

IMPLICATIONS OF THE CROWN'S RADICAL TITLE FOR STATUTORY REGIMES REGULATING THE ALIENATION OF LAND: 'CROWN LAND' v 'PROPERTY OF THE CROWN' POST-MABO

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It is clear from the High Court's decisions in Wik and Ward that, for the purpose of the statutory regimes regulating the alienation of land in Australia, 'Crown land' means land in respect of which the Crown has 'radical title'. Although the concept of radical title had emerged in Mabo, it was not unequivocally clear whether it denoted a bare legal title sufficient to support the Crown's right to acquire and confer title or a full beneficial interest except to the extent of native title. This article argues that, because both legal authority and principle support the former interpretation of radical title in the context of general schemes of land regulation, the pre-Mabo view that statutory definitions of 'Crown land' refer to land which is the 'property' of the Crown no longer reflects the law in Australia. It will be seen that this conclusion is consistent with the High Court's treatment of residuary rights to, and resumptions of, Crown land in Wik and Ward respectively, as well as the policy and purpose of the legislation relating to Crown land and the post-Mabo High Court's analysis of it generally and, in particular, the statutory trespass provisions. It is also consistent with the constitutional settlement of the mid-19th century, by which the Crown's prerogatives to grant interests in land and to appropriate land to itself were displaced by statutory powers: although this effected a transfer of political power and not title, the statutory definition of 'Crown land', like the common law definition of 'waste lands', presupposed, rather than conferred, the Crown's title to unalienated land. Further support for the proposition that, irrespective of the presence of native title, the Crown must exercise its sovereign power before its radical title converts to full beneficial ownership, before 'Crown land' becomes 'Crown property', is provided by the Crown's power of eminent domain: a power which compliments the Crown's radical title and shares the same underlying rationale.

I INTRODUCTION

Considered strictly on their facts, the High Court's most important decisions on the concept of radical title to date, *Mabo and Others v State of Queensland (No 2)*¹ and *Wik Peoples and Thayorre People v Queensland*,² were confined to interests

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

2 (1996) 187 CLR 1 ('Wik').

in land granted pursuant to the Queensland statutory regime regulating the alienation of land. The implications of these decisions are not, however, restricted in their application to Queensland legislation:³ although the Crown's radical title supported its sovereign powers at common law to grant interests in land and to appropriate unalienated land for public purposes,⁴ these prerogatives have been displaced by statutory powers in all Australian jurisdictions.⁵ The Crown's radical title may, therefore, no longer be central to its powers to *grant* rights and interests in land, which now derive from statute.⁶ Nevertheless, the crucial question is whether the Crown's radical title remains central to *characterising the nature of* the Crown's title to land.

It will be seen that the majority of the High Court in both *Wik* and *Western Australia v Ward*⁷ have made it clear that the term 'Crown land' is synonymous with 'radical title'. Although it is also clear that, at most, radical title only confers beneficial property rights except to the extent of native title,⁸ the *Wik* High Court indicated that, for the purpose of the statutory regime regulating the alienation of land, radical title does not, of itself and automatically, confer any beneficial property rights; it is more in the nature of a governmental power.⁹ The question examined in this article is, therefore, whether the pre-*Mabo* view that statutory definitions of 'Crown land'¹⁰ refer to land which, pursuant to legislative enactment, is the 'property' of the Commonwealth, a State or Territory¹¹ continues to reflect the law in Australia.

- 3 Richard Bartlett reached a similar conclusion in the context of the effectiveness of such legislation to extinguish native title: 'The conclusion [in *Mabo*] that [public lands legislation] was ineffective to extinguish native title is of general application throughout Australia and throughout its history': Richard Bartlett, *Native Title in Australia* (1999) 239.
- 4 *Mabo* (1992) 175 CLR 1, 48 (Brennan J), 15 (Mason CJ and McHugh J).
- 5 The provisions in the Crown Lands Acts take away the prerogative right of the Crown to grant land: *Attorney-General v Cochrane* (1970) 91 WN (NSW) 861, 865 (Jacobs JA); see also *Wik* (1996) 187 CLR 1, 189 (Gummow J). Indeed, in the case of some Australian colonies, for example South Australia, the prerogative never applied: See *Fejo v Northern Territory* (1998) 195 CLR 96, 145 (Kirby J). The prerogative right to grant land is only one attribute of the Crown's radical title. That is, the Crown's radical title encompasses the Crown's prerogatives in respect of land. The principal statutes currently regulating the alienation of land in Australia are detailed in n 6 below.
- 6 The following are the principal statutes currently regulating Crown Land in Australia: *Lands Acquisition Act 1989* (Cth); *Land (Planning and Environment) Act 1991* (ACT) (s 160 refers to 'Territory Land'); *Land Titles Act 1925* (ACT) (s 6(1) defines 'Crown land'); *Crown Lands Act 1992* (NT) (s 3 defines 'Crown Land'); *Crown Lands Act 1989* (NSW) (s 3(1) defines 'Crown Land'); *Western Lands Act 1901* (NSW) (s 3(1) defines 'Crown Land'); *Land Act 1994* (Qld) (Schedule 6 defines 'unallocated State land' rather than 'Crown Land'); *Crown Lands Act 1929* (SA) (s 4 defines 'Crown Land'); *Pastoral Land Management and Conservation Act 1989* (SA); *Crown Lands Act 1976* (Tas) (s 2 defines Crown Land'); *Crown Lands (Shack Sites) Act 1997* (Tas) (s 5 defines 'Crown land'); *Land Act 1958* (Vic) and *Land Administration Act 1997* (WA). In each jurisdiction, there also exists a range of additional regulatory statutes dealing with specific aspects of Crown land. See, eg, *Rural Lands Protection Act 1989* (NSW); *Irrigation Act 1912* (NSW); *Mineral Resources Act 1989* (Qld) and *Agricultural Lands Special Purchase Act 1901* (Qld).
- 7 (2002) 213 CLR 1 ('*Ward HC*').
- 8 See below nn 34 and 81 and accompanying text.
- 9 See below n 37 and accompanying text.
- 10 Although statutory definitions of 'Crown land' differ between jurisdictions: see n 6 above.
- 11 See, eg, Butterworths, *Halsbury's Laws of Australia*, vol 22 (at 12 March 2008) [355-13500].

Answering this question involves a consideration of four issues. The first, the High Court's treatment of the statutory definition of 'Crown land', involves three sub-issues: the post-*Mabo* relationship between Crown land and the concept of radical title in light of both the Court's analysis of residuary rights to, and resumptions of, Crown land which has previously been alienated and the policy of Crown lands legislation; the pre-*Mabo* acknowledgment of a statutory distinction between land which is 'Crown land' and land which is the 'property of the Crown'; and the effect of statutory trespass provisions. The second issue is the effect of legislative provisions dealing with the constitutional power to legislate regarding Crown land. The third is the common law definition of 'Crown land'. The fourth is the relationship between Crown land and the concept of eminent domain.

II CROWN LAND STATUTES: STATUTORY DEFINITION OF 'CROWN LAND'

A Post-Mabo Relationship between 'Crown Land' and Radical Title

The term 'Crown land' was no doubt defined in all Acts passed by the colonial governments dealing with unalienated land¹² in the pre-*Mabo* belief, current since *Attorney-General (NSW) v Brown*,¹³ that the absolute ownership of all land in Australia was vested in the Crown until it was alienated by Crown grant.¹⁴ Nevertheless, it will be seen that the majority of the *Wik* High Court concluded that the denotation of the term 'Crown Land' in the 1910 and 1962 Queensland *Land Acts* supports the proposition that unalienated land (whether or not subject to native title) is land in respect of which the Crown has a title equivalent to radical title only and not land in respect of which it also has beneficial ownership.¹⁵ Indeed, although cases decided in other colonial jurisdictions before *Mabo* had recognised the Crown's radical title, the meaning of the term was not definitively explained.¹⁶ Consequently, it was possible for the majority judges in *Mabo* to attribute a meaning of something less than absolute beneficial ownership to the

12 The term 'Crown land' was used as an alternative to the term 'waste lands' and was variously defined in the legislation. See, eg, *Crown Lands Alienation Act 1868* (Qld) s 2; *Crown Lands Alienation Act 1876* (Qld) s 1; *Crown Lands Act 1884* (Qld) s 4; *Land Act 1897* (Qld) s 4; *Land Act 1910* (Qld) s 4 and *Land Act 1962* (Qld) s 5. 'Unallocated State land' is the terminology adopted in the current Queensland legislation: *Land Act 1994* (Qld) s 5, Schedule 6, Dictionary.

13 *Attorney-General (NSW) v Brown* (1847) 1 Legge 312 ('A-G v Brown'); see also *Commonwealth v New South Wales* (1923) 33 CLR 1, 19 (Knox CJ and Starke J).

14 See similar words used in *Mabo* (1992) 175 CLR 1, 66 (Brennan J). Note also the comment by Dawson J in *Mabo* (1992) 175 CLR 1, 159 that: 'from the start [the Crown acted] upon the assumption (which was also the assumption lying behind the relevant legislation) that there was no such thing as native title and that the Crown was exclusively entitled to all lands which had not been alienated by it.'

15 Unalienated land in this context includes previously alienated land which has become Crown land again. See below n 37 and accompanying text. Cf *Mabo* (1992) 175 CLR 1, 66 (Brennan J).

16 See Ulla Secher, 'The Meaning of Radical Title: The Pre-*Mabo* Authorities Explained – Part I' (2005) 11 *Australian Property Law Journal* 179 and Ulla Secher, 'The Meaning of Radical Title: The Pre-*Mabo* Authorities Explained – Part II' (2005) 11 *Australian Property Law Journal* 209.

term, while the sole dissenting judge attributed a meaning of nothing less than absolute beneficial ownership to the term.

1 **Mabo: The Emergence of Radical Title**

Although the concept of radical title emerged in Australian jurisprudence as a result of the decision in *Mabo*, its conceptual content remained unclear.¹⁷ In particular, it was not unequivocally clear whether Brennan J, as author of the principal judgment in *Mabo*,¹⁸ regarded radical title as a bare legal title or as conferring full and unfettered beneficial rights except to the extent of native title.¹⁹ Indeed, three aspects of Brennan J's reasoning clearly support the interpretation of radical title as a bare legal title to land, investiture of which creates no automatic beneficial entitlement to the land to which it relates. First, considering the 'royal prerogative' basis for the proposition of absolute Crown ownership, Brennan J observed that the passing of the management and control of the waste lands of the Crown to the colonial governments, by Imperial legislation, was not a transfer of title, but rather a transfer of political power or governmental function.²⁰ Crucially, Brennan J expressly confirmed that the requirement that the Crown take further steps to become owner of land is not limited to land in respect of which pre-existing native title exists, for:

[I]f the Crown's title is merely a radical title — no more than a [logical] postulate to support the *exercise* of a sovereign power within the familiar feudal framework of the common law — the problem of the vesting of the absolute beneficial ownership of colonial land does not arise: absolute and beneficial Crown ownership *can be acquired, if at all, by an exercise of the appropriate sovereign power.*²¹

Secondly, Brennan J's analysis of the 'patrimony of the nation' basis for the proposition of absolute Crown ownership also indicates that radical title is merely in the nature of a governmental power, enabling the Crown to create interests in land in itself and others, rather than a proprietary right.²² Although Brennan J agreed that 'it is right to describe the powers which the Crown ... exercised with respect

17 See Nicolette Rogers, 'The Emerging Concept of "Radical Title" in Australia: Implications for Environmental Management' (1995) 12 *Environmental and Planning Law Journal* 183; Nehal Bhuta, 'Mabo, Wik and the Art of Paradigm Management' (1998) 22 *Melbourne University Law Review* 24, 33–35; Ulla Secher, 'The Legal Nature of the Crown's Title on the Grant of a Common Law Lease Post-Mabo: Implications of the High Court's Treatment of the "Reversion Expectant" Argument: Part I' (2006) 14(1) *Australian Property Law Journal* 1 and Ulla Secher, 'The Legal Nature of the Crown's Title on the Grant of a Common Law Lease Post-Mabo: Implications of the High Court's Treatment of the "Reversion Expectant" Argument: Part II' (2006) 13 *Australian Property Law Journal* 31.

18 As Brennan J's reasons were adopted by Mason CJ and McHugh J in *Mabo* (1992) 175 CLR 1, 15, his leading judgment represents a fundamental restatement of the legal nature of the Crown's title in Australia.

19 Cf *ibid* 48, 50.

20 *Ibid* 53, citing *Williams v Attorney-General (NSW)* (1913) 16 CLR 453, 456.

21 *Ibid* 54 (emphasis added).

22 *Ibid* 52–5.

to colonial lands as powers conferred for the benefit of the nation as a whole',²³ he did not agree that it followed that those powers were proprietary as distinct from political powers.²⁴ Furthermore, despite acknowledging that the 'nation obtained its patrimony by sales and dedications of land',²⁵ Brennan J observed that this did not mean 'that the patrimony was realised by sales and dedications of land owned absolutely by the Crown'.²⁶ Brennan J clarified that what the Crown acquired was 'a radical title to land and a sovereign political power over land, the sum of which is not tantamount to absolute ownership of land'.²⁷

The third aspect of Brennan J's decision which supports the proposition that radical title does not confer a plenary title on the Crown, is the holding that:

[T]he dispossession of the indigenous inhabitants of Australia was not worked by a transfer of beneficial ownership when sovereignty was acquired by the Crown, but by the recurrent exercise of a paramount power to exclude the indigenous inhabitants from their traditional lands as colonial settlement expanded and land was granted to colonists.²⁸

Brennan J concluded that it was only the fallacy of equating sovereignty and beneficial ownership of land that had given rise to the notion that native title was extinguished by the acquisition of sovereignty;²⁹ the 'notion that feudal principle dictates that the land in a settled colony be taken to be a royal demesne upon the Crown's acquisition of sovereignty is mistaken'.³⁰ Indeed, this conclusion followed from Brennan J's identification of the two limbs of radical title: it was both 'a postulate of the doctrine of tenure and a concomitant of sovereignty'.³¹

As a concomitant of sovereignty, the notion of radical title *enabled* the Crown 'to become absolute beneficial owner of unalienated land required for the Crown's purposes'.³² As a postulate of the doctrine of tenure, the notion of radical title '*enabled* the Crown to become Paramount Lord of all who hold a tenure granted

23 Ibid 52, citing *R v Symonds* [1847] NZPCC 387, 395.

24 Ibid 52.

25 Ibid 52–3 (emphasis added).

26 Ibid 53.

27 Ibid.

28 Ibid 58 (Brennan J); see also ibid 103–109 (Deane and Gaudron JJ) and *Western Australia v Commonwealth* (1995) 183 CLR 373, 433–4 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ): '[S]ince the establishment of the colony [of Western Australia] native title in respect of particular parcels of land has been extinguished only parcel by parcel. It has been extinguished by the valid exercise of power to grant interests in some of those parcels and to appropriate others of them for the use of the Crown inconsistently with the continuing right of Aborigines to enjoy native title.'

29 Accordingly, Brennan J concluded that the native title of the indigenous inhabitants was to be treated as a burden on the radical title which the Crown acquired.

30 *Mabo* (1992) 175 CLR 1, 52. See also *Mabo* (1992) 175 CLR 1, 45 (Brennan J): 'It was only by fastening on to the notion that a settled colony was *terra nullius* that it was possible to predicate of the Crown the acquisition of ownership of land in a colony already occupied by the indigenous inhabitants. It was only on the hypothesis that there was nobody in occupation that it could be said that the Crown was the owner because there was no other. If that hypothesis be rejected, the notion that sovereignty carried ownership in its wake must be rejected too.'

31 Ibid 48.

32 Ibid.

by the Crown'.³³ This latter proposition is crucial: by emphasising that '[t]he doctrine of tenure applies to every Crown grant of an interest in land, but not to rights and interests which do not owe their existence to a Crown grant',³⁴ Brennan J articulated the limited role of the doctrine of tenure in Australian land law. Only when the Crown exercises its power to grant an estate in land is such land brought within the regime governed by the doctrine of tenure.

Although these aspects of Brennan J's reasoning clearly support the proposition that radical title is merely a bare legal title to land, there are four aspects of Brennan J's decision which, *prima facie*, suggest a more generous interpretation of radical title: as conferring full and unfettered beneficial rights except to the extent of native title. Not only does Brennan J suggest that in the case of unoccupied lands at settlement the Crown would be the absolute beneficial owner of the land because 'there would be no other proprietor',³⁵ he also attributes to the Crown an 'automatic expansion of radical title' in three other situations: where native title expires, where native title is surrendered to the Crown and on the expiration of the term of a lease which has been granted by the Crown (the 'reversion expectant' argument).³⁶ However, since the issues of property in uninhabited unalienated land and residuary rights to land which has previously been alienated did not arise directly for determination in *Mabo*, Brennan J's comments in this context are merely *obiter*.

Nevertheless, in *Wik* one of the main legal arguments was based on Brennan J's 'reversion expectant' theory espoused in *Mabo*.³⁷ namely, whether the mere grant of a pastoral lease, or for that matter any leasehold interest in land, changed the underlying title of the Crown by creating a reversion expectant, thereby converting the Crown's underlying title from mere radical title to full beneficial title, such that upon expiry of the term of the leasehold interest, full beneficial ownership would revert to the Crown. It will be seen that it is in the context of considering the issue of residuary rights to land at the expiration of the term of a pastoral lease which has been granted over Crown land, that the *Wik* majority judgments provide considerable support for the proposition that radical title is merely a bare nominal title which does not automatically confer any beneficial entitlement to the land to which it relates; *a fortiori* the statutory definition of 'Crown land'.

33 *Ibid* (emphasis added).

34 *Ibid* 48–9. It will be seen that this conclusion has significant implications for the two-fold feudal fiction of original Crown ownership and original Crown grant: see below n 94 and accompanying text.

35 *Ibid* 48. Brennan J was referring to the reasons given by Stephen CJ in *A-G v Brown* (1847) 1 Legge 312, 317–18. The Crown would, therefore, have an allodial title to the land.

36 *Ibid* 60, 68; see also below n 37 and accompanying text.

37 *Ibid* 68. Brennan J discussed how native title can be extinguished by a Crown grant which vests in the grantee an interest in land which is inconsistent with the continued right to enjoy a native title in respect of the same land, stating that: 'If a lease be granted, the lessee acquires possession and the Crown acquires the reversion expectant on the expiry of the term. The Crown's title is thus expanded from a mere radical title and, on the expiry of the term, becomes a plenum dominium.' See also *ibid* 49. In *Wik*, (1996) 187 CLR 1, 154, Brennan CJ, as author of the minority judgment, reiterated these comments. For a detailed discussion of the 'reversion expectant' theory see Ulla Secher, 'The Legal Nature of the Crown's Title on the Grant of a Common Law Lease Post-*Mabo*: Implications of the High Court's Treatment of the "Reversion Expectant" Argument: Parts I and II', above n 17.

2 Wik: Residuary Rights to Crown Land at the Expiration of a Pastoral Lease

(a) Wik Majority Judgments

The inter-relationship between the concept of radical title and the term 'Crown land' arose for consideration in *Wik* as a result of the Court's examination of the consequences for native title of the expiration of a pastoral lease. In this context, the *Wik* majority rejected the reversion expectant argument: they denied that the Crown acquired a beneficial reversionary interest upon the grant of the relevant pastoral leases with the result that the underlying title of the Crown continued to be mere radical title. In doing so, all members of the majority discussed Brennan J's reversion expectant dictum in the context of the grant of a pastoral lease over land previously within the statutory definition of 'Crown land'.

Toohey J approved of Brennan J's explanation, in *Mabo*, of the content of radical title as being a bare nominal title only, essentially a power of alienation, rather than a full and unfettered beneficial interest except to the extent of native title. In support of this approach, Toohey J cited with approval the following passage by Brennan J in *Mabo*:

Recognition of radical title of the Crown is quite consistent with recognition of native title to land, for the radical title, *without more*, is merely a logical postulate required to support the doctrine of tenure (when the Crown has exercised its sovereign power to grant an interest in land) and to support the plenary title of the Crown (when the Crown has exercised its sovereign power to appropriate to itself ownership of parcels of land within the Crown's territory.³⁸

Consequently, Toohey J found it difficult to accept the argument based upon Brennan J's 'reversion expectant' dictum. To support his decision to reject this aspect of Brennan J's approach, Toohey J referred to both limbs of radical title.³⁹ In the context of the concomitant of sovereignty limb, Toohey J declared that although it was clear from the judgments in *Mabo* that the attribution of radical title to the Crown was a necessary concomitant of its sovereignty over Australia and thus empowered the Crown to grant interests in land,⁴⁰ 'radical title does not of itself carry beneficial ownership'.⁴¹ Accordingly, the grant of an estate in land does not require the Crown to assume beneficial ownership of the land. Nor was such a result dictated by the relevant legislation.⁴² Thus, although the radical title lies with the Crown immediately before the grant of a pastoral lease, Toohey J

38 *Mabo* (1992) 175 CLR 1, 128, citing *Mabo* (1992) 175 CLR 1, 50 (Brennan J).

39 *Ibid* 48.

40 *Wik* (1996) 187 CLR 1, 127.

41 *Ibid*.

42 *Ibid*; see also 244 (Kirby J) and *North Ganalanja Aboriginal Corp v Queensland* (1995) 61 FCR 1, 29 (Lee J).

questioned the relevance of speaking of the Crown acquiring the ‘reversion’ in such a case and of the Crown’s title becoming a ‘plenum dominium’.⁴³

As a postulate of the doctrine of tenure, however, because radical title enables the Crown to become paramount lord of all who hold a tenure created by Crown grant, the common law vests a reversionary interest in the Crown in order to support and enforce the relationship of landlord and tenant. Nevertheless, Toohey J found that the invocation of reversion and plenum dominium, as those expressions are usually understood, did not lie easily with the position of the Crown under the relevant statutes.⁴⁴ His Honour referred to the traditional definition of a reversion as ‘the interest which remains in a grantor who creates *out of his own estate* a lesser estate’.⁴⁵ Toohey J noted, however, that the ‘doctrine of estates is a feudal concept in order to explain the interests of those who held from the Crown, not the “title” of the Crown itself’.⁴⁶ Accordingly, Toohey J was of the view that to speak, in relation to the position of the Crown under the relevant statutes, of a reversion expectant on the expiry of the term of the lease as expanding the Crown’s radical title to a plenum dominium was to apply the concept of reversion to an unintended end.⁴⁷

In Toohey J’s view, therefore, to argue that the Crown, on granting a lease, acquires a ‘beneficial reversionary interest’ in the land, which ‘ensures that there is no room for the recognition of native title rights, is ... to read too much into the Crown’s title’.⁴⁸ His Honour referred to the ‘curious paradox’ involved in the proposition enunciated by Brennan J in *Mabo*:

[I]f it is the reversion which carries with it beneficial title, why is that title not there in the first place? And if it is the existence of that beneficial title which extinguishes native title rights, why were those rights not extinguished before the grant of a pastoral lease?⁴⁹

Toohey J reasoned that if the Crown never possessed the beneficial title, *a fortiori*, there could be no reversion of such title to it. Accordingly, the ‘reversion’ was not a reversion of the kind normally associated with leases. ‘Reversion’ was, therefore, distinguished from its traditional common law meaning⁵⁰ and held to connote the resumption of the character of ‘Crown Land’.⁵¹

Toohey J reconciled the two limbs of radical title by emphasising that such a result in no way detracted from the doctrine of sovereignty as the Crown could, upon

43 *Wik* (1996) 187 CLR 1, 128.

44 *Ibid* 129.

45 *Ibid* 128 (emphasis added), citing B A Helmore and G W Millard, *The Law of Real Property in New South Wales* (2nd ed, 1966) 227.

46 *Wik* (1996) 187 CLR 1, 128.

47 *Ibid*.

48 *Ibid* 129.

49 *Ibid*.

50 *Ibid* 128.

51 *Ibid* 128–9.

determination of the lease, deal with the land as authorised by statute.⁵² In the context of the relevant statutes, Toohey J observed that 'once a pastoral lease came to an end, the land answered the description of "Crown Land" and might be dealt with accordingly'.⁵³ Thus, on the expiration or other termination of a pastoral lease, it is still the radical title of the Crown that must be considered in relation to native title rights.⁵⁴ According to this analysis, the meaning of 'Crown land' in the relevant statutes is merely land which the Crown has radical title to, as opposed to beneficial ownership.

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

Although approaching the issue from a different perspective, Gaudron J adopted a view of radical title similar to Toohey J's. Unlike Toohey J, however, Gaudron J did not address the common law position; her Honour referred specifically to provisions of the *Land Act 1910* (Qld) (*'1910 Act'*). In particular, the statutory reversion prescribed by s 135 of the *1910 Act* was interpreted to mean that the previously alienated land became once more 'Crown land', which Gaudron J defined as 'land in respect of which the Crown had radical title, and not land in respect of which [the Crown] had beneficial ownership'.⁵⁵ Accordingly, Gaudron J also suggests that both prior to alienation of any land in Australia and upon early determination of a pastoral lease, the Crown has only a radical title to the land without any beneficial interest.

While Gaudron J reached the same conclusion on the facts as Toohey J, the underlying rationale of her decision was based not on the nature of the Crown's radical title but on the character of the particular grant. That is, because the relevant pastoral leases were not true leases in the traditional common law sense of conferring a right of exclusive possession, they did not operate to vest a leasehold estate.⁵⁶ Consequently, since a reversionary interest only arises on the vesting of a leasehold estate, there was no basis for the contention that, on the grant of the leases, the Crown acquired a reversionary interest which operated to expand its radical title to full beneficial ownership.⁵⁷

Thus, Gaudron J denied the applicability of the concept of a common law reversion to interests created by statute where those interests are not given their content by the common law. Instead, her Honour found that the statutory reversion which applied in such cases entitled the Crown to radical title only, and not to any beneficial interest

⁵² Ibid 128.

⁵³ Ibid 128–9.

⁵⁴ Ibid 129.

⁵⁵ Ibid 156.

⁵⁶ Ibid 155.

⁵⁷ Ibid.

in the land.⁵⁸ Nevertheless, according to Gaudron J's analysis, although all land in Queensland, and indeed in Australia, is regulated by statute, so that all interests in land are granted by the Crown pursuant to legislation, where the interest granted is equivalent to an interest recognised by the common law, the common law doctrine of reversion may apply. This is because although Gaudron J distinguished between common law and statutory reversions, her concept of a statutory reversion only connotes something different from a common law reversion where the particular interest granted is not given its content by the common law. Thus, unlike Toohey J, Gaudron J does not distinguish between a traditional common law reversion and a reversion in the context of the Crown's mere radical title (whether statutory or common law). Indeed, it has been seen that it is because Toohey J makes this distinction that his analysis is relevant to any interest granted by the Crown where the Crown has a mere radical title immediately before the grant.

Nevertheless, both Toohey and Gaudron JJ held that, although a reversion was created, it did not confer full beneficial ownership. The crucial point is that, while their reasoning differed, both justices held that a reversion was created by the grant of the relevant pastoral leases. This is in stark contrast to Gummow and Kirby JJ who held that no reversion was created at all in the context of statutory grants. It will be seen that although the rationale underlying their Honours' approach is based exclusively on the concomitant of sovereignty limb of radical title, there is an important difference between their judgments: while the rationale is expressly stated in Gummow J's judgment, it is only implied in Kirby J's.

Gummow J's conclusion on the meaning and content of radical title is similar to that expressed by both Toohey and Gaudron JJ. In particular, Gummow J adopts Brennan J's common law interpretation of radical title as a 'bare nominal title' only and not as an underlying estate conferring beneficial ownership except to the extent of the rights attaching to native title. For Gummow J, radical title is "a postulate to support the exercise of sovereign power within the familiar feudal framework of the common law"... [including] the doctrine of tenures.⁵⁹ Upon this analysis, '[a]bsolute and beneficial Crown ownership, a plenum dominium, [is] established not by the acquisition of radical title but by subsequent exercise of the authority of the Crown.'⁶⁰

For Gummow J, however, the contention that the grant of a lease by the Crown necessarily involved the acquisition by the Crown of the 'reversion which is expectant upon the expiry of the term' broke down when applied to the statutory scheme for the disposition of Crown lands established by the *1910 Act*. Gummow J noted that the phrase '[a]ll land in Queensland' in s 4 of the *1910 Act* was apt to include land in respect of which the Crown held radical title, and that by the two limbs of radical title, 'the common law enabled the Crown to grant interests in land to be held of the Crown and to become absolute beneficial owner of unalienated

58 Ibid. This analysis bears a very close resemblance to an argument advanced by Lee J in *North Galanjanja v Queensland* (1995) 65 FCR 1, see especially 29.

59 *Wik* (1996) 187 CLR 1, 186.

60 Ibid.

land required for the purposes of the Crown'.⁶¹ However, since all powers of alienation of interests in land in Australia are now governed by statute, the state had to justify its argument based on Brennan J's reversion expectant dictum by its adaptation to the statutory system for the disposition of land.

Thus, it was in the context of the statutory scheme for the disposition of land that the postulate of the doctrine of tenure limb of radical title was, for Gummow J, rendered otiose. The statute maintained a legal regime where, in respect of what it identified as leases, there was no need for the creation in the Crown of a reversionary estate out of which lesser estates might then be granted.⁶² Rather, when the lease expired, the land again answered the definition of 'Crown land',⁶³ and was liable to be further dealt with by the Crown.⁶⁴ Gummow J also referred to the statutory provisions which abrogated the common law requirement of entry for the creation of a reversion.⁶⁵ Not only did the statute operate effectively to vest interests granted under it in advance of and without dependence upon entry,⁶⁶ it also provided that, in the case of forfeiture or other premature determination of a lease, the land would revert to the Crown and become Crown land.⁶⁷ For Gummow J, the fact that the statute proceeded on a basis which was at odds with the common law principles with respect to leases confirmed the conclusion that the term 'revert' in the statute was used to denote the 'reassumption of the character of "Crown Land" liable to further disposition'.⁶⁸

It is important to note that while both Gaudron and Gummow JJ rejected the notion that the interest acquired by the Crown at the expiration of the term of the pastoral leases conferred beneficial ownership and was thus inconsistent with native title, it is clear from Gaudron J's judgment in *Mabo*⁶⁹ and Gummow J's judgment in *Yanner v Eaton*⁷⁰ that their Honours both regard the grant of a common law lease as effecting the extinguishment of native title. Nevertheless, while the grant of a common law lease may extinguish native title on the ground that the rights created by grant are inconsistent with native title rights, this does not have any significance for the Crown's title; it does not mean that any residuary rights to the land in respect of which the lease was granted automatically lie with the Crown.⁷¹

61 Ibid 188.

62 Ibid 189.

63 *Land Act 1910* (Qld) s 4.

64 *Land Act 1910* (Qld) s 6; *Wik* (1996) 187 CLR 1, 189.

65 *Land Act 1910* (Qld) ss 6(2), 135; *Wik* (1996) 187 CLR 1, 189, 198, 199.

66 *Land Act 1910* (Qld) s 6(2).

67 *Land Act 1910* (Qld) s 135. See *Wik* (1996) 187 CLR 1, 199 (Gummow J).

68 *Wik* (1996) 187 CLR 1, 189.

69 *Mabo* (1992) 175 CLR 1, 110.

70 *Yanner v Eaton* (1999) 201 CLR 351, 395.

71 See Ulla Secher, 'The Legal Nature of the Crown's Title on the Grant of a Common Law Lease Post-Mabo: Implications of the High Court's Treatment of the "Reversion Expectant" Argument: Parts I and II', above n 17; see also above nn 16 and 37 and accompanying text.

Although not expressly referring to the concomitant of sovereignty limb of radical title, Kirby J's treatment of the 'reversion expectant' theory is consistent with Gummow J's. Referring to the critical passage in Brennan J's reasoning in *Mabo*, Kirby J observed that Brennan J implied that it was not the grant of the lease which had the effect of expanding the Crown's title 'from mere radical title' to a 'plenum dominium', but the acquisition of the reversion expectant on the expiry of the leasehold term.⁷² Kirby J explained, however, that the grant of leases is regulated by the *Land Acts* and that these Acts do not expressly confer on the Crown the estate necessary to grant a lease.⁷³ The historical reason for this was clear: the enactments were based upon the assumption that the Crown exclusively enjoyed the power to grant leasehold and other interests simply as an attribute of its sovereignty. Since *Mabo*, however, it was clear that with sovereignty came no more than radical title which was burdened with native title.⁷⁴

Consequently, Kirby J was of the view that to 'invent the notion, not sustained by the actual language of the *Land Acts*, that the power conferred on the Crown to grant a pastoral leasehold interest was an indirect way of conferring on the Crown "ownership" of the land by means of the reversion expectant [involved] a highly artificial importation of feudal notions into Australian legislation'.⁷⁵ According to Kirby J, therefore, rather than inventing such a purpose by a new legal fiction, and retrospectively attributing it to the Queensland Parliament so that it could be read into the *Land Acts* in order to afford the estate out of which the Crown might grant a pastoral lease, the fact that the Parliament had said that the Crown's power to make such a grant existed was sufficient.⁷⁶ Kirby J was of the view that to import into the *Land Acts* notions of the common law apt for the tenurial holdings under the Crown and attribute them to the Crown itself 'piles fiction upon fiction' and, unless expressed in the legislation, should not be introduced.⁷⁷ Thus, like the other members of the majority, Kirby J equates Crown land under the *Land Acts* with mere radical title; a bare legal title rather than a full and unfettered beneficial interest except to the extent of native title.

(b) Wik Minority: Brennan CJ (Dawson and McHugh JJ concurring)

Notwithstanding the different rationales adopted by the members of the majority, they all rejected the reversion expectant argument. The minority, on the other hand, unequivocally embraced it. Indeed, Brennan CJ's reasoning, as author of the minority judgment in *Wik*, is logically consistent with his dictum in *Mabo* concerning the Crown's 'reversion expectant' on a lease granted by the Crown. For the minority, therefore, it was only by treating the Crown, on exercise of the power of alienation of an estate (statutory or otherwise), as having the full legal

⁷² *Wik* (1996) 187 CLR 1, 235.

⁷³ *Ibid.*

⁷⁴ *Ibid.*

⁷⁵ *Ibid.*

⁷⁶ *Ibid* 244–5.

⁷⁷ *Ibid* 245.

reversionary interest that the fundamental doctrines of tenure and estates could operate.⁷⁸ Like Toohey J, therefore, the minority unequivocally asserted that the doctrine of tenure does apply in the context of statutory grants. In contradistinction to Toohey J, however, the minority treated a reversion in this context as equivalent to a traditional common law reversion: as conferring full property rights.⁷⁹

Nevertheless, it has been seen that, following *Mabo*, it was not clear whether Brennan J regarded radical title as merely a 'bare title' sufficient to support the doctrine of tenure and the Crown's acquisition of a plenary title, or as conferring rights of beneficial ownership except to the extent of native title.⁸⁰ In his endeavours to sustain the reversion expectant theory in *Wik*, however, Brennan CJ suggested that the view that radical title is essentially 'a power of alienation controlled by statute'⁸¹ cannot be accepted.⁸² His comments were, however, confined to an examination of land that had been brought within the doctrine of tenure.⁸³ In particular, his comments relate to the creation of a leasehold tenure. Accordingly, not only is his Honour's judgment irrelevant to the question of the meaning and content of radical title in respect of land which has *not* been brought within the doctrine of tenure (unalienated or 'Crown' land), since it represents the minority view in *Wik* it is not authoritative in the context of previously unalienated land which has been brought within the doctrine of tenure as a result of the grant of a pastoral lease by the Crown.⁸⁴

(c) *Summary and Analysis*

Three distinct approaches vis-à-vis the nature and content of the Crown's title to land in the context of statutory grants emerge from the majority judgments in *Wik*: one from Toohey J; one from Gaudron J; and one from Gummow and Kirby JJ. By combining arguments based upon the two limbs of radical title, Toohey J concludes that such reversion does not confer full beneficial ownership although he accepts that, because the doctrine of tenure applies in the context of statutory

78 Ibid.

79 This is, of course, one of the possible consequences of Gaudron J's suggestion that the doctrine of tenure might apply to confer beneficial ownership in respect of interests created by statute where those interests are given their content by the common law.

80 Cf *Mabo* (1992) 175 CLR 1, 47–8, 50–1.

81 *Wik* (1996) 187 CLR 1, 94.

82 Ibid. Cf comments by Bartlett, above n 3, 151. Cf also *Wik* (1996) 187 CLR 1, 127, 128 (Toohey J) (referred to above n 37 and accompanying text); 156 (Gaudron J) (referred to in text accompanying above n 54); 186, 189 (Gummow J) (referred to in text accompanying above n 59); 244 (Kirby J) (referred to in text accompanying above n 75).

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

84 The implications for the Crown's title on the grant of a common law lease are considered in: Ulla Secher, 'The Legal Nature of the Crown's Title on the Grant of a Common Law Lease Post-*Mabo*: Implications of the High Court's Treatment of the 'Reversion Expectant' Argument: Parts I and II', above n 17.

grants,⁸⁵ a reversion is implied as a result of the fiction of original Crown ownership. In contrast, by focusing exclusively on the concomitant of sovereignty limb of radical title, both Kirby and Gummow JJ deny that the doctrine of tenure has any role in the context of statutory grants. That is, the fiction of original Crown ownership is not invoked to supply a reversionary interest. Significantly, not only does Kirby and Gummow JJ's approach represent a majority of the majority in *Wik*, but their Honours are also the only two members of the *Wik* High Court who are members of the currently constituted High Court.

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

The important point, however, is that three members of the *Wik* majority were of the view that either the fiction of original Crown ownership did not apply in the context of statutory grants (Gummow and Kirby JJ), or if it did, it conferred no more than a nominal proprietary interest sufficient to support the interest granted (Toohey J).⁸⁶ Although it might appear that, because the decision in *Wik* concerned land subject to native title, the fiction of original Crown ownership still applied to land which was not subject to native title, this is not the case. This is because 'fictions in law are only acknowledged "for some special purpose"'.⁸⁷ As Kent McNeil has shown, the purpose of the dual legal fiction that the King originally owned all land and that all titles to land were originally derived from Crown grant was to provide factual justification for the feudal theory of tenure.⁸⁸

85 The author has argued that the doctrine of tenure that applies in Australia post-*Mabo* is very different from its English, feudal, counterpart: see Ulla Secher, 'The Doctrine of Tenure in Australia Post-*Mabo*: Replacing the "Feudal Fiction" with the "Mere Radical Title Fiction" – Part I' (2006) 13 *Australian Property Law Journal* 107 and Ulla Secher, 'The Doctrine of Tenure in Australia Post-*Mabo*: Replacing the "Feudal Fiction" with the "Mere Radical Title Fiction" – Part II' (2006) 13 *Australian Property Law Journal* 140.

86 At least two members of the majority (Toohey and Gummow JJ) were of the view that a similar result would be achieved by reference to the common law: see text accompanying above n 40 and above n 59 respectively. Kirby J is also, arguably, of this view: see text accompanying above n 77.

87 *Mabo* (1992) 175 CLR 1, 212 (Toohey J), citing *Needler v Bishop of Winchester* (1614) Hob 220, 222; 80 ER 367, 369; *Mostyn v Fabrigas* (1774) 1 Cowp 161, 177; 98 ER 1021, 1030; *Considerations on the Law of Forfeitures for High Treason* (4th ed, 1775), 64–5; cited by Kent McNeil, *Common Law Aboriginal Title* (1st ed, 1989) 84.

88 McNeil, above n 87, 82–4. Cf 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, 431. '[T]he right of the people of England to their property does not depend upon, nor was in fact derived from, any royal grant. The reception of the feudal policy, in this nation, exactly answers the definition of a fiction; which is — some supposition in law, for a good reason, against the real truth of a fact in a matter possible to have been actually performed, according to that supposition': cited by McNeil, above n 87, 84. See also *A-G v Brown* (1847) Legge 312, 318.

Since possession generally had to be taken for a right of property to be acquired at common law,⁸⁹ the rights attached to the King's paramount lordship needed a possessory base.⁹⁰ The legal fiction 'that all land was, at one time, in the possession of the King who had granted some of it to subjects in return for services'⁹¹ was, therefore, invented to explain how the feudal relationship arose.⁹² That is the fiction's purpose. The High Court has, however, made it clear that, although the post-*Mabo* doctrine of tenure applies 'to every Crown grant of an interest in land', it does not apply 'to rights and interests which do not owe their existence to a Crown grant'.⁹³ This is crucial in the context of the Australian doctrine of tenure because it means that the fiction of original Crown grant is otiose.

More importantly for present purposes, the High Court has also made it clear that the Crown's statutory power to grant interests in land is not only independent of the Crown's ownership of the land, but the legislation does not confer on the Crown the estate necessary to support the grant.⁹⁴ This is crucial: because the effect of the fiction of past possession was to secure the 'paramount lordship or radical title of the Crown which [was] necessary for the operation of [the doctrine of tenure]',⁹⁵ the fiction should be given no wider application than is necessary to achieve this purpose.⁹⁶ The fiction of original Crown ownership of all land is, therefore, no longer relevant in the context of the statutory regime regulating the alienation of land in Australia. Thus, unless the Crown's possession and title are original,⁹⁷ for

89 At common law, if the King was not in possession, he could not grant the land. At best he had a right to acquire possession of it, assuming he had such a right, and then only expressly: *Winchester's Case* (1583) 3 Co R 1a, 4b–5a; 76 ER 621, 630–1. The exception was cases of title by descent.

90 McNeil, above n 87, 82.

91 *Ibid* 212.

92 In Blackstone's words, it became a 'fundamental maxim, and necessary principle (though in reality a mere fiction)' of the doctrine of tenure 'that the king is the universal lord and original proprietor of all the lands in his kingdom; and that no man doth or can possess any part of it, but what has, mediately or immediately, been derived as a gift from him, to be held upon [feudal] services': William Blackstone, *2 Commentaries on the Laws of England: Of Private Wrongs* (first published 1769, 1979 ed) 51.

93 *Mabo* (1992) 175 CLR 1, 48–9 (Brennan J).

94 That is, the Crown's power to grant land is an incident of radical title, rather than an incident of beneficial title. Although an actual exercise of sovereign power to grant unalienated land results, at common law, in the application of the fiction that the Crown must at one time have been in possession of and, therefore, owner of the land, such deemed 'fictional' possession is limited to the purpose for which it was invented: to explain how a particular feudal relationship arose. Nevertheless, on this approach any estate conferred on the Crown to support the grant is only conferred to achieve the intended grant, it does not apply to confer title on the Crown. The deemed possession and any resulting nominal proprietary interest would be limited to the minimum necessary to support the doctrine of tenure; that is, merely for the duration of the grant. Where a grant has terminated, no feudal relations exist.

95 *Mabo* (1992) 175 CLR 1, 212.

96 *Ibid*.

97 As in the case of land acquired by occupancy. It is important to note that, since one of the requirements for acquiring property rights by occupation is that the person purporting to acquire the property must have an intention of assuming ownership of it, the pre-*Mabo* belief that the Crown was the beneficial owner of all land in Australia is inconsistent with an intention of *assuming* ownership. Cf McNeil, above n 87, 135. Moreover, Deane and Gaudron JJ's suggestion in *Mabo* that it was 'conceivably' the whole of the lands of Australia that were affected by native title would deny another of the requirements for acquiring property rights by occupation: that Australia was *res nullius*, had no owner, at the time of its purported occupation: (1992) 175 CLR 1, 101.

the Crown to be in possession in the first place, it must have a recorded title. That is, the Crown has possession because it has title, not vice versa.⁹⁸ In other words, until the Crown has exercised its sovereign power to appropriate land to itself, the Crown's initial title to land, its radical title, is a bare legal title sufficient to support its power to acquire and confer title.

Crucially, Toohey, Gaudron and Kirby JJ all expressly equated the statutory concept of 'Crown land' with this conception of radical title: a nominal, rather than full beneficial, title.⁹⁹ Gummow J, however, concluded that the definition of the term 'Crown land' in these statutes was 'apt to *include* land in respect of which the Crown held radical title'.¹⁰⁰ Although Gummow J's conclusion might suggest that the statutory definition of 'Crown land' means something more than land in respect of which the Crown has radical title, his decision, as a member of the principal majority judgment in *Ward HC*,¹⁰¹ denies such a result. In *Ward HC*, the majority of a reconstituted High Court¹⁰² referred to the effect on the Crown's title of the resumption of a pastoral lease:

Resumption brought the relevant pastoral lease to an end. If there was no dedication of the land, and only a resumption, both before and after that resumption the land was Crown land. ... Resumption did not give the Crown any larger title to the land than the radical title acquired at sovereignty.¹⁰³

While it is clear that radical title gives the Crown the opportunity to become the owner of land, to acquire a plenary title by an appropriate exercise of sovereign power, it will be seen in the next section that the statutory resumption and vesting of Crown land which has previously been alienated does not elevate radical title to beneficial ownership.

3 Ward: Resumption and Vesting of Crown Land which has Previously been Alienated

In *Ward HC*, the Court considered three instances of resumption of land from pastoral leases:¹⁰⁴ first, under s 109 of the *Land Act 1933* (WA) ('*Land Act*'); secondly, under s 10 of the *Public Works Act 1902* (WA) ('*Public Works Act*') and s 62 of the *Rights in Water Irrigation Act 1914* (WA) ('*Rights in Water Act*');

98 McNeil, above n 87, 106. See also below n 210 and accompanying text.

99 *Wik* (1996) 187 CLR 1, 128–9 (Toohey J), 156 (Gaudron J), 244–5 (Kirby J).

100 *Wik* (1996) 187 CLR 1, 188 (emphasis added).

101 (2002) 213 CLR 1.

102 Gleeson CJ, Gaudron, Gummow and Hayne JJ; Kirby J substantially agreeing.

103 (2002) 213 CLR 1, 135. Subsequently, in the context of an argument about whether certain vacant Crown lands and reserves in Crown lands were vested in the Minister by the operation of the *Rights in Water and Irrigation Act 1914* (WA), the majority observed that '[i]t is incongruous to speak of unalienated Crown land being "held" by the Crown': (2002) 213 CLR 1, 154.

104 These were all different means of acquiring land for the Ord River Irrigation Project and other purposes: see *Ward v Western Australia* (1999) 159 ALR 483, 584–5.

and, thirdly, pursuant to a bargain-and-sale transaction.¹⁰⁵ Most of the land under consideration was resumed under s 109 of the *Land Act*. Pursuant to this section, the Governor was empowered to resume, enter upon, and dispose of the whole or any part of the Crown land in a pastoral lease,¹⁰⁶ for agricultural or horticultural settlement, mining or for any other purpose thought fit in the public interest.¹⁰⁷ Two acquisitions were expressed to be pursuant to the *Public Works Act* and the *Rights in Water Act*. Pursuant to s 62 of the *Rights in Water Act*, upon publication of notices of land being acquired by compulsory process for the purpose of that Act, the land, by force of the publication, was vested in the Crown.¹⁰⁸ Pursuant to s 18 of the *Public Works Act*, upon publication of notice that the land has been set apart, taken or resumed under that Act, the land, by force of that Act and as the Governor may direct, was 'vested in the Crown for an estate in fee simple in possession or such lesser estate for the public work expressed in such notice'. In both cases, the legislation provided that the vesting of the land freed and discharged the land from the interests of third parties.

The High Court dealt with the effect of the relevant resumptions at two levels: one general, one specific. Considering the general effect, upon native title, of the assertion or exercise, by the Crown, of rights or powers, the majority observed:

What exactly is the right or power which is said to be asserted or exercised? That is a question which can be answered only by examining the relevant statutory basis for the assertion or exercise of a right or power in relation to the land. Just as a change in sovereignty at settlement worked no extinguishment of native title, the bare fact that there is statutory authority for the executive to deal with the land in a way which would, on the occurrence of that dealing, create rights inconsistent with the continued existence of native title will not suffice to extinguish native title. ... Yet there may be cases where the executive, pursuant to statutory authority, takes full title or plenum dominium to land and it is clear that this would extinguish native title.¹⁰⁹

The majority then dealt with the specific effect, on native title, of the relevant legislative bases for the resumption and vesting of land. That is, did the statutory resumption or vesting of land which was, prior to the grant of the resumed interest, Crown land, confer beneficial title upon the Crown?

105 The Argyle Downs pastoral lease and freehold land were acquired by the State of Western Australia in a bargain-and-sale transaction rather than pursuant to the powers of resumption contained in the *Land Act 1933* (WA), the *Public Works Act 1902* (WA) or the *Rights in Water and Irrigation Act 1914* (WA): see *Ward v Western Australia* (1999) 159 ALR 483, 586.

106 It will be seen that pastoral lease land remained Crown land for the purposes of the *Land Act 1933* (WA): see below n 216 and accompanying text.

107 Land resumed from a pastoral lease would be Crown land available to be used for the purpose specified as the purpose for resumption or reserved under the *Land Act 1933* (WA) or otherwise held as vacant Crown land. Pursuant to the *Rights in Water and Irrigation Act 1914* (WA) s 3, all lands acquired for, or dedicated to, the purposes of that Act were vested in the Minister until such lands, irrigation works and constructions were vested in a board: *Ward v Western Australia* (1999) 159 ALR 483, 585.

108 Ibid 587.

109 *Ward HC* (2002) 213 CLR 1, 115.

The majority of the High Court, the Full Federal Court and the trial judge (Lee J) in *Ward* all agreed that resumptions of land do not, of themselves, expand the Crown's radical title to the land into full beneficial ownership. With respect to the resumption of the pastoral lease pursuant to s 109 of the *Land Act*, it is clear from the quote extracted above, that '[r]esumption did not give the Crown any larger title to the land than the radical title acquired at sovereignty.'¹¹⁰ Furthermore, in the context of s 3 of the *Rights in Water Act*, the High Court's analysis is consistent with both the majority of the Full Court and Lee J: that is, the statutory vesting of resumed land did not, of itself, confer a beneficial interest.¹¹¹

Although there is authority for the proposition that statutory provisions which vest resumed land in the Crown for an estate in fee simple do convert the Crown's radical title into beneficial ownership,¹¹² it is suggested that this result is due to the fact that the relevant vesting Act also provided that the vesting 'freed and discharged' the land from the interests of third parties.¹¹³ Thus, the statutory vesting of resumed land for an estate in fee simple did not, of itself, confer beneficial ownership.¹¹⁴

Although the bargain and sale transaction was not an issue before the High Court, the majority emphasised 'the protean qualities of the word "vest" and the proposition that what is "vested" will often be no more than is necessary for the

110 Ibid 135. See also above n 103; *Western Australia v Ward* (2000) 170 ALR 159, 267; *Ward v Western Australia* (1999) 159 ALR 483, 586 (Lee J). Although a compulsory acquisition does extinguish native title for the purposes of the *Native Title Act 1993* (Cth), this does not necessarily mean that the Crown acquires full beneficial ownership of the land.

111 *Ward HC* (2002) 213 CLR 1, 133–4; *Western Australia v Ward* (2000) 170 ALR 159, 267 (Full Federal Court); *Ward v Western Australia* (1999) 159 ALR 483, 588 (Lee J).

112 *Western Australia v Ward* (2000) 170 ALR 159, 271 (Full Federal Court); *Ward HC* (2002) 213 CLR 1, 133–4.

113 That is, because the *Public Works Act 1902* (WA) s 18 provided that the vesting of the land 'freed and discharged' the land from the interests of third parties, rather than because the statutory vesting of resumed land for an estate in fee simple conferred beneficial ownership. The statutory vesting provisions in both *Fejo v Northern Territory* (1998) 195 CLR 96 and *Mabo v Queensland (No 1)* (1988) 166 CLR 186 employed similar 'freed and discharged' terminology. Accordingly, it is suggested that the *Public Works Act 1902* (WA), like the *Coast Island Declaration Act 1985* (Qld) s 3 and the *Lands Acquisition Act 1906* (Cth) s 16 in *Mabo v Queensland (No 1)* (1988) 166 CLR 186 and *Fejo v Northern Territory* (1998) 195 CLR 96 respectively, is effective to extinguish native title merely because it is an example of the first category of laws, identified by Brennan CJ in *Wik*, which may extinguish native title: namely, laws which simply extinguish native title. By simply extinguishing any other title to the land, including native title, the law does not confer beneficial title on the Crown. The purported legislative vesting is, therefore, irrelevant. See also *Bodney v Westralia Airports Corporation* (2000) 109 FCR 178, 197 (Lehane J). That is, in conformity with Lee J's analysis, statutory vesting of resumed land for an estate in fee simple does not convert the Crown's radical title into a full beneficial interest.

114 *Ward v Western Australia* (1999) 159 ALR 483, 588, 586, 569 (Lee J); also below n 146. In the context of resumed land, therefore, Lee J appears to have attributed to the Crown's title a content which lies somewhere between mere radical title and beneficial ownership. Although the land remains Crown land and is, therefore, land in respect of which the Crown has a radical title, this radical title is qualified by the purpose of the vesting. Accordingly, the Crown's power of alienation in respect of such land is limited to a particular purpose. Where land has ceased to be Crown land within the definition of mere radical title, it ceases to be available for classification and disposal by way of purchase or lease tenure, until it again becomes Crown land by revesting the land in the Crown as Crown land per se by rescission of the dedication. Interestingly, Lee J's analysis is also consistent with older, pre-*Mabo*, authorities, notwithstanding the pre-*Mabo* understanding of the meaning of Crown land: see, eg, *Ex parte Collins* (1914) 14 NSWSR 31.

public body to discharge its function'.¹¹⁵ In any event, it is clear from *Ward HC* that at least some statutory provisions which vest resumed land in the Crown do not elevate the Crown's radical title to full beneficial ownership.

The important point is that the majority of both the *Wik* and *Ward HC* High Courts have made it clear that the term 'radical title' is synonymous with 'Crown land'. Although the *Ward HC* High Court's analysis of the statutory resumption and vesting of Crown land supports the inchoate nature of the Crown's radical title, it is also consistent with the more generous interpretation of radical title: as conferring full property rights except to the extent of native title. The *Wik* decision is, however, more unequivocal: not only does it make it clear that radical title, or Crown land, is not of itself and automatically tantamount to beneficial ownership of land, but it also emphasises that, for the purpose of Crown lands legislation, and contrary to the pre-*Mabo* view, the exercise by the Crown of the right to grant tenure in land is not dependent upon the Crown's beneficial ownership of the land. Unless the Crown has more than mere radical title to the land, therefore, the Crown does not have, nor need, ownership of land when an interest is created. The Crown's power to acquire and confer title is an aspect of its sovereignty rather than beneficial ownership. Accordingly, the fiction that the King originally owned all land is not required to provide factual justification for the King's paramount lordship over tenures created by Crown grant: there is no longer any legal reason for deeming the Crown to be the owner of all land in Australia.

Wik concerned pastoral leases granted under the *1910 Act* and the *Land Act 1962* (Qld) ('*1962 Act*').¹¹⁶ In the *1910 Act*, the term 'Crown land' was defined, in s 4, as:

All land in Queensland, except land which is, for the time being:

- (a) Lawfully granted or contracted to be granted in fee-simple by the Crown;
or
- (b) Reserved for or dedicated to public purposes; or
- (c) Subject to any lease or licence lawfully granted by the Crown: Provided that land held under an occupation license shall be deemed to be Crown land.

Section 4 of the *1910 Act* followed the terms of earlier legislation¹¹⁷ and the definition of 'Crown land' in s 5 of the *1962 Act* was in similar terms to s 4 of the *1910 Act*.¹¹⁸ Although this pattern is continued in the current Queensland *Land Act*,¹¹⁹ the current Act has replaced the term 'Crown land' with 'Unallocated state

¹¹⁵ *Ward HC* (2002) 213 CLR 1, 141.

¹¹⁶ *Ward* concerned a pastoral lease granted under the *Land Act 1898* (WA). The *Land Act 1898* (WA) was repealed by the *Land Act 1933* (WA).

¹¹⁷ Including: *Pastoral Leases Act 1869* (Qld) s 3; *Crown Lands Act 1884* (Qld) s 4 and *Land Act 1897* (Qld) s 4.

¹¹⁸ See also *Wik* (1996) 187 CLR 1, 190 (Gummow J).

¹¹⁹ *Land Act 1994* (Qld) repealing the *Land Act 1962* (Qld).

land'.¹²⁰ Nevertheless, the various incarnations of the Queensland *Land Act* do not alter the nature of the Crown's title to unalienated land, which remains radical. Since there is considerable authority for the proposition that radical title is bare legal title sufficient to support the Crown's right to acquire and confer title, but not title itself, the crucial question is: does the statutory definition of Crown land considered in light of the policy of the regime regulating the alienation of land support this interpretation?

4 Policy of Crown Lands Legislation

It is clear from both *Mabo* and *Wik* that 'Crown land' does not equate with 'Crown property' per se; indeed, a contrary conclusion would have prevented any recognition of native title rights and interests in land in Australia.¹²¹ Pre-*Mabo*, however, Stephen CJ, in *A-G v Brown*, relied upon early Imperial and colonial enactments as a reason for attributing absolute beneficial ownership of waste lands of Australia to the Crown since settlement.¹²² Nevertheless, it will be seen that such instruments merely recognise the Crown's right to grant interests in land; they do not, nor do they need to, assert any property rights of the Crown in unalienated land. They are consistent with acknowledgment of mere radical title in the Crown. Stephen CJ referred specifically to four Imperial enactments:

120 'Unallocated State Land' is defined to mean all land that is not: '(a) freehold land, or land contracted to be granted in fee simple by the State; or (b) a road or reserve, including a national park, conservation park, State forest or timber reserve; or (c) subject to a lease, licence or permit issued by the State': *Land Act 1994* (Qld) Sch 6.

121 See Deane and Gaudron JJ's observation in *Mabo* (1992) 175 CLR 1, 114 in the context of an early incarnation of the current *Land Act 1994* (Qld), that the provisions of the *Crown Lands Alienation Act 1876* (Qld) did not, of themselves, either extinguish existing common law native title in relation to the lands to which it applied or make [the native title holders] trespassers upon those lands. See also Toohey J's comments at 198: '[I]f the plaintiffs make good their claim to traditional native title ... there is nothing in the legislative history of Queensland ... which is destructive of traditional title.' Brennan J similarly observed at 65–7 that although Crown lands legislation was founded on the assumption of the initial absolute Crown ownership of all land and resources, by simply recognising the underlying radical title of the Crown, such legislation does not extinguish native title. Rather than being dispossessed by such legislation, Brennan J concluded at 68 that the Aboriginal people of Australia 'were dispossessed by the Crown's exercise of its sovereign power to grant land to whom it chose and to appropriate to itself the beneficial ownership of parcels of land for the Crown's purposes.' Cf Brennan J at 66. All members of the High Court in *Mabo*, except Dawson J, agreed with this conclusion: at 110–1 (Deane and Gaudron JJ); 196 (Toohey J). The High Court also endorsed this view in *Western Australia v Commonwealth* (1995) 183 CLR 373, 433–4: '[S]ince the establishment of the Colony [of Western Australia] native title in respect of particular parcels of land has been extinguished only parcel by parcel. It has been extinguished by the valid exercise of power to grant interests in some of those parcels and to appropriate others of them for the use of the Crown inconsistently with the continuing right of Aborigines to enjoy native title.' See also Richard Bartlett's comments in *Native Title in Australia*, above n 3, 234. Sections 20(1) and 21 of the *Property Law Act 1974* (Qld) are also consistent with this analysis. Section 21 merely maintains the position that land which is 'held of the Crown in fee simple may be assured in fee simple without licence and without fine and the person taking under the assurance shall hold the land of the Crown in the same manner as the land was held before the assurance took effect.' Section 20(1) merely confirms that '[a]ll tenures created by the Crown upon any grant in fee simple ... shall be taken to be in free and common socage without any incident of tenure for the benefit of the Crown.'

122 Albeit in obiter: *A-G v Brown* (1847) 1 Legge 312, 318–19.

the *Sale of Waste Lands Act 1842 (Imp)*;¹²³ *An Act to Provide, until the Thirty-First Day of December One Thousand Eight Hundred and Thirty-Four, for the Government of His Majesty's Settlements in Western Australia, on the Western Coast of New Holland 1829 (Imp)*;¹²⁴ the *Australian Agricultural Company's Act 1824 (Imp)*;¹²⁵ and the Statute 7 and 8 Will III, c 22, s 16.

It was in the context of discussing the *Sale of Waste Lands Act 1842 (Imp)*¹²⁶ that Stephen CJ articulated his infamous 'no other proprietor' statement.¹²⁷ This 1842 Imperial enactment introduced comprehensive statutory controls over the alienation of Crown land in the Australian colonies.¹²⁸ Stephen CJ observed that it could hardly be disputed that the terms 'waste lands of the Crown' and the 'waste lands belonging to the Crown', mentioned in the Act and the Act's title respectively, meant 'all the waste and unoccupied lands in the colony; for, at any rate, there is no other proprietor of such lands'.¹²⁹ No doubt the terms were defined by Stephen CJ in the belief, which was current in 1846,¹³⁰ that the absolute ownership of all land in the colony was vested in the Crown until it was alienated by the Crown. Nevertheless, and quite apart from the *Mabo* High Court's finding that acquisition of property is not a corollary of acquisition of sovereignty, as the principal object of the Act was to ensure that land in the colonies was only alienated by sale,¹³¹ there was no need to attribute to the Crown absolute beneficial ownership of the waste lands of the colony for the purposes of the Act; investiture of a power of alienation, mere radical title, was sufficient.

For Stephen CJ the significance of the statute entitled *An Act to Provide ... for the Government of His Majesty's Settlements in Western Australia ... 1829 (Imp)*,¹³² which recites that divers of the Crown's subjects had settled in certain unoccupied lands in Western Australia, was that such settlement was done with the consent and licence of the Crown.¹³³ His Honour also noted that the *Australian Agricultural Company's Act 1842 (Imp)*,¹³⁴ which was established 'for the cultivation and improvement of waste lands' in the colony, enacted that, 'in case a charter shall be granted to them, the Company may lawfully hold all such lands as shall be

123 5 & 6 Vict, c 36. This Act is discussed in text accompanying below n 126 and in the context of the legislative provisions dealing with the power to legislate regarding Crown land; see also text accompanying below n 222.

124 10 Geo IV, c 22.

125 5 Geo IV, c 86.

126 5 & 6 Vict, c 36.

127 *A-G v Brown* (1847) 1 Legge 312, 319.

128 Although not referred to by Stephen CJ, the later imperial statutes 9 & 10 Vict, c 104 and 11 Vict, No 61, which were both passed to regulate the sale of waste land in the Australian colonies, are also consistent with confirmation of mere radical title in the Crown.

129 *A-G v Brown* (1847) 1 Legge 312, 319.

130 *The King v Steele* (1834) 1 Legge 65.

131 5 & 6 Vict, c 36, s 17.

132 10 Geo IV, c 22.

133 *A-G v Brown* (1847) 1 Legge 312, 319.

134 5 Geo IV, c 86.

granted to them by His Majesty'.¹³⁵ Pursuant to the final Imperial Act referred to in this context, the Statute 7 and 8 Will III, c 22, s 16, the Crown's patentees were restrained from selling, without license, to any other than natural born subjects of the Crown. Although Stephen CJ only expressly acknowledged that the relevance of this last enactment was that it recognised the Crown's rights to make grants of land,¹³⁶ this was clearly also the importance of the other two Acts.¹³⁷

The legislative provisions relied upon by Stephen CJ are, therefore, consistent with investiture of mere radical title in the Crown, rather than also asserting the Crown's absolute ownership of the land. Furthermore, Stephen CJ was purporting to refute the contention that titles to land granted by the Crown to third parties were 'without foundation'.¹³⁸ Thus, his Honour was concerned with the title of the Crown grantee, not the title of the Crown per se. Nevertheless, he erroneously assumed that, in order for title to derive from the Crown, the Crown must have beneficial title to the land. In other words, if the Crown did not have absolute

135 *A-G v Brown*, (1847) 1 Legge 312, 319.

136 *Ibid*.

137 Stephen CJ also referred to two types of colonial enactments: the Acts for restraining the unauthorised occupation of the waste lands of the colony and the Acts for appointing Commissioners to report on disputed claims to grants of land. Only in respect of the latter type of Act did Stephen CJ cite two particular examples: *An Act to Remove Doubts Concerning the Validity of Grants of Land in New South Wales 1836* (Imp) 6 Will IV, No 16, and *An Act to Remove Doubts Concerning the Validity of Certain Grants of Land in New South Wales 1839* (Imp) 3 Vict, No 1. Statutes passed to remove doubts concerning the validity of grants of land in New South Wales required no more than ratification by the Crown in exercise of its sovereign power; a process necessitating no more than acknowledgement of the Crown's mere radical title to all land and the fact that the Crown's sovereign power to grant land, conferred by such radical title, had been exercised. Nevertheless, the Chief Justice went further and concluded that in these Acts, not only the right of the Crown to grant waste lands but 'the title of the Crown to the waste lands ... are too plainly recognised to admit of question': *A-G v Brown* (1847) 1 Legge 312, 320; Although Stephen CJ referred to the Acts for restraining the unauthorised occupation of waste lands in general terms, he noted that such Acts (for example, *An Act for Protecting the Crown Lands of this Colony from Encroachment Intrusion and Trespass 1833* (Imp) 4 Gul IV, No X) were important in two respects: not only are 'Crown lands ... mentioned *eo nomine* [in these Acts, but] their unauthorised occupation is said, expressly, to be derogatory to the rights of the Crown': *A-G v Brown* (1847) 1 Legge 312, 320. With respect to the designation of the waste lands of the colony as 'Crown lands', Stephen CJ had already accepted that the term 'waste lands of the Crown' meant 'all the waste and *unoccupied* lands in the colony': at 319 (emphasis added); see also text accompanying below n 231. Since radical title confers a power of alienation over all land, it is axiomatic that the Crown must have radical title in respect of any unalienated land, whether occupied or unoccupied at settlement. Furthermore, although these colonial Acts expressly referred to the unauthorised occupation of unalienated Crown land as being 'derogatory to the rights of the Crown, the measures contained in the Acts simply gave effect to the colonial government's policy of regulating the occupation of unalienated land by making it unlawful to occupy land beyond the limits of location without a lease or license. Thus, the Governor, as repository of both executive and legislative power, on behalf of the Crown, was merely regulating the use of the land pursuant to the Governor's powers to legislate within the colony. This is also consistent with the High Court's treatment of the statutory regulation of native title in *Yanner v Eaton* (1999) 201 CLR 351, which was analysed by North J in *Western Australia v Ward* [2000] 170 ALR 159. Indeed, in the event that the Crown is held to have acquired a beneficial title to any, or all, unalienated land not subject to native title, as a result of the various statutory definitions of 'Crown land', statutory trespass provisions or statutory provisions vesting title in the Crown, the argument that radical title is merely a bare legal title rather than a full proprietary right is intact. This is because a full beneficial title does not vest in the Crown by the common law but by force of statute. That is, the root of the Crown's title is statutory.

138 *A-G v Brown* (1847) 1 Legge 312, 319.

beneficial ownership of land, the Crown could not effectively grant the land:¹³⁹ an assumption which has certainly been rejected by the High Court in both *Mabo* and *Wik*. Indeed, the High Court made it clear that, at common law, the Crown has power to extinguish native title by an inconsistent executive grant per se (without the need for legislative authority to extinguish).¹⁴⁰ Nevertheless, it is clear that because Crown lands legislation in Australia merely recognises the Crown's radical title, it does not extinguish native title.¹⁴¹

Similarly, general schemes of land regulation have not been treated in America or Canada as amounting to an expansion of radical title for the purpose of extinguishing native title.¹⁴² This conclusion is also supported by the British Columbia Court of Appeal's and the Canadian Supreme Court's interpretation, in *Delgamuukw v British Columbia*¹⁴³ and *Calder v Attorney-General (British Columbia)*¹⁴⁴ respectively, of the legislation promulgated in order to assist British settlement in and authority over the colony of British Columbia.¹⁴⁵ Significantly, this legislation included the provision that 'all the lands in British Columbia, and all mines and minerals thereunder belonged to the Crown *in fee*'.¹⁴⁶ In interpreting this provision, the Court focused on 13 colonial instruments, enacted between

139 Like the courts in *The Queen v Symonds* (1847) [1840-1932] NZPCC 387 (NZSC), *Johnson v M'Intosh* 21 US (8 Wheaton) 453 (1823); and *Worcester v State of Georgia* 31 US (6 Peters) 515 (1832).

140 *Mabo* (1992) 175 CLR 1, 68–9 (Brennan J). Moreover, extinguishment of native title did not require the payment of compensation: at 15–16 (Brennan and Dawson JJ concurring). Although Deane and Gaudron JJ also indicated that native title might be extinguished by inconsistent Crown grant irrespective of any legislative intention to extinguish, they held, in accordance with the doctrine of continuity, that although native title would be subordinated to the Crown grant it would constitute a wrongful act and be actionable: at 88–90, 94, 110. Deane and Gaudron JJ decided that native title could be extinguished executively by inconsistent Crown grant or appropriation. However, they concluded that such executive extinguishment would be wrongful and would create a valid claim for compensatory damages in appropriate circumstances. Since 1975, the Crown's power to grant land is subject to the *Racial Discrimination Act 1975* (Cth): *Mabo v Queensland (No 1)* (1988) 166 CLR 186; *Mabo* (1992) 175 CLR 1, 67, 74, 112, 172–3, 214–16; see also 192–197 (Toohey J), but note that Toohey J concluded that since the plaintiffs claimed no relief in respect of the two leases granted on the Murray Islands, the question whether the leases were effective to extinguish any traditional title (as he called native title) must remain unanswered: at 197. See also *Western Australia v The Commonwealth* (Native Title Act Case) (1995) 183 CLR 373, 422, 439; *Wik* (1996) 187 CLR 1, 176 (Gummow J), 250 (Kirby J); see also 90–2 (Brennan CJ); 124–5 (Toohey J); cf *Nullagine Investments Pty Ltd v Western Australia Club Inc* (1993) 177 CLR 635, 656. A clear and plain legislative intention to extinguish is not required provided that the act of the executive reveals a clear and plain intention to extinguish: *Fejo v Northern Territory* (1998) 195 CLR 96, 1452–4 (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ); 1463–6 (Kirby J). See also *Wik* (1996) 187 CLR 1, 185–186 (Gummow J) and *Ward HC* (2002) 213 CLR 1, 89–90 (Gleeson CJ, Gaudron, Gummow and Hayne JJ). Cf at 264, 266 (Callinan J) and *Wilson v Anderson* (2002) 213 CLR 401, 477 (Callinan J).

141 *Mabo* (1992) 175 CLR 1, 66, 68–9 (Brennan J), 110–1 (Deane and Gaudron JJ), 196 (Toohey J); *Western Australia v Commonwealth* (1995) 183 CLR 373, 433–4.

142 *Gila River Prima-Maricopa Indian Community v United States* 494 F 2d 1386 (1974); *R v Sparrow* [1990] 1 SCR 1075.

143 (1993) 104 DLR (4th) 470 ('*Delgamuukw*'); reversed in part [1997] 3 SCR 1010.

144 [1973] SCR 313.

145 *Delgamuukw* (1993) 104 DLR (4th) 470, 526.

146 *Ibid* 525; see also 525–31 (MacFarlane JA) (emphasis added). The full text of the provision is extracted in *Calder v Attorney-General (British Columbia)* (1970) 8 DLR 59, 75–81 (SC (BC)).

1858 and 1870,¹⁴⁷ dealing with land and the purchase, pre-emption and settlement of land.

The British Columbia Court of Appeal unanimously held that the express declaration of land belonging to the Crown ‘in fee’ merely declared the existing underlying title of the Crown, which could, therefore, coexist with native title.¹⁴⁸ Indeed, MacFarlane JA concluded that the existing situation which the legislation declared was that ‘only the Crown was competent to convey land interests to third parties’ because ‘[t]he Crown held the underlying title to all lands in the province.’¹⁴⁹ Thus, the provisions relating to the Crown’s fee simple title had to be understood in the context of setting up an orderly system of purchase, pre-emption and settlement.¹⁵⁰ In *Western Australia v Commonwealth*,¹⁵¹ the High Court’s analysis was consistent with this approach. In both jurisdictions, therefore, the Crown’s colonial policy was capable of being implemented without a general expansion of the Crown’s radical title.¹⁵²

Although this conclusion might suggest that radical title is a full property right subject to native title, it is also consistent with the proposition that radical title is a nominal title only which does not confer any beneficial entitlement to the land to which it relates. That is, the suggestion that, for the purposes of Crown lands legislation, ‘in fee’ does not mean an absolute beneficial interest, has an affinity with Chapman J and Martin CJ’s analysis in *The Queen v Symonds*,¹⁵³ which attributed to the Crown a mere technical seisin:¹⁵⁴ rather than being seised in fee, the Crown is seised of the right to acquire title. Although both the High Court and the British Columbia Court of Appeal were construing statutes enacted at a time ‘when the existing state of the law was perceived to be the opposite of that which it since has been held to have been’,¹⁵⁵ it will be seen that the suggested construction is consistent with the object and purpose of the legislation.

In the context of the New South Wales lands legislation, it has been pointed out that the object of such legislation from 1861 onwards was ‘to control the Crown prerogative of *disposing* of the waste lands of the Colony at will and to provide the

147 A convenient summary of these instruments is set out by Judson J in *Calder v Attorney-General (British Columbia)* (1970) 8 DLR 59, 75–81 (SC (BC)), 159–9; reproduced in *Delgamuukw* (1993) 104 DLR (4th) 470, 525–6 (Macfarlane JA).

148 Although declarations of property have also been made in state legislation respecting minerals, water, wildlife, fish, and resumed land, an examination of all such regimes is beyond the scope of this article. The statutory declaration of property in the context of resumed land has been considered in the text accompanying above n 103.

149 *Delgamuukw* (1993) 104 DLR (4th) 470, 530–1.

150 *Ibid* 675 (Lambert JA).

151 (1995) 183 CLR 373, 433. See also *Wik* (1996) 187 CLR 1, 125–6 (Toohey J), 248 (Kirby J).

152 *Western Australia v Commonwealth* (1995) 183 CLR 373, 433 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ).

153 (1847) [1840-1932] NZPCC 387 (NZSC).

154 Martin CJ spoke of the ‘Sovereign right of control of land’: *ibid* 395. The New Zealand judicial concept of ‘technical seisin’ is simply another term for what the Australian High Court has designated the ‘concomitant of sovereignty’ limb of radical title.

155 *Wik* (1996) 187 CLR 1, 184 (Gummow J).

subjects of the Crown with a statutory right, upon the performance of conditions, to have a *grant* of land from the Crown'.¹⁵⁶ The purpose of the introduction of a land settlement scheme was to facilitate the orderly settlement of the colonies and to give the Crown control over grants to third parties.¹⁵⁷ Thus, the series of Acts passed by the various Australian colonial parliaments dealing with the disposition of unalienated lands merely needed to empower the Governor-in-Council to exercise the Crown's sovereign power by granting estates and interests in land in accordance with the Acts; they did not need to vest, or acknowledge, absolute beneficial ownership of land in the Governor-in-Council, the Crown or anyone else.¹⁵⁸

Indeed, in *Delgamuukw*, MacFarlane JA observed that '[o]ne should assume that the object [of Crown lands legislation] was to achieve the desired result with as little disruption as possible, and without affecting accrued rights and existing status any more than is necessary'.¹⁵⁹ This dictum was approved of by the High Court of Australia in *Western Australia v Commonwealth*¹⁶⁰ and was cited with approval by Toohey J in *Wik*.¹⁶¹ Accordingly, in Australia, since all Crown lands legislation passed by the colonial governments was founded upon the assumption of absolute Crown ownership of all land, such legislation presupposed, rather than conferred, the Crown's title. This presupposition about the 'existing status' of the Crown's title has, of course, been shown to be incorrect.

Moreover, it has been seen that the presumption of original Crown ownership is not relevant in the context of statutory grant.¹⁶² Accordingly, the passage of legislation declaring powers of disposition of land and resources is not sufficient to 'affect' the 'existing status' of the Crown's title, that is, to enhance the Crown's radical title. Consequently, the pre-*Mabo* view that statutory definitions of 'Crown land' refer to any land which, pursuant to legislative enactment, is the property of the

156 *Walsh v Minister for Lands for New South Wales* (1960) 103 CLR 240, 254 (Windeyer J) (emphasis added).

157 Cf Macfarlane JA's comments in *Delgamuukw* (1993) 104 DLR (4th) 470, 530–1 to similar effect in the context of the impact of various colonial instruments on native title.

158 It is worth noting that acknowledgment of the power to grant estates in land, rather than acknowledgment of absolute beneficial ownership of land, is also evident in Governor Phillip's commission, dated 2 April 1787: 'And we do hereby likewise give and grant unto you full power and authority to agree for such lands tenements and hereditaments as shall be in Our power to dispose of and grant to any person or persons upon such terms and under such moderate quit rents services and acknowledgments to be thereupon reserved unto Us according to such instructions as shall be given to you under Our Sign Manual which said grants are to pass and be sealed by Our Seal of Our said Territory and its dependencies and being entered upon record by such officer or officers as you shall appoint thereunto shall be good and effectual in law against Us Our heirs and successors.' See also Olney J's analysis of the history of fisheries legislation and administration in relation to the claimed area in *Yarmurr v Northern Territory* (1998) 82 FCR 533, 594–9.

159 *Delgamuukw* (1993) 104 DLR (4th) 470, 529.

160 (1995) 183 CLR 373, 433.

161 *Wik* (1996) 187 CLR 1, 125–6.

162 At least in the context of statutory grants of pastoral leases: see text accompanying above n 34.

Commonwealth, a State or Territory,¹⁶³ no longer accurately reflects the law.¹⁶⁴ Indeed, pre-*Mabo*, the High Court of Australia in *The Sydney Harbour Trust Commissioners v Wailes*¹⁶⁵ acknowledged that there was a distinction between land which is 'Crown land' and land which is the 'property of the Crown'.¹⁶⁶

B Pre-Mabo Distinction between 'Crown Land' and 'Property of the Crown'

In 1908, in *The Sydney Harbour Trust Commissioners v Wailes*,¹⁶⁷ Griffith CJ observed that the 'term "property of the Crown" was [not] equivalent to Crown lands'.¹⁶⁸ Although the term 'property of the Crown' covered 'all property of which the Crown [was] the *formal* owner', this included not only the waste lands of the Crown but also 'lands which are the property of the Crown vested in some statutory corporation as trustee for the Crown'.¹⁶⁹ According to Griffith CJ, therefore, 'property of the Crown' referred not only to all unalienated land in Australia, but also to all land which had been appropriated to the Crown.¹⁷⁰ 'Crown land' simpliciter,¹⁷¹ however, referred only to unalienated (or waste) land.

Although this was no doubt the correct interpretation pre-*Mabo*,¹⁷² the post-*Mabo* conception of the nature of the title acquired by the Crown upon settlement necessitated its reassessment. Post-*Mabo*, although the Crown acquired a radical title to all land upon acquisition of sovereignty, beneficial title required an appropriate exercise of sovereign authority. In terms of Griffith CJ's definition, therefore, 'property of the Crown', being land in respect of which the Crown is the 'formal owner', refers to land in respect of which the Crown has not only radical title but also beneficial ownership. Thus, the Crown must have exercised its sovereign power to appropriate ownership of the land to itself. On the other hand, 'Crown land', being unalienated and unappropriated land, refers to land in respect of which the Crown has only a radical title. In this context, the Crown has not taken the appropriate steps to become the formal owner. Importantly,

163 See, eg, Butterworths, *Halsbury's Laws of Australia*, vol 22 (at 12 April 2008) [355-13500].

164 See also the discussion of legislative declarations of Crown property in resumed land: text accompanying above n 103.

165 (1908) 5 CLR 879, a unanimous decision of the High Court.

166 *Ibid* 883 (Griffith CJ).

167 *Ibid*.

168 *Ibid* 883. Referring to s 27 of the *Sydney Harbour Trust Act 1900* (NSW).

169 *Ibid* 884 (emphasis added).

170 There is considerable authority indicating that the term 'property' is ambiguous: *McCaughey v Commissioner of Stamp Duties* (1945) 46 NSW 192, 201; *Minister for Army v Dalziel* (1944) 68 CLR 261, 276 (Latham CJ); *In the Marriage of Duff* (1977) 3 Fam LR 11, 211; *Yanner v Eaton* (1999) 201 CLR 351. In *Yanner v Eaton*, Gleeson CJ, Gaudron, Kirby and Hayne JJ found that the declaration of 'property' referred merely to the 'aggregate of the various rights of control by the Executive that the legislation created': at 370. See also Bartlett's analogous reasoning in the context of the effect of such provisions on native title: Bartlett, above n 3, 240.

171 See also *Commonwealth v New South Wales* (1923) 33 CLR 1, 22 (Knox CJ and Starke J; Gavan Duffy J agreeing at 28), 62 (Higgins J).

172 Due to the belief that the Crown initially owned all land upon settlement.

this reassessment preserves the unalienated/appropriated dichotomy integral to Griffith CJ's definition.

C Statutory Trespass

It is clear from *Mabo*,¹⁷³ *Wik*¹⁷⁴ and *Ward HC*,¹⁷⁵ that provisions in Crown lands legislation that deal with trespass on Crown lands¹⁷⁶ do not extinguish native title nor make Aboriginal people who occupied the land by right of their unextinguished title trespassers. However, it is the High Court's construction of the trespass provisions that is crucial when considering whether 'Crown land' and 'Crown property' are mutually exclusive concepts.

The relevant trespass provision in *Mabo* was s 91 of the *Crown Lands Alienation Act 1876* (Qld). This section was one of the progenitors of the trespass provisions considered in *Wik*, namely, s 203 of the *1910 Act* and s 372(1) *1962 Act*.¹⁷⁷ Since the *Wik* High Court held that the conclusions reached with respect to s 203 of the *1910 Act* applied to the 1962 provision,¹⁷⁸ discussion will be confined to s 203 of the *1910 Act*. This section provided that:

Any person, not lawfully claiming under a subsisting lease or license or otherwise under any Act relating to the occupation of Crown land, who is found occupying any Crown land or any reserve, or is found residing or erecting any hut or building or depasturing stock thereon, or clearing, digging up, enclosing, or cultivating any part thereof, shall be liable to a penalty not exceeding twenty pounds.¹⁷⁹

Gummow J explained that:

On its face, s 203 would have rendered a trespasser any person who, in exercise of what now are characterised as having been native title rights, occupied any of the very large area of Queensland falling within the definition of 'Crown land' or conducted there any of the activities referred to in s 203. Were that so, the ground would be provided for a submission as to the general extinction of native title in respect of any land from time to time falling within the definition of 'Crown land'.¹⁸⁰

173 (1992) 175 CLR 1, 66 (Brennan J; Mason CJ and McHugh J concurring), 114 (Deane and Gaudron JJ).

174 (1996) 187 CLR 1, 120–1 (Toohey J), 146–7 (Gaudron J), 191–4 (Gummow J).

175 (2002) 213 CLR 1, 125–128; see especially 127–8. Unlike the legislation considered in *Mabo* and *Wik*, the relevant trespass provision considered in *Ward HC* (*Land Act 1933* (WA) s 164) made no provision for the holder of a pastoral lease to bring an action for removal of persons in 'unlawful occupation' of the land the subject of the pastoral lease: at 127.

176 And declare it to be an offence for any unauthorised person to enter upon Crown land.

177 In essence, these provisions followed the terms of the *Unoccupied Crown Lands Occupation Act 1860* (Qld) s 29; *Pastoral Leases Act 1869* (Qld) s 72; *Crown Lands Alienation Act 1876* (Qld) s 91; *Crown Lands Act 1884* (Qld) s 124 and *Land Act 1897* (Qld) s 236.

178 See, eg, *Wik* (1996) 187 CLR 1, 195 (Gummow J).

179 *Land Act 1910* (Qld) s 203.

180 *Wik* (1996) 187 CLR 1, 190–1.

Nevertheless, the *Wik* High Court unanimously rejected the notion that the operation of s 203 involved the extinguishment of native title in relation to Crown land. In reaching this conclusion, the majority adopted Brennan J's construction of s 91 of the *Crown Lands Alienation Act 1876* (Qld)¹⁸¹ in *Mabo*.¹⁸² Brennan J's interpretation of s 91 of the Act is, therefore, critical. Section 91 provided that:

Any person unless lawfully claiming under a subsisting lease or license or otherwise under this Act who shall be found occupying any Crown lands or land granted reserved or dedicated for public purposes either by residing or by erecting any hut or building thereon or by clearing digging up enclosing or cultivating any part thereof or cutting or removing timber otherwise than firewood not for sale thereon shall be liable on conviction to a penalty not exceeding five pounds for the first offence and not exceeding ten pounds for the second offence and not exceeding twenty pounds for the third or any subsequent offence. Provided that no information shall be laid for any second or subsequent offences until thirty clear days shall have elapsed from the date of the previous conviction.

In the context of explaining the application of s 91, Brennan J drew a distinction between 'those who were or are in occupation under colour of a Crown grant or without any colour of right' and 'indigenous inhabitants who were or are in occupation of land by right of their unextinguished native title'.¹⁸³ Section 91 was directed to the former but not the latter.¹⁸⁴ Thus, indigenous inhabitants were not included in the class or description of persons to whom s 91 was directed.¹⁸⁵

Although the majority in *Wik* (except Kirby J)¹⁸⁶ expressly referred to and agreed with the construction given to s 91 by Brennan J,¹⁸⁷ only Gummow J attempted any analysis of Brennan J's approach. According to Gummow J, s 91 was not directed to indigenous inhabitants in occupation of land by right of their unextinguished native title because such indigenous inhabitants 'would not be "any person"' for the purposes of the section.¹⁸⁸ This analysis highlights the implications of the doctrine of tenure in the post-*Mabo* Australian real property law context: although the doctrine of tenure applies to every Crown grant of an interest in land and thus secures the Crown as a source of derivative title to land (when the Crown has alienated land), it does not preclude the existence of other interests in land which do not owe their existence to a Crown grant.¹⁸⁹ Accordingly, neither s 203

181 See below n 186 and accompanying text.

182 Although Brennan CJ delivered the minority judgment in *Wik* (1996) 187 CLR 1, he also adhered to his earlier views.

183 *Mabo* (1992) 175 CLR 1, 66.

184 Similar conclusions were reached in respect of soil conservation legislation and local government by-laws which imposed restrictions on land use in *Hayes v Northern Territory* (1999) 97 FCR 32, 100–3 and weed control legislation in *Ward v Western Australia* (1998) 159 ALR 483, 616.

185 *Wik* (1996) 187 CLR 1, 191 (Gummow J).

186 Cf *Wik* (1996) 187 CLR 1, 246–7, where Kirby J denies that the general provisions of the *1910 Act* and *1962 Act* involved any extinguishment of native title.

187 *Mabo* (1992) 175 CLR 1, 15 (Mason CJ and McHugh J), 121 (Toohey J); *Wik* (1996) 187 CLR 1, 146–7, 154–5 (Gaudron J), 192–5 (Gummow J); see also 246–7 (Kirby J).

188 *Wik* (1996) 187 CLR 1, 191.

189 *Mabo* (1992) 175 CLR 1, 50–1.

(nor its predecessor, s 91) applied to persons having an interest in land which was not derived from a Crown grant, like a native title right or interest.¹⁹⁰

To paraphrase the words of Brennan J, s 203 applied to those who were in occupation under colour of a Crown grant or without colour of a Crown grant, but not to those in occupation of land by right of an interest in land not derived from a Crown grant. Furthermore, the operation of s 203, by merely creating a statutory offence of trespass, did not involve an expansion of the Crown's radical title to beneficial ownership. In the event of its contravention, however, s 203 did provide for a penalty.¹⁹¹ A specific remedy for the removal of trespassers was also conferred by s 204 of the *1910 Act*,¹⁹² which provided that:

Any Commissioner or officer authorised in that behalf by the Minister who has reason to believe that any person is in unlawful occupation of any Crown land under colour of any lease or license that has become forfeited, may make complaint before justices, who shall hear and determine the matter in summary way, and, on being satisfied of the truth of the complaint, shall issue their warrant, addressed to the Commissioner or to such authorised officer or to any police constable, requiring him forthwith to remove such person from such land, and to take possession of the same on behalf of the Crown; and the person to whom the warrant is addressed shall forthwith carry the same into execution.

A lessee or his manager or a licensee of land from the Crown may in like manner make a complaint against any person in unlawful occupation of any part of the land comprised in the lease or license, and the like proceedings shall thereupon be had.

Although the legislation considered in *Ward* made no provision for the removal of trespassers, like the legislation considered in *Mabo*, it did provide for a penalty in the event of 'unlawful or unauthorised use or occupation of any Crown lands'.¹⁹³ Although the majority in *Ward HC* expressly approved of Gaudron and Gummow JJ's analysis in *Wik* in this context, both of these justices had agreed with Brennan J's construction of the relevant legislation in *Mabo*. Thus, the *Ward* High Court made it clear that these penal provisions should not be understood as working an extinguishment of native title because 'persons found in the "unlawful or unauthorised use or occupation" of Crown lands did not extend to persons exercising native title rights and interests'.¹⁹⁴

190 Indeed, this analysis has implications for any valid non-Crown derived titles, for example, the author has suggested that, as a result of the *Mabo* High Court's restatement of the common law, Aboriginal customary law can be a valid source of common law title to land and thus an alternative to native title: Secher, above n 85.

191 A fine not exceeding 20 pounds.

192 The corresponding provision in the *1962 Act* is s 373(1).

193 The *Land Act 1933* (WA) s 164 provided: 'Every person who, either by himself or by his servant, agent, or other person acting under his direction, shall be found in the unlawful or unauthorised use or occupation of any Crown lands, or land reserved for or dedicated to any public purpose, or set apart as town or suburban lands, or who in any manner trespasses thereon, shall on conviction be liable to a fine not exceeding twenty-five pounds.'

194 *Ward HC* (2002) 213 CLR 1, 128.

Nevertheless, by providing for the recovery of possession on behalf of the Crown, the actual execution of s 204 of the *1910 Act* could arguably constitute an exercise of the Crown's sovereign power to appropriate the land to itself, thereby converting its radical title to full beneficial ownership.¹⁹⁵ Since the Crown's radical title is subject to any native title rights and interests in land, such a result would mean that the act of taking possession on behalf of the Crown, for the purposes of s 204, has the effect of extinguishing any native title to the land; that is, s 204 recognises a statutory concept of 'operational inconsistency'.¹⁹⁶ In this context, Gaudron and Gummow JJ's view, in *Wik*, that the construction of s 203 was equally applicable to s 204 is significant.¹⁹⁷ That is, although s 204, like s 203,¹⁹⁸ does not apply to those in occupation of land by right of an interest in land not derived from Crown grant, if a trespasser within s 203 is removed (or possibly fined), this might constitute an appropriate exercise of the Crown's sovereign power in relation to that land for the purpose of converting its radical title to full beneficial ownership.¹⁹⁹ The important point is, however, that the legislative provisions will only be invoked if there is a 'trespasser'. That is, if a person is in unlawful occupation of Crown land 'under colour of a Crown grant'.²⁰⁰ Thus, where any person is in possession of land by virtue of a non-Crown derived title,²⁰¹ the legislation does not apply.

195 Cf acquisition of title by occupancy as one method of converting the Crown's radical title to *unoccupied* land into beneficial ownership.

196 Indeed, although the *Wik* High Court made it clear that inconsistency with native title, and therefore extinguishment in law, was determined by examining the legal character of the rights conferred by the grant, not the exercise of such rights, both Gaudron and Gummow JJ considered that extinguishment might also result 'as a matter of fact, but not as a matter of legal necessity', from the actual performance of conditions under the lease, such as the construction of buildings, which created an inconsistency with the exercise of native title rights: *Wik* (1996) 187 CLR 1, 166 (Gaudron J), 203 (Gummow J). In *Western Australia v Ward* (2000) 170 ALR 159, the majority of the Full Court of the Federal Court explained that Gaudron and Gummow JJ's observations in *Wik* referred to what they described as 'operational inconsistency'. Although the majority of the High Court in *Ward* rejected, 'in principle', the concept of 'operational inconsistency', the Court was dealing with the statutory, rather than the common law, position vis-à-vis extinguishment of native title. Accordingly, it is not clear whether the common law doctrine of extinguishment embraces the concept of operational inconsistency. Nevertheless, s 204 arguably constitutes a statutory form of operational inconsistency, not unlike the concept of operational inconsistency recognised by the *Native Title Act 1993* (Cth) ss 23B(9C), and 23DA. In effect, therefore, the legislative provisions facilitate the amplification of the Crown's radical title *pro tanto*; allowing for a gradual appropriation of proprietary rights over the land.

197 They concluded that once it was accepted that s 203 did not render Aboriginal people trespassers on their own land, it followed that s 204 did not render native title holders liable to removal because the section did not apply to them. In addition, Gummow J found that 'a bona fide assertion of a claim to rights conferred by native title would not render occupation unlawful' within the meaning of s 204: *Wik* (1996) 187 CLR 1, 193, 194 (Gummow J); see also 240 (Kirby J).

198 And possibly the *Land Act 1933* (WA) s 164.

199 A necessary consequence of such a conclusion would be that native title in respect of the land would be extinguished. Note, however, the difference in terms of vulnerability to extinguishment between common law non-Crown derived title and non-common law non-Crown derived title (eg native title). In any event, it is suggested that the operation of s 204 is analogous to the situation where the Crown has granted land in trust or has reserved land for a public purpose or for indigenous people: *Mabo* (1992) 175 CLR 1, 66 (Brennan J). In neither case does the exercise of sovereign power reveal a clear and plain intention to extinguish any non-Crown derived title.

200 See above n 183.

201 Although this necessarily includes occupation of land pursuant to native title, it would also encompass occupation of land pursuant to a common law title acquired by occupancy.

Whether or not Australian courts find that the Crown's act in removing trespassers pursuant to the various state and territory provisions equivalent to s 204 of the *1910 Act* enhances the Crown's radical title, the argument that radical title is merely a bare legal title rather than a full proprietary right is intact. This is because a full beneficial title does not vest in the Crown by the common law but by force of an act done pursuant to the statute. Indeed, it is clear that ss 203 and 204 of the *1910 Act* do not, of themselves, expand the Crown's radical title to a plenary title. At the very least, therefore, before the Crown takes action to remove a trespasser pursuant to these sections, it will not have formally entitled itself to the land.²⁰² Thus, statutory trespass provisions merely represent an exercise of the power of control over entry on Crown land which, like the power of disposition of Crown lands, does not of itself necessitate the expansion of the Crown's radical title to beneficial ownership. Furthermore, the historical background to the enactment of ss 203 and 204 of the *1910 Act* support the view that 'Crown land' does not mean 'Crown property'.

The *1910 Act* was enacted at a time when there was doubt as to whether, at common law, the Crown was obliged to proceed by way of information for intrusion because it could not maintain an action for ejectment. Although these doubts have since been dispelled,²⁰³ they assist in perceiving the purpose of s 204 in conferring a specific remedy for the removal of trespassers from Crown land.²⁰⁴ Before the procedure in ejectment was reformed in England by the *Common Law Procedure Act 1852* (UK),²⁰⁵ counsel in *Doe v Redfern*²⁰⁶ suggested that the Crown could not maintain an action in ejectment because:

[T]he action of ejectment by the King supposes him to have been turned out of possession, which cannot be; for if he be entitled at all, he is presumed to be in possession: and although ejectment be a fictitious proceeding, yet it must be consistent throughout, and the lessor must not only have in himself, but be capable of conveying to the plaintiff, a legal interest. So an intruder is not supposed to put the King out of possession; and therefore if the King have judgment on an information of intrusion, no *habere facias seisinam* issues.²⁰⁷

Thus, at common law, the King could not sue in ejectment because to maintain such an action would be 'inconsistent with his royal dignity and contradictory to the fiction of law that the King cannot be dispossessed of property once vested in him'.²⁰⁸ Because the fiction that the Crown could not be dispossessed²⁰⁹ was

202 Consequently, because the fiction of Crown ownership only applies in respect of a tenure created by Crown grant, this fiction can no longer, of itself, preclude acquisition of first title to unalienated and uninhabited real property in Australia: Secher, above n 85.

203 *Commonwealth v Anderson* (1960) 105 CLR 303, 318.

204 *Wik* (1996) 187 CLR 1, 191 (Gummow J).

205 15 & 16 Vict, c 76.

206 (1810) 12 East 96; 104 ER 39.

207 *Ibid* 107, 43.

208 J Chitty, *A Treatise on the Law of the Prerogatives of the Crown and the Relative Rights and Duties of the Subject* (1820), 245. See also *Doe v Redfern* (1810) 12 East 96; 104 ER 39; *Attorney-General v Lord Churchill* (1841) 8 M & W 171, 177, 186, 187, 191; 151 ER 997, 99, 1003, 1005.

209 *Lee v Norris* (1594) Cro Eliz 331; 78 ER 580; *The King v Bishop of Winton* (1604-6) Cro Jac 53, 123; 79 ER 45.

itself dependent upon the fiction of original Crown ownership, it merely served to pile fiction upon fiction'. The High Court's identification of radical title as the postulate of the doctrine of tenure has, however, begun the process of deconstructing the fiction mould. It has limited the application of the fiction of original Crown ownership to land which has been brought within the doctrine of tenure, for only then is it required to ensure the Crown its rights as feudal lord. Similarly, it has been seen that, because the post-*Mabo* doctrine of tenure only applies to every Crown grant of an interest in land, the fiction of original Crown grant has been rendered otiose.²¹⁰ By restricting the fictions of original Crown ownership and original Crown grant in this way, the post-*Mabo* doctrine of tenure also necessitates a reassessment of the associated fiction that the Crown cannot be dispossessed. Because dispossession presupposes ownership, this fiction can only apply to land in respect of which the Crown has in fact acquired a plenary title.

Indeed, although an information of intrusion presumed the Crown's ownership of land, it could be rebutted. Moreover, an office of entitlement, which found rather than gave the Crown its title, was necessary, in the absence of other record of the Crown's title, to give the Crown possession whenever lands were in possession of a subject when the Crown's title accrued.²¹¹ In light of the High Court's rejection of legal fictions, it is suggested that an office of entitlement is necessary in order to establish the Crown's right to possession of land. If land is unalienated and unappropriated, the Crown has, after all, only a radical title to the land. Importantly, inquests of office were necessary where the freehold was not cast upon the Crown by law.²¹² Thus, the requirement of an office of entitlement would make another fictitious proceeding, the action in ejectment, otiose (or at least less fictional).

The crucial point is that, 'property of the Crown' means land in respect of which both radical title and beneficial ownership is vested in the Crown;²¹³ that is, the Crown has formally entitled itself to the land. On the other hand, the definition of 'Crown land', for the purposes of the Crown land statutes, means land in respect of which radical title only is vested in the Crown; that is, the Crown has not formally entitled itself to the land. Consequently, the exception in the *1910 Act* and *1962 Act* definition of 'Crown land' — in respect of land which is, for the time being, granted or contracted in fee simple by the Crown; or reserved for or dedicated to public purposes; or subject to any lease, licence or permit — simply means land in respect of which the Crown no longer has radical title. There are, however, two limbs to this exception.

210 Above n 93.

211 McNeil, above n 87, 96; see also William Blackstone, *3 Commentaries on the Laws of England: Of Private Wrongs* (first published 1769, 1979 ed), 258; Sir William Holdsworth, *A History of English Law* (1st ed, 3rd Impression, 1975) 343.

212 McNeil, above n 87, 96.

213 Cf the position with respect to statutory declarations of Crown property: Bartlett, *Native Title in Australia*, above n 3, 235–59; see especially 237–8; [14.51]–[14.54].

First, where the Crown has exercised its sovereign power to grant an interest in land, the Crown will no longer have radical title, a power of alienation, over that land. In this context, Kirby J has observed that '[p]astoral lease land did not remain Crown land for the purposes of the [Queensland] Land Act'.²¹⁴ Secondly, where the Crown has exercised its sovereign power to appropriate to itself ownership of the land, the Crown will have become the formal owner, and thus have both the radical title and beneficial ownership of the land. For the duration of any dealing in land, therefore, the land ceases to be land in respect of which the Crown has a mere radical title. Where the Crown has exercised its sovereign power to grant an interest in land, however, the Crown has a power of eminent domain.²¹⁵

Notwithstanding the Crown's loss of radical title over certain land which no longer comes within the statutory definition of 'Crown land', by legislative enactment the Crown may still have radical title over that land for other specified purposes. That is, the Crown may retain a radical title in respect of the land for purposes other than the Crown lands legislation. In the context of pastoral lease land in Queensland, such land remains Crown land for the purposes of many other statutes, including mining and petroleum legislation.²¹⁶ Alternatively, the Crown may be deemed to retain radical title in a limited way for the purposes of the Crown lands legislation. In this context, land subject to a pastoral lease in Western Australia remains Crown land as defined in the relevant Land Act.²¹⁷ As CJ Brennan pointed out in *Wik*, this is significant because the 'problems of mining leases over land already leased by the Crown arise precisely because the Crown has already disposed of the leasehold estate [and, therefore, its radical title] in the land'.²¹⁸

Thus, the High Court's treatment of the statutory definition of 'Crown land' and the statutory trespass provisions support the proposition that 'Crown land', being land over which the Crown has only radical title, merely connotes the right of the Crown to dispose of land, rather than the Crown's proprietorship of land. Further support for this proposition is found in the legislative provisions dealing with the constitutional power to legislate regarding Crown land.

214 *Wik* (1996) 187 CLR 1, 241.

215 The Crown's power of eminent domain is discussed later: see below n 253.

216 See, eg, *Mining Act 1898* (Qld) s 3; *Mining Act 1968* (Qld) s 7; *Petroleum Act 1923* (Qld) s 3.

217 See, eg, in Western Australia pastoral lease land remains Crown land as defined in the *Land Regulations 1887* (WA) reg 2, the *Land Act 1898* (WA) s 3, and the *Land Act 1933* (WA) s 3; *Ward v Western Australia* (1998) 159 ALR 483, 556 (Lee J); *Ward HC* (2002) 213 CLR 1, 125. Furthermore, pastoral lease land is still 'Crown land' for the purposes of other legislation dealing with control, management and possession of such land and of flora and fauna, to wit, legislation dealing with the mining of minerals and petroleum, drainage and catchment of water, and conservation of land, flora and fauna: see *Mining Act 1904* (WA) s 3; *Mining Act 1978* (WA) s 8; *Petroleum Act 1936* (WA) s 4; *Petroleum Act 1967* (WA) s 5; *Land Drainage Act 1925* (WA) s 6; *Wildlife Conservation Act 1950* (WA) s 6; *Conservation and Land Management Act 1984* (WA) s 11; *Ward v Western Australia* (1998) 159 ALR 483, 556 (Lee J).

218 *Wik* (1996) 187 CLR 1, 75.

III LEGISLATIVE PROVISIONS DEALING WITH THE POWER TO LEGISLATE REGARDING CROWN LAND

The various state constitutions are the source of legislative power to deal with Crown land in Australia. Between 1855 and 1890, the enactment of local constitutions, which embodied the principle of responsible government, transferred the management and control of Crown lands to the colonial legislatures.²¹⁹

Prior to the establishment of responsible government, the Imperial government maintained exclusive control over the disposal of Crown land, or as they were termed in the early days of the colonies, ‘waste lands of the Crown’.²²⁰ Furthermore, until as late as 1842, there was no statutory restriction on the disposal of unalienated land; land was entirely administered by the Governor according to directions received from the Colonial Office.²²¹ In 1842, however, the *Sale of Waste Lands Act 1842* (Imp)²²² restricted the power of the Imperial government to dispose of the waste lands and apply the proceeds.²²³ Nevertheless, it did not confer any such power on the colonial legislatures. The Act was intended as a just and permanent settlement of the vexed land question: the Imperial government’s control of undisposed land as against colonial control. The colony obtained fixed rights with regard to the proceeds, but the exclusiveness of the Imperial government’s powers of disposal was maintained.²²⁴

Nevertheless, since the object of the Act was to place a restriction on the power to dispose of waste lands, the *1842 Act* defined ‘waste lands of the Crown’ restrictively to mean ‘land vested in Her Majesty, ... and which have not been already granted or lawfully contracted to be granted ... in fee simple, or for an estate of freehold, or for a term of years, and which have not been dedicated and set apart for some public use’.²²⁵ Thus, the definition prevented ‘lands from being dealt with as waste land which had been made the subject, to put it broadly, of disposal or contract for a freehold or chattel interest or had been dedicated or set apart for some public use’.²²⁶

219 *New South Wales Constitution Act 1855* (Imp); *Constitution Act 1855* (NSW), repealed by *Constitution Act 1902* (NSW); *Constitution Act 1856* (SA), repealed by *Constitution Act 1934* (SA); *Constitution Act 1855* (Tas), repealed by *Constitution Act 1934* (Tas); *Victoria Constitution Act 1855* (Imp); *Constitution Act 1855* (Vic), repealed by *Constitution Act 1975* (Vic); Order-in-Council empowering the Governor of Queensland to Make Laws of 6 June 1859; *Constitution Act 1867* (Qld); *Western Australia Constitution Act 1890* (Imp); *Constitution Act 1889* (WA).

220 *Williams v Attorney-General for New South Wales* (1913) 16 CLR 404, 423 (Barton ACJ) (*‘Williams v AG (NSW)’*).

221 Note, however, that in 1831 Lord Ripon’s regulations introduced the principle of public sale.

222 5 & 6 Vict c 36 (*‘1842 Act’*). See above nn 123 and 126.

223 The disposing authority of the Crown was restricted to ‘conveyance or alienation by way of sale’ under prescribed regulations.

224 *Williams v AG (NSW)* (1913) 16 CLR 404, 450–451 (Isaacs J).

225 5 & 6 Vict c 36, s 23. The 1846 Act, 9 & 10 Vict c 104, s 9, contained a similar definition although land granted by way of lease did not cease to be Crown land.

226 *Williams v AG (NSW)* (1913) 16 CLR 404, 427 (Barton ACJ).

The distinct line of policy represented by the *1842 Act*, that of maintaining, under regulation, the exclusive Imperial right of disposing of waste land, was also emphasised with the passing of the *Australian Constitutions Act (No 1)*.²²⁷ Although this Act enabled the legislature to enact laws for the peace, welfare, and good government of the colony, it forbade any interference with the sale or other appropriation of the lands belonging to the Crown within the colony or the revenue arising therefrom.²²⁸ The prohibition was not, however, merely as to waste lands as previously defined, but as to the waste lands belonging to the Crown, 'all of which might — in the opinion of Parliament — have otherwise come within its purview'.²²⁹ It is suggested that the introduction of this new terminology is the germ of the distinction between land which is the property of the Crown as a result of the Crown's appropriation thereof and unalienated land, albeit that current perceptions of unalienated land differ from those held at the time the Act was in effect.²³⁰

The *1842 Act* was amended in 1846 by the *Sale of Waste Lands Amendment Act (Imp)*.²³¹ Although this amending Act was the compliment of the earlier statute and part of the same policy, the two Acts differed in the meaning they gave to the term waste lands of the Crown. As employed in the amending Act, the words 'waste lands of the Crown' described any lands in the colonies 'which now are or hereafter shall be vested in Her Majesty ... and which have not been already granted or lawfully contracted to be granted ... in fee simple, and which have not been dedicated or set apart for some public use'.²³² There were, therefore, two principal differences between the definitions contained in the 1842 and 1846 Acts.

First, the *1842 Act* used the words 'dedicated and set apart', whereas the *1846 Act* used the words 'dedicated or set apart'. Although the conjunctive 'or' was substituted for 'and' in the second definition, in all other respects, the aim of the amending Act appears to have been 'to enlarge rather than to narrow the class of waste lands'.²³³ Secondly, in the earlier statute, lands granted or contracted to be granted for an estate of freehold less than the fee, or for years, were excluded from the meaning of waste lands, whereas in the latter statute land granted by way of lease did not cease to be waste land.

The definitions of 'waste lands of the Crown' contained in these two Acts differed because they were given for the different purposes of the Acts. The

227 5 & 6 Vict c 76. This Act enlarged the constitutional power of the colonies of New South Wales and Van Dieman's Land.

228 5 & 6 Vict c 76, s 29. These broad legislative powers are conferred on the state parliaments under their constituent instruments: see *Constitution Act 1902 (NSW)* s 5; *Constitution Act 1867 (NSW)* s 2; *Constitution Act 1850 (SA)* s 14 and *Australian Constitutions Act 1850 (Imp)* 13 & 14 Vict c 59, s 14; *Australians Constitutions Act (Imp)* 13 & 14 Vict c 59, s 14; *Constitution Act 1975 (Vic)* s 16; *Constitution Act 1889 (WA)* s 2(1).

229 *Williams v AG (NSW)* (1913) 16 CLR 404, 452 (Isaacs J).

230 See above n 12 and accompanying text.

231 9 & 10 Vict c 104 ('1846 Act').

232 9 & 10 Vict c 104, s 9.

233 *Williams v AG (NSW)* (1913) 16 CLR 404, 462 (Higgins J).

first Act authorised sales, the second authorised leases and licences to occupy. Nevertheless, the prohibition on the colonial legislature against interfering with the sale or appropriation of land was continued. Moreover, the Imperial government reasserted its control over land in the colonies in 1850 by passing the *Australian Constitutions Act (No 2)* (Imp).²³⁴ The prohibition on the colonial legislatures pursuant to this Act was in terms similar to the first Constitutions Act, namely against interfering with the sale or appropriation of ‘the lands belonging to the Crown’,²³⁵ not the waste lands as defined by the existing Acts.

The institution of responsible government brought with it a reversal of policy; an abandonment of the system of political control by reference to which the previous Acts had been framed. Responsible government was obtained in New South Wales in 1855.²³⁶ In 1853, the New South Wales colonial legislature had framed a Constitution Bill under which it was no longer to be excluded from dealing with the lands of the colony. Section 43 of the Constitution empowered the legislature of the colony to ‘make laws for regulating the sale, letting, disposal, and occupation of the waste lands of the Crown’ within the colony. It was stipulated, however, that the new Constitution should not come into force until certain enactments relating to the colony and repugnant to the Constitution were repealed²³⁷ and ‘the entire management and control of the waste lands belonging to the Crown in the said Colony ... and also the appropriation of the gross proceeds of the sales of any such lands ... shall be vested in the legislature of the said Colony’.²³⁸

When the Constitution Bill was reserved for royal assent, it was found that it was not competent for the Queen to assent to it without the authority of Parliament. Consequently, the *New South Wales Constitution Act 1855* (Imp), which gave the Queen the necessary authority and contained the local Constitution as a schedule, was passed. Section 2 of this Imperial Act vested in the legislature of New South Wales the entire management and control of the waste lands in the terms of the local Constitution.²³⁹ The passing of the management and control of the waste lands of the Crown to the colonial legislatures was, therefore, ‘a complete reversal of policy; ... it was the adoption of an entirely new line of action, a complete transfer of political power, and all the local control of the subject matter which

234 13 & 14 Vict c 59.

235 13 & 14 Vict c 59, s 14.

236 *New South Wales Constitution Act 1855* (Imp) 18 & 19 Vict c 54; *Constitution Act 1855* (NSW) 17 Vict c 41.

237 That is, the Acts of 5 & 6 Vict c 36; 9 & 10 Vict c 104 and 13 & 14 Vict c 59 and other Acts restricting the colonial power over the Customs and otherwise affecting the government of the colony: *Constitution Act 1855* (NSW) 17 Vict c 41, s 58 and recited in the preamble of the Imperial Act 8 & 19 Vict c 54.

238 *Constitution Act 1855* (NSW) 17 Vict c 41, s 58. The limiting provisions contained in the proviso to s 58, which are those in the proviso to s 2 of the Imperial covering Act, became exhausted long ago. Significantly, s 8 of the *Constitution Act 1902* (NSW) contains no limitation whatever.

239 *Constitution Act 1855* (NSW) 17 Vict c 41, s 58. Section 40 of the *Constitution Act 1867* (Qld) is an analogous provision conferring power on the Queensland legislature to deal with Crown land. Section 40 provides that the entire management and control of waste lands in the colony shall be vested in its legislature. Section 30 of the Queensland Constitution Act provides that the legislature of the colony has power to make laws for regulating the sale, letting, disposal and occupation of waste lands of the Crown within the colony. See the corresponding provision in the *Constitution Act 1855* (NSW) 17 Vict c 41, s 43.

that political power required'.²⁴⁰ It effected a transfer of political power, 'not as a matter of *title* ... but as a matter of *governmental function*';²⁴¹ a proposition reiterated by Brennan J when rejecting the prerogative basis for absolute Crown ownership of all land in Australia in *Mabo*.²⁴²

Although the control of sale and letting of the waste lands in Australia has been vested in the colonial legislatures since the introduction of responsible government, title to that land was merely assumed to have been vested in the Crown.²⁴³ As a result of the High Court's acknowledgment of radical title, however, the legal nature of (initial) landholding by the Crown, in the right of the various states, has changed. It is now clear that the Crown's title to unalienated land was radical only, a political notion rather than a real title for property purposes.²⁴⁴ Accordingly, the Crown was unable to transfer a better title to the colonial legislatures than it had. Furthermore, and notwithstanding the High Court's adjustment of the nature of the Crown's initial title to land, the transfer of political power effected by the introduction of responsible government required no more local control of the subject of land in the colony of New South Wales than a power of disposition.²⁴⁵

IV COMMON LAW DEFINITION OF 'WASTE LANDS'

Although differing in the meaning they gave to the term, both the 1842 and 1846 Acts provided legislative definitions of 'waste lands of the Crown'.²⁴⁶ The 1855 New South Wales Constitution and Imperial covering Act employed the phrase 'waste lands belonging to the Crown'. Both were, however, devoid of any definition of the term. Although it was suggested, in *Williams v Attorney-General*

240 *Williams v AG (NSW)* (1913) 16 CLR 404, 453 (Isaacs J), 467 (Gavan Duffy and Rich JJ agreeing) and 467 (Powers J agreeing).

241 *Ibid* 465 (Isaacs J). The Privy Council upheld this decision [1915] AC 573, mainly on procedural grounds, but approved the High Court's judgments. Although Isaacs J's judgment deals with the historical detail in relation to New South Wales, '[t]he position was no different in other colonies': *New South Wales v The Commonwealth* (1975) 135 CLR 337, 439 (Stephen J).

242 Brennan used the words 'not a transfer of title but a transfer of political power': *Mabo* (1992) 175 CLR 1, 53.

243 In accordance with either the feudal doctrine of tenure or the doctrine of occupancy.

244 See *Wik* (1996) 187 CLR 1, 234 (Kirby J), referring to Brennan J's statement in *Mabo* (1992) 175 CLR 1, 50 that 'radical title, without more, is merely a logical postulate required to support the doctrine of tenure ... and to support the plenary title of the Crown (when the Crown has exercised its sovereign power to appropriate to itself ownership of parcels of land within the Crown's territory)'.

245 *Williams v A G (NSW)* (1913) 16 CLR 404, 453 and 457 (Isaacs J). Rather than meaning land which is beneficially vested in the Crown, therefore, 'Crown land' simply means land in respect of which radical title is vested in Crown. Significantly, since the transfer of the management and control of the waste lands of the Crown included all mines and minerals, the minerals question is raised: that is, in the absence of adequate steps to expand its underlying title, does the Crown only have radical title to minerals? See Gary Meyers, Chloe Piper and Hilary Rumley, 'Asking the Minerals Question: Rights in Minerals as an Incident of Native Title' (1997) 2 *Australian Indigenous Law Reporter* 203, 242. An examination of this issue is, however, beyond the scope of this article.

246 See above n 230 and text immediately after.

for *New South Wales*,²⁴⁷ that the definition contained in the two Imperial Acts of 1842 and 1846 governed the words in the 1855 Acts,²⁴⁸ the High Court concluded otherwise.²⁴⁹

According to Barton ACJ, 'waste lands of the Crown, where not otherwise defined, are simply ... such of the lands of which the Crown became the absolute owner on taking possession of [Australia] as the Crown had not made the subject of any proprietary right on the part of any citizen'.²⁵⁰ According to Isaacs J, the title to the soil of the colonies belonged to the Crown when the colonies were settled, and no act of appropriation, reservation or setting apart was necessary to vest the land in the Crown.²⁵¹ For his Honour, therefore, 'the expression "waste lands" of the Crown, apart from legislative definition, ... designat[ed] Colonial lands not appropriated under any title from the Crown'.²⁵²

Like the statutory definitions of Crown land, these common law definitions of waste lands presuppose, rather than confer, the Crown's title: a presupposition which, post-*Mabo*, no longer represents the law. Indeed, although the Crown has not made land in respect of which native title exists the subject of any proprietary right on the part of any citizen and the land has, therefore, not been appropriated under any title from the Crown, such waste land does not mean land in respect of which the Crown has an absolute title. Interpreted in light of the High Court's recognition of radical title, therefore, these common law definitions of waste lands, like the statutory definitions of Crown land, are consistent with the confirmation of the Crown's power of disposal over such land.

Thus, the distinction between Crown land and Crown property is a byproduct of the emerging concept of radical title in Australian jurisprudence. Where, however, the Crown has created a tenure by grant, the Crown loses its radical title to the relevant land for the duration of the grant. It is in this context that the interplay between the concepts of radical title and eminent domain is highlighted.

V THE CONCEPT OF EMINENT DOMAIN

The right to own property has always been a cornerstone of Anglo-Australian real property law, but it has always been qualified by two conditions: first, that property is not used in a way which interferes with a neighbour's equal right to

247 (1913) 16 CLR 404. In this case, the High Court considered the status of land on which Government House was located. The Court found that the land was 'waste land' within the meaning of the New South Wales *Constitution Act 1855* (Imp) 18 & 19 Vict c 54 and that by virtue of that Act the control and management of it passed to the legislature of New South Wales.

248 In *Williams v AG (NSW)* (1913) 16 CLR 404 it was argued that as a result of *Attorney-General v Eagar* (1864) 3 SCR (NSW) 234 and the opinions of Sir William Atherton and Sir Roundell Palmer, two eminent English Crown law officers, dated 17 January 1862, appended thereto, the term 'waste lands', as used in both the New South Wales Constitution and the covering Imperial Act, was to be interpreted by the definitions in the Imperial Acts of 1842 and 1846.

249 Cf *New South Wales v The Commonwealth* (1975) 135 CLR 337, 370 (Barwick CJ) (obiter dicta).

250 *Williams v AG (NSW)* (1913) 16 CLR 404, 428 (Barton ACJ).

251 Ibid 439.

252 Ibid 440 (Isaacs J). At 453 Isaacs J said '[i]t meant *all* the waste lands.'

enjoy his property and, secondly, that the sovereign has the superior right to take property for public exigency. This latter condition represents the sovereign's power of eminent domain:²⁵³ the power of the sovereign to acquire private property for public use without the owner's consent.²⁵⁴

This prerogative power²⁵⁵ to take property by eminent domain was, however, subject to certain constraints. As early as 1215, the Magna Carta declared that: 'No Freeman shall be taken, or imprisoned, or be disseised of his Freehold ... but by lawful Judgment of his Peers, or by the Law of the Land.'²⁵⁶ Although this declaration did not expressly grant compensation to the dispossessed owner, this gradually became the acknowledged practice.²⁵⁷ The prerogative powers of the Crown to acquire land have since been replaced and supplanted by comprehensive legislation in the states and the Commonwealth.²⁵⁸ The terms 'eminent domain' and compulsory acquisition are thus interchangeable.²⁵⁹ Although it is clear that both the federal and state Parliaments have the constitutional power to make laws in respect of land acquisition,²⁶⁰ only the federal Parliament is subject to a constitutional requirement to pay compensation.²⁶¹ Section 51(xxxi) of the *Constitution* confers upon the federal Parliament an express power to make laws for the acquisition of property from any state or person in respect of which the

253 The term 'eminent domain' appears to have originated in 1625 in *De Jure Belli et Pacis* by Hugo Grotius in which the author stated that 'the property of subjects is under the eminent domain of the state, so that the state or he who acts for it may use and even alienate and destroy such property ... for ends of public utility ...': cited by Jacques Gelin and David Miller, *The Federal Law of Eminent Domain* (1982) 3.

254 Gelin et al, above n 253, 1 citing the leading reference source: P Nichols, *Eminent Domain* (3rd ed, 1971).

255 D Brown, *Land Acquisition: An Examination of the Principles of Law Governing the Compulsory Acquisition or Resumption of and in Australia and New Zealand* (4th ed, 1996) 25.

256 *Magna Carta*, Chapter xxix.

257 William B Stoebuck traces the earliest parliamentary Act authorising compensation for an exercise of the power of eminent domain to the 1427 Statutes of Sewers: 'A General Theory of Eminent Domain' (1972) 47 *Washington Law Review* 553, 562–4.

258 The principal land acquisition statutes currently in force are: *Lands Acquisition Act 1989* (Cth); *Land Acquisition (Just Terms Compensation) Act 1991* (NSW); *Land Acquisition and Compensation Act 1986* (Vic); *Acquisition of Land Act 1967* (Qld); *Land Acquisition and Public Works Act 1902* (WA); *Land Acquisition Act 1969* (SA); *Land Acquisition Act 1993* (Tas); *Lands Acquisition Act 1988* (NT); *Lands Acquisition Act 1994* (ACT). In times of peace, the prerogative powers of the Crown to acquire land are of no consequence in Australia: Brown, above n 255, 26. Nevertheless, it seems to be accepted that in times of national emergency it remains possible for the Crown to take land pursuant to its prerogative powers. See, eg, *Burmah Oil Co Ltd v Lord Advocate* [1965] AC 75.

259 But note that under the legislative regime, compulsory acquisition of land is not limited to alienated land.

260 Brown, above n 255, 6.

261 See *Lands Acquisition Act 1989* (Cth) s 93, which provides that the courts are to ensure that acquisitions are on 'just terms'. Although, in theory, the state parliaments have power to legislate to confiscate land without compensation (*Pye v Renshaw* (1951) 84 CLR 58), in practice, compensation is provided: see, eg, *Land Acquisition (Just Terms Compensation) Act 1991* (NSW) s 3(1)(b).

Parliament has power to make laws and provides that where land is compulsorily acquired ‘just terms’ compensation must be paid to the expropriated owner.²⁶²

In practice, therefore, cases dealing with the taking of land by compulsory process are not so much concerned with the existence of the power of eminent domain as they are with the question of what constitutes appropriate compensation after the power has been exercised. Indeed, Blackstone spoke of the eminent domain power of the state constrained by the requirement to pay compensation and insisted that nothing less than full compensation would suffice when the sovereign takes property.²⁶³ While Blackstone’s formulation of the sovereign’s eminent domain acknowledged the duty of government to pay for abridgments of owner’s property rights, it rejected the view that private property should yield to the public good.²⁶⁴ Although, today, a requirement of public purpose operates as a legal restraint on the powers of the federal government to appropriate private property,²⁶⁵ the important aspect of Blackstone’s high regard for private property rights is his indication that the source of the state’s eminent domain power is purely statutory. This justification is to be contrasted with Maitland’s.

Maitland attributed to the sovereign a power analogous to the concept of eminent domain as understood in American jurisprudence. For Maitland, therefore, the power of eminent domain is not dependent on any specific grant; it is an inherent

262 Apart from this constitutional principle which applies to all federal legislation, at common law, it is a firmly established rule of law that a statute will not be interpreted as authorising the expropriation of property without payment of compensation unless an intention to do so is clearly expressed: an intention to take away property without compensation should not be imputed to a state legislature in the absence of express and unequivocal terms: *CJ Burland Pty Ltd v Metropolitan Meat Industry Board* (1968) 120 CLR 400, 406; *Inglewood Pulp & Paper Co Ltd v New Brunswick Electric Power Commission* [1928] AC 492, 498 (PC).

263 ‘So great moreover is the regard of the law for private property, that it will not authorise the least violation of it; no, not even for the general good of the whole community. If a new road, for instance, were to be made through the grounds of a private person, it might perhaps be extensively beneficial to the public; but the law permits no man, or set of men, to do this without consent of the owner of the land. In vain may it be urged, that the good of the individual ought to yield to that of the community; for it would be dangerous to allow any private Man, or even any public tribunal, to be the judge of this common good, and to decide whether it be expedient or no. Besides, the public good is in nothing more essentially interested, than in the protection of every individual’s private rights, as modeled by the municipal law. In this, and similar cases the legislature alone can, and indeed frequently does, interpose, and compel the individual to acquiesce. But how does it interpose and compel? Not be absolutely stripping the subject of his property in an arbitrary manner; but by giving him a full indemnification and equivalent for the injury thereby sustained. The public is now considered as an individual, treating with an individual for an exchange. All that the legislature does is to oblige the owner to alienate his possessions for a reasonable price; and even this is an exertion of power, which the legislature indulges with caution, and which nothing but the legislature can perform’: W Blackstone, *Commentaries on the Laws of England: Of the Rights of Persons* (1st ed, 1799) 135.

264 See above n 263.

265 Pursuant to s 40(1) of the *Land Acquisition Act 1989* (Cth), the Commonwealth may acquire land by agreement for a ‘public purpose’. Where it becomes necessary to acquire the land by compulsory process, s 42(2)(b) provides that a declaration shall specify the ‘public purpose’ for which the land is being acquired. ‘Public Purpose’ is defined in s 6(1) to mean a purpose in respect of which the Commonwealth Parliament has power to make laws and includes in relation to land in a territory, any purpose in relation to the territory. Although it has in the past, the term ‘public purpose’ does not appear in the current state and territory land acquisition statutes.

and necessary attribute of sovereignty.²⁶⁶ Although the right of eminent domain exists independently of constitutional provisions, it may be recognised, limited or regulated by constitutions.²⁶⁷ It is the power to take private property for public use upon paying the owner due compensation.²⁶⁸ Nevertheless, questions of sovereignty and property rights are perceived as doctrinally distinct. Although eminent domain is an attribute of sovereignty, the eminent domain of the state is neither ownership nor any mode of ownership. The sovereign can in the exercise of eminent domain, without claiming any ownership of the soil, take private property for public use. Although the state may expropriate owners who have done no wrong, until the expropriation takes place, the state does not own the land. Thus, the power of eminent domain lies dormant in the sovereign until legislative action results in its exercise.²⁶⁹ It is superior to all property rights,²⁷⁰ and every owner of property holds it subject to the power of eminent domain.²⁷¹

It has been suggested that the justification for the source of the power of eminent domain in America fits a feudal conception of property: 'If William the Conqueror own[ed] all estates and deigns to grant them to his favorites while retaining ultimate ownership, there is no reason that he should not be able to reclaim them when "public necessity" requires.'²⁷² However, while '[l]ands in Colonial America were undoubtedly granted by the English Crown to be held in free and common socage',²⁷³ most American states have, either by legislative fiat or through judicial decision, declared that all lands should be allodial. Accordingly, a landowner in the United States does not 'hold of' the state or the government of the state. Moreover, because of his description of the eminent domain of the state as neither ownership nor any mode of ownership, Maitland's reference to eminent domain emphasised the distinction between governmental power and proprietary rights, sovereignty and property; the very antithesis of feudal patterns of thought.

266 Frederick Maitland, *Domesday Book and Beyond – Three Essays in the Early History of England* (1897) 342–3. See also *Albert Hanson Lumber Co v United States* 261 US 581, 587 (1923); *Searl v School District, Lake County* 133 US 553, 562 (1890); *Boom Co v Patterson* 98 US 403, 406 (1878).

267 Maitland, above n 266, 343. See also *Albert Hanson Lumber Co v United States* 261 US 581 (1923).

268 Gelin et al, above n 253, 94. Other definitions include: 'Eminent domain' is defined generally as the power of the nation or a state, or authorised public agency, to take or authorise taking of private property for a public use without the owner's consent, conditional upon payment of just compensation *Krambeck v City of Gretna* 254 NW 2d 691 (Neb, 1977). 'Eminent domain' is the right and power of the state to appropriate private property to a particular user for the purpose of promoting the general welfare, and embraces all cases where, by authority of the state and for the public good, property of an individual is taken, without his consent, for the purpose of being devoted to some particular use, either by the state itself or by a corporation, public or private, or by a private citizen: *Coronado Oil Co v Grieves* 603 P 2d 406 (Wyo, 1979), appeal after remand 642 P 2d 423 (Wyo, 1982).

269 Thus, legislative action specifies the occasions and conditions for its exercise. Gelin et al, above n 253, 97.

270 *Rosenthal & Rosenthal Inc v New York State Urban Development Corp* 771 F 2d 44 (NY, 1985), certiorari denied 475 US 1018 (1986).

271 *United States v 16.92 Acres of Land* 670 F 2d 1369 (Wis, 1982), certiorari denied *Brewer v United States* 459 US 824 (1987).

272 Ellen Paul, *Property Rights and Eminent Domain* (1987) 77.

273 William Vance, 'The Quest For Tenure in the United States' (1923) 33 *Yale Law Journal* 248.

Thus, it is clear that the sovereign's power of eminent domain, while arguably adapted from feudal theory,²⁷⁴ is not a property right. There appears, therefore, to be a fundamental similarity between the underlying rationales of both eminent domain and radical title.²⁷⁵ In the context of Australian land law, however, eminent domain, the power to take land, is to be distinguished from radical title, the power to grant land. Radical title enables the Crown to become paramount lord in respect of a tenure created by Crown grant. Once the Crown grants particular land to a subject, by definition, the Crown no longer has radical title to that land; that is, the sovereign loses its radical title to the land for the duration of the grant. Thus, radical title is only relevant in respect of land which is not subject to a Crown grant, that is, unalienated land.²⁷⁶

It is in the context of alienated land, therefore, that the concept of eminent domain is relevant. Although the Crown does not have a radical title to land which has been granted to a subject (the land is no longer Crown land), it has a power of eminent domain in relation to the land. Thus the concept of eminent domain compliments the concept of radical title. Until the Crown has exercised its sovereign power to grant an interest in unalienated land, bringing it within the doctrine of tenure, the Crown cannot exercise its powers of eminent domain to effect acquisition of property. Because unalienated land comes within the definition of Crown land, that is land in respect of which the Crown has a radical title, the Crown can simply exercise its sovereign power to appropriate to itself ownership of the land. By formally entitling itself to the land, the land loses its character as Crown land and becomes Crown property.

The argument that the sovereign can only exercise its powers of eminent domain in respect of a tenure created by Crown grant is to be contrasted with Strong J's comments on eminent domain in *Kohl v United States*.²⁷⁷ Strong J described eminent domain as distinct from and paramount to ultimate ownership and observed that it grew out of the necessities of governments being, not out of the tenure by which lands are held. Consequently, he concluded that it may be exercised, though the lands are not held by grant from the government, either mediately or immediately.²⁷⁸ Nevertheless, it has also been held that the power of eminent domain is not involved in an exercise of Congress' power to extinguish aboriginal title to land,²⁷⁹ land which is certainly not held of the government.

274 Like radical title: see *Mabo* (1992) 175 CLR 1, 48 (Brennan J).

275 Indeed, given its origins in the royal prerogatives, the concept of eminent domain is also analogous with the concept of 'common law sovereign rights', considered in *Commonwealth of Australia v WMC Resources Ltd* (1998) 194 CLR 1.

276 Whether original unalienated land (that is, land which has never been brought within the regime governed by the doctrine of tenure nor appropriated to the Crown) or currently unalienated land (that is, land which although previously having been brought within the tenurial regime by Crown grant, has ceased to be within it because the relevant Crown grant has expired).

277 91 US 367 (1875).

278 *Ibid* 371.

279 *Inupiat Community of Arctic Slope v United States* 680 F 2d 122 (Ct Cl, 1982), certiorari denied 459 US 969, 74 (1982).

Like the common law position in Australia, therefore, extinguishment of native title involves an exercise of sovereign rights which have the effect of converting radical title to beneficial ownership rather than an exercise of the sovereign's powers of eminent domain. This analysis provides an explanation for the High Court's decision that native title is subject to extinguishment at common law without creating an entitlement to compensation.²⁸⁰ Although compensation may be a necessary condition for the acquisition of property effected by an exercise of the Crown's power of eminent domain,²⁸¹ since the extinguishment of native title will, in most cases, not involve an exercise of such power, it does not attract the right to compensation on this basis.²⁸²

The important point about the comparison between the sovereign's power of eminent domain and the sovereign's radical title is that, while they have distinct spheres of operation, they share the same underlying premise. Thus, like eminent domain, radical title is an inherent and necessary attribute of sovereignty, yet it is neither ownership nor any mode of ownership. It lies dormant in the sovereign until legislative or executive action results in its exercise.

VI CONCLUSION

It is clear from the High Court's decisions in *Wik* and *Ward HC* that 'Crown land' in the Queensland and Western Australian *Land Acts* respectively, means land in respect of which the Crown has a radical title. This construction would no doubt also apply, by extension, to the various other statutory regimes regulating the alienation of land in Australia. Although the concept of radical title had emerged in *Mabo*, it was not unequivocally clear whether it denoted a bare legal title sufficient to support the Crown's right to acquire and confer title or a full beneficial interest except to the extent of native title. Importantly, however, the *Wik* and *Ward HC* High Courts' treatment of residuary rights to, and resumptions/vesting of, Crown land which has previously been alienated, supports an interpretation of radical title as a nominal title only, investiture of which creates no automatic beneficial entitlement to the land to which it relates. In this context, two legal principles emerge from the High Court: first, that the Crown's statutory power to grant interests in land is not dependent upon the Crown's beneficial ownership of the land, as it is an incident of radical, rather than beneficial, title. Secondly, the legislation regulating the

280 *Mabo* (1992) 175 CLR 1, 15 (Mason CJ, Brennan, McHugh, and Dawson JJ); cf 101 (Deane and Gaudron JJ), [204] (Toohey J dissenting). See also R H Bartlett, 'Resource Development and the Extinguishment of Aboriginal Title in Canada and Australia' (1990) 20 *University of Western Australia Law Review* 453.

281 Although the United States has constitutional provisions requiring compensation, in 1850 only half the states had such provisions and, in 1868, five states still did not. However, in the absence of legislative provision, judges accomplished the same purpose by appealing to natural law.

282 That is, extinguishment of native title will only involve an exercise of the Crown's power of eminent domain when the relevant native title has survived the Crown grant on an interest in land. Until the Crown has exercised its sovereign power to bring land within the doctrine of tenure, the Crown has a radical title to the land. Pursuant to this radical title, the Crown can simply exercise its sovereign power to appropriate to itself ownership of the land.

alienation of land does not confer on the Crown the estate necessary at common law to support the grant of any interest in land.

Accordingly, because the effect of the fiction of original Crown ownership of all land in Australia was to secure the 'paramount lordship or radical title of the Crown',²⁸³ the fiction is no longer relevant in the context of the statutory regime regulating the alienation of land in Australia: there is no longer any legal reason for deeming the Crown to be the owner of all land in Australia as regardless of whether the land is subject to native title. Thus, the Crown's initial title to land, its radical title, is a bare legal title sufficient to support its power to acquire and confer title. This conclusion is also confirmed by the policy and purpose of the legislation relating to Crown land and the post-*Mabo* High Court's analysis of it generally and, in particular, the statutory trespass provisions.

Furthermore, although the statutory definition of 'Crown land', like the common law definition of waste lands, presupposed, rather than conferred, the Crown's title to unalienated land, the constitutional settlement of the mid-19th century, by which the Crown's prerogatives to grant interests in land and to appropriate land to itself were displaced by statutory powers, effected a transfer of political power rather than title. Thus, when modified to incorporate the modern, yet retrospective, understanding of the Crown's initial title to land, the definition of 'Crown land', or radical title, whether statutory or common law, must be distinguished from 'Crown property', or beneficial title. 'Crown land' will only become 'Crown property', when the Crown has taken appropriate steps to formally entitle itself to the land.

Indeed, the acquisition of radical title, upon assumption of sovereignty, enabled the Crown to become beneficial owner of land appropriated to itself and to become paramount lord of all who hold a tenure granted by the Crown. Although the Crown loses its radical title to particular land for the duration of a tenure created by grant, it has a power of eminent domain over the land. The sovereign's power of eminent domain thus complements the High Court's conception of radical title: the former confined in its operation to alienated land, the latter confined in its operation to unalienated land. Crucially, the rationales underlying the two concepts are fundamentally similar. As a form of governmental power, rather than a proprietary right, therefore, the concept of eminent domain provides further support for the proposition that, irrespective of the presence of native title, the Crown must exercise its sovereign power before its underlying radical title converts to full beneficial ownership of land, before 'Crown land' becomes 'Crown property'. Automatic expansion of radical title, 'Crown land' considered as 'Crown property', is only possible if we confuse sovereignty with ownership, *imperium* with *dominium*, political power with proprietary right.

283 *Mabo* (1992) 175 CLR 1, 212.