

obligation, such as dependency (although this may assume moral obligation at least to the extent that relationships of dependency may give rise to it)? This would arguably be truer to the philosophy of testamentary freedom but would hugely increase discretion and for that reason may be unworkable. Should the court have jurisdiction not only to assess a breach of moral duty but also fully to rectify it? Should questions of conduct take over the litigation - where moral duty becomes the mechanism of the jurisdiction surely this must be the case. But then what *is* the value of testamentary freedom? Would this go too far into the testator's armchair?⁹⁰

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Family Provision, above n 10, [2.241]. See also the summary recommendations in Chapter 6.



Shaunnagh Dorsett and Lee Godden*

TENURE AND STATUTE: RE-CONCEIVING THE BASIS OF LAND HOLDING IN AUSTRALIA

Introduction: The Origins of Land Law

*Rather, the gist of Mabo [No 2] lay in the holding that the long understood refusal in Australia to accommodate within the common law concepts of native title rested upon past assumptions of historical fact, now shown to have been false. Those assumptions had been made within a particular legal framework which had been developed over a long period.*¹

Justice Gummow's evaluation of the significance of *Mabo (No 2)*² from the perspective of the *Wik* case tells a story of rupture and the displacement of false 'assumptions of historical fact'. *Mabo (No 2)* concurrently provided both a rupture to existing 'histories' and a re-institutionalisation of an authoritative 'collective memory' narrating the origins of land law in Australia. Those origins were re-interpreted through the doctrine of tenure. The doctrine of tenure provides an account of the ultimate source of the power to deal with land in Australia. Although the details of the origins of Australian land law may have altered, the fabric of the narrative remains firmly within the paradigms circumscribed by the traditional common law understandings of real property lawyers.

To examine the concurrent rupture and re-institutionalisation of common law frameworks, this paper discusses the re-invigoration of the doctrine of tenure in Australian land law. We argue that there was a singular opportunity presented by *Mabo (No 2)* to re-conceive the basis and nature of land law in Australia. At one level *Mabo* displaced elements, such as

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1 *The Wik Peoples v The State of Queensland & Ors* (1996) 187 CLR 1, 180 (Gummow J).

2 *Mabo v State of Queensland (No 2)* (1992) 175 CLR 1.

terra nullius, from the prevailing narrative of land law. Simultaneously, however, the doctrine of tenure was used to re-fashion the common law 'originary past' of land law in Australia. Law's collective memory now encompasses the occupation of Australia by indigenous peoples through the medium of recognition of native title. Yet rather than representing a departure from prevailing conceptions, native title was 'constructed' using traditional conceptual and classificatory structures of English land law.³

In *Mabo*, Brennan J made the doctrine of tenure the lynch-pin for developing native title at common law.⁴ The doctrine has now become a pivotal organising feature of the 'new' narrative of land law that is being told in subsequent native title decisions and in doctrinal explanations of land law. Thus a 'legal fiction' involving the doctrine of tenure was simultaneously expunged and re-created. Indeed, concepts of law are 'conventionally bounded by myths of legal origins'.⁵ Arguably, the rediscovered and re-worked doctrinal significance of the doctrine of tenure ensures that the common law, and not statute, remains the way in which we are compelled to understand land law. The new stories that are being told about land law and native title in Australia maintain the integrity of the common law by re-establishing its central importance. To question the explanatory power of the doctrine of tenure now appears an assault on the foundations of native title and the common law. Legal doctrine, academia and political and social factors in Australia have combined to legitimate the authority of this new narrative.

In this article, we want to more closely examine assumptions behind the re-invigoration of the doctrine of tenure which embodies the stories that law tells itself about the origins and nature of land law in Australia. As a counter-point to the prevailing narrative we propose a different story: a story that discusses the origins of land law in terms of sovereignty, constitutions, and statute law.

3 The idea that at the point of sovereignty the Crown assumes only a radical title, as distinct from beneficial ownership, does however depart from strictly feudal conceptions of the doctrine.

4 Marcia Neave, Chris Rossiter and Margaret Stone, *Sackville and Neave Property Law: -Cases and Materials* (6th edition, 1999) [3.2.6].

5 M Davies, 'Before the Law' *Delimiting the Law: Postmodernism and the Politics of the Law* (1996) 64.

The Doctrine of Tenure

The official explanation of the doctrine of tenure as outlined in *Mabo* is now well known. According to Brennan J, on the reception of the common law, the Crown's ultimate title in land was translated to the concept of 'radical title':

[T]he 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 territory and the concomitant of sovereignty.⁶

As Edgeworth notes, Brennan J treats radical title as the linking mechanism between the public law notion of sovereignty and private law of proprietary rights.⁷ Thus, by stating that the Crown has an interest called 'radical title', the common law enables the Crown to grant interests or estates in land which are to be held by the Crown. Of course, Brennan J tacitly acknowledges that the Crown does not, derive the power to actually grant land from the existence of radical title. That power is derived rather from sovereignty and the consequent supreme legal authority over the newly acquired territory. Similarly, it is the power as sovereign which enables the Crown to extinguish interests, including native title. As Brennan J notes:

[S]overeignty carries the power to create and extinguish private rights and interests in land within the Sovereign's territory.⁸

However, according to Brennan J, it is the doctrine of tenure which is the central feature of the Anglo-Australian property system.⁹ This is reinforced by Brennan J's remark that all common law tenures must be as a

⁶ *Mabo v State of Queensland (No 2)* (1992) 175 CLR 1, 48.

⁷ B Edgeworth, 'Tenure, Allodialism and Indigenous Rights at Common Law' (1994) 23 *Anglo-American Law Review* 397, 415.

⁸ *Mabo v State of Queensland (No 2)* (1992) 175 CLR 1, 63.

⁹ See also M Teehan, 'Co-existence of Interests in Land: A Dominant Feature of the Common Law', 12 *Land, Rights, Laws: Issues of Native Title*, Native Title Research Unit AIATSIS (January 1997) 2.

consequence of Crown grant.¹⁰ While this may be correct at one level, it presents only a partial picture of the structure of land grants in Australia.

The notion that somehow everything simply flows from the doctrine of tenure and the common law is reinforced by many of the standard textbooks. Since the decision in *Mabo*, the doctrine of tenure has been given a more prominent place in many of the standard property texts. Most real property textbooks reveal a skew toward English history as an explanatory rationale for the development of land law rules and principles. A more striking example of the power of the common law to frame our understanding of the origins and nature of land law is the space devoted to discussions of general land law concepts and the relative paucity of the discussion of statutory frameworks. Discussions of Torrens Title systems of land law often appear as an appendage upon an earlier discussion of general law concepts. These general law concepts apply often to only a very small percentage of the Australian continent - and that percentage is shrinking! Some time ago Sugarman adverted to the role played by a 'textbook tradition' in reinforcing the common law in its assumptions and methodology.¹¹ A similar function is performed by current real property textbooks and doctrinal structures.

Authority to grant land

As outlined above, the doctrine of tenure has been rediscovered as the fundamental basis of land holding in this country. We would contend that to explain the doctrine of tenure as the basis of land holding, without mere, misrepresents the ways in which authority to grant land in Australia developed and the way in which it currently functions.

One of the central parts of the doctrine of tenure is the notion of radical title, as described above. What then is radical title? Obviously, it is not a title in the usual sense of the term. Rather, the best explanation seems to be that it is a governmental power, which enables the Crown to make arrangements as to the ways in which land distribution and holding is to function. Obviously, at the point of reception of the common law, the

¹⁰ *Mabo v State of Queensland (No 2)* (1992) 175 CLR 1, 47.

¹¹ David Sugarman, 'Legal Theory, the Common Law Mind and the making of the Textbook Tradition' in William Twining (ed), *Legal Theory and Common Law* (1986) 26-35.

doctrine of tenure plays an important role. It provides a power, recognised by the common law, to undertake these roles. However, to read the official version of the structure of property law in *Mabo*, one would assume that we still directly rely on the doctrine of tenure, or radical title, to authorise the granting of land. In one way we do, and in another we don't. In fact, such an explanation ignores the constitutional and statutory aspects of land holding and the 200 years of land law history between what we would call the 'originary moment' of our history of land law and now.

We use the term originary moment to point to the fact that the time at which the common law was imported into the new colony, the doctrine of tenure, and what is now called radical title in particular, provided the governmental power which authorised the early granting of land. By radical title in this sense we mean no more than the bare governmental power to deal with land which arises as a consequence of sovereignty. It is, of course, no more than a legal fiction. Or, as Brennan J puts it, the Crown's title is no more than a postulate to support the exercise of sovereign power within the familiar feudal framework of the common law.¹²

The acquisition of sovereignty, not the fictional notion of radical title, allowed the Imperial Government, in 1787, to delegate to Governor Phillip the authority to dispose of lands.¹³ As Toohey J states in *Wik* '[t]he Royal Prerogative was initially the source of grants of land in Australia.'¹⁴ Or, as stated by Windeyer J in *Randwick Corporation*: '[t]he Gubernatorial authority to dispose of lands is confirmed by 6 Wm. IV No. 16 (1836), which recites in its preamble that the Governors by their commissions under the Great Seal had authority 'to grant and dispose of the waste lands'.¹⁵

Disposal of lands remained an executive function until the early 1840s. The way in which this executive power was exercised became formalised by statute in 1831 in the *Imperial Land Act* of that year. However, as Toohey J notes in *Wik*, '...in 1842 that the management and disposal of Crown land

¹² *Mabo v State of Queensland (No 2)* (1992) 175 CLR 1, 48.

¹³ *Governor Phillip's Second Commission*, 2nd April 1787, *HRA*, Series I, vol I, 7.

¹⁴ *The Wik Peoples v The State of Queensland & Ors* (1996) 187 CLR 1, 108.

¹⁵ *Randwick Corporation v Rutledge* (1959) 102 CLR 54. Interestingly, this case formed a plank of Brennan J's judgement arguing for the common law in *Wik*.

was first brought under statutory control.’¹⁶ This was effected by means of the *Sale of Waste Lands Act 1842 (Imp)*.¹⁷ The *Imperial Crown Land Sale Act*, for example, provided that:

...save as here-after is excepted, be conveyed or alienated by Her Majesty, or any Person or Persons acting on the Behalf or under the Authority of Her Majesty, either in Fee Simple, or for any Estate of Interest, unless such Conveyance or Alienation be made by way of Sale. nor unless such Sales be conducted in the Manner and according to the Regulations herein-after prescribed.¹⁸

Thus, the Act is intended to regulate the way in which land is to be disposed, but reiterates that the source of authority to deal with land is vested in the Crown and exercised by the Crown’s representatives. Essentially, the power to deal with land remained an executive function, delegated by the Imperial Crown, until the enacting of the colonial Constitutions. At that point, the political power was transferred to the colonies. As Brennan J notes in *Mabo*:

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.¹⁹

Thus, Brennan J himself acknowledges that radical title is merely a governmental power to deal with land. Upon the attaining of responsible government, the power to so deal with land was incorporated into the various state constitutions, where it remains today. Section 40 of the Queensland Constitution, for example, provides that the management and control of waste lands belonging to the Crown in right of Queensland is vested in the legislature. Section 30 further provides that:

...[I]t shall be lawful for the Legislature of the colony to make laws for regulating the sale letting disposal and

¹⁶ *The Wik Peoples v The State of Queensland & Ors* (1996) 187 CLR 1, 108.

¹⁷ *Imperial Crown Land Sale Act* (1846) 5 & 6 Vic. C. 36.

¹⁸ *Ibid* section II.

¹⁹ *Mabo v State of Queensland (No 2)* (1992) 175 CLR 1, 53.

occupation of the waste lands of the Crown within the said colony.

Even prior to responsible government, the proliferation of statutory forms of land holding had begun. The 1846 *Sale of Waste Lands Act Amendment Act* (Imp) authorised the making of Orders in Council with respect to the disposal of land. Under the authority of this Act we see the creation of the first pastoral interests. As noted by Gaudron J:

It is clear that pastoral leases are not the creations of the common law. Rather, they derive from the specific provisions in the Order-in-Council of 9 March 1847 issued pursuant to the *Sale of Waste Lands Act Amendment Act* 1846 (Imp) and, so far as is presently relevant, later became the subject of legislation in New South Wales and Queensland. That they are now and have for very many years been entirely anchored in statute law appears from the cases which have considered the legal character of holdings under legislation of the Australian States, and, earlier, the Australian Colonies authorising the alienation of Crown Lands.²⁰

Later, under the authority of the State Constitutions, various statutory regimes were implemented for managing 'waste' or more commonly 'unallocated' lands. In Queensland, for example, this takes the current form of the *Land Act* 1994 (Qld). Under the authority of this legislation and its predecessors, not only are statutory interests, such as pastoral leases, granted, but also interests such as estates in fee simple. Although, for example, the fee simple estate is a common law creation, the source of authority for its creation is not the common law through the doctrine of tenure, but the State Constitutions. As Brennan CJ noted in *McGinty*, in turn, the States owe their existence to ss 106 and 107 of the Commonwealth Constitution. The State Constitutions and State powers are also preserved by those sections.²¹ While the notion that the Constitution is underlain by

²⁰ *The Wik Peoples v The State of Queensland & Ors* (1996) 187 CLR 1, (Gaudron J) 149.

²¹ *McGinty v Western Australia* (1996) 186 CLR 140, [17]. See also *New South Wales v Commonwealth* (1975) 135 CLR 337, 372, (Barwick CJ). In addition, any residual power in the Imperial Parliament to legislate for the states was removed by the *Australia Act* 1986 (UK).

the sovereignty of the people remains relatively under-explored by the High Court,²² it is clear that at least it is the Federal Constitution which ultimately sources the power to deal with land.

From the brief discussion above it is clear that the feudal doctrine of tenure is a relatively insignificant part of the framework in which land law has developed in Australia. The power to dispose of land derived directly from the sovereignty of the Crown, exercised executively by Crown representatives until its incorporation into colonial (now state) Constitutions. While in *Wik* the majority did acknowledge that many interests, such as pastoral interests, are creatures of statute rather than common law, it is important to further acknowledge the executive and statutory dimensions of all land holding in Australia.

Despite the recognition in both *Mabo* and *Wik* of the Constitutional and statutory dimensions of land law in Australia, the dominant narrative of property which is taken from these cases is of a common law based system, derived from our English past. At the same time, for example, that Brennan J states that radical title is a mere governmental power, he also reinstates the derivative nature of Australian land law in his well-known statement that:

[T]he doctrine of tenure ... 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.²³

This is despite the fact that:

When the Crown acquired territory outside England which was to be the 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.

²² The notion that the sovereignty of the Australian people underlies the Commonwealth Constitution is not without qualification. One important qualification, for example, is to be found in s128 of the *Constitution*. While the ultimate authority to change the Constitution lies with the people, this is subject to the requirements of s.128: see *McGinty v Western Australia* (1996) 186 CLR 140, 274-5 (Gummow J).

²³ *Mabo v State of Queensland (No 2)* (1992) 175 CLR 1, 45.

After all, as Holdsworth observed, the universal application of the doctrine of tenure is a purely English phenomenon. ...

It is arguable that the universality of tenure is a rule depending on English history and that the rule is not reasonably applicable to the Australian Colonies.²⁴

In reinvigorating the doctrine of tenure as the central facet of the origins of land law in Australia, the hegemony of the common law is reinforced. Ritter argues that the problem facing the High Court in *Mabo (No 2)* was to find a doctrinal explanation that could exculpate the common law, while incorporating a 'revised history'. The solution lay in expunging the legal fiction of terra nullius whose source lay not in the common law but in international law. Terra nullius was rendered doctrinally irrelevant to whether native title existed under Australian common law.²⁵ At another level though, it was necessary to expunge this fiction to retain the integrity of the common law. With its doctrinal demise, a new symbolic origin for land law in Australia had to be found.

The doctrine of tenure becomes what Goodrich refers to, in a different context, as the 'ideational' source of land law.²⁶ Just as the common law generally seeks an ultimate validity for its existence, so too the common law seeks an ultimate foundation within itself for land law. The doctrine of tenure provides this originary foundation. As Goodrich notes:

The indefinite time of the originary refers to a past which was never present, it refers to an archetypal time whose function is iconic and not representative...²⁷

Goodrich suggests a distinction between the ideational and institutional sources of the common law.²⁸ An ideational source of law is an abstract principle which symbolically holds together a body of law. In contrast to an opposition of ideational and institutional sources, the doctrine of tenure

24 *Mabo v State of Queensland (No 2)* (1992) 175 CLR 1, 46-47.

25 See generally D Ritter, 'The "Rejection of Terra Nullius" in 'Mabo: A Critical Analysis' (1996) 18 *Sydney Law Review* 5.

26 P Goodrich, *Reading the Law* (1986) 4.

27 Ibid.

28 See generally *ibid* Chapter 1.

coalesces the ideational and the institutional origins of land law in Australia. The doctrine provides a symbolic or ideational function in holding together pre-existing land law and the recognition of native title. At the same time its importance is constantly reiterated in institutional form through academic and doctrinal writing and in textbooks.

Despite all the historical evidence presented within *Mabo* and *Wik* to the contrary, the common law continues to frame and limit our understanding of the origins and development of Australian land law.

The relationship between the doctrine of tenure, law and history

A window of opportunity to rethink the manner in which land law in Australia is conceived and operates was presented by the major native title cases. While on many other fronts native title has unsettled prevailing origin stories, the challenge to the legitimacy of common law understandings of land law has only been partially achieved. If anything, the ability of the common law to effect its own continuation has been strengthened by its perceived capacity to adapt to change as momentous as the recognition of native title.

To understand the paradox presented by the re-assertion of the doctrine of tenure as a common law understanding of land law in the face of what would appear serious challenges to its explanatory rationales requires an appreciation of the relationship between doctrine, law and history. We argue that the doctrine of tenure has become the ‘grundnorm’ or originary moment of the collective memory of land law in Australia.²⁹

For historians the ideas of collective memories and the constitution of origins as records of the past to mediate the present and the future, are familiar themes. Perhaps it is not too simplistic a statement from the perspective of another discipline to suggest that historians are very directly engaged in the constitutive production of collective memories.³⁰ To suggest that law is also

²⁹ ‘Grundnorm’ refers to the work of Kelsen who argued that legal systems are hierarchical system of rules which have an ultimate source. H Kelsen, *General Theory of Law and State* (1945).

³⁰ A Czarnota, ‘Law’s Expanding Empire: Legal Institutions and Collective Memories’, Work in progress Seminar delivered at Law School, Griffith University, Wednesday 30/6/99.