MABO, WIK AND THE ART OF PARADIGM MANAGEMENT

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[In this article, the author considers the extent to which the cases of Mabo v Queensland [No 2] *and* The Wik Peoples v Queensland *have altered the basis of land law in Australia. He argues that these two landmark cases have further removed Australian property law from its English feudal origins and brought it into accordance with the historical reality of its development. However, neither case alters the conceptual basis of Anglo-Australian property law sufficiently to accord equal recognition to indigenous property rights.]*

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INTRODUCTION

The High Court's judgment in *Mabo v Queensland [No 2]*[1] considered some of the fundamental tenets of Australian land law. The exact legal consequences of the judgment, however, are as controversial as its subject matter, with commentators characterising it as everything from a 'judicial revolution'[2] to a 'cautious correction'.[3] The implications of *Mabo* for Australian real property law have recently been reviewed by a reconstituted High Court in *The Wik Peoples v*

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1 (1992) 175 CLR 1 ('*Mabo*').

2 Margaret Stephenson and Suri Ratnapala (eds), *Mabo: A Judicial Revolution* (1993).

3 Garth Nettheim, 'Judicial Revolution or Cautious Correction? *Mabo v Queensland*' (1993) 16 *University of New South Wales Law Journal* 1.

Queensland; The Thayorre People v Queensland,[4] where Gummow J observed that '[t]here also is the need to adjust ingrained habits of thought and understanding to what, since 1992, must be accepted as the common law of Australia.'[5]

This article considers the extent to which the *Mabo* and *Wik* judgments have altered the *doctrinal* and *conceptual* foundations of Australian land law. It has two main theses. Part I contends that, at the doctrinal level, *Mabo* and *Wik* have developed the common law to bring it closer to the historical reality of land tenure development in Australia. Part II argues that neither case significantly alters the conceptual foundations of Anglo-Australian real property and considers some of the limits of both judgments.

I THE DOCTRINAL DEVELOPMENTS IN *MABO* AND *WIK*: LAND LAW AND LEGAL HISTORY

A *Feudal Doctrine and Australian Land Law I*

Textbook writers such as Oxley-Oxland and Stein,[6] and Hargreaves and Helmore[7] frequently make two contradictory observations about Australian land law: firstly, that its *theoretical* origins are in English feudal doctrines; and secondly, that English feudal doctrines have little or no *practical* relevance to Australian real property law.[8] Under the 'reception theory' of the common law,[9] all laws of England were automatically imported into the municipal law of a settled colony, to the extent that they were applicable to the new colony's circumstances.[10] The *Australia Courts Act 1828* (Imp) embodied this doctrine statutorily,[11] and was the legal instrument by which feudal land law was formally 'received' as the foundation of Australian land law.[12] Nevertheless, by 1828 in England the social reality of feudalism had all but disappeared,[13] and it was the *myth* of feudalism qua conceptual foundation of legal doctrine that retained suasive force.[14] A detailed knowledge of the actual workings of feudal tenures

[4] (1996) 187 CLR 1 ('*Wik*').

[5] Ibid 177.

[6] John Oxley-Oxland and Robert Stein, *Understanding Land Law* (1985).

[7] Anthony Hargreaves and Basil Helmore, *An Introduction to the Principles of Land Law* (1963) 3.

[8] See also Godfrey Millard and Alfred Millard, *The Law of Real Property in New South Wales* (1905).

[9] William Blackstone, *Commentaries on the Laws of England* (first published 1765, 1978 ed) vol 1, 107.

[10] *Attorney-General v Brown* (1847) 1 Legge 312; *Cooper v Stuart* (1889) 14 App Cas 286, 291–2; *R v Farrell* (1831) 1 Legge 5, 9–11, 16–20, *Randwick Corporation v Rutledge* (1959) 102 CLR 54, 71 (Windeyer J); *Mabo* (1992) 175 CLR 1, 37 (Brennan J); Kent McNeil, 'A Question of Title: Has the Common Law Been Misapplied to Dispossess the Aboriginals?' (1990) 16 *Monash University Law Review* 91.

[11] *Australia Courts Act 1828* (Imp) 9 Geo 4, c 83, s 24.

[12] *Mabo* (1992) 175 CLR 1, 37 (Brennan J).

[13] Alfred Simpson, *An Introduction to the History of Land Law* (1961) 1, J Spencer, 'The Freeholder and Feudalism Today' (1977) 122 *Solicitor's Journal* 289; Eric Hobsbawm, *Industry and Empire* (1969) 16–17.

[14] Karl Renner, *The Institutions of Private Law and Their Social Functions* (1949) 105–8, 114–22.

was irrelevant for even English lawyers,[15] while in Australia the tenurial incidents of grants were even further removed from feudal law than those applicable in England.[16] However, '*in theory* the jurisprudence of the common law could not be understood without recourse to the feudal idea'.[17] Modern legal doctrine,[18] with its tendency towards reification,[19] had 'forgotten' the social realities that gave rise to feudal land law[20] while retaining *in abstracto* its concepts and terms as the theoretical justification for the force of law.[21] Thus, while the practical legal consequences of feudal doctrine were negligible in Australia,[22] '[t]he received idea of feudalism, essentially from Blackstone and by this time highly abstracted, unequivocally informed the articulation of Australian land law.'[23]

Ironically, the emphasis placed upon the 'received idea' of feudalism in the judicial exposition of Australian land law had the paradoxical effect of making Australian doctrine 'more feudal' than England. Hence, in *Attorney-General v Brown*[24] the feudal principle that all land is held mediately or immediately of the Crown[25] was applied literally to render the Crown in Australia the universal beneficial occupant of all lands not alienated. While in England the principle of paramount lordship was recognised as a fiction developed to meet the imperatives of the emerging absolutist state after 1066,[26] a long line of authorities in Australia insisted that:

> By the laws of England, the King, in virtue of his Crown, is the possessor of all unappropriated lands of the Kingdom ... The right to the soil, and of all lands in

15 A Simpson, above n 13, 47

16 T Fry, 'Land Tenures in Australian Law' (1946) 3 *Res Judicatae* 158, 159. For further discussion, see below Part I(C)

17 Michael Stuckey, 'Feudalism and Australian Land Law: "A Shadowy, Ghostlike Survival"?' (1994) 13 *University of Tasmania Law Review* 102, 107.

18 Viz, legal doctrine characteristic of capitalist modernity.

19 Csaba Varga, *The Place of Law in Lukacs' World Concept* (1985) 50ff.

20 See generally A Simpson, above n 13, chh 1–2; Perry Anderson, *Passages from Antiquity to Feudalism* (first published 1979, 1996 ed) For a description of various kinds of land tenure, see Margaret Stephenson, '*Mabo* — A New Dimension to Land Tenure — Whose Land Now?' in Stephenson and Ratnapala (eds), above n 2, 96.

21 Interestingly, this form of justification reveals the tension between a claim to facticity (ie genesis in sacralised tradition) and a claim to validity (abstract reason). This tension seems characteristic of societies making the transition from the early modern to the modern/high modern: Jürgen Habermas, *Between Facts and Norms* (1996) ch 1.

22 Fry, above n 16, 160.

23 Stuckey, above n 17, 108.

24 (1847) 1 Legge 312.

25 William Blackstone, *Commentaries on the Laws of England* (first published 1765, 1978 ed) vol 2, 104–5; Simpson, above n 13, 2. This 'literal' application of feudal doctrine must also be seen as a response to domestic social and economic imperatives: see below Part I(C) for discussion

26 Henry Stephen, *New Commentaries on the Laws of England* (1979) vol 1, 161–73; Blackstone, above n 25, 50–1; Simpson, above n 13, 2; Brendan Edgeworth, 'Tenure, Allodialism and Indigenous Rights at Common Law: English, United States and Australian Land Law Compared after *Mabo v Queensland*' (1994) 23 *Anglo-American Law Review* 397, 427–8; Edward Jenks, *A History of the Australasian Colonies (From Their Foundation to the Year 1911)* (1912) 58–9; McNeil, above n 10, 98; Garth Nettheim, '*Wik*. On Invasions, Legal Fictions, Myths and Rational Responses' (1997) 20 *University of New South Wales Law Journal* 495.

> the colony, become vested immediately upon its settlement, in His Majesty, in the right of the Crown, and as representative of the British Nation.[27]

Predicated upon an 'expanded' international law notion of terra nullius, whereby societies deemed to be of a 'low-scale of social organization'[28] could not legally possess the land they occupied, the 'absolute beneficial ownership' theory of Crown title held that, upon the assertion of sovereignty the Crown also became the 'universal occupant' of all lands in Australia.[29] In a strict application of feudal doctrine, no interest in land could be asserted unless it was 'holden mediately or immediately of the Crown.'[30]

It must be observed immediately that the 'absolute beneficial ownership' theory of Crown title cannot be seen simply as an over-zealous judicial application of feudal doctrine. The doctrine in *Attorney-General v Brown*[31] was the legal basis for and post facto rationalisation of the denial of indigenous property rights, dispossession and genocide. It is a reflection not only of the 'shadowy, ghostlike survival of feudalism', but also of law selectively drawing upon its tradition to meet the exigencies of invasion and colonisation.[32] Just as in England the fiction of paramount lordship was invented to support the new rulers, in the Age of Empire the dogma of universal occupancy was revived to justify imperial conquest.[33] As Reynolds succinctly expresses it, '[t]he law became a weapon wielded by the conquerors'.[34]

B Mabo v Queensland [No 2] — *The Art of Paradigm Management*

Mabo v Queensland [No 2][35] represents a first step in the High Court's reassessment of the application of feudal doctrine to Australian conditions. When assessing the impact of *Mabo* on the foundations of land law, it is heuristically useful to synthesise the doctrines in *Attorney-General v Brown*[36] and subsequent cases into three interlinked postulates: firstly, that the common law, when applied in the colonies, included the doctrines of paramount lordship, Crown prerogative

[27] *R v Steel* (1834) 1 Legge 65, 68–9 (Forbes J). See also *MacDonald v Levy* (1833) 1 Legge 39; *Hatfield v Alford* (1846) 1 Legge 330; *Doe dem Wilson v Terry* (1849) 1 Legge 505; *Williams v Attorney-General (NSW)* (1913) 16 CLR 404, 439 (Isaacs J); *Randwick Corporation v Rutledge* (1959) 102 CLR 54, 71; *Wade v NSW Rutile Mining Co Pty Ltd* (1969) 121 CLR 177, *NSW v Commonwealth* (1975) 135 CLR 337.

[28] *Re Southern Indonesia* [1919] AC 211, 233–4.

[29] *Williams v Attorney-General (NSW)* (1913) 16 CLR 404, 439 (Isaacs J), *Attorney-General v Brown* (1847) 1 Legge 312; *NSW v Commonwealth* (1975) 135 CLR 337.

[30] *NSW v Commonwealth* (1975) 135 CLR 337, 438.

[31] (1847) 1 Legge 312

[32] See below Part I(C).

[33] Edgeworth, above n 26, 427; Noel Pearson, '204 Years of Invisible Title: From the Most Vehement Denial of a People's Rights to Land to a Most Cautious and Belated Recognition' in Stephenson and Ratnapala (eds), above n 2, 75, 87–8, Henry Reynolds, *The Law of the Land* (2nd ed, 1992) 4–5, 29, 36–7, 115–6, 156

[34] Henry Reynolds, *Aboriginal Sovereignty* (1996) 54 See also Robert Williams, *The American Indian in Western Legal Thought* (1990) 8.

[35] (1992) 175 CLR 1.

[36] (1847) 1 Legge 312.

(sovereignty), tenure and estates;[37] secondly, that there was no other proprietor of the land at the time of settlement;[38] and thirdly, in consequence of the Crown's prerogative and the absence of any other proprietor, all land in the colony was acquired by the Crown on behalf of 'the patrimony of the nation'.[39]

In effect, the majority judgments in *Mabo*[40] revise the second postulate in order to bring it into accordance with historical fact.[41] They abandon the 'self-serving ethnocentricism'[42] that indigenous Australians were not 'civilized' enough to hold an interest in land, and so are compelled to dispense with the third postulate — that, upon 'settlement', absolute beneficial ownership of all land passed immediately to the Crown.[43] Under the rubric of 'native title', the court recognises an interest in land that predates the Crown's assertion of sovereignty, and so is not held mediately or immediately of the Crown. Neither a tenure nor an estate, native title is variously characterised as a 'communal interest'[44] or a sui generis personal or usufructuary right[45] which survives the Crown's acquisition of sovereignty. The majority makes the recognition of a non-derivative indigenous interest in land *conceptually possible* by drawing on jurisprudence from comparable colonial jurisdictions, where the conflation of Crown prerogative and beneficial title has been abandoned.[46] The court recognises that the universal occupancy of the Crown is a fiction[47] that was applied only functionally in England.[48]

Nevertheless, each majority judgment is at pains to reiterate that the doctrines of tenure and estates form the foundations of landholding in Australia, and that native title exists subject to these doctrines.[49] Hence, *Mabo* clearly retains the first postulate of *Attorney-General v Brown*, upholding the doctrines of paramount lordship (*dominium directum*),[50] sovereignty and tenure and estates, while redefining the *consequences* of their application in the Australian context.[51]

[37] *Cooper v Stuart* (1889) 14 App Cas 286; *Williams v Attorney-General for NSW* (1913) 16 CLR 404, *NSW v Commonwealth* (1975) 135 CLR 337.

[38] *Attorney-General v Brown* (1847) 1 Legge 312; *Randwick Corporation v Rutledge* (1959) 102 CLR 54, 71.

[39] *Attorney-General v Brown* (1847) 1 Legge 312, 318.

[40] (1992) 175 CLR 1 (Mason CJ and McHugh J, Brennan J, Deane and Gaudron JJ, Toohey J).

[41] Reynolds, *The Law of the Land*, above n 33, 3; Reynolds, *Aboriginal Sovereignty*, above n 34, chh 1–3, 6

[42] McNeil, above n 10, 92.

[43] *Mabo* (1992) 175 CLR 1, 40–2 (Brennan J), 108–9 (Deane and Gaudron JJ), 180 (Toohey J); *Wik* (1996) 187 CLR 1, 180 (Gummow J). Cf David Ritter, 'The "Rejection of Terra Nullius" in *Mabo*: A Critical Analysis' (1996) 18 *Sydney Law Review* 5.

[44] *Mabo* (1992) 175 CLR 1, 57–8 (Brennan J), 88 (Deane and Gaudron JJ).

[45] Ibid 88 (Deane and Gaudron JJ).

[46] *Amodu Tijani v Secretary, Southern Nigeria* [1921] 2 AC 399; *Adeyinka Oyekan v Musendiku Adele* [1957] 1 WLR 876; *Calder v Attorney-General (British Columbia)* [1973] SCR 313.

[47] *Mabo* (1992) 175 CLR 1, 43 (Brennan J), 214 (Toohey J).

[48] Edgeworth, above n 26, 427; *Wik* (1996) 187 CLR 1, 186–7 (Gummow J).

[49] *Mabo* (1992) 175 CLR 1, 45 (Brennan J), 80–1, 86 (Deane and Gaudron JJ), 212–4 (Toohey J)

[50] Nicolette Rogers, 'The Emerging Concept of the "Radical Title" in Australia: Implications for Environmental Management' (1995) 12 *Environmental and Planning Law Journal* 183, 186.

[51] *Mabo* (1992) 175 CLR 1, 32, 43 (Brennan J), 102, 108–9 (Deane and Gaudron JJ).

Through the conceptual mechanism of 'radical title',[52] the Crown's prerogative to 'prescribe what parcels of land and what interests in those parcels should be enjoyed by others'[53] is retained, but divorced from the assumption that the Crown holds all land absolutely.[54] 'Radical title' is thus a postulate of both sovereignty and the doctrine of tenure[55] which is not 'real title'[56] but connotes the Crown's right to alienate land in accordance with the doctrines of tenures and estates. As Nicolette Rogers notes:

> The High Court plainly wished to secure the Crown as the only source of derivative title to land and thus the validity of those grants of estates in land already made by the Crown during the 200 years since settlement.[57]

To the extent that indigenous interests in land do not derive from a Crown grant, they stand outside the doctrine of tenure as a 'burden'[58] upon radical title.[59] However, native title is still subject to the Crown's prerogative to alienate any land in Australia, and native title is extinguished where the land is alienated in a tenure that is inconsistent with the incidents of native title.[60]

C *Feudal Doctrine and Australian Land Law II*

A feudal nomenclature unequivocally informed the judgments in *Mabo*,[61] but despite strong rhetorical gestures towards the English origins of Australian land law, it is not immediately clear from the judgments that the feudal concepts invoked have retained the same meaning in the Australian context as they held in England. Bradbrook, MacCallum and Moore strongly assert that '[t]he feudal system was irrelevant to the system of land grants in Australia',[62] while Hargreaves and Helmore argue that 'the feudal organization of society ... necessarily never affected this country'.[63] Only socage and copyhold tenures were applied to freehold grants in Australia from 1788, and quit rents were exacted in the form of an annuity that approximated a land tax.[64] Legal commentators also note that the advent of Torrens title as a system of encumbrance and transfer by registration 'is foreign to both the spirit and letter of the feudal system',[65] and exempli-

[52] The term is explained in Brennan J's judgment as cognate with 'ultimate title' and *plenum dominion*, and is a concept adapted from feudal land law: ibid 60.
[53] Ibid 48 (Brennan J).
[54] Ibid 43, 48, 53 (Brennan J), 81, 109 (Deane and Gaudron JJ), 180, 182 (Toohey J); Rogers, above n 50, 183–4; *Amodu Tijani v Secretary, Southern Nigeria* [1921] 2 AC 399, 410.
[55] *Mabo* (1992) 175 CLR 1, 48 (Brennan J).
[56] *Wik* (1996) 187 CLR 1, 234 (Kirby J).
[57] Rogers, above n 50, 184.
[58] *Mabo* (1992) 175 CLR 1, 57 (Brennan J), 111–2 (Deane and Gaudron JJ).
[59] Ibid 48–9, 52, 57 (Brennan J), 86 (Deane and Gaudron JJ).
[60] Ibid 58 (Brennan J), 111–2 (Deane and Gaudron JJ). For the incidents of native title, see ibid 58–60, 88, 109–10.
[61] Ibid 58 (Brennan J), 111–2 (Deane and Gaudron JJ).
[62] Adrian Bradbrook, Susan MacCallum and Anthony Moore, *Australian Real Property Law* (2nd ed, 1997), 1–2.
[63] Hargreaves and Helmore, above n 7, 2.
[64] Fry, above n 16, 160; Edgeworth, above n 26, 399–400.
[65] James Hogg, *The Australian Torrens System* (1905) 3. See also *Breskvar v Wall* (1971) 126 CLR 376.

fies the divergence between English and Australian property law over the first century of colonisation.[66] The system of registration, 'when superimposed on a system of feudal principles, tends to destroy those principles in practice'.[67]

The legal divergence was, naturally, a consequence of the unique social conditions of the developing colonies.[68] While the landed aristocracy in England retained sufficient social power to maintain (at least in part) the content of feudal rules,[69] there existed no corresponding class in Australia. It is not surprising, therefore, that the substantive content of land law diverged in accordance with the emerging needs and conflicts of expanding settler capitalism. With the shift from intensive to extensive agricultural production after 1825, and the rise of the wool trade,[70] the nascent squattocracy spread west and north in defiance of the colonial administration. According to Davidson and Wells, 'the central case law from 1834 governed disputes arising out of land settlement'.[71] A case which asserts the continued application of feudal principles as emphatically as *Attorney-General v Brown*[72] can in fact be seen as a domestic legal response to *local* conflicts over land and resource exploitation.[73] Feudal doctrine was invoked strategically to assert state control over land, against the aggressive expansion of agricultural capitalists.

The twenty year conflict (1830–1850) between the colonial administration and the new landed class also produced new forms of property suitable to the market relations and needs of colonial agrarian capitalism. The *Preferable Liens Act 1844* (NSW)[74] allowed sheep, cattle and horses to have the incidents of fixed property in England, and provided that mortgages could be entered into on the security of livestock and a grazier's wool clip.[75] This Act (vehemently opposed

66 A Buck, 'Torrens Title, Intestate Estates and the Origins of Australian Property Law' (1996) 4 *Australian Property Law Journal* 89, 91, Bradbrook, MacCallum and Moore, above n 62, 1–2; Peter Butt, *Land Law* (3rd ed, 1996). See also Godfrey Millard, *Appendix to Williams' Law of Real Property for the Use of Students in New South Wales* (1894) 4, cited in A Buck, 'Torrens Title, Intestate Estates and the Origins of Australian Property Law', 93.

67 Buck, 'Torrens Title, Intestate Estates and the Origins of Australian Property Law', above n 66, 96.

68 A Buck, 'Property Law and the Origins of Australian Egalitarianism' (1995) 1 *Australian Journal of Legal History* 145, 157; Alex Castles, *An Australian Legal History* (1982) 172–7.

69 A Davidson and A Wells, 'The Land, the Law and the State. Colonial Australia 1788–1890' (1984) 2 *Law in Context* 89, 111, Buck, 'Property Law and the Origins of Australian Egalitarianism', above n 68, 147–8; Hobsbawm, above n 13, ch 1. See also A Buck, 'The Logic of Egalitarianism: Law, Property and Society in Mid-nineteenth Century New South Wales' (1987) 5 *Law in Context* 18.

70 Davidson and Wells, above n 69, 91

71 Ibid

72 (1847) 1 Legge 312.

73 A somewhat more plausible explanation than Jenks' assertion that the doctrine was adopted because of the 'law-abidingness and innate conservatism of the Anglo-Saxon race': Jenks, above n 26, 59 See also A Buck, '*Attorney-General v Brown* and the Development of Property Law in Australia' (1994) *Australian Property Law Journal* 128, 130–1, Henry Reynolds and Jamie Dalziel, 'Aborigines and Pastoral Leases — Imperial and Colonial Policy 1826–1855' (1996) 19 *University of New South Wales Law Journal* 315, 327, 350; Edgeworth, above n 26, 410; Davidson and Wells, above n 69, 95.

74 *Preferable Liens Act 1844* (NSW) 7 Vict, c 3.

75 Castles, above n 68, 172; Buck, '*Attorney-General v Brown* and the Development of Property Law in Australia', above n 73, 134–8; Buck, 'Property Law and the Origins of Australian Egalitarianism', above n 68, 147.

by the Imperial authorities) effectively allowed squatters access to finance capital that they would otherwise have been unable to obtain with land acquired without title.[76] Similarly, their lobbying to legalise control over lands seized illegally was not insistent upon freehold as such, provided they had 'security over their means of production'.[77] This entailed obtaining land on terms 'fit for pastoral purposes'[78] because in the squatting age '[the land] is valued merely with reference to the stock it will feed'.[79]

It is in this context that a 'foundation was laid for the development of local laws which were essentially Australian in character'.[80] Pastoralists came to dominate the New South Wales Legislative Council, and after a 'degree of political organization hitherto unknown in Australia',[81] squatters succeeded in gaining rights to land they had seized under the *British Waste Lands Occupation Act 1846* (Imp).[82] This Act authorised the granting of pastoral leases for up to fourteen years, with rights to compensation for improvement and pre-emptive rights to purchase.[83] A counterpoint to the squatters' victory, however, was the Imperial administration's concern to prevent adverse possession by occupation,[84] and to preserve the access of Aboriginal people to the land (as part of a longer term policy of bringing the 'benefits' of civilisation to Aborigines).[85] Hence, among the unique incidents of such leases were reservations to the benefit of Aboriginal people, a right of resumption retained by the Crown,[86] and an express prohibition against converting perpetual or non-perpetual leasehold into a freehold without permission.[87]

The vesting of the control and management of 'waste lands' in the legislature, and the subsequent exercise of that control through the creation of various statutory instruments for the alienation of land, meant that 'Australia [was] ...

[76] Castles, above n 68, 173.

[77] Buck, 'Property Law and the Origins of Australian Egalitarianism', above n 68, 154–5.

[78] New South Wales, 'Report of the New South Wales Select Committee on Crown Land' in *Votes and Proceedings of the New South Wales Legislative Council* (1849) vol 2, 549 cited in Buck, '*Attorney-General v Brown* and the Development of Property Law in Australia', above n 73, 134.

[79] 'Law for the Colonies', *The Atlas*, 22 March 1845, cited in Buck, 'Property Law and the Origins of Australian Egalitarianism', above n 68, 157

[80] Castles, above n 68, 177.

[81] Ibid 176.

[82] *British Waste Lands Occupation Act 1846* (Imp) 9 & 10 Vict, c 104. The Act was introduced into the colony as *The Sale of Waste Lands Act Amendment Act 1846* (Imp), Order-in-Council, 9 March 1847

[83] Stephen Roberts, *History of Australian Land Settlement* (1924) 229–34; Jenks, above n 26, 70, Buck, 'Property Law and the Origins of Australian Egalitarianism', above n 68, 158, Castles, above n 68, 177

[84] Reynolds and Dalziel, above n 73, 316–17, 366–9

[85] Ibid 315–16, 323, 327, 330, 336–7, 338–42, 344, 380 Some of the 'benefits' of the civilising process are detailed in the recently released report of the Human Rights and Equal Opportunity Commission, *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* (1997)

[86] Fry, above n 16, 180.

[87] Ibid 163, *North Ganalanya Aboriginal Corporation v Queensland* (1995) 132 ALR 565, 585–6, 589, 590 (Lee J); Peter McDermott, '*Wik* and Doctrine of Tenures: A Synopsis' in Graham Hiley (ed), *The* Wik *Case. Issues and Implications* (1997) 35, 37, Reynolds and Dalziel, above n 73, 321, 323, 366.

transformed ... into a patchwork quilt of freeholdings, Crown leaseholdings, and Crown reserves.'[88] In contradistinction to the generalised rules of the English common law, in Australia it was possible to look to the precise terms of the instruments of the grant to ascertain its incidents,[89] and the system of grants that developed from 1855 onwards affirmed that 'the constitutional supremacy of Australian Parliaments and the Crown over all Australian Lands, as much as the feudal doctrines of the Common Law, is the origin of most of the incidents attached to Australian land tenures.'[90]

D The Wik Peoples v Queensland — *Another Look at Land Law*

The *Wik*[91] case considered the consequences of pastoral leases for native title, and hence was a second opportunity for the High Court to review the meaning of English land law terms in the Australian context. In essence, there were two issues for resolution in *Wik*: firstly, whether pastoral leases and native title could coexist;[92] and secondly, the consequences of the determination of pastoral leasehold for surviving native title rights.[93] The divergence between the majority[94] and the minority[95] can be summarised in terms of differing approaches taken toward the utility of English land law concepts in reinterpreting Australian leaseholds. What emerges from the majority's reasoning is a further 'Australianisation' of the land law lexicon, in contrast to Brennan CJ's fidelity to the English common law connotations of words. This divergence occurs in two areas: (i) the meaning of 'lease'; and (ii) the meaning of radical title.

1 *'True' Leases and Pastoral Leases*[96]

Under generalised common law rules, a definitive incident of a 'true' lease is exclusive possession.[97] An interest in land amounting to exclusive possession is, prima facie, inconsistent with native title and will extinguish it.[98] The question for the court was whether the use of the word 'lease' in the statutory instruments creating pastoral leases in Queensland should be given the same meaning and consequences as the common law 'lease'. Brennan CJ argued that 'the language of the lease' corresponds with the incidents of 'true' leasehold,[99] and that the

88 Fry, above n 16, 161.

89 Ibid.

90 Ibid 159. See also *North Ganalanja Aboriginal Corporation v Queensland* (1995) 132 ALR 565, 585–6, 589, 590 (Lee J); *Stewart v Williams* (1914) 18 CLR 381, 390; *Duncan v Queensland* (1916) 22 CLR 556, 578; *Hegarty v Ellis* (1908) 6 CLR 264.

91 (1996) 187 CLR 1.

92 Ibid 70 (Brennan CJ), 108 (Toohey J), 135 (Gaudron J), 195 (Gummow J), 208–9 (Kirby J).

93 Ibid 88 (Brennan CJ), 128–9 (Toohey J), 155 (Gaudron J), 189–90 (Gummow J), 234–5 (Kirby J).

94 Toohey, Gaudron, Gummow and Kirby JJ in separate judgments.

95 Brennan CJ, Dawson and McHugh JJ concurring.

96 This terminology is used by Gaudron J in *Wik* (1996) 187 CLR 1, 143

97 *Street v Mountford* [1985] AC 809, *Radaich v Smith* (1959) 101 CLR 209; *American Dairy Queen (Qld) Pty Ltd v Blue Rio Ltd* (1981) 147 CLR 677.

98 *Mabo* (1992) 175 CLR 1, 58–9, 68 (Brennan J), 112–13 (Deane and Gaudron JJ), 212–14 (Toohey J); *Wik* (1996) 187 CLR 1, 88 (Brennan CJ), 155 (Gaudron J), 176–7 (Gummow J), 234–5 (Kirby J). Cf *Wik* (1996) 187 CLR 1, 125 (Toohey J).

99 *Wik* (1996) 187 CLR 1, 77–8

meaning of the word 'lease' within other statutory grants has been held 'to import the interests and rights ordinarily attributed to those terms'[100] under general law. He thus characterises pastoral leases issued under statute as leases at common law, with the lessees entitled to exclusive possession.[101]

In contrast, a common theme in the majority judgments is a willingness to consider the meaning of 'lease' in the specific historical context that gave rise to the statutory instruments creating pastoral leases. They recognise that land tenure in the Australian context developed not only through different legal instruments,[102] but in accordance with

> the physical, social and economic conditions of the new colony, in particular the [practice of the] disposition of large areas of land (often unsurveyed) for a limited term for a limited purpose.[103]

Hence, while 'Australia inherited the English law of tenure',[104] it was 'subjected to change through a complex system of rights and obligations', such that the 'paraphernalia of feudal leasehold notions'[105] cannot be allowed to determine the content of the term 'lease'.[106] All four majority judges held that exclusive possession was not a necessary incident of a pastoral lease, and that the instruments under which the leases were created in the instant case did not express an intention to confer exclusive possession. As such, they did not necessarily extinguish native title.

2 *Reversion, Escheat and the Content of Radical Title*

The second critical divergence between the majority and Brennan CJ was on the meaning of radical title. The notion had emerged in *Mabo*, but its conceptual content remained unclear.[107] It arose for reconsideration in *Wik* through the question of the consequences for native title of the determination of a pastoral lease. Strictly, this was not necessary for the majority to decide, because of their view that native title survived the grant of the lease. On the other hand, Brennan CJ's interpretation of radical title and the results of its exercise were decisive in his conclusion that the creation of a statutory leasehold for third parties extinguished native title. The divergence between the majority and minority is again characterised by the latter's reliance on traditional English interpretations to determine the content of the concept, while the former are willing to use radical title more 'elastically' as a conceptual device to fit their argument.

[100] Ibid 78. Cited in support *American Dairy Queen (Qld) Pty Ltd v Blue Rio Ltd* (1981) 147 CLR 677, 686; *Goldsworthy Mining Ltd v Federal Commissioner of Taxation* (1973) 128 CLR 199, 213; *Davies v Littlejohn* (1923) 34 CLR 174, 187–8; *O'Keefe v Williams* (1907) 5 CLR 217, 230, *Minister for Lands and Forests v McPherson* (1991) 22 NSWLR 687, 712

[101] *Wik* (1996) 187 CLR 1, 82.

[102] Ibid 173–4 (Gummow J), 228–9 (Kirby J).

[103] Ibid 122 (Toohey J).

[104] Ibid 111.

[105] Ibid 224 (Kirby J).

[106] Ibid 175 (Gummow J), 139–44 (Gaudron J).

[107] See generally Rogers, above n 50

In Brennan CJ's view, 'radical title' connotes the Crown's *dominium directum*,[108] or paramount lordship, over all lands in the realm. Creating a tenure or estate in a third party is an exercise of *dominium directum* which confers on a third party a *dominium utile*.[109] Brennan CJ's dicta in *Mabo*[110] and his argument in *Wik*[111] are logically consistent with this schema. He asserts that the creation of a lease (statutory or otherwise) is an exercise of the Crown's right to determine which parcels of, and interests in, land will be enjoyed by subjects,[112] and this exercise

> establishes exhaustively the entire proprietary legal interests which may be enjoyed in that parcel of land ... Once land is brought within that regime, it is impossible to admit an interest which is not derived mediately or immediately from a Crown grant or which is not carved out from either an estate or the Crown's reversionary title.[113]

'Reversion' and 'escheat' are cognate concepts[114] that describe what occurs when an interest is determined (reversion) or a tenure lapses (escheat). The distinction is a vexed one,[115] but where donor and lord are one in the same (as in the case of land alienated by the Crown), both terms express the idea that the land must fall back to the donor/lord where a tenure lapses. This is consistent with the fundamental principle that a subject's land 'is not purely and simply [her or] his own, since it is held of a superior lord, in whom the ultimate property resides.'[116] In rejecting the plaintiff's argument that native title survives the lapse of a pastoral lease, Brennan CJ's argument coheres with the '*dominium directum*' interpretation of radical title, and *ex hypothesi*, the traditional meanings given to 'reversion' and 'escheat'.[117]

> If the interests alienated by the Crown do not exhaust those interests, the remaining proprietary interest is vested in the Crown ... In this country, the Crown takes either by reversion on the expiry of the interest granted or by escheat on failure of persons to take an interest granted ... It is only by treating the Crown, on exercise of the power of alienation of an estate, as having the full

[108] *Dominium directum* denotes the concept of paramount lordship, but the former term is used in classic texts: see generally Blackstone, above n 25, 104; Stephen, above n 26, 218–9; John Devereux and Shaunagh Dorsett, 'Towards a Reconsideration of the Doctrine of Tenures and Estates' (1996) 4 *Australian Property Law Journal* 6, 19–20. Brennan CJ seems to use *plenum dominium* in *Mabo* and *Wik* to denote *absolutum et directum dominium* viz paramount lordship *and* absolute ownership. Pollock and Maitland observe that 'in so far as the idea of feudalism is perfectly realised ... the same word dominium has to stand now for ownership and now for lordship': Sir Frederick Pollock and Frederic Maitland, *The History of English Law Before the Time of Edward I* (2nd ed, 1968) 230

[109] Blackstone, above n 25, 105.

[110] (1992) 175 CLR 1, 68.

[111] (1996) 187 CLR 1, 88.

[112] Ibid 90–1. See also *Mabo* (1992) 175 CLR 1, 48.

[113] *Wik* (1996) 187 CLR 1, 91.

[114] See generally A Simpson, above n 13, 19, 74–5.

[115] Ibid 74; *Wik* (1996) 187 CLR 1, 90

[116] Blackstone, above n 25, 105.

[117] See generally *Re Mercer v Moore* (1880) 14 Ch D 287.

> legal reversionary interest that the fundamental doctrines of tenure and estates can operate.[118]

One hundred and fifty years after *Attorney-General v Brown*, the 'received idea' of feudalism continues to exert the force of law, *in abstracto*, over Brennan CJ's judgment. In support of his argument, his Honour points out (somewhat indignantly) that to allow 'reversion' to native title holders is, in effect, to assert that *native title* underlies all forms of landholding. It logically conflates native title with residual (or allodial) title, and possibly *dominium directum*.[119] This hypothesis, rejected by Brennan CJ as a *reductio ad absurdum*, is correct in my view, and provides an alternative characterisation of indigenous interests in land that should be argued for. I will consider this in Part II below.

The majority in *Wik* do not, of course, conflate native title with residual title or *dominium directum* as Brennan CJ fears. Rather, they negotiate the tension by treating radical title as a 'thinner' concept than *dominium directum*, and so diverge further from English land law and its feudal legacy. 'Radical title' emerges in the judgments as an elastic concept which expands or recedes, depending upon the intention of the Crown as discerned from the statutory instruments creating interests in land.[120] 'Reversion' is distinguished from its common law meaning,[121] and held to connote the 'reassumption of the character of "Crown Land" ... liable to further disposition'.[122] The 'paraphernalia' of feudalism is abandoned.

II THE CONCEPTUAL LIMITS OF *MABO* AND *WIK*

It must be obvious to everyone who has undergone philosophical training that, if one has devised a language game, one can deduce one's own principles.[123]

> [T]here were two laws: the first was the law that belongs here, to the land, to Australia, that is the law that was here first. The other law, the law that came from Canberra and Sydney from the Courts, came over from England and it came here second, it came here a long time after the law here was strong.[124]

As Gerry Simpson observes, '[t]he *Mabo* case is the Australian judiciary's ... most significant attempt to integrate the claims of justice, Aboriginal human

118 *Wik* (1996) 187 CLR 1, 91.

119 Ibid 89.

120 Ibid 128 (Toohey J), 186–7 (Gummow J), 235 (Kirby J)

121 Ibid 128 (Toohey J), 155 (Gaudron J), 189 (Gummow J).

122 Ibid 189 (Gummow J)

123 Agnes Heller, *A Philosophy of Morals* (1990) 234.

124 Pitjantjatjara man, in evidence to the Australian Law Reform Commission, cited in Reynolds, *Aboriginal Sovereignty*, above n 34, 119 On Aboriginal concepts of law and land tenure, see also Nancy Williams, *The Yolngu and Their Land* (1986) chh 1–6; Ronald Hill, 'Blackfellas and Whitefellas: Aboriginal Land Rights, the *Mabo* decision and the Meaning of Land' (1995) 17 *Human Rights Quarterly* 303; Dianne Otto, 'A Question of Law or Politics? Indigenous Claims to Sovereignty in Australia' (1996) 22 *Syracuse Journal of Law and Commerce* 60; Nonie Sharp, 'No Ordinary Case. Reflections upon *Mabo (No 2)*' (1993) 15 *Sydney Law Review* 143, 152–7; Nonie Sharp, 'Contrasting Cultural Perspectives in the Murray Island Case' (1990) 8 *Law in Context* 1.

rights, international law, and Australian common law in a single decision'.[125] It is unsurprising, therefore, that numerous tensions arise in both *Mabo* and *Wik* in consequence of the court's attempt to reconcile conflicting imperatives. Part II of this article explores the conceptual limits of the cases. Its thesis is that the judgments are 'cautious corrections' that remain bounded by many of the assumptions that underpinned the 'unjust and discriminatory'[126] denial of Aboriginal title prior to *Mabo*.

A *The Characterisation of Native Title*

The adjustment of established legal doctrines to accommodate indigenous property rights undertaken in *Mabo* is best regarded, in my view, as a kind of 'minimalist legal pluralism'.[127] Indigenous property rights are acceptable only to the extent that they conform (or can be made to conform) to the 'skeleton'[128] of the existing framework. Hence, while the court[129] notionally rejects Blackburn J's requirement that indigenous property rights demonstrate recognised Anglo-European[130] characteristics of property (excludability, alienability, usufruct),[131] it is nevertheless wedded to the spirit of Blackburn J's judgment in that the very 'foreignness' of indigenous property rights relegates them to the bottom of the 'hierarchy of title' that characterises Anglo-Australian land law.[132] Native title is not an estate or a tenure,[133] and is analogised to a 'personal' or 'usufructuary' right[134] based on *occupatio* and *utile* rather than *dominium*.

Aboriginal leaders and activists point out that this characterisation not only misrecognises the nature of indigenous landholding,[135] but also renders it extremely vulnerable[136] because of its status as something less than beneficial title.[137] The retention of the Crown's prerogative (as a concomitant of sovereignty and a postulate of the doctrine of tenure)[138] to extinguish native title and

125 Gerry Simpson, '*Mabo*, International Law, Terra Nullius and the Stories of Settlement. An Unresolved Jurisprudence' (1993) 19 *Melbourne University Law Review* 196.

126 *Mabo* (1992) 175 CLR 1, 42.

127 James Tully, 'Aboriginal Property and Western Theory: Recovering a Middle Ground' in Ellen Paul, Fred Miller and Jeffrey Paul (eds), *Property Rights* (1994) 154, 179.

128 *Mabo* (1992) 175 CLR 1, 43 (Brennan J); *Wik* (1996) 187 CLR 1, 275 (Kirby J)

129 See, eg, *Mabo* (1992) 175 CLR 1, 185 (Toohey J).

130 Or at least, those characteristics of property in Europe at the beginning of the capitalist epoch *Res communes* property had a long-recognised tradition in land law prior to the industrial revolution.

131 *Milirrpum v Nabalco* (1971) 17 FLR 141, 268–73

132 Pearson, above n 33, 81.

133 *Wik* (1996) 187 CLR 1, 91 (Brennan J).

134 *Mabo* (1992) 175 CLR 1, 48, 52, 88; *Mason v Tritton* (1994) 34 NSWLR 572, 580–1

135 Michael Dodson, Aboriginal and Torres Strait Islander Social Justice Commission, *Native Title Report: January – June 1994* (27 April 1995) 54–7; Irene Watson, 'Law and Indigenous Peoples. The Impact of Colonialism on Indigenous Cultures' (1996) 14 *Law in Context* 107, 110–17.

136 Michael Mansell, 'Perspectives on *Mabo*: The Court Gives an Inch but Takes Another Mile' (1992) 57 *Aboriginal Law Bulletin* 4; Michael Mansell, 'Australians and Aborigines and the *Mabo* Decision: Just Who Needs Whom the Most ?' (1993) 15 *Sydney Law Review* 168.

137 Pearson, above n 33, 81.

138 *Mabo* (1992) 175 CLR 1, 46, 48, 111, 182; *Wik* (1996) 187 CLR 1, 89–90, 234 (Kirby J).

alienate land accentuates this vulnerability, while effectively legitimising colonisation, dispossession and genocide.[139]

Brennan CJ's judgment in *Wik* is perhaps logically most consistent with his arguments in *Mabo*, and demonstrates the weakness of native title within the existing doctrine of tenures and estates. The exercise of Crown prerogative may be sufficient to extinguish native title if it creates a tenure, which is, at common law, inconsistent with the continued existence of indigenous landholding.[140] Kirby J rejects the argument that native title is so fragile as to be expunged upon the 'mere exercise of sovereignty',[141] but does not provide an alternative characterisation by which to understand this new-found lack of fragility. The 'minimalist' recognition afforded by the court leaves indigenous property rights in a legal nether region. They are accorded neither full recognition on their own terms, nor are they acceptably characterised as mere 'use rights', even by the courts.

B *Settlement, Conquest and Allodialism*

My argument is that this conceptual difficulty inheres in the failure of *Mabo* and *Wik* to address the issue of Aboriginal sovereignty, and the legal status of the assertion of radical title. *Mabo* recognises the prior existence of indigenous

139 Watson, above n 135, 110, 117; Richard Bartlett, 'Is Equality Too Hard for Australia?' (1997) 20 *University of New South Wales Law Journal* 492 The susceptibility of native title to governmental expropriation under the sway of corporate power is well illustrated by the current plan to emasculate indigenous rights in favour of pastoral leaseholders *Plus ça change, plus ça reste la même chose*. See, eg, Office of the Prime Minister, *Amended Wik 10 Point Plan*, 8 May 1997 (note that the '10 Point Plan' has been drafted into the *Native Title Amendment Bill 1997* (Cth)); National Indigenous Working Group, *Coexistence — Negotiation and Certainty: Indigenous Position in Response to the* Wik *Decision and the Government's Proposed Amendments to the Native Title Act 1993* (April 1997) 8–10; Glenn Milne, 'An Irate State Wants the Wik Word from Howard', *The Australian* (Sydney), 28 April 1997, 9; 'Premier Challenges Wik Formula on Compensation', *The Australian* (Sydney), 28 April 1997, 2; John Short, Scott Emerson and Judy Hughes, 'States to Cut Black Rights in Wik Plan', *The Australian* (Sydney), 28 April 1997, 1; Laura Tingle, 'Sanctions Threat Over Wik', *The Age* (Melbourne), 19 April 1997, 1; Greg Roberts, 'PMs Queensland Headache Returns', *The Age* (Melbourne), 19 April 1997, 22; Shaun Carney, 'Wik a Nightmare in Howard's Dreamtime', *The Age* (Melbourne), 19 April 1997, 29, Kenneth Davidson, 'Rednecks Using Wik Debate to Grab New Rights', *The Age* (Melbourne), 17 April 1997, 11; David Nason, 'Labor Unites to Defend Native Title', *The Australian* (Sydney), 4 April 1997, 6; John Brown, Graeme Campbell, Lindsay Cleland, K Thomas, Ian Donges and Sylvia Monk, 'Goodwill Dropped from the Wik Equation', (collection of Letters to the Editor), *The Australian* (Sydney), 4 April 1997, 5; Paul Chamberlin, 'ALP Attacks Farmers' "Land Grab"', *The Age* (Melbourne), 31 March 1997, 4; Claire Miller, 'Tribal Elder Spells Out Bid for Native Title', *The Age* (Melbourne), 31 March 1997, 4; Lenore Taylor, 'Back Bench Lays Down the Law on Wik', *The Australian Financial Review* (Sydney), 26 March 1997, 6; Lenore Taylor, 'Conservatives Stall Wik Talks', *The Australian Financial Review* (Sydney), 21 March 1997, 5; Laura Tingle and Ben Mitchell, 'Prime Minister's Direction on Wik Pleases Premiers', *The Age* (Melbourne), 22 March 1997, 10; Ben Mitchell, 'We Won't Budge on Native Title, Says Farmers' Leader', *The Age* (Melbourne), 6 January 1997, 1; Henry Reynolds, 'Good Decision, Poor Advice', *The Age* (Melbourne), 28 December 1996, 11, Gareth Boreham and Ben Mitchell, 'Kennett Urges Action on Title', *The Age* (Melbourne), 28 December 1996, 1; Laura Tingle, 'Pastoralists Ignoring Leases, Lobby Admits', *The Age* (Melbourne), 18 April 1997, 7; Ben Mitchell, 'Who Are the Wik Winners?', *The Age* (Melbourne), 10 May 1997, 20; Susanna Lobez, interview with Bryan Keon-Cohen and Jim Macken, 'The Law Report', Australian Broadcasting Corporation (Sydney, 25 February 1997). See also papers in 'Forum: *Wik*: The Aftermath and Implications' (1997) 20 *University of New South Wales Law Journal* 487.

140 *Mabo* (1992) 175 CLR 1, 55; *Wik* (1996) 187 CLR 1, 71–2, 89

141 *Wik* (1996) 187 CLR 1, 233.

social organisation and landholding, but does not directly address the question of whether Aboriginal nations were sovereign, or whether sovereignty was validly surrendered. The assertion of Crown sovereignty and radical title are considered to be an act of state which is beyond the jurisdiction of domestic courts.[142] The international law arguments for Aboriginal sovereignty are beyond the scope of this article, and are dealt with comprehensively elsewhere.[143] However, Aboriginal sovereignty is the necessary postulate for the characterisation of indigenous landholding as *allodial*, and I argue below that this characterisation is (i) legally conceptualisable, (ii) historically more accurate, and (iii) morally preferable to the extent that it affords stronger recognition to forms of indigenous title and land use. I conclude by suggesting that categorising *both* Anglo-Australian and indigenous landholding as allodial is more suitable to modern Australian conditions, and is desirable because it affords both forms equal status.

1 *Indigenous Allodialism*

As noted above, Brennan CJ's analysis of the question of reversion/escheat conforms closely to the traditional meaning of these words in English land law. He asserts, correctly, in my view, that to allow land to 'revert' to native title holders is to accord them de facto status as possessors of 'residual title'. Three members of the majority sidestep this conclusion by redefining 'reversion', while Kirby J refers equivocally to the argument that Aboriginal land is allodial as 'unhelpful', and refrains from deciding the issue.[144]

Allodial land is distinguished from an estate or tenure because it is 'held of no superior at all'.[145] In contradistinction to *beneficium* or *feodum*, allodium

> is a man's [*sic*] own land, which he possesseth merely in his own right, without owing any rent or service to any superior. This is property in its highest degree, and the owner thereof hath *absolutum et directum dominium*.[146]

Historically, allodial land is that which survived conquest by a new lord, and stood outside feudal land holding[147] until surrendered and received back as a *beneficium* held on some kind of service.[148]

In England, the conversion of allodium land to *feodum* was almost universal by the time of Blackstone's *Commentaries*, allowing him to assert confidently that 'allodium property no subject in England has'.[149] In the Australian context, however, it is arguable that Aboriginal nations' land is in a similar position to that of Anglo, Saxon, Celtic and Scottish tribes at the time of the Norman

142 *Salaman v Secretary of State in Council of India* [1906] 1 KB 613, *Coe v Commonwealth* (1993) 118 ALR 193, 201; *Coe v Commonwealth* (1979) 24 ALR 118; Kent McNeil, *Common Law Aboriginal Title* (1989) 133.

143 See generally Reynolds, *The Law of the Land*, above n 33; Otto, above n 124; N L Wallace-Bruce, 'Two Hundred Years On: A Reexamination of the Acquisition of Australia' (1989) 19 *Georgia Journal of International and Comparative Law* 87.

144 *Wik* (1996) 187 CLR 1, 238.

145 Blackstone, above n 25, 47

146 Stephen, above n 26, 219. See also Blackstone, above n 25, 105

147 A Simpson, above n 13, 3

148 Stephen, above n 26, 162; Blackstone, above n 25, 47

149 Blackstone, above n 25, 105

Conquest, viz categorisable as allodial until ceded or seized. As Gummow J concedes in *Wik*, there is '[no] necessary *conceptual* difficulty in accommodating allodial to tenurial titles in principles derived from English common law'.[150]

2 *History and Law*

Mabo rejected as historically unfounded the assertion made in *Cooper v Stuart* that Australia was 'practically unoccupied' at the time it was 'peacefully annexed'.[151] Yet as Gerry Simpson points out, the court did not expressly challenge the view that Australia was acquired by settlement,[152] although the acknowledgment that Australia was not terra nullius places it logically within the category of territory acquired by conquest. Only territory which is terra nullius in the strict sense of being uninhabited, may be validly acquired by settlement.[153] In *Mabo*, the High Court acknowledges that Australia was not uninhabited, but persists in characterising it as 'settled' rather than conquered. As such, the court creates a method of territorial acquisition unknown to international law.[154] The distinction between settlement and conquest is relevant to the characterisation of indigenous landholding because, in a conquered territory, '[w]hatever was originally occupied by the people, and has not since been distributed, must be considered the property of the people.'[155]

And, within the common law tradition, such property may be characterised as allodial. Conquest was the historical reality of the establishment of colonial government in Australia, during which twenty to thirty thousand indigenous

150 *Wik* (1996) 187 CLR 1, 177 (emphasis added) An alternative basis for indigenous landholding may be found in Kent McNeil's argument (considered in *Mabo* at 206–14 (Toohey J)) concerning the presumptive possessory title of indigenous occupants in a 'settled' colony· McNeil, *Common Law Aboriginal Title,* above n 142, 206. Derived from well-recognised property law principles, McNeil's argument is that indigenous peoples have the status of prior possessors at the time that the Crown acquires sovereignty. Prior possession in the absence of a recognised common law right is sufficient to give the possessor title against all except the original owner· McNeil, 207. The presumption from possession is that the interest is held in fee simple, and could be transferred, alienated or ceded. It would entitle indigenous owners to the full benefit of the land (McNeil, 242–3) and Crown grants affecting the land would take effect on subinfeudation; the Crown would not have the power to displace native title by grant unless the land was ceded. This characterisation provides a stronger basis for indigenous land rights than native title, as it is less vulnerable to extinguishment and can be transferred and alienated by indigenous landholders. It is nonetheless subject to some of the same criticisms voiced by Aboriginal activists concerning native title in its current form: see below nn 158–9 and accompanying text.

151 *Cooper v Stuart* (1889) 14 App Cas 286, 291.

152 *Coe v Commonwealth* (1979) 24 ALR 118, 129 (Gibbs CJ); *Mabo* (1992) 175 CLR 1, 68–9, G Simpson, '*Mabo*, International Law, Terra Nullius and the Stories of Settlement', above n 125, 208.

153 Blackstone, above n 25, 108, McNeil, above n 142, 134; Emer de Vattel, *The Law of Nations or The Principles of Natural Law* (first published 1758, 1916 ed) 84, cited in G Simpson, '*Mabo*, International Law, Terra Nullius and the Stories of Settlement', above n 125, 203.

154 G Simpson, '*Mabo*, International Law, Terra Nullius and the Stories of Settlement', above n 125, 208. Similarly, Richard Bartlett observes that '[t]he High Court founded the concept of native title at common law *on the equation of the rights of the indigenous inhabitants of a settled colony with the inhabitants of a conquered colony*' LBC, *Laws of Australia*, vol 1 (at 25 March 1997) 1.3 Land Law, '2 Native Title at Common Law' [9] Given that, strictly, there are no prior inhabitants in a settled colony, the High Court can be seen to have effected a conflation of the categories of 'settlement' and conquest which is unique in Australia.

155 Grotius, *De Jure Belli ac Pacis* (first published 1646, 1925 ed) vol 2, 300, cited in G Simpson, '*Mabo*, International Law, Terra Nullius and the Stories of Settlement', above n 125, 204.

people were murdered.[156] Notwithstanding the legal fiction of occupation by settlement, intense Aboriginal resistance to colonisation compelled contemporary observers to recognise that 'it may be necessary to view such tribes, however savage and barbarous [*sic*] their manners, as a separate state or nation.'[157] Given the High Court's newfound enthusiasm for historical accuracy, the categorisation of indigenous landholding as the allodium of a formerly sovereign people would be a further step towards bringing common law doctrine in line with historical reality.

3 *According Equal Recognition to Indigenous Property Rights*

The current accommodation of indigenous landholding presumes a set of authoritative European traditions and institutions within which indigenous property relations must 'fit' in order to be recognised. It adverts to the fact that dispossession was a grave injustice, but nevertheless does not accord full, independent status to indigenous property relations as an equal partner with Anglo-European property rights. This non-recognition is expressed by Irene Watson:

> In general, Nunga rights from a Nunga perspective differ from the Anglo-Australian view of what Nunga rights should be, and ... using Anglo-Australian law to decide what the rights of Indigenous people are, is the same as using Aboriginal law to decide the rights of non-indigenous Australians. From both camps, there is a denial of the other's sovereignty.[158]

Similarly, Mick Dodson argues that:

> It is not just a matter of 'seeking to include us', or working out how to arrange the pieces on the board ... If we are going to enjoy our rights ... creative new concepts and structures will have to be set in place. We assert ... that there are indigenous political and legal systems which must be recognised as having a place, whether that place be within the basic structures underlying so-called mainstream society, or parallel to that society.[159]

It does not follow that 'justice' can only be achieved by the overthrow of present systems of property. This would indeed 'fracture the skeleton' of the Australian polity. Rather, a just *framework* for the adjudication of indigenous and Anglo-European property is one which predicates the sovereignty and 'coordinate legitimacy of the [diverse] Aboriginal traditions and institutions'[160] and does not take the sovereignty of the non-indigenous institutions for granted.[161] Each recognises the other on its own terms. Writing from a comparable North

[156] Reynolds, *The Law of the Land,* above n 33, 1; Reynolds, *Aboriginal Sovereignty,* above n 34, 117, 118, 120–1; see also *Coe v Commonwealth* (1979) 24 ALR 118, 138 (Murphy J).

[157] Governor Gawler, 1840, cited in Reynolds, *Aboriginal Sovereignty,* above n 34, 121

[158] Watson, above n 135, 110.

[159] Michael Dodson, cited in Reynolds, *Aboriginal Sovereignty,* above n 34, 137.

[160] Tully, above n 127, 179.

[161] The question of how translation between the traditions occurs is a serious philosophical issue beyond the current consideration. For an introduction to some of the problems in such an undertaking, see Robert Feleppa, *Convention, Translation and Understanding: Philosophical Problems in the Study of Culture* (1992). For a practical account, see Williams, above n 124.

American perspective, James Tully sketches out this framework in idealised form:

> In this unique cross-cultural speech situation, the negotiators are bound together by three shared norms (and by all, previous, justified agreements) of the system: that the equality of their respective traditions and institutions is recognised and continued, that the negotiations and argumentation respect the forms of negotiation of both cultures, and that the treaty relations of property they reach by negotiation will be based on consent.[162]

In spite of their beneficial consequences for asserting the existence of indigenous property rights, *Wik* and *Mabo* do not challenge the underlying tenets of current land law to open the possibility of this kind of dialogue. Moreover, the current racist hysteria makes it clear that dominant class interests would prevent a 'just framework' even if it were rendered conceptually possible by the court.[163]

CONCLUSION — TOWARDS A RECONSIDERATION (RECONCILIATION?) OF THE DOCTRINE OF TENURES AND ESTATES

Not all former English colonies have persisted with the doctrine of tenures.[164] Its anachronistic complexities have little substantive application, and exacerbate the obscurity of property law. Legal historians have also noted that, in its modern form, Anglo-Australian landholding is substantively similar to the allodial system in the United States,[165] where all derivative tenures were abolished after the revolution and replaced by absolute titles vested through registration. The current system of Torrens title registration is 'technically consistent with allodial [ie non-derivative] ownership'.[166] While the court in *Mabo* rejected the possibility of allodial landholding,[167] two judges in *Wik* leave open the possibility of reconsidering the doctrine of tenures and estates in future.[168]

Part I of this article argued that feudal doctrine has been increasingly recognised as only nominally applicable to the development of Anglo-Australian land law. Part II has argued that, if the court or legislature were to eventually banish the 'shadowy, ghostlike survival' of feudal doctrine, it should also take the opportunity to place indigenous and non-indigenous property on an equal footing by characterising *both* as independent and non-derivative.

[162] Tully, above n 127, 180.

[163] See, eg, Mitchell, 'Who Are the Wik Winners?', above n 139, for a description of the class interests behind current moves to extinguish native title.

[164] Eg, Sri Lanka, Mauritius, Quebec, South Africa, Kenya, Malawi, the Solomon Islands and the Seychelles

[165] Edgeworth, above n 26, 400; Devereux and Dorsett, above n 108, 13, Buck, 'Property Law and the Origins of Australian Egalitarianism', above n 68, 6

[166] Buck, 'Property Law and the Origins of Australian Egalitarianism', above n 68, 6; Hogg, above n 65, 2

[167] *Mabo* (1992) 175 CLR 1, 47, 88.

[168] *Wik* (1996) 187 CLR 1, 176–7 (Gummow J), 215 (Kirby J)