Indigenous Land Rights in Australia

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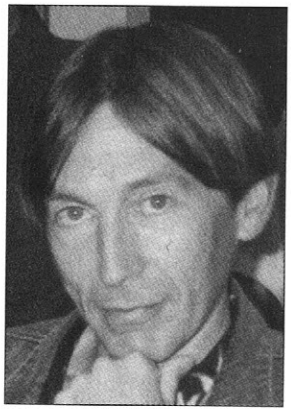

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SYNOPSIS

The 1992 Australian High Court decision known as "*Mabo*" represents a judicial revolution in terms of recognition of indigenous land rights. Changing community standards and sympathy for indigenous peoples influenced the decision. The plaintiffs, the Meriam people, regard all land as belonging to individuals or groups. *Terra nullius* was a legal doctrine originally applied to uninhabited land but was enlarged, often for practical reasons, to justify acquisition of land which was uncultivated or where its indigenous inhabitants were not "civilised". The judgment's rejection of *terra nullius* paved the way for the recognition of native title, the form of which is communal and depends on the particular type of traditional customs and lifestyle. Where any inconsistency is apparent between native titles and Crown grants, native title rights are extinguished. English feudal origins vest the Crown with ultimate title to all land, but *Mabo* held that, in Australia, this "radical" title does not confer on the Crown absolute beneficial ownership of land to the exclusion of the indigenous inhabitants. No municipal court could question the sovereignty by which it is constituted – this is the province of international law. *Mabo* is broadly in line with recent cases abroad and international human rights standards, but this paper's critique highlights some major oversights in the legal judgment as well as other western and indigenous perspectives on land rights.

From the late 1980s to the mid 1990s a series of legal cases concerning indigenous land rights preoccupied the Australian courts as well as the general public. As Australians were forced to re-examine the colonial dispossession of the indigenous peoples, the whole concept of land rights was pulled apart and put together in radically new ways. The centrepiece of this re-examination was a 1992 case commonly called *Mabo*[1] in Australia's ultimate court, the High Court, in which its 6-1 majority decision represented nothing short of a judicial revolution. This paper will primarily focus on the main issues drawn out in *Mabo*, which concerned the rights – both indigenous and non-indigenous – to own and benefit from land.

OVERVIEW OF THE *MABO* DECISION

The more important issues are later examined in detail, but here an overview of the High Court hearing and judgment is useful. *Mabo* examined whether the annexation by Australia of a group of islands had extinguished the islanders' native land title (a legal term denoting a form of indigenous land rights, to be examined later). In a number of previous court decisions, it had been held that annexation automatically extinguished pre-existing native titles. These decisions involved, in some form, the application of the *terra nullius* doctrine ("uninhabited land" or "no-one's land", to be elaborated upon). This doctrine held that the acquisition of new lands by the Crown (the supreme governing power under a monarchical constitution) vested their absolute ownership in the Crown. Although the *terra nullius* doctrine was initially applied only to uninhabited lands, it had been gradually extended to inhabited lands populated by natives, who were considered by colonial governments to have been primitive by European standards.

While the judges in *Mabo* were extremely mindful of preserving the "skeleton of principle" of the legal system, this preservation had to be weighed against the pace of change of community standards and sympathy for such matters as the plight of indigenous peoples. The court clearly accepted that European settlement in Australia proceeded on the basis that there was no need to deal with the indigenous inhabitants or even to acknowledge their laws, their rights or their interests[2]. The judgments in the High Court themselves restate the assumptions which had characterised settlement, and then go on (in the case of the majority) to refute

those assumptions and to declare the common law principles that should have been applied.

The historic nature of the decision in *Mabo* (that common law recognised the native title of the indigenous inhabitants of Australia) lies in it having overruled previous decisions that had held that, as a consequence of its acquisition of sovereignty, the Crown acquired the absolute beneficial ownership of all land comprising the Colony at the moment of settlement.

Prior to *Mabo*, no rights or interest in any land in the territory after that date could be possessed by any other person unless granted by the Crown. But in *Mabo* the High Court held that when the Crown acquired sovereignty over territory which is now part of Australia, the pre-existing rights and interests in land comprising native title survived and constituted a burden on the radical (ultimate or final) title of the Crown. The decision then turns on a distinction between this acquisition of *sovereignty* (in the sense of political authority) over Australia and absolute beneficial *ownership* thereof. But in any case, the Court held that the Crown had always had the right to extinguish native title by legislation expressing a clear and plain intention to do so, subject to certain restrictions.

THE PEOPLE, THEIR ISLANDS AND THEIR CULTURE

As so many of the legal decisions were based on the culture and traditions of the plaintiffs, these background facts require examination. Eddie *Mabo* (the plaintiff) represented the Meriam people who had long inhabited a small group of islands, the Murray Islands, in the Torres Strait between northern Queensland and Papua New Guinea. These islands were annexed by the Crown and incorporated into the then-colony of Queensland in 1879.

The Meriam people retain a strong sense of affiliation with their ancestors and with their traditional society and culture. Their society is organised according to customs which are not as far removed from European culture as those of the indigenous inhabitants of the mainland. The Meriam people live in houses organised into villages and gardening is a central feature of traditional life. Garden land is identified by reference to a named locality with the name of the relevant individuals. Boundaries are identified by known landmarks such as specific trees or mounds of rocks.[3]

There is no concept of public or general community ownership. All the land is regarded as belonging to individuals or groups, with

each person making their own garden on their own land. The society is regulated more by custom than by law.

THE CONCEPT OF *TERRA NULLIUS*

The Origins of *Terra Nullius*

In the era of British colonial expansion, there evolved a great body of legal principles and fine points surrounding the widely-varying circumstances of colonial "acquisitions". The English jurist Blackstone laid the framework with his broad classification of two types of colonies:

- **Previously-uninhabited** – these were claimed by right of occupancy only, with the principle that the colonisers took with them the existing English law so far as it could be applied to their situation and the conditions in the new colonies. Such territories were deemed to be *terra nullius*, meaning "empty land", applying to desert and uninhabited lands.
- **Previously-inhabited** – these were claimed by conquest or cession, with the territory's laws remaining in place until changed by the conquerors or were deemed to survive where they were not inconsistent with either the terms of the treaty ceding the territory. The American colonies were largely of this kind.

The Enlargement of *Terra Nullius*

But the doctrine of *terra nullius* was gradually extended to a wider range of territories to justify acquisition of land which was uncultivated or where its indigenous inhabitants were not "civilised". Organisation (at least, from the coloniser's cultural standpoint) was a major determinant – if a society was not united permanently for political action or not sufficiently organised for the territory to be regarded as "conquered" and where no formal cession occurred, then English law treated such territories as uninhabited.[4] There was a certain practical necessity to classify some inhabited lands as *terra nullius*, where there was not a system of law in place which was capable of recognition, or was without a sovereign. It certainly avoided the technicalities required when territory was acquired by conquest or treaty.

In the case of Australia there were further impracticalities facing the British if they were not to deem the land *terra nullius*. It was a vast, unexplored continent peopled by independent tribal groups with a mobility which would have made it extremely difficult to make treaties.[5] But whatever the rights and wrongs of the application of *terra nullius* to the mainland, the circumstances were quite different in Eddie *Mabo*'s

Murray Islands. This small (9 square kilometres in total) area had long been settled and organised into an agricultural community with a long history of individual land ownership.

Indeed, it was the High Court's overturning of the enlarged notion of *terra nullius* as applied to the Meriam people which constituted one of the judgment's profound legal precedents. The judgment considered *terra nullius* to be both racist and wrong in law. The court did not simply apply the existing law and then enquire whether the Meriam people had a higher degree of social organisation than the Australian Aborigines (whose claims had been previously disregarded by the law). Instead, the court set bold new legal precedents by overruling the existing law and discarding the unacceptable distinction between inhabited colonies and *terra nullius*.[6]

NATIVE TITLE

Types of Native Title

The clearing away of the doctrine of *terra nullius* paved the way for the declaration of a whole range of recognised rights and privileges embodied under the umbrella term native title, which may broadly be said to be a right to live on and use traditional lands. The form of the title depends on the type of traditional conduct of the Aboriginal group claiming it. Those, for instance, who have lived on a piece of land since the time of coming of the Europeans had a native title right to live on it. Those who used an area for hunting had a title to continue to hunt, and so on. For instance, if a group only hunted in an area, the decision does not allow them to exclude others from the area providing their hunting rights are not interfered with. Conversely, if a group lived, hunted, farmed and fished an area (as the people in the *Mabo* case itself did), their title to carry on uninterrupted would be protected by the courts.

Furthermore, native title is communal and the rights under it are communal rights enjoyed by the whole tribe. A problem which arises is how to identify the community. Native title is non-transferable, unable to be sold or leased.

Mining legislation nowadays contains general provision stating that minerals are the property of the Crown. The validity of this legislation is, in part, based on its timing, as the Crown's appropriation of minerals occurred long before anti-discrimination laws were heard of. In any case, while *Mabo* leaves the content of native title of minerals an open question, it seems highly unlikely that mineral rights are part of Aboriginal lore.[7]

Extinction of Native Title

This legal revolution was not carried as far as it could have for the court held that, where any inconsistency is apparent between native titles and Crown grants, native title rights are extinguished. Of greatest concern, freehold estates in urban and rural settings cannot be subject to native title because they effectively extinguish native title. The legal basis for this extinguishment flows from the perceived rights which flow from freehold lands (including the right to exclusive possession) being inconsistent with native title based on traditions and customs. Similarly, leasehold lands extinguish native title because they provide for the right to exclude others, in some cases by fencing off. Schools, hospitals, court houses and roads also extinguish native title, as does any legislation expressing a clear and plain intention to do so.

The possibility remains that where the non-indigenous use is not inconsistent with use by the indigenous people their title remains legally enforceable. Examples given are reservations for future public purposes such as schools or public office construction , or as land set aside for a national park. However, nowhere in Australia are royalty, lease or license payments made to Aborigines for the use of maritime resources.

Who Can Claim Native Title?

Claimants are those who are connected to the lands physically as well as according to customs and traditions. That connection can easily be proven where there is occupation of traditional lands, although occupation need not be permanent. It may be in the form of irregular or nomadic contact, and need not always be exclusive.

However, a native title which has ceased with the abandoning of laws and customs based on traditions cannot be revived for contemporary recognition, with certain exceptions. Understandably, indigenous groups have protested this ruling, stating that their physical disconnection with the land and the cessation of their laws and customs often necessarily came about as a consequence of the European "invasion and occupation". This has prompted one Aborigine to observe, "Is it really the case that the High Court, like many other institutions and individuals in this country, feel for those Aborigines who "look the part", or are more "quaint" and less "westernised"?[8]

In any case, the present culture of the Murray Islanders exhibits many features which validates the continuity of their title to their land[9] :

- the present inhabitants are direct descendants of the original population
- there has been no permanent immigrant population

- there is little foreign ancestry
- the present Meriam people have retained a strong affiliation with their forbears, their culture and society

A series of legal definitions defines and demarcates the sovereignty of the Crown and the concurrent existence of native title. Upon acquisition of sovereignty, the Crown was said to take its radical title (conferring authority, not benefits) subject to the beneficial title of the indigenous inhabitants. This effectively rejected the plea of the state government (the defendant) that once territory became a colony of the Crown, the Crown's ownership was such that no interest or right to land could exist except by Crown grant. The corollary of this ruling is the recognition that indigenous peoples had been deprived of their religious, cultural and economic sustenance which the land provides, and were made intruders in their own homes.

THE ORIGINS OF OUR LAND LAWS

Feudalism and the Doctrine of Tenure

English land law – from which Australian land law derives – is based on the doctrine of tenure, the origins of which are feudal. So fundamental is the doctrine of tenure that it has been said that it cannot be overturned without fracturing the skeleton which gives our land law shape and consistency.[10]

This doctrine holds that the Crown has the ultimate title to land, and that landowners do not "own" their land absolutely. They instead derive their ownership through "holding" their land "of" the Crown (harking back to the terminology that has come down from feudal times). This is another case of "the victors calling the shots", as the doctrine originated when, after the Norman Conquest, William the Conqueror became the owner of all the land in England, being the paramount lord. As the owner, he was able to grant the land out to his subjects.

The king did not grant the English lands to his followers absolutely, but in return for the fulfilment of certain conditions, usually conditions of service rather that of monetary payment. The type of service required was indicated by the title of the tenure – military service, frankalmoin, socage and so on. For example, the tenant-in-chief might be granted land on condition that he send a quota of knights to serve a certain number of days each year. Or church land required "spiritual service", such as a mass to be sung once a year.

No transfer of actual ownership of land could be made under this system, nor could any person own land absolutely. Rather, a person merely held land directly from the Crown, as tenant of the Crown. This

feudal system applies to all English land, but there are exceptions to this in Scotland (and much of Europe) termed allodial land, meaning an individual could own it absolutely.

Tenure in the Colonies

The same situation followed in the British colonies, with the common law according the Crown the status of paramount lord. It attributed to the Crown the radical (ultimate) title to all the land in the territory over which the Crown acquired sovereignty, empowering the sovereign to decide what areas of land it could keep personally and what areas could be enjoyed by others.

So too in Australia, where the doctrine of tenure had always been regarded as the foundation of the law, with the Crown being the ultimate owner of all land. Thus, anyone said to be "owning" land in Australia is, legally speaking, *holding* land of the Crown. It is this doctrine of tenure which applied to land holdings in Australia before *Mabo*. When Australia was settled, the type of tenure which was imported was the only remaining freehold tenure in England, "free and common socage", which was freehold tenure without any obligations.

From the earliest days of colonisation, Australia has been regarded as a settled and not a conquered or ceded colony, and this view has been consistently followed by the courts. Because the common law of England – including the feudal doctrine of land tenure – was imported into Australia as a complete body of law, then the Crown acquired property rights to all Australian land. Pre-*Mabo*, the common law governing colonisation was that the pre-existing customary rights and interests in land were abolished upon colonisation of inhabited territory unless those rights were expressly recognised by the new sovereign. The courts had found that the doctrine of tenure allowed no room for recognition of common law native title as the Crown was considered the owner of all land in Australia. In other words, the common law was then seen to have extinguished any form of native title.

Tenure, Post-*Mabo*

In *Mabo*, the High Court acknowledged that the doctrine of tenure is an essential principle of land law in Australia, and that it is too late to contemplate an allodial ("*held in absolute ownership*") or similar system of land ownership. However, the court has applied a modified version of the doctrine of tenure, setting limits to the Crown's power. Now, the Crown's radical title to land in a territory does not automatically give the Crown absolute and complete ownership of the

land to the exclusion of the indigenous inhabitants. The Court distinguished land *held* of the Crown from land owned by the Crown. In effect, radical title does not confer on the Crown an absolute beneficial *ownership* to land, but underlies the Crown's fundamental *right to administer* the country. Under radical title, the Crown has power to grant interests in the land because the sovereign has a supreme legal authority in and over a territory and has the power to prescribe what land should be enjoyed by others.

The court found the doctrine of tenure would apply to every grant of an interest in land that was made by the Crown. However, it would not apply to rights and interests which did not owe their existence to a Crown grant, such as those of the indigenous peoples. If the land was occupied by indigenous inhabitants, and if their rights and interests in the land were recognised by the common law, the Crown's radical title does not give the Crown absolute and exclusive ownership. This is in accordance with a number of historic English legal cases relating to the conquest of Ireland and Wales which hold that the law presumes that a conqueror intends to respect pre-existing private property rights and not to diminish or modify them.[11]

To express the findings of *Mabo* another way, the High Court accepted that the feudal doctrine of tenure was introduced by the colonists and did become part of the law in Australia. However, the court found the theory that the common law of England became the law of Australia was unfounded. The "barbarian theory" which provided the basis of *terra nullius* was contrary to the facts, and Australia was not without settled inhabitants. Thus, as the foundation of the common law's adoption in Australia was false, there was no warrant to apply the rules of English common law.

THE DOCTRINE OF SOVEREIGNTY

In 1788, Australia became a settled colony of England and therefore the Crown assumed sovereignty over that colony. In *Mabo*, the court found that the actual acquisition of sovereignty by the Crown is an Act of State and is therefore unable to be challenged in an Australian court. Thus, Australia's status as a settle colony continues. However, by rejecting the *terra nullius* hypothesis as being a false and unacceptable proposition in contemporary law, the court was able to overrule the existing authorities and review and reconsider the notion that sovereignty meant ownership of the land.

Even as sovereign, the Crown could only claim ownership of the already-occupied land through the notion of *terra nullius* and the

importation of the standard common law doctrine of tenure. Therefore the High Court found that the acquisition of sovereignty, where a territory was inhabited, conferred on the Crown a radical title only and not the absolute and beneficial ownership.

INTERNATIONAL COMPARISONS AND INTERNATIONAL LAW

Broadly speaking, similar legal frameworks to Australia exist in the USA, Canada and New Zealand – that is, unless specific acts of recognition have been made (such as treaties or protective legislation), native titles in these countries are also basically a right of occupancy subject to extinguishment by the sovereign authority.[12]

The Importance of Statehood

Many of the issues of law and legal jurisdiction in *Mabo* revolved around the status of nation-statehood. "Discovery" applied to territories inhabited by native people not under the jurisdiction of a European state, and such "discovery" entitled the state to establish sovereignty by settlement. In British "discoveries" the common law was introduced, whereas in conquered or ceded colonies the pre-existing laws were presumed to continue.[13] Because Britain was an internationally recognised nation-state, it was a corollary of its nationhood that not only the local but also the international sovereignty over Australia was established either originally or derivatively.

Indigenous peoples were not internationally recognised sovereign nation-states for the purposes of international law, even though they might be locally sovereign peoples recognised in international law as the sovereign owners of their territories. The acquisition of territory is chiefly the province of international law, being a prerogative act, an act of state "not justifiable in the municipal courts" and such municipal courts have no jurisdiction to entertain a challenge to an act of state.[14] In other words, no municipal court (such as the High Court of Australia, hearing the *Mabo* case) could question the sovereignty by which it is constituted.

United States

A broad summary of the United States experience was given in *Oneida Indian Nation v County of Oneida* in 1974, where it was observed:

> It very early became accepted doctrine … that although fee title to the lands occupied by Indians when the colonials arrived became vested in the Sovereign – first the discovering European nations and later the

> original states and the United States – a right of occupancy in the Indian tribes were nevertheless recognised. That right, sometimes called Indian title and good against all but the Sovereign, could be terminated only by Sovereign act.

American Indians were considered to hold native title to their lands regardless of their pattern of land use – their hunting grounds were as much in their possession as the cleared fields of Europeans, and their rights to its exclusive enjoyment in their own way and for their own purposes were as much respected until they abandoned them or made a cession to the government.[16] Whether the governments could, in practice, honour these legal rights in the face of rapid European expansion is another question.

There were four landmark cases[17] in the USA between 1810 and 1832 which reconciled the different methods of acquiring sovereignty in a way that accommodated original (native) titles with the Crown's ultimate title. This legal reconciliation was achieved by establishing the principle that the internationally recognised nation-state making the first discovery of a territory previously unclaimed and/or unknown as between such nation-states, acquired the *right of acquisition* of the original (native) title to the territory.

Here originated the so-called Marshall Doctrine, whereby self-government was conferred on the American Indians and by which a nation-state had the right to acquire the title to the land from its Indian owners. Sale or transfer could only be made to the Crown (its right of pre-emption). There was no use of *terra nullius*, but instead the state relied on the prior existence of local sovereign peoples (domestic dependent nations) who owned their land. Thus only European nation-states could be "first discovers and possessors" of the territories in this sense.

It was not until Roosevelt's New Deal in 1934 that the Secretary of the Interior was enabled to place land in trust for Indian tribes, founding the current federal endorsement of Indian domestic sovereignty. Under a 1938 Act(14) mining (by highest bidders) could proceed upon Indian lands with the consent of the Tribal Council, with rents & royalties being payable. However practical difficulties in compliance has dogged this scheme.

Not only the law but the policy of the United States has been founded on recognition of the concept of native title at common law. The policy of treaties and agreements with the Indian peoples and the establishment of the statutory Indian Claim Commission is founded on the settlement of native title.[18]

Canada

Early British imperial policy was to recognize native title to traditional lands and to permit its acquisition by the Crown alone. It was seen as morally just and reasonable to give peaceable recognition to the prior Indian occupation, and more economic to acquire the lands by treaty than by force. A more cynical view is that it was politically advantageous to elicit some degree of native co-operation lest the Indians ally with the French.

In Canada today, even more so than the United States, the dominant society negotiates regional agreements as to land use with the indigenous owners, thereby recognising the existence of two societies, cultures and laws. Indigenous Canadians' land rights were first outlined in 1888 and were put beyond question in the 1970s. 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.

Courts in Canada have taken a different approach to the threshold question of proving the existence of native title. In a number of cases in Canada during the 1970s, it was found that to establish Aboriginal title recognised at common law, four matters must be proved[19] :

- The claimants and their ancestors were members of an organised society.
- The organised society occupied the specific territory over which they assert the Aboriginal title.
- The occupation was to the exclusion of other organised societies.
- The occupation was an established fact at the time of sovereignty was acquired by the Crown.

In some provinces of Canada no treaties were established, and attempts are now being made to rationalise matters with a *Comprehensive Land Claims Policy*. This aims to reach, by negotiation, binding and comprehensive final settlements with non-treaty native title claimants regarding all issues (land, resources, harvesting, compensation etc.) thereby facilitating legal, economic and social stability.

New Zealand

The Treaty of Waitangi was signed between the British and the Maoris in 1840 when New Zealand was established as a separate colony, its charter providing for Maori native title. The North American approach of regional agreements and two societies, cultures and laws has been combined in New Zealand with a Waitangi Tribunal. New Zealand's small size obviates the need for state or provincial governments, which might otherwise compromise treaties and native titles. Similar to North America, there is a degree of political empowerment combined with the recognition of the native title land ownership.

Current International Standards

Mabo relied on a whole range of world-wide, authoritative cases, all holding that the Crown's radical title is subject to (burdened, reduced, or qualified by) the prior interests of indigenous inhabitants.[20] Furthermore, the International Court of Justice has rejected the enlarged notion of *terra nullius*[21], and it follows that Australia could not have been *terra nullius* either in fact or in law.

If Australia had not reversed the non-recognition of native title in *Mabo*, and if it had not supported that reversal by the enactment of native title legislation, the government would have been vulnerable to adverse commentary in international fora for the denial of generally applicable human rights standards. Now Australia is close to compliance even with the more specific requirements of International Labour Organisation Convention 169 and the current language of the UN Draft Declaration on the Rights of Indigenous Peoples.[22]

CRITIQUE

In the *Mabo* decision, none can deny the genuine judicial concern to redress, within the legal framework, the injustices perpetrated on Australian Aborigines as a consequence of the European settlement/invasion. However, the nimble legal juggling that the decision represents suffers from a wide range of incurable flaws that must, in the end, fail to deliver natural justice and prosperity to indigenous and non-indigenous peoples alike.

Absorbed by distinctions between, and definitions of, various types of titles, the court has largely failed to recognise the existence and value of the all-important *economic rent* which possession or control of natural resources confers. Justice demands that because one sector of the population can benefit greatly from their claim on the Earth while others are left with little, land titles need to be issued

with a form of user fees for common heritage resources. Similarly, with land whose locational value has been greatly enhanced by tax-funded infrastructure, the value of titles needs to be regularly assessed in order to recover publicly created value for public purposes.

So the judges in this case can not achieve any lasting, just solution while bound within the neoclassical economic paradigm which treats land as merely another form of capital to be bought outright in perpetuity, regardless of the value of its community-created benefits and how those benefits change over time.

Mabo is flawed in many other respects. Its practical implementation faces huge hurdles, especially with regard to the evidence needed to prove traditional uses and present cultural practices for the purposes of eligibility. Native title claims have been thwarted by practices such as national parks being alienated to prevent them from being claimed. Other obstructions include the boundaries of small country towns being extended to the size of major towns. Most notoriously, the small city of Darwin was officially extended to the size of Greater London to stop land claims near it.[23]

In any case, the benefits of native title are entirely a hit-or-miss affair. You'll only get your share if you belong to a certain race and can prove your immediate ancestors followed a certain set of cultural practices. Or if you're a gardener rather than a hunter-gatherer. But in any case, natural justice can still be discarded at the whim of the Crown, as the court held that all the Crown has to do is to express a clear and plain intention to extinguish native title and it can validly do so!

Flawed Western Perspectives

Most Australians, in the present national spirit of reconciliation between indigenous and non-indigenous peoples, now look back upon the colonial practices of 200 or so years ago and unreservedly deplore them. The picture of a representative of the "civilised" European club planting a flag on the Australian shore and claiming it for the King of England is as laughable now as when, at the bicentennial of settlement in 1988, the Aboriginal elder Burnum Burnum planted the Aboriginal flag on an English beach and declared he was taking possession of the British Isles on behalf of his people!

But are we yet still blind to the injustices of our current system of land tenure? All the judicial wisdom embodied in the lengthy 1992 decision still manages to overlook some great wrongs. Why rake over all the issues surrounding eligibility for native title when the vast

majority of humanity have been deprived of what should be our equal and common birthright, land?

This blind spot in our cultural and economic vision has arisen with the dominance of neoclassical economics, which has blurred the vital distinction between land and capital. Because of outright land ownership (instead of the Geonomic model of annually-assessed land value taxation), we find we are born into a situation where we are beholden to the "owners" of the best parts of the Earth and effectively have to pay these owners for permission to live. Land is *not* capital – we can't make it ourselves and, as long as the Law of Gravity holds, we'll always need some of it on which to stand!

So, nit-picking about relatively limited forms of native title, the judiciary in this case overlooked the absence of "human title" with its right to a universal Citizen's Dividend from the regularly-assessed rentals on a wide range of natural resources such as land, fishing and forestry licences, electromagnetic spectra, mineral wealth etc.

And, even among Aboriginals, *Mabo* confers little equity. Stuck in the mind set of parceling and distributing land in perpetuity, how could that ever be achieved? Land has such vastly different values according to its fertility and, in particular, its access to amenities that it would require the wisdom of Solomon (perhaps backed up by a mainframe computer) to ensure that somehow every person or clan received a parcel of equivalent worth. And even if the *different* values of land could be accounted for, what about the *changing* values of land? The constant building and relocation of infrastructure would soon mean that the original "all-wise" distribution has later skewed in favour of some more than others. And even if the different and changing values of land could somehow be accounted for, what about next year? What about the new-born – where is their fair share of the land?

Flawed Indigenous Perspectives

Aboriginal leaders rightly cry that they've been dispossessed, but the fact of *their* dispossession is only more visible because it's more recent. All our ancestors have had some type of William the Conqueror barge into their lives and claim their land as his.

Most of us, however, can sympathise with the *Mabo* verdict even if it's only a matter of two wrongs making a right. But there are a number of Aboriginal spokespersons who want much more than the limited native title rights which *Mabo* makes available. Some assert Aboriginals are not the custodians or traditional inhabitants but rather are the *owners* of Australia, and should have their right of ownership restored.

Aboriginals, it is claimed, have a sacred relationship with their land that arises out of their 40,000-year history of occupancy. Such talk forms the opening gambit in their bargaining for a "Pay the Rent" system, whereby Europeans would have to reimburse the indigenous people for the use of Aboriginal land. The indigenous line of argument goes something like this: "This land is our mother … we revere our Sacred Earth and can't possibly sell her off ... we won't take less than $5 billion a year."

And what is the basis for Aboriginal claims of ownership? – "prior occupancy", no less. In other words, "We got here first and so we're going to claim possession of all the natural treasures, even though they're the gift of Nature." Logically following this argument of prior occupancy, then, what would happen if new archeological findings produced firm evidence that one particular clan were the sole descendents of the very first inhabitants of Australia? Surely this clan could then assert, "Based on our descendants' prior occupancy, all you whitefellas *and other blackfellas* have to pay our clan rent or clear off!" And does prior occupancy mean that I could return to England and Ireland for *my* share of the Earth, where I could proclaim, "All you Pakistani and West Indian immigrants have to pay me rent or else go home!"

The Way Forward

Geonomics is the term sometimes used to describe the geo-centric economic system most famously proposed by the 19th century American social philosopher and economist, Henry George. It is not the intention of this paper to even sketch the list of profound changes that would be made to the apparently-insoluble problems of conventional neoclassical economics. However, an outline will be made of the contribution Geonomics can make to the indigenous land rights debate, offering an entirely new perspective to a conflict where opposing parties have become locked into positions with few areas of commonality.

The only means by which *all* people can regain their birthright and effectively become co-owners of land and natural resources is through a system of resources rentals, including land value taxation. This Geonomic system of land value taxation is eminently flexible enough to set aside land for cultural, environmental, social or historical reasons, including the provision of special reserves for disadvantaged individuals and groups, such as Aboriginals.

The question of the nature of native title or ownership of land

becomes somewhat irrelevant when *everyone's* birthright is effectively restored through land value taxation. One simply uses the land one needs, with no up-front purchase price, and pays the site rents according to its value. This is no casino-style, winner-take-all outcome as is implicit in both sides of the conventional land rights debate.

In attempting to undo the complex problems caused by a long history of dispossession alongside social and economic alienation, Geonomic principles can deliver a range of measures to deal with a number of special needs of Aboriginals.

As a Geonomic economy prevents land speculation and hoarding, land would be put to its best use and cities would become more compact and less wasteful. Vast tracts of land would be freed up at the economic margin, which would make land available to anyone intent on living a lifestyle which leaves soft ecological footprints. This would also eminently suit those Aboriginals who might opt to retain their traditional lifestyles. There are untapped opportunities for Aboriginals through National Park management (and other forms of ecotourism), artistic pursuits and farming (possibly including crocodiles, kangaroos and emus) to attain an excellent quality of life within a Geonomic economy, and by no means necessarily at the margins.

One possible Geonomic scenario would be for Aboriginal groups to have first option of taking possession of traditional lands subject to native title claim which, being mainly in outback Australia or in the sparsely-settled north away from commercial centres, are (mineral wealth aside) at the economic margins. It should be realised that the efficiencies of land use promoted by Geonomics (as speculation and sprawl are curtailed) would improve the ecological, agrarian and aesthetic quality of marginal land considerably above subsistence level. Indeed, such land could be very productive, and could provide inexpensive and very suitable means for Aboriginals to live comfortably at some point between traditional and modern lifestyles.

It should be borne in mind that land at the margins would not only attract little or no site revenue, but might actually afford those who chose to dwell there a positive rental income due to the service supplied by its vegetation as a carbon sink, and due to distribution of citizen dividends resulting from the excess of other site rentals collected over and above government expenditure.[24]

In recognition of Australia's need to right some historical wrongs, special one-off programs could be undertaken to provide adequate housing, on-site schooling and health services, plus a range of tailored education programs in practical areas of self-sufficiency and

professional training alike. Furthermore, for particularly disadvantaged groups, there could be a waver of land value taxation for a transitional period of, say, one generation. And with a hefty citizen's dividend for their share of the nation's resource rentals and an increasing degree of self-determination and lessening dependence on welfare, Aboriginals could confidently look to the future.

This outline of Geonomic solutions is no more than that, and the whole picture must really be understood in order to fully appreciate its sweeping implications. Of course, not everyone will get everything they want, but most objective observers would conclude that, with Geonomics, the net wash-up is better in terms of both social justice and economic prosperity. Nevertheless, there might still be indigenous peoples complaining that they didn't get all their "ancestral" land, but for such people there's a quick, clean solution to their protests:

We'll simply give all the land back to indigenous peoples, then tax it properly!

The Federal Government's *Native Title Act* of 1993 and other band-aids can patch up *Mabo* to some extent, but there will never be any true natural justice until *all* people's *full* land rights have been restored through the overturning of neoclassical economics in favour of the land value taxation proposals of so many of our great, albeit forgotten, social philosophers, scientists, and economists. If this means having to completely discard the "skeleton of principle" of the legal system, then the sooner, the better!

Notes

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11 Butt and Eagleson, *op.cit.*, p.29.
12 Phillips, *op.cit.*, p.18.
13 Hocking, B., "Aboriginal Law Does Now Run in Australia" in *Essays on the Mabo Decision*, *op.cit.*, p.75.
14 Brennan, F., "*Mabo* and the Racial Discrimination Act", in *Essays on the Mabo Decision*, *op.cit.*, p.88.
15 *Oneida Indian Nation v County of Oneida* 414 US 661 (1974) at 666 per White J.
16 Reynolds, H., "Origins and Implications of *Mabo*: an historical perspective" in Sanders, W. (ed.), *Mabo and Native Title: Origins and Institutional Implications*, Centre for Aboriginal Economic Policy Research, Canberra, 1994, p.26.
17 Fletcher v. Peck, 6 Cranch 87 (1810); Johnson v. McIntosh, 8 Wheat 543 (1823); The Cherokee Nation v. the State of Georgia, 5 Pet 1 (1831); Worcester v. the State of Georgia (1832).
18 Bartlett, R., "*Mabo*: Another Triumph for the Common Law", in *Essays on the Mabo Decision*, *op.cit.*, p.63.
19 Butt and Eagleson, *op.cit.*, p.43.
20 Hocking, *op.cit.*, p.75.
21 Western Sahara Case [1975], ICJR1.
22 The Working Group on Indigenous Populations: U.N. Draft Declaration on the Rights of Indigenous Peoples, Article 26, reads: "Indigenous peoples have the right to own, develop, control and use the lands and territories, including the total environment of their lands, air, water, coastal seas, sea-ice, flora and fauna and other resources which they have traditionally owned or otherwise occupied or used. This includes the full recognition of their laws, traditions and customs, land-tenure systems and institutions for the development and management of resources, and the right to effective measures by states to prevent any interference with, alienation of or encroachment upon these rights."
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24 Spain, D.W., "Solving Incongruities in Australian Native Title", in his honours thesis at University of Queensland Law School, 1997, p.63.