

THE COMMON LAW CONSTRUCT OF NATIVE TITLE A 're-feudalisation' of Australian land law

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Recent scholarship has interpreted the recognition of native title in *Mabo* and *Wik* as bringing about a decisive break between Australian land law and its feudal past. In this article we argue that once attention is shifted from the Crown's interest in native title land to the interest of the native title holders themselves, a very different picture emerges. This article argues that the common law construct of native title constitutes a 're-feudalisation' of Australian land law. We assert that native title can be understood as a product of a series of dialectics: public and private; stasis and dynamism; and transcendence and enslavement. We demonstrate that the dialectic nature of native title gives it the hallmarks of a feudal interest in land, that is, an interest that is contingent, limited and susceptible to co-existence with other interests.

Introduction***

The landmark High Court cases dealing with the rights of Indigenous peoples in land in Australia — *Mabo v Queensland (No 2)* and *Wik Peoples v Queensland*¹ — were each met with a legislative response in the form of the *Native Title Act 1993 (Cth)*² and the *Native Title Amendment Act 1998 (Cth)*,³ respectively. However, the *Native Title Act* continues to use as its fundament in the recognition, protection and extinguishment of Indigenous rights in

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

2 *Wik Peoples v Queensland* (1996) 187 CLR 1 (hereafter *Wik*).

3 See *Yarmirr v Northern Territory* (1998) 156 ALR 370 (hereafter *Yarmirr*) at 385.

4 See RH Bartlett, 'A Return to Dispossession and Discrimination: The Ten Point Plan' (1997b) 27 *UWALR* 44, pp 49–51, for a consideration of the history of, and the motivation behind, the Native Title Amendment Bill 1997, the precursor to the *Native Title Amendment Act 1998 (Cth)*.

land⁵ the concept of native title as expounded by the common law.⁶ And this concept — which we refer to in this paper as the ‘common law construct of native title’⁷ — has in recent times been the subject of judicial attention in Australia on several occasions. The Federal Court has handed down three lengthy judgments concerning native title: *Yarmirr v Northern Territory*, *Ward v Western Australia*, and *Yorta Yorta Aboriginal Community v Victoria*.⁸ The High Court has again contributed to the jurisprudence with its decision in *Fejo v Northern Territory*.⁹ In Canada as well, the nature of Indigenous ownership of land has been re-examined by that country’s Supreme Court in *Delgamuukw v British Columbia*.¹⁰ The implications of that decision are still being debated.¹¹ These developments reveal that the process of ‘unpacking’ and explaining the nature of the common law construct of native title is an ongoing one.

5 See, for example, *Native Title Act* ss 10–13.

6 See the definition of ‘native title’ and ‘native title rights and interests’ in the *Native Title Act* s 223 (1). Also see *Yarmirr* at 386–387. It must be noted that in *Yarmirr*, Olney J held that the *Native Title Act* allows for the recognition of native title in at least one context where native title would not be recognised by the Australian common law. According to his Honour, the Act permits the recognition of native title in offshore waters (at 388–389). This is despite the fact that the common law would not afford such recognition because the common law of Australia does not extend offshore. His Honour held that the Act provides a statutory basis for the recognition of such offshore rights, provided they are of a type that would have been recognised by the common law had the territorial restriction not applied.

7 We prefer to describe ‘native title’ as a common law *construct* because the reception of native title into the common law has not been an act of passive recognition of Indigenous relationships with land as they exist under relevant Indigenous law. Instead, in transforming Indigenous relationships with land through the institution of native title, by giving those relationships characteristics they do not have under Indigenous law — such as susceptibility to extinguishment — the courts have initiated a process of creation (or construction). See I Hunter (1994) ‘Native Title: Acts of State and the Rule of Law’ in M Groot and T Rowse (eds) *Make a Better Offer: The Politics of Mabo*, Pluto Press, p 107; and L McNamara and S Grattan, ‘The Recognition of Indigenous Land Rights as “Native Title”: Continuity and Transformation’ (forthcoming) *Flinders JL Reform*.

8 *Yarmirr, Ward v Western Australia* (1998) 159 ALR 483 (hereafter *Ward*); *Yorta Yorta Aboriginal Community v Victoria* (unreported, Federal Court of Australia, 18 December 1998) (hereafter *Yorta Yorta*).

9 *Fejo v Northern Territory* (1998) 156 ALR 721 (hereafter *Fejo*).

10 *Delgamuukw v British Columbia* [1997] 3 SCR 1010 (hereafter *Delgamuukw*).

11 See S Persky (1998) *Delgamuukw. The Supreme Court Decision on Aboriginal Title*, Greystone Books; and RH Bartlett, ‘The Content and Proof of Native Title: *Delgamuukw v Queen in right of British Columbia*’ (1998a) 4(9) *Indig L Bull* 17.

Statement of aims

This article has two aims. The first is to highlight the dialectic¹² nature of the common law construct of native title. We will demonstrate — in three contexts — that the characteristics that the common law impresses upon the concept of native title are a function of the tension between various oppositional categories.¹³ These categories are: public/private; stasis/dynamism; and transcendence/enslavement. By this we mean that] the construct of native title:

- ◇ unevenly treats the distinction between the *public* and *private* spheres by both *dislocating* and *fusing* these spheres;
- ◇ is located in a normative system (the Australian common law) which gives native title a *static* content, but which appropriates for its own vision of property rights a *dynamic* content; and
- ◇ both *transcends*, and is *enslaved* by, the common law's own vision of property rights.

The second aim of this article is explain how the dialectic nature of the construct of native title in these contexts constitutes a 're feudalisation' of Australian land law. We use this somewhat inelegant term as a shorthand description of the way in which the characteristics given to native title by the common law are analogous to land ownership in the feudal era.¹⁴ We are well aware that the prevailing view is that the recognition of native title in *Mabo* and the refinement of that recognition in *Wik* have constituted a decisive break between Australian land law and its feudal past.¹⁵ These events may be perceived as a 'de-feudalisation' of Australian land law. This de-feudalisation is seen to have arisen out of a dilution of the doctrine of tenure

12 We use this term in the Hegelian sense — admittedly shorn of some of its complexity and richness — to denote a concept ('synthesis') which is the product of the interplay between two other contradictory concepts ('thesis' and 'antithesis'): P Singer (1993) *Hegel*, Oxford University Press, pp 77–80.

13 We have elsewhere explored other examples of this phenomenon in relation to the origins of native title (whether it pre-dates or post-dates colonisation) and its content (whether it is uniform or variable): McNamara and Grattan (forthcoming). Lee Godden has considered the dialectic nature of native title in the context of its precedential status in terms of the 'change/immobility paradox': L Godden, 'Wik: Legal Memory and History' (1997b) 6 *Griffith LR* 123, esp pp 140–1.

14 For a discussion of the idea of feudalism together with its representation in history and law, see M Stuckey, 'Feudalism and Australian Land Law: "A Shadowy, Ghostlike Survival?"' (1994) 13 *Tasmania LR* 102.

15 See, for example, B Edgeworth, 'Tenure, Allodialism and Indigenous Rights at Common Law: English, United States and Australian Land Law Compared after *Mabo v Queensland*' (1994) 23 *Anglo-Am LR* 397; L Godden, 'Wik: Feudalism, Capitalism and the State' (1997a) 5 *Aust Prop LJ* 162; and N Bhuta, '*Mabo, Wik* and the Art of Paradigm Management' (1998) 22 *Melb ULR* 24.

in *Mabo* and *Wik* from the position accepted in England. Edgeworth explains the distinction between the rights of the Crown under English and Australian land law after *Mabo* as follows.

[T]he *Mabo* decision has applied some radical surgery to the enlarged, fictional definition of the doctrine of tenure, and has accorded the Crown in Australia a significantly more modest role in the structure of land law. Far from the enduring British image of its being universal occupant and ultimate source of all interests in land, the Crown in Australia is held to have only acquired beneficial ownership of indigenous land where the owners' rights were extinguished in favour of the Crown.... Equally importantly, indigenous landholders whose rights have not been extinguished do not in any sense hold their rights 'of' the Crown: 'title', in whatever form it is held according to their laws, has always been and continues to be allodial.¹⁶

There are thus two aspects of *Mabo's* weakening of the Crown's position under the doctrine of tenure. First, in acquiring sovereignty over various parts of Australia, the Crown did not also acquire beneficial ownership of (that is, property in) the land. Secondly, the Crown is not the font of all beneficial interests in land. The majority in *Wik* confirmed the diluted nature of the Crown's tenurial interest by refusing to accept that the Crown's interest expanded into beneficial ownership upon the granting of a statutory leasehold interest.¹⁷

We do not disagree with the foregoing view about the de-feudalisation of Australian land law brought about by the recognition of native title. However, we contend that once the emphasis is shifted from the nature of the Crown's interest in land to the interest of the native title holders, then a 'counter narrative'¹⁸ of re-feudalisation emerges. The common law construct of native title bears three characteristics that Macpherson sees as the hallmarks of ownership interests in land under feudalism. These characteristics are: the conditionality of the interest on the 'performance of [some] social function'; the limited nature of the interest; and amenability of the interest to co-exist with other ownership interests in the same land. This stands in stark contrast to property rights under capitalism which are 'not conditional upon the owner's performance of any social function', absolute and exclusive.¹⁹

16 Edgeworth (1994) p 432.

17 Bhuta (1998) p 35; Godden (1997a) pp 169–70.

18 Our use of this term is inspired by Patrick Macklem, who used ~~this term~~ to describe an alternate — and preferred — explanation to the dominant one (the 'narrative') about the dispossession of Aboriginal people in Canada and the place of the law in addressing this injustice: P Macklem, 'What's Law Got To Do With It?: The Protection of Aboriginal Title in Canada' (1997) 35 *Osgoode Hall LJ*125.

19 CB Macpherson (1975) 'Capitalism and the Changing Concept of Property' in E Kamenka and RS Neale (eds) *Feudalism, Capitalism and Beyond*, Australian

Structure of article

In order to achieve the aims of demonstrating both the dialectic nature of native title and how it constitutes a re-feudalisation of Australian land law, this article will consist of three sections. Each section will describe one of the three chosen aspects of the dialectic nature and one of the three feudal characteristics of the common law construct of native title. The second section will deal with the public/private dialectic and will also demonstrate how the common law construct of native title is conditional upon the performance of a social function. The stasis/dynamism dialectic will then be considered, and the limited content of the construct noted. In the final section, the transcendence/enslavement dialectic will be addressed, and the co-existence characteristic discussed.

The Public/Private Distinction in Native Title Law

In this section, our argument is not simply that the common law construct of native title blurs the distinction between 'public' and 'private'. After all, these concepts are hardly homogenous,²⁰ and property ownership has both public and private aspects in numerous contexts.²¹ Our thesis is that the common law both *dislocates* and *fuses* the concepts of public and private in the recognition of native title in a way that works towards the continuation of Indigenous disadvantage.

Prior to our analysis, we want to make two disclaimers. First, we are not commenting upon how the concepts of 'public' and 'private' are represented in Indigenous legal cultures.²² Our concern is the contradictory treatment of the distinction in the common law construct of native title.

Secondly, we will not attempt a concrete or universally valid definition of public and private. For this we do not apologise; leading legal scholars have felt able to analyse the distinction without providing such a definition.²³

National University Press, pp 109-10.

- 20 SI Benn and GF Gaus (1993) 'The Public and the Private: Concepts and Action' in SI Benn and GF Gaus (eds) *Public and Private in Social Life*, Croom Helm, p 3.
- 21 One example of this is title to land held under the Torrens system. The recording and guarantee of title by the state gives the system a distinct public flavour, whereas the ability of people to create and transfer interests in the land outside the scheme of registration maintains the private aspect of the system. Another example is the regulation of land use, which has both public (eg environmental and zoning laws) and private (eg the tort of nuisance) aspects. We consider the meaning of the terms 'private' and 'public' in the text accompanying notes 24 - 25.
- 22 Some of the perils which would be associated with such an attempt are discussed in M Krygier (1993) 'Publicness, Privatness and "Primitive Law"' in SI Benn and GF Gaus (eds) *Public and Private in Social Life*, Croom Helm, pp 334-7.
- 23 See, for example, D Kennedy, 'The Stages of the Decline of the Public/Private Distinction' (1982) 130 *U Penn LR* 1349; MJ Horwitz, 'The History of the Public/Private Distinction' (1982) 130 *U Penn LR* 1423; and GE Frug, 'The City as a Legal Concept' (1980) 93 *Harv LR* 1057. Our attention was drawn to

For our purposes, it is sufficient to operate at a high level of abstraction. By 'private', we connote a space where the preferences and desires of individuals or groups are permitted to dominate.²⁴ Certainly, such preferences and desires are constrained in this space, but the rationale for such constraint is respect for the preferences and desires of others. By 'public', we connote a space where the preferences and desires of individuals and groups are subordinated to a 'prior normative vision' of a proper social ordering.²⁵ Although this normative vision may find expression in the commands of the state, it may also do so in a set of cultural or religious rules.

Dislocating the public and the private

In articulating the concept of native title in the *Mabo* case, the High Court dislocated or 'decisively severed' the public and private spheres.²⁶ This was achieved by distinguishing between questions of sovereignty and questions of property. Sovereignty — the subordination of the individual to the command of the state²⁷ — is the archetypal public sphere concept. Property, on the other hand, has traditionally been regarded as primarily a private sphere concept where the owner is entitled to use his or her property as he or she wishes.²⁸ Taking the judgment of Brennan J as broadly representative of the majority's decision in this context, we will now note three ways in which the High Court in *Mabo* dislocated the public sphere of sovereignty and the private sphere of property rights.

First, a sharp division was made between the spheres on the issue of justiciability. Although the issue of the Crown's acquisition of sovereignty over various parts of Australia was held not to be justiciable in the Australian courts, the issue of the consequences of the acquisition of sovereignty for pre-existing property rights clearly was.²⁹

Secondly, the High Court rejected the argument put forward by Queensland that would have merged the public and private spheres. This argument was that in acquiring sovereignty over the Murray Islands, the Crown also gained beneficial ownership over those lands, thereby extinguishing the pre-existing property rights of the Indigenous inhabitants. In the words of Brennan J, '[i]t 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'.³⁰

these texts by B Bennet, 'The Economics of Wifing Services: Law and Economics on the Family' (1991) 18 *J Law & Soc'y* 206.

24 GS Alexander (1997) *Commodity and Propriety*, University of Chicago Press, p 1.

25 *Ibid*, p 2.

26 Edgeworth (1994) p 413.

27 See, for example, J Austin (1955) *The Provenance of Jurisprudence Determined*, orig 1832, ed HLA Hart, Weidenfeld & Nicolson, pp 193–6.

28 See, for example, W Blackstone (1966) *Commentaries on the Laws of England*, reprint of 1st edn, vol 2, Dawsons, p 2.

29 *Mabo* at 32, 57 per Brennan J (Mason CJ and McHugh J concurring).

30 *Ibid* at 51.

The third way in which the High Court dislocated the public and the private spheres in the recognition of native title relates to the status it gave to Indigenous law and custom. Although the High Court expressly located the source and the content of native title in 'the traditional laws acknowledged by and the traditional customs observed by the [relevant] indigenous inhabitants',³¹ the operation of these laws and customs is confined to the private sphere of property rights. As a manifestation of traditional law and custom, native title operates, according to Brennan J, as a 'burden on the Crown's radical title when the Crown acquires sovereignty over [a] territory'.³² The term 'burden' connotes the concept of encumbrance, that is, a limited form of property right. Additionally, the private dimension of this phenomenon is underscored by the reference to the *radical title*, rather than the *sovereignty*, of the Crown. It is the quasi-property right³³ of the Crown which has been constrained, rather than the Crown's sovereign right to command.

Understood in this way, Indigenous law and custom might be given effect to in the private sphere context of traditional land use. Indeed, Australian courts have been prepared to entertain arguments that forms of land use which come within the protection of native title are privileged against the operation of State legislation regulating resource exploitation.³⁴ By contrast, the courts have not been prepared to entertain the possibility that Indigenous law and custom might be given effect to in the public sphere. The High Court has rejected out of hand arguments that Indigenous law and custom may be the source of a sovereign or quasi-sovereign right of self-government giving Aboriginal people a general immunity from State and Commonwealth law to which they have not consented.³⁵

31 Ibid at 58 per Brennan J.

32 Ibid at 51.

33 See the text accompanying notes 37–42.

34 See *Mason v Tritton* (1994) 34 NSWLR 572; *Derschaw v Sutton* (1997) 17 WAR 419; and *Dillon v Davies* (1998) 156 ALR 142. Each of these cases considered the issue of whether fishing pursuant to native title rights was a good defence to alleged criminal breaches of State fishing laws. In each case, it was found that the respective defendants had not proven that they were exercising native title rights. Section 211 of the *Native Title Act* now provides a level of exemption for non-commercial fishing pursuant to native title rights. On these matters, see P Jeffery, 'Escaping the Net: Native Title as a Defence to Breaches of the Fishing Laws' (1997) 20 UNSWLJ 352.

35 *Coe v The Commonwealth* (1993) 68 ALJR 110 at 115; and *Walker v New South Wales* (1994) 182 CLR 45. See N Pearson (1993) '204 Years of Invisible Title' in MA Stephenson and S Ratnapala (eds) *Mabo: A Judicial Revolution*, University of Queensland Press, pp 82–3. We do not regard the recent decision of *Police v Yunupingu* (unreported, Magistrates' Court, Darwin, 20 February 1998) as signalling a sea change in this respect. In this case — as noted by Ron Levy in 'Native Title and the Criminal Law: The Defence of Galarwuy Yunupingu' (1998) 4(13) *Indigs L Bull* 10 — one of the bases for Mr Yunupingu being acquitted of assault and property offences was that the conduct with which he was charged was done in the exercise of his native title rights. However, the

We have seen how the High Court has dislocated the public and private spheres by employing a sharp distinction between sovereignty and property. We will shortly proceed to examine the other part of the dialectic, namely the way in which the High Court in *Mabo* also fused the public and private spheres. Before doing this, however, we need to note how one aspect of the decision might appear to — but in fact does not — contradict our previous analysis.³⁶ This aspect is the High Court's articulation of the concept of the Crown's radical title.

In *Mabo*, the High Court stated that the Crown acquired a radical title to the land over which it acquired sovereignty.³⁷ This might appear to give the Crown a (private) property interest that precisely corresponds to its (public) sovereignty over a territory. Now it is true that at the level of legal theory, radical title does bring the public and private spheres into interaction by 'linking ... the constitutional or public law notion of sovereignty on one hand, and the private law of proprietary rights on the other'.³⁸ However, no doctrinal consequences flow from this linking in respect of the survival of Indigenous property rights. The Crown's radical title 'is not a real title for property purposes',³⁹ but an incarnation of the Crown's sovereign power to create private property interests, either in others (by a grant under the doctrine of tenure) or in itself (by the appropriation of land for Crown purposes).⁴⁰ Understood in this way, the radical title of the Crown does not add to the rights the Crown otherwise has as sovereign.

This is to be contrasted with the position in English land law where the public sphere of sovereignty and the private sphere of property rights are not merely linked by the concept of radical title, but are in fact 'co-extensive'.⁴¹ The precise correspondence between sovereignty and property rights in land meant that when the Crown acquired sovereignty over England, and thus the ownership of all of the land in England, no room was left for the survival of the pre-existing property rights in land. These rights were extinguished.⁴²

magistrate held that Mr Yunupingu's native title rights provided him with a good defence because they were recognised and given effect to by the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth), as the conduct in question took place on land held under that Act. The magistrate did not therefore need to consider whether the native title rights of the accused had been recognised and given effect to by the common law alone: Levy (1998) p 12. The case does not therefore support the concept of native title affording a general immunity from the sovereignty of the Crown.

36 As will be seen below, in demonstrating the consistency between the concept of radical title and the drawing of a sharp distinction between sovereignty and property, we draw heavily on Edgeworth (1994).

37 *Mabo* at 51–52 per Brennan J; at 81 per Deane and Gaudron JJ; at 122 per Dawson J; at 180 per Toohey J.

38 Edgeworth (1994) p 415. Also see *Wik* at 186 per Gummow J.

39 *Wik* at 234 per Kirby J.

40 *Mabo* at 48 per Brennan J.

41 Edgeworth (1994) p 415.

42 See *Mabo* at 46–47 per Brennan J; and Edgeworth (1994) p 416.

The concept of radical title as articulated in *Mabo* is quite different from the concept under English law. In the Australian context, the concept does not involve a collapsing of the distinction between sovereignty and property, and is thus consistent with our analysis of the sharp division between these notions.

*Fusing the public and the private:
A re-feudalisation of Australian land law*

We now consider the way in which the *Mabo* decision does fuse the public and the private spheres. As we have seen, this phenomenon does not involve a blurring of sovereignty and property, but rather occurs in the conception of property itself. The conflation of the public and private spheres in the common law construct of native title as a form of property interest has parallels with the conflation of the public and private dimensions of land ownership in the feudal period. Hence we can say that *Mabo* also re-feudalises Australian land law.

Landholding in the feudal period was dominated by the reciprocal relationship between the lord (who granted an interest in land) and the tenant (who held the land pursuant to the grant). The ultimate source of all interests in land was the Crown, and all land was held 'mediately or immediately' of the Crown. In return for holding their estates in the land, and also the protection the lord was bound to afford them, tenants were obliged to perform certain services for their lords. These services ranged over the provision of military, spiritual, civil or agricultural activities⁴³ and were legally enforceable by a lord against a defaulting tenant.⁴⁴ It was the obligation to perform these services which gave feudal landholding its public aspect. The 'ownership' of land was 'conditional on the owner's performance of [a] social function',⁴⁵ and thus underpinned a vision of a proper social ordering. The relationship between political superior and political inferior had its locus not only in the personal relationship between individuals, but also in the land itself.⁴⁶ In this way, in the feudal period "public law" appear[ed] as a mere appendix to "real property law" ...⁴⁷

Of course, the modern law of freehold tenure is substantially located in the private sphere. Although the doctrine of tenure still applies in

43 Known respectively (and in somewhat simplified form) as knight service, frankalmoin, serejanty and socage tenure: JH Baker (1990) *An Introduction to English Legal History*, 3rd edn, Butterworths, pp 259-60. For a detailed survey of the various types of feudal services, see F Pollock and FW Maitland (1968) *The History of English Law*, orig 1898, vol 1, Cambridge University Press, pp 239-96.

44 Baker (1990) p 272.

45 Macpherson (1975) p 109.

46 See Pollock and Maitland (1968) pp 230-1, cited in Edgeworth (1994) p 426; and A E-S Tay and E Kamenka (1993) 'Public Law-Private Law' in SI Benn and GF Gaus (eds) *Public and Private in Social Life*, Croom Helm, pp 69-70.

47 Pollock and Maitland (1968) p 231, cited in Edgeworth (1994) p 426.

Australia,⁴⁸ it applies in a formal way only. The substance of the tenurial relationship between lord and tenant has been gutted with the abolition of the old feudal services and incidents. Land ownership is no longer contingent upon the performance of some social function, but has become much more absolute so as to be amenable for distribution through the market economy.⁴⁹ Land ownership is now driven by individual preference and desire, with ownership being seen as a way of satisfying individual wants. The Crown as paramount lord and the font of property rights (and hence located in both the public and private spheres) has, for all practical purposes, been replaced by the state which both protects and limits property rights (and which is firmly rooted in the public sphere).

The common law construct of native title differs significantly from this vision of property rights that substantially inhere in the private sphere. Native title also inhabits a public sphere in a manner analogous to land ownership under feudalism. We are not suggesting that the deeply spiritual relationship between the Indigenous peoples of Australia and their land was replicated in feudal society.⁵⁰ What we are suggesting is that the conditional nature of native title under Australian law places native title as a property interest in the public sphere of subordination to a shared normative framework, rather than in the private realm of the satisfaction of individual (or group) preferences and desires. Our view is based on this passage in the judgment of Brennan J:

[W]hen 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 is practicable to do so).⁵¹

48 As Brennan J said in *Mabo*: '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 ...' (at 47).

49 Macpherson (1975) pp 107–8.

50 On this issue, see Council for Aboriginal Reconciliation (1994) *Understanding Country*, Key Issue Paper No 1, Australian Government Publishing Service, pp 1–7; M Dodson (1997) 'Human Rights and the Extinguishment of Native Title' in E Johnston et al (eds) *Indigenous Australians and the Law*, Cavendish, p 159; H McRae et al (1997) *Indigenous Legal Issues: Commentary and Materials*, 2nd edn, LBC, pp 87–97; and GD Meyers et al, 'Asking the Minerals Question: Rights in Minerals as an Incident of Native Title' (1997) 2 *Aust Indig L Reporter* 203, pp 205–7.

51 *Mabo* at 60 (emphasis added). It should be noted that in *Mabo*, Deane and Gaudron JJ took a slightly different view on this point. Their Honours said:

The reasoning that the existence of native title is contingent upon the observance by the Indigenous community, and their ancestors before them, of their traditional laws and customs was used by Olney J in *Yorta Yorta*⁵² as one of the bases for finding that the claimants did not have native title in that case.⁵³ His Honour stated that the effect of European settlement in the Murray area upon the Aboriginal people had been 'devastating'.⁵⁴ Disease, conflict and forced relocation caused a drastic reduction in the Aboriginal population,⁵⁵ and the 'use of indigenous languages and the observance of traditional practices' had been suppressed on the Aboriginal mission in the claim area.⁵⁶ All this amounted to a 'process of disintegration of the Aborigines' former way of life',⁵⁷ and lead Olney J to conclude:

The evidence does not support a finding that the descendants of the original inhabitants of the claimed land ... have continued to observe and acknowledge, [since 1788], the traditional laws and customs in relation to land of their forebears. The facts in this case lead inevitably to the conclusion that before the end of the nineteenth century the ancestors through whom the claimants claim title had ceased to occupy their traditional lands in accordance with their traditional laws and customs. The foundation of the claim to native title in relation to the land previously occupied by those ancestors having disappeared, the native title rights and interests previously enjoyed are not capable of revival. This conclusion effectively resolves the application for a determination of native title.⁵⁸

The 'tide of history' basis for the expiry of native title was also considered by Lee J in *Ward*.⁵⁹ His Honour said that European settlement in the

It is unnecessary, for the purposes of this case, to consider the question whether [native title rights] 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. (at 110)

52 *Yorta Yorta*. The case involved an application for a determination of native title under the *Native Title Act* made on behalf of the Yorta Yorta people in respect of certain land and waters in the Murray region of northern Victoria and southern New South Wales.

53 The other basis was the view expressed by Toohey J in *Mabo* that native title would expire on the claimant group ceasing to occupy the relevant land (at 192). See *Yorta Yorta* at paras 121, 129.

54 *Yorta Yorta* at para 63.

55 *Ibid* at para 36.

56 *Ibid* at para 117.

57 *Ibid*.

58 *Ibid* at para 129.

59 *Ward* at 514-539. The case involved an application for the determination of native title under the *Native Title Act* made on behalf of the Miriuwung and Gajerrong people in respect of certain land and waters in the East Kimberley region of northern Western Australia and the Northern Territory, an application on behalf of certain subgroups of the Miriuwung and Gajerrong

East Kimberley area, the 'conquest' of the Aboriginal people of the region and the forced relocation of many of them had 'a great impact on the ability of Aboriginal people to maintain organised communities'.⁶⁰ Many Aborigines were killed by European settlers and miners, and many died from disease and malnutrition. The introduction of the pastoral industry also had a profound impact upon traditional Aboriginal life by depriving Aborigines of their traditional sources of food, making difficult their nomadic way of life and initiating their relocation to homesteads as a source of labour.⁶¹

His Honour found that European influences had significantly impacted upon the way of life of the Aboriginal peoples in the claim area. After colonisation, the 'quarrying and flaking of stone for spear points all but disappeared', and the absorption of many Aborigines into the pastoral industry resulted in a complete reversal of the pattern of Aboriginal activity between the wet and the dry seasons.⁶² Following European settlement, certain rules relating to marriage on the basis of subsection membership 'yielded to the influence of surrounding European lifestyle',⁶³ and a new flexibility was adopted in defining sub-group membership on the basis of choice by children. Further, the relative importance of subgroups declined in favour of an increased importance upon identity with either the Miriuwung or Gajerrong communities as a whole.⁶⁴

Yet despite the adverse impact of European settlement upon the culture of the Aboriginal communities of the East Kimberley, Lee J regarded the evidence as attesting to 'a community conducted in parallel with European society organised by adherence to, an observance of, traditional laws and customs of a prior Aboriginal community'.⁶⁵ His Honour found that the evidence showed that the claimants and their ancestors had fundamentally maintained the traditional connection with their land which was necessary to support the continuation of native title.⁶⁶

Archaeological evidence demonstrated a 'continuity of use of particular areas of land prior to, and after, European colonisation, the latter being demonstrated by artefacts such as tools or trade items fashioned from materials introduced by Europeans'.⁶⁷ The study of rock paintings demonstrated that some sites 'have spiritual and mythological meanings that have been handed down through the generations'.⁶⁸ Additionally, the

people in respect of the same land and waters and an application on behalf of the Balangarra peoples in respect of Lacrosse Island, a small island in the waters claimed by the other applicants.

60 *Ward* at 515–16.

61 *Ibid.*

62 *Ibid* at 515.

63 *Ibid* at 536.

64 *Ibid* at 540–541.

65 *Ibid* at 535.

66 *Ibid* at 539.

67 *Ibid* at 514.

68 *Ibid.*

'contemporary vitality of ceremonial law and custom'⁶⁹ is manifested by: the almost universal use among the claimant groups of Aboriginal as well as European names; the ceremonial bestowal of special 'narregoo' names (names of deceased ancestors); the observation of various avoidance and taboo rules; the performance of initiation and other traditional ceremonies; the transmission of ritual knowledge and belief — including the Ngarranggarni stories — from one generation to the next; the naming of various sites of their land and an acceptance of an obligation care for the land in accordance with traditional law; the observance of rules relating to separate men's and women's law; the contemporary use of natural resources of the land in ceremonies and for tool making; and the knowledge and employment of the traditional skills of hunting, fishing, gathering and the production of bush medicines.⁷⁰

The results reached in the *Yorta Yorta* and *Ward* cases demonstrate that the recognition of native title is contingent upon the continued observance of a particular (namely 'traditional') way of life. The common law construct of native title thus takes on a distinctive feudal appearance. Unlike the property interest constituted by the modern law of freehold tenure, the property interest constituted by native title does not serve the private sphere goals of promoting the autonomy and preferences of the holders of the property right. If it did serve these goals, the claimants in *Yorta Yorta* should have succeeded. After all, the claimants were able to prove that at least some of them were the biological descendants of the inhabitants of the claimed land at the time of the Crown's acquisition of sovereignty.⁷¹ This meant that the entity which (potentially) held the property rights had continued — that is, not ceased — to exist. Yet *Yorta Yorta* demonstrates that the common law subordinates the preferences of the (potential) holders of native title by denying them the freedom to act in relation to the land in the way they want in the prevailing circumstances. The preferences of Indigenous communities are therefore subordinated to the public sphere concept of a higher social purpose or proper social ordering, namely, their observance of a lifestyle which is sufficiently 'traditional'. The real significance of this, of course, is that it is the common law, and not the relevant Indigenous community, which is charged with deciding whether the lifestyle of the (potential) native title holders warrants the continued recognition of their property interest.⁷²

In this section, we have seen not only that the common law construct of native title is inconsistent in its treatment of the public/private distinction, but also that this treatment consistently works to the disadvantage of the Indigenous peoples of Australia. By dislocating the issues of property

69 Ibid at 538.

70 Ibid at 535-536, 538.

71 *Yorta Yorta* at para 104.

72 Another potential (and related) limitation is that the use of land by native title holders other than in accordance with traditional law and custom would not receive the protection of the common law. This potential aspect of native title will be analysed below.

ownership and sovereignty, the common law does allow for the existence of a form of native title. Equally as important, however, is that this dislocation confines Indigenous aspirations for empowerment to the private sphere of property ownership and forecloses access to the public sphere of self-determination. Yet, the common law imposes restrictions upon the private sphere options of native titleholders in the enjoyment of their property rights in a manner which is more akin to public sphere notions of subordination to a perceived proper social ordering.

Static Nature of Native Title/Dynamic Nature of Common Law Property Rights

In this section, we address the issue of the limitations upon the enjoyment of native title imposed by the common law. It will be seen that, in addition to prohibiting the alienation of native title, it is likely that the Australian common law will frequently limit its protection of the uses of native title land to the uses traditionally carried out by the holders of the native title.⁷³ The static nature of the common law construct of native title in this context can be contrasted with the freedom which the common law system has claimed for its own conception of land ownership to change radically over time.⁷⁴ The dialectic between *stasis* and *dynamism* has resulted in a conception of native title as a limited and feudal-like property right when seen against the backdrop of the development of common law freehold tenure from its feudal origins to the present day.

The static nature of native title: Restrictions on protected use

A number of commentators have argued that the common law construct of native title does not confine its protection to traditional uses of the land. Wootten and Pearson argue that the reference by the High Court in *Mabo* to the traditional laws and customs of an Indigenous group is only relevant in determining the rights of the members of the group *inter se*.⁷⁵ They argue

73 We say that the common law 'protects' rather than 'permits' certain uses of native title land for the following reason. To say that the common law permits certain uses of native title land suggests that if the native title holders engage in a use of the land which is not so permitted, they have performed an act which is wrongful (and will thus incur legal liability) even in the absence of some express legal prohibition. To say that the common law 'protects' certain uses of native title land does not suggest the foregoing. Rather, it suggests that the common law will prohibit a third party from interfering with the performance by the native title holders of a protected use of the land, but that it will not prohibit the interference with non-protected uses.

74 We use the term 'common law system' in contradistinction to non-Indigenous law, and we use it in the expansive sense of the body of general law rules as supplemented or altered by statute.

75 H Wootten, 'Mabo: Issues and Challenges' (1994) 1 *Judicial R* 303, pp 330-8; N Pearson (1996) 'The Concept of Native Title at Common Law' in *Land Rights - Past, Present and Future: Conference Papers*, Northern and Central Land Councils, p 118.

that as against non-native titleholders, the communal title of the relevant group carries something approaching full beneficial title. Standing in the way of this optimistic view, however, are statements in *Mabo* which presage that only traditional uses of land will be protected by the construct of native title. Brennan J stated:

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.⁷⁶

In the same vein, Deane and Gaudron JJ stated:

Since [native] 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.⁷⁷

The issue about the scope of the protected use of native title land is muddied by statements of Brennan J and Deane and Gaudron JJ about the potential for the development of the traditional laws or customs which delimit the content of native title. Their Honours thought that the development of traditional law and custom would not result in an extinguishment of native title, provided that the essential relationship or connection between the group and their land remains.⁷⁸ The precise boundary between the evolution of tradition, on one hand, and the replacement of it, on the other, is not clear.⁷⁹ Meyers, Piper and Rumley raise the possibility that the traditional use by Aborigines of various minerals may allow, under the auspices of native title, the commercial extraction of minerals by modern technological means.⁸⁰ In Canada, however, the courts have not allowed much scope within the context of Aboriginal rights for a traditional non-commercial use of land to metamorphose into a traditional commercial one.⁸¹ A similar tendency can be detected in the Federal Court of Australia in *Yarmirr*.⁸² In that case, Olney J had little difficulty in finding that the

⁷⁶ *Mabo* at 58.

⁷⁷ *Ibid* at 110.

⁷⁸ *Ibid* at 70 per Brennan J; at 110 per Deane and Gaudron JJ. Also see *Ward* at 538, 539.

⁷⁹ RH Bartlett (1993b) 'The Source, Content and Proof of Native Title at Common Law' in RH Bartlett (ed) *Resource Development and Aboriginal Land Rights in Australia*, Centre for Commercial and Resources Law, p 45; and RH Bartlett, 'The Mabo Decision' (1993a) 1 *Aust Prop LJ* 236, p 249.

⁸⁰ Meyers et al (1997) pp 221–31.

⁸¹ See the text accompanying notes 87–90.

⁸² The case involved an application for a determination of native title under the *Native Title Act* made on behalf of the Mandilarri-Ildugij, Mangalara, Murran,

traditional laws and customs of the claimants gave rise to native title rights to 'fish and hunt for the purpose of satisfying their personal, domestic [and] non-commercial communal needs'.⁸³ By contrast, his Honour was disposed to conclude that the traditional laws and customs of the native title holders did not support native title rights to trade in the resources of the claimed sea areas. This was despite the fact that there was 'some evidence that in the past the ancestors of some of the applicants engaged in a form of trade both amongst themselves and with Macassan trepangers'.⁸⁴ In the final analysis, however, his Honour found that there was no evidence 'to suggest that trade in the resources of the claimed area formed part of the traditional customs of the applicants' ancestors...'.⁸⁵

This reluctance of Canadian and Australian courts to find that native title will allow the use of land for something other than subsistence or ceremonial purposes might be countered by the recent decision of the Supreme Court of Canada in *Delgamuukw*.⁸⁶ This decision distinguished the institution of *Aboriginal title* from the institution of *Aboriginal rights*, and outlined the consequences which flow from this distinction. We will consider this aspect of the decision in some detail, so that its relevance to the Australian context can be assessed.

The Canadian institution of Aboriginal title

Aboriginal rights are activities which formed, at the time prior to European contact,⁸⁷ 'an element of a practice, custom or tradition integral to the distinctive aboriginal culture of the aboriginal group claiming the right'.⁸⁸ By and large, the Canadian courts have construed the content of these rights narrowly,⁸⁹ so that a traditional practice of fishing for subsistence and ceremonial purposes has been seen as not establishing a Aboriginal right to fish for commercial purposes.⁹⁰

By contrast, in *Delgamuukw*, Lamer CJ described the concept and the scope of Aboriginal title in this way.

Gadura, Minaga and Ngaynjaharr peoples in respect of certain sea areas in the Croker Island region of the Northern Territory.

83 *Yarmirr* at 439.

84 *Ibid* at 423.

85 *Ibid* at 425.

86 The case involved a claim by hereditary chiefs of the Gitksan and Wet'suwet'en peoples, on behalf of themselves individually and their Houses, for Aboriginal title over 58,000 square kilometres of land in British Columbia.

87 *R v Van der Peet* [1996] 2 SCR 507 (hereafter *Van der Peet*) at 554-555 per Lamer CJ (La Forest, Gonthier, Cory, Iacobucci and Major JJ concurring).

88 *Ibid* at 549.

89 See J Gray, 'O Canada: Van Der Peet as Guidance on the Construction of Native Title Rights' (1997) 2 *Aust Indig L Reporter* 18, pp 33-4.

90 See, for example, *Van der Peet* and *R v NTC Smokehouse Ltd* [1996] 2 SCR 672.

Aboriginal title is a right in the land and, as such, is more than the right to engage in specific activities which may themselves be Aboriginal rights. Rather, it confers the right to use land for a variety of activities, not all of which need be aspects of practices, customs and traditions which are integral to the distinctive cultures of aboriginal societies. Those activities do not constitute the right *per se*; rather, they are parasitic on the underlying title. However, the range of uses is subject to the limitation that they must not be irreconcilable with the nature of the attachment to the land which forms the basis of the particular group's aboriginal title. This inherent limit ... flows from the definition of aboriginal title as a *sui generis* interest in land, and is one way in which aboriginal title is distinct from a fee simple.⁹¹

Aboriginal title carries with it the right to exclusive use and occupation of the land for a variety of 'non-traditional' purposes.⁹² Mineral rights are included in Aboriginal title.⁹³ The uses to which Aboriginal title land may be put do not include uses which are 'irreconcilable with' or which would destroy the 'special bond between the group and the land in question'.⁹⁴ Thus, according to Lamer CJ, Aboriginal title would not allow land traditionally used as a hunting ground to be used for strip mining, nor would it allow land of ceremonial or cultural significance to be used as a parking lot.⁹⁵

Clearly, even with the limitation just mentioned, Aboriginal title permits a wider range of activities than Aboriginal rights. Whereas Aboriginal rights must be referable to traditional activities, Aboriginal title has an existence which is logically independent from the various activities which it protects and which are parasitic upon it. However, in terms of the requisite connection between a claimant Aboriginal group and particular land, the requirement for the existence of Aboriginal title is more demanding than the test for the existence of an Aboriginal right.⁹⁶

In order to found a claim of Aboriginal title, the group must prove that it was in exclusive occupation of the land prior to the Crown's acquisition of sovereignty,⁹⁷ and that it has maintained a substantial connection with the land since then.⁹⁸ However, in determining the question of exclusive occupation, a court must place equal weight on both the perspectives of the common law and Aboriginal law and *de facto* practice.⁹⁹ Thus, the common law's emphasis upon exclusive physical occupation¹⁰⁰ is ameliorated by the

91 *Delgamuukw* at 1080-1081 per Lamer CJ (Cory, McLachlin and Major JJ concurring).

92 *Ibid* at 1083.

93 *Ibid* at 1086-1087.

94 *Ibid* at 1083, 1089 respectively.

95 *Ibid* at 1089.

96 *Ibid* at 1094-1095, 1106.

97 *Ibid* at 1097.

98 *Ibid* at 1102-1103.

99 *Ibid* at 1099-1101, 1104-1105.

100 Physical occupation can be shown by a range of activities from:

possible role of Aboriginal law in providing an explanation for the presence of other Aboriginal groups on the land.¹⁰¹ For example, the law of the claimant group may explain the presence of another group on the land in a number of ways. The presence may be regarded as a trespass, or as being voluntarily consented to, or as permitted by treaty.¹⁰²

The relevance of the Canadian distinction to Australia

We have outlined the distinction drawn by the Canadian courts between the institutions of Aboriginal title and Aboriginal rights and the concomitant distinction in the range of land uses protected by these institutions. We now need to examine the relevance of this learning to the issue of the range of uses protected by the common law construct of native title in the Australian context.

Although none of the Australian cases have squarely considered the relevance to Australian law of the Canadian distinction between Aboriginal title and Aboriginal rights, the case which comes closest to doing so is *Ward*. In that case, a number of aspects of Lee J's judgment clearly show that his Honour regarded native title as it exists in Australian law under the *Native Title Act* as conforming more closely to the Canadian institution of Aboriginal title rather than the institution of Aboriginal rights.¹⁰³

First, after considering the distinction between Aboriginal title and Aboriginal rights in the Canadian cases, Lee J described native title by adopting the language Lamer CJ used in *Delgamuukw* to describe the insti-

the construction of dwellings through cultivation and enclosure of fields to regular use of definite tracts of land for hunting, fishing or otherwise exploiting its resources ... [assessed in light of] the group's size, manner of life, material resources, and technological abilities, and the character of the lands claimed. (ibid at 1101, reference omitted)

101 Ibid at 1104–1105.

102 Ibid at 1105.

103 Indeed, *Ward* may be read as positing native title as a form of land ownership which is relatively more favourable to Indigenous people than the Canadian institution of Aboriginal title. First, although Lee J did refer (at 505) to the caveat of Lamer CJ that Aboriginal title does not protect non-traditional uses of land which are incompatible with the special on-going bond between Indigenous peoples and their land (see text accompanying notes 91–95), Lee J did not include this caveat in his description (at 639–640, 645) of the nature and extent of the claimants' native title. Secondly, unlike Lamer CJ in relation to Aboriginal title (see text accompanying notes 97–102), Lee J did not expressly state that the wide range of uses permitted by native title was contingent upon the *exclusive* occupancy of the land by the ancestors of the claimant group. According to Lee J:

At common law, native title in land will exist at the date of sovereignty if an [I]ndigenous community had an entitlement to *use or occupy* the land at that time, that entitlement arising from local recognition that the *presence* of the community on the land reflected a particular *relationship*, or *connection*, between that community and the land. (at 500, emphasis added, reference omitted)

tution of Aboriginal title. According to Lee J, native title is not a 'mere "bundle of rights"', but rather a 'communal "right to the land"' which gives rise to rights which are 'parasitic' upon native title.¹⁰⁴

Secondly, Lee J contradistinguished native title from a "freestanding" usufructuary right' of Aboriginal persons which might potentially exist under Australian law.¹⁰⁵ The use of the term 'free-standing' is reminiscent of the Canadian concept of Aboriginal rights which are independent from, and not 'parasitic' upon, an underlying Aboriginal title.¹⁰⁶ Thus, Lee J saw native title as being very different from a right analogous to the Canadian institution of Aboriginal rights.

Finally, Lee J gave the claimants' native title a content which is at least as wide as that afforded to the holders of Aboriginal title under Canadian law.¹⁰⁷ Lee J determined that except where the claimants' native title had been extinguished, and subject to its co-existence with interests created by the Crown, the claimants were entitled, *inter alia*, to: 'possess, occupy, use and enjoy'; 'make decisions about the use and enjoyment' of; 'control the access of others' to; 'use and enjoy [the] resources' of; 'control the use and enjoyment of others of [the] resources' of; and 'trade in [the] resources' of, the claimed land.¹⁰⁸ In so doing, Lee J did not limit these entitlements to

104 *Ward* at 508. See the passage from the judgment of Lamer CJ quoted in the text accompanying note 91.

105 *Ward* at 615. His Honour claimed that such a right was asserted — ultimately unsuccessfully — by the respondent in *Eaton v Yanner*; *Ex parte Eaton* (unreported, Court of Appeal (Qld), 27 February 1998). With respect, this appears to be an inaccurate characterisation of the form of legal recognition of Aboriginal hunting rights for which Yanner argued before the Queensland Court of Appeal. Yanner argued that he had a *native title* right to hunt crocodiles on his traditional lands and waterways, not an independent or 'freestanding' Aboriginal right. The Court of Appeal did consider, as an alternative to native title recognition, that Yanner's claimed right to hunt could be characterised as a common law right to hunt. However, the latter is a right which arises at common law by virtue of the claimant's status as an owner or occupier of the land in question; it is not a distinctive Aboriginal right. By majority (McPherson JA and Moynihan J), the Court of Appeal ruled that the native title hunting right claimed by Yanner had been extinguished in 1974 by amendments to the *Fauna Conservation Act 1954* (Qld) which removed a statutory exemption from the s 54(1)(a) prohibition on the killing and taking of native animals previously applied to Aborigines and which purported to vest in the Crown ownership of all fauna covered by the Act (s7). Fitzgerald P dissented, ruling that the 1974 amendments regulated but did not extinguish native title hunting rights. Yanner has been granted special leave to appeal by the High Court of Australia.

The existence of an Aboriginal right to hunt in Australian law, independent of native title, has been postulated by D Sweeney, 'Fishing, Hunting and Gathering Rights of Aboriginal Peoples in Australia' (1993) 16(1) *UNSWLJ* 97, but apart from the comments of Lee J in *Ward*, there is no firm judicial authority for this proposition.

106 See text accompanying notes 87–91.

107 See the first paragraph of note 103.

108 *Ward* at 639, see also at 645 (there is a slight difference in wording between the

those practices which were encompassed by the traditional laws and customs of the claimants. This stands in sharp contrast to the uses protected under the Canadian institution of Aboriginal rights.¹⁰⁹ According to Lee J, the native title holders are entitled to engage in these uses of the claimed land, 'by reason of the existence of native title'.¹¹⁰ This language is again consistent with the notion of protected uses being parasitic upon the institution of native title which is logically prior to the various uses of the land which it protects.

Thus, *Ward* supports the view that the common law construct of native title in Australia can protect a wide range of non-traditional uses of land in the same way that these uses are protected by the Canadian institution of Aboriginal title. It does so both directly, in terms of the wide range of protected uses which Lee J expressly sets out in describing the nature and incidents of native title,¹¹¹ as well as indirectly, by describing native title in terms analogous to Aboriginal title and inconsistent with Aboriginal rights.¹¹²

Of course, *Ward* is a first instance decision of the Federal Court. Let us examine how the Canadian distinction between Aboriginal title and Aboriginal rights aligns with what can be extracted from the High Court's statements about the content of the common law construct of native title.

The reference in *Mabo* to the content and incidents of native title as being determined by the *traditional* law and custom of the *particular* Indigenous group¹¹³ appears to parallel the Canadian conception of Aboriginal rights as protecting the performance of a series of separately identifiable traditionally-based activities.¹¹⁴ Similarly, in the High Court case of *Fejo*, Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ, by way of *obiter dicta*, referred to 'rights which together constitute native title',¹¹⁵ and then went on to explain:

[t]he rights of native title are rights and interests that relate to the *use of the land* by the holders of native title. For present purposes let it be assumed that those rights may encompass a right to hunt, to gather or to fish, a right to conduct ceremonies on the land, a right to maintain the land in a particular state or other like rights and interests.¹¹⁶

Determination and the Order of Lee J).

109 See text accompanying notes 87–90.

110 *Ward* at 645; see also at 639.

111 See text accompanying note 108.

112 See text accompanying notes 104–106.

113 See the text accompanying notes 76–77.

114 See the text accompanying notes 87–90.

115 *Fejo* at 737.

116 *Ibid* (emphasis added); also see at 757 per Kirby J.

This description of native title appears to be inconsistent with the Canadian conception of Aboriginal title as a right *in* land which is logically prior to, and in fact supports, a wide range of traditional and non-traditional land uses. Like the statement in *Mabo* just referred to, it suggests that native title in Australia conforms to the Canadian institution of Aboriginal rights. This, of course, raises the possibility that the Australian courts may tightly limit the uses of land protected by native title to those uses traditionally carried out on the land, in the same way that the Canadian courts have done with Aboriginal rights.

Bearing in mind the foregoing analysis, there is also some support in the High Court's consideration of the nature of native title for the proposition that in Australian law native title conforms to the Canadian institution of Aboriginal *title*. In the judgment of Brennan J in *Mabo*, sitting side by side with the references to traditional law and custom determining the content of native title are references to the importance of exclusive possession of the claimant Indigenous group. A prominent example of this is the statement of Brennan J that:

[i]f it be necessary to categorise 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.... 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.¹¹⁷

As conceptualised in this passage, native title bears an extremely close resemblance to Aboriginal title as represented in *Delgamuukw*. Both are regarded as a communal interest in land based on the exclusive occupancy of an Indigenous group. This being so, strong arguments can be made for the same width of potential uses allowed under Canadian Aboriginal title also being allowed under Australian native title founded upon an Indigenous group's *exclusive possession*. The Order made in the *Mabo* case supports this view. The High Court declared that in respect of the lands over which their native title subsisted, the Meriam people were 'entitled *as against the whole world* to the *possession* [and] *occupation*', as well as the 'use and enjoyment' of those lands.¹¹⁸ The coincidence of the concepts of exclusive possession and unqualified use and enjoyment is certainly consistent with the Canadian learning on Aboriginal title.

It may be, then, that in the Australian context, the common law construct of native title is not singly wedded to *either* Aboriginal title or Aboriginal rights as these concepts have been defined in the Canadian case

117 *Mabo* at 51.

118 *Ibid* at 217 (emphasis added).

law. Rather, the High Court may be seen as having laid the foundations for conceptualising native title as encompassing *both* Aboriginal title and Aboriginal rights, with the content given to it depending upon the particular circumstances of the individual case. Thus, where the relevant Indigenous group was in exclusive possession of the relevant land at the time of the acquisition of sovereignty, the form of native title which may be constructed by the common law will conform to Aboriginal title, and a wide range of traditional and non-traditional uses of the land will be protected. By contrast, where the relevant Indigenous group was not in exclusive possession of the relevant land at the time of the acquisition of sovereignty, then the form of native title constructed will conform to Aboriginal rights, and only certain traditional uses of the land will be protected.

It must be noted, however, that even if the common law construct of native title does have this compendious nature, there may be little scope for successful native title claims in Australia based upon exclusive possession if the Australian courts as a whole adopt the approach taken by Olney J in *Yarmirr*, rather than that taken by Lamer CJ in *Delgamuukw*. We have seen that Lamer CJ gave a prominent role to 'the [A]boriginal perspective on land' in determining the question of exclusive possession.¹¹⁹ Two aspects of the judgment of Olney J in *Yarmirr* indicate that his Honour placed very little emphasis on Aboriginal conceptions of relationships with land.

First, and at a general level, his Honour rejected the relevance of the fact that under the traditional law of the claimants, the claimed area was their 'country'. Instead, his Honour found that the claimants' native title rights had to be determined by reference to the Western view of property as a bundle of individual, ascertainable rights.¹²⁰

Secondly, and at a more specific level, Olney J used particularities of the claimants' traditional law in a negative way so as to deny their claim of the exclusivity of their interest. On the question of whether the claimants and their ancestors had exclusive possession of the claimed area, Olney J found that under their traditional law, the claimants' right to exclude was limited to other Aborigines, and did not apply to non-Aborigines who generally had no understanding of Aboriginal law.¹²¹ His Honour fastened onto this fact to deny the claim of exclusivity. Unlike Lamer CJ in *Delgamuukw*,¹²² Olney J did not consider whether it was appropriate to defer to an explanation provided by the claimants' law for the presence of others on the land.

These two facets of the judgment of Olney J place a premium on Western notions of exclusivity rather than on Aboriginal conceptions of

119 See the text accompanying notes 99–102. In *Ward* at 500–501 Lee J advocated a similar approach with regard to the existence of native title.

120 *Yarmirr* at 414. For examples of a detailed articulation of the view of property as a bundle of rights, see WN Hohfeld (1919) *Fundamental Legal Conceptions As Applied in Judicial Reasoning*, ed WW Cook, Yale University Press; and AM Honore (1961) 'Ownership' in AG Guest (ed) *Oxford Essays in Jurisprudence*, Clarendon Press.

121 *Yarmirr* at 422.

122 See the text accompanying note 119.

ownership. Thus, if the approach taken by Olney J in *Yarmirr* is applied, there seems little scope for the success of native title claims based upon exclusivity of possession. This suggests that successful native title claims will fall (to the extent that the Canadian dichotomy is relevant) within the Aboriginal rights basket, rather than the Aboriginal title basket. Thus, (again to the extent that the Canadian learning is relevant to the Australian context), native title usually would permit, at most, only traditional uses of the relevant land.¹²³

The static nature of native title: Prohibition on alienation

We have considered the complex question as to the range of protected uses that may be carried out upon native title land. However, one restriction upon native title that is clearly beyond doubt is that it cannot be alienated.¹²⁴ The rationale given for this prohibition by Brennan J is that the right to alienation is not present under the traditional law and custom from which native title is derived.¹²⁵ The right to alienate is, of course, a key element in the bundle of common law property rights.¹²⁶

The static nature of Native Title: Concluding remarks

The two features of native title we have identified — the reduced range of protected uses and the lack of alienability — both allegedly have their source in the content of native title holders' traditional law and custom. What this completely ignores, however, is the that:

Aboriginal peoples have laws, traditions, customs and practices which have developed, grown, changed — and have been invented — as Aboriginal people have struggled for physical and cultural survival [following European colonisation].¹²⁷

And if the purpose of the common law's recognition of native title is to secure the physical and cultural survival of Indigenous people, then to hold that only the subsistence and ceremonial uses of land carried out prior to colonisation is compatible with Aboriginal tradition completely subverts that teleology. Borrows and Rotman argue that any contemporary Aboriginal practice — such as the commercial sale of fish — which has been

123 We say 'at most' because of the possibility of even traditional uses being denied to native title holders on the basis that their native title has been partially extinguished by, for example, the grant by the Crown of an inconsistent interest in the land. This issue is considered below.

124 *Mabo* at 59–60 per Brennan J; at 110 per Deane and Gaudron JJ; *Ward* at 500.

125 *Mabo* at 59.

126 In *Milrrpum v Nabalco Pty Ltd* (1971) 17 FLR 141, one of the reasons given by Blackburn J for the common law not recognising Indigenous property rights was that these rights were not alienable.

127 J Borrows and LI Rotman, 'The *Sui Generis* Nature of Aboriginal Rights: Does it Make a Difference?' (1997) 36 *Alberta LR* 9, p 36.

adopted to fulfil a cultural and physical need brought about by colonisation should receive recognition and protection by the common law, regardless of the length of time the practice has been recognised.¹²⁸

The dynamic nature of common law property rights

We find the above argument against a restricted range of permitted uses of native title land persuasive. We now assert our own, complementary argument: in denying Indigenous legal systems the capacity to develop so as to overcome restrictions on use and alienation, the courts have ignored the way in which common law property rights in land have themselves radically changed over time. For our purposes, we will focus upon the transformation of the ownership of land from a method underpinning the political allegiance of a particular tenant to a particular lord, to a means of exploiting a resource for the satisfaction of personal desires and preferences.

The first aspect of this transformation relates to the dramatic increase in the alienability of land brought about by the enactment of the *Statute of Quia Emptores* in 1290. At common law, the tenurial nature of land ownership provided a fetter upon the alienation of land. An interest in land could not be transferred (in feudal parlance, 'substituted') so as to break the tenurial relationship between the transferor tenant and their lord without the consent of that lord. It was possible for a tenant to 'subinfeudate' their interest in the land, thus creating a tenurial relationship between the grantor tenant and the grantee, but leaving the grantor tenant's relationship with their lord intact.¹²⁹

The enactment of *Quia Emptores* altered this position by allowing (with some minor exceptions) the transfer of land by substitution without the need for the lord's consent. The transferee tenant would then hold the land directly from the lord of the transferor tenant. The transferor tenant would no longer hold an interest in the land and thus would no longer be in a tenurial relationship with their former lord.¹³⁰ *Quia Emptores* thus worked a major reform in the history of land law.¹³¹

The second aspect of the transformation of the common law vision of land ownership is the metamorphosis of land ownership from a contingent (and public) to a non-contingent (and private) phenomenon. We noted

128 Ibid at 41. Janice Gray makes a similar point in noting the contrary messages which the Canadian jurisprudence on Aboriginal rights sends to the Indigenous peoples of Canada. They are expected to (i) live within a wider society whose economic and social structure has been profoundly shaped by European colonisation, yet (ii) not modify their own traditions and practices (at least if they want their 'Aboriginal rights' with regard to land recognised by the common law) in response to this colonisation: Gray (1997) p 33.

129 P Butt (1996) *Land Law*, 3rd edn, LBC, para 415.

130 Ibid, paras 415–16. Also see Baker (1990) pp 273–4. The substance of *Quia Emptores* has been preserved in New South Wales in the *Imperial Acts Application Act* 1969 (NSW) s 36. See Butt (1996) para 421.

131 It has been described as a 'pillar of [modern] English real property law': RP Meagher et al (1984) *Equity: Doctrines and Remedies*, 2nd edn, Butterworths, p xi.

above how, in the feudal era, property rights in land were contingent upon the performance of varying types of services by the tenant to the lord.¹³² Over time, the various types of tenure were rationalised, and the required services were commuted to a money payment, which itself was eventually abolished. A major landmark in this process was the enactment of the *Tenures Abolition Act* in 1660, which converted all tenures into socage tenure and abolished most feudal incidents.¹³³ As a result of these reforms, the ownership of land is no longer contingent upon the performance of an obligation owed to the Crown in its capacity of the ultimate 'owner' of the land.

Stasis, dynamism and the re-feudalisation of Australian land law

This brief treatment of several centuries of land law shows that the feudal notion of land as cementing the very personal nature of the tenurial relationship between a particular lord and a particular tenant has been completely displaced at the level of legal doctrine. The ownership of land is now seen as a means of satisfying private desires and preferences. The attitude of the common law with regard to native title can therefore be seen as hypocritical. The common law has denied Indigenous law and custom the same capacity for development that it has appropriated to itself. The common law has left the Indigenous people of Australia with a property interest which, because of its limited nature (in terms of protected use and alienability), can be described as feudal-like. Such an interest is one which the common law has long since abandoned for its own purposes.

Native Title and the Common Law Vision of Property: Transcendence and Enslavement

In this section, we examine how the common law construct of native title exhibits the dialectic of transcendence and enslavement in the context of the common law's own vision of how property exists. After this examination, we will then note how the ability of native title to co-exist with other property interests is reminiscent of the feudal paradigm of land ownership, rather than the contemporary one of exclusivity.

Native title and the transcendence of the common law

Native title, as constructed by the common law, transcends the common law's own vision of property in a number of ways.¹³⁴ Most obviously, native

132 See notes 43–44 and the text accompanying them.

133 See Butt (1996) paras 418–24, esp paras 420–1. The substance of the *Tenures Abolition Act* 1600 (Eng) has been preserved in New South Wales by the *Imperial Acts Application Act* 1969 (NSW) s 37.

134 In fact, in *Mabo* only Brennan J was prepared to call native title 'property' (at 51–52). Deane and Gaudron JJ said that native title was personal only and did not constitute an interest in land (at 88–89); although elsewhere in their judgments their Honours made statements to the effect that native title was

title is not derived from a Crown grant¹³⁵ and exists outside the common law doctrines of tenure and estates.¹³⁶ Additionally, although native title may be analogous to common law interests such as the fee simple, *profit à prendre* and easement,¹³⁷ the existence and content of native title are not determined by the common law rules relating to the validity of, or rights attaching to, these common law interests.¹³⁸ Rather, the existence and content of native title derive from, first, the traditional customs and laws of the relevant Indigenous group¹³⁹ and secondly, special common law rules relating specifically to the non-recognition and extinguishment of native title.¹⁴⁰ This means that native title can encompass rights and interests which have no parallel in the common law of real property. In both *Yarmirr* and *Ward*, for example, the respective sets of native title rights were held to include the right to safeguard cultural and spiritual knowledge.¹⁴¹ Indeed, in contrast to the position taken by Blackburn J in *Milirrpum v Nabalco Pty Ltd*,¹⁴² the majority in *Mabo* was keen to point out that the dissimilarity between Aboriginal and common law proprietary interests was no obstacle to the latter recognising the former.¹⁴³

Another example of the transcending aspect of native title is its communal nature.¹⁴⁴ Although native title rights which are proprietary can be held by individuals, usually the native title rights of individuals are

proprietary: see the passages referred to in K McNeil, 'Racial Discrimination and Unilateral Extinguishment of Native Title' (1996) 1 *Aust Indig L Reporter* 181, p 207, n 182. Toohey J described the debate as to whether native title was personal or proprietary as 'fruitless' (*Mabo* at 195). For an analysis of the consequences arising out of a characterisation of native title as property, see RH Bartlett, 'The Proprietary Nature of Native Title' (1998b) 6 *Aust Prop LJ* 77.

135 *Mabo* at 64 per Brennan J.

136 As Brennan J stated in *Mabo* (at 59): 'Native title, though recognised by the common law, is not an institution of the common law...'. Also see *Fejo* at 737 per Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ.

137 See GD Meyers (1994) 'Aboriginal Rights to the "Profits of the Land": The Inclusion of Traditional Hunting and Fishing Rights in the Content of Native Title' in R Bartlett and GD Meyers (eds) *Native Title Legislation in Australia*, Centre for Commercial and Resources Law, pp 222-3; and Meyers et al (1997) pp 120-1.

138 *Ward* at 498.

139 *Mabo* at 58 per Brennan J.

140 See McNamara and Grattan (forthcoming).

141 *Yarmirr* at 426-427, 439; *Ward* at 640, 645.

142 (1971) 17 FLR 141. In that case, his Honour relied upon the marked differences between Indigenous relationships with land and common law concept of property to deny recognition of native title under the common law (at 272-273).

143 *Mabo* at 49-52 per Brennan J; at 83-86 per Deane and Gaudron JJ; at 187 per Toohey J.

144 *Ibid* at 51-52 per Brennan J; at 109-110 per Deane and Gaudron JJ; at 178-179 per Toohey J.

usufructuary, and rely for their existence upon an underlying communal title held by the relevant Indigenous group.¹⁴⁵ Although the concept of a communal title — in the inter-generational sense rather than co-ownership among individuals by joint tenancy or tenancy in common — is not unknown to the common law, it exists only in very limited circumstances.¹⁴⁶ The rules against perpetuities and non-charitable purpose trusts are common law doctrines which have been used to strike down attempts to create communal property interests.¹⁴⁷

The enslavement of Native Title by the common law

Having examined the way in which the common law construct of native title transcends the common law's own vision of property, we now look at the way in which it is enslaved by that vision. We will see that a fundamental way in which the construct of native title is subordinated to the common law's concept of property is the susceptibility of native title to complete or partial extinguishment by inconsistent common law property interests.¹⁴⁸

There are numerous examples of this phenomenon of extinguishment in the Australian native title jurisprudence. In *Fejo*, the High Court held that the grant of a fee simple by the Crown completely and permanently extinguished all native title rights which may have existed in the relevant land, even though the land may have subsequently become vacant Crown land through resumption.¹⁴⁹ In *Mabo*, because of the possibility of extin-

145 Ibid at 51–52 per Brennan J; *Mason v Tritton* (1994) 34 NSWLR 572 at 582 per Kirby P.

146 In *Wik*, Gummow J said:

there is no particular reason to be drawn from English land law which renders it anomalous to accommodate in Australian land law notions of communal title which confer usufructuary rights. There are recognised in England rights of commons which depend for their establishment upon prescription and custom. An example is the common of pasture in gross enforceable by action by one commoner on behalf of that commoner and the other commoners. (at 177, reference omitted)

147 See, for example, *Leahy v Attorney-General for New South Wales* [1959] AC 457 (purported gift to an unincorporated religious order); and *Bacon v Pianta* (1966) 114 CLR 634 (purported gift to an unincorporated political party).

148 *Mabo* at 63–64 per Brennan J; at 89–90 per Deane and Gaudron JJ. Of course, the position has now been affected by the *Native Title Act*. Part 2, Division 2B of the *Act* — inserted by the *Native Title Amendment Act 1998* (Cth) — confirms the complete or partial extinguishment of native title by certain acts done on or before 23 December 1996 which constitute either a 'previous exclusive possession act' (as defined in s 23B) or a 'previous non-exclusive possession act' (as defined in s 23F), respectively. In *Ward*, Lee J said that this statutory regime 'purports to confirm the operation of the common law' (at 635). Part 2, Division 3 of the *Act* provides a level of protection for native title against complete or partial extinguishment from 1 January 1994 (or exceptionally from some other date) by the regulating the doing of a 'future act' (as defined in s 233).

149 *Fejo* at 736 per Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and

guishment, the High Court expressly framed its declaration regarding the existence of native title to exclude land subject of leases granted by the Crown.¹⁵⁰ In *Wik*, a High Court, although divided on certain issues, was unanimous in respect of the position where the Crown grants an interest (such as a pastoral lease) which is wholly or partly inconsistent with native title. All of their Honours agreed that the rights under a Crown grant take effect according to their tenor, and that native title is extinguished to the extent of the inconsistency.¹⁵¹ In *Yarmirr*, Olney J held that the claimants' native title rights in the minerals in the seabed and subsoil of the claimed area had been extinguished by legislation which vested the title to such minerals in the Crown.¹⁵² Further, the claimants' native title rights had to 'yield' to the rights of the lessee under a statutory lease granted by the Northern Territory for the purpose of commercial pearl culture.¹⁵³ In *Ward*, Lee J held that the claimants' native title rights were 'concurrent' with a plethora of interests granted by the Crown in the claimed land, and that the claimants' native title 'may be regulated, controlled, curtailed, restricted, suspended or postponed', by virtue of 'the nature and extent' of those interests granted by the Crown.¹⁵⁴

The enslavement of the common law construct of native title by the common law's vision of property rights is further demonstrated by the test for the extinguishment of native title employed by the High Court. This test, which we will discuss shortly,¹⁵⁵ adopts the common law's method for demarcating property rights on the basis of the underlying rights, rather than the mode of use actually carried out pursuant to those rights.

The importance of the legal inconsistency of competing rights, rather than the possibility of the physical co-existence of competing modes of use, to the common law vision of property can be seen with regard to airspace trespass. In *LPJ Investments Pty Ltd v Howard Chia Investments Pty Ltd (No 2)*, Hodson J enunciated the following rule for determining whether an incursion by one land owner into the airspace above the land of another is actionable.

Callinan JJ; at 756 per Kirby J. The common law position has been confirmed by the *Native Title Act* s 237A.

150 *Mabo* at 217.

151 *Wik* at 85 per Brennan CJ (Dawson and McHugh JJ concurring); at 132–133 per Toohey J (Gaudron, Gummow and Kirby JJ concurring on this point). See RH Bartlett, 'The Fundamental Significance of *Wik v State of Queensland* in the High Court of Australia' [1997a] 2 *Can Native L Reporter* 1, pp 3–8; K McNeil, 'Co-existence of Indigenous Rights and Other Interests in Land in Australia and Canada' [1997] 3 *Can Native L Reporter* 1, pp 1–6; and S Dorsett, "Clear and Plain Intention": Extinguishment of Native Title in Australia and Canada post-*Wik*' (1997) 6 *Griffith LR* 96, pp 110–17.

152 *Yarmirr* at 437–438.

153 *Ibid* at 438.

154 *Ward* at 640.

155 See the text accompanying notes 157–162.

I think the relevant test is not whether the incursion actually interferes with the occupier's actual use of the land at the time, but rather whether it is of a nature and at a height which *may* interfere with the ordinary uses of the land which the occupier *may* see fit to undertake.¹⁵⁶

This test seeks to demarcate a landowner's interest in the airspace above their land to a height which they can reasonably use. Once this has been done, then the right of the landowner to the exclusive enjoyment within the allocated space is enough to legally displace the appropriation of that space by other landowners. The fact that the airspace could be physically used by both is irrelevant. The allocation of legal rights carries the day.

That the same approach applies to the issue of the extinguishment of the common law construct of native title by an interest granted by the Crown to a third party, has been made clear by the High Court. In *Wik*, although the High Court was divided on the question of the exact rights which had been granted under the relevant pastoral leases,¹⁵⁷ a majority of their Honours agreed that native title is extinguished (to the extent of the inconsistency) when the *rights* granted by the Crown to a third party are inconsistent with the *rights* of the native title holders.¹⁵⁸ This approach was

156 (1989) 24 NSWLR 490 at 495 (original emphasis).

157 See the text accompanying note 167.

158 *Wik* at 85–88 per Brennan CJ (Dawson and McHugh JJ concurring); at 126 per Toohey J; at 233–238 per Kirby J. In *Wik* at 166–167 per Gaudron J, and at 203 per Gummow J, and in the judgment of Lee J in *Ward* at 618, their Honours made statements to the effect that, in some circumstances, native title is extinguished by the exercise of the rights of the third party grantee (in satisfying conditions contained in the grant), rather than the grant of the rights themselves. These statements do not undercut the legal inconsistency test. Their Honours were considering the situations of the grant of pastoral leases which did not carry the right to exclusive possession. Native title, therefore, had not been completely extinguished. What their Honours were thus dealing with was a case of partial extinguishment of native title, where generally it will only be possible to determine how the rights of the native title holder and the rights of the third party grantee co-exist once the content of both sets of rights are known. Their Honours' statements only go as far as saying that it is possible to say, *a priori* that whatever the content of the rights of the native title holders may be, those rights are extinguished over those parts of the land which have undergone significant physical development. In this way, factual inconsistency is not a substitute for legal inconsistency, but operates cumulatively with it.

It should be noted that in adopting the legal inconsistency test, the High Court has rejected a course taken by various Canadian courts in finding that native title had not been extinguished it could factually co-exist with the actual land use carried out under a Crown grant. (In *Fejo* at 739 per Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ; at 754–756 per Kirby J, the High Court admitted that it has taken an approach to extinguishment which is different from that taken in other jurisdictions.) For a consideration of the various possible approaches to the extinguishment of the common law construct of native title, see Bartlett (1997a); McNeil (1997); and Dorsett (1997).

unanimously approved by the High Court in *Fejo*.¹⁵⁹ The judgments of Brennan CJ and Kirby J in *Wik* most clearly articulate the test for extinguishment of the common law construct of native title and the justification for it. Brennan CJ said:

The law can attribute priority to one right over another, but it cannot recognise the co-existence in different hands of two rights that cannot both be exercised at the same time. To postulate a test of inconsistency not between the rights but between the manner of their exercise would be to deny the law's capacity to determine the priority of rights over or in respect of the same parcel of land.... To postulate extinguishment of native title as dependent on the exercise of the private right of the lessee (rather than on the creation or existence of the private right) *would produce situations of uncertainty, perhaps of conflict*. The question of extinguishment of native title by a grant of inconsistent rights is — and must be — resolved as a matter of law, not of fact. If the rights conferred on the lessee of a pastoral lease are, at the moment when those rights are conferred, inconsistent with a continued right to enjoy native title, native title is extinguished.¹⁶⁰

Kirby J similarly rejected the view that the grant by the Crown of a third party interest would not affect the continuation of native title provided that the third party grantee did not exercise its rights in a manner inconsistent with the enjoyment of native title. His Honour said that to use the factual co-existence test would be to 'introduce a *dangerous uncertainty* in the entitlements to all people in Australia ...'.¹⁶¹ His Honour then adopted the inconsistency of incidence test.

The search must ... be one which is first directed at the legal rights which are conferred on a landholder by the Australian legal system. *This is because legal title and its incidents should be ascertainable before the rights conferred are actually exercised and indeed whether they are exercised or not*. In some cases the grant of such legal rights will have the inevitable consequence of excluding any competing legal rights, such as to native title. But in other cases, although the native title may be impaired, it may not be extinguished. The answer is to be found in the character of the legal rights, not in the manner of their exercise.¹⁶²

Both Brennan CJ and Kirby J justified their adoption of the test for extinguishment based upon legal, as opposed to factual, inconsistency upon the basis that this test would be more conducive to certainty. The exclusiveness of property *rights* and the perceived certainty that this brings is, of

159 *Fejo* at 736–737 per Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ; at 759 per Kirby J.

160 *Wik* at 87 (emphasis added, references omitted).

161 *Ibid* at 238 (emphasis added).

162 *Ibid* (emphasis added, reference omitted).

course, essential to the ideology of market-derived efficiency.¹⁶³ Property rights need to be clearly defined so that they can move to more efficient uses through private exchange.¹⁶⁴

We should note, however, that it is only the party who derives their interest from the Crown grant who can benefit from the certainty derived from this approach. While that party's rights are expanded under the test, the rights of the native titleholders are contracted. Additionally, if it is permissible to translate the appeal by Brennan CJ and Kirby J to the ideal of certainty into the paradigm of efficient use through private exchange,¹⁶⁵ then it appears that the common law construct of native title does not fit within the framework. This is because, unlike the interest of the Crown grantee, the interests of the native titleholders are not tradeable because of the prohibition on their alienation.¹⁶⁶

What we have so far seen about the susceptibility of the common law construct of native title to extinguishment shows its subordination to the common law's own vision of property rights. Native title must give way to an interest derived under a Crown grant (rather than the converse). The focus of the test for extinguishment is upon *inconsistent rights*, rather than *inconsistent modes of use*. The rationale for the extinguishment test is based upon a paradigm into which native title does not comfortably fit. All this suggests a framework which assumes a property law universe populated by interests derived from Crown grants, with the interests derived from native title existing at the margins as anomalies.

Partial extinguishment, co-existence and a re-feudalisation of Australian land law

Cutting across this enslavement of the common law construct of native title to the common law's vision of property is the concept which emerges from *Wik* of partial extinguishment. This concept arose out of the majority's finding that the statutory pastoral leases in the case, unlike common law leases, did not confer exclusive possession on the lessees. This meant that although the rights of the native titleholders were affected to the extent of any (legal) inconsistency, they were not extinguished altogether.¹⁶⁷ The approach of legal co-existence was also adopted by Olney J in *Yarmirr*, where his Honour held that the rights of native title holders over sea areas

163 Macpherson (1975) pp 109–10.

164 See R Posner (1986) *Economic Analysis of Law*, 3rd edn, Little Brown, pp 30–3; R Cooter and T Ulen (1997) *Law and Economics*, 2nd edn, Addison-Wesley, pp 72–84.

165 In *Fejo*, Kirby J expressly justified the adoption of the legal inconsistency test by reference to a number of societal needs, including 'economic investment and prosperity' (at 756).

166 See the text accompanying notes 124–126.

167 *Wik* at 115–122 (esp at 122), 131, 132 per Toohey J; at 149–156 (esp at 155), 164–167 per Gaudron J; 174–177, 194–203 (esp at 201) per Gummow J; at 242–251 (esp at 250–251) per Kirby J. Cf the dissenting view of Brennan CJ (Dawson and McHugh JJ agreeing) at 83–84, 88.

could co-exist with, and were not totally extinguished by, a Crown lease for pearl culture.¹⁶⁸ The co-existence approach found great expression in *Ward*, where Lee J stated that '[f]undamental inconsistency' was required between native title rights and the rights granted to a third party by the Crown before native title was totally extinguished.¹⁶⁹ After reviewing a great number of interests granted by the Crown, including pastoral leases, mining tenements and special purposes leases for tourism, jetty and boat-launching facilities, and for an Aboriginal hostel and intercultural centre, his Honour found that the grant of none of these interests completely extinguished native title. The interests of the grantee and of the native titleholders could thus co-exist.¹⁷⁰

The right to exclusive possession usually plays a central role in the common law vision of property rights.¹⁷¹ Exclusive possession provides the distinction between 'ownership' and 'non-ownership' interests in land. Of course, the doctrine of tenure means that there can strictly be no private (that is, non-Crown) ownership of land, but freehold estates clearly approximate to this ideal.¹⁷² It is the concept of exclusive possession — clothed in the enigmatic term 'seisin'¹⁷³ — which demarcates freehold estates from non-ownership interests such as easements.¹⁷⁴

The preparedness of the majority in *Wik*, of Olney J in *Yarmirr* and of Lee J in *Ward* to find that the interests which derived from a Crown grant did not carry the right to exclusive possession harks back to this feudal ideal of the co-existence of interests in land. Under the feudal system, several parties had interests in the same land. These interests were substantive in the sense that they gave the holder — namely, the Crown, tenant in chief, mesne lord or tenant in demesne¹⁷⁵ — rights to services, produce or money.¹⁷⁶

In this respect, the co-existence approach amounts to a re-feudalisation of Australian land law. Unlike the aspects of re-feudalisation discussed above, however, this aspect of the phenomenon works to the advantage of

168 *Yarmirr* at 438.

169 *Ward* at 510.

170 *Ibid* at 553–562, 579–580, 616–626. Much of the judgment of Lee J in *Ward* was concerned with the effect of the reservation of parts of the claimed land by the Crown, rather than the effect of Crown grants to third parties. In certain instances where land reserved by the Crown was subsequently leased to third parties, Lee J found that it was the reservation of the land, and its commitment by the Crown to a particular purpose, rather than the grant of the lease itself, which resulted in the complete extinguishment of native title (at 593–594, 602).

171 See *Fejo* at 756 per Kirby J.

172 See the discussion of the relationship between 'possession' and 'title' in the judgment of Toohey J in *Mabo* at 207–211.

173 See FW Maitland, 'The Mystery of Seisin' (1886) 2 *LQR* 481.

174 Butt (1996) para 1618. Also see *Bursill Enterprises Pty Ltd v Berger Bros Trading Co Pty Ltd* (1971) 124 CLR 73 at 91, 93 per Windeyer J.

175 See AJ Bradbrook et al (1997) *Australian Real Property Law*, 2nd edn, LBC, para 2.02.

176 Macpherson (1975) p 110.

Indigenous people, at least when compared to the possibility of complete extinguishment.

Conclusion

We have seen that the common law construct of native title has received the attributes of a feudal-like property interest through the operation of various oppositional categories. With regard to the public/private dialectic, the construct of native title inhabits the private sphere of property rights, rather than the public sphere of a sovereign right to self-determination. Yet a condition has been attached to the recognition of native title: the continued observance of a traditional lifestyle by the native titleholders. This very closely parallels the public sphere notion of land ownership being contingent upon the performance of some social function, which underpinned feudal landholding.

As far as the stasis/dynamism dialectic is concerned, the recognition of native title is itself evidence of the capacity for change of common property rights. However, the limitations which the common law imposes upon the land uses protected by native title, and the restrictions imposed on alienation, give native title a static aspect reminiscent of the limited nature of feudal interests in land. We have seen how this contrasts with the common law's own abandonment of land ownership as a contingent and limited phenomenon.

Finally, in respect of the transcendence/enslavement dialectic, the susceptibility of native title to unilateral extinguishment by inconsistent interests subsequently granted by the Crown shows how the common law construct is subordinated to the common law's own vision of property. However, we have seen that the construct of native title is able to co-exist with other property interests that do not carry the right to exclusive possession. We have also seen that courts have actually been prepared to find that certain other interests in land do not carry the right to exclusive possession. This demonstrates a transcendence of the common law's vision of property as dominated by the concept of exclusive possession. This also harks back to the feudal era where co-existence of various interests in the same land — each reflecting a particular social function¹⁷⁷ — was the hallmark of feudal landholding.

The 'politics' of landholding under the feudal doctrine of tenure is described by Edgeworth as follows.

All those who hold interests in land are 'tenants' of the Crown as much as they are political subjects: their titles are deemed in theory to have originated in a Crown grant. They are therefore not autonomous landowners excluding the state as they would be under an allodial system. Rather, they are included and serve by means of the (now invisible) ties of service to the Crown.¹⁷⁸

177 TP Fry, 'Land Tenures in Australian Law' (1947) 3 *Res Judicatae* 158, pp 169-70.

178 Edgeworth (1994) p 425.

Native title is, of course, an allodial interest; it is not derived from a Crown grant and it is not burdened by feudal services and incidents.¹⁷⁹ However, we have seen that the substance of the common law construct of native title as an interest in land — in terms of the range of protected uses, its non-alienability and its susceptibility to extinguishment by a subsequent Crown grant — bears the mark of subordination to, rather than autonomy from, a political overlord in the form of the Crown. In this respect, the way in which the common law has constructed ‘native title’ constitutes a re-ferudalisation of Australian land law.

References

Books and Articles

- Alexander, GS (1997) *Commodity and Propriety*, University of Chicago Press.
- Austin, J (1955) *The Provenance of Jurisprudence Determined*, orig 1832, ed HLA Hart, Weidenfeld & Nicolson.
- Baker, JH (1990) *An Introduction to English Legal History*, 3rd edn, Butterworths.
- Bartlett, RH, ‘The Mabo Decision’ (1993a) 1 *Aust Prop LJ* 236, p 249.
- Bartlett, RH (1993b) ‘The Source, Content and Proof of Native Title at Common Law’ in RH Bartlett (ed) *Resource Development and Aboriginal Land Rights in Australia*, Centre for Commercial and Resources Law.
- Bartlett, RH, ‘The Fundamental Significance of *Wik v State of Queensland* in the High Court of Australia’ [1997a] 2 *Can Native L Reporter* 1.
- Bartlett, RH, ‘A Return to Dispossession and Discrimination: The Ten Point Plan’ (1997b) 27 *UWALR* 44.
- Bartlett, RH, ‘The Content and Proof of Native Title: *Delgamuukw v Queen in right of British Columbia*’ (1998a) 4(9) *Indig L Bull* 17.
- Bartlett, RH, ‘The Proprietary Nature of Native Title’ (1998b) 6 *Aust Prop LJ* 77.
- Benn, SI and GF Gaus (1993) ‘The Public and the Private: Concepts and Action’ in SI Benn and GF Gaus (eds) *Public and Private in Social Life*, Croom Helm.
- Bennet, B, ‘The Economics of Wifing Services: Law and Economics on the Family’ (1991) 18 *J Law & Soc’y* 206.
- Bhuta, N, ‘*Mabo, Wik* and the Art of Paradigm Management’ (1998) 22 *Melb ULR* 24.
- Blackstone, W (1966) *Commentaries on the Laws of England*, reprint of 1st edn, vol 2, Dawson’s.
- Borrows, J and LI Rotman, ‘The *Sui Generis* Nature of Aboriginal Rights: Does it Make a Difference?’ (1997) 36 *Alberta LR* 9.
- Bradbrook, AJ et al (1997) *Australian Real Property Law*, 2nd edn, LBC.
- Butt, P (1996) *Land Law*, 3rd edn, LBC.
- Cooter, R and T Ulen (1997) *Law and Economics*, 2nd edn, Addison-Wesley.
- Council for Aboriginal Reconciliation (1994) *Understanding Country*, Key Issue Paper No 1, Australian Government Publishing Service.
- Dodson, M (1997) ‘Human Rights and the Extinguishment of Native Title’ in E Johnston et al (eds) *Indigenous Australians and the Law*, Cavendish.
- Dorsett, S, ‘“Clear and Plain Intention”: Extinguishment of Native Title in Australia and Canada post-*Wik*’ (1997) 6 *Griffith LR* 96.

179 Ibid, p 416.

- Edgeworth, B, 'Tenure, Allodialism and Indigenous Rights at Common Law: English, United States and Australian Land Law Compared after *Mabo v Queensland*' (1994) 23 *Anglo-Am LR* 397.
- Frug, GE, 'The City as a Legal Concept' (1980) 93 *Harv LR* 1057.
- Fry, TP, 'Land Tenures in Australian Law' (1947) 3 *Res Judicatae* 158
- Godden, L, 'Wik: Feudalism, Capitalism and the State' (1997a) 5 *Aust Prop LJ* 162.
- Godden, L, 'Wik: Legal Memory and History' (1997b) 6 *Griffith LR* 123.
- Gray, J, 'O Canada: Van Der Peet as Guidance on the Construction of Native Title Rights' (1997) 2 *Aust Indig L Reporter* 18.
- Hohfeld, WN (1919) *Fundamental Legal Conceptions As Applied in Judicial Reasoning*, ed WW Cook, Yale University Press.
- Honore, AM (1961) 'Ownership' in AG Guest (ed) *Oxford Essays in Jurisprudence*, Clarendon Press.
- Horwitz, MJ, 'The History of the Public/Private Distinction' (1982) 130 *U Penn LR* 1423.
- Hunter, I (1994) 'Native Title: Acts of State and the Rule of Law' in M Groot and T Rowse (eds) *Make a Better Offer: The Politics of Mabo*, Pluto Press.
- Jeffery, P, 'Escaping the Net: Native Title as a Defence to Breaches of the Fishing Laws' (1997) 20 *UNSWLJ* 352.
- Kennedy, D, 'The Stages of the Decline of the Public/Private Distinction' (1982) 130 *U Penn LR* 1349.
- Krygier, M (1993) 'Publicness, Privateness and "Primitive Law"' in SI Benn and GF Gaus (eds) *Public and Private in Social Life*, Croom Helm.
- Levy, R, 'Native Title and the Criminal Law: The Defence of Galarrwuy Yunupingu' (1998) 4(13) *Indig L Bull* 10.
- Macklem, P, 'What's Law Got To Do With It?: The Protection of Aboriginal Title in Canada' (1997) 35 *Osgoode Hall LJ* 125.
- Macpherson, CB (1975) 'Capitalism and the Changing Concept of Property' in E Kamenka and RS Neale (eds) *Feudalism, Capitalism and Beyond*, Australian National University Press.
- Maitland, FW, 'The Mystery of Seisin' (1886) 2 *LQR* 481.
- McNamara, L and S Grattan, 'The Recognition of Indigenous Land Rights as "Native Title": Continuity and Transformation' (forthcoming) *Flinders J L Reform*.
- McNeil, K, 'Racial Discrimination and Unilateral Extinction of Native Title' (1996) 1 *Aust Indig L Reporter* 181.
- McNeil, K, 'Co-existence of Indigenous Rights and Other Interests in Land in Australia and Canada' [1997] 3 *Can Native L Reporter* 1.
- McRae, H et al (1997) *Indigenous Legal Issues: Commentary and Materials*, 2nd edn, LBC.
- Meagher, RP et al (1984) *Equity: Doctrines and Remedies*, 2nd edn, Butterworths.
- Meyers, GD (1994) 'Aboriginal Rights to the "Profits of the Land": The Inclusion of Traditional Hunting and Fishing Rights in the Content of Native Title' in R Bartlett and GD Meyers (eds) *Native Title Legislation in Australia*, Centre for Commercial and Resources Law.
- Meyers, GD et al, 'Asking the Minerals Question: Rights in Minerals as an Incident of Native Title' (1997) 2 *Aust Indig L Reporter* 203.
- Pearson, N (1993) '204 Years of Invisible Title' in MA Stephenson and S Ratnapala (eds) *Mabo: A Judicial Revolution*, University of Queensland Press.
- Pearson, N (1996) 'The Concept of Native Title at Common Law' in *Land Rights – Past, Present and Future: Conference Papers*, Northern and Central Land Councils.

- Persky, S (1998) *Delgamuukw: The Supreme Court Decision on Aboriginal Title*, Greystone Books.
- Pollock, F and FW Maitland (1968) *The History of English Law*, orig 1898, vol 1, Cambridge University Press.
- Posner, R (1986) *Economic Analysis of Law*, 3rd edn, Little Brown.
- Singer, P (1993) *Hegel*, Oxford University Press.
- Stuckey, M, 'Feudalism and Australian Land Law: "A Shadowy, Ghostlike Survival"?' (1994) 13 *Tasmania LR* 102.
- Sweeney, D, 'Fishing, Hunting and Gathering Rights of Aboriginal Peoples in Australia' (1993) 16(1) *UNSWLJ* 97.
- Tay, A E-S and E Kamenka (1993) 'Public Law-Private Law' in SI Benn and GF Gaus (eds) *Public and Private in Social Life*, Croom Helm.
- Wootten, H, 'Mabo: Issues and Challenges' (1994) 1 *Judicial R* 303.

Cases and Legislation

- Aboriginal Land Rights (Northern Territory) Act* 1976 (Cth).
- Bacon v Pianta* (1966) 114 CLR 634.
- Bursill Enterprises Pty Ltd v Berger Bros Trading Co Pty Ltd* (1971) 124 CLR 73.
- Coe v The Commonwealth* (1993) 68 ALJR 110.
- Delgamuukw v British Columbia* [1997] 3 SCR 1010.
- Derschaw v Sutton* (1997) 17 WAR 419.
- Dillon v Davies* (1998) 156 ALR 142.
- Eaton v Yanner; Ex parte Eaton* (unreported, Court of Appeal (Qld), 27 February 1998).
- Fauna Conservation Act* 1954 (Qld).
- Fejo v Northern Territory* (1998) 156 ALR 721.
- Imperial Acts Application Act* 1969 (NSW).
- Leahy v Attorney-General for New South Wales* [1959] AC 457.
- LPJ Investments Pty Ltd v Howard Chia Investments Pty Ltd (No 2)* (1989) 24 NSWLR 490.
- Mabo v Queensland (No 2)* (1992) 175 CLR 1.
- Mason v Tritton* (1994) 34 NSWLR 572.
- Milrrpum v Nabalco Pty Ltd* (1971) 17 FLR 141.
- Native Title Act* 1993 (Cth).
- Native Title Amendment Act* 1998 (Cth).
- Police v Yunupingu* (unreported, Magistrates' Court, Darwin, 20 February 1998).
- R v NTC Smokehouse Ltd* [1996] 2 SCR 672.
- R v Van der Peet* [1996] 2 SCR 507.
- Statute of Quia Emptores* 1290 (Eng).
- Tenures Abolition Act* 1660 (Eng).
- Van der Peet and R v NTC Smokehouse Ltd* [1996] 2 SCR 672.
- Walker v New South Wales* (1994) 182 CLR 45.
- Ward v Western Australia* (1998) 159 ALR 483.
- Wik Peoples v Queensland* (1996) 187 CLR 1.
- Yarmirr v Northern Territory* (1998) 156 ALR 370.
- Yorta Yorta Aboriginal Community v Victoria* (unreported, Federal Court of Australia, 18 December 1998).