

THE RECEPTION OF LAND LAW INTO THE AUSTRALIAN COLONIES POST-MABO: THE CONTINUITY AND RECOGNITION DOCTRINES REVISITED AND THE EMERGENCE OF THE DOCTRINE OF CONTINUITY *PRO-TEMPORE*

ULLA SECHER*

I INTRODUCTION

In rejecting the view that sovereignty conferred absolute beneficial ownership of all land on the Crown and in holding that the Crown acquired only a radical title to all land, the High Court in *Mabo v Queensland (No 2)*¹ ('*Mabo*') undermined the basic assumption that had guided all Australian real property law since colonisation. Thus, the legal consequences that flow from the feudal character of the English doctrine of tenure no longer apply *ipso jure* in Australia: title to land is no longer exclusively derivative; all titles to land can no longer theoretically be traced back to a Crown grant. Consequently, although the High Court confirmed that the doctrine of tenure is an essential principle of Australian land law, six members of the Court made it clear that the *grundnorm* of Australian real property law is no longer the English (feudal) doctrine of tenure; instead, it is the Australian doctrine of tenure with radical title as its postulate.²

Nevertheless, since the decision in *Mabo*, discussion has focused on the meaning of native title and the practical implications of its judicial recognition. This article, however, considers the effect of the Court's decision on the reception of English land law. Indeed, it will be shown that the applicability of the Australian doctrine of tenure was only possible because the High Court clarified the doctrine of reception as it applied to Australia.³ In this context, although the High Court rejected the common law classification of inhabited land

* LLB (Hons 1), James Cook University, PhD, University of New South Wales; Barrister of the Supreme Court of Queensland; Lecturer in Law, James Cook University. This article is derived from chapters 1, 2 and 3 of the author's PhD thesis: *A Conceptual Analysis of the Origins, Application and Implications of the Doctrine of Radical Title of the Crown in Australia: An Inhabited Settled Colony* (D Phil Thesis, University of New South Wales, 2003).

1 (1992) 175 CLR 1.

2 See generally Ulla Secher, *A Conceptual Analysis of the Origins, Application and Implications of the Doctrine of Radical Title of the Crown in Australia: An Inhabited Settled Colony* (D Phil Thesis, University of New South Wales, 2003), chh 1, 3.

3 For the pre-*Mabo* and post-*Mabo* legal position in this context, see *ibid* 33–40, 137–59.

as 'desert and uncultivated', the Court did not reclassify Australia as 'conquered' or 'ceded' rather than 'settled'. Nevertheless, and crucially, six justices changed the law that applies to a colony acquired by settlement where the colony was not previously uninhabited.

Under the common law pre-*Mabo*, the necessary result of the categorisation of a colony as settled (whether uninhabited in fact or 'legally uninhabited') was that English law, including the feudal doctrine of tenure, applied *ipso jure* throughout the colony. However, the High Court re-examined the constitutional status of Australia in light of the fact that Australia was inhabited at the time of settlement. By ascribing to Australia the status of a new colony – a settled yet inhabited colony – the High Court in *Mabo* was free to prescribe a doctrine relating to the law that applied in the colony. In doing so, the Court considered the relevance of the doctrines of continuity and recognition, and the scope of the Crown's prerogative powers in a settled yet inhabited colony.

Indeed, it will be seen that the test adopted by the High Court for determining whether pre-existing land rights survive a change in sovereignty is a merged version of the continuity and recognition doctrines: the doctrine of *continuity pro tempore*. Although the combined effect of the Australian doctrine of tenure and the doctrine of *continuity pro tempore* enabled native title to be accommodated within Australian land law, the High Court made it clear that the Crown's radical title, as a concomitant of sovereignty, conferred power to grant land in every part of the colony, including land subject to interests not deriving from Crown grant. Thus, the Crown had power to extinguish native title rights unilaterally. Indeed, the sovereign's power of extinguishment in an inhabited settled colony was considered greater than the sovereign's power of extinguishment in conquered or ceded colonies. It will be seen that the explanation for this unique conclusion on the scope of the sovereign's power unilaterally to extinguish pre-existing rights in Australia is found in the distinction between the scope of the Crown's prerogative powers in inhabited settled colonies on the one hand, and in conquered or ceded colonies on the other.⁴

It will be shown that, like the Australian doctrine of tenure, both the doctrine of *continuity pro tempore* and the scope of the Crown's prerogative powers in an inhabited settled colony are merely legal consequences of the High Court's restatement of the common law. After *Mabo*, there exists a new doctrine prescribing the system of law that applies upon settlement of an inhabited territory: a modified doctrine of reception.

II THE CONSTITUTIONAL STATUS OF AUSTRALIA: AN INHABITED SETTLED COLONY

Although the manner in which a sovereign acquires a new territory is a matter of international law, the system of law applicable in a newly acquired territory is

4 Cf Kent McNeil, 'Extinguishment of Native Title: The High Court and American Law' (1997) 2 *Australian Indigenous Law Reporter* 365, 369.

determined by the common law.⁵ The international law of the 18th century⁶ recognised four⁷ ways of acquiring sovereignty over a new territory: by conquest, cession, occupation or annexation.⁸ The British acquisition of sovereignty over the colony of New South Wales was regarded as dependant upon the occupation of territory that was terra nullius.⁹ Initially, the doctrine of terra nullius was applied to the acquisition of uninhabited new territory.¹⁰ Gradually, however, the doctrine was extended to justify acquisition of inhabited territories by occupation if the land was uncultivated or its indigenous inhabitants were not 'civilised' or not organised in a society that was united permanently for political action.¹¹

Although the doctrine of terra nullius is a well-established concept of international law, it is not a concept of the common law.¹² Nevertheless, the doctrine had a common law counterpart in the 'desert and uncultivated'

5 See Secher, above n 2, 35–9.

6 Although the acquisition of Australia occurred over 200 hundred years ago, the inter-temporal rule requires that the analysis focus, not on contemporary rules of international law, but on the rules existing in the 1770s: Ian Brownlie, *Principles of Public International Law* (3rd ed, 1979) 131–3.

7 Cf Nii Lante Wallace-Bruce, 'Two Hundred Years On: A Re-examination of the Acquisition of Australia' (1989) 19 *Georgia Journal of International and Comparative Law* 87, 89 and the authorities referred to below n 14, which identify five main modes of acquiring territory under international law: cession, occupation, prescription, accretion and conquest.

8 William Blackstone, *Commentaries on the Laws of England* (first published 1765–69, a facsimile of the 1st ed, 1979) vol 1, 104–5; Emmerich de Vattel, *The Law of Nations* (1982) ch 18; Kenneth Roberts-Wray, *Commonwealth and Colonial Law* (1966) 99 ff. A colony may be acquired by any one of these means or by a combination of two of them: Roberts-Wray at 99. An example is annexation of ceded colonies or conquered colonies: Roberts-Wray at 104–5, 107.

9 That is, land belonging to no-one. Terra nullius 'derives from classical Roman law under which the doctrine of "Occupatio" acted to confer title upon the discoverer of an object that was "res nullius", that is, "belonged to nobody": David Ritter, 'The "Rejection of Terra Nullius" in *Mabo*: A Critical Analysis' (1996) 18 *Sydney Law Review* 5, 7. In post-Renaissance Europe, this doctrine was 'conveniently and analogously' applied under international law to the acquisition of territory by states: at 7. See also Gerry Simpson, 'Mabo, International Law, Terra Nullius and the Stories of Settlement: An Unresolved Jurisprudence' (1993) 19 *Melbourne University Law Review* 195, 203–5.

10 In this context, 'uninhabited territory' means 'uninhabited territory that is also not under the control of any sovereign': Mark Lindley, *The Acquisition and Government of Backward Territory at International Law: Being a Treatise on the Law and Practice Relating to Colonial Expansion* (1926) 10. See also Ritter, above n 9, 7.

11 Ritter, above n 9, 7. Although opinions differed about exactly what types of inhabited land could be treated as terra nullius, 'all the expanded definitions ... shared the common feature of explicit ethnocentricity': at 8. Emmerich de Vattel, one of the most influential writers on the law of nations, argued that as a principle of natural law, wandering tribes could only be treated as owning property when they appropriated certain portions of earth to render them fertile and to derive sustenance from them. It followed that no country could lay claim to more of the land than it could use: de Vattel, above n 8, ch 18. See also John Bennett and Alex Castles, *A Sourcebook of Australian Legal History* (1979) 250–2; Heather McRae, Garth Nettheim and Laura Beacroft, *Aboriginal Legal Issues* (1991) 76–8. De Vattel's ideas reflected those of John Locke on the justification for private ownership of property in the sphere of international law: see John Locke, *The Second Treatise of Civil Government* (first published 1690, 1946 ed). Reynolds argues that although de Vattel's writings offered a justification for colonising part of the continent, they did not justify the expropriation of the whole continent: Henry Reynolds, *The Law of the Land* (1st ed, 1987) 18.

12 Richard Bartlett, *The Mabo Decision: Commentary and Text* (1993) ix; Ritter, above n 9, 8.

doctrine,¹³ which classified inhabited land as uninhabited for the purpose of the doctrine of reception. The common law doctrine determining the law in force in a newly acquired territory depended upon the manner of its acquisition by the Crown. In 1722, the Privy Council had recognised a distinction between conquered or ceded and settled territories¹⁴ in terms of the law which governed the new possession.¹⁵ In the case of a settled colony, the common law of England became the law of the colony in so far as it was applicable to colonial conditions.¹⁶ If a country was ceded or conquered, however, the law in force at the time of cession or conquest remained in force unless and until it was altered by or under the authority of the sovereign.¹⁷

At common law, the only category of land that could be acquired by settlement was land that was found to be ‘desert and uncultivated’.¹⁸ However, just as the categories of land that were terra nullius under international law were expanded to embrace certain inhabited land, ‘desert and uncultivated’ land under the common law was expanded to include land that was inhabited. Indeed, the extended meaning of ‘desert and uncultivated’ was the result of the common law’s acceptance of the international law doctrine of terra nullius.¹⁹ Consequently, judicial classification of inhabited land as desert and uncultivated

13 The phrase is Blackstone’s: Blackstone, above n 8, vol 1, 104. It is also discussed in *Mabo* (1992) 175 CLR 1, 34–7 (Brennan J) and in *Western Australia v Commonwealth* (1995) 183 CLR 373, 427 (‘Native Title Act Case’). Note, however, that in *Mabo*, Brennan J actually uses the phrase ‘desert uninhabited’: at 34. See also Secher, above n 2, 37–9.

14 According to Blackstone, this distinction was based upon the law of nature, or at least upon that of nations: Blackstone, above n 8, vol 1, 104.

15 *Case 15 – Anonymous* (1772) 2 P Wms Reports 75; 24 ER 646. See also Justice B H McPherson, ‘The Mystery of *Anonymous* (1722)’ (2001) 75 *Australian Law Journal* 169. A different position prevailed, however, if a country was conquered. In that case, the governance of the country was within the royal prerogative, and the Crown could impose upon the country whatever law it chose to make. However, until such time as the Crown in fact made new laws, the laws and customs of the conquered country remained in force. See also Blackstone, above n 8, vol 1, 104–5. *Campbell v Hall* (1774) Lofft 655; 98 ER 1045, where the law of a ceded colony was in question, treated the doctrine as stated by Blackstone as settled beyond doubt. In *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141, Blackburn J, citing *Campbell v Hall*, considered that Blackstone’s doctrine was settled beyond doubt in 1788 for settled colonies: at 201. See also Roberts-Wray, above n 8, 540–1.

16 *Case 15 – Anonymous* (1772) 2 P Wms 75; 24 ER 646; *Mabo* (1992) 175 CLR 1, 35 (Brennan J); Blackstone, above n 8, vol 1, 104–5; *Forbes v Cochrane* (1824) 2 B & C 448, 463; 107 ER 450, 456; Roberts-Wray, above n 8, 540–1. English law would become the law of a territory outside England either upon first settlement by English colonists of a ‘desert and uncultivated’ country or by the exercise of the sovereign’s legislative power over a conquered or ceded territory. The received English law of a colony included both the unwritten law (common law and equity) and the statute law in force at the time of settlement. English statute law subsequently enacted only applied if it was specifically extended to the colony: Joseph Chitty, *A Treatise on the Law of the Prerogatives of the Crown and the Relative Rights and Duties of the Subject* (1820) 32–3.

17 *Case 15 – Anonymous* (1772) 2 P Wms 75; 24 ER 646. See also Blackstone, above n 8, vol 1, 104–5; Roberts-Wray, above n 8, 541–2. This was, however, subject to the qualification that where English settlers formed their own separate community, English law governed that community: *Advocate General of Bengal v Ranee Surnomoye Dossee* (1863) 15 ER 811, 824.

18 According to Blackstone’s classic exposition: Blackstone, above n 8, vol 1, 104.

19 *Mabo* (1992) 175 CLR 1, 41 (Brennan J); Peter Butt, *Land Law* (4th ed, 2001) 61.

was justified on the basis of criteria similar to those which justified the expanded version of *terra nullius*.²⁰

The common law concept of acquiring territory by 'settlement' is, therefore, analogous to the international law mode of acquiring territory by 'occupation'; land that can be lawfully acquired by settlement at common law is the equivalent of territory that is regarded as *terra nullius* in either its narrow or extended senses under international law. Accordingly, the *concept* of *terra nullius* (as opposed to the *doctrine*) has two limbs: it applies to questions of sovereignty (under international law) and to questions of property (at common law). The *doctrine* of *terra nullius* is, however, only relevant under international law in deciding whether a state has acquired sovereignty by purported occupation;²¹ it is not relevant at common law in determining the law which is to govern the new possession.²²

Nevertheless, until *Mabo*, when sovereignty of a territory was acquired under the enlarged notion of *terra nullius* for the purpose of international law, that territory was treated as 'desert and uncultivated' country for the purpose of the common law because there was an absence of 'settled inhabitants' and 'settled law'.²³ According to pre-*Mabo* orthodoxy, if an inhabited territory was *terra nullius* for the purpose of acquisition of sovereignty, it was assumed that there could be no sufficiently organised system of native law and tenure to admit of recognition by the common law. In such circumstances, since the indigenous inhabitants and their occupancy of land were ignored when considering title to land in the settled colony, the Crown's sovereignty over the territory was equated with Crown ownership of the lands therein because there was 'no other proprietor of such lands'.²⁴ Accordingly, the classification of territory as 'desert and uncultivated' has been a basis for attributing absolute beneficial ownership of all land in Australia in the Crown. In this respect, therefore, the 'occupation' and 'settlement' of an inhabited territory were equated with the 'occupation' and 'settlement' of an uninhabited territory for the respective purposes of legitimising

20 In the context of Australian Aborigines, the two most important elements were the 'established law' approach combined with a 'vague criterion of nomadism': Kent McNeil, *Common Law Aboriginal Title* (1989) 121.

21 The Commonwealth Government acknowledged this in its written response to the Draft United Nations Declaration on the Rights of Indigenous Peoples in 1989, stating that '[t]erra nullius is a concept of public international law; it would be inappropriate to use it in the context of domestic land claims': cited in Simpson, above n 9, 210.

22 Sir Harry Gibbs, former Chief Justice of the High Court of Australia, has observed that the 'expression *'terra nullius'* seems to have been unknown to the common law'. He says: 'I have found no trace of it in legal dictionaries ranging from Cowel's Interpreter (1701 ed) to Strouds Judicial Dictionary (1986 ed). It is not mentioned in Tarring's Law Relating to the Colonies (1913 ed) which in its day was regarded as authoritative': 'Foreword' in Margaret Stephenson and Suri Ratnapala (eds), *Mabo: A Judicial Revolution – The Aboriginal Land Rights Decision and Its Impact on Australian Law* (1993) xiv.

23 *Cooper v Stuart* (1889) 14 App Cas 286, 291 (Lord Watson).

24 *A-G (NSW) v Brown* (1847) Legge 312, 319 (Stephen CJ), cited in *Mabo* (1992) 175 CLR 1, 40 (Brennan J).

the acquisition of sovereignty under international law and ascertaining the law of the territory on colonisation at common law.²⁵

In *Mabo*, it was conceded by all parties and accepted by the Court that the Crown had acquired sovereignty of Australia by occupancy under international law. Furthermore, all members of the High Court concluded that, at common law, irrespective of the original presence of the Aboriginal inhabitants, Australia was a territory acquired by settlement.²⁶ Accordingly, the question before the Court was whether or not native title was part of the common law of a settled territory.²⁷ However, notwithstanding that the classification of inhabited territory as uninhabited for legal purposes served different functions under international law and at common law, in rejecting the proposition that the common law of a settled colony did not recognise native title, one of the most contentious aspects of the High Court's decision has been its treatment of the international law doctrine of terra nullius.²⁸

Accepting that Australia was not, in fact, terra nullius in 1788, yet legally unoccupied for the purpose of acquisition of sovereignty, the High Court equated occupation of an inhabited territory with occupation of an uninhabited territory.

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- 25 'Occupation' and 'settlement' are used interchangeably in respect of both the common law and the international law doctrines relating to the classification of inhabited land as uninhabited. However, the term 'settlement' has often been preferred by Australian judges and writers when referring to the international law method of acquisition known as 'occupation': see, eg, *Coe v Commonwealth* (1979) 24 ALR 118, 129 (Gibbs J). Since the common law term is 'settlement' (see *Mabo* (1992) 175 CLR 1, 33 (Brennan J, with whom Mason CJ and McHugh J concurred)), 'occupation' will be employed to refer to the international law doctrine.
- 26 *Mabo* (1992) 175 CLR 1, 37–8, 57 (Brennan J, with whom Mason CJ and McHugh J concurred), 79–80 (Deane and Gaudron JJ), 182 (Toohey J), 138–9 (Dawson J). 'Terra nullius' was not mentioned in any of the plaintiffs' submissions, and was not referred to at all during the four days of substantive argument before the High Court of Australia: Transcript of Proceedings, *Mabo v Queensland (No 2)* (High Court of Australia, Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ, 28–31 May 1991).
- 27 Counsel for the plaintiffs made it clear that their submissions were not directed towards arguing that Australia had not been 'settled': Transcript of Proceedings, *Mabo v Queensland (No 2)* (High Court of Australia, Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ, 28–31 May 1991) 146. Counsel merely argued that, irrespective of the mode of acquisition of a colony, native interests inland were preserved as a burden upon the title of the Crown: at 3.
- 28 See, eg, Damian Austin, 'Mabo: Sorting the Fact from Fiction' (1993) 7(4) *Commercial Law Quarterly* 13, 15; Mark Brabazon, 'Mabo, The Constitution and the Republic' (1994) 11 *Australian Bar Review* 229, 232 ff; Frank Brennan, 'Implications for Aborigines and Islanders' in Stephenson and Ratnapala, above n 22, 26; Peter Butt, 'Native Land Rights in Australia: The *Mabo* Case' (1995) *The Conveyancer and Property Lawyer* 33, 34–5; John Forbes, 'Mabo and the Miners – Ad Infinitum?' in Margaret Stephenson (ed), *Mabo: The Native Title Legislation – A Legislative Response to the High Court's Decision* (1995) 51; Mark Gregory, 'Rewriting History 1: *Mabo v Queensland – The Decision*' (1992) 17 *Alternative Law Journal* 157; Barbara Hocking, 'Aboriginal Law Does Now Run in Australia' (1993) 15 *Sydney Law Review* 187, 188–9; G P McGinley, 'Indigenous Peoples' Rights: *Mabo and Others v State of Queensland – The Australian High Court Addresses 200 Years of Oppression*' (1993) 21 *Denver Journal of International Law and Policy* 311, 318 ff; Gary Meyers and John Mugumbwa, 'The *Mabo* Decision: Australian Aboriginal Land Rights in Transition' (1993) 23 *Environmental Law* 1203, 1213; Kamal Puri, 'Mabo – A Legal Revolution?' in *Mabo – A Critical Review: Proceedings of the University of Queensland T C Beirne School of Law Annual Symposium* (1992) 19; Henry Reynolds, *The Law of the Land* (2nd ed, 1992) 186, 195–6; Simpson, above n 9, 205 ff. Cf Bartlett, *The Mabo Decision*, above n 12, 241; Sir Harry Gibbs, above n 22, xiv; Garth Nettheim, 'Native Title and International Law' in Stephenson, 37; Pamela O'Connor, 'Aboriginal Land Rights at Common Law: *Mabo v Queensland*' (1992) 18 *Monash University Law Review* 251, 255; Ritter, above n 9, 5.

Sovereignty was, therefore, acquired under the enlarged notion of terra nullius. Despite this conclusion, however, the majority of the High Court expressly disapproved of the application of the concept of terra nullius to an inhabited country and recognised that the notion that inhabited land may be classed as terra nullius no longer commanded general support under international law.²⁹ Although the Court challenged the classification of Australia as a territory acquired by occupation and, therefore, the legal foundation for the Crown's assertion of sovereignty, the Court's unanimous view that the acquisition of sovereignty is not justiciable before municipal courts³⁰ precluded any review of this classification.³¹ Municipal courts have, however, jurisdiction to determine the consequences of an acquisition of sovereignty: thus, it was open to the High Court to determine the body of law that applied in the newly acquired territory of Australia.

Since the enlarged doctrine of terra nullius had ceased to command acceptance under international law,³² the Court found that its broadly analogous application in the common law of property was brought into question. In contrast to their conclusion on the issue of acquisition of sovereignty, the majority refused to follow the 'orthodox' approach which equated the settlement of an inhabited territory with settlement of an uninhabited territory in ascertaining the law of a territory on colonisation. The Court rejected this approach on substantially three grounds. In addition to the fact that its analogue under international law no

29 In rejecting the doctrine of terra nullius as a basis for the colonial acquisition of inhabited territories, four of the majority judges expressly relied upon the critical examination of the theory of terra nullius *Western Sahara (Advisory Opinion)* [1975] ICJ Rep 12; *Mabo* 175 CLR 1, 40–1 (Brennan J, with whom Mason CJ and McHugh J concurred), 141–2 (Toohey J). It was not until 1975 that an international tribunal raised doubts as to whether land occupied by indigenous people could be considered terra nullius: *Western Sahara (Advisory Opinion)* [1975] ICJ Rep 12. Although the separate opinion of Vice President Ammoun considered that the concept of terra nullius had been employed at all periods to justify conquest and colonisation and as such stood condemned (at 86), the majority thought that territory was not terra nullius if it were occupied by people having 'social and political organisation': at 39. The majority view appears to indicate that territory inhabited by people not having such organisation is terra nullius. Further, the High Court failed to note that the International Court of Justice actually applied the inter-temporal rule: see below n 31. 'The question was whether the territory was terra nullius according to the international practice of 1884, the date of Spain's colonisation. ... The relevant date was 1884, not 1974 (when the dispute arose) or 1975 (when the Court wrote its opinion)': Robin Sharwood, 'Aboriginal Land Rights: Further Reflections' (1995) 93 *Victorian Law News* 41, 45–6. See also David Harris, *Cases and Materials on International Law* (3rd ed, 1983) 165–7; Wallace-Bruce, above n 7, 88.

30 This principle was stated by Gibbs J in *New South Wales v Commonwealth* (1975) CLR 337 ('*Seas and Submerged Lands Case*') in the following terms: 'The acquisition of territory by a sovereign state for the first time is an act of state which cannot be challenged, controlled or interfered with by the courts of that state': at 388. It precludes 'any contest between the executive and the judicial branches of government as to whether a territory is or is not within the Crown's dominions': *Mabo* (1992) 175 CLR 1, 31 (Brennan J). See also *Post Office v Estuary Radio Ltd* [1968] 2 QB 740, 753 (Diplock LJ); *Wacando v Commonwealth* (1981) 148 CLR 1, 11 (Gibbs J), 21 (Mason J).

31 The Court's approach in relation to this aspect of the case also accords with inter-temporal law. The inter-temporal rule is an established rule of international law and provides that where 'the rights of parties to a dispute derive from legally significant acts ... [from] very long ago ... the situation in question must be appraised ... in the light of the rules of international law as they existed at the time, and not as they exist today': Harris, above n 29, 165–7.

32 *Mabo* (1992) 175 CLR 1, 41 (Brennan J).

longer commanded general support,³³ the Court held that the factual premise underpinning the colonial reception of the common law of England was not only false,³⁴ but also manifestly unjust.³⁵

Accordingly, six justices agreed that the Australian common law should be changed to acknowledge that Australia was not uninhabited for the purpose of determining the system of law applicable upon settlement. Prior to *Mabo*, however, the common law determining the law that was to govern a new possession had two limbs, one general and one specific. The general limb consisted of a doctrine prescribing the law (whether English or local) that applied in the newly acquired territory (in the case of settlements, the doctrine of reception). The specific limb consisted of a doctrine prescribing the effect of a change in sovereignty on pre-existing rights to land (the doctrine of continuity or the recognition doctrine). Although the English common law, as it was understood in Australia pre-*Mabo*, appeared certain with respect to the general limb,³⁶ the common law with respect to the effect of Crown acquisition of territory on pre-existing rights to land was not so clear.

III THE CONTINUITY AND RECOGNITION DOCTRINES REVISITED

According to Brian Slattery's pioneering work,³⁷ irrespective of the constitutional status of a colony (whether conquered, ceded or settled), pre-existing private property rights continue by virtue of the 'doctrine of continuity'³⁸ and cannot normally be unilaterally terminated by the sovereign

33 Ibid 40–1 (Brennan J) (relying on *Western Sahara (Advisory Opinion)* [1975] 1 ICJ Rep 12, 39), 182 (Toohey J).

34 *Mabo* (1992) 175 CLR 1, 17–18, 21–2 (Brennan J), 99–100 (Deane and Gaudron JJ), 182 (Toohey J).

35 Ibid 42 (Brennan J), 109 (Deane and Gaudron JJ).

36 See Secher, above n 2, 35–9.

37 Brian Slattery, *The Land Rights of Indigenous Canadian Peoples, as Affected by the Crown's Acquisition of Their Territories* (D Phil Thesis, University of Saskatchewan, 1979).

38 Ibid 50–9. In the absence of seizure of privately held lands, by act of state during the course of acquisition of territorial sovereignty by the Crown or subsequent confiscation by legislation, there is a presumption that private property rights continue after a change in sovereignty. Slattery rejects the distinction between settled and conquered colonies: Brian Slattery, 'Understanding Aboriginal Rights' (1987) 66 *Canadian Bar Review* 727, 738. He treats the 'doctrine of aboriginal rights' as a colonial law (or imperial constitutional law) doctrine, which, like other doctrines of colonial law, applied automatically to a new colony when the colony was acquired. Thus, in the same way that colonial law determined whether a colony was deemed to be settled or conquered, it also supplied the presumptive legal structure governing the position of native peoples: at 737. The doctrine of aboriginal rights was therefore 'part of a body of fundamental constitutional law that was logically prior to the introduction of English common law and governed its application in the colony': at 737–8. In this way, Slattery amalgamates the two theories. He also refers to the history of English settlement together with the practice of importing English law into the English factories in India to explain why English law applied in the Canadian communities. His theory is ultimately based upon Canadian history and constitutes a legal description of what occurred politically: at 732.

without recourse to Parliament.³⁹ In contrast, Geoffrey S Lester identified two theories in his thesis.⁴⁰ The first, which he also refers to as the 'doctrine of continuity', is, however, narrower than the theory suggested by Slattery.⁴¹ It applies only where the constitutional situation is one of settlement. For Lester, the concept of settlement properly applies to uninhabited or inhabited land, and in the latter case, the existing rights of the aboriginal inhabitants not only continue, but also cannot be terminated by the sovereign without the consent of the owners of those rights.⁴² The second theory identified by Lester, the recognition theory, applies where the constitutional situation is one of conquest or cession and, in such a case, the enforceability of the rights of aboriginal inhabitants depends exclusively on what has or has not been recognised by the sovereign.⁴³ Importantly, however, both Slattery and Lester conclude, by quite different reasoning,⁴⁴ that aboriginal rights in a settlement are capable of being enforced against the Crown, without any prior requirement of executive or legislative recognition.

This conclusion is also shared by Kent McNeil. McNeil argues that the doctrine of continuity articulated by Slattery is historically correct and that the recognition doctrine arose from the 'unfortunate misinterpretation of a few isolated decisions'.⁴⁵ McNeil agrees with Slattery that whatever the constitutional status of a colony, pre-existing private property rights continue as a result of the doctrine of continuity. McNeil agrees with Lester's conclusion that the Crown could not, in its executive capacity and simply by virtue of acquiring sovereignty over a settlement, acquire title to land then occupied by indigenous people under their own customary systems of law.⁴⁶ However, he disagrees with Lester's view that in conquered and ceded territories land rights must have been recognised legislatively or executively to be enforceable against the Crown.⁴⁷ It will be seen that, in *Mabo*, Deane, Gaudron and Toohey JJ applied the doctrine of continuity as articulated by Slattery and adopted by McNeil, whereas Justice Brennan's

39 Slattery, *The Land Rights of Indigenous Canadian Peoples*, above n 37, 146–53, 156–7; Slattery, 'Understanding Aboriginal Rights', above n 38, 748. In a conquered or ceded colony the Crown retains prerogative legislative powers by which it can extinguish such property rights before a representative assembly is summoned (*Campbell v Hall* (1774) Lofft 655, 742; 98 ER 1045, 1087) or before English law is introduced: see authorities cited in McNeil, *Common Law Aboriginal Title*, above n 20, 164 fnn 14, 15.

40 Geoffrey S Lester, *The Territorial Rights of the Inuit of the Canadian Northwest Territories: A Legal Argument* (D Juris Thesis, York University, 1981). Lester's thesis was cited by Brennan J in *Mabo* (1992) 175 CLR 1, 39. It is summarised in David Elliott, 'Aboriginal Title' in Bradford Morse (ed), *Aboriginal Peoples and the Law: Indian, Metis and Inuit Rights in Canada* (1991) 100, 110–11.

41 Lester supports this theory as the more correct approach.

42 Lester, above n 40, 1412–45. Lester derives this theory from cases from Ireland and Wales and from the decision in *R v Symonds* [1847] NZPCC 387, as supported by some comments of the Privy Council in *Tamaki v Baker* [1901] AC 561, 579.

43 Lester, above n 40, 75–81. Slattery refers to this approach as the 'doctrine of radical discontinuity': Brian Slattery, *Ancestral Lands, Alien Laws: Judicial Perspectives on Title* (1983) 8–9.

44 See the summary of Lester's arguments in Elliott, above n 40 and the summary of Slattery's argument in Slattery, *Ancestral Lands, Alien Laws*, above n 43.

45 McNeil, *Common Law Aboriginal Title*, above n 20, 162 ff.

46 Ibid 4.

47 See generally ibid ch 6.

reasoning, which was adopted by Mason CJ and McHugh J, involved elements of both the doctrine of continuity and the recognition doctrine.⁴⁸

Justices Deane and Gaudron interpreted the authorities that supported a general proposition that interests in property existing under the previous law or custom of a new British colony availed nothing unless recognised by the Crown as merely acknowledging that the act of state establishing a colony is itself outside the domestic law of the colony and beyond the reach of the domestic courts.⁴⁹ The act of state doctrine does not, however, preclude proceedings in the domestic courts in which, rather than seeking to challenge the validity of the act of state establishing the colony, 'it is sought to vindicate domestic rights arising under the common law consequent upon that act of State'.⁵⁰ Accordingly, it was open to domestic courts to consider the question whether the act of state of a particular colony had the effect of negating the strong assumption of the common law that pre-existing native interests in land in the colony were respected and protected.⁵¹

Their Honours relied on the Privy Council decision in *Oyekan v Adele* ('*Oyekan*') which held that the assumption that pre-existing rights are recognised and protected under the law of a British colony is a 'guiding principle'.⁵² Although noting that this case concerned a colony established by cession, their Honours stated that the 'guiding principle' was clearly capable of general application to British colonies in which indigenous inhabitants had rights in relation to land under the pre-existing native law or custom, and they proposed that it should be accepted as a correct general statement of the common law for two reasons.⁵³ First, it should be accepted because it accords with fundamental notions of justice⁵⁴ and, secondly, because it is supported by convincing authority, including the New Zealand case of *R v Symonds*,⁵⁵ recent Canadian decisions⁵⁶ and the majority decision of the Australian High Court in *Administration of Papua and New Guinea v Daera Guba*.⁵⁷

Justice Toohey also held that the doctrine of continuity is more persuasive than the recognition doctrine and should, therefore, be followed.⁵⁸ His Honour relied, however, on Lord Sumner's statement of principle in the Privy Council in

48 For a different interpretation of the approaches of the majority judges on the effect of Crown acquisition of territory on aboriginal rights to land, see Bradley Selway, 'The Role of Policy in the Development of Native Title' (2000) *Federal Law Review* 403, 414–16.

49 *Mabo* (1992) 175 CLR 1, 81.

50 *Ibid* 81–2.

51 *Ibid* 95.

52 [1957] 1 WLR 876, 933.

53 *Mabo* (1992) 175 CLR 1, 82.

54 *Ibid* 82–3.

55 [1847] NZPCC 387. For an analysis of this case, see Secher, above n 2, ch 2, especially 84–97.

56 *Calder v A-G (British Columbia)* [1973] SCR 313, 322–3, 328, 380–93; *Guerin v The Queen* [1984] 2 SCR 335, 376–8.

57 (1973) 130 CLR 544, 557, where Barwick CJ, with whom McTiernan and Menzies JJ concurred, accepted that the assumption that traditional native interests were preserved and protected under the law of a settled territory applied to the settled territory of British Papua. For a discussion of this case, see Secher, above n 2, 113–14.

58 *Mabo* (1992) 175 CLR 1, 183.

Re Southern Rhodesia,⁵⁹ in the context of conquests, and the Privy Council's subsequent confirmation of this principle in *Amodu Tijani v Secretary, Southern Nigeria*,⁶⁰ without limiting it to colonies acquired by conquest.⁶¹ Justice Toohey also considered that the recognition doctrine was at odds with basic values of the common law.⁶²

Accepting the continuity doctrine as the correct approach, Deane, Gaudron and Toohey JJ all concluded, in accordance with the reasoning in *R v Symonds*,⁶³ that the Crown was not lawfully entitled to effect unilateral extinguishment of native title against the wishes of the native occupants.⁶⁴

Justice Brennan used a different approach. Like the other majority justices, he approached the recognition of native title on the basis of the doctrine of continuity.⁶⁵ Relying on essentially the same authorities as Toohey J,⁶⁶ Brennan J concluded that the preferable rule, supported by the authorities, is that a mere change in sovereignty does not extinguish native title to land.⁶⁷ Indeed, this conclusion is consistent with the Court's finding, which undermined the twofold feudal fiction accompanying the English doctrine of tenure: that the Crown acquired a radical, rather than beneficial, title to all land upon acquisition of sovereignty. Thus, the preservation of native title is an incident of radical title as a postulate of the Australian doctrine of tenure.

In contrast to the other majority justices, however, Justice Brennan's approach to extinguishment of native title involves elements from the recognition doctrine. In this context, Brennan J agrees with Lester's conclusion that

the Recognition Doctrine addresses the question, not of the Crown's proprietary rights, but of its prerogative power. It is through the election to exercise or to refrain from exercising that prerogative power accorded to the sovereign in territories beyond the realm that antecedent rights may be respected or abrogated.⁶⁸

59 [1919] AC 211. See *ibid*.

60 [1921] 2 AC 399. See *Mabo* (1992) 175 CLR 1, 183.

61 *Mabo* (1992) 175 CLR 1, 184.

62 *Ibid*.

63 [1847] NZPCC 387, 391–2.

64 *Mabo* (1992) 175 CLR 1, 90–2 (Deane and Gaudron JJ) (the Crown's prerogative to acquire native title required the consent of the owners of those rights). Justice Toohey went further and suggested that there was a fiduciary duty upon the Crown: at 199–205.

65 *Ibid* 54–7.

66 Justice Brennan referred to Lord Sumner in *Re Southern Rhodesia* [1919] AC 211, 233, *Case of Tanistry* (1608) Davis 28; 80 ER 516 and *Witrong v Blany* (1674) 3 Keb 401, 402; 84 ER 789, 789: *Mabo* (1992) 175 CLR 1, 55–6. In particular, he interpreted Viscount Haldane's statement in *Amodu Tijani v Secretary, Southern Nigeria* [1921] 2 AC 399, 407 in the context of a cession as construing the terms of a cession in the light of the general principle by which private property rights survive a change in sovereignty by whatever means: at 56.

67 *Mabo* (1992) 175 CLR 1, 57.

68 Lester, above n 40, 95. See also 881, where Lester states that the 'Recognition Doctrine addresses the question of the enforceability against the Crown'. Although Lester concludes that the recognition doctrine does not apply to inhabited settled colonies, this is because he applied the received view of the doctrine of reception to such colonies: at 961. Accordingly, there was no prerogative power unilaterally to abrogate the property rights of the Crown's subjects. Cf Justice Brennan's analysis below, text accompanying nn 148–160.

As with the recognition doctrine, therefore, his approach to extinguishment is based upon the sovereignty of the Crown. Accordingly, the extinguishment of native title is an incident of the Crown's radical title as a concomitant of sovereignty. The Crown, through the exercise of its sovereign powers, can extinguish native title by its own unilateral act, whether or not the native titleholders have consented.⁶⁹ On Justice Brennan's analysis, therefore, antecedent rights and interests in land survived the acquisition of sovereignty⁷⁰ and, in the absence of express confiscation or subsequent expropriatory legislation, it was to be presumed that the new sovereign had respected the pre-existing rights and interests in the land.⁷¹

Justice Brennan's reasoning is crucial. It develops a new Australian common law rule for the recognition of native title.⁷² The effect of Crown acquisition of territory on aboriginal rights to land was, however, only one aspect of the broader common law basis for determining the system of law which was to govern a new territory. The other more general aspect was the doctrine that prescribed the general law to be applied in the newly acquired territory (in the case of settlements, the doctrine of reception). In this context, there were three different approaches from the six judges: one from Brennan J, one from Deane and Gaudron JJ and one from Toohey J.

69 *Mabo* (1992) 175 CLR 1, 63. Cf Selway, above n 48, 415. Although this approach might appear to suggest that the concept of 'radical title' is superfluous, it must be remembered that radical title has two limbs: not only is it a concomitant of sovereignty, it is also the postulate of the doctrine of tenure. Thus, as 'a concomitant of sovereignty', radical title confers power on the Crown to grant land in every part of Australia, including land subject to interests not deriving from Crown grant, so that the doctrine of tenure may apply to that land. Contrary to the received view, however, the Crown's undoubted power of alienation is divorced from the assumption that the Crown holds all lands absolutely. In this way, radical title enables the Crown, to use Justice Brennan's words, 'to become Paramount Lord of all who hold a tenure granted by the Crown and to become absolute beneficial owner of unalienated land required for the Crown's purposes': *Mabo* (1992) 175 CLR 1, 48.

70 *Mabo* (1992) 175 CLR 1, 54–7, especially 57. His Honour noted that there was a formidable body of authority, mostly cases relating to Indian colonies created by cession, supporting the defendant's submission that 'rights and interests in land possessed by the inhabitants of a territory when the Crown acquires sovereignty are lost unless the Crown acts to acknowledge those rights': at 54. However, his Honour held that this view, expressed in Lord Dunedin's oft-cited passage in *Vajensingji Joravarsingji* (1924) LR 51 Ind App 229, 360, did not 'accord with the weight of authority': at 55. Instead, Brennan J relied on a line of authority that rejected 'the proposition that after conquest or discovery the native peoples have no rights at all except those subsequently granted or recognised by the conqueror or discoverer', namely *Re Southern Rhodesia* [1919] AC 211; *Amodu Tijani v Secretary, Southern Nigeria* [1921] 2 AC 399; *Oyekan* [1957] 1 WLR 876; *Sobhuza II v Miller* [1929] AC 518; *Calder v A-G (British Columbia)* [1973] SCR 313; at 57. According to Brennan J, the authorities supported the rule that 'a mere change in sovereignty does not extinguish native title': at 57. Further, it is to be presumed that, in the absence of express confiscation or subsequent expropriatory legislation, the new sovereign had respected the pre-existing rights and interests in land: at 55–6, citing *Re Southern Rhodesia* [1919] AC 211, 233; *Oyekan* [1957] 1 WLR 876, 880.

71 *Mabo* (1992) 175 CLR 1, 55–6, citing *Re Southern Rhodesia* [1919] AC 211, 233; *Oyekan* [1957] 1 WLR 876, 880.

72 This new rule differs from the rules in other jurisdictions: see *Fejo v Northern Territory* (1998) 195 CLR 96, 130 (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ), 150 (Kirby J). See also *Wik Peoples v Queensland* (1996) 187 CLR 1, 182–4, 214; *Yanner v Eaton* (1999) 201 CLR 351, 402 fn 174; *Western Australia v Ward* (2000) 99 FCR 316, 344–6.

Indeed, it will be seen that although Justice Brennan's treatment of the doctrine of reception departs significantly from the received view, Justices Deane and Gaudron's more conservative approach accords more closely with the conventional view. Justice Toohey's treatment of the doctrine of reception is, however, equivocal. While his Honour examined the effect of the law that applied in Australia upon settlement, his Honour failed to explain why, in light of the doctrine of reception, this particular law applied.

For Deane and Gaudron JJ, the fact that New South Wales was validly established as a 'settled colony' meant that so much of the common law of England as was 'reasonably applicable to the circumstances of the colony' was introduced.⁷³ Although suggesting that '[i]f the slate were clean, there would be something to be said for the view that the English system of land law was not, in 1788, appropriate for application to the circumstances of a British penal colony',⁷⁴ their Honours accepted as 'incontrovertible' that the common law applicable upon the establishment of the colony of New South Wales included that general system of land law.⁷⁵

Nevertheless, the principle that only so much of the common law was introduced as was 'reasonably applicable to the circumstances of the Colony',⁷⁶ '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'.⁷⁷

Justices Deane and Gaudron suggested that if Crown officers had been aware of the numbers of Aboriginal inhabitants of the Australian continent, and the sophistication of their laws and customs, they would not have considered the territory unoccupied.⁷⁸ Furthermore, their Honours distinguished the line of Australian cases⁷⁹ that supported one or both of the broad propositions that New South Wales had been unoccupied for practical purposes and that the unqualified legal and beneficial ownership of all land in the colony vested in the Crown as obiter.⁸⁰ Accordingly, their Honours concluded that the application of settled principle to the current understanding of the facts compelled the result that 'the common law applicable to the colony in 1788, and thereafter until altered by valid legislation, preserved and protected the pre-existing claims of Aboriginal tribes ... to particular areas of land'.⁸¹

73 *Mabo* (1992) 175 CLR 1, 79.

74 *Ibid* 81.

75 *Ibid*, citing *Deloherty v Permanent Trustee Co of New South Wales* (1904) 1 CLR 283, 299–300; *Williams v A-G (NSW)* (1913) 16 CLR 404.

76 *Mabo* (1992) 175 CLR 1, 79, citing *Cooper v Stuart* (1889) 14 App Cas 286, 291.

77 *Mabo* (1992) 175 CLR 1, 79.

78 *Ibid* 99–100.

79 *Ibid* 102–3. In particular, Deane and Gaudron JJ considered that one of these cases, *Cooper v Stuart* (1889) 14 App Cas 286, had subsequently been seen as 'authoritatively establishing that the territory of New South Wales had, in 1788, been terra nullius not in the sense of unclaimed by any other European power, but in the sense of unoccupied or uninhabited for the purposes of the law': at 103.

80 *Mabo* (1992) 175 CLR 1, 101–4.

81 *Ibid* 100.

Thus, while applying the received view of the doctrine of reception, Deane and Gaudron JJ introduced the notion of an express adjustment of the applicable common law to include a strong assumption that native title interests were respected and protected by the domestic law of the colony after its establishment. In this way, the common law acknowledged that Australia, while settled, was not legally uninhabited. For Deane and Gaudron JJ, therefore, the colonial law determining that a colony was settled and that English law was automatically introduced (the doctrine of reception) included the doctrine of continuity. Although Brennan and Toohey JJ also reconcile the two limbs of the common law that determine the system of law applicable upon colonisation, their Honours' reasoning is fundamentally different.⁸²

According to Toohey J, although the Murray Islands were 'settled'⁸³ by Britain for the purposes of acquisition of sovereignty, 'it did not follow that [common law] principles of land law relevant to the acquisition of vacant land [were] applicable'.⁸⁴ His Honour emphasised that the 'idea that land which is in regular occupation' should be regarded as *terra nullius* is unacceptable in law as well as fact.⁸⁵ Applying current information regarding Aboriginal people to show that the land was in fact occupied on settlement, his Honour observed that upon acquisition of sovereignty, indigenous inhabitants became British subjects and, in the case of a settled colony like Australia, their interests were to be protected by the immediate operation of the common law. Justice Toohey explained that, because the real question was whether the rights of the Meriam people to the Islands survived acquisition of sovereignty, any common law dicta acknowledging that, on settlement, land vested in the Crown, which was not made in the context of the question of Aboriginal entitlement to land, was irrelevant.

It is clear that Toohey J considered the received view of the doctrine of reception as inapplicable to the Australian situation.⁸⁶ Rather than English law applying as though the territory were uninhabited, the doctrine of continuity applied automatically to protect native rights to land. Although Toohey J states the *result* of a different rule for prescribing the law that applied upon settlement of Australia, he fails to explicate this alternative rule *itself* – an explication comprehensively proffered by Brennan J.

Justice Brennan observed that the common law had had to 'march in step with international law in order to provide the body of law to apply in a territory newly

82 It is suggested that it is because Justices Deane and Gaudron's analysis preserves the distinction between the doctrine of reception and the doctrine of continuity that their Honour's concept of radical title (unlike Justices Brennan and Toohey's) confers beneficial ownership to land not subject to native title (as was the view under the conventional doctrine of reception).

83 Or 'occupied', to use the term of international law.

84 *Mabo* (1992) 175 CLR 1, 182.

85 *Ibid.* His Honour also considered that the proposition that land which is not in regular occupation is *terra nullius* required greater scrutiny, since there may be good reason why the occupation is irregular. He did, however, confirm that the doctrine of *terra nullius* had no application to the present case.

86 And thus accords with Justice Brennan's approach.

acquired by the Crown'.⁸⁷ His Honour found, however, that the acquisition of territory by way of the enlarged doctrine of terra nullius raised difficulties in determining what law was to be applied when inhabited territories were acquired by occupation.⁸⁸ Justice Brennan thus transposed the concept of terra nullius into the Australian common law by suggesting that the operation of the international law principles governing acquisition of territory had created an anomaly for the domestic law. Although the enlarged doctrine of terra nullius allowed Australia to be acquired by occupation despite being inhabited, Brennan J noted that Blackstone⁸⁹ had been unable to expound any rule whereby the common law of England became the law of a territory which was not uninhabited when the Crown acquired sovereignty over the territory by occupation.⁹⁰ Consequently, the common law had to prescribe a doctrine relating to the law to be applied in such colonies. Prior to *Mabo*,

the view was taken that, when sovereignty of a territory could be acquired under the enlarged notion of terra nullius, for the purposes of municipal law that territory (though inhabited) could be treated as 'desert uninhabited' country. The hypothesis being that there was no local law already in existence in the territory, the law of England became the law of the territory (and not merely the personal law of the colonists).⁹¹

Thus, the theory advanced to support the application of English law to colonial New South Wales was that, because the indigenous inhabitants were regarded as 'barbarous or unsettled and without a settled law', the law of England, including the common law, became the law of the colony as though it were an uninhabited colony.⁹²

Although contemporary law accepted that the laws of England, so far as applicable, became the laws of New South Wales and of the other Australian colonies, Brennan J considered that the theory advanced to support the introduction of the common law could be abandoned. Because the present understanding and appreciation of the facts⁹³ 'do not fit the "absence of law" or

87 *Mabo* (1992) 175 CLR 1, 32. This was because the manner in which a sovereign acquires new territory is a matter of international law, and, by the common law, the law in force in a newly acquired territory depends upon the manner of its acquisition by the Crown.

88 *Ibid* 33.

89 Blackstone, above n 8, vol 1, 104.

90 *Mabo* (1992) 175 CLR 1, 33–4.

91 *Ibid* 36.

92 *Ibid* 37–8. Moreover, because indigenous occupancy of colonial land was ignored in considering the title to land, the 'Crown's sovereignty over a territory which had been acquired under the enlarged notion of terra nullius was equated with Crown ownership of the lands therein': at 40.

93 His Honour's conclusion was supported by evidence demonstrating the existence of a complex and settled relationship of rights and obligations between the indigenous people and their land: *Mabo* (1992) 1 CLR 175 (findings of Moynihan J summarised at 17–18, 21–2, 24). See also Justice Blackburn's findings on the evidence presented in *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141, 267:

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

“barbarian” theory underpinning the colonial reception of the common law of England’,⁹⁴ Brennan J found that there was no warrant for contemporary law to continue to apply English legal propositions which were the product of that theory.⁹⁵

Justice Brennan also considered that the theory advanced to justify depriving indigenous inhabitants of a proprietary interest in the land was unacceptable, as it was ‘unjust’⁹⁶ and ‘depended on a discriminatory denigration of indigenous inhabitants, their social organisation and customs’.⁹⁷ His Honour strongly criticised the discriminatory doctrine formulated by the Privy Council in *Re Southern Rhodesia*, which had been applied to the detriment of the plaintiffs in *Milirrpum v Nabalco Pty Ltd*.⁹⁸ In classifying systems of native law for the purpose of determining whether rights under them are to be recognised at common law, the Privy Council implied the existence of a natural hierarchy of societies, some being ‘so low in the scale of social organisation that their usages and conceptions of rights and duties are not to be reconciled with the institutions or the legal ideas of a civilised society’.⁹⁹ Accordingly, if the inhabitants of a colony had no meaningful or recognisable system of land tenure, the colony was considered ‘desert uninhabited’ territory for legal purposes.¹⁰⁰ In Justice Brennan’s view, the Court was faced with two options. It could either

apply the existing authorities and proceed to inquire whether the Meriam people [were] higher ‘in the scale of social organisation’¹⁰¹ than the Australian Aborigines whose claims were ‘utterly disregarded’ by the existing authorities or the Court [could] overrule the existing authorities, discarding the distinction between inhabited colonies that were terra nullius and those that were not.¹⁰²

Thus, faced with a contradiction between the authority of the Privy Council in *Cooper v Stuart* (1889) 14 App Cas 286 and the evidence, Blackburn J concluded that the class to which a colony belonged was a question of law, not of fact: *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141, 244. See also *Mabo* (1992) 175 CLR 1, 39 (Brennan J).

94 *Mabo* (1992) 175 CLR 1, 39.

95 *Ibid* 38, 39.

96 *Ibid* 42.

97 *Ibid* 40. See also 42.

98 (1971) 17 FLR 141.

99 *Re Southern Rhodesia* [1919] AC 211, 233–34.

100 This theory suggested a possible ground of distinction in the case of settled territories and led to detailed analysis of the legal and social systems of the plaintiffs in *Milirrpum v Nabalco Pty Ltd* and in *Mabo*. If accepted, this could conceivably have seen a distinction drawn between the rights of the Meriam people and other Aboriginal and Islander people on the basis that some were more ‘civilised’ than others. Justice Brennan clearly repudiated the *Re Southern Rhodesia* doctrine to the extent that it dismissed *a priori* the claims of native inhabitants of settled colonies: see *Mabo* (1992) 175 CLR 1, 40 ff.

101 With respect, this was the theory advanced to justify the extension of the doctrine of terra nullius to the acquisition of inhabited territories by occupation under international law, and not to determine what system of law would be applied and what proprietary rights would be recognised in settled colonies: see *Re Southern Rhodesia* [1919] AC 11, 233–4.

102 *Mabo* (1992) 175 CLR 1, 40. His Honour’s reference to terra nullius merely acknowledged that when sovereignty of a territory was acquired under the enlarged doctrine of terra nullius, it followed that, for the purposes of the common law, such territory was treated as ‘desert and uninhabited’ although it was inhabited: at 36.

Observing that the notion that inhabited land may be classified as *terra nullius* no longer commanded general support under international law,¹⁰³ Brennan J chose the latter option. Since Australia was in fact inhabited at the time of colonisation, it could not, at common law, be considered uninhabited for legal purposes. Consequently, the conventional doctrine of reception could not apply to the colony. Effectively, therefore, Brennan J (and the majority) identified Australia as a new class of settled colony at common law: one over which sovereignty had been acquired via occupation of territory that was *terra nullius*, yet one acquired, at common law, by settlement of territory that was not legally uninhabited.¹⁰⁴ Consequently, Brennan J had to prescribe a new doctrine relating to the law that applied in the colony. This allowed him to find, retrospectively, that the common law that applies in inhabited settled colonies presumptively recognises native title rights to land.¹⁰⁵ In finding that prior native rights in land were presumed to be recognised, his Honour followed Blackstone¹⁰⁶ in regarding occupation as the natural law basis of ownership rather than the attainment of any particular degree of civilisation.¹⁰⁷

In reaching this conclusion, Brennan J equated 'the indigenous inhabitants of a settled colony with the inhabitants of a conquered colony in respect of their rights and interests in land'.¹⁰⁸ This comparison has two significant implications. First, it reinforces Justice Brennan's view that, in an inhabited settled colony, elements of both the continuity and recognition doctrines determine the legal status of pre-existing property rights after a change in sovereignty.¹⁰⁹ Secondly, it limits the practical consequences of Justice Brennan's reasoning to land rights.

103 Relying on *Western Sahara (Advisory Opinion)* [1975] 1 ICJ Rep 12, 39, 85–6.

104 A division of ceded territories into two classes, those acquired by an act of cession from some sovereign power and those ceded by the general consent of the inhabitants, was suggested by the respondent in *Sammot v Strickland* [1938] AC 678, 699–701. The Privy Council, however, rejected this contention, as they interpreted it to mean that British possessions acquired by voluntary cession would, in effect, be British settlements: at 700. Observing that 'until the present case no-one seems to have distinguished or divided cessions to the Crown in the way suggested', the Privy Council nevertheless noted the rarity of cases of voluntary cession and urged that the case had been neglected by textbook writers and gone unnoticed by the legislature: at 700–1.

105 It will be seen that this finding reconciled the two strands of the common law that, pre-*Mabo*, determined the system of law applicable upon colonisation: see above, text immediately following n 35 and below nn 143–148.

106 Blackstone, above n 8, vol 2, 8.

107 *Mabo* (1992) 175 CLR 1, 45. His Honour observed that

[i]t was only by fastening on the notion that a settled colony was *terra nullius* that it was possible to predicate of the Crown the acquisition of ownership of land in a colony already occupied by indigenous inhabitants. It was only on the hypothesis that there was nobody in occupation that it could be said that the Crown was the owner because there was no other. If that hypothesis be rejected, the notion that sovereignty carried ownership in its wake must be rejected too: at 45.

108 *Mabo* (1992) 175 CLR 1, 57. Cf fn 189. Thus, recognition of pre-existing rights was limited to rights in land. See also Secher, above n 2, ch 9, especially 510–13.

109 Although it will be seen that the land rights of inhabitants of a settled colony are more vulnerable than those in a conquered colony, the act of state doctrine allows the Crown, at the time of conquest, to seize and thus acquire title to both land and chattels: see McNeil, *Common Law Aboriginal Title*, above n 20, 161–80, especially 162–3 and authorities cited at 162 fn 10.

According to Justice Brennan's analysis, the effect of a change in sovereignty in the context of the inhabited settled colony of Australia was not that *English* land law immediately applied (as would have been the case in a settled uninhabited territory), but that the *local* land law continued until replaced by the new sovereign (like the legal position in a conquered territory). In this way, Brennan J incorporated elements of the continuity theory within his new rule for prescribing the law that applied upon settlement of Australia. The conclusion that in an inhabited settled colony the new sovereign retained powers by virtue of which it could extinguish local property rights meant, however, that aspects of the recognition theory were also accommodated within this new doctrine.¹¹⁰

By combining aspects of the continuity and recognition doctrines, Brennan J effectively reconciled these two formerly distinct doctrines¹¹¹ and replaced them with '*continuity pro tempore*',¹¹² a singular doctrine which is an incident of both limbs of radical title. Indeed, Justice Brennan's reconciliatory approach bears a striking resemblance to that adopted by the Privy Council in *Oyekan*, a case involving the cession of land to the British Crown in the former colony of Lagos. In that case, Lord Denning, delivering the judgment of the Judicial Committee, expounded two propositions. The first was that in inquiring what rights are recognised after a change in sovereignty there is one guiding principle, namely, that '[t]he courts will assume that the British Crown intends that the rights of property of the inhabitants are to be fully respected'.¹¹³ The second proposition was that

[w]hilst ... the British Crown, as Sovereign, can make laws enabling it compulsorily to acquire land for public purposes, it will see that proper compensation is awarded to every one of the inhabitants who has by native law an interest in it: and the

110 In this context, Justice Brennan's approach accords with Lester's conclusion that

the Recognition Doctrine addresses the question, not of the Crown's proprietary rights, but of its prerogative power. It is through the election to exercise or to refrain from exercising that prerogative power accorded to the sovereign in territories beyond the realm that antecedent rights may be respected or abrogated: Lester, above n 40, 959.

Cf Lester's conclusion that the recognition doctrine does not apply to inhabited settled colonies: see above n 68.

111 The term *continuity pro tempore* (indicating that continuity is for the time being only) is suggested as a useful alternative for the new assimilated doctrine. Cf McNeil, *Common Law Aboriginal Title*, above n 20, 175–6. This approach questions McNeil's conclusion that, rather than trying to reconcile the two doctrines, the doctrine of continuity is the correct approach regardless of the constitutional status of a colony. Consequently, McNeil's express disagreement with Lester's view that, in conquered (and ceded) territories, land rights must have been recognised legislatively or executively to be enforceable against the Crown is also questioned. Note that Justice Brennan's approach to the doctrines of continuity and recognition may also require a reconsideration of the legal dimensions of the recognition doctrine as articulated by McNeil, particularly in light of McNeil's conclusion that because the '[recognition doctrine] treats the Crown as presumptively seizing all private property upon acquisition of a territory', '[the recognition doctrine] is difficult to reconcile with the British colonial law rule that local laws remain in force in a conquest or cession until altered or replaced, for local laws involving property would be of little use to the inhabitants if everything had passed to the Crown': at 176. See also Lester, above n 40, 959.

112 Indicating that the presumption of continuity is only 'for the time being'; that continuity is a rebuttable presumption of fact: see above n 111.

113 *Oyekan* [1957] 1 WLR 876, 880.

courts will declare the inhabitants entitled to compensation according to their interests, even though those interests are of a kind unknown to English law.¹¹⁴

Thus, for both Brennan J and the Privy Council, the test for determining whether pre-existing interests survive a change in sovereignty has two limbs: the continuity limb and the recognition limb. According to the continuity limb, there is a presumption that pre-existing rights survive a change in sovereignty. According to the recognition limb, however, the sovereign has power unilaterally to extinguish these surviving pre-existing rights. Consequently, in both inhabited settled and ceded territories (and, *a fortiori*, conquered territories) there is a rebuttable presumption of fact that the antecedent rights of the inhabitants survive a change of sovereignty.¹¹⁵ Thus, the continuity limb is a general guiding principle that applies irrespective of the colonial classification of a colony. Consequently, it is only in the context of the recognition limb that the constitutional status of a particular colony is relevant. The scope of the sovereign's power of unilateral extinguishment varies, therefore, according to whether a colony is classified as inhabited settled, ceded or conquered.¹¹⁶

A critical aspect of Justice Brennan's treatment of the recognition limb is his agreement with Lester that the recognition doctrine addresses the question of the Crown's prerogative power rather than the Crown's proprietary rights.¹¹⁷ Thus, it is through the election to exercise, or to refrain from exercising, the Crown's prerogative power that antecedent rights may be respected or abrogated.¹¹⁸ Contrary to Lester, however, Brennan J focuses not on what amounts to recognition, but rather on what amounts to extinguishment.¹¹⁹ As a result, Justice Brennan's approach affords no basis for a general presumption of recognition by the new sovereign of pre-existing rights. Rather, recognition is a relative concept. Recognition is not concerned with extinguishment at the time when sovereignty is assumed. Nevertheless, it is only possible to draw an inference of recognition of pre-existing rights to land in circumstances where the Crown has not validly extinguished those rights. Only when the Crown has, at any given point in time, refrained from exercising its power to extinguish pre-existing rights are the rights recognised and thus enforceable. Accordingly, although the new sovereign allows native occupation and use of the land to continue undisturbed, this does not prevent the sovereign from subsequently exercising its power to abrogate those rights.

This interpretation of the recognition limb laid the foundation for Justice Brennan's (and the majority's) unique conclusion on the scope of the sovereign's power unilaterally to extinguish pre-existing rights in Australia: in contrast to the generally accepted position in other common law jurisdictions which recognise

114 Ibid.

115 Cf Lester, above n 40, 933.

116 Although Lester agrees with this proposition, his conclusion on the scope of the sovereign's power in a settled colony is in stark contrast to that of Brennan J: see *ibid* 933, 961–2.

117 See above, text accompanying n 68.

118 Lester, above n 40, 959.

119 Lester argues that pursuant to the recognition doctrine 'the only enforceable rights which the inhabitants have as against their new sovereign are those, and only those, which that sovereign, by agreement, express or implied, or by a course of conduct, has elected to confer on them': Lester, above n 40, 959.

pre-existing rights to land,¹²⁰ the sovereign has a power to extinguish native title by inconsistent executive grant per se (without the need for legislative authority to extinguish).¹²¹ Thus, although the Crown has the power unilaterally to

120 While noting that other common law countries have recognised that there can be grants of interests in land that are inconsistent with the continued existence of native title, the High Court held that such cases did not provide direct assistance, since they may have been affected by the existence of treaty or other like obligations: see authorities cited in *Fejo v Northern Territory* (1998) 195 CLR 96, 130 fn 170. Note that these authorities do not, however, relate to extinguishment by executive grant per se.

121 *Mabo* (1992) 175 CLR 1, 68–9 (Brennan J). Justices Deane and Gaudron also indicated that native title might be extinguished by an inconsistent Crown grant irrespective of any legislative intention to extinguish. However, they held, in accordance with the doctrine of continuity, that, although native title would be subordinated to the Crown grant, it would constitute a wrongful act and be actionable: at 88–90, 94, 110. See also 192–7 (Toohey J), but note Justice Toohey's conclusion that since the plaintiffs claimed no relief in respect of the two leases granted on the Murray Islands, the question whether the leases were effective to extinguish any traditional title (as he called native title) must remain unanswered: at 197. See also *Native Title Act Case* (1995) 183 CLR 373, 422, 439; *Wik Peoples v Queensland* (1996) 187 CLR 1, 176 (Gummow J), 250 (Kirby J). See also 90–2 (Brennan CJ), 124–5 (Toohey J). Cf *Nullagine Investments Pty Ltd v Western Australia Club Inc* (1993) 177 CLR 635, 656. A clear and plain legislative intention to extinguish is not required provided that the act of the executive reveals such an intention: *Fejo v Northern Territory* (1998) 195 CLR 96, 126–31 (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ), 146–51 (Kirby J). See also *Wik Peoples v Queensland* (1996) 187 CLR 1, 185–6 (Gummow J); *Western Australia v Ward* (2002) 213 CLR 1, 89, 90 (Gleeson CJ, Gaudron, Gummow and Hayne JJ). Cf *Western Australia v Ward* (2002) 213 CLR 1, 264, 266 (Callinan J); *Wilson v Anderson* (2002) 213 CLR 401, 477–8 (Callinan J).

For details relating to the legal position in other jurisdictions, see Bartlett, *The Mabo Decision*, above n 12, xi–xii; Richard Bartlett, *Native Title in Australia* (2000) ch 14 (United States law); Elliot, above n 40, 111–20 (Canadian law); McNeil, 'Extinguishment of Native Title', above n 4, especially 369; Selway, above n 48, especially 424–9. Cf the New Zealand and Canadian jurisprudence which has long maintained the equal status of native title and other interests in land. For New Zealand, see *Te Runanganui O Te Ika Whenua Inc Society v A-G* [1994] 2 NZLR 20, 24; *R v Symonds* [1847] NZPCC 387, 390. For Canada, see *Calder v A-G (British Columbia)* [1973] SCR 313, 351–4, 401–5 (Hall J); *Delgamuukw v British Columbia* (1993) 104 DLR (4th) 470, 522–5 (Macfarlane JA), 480 (Taggart JA), 595 (Wallace JA), 753 (Hutcheon JA in agreement). Justice Lambert would also appear to be in agreement: at 663, 670; *Delgamuukw v British Columbia* [1997] 3 SCR 1010.

In Canada, pre-existing rights can only be extinguished by the Crown acting under the prerogative with the consent of the owners of those rights: *Calder v A-G (British Columbia)* [1973] SCR 313, 401–2; *Guerin v The Queen* [1984] 2 SCR 335, 349, 352; *Blueberry River Indian Band v Canada* [1995] 4 SCR 344, 385–6; *Delgamuukw v British Columbia* [1997] 3 SCR 1010, 1081–5. Pre-existing rights are, however, subject to legislative extinguishment even in the absence of consent: *R v Sparrow* [1990] 1 SCR 1075, 1098–1102; *Delgamuukw v British Columbia* [1997] 3 SCR 1010, 1115–8 (such legislation is strictly interpreted: at 1120–1). The legislative power to extinguish pre-existing rights is subject to s 35 of the Canadian *Constitution Act* 1982, which prevents the extinguishment or interference with pre-existing rights except by surrender or in circumstances where the extinguishment or interference is 'justified': *R v Sparrow* [1990] 1 SCR 1075; *Delgamuukw v British Columbia* [1997] 3 SCR 1010, 1117–14; *R v Nikal* [1996] 1 SCR 1013, 1058–61; *Marshall v The Queen* [1999] 3 SCR 456.

In the United States, pre-existing rights can only be extinguished by express statutory action or by purchase or conquest. Thus, a grant made pursuant to the prerogative power over land subject to pre-existing rights takes effect subject to those rights: *Johnson v McIntosh*, 21 US (8 Wheat) 543, 587 (1823). Cf *United States v Sante Fe Pacific Railway Co*, 314 US 339, 347 (1941). Legislation can extinguish native title (*United States v Sante Fe Pacific Railway Co*, 314 US 339, 347 (1941)) although 'this will not be lightly implied': *County of Oneida v Oneida Indian Nation*, 470 US 226, 247–8 (1985). Legislation which authorises the grant of a fee simple does, however, evince an intention to extinguish pre-existing rights: *Buttz v Northern Pacific Railroad*, 119 US 55 (1886); *Missouri, Kansas and Texas Railway Co v Roberts*, 152 US 114 (1894).

extinguish pre-existing rights in conquered, ceded and inhabited settled colonies, this power is more ample in the case of an inhabited settled colony. The Crown's power to acquire land in a conquered or ceded territory after it has accepted the territory into its dominions requires either confiscatory legislation or an agreement to purchase.¹²² In an inhabited settled colony, however, the Crown has power to extinguish antecedent rights and interests in land¹²³ in the absence of legislation, without consent¹²⁴ and without compensation.¹²⁵

In New Zealand, pre-existing rights can be extinguished by legislation or by consent of the owners of the rights and by inconsistent grant made pursuant to the prerogative where reasonable compensation is provided: *R v Symonds* [1847] NZPCC 387, 390; *Tamaki v Baker* [1901] AC 561, 574, 578–9; *Te Runanganui O Te Ika Whenua Inc Society v A-G* [1994] 2 NZLR 139, 146, 153–4. Accordingly, a Crown grant made pursuant to the prerogative without consent or compensation is subject to any pre-existing rights unless given to the owners of those rights in substitution for their rights: *Faulkner v Tauranga DC* [1996] 1 NZLR 357, 363, 365.

122 The Crown does, however, have power at the time of conquest to seize, and thus acquire title to, both lands and chattels: see above n 109. Such seizure would be an act of state and thus outside the jurisdiction of the courts. Cf Lester, above n 40, 933.

123 Cf the position with respect to rights held under customary law: see generally Secher, above n 2, ch 9.

124 The High Court accepted Justice Brennan's approach to extinguishment by inconsistent grant in *Native Title Act Case* (1995) 183 CLR 373, 439 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ), citing *Mabo* (1992) 175 CLR 1, 64. Although the majority of the High Court in *Wik Peoples v Queensland* (1996) 187 CLR 1 (Toohey, Gaudron, Gummow and Kirby JJ) held that an inconsistent Crown grant of a pastoral lease can only unilaterally extinguish native title if there is a clear and plain legislative intention for such a result (at 126, 130, 155, 166, 168, 171, 185–6, 203, 242–3, 247), in that case the fundamental issue did not concern the extinguishment of native title by grant of fee simple or of a leasehold interest as known to the common law. Rather, it concerned the impact upon native title of statute and of sui generis interests created thereunder: at 176 (Gummow J). See also obiter comments relating to the executive generally: at 84–5 (Brennan CJ, with whom Dawson and McHugh JJ concurred: at 100 and 167 respectively), 135 (Gaudron J), 175–6 (Gummow J), 213–14 (Kirby J). Justice Toohey noted that:

[w]hile nothing in the judgments of the Court, in particular those in *Mabo* [No 2], points with any certainty to the answers demanded of the Court in the present proceedings, that decision is a valuable starting point because it explores the relationship between the common law and the 'law' which evidences native title rights: at 129.

125 *Mabo* (1992) 175 CLR 1, 15–16 (Brennan J). Since Dawson J also did not think that the extinguishment of native title required the payment of compensation, a majority of four judges was in support of that proposition. Cf Lester, above n 40, 946, 961–2. In *Mabo* (1992) 175 CLR 1, Deane, Gaudron and Toohey JJ dissented on the question of compensation: at 111, 112, 203. In *Wik Peoples v Queensland* (1996) 187 CLR 1, the majority of a differently constituted High Court accepted the ruling of the court in *Mabo* that native title could be unilaterally extinguished without compensation. The United States Supreme Court has held that there is no presumption that compensation is payable upon the extinguishment of native title: *Johnson v McIntosh*, 21 US (8 Wheat) 543 (1823); *Tee-Hit-Ton Indians v United States*, 348 US 272, 279 (1955). Canadian and New Zealand authorities are based on the early decision of Marshall CJ in *Johnson v McIntosh*, and thus have accepted the same principles of denying compensation. For Canada, see *Calder v A-G (British Columbia)* [1973] SCR 313; *Simon v The Queen* [1985] 2 SCR 387, 401–2, 405–6. For New Zealand see *R v Symonds* [1847] NZPCC 387; *Te Runangao Muriwhenua Inc v A-G* (1990) 2 NZLR 641. There is, of course, no need for compensation in the context of legislative extinguishment because, being derived from British constitutional law, the legislative power of extinguishment in theory contains no protection against interference with rights by the British Parliaments. Accordingly, provided a legislative body has the requisite constitutional authority, it can confiscate property by legislative act and vest it in the Crown without compensation if the intention to deny compensation is unequivocally expressed: see Kent McNeil, 'Racial Discrimination and Unilateral Extinguishment of Native Title' (1996) 1 *Australian Indigenous Law Reporter* 181, 182–3, especially authorities cited at 182 fn 12, 183 fn 13.

Although the foregoing analysis suggests that the classification of a colony as either conquered, ceded or ‘inhabited settled’ determines the scope of the sovereign’s power to extinguish pre-existing rights, it does not explain the legal basis for such a distinction. Why did Brennan J treat the sovereign’s power of extinguishment in an inhabited settled colony as greater than the sovereign’s power of extinguishment in conquered or ceded colonies? The explanation is found in the distinction between the scope of the Crown’s prerogative powers in inhabited settled colonies on the one hand, and in conquered or ceded colonies on the other.¹²⁶

IV ROYAL PREROGATIVE POWERS IN AN INHABITED SETTLED COLONY

When a country is acquired by conquest or cession, the acquiring sovereign possesses a supreme prerogative executive and legislative power over it, and may change the whole or part of its laws and political form of government.¹²⁷ In the course of acquiring sovereignty, therefore, the acquiring sovereign may unilaterally abrogate antecedent rights by act of state.¹²⁸ Nevertheless, the laws of the conquered or ceded territory remain in force unless and until they are altered by the acquiring sovereign.¹²⁹ Until altered, therefore, all local laws continue to apply; that is, the doctrine of *continuity pro tempore* applies not only to land rights but to all legal rights.¹³⁰ Furthermore, after the Crown has accepted the conquered or ceded territory into its dominions, the subjects of the former sovereign are the Crown’s subjects,¹³¹ with the result that the Crown’s power to deal with them and their property by act of state is at an end.¹³² Thereafter, the

126 Cf McNeil, ‘Extinguishment of Native Title’, above n 4, 369.

127 Chitty, above n 16, 29. It is clear that ‘those fundamental rights and principles on which the [Crown’s] authority rests, and which are necessary to maintain it, extend even to such of [the Crown’s] dominions as are governed by their own local and separate laws’: at 25.

128 See McNeil, *Common Law Aboriginal Title*, above n 20, 161–80.

129 Blackstone, above n 8, vol 1, 107. Blackstone’s rule was stated again by Lord Mansfield in *Campbell v Hall* (1774) Lofft 655, 741; 98 ER 1045, 1047. See also *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141, 201–4. Cf 223–5 where Blackburn J suggests that this rule is subject to the qualification that it does ‘not apply to a dispute between the Crown and a subject’ (relying on the Privy Council decision in *Cook v Sprigg* [1899] AC 572).

130 *Mabo* (1992) 175 CLR 1, 34–5 (Brennan J, with whom Mason CJ and McHugh J concurred). See also Secher, above n 2, ch 1, especially 38. This was, however, subject to the qualification that, where the English settlers formed their own separate community, that community was governed by English law: see *Advocate General of Bengal v Ranee Surnomoye Dossee* (1863) 15 ER 811, 842. The effect of this qualification was the creation of pluralism within the legal regime: H A Amankwah, ‘Post-Mabo: The Prospects of the Recognition of a Regime of Customary (Indigenous) Law in Australia’ (1994) 18 *University of Queensland Law Review* 15, 17. See also Selway, above n 48, 404 fn 3.

131 McNeil, *Common Law Aboriginal Title*, above n 20, 163 fn 12.

132 *Ibid* 164 and authorities cited at fn 13. See also *Abeyesekera v Jayatilake* [1932] AC 260, 264. Having been brought into the Crown’s dominions also entails the consequence that the territory is necessarily subject to the legislature of Great Britain. Consequently, the Crown cannot make any new change contrary to fundamental principles: Chitty, above n 16, 29; McNeil, *Common Law Aboriginal Title*, above n 20, 164 fn 14.

Crown would have to have lawful authority to interfere with the rights of its subjects. Thus, in the absence of unequivocal statutory authority, any power of the Crown to abrogate pre-existing rights would have to be found in the royal prerogative.¹³³

This raises the critical question: what prerogatives apply in a newly acquired territory after the prerogative to annex the territory by act of state has been exercised? In this context, it is important to distinguish between the two categories into which Chitty divides the Royal Prerogatives: major prerogatives and minor prerogatives. This distinction is relevant because Chitty attached colonial significance to it: minor prerogatives apply only in a territory where the common law runs, whereas major prerogatives extend to all the Crown's dominions, whether the common law is in operation or not.¹³⁴ Chitty distinguishes between the two categories of prerogatives in general terms. Minor prerogatives 'are merely local to England, and do not fundamentally sustain the existence of the Crown, or form the pillars on which it is supported'.¹³⁵ Major prerogatives, on the other hand, are 'those fundamental rights and principles on which the King's authority rests, and which are necessary to maintain it' – the attributes of the King which are inherent in and constitute the King's political capacity.¹³⁶

Since the prerogative power to grant land is a major prerogative,¹³⁷ it applies to all the Crown's dominions, whatever the general system of law and, thus, whatever the nature of the title acquired by the Crown. Moreover, a major prerogative operates as 'a pure question of English common law' in a territory where the common law is not in force.¹³⁸ Accordingly, in the context of the Crown's major prerogatives, there are the same restraints on the Crown's prerogative powers that are found in the realm itself.¹³⁹ Thus, although English law does not run *ipso vigore* into a conquest or cession, the Crown is restrained in the exercise of its major prerogative powers *pro tanto*, that is, in accordance with the law of the realm, by the right of the subject not to have property rights

133 See *Abeysekera v Jayatilake* [1932] AC 260, 264.

134 Chitty, above n 16, 25–6. See also Roberts-Wray, above n 8, 558–9. Blackstone, in a similar classification, divides prerogatives into those which are 'direct' and those which are 'incidental': Blackstone, above n 8, vol 1 232 ff. According to Blackstone,

[t]he former are a substantial part of the Royal character and authority, rooted in and springing from the King's political person, without reference to any extrinsic circumstance. The latter always bear a relation to something else, distinct from the Sovereign's person, being exceptions in favour of the Crown to general rules established for the rest of the community – such as the immunity of the Crown from recovery of costs and preference for Crown debts: cited in Roberts-Wray at 557–8.

135 Chitty, above n 16, 25.

136 Ibid. Although Chitty does not refer to these prerogatives as 'major', Roberts-Wray considers the expression an apt abbreviation: Roberts-Wray, above n 8, 557.

137 Chitty, above n 16, 25, 384–9.

138 *Sammur v Strickland* [1938] AC 678, 697. See also Roberts-Wray, above n 8, 559.

139 Cf Lester, above n 40, 933 (the Crown is restrained in the exercise of its powers by the law of the realm itself).

taken without consent in the absence of statutory authority.¹⁴⁰ The Crown's power to extinguish, and thereby to derogate from, pre-existing rights in conquered and ceded territories is therefore legislative. Where a representative assembly has not been promised or created and English law has not been introduced, the Crown would nonetheless have prerogative legislative powers by virtue of which it could enact confiscatory legislation.¹⁴¹ The executive could not, however, derogate from pre-existing rights because the executive has no legislative powers which have not been delegated to it by statute.¹⁴²

In an inhabited settled colony, the scope of the royal prerogative power is inextricably linked with Justice Brennan's reconciliation of the two strands of the common law that, prior to *Mabo*, determined the system of law applicable upon colonisation. Whereas the common law pre-*Mabo* distinguished between the doctrine prescribing the general law that applied upon settlement and the doctrine prescribing the effect of Crown acquisition of territory on aboriginal land rights, the Australian common law post-*Mabo* includes a singular doctrine. In prescribing the law that applies upon settlement, this singular doctrine (a modified doctrine of reception) includes the test for determining whether pre-existing land rights survive a change in sovereignty.¹⁴³

This new doctrine of reception is the direct result of the finding that, although Australia was settled, it was inhabited for legal purposes at common law. Pre-*Mabo*, the law of the previous inhabitants was not recognised or applied in an inhabited settled colony because the classification of such a colony as settled was justified on the ground that it was legally uninhabited and, thus, that there was no such previous law that could be applied. The enforceability of any pre-existing rights, therefore, depended on some different rule. This rule, which became known as the doctrine of continuity, contradicted the 'legally uninhabited' rule and, consequently, was a necessarily distinct and independent rule.

Since the new doctrine prescribing the system of law that applies upon settlement of an inhabited territory (a modified doctrine of reception) includes a merged version of the continuity and recognition doctrines (*continuity pro*

140 The genesis of this constitutional protection for land rights is found in *Magna Carta* (1215) 17 John, c 29, which provides that '[n]o Freeman shall ... be ... disseised ... but by the lawful Judgment of his Peers, or by the law of the Land'. See authorities cited in McNeil, 'Racial Discrimination and Unilateral Extinguishment of Native Title', above n 125, 187 fn 48. The acquiring sovereign can import his own domestic law but, even in the absence of the introduction of English law, the major royal prerogatives apply, the scope of which is defined by law: see above, text accompanying n 138; McNeil, 'Racial Discrimination and Unilateral Extinguishment of Native Title', above n 125, 187 (see also 185 fn 34). The Crown's prerogatives (both legislative and executive) are controlled by the common law, specifically, by the right of the subject not to have property rights taken from him without his consent, compensation or pursuant to statutory authority: Lester, above n 40, 962; McNeil, 'Racial Discrimination and Unilateral Extinguishment of Native Title', above n 125, 187. See also Enid Campbell, 'Prerogative Rule in New South Wales, 1788–1823' (1964) 50 *Royal Australian Historical Society Journal and Proceedings* 161–90.

141 And thus extinguish existing property rights: McNeil, *Common Law Aboriginal Title*, above n 20, 113–14, 163–4.

142 See generally Chitty, above n 16, 25–33; McNeil, 'Racial Discrimination and Unilateral Extinguishment of Native Title', above n 125, 185.

143 Cf Slattery, 'Understanding Aboriginal Rights', above n 38, 744–5.

tempore), it effectively replaces the three formerly distinct doctrines of reception, continuity and recognition. Nevertheless, the legal status of native title remains the same: rather than being a concept of the common law, it is *sui generis*. Because native title does not originate in English property law, it remains an autonomous body of law that is merely accorded recognition as a consequence of the modified doctrine of reception.

Thus, where the constitutional situation is one of 'settlement of legally inhabited territory', the doctrine of *continuity pro tempore* applies automatically to the new colony because it is part of the colonial law determining the law which is to govern the new possession. Although the doctrine of *continuity pro tempore* also applies where the constitutional situation is one of cession or conquest, it has been seen that in such cases the doctrine applies to all legal rights, not merely property rights.¹⁴⁴ In inhabited settled territories, however, the *continuity pro tempore* doctrine applies only to land rights, other legal rights being immediately subjected to English law (as per the conventional doctrine of reception). Thus, to the extent that English law runs into the inhabited settled colony *ipso vigore*, this entails the consequence that the Crown's prerogative powers, both major¹⁴⁵ and minor, apply and are defined by the common law *ab initio*. The Crown's prerogative rights as to property are, however, in a different position: as will be seen below, these powers are restrained by the common law in their application to interests derived from a valid Crown grant, yet they are absolute and unconstrained by the common law in their application to interests not derived from a Crown grant.¹⁴⁶ This result flows from the application of the modified doctrine of reception in inhabited settled territories. In the context of land, in addition to the doctrine of *continuity pro tempore* applying, the redefined doctrine of tenure automatically applies.

Consequently, Justice Brennan's declaration of the unique status of native title in terms of extinguishment is based on an attempt to reconcile the interrelationship between the Crown's prerogative powers relating to land (which have been entirely replaced by statute),¹⁴⁷ the native system of land law and the

144 *Oyekan* [1957] 1 WLR 876. According to the Privy Council's analysis, this doctrine of *continuity pro tempore* applies where the constitutional situation is one of cession. Indeed, regardless of the constitutional status of a colony, it is submitted that the doctrine of *continuity pro tempore* is the correct approach. Thus, the authorities referred to by McNeil (*Common Law Aboriginal Title*, above n 20, 171–4) which are analysed in the context of his version of the continuity doctrine, are equally capable of being interpreted under new doctrine.

145 Note, however, that by virtue of the royal prerogative, the Crown is *prima facie* entitled to legislate for possessions acquired by conquest or cession, but is not so entitled in the case of settlements. The Privy Council in *Sammut v Strickland* [1938] AC 678 point out that this distinction was based on the circumstance that English settlers carried with them, wherever they went, the principles of English law and that English common law necessarily applied as far as such laws were applicable to the conditions of the new colony. Thus, the Crown clearly had no prerogative right to legislate in such a case: at 701.

146 See below, text accompanying n 150 ff.

147 *Cudgen Rutile (No 2)* (1992) 175 CLR 1, 64–5, 111, 196; *Wik Peoples v Queensland* (1996) 187 CLR 1, 108–11, 139–43, 171–4, 227–8, 243. It should be noted that the relevant prerogative never applied in South Australia (*Fejo v Northern Territory* (1998) 195 CLR 96, 145–6 (Kirby J)) and that it has not applied elsewhere in Australia since 1842, when a statutory scheme for the granting of interests in land

European-based system of tenure: an interrelationship which only occurs automatically in settled inhabited colonies. The result of this reconciliatory approach was, of course, the decision that, upon acquisition of sovereignty of a settled inhabited colony, the Crown acquired a radical, rather than beneficial, title to all land.

Justice Brennan acknowledged that the exercise of sovereign power to create and extinguish private rights and interests in land depends on the authority which the municipal constitutional law vests in the organ of government purporting to exercise that power.¹⁴⁸ He also noted that, since the Crown's power to grant an interest in land in Queensland is an exclusively statutory power, the validity of a particular grant depends upon conformity with the relevant statute.¹⁴⁹ Thus, Brennan J explains that

[w]hen validly made, a grant of an interest in land binds the Crown and the Sovereign's successors. ... Therefore an interest validly granted by the Crown, or a right or interest dependent on an interest validly granted by the Crown cannot be extinguished by the Crown without statutory authority. As the Crown is not competent to derogate from a grant once made, a statute which confers a power on the Crown will be presumed (so far as consistent with the purpose for which the power is conferred) to stop short of authorising any impairment of an interest in land granted by the Crown or dependent on a Crown grant.¹⁵⁰

By contrast, since native title 'is not granted by the Crown, there is no comparable presumption affecting the conferring of any executive power on the Crown the exercise of which is apt to extinguish native title'.¹⁵¹ In summarising 'the common law of Australia with reference to land titles',¹⁵² Brennan J applied these legal propositions to articulate two general rules for the executive extinguishment of native title:

Where the Crown has validly alienated land by granting an interest that is wholly or partially inconsistent with a continuing right to enjoy native title, native title is extinguished to the extent of the inconsistency ... [In this context, the doctrine of tenure is brought into play.]

Where the Crown has validly and effectively appropriated land to itself and the appropriation is wholly or partially inconsistent with a continuing right to enjoy native title, native title is extinguished to the extent of the inconsistency ... [In this context,] [i]f native title to any parcel of the waste lands of the Crown is extinguished, the Crown becomes the absolute beneficial owner.¹⁵³

replaced the royal prerogative: *Sale of Waste Lands Act 1846* (Imp). See also *Wik Peoples v Queensland* (1996) 187 CLR 1, 108–11, 139–43, 171–4, 227–8, 243. Although radical title is no longer relevant to the Crown's powers to grant rights and interests in land, the Crown's radical title remains central to characterising the nature of the Crown's title to land: Secher, above n 2, chh 4, 5, 9.

148 *Mabo* (1992) 175 CLR 1, 63.

149 *Ibid* 63–4.

150 *Ibid*.

151 *Ibid* 64.

152 *Ibid* 69.

153 *Ibid* 69–70. See also 67.

Although Brennan J acknowledged that, in the absence of statutory authority,¹⁵⁴ the Crown cannot derogate from existing rights and interests,¹⁵⁵ his Honour limited the application of this fundamental common law rule to rights and interests derived from a valid Crown grant.¹⁵⁶ Indeed, this is consistent with Chitty's observation that '[i]t is scarcely necessary to mention that the King's grants are invalid, when they destroy and derogate from rights previously vested in another subject *by grant*'.¹⁵⁷ Consequently, Brennan J concluded that legislation authorising Crown grants of land does not permit the Crown to derogate from rights created by grant, but does permit it to derogate from native title.¹⁵⁸ Put another way, the major prerogative to grant land is restrained by the common law in its application to interests derived from valid Crown grant, yet is unconstrained by the common law in its application to interests not derived from Crown grant.¹⁵⁹

This conclusion on executive extinguishment of native title is merely another legal outcome of the application of the modified doctrine of reception, pursuant to which settlement conferred a radical title on the Crown. English common law principles relating to land do not immediately run into an inhabited settled colony. In particular, radical title, as a postulate of the doctrine of tenure and a concomitant of sovereignty respectively, ensures that the common law regimes governing the Australian doctrine of tenure and the restraints on the Crown's

154 The prerogative powers of acquisition of land, which the Crown has in times of emergency, discussed in Douglas Brown, *Land Acquisition: An Examination of the Principles of Law Governing the Compulsory Acquisition of Land in Australia and New Zealand* (1972) 25–7, are no longer relevant in Australian law. 'All taking of land from private persons by the Crown and other authorities is undertaken in pursuance of statutory powers': at 9.

155 Chitty, above n 16, 386.

156 See also *Fejo v Northern Territory* (1998) 195 CLR 96, 126–8 where the joint judgment cites with approval the following passage from Brennan CJ in *Wik Peoples v Queensland* (1996) 187 CLR 1, 84:

The strength of native title is that it is enforceable by the ordinary courts. Its weakness is that it is not an estate held from the Crown nor is it protected by the common law as Crown tenures are protected against impairment by subsequent Crown grant. Native title is liable to be extinguished by laws enacted by, or with the authority of, the legislature or by the act of the executive in exercise of powers conferred upon it.

The same conclusion is reached by McNeil in McNeil, 'Racial Discrimination and Unilateral Extinguishment of Native Title', above n 125, 192, but note that, notwithstanding the High Court's acceptance of this approach in *Native Title Act Case* (1995) 183 CLR 373, 439 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ), McNeil concludes that 'authority does not support Justice Brennan's limitation of the rule that the Crown cannot derogate from existing rights or interests to situations involving rights or interests derived from Crown grants': at 192–3. See also McNeil's discussion at 192–203.

157 Chitty, above n 16, 386 (emphasis added).

158 This is subject to the qualification that, since 1975, the power to make grants pursuant to State legislation is subject to the *Racial Discrimination Act* 1975 (Cth): *Mabo v Queensland (No 1)* (1988) 166 CLR 186; *Mabo* (1992) 175 CLR 1, 67, 74, 112, 172–3, 214–16.

159 Accordingly, there is no restraint on the prerogative power unilaterally to abrogate the pre-existing property rights of the Crown's subjects. Cf Lester, above n 40, 961, 962; McNeil, *Common Law Aboriginal Title*, above n 20, 179–92; McNeil, 'Racial Discrimination and Unilateral Extinguishment of Native Title', above n 125, 192–3.

major prerogative powers are only brought into play when the Crown grants an interest in land.¹⁶⁰

In holding that pre-existing rights continued (unless and until validly extinguished) in the settled yet inhabited colony of Australia, it may be thought that Brennan J brought Australian law into line with that of the inhabited British settlements of the Gold Coast, British New Guinea, Ocean Island, and New Zealand. McNeil has identified these settlements as colonies in which local customary law, and the rights held in accordance with those customs, survived the Crown's acquisition of sovereignty and the reception of English law.¹⁶¹ Although McNeil's conclusion appears, *prima facie*, to be similar to Justice Brennan's, it is in fact fundamentally different in a number of respects.

First, McNeil accepts the conventional colonial law classification of settled territory, irrespective of whether the territory is uninhabited or inhabited,¹⁶² and therefore applies the orthodox doctrine of reception. Secondly, McNeil concludes that the legal structure governing the position of native people in settled yet inhabited territories was erected on the foundation of the doctrine of continuity, as distinct from the doctrine of recognition. Thirdly, although treating inhabited territories as legally uninhabited for the purpose of the doctrine of reception, McNeil concludes that the application of the doctrine of continuity did not depend on the colony's constitutional status.¹⁶³ In this way, McNeil maintains the contradictory distinction between the doctrine of reception and doctrine of continuity.

Fourthly, McNeil's conception of the doctrine of continuity is not limited in its application to land, but applies equally to all pre-existing legal rights.¹⁶⁴ Indeed, arguments for recognition of aboriginal customary laws beyond those relating to land have been based upon this rationale.¹⁶⁵ Importantly, however, Brennan J expressly limited the consequences of his judgment to pre-existing rights to land. This is the second significant implication of Justice Brennan's statement equating the inhabitants of a settled colony with the inhabitants of a conquered colony in respect of their rights in land. Nevertheless, this rationale is often overlooked with the result that some commentators have been too eager to assume that the High Court has rendered the distinction between 'settled' and 'conquered or ceded' territories otiose.¹⁶⁶ To the contrary, the decision in *Mabo* highlights the distinction between 'settled' and 'conquered or ceded' territories.¹⁶⁷

160 *Mabo* (1992) 175 CLR 1, 48–9. Justice Brennan observed that the common law's recognition of native title meant that it could be protected by such legal or equitable remedies as are appropriate: at 61. Is the remedy of *scire facias* to revoke a Crown grant appropriate? Since the right of the subject to bring *scire facias* is a fundamental safeguard against abuse of the prerogative to make grants, it only extends to 'every Crown grant'. 'The King could not, by an exercise of his prerogative, prejudice those rights of his subjects which were secured to them by the rules of the common law': Sir William Holdsworth, *A History of English Law* (1903–66) vol 10, 360. See also Secher, above n 2, 420–2.

161 Identified by McNeil, *Common Law Aboriginal Title*, above n 20, 184.

162 Rather than Justice Brennan's classification of inhabited settled territory.

163 McNeil, *Common Law Aboriginal Title*, above n 20, 191.

164 *Ibid* 180, 192. See also 187 in the context of the settlement of Ocean Island.

165 *Ibid* ch 8.

166 See, eg, K E Mulqueeny, 'Folk-Law or Folklore' in Stephenson and Ratnapala, above n 22, 170.

167 This distinction is examined in detail in Secher, above n 2, ch 9, especially 510–13.

Since the laws of a conquered or ceded territory remain in force unless and until they are altered by the acquiring sovereign,¹⁶⁸ in a conquered or ceded territory, the doctrine of reception preserves all legal rights, not just property rights, of the inhabitants of the land unless and until such rights are superseded by English law.¹⁶⁹ Thus, on the hypothetical assumption that Australia was conquered, Aboriginal laws and customs including, but not necessarily limited to, laws and customs relating to land, would remain in force until altered.

Not only did Justice Brennan's judgment preserve the distinction between settled and conquered territories in respect of non-land pre-existing rights, it also clarified the rule which determined the general law that applied in the settled yet inhabited territory of Australia. By ascribing to Australia the status of a new colony, a settled yet legally inhabited colony, the doctrine of reception as previously understood was not applicable. Consequently, a modified doctrine of reception applied. Under this new doctrine, the legal structure governing *English land law* did not apply upon settlement. Significantly, this modification accommodated all the changes to the common law made by the High Court in *Mabo*: acknowledgment of mere radical title in the Crown, the redefined doctrine of tenure, the recognition of native title (via the *continuity pro-tempore* doctrine), and the dichotomy between the Crown's prerogative property rights as they apply to interests derived from Crown grant and interests not derived from Crown grant.¹⁷⁰ Indeed, the unifying concept is radical title; all the other changes are merely consequences of it.

Thus, as the counterbalance to rejecting the common law 'desert and uncultivated' doctrine for the purpose of determining the law on colonisation, Brennan J had to 'resort to some new and different rule, better adapted to the actual state of things'.¹⁷¹ Justice Brennan developed a theory for the law that applied upon settlement of an inhabited territory that was consistent with Australia's history and did not fracture a skeletal principle of the Australian legal system:¹⁷² that upon acquisition of sovereignty, the Crown acquired a radical, rather than a beneficial, title to all land.¹⁷³ In particular, this theory did not

168 *Mabo* (1992) 175 CLR 1, 34–5 (Brennan J, with whom Mason CJ and McHugh J concurred). See also Secher, above n 2, ch 1, especially 38.

169 *Mabo* (1992) 175 CLR 1, 34–6.

170 Although the same conclusion could, *prima facie*, be reached by applying the rule that English law would apply in so far as local conditions warranted (like Deane and Gaudron JJ did), this would not necessarily be limited to land rights. Accordingly, Deane and Gaudron JJ expressly qualified their exception to the effect of the traditional doctrine of reception to land rights.

171 *Johnson v McIntosh*, 21 US (8 Wheat) 543, 591, 599 (1823) (Marshall CJ). It is worth noting, however, that although the Chief Justice acknowledged that native title could be extinguished by conquest, he did not recognise a power to extinguish native title by inconsistent grant *per se*. See also *United States v Sante Fe Pacific Railroad Co*, 314 US 339 (1941), which affirmed the power of an acquiring sovereign to extinguish pre-existing rights 'by treaty, by the sword, by purchase, by the exercise of complete dominion adverse to the right of occupancy' but only pursuant to unambiguous legislative authority: at 347.

172 See *Mabo* (1992) 175 CLR 1, 29, 45 (Brennan J).

173 *Ibid* 30, 43.

disturb the validity of titles granted by the Crown.¹⁷⁴ ‘Legal history, authority and principle’,¹⁷⁵ therefore, combined to develop a theory for the recognition of pre-existing property rights following the Crown’s acquisition of sovereignty over Australia: an inhabited settled territory.¹⁷⁶ Although the Crown has power unilaterally to extinguish native title, it has been seen that this is the result of the scope of the Crown’s prerogative powers in a settled yet inhabited colony. Nevertheless, the High Court in *Mabo* also recognised the Crown’s exclusive right to acquire native title upon surrender, purchase or otherwise from native titleholders.¹⁷⁷ Indeed, such an exclusive right of pre-emption is concomitant with the prohibition upon alienation of native title other than to the Crown.¹⁷⁸

Although the Crown has the exclusive right to acquire sovereignty, does it necessarily follow that the Crown has the exclusive right to acquire title to property?¹⁷⁹ In the context of the right to acquire title to property, it is necessary to distinguish between an exclusive right to acquire title per se and an exclusive right of pre-emption in respect of land which is occupied at colonisation. In *Mabo*, Deane and Gaudron JJ adopted the reasoning of Chapman J in *R v Symonds* to explain these principles, that is, that because the Queen is the source of all title to land, the sovereign has the exclusive right of acquiring new territory.¹⁸⁰ This view not only confuses sovereignty and property, it also regards the feudal doctrine of tenure as crucial to the principles (as did Martin CJ in *R v Symonds*). Although Toohey J also referred to Justice Chapman’s analysis,¹⁸¹ he emphasised that the inalienability of native title constituted a means of protecting aboriginal people from exploitation from settlers.¹⁸² Moreover, Toohey J considered the question of inalienability ‘open to debate’.¹⁸³

On behalf of the majority of the Court, Brennan J offered a different explanation for the inalienability of native title and the Crown’s exclusive right

174 Ibid 47. See also Sir Gerard Brennan, ‘Reconciliation’ (1999) 22 *University of New South Wales Law Journal* 595, 596–7. Cf *Western Australia v Ward* (2000) 99 FCR 316, 520–1 where North J suggests that the doctrine of tenure should be rejected.

175 *Fejo v Northern Territory* (1998) 195 CLR 96, 151–2 (Kirby J).

176 Bradley Selway opines that ‘[i]f the common law was to recognise native title, accept the validity of existing titles and be consistent with [the] historical facts, then the new common law had to be very similar to that identified by Brennan J’: Selway, above n 48, 418.

177 *Mabo* (1992) 175 CLR 1, 59, 60 (Brennan J), 88 (Deane and Gaudron JJ), 194 (Toohey J).

178 Ibid 60 (Brennan J):

[A] right or interest possessed as a native title cannot be acquired from an indigenous people by one who, not being a member of the indigenous people, does not acknowledge their laws and observe their custom; nor can such right or interest be acquired by a clan, group or member of the indigenous people unless the acquisition is consistent with the law and customs of that people.

See also 88 (Deane and Gaudron JJ).

179 The implications of the Queen no longer being deemed the exclusive source of title are, of course, significant: is the Crown the only source of derivative title or merely a source of derivative title? See Secher, above n 2, ch 7.

180 *Mabo* (1992) 175 CLR 1, 88, referring to *R v Symonds* [1847] NZPCC 387, 389–91 and Marshall CJ in *Johnson v McIntosh*, 21 US (8 Wheat) 543 (1823).

181 *Mabo* (1992) 175 CLR 1, 194, citing Chapman J in *R v Symonds* [1847] NZPCC 387, 390–1.

182 *Mabo* (1992) 175 CLR 1, 194.

183 Ibid.

of pre-emption. Indeed, he expressly distinguished Justice Chapman's analysis.¹⁸⁴ Justice Brennan explained that although native title is recognised by the common law, it 'is not an institution of the common law and is not alienable by the common law. Its alienability is dependent on the law from which it is derived.'¹⁸⁵ However,

[o]nce the Crown acquires sovereignty and the common law becomes the law of the territory, the Crown's sovereignty over all land in the territory carries the capacity to accept a surrender of native title.¹⁸⁶

In Justice Brennan's (and the majority of the High Court's) view, the Crown's exclusive right of pre-emption is an incident of radical title as a concomitant of sovereignty. By framing his explanation in terms of the concomitant of the sovereignty limb of radical title, as opposed to the postulate of the doctrine of tenure limb, Brennan J made it clear that the doctrine of tenure and its accompanying fiction of original Crown ownership (whether considered ubiquitous, as in England, or not, as in Australia) was irrelevant. Thus, the High Court's position on the Crown's exclusive right of pre-emption and the inalienability of native title other than to the Crown is not based upon the Crown as the exclusive source of title, and thus confirms the limited role of the doctrine of tenure in Australian land law.

V CONCLUSION

It is clear that the High Court's decision in *Mabo* did not reject the *doctrine* of terra nullius¹⁸⁷ in any sense of denying Australian sovereignty, which remains unjusticiable.¹⁸⁸ Nor did the Court's decision have the effect of reclassifying Australia as 'conquered' or 'ceded' rather than 'settled'. Indeed, the High Court accepted that Australia was a settled territory. The new element introduced by the High Court was the recognition of a new class of settled colony at common law. By ascribing to Australia the status of a colony acquired by settlement, though not previously uninhabited, the Court rejected the *concept* of terra nullius, rather than the *doctrine* of terra nullius,¹⁸⁹ in its application to questions of property at common law. Thus, although sovereignty over Australia had been acquired under the enlarged *doctrine* of terra nullius under international law, the common law 'desert and uncultivated' doctrine, which had equated the settlement of an inhabited territory with settlement of an uninhabited territory in ascertaining the law of the territory on colonisation, was rejected. Consequently, the High Court was free to prescribe (and indeed needed to prescribe, as there was no law on

184 Ibid 60 fn 65. Justice Brennan also distinguished *Johnson v McIntosh*, 21 US (8 Wheat) 543 (1823).

185 *Mabo* (1992) 175 CLR 1, 59.

186 Ibid 60. See also Secher, above n 2, ch 2, text accompanying fn 265.

187 Cf above n 28.

188 See *Coe v Commonwealth* (1993) 118 ALR 193, 199–200.

189 Indeed, Brennan J expressly refers to the 'rejection of the *notion* of terra nullius': *Mabo* (1992) 175 CLR 1, 45 (emphasis added).

point) a doctrine relating to the law that applied in the colony, that is, a modified doctrine of reception.

The application of the new doctrine of reception to Australia meant that, as in other settled territories, the common law of England was in force as far as applicable;¹⁹⁰ but unlike as in other settlements, English common law principles relating to *land* did not immediately apply. In particular, radical title, as a postulate of the doctrine of tenure and a concomitant of sovereignty respectively, ensures that the common law regimes governing the Australian doctrine of tenure and the restraints on the Crown's major prerogative powers are only brought into play when the Crown grants an interest in land.

As a result of the High Court's restatement of the common law in *Mabo*, the new doctrine prescribing the system of law that applies upon settlement of an inhabited territory (a modified doctrine of reception) also includes the test for determining whether pre-existing land rights survive a change in sovereignty. Furthermore, the test for determining whether pre-existing land rights survive a change in sovereignty is a merged version of the continuity and recognition doctrines: the doctrine of *continuity pro tempore*. Although there is a presumption, under the doctrine of *continuity pro tempore*, that pre-existing property rights continue after a change in sovereignty, the sovereign has power unilaterally to extinguish these surviving pre-existing rights. Accordingly, the presumption of continuity is for the time being only; recognition is a relative concept. Only when the Crown has, at any given point in time, refrained from exercising its power to extinguish pre-existing rights are the rights recognised and thus enforceable.

By combining aspects of the continuity and recognition doctrines, the doctrine of *continuity pro tempore* effectively reconciled these two formerly distinct doctrines and replaced them with a singular doctrine. Moreover, by incorporating the doctrine of *continuity pro tempore*, the modified doctrine of reception effectively replaced the three formerly distinct doctrines of reception, continuity and recognition. Thus, the effect of a change in sovereignty in the context of the inhabited settled colony of Australia was, not that *English* land law immediately applied (as would have been the case in a settled uninhabited territory), but that

190 *Blankard v Galdy* (1693) Holt KB 341; 90 ER 1089; Privy Council Memorandum of 9 August 1722, set out in *Case 15 – Anonymous* (1722) 2 P Wms 75; 24 ER 646; *Forbes v Cochrane* (1824) 2 B & C 448, 463; 107 ER 450, 456; *Kielley v Carson* (1843) 4 Moo PC 63, 84–5; *The Lauderale Peerage* (1885) 10 App Cas 692, 744–5; *Cooper v Stuart* (1889) 14 App Cas 286, 291–2. The situation that English law accompanied the colonists, to the extent that it was applicable to local circumstances in settled territories, had the result that, apart from statute, the Crown had no legislative authority: *Jennings v Hunt* (1820) 1 Nfld LR 220, 225; aff'd *Hunt v Jennings* (1827, Privy Council, no reasons: see Privy Council, 'Printed Cases in Indian and Colonial Appeals Heard in 1827', 333, 362; Geoffrey S Lester, 'Primitivism versus Civilisation' in Carol Brice-Bennett (ed), *Our Footprints are Everywhere*, 351, 371 fn 77, cited by McNeil, *Common Law Aboriginal Title*, above n 20, 115 fn 27); *Kielley v Carson* (1843) 4 Moo PC 63, 84–5; *Sammut v Strickland* [1938] AC 678, 701; Herbert Evatt, 'The Legal Foundations of New South Wales' (1938) 11 *Australian Law Journal* 409, 421–2. Thus, although the Crown had power to establish courts of justice and constitute a representative assembly, the *British Settlements Acts* were passed to give the Crown legislative authority over settlements not within British legislative jurisdiction: *Sabally v A-G* [1964] 3 WLR 732, 744–5.

the *local* land law continued until replaced by the new sovereign (like the legal position in a conquered territory).

Where the constitutional situation is one of 'settlement of inhabited territory', therefore, the doctrine of *continuity pro tempore* applies automatically to the new colony because it is part of the colonial law determining the law which is to govern the new possession. Although the doctrine of *continuity pro tempore* also applies where the constitutional situation is one of cession or conquest, in such cases the doctrine applies to all legal rights, not merely property rights. In inhabited settled territories, however, the *continuity pro tempore* doctrine applies only to land rights; other legal rights being immediately subjected to English law (as per the conventional doctrine of reception).

Thus, the retrospective effect of the colonisation of Australia and reception of English law is that the legal structure governing *English* land law did not immediately apply. This is crucial: on the one hand, it allowed the High Court to declare that, as a result of the Australian version of the doctrine of tenure, with radical title as its postulate, and the 'continuity' element of the doctrine of *continuity pro tempore*, the Australian common law recognises rights in land which are not derived from the doctrine of tenure. On the other hand, the Crown's capacity unilaterally to extinguish such rights is due to the application of two interrelated incidents of the concomitant of sovereignty limb of radical title: not only did the 'recognition' element of the doctrine of *continuity pro tempore* apply immediately upon acquisition of sovereignty but, in its application to interests not deriving from Crown grant, the Crown's major prerogative to grant land was unrestrained by the common law.