OBSERVATIONS ON MABO & ORS v. QUEENSLAND

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> *The common law of this country would perpetuate injustice if it were to continue to embrace the enlarged notion of terra nullius and to persist in characterising the indigenous inhabitants of the Australian colonies as people too low in the scale of social organisation to be acknowledged as possessing rights and interests in land.*
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> *Per Brennan J in Mabo v. Queensland, (1992) 175 CLR 1 at 42.*

1. INTRODUCTION

After a decade of litigation, on 3 June 1992 justice was finally accorded to the Meriam people who occupy the Murray Islands, with the High Court's findings in *Mabo v. Queensland*.[1] It was, however, justice too late for one of the plaintiffs, Mr Eddie Mabo,[2] whose death earlier in 1992 prevented him from reading for himself the High Court's order that 'the Meriam people are entitled as against the whole world to possession, occupation, use and enjoyment of the lands of the Murray Islands ...'.

Prior to 3 June 1992, Australia stood apart from other post colonial States such as the United States, Canada and New Zealand for its judicial denial of the aboriginal title. The Australian legal system had invoked the notion of *terra nullius* to deny the very existence of Australia's aboriginal occupants and, conveniently, as a corollary concluded that their traditional territorial rights were not recognisable. Purportedly, 'annexation' gave the Crown absolute beneficial title to all lands within the perimeters of the colony.

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1. (1992) 175 CLR 1.
2. Eddie Mabo was awarded the Australian Human Rights 1992 in recognition of his efforts. The award was jointly conferred on all five plaintiffs in the *Mabo* case, Eddie Mabo, Sam Passi (deceased), Celui Mapo Salee (deceased), Fr Dave Passi, and James Rice for their dedication in pursuing their claim. Ms Barbara Hocking, BA, LLB, LLM, MA (prelim) was also recognised with such an award for her work in this area. In particular, the award was in acknowledgement of her writings, upon which much of the *Mabo* decision was based. See for example, her Masters of Laws thesis, "Native Land Rights" (1971) (Monash).

The suggestion that Australia was 'desart'[3] and uninhabited or inhabited by peoples so low in the social scale that they could not be recognised was finally rejected by a majority of the High Court in *Mabo v. Queensland.*[4]

As Brennan J declared in the course of his judgment:[5]

> The common law of this country would perpetuate injustice if it were to continue to embrace the enlarged notion of *terra nullius* and to persist in characterising the indigenous inhabitants of the Australian colonies as people too low in the scale of social organisation to be acknowledged as possessing rights and interests in land.

Similarly, with respect to the suggestion that annexation conferred on the Crown an absolute beneficial title to the Australian continent, the Court held:[6]

> ... it is not a corollary of the Crown's acquisition of a radical title to land in an occupied territory that the Crown acquired absolute beneficial ownership of that land to the exclusion of the indigenous inhabitants ...
> [I]f the land were occupied by the indigenous inhabitants and their rights and interests in the land are recognised by the common law, the radical title which is acquired with the acquisition of sovereignty cannot itself be taken to confer an absolute beneficial title.

Thus in *Mabo v. Queensland,* the Australian High Court finally acknowledged that 'annexation' of a country did not extinguish the aboriginal title.[7] Rather this form of original tenure continued hand in hand with the Crown's radical title and acted as a burden upon Crown claims to plenum dominium.[8]

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3. As *Blackstone's Commentaries* described *terra nullius*.
4. Supra n 1.
5. Id at 42.
6. Id at 48 per Brennan J.
7. Id at 65; contra Dawson J, id at 159. A matter that was appreciated by the United States judiciary over centuries ago. See for example, *Fletcher v. Peck*, 10 US (6 Cranch) 87 at 142-3 (1810); *Johnson v. McIntosh*, (1823) 8 Wheat 543 esp at 574; *Cherokee Nation v. Georgia*, 30 US (5 Pet) 1 (1831); *Worcester v. Georgia*, 31 US (6 Pet) 515 (1832) esp at 544.
8. Id at 49-50, citing *Witrong and Blany*, (1674) 3 Keb 401 at 402 and quoting *Amodu Tijani*, [1921] 2 AC 399 at 403. See also id at 57, 75 and 86-87.

A majority of the High Court[9] held that aboriginal title was recognised at common law and, in the absence of an effective extinguishment, such tenure preserves the original occupants' right to possession of their traditional lands in accordance with their customs and lores.[10]

Dawson J dissented[11] on nearly every point. He believed that on annexation, the Crown acquired an absolute beneficial title to all lands.[12] In the absence of formal Crown recognition of aboriginal tenure, such title could not be enforced.[13] Rather, it continued as no more than a form of permissive occupancy, subject to the will of the Crown.[14] On the facts, Dawson J believed the necessary recognition had not occurred. To the contrary, he believed settlement had extinguished any rights the original occupants may have held.[15]

Despite the majority's findings, the decision does not, however, bring Australian judicial practice totally in line with jurisprudence in other post colonial States. Toohey J was the only member of the Court to apply the traditional prerequisites[16] for the recognition of the aboriginal title.[17] Further, while a majority of the High Court stated that the annexation of the Torres Strait Islands had not extinguished the aboriginal title to these lands, four members of the Court[18] seemingly[19] denied that a wrongful extinguishment of such gives rise to a claim for compensation. These members appear to believe the Crown has an absolute power to extinguish the aboriginal title as long as this 'is not

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9. Brennan J (with whom Mason CJ and McHugh J agreed), Deane, Gaudron and Toohey JJ; Dawson J dissenting.
10. Supra n 1 at 15 per Mason CJ and McHugh J. No formal governmental recognition of this aboriginal title was necessary before such tenure could be acknowledged by the common law: supra n 1 at 55 per Brennan J; supra n 1 at 81-82 per Deane and Gaudron JJ; supra n 1 at 183-184 per Toohey J.
11. Not surprisingly, when one refers to the attitudes and opinions evidenced in the earlier decision in *Mabo v. Queensland,* (1988) 63 ALJR 84.
12. Suggesting this to be a corollary of the acquisition of sovereignty: supra n 1 at 122 and 150.
13. Id at 126-127, 129-130 and 161.
14. Id at 136.
15. Id at 160 and 175.
16. Set out in *Hamlet of Baker Lake v. Minister of Indian Affairs and Northern Development,* (1979) 107 DLR (3d) 513 at 542.
17. Supra n 1 at 187-188.
18. Brennan J (with whom Mason CJ and McHugh J agreed), and Dawson J (who dissented from the Court's ultimate finding).
19. This is not totally clear from Brennan J's judgment; with whom Mason CJ and McHugh J agreed. At one point Brennan J quoted case law suggesting the aboriginal title can only be extinguished through just purchase. Other comments in his judgment, however, suggest a contrary view.

inconsistent with the laws of the Commonwealth.'[20] A further two members of the Court[21] apparently confined this right to compensation to cases where the purported extinguishing act failed to evince a clear and plain intention to extinguish the aboriginal title.[22] Their judgments do not support the existence of a general right to compensation.[23]

This view is contrary to more than a century of jurisprudence[24] and suggests at least three members of the majority agreed with Dawson J's assertion that the Crown has an absolute right to extinguish the aboriginal title. In this respect the decision was disappointing, providing a somewhat hollow victory for Australia's aboriginal peoples. While the Court recognised the aboriginal title, they also recognised the right to extinguish such without compensation. Thus while the decision has been seen as a great victory for all Australian aboriginal peoples, it only assists those whose title has not already been extinguished.

Brennan, Deane and Gaudron JJ also stressed that if an aboriginal group ceases to acknowledge and observe its laws and customs, loses its traditional connections with the land, or the last of its members dies, the aboriginal title will be taken to be extinguished.[25] These limitations may prevent many aboriginal people, particularly, urban aboriginals, from using the decision to regain their traditional lands.

Moreover, strictly, the High Court's findings were limited to the facts before them. The Court was careful to confine the implications of the orders made to the land the subject of the litigation. In this respect, it is acknowledged that the Murray Islanders had a particularly strong case.

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20. While it is submitted in light of *Mabo v. Queensland,* supra n 11, s. 10 of the *Racial Discrimination Act 1975* (Cwlth) is such a law protecting the aboriginal title from uncompensated extinguishment, it is nevertheless important to appreciate that it is incorrect to suggest that the aboriginal title can be extinguished without compensation.
21. Gaudron and Deane JJ.
22. Supra n 1 at 119.
23. This is unclear in light of references to case law requiring the payment of compensation: ibid at 83, quoting *R v. Symonds,* [1847] NZ PCC at 390.
24. See for example, *Fletcher v. Peck,* supra n 7; *Johnson v. McIntosh,* supra n 7; *Worcester v. Georgia,* supra n 7 at 545; *Mitchel v. United States,* 9 Pet 711 (1835) at 745-746; *Chouteau v. Molony,* 16 How 203 (1853); *Buttz v. Northern Pacific Railroad,* US 55 [1886]; *Jones v. Meehan,* 175 US 1 (1899) at 8 and 16; *United States v. Shoshone Tribe of Indians,* 304 US 111 (1938) at 115-116; *United States v. Klamath and Moadoc Tribes of Indians,* 304 US 119 (1938); *Gila River Pima-Maricopa Indian Community v. United States,* 204 Ct Cl 137 (1974); *R v. Symonds,* supra n 23 at 390; *Tamihana Koraki v. Solicitor-General,* (1912) 32 NZLR 321.
25. Supra n 1 at 60 per Brennan J; supra n 1 at 110 per Deane and Gaudron JJ.

The 'gardening prowess' of the Meriam people,[26] the fact separate titles to land had been handed down from generation to generation and could be easily identified and the absence of extensive governmental interference in the Torres Strait Islands possibly played an important part in the case and thus could provide the basis for subsequent courts to distinguish *Mabo v. Queensland*.[27] The decision was, however, based on general propositions of law which should also be applicable to other aboriginal communities if they can establish a sufficient and continuing connection with their traditional lands.

Nevertheless, the positive features of the decision should not be under-estimated. While the High Court's finding that annexation did not confer an absolute title is hardly revolutionary, the decision at least puts to rest the suggestion in *Milirrpum v. Nabalco*[28] that the aboriginal title was not known to the common law.[29] Further, at a practical level, the decision ensures the maintenance of aboriginal territorial rights in the Torres Strait Islands despite Sir Joh Bjelke-Petersen's attempt to dispossess the traditional peoples of their lands.[30]

2. FACTS

Ten years ago five members of the Meriam community[31] began proceedings to have their customary title to, and usufructuary rights in, their traditional lands recognised. In response to these moves, the then National Party, Queensland Government, under the leadership of Sir Joh Bjelke-Petersen, enacted the *Queensland Coast Islands Declaratory Act 1985* (Qld) declaring the subject islands to be vested in the Crown in right of Queensland and subject to the State's Crown land legislation. The Act denied the traditional owners had any prior right, title or interest in these islands and consequently declared no compensation was payable for any grant of the subject lands. The Queensland government intended to vest title to the Murray Islands in a trustee council,[32] that entity having power to lease such land and determine traditional occupation.

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26. This was relevant in light of certain Eurocentric legal principles suggesting that uncultivating indigenous peoples were too low in the social scale for their rights to be recognised by the common law.
27. Supra n 1.
28. (1971) 17 FLR 141.
29. The ultimate decision is not necessarily incorrect as the action was brought by the clan, instead of the land holding entities such as the band or tribe.
30. Through the enactment of the *Queensland Coast Islands Declaratory Act 1985* (Qld).
31. Of the Torres Strait Island group of islands, off the coast of the State of Queensland.
32. Established under the *Land Act 1962* (Qld).

3. QUEENSLAND COAST ISLANDS DECLARATORY ACT 1985 (Qld)

Section 3(a) *Queensland Coast Islands Declaratory Act 1985* (Qld) declared that upon the annexation of Queensland, the subject islands vested in the Crown in right of Queensland 'freed from all other rights, interests and claims of any kind whatsoever and became waste lands of the Crown.' Section 3(c) provided further that 'the islands could thereafter be dealt with as Crown lands for the purposes of Crown lands legislation ...'.

Sections 4 and 5 *Queensland Coast Islands Declaratory Act* purported to prospectively validate any disposal of such land by the Crown. Section 4 declared any such disposal 'shall be taken to have been validly made and to have had effect in law according to its tenor.' Section 5 confirmed that no compensation was payable for the extinguishment of 'any right, interest or claim [in the islands] alleged to have existed prior to the annexation.' Thus the sections deemed 'those rights which might otherwise have survived annexation in 1879 ... not to have survived and ... never to have survived,'[33] thereby retrospectively extinguishing the Murray Islanders' traditional rights and title. Consequently, if effective, the *Queensland Coast Islands Declaratory Act 1985* could be pleaded by the Queensland Government as a complete defence to the plaintiffs' substantive claim for the recognition of their customary title.

The validity of the *Queensland Coast Islands Declaratory Act 1985* was therefore critical to the plaintiffs' claims. Four members of this group; Eddie Mabo, James Rice, David Passi and Celui Mapo Salee; demurred to the amended defence, claiming that as a matter of construction the Act did not extinguish their traditional title. Alternatively, they contended the Act was beyond the Parliament's legislative authority and/or inconsistent with the *Racial Discrimination Act 1975* (Cwlth)[34] and thus inoperative by reason of s. 109 *Commonwealth Constitution 1901*.[35]

While logically, establishing the plaintiffs' traditional rights was a necessary preliminary to determining whether the Act had extinguished such rights, for the purposes of determining the plaintiffs' demurrer all parties agreed it would be assumed the plaintiffs held such rights unless extinguished by the 1985 Act.

Brennan, Toohey and Gaudron JJ found that *prima facie* the *Queensland Coast Islands Declaratory Act* vested title to the subject

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33. *Mabo v. Queensland,* supra n 11 at 92 per counsel for the defendant.
34. Particularly s. 9 (declaring racial discrimination to be unlawful) and s. 10 (right to equality before the law) of the *Racial Discrimination Act 1975* (Cwlth).
35. This section provides state laws inconsistent with Commonwealth legislation are inoperative to the extent of that inconsistency.

lands in the Crown and consequently purported to extinguish the plaintiffs' and their predecessors' traditional legal rights.[36] Deane J, by contrast, confined the effect of the Act to validating past disposals of such land under such Crown land legislation.[37]

Ultimately, however, Brennan, Toohey, Gaudron and Deane JJ[38] found the *Queensland Coast Islands Declaratory Act* did not effectively extinguish the plaintiff's aboriginal title as it was inconsistent with the *Racial Discrimination Act 1975* (Cwlth)[39] and consequently inoperative.[40] Thus the attempt to extinguish the Meriam people's traditional rights was held to fail. The *Queensland Coast Islands Declaratory Act* could not, therefore, be pleaded as a defence to the plaintiffs' claims.[41]

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36. Supra n 11 at 93.
37. Id at 99.
38. Despite all parties to the dispute requesting the Court to assume the existence of the plaintiffs' traditional rights for the purposes of this hearing, the minority based their decision on a refusal to accept such. Dawson J, for example, declared that until it was proven the 'land rights of the kind alleged by the plaintiffs ... are exclusively possessed' by persons of the plaintiffs' race, colour or origin, it could not be said the *Queensland Coast Islands Declaratory Act 1985* destroys the plaintiffs' rights in a manner falling within s. 10(1) *Racial Discrimination Act 1975*: ibid at 107. Moreover, Dawson and Wilson JJ said that even if this was proved, as the land rights alleged were not enjoyed generally by all persons in Queensland, a denial of such rights 'would not necessarily be to deprive them of rights enjoyed by persons of another race, colour or national or ethnic origin' within the meaning of the *Racial Discrimination* Act 1975: id per Dawson J. Wilson J seemed to believe the *Queensland Coast Islands Declaratory Act 1985* removed a source of inequality!
39. While Mason CJ, Dawson, Wilson, Brennan, Toohey and Gaudron JJ found s. 9 of the *Racial Discrimination Act 1975* only prohibited 'acts', not the enactment of legislation by a state parliament, Brennan, Toohey, Gaudron JJ (at 95) and Deane J (at 101) found the *Queensland Coast Islands Declaratory Act 1985* to be contrary to the terms of s. 10 *Racial Discrimination Act 1975*. Section 10 provides, *inter alia*, that if by reason of a law, or provision thereof, persons of a particular 'race, colour or national or ethnic origin' do not enjoy, or only enjoy to a limited extent, a right enjoyed by persons of another race, colour or national or ethnic origin, notwithstanding that law, the first mentioned persons shall enjoy that right to the same extent as persons of that other race, colour or origin. As the rights protected by this provision included the right to own and inherit property, the *Queensland Coast Islands Declaratory Act's* arbitrary deprivation of the Meriam people's traditional legal rights in and over the Murray Islands was contrary to the *Racial Discrimination Act 1975* (Cwlth).
40. As a result of s. 109 *Commonwealth Constitution 1901* (Cwlth).
41. Brennan, Toohey and Gaudron JJ realised the dramatic impact of this finding, asserting that '[i]n practical terms, this means that if traditional

As noted above, these proceedings did not involve a consideration of the existence of the plaintiffs' aboriginal title. Not until May 1991 were counsels' submissions on this aspect heard by the High Court. Just over a year later the High Court upheld the plaintiffs' substantive claims.

4. PLAINTIFF'S CLAIMS

The plaintiffs' statement of claim stated that the Meriam people's laws and customs recognised the plaintiffs and their predecessors as the owners of parts of the Torres Strait Islands of Mer, Dawar and Waier and their surrounding seas, seabeds, fringing reefs and adjacent islets since time immemorial. The statement of claim affirmed that this title had been enjoyed by the plaintiffs without interruption.

While the plaintiffs accepted Her Majesty, Queen Victoria had extended her sovereignty to the Murray Islands when they were annexed as part of Queensland on 1 August 1879,[42] they alleged this was 'subject to the rights of the Meriam people and in particular subject to the rights of the predecessors in title of the Plaintiffs to the continued enjoyment of their rights in their respective lands, seas, seabeds and reefs,' until lawfully extinguished. The plaintiffs claimed that these rights had not been lawfully impaired and that the State of Queensland nevertheless invalidly denied their existence.

The plaintiffs sought a declaration that, *inter alia*, they were the holders of the traditional native title to certain lands and enjoyed the usufructuary rights attaching to such land under both their customary law and the common law. They also asked the Court to declare that the defendant state was prevented by the terms of the *Racial Discrimination Act 1975* (Cwlth) from making a deed of grant in trust under the *Land Act 1962* (Qld) with respect to their land. Alternatively, if such actions were within the state's authority, they contended they would nevertheless be entitled to just compensation for the disturbance of their traditional rights.

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native title was not extinguished before the *Racial Discrimination Act*, a State law which seeks to extinguish it now will fail ... It will fail because s. 10(1) of the *Racial Discrimination Act* clothes the holders of traditional native title who are of the native ethnic group with the same immunity from legislative interference with their enjoyment of their human right to own and inherit property as it clothes other persons in the community.': supra n 11. Note also Dawson J's inquiry as to the validity of ss. 10(1) *Racial Discrimination Act 1975* (Cwlth) as a limitation upon state power: supra n 11 at 107, citing Gibbs CJ in *Gerhardy v. Brown* (1985) 159 CLR 70 at 81.

42. In *Wacando v. The Commonwealth* (1981) 148 CLR 1 the High Court upheld the validity of the annexation of the Torres Strait Islands.

In support of their claims the plaintiffs proffered a number of arguments challenging the legitimacy of the then Queensland government's actions and supporting their claim to the area in dispute.

Counsel rejected the traditional classification of the Australian continent as *terra nullius* and submitted the legal implications of the settlement of Australia had been misrepresented. The accuracy of the 'settled' classification of the annexation of the Australian continent[43] was not disputed. Rather, the submissions sought to undermine the description of Australia, and thus the Murray Islands, as *terra nullius.* It was contended that while 'settled' acquisitions are not confined to uninhabited *terra nullius,* the legal consequences of occupying *terra nullius* and inhabited lands differed.

The crux of the plaintiffs argument lay in a re-examination of the implications of the settled classification. Australia's settled characterisation was based on the suggestion that the subject land was no one's land / *terra nullius.* This in turn involved a denial of the original occupants' existence, much less their territorial rights.[44] Thus with the rejection of the contention that only *terra nullius* could be acquired by settlement, it was possible to revise the very impact of the settled classification.

Counsel suggested that settlement should be perceived as a form of deemed cession, rather than a denial of traditional private rights. Under the common law, such deemed cession did not affect the inhabitants' private rights under their pre-existing law,[45] until validly extinguished

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43. The traditional legal classification of the annexation of Australia was that in 1788 Australia was terra nullius that was occupied and thereby acquired by settlement. It was commonly thought that to change the legal status of the annexation of Australia, the settled classification had to be abandoned in favour of an acquisition by conquest. Thus the author had previously suggested that as Australia's settled classification was based on the myth that Australia was *terra nullius*, a repudiation of the *terra nullius* characterisation allowed the annexation of Australia to be considered an acquisition by conquest or *sui generis* in nature: "The Conquered Continent," 1986 (unpublished Honours thesis) and *The Significance of the Classification of a Colonial Acquisition: the Conquered / Settled Distinction,* (1988) Aboriginal Studies, (Australian Institute of Aboriginal Studies). Arguing for a conquered classification as the basis for recognising aboriginal rights involves, however, a major problem as the inhabitants are at the mercy of the conquering sovereign. By contrast, in a settled colony, the inhabitants are protected by the common law.

44. Ibid.

45. Compare cases of conquest: ibid. This submission was supported by the common law presumption that the prior laws of the original occupants continue to exist until altered by the conduct of the new sovereign: *Case 15 Anonymous* (1722) 24 ER 646; *Dutton v. Howell* (1963) 11 ER 17.

by the Crown. Thus, as in cases of conquest,[46] the title acquired through settlement was derivative, not original.

Applying these principles to the plaintiffs' case, it was submitted that Australia in 1788 and the Torres Strait Islands in 1879[47] were inhabited and thus not *terra nullius*. On settlement, the common law flowed into the country and recognised the Meriam people's customary laws and the territorial rights held under such precepts.[48] Further, it was submitted that these laws and rights held under such had been legislatively recognised by the Queensland government. In particular, under the *Torres Strait Islanders Act 1939* (Qld) and subsequent legislation, Islander Courts had operated, determining and recording land disputes in accordance with customary law.

Thus it was submitted that under the Meriam people's customary laws, as recognised by the Australian common law, the plaintiffs' ancestors' title to the subject lands pre-existed and survived the annexation of the Torres Strait Islands.

The plaintiffs also relied on what is known as a common law possessory title. At common law possession of land confers a title good against all except the holder of a better title. The common law presumes those in possession of land to hold a lawful fee simple estate until proven otherwise.[49] The plaintiffs pointed to their continual possession of the subject lands since annexation as providing such a common law title.[50] As the Crown had not established a better title to the Islands, the plaintiffs submitted the presumption of a fee simple title had to be upheld. [51]

The plaintiffs further submitted that their titles to the subject lands had not been extinguished by, *inter alia*, British settlement nor the annexation of the Torres Strait Islands. Counsel went so far as to suggest that power to extinguish the aboriginal title resided solely in the Federal

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46. *Campbell v. Hall* (1774) 1 Cowp 204.
47. The date of the passage of *The Queensland Coast Islands Act 1879* (Qld), extending dominion over, *inter alia*, the Torres Strait Islands.
48. The plaintiffs' submitted that the prerequisites for the continual recognition of these laws were met: the laws were certain, they had been exercised since time immemorial, they were reasonable and not oppressive, they were observed as of right and not pursuant to the licence of another and were not inconsistent with any statute law: *Hanasiki v. OJ Symes*, (Unreported, High Court of the Solomon Islands, 17 August 1951); *Bastard v. Smith*, (1837) 2 M & Rob 129; *Pain v. Patrick*, (1690) 3 Mod 289; *Halsbury's Laws of England*, 4th edn, vol. 12, par 406: referred to by Toohey J, supra n 1 at 176-177.
49. *Wheeler v. Baldwin* (1934) 52 CLR at 632.
50. *Bracton on the Laws and Customs of England*, (Thorne Tr.) (1977), vol. III at 134.
51. Once established, the plaintiffs contended that this common law title gave them the same rights as those held under the aboriginal title. Toohey J believed this to be an unnecessary concession: supra n 1 at 207.

Parliament.[52] Thus the state of Queensland could not effectively extinguish the plaintiffs' territorial rights.

The plaintiffs also submitted that the defendant state was bound to recognise and protect their territorial rights. It was submitted that a fiduciary obligation to so protect the aboriginal title stemmed from the 'relative positions of power of the Meriam people and the Crown in right of Queensland with respect to their interests in the Islands.'[53] Any breach of this obligation rendered the Queensland government accountable in law for any consequent damage.[54]

Additional arguments related to the ownership of the reefs and seas beyond the low water mark. As a matter of federal relations, initially, sovereign title to these areas resided in the Commonwealth government, not the State of Queensland. By the *Coastal Waters (State Title) Act 1980* (Cwlth), however, the Commonwealth government purported to grant ownership of coastal waters to the state governments. This was, however, 'subject to existing property rights.' The plaintiffs argued that this proviso excluded the subject territorial rights in the Murray Islands from the grant of title to the State of Queensland.

Moreover, even if this proviso failed to save the plaintiffs' rights, it was submitted the *Coastal Waters (State Title) Act 1980* (Cwlth) was contrary to the requirement in s. 119 *Commonwealth Constitution 1901* that rights and property be acquired by 'just terms.' In the absence of compensation for this acquisition, the *Coastal Waters (State Title) Act 1980* (Cwlth) was, therefore, contrary to s. 119 and invalid.

5. DEFENDANT'S ARGUMENTS

The defendant's submissions were also based on a settled characterisation of the occupation of Australia and the consequent attraction of 'the law of England so far as applicable to the colonial conditions ...'.[55] The defendant, however, disagreed as to the legal consequences of such settlement and the effect introducing the common law had on the aboriginal occupants' rights. It was contended that under the common law, on settlement the 'Crown acquired the absolute beneficial ownership of all land in the territory so that the colony became the Crown's demesne and no right or interest in any land in the

52. As in the United States: *Narangansett Tribe v. Southern Rhode Island Land Development Corporation*, 414 US 661 (1976).
53. Per Toohey J, supra n 1 at 176: ie the Crown's exclusive right to extinguish the aboriginal title.
54. Per Toohey J, id at 177.
55. Per Brennan J, id at 26. In addition, the plaintiffs agreed that under such common law the Crown acquired the radical or ultimate title to the Murray Islands: see Brennan J, id at 30.

territory could thereafter be possessed by any other person unless granted by the Crown.'[56]

Thus it was submitted that the Letters Patent annexing, *inter alia*, the Torres Strait Islands as part of the colony of Queensland had the effect of vesting, not only sovereign rights, but 'absolute ownership of, legal possession of and exclusive power to confer title to, all land in the Murray Islands.'[57] The annexation of the Torres Strait Islands had the effect of extinguishing the plaintiffs', and their predecessors', interests in their traditional lands even though they had 'neither ceded their lands to the Crown nor suffered them to be taken as the spoils of conquest.'[58] The Crown simply 'took the land occupied by the Meriam people on 1 August 1879 without [the Meriam people] knowing of the expropriation ... [and the Meriam people] were no longer entitled without the consent of the Crown to continue to occupy the land they had occupied for centuries past.'[59]

This submission was based on Stephen CJ's statement in *Attorney-General v. Brown*[60] that:[61]

> the waste lands[62] of this colony are, and ever have been, from the time of its first settlement in 1788, in the Crown; that they are, and ever have been, from that date (in point of legal intendment), without office found, in the Sovereign's possession; and that, as his or her property, they have been and may now be effectually granted to subjects of the Crown.

Similarly in *Randwick Corporation v. Rutledge*,[63] Windeyer J declared that '[o]n the first settlement of New South Wales ... all the lands of the territory became in law vested in the Crown.'

The claim that all land was held by the Crown and that any title must stem mediately or immediately from the Crown was based on several propositions. The first is founded on a simple denial of any aboriginal interests in the land. It was suggested that as these peoples had no

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56. Id at 26.
57. As summarised by Brennan J, id at 25.
58. id at 29.
59. id at 25-26. See further Brennan J's description of the consequences of this argument, id at 29.
60. (1847) 1 Legge 312; followed by Windeyer J in *Randwick Corporation v. Rutledge* (1959) 102 CLR 54.
61. Id at 316.
62. Note that the phrase 'waste lands' has been taken to exclude lands held under the aboriginal title: see *The Queens v. Symonds*, supra n 23; *Nireaha v. Baker* [1901] AC 561; Russell to Hobson, 9 Dec 1840, *Parl Papers (Commons)*, Sess I, XVII (311) at 30.
63. Supra n 60 at 71.

proprietary interest in the land, 'there is no other proprietor' other than the Crown who could be the absolute owner of the colonial lands.[64]

The main basis for this argument was, however, found in the feudal system of tenure providing that the Sovereign be seen as the 'universal occupant,' originally holding all property[65] until granted to another.[66] Every parcel of land is held either mediately or immediately from the Crown who is the 'Lord Paramount.'[67] It was submitted that these principles were applicable to the Australian colonies[68] and flowed into the colony upon settlement as part of the common law.[69]

A third and related basis was the suggestion that the 'lands be the patrimony of the nation, [and] the Sovereign is the representative, and the executive authority of the nation,'[70] holding that land for the benefit of the Nation as a whole.[71] This was further supported by the Crown's prerogative right to the ownership of the vacant lands of the colonies.[72]

In the alternative, if the common law did recognise the aboriginal title, the defendant submitted that the aboriginal occupants' pre-existing rights were extinguished upon settlement unless expressly recognised by the new sovereign.[73] The defendant contended that no such recognition of the plaintiffs' aboriginal title had occurred.

The 'Recognition doctrine,' as it is known, has its origins in the 'Indian act of state cases,'[74] particularly Lord Dunedin's statement in

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64. Per Brennan J, supra n 1 at 30-31 relying in part on *New South Wales v. The Commonwealth,* (the "*Seas and Submerged Lands case*") (1975) 135 CLR 337.
65. Per Stephen CJ in *Attorney-General v. Brown,* supra n 60 at 318 and in *New South Wales v. The Commonwealth* (the "*Seas and Submerged Lands case*"), ibid. Further support for this conclusion is found in Dawson J's dissent in *Mabo v. Queensland,* supra n 11 at 236 where he stated that 'colonial lands which remained unalienated were owned by the British Crown.'
66. *New South Wales v. The Commonwealth* (the "*Seas and Submerged Lands case*"), ibid, quoting Issacs J in *Williams v. Attorney-General for New South Wales* (1913) 16 CLR 404 at 439.
67. See Brennan J, supra n 1 at 46.
68. See further Brennan J, id at 46-47.
69. *New South Wales v. The Commonwealth* (the "*Seas and Submerged Lands case*"), supra n 64, quoting Issacs J in *Williams v. Attorney-General for New South Wales*, supra n 66 at 439.
70. Supra n 60 at 318.
71. Per Brennan J, supra n 1 at 52, citing *R v. Symonds*, supra n 23 at 395.
72. See Stephen J in *New South Wales v. The Commonwealth* (the "*Seas and Submerged Lands case*"), supra n 64 at 438; Evatt J in *The Attorney-General for New South Wales v. Butterworth & Co. (Australia) Ltd,* (1938) 38 SR (NSW) 195 at 246 - 247.
73. See Brennan J's analysis, supra n 1 at 54-55.
74. *Secretary of State for India v. Bai Rajbai* (1915) LR 42 Ind App 229; *Vajesingji Joravarsingji v. Secretary of State for India,* (1924) LR 51 Ind

Vajesingji Joravarsingji v. Secretary of State for India[75] that 'any inhabitant of the territory' can only enforce in the municipal courts such rights as the new 'sovereign has, through his officers, recognised.'[76]

In reply to the plaintiffs' claims to a common law possessory title, the defendant contended that on annexation the Crown acquired an absolute title and that this better title rebutted the presumption of a fee simple title. Further, it was submitted that from 1882 the Meriam peoples' occupation of the subject islands was solely under a permissive licence from the Crown and could not, therefore, found an action against the Crown.

To the credit of the Solicitor-General, if the plaintiffs' title was recognised at common law, it was not contended that it had been extinguished by the Crown.[77]

Finally, the defendant submitted that as the Crown has an absolute power to extinguish the aboriginal title, there was no basis for any suggestion that it owed the plaintiffs any fiduciary obligation to protect their territorial rights. Any trust obligations that may exist were political in nature and therefore unenforceable.[78]

6. THE HIGH COURT'S FINDINGS

Broadly speaking, there were seven distinct issues to be considered:

(i) the effect of the acquisition of sovereignty and annexation;
(ii) the common law's preservation of aboriginal territorial rights and the related issue of the Crown's acquisition of territorial rights;
(iii) common law recognition of the aboriginal title;
(iv) the capacity of the Crown to extinguish the aboriginal title;
(v) the nature and incidents of the aboriginal title;
(vi) the existence of any fiduciary obligations on the Crown;
(vii) the existence of a common law possessory title.

In varying degrees of detail the High Court's consideration of these issues is examined below.

App 357; *Secretary of State for India v. Sadar Rustam Khan,* [1941] AC 356 at 370-372.

75. Ibid.
76. Id at 360.
77. Brennan J, supra n 1 at 567. Note, however, that Dawson J nevertheless concluded that the plaintiffs' aboriginal title had been extinguished: supra n 1 at 160.
78. Relying on what are known as the 'political trust' cases: *Kinloch v. Secretary of State for India* (1882) 7 App Cas 619 and *Tito v. Waddell (No 2)* [1977] Ch 106.

(i) The acquisition of sovereignty

As noted above, the nature and consequences of the acquisition of Australia and the Torres Strait Islands was central to the parties' cases. The High Court found that, while the acquisition of territory is an act of state,[79] the legitimacy of which cannot be challenged by the municipal courts,[80] the consequences of such an acquisition can be judicially determined.[81] Accordingly, the Court was able to determine what law governed rights and duties in the acquired territory.[82] As this depended upon the manner the country was acquired, the Court could also consider the nature of that annexation.[83]

As previously outlined, the assertion that Australia was in 1788 *terra nullius* open to settlement by European forces had provided a strong basis for the denial of aboriginal rights. Traditional Australian legal history suggested that the aboriginal people were either not in occupation of the subject lands, or that they were so low in the social scale that their rights could not be acknowledged.

While Brennan J doubted that the Torres Strait Islands were actually *terra nullius* at the date of annexation,[84] he believed the Court could not question the validity of the settled classification in so far as it provided the foundation for the Crown's acquisition of sovereignty.[85] This did not, however, prevent him rejecting the enlarged notion of *terra nullius* which denied any pre-existing rights held by the original occupants. Thus he rejected the suggestion that Australia's indigenous inhabitants were 'too low in the scale of social organisation to be acknowledged as possessing rights and interests in land.'[86] A finding to the contrary undermined the 'equality of all Australian citizens before the law' and

79. Supra n 1 at 32 per Brennan J; at 79 and 95 per Deane and Gaudron JJ.
80. Id at 32, citing *inter alia* Gibbs J in *New South Wales v. The Commonwealth (Seas and Submerged Lands case)*, supra n 64 at 388; Gibbs CJ and Mason J in *Wacando*, supra n 42 at 11 and 21 respectively; *Sobhuza II v. Miller,* [1926] AC 518 at 525; *The Fagernes,* [1927] P 311; *Reg v. Kent Justices; Ex parte Lye,* [1967] 2 QB 153 at 176-177 and 181-182; *Frost v. Stevenson,* (1937) 58 CLR 528 at 565-566; *A Raptis & Son v. South Australia,* (1977) 138 CLR 346 at 340. See also Deane and Gaudron JJ, ibid at 78.
81. Id at 32.
82. Id per Brennan J. In particular, the Court could determine whether the common law principle that pre-existing aboriginal interests survived the acquisition of sovereignty had been displaced: id at 895 per Deane and Gaudron JJ.
83. Id at 32.
84. The Meriam people being avid cultivators: id at 33.
85. Id at 33.
86. Id at 58 per Brennan J; referring to the International Court of Justice's condemnation of the application of the notion of *terra nullius* to inhabited lands in the *Western Sahara case,* (1975) ICJ p. 39.

was an 'unjust and discriminatory doctrine.'[87] Hence while Brennan J accepted the acquisition of Australia, and thus the Torres Strait Islands, as being by settlement, he implicitly rejected the suggestion that Australia was *terra nullius*. Explicitly he rejects the applicability of the enlarged notion of *terra nullius*, finding that the pre-existing rights of the original occupants were recognised at common law.[88]

A clearer and stronger rejection of the classification of Australia as terra nullius can be found in Deane, Gaudron and Toohey JJ's judgments where the suggestion that Australian was *terra nullius* or 'practically unoccupied' in 1788 was totally rejected.[89]

Adopting the International Court of Justice's findings in the *Western Sahara case,*[90] they concluded that lands occupied by even nomadic peoples could not be classified as *terra nullius*.[91] The 'idea that land which is in regular occupation may be *terra nullius*' was 'unacceptable, in law as well as in fact.'[92]

Toohey J was particularly critical of the Privy Council's suggestion in *Cooper v. Stuart*[93] that land could be classified as *terra nullius* because it lacks 'settled inhabitants.' He asserted 'the proposition that land which is not in regular occupation may be *terra nullius* is one that demands scrutiny'[94] in so far as it fails to appreciate there may be good reason for the nomadic life style.[95] He consequently preferred the International Court of Justice's suggestion that the land must belong to no-one for it to be characterised as *terra nullius*.[96] Thus the classification of the Torres Strait Islands as *terra nullius* was legally erroneous.

While these members of the Court believed the subject lands could not be characterised as *terra nullius*, in accordance with the plaintiffs' submissions, they nevertheless concluded that Australia, and the Murray Islands, were acquired by settlement.[97]

Dawson J, by contrast, believed there was no need to consider whether Australia was conquered, ceded or settled to determine the law operating in the colonies. As the Crown had expressly introduced the

87. Id at 41, 42 and 58. Note, however, these statements were always premised by the proviso that aboriginal rights would not be recognised 'if the recognition were to fracture a skeletal principle of our legal system': see for example, ibid at 43.
88. Id at 40.
89. Id at 109 per Deane and Gaudron JJ; id at 181 per Toohey J.
90. Supra n 86 at 39 and 85-86: id at 182 per Toohey J.
91. See for example, id per Toohey J.
92. Id per Toohey J.
93. (1889) 14 App Cas 286.
94. Supra n 1 at 182.
95. Supra n 1 at 181.
96. Ibid.
97. See for example, Toohey J id at 180.

common law into the colonies,[98] this declaration was effective whatever the character of the annexation. To his mind there was no need to resort to notions of *terra nullius*.[99]

There is some legal basis for Dawson J's comments. In conquered colonies the pre-existing traditional laws must be abrogated before the new sovereign's laws are operative.[100] Dawson J could be suggesting that legislation such as the *Australian Courts Act 1828* (UK), by confirming the application of the common law in Australia, abrogated the aboriginal peoples' laws and customs.

(ii) Preservation of aboriginal territorial rights under the common law

(a) Reception of common law

Brennan J believed the same rules governed the reception of law[101] in uninhabited lands and territories where the original inhabitants were not regarded as having a 'settled law.'[102] While he acknowledged that it would be incorrect to suggest these aboriginal peoples had no law,[103] he and other members of the Court[104] nevertheless affirmed that on the settlement of Australia the common law was received as the law governing the colonies.[105] Further, they affirmed that such law applied to colonists, indigenous inhabitants[106] and the Crown alike.[107] Thus the Court concluded that at the annexation of the Torres Strait Islands, the 'common law became the basic law of the Murray Islands.'[108]

As Deane and Gaudron JJ noted, however, only so much of the common law that was 'reasonably applicable to the circumstances of the Colony' flowed into the territory.[109] This 'left room for the continued operation of some local laws or customs among the native people and even the incorporation of some of those laws and customs as part of the common law.'[110] Thus the introduction of the common law into

98. Id at 138, citing *Cooper v. Stuart,* supra n 93 at 291.
99. Ibid.
100. *Blackstone's Commentaries,* Vol. I 107; *Calvin's case,* 77 ER 377; *Campbell v. Hall,* supra n 46.
101. Supra n 1 at 36-37 per Brennan J.
102. Id per Brennan J, quoting *Cooper v. Stuart,* supra n 93 at 291.
103. Id at 39 per Brennan J, quoting from *Milirrpum v. Nabalco Pty Ltd,* supra n 28 at 267.
104. See Deane and Gaudron JJ, id at 79.
105. Id at 34, 35 and 36 per Brennan J.
106. Id at 37 per Brennan J.
107. Id at 79 and 80 per Deane and Gaudron JJ.
108. Id at 38 per Brennan J.
109. Id at 79, citing *Cooper v. Stuart,* supra n 93 at 291; *States Government Insurance Commission v. Trigwell,* (1979) 142 CLR 617 at 634; *Blackstone's Commentaries,* 17th edn (1830) Vol. 1, par 107.
110. Ibid.

Australia did not necessitate the total annihilation of aboriginal laws and the rights held under such precepts.

(b) Survival of aboriginal territorial rights

Further, the majority of the Court held that the common law that was so received into the colonies recognised and preserved the private territorial rights of the aboriginal occupants. The 'antecedent rights and interests in land possessed by the indigenous inhabitants ... survived the change in sovereignty' and were recognised at common law as constituting a 'burden on the radical title of the Crown.'[111] Unless the defendant could establish that annexation destroyed these rights, the common law presumed them to have survived.[112] Deane and Gaudron JJ believed the establishment of the colonies had not negated this common law presumption.[113] Moreover, they suggested the derivative acquisition of the pre-existing aboriginal rights accorded more with the history of Australian settlement, than the suggestion that the aboriginal title failed to survive the acquisition of sovereignty.[114]

The majority consequently concluded that the plaintiffs' aboriginal title was preserved under the common law and continued to be 'effective as against the State of Queensland and as against the whole world unless the State, in valid exercise of its legislative or executive power, extinguishes the title.'[115]

(c) Theory of absolute crown ownership

The majority of the Court thereby rejected the defendant's suggestion that on annexation the Crown acquired an absolute beneficial title to all colonial lands. The majority critically approached the defendant's submissions, ultimately preferring the well established view that discovery only confers on the Crown a bare radical title, subject to the aboriginal title.

Dawson J, however, accepted the defendant's submission.[116] He believed that as the Crown was the absolute owner of all land, any rights held by others must stem from Crown grant.[117] It is respectively submitted this view is contrary to well established authority and must be rejected.

The defendant's submission that on annexation the Crown acquired the beneficial title to all Australian lands is critically examined below.

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111. Id at 57.
112. Ie the burden of proof was on the defendant: id at 183 per Toohey J.
113. See the discussion, id at 95-99.
114. Id at 58.
115. Id at 75 per Brennan J.
116. Suggesting this to be a corollary of the acquisition of sovereignty: id at 122 and 150.
117. Ibid.

Case law

As noted earlier, the defendant relied, *inter alia*, on certain case law to support the Crown's claim to absolute beneficial title.

Brennan J critically examined the assertions in *Attorney-General v. Brown*,[118] *Randwick Corporation v. Rutledge*[119] and *New South Wales v. The Commonwealth*[120] in light of their consequences; that is, the uncompensated extinguishment of aboriginal territorial rights upon settlement.[121] '[J]udged by any civilised standard,' he noted, 'such law was unjust and its application to contemporary Australia must be questioned.'[122]

Moreover, the suggestion that on the 'acquisition of sovereignty, the Crown acquired all colonial land as a royal demesne' was also erroneous.[123] Brennan J believed the error to stem from a failure to distinguish between the acquisition of sovereignty and the acquisition of title.[124] The latter 'could not be acquired by occupying land already occupied by another.'[125] Thus the Crown could not, and did not, acquire title through the mere occupation of Australia.

This conclusion did not, however, necessitate a total rejection of this line of authority and the theory of tenures. In fact, Brennan J believed that such would unacceptably undermine the skeletal framework of the Australian common law system:[126]

> A basic doctrine of the land law is the doctrine of tenure, to which Stephen CJ referred in *Attorney-General v. Brown*, and it is a doctrine which could not be overturned without fracturing the skeleton which gives our land law its shape and consistency.

While the theory of tenures remained in tact, this doctrine did not require Brennan J to accept the defendant's contention that the Crown

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118. Supra n 60.
119. Supra n 60.
120. Supra n 64.
121. Supra n 1 at 29-30; and thereby making them 'intruders in their own homes and mendicants for a place to live.'
122. Id at 30. Nevertheless he believed the principle could only be rejected if it would not 'fracture the skeleton principle which gives the body of law its shape and internal consistency': id at 30 and 43.
123. Id at 43.
124. Id at 44 and 45, quoting in support Roberts-Wray, *Commonwealth and Colonial Law*, at 625; Salmond, *Jurisprudence*, 7th edn (1924); O'Connell, *International Law*, 2nd edn (1970); Simpson, *A History of the Land Law*, 2nd edn (1986).
125. Id at 45, quoting in support *Blackstone's Commentaries*, Bk II, ch 1 at 8.
126. Ibid.

automatically acquired absolute title to all colonial lands on settlement. As the authorities[127] supporting the recognition and preservation of the aboriginal title establish, on occupation the Crown acquired no more than the radical title, subject to the aboriginal title. Moreover, as Brennan J notes, such a principle does not undermine the 'skeleton which gives our land law its shape and consistency' as only the traditional owners are exempted from showing that their title stems from a Crown grant.[128]

Deane and Gaudron JJ also considered the case law upon which the defendant relied. While they accepted that the statements in *Attorney-General v. Brown,*[129] *Williams v. Attorney-General for New South Wales,*[130] *Randwick Corporation v. Rutledge*[131] and *Cooper v. Stuart*[132] supported the proposition that on settlement all the lands of the colony became part of the Crown's desmene,[133] they nevertheless found reason to question their authority. They believed these statements to lack a reasoned basis, being bare assertions[134] made without the benefit of submissions directly pertaining to aboriginal territorial rights.[135] Further, in at least three of these cases, the relevant comments were made *obiter dicta.*[136] In light of these factors they ultimately concluded that the Nation's integrity required them to accept that the Crown's title was 'reduced or qualified by the burden of the common law native title ...'.[137]

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127. See for example, *Johnson v. McIntosh,* supra n 7; *Worcester v. Georgia,* supra n 7; *Mitchel v. United States,* supra n 24.
128. The theory of tenures only applying to interests in land stemming from Crown grants, not pre-existing titles: supra n 1 at 48-49.
129. Supra n 60. They found that while the Court's statement in *Attorney-General v. Brown,* supra n 60 could be confined to unoccupied 'waste lands,' implicit in the judgment was an assumption that all lands in the colony were unoccupied at the relevant time: id at 102.
130. Supra n 66.
131. Supra n 60.
132. Supra n 93.
133. They believed these sentiments also 'accorded with the general approach' in colonial Australia. It is submitted this characterisation of colonial Australia is erroneous; see for example, the analysis of colonial and imperial recognition of the aboriginal title in Cassidy, "A Reappraisal of Aboriginal Policy in Colonial Australia," (1989) 10(3) The Journal of Legal History 365 and Deane and Gaudron JJ's own comments, supra n 1 at 107-108.
134. Id at 104.
135. 'The question of Aboriginal entitlement was not directly involved in any of them and it would seem that no argument in support of Aboriginal entitlement was advanced on behalf of any party': ibid.
136. Ibid. See also Toohey J, id at 183.
137. Id at 110.

Feudal basis

While the Court agreed with the defendant that the theory of tenures was applicable to Australia,[138] the majority believed this theory did not necessitate conferring an absolute title on the Crown,[139] unless the land was 'truly uninhabited *terra nullius*.'[140] Rather, they found that on the settlement of Australia the Crown only acquired the ultimate/radical title.[141] This title was reduced[142] or qualified[143] by the aboriginal title[144] 'to the extent which it was necessary to recognise and protect the pre-existing native interest.'[145] Thus as Brennan J asserted, 'only the fallacy of equating sovereignty and beneficial ownership of land ... [gave] rise to the notion that native title is extinguished by the acquisition of sovereignty.'[146]

It is submitted Dawson J fell foul of this fallacy. His equation of sovereignty and title to land led him to conclude that the vesting of the radical title in the Crown upon the assumption of sovereignty was incompatible with the continued existence of traditional territorial rights.[147] In turn he failed to appreciate that the aboriginal title was a

138. It could be suggested that the doctrine of universality of tenure is based on unique English history and therefore inapplicable to the colonies: ibid at 47 per Brennan J; at 81 per Deane and Gaudron JJ, citing Roberts-Wray, *Commonwealth and Colonial Law* (1966) at 626. However, Brennan J believed '[i]t is far too late in the day to contemplate an allodial or other system of land ownership.' See also Deane and Gaudron JJ, ibid at 80-81, citing *Delohery v. Permanent Trustee Co. of NSW,* (1904) 1 CLR 283 at 299-300; *Williams v. Attorney-General for New South Wales*, supra n 66. As a corollary, the Crown held some title to land ie. the radical title: id at 48.
139. Id at 48.
140. Id at 182 per Toohey J; ibid at 48 per Brennan J.
141. Id at 48 per Brennan J, citing *Amodu Tijani v. Secretary, Southern Nigeria,* supra n 8 at 403, 404 and 407; *Nireaha Tamaki v. Baker,* supra n 62 at 580; *Administration of Papua and New Guinea v. Daera Guba,* (1973) 130 CLR 353 at 396 - 397.
142. *Amodu Tijani,* id at 410.
143. *Amodu Tijani,* id at 403 and 404.
144. Id at 49-50, citing *Witrong and Blany,* supra n 8 at 402 and quoting *Amodu Tijani,* ibid at 403.
145. Id at 87 per Deane and Gaudron JJ.
146. Id at 48.
147. Id at 129.

pre-existing interest[148] which could only be acquired by the Crown through cession or purchase.[149]

Patrimony of the Nation

The defendant's suggestion that the Crown acquired absolute title to the colonies' lands as the patrimony of the Nation was also rejected. The majority saw no inconsistency in maintaining this principle and recognising the aboriginal title as the Nation 'obtained its patrimony by sales and dedications of land which dispossessed its indigenous citizens ...'.[150] Until the aboriginal title was so extinguished and the underlying land sold, there was 'no reason to deny the law's protection to the descendants of the indigenous citizens who can establish their entitlement to rights and interests which survived the Crown's acquisition of sovereignty.'[151]

Prerogative basis

Similarly, the majority rejected the suggestion that the Crown had a prerogative right to all colonial lands. Brennan J believed it was illogical to suggest that while the colonial governments administered the sale of waste lands, the Imperial Crown held absolute beneficial title under any such prerogative right.[152]

Thus the majority of the Court concluded that none of the basis suggested by the defendant established that the Crown acquired an absolute beneficial title to all colonial lands on settlement.

(iii) Common law recognition of the aboriginal title

While the majority concluded that the common law preserved the original occupant's antecedent rights on a change of sovereignty, the

148. See for example, *Wallis & Ors v. Solicitor General,* [1903] NZPCC 23 at 32 and 33 where Lord McNaughton asserted that the aboriginal title 'never belonged to the Crown' and provided a form of tenure 'superior to that of the Crown.'

149. See for example, *United States v. Sante Fe Pacific Railroad Co.,* 314 US 339; *R v. Symonds,* supra n 23 at 390; *Nireaha Tamaki v. Baker,* supra n 62.

150. Supra n 1 at 52-53 per Brennan J.

151. Per Brennan J, id at 53. This legal protection, he said, was found in s. 10 *Racial Discrimination Act 1975* which had been held in *Mabo v. Queensland,* supra n 12, to confer on aboriginal peoples the 'same immunity from legislative interference with their enjoyment of their human right to own and inherit property as it clothes other persons in the community' : supra n 12 at 219, quoted by Brennan J, id at 53.

152. Ie pre the adoption of the Statute of Westminster: id at 454, citing *Madzimbamuto v. Lardner - Burke,* [1969] 1 AC 645 at 722.

Court still had to determine whether the plaintiffs' territorial rights were so recognised.

(a) Proprietary title

Certain case authority suggests the aboriginal title could only be recognised if it was proprietary in nature and the customary system of law upon which it depended was 'civilised.'[153] Thus in *Milirrpum v. Nabalco Co Pty Ltd,*[154] while Blackburn J found Aboriginal law to be sufficiently sophisticated[155] to satisfy this test, he did not believe the aboriginal title to be proprietary in nature. To be so characterised, he required proof of 'the right to use or enjoy, the right to exclude others and the right to alienate.'[156] As the claim had been brought by the clan, rather than land-holding entities such as the 'tribe' or band, the plaintiffs failed to satisfy this burden and their action consequently failed.

Deane and Gaudron JJ were critical of these Eurocentric tests, in particular, the requirement that aboriginal interests be framed as proprietary in nature. They did not believe such tenure should be forced to conform with the 'social and legal mores of England or Europe,'[157] preferring the authorities supporting a more flexible approach.[158]

This approach recognised individual and communal titles whether they be with respect to cultivated or uncultivated lands.[159] All that need be established was an entitlement to occupy or use particular land under the claimants' traditional laws and such 'entitlement ... be of sufficient significance to establish a locally recognised special relationship between ... [that entity] and that land.'[160]

In this case, the plaintiffs' territorial rights were clearly recognisable. While it was 'impossible to identify any precise system of title, any precise rules of inheritance or any precise methods of alienation,'[161] there was undoubtedly a local system of law recognising 'established familial or individual rights of occupation and use' far exceeding 'the

153. Id at 54.
154. Supra n 28.
155. Id at 267.
156. As described by Toohey J, supra n 1 at 186.
157. Id at 84, quoting from *Amodu Tijani,* supra n 8 at 403-404. See also ibid at 76.
158. Found in decisions such as *Amodu Tijani,* ibid; *St Catherine's Milling and Lumber Co v. The Queen,* (1888) 14 App Cas 46; *Attorney-General for Quebec v. Attorney General for Canada,* [1921] 1 AC 401; *Adeyinka Oyekan v. Musendiku Adele* [1957] 1 WLR at 880; *Sunmonu v. Disu Raphael* [1927] AC 881 at 883-884; *Sakariyawo Oshodi v. Moriamo Dakolo,* [1930] AC 667 at 668-669.
159. Supra n 1 at 85-86.
160. Ibid.
161. Id at 115.

minimum requirements necessary to found a presumptive common law native title.'[162]

Brennan J did not find it necessary to critically examine the need for a proprietary title as, contrary to Blackburn J, in light of the community's exclusive possession of the subject lands he believed the aboriginal title was of such a character.[163] He suggested the inalienability of the traditional title did not undermine its proprietary character,[164] noting that when validly extinguished the aboriginal title was replaced by a proprietary Crown title. If proprietary estates could be created in such land, Brennan J reasoned, the interests so replaced must also be proprietary in nature.[165]

Toohey J rejected outright the need to establish a proprietary title and 'civilised' legal system.[166] He preferred the North American approach, requiring claimants to establish:[167]

1. That they and their ancestors were members of an organised society.
2. That the organised society occupied the specific territory over which they assert the aboriginal title.
3. That the occupation was to the exclusion of other organised societies.
4. That the occupation was an established fact at the time sovereignty was asserted by England.'

(b) Organised society occupying land

While the aboriginal community must be an organised society, Toohey J believed it was not necessary for that society to be of a particular kind, conforming for example with western ideals.[168] Similarly, while that community must have a presence amounting to occupancy, that occupancy need not equate with English notions of a proprietary estate.[169] Rather, regard was to be had to 'the way of life, habits,

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162. Id at 115-116. By contrast, Dawson J stated that Moynihan J's conclusions indicated that there was no custom governing the ownership / use of land: id at 157, 160 and 161.
163. In determining such, Brennan J considered the nature of the title held by the community, rather than individuals' interests. Once it was established that such community title was proprietary, Brennan J believed the non-proprietary interests of individuals stemming from such community title could be recognised: id at 51.
164. Ibid. Nor did he believe the communal nature of the aboriginal title prevented this form of tenure being recognised.
165. Ibid.
166. See in particular, id at 187-188.
167. *Hamlet of Baker Lake v. Minister of Indian Affairs and Northern Development,* supra n 16 at 542.
168. In other words, civilised within western concepts: supra n 1 at 187.
169. Id at 187 and 188.

customs and usages' of the particular aboriginal peoples, dictating the mode of occupation.[170] Hence less settled forms of occupation could nevertheless satisfy this test where availability of food and other factors dictated that such a form of occupation be adopted.[171] As the Meriam people were comparatively 'settled and intensive'[172] this test was easily satisfied.

The defendant contended that the Meriam people lacked an ordered system of land tenure prior to settlement and that the territorial rights allegedly conferred under such laws were too uncertain to amount to traditional title.[173] While Toohey J accepted that the Meriam people's laws 'do not allow the articulation of a precise set of rules and that they are inconclusive as to how consistently a principle was applied ...', he believed they were nevertheless recognisable.[174] The application of the indigenous law would need to be totally capricious, occupation being merely 'coincidental and random,'[175] before the common law would refuse to recognise the traditional title stemming from such. On the facts, Toohey J did not believe such a contention could be maintained.[176]

(c) Exclusive occupation

Toohey J was critical of the third element requiring exclusive occupancy, noting there was no logical basis for excluding a claim 'merely on the ground that more than one group utilised land.'[177] Such situations could be accommodated either by conferring on each group a right of shared user or vesting title in a wider society incorporating all the smaller user groups.[178] It is submitted Toohey J's flexible approach is more appropriate. Requiring exclusive occupation smacks of Eurocentric notions of proprietary ownership, inappropriate to determining aboriginal traditional rights. Moreover, there seems to be no reason to distinguish between the aboriginal title and early English communal land holdings recognised under that system of law.

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170. Id at 188, quoting from *Sac and Fox Tribe of Indians of Oklahoma v. United States,* 383 F 2d (1967) 991 at 998. The application of this test in *Hamlet of Baker Lake,* supra n 16 at 544-545, allowed the Inuit claimants to be recognised as in occupation of their traditional lands despite the nature of their presence.
171. Id at 189, fn. 567.
172. Ie in comparison with nomadic aboriginal peoples: ibid.
173. Id at 191-192 per Toohey J.
174. Id at 191.
175. Ibid; or so violent a society that it was contrary to basic human rights.
176. Ibid.
177. Id at 190.
178. Ibid, noting that Blackburn J in *Milirrpum v. Nabalco Co.,* supra n 29, expressly left open the possibility of the aboriginal title vesting in a larger body. Further, non-exclusive traditional occupation was recognised by s. 11(1)(a), (1AD)(a), (1AE)(a), (1B)(4) *Aboriginal Land Rights (Northern Territory) Act 1976* (Cwlth).

Ultimately, even if the test did need to be satisfied, utilising a degree of speculation, Toohey J nevertheless concluded that this element was also satisfied.

(d) Temporal extent of occupation

The temporal extent of such occupation has been described in varying manners. While Toohey J only required proof of occupation for 'a long time' prior to the point of inquiry,[179] Blackburn J in *Milirrpum's case*[180] stated the claimants had to establish occupancy from the acquisition of English sovereignty.[181] Blackburn J's view accords with Canadian jurisprudence,[182] in particular the above quote from *Hamlet of Baker Lake v. Minister of Indian Affairs and Northern Development*,[183] while Toohey J's approach echoes the more flexible test applied by the United States Courts where it is acknowledged that the aboriginal title may arise after the acquisition of sovereignty.[184]

Whatever the appropriate test, this requirement was again clearly satisfied on the facts. The defendant did not dispute the plaintiffs' ancestors' occupation of the island prior to annexation,[185] allowing the Queensland Supreme Court to conclude in earlier proceedings that the Meriam people had occupied the islands for 'some generations.'[186]

(e) Changes of life style

Toohey J noted in the course of these findings that a change in the aboriginal community's ways of life would not undermine their claim.[187] As title is based on occupation, rather than the nature of the claimant's society,[188] 'modification of traditional society in itself does not mean traditional title no longer exists.'[189] This view accords with Mahoney J's findings in *Hamlet of Baker Lake v. Minister of Indian*

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179. Id at 189, citing *Alcea Band of Tillamooks v. United States* 59 F (1945) Supp 934 at 965; affirmed 329 US 40 (1946).
180. Supra n 28.
181. Id at 152. Also adopted by Mahoney J in *Hamlet of Baker Lake v. Minister of Indian Affairs and Northern Development,* supra n 16 at 542 and 546. United States jurisprudence, however, suggests that the aboriginal title may arise after the acquisition of sovereignty: *United States v. Seminole Indians*, 180 Ct Cl 373.
182. See, for example, *Hamlet of Baker Lake v. Minister of Indian Affairs and Northern Development*, id at 562.
183. *Hamlet of Baker Lake v. Minister of Indian Affairs and Northern Development*, id at 542.
184. *United States v. Seminole Indians,* supra n 181.
185. Supra n 1 at 189 and 191.
186. *Mabo v. Queensland: Determination of Moynihan,* Vol. 1 at 91.
187. Id at 191 and 192.
188. Id at 192.
189. Ibid.

Affairs and Northern Developments[190] where he rejected the suggestion that the use of modern amenities and modes of hunting undermined the Inuit plaintiffs' claim to title.

Thus Toohey J concluded that the Meriam people had established their traditional title to the Murray Islands and that such tenure survived annexation.[191]

(f) Recognition doctrine

A final possible requirement to the recognition of the aboriginal title was the satisfaction of the recognition doctrine. As noted above, the defendant suggested that the plaintiffs' title could not be enforced unless formally recognised by the government.[192]

The majority of the Court rejected this view[193] as contrary to the weight of authority.[194] They preferred the statement in *Adeyinka Oyekan v. Musendiku Adele*[195] that 'in the absence of express confiscation or of subsequent exproprietary legislation' private proprietary rights survive a change in sovereignty and compensation must be paid for any extinguishment of such.[196]

This line of authority is supported by United States and Canadian jurisprudence specifically dealing with the aboriginal title.[197] In cases such as *Cramer et al v. United States*,[198] for example, the courts have

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190. Supra n 16 at 559.
191. Supra n 1 at 192.
192. Also expressed in *Milirrpum v. Nabalco Pty Ltd*, supra n 28.
193. Supra n 1 at 55 per Brennan J. Except to the extent that they provide the act of state establishing the colony could not be scrutinised by the domestic courts: per Deane and Gaudron JJ id at 81.
194. In particular, the majority relied on statements in *In re Southern Rhodesia* [1919] AC at 233-234, *Amodu Tijani*, supra n 8 at 407, *Adeyinka Oyekan v. Musendiku Adele*, supra n 158 at 880 and *Sobhuza II v. Miller*, supra n 80 at 525.
195. Supra n 1 at 56 and 57 per Brennan J; at 81-82 per Deane and Gaudron JJ, noting also that earlier international law jurists suggested such recognition was required by the dictates of natural law: supra n 1 at 183 per Toohey J.
196. *Adeyinka Oyekan v. Musendiku Adele*, supra n 158 at 880.
197. See for example, *Cramer et al v. United States*, 261 US 219 (1923); *United States v. Sante Fe Pacific Railroad Company*, supra n 149 at 347; *Narangansett Tribe v. Southern Rhode Island Land Development Corporation*, supra n 52; *Lipan Apache Tribe et al v. United States*, 180 Ct Cl 487 (1967); *Calder v. Attorney-General of British Columbia*, (1973) 34 DLR (3d) 145 at 200; *Hamlet of Baker Lake v. Minister of Indian Affairs and Northern Development*, supra n 17; *Nireaha Tamaki v. Baker*, supra n 62 at 379-380; *County of Oneida, New York, et al v. Oneida Indian Nation of New York State et al*, 470 US 126 (1984) at 180.
198. Ibid.

confirmed that as the aboriginal title is a pre-existing interest it was in no way reliant on governmental recognition for its existence.[199] In *Calder v. Attorney General of British Columbia*,[200] Hall J felt it necessary to expressly refer to Blackburn J's adoption of the recognition doctrine in *Milirrpum v. Nabalco*,[201] noting this view to be 'wholly wrong as a mass of authorities ... including *Johnson v. McIntosh* and *Campbell v. Hall*, establishes.'[202]

The majority of the Court[203] found these principles to be applicable to an acquisition of 'sovereignty by whatever means,'[204] ultimately rejecting the defendant's submission as 'wholly wrong.'[205] Thus even in the absence of formal recognition of the plaintiffs' aboriginal title, the majority of the Court held that the aboriginal title was 'effective as against the State of Queensland and as against the whole world unless the State, in valid exercise of its legislative or executive power, extinguishes the title.'[206]

Toohey J went further, suggesting the very operation of the recognition doctrine to be incomprehensible. He thought it ridiculous to suggest that on settlement all pre-existing rights could automatically disappear, 'only to spring back to life immediately when recognition occurs.'[207] 'Even more startling,' he believed, was the contention that 'immediately on annexation, all indigenous inhabitants became

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199. Id at 229, referring to *Broder v. Water Co.*, 101 US 276 for support; adopted in *United States v. Sante Fe Pacific Railroad Company*, supra n 149 at 347. Similarly, in *Calder v. Attorney General of British Columbia*, supra n 197, the Canadian Supreme Court rejected suggestions that the aboriginal title was dependent on governmental rejection.
200. Ibid.
201. Supra n 28.
202. Supra n 197 at 200.
203. Toohey J, for example, concluded that the extinguishment of even unrecognised aboriginal interests 'would amount to an illegitimate act of state against British subjects ...': supra n 1 at 184. This is based on the principle whereby aboriginal occupants of settled colonies are accorded the rights and duties of British Subjects.
204. Id at 56 and 57 per Brennan J. Deane and Gaudron JJ found *R v. Symonds*, supra n 23 at 391-392; *Calder v. Attorney General of British Columbia*, supra n 197 at 152, 156, 193-202; *Guerin v. The Queen*, (1985) 13 DLR (4th) 321 at 335-336; and the Australian High Court in *Administration of Papua and New Guinea v. Daera Guba*, (1973) 130 CLR 353 at 397 established this principle to be applicable to settled territories.
205. As did Hall J in *Calder v. Attorney-General of British Columbia*, ibid at 416; implicitly Brennan J must have preferred Hall J's view from Judson J's contrary opinion proferred at supra n 204 at 328-330.
206. Supra n 1 at 75.
207. Id at 184.

trespassers on the land on which they and their ancestors had lived.'[208] If that was the effect of the common law, he believed it necessary to reject such principles as unacceptable and contrary to the basic values underlying the common law.[209]

Dawson J expressly refused to follow these authorities,[210] maintaining contrary to legal reason that the aboriginal title must be formally recognised by the Crown.[211] It is submitted that his suggestion that such case law[212] merely established that Crown acquiescence provided sufficient recognition[213] is contrary to clear statements in such cases that this form of tenure was not dependent upon the actions or inactions of the 'discovering' State.

As a matter of fact, Dawson J believed the necessary acquiescence had not occurred.[214] This conclusion was based on various propositions:

(i) the aboriginal title was not considered a recognisable form of tenure;[215]
(ii) the appointment of Protectors of Aborigines did not evidence an appreciation of the aboriginal title as these were only concerned with the education of aboriginal peoples;[216]
(iii) the reservation of the Murray Islands did not preserve the aboriginal title[217] as there was no express reference to such tenure in the governing legislation[218] and the circumstances showed the Crown intended to exercise absolute ownership over such land;[219] and
(iv) the 'Batman treaty' incident confirmed the Crown's absolute ownership of aboriginal lands.

Contrary to the first proposition, it is submitted various documentation shows that the Crown acknowledged the need to recognise aboriginal

208. Ibid.
209. Ibid.
210. While he acknowledged authorities such as *Amodu Tijani,* supra n 8 at 407, may support the independent existence of the aboriginal title apart from Crown recognition, he nevertheless refused to accept their authority: id at 129-130.
211. Id at 126-127; see also id at 161.
212. Such as *Calder v. Attorney-General of British Columbia,* supra n 197 at 218 per Hall J.
213. Supra n 1 at 161.
214. Id at 163.
215. Id at 139.
216. Id at 141.
217. Id at 150.
218. Ibid.
219. Ibid.

tenure. The Letters Patent[220] establishing South Australia, for example, preserved the rights of the 'aboriginal inhabitants' in any lands they 'occupied or enjoyed.'[221] The instructions to the Land Commissioners similarly directed 'that no lands in occupation or enjoyment be offered for sale until previously ceded by the Natives to yourself ... and you will take care that the Aborigines are not disturbed in the enjoyment of the lands over which they may possess proprietary rights.'[222] Protectors of Aborigines were appointed to ensure the aboriginal title was so protected. Coupled with the creation of aboriginal reservations, it is submitted erroneous to suggest that the Crown did not perceive the aboriginal title to be a recognisable form of tenure.

Dawson J's suggestion that the Protector of Aborigines was only concerned with the education of aboriginal peoples,[223] ignores the Protector's duty to ensure that lands in the 'occupation or enjoyment of the Natives'[224] were not declared open for sale 'unless the natives shall surrender their right of occupation or enjoyment by voluntary sale.'[225] Thus, contrary to Dawson J's suggestion, this office played an important part in the protection of the aboriginal title.

Similarly it is contended that Dawson J's treatment of the creation of aboriginal reserves[226] fails to appreciate that reserves were often seen as providing a form of compensation for the extinguishment of the aboriginal title.[227] As to the absence of express recognition in the

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220. Ultimately passed under the Great Seal of the United Kingdom, establishing South Australia and fixing the boundaries thereof. Reproduced, South Australian Statutes: vol. II at 749.
221. As Lord Russell stressed in relation to an identical proviso inserted in the New Zealand Letters Patent, these words evidenced the Crown's belief that 'the territorial rights of the Natives as owners of the soil, must be recognized and respected': Russell to Hobson, 28 Jan 1841, *Parl Papers (Commons)*. See further, *Cassidy*, supra n 133.
222. Colonisation Committee Letters to their Officers, 1836-1840, South Australian Archives. See further, *Cassidy*, ibid.
223. Supra n 1 at 141.
224. CO 13/5. Cf Reynolds, *The Law of the Land*, (1987) at 107.
225. Ibid. If the traditional owners did not wish to sell, it was the Protector's duty to 'secure to the Natives the full and undisturbed occupation or enjoyment of their lands and to afford them legal redress against depredators [and] trespassers.'
226. He believed the fact that in some cases the aboriginal people placed on reserves did not have any traditional association with the land supported his suggestion that reserves were not in recognition of the aboriginal title: supra n 1 at 143, 150 and 155.
227. The authorities believed 'the invasion of those ancient rights by surveys and land appropriations of any kind, [was] justifiable only on the ground that they should, at the same time, reserve for the natives an ample sufficiency for their present and future use and comfort, under the new

legislation, it is submitted that what was crucial[228] was the fact that the creation of the reserve was in no way inconsistent with the continued exercise of the Meriam people's territorial rights.[229] The legislation had to do more than regulate the aboriginal title[230] before it can be taken in law to have extinguished the aboriginal title. Accordingly, the creation of such reservations have been seen as recognising, rather than extinguishing, the aboriginal title.[231]

With respect to the third proposition, it is also submitted that the circumstances surrounding the creation of the reserve do not evince a Crown intention to exercise absolute title over the islands. This characterisation of the historical events does not sit comfortably with the extent of aboriginal self-management provided under the legislation governing the reservation.

Nor did the introduction of Crown lands/waste lands legislation[232] suggest that the Crown treated 'all the waste lands of the Murray Islands' as its own.[233] Dawson J's interpretation of such legislation is contrary to the Imperial Parliament's intentions[234] and judicial interpretations of such phraseology.[235] As the authorities stressed, as

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state of things into which they are thrown': South Australian Gazette, 23 July 1840, quoted by *Reynolds*, supra n 224 at 127.

228. In the absence of a clear and plain intention to extinguish the aboriginal title: *Calder v. Attorney-General of British Columbia,* supra n 197 at 404; *Hamlet of Baker Lake v. Minister of Indian Affairs,* supra n 17 at 552; *R v. Sparrow*, [1990] 1 SCR 1075 at 1095; *United States v. Sante Fe Pacific Railroad Co.*, supra n 149 at 353 and 354; *Lipan Apache Tribe v. United States,* supra n 197 at 492; *Te Weehi v. Regional Fisheries Officer,* [1986] 1 NZLR 680 at 691-692. See also ibid at 111 per Deane and Gaudron JJ; ibid at 196 per Toohey J citing *Calder's case*, supra n 197 at 404; *Sparrow's case* [1990] 1 SCR 1075 at 1099; *United States v. Sante Fe Pacific Railroad Co.*, supra n 149 at 353-354; *Lipan Apache Tribe v. United States,* supra n 197 at 492. Toohey J noted this did not require, however, the specific identification of particular interests to be extinguished: ibid at 196, citing *Mabo v. Queensland,* supra n 11.

229. Id at 65, 68 and 69 per Brennan J citing *United State v. Sante Fe Pacific Railroad Co.*, id at 353-354; at 89 and 110 per Deane and Gaudron JJ; ibid at 196 per Toohey J.

230. Id at 64, citing *R v. Sparrow,* supra n 228 at 1097.

231. *Gila River Pima-Maricopa Indian Community v. United States,* supra n 24 at 1389-1392; *United States v. Shoshone Tribe of Indians,* supra n 24 at 118; *Turtle Mountain Band of Chippewa Indians v. United States,* 490 F 2d at 945-947.

232. Such as the *Sale of Waste Land Act,* 1842 (Imp) (5&6 Vict c 36); *Crown Lands Alienation Act 1868* (Qld); *Land Act 1910* (Qld).

233. Supra n 1 at 148 and 150.

234. See Russell to Hobson, 9 Dec 1840, *Parl Papers (Commons),* Sess I, XVII (311) at 30.

235. See the comments with respect to similar New Zealand legislation in *The Queen v. Symonds,* supra n 23 and *Nireaha v. Baker,* supra n 62; *Wallis &*

aboriginal lands did not form part of the Crown's demesne, they were not taken to be 'waste lands' open for sale.[236] The Land Commissioners were consequently ordered not to proceed 'any further than those limits within which they can show some sufficient evidence that the land is unoccupied, and that no earlier and preferable title exists.'[237] Consequently, while such waste lands legislation authorised the granting of public lands within the broad geographical limits of the colonies, this authority was not to be exercised to dispossess the aboriginal owners.[238]

Finally, it is submitted Dawson J's contention that the Crown's absolute ownership of all unalienated waste lands is supported by the refusal to recognise the so-called Batman treaty,[239] reveals a misunderstanding of the reasons underlying the refusal. It was not based on the notion that the subject aboriginal people had no title to confer.

Rather, this transaction was considered unenforceable because it was contrary to the Crown's exclusive right of pre-emption. Only the Crown can acquire the aboriginal title. As a colonist, John Batman, rather than the Crown, had purported to acquire the aboriginal title, the transaction could not be recognised.

In light of these comments, it is submitted that none of the propositions proffered by Dawson J can be seen as authoritatively supporting an absolute Crown title.

(iv) Extinguishment of the aboriginal title

Having avoided the 'Scylla of the 1879 annexation of the Murray Islands to Queensland,'[240] the Court had to consider whether the plaintiffs' title

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Ors v. Solicitor General, supra n 148 especially at 32 and 33 where the Board noted that the traditional lands 'never belonged to the Crown.'

236. Russell to Hobson, 9 Dec 1840, *Parl Papers (Commons)*, Sess I, XVII (311) at 30. As Lord Glenelg stressed, while such legislation presupposes the existence of a vast area of vacant territory to which the Crown had territorial sovereignty and proprietary title, this assumption was not to be taken too far. Taken to its extremes, such proprietorship 'would extend very far into the Interior of New Holland and might embrace in its range numerous Tribes of People, whose Proprietary Title to the Soil, we have not the slightest ground for disputing': Secretary of State for the Colonies to the Chairman of the Colonization Commission, Col. Torrens, quoted in *Milirrpum v. Nabalco,* supra n 28 at 279.
237. See also an intra-office memo from James Stephen stressing the difficulty of drawing the boundaries of the colony having any regard to 'the rights of the present Proprietors of the Soil or Rulers of the country': *C.O.* 13/3.
238. In the minutes, supra n 236, Lord Glenelg stressed if the Aboriginals did want to sell their land, the Crown's right of pre-emption prevented colonists dealing directly with the traditional owners.
239. Supra n 1 at 144.
240. In other words, the suggestion that on settlement the Crown automatically acquired an absolute title to all lands.

avoided the 'Charybdis of subsequent extinction.'[241] While the defendant did not contend that the plaintiffs' aboriginal title had been so extinguished, the Court nevertheless examined the requirements for an effective extinguishment and whether these had been satisfied on the facts.

The Court found that upon settlement, the traditional owners' antecedent territorial interests became susceptible to the Crown's sovereign power to extinguish such private rights.[242] If these interests were so extinguished, the Court could not refuse to recognise a subsequent grant of such land[243] 'except perhaps in a proceeding by *scire facias*[244] or otherwise, on the prosecution of the Crown itself.'[245]

Further, this authority to extinguish the aboriginal title was not confined to the federal government as contended by the plaintiffs. Brennan J stated that the extinguishment of the aboriginal title was not a matter of international concern,[246] and thus there was no reason to deny the state governments the sovereign power to extinguish the aboriginal title. Thus, subject to the *Racial Discrimination Act 1975*, the Queensland Parliament could act to extinguish the aboriginal title.[247]

(a) Clear and plain intention

The majority found, however, that any purported act of extinguishment must evince a clear and plain intention to extinguish the aboriginal title.[248] Further, the act must do more than merely regulate the

241. Supra n 1 at 63.
242. Id per Brennan J, citing *Joint Tribal Council of the Passamaquoddy Tribe v. Morton*, (1975) 528 Fed 2d 370 at 376 n 6. The aboriginal title is 'not entrenched in the sense that, by reason of [its] nature, it is beyond the reach of legislative power': id at 89 and 111 per Deane and Gaudron JJ.
243. Under ss 30 and 40 *Constitution Act 1867* (Qld).
244. As utilised in *R v. Symonds*, supra n 23.
245. Id at 64, quoting *Wi Parata v. Bishop of Wellington*, (1877) 3 NZ (Jur) NS 72 at 77.
246. Id at 67.
247. Ibid. Deane and Gaudron JJ would appear to agree: id at 115. See also Dawson J, id at 174.
248. Ibid, citing *Calder v. Attorney-General of British Columbia*, supra n 197 at 404; *Hamlet of Baker Lake v. Minister of Indian Affairs*, supra n 16 at 552; *R v. Sparrow*, supra n 228 at 1095; *United States v. Sante Fe Pacific Railroad Co.*, supra n 149 at 353 and 354; *Lipan Apache Tribe v. United States*, supra n 197 at 492; *Te Weehi v. Regional Fisheries Officer*, supra n 228 at 691-692. See also ibid at 111 per Deane and Gaudron JJ; ibid at 196 per Toohey J citing *Calder v. Attorney-General of British Columbia*, supra n 197 at 404; *R v. Sparrow*, supra n 228 at 1099; *United States v. Sante Fe Pacific Railroad Co.*, supra n 149 at 353-354; *Lipan Apache Tribe v. United States*, supra n 197 at 492. Toohey J noted this did not require, however, the specific identification of particular interests to be

aboriginal title;[249] it must be inconsistent with the continued enjoyment of this form of aboriginal tenure.[250] This description of the law governing the extinguishment of the aboriginal title accords with United States,[251] Canadian[252] and New Zealand jurisprudence.[253]

(b) Implicit abrogation

Despite the wealth of authority requiring a clear and plain intention to extinguish, Dawson J suggested that the aboriginal title could be abrogated implicitly.[254] In support, he relied on Judson J's assertion in *Calder v. Attorney-General of British Columbia,*[255] that where 'the sovereign authority elected to exercise complete dominion over the lands in question, adverse to any right of occupancy ...' the aboriginal title to such lands would be extinguished.[256]

In accepting Judson J's view, Dawson J rejected Hall J's approach which required specific extinguishing legislation.[257] He sought to justify his choice by reference to a later decision, *R v. Sparrow*[258] which he claimed rejected Hall J's approach. It is submitted that such an interpretation of *R v. Sparrow*[259] is at the very least misleading. *R v. Sparrow*[260] has in fact been taken as establishing that Hall J's approach is correct.[261] In the course of its judgment the Court noted:[262]

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extinguished: ibid at 196, citing *Mabo v. Queensland,* supra n 11 at 213-214.

249. Id at 64, citing *R v. Sparrow,* id at 1097.
250. Id at 64, 68 and 69 per Brennan J citing *United States v. Sante Fe Pacific Railroad Co,* supra n 149 at 353-354; ibid at 80 and 101 per Deane and Gaudron JJ; ibid at 196 per Toohey J. Brennan J believed the granting of interests such as mining rights, was not necessarily inconsistent with the continued existence of the aboriginal title: ibid at 69.
251. See for example *United States v. Sante Fe Pacific Railroad Co.,* ibid at 353-354; *Lipan Apache case,* supra n 197; *Choctaw Nation v. United States,* 119 US 1 (1886) at 28.
252. See for example *Calder v. Attorney-General of British Columbia,* supra n 197 at 202 and 210; *Re Paulette and Registrar of Titles,* (1973) 42 DLR (3d) 8 at 35; *Hamlet of Baker Lake v. Minister of Indian Affairs and Northern Development,* supra n 16 at 552.
253. See for example *Te Weehi v. Regional Fisheries Officer,* supra n 228 at 691-692.
254. Supra n 1 at 134.
255. Supra n 197 at 167.
256. Supra n 1 at 134.
257. Supra n 197 at 208.
258. Supra n 228.
259. Ibid.
260. Ibid.
261. See for example, Foster, "It Goes Without Saying: Precedent and the Doctrine of Extinguishment by Implication in *Delgamuukw et al v. The Queen,*" (1991) 49(3) The Advocate 341 at 349.
262. Supra n 228; (1990) 56 CCC (3d) 263 at 279-280, quoted ibid at 349-350.

> ... as [Judson J] saw it, a series of statutes evinced a unity of intention to exercise a sovereignty inconsistent with any conflicting interest, including aboriginal title. But Hall J in that case stated ... that 'the onus of proving that the Sovereign intended to extinguish Indian title lies on the respondent and that intention must be "clear and plain".' The test of extinguishment to be adopted, in our opinion, is that the Sovereign's intention must be clear and plain if it is to extinguish an aboriginal right.

From this comment it is submitted the Court in *R* v. *Sparrow*[263] believed that, to be effective, the extinguishing act must be 'clear and plain intention' and that attempts at implicit extinguishment failed to evince such an intention. Thus, contrary to Dawson J's suggestion, it appears the Court in *R v. Sparrow*[264] preferred Hall J's view from that of Judson J upon which Dawson J sought to rely.

Dawson J also invoked the decision in *Delgamuukw v. British Columbia*[265] in support of his view. This decision has been vehemently criticised for suggesting an implicit abrogation can be effective,[266] contrary to *R v. Sparrow*.[267] For this reason the decision is presently under appeal and, it is submitted, should not have been treated as conclusive authority.

(c) Consensual purchase

While the majority found it to be well established that an act of extinguishment must evince a plain and clear intention, certain members appeared to have greater difficulty determining whether the aboriginal title could only be extinguished with the consent of the traditional owners. Their ultimate view on the matter is unclear.

At one point in their judgment, Deane and Gaudron JJ quoted from authorities requiring 'the free consent of the Native occupiers'[268] before an extinguishment will be effective. In turn they rejected the defendant's suggestion that the aboriginal title only conferred a permissive licence which the Crown had the absolute authority to unilaterally extinguish.[269]

While they found certain case law supported the defendant's submission,[270] they held the weight of authority[271] and considerations

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263. Ibid.
264. Ibid.
265. (1991) 79 DLR (4th) 465 and 474.
266. See for example, *Foster*, supra n 261.
267. Supra n 228. See further *Foster*, id at 349.
268. Supra n 1 at 92, quoting *R v. Symonds*, supra n 23 at 390.
269. Id at 90 and 93.
270. In particular, they held that the statement in *St Catherine's Milling*, supra n 158, that the Indian title was 'dependent upon the goodwill of the

of justice dictated otherwise.[272] They also noted that the defendant's suggestion did not accord with the fact that this form of tenure gave the holder 'title' to the subject land,[273] which operated as a 'burden' on the Crown's rights[274] until validly extinguished.[275]

Elsewhere in their judgment, however, they appear to suggest[276] the Crown has absolute authority to extinguish the aboriginal title without regard to traditional interests.[277] It is submitted these comments are contrary to, not only earlier statements in their own judgment, but also the numerous authorities to which they refer.[278] As the justices themselves noted,[279] such a suggestion of absolute authority fails to appreciate that the Crown does not have *plenum dominium.*

Sovereign' should not be read as supporting the characterisation of the title as a mere permissive licence. Both the majority and minority stated that the Crown's title was subject to the aboriginal title until it was surrendered by conquest or purchase: ibid at 91.

271. For example, *Nireaha Tamaki v. Baker,* supra n 62 at 579; *R v. Symonds,* supra n 23 at 390 where the strength of the aboriginal title was stressed.
272. Supra n 1 at 90. At the very least, there was a requirement to pay compensation: supra n 1 at 102. So far as the Commonwealth is concerned, this right to compensation is further supported by s. 51(xxxi) *Commonwealth Constitution,* 1901 providing an acquisition of property must be on 'just terms' : supra n 1 at 111.
273. Rather than a mere right of user: id at 90. See also the discussion of *Amodu Tijani,* supra n 8, id at 83-84.
274. Id at 90 per Deane and Gaudron JJ. See also discussion of *Amodu Tijani,* id at 92-93.
275. In other words, the Crown only acquired a *plenium dominium* on the 'surrender' of the aboriginal title: id at 89 per Deane and Gaudron JJ, quoting from *Attorney-General for Quebec v. Attorney-General for Canada,* supra n 158 at 408 and 411.
276. Contrary to the understanding outlined above: ibid at 94. See also id at 100.
277. As long as the extinguishment is clear and unambiguous: id at 119.
278. These require consensual purchase: see for example, *R v. Symonds,* supra n 23 at 390; *United States v. Sante Fe Pacific Railroad Company,* supra n 149; *Nireaha Tamaki v. Baker,* supra n 62 at 384; *Fletcher v. Peck,* supra n 7 per Johnson J; *Mitchel v. United States,* supra n 24 at 745-746; *Worcester v. Georgia,* supra n 7 at 560; *Wallis & Ors v. Solicitor-General,* supra n 148 at 26; *United States v. Sioux Nation of Indians,* 448 US 371 (1980).
279. Id at 89 and 90, quoting from *Attorney-General for Quebec v. Attorney-General for Canada,* supra n 158 at 408 and 411.

The Crown only has a preferential right to acquire so much as the aboriginal owners may be disposed to alienate,[280] not title itself.[281]

Thus a grant of land inconsistent with the aboriginal title can be avoided by the traditional owner[282] simply on the basis of the principle *nemo dat quod non habet*.[283] as the Crown has no title to pass. Decisions such as *The Queen v. Symonds*[284] clearly establish the aboriginal title cannot be ignored and usurped by the Crown.[285]

By contrast, Toohey J had no difficulty in determining that such authorities[286] required consensual purchase and consequently rejected any suggestion of absolute Crown authority. In the course of so concluding, Toohey J examined the three basis suggested by the defendant for such absolute authority:

(i) Crown sovereignty;
(ii) the need to protect the aboriginal title by limiting its alienability; and
(iii) the nature of the aboriginal title.

As to the first basis, Toohey J noted that while the Crown may exercise its sovereign authority by compulsorily acquiring land, such acts were subject to common law and statutory restraints.[287] Similarly, he rejected the suggestion that the conferral of an absolute authority to extinguish the aboriginal title without the consent of the traditional owners[288] was necessary to protect the aboriginal title. While confining the right to purchase the aboriginal title to the Crown protects the traditional owners from fraudulent dealings with colonists, increasing the extent of the Crown's power to an absolute right to take the land provides no added protection.[289]

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280. See for example, *Fletcher v. Peck,* supra n 7 per Johnson J; *Mitchel v. United States,* supra n 24 at 745-746; *Worcester v. Georgia,* supra n 7 at 545.
281. See for example, *Johnson v. McIntosh,* supra n 7; *County of Oneida v. Oneida Indian Nation of New York State,* supra n 197.
282. By way of proceedings in *scire facias*.
283. See for example *R v. Symonds,* supra n 23 at 390; *Wallis & Ors v. Solicitor-General,* supra n 148 at 32 and 33.
284. Id at 390 per Chapman J.
285. The grant would also be *ultra vires* where the statutory authority to grant land was confined to 'waste lands' which has been held to exclude aboriginal lands: see for example *Nireaha Tamaki v. Baker,* supra n 62 and Russell to Hobson, December 9, 1840, *Parl Pap (Commons),* 1841 Sess I, XVII (311) p 30.
286. Including *Worcester v. Georgia,* supra n 7 at 570; *The Queen v. Symonds,* supra n 23 at 390.
287. Supra n 1 at 194, citing *Calder's case,* supra n 197 at 353.
288. Ibid.
289. Id at 194-195.

Nor did Toohey J believe that the personal usufructuary nature of the aboriginal title make that form of tenure inherently weaker than a proprietary title and thus open to unilateral extinguishment. Taking heed of the Privy Council's warning in *Amodu Tijani*[290] that it was inappropriate to define aboriginal interests in terms of English notions of estates, Toohey J held the nature of the traditional title could not be used to 'determine the power of the Crown to extinguish the title unilaterally.'[291]

In addition to finding no logical basis for the defendant's submission, Toohey J detailed three further reasons for rejecting the suggestion that the aboriginal title only conferred a permissive licence to occupy land. First, the onus of proof was on the defendant to show the plaintiffs did not hold possession/title to the subject lands and that burden had not been discharged.[292] Second, there was no documentary evidence of a reservation[293] under which the plaintiffs had been conferred merely a permissive licence to use the subject land.[294]

Third, even if a reserve had been established, as the Meriam people's possession pre-dated such an act would have been an illegal dispossession entitling the plaintiffs to recover possession.[295] The suggestion that the plaintiffs held no more than a revocable licence to occupy was consequently rejected by the majority.

(d) Crown's authority to extinguish at will

Contrary to these conclusions, Dawson J accepted the defendant's suggestion that the Crown had an absolute authority to extinguish the aboriginal title at will. It is contended, however, this conclusion was based on a failure to follow well established case law in other post colonial Nations such as Canada, New Zealand and the United States. Moreover, the authorities upon which he relied are either inconsistent with such authorities or, with respect, erroneously interpreted.

First, Dawson J attempted to discard as irrelevant nearly two centuries of United States jurisprudence maintaining the strength of the aboriginal title. He suggested the United States case law was historically unique, based on that government's treaty policy rather than the common law,[296] and thus irrelevant to the case in hand. It is submitted this view of the underlying basis for such United States jurisprudence is misleading. In particular it ignores the fact that the United States courts

290. Supra n 8 at 403.
291. Supra n 1 at 195.
292. Id at 213.
293. Ibid. Allegedly established in 1882.
294. Ibid. Hence occupation appeared to be based on traditional title, not Crown permission.
295. Ibid.
296. Id at 131 and 135.

continually stressed the independent nature of the aboriginal title,[297] stemming as it does from prior occupation[298] rather than treaty provisions.[299] The courts viewed treaties as a recognition of the pre-existing aboriginal title, rather than the source of such territorial rights.

Dawson J's suggestion that United States case law is solely applicable to that country is also contrary to the New Zealand and Canadian judicial practice. These courts have actively supported a cross-fertilisation of authorities and ideas from one jurisdiction to the next, expressly stating that the practices of other jurisdictions are important to local disputes involving aboriginal peoples.[300]

Perhaps forced to ultimately accept the relevance of these authorities, Dawson J considered certain United States cases. Essentially,[301] however, he confined[302] this consideration to specific highly criticised cases which undermine the judiciary's protection of the aboriginal title.

One example of this 'selective approach'[303] is the reference to *Tee-Hit-Ton v. United States.*[304] The plaintiffs in this case had sought compensation under the Fifth Amendment to the United States Constitution for the extinguishment of their aboriginal title. To be successful, the plaintiffs had to establish that their aboriginal title was a property right within the terms of the Amendment. Through rather awkward reasoning[305] the United States Supreme Court held that the subject aboriginal title 'is not a property right but amounts to a right of occupancy'.[306] Dawson J relied on this statement to suggest the

297. See for example, *Cramer et al v. United States,* supra n 197; *Narangansett Tribe v. Southern Rhode Island Land Development Corporation,* supra n 52; *Lipan Apache Tribe et al v. United States,* supra n 197; *County of Oneida, New York, et al v. Oneida Indian Nation of New York State et al,* supra n 197.

298. See for example, *Mitchel v. United States*, supra n 24 at 743; *Worcester v. Georgia,* supra n 7 at 544.

299. In *United States v. Sante Fe Pacific Railroad Company,* the Court stressed that it is not true 'that a tribal claim to any particular lands must be based upon a treaty ...': supra n 149 at 269-270. See also *Narangansett Tribe v. Southern Rhode Island Land Development Corporation*, supra n 52 at 807-808.

300. See for example, *United States v. Sante Fe*, ibid at 346; *Calder v. Attorney-General of British Columbia,* supra n 197 at 200-201; *Wi Parata v. Bishop of Wellington,* supra n 245 at 77; *Milirrpum's case,* supra 28.

301. The word 'essentially' is used because on occasion Dawson J refers to main stream authorities but their effect is again misrepresented.

302. He described his own analysis as a 'selective approach': supra n 1 at 137.

303. Ibid.

304. (1955) 348 US 272.

305. Cf, *Foster,* supra n 319 at 343.

306. Supra n 261 at 279.

aboriginal title was merely a form of permissive occupancy which could be extinguished at will without compensation.[307]

It is submitted it was inappropriate for Dawson J to use this decision to support his conclusion. The decision has been criticised[308] for suggesting that in the absence of formal governmental recognition the plaintiff's aboriginal title was merely a non-proprietary right to permissive occupation. First, as noted above, it is well established that governmental recognition is irrelevant to the existence or nature of the aboriginal title.[309] The aboriginal title stems from the traditional owners' prior occupation.[310] Such title is a pre-existing right which survives annexation and is preserved under the common law.[311] Second, authority establishes that the aboriginal title confers full beneficial ownership,[312] not merely a licence to occupy, and that an infringement of such title entitles the traditional owner to just compensation.[313]

The decision in *Tee-Hit-Ton v. United States*[314] has also been criticised for suggesting that conquest / annexation gave the government full beneficial title. As discussed above, this view is erroneous; acquisition of sovereignty, by whatever form, did not confer absolute title.[315]

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307. Supra n 1 at 136.
308. See for example Hurley, "Aboriginal Rights in Modern American Case Law," [1983] 2 CNLR 9.
309. See for example, *Cramer et al v. United States,* supra n 197; *United States v. Sante Fe Pacific Railroad Company,* supra n 149 at 347; *Narangansett Tribe v. Southern Rhode Island Land Development Corporation,* supra n 52; *Lipan Apache Tribe et al v. United States,* supra n 197; *Calder v. Attorney-General of British Columbia,* supra n 197 at 200; *Hamlet of Baker Lake v. Minister of Indian Affairs and Northern Development,* supra n 16; *Nireaha Tamaki v. Baker,* supra n 62 at 379-380; *County of Oneida, New York, et al v. Oneida Indian Nation of New York State et al,* supra n 197 at 180.
310. See for example, *Mitchel v. United States,* supra n 24 at 743; *Worcester v. Georgia,* supra n 7 at 544.
311. In other words, contrary to the doctrine of continuity: *Campbell v. Hall, supra* n 46; *Mitchel v. United States,* ibid; *Worcester v. Georgia,* ibid.
312. See for example, *Mitchel v. United States,* ibid; *Worcester v. Georgia,* id at 560.
313. See for example, *Fletcher v. Peck,* supra n 7; *Johnson v. McIntosh,* supra n 7; *Worcester v. Georgia,* id at 545; *Mitchel v. United States,* supra n 24 at 745-746; *Chouteau v. Molony,* supra n 24; *Buttz v. Northern Pacific Railroad,* supra n 24; *Jones v. Meehan,* supra n 24 at 8 and 16; *United States v. Shoshone Tribe of Indians,* supra n 24 at 115-116; *United States v. Klamath and Moadoc Tribes of Indians,* supra n 24; *Gila River Pima-Maricopa Indian Community v. United States,* supra n 24; *R v. Symonds,* supra n 23 at 390; *Tamihana Koraki v. Solicitor-General,* supra n 24.
314. Supra n 304 at 279.
315. Hurley notes further that legally / historically the Indian Nations were never 'conquered': supra n 308 at 27.

In addition to this 'selective approach',[316] it is submitted Dawson J misrepresented certain 'main stream' cases[317] as supporting the Crown's acquisition of *plenum dominium* on annexation and the existence of a consequent right to extinguish aboriginal tenure seemingly[318] without compensation. Dawson J cites as authority, for example, *County of Oneida v. Oneida Indian Nation.*[319] Contrary to Dawson J's assertion, the Court in that case stressed that annexation only conferred an inchoate title on the Crown and the right of pre-emption.[320] The Supreme Court reaffirmed the strength of the aboriginal title and the exclusive right to occupation such title conferred.[321] Nor does the case support the proposition that an extinguishment can be uncompensated. In fact, the Court ordered compensation be paid to the traditional owners for the wrongful dispossession of their lands.[322] Similarly, in *Gila River Pima-Maricopa Indian Community v. United States*[323] and *United States v. Alcea Band of Tillamooks (Tillamooks I),*[324] to which Dawson J refers, the Courts affirmed that an involuntary extinguishment gave rise to a legally enforceable right to compensation/restitution for this 'ancient wrong'.[325]

Finally, any suggestion in these cases that the Crown enjoys an absolute authority to extinguish at will must be questioned in light of the authorities already outlined that require consensual purchase before an extinguishment will be effective.[326]

Dawson J adopted a similar approach with respect to the extensive New Zealand case law supporting the strength of the aboriginal title. First, he suggested that such decisions were based on the *Treaty of Waitangi* and therefore irrelevant to the case before him.[327] Again, it is

316. He described his own analysis as a 'selective approach': supra n 1 at 137.
317. Cited, id at 136.
318. While Dawson J cites these cases for the proposition that the aboriginal title can be extinguished at will, the context of the sentence suggests that these cases also support the suggestion that no compensation is payable on such extinguishment.
319. Supra n 197.
320. Id at 178 and 179. Similarly in *Narangansett Tribe v. Southern Rhode Island Land Development Corporation,* supra n 52, the Court recognised the aboriginal title and, on the facts, upheld such aboriginal tenure in the face of the purported extinguishment of such by the State of Rhode Island.
321. Id at 179.
322. Id at 191.
323. Supra n 24. This case was mainly concerned with identifying the date when the aboriginal title had been extinguished.
324. 329 US 40 (1946) at esp 47.
325. Supra n 24.
326. For example, *Nireaha Tamaki v. Baker,* supra n 62 at 579; *R v. Symonds,* supra n 23 at 390.
327. Supra n 1 at 136 and 137.

submitted this statement misrepresents the true basis for such case law. The New Zealand courts stressed the *Treaty of Waitangi* merely recognised and confirmed the pre-existing aboriginal title.[328] The New Zealand authorities were and are based on principles of general application and thus useful to the resolution of Australian disputes.

As with the United States authorities, Dawson J then went on to select an isolated decision undermining the strength of the aboriginal title. He invokes, for example, in *Re the Ninety-Mile Beach*[329] which, contrary to the weight of New Zealand authority,[330] suggests the Crown has an absolute right to extinguish the aboriginal title. It is submitted the use of this case misrepresents the state of New Zealand case law in so far as Dawson J ignored or misconstrued[331] other New Zealand decisions[332] providing the aboriginal title can only be extinguished through consensual purchase.

It is consequently submitted that Dawson J's suggestion that the aboriginal title was a mere form of permissive occupancy which the Crown can extinguish at will is based on a misconstruction of case law, the use of comments out of context and the isolation of rare authorities giving credence to his claims. For this reason, it is suggested his claim is erroneous and should not be seen as authoritative.

(e) Application of statute of limitations

Whilst these members of the Court appeared to accept certain limitations to the Crown's ability to extinguish the aboriginal title, disturbingly, they suggested that if an inconsistent use was not immediately challenged, subsequent protests could be defended on 'either an assumption of acquiescence in the extinguishment of the title or a defence based on laches or some statute of limitations.'[333]

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328. See for example, Chapman J in *R v. Symonds,* supra n 23, where he stated that 'it cannot be too solemnly asserted that [the Native title] is entitled to be respected, that it cannot be extinguished (at least in times of peace) otherwise than by the free consent of the Native occupiers ... [and that] the Treaty of Waitangi, confirmed by the Charter of the Colony, does not assert either in doctrine or in practice any thing new or unsettled.'
329. [1963] NZLR 461 at 468.
330. In particular, the Privy Council's express rejection of the proposition that the aboriginal title 'depends on the grace and favour of the Crown' in *Tamaki v. Baker,* supra n 62 at 383.
331. That is, misconstrues these decisions as supporting the Crown as having an absolute authority to extinguish the aboriginal title. For example, Dawson J cites *R v. Symonds,* supra n 23 as authority for the Crown's absolute power to extinguish the aboriginal title despite the assertions to the contrary in the Court's judgment.
332. Such as *R v. Symonds,* id at 390 and *Tamaki v. Baker,* supra n 62.
333. Supra n 1 at 90 and 109 per Deane and Gaudron JJ; id at 196 per Toohey J.

It is submitted that while a matter of some controversy, the preferable view is that such defences cannot be invoked by the government against traditional owners.[334] As explained in cases such as *County of Oneida v. Oneida Indian Nation of New York State*[335] and *Narangansett Tribe v. Southern Rhode Island Land Development Corporation,*[336] invoking such defences to allow the illegal usurpation of aboriginal land would be contrary to the government's fiduciary obligation to protect aboriginal interests.[337]

(f) Compensation for extinguishment

Whilst the right to compensation on the extinguishment of the aboriginal title has been adverted to, in a bid to clarify the divergence of thought in the High Court, the matter is briefly considered in isolation.

In their judgment, Mason CJ and McHugh J suggest that Deane, Gaudron and Toohey JJ believe that compensation is payable on the extinguishment of the aboriginal title, while Brennan J (with whom Mason CJ and McHugh J agreed) and Dawson J believe no restitution is legally required. It is submitted the division of opinion is not that clear.

Toohey J was the only member of the Court to recognise a comprehensive right to compensation on the extinguishment of the aboriginal title. He found that the Crown's fiduciary obligation requires it to ensure that the aboriginal title is not impaired without the consent of the traditional owners.[338] If the Crown acted contrary to the aboriginal owner's territorial interests, it was be liable to compensate the traditional owners for this breach of duty.[339]

Toohey J believed this right to compensation to be supported by s. 10 *Racial Discrimination Act 1975* (Cwlth).[340] This section had been held in earlier proceedings[341] to confer on aboriginal peoples the 'same immunity from legislative interference with their enjoyment of their human right to own and inherit property as it clothes other persons in the

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334. See for example *Narangansett Tribe v. Southern Rhode Island Land Development Corporation,* supra n 52 at 804; *United States v. Ahtanuta Irrigation District,* 236 F 2d 321 at 334; *Utah Power and Light Co v. United States,* 243 US 389 at 408-409; *Ewert v. Bluejacket,* 259 US 129; *County of Oneida v. Oneida Indian Nation of New York State,* supra n 197 at 178.
335. Id at 185.
336. Supra n 52 at 804.
337. See for example, *Narangansett Tribe v. Southern Rhode Island Land Development Corporation,* ibid at 804; *County of Oneida v. Oneida Indian Nation of New York State,* supra n 197 at 185.
338. Supra n 1 at 204.
339. Ibid.
340. Yet not s. 9 of the Act, following *Mabo v. Queensland,* supra n 11: id at 215.
341. *Mabo v. Queensland,* ibid.

community.'[342] As an uncompensated act of extinguishment would deprived the traditional owners of their right to just compensation, as enjoyed by other Queenslanders,[343] that act would be contrary to s. 10 *Racial Discrimination Act 1975* (Cwlth)[344] and thus inoperative.[345]

At one point in their judgment Deane and Gaudron JJ appear to require the payment of compensation for any unilateral extinguishment of the aboriginal title.[346] Elsewhere, however, they suggest that prior to recent legislative measures allowing proceedings against the Crown, a dispossessed aboriginal owner had no effective remedy against an illegitimate dispossession.[347]

The implications of this comment are unclear. It may have only been intended to suggest that past procedural limitations on the ability to sue the Crown prevented dispossessed aboriginal owners from successfully using the municipal courts to enforce their substantive right to compensation.[348] This interpretation of Deane and Gaudron JJ's comment is supported by their later discussion of the remedies open to aggrieved owners.[349]

At times, however, the absoluteness of the language used when referring to the Crown's power to extinguish the aboriginal title suggests there is no need for restitution if the intention to extinguish is clear and plain.[350] If intended, such an interpretation can be criticised as contrary to the limited nature of the Crown's preferential right to only acquire so much land as the aboriginal owners may be disposed to alienate.[351]

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342. Ibid at 219, quoted by Brennan J, supra n 1 at 53.
343. Under the *Acquisition of Land Act 1967* (Qld): ibid at 217.
344. Ibid. Dawson J stated that as he believed the plaintiffs' aboriginal title had been extinguished upon the annexation of the Islands, the subject legislation could not be seen as nullifying or impairing the enjoyment or exercise of these rights within the terms of ss. 9 or 10 *Racial Discrimination Act 1975*: ibid at 171-172.
345. By reason of s. 109 *Commonwealth Constitution,* 1901: ibid.
346. Id at 102. So far as the Commonwealth is concerned, this right to compensation is further supported by s. 51(xxxi) *Commonwealth Constitution* 1901 providing an acquisition of property must be on 'just terms': id at 111.
347. Id at 94. See also id at 100.
348. If this was the Court's intention, it should be noted that such a procedural bar could generally be circumvented in so far as the dispossessed traditional owner could nevertheless bring an action against any colonist purportedly holding title under a subsequent Crown grant.
349. Supra n 1 at 113.
350. Ibid.
351. *R v. Symonds,* supra n 23 at 390. In the absence of a valid consensual extinguishment, as established in *R v. Symonds,* supra n 23, a grant of land inconsistent with the aboriginal title could be avoided by the traditional owner in *scire facias* quite simply on the basis of *nemo dat quod non habet*. The grant would also be *ultra vires* where the statutory

As noted above, Mason CJ and McHugh J suggested that Brennan J denied any right to compensation on the extinguishment of the aboriginal title. Brennan J does not, however, expressly advert to the issue and in fact refers to case law requiring compensation on the extinguishment of the aboriginal title.[352]

Yet his later comment that the Meriam people's aboriginal title is subject to the power of the Queensland parliament and Governor-in-Council to extinguish that title by an 'appropriate exercise of power'[353] suggests that he believes the Crown to have an absolute power akin to that proposed by Dawson J.[354] Thus it is submitted Brennan J's view on the matter is still unclear.[355]

What is clear, however, is Dawson J's conviction that 'no general proposition [can] be found, either in law or in history, that the Crown is legally bound to pay compensation for the compulsory acquisition of land or any interests in it by the exercise of sovereign rights.'[356] He sought to justify this view in two ways.

First, he distinguished case authorities providing to the contrary. Thus Dawson J rejected Lord Denning's suggestion in *Adeyinka Oyekan v. Musendiku Adele*[357] that compensation was payable for the extinguishment of aboriginal interests,[358] suggesting the decision to be based on the existence of a statutory regime for compensation.

Second, he misrepresented certain case authority as supporting his assertion. For example, he sought to justify this view by reference to

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authority to grant land was confined to 'waste lands,' this phrase having been held to exclude aboriginal lands: see for example *Nireaha Tamaki v. Baker,* supra n 62, and Russell to Hobson, December 9, 1840, *Parl Pap (Commons),* 1841 Sess I, XVII (311) p 30.

352. For example, supra n 1 at 56 he quotes Lord Denning in *Adeyinka Oyekan v. Musendiku Adele*, supra n 158.

353. Id at 75.

354. While at one point Brennan J asserts that an extinguishment must stem from a 'valid' exercise of power, it appears he intends such validity to be determined by statutory limitations, rather than an inherent limitation on the exercise of this Crown authority: id at 76.

355. Again, if Brennan J is suggesting that there is no right to compensation the view can be criticised in light of cases providing the contrary, such as *Fletcher v. Peck,* supra n 7; *Johnson v. McIntosh,* supra n 7; *Worcester v. Georgia,* supra n 7 at 545; *Mitchel v. United States,* supra n 24 at 745-746; *Chouteau v. Molony,* supra n 24; *Buttz v. Northern Pacific Railroad,* supra n 24; *Jones v. Meehan,* supra n 24 at 8 and 16; *United States v. Shoshone Tribe of Indians,* supra n 24 at 115-116; *United States v. Klamath and Moadoc Tribes of Indians,* supra n 24; *Gila River Pima-Maricopa Indian Community v. United States,* supra n 24; *R v. Symonds,* supra n 23 at 390; *Tamihana Koraki v. Solicitor-General,* supra n 24.

356. Supra n 1 at 126-127. Contrary to the authorities cited, ibid.

357. Supra n 167.

358. Supra n 1 at 126-127.

cases such as *County of Oneida v. Oneida Indian Nation*,[359] *Gila River*,[360] and *United States v. Alcea Band of Tillamooks (Tillamooks I)*[361] despite the courts' reaffirmation in those cases of the need to pay compensation for the wrongful extinguishment of the aboriginal title.[362]

Finally, he stated his view was supported by the past failure to pay compensation for the use of land constituting part of the Murray Islands.[363] Moreover, when compensation was paid, he suggested, such payments were not made for the acquisition of the aboriginal title, but rather 'for the loss of land.'[364] With respect, the distinction between compensation 'for the loss of land' and for the aboriginal title is meaningless as, in both cases, the payment is implicitly in recognition of an infringement of rights in that land.

Thus an examination of the various judgments suggests that, despite the well established nature of jurisprudence in other countries requiring the payment of compensation, only Toohey J recognised a comprehensive right to damages/restitution for the extinguishment of the aboriginal title. Deane and Gaudron JJ confined the right to compensation to cases where the aboriginal title has been extinguished in the absence of a clear or plain intention to so operate. Implicitly, as long as the Crown makes its intentions clear, the aboriginal title may be extinguished without remedy. While Brennan J's opinion is unclear, the rest of the Court seem to reject totally the notion of compensation apart from statutory remedies provided under legislation such as the *Racial Discrimination Act 1975* (Cwlth).

(g) Extinguishment of the aboriginal title to the Murray Islands

On the facts, the majority of the Court held the aboriginal title to the plaintiffs' land had not generally been extinguished. In accordance with the above discussion they concluded that the annexation of the Murray Islands did not extinguish the aboriginal title[365] and that the general waste lands/Crown lands legislation governing the area failed to evince a 'clear and unambiguous' intent to extinguish the aboriginal title.[366] In

359. Supra n 197.
360. Supra n 24.
361. Supra n 324 at esp 47.
362. See for example, *County of Oneida v. Oneida Indian Nation,* supra n 197 at 191. Similarly in *Gila River,* supra n 24 at 1394 Nichols J affirmed the need for restitution for this 'ancient wrong' and in *Tillamooks I,* ibid, a majority of the United States Supreme Court held an involuntary extinguishment of the aboriginal title gave the traditional owners a legally enforceable right to compensation.
363. Supra n 1 at 159.
364. Ibid. He does, however, later suggest that the payments were to avoid ill-feeling or to compensate for improvements to the land: ibid.
365. Id at 65.
366. Ibid; contra Dawson J, id at 159.

fact, contrary to suggestions of extinguishment,[367] the Crown had later reserved[368] these lands for the use of their aboriginal inhabitants,[369] thereby preserving the aboriginal title.[370]

By contrast, Dawson J in his dissent asserted that the Crown had exercised absolute authority over all the lands of the colonies, including the Murray Islands, and such was inconsistent with the continuation of any aboriginal rights.[371]

One difficulty the plaintiffs' faced was s. 19 of the *Crown Lands Alienation Act 1876*. This provided that it was an offence for persons to occupy certain lands 'unless lawfully claiming under a subsisting lease or licence.' While the defendant did not contend that this section was applicable to Mer Island, the Solicitor-General asserted that if it were, the Meriam people would be trespassers who 'could lawfully have been driven into the sea ...'.[372]

Brennan J rejected this submission as 'nonsense' and barbaric,[373] confining s. 19 to those persons holding under a Crown grant, rather than those relying on rights stemming from an unextinguished aboriginal

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367. Id at 64-65, 66 and 71. See in this regard *Gila River,* supra n 24. Similarly, the setting aside of land for a national park may not be inconsistent with aboriginal land tenure: id at 70. See also Toohey J ibid at 196.

368. This conclusion was not affected by the fact that the reservation of the lands was 'for the use of Aboriginal Inhabitants of the State' generally, rather than just the Meriam people. This did not extinguish the traditional owners' rights, as the general right of user provided by the statute was subordinate to the rights stemming from the aboriginal title: id at 67, 115, 117 and 118.

369. Ibid, under the *Crown Lands Alienation Act 1876*, the *Crown Lands Act 1884* and *Land Act 1910*. Contra Dawson J, ibid at 160.

370. Similarly, the majority found the placing of these lands in the hands of trustees in 1939 was not inconsistent with the continuation of the aboriginal title, as it did not confer on the trustees a power to interfere with these antecedent rights: id at 66 and 71 per Brennan J. See Deane and Gaudron JJ: 'it will be presumed ... that the lands were intended to be held by the trustees for the holders of the common law native title to the extent necessary to enable enjoyment of their rights of occupation and use': id at 111 and 118.

371. Id at 160 and 175.

372. Id at 66. Note the classification of the Murray Islanders as trespassers was also raised with respect to Dawson J's findings. If the plaintiffs' aboriginal title had been extinguished, as he suggested, this would have possibly rendered the Murray Islanders trespassers. Dawson J quickly rejected this submission on the basis that the plaintiffs occupied the land with the Crown's permission: id at 174.

373. Id at 66 and 67, accepting Hall J's suggestion that the idea would be 'self-destructive.'

title.[374] Similarly, Deane and Gaudron JJ held the legislation was too general to extinguish the aboriginal title.[375]

Whilst the majority were able to conclude that the aboriginal title had survived annexation, they had greater difficulty determining the status of portions of the Murray Islands which had been leased by the Crown.[376] Brennan and Dawson JJ held these leases to be inconsistent with the continuation of the aboriginal title in these areas and consequently held such aboriginal tenure had been extinguished.[377] Brennan J asserted this conclusion was not affected by the fact that on the forfeiture of the lease, the land reverted to being part of the reserve. He believed the initial conferral of the lease usurped and extinguished the aboriginal title and on the expiry of such the Crown acquired *plenum dominium*.[378] Deane and Gaudron JJ disagreed. They believed a clause in the lease which purported to recognise and protect the Murray Islanders' rights preserved the aboriginal title.[379]

(h) Would a grant of deed under the Land Act be unlawful?

The plaintiffs had also sought a declaration that the granting of a deed of grant in trust under the then current *Land Act 1962* (Qld) would be unlawful under ss. 9 and 10 *Racial Discrimination Act 1975* (Cwlth).[380] It was submitted that the legislation would allow the Island Council to lease out aboriginal land in a manner inconsistent with the continuation of the aboriginal title and thereby extinguish such title contrary to the terms of the *Racial Discrimination Act 1975* (Cwlth).[381]

The Court refused the application for the declaration primarily on the basis that there was no evidence that a deed was to be granted with respect to this land.[382] Brennan J also believed s. 10 *Racial Discrimination Act 1975* (Cwlth) would not necessarily invalidate a grant[383] as the *Land Act 1962* could be seen as a valid 'special measure'

374. Id at 67.
375. Id at 114-115.
376. Two acres on Mer were granted to the London Missionary Society and a lease was granted to two non-aboriginal lessees with respect to the whole of the islands of Dauar and Waier for 20 years in 1931: id at 71 and 72.
377. Id at 71 per Brennan J; id at 158 per Dawson J.
378. Not just the radical title, subject to the aboriginal title: id at 68 and 73. In addition, some land on Mer was used for administrative purposes such as the running of a Court, school and hospital. Whether the aboriginal title to these lands had been extinguished was not considered by counsel and consequently not determined by Brennan J: id at 73.
379. Id at 117. Toohey J left this matter open, asserting that the Court had not been asked to determine this question: id at 197.
380. On the basis of the Court's findings in *Mabo v. Queensland,* supra n 11.
381. Supra n 1 at 74.
382. Ibid, per Brennan J; id at 119 per Deane and Gaudron JJ; id at 199 per Toohey J.
383. Ibid.

within s. 8 *Racial Discrimination Act 1975*.[384] This suggestion is most disturbing given the rationale for the exemption of 'special measures.' The intention was to allow positive discrimination in favour of disadvantaged groups, such as aboriginal peoples, by placing such actions outside the scope of the Act. Brennan J is suggesting that a provision designed to protect positive discrimination[385] could validate the denial of aboriginal territorial rights. It is submitted to be a anomalous notion that s. 8 *Racial Discrimination Act 1975* (Cwlth) could be used against such disadvantaged groups, facilitating, for example, the extinguishment of their indigenous rights.

(v) Nature of the aboriginal title

In the course of their judgments, the members of the Court considered the nature and incidents of the aboriginal title. Deane and Gaudron JJ stressed that in attempting to characterise the aboriginal title, care should be taken not to modify its incidents in an attempt to analogise it with English estates.[386] They suggested the aboriginal title to be a personal,[387] 'communal usufructuary' right of occupation.[388] While personal in nature,[389] Deane and Gaudron JJ expressly rejected the defendant's suggestion[390] that the aboriginal title was 'no more than a permissive occupancy which the Crown was lawfully entitled to revoke or terminate at any time ...' They stressed the aboriginal title conferred legal rights which 'can be vindicated, protected and enforced by proceedings in the ordinary courts.'[391]

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384. Placing the actions outside the scope of s. 10 *Racial Discrimination Act 1975*: ibid, citing *Gerhardy v. Brown* (1985) 159 CLR 70.
385. By removing the ability of non-aboriginal peoples to claim such action to be discriminatory: *Gerhardy v. Brown,* ibid.
386. Supra n 1 at 87, quoting from *Amodu Tijani,* supra n 8 at 403.
387. And thus 'does not constitute a legal or beneficial estate or interest in the actual land': id at 88-89 and 110 per Deane and Gaudron JJ citing *Attorney-General for Quebec v. Attorney-General for Canada*, supra n 158 at 408. Ultimately, however, Deane and Gaudron JJ accepted Dickson J's judgment in *Guerin v. The Queen*, supra n 204 at 339 that it is inappropriate to attempt to characterise the aboriginal title in terms of traditional common law concepts. Rather, it should be perceived as '*sui generis* or unique': id at 89.
388. Id at 87, quoting from *Amodu Tijani,* supra n 8 at 409-410. Dawson J suggested the aboriginal title *must* be held communally and thus the plaintiffs could not make a claim to a particular parcel of land: ibid at 156.
389. Id at 80 and 110 per Deane and Gaudron JJ.
390. Adopted by Dawson J in his dissent.
391. Supra n 1 at 110 and 113 per Deane and Gaudron JJ. This statement was, however, confined to an unextinguished aboriginal title. To extend it to suggest that remedies were available for an extinguished aboriginal title

The Court believed the source of the rights and incidents of such tenure, while enforced under the common law,[392] is to be found in laws and customs of the traditional owners.[393] The content of the aboriginal title and who is entitled to the enjoyment of such is, therefore, determined by the precepts of the traditional law and custom.[394] A claim to the aboriginal title was consequently dependent upon the continued existence and observance of these traditional laws and customs.[395] Thus, subject to the prescripts of such traditional law, the aboriginal title can only be enjoyed by the aboriginal inhabitants and their descendants[396] who observe such laws and customs.[397] These requirements consequently provided a major limitation to the enjoyment of the aboriginal title.[398]

The only exception to this general rule confining alienability is the Crown's exclusive right of pre-emption.[399] Under the right of pre-emption,[400] the Crown enjoys the sole right to acquire the aboriginal

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would seemingly be inconsistent with the earlier suggestion that a dispossessed traditional owner was without a remedy against the Crown (id at 89-90) unless the comment was intended to relate solely to the fact that it is a burden on the Crown's title.

392. Id at 59-60.

393. Id at 58, per Brennan J, rejecting the fiction that the original occupants had no settled law as suggested in *Cooper v. Stuart,* supra n 93; see also Deane and Gaudron JJ, id at 87-88, citing *Adeyinka Oyekan v. Musendiku Adele,* supra n 158 at 880 - 881.

394. Id at 87-88 and 109-110 per Deane and Gaudron JJ, citing *Adeyinka Oyekan v. Musendiku Adele,* ibid at 880-881; *Amodu Tijani,* supra n 8 at 404-405 and 409-410; *Geita Sebea v. Territory of Papua,* (1941) 67 CLR at 557.

395. Id at 60 and 61.

396. Id at 59 per Brennan J; id at 110 per Deane and Gaudron JJ.

397. Ie the aboriginal title is extinguished through the abandonment of the traditional laws and customs: id at 60 per Brennan J; id at 110 per Deane and Gaudron JJ.

398. In other words, only aboriginal peoples can claim such: id at 59 per Brennan J. In this way the aboriginal title is an accepted exception to the general rule under common law that title is generally alienable. See also Deane and Gaudron JJ, id at 88 and 110.

399. Id at 60 per Brennan J; Deane and Gaudron JJ at 79 citing *R v. Symonds,* supra n 23 at 390; *Johnson v. McIntosh,* supra n 7 at 586; *St Catherine's Milling & Lumber Co v. The Queen,* supra n 158 at 599.

400. This does not allow the Crown to interfere with changes to entitlement under the local 'native' system of law. Changes to such traditional entitlements do not serve to extinguish the aboriginal title: id at 110 per Deane and Gaudron JJ.

title[401] through outright or conditional[402] purchase or voluntary surrender to the Crown.[403]

The Court found the rights and incidents stemming from the aboriginal title 'may be protected by such legal or equitable remedies' that are appropriate to the particular rights and interests provided under the traditional laws and customs.[404] Further, such remedies may be sought through representative actions brought on behalf of those claiming under the communal native title.[405] The Court believed such persons would have a sufficient interest in the proceedings to bring an action to protect that communal title.[406]

The majority's views on the nature of the aboriginal title stands in marked contrast with those of Dawson J. He believed the aboriginal title was no more than a form of permissive licence, quoting in support Lord Watson's comment in *St Catherine's Milling and Lumber Company v. The Queen*[407] that aboriginal tenure is 'a personal and usufructuary right, dependent upon the goodwill of the Sovereign.'

It is submitted his use of this statement is misleading, failing to note that it was unnecessary for the Board to determine the nature of the aboriginal title to resolve that dispute.[408] Moreover, subsequent case law has either rejected this description of the aboriginal title as incorrect[409] or re-interpreted the characterisation in terms of an enforceable legal right.[410] By describing the aboriginal title as

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401. Id at 88 per Deane and Gaudron JJ.
402. If the surrender was conditional on, for example, 'a grant of tenure in land,' the Crown may be under a fiduciary obligation to comply: ibid at 60, citing *Guerin v. The Queen,* supra n 204 at 334, 339, 342-343, 356-357 and 360-361, Brennan J finding it unnecessary to consider the existence of a fiduciary duty in this case.
403. Id at 60, citing *St Catherine's Milling and Lumber Co v. The Queen,* supra n 158 at 55. Note the apparent inconsistency between this reference to 'purchase' and Brennan J's seeming belief that the Crown had a limitless power to extinguish the aboriginal title. See also Deane and Gaudron JJ, id at 110.
404. Id at 61; provided they 'are not repugnant to natural justice, equity and good conscience,' citing *Idewu Inasa v. Oshodi,* [1934] AC 99.
405. Id at 61-62.
406. Id at 62, citing *Australian Conservation Foundation v. The Commonwealth,* (1980) 146 CLR 493 at 530-531, 537-539 and 547-548; *Onus v. Alcoa of Australia Ltd,* (1981) 149 CLR 27 at 35-36, 41-42, 46, 51, 62 and 74-75.
407. Supra n 167.
408. Id at 55.
409. See the comments of Judson J in *Calder's case,* supra n 197 esp at 156 where he notes 'it does not help one in the solution of this problem to call it a 'personal usufructuary right'.'
410. Such as Dickson J in *Guerin v. The Queen,* supra n 204 at 339; a passage which Dawson J himself quotes, supra n 1 at 133.

'personal', as one eminent justice has explained, all this characterisation is highlighting is the general inalienability of the aboriginal title.[411] Thus it is submitted the personal nature of the title does not serve to reduce such tenure to a permissive licence as Dawson J suggests.

It is submitted the preferable approach can be found in Dickson J's judgment in *Guerin v. The Queen*[412] where he stressed the *sui generis* nature of the aboriginal title, incapable of exact definition. As Judson J appreciated in *Calder's case,*[413] no great assistance can be gained from classifications such as personal and proprietary. The aboriginal title is a unique form of tenure stemming from traditional concepts and thus in many ways alien to western notions of land tenure.

(vi) Crown's fiduciary duties

As noted above, the plaintiffs suggested the Crown stood in a fiduciary relationship with the aboriginal peoples of the Murray Islands and was consequently bound to protect their aboriginal interests. The defendant, by contrast, asserted there was no basis for any suggestion and that the Crown enjoyed an unhampered, absolute power to extinguish the aboriginal title.

Toohey J was the only member of the majority to consider these submissions. He rejected the defendant's suggestion that the Crown had an absolute power, declaring that it is 'precisely the power to affect the interests of a person adversely which gives rise to a duty to act in the interests of that person ...'.[414] Following the decision in *Guerin v. The Queen,*[415] he stated that it was the very power to extinguish the aboriginal title, and the aboriginal owner's consequent vulnerability, that gave rise to this 'fiduciary obligation on the part of the Crown.'[416] The power to so destroy the aboriginal title was so extraordinary that it was appropriate for '[e]quity to ensure that the position is not abused.'[417]

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411. Per Dickson J in *Guerin v. The Queen,* ibid, quoted by Dawson J, id at 133.
412. Ibid.
413. Supra n 197.
414. Supra n 1 at 200-201, citing *inter alia Hospital Products Ltd* (1984) 156 CLR at 97.
415. Supra n 204 at 376. The case arose out of a surrender of valuable reserve land by the Musqueam Indian Band of British Columbia to the Crown. The land was surrendered for the purpose of leasing it to a golf club. The Crown ultimately entered into a lease for the land on the basis of terms considerably less advantageous than those discussed with the Band. The Band successfully sought damages for the breach of the Crown's fiduciary duties.
416. Supra n 1 at 203.
417. Ibid.

Toohey J found an additional basis for this fiduciary duty to lie in the Queensland government's dealings with the subject Islands.[418] The creation of the reservation, for example, sufficed to create a trust/fiduciary relationship, requiring the Crown to act in the best interests of the aboriginal occupants of such lands. Moreover, this conclusion accorded with the history of the protection of aboriginal interests[419] and the common law principle of continuity.[420]

As to the nature of this fiduciary relationship, Toohey J suggested it to be based on a constructive trust, with the Crown holding the legal title to traditional lands, while the aboriginal owners enjoyed the beneficial title.[421] The consequent obligations strictly did not limit Parliament's legislative authority, but made this entity liable for any breach of its duties.[422] Whilst he believed the particular obligations stemming from this relationship were tailored to the 'specific relationship from which it arises,'[423] certain obligations, such as the duty to act for the benefit of the beneficiaries,[424] were applicable to all cases.

In the present situation, Toohey J found this fiduciary duty obliged the Crown to 'ensure the traditional title is not impaired or destroyed without the consent of or otherwise contrary to the interests of the titleholders.'[425] Thus Toohey J believed the obligation prevented the Crown from degazetting the Islands and thereby terminating the reserve, or alienating these lands in a manner inconsistent with the plaintiffs' aboriginal interests.[426]

Toohey J also rejected the defendant's suggestion that any trust obligations imposed on the Crown were political in nature and thus

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418. Ibid.
419. Through the creation of reserves and the condemnation of purported sales of aboriginal land: ibid.
420. Which requires the Crown to respect the aboriginal title: ibid.
421. Id at 203; Toohey J referred to Dickson J's approach where the obligation is seen as fiduciary in nature, rather than as a trust, but perhaps because of Dickson J's comment that the Crown is liable for a breach of the fiduciary obligation 'to the same extent as if such a trust were in effect' (supra n 204 at 376) Toohey J concluded the obligation to be in the nature of a constructive trust: id at 204.
422. Ibid.
423. Ibid. Thus Toohey J distinguishes the content of the obligation considered by McEachern CJ in the *Delgamuukw case,* supra n 265 on the basis that the fiduciary obligation in that case stemmed from the extinguishment of the aboriginal title. By contrast, here the extinguishment of the aboriginal title was not the source of the obligations, but rather would amount to a breach of such obligation: id at 205.
424. As opposed to his or her own benefit or that of a third party: id at 204, citing *Hospital Products case,* supra n 414.
425. Id at 204 and 214.
426. Id at 204.

unenforceable.[427] The 'political trust' cases upon which the defendant relied were distinguished on the basis that they involved the creation of express trusts by the Crown. By contrast, the subject obligations arose out of the relationship between the Crown's legal authority and the aboriginal occupants' title and thus gave rise to legally enforceable rights.[428]

By contrast, Dawson J rejected the suggestion that the Crown in this case was bound by any such fiduciary duties, essentially on the basis that the plaintiffs' aboriginal title had been extinguished on annexation.[429] As the fiduciary duty was dependant upon the existence of the aboriginal title, with the extinguishment of the plaintiffs' rights, the possibility of fiduciary responsibilities disappeared.[430]

Furthermore he rejected the very notion that the Crown could be subject to such fiduciary obligations.[431] The wealth of United States authorities[432] supporting the plaintiffs' contentions was said to be based on the status of Indian tribes as domestic dependent Nations and therefore irrelevant.[433] Similarly, Dawson J rejected the Canadian authority, *Guerin v. The Queen*[434] as based, *inter alia*, on 'statutory provisions prohibiting the disposal of reserve land except through surrender to the Crown.'[435]

He suggested such a statutory regime found no parallel in Queensland.[436] While under the *Land Act 1910* the Murray Islands had been placed in trust for the aboriginal occupants, Dawson J believed the Crown's ability to revoke the reservation[437] and the fact that reservation was for the benefit of the aboriginal people of Queensland generally,

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427. Relying on what are known as the 'political trust' cases: *Kinloch v. Secretary of State for India,* (1882) 7 App Cas 619 and *Tito v. Waddell (No 2),* [1977] Ch 106.
428. Supra n 1 at 202. Toohey J also distinguished *Williams v. Attorney-General for New South Wales,* supra n 66, suggesting the basis for that decision was the impossibility of identifying the interest in land which was to be held on trust. No such difficulty existed on the facts of this case.
429. Id at 164 and 166-167.
430. Id at 166-167.
431. Id at 165.
432. Such as *Cherokee Nation v. Georgia,* supra n 7 at 12; *Worcester v. Georgia,* supra n 7 at 376; *United States v. Kagma,* 118 US (1886) at 383-384; *United States v. Mitchell,* supra n 24 at 225.
433. Supra n 1 at 165.
434. Ibid.
435. Ibid.
436. Id at 167.
437. Id at 168.

were inconsistent with the preservation of the aboriginal title[438] and thus not akin to the *Indian Act's* recognition of the aboriginal title.[439]

It is submitted Dawson J erroneously rejected such cases law as being inapplicable to the Australian circumstances. These cases were not decided on the basis of the sovereign character of the Indian Nations, nor the statutory regime in Canada. Rather, the courts found that the nature of the aboriginal title and, in particular, the vulnerability of such title to Crown extinguishment,[440] gave rise to the subject fiduciary obligations. While it is true that the disposition of land in Canada was regulated under the *Indian Act*, it is submitted the Court's conclusion in *Guerin* v. *The Queen*[441] was not confined to this statutory regime, but rather was based on the general nature of the aboriginal title.[442] More specifically, Dawson J's rejection of any fiduciary relationship ignores the High Court's own comments in *Northern Land Council v. The Commonwealth*[443] that this fiduciary relationship stemmed from the inherent nature of the aboriginal title, rather than any statutory provisions.[444] Thus it is submitted the reasoning in such cases is equally applicable to the aboriginal peoples of Australia and, in particular, the plaintiffs.

Further, it is submitted that Dawson J's suggestion that the *Land Act 1910* does not afford protection akin to that provided under the Indian Act can be met with criticism. As to the suggestion that the *Land Act 1910* accords no protection because the reservation could be revoked at any time,[445] it is submitted that such an assertion of sovereign power begs the question of how that power can/should be exercised. The existence of a power does not logically involve the ability to exercise it at will, illegally or for self serving reasons.

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438. Suggesting the Act to affirm the Crown's control of the subject lands to the exclusion of aboriginal interests in the land: id at 167, 168 and 169. Similarly, while he acknowledged that the Queensland legislature engaged in a policy of protecting the welfare and lifestyle of the Murray Islanders, he did not believe this to extend to the protection of interests in land: id at 169.
439. Id at 167.
440. As Dickson J stressed in *Guerin v. The Queen,* the fiduciary relationship 'has its roots in the concept of aboriginal, native or Indian title': supra n 204 at 334. See also *R v. Sparrow,* supra n 228 at 408.
441. Ibid.
442. This is supported by the general language Dickson J uses when he refers to the inalienability of the aboriginal title: ibid.
443. (1986) 161 CLR 1; further stated to the Full Court of the High Court on 21 October 1987, 87 / 049.
444. Transcript of proceedings, id at 4 and 9-10.
445. Supra n 1 at 168.

As to the second basis for rejecting the *Land Act 1910*; that is, the reservation of the land for all aboriginal peoples of the State;[446] as the majority of the Court noted, any general right of user provided under the statute was subordinate to the Meriam people's specific rights stemming from the aboriginal title.[447]

Thus it is submitted that the preferable view is that the reasoning in *Guerin v. The Queen*[448] and other authorities are applicable to Australian aboriginal relations.

(vii) Common law title

As noted above, the plaintiffs' claims were based on two forms of title: the aboriginal title and the common law possessory title.[449] Toohey and Dawson JJ were the only members of the Court to consider the plaintiffs' claims to the latter.[450]

Assuming the Australian colonies were acquired by settlement and the common law consequently governed the ownership of land on the Islands, Toohey J asserted that under the common law the possessor of land was presumed to have a fee simple estate in the absence of proof of better title held by another.[451] Applying this principle to the facts before him, he found that *prima facie* the Meriam people had acquired at annexation fee simple estate to the subject lands.[452] Such presumed title, he noted, gave the plaintiffs a right to recover possession of their land in the case of dispossession.[453]

As noted above, the majority of the Court rejected the defendant's claim that on annexation the Crown acquired an absolute title to the Australian colonies. Consequently, claims that the Crown had an absolute title and therefore a better claim to the land held by the Meriam people, had to be rejected. Importantly, Toohey J stressed that the Crown's title would not be just assumed by the courts. To rebut the

446. In other words, for the benefit of the aboriginal inhabitants of the State as a whole: ibid.
447. Id at 67. See also Deane and Gaudron JJ, id at 114, 117 and 118.
448. Supra n 204.
449. Based on long (as opposed to adverse) possession from annexation to today: supra n 1 at 206.
450. Though in light of his earlier conclusions regarding the existence of the aboriginal title and the Crown's obligations to protect such territorial interests, Toohey J believed it was unnecessary for him to express a firm opinion on this argument: id at 207.
451. Id at 210. See also Dawson J, id at 163.
452. Id at 209-210 and 211.
453. As nothing has upset the presumption that the possessor has the fee simple title: id at 210.

plaintiffs' presumption of fee simple title, '[t]he Crown must prove its present title just like anyone else.'[454]

Toohey J believed a stronger basis for the defendant's claim to better title lay with the fiction underlying the theory of tenures that all land was at some time in the possession of the Crown. Thus it could be argued that on annexation, possession of all land vested in the Crown[455] and thus the Crown had a superior title. Toohey J ultimately rejected this line of argument, declaring this fiction to be confined to the 'special purpose' of securing the Crown's paramount lordship for the purpose of Crown grants.[456] The fiction was, therefore, inapplicable to determining interests which had their source other than in Crown grants.[457]

Finally, to establish a common law title the plaintiffs had to show that at the date of annexation their ancestors occupied the subject lands in a manner amounting to legal possession of these lands.[458] Whilst, Toohey J believed that in the absence of proof to the contrary, he could presume that the occupier of land was also in legal possession,[459] in this case he found it was unquestionable that the Meriam people's occupation amounted to possession under English law.[460] Thus Toohey J concluded the Meriam people may hold both the aboriginal title and a common law title to the lands under claim.[461]

Dawson J rejected the plaintiffs' claim to a common law title, simply asserting that the plaintiffs' deemed seisin in fee could not prevail over the Crown's radical title.[462] It appears this conclusion was based on his belief that on annexation the Crown acquired an absolute title to all lands and thus had a better title than the plaintiffs' presumed fee simple.

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454. Id at 211, quoting McNeil, *Common Law Aboriginal Title* at 85.
455. Ibid.
456. Ibid.
457. Further, he believed that if this fictitious title was taken to its full extent it could be suggested necessary to create a fictitious person in possession of the land and from whom the Crown acquired its title: ibid, quoting *McNeil*, supra n 454 at 84. Moreover, Toohey J believed if fictions were operative in this context, it would be necessary to deem the possessor also to be the recipient of a fictitional Crown grant at least equal to that claimed by the Crown. It is submitted the extension of such fictions to this area is fraught with difficulties and it is submitted does not provide a sufficient basis for rejecting claims to a common law title: id at 211, quoting *McNeil*, id at 84.
458. Id at 206. The necessary conduct to establish possession will vary according to the nature of the subject land ie whether it was open to cultivation: id at 213.
459. Id at 212.
460. Ibid.
461. Ibid.
462. Id at 163.

7. MABO IN PERSPECTIVE

What then did *Mabo v. Queensland*[463] decide? The following propositions were established in the majority judgments:

(i) Australia was not *terra nullius* in 1788;
(ii) Australian was acquired by settlement, through deemed cession;
(iii) the common law recognises and preserves aboriginal title;
(iv) aboriginal title operates as a burden on the Crown's title;
(v) aboriginal title need not be formally acknowledged by the government before it will be recognised at common law;
(vi) aboriginal title may be extinguished by a governmental actions evincing a clear and plain intent to so extinguish the title or by actions inconsistent with the continued enjoyment of aboriginal title; and
(vii) while divided on the issue, the majority asserted there to be no common law right to compensation for the extinguishment of aboriginal title.

Many issues, however, remain unresolved:

(i) what are the prerequisites for establishing title at common law;
(ii) the applicability of such principles to non-territorial rights such as sea rights;
(iii) whether aboriginal title extends to the traditional owners the right to enjoy the proceeds from mining on such land;
(iv) what actions are considered to be inconsistent with the continued enjoyment of aboriginal title ie reservations and national parks;
(v) whether aboriginal title can be implicitly abrogated;
(vi) the governments' ability to invoke defences such as laches and statute of limitations;
(vii) the governments' ability to legislatively reverse the determination;
(viii) the existence, and extent, of the Crown's fiduciary duty to safeguard aboriginal interests; and
(ix) the interaction between the *Racial Discrimination Act 1975* (Cwlth), s. 51(xxxi) *Commonwealth Constitution Act 1901* (Cwlth) and the majority's finding with respect to the absence of any right to compensation at common law.

8. THE FUTURE

463. Supra n 1.

For members of the aboriginal population not still in occupation of their traditional lands, the decision does not bring much comfort.[464] As the use of land in a manner inconsistent with the continuation of aboriginal title serves to extinguish traditional tenure, future claims will only be able to extend to vacant Crown land or areas subject to pastoral leases which expressly preserve the right of the aboriginal owners to continue to use such.

Moreover, as the Court confined the right to claim title to those who still maintain contact with their traditional lands and obey the customs from which this traditional right of occupation stems, many dispossessed communities will continue to be remediless despite this determination.

Even if a sufficient and continuing connection with the land was established by a claimant, given the majority's[465] finding that there is no right to compensation even for a wrongful dispossession, the decision itself only provides a minute portion of the aboriginal population with any rights in practice.[466] Were it not for the protection extended by the *Racial Discrimination Act 1975* (Cwlth), it is submitted even after *Mabo v. Queensland*[467] the aboriginal title would only provide a precarious form of tenure in Australia.

It appears that attempts will also be made by certain Australian governments to prevent the few groups that appear to meet the rigours of *Mabo v. Queensland*[468] from making a claim. The *McArthur River Project Agreement Ratification Amendment Act 1993* (NT), for example, purports to validate titles in respect to the McArthur River lead, zinc and silver mine. The Victorian Parliament also passed general legislation for the validation of titles granted after the introduction of the *Racial Discrimination Act 1975* (Cwlth).[469]

While the validity of such legislative enactments remains to be determined in light of (i) the governments' fiduciary duty to safeguard aboriginal interests and (ii) the operation of the *Racial Discrimination Act 1975*, coupled with s. 109 *Commonwealth Constitution*, it is submitted such actions should be deplored. Any attempt to legislatively reverse *Mabo v. Queensland*[470] or suspend claims made by traditional

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464. Brennan J noted the Aboriginal people have been 'substantially dispossessed of their traditional lands' through the exercise of the Crown's sovereign power to grant land: id at 68.
465. Brennan J, with whom Mason CJ and McHugh J agreed, and Dawson J. Deane and Gaudron JJ also denied any right to compensation where the dispossession was carried out with a clear and plain intention to extinguish the aboriginal title.
466. Only Toohey J recognised an extinguishment of the aboriginal title to be a compensateable breach of the Crown's fiduciary duties.
467. Supra n 1.
468. Ibid.
469. *Land Titles Valuation Act 1993* (Vic.).
470. Supra n 1.

owners in reliance of this decision are as unjust as the original acts of dispossession throughout the history of European settlement.

Perhaps the most disturbing aspect of *Mabo v. Queensland*[471] stems, not from the judgment itself, but from the outrage it has provoke. Inflamed by media sensationalism and outrageous claims by certain political figures, many members of Australian society incorrectly believe that the decision allows aboriginal peoples to successfully claim the backyards of suburban Australia. Despite the Minister for Aboriginal and Torres Strait Islander Affairs, Mr Robert Tickner's document, entitled 'Rebutting Mabo Myths,' these unfounded fear continue to grow and intensify. It is unfortunate that a decision which should have provided the foundations for a reconciliation between aboriginal and non-aboriginal Australians has incited such unnecessary insecurity of tenure and consequent hatred.

471. Ibid.