High Court of Australia

Mabo v Queensland (No 2) ("Mabo case") [1992] HCA 23; (1992) 175 CLR 1 (3 June 1992)

HIGH COURT OF AUSTRALIA

MABO AND OTHERS v. QUEENSLAND (No. 2) [1992] HCA 23; (1992) 175 CLR 1
F.C. 92/014

Aborigines - Constitutional Law - Real Property

High Court of Australia
Mason C.J.(1), Brennan(2), Deane(3), Dawson(4), Toohey(5), Gaudron(3) and McHugh(1) JJ.

CATCHWORDS

Aborigines - Native title to land - Whether extinguished by annexation by Crown - Reception of common law in Australia - Effect on native title - Terra nulius - Whether doctrine applicable in Australia.

Constitutional Law (Q.) - Reception of common law in settled colony - Effect on title of indigenous people - Annexation of territory by colony - Terra nullius - Whether doctrine applicable in Australia - Power of Parliament of Qeensland to extinguish native title.

Real Property - Tenures and estates - Application on settlement of New South Wales - Effect on native title - Land over which native title exists - Whether Crown land - Land Act 1962 (Q.), s. 5 - "Crown land."

HEARING

Canberra, 1991, May 28-31; 1992, June 3. 3:6:1992

DECISION

MASON C.J. AND McHUGH J. We agree with the reasons for judgment of Brennan J. and with the declaration which he proposes.

2. In the result, six members of the Court (Dawson J. dissenting) are in agreement that the common law of this country recognizes a form of native title which, in the cases where it has not been extinguished, reflects the entitlement of the indigenous inhabitants, in accordance with their laws or customs, to their traditional lands and that, subject to the effect of some particular Crown leases, the land entitlement of the

Murray Islanders in accordance with their laws or customs is preserved, as native title, under the law of Queensland. The main difference between those members of the Court who constitute the majority is that, subject to the operation of the Racial Discrimination Act 1975 (Cth), neither of us nor Brennan J. agrees with the conclusion to be drawn from the judgments of Deane, Toohey and Gaudron JJ. that, at least in the absence of clear and unambiguous statutory provision to the contrary, extinguishment of native title by the Crown by inconsistent grant is wrongful and gives rise to a claim for compensatory damages. We note that the judgment of Dawson J. supports the conclusion of Brennan J. and ourselves on that aspect of the case since his Honour considers that native title, where it exists, is a form of permissive occupancy at the will of the Crown.

3. We are authorized to say that the other members of the Court agree with what is said in the preceding paragraph about the outcome of the case.

4. The formal order to be made by the Court accords with the declaration proposed by Brennan J. but is cast in a form which will not give rise to any possible implication affecting the status of land which is not the subject of the declaration in par.2 of the formal order.

BRENNAN J. The Murray Islands lie in the Torres Strait, at about 10 degrees S. Latitude and 144 degrees E. Longitude. They are the easternmost of the Eastern Islands of the Strait. Their total land area is of the order of 9 square kilometres. The biggest is Mer (known also as Murray Island), oval in shape about 2.79 kms long and about 1.65 kms across. A channel about 900 m. wide separates Mer from the other two islands, Dauar and Waier, which lie closely adjacent to each other to the south of Mer. The Islands are surrounded for the most part by fringing reefs. The people who were in occupation of these Islands before first European contact and who have continued to occupy those Islands to the present day are known as the Meriam people. Although outsiders, relatively few in number, have lived on the Murray Islands from time to time and worked as missionaries, government officials, or fishermen, there has not been a permanent immigrant population. Anthropological records and research show that the present inhabitants of the Islands are descended from the people described in early European reports. The component of foreign ancestry among the present population is small compared with most communities living in the Torres Strait. The Meriam people of today retain a strong sense of affiliation with their forbears and with the society and culture of earlier times. They have a strong sense of identity with their Islands. The plaintiffs are members of the Meriam people. In this case, the legal rights of the members of the Meriam people to the land of the Murray Islands are in question.
Early contact with Europeans

2. The Meriam people were in occupation of the Islands for generations before the first European contact. They are a Melanesian people (perhaps an integration of differing groups) who probably came to the Murray Islands from Papua New Guinea. Their numbers have fluctuated, probably no more than 1000, no less than 400.

3. Some of the features of life in the Murray Islands at the time of first European contact, at the end of the 18th century, are described by Moynihan J. in his findings in the present case:
" Communal life based on group membership seems to have
been the predominant feature of life. Many of the
activities of daily life were social activities which took
place in the context of group activities of a ceremonial
or ritualistic nature. Behaviour was regulated in the
interest of the community by social pressures. ...
The people lived in groups of huts strung along the
foreshore or strand immediately behind the sandy beach.
They still do although there has been a contraction of

the villages and the huts are increasingly houses. The cultivated garden land was and is in the higher central portion of the island. There seems however in recent times a trend for cultivation to be in more close proximity with habitation.

The groups of houses were and are organised in named villages. It is far from obvious to the uninitiated, but is patent to an islander, that one is moving from one village to another. The area occupied by an individual village is, even having regard to the confined area on a fairly small island which is in any event available for 'village land', quite small.

Garden land is identified by reference to a named locality coupled with the name of relevant individuals if further differentiation is necessary. The Islands are not surveyed and boundaries are in terms of known land marks such as specific trees or mounds of rocks.

Gardening was of the most profound importance to the inhabitants of Murray Island at and prior to European contact. Its importance seems to have transcended that of fishing ...

Gardening was important not only from the point of view of subsistence but to provide produce for consumption or exchange during the various rituals associated with different aspects of community life. Marriage and adoption involved the provision or exchange of considerable quantity of produce. Surplus produce was also required for the rituals associated with the various cults at least to sustain those who engaged in them and in connection with the various activities associated with death.

Prestige depended on gardening prowess both in terms of the production of a sufficient surplus for the social purposes such as those to which I have referred and to be manifest in the show gardens and the cultivation of yams to a huge size. Considerable ritual was associated with gardening and gardening techniques were passed on and preserved by these rituals. Boys in particular worked with their fathers and by observations and imitations reinforced by the rituals and other aspects of the social fabric gardening practices were passed on."

> " It seems that before European contact social cohesion was sought by the combined operation of a number of factors. Children were inculcated from a very early age with knowledge of their relationships in terms of social groupings and what was expected of them by a constant pattern of example, imitation and repetition with reinforcing behaviour. It was part of their environment - the way in which they lived. ... Initiation and other group activities reinforced these patterns. A sense of shame was the outcome of a failure to observe.

> It could be reinforced by group pressures leading to retribution. Ultimately force might be resorted to by those who had access to the means of exerting it. Sorcery, magic and taboo were obviously important cohesive factors and a source of sanction."

The findings show that Meriam society was regulated more by custom than by law.

4. Contacts with Europeans were initially few and sporadic. There were occasional visits by passing ships in the early 19th century. In 1834, two young British castaways were rescued and they stayed on Mer until a ship called there 2 years later. The ship's captain, Captain Lewis, recorded that the natives "acknowledge no chief each family being distinct and independent of each other. Quarrels frequently take place which, after a fight are generally followed by a speedy reconciliation." The London Missionary Society came to the Murray Islands in about 1871 and moved its Torres Strait headquarters to Mer in 1877. It was a significant influence in keeping the peace among the Meriam people and in modifying some of their customs. It appears that, prior to the arrival of the London Missionary Society, elaborate funeral ceremonies and the collection and preservation of human heads were features of life in the Murray Islands.

5. Although the Murray Islands, prior to their annexation to Queensland in 1879, were not part of her Majesty's dominions, Imperial and Colonial authorities were concerned for the maintenance of order in, and the protection of the indigenous inhabitants of, those Islands and other islands in the Western Pacific. "Blackbirding" was being practised and in the 1860s the Murray Islands were raided, women seized and some of the Meriam people murdered. The Pacific Islanders Protection Acts of 1872 and 1875 (Imp) (1) 35 and 36 Vict c 19 (P9/579); 38 and 39 Vict c 51. were enacted to stamp out blackbirding (2) See O'Connell and Riordan, Opinions on Imperial Constitutional Law, (1971), pp 100-103 and to confer on a High Commissioner's Court jurisdiction over British subjects in the islands of the Western Pacific. However, the 1875 Act expressly disavowed "any claim or title whatsoever to dominion or sovereignty over any such islands or places" and any intention "to derogate from the rights of the tribes or people inhabiting such islands or places, or of chiefs or rulers thereof, to such sovereignty or dominion".

6. Nevertheless, it appears that the Queensland authorities exercised some de facto control in the 1870s over islands in the Torres Strait which were not part of that Colony's territory. When a proposal to expand the maritime boundaries of Queensland to include these islands was under consideration, CommandER Heath, R.N., the Portmaster at Brisbane, reported to the Colonial Treasurer on 11 December 1877:

> "Where any lodgment of Islanders or others for questionable purposes had been made on the islands beyond our jurisdiction and yet not within the limits of Polynesia, the police have been obliged to act as though these islands did belong to Queensland, the Police Magistrate wisely considering it a lesser evil to exceed his authority in this matter than to allow any attempt at settlement on these islands for improper purposes."

7. The proposal to annex coastal islands that were not already part of Queensland found favour with the Executive Council. The Hon. John Douglas, then Premier of the Colony, sent the Governor of Queensland a memorandum dated 27 December 1877 containing the following:

> "A sort of police surveillance is even now exercised over some of the islands outside our limits, but it is certainly

> desirable that we should possess a real authority to deal with the somewhat doubtful characters who are occasionally found to act in a very independent way. It does not at all follow that we should form settlements. They will be frequented by pearl-shellers, and probably eventually by more permanent settlers. They ought to be visited occasionally by the Resident Magistrate at Thursday Island, but it would not be necessary to do more than this at present, and I do not think that we should have to increase our expenditure on that account."

8. In July 1878, as Moynihan J. found -

> "H.M. Chester the Police Magistrate at Thursday Island ... visited Murray. He advised the people to select a chief and submit to his authority which, if properly exercised, would be supported. Harry (Ari) Buzire was designated. The name Mamoose came to be applied to the holders of such office throughout the Straits. ... The reasons for Ari's selection are obscure. He had apparently no important ritual office or any particular claim to elevation to central authority which was itself the creature of Chester's intervention. Ari was provided with executive capacity in the form of some designated constables and a boat."

9. The Mamoose, as Moynihan J. found, became "something of an executive arm to the mission".

Annexation of the Murray Islands

10. Ultimately, the proposal to extend the maritime boundaries of Queensland to include the Murray and Darnley Islands was adopted by the Colonial Office and, on 10 October 1878 at Westminster, Queen Victoria passed Letters Patent "for the rectification of the Maritime Boundary of the Colony of Queensland, and for the annexation to that Colony of (certain) Islands lying in Torres Straits, and between Australia and New Guinea". The Murray Islands lay within the maritime boundary mentioned in the Letters Patent.

11. The Letters Patent authorized the Governor of Queensland by Proclamation -

> "to declare that, from and after a day to be therein mentioned, the said Islands shall be annexed to and form part of Our said Colony. Provided always that Our said Governor issues no such Proclamation as aforesaid until the Legislature of Our said Colony of Queensland shall have passed a law providing that the said Islands shall, on the day aforesaid, become part of Our said Colony, and subject to the laws in force therein. Provided also that the application of the said laws to the said Islands may be modified either by such Proclamation as aforesaid, or by any law or laws to be from time to time passed by the Legislature of Our said Colony for the government of the said Islands so annexed."

The Queensland Legislature passed the requisite law (The Queensland Coast Islands Act of 1879) and, on 21 July 1879 at Brisbane, the Governor of Queensland by Proclamation declared -

> "that from and after the first day of August, in the year of our Lord one thousand eight hundred and seventy-nine, the Islands described in the Schedule (which followed the Letters Patent and the Act) shall be annexed to and become part of the Colony of Queensland, and shall be and become subject to the laws in force therein."

The "most dominant" of the purposes for which the Torres Strait islands were annexed were found by Moynihan J. to have been:

> "(a) command of Torres Strait and the sea lane to India; (b) control of the fishery industry in Torres Strait including the pearl-shell industry; (c) the protection of shipping and ship-wrecked crews; (d) the extension of jurisdiction to non-British subjects and the native inhabitants of the islands; (e) the protection of the native inhabitants of the islands".

And, in Wacando v. The Commonwealth (3) [1981] HCA 60; (1981) 148 CLR 1, at p 10, Gibbs C.J. noted Professor Cumbrae-Stewart's view that the occasion for the passing of the Letters Patent was that the inhabitants of some of the islands had no protection against violence and that the islands provided bases for those intent on evading Queensland's revenue and immigration laws. The acquisition of beneficial ownership of land by the Crown does not appear to have been among the purposes of the annexation entertained by either the Queensland or the Imperial Government.

12. In September 1879, Captain Pennefather on the instructions of H.M. Chester visited the Murray Islands where (as he reported) he "mustered the natives" and informed them "that they would be held amenable to British law now the island was annexed". He also noted:

> "The Chief acts as magistrate, he has a staff of 10 or 12 men as policemen, they have built a church and courthouse of which they are very proud, there is also a very good house belonging to the London Missionary Society this island being the headquarters for the mission in these waters."

The system of local administration, established prior to annexation, proved to be tyrannous in its operation and, in October 1882, Captain Pennefather reported that he had dismantled it. (It appears from later history, however, that Harry, the Mamoose, continued to exercise considerable authority.) At the same time, he reported:

> "The natives are very tenacious of their ownership of the land and the island is divided into small properties which have been handed down from father to son from generation to generation, they absolutely refuse to sell their land at any price, but rent small portions to the beche-de-mer men and others. These natives, though lazy like all Polynesians on their islands, build good houses and

> cultivate gardens, they are a powerful intelligent race and a white man is as safe if not safer residing amongst them, as in Brisbane."

Moynihan J. found that there was apparently no concept of public or general community ownership among the people of Murray Island, all the land of Murray Island being regarded as belonging to individuals or groups.

13. In about February 1882, the Queensland Government "reserved" Murray Island for native inhabitants. In the same year, a special lease of 2 acres on Mer was granted by the Queensland Government to the London Missionary Society, which had assumed some responsibility for law and order and for the peaceful resolution of disputes. Shortly after the Reserve was created, the Queensland authorities, at the request of the Meriam people, "removed a number of trespassers" from the Islands.

14. In 1885, the Hon. John Douglas, by then Government Resident at Thursday Island, went to the Murray Islands to arrange for the eviction of "intruders" (South Sea Islanders) in order to ensure that "the Murray Islanders will have Murray Island to themselves". He successfully negotiated the departure of the intruders. He found Harry, "the Chief or primate of Murray Island", to be a "benignant despot ... (whose) position is respected."

15. In 1886, the Acting Government Resident at Thursday Island reported to the Chief Secretary of Queensland on the application of Queensland law:

> "I do not see how it will be possible to administer these islands under the present laws of Queensland, more especially as touching the land question, and the tenure under which the native races are to be allowed to hold the land they own. There is no doubt that if every acre has not a reputed owner (and I am inclined to think every acre has) but every grove or single tree of any value has its proper and legitimate hereditary owner. To disturb these rights, great care would have to be exercised and the natives recompensed for any loss that they might suffer through deprivation."

16. By 1891 the headquarters of the London Missionary Society had been moved from the Murray Islands. Later, Douglas, in a report on a visit to the Murray Islands, described the system of government then in place:

> "The secular government is conducted by 'Harry', the recognised chief or headman who is assisted in his administration by four officers, or 'policemen' so called. They are recognised by me, and they assist to keep the peace when it is necessary that their authority should be invoked, which is not often.
> They receive a small annual honorarium, and they are privileged to wear a uniform. 'Harry' has a whaleboat, presented to him by the Government, the 'policemen' man this boat. 'William' a native of New Zealand, is the head of the spiritual or theocratic government."

Douglas recommended that a teacher and adviser be appointed to reside on the Islands. John Stuart Bruce took up an appointment to that office in October 1892 and remained there until January 1934.

17. The "system of self-government ... as instituted by the late Hon. John Douglas, C.M.G." was described by the Chief Protector of Aboriginals in Queensland in his Annual Report for 1907 as follows:

> "The Governing body consists of the native chief or 'mamoose', assisted and advised by the councillors or elders of the village, with a staff of native police to uphold his authority and to keep order among the inhabitants or visitors.
> The European school teacher acts as clerk and treasurer of the native court, assisting with suggestion or advice when requested, but otherwise has no authority to interfere in the internal management of affairs.
> The mamoose acts as a police magistrate and governor, with power to deal summarily with offences and breaches of local regulations, and is directly responsible for the behaviour and cleanliness of his village to the Government Resident and Police Magistrate at Thursday Island. He may inflict punishment by fine or imprisonment upon minor offences, but misdemeanours and serious offences must be reserved for the bench at Thursday Island. The councillors attend at courthouse to assist the mamoose with advice and, in order of seniority, may act on his behalf during his absence.
> They also meet to confer monthly with the mamoose upon any questions concerning the conduct of affairs.
> The native island police, under a native sergeant, are responsible to the mamoose for the good behaviour of the inhabitants, etc., and may arrest and lock up offenders till the next meeting of court. They have also to inspect and see that each householder keeps his premises and grounds clean, and that the portion of the public road adjacent to his residence is kept in good repair and order; also that the public properties (coconut-trees, fish-traps, etc.), and buildings (court-house, lock-up, school-house, etc.) are not damaged or destroyed.
> The European teacher resident upon the island acts as clerk of the court and registrar of births, marriages, and deaths, keeping all books and records, and also as treasurer, keeping an account and taking charge of all collections from fines, taxes upon dogs, etc., the mamoose having authority to expend all such collections upon public improvements, repairs, etc."

18. It appears from reports by Mr Bruce that, from the end of the 19th century, the Mamoose's court entertained cases arising from disputes over land or land boundaries.

19. When an anthropological expedition from Cambridge visited the Islands in 1898 they found that -

> "Queensland has not affected native land tenure which is

> upheld in the Court of the Island. In a few instances it is not impossible that English ideas, especially of inheritance are making themselves felt. There is no common land and each makes his own garden on his own land at his own convenience."

The Island Court, according to Moynihan J., sought "to achieve a consistent application of certain basic principles" although his Honour went on to say that -

> "the role of the Court was to maintain social harmony by accommodating peoples wishes as far as possible and doing what seemed to be right in the circumstances."

Although there was a clear insistence on exclusive possession by the "owners" of particular blocks of land and a general expectation that land would be passed on patrilineally, his Honour thought that:

> "The ultimate determining factor in terms of the control and disposition of land was simply what was acceptable in terms of social harmony and the capacity of an individual to impose his (it seems almost (always) to have been a him) will on the community. This was easier done if the claim had the appearance of certain expected characteristics."

It would not be surprising to find that land disputes in a small community were settled by a consensus which is arrived at aftER consideration of a variety of factors. Strict legal rules might have been disruptive of community life.

20. Without pausing to enquire into the legal support for the "system of self-government" instituted by Douglas or for the jurisdiction of the Island Court, it appears that the Meriam people came peacefully to accept a large measure of control by Queensland authorities and that officials of the Queensland Government became accustomed to exercise administrative authority over the Murray Islands. Formal annexation had been followed by an effective exercise of administrative power by the Government of Queensland.

21. In 1894, some doubts had arisen in the Colonial Office as to the legality of the annexation of the islands included in the 1879 Letters Patent to Queensland. Queensland had been separated from New South Wales and erected into a Colony pursuant to The New South Wales Constitution Act, 1855 (Imp) (4) 18 and 19 Vict c 54 by Letters Patent of 6 June 1859 and an Order in Council of the same day. The boundaries of the new colony were fixed, the Colony was granted a constitution with representative institutions and the laws of New South Wales became the laws of Queensland on separation. The doubts which arose in the Colonial Office related to the legality of incorporating new territory into a colony with representative institutions once the boundaries of the colony were fixed by or under Imperial legislation. To settle these doubts, the Colonial Boundaries Act 1895 (Imp) (5) 58 and 59 Vict c 34 was enacted. As this Court held in Wacando, if the Queensland Coast Islands Act 1879 did not suffice to effect the incorporation of the Murray Islands into Queensland (either by its own force or by satisfying a condition bringing the Letters Patent of 1879 into operation), the requisite Imperial legislative authority could be found in the Colonial Boundaries Act.

22. With this brief conspectus of the history of the Murray Islands, we may now turn to an examination of the effect of annexation on the legal rights of the members of the Meriam people to the land of the Murray Islands.

The theory of universal and absolute Crown ownership

23. It may be assumed that on 1 August 1879 the Meriam people knew nothing of the events in Westminster and in Brisbane that effected the annexation of the Murray Islands and their incorporation into Queensland and that, had the Meriam people been told of the Proclamation made in Brisbane on 21 July 1879, they would not have appreciated its significance. The legal consequences of these events are in issue in this case. Oversimplified, the chief question in this case is whether these transactions had the effect on 1 August 1879 of vesting in the Crown absolute ownership of, legal possession of and exclusive power to confer title to, all land in the Murray Islands. The defendant submits that that was the legal consequence of the Letters Patent and of the events which brought them into effect. If that submission be right, the Queen took the land occupied by Meriam people on 1 August 1879 without their knowing of the expropriation; they were no longer entitled without the consent of the Crown to continue to occupy the land they had occupied for centuries past.

24. The defendant's submission is founded on propositions that were stated in cases arising from the acquisition of othER colonial territory by the Imperial Crown. Although there are differences which might be said to distinguish the Murray Islands and the Meriam people of 1879 from other colonial territories and their indigenous inhabitants when those territories respectively became British colonies, the propositions on which the defendant seeks to rely have been expressed to apply universally to all colonial territories "settled" by British subjects. Assuming that the Murray Islands were acquired as a "settled" colony (for sovereignty was not acquired by the Crown either by conquest or by cession), the validity of the propositions in the defendant's chain of argument cannot be determined by reference to circumstances unique to the Murray Islands; they are advanced as general propositions of law applicable to all settled colonies. Nor can the circumstances which might be thought to differentiate the Murray Islands from other parts of Australia be invoked as an acceptable ground for distinguishing the entitlement of the Meriam people from the entitlement of other indigenous inhabitants to the use and enjoyment of their traditional lands. As we shall see, such a ground of distinction discriminates on the basis of race or ethnic origin for it denies the capacity of some categories of indigenous inhabitants to have any rights or interests in land. It will be necessary to consider presently the racial or ethnic basis of the law stated in earlier cases relating to the entitlement of indigenous people to land in settled colonies.

25. On analysis, the defendant's argument is that, when the territory of a settled colony became part of the Crown's dominions, the law of England so far as applicable to colonial conditions became the law of the colony and, by that law, the Crown acquired the absolute beneficial ownership of all land in the territory so that the colony became the Crown's demesne and no right or interest in any land in the territory could thereafter be possessed by any other person unless granted by the Crown. Perhaps the clearest statement of these propositions is to be found in Attorney-General v. Brown (6) (1847) 1 Legge 312, at p 316, when the Supreme Court of New South Wales rejected a challenge to the Crown's title to and possession of the land in the Colony. Stephen C.J. stated the law to be -

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

The reasons for this conclusion were stated (7): ibid., at pp 317-318

> "The territory of New South Wales, and eventually the whole

> of the vast island of which it forms a part, have been taken possession of by British subjects in the name of the Sovereign. They belong, therefore, to the British Crown. ... The fact of the settlement of New South Wales in that manner, and that it forms a portion of the Queen's Dominions, and is subject to and governed by British laws, may be learned from public colonial records, and from Acts of Parliament. New South Wales is termed in the statute 54 GEO III, c.15, and in the 59 GEO III, c.122, His Majesty's Colony; not the colony of the people, not even the colony of the empire. It was maintained that this supposed property in the Crown was a fiction. Doubtless, in one sense, it was so. The right of the people of England to their property, does not in fact depend on any royal grant, and the principle that all lands are holden mediately or immediately of the Crown flows from the adoption of the feudal system merely (Co Lit 1, and ibid.191, a, Mr. Butler's note 6; Bac Ab Prerog B.; Vin Ab same title K.A. 19). That principle, however, is universal in the law of England, and we can see no reason why it shall be said not to be equally in operation here. The Sovereign, by that law is (as it is termed) universal occupant. All property is supposed to have been, originally, in him. Though this be generally a fiction, it is one "adopted by the Constitution to answer the ends of government, for the good of the people." (Bac Ab ubi supra, marginal note.) But, in a newly-discovered country, settled by British subjects, the occupancy of the Crown with respect to the waste lands of that country, is no fiction. If, in one sense, those lands be the patrimony of the nation, the Sovereign is the representative, and the executive authority of the nation, the 'moral personality' (as Vattel calls him, Law of Nations, book 1, chap 4), by whom the nation acts, and in whom for such purposes its power resides. Here is a property, depending for its support on no feudal notions or principle. But if the feudal system of tenures be, as we take it to be, part of the universal law of the parent state, on what shall it be said not to be law, in New South Wales? At the moment of its settlement the colonists brought the common law of England with them."

So conceiving the common law, his Honour understood a statutory reference to "the waste lands of the Crown" to mean "all the waste and unoccupied lands of the colony; for, at any rate, there is no other proprietor of such lands". (8) ibid., at p 319.

26. This judgment has formidable support. It was described as "notable" by Windeyer J. (9) In Wade v. New South Wales Rutile Mining Co. Pty. Ltd. [1969] HCA 28; (1969) 121 CLR 177, at p 194 who followed its doctrine in Randwick Corporation v. Rutledge (10) [1959] HCA 63; (1959) 102 CLR 54, at p 71:

" On the first settlement of New South Wales (then comprising the whole of eastern Australia), all the land in the colony became in law vested in the Crown. The early Governors had express powers under their commissions to make grants of land. The principles of English real property law, with socage tenure as the basis, were introduced into the colony from the beginning - all lands of the territory lying in the grant of the Crown, and until granted forming a royal demesne. The colonial Act, 6 Wm IV No. 16 (1836), recited in its preamble that the Governors by their commissions under the Great Seal had authority 'to grant and dispose of the waste lands' - the purpose of the Act being simply to validate grants which had been made in the names of the Governors instead of in the name of the Sovereign. And when in 1847 a bold argument, which then had a political flavour, challenged the right of the Crown, that was to say of the Home Government, to dispose of land in the colony, it was as a legal proposition firmly and finally disposed of by Sir Alfred Stephen C.J.: The Attorney-General v. Brown (11) (1847) 1 Legge, at pp 317-320."

27. The doctrine of exclusive Crown ownership of all land in the Australian colonies was again affirmed by Stephen J. in New South Wales v. The Commonwealth ("the Seas and Submerged Lands Case") (12) [1975] HCA 58; (1975) 135 CLR 337, at pp 438-439:

" That originally the waste lands in the colonies were owned by the British Crown is not in doubt. Such ownership may perhaps be regarded as springing from a prerogative right, proprietary in nature, such as is described by Dr. Evatt in his unpublished work on the subject ... the prerogatives of the Crown were a part of the common law which the settlers brought with them on settlement (R. v. Kidman, per Griffith C.J. (13) [1915] HCA 58; (1915) 20 CLR 425, at pp 435-436); 'the prerogative of the Queen, when it has not been expressly limited by local law or statute, is as extensive in Her Majesty's colonial possessions as in Great Britain' (per Lord Watson speaking for their Lordships in Liquidators of Maritime Bank of Canada v. Receiver-General (New Brunswick) (14) (1892) AC 437, at p 441); cited by Isaacs J. in The Commonwealth v. New South Wales (15) [1923] HCA 34; [1923] HCA 34; (1923) 33 CLR 1, at p 37. On the other hand that ownership may be described as a consequence of the feudal principle which, on first settlement in Australia, was 'extended to the lands oversea', so that all colonial land belonged 'to the Crown until the Crown chose to grant it' (per Isaacs J. in Williams' Case (16) Williams v. Attorney-General for New South Wales [1913] HCA 33; (1913) 16 CLR 404, at p 439). In either event the consequence is

the same, the lands of Australia became the property of the King of England (Attorney-General v. Brown (17) (1847) 1 Legge, at pp 317-320)."

Dawson J., following this line of authority in Mabo v. Queensland (18) (1988) 166 CLR 186, at p 236, said that "colonial lands which remained unalienated were owned by the British Crown".

28. The proposition that, when the Crown assumed sovereignty ovER an Australian colony, it became the universal and absolute beneficial owner of all the land therein, invites critical examination. If the conclusion at which Stephen C.J. arrived in Attorney-General v. Brown be right, the interests of indigenous inhabitants in colonial land were extinguished so soon as British subjects settled in a colony, though the indigenous inhabitants had neither ceded their lands to the Crown nor suffered them to be taken as the spoils of conquest. According to the cases, the common law itself took from indigenous inhabitants any right to occupy their traditional land, exposed them to deprivation of the religious, cultural and economic sustenance which the land provides, vested the land effectively in the control of the Imperial authorities without any right to compensation and made the indigenous inhabitants intruders in their own homes and mendicants for a place to live. Judged by any civilized standard, such a law is unjust and its claim to be part of the common law to be applied in contemporary Australia must be questioned. This Court must now determine whether, by the common law of this country, the rights and interests of the Meriam people of today are to be determined on the footing that their ancestors lost their traditional rights and interests in the land of the Murray Islands on 1 August 1879.

29. In discharging its duty to declare the common law of Australia, this Court is not free to adopt rules that accord with contemporary notions of justice and human rights if their adoption would fracture the skeleton of principle which gives the body of our law its shape and internal consistency. Australian law is not only the historical successor of, but is an organic development from, the law of England. Although our law is the prisoner of its history, it is not now bound by decisions of courts in the hierarchy of an Empire then concerned with the development of its colonies. It is not immaterial to the resolution of the present problem that, since the Australia Act 1986 (Cth) came into operation, the law of this country is entirely free of Imperial control. The law which governs Australia is Australian law. The Privy Council itself held that the common law of this country might legitimately develop independently of English precedent (19) See Australian Consolidated Press Ltd. v. Uren [1967] UKPCHCA 2; (1967) 117 CLR 221, at pp 238, 241; (1969) AC 590, at pp 641, 644. Increasingly since 1968 (20) See the Privy Council (Limitation of Appeals) Act 1968 (Cth) and see the Privy Council (Appeals from the High Court) Act 1975 (Cth), the common law of Australia has been substantially in the hands of this Court. Here rests the ultimate responsibility of declaring the law of the nation. Although this Court is free to depart from English precedent which was earlier followed as stating the common law of this country (21) Cook v. Cook [1986] HCA 73; (1986) 162 CLR 376, at pp 390, 394; Viro v. The Queen [1978] HCA 9; (1978) 141 CLR 88, at pp 93, 120-121, 132, 135, 150-151, 166, 174, it cannot do so where the departure would fracture what I have called the skeleton of principle. The Court is even more reluctant to depart from earliER decisions of its own (22) Jones v. The Commonwealth (1987) 61 ALJR 348, at p 349; 71 ALR 497, at pp 498-499; John v. Federal Commissioner of Taxation [1989] HCA 5; (1989) 166 CLR 417, at pp 438-439, 451-452; McKinney v. The Queen [1991] HCA 6; (1991) 171 CLR 468, at pp 481-482. The peace and order of Australian society is built on the legal system. It can be modified to bring it into conformity with contemporary notions of justice and human rights, but it cannot be destroyed. It is not possible, a priori, to distinguish between cases that express a skeletal principle and those which do not, but no case can command unquestioning adherence if the rule it expresses seriously offends the values of justice and human rights (especially equality before the law) which are aspirations of the contemporary Australian legal system. If a postulated rule of the common law expressed in earlier cases seriously offends those contemporary values, the question arises whether the rule should be maintained and applied. Whenever such a question arises, it is necessary to assess whether the particular rule is an

essential doctrine of our legal system and whether, if the rule were to be overturned, the disturbance to be apprehended would be disproportionate to the benefit flowing from the overturning.

30. In the present case, the defendant's chain of argument contains several links, each of which must be separately considered although, as we shall see, a common theme or thread runs through them. Some of these links are unchallenged. We start with the proposition that the Imperial Crown acquired sovereignty over the Murray Islands on 1 August 1879 and that the laws of Queensland (including the common law) became the law of the Murray Islands on that day - or, if it be necessary to rely on the Colonial Boundaries Act 1895, is deemed to have become the law of the Murray Islands on that day. Next, by the common law, the Crown acquired a radical or ultimate title to the Murray Islands. The plaintiffs accept these propositions but challenge the final link in the chain, namely, that the Crown also acquired absolute beneficial ownership of the land in the Murray Islands when the Crown acquired sovereignty ovER them.

31. As the passages cited from the judgments in Attorney-General v. Brown and the Seas and Submerged Lands Case show, the proposition that, by the common law, the Sovereign acquired absolute beneficial ownership of all land in the Murray Islands rests on a number of bases. In the first place, it is said that the Crown is absolute owner because "there is no othER proprietor". This basis denies that the indigenous inhabitants possessed a proprietary interest. The negative basis is then buttressed by three positive bases to show why it is necessary to attribute absolute beneficial ownership to the Crown. One basis is that, when English law was brought to Australia with and by British colonists, the common law to be applied in the colonies included the feudal doctrine of tenure. Just as the Crown acquired or is deemed to have acquired universal ownership of all land in England, so the Crown became the owner of all land in the Australian colonies. We may call this the feudal basis. Another basis is that all land in a colony is "the patrimony of the nation" and, on this basis, the Crown acquired ownership of the patrimony on behalf of the nation. A third basis is the prerogative basis mentioned by Stephen J. in the Seas and Submerged Lands Case. In order to determine whether, on any or all of these bases, the Crown acquired beneficial ownership of the land in the Murray Islands when the Crown acquired sovereignty over them, we must first review the legal theories relating to the acquisition of sovereignty and the introduction of the common law.

The acquisition of sovereignty

> "The acquisition of territory by a sovereign state for the first time is an act of state which cannot be challenged, controlled or interfered with by the courts of that state."

This principle, stated by Gibbs J. in the Seas and Submerged Lands Case (23) New South Wales v. The Commonwealth (1975) 135 CLR, at p 388, precludes any contest between the executive and the judicial branches of government as to whether a territory is or is not within the Crown's Dominions. The Murray Islands were annexed by an exercise of the prerogative evidenced by the Letters Patent; a mode of acquisition recognized by the common law as a valid means of acquiring sovereignty ovER foreign territory. The recognition is accorded simply on the footing that such a prerogative act is an act of State the validity of which is not justiciable in the municipal courts (24) Sobhuza II. v. Miller (1926) AC 518, at p 525; The Fagernes (1927) P 311; Reg. v. Kent Justices; Ex parte Lye (1967) 2 QB 153, at pp 176-177, 181-182; Ffrost v. Stevenson [1937] HCA 41; (1937) 58 CLR 528, at pp 565-566; A Raptis and Son v. South Australia [1977] HCA 36; (1977) 138 CLR 346, at p 360; cf. Bonser v. La Macchia [1969] HCA 31; (1969) 122 CLR 177, at pp 193, 217, where the meaning of a constitutional term was in issue. In Post Office v. Estuary Radio Ltd., Diplock L.J. said (25) (1968) 2 QB 740, at p 753:

> " It still lies within the prerogative power of the Crown to extend its sovereignty and jurisdiction to areas of land or sea over which it has not previously claimed or

exercised sovereignty or jurisdiction. For such extension the authority of Parliament is not required."

This proposition was approved by Gibbs J. in the Seas and Submerged Lands Case and, in Wacando, Gibbs C.J. and Mason J. accepted that an annexation of territory by exercise of the prerogative is an act of State (26) (1981) 148 CLR, per Gibbs C.J. at p 11; per Mason J. at p 21. See also Coe v. The Commonwealth [1979] HCA 68; (1979) 53 ALJR 403, per Jacobs J. at p 410.

32. Although the question whether a territory has been acquired by the Crown is not justiciable before municipal courts, those courts have jurisdiction to determine the consequences of an acquisition under municipal law. Accordingly, the municipal courts must determine the body of law which is in force in the new territory. By the common law, the law in force in a newly-acquired territory depends on the manner of its acquisition by the Crown. Although the manner in which a sovereign state might acquire new territory is a matter for international law, the common law has had to march in step with international law in order to provide the body of law to apply in a territory newly acquired by the Crown.

33. International law recognized conquest, cession, and occupation of territory that was terra nullius as three of the effective ways of acquiring sovereignty. No other way is presently relevant (27) See E. Evatt, "The Acquisition of Territory in Australia and New Zealand" in (1968) Grotian Society Papers, p 16, who mentions only cession and occupation as relevant to the Australasian colonies. The great voyages of European discovery opened to European nations the prospect of occupying new and valuable territories that were already inhabited. As among themselves, the European nations parcelled out the territories newly discovered to the sovereigns of the respective discoverers (28) Worcester v. Georgia [1832] USSC 39; [1832] USSC 39; (1832) 6 Pet 515, at pp 543-544 (31 US 350, at p 369), provided the discovery was confirmed by occupation and provided the indigenous inhabitants were not organized in a society that was united permanently for political action (29) Lindley, The Acquisition and Government of Backward Territory in International Law, (1926), Chs III and IV. To these territories the European colonial nations applied the doctrines relating to acquisition of territory that was terra nullius. They recognized the sovereignty of the respective European nations over the territory of "backward peoples" and, by State practice, permitted the acquisition of sovereignty of such territory by occupation rather than by conquest (30) See Lindley, ibid., p 47. Various justifications for the acquisition of sovereignty over the territory of "backward peoples" were advanced. The benefits of Christianity and European civilization had been seen as a sufficient justification from mediaeval times (31) See Williams, The American Indian in Western Legal Thought, (1990), pp 78ff; and Johnson v. McIntosh [1823] USSC 22; (1823) 8 Wheat 543, at p 573 (21 US 240, at p 253). Another justification for the application of the theory of terra nullius to inhabited territory - a justification first advanced by Vattel at the end of the 18th century - was that new territories could be claimed by occupation if the land were uncultivated, for Europeans had a right to bring lands into production if they were left uncultivated by the indigenous inhabitants (32) Vattel, The Law of Nations (1797), Bk I, pp 100-101. See Castles, An Australian Legal History, (1982), pp 16-17. It may be doubted whether, even if these justifications were accepted, the facts would have sufficed to permit acquisition of the Murray Islands as though the Islands were terra nullius. The Meriam people were, as Moynihan J. found, devoted gardeners. In 1879, having accepted the influence of the London Missionary Society, they were living peacefully in a land-based society under some sort of governance by the Mamoose and the London Missionary Society. However that may be, it is not for this Court to canvass the validity of the Crown's acquisition of sovereignty over the Islands which, in any event, was consolidated by uninterrupted control of the Islands by Queensland authorities (33) 10 Encyclopaedia of Public International Law, (1987), p 500; cf. J. Crawford, "The Criteria for Statehood in International Law", (1977) 48 The British Year Book of International Law 93, at p 116.

34. The enlarging of the concept of terra nullius by international law to justify the acquisition of inhabited territory by occupation on behalf of the acquiring sovereign raised some difficulties in the expounding of

the common law doctrines as to the law to be applied when inhabited territories were acquired by occupation (or "settlement", to use the term of the common law). Although Blackstone commended the practice of "sending colonies (of settlers) to find out new habitations", he wrote (34) Commentaries on the Laws of England, 17th ed. (1830), Bk II, ch 1, p 7-

> "so long as it was confined to the stocking and cultivation of desert uninhabited countries, it kept strictly within the limits of the law of nature. But how far the seising on countries already peopled, and driving out or massacring the innocent and defenceless natives, merely because they differed from their invaders in language, in religion, in customs, in government, or in colour; how far such a conduct was consonant to nature, to reason, or to christianity, deserved well to be considered by those, who have rendered their names immortal by thus civilizing mankind".

As we shall see, Blackstone's misgivings found a resonance in international law after two centuries (35) Advisory Opinion on Western Sahara (1975) 1 ICJR 12. But he was unable to declare any rule by which the laws of England became the laws of a territory which was not a "desert uninhabited" country when the Crown acquired sovereignty over that territory by discovery and occupation as terra nullius. As the British acquisition of sovereignty over the Colony of New South Wales was regarded as dependent upon the settlement of territory that was terra nullius consequent on discovery (36) See E. Evatt, op cit, at p 25; Cooper v. Stuart (1889) 14 App Cas 286, and as the law of New South Wales is the source of the law applicable to the Murray Islands, we must next examine the basis on which the common law was received as the law of the Colony of New South Wales.

Reception of the common law

35. The means by which the municipal laws of England, including the common law, became the law of a country that had been outside the King's dominions were stated by Blackstone (37) Commentaries, Bk I, ch.4, pp 106-108; accord: Forbes v. Cochrane (1824) 2 B and C 448, at p 463 [1824] EngR 93; (107 ER 450, at p 456) as follows:

> "Plantations or colonies, in distant countries, are either such where the lands are claimed by right of occupancy only, by finding them desert and uncultivated, and peopling them from the mother-country; or where, when already cultivated, they have been either gained by conquest, or ceded to us by treaties. And both these rights are founded upon the law of nature, or at least upon that of nations. But there is a difference between these two species of colonies, with respect to the laws by which they are bound. For it hath been held, that if an uninhabited country be discovered and planted by English subjects, all the English laws then in being, which are the birthright of every subject, are immediately there in force. But this must be understood with very many and very great restrictions. Such colonists carry with them only so much of the English law, as is applicable to their own situation and the condition of an infant colony; ... What shall be admitted and what rejected, at what times, and under what

> restrictions, must, in case of dispute, be decided in the first instance by their own provincial judicature, subject to the revision and control of the king in council: the whole of their constitution being also liable to be new-modelled and reformed by the general superintending power of the legislature in the mother-country. But in conquered or ceded countries, that have already laws of their own, the king may indeed alter and change those laws; but, till he does actually change them, the ancient laws of the country remain, unless such as are against the law of God, as in the case of an infidel country. Our American plantations are principally of this latter sort, being obtained in the last century either by right of conquest and driving out the natives (with what natural justice I shall not at present inquire) or by treaties. And therefore the common law of England, as such, has no allowance or authority there; they being no part of the mother-country, but distinct (though dependent) dominions. They are subject, however, to the control of the parliament".

According to Blackstone, English law would become the law of a country outside England either upon first settlement by English colonists of a "desert uninhabited" country or by the exercise of the Sovereign's legislative power over a conquered or ceded country. Blackstone did not contemplate other ways by which sovereignty might be acquired. In the case of a conquered country, the general rule was that the laws of the country continued after the conquest until those laws were altered by the conqueror (38) Blankard v. Galdy [1738] EngR 444; (1693) Holt KB 341 (90 ER 1089); Campbell v. Hall (1774) Lofft 655, at p 741 (98 ER 848, at pp 895-896); Beaumont v. Barrett [1836] EngR 841; (1836) 1 Moo PC 59 (12 ER 733). The Crown had a prerogative power to make new laws for a conquered country although that power was subject to laws enacted by the Imperial Parliament (39) Campbell v. Hall, (1774) Lofft, at pp 741, 742 (98 ER, at pp 895, 896). The same rule applied to ceded colonies, though the prerogative may have been limited by the treaty of cession (40) See the discussion in Roberts-Wray, Commonwealth and Colonial Law, (1966), pp 214ff; Sammut v. Strickland (1938) AC 678; Blankard v. Galdy [1795] EngR 570; (1693) 2 Salk 411 (91 ER 356); Buchanan v. The Commonwealth [1913] HCA 29; (1913) 16 CLR 315, at p 334. When "desert uninhabited countries" were colonized by English settlers, however, they brought with them "so much of the English law as (was) applicable to their own situation and the condition of an infant colony" (41) Commentaries, Bk I, ch 4, p 107; State Government Insurance Commission v. Trigwell [1979] HCA 40; (1979) 142 CLR 617, at pp 625, 634. English colonists were, in the eye of the common law, entitled to live under the common law of England which Blackstone described as their "birthright" (42) Commentaries, Bk I, ch 4, p 107. And see Sabally and N'Jie v. H.M. Attorney-General (1965) 1 QB 273, at p 294. That law was not amenable to alteration by exercise of the prerogative (43) Sammut v. Strickland (1938) AC, at p 701. The tender concern of the common law of England for British settlers in foreign parts led to the recognition that such settlers should be regarded as living under the law of England if the local law was unsuitable for Christian Europeans (44) Ruding v. Smith (1821) 2 Hag.Con.371 (161 ER 774); Freeman v. Fairlie (1828) 1 Moo Ind App 306, at pp 323-325, aff p 341 [1828] EngR 63; (18 ER 117, at pp 127-128, 137); cf. Campbell v. Hall (1774) Lofft, at p 741 (98 ER, at pp 895,896). See also Yeap Cheah Neo v. Ong Cheng Neo (1875) 6 LR 381, at p 393; cf. Reg. v. Willans (1858) 3 Kyshe 16, at pp 20-25; and see Re Loh Toh Met (1961) 27 MLJ 234, at pp 237-243; Khoo Hooi Leong v. Khoo Chong Yeok (1930) AC 346, at p 355. This rule was applied even to English residents in Eastern countries which were not under British sovereignty (45) The "Indian Chief" [1799] EngR 782; (1801) 3 C Rob 12, at pp 28-29 (165 ER 367, at pp 373-374).

36. When British colonists went out to other inhabited parts of the world, including New South Wales, and settled there undER the protection of the forces of the Crown, so that the Crown acquired sovereignty recognized by the European family of nations under the enlarged notion of terra nullius, it was necessary for the common law to prescribe a doctrine relating to the law to be applied in such colonies, for sovereignty imports supreme internal legal authority (46) See A. James, Sovereign Statehood, (1986), pp 3ff., 203-209. The view was taken that, when sovereignty of a territory could be acquired under the enlarged notion of terra nullius, for the purposes of the municipal law that territory (though inhabited) could be treated as a "desert uninhabited" country. The hypothesis being that there was no local law already in existence in the territory (47) Lyons (Mayor of) v. East India Co. [1836] EngR 1155; (1836) 1 Moo PC 175, at pp 272-273 [1836] EngR 1155; (12 ER 782, at p 818); Cooper v. Stuart (1889) 14 App Cas ; The Lauderdale Peerage (1885) 10 App Cas 692, at pp 744-745; Kielley v. Carson [1842] EngR 593; (1842) 4 Moo PC 63, at pp 84-85 [1842] EngR 593; [1842] EngR 593; (13 ER 225, at p 233), the law of England became the law of the territory (and not merely the personal law of the colonists). Colonies of this kind were called "settled colonies". Ex hypothesi, the indigenous inhabitants of a settled colony had no recognized sovereign, else the territory could have been acquired only by conquest or cession. The indigenous people of a settled colony were thus taken to be without laws, without a sovereign and primitive in their social organization. In Advocate-General of Bengal v. Ranee Surnomoye Dossee (48) (1863) 2 Moo N S 22, at p 59 [1863] EngR 761; (15 ER 811, at p 824); 9 Moo Ind App 391, at p 428 [1863] EngR 767; (19 ER 786, at p 800) Lord Kingsdown used the term "barbarous" to describe the native state of a settled colony:

> " Where Englishmen establish themselves in an uninhabited or barbarous country, they carry with them not only the laws, but the sovereignty of their own State; and those who live amongst them and become members of their community become also partakers of, and subject to the same laws."

In Campbell v. Hall Lord Mansfield suggested that Jamaica should be regarded as a settled colony because the English colonists arrived after the Spaniards had left (49) His Lordship may have wrongly appreciated the history of Jamaica: see Roberts-Wray, op cit, pp 46-47, 851-852, the negro inhabitants presumably being of no significance (50) See (1774) Lofft, at p 745 (98 ER, at p 898). In Cooper v. Stuart Lord Watson proffered the absence of "settled inhabitants" and "settled law" as a criterion for determining whether inhabited territory had been acquired by "settlement" under English law (51) (1889) 14 App Cas, at p 291:

> " The extent to which English law is introduced into a British Colony, and the manner of its introduction, must necessarily vary according to circumstances. 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. In the case of such a Colony the Crown may by ordinance, and the Imperial Parliament, or its own legislature when it comes to possess one, may by statute declare what parts of the common and statute law of England shall have effect within its limits. But, when that is not done, the law of England must (subject to well-established exceptions) become from

> the outset the law of the Colony, and be administered by its tribunals. In so far as it is reasonably applicable to the circumstances of the Colony, the law of England must prevail, until it is abrogated or modified, either by ordinance or statute."

As the settlement of an inhabited territory is equated with settlement of an uninhabited territory in ascertaining the law of the territory on colonization, the common law which the English settlers brought with them to New South Wales could not have been altered or amended by the prerogative - only by the Imperial Parliament or by the local legislature (52) Holdsworth, A History of English Law, 3rd ed., vol.ix, (1944), p 84; Sammut v. Strickland (1938) AC, at p 701; Kielley v. Carson (1843) 4 Moo PC, at pp 84-85 (13 ER, at p 233); Falkland Islands Co. v. The Queen [1863] EngR 782; (1863) 2 Moo PC (NS) 266, at p 273 [1863] EngR 782; (15 ER 902, at p 905); Sabally and N'Jie v. H.M. Attorney-General (1965) 1 QB , at p 294. (This principle raises some doubts about the validity of the exercise of legislative power by the Governor of New South Wales before a Legislative Council was established in 1823, but we need not pause to consider that question (53) See the discussion by Windeyer, Lectures on Legal History, 2nd ed. (1949), pp 332-333; H.V. Evatt, "The Legal Foundations of New South Wales", (1938) 11 Australian Law Journal 409, at pp 417-422; and Enid Campbell, "Prerogative Rule in New South Wales, 1788-1823", (1964) 50 Royal Australian Historical Society 161) In a settled colony in inhabited territory, the law of England was not merely the personal law of the English colonists; it became the law of the land, protecting and binding colonists and indigenous inhabitants alike and equally. Thus the theory which underpins the application of English law to the Colony of New South Wales is that English settlers brought with them the law of England and that, as the indigenous inhabitants were regarded as barbarous or unsettled and without a settled law, the law of England including the common law became the law of the Colony (so far as it was locally applicable) as though New South Wales were "an uninhabited country ... discovered and planted by English subjects" (54) See per Lord Watson in Cooper v. Stuart (1889) 14 App Cas, at p 291; and cf. Roberts-Wray, op cit, p 540. The common law thus became the common law of all subjects within the Colony who were equally entitled to the law's protection as subjects of the Crown (55) As the subjects of a conquered territory (Calvin's Case [1572] EngR 64; (1608) 7 Co Rep 1a, at p 6a (77 ER 377, at p 384)); Campbell v. Hall (1774) Lofft, at p 741 (98 ER, at p 895) and of a ceded territory (Donegani v. Donegani (1835) 3 Knapp 63, at p 85 (12 ER 571, at p 580)) became British subjects (Lyons (Mayor of) v. East India Co. (1836) 1 Moo PC, at pp 286-287 (12 ER, at p 823); 1 Moo Ind App 175, at pp 286-187 (18 ER 66, at pp 108-109)), a fortiori the subjects of a settled territory must have acquired that status. And see Reg. v. Wedge (1976) 1 NSWLR 581, at p 585. Its introduction to New South Wales was confirmed by s.24 of the Australian Courts Act 1828 (Imp) (56) 9 GEO IV c.83. As the laws of New South Wales became the laws of Queensland on separation of the two Colonies in 1859 (57) Letters Patent of 6 June 1859: see p 11 above and, by the terms of the Queensland Coast Islands Act 1879 and the Governor's Proclamation, the Murray Islands on annexation became subject to the laws in force in Queensland, the common law became the basic law of the Murray Islands. Thus the Meriam people in 1879, like Australian Aborigines in earlier times, became British subjects owing allegiance to the Imperial Sovereign entitled to such rights and privileges and subject to such liabilities as the common law and applicable statutes provided. And this is so irrespective of the fact that, in 1879, the Meriam people were settled on their land, the gardens were being tilled, the Mamoose and the London Missionary Society were keeping the peace and a form of justice was being administered.

The basis of the theory of universal and absolute Crown ownership

37. It is one thing for our contemporary law to accept that the laws of England, so far as applicable, became the laws of New South Wales and of the other Australian colonies. It is anothER thing for our contemporary law to accept that, when the common law of England became the common law of the several colonies, the theory which was advanced to support the introduction of the common law of England accords with our present knowledge and appreciation of the facts. When it was sought to apply

Lord Watson's assumption in Cooper v. Stuart that the colony of New South Wales was "without settled inhabitants or settled law" to Aboriginal society in the Northern Territory, the assumption proved false. In Milirrpum v. Nabalco Pty. Ltd. Blackburn J. said (58) (1971) 17 FLR 141, at p 267:

> "The evidence shows a subtle and elaborate system highly adapted to the country in which the people led their lives, which provided a stable order of society and was remarkably free from the vagaries of personal whim or influence. If ever a system could be called 'a government of laws, and not of men', it is that shown in the evidence before me."

Faced with a contradiction between the authority of the Privy Council and the evidence, his Honour held that the class to which a colony belonged was a question of law, not of fact (59) ibid., at p 244; McNeil, Common Law Aboriginal Title, (1989), p 292, fn.207; Lester, The Territorial Rights of the Inuit of the Canadian Northwest Territories: A Legal Argument, (unpublished doctoral thesis (1981)), pp 100-107, 155-157:

> "Whether or not the Australian aboriginals living in any part of New South Wales had in 1788 a system of law which was beyond the powers of the settlers at that time to perceive or comprehend, it is beyond the power of this Court to decide otherwise than that New South Wales came into the category of a settled or occupied colony."

38. The facts as we know them today do not fit the "absence of law" or "barbarian" theory underpinning the colonial reception of the common law of England. That being so, there is no warrant for applying in these times rules of the English common law which were the product of that theory. It would be a curious doctrine to propound today that, when the benefit of the common law was first extended to Her Majesty's indigenous subjects in the Antipodes, its first fruits were to strip them of their right to occupy their ancestral lands. Yet the supposedly barbarian nature of indigenous people provided the common law of England with the justification for denying them their traditional rights and interests in land, as Lord SumnER speaking for the Privy Council said in In re Southern Rhodesia (60) (1919) AC 211, at pp 233-234:

> " The estimation of the rights of aboriginal tribes is always inherently difficult. Some tribes are so low in the scale of social organization that their usages and conceptions of rights and duties are not to be reconciled with the institutions or the legal ideas of civilized society. Such a gulf cannot be bridged. It would be idle to impute to such people some shadow of the rights known to our law and then to transmute it into the substance of transferable rights of property as we know them."

39. As the indigenous inhabitants of a settled colony were regarded as "low in the scale of social organization", they and their occupancy of colonial land were ignored in considering the title to land in a settled colony. Ignoring those rights and interests, the Crown's sovereignty over a territory which had been acquired under the enlarged notion of terra nullius was equated with Crown ownership of the lands therein, because, as Stephen C.J. said, there was "no other proprietor of such lands". Thus, a Select Committee on Aborigines reported in 1837 to the House of Commons that the state of Australian Aborigines was "barbarous" and "so entirely destitute ... of the rudest forms of civil polity, that their

claims, whether as sovereigns or proprietors of the soil, have been utterly disregarded" (61) Cited by Lindley, op cit, at p 41. The theory that the indigenous inhabitants of a "settled" colony had no proprietary interest in the land thus depended on a discriminatory denigration of indigenous inhabitants, their social organization and customs. As the basis of the theory is false in fact and unacceptable in our society, there is a choice of legal principle to be made in the present case. This Court can either apply the existing authorities and proceed to inquire whether the Meriam people are higher "in the scale of social organization" than the Australian Aborigines whose claims were "utterly disregarded" by the existing authorities or the Court can overrule the existing authorities, discarding the distinction between inhabited colonies that were terra nullius and those which were not.

40. The theory of terra nullius has been critically examined in recent times by the International Court of Justice in its Advisory Opinion on Western Sahara (62) (1975) ICJR, at p 39. There the majority judgment read:

> "'Occupation' being legally an original means of peaceably acquiring sovereignty over territory otherwise than by cession or succession, it was a cardinal condition of a valid 'occupation' that the territory should be terra nullius - a territory belonging to no-one - at the time of the act alleged to constitute the 'occupation' (cf. Legal Status of Eastern Greenland, P.C.I.J., Series A/B, No.53, pp 44 f. and 63 f.). In the view of the Court, therefore, a determination that Western Sahara was a 'terra nullius' at the time of colonization by Spain would be possible only if it were established that at that time the territory belonged to no-one in the sense that it was then open to acquisition through the legal process of 'occupation'.
> 80. Whatever differences of opinion there may have been among jurists, the State practice of the relevant period indicates that territories inhabited by tribes or peoples having a social and political organization were not regarded as terrae nullius. It shows that in the case of such territories the acquisition of sovereignty was not generally considered as effected unilaterally through 'occupation' of terra nullius by original title but through agreements concluded with local rulers. On occasion, it is true, the word 'occupation' was used in a non-technical sense denoting simply acquisition of sovereignty; but that did not signify that the acquisition of sovereignty through such agreements with authorities of the country was regarded as an 'occupation' of a "terra nullius" in the proper sense of these terms. On the contrary, such agreements with local rulers, whether or not considered as an actual 'cession' of the territory, were regarded as derivative roots of title, and not original titles obtained by occupation of terrae nullius."

Judge Ammoun, Vice-President of the Court, delivered a separate opinion in which he commended as penetrating the views expressed on behalf of the Republic of Zaire which he restated as follows (63) ibid., at pp 85-86:

" Mr. Bayona-Ba-Meya, goes on to dismiss the materialistic concept of terra nullius, which led to this dismemberment of Africa following the Berlin Conference of 1885. Mr. Bayona-Ba-Meya substitutes for this a spiritual notion: the ancestral tie between the land, or 'mother nature', and the man who was born therefrom, remains attached thereto, and must one day return thither to be united with his ancestors. This link is the basis of the ownership of the soil, or better, of sovereignty. This amounts to a denial of the very concept of terra nullius in the sense of a land which is capable of being appropriated by someone who is not born therefrom. It is a condemnation of the modern concept, as defined by Pasquale Fiore, which regards as terrae nullius territories inhabited by populations whose civilization, in the sense of the public law of Europe, is backward, and whose political organization is not conceived according to Western norms.
One might go still further in analysing the statement of the representative of Zaire so as to say that he would exclude from the concept of terra nullius any inhabited territory. His view thus agrees with that of Vattel, who defined terra nullius as a land empty of inhabitants."

He concluded (64) ibid., at p 86 that "the concept of terra nullius, employed at all periods, to the brink of the twentieth century, to justify conquest and colonization, stands condemned." The court was unanimously of the opinion that Western Sahara at the time of colonization by Spain in 1884 was not a territory belonging to no-one (terra nullius).

41. If the international law notion that inhabited land may be classified as terra nullius no longer commands general support, the doctrines of the common law which depend on the notion that native peoples may be "so low in the scale of social organization" that it is "idle to impute to such people some shadow of the rights known to our law" (65) In re Southern Rhodesia (1919) AC, at pp 233-234 can hardly be retained. If it were permissible in past centuries to keep the common law in step with international law, it is imperative in today's world that the common law should neither be nor be seen to be frozen in an age of racial discrimination.

42. The fiction by which the rights and interests of indigenous inhabitants in land were treated as non-existent was justified by a policy which has no place in the contemporary law of this country. The policy appears explicitly in the judgment of the Privy Council in In re Southern Rhodesia in rejecting an argument (66) ibid., at p 232 that the native people "were the owners of the unalienated lands long before either the Company or the Crown became concerned with them and from time immemorial ... and that the unalienated lands belonged to them still". Their Lordships replied (67) ibid., at p 234-

"the maintenance of their rights was fatally inconsistent with white settlement of the country, and yet white settlement was the object of the whole forward movement, pioneered by the Company and controlled by the Crown, and that object was successfully accomplished, with the result that the aboriginal system gave place to another prescribed by the Order in Council".

Whatever the justification advanced in earlier days for refusing to recognize the rights and interests in land of the indigenous inhabitants of settled colonies, an unjust and discriminatory doctrine of that kind can no longer be accepted. The expectations of the international community accord in this respect with the contemporary values of the Australian people. The opening up of international remedies to individuals pursuant to Australia's accession to the Optional Protocol to the International Covenant on Civil and Political Rights (68) See Communication 78/1980 in Selected Decisions of the Human Rights Committee under the Optional Protocol, vol.2, p 23 brings to bear on the common law the powerful influence of the Covenant and the international standards it imports. The common law does not necessarily conform with international law, but international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights. A common law doctrine founded on unjust discrimination in the enjoyment of civil and political rights demands reconsideration. It is contrary both to international standards and to the fundamental values of our common law to entrench a discriminatory rule which, because of the supposed position on the scale of social organization of the indigenous inhabitants of a settled colony, denies them a right to occupy their traditional lands. It was such a rule which evoked from Deane J. (69) Gerhardy v. Brown [1985] HCA 11; (1985) 159 CLR 70, at p 149 the criticism that -

> "the common law of this land has still not reached the stage of retreat from injustice which the law of Illinois and Virginia had reached in 1823 when Marshall C.J., in Johnson v. McIntosh (70) (1823) 8 wheat, at p 574 (21 US , at p 253), accepted that, subject to the assertion of ultimate dominion (including the power to convey title by grant) by the State, the 'original inhabitants' should be recognized as having 'a legal as well as just claim' to retain the occupancy of their traditional lands".

43. However, recognition by our common law of the rights and interests in land of the indigenous inhabitants of a settled colony would be precluded if the recognition were to fracture a skeletal principle of our legal system. The proposition that the Crown became the beneficial owner of all colonial land on first settlement has been supported by more than a disregard of indigenous rights and interests. It is necessary to consider these other reasons for past disregard of indigenous rights and interests and then to return to a consideration of the question whether and in what way our contemporary common law recognizes such rights and interests in land.

Crown title to colonies and Crown ownership of colonial land distinguished

44. In the trilogy of cases cited earlier in this judgment (71) Supra, pp 12-15: Attorney-General v. Brown; Randwick Corporation v. Rutledge; the Seas and Submerged Lands Case, it was said that colonial land became a royal demesne - that is, that the Crown became the absolute beneficial owner in possession of all colonial land - on first settlement, the event which conferred sovereignty on the Imperial Crown. Curiously, in Williams v. Attorney-General for New South Wales (72) [1913] HCA 33; (1913) 16 CLR 404, at p 439, Isaacs J. said it was unquestionable that -

> "when Governor Phillip received his first Commission from King George III. on 12th October 1786, the whole of the lands of Australia were already in law the property of the King of England".

With respect to Isaacs J., that proposition is wholly unsupported. Roberts-Wray comments (73) Commonwealth and Colonial Law op cit, p 631 that the proposition is "startling and, indeed, incredible". We need not be concerned with the date on which sovereignty over the Australian colonies was acquired

by the Crown but we are concerned with the proposition that on, and by reason of, the acquisition of sovereignty, the Crown acquired all colonial land as a royal demesne.

45. There is a distinction between the Crown's title to a colony and the Crown's ownership of land in the colony, as Roberts-Wray points out (74) ibid., p 625:

> "If a country is part of Her Majesty's dominions, the sovereignty vested in her is of two kinds. The first is the power of government. The second is title to the country ...
> This ownership of the country is radically different from ownership of the land: the former can belong only to a sovereign, the latter to anyone. Title to land is not, per se, relevant to the constitutional status of a country; land may have become vested in the Queen, equally in a Protectorate or in a Colony, by conveyance or under statute ...
> The distinction between these two conceptions has, however, become blurred by the doctrine that the acquisition of sovereignty over a Colony, whether by settlement, cession or conquest, or even of jurisdiction in territory which remains outside the British dominions, imports Crown rights in, or in relation to, the land itself."

Similarly, Sir John Salmond distinguished the acquisition of territory from the Crown's acquisition of property (75) Jurisprudence, 7th ed. (1924), appendix "The Territory of the State", p 554:

> "The first conception pertains to the domain of public law, the second to that of private law. Territory is the subject-matter of the right of sovereignty or imperium while property is the subject-matter of the right of ownership or dominium. These two rights may or may not co-exist in the Crown in respect of the same area. Land may be held by the Crown as territory but not as property, or as property but not as territory, or in both rights at the same time. As property, though not as territory, land may be held by one state within the dominions of another."

Professor O'Connell in his work International Law (76) 2nd ed. (1970), at p 378, cited by Hall J. in Calder v. Attorney-General of British Columbia (1973) SCR.313, at pp 404-405; (1973) 34 DLR (3d) 145, at p 210 points to the distinction between acquisition of territory by act of State and the abolition of acquired rights:

> "This doctrine (of act of State), which was affirmed in several cases arising out of the acquisition of territory in Africa and India, has been misinterpreted to the effect that the substantive rights themselves have not survived the change."

The acquisition of territory is chiefly the province of international law; the acquisition of property is

chiefly the province of the common law. The distinction between the Crown's title to territory and the Crown's ownership of land within a territory is made as well by the common law as by international law. A.W.B. Simpson (77) A History of the Land Law, 2nd ed. (1986) distinguishes the land law rule in England that all land is held of the Crown from the notion that all land is owned by the Crown. Speaking of the mediaeval conception of materialism, he comments (78) ibid., p 47:

> "This attitude of mind also encouraged the rejection of any theory which would say that the lord 'owned' the land, and that the rights of tenants in the land were iura in re aliena. Such a theory would have led inevitably to saying that the King, who was ultimately lord of all land, was the 'owner' of all land.
> The lawyers never adopted the premise that the King owned all the land; such a dogma is of very modern appearance. It was sufficient for them to note that the King was lord, ultimately, of all the tenants in the realm, and that as lord he had many rights common to other lords (e.g. rights to escheats) and some peculiar to his position as supreme lord (e.g. rights to forfeitures)."

The general rule of the common law was that ownership could not be acquired by occupying land that was already occupied by another. As Blackstone pointed out (79) Commentaries, Bk.II, ch.1, p 8:

> "Occupancy is the thing by which the title was in fact originally gained; every man seizing such spots of ground as he found most agreeable to his own convenience, provided he found them unoccupied by any one else." (Emphasis added.)

46. It was only by fastening on the notion that a settled colony was terra nullius that it was possible to predicate of the Crown the acquisition of ownership of land in a colony already occupied by indigenous inhabitants. It was only on the hypothesis that there was nobody in occupation that it could be said that the Crown was the owner because there was no other. If that hypothesis be rejected, the notion that sovereignty carried ownership in its wake must be rejected too. Though the rejection of the notion of terra nullius clears away the fictional impediment to the recognition of indigenous rights and interests in colonial land, it would be impossible for the common law to recognize such rights and interests if the basic doctrines of the common law are inconsistent with their recognition.

47. A basic doctrine of the land law is the doctrine of tenure, to which Stephen C.J. referred in Attorney-General v. Brown, and it is a doctrine which could not be overturned without fracturing the skeleton which gives our land law its shape and consistency. It is derived from feudal origins.
The feudal basis of the proposition of absolute Crown ownership

48. The land law of England is based on the doctrine of tenure. In English legal theory, every parcel of land in England is held either mediately or immediately of the King who is the Lord Paramount; the term "tenure" is used to signify the relationship between tenant and lord (80) Attorney-General of Ontario v. Mercer (1883) LR 8 App Cas 767, at pp 771-772, not the relationship between tenant and land. The characteristic of feudalism "is not tenere terram, but tenere terram de X" (81) Pollock and Maitland, The History of English Law, 2nd ed. (1898, reprinted 1952), vol.1, p 234n. It is implicit in the relationship of tenure that both lord and tenant have an interest in the land: "The King had 'dominium directum', the subject 'dominium utile'" (82) ibid., p 773; Co Litt 16. Absent a "dominium directum" in the Crown, there

would be no foundation for a tenure arising on the making of a grant of land. When the Crown acquired territory outside England which was to be subject to the common law, there was a natural assumption that the doctrine of tenure should be the basis of the land law. Perhaps the assumption did not have to be made. After all, as Holdsworth observed (83) op cit, vol.ii, p 199, the universal application of the doctrine of tenure is a purely English phenomenon. And Pollock and Maitland may be correct in saying (84) op cit, vol.2, p 236; accord: Holdsworth, op cit, vol.ii, (1923), p 75 fn.8 that the notion of universal tenure "perhaps was possible only in a conquered country". In Scotland, the King was not Paramount Lord of all land: some allodial lands remained in the Orkney and Shetland Islands, though most land that had been held allodially became subject to feudal tenure (85) Bell, Lectures on Conveyancing, (Edinburgh, 1867), vol.1, ch I, pp 531-532; Stair, The Institutions of the Law of Scotland, 4th ed. (1826), pp 219, 222; Craigie, Scottish Law of Conveyancing, (Edinburgh, 1899), pp 27-28; Lord Advocate v. Balfour (1907) SC 1360, at p 1368-1369. However, the English view favoured a universal application of the doctrine of tenure (86) Pollock and Maitland, op cit, pp 232-233:

> " Every acre of English soil and every proprietary right therein have been brought within the compass of a single formula, which may be expressed thus: - Z tenet terram illam de ... domino Rege. The king himself holds land which is in every sense his own; no one else has any proprietary right in it; but if we leave out of account this royal demesne, then every acre of land is 'held of' the king. The person whom we may call its owner, the person who has the right to use and abuse the land, to cultivate it or leave it uncultivated, to keep all others off it, holds the land of the king either immediately or mediately."

49. It is arguable that universality of tenure is a rule depending on English history and that the rule is not reasonably applicable to the Australian colonies. The origin of the rule is to be found in a traditional belief that, at some time after the Norman Conquest, the King either owned beneficially and granted, or otherwise became the Paramount Lord of, all land in the Kingdom (87) Bacon's Abridgement, 6th ed. (1807), vol.V, "Prerogative", B,1. According to Digby's History of the Law of Real Property (88) (1897), p 34 William I succeeded to all rights over land held by the Anglo-Saxon kings; he acquired by operation of law the land of those who had resisted his conquest and a vast quantity of land was deemed to have been forfeited or surrendered to William and regranted by him. He may have become the proprietor of all land in England so that no allodial land remained. Or it may be, as Blackstone asserts, that in England, as in France, the allodial estates were surrendered into the king's hands and were granted back as feuds, the only difference being that in France the change "was effected gradually, by the consent of private persons; (the change) was done at once, all over England, by the common consent of the nation" (89) Commentaries, Bk II, ch.4, pp 50-51. But, whatever the fact, it is the fiction of royal grants that underlies the English rule. Blackstone says (90) ibid that -

> "it became a fundamental maxim, and necessary principle (though in reality a mere fiction) of our English tenures, 'that the king is the universal lord and original proprietor of all the lands in his kingdom; and that no man doth or can possess any part of it, but what has, mediately or immediately, been derived 'as a gift from him, to be held upon feodal services.' For this being the real case in pure, original, proper feuds, other nations who adopted this system were obliged to act upon the same supposition, as a substruction and foundation of their new polity,

though the fact was indeed far otherwise".

It is not surprising that the fiction that land granted by the Crown had been beneficially owned by the Crown was translated to the colonies and that Crown grants should be seen as the foundation of the doctrine of tenure which is an essential principle of our land law. It is far too late in the day to contemplate an allodial or other system of land ownership. Land in Australia which has been granted by the Crown is held on a tenure of some kind and the titles acquired under the accepted land law cannot be disturbed.

50. Accepting the doctrine of tenure, it was an essential postulate that the Crown have such a title to land as would invest the Sovereign with the character of Paramount Lord in respect of a tenure created by grant and would attract the incidents appropriate to the tenure, especially the Crown's right to escheat (91) Wright, Introduction to the Law of Tenures, 4th ed. (1792), p 5. The Crown was invested with the character of Paramount Lord in the colonies by attributing to the Crown a title, adapted from feudal theory, that was called a radical, ultimate or final title: see, for example, Amodu Tijani v. Secretary, Southern Nigeria (92) (1921) 2 AC 399, at pp 403, 404, 407; Nireaha Tamaki v. Baker (93) (1901) AC 561, at p 580; cf. Administration of Papua and New Guinea v. Daera Guba (94) (1973) 130 CLR 353, at pp 396-397. The Crown was treated as having the radical title to all the land in the territory over which the Crown acquired sovereignty. The radical title is a postulate of the doctrine of tenure and a concomitant of sovereignty. As a sovereign enjoys supreme legal authority in and over a territory, the sovereign has power to prescribe what parcels of land and what interests in those parcels should be enjoyed by others and what parcels of land should be kept as the sovereign's beneficial demesne.

51. By attributing to the Crown a radical title to all land within a territory over which the Crown has assumed sovereignty, the common law enabled the Crown, in exercise of its sovereign power, to grant an interest in land to be held of the Crown or to acquire land for the Crown's demesne. The notion of radical title enabled the Crown to become Paramount Lord of all who hold a tenure granted by the Crown and to become absolute beneficial owner of unalienated land required for the Crown's purposes. But it is not a corollary of the Crown's acquisition of a radical title to land in an occupied territory that the Crown acquired absolute beneficial ownership of that land to the exclusion of the indigenous inhabitants. If the land were desert and uninhabited, truly a terra nullius, the Crown would take an absolute beneficial title (an allodial title) to the land for the reason given by Stephen C.J. in Attorney-General v. Brown (95) See pp 13-14 above; (1847) 1 Legge, at pp 317-318: there would be no other proprietor. But if the land were occupied by the indigenous inhabitants and their rights and interests in the land are recognized by the common law, the radical title which is acquired with the acquisition of sovereignty cannot itself be taken to confer an absolute beneficial title to the occupied land. Nor is it necessary to the structure of our legal system to refuse recognition to the rights and interests in land of the indigenous inhabitants. The doctrine of tenure applies to every Crown grant of an interest in land, but not to rights and interests which do not owe their existence to a Crown grant. The English legal system accommodated the recognition of rights and interests derived from occupation of land in a territory over which sovereignty was acquired by conquest without the necessity of a Crown grant.

52. After the conquest of Ireland, it was held in The Case of Tanistry (96) (1608) Davis 28 (80 ER 516); 4th ed. Dublin (1762) English translation 78, at pp 110-111 that the Crown was not in actual possession of the land by virtue of the conquest and that -

> "a royal monarch (who) hath made a new conquest of a realm, although in fact he hath the lordship paramount of all the lands within such realm, so that these are all held of him, mediate vel immediate, and he hath also the possession of all the lands which he willeth actually to seise and retain

> in his own hands for his profit or pleasure, and may also by his grants distribute such portions as he pleaseth ... yet ... if such conqueror receiveth any of the natives or antient inhabitants into his protection and avoweth them for his subjects, and permitteth them to continue their possessions and to remain in his peace and allegiance, their heirs shall be adjudged in by good title without grant or confirmation of the conqueror, and shall enjoy their lands according to the rules of the law which the conqueror hath allowed or established, if they will submit themselves to it, and hold their lands according to the rules of it, and not otherwise."

Similarly, after the conquest of Wales, in Witrong and Blany (97) (1674) 3 Keb.401, at p 402 [1685] EngR 4051; [1685] EngR 4051; (84 ER 789, at p 789) and see McNeil, op cit, p 174 it was held that the inhabitants who had been left in possession of land needed no new grant to support their possession under the common law and they held their interests of the King without a new conveyance. In these cases, the courts were speaking of converting the surviving interests into an estate of a kind familiar to the common law, but there is no reason why the common law should not recognize novel interests in land which, not depending on Crown grant, are different from common law tenures. In Amodu Tijani (98) (1921) 2 AC, at p 403 Viscount Haldane, speaking for the Privy Council, referred to the variable nature of native title to land capable of recognition by the common law:

> "There is a tendency, operating at times unconsciously, to render (native) title conceptually in terms which are appropriate only to systems which have grown up under English law. But this tendency has to be held in check closely. As a rule, in the various systems of native jurisprudence throughout the Empire, there is no such full division between property and possession as English lawyers are familiar with. A very usual form of native title is that of a usufructuary right, which is a mere qualification of or burden on the radical or final title of the Sovereign where that exists. In such cases the title of the Sovereign is a pure legal estate, to which beneficial rights may or may not be attached. But this estate is qualified by a right of beneficial user which may not assume definite forms analogous to estates, or may, where it has assumed these, have derived them from the intrusion of the mere analogy of English jurisprudence."

And, in Administration of Papua and New Guinea v. Daera Guba (99) (1973) 130 CLR, at p 397; but note comment by McNeil, op cit, p 297, fn.237. Cf. the Indian title in Ontario under the Proclamation of 1763: St. Catherine's Milling and Lumber Company v. The Queen (1888) 14 App Cas 46 Barwick C.J. was able to say that the indigenous people of Papua New Guinea -

> "were secure in their usufructuary title to land, (but) the land came from the inception of the colony into the dominion of Her Majesty. That is to say, the ultimate title subject to the usufructuary title was vested in the Crown. Alienation of that usufructuary title to the Crown

completed the absolute fee simple in the Crown".

In Amodu Tijani, the Privy Council admitted the possibility of recognition not only of usufructuary rights but also of interests in land vested not in an individual or a number of identified individuals but in a community. Viscount Haldane observed(100) (1921) 2 AC, at pp 403-404:

> "The title, such as it is, may not be that of the individual, as in this country it nearly always is in some form, but may be that of a community. Such a community may have the possessory title to the common enjoyment of a usufruct, with customs under which its individual members are admitted to enjoyment, and even to a right of transmitting the individual enjoyment as members by assignment inter vivos or by succession. To ascertain how far this latter development of right has progressed involves the study of the history of the particular community and its usages in each case. Abstract principles fashioned a priori are of but little assistance, and are as often as not misleading."

Recognition of the radical title of the Crown is quite consistent with recognition of native title to land, for the radical title, without more, is merely a logical postulate required to support the doctrine of tenure (when the Crown has exercised its sovereign power to grant an interest in land) and to support the plenary title of the Crown (when the Crown has exercised its sovereign power to appropriate to itself ownership of parcels of land within the Crown's territory). Unless the sovereign power is exercised in one or other of those ways, there is no reason why land within the Crown's territory should not continue to be subject to native title. It is only the fallacy of equating sovereignty and beneficial ownership of land that gives rise to the notion that native title is extinguished by the acquisition of sovereignty.

53. If it be necessary to categorize an interest in land as proprietary in order that it survive a change in sovereignty, the interest possessed by a community that is in exclusive possession of land falls into that category. Whether or not land is owned by individual members of a community, a community which asserts and asserts effectively that none but its members has any right to occupy or use the land has an interest in the land that must be proprietary in nature: there is no other proprietor. It would be wrong, in my opinion, to point to the inalienability of land by that community and, by importing definitions of "property" which require alienability under the municipal laws of our society(101) See, for example, National Provincial Bank Ltd. v. Ainsworth [1965] UKHL 1; (1965) AC 1175, at pp 1247-1248, to deny that the indigenous people owned their land. The ownership of land within a territory in the exclusive occupation of a people must be vested in that people: land is susceptible of ownership, and there are no other owners. True it is that land in exclusive possession of an indigenous people is not, in any private law sense, alienable property for the laws and customs of an indigenous people do not generally contemplate the alienation of the people's traditional land. But the common law has asserted that, if the Crown should acquire sovereignty over that land, the new sovereign may extinguish the indigenous people's interest in the land and create proprietary rights in its place and it would be curious if, in place of interests that were classified as non-proprietary, proprietary rights could be created. Where a proprietary title capable of recognition by the common law is found to have been possessed by a community in occupation of a territory, there is no reason why that title should not be recognized as a burden on the Crown's radical title when the Crown acquires sovereignty over that territory. The fact that individual members of the community, like the individual plaintiff Aborigines in Milirrpum(102) (1971) 17 FLR, at p 272, enjoy only usufructuary rights that are not proprietary in nature is no impediment to the recognition of a proprietary community title. Indeed, it is not possible to admit traditional usufructuary

rights without admitting a traditional proprietary community title. There may be difficulties of proof of boundaries or of membership of the community or of representatives of the community which was in exclusive possession, but those difficulties afford no reason for denying the existence of a proprietary community title capable of recognition by the common law. That being so, there is no impediment to the recognition of individual non-proprietary rights that are derived from the community's laws and customs and are dependent on the community title. A fortiori, there can be no impediment to the recognition of individual proprietary rights.

54. Once it is accepted that indigenous inhabitants in occupation of a territory when sovereignty is acquired by the Crown are capable of enjoying - whether in community, as a group or as individuals - proprietary interests in land, the rights and interests in the land which they had theretofore enjoyed under the customs of their community are seen to be a burden on the radical title which the Crown acquires. The notion that feudal principle dictates that the land in a settled colony be taken to be a royal demesne upon the Crown's acquisition of sovereignty is mistaken. However, that was not the only basis advanced to establish the proposition of absolute Crown ownership and the alternative bases must next be considered.
The "patrimony of the nation" basis of the proposition of absolute Crown ownership

55. In Williams v. Attorney-General for New South Wales(103) (1913) 16 CLR, at pp 449-450 and in The Commonwealth v. Tasmania. The Tasmanian Dam Case(104) [1983] HCA 21; (1983) 158 CLR 1, at pp 208-212, there are references to the importance of the revenue derived from exercise of the power of sale of colonial land. The funds derived from sales of colonial land were applied to defray the cost of carrying on colonial government and to subsidize emigration to the Australian Colonies. Further, the power to reserve and dedicate land for public purposes was important to the government and development of the Colonies as it remains important to the government and development of the Commonwealth and the States and Territories. Therefore it is right to describe the powers which the Crown - at first the Imperial Crown and later the Crown in right of the respective Colonies - exercised with respect to colonial lands as powers conferred for the benefit of the nation as a whole(105) Reg. v. Symonds (1847) NZPCC 387, at p 395, but it does not follow that those were proprietary as distinct from political powers. Nor does it follow that a combination of radical title to land and a power of sale or dedication of that land was not a valuable asset of the Colonies. It can be acknowledged that the nation obtained its patrimony by sales and dedications of land which dispossessed its indigenous citizens and that, to the extent that the patrimony has been realized, the rights and interests of the indigenous citizens in land have been extinguished. But that is not to say that the patrimony was realized by sales and dedications of land owned absolutely by the Crown. What the Crown acquired was a radical title to land and a sovereign political power over land, the sum of which is not tantamount to absolute ownership of land. Until recent times, the political power to dispose of land in disregard of native title was exercised so as to expand the radical title of the Crown to absolute ownership but, where that has not occurred, there is no reason to deny the law's protection to the descendants of indigenous citizens who can establish their entitlement to rights and interests which survived the Crown's acquisition of sovereignty. Those are rights and interests which may now claim the protection of s.10(1) of the Racial Discrimination Act 1975 (Cth) which "clothes the holders of traditional native title who are of the native ethnic group with the same immunity from legislative interference with their enjoyment of their human right to own and inherit property as it clothes other persons in the community": Mabo v. Queensland(106) (1988) 166 CLR, at p 219.
The Royal Prerogative basis of the proposition of absolute Crown ownership

56. Mr Justice Evatt described ownership of vacant lands in a new colony as one of the proprietary prerogatives(107) See The Attorney-General for New South Wales v. Butterworth and Co. (Australia) Ltd. (1938) 38 SR (NSW) 195, at pp 246-247 . But, as that author's lately published work on The Royal Prerogative shows(108) (1987), at pp 102-103, there was no judicial consensus as to whether title to ownership of the vacant lands in the Australian Colonies was vested in the King as representing the supreme executive power of the British Empire or in the Crown in right of the respective Colonies. The

management and control of the waste lands of the Crown were passed by Imperial legislation to the respective Colonial Governments as a transfer of political power or governmental function not as a matter of title(109) Williams v. Attorney-General for New South Wales (1913) 16 CLR, at pp 453, 456. The suggestion that, after the passing of these powers to colonial governments the Crown commenced to hold Crown lands "in right of the colony"(110) Per Stephen J. in the Seas and Submerged Lands Case (1975) 135 CLR, at p 439; and note per O'Connor J. in The State of South Australia v. The State of Victoria [1911] HCA 17; (1911) 12 CLR 667, at pp 710-711 and held those lands in absolute ownership, involves the notion that ownership resided in the Executive Government whose legislature was vested with power to enact laws governing the management and control of colonial waste lands. But the Imperial Parliament retained the sovereign - that is, the ultimate - legislative power over colonial affairs, at least until the adoption of the Statute of Westminster(111) Madzimbamuto v. Lardner-Burke [1968] UKPC 2; (1969) 1 AC 645, at p 722 and it is hardly to be supposed that absolute ownership of colonial land was vested in colonial governments while the ultimate legislative power over that land was retained by the Imperial Parliament. However, if the Crown's title is merely a radical title - no more than a postulate to support the exercise of sovereign power within the familiar feudal framework of the common law - the problem of the vesting of the absolute beneficial ownership of colonial land does not arise: absolute and beneficial Crown ownership can be acquired, if at all, by an exercise of the appropriate sovereign power.

57. As none of the grounds advanced for attributing to the Crown an universal and absolute ownership of colonial land is acceptable, we must now turn to consider a further obstacle advanced against the survival of the rights and interests of indigenous inhabitants on the Crown's acquisition of sovereignty.

The need for recognition by the Crown of native title

58. The defendant contests the view that the common law recognizes the possession of rights and interests in land by indigenous inhabitants of British colonies and submits that, by the common law governing colonization, pre-existing customary rights and interests in land are abolished upon colonization of inhabited territory, unless expressly recognized by the new sovereign. There is a formidable body of authority, mostly cases relating to Indian colonies created by cession, to support this submission(112) Secretary of State for India v. Bai Rajbai (1915) LR 42 Ind App 229, at pp 237, 238-239; Vajesingji Joravarsingji v. Secretary of State for India (1924) LR 51 Ind App 357, at pp 360, 361; Secretary of State for India v. Sardar Rustam Khan (1941) AC 356, at pp 370-372. Thus Lord Dunedin's judgment in Vajesingji Joravarsingji v. Secretary of State for India contains the following oft-cited passage(113) (1924) LR 51 Ind App, at p 360:

> "But a summary of the matter is this: when a territory is acquired by a sovereign state for the first time that is an act of state. It matters not how the acquisition has been brought about. It may be by conquest, it may be by cession following on treaty, it may be by occupation of territory hitherto unoccupied by a recognized ruler. In all cases the result is the same. Any inhabitant of the territory can make good in the municipal Courts established by the new sovereign only such rights as that sovereign has, through his officers, recognized. Such rights as he had under the rule of predecessors avail him nothing. Nay more, even if in a treaty of cession it is stipulated that certain inhabitants should enjoy certain rights, that does not give a title to those inhabitants to enforce these stipulations in the municipal Courts."

59. The proposition that pre-existing rights and interests in land must be established, if at all, under the

new legal system introduced on an acquisition of sovereignty is axiomatic, and the proposition that treaties do not create rights enforceable in municipal courts is well established(114) Cook v. Sprigg (1899) AC 572, at pp 578-579; Winfat Ltd. v. Attorney-General (1985) AC 733, at p 746. However, the relevant question is whether the rights and interests in land derived from the old regime survive the acquisition of sovereignty or do they achieve recognition only upon an express act of recognition by the new sovereign? Lord Dunedin's view in Vajesingji Joravarsingji(115) (1924) LR 51 Ind App, at p 361 was that recognition by the sovereign of rights and interests possessed under the old regime was a condition of their recognition by the common law:

> "The moment that cession is admitted the appellants necessarily become petitioners and have the onus cast on them of showing the acts of acknowledgment, which give them the right they wish to be declared."

Presumably, until the relevant "acts of acknowledgment" occur, the Crown would be the absolute owner of private property but, when those acts occur, the rights and interests acknowledged would revest in their erstwhile possessor. One might think that the consequence of such a rule would be to create or compound chaos. Of course, if the Crown were to confiscate private property as an act of State(116) As in Secretary of State in Council of India v. Kamachee Boye Sahaba [1859] EngR 837; [1859] EngR 837; (1859) 7 Moo Ind App 476 (19 ER 388); but cf. Attorney-General v. Nissan [1969] UKHL 3; (1970) AC 179, at p 227, and Burmah Oil Co. Ltd. v. Lord Advocate [1964] UKHL 6; (1965) AC 75 in acquiring sovereignty of a territory or if the Crown were to extinguish private property pursuant to a law having effect in the territory(117) As in Winfat Ltd. v. Attorney-General (1985) AC 733, thereafter no recognition of the rights and interests which had existed under the old regime would be possible. In either of those events, however, the loss of the rights or interests possessed under the old regime is attributable to the action of the Crown, not to an absence of an act of recognition of those rights or interests. Those cases apart, Lord Dunedin's view that the rights and interests in land possessed by the inhabitants of a territory when the Crown acquires sovereignty are lost unless the Crown acts to acknowledge those rights is not in accord with the weight of authority. For example, Lord Sumner in In re Southern Rhodesia(118) (1919) AC, at p 233 understood the true rule as to the survival of private proprietary rights on conquest to be that -

> "it is to be presumed, in the absence of express confiscation or of subsequent exproprietary legislation, that the conqueror has respected them and forborne to diminish or modify them".

This view accords with the old authorities of The Case of Tanistry and Witrong and Blany(119) Supra, pp 37-38, earlier mentioned. Again, Lord Dunedin's view does not accord with the rule stated by Viscount Haldane in Amodu Tijani(120) (1921) 2 AC, at p 407:

> "A mere change in sovereignty is not to be presumed as meant to disturb rights of private owners; and the general terms of a cession are prima facie to be construed accordingly."

His Lordship does not limit the generality of the first sentence to acquisitions by cession; rather, he appears to be construing the terms of a cession in the light of the general principle by which private proprietary rights survive a change in sovereignty by whatever means. Despite his judgment in Vajesingji Joravarsingji, Viscount Dunedin subsequently accepted(121) In Sakariyawo Oshodi v. Moriamo Dakolo (1930) AC 667, at p 668 that the decision in Amodu Tijani laid down that the cession of Lagos in 1861 "did not affect the character of the private native rights". As Viscount Haldane's statement of the rule was limited neither to the construction of a treaty of cession nor to the cession of Lagos, must it not be taken

as the general rule of the common law? Again Lord Denning, speaking for the Privy Council in Adeyinka Oyekan v. Musendiku Adele(122) (1957) 1 WLR 876, at p 880; (1957) 2 All ER 785, at p 788, said:

> "In inquiring ... what rights are recognized, there is one guiding principle. It is this: The courts will assume that the British Crown intends that the rights of property of the inhabitants are to be fully respected. Whilst, therefore, the British Crown, as Sovereign, can make laws enabling it compulsorily to acquire land for public purposes, it will see that proper compensation is awarded to every one of the inhabitants who has by native law an interest in it: and the courts will declare the inhabitants entitled to compensation according to their interests, even though those interests are of a kind unknown to English law".

We are not concerned here with compensation for expropriation but we are concerned with the survival of private rights and interests in land and their liability to be extinguished by action of the Crown. The rule in Amodu Tijani was followed by the Privy Council in Sobhuza II. v. Miller(123) (1926) AC, at p 525 where the title of an indigenous community, which their Lordships thought to be generally usufructuary in character, was held to survive as "a mere qualification of a burden on the radical or final title of whoever is sovereign", capable of being extinguished "by the action of a paramount power which assumes possession or the entire control of land."

60. In Calder v. Attorney-General of British Columbia(124) (1973) SCR, at p 416; contra per Judson J. at pp 328-330; (1973) 34 DLR (3d), at p 218; contra per Judson J. at pp 156, 157 Hall J. rejected as "wholly wrong" "the proposition that after conquest or discovery the native peoples have no rights at all except those subsequently granted or recognized by the conqueror or discoverer".

61. The preferable rule, supported by the authorities cited, is that a mere change in sovereignty does not extinguish native title to land. (The term "native title" conveniently describes the interests and rights of indigenous inhabitants in land, whether communal, group or individual, possessed under the traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants.) The preferable rule equates the indigenous inhabitants of a settled colony with the inhabitants of a conquered colony in respect of their rights and interests in land and recognizes in the indigenous inhabitants of a settled colony the rights and interests recognized by the Privy Council in In re Southern Rhodesia as surviving to the benefit of the residents of a conquered colony.

62. If native title survives the Crown's acquisition of sovereignty as, in my view, it does, it is unnecessary to examine the alternative arguments advanced to support the rights and interests of the Meriam people to their traditional land. One argument raised the presumption of a Crown grant arising from the Meriam people's possession of the Murray Islands from a time before annexation; another was the existence of a title arising after annexation in accordance with a supposed local legal custom under the common law whereby the Meriam people were said to be entitled to possess the Murray Islands. There are substantial difficulties in the way of accepting either of these arguments, but it is unnecessary to pursue them. It is sufficient to state that, in my opinion, the common law of Australia rejects the notion that, when the Crown acquired sovereignty over territory which is now part of Australia it thereby acquired the absolute beneficial ownership of the land therein, and accepts that the antecedent rights and interests in land possessed by the indigenous inhabitants of the territory survived the change in sovereignty. Those antecedent rights and interests thus constitute a burden on the radical title of the Crown.

63. It must be acknowledged that, to state the common law in this way involves the overruling of cases which have held the contrary. To maintain the authority of those cases would destroy the equality of all Australian citizens before the law. The common law of this country would perpetuate injustice if it were to continue to embrace the enlarged notion of terra nullius and to persist in characterizing the indigenous inhabitants of the Australian colonies as people too low in the scale of social organization to be acknowledged as possessing rights and interests in land. Moreover, to reject the theory that the Crown acquired absolute beneficial ownership of land is to bring the law into conformity with Australian history. The dispossession of the indigenous inhabitants of Australia was not worked by a transfer of beneficial ownership when sovereignty was acquired by the Crown, but by the recurrent exercise of a paramount power to exclude the indigenous inhabitants from their traditional lands as colonial settlement expanded and land was granted to the colonists. Dispossession is attributable not to a failure of native title to survive the acquisition of sovereignty, but to its subsequent extinction by a paramount power. Before examining the power to extinguish native title, it is necessary to say something about the nature and incidents of the native title which, surviving the Crown's acquisition of sovereignty, burdens the Crown's radical title.

The nature and incidents of native title

64. Native title has its origin in and is given its content by the traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants of a territory. The nature and incidents of native title must be ascertained as a matter of fact by reference to those laws and customs. The ascertainment may present a problem of considerable difficulty, as Moynihan J. perceived in the present case. It is a problem that did not arise in the case of a settled colony so long as the fictions were maintained that customary rights could not be reconciled "with the institutions or the legal ideas of civilized society"(125) In re Southern Rhodesia (1919) AC, at p 233, that there was no law before the arrival of the British colonists in a settled colony and that there was no sovereign law-maker in the territory of a settled colony before sovereignty was acquired by the Crown. These fictions denied the possibility of a native title recognized by our laws. But once it is acknowledged that an inhabited territory which became a settled colony was no more a legal desert than it was "desert uninhabited" in fact, it is necessary to ascertain by evidence the nature and incidents of native title. Though these are matters of fact, some general propositions about native title can be stated without reference to evidence.

65. First, unless there are pre-existing laws of a territory over which the Crown acquires sovereignty which provide for the alienation of interests in land to strangers, the rights and interests which constitute a native title can be possessed only by the indigenous inhabitants and their descendants. Native title, though recognized by the common law, is not an institution of the common law and is not alienable by the common law. Its alienability is dependent on the laws from which it is derived. If alienation of a right or interest in land is a mere matter of the custom observed by the indigenous inhabitants, not provided for by law enforced by a sovereign power, there is no machinery which can enforce the rights of the alienee. The common law cannot enforce as a proprietary interest the rights of a putative alienee whose title is not created either under a law which was enforceable against the putative alienor at the time of the alienation and thereafter until the change of sovereignty or under the common law. And, subject to an important qualification, the only title dependent on custom which the common law will recognize is one which is consistent with the common law. Thus, in The Case of Tanistry, the Irish custom of tanistry was held to be void because it was founded in violence and because the vesting of title under the custom was uncertain(126) (1608) Davis (80 ER); 4th ed. Dublin (1762) English translation, at pp 94-99. The inconsistency that the court perceived between the custom of tanistry known to the Brehon law of Ireland and the common law precluded the recognition of the custom by the common law. At that stage in its development, the common law was too rigid to admit recognition of a native title based on other laws or customs, but that rigidity has been relaxed, at least since the decision of the Privy Council in Amodu Tijani. The general principle that the common law will recognize a customary title only if it be consistent with the common law is subject to an exception in favour of traditional native title.

66. Of course, since European settlement of Australia, many clans or groups of indigenous people have been physically separated from their traditional land and have lost their connexion with it. But that is not the universal position. It is clearly not the position of the Meriam people. Where a clan or group has continued to acknowledge the laws and (so far as practicable) to observe the customs based on the traditions of that clan or group, whereby their traditional connexion with the land has been substantially maintained, the traditional community title of that clan or group can be said to remain in existence. The common law can, by reference to the traditional laws and customs of an indigenous people, identify and protect the native rights and interests to which they give rise. However, when the tide of history has washed away any real acknowledgment of traditional law and any real observance of traditional customs, the foundation of native title has disappeared. A native title which has ceased with the abandoning of laws and customs based on tradition cannot be revived for contemporary recognition. Australian law can protect the interests of members of an indigenous clan or group, whether communally or individually, only in conformity with the traditional laws and customs of the people to whom the clan or group belongs and only where members of the clan or group acknowledge those laws and observe those customs (so far as it is practicable to do so). Once traditional native title expires, the Crown's radical title expands to a full beneficial title, for then there is no other proprietor than the Crown.

67. It follows that a right or interest possessed as a native title cannot be acquired from an indigenous people by one who, not being a member of the indigenous people, does not acknowledge their laws and observe their customs; nor can such a right or interest be acquired by a clan, group or member of the indigenous people unless the acquisition is consistent with the laws and customs of that people. Such a right or interest can be acquired outside those laws and customs only by the Crown(127) This result has been reached in other jurisdictions, though for different reasons: see Reg. v. Symonds (1847) NZPCC , at p 390; Johnson v. McIntosh (1823) 8 wheat, at p 586 (21 US , at p 259); St. Catherine's Milling and Lumber Co. v. The Queen (1887) 13 SCR 577, at p 599. Once the Crown acquires sovereignty and the common law becomes the law of the territory, the Crown's sovereignty over all land in the territory carries the capacity to accept a surrender of native title. The native title may be surrendered on purchase or surrendered voluntarily, whereupon the Crown's radical title is expanded to absolute ownership, a plenum dominium, for there is then no other owner(128) St. Catherine's Milling and Lumber Co. v. The Queen (1888) 14 App Cas, at p 55. If native title were surrendered to the Crown in expectation of a grant of a tenure to the indigenous title holders, there may be a fiduciary duty on the Crown to exercise its discretionary power to grant a tenure in land so as to satisfy the expectation(129) See Guerin v. The Queen (1984) 13 DLR (4th) 321, at pp 334, 339, 342-343, 356-357, 360-361, but it is unnecessary to consider the existence or extent of such a fiduciary duty in this case. Here, the fact is that strangers were not allowed to settle on the Murray Islands and, even after annexation in 1879, strangers who were living on the Islands were deported. The Meriam people asserted an exclusive right to occupy the Murray Islands and, as a community, held a proprietary interest in the Islands. They have maintained their identity as a people and they observe customs which are traditionally based. There was a possible alienation of some kind of interest in 2 acres to the London Missionary Society prior to annexation but it is unnecessary to consider whether that land was alienated by Meriam law or whether the alienation was sanctioned by custom alone. As we shall see, native title to that land was lost to the Meriam people in any event on the grant of a lease by the Crown in 1882 or by its subsequent renewal.

68. Secondly, native title, being recognized by the common law (though not as a common law tenure), may be protected by such legal or equitable remedies as are appropriate to the particular rights and interests established by the evidence, whether proprietary or personal and usufructuary in nature and whether possessed by a community, a group or an individual. The incidents of a particular native title relating to inheritance, the transmission or acquisition of rights and interests on death or marriage, the transfer of rights and interests in land and the grouping of persons to possess rights and interests in land are matters to be determined by the laws and customs of the indigenous inhabitants, provided those laws and customs are not so repugnant to natural justice, equity and good conscience that judicial sanctions

under the new regime must be withheld: Idewu Inasa v. Oshodi(130) (1934) AC 99, at p 105. Of course in time the laws and customs of any people will change and the rights and interests of the members of the people among themselves will change too. But so long as the people remain as an identifiable community, the members of whom are identified by one another as members of that community living under its laws and customs, the communal native title survives to be enjoyed by the members according to the rights and interests to which they are respectively entitled under the traditionally based laws and customs, as currently acknowledged and observed. Here, the Meriam people have maintained their own identity and their own customs. The Murray Islands clearly remain their home country. Their land disputes have been dealt with over the years by the Island Court in accordance with the customs of the Meriam people.

69. Thirdly, where an indigenous people (including a clan or group), as a community, are in possession or are entitled to possession of land under a proprietary native title, their possession may be protected or their entitlement to possession may be enforced by a representative action brought on behalf of the people or by a sub-group or individual who sues to protect or enforce rights or interests which are dependent on the communal native title. Those rights and interests are, so to speak, carved out of the communal native title. A sub-group or individual asserting a native title dependent on a communal native title has a sufficient interest to sue to enforce or protect the communal title(131) Australian Conservation Foundation v. The Commonwealth (1980) 146 CLR 493, at pp 530-531, 537-539, 547-548; Onus v. Alcoa of Australia Ltd. [1981] HCA 50; (1981) 149 CLR 27, at pp 35-36, 41-42, 46, 51, 62, 74-75. A communal native title enures for the benefit of the community as a whole and for the sub-groups and individuals within it who have particular rights and interests in the community's lands.

70. The recognition of the rights and interests of a sub-group or individual dependent on a communal native title is not precluded by an absence of a communal law to determine a point in contest between rival claimants. By custom, such a point may have to be settled by community consensus or in some other manner prescribed by custom. A court may have to act on evidence which lacks specificity in determining a question of that kind. That is statutorily recognized in the case of the Murray Islands. The jurisdiction conferred on the Island Court by s.41(2)(b) of the Community Services (Torres Strait) Act 1984-1990 (Q.) includes a jurisdiction which must be exercised in accordance with the customs of the Meriam people. The Act provides -

> "An Island Court has jurisdiction to hear and
> determine -
> ...
> (b) disputes concerning any matter that -
> (i) is a matter accepted by the community resident in
> its area as a matter rightly governed by the usages
> and customs of that community;
> and
> (ii) is not a breach of the by-laws applicable within
> its area or of a law of the Commonwealth or the
> State or a matter arising under a law of the
> Commonwealth or the State;
> and shall exercise ... that jurisdiction referred to in
> provision (b) in accordance with the usages and customs of
> the community within its area."

71. Whatever be the precision of Meriam laws and customs with respect to land, there is abundant evidence that land was traditionally occupied by individuals or family groups and that contemporary rights and interests are capable of being established with sufficient precision to attract declaratory or other relief. Although the findings made by Moynihan J. do not permit a confident conclusion that, in 1879,

there were parcels of land in the Murray Islands owned allodially by individuals or groups, the absence of such a finding is not critical to the final resolution of this case. If the doctrine of Attorney-General v. Brown were applied to the Murray Islands, allodial ownership would have been no bar to the Crown's acquisition of universal and absolute ownership of the land and the extinguishing of all native titles. But, by applying the rule that the communal proprietary interests of the indigenous inhabitants survive the Crown's acquisition of sovereignty, it is possible to determine, according to the laws and customs of the Meriam people, contests among members of the Meriam people relating to rights and interests in particular parcels of land.

72. The native titles claimed by the Meriam people - communally, by group or individually - avoid the Scylla of the 1879 annexation of the Murray Islands to Queensland, but we must now consider whether they avoid the Charybdis of subsequent extinction.

The extinguishing of native title

73. Sovereignty carries the power to create and to extinguish private rights and interests in land within the Sovereign's territory(132) Joint Tribal Council of the Passamaquoddy Tribe v. Morton (1975) 528 Fed 2d 370, at p 376 n.6. It follows that, on a change of sovereignty, rights and interests in land that may have been indefeasible under the old regime become liable to extinction by exercise of the new sovereign power. The sovereign power may or may not be exercised with solicitude for the welfare of indigenous inhabitants but, in the case of common law countries, the courts cannot review the merits, as distinct from the legality, of the exercise of sovereign power(133) United States v. Santa Fe Pacific Railroad Company [1942] USSC 12; [1942] USSC 12; (1941) 314 US 339, at p 347; Tee-Hit-Ton Indians v. United States [1955] USSC 24; (1954) 348 US 272, at pp 281-285. However, under the constitutional law of this country, the legality (and hence the validity) of an exercise of a sovereign power depends on the authority vested in the organ of government purporting to exercise it: municipal constitutional law determines the scope of authority to exercise a sovereign power over matters governed by municipal law, including rights and interests in land.

74. In Queensland, the Crown's power to grant an interest in land is, by force of ss.30 and 40 of the Constitution Act of 1867 (Q.), an exclusively statutory power and the validity of a particular grant depends upon conformity with the relevant statute(134) Cudgen Rutile (No.2) Ltd. v. Chalk (1975) AC 520, at pp 533-534. When validly made, a grant of an interest in land binds the Crown and the Sovereign's successors(135) Halsbury, op cit, 4th ed., vol.8, par.1047. The courts cannot refuse to give effect to a Crown grant "except perhaps in a proceeding by scire facias or otherwise, on the prosecution of the Crown itself"(136) Wi Parata v. Bishop of Wellington (1877) 3 NZ(Jur) NS 72, at p 77. Therefore an interest validly granted by the Crown, or a right or interest dependent on an interest validly granted by the Crown cannot be extinguished by the Crown without statutory authority. As the Crown is not competent to derogate from a grant once made(137), a statute which confers a power on the Crown will be presumed (so far as consistent with the purpose for which the power is conferred) to stop short of authorizing any impairment of an interest in land granted by the Crown or dependent on a Crown grant. But, as native title is not granted by the Crown, there is no comparable presumption affecting the conferring of any executive power on the Crown the exercise of which is apt to extinguish native title.

75. However, the exercise of a power to extinguish native title must reveal a clear and plain intention to do so, whether the action be taken by the Legislature or by the Executive. This requirement, which flows from the seriousness of the consequences to indigenous inhabitants of extinguishing their traditional rights and interests in land, has been repeatedly emphasized by courts dealing with the extinguishing of the native title of Indian bands in North America. It is unnecessary for our purposes to consider the several juristic foundations - proclamation, policy, treaty or occupation - on which native title has been rested in Canada and the United States but reference to the leading cases in each jurisdiction reveals that, whatever the juristic foundation assigned by those courts might be, native title is not extinguished unless

there be a clear and plain intention to do so(138) Calder v. Attorney-General of British Columbia (1973) SCR, at p 404; (1973) 34 DLR (3d), at p 210; Hamlet of Baker Lake v. Minister of Indian Affairs (1979) 107 DLR (3d) 513, at p 552; Reg. v. Sparrow (1990) 1 SCR.1075, at p 1094; (1990) 70 DLR (4th) 385, at p 401; United States v. Santa Fe Pacific Railroad Co. (1941) 314 US , at pp 353, 354; Lipan Apache Tribe v. United States (1967) 180 Ct Cl 487, at p 492. That approach has been followed in New Zealand(139) Te Weehi v. Regional Fisheries Officer (1986) 1 NZLR 680, at pp 691-692. It is patently the right rule.

76. A clear and plain intention to extinguish native title is not revealed by a law which merely regulates the enjoyment of native title(140) Reg. v. Sparrow (1990) 1 SCR, at p 1097; (1990) 70 DLR (4th), at p 400 or which creates a regime of control that is consistent with the continued enjoyment of native title(141) United States v. Santa Fe Pacific Railroad Co. (1941) 314 US , at pp 353-354 . A fortiori, a law which reserves or authorizes the reservation of land from sale for the purpose of permitting indigenous inhabitants and their descendants to enjoy their native title works no extinguishment.

77. The Crown did not purport to extinguish native title to the Murray Islands when they were annexed in 1879. In 1882, in purported exercise of powers conferred by the Crown Lands Alienation Act of 1876 (Q.), the Murray Islands were reserved from sale. The 1882 instrument of reservation has not been traced, and it is arguable that the 1876 Act did not apply to land in the Murray Islands for the Murray Islands were not part of Queensland when that Act was passed. That Act was repealed by the Crown Lands Act 1884 (Q.), which took its place. In 1912, a proclamation was made pursuant to s.180 of the Land Act 1910 which "permanently reserved and set apart" the Murray Islands "for use of the Aboriginal Inhabitants of the State". Section 180(1) of the Land Act 1910 empowered the Governor in Council to reserve any Crown land from sale or lease "which, in the opinion of the Governor in Council, is or may be required for public purposes". "Public purposes" included "Aboriginal reserves"(142) s.4. "Crown land" was defined by s.4 of the Land Act 1910 as follows:

> "All land in Queensland, except land which is, for the time being -
> (a) Lawfully granted or contracted to be granted in fee-simple by the Crown; or
> (b) Reserved for or dedicated to public purposes; or
> (c) Subject to any lease or license lawfully granted by the Crown: Provided that land held under an occupation license shall be deemed to be Crown land".

If the Murray Islands had been effectively "reserved for public purposes" by the 1882 reservation, they would not have been "Crown land" by reason of par.(b) of the definition but, in that event, they would have fallen within s.180(3) which provided:

> " All land heretofore reserved or set apart for any public purpose, and the fee-simple whereof has not been granted by the Crown, shall hereafter be deemed to be a reserve for public purposes under this Act, and deemed to have been so reserved under this section."

Section 181 of the Land Act 1910 empowered the Governor in Council "without issuing any deed of grant, (to) place any land reserved, either temporarily or permanently, for any public purpose under the control of trustees; and may declare the style or title of such trustees and the trusts of the land." In 1939, the Governor in Council placed the Murray Islands reserve under the control of trustees but did not declare "the trusts of the land". By s.4(15) of The Land Act of 1962 (Q.) the reservation of the Murray Islands and the appointment of trustees of the reserve continue in force notwithstanding the repeal of the

Land Act 1910 and are deemed to have been made under the analogous provisions of the Land Act 1962. Sections 334(1) and (3) and 335 are provisions analogous respectively to ss.180(1) and (3) and 181 of the Land Act 1910. The definition of "Crown land" in s.5 of the Land Act 1962 corresponds with the definition in the Land Act 1910.

78. No doubt the term "Crown land" was defined in these Acts in the belief, which has been current since Attorney-General v. Brown, that the absolute ownership of all land in Queensland is vested in the Crown until it is alienated by Crown grant. Nevertheless, the denotation of the term "Crown land" in the Land Act 1910 and the Land Act 1962 is the same whether the common law attributes to the Crown the radical title or absolute ownership. A difficulty of construction arises, however, in connection with the provisions relating to the removal of intruders from Crown land or land reserved for public purposes. Section 91 of the Crown Lands Alienation Act, for example, makes it an offence for a person to be found in occupation of any such land "unless lawfully claiming under a subsisting lease or licence". If this provision were construed as having denied to the Meriam people any right to remain in occupation of their land, there would have been an indication that their native title was extinguished. The Solicitor-General for Queensland conceded that, if s.91 applied - and he did not contend that it did - the Meriam people could lawfully have been driven into the sea at any time after annexation and that they have been illegally allowed to remain on the Murray Islands ever since. Such a conclusion would make nonsense of the law. As Hall J. said of a similar proposition in Calder v. Attorney-General of British Columbia(143) (1973) SCR, at p 414; (1973) 34 DLR (3d), at p 217: "The idea is self-destructive". To construe s.91 or similar provisions as applying to the Meriam people in occupation of the Murray Islands would be truly barbarian. Such provisions should be construed as being directed to those who were or are in occupation under colour of a Crown grant or without any colour of right; they are not directed to indigenous inhabitants who were or are in occupation of land by right of their unextinguished native title.

79. Native title was not extinguished by the creation of reserves nor by the mere appointment of "trustees" to control a reserve where no grant of title was made. To reserve land from sale is to protect native title from being extinguished by alienation under a power of sale. To appoint trustees to control a reserve does not confer on the trustees a power to interfere with the rights and interests in land possessed by indigenous inhabitants under a native title. Nor is native title impaired by a declaration that land is reserved not merely for use by the indigenous inhabitants of the land but "for use of Aboriginal Inhabitants of the State" generally(144) Assuming that that term relates to all indigenous inhabitants of the State whether having any connection with the particular reserve or not: see Corporation of the Director of Aboriginal and Islanders Advancement v. Peinkinna (1978) 52 ALJR 286. If the creation of a reserve of land for Aboriginal Inhabitants of the State who have no other rights or interest in that land confers a right to use that land, the right of user is necessarily subordinate to the right of user consisting in legal rights and interests conferred by native title. Of course, a native title which confers a mere usufruct may leave room for other persons to use the land either contemporaneously or from time to time.

80. In this case, the Solicitor-General did not contend that if, contrary to his submissions, native title became, after annexation and without an act of recognition by the Crown, a legally recognized interest in the Murray Islands, the Crown had extinguished that title. He drew attention to the fact that the Meriam people had been left in peaceful occupation of the Murray Islands. For his part, counsel for the plaintiffs submitted that the State of Queensland had no power to extinguish native title. That argument proceeded on the footing that sovereignty is an attribute possessed only by an internationally recognized sovereign and that the Commonwealth answers that description but the States of the Commonwealth do not(145) Seas and Submerged Lands Case (1975) 135 CLR, at p 373. Although that proposition is significant in determining title to the territorial sea, seabed and airspace and continental shelf and incline, it has no relevance to the power to extinguish native title to land which is not a matter of international concern(146) ibid., at pp 373, 467. The sovereign powers which might be exercised over the waste lands of the Crown within Queensland were vested in the Colony of Queensland subject to the ultimate

legislative power of the Imperial Parliament so long as that Parliament retained that power and, after Federation, subject to the Constitution of the Commonwealth of Australia. The power to reserve and dedicate land to a public purpose and the power to grant interests in land are conferred by statute on the Governor in Council of Queensland and an exercise of these powers is, subject to the Racial Discrimination Act, apt to extinguish native title. The Queensland Parliament retains, subject to the Constitution and to restrictions imposed by valid laws of the Commonwealth(147) Mabo v. Queensland (1988) 166 CLR 186, a legislative power to extinguish native title. This being so, it is necessary to consider the effect which the granting of leases over parts of the Murray Islands has had on native title before the Racial Discrimination Act came into force.

81. A Crown grant which vests in the grantee an interest in land which is inconsistent with the continued right to enjoy a native title in respect of the same land necessarily extinguishes the native title. The extinguishing of native title does not depend on the actual intention of the Governor in Council (who may not have adverted to the rights and interests of the indigenous inhabitants or their descendants), but on the effect which the grant has on the right to enjoy the native title. If a lease be granted, the lessee acquires possession and the Crown acquires the reversion expectant on the expiry of the term. The Crown's title is thus expanded from the mere radical title and, on the expiry of the term, becomes a plenum dominium. Where the Crown grants land in trust or reserves and dedicates land for a public purpose, the question whether the Crown has revealed a clear and plain intention to extinguish native title will sometimes be a question of fact, sometimes a question of law and sometimes a mixed question of fact and law. Thus, if a reservation is made for a public purpose other than for the benefit of the indigenous inhabitants, a right to continued enjoyment of native title may be consistent with the specified purpose - at least for a time - and native title will not be extinguished. But if the land is used and occupied for the public purpose and the manner of occupation is inconsistent with the continued enjoyment of native title, native title will be extinguished. A reservation of land for future use as a school, a courthouse or a public office will not by itself extinguish native title: construction of the building, however, would be inconsistent with the continued enjoyment of native title which would thereby be extinguished. But where the Crown has not granted interests in land or reserved and dedicated land inconsistently with the right to continued enjoyment of native title by the indigenous inhabitants, native title survives and is legally enforceable.

82. As the Governments of the Australian Colonies and, latterly, the Governments of the Commonwealth, States and Territories have alienated or appropriated to their own purposes most of the land in this country during the last 200 years, the Australian Aboriginal peoples have been substantially dispossessed of their traditional lands. They were dispossessed by the Crown's exercise of its sovereign powers to grant land to whom it chose and to appropriate to itself the beneficial ownership of parcels of land for the Crown's purposes. Aboriginal rights and interests were not stripped away by operation of the common law on first settlement by British colonists, but by the exercise of a sovereign authority over land exercised recurrently by Governments. To treat the dispossession of the Australian Aborigines as the working out of the Crown's acquisition of ownership of all land on first settlement is contrary to history. Aborigines were dispossessed of their land parcel by parcel, to make way for expanding colonial settlement. Their dispossession underwrote the development of the nation. But, if this be the consequence in law of colonial settlement, is there any occasion now to overturn the cases which held the Crown to have become the absolute beneficial owner of land when British colonists first settled here? Does it make any difference whether native title failed to survive British colonization or was subsequently extinguished by government action? In this case, the difference is critical: except for certain transactions next to be mentioned, nothing has been done to extinguish native title in the Murray Islands. There, the Crown has alienated only part of the land and has not acquired for itself the beneficial ownership of any substantial area. And there may be other areas of Australia where native title has not been extinguished and where an Aboriginal people, maintaining their identity and their customs, are entitled to enjoy their native title. Even if there be no such areas, it is appropriate to identify the events which resulted in the dispossession of the indigenous inhabitants of Australia, in order to dispel the misconception that it is the common law

rather than the action of governments which made many of the indigenous people of this country trespassers on their own land.

83. After this lengthy examination of the problem, it is desirable to state in summary form what I hold to be the common law of Australia with reference to land titles:
1. The Crown's acquisition of sovereignty over the several parts of Australia cannot be challenged in an Australian municipal court.
2. On acquisition of sovereignty over a particular part of Australia, the Crown acquired a radical title to the land in that part.
3. Native title to land survived the Crown's acquisition of sovereignty and radical title. The rights and privileges conferred by native title were unaffected by the Crown's acquisition of radical title but the acquisition of sovereignty exposed native title to extinguishment by a valid exercise of sovereign power inconsistent with the continued right to enjoy native title.
4. Where the Crown has validly alienated land by granting an interest that is wholly or partially inconsistent with a continuing right to enjoy native title, native title is extinguished to the extent of the inconsistency. Thus native title has been extinguished by grants of estates of freehold or of leases but not necessarily by the grant of lesser interests (e.g., authorities to prospect for minerals).
5. Where the Crown has validly and effectively appropriated land to itself and the appropriation is wholly or partially inconsistent with a continuing right to enjoy native title, native title is extinguished to the extent of the inconsistency. Thus native title has been extinguished to parcels of the waste lands of the Crown that have been validly appropriated for use (whether by dedication, setting aside, reservation or other valid means) and used for roads, railways, post offices and other permanent public works which preclude the continuing concurrent enjoyment of native title. Native title continues where the waste lands of the Crown have not been so appropriated or used or where the appropriation and use is consistent with the continuing concurrent enjoyment of native title over the land (e.g., land set aside as a national park).
6. Native title to particular land (whether classified by the common law as proprietary, usufructuary or otherwise), its incidents and the persons entitled thereto are ascertained according to the laws and customs of the indigenous people who, by those laws and customs, have a connection with the land. It is immaterial that the laws and customs have undergone some change since the Crown acquired sovereignty provided the general nature of the connection between the indigenous people and the land remains. Membership of the indigenous people depends on biological descent from the indigenous people and on mutual recognition of a particular person's membership by that person and by the elders or other persons enjoying traditional authority among those people.
7. Native title to an area of land which a clan or group is entitled to enjoy under the laws and customs of an indigenous people is extinguished if the clan or group, by ceasing to acknowledge those laws, and (so far as practicable) observe those customs, loses its connection with the land or on the death of the last of the members of the group or clan.
8. Native title over any parcel of land can be surrendered to the Crown voluntarily by all those clans or groups who, by the traditional laws and customs of the indigenous people, have a relevant connection with the land but the rights and privileges conferred by native title are otherwise inalienable to persons who are not members of the indigenous people to whom alienation is permitted by the traditional laws and customs.
9. If native title to any parcel of the waste lands of the Crown is extinguished, the Crown becomes the absolute beneficial owner.

84. These propositions leave for resolution by the general law the question of the validity of any purported exercise by the Crown of the power to alienate or to appropriate to itself waste lands of the Crown. In Queensland, these powers are and at all material times have been exercisable by the Executive Government subject, in the case of the power of alienation, to the statutes of the State in force from time to time. The power of alienation and the power of appropriation vested in the Crown in right of a State are also subject to the valid laws of the Commonwealth, including the Racial Discrimination Act. Where a

power has purportedly been exercised as a prerogative power, the validity of the exercise depends on the scope of the prerogative and the authority of the purported repository in the particular case.

85. It remains to apply these principles to the Murray Islands and the Meriam people.
The effect of post-acquisition transactions

86. In February 1882, the Murray Islands were reserved from sale by the Governor in Council acting under the Crown Lands Alienation Act of 1876 (Q.). Section 6 of that Act authorized the proclamation of reserves "for the use or benefit of the aboriginal inhabitants of the colony". Far from extinguishing the native title of the Meriam people, the reservation of the Murray Islands from sale left them in undisturbed enjoyment of their land(148) Randwick Corporation v. Rutledge (1959) 102 CLR, at pp 71-73; cf. United States v. Sante Fe Pacific Railroad Co. (1941) 314 US , at p 353. Nor was their native title affected when, in 1912, acting under the Land Act 1910 the Governor in Council ordered that the Murray Islands (with the exception of an area leased to the London Missionary Society) be permanently reserved and set apart for the use of the Aboriginal Inhabitants of the State; nor in 1939 when trustees of the reserve were appointed. There was no disposition of the reserve lands which was inconsistent with the continued right of the Meriam people to enjoy their native title.

87. However, leases were granted by the Crown over certain parcels of land in the Murray Islands. In 1882, a special lease of 2 acres on Mer was granted to the London Missionary Society and in later years further leases of the same land were granted to the London Missionary Society. The London Missionary Society lease was subsequently transferred to the Australian Board of Missions thence to trustees of the Board. Whatever native title had been enjoyed in this parcel of land, that title was extinguished by the granting or renewal of the lease.

88. Another lease was purportedly granted on 6 May 1931 to two lessees (not being members of the Meriam people) under either s.171(1) or s.179(1) of the Land Act 1910-1930 (Q.) over the whole of the islands of Dauar and Waier for a period of 20 years for the purpose of establishing a sardine factory. The special conditions contained in the lease included the following:

> "The Lessees shall not in any way obstruct or interfere with
> the use by the Murray Island natives of their tribunal (semble tribal)
> gardens and plantation of the leased land.
> The Lessees shall not in any way obstruct or interfere with
> the operations of the Murray Island natives who fish around
> the reefs adjacent to the leased land for Beche-de-mer,
> Trochus etc."

Factory buildings and houses were erected there. Although the term of the lease was extended and a new lease was issued containing the same conditions, the sardine factory was closed and, on 15 June 1938, the Chief Protector of Aboriginals sought forfeiture of the lease and revealed that:

> "The Murray Island natives are asking for unrestricted entry
> to these islands, although under the terms of the lease
> they can proceed there for gardening purposes".

Ultimately, the lease was forfeited, the Chief Protector paid for the improvements and Dauar and Waier again became part of the reserve.

89. The plaintiffs submit that the Crown had no power under the Land Acts to grant a lease of these Islands for the purpose of establishing and carrying on a sardine factory. If that submission be right, the

lease was wholly ineffective, for a purported lease granted without statutory authority is ineffective to dispose of any interest in land(149) Cudgen Rutile (No.2) Ltd. v. Chalk (1975) AC, at pp 533-534. The submission is founded on a reading down of s.179(1) of the Land Act 1910-1930 (which contains a general power to grant a lease for business purposes) so that it conforms to the power conferred by s.179(2) to grant a lease of country land which has been reserved for a public purpose when the land is infested with noxious weeds. In my opinion the powers conferred by sub-ss.(1) and (2) of s.179 are cumulative and the power conferred by sub-s.(1) should not be read down in the manner suggested. Section 179 does not deny the validity of the lease. Whether land reserved for a public purpose under s.180 could be leased by anybody but trustees of the reserve under s.185(2) is perhaps an open question, but it was not raised in argument. It should not now be finally determined. The question can be left for determination, if need be, in proceedings in which the Crown's power to grant the lease of Dauar and Waier on 6 May 1931 is canvassed and in which all interested parties can be joined. If the lease of Dauar and Waier were validly granted, the limited reservations in the special conditions are not sufficient to avoid the consequence that the traditional rights and interests of the Meriam people were extinguished. By granting the lease, the Crown purported to confer possessory rights on the lessee and to acquire for itself the reversion expectant on the termination of the lease. The sum of those rights would have left no room for the continued existence of rights and interests derived from Meriam laws and customs.

90. Moynihan J's findings mention the use of other land on Mer for administrative purposes, namely, for the construction of a Court House, a hospital, a store, a school, a teacher's residence, a Jail House, a new "native constable's residence with lock-up" and a village square. His Honour mentions a Murray Island Court Record relating to an area which "was resumed by the Protector of Aboriginals and set aside for a new village". Whether these activities were authorized by law and whether, if so, they were inconsistent with continued enjoyment of the native title to the land affected by these activities are questions which were not discussed in submissions before this Court. It is not possible now finally to determine whether the affected parcels of land are the subject of native title.

Deed of Grant in Trust

91. The Court was informed that deeds of grant in trust pursuant to the Land Act 1962-1988 have been granted in respect of all islands in the Torres Strait other than the Murray Islands pursuant to the Land Act 1962-1988 and that the plaintiffs are concerned that similar action may be taken in respect of the Murray Islands. A deed of grant in trust can be granted in respect of any Crown land which, in the opinion of the Governor in Council, is or may be required for any public purpose: s.334(1). To bring a reserve within the definition of "Crown land", the Order in Council creating the reserve must be rescinded: ss.5 and 334(4). Although the Governor in Council is empowered generally to declare that land granted in trust for a public purpose shall "revert to the Crown" (s.353) an Act of Parliament is needed to authorize the Governor in Council to declare that land granted in trust for the benefit of Aboriginal or Islander inhabitants should revert to the Crown: s.353A. As no deed of grant in trust has issued in respect of the Murray Islands, s.353A does not appear to have any present application to those Islands. The plaintiffs contend that the Aborigines and Torres Strait Islanders (Land Holding) Act 1985 (Q.) is an Act of Parliament satisfying s.353A but, in the absence of a deed of grant in trust, there is no need to consider that contention. It appears that the plaintiffs see some advantage in preventing the granting of a deed of grant in trust and they seek, inter alia, a declaration that the granting of a deed of grant in trust "would be unlawful by reason of the provisions of section 9 and 10 of the Racial Discrimination Act 1975 (Commonwealth)."

92. This declaration is founded on the decision in Mabo v. Queensland(150) (1988) 166 CLR 186 in which it was held that the Queensland Coast Islands Declaratory Act 1985 (Q.) which purported to extinguish the plaintiffs' native title, was nullified by operation of s.10 of the Racial Discrimination Act. The plaintiffs now seek to deny the power of the Governor in Council to grant a deed of grant in trust because, if effective, the alienation of the Murray Islands to a trustee - albeit the trustee would be the

Island Council constituted under the Community Services (Torres Strait) Act - would extinguish native title including the native title claimed by the individual plaintiffs. Under the relevant provisions of the Land Act, the Island Council as trustee would have power to lease land inconsistently with native title.

93. There are two reasons why the declaration sought by the plaintiffs should be refused. First, there is no evidence that the Governor in Council intends to grant a deed of grant in trust in respect of land in the Murray Islands and the Solicitor-General denied that there were "the slightest indications" that the Governor in Council would do so. Secondly, s.10 of the Racial Discrimination Act may not have an effect on the granting of a deed of grant in trust similar to the effect which s.10 had upon the Queensland Coast Islands Declaratory Act 1985. It will not have a nullifying effect if the action taken under the relevant State laws constitutes a special measure falling within s.8(1) of the Racial Discrimination Act and thereby escapes the operation of s.10(151) Gerhardy v. Brown [1985] HCA 11; (1985) 159 CLR 70. Whether the granting of a deed of grant in trust would constitute a special measure is a question which cannot be answered without an examination of all the relevant circumstances; it involves findings of fact. In the absence of findings which determine whether a deed of grant in trust would constitute a special measure, no declaration that the granting of such a deed would be "unlawful" can be made. There is no need to determine whether s.9 of the Racial Discrimination Act is inconsistent with the relevant provisions of the Land Act 1962, for there is nothing to show that those provisions will be used to affect interests which the plaintiffs seek to protect.

Answers to Questions

94. This matter came before the Full Court pursuant to an order made by the Chief Justice under s.18 of the Judiciary Act 1903 (Cth) reserving questions relating to the rights and interests claimed by two of the plaintiffs, David Passi and James Rice in specified blocks of land on the islands of Mer, Dauar and Waier. No such claim was made before this Court by the plaintiff Eddie Mabo. In the course of the hearing before this Court, it emerged that it was not practicable to answer those questions by acting upon findings made by Moynihan J. The plaintiffs' statement of claim was then amended to seek declarations relating to the title of the Meriam people. The plaintiffs Passi and Rice claim rights and interests dependent on the native title of the Meriam people, not as interests dependent upon Crown grants. In the absence of any party seeking to challenge their respective claims under the laws and customs of the Meriam people, the action is not constituted in a way that permits the granting of declaratory relief with respect to claims based on those laws and customs - even had the findings of fact been sufficient to satisfy the Court of the plaintiffs' respective interests. Declaratory relief must therefore be restricted to the native communal title of the Meriam people. The plaintiffs have the necessary interest to support an action for declarations relating to that title.

95. The plaintiffs seek declarations that the Meriam people are entitled to the Murray Islands -

> "(a) as owners
> (b) as possessors
> (c) as occupiers, or
> (d) as persons entitled to use and enjoy the said islands";

that -

> "the Murray Islands are not and never have been 'Crown Lands'
> within the meaning of the Lands Act 1962 (Qld) (as amended) and
> prior Crown lands legislation"

and that the State of Queensland is not entitled to extinguish the title of the Meriam people.

96. As the Crown holds the radical title to the Murray Islands and as native title is not a title created by grant nor is it a common law tenure, it may be confusing to describe the title of the Meriam people as conferring "ownership", a term which connotes an estate in fee simple or at least an estate of freehold. Nevertheless, it is right to say that their native title is effective as against the State of Queensland and as against the whole world unless the State, in valid exercise of its legislative or executive power, extinguishes the title. It is also right to say that the Murray Islands are not Crown land because the land has been either "reserved for or dedicated to public purposes" or is "subject to ... lease". However, that does not deny that the Governor in Council may, by appropriate exercise of his statutory powers, extinguish native title. The native title has already been extinguished over land which has been leased pursuant to powers conferred by the Land Act in force at the time of the granting or renewal of the lease. Accordingly, title to the land leased to the Trustees of the Australian Board of Missions has been extinguished and title to Dauar and Waier may have been extinguished. It may be that areas on Mer have been validly appropriated for use for administrative purposes the use of which is inconsistent with the continued enjoyment of the rights and interests of Meriam people in those areas pursuant to Meriam law or custom and, in that event, native title has been extinguished over those areas. None of these areas can be included in the declaration.

97. I would therefore make a declaration in the following terms:

> Declare -
> (1) that the land in the Murray Islands is not Crown land within the meaning of that term in s.5 of the Land Act 1962-1988 (Q.);
> (2) that the Meriam people are entitled as against the whole world to possession, occupation, use and enjoyment of the island of Mer except for that parcel of land leased to the Trustees of the Australian Board of Missions and those parcels of land (if any) which have been validly appropriated for use for administrative purposes the use of which is inconsistent with the continued enjoyment of the rights and privileges of Meriam people under native title;
> (3) that the title of the Meriam people is subject to the power of the Parliament of Queensland and the power of the Governor in Council of Queensland to extinguish that title by valid exercise of their respective powers, provided any exercise of those powers is not inconsistent with the laws of the Commonwealth.

DEANE AND GAUDRON JJ. The issues raised by this case directly concern the entitlement, under the law of Queensland, of the Meriam people to their homelands in the Murray Islands. Those issues must, however, be addressed in the wider context of the common law of Australia. Their resolution requires a consideration of some fundamental questions relating to the rights, past and present, of Australian Aborigines in relation to lands on which they traditionally lived or live. The starting point lies in the second half of the eighteenth century with the establishment of the Colony of New South Wales.
(i) The establishment of New South Wales

2. The international law of the eighteenth century consisted essentially of the rules governing the relations and dealings among the nations of Europe. Under it, the three main theoretical methods by which a State could extend its sovereignty to new territory were cession, conquest and settlement. Settlement was initially seen as applicable only to unoccupied territory. The annexation of territory by "settlement" came, however, to be recognized as applying to newly "discovered" territory which was inhabited by native

people who were not subject to the jurisdiction of another European State. The "discovery" of such territory was accepted as entitling a State to establish sovereignty over it by "settlement", notwithstanding that the territory was not unoccupied and that the process of "settlement" involved negotiations with and/or hostilities against the native inhabitants.

3. The consistent references to "our territory called New South Wales" in the two Commissions(152) 12 October 1786 and 2 April 1787: see Historical Records of Australia (hereafter "HRA"), (1914) Series 1, vol.1, pp 1, 2 and in the Instructions(153) 25 April 1787: ibid., p 9 from George III to Captain Arthur Phillip indicate a view that at least part(154) i.e. the coastline and adjacent islands between latitudes 10 37' and 38 south (see Captain Cook's Journal (ed. Wharton), (1893), p 312), perhaps "backed by an unexplored interior": see In re Southern Rhodesia (1919) AC 211, at pp 215-216 of the new Colony had automatically become British territory in 1770 by virtue of Cook's "discovery" and various pronouncements of taking "possession ... in the Name of His Majesty"(155) See, e.g., Captain Cook's Journal, op cit, p 312 and, generally, Scott, "Taking Possession of Australia - The Doctrine of 'Terra Nullius'", (1940) 26 Royal Australian Historical Society Journal and Proceedings, 1, at pp 8-9. In the context of the contemporary international law, however, the preferable view is that it was the intention of the Crown that the establishment of sovereignty would be by "settlement" in the extended sense explained above and would be effected when, after the arrival of the First Fleet, Phillip complied with his Instructions and caused his second Commission as Governor to be read and published "with all due solemnity"(156) HRA, (1914), Series 1, vol.1, p 9. The Commission was so read and published on 7 February, 1788: HRA, (1922), Series 4, p xiv. Even on that approach, there are problems about the establishment of the Colony in so far as the international law of the time is concerned. In particular, contemporary international law would seem to have required a degree of actual occupation of a "discovered" territory over which sovereignty was claimed by settlement and it is scarcely arguable that the establishment by Phillip in 1788 of the penal camp at Sydney Cove constituted occupation of the vast areas of the hinterland of eastern Australia designated by his Commissions(157) i.e. "all the country inland (from the eastern coastline) westward as far as" longitude 135 east: HRA, (1914), Series 1, vol.1, p 2. However, in so far as the establishment of British sovereignty is concerned, those problems do not exist for the purposes of our domestic law.

4. Under British law in 1788, it lay within the prerogative power of the Crown to extend its sovereignty and jurisdiction to territory over which it had not previously claimed or exercised sovereignty or jurisdiction(158) See Post Office v. Estuary Radio Ltd. (1968) 2 QB 740, at p 753; New South Wales v. The Commonwealth ("the Seas and Submerged Lands Case") [1975] HCA 58; (1975) 135 CLR 337, at p 388; Wacando v. The Commonwealth [1981] HCA 60; (1981) 148 CLR 1, at p 11. The assertion by the Crown of an exercise of that prerogative to establish a new Colony by "settlement" was an act of State whose primary operation lay not in the municipal arena but in international politics or law. The validity of such an act of State (including any expropriation of property or extinguishment of rights which it effected) could not be challenged in British courts(159) See, e.g., Salaman v. Secretary of State for India (1906) 1 KB 613, at pp 625-627, 635, 639-640; Sobhuza II. v. Miller (1926) AC 518, at pp 528-529; Secretary of State for India v. Sardar Rustam Khan (1941) AC 356, at pp 369-370. Nor could any promise or undertaking which it embodied be directly enforced against the Crown in those courts(160) See, e.g., Cook v. Sprigg (1899) AC 572; Secretary of State for India v. Sardar Rustam Khan (1941) AC, at p 371; J.H. Rayner Ltd. v. Dept. of Trade (1990) 2 AC 418. The result is that, in a case such as the present where no question of constitutional power is involved, it must be accepted in this Court(161) See, e.g., Seas and Submerged Lands Case (1975) 135 CLR, at p 388 that the whole of the territory designated in Phillip's Commissions was, by 7 February 1788, validly established as a "settled" British Colony.

(ii) The introduction of the common law

5. The common law of this country had it origins in, and initially owed its authority to, the common law of England(162) Confirmed by 9 GEO IV c.83 (The Australian Courts Act 1828 (Imp)), s.24. Under the

common law of England, a distinction has traditionally been drawn, for the purposes of identifying the law of a new British Colony, between colonies where British sovereignty was established by cession or conquest and colonies where such sovereignty was established by settlement or "occupancy"(163) See Blackstone, Commentaries, 17th ed. (1830) (hereafter "Blackstone"), vol.1, par.107. In cases of cession and conquest, the pre-existing laws of the relevant territory were presumed to be preserved by the act of State constituting the Colony but the Crown, as new Sovereign, could subsequently legislate by proclamation pending local representative government. The position was quite different in the case of a settled Colony. Where persons acting under the authority of the Crown established a new British Colony by settlement, they brought the common law with them. The common law so introduced was adjusted in accordance with the principle that, in settled colonies, only so much of it was introduced as was "reasonably applicable to the circumstances of the Colony"(164) Cooper v. Stuart (1889) 14 App Cas 286, at p 291; see, also, State Government Insurance Commission v. Trigwell [1979] HCA 40; ; (1979) 142 CLR 617, esp. at p 634; Blackstone, vol.1, par.107. This left room for the continued operation of some local laws or customs among the native people and even the incorporation of some of those laws and customs as part of the common law. The adjusted common law was binding as the domestic law of the new Colony and, except to the extent authorized by statute, was not susceptible of being overridden or negatived by the Crown by the subsequent exercise of prerogative powers. Putting to one side the Crown's prerogative to establish courts and representative local government, the overall position was succinctly explained by the Privy Council in Sammut v. Strickland(165) (1938) AC 678, at p 701: the "English common law necessarily applied in so far as such laws were applicable to the conditions of the new Colony. The Crown clearly had no prerogative right to legislate in such a case." A fortiori, the Crown had no prerogative right to override the common law by executive act without legislative basis.

6. It follows that, once the establishment of the Colony was complete on 7 February 1788, the English common law, adapted to meet the circumstances of the new Colony, automatically applied throughout the whole of the Colony as the domestic law except to the extent (if at all) that the act of State establishing the Colony overrode it. Thereafter, within the Colony, both the Crown and its subjects, old and new, were bound by that common law.

(iii) The English law of real property

7. The English common law principles relating to real property developed as the product of concepts shaped by the feudal system of medieval times. The basic tenet was that, consequent upon the Norman Conquest, the Crown was the owner of all land in the kingdom. A subject could hold land only as a tenant, directly or indirectly, of the Crown. By 1788, the combined effect of the Statute Quia Emptores 1290 and the Tenures Abolition Act 1660 had been largely to abolish the "pyramid of free tenants"(166) Gray, Elements of Land Law, (1987), p 57 which had emerged under the feudal system of tenure and to confine the practical significance of the basic tenet that all land was owned by the Crown to matters such as escheat and foreshore rights. The "estate" which a subject held in land as tenant was itself property which was the subject of "ownership" both in law and in equity. The primary estate of a subject, the estate in fee simple, became, for almost all practical purposes, equivalent to full ownership of the land itself. Nonetheless, the underlying thesis of the English law of real property remained that the radical title to (or ultimate ownership of) all land was in the Crown and that the maximum interest which a subject could have in the land was ownership not of the land itself but of an estate in fee in it. The legal ownership of an estate in land was in the person or persons in whom the legal title to it was vested. Under the rules of equity, that legal estate could be held upon trust for some other person or persons or for some purpose.

8. If the slate were clean, there would be something to be said for the view that the English system of land law was not, in 1788, appropriate for application to the circumstances of a British penal colony(167) See, e.g., Roberts-Wray, Commonwealth and Colonial Law, (1966), p 626. It has, however, long been accepted as incontrovertible that the provisions of the common law which became applicable upon the establishment by settlement of the Colony of New South Wales included that general system of land

law(168) See, e.g., Delohery v. Permanent Trustee Co. of N.S.W. [1904] HCA 10; (1904) 1 CLR 283, at pp 299-300; Williams v. Attorney-General for New South Wales [1913] HCA 33; [1913] HCA 33; (1913) 16 CLR 404. It follows that, upon the establishment of the Colony, the radical title to all land vested in the Crown. Subject to some minor and presently irrelevant matters, the practical effect of the vesting of radical title in the Crown was merely to enable the English system of private ownership of estates held of the Crown to be observed in the Colony. In particular, the mere fact that the radical title to all the lands of the Colony was vested in the British Crown did not preclude the preservation and protection, by the domestic law of the new Colony, of any traditional native interests in land which had existed under native law or custom at the time the Colony was established. Whether, and to what extent, such pre-existing native claims to land survived annexation and were translated into or recognized as estates, rights or other interests must be determined by reference to that domestic law.
(iv) Traditional claims to land under the law of a "settled" Colony

9. There are some statements in the authorities which support a general proposition to the effect that interests in property which existed under the previous law or custom of a new British Colony availed "nothing" unless recognized by the Crown(169) See, e.g., Vajesingji Joravarsingji v. Secretary of State for India (1924) LR 51 Ind Ap 357, at p 360; Secretary of State for India v. Sardar Rustam Khan (1941) AC, at p 371. Those statements are correct to the extent that they recognize that the act of State establishing a Colony is itself outside the domestic law of the Colony and beyond the reach of the domestic courts. As has been seen, however, once a Colony was established by "settlement", the Crown was bound by the common law which, subject to appropriate adjustment, automatically became the domestic law of the Colony. After the establishment of the Colony, the act of State doctrine does not preclude proceedings in the courts in which, rather than seeking to enforce or challenge the act of State establishing the Colony, it is sought to vindicate domestic rights arising under the common law consequent upon that act of State.

10. The strong assumption of the common law was that interests in property which existed under native law or customs were not obliterated by the act of State establishing a new British Colony but were preserved and protected by the domestic law of the Colony after its establishment. Thus, in In re Southern Rhodesia(170) (1919) AC, at p 233, the Privy Council expressly affirmed that there are "rights of private property", such as a proprietary interest in land, of a category "such that upon a conquest it is to be presumed, in the absence of express confiscation or of subsequent expropriatory legislation, that the conqueror has respected them and forborne to diminish or modify them". Similarly, in Amodu Tijani v. Secretary, Southern Nigeria ("Amodu Tijani")(171) (1921) 2 AC 399, at p 407, the Privy Council affirmed and applied the "usual" principle "under British ... law" that when territory is occupied by cession, "the rights of property of the inhabitants (are) to be fully respected".

11. In Adeyinka Oyekan v. Musendiku Adele(172) (1957) 1 WLR 876, at p 880; (1957) 2 All ER 785, at p 788, the Privy Council expressly held that the assumption that pre-existing rights are recognized and protected under the law of a British Colony is a "guiding principle". In a judgment read by Lord Denning, their Lordships said:

> "In inquiring ... what rights are recognized, there is one guiding principle. It is this: The courts will assume that the British Crown intends that the rights of property of the inhabitants are to be fully respected. Whilst, therefore, the British Crown, as Sovereign, can make laws enabling it compulsorily to acquire land for public purposes, it will see that proper compensation is awarded to every one of the inhabitants who has by native law an interest in it: and the courts will declare the inhabitants entitled to

compensation according to their interests ... "

That case was concerned with the position in a Colony established by cession and the above passage needs to be modified to take account of the fact that, as has been seen, the Crown had no prerogative right to legislate by subsequent proclamation in the case of a Colony established by settlement. Otherwise, the "guiding principle" which their Lordships propounded is clearly capable of general application to British Colonies in which indigenous inhabitants had rights in relation to land under the pre-existing native law or custom. It should be accepted as a correct general statement of the common law. For one thing, such a guiding principle accords with fundamental notions of justice. Indeed, the recognition of the interests in land of native inhabitants was seen by early publicists as a dictate of natural law(173) See, e.g., Wolff, Jus Gentium Methodo Scientifica Pertractatum (trans. Drake), (1934), vol.II, pp 155-160, ss308-ss313; Vattel, The Law of Nations or Principles of the Law of Nature, London, (1797), pp 167-171; F. de Victoria, De Indis et de Jure Belli Relectiones, (ed. Nys, trans. Bate), (1917), pp 128, 138-139; Grotius, Of the Rights of War and Peace, (1715), vol.2, Ch.22, pars 9, 10. For another, it is supported by other convincing authority(174) See, generally, the cases referred to by Professor McNeil in his landmark work, Common Law Aboriginal Title, (1989), pp 173-174, 183-184 and 186-188 applying to a wide spectrum of British Colonies, including a long-standing New Zealand(175) See Reg. v. Symonds (1847) NZPCC 387, at pp 391-392 case and recent Canadian cases(176) See Calder v. Attorney-General of British Columbia (1973) 34 DLR (3d) 145, at pp 152, 156, 193-202; Guerin v. The Queen (1984) 13 DLR (4th) 321, at pp 335-336. In this Court, the assumption that traditional native interests were preserved and protected under the law of a settled territory was accepted by Barwick C.J. (in a judgment in which McTiernan and Menzies JJ. concurred) in Administration of Papua and New Guinea v. Daera Guba(177) [1973] HCA 59; [1973] HCA 59; (1973) 130 CLR 353, at p 397; see, also, Geita Sebea v. Territory of Papua [1941] HCA 37; (1941) 67 CLR 544, at p 557 as applicable to the settled territory of British Papua. (v) What kinds of pre-existing native interests were respected and protected by the common law?

12. The judgments in past cases contain a wide variety of views about the kinds of pre-existing native interests in land which are assumed to have been fully respected under the common law applicable to a new British Colony. In some cases, a narrow and somewhat rigid approach was taken. Thus, in In re Southern Rhodesia(178) (1919) AC, at p 233, it was said by the Privy Council that pre-existing interests in relation to land are presumed to be protected and preserved under the law of a newly annexed British territory only if they "belonged to the category of rights of private property" and were the product of a "social organization" whose "usages and conceptions of rights and duties" were able "to be reconciled with the institutions or the legal ideas of civilized society". It is true that their Lordships went on to make clear(179) ibid., at p 234 that those requirements could be satisfied in the case of rights claimed by "indigenous peoples whose legal conceptions" were differently developed from those recognized by the common law. Nonetheless, the requirement that the pre-existing rights be of the category of "rights of private property" invited a formulation in terms of common law "proprietary rights" and the requirement that local "usages and conceptions of rights and duties" be reconcilable with the "institutions or the legal ideas of civilized society" involved a degree of conformity with the social and legal mores of England or Europe.

13. In contrast, one finds clear support in other judgments, including later judgments of the Privy Council, for a less demanding and more flexible approach. In Amodu Tijani(180) (1921) 2 AC, at p 403, their Lordships disparagingly referred to "a tendency, operating at times unconsciously, to render (native title to land) conceptually in terms which are appropriate only to systems which have grown up under English law". That tendency must, they said(181) ibid, be "held in check closely" since "(a)s a rule, in the various systems of native jurisprudence throughout the Empire, there is no such full division between property and possession as English lawyers are familiar with." Subsequently, having referred to a number of different types of "native title" to land, their Lordships said(182) ibid., at pp 403-404:

"The title, such as it is, may not be that of the individual, as in this country it nearly always is in some form, but may be that of a community. Such a community may have the possessory title to the common enjoyment of a usufruct, with customs under which its individual members are admitted to enjoyment, and even to a right of transmitting the individual enjoyment as members by assignment inter vivos or by succession. To ascertain how far this latter development of right has progressed involves the study of the history of the particular community and its usages in each case. Abstract principles fashioned a priori are of but little assistance, and are as often as not misleading."

14. It is important to note that the judgment in Amodu Tijani makes quite clear(183) ibid., at p 403 that their Lordships saw the Indian claims to traditional homelands in Canada as providing the obvious example of the kind of traditional native title which was assumed to be recognized and protected under the law of a British Colony. They referred to the judgments in St. Catherine's Milling and Lumber Company v. The Queen(184) (1888) 14 App Cas 46 (hereafter "St. Catherine's Milling Case") and Attorney-General for Quebec v. Attorney-General for Canada(185) (1921) 1 AC 401, two cases dealing with the Indian claims, as explaining the relevant principles. The traditional native title involved in the St. Catherine's Milling Case was that of the Salteaux tribe of Ojibbeway Indians. The land, which was in the Province of Ontario, consisted of "a tract of country upwards of 50,000 square miles in extent"(186) St. Catherine's Milling Case (1888) 14 App Cas, at p 51. It was largely uncultivated and the Indians' claim to it was as lands upon which they pursued "their avocations of hunting and fishing"(187) ibid. The claim was that of the whole tribe and was clearly seen by their Lordships as of a nature which did not conform to English notions of property. It provided an "illustration of the necessity for getting rid of the assumption that the ownership of land naturally breaks itself up into estates, conceived as creatures of inherent legal principle"(188) Amodu Tijani (1921) 2 AC, at p 403. Under the law of the Province, it was to be recognized and protected as a right of occupation or user of the relevant land which "qualified" the "radical or final title" of the Sovereign(189) ibid.

15. In Adeyinka Oyekan v. Musendiku Adele(190) (1957) 1 WLR, at p 880; (1957) 2 All ER, at p 788, the Privy Council, while using the phrase "rights of property", clearly endorsed the more lenient approach adopted in Amodu Tijani to the kind of pre-existing native "rights" which are to be assumed to be fully respected under the law of a new British territory. The courts will, their Lordships said(191) ibid, assume that the traditional interests of the native inhabitants are to be so respected "even though those interests are of a kind unknown to English law". That approach is supported by other authority(192) See, e.g., Sunmonu v. Disu Raphael (1927) AC 881, at pp 883-884; Sakariyawo Oshodi v. Moriamo Dakolo (1930) AC 667, at pp 668-669 and by compelling considerations of justice. It should be accepted as correct.

16. On that approach, the pre-existing native interests with respect to land which were assumed by the common law to be recognized and fully respected under the law of a newly annexed British territory were not confined to interests which were analogous to common law concepts of estates in land or proprietary rights. Nor were they confined by reference to a requirement that the existing local social organization conform, in its usages and its conceptions of rights and duties, to English or European modes or legal notions. To the contrary, the assumed recognition and protection extended to the kinds of traditional enjoyment or use of land which were referred to by the Privy Council in Amodu Tijani. As their Lordships made plain in that(193) (1921) 2 AC, at pp 403-404 and subsequent(194) See, e.g., Sobhuza II. v. Miller (1926) AC, at p 525; Sunmonu v. Disu Raphael (1927) AC, at pp 883-884 cases, such a traditional interest would ordinarily be that of a community or group. It could, however, be that of an

individual. It could relate to lands which were under actual cultivation or to lands which, like much of the lands involved in the Canadian cases to which their Lordships referred, were left uncultivated but which, under the law or custom observed in the territory, constituted traditional homelands or hunting grounds. What the common law required was that the interest under the local law or custom involve an established entitlement of an identified community, group or (rarely) individual to the occupation or use of particular land and that that entitlement to occupation or use be of sufficient significance to establish a locally recognized special relationship between the particular community, group or individual and that land. In the context of the Privy Council's insistence(195) Amodu Tijani (1921) 2 AC, at pp 403-404 that English concepts of property might be quite inappropriate and that all that was involved might be the possession of the common enjoyment of a usufruct(196) ibid., at p 402, it is clear that such a traditional interest could result from the established and recognized occupation and use by a tribe or clan of particular land for purposes such as the obtaining of food(197) ibid., at pp 409-410: "prima facie based ... on a communal usufructuary occupation".

(vi) Common law native title

17. As has been seen, it must be accepted as settled law that the provisions of the common law which became applicable upon the establishment by settlement of the Colony of New South Wales included the system of land law which existed in England and that the consequence of that was that the radical title to all land in the new Colony vested in the Crown. If there were lands within the Colony in relation to which no pre-existing native interest existed, the radical title of the Crown carried with it a full and unfettered proprietary estate. Put differently, the radical title and the legal and beneficial estate were undivided and vested in the Crown. Thereafter, any claim by the Aboriginal inhabitants to such lands by reason of possession or occupation after the establishment of the Colony must be justified by ordinary common law principles or presumptions which apply and (at least theoretically) applied indifferently to both native inhabitants and Europeans (e.g. possessory title based on a presumed lost grant).

18. On the other hand, if there were lands within a settled Colony in relation to which there was some pre-existing native interest, the effect of an applicable assumption that that interest was respected and protected under the domestic law of the Colony would not be to preclude the vesting of radical title in the Crown. It would be to reduce(198) ibid., at p 410, qualify(199) ibid., at pp 403, 404 or burden(200) Attorney-General for Quebec v. Attorney-General for Canada (1921) 1 AC, at pp 409-410 the proprietary estate in land which would otherwise have vested in the Crown, to the extent which was necessary to recognize and protect the pre-existing native interest. Obviously, where the pre-existing native interest was "of a kind unknown to English law", its recognition and protection under the law of a newly settled British Colony would require an adjustment either of the interest itself or of the common law: either a transformation of the interest into a kind known to the common law or a modification of the common law to accommodate the new kind of interest.

19. In Amodu Tijani, the Privy Council gave careful consideration to the manner in which traditional native claims may be recognized and protected under the law of a British Colony. The claim which their Lordships recognized as established in that case was that of a native community based on communal occupation. Their Lordships recognized that the interests underlying such a claim could theoretically be respected and protected under the law of a Colony by transforming them into some "definite forms analogous to estates ... derived ... from the intrusion of the mere analogy of English jurisprudence"(201) (1921) 2 AC 399, at p 403. They concluded, however, that the appropriate course was to recognize a "full native title of usufruct"(202) ibid., at p 403 which qualified and reduced the proprietary estate of the Crown as radical owner. In rejecting the conclusion reached by the Supreme Court of Nigeria to the effect that native "title" under the earlier law or custom had been extinguished upon the establishment of the Colony by cession, they said(203) ibid., at pp 409-410:

> "That title ... is prima facie based, not on such individual

> ownership as English law has made familiar, but on a communal usufructuary occupation ... In (our) opinion there is no evidence that this kind of usufructuary title of the community was disturbed in law".

As their Lordships also indicated, a similar approach had been adopted by the Privy Council with respect to the claims of Canadian Indians to their traditional homelands or hunting grounds(204) See ibid., at p 403, fn.1 and, generally, St. Catherine's Milling Case (1888) 14 App Cas, at pp 54-55; Attorney-General for Quebec v. Attorney-General for Canada (1921) 1 AC, at pp 408-410. The content of the traditional native title recognized by the common law must, in the event of dispute between those entitled to it, be determined by reference to the pre-existing native law or custom(205) See Adeyinka Oyekan v. Musendiku Adele (1957) 1 WLR, at pp 880-881; (1957) 2 All ER, at p 788. We shall, hereafter, use the phrase "common law native title" to refer generally to that special kind of title.

20. The content of such a common law native title will, of course, vary according to the extent of the pre-existing interest of the relevant individual, group or community. It may be an entitlement of an individual, through his or her family, band or tribe, to a limited special use of land in a context where notions of property in land and distinctions between ownership, possession and use are all but unknown(206) See, e.g., Amodu Tijani (1921) 2 AC, at pp 404-405. In contrast, it may be a community title which is practically "equivalent to full ownership"(207) Geita Sebea v. Territory of Papua (1941) 67 CLR, at p 557 and see Amodu Tijani (1921) 2 AC, at pp 409-410. Even where (from the practical point of view) common law native title approaches "full ownership", however, it is subject to three important limitations.

21. The first limitation relates to alienation. It is commonly expressed as a right of pre-emption in the Sovereign, sometimes said to flow from "discovery" (i.e. in the European sense of "discovery" by a European State)(208) See, e.g., Johnson v. McIntosh [1823] USSC 22; (1823) 8 Wheat 543, at p 592 (21 US 240, at p 261); Reg. v. Symonds (1847) NZPCC, at pp 389-391. The effect of such a right of pre-emption in the Crown is not to preclude changes to entitlement and enjoyment within the local native system. It is to preclude alienation outside that native system otherwise than by surrender to the Crown. The existence of any rule restricting alienation outside the native system has been subjected to some scholarly questioning and criticism(209) See, e.g., McNeil, op cit, pp 221ff. In our view, however, the rule must be accepted as firmly established(210) See, e.g., Nireaha Tamaki v. Baker (1901) AC, at p 579; Attorney-General for Quebec v. Attorney-General for Canada (1921) 1 AC, at pp 408, 411; Administration of Papua and New Guinea v. Daera Guba (1973) 130 CLR, at p 397.

22. The second limitation has sometimes been seen as flowing from the first(211) See Attorney-General for Quebec v. Attorney-General for Canada (1921) 1 AC, at p 408. Arguably, it would be more accurate to say that the first flows from it. It is that the title, whether of individual, family, band or community, is "only a personal ... right"(212) See, ibid., at p 406; and see St. Catherine's Milling Case (1888) 14 App Cas, at p 54 and, that being so(213) Reg. v. Toohey; Ex parte Meneling Station Pty. Ltd. [1982] HCA 69; (1982) 158 CLR 327, at p 342, it does not constitute a legal or beneficial estate or interest in the actual land. Thus, it was held by the Privy Council in Attorney-General for Quebec v. Attorney-General for Canada(214) (1921) 1 AC, at pp 408, 411 that even a specific provision in an 1850 Canadian statute(215) 13 and 14 Vict c 42, s.1 that lands set aside under the statute for a particular band were to be "vested in trust for" that band did not, in a context where the traditional Indian title was merely "a personal and usufructuary right", suffice to create an equitable estate in the lands set aside under the statute. The inalienability outside the native system of common law native title except by surrender to the Crown, the personal nature of the rights under it and the absence of any legal or equitable estate or interest in the land itself invite analogy with the kind of entitlement to use or occupy the land of another which confers no estate or interest in the land and constitutes a "mere equity"(216) See, e.g., National Provincial Bank Ltd.

v. Ainsworth [1965] UKHL 1; (1965) AC 1175, at pp 1238-1239, 1247-1248; Reg. v. Toohey; Ex parte Meneling Station Pty. Ltd. (1982) 158 CLR, at p 342. On the other hand, the rights under common law native title can, as the Privy Council has pointed out(217) Amodu Tijani (1921) 2 AC, at pp 409-410, approach the rights flowing from full ownership at common law. The preferable approach is that adopted in Amodu Tijani(218) ibid., at p 403 and by Dickson J. in the Supreme Court of Canada in Guerin v. The Queen(219) (1984) 13 DLR (4th), at p 339, namely, to recognize the inappropriateness of forcing the native title to conform to traditional common law concepts and to accept it as sui generis or unique.

23. The third limitation is related to both the first and the second. It is that common law native title, being merely a personal right unsupported by any prior actual or presumed Crown grant of any estate or interest in the land, was susceptible of being extinguished by an unqualified grant by the Crown of an estate in fee or of some lesser estate which was inconsistent with the rights under the common law native title. In such a case, prior occupation or use under the common law native title is explained by the common law's recognition of prior entitlement under the earlier indigenous law or custom and is predicated upon the absence of any intervening grant from the Crown. Accordingly, it does not found an assumption of a prior lost grant and would be unavailing against those claiming under the inconsistent grant which would otherwise be beyond challenge except on the ground of invalidity on its face(220) See, e.g., Nireaha Tamaki v. Baker (1901) AC, at p 579. Common law native title could also be effectively extinguished by an inconsistent dealing by the Crown with the land, such as a reservation or dedication for an inconsistent use or purpose, in circumstances where third party rights intervened or where the actual occupation or use of the native title-holders was terminated. In the latter case, an ultimate lack of effective challenge would found either an assumption of acquiescence in the extinguishment of the title or a defence based on laches or some statute of limitations.

24. Implicit in what has been written above is the rejection of any proposition to the effect that the common law native title recognized by the law of a British Colony was no more than a permissive occupancy which the Crown was lawfully entitled to revoke or terminate at any time regardless of the wishes of those living on the land or using it for their traditional purposes. Acceptance of that, or any similar, proposition would deprive the traditional inhabitants of any real security since they would be liable to be dispossessed at the whim of the Executive, however unjust. There is some support in the decided cases for such a proposition. In particular, it is supported by some cases in the United States(221) See, in particular, Tee-Hit-Ton Indians v. United States [1955] USSC 24; [1955] USSC 24; (1954) 348 US 272, at p 279; but cf., per Marshall C.J., Johnson v. McIntosh (1823) 8 wheat, at p 587; (21 US, at p 259) and Cherokee Nation v. Georgia [1831] USSC 6; (1831) 5 Pet 1, at p 17; (30 US 1, at p 12), where special constitutional and historical considerations arguably apply(222) See, e.g., Priestley, "Communal Native Title and the Common Law", (1974) 6 Fed LR 150 and Hookey, "Chief Justice Marshall and the English Oak: A Comment", (1974) 6 Fed LR 174, and, superficially, by the ambiguous reference to "dependent upon the goodwill of the Sovereign" in the Privy Council's judgments in the St. Catherine's Milling Case(223) (1888) 14 App Cas, at p 54 and Attorney-General for Quebec v. Attorney-General for Canada(224) (1921) 1 AC, at p 406. However, the weight of authority (see below) and considerations of justice seem to us to combine to compel its rejection.

25. The substance of the judgment of the Privy Council in Attorney-General for Quebec v. Attorney-General for Canada is, upon analysis, inconsistent with the notion that the common law native title was no more than a shadowy entitlement to occupy or use the relevant land until the Crown saw fit to terminate it. Their Lordships recognized that the Indian usufructuary title was "a right" which, while being "personal ... in the sense that it is in its nature inalienable except by surrender to the Crown" (emphasis added), was a "burden" on the Crown's proprietary estate in the land(225) ibid., at pp 408, 411. They also acknowledged(226) ibid., at p 411 that the Crown's "substantial and paramount estate, underlying the Indian title"(227)) ibid., at p 410, quoting from the St. Catherine's Milling Case did not become "a plenum dominium" "except after a surrender of (the Indian title) ... to the Crown"(228) ibid., at

p 411. If common law native title conferred no more than entitlement to occupy or use until the Crown or those acting locally on its behalf told the native title-holders to cease their occupation or use, the term "title" would be misleading, the "rights" under it would be essentially illusory since they could be lawfully terminated at the whim of the Executive, the reference to inalienability "except by surrender" would be inappropriate, and the statements that the title was a "burden" on the Crown's proprietary estate and that the title precluded the Crown from possessing "a plenum dominium" would be simply wrong. It is true that, at one point in the judgment, their Lordships, quoting from the Privy Council judgment in the St. Catherine's Milling Case, referred(229) ibid., at p 406 to the Indian title as a personal right "dependent upon the goodwill of the Sovereign". That phrase may be explicable as a reference to past procedural difficulties in enforcing non-contractual rights against the Crown. Be that as it may, the context of the case makes it highly probable that the phrase was used to distinguish Indian title from an estate in land, and it cannot properly be understood as intended to convey the view that the Indian title was merely a kind of permissive occupancy terminable at will. In that regard, it is relevant to note that what was said in both the majority and minority judgments in the Supreme Court of Canada in the St. Catherine's Milling Case(230) (1887) 13 SCR 577 was plainly inconsistent with the suggestion that the Indian occupancy under the native title was merely such a permissive occupancy. Ritchie C.J. (for the majority) stated(231) ibid., at pp 599-600 (emphasis added) that the Indians possessed the "right of occupancy" and that the Crown's legal title was "subject to that occupancy, with the absolute exclusive right to extinguish the Indian title either by conquest or by purchase". Strong J. (in the minority) disregarded the possibility of "conquest" and expressed the view(232) ibid., at p 612 (emphasis added). See, also, per Gwynne J. at p 664 that the lands occupied by the Indians under native title "are, until surrendered, treated as their rightful though inalienable property, so far as the enjoyment and possession are concerned", adding(233) ibid., at p 613 that "these territorial rights of the Indians were strictly legal rights".

26. The judgments in subsequent Privy Council cases make plain their Lordships' view that the Crown was not, as between the native inhabitants and itself, lawfully entitled to effect a unilateral extinguishment of common law native title against the wishes of the native occupants. Thus, in Nireaha Tamaki v. Baker(234) (1901) AC, at p 579, their Lordships quoted with approval the following comment of Chapman J. in Reg. v. Symonds(235) (1847) NZPCC , at p 390 which they described as being "very pertinent" to the case before them:

> "Whatever may be the opinion of jurists as to the strength
> or weakness of the Native title ... it cannot be too
> solemnly asserted that it is entitled to be respected, that
> it cannot be extinguished (at least in times of peace)
> otherwise than by the free consent of the Native occupiers."

That statement was made by Chapman J. in the course of demonstrating that "in solemnly guaranteeing the Native title, and in securing what is called the Queen's pre-emptive right, the Treaty of Waitangi, confirmed by the Charter of the Colony, does not assert either in doctrine or in practice any thing new and unsettled"(236) ibid. Their Lordships' endorsement of it was as a statement of the effect of the common law.

27. The Privy Council judgment in Amodu Tijani is also inconsistent with the notion that the common law native title was merely a permissive occupancy which the Crown could terminate at any time without any breach of its legal obligations to the traditional occupants. Their Lordships consistently referred to the native title as "a right" or "rights". They described the legal title of the Crown as being qualified(237) (1921) 2 AC, at p 403 and reduced(238) ibid., at p 410 by the common law native title. They rejected views expressed by the Chief Justice of Nigeria to the effect that the merely "seigneurial" rights of control possessed by the natives were extinguished upon cession, on the ground that those views "virtually exclude ... the legal reality of the community usufruct" by failing to "recognize the real character of the

title to land occupied by a native community"(239) ibid., at p 409 (emphasis added). That title was, their Lordships said(240) ibid., at pp 409-410:

> "prima facie based, not on such individual ownership as English law has made familiar, but on a communal usufructuary occupation, which may be so complete as to reduce any radical right in the Sovereign to one which only extends to comparatively limited rights of administrative interference" (emphasis added).

The judgment in Amodu Tijani was subsequently described by the Privy Council(241) Sunmonu v. Disu Raphael (1927) AC, at p 883 as one in which "the title to native lands is explained" and in which "various misconceptions ... were finally laid to rest".

28. In Administration of Papua and New Guinea v. Daera Guba(242) (1973) 130 CLR, at p 397 (emphasis added), Barwick C.J. identified the "traditional result" of the establishment of British sovereignty by "occupation or settlement" as being that "the indigenous people were secure in their usufructuary title to land" and that "the ultimate title subject to the usufructuary title was vested in the Crown. Alienation of that usufructuary title to the Crown completed the absolute fee simple in the Crown." In a context where the primary issue in the case was whether a claim by traditional inhabitants against the Crown was defeated by reason of an earlier "purchase" by the Crown, it is most unlikely that Barwick C.J., who spoke for the majority of the Court on that issue, would so describe the common law native title if he had considered that the Crown could extinguish it by unilateral act at any time without breach of its legal obligations to the traditional owners. Similarly, it is most unlikely that Williams J., whose judgment was that of the majority in Geita Sebea v. Territory of Papua, would have held(243) (1941) 67 CLR, at p 557 that, for the purposes of assessing compensation, the communal usufructuary title was "equivalent to full ownership" and that no deduction should be made by reason of restrictions upon alienability, if his Honour had considered that the title was extinguishable at the will of the Crown without infringement of the rights of the native title-holders.

29. Notwithstanding that the rights of use or occupancy under a common law native title recognized by the law of a settled British Colony were binding upon the Crown, the native inhabitants of such a Colony in the eighteenth century were in an essentially helpless position if their title was wrongfully denied or extinguished or their possession was wrongfully terminated by the Crown or those acting on its behalf. In theory, the native inhabitants were entitled to invoke the protection of the common law in a local court (when established) or, in some circumstances, in the courts at Westminster. In practice, there is an element of the absurd about the suggestion that it would have even occurred to the native inhabitants of a new British Colony that they should bring proceedings in a British court against the British Crown to vindicate their rights under a common law of which they would be likely to know nothing. There were, however, a few occasions on which, even in those times, proceedings were brought in British courts to vindicate the rights of the weak against the actions of the powerful. The case of James Sommersett (the "Negro Case")(244) (1772) 20 Howells' State Trials 2 provides an example. Even if the native inhabitants of an eighteenth century Colony did somehow institute proceedings against the Crown or its agents in the British courts, however, they would have failed. As has been said, if the Crown had already made an unqualified grant of an inconsistent estate in the relevant land, the common law native title of the inhabitants would have been extinguished. The same position would apply if the Crown had reserved or dedicated the land for some inconsistent public purpose or use in circumstances giving rise to third party rights or assumed acquiescence. True it is that, subject to the effect of any acquiescence, the Crown would have infringed the legal rights of the traditional inhabitants and would have acted wrongfully. The extent of Crown immunity from curial proceedings was, however, such that, no breach of contract being involved, no action would have lain against the Crown to prevent the wrongful act being done or against

the Crown or its agents for compensatory damages after it was done(245) See, e.g., Clode, The Law and Practice of Petition of Right, (1887), pp 53-54; Tobin v. The Queen [1864] EngR 21; [1864] EngR 21; (1864) 16 CB (NS) 310, at pp 353-356 [1864] EngR 21; (143 ER 1148, at p 1165); Windsor and Annapolis Railway Co. v. The Queen and the Western Counties Railway Co. (1886) 11 App Cas 607, at p 614; and see also, as to New South Wales, Farnell v. Bowman (1887) 12 App Cas 643, at p 649 and note that it may be theoretically arguable that a claim could have been framed as a real action: see, generally, Holdsworth, A History of English Law, 3rd ed. (1944), vol.9, p 19. Indeed, until a general remedy was granted by statute against the Crown, the Sovereign's courts would not even entertain the suggestion that the Sovereign would do or had done wrong(246) See, e.g., Werrin v. The Commonwealth [1938] HCA 3; (1938) 59 CLR 150, at pp 167-168; Williams v. Downs (1970) 72 SR (NSW) 622, at pp 628-629.

30. The practical inability of the native inhabitants of a British Colony to vindicate any common law title by legal action in the event of threatened or actual wrongful conduct on the part of the Crown or its agents did not, however, mean that the common law's recognition of that title was unimportant from the practical point of view. The personal rights under the title were not illusory: they could, for example, be asserted by way of defence in both criminal and civil proceedings (e.g. alleged larceny of produce or trespass after a purported termination of the title by the Crown by mere notice as distinct from inconsistent grant or other dealing). More important, if the domestic law of a British Colony recognized and protected the legitimate claims of the native inhabitants to their traditional lands, that fact itself imposed some restraint upon the actions of the Crown and its agents even if the native inhabitants were essentially helpless if their title was wrongfully extinguished or their possession or use was forcibly terminated.

(vii) The act of State establishing New South Wales

31. It has been seen that the validity of the act of State establishing a new Colony cannot be challenged in the domestic courts. Nor can the domestic courts invalidate an expropriation of property or extinguishment of rights effected in the course of that act of State, or enforce a promise or undertaking made or given as part of it. On the other hand, when the subject seeks to assert a right alleged to arise under the domestic law and a question arises whether the act of State establishing a Colony excluded what would otherwise be a rule of the common law or precluded or extinguished rights which would otherwise exist under the domestic law, it is incumbent upon the domestic courts in the discharge of their jurisdiction to determine whether, as a matter of domestic law, the act of State did have that extended operation. Were the law otherwise, the subject would have no rights against the Executive in any case where the Executive simply asserted that property or rights to which the subject was presumptively entitled under the common law had been expropriated, precluded or extinguished by the act of State establishing a Colony. Accordingly, it is open to the domestic courts to consider the question whether the act of State establishing a particular Colony, or other act or declaration performed or made as part of that act of State, or some other expropriation of property had the effect of negativing the strong assumption of the common law that pre-existing native interests in lands in the Colony were respected and protected(247) See, e.g., In re Southern Rhodesia (1919) AC, at p 233; Amodu Tijani (1921) 2 AC, at p 407; Adeyinka Oyekan v. Musendiku Adele (1957) 1 WLR, at p 880; (1957) 2 All ER, at p 788; Administration of Papua and New Guinea v. Daera Guba (1973) 130 CLR, at p 397. Both legal principle relating to the deprivation of property or rights and considerations of justice require that any such act or declaration be clear and unambiguous(248) See, e.g., In re Southern Rhodesia (1919) AC, at p 233; Adeyinka Oyekan v. Musendiku Adele (1957) 1 WLR, at p 880; (1957) 2 All ER, at p 788; Calder v. Attorney-General of British Columbia (1973) 34 DLR (3d), at p 210; Hamlet of Baker Lake v. Minister of Indian Affairs (1979) 107 DLR (3d) 513, at p 552.

32. As has been said, the establishment of the Colony of New South Wales by settlement was complete, at the latest, when Captain Phillip caused his second Commission to be read and published in the territory of the Colony. It is debatable whether the act of State constituting the Colony consisted solely of the reading and publishing of the second Commission or should be extended to include the other documents

which were read and published(249) the Statute 27 GEO III c.2 (authorizing the establishment of a Criminal Court of Record) and the Letters Patent of 2 April and 5 May 1787 (establishing courts) and/or the earlier activities of Captain Cook and the members of his expedition on the eastern coastline. Even if the act of State establishing the Colony be so extended to include all the documents read and all those activities, there is nothing which could properly be seen as effecting a general confiscation or extinguishment of any native interests which may have existed in the Colony under native law or custom or as negating or reversing the strong assumption of the common law that any such pre-existing native interests were respected and protected under the law of the Colony once established.

33. Cook's activities of discovery and pronouncements of taking possession were in no way directed to depriving the native inhabitants of the ownership of any land in which they had an interest under their law or custom. They were concerned with the assertion of British sovereignty. Examination of the documents which might arguably be involved in the act of State establishing the Colony discloses little that is relevant to the question of its intended effect upon any existing native interests in the lands of the new Colony. The first Commission was a formal document which, for present purposes, did no more than appoint Phillip as the Governor of the designated territory. The second Commission conferred upon Phillip "full power and authority to agree for such lands tenements and hereditaments as shall be in our power to dispose of and them to grant to any person or persons"(250) HRA, (1914) Series 1, vol.1, p 7 (emphasis added). The Instructions recorded(251) ibid., p 12 the Royal intent that, after arrival in the territory of the new Colony, supplies of livestock be acquired by the use of "a quantity of arms and other articles of merchandize" for the purposes of "barter with the natives either on the territory of New South Wales or the islands adjacent". They also recorded(252) ibid., pp 14-15 the Royal wish that land be granted and provisions be supplied to emancipated convicts. In order to enable encouragement to be given to prospective new settlers, Phillip was instructed(253) ibid., p 15 that he should, "with all convenient speed, transmit a report of the actual state and quality of the soil at and near the said intended settlement". As regards the Aboriginal inhabitants, the Instructions contained what was to become a familiar clause. It read(254) ibid., pp 13-14:

> "You are to endeavour by every possible means to open an intercourse with the natives, and to conciliate their affections, enjoining all our subjects to live in amity and kindness with them. And if any of our subjects shall wantonly destroy them, or give them any unnecessary interruption in the exercise of their several occupations, it is our will and pleasure that you do cause such offenders to be brought to punishment according to the degree of the offence. You will endeavour to procure an account of the numbers inhabiting the neighbourhood of the intended settlement, and report your opinion to one of our Secretaries of State in what manner our intercourse with these people may be turned to the advantage of this colony."

There is nothing in the Statute 27 GEO III c.2 or any of the other documents associated with the actual establishment of the Colony which takes the matter any further.

34. It follows that, for present purposes, the most that can be said about the act of State establishing the Colony is that it envisaged (i) that some lands within the Colony would become Crown lands and be available both for the establishment of the penal settlement and for future grants of Crown land to emancipated convicts and new settlers, and (ii) that the native inhabitants of the Colony would be protected and not subjected to "any unnecessary interruption in the exercise of their several occupations". The expectation that some colonial lands would become Crown lands and be available both for the use of

the Crown and for future grant to others was one that would have probably existed in respect of all of the British Colonies established in the eighteenth and nineteenth centuries. It may be arguable, though we think unpersuasively, that the Instructions unambiguously authorized the unilateral extinguishment by the Crown of any existing native interests in the land required for the actual establishment of the convict settlement ("at and near the said intended settlement"(255) ibid., p 15). Otherwise, it seems to us to be simply not arguable that there was anything in the act of State establishing the Colony which constituted either an expropriation or extinguishment of any existing native interests in the vast areas of land in the new Colony or a negation or reversal of the strong assumption of the common law that such native interests were respected and protected under the law of the Colony after its establishment.

35. Any explanation of the absence, in the documents encompassed by the act of State, of any specific reference to existing native interests in the lands of the Colony necessarily involves a degree of speculation. In the context of British experience in North America (including the 1763 Imperial Proclamation(256) the "Indian Bill of Rights", which had "force ... analogous to the status of Magna Carta" and which "has always been considered to be the law throughout the Empire", following "the flag" to "newly discovered or acquired lands or territories": see Calder v. Attorney-General of British Columbia (1973) 34 DLR (3d), at p 203; Reg. v. Foreign Secretary; ex parte Indian Association of Alberta (1982) QB 892, at p 912 which recognized Indian rights of occupation of their traditional homelands) and of the specific instructions to Phillip protecting the Aboriginal inhabitants of Australia from "any unnecessary interruption in the exercise of their several occupations", it is unlikely that there was any actual but unexpressed intent on the part of the Crown that the act of State establishing the Colony of New South Wales should reverse the assumption of the common law or extinguish existing native interests in land throughout the more than 1.4 million square miles of the Colony. The information provided by Cook and those who sailed with him had been misleading about the numbers of native inhabitants. Banks thought that there were "very few inhabitants" on either the eastern coast in general or around Botany Bay(257) See the extract from Banks' evidence before the House of Commons Committee on Transportation quoted by R.J. King in "Terra Australis: Terra Nullius aut Terra Aboriginum?", (1986) 72 Journal of the Royal Australian Historical Society, 75, at p 77 and, while admitting that what the inland might produce was "totaly unknown", commented that "we may have liberty to conjecture however that (it is) totaly uninhabited"(258) J. Banks, The 'Endeavour' Journal of Joseph Banks, 1768-1771, (ed. Beaglehole), (1962), vol.2, p 122. In fact, it is now clear that parts of the continent were, for an unindustralized and uncultivated territory, quite heavily populated. If one must speculate, the most likely explanation of the absence of specific reference to native interests in land is that it was simply assumed either that the land needs of the penal establishment could be satisfied without impairing any existing interests (if there were any) of the Aboriginal inhabitants in specific land or that any difficulties which did arise could be resolved on the spot with the assent or acquiescence of the Aboriginals: e.g., by "purchase" (on behalf of the Crown) "of a part of the country from the native inhabitants for articles more agreable and useful to them"(259) "An Anonymous Proposal for the Settlement of New South Wales", (1783-86), Historical Records of New South Wales, vol.2, p 364 (semble, written by Sir John Call).

36. There can be cases in which events after an act of State can remove uncertainty or ambiguity about what was involved in the act of State itself. What was done after the establishment of the Colony of New South Wales does not, however, affect the nature and content of the act of State which established it. The reason why that is so is that there is no relevant ambiguity about the act of State establishing the Colony. We know what was done and it is plain that what was done neither constituted a specific expropriation of pre-existing native interests in the lands of the Colony nor sufficed to negate the strong assumption of the common law that any such pre-existing native interests were respected and protected under the law of the Colony after its establishment. In any event, while those subsequent acts were increasingly inconsistent with the existence of any valid Aboriginal claims to land within the Colony, they cannot properly be seen as evincing an intention to extinguish any Aboriginal interests of a kind presumptively recognized by the common law. When they were purportedly rationalized and justified, it was on the basis of a denial that

there were pre-existing Aboriginal interests of the relevant kind for the law to respect and protect. All the lands of the Colony had been, so it was asserted, unoccupied for practical purposes. As such, they were all unoccupied and unclaimed waste lands of which the Crown had become the complete and unqualified legal and beneficial owner.

(viii) The Aborigines and the land in 1788

37. The numbers of the Aboriginal inhabitants of the Australian continent in 1788, the relationship between them and the lands on which they lived, and the content of the traditional laws and customs which governed them are still but incompletely known or imperfectly comprehended. The following broad generalizations must, however, now be accepted as beyond real doubt or intelligent dispute at least as regards significant areas of the territory which became New South Wales. As has been said, it is clear that the numbers of Aboriginal inhabitants far exceeded the expectations of the settlers. The range of current estimates for the whole continent is between three hundred thousand and a million or even more. Under the laws or customs of the relevant locality, particular tribes or clans were, either on their own or with others, custodians of the areas of land from which they derived their sustenance and from which they often took their tribal names. Their laws or customs were elaborate and obligatory. The boundaries of their traditional lands were likely to be long-standing and defined. The special relationship between a particular tribe or clan and its land was recognized by other tribes or groups within the relevant local native system and was reflected in differences in dialect over relatively short distances. In different ways and to varying degrees of intensity, they used their homelands for all the purposes of their lives: social, ritual, economic. They identified with them in a way which transcended common law notions of property or possession. As was the case in other British Colonies(260) See, e.g., Amodu Tijani (1921) 2 AC, at p 404; Sobhuza II. v. Miller (1926) AC, at p 525, the claim to the land was ordinarily that of the tribe or other group, not that of an individual in his or her own right.

38. In the context of the above generalizations, the conclusion is inevitable that, at the time of the establishment of the Colony of New South Wales in 1788, there existed, under the traditional laws or customs of the Aboriginal peoples in the kaleidoscope of relevant local areas, widespread special entitlements to the use and occupation of defined lands of a kind which founded a presumptive common law native title under the law of a settled Colony after its establishment. Indeed, as a generalization, it is true to say that, where they existed, those established entitlements of the Australian Aboriginal tribes or clans in relation to traditional lands were no less clear, substantial and strong than were the interests of the Indian tribes and bands of North America, at least in relation to those parts of their traditional hunting grounds which remained uncultivated.

39. It follows from what has been said in earlier parts of this judgment that the application of settled principle to well-known facts leads to the conclusion that the common law applicable to the Colony in 1788, and thereafter until altered by valid legislation, preserved and protected the pre-existing claims of Aboriginal tribes or communities to particular areas of land with which they were specially identified, either solely or with others, by occupation or use for economic, social or ritual purposes. Under the law of the Colony, they were entitled to continue in the occupation or use of those lands as the holders of a common law native title which was a burden upon and reduced the title of the Crown. The Crown and those acting on behalf of the Crown were bound by that native title notwithstanding that the Crown's immunity from action and the fiction that the King could do no wrong precluded proceedings against the Crown to prevent, or to recover compensation for, its wrongful infringement or extinguishment. In accordance with the basic principles of English constitutional law applicable to a settled Colony, the sovereignty of the British Crown did not, after the act of State establishing the Colony was complete, include a prerogative right to extinguish by legislation or to disregard by executive act the traditional Aboriginal rights in relation to the land which were recognized and protected by the common law as true legal rights. The combined effect of (i) the personal nature of those rights, (ii) the absence of any presumption of a prior grant to the Aboriginal title-holders, and (iii) the applicable principles of English

land law was that native title would be extinguished by a subsequent inconsistent grant of the relevant land by the Crown which was not invalid on its face. That extinguishment would, however, involve a wrongful infringement by the Crown of the rights of the Aboriginal title-holders.

40. It is unnecessary for the purposes of this judgment, and probably now impracticable, to seek to ascertain what proportion of the lands of the continent were affected by such common law native titles. Obviously, the proportion was a significant one. Conceivably, it was the whole.

(ix) The Australian cases

41. The only reported decision of an Australian court directly dealing with the merits of an Aboriginal claim to particular traditional tribal or communal lands is Milirrpum v. Nabalco Pty. Ltd.(261) (1970) 17 FLR 141. There, a group of Aborigines representing native tribes sued a mining company and the Commonwealth in the Supreme Court of the Northern Territory claiming relief in relation to the possession and enjoyment of areas of land which had initially been part of the Colony of New South Wales. The learned trial judge (Blackburn J.) rejected the plaintiffs' claim of common law communal native title. The primary reason for that rejection was that his Honour found that the plaintiffs had not established, on the balance of probabilities, that their predecessors had had the same links as themselves to the relevant areas of land at the time of the establishment of New South Wales. It is not necessary, for present purposes, to examine the correctness or the relevance of that particular finding in the context of the evidence in Milirrpum. The importance of the case for present purposes lies in Blackburn J.'s conclusion that, quite apart from that finding, there were general reasons of principle which precluded the plaintiffs' success. One was that a doctrine of common law native title had no place in a settled Colony except under express statutory provisions. Another was that, under any such doctrine, the narrow and somewhat rigid approach referred to in In re Southern Rhodesia would be appropriate and that the plaintiffs had failed to establish any pre-existing interest in relation to the land which satisfied the requirement that it be of the category of "rights of property".

42. It should be apparent from what has been written above that we disagree with each of the above conclusions of general principle reached by Blackburn J. in Milirrpum. As has been seen, the doctrine of presumptive common law native title, which has long been recognized by the common law, is applicable to a settled British Colony. As has also been seen, the view expressed in In re Southern Rhodesia, to the effect that pre-existing native interests are not assumed to be recognized by the law of a British Colony unless they fall within the category of "rights of private property", has not prevailed in subsequent cases and should be rejected. Nonetheless, it must be acknowledged that Blackburn J.'s ultimate conclusion that the doctrine of common law native title had never formed part of the law of any part of Australia derives support from some general statements of great authority in earlier Australian cases. We turn to consider the four most important of those cases. They are: Attorney-General v. Brown(262) (1847) 1 Legge 312, Cooper v. Stuart(263) (1889) 14 App Cas 286, Williams v. Attorney-General for New South Wales(264) [1913] HCA 33; (1913) 16 CLR 404 and Randwick Corporation v. Rutledge(265) [1959] HCA 63; (1959) 102 CLR 54.

43. In Attorney-General v. Brown, Williams v. Attorney-General for New South Wales and Randwick Corporation v. Rutledge, one finds strong support for the broad proposition that, upon the settlement of New South Wales, the unqualified legal and beneficial ownership of all land in the Colony vested in the Crown. Arguably, the judgment of the Supreme Court of New South Wales (Stephens C.J., Dickinson and Therry JJ.) in Attorney-General v. Brown is ambiguous in that their Honours confined the proposition(266) See (1847) 1 Legge, at p 318 to "waste lands" which they defined(267) ibid., at p 319 as meaning "all the waste and unoccupied lands of the colony" (emphasis added). Careful reading of the judgment seems to us, however, to make plain that implicit in it is the assumption that all the lands of the Colony were relevantly unoccupied at the time of its establishment.

44. In Williams v. Attorney-General for New South Wales, Isaacs J., in the course of a judgment dealing with the ownership of the land of State Government House in Sydney, identified as his starting point "the unquestionable position that, when Governor Phillip received his first commission from King George III on 12 October 1786, the whole of the lands of Australia were already in law the property of the King of England"(268) (1913) 16 CLR, at p 439. It has been pointed out that that proposition is far from "unquestionable" in so far as its identification of the time of establishment of the Colony is concerned(269) See Roberts-Wray, op cit, p 631: "startling and, indeed, incredible". Be that as it may, it is clear that Isaacs J. regarded the proposition that, on the establishment of New South Wales, the unqualified legal and beneficial property in all the lands of the Colony vested in the Crown as being clear beyond argument. His Honour's judgment also made plain his view that the Aboriginal inhabitants had no claims which qualified or affected the absolute ownership of the Crown(270) See the reference to Batman's Treaty: (1913) 16 CLR, at p 439.

45. The question in Randwick Corporation v. Rutledge was whether the lands used for Randwick Racecourse in Sydney fell within an exemption from rating under the Local Government Act 1919 (N.S.W.). Windeyer J., in the course of a judgment with which Dixon C.J. and Kitto J. (and perhaps Fullagar J.(271) See (1959) 102 CLR, at p 61) agreed, stated(272) ibid., at p 71 that from the first settlement of New South Wales all lands of the territory lay in the grant of the Crown and, until grant, formed "a royal demesne". His Honour added(273) ibid that, "when in 1847 a bold argument ... challenged the right of the Crown ... to dispose of land in the colony, it was as a legal proposition firmly and finally disposed of by Sir Alfred Stephen C.J.: The Attorney-General v. Brown".

46. The other case, Cooper v. Stuart, was a decision of the Privy Council on appeal from the Supreme Court of New South Wales. In the course of considering whether the rule against perpetuities had been applicable to a reservation in an 1823 Crown grant of land in the Colony, their Lordships asserted(274) (1889) 14 App Cas, at p 291 that, at the time of the establishment of the Colony, it "consisted of a tract of territory practically unoccupied, without settled inhabitants or settled law". Their statement to that effect was thereafter seen as authoritatively establishing that the territory of New South Wales had, in 1788, been terra nullius not in the sense of unclaimed by any other European power, but in the sense of unoccupied or uninhabited for the purposes of the law.

47. It is important to note that, in each of those four cases, the reasoning supporting one or both of the broad propositions that New South Wales had been unoccupied for practical purposes and that the unqualified legal and beneficial ownership of all land in the Colony had vested in the Crown, consists of little more than bare assertion. The question of Aboriginal entitlement was not directly involved in any of them and it would seem that no argument in support of Aboriginal entitlement was advanced on behalf of any party. In three(275) Attorney-General v. Brown; Williams v. Attorney-General for New South Wales; Randwick Corporation v. Rutledge, and arguably all, of them the relevant comments were obiter dicta. Nonetheless, the authority which the four cases lend to the two propositions is formidable. Indeed, the paucity of the reasoning tends to emphasize the fact that the propositions were regarded as either obvious or well-settled. Certainly, they accorded with the general approach and practice of the representatives of the Crown in the Colony after its establishment.

(x) The "dispossession of the original Inhabitants"

48. The first days of the Colony were peaceful in so far as the Aboriginal inhabitants were concerned. They received numerous gifts from the new arrivals(276) See, e.g., Phillip's despatch of May 15, 1788, Historical Records of New South Wales, vol.1, Pt 2, pp 128-129, 131. They gave up, without dispute, the lands initially occupied by, and in connection with, the penal camp.

49. As time passed, the connection between different tribes or groups and particular areas of land began to emerge. The Europeans took possession of more and more of the lands in the areas nearest to Sydney

Cove. Inevitably, the Aborigines resented being dispossessed. Increasingly there was violence as they sought to retain, or continue to use, their traditional lands.

50. An early flash point with one clan of Aborigines illustrates the first stages of the conflagration of oppression and conflict which was, over the following century, to spread across the continent to dispossess, degrade and devastate the Aboriginal peoples and leave a national legacy of unutterable shame. It came in 1804 in the fertile areas surrounding the lower reaches of the Hawkesbury River. The Aborigines were said to have threatened to set fire to the settlers' wheat crops when they ripened. Governor King summoned three representatives of the Aborigines for questioning. They "readily came" (277) ibid., vol.5, p 513. In his despatch of 20 December 1804 to Lord Hobart, King reported(278) ibid that "they very ingenuously answered that they did not like to be driven from the few places that were left on the banks of the river, where alone they could procure food; that they had gone down the river as the white men took possession of the banks; if they went across white men's ground the settlers fired upon them and were angry; that if they could retain some places on the lower part of the river they should be satisfied and would not trouble the white men. The observation and request appear to be so just and so equitable that I assured them no more settlements should be made lower down the river." In an earlier despatch to King, Hobart had expressly acknowledged(279) ibid., vol.4, p 684 the extent to which the practice in the Colony had departed from "the wise and humane instructions" of his "predecessors" and that the Aborigines had been "too often" subjected to "unjustifiable injuries". In due course, King's assurance that no more settlements should be made lower down the river was dishonoured. While the wrongs involved in the dispossession of the Aborigines were acknowledged, the underlying problems were left unaddressed.

51. Throughout the rest of the century, the white expropriation of land continued, spreading not only throughout the fertile regions of the continent but to parts of the desert interior. There were some reserves established for Aborigines and some reservations, increasingly ignored, in pastoral leases protecting Aboriginal usufructuary access. On the broad front, however, land was granted by the Crown or dedicated or reserved for inconsistent public purposes without regard to Aboriginal claims. As political power in relation to domestic matters was transferred from the Imperial Government in England to the European Colonists on the other side of the world, the Aborigines were increasingly treated as trespassers to be driven, by force if necessary, from their traditional homelands. A dramatic illustration of the effect upon them of the first one hundred and five years of European settlement is provided by the contrast between what Cook wrote in the Endeavour's Log Book in August 1770 and what Captain Wharton F.R.S. wrote as editor of a transcription of the Log Book in 1893. Cook had written of the Aborigines(280) See Captain Cook's Journal, op cit, p 323:

> "They live in a Tranquility which is not disturbed by the Inequality of Condition. The earth and Sea of their own accord furnishes them with all things necessary for Life ... they live in a Warm and fine Climate, and enjoy every wholesome Air, so that they have very little need of Cloathing; ... in short, they seem'd to set no Value upon anything we gave them; nor would they ever part with anything of their own ... This, in my opinion Argues that they think themselves provided with all the necessarys of Life."

In his notes to that passage, Wharton was roundly condemnatory of the "native Australians" and their habits. For present purposes, however, the significance of his comments lies in his portrayal of the state of affairs, as regards the Aborigines and the land, which had developed by 1893(281) ibid., pp 323-324:

> "Their treachery, which is unsurpassed, is simply an outcome of their savage ideas, and in their eyes is a form of independence which resents any intrusion on their land, their wild animals, and their rights generally. In their untutored state they therefore consider that any method of getting rid of the invader is proper. ... although treated by the coarser order of colonists as wild beasts to be extirpated, those who have studied them have formed favourable opinions of their intelligence. The more savage side of their disposition being, however, so very apparent, it is not astonishing that, brought into contact with white settlers, who equally consider that they have a right to settle, the aborigines are rapidly disappearing."

It should be stressed that the statement that "the coarser order of colonists" treated the Aborigines "as wild beasts to be extirpated" was written in 1893 and was obviously a reference to free settlers not to transported convicts(282) Transportation of convicts to the Australian Colonies ended in 1868. What the extract makes plain is that the oppression and, in some areas of the continent, the obliteration or near obliteration of the Aborigines were the inevitable consequences of their being dispossessed of their traditional lands.

52. Only seven years later, the Australian Aborigines were, at least as a matter of legal theory, included among the people who, "relying on the blessing of Almighty God", agreed to unite in an indissoluble Commonwealth of Australia(283) See the preamble to the Commonwealth of Australia Constitution Act (63 and 64 Vict c 12). The Constitution contained but two references to them. Both were dismissive and have now been removed. The first(284) s.51(xxvi) excluded them from the reach of the power of the Commonwealth Parliament to make laws with respect to the people of any race. In a context where the courts had affirmed the proposition that the territory of New South Wales had been "practically unoccupied" in 1788 and that the lands of the Colony were unaffected by any pre-existing traditional claims, the second(285) s.127 was not all that surprising. It had been adopted by the framers of the Constitution without any dissent or, for that matter, any real discussion. It provided that, "in reckoning the numbers of the people of the Commonwealth, or of a State or other part of the Commonwealth, aboriginal natives shall not be counted".

53. In the very early days, the explanation of the disregard of Aboriginal claims and the resulting dispossession and conflict may have been that the new arrivals were ignorant of the fact that, under pre-existing local law or custom, particular tribes or clans had established entitlements to the occupation and use of particular areas of land. That explanation is not, however, a plausible one in respect of later events. Increasingly, the fact that particular tribes or clans enjoyed traditional entitlements to the occupation and use of particular lands for ritual, economic and social purposes was understood. Increasingly, that fact was even acknowledged by government authorities and in formal despatches(286) See, e.g., the examples given by Reynolds, The Law of the Land, (1987), Chs.III and V. Thus, on 14 March 1841, James Stephen, probably the most knowledgeable of all the nineteenth century permanent heads of the Imperial Colonial Office, noted on a despatch received from South Australia(287) Colonial Office Records, Australian Joint Copying Project, File No.13/16, Folio 57:

> "It is an important and unexpected fact that these Tribes had proprietary rights in the Soil - that is, in particular sections of it which were clearly defined or well understood before the occupation of their country".

Two years later, Stephen wrote(288) ibid., File No. 18/34, Folio 106 (9 June 1843) of the "dispossession of the original Inhabitants".

54. Nor can it be said that it did not occur to the Imperial and local authorities that the dispossession of the Aboriginal inhabitants might involve the infringement of rights recognized by the common law. The story of the development of South Australia, including the ineffective reservation in the Letters Patent of 1836(289) Appendix to Reprints of the Public General Acts of South Australia 1837-1936, vol.8, pp 830-831 protecting "the rights of any Aboriginal Natives (of South Australia) to the actual occupation or enjoyment in their own persons or in the persons of their descendants of any land therein now actually occupied or enjoyed by such Natives", demonstrates that the contrary was the case(290) See, e.g., the sources referred to in Reynolds, op cit, pp 103-120. Another example is apposite. In Williams v. Attorney-General for New South Wales(291) (1913) 16 CLR, at p 439, Isaacs J. referred to Governor Bourke's Proclamation approved by the Colonial Office, refusing to recognize Batman's 1835 Treaty with the local Aboriginal elders for the purchase of a large tract of land on the shores of Port Phillip, as a "very practical application" of the doctrine that the Crown had acquired full legal and beneficial ownership of all the lands of Australia. Examination of the contemporary documents discloses that the purchasers obtained advice from no less an authority than Dr. Stephen Lushington(292) Then a leader of the English Bar and judge of the London consistory court and subsequently the eminent English Admiralty Judge and a member of the Judicial Committee of the Privy Council. In an Opinion dated 18 January 1836(293) See HRA, (1923), Series 1, vol.18, p 389 (emphasis added), Dr. Lushington advised that the purported grants of land by the Aborigines were "not valid without the consent of the Crown". He added(294) ibid that he did not think "that the right to this Territory is at present vested in the Crown" but that it was "competent to the Crown to prevent such settlements being made by British Subjects, if it should think fit". Presumably, Dr. Lushington was recognizing the radical title and associated right of pre-emption of the Crown but acknowledging the rights in relation to the territory of the Aboriginal occupants. When a copy of Dr. Lushington's Opinion was forwarded to the then Secretary of State for the Colonies, Lord Glenelg, he conceded(295) ibid., p 390 "the great weight which is due to the deliberate judgment of Dr. Lushington on a question of this nature" but dismissed Dr. Lushington's advice on the specious ground that he must have been "under a misapprehension of some of the most material parts of the case". It is perhaps relevant to mention that, in an earlier despatch to Bourke, Glenelg had written that, although many circumstances had contributed to render him anxious that the "Rights" of the Aborigines "should be studiously defended", to concede to them "any right to alienate to private adventurers ... would subvert the foundation on which all Proprietary rights in New South Wales at present rest"(296) ibid., p 379.

55. Inevitably, one is compelled to acknowledge the role played, in the dispossession and oppression of the Aborigines, by the two propositions that the territory of New South Wales was, in 1788, terra nullius in the sense of unoccupied or uninhabited for legal purposes and that full legal and beneficial ownership of all the lands of the Colony vested in the Crown, unaffected by any claims of the Aboriginal inhabitants. Those propositions provided a legal basis for and justification of the dispossession. They constituted the legal context of the acts done to enforce it and, while accepted, rendered unlawful acts done by the Aboriginal inhabitants to protect traditional occupation or use. The official endorsement, by administrative practice and in judgments of the courts, of those two propositions provided the environment in which the Aboriginal people of the continent came to be treated as a different and lower form of life whose very existence could be ignored for the purpose of determining the legal right to occupy and use their traditional homelands.

(xi) Should the propositions supported by the Australian cases and past practice be accepted?

56. If this were any ordinary case, the Court would not be justified in reopening the validity of fundamental propositions which have been endorsed by long-established authority and which have been accepted as a basis of the real property law of the country for more than one hundred and fifty years. And that would be so notwithstanding that the combined effect of Crown grants, of assumed acquiescence in

reservations and dedications and of statutes of limitations would be that, as a practical matter, the consequences of re-examination and rejection of the two propositions would be largely, and probably completely, confined to lands which remain under Aboriginal occupation or use. Far from being ordinary, however, the circumstances of the present case make it unique. As has been seen, the two propositions in question provided the legal basis for the dispossession of the Aboriginal peoples of most of their traditional lands. The acts and events by which that dispossession in legal theory was carried into practical effect constitute the darkest aspect of the history of this nation. The nation as a whole must remain diminished unless and until there is an acknowledgment of, and retreat from, those past injustices. In these circumstances, the Court is under a clear duty to re-examine the two propositions. For the reasons which we have explained, that re-examination compels their rejection. The lands of this continent were not terra nullius or "practically unoccupied" in 1788. The Crown's property in the lands of the Colony of New South Wales was, under the common law which became applicable upon the establishment of the Colony in 1788, reduced or qualified by the burden of the common law native title of the Aboriginal tribes and clans to the particular areas of land on which they lived or which they used for traditional purposes.

(xii) The nature, incidents and limitations of the common law native title of Australian Aborigines

57. To a large extent, the nature, incidents and limitations of the rights involved in the common law native title of Australian Aborigines appear from what has been written above. It would, however, seem desirable to identify them in summary form at this stage of this judgment.

58. Ordinarily, common law native title is a communal native title and the rights under it are communal rights enjoyed by a tribe or other group. It is so with Aboriginal title in the Australian States and internal Territories. Since the title preserves entitlement to use or enjoyment under the traditional law or custom of the relevant territory or locality, the contents of the rights and the identity of those entitled to enjoy them must be ascertained by reference to that traditional law or custom. The traditional law or custom is not, however, frozen as at the moment of establishment of a Colony. Provided any changes do not diminish or extinguish the relationship between a particular tribe or other group and particular land, subsequent developments or variations do not extinguish the title in relation to that land.

59. The rights of an Aboriginal tribe or clan entitled to the benefit of a common law native title are personal only. The enjoyment of the rights can be varied and dealt with under the traditional law or custom. The rights are not, however, assignable outside the overall native system. They can be voluntarily extinguished by surrender to the Crown. They can also be lost by the abandonment of the connection with the land or by the extinction of the relevant tribe or group. It is unnecessary, for the purposes of this case, to consider the question whether they will be lost by the abandonment of traditional customs and ways. Our present view is that, at least where the relevant tribe or group continues to occupy or use the land, they will not.

60. The personal rights conferred by common law native title do not constitute an estate or interest in the land itself. They are extinguished by an unqualified grant of an inconsistent estate in the land by the Crown, such as a grant in fee or a lease conferring the right to exclusive possession. They can also be terminated by other inconsistent dealings with the land by the Crown, such as appropriation, dedication or reservation for an inconsistent public purpose or use, in circumstances giving rise to third party rights or assumed acquiescence. The personal rights of use and occupation conferred by common law native title are not, however, illusory. They are legal rights which are infringed if they are extinguished, against the wishes of the native title-holders, by inconsistent grant, dedication or reservation and which, subject only to their susceptibility to being wrongfully so extinguished, are binding on the Crown and a burden on its title.

(xiii) Legislative powers with respect to common law native title.

61. Like other legal rights, including rights of property, the rights conferred by common law native title and the title itself can be dealt with, expropriated or extinguished by valid Commonwealth, State or Territorial legislation operating within the State or Territory in which the land in question is situated. To put the matter differently, the rights are not entrenched in the sense that they are, by reason of their nature, beyond the reach of legislative power. The ordinary rules of statutory interpretation require, however, that clear and unambiguous words be used before there will be imputed to the legislature an intent to expropriate or extinguish valuable rights relating to property without fair compensation(297) See, e.g., The Commonwealth v. Hazeldell Ltd. [1918] HCA 75; [1918] HCA 75; (1918) 25 CLR 552, at p 563; Central Control Board (Liquor Traffic) v. Cannon Brewery Company Ltd. (1919) AC 744, at p 752; Clissold v. Perry [1904] HCA 12; (1904) 1 CLR 363, at pp 373-374 (affirmed (1907) AC 73): a case dealing with possessory title. Thus, general waste lands (or Crown lands) legislation is not to be construed, in the absence of clear and unambiguous words, as intended to apply in a way which will extinguish or diminish rights under common law native title. If lands in relation to which such title exists are clearly included within the ambit of such legislation, the legislative provisions conferring executive powers will, in the absence of clear and unambiguous words, be construed so as not to increase the capacity of the Crown to extinguish or diminish the native title. That is to say, the power of the Crown wrongfully to extinguish the native title by inconsistent grant will remain but any liability of the Crown to pay compensatory damages for such wrongful extinguishment will be unaffected. The executive acts of the Crown under Crown or waste lands legislation will likewise be presumed not to have been intended to derogate from the native title. Thus, when Crown lands or waste lands are transferred to trustees to be held upon trust for Aboriginal interests, it will be presumed, in the absence of clear and unambiguous words, that the lands were intended to be held by the trustees for the holders of the common law native title to the extent necessary to enable enjoyment of their rights of occupation and use.

62. There are, however, some important constraints on the legislative power of Commonwealth, State or Territory Parliaments to extinguish or diminish the common law native titles which survive in this country. In so far as the Commonwealth is concerned, there is the requirement of s.51(xxxi) of the Constitution that a law with respect to the acquisition of property provide "just terms". Our conclusion that rights under common law native title are true legal rights which are recognized and protected by the law would, we think, have the consequence that any legislative extinguishment of those rights would constitute an expropriation of property, to the benefit of the underlying estate, for the purposes of s.51(xxxi). An even more important restriction upon legislative powers to extinguish or diminish common law native title flows from the paramountcy of valid legislation of the Commonwealth Parliament over what would otherwise be valid State or Territory legislation. In particular, as Mabo v. Queensland(298) (1988) 166 CLR 186 has demonstrated, the provisions of the Racial Discrimination Act 1975 (Cth) represent an important restraint upon State or Territory legislative power to extinguish or diminish common law native title.

63. It is unnecessary and would be impracticable to seek to identify the extent to which particular legislative provisions have clearly and unambiguously extinguished or adversely affected common law native title in different areas of this country. That being so, the general comments about enforcement and protection in the next section of this judgment must necessarily be read as subject to the provisions of any valid applicable legislation.

(xiv) The enforcement and protection of common law native title

64. As has been seen, common law native title-holders in an eighteenth century British Colony were in an essentially helpless position if their rights under their native title were disregarded or wrongly extinguished by the Crown. Quite apart from the inherent unlikelihood of such title-holders being in a position to institute proceedings against the British Crown in a British court, the vulnerability of the rights under native title resulted in part from the fact that they were personal rights susceptible to extinguishment by inconsistent grant by the Crown and in part from the immunity of the Crown from

court proceedings. The vulnerability persists to the extent that it flows from the nature of the rights as personal. On the other hand, as legislative reforms increasingly subjected the Crown or a nominal defendant on its behalf to the jurisdiction of the courts and to liability for compensatory damages for a wrong done to a subject, the ability of native title-holders to protect and vindicate the personal rights under common law native title significantly increased. If common law native title is wrongfully extinguished by the Crown, the effect of those legislative reforms is that compensatory damages can be recovered provided the proceedings for recovery are instituted within the period allowed by applicable limitations provisions. If the common law native title has not been extinguished, the fact that the rights under it are true legal rights means that they can be vindicated, protected and enforced by proceedings in the ordinary courts.

65. In a case where the Crown or a trustee appointed by the Crown wrongly denies the existence or the extent of an existing common law native title or threatens to infringe the rights thereunder (e.g. by an inconsistent grant), the appropriate relief in proceedings brought by (or by a representative party or parties on behalf of) the native title-holders will ordinarily be declaratory only since it will be apparent that the Crown or the trustee, being bound by any declaration, will faithfully observe its terms. Further relief is, however, available where it is necessary to protect the rights of the title-holders. One example of such further relief is relief by way of injunction(299) See, e.g., Nireaha Tamaki v. Baker (1901) AC, at p 578. Notwithstanding their personal nature and their special vulnerability to wrongful extinguishment by the Crown, the rights of occupation or use under common law native title can themselves constitute valuable property. Actual or threatened interference with their enjoyment can, in appropriate circumstances, attract the protection of equitable remedies. Indeed, the circumstances of a case may be such that, in a modern context, the appropriate form of relief is the imposition of a remedial constructive trust framed to reflect the incidents and limitations of the rights under the common law native title. The principle of the common law that pre-existing native rights are respected and protected will, in a case where the imposition of such a constructive trust is warranted, prevail over other equitable principles or rules to the extent that they would preclude the appropriate protection of the native title in the same way as that principle prevailed over legal rules which would otherwise have prevented the preservation of the title under the common law. In particular, rules relating to requirements of certainty and present entitlement or precluding remoteness of vesting may need to be adapted or excluded to the extent necessary to enable the protection of the rights under the native title.

(xv) The annexation of the Murray Islands

66. It must now be accepted as settled(300) See Wacando v. The Commonwealth [1981] HCA 60; (1981) 148 CLR 1 that the Murray Islands became, or are deemed to have become, part of the Colony of Queensland on 1 August 1879 pursuant to the combined effect of the Imperial Letters Patent of 10 October 1878, the Queensland Coast Islands Act 1879 (Q.) and the Proclamation of 18 July 1879(301) See Supplement to the Queensland Government Gazette, vol.25, No.10, 21 July, 1879: the Proclamation was made on 18 July, gazetted on 21 July and expressed to take effect from 1 August of the Queensland Governor in Council. If, as is arguable, the Imperial Letters Patent did not validly authorize the local Act and Proclamation of 1879, any defect was retrospectively cured by the Colonial Boundaries Act 1895 (Imp)(302) See Wacando v. The Commonwealth (l981) 148 CLR at pp 16-18, 24-27, 28, 30; and note that the possible relevance of the Pacific Islanders Protection Acts 1872-1875 (Imp) appears not to have been adverted to in Wacando. See, generally, Lumb, "The Torres Strait Islands: Some Questions Relating to their Annexation and Status", (1990) 19 FLR 154.

67. Upon the annexation of the Murray Islands to Queensland, the law of Queensland became applicable to them. For its part, the law of Queensland traced back to the law of New South Wales, from whose territory Queensland had been carved by the Imperial Letters Patent and Order in Council of 6 June 1859(303) Pursuant to 18 and 19 Vict c 54 (Imp) (the New South Wales Constitution Act 1855). The power to separate the northern portion of New South Wales was first inserted in the Australian

Constitutions Act 1842 (Imp), s.51, and continued in the Australian Constitutions Act 1850 (Imp), s.34 and the New South Wales Constitution Act 1855 (Imp) respectively. Since the establishment of New South Wales in 1788, there had been no legislation enacted which expressly altered the Colony's domestic law in relation to the preservation and protection of pre-existing native entitlements to the occupation and use of land. Nor had there been any such legislation enacted in Queensland after its establishment as a Colony. There had been some general statutes - Imperial and Colonial - dealing with waste lands and their disposition. In a context where, as has been seen, the rights of occupation and use under common law native title can be "so complete as to reduce any radical right in the Sovereign to one which only extends to comparatively limited rights of administrative interference"(304) Amodu Tijani (1921) 2 AC, at p 410, the settled rules of statutory construction required that the general words of those provisions be construed as not intended to extinguish those rights(305) See, e.g., the cases referred to in fn.297 (above). Accordingly, where lands in respect of which common law native title existed were included in the "waste lands" affected by such legislation, the legislation neither obliterated nor reduced the personal rights of the native title-holders. To the extent that general provisions in such legislation would otherwise have the effect of making the native title-holders trespassers on the relevant land, those provisions must be read as inapplicable to those native title-holders. In particular, the provisions of the Crown Lands Alienation Act 1876 (Q.) did not, of themselves, either extinguish existing common law native title in relation to the lands to which it applied or make them trespassers upon those lands. On the other hand, such legislation did not enhance the nature of common law native title by diminishing or abolishing the capacity of the Crown wrongfully to extinguish it by an inconsistent grant which was not invalid on its face. After Federation, the power of the Crown to deal with land in Queensland and to extinguish native title by inconsistent grant remained in the Crown in right of the State.

68. It follows that, at the time the Murray Islands were annexed to the Colony, it was a doctrine of the domestic law of Queensland, as it was of the domestic law of New South Wales and the common law of England, that pre-existing native interests in relation to land were preserved and protected. There was nothing at all in the Proclamation of the Governor annexing the Islands, or in the associated Letters Patent and legislation, which could even arguably be suggested as evincing an intention to negative that strong assumption of the common law. To the contrary, the unavoidable inference is that it was the intention of the Crown that the existing entitlements of the native inhabitants to the occupation and use of their traditional homelands would be preserved and protected. The question therefore arises whether those existing entitlements were of a nature such as to found a common law native title.

(xvi) Traditional claims to land in the Murray Islands

69. The detailed findings of Moynihan J. of the Supreme Court of Queensland in relation to the issues of fact remitted to that court unavoidably contain areas of uncertainty and elements of speculation. Nonetheless, they provide, for present purposes, a sound basis for some generalizations in relation to native entitlements to the occupation and use of land within the Murray Islands under local law or custom at the time of their annexation to Queensland. It suffices, for the purposes of this judgment, to say that the Meriam people lived in an organized community which recognized individual and family rights of possession, occupation and exploitation of identified areas of land. The entitlement to occupation and use of land differed from what has come to be recognized as the ordinary position in settled British Colonies in that, under the traditional law or custom of the Murray Islanders, there was a consistent focus upon the entitlement of the individual or family as distinct from the community as a whole or some larger section of it. It would seem that, with the exception of the area used by the London Missionary Society, those individual or familial entitlements under traditional law or custom extended to all the land of the Islands. It is true, as the learned Solicitor-General for Queensland submitted, that it is impossible to identify any precise system of title, any precise rules of inheritance or any precise methods of alienation. Nonetheless, there was undoubtedly a local native system under which the established familial or individual rights of occupation and use were of a kind which far exceed the minimum requirements necessary to found a presumptive common law native title. In circumstances where the strong assumption of the common law

was unaffected by the act of State annexing the Islands, the effect of the annexation was that the traditional entitlements of the Meriam people were preserved. The radical title to all the lands of the Islands vested in the Crown. The Crown's proprietary estate in the land was, however, reduced, qualified or burdened by the common law native title of the Islanders which was thereafter recognized and protected by the law of Queensland. It is unnecessary to determine whether the lands of the Islands became, upon annexation, Crown lands for the purposes of the Crown Lands Alienation Act. If they did, the common law native title of the Islanders was not extinguished but remained a burden on the underlying title of the Crown, and any provisions of that Act which would have the effect of modifying the common law native title or restricting the rights of use and occupation of the Islanders were, to that extent, inapplicable.

(xvii) Post-annexation legislation and executive acts

70. In 1985, the Queensland Parliament enacted the Queensland Coast Islands Declaratory Act. In Mabo v. Queensland(306) [1988] HCA 69; (1988) 166 CLR 186, this Court held that the effect of that Act, if it had been wholly valid, would have been retrospectively to extinguish, from the time of annexation in 1879, any rights, interests and claims which any of the Meriam people might have had in relation to land in the Islands. The Act was, however, held by the Court to be invalid, by reason of inconsistency with s.10(1) of the Racial Discrimination Act 1975 (Cth), to the extent that it purportedly extinguished any traditional native title of the Murray Islanders. In the present case, the defendant State of Queensland has conceded that any native title to the occupation and use of lands in the Murray Islands which survived annexation has not been extinguished by subsequent legislation. That concession was rightly made since, putting to one side the purported extinguishment by the Queensland Coast Islands Declaratory Act, there is no provision of any other relevant statute which could properly be construed as evidencing a legislative intent to extinguish the rights of the Murray Islanders under the common law native title which preserved traditional entitlements.

71. After 1879, there were some dealings with two particular areas of Murray Islands land which set them apart from the other lands of the Islands. One of those areas was the subject of a series of leases by the Crown to the London Missionary Society. The current "lessees" of that area are the trustees of the Australian Board of Missions. The parties interested in it are not before the Court and the general comments made hereunder in relation to land in the Murray Islands should not be understood as applicable to that area of land. The second area, consisting of the whole of the Islands of Dauer and Waier, was the subject of a purported twenty-year Crown lease to two non-Islanders for the purpose of establishing a sardine factory. This lease recognized and protected usufructuary rights of the Murray Islanders and was subsequently forfeited. It would seem likely that, if it was valid, it neither extinguished nor had any continuing adverse effect upon any rights of Murray Islanders under common law native title. It is, however, appropriate to leave the question of the validity and possible effect of that lease until another day.

72. In 1882, a "reservation from sale" of the lands of the Murray Islands was purportedly made pursuant to the provisions of the Crown Lands Alienation Act 1876 (Q.). The instrument of reservation has not been located. Its validity is open to doubt since it is arguable that the Crown Lands Alienation Act was inapplicable to lands within a territory which was not annexed to Queensland until after its enactment. Be that as it may, there is nothing to suggest that the instrument of reservation contained anything which would have the effect of extinguishing the common law native title of Murray Islanders to lands within the Islands.

73. It is unnecessary to trace in detail the history of subsequent Crown lands legislation in Queensland. It was argued on behalf of the plaintiffs that the lands of the Murray Islands had remained right outside the provisions of the Land Act 1910 (Q.). The preferable view is, however, that, by one course or another, the Murray Islands were initially within the definition of "Crown Lands" for the purposes of that Act(307)

See the definition of "Crown land" in s.4 and the provisions of s.180(3). Section 180(1) of the Land Act 1910 authorized the Governor in Council to reserve any Crown land required for "public purposes", which by definition included "Aboriginal reserves"(308) s.4, from sale or lease. In 1912, the Governor in Council permanently reserved and set apart the Murray Islands "for use of the Aboriginal inhabitants of the State". Section 181 of the Land Act authorized the Governor in Council, without issuing any deed of grant, to place any land reserved for any public purpose under the control of trustees. In 1939, the Governor in Council placed the Murray Islands reserve under the control of trustees without specifically declaring any particular trust upon which it was held. The effect of subsequent legislative provisions is that the reservation of the Murray Islands and the appointment of trustees continue in force as if made under the presently operative provisions of the Land Act 1962 (Q.). However, by reason of that reservation, the lands included in the Murray Islands reserve are not "Crown lands" for the purposes of the Land Act 1962 since s.5 of that Act excludes, from its definition of "Crown land", any land "which is, for the time being ... reserved for ... public purposes" and the definition of "public purposes" includes "Aboriginal reserves"(309) s.5.

74. None of the above-mentioned executive acts had the effect of extinguishing the existing rights of Murray Islanders under common law native title. The reservation from sale or lease "for use of the Aboriginal inhabitants of the State" should clearly be construed as intended to protect, rather than extinguish, any existing native rights of occupation and use. The placing of the lands of the Murray Islands under the control of trustees must likewise be construed as intended to safeguard rather than extinguish those existing rights. It follows that the common law native title of Murray Islanders in relation to land in the Murray Islands survives. In the light of what has been said previously in this judgment, the identity of familial or individual title-holders and the content of the rights possessed in relation to particular land fall to be determined by reference to local law or custom.

(xviii) Relief

75. Subsequent to the completion of the argument, the firstnamed plaintiff, Mr. Eddie Mabo, died. The secondnamed and thirdnamed plaintiffs, Mr. David Passi and Mr. James Rice, remain as competent plaintiffs. Each of them claims to be a native title-holder in relation to land on Mer Island and to have an interest in that land.

76. It would be inappropriate for this Court to seek to define the rights of any plaintiffs in the absence of other persons who may have competing claims to the relevant areas of land. Each of Mr. Passi and Mr. Rice has, however, standing to seek and obtain more general declaratory relief against the defendant State of Queensland in relation to the question whether all existing entitlements to land within the Murray Islands were, as the defendant State claims, extinguished upon annexation of the Islands to Queensland. In these circumstances, the answers to the questions reserved for the Full Court and any declaratory relief should be confined to declarations:

> 1. That, upon the annexation of the Murray Islands to Queensland, the radical title to all the lands in the Murray Islands vested in the Crown in right of the State of Queensland;
> 2. That, putting to one side the London Missionary Society land and subject to the effect of the grant of the forfeited Crown lease of the islands of Dauer and Waier, the Crown's ownership of lands in the Murray Islands after their annexation to Queensland was qualified and reduced by a communal native title of the Murray Islanders to the land of the Islands which was preserved and protected by the common law;

3. That the entitlement of particular Island families or individuals with respect to particular land under that common law communal title falls to be determined by reference to traditional law or custom;
4. That, apart from the effect of the leases of the London Missionary Society land and of the forfeited Crown lease of the islands of Dauer and Waier, the common law native title of Murray Islanders in respect of land in the Islands has not been extinguished by subsequent legislation or executive act;
5. That the lands of the Murray Islands are not "Crown lands" for the purposes of the Land Act 1962 (Q.); and
6. That the rights under that common law native title are true legal rights which may be enforced and protected by legal action and which, if wrongfully extinguished (e.g., by inconsistent grant) without clear and unambiguous statutory authorization, found proceedings for compensatory damages.

We would reserve liberty to apply to the plaintiffs for further relief including, if the circumstances justified it, injunctive relief and/or declarations of a remedial constructive trust.

77. It should be mentioned that the plaintiffs also sought a declaration that any future grant by the Governor in Council of lands on Murray Island in purported pursuance of the Land Act 1962 would be unlawful by reason of the provisions of ss.9 and 10 of the Racial Discrimination Act 1975 (Cth). In our view, it has not been shown that such a declaration is warranted. For one thing, the material before the Court does not establish that there exists any intention to make such a grant. For another, the effect of this judgment is that any such deed of grant would, if it had the effect of extinguishing the rights of the Murray Islanders under common law native title, be wrongful unless it was clearly and unambiguously authorized by a valid enactment of the Queensland Parliament. There is no basis upon which the Court could properly conclude that the Queensland Government is likely, in the absence of such clear and unambiguous legislative authorization, to infringe the rights of Murray Islanders by such an inconsistent deed of grant. If such clear and unambiguous legislation was purportedly enacted, it would be necessary to examine its operation to determine whether it was invalid by reason of inconsistency with the Racial Discrimination Act 1975.

78. There are two further matters which should be mentioned. The first is that we are conscious of the fact that, in those parts of this judgment which deal with the dispossession of Australian Aborigines, we have used language and expressed conclusions which some may think to be unusually emotive for a judgment in this Court. We have not done that in order to trespass into the area of assessment or attribution of moral guilt. As we have endeavoured to make clear, the reason which has led us to describe, and express conclusions about, the dispossession of Australian Aborigines in unrestrained language is that the full facts of that dispossession are of critical importance to the assessment of the legitimacy of the propositions that the continent was unoccupied for legal purposes and that the unqualified legal and beneficial ownership of all the lands of the continent vested in the Crown. Long acceptance of legal propositions, particularly legal propositions relating to real property, can of itself impart legitimacy and preclude challenge. It is their association with the dispossession that, in our view, precludes those two propositions from acquiring the legitimacy which their acceptance as a basis of the real property law of this country for more than a hundred and fifty years would otherwise impart. The second further matter is that, in the writing of this judgment, we have been assisted not only by the material placed before us by the parties but by the researches of the many scholars who have written in the areas into which this judgment has necessarily ventured. We acknowledge our indebtedness to their writings and the fact that our own research has been largely directed to sources which they had already identified.

DAWSON J. In 1879 the Murray Islands (comprising Mer, Dauer and Waier), which lie between Australia and New Guinea in Torres Strait, were annexed by the Colony of Queensland(310) See U.K. Letters Patent dated 10 October 1878; Proclamation of 18 July 1879; Queensland Government Gazette, 21 July 1879; and the Queensland Coast Islands Act 1879 (Q.). The Colonial Boundaries Act 1895 (Imp) (58 and 59 Vict c 34) removed any doubts about the effectiveness of these measures by authorizing the incorporation of the Murray Islands into Queensland retrospectively. See also Wacando v. The Commonwealth [1981] HCA 60; (1981) 148 CLR 1 and Mabo v. Queensland (1988) 166 CLR 186, at pp 235-236. Those islands thereupon became part of the colony and were proclaimed to be subject to the laws in force in Queensland. Although the letters patent which authorized the Governor of Queensland to proclaim the annexation provided that the application of Queensland laws to the islands might be modified, there was no modification and upon annexation the laws in force in Queensland were applied in their entirety.

2. The annexation of the Murray Islands is not now questioned. It was an act of state by which the Crown in right of the Colony of Queensland exerted sovereignty over the islands. Whatever the justification for the acquisition of territory by this means (and the sentiments of the nineteenth century by no means coincide with current thought), there can be no doubt that it was, and remains, legally effective.

3. The plaintiffs are Murray Islanders and members of the Meriam people. Each of them claims rights in specified parcels of land on the Murray Islands. The basis of their claims is, alternatively:

(a) their holding the land under traditional native title;
(b) their possessing usufructuary rights over the land; or
(c) their owning the land by way of customary title.

The plaintiffs contend that their rights are of a kind that have been enjoyed by the Meriam people since time immemorial. They say that these rights were not extinguished upon the assumption of sovereignty by the Crown over the Murray Islands at the time of annexation. And, while the plaintiffs acknowledge that the traditional land rights for which they contend are of a kind which may be extinguished at any time by the Crown, they say that they can only be extinguished by clear and unequivocal action so that, in effect, specific legislation is required. Thus the plaintiffs deny that the rights which they claim can be extinguished by manifest policy on the part of the Crown. In particular, the plaintiffs deny that the Queensland Crown lands legislation, which is of a kind found in all States of Australia, is sufficient to extinguish traditional land rights. The plaintiffs say that the Crown has taken no steps, other than by the Queensland Coast Islands Declaratory Act 1985 (Q.), to extinguish their traditional land rights. That Act, which amongst other things declared that upon annexation the Murray Islands were vested in the Crown in right of Queensland freed from all other rights, was held by a majority in Mabo v. Queensland(311) (1988) 166 CLR 186 upon certain assumptions to be invalid, in the sense of inoperative, under s.109 of the Constitution by reason of its inconsistency with the Racial Discrimination Act 1975 (Cth). It is implicit in the plaintiffs' case that, because any further legislation to extinguish their rights in the land would be inconsistent with the Racial Discrimination Act, they are, while that Act is in force, secure in their enjoyment of those rights.

4. The plaintiffs also claim that the Crown, far from extinguishing their rights, has recognized them. In this respect the plaintiffs point to the reservation of the Murray Islands by the Crown for the use or benefit of the aboriginal inhabitants of the State. They say that the reservation of these islands shows that they were not intended to be opened up for settlement or to be the subject of Crown grants which, they freely concede, would extinguish any traditional land rights.

5. The defendant argues that if the traditional land rights claimed by the plaintiffs ever existed, they were extinguished from the moment of annexation. It contends that those rights could not have survived the

assertion of sovereignty by the Crown unless they were recognized in some way. The defendant argues that not only were any traditional land rights over the Murray Islands not recognized, but they were extinguished by the exercise of a clear governmental policy which existed at the time of annexation and has continued since then. The defendant does not contend that, if there are traditional land rights that survived the assumption of sovereignty, they have been subsequently extinguished.

6. One thing is clear - I do not understand it to have been contested by the plaintiffs - and that is that, upon annexation, the ultimate title to the lands comprising the Murray Islands vested in the Crown. This was a necessary consequence of the exertion of sovereignty by the Crown for, under the system of law which the Crown brought with it, the ultimate title to land - sometimes called the absolute or radical title - resides in the Crown. The law that the Crown brought with it was the common law and, at common law, land is not the subject of absolute ownership other than by the Crown(312) See Williams, "The Fundamental Principles of the Present Law of Ownership of Land", (1931) 75 The Solicitors' Journal 843, at p 844; rather, it is the subject of tenure. That notion may for most purposes be of historical rather than practical interest, for the fee simple which may be acquired under the Crown carries with it all the advantages of absolute ownership. But it is fundamental in any consideration of the acquisition of territory such as is required by this case. Thus it was that upon annexation of the Murray Islands the Crown became the absolute owner of the land and such rights as others might have in it must be derived from the Crown and amount to something less than absolute ownership. The notion that only the Crown has the radical title stems from the feudal system of land tenure but, as Stephen J. pointed out in New South Wales v. The Commonwealth(313) [1975] HCA 58; (1975) 135 CLR 337, at pp 438-439, it does not much matter whether it now be regarded in that way or whether it be regarded as a prerogative right accompanying the exertion of sovereignty. The result is the same: upon annexation the lands annexed became the property of the Crown and any rights in the land that the plaintiffs have must be held under the Crown.

7. The main thrust of the plaintiffs' case is, however, that following the annexation of the Murray Islands no formal grant of an interest in land to the Meriam people was necessary for their existing interests in the land to continue, notwithstanding that from the time of annexation they held their interests under the Crown. Further, the plaintiffs deny that the continuation of their rights was dependent upon any positive act of recognition by the Crown, although they contend that, in any event, there have been acts of recognition by the Crown and, later, the Queensland legislature. Indeed, the plaintiffs argue that their rights are presumed to continue even in the absence of some positive act of recognition. In other words, the plaintiffs argue that if the continuation of the rights of the Meriam people existing in the land prior to annexation requires some form of recognition, that recognition need not be express but may be established by acquiescence.

8. There is ample authority for the proposition that the annexation of land does not bring to an end those rights which the Crown chooses, in the exercise of its sovereignty, to recognize. This is so whether the assumption of sovereignty is by way of conquest, cession or annexation, or by the occupation of territory that is not at the time held under another sovereign. The law was summarized by the Privy Council in Vajesingji Joravarsingji v. Secretary of State for India(314) (1924) LR 51 Ind App 357, at p 360:

> "(W)hen a territory is acquired by a sovereign state for the first time that is an act of state. It matters not how the acquisition has been brought about. It may be by conquest, it may be by cession following on treaty, it may be by occupation of territory hitherto unoccupied by a recognized ruler. In all cases the result is the same. Any inhabitant of the territory can make good in the municipal Courts established by the new sovereign only such rights as that

> sovereign has, through his officers, recognized. Such rights as he had under the rule of predecessors avail him nothing."

Their Lordships went on to point out that in that case, which was a case of the acquisition of territory by cession(315) ibid., at p 361:

> "The moment that cession is admitted the appellants necessarily become petitioners and have the onus cast on them of showing the acts of acknowledgment, which give them the right they wish to be declared. ...
> The whole object accordingly of inquiry is to see whether, after cession, the British Government has conferred or acknowledged as existing the proprietary right which the appellants claim."

9. In Secretary of State for India v. Bai Rajbai the Privy Council was concerned with the cession of territory previously under native rule and said of the members of the class of persons (the kasbatis) one of whom was the respondent's ancestor(316) (1915) LR 42 Ind App 229, at p 237:

> "The relation in which they stood to their native sovereigns before this cession, and the legal rights they enjoyed under them, are, save in one respect, entirely irrelevant matters. They could not carry in under the new regime the legal rights, if any, which they might have enjoyed under the old. The only legal enforceable rights they could have as against their new sovereign were those, and only those, which that new sovereign, by agreement expressed or implied, or by legislation, chose to confer upon them. Of course this implied agreement might be proved by circumstantial evidence, such as the mode of dealing with them which the new sovereign adopted, his recognition of their old rights, and express or implied election to respect them and be bound by them, and it is only for the purpose of determining whether and to what extent the new sovereign has recognized these ante-cession rights of the kasbatis, and has elected or agreed to be bound by them, that the consideration of the existence, nature, or extent of these rights becomes a relevant subject for inquiry in this case."

10. And in Secretary of State for India v. Sardar Rustam Khan the Privy Council again dealt with what was in effect a cession of territory by the passing over of sovereignty to the Government of India. Lord Atkin, delivering the judgment of their Lordships, observed(317) (1941) AC 356, at p 371:

> "It follows, therefore, that in this case the Government of India had the right to recognize or not recognize the existing titles to land. In the case of the lands in suit they decided not to recognize them, and it follows that the plaintiffs have no recourse against the Government in the municipal courts."

In making this observation, his Lordship declined, in accordance with the authorities, to embark upon any consideration of whether the decision was just or unjust, politic or impolitic(318) ibid., at p 372; see also Cook v. Sprigg (1899) AC 572, at p 579.

11. Amodu Tijani v. Secretary, Southern Nigeria(319) (1921) 2 AC 399 is a case in which the Crown did accord recognition to rights existing prior to the assumption of sovereignty by the Crown. In that case certain territory, comprising the colony of Lagos, was ceded by the Eleko (effectively the King of Lagos) to the British Crown and the issue to be determined was the basis for the calculation of compensation for land which was taken for public purposes under the Public Lands Ordinance 1903 of the colony. The cession itself was made on the footing that the rights of property of the inhabitants were to be fully respected, although there was no doubt that the radical title to the land vested in the British Crown at the time of cession(320) ibid., at p 407. These rights included the seigneurial rights of the "white cap chiefs" to receive rent or tribute from the occupiers of land allotted to them by the chiefs, the rights of the white cap chiefs to family lands held individually by them and the communal usufructuary right of the members of the native community to communal lands(321) ibid., at pp 410-411; in the Divisional and Full Courts below the white cap chiefs were held not to have absolute ownership of the communal lands but only to have a form of seigneurial right in relation to them (Amodu Tijani v. Secretary, Southern Provinces (1914-1922) III Nig LR 24). This arrangement of itself would have conferred no rights upon those inhabitants because the municipal courts cannot enforce obligations under a treaty against the sovereign, but it did afford some evidence of the recognition of those rights by the new sovereign. There was, however, other evidence of recognition of those rights. For example, the native inhabitants were assured that it was the settled intention of the British Government to secure them in the possession of all their rights and privileges existing at the time of the cession(322) ibid., at pp 406-407; see also Amodu Tijani v. Secretary, Southern Provinces (1914-1922) III Nig LR, at p 29 (Divisional Court). Moreover, in so far as the white cap chiefs' seigneurial rights were concerned, the lower courts noted that the British Government was apparently aware of their continued exercise after cession and did not prevent this, although it sometimes disregarded these rights by, for example, granting the land away to others(323) Amodu Tijani v. Secretary, Southern Provinces (1914-1922) III Nig LR, at pp 29-30 (Divisional Court) and at p 45 (Full Court). Finally, the Privy Council considered that the system of Crown grants applying in the colony was not introduced with a view to altering substantive titles already existing but to define properly these substantive titles and to facilitate a system of conveyancing(324) Amodu Tijani v. Secretary, Southern Nigeria (1921) 2 AC, at pp 404, 407-408. In the course of its judgment the Judicial Committee of the Privy Council noted that the precise incidents and nature of the rights held by the native inhabitants of the land (whether individually or communally) depended on the particular circumstances and that "(a)bstract principles fashioned a priori are of but little assistance, and are as often as not misleading"(325) ibid., at p 404. The Privy Council went on to conclude that the radical title to the land, which was then in the Crown as a result of the cession, was "throughout qualified by the usufructuary rights of communities, rights which, as the outcome of deliberate policy, have been respected and recognized"(326) ibid. In reaching this conclusion, the Privy Council noted that "(a) mere change in sovereignty is not to be presumed as meant to disturb rights of private owners"(327) ibid., at p 407.

12. The Privy Council was again concerned with the cession of land to the British Crown in the former colony of Lagos in Adeyinka Oyekan v. Musendiku Adele(328) (1957) 1 WLR 876. Lord Denning, delivering the judgment of the Judicial Committee of the Privy Council, recognized(329) ibid., at p 880 that the treaty of cession was an act of state by which the British Crown acquired full rights of sovereignty over Lagos. He continued:

> "The effect of the Act of State is to give to the British Crown sovereign power to make laws and to enforce them, and therefore the power to recognize existing rights or extinguish them or to create new ones. In order to

> ascertain what rights pass to the Crown or are retained by the inhabitants, the courts of law look, not to the treaty, but to the conduct of the British Crown."

His Lordship went on to say that in inquiring what rights are recognized there is one guiding principle, namely:

> "The courts will assume that the British Crown intends that the rights of property of the inhabitants are to be fully respected".

His Lordship then expounded a second proposition:

> "Whilst, therefore, the British Crown, as Sovereign, can make laws enabling it compulsorily to acquire land for public purposes, it will see that proper compensation is awarded to every one of the inhabitants who has by native law an interest in it: and the courts will declare the inhabitants entitled to compensation according to their interests, even though those interests are of a kind unknown to English law".

For the latter of these two propositions, Lord Denning cited as authority Amodu Tijani v. Secretary, Southern Nigeria. Of course in Lagos there was legislative provision for the payment of compensation for the compulsory acquisition of such land. There is, however, no general proposition to be found, either in law or in history, that the Crown is legally bound to pay compensation for the compulsory acquisition of land or any interests in it by the exercise of sovereign rights. The first proposition - the guiding principle - may express sentiments which had emerged by the mid-nineteenth century, but whether, in any particular case, a change of sovereignty is accompanied by a recognition or acceptance by the new sovereign of pre-existing rights is a matter of fact. There is no basis for a general presumption either for or against recognition or acceptance by the new sovereign of pre-existing rights, although a presumption in favour of their recognition may be raised in the interpretation of a treaty of cession(330) Amodu Tijani v. Secretary, Southern Nigeria (1921) 2 AC, at p 407.

13. In any event, whether or not there is any presumptive recognition of native interests in land upon a change in sovereignty may be little more than a matter of emphasis upon which there is some variance in the cases. Once it is accepted, as I think it must be, that recognition of these interests by the Crown may be a matter of inference from all the facts, including mere acquiescence, it is obvious that if, following a change in sovereignty, the new sovereign allows native occupation and use of the land to continue undisturbed, that may afford some foundation for the conclusion that such native interests (if any) in the land as may have existed prior to the assumption of sovereignty are recognized by the Crown. Of course, these interests need not correspond with title to land as known to the sovereign under its own law(331) ibid., at pp 402-404 - for example, the interests by virtue of which land was occupied by the natives of Lagos was held to be communal(332) ibid., at pp 409-410 and this is not a form of title to land that is known to the British Crown under English law. On the other hand, if native interests in land are not recognized at all by the new sovereign, they will be extinguished at the time sovereignty is assumed. But, in the end, the question whether any native interests in the land have been extinguished by an assumption of sovereignty is a question of fact which can only be determined by reference to the surrounding circumstances.

14. There may be circumstances which render it impossible to draw any inference of recognition of native

interests in land even where there is no interference with the continued native occupation of land following a change in sovereignty. For example, in In re Southern Rhodesia(333) (1919) AC 211 the Privy Council considered lands in Southern Rhodesia over which the sovereign ruler was at one time a chief known as Lobengula. A charter had been issued which incorporated the British South Africa Company for commercial purposes and gave it wide administrative powers. After hostilities Lobengula fled and his rule came to an end, and thus the company, in 1894, became the effective ruler by conquest on behalf of the Crown. Amongst the powers exercised by the company was the power to grant title to land in the name of the Crown. Upon the question of the recognition of native title, Lord Sumner, delivering the judgment of the Board, said(334) ibid., at pp 234-235:

> "According to the argument the natives before 1893 were owners of the whole of these vast regions in such a sense that, without their permission or that of their King and trustee, no traveller, still less a settler, could so much as enter without committing a trespass. If so, the maintenance of their rights was fatally inconsistent with white settlement of the country, and yet white settlement was the object of the whole forward movement, pioneered by the Company and controlled by the Crown, and that object was successfully accomplished, with the result that the aboriginal system gave place to another prescribed by the Order in Council.
> This fact makes further inquiry into the nature of the native rights unnecessary. If they were not in the nature of private rights, they were at the disposal of the Crown when Lobengula fled and his dominions were conquered; if they were, any actual disposition of them by the Crown upon a conquest, whether immediately in 1894 or four years later, would suffice to extinguish them as manifesting an intention expressly to exercise the right to do so. The Matabeleland Order in Council of 1894 and the Southern Rhodesia Order in Council of 1898 provided for native reserves, within which the tribal life of the natives might be continued under protection and control, and to the rest of the country the Company's officers and white men were admitted independently of any consent of the natives. The Company's alienations by grant are unquestionably valid, yet the natives have no share in them. The ownership of the reserves was, at least administratively, vested in the Company under the Southern Rhodesian Native Regulations promulgated by the High Commissioner in 1898, and with the consent of the Crown other dispositions of those reserves can be made by the Company from time to time. By the will of the Crown and in exercise of its rights the old state of things, whatever its exact nature, as it was before 1893, has passed away and another and, as their Lordships do not doubt, a better has been established in lieu of it. Whoever now owns the unalienated lands, the natives do not."

These unalienated lands consisted partly of native reserves, partly of land in the company's own occupation and partly of country altogether waste and unsettled(335) ibid., at p 213. Thus the

circumstances surrounding or following the assumption of sovereignty (in that case, by conquest) indicated that even though the occupation of the natives had not necessarily been physically disturbed, their pre-existing rights (if any) had nevertheless not been accepted by the Crown and so had not been recognized by it.

15. The recognition of native interests in land following the exercise of sovereignty by the Crown is sometimes described as the recognition of the continued existence of those interests. The vesting of the radical title in the Crown upon the assumption of sovereign authority is, however, incompatible with the continued existence in precisely the same form of any pre-existing rights. Necessarily the pre-existing rights were held of a former sovereign or in the absence of any sovereign at all. After the Crown has assumed sovereignty and acquired the radical title to the land, any pre-existing "title" must be held, if it is held at all, under the Crown. This new title is therefore not merely the continuation of a title previously held, notwithstanding that it may be identifiable by reference to the previous title. If the new title is to be held under the Crown, the Crown must obviously accept it. Such acceptance may be by way of acquiescence in the continued occupancy of land by the aboriginal inhabitants and, if the native interests are accepted in this manner by the Crown, the nature of those interests can then only be determined by reference to the nature of the former occupancy by the aboriginal inhabitants. The appearance (although not the fact as a matter of law) is, then, that these native interests continue undisturbed. In this sense it may be true to say that positive recognition of native interests by the Crown is unnecessary for their continued existence and that what appear to be different views upon the subject are, on analysis, fundamentally the same.

16. In my view this explains the conclusion of Hall J. (Spence and Laskin JJ. agreeing) in Calder v. Attorney-General of British Columbia that traditional native title is not dependent upon a grant to or recognition of rights in the native inhabitants(336) (1973) 34 DLR (3d) 145, at p 218 because such title is not dependent upon a treaty, statute or other formal government action(337) ibid., at p 200; see also United States v. Santa Fe Pacific Railroad Co. [1942] USSC 12; (1941) 314 US 339, at p 347; Narragansett Tribe v. Southern Rhode Island Land Development Corp (1976) 418 F Supp 798, at p 807; Hamlet of Baker Lake v. Minister of Indian Affairs (1979) 107 DLR (3d) 513, at p 541; Delgamuukw v. British Columbia (1991) 79 DLR (4th) 185, at p 286; Guerin v. The Queen (1984) 13 DLR (4th) 321, at p 336. But if what Hall J. meant was that traditional native title somehow survived the exertion of sovereignty by the Crown independently of any recognition of it by the Crown (accepting that mere acquiescence might, depending upon the circumstances, provide the necessary recognition), I am unable to agree.

17. What I have said is not inconsistent with the well-established principle that the municipal courts have no jurisdiction to entertain a challenge to an act of state and, in particular, that obligations assumed by one sovereign to another, as in a treaty, cannot be enforced by municipal courts(338) See Secretary of State for India v. Kamachee Boye Sahaba (1859) 13 Moo 22, at pp 75, 86 (15 ER 9, at pp 28-29, 32-33); Doss v. Secretary of State for India in Council (1875) LR 19 Eq. 509, at pp 534, 535; Cook v. Sprigg (1899) AC, at pp 578-579; Vajesingji Joravarsingji v. Secretary of State for India (1924) LR 51 Ind.App, at p 360; Hoani Te Heuheu Tukino v. Aotea District Maori Land Board (1941) AC 308, at pp 324-325; Secretary of State for India v. Sadar Rustam Khan (1941) AC, at pp 369-372. Recent authority for this proposition is to be found in Winfat Enterprise (HK) Co. Ltd. v. Attorney-General of Hong Kong(339) (1985) AC 733. In that case, the Privy Council was concerned with the cession of the New Territories in Hong Kong to the British Crown. The Peking Convention, by which the cession was made, expressed an understanding that there would be no expropriation or expulsion of the inhabitants of the New Territories but that if land were required for public purposes a fair price would be paid.

18. Lord Diplock delivered the judgment of the Judicial Committee of the Privy Council and, if I may say so with respect, accurately reflected the authorities when he observed of a claim by the appellant land

developers to a title which survived the cession(340) ibid., at p 746:

> "The elementary fallacy of British constitutional law which vitiates the land developers' claim is the contention that this vaguely expressed understanding, stated in the Peking Convention, that there shall not be expropriation or expulsion, is capable of giving rise to rights enforceable in the municipal courts of Hong Kong or by this Board acting in its judicial capacity. Although there are certain obiter dicta to be found in cases which suggest the propriety of the British Government giving effect as an act of state to promises of continued recognition of existing private titles of inhabitants of territory obtained by cession, there is clear long-standing authority by decision of this Board that no municipal court has authority to enforce such an obligation."

19. As I have said, the plaintiffs base their claim upon traditional native title, usufructuary rights and customary ownership. It would seem that they seek to draw a distinction between all three and, in particular, between traditional native, or aboriginal, title and usufructuary rights. Since the main thrust of the plaintiffs' case was directed towards establishing the existence of traditional native title, it is that aspect of the case to which I turn first.

20. Although the earliest cases upon this subject were decided in the United States, it is convenient to deal initially with the Canadian authorities. This is because the historical context in which the United States cases arose and the policy which they reflect do not find any real counterpart elsewhere. That policy involved dealing with a largely hostile native population in the course of European settlement and concluding various treaties with the natives that afforded them a particular status which, to a large extent, forms the basis of the law laid down in the cases. On the other hand, in Canada, whilst there are unique features, the Privy Council was the final court of appeal and there is thus a common origin for the law upon the subject of aboriginal title (or Indian title as it is often called) in both Canada and Australia.

21. St. Catherine's Milling and Lumber Company v. The Queen(341) (1888) 14 App Cas 46 was a case which concerned, amongst other things, the nature of the tenure of the aboriginal inhabitants - the Indians - of land in Ontario. Lord Watson, who gave judgment for the Privy Council, decided the case upon the basis that Indian title stemmed from a royal proclamation of 1763 that extended to the land in question. That proclamation recited that it was just and reasonable that the several nations and tribes of Indians who lived under British protection should not be molested or disturbed in the "possession of such parts of Our dominions and territories as, not having been ceded to or purchased by us, are reserved to them or any of them as their hunting grounds" and declared that no warrants of survey should be granted or patents be passed for lands beyond the bounds of the respective governments of the colonies established under the proclamation or "until Our further pleasure be known", such lands, not having been ceded or purchased as aforesaid, being reserved to the Indians. It was further declared that, subject to an exception in favour of the Hudson's Bay Company, land outside the bounds of such governments was reserved "under Our sovereignty, protection, and dominion, for the use of the said Indians". Finally, the proclamation enacted that no private person should make any purchase from the Indians of lands reserved to them within those colonies where settlement was permitted, and that all purchases had to be on behalf of the Crown, in a public assembly of the Indians, by the governor or commander-in-chief of the colony in which the lands lay.

22. Lord Watson said(342) ibid., at pp 54-55:

> "It was suggested in the course of the argument for the Dominion, that inasmuch as the proclamation recites that the territories thereby reserved for Indians had never 'been ceded to or purchased by' the Crown, the entire property of the land remained with them. That inference is, however, at variance with the terms of the instrument, which shew that the tenure of the Indians was a personal and usufructuary right, dependent upon the good will of the Sovereign. The lands reserved are expressly stated to be 'parts of Our dominions and territories;' and it is declared to be the will and pleasure of the sovereign that, 'for the present,' they shall be reserved for the use of the Indians, as their hunting grounds, under his protection and dominion. There was a great deal of learned discussion at the Bar with respect to the precise quality of the Indian right, but their Lordships do not consider it necessary to express any opinion upon the point. It appears to them to be sufficient for the purposes of this case that there has been all along vested in the Crown a substantial and paramount estate, underlying the Indian title, which became a plenum dominium whenever that title was surrendered or otherwise extinguished."

23. Although Lord Watson chose to base the interest of the Indians in the land entirely upon the proclamation, that was not the only source of their title or, at all events, it has not subsequently been treated as being so. Instead, a title of the same kind has been held to arise independently of the proclamation so that both Indians who are not covered by the proclamation and those who are covered have been held to have the same kind of title over land(343) See Calder v. Attorney-General of British Columbia (1973) 34 DLR (3d), at pp 156, 200; Hamlet of Baker Lake v. Minister of Indian Affairs (1979) 107 DLR (3d), at p 541; Delgamuukw v. British Columbia (1991) 79 DLR (4th), at p 286.

24. The question upon which the Privy Council refrained from expressing an opinion - the nature of Indian title - has never been given a precise answer. Lord Watson did, however, suggest that Indian title was a kind of "personal and usufructuary right". A personal and usufructuary right is a right temporarily to possess, use or enjoy the advantages of land belonging to another so far as may be had without causing damage or prejudice to it. In Delgamuukw v. British Columbia(344) (1991) 79 DLR (4th) 185, at p 458; see also Attorney-General for Ontario v. Bear Island Foundation (1984) 15 DLR (4th) 321, at p 360, for example, McEachern C.J. described Indian title for the purposes of that case as including "all those sustenance practices and the gathering of all those products of the land and waters ... which (the Indians) practised and used before exposure to European civilization (or sovereignty) for subsistence or survival".

25. Whilst attempts have subsequently been made to classify the rights arising from Indian title as proprietary rights(345) See Guerin v. The Queen (1982) 143 DLR (3d) 416, at p 462 (Federal Court of Appeal); but cf. Calder v. Attorney-General of British Columbia (1973) 34 DLR (3d), at p 167; Hamlet of Baker Lake v. Minister of Indian Affairs (1979) 107 DLR (3d), at p 558; Delgamuukw v. British Columbia (1991) 79 DLR (4th), at pp 415-416 which held to the contrary, such a notion is contrary to the observation of Lord Watson that the tenure of the Indians was "dependent upon the good will of the Sovereign" or his later observation(346) (1888) 14 App Cas., at p 58 that the character of the interest of the Indian inhabitants in the land was less than that of owners in fee simple and was a "mere burden" upon the Crown's present proprietary estate. However, it may be that in truth aboriginal title is neither a personal nor a proprietary right but is sui generis. This was the view of Dickson J. (with whom Beetz,

Chouinard and Lamer JJ. concurred) in Guerin v. The Queen where he said(347) (1984) 13 DLR (4th) 321, at p 339:

> "It appears to me that there is no real conflict between the cases which characterize Indian title as a beneficial interest of some sort, and those which characterize it a personal, usufructuary right. Any apparent inconsistency derives from the fact that in describing what constitutes a unique interest in land the courts have almost inevitably found themselves applying a somewhat inappropriate terminology drawn from general property law. There is a core of truth in the way that each of the two lines of authority has described native title, but an appearance of conflict has none the less arisen because in neither case is the categorization quite accurate.
> Indians have a legal right to occupy and possess certain lands, the ultimate title to which is in the Crown. While their interest does not, strictly speaking, amount to beneficial ownership, neither is its nature completely exhausted by the concept of a personal right. It is true that the sui generis interest which the Indians have in the land is personal in the sense that it cannot be transferred to a grantee, but it is also true, as will presently appear, that the interest gives rise upon surrender to a distinctive fiduciary obligation on the part of the Crown to deal with the land for the benefit of the surrendering Indians."

I will deal later with the fiduciary obligation referred to by Dickson J.

26. However, it is the question not of whether, but of how, Indian title can be extinguished that has given rise to greater dispute. In Calder v. Attorney-General of British Columbia an action was brought on behalf of the Nishga Indian tribe seeking a declaration that their Indian title to certain lands in British Columbia had never been lawfully extinguished. Apart from Pigeon J., who held that the Court had no jurisdiction without the fiat of the Lieutenant-Governor of the Province, the remaining members of the court were equally divided: Judson, Martland and Ritchie JJ. held that whatever rights the aboriginal inhabitants had had in the land, they were extinguished by the exercise of sovereign powers, whereas Hall, Spence and Laskin JJ. held to the contrary. Judson, Martland and Ritchie JJ. also agreed with Pigeon J., so that the plaintiff's appeal was dismissed. Judson J. (with whom Martland and Ritchie JJ. concurred) held that "the sovereign authority elected to exercise complete dominion over the lands in question, adverse to any right of occupancy which the Nishga Tribe might have had, when, by legislation, it opened up such lands for settlement, subject to the reserves of land set aside for Indian occupation"(348) (1973) 34 DLR (3d), at p 167. This legislation, which consisted of a series of proclamations, ordinances and statutes, comprehensively regulated the method of alienation and possession of the relevant lands.

27. Conversely, Hall J. (with whom Spence and Laskin JJ. concurred) held that the Indian title of the Nishga tribe, being a legal right, could not be extinguished "except by surrender to the Crown or by competent legislative authority, and then only by specific legislation"(349) ibid., at p 208. He further held that once Indian title is established it is presumed to continue until the contrary is proved(350) ibid. The consequence was, in his view, that as there was no specific legislation and no surrender, the title of the Nishga tribe had not been extinguished.

28. However, in Reg. v. Sparrow(351) (1990) 70 DLR (4th) 385, a case which dealt with the issue of whether an aboriginal right to fish for food had been extinguished, the Supreme Court of Canada failed to endorse the requirement, suggested by Hall J. in Calder, that specific legislation was necessary to extinguish Indian title. In a judgment delivered by Dickson C.J.C. and La Forest J. it merely said(352) ibid., at p 401:

> "The test of extinguishment to be adopted, in our opinion, is that the Sovereign's intention must be clear and plain if it is to extinguish an aboriginal right."

This test was accepted in two single judge decisions after Calder - that of Mahoney J. of the Federal Court of Canada in Hamlet of Baker Lake v. Minister of Indian Affairs(353) (1979) 107 DLR (3d) 513 and that of McEachern C.J. of the Supreme Court of British Columbia in Delgamuukw v. British Columbia - which clearly contemplated that specific legislation was not essential to extinguish Indian title. In particular, in the latter case McEachern C.J. held that a series of ordinances (which made provision for, among other things, pre-emption of land, leases, actions for ejectment, Crown reserves and surveys, water privileges and mining licences) established such a thorough and comprehensive land system in British Columbia based on the appropriation of all lands in that colony to the Crown that, together with a policy of throwing open the colony for settlement, was entirely inconsistent with the continued existence of any system of aboriginal interests in land, and so had the effect of extinguishing Indian title(354) (1991) 79 DLR (4th), at pp 465, 474.

29. It is now possible to turn briefly to several United States authorities. As I have explained, the course of history in that country finds no real parallel elsewhere and the law in its detailed application is of limited assistance in a case such as the present one. That is because the Indian tribes were regarded as "domestic dependent nations" who retained a certain degree of sovereignty and thus had a very special relationship with the United States government(355) See, for example, Cherokee Nation v. Georgia [1831] USSC 6; (1831) 30 US 1, at p 12; Worcester v. Georgia (1832) 31 US 350, at p 376; United States v. Kagama [1886] USSC 194; [1886] USSC 194; (1886) 118 US 375, at pp 383-384; Seminole Nation v. United States [1942] USSC 105; (1942) 316 US 286, at pp 296-297; United States v. Mitchell [1983] USSC 154; (1983) 463 US 206, at p 225.

30. Nevertheless, the notion of native or Indian title owes much to the celebrated judgment of Marshall C.J. in the case of Johnson v. McIntosh(356) (1823) 21 US 240. It is unnecessary to refer to the detailed facts of the case. As Marshall C.J. pointed out(357) ibid., at p 253, the inquiry was in great measure "confined to the power of Indians to give, and of private individuals to receive, a title, which can be sustained in the courts of this country". He then described the discovery of the American continent and the relations which were to exist between the discoverers and the natives. On this aspect, Marshall C.J. said(358) ibid., at pp 253-254:

> "In the establishment of these relations, the rights of the original inhabitants were, in no instance, entirely disregarded; but were, necessarily, to a considerable extent, impaired. They were admitted to be 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; but their rights to complete sovereignty, as independent nations, were necessarily diminished, and their power to dispose of the soil, at their own will, to whomsoever they pleased, was denied by the original fundamental principle, that discovery gave exclusive title

> to those who made it. While the different nations of Europe respected the right of the natives, as occupants, they asserted the ultimate dominion to be in themselves; and claimed and exercised, as a consequence of this ultimate dominion, a power to grant the soil, while yet in possession of the natives. These grants have been understood by all, to convey a title to the grantees, subject only to the Indian right of occupancy."

31. The nature and extent of Indian title in the United States is amply described in Tee-Hit-Ton Indians v. United States(359) [1955] USSC 24; (1955) 348 US 272. In that case a claim was made under the Fifth Amendment of the United States Constitution for compensation for the taking of timber by the United States from lands in Alaska over which the Tee-Hit-Ton Indians claimed Indian title. The Supreme Court held that the claimants' Indian title amounted to a permissive occupancy which could be extinguished by the government without compensation. Reed J., delivering the judgment of the Court, said(360) ibid., at p 279:

> "It is well settled that in all the States of the Union the tribes who inhabited the lands of the States held claim to such lands after the coming of the white man, under what is sometimes termed original Indian title or permission from the whites to occupy. That description means mere possession not specifically recognized as ownership by Congress. After conquest they were permitted to occupy portions of territory over which they had previously exercised 'sovereignty,' as we use that term. This is not a property right but amounts to a right of occupancy which the sovereign grants and protects against intrusion by third parties but which right of occupancy may be terminated and such lands fully disposed of by the sovereign itself without any legally enforceable obligation to compensate the Indians."

32. So, not unlike the position in Canada, Indian title in the United States (in the absence of recognition by Congress through treaty or legislation so that it becomes property within the meaning of the Fifth Amendment) is a right of occupancy which can be terminated by Congress at will(361) See Oneida Indian Nation v. County of Oneida [1974] USSC 15; (1974) 414 US 661, at p 667; Lipan Apache Tribe v. United States (1967) 180 Ct Cl 487, at p 492; United States v. Santa Fe Pacific Railroad Co. (1941) 314 US, at p 347; Johnson v. McIntosh (1823) 21 US, at pp 258, 259; United States v. Tillamooks [1946] USSC 126; [1946] USSC 126; (1946) 329 US 40, at p 46; United States v. Atlantic Richfield Co. (1977) 435 F Supp 1009, at p 1031; Narragansett Tribe v. Southern Rhode Island Land Development Corp (1976) 418 F Supp, at p 807; Gila River Pima-Maricopa Indian Community v. United States (1974) 494 F 2d 1386, at p 1389 The actual title to the land lies in the United States(362) Johnson v. McIntosh (1823) 21 US, at p 253; Oneida Indian Nation v. County of Oneida (1974) 414 US, at p 667; United States v. Tillamooks (1946) 329 US, at p 46. However, Indian title will only be extinguished where Congress' intention to effect such extinguishment is "clear and plain"(363) Lipan Apache Tribe v. United States (1967) 180 Ct Cl, at p 492.

33. In New Zealand the course of the law has been affected by the statutory implementation of the Treaty of Waitangi. This treaty guaranteed to the native inhabitants of New Zealand "the full, exclusive, and undisturbed possession of their Lands and Estates, Forests, Fisheries, and other properties which they

may collectively or individually possess, so long as it is their wish and desire to retain the same in their possession"(364) Art.2 as quoted in Nireaha Tamaki v. Baker (1901) AC 561, at pp 566-567. The sole and absolute right of pre-emption from the aboriginal inhabitants was vested in the Crown: Land Claims Ordinance 1841 (N.Z.). For that reason New Zealand authority is, for the most part, not directly relevant, but the basic principle that, upon the assumption of sovereignty, the radical title to lands in New Zealand vested in the Crown giving it the right - apart from the treaty - to extinguish native title, has not been doubted(365) See Reg. v. Symonds (1847) NZPCC 387, at pp 388-389 and 393-394. The position was summarized by North J. in In re the Ninety-Mile Beach(366) (1963) NZLR 461, at p 468:

> "There is no doubt that it is a fundamental maxim of our laws that the Queen was the original proprietor of all lands in the Kingdom and consequently the only legal source of private title, and that this principle has been imported with the mass of the common law into New Zealand; that it 'pervades and animates the whole of our jurisdiction in respect to the tenure of land.' ... (I)n my opinion it necessarily follows that on the assumption of British sovereignty - apart from the Treaty of Waitangi - the rights of the Maoris to their tribal lands depended wholly on the grace and favour of Her Majesty Queen Victoria, who had an absolute right to disregard the Native title to any lands in New Zealand, whether above high-water mark or below high-water mark. But as we all know, the Crown did not act in a harsh way and from earliest times was careful to ensure the protection of Native interests and to fulfil the promises contained in the Treaty of Waitangi."

34. I have been able to deal with the authorities, other than the Australian authorities, in a somewhat selective way. A full and scholarly examination is to be found in the judgment of Blackburn J. in Milirrpum v. Nabalco Pty. Ltd.(367) (1971) 17 FLR 141. But I have been able to do so because, at least so far as the plaintiffs' claim to traditional native title is concerned, this case turns upon the application of accepted principles rather than upon the ascertainment of the principles themselves. It is obviously a convenient course, which has been adopted in other cases, to assume that traditional native title or aboriginal title existed in the Murray Islands prior to annexation and to see whether it has been extinguished. That is essentially a question of historical fact to which I shall now turn. The plaintiffs, against the weight of overseas authority to which I have referred, maintain that aboriginal title may be extinguished only by express legislation. However, this is to confuse the prerogative of the Crown with the power of the legislature. No doubt aboriginal title - or any other title for that matter - may be extinguished by legislation, but that is because of the power of the legislature, not because of the nature of the title of the Crown. Aboriginal title (and it is in this context that the word "title" is misleading) is an occupancy which the Crown, as absolute owner, permits to continue. The permission may be withdrawn. The extinction of aboriginal title does not, therefore, require specific legislation. No doubt the intention of the Crown must be plain, but there is no reason in principle or logic why it should not be inferred from the course taken by the Crown in the exercise of its powers, whether in administering statute law or otherwise.

35. The genesis of the law which applies in the Murray Islands is to be found in the Colony of New South Wales, of which Queensland originally formed a part. The law of New South Wales included the common law. If there ever had been any doubt about that, it was settled by s.24 of the Australian Courts Act 1828 (Imp) (9 GEO IV c.83) which provided that all the laws and statutes in force within the realm of England at the time of the passing of that Act should be applied in the Colony of New South Wales so far as they

could be applied. The Colony of Queensland inherited the laws of the Colony of New South Wales upon its separation from New South Wales in 1859. To use the words of the Letters Patent of 6 June 1859 that erected Queensland into a separate colony, the Governor of the new colony was commanded to govern "according to such laws and ordinances as are now in force in our said colony of New South Wales and its dependencies and as shall hereafter be in force in our said Colony of Queensland". It was the law of Queensland which was introduced upon the annexation of the Murray Islands. It was introduced expressly and the power of the new sovereign, the Crown in right of the Colony of Queensland, to introduce that law cannot be questioned. There is no need to classify the Murray Islands as conquered, ceded or settled territory. Those classifications have been used to determine the question of what law, if any, is introduced to acquired territory, but they are irrelevant where the law which is introduced is expressly declared by the new sovereign(368) See Cooper v. Stuart (1889) 14 App Cas 286, at p 291. There is thus no need to resort to notions of terra nullius in relation to the Murray Islands. The law which applied upon annexation was the law of Queensland and, as I understand the plaintiffs' submissions, there is no issue about that in this case.

36. Upon any account, the policy which was implemented and the laws which were passed in New South Wales make it plain that, from the inception of the colony, the Crown treated all land in the colony as unoccupied and afforded no recognition to any form of native interest in the land. It simply treated the land as its own to dispose of without regard to such interests as the natives might have had prior to the assumption of sovereignty. What was done was quite inconsistent with any recognition, by acquiescence or otherwise, of native title. Indeed, it is apparent that those in authority at the time did not consider that any recognizable form of native title existed.

37. Thus it was that successive Governors of the Colony of New South Wales were given power to grant land without reference to any claim or consent by the aboriginal inhabitants. The power of the earlier Governors (from Governor Phillip to Governor Brisbane) to grant land extended to the whole of the colony which at that time (so far as the mainland was concerned) extended from Cape York in the north, in the latitude of 10 degrees 37' south, to South Cape in the south, in the latitude of 43 degrees 49' south, and to all country inland to the west as far as the 135th degree of east longitude.

38. The instructions to these earlier Governors, which accompanied their Commissions, merely required the Governors to extend their intercourse with the natives, to conciliate their affections, and to enjoin the Sovereign's subjects to live in kindness and amity with them(369) Governor Hunter's Instructions dated 23 June 1794 (Historical Records of Australia ("HRA"), (1914), Series I, vol.1, p 520, at p 522); see also Governor Phillip's Instructions dated 25 April 1787 (HRA, (1914), i.1.9, at pp 13-14); Governor King's Instructions dated 23 February 1802 (HRA, (1915), i.3.391, at p 393); Governor Bligh's Instructions dated 25 May 1805 (HRA, (1916), i.6.8, at p 10); Governor Macquarie's Instructions dated 9 May 1809 (HRA, (1916), i.7.190, at p 192); Governor Brisbane's Instructions dated 5 February 1821 (HRA, (1917), i.10.596, at p 598). The generality of these instructions, which made no reference at all to any interest of the aboriginal inhabitants in the land, may be contrasted with the considerable and minute detail in the instructions as to the way in which the Governors' power to grant land was to be exercised(370) See, for example, Governor Phillip's Instructions dated 25 April 1787 (HRA, (1914), i.1.9, at pp 14-15); Governor Phillip's Instructions re Land Grants enclosed in Despatch No.3 Grenville to Phillip dated 22 August 1789 (H.R.A, (1914), i.1.124-128); Governor Hunter's Instructions dated 23 June 1794 (HRA, (1914), i.1.520, at pp 523-526); Governor King's Instructions dated 23 February 1802 (HRA, (1915), i.3.391, at pp 394-396); Governor Bligh's Instructions dated 25 May 1805 (HRA, (1916), i.6.8, at pp 11-14); Governor Macquarie's Instructions dated 9 May 1809 (HRA, (1916), i.7.190, at pp 193-196); Governor Brisbane's Instructions dated 5 February 1821 (HRA, (1917), i.10.596, at pp 598-601).

39. Some efforts were, however, made for the welfare of the aboriginal inhabitants by setting aside land for their use and benefit. For example, Governor Macquarie assigned 10,000 acres of land for the

"permanent Benefit" of certain natives for the purposes of establishing a reserve on which those natives could be educated and "civilized", and encouraged to cultivate the land(371) Despatch No.10 Macquarie to Earl Bathurst dated 24 February 1820 (HRA, (1917), i.10.262). Governor Macquarie also indicated and demonstrated his willingness to grant small areas of land to individual aboriginal inhabitants(372) See Despatch No.15 Macquarie to Earl Bathurst dated 8 October 1814 (HRA, (1916), i.8.367, at p 369); Despatch No.4 Macquarie to Earl Bathurst dated 24 March 1815 (HRA, (1916), i.8.461, at p 467); Despatch from Macquarie to Earl Bathurst dated 27 July 1822 (HRA, (1917), i.10.671, at pp 677-678); HRA, (1916), i.8. note 86; HRA, (1917), i.10 note 64; Proclamation dated 4 May 1816 enclosed in Despatch No.10 Macquarie to Earl Bathurst dated 8 June 1816 (HRA, (1917), i.9.141). Likewise, Governor Brisbane reserved 10,000 acres of land "for the use of the Aborigines" and appointed certain officers as trustees of the land upon which the London Missionary Society was to establish a mission. The trustees were empowered to remove intruders or trespassers and "to convey, for terms of years, or in tail, or in fee simple" an amount not exceeding 30 acres to any Aborigine on condition that the land not be sold, let or given to any white person(373) Despatch No.33 Brisbane to Earl Bathurst dated 8 February 1825 (HRA, (1917), i.11.512, at pp 512-513). The land was to revert to the Crown if the project failed(374) Despatch No.1 Earl Bathurst to Darling dated 10 January 1827 (HRA, (1920), i.13.14, at p 15). Examples might be multiplied but it is sufficient to observe that none of the measures taken for the welfare of the aboriginal inhabitants involved the acceptance of any native rights over the land. On the contrary, in so far as the measures involved the provision of land, they were undertaken in the exercise of the relevant Governor's discretion under the power conferred upon him by his Commission and the land so provided was not necessarily that which the aboriginal inhabitants settled on it had traditionally occupied.

40. As settlement expanded under successive Governors of New South Wales, conflict between the colonists and the aboriginal inhabitants intensified. There was correspondingly more pressure to attend to the welfare of the aboriginal inhabitants(375) See, e.g. the report of a Select Committee of the House of Commons on Aborigines 1836 (538), vol.VII, p 1. Most of the measures that were taken did not, however, relate to land. For instance, instructions were issued by Lord Glenelg for the appointment of Protectors of Aborigines who were, amongst other things, to watch over the rights and interests of the natives within their jurisdiction, to represent their wants, wishes or grievances to the colonial government and to attempt to settle them down and to educate and "civilize" them(376) Despatch No.72 Lord Glenelg to Gipps dated 31 January 1838 (HRA, (1923), i.19.252). However, outrages committed on the native inhabitants did not cease and were the subject of concern. When Lord Russell succeeded Lord Glenelg in the colonial office, he reiterated the solicitude of the Imperial government for the Aborigines, saying that "it is impossible that the Government should forget that the original aggression was our own, and that we have never yet performed the sacred duty of making any systematic or considerable attempt to impart to the former occupiers of New South Wales the blessings of Christianity, or the knowledge of the Arts and advantages of civilised life"(377) Despatch No.62 Lord Russell to Gipps dated 21 December 1839 (HRA, (1924), i.20.439, at p 440). But still nothing was said which could be construed in any way as a recognition or acceptance by the Crown of any native rights in the land.

41. Alternatively, to the extent that measures were taken which related to land, they were too late to produce any fundamental change in the character of the occupation of the land following the assumption of sovereignty. For example, in 1848 Earl Grey stated in a despatch to Governor Fitz Roy(378) Despatch No.24 Earl Grey to Fitz Roy dated 11 February 1848 (HRA, (1925), i.26.223, at p 225):

> "I think it essential that it should be generally understood that leases granted for (the purpose of pastoral occupation) give the grantees only an exclusive right of pasturage for their cattle, and of cultivating such Land as they may require within the large limits thus assigned to them; but

> that these Leases are not intended to deprive the natives of their former right to hunt over these Districts, or to wander over them in search of subsistence, in the manner to which they have been heretofore accustomed, from the spontaneous produce of the soil, except over land actually cultivated or fenced in for that purpose."

On advice that a condition to this effect could not validly be inserted in Crown leases by the local Government, Fitz Roy requested an Order in Council giving the necessary authority(379) Despatch No.221 Fitz Roy to Earl Grey dated 11 October 1848 (HRA, (1925), i.26.632). As a result, an Order in Council dated 18 July 1849 was made enabling the Governor to insert in pastoral leases "such conditions, clauses of forfeiture, exceptions, and reservations, as may be necessary for securing the peaceful and effectual occupation of the land comprised in such leases, and for preventing abuses and inconveniences incident thereto". Earl Grey considered that this Order in Council would enable the Governor "to prevent the injury to the public which would result from the absolute exclusion of natives or other persons travelling or searching for minerals and so forth"(380) Quoted in Rusden, History of Australia, (1883), vol.II, p 513. The somewhat imprecise wording of this Order in Council is self-evident and it was thus a safe prediction that "as the Earl refused to declare that the native rights deserved respect, they would not be respected"(381) ibid. Thus, although a clause reserving to the Aborigines "free access to the said parcel of land" or to any portion of it including the trees and water which would "enable them to procure the animals, birds, fish and other foods of which they subsist" was apparently inserted in Queensland leases(382) Reynolds, The Law of the Land, (1987), p 144, the squatters ignored this provision and, by and large, they continued to drive the aboriginal inhabitants from their runs.

42. Therefore, the policy of the Imperial Government during this period is clear: whilst the aboriginal inhabitants were not to be ill-treated, settlement was not to be impeded by any claim which those inhabitants might seek to exert over the land. Settlement expanded rapidly and the selection and occupation of the land by the settlers were regulated by the Governors in a way that was intended to be comprehensive and complete and was simply inconsistent with the existence of any native interests in the land.

43. Initially settlers were permitted to occupy land only where that land had been granted or leased to them by, or on the authority of, the Governor and so the earlier Governors were able to control the settlement of the colony. As I have said, such settlement was regulated in considerable detail by the instructions given to these earlier Governors. However, as settlement expanded, the quantity of land surveyed was insufficient to meet the demand, and so settlers were permitted by Governors Macquarie and Brisbane to occupy land without a grant or lease, such occupation being terminable at the will of the Crown(383) Perry, Australia's First Frontier, (1963), pp 33-34, 44. The Governors after Governor Brisbane were empowered by their Commissions, with the advice and consent of the Executive Council, to divide the whole of the colony "into Districts, Counties, Hundreds, Towns, Townships and Parishes" (384) See, for example, Governor Darling's Commission dated 16 July 1825 (HRA, (1919), i.12.99, at p 103); Governor Bourke's Commission dated 25 June 1831 (HRA, (1923), i.16.837, at p 841) and Governor Gipps' Commission dated 5 October 1837 (HRA, (1923), i.19.295, at p 299). The disposal (by sale or grant without purchase) of the waste lands within these divisions, the terms and mode of such disposal, the purchase price (in the case of sale) and the quit rent (in the case of grant without purchase) were exhaustively and comprehensively specified in the instructions issued to the Governors from time to time(385) See, for example, Governor Darling's Instructions dated 17 July 1825 (HRA, (1919), i.12.107, at pp 113-124) and "the Ripon Regulations" (see Roberts, History of Australian Land Settlement: (1788-1920), (1924), p 95, fn.9).

44. Under Governor Darling the settlers were only permitted to select land within certain prescribed

limits(386) First specified by Government Order dated 5 September 1826 and then expanded by Government Order dated 14 October 1829, which came to be known as the "Limits of Location" and, as of 14 October 1829, consisted of nineteen counties which essentially comprised the area that is today known as the State of New South Wales. Land outside these limits (such as that comprising today's States of Victoria and Queensland) was considered and treated by the Crown as waste lands just as was unalienated land within these limits. When it became clear that the government could not prevent squatters from grazing their stock outside the Limits of Location, the government acted to regulate their occupation and to assert the rights of the Crown over that land. The government treated these squatters as unauthorized occupants of unalienated Crown land and permitted the land to be occupied only under a licence. For the purposes of regulating the use and occupation of land beyond the Limits of Location, the government divided this land into districts, each of which had a Commissioner and a Border Police Force(387) See 4 Wm IV No.10 (amended by 5 Wm IV No.12); 7 Wm IV No.4; 2 Vict No.19; 2 Vict No.27; 5 Vict No.1.

45. Subsequently the Sale of Waste Land Act 1842 (Imp) (5 and 6 Vict c.36) was passed. This Act made comprehensive provision for the terms on which the Governor was to exercise his power to alienate the waste lands of the Crown and it was followed by the Sale of Waste Land Act 1846 (Imp) (9 and 10 Vict c.104), which was to similar effect. Both of these Acts were clearly based on the premise that the waste lands were owned by the Crown. Squatting was further regulated by an Order in Council dated 9 March 1847 which divided all land in the Colony of New South Wales into three classes (settled land, intermediate land and unsettled land) and specified the terms on which pastoral leases in those classes would be granted by the Crown. The class designated "unsettled land" comprised land which was unsuitable for farming purposes but might be the subject of squatting. Most of the land in what was to become Queensland was unsettled land.

46. The fact that the Crown regarded unalienated waste land as entirely its own to deal with as it pleased is further exemplified by its refusal to recognize a "treaty" whereby John Batman purported to acquire 500,000 acres known as "Dutigalla" and 100,000 acres known as "Geelong" from certain natives. Given the policy of the Crown which I have described, the refusal emphasized that the Crown considered itself to be the owner of the land, unencumbered by any form of native title.

47. It is unnecessary to trace in detail the history of land settlement in Queensland. It is sufficient to say that squatters had reached the fringe of what is now Queensland in 1836 and expanded throughout Queensland by the early 1860s(388) See generally Roberts, op cit, pp 53-58, 155-165, 202; Roberts, The Squatting Age in Australia: 1835-1847, (1935), pp 169-177, 208-214. The pattern of conflict between the settlers and the aboriginal inhabitants which was manifest in early New South Wales was repeated. But again no basis was afforded for saying that native rights in the land were recognized or accepted. There is nothing to indicate that any change occurred in the way in which the Crown dealt with the land. That is to say, land was dealt with upon the basis that, where not retained or reserved for public purposes, it was available for settlement without regard to any claim on the part of the aboriginal inhabitants. Certainly the comprehensive system of land regulation that was adopted by the Colony of Queensland(389) See, for example, Alienation of Crown Lands Act 1860 (Q.), Unoccupied Crown Lands Occupation Act 1860 (Q.), Tenders for Crown Lands Act 1860 (Q.), Occupied Crown Lands Leasing Act 1860 (Q.), Unoccupied Crown Lands Act 1860 (Q.), Pastoral Leases Act 1863 (Q.), Crown Lands Alienation Act 1868 (Q.), the Homestead Acts, Crown Lands Act 1884 (Q.), Land Act 1910 (Q.) made no mention of native rights. Indeed, so far as the native inhabitants were concerned, the first Governor of the Colony of Queensland, Sir George Bowen, was merely required to "promote religion and education among the native inhabitants", "to protect them in their persons and in the free enjoyment of their possessions", "by all lawful means (to) prevent and restrain all violence and injustice which may in any manner be practised or attempted against them" and to take such measures as appeared to him necessary "for their conversion to the Christian Faith and for their advancement in civilization"(390) Governor Bowen's Instructions

dated 6 June 1859.

48. There may not be a great deal to be proud of in this history of events. But a dispassionate appraisal of what occurred is essential to the determination of the legal consequences, notwithstanding the degree of condemnation which is nowadays apt to accompany any account(391) See, e.g. Wacando v. The Commonwealth (1981) 148 CLR, per Murphy J. at pp 27-28. The policy which lay behind the legal regime was determined politically and, however insensitive the politics may now seem to have been, a change in view does not of itself mean a change in the law. It requires the implementation of a new policy to do that and that is a matter for government rather than the courts. In the meantime it would be wrong to attempt to revise history or to fail to recognize its legal impact, however unpalatable it may now seem. To do so would be to impugn the foundations of the very legal system under which this case must be decided.

49. Having dealt with the history I now turn specifically to the Crown lands legislation which, in my view, makes it abundantly clear that the Crown assumed ownership of the waste lands, unencumbered by any native interests. The early legislation is recounted by Windeyer J. in Randwick Corporation v. Rutledge(392) [1959] HCA 63; (1959) 102 CLR 54, at p 71 et seq.; see also Mabo v. Queensland (1988) 166 CLR, at pp 236-240 in a judgment with which Dixon C.J. and Kitto J. agreed. Upon settlement, all the land in the Colony of New South Wales, which then comprised the whole of eastern Australia, became in law vested in the Crown. The early Governors had express powers under their Commissions to make grants of land, referred to in the preamble to 6 Wm.IV No.16 (1836) as authority "to grant and dispose of the waste lands". The term "waste lands" was, apart from legislative definition, understood long before the colonization of New South Wales in 1788 to designate colonial lands not appropriated under any title from the Crown(393) Williams v. Attorney-General for New South Wales [1913] HCA 33; (1913) 16 CLR 404, per Isaacs J. at p 440; see also per Barton ACJ. at p 428. Initially, ultimate control over the disposal of waste lands was retained by the Imperial Crown. The revenue from this source was used to fund the administration of, and emigration to, the colony. So it was that while The Australian Constitutions Act 1842 (Imp) (5 and 6 Vict c.76) empowered the Governor of New South Wales to make laws for the peace, welfare and good government of New South Wales with the advice and consent of a legislative council, this power was made subject to the proviso that "no such law shall ... interfere in any manner with the sale or other appropriation of the lands belonging to the Crown within (New South Wales) or with the revenue thence arising"(394) s,29.

50. As I have said, the sale of the waste lands of the Crown came to be regulated by the Sale of Waste Land Act 1842. "Waste Lands of the Crown" was defined to mean "any Lands situate (in New South Wales), and which now are or shall hereafter be vested in Her Majesty, Her Heirs and Successors, and which have not been already granted or lawfully contracted to be granted to any Person or Persons in Fee Simple, or for an Estate of Freehold, or for a Term of Years, and which have not been dedicated and set apart for some public Use"(395) s.23. Under this Act the Queen and her authorized agents were expressly empowered to except from sale and either reserve to Her Majesty, Her Heirs and Successors, or dispose of in such other manner as for the public interest may seem best, "such Lands as may be required ... for the Use or Benefit of the aboriginal Inhabitants of the Country"(396) s.3. A later Act, the Sale of Waste Land Act 1846, empowered the Queen to demise, or to grant a licence to occupy, waste lands of the Crown for a term not exceeding fourteen years(397) s.1 and provision was made in that Act for the prosecution of persons in occupation of waste lands without such a demise or licence(398) s.4. The definition of "Waste Lands of the Crown" in the 1846 Act was similar to that contained in the 1842 Act, except that it expressly included waste lands "whether within or without the Limits allotted to Settlers for Location"(399) s.9.

51. In 1855 responsible government was attained in New South Wales. The steps preceding it - direct Crown rule, followed by a limited legislature in 1823 and further advances towards representative

institutions in 1828 and 1842(400) New South Wales Act 1823 (Imp) (4 GEO IV. c.96); Australian Courts Act 1828 (Imp) (9 GEO IV c.83); The Australian Constitutions Act 1842 (Imp) (5 and 6 Vict c.76) - were all accompanied by a refusal by the Imperial government to relinquish control of the disposal of waste lands, notwithstanding that before 1850 the Imperial government ceased to contribute to the expenses of the colonial government. However, by 1855 "(t)he insistence of the public for complete powers, added to the revolutionary change on the subject of emigration, which took place on the discovery of gold, led to the final concession"(401) Williams v. Attorney-General for New South Wales (1913) 16 CLR, per Isaacs J. at p 449. The New South Wales Constitution Act 1855 (Imp) (18 and 19 Vict c.54) provided that as from its date of proclamation "the entire management and control of the waste lands belonging to the Crown in (New South Wales) and also the appropriation of the gross proceeds of the sale of any such lands and of all other proceeds and revenues of the same from whatever source arising within the said colony including all royalties mines and minerals shall be vested in the legislature of the said colony"(402) s.2. Accordingly, the Sale of Waste Land Acts 1842 and 1846 were repealed by The Australian Waste Lands Act 1855 (Imp) (18 and 19 Vict c.56)(403) s 1. However, past appropriations of the proceeds of the sale or disposal of the waste lands of the Crown made under the repealed Acts were deemed not to be invalid(404) s.8 and all regulations respecting the disposal of the waste lands of the Crown made under the repealed Acts were to remain in force in New South Wales until otherwise provided by the legislature of New South Wales(405) s.6. The New South Wales Constitution Act also contained a proviso that preserved contracts, promises or engagements made with respect to land under the previous legislation(406) s.2; see also The Australian Waste Lands Act, s.4. I directed my attention to this proviso in Mabo v. Queensland(407) (1988) 166 CLR, at pp 237-240 and need not repeat what I said there.

52. In 1847 in The Attorney-General v. Brown(408) (1847) 1 Legge (N.S.W.) 312 the suggestion was made that the Crown had neither the property in the waste lands of the Colony of New South Wales nor possession of them. Stephen C.J., delivering a judgment, which was the judgment of the Court, gave the firm answer(409) ibid., at p 316:

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

53. The separation of the Colony of Queensland from the Colony of New South Wales was effected by Letters Patent dated 6 June 1859. At the same time an Order in Council was made providing for the government of the new colony. Clause 5 of the Letters Patent gave power to the Governor of the Colony of Queensland, with the advice of the Executive Council, to grant any "waste or unsettled" lands vested in the Crown within the Colony of Queensland subject to any laws in force in that colony regulating the sale or disposal of such lands. Clause 17 of the Order in Council provided that, subject to The New South Wales Constitution Act and The Australian Waste Lands Act, the legislature of the Colony of Queensland was to have power to make laws for regulating the sale, letting, disposal and occupation of the waste lands of the Crown within the colony.

54. In 1867 the Queensland legislature passed a consolidating Act, the Constitution Act 1867 (Q.), which incorporated Queensland constitutional legislation passed between 1860 and 1867. Section 30 of that Act provides that, subject to the provisions of The New South Wales Constitution Act and of The Australian Waste Lands Act "which concern the maintenance of existing contracts", the legislature of the colony has power to make laws for regulating the sale, letting, disposal and occupation of the waste lands of the

Crown within the colony. Section 40 provides that the entire management and control of waste lands belonging to the Crown in the colony shall be vested in its legislature subject to a proviso which is similar to that contained in s.2 of The New South Wales Constitution Act. Section 40 also provides that the appropriation of the gross proceeds of the sales of such lands and of all other proceeds and revenues shall be vested in the legislature. Sections 30 and 40 of the Constitution Act are the source of legislative power in Queensland to deal with waste lands. They are authorized by cl.17 of the Order in Council of 1859 which is in turn authorized by s.7 of The New South Wales Constitution Act. Upon the annexation of the Murray Islands in 1879 the powers referred to in ss.30 and 40 extended to those islands as part of Queensland. The Queensland legislature thereupon had power to deal with the waste lands of the Murray Islands, and that power was not limited by the proviso to s.40, the proviso having no application in the circumstances, as I explained in Mabo v. Queensland(410) (1988) 166 CLR, at p 239.

55. There followed a series of Acts passed by the Queensland parliament dealing with the alienation of Crown lands. The term "Crown lands" was used as an alternative to the term "waste lands" and is variously defined in the legislation. For example, in the Crown Lands Alienation Act 1868 (Q.), s.2, it is defined in part as:

> "All lands vested in Her Majesty which have not been dedicated to any public purpose or which have not been granted or lawfully contracted to be granted to any person in fee simple".

In the Crown Lands Alienation Act 1876 (Q.), s.1, it is defined in part as:

> "All lands vested in Her Majesty which are not dedicated to any public purpose and which are not for the time being subject to any deed of grant lease contract promise or engagement made by or on behalf of Her Majesty"(411) See also Crown Lands Act 1884 (Q.), s.4 and Land Act 1897 (Q.), s.4.

And, in the Land Act 1910 (Q.), s.4, it is defined as it is in the current legislation, the Land Act 1962 (Q.) (s.5), namely, as:

> "All land in Queensland, except land which is, for the time being -
> (a) Lawfully granted or contracted to be granted in fee-simple by the Crown; or
> (b) Reserved for or dedicated to public purposes; or
> (c) Subject to any lease or license lawfully granted by the Crown: Provided that land held under an occupation license shall be deemed to be Crown land".

56. Generally speaking these Acts empowered the Governor in Council to grant in fee simple or to demise for a term of years or to otherwise deal with Crown lands in Queensland. They also empowered the Governor in Council to reserve Crown lands for public purposes, including for the use or benefit of the aboriginal inhabitants or for aboriginal reserves, and to place such land under the control of trustees; alternatively the Governor in Council was empowered to grant Crown lands in trust for such public purposes(412) See Crown Lands Alienation Act 1868, s.18; Crown Lands Alienation Act 1876, ss.6, 7; Crown Lands Act 1884, ss.95, 96; Land Act 1897, ss.190, 191; Land Act 1910, ss.4, 180, 181; and see now Land Act 1962, ss.5, 334, 335.

57. The observation of Blackburn J. in Milirrpum(413) (1971) 17 FLR, at pp 254-255 (although it was made in relation to the entire history of land policy and legislation in New South Wales, South Australia and the Northern Territory) is apposite:

> "The first event in that history, for the purposes of this case, was the inclusion in Governor Phillip's second commission of the words 'full power and authority to agree for such lands tenements and hereditaments as shall be in our power to dispose of and them to grant to any person or persons ...'. (Since then there has been) a long succession of legislative and executive acts designed to facilitate the settlement and development of the country, not expressly by white men, but without regard for any communal native title."

His Honour regarded it as significant, as indeed I do, that there was a consciousness that the occupation of the land by white men was a deprivation of the Aborigines, but that nevertheless no attempt was made to solve this problem by way of the creation or application of law relating to title to land which the Aborigines could invoke(414) ibid., at pp 256-259.

58. The very concept of waste lands is an indication that the Crown proceeded, and was required to proceed, in disregard of any notion of native title and this is emphasized by the power to reserve from the sale of waste lands land required for the use or benefit of the aboriginal inhabitants. This was the case both on the mainland and in the Murray Islands, where the Crown lands legislation applied by virtue of the instruments effecting the annexation.

59. It was pursuant to Crown lands legislation that reserves in Queensland were created. For instance, on 30 June 1871 an aboriginal reserve at Mackay was gazetted and, following recommendations by a Commission of Inquiry (set up in 1873) and growing interstate and international concern about the treatment of Aborigines in Queensland, further reserves at Durundur, Bribie Island, Cape Hillsborough, Townsville, Bowen and Cardwell were gazetted in 1877. However, partly due to the opposition of certain settlers and partly due to a lack of financial support from the government, most of these reserves were cancelled in 1878 (the reserve at Mackay was cancelled in 1880 and that at Durundur in 1885). Subsequently, in the late 1880s and early 1890s, further reserves were established to be run by church organizations with little financial support from the government.

60. Following recommendations made to the Queensland government in 1896 the Aboriginals Protection and Restriction of the Sale of Opium Act 1897 (Q.) was passed. It was pursuant to this Act that the natives were placed on government controlled reserves and were entirely isolated from contact with other races. The first of these reserves was set up in 1897 at Bogimbah Creek on Fraser Island and was initiated by the removal of about 50 natives from the Maryborough district. This was the beginning of a large-scale program of removals (authorized under s.9 of the Act) to reserves at places such as Yarrabah, Durundur, Barambah, Taroom, Hull River, Woorabinda and Palm Island. By the end of the 1930s, reserves had also been gazetted in the north at Edward River, Lockhart River and Doomadgee. Concurrently, "country reserves" (often on the outskirts of rural towns) were set up to provide a source of aboriginal labour for pastoral areas (e.g. outside Herberton and Georgetown)(415) See generally Foxcroft, Australian Native Policy, (1941), pp 115-119; Anderson, "Queensland" in Peterson (ed.), Aboriginal Land Rights: A Handbook, (1981), pp 54-64; Singe, The Torres Strait: People and History, (1979), pp 214-215.

61. Thus, whilst land was reserved in Queensland for Aborigines, those placed on the reserves did not necessarily have any traditional association with the land. Moreover, the land remained land owned by

the Crown, the reserves could be revoked or altered by the Crown and the location and size of the reserves was largely dictated by the suitability of the land for settlement by the white population.

62. It appears that by a proclamation issued in 1882 the Murray Islands were reserved for native use. The proclamation would seem to have been issued pursuant to the powers conferred on the Governor in Council by s.6 of the Crown Lands Alienation Act 1876. In the same year a special lease (Special Lease 164) of two acres on Mer was granted by the Crown to the London Missionary Society for fourteen years. That lease appears to have been subsequently renewed and was later transferred to the General Secretary, Australian Board of Missions, then to the Trustees of the Australian Board of Missions and finally to the Corporation of the Synod of the Diocese of Carpentaria.

63. By an Order in Council dated 14 November 1912, the Governor in Council ordered that "the Murray Islands (Mer, Daua, Waua) containing an area of about 1200 acres (exclusive of Special Lease 1677)" were to be "permanently reserved and set apart for use of the Aboriginal Inhabitants of the State (of Queensland)". Presumably Special Lease 1677 relates to the land previously the subject of Special Lease 164. The reservation was made pursuant to the powers conferred upon the Governor in Council by s.180 of the Land Act 1910.

64. By an Order in Council dated 9 September 1939 the reserve comprising the Murray Islands was placed under the control of trustees pursuant to s.181(1) of the Land Act 1910. This section provided that the Governor in Council might, by Order in Council and without issuing any deed of grant, place any land reserved for any public purpose under the control of trustees and might declare the style or title of such trustees and the trusts of the land.

65. Aboriginal reserves, whether created under the Crown Lands Alienation Act 1876 or the Land Act 1910, were, as I have said, initially regulated by the Aboriginals Protection and Restriction of the Sale of Opium Act 1897. For the purposes of that Act, an "aboriginal" included an aboriginal inhabitant of Queensland(416) s.4(a). The Governor in Council was empowered to appoint a Protector of Aboriginals in respect of proclaimed districts in Queensland and a superintendent for each reserve in each district(417) ss.5, 6, 7. The Act provided in a detailed way for the welfare of "aboriginals" by the imposition of controls upon them and upon others in relation to them.

66. This Act was repealed by the Aboriginals Preservation and Protection Act 1939 (Q.)(418) s.3 but the Murray Islands reserve was continued, and regulated, as a reserve under the Torres Strait Islanders Act 1939 (Q.)(419) s.1(4)(a). Certain sections of the Aboriginals Preservation and Protection Act, which was to be read and construed with the Torres Strait Islanders Act(420) Torres Strait Islanders Act 1939, s.21, also applied to the Murray Islands reserve. The former Act continued the office of Chief Protector of Aboriginals, albeit in the guise of the Director of Native Affairs(421) s.6(1), and the latter Act provided that a designated Protector of Aboriginals was to be the Protector of Islanders for the purposes of that Act(422) s.4(2). The Torres Strait Islanders Act also made detailed provision for the regulation of the affairs of the aboriginal inhabitants, including the protection and management of their property(423) See the Aboriginals Preservation and Protection Act, s.16 read in conjunction with the Torres Strait Islanders Act, s.21. Further, it established a council to govern each island reserve in Torres Strait which was to be elected from among the native inhabitants of the relevant reserve(424) s.11. Each council was to exercise "the functions of local government of the reserve" and was charged with "the good rule and government of the reserve in accordance with island customs and practices"(425) s.18(1). For these purposes the council was empowered to make by-laws, including by-laws in relation to the "subdivision of land and use and occupation of land, buildings and use and occupation of buildings, ... boundaries and fences" (426) s.18(1), (3). However, the by-laws were to be of no force or effect until approved by the Director(427) s.18(8). This Act also provided for an island court for each reserve consisting of members of the council(428) s.20(1), which was to adjudicate on all offences committed by islanders on the reserve

against the by-laws of the reserve(429) s.20(2). Provision was made for appeal from a decision of the island court to the Protector of Islanders(430) s.20(11). The Governor in Council was given extensive power to make regulations for, among other things, the welfare, control and supervision of islanders and the jurisdiction and procedure of island courts(431) s.6.

67. The Aboriginals Preservation and Protection Act and the Torres Strait Islanders Act were repealed by the Aborigines' and Torres Strait Islanders' Affairs Act 1965 (Q.)(432) s.4(1). The Murray Islands reserve was, however, continued as a reserve under that Act(433) s.4(2)(a)(ii) and (v). This Act created the position of Director of Aboriginal and Island Affairs (which was occupied by the former Director of Native Affairs)(434) s.10(1), (2). This position was later incorporated(435) s.10A inserted by the Aborigines' and Torres Strait Islanders' Affairs Act Amendment Act 1967 (Q.), s.3. In the case of the Murray Islands the Director was also appointed trustee of the reserve(436) Queensland Government Gazette, 29 November 1969, p 1297. The office of protector was abolished, but the previous superintendents of reserves became managers of the communities which resided on those reserves(437) s.4(2)(b)(i), (ii). Under the Act a district officer in the district in which a reserve was situated was given the power to manage and deal with the property of any islander residing on the reserve where the officer was satisfied that this was in the best interests of the islander or his dependent family members(438) ss.27, 28, although the district officer could be required to cease doing so on the order of a stipendiary magistrate(439) s.29. The island councils were continued(440) s.45(1)(b) with similar functions and powers although in addition they were empowered to levy a rate and to impose fees, charges, fares, rents and dues in respect of any property, service, matter or thing for the purpose of enabling them to exercise and perform their functions(441) s.47. The island courts were also continued(442) s.52(1), but an appeal lay in the first instance to a group representative appointed under the Act(443) s.51 and then to the district officer(444) s.52(2). The Governor in Council was also given extensive power to make regulations for, among other things, the administration of reserves and the employment, welfare and control of islanders residing on the reserves(445) s.60. Pursuant to this power The Aborigines' and Torres Strait Islanders' Regulations 1966 were promulgated. They dealt with, among other things, the administration of reserves, entry on to reserves and the jurisdiction, powers and procedure of island courts.

68. The Act succeeding the Aborigines' and Torres Strait Islanders' Affairs Act, the Torres Strait Islanders Act 1971 (Q.), may be dealt with shortly. This Act continued the Murray Islands as a reserve(446) s.4(1). It also continued The Corporation of the Director of Aboriginal and Island Affairs(447) s.5 (its name was subsequently changed to The Corporation of the Director of Aboriginal and Islanders Advancement(448) Aborigines Act and Other Acts Amendment Act 1975 (Q.), s.4) and the island councils(449) s.4(3) (these were subsequently incorporated(450) s.35A inserted by the Aborigines and Islanders Acts Amendment Act 1979 (Q), s.21) with much the same powers as they had under the previous Act. The island courts were continued as well(451) s.42(1), but an appeal now lay in the first instance to the group representative, then to the Island Advisory Council appointed under the Act(452) s.49 and then to a stipendiary magistrate(453) s.43(1). A significant change, however, was that under the Act a district officer could only assume the management of an islander's property when requested to do so by the islander(454) s.61(1) and, subsequently, an islander was able to terminate such management as of right(455) Aborigines Act and Torres Strait Islanders Act Amendment Act 1974 (Q.), s.6. Again, the Governor in Council was given extensive power to make regulations for the welfare of islanders and for the administration of the reserves on which they resided(456) s.78. The Torres Strait Islanders Regulations 1972 were made under this Act; these regulations related to, among other things, the administration and control of reserves, the proceedings of island councils and the powers, jurisdiction and proceedings of island courts.

69. This Act was repealed by the Community Services (Torres Strait) Act 1984 (Q.)(457) s.4. Under that Act the Murray Islands are continued as a trust area(458) s.5(1). "Trust area" was at that time defined as "land granted in trust by the Governor in Council for the benefit of Islander inhabitants or reserved and

set apart by the Governor in Council for the benefit of Islanders under the provisions of law relating to Crown lands"(459) s.6(1); this definition has since been amended by the Aboriginal and Torres Strait Islander Land (Consequential Amendments) Act 1991 (Q.), s.22(2). The island councils are continued(460) s.593) and, as under the repealed Act, are incorporated(461) s.15(1) and made "capable in law of suing and being sued, of acquiring, holding (absolutely or subject to trusts), letting, leasing, hiring, disposing of and otherwise dealing with property real and personal"(462) s.15(3). The previous powers of island councils are also extended to include the powers of a "Local Authority" in certain circumstances(463) s.23(3)(d). Although a council's by-laws have no force or effect until approved by the Governor in Council, there is no longer any power in another body to suspend a by-law. Provision is also made for island courts but these are now generally to be constituted by two justices of the peace who are islanders resident in the relevant trust area(464) s.40(2)(a). The jurisdiction of an island court extends, among other things, to disputes concerning any matter that "is a matter accepted by the community resident in (the relevant trust area) as a matter rightly governed by the usages and customs of that community"(465) s.41(2)(b)(i). The decision of an island court upon such a matter is final and conclusive(466) s.41(3). Finally, the Governor in Council is given extensive power to make regulations for, among other things, the administration and supervision of island councils, the jurisdiction and procedure of island courts, the self-management and good government of islanders, the skills development, training and employment of islanders and the financial well-being of islanders(467) s.81.

70. As can be seen from the preceding summary none of these Acts that regulated or now regulate reserves (such as the Murray Islands reserve) adverts to any native interests in the reserved land and, significantly, the power of an island council under these Acts does not extend to dealing with titles to land.

71. So far as the Murray Islands are concerned, the creation of a reserve of practically all of the land on the Murray Islands for the benefit of aboriginal inhabitants so soon after annexation is, in the light of the policy adopted by Queensland towards land and the aboriginal inhabitants on the mainland, a clear indication that the Crown was proceeding upon a basis other than that of preserving any native rights in respect of the land. The creation of a reserve is not necessarily inconsistent with the continued existence of native title(468) See United States v. Santa Fe Pacific Railroad Co. (1941) 314 US, at p 353; Gila River Pima-Maricopa Indian Community v. United States (1974) 494 F 2d, at pp 1389-1392. However, it is to be noted that in these cases the issue was whether the creation of the reserve extinguished Indian title outside the reserve, rather than whether the creation of the reserve extinguished any pre-existing Indian title over the reserved land, but where the circumstances which accompany a reservation of land clearly indicate the Crown's exercise of rights of absolute ownership such that there is no room for the continued existence of native title, then the reservation will clearly be inconsistent with the recognition of that title. The reservation of the Murray Islands and the regulation of the affairs of the aboriginal inhabitants was part of a legislative and administrative scheme extending to the whole of the colony and it is clear that elsewhere the creation of aboriginal reserves was unrelated to the preservation of native title. The reservation was in no way a recognition of any traditional land rights. The policy behind the creation of reserves on the mainland was accurately described by Blackburn J. in Milirrpum(469) (1971) 17 FLR, at p 255:

> "The creation of aboriginal reserves - a policy which goes back at least to the time of Governor Macquarie - implies the negation of communal native title, for they are set up at the will of the Government and in such places as the Government chooses. There is never the slightest suggestion that their boundaries are negotiated between parties by way of the adjustment of rights."

72. Just as those concerned with the administration of the Murray Islands assumed full power to regulate the affairs of the occupants of the Murray Islands reservation, the Crown (and its agents) assumed full power to deal with the land as it saw fit. Indeed, the creation of reserves out of Crown land was itself the exercise by the Crown of its rights of absolute ownership over the land. In these circumstances the fact that almost the whole of the Murray Islands was reserved carries with it no particular significance. On the contrary, there is a certain unreality in any separate examination of the reservation of the Murray Islands in order to discern an intention not to disturb native title. The lands comprising the islands were quite plainly thought to be Crown lands and to be in no different category to Crown lands elsewhere in the colony. There was never in Queensland, as there was not in New South Wales, any policy which could be said to embrace the concept of native title. The opposite was the case and it is in that context that the creation of reserves for the benefit of aboriginal inhabitants must be seen.

73. The findings of fact made by Moynihan J. upon the remitter of this matter to the Supreme Court of Queensland are consistent with the conclusions which I have arrived at from a consideration of the legislation passed and executive action taken, namely that as from annexation traditional native title in the land was not recognized by the Crown (or, what amounts to the same thing, was extinguished by the Crown). In particular, Moynihan J. found that there was no concept of public or general community ownership of land before the arrival of Europeans but that all land was considered to be in the possession of a particular individual or family group. Whatever the true character of traditional native title, it seems that it can only be claimed by or on behalf of a group of native inhabitants and that it does not support the claim of an individual to a particular parcel of land. Of course this of itself does not deny the possibility that the Crown has recognized or granted to the native inhabitants of the Murray Islands after annexation something more than traditional native title, and more akin to private ownership of the land. But Moynihan J. was able to go only so far as to find that, prior to European contact, the native inhabitants of the Murray Islands had a strong sense of the propriety of respecting and not trespassing on "someone else's place or locality"; his Honour found this attitude to be "ingrained in the culture of the people ... rather than objectively laid down and enforced by some distinct agency - rather like our (or more likely another age's) concept of good manners for example than the traffic regulations enforced by the police force". This respect for another's "place or locality" was not due to any spiritual or religious relationship with the land or necessarily to any intrinsic value of the land as such; instead, it was at least partly due to "the need to control access in the terms of distribution or sharing life sustaining or socially advantageous resources in a potentially volatile social environment". In other words, controlled access to land on the basis of social groupings was necessary for social harmony. In addition Moynihan J. found that the disposition of and dealings in village land and garden land at this time essentially depended on whatever basis was acceptable to those directly affected and, to the extent to which a wider community might be affected, whatever basis was acceptable to that community. Moynihan J. concluded that, prior to the arrival of Europeans:

> "The ultimate determining factor in terms of the control and disposition of land was simply what was acceptable in terms of social harmony and the capacity of an individual to impose his (it seems almost (always) to have been a him) will on the community."

74. Moynihan J. thus appears to have formed the view that it would be no more than speculation to conclude that there was any particular system controlling the use of land on the Murray Islands before European contact.

75. European contact brought with it certain changes. In particular a system of chieftainship was introduced with the appointment of the "mamoose" (or chief) at the instigation of the European authorities and this was followed by the establishment of the island council, the island court and the island

policemen. These were all introduced agencies that, in the words of Moynihan J., bore "little or no relationship to anything previously in place in the society or reflected by the culture". Other changes included the introduction of school for the children, the introduction of Christianity, the migration of a number of islanders to the mainland and a change in the economy from one based on subsistence gardening supplemented by fishing to one based on cash from employment. To some extent the manner of dealing with land was also affected - for example, it appears that since European contact the practice of leasing or loaning garden land to other Murray Islanders has become a relatively common and accepted transaction. In particular though, after European contact, the London Missionary Society, the schoolmaster and finally the island court assumed the function of resolving disputes concerning residential (or village) land and gardening land. Previously, there was nothing resembling these institutions or performing their functions. Of the court Moynihan J. said:

> "I am inclined to think that the operation of the Court reflected as much as anything the imperative of achieving social harmony by seeking to reconcile conflicting parties or having them accept a decision perhaps in terms of accepted expectation."

And, a little later, he concluded that:

> "The view I take on the whole of the evidence is that the role of the Court was to maintain social harmony by accommodating peoples' wishes as far as possible and doing what seemed to be right in the circumstances."

In other words, it appears that the court proceeded upon an ad hoc basis rather than upon the basis of protecting such rights (if any) as may have existed before the annexation of the Murray Islands. Whilst the court did seek to achieve a consistent application of certain basic principles, this was because of the intrinsic value of consistency and predictability rather than an attempt to apply any traditional or customary law. Thus the institutions introduced by the Europeans (in particular, the island court) do not provide evidence of the recognition of any rights in land enjoyed by the native inhabitants before annexation.

76. On 6 May 1931 a lease (Special Lease 6619) was granted to two persons (not being aboriginal inhabitants) over the whole of the islands of Dauer and Waier for a period of twenty years for the purpose of establishing a sardine factory. A new lease (Special Lease 6856) was later granted in the same year on the same terms except that it provided for an extension of the lease for thirty years upon the giving of six months' notice. This lease was then transferred to Murray Island Fisheries Limited on 10 June 1932. The lease was, however, forfeited in 1938 for failure to pay the rent due and the improvements made on the leased land were purchased by the Lands Department on behalf of the Chief Protector of Aboriginals.

77. The granting of the lease of land to the London Missionary Society referred to earlier and of the lease for the purposes of a sardine factory are inconsistent with the preservation of native title, although in the latter case the lease was subject to conditions that the lessees would not in any way obstruct or interfere with the use of the Murray Island natives of "their tribal gardens and plantations" on the demised land and would not in any way obstruct or interfere with the operations of the Murray Island natives who fished around the reefs adjacent to the demised land. The construction of public buildings and the carrying out of public works on the islands is also inconsistent with the preservation of native title.

78. The court records do show that in September 1913 the government purchased three portions of land for a gaol house, a court house and a recreation reserve respectively for a total sum of 6.0.0 pounds.

Further, it appears that during the 1960s the Department of Native Affairs paid $50 for a site for a kindergarten "in recognition of any claim he (the recipient) had to the use of the land". And, in 1973 the area of land used by the kindergarten was increased and another person was paid $75 by the Department of Aboriginal and Islander Affairs for the loss of use of the land. Each of these transactions was variously referred to as a "sale", a "disposal", an "acquisition" or a "purchase". The court records also show that in 1928 land on Mer "was resumed by the Protector of Aboriginals and set aside for a new village. The land was then cleared and subdivided into 23 lots and balloted for".

However, it was only upon some occasions when Murray

Islanders were deprived of the use of their land that they were compensated. For example, in 1978 land was used for the construction of an air-strip on Mer without any question of compensation being raised. In any event, such payments as were made were (despite some of the terminology used) for the loss of use of the land rather than for the acquisition of any rights in the land, the payments being made in some instances after the intervention of the island council. In my view there was no legal obligation to give such compensation and the giving of it is explicable on the grounds that it was desirable to avoid ill-feeling and possibly to compensate the occupier for any improvements (such as gardens or dwellings) that may have been made by him. It is true that on occasions land on the Murray Islands has been referred to as being "owned" by or "belonging to" the native inhabitants and that in one instance land was said to have been "resumed". However, in the circumstances, this again only reflects an imprecision in the language used rather than the true legal position. It is equally true that on occasions "trespassers" were removed from the Murray Islands, but this is explicable not on the basis that they were trespassers on land owned by the native inhabitants but that they were trespassers on land owned by the Crown, notwithstanding that they may have been removed to protect the native inhabitants.

79. In my view, the conclusion is inevitable that, assuming the native inhabitants of the Murray Islands to have held some sort of rights in the land immediately before the annexation of those islands, the Crown in right of the Colony of Queensland, on their annexation, exerted to the full its rights in the land inconsistently with and to the exclusion of any native or aboriginal rights. It did so under the law which it brought with it. It did so from the start by acting upon the assumption (which was also the assumption lying behind the relevant legislation) that there was no such thing as native title and that the Crown was exclusively entitled to all lands which had not been alienated by it: lands which were designated as Crown lands. In making provision for the reservation of land for public purposes, in particular the welfare of the aboriginal population, the relevant legislation and the action taken pursuant to it disclose no intention to preserve native rights in the land: they were simply thought not to exist. The reservation of land for the use of the aboriginal population was in the exercise of a benevolent jurisdiction whereby the land was to be controlled by the Crown in accordance with a legislative scheme which was inconsistent with the exertion of native rights, communal or otherwise, in the land. If any ambiguity arose from the fact that practically the whole of the Murray Islands were reserved and the fact that the aboriginal inhabitants were allowed to continue in occupation of the land more or less as they had been in the past (or at all events since European contact), that ambiguity is resolved when it is recognized that the scheme under which the islands were reserved extended to the whole of the colony and was elsewhere plainly incompatible with the preservation of any native title and consistent only with the assertion by the Crown of full and complete dominion over land. Indeed, the creation of aboriginal reserves was for the purpose of actually retaining the land within the control of the Crown or its agencies in order that it might be administered for the benefit of the aboriginal population of the colony. Further, aboriginal reserves were not created in a manner which coincided with the aboriginal inhabitants' occupation of the land. On the contrary, aboriginal reserves were created without any regard to aboriginal title.

80. My conclusion that the plaintiffs have no aboriginal title to the land necessarily carries with it the further conclusion that the plaintiffs' separate claim to usufructuary rights over the land cannot succeed.

Imprecise as the authorities are concerning the nature of aboriginal title, it would appear upon any view to embrace usufructuary rights. The separate claims made by the plaintiffs to aboriginal title and usufructuary rights would appear to be based upon the notion that aboriginal title is proprietary by nature, whereas usufructuary rights are, by definition, not proprietary in nature. The weight of authority rather suggests that aboriginal title is of its nature also non-proprietary and carries with it little if anything more than usufructuary rights. But it is unnecessary to pursue the matter because it is not, and cannot be, questioned that aboriginal title may be extinguished and it follows that any usufructuary rights amounting to something less than aboriginal title may also be extinguished. The exertion by the Crown of its rights over the Murray Islands, as evidenced by, among other things, the creation of a reserve, to the exclusion of any native rights in that land, carries with it the result that any usufructuary rights in the land stemming from occupancy before annexation, have been extinguished.

81. Similarly, in the light of what I have already said, the plaintiffs' claims to ownership by custom of the lands comprising the Murray Islands cannot be sustained. The short answer is that, upon the facts found by Moynihan J., which I have set out previously, the plaintiffs failed to establish any custom by which they could be said to have inherited rights over the land which they claim. A system, such as that which apparently existed prior to annexation, whereby the control and disposition of land depended on what was acceptable in terms of social harmony and on the capacity of the individual to impose his will on the community, does not seem to me to amount to any sort of custom, whether or not characterized as a system of laws, regarding the control and disposition of land. But, more fundamentally, customary rights which are not recognized by a new sovereign who acquires the radical title to the land are extinguished upon the assumption of sovereignty, no less than rights which might be characterized as aboriginal title. No doubt, as in my view is the case with aboriginal title, recognition may take the form of acquiescence, at least where the customary rights are reasonable(470) Halsbury's Laws of England (4th ed.), vol.12, pars 406, 409-414; New Windsor Corporation v. Mellor (1975) Ch 380, at p 386; Lockwood v. Wood (1844) 6 QB 50, at p 64 [1844] EngR 452; (115 ER 19, at p 24); Mercer v. Denne (1904) 2 Ch 534, at pp 551-552; Tyson v. Smith (1838) 9 Ad. and E 406, at p 421 (112 ER 1265, at p 1271) and not repugnant to the common law(471) The Case of Tanistry (1608) Davis 28, at p 40 (80 ER 516, at p 527); 4th ed. Dublin (1762) p 78, at p 109 (English translation). But the history, both legislative and executive, to which I have made reference, affords no basis for any claim that the Crown in right of the Colony or State of Queensland recognized the existence of any customary rights of ownership on the part of the aboriginal inhabitants of the Murray Islands.

82. As I have said, under both the Community Services (Torres Strait) Act and its predecessor, an island council is required to govern the reserve "in accordance with the customs and practices" of the islanders. Indeed, the 1980 by-laws expressly require the transmission of land on the holder's death or permanent departure to be "in accordance with native custom" (by-law no.35) and provide that, if a deceased islander does not make a will, the deceased islander's land and property is to be distributed by the island court "by native custom" (by-law no.38). Also, in some cases, the jurisdiction of the island court is required to be exercised having regard to or in accordance with "the usages and customs of the community"(472) See, for example, Community Services (Torres Strait) Act, s.41(2)(a), (b). The plaintiffs contend that these provisions confer "statutory rights" on the Meriam people. However, these provisions cannot preserve that which has been found not to exist by Moynihan J. and they do not constitute a recognition of customary rights which, at least so far as land is concerned, are inconsistent with Queensland laws introduced upon annexation.

83. The plaintiffs placed reliance upon The Case of Tanistry(473) (1608) Davis 28 (80 ER 516); 4th ed. Dublin (1762) p 78 (English translation). That was a case in which it was sought to establish the continuation in Ireland of the custom of tanistry (a tenure involving a mode of descent through the male line) despite the introduction of the common law of England. It was held in that case that the custom did not survive because it was unreasonable and repugnant to the common law(474) ibid., at pp 33-35, 40 (pp

521-523, 527 of ER); pp 92-95, 109 of English translation. In addition, the court affirmed the basic principle which I have stated before(475) ibid., at pp 40-41 (p 528 of ER); pp 111-112 of English translation:

> "queen Elizabeth shall not be said to be in actual possession of this land, by virtue of the first conquest, if it doth not appear by some record that the first conqueror had seised this land at the time of the conquest, and appropriated it particularly to himself as parcel of his proper demesne.
> For the kings of England have always claimed and had within their dominions, a royal monarchy and not a despotick monarchy or tyranny ... And therefore when such a royal monarch, who will govern his subjects by a just and positive law, hath made a new conquest of a realm, although in fact he hath the lordship paramount of all the lands within such realm, so that these are all held of him, mediate vel immediate, and he hath also the possession of all the lands which he willeth actually to seise and retain in his own hands for his profit or pleasure, and may also by his grants distribute such portions as he pleaseth to his servants and warriors, or to such colonies as he will plant immediately upon the conquest ... yet Sir James Ley chief-justice said, that if such conqueror receiveth any of the natives or antient inhabitants into his protection and avoweth them for his subjects, and permitteth them to continue their possessions and to remain in his peace and allegiance, their heirs shall be adjudged in by good title without grant or confirmation of the conqueror, and shall enjoy their lands according to the rules of the law which the conqueror hath allowed or established, if they will submit themselves to it, and hold their lands according to the rules of it, and not otherwise."

In other words, on conquest the Crown took the paramount title to (though not actual possession of) all the lands in the conquered realm so that all the lands were held of the Crown. If the Crown permitted the conquered people to remain in possession of the land then they obtained good title to it (under the laws designated by the conqueror) without grant or confirmation of the Crown. The Case of Tanistry therefore does not assist the plaintiffs in their claim to ownership by custom. Even if they were able to establish the necessary custom, it did not survive the annexation of the Murray Islands by the Crown in right of the Colony of Queensland because, unlike the situation in The Case of Tanistry, the Crown did not permit the inhabitants of the Murray Islands to remain in possession of the land in accordance with its laws, including any custom recognized under Queensland law. Instead their continued occupation was at the pleasure of the Crown.

84. Alternatively, the plaintiffs argue that, whether or not they are able to establish that they have traditional land rights, they nevertheless have a title based on possession. This argument is heavily based on a theory advanced by Professor McNeil in his book Common Law Aboriginal Title, (1989). The starting point is that the plaintiffs' predecessors in title have been in occupation of the land since beyond living memory. Upon annexation, the common law was introduced into the Murray Islands as part of the law of Queensland. Under the common law, occupation is prima facie proof of possession and possession

carries with it a possessory title, which is good as against those who cannot show a better title in themselves. Indeed, mere possession of land is prima facie evidence of a seisin in fee. Thus, say the plaintiffs, since they were allowed to remain in possession of their lands and since no one can assert a better title against them, they must be taken to hold their land by way of an estate in fee simple.

85. But, of course, any presumption that the plaintiffs have an estate in fee simple is rebuttable(476) See Wheeler v. Baldwin [1934] HCA 58; (1934) 52 CLR 609, at p 632 and any possessory title would not withstand the assertion by the Crown of its radical title. In other words, upon the assumption of sovereignty by the Crown, the plaintiffs or their predecessors could only retain such interests as the Crown chose to recognize by one means or another and, as I have endeavoured to explain, the Crown upon annexation asserted its right to the land to the exclusion of any rights of ownership on the part of the plaintiffs or their predecessors.

86. The plaintiffs put yet another argument. They submit that if they fail to establish title to the lands which they claim on the Murray Islands, nevertheless the Crown, whether as a trustee or not, owes them a fiduciary duty to deal with those lands in such a manner as to have regard to their traditional rights in them. They argue that this duty arises from the unilateral assumption of control by the Crown over the native inhabitants on annexation, the policy of protection of the native inhabitants adopted by the Crown and the creation of a reserve (later put under the control of trustees) for the use and benefit of the native inhabitants. The plaintiffs say that this duty imposes an obligation on the defendant, among other things, to preserve or have regard to the traditional land rights of the plaintiffs, to exercise any discretionary powers conferred by statute or otherwise in a manner which preserves or has regard to these rights, and to pay proper compensation for any extinguishment or impairment of these rights. I have some difficulty with this submission because, assuming that the plaintiffs had traditional rights in those lands, I have reached the conclusion that those rights have been extinguished. It is in the end for that reason that I have also concluded that there is no fiduciary duty imposed upon the Crown such as is advanced by the plaintiffs, but it is necessary for me to elaborate my reasons for reaching that conclusion.

87. In the United States it has been held that a fiduciary relationship exists between the United States government and the various Indian tribes. Its foundation is said to lie in the judgments of Marshall C.J. in Cherokee Nation v. Georgia(477) [1831] USSC 6; (1831) 30 US 1 and in Worcester v. Georgia(478) (1832) 31 US 350. This relationship seems to derive from the fact that the Indian tribes, as "domestic dependent nations", rather than as individuals abandoning their national character and submitting as subjects to the laws of another, have sought and received the protection of a more powerful government, namely, that of the United States. Accordingly there has arisen between the Indian tribes and the United States government a relationship which has been described as resembling that between a ward and his guardian(479) Cherokee Nation v. Georgia (1831) 30 US, at p 12 and Worcester v. Georgia (1832) 31 US, at p 376; see also United States v. Kagama (1886) 118 US, at pp 383-384. This relationship has also been described as "a general trust relationship between the United States and the Indian people"(480) United States v. Mitchell (1983) 463 US, at p 225, and the United States government, in dealing with the Indians, and in particular in carrying out its treaty obligations towards them, is under "a humane and self imposed policy" whereby "it has charged itself with moral obligations of the highest responsibility and trust"(481) Seminole Nation v. United States (1942) 316 US, at pp 296-297. The precise origins of this United States "federal trust responsibility", as it is sometimes called, as well as its content, are somewhat obscure. Marshall C.J. spoke in broad moral terms, but the theoretical basis has been variously explained(482) See Note, "Rethinking the Trust Doctrine in Federal Indian Law" (1984) 98 Harvard Law Review 422. It is clear, however, that the doctrine is dependent upon a history of protection of the Indian tribes, as separate domestic dependent nations with their own limited form of sovereignty and territorial and governmental integrity, the protection being undertaken by the United States government either pursuant to legislation or otherwise. The doctrine also assumes some form of title in the Indian tribes to the land, either by way of aboriginal title ("unrecognized Indian title") or under treaty ("recognized Indian

title").

88. In Canada the notion of a fiduciary duty with respect to aboriginal lands was taken up in Guerin v. The Queen(483) (1984) 13 DLR (4th) 321. In that case part of an Indian reserve set apart for the use of the Musqueam band was surrendered to the Crown by the band "in trust to lease the same to such person or persons, and upon such terms as the Government of Canada may deem most conducive to our Welfare and that of our people". The Crown accepted the surrender and entered into a lease upon terms substantially less advantageous than those which had been discussed with the band. No copy of the lease was made available to the band until a considerable time after it had been entered into. Under the Indian Act, RSC 1952, c.149, it was provided that reserves were to be held by the Crown for the use of the respective Indian bands for which they were set apart: s.18(1). It was also provided that generally lands in a reserve were not to be sold, alienated, leased or otherwise disposed of until they had been surrendered to the Crown by the band for whose use and benefit in common the reserve was set apart: s.37. The purpose of this latter stipulation was to interpose the Crown between the bands and the prospective purchasers or lessees of their land so as to prevent the bands from being exploited(484) ibid., at p 340.

89. Dickson J. (with whom Beetz, Chouinard and Lamer JJ. agreed) found that the Crown was under a fiduciary duty towards the Indians with respect to the surrendered land which, whilst not a trust, made the Crown liable in the same way and to the same extent as if a trust were in effect. The finding of Dickson J. that a fiduciary duty existed was dependent upon the existence of Indian title and the statutory provisions prohibiting the disposal of reserve land except through surrender to the Crown. He said(485) ibid., at p 334:

> "In my view, the nature of Indian title and the framework of the statutory scheme established for disposing of Indian land places upon the Crown an equitable obligation, enforceable by the courts, to deal with the land for the benefit of the Indians. ...
> The fiduciary relationship between the Crown and the Indians has its roots in the concept of aboriginal, native or Indian title. The fact that Indian bands have a certain interest in lands does not, however, in itself give rise to a fiduciary relationship between the Indians and the Crown The conclusion that the Crown is a fiduciary depends upon the further proposition that the Indian interest in the land is inalienable except upon surrender to the Crown."

90. Wilson J. (with whom Ritchie and McIntyre JJ. agreed) held that, while the Crown did not hold reserve land under s.18 of the Indian Act in trust for the bands because the bands' interests were limited by the nature of Indian title, it did hold the lands subject to a fiduciary obligation to protect and preserve the bands' interests from invasion or destruction. Thus the Crown could not utilize reserve land for purposes incompatible with the bands' Indian title unless the relevant band agreed(486) ibid., at p 357. Wilson J. further held that this fiduciary duty, which was founded upon aboriginal title, "crystallized upon the surrender into an express trust of specific land for a specific purpose"(487) ibid., at p 361.

91. The existence of some sort of fiduciary or trust obligation upon the Crown in dealing with surrendered reserve land which is identified in Guerin is similar to a manifestation of the fiduciary relationship said to generally exist between the Indian tribes and the United States government. That is that land in the United States, whether held under unrecognized or recognized Indian title, cannot be disposed of without the consent of Congress; in other words, analogously to the position of the Crown in Canada, the United States government has assumed a responsibility to protect the Indian tribes in their land transactions(488)

See, for example, Catawba Indian Tribe of South Carolina v. State of South Carolina [1983] USCA4 1475; [1983] USCA4 1475; (1983) 718 F 2d 1291, at pp 1298-1299; Joint Tribal Council of Passamaquoddy Tribe v. Morton [1975] USCA1 273; (1975) 528 F 2d 370, at p 379; Narragansett Tribe v. Southern Rhode Island Land Development Corp (1976) 418 F Supp, at p 803; United States v. Oneida Nation of New York (1973) 477 F 2d 939, at p 942; Fort Sill Apache Tribe of State of Oklahoma v. United States (1973) 477 F 2d 1360, at p 1366.

92. However, it has been suggested that in Canada, as in the United States, the Crown in fact has a broader responsibility to act in a fiduciary capacity with respect to its aboriginal peoples. That responsibility is said to arise out of the Crown's historic powers over, and assumption of responsibility for, those aboriginal peoples and out of the recognition and affirmation of existing aboriginal rights contained in s.35(1) of the Canadian Constitution(489) Reg. v. Sparrow (1990) 70 DLR (4th), at p 408 but cf. Delgamuukw v. British Columbia (1991) 79 DLR (4th), at p 482.

93. But once it is accepted, as I think it must be, that aboriginal title did not survive the annexation of the Murray Islands, then there is no room for the application of any fiduciary or trust obligation of the kind referred to in Guerin or of a broader nature. In either case the obligation is dependent upon the existence of some sort of aboriginal interest existing in or over the land. Yet, as I have said, upon annexation the lands comprising the Murray Islands became Crown lands and the Crown asserted the right to deal with those lands unimpeded by any recognition of, or acquiescence in, native title.

94. As I have already stated, in 1939 a trust (at least in name) of the lands comprising the Murray Islands was created pursuant to s.181(1) of the Land Act 1910. The present trustee would appear to be a corporation sole, The Corporation of the Director of Aboriginal and Islanders Advancement. But the terms of the trust, which are now to be gleaned from the Land Act 1962, are inconsistent with the preservation of any form of native title and may in this respect be contrasted with the provisions of the Indian Act. The trust was created without any deed of grant from the Crown to the trustees and appears to be limited to the imposition of an obligation to control the use of the land without any title being vested in the trustees. It is, therefore, more akin to an administrative arrangement than a conventional trust. Whether or not a trust of this kind creates any enforceable rights in equity against the Crown or those appointed as "trustees" by the Crown is a question which may on some other occasion require to be answered(490) cf. Williams v. Attorney-General for N.S.W. [1913] HCA 33; (1913) 16 CLR 404; see also Tito v. Waddell (No.2) (1977) Ch 106, at pp 211, 216, 223, 228-229, 234, 235-236; Kinloch v. Secretary of State for India (1882) 7 App Cas 619, per Lord Selborne L.C. at pp 625-626, Lord O'Hagan at p 630, and Lord Blackburn at pp 631-632; Town Investments v. Department of Environment [1977] UKHL 2; (1978) AC 359, per Lord Diplock at p 382 and Lord Simon of Glaisdale at p 397; Aboriginal Development Commission v. Treka Aboriginal Arts and Crafts Ltd. (1984) 3 NSWLR 502, at p 517; Guerin v. The Queen (1982) 143 DLR (3d), at pp 468-470, but I am prepared to assume for the purposes of argument that some form of trust has been created giving rise to enforceable obligations on the part of the Crown. As I have said, it is the Land Act 1962 which defines the nature of the trust and it seems to me that the relevant provisions of that Act assert the control of the Crown to the exclusion of any native interests in the land.

95. Under the Land Act 1962, the trustees may take action for the removal of trespassers, for the protection of the land or for injury to or misuse of the land(491) s.338(1). They may also, with the approval of the Governor in Council, make by-laws for, among other things, protecting the land from trespass, injury or misuse and regulating the use and enjoyment of the land and imposing reasonable fees and charges therefor(492) s.339. The trustees are also prohibited from permitting any person to occupy the reserved land for any purpose that is contrary to or inconsistent with the purposes for which the land was reserved(493) s.350(1)(a). Further, the trustees may lease the whole or any part of the land, but only with the prior approval of the relevant Minister(494) s.343(1). In this respect it is relevant to note that the

Governor in Council may, on the recommendation of the Minister, approve the leasing of the land for a purpose other than the purpose for which the land was reserved(495) s.343A(1) and that, while any rents are generally to be applied solely for the purposes of the trust, the Minister does have the power to apply them for some other purpose(496) s.346. Moreover, the trustees do not have power to sell or transfer the land(497) s.342(1). Finally, the Governor in Council, by Order in Council, is empowered to rescind in whole or in part or amend, alter, vary or otherwise modify any Order in Council reserving and setting apart any Crown land for any public purpose(498) s.334(4). If the Order in Council reserving the land for a public purpose is rescinded by the Governor in Council, the Minister may order the trust to be wound up and any surplus moneys are to be remitted to the Minister to be disposed of as the Minister may direct(499) s.354(1).

96. These provisions define the parameters of the trust and they do so without any reference to any interest in the land on the part of the inhabitants of the reserve. It is clear that, in establishing a reserve, the Crown is not creating an interest in the land in anyone else which can form the subject of a fiduciary or trust obligation owed by the Crown to that other person or persons. It is merely setting aside Crown land for a particular purpose. The Crown retains absolute control over the disposition of that land and the legislation does not prevent, but expressly enables, the Crown to revoke the reserve, whereupon it once again becomes Crown land within the meaning of s.5 of the Land Act 1962 and so is available for disposal by the Crown as absolute owner just as it was before it was reserved. In dealing with reserved land in this way there is no legislative requirement imposed on the Crown to consider the interests of the inhabitants of the reserve at all.

97. Moreover, it does not appear that the reserve comprising the Murray Islands or the trust created with respect to those lands was for the benefit of the inhabitants of the Murray Islands to the exclusion of the other aboriginal inhabitants of the State of Queensland. It has not proved possible to locate the actual terms of the proclamation issued in 1882 but the Order in Council dated 14 November 1912, which reserved the Murray Islands, did so for the use of "the Aboriginal Inhabitants of the State". Moreover, the Order in Council dated 9 September 1939, which placed the reserve under the control of trustees, did so by reference to the reserve in those terms, that is to say, it referred to the reserve as being a reserve for the use of "the Aboriginal Inhabitants of the State". In The Corporation of the Director of Aboriginal and Islanders Advancement v. Peinkinna(500) (1978) 52 ALJR 286, the Privy Council considered the nature of a reserve "for the Benefit of the Aboriginal Inhabitants of the State, Aurukun" which was placed under the control of the Director of Native Affairs as trustee. The Privy Council was prepared to assume, without deciding, that a public charitable trust arose by reason of the Land Act 1962 and the Orders in Council made under it reserving that land and placing it under the control of a trustee. However, their Lordships concluded that such a trust would be a trust for the benefit of the aboriginal inhabitants of the State as a class and not a trust for the benefit of the aboriginal inhabitants upon the reserve at Aurukun. That case is indistinguishable in all relevant respects from the present one and it may be observed that a trust to control land for the use of the aboriginal inhabitants of the State generally does not suggest a trust intended to protect such communal or individual interests in the land as may have been previously possessed by the inhabitants of the Murray Islands.

98. There is no doubt that the initial annexation of the Murray Islands was motivated in part by a desire on the part of the Crown in right of the Colony of Queensland to protect the native inhabitants of the islands. Further, it is clear that the policy adopted by the Queensland legislature towards the native inhabitants of the Murray Islands and of Queensland in general was one of protection of their welfare and, to a certain extent, preservation of their traditional way of life(501) See, for example, Pearl-Shell and Beche-de-Mer Fishery Act 1881 (Q.); Liquor Act 1912 (Q.), s.71(2); Native Animals Protection Act 1906 (Q.), s.9(c); Fauna Conservation Act 1952 (Q.), s.78; Fisheries Act 1957 (Q.), s.3; Fisheries Act 1976 (Q.), s.5(d); Torres Strait Fisheries Act 1984 (Q.). But the measures taken in furtherance of this policy in no way relate to native interests in land and cannot be used to found a fiduciary duty upon the Crown to

deal with land in a particular way.

99. In the absence of any native title and in the light of the detailed legislative provisions which govern the relationship of the Crown with the aboriginal inhabitants of the State upon the basis that there is no native title or (if there is a difference) traditional rights in the land, there is, in my view, no foundation for the imposition of a fiduciary duty upon the Crown to deal with the lands comprising the Murray Islands in a manner involving the recognition of any of the rights which the plaintiffs claim. Of course, it was not suggested, nor could it be, that the Queensland legislature which, subject to any paramount Commonwealth legislation, has plenary power to deal with those lands, is under any fiduciary duty in the exercise of that power.

100. The plaintiffs also pursued an argument based on the Racial Discrimination Act 1975 (Cth). As I have said, under s.334(4) of the Land Act 1962 the Governor in Council may rescind an Order in Council reserving and setting apart any Crown land for any public purpose. The Murray Islands are deemed to have been so reserved and set apart under such an Order in Council: s.334(3). Under s.334(1) the Governor in Council may grant in trust any Crown land which, in the opinion of the Governor in Council, is or may be required for any public purpose. "Public purpose" includes the benefit of aboriginal and islander inhabitants or any objects or purposes connected therewith or incidental thereto: s.5. The plaintiffs contend that by virtue of these provisions the Governor in Council may rescind the Order in Council reserving the Murray Islands for the use of the aboriginal inhabitants of the State and grant the land in trust for the benefit of the aboriginal and islander inhabitants of the Murray Islands. The grant, they say, may be to the Murray Island Council, which is a body corporate capable of holding land (absolutely or subject to trusts) under s.15(3) of the Community Services (Torres Strait) Act. To do that, the plaintiffs argue, would be unlawful under s.9(1) of the Racial Discrimination Act. Section 9(1) provides:

> "It is unlawful for a person to do any act involving a distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of any human right or fundamental freedom in the political, economic, social, cultural or any other field of public life."

The human right or fundamental freedom which the plaintiffs allege would be nullified or impaired is, apparently, that identified in Mabo v. Queensland, namely, the right to own and inherit property (including the right to be immune from arbitrary deprivation of property).

101. The consequences of a grant in trust of the Murray Islands to the Island Council under the Land Act 1962 would include: giving to the Governor in Council an authority to exclude certain lands and improvements to the land from the grant(502) ss.334C, 334F and to make certain reservations from the grant(503) ss.334D; an inability on the part of the trustee to lease any part of the land except with the prior approval of the relevant Minister and then only on certain conditions including that the term of the lease is not to exceed seventy-five years(504) ss.343,344; a prohibition upon a lessee from transferring or mortgaging the lease or sub-letting without the prior approval of the Minister(505) s.347; and giving a power to the Minister to cancel a lease for breach of its terms by the lessee or where "it is desirable in the public interests so to do" without any right to compensation(506) s.348. Further, the Governor in Council may, by Order in Council, declare that land granted in trust for the benefit of aboriginal or islander inhabitants shall revert to the Crown, but only if he is authorized to do so by an Act that specifically relates to that land; in such a case, the land reverts to the Crown freed and discharged from the trusts and

all encumbrances, estates or interests whatsoever and may be dealt with by the Crown as if it had never been granted(507) s.353A(1); see also s.352A which relates to the resumption of land granted in trust for the benefit of aboriginal or islander inhabitants where that land is approved by an Act for resumption as land surplus to the requirements of the trust.

102. At the time when argument was heard, a further Act, the Aborigines and Torres Strait Islanders (Land Holding) Act 1985 (Q.), permitted land vested in an island council as trustee to be divested and thereupon to become Crown land under the Land Act 1962(508) s.10. This divestiture of land from an island council was to take place when a "qualified" islander (defined in s.4(1)) applied to the council for a lease (of a kind described in s.9 of that Act) of part of the land and that application was approved by the council. The Governor in Council was thereupon authorized to grant the lease pursuant to the Land Act 1962(509) s.9(2). The restrictions imposed by the Land Act 1962 on the transfer and mortgaging of leases and on sub-letting were equally applicable to leases granted under this Act(510) s.18. The Act further stipulated the method by which the annual rent payable under such leases was to be determined(511) s.16, the rent being payable to the relevant island council(512) s.17(1) to be used by that council for the purposes of the local government of the trust area under its control or otherwise for the benefit of that trust area(513) s.17(2). Finally the Act stipulated the grounds on which these leases became liable to forfeiture(514) ss.21-24, in which event the land was to revert to and vest in the relevant council(515) s.27. The system of granting leases under this Act has, however, been terminated by the Aboriginal and Torres Strait Islander Land (Consequential Amendments) Act 1991 (Q.), s.13(516) Section 13 inserted s.33A into the Aboriginal and Torres Strait Islanders (Land Holding) Act, an Act which came into operation after hearing argument in this case.

103. It is unnecessary to refer in any more detail to the consequences which may follow upon a grant in trust of the land comprising the Murray Islands, for the discrimination which the plaintiffs allege under s.9(1) of the Racial Discrimination Act is the nullification or impairment of the traditional land rights which they claim in the land. The view which I have expressed is that any rights in the land held by the aboriginal inhabitants were extinguished upon annexation and it follows that the relevant legislation cannot be regarded as authorizing the nullification or impairment of the enjoyment or exercise of those rights. On the contrary, on the view that I have taken, the legislation authorizes the conferring of rights of a kind which the plaintiffs otherwise do not have.

104. In dealing with this aspect of the plaintiffs' argument as I have, I have been able to avoid the problem adverted to in Mabo v. Queensland by Brennan, Toohey and Gaudron JJ.(517) (1988) 166 CLR, at p 216 that:

> Section 9 (of the Racial Discrimination Act) proscribes
> the doing of an act of the character therein mentioned.
> It does not prohibit the enactment of a law creating,
> extinguishing or otherwise affecting legal rights in or
> over land: Gerhardy v. Brown(518) [1985] HCA 11; [1985] HCA 11; (1985) 159 CLR 70,
> at pp 81, 120-121. It is arguable that
> the operation of a law which brings into existence or
> extinguishes rights in or over land is not affected by s.9
> merely because a consequence of the change in rights is that
> one person is free to do an act which would otherwise be
> unlawful or another person is no longer able to resist an
> act being done. It is not necessary to decide that question
> now."

That question remains.

105. The plaintiffs also place reliance upon s.10(1) of the Racial Discrimination Act. That sub-section provides:

> "If, by reason of, or of a provision of, a law of the Commonwealth or of a State or Territory, persons of a particular race, colour or national or ethnic origin do not enjoy a right that is enjoyed by persons of another race, colour or national or ethnic origin, or enjoy a right to a more limited extent than persons of another race, colour or national or ethnic origin, then, notwithstanding anything in that law, persons of the first-mentioned race, colour or national or ethnic origin shall, by force of this section, enjoy that right to the same extent as persons of that other race, colour or national or ethnic origin."

But, of course, in the absence of the traditional land rights which they claim, the plaintiffs enjoy the same rights under the Crown lands legislation as any other inhabitant of Queensland and any special rights which they enjoy under the legislation dealing with the Murray Islands are by way of addition to, and not in limitation of, those rights which are enjoyed generally.

106. As I have said, for the purpose of reaching their conclusion in Mabo v. Queensland the majority assumed the existence of traditional land rights over the Murray Islands and it was upon this basis that they determined that the Queensland Coast Islands Declaratory Act 1985 (Q.) was inconsistent with the Racial Discrimination Act. The minority considered it inappropriate to allow a demurrer to the defendant's defence upon the assumption of facts yet to be proved by the plaintiff. In the event, I have concluded that those facts have not been proved with the result that, in my view, there was no inconsistency between the Queensland Coast Islands Declaratory Act (which, in any event, has since been repealed by the Torres Strait Islander Land Act 1991 (Q.), s.1.03) and the Racial Discrimination Act. Nor is there any inconsistency between the latter Act and the provisions of the Land Act 1962 which enable a grant in trust to be made of the lands comprising the Murray Islands.

107. As I have said, since the Court heard this case, a further Act, the Torres Strait Islander Land Act 1991 has come into operation. Under this Act land may be granted in fee simple to trustees to be held for the benefit of islanders, their ancestors and descendants. The trustees are empowered to deal with that land in a number of ways and, in particular, to grant a lease or licence over the whole or part of that land to an islander who has a particular connection with that land under island custom. Provision is also made for land to be claimed by an islander or group of islanders on the grounds, among other things, of customary affiliation or historical association, in which case, if the claim is established, and the Minister agrees, the land may be granted in fee simple to trustees to hold for the benefit of the successful claimants.

108. Finally, the plaintiffs contend that the land comprising the Murray Islands was not Crown land within the meaning of the Crown Lands Alienation Act 1876 (if the reserve was established in 1882) or within the meaning of the Land Act 1910 (if the reserve was established in 1912). According to the plaintiffs, waste land or Crown land must mean land which is genuinely vacant and unoccupied so that the Crown can take a full possessory title over it based on occupation which does not displace any other occupation. They say that if land occupied by indigenous peoples, such as the Murray Islands, were to be treated as waste land or Crown land it would result in those indigenous peoples becoming trespassers upon annexation. This argument is unsustainable. As I have already stated, waste land designates land that has not been alienated by the Crown. This is made clear by the definition of "Crown lands" in the Land Act 1910 (s.4). While "Crown lands" are defined in the Crown Lands Alienation Act 1876 (s.1) as

lands "vested in Her Majesty" this does not mean vested in actual possession, as a matter of fact, but vested in legal possession. Of course the Crown does not physically possess waste lands but, as a matter of law, it is considered to possess them so that, for example, it can bring an action for trespass. Land inhabited by an indigenous people whose rights are not recognized by the Crown are therefore waste lands or Crown lands within the meaning of the Crown lands legislation. But the native inhabitants do not become trespassers if, as is the case with the Murray Islands, those native inhabitants occupy the land with the permission of the Crown. The plaintiffs also contend that, even if the Murray Islands are Crown land and so capable of being dealt with as such by the Crown, the Crown in right of the State of Queensland had, and still has, no power to deal with land on the Murray Islands (e.g. under the deed of grant in trust legislation) because there was no Imperial grant of power to deal with these lands, as opposed to lands on the mainland. The short answer to this contention is that it was the Crown in right of the Colony of Queensland which annexed the Murray Islands to Queensland under the authority of Imperial letters patent, later confirmed by Imperial legislation. The Crown in right of Queensland had power to deal with waste lands in that colony and upon annexation the Murray Islands fell within the ambit of that power.

109. This matter comes before the Court in the form of questions reserved for its consideration pursuant to s.18 of the Judiciary Act 1903 (Cth). The first two of those questions relate to the particular interest of the plaintiffs Passi and Rice in individual parcels of land. The claim of the plaintiff Mabo is no longer pursued. Towards the conclusion of argument, the attention of the plaintiffs' counsel was directed to the difficulty of answering the first two questions asked having regard to the findings made by Moynihan J. which may not support the claims made by individuals or families to specific parcels of land.

110. It was suggested that there may nevertheless be room for argument that the plaintiffs exercised traditional rights in the land as members of a relevant group. Accordingly, the plaintiffs reformulated the declarations which they sought in the action and it seems appropriate to express my ultimate conclusions with respect to the reformulated declarations, rather than attempt to answer the questions referred. For my part I would refuse each of the declarations sought. However, the first and second of those declarations incorporate a claim, in the alternative, that the Meriam people are, and have been since 1879, entitled as against the whole world to occupy, use and enjoy the Murray Islands. Of course, the plaintiffs and their predecessors have, since annexation, been permitted to occupy, use and enjoy lands which comprise some part of the Murray Islands, but they have been permitted to do so, not in recognition of any traditional land rights, but as occupants of a reserve created by the Crown pursuant to legislation. It is because I conceive the first and second declarations sought, in the form which I have described, to be based upon the continued existence of traditional land rights in one form or another that I am of the view that they ought to be refused. As I have said, any traditional land rights which the plaintiffs may have had were extinguished upon the assumption of sovereignty by the Crown over the Murray Islands and any fiduciary or trust obligation that might otherwise have existed in relation to such rights is precluded by the terms of the relevant legislation. Accordingly, if traditional land rights (or at least rights akin to them) are to be afforded to the inhabitants of the Murray Islands, the responsibility, both legal and moral, lies with the legislature and not with the courts.

Introduction TOOHEY J. The plaintiffs seek declarations as to their entitlement and that of the Meriam people as a whole to three Torres Strait islands - Mer (known also as Murray Island), Dauer (also spelt Dauar and Dawar) and Waier - and as to the powers and obligations of the defendant, the State of Queensland, with respect to those islands and the rights of the Meriam people who live there. The three islands are collectively known as the Murray Islands; I shall refer to them in this judgment simply as "the Islands"(519) For general background, see Hocking, Torres Strait Islanders and Australian Law, (1987), International Academy of Comparative Law, 12th Congress, Session A.1: "The Aborigine in Comparative Law".
The plaintiffs' claim

2. Central to the case is the plaintiffs' claim that they or the Meriam people are, and have been since prior to annexation by the British Crown, entitled to the Islands: (a) as owners (b) as possessors (c) as occupiers or (d) as persons entitled to use and enjoy the Islands. The declarations now sought give primacy to the rights of the Meriam people rather than to those of the individual plaintiffs. Indeed, at the end of the hearing the plaintiff Mr Mabo, who has since died, no longer asserted any claim on his own behalf.

3. The plaintiffs put their claim on three bases. First, that the interests their predecessors enjoyed in the Islands prior to annexation survived acquisition by the British Crown and became a dimension of the common law ("traditional title", sometimes referred to as "native title"). Second, that those predecessors acquired a possessory title as a consequence of the operation of the common law in the new colony ("common law aboriginal title"). The precise way in which this argument was put will need attention later in the judgment. Third, that they could establish, as of today, local legal customary rights(520) An argument not reliant on the effect of annexation. They said that legal customs exercised by the Meriam people today, though different from common law, should prevail so long as certain conditions are met. The customs must be certain; they must have been exercised since "time immemorial" without interruption; they must be reasonable and not oppressive at the time of their inception; they must be observed as of right and not pursuant to any licence or permission granted by another; and they must not be inconsistent with any statute law(521)Hanasiki v. O.J. Symes (Unreported, High Court of the Solomon Islands, 17 August 1951); Bastard v. Smith (1837) 2 M and Rob 129 [1837] EngR 942; (174 ER 238); Pain v. Patrick (1690) 3 Mod. 289 (87 ER 191); Halsbury's Laws of England, 4th ed., vol.12, par.406.

4. This third basis of claim raises difficult questions with respect to the interruption of these rights since such a "title" rests, not on factual occupation or possession, but on the exercise of particular customs. Difficulties also arise in so far as authority supporting customary rights focuses on specific customs. Entitlement is to enjoy a particular custom rather than to continue a way of life, or occupation, generally(522) For example the custom of "Borough English" in which the youngest son, and not the eldest, succeeded to the burgage tenement on the death of his father: Blackstone, Commentaries, 17th ed. (1830), vol.II, p 83. It has become unnecessary to pursue these questions. Given my conclusions in regard to traditional title, I need not consider this basis of claim further. The judgment turns on conclusions as to traditional title though important questions are raised by the plaintiffs' claim to a possessory title.

5. The plaintiffs say that their traditional title is good against the whole world and that it continues today, "subject to the capacity of the Defendant to extinguish the same by, or pursuant to clear and plain legislation"(523) Plaintiffs' claim for declaratory relief as finally formulated during the hearing: par.1.E.. They say (and the defendant so concedes, while denying the existence of any title) that power has not been exercised to extinguish that title with respect to the Islands generally. They say further that the defendant is bound as a trustee or is under a fiduciary duty to recognise and protect the rights asserted and that the defendant is accountable in law for a breach of that trust or that obligation. As to their possessory title, the plaintiffs contend that it also is good against all the world and say that no action has been taken by the defendant to extinguish or acquire it.

6. Finally, the plaintiffs seek a declaration that the defendant is not empowered to make a deed of grant in trust in respect of the Islands under the Land Act 1962 (Q.) and that any such deed would be unlawful by reason of ss.9 and 10 of the Racial Discrimination Act 1975 (Cth). Alternatively, they say, such a deed may not be granted except upon payment of proper compensation.
The issues

7. Broadly speaking, the legal issues to be decided by the Court include: the effect of annexation, involving questions of the presumption of vacancy and the position of the Crown on annexation by settlement; the existence and nature of aboriginal interests which may continue after annexation or be

created by operation of the common law on settlement; the capacity of the Crown to extinguish any such interests; and the consequences in law of any breach of trust or fiduciary obligation owed by the defendant to the plaintiffs or to the Meriam people.

8. The two kinds of interest claimed by the plaintiffs have different sources and different characteristics, though the two overlap in some ways and the same set of circumstances, it is said, may give rise to either title. The first interest, traditional title(524) See generally McNeil, Common Law Aboriginal Title, (1989) (hereafter "McNeil"), Ch.6, has been the most commonly argued in land rights cases; its origin lies in the indigenous society occupying territory before annexation. This title is one recognised by the common law (though what is required to establish that recognition is a matter of contention) but its specific nature and incidents correspond to those of the traditional system of law existing before acquisition of sovereignty by the Crown. The second kind of title, common law aboriginal title(525) See generally McNeil, Ch.7, has no existence before annexation since it is said to arise by reason of the application of the common law. Not only its existence but its nature and incidents are determined entirely by principles of common law. "Title" is a title based on possession and the consequences of that status at common law. It would, if made out, amount to a fee simple.

9. It will be necessary to examine each form of title at greater length. But it is important to appreciate that, particularly with respect to traditional title, the use of the term "title" is artificial and capable of misleading. The rights claimed by the plaintiffs on behalf of the Meriam people do not correspond to the concept of ownership as understood by the land law of England, developed since feudal times, and by the later land law of Australia. "Title" is no doubt a convenient expression and has the advantage that, when recognised by the law of Australia (or Canada, the United States or New Zealand), it fits more comfortably into the legal system of the colonising power. In the case of the Meriam people (and the Aboriginal people of Australia generally), what is involved is "a special collective right vested in an Aboriginal group by virtue of its long residence and communal use of land or its resources"(526) The Law Reform Commission, Australia, Report No.31, The Recognition of Aboriginal Customary Laws, (1986), par.63. Speaking generally, traditional or native title is communal and the rights it generates belong to the group as a whole: Amodu Tijani v. Secretary, Southern Nigeria (1921) 2 AC 399, at pp 403-404; Calder v. Attorney-General of British Columbia (1973) SCR 313, at p 355; (1973) 34 DLR (3d) 145, at p 175; Re Paulette and Registrar of Titles (No.2) (1973) 42 DLR (3d) 8, at p 27 (reversed on appeal on different grounds).

10. At the forefront of the argument is the issue whether such rights in land as were held by indigenous groups survived annexation. There are of course evidentiary problems that will arise in this regard but they do not affect the principle involved. If the matter is seen strictly in terms of aboriginal "title", it is perhaps not surprising that a court may reject such a claim as not giving rise to a title recognised by the common law. That was the approach taken by Blackburn J. to the plaintiffs' claim in Milirrpum v. Nabalco Pty. Ltd.(527) (1971) 17 FLR 141. But in truth what the courts are asked to recognise are simply rights exercised by indigenous peoples in regard to land, sufficiently comprehensive and continuous so as to survive annexation.

11. Before proceeding further, one more point should be noted. While this case concerns the Meriam people, the legal issues fall to be determined according to fundamental principles of common law and colonial constitutional law applicable throughout Australia. The Meriam people are in culturally significant ways different from the Aboriginal peoples of Australia, who in turn differ from each other. But, as will be seen, no basic distinction need be made, for the purposes of determining what interests exist in ancestral lands of indigenous peoples of Australia, between the Meriam people and those who occupied and occupy the Australian mainland. The relevant principles are the same.

Annexation - its consequences

12. In his judgment Brennan J. has traced the steps leading up to the Letters Patent passed by Queen Victoria on 10 October 1878 "for the rectification of the Maritime Boundary of the Colony of Queensland, and for the annexation to the Colony of (certain) Islands lying in Torres Straits, and between Australia and New Guinea". Pursuant to authority contained in the Letters Patent and The Queensland Coast Islands Act 1879 (Q.), the Governor of Queensland, on 21 July 1879, declared that the islands described in the Schedule to the Proclamation (which included the Islands) "shall be annexed to and become part of the Colony of Queensland".

13. If these procedures were ineffective to incorporate the Islands into Queensland, it must be taken that the Colonial Boundaries Act 1895 (Imp) authorised their incorporation retrospectively(528) Wacando v. The Commonwealth [1981] HCA 60; (1981) 148 CLR 1.

14. In considering the consequences of the annexation of the Islands, the distinction between sovereignty and title to or rights in land is crucial. The distinction was blurred in English law because the sovereignty of the Crown over England derived from the feudal notion that the King owned the land of that country. It was ownership of the land that produced the theory of tenures, of obligations owed to the Crown in return for an estate in land. The position of the Crown as the ultimate owner of land, the holder of the radical title, has persisted and is not really in issue in these proceedings. What is in issue is the consequences that flow from that radical title.

15. The blurring of the distinction between sovereignty and title to land should not obscure the fact that(529) McNeil, p 108:

> "(t)he former is mainly a matter of jurisdiction, involving questions of international and constitutional law, whereas the latter is a matter of proprietary rights, which depend for the most part on the municipal law of property. Moreover, acquisition of one by the Crown would not necessarily involve acquisition of the other."

16. Lord Reid, in Nissan v. Attorney-General(530) [1969] UKHL 3; (1970) AC 179, at pp 210-211, after referring to some nineteenth century decisions of English courts, said:

> " In my view, none of these cases decides that when the Crown annexes territory it is entitled to confiscate the property of British subjects which is in that territory."

But what of the annexation of territory not occupied by British subjects? It was only with the colonising of territories that were uninhabited or treated as such that settlement came to be recognised as an effective means of acquiring sovereignty, additional to conquest and cession. There is no question of annexation of the Islands by conquest or cession so it must be taken that they were acquired by settlement even though, long before European contact, they were occupied and cultivated by the Meriam people.

17. One thing is clear. The Islands were not terra nullius. Nevertheless, principles applicable to the acquisition of territory that was terra nullius have been applied to land that was inhabited. Justification for this extension has been sought in various ways, including the extent to which the indigenous people have been seen as "civilised" or to be in permanent occupation. Thus, in Cooper v. Stuart(531) (1889) 14 App Cas 286, at p 291 Lord Watson observed:

> "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."

18. The reference to "peacefully annexed" carries a certain irony in the light of what we now know. But, in any event, the idea that land is terra nullius because it lacks "settled inhabitants" is a contentious one(532) The application of the doctrine of terra nullius to Australia is strongly attacked in Reynolds, The Law of the Land, (1987), passim. In particular, the view that a nomadic lifestyle is inconsistent with occupation of land is at odds with reality. It pays no regard to the reason why people move from one area of land to another. Often people move, not because they lack any association with the land over which they travel but to follow the availability of water and food in a harsh climate. An approach more in accord with reality may be found in the judgment of the International Court of Justice in Western Sahara (Advisory Opinion). The majority concluded(533) (1975) ICJR 12, at p 39:

"In the view of the Court, therefore, a determination that Western Sahara was a 'terra nullius' at the time of colonization by Spain would be possible only if it were established that at that time the territory belonged to no-one in the sense that it was then open to acquisition through the legal process of 'occupation'."

19. The matter was put even more strongly by Vice-President Ammoun in a separate opinion apparently endorsing the following assessment by one of the parties(534) ibid., at pp 85-86:

" Mr. Bayona-Ba-Meya goes on to dismiss the materialistic concept of terra nullius, which led to this dismemberment of Africa following the Berlin Conference of 1885.
Mr. Bayona-Ba-Meya susbtitutes for this a spiritual notion: the ancestral tie between the land, or 'mother nature', and the man who was born therefrom, remains attached thereto, and must one day return thither to be united with his ancestors. This link is the basis of the ownership of the soil, or better, of sovereignty. This amounts to a denial of the very concept of terra nullius in the sense of a land which is capable of being appropriated by someone who is not born therefrom. It is a condemnation of the modern concept, as defined by Pasquale Fiore, which regards as terrae nullius territories inhabited by populations whose civilization, in the sense of the public law of Europe, is backward, and whose political organization is not conceived according to Western norms.
One might go still further in analysing the statement of the representative of Zaire so as to say that he would exclude from the concept of terra nullius any inhabited territory. His view thus agrees with that of Vattel, who defined terra nullius as a land empty of inhabitants."

20. The idea that land which is in regular occupation may be terra nullius is unacceptable, in law as well as in fact. Even the proposition that land which is not in regular occupation may be terra nullius is one

that demands scrutiny; there may be good reason why occupation is irregular. Rather, in terms of Western Sahara (Advisory Opinion), the question is whether, at the time of colonisation, the land belonged to no-one.

21. The operation of the notion of terra nullius only arises in the present case because of its theoretical extension to the Islands. But clearly it can have no operation. The plaintiffs accept that the Islands were settled by Britain rather than conquered or ceded. But it does not follow that principles of land law relevant to acquisition of vacant land are applicable. The acquisition of sovereignty was effected, both with respect to other European colonisers and the indigenous inhabitants, by the acquisition by the British Crown of radical title. No more was required or, with respect to occupied land, possible. Immediately on acquisition indigenous inhabitants became British subjects whose interests were to be protected in the case of a settled colony by the immediate operation of the common law. The Crown did not acquire a proprietary title to any territory except that truly uninhabited.

22. The real question is whether the rights of the Meriam people to the Islands survived annexation. This is not answered by pointing to dicta which acknowledge that, on settlement, land vested in the Crown(535) See for instance Attorney-General v. Brown (1847) 1 Legge 312, at pp 316-318; Randwick Corporation v. Rutledge [1959] HCA 63; (1959) 102 CLR 54, at p 71; New South Wales v. The Commonwealth ("The Seas and Submerged Lands Case") [1975] HCA 58; (1975) 135 CLR 337, at pp 438-439, irrespective of whether there were indigenous inhabitants.

Traditional title

(i) Existence: Recognition

23. It follows from what has been said that traditional title is not precluded by the argument that the Crown acquired a proprietary interest in all land in the colony on annexation. Previous interests in the land may be said to survive unless it can be shown that the effect of annexation is to destroy them. That is, the onus rests with those claiming that traditional title does not exist(536) See Calder (1973) SCR, at p 375; (1973) 34 DLR(3d), at pp 189-190.

24. In this respect the defendant argued that previously existing aboriginal interests in ancestral lands continue after annexation only if they are recognised by positive executive or legislative acts. This submission is supported by a line of authority including Vajesingji Joravarsingji v. Secretary of State for India(537) (1924) LR 51 Ind App 357, Secretary of State for India v. Bai Rajbai(538) (1915) LR 42 Ind App 229, Asrar Ahmed v. Durgah Committee, Ajmer(539) (1947) 34 AIR(PC) 1. and Tee-Hit-Ton Indians v. United States(540) [1955] USSC 24; (1955) 348 US 272.

25. In Vajesingji Joravarsingji Lord Dunedin said(541) (1924) LR 51 Ind App, at p 360, referring to the act of state which amounts to acquisition of sovereignty whether by conquest, cession or settlement:

> "In all cases the result is the same. Any inhabitant of the territory can make good in the municipal Courts established by the new sovereign only such rights as that sovereign has, through his officers, recognized. Such rights as he had under the rule of predecessors avail him nothing."

Blackburn J., in Milirrpum(542) (1971) 17 FLR, especially at pp 223-227, followed this line of authority. This perhaps is not surprising, at least in so far as the Privy Council decisions were concerned, since they were binding on him where applicable(543) See also Hookey, "The Gove Land Rights Case: A Judicial Dispensation for the Taking of Aboriginal Lands in Australia?", [1972] FedLawRw 5; (1972) 5 Federal Law Review 85.

26. However, a line of authority represented by In re Southern Rhodesia(544) (1919) AC 211, at p 233, Amodu Tijani(545) (1921) 2 AC, at pp 407, 410, Guerin v. The Queen(546) (1984) 2 SCR 335, at pp 378-379; (1984) 13 DLR (4th) 321, at p 336, Calder and Delgamuukw v. British Columbia(547) (1991) 79 DLR (4th) 185 is more persuasive and should be followed. This so called doctrine of continuity was exemplified by Lord Sumner in the Privy Council in In re Southern Rhodesia(548) (1919) AC, at p 233:

> "(U)pon a conquest it is to be presumed, in the absence of express confiscation or of subsequent expropriatory legislation, that the conqueror has respected (private property rights) and forborne to diminish or modify them".

And in Amodu Tijani(549) (1921) 2 AC, at p 407 Viscount Haldane, speaking for the Privy Council, confirmed this presumption, without limiting it to colonies acquired by conquest.

27. A sovereign can, by a positive act, seize private as well as public property in the act of acquiring sovereignty and the seizure is non-justiciable(550) Secretary of State in Council of India v. Kamachee Boye Sahaba [1859] EngR 837; (1859) 7 Moo Ind App 476 (19 ER 388). But seizure of private property by the Crown in a settled colony after annexation has occurred would amount to an illegitimate act of state against British subjects since in a settled colony, where English law applies, there is no power in the Crown to make laws, except pursuant to statute. Emergency powers aside, the common law required legislative authority for compulsory acquisition of property. Furthermore, the proposition that positive acts of recognition are required before interests exist entails the difficult idea that on acquisition of sovereignty rights disappear, only to spring back to life immediately recognition occurs. Even more startling is the consequence that, immediately on annexation, all indigenous inhabitants became trespassers on the land on which they and their ancestors had lived. That was not a consequence the common law dictated; if it were thought to be, this Court should declare it to be an unacceptable consequence, being at odds with basic values of the common law.

28. I conclude therefore that, subject to proof of the relevant interest, traditional title to land is not extinguished by the act of state amounting to annexation but is presumed to continue unless and until lawfully terminated.

(ii) Existence: Requirements of proof

29. Given that traditional title may exist after annexation because it was not precluded by Crown ownership of occupied lands and because it arose regardless of positive recognition by the Crown, what is required to prove such a title? At the outset a distinction should be noted between the existence of traditional title and the nature of the title. These two questions dictate different lines of inquiry but they have been blurred in some instances, leading to confusion in the proof required to establish title.

30. Relevant authority has dealt with the question of proof of the existence of traditional title in different ways. In English and Australian decisions two requirements have emerged: that the interests said to constitute title be proprietary and that they be part of a certain kind of system of rules. Both of these requirements are apparent in In re Southern Rhodesia. There the Privy Council said(551).(1919) AC, at pp 233-234, in relation to the question whether the rights of the Matabele and Mashonas (the indigenous inhabitants of what became Southern Rhodesia) survived annexation:

> "(I)t was necessary that the argument should go to the length of showing that the rights, whatever they exactly were, belonged to the category of rights of private property ...
> The estimation of the rights of aboriginal tribes is

> always inherently difficult. Some tribes are so low in the scale of social organization that their usages and conceptions of rights and duties are not to be reconciled with the institutions or the legal ideas of civilized society. Such a gulf cannot be bridged. It would be idle to impute to such people some shadow of the rights known to our law and then to transmute it into the substance of transferable rights of property as we know them. ... On the other hand, there are indigenous peoples whose legal conceptions, though differently developed, are hardly less precise than our own."

The Court concluded that "the position of the natives of Southern Rhodesia ... approximate(s) rather to the lower than to the higher limit"(552) ibid., at p 234.

31. Thus traditional title was said to depend on proof of something akin to a private proprietary right emanating from a "civilized society". The Court did not spell out what "institutions or ... legal ideas" were necessary to constitute such a society but it is clear that approximation to British society would suffice. The passage implies the possibility of "conceptions of rights and duties" which, because of their nature (determined by their source), do not amount to traditional title. There may be a system of rules, but not such as to attract the notion of traditional title at common law. The distinction echoes that said to exist between law and custom.

32. In Milirrpum Blackburn J. concluded(553) (1971) 17 FLR, at pp 244-245, 262 that no positive doctrine of "communal native title" existed at common law at the time of annexation. So he did not need to deal with proof of title. But, in order to answer submissions made to him, his Honour went on to consider that question. Based on those submissions, he said that communal native title involved proof that the aboriginal interests said to comprise the title were "capable of recognition" and that they were "proprietary"(554) ibid., at p 198. In answering the first question, whether the interests were capable of recognition, Blackburn J. quoted(555) ibid., at p 264 the passage from In re Southern Rhodesia noted earlier in this judgment and then heeded comments made by Viscount Haldane for the Privy Council in Amodu Tijani(556) (1921) 2 AC, at pp 402-403:

> "(I)n interpreting the native title to (the) land ...(t)here is a tendency, operating at times unconsciously, to render that title conceptually in terms which are appropriate only to systems which have grown up under English law. But this tendency has to be held in check closely."

33. Blackburn J. then considered the distinction made by the Privy Council in In re Southern Rhodesia, leaving open the question whether assessment according to such a scale may be possible, and said(557) (1971) 17 FLR, at p 267:

> "(T)he social rules and customs of the plaintiffs cannot possibly be dismissed as lying on the other side of an unbridgeable gulf. The evidence shows a subtle and elaborate system highly adapted to the country in which the people led their lives, which ... was remarkably free from the vagaries of personal whim or influence. If ever a system could be called 'a government of laws, and not of men', it is that shown in the evidence before me."

34. Thus, his Honour recognised the system before him as a system of law(558) ibid., at p 268. However, on the other requirement of proof, that the aboriginal interests be proprietary, the plaintiffs failed. Blackburn J. held that the clan's relationship with the land was not proprietary because it failed to satisfy the essential elements of a proprietary interest under the common law, those elements being: the right to use or enjoy, the right to exclude others and the right to alienate(559) ibid., at pp 272-273.

35. North American courts have taken a different approach to the question of proof of the existence of traditional title. One of the leading discussions in this regard is to be found in Hamlet of Baker Lake v. Minister of Indian Affairs and Northern Development. There Mahoney J. concluded(560) (1979) 107 DLR (3d) 513, at p 542, after an examination of Canadian and United States authority and a reference to Milirrpum:

> " The elements which the plaintiffs must prove to
> establish an aboriginal title cognizable at common law are:
> 1. That they and their ancestors were members of an
> organized society.
> 2. That the organized society occupied the specific
> territory over which they assert the aboriginal title.
> 3. That the occupation was to the exclusion of other
> organized societies.
> 4. That the occupation was an established fact at the time
> sovereignty was asserted by England."

36. Hamlet of Baker Lake and like authority may be analysed in the following way. Ultimately, traditional title has a common law existence because the common law recognises the survival of traditional interests and operates to protect them. Proof of existence, therefore, is a threshold question. The content of the interests protected is that which already exists traditionally; the substance of the interests is irrelevant to the threshold question. Moreover, it would defeat the purpose of recognition and protection if only those existing rights and duties which were the same as, or which approximated to, those under English law could comprise traditional title; such a criterion is irrelevant to the purpose of protection. Furthermore, the problem which arises where, for example, the evidence of the claimed traditional right is so vague that there is doubt that it existed, or exists, is different. That is an evidentiary problem and the criterion for dealing with it is not the claimed right's similarity to, difference from, or even incomprehensibility at, common law. Therefore, inquiries into the nature of traditional title are essentially irrelevant(561) See Calder (1973) SCR, at p 372; (1973) 34 DLR (3d), at p 187. A determination that a traditional right or duty amounts to a proprietary interest, however that is defined, will not reveal the existence or non-existence of traditional title, except in so far as it indicates that reasonably coherent rights and duties were, and are, exercised in an area of land.

37. The same criticism can be directed at a requirement which distinguishes between types of society. In the end such a criterion is concerned with the kind of traditional right or duty, the distinguishing feature being its source. It presupposes the possibility that rights and duties will not constitute a title even though they are coherent, existent and underlie a functioning society. Therefore, apart from a prohibition against discriminatory treatment of some indigenous societies, an inquiry into the kind of society from which rights and duties emanate is irrelevant to the existence of title, because it is inconceivable that indigenous inhabitants in occupation of land did not have a system by which land was utilised in a way determined by that society. There must, of course, be a society sufficiently organised to create and sustain rights and duties, but there is no separate requirement to prove the kind of society, beyond proof that presence on land was part of a functioning system. It follows from this discussion that requirements that aboriginal interests be proprietary or part of a certain kind of system of rules are not relevant to proof of traditional title.

38. In general the approach taken in the North American authority is to be preferred. So, what is required to prove title?

39. The requirements of proof of traditional title are a function of the protection the title provides(562) Bartlett, "Aboriginal Land Claims at Common Law", (1983) 15 University of Western Australia Law Review 293, at p 310. It is the fact of the presence of indigenous inhabitants on acquired land which precludes proprietary title in the Crown and which excites the need for protection of rights. Presence would be insufficient to establish title if it was coincidental only or truly random, having no connection with or meaning in relation to a society's economic, cultural or religious life. It is presence amounting to occupancy which is the foundation of the title and which attracts protection, and it is that which must be proved to establish title(563) ibid., at pp 311, 319-320. See now Ontario (Attorney-General) v. Bear Island Foundation (1991) 83 DLR (4th) 381; Hamlet of Baker Lake (1979) 107 DLR (3d), at p 542; The Queen v. Sparrow (1990) 1 SCR 1075; (1990) 70 DLR (4th) 385. Thus traditional title is rooted in physical presence. That the use of land was meaningful must be proved but it is to be understood from the point of view of the members of the society.

(iii) Occupancy of land

40. North American cases have begun to articulate factors which will indicate this kind of presence on, or use of, land. Any such articulation cannot be exhaustive.

41. First, presence on land need not amount to possession at common law in order to amount to occupancy(564) See Calder (1973) SCR, at p 328; (1973) 34 DLR (3d), at p 156. United States and Canadian cases have required proof of occupancy by reference to the demands of the land and society in question "in accordance with the way of life, habits, customs and usages of the (indigenous people) who are its users and occupiers"(565) Sac and Fox Tribe of Indians of Oklahoma v. United States (1967) 383 F 2d 991, at p 998. In Hamlet of Baker Lake the Canadian Federal Court held that the Inuit succeeded in showing that they occupied their land. Mahoney J. said(566) (1979) 107 DLR (3d), at pp 544-545:

> "The absence of political structures like tribes was an inevitable consequence of the modus vivendi dictated by the Inuit's physical environment. ... Furthermore, the exigences of survival dictated the sparse, but wide ranging, nature of their occupation.
> ...
> The nature, extent or degree of the aborigines' physical presence on the land they occupied, required by the law as an essential element of their aboriginal title is to be determined in each case by a subjective test. To the extent human beings were capable of surviving on the barren lands, the Inuit were there; to the extent the barrens lent themselves to human occupation, the Inuit occupied them."

42. This aspect of occupancy need not be pursued further since the economy of the Meriam people on the Islands was, compared with that described in Hamlet of Baker Lake, settled and intensive. It is clear, however, that a nomadic lifestyle is not inconsistent with occupancy(567) This is not to say that a nomadic lifestyle cannot amount to possession at common law: see McNeil, pp 202-204.

43. Secondly, it has been said that to amount to occupancy presence on land must have been established "long prior" to the point of inquiry(568) Alcea Band of Tillamooks v. United States (1945) 59 F Supp 934, at p 965; affirmed [1946] USSC 126; (1946) 329 US 40. That is necessarily a relative concept. In

Milirrpum Blackburn J. was content to approach the plaintiffs' claim as requiring proof of occupancy from a "time in the indefinite past". He rejected the expression "from time immemorial", though used in the statement of claim, as having technical connotations that were of no relevance to the plaintiffs' case(569) (1971) 17 FLR, at p 152. Blackburn J. thought it necessary that the plaintiffs prove occupancy from the acquisition of English sovereignty, a view also taken by Mahoney J. in Hamlet of Baker Lake(570) (1979) 107 DLR (3d), at pp 542, 546. If occupation by an indigenous people is an established fact at the time of annexation, why should more be required? In any event, in the present case, the defendant did not argue that the plaintiffs failed because their presence on the Islands was too recent.

44. Thirdly, it was said in United States v. Santa Fe Pacific Railroad Co.(571) [1942] USSC 12; (1941) 314 US 339, at p 345; see also Alcea Band of Tillamooks (1945) 59 F Supp, at p 965:

> "If it were established as a fact that the land in question were, or were included in, the ancestral home of the Walapais 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'". (emphasis added)

This principle of exclusive occupancy is justified in so far as it precludes indiscriminate ranging over land but it is difficult to see the basis for the rule if it precludes title merely on the ground that more than one group utilises land. Either each smaller group could be said to have title, comprising the right to shared use of land in accordance with traditional use; or traditional title vests in the larger "society" comprising all the rightful occupiers. Moreover, since occupancy is a question of fact, the "society" in occupation need not correspond to the most significant cultural group among the indigenous people(572) Blackburn J. in Milirrpum (1971) 17 FLR, at p 273, expressly left open the possibility of a larger group establishing traditional title.

45. It may be noted that the Aboriginal Land Rights (Northern Territory) Act 1976 (Cth) ("the Land Rights Act") speaks in various places of "Aboriginals entitled by Aboriginal tradition to the use or occupation of ... land, whether or not the traditional entitlement is qualified as to place, time, circumstance, purpose or permission"(573) For instance, s.11(1)(a), (1AD)(a), (1AE)(a), (1B)(4); see also s.71(1). The Land Rights Act recognises that traditional occupation may not be exclusive. It may be, for instance, that one group is entitled to come on to land for ceremonial purposes, all other rights in the land belonging to another group(574) The reports of Aboriginal Land Commissioners under the Land Rights Act contain a number of examples that bear out this observation.

46. It is, of course, ultimately a matter of speculation how long, and in what manner, the Meriam people lived on the Islands before European contact. However, it seems that the Islands were probably first inhabited by people of Melanesian origin coming from Papua New Guinea(575) Determination of Moynihan J., vol.1, p 89 and that the Islanders lived by way of a subsistence economy reliant on gardening and fishing. Cultivation was by a slash and burn technique(576) ibid., pp 76-77. Dwellings, occupied by family groups, were built from bamboo and fenced around(577) ibid., p 96. Moynihan J. said(578) ibid., p 91:

> "The islands had been occupied by such people for some generations."

Later his Honour said (579) ibid., p 155:

> " Given considerations such as the constraints imposed

> by the rugged terrain on what are, in any event, three small islands, the pressures of population, the elaborate and complex social organisation of the people and the importance of gardening from the point of view of subsistence and socially it would perhaps be surprising if the Murray Islanders had not, during the period of their occupation of the Islands, developed ways of controlling access to and the use of land (in the extended sense) and the resources it afforded. In any event it seems fairly safe to assume they brought with them a social organisation which they adopted (sic) to the conditions on the Islands."

And, with respect to the current Meriam society, Moynihan J. found(580) ibid., pp 155-156:

> "Murray Islanders have a strong sense of relationship to their Islands and the land and seas of the islands which persists from the time prior to European contact. They have no doubt that the Murray Islands are theirs."

47. All the factors discussed above in support of traditional title are clearly satisfied in the present case. Indeed, the defendant agreed that the Meriam people were present on the Islands before and at the time of annexation and that the Crown in right of Queensland has not attempted since then to dispossess them. However, the defendant argued that there was no ordered system of land tenure before annexation which was continued, albeit changed, to the present time. The argument seems to have been that the system of rules on which Meriam society was based prior to European contact was too uncertain to amount to traditional title; and that, after annexation, disputes over land were resolved by the Island Court which owed little to the pre-contact situation.

48. The first aspect of the argument rests on such statements by Moynihan J. as(581) ibid., p 172:

> "The ultimate determining factor in terms of the control and disposition of land was simply what was acceptable in terms of social harmony and the capacity of an individual to impose his ... will on the community."

It is true that the findings of Moynihan J. do not allow the articulation of a precise set of rules and that they are inconclusive as to how consistently a principle was applied in local law, for example, with respect to inheritance of land. But, as has been said earlier in this judgment, the particular nature of the rules which govern a society or which describe its members' relationship with land does not determine the question of traditional land rights. Because rights and duties inter se cannot be determined precisely, it does not follow that traditional rights are not to be recognised by the common law.

49. The only relevance of an argument of uncertainty is if it can be said that the rules or practices governing Meriam society were so capricious and their application so inconsistent as to indicate that the Meriam people's presence on the Islands was coincidental and random(582) There may in some circumstances be an argument that a traditional system was so violent or otherwise repressive of human rights as to make adoption by the common law impossible: see Bastard v. Smith. But that is not relevant here. On the findings of Moynihan J. that is impossible to conclude.

50. An argument to the effect that, regardless of the state of things at the time of annexation, the Meriam people now do not have title because they no longer exercise "traditional" rights and duties and have

adopted European ways also fails. There is no question that indigenous society can and will change on contact with European culture. Since annexation a school, a hospital, the Island Court, the Island Council, a police force and other government agencies have been introduced to the Islands. Christianity has had a profound influence; so too have changed means of communication. The economy of the Islands is now based on cash from employment rather than on gardening and fishing(583) Determination of Moynihan J., vol.1, pp 158-159; vol.2, p 26.

51. But modification of traditional society in itself does not mean traditional title no longer exists(584) See Hamlet of Baker Lake (1979) 107 DLR (3d), especially at pp 527-529. Traditional title arises from the fact of occupation, not the occupation of a particular kind of society or way of life. So long as occupation by a traditional society is established now and at the time of annexation, traditional rights exist. An indigenous society cannot, as it were, surrender its rights by modifying its way of life(585) In Hamlet of Baker Lake aboriginal title was held to exist despite the fact that the Inuit had changed from a nomadic to a settled lifestyle: see ibid., at pp 524-529. See also Ontario (Attorney-General) v. Bear Island Foundation; Re Paulette and Registrar of Titles (No.2) (1973) 42 DLR (3d) 8; Sparrow (1990) 1 SCR, at pp 1094-1099; (1990) 70 DLR (4th), at pp 397-401.

52. It follows from what has been said that the Meriam people, represented by the plaintiffs, had traditional title to the Islands which survived annexation. It is necessary now to consider submissions as to the power of the Crown to extinguish that title.

Extinguishment of traditional title

(i) The power of the Crown to extinguish traditional title

53. The plaintiffs' argument before the Court proceeded on the assumption that the Crown had power to extinguish traditional title, at any rate "by, or pursuant to, clear and plain legislation"(586) The precise language employed by counsel for the plaintiffs varied only little during argument e.g. "extinguishable by appropriate clear and plain legislative words"; "assuming the legislation clearly and plainly permitted it". Nevertheless, something should be said about the concept of extinguishment.

54. There is precedent for the proposition that the Crown has power to extinguish traditional title(587) Johnson v. McIntosh (1823) 21 US 240, at p 259; United States v. Santa Fe Pacific Railroad Co.; St Catherine's Milling and Lumber Company v. The Queen (1888) 14 AC 46; Tee-Hit-Ton Indians v. United States (1955) 348 US, at p 279; Hamlet of Baker Lake (1979) 107 DLR (3d), at p 549. In Mabo v. Queensland (1988) 166 CLR 186, at pp 195, 201, 213-214, the power to extinguish by legislation consisting of "clear and plain" language, was assumed. But is such a power exercisable only with the consent of the titleholders (that is, akin to a right of pre-emption), or is it a power exercisable unilaterally without account of the traditional titleholders' interests? In what way is it different from the power in the Crown compulsorily to acquire any interest in land? Is it compensable? Although most authority appears to assume a power in the Crown to extinguish traditional title unilaterally, there is support for the proposition that consent is required. It is true that in St Catherine's Milling the Privy Council said(588) (1888) 14 App Cas, at pp 54, 55 that the Indians' interest was "a personal and usufructuary right, dependent upon the good will of the Sovereign" and that it existed at the "pleasure of the sovereign". In that case however, the Indians' interest was held to arise from the Royal Proclamation of 1763. On the other hand, in Worcester v. Georgia Marshall C.J. said(589) (1832) 31 US 350, at p 370 that the Crown's title comprised "the exclusive right of purchasing such lands as the natives were willing to sell". And in The Queen v. Symonds Chapman J. said(590) (1847) NZPCC 387, at p 390; Chapman J. continued: "It follows from what has been said, that in solemnly guaranteeing the Native title, and in securing what is called the Queen's pre-emptive right, the Treaty of Waitangi ... does not assert either in doctrine or in practice anything new and unsettled.":

> "Whatever may be the opinion of jurists as to the strength

> or weakness of the Native title ... it cannot be too solemnly asserted that it is entitled to be respected, that it cannot be extinguished (at least in times of peace) otherwise than by the free consent of the Native occupiers."

55. Furthermore, even assuming the power of extinguishment to be a power to act unilaterally, it is not easy to discern the basis for such a proposition. There are suggestions in decided cases that it may be a concomitant of an assertion of sovereignty(591) See Johnson v. McIntosh (1823) 21 US, at p 253. But to say that, with the acquisition of sovereignty, the Crown has the power to extinguish traditional title does not necessarily mean that such a power is any different from that with respect to other interests in land. The Crown has the power, subject to constitutional, statutory or common law restrictions, to terminate any subject's title to property by compulsorily acquiring it(592) See Calder (1973) SCR, at p 353; (1973) 34 DLR (3d), at p 174.

56. Another rationale for the special power of the Crown to extinguish traditional title appears to be that it is part of British colonial policy to protect the interests of indigenous inhabitants; that the Crown's power is the corollary of the general inalienability of title, which itself constituted a means of protecting aboriginal people from exploitation by settlers(593) See The Queen v. Symonds (1847) NZPCC , at pp 390-391; Guerin v. The Queen (1984) 2 SCR, at pp 383-384; (1984) 13 DLR (4th), at p 340, where reference is made to the Royal Proclamation of 1763, applicable to recently-acquired North American colonies; note also the Proclamation by Governor Bourke and comments by Lord Glenelg following John Batman's attempted purchases of land at Port Phillip in 1835, discussed in McNeil, pp 224-225. That traditional title is generally inalienable may itself be open to debate(594) Dicta referring to inalienability must be read in the light of ordinances and statutes precluding alienation except by surrender to the Crown. See for instance Nireaha Tamaki v. Baker (1901) AC 561, at p 579; Attorney-General for Quebec v. Attorney-General for Canada (1921) 1 AC 401, at pp 408, 411; Administration of Papua and New Guinea v. Daera Guba [1973] HCA 59; (1973) 130 CLR 353, at p 378. This is not the place for an examination of alienability of land in indigenous societies; no sufficient evidence was offered to the Court in that regard. But alienability itself is a relative concept and there was evidence in at least one of the claims made under the Land Rights Act of land being "given" by the few remaining survivors of one group to another group: see the Report by the Aboriginal Land Commissioner, Alligator Rivers Stage II land claim, (1981), pars 118, 119. But, in any event, a principle of protection is hardly a basis for a unilateral power in the Crown, exercisable without consent. Moreover, inalienability of the title says nothing of the Crown's power or the nature of the title. Rather, it describes rights, or restrictions on rights, of settlers or other potential purchasers(595) See The Queen v. Symonds (1847) NZPCC , at pp 389-391; McNeil, pp 230-235.

57. Finally, some cases suggest that a power to extinguish traditional title unilaterally is vested in the Crown as a result of an inherent quality of the title itself. This follows from characterisation of the title as "a personal and usufructuary right" as opposed to a proprietary right(596) St. Catherine's Milling (1888) 14 App Cas, at p 54; Tee-Hit-Ton Indians v. United States (1955) 348 US, at pp 279, 281 ("right of occupancy", not compensable); Calder (1973) SCR, at pp 352-353; (1973) 34 DLR (3d), at pp 173-174 ("usufructuary right", but right to compensation suggested), the former being inherently weaker and more susceptible to extinguishment. As long ago as 1921 the Privy Council cautioned against attempting to define aboriginal rights to land by reference to the English law notion of estates. In Amodu Tijani, Viscount Haldane said(597) (1921) 2 AC, at p 403:

> "There is a tendency, operating at times unconsciously, to render (native) title conceptually in terms which are appropriate only to systems which have grown up under

> English law. But this tendency has to be held in check closely."

58. As discussed earlier, the specific nature of such a title can be understood only by reference to the traditional system of rules. An inquiry as to whether it is "personal" or "proprietary" ultimately is fruitless and certainly is unnecessarily complex. The warning in Amodu Tijani has been heeded in recent cases. For example, in Calder Judson J. said(598) (1973) SCR, at p 328; (1973) 34 DLR (3d), at p 156. See also Dickson J. in Guerin (1984) 2 SCR, at p 382; (1984) 13 DLR (4th), at p 339: "It appears to me that there is no real conflict between the cases which characterize Indian title as a beneficial interest of some sort, and those which characterize it a personal, usufructuary right. Any apparent inconsistency derives from the fact that in describing what constitutes a unique interest in land the courts have almost inevitably found themselves applying a somewhat inappropriate terminology drawn from general property law.":

> "(T)he fact is that when the settlers came, the Indians were there, organized in societies and occupying the land as their forefathers had done for centuries. This is what Indian title means and it does not help one in the solution of this problem to call it a 'personal or usufructuary right'."

Therefore, a conclusion that traditional title is in its nature "personal" or "proprietary" will not determine the power of the Crown to extinguish the title unilaterally.

59. As I have said, the plaintiffs did not contest the Crown's power to extinguish traditional title by clear and plain legislation. That concession was properly made, subject to a consideration of the implications that arise in the case of extinguishment without the consent of the titleholders. Where the legislation reveals a clear and plain intention to extinguish traditional title, it is effective to do so. In this regard traditional title does not stand in a special position, although the canon of construction referred to by Lord Atkinson in Central Control Board (Liquor Traffic) v. Cannon Brewery Company Limited(599) (1919) AC 744, at p 752. See also The Commonwealth v. Hazeldell Ltd. [1918] HCA 75; [1918] HCA 75; (1918) 25 CLR 552, at p 563 and the decisions there referred to is of equal application:

> "That canon is this: that an intention to take away the property of a subject without giving to him a legal right to compensation for the loss of it is not to be imputed to the Legislature unless that intention is expressed in unequivocal terms."

Application of this canon to traditional title may be found in several Canadian and American decisions(600) For Canada, see Calder (1973) SCR, at p 404; (1973) 34 DLR (3d), at p 210; Sparrow (1990) 1 SCR, at p 1099; (1990) 70 DLR (4th), at p 401. For the United States, see United States v. Santa Fe Pacific Railroad Co. (1941) 314 US, at pp 353-354; Lipan Apache Tribe v. United States (1967) 180 Ct Cl 487, at p 492.

60. It need hardly be said that where an executive act is relied upon to extinguish traditional title, the intention of the legislature that executive power should extend this far must likewise appear plainly and with clarity.

61. It follows that traditional title may not be extinguished by legislation that does no more than provide in general terms for the alienation of the waste lands of the colony or Crown land. That is not to say that the legislature must identify with specificity particular interests to be extinguished if the legislative

intention is otherwise clear(601) Mabo v. Queensland (1988) 166 CLR, at pp 213-214. Even if a law deals specifically with land the subject of traditional title, it may take the form of a reservation or grant to trustees for the benefit of indigenous people and so be consistent with the continuance of title. These are all questions, the answers to which depend upon the terms of the legislation and any relevant circumstances. Where there has been an alienation of land by the Crown inimical to the continuance of traditional title, any remedy against the Crown may have been lost by the operation of limitation statutes. And nothing in this judgment should be taken to suggest that the titles of those to whom land has been alienated by the Crown may now be disturbed. Except in the context of the lease to the London Missionary Society and the lease granted over Dauer and Waier (to be discussed), that is not a matter the Court was asked to consider.

(ii) Has there been any extinguishment?

62. While it is common ground that nothing has been done to extinguish the rights of the Meriam people to the Islands generally, there have been some transactions which were inconsistent with the continuance of traditional title in respect of the relevant land.

63. The London Missionary Society came to the Murray Islands in or about 1871; in 1877 it moved its local headquarters to Mer(602) Determination of Moynihan J., vol.1, p 99. In 1882 the Queensland Government granted the Society a special lease of 2 acres on Mer for a term of 14 years(603) ibid., vol.2, p 12. There were further leases of the land to the Society. In 1914 the Society assigned its leasehold interest to the General Secretary of the Australian Board of Missions. The General Secretary later assigned his interest to the trustees of the Board and in 1933 the trustees assigned their interest to the Corporation of the Synod of the Diocese of Carpentaria(604) ibid., vol.2, p 25.

64. The plaintiffs made submissions as to the consequences of the lease to the Society but claimed no relief in respect of what had occurred. Whether, in the light of the principles discussed in this judgment, the leases granted in 1882 and subsequently were effective to extinguish the traditional title of the Meriam people to that land is a question we do not have to answer. It may be that, since there was a special lease of 2 acres of the Islands, the intention of the legislature to extinguish title was expressed in unequivocal terms. If so, questions arise as to the consequences of that extinguishment. But, in the absence of a claim for particular relief in respect of the lease and in the absence of representation on behalf of anyone laying claim to an interest under any lease, these questions must remain unanswered.

65. In 1931 a lease was granted over the islands of Dauer and Waier for a term of 20 years for the purpose of establishing a sardine factory. The lease was granted to two persons who were not Meriam people(605) ibid., vol.2, p 47. Special conditions attached to the lease precluded the lessees from interfering with "the use by the Murray Island natives of their tribal gardens and plantations" or with "the operations of the Murray Island natives who fish around (the) reefs"(606) ibid., vol.2, pp 48-49. Subsequently the Chief Protector of Aboriginals bought the improvements made on Dauer and the two islands became part of the reserve again(607) ibid., vol.2, pp 51-52.

66. Whether that lease was effective to extinguish the traditional title of the Meriam people to Dauer and Waier, again is a question the Court was not asked to answer and no relief is claimed in regard to that transaction. In those circumstances it is unnecessary to say more about the lease.

(iii) Status of the Islands as Crown land

67. As mentioned earlier, the Islands were annexed to Queensland in 1879, whether by proclamation or, retrospectively, by legislation. By various statutes the Islands were "reserved" from sale. Brennan J. has identified the relevant legislative history and it is unnecessary to repeat what his Honour has said in that regard.

68. The current legislation is the Land Act 1962 (Q.), s.5 of which defines "Crown land" as follows:

> "All land in Queensland, except land which is, for the time being -
> (a) lawfully granted or contracted to be granted in fee-simple by the Crown; or
> (b) reserved for or dedicated to public purposes; or
> (c) subject to any lease or licence lawfully granted by the Crown: Provided that land held under an occupation licence shall be deemed to be Crown land."

69. Section 4 of the Land Act is the repeals and savings provision. By s.4(15)(a) all appointments of trustees of reserves and all things lawfully done under the repealed Acts and in force at the commencement of the 1962 statute "shall continue to be of full force and effect" and be deemed to have been done "under the analogous provisions of and for the purposes of this Act".

70. In consequence, the earlier reservation of the Islands from sale continued and the Islands are excluded from the definition of Crown land in the 1962 statute. In further consequence, there has been no alienation of the Islands by the Crown and there can be none, while the Islands are reserved for a public purpose. Nothing in the reservation of the Islands through various statutes nor the appointment of trustees to control reserved land could amount to an extinguishment of traditional title. Nor did the defendant contend otherwise.

71. Thus, if the plaintiffs can make good their claim to traditional title to the Islands, whether on their own behalf or on behalf of the Meriam people, there is nothing in the legislative history of Queensland, at least until the Queensland Coast Islands Declaratory Act 1985 (Q.), which is destructive of traditional title. And, so far as the plaintiffs' title is concerned, that Act was held to have been nullified by s.10 of the Racial Discrimination Act 1975 (Cth)(608) Mabo v. Queensland.
(iv) Deed of grant in trust

72. As indicated at the outset of this judgment, the plaintiffs seek declaratory relief in regard to any deed of grant in trust in respect of the Islands. They say that the defendant is not "empowered" to make such a grant under the Land Act and that the making of such a grant would be unlawful by reason of ss.9 and 10 of the Racial Discrimination Act. There is an alternative claim, namely, that a deed may be granted in respect of the Islands only upon payment of "proper compensation".

73. Section 334(1) of the Land Act empowers the Governor in Council to grant in trust, or by Order in Council to reserve and set apart, any Crown land which is or may be required for any public purpose. For reasons already given, the Islands are not Crown land and they would have to become Crown land before s.334(1) could be brought into operation. It would be necessary therefore to rescind the Order in Council creating the existing reserve: s.334(4).

74. Section 353A(1) of the Land Act contains a special provision whereby, in the case of land granted in trust for the benefit of Aboriginal or Islander inhabitants, the Governor in Council may, by Order in Council, declare that the land shall revert to the Crown. But he may do so only if authorised by an Act of Parliament specifically relating to that land. The effect of such a declaration is that the land reverts to the Crown "freed and discharged from the trusts and all encumbrances, estates or interests whatsoever and may be dealt with by the Crown as if it had never been granted".

75. If there were a real prospect that the Governor in Council intended to make a deed of grant in trust in respect of the Islands, it would be appropriate for the Court to determine this aspect of the plaintiffs' claim

to declaratory relief. But there was no evidence to this effect and the Solicitor-General denied that there was any indication of the Governor's intentions to do so. In those circumstances no justification exists for making a declaration in the terms sought even if the plaintiffs had otherwise made good their case for that relief.

76. That case depends upon the operation of ss.9 and 10 of the Racial Discrimination Act. But the questions raised by those sections in the present context are not the same questions decided in Mabo v. Queensland and they could not be answered without reference to factual matters, a decision about which is not before the Court. Nevertheless, the Racial Discrimination Act has a wider significance which is explored towards the end of this judgment.

Fiduciary duty

77. The plaintiffs seek a declaration that:

> "the Defendant is under a fiduciary duty, or alternatively bound as a trustee, to the Meriam People, including the Plaintiffs, to recognize and protect their rights and interests in the Murray Islands".

They argued that such a duty arises by reason of annexation, over which the Meriam people had no choice; the relative positions of power of the Meriam people and the Crown in right of Queensland with respect to their interests in the Islands; and the course of dealings by the Crown with the Meriam people and the Islands since annexation. However, while the plaintiffs claim the declaration just mentioned, the statement of claim does not seek any specific relief for a breach of fiduciary duty.

(i) Existence of the obligation

78. The factors giving rise to a fiduciary duty are nowhere exhaustively defined(609) Hospital Products Ltd. v. United States Surgical Corporation [1984] HCA 64; (1984) 156 CLR 41, at pp 68, 96-97, 141-142; Finn, Fiduciary Obligations, (1977), p 1. There are certain kinds of relationships which necessarily entail fiduciary obligations, for example, trustee and beneficiary, company director and shareholder, principal and agent. But a fiduciary obligation may arise in a variety of circumstances as a result of a particular relationship. The kinds of relationships which can give rise to a fiduciary obligation are not closed(610) Hospital Products Ltd. ibid., at pp 68, 96, 102; Tufton v. Sperni (1952) 2 TLR 516, at p 522; English v. Dedham Vale Properties Ltd. (1978) 1 WLR 93, at p 110; (1978) 1 All ER 382, at p 398. In Hospital Products Ltd. Mason J. said(611) (1984) 156 CLR, at pp 96-97:

> "The critical feature of (fiduciary) relationships is that the fiduciary undertakes or agrees to act for or on behalf of or in the interests of another person in the exercise of a power or discretion which will affect the interests of that other person in a legal or practical sense. The relationship between the parties is therefore one which gives the fiduciary a special opportunity to exercise the power or discretion to the detriment of that other person who is accordingly vulnerable to abuse by the fiduciary of his position."

79. Underlying such relationships is the scope for one party to exercise a discretion which is capable of affecting the legal position of the other. One party has a special opportunity to abuse the interests of the other. The discretion will be an incident of the first party's office or position(612) Weinrib, "The Fiduciary Obligation", (1975) 25 University of Toronto Law Journal 1, at pp 4-8; Guerin (1984) 2 SCR,

at p 384; (1984) 13 DLR (4th), at pp 340-341. The undertaking to act on behalf of, and the power detrimentally to affect, another may arise by way of an agreement between the parties, for example in the form of a contract, or from an outside source, for example a statute or a trust instrument. The powers and duties may be gratuitous and "may be officiously assumed without request"(613) Finn, Op Cit, p 201; Guerin ibid., at p 384; p 341 of DLR

80. The defendant argued that there is no source for any obligation on the Crown to act in the interests of traditional titleholders and that, given the power of the Crown to destroy the title, there is no basis for a fiduciary obligation. This can be answered in two ways. First, the argument ignores the fact that it is, in part at least, precisely the power to affect the interests of a person adversely which gives rise to a duty to act in the interests of that person(614) Hospital Products Ltd. (1984) 156 CLR, at p 97; Weinrib, Op Cit, at pp 4-8; the very vulnerability gives rise to the need for the application of equitable principles. The second answer is that the argument is not supported by the legislative and executive history of Queensland in particular and of Australia in general. In the present case, a policy of "protection" by government emerges from the legislation, examples of which are quoted above, as well as by executive actions such as the creation of reserves, the removal of non-Islanders from the Islands in the 1880s and the appointment of a school teacher and an "adviser" in 1892. More general indications include the stated policy of protection underlying the condemnation of purported purchases of land by settlers from Aborigines as, for example, the John Batman incident referred to earlier. And even the general presumption that the British Crown will respect the rights of indigenous peoples occupying colonised territory, as discussed above, itself indicates that a government will take care when making decisions which are potentially detrimental to aboriginal rights.

81. The defendant also argued that the Crown cannot be a trustee or fiduciary in the present circumstances because its responsibilities towards the Islanders with respect to the reserve are a matter of "governmental discretion", in reliance upon the "political trust" decisions in Kinloch v. Secretary of State for India(615) (1882) 7 App Cas 619 and Tito v. Waddell (No.2)(616) (1977) Ch 106, rather than an enforceable equitable obligation. In Kinloch Lord Selborne L.C. said(617) (1882) 7 App Cas, at pp 625-626:

> "Now the words 'in trust for' are quite consistent with, and indeed are the proper manner of expressing, every species of trust - a trust not only as regards those matters which are the proper subjects for an equitable jurisdiction to administer, but as respects higher matters, such as might take place between the Crown and public officers discharging, under the directions of the Crown, duties or functions belonging to the prerogative and to the authority of the Crown. In the lower sense they are matters within the jurisdiction of, and to be administered by, the ordinary Courts of Equity; in the higher sense they are not."

82. Whether the idea of a political or "higher" trust has any utility need not be considered here because it does not, in any case, apply in the present circumstances. Kinloch concerned a specific grant of goods by Royal Warrant to the Secretary of State for India in Council "in trust" for armed forces personnel. The interest claimed to be held in trust was created expressly by the Crown itself. If a traditional title exists, it arises as a matter of common law, quite independently of any grant or other action on the part of the Crown. And if it is extinguishable, then the existence of the power is also a matter of law, independent of legislation or the Crown's action. Ultimately the decisions in both Kinloch and Tito v. Waddell (No.2) (618) The trust claimed in Tito v. Waddell (No.2) to exist for the benefit of Banaban landowners, with respect to a fund comprising compensation or royalties paid by Crown lessees, was a question of

construction of the Mining Ordinance 1928 of the Gilbert and Ellice Islands Colony turned on the construction of an instrument to determine whether it created an express trust. The obligation relevant in the present case arises as a matter of law because of the circumstances of the relationship.

83. The defendant further relied on Williams v. Attorney-General for New South Wales(619) [1913] HCA 33; (1913) 16 CLR 404. In that case, this Court held that use by the Crown of land for a Governor's residence in New South Wales did not dedicate the land for a public purpose so as to create a trust for the benefit of the public of New South Wales or of the United Kingdom, comprising the right to have the land continue to be used for that purpose. But the decision with respect to the trust question turned on the impossibility of specifying the interest in the land to which the public were entitled(620) ibid., at pp 429, 433-435, 467. The decision also seems to have turned, in part, on the lack of specificity of the objects of the claimed trust - that is, the public of New South Wales or of the United Kingdom: see pp 433-435. No such difficulty occurs here.

84. In Guerin the Supreme Court of Canada held that the Crown had a fiduciary duty towards the Indians. Dickson J. (Beetz, Chouinard and Lamer JJ. concurring) said(621) (1984) 2 SCR, at p 376; (1984) 13 DLR (4th), at p 334:

> " The fiduciary relationship between the Crown and the Indians has its roots in the concept of aboriginal, native or Indian title. The fact that Indian Bands have a certain interest in lands does not, however, in itself give rise to a fiduciary relationship between the Indians and the Crown. The conclusion that the Crown is a fiduciary depends upon the further proposition that the Indian interest in the land is inalienable except upon surrender to the Crown."

In its terms the fiduciary obligation found by Dickson J. depended on the statutory scheme prescribing the process by which the Indian land could be disposed of(622) cf. ibid., per Wilson J. at pp 348-350; pp 356-357 of DLR. But the relevant elements of that scheme appear to be that the Indians' interest in land was made inalienable except by surrender to the Crown, arguably an attribute of traditional title independent of statute in any case.

85. Be that as it may, if the Crown in right of Queensland has the power to alienate land the subject of the Meriam people's traditional rights and interests and the result of that alienation is the loss of traditional title, and if the Meriam people's power to deal with their title is restricted in so far as it is inalienable, except to the Crown, then this power and corresponding vulnerability give rise to a fiduciary obligation on the part of the Crown. The power to destroy or impair a people's interests in this way is extraordinary and is sufficient to attract regulation by Equity to ensure that the position is not abused. The fiduciary relationship arises, therefore, out of the power of the Crown to extinguish traditional title by alienating the land or otherwise; it does not depend on an exercise of that power.

86. Moreover if, contrary to the view I have expressed, the relationship between the Crown and the Meriam people with respect to traditional title alone were insufficient to give rise to a fiduciary obligation, both the course of dealings by the Queensland Government with respect to the Islands since annexation - for example the creation of reserves in 1882 and 1912 and the appointment of trustees in 1939 - and the exercise of control over or regulation of the Islanders themselves by welfare legislation - such as The Native Labourers' Protection Act of 1884 (Q.), The Torres Strait Islanders Act of 1939 (Q.) under which an Island Court was established and a form of "local government" instituted, and the Community Services (Aborigines) Act 1984 (Q.) - would certainly create such an obligation.

(ii) Nature of the obligation

87. To say that, where traditional title exists, it can be dealt with and effectively alienated or extinguished only by the Crown, but that it can be enjoyed only by traditional owners, may be tantamount to saying that the legal interest in the traditional rights is in the Crown whereas the beneficial interest in the rights is in the indigenous owners. In that case the kind of fiduciary obligation imposed on the Crown is that of a constructive trustee. In any event, the Crown's obligation as a fiduciary is in the nature of, and should be performed by reference to, that of a trustee.

88. In Guerin Dickson J. said(623) ibid., at p 376; p 334 of DLR, referring to the Crown's duty towards the Musqueam Indians:

> "This obligation does not amount to a trust in the private law sense. It is rather a fiduciary duty. If, however, the Crown breaches this fiduciary duty it will be liable to the Indians in the same way and to the same extent as if such a trust were in effect."

Thus, the fiduciary obligation on the Crown, rooted in the extinguishability of traditional title, is in the nature of the obligation of a constructive trustee(624) The situation where a particular traditional title is dealt with by the Crown is distinguishable. This may occur where a parcel of land is alienated to a third party by the Crown with the consent of the traditional titleholders, as in Guerin. In such a case the Crown is clearly a trustee with respect to the particular traditional titleholders: see Guerin (1984) 2 SCR, per Wilson J. at p 355; (1984) 13 DLR (4th), at p 361.

(iii) Content of the obligation

89. The content of a fiduciary obligation or constructive trust will be tailored by the circumstances of the specific relationship from which it arises. But, generally, to the extent that a person is a fiduciary he or she must act for the benefit of the beneficiaries(625) Hospital Products Ltd.; Finn, Op Cit, p 15. Moreover, this general mandate comprises more particular duties with respect to, first, the procedure by which a fiduciary makes a decision or exercises a discretion and secondly, the content of that decision. On the one hand, a fiduciary must not delegate a discretion and is under a duty to consider whether a discretion should be exercised. And on the other hand, a fiduciary is under a duty not to act for his or her own benefit or for the benefit of any third person(626) Finn, ibid., pp 15-16. The obligation on the Crown in the present case is to ensure that traditional title is not impaired or destroyed without the consent of or otherwise contrary to the interests of the titleholders. For example, the Crown could not degazette the Islands, thereby terminating the reserve, or simply alienate the Islands contrary to the interests of the Islanders; nor could it take these or any other decisions affecting the traditional title without taking account of that effect. If it did, it would be in breach of its duty and liable therefor.

90. The content of the fiduciary obligation in this case will be different from that of an obligation arising as a result of particular action or promises by the Crown. For example, in Delgamuukw McEachern C.J. found(627) (1991) 79 DLR (4th), at p 482 the content of the Crown's fiduciary obligation to be:

> "to permit aboriginal people, but subject to the general law of the province, to use any unoccupied or vacant Crown land for subsistence purposes until such time as the land is dedicated to another purpose. The Crown would breach its fiduciary duty if it sought arbitrarily to limit aboriginal use of vacant Crown land."

But that is not the kind of duty which is relevant here. Delgamuukw differed from the present case significantly in that both the nature of the protected rights and the source of the Crown's obligation were

different. McEachern C.J. held that the Indians' traditional title had been extinguished prior to Confederation(628) ibid., at pp 464, 477-478; that this unilateral extinguishment was, in part, the source of the Crown's obligation; and that the rights of the Indians protected by the obligation were those invoked by promises made by the Crown after extinguishment, to permit the Indians to use land not used for other purposes. In the present case, extinguishment or impairment of traditional title would not be a source of the Crown's obligation, but a breach of it.

91. A fiduciary has an obligation not to put himself or herself in a position of conflict of interests. But there are numerous examples of the Crown exercising different powers in different capacities. A fiduciary obligation on the Crown does not limit the legislative power of the Queensland Parliament, but legislation will be a breach of that obligation if its effect is adverse to the interests of the titleholders, or if the process it establishes does not take account of those interests.

Interim summary

92. It is convenient at this point to summarise the conclusions so far reached in this judgment. They are that the traditional title of the Meriam people survived the annexation of the Islands; that the title is capable of extinguishment by clear and plain legislation or by an executive act authorised by such legislation; that extinguishment would involve a breach of a fiduciary obligation owed by the Crown to the Meriam people; but that extinguishment of that title has not occurred. These conclusions accept what are the primary aspects of the plaintiffs' case.

93. It should be noted that the plaintiffs seek no more than recognition of a fiduciary duty or a trust; they do not ask the Court to spell out the consequences of a breach of that duty or trust. In particular they do not seek compensation or damages in respect of any past interference with the rights and interests of the Meriam people in the Islands. Whether there should be a declaration, even on the terms sought, depends in part upon the operation of the Racial Discrimination Act. I shall explain what I mean by this later. It is convenient at this point to turn to the other form of title claimed by the plaintiffs.

Common law aboriginal title

(i) The plaintiffs' case

94. The plaintiffs did not argue for an adverse title against the Crown but for a possessory title by reason of long possession. Such a title must, of course, be shown to exist at the present time to be of use to the plaintiffs. But the inquiry focuses on the point of annexation. It must, as was clear from the plaintiffs' written submissions, be shown that such a possessory title arose immediately after annexation and continues today. To succeed, the plaintiffs must show that the Crown never had title to the Islands; that issue concerns the law at the time of annexation.

95. The plaintiffs' submissions with respect to possessory title may be summarised in this way. The common and statute law of England applied in a settled colony, where applicable to local conditions. English land law applied in the Colony of Queensland. According to common law then, as now, possession of land gives rise to a title which is good against all the world except a person with a better claim. Such a possessor is "seised" of the land so that he or she acquires an estate in the land which is an estate in fee simple. It is a fee simple because the interest acquired is presumed to be such until shown otherwise. Therefore, even a wrongful possessor acquires a fee simple (sometimes called a "tortious fee simple")(629) See Pollock and Wright, An Essay on Possession in the Common Law, (1888) (hereafter "Pollock and Wright"), p 94, effective against all the world except a person with a better right. But, in addition, the title arising from possession is presumed to be lawful and by right (that is, it is presumed to be the best right to possession) unless the contrary is proved.

96. According to the plaintiffs' submissions, the Crown could not show that, on acquisition of New South Wales or Queensland, it had a better claim to possession of occupied land and so the presumption of a fee

simple title in the indigenous possessors of land was left undisturbed. Such a title would have been held of the Crown, however, which held a radical title to all acquired territory. In order to establish such a possessory title, the indigenous inhabitants would have to prove occupation by their ancestors at the time of settlement, such that it amounted in law to possession of particular areas of land. This, they said, could be proved by reference to the findings of Moynihan J.

97. In the absence of argument to the contrary, it may be accepted that New South Wales and subsequently Queensland were settled colonies. It may also be accepted that English land law and its two fundamental doctrines, estates and tenures, applied in these colonies(630) Attorney-General v. Brown (1847) 1 Legge, at p 318, though, as we have seen, Stephen C.J. understood its application to have a different effect. The issues which arise for consideration, therefore, are:

> (a) the validity of the proposition that possession gives rise to a presumption of a fee simple title against all but a better claimant;
> (b) the validity of the claim that the Crown was not, at the time of annexation, a better claimant to possession; and
> (c) the question of what, as a matter of law, amounts to possession of land.

98. As the plaintiffs put their case, there would be no more favourable consequences flowing from acceptance of their submissions as to possessory title than from acceptance of their submissions as to traditional title. After contending for the existence of a possessory title, the plaintiffs relied on the same line of argument as they did for traditional title. Significantly, they conceded that a possessory title is extinguishable by "clear and plain" legislation. And the argument as to fiduciary duty and trust did not focus on the existence of a possessory title. It may have been too great a concession that a fee simple arising from possession is "extinguishable" in the same way as traditional title. But, given my conclusions as to traditional title and, especially, those as to the existence of a fiduciary obligation on the Crown arising from it and given what follows concerning the Racial Discrimination Act, there is no need to express a firm opinion on the plaintiffs' arguments concerning possessory title.

99. Nevertheless, those arguments raised important issues which have not been examined before in this area of the law, and something should be said about the principles of law on which they rested. The plaintiffs' case in this regard owed much to McNeil; so too does this portion of my judgment.
(ii) The relationship between possession and title:
Does possession give rise to a presumptive title?

100. "Possession" is notoriously difficult to define(631) See Pollock and Wright, pp 1-42; Tay, "The Concept of Possession in the Common Law: Foundations for a New Approach", [1964] MelbULawRw 17; (1964) 4 Melbourne University Law Review 476 but for present purposes it may be said to be a conclusion of law defining the nature and status of a particular relationship of control by a person over land. "Title" is, in the present case, the abstract bundle of rights associated with that relationship of possession. Significantly, it is also used to describe the group of rights which result from possession but which survive its loss; this includes the right to possession.

101. In the thirteenth century Bracton wrote(632) Bracton on the Laws and Customs of England, (Thorne Tr.) (1977), vol.III, p 134:

> "(E)veryone who is in possession, though he has no right, has a greater right (than) one who is out of possession and has no right".

It is said that possession is the root of title(633) Asher v. Whitlock (1865) 1 QB 1; Perry v. Clissold (1907) AC 73; Calder (1973) SCR, at p 368; (1973) 34 DLR (3d), at p 185; Megarry and Wade, The Law of Real Property, 5th ed. (1984) (hereafter "Megarry and Wade"), pp 105-106; Pollock and Wright, pp 22,94-95. Cf. Holdsworth, A History of English Law, 2nd ed. (1937), vol.VII, (hereafter "Holdsworth, vol.VII"), pp 64-65, but see analysis of Holdsworth, vol.VII, in Allen v. Roughley (1955) 94 CLR 98, at pp 134ff. To understand this statement it is necessary to have regard to the history and development of actions for the recovery of land. In the present context, it is enough to recall that through the seventeenth, eighteenth and nineteenth centuries ejectment became the most popular action for the recovery of interests in land - both leasehold and freehold(634) Holdsworth, vol.VII, p 9. And despite its abolition in 1852, its principles remain the basis of present actions for the recovery of land(635) Bristow v. Cormican (1878) 3 App Cas 641, at p 661; Megarry and Wade, pp 105, 1158-1159. It is therefore the focus of the present inquiry, the principles on which it is based being relevant both at the time of the acquisition of the Islands and now. Ejectment was a response to the growing cumbersomeness and ineffeciency of the old real actions. The real actions, so named because they provided specific recovery of interests in land, not merely damages(636) Holdsworth, A History of English Law, 5th ed. (1942), vol.III (hereafter "Holdsworth, vol.III"), pp 3-4; Holdsworth, vol.VII, p 4., emerged in the twelfth and thirteenth centuries. The nature and history of these forms of action are canvassed by Holdsworth(637) Holdsworth, vol.III, pp 3-29 and by Pollock and Maitland(638) The History of English Law, 2nd ed. (1898), vol.II (hereafter "Pollock and Maitland"), pp 46-80; it is unnecessary to repeat what is said by those writers.
(iii) Ejectment: The relationship between possession and title

102. One view(639) See Holdsworth, vol.VII, pp 62-64 is that the advent of ejectment represented a fundamental change in the concept of ownership in English law, involving the idea of absolute title divorced from its radical attribute, possession. But the other view(640) See Hargreaves, "Terminology and Title in Ejectment", (1940) 56 Law Quarterly Review 376; Pollock and Wright, pp 93-97; Megarry and Wade, pp 104-105; Asher v. Whitlock (1865) 1 QB, at p 5, which is more persuasive, is that the basic relationship between possession and ownership of land established by the earlier real actions, involving the idea of relative claims to possession, was maintained or even emphasised in the action of ejectment. A successful claim to an interest in land comprised the better claim to possession and its associated rights as between the parties.

103. In order to show a title which would defeat the defendant in possession, the plaintiff in ejectment had to prove a right of entry; the defendant could rely on possession. Therefore, the plaintiff was put to proof of the strength of his or her title and could not rely on the weakness of the defendant's title(641) Roe d. Haldane v. Harvey [1769] EngR 17; (1769) 4 Burr 2484, at p 2487 [1769] EngR 17; (98 ER 302, at p 304); Goodtitle d. Parker v. Baldwin [1809] EngR 457; [1809] EngR 457; (1809) 11 East 488, at p 495 (103 ER 1092, at p 1095). The central issue, therefore, in an action for ejectment, and on which opinions have differed, was what circumstances gave a right of entry. Was proof by the plaintiff of mere prior possession sufficient to found a right of entry against the defendant, indicating that possession gave rise to an enforceable "title", or was more required? Did possession give rise to a title which survived the loss of possession? The relevance of this question is that it points up the nature of the entitlements arising from the mere possession which would, subject to proof, have existed immediately on annexation.

104. So long as it is enjoyed, possession gives rise to rights, including the right to defend possession or to sell or to devise the interest(642) Asher v. Whitlock; Ex parte Winder (1877) 6 ChD 696; Rosenberg v. Cook (1881) 8 QBD 162. A defendant in possession acquires seisin even if possession is tortiously acquired. That is, a person in possession has an estate in fee simple in the land; it is this interest on which a defendant in an action for ejectment could rely. The disseisee loses seisin and acquires a right of entry in its stead(643) Wheeler v. Baldwin [1934] HCA 58; (1934) 52 CLR 609, at pp 631-633; Elvis v. Archbishop of York (1619) Hob 315, at p 322 [1792] EngR 2252; [1792] EngR 2252; (80 ER 458, at p 464); Pollock and Wright, pp 93-94; Maitland "The Mystery of Seisin" (1886) 2 Law Quarterly Review

481, esp. pp 482-486. A possessor acquires a fee simple estate because the fullest estate known to the law is presumed until a lesser estate is proved(644) Wheeler v. Baldwin (1934) 52 CLR, at p 632. And, in the circumstances under consideration, there is no possibility of a leasehold estate at the time of annexation or of some other lesser estate. Applied to these circumstances, prima facie all indigenous inhabitants in possession of their land on annexation are presumed to have a fee simple estate.

105. But what does English land law have to say if possession of land is lost? The seisin and fee simple enjoyed as a result of possession would also be lost because each successive possessor must enjoy the rights directly associated with possession. According to this analysis, the last possessor only in any succession would enjoy the entitlements. If the Crown dispossessed an indigenous people, its title arising from possession would be the best claim. This was the effect of Holdsworth's analysis of land law. He concluded that proof of prior possession was insufficient in itself to provide a right of entry in the plaintiff against a defendant who was a mere possessor(645) Holdsworth, vol.VII, pp 61-68; Stokes v. Berry [1795] EngR 3275; [1795] EngR 3275; (1699) 2 Salk 421 (91 ER 366); Doe d. Wilkins v. Marquis of Cleveland (1829) 9 B. and C. 864 [1829] EngR 57; (109 ER 321). That is, possession of itself gives rise to no title which survives dispossession.

106. The better understanding is, I think, that if no other factors come into play, then, regardless of the length of time, as between mere possessors prior possession is a better right(646) Allen v. Rivington [1845] EngR 2; (1670) 2 Wms Saund 111 (85 ER 813); Doe d. Smith and Payne v. Webber (1834) 1 AD. and E 119 (110 ER 1152); Doe d. Hughes v. Dyeball (1829) M.and M. 346 (173 ER 1184); Asher v. Whitlock; Perry v. Clissold; Oxford Meat Co Pty. Ltd. v. McDonald (1963) 63 SR(NSW) 423; Spark v. Whale Three Minute Car Wash (1970) 92 WN (NSW) 1087; Allen v. Roughley; Wheeler v. Baldwin (1934) 52 CLR, at pp 624, 632-633; Pollock and Maitland, p 46. Possession is protected against subsequent possession by a prima facie right of entry.

107. The proposition that possession of itself gives rise to a right in the plaintiff to recover possession, if lost, is supported by principle. In losing possession, a plaintiff has lost the rights associated with possession, including the right to defend possession as well as an estate in the land. But nothing has upset the presumption that the plaintiff's possession, and therefore his or her fee simple, was lawfully acquired and hence good against all the world. "Possession is prima facie evidence of seisin in fee simple"(647) Peaceable d. Uncle v. Watson [1811] EngR 375; (1811) 4 Taunt 16, at p 17 (128 ER 232, at p 232); Wheeler v. Baldwin (1934) 52 CLR, at p 632; see also Doe d. Stansbury v. Arkwright (1833) 5 Car. and P 575 [1833] EngR 481; (172 ER 1105); Denn d. Tarzwell v. Barnard [1777] EngR 3; (1777) 2 Cowp 595 (98 ER 1259); Asher v. Whitlock (1865) 1 QB, at p 6; Allen v. Roughley (1955) 94 CLR, at p 108. Without evidence to the contrary, nothing has displaced the presumption arising from proof of the plaintiff's possession that he or she had lawful title amounting to a fee simple. Thus, although a dispossessed plaintiff in ejectment must prove the strength of his or her own title and cannot rely on the weakness of the defendant's title, the presumption of lawfulness arising from prior possession is positive evidence in that regard(648) cf. note (a) in Allen v. Rivington (1670) 2 Wms Saund, at p 111 (85 ER, at p 813).

108. It follows from this, however, that a person's title arising from prior possession can be defeated either by a defendant showing that he or she (or another person, in so far as it undermines the plaintiff's claim) has a better, because older, claim to possession or by a defendant showing adverse possession against the person for the duration of a limitation period.

109. In sum, English land law, in 1879 and now, conferred an estate in fee simple on a person in possession of land enforceable against all the world except a person with a better claim. Therefore, since the Meriam people became British subjects immediately on annexation, they would seem to have then acquired an estate in fee simple. This is subject to the question whether the Meriam people could be said

to be in possession. The question then arises - does the Crown have a better title? Put another way, did the defendant have a better claim to possession when it acquired sovereignty in 1879 or 1895?
(iv) Did the Crown have a better claim to possession?

110. The defendant argued that upon annexation the Crown became the absolute owner of and was, in law, in possession of the Islands and that this precludes any possessory title in the plaintiffs. Furthermore, it says, since 1882 the possession of the plaintiffs and their predecessors in title (if any) has, in law, been attributable to the fact that the Crown has permitted them to occupy a reserve created for the benefit of Aboriginals and of Islanders of the State. It follows, so the argument runs, that the plaintiffs' possession now cannot constitute good title against the State of Queensland.

111. The position of the Crown resulting from annexation was discussed earlier in this judgment. There is no foundation for the conclusion that by annexation the Crown acquired a proprietary title or freehold possession of occupied land. It acquired a radical title only. This may dispose of the defendant's answer. However, it should be considered further in the context of English land law and the doctrine of tenures.

112. As McNeil observes(649) McNeil, p 85:

> "The Crown must prove its present title just like anyone else."

The Crown could not have acquired original title by occupancy as a matter of fact because it had no presence in the colony before settlement and occupation of land by indigenous inhabitants would have excluded occupancy by the Crown after annexation, except in land truly vacant(650) See "Annexation - its consequences" above; McNeil, pp 216-217. However, underlying the doctrine of tenures is the proposition that landholders hold their land either mediately or immediately of the Crown(651) See Blackstone, Commentaries, 17th ed. (1830), vol.II, pp 50-51. And a legal fiction justifies this feudal theory: that all land was, at one time, in the possession of the King who had granted some of it to subjects in return for services. Therefore, it is said in answer to the claim for a possessory title, at the commencement of the realm - on annexation - possession to all land was vested in the Crown.

113. However, the effect of the fiction of past possession by the Crown is to secure the paramount lordship or radical title of the Crown which is necessary for the operation of feudal land law. And since fictions in law are only acknowledged "for some special purpose"(652) Needler v. Bishop of Winchester (1614) Hob 220, at p 222 [1792] EngR 49; (80 ER 367, at p 369); Mostyn v. Fabrigas [1774] EngR 104; (1774) 1 Cowp 161, at p 177 [1774] EngR 104; (98 ER 1021, at p 1030); Anon., Considerations on the Law of Forfeitures, for High Treason, 4th ed. (1775), pp 64-65, cited in McNeil, p 84, that should be taken to be the extent of the fiction. So far as the system of tenures is concerned, on which English land law is based, no more is required.

114. Furthermore, the fiction of a lost Crown grant(653) The idea of a presumption of a Crown grant to make good a title where possession is proved is referred to in Doe d. Devine v. Wilson in the Privy Council on appeal from New South Wales: (1855) 10 Moo 502, at pp 523-528 [1855] EngR 708; (14 ER 581, at pp 589-591) answers the fiction of original Crown ownership and in so doing protects titleholders. As McNeil points out(654) McNeil, p 84:

> "The Crown cannot, on the strength of its fictitious original title, require a person who is in possession of land to prove his right by producing a royal grant, for in most cases no grant exists. The grant is deemed in law to have been made, if not to a predecessor of the present possessor, then to someone else."

115. Therefore, if the fiction that all land was originally owned by the Crown is to be applied, it may well be that it cannot operate without also according fictitious grants to the indigenous occupiers.

(v) Possession

116. Possession is a conclusion of English law, a law alien to indigenous inhabitants before annexation. Therefore, before annexation the Meriam people would not have been in possession. Occupation on the other hand is a question of fact. In some cases the person in occupation is not the possessor of land, for example, where he or she is an agent of the possessor. But it may be presumed, in the absence of circumstances which show possession is in another, that the occupier of land is also in possession(655) Pollock and Wright, p 20; Doe d. Stansbury v. Arkwright. As we have seen, the Crown could not show it had possession of occupied land after annexation.

117. At common law conduct required to prove occupation or possession will vary according to the circumstances including, for example, whether the claimant enters as a trespasser or as of right(656) Stanford v. Hurlstone (1873) LR 9 Ch App 116. And the nature of the land will to a large extent dictate the use that might be made of it. For example, conduct amounting to possession will be different in relation to a dwelling and to uncultivated land(657) Lord Advocate v. Lord Lovat (1880) 5 App Cas 273, at p 288; Johnston v. O'Neill (1911) AC 552, at p 583; Kirby v. Cowderoy (1912) AC 599, at pp 602-603. Some land is barren and unproductive so that it cannot sustain people all the year round. It may be necessary for occupiers to seek water and sustenance elsewhere for part of the year, returning to "their" land as soon as it is possible.

118. These are matters which are discussed at some length by McNeil(658) McNeil, pp 196-204. It is unnecessary to pursue evidentiary matters in the present case because the nature of the occupation of the Islands by the Meriam people, already discussed in relation to traditional title, points clearly enough to possession according to English law.

119. The defendant argued that the occupation enjoyed by the Meriam people today is by permission from the Crown, due to the creation of a reserve in 1882, and therefore cannot amount to possession in the relevant sense. In answer to this, first, since occupation by the Meriam people is, and was, apparent, the onus lies on the defendant to show possession is not in the occupiers. Secondly, there is no documentary evidence to prove the 1882 reserve. Assuming for the defendant that it was created, if annexation occurred in 1879 the reserve would amount to dispossession, unless the defendant can show that it and not the Meriam people acquired the right to possession on annexation. Subject to the limitation of actions and the question whether possession by the Crown was adverse, the Meriam people may well be entitled to recover possession according to the principles discussed above. If annexation occurred in 1895, the Crown in right of Queensland may have prevented the Meriam people acquiring possession on annexation. But it is unlikely that the creation of the reserve in 1882, or subsequently in 1912, affected the Meriam people's common law possession since that did not diminish enjoyment but ensured it remained with the people.

(vi) Possessory title - conclusions

120. It follows from this analysis that the Meriam people may have acquired a possessory title on annexation. However, as I have said, the consequences here are no more beneficial for the plaintiffs and, the argument having been put as an alternative, it is unnecessary to reach a firm conclusion. In any event, it is unlikely that a firm conclusion could be reached since some matters, the creation of the reserve for example, were not fully explored.

Racial Discrimination Act

121. The effect of this judgment is that the traditional title of the Meriam people survived annexation. Anything done by the defendant constituting interference with that title would, on the view I have taken,

be a breach of a fiduciary obligation owed by the defendant to the Meriam people. Earlier in this judgment I have referred to possible implications of the Racial Discrimination Act; I should now explain what I mean.

122. Ordinarily, land is only acquired for a public purpose on payment of just terms, whatever may be the precise statutory language employed(659) See for instance Lands Acquisition Act 1989 (Cth), Pt VII; Land Acquisition (Just Terms Compensation) Act 1991 (N.S.W.), Pt 3; Land Acquisition and Compensation Act 1986 (Vict), Pt 3; Acquisition of Land Act 1967 (Q.), Pt IV; Land Acquisition Act 1969 (S.A.), Pt IV; Public Works Act 1902 (W.A.), Pt III; Lands Resumption Act 1957 (Tas.), Pt IV; Lands Acquisition Act 1978 (N.T.), Pt VII. If the defendant sought to interfere with the Meriam people's enjoyment of the Islands which their traditional title gives them and failed to do so on just terms, a question arises whether that action would be in contravention of ss.9 or 10 of the Racial Discrimination Act.

123. Section 9 relevantly provides:

> " (1) It is unlawful for a person to do any act involving a distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of any human right or fundamental freedom in the political, economic, social, cultural or any other field of public life.
> ...
> (2) A reference in this section to a human right or fundamental freedom in the political, economic, social, cultural or any other field of public life includes any right of a kind referred to in Article 5 of the Convention."

124. Section 10 reads:

> " (1) If, by reason of, or of a provision of, a law of the Commonwealth or of a State or Territory, persons of a particular race, colour or national or ethnic origin do not enjoy a right that is enjoyed by persons of another race, colour or national or ethnic origin, or enjoy a right to a more limited extent than persons of another race, colour or national or ethnic origin, then, notwithstanding anything in that law, persons of the first-mentioned race, colour or national or ethnic origin shall, by force of this section, enjoy that right to the same extent as persons of that other race, colour or national or ethnic origin.
> (2) A reference in subsection (1) to a right includes a reference to a right of a kind referred to in Article 5 of the Convention.
> (3) Where a law contains a provision that:
> (a) authorizes property owned by an Aboriginal or a Torres Strait Islander to be managed by another person without the consent of the Aboriginal or Torres Strait

Islander; or
(b) prevents or restricts an Aboriginal or a Torres Strait Islander from terminating the management by another person of property owned by the Aboriginal or Torres Strait Islander;
not being a provision that applies to persons generally without regard to their race, colour or national or ethnic origin, that provision shall be deemed to be a provision in relation to which subsection (1) applies and a reference in that subsection to a right includes a reference to a right of a person to manage property owned by the person."

125. In Mabo v. Queensland Brennan, Toohey and Gaudron JJ. said of s.9(660) (1988) 166 CLR, at p 216:

"Section 9 proscribes the doing of an act of the character therein mentioned. It does not prohibit the enactment of a law creating, extinguishing or otherwise affecting legal rights in or over land: Gerhardy v. Brown(661) [1985] HCA 11; ; (1985) 159 CLR 70, at pp 81, 120-121. It is arguable that the operation of a law which brings into existence or extinguishes rights in or over land is not affected by s.9 merely because a consequence of the change in rights is that one person is free to do an act which would otherwise be unlawful or another person is no longer able to resist an act being done."

126. But, as the judgment continued, s.10 relates to the enjoyment of a right, not to the doing of an act and the right referred to in s.10(1) need not be a legal right. Rights referred to in Art.5 of the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention referred to in s.10(2), include:

"(d)(v) The right to own property alone as well as in association with others;
(vi) The right to inherit."

The right to be immune from arbitrary deprivation of property is a human right, if not necessarily a legal right, and falls within s.10(1) of the Act, even if it is not encompassed within the right to own and inherit property to which Art.5 refers.

127. The question here is whether extinguishment of the traditional title of the Meriam people without the compensation provided for in the Acquisition of Land Act 1967 (Q.) means that, by reason of a law of Queensland, persons of a particular race, colour or national or ethnic origin do not enjoy a right that is enjoyed by persons of another race, colour or national or ethnic origin or enjoy a right to a more limited extent than those persons. If the traditional title of the Meriam people may be extinguished without compensation, they do not enjoy a right that is enjoyed by other titleholders in Queensland or, at the least, they enjoy a right to a more limited extent. A law which purported to achieve such a result would offend s.10(1) of the Racial Discrimination Act and in turn be inconsistent with the Act within the meaning of s.109 of the Constitution. The Racial Discrimination Act would therefore prevail and the proposed law would be invalid to the extent of the inconsistency.
Conclusion

128. While this action raises questions of great importance, the answers which it is possible to give to those questions necessarily speak in general terms rather than deal with particular aspects of the traditional title of the Meriam people. This is not a criticism of the way in which the plaintiffs' claim was formulated; it is simply a recognition that the claim for declaratory relief does speak in general terms. Consistent with the general nature of the claim made and the reasons underlying this judgment, I would make a declaration in the following terms:

> 1. Upon the annexation of the Murray Islands to Queensland, the radical title to all the land in those islands vested in the Crown in right of Queensland.
> 2. The traditional title of the Meriam people to the Murray Islands, being their rights to possession, occupation, use and enjoyment of the Islands, survived annexation of the Islands to Queensland and is preserved under the law of Queensland.
> 3. The traditional title of the Meriam people to the land in the Islands has not been extinguished by subsequent legislation or executive act and may not be extinguished without the payment of compensation or damages to the traditional titleholders of the Islands.
> 4. The land in the Murray Islands is not Crown land within the meaning of that term in s.5 of the Land Act 1962 (Q.)

129. For the reasons that appear in this judgment, I would not make any declaration as to the consequences of the lease to the London Missionary Society in 1882 and the consequences of the lease granted over Dauer and Waier in 1931. It may be appropriate to grant liberty to apply in respect of each of those matters if any of the parties seeks an order to this effect.

ORDER

In lieu of answering the questions reserved for the consideration of the Full Court,

(1) declare that the land in the Murray Islands is not Crown land within the meaning of that term in s. 5 of the Land Act 1962 (Q.);

(2) putting to one side the Islands of Dauer and Waier and the parcel of land leased to the Trustees of the Australian Board of Missions and those parcels of land (if any) which have validly been appropriated for use for administrative purposes the use of which is inconsistent with the continued enjoyment of the rights and privileges of the Meriam people under native title, declare that the Meriam people are entitled as against the whole world to possession, occupation, use and enjoyment of the lands of the Murray Islands;

(3) declare that the title of the Meriam people is subject to the power of the Parliament of Queensland and the power of the Governor in Council of Queensland to extinguish that title by valid exercise of their respective powers, provided any exercise of those powers is not inconsistent with the laws of the Commonwealth.
