ARTICLES

The Impact of the Conquered/Settled Distinction regarding the Acquisition of Sovereignty in Australia

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1. Introduction

The deconstruction of the Aboriginal and Torres Strait Islander Commission (ATSIC),[1] which had been lauded on its establishment in 1990 as providing a fundamental shift towards self-determination for the Aboriginal peoples of Australia,[2] has led the author to re-examine her 1988 article[3] on the significance of the classification of a colonial acquisition as being through conquest, cession or settlement.[4] In that article it was contended that Australia had not been acquired by the British Crown, and in turn the Australian Crown, by peaceful settlement, but by conquest. The article also sought to clarify the consequences of classifying the acquisition of sovereignty as settlement or conquest. That article pre-dated the landmark decision in *Mabo v Queensland (No 2)*[5] (*Mabo*). The Australian legal system had invoked the notion of *terra nullius* to deny the very existence of Australia's Aboriginal occupants and, as a corollary, concluded that

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1 See "Reconciliation at the crossroads", *The Age*, 8 May 2004; Gatjil Djerrkura "ATSIC deserved better than this" *The Age*, 21 May 2004.

2 See the Foreword by the Hon Gerry Hand, Minister for Aboriginal Affairs, in Hocking B (ed) *International Law and Aboriginal Human Rights* 1988; Gatjil Djerrkura "ATSIC deserved better than this" *The Age* 21 May 2004.

3 Cassidy J, "The significance of the classification of a colonial acquisition: the conquered/settled distinction" (1988) 1 *Australian Aboriginal Studies* 2.

4 In this regard, query what happened to the 'Makarratta' that shortly before ATSIC's establishment was proposed by the Select Committee on Constitutional and Legal Affairs, *Two Hundred Years Later* (AGPS, Canberra 1983).

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

their traditional territorial rights were not recognisable. Accordingly, 'annexation' gave the Crown not only sovereignty but also absolute beneficial title to all lands within the perimeters of the colony. The suggestion that Australia was *terra nullius*, in the sense that it was uninhabited or inhabited by peoples so low in the social scale that they could not be recognised, was finally rejected by a majority of the High Court in *Mabo*.[6] The High Court, while affirming the traditional view that Australia had been acquired by settlement,[7] asserted that the laws of England that provided the legal foundations of the Australian legal system[8] recognised Aboriginal title.[9] The article also pre-dated the recent decision of the New Zealand Court of Appeal in *Ngati Apa, Ngati Koata v Ki Te Tau Ihu Trust*[10] (*Marlborough Sounds*). The court recognised that the common law of England was modified by the New Zealand conditions at the point of acquisition of sovereignty, including "Maori customary proprietary interests."[11] The court held that the common law of New Zealand was different to the common law of England as the former "reflected local circumstances."[12]

The author now returns to the question of classification and its legal consequences. The article begins by considering relevant Australian judicial pronouncements on whether:

- Australia was *terra nullius*
- the Aboriginal peoples were sovereign nations
- sovereignty was acquired through settlement or conquest
- the laws of England, including the theory of tenures, flowed into and provided the legal foundations of the colony, and
- those laws recognised the pre-existing Aboriginal title.

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6 See *Mabo v Queensland (No 2)*, note 5, at 41, 42, 48, 58, 109, 181 and 182.

7 See *Mabo v Queensland (No 2)*, note 5, at 33 and 180.

8 See *Mabo v Queensland (No 2)*, note 5, at 34, 35, 36 and 38.

9 See *Mabo v Queensland (No 2)*, note 5, at 40 and 79

10 *Ngati Apa, Ngati Koata v Ki Te Tau Ihu Trust* [2003] NZCA 117 (19 June 2003).

11 *Ngati Apa, Ngati Koata v Ki Te Tau Ihu Trust*, note 10 at [13]; see also [17].

12 *Ngati Apa, Ngati Koata v Ki Te Tau Ihu Trust*, note 10 at [17].

The article then reconsiders the relevance of the classification of the acquisition of a country. While *Mabo* has resolved some issues,[13] other issues such as the recognition of Aboriginal sovereignty continue unresolved. The classification of the acquisition of the Australian Continent continues to be a matter of great importance to the Aboriginal peoples of Australia. It continues to determine their rights to land, their personal status as "British subjects" or aliens, and whether they can be considered sovereign nations either domestically or internationally.[14] Ironically, had the acquisition of Australia been classified as a 'conquest' and the Aboriginal peoples of Australia regarded as 'conquered' then, despite the negative connotations seeming to flow from these terms, they might historically have been considerably better served. It will be seen that in law 'conquest' does not necessarily mean the extinguishment of pre-existing customary law,[15] nor Aboriginal customary rights.[16] Thus, conquest would have provided an alternative[17] ground for recognising Aboriginal rights. Moreover, if the linguistic groups occupying Australia were seen as sovereign *politiques,* conquest might also have provided for the more

13 For example, the recognition of Aboriginal title in *Mabo v Queensland (No 2)*, note 5, at 40 and 79.

14 Note, sovereignty and the 'Nationhood' necessary to, for example, conclude an internationally recognised treaty need not coincide. The latter is dependent upon the sovereign being recognised by the international community as being a Nation-State with international legal personality. See Cassidy J, "The Enforcement of Aboriginal Rights in Customary International Law" (1993) 4(1) *Indiana International and Comparative Law Review* 59; see also Select Committee on Constitutional and Legal Affairs, *Two Hundred Years Later* (AGPS, Canberra 1983).

15 The prior laws of the original occupants continue to exist until altered by the conduct of the new sovereign: *Case 15 Anonymous,* (1722) 24 ER 646; *Dutton v Howell,* (1963) 11 ER 17. See also *Campbell v Hall* (1558-1774) All ER 252; *Calvin's case* (1608) 77 ER 377; *Blackstone's Commentaries*, Vol 1 at 107.

16 Cassidy J, note 3, p 9; citing *Amodu Tijani v Secretary, Southern Nigeria* (1921) 2 AC 399 at 407.

17 An alternative basis to the High Court's recognition of the Aboriginal title as part of the theory of tenures that provided the legal foundation of landholding in Australia according to *Mabo v Queensland (No 2)*, note 5, at 45 and 48-50, 57, 75 and 86-87.

effective recognition of the status of Aboriginal peoples under national and perhaps even international law.[18]

2. Australian judicial approach to the acquisition of Australia

(i) Attorney-General v Brown

One of the earliest relevant statements was in *Attorney-General v Brown*[19] (*Brown*).

> [T]he waste lands of this colony are, and ever have been, from the time of its first settlement in 1788, in the Crown; that they are, and ever have been, from that date (in point of legal intendment), without office found, in the Sovereign's possession; and that, as his or her property, they have been and may now be effectually granted to subjects of the Crown. … [As the feudal system of tenures was part of the law of England] we can see no reason why it shall not be said to be equally in operation here. … But if the feudal system of tenures be, as we take it to be, part of the universal law of the parent state, on what shall it be said not to be law, in New South Wales? At the moment of its settlement the colonists brought the common law of England with them.[20]

While Stephen CJ's statement did not specifically address the rights of the pre-occupying Aboriginal peoples, and the phrase "waste lands" could be confined to "unoccupied waste lands" thereby excluding lands held under the Aboriginal title,[21] in *Mabo*[22] Deane

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18 Again, note that even if the Aboriginal peoples of Australia were recognised under international legal theory as being sovereign, this might not mean they were also recognised as Nation-States with international legal personality. See Cassidy J, note 14. See further Select Committee on Constitutional and Legal Affairs, note 14.

19 Attorney-General v Brown (1847) 1 Legge 312; followed by Windeyer J in Randwick Corporation v Rutledge (1959) 102 CLR 54.

20 Attorney-General v Brown, note 19, per Stephen CJ at 316-317.

21 The phrase "waste lands" has at times been taken to exclude lands held under Aboriginal title: see The Queen v Symonds, [1847] NZ PCC at 390; Nireaha v Baker [1901] AC 561; Russell to Hobson, 9 Dec 1840, Parl Papers (Commons), Sess I, XVII (311) at 30.

22 Mabo v Queensland (No 2), note 5.

and Gaudron JJ noted that implicit in the judgment was an assumption that all lands in the colony were unoccupied at the relevant time.[23] Thus the case has been taken as a primary authority for the 'settled' classification of the colony and the consequent adoption of the theory of tenures as governing landholding in the colony. In *Mabo*,[24] Brennan J recognised *Brown*[25] as the foundational authority for the proposition that:

> [W]hen the territory of a settled colony became part of the Crown's dominions, the law of England so far as applicable to colonial conditions became the law of the colony and, by law, the Crown acquired the absolute beneficial ownership of all land in the territory so that the colony became the Crown's demesne and no right or interest in any land in the territory could thereafter be possessed by any other person unless granted by the Crown.[26]

Thus, *Brown*[27] "[could not be] overturned without fracturing the skeleton which gives our land law its shape and consistency."[28]

(ii) Cooper v Stuart

In *Cooper v Stuart*[29] the Privy Council pronounced upon the classification of the acquisition of the Australian Continent. The Board declared Australia to be "a colony which consisted of a tract of territory practically unoccupied, without settled inhabitants or settled law, [acquired by] settlement."[30] As "there was no land law or tenure existing in the Colony at the time of its annexation to the Crown",[31]

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23 Mabo v *Queensland (No 2)*, note 5, at 102.

24 *Mabo v Queensland (No 2)*, note 5.

25 *Attorney-General v Brown*, note 19.

26 *Mabo v Queensland (No 2)*, note 5, at 12-14. See also Deane and Gaudron JJ at 102.

27 *Attorney-General v Brown*, note 19.

28 *Mabo v Queensland (No 2)*, note 5, at 45.

29 *Cooper v Stuart* (1889) 14 AC 286 at 291.

30 *Cooper v Stuart*, note 29, at 291.

31 *Cooper v Stuart*, note 29, at 292.

the Board asserted that the colony had been "peacefully annexed to the British Dominions."[32] The Board relied on Blackstone's *Commentaries on the Laws of England* where it was stated that "desert and uncultivated" and "uninhabited" lands could be acquired by mere occupation.[33] While the Board was only concerned with determining the law governing the colony and the rights and duties of white colonists under such law, and thus did not expressly determine the legal position of the Aboriginal occupants, its statements implicitly denied Aboriginal territorial and sovereign rights.

(iii) R v Murrell

The legal status of the Aboriginal peoples of Australia was expressly considered by the courts in criminal proceedings, particularly in relation to disputes *inter se*.[34] Two important cases were *R v Murrell*[35] (*Murrell*) and *The trial of Bonjon*[36] (*Bonjon*).

Murrell[37] entrenched in Australian legal history the amenability of Aboriginal accused to the laws of England that flowed into the colony through the concept of settlement. Two Aboriginal men, Jack Congo Murrell[38] and George Bummary, stood trial for the murder of two Aboriginal men, Bill Jaberguy and Pat Cleary. Counsel for the defence, Alfred Stephen, questioned the court's jurisdiction over Aboriginal persons in cases of disputes *inter se*. Utilising Rousseau's social contract theory, he argued that as the accused had not consented to the Crown's sovereignty, they were not amenable to the Crown's law. As the Crown had failed to protect their persons and property such consent could not be implied; consequently there was no legitimate basis for subjecting the accused to the rigours of the Crown's laws. Stephen submitted that:[39]

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32 *Cooper v Stuart*, note 29, at 291.

33 *Cooper v Stuart*, note 29, at 291.

34 That is, disputes between Aboriginal persons.

35 *R v Murrell* (1836) 1 Legge 72.

36 *The trial of Bonjon*: Justice Willis' judgment appears in the *Port Phillip Gazette* 1841, contained in Vol 8, *Papers Relative to South Australia*, IUP at 143-156.

37 *R v Murrell*, note 35.

38 Murrell claimed he was drunk and could not help his acts, while Bummary said he killed Cleary in accordance with the Aboriginal custom of revenge killing.

39 *R v Murrell*, note 35.

> [T]he reason why subjects of Great Britain are bound by the laws of their own country is that they are protected by them[40] … [but] the natives are not protected by those laws, they are not admitted as witnesses in Courts of Justice, they cannot obtain recovery of, or compensation for, those lands which have been torn from them, and which they have probably held for centuries. … [It is illegitimate to bind them] by laws which afford them no protection.

Further, he argued that trying the accused in the colonial courts would amount to double jeopardy. Irrespective of the outcome of the trial, the accused would be tried under the tribe's customary law. Finally, Stephen submitted Australia was not conquered, ceded or settled; the Australian colonists had just 'moved' into Aboriginal society. Consequently, the laws of England did not flow into the colony to govern the actions of all the inhabitants. As the colonists had moved into Aboriginal society, the colonists should be subject to Aboriginal customary law. Not the reverse!

On 11 April Burton J delivered the unanimous decision of the court, overruling the plea of lack of jurisdiction. While the legitimacy of Stephen's claims were not denied, the court held s 3 and s 24 of the statute *9 George IV C 93* required the application of the laws of England[41] and those enacted by the local legislatures to all offences in the colony. All inhabitants of New South Wales, whether 'black' or 'white', were subjects of the Crown and all were amenable to the colonial criminal law. Moreover, Burton J asserted that the Aboriginal people had no recognisable laws[42] or customs[43] that could be applied to this matter instead of colonial law. It is relevant to note that the case

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40 There is an implied acceptance of the sovereign's authority through the subject's enjoyment of the sovereign's protection or the privileges the sovereign's power offers: Detmold, *The Australian Commonwealth* at 55.

41 Flowing into the colony upon settlement.

42 Bridges, "The Extension of English Law to the Aborigines for Offences Committed Inter Se" (1829-1842) *JRAHS* December 1973, 264 at 267. Burton J believed their 'lewd' practices and irrational superstitions to be contrary to Divine law and thus unable to be acknowledged by the colonial courts.

43 Possibly, Burton J sought to establish a system of indigenous law which continued to operate until abrogated by the conquering sovereign in accordance with the common law rules governing conquered colonies.

did not necessarily support a rejection of legal pluralism. Justice Burton believed amenability to be determined by territorial delineation.[44] Only those Aboriginal persons, such as Murrell, "within the boundaries of the Colony [were subject to] the laws of the Colony."

Murrell was ultimately found not guilty, the prosecution failing to prove he had struck the mortal blow.[45] As the *Sydney Gazette* noted, "[this failure] helped the court out of a very intricate and puzzling dilemma."

(iv) The trial of Bonjon

The resident judge of Port Phillip, Willis J, refused to follow *Murrell* in *Bonjon.*[46] His comments in that case evidence a judicial concern for the sovereignty of Aboriginal communities. Justice Willis did not accept *Murrell* as a binding precedent for his authority over disputes between Aboriginal persons *inter se*, warning that an "undue assumption of legal jurisdiction [would darken] the annals of our country with the crime of regicide."[47] He believed the New South Wales colony stood "on a different footing from some others, for it was neither an unoccupied place, nor was it obtained by right of conquest and driving out the natives, nor by treaties."[48] The

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44 Similarly, pencil notes made by Governor Grey suggest he believed "a circle of protection [should be drawn] around towns, homesteads and adopted natives" and outside these confines, the force of colonial law should not be extended: Grey, *Report of 1840 to Secretary of State upon the civilising of the Australian Aborigines*; referred to in Lendrum, "The Coorong Massacre: Martial Law and the Aborigines at First Settlement" (1977) *Adel LR* 26 at 86; contained in full in Grey, *Journals of Two Expeditions of Discovery in North-West and Western Australia* (1841) (SA State Library facsimile ed), 1964, vol 2 p 372.

45 The Crown Prosecutor declined to proceed with Bummary's case for the same reason.

46 *The trial of Bonjon*, note 36. Bonjon was charged with the murder of James Weir at Geelong on 2 September 1841. Ultimately, Willis J was considered too radical for the small town and removed from the bench.

47 Were there any reasonable doubt as to the court's jurisdiction, he felt bound not to entertain the dispute for "the fair and lovely face of justice, if urged beyond her legal boundary, assumes the loathsome and distorted features of tyranny and guilt." *The trial of Bonjon*, note 36, at 150.

48 *The trial of Bonjon*, note 36, at 152: See also at 152: "[It could not have been acquired by discovery because] it was not unoccupied when it was taken by the colonists. … [When the first settlers landed] a body of Aborigines appeared on the

Aboriginal peoples were "dependent allies, still retaining their own laws and usages, subject only to such restraints and qualified control as the safety of the colonists and the protection of the aborigines required."[49] The "Aborigines ... remained unconquered and free, but dependent tribes, dependent on the colonists as their superiors for protection ...".[50] Such dependency did not, however, amount to a surrender of Aboriginal sovereignty.[51] Relying on the United States analogy of domestic dependent Indian Nations, Willis J held the Aboriginal peoples of Australia were not reduced to the status of British subjects, but retained their traditional rights even in the face of British sovereignty.[52] He concluded that "the Aborigines [are] a distinct though dependent people, and entitled to be regarded as self governing communities."[53]

In the view of Willis J, the application of 'white' law to Aboriginal persons could not be justified in the same way as its application to foreign visitors in an English country.[54] "For in Australia it is the colonists and not the Aborigines [who] are the foreigners; the former are *exotris*, the latter indigenous; the latter the native sovereigns of the soil, the former uninvited intruders."[55] Thus, the colonists should be subject to Aboriginal law, not the Aboriginal peoples subject to English law.

Justice Willis held the statute *9 Geo IV c 93* did not give him jurisdiction over Aboriginal persons. While the statute declared the laws of England were to be applied in the administration of justice so far as circumstances permitted, this did not make Aboriginal persons amenable to British law for *inter se* offences. The mere introduction of the common law did not serve to extinguish Aboriginal customary

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shore, armed with spears, which they threw down as soon as they found the strangers had no hostile intention".

49 *The trial of Bonjon*, note 36, at 152.

50 *The trial of Bonjon*, note 36, at 152.

51 *The trial of Bonjon*, note 36, at 152.

52 *The trial of Bonjon*, note 36, at 152.

53 Quoting in support passages from Kent's *Commentaries*: *The trial of Bonjon*, note 36, at 152.

54 Pointing to Jamaica and St Vincent for examples of colonies where English law prevails, while the native peoples maintain self-government as dependent allies: *The trial of Bonjon*, note 36, at 152.

55 *The trial of Bonjon*, note 36, at 152.

law.[56] It would be highly unjust if Aboriginal sovereignty could be so easily abrogated by the introduction of white society:[57]

> Indeed as M Vattel very justly says, 'whoever agrees that robbery is a crime and that we are not allowed to take forcible possession of our neighbours property, will acknowledge, without any other proof, that no nation has a right to expel another people from the country they inhabit in order to settle in it herself.'

The judge held that Aboriginal sovereignty had not been legitimately extinguished by colonial settlement and thus it could continue to be exercised, at least concurrently, with the Crown. The British settlement of Australia was an unlawful act in defiance of Aboriginal sovereignty, and until that sovereignty was ceded or abrogated in some other manner it continued to be exercised by Aboriginal peoples as domestic dependent nations.[58] Justice Willis believed disputes amongst Aboriginals persons should be governed by "their own rude laws and customs." He therefore refused to exercise jurisdiction over the matter before the court.[59]

While Willis J's approach was not accepted by subsequent courts,[60] the judgment provides the strongest assertion that the Aboriginal communities of Australia retained their sovereign status as domestic dependent nations. However, in *Coe v Commonwealth*[61] a majority[62]

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56 *The trial of Bonjon*, note 36, at 152. He noted that in practice the authorities allowed the traditional laws to continue to govern disputes between Aboriginal persons in certain parts of the State. In the ten years following Willis J's words only two Aboriginal accused were successfully prosecuted in the colonial courts: Bridges, note 42, at 268.

57 *The trial of Bonjon*, note 36, at 152.

58 *The trial of Bonjon*, note 36, at 152.

59 Ultimately, the prosecution did not proceed. The Crown Prosecutor, unable to produce certain crucial pieces of evidence, entered a *nolle prosequi*. Bonjon did not escape punishment: in accordance with Aboriginal customary law he was killed by his victim's kin: Sir George Gipps to Lord Stanley, 24 January 1842.

60 However, it was reiterated by Cooper J in the Supreme Court of South Australia: 15 May 1851, 'Register' 16 and 20 May 1851; Address to Grand Jury, Supreme Court, 3 November 1840; *Adelaide Chronicle* 4 November 1840 and the jury's statement in *The trial of Tukkum, Nyalta Wikkannin and Kanger Warli*, Supreme Court 15 May 1851, 'Register' 16 and 20 May 1851.

61 *Coe v Commonwealth* (1979) 53 ALJR 403.

of the High Court of Australia rejected the plaintiff's claim of Aboriginal sovereignty, even in the form of domestic dependent nations.

(v) Milirrpum v Nabalco Pty Ltd

Milirrpum v Nabalco Pty Ltd[63] (*Milirrpum*) was the first case brought by Aboriginal Australians seeking the recognition of their customary Aboriginal title. The case provides, therefore, important statements regarding many interrelated issues pertaining to the acquisition of Australia and proving Aboriginal title. In the context of this article focus is placed on those statements most directly relating to the former.

Justice Blackburn reiterated that Australia was a 'settled' colony and, accordingly, the doctrine of communal native title "does not form, and never has formed part of the law of any part of Australia."[64] He asserted that Blackstone's reference to "desert and uncultivated [has] always been taken to include territory in which live uncivilised inhabitants in a primitive state of society."[65] The classification of the acquisition of a colony was a question of law "which becomes settled and is not to be questioned upon a reconsideration of the historical facts.[66] … [T]here is no doubt that Australia came into the category of a settled or occupied colony."[67]

However, in case he erred in rejecting the applicability of the doctrine of communal title, Blackburn J continued to examine the evidence presented and to determine whether the plaintiffs had established title to the relevant lands. He required the claimants to show a recognisable

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62 Note that Murphy J held that he would allow a plaintiff to argue that sovereignty over Australia resided in the Aboriginal Nation. Referring to *Western Sahara Case* (1975) ICJ 12 and other decisions, he suggested the traditional characterisation of the annexation of the Australian continent as one of 'occupation' could be questioned, thereby undermining the foundations of the Australian Government's sovereignty: *Coe v Commonwealth*, note 61, at 412.

63 *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141.

64 *Milirrpum v Nabalco Pty Ltd*, note 63, at 245.

65 *Milirrpum v Nabalco Pty Ltd*, note 63, at 201.

66 *Milirrpum v Nabalco Pty Ltd*, note 63, at 203.

67 *Milirrpum v Nabalco Pty Ltd*, note 63, at 242.

interest in the land and proof that this was a proprietary interest.[68] Ultimately, he found the plaintiffs had failed to satisfy these prerequisites.

In this context, Blackburn J addressed one issue that is also relevant to our broader discussion of the classification of the acquisition of Australia. Counsel for the defendant submitted Aboriginal 'tribes' were "so low in the scale of social organization" their laws were not recognisable. Counsel contended these people were on the other side of the "unbridgeable gap"[69] between civilised and uncivilised societies. Justice Blackburn disagreed. He found Aboriginal law to be "a subtle and elaborate system highly adapted to the country in which the people led their lives."[70] This system "provided a stable order of society, and was remarkably free from the vagaries of personal whim or influence."[71] The judge declared, "[i]f ever a system could be called 'a government of laws, and not of men', it is that shown in the evidence before me."[72] He stressed the inadequacy of an Austinian definition of law used by the Solicitor-General, and found that Aboriginal customary law was recognised as obligatory by the members of the communities using and occupying the land in question. Despite the plaintiff's failure, at least Blackburn J's judgment provided an important judicial recognition of the sophistication of Aboriginal social, political and legal systems.

(vi) Coe v Commonwealth

In *Coe v Commonwealth*[73] (*Coe*) the plaintiff sued the Commonwealth, on behalf of the Aboriginal community, for the alleged unlawful dispossession of the Aboriginal peoples of Australia by Captain Cook and those who followed him. He submitted that the Aboriginal Nation had enjoyed exclusive sovereign rights over Australia since time immemorial. The rights of the clans, tribes and groups of Aboriginal peoples living and travelling across the continent were part of a system of interlocking rights and responsibilities that

68 *Milirrpum v Nabalco Pty Ltd*, note 63, at 213- 4 and 273.

69 In accordance with the test in *Re Southern Rhodesia* [1919] AC 211.

70 *Milirrpum v Nabalco Pty Ltd*, note 63, at 267.

71 *Milirrpum v Nabalco Pty Ltd*, note 63, at 267.

72 *Milirrpum v Nabalco Pty Ltd*, note 63, at 267.

73 *Coe v Commonwealth*, note 61.

constituted the sovereign Aboriginal Nation. Alternatively, he submitted the Australian Continent was acquired by conquest, not peaceful settlement, and the Aboriginal peoples' territorial rights were retained despite this annexation. Finally, he sought to question the correctness of *Milirrpum*[74] and relied upon the rights stemming from the doctrine of communal native title. The plaintiff sought a number of declarations and injunctions designed to protect the land and waterways being used by Aboriginal peoples from interference by mining and other activities. The injunctions were to be effective until internationally recognised arrangements were made to transfer these rights to the Aboriginal peoples of Australia.

Justice Mason dismissed an application for leave to amend what was said to be an extremely poorly drafted statement of claim.[75] The plaintiff appealed to the High Court. The Solicitor-General for the Commonwealth agreed to treat the amended statement of claim as if it were the original. Ultimately, the court being divided evenly,[76] Mason J's decision was affirmed.[77]

Justice Gibbs[78] believed the pleadings to be badly drafted,[79] but in view of the Solicitor-General's concession he considered the plaintiff's substantive arguments. In his view,[80] the claim of Aboriginal sovereignty was so outrageous and vexatious that it amounted to an abuse of process.[81] Nevertheless, he went on to consider the plaintiff's claim, and the possible application of the doctrine of domestic dependent nations. He concluded that, unlike the United States Indian Nations, the Aboriginal peoples of Australia were not "a distinct political society" separated from the rest of the

74 *Milirrpum v Nabalco Pty Ltd*, note 63.

75 (1978) 52 ALJR 334.

76 Murphy and Jacobs JJ dissenting.

77 By virtue of s 23(2)(a) *Judiciary Act 1903* (Cth).

78 With whom Aickin J agreed.

79 *Coe v Commonwealth*, note 61, at 407.

80 Aickin J agreed with Gibbs J on the issue of the acquisition of the Australian continent, asserting that the peaceful settlement of the continent prevented the Aboriginal peoples having any sovereign rights.

81 *Coe v Commonwealth*, note 61, at 407. He believed "no judge could in the proper exercise of his discretion permit the amendment of a pleading to put it in such a shape" and consequently refused leave to amend the rather confused and poorly drafted pleadings.

Australian people and able to exercise sovereignty concurrently with the Crown.[82] Following this conclusion, Gibbs J developed what the author considers "an extremely eurocentric test"[83] for the recognition of Aboriginal sovereignty, asserting that an Aboriginal Nation required distinct legislative, executive and judicial organs before its sovereignty could be recognised.[84] Applying this stringent test, "the contention that there is in Australia an Aboriginal nation exercising sovereignty, even of a limited kind, is quite impossible in law to maintain."[85] In Gibbs J's view, this denial of Aboriginal sovereignty resulted in the plaintiff having no standing to make his claims.[86]

To some extent Gibbs J's conclusion was also dictated by his belief that the issue before the court was nonjusticiable.[87] He called in aid the Act of State doctrine to declare the validity of the annexation of the continent to be nonjusticiable.[88] In Gibbs J's view, the classification of the Australian Continent was "so fundamental to our legal system" that a claim of Aboriginal sovereignty was not fit for consideration.[89] He stated that "the annexation of the east coast of Australia by Captain Cook in 1770, and the subsequent acts by which the whole of the Australian continent became part of the dominions of the Crown, were acts of state whose validity cannot be challenged …".[90] Further, "the question is not how the manner in which Australia became a British possession might appropriately be described" but how the Crown had decided to classify the colony.[91] Moreover, he thought it indisputable that Australia was *terra nullius* and thus open to

82 *Coe v Commonwealth*, note 61, at 407; quoting Marshall CJ in *Cherokee Nation v Georgia* (1831) 30 US 1 at 17.

83 Cassidy, "Sovereignty of Aboriginal Peoples" (1998) 9(1) Indiana International and Comparative Law Review 65 at 115.

84 *Coe v Commonwealth*, note 61, at 407; the judicial organs must also apply law of a European type.

85 *Coe v Commonwealth*, note 61, at 407.

86 In this way, Gibbs J recognised the interrelationship between questions of sovereignty and standing.

87 *Coe v Commonwealth*, note 61, at 408.

88 *Coe v Commonwealth*, note 61, at 408.

89 *Coe v Commonwealth*, note 61, at 408.

90 *Coe v Commonwealth*, note 61, at 408.

91 *Coe v Commonwealth*, note 61, at 408.

acquisition by simple occupation.[92] Consequently, he held the Aboriginal peoples of Australia had no sovereign rights.

While Gibbs J held the Aboriginal peoples of Australia could not be regarded as possessing sovereign rights of even a limited kind,[93] he asserted it was open to the plaintiff to question the accuracy of the decision in *Milirrpum*.[94] Further, he noted the appropriation of Aboriginal land could breach the free exercise of religion provision (s 116) in the *Constitution*.[95] However, he believed the plaintiff's claims were too general. No particular lands had been identified, and it was not clear whether "the claims are intended to refer to lands which have been alienated, ... [those] dealt with by statute, and to lands in States as well as in territories."[96] Implicitly, had the lands claimed been sufficiently identified, Gibbs J would have considered recognising the inherent territorial rights of the occupants.

Justice Jacobs held he could not consider whether the Crown had properly obtained its sovereign rights to the continent, as it was not open to a municipal court to consider claims adverse to the Crown's sovereign rights.[97] The statement of claim "apparently intended to dispute the validity of the British Crown's and now the Commonwealth of Australia's claim to sovereignty over the continent of Australia. ... These are not matters of municipal law but the law of nations and are not cognisable in a Court exercising jurisdiction under that sovereignty which is sought to be challenged."[98] He did not, however, advert to the question of concurrent sovereignty in the sense of domestic dependent nations.

In Jacobs J's view questions as to the classification of the annexation of Australia and claims based on the doctrine of communal native title were justiciable. The plaintiff could, therefore, argue that the Aboriginal peoples were entitled to the enjoyment of "the proprietary

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92 *Coe v Commonwealth*, note 61, at 408.

93 He held they were not even domestic dependent nations like the Indian tribes of the United States, who enjoyed concurrent sovereignty with the United States Government.

94 *Milirrpum v Nabalco Pty Ltd*, note 63.

95 *Coe v Commonwealth*, note 61, at 408.

96 *Coe v Commonwealth*, note 61, at 408.

97 *Coe v Commonwealth*, note 61, at 410.

98 *Coe v Commonwealth*, note 61, at 410.

and possessory rights" they held by reason of their prior occupation of the continent.[99] It could validly be argued that the Commonwealth had unlawfully dispossessed the Aboriginal peoples of "their rights, privileges, interests, claims and entitlements in respect of their lands."[100] Thus, he did not object to the general nature of the plaintiff's submissions:[101]

> It is public knowledge that there are large tracts of land in the Northern Territory which have never been alienated by grant from the Crown, and ... in those tracts of land there are Aboriginal people in considerable numbers. It seems to me that the matters stated ... are sufficient to raise for consideration the kinds of questions which were dealt with by Blackburn J in *Milirrpum v Nabalco Pty Ltd* ...

As to the classification of the acquisition of the continent Jacobs J noted that, while the judiciary had traditionally adopted a 'settled' classification,[102] there was no decision binding the court on this point. He held that "the plaintiff should be entitled to rely on alternative arguments [to the settled classification] when it comes to be determined whether the Aboriginal inhabitants of Australia had and have any rights in land."[103] Thus, the plaintiff could also rely on a 'conquered' classification and any rights stemming from it,[104] and, using either approach, could call for the legal recognition of his peoples' Indigenous rights.

Justice Murphy, while highly critical of the irresponsible and frivolous claims of the plaintiff, ultimately held that the classification of the acquisition of the Australian Continent was disputable and that it was arguable that Australian sovereignty resided in the Aboriginal Nation.[105] The decisions to the contrary in *Cooper v Stuart*[106] and

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99 *Coe v Commonwealth*, note 61, at 411.

100 *Coe v Commonwealth*, note 61, at 411.

101 *Coe v Commonwealth*, note 61, at 411. He made no further comment on the substantive issue other than referring to a few articles criticising the case.

102 For example, *Cooper v Stuart*, note 29, and *Council of the Municipality of Randwick v Rutledge* (1959) 102 CLR 54.

103 *Coe v Commonwealth*, note 61, at 411.

104 *Coe v Commonwealth*, note 61, at 411.

105 *Coe v Commonwealth*, note 61, at 412.

106 *Cooper v Stuart*, note 29.

Milirrpum[107] suggesting a 'settled' classification were not binding on the court.[108] Moreover, in Murphy J's view international law and practice indicated these decisions were wrong. It was cardinal to a valid 'occupation' under the notion of 'settlement' that the land annexed be *terra nullius*; territory belonging to no one.[109] He pointed out that there was a "wealth of historical material" acknowledging the prior occupation of Australia by the Aboriginal peoples.[110] Australia had not been *terra nullius* because a "[t]erritory inhabited by tribes having a social and political organisation cannot be of the nature *terra nullius*."[111] He noted the complexity of the Aboriginal peoples' social, political and legal systems and stressed that Australia had not been uninhabited in 1788, the Aboriginal population then being approximately 300,000.[112] Nor was Australia "taken 'peacefully'; they were killed or removed forcibly from the lands by United Kingdom forces or the European colonists in what amounted to attempted (and in Tasmania almost complete) genocide."[113] Justice Murphy noted that the International Court of Justice had held "[i]ndependent tribes, travelling over a territory or stopping in certain places, may exercise a de facto authority which prevents the territory being *terra nullius*."[114] To the extent that international law and practice flows into and becomes part of our municipal system of law, Murphy J believed these principles should be recognised.[115] Thus, the nomadic nature of some Aboriginal peoples was not a bar to the legal recognition of their occupation.[116]

In Murphy J's view, the 'settled' classification of the annexation of Australia was wrong. Pronouncements reinforcing this traditional view were "made in ignorance or as a convenient falsehood to justify the

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107 *Milirrpum v Nabalco Pty Ltd*, note 63.

108 Citing *Viro v The Queen*, (1978) 52 ALJR 418.

109 *Coe v Commonwealth*, note 61, at 412.

110 *Coe v Commonwealth*, note 61, at 412.

111 *Coe v Commonwealth*, note 61, at 412; quoting Professor Starke, *International Law* (8th ed) 1977 at 185.

112 *Coe v Commonwealth*, note 61, at 412.

113 *Coe v Commonwealth*, note 61, at 412.

114 *Coe v Commonwealth*, note 61, at 412; citing *Western Sahara Case*, note 62, at 4.

115 *Coe v Commonwealth*, note 61, at 412.

116 *Coe v Commonwealth*, note 61, at 412.

taking of aborigines' land."[117] Consequently, Murphy J held it was open to the plaintiff to argue that Australia was acquired by conquest and/or that sovereign rights to the Australian Continent existed originally and continued to reside in the Aboriginal Nation. The plaintiff was "entitled to endeavour to prove that the lands were acquired by conquest and to rely upon the legal consequences which followed."[118] Alternatively, the plaintiff could rely on the common law's protection of the Aboriginal title as recognised in the United States, Canada and New Zealand.[119]

In summary, while the court was divided as to the existence of Aboriginal *sovereign* rights, all members appeared to believe the plaintiff could rely on Indigenous *territorial* rights. It appears Gibbs J would only acknowledge these rights insofar as they related to unalienated Crown land.[120] The other members of the court did not adopt such a restrictive interpretation. Justice Murphy would have gone so far as to support claims to Aboriginal sovereignty over the continent stemming from the original occupation of Australia.

(vii) Mabo v Queensland (No 2)

In *Mabo*,[121] as in *Milirrpum*,[122] there were many interrelated legal issues. However, for current purposes, the primary focus will be upon the classification of the acquisition of Australia and the consequences of such characterisation. The nature and consequences of the acquisition of Australia and the Torres Strait Islands were central to the parties' cases. The plaintiffs' statement of claim alleged that the Meriam people's laws and customs recognised the plaintiffs and their predecessors had been since time immemorial the owners of parts of the Torres Strait Islands of Mer, Dawar and Waier and their surrounding seas, seabeds, fringing reefs and adjacent islets. The plaintiffs had enjoyed this title without interruption. While accepting that Queen Victoria had extended her sovereignty to the Murray Islands when they were annexed as part of Queensland on 1 August

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117 *Coe v Commonwealth*, note 61, at 412.

118 *Coe v Commonwealth*, note 61, at 412.

119 *Coe v Commonwealth*, note 61, at 412.

120 As does the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth).

121 *Mabo v Queensland (No 2)*, note 5.

122 *Milirrpum v Nabalco Pty Ltd*, note 63.

1879, the plaintiffs alleged this was "subject to the rights of the Meriam people and in particular subject to the rights of the predecessors in title of the Plaintiffs to the continued enjoyment of their rights in their respective lands, seas, seabeds and reefs" until lawfully extinguished. The plaintiffs claimed these rights had not been lawfully impaired and that the State of Queensland invalidly denied their existence.

The accuracy of the 'settled' classification of the acquisition of the Australian Continent was not disputed. Rather, the plaintiffs sought to undermine the description of Australia, and thus of the Murray Islands, as *terra nullius*. Their contention was that while 'settled' acquisitions are not confined to uninhabited *terra nullius*, the legal consequences of occupying *terra nullius* and inhabited lands differ. With the rejection of the contention that only *terra nullius* could be acquired by settlement, it was possible to revise the very impact of the settled classification. Counsel submitted that settlement should be perceived as a form of "deemed cession", rather than a denial of traditional private rights. At common law, unless and until validly extinguished by the Crown, such "deemed cession" did not affect the inhabitants' private rights under their pre-existing law. Thus, as in cases of conquest, the title acquired through settlement was derivative, not original.

Applying these principles to the plaintiffs' case, it was submitted that as Australia in 1788 and the Torres Strait Islands in 1879[123] were inhabited they were not *terra nullius*. On settlement, the common law flowed into the country and recognised the Meriam people's customary laws and the territorial rights held under them. Further, it was submitted that these laws and rights had been legislatively recognised by the Queensland Government. In particular, pursuant to the *Torres Strait Islanders Act 1939* (Qld) and subsequent legislation, Islander Courts had operated, determining and recording land disputes in accordance with customary law. Therefore, under the Meriam people's customary laws, as recognised by the Australian common law, the plaintiffs' ancestors' title to the subject lands pre-existed and survived the annexation of the Torres Strait Islands.

123 The year of the *Queensland Coast Islands Act 1879* (Qld), extending dominion over the Torres Strait Islands.

The High Court declared the acquisition of territory to be an act of state,[124] whose legitimacy could not be challenged by the municipal courts.[125] However, the consequences of acquisition could be judicially determined.[126] Thus the court could determine the relevant law governing rights and duties in the acquired territory and, as this depended upon the classification of the acquisition of a territory, it could also consider the nature of that acquisition.[127]

As to whether Australia was *terra nullius*, Brennan J suggested that factually he doubted that it was of such a character at the date of acquisition.[128] As to whether Australia was conquered or settled, in Brennan J's view the court could not question the validity of the 'settled' classification because it provided the foundation for the Crown's acquisition of sovereignty.[129] However, the notion of *terra nullius* could be rejected to the extent that it suggested Australia's Indigenous inhabitants were "too low in the scale of social organization to be acknowledged as possessing rights and interests in land."[130] Thus, an enlarged version of *terra nullius* could be rejected to the extent that it denied any pre-existing rights held by the original occupants.[131]

Regarding the laws flowing into Australia upon settlement, Brennan J noted that where the original inhabitants were not regarded as having a "settled law",[132] the rules governing the reception of law[133] were the same as those applied to uninhabited lands and territories. While acknowledging it would be incorrect to suggest that the Aboriginal

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124 *Mabo v Queensland (No 2)*, note 5, at 79 per Brennan J; at 95 per Deane and Gaudron JJ.

125 *Mabo v Queensland (No 2)*, note 5, at 32; see also Deane and Gaudron JJ at 78.

126 *Mabo v Queensland (No 2)*, note 5, at 32.

127 *Mabo v Queensland (No 2)*, note 5, at 32.

128 The Meriam people being avid cultivators: *Mabo v Queensland (No 2)*, note 5, at 33.

129 *Mabo v Queensland (No 2)*, note 5, at 33.

130 *Mabo v Queensland (No 2)*, note 5, at 58; referring to the ICJ's condemnation of the application of the notion of *terra nullius* to inhabited lands in *Western Sahara Case*, note 62, at 39.

131 *Mabo v Queensland (No 2)*, note 5, at 58; referring to the ICJ's condemnation of the application of the notion of *terra nullius* to inhabited lands in the *Western Sahara case*, note 62, at 39.

132 *Mabo v Queensland (No 2)*, note 5, at 36-37; quoting *Cooper v Stuart*, note at 291.

133 *Mabo v Queensland (No 2)*, note 5,at 36-37.

peoples of Australia had no law,[134] he nevertheless affirmed that on settlement the common law was received into the colony to provide its legal foundations.[135] Additionally, upon the annexation of the Torres Strait Islands, the "common law became the basic law of the Murray Islands."[136] Such laws applied to all occupants whether colonists or Aboriginal persons.[137]

In Brennan J's view, the common law recognised the pre-existing rights of the original occupants.[138] Statements in *Brown*[139] suggesting that Aboriginal territorial rights were extinguished upon settlement had to be rejected.[140] Justice Brennan noted that "judged by any civilized standard, such law was unjust and its application to contemporary Australia must be questioned."[139] The suggestion that "on the acquisition of sovereignty, the Crown acquired all colonial land as a royal demesne" was erroneous.[140] He believed the error stemmed from a failure to distinguish the acquisition of sovereignty from the acquisition of title.[141] The latter "could not be acquired by occupying land already occupied by another."[142] The Crown could not acquire title to Aboriginal lands through the mere occupation of Australia.

Justice Brennan held the common law that flowed into the colony included the theory of tenures.[143] While rejecting aspects of the

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134 *Mabo v Queensland (No 2)*, note 5, at 39, quoting *Milirrpum v Nabalco Pty Ltd*, note 63, at 267.

135 *Mabo v Queensland (No 2)*, note 5, at 34, 35 and 36.

136 *Mabo v Queensland (No 2)*, note 5, at 38.

137 *Mabo v Queensland (No 2)*, note 5, at 37.

138 *Mabo v Queensland (No 2)*, note 5, at 40.

139 *Mabo v Queensland (No 2)*, note 5, at 30. Nevertheless, he believed the principle could only be rejected if it would not "fracture the skeleton principle which gives the body of law its shape and internal consistency": *Mabo v Queensland (No 2)*, note 5, at 30 and 43.

140 *Mabo v Queensland (No 2)*, note 5, at 43.

141 *Mabo v Queensland (No 2)*, note 5, at 44 and 45, quoting in support Roberts-Wray, *Commonwealth and Colonial Law*, at 625; Salmond, *Jurisprudence* (7th ed) 1924; O'Connell, *International Law*, (2nd ed) 1970; Simpson, *A History of the Land Law*, (2nd ed) 1986.

142 *Mabo v Queensland (No 2)*, note 5, at 45, quoting in support *Blackstone's Commentaries* Bk II, ch 1 at 8.

143 *Mabo v Queensland (No 2)*, note 5, at 48.

reasoning in *Brown,*[144] he nevertheless asserted that a rejection of the theory of tenures would unacceptably undermine the skeletal framework of the Australian common law system:[145]

> A basic doctrine of the land law is the doctrine of tenure, to which Stephen CJ referred in *Attorney-General v Brown*, and it is a doctrine which could not be overturned without fracturing the skeleton which gives our land law its shape and consistency.

While affirming that the theory of tenures provided the basis of land law in the colony, unless the land was truly uninhabited *terra nullius*[146] this did not result in the Crown automatically acquiring absolute title to all colonial lands on settlement. On occupation the Crown acquired no more than the radical title, and that title was subject to the Aboriginal title.[147] Such a principle did not undermine "the skeleton which gives our land law its shape and consistency" as only the traditional owners were exempt from showing that their title stemmed from a Crown grant.[148] Thus, this aspect of the theory of tenures only applied to interests in land that stemmed from Crown grants, not pre-existing Aboriginal title.[149] Again, "only the fallacy of equating sovereignty and beneficial ownership of land ... [gives] rise to the notion that native title is extinguished by the acquisition of sovereignty."[150]

Justices Deane, Gaudron and Toohey totally rejected the suggestion that Australian was *terra nullius* or "practically unoccupied" in 1788.[151] Adopting the International Court of Justice's approach in *Western Sahara Case,*[152] they concluded that lands occupied even by

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144 *Attorney-General v Brown*, note 19.

145 *Mabo v Queensland (No 2)*, note 5, at 45.

146 *Mabo v Queensland (No 2)*, note 5, at 48.

147 *Mabo v Queensland (No 2)*, note 5, at 49-50; citing *Witrong and Blany* (1674) 3 Keb 401 at 402 and quoting *Amodu Tijani* [1921] 2 AC 399 at 403.

148 *Mabo v Queensland (No 2)*, note 5, at 48-49.

149 *Mabo v Queensland (No 2)*, note 5, at 48-49.

150 *Mabo v Queensland (No 2)*, note 5, at 48.

151 *Mabo v Queensland (No 2)*, note 5, at 109 per Deane and Gaudron JJ and at 181 per Toohey J.

152 *Western Sahara Case*, note 62, at 39 and 85-86: *Mabo v Queensland (No 2)*, note 5, at 182 per Toohey J.

nomadic peoples could not be classified as *terra nullius*.[153] The "idea that land which is in regular occupation may be *terra nullius* [is] unacceptable, in law as well as in fact."[154] Justice Toohey was particularly critical of the Privy Council's suggestion in *Cooper v Stuart*[155] that land lacking "settled inhabitants" could be classified as *terra nullius*. He stated, "the proposition that land which is not in regular occupation may be *terra nullius* is one that demands scrutiny",[156] particularly given there may be good reason for a nomadic lifestyle.[157] He preferred the approach in *Western Sahara Case*[158] that before land can be characterised as *terra nullius* it must belong to no one.[159] Thus the classification of the Torres Strait Islands as *terra nullius* was legally erroneous.

As to whether Australia was conquered or settled, Deane, Gaudron and Toohey JJ held that Australia, and the Murray Islands, were acquired by settlement.[160] They reached this conclusion despite their rejection of *terra nullius*.

As to the reception of law, Deane and Gaudron JJ affirmed that on settlement the common law was received as the law governing the colony.[161] They agreed with Brennan J that such laws applied to colonists, Aboriginal inhabitants and the Crown alike.[162] However, Deane and Gaudron JJ were of the view that only so much of the common law as was "reasonably applicable to the circumstances of the Colony" flowed into the colony.[163] This "left room for the continued operation of some local laws or customs among the native

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153 See, for example, *Mabo v Queensland (No 2)*, note 5, at 182 per Toohey J.

154 *Mabo v Queensland (No 2)*, note 5, at 182 per Toohey J.

155 *Cooper v Stuart*, note 29.

156 *Mabo v Queensland (No 2)*, note 5, at 182.

157 *Mabo v Queensland (No 2)*, note 5, at 181.

158 *Western Sahara Case*, note 62, at 39 and 85-86: *Mabo v Queensland (No 2)*, note 5, at 182 per Toohey J.

159 *Mabo v Queensland (No 2)*, note 5, at 181.

160 See, for example, Toohey J in *Mabo v Queensland (No 2)*, note 5, at 180.

161 *Mabo v Queensland (No 2)*, note 5, at 79.

162 *Mabo v Queensland (No 2)*, note 5, at 79 and 80.

163 *Mabo v Queensland (No 2)*, note 5, at 79, citing *Cooper v Stuart*, note 29, at 291; *State Government Insurance Commission v Trigwell* (1979) 142 CLR 617 at 634; *Blackstone's Commentaries* 1830, (17th ed), vol 1, para 107.

people and even the incorporation of some of those laws and customs as part of the common law."[164] In their view, the introduction of the common law into Australia did not result in the total annihilation of Aboriginal laws and the rights held under them.

In Deane and Gaudron JJ's view, unless annexation destroyed the antecedent rights of the Aboriginal peoples, the common law presumed them to have survived.[165] They suggested that the derivative acquisition of pre-existing Aboriginal rights accorded more with the history of Australian settlement than a finding that Aboriginal title failed to survive the acquisition of sovereignty.[166] In their view, although *Brown*[167] and *Cooper v Stuart*[168] were authorities for the proposition that on settlement all the lands of the colony became part of the Crown's demesne,[169] these decisions lacked a reasoned basis[170] and were made without the benefit of submissions directly pertaining to Aboriginal territorial rights.[171] They concluded that the nation's integrity required them to accept that the Crown's title was "reduced or qualified by the burden of the common law native title …".[172] Although acknowledging that the theory of tenures was based upon unique English history,[173] they believed it was part of the law of the colony.[174] On this view the Crown acquired the radical title, but it

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164 *Mabo v Queensland (No 2)*, note 5, at 79.

165 See the discussion, *Mabo v Queensland (No 2)*, note 5, at 95-99.

166 *Mabo v Queensland (No 2)*, note 5, at 58.

167 *Attorney-General v Brown*, note 19. They found that while the court's statement in *Brown* could be confined to unoccupied "waste lands", implicit in the judgment was an assumption that all lands in the colony were unoccupied at the relevant time: *Mabo v Queensland (No 2)*, note 5, at 102.

168 *Cooper v Stuart*, note 29.

169 They believed these sentiments also "accorded with the general approach" in colonial Australia. It is submitted this characterisation of colonial Australia is erroneous: see Cassidy J, "A Reappraisal of Aboriginal Policy in Colonial Australia" (1989) 10(3) *The Journal of Legal History* 365, and Deane and Gaudron JJ's own comments: *Mabo v Queensland (No 2)*, note 5, at 107-108.

170 *Mabo v Queensland (No 2)*, note 5, at 104.

171 They noted that "the question of Aboriginal entitlement was not directly involved in any of them and it would seem that no argument in support of Aboriginal entitlement was advanced on behalf of any party": *Mabo v Queensland (No 2)*, note 5, at 104; see also Toohey J at 183.

172 *Mabo v Queensland (No 2)*, note 5, at 110.

173 *Mabo v Queensland (No 2)*, note 5, at 81.

174 *Mabo v Queensland (No 2)*, note 5, at 80-81; citing *Delohery v Permanent Trustee Co of NSW* (1904) 1 CLR 283 at 299-300; *Williams v Attorney-General for New*

was subject to the Aboriginal title "to the extent necessary to recognize and protect the pre-existing native interest."[175]

3. Significance of the classification of a colonial acquisition

(i) Non-legal aspects

As noted in my earlier article,[176] the advancement of the notion that Australia was acquired by settlement has important non-legal ramifications. The notion that Australia was occupied by settlement is rightfully considered by some Aboriginal peoples as derogatory. There are two aspects to this 'insult'. First, historically, unoccupied territory could be acquired by discovery and effective occupation,[177] while inhabited land could only be acquired by descent, conquest, cession or, perhaps, prescription.[178] Thus, while the Australian Government has accepted the previous occupation of Australia by the Aboriginal peoples,[179] the notion of settlement perpetuates the myth that they were not there. As a witness before the Select Committee on Constitutional and Legal Affairs stated: "[t]he younger white generation should know that the Aboriginal people were in Australia before the white men came."[180] Similarly, as the Legal Adviser to the Aboriginal Treaty Committee said to the Committee: "[the concept of peaceful settlement] really proceeds on the assumption that the [Aboriginal peoples] were not there, or if they were, their institutions

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South Wales (1913) 16 CLR 404 at 439. As a corollary, the Crown held some title to land, namely, the radical title: *Mabo v Queensland (No 2)*, note 5, at 48.

175 *Mabo v Queensland (No 2)*, note 5, at 87 per Deane and Gaudron JJ.

176 Cassidy J, note 3, p 3.

177 While it has been suggested that in the 18th century mere discovery was sufficient to establish title to *terra nullius*, the inchoate title stemming from discovery had to be perfected by effective occupation. See *Island of Palmas Case* (1928) 22 Am J Int L 867 at 872-873.

178 The author rejects the argument that sovereign title to occupied lands can be acquired by prescription.

179 See, for example, the Senate's recognition that "the indigenous people of Australia, now known as Aborigines and Torres Strait islanders, were in possession of this entire nation prior to the 1788 First Fleet landing at Botany Bay …": quoted by Select Committee on Constitutional and Legal Affairs, note 14, para 2.11; see also para 3.41.

180 Select Committee on Constitutional and Legal Affairs, note 14, para 2.7.

should not be recognised as being civilised."[181] As to the latter point, while most Aboriginal Nations did not conform to eurocentric political systems,[182] each had sophisticated legal systems which had to be obeyed under the threat of sanction. The Aboriginal peoples lives were highly regulated by social rules providing "a stable order of society."[183] As Blackburn J declared in *Milirrpum*,[184] "[i]f ever a system could be called 'a government of laws, and not of men,' it is shown in the evidence before me." The Select Committee recognised that there was "a growing appreciation of evidence that [the Aboriginal peoples] were in existence at the time of white settlement … with complex systems of social, cultural and religious networks and of land tenure."[185]

Second, the notion of settlement also insinuates that Australia was peacefully occupied. As another witness to the Select Committee stated:

> Since 1788 our nation has been invaded by ever-increasing numbers of Europeans who, with superior weapons, have attempted to defeat our people and destroy our law and culture and seize, without compensation, our land. We have never conceded defeat and will continue to resist this ongoing attempt to subjugate us. The crimes against our nation have been carefully hidden from those who now make up the constituency of the settler state. … The Aboriginal people have never surrendered to the European invasion.[186]

As the Select Committee noted, "the history of violent physical resistance to British colonial expansion belies British claims that the colony was settled peacefully. … frontier conflict between the

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181 Select Committee on Constitutional and Legal Affairs, note 14, para 3.40.

182 Possibly, certain peoples of South Australia (see Taplin, *The Ngarrindjeri*, 1873, reprinted in JD Woods, *The Native Tribes of South Australia*, 1879) and the Maori peoples of New Zealand would have satisfied eurocentric models.

183 *Milirrpum v Nabalco Pty Ltd*, note 63, at 267. See further Maddock K, "Aboriginal Customary Law" in Hanks and Keon-Cohen (eds) *Aborigines and the Law*.

184 *Milirrpum v Nabalco Pty Ltd*, note 63, at 267.

185 Select Committee on Constitutional and Legal Affairs, note 14, at para 3.28.

186 Select Committee on Constitutional and Legal Affairs, note 14, para 2.2; see also para 3.40.

Aboriginal people and the settlers was frequent and violent and extended throughout the continent."[187]

(ii) Determination of the law applicable in a colony

The classification of a colonial acquisition is not only important for historical, political and social reasons. The character of an acquisition will determine which legal system provides the legal foundations of a colony. Under the 'settled' classification, common law protections flowed into the colony and were used by the courts to determine the rights and obligations of all occupants, including Aboriginal persons. The 'newly discovered country' was governed by the laws of England which flowed in with the new settlers.[188] All existing English laws were immediately in force in the new colony, thereby providing its legal foundations. This was taken to mean that, despite local circumstances,[189] certain fundamental principles of law including the theory of tenures[190] flowed into the colony. All inhabitants, including Aboriginal occupants,[191] were regarded as British subjects,[192] and the law of the colonial power remained the only acceptable basis for the administration of justice. The 'settlement' concept enabled colonial forces to ignore Indigenous legal systems and deny Aboriginal rights to land.

However, as *Mabo*[193] indicated, a 'settled' classification did not necessarily require a denial of Aboriginal rights. As Deane and

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187 Select Committee on Constitutional and Legal Affairs, note 14, para 3.28 and ch 2.

188 *Case 15 Anonymous*, note 15. See also *Mabo v Queensland (No 2)*, note 5, at 34, 35, 36 and 38.

189 Subject to the principle that only those laws applicable to the regional circumstances flowed into the colony.

190 *Mabo v Queensland (No 2)*, note 5, at 45 and 48-49. Historically one such principle was that despite local circumstances, all lands vested in the Crown without the recognition of the prior Aboriginal interests in land.

191 As confirmed in Governors' instructions and proclamations. See, for example, Proclamation 28, December 1836, *South Australian Gazette and Colonial Register* 3 June 1837. See also Governor Macquarie's Proclamation to the Aboriginals *HRA* Series (1) vol (1) at 13-14 and the Proclamation of Governor Hindmarsh, 28 December 1836 and Governor King *HRA* Series (1) vol (3) at 592-593.

192 In Australia, *R v Murrell*, note 35, is cited for this proposition.

193 *Mabo v Queensland (No 2)*, note 5, at 79.

Gaudron JJ recognised, only so much of the common law as was "reasonably applicable to the circumstances of the Colony" flowed into the territory.[194] This "left room for the continued operation of some local laws or customs among the native people and even the incorporation of some of those laws and customs as part of the common law."[195] In their view, the introduction of the common law into Australia did not necessitate the total annihilation of Aboriginal laws and the rights held under them.

On this point, the recent decision of the New Zealand Court of Appeal in *Marlborough Sounds*[196] is fundamental. In its judgment the Court of Appeal stressed that the decision[197] under appeal erroneously began "[by] starting with the English common law, unmodified by New Zealand conditions (including Maori customary proprietary interests), and [by] assuming that the Crown acquired property in the land of New Zealand when it acquired sovereignty …".[198] While this was said in the context of the cession of New Zealand under the Treaty of Waitangi,[199] the court was referring to the principle that the laws of England were applied in New Zealand "only so far as applicable to the circumstances thereof."[200] Under this principle, "English laws which are to be explained merely by English social or political conditions have no operation in a Colony."[201] The court took Deane and Gaudron JJ's view one step further by stating this meant that from the outset "the common law of New Zealand as applied in the courts differed from the common law of England because it reflected local circumstances.[202] … In British territories with native populations, the introduced common law adapted to reflect local custom, including property rights."[203] Thus, while "the content of customary property

194 *Mabo v Queensland (No 2)*, note 5, at 79.

195 *Mabo v Queensland (No 2)*, note 5, at 79.

196 *Ngati Apa, Ngati Koata v Ki Te Tau Ihu Trust*, note 10.

197 [2002] 2 NZLR 661.

198 *Ngati Apa, Ngati Koata v Ki Te Tau Ihu Trust*, note 10 at [13].

199 *Ngati Apa, Ngati Koata v Ki Te Tau Ihu Trust*, note 10 at [15].

200 *Ngati Apa, Ngati Koata v Ki Te Tau Ihu Trust*, note 10 at [17]; see also [28] and [134]. This principle was made explicit in the *English Laws Act 1858*.

201 *Ngati Apa, Ngati Koata v Ki Te Tau Ihu Trust*, note 10 at [28], quoting Robert-Wray, *Commonwealth and Colonial Law*, 1966, p 626.

202 *Ngati Apa, Ngati Koata v Ki Te Tau Ihu Trust*, note 10 at [17]; see also [86], [183] and [212].

203 *Ngati Apa, Ngati Koata v Ki Te Tau Ihu Trust*, note 10 at [17]; see also [183].

differed in other colonies, … the principle of respect for property rights [of the Aboriginal occupants] until they were lawfully extinguished was of general application."[204]

In this way New Zealand common law differed from English common law as the latter did not recognise Maori customary title.[205] The Court of Appeal asserted that the common law was displaced under this principle to the extent that it clashed with Maori customary rights.[206] As to the specific issue before it, the Court of Appeal held that the existence of Maori title to the foreshore and seabed was to be determined under New Zealand common law (including *tikanga* Maori) not English common law.[207] The localisation of the common law in the new colony enabled the court to recognise Aboriginal title to land. However, this begs the question of how else that common law could/should have been modified to reflect the pre-existence of the Aboriginal occupants. In particular, did it necessitate a rejection of the theory of tenures? A colleague argues that an allodial system better accommodates Aboriginal interests in land than the theory of tenures.[208]

While the point was not specifically addressed in *Marlborough Sounds*,[209] the Court of Appeal seemed to assume that "English tenure" applied, but nevertheless held this did not necessitate the rejection of Native proprietary rights. The Court of Appeal stated: "[o]n the acquisition of the territory, whether by settlement, cession or annexation, the colonising power acquires a radical or underlying title which goes with sovereignty …".[210] This statement reinforced the applicability of the theory of tenures. However, later in its judgment

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204 *Ngati Apa, Ngati Koata v Ki Te Tau Ihu Trust*, note 10 at [17]; see also [85], [136], [143], [185], [197], [204] and [208]. The Court of Appeal asserted that the view to the contrary was based on the equation of sovereignty with ownership "conflating imperium and dominion": [26]; see also [84].

205 *Ngati Apa, Ngati Koata v Ki Te Tau Ihu Trust*, note 10 at [212].

206 *Ngati Apa, Ngati Koata v Ki Te Tau Ihu Trust*, note 10 at [86].

207 *Ngati Apa, Ngati Koata v Ki Te Tau Ihu Trust*, note 10 at [205]; see also [212].

208 See the research thesis of Samantha Hepburn, Senior Lecturer, School of Law, Deakin University. The thesis is entitled "Feudal Tenure and native Title: Towards an allodial land model" (forthcoming).

209 *Ngati Apa, Ngati Koata v Ki Te Tau Ihu Trust*, note 10 at [18].

210 *Ngati Apa, Ngati Koata v Ki Te Tau Ihu Trust*, note 10 at [29], quoting Cooke P in *Te Ika Whenua* [1994] 2 NZLR 20 at 23-24; see also [102].

the court approached the issue in a manner that seemed to indicate that it was modifying the theory of tenures because of the New Zealand circumstances. The court stated: "the applicable common law principle in the circumstances of New Zealand is that [Maori] rights of property are respected on assumption of sovereignty. … Any presumption of the common law inconsistent with recognition of customary property is displaced by the circumstances of New Zealand …".[211] Thus, with regard to the English common law presumptions relating to the ownership of the foreshore and seabed, "the common law as received in New Zealand was modified by recognised Maori customary property interests. If any such custom is shown to give interests in foreshore and seabed, there is no room for a contrary presumption derived from English common law. The common law of New Zealand is different."[212]

In *Mabo*, Brennan J recognised that there was an argument that the theory of tenures was based upon unique English history and therefore inapplicable to the colonies.[213] However, in his view "[i]t is far too late in the day to contemplate an allodial or other system of land ownership."[214] This required him to accept the Crown's title but also to acknowledge that it was "reduced or qualified by the burden of the common law native title …".[215] Similarly, Gaudron and Deane JJ recognised that as the theory of tenures was based upon English circumstances, it was arguably inapplicable to the colonies,[216] but ultimately they thought it part of the law of the colony.[217] They concluded that the "Nation's integrity" required them to accept that the Crown acquired the radical title, but it was subject to the Aboriginal title "to the extent necessary to recognise and protect the pre-existing native interest."[218]

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211 *Ngati Apa, Ngati Koata v Ki Te Tau Ihu Trust*, note 10 at [85], citing Robert-Wray *Commonwealth and Colonial Law*, 1966 p 635.

212 *Ngati Apa, Ngati Koata v Ki Te Tau Ihu Trust*, note 10 at [86].

213 *Mabo v Queensland (No 2)*, note 5, at 81.

214 *Mabo v Queensland (No 2)*, note 5, at 47.

215 *Mabo v Queensland (No 2)*, note 5, at 110.

216 *Mabo v Queensland (No 2)*, note 5, at 81.

217 *Mabo v Queensland (No 2)*, note 5, at 80-81, citing *Delohery v Permanent Trustee Co of NSW*, note 174, at 299-300; *Williams v Attorney-General for New South Wales*, note 174, at 439. As a corollary, the Crown held some title to land, namely, the radical title: *Mabo v Queensland (No 2)*, note 5, at 48.

218 *Mabo v Queensland (No 2)*, note 5, at 87.

In view of the importance of the decision in *Mabo*, the High Court should have gone one step further and reviewed the applicability of the theory of tenures to a colony previously occupied by traditional owners. It is relevant to note that Viscount Haldane warned in *Amodu Tijani v Secretary, Southern Nigeria*[219] that caution was needed in applying English legal concepts to native title. He declared it necessary to "rid [ourselves] of assumptions that the ownership of land naturally breaks itself up into estates, conceived as creatures of inherent legal principles."[220] In light of this warning, should not the theory of tenures have been rejected as incompatible with a colony where there were traditional landholdings? As acknowledged in *Marlborough Sounds*:[221] "Maori customary property is a residual category of ownership not dependent upon title from the Crown. … The Crown has no property interests in customary land and is not the source of title to it."[222] Similarly, in *Mabo*[223] the court recognised that the source of the Aboriginal title, while enforced under the common law,[224] was to be found in the laws and customs of the traditional owners.[225] Questions as to the content of Aboriginal title and who is entitled to enjoy it are to be determined by traditional law and custom.[226] Therefore, the nature of Aboriginal title is totally contrary to the essence of the theory of tenures, namely, that all titles emanate from the Crown.

What then of the applicable law in a conquered or ceded colony? The consequences of a conquered classification were not always as draconian as the notion of 'conquest' implies.[227] While prima facie the conquering sovereign "may impose upon them what laws he

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219 *Amodu Tijani v Secretary, Southern Nigeria* [1921] 2 AC 399 at 404.

220 *Amodu Tijani v Secretary, Southern Nigeria*, note 219, at 404. Compare *Ngati Apa, Ngati Koata v Ki Te Tau Ihu Trust*, note 10 at [146] and [184].

221 *Ngati Apa, Ngati Koata v Ki Te Tau Ihu Trust*, note 10 at [40]; see also [184].

222 *Ngati Apa, Ngati Koata v Ki Te Tau Ihu Trust*, note 10 at [47]; see also [184], [197] and [211].

223 *Mabo v Queensland (No 2)*, note 5.

224 *Mabo v Queensland (No 2)*, note 5, at 59-60.

225 *Mabo v Queensland (No 2)*, note 5, at 58 and 87-88.

226 *Mabo v Queensland (No 2)*, note 5, at 87-88 and 109-110.

227 The word 'conquest' implies the mediaeval idea of one state enslaving another state.

pleases",[228] as noted in *Campbell v Hall*[229] "the laws of a conquered country continue in force until they are altered by the conquerer. … The laws and customs of the conquered country shall hold place."[230] Thus, the existing customary laws governing ownership and rights to land continue unless and until displaced by the new legal system. Had Australia been 'conquered', Aboriginal law would have been preserved until abrogated. Particularly in the era pre-dating *Mabo*,[231] this attribute of conquest would have been beneficial to claims to Aboriginal title.

There is some dispute as to how customary law can be abrogated. Some have suggested that only an express assertion by Parliament that it is abrogating Aboriginal law will be effective.[232] However, it seems that implied abrogation may displace customary law. For example, the subjection of Aboriginal persons to British criminal law may have impliedly effected an abrogation of customary law. In his dissenting judgment in *Mabo*,[233] Dawson J suggested that in Australia there had been an express abrogation of customary rights. He asserted that there was no need to consider whether Australia was conquered, ceded or settled to determine the law operating in the colonies, because the Crown had expressly introduced the common law into the colonies.[234] He believed this declaration was effective to displace Aboriginal laws and customs whatever the character of the annexation.[235]

This matter is further complicated by the early case law in relation to non-Christian kingdoms. As Lord Coke pointed out in *Calvin's case*[236]:

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228 *Case 15 Anonymous*, note 15; *Dutton v Howell*, note 15.

229 *Campbell v Hall*, note 15.

230 *Case 15 Anonymous*, note 15; *Dutton v Howell*, note 15. See also *Campbell v Hall*, note 15; *Calvin's case*, note 15; *Blackstone's Commentaries*, vol I p 107.

231 *Mabo v Queensland (No 2)*, note 5,.

232 See for example the submission of the Central Aboriginal Organisation to the Select Committee on Constitutional and Legal Affairs, note 14. See also Reynolds, *The Other Side of the Frontier*, Penguin, Ringwood, 1972.

233 *Mabo v Queensland (No 2)*, note 5.

234 *Mabo v Queensland (No 2)*, note 5, at 138, citing *Cooper v Stuart*, note 29.

235 *Mabo v Queensland (No 2)*, note 5, at 138.

236 *Calvin's case*, note 15.

> If a Christian King should conquer a kingdom of an infidel, and living then under his subjections, there *ipso facto* the laws of the infidel are abrogated, for that they be not only against Christianity, but against the laws of God and nature, contained in the Decalogue.

Unlike conquered Christians, who owed allegiance to the Crown and were entitled to be protected, conquered non-Christians were *perpetui inimici* (perpetual enemies) having no rights as subjects or citizens. In time, the distinction between Christian and non-Christian kingdoms was acknowledged to be the result of "the mad enthusiasm of the Crusades."[237] Nevertheless, there was still a degree of ambiguity as to the manner in which the doctrine of conquest was to be applied to non-Christian peoples. There always remained the overriding principle that the monarch "could impose upon them what law he pleases."[238]

The reality is that the subjection of all Australians today to Aboriginal law would be just as misplaced as the original application of British law to the Aboriginal peoples of Australia. Moreover, even if Aboriginal law was recognised as only being applicable to Aboriginal peoples, the passage of two hundred years of occupation has created new and special problems unable to be easily resolved. The Australian Law Reform Commission lists a number of problems[239] including the sacred-secrecy issue,[240] the suggested unacceptability of certain Aboriginal laws and punishments, and the question of the authority of tribal elders to administer such laws.[241] There is also the difficulty of how such laws could be adapted to apply to 'modern' problems such as alcohol and drug abuse. The commission also recognised the pressing question of how much traditional law still survives, particularly where Aboriginal people have been dispossessed for many generations.[242] The entwining of customary law and customary

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237 Cassidy, note 3, p 3.

238 *Case 15 Anonymous*, note 15.

239 See Australian Law Reform Commission, *The Recognition of Aboriginal Customary Laws*, Report 31, Canberra, AGPS, 1986 at 50.

240 The secrecy of certain laws, access to which is restricted to certain persons.

241 See ALRC Report 31, note 239, at 2.

242 See ALRC Report 31, note 239, at 50. See also the evidence of Mr Nelson before the Select Committee on Constitutional and Legal Affairs, note 14.

landholding may be such that attributes of Aboriginal law have been lost through dispossession.[243] This does not deny the continued existence of Aboriginal law and its force within both rural and urban communities,[244] but simply recognises that occupation itself may have effectively abrogated certain customary laws.

In a narrower context, this principle of the preservation of Aboriginal custom in a conquered country can operate without an air of unreality. If the pre-existing legal system was only displaced to the extent to which it was abrogated by the conquering power, might not the conquering power displace the 'public' laws of the conquered nation yet leave intact 'private' rights such as the rights to land? This principle would preserve the pre-existing customary rights and, in a manner akin to the modern day approach to settled colonies, these rights would continue and be recognised under the new laws of the conquering power. In this way the notion of conquest would provide an alternative method of recognising and protecting traditional Aboriginal rights. Following conquest "the antecedent private rights of the conquered inhabitants are not extinguished by the unilateral acts of the conquering power but are presumed to survive the change of sovereignty."[245] Thus, the conquering power succeeds to all of the public rights and prerogatives of the conquered sovereign, but the private rights of the inhabitants remain intact.

The fact that derivative forms of acquisition (conquest and cession) do not displace private rights under customary law has been recognised by the courts. The Privy Council stated in *Amodu Tijani v Secretary, Southern Nigeria*:[246]

> A mere change in sovereignty is not to be presumed as meant to disturb rights of private owners; and the general terms of a cession are prima facie to be construed accordingly. The introduction of the system of Crown grants which was made subsequently must be regarded as having been brought about mainly, if not exclusively, for conveyancing purposes, and not with a view to altering substantive titles already existing.

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243 See the evidence of Mr Nelson before the Select Committee on Constitutional and Legal Affairs, note 14.

244 See Gale, *Urban Aborigines*, 1972.

245 *Amodu Tijani v Secretary, Southern Nigeria*, note 219, at 407.

246 *Amodu Tijani v Secretary, Southern Nigeria*, note 219, at 407-8, quoted in *Ngati Apa, Ngati Koata v Ki Te Tau Ihu Trust*, note 10 at [15].

As stated in *Marlborough Sounds*,[247] "the recognition of existing native rights when colonies were settled was closely paralleled by the recognition of existing property rights when sovereignty was transferred by cession or even by conquest." The court quoted in support Marshall CJ in *US v Percheman*:[248]

> It may not be unworthy of remark that it is very unusual, even in cases of conquest, for the conqueror to do no more than displace the sovereign and assume dominion over the country. The modern usage of nations, which has become law, would be violated; that sense of justice and of right which is acknowledged and felt by the whole civilised world would be outraged, if private property should be generally confiscated, and private rights annulled. The people change their allegiance; their relation to their ancient sovereign is dissolved; but their relations to each other, and their rights of property, remain undisturbed. If this be the modern rule even in cases of conquest, who can doubt its application to the case of an amicable cession of territory.[249]

The laws that were the source of traditional private rights survived conquest unless they were abrogated by the conquering power, and any such abrogation was considered to be "contrary to the laws and usages of nations"[250]

(iii) Scope of the prerogative

The classification of annexation is also relevant to determining the scope of the prerogative. Thus, 'conquest' might provide a basis for the mistreatment of the traditional occupants. Lord Mansfield stated in *Campbell v Hall* that a conquering power had a choice. It could leave the inhabitants undisturbed, but if it 'put them to the sword' then title

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247 *Ngati Apa, Ngati Koata v Ki Te Tau Ihu Trust*, note 10 at [15]; see also [29], [31], [37], [82], [137], [138] and [143].

248 (1833) 10 US 393 at 396-397.

249 Quoted in *Ngati Apa, Ngati Koata v Ki Te Tau Ihu Trust*, note 10 at [137].

250 Quoted in *Ngati Apa, Ngati Koata v Ki Te Tau Ihu Trust*, note 10; citing Marshall CJ in *US v Percheman*, note 48, at 396-397 and O'Connell, *State Succession in Municipal Law and International Law*, (1967) vol 1 p 410.

to all the lands vested in the conquering power.[251] The expansion of European settlement resulted in traditional peoples being displaced and their populations decimated. Such dispossession and decimation facilitated an extinguishment of Aboriginal title and the granting of title to land under the theory of tenures. Thus, the same historical facts used to support the claim that Australia was acquired by conquest could undermine the continuing existence of customary rights to land.

4. Sovereignty

Introductory remarks

The notion that Australia was acquired by settlement continues to provide a key basis for denying Aboriginal sovereignty. The premise underlying the concept of conquest is the very antithesis of assertions that Australia was *terra nullius* and/or acquired by settlement. Conquest implies the derivative acquisition of rights. Conquest implies prior rights, including sovereign rights that have forcefully been displaced. If pre-existing sovereignty resided in the Aboriginal nations of Australia that sovereignty could only be determined by conquest or cession. If sovereignty vested in the Aboriginal peoples of Australia those sovereign rights are capable of survival, resurrection and acknowledgement centuries later. If Australia was not settled and the irruption by British forces in 1788 is seen as an invasion of Aboriginal sovereign rights then, in the absence of any surrender,[252] the Aboriginal peoples may enable the restoration of that sovereignty. International law notions of continuity and reversion of sovereignty, supported by movements for decolonisation and self-determination, have seen the sovereignty of displaced peoples resurrected. Two examples are the establishment of the State of Israel and the recognition by the United Nations of the Palestinian Liberation Organisation (PLO) as an international 'body' representing the Palestinian people.

The author has previously considered in detail the issues relevant to Aboriginal sovereignty.[253] For the purposes of this article, the

251 *Campbell v Hall*, note 15, at 255.

252 See note 187.

253 Cassidy J, note 83.

discussion will briefly focus on four key issues relevant to any discussion of Australia judicial pronouncements on sovereignty:

- terra nullius
- Aboriginal sovereignty
- domestic dependent nations, and
- reversion of sovereignty.

(i) Terra nullius

In Australia, prior to *Mabo*,[254] the denial of Aboriginal sovereignty was based on the erroneous notion that the continent was *terra nullius*, acquired by peaceful occupation. Historically, *terra nullius*, could be acquired by discovery and effective occupation,[255] while inhabited land could only be acquired by descent, conquest, cession or, perhaps, prescription. Thus it is cardinal to a valid 'settlement' that the land be *terra nullius*.[256]

This raises the issue of whether Aboriginal occupation was recognised by international law as preventing the land being classified as *terra nullius.* In Lindley's *Acquisition of Territory from Backward Peoples* he reviewed the opinions of jurists over the centuries and found:[257]

> [A] persistent preponderance of juristic opinion in favour of the proposition that lands in the possession of any backward peoples who are politically organized ought not to be regarded as if they belonged to no-one. ... [W]henever a country is inhabited by people who are connected by some political organization, however primitive and crude, such a country is not to be regarded as *territorium nullius* and open to acquisition by occupation. ... [I]n order that an area shall not be *territorium nullius* it would appear that it be inhabited by a political society, that is, by a considerable number of persons who are permanently united by habitual obedience to a certain and

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254 *Mabo v Queensland (No 2)*, note 5, at 33, 40, 41, 42, 58, 109, 181 and 182.

255 *Island of Palmas Case*, note 177.

256 Grotius, *The Freedom of the Seas (Mare Liberum)*, 1605, (1916 ed) at 13.

257 Lindley, *Acquisition of Territory from Backward Peoples*, 1926, (1969 ed) p 17 and pp 22-23.

> common superior, or whose conduct in regard to their mutual relations habitually conforms to recognized standards.

Thus, all that international law required for Aboriginal populations to be recognised as being in occupation of land was a degree of political organisation and authority sufficient for the general maintenance of order. Particularly given Lindley's comment that "no race is without organization of some kind",[258] the Aboriginal peoples of Australia clearly satisfied these international law requirements and their occupation prevented their lands being *terra nullius*. In this regard the observations of Blackburn J in *Milirrpum*[259] as to the sophistication of the nature of Aboriginal customary law and society are significant. Consequently, the Aboriginal lands purportedly acquired by colonial forces were not uninhabited *terra nullius* acquired by peaceful occupation.

Lindley's analysis is supported by the decision of the International Court of Justice in *Western Sahara Case*.[260] The court delivered an advisory opinion on two matters relating to the Spanish colonisation of the Western Sahara. One of the questions involved whether the Western Sahara was "a territory belonging to no one (*terra nullius*)" in 1884 when colonised by the Spanish. The majority held that given the subject lands were inhabited by nomadic tribes they could not be classified as *terra nullius*:[261]

> Whatever the differences of opinion there may have been among jurists, the State practice of the relevant period indicates that territories inhabited by tribes or peoples having a social and political organization were not regarded as *terrae nullius*.

Judge Gros stressed:[262]

> [T]he independent tribes travelling over the territory, or stopping in certain places, exercised a *de facto* authority which

258 Lindley, note 257, p 19.

259 *Milirrpum v Nabalco Pty Ltd*, note 29, at 267.

260 *Western Sahara Case*, note 62.

261 *Western Sahara Case*, note 62, at 39.

262 *Western Sahara Case*, note 62, at 75.

> was sufficiently recognised for there to have been no *terra nullius*.

Judge Amoun noted:[263]

> Mr Bayona-Ba-Meya, goes on to dismiss the materialistic concept of *terra nullius*, which led to this dismemberment of Africa following the Berlin Conference of 1885. Mr Bayona-Ba-Meya substitutes for this a spiritual notion: the ancestral tie between the land, or 'mother nature', and the man who was born therefrom, remains attached thereto, and must one day return thither to be united with his ancestors. This link is the basis of the ownership of the soil, or better, of sovereignty.

While the word 'occupation' was at times used to signify the acquisition of sovereignty from these types of peoples, the majority held that this use of the term was technically improper. An original sovereign title could only be acquired by occupation of *terra nullius*, otherwise only a derivative title could be acquired and only through agreements with local rulers. This was the approach substantially adopted by Judges Dillard,[264] de Castro[265] and Boni.[266]

It is clear from this decision that the eurocentric test for the recognition of sovereignty adopted by Gibbs J in *Coe*[267] did not accord with international law. The decision affirmed that the nomadic nature of some Aboriginal peoples' occupation did not prevent them exercising sovereignty over their lands. Judge Amoun's statement regarding the relationship of the peoples of the Western Sahara to their land echoes that of the Aboriginal peoples of Australia, as Blackburn J recognised in *Milirrpum*.[268] Moreover, in light of Judge Dillard's comment that

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263 *Western Sahara Case*, note 62, at 85-86.

264 *Western Sahara Case*, note 62, at 124.

265 *Western Sahara Case*, note 62, at 171.

266 *Western Sahara Case*, note 62, at 173.

267 *Coe v Commonwealth*, note 61, at 407.

268 See the discussion of the Aboriginal relationship with land in *Milirrpum v Nabalco Pty Ltd*, note 63. See also *Re Kearney (Aboriginal Commissioner); Ex parte Japanangka* (1984) 52 ALJR 31.

"you do not protect a *terra nullius*",[269] the Aboriginal resistance to colonial expansion also appears to be important to the classification of the Australian Continent as not *terra nullius*.

(ii) Aboriginal sovereignty

While Aboriginal occupation prevented the land being *terra nullius*, thereby undermining the validity of the 'settlement' of Australia, whether international law recognised such occupation as giving rise to sovereign rights was another matter. A survey of international law jurists revealed that the preponderance of thought was that "the aborigines undoubtedly had true dominion in both public and private matters[270] … neither their princes nor private persons could be despoiled of their property on the ground of them not being true owners."[271] Thus it was not only private rights to land which international law required to be respected. The public or sovereign rights of these peoples also had to be acknowledged. Consequently, Crawford notes that the normal method of acquisition of Aboriginal sovereignty was by cession or conquest, rather than by settlement.[272]

Lindley's analysis of the works of international law jurists established that they accepted certain Aboriginal peoples to be more than mere legal occupants. They were considered full sovereign nations. While some jurists required these peoples to comply with a prescribed degree of 'civility',[273] generally the only prerequisite was a degree of governmental authority sufficient to maintain order within the group.[274] That sovereignty could be exercised by a local community

269 *Western Sahara Case*, note 62, at 124.

270 Vitoria, "De Indis et de Jure Belli Relectiones (Reflections on the Indians and on the Law of War)", 1532, (published posthumously, 1557) in Scott J, (ed) *Classics of International Law*, 1917, p 24.

271 Vitoria, note 270, p 24.

272 Crawford, *The Creation of States in International Law*, Oxford, Clarendon, 1979, p 180.

273 See in particular Westlake, *Collected Papers*, Oppenheim (ed), 1911, pp 139-157. He required a "native government capable of controlling white men or under which white civilization can exist": at 145.

274 Crawford, note 272, p 176.

or local communities, a native sovereign, a number of rulers across the country, or small groups jointly exercising co-sovereignty.[275]

In light of international law's recognition of Aboriginal sovereignty in these circumstances, there is no reason to deny the sovereignty of the Aboriginal peoples of Australia. As the court pointed out in *Western Sahara Case*[276] even nomadic peoples can exercise *de facto* sovereignty over the lands through which they roam. The nomadic tribes, confederations and emirates considered in that case were found to "jointly exercise co-sovereignty over the Shinguitti country."[277] Similarly, nomadic[278] and sedentary bands of Aboriginal peoples in Australia could be considered to jointly exercise sovereign rights over the country.

If these Aboriginal peoples legally held the sovereign title to their traditional lands, before their territory could be validly acquired the consent of the people or their sovereign had to be obtained. Yet no treaties were concluded between the acquiring imperial/colonial powers and the Australian Aboriginal peoples.[279] The High Court in *Mabo*[280] recognised that the Aboriginal peoples of Australia have "neither ceded their lands to the Crown nor suffered them to be taken as the spoils of conquest." Where no treaty of cession has been concluded the sovereign rights of the Aboriginal occupants can only have been assumed illegally. After examining the notion of domestic dependent nations, the ability of such an Aboriginal Nation or Aboriginal Nations to resurrect its/their sovereignty is considered.

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275 For example, the tribes, confederations and emirates of the Western Sahara. For particular case examples see *Western Sahara Case*, note 62; *Right of Passage Case* (1960) ICJ 6 at 38; *Temple Case* (1962) ICJ 6.

276 *Western Sahara Case*, note 62, at 122.

277 *Western Sahara Case*, note 62, at 122.

278 In Australia there has been a misapprehension that all Aboriginal peoples were nomadic. This belief is not accurate. Many Aboriginal communities undertook a sedentary existence.

279 For example, the Chairman of the Northern Land Council, Mr Galarrwuy Yunupingu declared in 1987: "Aboriginal People are the indigenous sovereign owners of Australia and adjacent islands since before 1770 and as such have rights and treaty rights. Their Sovereignty has never been ceded ...": *The Weekend Australian*, 30 June/1 July 1990 at 21. See also note 187.

280 *Mabo v Queensland (No 2)*, note 5, at 29.

(iii) Domestic dependent nations

The resolution of disputes relating to Aboriginal sovereignty is often mistakenly perceived as involving only two possibilities: (1) acknowledgment of Aboriginal sovereignty and the consequent destruction of the 'occupying' State's sovereignty, or (2) continuation of the past denial of Aboriginal sovereignty. However, it is possible for both entities to enjoy concurrent sovereignty through the notion of domestic dependent nations.

The Indian tribes of the United States have long been recognised as domestic dependent nations, exercising inherent sovereign rights over Indian country[281] concurrently with the United States Government's claim to sovereignty.[282] The sovereignty of Indian Nations became entrenched in United States case law as a result of a series of cases known as "the Marshall trilogy".[283] These and subsequent cases[284] recognised the Indian tribes as separate nations entitled to govern themselves and enforce their own customary laws.

In *Johnson v McIntosh*,[285] Marshall CJ declared that the Aboriginal occupants were:[286]

> [T]he rightful occupants of the soil, with a legal as well as a just claim to retain possession of it, and to use it according to their own discretion; but their rights to complete sovereignty, as independent nations, were necessarily diminished, and their power to dispose of the soil at their own will, to whomsoever they pleased, was denied by the original fundamental principle, that discovery gave exclusive title to those who made it.

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281 In essence, "Indian country" constitutes (i) reservations, (ii) allotments, (iii) dependent Indian communities, and (iv) lands the Aboriginal title to which has not been extinguished. The concept of Indian country was originally developed in *US v Sandoval* 231 US 28 (1913).

282 See further McCoy RG, "The Doctrine of Tribal Sovereignty: Accommodating Tribal, State and Federal Interests" (1978) 13 *Harvard Civil Rights - Civil Liberties Law Review* 357 at 359; Case D, *Alaska Natives and American Laws*, University of Alaska Press, Fairbanks, 1984, especially ch 10.

283 *Johnson v McIntosh* (1823) 21 US 543 at 574; *Cherokee Nation v Georgia* (1831) 30 US 1 at 16, 17, 20 and 53; *Worcester v Georgia* (1832) 31 US 515 at 544-545 and 559.

284 See the cases detailed in Cassidy, note 83, at footnote 218.

285 *Johnson v McIntosh*, note 283.

286 *Johnson v McIntosh*, note 283, at 574.

Until sovereign and territorial title to their lands was ceded, the Aboriginal occupants enjoyed the right to govern themselves according to their own customary laws. The only limitation was the 'occupying' state's right of pre-emption, that is, its sole right as against other European Nations to purchase Indian lands if the latter persons wished to sell.[287]

In *Cherokee Nation v Georgia*,[288] Marshall CJ held that while the Cherokee Nation did not constitute "a foreign state," the United States "plainly recognise[d] the Cherokee Nation as a state ... from the settlement of our country."[289] The Indian Nations were "domestic dependent nations" standing in a relationship with the United States resembling that of "a ward to his guardian."[290] This nation exercised concurrent sovereignty with the 'conquering' power, maintaining control within its territorial units. Thus the Cherokee Nation was "a distinct political society, separated from others, capable of managing its own affairs and governing itself."[291] This nation possessed recognised sovereign and territorial rights, enjoyed by reason of its original occupation of the country. Justice Thompson went even further in recognising Indian sovereignty by stating:[292]

> [P]rovided the inferior ally reserves to itself the sovereignty or the right to govern its own body, it ought to be considered an independent state. Consequently, a weak state, that, in order to provide for its safety, places itself under the protection of a more powerful one, without stripping itself of the right of government and sovereignty, does not cease on this account to be placed among the sovereigns who acknowledge no other power.

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287 The right of pre-emption was defined by Marshall CJ in *Johnson v McIntosh*, note 283, at 573: "This principle was, that discovery gave title to the government by whose subjects, or by whose authority, it was made, against all other European governments, which title might be consummated by possession. The exclusion of all other Europeans necessarily gave to the nation making the discovery the sole right of acquiring the soil from the natives, and establishing settlements upon it."

288 *Cherokee Nation v Georgia*, note 283.

289 *Cherokee Nation v Georgia*, note 283, at 16, 17 and 20.

290 *Cherokee Nation v Georgia*, note 283, at 17.

291 *Cherokee Nation v Georgia*, note 283, at 16.

292 *Cherokee Nation v Georgia*, note 283, at 53.

In *Worcester v Georgia*,[293] the court recognised that "America ... was inhabited by a distinct people, divided into separate nations, independent of each other and the rest of the world, having institutions of their own, and governing themselves by their own laws."[294] Chief Justice Marshall stressed that discovery did not give the federal or state authorities power to legislate with respect to the Indian Nations or their territory. Discovery only gave the United Kingdom and the United States[295] the right to purchase "such lands as the natives were willing to sell"[296] as against all other European governments.[297] The Indian Nation's right of self-government remained unaffected by discovery.[298]

The court thought "the suggestion that the feeble settlements made on the sea-coast [gave the authorities] legitimate power [to govern the Indians]" was absurd.[299] Rather:[300]

> The Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial, with the single exception of that imposed by irresistible power, which excluded them from intercourse with any other European potentate than the first discoverer of the coast of the particular region claimed. ... The words 'treaty' and 'nation' are words of our own language, selected in our diplomatic and legislative proceedings, by ourselves, having each a definite and understood meaning. We have applied them to Indians as we have applied them to other nations of the earth: they are applied all in the same sense.

While Marshall CJ believed that as domestic dependent nations the Indian Nations had placed themselves "under the protection of one

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293 *Worcester v Georgia*, note 283.

294 *Worcester v Georgia*, note 283, at 542.

295 "The United States succeeded to all the claims of Great Britain, both territorial and political" but no more: *Worcester v Georgia*, note 283, at 544.

296 *Worcester v Georgia*, note 283, at 545 and 560. See also McLean J at 580.

297 *Worcester v Georgia*, note 283, at 544. See also McLean J at 579.

298 *Worcester v Georgia*, note 283, at 542-545.

299 *Worcester v Georgia*, note 283, at 542-545.

300 *Worcester v Georgia*, note 283, at 559-560.

more powerful", this did not take away an Indian Nation's "right of government, [with it thereby] ceasing to be a state."[301] The notion of domestic dependent nations was not synonymous with the surrender of the Indian Nations' sovereign character:[302]

> Protection does not imply the destruction of the protected. [It is a] settled doctrine of the law of nations ... that a weaker power does not surrender its independence - its right to self-government - by associating with a stronger, and taking its protection ... 'Tributary and feudatory states', says Vattel, 'do not thereby cease to be sovereign and independent.'

The Crown could not, therefore, legitimately claim dominion over the Cherokee Nation's territory or persons within such territory. The court held that the Cherokee Nation was a distinct self-governing community, within which the subject laws of Georgia had no force.[303] Justice McLean J stressed that insofar as the subject Georgian law purported to abolish the territorial and internal political rights of the relevant Indian Nation, it was repugnant to the terms of treaties with the Cherokee Indians.[304]

In *Bonjon*,[305] Willis J held these principles were equally applicable to the Aboriginal peoples of Australia. He asserted that the Aboriginal peoples were "dependent allies, still retaining their own laws and usages, subject only to such restraints and qualified control as the safety of the colonists and the protection of the aborigines required.[306] … [The] Aborigines ... remained unconquered and free, but dependent tribes, dependent on the colonists as their superiors for protection ...". As with the Marshall trilogy, he recognised that this dependency did not amount to a surrender of Aboriginal sovereignty.[307] Relying on the United States' case law, he held the Aboriginal peoples were not reduced to the status of Crown subjects,

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301 *Worcester v Georgia*, note 283, at 560-561.

302 *Worcester v Georgia*, note 283, at 561.

303 *Worcester v Georgia*, note 283, at 561.

304 *Worcester v Georgia*, note 283, at 578-579.

305 *The trial of Bonjon*, note 36.

306 *The trial of Bonjon*, note 36, at 152.

307 *The trial of Bonjon*, note 36, at 152.

but retained their traditional rights even in the face of British sovereignty.[308] He therefore concluded that "the Aborigines [were] a distinct though dependent people, and entitled to be regarded as self governing communities."[309]

This approach was rejected by Gibbs J in *Coe*.[310] In his view, unlike the United States Indian Nations, the Aboriginal peoples of Australia were not a "distinct political society" separated from the rest of the Australian people and entitled to exercise sovereignty concurrently with the Crown.[311] The contention that the Aboriginal peoples of Australia have not maintained a distinct identity in varying degrees must be disputed. This identity has found expression in activities such as the Aboriginal Embassy established on the lawns of Federal Parliament, the establishment of the National Aboriginal Congress in 1977 and its calls for a Makaratta/treaty, and the creation of the Aboriginal Provisional Government in 1990. Perhaps more importantly, Gibbs J's finding was based on the discredited view that before Aboriginal sovereignty could be recognised the relevant Aboriginal Nation had to satisfy a highly eurocentric test[312] that conflicted with international law. His rejection of "the contention that there is in Australia an Aboriginal nation exercising sovereignty, even of a limited kind"[313] was based on an untenable legal foundation. Nevertheless, in *The Wik Peoples v Queensland*,[314] Kirby J reaffirmed Gibbs J's view by stating that the "indigenous people of Australia [did not] enjoy" the status of domestic dependent nations. As no reasoned basis was provided for this statement, it can still be contended that Willis J's view that the Aboriginal Nations were domestic dependent nations was an accurate portrayal of the status of the Aboriginal peoples of Australia post-occupation. As in the United States, in the absence of a valid surrender of Aboriginal sovereignty logic dictates that it was retained and could be exercised at least concurrently with the occupying power.

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308 *The trial of Bonjon*, note 36, at 152.

309 *The trial of Bonjon*, note 36, at 152.

310 *Coe v Commonwealth*, note 61.

311 *Coe v Commonwealth*, note 61, at 412; quoting Marshall CJ in *Cherokee Nation v Georgia*, note 283, at 17.

312 *Coe v Commonwealth*, note 61, at 412.

313 *Coe v Commonwealth*, note 61, at 412.

314 *The Wik Peoples v Queensland* (1996) 141 ALR 129 at 256 (High Court).

(iv) Reversion of sovereignty

The final matter for consideration is the issue of the legal redress that Aboriginal peoples might have if it is concluded that the colonial occupation of Australia constituted an invalid invasion of their sovereign rights. In the absence of any formal surrender by the Aboriginal Nations,[315] under international law this sovereignty may be resurrected and restored. Bolstered by international movements supporting decolonisation and self-determination, the principles of continuity and reversion[316] may be invoked to resurrect the sovereignty of dispossessed Aboriginal peoples. The sovereignty of the dispossessed peoples continues, awaiting reversion, despite the loss of territory[317] and even total illegal annexation. Thus Vattel believed that even if these people had been completely subjugated, as long as they "ha[d] not voluntarily submitted, and ha[d] merely ceased to resist from lack of power ..."[318] they could nevertheless retain their sovereignty. That sovereignty can be resurrected, because sovereign rights do not inure in a belligerent occupant, much less an occupant whose entry was unlawful: *ex injuria non oritur jus* (a right does not arise out of wrongful conduct).

While the exact legal effect of reversion is unclear, it appears the resurrected state resumes full sovereign title:[319]

> There is a legal presumption that a State which lost its sovereignty but reverted to it (before the dust of history had settled), recovers a full and unencumbered sovereignty. The interpretation of rights and obligations connected with such sovereignty would therefore be in favour of the reverting State.

Examples of reversion of sovereignty include the resurrection of Portugal's sovereignty after the invasion by Philip II of Spain[320] and

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315 See notes 187 and 252.

316 Reversion is to be distinguished from succession. In the former case, sovereignty is not surrendered and continues in abeyance awaiting revival under the notion of reversion or *post liminium*. Some have suggested Israel falls into this category: see Stone J, *Israel and Palestine*.

317 Crawford, note 272, pp 412-413.

318 *Droit des gens* vol I, ch xvi, 193 at 213.

319 Alexandrowicz (1969) 45 Int Aff 465 at 474.

320 Crawford, note 272, p 413.

modern day Korea's resurrection of sovereignty after the Japanese occupation.[321] The establishment of the State of Israel[322] is seen as a resurrection of the historical rights of the Jewish people[323] on the basis that the occupants (Arabian and Jordanian States) were unlawful belligerents. Similarly, the recognition of the PLO by the United Nations[324] could reflect an appreciation of the historic legal rights of Palestinian Arab peoples.[325]

It is submitted that the Australian Government could be seen as an unlawful belligerent occupant that failed to obtain legitimate title to this nation. Therefore, any acknowledgment of Aboriginal sovereignty today would simply involve a reinstatement of the historical sovereign rights of the prior Aboriginal Nation or Nations. As the Aboriginal occupants strongly resisted the invasion of imperial and colonial forces, before they eventually weakened and their resistance subsided, in accord with Vattel's approach this did no more than acknowledge the strength of their foes. There was no voluntary submission to the 'conquering' power, or implied acknowledgment of this occupant as the legitimate sovereign. Moreover, in varying degrees, the Aboriginal peoples of Australia have managed to survive the invasion of their country and maintain their identity as a separate nationality. Thus, it is submitted that the decimation of these Aboriginal peoples and the seizure of their lands would not prevent the reversion of their sovereign rights. Consequently, there exists a legal basis for the creation of a separate Aboriginal State, as in the case of Israel, or the international recognition of a body representing the Aboriginal peoples, as in the case of the PLO. The Commonwealth's sovereignty could either be displaced wholly or, through the notion of domestic dependent nations, partially. Especially in view of the deconstruction

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321 Crawford, note 272, pp 407-408.

322 By 33 to 13, with 10 abstentions, the General Assembly adopted Resolution 181(II) recommending Palestine be partitioned into separate Arab and Jewish States. When Israel declared itself to be an independent State, it was almost immediately recognised by the United Nations.

323 See the Declaration of Independence of the Jewish State (14 May 1948), wherein it was stated these peoples were assembled "by virtue of the natural and historic right of Jewish people and of the resolution of the General Assembly of the United Nations." See also the United States' recognition of Israel, *The New York Times*, 15 May 1948.

324 See Resolution 181(II). The recognition of the PLO is discussed in more detail in Cassidy, note 3, pp 6-7.

325 According to the Palestine National Charter of 1964, Palestine is "the homeland of the Palestinian People": Art 1.

of ATSIC, the recognition of Aboriginal sovereignty[326] would at the very least provide the Aboriginal peoples of Australia with some say in their destiny.

5. Conclusion

There still exists considerable uncertainty as to the consequences of finding that Australia was acquired by conquest, as opposed to settlement. The above discussion indicates that the notion of conquest would not only serve as a powerful political lever, but also provide a basis for acknowledging Aboriginal public and private legal rights.[327] The reclassification of the acquisition of the continent could even lead to the resurrection of Aboriginal sovereignty. Whether or not such reclassification was accompanied by compensation, it would undoubtedly be welcomed by the Aboriginal peoples of Australia. Understandably, they find the current legal characterisation of the acquisition of Australia extremely offensive. In addition, the derivative nature of a conquered acquisition could well provide benefits in the recognition of both private rights to land and Aboriginal sovereignty.

There is no doubt that some progress has been made since 1988. *Marlborough Sounds*[328] acknowledged that even under a 'settled' classification the common law should be modified to reflect the pre-existence of Aboriginal customary law and Aboriginal title.[329] Equally, the High Court decision in *Mabo*[330] established that the

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326 In Australia, perhaps the most realistic approach would be to provide Aboriginal communities, such as the Pitjantjatjara peoples, with concurrent sovereignty as domestic dependent nations.

327 Cassidy, note 3, p 13.

328 *Ngati Apa, Ngati Koata v Ki Te Tau Ihu Trust*, note 10.

329 *Ngati Apa, Ngati Koata v Ki Te Tau Ihu Trust*, note 10 at [13]; see also [17].

330 *Mabo v Queensland (No 2)*, note 5.

'settled' classification of the acquisition did not negate the common law's recognition of Aboriginal title. However, under this classification Aboriginal title is vulnerable. The factual reality has been its extinguishment. The notion of 'settlement' remains the very antithesis of Aboriginal sovereignty and its reversion. As concluded in 1988,[331] the benefits of finding the Aboriginal peoples of Australia to have been 'conquered' should not be completely disregarded. If nothing else, such a finding would sit more comfortably with the factual reality.

331 Cassidy, note 3, p 13.