order are the lease of two acres, and of Dauer and Waier, and any other parcels which may validly have been appropriated for administrative or other purposes inconsistent with continued native title.

The Murray Islands are not Crown land. However, the native title is subject to extinguishment by the Parliament or Crown of Queensland, provided any extinguishment is clear and is not inconsistent with the laws of the Commonwealth.

The effect for Australia generally is that the doctrine of *terra nullius* has been dismissed. The new orthodoxy is that, upon acquisition of sovereignty, the Crown obtained only a radical title to land occupied by Aborigines and Islanders. Land not under such native occupancy upon colonisation would have vested in the Crown absolutely.

However, most land in Australia has been dealt with in ways inconsistent with continuing native title, and thus native title has been extinguished in those areas. Similarly, where Aborigines have moved off their land or lost their traditional connection with it, they have lost their native title. Significant amounts of unalienated land in Australia would thus still be subject to claims of native title by traditional occupiers. In many cases, however, the evidentiary burdens apparent in *Mabo* will make litigation of such claims difficult.

It would seem, therefore, that the great value of the *Mabo* decision will not be as a precedent for future litigation. Rather, it marks a paradigm shift in the underlying legal and moral assumptions of European colonisation, and should provide an impetus for political resolution, whether that be reconciliation, treaty or other outcome.[12]

References

1. Blackstone, *Commentaries on the Laws of England*, 17th edn (1830), Bk II, Ch.1, p.7.
2. Taken from the judgment of Brennan at (1992) 107 ALR 1 at 14
3. *Mabo v Queensland* (1988) 166 CLR 186.
4. Brennan J at p.20; Deane and Gaudron JJ at p.58; Dawson J at p.92; Toohey J does not expressly state it, but it is implicit in his judgment.
5. Brennan J at pp.32-6; Dawson J at pp.92-3; Toohey J at p.140; Deane and Gaudron JJ at p.60, felt that the feudally-based fiction of Crown radical title may have been inappropriate for the infant colony in 1788. But because it has been treated as applicable for 204 years, it is far too late to reconsider the question.
6. McNeil, Kent, *Common Law Aboriginal Title*, Oxford Clarendon Press, 1989.
7. Southern Nigeria had been ceded to Britain by treaty with local chiefs. Several cases confirmed that the cession did not affect private natives' rights: *Amodu Tijani v Secretary, Southern Nigeria* [1921] 2 AC 399; *Sakariyawo Oshodi v Moriamo Dakolo* [1930] AC 667; *Adeyinka Oyekan v Musendiku Adele* [1957] 2 All ER 785. Parts of Southern Rhodesia had been conquered under British auspices. The Privy Council held in *In re Southern Rhodesia* [1919] AC 211 that, as a general rule, natives' rights of property would be presumed to be respected by the conqueror (at p.233). However, in this case the natives' land usages were deemed so primitive as not to amount to rights of private property (at pp.233-5), a view attacked elsewhere in *Mabo*.
8. At pp.156-160. This finding arose from one of the Islanders' alternative claims: that even if they did not enjoy native title, the Crown was nevertheless obliged to act in their interests. Toohey J was also sympathetic to another of the Islanders' alternative claims. This was the idea that, even if their native title had not survived annexation, they had acquired a common law title by length of possession. This claim relied heavily on the central notion of Kent McNeil's book *Common Law Aboriginal Title*. However, Toohey J concluded that this alternative basis of title would be no more beneficial for the Islanders than their success in their native title claim, and so did not finally decide. See at pp.161-167.
9. Brennan J at p.42; see also Deane and Gaudron JJ at p.83.
10. Deane and Gaudron JJ at pp.66-7; Toohey J at p.152.
11. A point made expressly by Toohey J at p.139-40.
12. Some peripheral points of legal interest can be found in the *Mabo* decision. First, it is a striking example of the new confidence in Australia law, to forge its own frontiers. Since abolition of Privy Council appeals culminating with the *Australia Acts* 1986, Australian courts have been free to fashion a distinctly Australian common law. This was expressly noted by Brennan J (at 18) and *Mabo* sees the High Court at the forefront of that development. Second, the judgments are notable for their reliance on scholarly writings in addition to case law. This seems to be a developing practice in High Court judgments. The assistance of academic writers was acknowledged by Deane and Gaudron JJ (at 91) and Kent McNeil's book *Common Law Aboriginal Title* appears to have been particularly useful throughout — see especially Toohey J at p.139.

LEGAL STUDIES

Article 1: 'Rewriting history 1: *Mabo v Queensland*: the decision' by Mark Gregory.
Article 2: 'Rewriting history 2: the wider significance of *Mabo v Queensland*' by Gordon Brysland.

Questions: Article 1

1. Explain the doctrine of 'terra nullius'. In which colonies was this doctrine not applied?
2. According to the majority of the High Court in *Mabo* why did acquisition of sovereignty and radical title not necessarily mean acquisition of full ownership of territory? What were the implications of this for native title?
3. The colonial authorities view that Aboriginal people were 'primitive' had important implications for recognition of native title. How did Brennan J deal with this view?
4. In what circumstances can the Crown extinguish native title? Had this been done on the Murray Islands?
5. What limitations are there on the ability of State legislatures to extinguish native title?

Questions: Article 2

6. What types of interests granted over land might extinguish native title?
7. The author suggests that future land rights claims will depend on two matters. What are they?
8. Do Aboriginal people have a right to compensation when their native title is extinguished? Discuss the different views expressed by members of the High Court on this point.
9. Discuss the wider implications of the *Mabo* decision. In particular, what impact do you think the decision might have on race relations in Australia?

Activities/discussion

Debate the topic: 'That the decision in *Mabo* provides little comfort to Aboriginal people. While recognising native title in theory, the reality is that most land in Australia has been taken away from Aboriginal people without compensation and the High Court decision provides little support for compensation to be paid.'

Essay topic: 'Now that the High Court has decided that native title does exist in Australia it is time to take one more step and recognise Aboriginal customary law for all purposes.'

Research: The claiming of land rights by Aboriginal people is not just about title to property. The importance of the issue lies in the extent to which denial of land rights underpins a whole system of social and economic injustice. Find out as much as you can about the special relationship Aboriginal people have with their land and the impact the denial of land rights has on Aboriginal people.

Further references

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Reynolds, Henry, *The Law of the Land*, Penguin, Ringwood, Victoria, 1987.

Hanks, Peter and Keon-Cohen, Bryan (eds), *Aborigines and the Law*, Allen & Unwin, Sydney, 1984.

Australian Law Reform Commission, *The Recognition of Aboriginal Customary Law*, Report No. 31, AGPS, 1986.

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