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# SOLVING INCONGRUITIES IN AUSTRALIAN NATIVE TITLE LAW

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# 1. OVERVIEW

The colonists of Australia made little effort to understand or respect the land tenure systems, or indeed the civilization, of the Aborigines, instead treating the continent as *terra nullius*, arrogating its land to the Crown and granting it as freehold or by leases. This approach implemented the jurisprudential doctrine of *occupatio*, whereby ownership of vacant land can be asserted by the discoverer. This is quite inappropriate in the modern world, with its shortage of resources and need for social & intergenerational equity. It was, moreover, in breach both of international law at the time and of the mandate given by Britain.

The colonial impact was a tremendous blow to the indigenous population, which was heavily impacted by disease, extermination and *anomie* occasioned by loss of their sacred land. After two centuries the collective voice of Aboriginal descendants seeking redress could no longer be ignored. This led to legislation in Queensland and the Northern Territory permitting grants of freehold land in certain circumstances, and in 1992 to the decision of the High Court in *Mabo*, whereby a surviving common law status was recognized for Native Title independent of statute. The Mabo doctrine was then regularised (inadequately, as it has transpired), by legislation which is openly racially discriminatory (in favour of Aborigines) in its basis, but has been legitimized as such as a (necessarily temporary) "special provision" countenanced by international treaty.

Whilst the recognition of Native Title in Australia goes some way towards redressing injustices, replenishing the spiritual health of Aborigines and facilitating their economic productivity, the concept is inadequately and inconsistently developed and contains many incongruities. It remains a racially-discriminatory "temporary special provision" and does nothing to redress the inherent jurisprudential void underlying Australian land law. In the background, largely due to the dominant industrial culture treating land as a private asset and the environment as an exploitable commons, planetary political, economic & environmental problems persist.

The only proper resolution of these various problems (jurisprudential, Aboriginal and planetary) is to collect the annual rental value of all sites (on land, or in water, atmosphere or ethers) privately occupied as the sole source of public revenue. This would impose a severe disincentive to anyone owning more land than is essential and would constrain degradation of sites (eg by eroding hoofs or pollution), thereby making vast marginal sites available to those who would live simply. Any extraction of minerals or license to pollute would be paid for upon a full indemnity basis.

This solution to the problem of Native Title (amongst many others) would be much sounder jurisprudentially than the current approach. It would eschew racial discrimination of all kinds and avoid unjust enrichment both between indigenous tribes & persons and between Aborigines & the general population. It would also place an appropriate degree of pressure upon Aborigines to avoid welfare-dependency. Collection of the site revenue at local level would enhance local sovereignty and foster a colourful diversity, not only for Aborigines but for other coherent sub-groups of society.

In order to viably restructure the situation and base it upon a firm jurisprudence, all vacant Crown land should be vested in a legal entity representing the Aborigines. However, such land, together with all privatized land, should be subjected to site revenue, although the impact of full industrial-economy rentals against native homelands could be buffered by adoption of suitable zoning. By adoption of site revenue as the keystone of a treaty, both Aboriginal and land rights & law would rest upon a solid jurisprudence which is unshakable morally, legally and scientifically.

# 2. The Nature & Origin of Native Title Law.

## 2(a) International Law

Under the traditional Roman doctrine of *occupatio*, rights of ownership were given to any person who took occupation of unowned land, disinterred jewels, killed or captured wild animals or plucked uncultivated vegetation. The same applied to things which once had, but now have not, an owner, such as abandoned chattels, deserted land and the property of an enemy[1]. This right & liberty was seen as prevalent since primitive times and so an expression of Natural Law.

Thus the legitimacy of effective occupation & use became fundamental to recognition of radical (as distinct from derivative) title under international law. If territory was not *terra nullius* (belonging to no-one) such that *occupatio* could apply, sovereignty over it could only be acquired by derivation from the prior sovereign. In the case of a nation-state, this was done by conquest (which required war), cession (by treaty) or purchase. In the case of an inhabited territory falling short of nation-state status, sovereignty could not be unilaterally asserted but had to be accreted by agreements with local rulers, and local law remained potent unless legitimately extinguished[2].

Despite being founded in little more than good luck & aggressive acquisitiveness, the doctrine of *occupatio* became extremely important as the great navigations of the 15th & 16th centuries discovered vast new lands[3]. It proved, however, quite inadequate for the task of legalizing the relationship of the discoverer's sovereign to the discovered, for it failed to define both the extent of the territory acquired by the sovereign and the acts required to assume sovereignty. In theory, mere visual discovery or flag-raising was insufficient to establish ownership, the latter signifying only intent to appropriate[4]. Acquisition of state sovereignty necessitates exclusive legislative, executive & judicial competence or *imperium* over a territory. Even so, Britain claimed the bulk of North America and all Australia, Spain claimed all South America south of Mexico, France claimed the Ohio & Mississippi valleys: assertions which (legal sophistries aside) had no more rational credibility when made than the Bull of Pope Alexander 6th which drew a line 100 leagues west of the Azores to divide the undiscovered countries of the world between the Spaniards and the Portuguese.

1 See generally Henry Maine *Ancient Law* (Murray, London 1870) Chap VIII and Gaius *Elements of Roman Law* circa 150-190 AD

2 *Oyekan v. Adele* [1957], 2 All E.R. 785, at 788, (Privy Council) per Denning LJ.

3 For a full analysis see Goebel *The Struggle for the Falkland Islands* (1927) p.70.

4 McDougall, Lasswell, Vlasic, and Smith, 'The Enjoyment and Acquisition of Resources in Outer Space,' (1963), III U. Pen. L. R. 521, at 598-634.

Uncritically borne by the jurisprudence of *occupatio*, John Locke was able to assert[5] that the first person to find a plot of land can make it their property, by mixing their labour with it, and can claim endless land in this way as long as s/he leaves as much and as good land for others. He did not clarify how much labour must be mixed, or how mixing labour with the surface gives the labourer ownership over the oil & mineral deposits far below (as was the case at English common law and remains the case in North America). Rothbardian (conservative) libertarians, in their 'homesteading' model which remains the bible of the libertarian movement, reassert Locke's assertion but ignore his proviso to leave as much and as good land for others[6]. Even ignoring their internal inconsistencies, neither the Lockian nor the Rothbardian models work justice between all peoples & generations, nor do they cater at all for such private exploitations of the global commons as are involved in environmental externalities like pollution and resource extraction.

## 2(b) Native Title in the United States of America[7]

### (i) Historical

In seeking to rationalize the relationship of the colonists to the Indians, the "discovery doctrine" was asserted by Chief Justice Marshall in *Johnson v. McIntosh*[8]. This expansionist, exploitative & ethnocentric doctrine, which (advertently or inadvertently) perpetuated a relationship of superior to inferior, endorsed centuries of practice under which 'discovery' of the North American continent by the colonial powers entitled them to extinguish the occupancy rights of the Indians either by purchase or blatant conquest. Further decisions in the "Marshall Trilogy" established that Indian tribes were judicially considered to be distinct political societies capable of domestic self-government, but not separate states[9].

As a result, it was held that the federal government owed a fiduciary duty to the Indians: from this sprang the basic tenet that any uncertainty in congressional intent must be resolved in favour of the Indians[10]. Reservations were set aside but were little respected as the immigrants, thirsty for land, rolled westwards, and a federal policy of assimilation was imposed to destroy Indian culture. By legislation[11] in 1887 the communal reservations could be divided into private allotments which were available for sale or mortgage after 25 years. This invasion & fragmentation of reservations reduced Indian land holdings from 138 million acres to 52 million acres in just over thirty years.

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5 John Locke, *Second Treatise on Government*, Ch. 5 para 27.

6 Murray Rothbard, *For A New Liberty*, p.34.

7 I am indebted for elements in this section to internet material of Mike McBride III email: indnlaw@ ionet.net.

8 21 U.S. (8 Wheat) 543 (1823).

9 *Cherokee Nation v Georgia* 30 U.S. (5 Pet) 1 (1831)

10 *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164, 174 (1973); *Mattz v. Arnett*, 412 U.S. 481, 504 n.22 (1973) and *Brian v. Itasca County, Minn.*, 426 U.S. 373 (1976).

11 General Allotment (Dawes) Act of 1887

It was not until Roosevelt's New Deal in 1934 that the Secretary of the Interior was enabled[12] to place land in trust for Indian tribes, founding the current federal endorsement of Indian domestic sovereignty. Fragmentation of reservations was forbidden. As a result of these reforms it has been said:

> There is no nation on the face of the earth which has set for itself so high a standard for dealing with native aboriginal people as the United States and no nation on earth has been more self-critical in seeking to rectify its deviations from those standards[13].

Under a 1938 Act[14] mining (by highest bidders) could proceed upon Indian lands with the consent of the Tribal Council, with rents & royalties being payable to the tribe at a flat rate. However, delays in approving leases, inflexibility of terms, theft of resources, lack of commercially-competitive royalties and poor accounting practices led to dissatisfaction. In 1982 additional legislation[15] allowed the tribes themselves to negotiate mining agreements upon any terms (eg as to royalties, service agreements, employment & environmental protection).

## (ii) Tenure & Rights on Reservations

19th century treaties guaranteed tribes separate homelands, where they would be free to control their own internal affairs, without State interference and with Federal protection. Tribal reservations are tracts of land (under control of the Bureau of Indian Affairs) to which a tribe retains original title, or which has been set aside for its use from the public domain. "Indian Country" is held, either directly or under trusts, in common: babies are born with entitlements and the land cannot be alienated.

Reservations are natural bastions against racism, debilitating discrimination & invasive culture: they constitute the most important geographical basis for identity & economic activity and are central to domestic sovereignty. To a substantial extent, as regards the majority of everyday concerns (such as families, schools, municipal regulation, local finances & crimes, and land use) political & economic separatism is feasible.

Indian tribes, which comprise about 2m. people (nearly 1% of the US population) owned approximately 56.6 million acres of land as of 1993 (5% of all land in the west) plus 44 million acres set aside for Alaskan Natives[16]. This land contains 10% of all coal, oil & gas reserves, 16%+ of all uranium deposits, 5% of all grazing land and 1.5% of commercial timber and valuable recreational land. From a democratic and industrial-economic point of view (for what such is worth), this is obviously a disproportionate amount of land & mineral wealth in a few hands.

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12 By the *Indian Reorganization Act* (1934)

13 Felix S. Cohen "Original Land Title" 32 Minn. L. Rev. 28, 43 (1947).

14 The *Indian Mineral Leasing Act* (1938)

15 The *Indian Mineral Development Act*

16 Under the *Alaskan Native Claims Settlement Act*

In common with other land tenures in the USA, the rights of tribes have been upheld to exploit, develop use & sell timber, minerals & resources upon reservations[17]. The courts have implied water rights as accompanying catchments within reservations, but have limited them to agricultural (not hydropower) applications, such being asserted as the "treaty intent". However, federal congress retains plenary power and can limit tribal sovereignty by abrogating hunting, fishing & water rights, prohibiting tribal taxation of non-Indians and curtailing Indian gaming. Tribal sovereignty is threatened in the current popular political atmosphere which favours strengthening states' rights in the federal system, giving primacy to principles of equality & democracy, and ceasing to subsidize Indian separatism out of some guilt at historical land grabs & treaty breaches.

## (iii) Gaming

Following a decision of the Supreme Court in 1987 allowing commercial gaming on reservations[18], compromise legislation[19] was enacted to nationalize Indian gaming with uniform standards rather than to forbid it altogether. Indian lands have the advantage of being Federal territory scattered across State lands, and where those States forbid or heavily regulate gaming the Indians have a monopolistic advantage, such as with the Agua Caliente Band of Cahuilla Indians, which own some half of Palm Springs, California. Gaming has become a huge growth industry upon reservations, with 115 out of 557 tribes having entered (with State approval) 131 casino & lottery operations netting gross gaming revenues exceeding US$2.6bn p.a., which is 15% of the US gaming industry[20]. This has created a lot of cash-flow and part-time, low-skill jobs for Indians, together with solid profits which can be applied to domestic infrastructure & welfare. Such benefits are, however, based upon an artificial, uncompetitive economic monopoly: this can only breed distortion and unfairness.

For public policy & revenue reasons some States have opposed the setting aside of Indian lands for gambling free of state controls and recent State High Court decisions[21] have curbed the practice, especially upon purchased lands non-contiguous to the reservation. This trend is much to the annoyance of the tribes which proclaim their ability to self-regulate, subject only to Federal law, and which see such cases as brought (by States) upon dubious technical bases (such as a revival of the moribund "legislative-executive non-delegation doctrine") to curb their sovereignty and constrain economic development. It remains to be seen how the Supreme Court handles this trend.

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[17] *United States v. Cook*, 86 U.S. (19 Wall.) 591 (1873); *United States v. Shoshone Tribe of Indians* 304 U.S. 111 (1938)

[18] *California v. Cabazon Band of Mission Indians* 480 U.S. 202 (1987).

[19] Indian Gaming Regulatory Act 25 U.S.C. § 2719.

[20] Figures from a Senate Report from the Committee on Indian Affairs, as of March 23, 1995,

[21] *Seminole Tribe of Florida v. Florida*, 116 S. Ct. 1114, 1996 WL 134309 (March 27, 1996) and *State of South Dakota v. United States Department of Interior* 69 F.3d 878 (8th Cir. 1995).

## 2(c) Native Title in Canada

### (i) Land Rights

At the beginning of British settlement in Canada, imperial policy[22] was to recognize native title to traditional lands and to permit its acquisition by the Crown alone. It was seen as morally just & reasonable to give peaceable recognition to the prior Indian *occupatio*, as more economic to acquire the lands by treaty than by force, and as politically advantageous to elicit some degree of native co-operation lest the Indians ally with the French. Treaties were entered as settlement requirements & mineral discovery dictated. Reservations sufficed for settlement & cultivation, with foraging rights being retained over unsettled surrendered lands. After federation, jurisdiction over reservations was vested in the federal government[23]. In some provinces of Canada (e.g. British Columbia) no treaties were entered, and attempts are now being made to rationalize the situation with a Comprehensive Land Claims Policy. This aims to reach, by negotiation, binding & comprehensive final settlements with non-treaty native title claimants regarding all issues (land, resources, harvesting, compensation etc.) thereby facilitating legal, economic & social stability.

The remnant 'native title' rights of forage across unsettled but surrendered lands remain a source of contention. Traditionally, the Canadian courts saw native title as some sort of usufruct conducted across Crown lands[24], but a great deal of jurisprudential confusion blurred focus on its nature & origins. Was it a construct of the common law, or a *dictat* of international law? Is native title to land impossible, title being a concept & practice which came with the Europeans, such that all natives can hope to establish is a bundle of disparate historical rights in, upon & about territory?

Since the decision of the Supreme Court of Canada in *Calder*[25], it is clear that native title is recognized in Canada as a common law right, even though the judges in this case were equally divided as to whether or not it had been extinguished as against the claimant Nisgaa Indians. Native rights were seen as arising from prior occupation & social organization by distinctive cultures and so remain unless expressly distinguished by sovereign power in a way which is not racially discriminatory.

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22 See 1763 Royal Proclamation

23 *Constitution Act* 1867 s.91(24).

24 See e.g. *St. Catherine's Milling & Lumber Co. v. The Queen*, (1888), 14 App. Cas. 46; *Tamaki v. Baker*, [1901] A.C. 561; *Tijani v. Sec. of Southern Nigeria*, [1921] 2 A.C. 399; *A.G. Quebec v. A.G. Canada*, [1921] 1 A.C. 401.

25 *Calder v The Attorney-General of British Columbia* 34 D.L.R. (3d) 145. For a thorough analysis see Lysyk, 'The Indian Title Question in Canada: An Appraisal in the Light of Calder' (1973 ), 51 Can. Bar Rev. 450.

In *Delgamuukw*[26] the Court of Appeal in British Columbia held that sovereign legislation extinguishes Indian interests which could not possibly co-exist, but that extinguishment should not be implied (even in the case of fee simple) if only partial impairment was legally or factually imposed. Thus, even in the case of fee simple which was actually used for an inconsistent purpose (eg by fencing & grazing), hunting & ceremony rights may be merely suspended and survive if such uses cease.

This exposes a theme of Canadian jurisprudence regarding the co-existence of private & Aboriginal rights which (in the light of their basic congruence of development) starkly differs from the Australian position[27]. In *Mabo No. 2*[28] the High Court of Australia held that grant of fee simple 'necessarily expels any residual native title in respect of such land'[29] , and there was no departure from this in its subsequent *Wik*[30] decision.

However, a continuing string of Canadian cases holds to the contrary. In *Sioui*[31] a Huron band were held entitled to practice treaty rights (of hunting & ceremony) without constraint under municipal legislation throughout lands frequented at the time of the treaty and still held by the Crown (e.g. a provincial park), despite having no claim to the land itself. Even more radical is *Badger*[32] where hunting & ceremony rights were extended to fee simple private land (uncleared muskeg) which was not manifestly being put to any inconsistent purpose (e.g. fenced agriculture or grazing): the court said that such extensions must be considered on a case-by-case basis. Whilst both *Sioui* and *Badger* were based on treaty rights and no treaties were made in Australia (except perhaps in Tasmania[33]), the rights involved would have existed at the time of signing any treaty and are not dependent upon such signature for their establishment[34]. "[T]he High Court's decision in *Wik* still lags behind Canadian jurisprudence on indigenous rights."[35]

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26 *Delgamuukw* v British Columbia (now on appeal to the SCC) (1993) 104 DLR 470 at 525

27 See generally Kent McNeil "Co-existence of indigenous and non-indigenous land rights: Australia and Canada compared in the light of the Wik decision" (1997) 4 Indigenous Law Bulletin, Issue 5 p.4.

28 *Mabo v Queensland* [No. 2] (1992) 175 CLR 1

29 *Mabo v Queensland* [No. 2] (1992) 175 CLR 1, per Kirby J at 285.

30 *Wik v Queensland* (1997) 141 ALR 129.

31 [1990] 3 CNLR 127 (SCC)

32 *R v Badger* [1996] 2 CNLR 77 (SCC)

33 See Henry Reynolds Fate of a Free People (Penguin, 1995).

34 See Simon v R [1986] 1 CNLR 153 (SCC)

35 McNeil, op. cit. p.9.

## (ii) The Ambit & Extent of Native Rights

Another interesting stream of Canadian jurisprudence, which is not yet fully developed or applied, concerns the ambit & scope of native title rights. In *Sparrow*[36], an Indian's conviction for using an excessively large net, in breach of his Band's license, was upheld, despite fishing being an integral traditional custom, since the regulation was passed with good & non-discriminatory motive (to protect fish as a scarce resource) and was consistent with the fiduciary duty of the Crown to aborigines. The Court observed that the mere fact the traditional activity was being regulated was insufficient to extinguish it.

In *Van Der Peet*[37] the Court upheld the conviction of a native woman for selling fish caught under a native fishing license but sold contrary to regulations, despite fishing being a traditional practice, since fishing for the purpose of trade was not. The court held that the practice must have been practiced continuously (even if sporadically) since prior to European contact, but:

> "[I]n order to be an Aboriginal right an activity must be an element of a practice, custom or tradition integral to the distinctive culture of the Aboriginal group claiming the right ... They may be an exercise in modern form of a pre-contact practice, custom or tradition. ... To be integral, a practice, custom or tradition must be of central significance to the aboriginal society in question -- one of the things which made the culture of the society distinctive. A court cannot look at those aspects of the aboriginal society that are true of every human society (e.g., eating to survive) or at those aspects of the aboriginal society that are only incidental or occasional to that society. It is those distinctive features that need to be acknowledged and reconciled with the sovereignty of the Crown."[38].

In *Pamajewon*[39] the Supreme Court, whilst not denying the right of First Nations to self-governance, refused them the right to circumvent gambling laws since this activity failed the *Van Der Peet* test.

## (iii) The 'Frozen' v 'Dynamic' Rights Debate

The court in *Van Der Peet* maintained a 'large and liberal', 'dynamic', rather than a 'frozen', approach to traditional practices, saying that flexibility & vitality required their evolution over time. Thus, Inuit hunting on foot could now do so on skidoos, or (in Australia) aborigines hunting crocodiles with spears could now do so using outboards & rifles. It would seem (strangely) that the *method* of practicing the tradition may change, but the *purpose* may not: one can hunt & fish using modern industrial tools but not *sell* the produce. It is arbitrary to give a green light to 'evolution' of the way an "integral practice" is conducted but a red light to evolution of the purpose for which it is conducted.

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36 (1990) 70 DLR (4th) 385.

37 *R v Van Der Peet* [1996] 4 CNLR 177.

38 Lamer CJ in *R v Van Der Peet* [1996] 4 CNLR 177 at 199.

All of this is rather artificial and sits ill with any rationalization or realistic policing. Native title is a traditional tenure in a modern world. It would be better to bring consistency & equality to bear upon the situation: if First Nations are to have land & hunting rights unavailable to the general population due to traditional tenure and custom, the rationale is blurred by allowing them to "have their cake and eat it too" by participating in, or using the products of, a non-traditional and uncustomary industrial economy. If a native culture "evolves" so as to be little distinguishable from the mainstream culture, the moral & legal claim to preserve it as aboriginal, as worthy of preservation (in the name of pluralism) in the face of industrial monoculture, is greatly weakened, indeed is just a sham. The core of the custom or practice was the skill & bravery associated with doing it in a particular way, not doing it in any way. Anyone can shoot kangaroos with rifles: it takes more than a little skill to spear one.

The *Van Der Peet* and *Pamajewon* jurisprudence goes some way to addressing the incongruities by insisting that the activity be "integral" and conducted for a traditional purpose, but should be strengthened to require its performance in a traditional manner if Aborigines are to have some racially-based legal or economic advantages over other citizens on that account. In Australia, current *obiter dicta* is unpromising:

> "[M]odification of traditional society in itself does not mean that traditional title no longer exists. Traditional title arises from the fact of occupation, not the occupation of a particular kind of society or way of life. So long as occupation by a traditional society is established now and at the time of annexation, traditional rights exist. An indigenous society cannot, as it were, surrender its rights by modifying its way of life"[40].

## 2(d) Historical Factors at Settlement of Australia

The first aborigines appear to have migrated from an unknown point in Asia (but probably Southern India) some 60,000 years ago and have dwelt here for in excess of 2000 generations. They are all immigrants and did not biologically originate as a unique taxon in Australia. Three different racial types have been postulated: Oceanic negritos (with spirally tufty hair & short stature), Murrayians (of the Murray-Darling basin across to the east coast) and Carpentarians (with extra Malaysian influence) along the northern coastline[41]. It is certain that the negritos (who were of Melanesian stock, crossing at a period when glaciation created a land bridge to New Guinea) arrived first, since they brought no dingoes. They would have enjoyed sole possession until the next glaciation, by when some of them had traveled south along the coast and were able to enter Tasmania (without dingoes) prior to the Bass Strait land bridge being drowned 8000 years ago, creating for them a protective moat. The negrito population of Tasmania was only about 3000 at British colonization and quickly died out completely. Despite Australian aborigines being physically amongst the world's most variable people[42], there is no evidence of any negrito component in their skeletal material[43], leaving a possibility from an anthropological viewpoint that the Murrayians gradually eliminated & dispossessed the mainland negritos (along the rich coastal strip & hinterland, at any rate) rather than colonized vacant space.

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[39] *R v Pamajewon* [1996] 4 CNLR 164
[40] Toohey J. in *Mabo (No. 2)* at p.192
[41] B.C. Cotton (ed.) *Aboriginal Man in South and Central Australia* Government Printer, Adelaide 1966, pp. 59-74; AP Elkin *The Australian Aborigines* Angus & Robertson (1964) p.19.
[42] Josephine Flood *Archaeology of the Dreamtime* Collins 1983, p.68.

The aborigines quickly covered the whole continent (the interior very sparsely), living with few possessions as hunters & gatherers, nomadic according to the seasons. Anchored by cultural sentiment for 'spirit homes' in specific localities, where every prominent feature was a memorial to cultural heroes, there appears to have been little inter-tribal territorial aggression, although change & rearrangement of boundaries did occur especially where tribes died out[44]. Each family member had a definite role and society was an intricate network of kinship relations, with social control maintained by strong customs & beliefs passed on within an oral tradition ["**the Dreaming**"], rather than by an formal government. The best educated guess is that in 1788 there were in Australia about 750,000 Aborigines, speaking 200 languages[45].

Whilst there were occasional prior European contacts, the lasting advent of the British began with Cook's flagraising in 1770 and the settlement at Port Jackson in 1788. At this time British colonial policy (and that of other European powers) required that, where its sovereignty was extended (by whatever means) over a colonial territory, there be no abrogation of indigenous property rights without consent. In breach of his instructions from the Admiralty, Cook neglected to 'obtain the consent of the natives' when claiming possession of half Australia on 22 August 1770[46]. There ensued a blanket denial of prior Aboriginal title, such being based on the unsubstantiated assertion that Australia was a "settled" colony upon land which was *terra nullius*. The British common law was imported, to the extent it was relevant, into the settled colony[47]. Ironically, for more than 50 years after settlement at Port Jackson there was no general acceptance that aborigines were necessarily British subjects and so subject to European law[48], but this changed for imperial & political (rather than jurisprudential) reasons, not least to satisfy land-hungry colonial settlers. As early as 1836 it was judicially recognized that prior to settlement the Aborigines were free and independent people[49], however the Supreme Court held that they had not attained such numbers & civilizations as to be entitled to be recognized as sovereign states[50].

"The weak accept what they must"[51], but the fact remains that the imposition of British sovereignty (upon land which was not in fact *terra nullius*), without payment of compensation, was & still is unjust and without objective and inter-disciplinary jurisprudential foundation.

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43 Flood, *ibid.,* p.69.
44 Elkin *op. cit.* P. 59.
45 "The End of the beginning: 6000 Years Ago to 1788" in Mulvaney & White *Australians to 1788. A Historical Library* (Fairfax, Syme & Weldon Assoc. Sydney 1987) pp. 115-117.
46 The instructions are quoted in H. McRae, G. Nettheim & L. Beacroft *Aboriginal legal Issues* (LBC, 1991) at p.10
47 Campbell v Hall (1774) 1 Cowp. Rep. 204.
48 See R. Milliss Waterloo Creek (UNSW Press 1992) p.240
49 New South Wales Supreme Court Papers, 5/1161, p.210
50 *Rex v Murrell*, 1836, 1, Legge, p.73

## 2(e) *The Racial Discrimination Act*

In any large nation there are many interests, cultures and communities which must co-exist. In 1966 Australia signed an international treaty[52], the purpose of which was to eliminate discrimination of any kind due to race, colour or national origin and to condemn all practices of segregation. Such practices were viewed as repugnant to the ideals of any human society and an obstacle to friendly & peaceful relations among & within nations. As the Preamble says:

> "Considering that all human beings are equal before the law and are entitled to equal protection of the law against any discrimination and against any incitement to discrimination…"

Under this convention[53], the term "racial discrimination" means any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life. Equality before the law, regardless of race, is to be guaranteed[54], and this expressly extends to the right to own property[55]. However:--

> Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved[56].

Under the Federal *Racial Discrimination Act*[57] ***["RDA"],*** promulgated pursuant to this convention and subsequently upheld as a valid exercise of power[58], racial discrimination is declared to be unlawful[59] and all persons have a right to equality before the law[60]. The application of this legislation, and of the *Native Title Act*[61] ***["NTA"]*** promulgated as a "special measure" pursuant to it, were judicially considered in the cases of *Mabo*[62] and *WA v Commonwealth*[63], both of which are dealt with below[64].

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51 Thucydides, *The Standard of Justice*.
52 The International Convention On The Elimination of All Forms of Racial Discrimination
53 Article 1.
54 Pursuant to Article 5
55 Article 5(v).
56 Article 4.
57 The *Racial Discrimination Act* (Cth. 1975).
58 In *Koowarta v. Bjelke-Petersen* (1982) 153 CLR 168.
59 **9. (1)** It is unlawful for a person to do any act involving a distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of any human right or fundamental freedom in the political, economic, social, cultural or any other field of public life.
**(2)** A reference in this section to a human right or fundamental freedom in the political, economic, social, cultural or any other field of public life includes any right of a kind referred to in Article 5 of the Convention.
60 **10. (1)** If, by reason of, or of a provision of, a law of the Commonwealth or of a State or Territory, persons of a particular race, colour or national or ethnic origin do not enjoy a right that is enjoyed by persons of another race, colour or national or ethnic origin, or enjoy a right to a more limited extent than persons of another race, colour or national or ethnic origin, then, notwithstanding anything in that law, persons of the first-mentioned race, colour or national or ethnic origin shall, by force of this section, enjoy that right to the same extent as persons of that other race, colour or national or ethnic origin.
**(2)** A reference in subsection (1) to a right includes a reference to a right of a kind referred to in Article 5 of the Convention.
61 *Native Title Act* (Cth., 1993).
62 *Mabo v Queensland (No. 1)* (1988) 166 CLR 186.
63 *Western Australia v The Commonwealth* (1995) 128 ALR 1
64 Sections 2(h), 2(i) and 2(j).

## 2(f) The Northern Territory Legislative Scheme

In 1975 Commonwealth legislation[65] vested Aboriginal reserve lands immediately into local Aboriginal land councils, and set up a mechanism whereby these could claim unalienated Crown land. About 50% of land in the Northern Territory is now under, or claimed under, this legislation[66], and grants under same are not racially discriminatory[67]. Such tenures are consistent with native title rights under the *Native Title Act* and do not impair or extinguish same, but there is little if anything to be gained by claiming under *NTA*.

Applicants for mining rights must present a comprehensive proposal, which the local land council has 12 months to consider and (except where consent has been given to exploration) may veto, thereby freezing for five years any further application for that tenement. Payments for obtaining consent are forbidden, but compensation is payable in respect of actual damage by mining to the land and formal agreements may require payment of royalties, delivery of equity share, employment of natives or engagement of local service-providers. Due to these impediments, many miners have abandoned efforts to locate & exploit mineral resources in the Northern Territory[68].

## 2(g) Queensland Statutory Schemes[69]

Legislation[70] enacted under the Goss Labor government (which foresaw the *Mabo* outcome a year before that decision) in itself created no indigenous title to land, but did create a framework whereby such title could be obtained and management of land exercised. This scheme is statutory and quite different to native title at common law: claimants retain separate & independent rights[71]. The legislation did some good for less remote and half-blood claimants (especially by opening up national parks), but did nothing for urban aborigines. Unfortunately, successful claims have not been finalized and remain foundering upon the incumbent National Party minister's desk.

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65 Aboriginal Land Rights (Northern Territory) Act (Cth. 1975).

66 *Economic Effects of land rights in the Northern Territory*, Centre for International Economics, Canberra 1993.

67 *Pareroultja v Tickner & Ors,* Full Bench Federal Court, unreported No. G40 of 1993

68 Geoffrey Ewing "Terra Australia post Mabo" in *Make a Better Offer: The Politics of Mabo*, Murray Goot & Tim Rowse (eds), Pluto Press 1994 at p. 164.

69 Regarding which generally see MA Stephenson "Statutory Schemes of Native Title and Aboriginal Land in Qld" 1995 (2) James Cook Uni LR 109

70 The *Aboriginal Land Act* (Qld., 1991) ["**ALA**"] and *Torres Strait Islander Act* (Qld., 1991)

71 *Periucha v Tickner* 1993 42 FLR 32

Only vacant Crown land & National Parks, when declared claimable by regulation, may be claimed (by the 2006 deadline), upon a basis of traditional affiliation (i.e. spiritual connection & responsibility under Aboriginal tradition)[72], historical association (i.e. substantial ancestral occupation[73]) or economic & cultural viability[74], but this last is unavailable for National Park and DOGIT lands[75]. Vacant Crown land in urban areas, road & timber reserves, stock routes and special mining leases cannot be claimed. Some types of land (e.g. Aboriginal Reserves and DOGIT lands) are already held for aboriginal purposes and need not be claimed: they can be 'transferred'. Both claimed and transferred land is held in fee simple by the grantees as trustees for the relevant group and their descendants. A successful claim as regards a National Park gives the natives a say in management and the right to hunt & fish protected wildlife (but in accordance with the management plan and not in protected areas)[76].

In order to prove a claim based on traditional affiliation, claimants must demonstrate an association (not necessarily continuous) with the land based on spiritual connection, complete with rights & responsibilities. A historical claim is proven if ancestors are shown to have lived on or used the land for a substantial period. To establish cultural viability, it must be shown that title would enhance the integrity of the group and regard will be had to proposed use. Culture is a system of organized knowledge, rules & principles observable from behaviour, whilst social structure is a patterned regularity which an outsider perceives. Both are valuable in proving the necessary degree of connection between a people and their land or waters to found a grant of native title. If the land is granted for economic or cultural viability reasons it may be granted to the grantees as perpetual lessees, but no such leases have been granted to date.

Ministerial permission is required to sell or mortgage and leases to non-aborigines cannot exceed ten years. Any unauthorized interest is deemed void[77]. Land may be resumed by express legislation with just compensation. Petroleum & minerals are reserved to the Crown, save that a percentage of mining royalties will be paid to the grantees. The natives may consent to a royalties agreement, and arguably even have a right of veto subject to override by the executive council.

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72 ALA s.53(1).This root of claim is similar to the common law title established in *Mabo*, but need not be continuous.

73 ALA s.54(1)

74 ALA s.55.

75 I.E. **D**eeds **O**f **G**rant **I**n **T**rust under *Land Act* (1994) s.451.

76 This right is protected by s.93 of the *Nature Conservation Act* (Qld. 1993).

77 See Part 3 Div 2, Part 5 Div 2 ALA.

# 2(h) The High Court Decision in *Mabo*

## (i) *Mabo [No. 1]*[78]

The initial *Mabo* claim was lodged, by Meriam Islanders seeking a declaration of title to their traditional lands, in 1982. By preemptive legislation[79] **["the *Declaratory Act*"]** in 1985 the State of Queensland declared that certain offshore islands, including the Torres Strait islands subject to the *Mabo* claim, were and always had been exclusively vested (without compensation) in the Crown "free of any interests whatsoever". Its defence to the *Mabo* claim was then amended, and upon the hearing of a demurrer against such amendment the High Court struck down the legislation as racially discriminatory, contrary to the *RDA*[80], since it purported to strike down rights in property (under Meriam Islander law) whilst leaving intact the land rights of other Australians.

As a matter of black-letter law, the promulgation of the *RDA* voided the discriminatory legislation and, as regards such grants, necessitated payment of compensation. As a matter of human jurisprudence, one wonders why adoption of the *RDA* should make such a difference upon a matter of principle. Technically, the government could repeal both the *RDA* and the *NTA* so as to extinguish native title, but (same having now been asserted as a common law right), there would be an acquisition of property and compensation 'on just terms' would be payable under the *Constitution*[81].

The meaning of the provisions in ss. 8, 9 & 10 of *RDA* was investigated in *Mabo (No. 1)*[82], where Wilson J. (despite his being in a minority) pointed out, with compelling logic, that the *Declaratory Act* removed, rather than created, inequality between Aborigines and persons of another race:

> "Henceforth, by virtue of the assumed operation of the Queensland Act, the plaintiffs will enjoy the same rights with respect to the ownership of property and rights of inheritance as every other person in Queensland of whatever race. There will be equality before the law."

The problem, of course, as Wilson J. himself observed, is that formal equality before the law may nevertheless result in factual inequality, such that sometimes differential treatment may be necessary to remedy some structural disequilibrium. This possibility is expressly permitted under the convention[83], but the unequal rights are to terminate once their objectives have been achieved.

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78 *Mabo v Queensland (No. 1)* (1988) 166 CLR 186
79 The *Queensland Coast Islands Declaratory Act* (Qld. 1985)
80 Contrary to S.10(1) of the *Racial Discrimination Act* (Cth., 1975).
81 *Constitution* s.51(xxxi). See *Magennis v Commonwealth* (1949) 80 CLR 382.
82 *Mabo v Queensland (No. 1)* (1988) 166 CLR 186
83 Articles 1 (4) and 2 (2), as reflected in s.8(1) of RDA

The majority of the High Court, however, by a 4-3 decision, found that the rights quashed by the *Declaratory Act*, namely any possible native right to tenure & inheritance which might have survived colonization, were “human rights”, as distinct from “legal rights”. Since the *Declaratory Act* purported to deprive the plaintiffs of these human rights without compensation, a deprivation which did not affect other races in their tenure over the islands (eg under the *Lands Acts*), it was to that extent nullified.

## (ii) *Mabo [No. 2]* [84]

When *Mabo* eventually was heard, the High Court granted the Meriam Islanders the native title they sought, deciding by a 6:1 majority that pre-existing land rights survived imposition of British sovereignty over Australia. The court rejected the notion that Australia was *terra nullius* upon annexation by the British Crown, to hold instead that at Common Law native title survived (upon unalienated Crown lands) imposition of its sovereignty. In *Mabo No. 2* Dean and Gaudron JJ say[85], with reference to the dispossession of Aboriginal people from their traditional lands:--

> "The acts and events by which that dispossession in legal theory was carried into practical effect constitute the darkest history of this nation. The nation as a whole must remain diminished unless and until there is an acknowledgment of, and retreat from those past injustices".

The native title recognized in *Mabo* eroded the jurisprudential bases of *occupatio* and *terra nullius* supposedly underpinning Australian land law, and so rendered dubious all titles claimed or granted by the Crown at any time. The logic of *Mabo* goes far beyond validating land claims, and extends to a wide array of native rights eg hunting, fishing, ceremony and even self-governance. However, by a pragmatic compromise the High Court asserted that native title could be, and had been, effectively extinguished (without compensation) over such tracts of land as had been alienated (prior to passage of the *RDA* in 1975, in any event) by inconsistent Crown grant. This effectively quarantined most private landowners and interest-holders from challenge by native title.

This blatantly racist assertion, dictated by the Court's inability to question that very sovereignty which empowered it, exposed aborigines to dispossession from such native title as they might still claim (despite such extinguishing grants) at the will of the executive, depriving them of any real security other than that afforded since 1975 by the *RDA*. In making this assertion, the majority relied upon ss.9(2) and 10(2) of the *RDA*, which state that the rights being protected thereby are the kind referred to in Article 5 of the Convention. That Article, however, does not mention “human rights”, although such are mentioned rather

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

vaguely in the preamble to the Convention. This slim majority of the High Court has, perhaps with human decency but with scant jurisprudential foundation when an international, inter-disciplinary and long-term view is taken, conflated legal & human rights and has asserted that the latter includes native title claims.

The court held that native title may be claimed where traditional ties to the land are continuous (claimants face factual difficulties of proof demonstrating continuous tenure of which they are the rightful inheritors), provided that there has been no extinguishment of their native title by exercise of sovereignty. Extinguishment by sovereign power may be under express legislation (demonstrating a 'clear & plain' intention), inconsistent grants (e.g. freehold or exclusive leasehold) to others or dedication for public purposes. It is largely unexplored as to just what type or extent of legislative or executive act effects extinguishment, and a case-by-case procedure seems required[86]. The court did not expressly state whether native title would revive upon termination of an exclusive lease, but indications were to the contrary, the reversion going to the Crown.

Native title was held to be *sui generis* (unique), arising from a traditional connection to land which is recognized by (but not an institution of) the common law. It can only be alienated according to native custom[87], and not outside the overall native system[88]. Once native title is established, it is a matter for the holders how they regulate amongst themselves use & access to the land. It may be communal or individual[89] and may be surrendered or lost if customary usage ceases[90].

## 2(i) *Native Title Act* (Cth., 1993)

The High Court's decision in *Mabo* raised extensive legal, anthropological and socio-economic complications. It was widely seen as 'judicial legislation' by an unelected elite, creating privilege based frankly on race in a fashion quite at odds with modern liberalism. It must however be seen against international trends recognizing the rights of indigenous persons and the continuance of aboriginal possessory title where unextinguished by colonial sovereignty. Decisions of the International Court of Justice that colonial occupation of lands roamed by nomadic peoples has no foundation in *terra nullius*[91], and the Canadian decision in *Calder*[92], had severely undermined Australian decisions to the contrary[93], and a more balanced & objective assessment could no longer be avoided without embarrassment.

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85 At p.82,
86 See the Full Federal Court in *Periucha v Tickner* 1993 42 FLR .
87 *Mabo No. 2* (1992) 175 CLR 1 at 69.
88 *Mabo No. 2* (1992) 175 CLR 1 at 110
89 Per Brennan J. at p. 57, McHugh J. at 15.
90 Per Brennan J. at p. 60.
91 *Western Sahara* [1975] ICJR 3 and *Namibia* [1971] ICJR 3.
92 *Calder v The Attorney-General of British Columbia* 34 D.L.R. (3d) 145
93 In *Milirrpum v Nabalco Pty Ltd and the Commonwealth of Australia* (1971) 17 FLR 141 and

In the wake of *Mabo*, the Commonwealth Labor government enacted the *NTA*[94], which was subsequently upheld by the High Court of Australia[95] and implemented by complementary State Acts[96]. The *NTA* was designed to provide a comprehensive regime for recognizing & protecting common law native title, validating past acts & dealings, providing compensation in respect of such validation[97], protecting public preserves (eg beaches)[98], regularizing (via a Native Title Tribunal **["NTT"]**[99]) machinery & procedure for future claims, and providing for compensation where native title is extinguished or impaired. "Future acts" against native title land (other than "low impact" acts such as bee-keeping & camping licenses) were forbidden unless such acts could be done equally against freehold land, and as regards future mining & acquisition, native title land was given (over & above anything held by freehold proprietors) a "right to negotiate", which does not however amount to a total veto[100].

The legislation requires "proof of a connection with the traditional land or waters in accordance with the laws and customs of the Aboriginal group"[101]. Applications may be brought (without time limit) by individuals or groups (or some coalition of them)[102], although the latter is more likely. It does not matter whether that connection is by a territorial unit (tribe, dialect group or constituent clan) or by an economic unit such as a family or band, nor that the connection was traditionally shared by several units, nor that any actual usage was forbidden due to the sacredness of the site[103]. Proof is essentially an historical & anthropological exercise. Probably a (long-term) physical connection is necessary but a spiritual one may suffice. No type of unallocated Crown land is excluded from a native title claim, but continuous long-term occupation must be established and there must have been no extinguishment.

Under *NTA*[104] only "permissible future acts" (that is, ones which apply equally to other forms of title, eg grants of mining leases) can impinge upon native title. Joint ventures with non-natives[105] and the negotiation of local or regional agreements are envisaged[106]. Under the first of these[107] 12.4 ha. of land was freed, after negotiations, and without the need for any determination by the Tribunal, for subdivision. A corporate body representing the Dunghutti people obtained $738,000 in compensation payable progressively (as lots sold) over 10 years. In economic terms, this was an implicit recognition that 'communal,

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*Coe v Commonwealth of Australia and Another* (1979) 24 ALR 118

94 *Native Title Act* (Cth. 1993).

95 In *Western Australia v The Commonwealth* (1995) 128 ALR 1.

96 E.G. Native Title (Queensland) Act 1993.

97 Ss.17, 20 & 51.

98 See NTA s.212(1) & (2); NTQA s.s 17(1), (2), (3) & 18.

99 Established under Part 6.

100 Ss. 21-44.

101 *NTA* s.223

102 *NTA* ss. 61, 67

103 See the judgment of Toohey J. in *Mabo (No. 2)* (1992) 175 CLR 1 at 187-188.

104 Ss.22, 23, s.235

105 *NTA* s.21

106 Pursuant to ss.29 & 31 of *NTA*

107 That at Crescent Head (NSW), signed 9 October 1996

usufructory' native title land (despite its inalienability) had a value similar to freehold[108].

## 2(j) *WA v Commonwealth*

In March 1995 the High Court of Australia[109] confirmed the constitutional validity of the *NTA* as against preemptive Western Australian legislation[110], which came into force a month earlier[111]. Rather than bluntly extinguish native title by a bare legislative provision, as Queensland had unsuccessfully tried to do[112], WA (of which over half is unalienated Crown land[113]) tried to supplant it with statutory "rights of traditional usage". The crucial section of the WA Act was s.7, which purported to extinguish any pre-existing native title and to replace the rights and entitlements that were the incidents of native title with statutory rights of traditional usage **["s.7 rights"].** Under s.23 of the WA Act, s.7 rights could themselves be extinguished by inconsistent legislative or executive action under the "general laws" of the State[114]. Thus, at any time the Crown could arbitrarily alienate its vacant land and extinguish s.7 rights to it.

Constitutional challenges to the WA Act were brought by two aboriginal plaintiffs and WA itself challenged the *NTA*; these cases were amalgamated. WA admitted that its Act purported to extinguish native title in a manner which was contrary to *NTA*[115], but argued that it in fact had no native title to extinguish (since the mere fact of establishing the State in March 1831 had automatically extinguished it all), and that if this was not so, the WA Act had done so prior to the NTA becoming operative.

The High Court held[116] that there was no evidence that the mere establishment of the State of WA had extinguished all native title, since colonial policy was only to grant land to immigrant settlers, or to dedicate same for its own inconsistent uses, parcel-by-parcel and a complete extinguishment was unnecessary for this.

Furthermore, in purporting to allow fresh Crown grants (of freehold, leases or mining leases), or compulsory acquisition for public works, to extinguish the natives' s.7 rights, and to do so without compensation[117], the Court held[118] that WA was protecting the tenure of the grantees above the comparatively insecure title of the natives and so breaching s.10 of the *RDA* by discriminating against aborigines as compared to other forms of title holder.

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108 This equates with the decision in *Geta Sebea & Ors v Territory of Papua* (1941) 67 CLR 544.

109 In an amalgamation of three cases, *The State of Western Australia v the Commonwealth*; *The Wororra Peoples v The Commonwealth* and *Teddy Biljabu v The Commonwealth.*

110 The *Land (Titles and Traditional Usage) Act* (WA; 1993)

111 On 02.12.93 as compared to the NTA on 01.01.94.

112 In the *Queensland Coast Declaratory Act* (Qld. 1985), rendered inoperative by *Mabo v. Queensland [No 1]* ((1988) 166 CLR 186) as contrary to the *Racial Discrimination Act* (Cth 1975) and hence infringing s.109 of the *Constitution.*

113 *WA v Commonwealth* at p. 19

114 E.G the *Land Act* (1933), *Mining Act* (1978), *Petroleum Act* (1967) and *Public Works Act* (1902).

115 Under s.11(2)

116 At p. 22.

117 Under s.28(1)

118 At p.35

The Court refused to endorse WA's argument that *NTA* was beyond the constitutional powers of the Commonwealth[119]. The "race" power alone sufficed and it was unnecessary to call upon the "external affairs" power. The "race" power expressly permitted the making of "special" laws for the people of a particular race[120]. The *NTA* protected native title by removing its common law defeasibility and limited its impairment to clear legislative intent with payment of compensation: it was thus "special". The Court refused to hold that the *NTA* in any way exceeded constraints "implicit" in a federal structure or imposed unfair discrimination against WA[121] merely because it happened (for historical reasons) to have more land subject to native title claims that other states.

The Court also refused to hold that the *NTA* was itself contrary to the *RDA* as it is a special measure[122] discriminating in favour of indigenous peoples: the racial distinctions it makes are not "racially discriminatory" within the sense of the treaty[123]. It is important to note, however, that the treaty itself sees such special measures as merely temporary, until the imbalance they address is resolved. On this basis, the *NTA*, must be construed as a special measure which is necessary in order to prevent the unequal operation of laws directed to formal equality of all races before the law.

## 2(k) The High Court Decision in *Wik* (1996)

Whilst in *Mabo* the High Court asserted that the lease of two small islands for a sardine factory extinguished native title even at the expiration of the term (since the Crown expected the reversion), the major issue of native title claims across pastoral leases was left open and was not addressed by *NTA*, save (to the negative) in its preamble. It appears that all legal advice at the time was that the grant of pastoral leases extinguished native title.

Pastoral leases are limited-purpose statutory leases (envisaged in the British Colonial Office in the 1840's), more akin to licenses, applying across much of Australia. The enabling State[124] statutes do not expressly extinguish other titles. Some 52% of Australia's vast rangelands, consisting of native grass shrub & wood-land in arid & semi-arid areas, are held under Crown leases, a significant proportion being pastoral leases[125]. They allow depasturing of stock and the making of allied improvements (eg dams & fences), but fall short of granting exclusive possession: indeed in states other than Queensland they

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119 Under s.51 (xxvi) (the races power) and s.51 (xxix) (the external affairs power) of the *Constitution.*

120 A legislative scope investigated by Stephen J. in *Koowarta v. Bjelke-Petersen* ((1982) 153 CLR 168 at 210):

121 Contrary to the principle in *Melbourne Corporation v. The Commonwealth* (1947) 74 CLR 31) and *Queensland Electricity Commission v. The Commonwealth* (1985) 159 CLR 192).

122 Under s.8 of the *Racial Discrimination Act* (Cth., 1975)

123 I.E. the International Convention on the Elimination of All Forms of Racial Discrimination.

124 E.G. *Land Act* (Qld. 1910)

125 See Draft National Strategy for Rangeland Management, Department of Environment, Sport & Territories, Canberra 1996.

frequently contain express clauses 'reserving' traditional aboriginal rights of hunting & ceremony.

The *Wik* case involved two pastoral leases with no express reservations of Aboriginal rights, one of which had been forfeited and the other never permanently occupied. The High Court, reversing the decision of Drummond J. in the Federal Court, decided that, whilst a grant of radically inconsistent title (e.g. fee simple, even where no possession is in fact taken) extinguishes native title, grant of a lesser title (e.g. a pastoral lease, which is neither exclusive nor perpetual) may not, and in this case did not. Neither the statutes enabling the pastoral leases, nor the terms of them, gave exclusive possession to the pastoralists. Native rights to hunt & forage and practice ceremonies could be exercised quite consistently with pastoral activities. Indeed, even those elements of native title rights which are temporarily submerged by grant of the lesser title probably resurface upon its expiration. There may be other forms of Crown leases which, considering their purposes & terms, do not extinguish native title

The *Wik* decision raised a storm of outcry from pastoralists, who have substantial economic & political clout and were used to treating their holdings as freehold. In fact, *Wik* is only a modest, and by no means radical, decision. Pastoral leaseholders remain secure in operating their leases during the term and for the purposes they were granted.

# 2(l) Post-Wik Assessment

## (i) Introduction

*Wik* presented the the newly-incumbent conservative Howard Government with a major dilemma. Legal rights over land titles & usage reside with the States, so any Commonwealth legislation extinguishing, validating & enabling native title must be based upon its race, external affairs or 'incidental' powers. Any address of post-*Wik* confusion via codification of rights (whether Native Title or under pastoral or Crown leases) would be problematical & unwieldy due to the range & complexity of the rights involved, and would be bound to disturb the delicate balance of rights contained in the *NTA*. Any code constraining common law rights of native title would contravene the *RDA* thereby breaching treaty obligations and arousing entitlement to compensation in respect of property acquired pursuant to s.51(xxxi) of the *Constitution*.

Under intense lobbying from pastoralists & miners, the Howard Government quickly expressed alarm at the disruption & threat posed to established interests by the *Mabo* & *Wik* decisions. Whilst professing to retain native title and legislation against racial

discrimination, this government formulated a "Ten-Point Plan" which would substantially curtail potential claims.

## (ii) Ten-Point Plan

The Howard Government's politically-determined Ten Point Plan involves:--

**1**. Validation of all acts & grants (mostly exploration & mining tenements) relating to non-vacant Crown land (i.e. mostly pastoral leases) between *NTA* (commencing 01.01.94) and *Wik* (decided 23.12.96). This rewards those states which ignored the likelihood that native title applied to pastoral leases and sidestepped the negotiation process. Compensation would be payable at taxpayer expense (75% Commonwealth, 25% State).

**2.** Confirmation of extinguishment on pre-1994 'exclusive' tenures (i.e. freehold and all leases 'to the extent that it can reasonably be said ... exclusive possession must have been intended'). This threatens extinguishment upon agricultural leases of non-arable land, even where the leases had specific clauses in favour of aborigines. It also threatens legislative extinguishment upon pastoral leases, especially those opened to mining.

**3.** Removal of impediments (without negotiation albeit with compensation) to provision of municipal services, and acquisition of land for that purpose, in towns & cities. This point merely reflects the current law and adds nothing.

**4**. Extinguishment of inconsistent native title rights upon pastoral leasehold (even lapsed ones!) and enhanced powers for government to upgrade such leases to freehold or exclusive tenure. Activities incidental to primary production (eg farmstay tourism) were to be permitted upon pastoral leases..

**5.** Provided there is current physical connection (something which is often forcibly prevented!), access rights for traditional purposes to be protected by statute pending determination of claims.

**6.** Claimants to have right to negotiate regarding mining (at extraction but not exploration stage) upon vacant Crown land (but not upon exclusive tenures) and upon pastoral leases, but all pre-1994 mining rights to be automatically renewed.

**7.** Claimants to have right to negotiate regarding commercial development on vacant Crown land (except that in point 3) and pastoral leases, but lessees to have augmented rights to take timber & gravel (at taxpayer expense in compensation payments to natives!).

**8.** Government control over regulation & management of surface & subsurface water. This could amount to an expropriation of native rights[126].

**9.** Speeding up of native title claims, with a stringent & retrospective 'higher registration test' to qualify for negotiating rights; and a sunset clause on claims.

**10.** Encouragement of voluntary but binding local & regional agreements.

## (iii) Indigenous Reaction

In early 1996 the National Indigenous Working Group[127] ["**NIWG**"] was established, as widely representative of indigenous Australians[128]. This endorsed the coexistence of rights on pastoral leases, the terms of which should not be upgraded. It opposed any extinguishment of native title without consent, including by such *de facto* means as unfair threshold tests or imposition of sunset clauses upon claims, and recommended that representative bodies themselves sort out competing claims. Claimants were to have immediate right of access once a claim passed threshold tests and was accepted (even if read-down) by the registry, with any non-pastoralist activity (eg quarrying or tourism) subject to negotiation.

NIWG accepted that pastoral rights would prevail upon pastoral leases but opposed amending the *NTA* to prevent its application to any 'primary production' activities[129], since this would invite State upgrading of pastoral leases to permit all such activities, thereby effectively giving the land to pastoralists as actual or quasi-freehold (at the expense of citizens whose taxes would pay the native title compensation!). Such a gift would also entail adverse environmental problems, since no controls exist in Queensland as regards broadscale land-clearing upon freehold land. It reserved the right to claim upon reversion of exclusive leases. Automatic validation of mining rights granted (especially by WA) was opposed.

NIWG heavily emphasised site-specific and regional agreements with responsible local representative bodies (with non-political funding) as being an efficient, flexible & relatively simple alternative to the costly, adversary processes contained in the *NTA*. It saw such

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126 See below section 3(e)(iii).

127 The National Indigenous Working Group on Native Title

128 It represents the National Aboriginal and Torres Strait Islander Commission Indigenous Land Corporation, Aboriginal and Torres Strait Islander Social Justice Commission, National Aboriginal and Islander Legal Services Secretariat, Queensland Foundation for Aboriginal and Islander Research Action, Cape York Land Council, New South Wales Aboriginal Land Council, (Victorian) Mirimbiak Nations Aboriginal Corporation, South Australian Aboriginal Legal Rights Movement, Aboriginal Legal Service of WA, Kimberley Land Council , Goldfields Land Council, Northern Territory Central Land Council and Northern Land Council.

129 Within the definition of in the *Income Tax Assessment Act* (Cth., 1936).

agreements covering not only native tenure & sustenance but also providing for the construction & use of infrastructure (roads, ports etc.) and public access to beaches, foreshores, national parks and recreation areas.
It endorsed an "Indigenous Economic Empowerment Package", being the creation of a capital base to allow equity participation in developments and investment on native title lands. This fund was intended as a social justice measure to remedy indigenous economic disadvantage allegedly due to erosion of property rights over decades and "reduce the substantial financial, economic, human and environmental costs imposed by policies and practices which maintain the status quo of marginalisation and disempowerment."

A major problem under *NTA*, and a key mining industry concern, is that overlapping native claims are frequently made, new claimants continuously emerge and an invalid claimant may negotiate. ATSIC has suggested[130] that local incorporated Land Councils sort such claims out within themselves to present an authoritative endorsement, but ATSIC (like any democratic body) can be manipulated by savvy or ruthless members to the detriment of the humble & meritorious. Nevertheless, some cost-effective mechanism is essential, so such a reform is desirable if allied with transparent written reasons and a right of appeal.

## 2(m) The Native Title Amendment Bill (1997)

Proposed amendments to *NTA*, currently before parliament, seek to implement the 10-point plan. They impose 'certainty' by expanding the permitted use on pastoral leases to a widely-defined primary production, by validating mining tenements upon them and by stipulating that native title is extinguished (or permanently party-extinguished) upon reversion to the Crown of exclusive (or non-exclusive, as the case may be) grants. These amendments provide a windfall for leaseholders, many of whom are foreign companies, and further damage the ability of government to halt environmentally-destructive practices.

Various types of 'previous exclusive acts' are detailed in a schedule, which does not include pastoral leases or grazing leases[131] but these may be added quietly by regulation. Any legislative exclusion of native title from pastoral leases is likely to jeopardise reconciliation forever[132]. Compensation is payable for all these types of extinguishment, but it is capped at freehold value[133], a cap which is, however, subject to the 'just terms'

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130 Aboriginal and Torres Strait Islander Commission Review of Native Title representative Bodies (ATSIC, Canberra 1995) p.95.
131 Under the NSW *Western Lands Act* (1901).
132 See article by Dr. Henry Reynolds, senior research fellow in History and Politics at James Cook University, published in "The Australian" 9/1/96.
133 Proposed s.51A.

requirement of the *Constitution* and may exceed freehold value given the religious & cultural significance involved.

# 2(n) The Position with Mining

## (i) Mining at Common Law and under Statutory Schemes

At Common Law all rights to mine gold belong to the Crown[134], but aside from this all minerals belonged to the owner of the surface land – a position which still prevails in North America. In Australia, however, Crown grants of freehold or leasehold usually reserved to the Crown all minerals, but were it not for various statutes it is possible that full rights to mineralization under vacant Crown lands, successfully subjected to native title claims, would pass to the claimants, since by definition native title is not subject to reservations accompanying grants. In the event, however, various state & federal acts[135] reserve to the Crown all (or most) gold, minerals, coal & petroleum, and the right to allow prospecting for them. Imposition of these provisions to native title lands involves no racial discrimination or diminution in 'security of enjoyment'. This statutory reservation of minerals to the Crown is not inconsistent with the existence of native title[136].

During the era prior to land rights, mining could only proceed upon Aboriginal reserves (as they then were) upon payment of double royalty to an Aboriginal Benefits Trust Fund[137], but even this was subject to arbitrary statutory termination[138]. A thorough formal analysis[139] recommended that 30% of the entire statutory royalty be eartagged for traditional owners in the affected area, 40% fund Aboriginal land councils and the balance 30% benefit aborigines generally, such payments to be compensatory public monies and not resource rent. This is reflected in the current Northern Territory legislation[140] which, however, is quite deficient in defining 'the affected area'. In South Australia[141] the division is one-third to each (the State getting the final third). In NSW[142], 60% is invested

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134 *In the Case of Mines* (1568) 75 ER 472

135 *Mineral Resources Development Act* (Vic. 1990), *Mineral Resources Act* (Qld. 1989), *Petroleum Act* (Qld. 1923) Mining Act (WA, 1978), *Mining Act* (SA, 1971), *Petroleum Act* (SA. 1940)

136 See Drummond J. in *The Wik Peoples v Queensland* (1996) 134 ALR 637.

137 See Mining Ordinance (NT, 1953) and Aboriginals Ordinance (NT, 1953).

138 As in the Mining (Give Peninsula Nabalco Agreement) Ordinance (NT, 1968), upheld in Milirrpum and others v Nabalco and the Commonwealth

139 See the A.E. Woodward Aboriginal Land Rights Commission Final Report, April 1974 AGPS Canberra

140 Under s.64(3) of the Aboriginal Land Rights (Northern Territory) Act (1976).

141 Under s.24(2) of the *Pitjantjatjara Land Rights Act* (SA, 1981).

142 Under s.46 of the *Aboriginal Land Rights Act* (NSW, 1983).

in the local, and 40% in the state peak, Aboriginal Land Council. It is not clear whether these payments are public monies or private rent: a distinction which is important for auditing & accountability.

## (ii) Mining Under *NTA*

Under *NTA*[143], federal or state legislation may confirm the existing right of the Crown over ownership of natural resources & water. Native title holders must comply, as must any proprietor, with imposition of exploration & mining activities. Native title holders (as with any proprietor) can use topsoil which contains minerals (to which the Crown has property), for instance by farming or smearing of ochre, since this is not "mining" within the legislative definitions.

When the Keating Labor government denied native title holders a veto on mining, a compromise was reached whereby the natives were given a right to negotiate terms regarding mining exploration or extraction, but subject to arbitration and ministerial override in the national interest. This right to negotiate, which is also available against compulsory acquisition, treats native title land quite differently to any form of Crown grant. An almost identical right to negotiate is available at both mining and extraction stages under *NTA*, but the statute fails to distinguish clearly between the two stages. Since even claimants have negotiating rights there is encouragement to act strategically by laying claim to the maximum. Miners & governments too act strategically by white-anting the viability of the *NTA*.

To obtain the right to negotiate, native title holders or claimants must register a claim with the NTT within 4 months of notification (for an exploration license) and within 6 months (for other acts). An expedited procedure applies[144] if the "future act" meets certain criteria[145], such as not directly interfering with natives' community life & significant areas, or involve 'major disturbance' of land & waters. The test is on a 'worst case' scenario and the nature of Aboriginal culture & concerns are relevant to evaluating whether disturbance may be 'major', and whether or not the land is 'remote'[146].

This right to negotiate appears to be aimed at enabling indigenous peoples to factor in the weight of spiritual values, protect their culture, participate in development & economic

143 S.212(1).
144 Under s.32(1) *NTA*
145 In s.237
146 *Dann v State of WA & Anor* (1997) 144 ALR 1 (application for exploration tenement).

activity and some compensation in respect of impairment of their quality of life by mining. Such protections and compensation are not available to the ordinary citizen. From an Aboriginal point of view:--

> The right to negotiate principles in the Act have provided many Aboriginal people with a real right for the first time to directly control the protection of their culture, to be involved in economic activity through agreements which deliver employment and wealth generation opportunities and allowing them to control negative social impacts related to these developments. The Act has therefore provided an incentive for indigenous people to constructively engage in economic development proposals.[147]

If the aim of these policies is to alleviate impact upon affected areas and improve the economic status of Aborigines generally, the outcomes are unimpressive. Little permanent economic infrastructure is evident despite $14m. being paid to Aborigines in western Arnhem Land from royalties at Nabarlek uranium mine[148]. Aborigines in Kakadu (a world heritage area where mining was imposed by the federal government during the 1970's) are no better off than neighbouring communities despite an injection of $40m in uranium royalties over 17 years: poor investments have been made and the local aborigines disagree amongst themselves[149]. For there to be any lasting benefit there must be solid, responsible administering institutions, committed support from key agencies and minimal Aboriginal bickering.

Some exploration agreements have been reached, traversing such factors as payment of a percentage (examples indicate 5%) of annual exploration expenditure, employment of natives, the grant of an assignable equity interest and the miner's undertaking not to oppose native title claims[150]. However, under *NTA*[151] the government foregoes no royalty receipts when an agreement is negotiated, leaving the cost of any negotiated outcome a sheer burden for the miner. Negotiated outcomes are thus less likely, especially since, if the deadlock proceeds to arbitration, profits & income must be excluded from the terms of the award.

If agreement is not reached within six months of negotiation then the NNTT (or a State arbitral body) has a further six months to arbitrate, or if need be dictate, a decision, which is registered in the Federal Court. Negotiated agreements[152] may contain terms for lump sum payment, a share of royalties or profits, guaranteed employment and service agreements. As

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147 Coexistence — Negotiation and Certainty: Indigenous Position in Response to the Wik Decision and the Government's Proposed Amendments to the Native Title Act, 1993. Prepared by the National Indigenous Working Group on Native Title, April 1997.

148 J.C. Altman and D.E. Smith "The economic impact of mining moneys: the Nabarlek case, Western Arnhem Land", CAEPR Discussion Paper 63/1994.

149 Kakadu Region Social Impact Study, quoted in *The Australian* 11.08.97 at p.5

150 See Altman 105/96 op cit. pp. 6-8.

151 S.38(2)

152 E.g. that between the Northern Territory government, Zapopan Mining and Jawoyn Aboriginal Association.

with normal freehold, but in sharp contrast to the position under the Northern Territory statutory scheme, there is no absolute right under *NTA* to a veto of mining.

### (iii) The Politics behind Mining

Miners can deal with native title just as with any other form of tenure, but its advent has created extensive uncertainty due to the time it will take to ascertain & settle the status of lands (especially where claims overlap), the dubious legality of rights & titles granted since 1975, and the potential costs & delays inherent in the statutory right to negotiate (at both exploration & extraction stage) .

Mining interests invariably wish to access land for exploration & development upon certain and reasonable terms, without undue delays, such as those raised by the right to negotiate. Faced with such statutory delays, miners wish to minimize transaction costs arising from them, and prefer extraction to follow automatically (normal environmental & heritage factors permitting) once exploration indicates viability. They prefer native rights of negotiation to be exerciseable (if at all) once-only, that is upon either exploration or extraction, but not both. They are loathe to make payments at exploration stage, since this activity is invariably loss-making and the strike rate is low: in only about one case in a thousand does a viable mine emerge. This prompts natives to press for payments at exploration stage, so that at least they are sure to get something: an economically distortive exercise which creates disincentives for explorers[153].

Many native title interests are quite pro-development, provided they receive an acceptable financial return from the mining and significant sites are protected. The *NTA* lacks any express provisions stipulating precise income sharing, compensation or incentives. References are made[154] to the sharing (between miners & natives) of profits, but it is not clear whether this is aimed at encouraging swift agreements or because native title bestows mineral rights and mining entitles payment of resources rent.

## 2(o) The Prospect of a Treaty

No doubt the colonial tide of historical violence & vapid assertion (regarding *terra nullius*) succeeded in sweeping away the bulk of Aboriginal land tenure and laws, but what (if anything) legitimizes that tide? In fact, it has no basis in morality or reason[155]. *Mabo* does nothing to legitimise the tide itself, merely supplanting the assertion of *terra nullius* with the supine racist, imperialistic & Eurocentric assertion of British sovereignty

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153 See J.C. Altman "Reforming financial aspects of the Native Title Act: an economics perspective (CEEPR Discussion Paper 105/96) p.5.

154 In s.33 *NTA*.

155 MJ Detmold "Law and Difference: Reflections on Mabo's Case" in Essays on Mabo (LBC, 1993) p.42.

and its right to extinguish native title[156].

Quoting Wolff[157], Professor Henry Roberts says[158]:

> If the High Court can determine that Aborigines and Torres Strait Islanders had a form of land tenure before annexation which flowed through into the era of colonisation, how did it exist without some accompanying form of sovereignty? The existence of land tenure implies a form of sovereignty. Writing in the middle of the eighteenth century Wolff argues exactly that point, explaining that a nation "which inhabits a territory has not only ownership but also sovereignty over the lands and things which are in it"...
>
> If sovereignty was exercised before the arrival of the British how then was it lost, and when? The answers provided by Australian jurists are quite unsatisfactory, implying that if there was any Aboriginal sovereignty at all, it was extinguished at the moment of annexation. The unreality of this is obvious, underscoring the chasm between the competing stories of the law and history. Historically, British control over the Australian continent expanded slowly and it was many years before even half the land mass was effectively administered and so Aboriginal communities remained outside British Australia until the twentieth century.

# 3. Problems with Native Title

## #3(a) Jurisprudential Knots

### (i) Introduction

Jurisprudence is the science or theory of law. Whilst ‘law’ is, upon close investigation, an extremely complicated concept, basically it is a set of rules creating rights & duties. Insofar as law conduces to certain ends (which may to some extent clash), such as utility, productivity, wealth, happiness, harmony, and peace, it may be described as a “good” law. Such “good” law tends to be characterized by or consistent with standards of certainty, efficiency, equality, liberty and justice.

### (ii) Property

Scarcity and labour are basic to the social institution of property, together with such subsidiary concepts as theft & trespass: there is little need for concepts of property where resources are endless or adequate and they can be appropriated with little or no labour. Thus, nomadic tribes, with abundant land used only for grazing, recognize no private property in land, nor any ‘trespass’ to it[159]. Commonly, unused, unclaimed or permanently abandoned resources can be acquired. However, in every society, some vital resources are scarce, and invariably rules exist controlling acquisition, tenure & use of them, and such rules are

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156 See Watson, I; "Nungas in the Nineties" in *Majah: Indigenous Peoples and the Law*, Bird, Martin & Nielsen (eds.) Federation Press, 1996. See also: I Watson, "Has Mabo Turned the Tide for Justice" (1993 12:1 *Social Alternatives* 3.

157 C.Wolff, *The Law of Nations* [1750] Clarendon, Oxford, 1934, p.144.

158 Henry Reynolds “After Mabo,What About Aboriginal Sovereignty?” Australian Humanities Review, http://www.lib.latrobe.e du.au.

backed by sanctions against transgressors. These rules may be customary norms or they may be formalized into law.

Ensconced in the artificial construct of a refined jurisprudence, Blackstone summarises the common world view in the 18th century as being that God gave the whole world to humanity in common, but individuals had a transient property right of *occupatio* to such portion of it (e.g. a cave, shade tree or animal trapping spot) as they were actually using at any given time. As populations grew larger and domiciles grew amidst cultivation, it "became necessary to entertain conceptions of more permanent dominion, and to appropriate to individuals not the immediate use only, but the very substance of the thing to be used"[160]. Such a summary is, however quite idle: we are in no position to meaningfully theorize about the "rights" of primitives: one can well imagine a physically weaker person being hounded from his shade-tree or relieved of his slain buck by a stronger person who coveted them regardless of any 'right'. It is not surprising that adverse possession (especially of land) by the strong (mostly families & clans rather than individuals) created property rights, but it is surprising that over time sentiment gave that possession respectability.

Arguably as a result of partially disentangling individual from communal rights, a presumption does seem to have developed in Roman jurisprudence that everything should have an owner, and mature Roman law, from which modern western jurisprudence directly flowed, regards co-ownership as exceptional & momentary[161]. The physical power of the Roman State led to a collective fit of imperious arrogance whereby not only could & did some humans see themselves as separate from & above others, but also as separate from & above Nature and as capable of existing severally. Yet no society, let alone humanity-on-Earth, is a sandheap of independent & several individuals. It is the growth & arrogance of this jurisprudence, enormously swollen & exported by the Church it came to commandeer to its purposes, which has roamed the earth as a gross & sacriligeous beast, decimating others & the resources of nature for the private gain of a few.

The European colonizers, especially England, France & Spain, brought to their colonies various technical & artificial Roman Law[162] concepts of property which differed radically to those of the indigenous peoples. These concepts included a division of legal & equitable

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159 H Wheaton, *Elements of International Law* [1836], Oceania, New York, 1964, p.32.
160 Blackstone's *Commentaries*, Book II Chapter 1.
161 *Nemo in communione potest invitus detineri*: "No-one can be kept in co-proprietorship against his will".
162 See Smith, 'The Unique Nature of the Concepts of Western Law' (1968), 46 Can. Bar Rev. 191.

title, title divorced from possession, and various 'bundles' of abstract rights such as easement and trespass.

Indigenous peoples, however, invariably viewed physical possession arising from long tenure & use by & within an organic group (rather than abstract bundles of rights held by individuals) as integral to 'property', both in things and in land. Such indigenous concepts are essentially similar to the old English concept of seisin or feudal tenure, which required possession (but more than mere fleeting occupation), and which could prevail against legal title, e.g. where there was an intestacy[163]. In traditional cultures (e.g. the Hindu[164], American Indian, Inca, & Australian Aboriginal, Slavic and even feudal Russian although in that instance the rights of stewardship were only ever temporary and redistributable by the seignior) ownership of land was invariably communal, although to various degrees individual rights of usufruct or stewardship of divided portions could be alienated (with village consent) by sale, transfer & mortgage[165]. The 'village' or 'commune' was basically an extended group of kinsmen, although strangers could (with village consent) accede to the rights & obligations of members: in this sense the 'commune' was very similar to the ancient Roman Gens or House, as distinct from the Family.

Indigenous 'property' tenure is more a function of use, territoriality & range than an equation with freehold or leasehold title legalities, although modern native title legislation attempts to give the former recognition under the latter. Where various tribes or states inhabit a single land mass it is desirable (for peace & stability) that they agree upon the boundaries between them. Much greater potential for conflict exists, however, where various groupings of people <u>within</u> a single society recognize <u>differing</u> rights of tenure, and this potential is exacerbated where one of the groups (eg Aborigines) perceives itself as servient and the other group as dominant and as arbitrarily imposing particular laws of tenure. In some territories (eg Canada & the USA) treaties were entered so as to 'legitimize' the acquisition of native land by the sovereign, with certain land being reserved for the exclusive domestic use of the servient group but subject to the sovereignty of the dominant group.

Native Title issues arise where the precise ambit of native title held by the servient group has not been fully & properly defined in the legalities of the dominant group, as it was in New Zealand where intra-group domains were freeholded. The right to native title is held *in personam* against the Crown, not *in rem* against any person holding the land. In accordance with

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163 See e.g. Potter's *Historical Introduction to English Law* (Sweet & Maxwell, 1962) p. 515, 558
164 Henry Maine *Ancient Law* op. cit. p.260
165 Mountstuart Elphinstone *History of India* Vol. 1. p.126

Roman jurisprudence, native title would thus be perceived as a bundle of rights accruing to that organic group (tribe, band) who meet their own internal criteria (long possession etc.). The group can then make its own internal arrangements regarding division or use of the land, but the entire holding cannot be sold so as to protect the rights of the dead & unborn.
*Occupatio* may have worked adequately, as a jurisprudential basis for property rights, when populations were small & resources seemingly endless, but this is not the case today. With the vast growth of global population and the pressure it places upon resources, land & its resources (of which there is a finite supply) has become a scarce commodity, whilst sites of all kinds are in demand.

The fact is that sites were not made by humanity, whilst chattels were. There can be no absolute ownership of sites: "The land shall not be sold for ever: for the land is mine: ye are strangers and sojourners with me."[166] This simple truth could be temporarily avoided, and *occupatio* could rage, during an era when population was small, when resources seemed endless and when imposition of imperial colonialism upon oppressed Third World nations appeared a palatable norm. That time has ended. Land is no longer freely available for the taking and acquisition of title to it must be limited to native tradition, state (public) grant, purchase, inheritance & gift, within procedures strictly controlled by law.

Only the mechanism of Site Revenue[167] can fairly & impartially, with complete environmental responsibility & intergenerational equity, provide a flexible matrix adjusting the endless array of competing political, racial, economic and other interests on the globe. Instead of basing Australian land law upon the doctrine of *occupatio*, and upon a fraudulent assertion of same at that (Australia not having been *terra nullius* at colonization), we must look elsewhere for its valid & rational jurisprudential basis.

## (iii) Equality[168]

The equality principle requires that beings considered to be essentially similar ought to be treated in the same manner, i.e. without discrimination. However, equality of persons before the law[169] must be a general guiding principle, not an absolute, since other values (such as human dignity & freedom) may deserve priority given the variety of strengths & talents with which individuals are endowed as they struggle with each other & the environment for survival & success. Equality of opportunity is roughly feasible, but equality of outcome and factual circumstance is impossible and must always be departed from for sufficient reason --– some individuals will always try harder, have better support and be luckier than others.

166 Leviticus 25:23.
167 See chapter 4 below.
168 See e.g. Julius Stone *Human Law and Human Justice* (Maitland Publications, Sydney 1965) Ch. 3 §§15-16, Ch. 11 §7.
169 Enshrined in the XIVth amendment to the United States Constitution

Rawls[170] held that inequalities must be justifiable as advantaging everyone, whilst unequal positions must be open to all, if legal differentiation between identical types (e.g. adult humans) is to be defensible.
Thus, arguably, Aborigines (having been deprived of land hence independent livelihood, decimated by disease and disorientated culturally) should receive additional support lest the insult to human dignity imposed rebound upon the dominant culture or less their subjection to those with economic power effectively destroy freewill. Even under this limitation, however, as a matter of logic (although not necessarily of justice) all persons within the differential class should themselves be treated equally. One would expect equal rights to be extended to urban, rural and outback aborigines.

This differential treatment of aborigines should not, however, be regarded as either inevitable or eternal. Whatever were the undoubted injustices meted out to their forebears (e.g. by massacre, dispossession, effective enslavement, stealing of children), none of these still occur. Aborigines can vote, are legally (albeit not yet culturally) protected against racial discrimination, are entitled to take jobs with equal pay, and can buy & develop land (as individuals or groups) the same as any citizen. Whilst improvements can be made (e.g. by more appropriate curricula and provision of funding via a voucher system, spending whereof is a local discretion), aborigines have an essential equality of opportunity with any citizen to learn & obtain skills.

The proper jurisprudential approach is to redress the core or base factors which necessitate differential treatment in the first place. As regards aborigines, and despite the much-improved equality of opportunity now existing, such factors (for a people whose identity & culture is very bound up with land) remain dispossession from traditional territory, with all the cultural fragmentation, personal disorientation, bitterness and *anomie* this has engendered, even unto current generations. It cannot necessarily be said that aborigines have voluntarily, from a position of equal liberty, joined the dominant cultural compact with its various strands of colonial origins, parliamentary democracy, common law, industrialization etc. It is not, therefore, necessarily fair (philosophically) that they should *necessarily* be bound by it at all.

## (iv) "Justice"

"Justice", which is a distinct concept from "equality", "liberty" & "law", must be seen against a background where all men are presumed to have moral nature and be free to define their own interest. Individuals will then act so as to eventuate authentic cases, situations or

[170] John Rawls *A Theory of Justice* (1972).

consequences which are relatively free of extraneous warping and can be compared objectively. "Justice is an ideal founded in the moral nature of man"[171]. Law is an instrument by which justice may be achieved; justice can be used both as motivation in implementing law and as an external evaluator of law.

All that can rationally then be said about "justice" is that similar situations are treated in similar fashion: an approach which has traditionally re-established balance & harmony. The difficulty arises in ascertaining whether the situations are similar: any rule of law is a prescription abstracted from average cases: such should not be applied automatically, each fresh case must be considered on its merits. Perceptions of those merits themselves may be coloured & skewed depending upon the differing enclaves (being complexes of attitudes & values) in which they arise of from which they are viewed.

Ultimately, given irreconcilable premises, attempting to evaluate conflicting perceptions of merits by logical argument is a waste of time: it is more productive to debate & forge policies which remove causes of imbalance & disharmony. With the Australian Aborigines, we come up against a situation where dispossession & *anomie* have blighted many generations and crippled ability both to define and realize own interest. Thus, mutual focus upon a remedial and unifying policy continues to elude all players: it will be submitted that only Site Revenue is the key.

## (v) "Certainty"

Whilst undue fixity untempered by flexible discretion (albeit exerciseable within definite parameters) brings its own dangers in some cases, certainty & predictability, as regards advance knowledge of the law and its consistent application, is essential for stability & reliable planning in a society. It was largely for this reason that, as early as 1836, the sovereignty of the Crown over all Australian lands was judicially asserted[172], and the law remained consistent in this assertion through 1971[173]. As has been seen[174], this jurisprudential assertion is now incorrect insofar as it purported to oust native title at common law, whilst its continuance as an underpinning for other types of land title is bankrupt since Australia was not *terra nullius* at settlement.

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171 Paton, GW *A Text Book of Jurisprudence* (Oxford, 1964), p. 85.
172 *Rex v Murrell*, 1836, 1, Legge, p.73
173 *Milirrpum v Nabalco Pty Ltd and the Commonwealth of Australia* (1971) 17 FLR 141
174 Above, section 2(i).

Both the nature & scope of native title and (observed from outside the established jurisdiction rather from within it) the jurisprudential basis for all Australian real property and revenue law, is now bedevilled by profound uncertainty.

### (vi) "Efficiency"

The socialization of law[175] has sought, by such means as redistributing income via Welfare States and imposing liability regardless of fault, to place some persons in a position of life they could not otherwise attain. No doubt this approach conduces to short-term benefits (e.g. avoiding revolutions or spawning disease), but it does so at considerable cost: essentially identical people (eg adults with equality of opportunity) are treated differently, an intermediary edifice of taxation & bureaucracy is interposed, and lack of motivation & low self-esteem is inadvertently fostered in dependents. The most efficient application of the law is in facilitating equality of opportunity, not equality of outcome.

## 3(b) Difficulty in Definition of Those Entitled

Who is entitled to claim native title? The definition of "Aboriginal peoples" in the *NTA*[176] simply begs the question, defining them as 'peoples of the Aboriginal race of Australia'. The *Constitution* provides no assistance, but an administrative definition appears to have been adopted[177] requiring some degree of Aboriginal blood, self-identification as an Aboriginal and recognition of a person as an Aborigine by the Aboriginal community. At the margins, this situation is fraught with uncertainties. Has a person of exclusively Anglo-Saxon stock, save for an Aboriginal great-great grandmother, who has always lived as a 'white' man, rights to make native title claims? And what is the position when a person on non-trivial Aboriginal descent refuses to identify himself as Aboriginal[178]?

As a result of the *Wouters*[179] decision and the Federal Court decision in *Gibbs v Capewell*[180] it seems that, despite the view of Deane J. of the High Court in the *Tasmanian Dams*

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175 See Pound, R. *Jurisprudence* (1959) Vol. 1 pp 429-459

176 S.253

177 See Deane J. in *Commonwealth v Tasmania* (1983) 158 CLR 1 at pp. 273-274.

178 See *Attorney-General of the Commonwealth v Queensland and Anor* (1990) 25 FCR 125 for the ruling of Jenkinson, Spender & French JJ in the full Federal Court regarding the ability of the Commissioner into Aboriginal Deaths in Custody to enquire into the suicide of a Darren Wouters.

179 *Attorney-General of the Commonwealth v Queensland and Anor* (1990) 25 FCR 125.

180 *Gibbs v Capewell & Ors* (1995) 128 ALR 577.

*Case*[181], some proof of genetic descent is essential, and once it is present then either self-identification or community acceptance will suffice.

## 3(c) Exclusion of Some Indigenous Persons as Claimants

Neither the various state statutory schemes nor common law native title rights are of much assistance to the many Aborigines whose forebears were dispossessed entirely and who now dwell in urban centres. After 200 years of dispossession, save in central & northern Australia (where statutory title is available), the vast bulk of Aboriginal tribes have been fragmented such that they cannot demonstrate continuous connection, and the bulk of land has been alienated under inconsistent grants. *Mabo* gave no rights or compensation to dispossessed or urban aborigines: basically, the more indigenous peoples had suffered, the less they got, whilst viable claims were pushed to the remoter parts of the country. Ironically, the greater the impact of colonial sovereignty, and the greater the crimes against this class of Aborigine, the less rights they have. Meanwhile, mainstream Australian fee simple remained intact. Despite all the obfuscation & rhetoric since, with *Mabo* corporate Anglo-Australia heaved a sigh of relief:

> In short, after promised validating legislation has been passed, no white Australia will have lost any rights enjoyed before Mabo. Non-Aboriginal Australia, which holds 98 per cent of the voting power, will, not surprisingly, have looked after its own[182].

## 3(d) Fudging the Sovereignty Issue[183]

At the time of colonization, jurisprudence distinguished between civil and uncivil society, the distinction apparently being the existence of a sovereign authority or system of law to which obedience was granted[184]. Whilst aborigines lacked all the usual external edifices & trappings of such a system (e.g. public buildings, officials, written records), they certainly had such a system, and indeed one of great complexity & sophistication. Certainly the tribes were small and no broad external union existed, but it was not the numbers which mattered, rather the internal union: "A dwarf is as much a man as a giant, a small Republic no less a sovereign state than the most powerful kingdom".[185] These tribes performed the primary &

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181 *Commonwealth v Tasmania* (1983) 158 CLR 1 at pp. 273-274.

182 Hal Wootten (QC Former Royal Commissioner Deaths in Custody) in the Sydney Morning Herald 29 July 1993

183 For a full investigation of Aboriginal Sovereignty, see Henry Reynolds *Aboriginal Sovereignty* Allen & Unwin 1996

184 William Blackstone, Commentaries on the laws of England, 18th. ed, London 1823, Vol. 1, pp.26-27

185 Enerich de Vattel, *The Law of Nations*, [1758], 3 vols, Carnegie Institute, Washington, 1916, 3, 0.7

essential operations of government: those of defending territory and administering justice.[186] There was a well-developed system of law[187]. Ultimately, these tribes were a "congeries of independent political communities, however small".[188]

Ultimately, in recognition of this, the High Court in *Mabo (No. 2)* reversed the old fiction that Australia was *terra nullius* when the Crown's sovereignty was imposed. However, it perpetuated the underlying jurisprudential lie, and refused to allow either Aboriginal domestic self-rule or legal pluralism, by declaring itself impotent to question that other old fiction: imperial sovereignty. The court declared that it could not entertain such an investigation due to the 'Act of State' doctrine: the judiciary of a territory cannot question a declaration by the Crown of sovereignty over that same territory. Such a radical matter is "not cognisable in a court exercising jurisdiction under that sovereignty which is sought to be challenged"[189]. The domestic legal system must dismiss as non-justiciable any claim based on a sovereignty adverse to the Crown[190]. This leaves us with the situation where a person, finding some car keys, asserts ownership of the car. The High Court has done nothing to end the juristic fraud of entrapping first nations within sovereign states[191] .

> "When it comes to reconstructing the legal history of their own countries, courts cannot take refuge in the act of state doctrine without forfeiting their local authority and acting as passive instruments of colonial rule"[192].

Furthermore, local sovereignty & financial priority threaten modern national & international statism. Any such shift of interpretation on the question of sovereignty was seen as potentially undermining the legal system constructed thereon and could "fracture the skeleton of principle which gives the body of our law its shape and internal consistency". In the words of Brennan J.:

> The peace and order of Australian society is built on the legal system. It can be modified to bring it into conformity with contemporary notions of justice and human rights, but it cannot be destroyed

Nor can the Aborigines themselves challenge Crown sovereignty since there is no forum in which to do so: only a State may invoke the jurisdiction of the International Court of Justice. We are thus left with a very unhealthy constitutional situation, devoid of any meaningful jurisprudential foundation. If Australia was not *terra nullius* then (under international law)

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186 See Sir John Salmond Jurisprudence 8th Edition (1930 pp. 139, 140.

187 See 'Traditional Concepts of Aboriginal Land' by R. Berndt in *Aboriginal Sites, Rights and Resource Development* UWAP, Perth, 1981 p.1.

188 John Austin, Lectures on Jurisprudence, 4th ed., London, 1873, p.239.

189 Jacobs J in *Coe v Commonwealth* (1979) 53 ALJR 403.

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

191 R. Falk 'Promise of Natural Political Communities', in R. Rhomson (ed.) *The Rights of Indigenous People in International Law* University of Saskatchewan, Saskatoon, 1987 p. 158.

192 B. Slattery 'Aboriginal Sovereignty and Imperial Claims', in B.W. Hodgens (ed.) *Co-Existence?*

sovereignty could only be imposed by conquest (but there was no war), by cession (but there was no treaty) or by purchase (of which there was none). From an objective, detached viewpoint, therefore, that sovereignty was imposed illegally and is void, although predominant legal systems permit of no challenge.

> "It is possible to develop a cogent argument that the acquisition of British sovereignty over Australia without "the consent of the natives" was, even in the context of the time, contrary to both international and British law. The problem remains one of finding a forum before which such an argument can be effectively asserted at this time[193]".

This inherent constitutional cancer can only fester & suppurate unless cauterized. Subjugation & denial of minority cultures has yet again founded the dangerous fiction of a territorially defined nation[194]. It is ironic that, in subsequently using s.8 of *RDA* to enact the *NTA*, in the face of ss.9 & 10 of that Act, the Commonwealth government also substantially acted to the detriment of indigenous peoples by hammering the jurisprudentially void nail of "British sovereignty" into the coffin of their larger land rights.

Yet the situation might be remedied. The colonial occupation happened piecemeal as settlement rolled inland. Some aborigines did not see whitemen for generations. In places (where native title yet persists) the occupation never fully ousted Aboriginal domestic sovereignty, the vestigial continuance of which could be accommodated at least in regional agreements as part of a general *Makkarata* or treaty. Aboriginal law does not confuse occupation with ownership and still recognises native rights regardless of Crown grants: "It is fictitious to assume that Aboriginal law is extinguished where the common law is unable to recognise that law[195]". Aborigines should at least retain a continuing domestic sovereignty which is subordinate to the international sovereignty of the Crown, however this concept has elicited little judicial support in Australia[196] (where it has, unfortunately, been raised mostly in a criminal context) despite endorsement in Canada and the USA[197].

> "Aboriginal rights of governance ought to be recognised as surviving the assertion of Crown sovereignty according to the same principle of justice governing the survival of Aboriginal rights with respect to land.

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*Studies in Ontarion -- First Nations Relations* Trent University Press, Trent, 1992 p.158.

193 "The Consent of the Natives": Mabo and Indigenous Political Rights' G. Nettheim in *Essays on the Mabo Decision* LBC Sydney 1983 p.111.

194 See generally Howitt, Connell & Hirsch (eds) Resources, Nations and Indigenous Peoples; Case Studies from Australasia, Melanesia and Southeast Asia (OUP, 1996).

195 Noel Pearson "The Concept of Native Title at Common Law" in G. Yunupingu (ed.) *Our Land is Our Life* UQP 1997, p.155

196 *R v Murrell* 1836, 1 Legge p.73; *Coe v Commonwealth of Australia* (1993) 118 ALR 193; Walker

197 Since the Marshall trilogy.

> "The Mabo judgment was a major landmark in the decolonising of Australian law and society. It was, nevertheless, only a beginning to the process of redressing the legal injustice to Australia's indigenous people. Now the time has come to move on to tackle the question of Aboriginal sovereignty.[198]"

# 3(e) Commercial Uncertainty[199]

## (i) Forestry

At common law, a proprietor owns trees in the absence of any express reservation of them to another, and this would be the position of native title holders. However, that position is affected by various Acts[200], the thrust of which is to allow the declaration of Crown Land as State Forest or timber reserve, and also to vest in the Crown property in all forest products (and quarry reserves) upon all Crown lands, whether or not they be State Forests or timber reserves. It may be that such blanket legislation operates to divest from native title holders any rights to forest products (including standing timber), although the situation may vary depending upon jurisdiction. For instance, under the Queensland Act the provision stipulates "unless and until the contrary is proved"[201], and establishment of native title may leave timber rights unimpaired.

Certainly, any express declaration (since 1975) of Crown land to which a native title claim lies, as State Forest or timber reserve, would be invalid as constituting a forbidden imposition over "other titles", although if the declaration occurred between 1975 and 1994 it would be validated by *NTA* leaving the native title claim suppressed (not extinguished) but entitled to compensation. The same occurs where a declaration is made[202] vesting the cultural & natural resources of an area in the State as a National Park.

## (ii) Flora & Fauna

Legislation[203] now regulates common law rights to take (wild, native) flora & fauna, which is classified into various categories, of which property in the protected ones is vested in the State unless the taking is under a license or permit. Common law rights to take flora & fauna do not survive such legislation, even when exercised *bona fide* in practice of aboriginal tradition[204] and this would remain true (without constituting racial discrimination) whether or not the taking occurred upon land held under native title.

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198 Professor H. Reynolds http://www.lib.latrobe.edu.au/AHR

199 See generally *Commercial Implications of Native Title* (B. Horrigan & S. Young, eds.) The Federation Press 1997.

200 *Forestry Act* (NSW, 1916), *Forests Act* (Vic. 1958), *Forestry Act* (Qld. 1959), *Forestry Act* (SA, 1950).

201 *Forestry Act* (Qld. 1959), s.45

202 Under s.61 of the *Nature Conservation Act* (Qld. 1992)

203 *National Parks and Wildlife Act* (NSW, 1974), *Nature Conservation Act* (Qld. 1992) [formerly *Fauna Conservation Act* (Qld. 1974)], *Wildlife Conservation Act* (WA, 1950).

204 *Walden v Hensler* (1987) 163CLR 561.

A wide range of state & federal environmental & natural resource laws aim (in general) at regulating rather than prohibiting activities. The imposition of regulatory constraints, such as fishing quotas, licensing requirements[205] or creation of compulsory residential reserves[206], may *regulate* but does not of itself *extinguish* native title and is consistent with its continued enjoyment. Any such regulation must, however, treat native title equally with other forms of land tenure, lest the *RDA* be breached.
It may be that legislation[207] expressly entitles native peoples to take protected wildlife, except in protected areas. The *NTA*[208] specifies certain classes of activity, including hunting, fishing & cultural spiritual activity, which native title holders may pursue, to satisfy personal, domestic or non-commercial needs, without subjection to ordinary laws or any requirement for license or permit. It is not entirely certain whether such pursuit may use modern methods (e.g. rifles, outboard motors, nets)[209] , or whether the methods used should be restricted to traditional ones[210]. Certainly the latter restriction is more logical and consistent: if natives are to be favoured above other citizens in having claims to land due to continuous culture & tradition, one would expect them to dwell upon it in accordance with that culture & tradition without taking a bit on the side from the industrial world as well.

## (iii) Onshore Water Resources

At common law, non-tidal, non-navigable flowing water belonged to the Crown but could be used by riparian holders (who were presumed to own the beds of internal watercourses entirely and boundary streams to the centre of flow) for ordinary domestic purposes and for reasonable irrigation, leaving down-stream owners with no right of action even if the water is exhausted. Where the water lay or percolated below the land, the landowner could use it without limitation. Thus, at common law native title rights to the bed & banks of a watercourse, or water in it, would be terminated once any riparian title existed.

These rights are constrained by legislation[211], and the caselaw is unclear as to whether such legislation totally ousts the common law position[212], or leaves it intact unless overruled any express inconsistency[213]. The latter view is better, and probably involves termination of all

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205 *R. v Sparrow* (1990) 70 DLR (4th) 385, endorsed by Brennan J. in *Mabo (No. 2)* at 64. See also *Mason v Tritton* (1994) 34 NSWLR.

206 See Brennan J in See *Mabo (No.2)* at pp 64-65, following *US v Santa Fe Railway Co* 314 US 339 (1941).

207 E.g. s.93 of the *Nature Conservation Act* (Qld. 1992).

208 In s.211.

209 *R. v Sparrow* (1990) 70 DLR (4th) 385, endorsed by Brennan J. in *Mabo (No. 2)* at 64. See also *Mason v Tritton* (1994) 34 NSWLR.

210 See *R v Van Der Peet* [1996] 4 CNLR 177 and *Delgamuukw v British Columbia* (1993) 104 DLR (4th) 470 at 574 *(obiter)*. And see sections 2(c)(ii) & (iii) above.

E.G. The revolutionary *Irrigation Act* (Vic. 1886) -- which vested in the Crown all rights in water not already alienated to riparian holders, *Water Rights Act* (NSW, 1896), *Water Resources Act* (Qld. 1989).

212 *Hanson v Grassy Gully Gold Mining Co* (1900) 21 NSWLR 271.

213 *Thorpes Ltd v Grant Pastoral Co Pty Ltd* (1955) 92 CLR 317.

native rights once a pre-1975 riparian grant exists. Riparian grants after 1975 could only bear water rights equally concomitant with native title rights. Of course, both would remain subject to Crown exercise of superior power under the statutes. Insofar as the statutes retain for the Crown property in the bed & banks of (non-internal) watercourses, such retention becomes effective only upon alienation by grant of riparian land. Until then, where the riparian land too remains Crown land, both the riparian land and the bed & banks of watercourses remain subject to native title claim.

The contrary argument is that the mischief of these early irrigation Acts was to equitably share water amongst, and prevent its complete consumption by, pastoralists & irrigators, such that expropriating the pre-existing native rights was not in contemplation and hence (in the absence of either express extinguishment or 'unavoidable implication'), they survived. This can raise problems, e.g. where a town is dependent upon bores located upon aboriginal land[214] or where a mine draws waters from an aquifer below aboriginal land[215].

By analogy with the constraints upon native taking of flora & fauna for commercial purposes, aboriginal use of water for commercial irrigation should require licensing and attract user charges[216], although the opposite impact might be expected, with native title holders insisting that their water entitlements run free to general environmental benefit.

## (iv) Securities & Valuation

The advent of native title renders uncertain the status of many existing and future potential mining ventures & pastoral leases. Native title holders and claimants have the right either to prevent or control activity upon their land or the 'right to negotiate'[217]. These rights cause commercial uncertainty for financiers, who are very loss-averse and dubious about the value of securities placed over ventures potentially subject to claim. It is difficult for valuers to ascertain a value for land which is or may be subject to claim, or even to identify reliably whether a claim *might* be brought.

To a certain extent, this uncertainty is irrational. Native title upon pastoral leases does not permit interference with authorized activities or invasion of homestead privacy. There is no reason why native title should impede financial security over pastoral leases, provided same is by way of stock mortgage and bill of sale geared to the carrying capacity & cash-flow generated and the value of improvements.

Unfortunately, what has occurred in practice is that rents charged upon pastoral leaseholders

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214 Daly River land claim.
215 Warlmanpa, Warlpiriri, Mudbura and Warumungu Land Claim (AGPS, Canberra, 1982), pp. 76-82.
216 E.G. under the Rural Water Pricing Policy of the NSW Department of Land and Water Conservation.

have been below market value, leaving the lessees with an unearned value for the lease itself (as a bundle of future rights), which (especially in the expectation of perpetual renewal) can be capitalized into a sale price. Many leaseholders, having paid their predecessor this artificial sale price, are upset at the threat of it evaporating, especially as the leases have no provisions for amortization against rentals of expenditure upon improvements, or for compensation payments (in respect of improvements) upon termination. Collecting the full economic rent and dealing fairly with improvements should make vacation of the pastoral lease at termination effectively a matter of indifference: this is the preferable position, regardless of native title.

Despite the helpful certainties provided by the *Native Title Act*, miners fear that access to land for exploration and mining will be reduced and extra costs incurred due to management downtime, the need for anthropological studies, due diligence exposure for prospectus representations and investors' concerns. Actual or potential native title claims may require writing down the value of current assets and may erode their value as security for money-raising purposes.

Compensation is payable[218] when an inconsistent grant is made. It is unclear, however, upon what basis the compensation is to be assessed. By what criteria to value native title land, which cannot be sold? An acceptance of an equality with freehold land would seem to be the only viable way, but can even adoption of that strong scale necessarily compensate native peoples for loss of ancestral lands with all its cultural & spiritual connotations? As regards past acts (that is, extinguishment of native title between the *RDA* & *NTA*), the Commonwealth has offered to pay 75% of the compensation. In the Dunghutti subdivision agreement there was an implicit recognition that native title land (despite its inalienability) had a value similar to freehold[219].

## 3(f) Perpetuating Welfare Dependency

Whilst some Aborigines have become urbanized, or have succeeded as skilled & professional members of industrial economies, even for these, and certainly for the vast majority of Aborigines, it is beyond dispute that dwelling upon traditional homelands is integral to their happiness, productivity and cultural identity[220].

> "Aboriginal people are united in their view that land, whether under the banner of land rights or not, is the key to their cultural and economic survival as a people[221]."

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217 Under *NTA* Division B, Subdivision 3.
218 Under *NTA* s.240.
219 See *supra* p.
220 See the various oral testimonies in G. Yunupingu (ed.) *Our Land is Our Life* UQP 1997.

Dispossession of Aborigines from their land has produced grave problems of health, poverty, unemployment and drug-dependency (especially upon alcohol and petrol-sniffing, which induces long-term neurological damage & death from asphyxia & cardiac failure). Legislative constraints upon Aboriginal access to alcohol was repealed in all states during the 1960s, and their alcohol-related deaths fluctuate around 10%, 3-4 times that of the mainstream population, leading to community action (often driven by women) to curb alcoholism via awareness campaigns, declaring communities 'dry', opposing licenses and rationing supplies.

Ministering to these problems via the 'valuable civic right' of welfare handouts is, arguably, some implicit compensation for dispossession, but if so it is unsatisfactory and has also had major downsides:

> "The cumulative effect of intervention in Aboriginal affairs by successive colonial, state and federal governments has been to make Aborigines dependent on welfare. The effects, psychic as well as material, are profound, because Aboriginal people have come to view themselves as welfare recipients. That in turn keeps them in perpetual 'underclass' status, forever reliant on the fickle charity of governments and welfare agencies."[222]

Aborigines themselves are unhappy with the situation:

> "Indigenous peoples, governments and other Australians have long recognized that welfare dependence or dependence on continuing government programs is not a way ahead for indigenous people. Unemployment and poverty have considerable social costs, contributing to poor health, harmful behaviour, lack of success in the education system, and unacceptably high custody rates".[223]

The modern welfare state is proving increasingly complex & difficult to fund & maintain. There is no reason (especially in a Geoist society, for whilst site revenue is the political economy) why the vast bulk of people cannot make appropriate personal arrangements to protect against their several unique vicissitudes of unemployment, health, accident, old age and death: humanity did this for millennia on the basis of families, communities and Friendly Society funds. State involvement in the field has gotten quite out of hand, as the lack of viable solutions, the mounting expense of attempted ones and bipartisan back-tracking (eg in modern Britain) evidences. Aborigines (as with every sector of society) should plan to be independent of any welfare state.

Education in a site revenue society should continue to be provided as public infrastructure, but citizens should be issued vouchers so that they can arrange & attend the facilities most suitable to their needs. It would be of great assistance to Aborigines in this process were they to be allowed (via a voucher system) to develop their own chosen & appropriate educational system, rather than necessarily adopting or receiving that supplied or required by a western, industrial lifestyle.

However, this demeaning dependence & hand-out mentality continues unabated, despite (or, indeed, because of enervating reliance upon) a burgeoning, centralized bureaucracy

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221 Royal Commission Into Aboriginal Deaths in Custody (WA Report) p.467
222 *Encyclopaedia of Aboriginal Australia* p. 881.
223 FAIRA Native Title Supporters Information Kit, p.22

and huge ameliorative investment by governments, and fosters continuing isolation & alienation: these in turn upset internal tribal authority & engender psycho-social destruction. Proposals for a vast annual donation (of say $1 bn. p.a.) as 'compensation' for lands are just another hand-out writ large and miss all points of racial equality and political equity. These systemic handouts conduce to those perceptions of racial favouritism so shrilly exploited by Pauline Hanson.

As we have seen, Aboriginal disadvantage & marginalization due to dispossession is largely the legacy of erroneous legal doctrines[224]. If correct legal doctrines were applied, self-respect, cultural identity and productivity might be restored and the evils reversed.

## 3(g) Windfall Enrichment from Mineralization & Location

Whether or not any particular native lands will contain a viable mine is just a lottery. This means that some native title holders may gain a windfall income from royalties, due to mineral deposits which happen to be under their lands, whilst other communities will get no such windfall. Some state legislation[225] attempts a degree of allocative efficiency by providing for redistribution (usually by government foregoing royalty receipts) of any windfall payments resulting. This is not the case under *NTA* lands.

Humanity, including the Aborigines despite their long tenure, did not make the land and its resources. It is not appropriate that private individuals pocket unearned profits from exploiting such resources, let alone that those private individuals who do so, do so unequally as between others of their class. Site revenue would, very properly, socialize amongst the entire community the value of all such wealth inherited from the Creator. The position is similar as regards sites which are rendered economically valuable merely because of their location amongst human infrastructure created by the society as a whole. The Aboriginal tradition of communal sharing is a promising factor in their involvement with the Site Revenue debate.

## 3(h) Racial Discrimination against Non-Indigenous Peoples

As we have seen above[226], the *NTA* and the *Mabo* doctrine are both racist, giving unto one race rights unavailable to others, but they are not necessarily "unjust", since they are justifiable as "special measures" within Article 4 of the Treaty. That Treaty in itself, however, enjoins that such "special measures" be only temporary, and it behooves us to consider upon what basis the racial anomalies can be redressed.

> "At the end of a century filled with the harsh lessons of racial conflict and at a time when genetic

[224] McRae, Nettheim & Beacroft *Indigenous Legal Issues* (LBC, 1997)
[225] *Aboriginal Land Rights (Northern Territory) Act* (Cth. 1975).
[226] Section 2(e) and 2(h).

> research and DNA technology are making it clear that there are profound similarities between races rather than profound differences, it seems extraordinary that a liberal multi-ethnic society such as Australia is still making laws distinguishing one race from the rest and discussing amendments to the Constitution to make this racial distinction permanent".[227]

Just what are these "human rights", as distinct from "legal rights", which the High Court in *Mabo* found had been stripped from the Meriam Islanders by the *Declaratory Act*? The questions arising from & surrounding such a concept never end. Is one entitled to the spot (plus a particular buffer around it?) where one is conceived, or born, or where one's afterbirth or one's grandfather's bones are buried? Has one a human right to land where

one's forebears lived since "time immemorial", give or take a century or two of disruption? Does it make a difference if that disruption was voluntary, or was due to oppressive economic factors (eg the English upon the Irish)? Do Jews have "human rights" to all the territory of Davidic Israel such that all Palestinians are newcomers, without valid claim? Does it matter if the Jews lost physical possession given that their spiritual, intellectual, artistic & emotional striving has been so great? Can a break in possession of 4000 or 2000 years be reduced to the equivalent of as many minutes given the scale & horror of Babylonian captivity and Roman brutality? Is the longevity of the Aboriginal claim to be diminished because they did not have to face such forces, or because their scientific & physical advances were so small?

What means of dispossession count? Must ones forebears have been dispossessed by actual violence, or is fear of it enough? Does effective dispossession due to diseases brought by migrants, or due to the attractions of their culture & economy, suffice to now complain? How relevant is it that the dispossession was from only part of the ancestral lands, or that the traditional use of the ancestral lands was crude & ineffective?

If claimants have valid land rights upon ancestral grounds, can those rights be defeated if a challenger proves the claimant's forebears displaced by force his own ancestor? Is the entirety of the Australian Aboriginal claim to native title void if it is proven that their forebears, or unknown ones amongst them, drove out negritos to seize the land? Should the Hurons be entitled to demand the return of lands from which they were driven by the Iroquois; the Sioux from the Chippewa? Should Europeans be ranked in order of their ancestors' arrival? In the USA, should Mayflower descendants and Hudson Valley Dutch have priority of claim before 19th century immigrants, followed by Irishmen and Germans, then the Jews & Italians of the next wave? In Australia, should First Fleeters rank above the influx of gold diggers and the £10 assisted passengers, and these above the postwar refugees and the Asians of modern times?

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227 Professor Austin Gough, *The Australian* 07.11.97 p.17

Where would it end, if ever? Is that the kind of society we want? Is it a society at all? Could anyone enjoy quiet title to land anywhere? It seems more likely we should become like East Germany today, with multiple claimants for every parcel of land, and paralysis of production.

The problems are complex and philosophical, but I know a woman of action who, as women will, cut the knot with a stroke. Irene Hickman said "The solution is to give all the land back to the Indians, then tax it properly." Hmmm - think about it[228].

# 4. Site Revenue as Sovereign Remedy

## 4(a) Introductory

In order to come to grips with the native title issue, it is necessary to analyse the economic imperatives underlying all human access to & use of sites in the struggle for survival and fulfillment: an analysis which necessary involves community infrastructure and financing.

Only the application of labour, aided by capital (in the form of buildings, tools, machinery etc.), to land, can produce wealth. There are no other factors in production. In this context the term 'land' must be widely defined to mean the entire surface of the globe (whether covered by land or water) and all that is above or below them in the form of raw resources, atmosphere and wave-lengths in the ethers. In all free enterprise societies private monopolies to tenure of defined portions of the land ["**sites**"] are granted by law to individuals. This is essential for security & productivity, however fundamental economic distortion is inevitable if the market value of than monopoly is privatized rather than socialized.

A **Geoist society** collects **site revenue** (being the annual rental value of sites privately-occupied ignoring improvements upon them) as its sole source of public finance. Sites held by elements of the Crown, churches, charities etc. would not be exempt. No other imposts of any kind would be collected, including taxes (upon income, sales, goods & services, payroll etc.) and duties (e.g. stamp, death & import duties). Against a background of high unemployment & environmental abuse, taxes on labour or earnings should be eliminated and replaced by site revenue.

It is inappropriate to fear 'higher bidders' ousting happy little folk from their sites. Fee simple title, devisable in perpetuity, can continue in a Geoist society. So long as the proprietor pays site revenue, just as now s/he pays rates, title remains good against all the world. Each site's rental is set (subject to appeal) by an independent professional valuer and published cadastrally on internet. There will be a natural consistency between site values in a neighbourhood. It is not as though everything is 'up for grabs' annually or that some artificially inflated bid can be imposed upon a normal siteholder.

There would be no facility for governmental deficit financing & highly inflationary

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228 Professor Mason Gaffney "Whose Water? Ours," in Polly Dyer (ed.), *Whose Water? Past; Present; Future*. Seattle: Institute for Environmental Studies, University of Washington, pp. 69-93 + 125-33 (1993).

borrowings, selfishly creating burdens for generations yet unborn: governments, like individuals and corporations, would be constrained to live within their budget. Nor, as a general rule, would the public sector be involved in business: government should only do what private enterprise cannot do[229], and to the extent that government provides goods & services, user would pay.
This system[230] is sometimes called "the Single Tax", but erroneously. The revenue collected is really a payment for services (i.e. locational advantage to monopolists over sites) provided by the community: it is not a tax at all; nor is it a "rental" since the fee simple remains with the citizen.

The price[231] of a site is the transfer consideration it commands in the free market, ignoring all improvements to it[232] but in the light of its natural attributes and location amidst surrounding services, community demand & development. The annual rental value of a site is the sum which would be offered, upon the free market, for the right to occupy it (disregarding visible improvements) for one year, with a perpetual option to renew that tenure. The Nett Annual Value ["**NAV**"] of a site is its annual rental-value *inclusive* of improvements. NAV forms the rating base in the UK, much of the USA and some Australian States[233], and is a severe disincentive to making improvements, thus fostering inner-city decay.

If the full annual site rental is collected, all unearned increments (including, but not limited to, betterment) to the price of the site are recouped by the community. The price paid upon transfer of any site should equate with the market value of the improvements upon it. If the price exceeds that value then it contains an element of capitalized locational advantage and the site revenue is inadequate, whilst any shortfall indicates that the site revenue fixed for that location is excessive. The price of bare sites (which, after all, were given to, not made by, humanity) should be zero to any transferee willing to pay the annual assessment: improvements alone would provide collateral security to mortgagees.

Site Revenue does exist, in a limited form, in the collection of rates based exclusively upon

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229 "Society is produced by our wants and government by our wickedness; the former promotes our happiness positively , by uniting our affections, the latter negatively, by restraining our vices. The first is a blessing, but government, even in its best state, is but a necessary evil; in its worse state, an intolerable one." -- Tom Paine *Common Sense* (1776), opening paragraphs. In a Site Revenue Society "Government would change its character and would become the administration of a great co-operative society. It would become merely the agency through which common property was administered for the common benefit." -- Henry George, *Progress and Poverty* Schalkenbach Centenary Edition, N.Y. (1979), p. 456.

230 First propounded in detail by Henry George in *Progress and Poverty* (1879); *Social Problems* (1884); *The Condition of Labour* and *Protection or Free Trade* (1886) and *A Perplexed Philosopher* (1892).

231 The "price" of a site should be distinguished from its "value". The latter is a subjective term: a site might be a precious ecological wilderness or a noisy, polluted hole to one person, but a piece of God-forsaken bush & leach-ridden ditch or a marvelous commercial niche to another. Nevertheless, the expert study of land prices is properly described as "valuation".

232 (Except those which are invisible, merged with the land and requiring no maintenance -- to ignore these as well establishes the "unimproved capital value").

233 Specifically Tasmania and some regions of Victoria, where s. 320 of the *Local Government Act* allows Council-initiated polls of ratepayers (who are easily confused) on the issue.

unimproved or site values in Queensland[234] and New South Wales[235]. Numerous Commissions of Enquiry have endorsed this system[236], however it has been adulterated by inequitable & regressive "minimum rate" imposts and (since 1971) by Commonwealth allotment of some 2% on income tax for distribution amongst local authorities (which allotment constitutes some 15% of their income and is increasingly made as "tied grants"). Federally, the *Land Tax Act*, enacted in 1910 but repealed by Prime Minister Menzies in 1952, was a limited Site Revenue measure, collecting 5% of the unimproved capital value[237].

## 4(b) Assessment & Collection Mechanisms

It is simple to assess the annual rental-value of sites once expert valuers continuously observe the conditions of site transfer throughout the entire broad economy. In a Site Revenue economy, legislation would require details of all prices & rentals of sites to be reported and publicly displayed (thereby preventing graft), at local government level, upon cadastral maps marking the dimensions & boundaries of every site and the position of significant variables.

The Site Revenue would be collected at local government level (which should preferably be granted constitutional recognition) and remitted to higher levels of government in negotiated proportions. The process should be co-ordinated under a Commonwealth Valuer-General, with the State Valuers-General as deputies. Valuers would distinguish how much the price or rental a site commands is due to the improvements upon it and how much to the locational value of the site itself. They would declare the annual site value applying to each site, but in doing so would be performing as scrutineers & analysers (rather than manipulators & dictators) of free market forces. The annual assessment would be payable by the proprietor of each site just as rates are at present. The debt would constitute a charge against the title and could be amortized for payment after death.

Ultimately, each valuation of a site's annual rental value must be justifiable as compared to similar sites locally & nationally. Local data must be continuously cross-checked against information from brokers, auctions, the press, advertisements, land developer's brochures

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234 Since the 1890 *Valuation and Rating Act.*

235 In 1895 the Reid government placed tax on unimproved value of land in town and country. In 1905 the *LocalRating Act* was passed by the government of Sir Joseph Carruthers and introduced rating upon the unimproved capital value of land throughout NSW except in the City of Sydney. Largely through the efforts of A.G. Huie it was introduced into the City of Sydney by R.D. Meaher, Lord Mayor, in 1915.

236 E.G. Report of Sir Alan Bridge Q.C. to the NSW Government (1960), Report chaired by Ald. N.L. Buchan to Brisbane City Council (1964), Report by Committee of Enquiry under Mr. Justice Hardy to the Queensland Government (1966); Royal Commission on Rating under the Hon. Mr. Justice Else-Mitchell to the NSW Government (1967); Committee of Enquiry into Local Government Revenue Raising in Brisbane, 1987-89 (under Sir Gordon Chalk).

237 Further elements of site- (or resource-) based revenue are present in the various royalties paid to government for use of publicly-owned minerals, forestry products, etc. in levies imposed upon crude oil and in rent for leasehold of Crown land.

and advice from banks & finance agencies. An assessor, studying the flux of prices for sales & leases across an area and amassing, digesting & swapping data concerning them, will be able to establish approximate "benchmark" values for particular types & sizes of sites in particular zonings. This "benchmark" must then, with caution, be "fine tuned" in the light of conditioning variables and each site's relevant improvements. If the correct site revenue is being collected, sites should be transferred for the value of improvements alone. After a few years of high-quality valuation, as publicly displayed, annual rental-values in areas would be well known & established such that any alteration of them would be clearly & evidently traceable to the direct influence of fresh, known variables.

## 4(c) Broad Economic Effects

The argument is conclusive that Site Revenue is a simple yet sovereign remedy for most of the economic ills of our time, including excessively-big government, rich-poor gap, unemployment, inflation, currency fluctuations, unjust enrichment, high interest rates and planning distortions.

Human life and civilization cannot exist without the use of sites. Centrally-planned Statist communism has failed all over the globe and it will not be tried again. It is clear that legally-assured, community-endorsed private monopoly[238] over specific sites (whether the use be agricultural, residential, commercial, industrial, etc.) is equally fundamental to human welfare.

Sites exist upon land, upon certain locations in the sea (e.g. moorings, oyster leases) and in the air (highrise buildings, flight paths, transmission wavelengths). They were given by Creation, not made by humanity (land reclamation partially aside), and there is no moral or rational basis for assertion of private ownership over them as if they were chattels created by labour[239]. Sites are a limited community resource essential for survival & civilization and economic sanity is impossible unless the community, having granted private monopoly over them, collects the full site revenue in return"[240]. Site Revenue constitutes

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[238] Sundry other minor, but equally unsupportable, monopolies exist in our society, e.g. egg & milk board quotas, pharmacy and newsagency density controls, constricted availability of taxi plates: in all instances an unearned increment accrues to the advantage artificially extended).

[239] "What would be the result in Heaven itself, if the people who should first get to Heaven were to parcel it out in big tracts amongst themselves?" Henry George "Justice the Object: Taxation the Means" [An address, San Francisco, 7.2.1890].

[240] It is quite true that land monopoly is not the only monopoly that exists, but it is by far the greatest of

the only logical & ethical source of public finance[241].

Throughout the CANZEUS countries, indeed since Tudor times[242], holding charges on land have been relatively mild and proprietors can hold tracts out of use pending sale at a price increased by the resultant artificial scarcity. This facilitates a vicious circle maximizing imbalance in land ownership and a rich-poor gap[243].

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monopolies -- it is a perpetual monopoly, and it is the mother of all other forms of monopoly." (Winston S. Churchill *The Peoples' Rights* Jonathon Cape Ed., London, 1970 at p.117). "The unearned increment in land is reaped by the land monopolist in exact proportion, no, not to the service done but to the disservice done." (Speech by Churchill at Edinburgh, 17 July 1909 as reported in his *Liberalism and the Social Problem.*

241 "The earth, being the birthright of all mankind, its rental is the property of the people. Thus the site rent is the debt owed to the community by every landed proprietor, the duty of the State being to collect that debt as its revenue, to utilize it for the purposes of the community and not to tax." Tom Paine, *Commonsense*.

242 Prior to the reign of Henry VIII there was a veritable Golden Age for English labour. There was no extreme poverty, prosperity was everywhere and an 8-hour day was worked. Yet by 1541 there was so much misery and vagrancy that a series of Acts to aid the destitute had to be passed. By the end of the reign of Charles II the revenue collected to relieve paupers exceeded one-third of the peacetime budget. This deplorable change in the social condition of the English people was brought about by that profligate wastrel Henry VIII, who confiscated the land of the Catholic church when he broke with Rome and dissolved the monasteries. [The fortune which Henry VIII appropriated in this way was squandered in such wanton waste and boundless extravagance of lifestyle that he died in penury.]

These confiscated lands, one-third of the kingdom, had previously been available for the peoples' use, for grazing & planting, albeit under a moderate labour fee (and their subjection to mismanagement by an increasingly-corrupt clergy). Now they were confiscated and sold to the social-climbing merchant class who "regarded the land as a commodity to be dealt with like any other, for the profit to be gained, and not merely as a source of sustenance" (H.D. Traill *Social England* Vol. 3. p. 115). The rent for agricultural land, which had been six pence per acre annually for 300 years prior to 1550, rose to an average 45 shillings in 1879. The era of rack-renting, of the rich battening upon the poor, had arrived. See generally James Edwin Thorold Rogers *The Economic Interpretation of History* (1888).

Adam Smith, dependent for his leisure to write upon employment as a tutor by a landowning Duke, was unwilling to undermine land monopoly, seeing it as the mainstay of a capitalist system with which he was ideologically sympathetic. He wished to maintain the position of the wealthy landlords and asserted, with a lack of his usual care & acuteness, that free market competition would provide plenty for all. In fact, this insulated the landlords from having to compete and crippled a free-enterprise economy from the outset. The working class only had their labour left to bargain with, and that led to two centuries of strife. See generally Fred Harrison *The Power in the Land*, Shepheard-Walwyn Ltd, London 1983.

Marx took a wrong turning when he failed to draw proper conclusions (in *Das Kapital* Part 8) from his own insights into the impact of dispossession from sites upon labourers and the accretionary powers of Landowners. In the resultant communist bloc this confusion led to its own unresolved disasters. In the capitalist bloc these evils have been temporarily ameliorated for a nearly a century by the palliatives of Keynesian inflationary deficit financing and -- arising from the great Depression -- socialist welfarism: now the inevitable outcome is upon us as persistent inflation renders debt-addicted national economies hostage to the financiers behind the bond markets, and they collapse into large-scale unemployment (see generally F.A. Hayek *A Tiger by the Tail: the Keynesian Legacy of Inflation* Hobart Paperback, Tonbridge Printers, Kent, 1972.

All these were fatal mistakes. Due to the vested interests spawned since the 15th century and the confusion engendered by Smith, Marx & Keynes, the debate has been one of the deaf, ignoring the central issue of land monopoly for two centuries. The glimmers of insight held by Lloyd George's ruling Liberal Party during the first decade of this century were not sufficiently focussed and were swamped by a world war, a depression and Hitler's war, followed by a Cold War, all in rapid succession. Control of the land, governments and the global economy is now firmly in the hands of financier cartels.

243 50% of Australians own less than 8% of the wealth, and 1% owns 22% of the wealth: P. Raskall *Journal of Political Economy* No. 2, 1978. In South America 17% of landowners control 90% of the

Site Revenue provides a severe disincentive to owning more land than one has to. Since the annual rental value collected reflects the "highest & best use" to which the market could put that site (rather than its "actual" use), Site Revenue forces optimum development & usage of, and ends speculation in, sites, assists liquidity and enhances efficient resource allocation. Unjust enrichment from "exploiting the ecosphere", "locational advantage" and "capital gains" become impossible, since the rental-value is collected and land-price is destroyed.
The expectation of pocketing the unearned increment in land prices is bad economically, since it diverts investment from productive enterprise, fosters inflation[244], encourages the holding of land off the market, and (despite popular illusion) does little to create employment or enable "trickle down" of wealth. Artificial escalation in land price diminishes the ability of site purchasers to spend on consumer goods, thereby adversely impacting across the economy, depressing activity & employment, spreading dissatisfaction & a "get rich quick" attitude, and sparking unrest over wages and political extremism.

Since Site Revenue destroys most forms of speculation, so the only feasible investment for capital would be in productive enterprise. The ever-increasing efficiency of society would threaten a continual albeit slight depreciation in the worth of money so that those with savings would be only too glad to preserve its value and to lend it without interest. Since money is properly only a medium of exchange, not a good in itself which a citizen can responsibly hold out of circulation, economic health demands that it be circulated via expenditure or loan[245].

Site Revenue meets all the criteria of a good tax[246]: it is visible & intelligible, has a high revenue potential, is economic & effective to collect, and does nothing to distort the market. Sites are essential & immovable and their supply is fixed, so collection of Site Revenue cannot warp either demand or supply (as it does with non-natural goods or

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land: Susan George *How the Other Half Dies*, Penguin 1978.

244 Increased land prices are inflationary in the broad economy because they increase money-supply with no commensurate increase in the goods & services that money can chase. This in turn stimulates over-capacity & over-production (often of shoddy goods, with repercussions of environmental abuse) as the comparative income of producers diminishes and they strive to ride the inflationary wave and compensate for these losses. The end-result is a rash of bankruptcies, widespread unemployment (which constitutes stagflation when accompanied by inflation), downward pressure on wages, industrial strife, destruction of initiative, a collapse in confidence and reduced land & interest rates until the bust builds to boom and the aberrant cycle repeats itself.

245 Perhaps unnecessarily, in *The Natural Economic Order* (Berlin, 1929), Sylvio Gesell even proposes that a "stamp duty" be payable, on dates set without warning by a committee of the Judiciary, upon all banknotes in circulation or held by banks upon a particular day: this would pressure continual spending, investment or lending in preference to hoarding of currency.

246 See e.g. Geoffrey Brennan and James Buchanan *The Power to Tax: Analytical Foundations of a Fiscal Constitution* Cambridge University Press, Cambridge 1989.

services). "Tax capital and you drive it away; tax land and you drive it into use"[247].

Logically the Site Revenue fund would be more than adequate to pay for a modern government[248]. Since human civilization depends upon its citizens having secure private

title to land, so the monopoly thus granted will possess a certain value fixed by, and reflecting, the nature of that civilization therefore the annual collection of that value will suffice to fund public infrastructure for the civilization. Since a healthy civilization is unlikely to enter retrograde decline, one would expect the site revenue fund to at least equal the sum of all present taxation (which is at the expense of site revenue), plus all unearned increments privately appropriated, plus all interest payments. Indeed, the greatest likelihood is that there would be an embarrassing superfluity of site revenue, the excess of which could be returned to citizens equally as a dividend.

Instead of doing the simple, intelligent thing, governments worldwide (caught & distorted in the grip of vested interests) impose a welter of complex, counter-productive and inefficient taxes, upon earnings, economic activity, and even employment. At least they have, for the time being, ceased to tax windows and date palms[249].

Reduction of site-price to zero, and the release of impediments upon initiative, enterprise & productivity, would mean that everyone willing to work with hand or brain would have easy access to a site, even if only for subsistence farming or as a base for part-time work. Workers, without mortgages and with ready access to their own sites, would be in a natural, strong position against capital, which would no longer (thanks to its command of sites) be able to force wages down to subsistence level. Small business would be freed from a plethora of taxes & red tape.

With the high cost of land and the burden of tariffs removed, farmers would have more capital available for environmentally safe farming. Conservation zonings & environmental protection laws would apply to prevent destructive exploitation of sites, and polluters of the atmosphere would pay (via e.g. a fuel tax) for its cleansing by vegetation.

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[247] Mason Gaffney "Land Planning and the Property Tax" *Journal of the American Institute of Planners*, May 1969 p. 178.

[248] Fred Harrison *The Power in the Land* Shepheard-Walwyn, London (1983) pp. 200-207 estimates that there would be an embarrassment of riches for government. Indeed, before the influence of liberal economists this was the major fear of critics (see Steven B. Cord *Henry George: Dreamer or Realist?* Uni. of Pennsylvania Press, 1965 p. 67. The excess can always be returned to the people equally as a dividend, as with the proceeds of the silver mines in ancient Athens.

[249] "A tax on date trees, imposed by Mohammed Ali, caused the Egyptian fellahs to cut their trees; but a tax of twice the amount imposed on the land produced no such result." Henry George *Progress and Poverty* Schalkenbach Foundation, New York 1958 page 409.

With land easily available to every farmer, so absentee owners (especially giant corporations) would find it hard & expensive to obtain labourers & managers. Agricultural land would tend to be owned by those who actually farmed it. Downturns in world commodity markets would lower the demand for, and hence the annual rental value of, rural land affected. Farmers would no longer be able to hand on a property of certain capital worth (beyond that of its improvements) to their children, but, on the other hand, those children would not need to buy land when they struck out on their own.

Homebuilders would have easy access to sites, without being mortgaged for life, and there would be a boom in the building industry. Payment of Site Revenue could not be wholly passed on to tenants because (a) destruction of land "price" would make it much easier for folk to buy their own site and (b) landlords would be so keen to keep rental sites occupied that there would be strong competition for tenants.

## 4(d) Specific Planning Effects

Site Revenue would eliminate self-interested, secret & corrupt planning pressures, benefit government finances and reduce premature development.

Allowing speculators to retain a sizeable proportion of unearned increment (including elements of betterment) encourages their purchase of land suitable for various kinds of development and their holding same out of the market until prices escalate. This is a legalized fraud upon the community, whose needs and public works have driven up demand for sites.

By forcing the release of unused or underutilized sites and their optimum development, and by removing imposts on labour, undeveloped & degenerated sites would be improved, increasing the base value of total sites. It is illogical to fear over-stimulation of growth since major capital expenditure is unlikely without solid market research: moreover, it is the present system of speculation which forces excessive development. Developmental pressure would be reduced upon marginal land and urban sprawl & ribbon development would be constrained by the natural synergistic economies of spatial agglomeration, which foster efficient & shared infra-structures, broad choice, specialization, competition, social contact & communication.

Thus, a Site Revenue society would develop organically from a healthy economic basis, lessening the need for planning but not rendering it redundant since a major & responsible supervisory role would remain so as to preserve heritage pieces, protect public assets (e.g. CBD theatre areas) from commercial pressures, safeguard open space & environmental reserves, and constrain urban sprawl. There is a need to combine

the freedom of entrepreneurial vigour with the broad responsibility of planning control.

There is no problem for site revenue with downzoning: the purchaser of undeveloped land zoned residential should pay nil (but incur site revenue liabilities). There is unlikely to be unfair or unpredictable loss if land is downzoned to agricultural or environment protection: true developmental potential (return on rents etc.) is cut, but so is the site revenue payable. The only exception would be where worsenment actually diminishes the value of improvements to land, and in such an instance compensation should be paid.

## 4(e) Site Revenue and the Environment

### (i) Overview

Site Revenue would be inherently beneficial to the environment, removing profiteering in its "developmental" value and encouraging the widespread low-impact, low-demand lifestyle so necessary for a sustainable civilization & avoidance of war.

Landowners would be inspired to beautify & improve their properties without fear of penalty and public expenditure upon habitat preserves & national parks would be viable in order to profitably augment the site value of benefited areas. No concern need be held that sites would be abused (strip-mined etc.) provided that normal command & control regulations were in place and a range of appropriate economic instruments for environmental purposes (eg site revenue in respect of pollution or erosion) were applied.

### (ii) Beautification

In a Site Revenue society no speculative gain could possibly accrue to tenure of sites. All holders of sites would have to pay the annual rental accruing to them. There would thus a severe disincentive to owning more land than one could directly manage productively in the face of competition, for failure to do so efficiently would lead to enforcement of the accrued site revenue debt against the improvements of some (if need be, all) of the sites held, and loss of them. It is to be expected that a great deal of under-utilized land, at present held as a hedge against inflation or for speculative reasons, or reliant upon employment of others for whom no viable alternative exists, would come on the market -- available to anyone willing to work productively -- at a price equivalent to the value of improvements upon it.

Whilst employment of labour and rental to tenants would remain, the marked trend (especially in residential, commercial & rural zones) would be towards individuals -- sometimes writ large as corporations -- owning & managing their own properties. There would be a general tendency towards tenure of highly-improved small holdings, developed

& operated carefully to maximum economic advantage. With an enormous tightening of State welfare benefits, this would soak up the vast pool of welfare dependents, especially the unemployed, into a new class of low-impact, low-demand self-managing settler. This class would basically equate with the traditional peasant class, however at this turn of the spiral it would be politically free, able to live well with only part-time labour in the cash economy, and blessed with all the advantages of the information age.

This structure of independence & proprietorship would instill the powerful motivation of personal interest and responsibility, inspiring settlers to improve the quality & viability of the holding so as to enhance its long-term, reliable productivity with a view to handing it on to the next generation. Site Revenue encourages site-holders to improve and beautify their holding, whether it be urban or rural, by appropriate landscaping and conservation measures. Caring is natural to those with a real stake in their environments. Those who do care and improve their holding incur no extra revenue obligations, since the annual site value is calculated against the average, unimproved land of that locality. Those who do not improve their sites will be less able to compete for tenants.

Site Revenue would force maximum utilization of holdings and would end tenure of sites for speculative reasons. This would release masses of land onto the market, especially at marginal locations (e.g. desert fringes). This land could be obtained cheaply by the community and dedicated as national parks (preferably with broad inter-linking swathes), or as local beauty-spots, which would bear no Site Revenue obligations.

Public policy encourages farming of marginal land, and hence agricultural sprawl, by allowing urbanization of fertile land (and, even worse, allowing individuals to pocket unearned windfall profits for doing so); rating unused (or under-used) land, often held for speculative purposes, at the same rate as productive land; subsidizing the dumping or destruction of surpluses (not an Australian sin); and artificially facilitating the spread of preferred crops at expense elsewhere (eg permitting irrigation of cotton at the expense of waters needed to reinvigorate or flush river systems). The quest for unearned increments to land value is the driving force behind excessive sprawl of all kinds, urban, agricultural & industrial, and in the instance of agricultural land replaces the genuine steward with an unnatural class of absentee owner who cannot work the land personally and so employs others to do so using the "efficient" perversion of monocultural, inorganic chemical farming.

> The prospect of a windfall increase in land value operates as a standing invitation to 'develop" land by seeking approval for a change of use -- regardless of whether the proposed development is genuinely needed. Which means that, irrespective of its environmental significance, or the need to maintain some clear demarcation between town and country and curb the environmentally destructive process of urban sprawl, *all* land becomes vulnerable to entrepreneurial initiatives.[250]

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[250] Philip Day *Land* Australian Academic Press, 1995, p.3.

War (especially nuclear) wastes and damages the environment and is caused by nationalistic land-hunger, resource-grabbing and governmental direction of citizen disgruntlement away from home economic problems (e.g. boom & slump, unemployment, rich-poor gap) which are invariably occasioned by land monopoly Site Revenue prevents private profiteering out of raw resources, diminishes central government and national boundaries and founds economic stability upon rock. It is, therefore, the indicated remedy against war.

## (iii) Site Bounties

In some instances, particularly forestry, growing of the resource has extensive side-benefits, such as enhancing the visual amenity of other sites (hence increasing their locational value & site revenue), enabling photosynthesis of $CO_2$ and (in other than conifer plantations) supplying wildlife habitat.

Landowners rarely receive any economic incentive to preserve treecover or natural habitat. On the contrary, in Australia, for many years Crown leases required active land clearing. Usually the most profitable (economically) use of rural land requires clearance of vegetation to facilitate grazing or agriculture. Despite the possibility of differential rating being available under Australian legislation[251], no local authorities in fact give rates reductions for preservation of habitat, even where the land is dedicated (and its title encumbered ) as a Nature Refuge[252]. Nor is dedication for habitat preservation considered to be a charity for which stamp duty relief is available[253]. Overseas, there are exceptions: commercial woodlots in the UK are rated at 1/3 their assumed income were they unimproved pasture.

Under an environmentally-sensitive Site Revenue system, assessors of site values should be mindful to give credit where credit is due. Thus, if a voluntary (and perhaps commercially sacrificial) beautification or preservation of one site increases the value of others, then a "negative rental" or bounty should accrue, in much the same way as domestic solar generators achieving a nett input to the electricity grid receive payment.

Herein lies a mechanism for rendering equity to those developing nations which yet retain extensive natural <u>vegetation</u>. Rather than economically encourage or force them to cut it down, rather they should receive (out of levies collected in respect of atmospheric externalities) continuous bounties from developed, atmospheric polluting nations in respect of the contribution to homeostasis thereby contributed. Those nations who preserve habitat benefiting <u>fauna</u> would also receive bounties in respect thereof, payable from the national & global trust fund comprising 50% of all income in respect of licenses to extract raw resources[254].

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[251] EG s.568 of the *Local Government Act* (Qld., 1993)
[252] Under the *Nature Conservation Act* (Qld., 1992).
[253] Under s.59E of the *Stamp Act* (Qld. 1894-1988)
[254] See *supra*, section 3(d)(x), infra section 5(f)(ii).

### (iv) Site Degradation

Critics sometimes allege that, when subjected to a Site Revenue system, rural landowners would respond by over-exploiting their land so as to pay, or be able to pay. This allegation is hypocritical and unfounded. It is the existing high price of land and interest rates (both of which are ended by Site Revenue) which already make landowners over-exploit their soils. Moreover, in a Site Revenue society protective environmental laws would remain in force and enable community interference in any illicit mining (e.g. of topsoil), poisoning, timber-harvesting, clearing or erosion.
Furthermore, the amount of Site Revenue payable is determined by market forces (not government edict) according to the average financial return possible from land in a locality. If there is a drought, bushfire, downturn in pertinent commodity prices etc. then the local market will reflect this with decreased annual site values. Usually, the amount due would be less than that extracted under present taxation systems.

Finally, a site-holder who degrades his land would eventually find it failing to provide adequate income for the annual revenue requirements (which would reflect general landforms locally and be assessed according to the previous, unexploited, legitimate status of the site). Such a one would eventually lose greatly, for the degraded site could not be transferred for the value of its improvements.

### (v) Site Revenue, Resource Extraction & Externalities

In a Site Revenue civilization resources could no longer be exploited cheaply for private gain. Factored into site revenue would necessarily be royalties upon resource extraction and impact levies upon pollution. Rebates would be available in respect of environmental positivities – such as the maintenance & establishment of vegetation as a carbon sink & oxygenator. I detail the intricate workings of such mechanisms elsewhere[255].

## 4(f) Political Realities

Site Revenue is a completely viable solution[256] for economic & planning ills. It is neither "communist" nor "capitalist", and forms the basis of a political economy known as **Geoism**, after the Greek root word Γη (Gē), meaning earth hence Gaia, meaning Earth Mother. It has never been wholly implemented, and in fact has been deliberately repressed from public debate[257] by vested interests for over a century. Partial collection of the unearned

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255 See "Revenue Law and the Environmental Legal System", LLM Assignment, November 1996.

256 All salient arguments against the Site Revenue analysis have been painstakingly dismissed by e.g. Steven B. Cord in *Henry George: Dreamer or Realist* (University of Pennsylvania Press 1965) and Robert V. Andelson (ed.) *Critics of Henry George* (Associated University Presses 1979).

257 For instance, all advocates of the proposal, however qualified, were refused an invitation to the "National Tax Summit" called by Prime Minister Hawke in 1985, despite the reform satisfying all except the last ("popular support") of the nine "principles" supposed to qualify an invitee: no increase in overall tax burden, reduction in income tax, tax avoidance & evasion lessened, simplicity, fairness, no disadvantage to welfare dependents, no agitation of wage movements, promotional of investment, growth & employment.

increment was a salient theme during the formative years of ALP politics in the 1890's[258], indeed its total collection was ALP policy in South Australia until 1905, but worker-wavering over the viability of free trade and political pandering to the middle class saw the introduction of "thresholds" and its gradual demise until in 1964 the concept was removed "by subterfuge" without debate from the ALP policy reprint[259].
Sadly, established and vested interests "dwell upon the heights" across the globe and everywhere beat back reason & decency so as to buttress the parasitic, profiteering privilege of the powerful. Site monopolies are everywhere granted without community collection of site revenue[260]. The result is to capitalize community-generated locational advantages as "land price" and "profit" in the pockets of the "proprietors". This beats the masses into landlessness (or lifelong enslavement to mortgagees) and strips them of employment. Lulled by the "bread & circuses" of welfare & television, the masses, poorly-educated & preoccupied with survival, stumble along stunned by the enormity of the "problem".

All the most powerful sectors of society are against Geoism. Politicians dislike it because it decentralizes power and promotes natural peace, harmony & equality, thus ending the divisions upon which they feed: yet political manipulation of monetarism will never address the fundamentals of economic malaise. The rich and financiers, who control the media and manipulate politicians, dislike it because it ends two of the three bases for their wealth (the third is enabled by legislative interference with "morality") -- to wit pocketing the unearned increments from land monopoly (including resource exploitation) and the ability to command interest rates (which is a spin-off thereof). Trade Unionists are against Geoism because an independent workforce and an even distribution of capital would destroy their empire. The Middle Classes, struggling to maintain a decent living, are scared to endorse the concept because it appears to threaten that "capitalized land price" which forms the backbone of their apparent assets[261]. The voluntarily unemployed hate the concept because it will force them to think, work and take responsibility for their own

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258 See *passim* Verity Burgmann *In our Time*, Allen & Unwin 1985 and Airlie Worral *The New Crusade: Origins, Activities and Influence of the Australian Single Tax Leagues 1889-1895* M.A. Thesis, Melbourne, 1978.

259 See Clyde Cameron June & July 1984 *Progress*.

260 Besides the partial implementation of Site Revenue in Australia as traversed, the only other attempts have been in Denmark, Singapore and Taiwan. After lobbying for three years, in 1956 the Danish Justice Party secured a promise (largely unfulfilled) of taxes on increments in site values for its participation in a coalition government. Land speculation ceased immediately and all investment went into productivity. By 1960 a big deficit on the national balance of payments was turned into a surplus and the large foreign debt was reduced to one-quarter. Interest rates and rents diminished and there was nearly full employment. Inflation halted and there was industrial peace. Then, at the 1960 general election huge propaganda-expenditure by rich landlords and a change in the voting system halved support for the party, which lost its balance of power and the advances collapsed. Resulting from the influence of Dr. Sun Yat Sen, taxes on increments in site values were, after 1950, in large part collected as the centrepiece of a strategy for economic recovery in Taiwan. As a result, rural incomes increasingly equalized and land came into the hands of efficient farmers rather than absentee landlords. Capital, previously bound up in land speculation, was freed for industrial investment. But the rates of rental-value collected became inadequate enabling capitalization of increments. Both deliberate speculation and widespread unearned profiteering from locational advantage returned, especially on the urban fringe: (Fred Harrison *The Power in the Land* Shepheard-Walwyn, London 1983, pp. 226-229).

261 (Even though realistically a homeowner would be no worse off selling one holding for the value of improvements alone, *sans* land price element, if s/he were then able to buy again elsewhere upon the same basis).

lives. These elements will combine in unsubstantiated assertion to shallowly dismiss Site Revenue as "crackpot Utopianism". It remains to be seen what attitude Aborigines will take to Geoism. They may be its only friends, and vital to save the planetary day.

> "[S]ly,double-talking double-dealing governments behind the walls of studies, national interest, and other obfuscation get too little attention. They tend to disappear into the background ... Until ... socially conscious persons ... expose them ... the 'new world order' of small-scale sustainable development ... will not happen"[262].

[262] Peter Jull, (1997) 4 Indigenous Law Bulletin, issue 2, p.19.

# 5. GEOISM AND NATIVE TITLE

## (i) Geoism the Sovereign Remedy

At this juncture, the submission is made that Geoism supplies the immediate, vital and probably comprehensive answer to global political, economic, social and environmental problems. It remains to be seen how its universal application would and could affect Aborigines.

## (ii) Aborigines in Global Perspective

In defining the appropriate mechanism to integrate the competing needs of both humans & creatures for sites upon a healthy planet, against the complex & threatening planetary political, economic & environmental maëlstrom, it is important to bear in mind that, whilst they are an important factor to be properly dealt with, Aborigines themselves are a relatively minor issue. Like others over millennia, they may have to adapt and compromise. Even at the basic level of sustenance & survival (let alone at higher levels of culture & communication) it is not feasible to abandon technological & industrial advances to re-establish some primeval bucolic Arcadia.

> It is a mistake to equate "rural" with "non-industrial." This can only confuse issues. Pre-industrial folks often huddled in cities and villages; post-industrial farmers are highly mechanized and chemicalized, which doesn't stop them from adopting the pathos of primitive ruralists being invaded by the brutal, brutal city. Let's not fall for it! A handful of unreconstructed aborigines, or unreasonable facsimiles thereof carrying the surnames and genes of Smith, Szyzmanski, or LaBoeuf are used as stalking horses for first world land speculators, mostly. It's a new version of the capitalist hiding behind the widows' skirts.
>
> Out in the boonies you meet loggers with trucks and chainsaws; miners with explosives and smelly smelters; exploitive shepherds with "woolly maggots" despoiling the native veggies; Disney Inc. seeking to make a new Disneyland out of a natural wonder; gambling casinos protected from state law because they are on Indian reservations; floating fish factory ships trawling purse seines over many miles; militarists installing spooky facilities; etc. These are 90% of our real problems, not subsidizing an ancient, obsolete, nostalgic and land-hogging way of life for a few holdouts who cannot or will not adapt to modern facts and scarcities as you and I must.[263]

There is, however, one illimitable and valuable gift to humanity which remains borne by many aboriginal persons: that of knowing humanity as a part of, and revering, nature: this knowledge is integral to the Dreamtime and its realization planetwide is essential to restoring global health. Great promise & potential resides in the combination of the spiritually & emotionally potent Dreamtime (with its inherent reverence of nature) with Geoism and its forceful but fair & simple economic dynamic requiring respect for nature. Indeed, it may be that cross-pollination between Dreamtime and Geoism is essential for them both to flourish. Certainly all vacant Crown land possessing salient Dreamtime significance should be dedicated as a form of sacred National Park (even if access is restricted to initiates, but preferably where passage through initiation is available to all, regardless of race). Such sacred sites should be exempt from Site Revenue.

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263 Professor Mason Gaffney, personal email.

## (iii) Subjection of Aborigines to Site Revenue: Cultural Imperialism?

That said, given the less-than-glorious dominance of industrial cultures and the global dearth of colourful pluralism, we must be morally hesitant to imperialistically intrude into freedom of values by imposing an industrial economy upon any aboriginal peoples (as with certain remnant Amazonian tribes) who clearly wish to avoid it altogether.

The cutting edge of the real problem occurs where folk wish to live a pre-industrial culture upon land which (for reasons of fertility, mineralization, vista, locality or whatever) commands in the industrial economy a far higher site revenue that the pre-industrialist culture can amass. This problem is exacerbated where the cultural disposition is religious (e.g. the Amish), or springs from long ancestral affinity with the territory. With the Australian Aborigines, the cultural disposition is both religious and ancestral.

Such an imposition could be indirectly effected by an industrial culture imposing its quantum of site revenue upon folk who wish to live in a pre-industrial culture, thus effectively forcing them into industrial-age use of sites upon pain of being dispossessed and tipped out onto the road by the sheriff or an army. Granting site revenue exemptions in such circumstances raises massive problems of defining what constitutes an industrial culture.

How may people does it take to make a culture? How long must their practices have persisted? Does 300 years of Amish lifestyle, or 30 years of "Back to Nature" self-sufficiency by dropout hippies, constitute a culture? And what constitutes an "industrial' culture? Certainly the use of engines and electrical energy or conversion, or products from same (eg mass-produced clothing) would be salient characteristics of industrialism. This would leave open the use of biological (eg horse) or wind & water power – none of which, however, were used traditionally by Aborigines. But would such a definition of industrialism suffice? The Romans & Incas manually made massive mines for gold & silver, aquaducts & canals. Even granted that we can define a valid pre-industrial culture as subsisting, over what territory should it be allowed to range? Does there come a point when insistence upon living a primeval, non-industrial lifestyle across vast traditional tracts becomes an immoral insult to the needs of others who would use the resource efficiently? All of this, of course, could be debated & nit-picked endlessly.

Whilst provision should be made against the possibility, it may be that there is no real demand to grant such total exemption from site revenue. The prospect is probably remote of Australian Aborigines, even if given the chance, actually living, or indeed wishing to live, in a purely traditional lifestyle, eschewing industrial society & all its products to hunt & gather upon traditional tracts, living in bark gunyas happily practicing tooth avulsion & chewing psychoactive pituri, without the least benefit of western technology, whether for machines, electronics, medicines or even clothes.

> "Indigenous people from the Inuit of North America to the Warlpiri in Australia have shown in negotiations with government and with mining, logging and pastoral companies, that what they want for the next generation are the benefits of a modern education, housing, medical and municipal services, access to jobs, investment capital and scope for individual initiative and legal protection for women and families.
>
> There is wide recognition that these are benefits created by Western civilization. Traditional societies never provided them in the past and will not do so in the future. Pragmatic negotiators recognise also that taking full advantage of the tangible benefits entails accepting the responsibilities of citizenship in a modern State and that this can be done without indigenous people having to turn their backs altogether on their spiritual traditions".[264]

No pre-industrialist should be allowed to take up land in the middle of an industrial area and declare himself exempt for site revenue, for this extreme form of secession rights would violate the rights of neighbours who have a right to have the economic rental value of the surrounding public infrastructure properly & fully reflected in the quantum of site revenue collected. Such a pre-industrialist or survival-lifestyler would have to move to the margins, but it is to be borne in mind that the efficiencies of land-use promoted by Geoism (as speculation & ribbon-development are curtailed) would improve the agrarian & visual quality of marginal land considerably above subsistence level: such land could be very productive.

Under the pressures of a Geoist economy much free land, situated at the economic margins, would become available for Aborigines who have chosen to retain their traditional lifestyles. This would be true for anyone wishing to live a low-impact, low-demand lifestyle. By settling at the margins any low-tech person can voluntarily opt out an industrial economy. The vast bulk of lands subject to native title claim, being in outback Australia or in the sparsely-settled north away from commercial centres, is (mineralization aside) at the economic margins. Much land approaching, but not at, the margin would become available, without payment of land price, at low annual rentals. There is vast potential for Aborigines, by ecotourism, artistic pursuits and farming (even emus & kangaroos) to earn at excellent living in a site revenue society, and by no means necessarily at the margins.

It should be borne in mind that land at the margins, for instance land distant from commercial centres, or lacking extensive mineralization or fertility, would not only attract little or no site revenue, but might actually afford those who chose to dwell there a positive rental income due to the service supplied by its vegetation as a carbon sink, and due to distribution of citizen dividends[265] from the excess site revenue collected.

Geoism is a political philosophy whereby all users of sites owe the community a use-fee: it is pertinent to all people at all times, being both gender and colour-blind. It would be better if all Aborigines simply got with the program. Would not the mainstream meet its moral obligations by taking any and all people into one society as equals? Nevertheless, the Aborigines have suffered enough and one does not wish to push full exposure to site revenue obligations upon Aborigines who genuinely wish to practice, and do practice, a stone-age culture, despite the complications of defining & policing such.

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264 Professor Austin Gough, *The Australian* 07.11.97 p.17
265 See above, section 4(c).

## (iv) "Special Provision" Zoning

A cultural difficulty is that primitive peoples, having few daily needs, can live a particularly leisured lifestyle, and have neither appreciation of the effort it takes to gather industrial wealth nor the disciplined endurance to do so. Western, industrial productivity is largely the product of western society itself.

The extra productivity obtained by application of industrial technologies renders dubious any continued assertion by natives of a right to exclusive domain over extensive traditional foraging ranges. Why not apply modern agricultural methods to small portions and retain non-exclusive rights to hunt, gather and conduct ceremony over the balance? In any event, it would not be feasible for natives to farm their holdings using industrial methods without industrial society itself to supply materials (eg machines, fuels & fertilizers) and markets for produce. Even the most remote property benefits from connection with urban & industrial centres.

The rent payable to Aborigines for allowing tourist access to Uhluru in fact almost entirely represents the infrastructure of transport, accommodation & communication supplied by the mainstream society. There is no legal or economic justification for setting up Aborigines, or anyone else, as idle monopolistic landlords, like the Duke of Bedford who owns Grosvenor Square in London due to some ancestral inheritance, pocketing rentals generated by others. Anyone in this position is excluding others from equal access to sites. "Special provisions" aside, to allow Aborigines (or anyone) title to land, without collection by the entire community of its site revenue, makes no legal, economic or moral sense. Against this background, the 1980's Aboriginal slogan "Pay the Rent" is deep & accurate (so long as they do not mean "exclusively to us").

Arguably, if Aborigines wish to adopt or exploit even the slightest element of industrial culture, it is hard to see that any moral claim to exemption applies. This would be especially so when industrial producers & consumers are forced to recompense the full value of their environmental externalities, for then the crude plutocracy of modern industrialism would be tempered by planetary & inter-generational responsibility. As a result of Geoist efficiencies and redress of externalities, industrial societies would reduce their impacts whist at the same time low-tech societies (certainly via their youth) would be drawn into global cross-pollination: in both events reduction in cultural conflicts and land use disputes would ensue.

Nevertheless, and bending over backwards to mend old ills, it is possible that some "half way house" could or should be adopted to buffer Aboriginal communities, despite their tenure of valuable traditional lands and despite their benefitting from the industrial infrastructure created by others, against the full rigorous impact of Site Revenue. Perhaps it is appropriate that some level of truck with industrial economies (eg the wearing of factory-made clothes and use of community vehicles & electronics) be permitted whilst limiting full exposure to site revenue.

This would be best achieved simply by application of a particular town planning zoning over the native title land. Imposition of planning constraints significantly affects the profitability & price of land. Such a zoning might, for instance, forbid the conduct of businesses, the erection or conduct of tourist facilities or factories, the construction of buildings using other than approved materials, the construction of sealed roads (other than in urban areas), the use of vehicles other than communal buses & trucks, the use of machinery to farm, any form of mining, any vegetation clearance or construction of any distribution system for utilities. In all instances it should be purely a matter for the residents of such zones (having opted out of the mainstream economy) to arrange their own conflict resolution, policing, internal civil & criminal law enforcement, welfare & health support systems. By such a device some happy mean might be struck catering for the needs of Aborigines who do not wish to revert to a pure traditional lifestyle but nevertheless wish to retain exclusive tenure of substantial tracts of traditional lands, plus perhaps hunting & ceremony rights over other lands, without full exposure to site revenue.

Granting to Aborigines exclusive title over tracts largely puts them in the position they complain about: that of dispossessing or precluding other citizens from use of the same land. The idea that land could or should remain 'in the family' has led to distortive revenue practices (untaxing the land and taxing employment & effort) and conduced to rich-poor gap. It may be that, in a broadscale concatenation of separate communities within such **"native homeland**" zones (as across the central or northern portions of Australia), site revenue would remain payable, but would be assessed, collected and applied under the economics of the national or regional native homeland zone generally, rather than under mainstream economics. It might be that the local authorities or elders of such homelands would assess and levy site revenue upon individuals or sub-groups within them, where some monopoly or exclusivity exists over portions. As with the national scheme, site revenue for native homelands (which should preferably constitute entire local government areas, or series of them) should still be collected locally and remitted inwards.

## (v) Racial Equality

It is appropriate at this stage to recall that, against a background of horrendous planetwide problems, not only is mainstream Australia now doubly without any rational jurisprudential basis for its land law (*occupatio* being irrelevant in the modern age and fraudulently imported anyway), but its Aborigines are stuck with native title rights which, quite apart from being confused, are based upon legislation which is blatantly racially discriminatory: a position which the amendments to *NTA* threaten to exacerbate.

Whilst the *NTA* may be justifiable as a "special provision"[266], it is requisite within the treaty framework that attention be given to such inequality being temporary. Within the moral constraints against cultural imperialism, this is only fair: the waves of people who came to settle Australia were largely people who had themselves been driven from their lands. It is vain to assert that aboriginality is such a superior value that it deserves preferential access to limited resources, or to attempt to freeze the endless flow & displacement of human population and restore it to some *status quo ante*. Only confusion can result from excluding some people from the normal legal & economic pressures of land-owing on account of 'ancient titles'. The law, as an institution promoting co-operation, stability & peace, must be consistent if it is to be respected. Differing rights according to race or length of residence inject variables which spawn confusion & resentment. Similarly, laws which treat land & sites generally (which were not made by humanity), identically with chattels (which were), equate like with unalike and are fundamentally flawed.

Whilst operating within the context of a fatally-flawed Australian jurisprudence, the *NTA* remains a racially-discriminatory "special provision", and it behooves all involved to focus upon restoring normality. Whether or not Aborigines, or some of them, wish to have the benefit of unique zonings within the resultant commonwealth is a matter which can be left open.

## (vi) Reconciliation Treaty

In order to draw together these threads, a *Makkarata* or treaty should be entered between the Aborigines and the peoples of Australia as represented by the Commonwealth and State governments whereby all vacant Crown lands are given to the Aborigines (as constituted by some legal entity they can arrange). Probably, by negotiated consent with the Aborigines and under suitable management arrangements, bulk tracts of vacant Crown lands could be dedicated as Natural Parks and public reserves of various kinds, at the time of the *Makkarata.*

Thereafter, all non-public land, whoever the proprietor (and including this peak Aboriginal body), should be subjected to site revenue, however if required suitably-zoned Native Homelands could exist within sheltered economic zones. Such a reconciliation process would be based upon equality of all Australians, and characterized by a spirit of openness, goodwill & understanding.

The reality of this arrangement is that much vacant ex-Crown land would then be subject to site revenue which the Aborigines would have to pay. Of course, they could not, since the limit of Aboriginal ability to pay would be their private holdings as citizens indistinguishable from any other (both those they have now and those they chose to grant themselves in freehold from the ex-Crown pool), plus the protected Native Homelands. Thus the balance of the ex-Crown land would have to be itself dedicated as national park or other forms of totally public space, or held in some reserve system from which it could be privatized at some future time, but in which for the meantime it is unavailable for any private exploitation save recreation.

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[266] Under s.8 of *RDA* and Article 4 of the Convention.

# #6. Conclusion.

The *Mabo* decision leaves naked the inevitable conclusion that Australian land law has no jurisprudential basis whatsoever. It is not only based upon the discredited Roman assertion of *occupatio*, which has occasioned vast & vile suffering across the globe and is quite inappropriate in a world of scarce resources, but furthermore the very importation of *occupatio* into this land upon its colonization is founded upon the false premise that Australia was *terra nullius* at colonization.

If any valid jurisprudential basis is to underpin our land law, it must be done by a compact which integrates all the relevant factors and which reconciles all Australian peoples with each other and the land. This should be achieved in a general *Makkarata* with the Aboriginal people and a new mutual constitution.

There can be only one key to such reconciliation: the return of unoccupied Crown land to the Aborigines and the collection of site revenue in respect of all sites which are not dedicated to public or Dreamtime-sacred use, including (but with capacity for amelioration by zonings if desired) any elements of the surrendered Crown land dedicated to native title.

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