapopan) and the Northern Territory Government, Jawoyn people agreed to withdraw a repeat land claim and not to pursue a possible native title claim over land containing a gold prospect in return for Northern Territory freehold title to that land (without any veto right), other parcels of land, employment and training guarantees, enterprise concessions, education scholarships and additional rentals for Nitmiluk National Park (already owned by Jawoyn). This important agreement is indicative of the sort of mutually beneficial accommodation between indigenous interests and miners that can occur outside the tribunal system when both parties are willing to negotiate. Alternatively, groups may generate resources or access to non-monetary benefits from agreements to surrender land held under native title at a local or regional level (under s.21 of the legislation). Ultimately, and perhaps paradoxically given that indigenous people are frequently presented as 'anti-development', it will be the combination of native title and resource development that will provide the means to improve the economic status of native title holders. However, such an option is obviously dependent on profitable mineral prospects on land held, or potentially held, under native title.

For the majority of indigenous Australians, maybe 75 per cent, economic improvement will not occur via native title legislation but, potentially, via mainstream labour markets and the mainstream economy.

From a narrow economic perspective, the *Mabo* debate, as important a symbol as it is, has diverted much attention from the reality, that for most indigenous Australians, human capital, rather than land, has to be accumulated for the possibility of enhanced economic status. Currently, both the Aboriginal Employment Development Policy and the Aboriginal and Torres Strait Islander Education Policy are being reviewed and revamped to the end of this decade. Throughout 1993, the indigenous leadership has, not surprisingly, been almost totally focused on native title issues to the possible detriment of other, equally pressing, economic policy concerns.

Conclusion

To link the conclusion to this chapter to its title, it appears that in some situations native title may provide a way forward, but in others it will be a dead end, at least in terms of improved economic status. On the optimistic side, one can foreshadow some strategic economic gains in regional situations from native title legislation. The Mt Todd negotiated agreement model looms very large as an option that could emanate from such legislation or conversely one could argue that it has been influential in shaping negotiation procedures in the *Native Title Act 1993*. However, it must be emphasised that beneficial conditions and concessions in agreements like that at Mt Todd only provide potential economic benefit for indigenous Australians that need yet to be fully realised. This in turn will be dependent on appropriate organisational structures and investment strategies, strong leadership and skilled management. In other situations in north Australia a combination of land rights and substantial compensation payments have not operated to generate regional economic development as might have been expected.

For other indigenous Australians, especially those living in metropolitan and urban Australia, the High Court's *Mabo* judgement and the *Native Title Act 1993* may be an economic dead end. The only avenue provided to non-native title holders is via resources to be provided to the National Land Fund under the forthcoming *Mabo*-driven social justice package. Such resources will need to be both substantial and extremely skilfully managed if they are to generate enhanced economic opportunities.

It is my view, based on economic realism rather than economic rationalism, that we will not see a sudden *Mabo*-led economic take-off for Australia's indigenous population. Woodward noted: 'There will be no immediate and dramatic change in the Aborigines' manner of living. In truth, the granting of land rights can only be a first step on a long road towards self-sufficiency and eventual social and economic equality for Aborigines'.²⁷ Some 20 years later, with growing economic disparities between metropolitan and regional Australia and intractable levels of unemployment this observation remains valid. Like land rights, native title will only provide a first step, but one that will have significant regional

variation and one that will need to be taken in close concert with strategies to enhance other factor endowments that will make indigenous Australians competitive in the wider economy.

Notes

- 1 Subtitle from a book edited by Stephen King and Peter Lloyd 1993. *Economic Rationalism: Dead End or Way Forward?* Allen and Unwin, Sydney, that I was reading when preparing my seminar.
- 2 Woodward, A.E. 1974. *The Aboriginal Land Rights Commission, Second Report, April 1974*, Australian Government Publishing Service, Canberra, p. 2.
- 3 See Kenyon, P. 1993. 'Policy forum on Mabo: introduction', *Australian Economic Review*, 103 (3rd Quarter): 20-21; Altman, J.C. 'Economic dimensions of the Mabo High Court judgment', *Australian Economic Review*, 103 (3rd Quarter): 26-34; McEwin, R.I. 1993. 'Legal versus economic perceptions of real property rights', *Australian Economic Review*, 103 (3rd Quarter): 35-40; Williams, P.L. 1993. 'Mabo and inalienable rights to property', *Australian Economic Review*, 103 (3rd Quarter): 41-44.
- 4 As most of the arguments in the seminar have not altered with amendments to the original Bill, this chapter is little altered to the seminar presented, except that references to the legislation have now been updated to refer to the Act. I would like to thank Steven Wright, New South Wales State Aboriginal Land Council and Mike Lane, ABTA for assistance; Nicky Lumb for research assistance; seminar participants for a number of helpful comments and Will Sanders, Hilary Bek, John Taylor, Neil Westbury and Diane Smith for comments on the written version of the seminar. Brian Polden, AUSLIG assisted by providing the most accurate information on Australia's land tenure available.
- 5 Seaman, P. 1984. *The Aboriginal Land Inquiry*, Government Printer, Perth.
- 6 In debates in the Senate on 16 December 1993, Senator Evans indicated in response to a question from Senator Tambling that the National Land Fund would not be used to purchase pastoral stations in the Northern Territory that could then be converted to inalienable title under the *Aboriginal Land Rights (Northern Territory) Act 1976*. However, the National Land Fund could be used to purchase stations that could be converted to native title. The difference will be that the right of veto exists under inalienable title, but not under native title.
- 7 Williams, op. cit.
- 8 Woodward, op. cit., p. 10.
- 9 An innovative proposal to regulate fisheries in New South Wales will give fishers a share in each fishery that operates like a land title. This scheme will provide a form of tradeable private property in mobile renewable resources ('The tragedy of the oceans', *The Economist*, March 19-25 1994).
- 10 Industry Commission 1991. *Mining and Mineral Processing in Australia*, Report No. 7, Australian Government Publishing Service, Canberra.
- 11 Ibid.

- 12 With the exception of Western Australian farmers on improved agricultural lands who maintain a full veto right.
- 13 Reasons include legal disputes over conjunctive (that is exploration and mining) versus disjunctive agreements (that is separate negotiation at exploration stage and mining stage) and an associated inability to meet timetables stipulated in the *Aboriginal Land Rights (Northern Territory) Act 1976*. At times, resulting transactions costs can be strategically turned to transactions gains if depressed prices for minerals increase over time.
- 14 See Altman, J.C. 1991. 'The economic impact of Australian Aboriginal land rights', in Whitwell, J. and M.A. Thompson (eds) *Society and Culture: Economic Perspectives*, vol. 1, New Zealand Association of Economists, Wellington, pp. 5-22, for a comparison.
- 15 Altman, 1993, op. cit.
- 16 Land can also be purchased for Aboriginal groups via ATSIC's land acquisition program. In recent years, resources from ATSIC have been primarily channelled to land management and enterprise support on Aboriginal-owned pastoral stations (see Office of Evaluation and Audit 1992. *Impact Evaluation Land Acquisition Program*, Office of Evaluation and Audit, Aboriginal and Torres Strait Islander Commission, Canberra).
- 17 Correspondence from Stephen Wright, Property Services Unit, New South Wales Aboriginal Land Council dated 27 November 1993.
- 18 Such ratios quantify similar processes that occur in the Northern Territory. It is very likely that the claims process in the Northern Territory is far more cost-effective than the purchase and claim option. However, valuation of Aboriginal-owned land in the Northern Territory is not available to make such a calculation.
- 19 Altman, J.C. and Allen, L.M. 1992. 'Indigenous participation in the informal economy: statistical and policy implications', in J.C. Altman (ed.) *A National Survey of Indigenous Australians: Options and Implications*, Centre for Aboriginal Economic Policy Research, Australian National University, Canberra.
- 20 Altman, 1991, op. cit.
- 21 Tesfaghiorghis, H. 1991. 'Geographic variations in the economic status of Aboriginal people: a preliminary investigation', *CAEPR Discussion Paper No. 2*, Centre for Aboriginal Economic Policy Research, Australian National University, Canberra; Taylor, J. 1993. *Regional Change in the Economic Status of Indigenous Australians, 1986-91*, Centre for Aboriginal Economic Policy Research, Australian National University, Canberra.
- 22 Office of Evaluation and Audit, op. cit.
- 23 Wilkie, M. 1985. *Aboriginal Land Rights in NSW*, Alternative Publishing Cooperative Limited, Chippendale, New South Wales, p. 130.
- 24 Altman, J.C. 1983. *Aborigines and Mining Royalties in the Northern Territory*, Australian Institute of Aboriginal Studies, Canberra; O'Faircheallaigh, C. 1986. 'The economic impact on Aboriginal communities of the Ranger Project, 1979-1985', *Australian Aboriginal Studies*, 1986/2: 2-14.
- 25 O'Faircheallaigh, C. 1988. 'Uranium royalties and Aboriginal economic

development', in Wade-Marshall, D. and P. Loveday (eds) *Contemporary Issues in Development, Northern Australia Progress and Prospects*, vol. 1, North Australia Research Unit, Darwin.

- 26 More recently, in March 1994, an agreement was signed between the Commonwealth, the Northern Land Council (on behalf of Gurdanji, Yanyuwa and Mara people) and the Gurdanji-Bingbinga Corporation that will provide economic opportunities for Aboriginal people in the McArthur River region in exchange for the granting and validation of certain mining interests to Mount Isa Mines.
- 27 Woodward, op. cit., p. 138.

References

Aboriginal and Torres Strait Islander Commission (ATSIC) 1992. *United Nations Working Group on Indigenous Populations, Tenth Session, 20-31 July 1992, Geneva, Switzerland: The Australian Contribution*, ATSIC, Canberra.

Altman, J.C. 1983. *Aborigines and Mining Royalties in the Northern Territory*, Australian Institute of Aboriginal Studies, Canberra.

Altman, J.C. 1991. 'The economic impact of Australian Aboriginal land rights', in J. Whitwell and M.A. Thompson (eds) *Society and Culture: Economic Perspectives*, vol. 1, New Zealand Association of Economists Incorporated, Wellington, New Zealand.

Altman, J.C. and Allen, L.M. 1992. 'Indigenous participation in the informal economy: statistical and policy implications', in J.C. Altman (ed.) *A National Survey of Indigenous Australians: Options and Implications*, Centre for Aboriginal Economic Policy Research, Australian National University, Canberra.

Altman, J.C. 1993. 'Economic dimensions of the Mabo High Court judgment', *Australian Economic Review*, 103 (3rd Quarter): 26-34.

Balkin, R. 1988. 'International law and sovereign rights of indigenous peoples', in B. Hocking (ed.) *International Law and Aboriginal Human Rights*, Law Book Company, Sydney.

Barsh, R.L. 1988. 'Indigenous peoples and the rights to self-determination in international law', in B. Hocking (ed.) *International Law and Aboriginal Human Rights*, Law Book Company, Sydney.

Beckett, J. 1987. *Torres Strait Islanders: Custom and Colonialism*, Cambridge University Press, Sydney.

Benjamin, W. 1969. *Illuminations*, Shoken Books, New York.

Berman, H.R. 1988. 'The International Labour Organization and indigenous peoples: revision of ILO Convention No. 107 at the 75th Session of the International Labour Conference 1988', *The Review* (International Commission of Jurists) 41: 48.

Brennan, F. 1991. *Sharing the Country: The Case for an Agreement Between Black and White Australians*, Penguin, Ringwood.

Brennan, F. 1992. *Land Rights Queensland Style: The Struggle for Aboriginal Self-Management*, University of Queensland Press, St Lucia.

Brennan, F. 1992. 'Aboriginal self-determination: the "new partnership" of the 1990s', *Alternative Law Journal*, 17 (2): 53.

Cass, D.Z. 1992. 'Re-thinking self-determination: a critical analysis of current international law theories', *Syracuse Journal of International Law and Commerce*, 18: 21-40.

- Coe, P. 1992. 'Statement on behalf of the National Aboriginal and Islander Legal Services Secretariat', in *United Nations Working Group on Indigenous Populations, Tenth Session, 20-31 July 1992, Geneva, Switzerland. The Australian Contribution*, Aboriginal and Torres Strait Islander Commission, Canberra.
- Commonwealth of Australia 1991. *Royal Commission into Aboriginal Deaths in Custody, National Report* (Commissioner E. Johnston), Australian Government Publishing Service, Canberra.
- Commonwealth of Australia 1993. *Mabo: The High Court Decision on Native Title*, Discussion Paper, Australian Government Publishing Service, Canberra.
- Commonwealth of Australia 1994. *Native Title Legislation with Commentary by the Attorney-General's Legal Practice*, Australian Government Publishing Service, Canberra.
- Durack, P. 1993. 'Legal and political matters', *IPA Environmental Backgrounder*, 17: 2.
- Frost, A. 1981. 'New South Wales as *Terra Nullius*', *Historical Studies*, 19: 77.
- Haddon, A.C. 1908. *Sociology, Magic and Religion of the Eastern Islanders: Reports of the Cambridge Anthropological Expedition to Torres Strait, Volume VI*, Cambridge University Press, Cambridge.
- Hand, G. 1987. *Foundations for the Future*, Australian Government Publishing Service, Canberra.
- Hewat, T. 1993. *Who Made the Mabo Mess?*, Wright Books, Brighton, Victoria.
- Hookey, J. 1984. 'Settlement and sovereignty', in P. Hanks and B. Keon-Cohen (eds) *Aborigines and the Law*, George Allen and Unwin, Sydney.
- House of Representatives Standing Committee on Aboriginal Affairs 1990. *Our Future, Our Selves: Aboriginal and Torres Strait Islander Community Control Management and Resources*, Australian Government Publishing Service, Canberra.
- Huggins, J. and Beacroft, L. 1992. 'The final report: recommendations of the Legislation Review Committee,' *Aboriginal Law Bulletin*, 2 (55): 8.
- Hunt, A.E. 1899. 'Ethnographical notes on the Murray Islands, Torres Strait', *Journal of the Royal Anthropological Institute*, Vol. XXVIII: 5-18.
- Hurst, H. 1990. *Autonomy, Sovereignty and Self-Determination. The Accommodation of Conflicting Rights*, University of Pennsylvania Press, Philadelphia, United States of America.
- Idriess, I.L. 1938. *Drums of Mer*, Angus and Robertson, Sydney.
- Iorns, C.J. 1992. 'Indigenous peoples and self-determination: challenging state sovereignty', *Case Western Reserve Journal of International Law*, 24 (2): 199-348.
- Iorns, C.J. 1993. 'The draft declaration on the rights of indigenous peoples', *Aboriginal Law Bulletin*, 3 (64): 4-6.
- Industry Commission 1991. *Mining and Mineral Processing in Australia*, Report No. 7, Australian Government Publishing Service, Canberra.

Jacobs, J.M. 1988. 'The construction of identity', in J. Beckett (ed.) *Past and Present: The Construction of Aboriginality*, Aboriginal Studies Press, Canberra.

Kenyon, P. 1993. 'Policy forum on Mabo: introduction', *Australian Economic Review*, 103 (3rd Quarter): 20-21.

Keon-Cohen, B. and Morse, B.W. 1984. 'Indigenous land rights in Australia and Canada', in P. Hanks and B. Keon-Cohen (eds) *Aborigines and the Law*, George Allen and Unwin, Sydney.

King, S. and Lloyd, P. (eds) 1993. *Economic Rationalism: Dead End or Way Forward?* Allen and Unwin, Sydney.

Legislative Assembly of the Northern Territory 1993. 'Aboriginal rights and issues - options for entrenchment', *Discussion Paper No. 6*, Sessional Committee on Constitutional Development.

Lindley, R.F. 1928. *The Acquisition and Government of Backward Territory in International Law*, London.

Lui, G. (Jnr) 1994. 'A Torres Strait perspective', in Australian Broadcasting Commission (ed.) *Voices From the Land: 1993 Boyer Lectures*, ABC Books, Sydney.

Mansell, M. 1992. 'The court gives an inch but takes another mile', *Aboriginal Law Bulletin*, 2 (57): 4-6.

McEwin, R.I. 1993. 'Legal versus economic perceptions of real property rights', *Australian Economic Review*, 103 (3rd Quarter): 35-40.

McRae, H., Nettheim, G. and Beacroft, L. 1991. *Aboriginal Legal Issues: Commentary and Materials*, Law Book Company, Sydney.

Milner, C. 1992. 'Statement on behalf of the Australian delegation', in *United Nations Working Group on Indigenous Populations, Tenth Session, 20-31 July 1992, Geneva, Switzerland. The Australian Contribution*, Aboriginal and Torres Strait Islander Commission, Canberra.

Moynihan, M. 1990. Determination Pursuant to Reference of 27 February, 1986, by the High Court of Australia to the Supreme Court of Queensland to hear and determine all issues of fact raised by the pleadings, particulars and further particulars in High Court Action B12 of 1982.

Nettheim, G. 1981. *Victims of the Law: Black Queenslanders Today*, George Allen and Unwin, Sydney.

Nettheim, G. 1992. 'International law and indigenous political rights: yesterday, today and tomorrow', in H. Reynolds and R. Nile (eds) *Indigenous Rights in the Pacific and North America: Race and Nation in the late Twentieth Century*, Sir Robert Menzies Centre for Australian Studies, Institute of Commonwealth Studies, University of London.

Nettheim, G. 1993. "'The consent of the natives": Mabo and indigenous political rights', *Sydney Law Review*, 15 (2): 223-46.

O'Faircheallaigh, C. 1986. 'The economic impact on Aboriginal communities of the Ranger Project, 1979-1985', *Australian Aboriginal Studies*, 1986/2: 2-14.

- O'Faircheallaigh, C. 1988. 'Uranium royalties and Aboriginal economic development', in D. Wade-Marshall and P. Loveday (eds) *Contemporary Issues in Development, Northern Australia Progress and Prospects*, vol. 1, North Australia Research Unit, Darwin.
- Office of Evaluation and Audit 1992. *Impact Evaluation Land Acquisition Program*, Office of Evaluation and Audit, Aboriginal and Torres Strait Islander Commission, Canberra.
- Pritchard, S. 1992. 'The right of indigenous peoples to self-determination under international law', *Aboriginal Law Bulletin*, 2 (55): 4.
- Pritchard S. 1993. 'Declaration on rights of indigenous peoples. Drafting nears completion in the United Nations Working Group', *Aboriginal Law Bulletin*, 2 (60): 9.
- Queensland Legislation Review Committee 1991. *Inquiry into the Legislation Relating to the Management of Aboriginal and Torres Strait Islander Communities in Queensland*, Final Report, Queensland Legislation Review Committee, Brisbane.
- Reynolds, H. 1987. *The Law of the Land*, Penguin, Ringwood.
- Royal Commission on Aboriginal Peoples 1992. *The Right of Aboriginal Self-Government and the Constitution: A Commentary*, Canada Communication Group, Ottawa.
- Royal Commission on Aboriginal Peoples 1993. *Partners in Confederation. Aboriginal Peoples, Self-Government and the Constitution*, Canada Communication Group, Ottawa.
- Sanders, D. 1989. 'The United Nations Working Group on Indigenous Populations', *Human Rights Quarterly*, 11: 406.
- Sanders, D. 1992. 'Towards Aboriginal self-government: an update on Canadian constitutional reform', *Aboriginal Law Bulletin*, 2 (58): 12.
- Seaman, P. 1984. *The Aboriginal Land Inquiry*, Government Printer, Perth.
- Sharp, N. 1993a. *Stars of Tagai: The Torres Strait Islanders*, Aboriginal Studies Press, Canberra.
- Sharp, N. 1993b. 'No ordinary case: reflections upon Mabo No. 2', in *Essays on the Mabo Decision*, Law Book Company, Sydney.
- Simpson, T. 1993. 'Update on the Working Group on Indigenous Populations', *Aboriginal Law Bulletin*, 3 (64): 4-6.
- Stanner, W.E.H. 1979. 'The Yirrkala land case: dress rehearsal', in W.E.H. Stanner (ed.) *White Man Got No Dreaming: Essays 1938-1973*, Australian National University Press, Canberra.
- Stephenson, M.A. and Ratnapala, S. (eds) 1993. *Mabo: A Judicial Revolution*, University of Queensland Press, St Lucia.
- Swepton, L. 1989. 'Response to Review 41 article in ILO Convention 107', *The Review (International Commission of Jurists)*, 42: 43.

Taylor, J. 1993. *Regional Change in the Economic Status of Indigenous Australians, 1986-91*, Centre for Aboriginal Economic Policy Research, Australian National University, Canberra.

Tesfaghiorghis, H. 1991. 'Geographic variations in the economic status of Aboriginal people: a preliminary investigation', *CAEPR Discussion Paper No. 2*, Centre for Aboriginal Economic Policy Research, Australian National University, Canberra.

Toohey, J.L. 1984. *Seven Years On: Report by Mr Justice Toohey to the Minister for Aboriginal Affairs on the Aboriginal Land Rights (Northern Territory) Act 1976 and Related Matters* (December 1983), Australian Government Publishing Service, Canberra.

von Martens, G.F. 1829 (Translated from French by W. Cobbett). *The Law of Nations*, 4th ed., W. Cobbett, London.

Wallace-Bruce, N.L. 1989. 'Two hundred years on: a re-examination of the acquisition of Australia', *Georgia Journal of International and Comparative Law*, 19 (1): 87.

Wilkie, M. 1985. *Aboriginal Land Rights in NSW*, Alternative Publishing Cooperative Limited, Chippendale, New South Wales.

Williams, P.L. 1993. 'Mabo and inalienable rights to property', *Australian Economic Review*, 103 (3rd Quarter): 41-44.

Wolff, C. 1934. *Jus Gentium Methodo Scientifica Pertractatum* (1764), Clarendon Press, Oxford.

Woodward, A.E. 1974. *The Aboriginal Land Rights Commission, Second Report, April 1974*, Australian Government Publishing Service, Canberra.

Contributors

Jon Altman

Director, Centre for Aboriginal Economic Policy Research, Faculty of Arts, Australian National University.

Jeremy Beckett

Associate Professor, Department of Anthropology, Faculty of Arts, University of Sydney.

Frank Brennan

Visiting Fellow, Law Program, Department of Law and Philosophy, Reshaping Australian Institutions Towards and Beyond 2001 Project, Research School of Social Sciences, Australian National University.

Garth Nettheim

Professor of Law and Chairman, Aboriginal Law Centre, University of New South Wales; Visiting Fellow, Law Program, Department of Law and Philosophy, Reshaping Australian Institutions Towards and Beyond 2001 Project, Research School of Social Sciences, Australian National University.

Henry Reynolds

Associate Professor, (Currently Australian Research Council Senior Research Fellow), History Department, James Cook University of North Queensland.

Will Sanders

Research Fellow, Centre for Aboriginal Economic Policy Research, Faculty of Arts, and Coordinator, Institutions of Aboriginal Australia Strand, Reshaping Australian Institutions Towards and Beyond 2001 Project, Research School of Social Sciences, Australian National University.

CONTRIBUTIONS BY

Jon Altman
Jeremy Beckett
Frank Brennan
Garth Nettheim
Henry Reynolds
Will Sanders

Papers from a seminar series in November 1993 entitled *Mabo* and the Recognition of Native Title: Origins and Implications for the Institutions of Aboriginal Australia. Early papers discuss the historical, legal and anthropological origins of the *Mabo* case and the High Court's recognition of native title in June 1992. Later papers are concerned with the decision's legal, political and economic policy implications in the light of responses from government.

ISBN 0 7315 2008 4
ISSN 1036-6962