ELECTRONIC VERSION

ABORIGINAL LAND RIGHTS

A Comparative Assessment

BACKGROUND INFORMATION BRIEF 23

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SYNOPSIS

The debate in Australia over Aboriginal land rights accelerated after the Yirrkala people presented their bark petition to the House of Representatives in 1963. The definition of Aboriginal land rights revolves around whether the English common law bestows title on the indigenous people who occupied Australia when it was annexed to the Crown by settlement. The legal debate is not one about justification for either the colonization process or for land rights but rather whether the colonizing nation had a legal obligation to respect the occupation of the land by the people occupying the land when the colonizers arrived.

There are two avenues for achieving Aboriginal land rights - through the common law developed by judges or through the legislative process. Neither approach has been successful in achieving the goals of Aborigines. The issue to be resolved in the courts is whether Aboriginal private or clan property rights continued after the change in sovereignty in Australia. To succeed, Aboriginal and Torres Strait Islander plaintiffs must prove a continuing common law Aboriginal title under Australia's common law as distinct from indigenous customary law title under Aboriginal law.

This paper analyses the fundamental issues surrounding Aboriginal common law title through a legal approach assessing the evolution of the common law together with historical and anthropological evidence. The Australian legislative responses are set out in a comparative legislation section. The current legal situation in Queensland is analysed in the context of the *Mabo* case which forms an appendix.

1. INTRODUCTION:

The Aboriginal Land Rights debate in Australia may be likened to an archaeological dig on an abandoned townsite. Visitors to the townsite have varied motives for engaging in the debate. Many traverse the scene quickly, climb to the highest hill and depart with knowledgeable comments. Those with ancestral links to the land and who lived or worked in the town come to relocate their life symbols, hoping to enshrine them in our nation's law. Advocates for the former residents or those prompted by official duty select a site in the town, excavate its layers of human occupation, locate the remains of a household item or a tool, pronounce upon its significance, and erect a signpost. Surrounding landholders and the mining industry concern themselves with general issues about the form of tenure of the site and lobby authorities to safeguard its continued use. Meanwhile foundations of the town remain hidden beneath the undergrowth, their vein-like structure and larger import unknown.

This process has been unfolding for more than a century but with quickened pace in Australia since 1963 when the bark petition for Aboriginal land rights was presented to the House of Representatives by the Yolngu people of Yirrkala in Arnhem Land.[1] The painted designs on the petition belonged to the two clans whose land was threatened by mining activities. After a Parliamentary Select Committee failed to resolve the issue the Yirrkala people sought to claim their rights through the courts in *Milirrpum v Nabalco Pty Ltd*[2] and failed. The Gurindji people at Wattie Creek were similarly moved to claim their land. In 1967 they withdrew their labour from Lord Vestey on Wave Hill Station in the Northern Territory and established a settlement called Darguragu on station land they claimed as their own. The publicity achieved was instrumental in the establishment of the Woodward Commission into Land Rights in the Northern Territory in 1973 which led to the *Aboriginal Land Rights (Northern Territory) Act 1976*.[3] At a broad level the ensuing Aboriginal Land Rights Movement through its publicity has raised the awareness of the general population to the economic, social and health conditions of Aborigines.[4]

The artificial view that Australian Aborigines are passive incumbents of the Australian landscape has been questioned recently. There is evidence that they altered the landscape

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[1] Commonwealth of Australia. House of Representative. *Debates* vol. H. of R. 39, p.81, (14 August 1963).

[2] (1971) 17 FLR 141.

[3] The long title of the act reads: *An Act providing for the granting of Traditional Aboriginal Land in the Northern Territory for the benefit of Aboriginals, and for other purposes.*

[4] In this paper references to Aborigines should be read as including reference to Torres Strait Islanders. Both the terms, "Aborigine" and "Aboriginal" are used as nouns in Australian legislation.

significantly by "fire-stick farming" to facilitate hunting.[5] The notion of pristine Aborigines with a "pure" culture is idealistic as it is well documented that they had considerable contact with Melanesians and Indonesians. Australian Aboriginal society across the entire continent has been swept by waves of change in social organization, mythology, ceremonial practices and trading routes. Aborigines have always emphasised differences between individual groups. It is the dynamics and conceptual ideals ascribed to these groups by their members which determines the process of land utilisation that is so important to discussions about Aboriginal land rights. Australian anthropologists and linguists now describe the small local groups of Australian Aborigines as belonging to clans closely associated with or "owning" in a certain sense particular pieces of land.[6] The primary structures of Aboriginal society are based on kinship ties and these relationships along with travel patterns for economic reasons have produced a complex system of land affiliation and identification with local areas.

There are two avenues for achieving Aboriginal land rights - through the common law developed by judges or through the legislative process. Both have been explored in Australia but neither approach has been successful so far in achieving the Aborigines' goals. Central to the issue is the question of whether principles of common law in Australia entitle Aboriginal and Torres Strait Islander people to the land to which they can prove ownership and clan relationship, until their title is extinguished by voluntary surrender to the Crown or by legislation. Thus, the question to be resolved in the law courts is whether there is a presumption that private or clan property rights continue after a change in sovereignty in a country such as Australia which is considered to be a *settled* country in constitutional law. If so, then to succeed Aboriginal and Torres Strait plaintiffs must prove a continuing common law Aboriginal title under Australia's common law as distinct from indigenous customary law title under Aboriginal law.

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[5] There is a growing literature on this subject. See, for example, Boutland, Annie, 'Review Paper: Forests and Aboriginal Society', and Feary, Sue, 'Aboriginal use of forests in south eastern Australia: past and present', in Frawley, Kevin J. and Semple, Noel M. (eds.) 1989, *Australia's Ever Changing Forests*, Campbell ACT, Australian Defence Force Academy, pp.143-168 and 179-197 respectively and references cited.

[6] Sutton, Peter (ed.) 1989, *Dreamings: the Art of Aboriginal Australia*, New York, Viking, Introduction pp.1-12. Even the idea of Aboriginal "tribes" is now considered problematical by the Australian Anthropological profession.

2. HUMAN ATTACHMENTS TO LAND:

The acquisition of land by whatever means inevitably raises legal, economic and civil rights issues. This activity is a crucial element and determinant of human history. When the rush for empire commenced four centuries ago Australia became part of the European world. The Europeans and British were already well experienced in colonial enterprise. Britain had been successively invaded by the Romans, Anglo Saxons, the Danes, and in 1066 by the Normans. Each displaced and absorbed their predecessors with varying degrees of violence. However Great Britain has never been invaded since 1066 and in the eighteenth century became a colonizing power itself. Their history produced legal precedents to resolve the complex issues involved in the acquisition and management of an overseas empire.

Before European settlement, land tenure in colonies depended on either customary legal systems or conceptually less precise attachments to land. From a European perspective indigenous peoples' attachment to land appeared to be personal rather than proprietary in nature. Consequently, the fundamental question became whether the Aboriginal and Torres Strait Islanders' title to land was extinguished by Acts of the British Parliament, and Australian Colonial and State Legislatures. The legal debate over Land Rights is thus not one about the justifications for the colonization process but rather whether the colonizing nation had a legal obligation to respect the occupation of the land by the people occupying the land when the colonizers arrived.

Land settlement is central to the Australian experience. The legal debate in this area centres on the issues of *settled, conquered* or *ceded* territory in the colonization process. In law Australia is generally regarded as *settled*, a legal principle laid down in *Cooper v Stuart*[7] in 1889 and followed by Blackburn J in *Milirrpum v Nabalco Pty Ltd* in 1971. However it must be stressed that the *Milirrpum* case was decided by a single judge in the Northern Territory Supreme Court and was not appealed to the High Court of Australia. In the latter case Blackburn J regarded the classification of territory as being *settled* not as a fact but as a matter of law which could not be overturned by a reconsideration of historical evidence.[8]

This paper analyses the issues raised by these fundamental questions through a legal approach assessing the evolution of the common law with respect to Aboriginal land title. Some historical and anthropological evidence is included to complete the context. The Australian legislative responses are set out in a comparative legislation section. The conclusion focuses on

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[7] (1889) 14 App. Cas. 286.

[8] (1971) 17 FLR 141; This view was affirmed by Gibbs and Aickin JJ. in *Coe v Commonwealth of Australia* (1979) 53 ALJR 403. To the contrary, Jacobs J. noted that no High Court decision had settled that rule. Murphy J thought that Coe should be given an opportunity to prove that Australia was a conquered country.

the legal consequences of both approaches. The current legal position in Queensland is analysed in the context of the *Mabo* case, which forms an appendix.

Although in the past twenty-five years enormous emotional debate has been engendered in Australia about Aboriginal Land Rights, there has been little consensus of opinion. Aboriginal Land Rights is not a recent phenomenon in this country. Calls for land rights and compensation were made by Christian philanthropists and the Aboriginal Protection Society in Australia from the 1820s. In *The Law of the Land* Henry Reynolds argues that the British Government recognised Aboriginal land title in Australia in the 1830s through the wording of the Instructions to the Colonial Governors. As a result reserves were established, rights of use and occupancy of Crown land was recognized, and education and welfare were seen as a form of compensation.[9] The first land in Queensland set aside for the exclusive use of Aborigines was 14 080 acres near Mackay, gazetted on 1 July 1871. However, entrenched colonial attitudes and policies avoided acceptance of any abstract land rights of Aborigines. Colonial Government promises of abundant land for immigrants and capitalists alike pushed the frontiers of settlement further out where pastoralists dominated even though they held extremely insecure title to the land. In Queensland, especially the northern regions, in the late nineteenth century, aid was provided to the Aborigines, as public practice rather than public policy. This aid by miners, settlers and public officials prevented raids on European stock, gardens and stores. In his thesis on Humanitarian and Benevolent assistance to Aborigines in nineteenth century Queensland[10] Gordon Reid analyses the evolution of Aboriginal policy in Queensland. He argues that this humanitarian approach avoided the typical transgressions which previously resulted in Government retaliations. This process shows that no matter what official Aboriginal policy was claimed to be or what the critics thought and said of the policy, its effective shaping was done in the field. In the 1850s and 1860s it was developed by the Native Mounted Police without written instructions and, by the 1880s, was devised independently by regional public officials. By the 1890s the policy of "peace through food" was supported by Parliamentary appropriations. This was the basis on which Archibald Meston and subsequent Chief Protectors of Aboriginals based their codified scheme of protection and preservation which extended to the mid-twentieth century.

Writers on the theme of relations between Australian Aborigines and Australians of European ancestry have stressed the essential need for recognition of each other's heritage, dignity and fundamental rights in the Australian nation. Resolution of the issues involve legal and practical administrative and economic solutions. The *Aboriginal Land Rights (Northern Territory) Act 1976* thrust anthropological theory and methodology to the forefront as a determinant of juridical rights, especially to "traditional Aboriginal owners" according to classical notions of Aboriginal social structure. It has been said by Gumbert in his analysis of the issue, *Neither Justice Nor Reason*, that land rights are no more than a starting point and that compensation is

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[9] Reynolds, Henry 1987, *The Law of the Land*, Melbourne, Penguin, p.125.

[10] Reid, G.S. (1988), PhD thesis, Australian National University, pp.180-181.

> the acquisition of such different forms of means of production to enable Aborigines to establish once again, an economically viable measure of self-determination.[11]

Gumbert has expressed concern about the effects of granting Aboriginal Reserve land and unalienated Crown land not previously used for the purposes of the European economy as he sees this as second-rate land.[12] Yet these solutions do not relieve the ancient injustice of loss of land and kin - dispossession which has happened to so many races and groups in world history.

To begin to understand the kinds of laws our society has about land and the way our economic production systems encourage certain types of land uses we need to know the systems of knowledge that underpin them. Both the written and oral sources reveal attachments to land. Pastoralists, agriculturalists and horticulturalists depend on this relationship and have taken positive roles to influence patterns and progress of settlement to conserve resources in order to protect their interests. From the outset of settlement in Australia there was a strong movement of educated middle-class colonists who had an intellectual enthusiasm for the natural history sciences. They tried to influence colonial governments on the management of the floral and timber resources by the incorporation of conservation strategies into the legislative and administrative framework through which the state controlled and directed land usage. They had a scientifically based vision of how settlement should proceed and how economic prosperity should be sustained in an era of industrial progress. Religious interpretation provided a persuasive backdrop for theme to conceptualize nature. The association of tree clearance with economic improvement was a key feature of the ethos of land settlement and was reinforced through the requirements of *Land Acts* and the inevitable environmental alterations necessary to prepare land for economic production. Leading influential thinkers with considerable influence on this movement in Australia were James Fawcett, a resident naturalist in Townsville, George Perkins Marsh who published the book, *Man and Nature: or Physical Geography as Modified by Human Action*, in 1874, Lewis A. Bernays, Clerk of the Legislative Assembly in the Queensland Parliament and Vice President of the Acclimatization Society, and the colonial botanists such as Frederick M. Bailey. Much of their work was promoted by editors of the Melbourne *Age* and *Argus* and the *Queenslander* newspapers.

Many colonists did attempt to work out how an economically viable and prosperous society could emerge without irreparably harming nature. There is a growing body of academic research and thought which illustrates the sensitive relationship to the land which colonists sought to present through rational scientific research, a market economy producing culturally desired items of consumption, the implementation of Christian and Jewish religious principles, and the democratic process.[13] Much of this research has not yet influenced Australian historiography including the Aboriginal land rights debate.[14]

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[11] Gumbert, Marc 1984, *Neither Justice Nor Reason: A Legal and Anthropological Analysis of Aboriginal Land Rights,* St Lucia, University of Queensland Press, p.198.

[12] ibid.

[13] For an assessment of human relationships to land in a philosophical sense see: Daly, Herman 1988, *For the Common Good: Redirecting the Economy towards Community, the Environment*

It is difficult to use this kind of rationale in the debate over which group has the greater entitlement to land because there are no definitions or processes within our legal system to measure this attachment in our legal system or to make judgments. Identifying ownership to land is easier when traditional Aboriginal manifestations of land "ownership" exist as is the case in the Northern Territory where it is the basis of the *Aboriginal Land Rights (Northern Territory) Land Rights Act 1976*. However, attachments to land by Aborigines and non-Aborigines are complex socially, culturally, psychologically, economically and aesthetically - both world views profoundly incomprehensible to each other. The legal process has dominated society's approach to these issues.

and a Sustainable Future, Boston, Beacon Press; Breuggemann, Walter (US economist) 1977, *The Land*, Philadelphia, Fortress; Torrey, Archer 1985, *The Land and Biblical Economics*, New York, Henry George Institute.

[14] Dr Peter Read of the Australian National University Research School of Social Sciences has commenced substantial research on this topic in co-operation with an Anthropologist and presented his preliminary findings to the Australian Historical Association Conference in Darwin on 1 July 1991.

3. LEGAL HISTORY:

To determine whether indigenous people have title to occupied lands under English common law one requires a clear understanding of the relationship between **possession** and **title**. The position of the Crown in relation to land held by people or subjects must also be clear in law. A brief summary of the development of the concepts of **title** and **possession** in English Law provides a necessary and helpful basis for understanding the legal approach to land rights issues. The perplexities of the common law concerning land is good reason to hasten slowly through the conceptual labyrinth.

The definition of **possession** in law is elusive. It implies physical control, with the protection of the law. It is attained by an initial act creating a right of possession which continues until terminated by another action. The concept of **title** refers to the manner in which a right or entitlement to real property, ie. land, is acquired.[15] Renowned English lawyer, Blackstone in his *Commentaries* describes the process of acquiring title to property that belongs to no one as occupancy ie. taking of actual possession.[16] In English Law (which the Australian colonies assumed in 1828[17]) the Crown is considered to be the "universal occupant" so controlling the acquisition of title by occupancy by any other legal entity.

The law protects possession against trespass and adverse claims and presumes every possession to be rightful until proved otherwise. Occupancy is *prima facie* proof in English Law of possession. Entry to unowned or unclaimed land is a condition entitling the occupier to a right of property, valid against all comers. Unlike chattels, title to land cannot be lost. Entering or taking possession of land without a right is illegal and does not convey a title to the occupier. If this occupier is ousted by a second wrongful intruder the first person may recover possession by virtue of having "title by being wrongfully ousted" as well as having prior possession. If the first person relies on his prior possession and a presumption of a title arising from it, the second person might well rebut it with evidence about his third party rights. The important question arising out of this discussion for the land rights debate is whether the prior

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[15] Harris, D.R., 'The Concept of Possession in English Law'" in A.G. Guest, (ed.) 1961, *Oxford Essays in Jurisprudence*, Oxford, University Press, pp.69-106; Tay, A.E.S., 'The Concept of Possession in the Common Law: Foundations for a New Approach', *Melbourne University Law Review*, (1964) vol.4, pp.476-497.

[16] Blackstone William 1765-9, *Commentaries on the Laws of England* (sixteenth edition), Oxford, Clarendon Press, vol.II, pp.3-9.

[17] 9 George IV Ch.83.

occupier's possession and presumption of title arising therefrom is good against the later occupier.[18]

4. CROWN'S TITLE TO LAND:

The principle that the Crown is the proprietor of all land held by people in that country is considered central to English land law and the law of nations where the English Common Law has been introduced including Australia. Therefore, without grants by the Crown, Australian Aboriginal people could not have title to lands occupied by them. Thus, many lawyers have considered that this principle is inimical to a common law doctrine of Aboriginal title.

In *Common Law Aboriginal Title*, Kent McNeil argues that title to land can exist apart from Crown grant where the title arises at common law as a result of possession. The only way it could be extinguished is by legislation or voluntary surrender.[19] His argument proceeds from the point that under English common law Anglo Saxon landholders were free to determine their allegiance to a lord or formal authority. The extent to which English feudalism predated the Norman Conquest is a controversial topic among historians. The Normans instituted a feudal system where there could be *nulle terre sans seigneur* ie. no land without a lord, and landowners became tenants of the lord. However they were obliged to register ownership of land in the *Domesday Book* as confiscations did not affect all landowners and many Anglo Saxons retained title to their land after the Norman Conquest.

A number of historians and lawyers involved in the Aboriginal land rights movement consider the argument that the Crown is the ultimate proprietor of all lands to be a legal fiction. McNeil relies on the cases of *Bristow v Cormican*[20] and *Doe d. Wilson v Terry* for his view.[21] Stephen CJ wrote in 1849 in *Doe d. Wilson v Terry* that

> In England ... the title of Sovereign to land is a fiction; or, where the Crown really owns land, the property is enjoyed as that of a subject is, and by a title which admits of proof by documentary or other evidence.[22]

In *Bristow v Cormican* in 1878 Lord Blackburn dismissed the proposition that the Crown is entitled by a prerogative to all land to which no one else could show title.[23] The principle of law established in this case is that the Crown must have title before it can succeed in a claim to land

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[18] Rudden, Bernard, 'The Terminology of Title', *Law Quarterly Review*, (1964) vol.80 pp.63-72; Honore, A.M., 'Ownership' in A.G. Guest, (ed.) *Oxford Essays in Jurisprudence*, op.cit., pp.107-147.

[19] McNeil, Kent 1989, *Common Law Aboriginal Title*, Oxford, Clarendon Press.

[20] (1878) 3 App. Cas. 641.

[21] (1849) 1 Legge 505 quoted in McNeil, op.cit., p.85.

[22] *Doe d. Wilson v Terry* (1849) 1 Legge 505 at 508-509 quoted in McNeil, op.cit., p.85.

[23] *Bristow v Cormican* (1878) 3 App. Cas. 641 at 667.

of which a person is in possession. The Crown's prerogative title to land has not been questioned in any of the leading land rights cases in the United States, Canada or Australia. Hence, McNeil's unique proposition remains a theoretical question.

5. ACQUISITION OF TERRITORIAL SOVEREIGNTY BY THE CROWN:

Actual acquisition of possession and ownership is not a prerequisite to sovereignty in English law. European powers sought to confirm their claims through symbolic acts of possession, papal bulls, public assertions of discovery, treaties with native rulers, establishment of settlements, and conquest through force of arms. The concept of *terra nullius* has been used as an instrument of domination in this process, whereby the land was said to have been "discovered" when it was perceived to be ownerless. Enormous legal and historical debate continues about which of these methods were used to acquire sovereignty. Ultimately it is the group who exercises exclusive control who is regarded as having acquired sovereignty.[24] Also, it became a legal rule that the acquisition of sovereignty over *terra nullius* (lands of no one) depends on effective occupation.[25] It was not until apparently vacant land was being colonized that the principle of *settlement* as a means of acquiring territory was accepted by the law.[26] This classification of the territory is important to the land rights debate because the law in force and the power of the colonizing power to legislate, depends upon it.[27] In settled territories English Common Law accompanied the colonists to the degree of its applicability to local circumstances.[28] Another important rule is that no subject can thrust sovereignty upon the Crown without the Crown's consent, as occurred, for example, with the attempted annexation of the eastern half of New Guinea by Queensland in 1883.[29]

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[24] Wade, H.W.R. 1955, 'The Basis of Legal Sovereignty', *Cambridge Law Journal*, vol.25, pp.172-197.

[25] See Goebel, Julius Jnr. 1971 (repr. orig. 1927 ed.), *The Struggle for the Falkland Islands: A Study in Legal and Diplomatic History*, Port Washington, NY, Kennikat Press, pp.47-119; O'Connell, D.P., 'Change of Sovereignty and the Doctrine of the Act of State', *Australian Law Journal* (1952) vol.26, pp.201-205; Roberts-Wray, Kenneth 1966, *Commonwealth and Colonial Law*, London, Stevens & Sons; Johnson, D.H.N., 'Consolidation as a Root of Title in International Law', *Cambridge Law Journal*, 1955, pp.215-225.

[26] Roberts-Wray, op.cit., pp.99-112; Blackstone, op.cit., vol.II, pp.3-9; *Halsbury's Laws of England* (4th edition), vol.6, para.1017, and vol.5, paras. 1180 and 1313.

[27] Blackstone, William, op.cit., vol.I, pp.108-110; Castles, Alexander 1981, *An Introduction to Australian Legal History*, Sydney, Law Book Company, pp.1-7 and 14-21.

[28] *Cooper v Stuart* (1889) 14 App. Cas. 286 at 291.

[29] Jacobs J. in *New South Wales v Commonwealth of Australia* (1975) 135 CLR 337; For details of the reasons for and consequences of annexation by a colony see Moore, C.R. 1984,

The courts have developed criteria for classifying colonies as *settled, ceded, conquered* and *annexed* but have not specified clear definitions of each. Part of that classification process depends on the court's perception of the level of "civilization" of the indigenous people in European eyes. By this approach a territory is regarded as settled unless acquired from a person with internationally recognized status. For example, Sierra Leone in Africa was considered a *settled* country even though the people had cultivated their land extensively. Most of North America was obtained by treaty or by conquest of the native people. The difference between *ceded* and *settled* territories was defined in the case, *Freeman v Fairlie* in 1828 as:

> the absence and the existence of *lex loci*, by which the British settlers might, without inconvenience, for a time, be governed; for the powers from whom we had wrested colonies by conquest, or had obtained them by treaties of cession, had ordinarily, if not always, been civilized and Christian States, whose institutions, therefore were not wholly dissimilar to our own.[30]

Judge Stephen went on to point out that local law continued to apply to indigenous inhabitants in colonies such as India whereas English law governed Europeans with modifications agreed between the two groups.

In **Australian** cases the prevailing criterion has been *nomadism*. In 1889 in *Cooper v Stuart*, a case relating to resumption of land for a road in Sydney, Lord Watson determined the legal status of New South Wales as a *settled* colony:

> There is a great difference between the case of a Colony acquired by conquest or cession, in which there is an established system of law, and that of a Colony which consisted of a tract of territory practically unoccupied, without settled inhabitants or settled law, at the time when it was peacefully annexed to the British dominions. The Colony of New South Wales belongs to the latter class.[31]

The *Millirpum v Nabalco Pty Ltd* case established in 1971 that, at common law, Australian Aborigines had no recognizable title to land - simply by virtue of being Aborigines and having held traditional tenure. The decision in this case suggested that Aboriginal Land Rights in Australia would need to be created by statute.

Anthropological issues as to whether Aboriginal people's customs and traditions were a local form of law were not introduced until the twentieth century.[32] Classification of territory has been viewed as a matter of law not fact by the judiciary. Thus the case, *Milirrpum v Nabalco Pty Ltd*, was decided by Blackburn J on the basis of a principle of law, which, once

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'Queensland's Annexation of New Guinea in 1883', Royal Historical Society of Queensland *Journal*, vol.XII no.1, pp.26-54.

30 (1828) 1 Moo. 1A 305 at 324 (Stephen J.)

31 (1889) 14 App.Cas. 286 at 291. (There was no anthropological evidence presented about Australian Aboriginal lifestyles.)

32 See Roberts, Simon 1979, *Order and Dispute An Introduction to Legal Anthropology*, Harmondsworth, Penguin Books.

established, **he found** could not be overturned by re-examination of historical evidence, even though Blackburn J found that the Aboriginals of the Gove peninsula area were governed by their own subtle system of law "highly adapted to the country in which [they] led their lives, which provided a stable order of society".[33]

Judges have taken the view that the determinative factor in classifying a territory as *settled, ceded* or *conquered* is the conduct of the Crown in proceeding to acquire sovereignty. It is the perception of the indigenous people's level of civilization by the British Foreign Office which must be examined in the case law, not the nature of the society itself.[34]

There are many unresolved legal difficulties about the continuity of customary law as a source of indigenous land rights in the Crown's overseas dominions irrespective of whether they are *settled, ceded* or *conquered* territories. The alternatives are: private property rights under customary law continue after the change of sovereignty in the absence of any express confiscation or expropriatory legislation (Doctrine of Continuity); or only rights which the Crown specifically decides to recognize are enforceable (Doctrine of Recognition). Lord Denning sought to resolve this difficulty in the case, *Oyekan v Adele* in 1957,[35] involving the effect of the cession of the palace in Lagos (Nigeria) in 1861. In discussing Lord Dunedin's ruling in *Vajesingji Joravarsingji v Sec. of State for India* in 1924[36] Denning noted in an *obiter dictum* that, "The courts will assume that the British Crown intends that the rights of property of the inhabitants are to be fully respected".[37] However Lord Dunedin placed the burden of proving acknowledgment of these rights on the indigenous people themselves.[38] Dunedin had established the doctrine of recognition in the case, *Sec. of State of India v Bai Rajbai* in 1915.[39] This view was also espoused by the Swiss Anglophile lawyer, Emerich Vattel, in the mid-eighteenth century.[40] Part of the Recognition Doctrine, the principle that the inhabitants of an occupied or settled territory could enforce only those rights recognized by the State, was applied in the well-known Australian case, *Milirrpum v Nabalco Pty Ltd*.[41] It is a well-accepted rule of law that English common law accompanied English colonists to a *settled*

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33 (1971) 17 FLR 141 at 267-8.

34 McNeil, op.cit., pp.130-1.

35 [1957] 2 All ER 785.

36 (1924) LR 51 1A 357.

37 [1957] 2 All ER 785 at 788.

38 (1924) LR 51 IA 357 at 361; *Sec. of State for India v Bai Rajbai* (1915) LR 42 1A 229.

39 (1915) LR 42 1A 229.

40 Keith, A. B. 1907, *The Theory of State Succession, with special reference to English and Colonial Law*, London, Waterlow & Sons; O'Connell, D.P. 1967, *State Succession in Municipal Law and International Law*, 2 vols., Cambridge University Press.

41 (1971) 17 FLR 141 at 226-7, 233.

territory such as Australia. where English common law existed to the extent that it was applicable to local circumstances. The Crown had no legislative authority other than by statute but could establish courts and a representative legislative assembly.[42]

By contrast the Doctrine of Continuity of presumptive Aboriginal title after a change in sovereignty has been established in several notable overseas land rights cases, *Amodu Tijani v Secretary Southern Nigeria*[43], *Calder v Attorney General of British Columbia*[44], and *Guerin v The Queen*[45] (Canadian case) which will be discussed in more detail later in this paper. In *Amodu Tijani v Secretary Southern Nigeria,* and other cases involving customary tenure, such as *Stool of Abinabina v Chief Kojo Enyimadu*[46] title was proven by traditional evidence where witnesses depending on oral history were able to say who held specific lands since the remote past. However, in a very interesting single judge case in a single province of Canada, *Delgamuukw v Province of British Columbia and Attorney General of Canada*[47] in 1991 the legal basis for Aboriginal Land Rights was totally dismissed as was the argument that any rights were extinguished by colonial administration.

Closer to home the case law respecting **Papua New Guinea** preserves the pre-existing land rights of the people in the Crown's acquisition of the territory. Land was originally purchased by agreement from the indigenous people but by the *Land Regulation Ordinance* of 1888 the Crown's exclusive right of purchase of land was regulated.[48] In the case, *Administration of Papua v Daera Guba*[49], Barwick CJ referred to the initial intention of the Crown to safeguard the land rights of the indigenous people and the confirmation of it through legislative acts.

The complex topic of Maori land rights in **New Zealand** has been treated exhaustively by Paul McHugh in a treatise, 'The Aboriginal Rights of the New Zealand Maori at Common Law' in 1987.[50] Kent McNeil refers to it in his book, *Common Law Aboriginal Title*, and observes that the Crown's intention in the Treaty of Waitangi was to preserve the customary land rights of

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42 *Cooper v Stuart* (1889) 14 App. Cas. 286 at 291-2; Evatt, H.V. 1938, 'The Legal Foundations of New South Wales', *Australian Law Journal*, vol.11, 409-421; Campbell, Enid 1964, 'The Prerogative Rule in New South Wales', Royal Australian Historical Society *Journal and Proceedings*, vol.50, pp.161-190.

43 [1921] 2 AC 399.

44 [1973] SCR 313.

45 [1984] 2 SCR 335.

46 [1953] AC 207.

47 (1991) 3WWR 97; *Weekend Australian,* 16-17 March 1991, p.2.

48 See O'Regan, Robin S. 1971, *The Common Law in Papua New Guinea*, Sydney, Law Book; Since independence the *Land Disputes Settlement Act* No.25 of 1975 regulates these purchases.

49 (1972-3) 130 CLR 353.

50 McHugh, Paul G., 'The Aboriginal Rights of the New Zealand Maori at Common Law, PhD thesis Cambridge University, 1987.

Maoris. New Zealand land law respecting Maoris was thus founded on the Doctrine of Continuity and the country's constitutional status (*ceded, conquered* or *settled*) is irrelevant to the argument.[51] This view has been challenged recently and legislative remedies urged to redress the pervasive intrusion of the principles of the Treaty of Waitangi into the New Zealand democratic process.[52]

In courts established under common law principles customary law is a matter of **fact** not **law**. It has to be proved frequently in the courts to be judicially noticed in future. The case, *Re Southern Rhodesia*[53] in 1919, established that these rights must relate to private property. The consequent difficulty for these people is that some cultures eg. the Australian Aborigines see land as a sacred provider rather than they themselves individually holding it in a proprietary way. Blackburn J said of the Aborigines of Gove Peninsula that "the clan belongs to the land rather than the land belongs to the clan" but that this interest did not provide them with proprietary rights to land.[54]

6. ACQUISITION OF TITLE BY OCCUPANCY:

Occupancy is logically the only means by which an original title can be obtained at common law. To achieve common law Aboriginal title sufficiency of land use by indigenous peoples is a test at law of their title by occupancy of the land alone. There must be proof of actual entry and that intention to occupy the land could be inferred from some act/s. There have been innumerable cases which have shown building, cultivating, mining, enclosing, warding off trespassers, fishing in the water, cutting trees or grass, walking across it and establishing the boundaries, to be sufficient to hold land. There are also differences for improved and unimproved land whereby acts to hold unimproved land are less complex than for improved land. Whilst acknowledging the ongoing anthropological research into whether some Australian Aborigines were cultivators of specific pieces of land, modern anthropological research shows that hunters and gatherers are attached to definite areas to which they have spiritual ties and of which they know the resources intimately.[55]

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51 McNeil, op.cit., pp.188-191.

52 For details of the formation and judicial consequences of the Treaty see, Ross, Ruth M. 1972, 'Te Tiriti o Waitangi, Texts and Translations', *New Zealand Journal of History*, vol.6 pp.129-155, and Chapman, Guy 1991, 'The Treaty of Waitangi - fertile ground for judicial (and academic) myth-making', *New Zealand Law Journal*, July 1991, pp.228-236.

53 (1919) AC 211.

54 (1971) FLR 141 at 267-8, 270-1 and 273-4.

55 See for example, Peterson, N. (ed.) 1976, *Tribes and Boundaries in Australia*, Canberra, Australian Institute of Aboriginal Studies; Flood, Josephine 1983, *Archaeology of the Dreamtime: the story of prehistoric Australia and its people*, Sydney, Collins.

The effect of indigenous occupation at the time of colonial *settlement, cession* or *conquest*, according to some Canadian Aboriginal land rights advisers, is to entitle indigenous people to possession and their presumptive title at the time the Crown acquired sovereignty over the land, providing no other person or group of people had prior title which can be proven. Kent McNeil defines this presumptive title as "Common Law Aboriginal Title".[56] It could be contended that indigenous people are aliens and so disqualified from holding land within the Crown's dominion. However, the inhabitants of a *settled* territory became British subjects from the time of annexation as set out in the Instructions of the British Government to the Australian colonial Governors. The beneficiaries were the persons then occupying the land. Determining these people in a system of subsisting untransferred Aboriginal title involves ascertaining the present membership of the group and for genealogists or anthropologists to trace their genealogy. Both Blackburn J and Marc Gumbert suggested taking the "geocentric" Aboriginal communities as the correct groupings.[57]

The fact that colonists bought land from indigenous people has clouded the issues. History and a number of legal cases have shown that purchase was seen to be good business practice and a demonstration of Christian principles. However the practice was prohibited by the British Government and written into Governors' Instructions from the mid-eighteenth century.[58] However, in British India and in settled west African colonies private purchases of land from the indigenous people was accepted. The basis for administrative practice in this area appears to have been legislative in terms of extinguishing rights to land through occupation rather than the application of the English common law. The leading jurist in this area of the North American legal system has been Chief Justice Marshall. His decisions have been quoted in much of the literature on Aboriginal land rights, and it has been said that he created new law in this area. The most quoted case is *Johnson v McIntosh*[59] where Marshall CJ held that private purchases of land from Indian tribes in British North America in 1773 and 1775 did not result in a title sustainable at law, but rather that the Crown is the only source of private title.

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56 McNeil, op.cit., pp.207-208.

57 Gumbert, op.cit., pp.70-90; *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141 at 273.

58 *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141 at 204; *Attorney General for Ontario v Bear Island Foundation* (1984) 15 DLR (4th) 321 at 350 passim.

59 (1823) 8 Wheat. 543.

7. RELEVANCE OF COMMON LAW ABORIGINAL TITLE TO UNITED STATES, CANADA AND AUSTRALIA:

There is a major difference between the position of American Indians under United States law and indigenous peoples in other British colonies who followed the English common law system. The United States Congress has an unfettered power to extinguish Indian title by whatever means it chooses and generally has not recognized the title of the American Indians, subject to their right of occupancy. Although Marshall CJ stated that his findings in major land rights cases between 1810 and 1835 were based on universal principles, the relevance of these cases to Australia must be tempered by an understanding of the constitutional differences between the two nations. Whether original Indian title, legal or equitable, amounted to a right of property was the point at issue in the main American cases - *Fletcher v Peck* in 1810, *Johnson v McIntosh* in 1823, *Worcester v Georgia* in 1832, *Mitchel v United States* in 1835.[60] The Marshall court found favourably for the Indians that they were:

> the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion.[61]

In *Mitchel v United States* in 1835 the land rights of the American Indians was clearly stated by Baldwin J as follows:

> friendly Indians were protected in the possession of the lands they occupied, and were considered as owning them by a perpetual right of possession in the tribe or nation inhabiting them as their common property from generation to generation, not as a right of individuals located in particular spots.[62]

Baldwin also emphasised that:

> their hunting-grounds were as much in their actual possession as the cleared fields of the whites; and their rights to exclusive enjoyment in their own way and for their own purposes were as much respected until they abandoned them, made a cession to the government, or an authorized sale to individuals.[63]

There were many United States judgments in cases involving American Indians which confirmed that hunter-gatherers were just as capable as agriculturalists of occupying specific

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60 These cases are summarised in McNeil, op.cit., pp.250-259.

61 Marshall CJ in *Johnson v McIntosh* (1823) 8 Wheat 543 at 574,592 quoted in McNeil, op.cit., p.257.

62 The judgment was given by Baldwin J. in (1835) 9 Pet 711 and is quoted in McNeil, op.cit., p.253.

63 ibid p.746 quoted in McNeil, op.cit., p.254.

tracts of land, and it was expressed succinctly in the case, *United States v Santa Fe Pacific Railroad* in 1941:

> Occupancy necessary to establish aboriginal possession is a question of fact to be determined as any other question of fact. If it were established as a fact that the lands in question were, or were included in, the ancestral home of the Walapais [an Indian tribe] in the sense that they constituted definable territory occupied exclusively by the Walapais (as distinguished from lands wandered over by many tribes), then the Walapais had "Indian title".[64]

Thus their "right of occupancy" was considered as equivalent to the "fee simple" of the whites, but Indian title could be lost by abandonment of their lands.

These Marshall court views were overturned in 1955 in the case of the Alaskan Indians, *Tee-Hit-Ton Indians v United States*, where the American colonies were defined to have been acquired by conquest and where the majority judgment found that the Indians' right of occupancy is not a property right granted by the sovereign authority but may be terminated and re-alienated by that authority without any legally enforceable obligation to compensate the Indians. Consequently Indian title does not correspond to Aboriginal Common Law title.[65] This view has been held by the United States courts since then but the decision is not relevant to nations defined as being *settled*.

In **Canada** Aboriginal land rights depends in the various provinces on whether that area was *settled, ceded* or *conquered*.[66] The Royal Proclamation of 1763 does not apply to *settled* parts of Canada because the Crown's legislative authority in *settled* colonies is a statute authority only.[67] An important Canadian case, *Calder v Attorney General of British Columbia* was before the court when the Gove Land case was being heard in the Northern Territory Supreme Court. The majority view in the *Calder* decision handed down in 1973 was that the Nishgas Indian tribe had rights of occupation and use of the land but that these rights were extinguished by legislation before British Columbia became a province of Canada in 1871. They considered that the Crown has a right to extinguish Aboriginal interests. There was also a technical reason, viz. failure to obtain a fiat permitting them to sue the Crown, why the plaintiffs failed and this narrow judgment by Pigeon J became the *ratio* of the case. Hall J delivered a dissenting opinion which has been actively debated in the land rights movement. Hall's view was that Aboriginal title had never been extinguished. He considered that Aboriginal groups' land rights depend on their own "concepts of ownership" which need to be capable of being

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64 (1941) 314 US 339 at 345 quoted in McNeil, op.cit., p.254.

65 348 US 272 at 279 quoted by McNeil, op.cit., at p.259.

66 The *settled* regions of Canada comprise New Foundland, Rupert's Land, Canadian Arctic Islands, old North-Western Territory, and British Colombia.

67 See Evatt and Campbell, op.cit.; *Cooper v Stuart* (1889) 14 App. Cas. 286 and *Delgamuukw v Province of British Colombia and the Attorney General of Canada* (1991) 3 WWR 97 at p.111.

explained under the common law but need not correspond with conventional elements of "ownership". Hall J. further commented that, as indigenous "possession from time immemorial" [1189 AD] was admitted in *Calder*, then the possessors are owners as possession is proof of ownership under the common law. Accordingly, Hall J placed the burden on the Crown to prove that the presumptive title of the Nishgas Indians had been extinguished. He considered that the Crown failed to do this in the case. Also he did not believe that the plaintiffs were obliged to prove that their customary law applied.[68]

In the case, *The Hamlet of Baker Lake v Minister of Indian Affairs and Northern Development*, in 1979 Mahoney J found that the Inuit (Eskimo) had an Aboriginal land title in the Northwest Territories formerly within Rupert's Land which encompassed the right to hunt and fish on their lands as their ancestors did.[69] Mahoney J stated that to establish Aboriginal title claimants must establish they and their ancestors lived in an organized society; that organized society occupied a specific territory over which they assert Aboriginal title; they excluded other organized societies; and that this occupation was an established fact when the English asserted sovereignty. The Inuit only achieved a declaration that the specified lands were "subject to the aboriginal [sic] right and title of the inuit to hunt and fish thereon" but their other claims were dismissed.[70] This judgment highlighted uncertainties about whether Aboriginal occupation and developmental projects could occur concurrently and the Crown's intention to extinguish Aboriginal rights had to be clear and specific. Some of these issues were addressed in *Guerin v The Queen* in 1984.[71] In this case the Supreme Court of Canada held that the Crown had a fiduciary (trusteeship) obligation towards the Musqueam Indians. The eight judges held that Aboriginal title is a legal right that can only be extinguished by native consent or by statute. However, because this case related to reserve lands, it cannot be seen as a definitive statement about indigenous rights to land generally, although in *Mabo and Anor. v. State of Queensland and Anor*. Deane J of the Australian High Court suggested that *Guerin* may be applicable to Australia.[72] In summary, the Canadian case law has not specified the source of Indians' title to land.

The judgments in two further Canadian cases, *R. v Sioui*[73] and *R. v Sparrow*[74] in 1990 seek to reconcile conflicting rights so that two groups may operate together on specific land by reasonably limiting each other's rights. Further, the *Sparrow* case established a test of

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68 [1973] SCR 313.

69 [1980] I FC 518 [Federal Court of Canada (Trial Divsion)].

70 ibid. pp.557-8 quoted by McNeil, op.cit., p.281.

71 [1984] 2 SCR 335.

72 (1988) 63 ALJR 100.

73 (1990) 70 DLR (4th) 427 (SCC).

74 (1990) 4 WWR 410 (SCC); The facts of the case dealt with fishing rights of Indians.

extinguishment viz. that the Crown's intention to extinguish Aboriginal rights must be clear and plain.

An unsatisfactory element of the development of common law Aboriginal land rights is shown by the judgment in the case, *Delgamuukw v Province of British Columbia and Attorney General of Canada* (the Gitksan Wet'suwet'en land claim case),[75] in the Supreme Court of British Columbia in 1991 where 35 Gitksan and 13 Wet'suwet'en hereditary chiefs claimed 22 000 square miles of territory in north-west British Columbia. Judge Allan McEachern held that the land was occupied for at least 3 000 years before it was settled but Gitksan and Wet'suwet'en Aboriginal land rights were extinguished by the colonial administration. However, Delgamuukw has appealed Judge McEachern's decision to the British Columbian Court of Appeal and the appeal is scheduled to commence on 6 April 1992. It is expected that the issues will ultimately be resolved in the Supreme Court of Canada. This case is an example of the uncertainties of common law based Aboriginal land title which necessitates a thorough and costly evaluation on a case by case basis with unpredictable results.

Judge McEachern considered the following cases, *R v St Catherine's Milling and Lumber Company, Calder v Attorney General of British Columbia, The Hamlet of Baker Lake v Minister of Indian Affairs and Northern Development, Guerin v the Queen, R v Sioui (Quebec),* and *Sparrow v The Queen.*[76] McEachern found that the members of the House of Delgamuukw had established their rights for continued residence in their villages and non-exclusive Aboriginal sustenance rights to their territories. On the questions of **extinguishment and fiduciary duties** McEachern concluded that

> an intention to extinguish aboriginal rights can be clear and plain without being stated in express statutory language or even without mentioning aboriginal rights if such a clear and plain intention can be identified by necessary implication. An obvious example would be the grant of a fee simple interest in land to a third party, or the grant of a lease, licence, permit or other tenure inconsistent with continued aboriginal use.[77]

In **Australia** the Crown acquired sovereignty over the whole of the continent by a succession of proclamations. The British Government presumed all the land to be vacant Crown land. The first major judgment in a Aboriginal land rights case in Australia was *Milirrpum v Nabalco Pty Ltd*[78] in 1971. Gove Peninsula Aboriginals had claimed that both they and their ancestors

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75 (1991) 3 WWR 97; *Weekend Australian*, 16-17 March 1991, p.2.

76 Judgment was given in *Sparrow v The Queen* on 31 May 1990 and published in 4 WWR 335; Notes on this case appear in *Aboriginal Law Bulletin*, vol.2 no.48 (February 1991) p.12; The case raises questions about the value of constitutionalization of Aboriginal Rights, that Aboriginal Rights should be respected on the indigenous peoples' own terms and that they should not be required to fit in with common law requirements, and that plain and clear intention must be expressed before Aboriginal Rights can be extinguished.

77 (1991) 3WWR 97 at p.406 of the judgment.

78 (1971) 17 FLR 141.

occupied those lands for an indefinite time which predated the Crown's acquisition of sovereignty over Australia. The Aborigines claimed that customary law clan members had communal proprietary land rights which survived the acquisition of sovereignty, that these rights were still in existence and that the current members of the clan living in the Gove area were entitled to occupation and enjoyment of those lands. The plaintiffs failed because they could not prove that the land was held by ancestors in their specific clan in 1788. There had been migrations, extinction of some clans and visits by other racial groups to the area such as the Macassans from the Indonesian archipelago. Blackburn J found that the Aborigines did have a system of law but that it did not include a proprietary relationship to land. The local clan's relationship to the land was religious rather than economic, and the economic use of the specific land was in the hands of roving groups of other Aboriginal people. Blackburn J concluded from the evidence placed before him by the Aboriginals' counsel, Mr Woodward (later Mr Justice and Sir Edward Woodward), that customary law title of indigenous people had been held in former British colonies only where it was recognized by statute or government policy.[79] *Milirrpum v Nabalco Pty Ltd* has stood as the legal authority on Aboriginal land rights in Australia, excepting statutes passed by the Commonwealth and State governments. However, current litigation on Aboriginal Land Rights - *Mabo v State of Queensland*[80] and the Kimberley land rights case, *Utemorrah and Others v Commonwealth of Australia and Western Australia*, where the Worora, Wunambul and Ngarinyin people claim the Mitchell Plateau, Northwest coast, Drysdale and Prince Regent River areas, Kalumburu Aboriginal Reserve on the Timor Sea and the islands of the Buccaneer and Bonaparte archipelagos and adjacent seas, reefs, inlets and rivers[81] - provide the High Court of Australia with opportunities to reconsider the issues. It is unclear what use the High Court may make of the judgment in the Canadian case, *Delgamuukw v Province of British Columbia and Attorney General of Canada*.

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79 17 FLR 141 at 262; The main Australian cases considered by Blackburn J were *The King v Steel* (1834), *Hatfield v Alford* (1846), *Attorney General v Brown* (1847), *Williams v Attorney General for New South Wales* (1913), *Council of the Municipality of Randwick v Rutledge* (1953), *Randwick v Rutledge* (1954). These cases are analysed in the article, 'A Question of Title: Has the Common Law been misapplied to Dispossess the Aboriginals?' by Kent McNeil 1990, *Monash University Law Review,* vol.16 no.1, pp.91-110.

80 High Court of Australia, Brisbane Registry, No.B12 of 1982; (1986) 64 ALR 1; Supreme Court, Brisbane (Moynihan J.) 16 November 1990 Determination Pursuant to the Remitter of 28 February 1986 and the Reasons Which Support It; *Queensland Law Reporter*, 27 April 1991, pp.346-347.

81 Brief details are included in the articles, 'The New Dreamtime: Land Rights and Wrongs', *Weekend Australian,* 2 February 1991, pp.33-34; 'Left backs down over land rights legislation', in *Australian,* 6 June 1991, p.5, 'Uniting Church supports Kimberley land claim', *Australian,* 18 July 1991, p.3, and 'New Land Rights Case', *Aboriginal Law Bulletin*, vol.2 no.51, August 1991, p.23.

8. ANTHROPOLOGICAL APPROACHES:

This brief overview provides an insight into the main themes involved in illuminating Aboriginal clan ownership, lineal descent and group organization patterns. It is much easier to assess Aboriginal land rights when cultural systems exist and there is no economic competition for the land. In Queensland, Athol Chase of Griffith University has written about the domiculture (between a hunter-gatherer and agricultural economy) of the Lockhardt River people.[82] He demonstrates that Aborigines "cultivated" the landscape in ways imperceptible to those used to European agricultural methods and that this process of cultivation was linked with the Aborigines' cultural and social systems. The difficulty for Queensland Aborigines is that many do not know the language group of their origins nor their social and religious system - but feel obligated to make a claim upon past history in terms of their present and future needs.

Fred Myers' book, *Pintupi Country, Pintupi Self: Sentiment, Place, and Politics among Western Desert Aborigines*,[83] in 1986 presents an outstanding explanation of land attachment by his analysis of the Pintupi people's intimate recollections of daily life before moving into government settlements. Myers achieves what few anthropologists tackle - an understanding of the structural differences in the political organization of small scale Aboriginal societies. His work stems from his commitment to individuals among the Pintupi people who considered Myers a "relative". Aboriginals living in harsh, isolated Central Australian environments exhibit a regional organization as the basis for forming residential communities. Social activities occur in conjunction with conforming to the ecological constraints of the land. The Dreaming, a specific cultural form, has a geographical extension continuing through time which consists of the sustaining bond between relatives. Thus the Dreaming is a control or structure binding itself to the desert people and over-riding their methods of managing land. Boundaries are insignificant compared to kinship, residence and travel which express relational and economic relations reflected in a spatial way of "one country". There is a repeated pattern of movement of people through the landscape. Accordingly, their understanding of land ownership revolves around their sensitivity to resources and population.[84] By contrast where population density of Aborigines is higher the clan structure is dominant.

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82 Chase, Athol, 'Belonging to Country: Territory, Identity and Environment in Cape York Peninsula, Northern Australia', in Hiatt, L.R. (ed.) 1984, *Aboriginal Landowners: Contemporary Issues in the Determination of Traditional Aboriginal Ownership*, Oceania Monograph 27, University of Sydney, pp.104-122.

83 Myers, Fred R. 1986, *Pintupi Country, Pintupi Self: Sentiment, Place, and Politics among Western Desert Aborigines*, Canberra, Australian Institute of Aboriginal Studies. (The Pintupi Aboriginals moved in from the Gibson Desert in 1984).

84 Myers, op.cit., pp.94-95, 286-297.

The Aborigines' bark paintings illustrate rights of ownership in land. In 1957 the Yirrkala people at Elcho Island (Galiwinku) displayed a series of sacred objects including bark paintings in a park beside the church as a commitment to a process of exchange for Europeans' consideration of the Aborigines' social autonomy. Many paintings are in a sense maps of the clan land.[85] In the book, *Dreamings: the Art of Aboriginal Australia*, Christopher Anderson and Francoise Dussart, describe Western Desert art[86] as social, mythic and geographic maps. They distil out the general themes in the paintings of the linkages and separations between people and place. The paintings are like schematic maps of the landscape, portraying the artist's country. This is what the Yirrkala people painted in their bark petition to the House of Representatives in 1963.

9. CURRENT LAND RIGHTS LEGISLATION IN AUSTRALIA:

Australia has been a leader in the western world in passing legislation granting ownership of land to Aborigines. The first such legislation was the South Australian *Aboriginal Land Trust Act* of 1966. Before then Aboriginals owned virtually no land in Australia. They resided on reserves established under Aboriginal Protection legislation of the nineteenth century.

9.1 NORTHERN TERRITORY:

In February 1973 the Commonwealth Government appointed Woodward J. (counsel for Milirrpum in the *Milirrpum v Nabalco Pty Ltd* case) to inquire into appropriate means of recognizing Aboriginal aspirations for land rights. He produced two reports, in 1973 and 1974.[87] His underlying conclusions were that Aborigines should be consulted, flexibility for change over time should be built into land rights legislation, cash compensation is not a solution to land rights, financial support and autonomy in decision-making is necessary for Aboriginal communities who must be accountable for their decisions about land use, natural resources and public moneys, and differences between Aborigines must be allowed for.[88]

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85 The relationship between paintings and the clan land are analysed in the articles by Nancy M. Williams, 'Yolngu Concepts of Land Ownership', and Howard Morphy, '"Now you understand": Analysis of the way Yolngu have used sacred knowledge to retain their autonomy', in Peterson Nicholas and Langton, Marcia (eds.) 1983, *Aborigines, Land and Land Rights*, Australian Institute of Aboriginal Studies, Canberra. See also, Sutton, Peter, op. cit., passim.

86 Sutton, Peter, op.cit., pp.89-142.

87 Australia. Aboriginal Land Rights Commission (Commissioner, Mr Justice Woodward), *First Report* 1973, *Second Report* 1974 (hereinafter Woodward Report 1973 and 1974, respectively).

88 Woodward Report 1974 paragraphs 48-66.

The *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) followed Woodward's recommendations except for the "needs" of some Aborigines living in Town Camps and on pastoral leases. The act includes provisions for a veto over mining (exercised as recently as the Coronation Hill decision by the Jawoyn people in June 1991) and a Land Commissioner to determine clan ownership. Large areas of unalientated crown land (26% of Northern Territory) are available for claim by Aborigines who can convince the Aboriginal Land Commissioner that they are the owners of the land according to Aboriginal law (s.50). Aboriginal reserves are transferred to Aboriginal land trusts. The Northern Land Council, Central Land Council and Tiwi Land Council have been established under the act to protect the interests of traditional owners (s.23(i)).[89] The Northern Territory legislature has also passed legislation to grant certain National Park land to Aboriginals (*Coburg Peninsula Aboriginal Land and Sanctuary Act 1981*), the management of some National Parks (*Nitmiluk (Katherine Gorge) National Park Act 1989*, and for land to be excised from pastoral leases (*Miscellaneous Acts Amendment (Aboriginal Community Living Areas) Act 1989* (the Excisions Law)).

Aboriginals in the Northern Territory may claim land under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth), *Coburg Peninsula Aboriginal Land and Sanctuary Act 1981* (NT) and the *Crown Lands Act 1931* (NT). Traditional land claims may be made for unalientated Crown land but not within a town - leases under the *Crown Lands Act 1931*, certain stock routes and reserves, river beds and banks (excluding the interest held by adjoining landholders), mining exploration leases, pastoral leases held by Aborigines, and land set aside for public purposes. Land held in fee simple, land set aside by the Commonwealth Government for public purposes, town land, land held by Aboriginal Councils and land set aside for the use of statutory authorities is not available for claim. Thus Aborigines in the Northern Territory are prevented from claiming traditional land within a pastoral lease except under the provisions for excisions. The "Memorandum of Agreement between the Commonwealth and the Northern Territory on the Granting of Community Living Areas in Northern Territory Pastoral Districts" which led to the *Miscellaneous Act Amendment (Aboriginal Community Living Areas) Act 1989* (the Excisions Act) incorporated the ideas of the failed bills of 1983 and 1984 on this issue, with a restrictive criterion of "demonstrate[ing] a present need" for adequate housing on a particular pastoral lease. Aboriginals' general right of access to pastoral leases under ss.24 and 94 of the *Crown Lands Act 1931* was altered by an amendment in 1985 which restricted the right of permanent residence to Aboriginals who at any time since 1 January 1968 has had a continuous presence on the lease (s.3 of amending act) and permitted hunting and gathering rights only to others. Also the *Sacred Sites Act 1989* (NT) prescribed the rights of Aborigines to visit sacred sites (s.46). Excision applications within two kilometres of homesteads were

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89 For an analysis of progress towards the *Aboriginal Land Rights (Northern Territory) Act* 1976 see 'The Central Council: the politics of change' by Geoff Eames in Peterson, N. and Langton, Marcia (eds.) 1983, *Aborigines, Land and Land Rights*, Canberra, Australian Institute of Aboriginal Studies, pp.268-277.

retrospectively outlawed under the *Crown Lands Amendment Act 1991*, except for those entitled under s.24(4) of the *Crown Lands Act 1931*.[90]

Land is claimed on the basis of traditional Aboriginal ownership (defined in s.3(1) of the 1976 act):

> "traditional Aboriginal owners", in relation to land, means a local descent group of Aboriginals who -
>
> > (a) have common spiritual affiliations to a site on the land, being affiliations that place the group under a primary spiritual responsibility for that site and for the land; and
> >
> > (b) are entitled by Aboriginal tradition to forage as of right over that land;

An Aboriginal Land Commissioner must determine whether the Aboriginal applicants or any others are the "traditional Aboriginal owners" of the land in whole or in part. The spiritual basis of the Aboriginal relationship to land has been established judicially.[91] The view of Brennan J expressed in his judgment in *R. v Toohey; Ex Parte Meneling Station* in 1982, particularly the statement:

> Commissioner's function. His inquiry is a step in the restoration of land to Aboriginals who have retained their Aboriginal traditions with respect to the land, and the inquiry which he makes is for the purpose of determining whether the primary criterion for the granting of Crown land other than Schedule 1 land is fulfilled. That criterion - the existence of traditional Aboriginal owners - is a test of need as much as it is a test of entitlement. The strength of the putative traditional owners' spiritual affiliation and responsibility is the measure of the extent to which the deprivation of that land would leave or has "left [the] local band of an essential constant that made their plan and code of living intelligible."

indicates that it may be arguable that Aborigines have certain proprietary rights in some land and are entitled to declaration and enjoyment of their rights or compensation.[92] Where the Aboriginal Land Commissioner ascertains who the Aboriginal traditional owners of the claimed land are, the Commissioner reports to the Federal Minister for Aboriginal Affairs and the Administrator of the Northern Territory recommending the grant of all or part of the claimed

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90 See Burke, Paul 1991, 'Who Needs a Community Living Area?: the "Need" Requirement in N.T. Excisions Legislation', *Aboriginal Law Bulletin*, vol.2 no.50, pp.7-9, for details of excision applications and their progress.

91 See also *Re Toohey, Ex parte Meneling Station Pty Ltd* (1982) 158 CLR 327 and 44 ALR 63 at 88-89 (Brennan J); *Wamba Wamba Local Aboriginal Land Council v Minister Administering the Aboriginal and Torres Strait Islander Heritage Protection Act 1984*, (1989) 86 ALR 161; *A.G. (NT) v Minister for Aboriginal Affairs* (1989) 90 ALR 59; *Milirrpum v Nabalco Pty Ltd* 17 FLR 141.

92 158 CLR 327 at 356-9.

land be made to an Aboriginal Land Trust.[93] Under s.50 of the *Aboriginal Land Rights (Northern Territory) Act 1976* the Aboriginal Land Commissioner must comment on the effect the grant will have on land usage patterns in the surrounding area and the likely detriment to other people, the number of Aboriginals to be advantaged by the grant and the resulting financial costs. Upon the Minister's satisfaction with the report the Land Trust is established and the grant made with the approval of Governor-in-Council. These processes may be tested in the courts. These grants of Aboriginal land have been judicially described as "an inalienable fee simple, subject to various prohibitions and controls on dealing".[94] The land cannot be sold or mortgaged although a Land Trust may transfer its estate or interest to another Land Trust or to the Crown, only with the approval of the relevant Land Council. Section 67 of the *Aboriginal Land Rights (Northern Territory) Act 1976* prohibits the resumption, compulsory acquisition, or forfeiture of Aboriginal land under any Northern Territory law.

Mining and exploration of Aboriginal land is controlled by the *Mining Act* (NT) and Part IV of the *Aboriginal Land Rights (Northern Territory) Act 1976* as amended in June 1987. Applicants for Exploration Licences must provide the Aboriginal Land Council with a comprehensive proposal and negotiate for its consent. The mining interest may only be granted after an agreement between the mining company and the Aboriginal Land Council has been entered into and the Federal Minister has consented in writing. Sums of money equal to the royalties paid by the mining companies to the Northern Territory and Commonwealth Governments are paid out of consolidated revenue into the Aboriginals Benefit Trust Account (under ss.62 and 63 of the 1976 act). There has been some criticism of this and the Commonwealth Government Industry Commission has recommended recently that the money be directed to the Aboriginal owners of the mined land rather than the Land Councils.

The resolution in 1991 of the *Kenbi (Cox Peninsula) Land Claim (Kenbi Land Claim)* by the Danggalaba Aboriginal clan of the Larrakia language group for the Darwin and Cox Peninsula areas in the Northern Territory aptly illustrates the operation of the *Aboriginal Land Rights (Northern Territory) Act 1976*. The *Kenbi Land Claim* is one of the most recently determined claims. It began on 20 March 1979 and was not finalized until February 1991 by which time almost all of the clan members had died. In the determination of this claim the statutory definition of "traditional Aboriginal owners" [s.50(1)(a)(i) of the act] was fully examined. Aboriginal Land Commissioner, Mr Justice Olney, found that there were no traditional Aboriginal owners within the meaning of the act and recommended that the Northern Territory Minister for Aboriginal Affairs negotiate with the Northern Territory Government to obtain for the use and benefit of the descendants of the Larrakia people "sufficient areas of suitable land

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93 Four Land Councils have been established: Central Land Council (established 26 January 1977), Northern Land Council (established 26 January 1977), Tiwi Land Council (for Bathurst and Melville Islands)(established in July 1978) and Anindilyakwo Land Council (for Grrok and Bickerton Islands) (established on 1 July 1991).

94 *Murray Meats (NT) v Northern Territory Planning Authority* (1982) 69 FLR 32 (NTR) at 15 per Toohey J, SCT(NT); 66 FLR 394, 48 ALR at 190 lines 5-7 per McGregor J, at 209 lines 40-41 per Fitzgerald J, Federal Court of Australia, Full Court.

on Cox Peninsula as may be necessary to satisfy the reasonable aspirations of those people to maintain and enhance the cultural traditions of their ancestors".[95]

The validity of Northern Territory Town Planning legislation was also an important factor in the *Kenbi Land Claim*. During the decade that the claim proceeded the High Court of Australia became involved four times on the issue of whether the Northern Territory *Town Planning Act* (the *Town Planning Ordinance* 1964 before self-government) and the *Regulations* 1979 No.13 defined the Cox Peninsula component of the claim as "land within a town" for the purposes of the definition of "unalientated Crown land" in section 3(1) of the *Aboriginal Land Rights (Northern Territory) Act 1976*.[96]

Aboriginal Land Commissioner, Mr Justice Olney, made an exhaustive examination of the policy and purpose of the *Aboriginal Land Rights (Northern Territory) Act 1976* in order to define the term, "traditional Aboriginal owners". Mr Justice Olney used the evidence, the two *Reports* of the Aboriginal Land Rights Commission, the Minister for Aboriginal Affairs' Second Reading Speech on the Bill and other relevant material in the *Votes and Proceedings* of the House of Representatives as permitted by s.15AA of the *Acts Interpretation Act 1901* (Cth). Mr Justice Olney accepted Mr Justice Woodward's description of the traditional relationships between Aborigines and their land contained in paragraphs 20 to 65 inclusive of his *First Report* on 19 July 1973 into Aboriginal Land Rights. In his second report Woodward J. was able to say that, after an extensive consultation process, his description of the traditional relationship between Aborigines and their land was accepted by both Aborigines and others who studied the subject.[97] In *Kenbi Land Claim Findings and Report* Mr Justice Olney was of the opinion that the words, "local descent group", used in the definition of "traditional Aboriginal owners" in s.3(1) of the act has the meaning which Mr Justice Woodward gave to it in his First *Report*. Woodward J. also equated the term, "clan" with "local descent group".[98] Mr Justice Olney also relied on the statement of Gibbs CJ (with whom Mr Justice Brennan, Deane and Dawson agreed) in *Re Kearney; ex parte Julama*[99] that

> If the section (50(1)(a)) is ambiguous it should, in my opinion, be given a broad construction, so as to effectuate the beneficial purpose which it is intended to serve.

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95 *Finding and Report of the Aboriginal Land Commissioner, Mr Justice Olney, on the Kenbi (Cox Peninsula) Land Claim under the Aboriginal Land Rights (Northern Territory Act) 1976*, (hereinafter *Kenbi Land Claim Findings and Report*), February 1991, Office of the Aboriginal Land Commissioner, Darwin, NT.

96 A summary of the proceedings and findings appears in the *Kenbi Land Claim Findings and Report* at pages 21-52.

97 Woodward *Report* 1974 para.15.

98 Woodward First *Report* 1973 para.37.

99 52 ALR 24 at 28 quoted in *Kenbi Land Claim Findings and Report* p.96.

Mr Justice Olney decided the Larrakia people's claim in terms of the application of the definition of "local descent group" to them. He rejected the method of proof of "traditional Aboriginal ownership" by asserting or proving that individual members of the claimant group have an ancestor who was a member of that language group which, before the arrival of Europeans in the region, had an association with or used a large area of land which the claimed area is a part. This would have meant elasticising the definition to cope with current anthropological theory and these people's particular factual situation.[100] The Aboriginal Land Commissioner drew attention to the potential tension between statutory interpretation in Aboriginal land rights cases and current anthropological theory, stating that the remedy lies with Parliament in amending the act.[101] To identify "traditional Aboriginal owners" Mr Justice Olney stated his policy in applying the statutory definition as:

> to first identify a group of people who have relevant links both to the locality of the land claimed and by descent who can fairly be thought to comprise a local descent group, and then to examine the evidence relating to the spiritual affiliations of these individuals to determine whether they are such as to conform with the wording of paragraphs (a) and (b) of the definition.[102]

By this process Mr Justice Olney found that there was no surviving Larrakia claimants (and there had to be more than one) with any real knowledge of the sites and the spiritual traditions except through information passed on by non-Larrakia Aborigines. Therefore the Larrakia people could not be regarded as a "local descent group" within the meaning of the act.

9.2 SOUTH AUSTRALIA

The *Aboriginal Land Trusts Act 1966* (SA) was the first piece of legislation in Australia to allow Aboriginals to own their reserves. It vested the land in a trust and this act is presently being reviewed. The Pitjantjatjara people in the north-west of the state were specifically excluded and they obtained land rights under the *Pitjantjatjara Land Rights Act 1981* (SA) after lengthy negotiations. The Pitjantjatjara people in the south-west of the state were covered by the *Aboriginal Land Trusts Act 1966* and their land included the contaminated Maralinga area used for atomic testing. The *Maralinga Tjarutja Land Rights Act 1984* (SA) follows the style of the 1981 act but has less powers over mining and management of the land. None of the three South Australian acts provide for a claims procedure, or for urban Aborigines.[103]

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100 *Kenbi Land Claim Findings and Report* p.99.

101 *Kenbi Land Claim Findings and Report* p.100.

102 *Kenbi Land Claim Findings and Report* p.102.

103 For an analysis of the campaign for land rights for the Pitjantjatjara people see Toyne, Phillip and Vachon, D. 1984, *Growing up the country*, Melbourne, McPhee Gribble & Penguin.

9.3 NEW SOUTH WALES

In 1980 a Select Committee of the Legislative Assembly recommended the establishment of an Aboriginal Land and Compensation Tribunal, local and regional Aboriginal Land Councils, ownership of minerals on Aboriginal land and a veto over mining. The *Green Paper on Aboriginal Land Rights in New South Wales* in 1982 did not offer such extensive advances. The *Aboriginal Land Rights Act 1983* transferred freehold title over existing reserves to Aboriginal Land Councils (s.35). An on-going claims procedure for small amount of Crown land is provided for in s.36(2). National Parks and historic sites, wildlife areas, state forests and timber reserves and other "dedicated" areas are excluded by s.36(1). The Minister for Crown Lands may also veto claims if the land is required for residential or other public purposes. As there are few surviving traditional groupings of Aborigines in the State any incorporated groups may make a claim. There are limited means for judicial review of decisions in the Land and Environment Court and there has been strident criticism of the operation of the act. A proportion (7.5%) of Land Tax from 1984 to 1998 is appropriated to the Aboriginal Land Council, half of it to be retained as a capital fund to yield sufficient income beyond 1998 and the other half to be used for the purchase of land and expenses. Under s.45(2)-(4) and (11)-(13) vests ownership of minerals excepting gold, silver, coal and petroleum, in the Aboriginal owners and exploration may be prohibited. An amendment in 1986 ensures that Aboriginals may only obtain perpetual leasehold in the Western Land Division of the state because of the fragility of the arid land. Forfeiture conditions apply for breaches of land management conditions.

9.4 QUEENSLAND

When legislation concerning Aboriginals was being extensively changed in Australia in the 1970s the laws which applied in Queensland were the *Aborigines Act 1971* and the *Torres Strait Islanders Act 1971*. The reserve system established under the *Aboriginals Protection and Restriction of the Sale of Opium Act 1897*[104] continued under the 1971 acts until 1984

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104 For an analysis of progress towards this act see Gordon S. Reid's History of Philanthropic Movements towards Protection of Aboriginals in Queensland in the nineteenth century (Unpublished PhD thesis, Australian National University, Canberra, 1988). Rev Duncan McNab, a Catholic missionary and a member of the Aborigines Commission, applied on 24 July 1876 on behalf of Aborigines for selection of homestead blocks of land in the Logan district under the *Crown Lands Alienation Act of* 1868. They were refused as deposits for the first year's rent and survey fees had not been sent. McNab explained that they (Charles Diper Ghipara, William Watiman Nilapi and James Diper) had not sent the money as,

> They conceive and maintain that because they and their ancestors, from time immemorial, have occupied and possessed those lands and their appurtenances for their use and benefit, especially of residence, hunting, fishing, and of otherwise providing for the necessaries of life,

except for Aurukun and Mornington Island. These Aboriginal communities were specifically provided for in the *Queensland (Aboriginal Lands) Act 1978* in controversial circumstances relating to bauxite mining at Weipa and the management of the two reserves by the Uniting Church. The Aboriginals were unable to prohibit the payment of the mining royalties to the Director of Aboriginal and Islanders Advancement when their case, *Corporation of the Director of Aboriginal and Islanders Advancement v. Peinkinna*, failed in the Privy Council in 1978.[105] When the Commonwealth Government passed the *Aboriginal and Torres Strait Islanders (Queensland Reserves and Communities Self Management) Act 1978* the Queensland Government revoked the reserve status of the land and enacted the *Queensland (Aboriginal Lands) Act 1978*. This act provided for 50 year leases to the residents of Arukun and Mornington Island and a degree of Local Government. The Commonwealth Government also passed the *Aboriginal and Torres Strait Islanders (Queensland Discriminatory Laws) Act 1975* to override Queensland law relating to Aboriginals' management of land. The High Court decision in *Koowarta v. Bjelke-Petersen* in 1982 upholding the provisions of the *Racial Discrimination Act 1975* (Cth) confirmed the role of the Commonwealth Government in Aboriginal land rights legislation.[106]

The *Land Act (Aboriginal and Islander Land Grants) Amendment Act 1982* (Qld.) established the "deed of grant in trust" (D.O.G.I.T.) land-holding scheme for Aboriginal communities. This act amended various sections of the *Land Act 1962*[107] and section 45 of the *Forestry Act 1959*, and s.22 of the new act provided that no mining tenement within the meaning of the *Mining Act 1968* shall exist or be approved on land granted in trust for Aborigines or Islanders without approval of Governor-in-Council. D.O.G.I.T.s are now in place throughout Aboriginal and Islander communities throughout Queensland.

The *Community Services (Aborigines) Act 1984* and *Community Services (Torres Strait Islanders) Act 1984* provided for Local Government administration on all the reserves, renamed communities. Local Councils with powers to make and administer by-laws are elected in all the communities.

The *Aboriginal Land Bill* and the *Torres Strait Islander Land Bill* were introduced in the Queensland Parliament on 22 May 1991 and passed on 31 May 1991 at the time the *Mabo* case was being heard in the High Court. Sections 1 and 2 of the *Aboriginal Land Act 1991* and the *Torres Strait Islander Land Act 1991* came into effect on 12 June 1991 and the remainder

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and also had always the right of tillage and pasturage, they ought to be acknowledged, without expense, the rightful owners of the specified homesteads.

(Reid, op.cit., p.147; Letter of Duncan McNab to Minister for Lands, Brisbane, 24 July 1876, enclosing applications by Diper, Nilapi and Ghipara, in *The Rev Duncan McNab and the Aborigines*, correspondence ordered to be printed by the Queensland Legislative Assembly, 26 October 1876, Queensland *Votes and Proceedings*, 1876, vol.III, pp.159-172, pp.161-162.)

105 (1978) 52 ALJR 286 (PC) and 17 ALR 129.

106 (1982) 56 ALJR 625.

107 Sections 5, 334, 338, 344, 346, 347, 350. 353, 358 and 361.

of the acts are to take effect from the date gazetted, enabling 20 000 square kilometres of vacant Crown land (1.16% of the state) to be added to 34 000 square kilometres of land currently held by Aboriginals and Torres Strait Islanders. The acts transfer all existing "deeds of grant in trust" (D.O.G.I.T.), reserve lands, and the Arukun and Mornington Island shire leases to Aboriginal Trust ownership. It also establishes a Land Tribunal to hear claims for vacant Crown land (except that in towns and cities) which is gazetted as claimable land, but a Land Acquisition Fund is not provided for as in New South Wales.

Claims in Queensland must be based on traditional affiliation or historical association with the specific land when fee simple tenure will be granted, or for cultural or economic viability criteria when leasehold tenure will be granted. National Parks are claimable under the first two criteria if the grantees agree to lease the land back to the Crown in perpetuity and the land is jointly managed. Hunting and gathering rights are limited to the traditional owners of the particular National Park. Pastoral leases, stock routes and excisions from pastoral leases for "living areas" are not claimable. In 1991 only Western Australia, Tasmania and South Australia do not have any statutory procedures for Aboriginal land claims. Control over mining is unchanged although a percentage of royalties may be payable to the Aboriginal Trusts. The *Torres Strait Land Act 1991* provides similar conditions of land claims and administration for the Torres Strait islands.

The Land Tribunal is to comprise three members - a lawyer, a person knowledgeable of Aboriginal customs and a person familiar with public administration, business or a profession. Groups of Aboriginals and Torres Strait Islanders will be able to claim areas of land granted to trustees on behalf of Aboriginals and Torres Strait Islanders and also areas gazetted as claimable land. The Aboriginal and Torres Strait Islander Land Interest Program within the Lands Department will be responsible for administering the land claim process. After the claimable land is gazetted it is to be the responsibility of the Land Interest Program field staff to communicate the land availability to the groups of Aboriginals and Islanders known to have traditional links to the specific land. It is proposed that staff of the Department of Environment and Heritage will be involved in discussions regarding National Park land. The Land Interest Program may provide information and financial assistance to Aboriginal and Islander people (in incorporated groups) to prepare their claims. The claims must be submitted to a Land Claims Registrar who determines whether it should be received or rejected. There does not appear to be any appeal available against the Registrar's decision. Claims are restricted to a fifteen year period. The tribunal will evaluate the claims and make recommendations to the Minister on whether the land should be granted to trustees for the benefit of Aboriginals and Torres Strait Islanders. An appeal against the decision of the tribunal is possible to the Land Court. The Minister holds a discretionary power over grants. Section 5 of the *Aboriginal Land Act 1991* and the *Torres Strait Islander Land Act 1991* provide that the freehold or leasehold land granted shall be held by the grantees for the benefit of specific persons or groups of persons. The grantees must consent to a transfer of an interest in the land or to allow exploration or mining.

These and other acts were amended by the *Aboriginal and Torres Strait Islander (Consequential Amendments) 1991*, assented to on 21 November 1991.[108] The purpose of the amendments is to permit smooth administration of the process of Aboriginal and Islander land claims, changing various definitions, allowing traditional methods of fishing, administering rights of entry to Aboriginal and Islander land for traditional hunting purposes, provide for land claims to islander land on the basis of spiritual or other associations with the land under Island custom, the appointment of members of the Land Tribunal to the Land Court, and that by-laws be made with the agreement of the Aboriginal people particularly concerned. The amendments also removes the potential problem of another group of Aborigines or Islanders being able to claim D.O.G.I.T. land. Aboriginal or Islander Township and surrounding land held as D.O.G.I.T. tenure may be vested in the hands of the elected Aboriginal or Islander Council for the area. The size of the Land Court is also to be changed from a maximum of six members to a number determined by Governor-in-Council.

An all Aboriginal and Islander Legislation Review Committee recommended in early 1991 that these acts be amended to allow the residents to determine the number of elected representatives they desired on their Councils and to decide the method of election of the Chairperson, to tighten financial reporting, to upgrade the administration of the courts and extend their jurisdiction over non-Aboriginal and non-Islander residents entering Trust lands, to ensure the definitions of "Aboriginal" and "Torres Strait Islander" were more closely aligned with those in Commonwealth legislation, and to authorize officers to protect the cultural and natural resources of the Trust areas. This committee delivered its final report on Friday, 22 November 1991.[109]

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108 *The Aboriginal and Torres Strait Islander (Consequential Amendments) Act 1991* amends the *Aboriginal Land Act* 1991 in s.2.12, 2.13, 3.02, 3.06(2)(a), 3.15 and 5.18(2), inserts a s.3.06(3) and 3.08A, and omits s.8.02(5), the *Torres Strait Islander Land Act* 1991 in s.2.09, 3.02, 3.06(2)(a), 3.06(3), 3.15, 4.09(1), 5.18(1) and 8.02(5); the *Fisheries Act* 1976 in s.5.1(d), 6(1) and 51(2); the *Fishing Industry Organization and Marketing Act* 1982 in s.6(1), 45AA(d); the *Land Act* 1962 in s.5, 30(1) regarding the Land Tribunal, s.31 to 34, 44(1A); the *Aborigines and Torres Strait Islanders (Land Holding) Act* 1985 by inserting sections 33A and 33B; the *Community Services (Aborigines) Act* 1984 by inserting definitions of Aboriginal and "non-Aboriginal" land (s.6(1)), sections 26(4) on by-laws, 45A, 68, adding s.77 regarding forest and quarry material; the *Community Services (Torres Strait) Act* 1984 in s.6(1), 24(4), 43A, 66 and 76; and the *Local Government (Aboriginal Lands) Act* 1978 in s.3(1), 25 and 29(2).

109 Queensland. Department of Family Services and Aboriginal and Islander Affairs. *Annual Report* 1990-91 p.15; Queensland. Legislation Review Committee, *Inquiry into the Legislation Relating to the Management of Aboriginal and Torres Strait Islander Communities in Queensland. Final Report*, November 1991. It was submitted to the Minister for Housing and Local Government and the Minister for Family Services and Aboriginal and Islander Affairs.

9.5 WESTERN AUSTRALIA

The Seaman Report on implementation of Aboriginal Land Rights in Western Australia was released in 1984, recommending transfer of reserve lands to Aboriginal ownership, pastoral excisions, the return of some pastoral leases to Aboriginal groups along with a land claims process and a mining veto on their land. In the face of a vigorous publicity campaign by the mining industry the Government shelved its proposed land rights legislation. Federal Government plans for uniform national land rights legislation was also abandoned in March 1985.

The *Land Bill* of 1985 was introduced but failed to pass in the Legislative Council in April 1985, even though it was more favourable to the mining and pastoral industries. The *Land Act 1933* and the *Aboriginal Affairs Planning Authority Act 1972* contain all the powers for dealing in Aboriginal reserve land. An Aboriginal Affairs Planning Authority (s.27), a non-Aboriginal body under Ministerial control, manages Aboriginal reserve land and may transfer land to an Aboriginal Lands Trust (s.24), and all-Aboriginal body which may grant 99 year leases to local Aboriginal communities. Aboriginal reserves comprise 13% of Western Australian land and 4.09% is held by Aboriginal communities as leasehold land. Garth Nettheim writes in the book, *Aboriginal Legal Issues*, that

> Apart from Tasmania, the Western Australian legislation confers fewest land rights on Aborigines. No provision is made for Aboriginal ownership. At best, 99 year leases area available, and the majority of Aboriginal land is still held by a non-Aboriginal body. Potential Ministerial control over land use and administration is greater than in other States, though the actual amount of Government intervention is dependent upon current government policy, and the whole structure retains more features of the protectionist regime, under which governments held and managed Aboriginal land, than any other State. Control of mining, and payments to communities where mining occurs, are within Ministerial discretion. Some progress has been made in excising living areas from pastoral leases, but this does not satisfy the aspirations of Aboriginal communities living on pastoral leases which are not accessible to Aboriginal claims.[110]

9.6 VICTORIA

There is only a minute area (0.01 per cent) of Victoria currently reserved for the use of Aboriginals.[111] The *Aboriginal Lands Act 1970*, which retains a protectionist purpose, is still the main legislation controlling Aboriginal land. On 24 July 1971 freehold title to the Framlingham reserve (237 hectares) was made under sections 7 and 9(1) of the *Aboriginal Lands Act 1970* to the Framlingham Aboriginal Trust and the Lake Tyers reserve (1,619

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110 McRae, Nettheim, Beacroft, op.cit., p.158.

111 Commonwealth of Australia. Department of Aboriginal Affairs. *Annual Report* 1988-89.

hectares) to the Lake Tyers Aboriginal Trust. Under section 9 (3),(4) and (5) of this act Aboriginals may also be granted a perpetual licence to occupy and use the parts of the reserve excepted from the grant of title. Each Aboriginal Trust is a body corporate with transferable shares which are the personal property of the members. The trusts have an elected board of management and may borrow money (ss.11-21,25,27).

By the mid 1970s when land rights was being introduced in the States all the Aboriginal reserves in Victoria had been revoked except for two - Lake Tyers and Framlingham. The Victorian Government introduced the *Land Claims Bill* in 1983 with the main aim of creating a Land Claims Tribunal for Aboriginal claims to public land. The Victorian Farmers and Graziers' Association led a publicity campaign against the bill and it was defeated in the Legislative Council. The Victorian Upper House also rejected a proposal to vest Lake Condah (a significant Aboriginal site which the Victorian Government had purchased) and Framlingham Forest in the relevant Aboriginal clans. On request from the Victorian Government the Commonwealth Government enacted the *Aboriginal Land (Lake Condah and Framlingham Forest) Act 1987* to grant freehold title to the Elders Corporation (ss.6 and 7) for Aborigines who have proven their clan's traditional relationship to the land. However there is no provision for on-going Aboriginal land claims in Victoria. The *Aboriginal Land (Northcote Land) Act 1989* provides for land at Northcote to be claimed by Aborigines and granted in fee simple to the Aborigines' Advancement League Inc. There are also three other small pieces of land and access roads reserved under the *Aboriginal Lands Act* 1991 for public purposes for the protection of Aboriginal graves and the conservation of a historic site. This land is granted in fee simple to a nominated Aboriginal body (s.3(1), Schedule 1) who may not sell or otherwise dispose of the land (s.7).

Under the *Aboriginal Land (Lake Condah and Framlingham Forest) Act 1987* the title to the land is held by the Kerrup-Jmara Elders Aboriginal Corporation and the Kirrae Whurrong Aboriginal Corporation. A person is eligible to be a member of an Aboriginal corporation if the relevant Committee of Elders declares them eligible and there is also a twelve month residence qualification on the Framlingham Reserve (ss.18,25,27). Each area has a Committee of Elders comprising persons of the local corporation and who are considered by the local community and by Aboriginal tradition and practice to be the Committee of Elders (ss.17,26). Inter-personal disputes have arisen over rights to shares and land. Each Aboriginal corporation may transfer the land to another Aboriginal corporation. For any current mining applications there must be consultation with the corporation and no new applications for mining may be made.

9.7 TASMANIA:

There is no Aboriginal land rights legislation in Tasmania. There is no land in Tasmania reserved specifically for the use of Aboriginals. In 1986 the Federal Department of Aboriginal Affairs sought to negotiate the handover of Oyster Cove for a cultural centre but were unsuccessful. There is no security of tenure over the present occupation of the land by Aborigines. The Tasmanian Government introduced the *Aboriginal Lands Bill* 1991 to transfer freehold title to various areas of land - Oyster Cove, Cape Barren Island, Kutikina, Ballawinne

and Margata Mina Caves, Mount Cameron West, Wybalenna (Flinders Island), Furneaux and Hunter Islands - to the Tasmanian Aboriginal Land Council. The bill was defeated in the Legislative Council on 12 July 1991.

9.8 AUSTRALIAN CAPITAL TERRITORY

The *Aboriginal Land Grant (Jervis Bay Territory) Act 1986* (Cth) provided for the Jervis Bay Territory to become Aboriginal land vested in the Wreck Bay Aboriginal Community together with some vacant crown land surrounding it on 14 March 1987. The Community Council has freehold title to the land. The general public only has access to land (excepting significant sites and land used for domestic purposes) specifically gazetted by the Minister to be so. The Council may not transfer or deal in the title to the land except for certain types of leases (s.38). Exploration and mining may only be carried out with the agreement of the Minister and the Council.

CONCLUSION:

The process of defining Aboriginal land rights in the legal sense is inconclusive. In Canada and the United States the courts have accorded the Indians land rights but have not based this on the principles of land tenure in the English Common Law. In the United States, Indian title has been described since 1955 in terms of permissible occupation of government owned land. In Canada, Indian land is seen as inalienable and any surrender of the land creates a fiduciary duty on the part of the Crown to deal with the lands for the benefit of the Indians. The central point of the Aboriginal land rights legal debate is whether Common Law Aboriginal title exists.

TABLE OF CASES CITED PAGE/S

LIST OF ABBREVIATIONS

AC	Appeal Cases
ALJR	Australian Law Journal Reports
ALR	Australian Law Reports
All ER	All English Reports
App. Cas.	Appeal Cases (Privy Council)
CLR	Commonwealth Law Reports
DLR	Dominion Law Reports
FC	Federal Report of Canada (Trial Division)
FLR	Federal Law Reports
LR	Law Reports
Legge.	Legge Supreme Court Cases (NSW)
Pet.	Peter's Supreme Court Reports
Moo.	Moore, Privy Council
SCR	Canada. Supreme Court Reports
US	United States Reports
Wheate.	Wheaton's Supreme Court Reports
WWR	Western Weekly Reports

APPENDIX - GENERAL OVERVIEW OF THE MABO CASE

INTRODUCTION

The case, *Mabo and Anor. v State of Queensland and Anor.*, is a significant lands rights case in Australia. It has been before the courts since 1982 and is still unresolved. There were originally five plaintiffs, Edward Mabo, Celuia Mapo Salee, James Rice, Sam Passi and David Passi. Currently there are three plaintiffs, Edward Mabo, James Rice and David Passi. Celuia Mapo Salee died in 1985 and Sam Passi was withdrawn as a plaintiff. All the plaintiffs are Murray Islanders although neither Edward Mabo nor David Passi have lived on the island permanently since 1956 and the late 1970's respectively. The plaintiffs have brought the action on their own behalf and on behalf of their family groups, but not on behalf of the whole of the Murray Island people. They have made specific claims to land on the islands of Mer and Dauar (the two main islands of the Murray Islands which also includes Waier Island), the seas, sea-beds and reefs.

There appear to be several reasons why the case has been brought. The most obvious one is that it is a part of the whole Aboriginal Lands Right Campaign in Australian following the adverse judgement in the Nabalco case in 1971, *Millirrpum v Nabalco Pty. Ltd. and Commonwealth*. Secondly, the plaintiff, Edward Mabo, who had left Murray Island in 1956 to work, was a University student at James Cook University in the mid 1970's studying History and Aboriginal and Torres Strait Islands Culture, and was actively involved in the Lands Rights Movement. A third reason is that it provides a vehicle to test the question of whether Native Land Title could be recognized in the Common Law in Australia. This issue had been actively debated in academic circles in Australia by anthropologists, sociologists and historians in the 1970's and a number from Melbourne, Sydney and Japan had visited Murray Island to study the culture.

ORIGIN AND BACKGROUND TO THE ACTION:

In an interview in late 1986 with the ABC in Cairns, solicitor, Greg McIntyre, recalled that the case arose out of a meeting at a conference in the late 1970's between himself, Eddie Mabo and Noni Sharp a sociologist from La Trobe University, Melbourne. McIntyre said that they talked of the possibility of a Lands Rights Test Case as Eddie Mabo and others were very keen to establish their traditional rights to land on Murray Island. McIntyre stated that the aim of the case is to establish that the plaintiffs have traditional rights to their land which have been handed down to them from their ancestors and that these rights are recognized as part of the common law inherited by Australia from England.

The data collected by the academic researchers, especially the Murray Island Court Records, in the 1970's and early 1980's provided the basis for the action. The Statement of Claim, Statement of Acts and the Volumes of Plaintiffs' Source Documents and Transcriptions of the Murray Island Court Records were prepared by solicitor, Greg McIntyre of Greg McIntyre and Associates, Cairns, and Holding and Redlich, Melbourne. Mr Richard Brear, a barrister and

solicitor of Melbourne has also carried out research for this case. Greg McIntyre, solicitor, Cairns

and more latterly of the Western Australian Aboriginal Legal Service, Perth, has acted for the plaintiffs throughout the case. Three barristers of the Melbourne Bar, Mr Ron Castan, Q.C., Mr Brian Keon-Cohen and Ms Barbara Hocking have been briefed at various times in this action. Each of these barristers has had a prominent role in the Aboriginal Lands Rights Campaign in Australia.

PROGRESS OF THE CASE:

The initial Writ with an endorsed Statement of Claim was issued in the High Court of Australia on 20 May 1982 (No.B12 of 1982). The two defendants named were the State of Queensland and the Commonwealth of Australia. A list of the details of the Progress of Proceedings from 1982 to 1989 is attached in Annexure A. This list indicates the steps taken by the State of Queensland to defend the action. These methods include a summons by the State of Queensland on 18 August 1982 to have the action either struck out or remitted to the Full Court.

On 28 October 1982 at a hearing before Justice Deane in the High Court of Australia the plaintiffs agreed to prepare a Statement of Acts in support of the Statement of Claim. These documents were delivered progressively between 28 August 1983 and 17 January 1984 and finalized on 26 November 1984. Queensland's and the Commonwealth's defences were delivered on 26 February 1985 and 5 March 1985 progressively.

The plaintiffs included 116 Statements in their Statements of Fact. Many of these included up to a dozen sub-sections. It is apparent from the huge amount of documentation that the State of Queensland tendered to the court that extensive historical research has been done using Archives, as well as historical documents and books etc. in many Manuscript Libraries.

The progress of the action is described in detail under major headings as follows:[112]

STATEMENT OF CLAIM

The plaintiffs have amended their statement of Claim several times, the last being on 8 June 1989.

A summary by the plaintiffs' solicitor of the Statement of Claim is as follows:

The plaintiffs claim that their people have occupied and used Murray Island and surrounding seas, seabeds and reefs since time immemorial. They claim that their laws recognize various rights regarding the land, seas and reefs and belonging to various individuals or family groups

[112] Copies of the Statement of Claim, the Defence of the State of Queensland, the Reasons for Judgment given by Gibbs CJ for the Remitter, and the High Court's Judgment in the Demurrer are appended to the *General Overview of the Mabo Case* by this author and located in the Queensland Parliamentary Library at 347.943077/89.

or to the people as a whole. They claim that the annexation of the islands to Queensland in 1879 did not disturb the Miriam people's rights. The plaintiffs claim that their rights have not been extinguished or surrendered to date but have been recognized by Queen Victoria and by the State of Queensland and the Commonwealth of Australia. The plaintiffs then claim that the State of Queensland now denies the existence of these rights. The plaintiffs claim a declaration by the court that the Queensland Government has no power to extinguish their rights and a declaration that a deed of grant in trust under the *Land Act 1962* would be inconsistent with their ownership.

PLEADINGS

The plaintiffs pleaded the concept of possessory title and alleged a system of traditional land tenure in Paragraph 12(a)-(c) of the Statement of Claim, and details of it are described in Paragraphs 3, 4(a)-(e) and 8(I). The claimed rights are described as rights based upon:

(a) local custom of the Miriam people

(b) Miriam people's original native ownership of the land of Mer, Dauar and Waier islands

(c) actual possession, use and enjoyment of the three islands.

In their Statement of Facts the plaintiffs detailed the main element of the traditional land tenure system under the headings:

A. Ownership Rights of Land

(i) Group ownership (para. 84);

(ii) Individual ownership (para. 85-87);

B. Lesser interests in land

(i) Caretaker (para. 88);

(ii) Lease or loan (para. 89-91);

C. Acquisitions and dispositions of rights in land

(i) Inheritance -

(a) group owned land (para. 93);

(b) individually owned land (para. 94);

(ii) Transactions inter-parties -

(a) group owned land (para. 95);

(b) individually owner land (para. 96-97).

D. Practice and procedure

(i) Boundary identification (para. 108);

(ii) Devising/succeeding to land (para. 109, 113);

(iii) Leases, loans, gifts and exchanges (para. 110);

(iv) Marriage gifts, etc.

E. Resolution of disputes (para. 114-116).

STATE OF QUEENSLAND'S DEFENCE

Since the issue of the writ in 1982 the first defendant, the State of Queensland, has been represented by the Crown Solicitor, and senior counsel was Mr David Jackson Q.C., initially. On Mr Jackson's elevation to the bench Mr John Byrne Q.C. was senior counsel for Queensland. Mr John Byrne Q.C. who was also elevated to the bench and Mr G.L. Davies Q.C. have subsequently been counsel for Queensland. Junior Counsel have been Mrs M.J. White and Mr G. Koppenol.

The State of Queensland's Defence to the Statement of Claim as amended in June 1989 was delivered on 21 June 1989. The State of Queensland had previously filed defences to earlier Statements of Claim.

The defence set out the manner by which the islands were annexed to Queensland and how the lands in the islands have been dealt with by the State of Queensland in the exercise of powers conferred by enactments of the legislature of Queensland.

The State of Queensland does not admit that the judicial activities of the Murray Island Court, established under Queensland legislation, constitute recognition and continuation of the rights of the people referred to in paragraph 13 of the Statement of Claim.

MURRAY ISLAND COUNCIL RECORDS

Torres Strait Island Councils were established under Section 11 of the *Torres Strait Islanders Act* of 1939 and their powers and functions were defined in Section 18(1). Under Section 20(1) of the act the council could constitute itself as a court within the island reserve. Thus the Murray Island Court Registers also contain a large number of court proceedings. All the councils established under the 1939 act were continued under successive acts, culminating in the *Community Services (Torres Strait) Act 1984*. The Island court was constitute by members of the island council or Justices of the Peace, as defined in Section 40 and Section 41 of the act. Before 1939 the Murray Island Court was apparently composed of elected men who were assisted by the school teacher in making decisions. The first Government school teacher on the island, John S. Bruce, a Scotsman, appears to have instituted this form of court from his appointment in 1892. The form of the Murray Island "council" before 1892 is unclear and forms part of the facts determined by His Hon. Mr Justice Moynihan.

The Murray Island Council Records, 1908-1981, were used extensively by the Plaintiffs in their research. After delivery of all their Source Documents and their transcriptions of the Murray Island Council Records to the State of Queensland and the Commonwealth of Australia, the Murray Island Council Records were handed over to the State of Queensland. Due to their age the documents are very fragile. Queensland State Archives encapsulated the records in acid-free polyester to preserve them. Unfortunately it appears that some of the original documents may have been misplaced before delivery to the State of Queensland.

The Solicitor General's Office (now the Crown Law Division of the Attorney General's Department) prepared on behalf of the Department of Community Services copies of the Murray Island Council Records in chronological order. One set, bound in high quality binding for protection was handed over to the Murray Island Council by the Department of Community Services on 24 May 1989 at Murray Island. Another set was used during the court hearing and forms Exhibit 284. A third set was handed over the plaintiffs.

QUEENSLAND LEGISLATION 1985

In April 1985 the Queensland Parliament passed the *Queensland Coast Islands Declaratory Act 1985*, which was assented to on 15 April 1985. This act was passed to remove any doubts about the legality of the annexation of the Torres Strait Islands including Murray Island under the *Queensland Coast Island Act* of 1879. The act also sought to validate disposals of land on the island after 1879 and to declare that no compensation was payable. The relevant sections of the act are as follows:

3. Effect of annexation of islands to Queensland. For the purpose of removing any doubt that may exist as to the application to the islands of certain legislation upon their becoming part of Queensland, it is hereby declared that upon the islands being annexed to and becoming part of Queensland and subject to the laws in force in Queensland-

(a) the islands were vested in the Crown in right of Queensland freed from all other rights, interests and claims of any kind whatsoever and became waste lands of the Crown in Queensland for the purposes of sections 30 and 40 of the Constitution Act;

(b) the laws to which the islands became subject included the Crown lands legislation then and from time to time in force;

(c) the island could thereafter be dealt with as Crown lands for the purpose of Crown lands legislation then and from time to time in force in Queensland.

4. Disposal after annexation. Every disposal of the islands or part thereof purporting to be in pursuance of Crown lands legislation after the islands were annexed to and became part of Queensland shall be taken to have been validly made and to have had effect in law according to its tenor.

5. Claims to compensation. No compensation was or is payable to any person-

(a) by reason of the annexation of the islands to Queensland;

(b) in respect of any rights, interest or claim alleged to from such a right, interest or claim;

(c) by reason of any provision of this Act.

The State of Queensland used the *Queensland Coast Islands Declaratory Act 1985* as part of its defence in 1985.

DEMURRER

The plaintiffs issued a Demurrer to the *Queensland Coast Islands Declaratory Act 1985* in the High Court of Australia on 18 June 1985.

The issues raised by the Demurrer were:

(1) The existence of Common Law of private indigenous rights to land.

(2) The reservation to the Commonwealth as International Sovereign of the Duty to protect and the right to extinguish indigenous rights, subject to a duty to pay compensation.

(3) (a) The conflict between Commonwealth and State laws covering the field of indigenous rights to land;

(b) The conflict of Queensland State law with the Commonwealth Racial Discrimination Act.

(4) The power of the Queensland Parliament to legislate to interfere with the Judicial power of the High Court, by passing legislation specifically intended to affect the result of this litigation.

(5) The power of the Queensland Legislature to retrospectively effect:

(a) Legislation of the Colony of Queensland

(b) Imperial legislation.

(6) The power of the Queensland Legislature to purport to deal with the external affairs, and affect the meaning and operation of the Colonial Boundaries Act of the Imperial Parliament.

(7) The form of annexation of Murray Island, as part of the colony of Queensland - whether it is by conquest, settlement or cession.

No date was set down for the hearing of the demurrer.

REMITTER

On 27 February 1986 Sir Harry Gibbs, Chief Justice of the High Court, sitting in Chambers, remitted all issues of fact raised in the pleadings, and particulars and further particulars to the Supreme Court of Queensland for hearing and determination.

Gibbs C.J. ordered that each party delivery a list of all documents relied upon at the hearing, that had not already been obtained by discovery and copies handed to the other parties by 30 June 1986. Other orders made in the remitter related to costs, counsel and the grant of two days notice to the other party.

TRIAL OF THE FACTS IN THE SUPREME COURT OF QUEENSLAND

The case was set down for hearing by Moynihan J in the Supreme Court, Brisbane. The hearing of evidence commenced on 15 October 1986. The plaintiffs' counsel opened their case and proceeded with the examination-in-chief of principal witness, Edward Mabo. Another Murray Islander, Robert Pitt, also gave evidence. An examination of the Transcript indicates that the admissibility of hearsay evidence in the court became an issue that was not resolved. The plaintiffs then decided to return to the High Court for the hearing of the Demurrer. Directions Hearings before Moynihan J. were held in February 1987 regarding hearsay evidence. The Remitter was adjourned by consent on 22 April 1987 for the hearing of the Demurrer.

HEARING OF DEMURRER IN HIGH COURT, 15 TO 17 MARCH 1988

and

JUDGEMENT DELIVERED ON 8 DECEMBER 1988

The plaintiffs placed thirteen separate arguments before the High Court relating to inconsistency of legislation, continuance of pre-existing rights, interference with the judicial process, and the fundamental principles of the validity of laws.

The plaintiffs' decisive argument was that the *Queensland Coast Islands Declaratory Act 1985* was inconsistent with Section 10(1) of the *Racial Discrimination Act 1975* (Commonwealth). Judges Deane, Brennan, Toohey and Gaudron allowed the demurrer and Judges Mason, Wilson and Dawson overruled the demurrer. The effect of the judgement was to remove the *Queensland Coast Islands Declaratory Act 1985* as a defence of the State of Queensland.

FURTHER HEARING OF THE REMITTER IN THE SUPREME COURT

OF QUEENSLAND, 4 MAY 1989 TO 6 SEPTEMBER 1989

Following determination of the Demurrer the Trial of the Facts resumed before Moynihan J. Evidence was heard from all the plaintiffs' and first defendant's witnesses. The Supreme Court sat on Murray Island from 23 to 25 May 198 and on 26 and 27 May 1989 on Thursday Island to hear evidence from elderly Murray Islanders. On the afternoon of 22 May 1989 Moynihan J. travelled around many parts of the island to view the sites which were at issue in the evidence. Hearing of evidence recommenced in Brisbane on 5 June 1989. The State of Queensland opened its case on 3 July 1989. The evidence given in the court dealt chiefly with the pieces of land claimed by the plaintiffs and the genealogy of each witness as it related to the individual land claims. The final submission in the action were made on 6 September 1989, and His Hon. Mr Justice Moynihan reserved his decision on the determination of the facts.

POSITION OF THE COMMONWEALTH OF AUSTRALIA AS THE SECOND DEFENDANT

The Commonwealth of Australia as the second defendant was represented at proceedings from time to time. The Commonwealth of Australia was struck out as a party by Moynihan J. on 7 July 1989.

SUPREME COURT OF QUEENSLAND: MOYNIHAN J, 16 NOVEMBER 1990

FINDINGS OF FACT

Moynihan J presented his Findings of Fact in a 400 page (approx) document for presentation to the High Court of Australia. These detailed findings deserve careful attention and study "as a whole", especially in relation to evidence given by the witnesses including the plaintiffs along with the outcome of extensive research on the incomplete Murray Island Court Records and the historical documents. Moynihan J made findings on the use of land, forms of administration on Murray Island, question of Edward Mabo's adoption and the ways that the plaintiffs' ancestors held land.

HEARING IN HIGH COURT OF AUSTRALIA

There was a hearing of four days of legal argument by lawyers in the High Court commencing on 31 May 1991. The submissions by Queensland were extremely detailed in nature.[113] Apart from the long written submissions the oral argument occupied the High Court for the greater part of a full sitting week. Counsel for the plaintiffs asked the court to declare that they have land rights on the island and have done so since it was annexed to Queensland in 1879 and that Murray Island has never been Crown land. The case law and authorities on the continuation of cutomary rights in England, Ireland, Canada, United States and New Zealand was submitted to the court. Cases on the process of colonization and the introduction of the common law in west Africa, India and Australia were also referred in submissions to the High Court judges. The court has reserved its decision.

[113] Queensland. Department of the Attorney General. *News*, June 1991, no.4, p.2.

ANNEXURE A

MABO and Anor. -v- STATE OF QUEENSLAND &

COMMONWEALTH OF AUSTRALIA

PROGRESS OF PROCEEDINGS

No.	Date	Details
1	20.5.82	Issue of Writ with endorsed Statement of Claim
2	1.6.82	Entry of Appearance for first defendant (Q)
3	28.5.82	Entry of Appearance for second defendant (C)
4	16.8.82	Affidavit of P.J. Killoran
5	18.8.82	Summons of State of Queensland to:- (a) Strike Out Statement of Claim; or, (b) Refer Strike Out Application to Full Court; or, (c) Refer question to Full Court
6	13.9.82	Amended Statement of Claim
7	26.10.82	Affidavit of Gregory McIntyre
8		Affidavit of Jeremy Beckett
9	21.10.82	Queensland's Request for Further and Better Particulars
10	26.10.82 to 28.10.82	Preparation of Summary of Causes of Action
11	28.10.82	Hearing of Summons before Deane J.
12	28.10.82	Presentation to Deane, J. of agreement that Plaintiffs prepare Statement of Facts
13	23.8.83 & -	Statement of Facts - Part One) 31.8.83 Part Two) delivered

		- Annexures B & C)
14	8.9.83	Annexure 'A' - set of maps delivered
15	31.10.83	Amended annexure B 3 (a) delivered
16	17.1.84	Annexure 'D' - (Murray Island Cases) delivered
17	12.6.84	Plaintiff's Summons for Directions seeking Pleadings from Defendants (Listed for 20.6.84 but not brought on for hearing)
18	15.6.84	Affidavit of Francis Pulsford, for Queensland
19	23.11.84	Affidavit of F. Pulsford for Queensland
20	26.11.84	Affidavit of G. McIntyre for Plaintiffs exhibiting Statement of Facts Volume 4 - Source Documents (407 pages)
21	27.11.84	Hearing of Plaintiff's Summons for Directions before Gibbs C.J.
22	18.12.84	Further Amended Statement of Claim filed
	19.12.84	Further Amended Statement of Claim delivered
23	26.2.85	Queensland's Defence Delivered
24	5.3.85	Commonwealth's defence delivered
25	29.3.85	First Defendant's Response to Particulars
26	19.4.85	First Defendant's Supplementary Response to Particulars
27	24.5.85	First Defendant's (Q) Amended defence (including references to the Queensland Coast Island Declaratory Act 1985)
28	24.5.85	Plaintiff's Notice to Admit Documents
29	31.5.85	First Defendant's Admission of Documents
30	9.6.85	Notice of Hearing of Adjourned Summons for Direction
31	18.6.85	Plaintiff's Demurrer delivered
32	27.2.86	Directions Hearing, Gibbs C.J. Proceedings remitted to Supreme Court Order to parties to provide lists of documents
33	10.4.86	Plaintiff's Reply to Defence of First Defendant (Q)

34	16.5.86	Attendance Judge's Chambers, Supreme Court Brisbane to plan Remitter Hearing
35	25.7.86	Directions Hearing, Moynihan J. re Conduct of Hearing, Admissibility of Documents and Hearsay Evidence and Proofs of Witnesses
36	30.6.86	Queensland's list of Documents delivered (in excess of 1,000 documents)
37	18.9.86	Queensland's Revised List of Documents delivered
38	19.9.86	Queensland's Notice to admit Documents served
39	6.10.86	Amended Defence of second defendant (C)
40	15.10.86 to 7.11.86	Hearing of Evidence, Moynihan J, Supreme Court Plaintiff's Outlines, Presentation of Documentary Evidence, Examination-in-Chief of E. Mabo and evidence of Robert Pitt and Greg McIntyre.
41	Oct. 86	Further Amended Statement of Claim
42	Oct. 86	Amendments to Particulars of Claim
43	13.2.87	Directions Hearing High Court, Deane J. Application to refer to Full Court Argument re hearsay exceptions and traditional evidence
44	23.2.87 to 24.2.87	Appearance before Moynihan re Hearsay Evidence exceptions: finding in the alternative and computerised transcript.
45	3.4.87	Directions Hearing, Toohey J: Demurrer set down for hearing with undertaking by plaintiffs to discontinue the action if the *Queensland Coast Islands Declaratory Act 1985* was held to be valid.
46	8.4.87	Amended Demurrer of Plaintiff was delivered
47	22.4.87	Remitter adjourned by consent
48	17.2.88	Direction Hearing Toohey J.
49	15.3.88 to 17.3.88	Demurrer Hearing, Full Bench, High Court

50	8.12.88	Delivery of Judgement of Full Bench, High Court
51	22.12.88	Directions Hearing Supreme Court on Application of the first defendant (Q) to set down Remitter for further hearing
52	23.2.89	Directions Hearing, Supreme Court, to plan Endentiary hearing
53	23.2.89	Plaintiff's Amendments to Statement of Claim re fiduciary duty and trust
54	23.2.89	First Defendant's (Q) Request for Particulars of Amendments
55	17.3.89	Second Defendant's (C) Request for Particulars of Offshore Claims and alleged Commonwealth Infringement of Rights
56	23.3.89	Plaintiff's Response to First Defendant's (Q) Request for Particulars
57	18.4.89	Directions Hearing, Moynihan J, re arrangements for hearing of evidence
58	April 1989	A number of affidavits were filed in early April 1989 regarding an application by the plaintiffs to add Sam and David Passi as plaintiffs. These affidavits showed Sam Passi's unwillingness to be so joined.
59	2.5.89	Hearing, Moynihan, J, submissions an ruling on limitations of remitter re amendments to pleadings
60	3.5.89	Directions Hearing, Toohey J: Order amending terms of remitter
61	4.5.89	Commencement of Hearing of Evidence by Moynihan J. in Brisbane
62	22.5.89	View of Murray Island and Hearing of Evidence on Murray Island by Moynihan J.
63	26.5.89	Hearing of Evidence on Thursday Island by Moynihan J.

64	5.6.89	Hearing before Moynihan J. and granting of application by Summons to adjourn proceedings against the Commonwealth and add David Passi as a Plaintiff. Application to join Sam Passi as a plaintiff was not proceeded with.
65	5.6.89	Recommencement of further hearing of evidence at Brisbane by Moynihan J.
66	8.6.89	Delivery of Statement of Claim as Amended by Leave of Moynihan J. (In the preceding months a number of amended Statements of Claim were proposed by the plaintiffs but they were not proceeded with).
67	15.6.89	Amended Defence of First Defendant (Q) delivered
68	19.6.89	Order of Moynihan J. striking out sub-paragraph 9A (b) of the Amended Defence of the First Defendant (Q).
69	22.6.89	Another amended defence by the first defendant
70	26.6.89	Agreement between Counsel for the Plaintiffs and Counsel for the second defendant (C) tendered, i.e. all actions against the second defendant (C) were to be put aside until the action against the first defendant (Q) were resolved.
71	3.7.89	Opening of the Evidence for the first defendant (Q)
72	7.7.89	On the application of the first defendant (Q) Order of Moynihan J. striking out the second defendant (C) as a party.
73	24.7.89	Closure of the hearing of evidence of the first defendant, State of Queensland and adjournment for the preparation of final submissions on evidence in writing.
74	August 1989	Written submissions were lodged by the plaintiffs and the first defendant (Q)
75	4.9.89	Commencement of final addresses on evidence before Moynihan J. in Brisbane.
76	6.9.89	Final submissions were made.

77	16.11.90	Findings of Fact by Moynihan J.
78.	31.5.91	Hearing commenced in High Court, and was completed in four days.

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