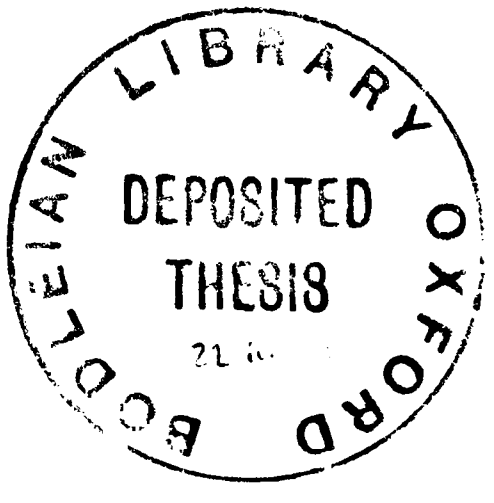
Crown Land in Australia

Submitted for Examination for the Degree
of
Doctor of Philosophy
in the
Faculty of Law
University of Oxford
by
Paul Theodore Babie
St Catherine's College

Trinity 2001



To my parents, my wife,
and to the memory of
Catherine Rita Uniacke (Gaetz)
1910-1998
and
Olga Babie (Kobylanski)
1910-1998

I declare that this thesis is approximately 100,000 words in length, that it is entirely my own original work except to the extent acknowledged in the footnotes, and that no part of it has previously been published or submitted for another degree at this or any other institution.

Paul T Babie
St Catherine's College
Trinity 2001

Abstract

Crown Land in Australia
Paul Theodore Babie
St Catherine's College
Doctor of Philosophy
Trinity 2001

Property theory has long explored the meaning and content of private property. Similarly, one finds no shortage of analysis of common or communitarian property. In the theoretical literature, however, one finds very little writing about public property, a third, very significant, type of property. This lack of attention is not due to a lack of examples; on the contrary, examples abound. This thesis offers a theoretical analysis of one such example: Crown land in Australia. Crown land is a largely forgotten and therefore under-analysed aspect of Australian real property law. This lack of analysis has produced significant confusion in recent judicial developments concerning Australian common law native title. In order to alleviate the potential for confusion, this thesis fills a long-standing gap in the literature of Australian real property law.

In order to fill this gap and to provide a much-needed analytical account, it is necessary to make use of working definitions of private, public and communitarian property. This thesis provides each. First, using JW Harris' *Property and Justice*, it constructs a working definition of private property. From that, by way of contrast, a working definition of public property is offered. Finally, by way of contrast to both private and public property, a working definition of communitarian property is also developed.

Armed with working definitions of private, public and communitarian property, the thesis provides an analytical account of Crown land in Australia. It describes Crown land as the quasi-ownership use-privileges and control-powers which the Crown, by virtue of its

prerogative power over land, enjoys in Australian land. The Crown enjoys differently packaged bundles of such privileges and powers over many different sorts of land, such as those which have never been allocated for any use, specific natural resources such as minerals or petroleum, those over which Australia's Aboriginal peoples enjoy native title, and even those over which private persons hold freehold estates or statutory leases. All such lands, due to the Crown's quasi-ownership privileges and powers therein, can be called Crown land, which embraces a continuum of locations, each defined by a unique package of such privileges and powers over the relevant type of land. The thesis calls this the Crown land continuum, which, in its totality, is a working example of public property.

Contents

Acknowledgments

In writing this thesis, I have incurred many debts of gratitude to many people. I fear that I will be unable to repay many of them. Moreover, in attempting to thank everyone who has given me intellectual, moral and spiritual support and guidance, I am sure that I will inadvertently forget some. I apologise in advance for my oversight.

For intellectual and moral support, I thank, in no particular order, Michael Spence, Peter Oliphant, Cheree Murrihy, Tracey Oliphant, Raymond Oliphant, Ann Oliphant, Richard Bauman, David Percy, Roger Magnusson, Michael Crommelin, Andrew Christie, Belinda Fehlberg, Geoff Stapledon, Elizabeth Boros, Mark McGaw, Victor Tunkel, Ian DeArdo, Ngairre Naffine, Gary Edmond, John Williams, David Wright, Simon Palk, Adrian Bradbrook, John Keeler, Rob Fowler, Kath McEvoy, Michael Detmold, Judith Gardam, David Baker, Janey Greene, John Gava, Leighton McDonald, Rosemary Owens, Bernadette Richards, Kent McNeil, Malcolm Cope, Justice John Toohey, Paul Toohey, Justice Bruce McPherson, Robb Beeman, and Sean Fairhurst. I would also like to thank the participants in Graduate Research Seminars at Oxford University and Faculty Seminars at Adelaide and Flinders Universities, my Advanced Property students, and my honours students. I thank them all for their support and for giving me more to think about. Margaret Priwer and Paul Maloney of the Adelaide University Law Library also deserve special thanks.

For spiritual guidance and support, I thank Bishop Peter Stasiuk, CSsR, Archbishop Philip Wilson, Fr Simon Ckuj, and Sr Gabrielle Redden.

For financial support I thank my parents for their generosity over many years, without their help I would not have been able to undertake this degree. I should also like to thank the Law Society of Alberta for awarding me three Viscount Bennett Scholarships, The Canadian

Women's Club for two Canadian Centennial Scholarships and The Law Fellows of St Catherine's College for a Landau Scholarship.

There are many friends who have given me much intellectual and moral support and encouragement over the years, and I thank especially Tom and Jan Groulx, James Mendel, Grant Cameron and David McKenzie. Alan Bogg became a close friend near the end of my residency in Oxford, and his support and encouragement since has been invaluable. More recently, I have been befriended by Fr Maurice Shinnick, AOM, and Fr Kevin Taylor. Their outstanding support, encouragement and friendship have helped me though the last two years of my work on this thesis.

Bruce Ziff deserves special mention for having encouraged me since I left the practise of law in 1993 to undertake graduate study, first, at the University of Melbourne and, since 1996, at Oxford. More significantly, he has taken the time to read the entire thesis, twice, and has made substantial and perceptive comments that have allowed me to develop my arguments.

My supervisors, Derek Davies, James Harris and David Ibbetson have been wonderful in their support, encouragement, advice, insight and guidance in writing this thesis. I could not have hoped for better supervisors.

Most importantly, though, I would like to thank my family. My sister Colleen and her husband Randy have been a source of encouragement and support throughout the completion of this thesis. My parents have been and are unfailing in their wisdom and love for me. Without them I could not have embarked upon nor completed this thesis. They have always encouraged my education; I hope the completion of this thesis repays them in some small way for what they have given me over the years. Finally, I would like to thank my wife Rachael; I met her about the time that I was embarking upon my Oxford adventure. So we have lived

together the ups and downs of life with a thesis. I could not have lived it without her. She has done more to see this through to completion than anyone should reasonably be expected to endure. If anyone deserves the credit for the completion of this thesis, it is her.

Paul Babie
Adelaide
22 August 2001

Table of Cases

Cudgen Rutile (No 2) Ltd v *Chalk* [1975] AC 520, (1974) 4 ALR 438

Cummins v *Tenterfield Pastures Protection Board* (1931) 10 LVR 100

Dangar and Macdonald v *Thornton* (1905) 15 LCC 342, G Herbert Pike and HB Bignold, *Digest of Land Appeal Court Cases 1890 to 1911* (1895-1912), vol (1901-1905), 23 and 172

Davies v *Littlejohn* (1924) 34 CLR 174

Day Dawn Block & Wyndham GM Co Ltd v *Plant* (1901) 11 QLJR 18

Day & Others v *Brunker* (1891) 12 NSW LR (Eq) 157

De Britt v *Carr* (1911) 13 CLR 114

Delgamuukw v *British Columbia* (1998) 153 DLR (4th) 193

Delohery v *Permanent Trustee Co of NSW* (1904) 1 CLR 283

Denniss v *Minister for Land & Water Conservation* (1999) 91 FCR 228

Derschaw v *The Queen* (1996) 90 A Crim R 9

Dillon v *Davies* (1998) 156 ALR 142

Doe d Seebkristo v *East India Co* (1856) 10 Moo PC 140, 14 ER 445

Doe d Wilson v *Terry* (1849) 1 Legge 505

Dugan v *Mirror Newspapers Ltd* (1978) 142 CLR 583

Dumaresq v *Robertson (No 3)* (1860) 2 Legge 1291

Dumaresq v *Robertson (No 4)* (1861) 2 Legge 1387

Eastern Construction Co Ltd v *National Trust Co Ltd* [1914] AC 197

Edwards v *Simms*, 24 SW 2d 619 (1929)

Glenwood Lumber Co v *Phillips* [1904] AC 405

Goldsworthy Mining Ltd v *Fed Cmr of Taxation* (1973) 128 CLR 199

Gollan v *Nugent* (1987) 8 NSWLR 166

Gould v *Greylock Reservation Commission*, 215 NE 2d 114 (1966)

Griffin v *South Australia* (1924) 35 CLR 200

Hamlet of Baker Lake v *Minister of Indian Affairs and Northern Development* (1979) 107 DLR (3d) 513

Hatfield v *Alford* (1846) Legge 330

Hawkins v *Minister for Lands (NSW)* (1949) 78 CLR 479

Hayes v *Northern Territory* (1999) 97 FCR 32, [1999] FCA 1248

Hegarty v *Ellis* (1908) 6 CLR 264

Heinz v *Walker* (1885) 6 NSWLR 166

Herlakenden's Case (1589) 4 Co Rep 62a, 76 ER 1025

Hesketh v *Willis Cruisers Ltd* (1968) 19 P&CR 573

Howarth v *McMahon* (1951) 82 CLR 442

Humphrey v *Burrell* [1951] NZLR 262

Hutchinson v *Scott* (1905) 3 CLR 359

Illinois Central Railway Co v *Illinois*, 146 US 387 (1892)

In re Richard Foreman & Sons Pty Ltd, Uther v *Federal Commissioner of Taxation* (1946-1947) 74 CLR 508

Jacques v *Stafford* (1890) 11 NSWLR 127

Re McNally (1891) 1 LCC 446, G Herbert Pike and HB Bignold, *Digest of Land Appeal Court Cases 1890 to 1911* (1895-1912), vol (1890-1894), 175

Re Meppem (1915) 25 LCC 338

Re Millgate (1911) 21 LCC 24, G Herbert Pike and HB Bignold, *Digest of Land Appeal Court Cases 1890 to 1911* (1895-1912), vol (1906-1911), 127

Re Mitchell, Hatton v *Jones* [1954] Ch 525

Re Municipal Council of Hunter's Hill (1894) 4 LCC 94, G Herbert Pike and HB Bignold, *Digest of Land Appeal Court Cases 1890 to 1911* (1895-1912), vol (1890-1894), 158 and 181

Re New Zealand and Australian Land Co Ltd (1916) 26 LCC 94

Re Oxenford (1903) 13 LCC 172, G Herbert Pike and HB Bignold, *Digest of Land Appeal Court Cases 1890 to 1911* (1895-1912), vol (1901-1905), 172

Re Selpam Pty Ltd (1994) 121 FLR 87

Re Stone (1898) 8 LCC 127

Re Suncorp Insurance and Finance [1991] 2 Qd R 704

Re Swaysland (1907) 17 LCC 246, G Herbert Pike and HB Bignold, *Digest of Land Appeal Court Cases 1890 to 1911* (1895-1912), vol (1906-1911), 120

Re Thompson (1911) 21 LCC 9, G Herbert Pike and HB Bignold, *Digest of Land Appeal Court Cases 1890 to 1911* (1895-1912), vol (1906-1911), 122

Re Travelling Stock Reserve No 33,614 (1906) 16 LCC 486

Re Tulloch Ltd (1978) 3 ACLR 808

Re Turner (1892) 2 LCC 47, G Herbert Pike and HB Bignold, *Digest of Land Appeal Court Cases 1890 to 1911* (1895-1912), vol (1890-1894), 180

Re Wadi Wadi People's Native Title Application (1995) 129 ALR 167

Re Waldron (1894) 3 LCC 144, G Herbert Pike and HB Bignold, *Digest of Land Appeal Court Cases 1890 to 1911* (1895-1912), vol (1890-1894), 175

Re Wills-Allen (1894) 4 LCC 250

Ricketson v *Barbour* (1893) AC 194

Te Weehi v *Regional Fisheries Officer* [1986] 1 NZLR 680

Tearle v *Edwards* (1888) 13 AC 183

Terry v *Wilson* (1849) 1 Legge 522

The King v *Kidman* (1915) 20 CLR 425

The King v *Steel* (1834) 1 Legge 65

The Odessa [1916] 1 AC 145

Thomas v *Pritchard* [1903] 1 KB 209

Thompson v *Randwick Corporation* (1950) 81 CLR 87

Tindal v *Cameron* (1910) 4 CLLR 171

Tindal v *Lollback* (1918) 28 LCC 5

Trinidad Asphalt Co v *Ambard* [1899] AC 594

Turner v *Walsh* (1881) 6 AC 636

Uren v *John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118

US v *Santa Fe Pacific Railway Co* 314 US 339 (1941)

Van Son v *Forestry Commission (NSW)* (1995) 86 LGERA 108

Wade v *NSW Rutile Mining Co Pty Ltd* (1969) 121 CLR 177

Walden v *Hensler* (1987) 163 CLR 561

Walsh v *Minister for Lands (NSW)* (1960) 103 CLR 240

Walsingham's Case (1579) 2 Plowd 547

Wandarang Peoples v *Northern Territory* (2000) 177 ALR 512.

Wandsworth Board of Works v *United Telephone Co* (1884) 13 QBD 904

Ward v *Western Australia* (1995) 40 ALD 250

Ward v *Western Australia* (1998) 159 ALR 483

Watson's Bay and South Shore Ferry Co v *Whitfield* (1919) 27 CLR 268

Western Australia v *Commonwealth (Native Title Act Case)* (1995) 183 CLR 373

Western Australia v *Ward* (2000) 170 ALR 159

Westover v *Perkins* (1859) 2 E & E 57

Wheeler v *Kelly* (1956) 94 CLR 206

Wi Parata v *Bishop of Wellington* (1877) 3 NZ(Jur)NS 72

Wik Peoples v *Queensland* (1996) 134 ALR 637

Wik Peoples v *Queensland* (1996) 187 CLR 1

Wildash v *Brosnan* (1870) 1 CLLR 17

Wilkes v *Johnsen* (1999) 21 WAR 269

Williams v *A-G NSW* (1913) 16 CLR 404

Williams v *A-G NSW* (1915) 19 CLR 343, [1915] AC 573

Williams v *Booth* (1910) 10 CLR 341

Williamson v *Wootton* (1855) 3 Drew 210, 61 ER 883

Witrong v *Blany* (1674) 3 Keb 401

Woolley v *A-G Victoria* (1877) 2 App Cas 163

Yandama Pastoral Co v *Mundi Mundi Pastoral Co Ltd* (1925) 36 CLR 340

Yanner v *Eaton* (1999) 166 ALR 258

Yarmirr v *Northern Territory (Croker Island)* (1998) 156 ALR 370

Yorta Yorta Aboriginal Community v *Victoria* [2001] FCA 45

Table of Statutes

Native Title Act 1993

Native Title Amendment Act 1998

Norfolk Island Act 1979

Northern Territory (Self-Government) Act 1978

Racial Discrimination Act 1975

Seas and Submerged Lands Act 1973

Australian Capital Territory

Lakes Act 1976

Land (Planning and Environment) Act 1991

New South Wales

Aboriginal Land Rights Act 1983

Act of 1833, 4 Wm IV, No 10

Act of 1834, 5 Wm IV, No 12

Act of 1838, 2 Vict, No 19

Act of 1839, 2 Vict, No 27

Act of 1841, 5 Vict, No 1

Administration of Estates Act 1954

Closer Settlement Act 1904

Common Law Procedure Act 1899

Crimes Act 1900

Criminal Law Amendment Act 1883

Crown Lands Act 1884

Crown Lands Act 1889

Crown Lands Act 1891

Crown Lands Act 1894

Crown Lands Act 1989

Crown Lands Alienation Act 1861

Crown Lands (Amendment) Act 1912

Crown Lands (Amendment) Act 1932

Crown Lands (Amendment) Act 1964

Crown Lands Acts Amendment Act 1875

Crown Lands Consolidation Act 1913

Crown Lands (Continued Tenures) Act 1989

Crown Lands Occupation Act 1861

Crown Lands Regulations

Electricity Supply Act 1995

Fire Brigades Act 1989

Fisheries Management Act 1994

Forestry Act 1916

Government Railways Act 1912

Hay Irrigation Act 1902

Higher Education (Amalgamation) Act 1989

Housing Act 1912

Housing Act 1976

Imperial Acts Application Act 1969

Land Acquisition (Just Terms Compensation) Act 1991

Limitation Act 1969

Local Government Act 1993

Maritime Services Act 1935

Milk Act 1913

Mining Act 1992

Occupation of Crown Lands Act 1836

Pastures Protection Act 1934

Petroleum (Onshore) Act 1991

Prickly-pear Act 1924

Public Hospitals Act 1929

Reclamation Act 1930

Roads Act 1993

Statutory and Other Offices Remuneration Act 1975

Supreme Court Act 1970

Sydney Harbour Foreshore Authority Act 1998

Sydney Harbour Trust Act 1900

Water Management Act 2000

Wentworth Irrigation Act 1890

Western Lands Act 1901

Western Lands (Amendment) Act 1989

Western Lands (Crown Lands) Amendment Act 1989

Wills, Probate and Administration Act 1898

Northern Territory

Crown Lands Act

Crown Lands Act 1931

Mining Act

Pastoral Land Act

Petroleum Act

Water Act

Queensland

Queensland Statutes, 1828-1962 (1967) vol 9

Aboriginal Land Act 1991

Coal Mining Act 1925

Constitution Act 1867

Crown Lands Act 1884

Crown Lands Alienation Act 1876

Fauna Act 1974

Forestry Act 1959

Gold Fields Act 1874

Land Act 1910

Land Act 1962

Land Act 1994

Limitation of Actions Act 1974

Mineral Lands Act 1882

Mineral Resources Act 1989

Mining Act 1898

Mining Act 1968

Mining Act Amendment Act 1976

Mining Act Amendment Act 1976 (No 3)

Mining on Private Land Act 1909

Petroleum Act 1923

Queensland Coast Islands Act 1879

Vegetation Management Act 1999

Water Resources Act 1989

South Australia

Aboriginal Land Trusts Act 1966

Crown Lands Act 1929

Maralinga Tjarutja Land Rights Act 1984

Mining Act 1971

Native Title (South Australia) Act 1994

Native Title (South Australia) (Validation and Confirmation) Amendment Act 2000

Pastoral Act 1936

Pastoral Land Management and Conservation Act 1989

Petroleum Act 2000

Pitjantjatjara Land Rights Act 1981

Water Resources Act 1997

Tasmania

Crown Lands Act 1935

Crown Lands Act 1976

Forestry Act 1920

Groundwater Act 1985

Limitation Act 1974

Mineral Resources Development Act 1995

Mining (Amendment) Act 1911

Water Act 1957

Water Management Act 1999

Victoria

Aboriginal Land (Manatunga Land) Act 1992

Aboriginal Lands Act 1991

Crown Lands (Reserves) Act 1978

Forestry Rights Act 1996

Forests Act 1958

Land Act 1958

Limitation of Actions Act 1958

Mineral Resources Development Act 1990

Petroleum Act 1958

Water Act 1989

Water Industry Act 1994

Western Australia

Land Act 1933

Land Administration Act 1997

Land (Titles and Traditional Usage) Act 1993

Limitation Act 1935

Mining Act 1904

Mining Act 1978

Petroleum Act 1967

Rights in Water and Irrigation Act 1914

Canada

Constitution Act 1982

United Kingdom

Act of Settlement 1700, 12 & 13 Will III, c 2

Administration of Estates Act 1925, 15 Geo V, c 23

Australian Constitution Act 1842, 5 & 6 Vict, c 76

Australian Constitutions Act 1850, 13 & 14 Vict, c 59

Australian Courts Act 1828, 9 Geo IV, c 83

Bankruptcy Act 1914, 4 & 5 Geo V, c 59

Bill of Rights 1688, 1 Will & Mar, sess 2, c 2

Charter of Justice Act 1823, 4 Geo IV, c 96

Companies Act 1948, 11 & 12 Geo VI, c 38

Corruption of Blood Act 1814, 54 Geo III, cc 145 and 146

Crown and Parliament Recognition Act 1689, 2 Will & Mar, c 1

Crown Estate Act 1961, 9 & 10 Eliz II, c 55

Crown Suits Act 1769, 9 Geo III, c 16

Forfeiture Act 1870, 33 & 34 Vict, c 23

Land Registration Act 1925, 15 & 16 Geo V, c 21

Law of Property Act 1922, 12 & 13 Geo V, c 16

Magna Carta 1297, 25 Edw I, cc 1-7

New South Wales Constitution Act 1855, 18 & 19 Vict, c 54

Petition of Right 1627, 3 Car I, c 1

Prerogativa Regis, 17 Edw II, cc 13 and 17

Quia Emptores 1290, 18 Edw I, cc 1 and 2

Sale of Waste Lands Act 1842, 5 & 6 Vict, c 36

Sale of Waste Lands Act 1846, 9 & 10 Vict, c 104

Statute of Gloucester 1278, 6 Edw I, c 4

Statute of Westminster II 1285, 13 Edw I, c 21

Tenures Abolition Act 1660, 12 Car II, c 24

Wills Act 1540, 32 Hen VIII, c 1

United States

Constitution of the United States of America

Roman Legal Sources

Justinianic
Institutiones

Inst 1.13.1

Inst 1.23pr

Inst 2.1.1

Inst 3.27

Inst 4.5.1, 2

Digesta

D 1.8.2 (Marcianus 3 *institutionum*)

D 3.3.55 (Ulpian 65 *ad edictum*)

Magna utilitas absentium D 3.5.1 (Ulpian 10 *ad edictum*)

D 9.2.30.3 (Paul 22 *ad edictum*)

D 44.7.5pr (Gaius 3 *aureorum*)

D 44.7.5.5 (Gaius 3 *aureorum*)

Non-Justinianic

Gaius, Institutiones

Gaius 2.11

Gaius 2.64

Gaius 2.80-.86

Gaius 4.84-.86

Chapter 1

INTRODUCTION

The theoretical lexicon of property identifies three types: private, common and public. A review of the literature of property theory, however, reveals that while there is a great deal written about the former two types, there is very little about the latter.[1] Indeed, at first glance, one might conclude that there are very few real-world examples of public property. Nothing could be further from the truth. The reality is that while examples of that type abound, theoretical analysis does not. In the literature there is a paucity of analysis of both public property and of the available examples of it.

The paucity of analysis is not surprising. The recent implosion of the communist systems of Eastern Europe, which were structured around systems of public property such as that found in the Soviet Union, has diminished the interest amongst theorists in that type of property. With the emergence of market economies and privatisation in the former Eastern Bloc has come an increased and renewed theoretical and practical interest in the nature and

---

[1]Kevin Gray and Susan Francis Gray, 'Private Property and Public Property' in Janet McLean, ed, *Property and the Constitution* (1999) 11-39, 18 and generally. See also Simon Evans, 'From Private Property to Public Law' (2000) 28 *Federal Law Review* 155, 156-9.

operation of ownership and private property.[2] Nonetheless, these shifts notwithstanding, and while few would recognise it, public property is alive and well in the common law world. Indeed, examples abound. Even in the United States, the largest and most renowned free-market private property-driven society in the world, paradoxically, a vast system of public property operates in the form of public land held under the 'public trust doctrine'.[3]

This thesis is a study of Crown[4] land in Australia, a significant, but forgotten example

---

[2]Bruce H Ziff, *Principles of Property Law* (3rd ed, 2000), 11 and 16; Evgueny A Sukhanov, 'The Right of Ownership in the Contemporary Civil Law of Russia' (1999) 44 *McGill Law Journal* 301.

[3]The origins of the public trust doctrine lie in both Roman and English law. The former had its *publicus*, while the latter recognised a public right of access to all navigable waters for the purposes of fishing and navigation, of which the Sovereign had the duty to manage all navigable waters to uphold this right: *Gann* v *Free Fishers of Whitstable* (1865) 11 HL Cas 192. The US courts, beginning with the Supreme Court in 1892, have clearly stated the government's trust duty in relation to public land to preserve public access to waters and lands: *Illinois Central Railway Co* v *Illinois*, 146 US 387 (1892); *Gould* v *Greylock Reservation Commission*, 215 NE 2d 114 (1966); *Sierra Club* v *Department of Interior*, 376 F Supp 90 (1974); *Sierra Club* v *Department of Interior*, 398 F Supp 284 (1975). Several US States have also incorporated the doctrine into statutory constitutions: for a list see Joseph F Dimento, 'Citizen Environmental Legislation in the States: An Overview' (1976) 53 *Journal of Urban Law* 413. Joseph Sax, 'The Public Trust Doctrine in Natural Resources Law' (1970) 68 *Michigan Law Review* 471, 484-5, summarises the interest encapsulated by the public trust doctrine as meaning that '[w]hen a state holds a resource which is available for the free use of the general public, a court will look with considerable scepticism upon any government conduct which is calculated either to reallocate that resource to more restricted uses or to subject public uses to the self-interest of private parties'. The presumption is particularly applicable when it is an administrative official, rather than a legislature, who is attempting to dispose of an interest in public lands or waters: Stewart Elgie, 'Protected Spaces and Endangered Species' in Elaine L Hughes, Alistair R Lucas, and William A Tilleman, eds, *Environmental Law and Policy* (2nd ed, 1998) 437-85, 456.

[4]'Crown' refers to the reigning King or Queen in the capacity of Sovereign, and which signifies the entire administrative edifice of executive government thereunder. In the Australian federal system, while the Crown acts 'in right of' the Commonwealth, and each of the States and Territories, it has only one indivisible existence: Peter E Nygh and Peter Butt, *Butterworths Concise Australian Legal Dictionary* (2nd ed, 1998), 'Crown' (1); Peter Hanks, *Constitutional Law in Australia* (2nd ed, 1996), 158-61. In this thesis, unless otherwise specified, 'Crown' refers to the entire administrative edifice of government acting under the Crown in right of each of the States and Territories.

In this thesis, 'Commonwealth' refers to the Commonwealth of Australia, which is not

of public property. This public property system, seemingly well-known to Australians, is largely forgotten by the legal literature as a subject of theoretical analysis. This thesis seeks to fill this literature gap. This introduction explains how it does so.

Before turning to the objectives of this introduction, however, it is necessary to clarify a matter of terminological usage. This thesis uses the phrase 'Crown land' in a special sense to refer to the totality of the public property system which is analysed and defined herein. In this thesis, Crown land can be taken to mean, or be synonymous with, public property. This special usage is to be distinguished from the more common lay or legal use of 'Crown land' or 'Crown lands', which refers only to one sort of land over which the Crown enjoys public property. In order to clarify this distinction, Chapter 6 defines the lands which are referred to by the lay or legal usage and gives them their own term: 'waste and demesne lands'.

Having explained the use of the term Crown land, this introduction has five objectives. First, to identify, in outline only, the primary differences between private, common and public property. Second, to demonstrate that the lack of analysis of the Crown's relationship to

---

only the form of government, essentially federal in character, established for Australia in 1901 by the creation of the Commonwealth of Australia Constitution Act, but also the body in which the legislative power of the Commonwealth of Australia is vested, consisting of the Queen, the Senate, and the House of Representatives: Commonwealth of Australia Constitution Act, ss 1 and 6. 'State' or 'States' refers to one of the six original States (New South Wales, Queensland, South Australia, Tasmania, Victoria and Western Australia) which are constituent elements of the Australian federal democracy and which share political and legal authority with the Commonwealth and have a substantial degree of political and legal autonomy in relation to the federal institutions of government. The executive government of each State is vested in a Governor as the representative of the Crown, an Executive Council, and Ministers of the Crown appointed by the Governor. The legislative powers of the State parliaments are derived from their own Constitution Acts as reinforced by the Commonwealth of Australia Constitution Act. 'Territory' or 'Territories' refers to an area within the Commonwealth of Australia that is not under the control of the States over which the Commonwealth has power. These definitions are taken from Peter E Nygh and Peter Butt, eds, *Butterworths Concise Australian Legal Dictionary* (2nd ed, 1998), 'Commonwealth of Australia', 'Commonwealth Parliament', 'State', and 'Territory'.

Crown land represents a significant gap in the literature of Australian real property law. Third, to describe the cure prescribed by this thesis to address the lack of analysis. Fourth, to outline the key elements of the analysis the thesis offers. Finally, to explain what the thesis does not do.

I. PRIVATE, COMMON AND PUBLIC PROPERTY IN AUSTRALIAN REAL PROPERTY LAW

A. Private and Common Property

'Private property' defies easy definition; at best it encompasses a virtually impenetrable thicket of contrasting views, arguments, and notions about its core attributes. This ongoing debate is briefly touched upon in Part One of the thesis, but the core attributes of private property can be very summarily sketched here. The most common view of private property sees it as a group or bundle of rights between persons in relation to things, such as land, while it is less commonly seen as the things themselves. The primary rights found in the bundle relate to the use and transferability of use-rights over the thing, and to the exclusion of others from the enjoyment of those rights. While the debate about these attributes is deep and complex, one thing is certain: whatever rights which private property might comprise are limited to those which are exercisable by private legal persons, either as individuals or as a group.[5] In Anglo-Australian real property law, for example, the best-known example of private property in land is the fee simple estate. In its modern incarnation, the fee simple comprises the greatest possible accumulation of rights in relation to land that a private legal person or group of them can hold.[6]

In contrast to private property one finds that common property--which may also be

---

[5]See Ziff, above n 2, 2-6.

[6]Ziff, above n 2, 154-6.

called communal, collective[7] or communitarian[8] property--refers to interests for which there is a shared right of use conferred on all members of a given society.[9] The literature typically uses this concept in relation to land and refers to it as the 'commons'[10]--a scheme of universally distributed, all-encompassing privilege which is the opposite of property.[11] While private property *prima facie* confers upon its holder a right to exclude others from access to or the use of a thing, common property does not. It might even be said that in its purest form common property is the right not to be excluded. As such, at the end of the day, common property may simply be no property at all.[12] As with private property, examples of common property are readily available, the most obvious being air, light and water.[13]

Australian real property law is full of examples of private and common property and its literature is equally full of theoretical analysis of those examples. Indeed, in coming to Australian real property law for the first time, one could be forgiven for concluding that private property, and to a lesser extent, common property, are the only types available in relation to Australian land. The literature is overwhelmingly concerned with the estates of

---

[7]See Ziff, above n 2, 7.

[8]See JW Harris, *Property and Justice* (1996), 102-4 and 115-8.

[9]See Michael A Heller, 'The Boundaries of Private Property' (1999) 108 *The Yale Law Journal* 1163; Michael A Heller, 'The Tragedy of the Anticommons: Property in the Transition from Marx to Markets' (1998) 111 *Harvard Law Review* 621, 622-5.

[10]See Garrett Hardin, 'The Tragedy of the Commons' (1968) 162 *Science* 1243.

[11]Frank I Michelman, 'Ethics, Economics, and the Law of Property' in J Rowland Pennock and John W Chapman, eds, *NOMOS XXIV: Ethics, Economics, and the Law* (1982) 3-40, 9.

[12]Harris, above n 8, 110.

[13]William Blackstone, *Commentaries on the Laws of England* (1765-9, University of Chicago edition, 1979), vol 2, 14. See also *Colls* v *Home and Colonial Stores Limited* [1904] AC 179, 182-3 (Earl of Halsbury LC).

freehold--the fee simple, the leasehold and the life estate. A great deal has been written, and is therefore known, about the relationship between the holder of such estates and the lands subject to them.[14] Similarly, a wealth of material has been written about Australian common law native title and its role in Australian real property law.[15] While native title is not strictly speaking common property, it is usually referred to as if it were; while this thesis will demonstrate that it is not a true form of common property, the fact remains that there is no lack of analysis of this unique form of property. Nonetheless, having accounted for both private and common property does not accurately portray the totality of Australian real property law.

---

[14]The two major Australian textbooks on the subject devote most of their content to the Anglo-Australian estates and interests in land: Adrian J Bradbrook, Susan V MacCallum and Anthony P Moore, *Australian Real Property Law* (2nd ed, 1997) devote 794 of 847 pages to these tenures, and Peter Butt, *Land Law* (3rd ed, 1996) 838 of 919 pages.

Peter Butt, *Land Law* (4th ed, 2001) became available one week before the submission of this thesis. While some account has been taken of the fourth edition, most references to this work are still to the third edition. The fourth edition devotes 753 of 863 pages to the estates and interests in land.

[15]Richard H Bartlett, *Native Title in Australia* (2000) (585 pages in length). See also eg Pamella O'Connor, 'Aboriginal Land Rights at Common Law: *Mabo* v *Queensland*' (1993) 18 *Monash Law Review* 251; Barbara Hocking, 'Aboriginal Law Does Now Run in Australia: Reflections on the *Mabo* case: from *Cooper v Stuart* through *Milirrpum* to *Mabo*' (1993) 15 *Sydney Law Review* 187; Greg McIntyre, 'Aboriginal Title: Equal Rights and Racial Discrimination' (1993) 16 *University of New South Wales Law Journal* 57; Michael Detmold, 'Law and Difference: Reflections on Mabo's Case' (1993) 15 *Sydney Law Review* 159; H Reynolds, 'The *Mabo* Judgment in the Light of Imperial Land Policy' (1993) 16 *University of New South Wales Law Journal* 27; Richard Bartlett, 'Political and Legislative Responses to Mabo' (1993) 23 *University of Western Australia Law Review* 352; Richard Bartlett, 'Native Title: From Pragmatism to Equality Before the Law' (1995) 20 *Melbourne University Law Review* 282; David Ritter, 'The 'Rejection of *Terra Nullius*' in *Mabo*: A Critical Analysis' (1996) 18 *Sydney Law Review* 5; Lee Godden, '*Wik*: Feudalism, Capitalism and the State. A Revision of Land Law in Australia?' (1997) 5 *Australian Property Law Journal* 162; Nehal Bhuta, '*Mabo*, *Wik* and the Art of Paradigm Management' (1998) 22 *Melbourne University Law Review* 24.

B. Public Property

'Public property', by contrast with private and common property, confers on the State or its public bodies, and not on private legal persons or groups of them, whatever rights it contains. Those rights may be as full as those conferred on the holder of private property--such as the fee simple--or they may be much less than those conferred upon private persons. In either case, there is one significant difference between private and public property: the way in which the state may dispose of whatever it holds is generally predicated on an assessment of collective interest or the public good. In other words, the obligations of good governance affect the way that the property is used.[16] Public property is, therefore, subject to state control and is burdened with public obligations; private property holders are not constrained in the same way.[17]

II. CROWN LAND IN AUSTRALIA: THE DIAGNOSIS

A. The Lack of Theoretical Analysis: The Literature Gap

Given the literature saturation by the dominant examples of private and common property, one might be surprised to find that the bulk of the total land area of Australia is Crown land in the lay or legal sense.[18] It is easy enough to find; the States and Territories,

---

[16]This is sometimes called 'political sovereignty', which describes the relationship that the state has with its citizenry, and which is mediated by the common good: see PG McHugh, 'Constitutional Theory and Māori Claims' in IH Kawharu, ed, *Waitangi: Māori & Pākehā Perspectives of the Treaty of* Waitangi (1989) 25-63, 33-7.

[17]Ziff, above n 2, 7. See also Jeremy Waldron, *The Right to Private Property* (1988), 40.

[18]Bartlett, *Native Title in Australia*, above n 15, 174. Carmel MacDonald, Les McCrimmon and Anne Wallace, *Real Property Law in Queensland* (1998), 33 and 36, note that in 1992, approximately 20 per cent of Queensland was held in fee simple or pursuant to a lease from the Crown which enabled the lessee to obtain a freehold tenure of the land. About 70 per cent was leased by the Crown to companies or individuals and the remaining 10 per cent was roads, reserves, or otherwise unallocated and vacant land. Adding the latter two figures together, 80 per cent of Queensland is public property. With the exception of

for example, retain the control over access to and exploitation of vast tracts of natural resource-rich waste and demesne lands, which are but one type of Crown land.[19] This control power constitutes an extensive power to use land as an instrument of national and social policy, and thereby control access to and the use and development of most Australian land.[20]

The Crown's control power over the use and development of land has a significant impact upon Australia's economy and culture. The pastoral industry, for example--a significant sector of the Australian economy--requires vast quantities of land for the depasturing of livestock.[21] Because the available freehold land is insufficient for this purpose, pastoralists depend to a large degree upon access to Crown land. Mineral and petroleum exploration is also of great importance to the Australian economy and much of this occurs on some form of Crown land. Culturally, many of the outdoor activities that Australians pursue take place on Crown land. But perhaps most importantly, common law native title,[22] an

---

Victoria, similar percentages pertain in the other States and Territories: Bartlett, *Native Title in Australia*, above n 15, 50.

[19]See Thomas Penberthy Fry, *Freehold and Leasehold Tenancies of Queensland Land* (1946), 34-7; Thomas Penberthy Fry, 'Land Tenures in Australian Law' (1947) 3 *Res Judicatae* 158, 167; Bartlett, *Native Title in Australia*, above n 15, 274; MacDonald, McCrimmon and Wallace, above n 18, 36.

[20]Fry, 'Land Tenures in Australian Law', above n 19, 167. See also Queensland Government, The Land Settlement Advisory Commission, *Report on Progressive Land Settlement in Queensland* (1959), 16, and Department of Lands, Queensland Government, White Paper, *Crown Land Management Reform in Queensland* (December 1992), 31, cited in MacDonald, McCrimmon and Wallace, above n 18, 36-7.

[21]Bartlett, *Native Title in Australia*, above n 15, 274; MacDonald, McCrimmon and Wallace, above n 18, 36. And see CD Field, *Landholding and the Relation of Landlord and Tenant in Various Countries* (1885), 384; JM Powell, *The Public Lands of Australia Felix: Settlement and Land Appraisal in Victoria 1834-91 with Special Reference to the Western Plains* (1970), 3-31; Stephen H Roberts, *History of Australian Land Settlement 1788-1920* (1968) generally.

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

integral part of the spiritual and cultural life of Australia's Aboriginal peoples,[23] cannot exist but on Crown land.

Crown land and its control clearly constitutes an important segment of Australia's land resource, and as such comprises a fundamental component of the law of real property. Nonetheless, while its practical and legal importance cannot be gainsaid, one searches the Australian literature in vain for any theoretical analysis of the relationship between the State and Territory Crowns and Crown land. In comparison with the wealth of analysis concerning both the relationship of estate holder to estate and Aboriginal to native title, analysis of the underlying relationship between the Crown and Crown land is virtually non-existent. A review of the literature leads one to conclude that in many areas, of which Crown land is but one, '[t]he fact, as well as the importance of the Crown both legally and politically, tends to be obscured and...the influence of the Sovereign upon public affairs...frequently overlooked.'[24]

Indeed, even from a constitutional, political, or historical[25] perspective, very little is written

---

[23]One ought to use caution in the use of the nouns 'Aborigine(s)' or 'Aboriginal(s)'. Either of these nouns refer to the indigenous group of any country and can detract from the named identity of the Aboriginal and Torres Strait Islanders of Australia. There are in fact general names for all Aboriginal people in Australia, which differ in different regions--for example the term 'Koori' is used by the people in Victoria, Tasmania, New South Wales and Southern Queensland to refer to 'Aborigines' in general. 'Nyungga' is used by the people in South Australia. Hence, there is no clear consensus on the proper form of the noun. The Australian Institute of Aboriginal and Torres Strait Islander Studies prefers 'Aborigine(s)' (and the more formal 'Aborigines and Torres Strait Islanders') while others, including most Aboriginal communities, prefer 'Aboriginal(s)'. For these reasons, Bradbrook, MacCallum, and Moore, above n 14, 7-1, n 1, use the term 'Aborigine(s)'. Nicholas Hudson, *Modern Australian Usage* (1993), 5, 'Aborigines, Aboriginals' (and see 217-8, 'Koori', and 402-4, 'Taboo words'), however, points out that because there is no consensus about the proper noun form, neither is likely to cause any offence. For consistency's sake, this thesis follows Hudson and uses 'Aboriginal(s)' or 'Aboriginal people(s)'.

[24]W Anstey Wynes, *Legislative, Executive and Judicial Powers in Australia* (5th ed, 1976), 383, citing Dr HV Evatt, then Leader of the Opposition, House of Representatives, 25 March 1953, Parl Deb 1501.

[25]Although, see Field, above n 21; Powell, above n 21; Roberts, above n 21.

about the rights of the State and Territory Crowns in relation to Crown land.[26]

Equally unhelpful is the English real property law literature. During the colonisation of Australia, differences in climate and soil limited the applicability of the English law of real property to the new territory.[27] Even had that not been the case, there was and is no theoretical analysis of Crown land in the English literature for the simple reason that it comprised and comprises very little of all English or Welsh land.[28] Virtually all English land was and is held of the Crown pursuant to some freehold estate.[29] Today, even when the English Crown occasionally grants land to private individuals or corporations, such grants rarely concern Parliament in the same way as they do the Australian State and Territory parliaments. Simply, the need to 'settle people on the land' pressed and presses on Australian legislators in ways never known in England.[30] Indeed, the political, social, and economic considerations surrounding the distribution of land in Australia have concerned colonial

---

[26]George Winterton, *Parliament, the Executive and the Governor-General: A Constitutional Analysis* (1983), 48-9 and 111, hardly mentions the proprietary prerogatives.

[27]Alex C Castles, *An Australian Legal History* (1982), 456-7.

[28]BA Helmore, *The Law of Real Property in New South Wales* (2nd ed, 1966), 525. But see the Crown Estate Act 1961 (Eng) and generally Kent McNeil, *Common Law Aboriginal Title* (1989), 79-107. For a review of the very small corpus of Crown land that still remains in England and Wales, see *Halsbury's Laws of England* (4th ed reissue, 1998), Volume 12(1), 'Crown Property', paras 278-299 and 364-367. And Crown land was not completely unknown, nor unimportant, in medieval England: see David Lindsay Keir, *The Constitutional History of Modern Britain 1485-1951* (5th ed, revised, 1955), 10-1, 146, 190, 223 and 248.

[29]Frederick Pollock and FW Maitland said 'there is no land without a freeholder': *History of English Law before the Time of Edward I* (SFC Milsom, 2nd ed, 1968), vol 1, 239.

[30]Helmore, above n 28, 525. See also Andrew G Lang, *Crown Land in New South Wales: The principles and practice relating to the disposal of and dealings with Crown land pursuant to the Crown Lands Consolidation Act, 1913; Western Lands Act, 1968; Returned Soldiers Settlement Act, 1916; War Service Land Settlement Act, 1914; Closer Settlement Acts & related legislation* (1973), 12-4.

administrators, legislatures, and parliaments almost since the First Fleet landed in Sydney Cove in February 1788.

While the Australian and English literature therefore offers little assistance in coming to theoretical grips with the relationship between the State and Territory Crowns and Crown land, two works do, however, tackle this issue from a legal perspective.[31] These works take a practical rather than a theoretical focus, looking at the tenures, estates, and interests which the Crown may use as vehicles to allow access to or exploitation of Crown land and the relationship between the tenure-holders, the tenures and the relevant lands. The first of these works, TP Fry's *Freehold and Leasehold Tenancies of Queensland Land*, was published in 1946 by the University of Queensland Press. Although it was recently cited by the High Court in one of its native title decisions, *Wik Peoples* v *Queensland*,[32] Fry's work never gained wide use. In any event, it failed directly to analyse the relationship of the Crown to Crown land; Fry himself said:

> In Queensland, as in the rest of Australia, we are in the middle of a period in which the complexity and multiplicity of the law of Crown tenures beggars comparison unless we go back to the early medieval period of English Land Law....Indeed, the history of the Land Law of Australia, and even of Queensland, is a field which has never been adequately prospected by any legal historian, and a great reward of gratitude awaits him who ultimately reveals the rich veins of social policy that have run through the reefs of Australian land legislation.[33]

While Fry refers to the lack of historical analysis, his book itself failed not only to fill that gap,

---

[31]Christopher Boge, *State Leasehold in Queensland* (2000), devotes two chapters to an analysis of the Land Act 1994 (Qld) and the powers of the Crown to grant statutory leases. His study is limited, however, to this narrow aspect of Crown land and offers no analysis of the Crown's relationship to such land.

[32]*Wik Peoples* v *Queensland* (1996) 187 CLR 1 ('*Wik*'), 108-12 (Toohey J), 140 and 153 (Gaudron J), 175 and 201 (Gummow J), 205, 206, 220, 223, 226, 228, 243-4 and 250 (Kirby J). These citations also refer to Fry, 'Land Tenures in Australian Law', above n 19.

[33]Fry, *Freehold and Leasehold Tenancies of Queensland Land*, above n 19, 29.

but also the one in relation to theoretical analysis. And no one seems ever to have heeded Fry's admonition in any serious sense, either in relation to history[34] or theory.

The second study, Andrew Lang's *Crown Land in New South Wales*, published in 1973 by Butterworths, was, by his own admission, written for practitioners and as such, its focus was heavily procedural. In his preface, Lang said:

> [t]he lack of modern treatment, coupled with frequent and complex legislative changes, endowed this topic with an aura of mystery. One of the purposes of this work is to dispel this mystery, to re-examine the extensive caselaw contained in decisions of the Land Appeal Court, Land and Valuation Court and the higher appellate Courts and to elucidate the principles and practice pursuant to the statutes dealing with the disposal of Crown land.[35]

Neither Fry nor Lang offer an analysis of Crown land; as such, there remains a gap in the Australian literature of real property law. This long-standing gap creates the potential for significant confusion when the courts are faced with problems that require an understanding of the Crown's relationship to Crown land. Examples of judicial confusion and uncertainty demonstrate the need for theoretical analysis. The High Court's development of the concept of native title provides one such example.

B. The High Court and Native Title

The difficulties created by the lack of a theoretical analysis of the Crown's relationship to Crown land can be demonstrated using the High Court's development of common law native title jurisprudence. In *Yanner* v *Eaton*,[36] for example, the High Court was asked to decide whether the legislative vesting of the Queensland Crown with property in estuarine

---

[34]With the possible exception of Castles, above n 27, 456-65.

[35]Lang, above n 30, ix.

[36]*Yanner* v *Eaton* (1999) 166 ALR 258 ('*Yanner*').

crocodiles[37]--chattels--was inconsistent with a claimed native title right to hunt such crocodiles. The majority considered what legislative property in crocodiles might mean and decided that whatever it meant, it was not the same as the property which a private person might have in relation to wild animals.[38] They did not venture as far as to say what it might be. The minority, however, reached the surprising conclusion that the property enjoyed by the Crown was the same as that enjoyed by the private person.[39] Neither group considered whether the Crown might have public property in relation to crocodiles and, if it did, what that might mean nor what its content might be. Such confusion and uncertainty demonstrates the necessity of a fully developed and sufficiently nuanced theory of property when analysing the Crown's relationship to a particular resource, in this case wild animals. Any such theory of property must also distinguish between private and public types.

While confusion and uncertainty about the nature of the Crown's property in chattels demonstrates the need for a fully developed and nuanced theory of property, this thesis is concerned with land. There the confusion and uncertainty is no less acute. Indeed, it is much more evident and dramatic. In developing the concept of native title, the High Court has repeatedly stated that Crown land--in the lay or legal sense--is the only land over which native title may exist. It has also concluded that the Crown does not have a proprietary relationship, of any type, to Crown land. The Court has come to such conclusions while making little, if any, effort to analyse or explain the nature of the relationship between the Crown and these

---

[37]Fauna Act 1974 (Qld), s 7.

[38]*Yanner* (1999) 166 ALR 258, 264-8 (Gleeson CJ, Gaudron, Kirby and Hayne JJ), 282-7 (Gummow J).

[39]*Yanner* (1999) 166 ALR 258, 271-4 (McHugh J), 297-8 (Callinan J).

lands, whatever they might be.[40] And in no case has it relied upon a coherent theory of property to aid its discussion. Rather, it has focused solely upon the relationship between Aboriginal groups and native title lands. If it were to have used a theory of property in analysing the relationship of Aboriginal groups to native title lands--a theory that identified the distinction between property and ownership and between private and public property--it might have reached the same result--that native title was a part of Australian law--without also concluding that the Crown had no proprietary relationship at all to Crown land.

Therein lies the problem; because the High Court has acted without the aid of a sufficiently nuanced theory of property, especially public property, it has come to the rather surprising conclusion that in recognising native title as a form of property over land, one must reject the proposition that the Crown too enjoys a proprietary relationship to the same land. Instead, the Court has advanced the proposition that the relationship between the Crown and Crown land is political, by which it must have meant constitutional, rather than proprietary. The most obvious example of this 'political' treatment was in the seminal native title case, *Mabo*,[41] in which Brennan J said that:

> ...there are references [in earlier decisions of the High Court] to the importance of the revenue derived from exercise of the [Crown's] power of sale of colonial land. The funds derived from sales of colonial land were applied to defray the cost of carrying on colonial government and to subsidise emigration to the Australian Colonies. Further, the power to reserve and dedicate land for public purposes was important to the government and development of the Colonies as it remains important to government and development of the Commonwealth and the States and Territories. ***Therefore, it is right to describe the powers which the Crown--at first the Imperial Crown and later the Crown in right of the respective Colonies--exercised with respect to colonial lands as powers conferred for the benefit of the nation as a whole, but it does not follow that those were proprietary as distinct from political***

---

[40]*Mabo [No 2]* (1992) 175 CLR 1; *Wik* (1996) 187 CLR 1; *Fejo* v *Northern Territory* (1998) 195 CLR 96.

[41]*Mabo [No 2]* (1992) 175 CLR 1.

powers.[42]

In this passage Brennan J is discussing a rather forgotten and certainly ill-defined power of the Crown known as its prerogative power to deal with or dispose of land. The High Court's view, as exemplified by this passage, and especially the highlighted sentence, is that the prerogative is political or constitutional in nature; therefore, in its view, the relationship of the Crown to Crown land, being founded upon the prerogative, is political or constitutional rather than proprietary.

The difficulty with the High Court's approach centres on its failure to define adequately what is meant by ownership and property; indeed, its interchangeable use of these terms has led it to reject entirely any form of proprietary relationship between the Crown and Crown land. The High Court's approach was insufficiently nuanced to the extent that it failed to recognise that there is a difference between property and absolute ownership, which it treated as one in the same thing. By doing so, it failed to recognise that while the Crown's relationship to Crown land may not be one of absolute ownership--which is very rare if not entirely non-existent in most private property systems anyway--it may nonetheless constitute a form of public property, a type of property capable of accommodating the existence of native title.

This thesis argues that notwithstanding the High Court's conclusion, the Crown does indeed enjoy a proprietary relationship to its lands. In its rush to ensure that the Crown did not have a property which would trump native title, the High Court equated property with absolute ownership, which would, in its view, have allowed no other rights of any kind to co-exist. But even the Romans, upon whom the High Court often relied for its definition of

---

[42]*Mabo [No 2]* (1992) 175 CLR 1, 52 (Brennan J) (emphasis added).

absolute ownership, did not use absolute ownership in such a way as to exclude the possibility of the existence of any other rights over land. Such a view, as has been said, is insufficiently nuanced and does not at all reflect the true state of the relationship of the Crown to Crown land. If we examine both the Crown's prerogative and native title through the prism of a sufficiently sophisticated theory of property, one which recognises the difference between property and absolute ownership, we find that both can be seen as unique types of property--without the need to call either absolute ownership--operating within one property system. The two can co-exist; if one accepts that the prerogative has a proprietary character, albeit one short of absolute ownership, there is no need to deny the possibility that native title may peaceably co-exist alongside the Crown's interest. In other words, it becomes possible to recognise the Crown ***and*** the Aboriginal relationship to Crown land as two elements within the same property system.

What the High Court must have meant, or at least what it ought to have meant, is not that the powers of the prerogative over land do not confer upon the Crown a public property relationship to land--they do--but that they do not confer absolute ownership of those lands. The failure to reach that conclusion comes from confusion about the differing roles of property and ownership, which in turn flows from the lack of theoretical analysis of the Crown's relationship to Crown land.

III. CROWN LAND IN AUSTRALIA: THE CURE

This thesis proposes a radical solution to fill the existing literature gap. It is radical because it argues that what one intuitively thinks of when the phrase 'Crown land' is used is actually closer to the truth than one might think. When one uses the phrase Crown land there is a tacit assumption that the lands to which the speaker is referring belong to the Crown, in the same way that one might say that my lands belong to me or your lands belong to you.

Saying that lands belong to me or you suggests what most people understand such language to mean, that my lands or your lands are owned--no matter what the law says about fees simple--by me or by you. For most people, Crown land carries a similar meaning: land owned by the Crown. There is, therefore, a *prima facie* intuitive understanding of the phrase Crown land, that the phrase involves a notion of ownership.

As we have seen, however, while this intuitive understanding of the Crown's relationship to Crown land may have much to commend itself, and indeed seems defensible given the lay meaning attached to the ownership concept, the High Court of Australia has created considerable uncertainty as to its acceptability in the course of developing the concept of native title. This uncertainty is the product of a failure to comprehend the full implications of the difference between property and ownership. What is necessary, then, is a theory of property and ownership that makes the relationship and the distinction between those two concepts sufficiently clear. That theory can then be used to provide the much needed theoretical analysis of the public property system embodied in Australian Crown land.

The cure proposed by this thesis to fill the gap is to place the royal prerogative over land at the heart of the Crown's relationship to Crown land and to characterise that relationship as one of public property. The prerogative authorises the Crown to control access to and exploitation of Crown land mainly through the ability to confer freehold estates and other lesser tenures such as pastoral leases and mining tenures over it. And while this power of control--or bundle of rights--no doubt derives from constitutional theory and law,[43]

---

[43]William R Anson, *The Law and Custom of the Constitution* (3rd ed, 1907), vol 2, The Crown, Part 1, 1-6; Winterton, above n 26, 48-9 and 111; Wynes, above n 24, 383-409; Peter W Noonan, *The Crown and Constitutional Law in Canada* (1998), 75-7. In relation to the former see Peter Hanks and Deborah Cass, *Australian Constitutional Law: Materials and Commentary* (6th ed, 1999), 50-112, and to the latter, Lang, above n 30, and Fry, *Freehold and Leasehold Tenancies of Queensland Land*, above n 19.

this thesis argues that it also forms the core of a public property system; a property system is that, established either by law or social practice or convention, which performs the dual function of governing the use of a thing and its allocation.[44]

The objective of the thesis, therefore, is to examine the Crown's rights over Crown land, which flow from its prerogative, in order to demonstrate the defensibility of the intuitive understanding of the relationship outlined above. This argument has three integral components. First, the use of a working definition of public property. Second, based upon the definition of public property, an expanded definition of Crown land. Finally, an analysis of the prerogative over land.

IV. A THEORETICAL ANALYSIS OF CROWN LAND I: WHAT THE THESIS DOES

A. Part One: A Working Definition of Public Property

A defence of the intuitive understanding of the Crown's relationship to land requires a working definition of public property, which provides the normative and analytical starting-point for the construction of the public property system embodied by Australian Crown land. The development of such a definition is the objective of Part One of the thesis.

To develop a working definition of public property, one must begin with a working definition of private property. Against a definition of the latter one may contrast and thus define the former. This is no easy task; a working definition of private property, one which demonstrates the difference between ownership and property, has, despite their attempts, eluded lawyers and philosophers throughout the history of theorising about property. This thesis offers no panacea in that regard; it does not claim that the definition of private property used herein is correct for all purposes. Rather, it adopts and adapts JW Harris' theory of

---

[44]Harris, above n 8, 4.

private property in *Property and Justice*[45] in order to provide a useful working definition, one which, most importantly, demonstrates the difference between ownership and property.

Using a modified version of Harris' theory of private property, public property can also be defined. There is substantial continuity between the two types of property: the rights that may be conferred upon the holder of private property may also be conferred upon the holder of public property. Still, the discontinuity between them overshadows this similarity. Whatever else one may say about the similarities between them, private and public property differ because the rights conferred upon the holder of the former *prima facie* confer unfettered self-seekingness in their exercise (the holder may suit oneself) while the holder of the latter does not have that unfettered self-seekingness. Rather, limitations imposed by the obligations of good governance and the common good, or political sovereignty, constrain the ways in which the holder of public property may act.

B. Part Two: An Expanded Definition of Crown Land

Part Two of the thesis applies the working definition of public property to the various manifestations of the Crown's prerogative to deal with or dispose of Crown land. The main thrust of this Part is that the Crown's power over land is not restricted simply to those lands which laypeople and lawyers refer to as Crown land. Rather, a range of different sorts of land, and the rights of the Crown over them, can be plotted along a continuum. The Crown's limited powers in relation to the estates of freehold pursuant to the doctrine of tenure lie at the foot, its much fuller powers to deal with and dispose of land or specific natural resources at or near the head, and the strange hybrid powers which the Crown shares with holders of novel private property tenures found in relation to Australian land, such as the pastoral lease,

---

[45]Harris, above n 8.

somewhere in the middle. The thesis calls this the 'Crown land continuum'.

Part Two also analyses Australian common law native title and plots it along the Crown land continuum. While native title constitutes a form of communitarian property, it nonetheless must be placed upon the continuum because it cannot exist otherwise. It depends for its existence upon the exercise or non-exercise of the Crown's power to extinguish it. This power links the common law construct of native title to Crown land. Thus, while native title, through the common law, confers powers upon Australian Aboriginal peoples which are significant enough to characterise it as a form of communitarian property, the presence of the Crown's power of extinguishment controls its existence and serves to inextricably link it to Crown land. That power necessitates the placement of native title on the continuum.

C. Part Three: The Royal Prerogative to Deal With or Dispose of Land

Part Three of the thesis deals with the instrumental question regarding the source of the Crown's privileges and powers over land: the prerogative to deal with or dispose of land, or simply the prerogative over land. The question is an instrumental one because it is a matter of how, not whether, the Crown acts in relation to land. We know that it can, it is simply a matter of determining and analysing the source and scope of its power to do so. The Part is divided into two chapters, the first analyses the prerogative over land, while the second comprises a case study of its operation in the power to extinguish native title.

V. A THEORETICAL ANALYSIS OF CROWN LAND II: WHAT THE THESIS DOES NOT DO

The great wealth of English and Australian caselaw, legislation and literature dealing with the history and policy of Crown land and native title necessitates seven restrictions upon the scope of this study.

First, Part One, which develops the working definition of public property used in this

thesis, does not deal with three matters. (i) It does not deal with chattels or moveables. And in relation to land, the working definition is concerned with private property only to the extent that it is useful in contrasting and distinguishing public property from it. (ii) It leaves to others the advancement of the debate concerning the normative nature of private property, or its justification or dis-justification from any one theoretical perspective.[46] Rather, drawing upon a number of sources, the theory is built upon stipulative definitions of private property and ownership. While the thesis accepts that there is a necessary debate about private property and ownership,[47] it steers clear of that debate because it is irrelevant to the study. (iii) Rather than ranging widely over the whole of the discourse concerning the relationship between ownership and private property, Part One argues that some form of ownership ***is*** a necessary analytical prerequisite to the existence of any private property system.[48] While it adopts such an approach, the thesis makes no claim to settle the dispute about the location of ownership within the broader institution of private property or society as a whole. What is presented is

---

[46]For some of the alternative perspectives used to justify or dis-justify private property see Harris, above n 8, 165-369; Joshua Getzler, 'Theories of Property and Economic Development' (1996) 26 *Journal of Interdisciplinary History* 639; Richard Schlatter, *Private Property: The History of an Idea* (1951); Richard Pipes, *Property and Freedom* (1999); Harold Demsetz, 'Toward a Theory of Property Rights' (1967) 57 *American Economic Review* 347; Guido Calabresi and A Douglas Mellamed, 'Property Rules, Liability Rules and Inalienability: One View of the Cathedral' (1972) 85 *Harvard Law Review* 1089; Michael J Whincop, 'Conflicts in the Cathedral: Towards a Theory of Property Rights in Private International Law' (2000) 50 *University of Toronto Law Journal* 41; Susan Rose-Ackerman, 'Inalienability and the Theory of Property Rights' (1985) 85 *Columbia Law Review* 931; Hardin, above n 10; C Edwin Baker, 'Property and its Relation to Constitutionally Protected Liberty' (1986) 134 *University of Pennsylvania Law Review* 741, 785-804.

[47]For some of the chief protagonists see AM Honoré, 'Ownership' in *Making Law Bind: Essays Legal and Philosophical* (1987) 161-92; JE Penner, *The Idea of Property in Law* (1997); Waldron, above n 17; Harris, above n 8; David Lametti, 'Property and (Perhaps) Justice. A Review Article of James W. Harris, *Property and Justice* and James E. Penner, *The Idea of Property in Law*' (1998) 43 *McGill Law Journal* 663.

[48]Harris, above n 8, 112 and see 145.

an analytical, but stipulative, account of private property which places ownership at its heart.

The second restriction relates to the wealth of historical and policy literature regarding Australian Crown land: this thesis is not a historical or policy account.[49] To the extent that the thesis uses history or policy, it does so only for the purpose of demonstrating the legal principles involved as they relate to the argument that Crown land is public property.

Third, the study does not consider every State and Territory enactment which deals with Crown land--such a study would take many volumes and be of little help to the present project.[50] Rather, the study focuses only on the legislation in each State and Territory which expressly defines the scope of the Crown's prerogative power over land. The legislation considered in the thesis, dealt with in Part Two, comprises mainly what are known as the 'Crown land statutes' and the 'natural resources statutes.'

That said, the fourth restriction relates to the Crown land and natural resources statutes themselves: this is ***not*** a comprehensive study even of those enactments. Such a study would be difficult to accomplish in one thesis, and unnecessary to the argument.[51] Instead,

---

[49]For that see Field, above n 21; Powell, above n 21; Roberts, above n 21; Castles, above n 27.

[50]In New South Wales alone, the phrase 'Crown land' or 'Crown lands' can be found in such diverse Acts as the Higher Education (Amalgamation) Act 1989 (NSW), the Appropriation (1998-99 Budget Variations) Act 1999 (NSW), the Maritime Services Act 1935 (NSW), and the Statutory and Other Offices Remuneration Act 1975 (NSW). Although not every match is relevant, a search of the Australasian Legal Information Institute Database of New South Wales legislation produces 9128 matching documents.

[51]Nor does it review the vast body of case law dealing with all of the legislation. *The Australian Digest* (3rd ed, 1994, 1995), Title 70 Real Property, Chapter Two Crown Lands, Pt 1 New South Wales, Divn 1 Crown Lands, A. What Are, states that its first and second editions contain copious notes of decisions of the New South Wales Land Appeal and Land and Valuation Courts. *The Australian Digest* omits these notes because those cases carry no ongoing significance as points of principle. This thesis only examines those earlier cases to the extent that they have ongoing relevance to the definition of the main locations along the Crown land continuum.

Nor does the thesis deal with alterations made to the general law position regarding

the thesis selectively employs the Crown land and natural resources statutes in order to develop 'virtual definitions' of the various locations along the Crown land continuum; each definition is representative but not a comprehensive statement of the location it identifies. Each definition provides the contours of its location. Not every piece of legislation nor every provision thereof is necessary to do this. Rather, the virtual definitions draw pertinent examples from the State and Territory legislation.

Fifth, this thesis is not about the means by which the Crown may acquire, and did acquire, legal sovereignty over new territories. Much has been written about that elsewhere.[52] Rather, the thesis assumes that sovereignty over Australia was acquired according to law and focuses instead on the legal system established since that moment. To the extent that the acquisition of sovereignty is touched upon, it relates only to matters concerning the reception of English constitutional and real property law as the law of Australia and the consequences which followed therefrom.

Sixth, because the thesis is not directly about native title, it does not consider the Commonwealth of Australia's Native Title Act 1993 (Cth) nor State and Territory Aboriginal land rights legislation.[53] Such legislation relates mainly to the procedural aspects of establishing a native title claim, to future acts of extinguishment, and to statutorily created

---

Crown land by the Torrens title registration system. These changes relate to title registered in the name of the Crown, which are not the focus of this thesis. For a survey of the issues raised in this regard see *The Australian Digest* (3rd ed, 1994, 1995), Title 70 Real Property, Chapter One General Principles, Part IV Registration.

[52]McNeil, above n 28, 108-33; Paul McHugh, *The Māori Magna Carta: New Zealand Law and the Treaty of Waitangi* (1991), 11-65; Henry Reynolds, *The Law of the Land* (2nd ed, 1992), 7-54; Henry Reynolds, *Dispossession: Black Australians and White Invaders* (1989), 1-95; Heather McRae, Garth Nettheim and Laura Beacroft, *Indigenous Legal Issues* (2nd ed, 1997), 139-57.

[53]For a review of this legislation see H McRae, G Nettheim and L Beacroft, *Aboriginal Legal Issues* (1991), 137-201.

Aboriginal land rights. To the extent that this thesis considers this legislation, it relates only to its interaction with common law native title. The Native Title Act 1993 (Cth), for instance, has little impact upon either the nature of common law native title or the source of the Crown's power to extinguish it; if anything, it clearly confirms that latter power as a component of the prerogative over land. The thesis focuses on the ***concept*** of extinguishment as part of the Crown's prerogative over land and not on any legislative confirmation of that power.

Finally, the thesis is not intended to provide a theory which either justifies or dis-justifies the current Crown land system. Some may see the current system as out of step with a modern democratic nation which may, one day, adopt a republican form of government. Similarly, some may see the current understanding of native title as insufficient to give full recognition to the property--or other resource allocation--systems recognised by Aboriginal peoples prior to English settlement. While republican aspirations and true reconciliation will almost certainly require a re-consideration of the current Crown land system, this thesis is not the place for justification or dis-justification. Before that must come analysis of the current system, which is the primary objective of this thesis.

PART ONE

DEFINING PUBLIC PROPERTY

This thesis argues that the intuitive understanding--the public property view--of the relationship between the Crown and Crown land is defensible. In order to demonstrate the defensibility of this claim it is necessary to examine that relationship through the lens of a working definition of public property. That in turn requires a working definition of private property, against which can be contrasted, and thus constructed, a definition of public property. From the working definitions of private and public property, one can also define communitarian property, also integral to an understanding of Crown land. Each of these working definitions can only be constructed, though, from a coherent theory of property. The theory used in this thesis is JW Harris' *Property and Justice*.[1] Before turning to the structure of Part One, therefore, it is necessary to explain the choice of Harris' theory.

I. PRIVATE PROPERTY: CHOOSING A THEORY

A. The Sophisticated Theories

Despite many historical[2] and contemporary[3] attempts, there remains a lack of

---

[1]JW Harris, *Property and Justice* (1996).

[2]Plato, *The Republic* (trans Desmond Lee, 2nd ed, 1974); Aristotle, *The Politics* (trans TA Sinclair, revised Trevor J Saunders, 1981); Jean-Jacques Rousseau, *A Discourse on*

consensus about what private property means; every attempt has failed to produce a univocal, unitary, independent, inherent, universal, or general meaning.[4] What can be said about the bulk of these attempts, however, is that they are all known as 'sophisticated' theories of private property.

Sophisticated theories posit that private property consists of *in rem* rights between people in relation to things; they reject the lay or intuitive notion that people actually own

---

Inequality (trans Maurice Cranston, 1984); William Blackstone, *Commentaries on the Laws of England* (1765-9, University of Chicago Edition, 1979), vol 2; Jeremy Bentham, *Of Laws in General* (HLA Hart, ed, 1970); John Locke, *Two Treatises of Government* (Peter Laslett, 1988); GWF Hegel, *The Philosophy of Right* (trans TM Knox, 1967).

Continental legal dogmatics have made numerous attempts to promulgate a univocal or unitary meaning, although Roman classical law itself never knew of such a concept: WW Buckland and Arnold D McNair, *Roman Law and Common Law: A Comparison in Outline* (FH Lawson, 2nd ed, 1965), ch III; Peter Birks, 'The Roman Law Concept of Dominium and the Idea of Absolute Ownership' [1985] *Acta Juridica* 1, 2-3; Joshua Getzler, 'Roman Ideas of Landownership' in Susan Bright and John Dewar, eds, *Land Law: Themes and Perspectives* (1998) 81-106, 82-5; J Walter Jones, 'Forms of Ownership' (1947) 22 *Tulane Law Review* 82, 82-5; Boudewijn Bouckaert, 'What is Property?' (1990) 13 *Harvard Journal of Law and Public Policy* 775, 776-7 and 784-9.

[3]See Jeremy Waldron, *The Right to Private Property* (1988); JE Penner, *The Idea of Property in Law* (1997), 1-6; John Christman, *The Myth of Property: Toward an Egalitarian Theory of Ownership* (1994), 15-27; Stephen R Munzer, *A Theory of Property* (1990), 15-36; Thomas C Grey, 'The Disintegration of Property' in J Rowland Pennock and John W Chapman, eds, *NOMOS XXII: Property* (1980) 69-85; Richard A Posner, *Economic Analysis of Law* (4th ed, 1992); Lawrence C Becker, *Property Rights: Philosophic Foundations* (1977); Alan Ryan, *Property and Political Theory* (1984); Margaret Jane Radin, ed, *Reinterpreting Property* (1993); Carol Rose, *Property and Persuasion: Essays on the History, Theory, and Rhetoric of Ownership* (1994); Harris, above n 1.

For a history of the development of the property idea see Richard Schlatter, *Private Property: The History of an Idea* (1951), and more recently, Anthony Parel and Thomas Flanagan, eds, *Theories of Property: Aristotle to the Present* (1979); Kenneth J Vendevelde, 'The New Property of the Nineteenth Century: The Development of the Modern Concept of Property' (1980) 29 *Buffalo Law Review* 325; Joshua Getzler, 'Theories of Property and Economic Development' (1996) 26 *Journal of Interdisciplinary History* 639; Richard Pipes, *Property and Freedom* (1999); Andrew Reeve, 'Convention and Justification: Professor Harris on Property and Justice' (1999) 19 *Oxford Journal of Legal Studies* 323, 323-4.

[4]Harris, above n 1, 6-8 and 12. See also C Edwin Baker, 'Property and its Relation to Constitutionally Protected Liberty' (1986) 134 *University of Pennsylvania Law Review* 741, 773-4.

things, or that things themselves can be property. Rights *in rem*---to be distinguished from rights *in personam*[5]--are exigible against a thing; they are defined by reference to the existence and location of a thing,[6] and are capable of extraction from anyone who has that thing.[7] While they are uniform in their view that private property is only about *in rem* rights, the sophisticated theorists fail to agree upon which of them must be present before one can conclude that private property exists in any given case.

1. The Lack of Consensus: A Sampling of the Debate

Amongst those who have developed sophisticated theories, the point upon which consensus cannot be achieved concerns the sorts of rights considered essential or necessary to a normative conclusion that private property exists. While hybrids are possible, the protagonists in the debate can be grouped into two main camps: (i) the 'neo-conservative'[8] or 'essentialist', and (ii) the 'nominalist'[9] or 'disaggregated'.[10] While not central to the project in this thesis, a brief review of the central players in this debate is nonetheless helpful to explain the choice of Harris' theory of private property.

---

[5]Peter Birks, *An Introduction to the Law of Restitution* (1985, repr 1993), 49. On rights *in rem* see FH Lawson, 'Rights and other relations in rem' in *Sonderdruck aus Festschrift für Martin Wolff* (1952) 103-22, 107-9 and 113; George Whitecross Paton, *A Text-Book of Jurisprudence* (2nd ed, 1951), 232-9.

[6]Birks, *An Introduction to the Law of Restitution*, above n 5, 49.

[7]Birks, *An Introduction to the Law of Restitution*, above n 5, 49-50; Morris Cohen, 'Property and Sovereignty' (1927) 13 *Cornell Law Quarterly* 8, 12; Waldron, above n 3, generally; Munzer, above n 3, 17.

[8]Margaret Jane Radin, 'The Liberal Conception of Property: Crosscurrents in the Jurisprudence of Takings' in Radin, above n 3, 120-145, 121-3.

[9]See Thomas W Merrill, 'Property and the Right to Exclude' (1998) 77 *Nebraska Law Review* 730.

[10]See Christman, above n 3, 20-2.

(a). Essentialism

Essentialist theories attempt to identify the essential *in rem* right or rights that constitute the irreducible core of private property.[11] The rights most commonly focused upon have been called 'standard incidents' of private property, which are encapsulated by the 'liberal triad' of possession, use, and disposition.[12] Once one accepts that there are standard incidents at the core of private property, two types of essentialism emerge: 'single variable' and 'multiple variable'. The first posits that one right, usually the right to exclude others,[13] constitutes the irreducible core; it is a necessary and sufficient condition of private property.[14] 'Multiple-variable essentialism', on the other hand, the more common of the two, holds that

---

[11]The first to attempt such an exercise was Blackstone, above n 2, vol 2.

[12]There are at least eleven such incidents: (i) right to possess, (ii) right to use, (iii) right to manage, (iv) right to income, (v) right to capital, (vi) right to security, (vii) transmissibility, (viii) absence of term, (ix) duty to prevent harm, (x) liability to execution, and (xi) residuary character: AM Honoré, 'Ownership' in *Making Law Bind: Essays Legal and Philosophical* (1987) 161-92, 165-79. Others identify larger or smaller groupings; some as many as twelve incidents, some five, others, more commonly, three (the liberal triad), and still others only two: see Radin, 'The Liberal Conception of Property: Crosscurrents in the Jurisprudence of Takings' in Radin, above n 3, 121; FH Lawson and Bernard Rudden, *The Law of Property* (2nd ed, 1982), 8-13; Evgueny A Sukhanov, 'The Right of Ownership in the Contemporary Civil Law of Russia' (1999) 44 *McGill Law Journal* 301, 307-8, n 18; Roy Vogt, *Whose Property?: The Deepening Conflict between Private Property and Democracy in Canada* (1999), 14; Getzler, above n 3, 654; Pipes, above n 3, xv; Richard A Epstein, *Takings: Private Property and the Power of Eminent Domain* (1985), 58-9 and 304; Michael J Whincop, 'Conflicts in the Cathedral: Towards a Theory of Property Rights in Private International Law' (2000) 50 *University of Toronto Law Journal* 41; Reeve, above n 3, 324.

[13]Penner, *The Idea of Property in Law*, above n 3, 68-104, who calls the right to exclusive use the 'exclusion thesis' and argues that it is the sole determinant of private property. He also advances the remarkable view that 'property' comprises the right to alienate by way of gift but not by way of sale or exchange. This novel claim sets him apart from most other essentialists, let alone single-variable essentialists. See also Baker, above n 4, 815.

[14]Merrill, above n 9, 734-5. See also Jeremy Bentham, *Of Laws in General* (HLA Hart, ed, 1970), Ch XIV; Felix S Cohen, 'Dialogue on Private Property' (1954) 9 *Rutgers Law Review* 357; Reeve, above n 3, 324.

any one right can only be a necessary but not a sufficient condition of private property. The right to exclude, for example, may be considered necessary, but more than that right alone is needed in order to create a package of rights sufficiently impressive to be called private property.[15] Essentialism has many proponents, and all argue that a particular right, or a particular bundling of rights is necessary for the existence of private property.[16]

(b). Nominalism

Nominalism sees private property as having no fixed content,[17] an empty vessel into which each legal system may pour content according to its cultural, political and ideological beliefs. Unlike the essentialists, the nominalists see private property as having no irreducible core; the presence of any one right is not essential, on the contrary, it is entirely optional. In this school, a legal system can label as private property anything it chooses.[18]

(c). Hybrids

Hybrid theories combine elements drawn from both essentialism and nominalism.[19]

---

[15]Merrill, above n 9, 736.

[16]See, for example, Honoré, above n 12. For a philosophical examination, see Frank Snare, 'The Concept of Property' (1972) 9 *American Philosophical Quarterly* 200. See also Baker, above n 4, 757; Radin, 'The Liberal Conception of Property: Crosscurrents in the Jurisprudence of Takings' in Radin, above n 3, 121.

[17]See JE Penner, 'The "Bundle of Rights" Picture of Property' (1996) 43 *UCLA Law Review* 711; Michael A Heller, 'The Boundaries of Private Property' (1999) 108 *The Yale Law Journal* 1163, 1191-94; Christman, above n 3, 20.

[18]Merrill, above n 9, 737-9. The seminal authority on nominalism is that of Grey, above n 3. See also Bruce A Ackerman, *Private Property and the Constitution* (1977), 26-9; Robert W Gordon, 'Paradoxical Property' in John Brewer and Susan Staves, eds, *Early Modern Conceptions of Property* (1996) 95-110; Gregory Alexander, 'Critical Land Law' in Susan Bright and John Dewar, eds, *Land Law: Themes and Perspectives* (1998) 52-78; Heller, 'The Boundaries of Private Property', above n 17; Baker, above n 4, 758-74. See also Duncan Kennedy, *A Critique of Adjudication {fin de siècle}* (1997) generally.

[19]Merrill, above n 9, 739.

For example, Jeremy Waldron sees private property as a general 'concept' of which various groupings of standard incidents embody different 'conceptions'. The general concept of private property therefore acts as an ideal type which from which different conceptions can arise by adding or subtracting rights depending upon context, the resource involved, and the traditions of the legal system.[20]

2. The Shortcomings of the Sophisticated Theories

In one way or another, all modern theories of private property either expand upon or critique one or more of the sophisticated theories.[21] There are two significant shortcomings of such theories. First, no approach, essentialist, nominalist, or hybrid tells us, definitively, whether private property exists in a given case. Every theory starts from the baseline of western private property and as such, it can only tell us what private property might be like in a western system. But even that fails to account for societal differences, especially those in relation to the way a society may choose to allocate resources pursuant to private property. More importantly, though, such theories fail to offer any assistance in dealing with non-western techniques for allocating resources.[22]

The second shortcoming is perhaps more troublesome: sophisticated theories have difficulty accounting for the discrepancy between the way private property is viewed by laypeople and lawyers. The former tend to ascribe a certain 'propertyness' to things, while the latter argue--based on sophisticated theories--that only a full understanding of the rights

---

[20]Waldron, above n 3, 47-53.

[21]Usually Honoré's nominalism: Harris, above n 1, 125.

[22]Harris, above n 1, 112. See also Stuart Banner, 'Two Properties, One Land: Law and Space in Nineteenth Century New Zealand' (1999) 24 *Law and Social Inquiry* 807, 816. This is also the failure of other theories about property, such as the anticommons of Michael A Heller, 'The Tragedy of the Anticommons: Property in the Transition from Marx to Markets' (1998) 111 *Harvard Law Review* 621.

that a person has in relation to a thing or in relation to others regarding a thing can tell us about private property. Lawyers tend to decide which rights *in rem* are relevant, and then outline a general concept made up of such rights which, when taken together, they call private property. This conception of private property ignores altogether that held by laypeople; as such, the sophisticated view captures only a subset of the universe of property relations.[23]

Herein lies the crux of the second shortcoming: the standard incidents of private property, however one defines them, offer no single, univocal, or universal definition of its content which can be applied cross-culturally or even among different groups within one society. Even the exemplar of the sophisticated theories, Honoré, admits that all attempts to find such a conception have failed to account for ***all*** socio-cultural invocations of private property.[24] Indeed, as unsatisfying as it may seem, perhaps the most that can be said about the content of private property is that it will be what it will be in any society under review; it will include some, or all, or only a few 'standard incidents'. No one grouping of standard incidents is objectively correct in the sense that if its requirements are not met private property does not exist.

In order to define other types of property--public, common, or communitarian--it is important that we begin with a theory of private property, a working definition of that

---

[23]Harris, above n 1, 6-11. See also Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* (JH Burns and HLA Hart, eds, 1970), 211, n 12, who denied that property could be used at ***all*** to refer to things rather than rights over things; Birks, *An Introduction to the Law of Restitution*, above n 5, 49-50; Baker, above n 4, 742-3; Merrill, above n 9, 731-2; FR Barker and NDM Parry, 'Private property, public access and occupiers liability' (1995) 15 *Legal Studies* 335, 335, n 1 and 336, refer to the rights only view as the 'relational view' and call the lay view 'simplistic'; Waldron, above n 3, 47-61; Penner, 'The 'Bundle of Rights' Picture of Property', above n 17; Nicholas Blomley, 'Landscapes of Property' (1998) 32 *Law & Society Review* 567, 605.

[24]Honoré, above n 12, 162-3.

concept, which can be applied in a flexible way to demonstrate the differences between societies and between types of property. The sophisticated theories, due to their shortcomings, are of little help in this regard. This thesis argues that context determines the nature of private property in a given society,[25] and for this reason, it is necessary to move beyond nominalism and essentialism, which start from a non-contextual western baseline.

B. Moving Beyond the Sophisticated Theories

Recent theories of property move beyond the sophisticated view. They see property as comprising both rights and things.[26] More importantly, these new theories accept the importance of examining the system or society--the social context--under review before coming to any normative conclusions about its property system. This contemporary theorising about property, by taking an intuitive approach, sidesteps the confusion caused when the social or popular understanding of property is ignored. This thesis relies upon the work of JW Harris, one of the leading proponents of this socio-contextual approach, to construct a working definition of private property.[27]

---

[25]Australian Aboriginal culture, for instance, provides ample evidence of a very sophisticated and thus mature system of law and resource allocation that was not private property at the time of first European contact: John Brewer and Susan Staves, 'Introduction' in Brewer and Staves, above n 18, 1-18, 14; Henry Reynolds, *The Law of the Land* (1992), generally; Heather McRae, Garth Nettheim, and Laura Beacroft, *Indigenous Legal Issues* (2nd ed, 1997), 9-160; Ronald M and Catherine H Berndt, *The World of the First Australians: Aboriginal Traditional Life: Past and Present* (1964), 336-62; R Tonkinson, 'Social Organisation' in David Horton, gen ed, *The Encyclopaedia of Aboriginal Australia* (1994), vol 2; John Bern, 'Administration' in Horton, vol 1; HW Scheffler, 'Kinship' in Horton, vol 1; KJ Maddock, 'Tribal Organisation' in Horton, vol 2.

[26]Harris, above n 1; Penner, *The Idea of Property in Law*, above n 3; Munzer, above n 3; David Lametti, 'Property and (Perhaps) Justice. A Review Article of James W. Harris, *Property and Justice* and James E. Penner, *The Idea of Property in Law*' (1998) 43 *McGill Law Journal* 663.

[27]Harris, above n 1.

II. THE STRUCTURE OF PART ONE

The objective of this Part is two-fold: first, to develop a working definition of private property, and second, to use that definition as a tool to develop working definitions of public and communitarian property.

A novel approach to private property, one that avoids the problems associated with the sophisticated theories, is utilised to achieve the first of these objectives. In Chapter 2, the work of JW Harris is used to demonstrate that property is both a legal and a social institution, which means that property is not just about *in rem* rights, but also about the things which are the subject of those rights. Having concluded that property is both legal and social, it is important to understand the role of ownership within such a system. It is argued that ownership, which according to the sophisticated theories is a rare form of private property characterised by the largest bundle of rights that a legal system recognises in a thing, actually acts as an organising idea--an idea around which society and people organise and order their affairs--around which any system of private property coalesces.[28] As such, it is that part of a society's social context which defines the content of the rights that a person may have in relation to a thing held as property and what can be done with it.

Chapter 3 builds upon the concepts developed in Chapter 2. It defines any system of private property as having a core of socially defined privileges and powers--ownership--and a broader network of rules--a property domain--around that core. When combined, ownership and the property domain comprise a system of private property. Finally, Chapter 4 utilises the working definition of private property in order to distinguish and define public and communitarian property.

---

[28]Much confusion is engendered by the interchangeable use of 'property' and 'ownership': see eg Sukhanov, above n 12.

The definitions developed in this Part are paradigm models rather than essentialist constructs which must be satisfied if one is to find that one of the three types of property exists. They describe the characteristics one might look for in trying to identify a property system.

Chapter 2

THE SOCIAL AND LEGAL BASIS OF PRIVATE PROPERTY[1]

I. PRIVATE PROPERTY IS BOTII A LEGAL AND A SOCIAL INSTITUTION

A. Private Property, Individual Power and Freedom: Property Talk

The debate between proponents of the essentialist and nominalist theories of private property, while intractable, makes one thing clear: private property, whatever it means, acts as a powerful socio-cultural symbol. It is central to western discourse on individual power and freedom from state power or the claims of other individuals.[2] This 'property talk'--words like 'my', 'mine', or 'yours'--reveals the important connection between social practices and conceptual assumptions. People speak about things as property and expect that their claims to things will be protected by the state through law. Hence, social context structures the

---

[1]This chapter relies heavily upon and adapts the work of JW Harris, *Property and Justice* (1996), chs 1, 3-7 and 9. For critiques of Harris' work, see Andrew Reeve, 'Convention and Justification: Professor Harris on Property and Justice' (1999) 19 *Oxford Journal of Legal Studies* 323; Alain Pottage, 'Instituting Property' (1997) 18 *Oxford Journal of Legal Studies* 331; David Lametti, 'Property and (Perhaps) Justice. A Review Article of James W. Harris, *Property and Justice* and James E. Penner, *The Idea of Property in Law*' (1998) 43 *McGill Law Journal* 663.

[2]Bruce H Ziff, *Principles of Property Law* (3rd ed, 2000), 20-4; Craig Rotherham, 'Restitution and Property Rites: Reason and Ritual in the Law of Proprietary Remedies' (2000) 1 *Theoretical Inquiries in Law* 205, 213.

discourse of property in everyday life.

Still, property talk, while offering a valuable insight into social praxis, fails to provide the key to unlock the meaning of private property; the ambiguity of any word or combination of words belies its normative usefulness.[3] Real-world property talk is lumpy in the sense that it typically refers at once to both rights and things. Nonetheless, property talk tells us that neither usage--rights nor things--is incorrect or unjustifiable.[4] For that reason, we must look beyond property talk and the sophisticated rights usage for the meaning of private property.

B. Two Controversial Claims

1. Property is Both Rights and Things

In order to accommodate both the lay and sophisticated views of private property, one can begin with a controversial claim: private property refers not only to rights between people in relation to things, but also to the things themselves. This produces a more realistic understanding of the real-world context of private property, the idea that property, when used by lawyers or laypeople, means things or the rights attached to those things.[5] This claim is not indefensible.

The claim that property is both rights and things can be defended in three ways. The

---

[3]Harris, above n 1, 8-11. See also John Brigham and Diana R Gordon, 'Law in Politics: Struggles Over Property and Public Space on New York's Lower East Side' (1996) 21 *Law & Social Inquiry* 265, 277-8, cited in Nicholas Blomley, 'Landscapes of Property' (1998) 32 *Law & Society Review* 567, 572, and see 583; JE Penner, *The Idea of Property in Law* (1997), 3.

[4]Harris, above n 1, 10-3.

[5]Harris, above n 1, 10-3. See also Penner, *The Idea of Property in Law*, above n 3, 2; Richard Pipes, *Property and Freedom* (1999), xvi; Roy Vogt, *Whose Property?: The Deepening Conflict between Private Property and Democracy in Canada* (1999), 14. But see Michael A Heller, 'The Boundaries of Private Property' (1999) 108 *The Yale Law Journal* 1163, 1189-91; FH Lawson, 'Rights and other relations in rem' in *Sonderdruck aus Festschrift für Martin Wolff* (1952) 103-22, 120-1.

first stems from common legal assumptions about property: cases and legislation refer interchangeably to property as rights ***and*** as things.[6] The second, stronger, defence, involves the lay understanding of ownership. While the sophisticated theories of private property reserve the term ownership for '...the greatest possible...[bundle of rights] in a thing which a mature system of law recognizes....',[7] laypeople see it as common-sense that we can own ***things***.[8] Consider what a layperson means when calling a thing property. For Harris, rather than referring to the bundle of rights in that thing, such usage is merely one of many ways of referring to the social fact of ownership. Because social fact accepts that people own things, there is no reason for theory to restrict the concept of private property to rights; by using ownership people describe the ***thing*** owned. For laypeople, the thing is synonymous with property, a certain propertyness inheres in the thing.[9]

The final defence flows from the simple fact that a society must somehow allocate and parcel out scarce things--social wealth (all things for which there is a greater potential total demand than supply[10])--among individuals, groups, and public authorities.[11] One must have

---

[6]Harris, above n 1, 6-11. See also *Coles Myer Property Development Ltd* v *Shire of Augusta-Margaret River and Anor* (Western Australia Town Planning Appeal Tribunal) (2000) *Local Government & Planning Law Guide* 24-5 (whether the Western Australia government or the Shire of Augusta-Margaret River was the 'owner' of public land); Reeve, above n 1, 328; Peter Birks, *An Introduction to the Law of Restitution* (1985, repr 1993), 49.

[7]AM Honoré, 'Ownership' in *Making Law Bind: Essays Legal and Philosophical* (1987) 161-92, 162.

[8]See Blomley, above n 3, 573.

[9]Harris, above n 1, 6-11. See also Michael A Heller & James E Krier, 'Deterrence and Distribution in the Law of Takings' (1999) 112 *Harvard Law Review* 997, 1013.

[10]Reeve, above n 1, 332, critiques this view of social wealth, although this issue is not central to my argument.

[11]Harris, above n 1, 4. See also Michael J Whincop, 'Conflicts in the Cathedral: Towards a Theory of Property Rights in Private International Law' (2000) 50 *University of*

some means of identifying those items of social wealth, and seeing property as things identifies those items.

2. Property is Both a Legal and a Social Institution

To the claim that property is both rights and things can be added a second: property is both a legal ***and*** a social[12] institution.[13] While legal rules[14] provide the framework within which private property exists, its control of the use of most things and the allocation of some resources[15] depend just as much on social context (which can include spirituality,[16] culture,[17]

Toronto Law Journal 41, 42.

[12]Blomley, above n 3, 580 and 605-9, argues that property is constituted ***through*** social struggle and constitutive ***of*** everyday social and political relations. And see generally Rotherham, above n 2.

[13]Harris, above n 1, 3-4 and 9-10. See also Penner, *The Idea of Property in Law*, above n 3, 3; Eric T Freyfogle, 'The Particulars of Owning' (1999) 25 *Ecology Law Quarterly* 574, 578; C Edwin Baker, 'Property and its Relation to Constitutionally Protected Liberty' (1986) 134 *University of Pennsylvania Law Review* 741, 742-55; Arnold S Weinrib, 'Property, Precedent, and Policy' (1985) 35 *University of Toronto Law Journal* 542, 542 and 556.

[14]See Heller, 'The Boundaries of Private Property', above n 5, 1166, n 9; Heller & Krier, above n 9, 1015.

[15]Freyfogle, above n 13, 579; Jeanne L Schroeder, 'Never Jam To-day: On the Impossibility of Takings Jurisprudence' (1996) 84 *Georgetown Law Journal* 1531; Joseph William Singer & Jack M Beermann, 'The Social Origins of Property' (1993) 6 *Canadian Journal of Law and Jurisprudence* 217.

[16]See Stuart Banner, 'Two Properties, One Land: Law and Space in Nineteenth Century New Zealand' (1999) 24 *Law and Social Inquiry* 807, 815-6.

[17]Culture refers to a people's cumulative way of life, both material and nonmaterial, which comprises morals, art, custom, language, religion, law, race, gender, and class, all of which continually evolve over time: Charles C Geisler, 'Estates of Mind: Culture's Many Paths to Land' (2000) 13 *Society and Natural Resources* 51, 51-4; Blomley, above n 3, 582-3 and n 13, argues that within one society there may be different local cultures which vary depending upon specific patterns of urban ownership and use.

politics, ideology,[18] history, technology,[19] and even geography or spatiality[20]).[21] People living within a society take property for granted in the everyday give and take of life--they make assumptions and claims based upon the social, and not always the legal, reality of property.[22] The social context of property engenders a sense of community and the bringing-together of various communities or sub-groups in relation to resources. Social context--slowly changing over time and between societies[23]--thus dictates the definition of any societal deployment of a resource allocation system (private property in the western tradition).

Examining social context in an effort to define property requires one to play the role of 'hypothetical anthropologist'.[24] Playing that role reveals the central or core idea--the 'organising idea'--around which a society constructs its system for distributing resources. An organising idea encapsulates the network of social relations and intentions coloured by shared value-laden assumptions within which people live their lives, the bulk of which we take for granted as the background of everything thought or said. The organising idea around which any system of private property coalesces is ownership.[25]

II. THE ROLE OF OWNERSHIP IN A PRIVATE PROPERTY SYSTEM

While there exists a considerable lack of clarity regarding the distinction between

---

[18]See Banner, above n 16, 813.

[19]Heller, 'The Boundaries of Private Property', above n 5, 1166, n 9.

[20]Blomley, above n 3, 568-74 and 582-5.

[21]Reeve, above n 1, 324; Freyfogle, above n 13, 580-2.

[22]Harris, above n 1, 3-4 and 9-10.

[23]Freyfogle, above n 13, 577-8.

[24]Reeve, above n 1, 331.

[25]Harris, above n 1, 63-4. See also Blomley, above n 3, 578 and 588-92.

'property' and 'ownership',[26] Harris' theory of private property places the latter concept at the heart of the former.[27] He argues that although not explicit, the western philosophical tradition tends to approach all matters of private property from the baseline 'organising idea' of ownership.[28] By describing ownership as an organising idea, Harris attempts to find, looking at the entire social context, lay and legal, '...those occasions on which unchallenged assumptions about the normative significance of ownership...provide a background for discourse.'[29]

For Harris, it is ownership and not private property that constitutes a pervasive and irreducible core organising idea in any society.[30] Private property is a system that depends upon ownership as an organising idea around which it coalesces. Recall that private property refers both to rights in relation to things and in relation to people in regard to things ***and*** to things. When a layperson therefore uses the phrase 'X is 'my property''--a use of property

---

[26]See eg Gerald F Gaus, 'Property, Rights, and Freedom' in Ellen Frankel Paul, Fred D Miller, Jr, and Jeffrey Paul, eds, *Property Rights* (1994) 209-40; CB Macpherson, 'The Meaning of Property' in CB Macpherson, ed, *Property: Mainstream and Critical Positions* (1978, repr 1989) 1-13; Jeremy Waldron, *The Right to Private Property* (1988), 26-61; Evgueny A Sukhanov, 'The Right of Ownership in the Contemporary Civil Law of Russia' (1999) 44 *McGill Law Journal* 301, 301; Rotherham, above n 2. An explanation of the confusion and its origins is found in Reeve, above n 1, 327-8.

[27]Harris, above n 1, 13.

[28]See also Reeve, above n 1, 328 and 331-2.

[29]Harris, above n 1, 64 and see also 4, 10, 12, 141, 143 and 362.

[30]Wittgensteinians would argue, however, that there is no irreducible core of anything, much less property: Ludwig Wittgenstein, *Philosophical Investigations* (GEM Anscombe, 1953), section 66. See eg Gaus, above n 26, 213, n 18; Bruce A Ackerman, *Private Property and the Constitution* (1977), generally; Thomas C Grey, 'The Disintegration of Property' in J Rowland Pennock and John W Chapman, eds, *NOMOS XXII: Property* (1980) 69-85, generally. But see Rotherham, above n 2, 215 and 231.

talk--that is the least ambiguous way of referring to the social fact of ownership.[31] Ownership, in this socio-contextual sense, while not a term of art which conjures a meaning peculiar to law or lawyers, constitutes the organising idea which provides the social and cultural content of those rights around which people order their affairs.[32]

One can thus characterise the relationship between private property and ownership as follows: private property constitutes the system which a particular society recognises in order to control the distribution and use of a particular resource.[33] Ownership, on the other hand, acts in concrete situations as the organising idea which defines what it is that a person may do with the resource; it defines the content of the rights enjoyed by a person who holds private property in the resource.

The task in defining private property is, therefore, to come to grips with ownership as it is used as an organising idea in any society--not an easy task[34]--and to identify the ways in which that society builds a private property institution around that core. Ownership is the key to defining private property simply because it defines the content of the rights enjoyed by those who hold it. Building upon this conclusion, the next chapter provides a working definition of private property.

---

[31]Harris, above n 1, 10-1.

[32]Harris, above n 1, 86. See also Baker, above n 13, 743.

[33]Harris, above n 1, 112 and 145.

[34]Honoré, above n 7, generally. The Romans, however, attempted to do so: see Peter Birks, 'The Roman Law Concept of Dominium and the Idea of Absolute Ownership' (1985) *Acta Juridica* 1. Even the Roman conception of ownership has been glossed in more recent times for specific purposes, such as republicanism and the overthrow of feudal land-holding: Joshua Getzler, 'Ideas of Roman Landownership' in Susan Bright and John Dewar, eds, *Land Law: Themes and Perspectives* (1998) 81-106, 82-5.

Chapter 3

A WORKING DEFINITION OF PRIVATE PROPERTY[1]

I. INTRODUCTION: OWNERSHIP DEFINES THE RIGHTS CONFERRED BY PRIVATE PROPERTY

Because private property is both a legal and a social institution, and because the social context within which any invocation of private property operates produces differences in relation to the organising idea of ownership, namely the rights which it confers upon its holders, little sense can be made of a private property system in the absence of social context.[2] Irrespective of social context, though, it is still possible to identify a minimal unifying structure common to all private property systems. The minimal unifying structure revolves around the rights conferred upon the holder of private property; for Harris these are encapsulated by ownership. The rights contained in this ownership core of private property enjoy protection through legal rules. In any private property system, therefore, ownership constitutes the social element, while its protection comprises the legal element. The former is captured in what Harris calls the 'ownership spectrum' and the latter in 'trespassory rules'. Harris calls

---

[1]This chapter relies heavily upon and adapts the work of JW Harris, *Property and Justice* (1996), chs 1, 3-7 and 9.

[2]Harris, above n 1, 10, 12, 18 and 22.

these the twin pillars of private property; this chapter examines each in turn.

A. The Ownership Spectrum

Rather than focusing upon 'standard incidents', as do the sophisticated theories of property, Harris' ownership spectrum emphasises the fact that a societal invocation of private property captures a range of open-ended relationships (standard incidents or elements) to things and other persons which that system protects through force of law.[3] Any one of those relationships is, at best, merely an example of the way that a particular society--usually a western and so-called 'mature' one--structures the content of its private property system. As such, if one uses only the western conception of private property as a benchmark, one runs the risk of equating that society's property system to the normative content of private property. In fact, the western conception is but one example of how a society might bundle various rights and call them private property. It is but one 'property institutional design'; it is not what private property is.

To determine what private property is, one must locate the rights a society has decided to call private property, and for that we need to know what that society thinks about ownership, about the rights that it contains.[4] The spectrum assists in this task by separating the range of rights that might be called private property from the way in which they might be bundled (institutional design), it avoids the onerous task of defining the specifics of the range of open-ended relationships to things and other persons which operate to confer autonomous

---

[3]Harris, above n 1, 5.

[4]See also John Christman, *The Myth of Property: Toward an Egalitarian Theory of Ownership* (1994), 23-4; C Edwin Baker, 'Property and its Relation to Constitutionally Protected Liberty' (1986) 134 *University of Pennsylvania Law Review* 741, 743.

choice upon individuals or groups.[5]

The spectrum operates on a vertical axis, and defines as private property those points along it which are fixed by reference to and presupposed by trespassory rules.[6] By tying ownership to its protection, this definition of private property accounts for both an individual's ability to use a thing ***and*** powers over others by means of the capacity to dictate that use. Harris segregates into two categories the types of rights that might be found along the spectrum. Those concerning the relationship between person and thing he calls 'use-privileges' and those that allow the owner to dictate the use of the thing 'control-powers'.[7] This thesis calls these 'ownership privileges and powers', or simply 'privileges and powers'. Having identified the privileges and powers that comprise them, the next two sections consider those locations at the head of the spectrum--'full-blooded ownership'--and at its foot--'mere property', the various locations in between, and the features that unite the content of every such location.

1. Locations Along the Spectrum

At the head of the spectrum, one finds full-blooded ownership, which comprises the

---

[5]Harris, above n 1, 275. See also CB Macpherson, 'Introduction' in CB Macpherson, ed, *Property: Mainstream and Critical Positions* (1978) 1-13, 1.

[6]Harris, above n 1, 5-6 and 28-32.

[7]Harris, above n 1, 13. See also Baker, above n 4, 815.

As regards 'use-privileges' and 'control-powers', see also Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning, and other Legal Essays* (Walter Wheeler Cook, ed, 1923), 65-114; Wesley Newcomb Hohfeld, 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1913) 23 *The Yale Law Journal* 16; Wesley Newcomb Hohfeld, 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1917) 26 *The Yale Law Journal* 710. See also Stephen R Munzer, *A Theory of Property* (1990), 17-22; FR Barker and NDM Parry, 'Private property, public access and occupiers liability' (1995) 15 *Legal Studies* 335, 337. For a critique of Hohfeld, see FH Lawson, 'Rights and other relations in rem' in *Sonderdruck aus Festschrift für Martin Wolff* (1952) 103-22.

fullest set of ownership privileges and powers available in relation to a thing. As we have seen in Chapter 2, property is a social and a legal institution, and as such, a determination about whether a society has decided to treat a group of privileges and powers as full-blooded ownership is heavily context-dependant.[8] In making such a determination, however, one factor will weigh heavily: full-blooded ownership typically includes the power to transmit the entire interest or the thing itself to others.[9] This transmission power distinguishes locations at the head of the spectrum--full-blooded ownership--from those at the foot--mere private property. The transmission power is therefore the key feature of discontinuity between interests at the head and those at the foot of the spectrum, or those which do not fall along the spectrum at all.[10]

At the foot of the spectrum, we find mere private property, which defines those relationships that permit a person to use a thing as that person pleases and to permit others the use of it but which embraces only some of the privileges and powers available to the holder of full-blooded ownership. Most significantly, the power to transmit enjoyed by the holder of full-blooded ownership is typically absent.[11]

---

[8]Harris, above n 1, 231, 275 and 362.

[9]Harris, above n 1, 5, 30, 66-7, 120 and 130. As one progresses up the spectrum, there occurs a 'significant point' or 'discontinuity in transition' where the power of transmission--the owner can transfer the entire package of use-privileges and control-powers to another--is allowed. Those at the lower end can 'exploit' their powers gratuitously or by exchange for favours, but the much more important exploitation is that which occurs beyond the significant point by which the owner may trade the ***thing*** owned *inter vivos*, by gift, exchange, and once money exists, by sale. Control powers may also encompass the qualified or absolute power of testation. See also Michael A Heller, 'The Boundaries of Private Property' (1999) 108 *The Yale Law Journal* 1163, 1201.

[10]Harris, above n 1, 5 and 10.

[11]Harris, above n 1, 20-2, 27, 29-30 and 73-4. See also FH Lawson, 'Rights and other relations in rem' in *Sonderdruck aus Festschrift für Martin Wolff* (1952) 103-22.

In between full-blooded ownership and mere property one finds an infinite number of other locations, or ownership interests, along the spectrum. The fact that such locations exist does not imply that those locations can be ascribed a fixed content according to an essentialist theory; the content of the privileges and powers found in each interest may change as the kinds of things which people take for granted as being ownable change.[12] The spectrum idea merely obviates the essentialist's need to search for specific bundles of standard incidents. And in so doing, the spectrum captures some of the nominalist's argument that nothing can unite the infinite number of locations along the spectrum in one universal or univocal concept, save for the core idea of ownership, which depends upon social context for its content.[13]

2. Features That Unite the Content of Each Location

The content of each location is really the content of ownership, which, Harris argues, may only be defined in terms of the *prima facie* unlimited privileges and powers which a society ascribes to the holder of private property at the selected location. How each location--ownership interest--is packaged as private property is a question of 'property-institutional design', which means that it depends upon the context of the society being scrutinised.[14] Thus, there are not only an infinite number of locations along any society's spectrum, but an infinite number of ways in which their content may be packaged. Notwithstanding the plurality and mutability of the ownership interests which may be found along a society's spectrum, though, three features unite the content of them all:[15] (i) every ownership interest comprises a juridical relationship--characterised by privileges and powers--between persons

---

[12]Harris, above n 1, 66.

[13]Harris, above n 1, 136-8.

[14]Harris, above n 1, 5 and 275.

[15]Harris, above n 1, 5, 64, 75-6, 81-3 and 133.

or groups and a resource;[16] (ii) 'open-endedness', and (iii) 'self-seekingness'. The latter two features require elaboration.

All locations along the spectrum enjoy ownership privileges and powers that are open-ended, meaning that the possible ways in which they can be exercised are indefinable and cannot be concretely listed. To attempt, as do the essentialists, to infuse these privileges and powers with any more than the loosest possible structure is to become mired in the realm of particular property-institutional design. For instance, while the formalities of a valid exercise of the power to transmit are typically subject to culture-specific regulation, the range of concrete potential exercises available to an owner remain open-ended and premised upon the prevailing conception of ownership. I can give something to whomever I please because I am the owner, but I am not the owner because the law specifies useful formalities for demarcating an effective from an invalid sale or gift.[17]

Open-endedness is a key feature which distinguishes relationships found along the spectrum from those which, while private property, lie beyond it. These Harris calls 'non-ownership proprietary interests', which comprise all of those instances in which a person who enjoys a relationship to a resource lacks an open-ended set of ownership privileges and powers.[18] Consider the common law easement: while it does not invoke an open-ended set of possessory privileges and powers--such as those conferred by the fee simple, leasehold, or life estate--we still call it private property.

While they lack open-ended privileges and powers, non-ownership proprietary

---

[16]Harris, above n 1, 5, 25, 64 and 126.

[17]Harris, above n 1, 12, 29, 67-8, 130 and 275.

[18]Harris, above n 1, 55-7. See also Heller, 'The Boundaries of Private Property', above n 9, 1166.

interests enjoy protection against all those who might seek to interfere with them. Indeed, Harris argues that such interests cannot exist without appropriate 'civil trespassory rules' which impose general obligations not to frustrate them. While such rules ban, either by damages or injunctive relief, uses of the resource which would frustrate the limited privileges and powers conferred by the interest, they stop short of outlawing any use of the resource not authorised by the holder of the interest. But the range of persons who may fall under obligations by virtue of civil trespassory rules is open-ended, which serves to rank these interests alongside ownership interests as rights *in rem*.[19]

Non-ownership proprietary interests are an integral element of a private property system. Most importantly, one of the significant transactional powers normally enjoyed by an owner is that to create specific non-ownership proprietary interests. As we have seen , an ownership interest which falls near the head of the spectrum typically carries with it an extensive set of open-ended privileges and powers which may only be divested voluntarily or involuntarily. The latter occurs in cases such as prescription, which may result in the creation or acquisition of easements or servitudes over land.[20] The former can occur in situations such

---

[19]Harris, above n 1, 55 and 120. Roman praedial servitudes and rights *in personam* are also non-ownership proprietary interests in the sense that such interests were not smaller packagings of ownership. Roman land-ownership was indivisible and absolute in the sense that there was only one owner whose ownership could be burdened by praedial servitudes and rights *in personam*. But these rights were not ownership.

Usufruct, *Emphyteusis*, and *superfices*, on the other hand, were rights in relation to land which at least in some sense included an open-ended set of use-privileges and control powers taken for granted in social life but not spelled out in formal definitions. As such, notwithstanding what Roman dogmatics might say about them, they can be classed as ownership interests. *Emphyteusis* and *superfices*, for example, were freely alienable in a way that praedial servitudes and rights *in rem* were not, which made serious inroads on the indivisibility of ownership in Roman law: see Reinhard Zimmerman, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (1990 and 1996), 358-9.

[20]Harris, above n 1, 56.

as those where an owner enters into a contract with another person, which, while the transaction may not introduce new interests into the private property system,[21] can confer a distinctively proprietary status upon the grantee.[22] Hence:

> [i]f a particular category of contract or grant conferring some specific use-privilege over the thing...is protected by trespassory rules, not merely against the contractor or grantor, but against the world in general including succeeding owners, the contract or grant creates a non-ownership proprietary interest.[23]

Nonetheless, while recognising that they are private property, non-ownership proprietary interests must be distinguished from ownership interests simply because the former do not find any location along the spectrum while the latter do.

While other relationships are juridically defined, and may even be open-ended, only the privileges and powers conferred by ownership--relationships found on the spectrum--authorise self-seekingness (variously called 'self-interest', 'choice', 'preference-satisfaction', 'decision-making authority', 'sovereignty', 'certainty of expectation', or 'wealth-maximization'[24]) on the part of the person or group to whom they belong. It means that the

---

[21]Seminally discussed as the '*numerus clausus* of real rights' by Bernard Rudden, 'Economic Theory v. Property Law: The *Numerus Clausus* Problem' in John Eekelaar and John Bell, eds, *Oxford Essays in Jurisprudence, Third Series* (1987) 239-63. See also Bruce H Ziff, *Principles of Property Law* (3rd ed, 2000), 44, 175, 235, 237, 333, 337 and 366; Heller, 'The Boundaries of Private Property', above n 9, 1176.

[22]Harris, above n 1, 55-6.

[23]Harris, above n 1, 56.

[24]Many agree that the core of ownership authorises self-seekingness or preference-satisfaction: see eg Stephen R Munzer, *A Theory of Property* (1990), 3-9; Gregory S Alexander, 'Property as Propriety' (1998) 77 *Nebraska Law Review* 667, 699; James L Huffman, 'Land Ownership and Environmental Regulation' (1999) 25 *Ecology Law Quarterly* 574, 594-5, 597-9; Joshua Getzler, 'Theories of Property and Economic Development' (1996) 26 *Journal of Interdisciplinary History* 639, 642-3. Others disagree: Carol M Rose, *Property and Persuasion: Essays on the History, Theory, and Rhetoric of Ownership* (1994), 58; JE Penner, *The Idea of Property in Law* (1997), 205.

holder of private property, within certain boundaries,[25] is entitled to defend any use or exercise of the relevant ownership privileges and powers by answering that 'I am, as owner, at liberty to suit myself.'[26] In other words, in relation to any relationship along the ownership spectrum, but most typically in relation to full-blooded ownership

> '...the rules of the [private] property [system]...are premised on the assumption that, *prima facie*, [a]...person [or group] is entirely free to do...[anything with the thing] by way of use, abuse, or transfer.'[27]

It is, therefore, impossible, in relation to any location along the spectrum, to produce a definitive catalogue of the uses that may be made of a resource or the control-powers exercisable over it.

The extent to which self-seekingness may exist, however, depends solely upon the various trespassory rules which protect the exercise of the available ownership privileges and powers. The next section considers these rules further.

B. Trespassory Rules

The open-ended privileges and powers conferred by ownership interests are meaningless in the absence of specific rules which protect them from encroachment by others. For example, X, having an ownership interest in land, can do little about Y's wrongful entry to it in the absence of some protection, such as the criminal law or tort of trespass, against

---

[25]See Section I.C.

[26]Harris, above n 1, 31 and 105.

[27]Harris, above n 1, 29. See also Heller, 'The Boundaries of Private Property', above n 9, 1166. Some might argue that economic efficiency is responsible for these freedoms playing such a significant role in ownership as a principle. The exemplar of this school is Richard A Posner, *Economic Analysis of Law* (4th ed, 1992), 31-84. Many have followed his lead: eg Huffman, above n 24; Munzer, above n 24; Garrett Hardin, 'The Tragedy of the Commons' (1968) 162 *Science* 1243. For a critique of such views see Rose, *Property and Persuasion*, above n 24; Margaret Jane Radin, *Reinterpreting Property* (1993); Margaret Jane Radin, *Contested Commodities* (1996).

that wrong. Harris calls such protection trespassory rules, which are

> '...any social rules, whether or not embodied in law, which purport to impose obligations on all members of a society, other than an individual or group who is taken to have some form of open-ended relationship to a thing, not to make use of that thing without the consent of the individual or group'.[28]

Without trespassory rules an ownership interest cannot be private property, and the greater the trespassory protection, the higher upon the spectrum the interest must be placed. All such rules are open-textured in the sense that it is open to interpretation whether some conduct in question is prohibited.[29]

Trespassory rules do not, however, vest unqualified claims correlating to duties on the part of others not to encroach upon the ownership interest. Although the holder of the interest is free to enjoy the thing held without interference from others, the duties imposed upon others not to encroach upon that holder do not form a part of the ownership interest. Privileges and powers are part of the ownership interest, while the duties imposed upon others by trespassory rules are not.[30] As a matter of analysis:

> ...the internal content of the ownership interest and the internal content of the trespassory rules are mutually independent. These twin pillars of property institutions cannot be collapsed either one into the other. The *prima facie* privileges and powers intrinsic to an ownership interest cannot be spelled out from the trespassory rules which protect it. The content of the trespassory rules is given by the social practices, legislation, or case law which create them. The content of claim-rights which accompany ownership interests is the same as that of the duties which the trespassory rules impose. They are the correlatives of such duties. It follows that claim-rights are

---

[28]Harris, above n 1, 5.

[29]Harris, above n 1, 5, 64 and 100, and see 25. See also Eric T Freyfogle, 'The Particulars of Owning' (1999) 25 *Ecology Law Quarterly* 574, 579; Lawson, above n 11, 109 and 111; AH Campbell, 'Some Footnotes to Salmond's Jurisprudence' (1939-1941) 7 *Cambridge Law Journal* 206; Jeremy Waldron, 'Homelessness and the Issue of Freedom' (1991) 39 *UCLA Law Review* 295; Nicholas Blomley, 'Landscapes of Property' (1998) 32 *Law & Society Review* 567, 570; Baker, above n 4, 748.

[30]Harris, above n 1, 127.

not intrinsic to ownership interests.[31]

C. Rules Which Surround the Twin Pillars of Private Property: The Private Property Domain

1. Private Property Institutional Design

For Harris, the ***essential*** and ***typical*** features of a system of private property are his twin pillars: the ownership spectrum and trespassory rules.[32] But the twin pillars are not sufficient conditions for the existence of a private property system; to operate effectively, it needs more. Any system requires shape around the twin pillars, what Harris calls property institutional design.[33] Because this too is social-context dependant, any one design can tell us little about what private property is. Still, there are some typical features shared by every design.[34]

These typical features emanate from the twin pillars to produce what can be called, modifying Harris' language, a 'private property domain', which, when combined with the former, constitutes a functional system of private property. Every person, group, and the society within which they live their lives, if it recognises private property, enjoys a private property domain. While the content and scope of the domain varies in time and place, every society which recognises private property must have one; indeed, private property and its

---

[31]Harris, above n 1, 129, and see 26 and 231. See also Andrew Reeve, 'Convention and Justification: Professor Harris on Property and Justice' (1999) 19 *Oxford Journal of Legal Studies* 323, 330.

[32]Harris, above n 1, 13, 33, 119 and 143.

[33]Harris, above n 1, 114 and 275.

[34]Harris, above n 1, 64. Others refer to this notion of substance and form, but do not use a term which so neatly summarises that point as does private property domain. See eg Freyfogle, above n 29, 578.

domain are one in the same.[35] This section examines three primary emanations from the twin pillars: 'property-limitation rules', expropriation rules', and 'appropriation rules'.[36] Together, these emanations comprise a typical private property domain.

Before examining the three emanations, it is important to distinguish them from a closely related type of rule: Harris' 'property-independent prohibitions'. These prohibitions, most often found in criminal or contract law, are not features of nor limitations upon private property ***at all*** because their impact is entirely ***independent*** of ownership interests.[37] Nonetheless, private property holders may not act in direct contravention of them; not even the fullest ownership interest would permit that. For example, it matters not to the criminal law whether a drug trafficker owns the drugs which are trafficked. The law which prohibits drug trafficking is a property-independent prohibition; it applies to those who hold private property ***and*** to those who do not. Because all people are subject to property-independent prohibitions, a failure to distinguish them from the emanations from the twin pillars would give all relationships and things the appearance of being private property.[38]

2. Three Primary Emanations from the Twin Pillars

The three primary emanations from the twin pillars demonstrate that in the absence of a rule to the contrary, a private property holder may, *prima facie*, do a certain thing with the relevant subject matter of the property. The emanations reign-in the otherwise unfettered self-seekingness enjoyed by the holder of an ownership interest. In this sense, the three

---

[35]Harris, above n 1, 5, 33-4 and 42. See also Freyfogle, above n 29, 578-9.

[36]For an alternative characterisation of the three primary emanations, see Heller, 'The Boundaries of Private Property', above n 9, 1198-1201.

[37]Harris, above n 1, 35-6 and 128. See also Lawson, above n 11, 109-10.

[38]Harris, above n 1, 23, 32-3, 40-1 and 83-4.

primary emanations assist in defining private property, especially full-blooded ownership, which entails a relationship between a person or a group and a resource which comprises, subject to any relevant manifestations of the three primary emanations or property-independent prohibitions, unlimited rights of use and abuse and control and transmission.[39]

(a). Property-limitation rules

Private property is not absolute ownership.[40] Every legal system that recognises private property imposes rules, enforceable either by civil or criminal law,[41] upon it--even full-blooded ownership interests--that override the *prima facie* self-seekingness enjoyed by its holder.[42] Harris calls these restrictions property-limitation rules,[43] which are premised upon the assumption that, but for the restrictions they contain, the holder of private property would otherwise be free to act with unfettered self-seekingness. They may be negative--to restrict the exercise of specified privileges or powers--or positive--to require an owner to use assets or exercise powers in a particular way. All such rules depend for their existence upon social context and as such presuppose the relevant ownership interest.

---

[39]Harris, above n 1, 29-30, 126, 134 and 136. See generally Robert W Gordon, 'Paradoxical Property' in John Brewer and Susan Staves, eds, *Early Modern Conceptions of Property* (1995) 95-110; Carol M Rose, 'Canons of Property Talk, or, Blackstone's Anxiety' (1998) 108 *The Yale Law Journal* 601; Heller, 'The Boundaries of Private Property', above n 9, 1168, n 15.

[40]See Baker, above n 4, 743. But see Richard A Epstein, *Takings: Private Property and the Power of Eminent Domain* (1985), who is powerfully critiqued by Margaret Jane Radin, 'Problems for the Theory of Absolute Property Rights' in Radin, *Reinterpreting Property*, above n 27, 98-119.

[41]Harris, above n 1, 36. See also Heller, 'The Boundaries of Private Property', above n 9, 1170-87.

[42]See Heller, 'The Boundaries of Private Property', above n 9, 1167-9; Baker, above n 4, 811-5; Alexander, above n 24, 699-700.

[43]Harris, above n 1, 34.

The Anglo-Australian fee simple provides a good example of property-limitation rules in action. Notwithstanding that it contains a full-blooded ownership interest, the fee simple is subject to significant property-limitation rules. These limitations are found in such diverse places as the torts of negligence[44] and nuisance (including what is left of *Rylands* v *Fletcher*[45]), legislatively or judicially created occupiers liability,[46] and in planning and environmental law.[47]

(b). Expropriation Rules

'Expropriation rules' further destroy the notion that there can be anything like absolute ownership in a private property system. Like property-limitation rules, these presuppose the existence of ownership interests, although rather than merely restricting the exercise of privileges and powers, they strip, against a person's will '...part or all of the privileges and powers constituting [the] ownership [interest] of something....'.[48] Land represents the most obvious subject of such rules: the governments of most modern states enjoy the power,

---

[44]See FR Barker and NDM Parry, 'Private property, public access and occupiers liability' (1995) 15 *Legal Studies* 335, 343-52.

[45]*Rylands* v *Fletcher* (1866) LR 1 Ex 265; *Rylands* v *Fletcher* (1868) LR 3 HL 330; *Cambridge Water Co* v *Eastern Counties Leather Plc* [1994] 2 AC 264; *Burnie Port Authority* v *General Jones Pty Ltd* (1994) 179 CLR 520.

[46]See Barker and Parry, above n 44, 339-43; *Australian Safeway Stores Pty Ltd* v *Zaluzna* (1987) 162 CLR 479.

[47]Harris, above n 1, 73. And see Huffman, above n 24.

[48]Harris, above n 1, 37. Freyfogle, above n 29, 576-7, notes that if one took a Benthamite argument to its logical end-point, it might be possible to say that because private property rises and falls with law, an expropriation is really a change in the law that created the ownership interest in the first place so that it is not a taking at all, but rather, the interest simply ceases to exist. If one accepts, though, that property is both a legal and a social institution, then the social expectations created by the existence of the legally created ownership interest mean that an expropriation of that interest is indeed an expropriation of property and not a magical disappearing act. Freyfogle himself rejects the extended Benthamite view for this reason.

enshrined in law, to compulsorily acquire, usually with compensation, property holdings in land to fund the discharge of state functions undertaken or to provide for governmental or public purposes.[49] Most see expropriation rules as uncontroversial; if property is sacred then the community has a legitimate role in protecting it and persons, which in turn requires the expenditure of resources.[50]

The identification of expropriation rules is not new. Most sophisticated theories, especially Honoré's, classify the impact of some of them as 'standard incidents' of private property. The novelty of Harris' work lies in the rejection of such a characterisation. He argues that what private property is ***analytically*** is one thing, while its socially significant interactions with expropriation rules--of which every private property system contains ***some***--is quite another. Simply because every private property system contains some expropriation rules does not make them a part of ownership.[51]

(c). Appropriation Rules

Appropriation rules are another means by which private property systems discharge

---

[49]Harris, above n 1, 37-8. See also Michael A Heller & James E Krier, 'Deterrence and Distribution in the Law of Takings' (1999) 112 *Harvard Law Review* 997, 1024; Baker, above n 4, 748; Alexander, above n 24, 701-2; Getzler, above n 24, 656-7; Frank I Michelman, 'Property as a Constitutional Right' (1981) 38 *Washington & Lee Law Review* 1097, 1110-14; Joseph L Sax, 'Do Communities Have Rights? The National Parks as a Laboratory of New Ideas' (1984) 45 *University of Pittsburgh Law Review* 499.

As concerns just compensation for an expropriation of private property, see the Commonwealth of Australia Constitution Act, sub-s 51 (xxxi), and The Constitution of the United States of America, Amendment V; Alan Freeman and Elizabeth Mensch, 'Property' in Jack P Greene and JR Pole, eds, *The Blackwell Encyclopedia of the American Revolution* (1991) 620-28; Margaret Jane Radin, 'The Liberal Conception of Property: Crosscurrents in the Jurisprudence of Takings' in Radin, above n 27, 120-45; Heller, 'The Boundaries of Private Property', above n 9, 1203-22; James Kent, *Commentaries on American Law* (1827, repr 1971) vol 2, 275.

[50]Harris, above n 1, 93. But see Epstein, above n 40.

[51]Harris, above n 1, 128-30.

the community obligation to meet the basic needs of its citizens.[52] These rules, the converse and counterpart of expropriation rules, permit some people to acquire private property while others lose it. And like expropriation rules, appropriation rules depend upon and presuppose ownership interests in the course of restricting and re-allocating them.[53]

Confusion may sometimes arise as to whether a particular rule is an expropriation or an appropriation rule. Examples of such confusion abound in Anglo-Australian law: consider a chattel which is characterised as land (a fixture)--what the owner of the former loses, the owner of the latter gains. One may treat the operation of such rules indifferently as either expropriation or appropriation rules, but in such a case, the latter interpretation is preferable where a rule's social purpose is seen exclusively as the advancement of the welfare of the person who obtains the ownership interest.[54]

3. Overlapping Emanations

While each of the three main emanations from the twin pillars serves its own social function within a private property system, it is not always the case that each rule serves a mutually exclusive social function. There is not in every case a perfect correlation between rule and function; two or more rule categories may overlap. For Harris, '[i]t is the fact that they presuppose ownership interests which makes all such rules property rules, whether or not they discharge more than one function in relation to such interests.'[55]

The re-allocation of land from a private to a public use, for example, may display more

---

[52]Harris, above n 1, 38-9. See also Baker, above n 4, 748-51, who argues that without appropriation rules, other means of allocating resources will sprout up.

[53]Harris, above n 1, 5 and 128.

[54]Harris, above n 1, 38-9.

[55]Harris, above n 1, 40.

than one social function in action.[56] Consider recent Queensland environmental legislation which controls the clearing of trees on freehold land.[57] This Act operates as a property-limitation, expropriation ***and*** appropriation rule depending on interpretation and perspective.[58]

II. WHAT PRIVATE PROPERTY IS NOT

So far, using the work of Harris, this chapter has developed a working definition of private property. It is necessary, before proceeding, to clear up two common mis-conceptions about private property: the role of title and of possession. It is sometimes thought that these two concepts are either private property itself or are synonymous with it. They are not; this section explains why.

A. Title

Title, often treated as being synonymous with private property or ownership,[59] really refers to the set of conditions by which an ownership interest may be 'slotted into' a package of trespassory rules and the detrimental effects of the private property domain, especially the

---

[56]Harris, above n 1, 40-1. See also Baker, above n 40, 767.

[57]Vegetation Management Act 1999 (Qld), ss 5-7 and generally.

[58]Instances of such overlap are widespread and numerous, especially in relation to takings jurisprudence pursuant to the Takings Clause of The Constitution of the United States of America, Amendment V: see Heller, 'The Boundaries of Private Property', above n 9, 1208-11; Heller & Krier, above n 49. See especially *Pennsylvania Coal Co* v *Mahon*, 260 US 393 (1922); *Penn Central Transportation Co* v *City of New York*, 438 US 104 (1978); *Nollan* v *California Coastal Commission*, 483 US 825 (1987); *Keystone Bituminous Coal Association* v *DeBenedictus*, 480 US 470 (1987); *First English Evangelical Lutheran Church* v *County of Los Angeles*, 482 US 304 (1987).

Takings issues often also arise in relation to laws intended to protect the environment: Freyfogle, above n 29, 583. For a recent treatment of the impact which environmental legislation has on the service and manufacturing sectors of the United States economy, see James Salzman, 'Beyond the Smokestack: Environmental Protection in the Service Economy' (1999) 47 *UCLA Law Review* 411. See also Cass R Sunstein, 'Is the Clean Air Act Unconstitutional?' (1999) 98 *Michigan Law Review* 303.

[59]See AM Honoré, 'Ownership' in *Making Law Bind: Essays Legal and Philosophical* (1987) 161-92, 184.

three primary emanations.[60] Harris says that the process of slotting-in is what the law calls title:

> [i]f [Φ]...is true of X, then X is entitled to the protection of...[trespassory] rules in relation to ownership over a *res* (a tangible or ideational thing...), or to some other...[ownership] interest, where [Φ represents]...some such conditions as creation, long possession or long user, transactions, or registration.[61]

As such, any usage which attempts to conflate title with ownership or private property is misleading and ought to be eschewed.[62]

Seen in this way, title fails to define the content of an ownership interest and therefore is denied a place anywhere along the spectrum. The relationship between private property and title can be summarised thus: on the one hand, any normative conclusions about what a person may do with a given thing depends upon the prevailing cultural and ideological conception of ownership and the relevant private property domain and trespassory rules; whether a person ***is*** an owner--the holder of private property--on the other hand, depends upon the satisfaction of the necessary title conditions specified by a particular system.[63]

---

[60]Harris, above n 1, 5, 23, 39-40, 42 and 80-1.

[61]Harris, above n 1, 39.

[62]Harris, above n 1, 39-40. See, for example, the situation which ensued in Western Australia following *Mabo* v *Queensland [No 2]* (1992) 175 CLR 1 and the enactment of the Native Title Act 1993 (Cth). The Western Australia government attempted to devalue common law native title by enacting legislation that recognised only rights of traditional usage--the Land (Titles and Traditional Usage) Act 1993 (WA)--which the High Court found unconstitutional in *Western Australia* v *Commonwealth (Native Title Act Case)* (1995) 183 CLR 373. The very attempt to devalue common law native title may imply that Western Australia saw its content ***as*** a type of property or ownership. See Richard H Bartlett, *Native Title in Australia* (2000), 192-3.

[63]See Harris, above n 1, 23, 39-40, 42 and 80-1. See also Michael J Whincop, 'Conflicts in the Cathedral: Towards a Theory of Property Rights in Private International Law' (2000) 50 *University of Toronto Law Journal* 41, generally.

B. Possession

The Anglo-Australian approach to private property in land has its origins in the idea of possession as the foundation of right,[64] as does the operation of indigenous land rights and legal sovereignty over newly-acquired territory.[65] Despite its foundational prevalence, though, possession is neither ownership nor private property.[66] Possession does not permit normative conclusions to be drawn regarding what an owner may do with a thing. Rather, it is a context-bound form of language,[67] usually factual,[68] which refers to a relationship between person and thing. Because it is context-bound and factual, it assumes different meanings depending on the objects, circumstances and purposes for which it is being used. It is, therefore, an imperfect way of referring to ownership, one which ought to be eschewed.[69]

Harris offers the lease as an example of why this use of possession should be avoided.

---

[64]Getzler, above n 24, 651. See also Richard Pipes, *Property and Freedom* (1999), xv.

[65]See the seminal work of Kent McNeil, *Common Law Aboriginal Title* (1989), generally. See also Morris Cohen, 'Property and Sovereignty' (1927) 13 *Cornell Law Quarterly* 8.

[66]Although some refer to it, erroneously, as ownership *de jure* rather than ownership *de facto*: Pipes, above n 64, xv. Both uses are incorrect.

[67]Bruce H Ziff, 'Book Review, Carol M Rose, *Property and Persuasion: Essays on the History, Theory, and Rhetoric of Ownership* (Boulder, Westview Press, 1994)' (1996) 27 *Canadian Business Law Journal* 152, 157.

[68]Pipes, above n 64, xv; Thomas W Merrill, 'Property and the Right to Exclude' (1998) 77 *Nebraska Law Review* 730, 732; Carol M Rose, 'Possession as the Origin of Property' (1985) 52 *University of Chicago Law Review* 73; Thomas W Merrill, 'Property Rules, Liability Rules, and Adverse Possession' (1984-1985) 79 *Northwestern University Law Review* 1122.

[69]Harris, above n 1, 81. See also Merrill, 'Property and the Right to Exclude', above n 68, 732; Ziff, 'Book Review, Carol M Rose, *Property and Persuasion: Essays on the History, Theory, and Rhetoric of Ownership* (Boulder, Westview Press, 1994)', above n 67, 157-8; DR Harris, 'The Concept of Possession in English Law' in AG Guest, ed, *Oxford Essays in Jurisprudence* (1961) 69-106, generally; Pipes, above n 64, xv.

Because someone else is more aptly described as owner, lawyers typically refrain from referring to short leaseholders by this label, choosing instead to call them possessors or occupiers. But while it is true that such a lease lacks the larger set of privileges and powers enjoyed by someone higher up the spectrum, the short leaseholder nonetheless enjoys an ownership interest which allows that person to be called an owner. The difference is merely one of location along the spectrum. Once one satisfies the necessary title conditions to place the interest on the spectrum, an ownership interest exists whatever one calls it.[70]

III. CONCLUSIONS: ROMAN LAND-OWNERSHIP--A REAL-WORLD EXAMPLE OF PRIVATE PROPERTY

An example drawn from Roman law demonstrates the usefulness of our working definition of private property.[71]

A. Rejecting the Fictional Account of Roman Land-Ownership

The Romans developed a rational[72] form of land-ownership which constituted a

---

[70]Harris, above n 1, 81-3.

[71]One might be tempted to use the Anglo-Australian fee simple, which fits easily within the parameters of our working definition of private property. Roman land ownership is chosen, however, because it has so often stood as the counter-point to the fee simple as an example of absolute ownership, whatever that means, while the fee simple was something less. For a discussion of the way that a fee simple does fit our definition of private property and its content as being one of ownership, see Harris, above n 1, 68-71 and 91-3; Getzler, above n 24, 644-5; AWB Simpson, *A History of the Land Law* (2nd ed, 1986), generally and 47-54; Ziff, *Principles of Property Law*, above n 21, 53 and 148-50; Elizabeth V Mensch, 'The Colonial Origins of Liberal Property Rights' (1982) 31 *Buffalo Law Review* 635, 644-5; Freeman and Mensch, above n 49, 621-3; Baker, above n 4, 749; Charles C Geisler, 'Estates of Mind: Culture's Many Paths to Land' (2000) 13 *Society and Natural Resources* 51, 54-5. Land-ownership in the United States closely parallels the Roman model, although it uses the language of the common law: see Alexander, above n 24.

See also HW Challis, *Law of Real Property* (3rd ed, Charles Sweet, 1911), 218; AD Hargreaves, 'Modern Real Property' (1956) 19 *Modern Law Review* 14, 17; SFC Milsom, *Historical Foundations of the Common Law* (2nd ed, 1981, repr 1997), 99-100; JH Baker, *An Introduction to English Legal History* (3rd ed, 1990), 262-6.

[72]See Getzler, above n 24, 646.

distinct paramount right;[73] ***conceptually***, it comprised a legal relationship between a person and land that gave the holder the greatest possible accumulation of ownership privileges and powers, protected by trespassory rules, which were exercisable in accordance with unfettered self-seekingness.[74] Moreover, the Romans used their notion of ownership to refer to ***the, one, single*** owner; an indivisible ownership residing in one person, in contradistinction to all others who had interests in the land, who were known as something ***less*** than an owner.[75] Indivisible ownership depended upon an 'absolute title', a term which meant that ***only*** those persons who could show the best title to a piece of land could justifiably be called its owner. Given this conceptual understanding, Roman land-ownership was, *prima facie*, private property, but one which the common law world, with its relative title and property domain, would be hard-pressed to duplicate.

As conceptually tidy as the Roman picture might at first appear, however, it never existed. The tidy picture was the creation of a scholarly Roman tradition--working from the conceptual analysis--which it often found difficult to square with the complexities of real-life private property systems.[76] In truth, Roman land-ownership, while it required absolute title, never recognised absolute or allodial ownership or *dominium*[77] in the person who could satisfy

---

[73]DL Carey Miller, 'Property' in Ernest Metzger, ed, *A Companion to Justinian's Institutes* (1998) 42-79, 45; Peter Birks, 'The Roman Law Concept of Dominium and the Idea of Absolute Ownership' (1985) *Acta Juridica* 1, 25-9.

[74]Barry Nicholas, *An Introduction to Roman Law* (1962, repr 1990), 153-4; Birks, above n 73, 25-9.

[75]Lawson, above n 11, 114.

[76]J Walter Jones, 'Forms of Ownership' (1947) 22 *Tulane Law Review* 82, 82-5; Boudewijn Bouckaert, 'What is Property?' (1990) 13 *Harvard Journal of Law and Public Policy* 775, 776-7 and 784-9.

[77]Land-ownership in the United States is similar to the Roman model in this regard. While land-ownership there was in the process of moving toward a feudal system immediately

that requirement.[78] It was a form of full-blooded ownership just as is the Anglo-Australian fee simple, differing merely in property-institutional design, a matter of packaging rather than content. Thus, while the fictional account must be rejected in favour of the factual reality, the reality itself stands as an example of private property in a real-world setting. It includes the twin pillars and the property domain of a private property system.

B. The Twin Pillars

Prima facie, Roman land ownership includes ownership privileges and powers, including transmission, familiar to the Anglo-Australian fee simple owner and to the paradigm model of full-blooded ownership.[79] But more importantly, while the Roman owner enjoyed

---

prior to the Revolution--which would have resulted in the imposition of incidents of tenure--it moved radically in the opposite direction after that period. Post-revolutionary state legislators quickly abolished all forms of land-ownership locally perceived as feudal. Their clear preference was for an allodial, or absolute and non-feudal, system of land-ownership. This, as with much of the revolutionary history of the United States, was fuelled by a rejection of feudal hierarchy and Crown privilege. The dilemma for the legislators was to develop a notion of land-ownership that would stem majoritarian (republican) excesses without appealing to the despised aristocratic institutions of the Crown embodied in the feudal system. Such a right came to fruition in The Constitution of the United States of America, Article I, Section 9, which provided the basis for inviolable land-ownership, derived from the republican people themselves, but protected from their majoritarian excess by their own constitutionally structured judiciary: Freeman and Mensch, above n 49, 623-5. *Fletcher* v *Peck*, 6 Cranch 87 (1810) confirmed this approach to land-ownership. Nonetheless, the American system of absolute or republican land-ownership remains identical in content to the Anglo-Australian or Roman models; it represents the fullest available set of privileges and powers in relation to American land protected by trespassory rules and it is subject to property-limitation, expropriation and appropriation rules and property-independent prohibitions. Its republican roots notwithstanding, it comprises an example of full-blooded ownership. See also Alexander, above n 24, 672-8.

[78]Harris, above n 1, 133. See also Birks, above n 73, 19-20 and 23-5; Joshua Getzler, 'Roman Ideas of Landownership' in Susan Bright and John Dewar, eds, *Land Law: Themes and Perspectives* (1998) 81-106, 82-5, n 7; Fritz Schulz, *Principles of Roman Law* (Marguerite Wolff, 1936), 151-5; Fritz Schulz, *Classical Roman Law* (1951), 338-55; WW Buckland and Arnold D McNair, *Roman Law and Common Law* (FH Lawson, 2nd ed, 1952), ch III.

[79]Carey Miller, above n 73, 45; Birks, above n 73, 1 and 7-25; Nicholas, above n 74, 144 and 154. See also Robert Feenstra, '*Dominium* and *ius in re aliena*: The Origins of a

self-seekingness in relation to these privileges and powers, this attribute was not unfettered. The holder was not free from the usual range of property-limitation, expropriation, and appropriation rules nor from property-independent prohibitions.[80] Indeed, with the notable absence of feudal burdens,[81] such contential limitation, which parallels English real property law, was deeply ingrained in the Roman legal mind.[82] The existence of such limitations[83] fails to impugn the conclusion that Roman land-ownership was full-blooded ownership and thus private property,[84] indeed, their presence presupposes it. A brief examination of the operation of trespassory rules demonstrates this.

The Roman land-owner enjoyed trespassory protection of the relevant ownership privileges and powers. Roman law drew an interesting distinction, however, between trespassory protection and property-limitation rules in determining the extent of the protection afforded against trespassers, the consequence of which was that the Roman land-owner failed to enjoy the same sort of trespassory protection enjoyed by the holder of an Anglo-Australian fee simple. The distinction was between an intermeddler, one who entered land in the interest

---

Civil Law Distinction' in Peter Birks, ed, *New Perspectives in the Roman Law of Property: Essays for Barry Nicholas* (1989) 111-22, 111.

[80]Birks, above n 73, 16 and nn 73 and 75-6. See also D 9.2.30.3 (Paul 22 *ad edictum*); D 44.7.5.5 (Gaius 3 *aureorum*); *Institutes* 4.5.1, 2. See also Buckland and McNair, above n 78, 99.

[81]Birks, above n 73, 19-20. Although Roman land-ownership could be burdened by non-ownership proprietary interests, or praedial servitudes--duties either to abstain from conduct or to permit the dominant owner to do something--these failed to constitute feudal burdens. An agreement that one owner would, for instance, plough the field of another, operated as a contract between them that failed to run with the land as an independent ownership interest or to act as a property-limitation rule.

[82]Birks, above n 73, 8-10.

[83]A full examination of these can be found in Birks, above n 73, 7-25.

[84]Nicholas, above n 74, 148-9 and 154.

of the owner, and an intruder. In the former case, Roman law imposed a duty upon the land-owner to reimburse the intermeddler for expenses incurred. In the latter, any such duty owed, if at all, was minimal, which meant the land-owner enjoyed broader trespassory protection.[85] The imposition of the duty upon the land-owner in the case of the intermeddler constitutes a property-limitation rule in the sense that the owner was not entitled to act self-seekingly in relation to those who entered the land in order to assist the owner.

C. The Private Property Domain

Property-limitation rules were evident, indeed prevalent, in the Roman world; various rules might impinge in a number of ways upon a land-owner's self-seeking exercise of privileges and powers. A land-owner might, for instance, find that certain rules ensured the protection of non-ownership proprietary interests over the land which removed a particular use-privilege from[86] or created a servitude over the land.[87] Or, certain aspects of the owner's land might be removed from the scope of the relevant ownership privileges and powers because of what it was: a land-owner may be prohibited from making any use of air, sea-shore, running water, rivers or river-banks, for instance. Others might arise through legislation or the interpretation of the law. In the former case, for example, laws required owners to keep clear space on either side of aqueducts, while in the latter, an owner may be required to respect the views of adjoining landowners.[88] The doctrine of waste placed

---

[85]*Magna utilitas absentium* D 3.5.1 (Ulpian 10 *ad edictum*); D 44.7.5pr (Gaius 3 *aureorum*); *Institutes* 3.27; see also Alan Rodger, *Owners and Neighbours in Roman Law* (1972), 40-7; Birks, above n 73, 17, n 105.

[86]*Institutes* 2.1.1; D 1.8.2 (Marcianus 3 *institutionum*); Birks, above n 73, 9, n 40.

[87]Birks, above n 73, 17 and n 79.

[88]For a more complete list see Rodger, above n 85, 34-7 and 39-89; Birks, above n 73, 17 and n 79.

restrictions upon irresponsible extravagance and wasteful neglect.[89]

Most importantly, the power of transmission was hedged. Two main rules affected the power to transmit land:[90] (i) incapacity through age, mental health, or irresponsible extravagance;[91] and (ii) the elimination of specified and penalised transactions. Neither present any difficulty for the conclusion that Roman land-ownership was full-blooded because both arose not from the ownership interest itself, but from personal conditions[92] or miscellaneous policy objectives.[93]

Expropriation and appropriation rules also limited Roman land-ownership. For example, Roman land was subject to compulsory acquisition at market value in the public interest.[94] From this one can exclude rules which, while appearing to be expropriation rules, are, as already noted, property-independent prohibitions, such as expropriations which flowed from political upheaval. These are not expropriation rules because they clearly operate irrespective of whether one has property or not.[95]

---

[89]Birks, above n 73, 17-9.

[90]Birks, above n 73, 20-3; Nicholas, above n 74, 156-7.

[91]The Romans did place significant restrictions on the alienation of owned ***rights*** in relation to land, such as usufruct, praedial servitudes and rights *in personam*. But such restrictions as existed applied ***only*** to the rights and not to the land itself. The only exception to this clean distinction is that of *emphyteusis* and *superfices* which ***were*** freely alienable, although they were not land alone, which renders the distinction between land and rights troublesome: Nicholas, above n 74, 157; Zimmerman, above n 19, 358-9. See also Gaius 4.84-.86; D 3.3.55 (Ulpian 65 *ad edictum*); Birks, above n 73, 21, n 120.

[92]Gaius 2.64, 2.80-.86; *Institutes* 1.13.1 and 1.23pr; Birks, above n 73, 21, nn 117-8. See also WW Buckland, *Textbook of Roman Law* (Peter Stein, 3rd ed, 1963), 143-73.

[93]Birks, above n 73, 22.

[94]J Walter Jones, 'Expropriation in Roman Law' (1929) 45 *Law Quarterly Review* 512, 516; Nicholas, above n 74, 154.

[95]Birks, above n 73, 14-5.

Chapter 4

WORKING DEFINITIONS OF PUBLIC PROPERTY AND COMMUNITARIAN PROPERTY[1]

This chapter has two objectives. First, using the working definition of private property provided in Chapter 3, it identifies the main analytic features of public property, and in so doing, constructs a working definition of that concept. Second, it defines communitarian property, a unique type of property which is necessary for an understanding of the role of common law native title within the Australian Crown land system.

I. PUBLIC PROPERTY

The power of the State to hold property--typically, but as we will see, inaccurately referred to as its ownership or *dominium*[2]--is usually captured by the phrases State property or public property.[3] Using Harris' structure, one can identify the main elements which

---

[1]This chapter relies heavily upon and adapts the work of JW Harris, *Property and Justice* (1996), chs 3-9.

[2]Morris Cohen, 'Property and Sovereignty' (1927) 13 *Cornell Law Quarterly* 8; Ian Brownlie, *Principles of Public International Law* (4th ed, 1990), 109. And see also DP O'Connell, *The International Law of the Sea* (IA Shearer, 1982), 59-61 and generally 61-83.

[3]See James L Huffman, 'Land Ownership and Environmental Regulation' (1999) 25 *Ecology Law Quarterly* 591, 597-9; Thomas W Merrill, 'Property and the Right to Exclude'

distinguish this type of property from its private counterpart. Variations typically occur in relation to particular locations along the ownership spectrum which have the result of removing any one interest from the spectrum and thus from the realm of private property. Harris, who calls the interests which result from the main variations of an ownership interest 'quasi-ownership interests', identifies two main features which distinguish public from private property: (i) a synthesis of a public authority's or agency's social-political function and ownership interests, and, (ii) a lack of self-seekingness in the exercise of the relevant privileges and powers.[4] This section considers both of these features and adapts the ownership spectrum and private property domain accordingly.

A. The Synthesis of Social-Political Function and Ownership Privileges and Powers

The relationship between State or public institutions (authorities or agencies) and public property differs from that enjoyed by the private owner: the former permits the exploitation of a thing through a hybrid mix of privileges and powers derived, first, from the particular social-political function discharged by the agency or authority, and, second, by analogy to the ownership privileges and powers inherent to private property.[5]

The social-political function of a public official or authority--which varies according to the public enterprise in question--rather than individual preference-satisfaction, represents the cornerstone of any invocation of public property.[6] In relation to land, for instance, the

---

(1998) 77 *Nebraska Law Review* 730, 733 and 749-50. See also Arnold S Weinrib, 'Property, Precedent, and Policy' (1985) 35 *University of Toronto Law Journal* 542, 548-51.

[4]Harris, above n 1, 24 and 106-9.

[5]Harris, above n 1, 106-9, 114 and 120. On the social-political function of quasi-ownership interests see Gregory S Alexander, 'Property as Propriety' (1998) 77 *Nebraska Law Review* 667, 672, and Merrill, above n 3, 749-50 and generally.

[6]Harris, above n 1, 106-9, 114 and 120.

social-political function may take the form of the public interest, which could include, among other things, long-term stewardship and ecologically sound use.[7] Social-political function determines, to a large extent, the sorts of privileges and powers which the public quasi-owner enjoys, as drawn from the prevailing societal conception of ownership.

In addition to the social-political function of the official or authority, private property also plays a pivotal role in the definition of public property. This is so because notwithstanding the social-political function of the entity which holds it, the varying contours of public property always reflect and are parasitic upon, in part, the prevailing societal conception of ownership, borrowing some of its content, great or small, from the open-ended privileges and powers which belong to that conception.[8]

In constructing public property, the municipal law--usually legislation[9]--of most

---

[7]See also Charles C Geisler, 'Estates of Mind: Culture's Many Paths to Land' (2000) 13 *Society & Natural Resources* 51, 56-8; Bruce H Ziff, 'Book Review, Carol M. Rose, *Property and Persuasion: Essays on the History, Theory and Rhetoric of Ownership* (Boulder, Westview Press, 1994)' (1996) 27 *Canadian Business Law Journal* 152, 153.

[8]Harris, above n 1, 106-9, 114 and 120. *British Airports Authority* v *Ashton* [1983] 3 All ER 6 provides a good example of the amalgam of private property ownership privileges and powers in public property. In that case, statute created a public authority vested with ownership of Heathrow Airport in London. The authority had a statutory duty to provide facilities to the public combined with defined powers ancillary to the discharge of that duty. The Court was asked to decide whether its powers enabled it to make regulations under which it would be an offence for trade union members to carry out peaceful picketing at the airport after being asked to leave. The Court held that they did as an incident to the authority's ownership privileges and powers. It held that the ownership in question, while that of a private land-owner, was subject to a gatekeeper duty; the right of the public to have access for the purpose of taking advantage of the services and facilities provided by the authority in pursuance of its statutory duty. Nonetheless, that 'ownership' was not subject to allowing access for the purpose of picketing. For another English example, see *R* v *Somerset County Council, ex parte Fewings* [1995] 3 All ER 20, and for an Australian example see *Margarula* v *Rose* (1999) 149 FLR 444.

[9]Eric T Freyfogle, 'The Particulars of Owning' (1999) 25 *Ecology Law Quarterly* 574, 578; Eric T Freyfogle, 'The Owning and Taking of Sensitive Lands' (1995) 43 *UCLA Law Review* 77, 103-6.

modern States typically mixes some features of full-blooded ownership with its system of public property.[10] The validity of an exercise of powers conferred upon a public entity therefore depends upon a synthesis of legally defined and residual ownership privileges and powers.[11] In Australia, for instance, a traditional indigenous landowner who uses legislatively conferred rights of entry to public land for the purpose of protesting against uranium mining carried out by a governmental entity becomes a trespasser pursuant to relevant legislation which protects all land-owners.[12] In such a case, at least for the purpose of trespass, the state is treated as though it were an owner. The state is not so treated for all purposes; notwithstanding the protection of some trespassory rules, it may not, for instance, ever act so as to suit personal tastes and desires. In other words, there is a lack of self-seekingness in the exercise of public property quasi-ownership privileges and powers. Let us consider this limitation further.

B. Lack of Self-Seekingness

Even if Harris' view of the analytical and normative content of private property is mistaken, he is almost certainly right that a lack of self-seekingness differentiates private from public property. While the normal trespassory protection of the relevant private property system confers upon agents of the State or other public institutions a range of privileges and powers which, modelled upon ownership, permit it to exploit whatever constitutes the subject-matter of public property, such exploitation is not driven by the notion that governmental officials, or any personified complex of them may, *prima facie*, do what they like with 'their'

---

[10]Geisler, above n 7, 57.

[11]Harris, above n 1, 106-9, 114 and 120.

[12]*Margarula* v *Rose* (1999) 149 FLR 444.

property.[13] Neither law nor social convention entitles such managers or functionaries to answer any disputed exercise of their privileges and powers, whatever they may be, with 'it was my free choice to do with the thing as I pleased'.[14] Public property lacks self-seekingness, and this negative quality is called the 'non-self-seekingness limitation'. And because it lacks entirely the essential quality of self-seekingness in the exercise of privileges and powers, public property cannot be located anywhere along the ownership spectrum.[15]

Rather, for the very reason that it lacks self-seekingness, public property is ***quasi***-ownership.[16] In relation to land, for example, while quasi-ownership allows for the exclusion of others from the land held thereunder,[17] the specific social-political function assigned to the authority vested with that interest will not always coincide with the desire to act in whatever way an official of that authority might please. While the authority and its officials are usually required to allow access for specific purposes (and may sometimes exclude others from the land at its discretion), it may not be entitled to do all that a private owner is entitled to do with the land.[18] The authority may not, for example, be entitled to clear it for crops, build upon it, transfer it, borrow against it, and so forth.[19]

---

[13]Harris, above n 1, 104-5. See also Huffman, above n 3, 597-9.

[14]Harris, above n 1, 104-5.

[15]Harris, above n 1, 5-6, 31, 65, 101, 104-10 and 119-20. See also Bruce H Ziff, *Principles of Property Law* (3rd ed, 2000), 7-8; Huffman, above n 3, 597-9.

[16]Harris, above n 1, 65.

[17]Merrill, above n 3, 749.

[18]In the United States, for example, States hold public land in trust for the people under the public trust doctrine, which allows the State to do certain things with the land, but always in the interest of the people, which includes free public access: see Chapter 1, n 3.

[19]Harris, above n 1, 104-5. See also Merrill, above n 3, 749-50.

No doubt public authorities and agencies may still do things with public property, and what they can do may be left to their discretion,[20] but they are simply not free to say that what they have done was done because they are entitled to satisfy personal tastes and desires. But, one might ask, how does the quasi-owner's lack of self-seekingness differ from situations where a private owner lacks self-seekingness? A trustee--a private owner--for example, must act in the interests of beneficiaries, and to that extent, lacks self-seekingness. Similarly, corporations must act in the interests of their shareholders. But even in the case of a trustee or a corporate officer, a socially deleterious exercise of ownership privileges or powers can be answered with the response that it was for the benefit of a beneficiary or the shareholders.[21] How is it, then, that these instances of limited self-seekingness in the case of owners differ from that which affects quasi-owners?

It is possible to identify at least two reasons why quasi-owners lack self-seekingness in a way that does not apply in the case of owners. First, the constitutions of states and the legislation enacted thereunder empower quasi-owners to act pursuant to quasi-ownership privileges and powers. Both typically limit or remove entirely the self-seekingness otherwise enjoyed by owners in the exercise of those privileges and powers. Second, the quasi-owner must ***always***, without exception, act on behalf of the citizenry for the public good. This duty applies in all cases involving public property. It is a political, rather than a legal constraint. While the owner may be subject to legal rules that require an exercise of privileges and powers in the interests of some other person or persons, in the case of the state, the rules are political.

---

[20]Margaret Jane Radin, 'Government Interests and Takings: Cultural Commitments of Property and the Role of Political Theory' in Margaret Jane Radin, ed, *Reinterpreting Property* (1993) 166-90, 179, argues that it is even possible to attribute tastes and desires to entities such as the government, which are not persons but which are composed of persons.

[21]Harris, above n 1, 105-6.

A similarly imposed duty obviously does not affect owners. Let us consider these two reasons more closely.

1. Constitutional and Legislative Limitations

The constitution of a state and any legislation enacted thereunder which empowers a sovereign, public authority or agency to deal with public property affects the extent to which it enjoys self-seekingness.[22] The convergence of the two typically conditions the way in which quasi-ownership privileges and powers over a resource may be exercised, thus drastically reducing, if not eliminating, the ability of the sovereign, authority or agency to exercise proper desires and appetites in relation to the resource. This sort of vulnerability is dissimilar to that experienced by the holder of private property, who faces the potential operation of property rules.

The inherent ability of the holder of private property to act in accordance with proper tastes or desires is not removed by vulnerability to property rules, while in the case of public property, the existence of constitutional provisions which prescribe the exercise of quasi-ownership privileges and powers restrict or remove the ability to act in accordance with proper tastes and desires. Similarly, the vulnerability of constitutional and legislative provisions to alteration, either through formal processes of amendment, or judicial or legislative interpretation or limitation, and the vulnerability of empowering legislation to repeal or amendment also affect the extent of self-seekingness in the exercise of quasi-ownership

---

[22]Constitutional and legislative provisions to this effect are found in relation to the United States public trust doctrine: see Stewart Elgie, 'Protected Spaces and Endangered Species' in Elaine L Hughes, Alastair R Lucas and William A Tilleman, eds, *Environmental Law and Policy* (2nd ed, 1998) 437-485, 455-6; Joseph F Dimento, 'Citizen Environmental Legislation in the States: An Overview' (1976) *Journal of Urban Law* 413.

privileges and powers.[23]

2. The Public Good

We have seen that the social-political function of a public official or authority, as conferred by law, plays a role in determining the quasi-ownership privileges and powers enjoyed by the official or authority. In some cases, the public too may play a role in determining how an official or authority exercises the quasi-ownership privileges and powers accorded it in relation to public property.

Consider the case of empowering legislation that permits a public official or authority to confer upon an individual person, for a limited term, a lesser quasi-ownership interest in relation to a state resource, such as land. The individual person may exercise privileges and powers thereunder according to proper tastes and desires in relation to the resource, and depending upon the legislation, may either be treated, on the one hand, as being able to act as if they held private property, or, on the other, as no more than a steward of the land acting on behalf of the public and not as the holder of private property.[24] In either case, however, the official or authority holds whatever interest it retains subject to the interests of, or as nominee on behalf of, the wider community.[25] And this obligation, duty, or requirement, applies not just to those instances where other private property or quasi-ownership interests are created by the state. Rather, it applies in all cases to the state and its officials or authorities; it must

---

[23]Harris, above n 1, 104-9.

[24]Such a view has been adopted in Alberta, Canada, in relation to Crown land: see *OH Ranch Ltd* v *Patton* (1995) 48 RPR(3d) 308; *OH Ranch Ltd* v *Patton* (1996) 138 DLR(4th) 381.

[25]Harris, above n 1, 104-9. See also FR Barker and NDM Parry, 'Private property, public access and occupiers liability' (1995) 15 *Legal Studies* 335, 338. See also Richard F Babcock and Duane A Feurer, 'Land as a Commodity "Affected with a Public Interest"' (1977) 52 *Washington Law Review* 289.

act in accordance with the common or social good, or at least have those objectives in mind when acting.[26]

If we consider more closely the distinction alluded to earlier between private and public property that flows from the difference between the duty or requirement of the owner to act for the benefit of others and that of the quasi-owner to act in the public good, we find that three further, but related differences emerge. First, the duty to act in the public good always applies to the quasi-owner. It is not situational or occasional as in the case with owners who owe a duty to act in the interests of specific individuals, such as trustees to beneficiaries or corporations to shareholders.

The second difference, which flows from the first, concerns those to whom the duty is owed. In the case of the owner, the duty is owed only to defined persons; as we have seen, these may be beneficiaries under a trust or the shareholders of a corporation. In relation to the quasi-owner, the duty is owed to the entire citizenry simply because its members are citizens. It is an automatic right which every citizen may expect to be fulfilled by the state by virtue of citizenship. The duty owed to the beneficiary or the shareholder by an owner, on the other hand, is connected to the property. It is not owed in the absence of the trust or the shareholding.

Finally, there is a difference between owners and quasi-owners who breach the duty to act in the interests of others. As we have seen, the quasi-owner must act in the public good, on behalf of the entire citizenry in every case. What if the public official or authority

---

[26]In relation to governmental obligations regarding choices made in exercising the control of public property in accordance with the social and common good, see generally Paul Craig, *Public Law & Democracy in the United Kingdom and the United States of America* (1990), 245-316; Philip Pettit, *Republicanism: A Theory of Freedom and Government* (1997), 120-6; Cass R Sunstein, 'Beyond the Republican Revival' (1988) 97 *Yale Law Journal* 1539.

exercises the quasi-ownership privileges and powers in contravention of this duty? The answer lies partly in the fact that the duty is really a matter of constitutional law. As such, any contravention of the constitutional law of the state brings with it political consequences, most notably those that flow from the ballot-box. Conversely, the consequences that flow from a contravention of the duty of a trustee to act for the benefit of a beneficiary or of a corporation to act in the interests of its shareholders are legal.

The three differences which we have identified in relation to the duty to act for the benefit of others, and what they tell us about the state's duty to act for the public good, can be summarised in a principle of constitutional theory known as 'political sovereignty' or 'popular sovereignty'. This always lurks below the surface of every relationship between an official or authority and public property, even if that relationship is legislatively established. This concept, identifiable in the origins of the American Revolution[27] and comprehensively analysed by AV Dicey,[28] must be distinguished from 'legal sovereignty'. McHugh distinguishes the two this way:

> Legal sovereignty is the constitutional authority vested in the Crown in its executive, legislative and...judicial capacities. Political sovereignty, however, describes the relation between Crown and subject. It embodies the belief that the consent of the community is the ultimate source of all political authority or right of government. Given this source, those equipped with constitutional power and authority are required to condition their conduct to the community will.[29]

---

[27]Bernard Bailyn, *The Ideological Origins of the American Revolution* (1967), 162-75.

[28]AV Dicey, *Introduction to the Study of the Law of the Constitution* (10th ed, 1959), 72-4. See also PG McHugh, *The Māori Magna Carta: New Zealand Law and the Treaty of Waitangi* (1991), 13-9; PG McHugh, 'Constitutional Theory and Māori Claims' in IW Kawharu, ed, *Waitangi: Māori & Pākehā Perspectives of the Treaty of Waitangi* (1989) 25-63, 33-7.

[29]McHugh, 'Constitutional Theory and Māori Claims', above n 28, 33-4.

The limitations imposed by political sovereignty constitute the 'morality' of the constitution,[30] the requirement, not embodied in law, that parliament, and public officials or authorities empowered by it, act in accord with the public good or with the community will in mind. Such substantive limitations can be found in the role played by elections in a democratic system or by constitutional conventions.[31] They can also be found in the way in which public officials or authorities must, in exercising their quasi-ownership privileges and powers over public property, act, not to satisfy their own personal tastes and desires, but in the public good or with the community will in mind. While that requirement is typically not embodied in the constitution or the empowering legislation which confers the quasi-ownership privileges and powers, it comes with them as part of the moral responsibility of the executive or legislature to its citizenry. Acting according to the dictates of the public good or the common will, entirely unknown to the private property holder, is the hallmark of the non-self-seekingness limitation.

C. The Spectrum Analogy: A Quasi-Ownership Spectrum

As we have seen, public property combines, on the one hand, a synthesis of social-political function and ownership privileges and powers, with, on the other, a lack of self-seekingness. As such, the spectrum analogy used in relation to ownership can also be applied to public property. This 'quasi-ownership spectrum' accommodates only those interests which ***lack*** self-seekingness, but so far as privileges and powers are concerned, operates in much the same way as the ownership spectrum.

The spectrum will vary depending upon the society and type of public property under

---

[30]John Austin, *Province of Jurisprudence Determined* (1832), lect 5.

[31]McHugh, 'Constitutional Theory and Māori Claims', above n 28, 33-4.

review. The overarching consideration in using the analogy is that the spectrum maps the privileges and powers available to a public agency or authority in relation to a given resource, always bearing in mind the non-self-seekingness limitation. How those powers are bundled will obviously differ depending upon the property institutional design employed.

Harris provides as an example the quasi-ownership spectrum which might apply to State corporations. At the upper end of the spectrum might be those interests of the corporation by which it is vested with ownership of some industrial enterprise. Legislation specifies in general terms some of the powers and duties held by the corporation while the remainder are presumed to be virtually identical to the ownership powers and privileges held by any private corporation. At the lower end, one might find interests established by legislative codes which lay down in detail the majority of rights, duties, privileges and powers enjoyed by the corporation, with ownership privileges and powers resorted to only if necessary to fill gaps in the code.[32]

D. A Public Property Domain: The Role of Property Rules

Public property, just like private, requires a property domain. Property rules--property limitation, expropriation and appropriation rules--constrain whatever inherent freedom to act with which is left to a quasi-owner after accounting for the non-self-seekingness limitation. Each of the various property rules examined in Chapter 3 apply, modified, and in some cases drastically curtailed as necessary, to quasi-ownership interests. Most public property, for instance, is not subjected to bankruptcy law or the law of criminal forfeiture and typically features differently in taxation law. Similarly, while land may be expropriated from State or public institutions, the principle of no expropriation without compensation is usually not

---

[32]Harris, above n 1, 106.

applicable to statutes which divest public bodies of an ownership interest.[33] Thus, while curtailed, property rules constitute a necessary element of public property, just as they do in the private sphere. Drawing together the property rules borrowed from the private property domain and applying them to the quasi-ownership spectrum exhibits a typical real-world public property domain.

E. Conclusions: Roman *Publicus*--A Real World Example of Public Property

As it did with private property, Roman law offers a good example of public property. During the Empire, Roman law countenanced the removal of particular classes of land from the possibility of full-blooded private property. One such class was land common to all people, called the *res communes* (comprising elements of land, such as the air, sea, sea-shore, running water, rivers and the use of river banks). This land was vested in the state, identified as the whole body of citizens or the *res publica*, and held as public property (*publicus*). And while some *publicus* might be let out to private individuals,[34] it could never be said that it belonged to any one individual. Self-seekingness was therefore entirely absent from the analytical make-up of *publicus*. It was among the belongings of no one person, rather, it

---

[33]Harris, above n 1, 108. While the principle may not apply in England, that is not always the case in Australia: see eg Land Acquisition (Just Terms Compensation) Act 1991 (NSW), s 29, which provides for the compulsory acquisition of Crown land for public purposes upon payment of just terms compensation where the owners have agreed on the that matter. Sub-section 4(1) 'owner' includes the Crown.

[34]Such as *emphyteusis*, which originated in the practice of granting State or municipal land for very long periods, or perpetually, in return for the payment of an annual rent. Grants of *emphyteusis* differed from ordinary leases and usufruct in that they were inheritable and alienable. Moreover, the holder had a real relation to the land that inured in possession. *Emphyteusis* derived almost all of its content from ownership, particularly when granted in perpetuity. Nonetheless, the grantor retained ownership, although the rights of the *emphyteuta* were so extensive as to in effect create two ownerships. This, of course, diverges radically from the Roman conception of unity of ownership: Barry Nicholas, *An Introduction to Roman Law* (1962, repr 1990), 149; Reinhard Zimmerman, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (1990 and 1996), 358-9.

belonged to the collectivity itself.

Not even the Emperor, in fact, could be said to enjoy a self-seeking relationship to *publicus*. Roman law viewed the emperor as an immensely wealthy private individual who owned land both as a person ***and*** as a member of the collectivity which owned *publicus*.[35] Accordingly, no special category was required to describe the land which the Emperor owned as a person, nor did he require a special personality as the State. The Emperor was completely distinct, in terms of ownership, from the *res publica*, of which he was one.[36] Thus, *publicus* resided with the State, the people.[37]

II. COMMUNITARIAN PROPERTY

A. Not Private, Public or Common Property

For the purposes of this thesis, it is not necessary to further distinguish common property from private property or public property. For present purposes, it is sufficient to say

---

[35]On the distinction drawn by medieval political theory between the King as Crown and the King as person, see Ernst H Kantorowicz, *The Kings Two Bodies: A Study in Medieval Political Theology* (1957, repr 1981), generally, and in relation to feudal land law in particular George Garnett, 'The Origins of the Crown' in John Hudson, ed, *The History of English Law: Centenary Essays on 'Pollock and Maitland'* (1996) 171-214, 184-9, who says (at 187) that '[t]here may turn out to be some truth in Maitland's carefully hedged hunch that, in the Anglo-Saxon period, it would be on the death of a king that the necessity would first arise of drawing some distinction between what belonged to the king as king and 'what belonged to him--if we may use so modern a phrase--in his private capacity.''

[36]Peter Birks, 'The Roman Law Concept of Dominium and the Idea of Absolute Ownership' (1985) *Acta Juridica* 1, 10.

[37]Gaius 2.11; Birks, above n 36, 10. A more recent example of State property residing in the people is found in United States public land. There, in the case of both Federal and State public lands, the public land manager is viewed as different from the private land-owner in the sense that the former seeks to maximize benefits to the public. James Huffman notes that Gifford Pinchot, the founder of the US Forest Service and an early leader in the effort to retain lands as public property, wrote that the public land manager's goal is to create 'the greatest good for the greatest number over the longest time': Gifford Pinchot, *Breaking New Ground* (1947), 261, cited in Huffman, above n 3, 597. And in some cases--most notably national parks--the ownership of public lands in the United States is governed by the public trust doctrine: see Chapter 1, n 3.

that the former refers simply to no property at all; it is a way of pointing out that a particular resource has not been subjected to a property institution, either private or public.[38] As such, it cannot help in an examination of Australian Crown land.

There is, however, an important type of property which is not private, public, or common, but which is absolutely essential to any understanding of the current theoretical status of Australian Crown land. Harris calls this 'communitarian property', which he argues cannot be defined by, although it can be distinguished from, private, public, or common property.[39] It is a necessary category of property simply because it is needed to make sense of the colonialising activities of the English.

Kent McNeil writes:

> The English were no newcomers to colonial enterprise when the great rush for empire began with the European 'discovery' of America in 1492. Their Anglo-Saxon forebears started to invade the British isles in the fifth century AD, eventually spreading over most of what is now England. They absorbed the Danes and Normans who came to conquer them in turn, and went on to subdue Ireland, Wales, and the Isle of Man. On the continent, they were less successful: after making some gains in the Hundred Years War they were ultimately driven out of France, losing almost all the territories the kings of England claimed by inheritance from their Norman and Aquitanian ancestors. The English thus had a long history of colonial experience when the age of discovery began.[40]

Beginning in the 15th century, these colonising attempts were taken, with somewhat greater success, to the Americas, Africa, Asia and Australia.[41] In some instances the resource

---

[38]Harris, above n 1, 110.

[39]Harris, above n 1, 102-4. For very different perspectives on communitarian property see Bradley Bryan, 'Property as Ontology: On Aboriginal and English Understandings of Ownership' (2000) 13 *Canadian Journal of Law and Jurisprudence* 3; Richard A Epstein, 'Property Rights Claims of Indigenous Populations: The View from the Common Law' (1999) 31 *University of Toledo Law Review* 1.

[40]Kent McNeil, *Common Law Aboriginal Title* (1989), 1.

[41]McNeil, above n 40, 1; McHugh, *The Māori Magna Carta*, above n 28.

allocation systems--or what might be called, from a western perspective, the property systems--enjoyed by the indigenous societies found in these new territories were left intact, while in others they were subsumed by the law brought with the colonisers. And in still other cases, the contemporary society that has grown from these colonising activities has eclipsed or eliminated the historically significant indigenous property systems that once flourished. The eclipse has usually been accomplished using western conceptions of private property.

But the obliteration of the pre-existing indigenous property system has not always been the outcome of colonising activities; in some cases alteration or contamination[42] by a dominant society has not led to the ultimate breakdown and replacement of the indigenous property system.[43] In such cases, the indigenous system spontaneously evolves[44] as a form of collective ownership which either survives or is permitted to survive by the dominant society. Sometimes it even survives in societies which had long thought it eliminated.[45] One thing is clear, however; while having extreme historical significance, it does not always fit neatly, if at all, within western conceptions of private property. As such, any label which attempts to draw upon or equate such collective ownership to private, public or common

---

[42]See Stuart Banner, 'Two Properties, One Land: Law and Space in Nineteenth Century New Zealand' (1999) 24 *Law and Social Inquiry* 807, 808 and 821-3, describing the pre- and post-English contact relationship to land of New Zealand's Māori peoples.

[43]See Banner, above n 42, 845 and 847.

[44]See Paul Vinogradoff, *Outlines of Historical Jurisprudence: Introduction: Tribal Law* (1920), vol 1, 341-3; Henry Sumner Maine, *Ancient Law: Its Connection With the Early History of Society and its Relation to Modern Ideas* (1st ed, 1906, repr 1920), 271-81; Henry Sumner Maine, *Early Law and Custom* (new ed, 1890), 192-231. In the Australian context specifically, see John Mulvaney and Johan Kamminga, *Prehistory of Australia* (1999), 75-8, 130-46, 172-206, 273-356. See also Robert C Ellickson, 'Property in Land' (1993) 102 *The Yale Law Journal* 1315, 1364-71.

[45]Because the best example of communitarian property is Australian common law native title (not to be confused with common law Aboriginal title: McNeil, above n 40) no example of it is given here. Instead, see Chapters 9 and 11.

property is misleading and logically inappropriate.[46]

B. The Content of Communitarian Property: Founded on Community Customs and Traditions

Communitarian property exists in any situation where it can be said that the members of a group have mutual rights over land, which they claim as theirs--the private property, in a sense the very identity[47] of the community[48]--referable exclusively to their own traditions and customs but recognised by a wider (dominant) society which protects it against all comers by conferring upon it trespassory rules.[49] And so long as this external protection stops short of intrusion upon its internal regulation,[50] the relationship of communitarian property-holders to their land differs from any western form of private property in land. The latter relationship is a matter of content.

The content of the rights afforded the holder of communitarian property differentiates

---

[46]Harris, above n 1, 102-4.

[47]C Edwin Baker, 'Property and its Relation to Constitutionally Protected Liberty' (1986) 134 *University of Pennsylvania Law Review* 741, 747, who, in discussing its personhood function, argues that property can protect people's control of unique objects and the specific spaces that are intertwined with their present and developing individual personality or group identity.

[48]Not to be confused with or equated to the form of property-holding conforming to philosophic advocates of communitarianism: Harris, above n 1, 103, n 7.

[49]Harris, above n 1, 115. See also Merrill, above n 3, 750; Elinor Ostrom, *Governing the Commons: The Evolution of Institutions for Collective Action* (1990).

[50]Obviously there are cases in which the dominant society will not stop short of intrusion upon the internal regulation of the communal ownership interest. In Canada, for instance, the Constitution Act, 1982, ss 25 and 35, entrenches 'existing aboriginal and treaty rights'. This requires the judiciary to enter into the internal organisation of those rights in order to articulate their content, which results in attempts to construct a theory of Aboriginal rights from first principles rather than the Australian approach which favours a re-interpretation of common law history to secure a modern theory of native title: see Mark D Walters, 'The "Golden Thread" of Continuity: Aboriginal Customs at Common Law and Under the *Constitution Act, 1982*' (1999) 44 *McGill Law Journal* 711.

it from western conceptions of private property. The powers of internal division or transmission which the community enjoys are referable not to the wider institution which provides the trespassory protection against outsiders, but to the internal regulations arising from the mutual sense of community.[51]

The internal social rules of the community which claims such property are, therefore, the only relevant focus in determining the content of communitarian property. And just as with private or public property, the social, ethical and spiritual bonds which unite a spontaneously-evolved community to the resource it collectively claims for its own are infinitely variable.[52] And no label can capture that variability. In the absence of an ***understanding*** of a property institution and its constituent elements, therefore, each variable relationship derives its normative force independently of any conception of ownership or property. As such, communitarian property is a label that describes a paradigm type; it does not define content. For that, one must examine the society in question.

---

[51]Harris, above n 1, 103-4.

[52]See Banner, above n 42, 822.

PART TWO

CROWN LAND IN AUSTRALIA: A CONTINUUM OF QUASI-OWNERSHIP PRIVILEGES AND POWERS

Part Two of the thesis utilises the working definitions developed in Part One to analyse and define Australia's Crown land system. As we have seen in Chapter 1, the High Court's conclusion in *Mabo* v *Queensland [No 2]*[1] does not preclude the argument that the Crown enjoys a proprietary relationship to Australian land. What it does preclude is the argument that the Crown has *private* property or absolute ownership in those lands. As such, this Part has one objective: to define, using public property as an analytical tool, Crown land, or more precisely, to answer the question 'what is Crown land?'

This Part contains five chapters. Chapter 5 outlines the English doctrines of tenure and estates and their reception as the law of Australia. Crown land cannot be understood in the absence of these key elements of the feudal land law which the English took with them wherever they acquired legal sovereignty over a new territory. The centrality of these doctrines to Australia's Crown land system will be developed in the subsequent chapters of this Part.

---

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

Having established that with the Crown's acquisition of legal sovereignty came feudalism as the foundation of Australian real property law,[2] Chapters 6 through 9 address the central question of this thesis: 'what is Crown land?' In doing so, they analyse and so define the scope of Crown land. The answer to this central question, when feudalism forms the foundation of a real property system, is that Crown land comprises a system of public property that may be plotted along a continuum of quasi-ownership privileges and powers, ranging from the fullest possible package of such privileges and powers at its head to the smallest package at its foot. The continuum analogy, borrowed from Harris, provides a novel tool with which to analyse the sorts of land comprised by Crown land and the powers and privileges which the Crown enjoys over those lands. This is called the 'Crown land continuum'.

The Crown land continuum is open-ended because it is impossible to identify all the possible ways in which powers and privileges may be packaged at the locations found along its length; there is an infinite plurality and mutability of quasi-ownership interests enjoyed by the Crown. For this reason, no attempt is made to provide a comprehensive analysis of every possible location. Rather, by describing the most significant of them, Part Two provides only the basic contours of the range of possible quasi-ownership interests in land enjoyed by the Crown. The Crown land continuum is open only to those interests which confer privileges and powers which are subject to the non-self-seekingness limitation; that is the hallmark of any public property system and Crown land is no exception.

Chapter 6 deals with the upper and lower ends of the continuum. It begins, briefly, with the foot, where we find those interests which confer upon the Crown the limited

---

[2]The classic account of the English settlement of Australia is found in Stephen H Roberts, *History of Australian Land Settlement 1788-1920* (1968).

privileges and powers in fee simple lands--escheat and forfeiture--left to it by virtue of the doctrine of tenure following the grant of a fee simple. At the head, one finds those interests which confer upon the Crown the largest package of quasi-ownership privileges and powers, such as those the Crown enjoys in relation to waste and demesne lands.

Chapter 7 assesses the location found just below the waste and demesne lands, but still in the upper range, which comprises the Crown's privileges and powers in relation to particular natural resources, such as coal, water, and petroleum. The Crown retains privileges and powers over these resources even when surface rights are held by a private person pursuant to a freehold tenure.

Chapters 8 and 9 turn to the middle of the continuum, a singularly schizophrenic range, where the Crown and private persons ***both*** retain significant privileges and powers in relation to the same piece of land. Chapter 8 considers those tenures which are a curious Australian statutory invention known as Crown leases and licences. These confer substantial privileges and powers upon ***both*** the Crown and private persons. Chapter 9 deals with another interest found in the middle range of the continuum: common law native title. In the last nine years, this interest has necessitated a major re-appraisal of Australian real property law, and this thesis demonstrates that it too has a place within the Crown land system.

A cautionary word is necessary regarding Chapters 6 to 8. They develop virtual definitions of their respective locations along the Crown land continuum. As noted in Chapter 1, it would be impossible to examine in one thesis every State and Territory enactment which deals with the various locations along the continuum. It is also unnecessary to examine every such enactment; while there is no unitary or univocal legislative definition of the various locations along the continuum that apply to every Australian jurisdiction, the general structure of those definitions are the same. The task, therefore, is to construct virtual definitions of

each location using common elements. As such, definitions are constructed which, while not definitive, are representative of the law in every State and Territory. In each case, the process of constructing the definition utilises the available historical, legislative, judicial and secondary materials. In most cases a representative piece of legislation is used, usually New South Wales or Queensland, always identifying significant differences between jurisdictions. The virtual definitions constructed provide a representative snapshot of each location while obviating the need to slavishly review the legislation of each State and Territory.

Chapter 5

THE RECEPTION OF THE DOCTRINES OF TENURE AND ESTATES

I. INTRODUCTION

The feudal English foundation of Australian real property law, especially its two main planks, the doctrines of tenure and estates, provides an important background to the Crown land continuum. To explain that background, this chapter addresses three points. First, it briefly examines the historical construction of the doctrines of tenure and estates. Second, it explains how those doctrines formed the foundation of Australian real property law upon England's acquisition of legal sovereignty over Australia. Finally, while the High Court has re-drafted the understanding of the acquisition of legal sovereignty to remove any doubt that the Crown might have been acquiring an absolute ownership (or private property) in the Australian continent, this chapter confirms that the Crown remains the holder of public property in Australian land.

H. ENGLISH FEUDALISM: THE DOCTRINES OF TENURE AND ESTATES

This section demonstrates that the State and Territory Crowns enjoy quasi-ownership privileges and powers in relation to all Australian land as a result of their tenurial relationship thereto. Having done that, one of the objectives of Chapter 6 will be to demonstrate how the

limited privileges and powers which the Crown continues to enjoy in relation to fee simple lands as a result of the doctrine of tenure must be plotted along the continuum. In order to accomplish that objective, it is first necessary to know about the Crown's quasi-ownership privileges and powers which are derived from the doctrine of tenure. That does not mean that we need to examine in any detail the objective feudal history that produced them. All we need be concerned with is the contemporary construction of the historical account that suits what has become modern day Anglo-Australian real property law. That is the objective of this section.

A. The Feudal-Historical Construct

The history of the doctrines of tenure and estates reveals the gradual emergence of a relatively successful functioning framework of rules governing private property in land.[1] The operation of this body of rules--which still governs the contemporary relationship between the English Crown and freeholder--is not, however, historical fact; rather, it is a fiction, a legal and intellectual construct[2] fashioned as a retrospective invention to suit the legal position which by the 18th century had become prevalent in the English law of real property.[3] We may call this 'the feudal-historical construct'. While modern scholarship refers to the feudal-

---

[1]See generally AWB Simpson, *A History of the Land Law* (2nd ed, 1986); SFC Milsom, *Historical Foundations of the Common Law* (2nd ed, 1981, reprinted 1997); JH Baker, *An Introduction to English Legal History* (3rd ed, 1990); Bruce H Ziff, *Principles of Property Law* (3rd ed, 2000), 50-61; Peter Butt, *Land Law* (3rd ed, 1996), 50-63 and 84-96.

Other, and perhaps better, systems of private property in land did, of course, develop. The Romans, for instance, developed a system that exhibits even today a conceptually cleaner system, beginning with the notion of allodial ownership or *dominium*, which eliminates much of the messiness created by the English doctrines of tenure and estates. As we have seen in Chapter 3, however, even the contemporary understanding of the Roman system is fictional. See generally Barry Nicholas, *An Introduction to Roman Law* (1962, reprinted 1990), 98-158.

[2]Kevin Gray, *Elements of Land Law* (2nd ed, 1993), 51.

[3]Ziff, above n 1, 50.

historical construct as the 'history' of Anglo-Australian real property law, it has very little basis in historical reality. That need not concern us; fact or fiction, the feudal-historical construct governs the relationship of the Crown to land held as private property and, as such, we must understand it if we are to understand the quasi-ownership privileges and powers which the Crown enjoys pursuant to that relationship.

The feudal-historical construct originates in the Norman conquest of England in 1066. According to the construct, by virtue of the conquest, the King acquired an ultimate or radical title to all English land,[4] which vested him exclusively with the fullest ownership interest. The King's interest ranked higher than any other; indeed, it was said that the Crown was the only *true* owner of English land.[5] If others wanted to use land, they could not acquire the absolute ownership of the land itself; rather, they could obtain rights over land in the form of tenures available from the King.[6]

The fact of subjugation of territory by the King (the Crown) as paramount lord provided the foundation for the feudal theory that every parcel of land in England was and is held either mediately or immediately of the Crown in return for the performance of services to a feudal superior. This became known as the doctrine of tenure. This medieval concept

---

[4]*Mabo* v *Queensland [No 2]* (1992) 175 CLR 1 ('*Mabo [No 2]*'), 24-31 and 38-54 (Brennan J).

[5]William Blackstone, *Commentaries on the Laws of England* (1765-9, University of Chicago edition, 1979), vol 2, 51; Kenelm Edward Digby, *An Introduction to the History of the Law of Real Property With Original Authorities* (5th ed, 1897), 29-56; TC Williams 'The Fundamentals of the Present Law of Ownership of Land' (1931) 75 *Solicitor's Journal* 843, 844. In the context of Māori land claims in New Zealand, see on this point PG McHugh, 'The Legal Status of Maori Fishing Rights in Tidal Waters' (1984) 14 *Victoria University of Wellington Law Review* 247, 249-54; PG McHugh, 'Aboriginal Title in New Zealand Courts' (1984) 2 *Canterbury Law Review* 235, 237-40.

[6]Charles Harpum with Malcolm Grant and Stuart Bridge, *Megarry and Wade The Law of Real Property* (6th ed, 2000), 12.

signified the relationship between a tenant--the holder of the land--who in return for land rendered services of some specified kind either immediately or mediately to the Crown or immediately to some lord who, in turn, owed services either to another lord or to the Crown.[7]

The main forms of tenure that existed in feudal times can be grouped into four categories: (i) security (knight service), (ii) spirituality (frankalmoign or divine service), (iii) splendour (grand or petty serjeanty), and (iv) agrarian (free and common socage). The most significant of these was free and common socage; designed to meet sustenance requirements, it also served as a form of residual tenure encompassing a host of obligations that did not fall within the other three categories.[8]

While it mediated the sorts of rights over land that might be allocated to private persons, tenure did not mediate the duration of those rights.[9] That job was performed by the various 'estates' over land which the Crown could grant.[10] Over the course of the development of feudal land-holding, three main estates emerged, all considered free tenures: the fee simple, the fee tail and the life estate. There also arose what were known as the unfree tenures (villeinage or copyhold).[11]

Each of the three main estates (and the unfree tenures) conferred a package of

---

[7]Harpum, *Megarry and Wade The Law of Real Property*, above n 6, 12-3; Gray, above n 2, 53-4; Butt, above n 1, 51-9.

[8]Harpum, *Megarry and Wade The Law of Real Property*, above n 6, 13-5; Ziff, above n 1, 51. See also JE Cribbet and CW Johnson, *Principles of the Law of Property* (3rd ed, 1989).

[9]Ziff, above n 1, 52.

[10]Frederick Pollock and FW Maitland, *History of English Law before the time of Edward I* (2nd ed, 1898, SFC Milsom, 1968), vol 2, 10; *Walsingham's Case* (1579) 2 Plowd 547, 555; Harpum, *Megarry and Wade The Law of Real Property*, above n 6, 13-4 and 37-94.

[11]Harpum, *Megarry and Wade The Law of Real Property*, above n 6, 15-27 and 37-94; Ziff, above n 1, 53.

ownership privileges and powers upon the tenant. The fee simple was the most significant of these because it conferred the largest such package: full-blooded ownership in land. The remaining two estates (and the unfree tenures) conferred smaller packages, although they too were private property. We need not, however, consider them in any further detail; we are concerned not with the ownership interest enjoyed by the free and unfree tenants, but with that held by the Crown in relation to each of them. As such, we need only recognise that during the existence of any estate, the Crown enjoyed a package of quasi-ownership privileges and powers, some of which continue to be enjoyed by the Crown today.

The privileges and powers enjoyed by the Crown in relation to the estates were known as incidents of tenure. These varied according to the type of holding, but typically included such things as oaths of allegiance given by the tenant to the lord (homage and fealty), the right of the lord to call for financial contributions in certain circumstances (aids), transfer taxes (fines), death duties payable on the descent of land to an heir (relief and primer seisin), control over lands held by a minor or in relation to the marriage of the heir of the estate (wardship and marriage), other local tax-like levies (customary dues), and the power of a lord to recover land when the tenurial term had expired or was forfeited (escheat and forfeiture).[12] As with ownership interests, the packaging of the various incidents of tenure was context dependent, although it can be said that over time, particular packages came to be associated with particular estates.

B. Dismantling the Feudal System

Within the feudal system, each further dissection or fragmentation of land among new tenants became a new free or unfree tenure. The process of fragmentation was known as

---

[12]Harpum, *Megarry and Wade The Law of Real Property*, above n 6, 16-8, 19-22 and 24; Ziff, above n 1, 52.

subinfeudation, which permitted the number of tenants to grow, so that lesser landholders--mesne lords--soon outnumbered head tenants--tenants-in-capite.[13] This ever-expanding system formed the backbone of English real property.[14] Not surprisingly, the complexity and unwieldiness of the system caused substantial difficulties associated with the enforcement of incidents and ultimately precipitated significant reforms in an attempt at simplification.[15]

A succession of reforms ultimately led to the dismantling of the feudal system: in 1290 Quia Emptores[16] abolished subinfeudation; in 1540 the Wills Act[17] diminished the importance of escheat by permitting land to be devised by will; in 1660 the Tenures Abolition Act[18] converted all free tenures (with the exception of frankalmoign) into free and common socage (essentially tenures without incidents, save escheat and forfeiture); the Law of Property Act 1922[19] (in force from 1 January 1926) enfranchised all copyhold tenure, converting it automatically into freehold (or socage) tenure.[20] The cumulative effect of these statutes was to reduce the number of tenants and give them all freehold tenures held directly of the

---

[13]Harpum, *Megarry and Wade The Law of Real Property*, above n 6, 27-8; Alan M Sinclair, *Introduction to Real Property* (3rd ed, 1987), 1-2.

[14]Gray, above n 2, 52. See also Pollock and Maitland, above n 10, vol 1, 236.

[15]Harpum, *Megarry and Wade The Law of Real Property*, above n 6, 28.

[16]Quia Emptores 1290, 18 Edw I, cc 1 and 2.

[17]Wills Act 1540, 32 Hen VIII, c 1.

[18]Tenures Abolition Act 1660, 12 Car II, c 24.

[19]Law of Property Act 1922, 12 & 13 Geo V, c 16.

[20]Harpum, *Megarry and Wade The Law of Real Property*, above n 6, 28-32; Butt, above n 1, 68-70; Gray, above n 2, 54-5. See the Law of Property Act 1922, s 128, Sched 12, para (1).

Crown.[21] These reforms have since been subsumed by and become a part of the feudal-historical construct.

While the English law of real property as it affected the holders of private property was radically altered, the reforms did nothing to change the Crown's theoretical position in relation to land. Today, as in feudal England, it is still technically correct to say that the Crown holds the ultimate or radical title to all English land, that all occupiers of land, with the exception of the Crown itself, are merely, in the feudal sense, tenants of the Crown pursuant to free and common socage, and that, because the doctrine of tenure is functionally obsolete, an estate in fee simple--the primary way in which land is held of the Crown--is full-blooded ownership (private property) because, while subject to property-limitation, expropriation and appropriation rules, it represents the largest package of ownership privileges and powers available over land.[22] More importantly, though, the feudal-historical construct, which obscures a far more complex and ever-evolving legal order, tells us not only about the fee simple holder's privileges and powers, but also about those which the Crown enjoys in relation to freehold land.[23] The incidents of tenure are the key to these privileges and powers.

Of all the incidents which the Crown once enjoyed over freehold land, only escheat and forfeiture enjoy contemporary significance,[24] and more so in those jurisdictions, such as Australia, where the reforms effected by the Law of Property Act 1922 never took effect. These two incidents allowed the lord to regain land once an estate had ended naturally or was

---

[21]Harpum, *Megarry and Wade The Law of Real Property*, above n 6, 35-6.

[22]Gray, above n 2, 55.

[23]Ziff, above n 1, 50. See also Michael Stuckey, 'Feudalism and Australian Land Law: A Shadowy Ghostlike Survival?' (1994) *University of Tasmania Law Review* 102.

[24]Harpum, *Megarry and Wade The Law of Real Property*, above n 6, 32-3.

forfeited for some other reason.[25] In every jurisdiction where the feudal-historical construct became the law of real property, authority can be found for the enduring importance of these incidents:

> What is meant is that, when there is no longer any tenant, the land returns, by reason of tenure, to the lord by whom, or by whose predecessors in title, the tenure was created. [Some] writers speak of the lord as taking it by way of succession or inheritance, as if from the tenant, which is certainly not accurate. The tenant's estate (subject to any changes upon it which he may have created) has come to an end, and the lord is in by...right.[26]

But even the incident of escheat may be disappearing. It has been shown that the successive legislative reforms intended to simplify the feudal system, most particularly the removal of subinfeudation by Quia Emptores 1290, eventually resulted in the removal of all mesne lords and left the Crown as the only ultimate lord of all English land. That in turn led to the modern position, under which it is arguable that there is little if any difference between the operation of escheat and that of *bona vacantia*, which governs the distribution of personalty when its owner dies without heirs. In the latter case, the personalty passes as ownerless goods to the Crown by prerogative.[27] If the Crown is the only lord to whom land may escheat, the difference between that and *bona vacantia* may be slight indeed.

Australian State and Territory legislation confirms the erosion of the distinction between escheat and *bona vacantia*. In New South Wales, for example, succession legislation may mean that land no longer escheats to the Crown, but simply passes to it as *bona vacantia*,

---

[25]Ziff, above n 1, 52.

[26]*Sandhurst Trustees Ltd* v *72 Seventh Street Nominees Pty Ltd (in Liq)* (1998) 45 NSWLR 556, 563-8 (Bryson J); see also *A-G Ontario* v *Mercer* (1883) 8 AppCas 767, 771-9 (Earl of Selbourne LC).

[27]Harpum, *Megarry and Wade The Law of Real Property*, above n 6, 33; Ziff, above n 1, 179.

or property without an apparent owner.[28] It is even arguable that such legislation may abolish the very basis of the doctrine of tenure by which it is said that land is not the subject of full-blooded ownership but is merely held of the Crown. Because such legislation treats the devolution of realty as the common law treats the devolution of personalty, the Crown may have no more than a mere contingent right of succession as owner *bona vacantia*.[29] While the technical distinction between escheat and *bona vacantia* may be of little practical consequence to the holder of realty or personalty, for our purposes the existence of any such rule is significant; it means that the Crown retains at least some privileges and powers in relation to land held pursuant to freehold tenures.

The feudal-historical construct of tenure and estates--the background understanding of the Crown's relationship to all land within its territory--held sway as the English law of real property when England acquired sovereignty over New South Wales (modern Australia).

III. ENGLAND ACQUIRES SOVEREIGNTY OVER NEW SOUTH WALES

There are three methods by which a sovereign state may acquire legal--as opposed to political--sovereignty[30] over new territory:[31] (i) conquest, (ii) cession, or (iii) settlement.[32]

---

[28]Administration of Estates Act 1954 (NSW); Wills, Probate and Administration Act 1898 (NSW), sub-s 61B(7). See also *Re Suncorp Insurance and Finance* [1991] 2 Qd R 704.

[29]Butt, above n 1, 72-3. But see WL Morison, Legislation Note (1956-1958) 2 *Sydney Law Review* 129, 134.

[30]On the distinction between 'legal' and 'political' sovereignty, see PG McHugh, 'Constitutional Theory and Māori Claims' in IW Kawharu, ed, *Waitangi: Māori and Pākehā Perspectives of the Treaty of Waitangi* (1989) 25-63, 33-7. And see Chapter 4, Section I.B.2.

[31]For a discussion of the philosophical meaning of 'sovereignty' see PG McHugh, *The Māori Magna Carta: New Zealand Law and the Treaty of Waitangi* (1991), 13-7; McHugh, 'Constitutional Theory and Māori Claims', above n 30, 33-46. And see PG McHugh, 'The Legal and Constitutional Position of the Crown in Resource Management' in Richard Howitt with John Connell & Philip Hirsch, eds, *Resources, Nations and Indigenous Peoples: Case Studies from Australasia, Melanesia and Southeast Asia* (1996) 300-16, 300-8; PG McHugh, 'Sovereignty This Century--Maori and the Common Law Constitution' (2000) 31 *Victoria*

Because Australia was acquired pursuant to the third method, the others are not considered here. Rather, this section considers the acquisition of legal sovereignty by settlement and the consequences of that acquisition for the Crown's relationship to the lands lying therein. But it is important to note that legal sovereignty is not the same as property in land. The former is a matter of legal jurisdiction while the latter is a matter of proprietary rights. The acquisition of one is not the same as the acquisition of the other.[33] This point, central to the Crown's relationship to Australian land, will be returned to in Section III.C. For the moment, we are merely concerned with the English acquisition of legal sovereignty over Australia by settlement. Once that matter has been addressed, the second part of this section turns to the major consequence that flows from the acquisition of sovereignty by settlement: the reception of English law as that applicable to settlers.

A. Acquisition of Legal Sovereignty by Settlement

Chronologically, England acquired legal sovereignty over the Australian continent in three major phases:[34] (i) On 22 August 1770, Captain Cook claimed possession of the east

---

University of Wellington Law Review 187, 192-202. And as to indigenous sovereignty in Australia, New Zealand and Canada, see PG McHugh, 'Aboriginal rights and sovereignty: Commonwealth developments' [1986] *New Zealand Law Journal* 57, 59-63; PG McHugh, 'From Sovereignty Talk to Settlement Time: The Constitutional Setting of Māori Claims in the 1990s' in Paul Havemann, ed, *Indigenous Peoples' Rights in Australia, Canada, & New Zealand* (1999), 447-67.

[32]For an account of the methods by which a sovereign state may acquire legal sovereignty over a new territory, see Kent McNeil, *Common Law Aboriginal Title* (1989), 110-33; Richard H Bartlett, *Native Title in Australia* (2000), 237-8. And, as to cession and the Treaty of Waitangi in New Zealand, see generally McHugh, *The Māori Magna Carta: New Zealand Law and the Treaty of Waitangi*, above n 31, 1-65; PG McHugh, 'The legal basis for Maori claims against the Crown' (1988) 18 *Victoria University of Wellington Law Review* 1.

[33]McNeil, above n 32, 108-10.

[34]See also Alex C Castles, *An Australian Legal History* (1982), 21-31.

coast of Australia for the Crown by raising the British flag on Possession Island in the Torres Strait.[35] (ii) On 7 February 1788--deemed by the High Court to be the legal date of acquisition[36]--Captain Phillip landed at the mouth of the Paramatta River, near the spot where Sydney now stands, to establish a penal colony, the first permanent British settlement in Australia. Phillip later affirmed that the British Crown maintained an independent right to control the settlement of the colony, which later became New South Wales. The area claimed comprised the entire eastern half of the continent from just west of the Gulf of Carpentaria to a point in the south in present day South Australia, and included all islands in the adjacent Pacific Ocean within the latitudes which included Cape York Peninsula and the southern tip of modern Tasmania.[37] The British Crown later perfected its claim to New South Wales by setting up its first governmental administration[38] and the furthest boundary was extended west in 1824[39] and again in 1825.[40] (iii) In 1829, Captain Fremantle, acting under direct authorisation from the British government, asserted a right of legal sovereignty over all that

---

[35]Carmel MacDonald, Les McCrimmon and Anne Wallace, *Real Property Law in Queensland* (1998), 1.

[36]*Mabo [No 2]* (1992) 175 CLR 1, 78-80 (Deane and Gaudron JJ); *Western Australia* v *Commonwealth (Native Title Act Case)* (1995) 183 CLR 373, 429 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ).

[37]Castles, above n 34, 25.

[38]MacDonald, McCrimmon and Wallace, above n 35, 1.

[39]Sovereignty over the coast of the Northern Territory was acquired during a voyage of discovery by Captain Bremer, during which he declared a formal taking of possession: *Yarmirr* v *Northern Territory (Croker Island)* (1998) 156 ALR 370, 389 (Olney J); *Commonwealth* v *Yarmirr* (1999) 168 ALR 426, 449 (Beaumont and von Doussa JJ).

[40]CD Field, *Landholding and the Relation of Landlord and Tenant in Various Countries* (1885), 381 and 407.

part of the continent not already included within the territory of New South Wales.[41]

We therefore know the chronology of events which led to the official date on which England acquired legal sovereignty over the Australian continent. But that leaves unanswered the question why Australia was treated as a settled colony when there were Indigenous peoples inhabiting the continent. The answer to this question lies at the heart of the acquisition of legal sovereignty: the doctrine of *terra nullius*. The application of this legal fiction--which describes lands inhabited by no one, or 'desert uninhabited' lands, whether occupied in fact or not--paved the way for the English acquisition of legal sovereignty over lands actually occupied by indigenous peoples who had not ceded their land nor been conquered.[42] Provided that the fiction of *terra nullius* applied, international law countenanced the settlement of lands occupied in fact as an effective means of acquiring legal sovereignty.[43]

In order to determine whether lands that were inhabited in fact were *terra nullius*, European cultural standards were applied to indigenous peoples. One such method of making the determination was to ask whether the indigenous inhabitants practised 'European Christianity' and whether they cultivated their lands. If they failed to satisfy either of these criteria, international law treated the lands, though occupied in fact, as *terra nullius*.[44] And

---

[41]Castles, above n 34, 21-7; Bartlett, above n 32, 110-1; MacDonald, McCrimmon and Wallace, above n 35, 1; *Native Title Act Case* (1995) 183 CLR 373, 423-5 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ).

[42]The fiction was developed using theories developed by the most influential of the early international law theorists, Emerich de Vattel, *The Law of Nations or the Principles of Natural Law* (Albert de Lapradelle, 1916), Bk I, ch VII, 37-8, and ch XVIII, 84-6. See also Castles, above n 34, 16-7, nn 65-6.

[43]Even Blackstone, above n 5, vol 2, 7, was unable to declare any other rule by which English law might become the law of a territory not truly (in other words *factually*) *terra nullius*.

[44]Vattel, above n 42, Bk I, 100-1, first advanced this theory. See also Castles, above n 34, 16-7.

as far as domestic English law was concerned, if a newly acquired territory was *terra nullius*, it could be treated as settled. This meant that any land therein passed immediately into the possession of the English Crown, which could then dispose of that land as it wished.[45]

The question of cultivation loomed large in the English acquisition of legal sovereignty over Australia. The English Crown treated Australia's Aboriginal peoples, who, in 1788, actually enjoyed a rich legal, cultural and spiritual life,[46] as if they did not exist and therefore lacked effective possession of the lands over which they roamed. The treatment of the Aboriginal peoples by the English was based on the belief that the former lived merely by hunting, had no settled homes, did not practise agriculture[47] and failed to exhibit a sufficiently developed and organised society.[48] And although it is now widely accepted that he was mis-interpreted by the English authorities in order to further their expansionist objectives for Australia,[49] the writings of Emerich de Vattel were used to perpetuate the fiction that Australia was *terra nullius* when the English arrived. The Imperial authorities therefore regarded Australia as *terra nullius* and a settled colony at the moment of the acquisition of

---

[45]Castles, above n 34, 20.

[46]See Henry Reynolds, *The Law of the Land* (2nd ed, 1992), 55-72; Geoffrey Blainey, *The Triumph of the Nomads: A History of Ancient Australia* (1975); Michael J Detmold, 'Law and Difference: Reflections on Mabo's Case' (1993) 15 *Sydney Law Review* 159; Jeremy Webber, 'The Jurisprudence of Regret: The Search for Standards of Justice in Mabo' (1995) 17 *Sydney Law Review* 5; Stewart Motha, 'Mabo: Encountering the Epistemic Limit of the Recognition of 'Difference'' (1998) 7 *Griffith Law Review* 79; Robert Hughes, *The Fatal Shore: A History of the Transportation of Convicts to Australia, 1787-1868* (1987, 1st paperback ed, 1996); John Brewer and Susan Staves, 'Introduction' in John Brewer and Susan Staves, eds, *Early Modern Conceptions of Property* (1995) 1-18, 14; Heather Goodall, 'Aboriginal Land Rights' in Graeme Davison, John Hirst and Stuart MacIntyre, eds, *The Oxford Companion to Australian History* (1998) 5-7, 5.

[47]Field, above n 40, 381.

[48]Castles, above n 34, 9-11 and 14-8.

[49]Reynolds, above n 46, 12-29.

legal sovereignty.[50] It stands '...as one of the rare examples of a large tract of inhabited territory acquired peaceably by occupation without any consent from the indigenous population':[51]

> So far as any criteria for sovereignty can be said to have been necessary, the Crown transacted with those societies which had recognised and recognisable leaders and a semblance of perceptible organisation. The hallmark of sovereignty in British practice prior to the mid 19th century was simply the particular society's achievement of a discernible system of social organisation and leadership. Only...Australian Aborigin[als] (whom some 19th century commentators considered so primitive as to be scarcely human) fell short of this.[52]

The fiction of *terra nullius* stood at the heart of, and formed the justification for, Australian real property law for over 200 years. Judicial authority time and again confirmed its applicability to Australia.[53] In 1992, however, having found it to be racist and unjust, the

---

[50]Castles, above n 34, 16-7 and ch 2; MacDonald, McCrimmon and Wallace, above n 35, 3-4.

[51]Elizabeth Evatt, 'The Acquisition of Territory in Australia and New Zealand' (1968) 16 *Grotian Society Papers* 18.

[52]McHugh, *The Māori Magna Carta: New Zealand Law and the Treaty of Waitangi*, above n 31, 27.

[53]*Cooper* v *Stuart* (1899) 14 App Cas 286; *Williams* v *A-G for NSW* (1913) 16 CLR 404; *Randwick Corporation* v *Rutledge* (1959) 102 CLR 54, 71 (Windeyer J); *A-G* v *Brown* (1847) 1 Legge 312, 316-8 (Stephen CJ); *The King* v *Steel* (1834) 1 Legge 65; *Hatfield* v *Alford* (1846) 1 Legge 330, 336 (Stephen CJ); *Doe d Wilson* v *Terry* (1849) 1 Legge 505; *Geita Sebea* v *Papua* (1941) 67 CLR 544; *Wade* v *NSW Rutile Mining Co Pty Ltd* (1969) 121 CLR 177, 194 (Windeyer J); *NSW* v *Commonwealth* (1975) 135 CLR 337, 438-9 (Stephen J); *The King* v *Kidman* (1915) 20 CLR 425, 435-6 (Griffith CJ); *Liquidators of the Maritime Bank of Canada* v *Rec'r General of New Brunswick* [1892] AC 437, 441 (Lord Watson) cited in *Commonwealth* v *NSW* (1923) 33 CLR 1, 37 (Isaacs J) and in *Williams* v *A-G NSW* (1913) 16 CLR 404, 439-40 (Isaacs J); *Mabo* v *Queensland [No 1]* (1988) 166 CLR 186, 236 (Dawson J); *Milirrpum* v *Nabalco Pty Ltd* (1971) 17 FLR 141 ('*Milirrpum*'); *Mathaman* v *Nabalco Pty Ltd* (1969) 14 FLR 10.

See also Reynolds, above n 46; Heather McRae, Garth Nettheim and Laura Beacroft, *Aboriginal Legal Issues* (1991), 104-7; Heather McRae, Garth Nettheim and Laura Beacroft, *Indigenous Legal Issues* (2nd ed, 1997), 139-60; Adrian J Bradbrook, Susan V MacCallum and Anthony P Moore, *Australian Real Property Law* (2nd ed, 1997), 7-8-7-14; John Hookey, 'The Gove Land Rights Case: A Judicial Dispensation for the Taking of Aboriginal Lands in Australia?' (1972) 5 *Federal Law Review* 85; CF Fairleigh, 'Basic Questions on

High Court finally removed it from Australian law.[54] But once legal sovereignty was acquired over a colony, *terra nullius* or not, the question of applicable law needed to be addressed.

B. The Reception of the English Law of Real Property

Once legal sovereignty had been acquired, the settlers of any new English territory had to determine what law applied to them. Settling this matter lay in the doctrine of reception, which, in the case of Australia, links the development of the Anglo-Australian law of real property to the English feudal-historical construct considered earlier. The doctrine of reception worked to ensure that the 'laws of Empire'[55]--the law of England--were carried by every free settler to a new territory:[56]

About the date of the first settlement in New South Wales, in 1788, Professor

---

Native Lands' (1973) 46 *Australian Law Journal* 663; John Little, 'Aboriginal Land Rights' (1973) 47 *Australian Law Journal* 151; JL Priestly, 'Communal Native Title and the Common Law: Further Thoughts on the Gove Land Rights Case' (1974) 6 *Federal Law Review* 150; John Hookey, 'Chief Justice Marshall and the English Oak: A Comment' (1974) 6 *Federal Law Review* 174; Barbara Hocking, 'Does Aboriginal Law Now Run in Australia?' (1979) 10 *Federal Law Review* 161; Richard H Bartlett, 'Aboriginal Land Claims at Common Law' (1983) *University of Western Australia Law Review* 16.

[54]*Mabo [No 2]* (1992) 175 CLR 1.

[55]See Castles, above n 34, 1-19.

[56]*Skelton* v *Collins* (1966) 115 CLR 94, 134-6 (Windeyer J); *R* v *Maloney* (1836) 1 Legge 74. See also Castles, above n 34, 11-4; Ziff, above n 1, 57-61; Butt, above n 1, 1-7. This principle finds its origins in *Calvin's Case* (1608) 7 Co Rep 1a. In relation to *Calvin's Case*, see PG McHugh, 'The Common-Law Status of Colonies and Aboriginal "Rights": How Lawyers and Historians Treat the Past' (1998) 61 *Saskatchewan Law Review* 393, 403-27; Keechang Kim, '*Calvin's Case* (1608) and the Law of Alien Status' (1996) 17 *Legal History* 155.

Some, however, question the accuracy of saying that the English carried with them the feudal-historical construct as a consequence of the Crown acquiring sovereignty over a new territory. McHugh, *The Māori Magna Carta*, above n 31, 98-101, for instance, argues that the feudal-historical construct could only be applied to a new territory by some 'act of state', a separate, positive act of the Crown, such as a colonial charter, or legislation affecting that particular colony. In Australia, *Mabo [No 2]* (1992) 175 CLR 1, 37-8 (Brennan J), 79 and 86 (Deane and Gaudron JJ), put beyond doubt that the acquisition of sovereignty was a sufficient act of state to apply the feudal-historical construct to land.

> Blackstone was telling Jeremy Bentham and his fellow students at Oxford that, by virtue of the Common Law, Englishmen automatically carried English law (including the law concerning property in land) with them when they settled in unoccupied territory such as New South Wales.[57]

The laws of Empire could be complemented by any Imperial legislation (laws passed in relation to a colony by the English Parliament) applicable directly to the colonies by their own force (*ex proprio vigore*). Imperial legislation could be adopted in whole or in part.[58]

English law was received in one of two ways, depending upon the method by which the Crown acquired legal sovereignty. A territory obtained through conquest or cession from another imperial power retained its pre-existing law until altered by English law. By contrast, in settled colonies, such as Australia, the law of reception regarded incoming settlers as having brought the laws of Empire in their pockets.

But as we have seen, in the case of Australia, the land was inhabited by Aboriginal peoples and was only treated as acquired by settlement through the application of the fiction of *terra nullius*. Moreover, that fiction was rejected and removed from Australian law by *Mabo [No 2]*. The question therefore arises: does the retrospective alteration of the common law worked by *Mabo [No 2]* mean that Australia can no longer be treated as a settled territory? No. The High Court held that the acquisition of legal sovereignty itself was a non-justiciable act of state,[59] which meant that the Australian courts could not second-guess the

---

[57]Thomas Penberthy Fry, *Freehold and Leasehold Tenancies of Queensland Land* (1946), 18, citing William Blackstone, *Commentaries on the Laws of England* (1765-1769, University of Chicago Edition, 1979), vol 1.

[58]Ziff, above n 1, 58.

[59]*Mabo [No 2]* (1992) 175 CLR 1, 25-32 (Brennan J), 79-81 and 95-9 (Deane and Gaudron JJ), 179-82 (Toohey J), and 121-30 (Dawson J). A wealth of authority supports the High Court's approach: see the cases cited by McNeil, above n 32, 173-4, 183-4 and 186-8.

See also Christian Wolff, *Jus Gentium Methodo Scientifica Pertractatum* (Joseph H Drake, 1934), vol 2, 155-60, ss 308-313; Vattel, above n 42, Bk II, ch XII, 167-71; Hugo Grotius, *The Law of War and Peace* (1646, Francis Kelsey, 1925), Bk II, ch XXII, pars 9-10.

categorisation of New South Wales as a settled colony. The Colony was uncultivated in fact at the time legal sovereignty was acquired: it was, therefore, a settled colony.[60] That conclusion meant that as of the moment of the acquisition of legal sovereignty by settlement, English law, including the feudal-historical construct, became the general law of Australia and not merely the personal law of the colonists.[61]

As such, while the regulatory and legislative codes[62] which governed the legal conditions under which grants of land were made often diverged from it, the feudal-historical construct of real property law underpinned the way in which land was dealt with by the Crown and held as private property in New South Wales. Indeed, in its theoretical operation, Australian real property law relied and relies just as heavily as its English counterpart on the feudal-historical construct for its shape and form.[63]

Imperial legislation enacted after the acquisition of legal sovereignty over Australia bolstered the reception of real property law, and settled doubts as to the applicability of the feudal-historical construct in the new territory, the applicability of English statutes, and if such

---

[60]*Mabo [No 2]* (1992) 175 CLR 1, 32-4 (Brennan J), 77-81 (Deane and Gaudron JJ), 179-82 (Toohey J), 95-9, 104-9 and 121 (Dawson J).

[61]*Mabo [No 2]* (1992) 175 CLR 1, 34-8 (Brennan J), 77-81 (Deane and Gaudron JJ), 179-82 (Toohey J). Brennan J cited *Cooper* v *Stuart* (1889) 14 App Cas 291 and Kenneth O Roberts-Wray, *Commonwealth & Colonial Law* (1966), 540-8. It is arguable that the English law of real property was not received as Australian law at the moment that sovereignty was acquired over New South Wales. Rather, it is possible that some other act of the Crown was required in addition to the acquisition of sovereignty in order for the law of real property to be received: see McHugh, *The Māori Magna Carta*, above n 31, 98-106. In any event, the High Court put this question beyond doubt in *Mabo [No 2]* (1992) 175 CLR 1, holding that the act of state which achieved the acquisition of sovereignty over New South Wales also achieved the reception of English real property law.

[62]Field, above n 40, 382.

[63]Butt, above n 1, 59-60 and 70-3.

statutes did apply, the relevant cut-off date.[64] The Australian Courts Act 1828 (Eng) confirmed the application of all the laws and statutes in force within the realm of England on 25 July 1828 'so far as the same can be applied within the said Colony [New South Wales]'.[65] The combination of the doctrine of reception and the 1828 legislation meant that the Australian law of real property consisted of the received feudal-historical construct--both common law and statutes--Imperial legislation applicable *ex proprio vigore*, and the legislation of the Colonial legislature.[66] That law applied to all of New South Wales, which, because it was later carved up to form the modern States and Territories, means that it applied and applies to all of Australia. And its reception, including its legislative alterations--save for any post-1828 changes--has since been confirmed by modern State and Territory legislation.[67]

But English law was not always received in its totality. As we have seen, the Australian Courts Act 1828 (Eng) made it necessary to determine whether the law was applicable to the local conditions at the date of the acquisition of legal sovereignty.[68] The Australian Courts Act 1828 (Eng) itself confirmed that all laws of England so far as could be applied, were in force in New South Wales. Pursuant to this legislation, if a law was applicable at the date of reception or on 25 July 1828, it was received no matter how much

---

[64]Butt, above n 1, 2-3.

[65]Australian Courts Act 1828 (Eng), s 24. See also *R* v *Maloney* (1836) 1 Legge 74; Castles, above n 34, 17-9 and 400-3.

[66]See Thomas Penberthy Fry, 'Land Tenures in Australian Law' (1947) 3 *Res Judicatae* 158, 159; Butt, above n 1, 2-5.

[67]See eg Imperial Acts Application Act 1969 (NSW), ss 36 and 37.

[68]Butt, above n 1, 2-3. See *Mitchell* v *Scales* (1907) 5 CLR 405; *Quan Yick* v *Hinds* (1905) 2 CLR 345; *Delohery* v *Permanent Trustee Co of NSW* (1904) 1 CLR 283; *Dugan* v *Mirror Newspapers Ltd* (1978) 142 CLR 583.

local conditions might subsequently change.[69] The question of applicability was a vexing one; it injected a measure of uncertainty into the reception process. Which laws were applicable and which were not? The uncertainty meant that Australian courts had no clear principles to guide them when grappling with the problem of which aspects of the feudal-historical construct, if any, applied to the very different physical and climatic conditions found in New South Wales.[70] The most significant question which faced the Colonial courts was whether the doctrine of tenure itself applied to local conditions.

The Full Court of the Supreme Court of New South Wales definitively settled this question in *A-G* v *Brown*,[71] which involved a claim that English settlement eliminated the doctrine of tenure in Australia, making all land allodial and. As such, it was argued, any person could acquire absolute ownership to any Australian land simply by occupying it or, if necessary, obtaining it from Aboriginal peoples. In a judgment delivered by Stephen CJ, the Full Court rejected this argument and held that, by virtue of the doctrine of tenure, all land could only be held of the Crown in free and common socage. The doctrine of tenure was received law that met the threshold of applicability to the Colony of New South Wales.[72] The High Court has since affirmed Stephen CJ's conclusion in *Mabo [No 2]*.[73]

The passage of time has not altered the role played by the doctrine of tenure in Anglo-Australian real property law. While almost two centuries of subsequent Australian State and

---

[69]And Australian courts are free to develop the received law: *Uren* v *John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118.

[70]Ziff, above n 1, 58.

[71]*A-G* v *Brown* (1847) 1 Legge 312.

[72]*A-G* v *Brown* (1847) 1 Legge 312, 318-25 (Stephen CJ).

[73]*Mabo [No 2]* (1992) 175 CLR 1. See also *Milirrpum* (1971) 17 FLR 141; Bradbrook, MacCallum and Moore, above n 53, 2-3-2-4 and n 10.

Territory legislation have developed a new system of available tenures, the doctrine of tenure, as received law, has not been eclipsed, either by legislation or the common law. Quite the contrary; the dismantling effects of the Law of Property Act 1922 (Eng) were never received as Australian law. And subsequent Australian legislation has filled gaps in the reception process,[74] giving the lynchpin of the feudal-historical construct an importance in modern Australian real property law which it failed to enjoy at any time in England since the sixteenth century.[75] Similarly, the common law, and most notably the High Court in *Mabo [No 2]*, has revitalised and developed the significance of tenure for Australian law. Even in England, where the reforms of the Law of Property Act 1922 (Eng) and the Land Registration Act 1925 (Eng) arguably abolished escheat, the survival of tenure has recently been confirmed.[76]

Today in Australia it is as true as it was in feudal England to say that a person who owns land actually holds it of the Crown in right of a State or Territory.[77] But while it remains correct to say that a private person holds land of the Crown, can it also be said that the Crown has the absolute ownership of all Australian land? The next section considers this question.

C. The Crown and Absolute Ownership

1. Pre-1992: Absolute Ownership

Because the doctrine of tenure formed a part of the received law of Australia, it was

---

[74]Imperial Acts Application Act 1969 (NSW), ss 36 and 37. For a brief history of the statutory confirmation of the reception of English real property law in the Australian colonies see Fry, *Freehold and Leasehold Tenancies of Queensland Land*, above n 57, 18.

[75]Fry, 'Land Tenures in Australian Law', above n 66, 159 and 169.

[76]*Scmlla Properties Ltd* v *Gesso Properties (BVI) Ltd* [1995] BCC 793, 797-802 (Stanley Burnton QC). See also Harpum, *Megarry and Wade The Law of Real Property*, above n 6, 32-3.

[77]*Commonwealth* v *Anderson* (1960) 105 CLR 303, 325 (Windeyer J).

widely assumed that as at 7 February 1788 the Crown became the ultimate or absolute owner of all land within the colony of New South Wales. All lands over which the Crown had acquired legal sovereignty automatically vested in the Crown,[78] as Isaacs J noted in *Williams* v *A-G NSW*:[79]

> We start with the unquestionable position that, when Governor Phillip received his first Commission from King George III on 12th October, 1786, the whole of the lands of Australia were already in law the *property* of the King of England....No act of appropriation, or reservation, or setting apart, was necessary to vest the land in the Crown....The mere fact that men discovered and settled upon the territory gave them no title to the soil. It belonged to the Crown until the Crown chose to grant it....This doctrine received very practical application when the Crown, by Governor Bourke's proclamation, approved by the Colonial Office, refused to recognise Batman's treaty with the native chiefs in 1835, and notified that persons found in possession of the lands would be treated as trespassers and intruders.

The latter event to which Isaacs J refers was the attempt by John Batman to acquire land in what is now Melbourne from Aboriginal inhabitants by means of a 'treaty'. The Crown set this attempt aside on the basis that no title to land could be acquired within the boundaries of annexed territories other than by express Crown grant. Similarly, it was impossible for any person to acquire title to such land other than by obtaining from the Crown a fee simple, lease or licence; otherwise, that person was a trespasser.[80]

Justice Isaacs was simply affirming a long line of Australian authority. In 1846, for example, Stephen CJ held that the courts must take judicial notice of the fact that at the time of English settlement in 1788 the Crown was the legal owner of all land in the Colony of New

---

[78]Fry, *Freehold and Leasehold Tenancies of Queensland Land*, above n 57, 1.

[79]*Williams* v *A-G NSW* (1913) 16 CLR 404, 439-40 (Isaacs J). See also *Randwick Corporation* v *Rutledge* (1959) 102 CLR 54, 71 (Windeyer J); *NSW* v *Commonwealth* (1975) 135 CLR 337, 438-9 (per Stephen J).

[80]Fry, 'Land Tenures in Australian Law', above n 66, 158; Fry, *Freehold and Leasehold Tenancies of Queensland Land*, above n 57, 1-3.

South Wales.[81] According to Stephen CJ, legal ownership allowed the Crown to deal with waste and demesne lands in any way it pleased. A year later he again expressed this idea in the following terms:

> ...the waste lands of this colony are, and ever have been, from the time of its first settlement in 1788, in the Crown;...they are, and ever have been, from that date (in point of legal intendment), without office found, in the Sovereign's possession; and...as his or her property, they have been and may now be effectually granted to subjects of the Crown.[82]

The High Court itself, in its native title decisions, *Mabo [No 2]*[83] and *Wik Peoples* v *Queensland*,[84] has adopted this line of authority as representing the law concerning the nature of the Crown's relationship to land prior to 1992.

2. Post-1992: Radical Title

In 1992, *Mabo [No 2]* shattered the myth that the Crown had the ultimate or absolute ownership of all Australian land.[85] Still, because this myth was founded upon existing authority, the High Court proceeded cautiously so as not to fracture the skeleton of Australian legal principle, namely the doctrine of tenure.[86] Therefore, after rejecting arguments that

---

[81]*Hatfield* v *Alford* (1846) Legge 330, 336-7 (Stephen CJ). See also *A-G* v *Brown* (1847) 1 Legge 312; *A-G* v *Robinson* (1864) 3 SCR (NSW) (L) 23.

[82]*A-G* v *Brown* (1847) 1 Legge 312, 316 (Stephen CJ).

[83]*Mabo [No 2]* (1992) 175 CLR 1, 24-31 (Brennan J), 101-4 (Deane and Gaudron JJ), 145-8 (Dawson J), 179-82 (Toohey J).

[84]*Wik Peoples* v *Queensland* (1996) 187 CLR 1 ('*Wik*'), 108-12 (Toohey J), 139-43 (Gaudron J), 171-84 (Gummow J).

[85]*Mabo [No 2]* (1992) 175 CLR 1, 17-58 (Brennan J), 77-113 (Deane and Gaudron JJ), 179-98 and 206-14 (Toohey J).

[86]*Mabo [No 2]* (1992) 175 CLR 1, 38-43 (Brennan J), 77-81 and 95-9 (Deane and Gaudron JJ), 179-82 (Toohey J).

absolute ownership could be founded upon feudalism,[87] the patrimony of the nation,[88] or the royal prerogative,[89] the Court held that at the time of English settlement in 1788, the Crown at most acquired only a radical title[90] to New South Wales.[91] Radical title plays two roles in Australian real property law: first, it permits the recognition of native title, and, second, it acts as the foundation of the doctrine of tenure in place of absolute ownership.

The High Court held that radical title, in its first role, might, in the fullness of time and following the grant of an interest leaving a reversion in the Crown, ripen into a full beneficial ownership. The Crown might acquire full beneficial ownership--or absolute ownership--upon acting to appropriate to itself ownership of the land or by a surrender of the native title which might subsist in Aboriginal peoples. But even in the absence of subsisting native title, the Crown acquired only a radical title until some other act of appropriation occurred.[92]

---

[87]*Mabo [No 2]* (1992) 175 CLR 1, 46-52 (Brennan J).

[88]*Mabo [No 2]* (1992) 175 CLR 1, 52-3 (Brennan J). See also *Williams* v *A-G NSW* (1913) 16 CLR 404, 449-50 (Isaacs J); *Commonwealth* v *Tasmania (The Tasmanian Dam Case)* (1983) 158 CLR 1, 208-12 (Brennan J).

[89]*Mabo [No 2]* (1992) 175 CLR 1, 53-4 (Brennan J) citing *Williams* v *A-G NSW* (1913) 16 CLR 404; *NSW* v *Commonwealth* (1975) 135 CLR 337, 439 (Stephen J); *South Australia* v *Victoria* (1911) 12 CLR 667, 710-1 (O'Connor J). See also *A-G NSW* v *Butterworth & Co (Australia) Ltd* (1938) 38 SR (NSW) 195, 246-7 (Long Innes CJ in Eq); HV Evatt, *The Royal Prerogative* (1987), 102-3.

[90]For a review of the historical concept of radical title, see Castles, above n 34, 20-1.

[91]See also Fry, 'Land Tenures in Australian Law', above n 66, 158-9 and n 1, who uses ultimate title or radical title to mean that rights in respect of any land in Australia had therefore to derive either directly or indirectly from the Crown, or not at all. He further argues, based upon the prevailing view at the time, that this justified the deprivation by the Crown of the property rights in respect of lands previously possessed by Aboriginal peoples. He notes, however, that the Crown could have confirmed the title of Aboriginal peoples, subject only to the new paramount title of the Crown, but that it did not in fact do so on the mainland.

[92]*Wik* (1996) 187 CLR 1.

The second role of radical title is its foundational position in relation to the doctrine of tenure as it operates in Australian real property law. If the feudal-historical construct is the foundation of real property law in Australia, it requires as a 'logical postulate to the doctrine of tenure' that the Crown have such title to the land so as to invest it with the character of paramount lord in respect of tenures created by grant.[93] The High Court concluded that radical title, acquired along with legal sovereignty, fulfilled this role.[94] Investing the Crown with the character of paramount lord also attracts the Crown's incidents, especially escheat, necessary for the operation of the doctrine of tenure.[95] Radical title therefore solidifies the distinction between, on the one hand, sovereignty, *imperium*, or legal jurisdiction over territory, and, on the other, ownership, *dominium*, or property in land.[96]

At the time of the initial colonisation of Australia, radical title protected the Crown's privileges and powers in relation to all land in New South Wales over which it acquired legal sovereignty. It bestowed upon the Crown the power to prescribe the rights that others could enjoy over land while at the same time creating a justification for keeping some as a part of its waste and demesne lands. Thus, it gained a power of alienation, but not absolute ownership.[97] The establishment of the power to deal in all ways with all Australian land

---

[93]*Mabo [No 2]* (1992) 175 CLR 1, 48 and 50 (Brennan J).

[94]*Mabo [No 2]* (1992) 175 CLR 1, 52-3 (Brennan J). See also *Wik* (1996) 187 CLR 1, 234 (Kirby J); *Amodu Tijani* v *Secretary, Southern Nigeria* [1921] 2 AC 399; *Nireaha Timaki* v *Baker* [1901] AC 561; *Administration of Papua and New Guinea* v *Daera Guba* (1973) 130 CLR 353.

[95]*Mabo [No 2]* (1992) 175 CLR 1, 46-52 and n 29 (Brennan J) citing Wright, *Introduction to the Law of Tenures* (4th ed, 1792), 5. See also Butt, above n 1, 72-3; Bradbrook, MacCallum and Moore, above n 53, 2-3-2-4.

[96]See McNeil, above n 32, 108-10.

[97]*Wik* (1996) 187 CLR 1, 89-90 (Brennan CJ), 127 (Toohey J), 156 (Gaudron J), 186 (Gummow J).

represents the great achievement of radical title as a legal concept.[98] But does this achievement exclude the possibility that the Crown enjoys quasi-ownership of or public property in Australian land?

This thesis argues that the answer is no. Members of the High Court in *Mabo [No 2]* were conflicted in their explanation of the nature of radical title and what it meant about the Crown's relationship to land. Justice Brennan, for instance, seemed to refer to the Crown's interest, its radical title, as beneficial ownership.[99] Having said this, he failed to provide any thoroughgoing analysis of the underlying nature of that interest, certainly not subjecting it to the rigours of property theory. As such, his statement that radical title is a 'logical postulate' of the doctrine of tenure seems to open a pandora's-box of questions. Our focus upon this statement must ask whether the privileges and powers that the Crown enjoys by virtue of the doctrine of tenure--the whole point of radical title--in fact constitute quasi-ownership. Is radical title something more than simply a logical postulate for the doctrine of tenure? The answer, given that none of the privileges and powers which the Crown previously enjoyed over land were removed by the finding that the foundation of tenure in Australia was radical title and not absolute ownership, is yes. Radical title is also a logical postulate of quasi-ownership or public property in Crown land.

The fact that the privileges and powers which the Crown has in relation to land may be political in their origin is no reason for concluding that they are not public property. Such a conclusion only follows from the use of an insufficiently nuanced theory of property or worse, no theory at all. And in *Mabo [No 2]*, the High Court committed this error by failing

---

[98]*Mabo [No 2]* (1992) 175 CLR 1, 48 (Brennan J).

[99]*Mabo [No 2]* (1992) 175 CLR 1, 49-52 (Brennan J).

to take any account of the role of public property as an analytical tool with which to examine the Crown's relationship to Australian land. In the case of public property, privileges and powers may be both political and proprietary. The key distinction is not the source of the power, but the way in which it may be exercised. The fundamental self-seekingness which characterises the exercise of ownership--private property--privileges and powers is lacking in relation to public property. Thus, treating the Crown's privileges and powers as quasi-ownership, which is what they are, removes the Crown's ability to answer any disputed exercise of those privileges and powers in relation to land with the response 'it was mine to do with what I pleased'. The High Court could easily have sidestepped a conclusion that radical title was not property by simply distinguishing between private and public property as the key difference between absolute ownership and radical title. Furthermore, such an analysis would have removed the difficulties which the Court had with absolute ownership. The distinction between private and public property would have made clear that radical title could be no more than quasi-ownership, a conclusion which would leave room for the operation of native title. More importantly, such a conclusion would have rendered unnecessary the need to deny the public property character of radical title.

Perhaps it was just this result which other members of the High Court contemplated. Justice Toohey, for instance, asserted that English law blurs the distinction between legal sovereignty (or *imperium*) and title (or *dominium*) because the Crown's sovereignty over England derived from the feudal notion that the King owned all English land, which in turn produced the doctrine of tenure; he went on to say that '[t]he position of the Crown as the ultimate ***owner*** of land, the holder of the ***radical title***, has persisted and is not really in issue

in these proceedings.'[100]

Statements such as Toohey J's get us no closer to an accurate understanding of the nature of radical title. They do, however, tell us two things. First, that the High Court itself was unclear about the meaning of radical title, which demonstrates why it is important to have a clear understanding of the distinction between private and public property. Second, these statements tell us that radical title is at the very least more than mere political powers. Indeed, English law itself probably never really saw the Crown as 'owning' all land; the historical development of feudal English land law reveals that lawyers of the time probably thought more in terms of reciprocal rights and obligations between lord (Crown) and tenant than they did in terms of the lord's (Crown's) ownership.[101] In other words, the Crown's relationship to land in England was one of public property. As such, if the English Crown's relationship to land held in fee simple or some other tenure can be characterised as public property, then so can the Australian Crown's, even if the underlying postulate of that relationship is radical title.

IV. CONCLUSIONS: THE CENTRAL QUESTION--WHAT IS CROWN LAND?

This brief review of the acquisition of legal sovereignty over Australia and the reception of the English feudal-historical construct of real property law allows us to conclude that in technical terms it remains correct to say that all Australian land is held by or of the Crown. While using such terminology may give rise to misunderstanding by virtue of

---

[100]*Mabo [No 2]* (1992) 175 CLR 1, 180 (Toohey J) (emphasis added); see also 48 (Brennan J), and especially 122-3 (Dawson J), where ultimate or radical title is equated to property. But see *Wik* (1996) 187 CLR 1, 234 (Kirby J), where radical title is said not to be a real title for property purposes. Both positions are ambiguous.

[101]AWB Simpson, above n 1, 47-8.

suggesting a closer connection with its medieval forebear than is the case,[102] the general point is one that assists in demonstrating that the Crown brought with it from England the underlying theory that it has always enjoyed a public property relationship to land over which it claims sovereignty. In England, that relationship took the form of the incidents of tenure that it retained over lands granted in freehold to private persons. In Australia, where land is held not only in freehold, but in many cases also lies unused, or subject to a wide range of statutory leases and licences, the relationship takes other forms depending on the type of land and the content of the Crown's privileges and powers therein.

Having come to the conclusion that the Crown has public property in all Australian land, it is necessary to develop a structure which encompasses all of the types of land to which the Crown has that relationship. This is the work of the Crown land continuum. Chapters 6 to 9 and 11 plot the various locations along the continuum, which are merely different packages of quasi-ownership privileges and powers which the Crown enjoys in relation to different types of Australian land.

---

[102]Butt, above n 1, 71.

Chapter 6

THE ENDS OF THE CONTINUUM: FEE SIMPLE LANDS AND WASTE AND DEMESNE LANDS

I. INTRODUCTION

This chapter analyses the locations at the opposite ends of the Crown land continuum. At the foot one finds the Crown's quasi-ownership interest in lands which are held in fee simple by private persons. This location is characterised by the tenurial incidents of escheat and forfeiture. It is the smallest package of quasi-ownership privileges and powers available to the Crown in relation to Australian land.

If the foot of the continuum contains the smallest package of quasi-ownership privileges and powers, the head is characterised by the largest. Here one finds those lands which laypeople refer to as Crown lands but which this thesis calls waste and demesne lands.

II. THE FOOT OF THE CONTINUUM: FEE SIMPLE LANDS AND THE INCIDENTS OF ESCHEAT AND FORFEITURE

The grant of a fee simple represents the most significant exercise of the Crown's prerogative over land, conferring upon a private person the largest possible package of ownership privileges and powers in relation to land.[1] The feudal-historical construct of real

---

[1]The power to grant fees simple is found in State and Territory legislation: Crown Lands Act 1989 (NSW), ss 34-40; Land Act 1994 (Qld), ss 14-26; Crown Lands Act 1929

property law examined in Chapter 5 demonstrates, however, that even when the Crown grants a fee simple, by which it loses many of its quasi-ownership privileges and powers, it also, at a minimum, retains a narrow band of privileges and powers in the relevant land. While the fee simple holder is viewed by laypeople as being the absolute owner of the land so held, the technical position belies that view. The land is in truth held of the Crown pursuant to the doctrine of tenure. And while the doctrine has been significantly eroded--but not eliminated[2]--in England, such is not the case in Australia; indeed, *Mabo [No 2]*[3] has re-affirmed and strengthened its status within the Australian law of real property.[4] This thesis calls all lands over which fees simple exist 'fee simple lands'.

While the doctrine of tenure represents the true relationship of the Australian State and Territory Crowns in relation to the fee simple lands, its practical significance has diminished substantially in modern times. Whereas a range of incidents of tenure once provided the Crown or a lord with substantial privileges and powers in relation to English land, in contemporary Australia only the incidents of escheat and forfeiture remain, and even they enure only to the benefit of the Crown. These incidents, as we have seen in Chapter 5, constitute quasi-ownership, which, because they comprise the smallest such interest available to the Crown, must be placed at the foot of the Crown land continuum. Before turning to the operation of escheat and forfeiture, however, it is necessary to deal with a possible difficulty

---

(SA), ss 4C, 5AA, 5AB, 5, 5A, 6, 6A and B, 9 and 9A; Crown Lands Act 1976 (Tas), ss 3, 6 and 13-28; Land Act 1958 (Vic), s 12; Land Administration Act 1997 (WA), ss 77-8; Crown Lands Act (NT), ss 4, 9-18.

[2]*Scmlla Properties Ltd* v *Gesso Properties (BVI) Ltd* [1995] BCC 793, 797-806 (Stanley Brunton QC).

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

[4]See Chapter 5, Section III.C.2.

with the placement of the fee simple lands at the foot of the continuum.

A. A Preliminary Concern About Location: Compulsory Acquisition

Because it can be dismissed in short order, it is easiest to deal with a potential difficulty about the location of fee simple lands on the Crown land continuum before proceeding. The difficulty concerns the power of the Crown to compulsorily acquire fee simple land for compensation.[5] It is possible that if classed as one of the Crown's quasi-ownership powers in relation to fee simple lands, the addition of the power to compulsorily acquire would expand the scope of the quasi-ownership interest enjoyed by the Crown therein, necessitating a shift in this location on the continuum, possibly higher, indeed, perhaps even to the middle-range near the native title lands.[6] Conversely, it is possible that native title lands, because they are subject to the Crown's power of extinguishment[7]--a power very similar to the Crown's power to expropriate a fee simple--may need to be re-located lower on the continuum, perhaps placing them, along with fee simple lands, near the foot.

This thesis leaves the fee simple lands at the foot of the continuum and the native title lands in the middle range or the high end of the lower range. The reason for this is straightforward. Even if the Crown's quasi-ownership interest was expanded in size by the

---

[5]Pursuant to State legislation such as the Local Government Act 1993 (NSW). If the Commonwealth compulsorily acquires land, the Commonwealth of Australia Constitution Act, sub-s 51(xxxi), provides that the acquisition shall be on just terms compensation. This prohibition does not apply to the States or Territories, in which just terms compensation is either implied by a canon of statutory interpretation that legislation may not authorise compulsory acquisition without the payment of compensation, or by legislation, such as the Land Acquisition (Just Terms Compensation) Act 1991 (NSW). On the Commonwealth, State and Territory powers of compulsory acquisition of land and just terms compensation see Adrian J Bradbrook, Susan V MacCallum and Anthony P Moore, *Australian Real Property Law* (2nd ed, 1997), 1-4-1-5.

[6]See Chapter 9.

[7]See Chapter 11.

addition of the power to expropriate or compulsorily acquire land, the significant package of ownership privileges and powers enjoyed by the fee simple holder in comparison with the quasi-ownership interest held by the Crown--even if it includes the power of compulsory acquisition--requires the placement of the fee simple lands at the very least in the bottom-range of the continuum, below the native title lands, and only marginally higher than the foot. The Crown's quasi-ownership interest in fee simple lands is less significant when compared to the ownership interest held by the fee simple holder. On the other hand, when one compares the Crown's power of extinguishment with the much more constrained bundle of communitarian privileges and powers conferred upon the holders of native title, the Crown's quasi-ownership interest therein, even though it might appear to be very similar to its quasi-ownership interest in fee simple lands, is more substantial than the communitarian interest.

Two issues demonstrate the importance of comparing the Crown's quasi-ownership interest with that of either the fee simple or native title holder. The first is transferability or alienability. Native title may not be transferred to anyone other than the Crown, and this represents a significant point of contrast with the fee simple.[8] This exclusive pre-emptive right of acquisition gives the Crown a power in relation to native title that it does not have in relation to fees simple; the Crown is the only possible grantee of native title communitarian privileges and powers. The fee simple holder, on the other hand, has a plenary power of alienation, which means that the Crown in turn has no residual pre-emptive power at all, let alone an exclusive one, in the way that it does with native title. This difference alone necessitates placing native title lands at the very least above the fee simple lands.

The second issue which demonstrates the importance of comparing the Crown's

---

[8]See Chapter 11.

package of quasi-ownership privileges and powers with the interest held pursuant to native title or a fee simple concerns the operation of the Crown land statutes, which we will examine in the second part of this chapter. When we examine those statutes and later when we consider native title and the power of extinguishment in Chapters 9 and 11, we will see that subject to the operation of the Native Title Act 1993 (Cth), the Crown retains the power to deal with or dispose of native title lands pursuant to the Crown land and natural resources statutes; the privileges and powers conferred by those enactments are not affected by the existence of native title. That is not the case with the fee simple. Once a fee simple has been granted, the Crown may no longer deal with the relevant land pursuant to the Crown land statutes. This too necessitates the higher placement of native title lands on the continuum; the Crown has a larger package of quasi-ownership privileges and powers in relation to native title than it does in relation to fees simple.

Even if the suggested location of the fee simple and native title lands on the Crown land continuum is wrong, the resulting shift in location does nothing to impeach the argument advanced in this thesis in relation to the overall structure of the Crown land continuum. The continuum remains, it is only the location of the fee simple and native title lands that may require shifting, but certainly not above the middle range. Having dealt with this concern, the next two sections examine the contemporary operation of escheat and forfeiture in Australian real property law.

B. Escheat

The feudal incident of escheat is found in the small package of privileges and powers found at the foot of the Crown land continuum which the Crown enjoys in relation to the fee simple lands. As we have seen in Chapter 5, escheat survived English legislative attempts to simplify the doctrine of tenure between 1290 and 1925, and was part of the received laws of

Empire in New South Wales as at 1828.[9] In the feudal-historical construct, escheat operated as a matter of tenure so that when an estate came to an end, the land escheated (reverted) to the immediate lord of whom it was held. If held of a mesne lord, it escheated to that lord. Otherwise it escheated to the Crown.[10] If the land was held in fee simple, it could occur in one of two ways: (i) where the tenant died without leaving an heir, in which case it was *propter defectum sanguinis* (for failure of blood), and, (ii) where the tenant was attainted for felony, in other words convicted and sentenced to death, in which case it was *propter delictum tenentis* (for the tenant's crime).[11] Escheat also applied to land held for a life estate, although in that case the land reverted to the lord in the capacity as grantor and not that of lord.[12] Any other instances of escheat were very rare.[13]

While England and Australia seem to differ as to the contemporary significance of escheat, on closer inspection, the modern position in the two jurisdictions is quite similar. In England, while both forms of escheat appeared to be legislatively abolished,[14] it has in fact

---

[9]The date established for the reception of English law by the Australian Courts Act 1828 (Eng), 9 Geo IV, c 83. See Chapter 5, Section III.B.

[10]Peter Butt, *Land Law* (3rd ed, 1996), 67; Charles Harpum with Malcolm Grant and Stuart Bridge, *Megarry and Wade The Law of Real Property* (6th ed, 2000), 17-8.

[11]Butt, above n 10, 67; AWB Simpson, *A History of the Land Law* (2nd ed, 1986), 19-20; Harpum, *Megarry and Wade The Law of Real Property*, above n 10, 17-8 and 32-3; Kenelm Edward Digby, *An Introduction to the History of the Law of Real Property with Original Authorities* (5th ed, 1897), 91-4 and 425-7.

[12]Simpson, above n 11, 19; Robert Megarry and HWR Wade, *The Law of Real Property* (5th ed, 1984), 68, n 90.

[13]See TC Williams, 'The Fundamental Principles of the Present Law of Ownership of Land' (1931) 75 *Solicitor's Journal* 843.

[14]Harpum, *Megarry and Wade The Law of Real Property*, above n 10, 32-3. Escheat *propter delictum tenentis* by the Corruption of Blood Act 1814, 54 Geo III, cc 145 and 146 and the Forfeiture Act 1870, 33 & 34 Vict, c 23, s 1, and escheat *propter defectum sanguinis* by the Administration of Estates Act 1925, 15 Geo V, c 23, ss 45 and 46.

survived, albeit as a modern invention rather than its feudal *propter delictum sanguinis* or *propter defectum tenentis*. In comparison to the feudal law, the scope of the modern invention is very narrow.[15] In Australia, fixing the date of reception of English law at 1828 seemed to mean that escheat retained its feudal vigour. The truth, however, as in England, is that it has a narrow scope.

In New South Wales, for instance, escheat for felony has long been abolished[16] and the distinction between escheat and *bona vacantia* has been eroded if not eliminated by modern succession legislation.[17] The only remnants of the incident seem to be the case where a landowner's trustee in bankruptcy exercises the statutory power to disclaim land that is subject to onerous covenants or difficult to sell,[18] or where a company's liquidator exercises a similar power to disclaim land of that company.[19]

C. Forfeiture

Unlike escheat, the incident of forfeiture operated within the feudal-historical construct as a matter of prerogative and not tenure; as such, it permitted the Crown to seize and keep

---

[15]*Scmlla Properties Ltd* v *Gesso Properties (BVI) Ltd* [1995] BCC 793, 797-806 (Stanley Brunton QC); Simpson, above n 11, 23-4.

[16]Criminal Law Amendment Act 1883 (NSW), s 416; Crimes Act 1900 (NSW), sub-s 465(1); *Burns Philp Trustee Co Ltd* v *Viney* [1981] 2 NSWLR 216, 220-1 (Kearney J); *Gollan* v *Nugent* (1987) 8 NSWLR 166, 184-5 (McHugh JA).

[17]See Chapter 5, Section II.B.

[18]Bankruptcy Act 1966 (Cth), s 133. See also *Scmlla Properties Ltd* v *Gesso Properties (BVI) Ltd* [1995] BCC 793, 797-806 (Stanley Brunton QC); Williams, above n 13; *Ex parte Cleland and Teesdale Smith* [1960] SASR 199, 202-3 (Napier CJ); Harpum, *Megarry and Wade The Law of Real Property*, above n 10, 32-3; Bankruptcy Act 1914, 4 & 5 Geo V, c 59, s 54.

[19]Corporations Law (Cth), s 568; *Re Tulloch Ltd* (1978) 3 ACLR 808, 812-3 (Needham J). See also *Scmlla Properties Ltd* v *Gesso Properties (BVI) Ltd* [1995] BCC 793, 797-806 (Stanley Brunton QC), 797-806; Harpum, *Megarry and Wade The Law of Real Property*, above n 10, 33-4; Companies Act 1948, 11 & 12 Geo VI, c 38, s 354.

lands of any person attainted of high treason, whether the fee simple was held of the Crown or some mesne lord. A tenant might also forfeit land for failure to perform feudal services, either by virtue of an express right of forfeiture reserved by the lord or under statute.[20] While the Forfeiture Act 1870 (Eng)[21] abolished forfeiture in England, that legislation was not a part of the received law of Australia. As such, this incident in some cases still exists as part of the small package of quasi-ownership privileges and powers which the Crown has in fee simple lands.[22] In practical terms, though, its exercise is rare; indeed, it is not even mentioned in any of the Australian real property texts.

Escheat and forfeiture presage the possibility that the Crown may once again have a full-blooded quasi-ownership interest in fee simple lands, and, as such, all such lands are Crown land.[23] Still, the Crown's relationship to fee simple lands gives it public property only in the narrowest possible sense. In the case of escheat, it enjoys only a contingent privilege of a future interest in the lands rather than any present quasi-ownership privileges and powers. As for forfeiture, the rarity of treason prosecutions would render minimal its practical significance to the Crown. Because both escheat and forfeiture have very limited application to Australian fee simple lands, their potential importance as a location along the Crown land continuum may seem minimal. Be that as it may, the existence of these incidents permits the very significant conclusion that all land in Australia is Crown land. Of course, the much more

---

[20]Harpum, *Megarry and Wade The Law of Real Property*, above n 10, 17-8 and 32-3. See also Statute of Gloucester 1278, 6 Edw I, c 4; Statute of Westminster II 1285, 13 Edw I, c 21.

[21]Forfeiture Act 1870, 33 & 34 Vict, c 23, s 1.

[22]See eg Land Act 1958 (Vic), s 23.

[23]This fact is codified in some State and Territory Crown land statutes, such as the Land Act 1958 (Vic), s 23.

significant location on the continuum is found at its head: the waste and demesne lands.

III. THE HEAD OF THE CONTINUUM: WASTE AND DEMESNE LANDS AND THE CROWN LAND STATUTES

A. Describing the Location: Waste and Demesne Lands

By far the most significant location on the Crown land continuum is that found at its head. The lands at this location are interchangeably referred to by laypeople and in the historical and legal materials as 'unalienated waste lands of the Crown', the 'Crown's demesne', or simply 'Crown lands'. While each of these terms means much the same thing, because the Crown land continuum comprises larger or smaller packages of quasi-ownership privileges and powers over many types of land, it is inappropriate to use the phrase Crown lands to refer to one of the locations along the continuum. This thesis refers to these lands and to their location on the continuum as 'waste and demesne lands of the Crown' or simply 'waste and demesne lands'. A brief reprisal of the historical meanings of waste lands and demesne lands explains why such a usage is permissible.

Demesne lands, a term of medieval origin, refers to those lands of a manor not granted pursuant to tenure but reserved by the lord for personal use and occupation. So far as the Crown was concerned, this term meant lands reserved to the Crown at the original distribution of landed property, or which came to it later by escheat or forfeiture.[24]

Waste lands, on the other hand, referred to land which is in a natural, uncultivated state within a feudal manor, typically used to graze livestock belonging to the lord or

---

[24]Paul Vinogradoff, *The Growth of the Manor* (2nd ed, 1911), 312-3 and 330; Thomas Edward Scrutton, *Commons and Common Fields or The History and Policy of the Laws Relating to Commons and Enclosures in England* (1887), 2 and 25-6; *Black's Law Dictionary* (5th ed, 1979), 'Demesne'. For Australian authority see *Randwick Corporation* v *Rutledge* (1959) 102 CLR 54, 71 (Windeyer J). See also Simpson, above n 11, 157; Kevin Gray and Susan Francis Gray, 'The Idea of Property in Land' in Susan Bright and John Dewar, eds, *Land Law: Themes and Perspectives* (1998) 15-51, 28.

tenants.[25] In Australia, since at least the nineteenth century, Crown lands were known by this title, which Australian courts used to describe land that was vested in the Crown, unoccupied and uncultivated but not entirely profitless.[26]

The location found at the head of the continuum comprises both waste and demesne lands over which the Crown, through one of the States or Territories, has not granted an estate or interest in land to a private person and which remain unoccupied and uncultivated.[27] While in contemporary Australia these two medieval terms have been swallowed by the more popularly meaningful Crown lands, in order to distinguish this location from all others on the Crown land continuum, this thesis uses the phrase 'waste and demesne lands' to describe them.

The waste and demesne lands, and the substantial quasi-ownership privileges and powers which the Crown has over them, have been given definition by and may be dealt with pursuant to a disparate group of statutes, which the next section considers.

---

[25]PE Nygh and Peter Butt, gen eds, *Butterworth's Australian Property Law Dictionary* (1997), 'Waste land' and 'Waste land of the Crown'.

[26]*Wildash* v *Brosnan* (1870) 1 CLLR 17; *Williams* v *A-G NSW* (1913) 16 CLR 404, 423-30 (Barton ACJ), 439-40 and 450 (Isaacs J), 461-2 (Higgins J); *A-G* v *Brown* (1847) 1 Legge 312; *Munday* v *ACT* (1998) 146 FLR 17; AR Buck, '*Attorney General v Brown* and the Development of Property Law in Australia' (1994) 2 *Australian Property Law Journal* 128; Simpson, above n 11, 156.

[27]See Nygh and Butt, *Butterworth's Australian Property Law Dictionary* above n 25, 'Crown land'; CEA Bedwell, *Australasian Judicial Dictionary* (1920), 34, 'Crown Lands'; BA Helmore, *The Law of Real Property in New South Wales* (2nd ed, 1966), 525-31. See also *Plant* v *Rollston* (1894) 6 QLJ 98.

B. The Crown Land Statutes

1. Function

Each Australian State and Territory[28] exercises its entire prerogative power to manage, control and alienate its waste and demesne lands[29] through legislation enacted to define, prescribe the use of, and control access to such lands.[30] The power is typically exercisable through the grant, dedication, reservation or classification of land to persons or governmental entities, usually in fee simple or pursuant to some form of statutory lease, licence, easement,

---

[28]The Commonwealth of Australia Constitution Act, sub-ss 52(i) and 122, vests the Commonwealth Parliament with the legislative power in relation to Australia's Territories. Thus, the control of Crown land within the Territories lies with the Commonwealth Parliament. Notwithstanding the constitutional position, through various enactments, the Commonwealth has conferred upon the Territories the legislative power thereto: see Australian Capital Territory (Self-Government) Act 1988 (Cth); Norfolk Island Act 1979 (Cth); Northern Territory (Self-Government) Act 1978 (Cth); Christmas Island Act 1958 (Cth); Cocos (Keeling) Islands Act 1955 (Cth). This thesis does not deal with the offshore territories of Australia; for some discussion of those territories see PH Lane, *The Australian Federal System* (2nd ed, 1979), 919-53; Peter Hanks, *Constitutional Law in Australia* (2nd ed, 1996), 34.

The Commonwealth deals with the small residue of waste and demesne lands which still fall within its legislative competence pursuant to the Lands Acquisition Act 1989 (Cth) (in the case of a conflict with any Territory law, the Commonwealth legislation is paramount: sub-ss 3, 4 and 5(1)). This thesis does not deal with Commonwealth waste and demesne lands.

For a full examination of the constitutional position of the Territorial legislatures see PH Lane, *The Australian Federal System* (2nd ed, 1979), 919-53.

[29]See Chapter 10. For a detailed, but dated, account of the administration of waste and demesne lands in New South Wales see Andrew G Lang, *Crown Land in New South Wales: The principles and practice relating to the disposal of and dealings with Crown land pursuant to the Crown Lands Consolidation Act, 1913; Western Lands Act, 1968; Returned Soldiers Settlement Act, 1916; War Service Land Settlement Act, 1914; Closer Settlement Acts and related legislation* (1973), 25-7. And for Queensland, see Thomas Penberthy Fry, *Freehold and Leasehold Tenancies of Queensland Land* (1946); Christopher Boge, *State Leasehold in Queensland* (2000).

[30]Crown Lands Consolidation Act 1913 (NSW), Crown Lands Act 1989 (NSW), Crown Lands (Continued Tenures) Act 1989 (NSW), Western Lands Act 1901 (NSW); Land Act 1958 (Vic); Land Act 1994 (Qld); Crown Lands Act 1929 (SA); Land Administration Act 1997 (WA); Crown Lands Act 1976 (Tas); Crown Lands Act (NT); Pastoral Land Act (NT); Land (Planning and Environment) Act 1991 (ACT).

enclosure, trust, or plan of management.[31] As such, this body of legislation establishes the package of quasi-ownership privileges and powers which the Crown enjoys over waste and demesne lands; it is the largest such package available to the Crown in any Australian land. Commentators refer collectively to this body of legislation as the 'Crown land statutes'.[32]

The Crown land statute of any State or Territory is typically a highly complex enactment the result of piecemeal drafting by successive legislatures in an effort to keep pace with changing political, social, and economic conditions. The product is inelegantly drafted legislation with little theoretical or philosophical underpinning,[33] which, upon even cursory examination, leads one to conclude that

> [i]t would be a wonder if a law so framed showed any fixed principle and consistency in its administration. The history of its whole operation for years has been an unintelligible chaos, in which the rights and interests of all mainly concerned have been the sport of accident, political interest, and departmental disorder....
> [i]t has barred the advance of honest enterprise in all directions, and has at the same time, opened a door for the entrance of every phase of abuse and fraud....[34]

This statement, made in 1883 in relation to the New South Wales Crown land statute, is as true today as it was then. The Crown land statutes are justifiably referred to as a 'veritable jungle of legislation'[35] 'penetrable only by the initiate'.[36]

Some modern State and Territory parliaments--most notably New South Wales and

---

[31]See eg Crown Lands Act 1989 (NSW), ss 34-128.

[32]Butt, above n 10, 839.

[33]Lang, above n 29, 13.

[34]Lang, above n 29, 10, quoting without citation a Report of Mr Morris and Mr Ranken, Commissioners appointed in 1883 to inquire into and report on the state of public lands and land laws of New South Wales.

[35]*Hegarty* v *Ellis* (1908) 6 CLR 264, 280 (Higgins J).

[36]*Re Hawkins* (1948) 49 SR (NSW) 114, 118 (Jordan CJ).

Queensland--have repealed and replaced older legislation with somewhat more coherent enactments. Still, the complexity remains. The next section seeks to clear a path through this legislative thicket in order to provide a basic understanding of the waste and demesne lands; this analysis tells us which lands can be characterised as waste and demesne, and which therefore fall subject to the Crown's quasi-ownership privileges and powers conferred by the Crown land statutes. It constructs the legislative definition of these lands using the New South Wales materials as a representative guide. It also considers the physical scope of that definition and those instances where the legislative definition is silent as to whether specific parcels of land are waste and demesne lands. As a whole, this section maps out the content of the quasi-ownership interest enjoyed by the Crown in waste and demesne lands.

2. The Legislative Definition of Waste and Demesne Lands: The New South Wales Crown Land Statute

The Crown Lands Act 1989 (NSW) ('the 1989 legislation') provides a representative example of the legislative definition of waste and demesne lands (the legislation uses the phrase 'Crown lands') typically found in State and Territory Crown land statutes.[37] The product of chaotic and piecemeal reform dating back to the English settlement of Australia

---

[37]With the exception of Victoria, where the Land Act 1958 contains no definition of Crown lands. Rather, s 4 states that Part I of the Act applies to all *Crown land* in Victoria and sub-s 12(1) states that '... the Governor in Council in the name and on behalf of Her Majesty may grant convey or otherwise dispose of lands for the time being belonging to the Crown for such estate or interest as in each case is hereby authorized and for none other'. Because the legislation fails to define the phrase 'lands for the time being belonging to the Crown', judicial analysis provides the only guidance as to the lands covered by the legislation: see eg *Melbourne Harbour Trust Commissioners* v *Colonial Sugar Refining Co Ltd* (1925) 36 CLR 230, 269-72 (Isaacs J) (the phrase 'land for the time being belonging to the Crown' comprises 'the largest terms to denote all lands of the Crown'), 291-2 (Higgins J) (the phrase 'expressly applies to all lands belonging to the Crown, whether under water or not' includes the shore of the seas and navigable rivers); *Colonial Sugar Refining Co Ltd* v *Melbourne Harbour Trust Commissioners* (1927) 38 CLR 547 (PC) (reversing the decision of the High Court on other grounds).

in 1788, the 1989 legislation is the product of two major consolidations of a vast array of disparate enactments and changing policies:[38] (i) the Crown Lands Consolidation Act 1913 (NSW), which consolidated all earlier legislation into one Act ('the 1913 legislation'),[39] and (ii) the consolidation of the post-1913 amendments[40] effected by the 1989 legislation itself.

The 1913 and 1989 legislation left intact only the Western Lands Act 1901 (NSW) ('the 1901 legislation'), which controls land in the Western Division of New South Wales (the colony had been divided in 1884 into the Eastern, Central and Western Divisions).[41] Because the 1901 and 1989 legislation are similar in their definitions of waste and demesne lands, we need consider only the latter.

The 1989 legislation defines waste and demesne lands as '...land that is vested in the Crown...not...being...land dedicated for a public purpose; or...land that has been sold or lawfully contracted to be sold and in respect of which the purchase price or other consideration for the sale has been received by the Crown.'[42] This section considers the three

---

[38]See Stephen H Roberts, *History of Australian Land Settlement 1788-1920* (1968); Alex C Castles, *An Australian Legal History* (1982); William Campbell, *The Crown Lands of Australia* (1855).

[39]Lang, above n 29, 11.

[40]Lang, above n 29, 11-2.

[41]Lang, above n 29, 10 and 12.

[42]Crown Lands Act 1989 (NSW), sub-s 3(1). See also Crown Lands Act (NT), s 3; Pastoral Land Act (NT), s 3; Land Act 1962 (Qld), s 5; Crown Lands Act 1929 (SA), sub-s 4 'Crown Lands' (b); Crown Lands Act 1976 (Tas), s 2; Land (Planning and Environment) Act 1991 (ACT), s 4 'public land'. With the exception in South Australia of a mining lease or licence, the Crown Lands Act 1929 (SA), sub-s 4 'Crown Lands' (b) (which expressly includes lands revested in the Crown in addition to unalienated lands), and the Pastoral Land Management and Conservation Act 1989 (SA), s 3, include as waste and demesne lands those held under an agreement, lease or licence from the Crown. The Tasmanian legislation, sub-ss 53(1) and (2), also states that subject to licences granted for certain purposes, no person may reclaim any land below the high-water mark forming the shore, the bed of the sea or other waste and demesne lands. The Land Administration Act 1997 (WA), sub-ss 3(1), 'Crown

elements of the definition: (i) land vested in the Crown; (ii) land dedicated for a public purpose; and (iii) land sold or lawfully contracted to be sold.

(a). Land Vested in the Crown

In *Williams* v *A-G NSW*,[43] the High Court dealt with a definition of waste and demesne lands found in an earlier incarnation of the 1989 legislation, which read: '...Lands vested in Her Majesty...not...already granted or lawfully contracted to be granted...in Fee Simple...or for a Term of Years, and which have not been dedicated and set apart for some public Use....'[44] The High Court held this definition to mean land belonging to the Crown by way of the acquisition of sovereignty over the Colony, and that no act of appropriation, reservation or setting apart was necessary for its vesting in the Crown.[45] As we saw in Chapter 5,

---

land', (2), (3), (4) and (5), excludes all freehold land, but includes those below the high water mark, including the beds and banks of tidal waters, unless inundated or freehold (the South Australian legislation contains similar language concerning the seashore). The Western Australian legislation is also interesting because it is the only legislation that provides for the grant of an interest in land in airspace. For the purposes of granting a lease or licence of land for pedestrian bridges and subways, the Land Act 1933 (WA), s 117A(3), saved by the Land Administration Act 1997 (WA), Sched 2, sub-s 31(1), provides that a 'part of land' means land below the surface of the land and any part of the air space above land. The Victorian legislation similarly provides that the Minister may lease or licence a stratum of Crown land: Land Act 1958 (Vic), ss 3 'stratum of Crown land', 134A and 138A.

The Land Act 1994 (Qld) (which repealed the Land Act 1962 (Qld)), s 3, Schedule 6, re-names Crown land 'unallocated State land', although the content of this definition changed little from that for 'Crown land' found in the 1962 legislation and its counterpart State and Territory legislation. And because it excludes from unallocated State land, in addition to fees simple and leasehold tenures, lands held under licence or permit issued by the State, it better describes the sort of land covered by other State and Territory legislation than does 'Crown land'.

[43] *Williams* v *A-G NSW* (1913) 16 CLR 404. See also Lang, above n 29, 15-6.

[44] Sale of Waste Lands Act 1842 (Eng), 5 & 6 Vict, c 36, s 23, subsequently consolidated by the Crown Lands Consolidation Act 1913 (NSW).

[45] *Williams* v *A-G NSW* (1913) 16 CLR 404, 428 (per Barton ACJ), 456 (Isaacs J); *Williams* v *A-G NSW* [1915] AC 573, 582 (Lord Sumner) (upholding the High Court on other grounds).

following *Mabo [No 2]*, the acquisition of sovereignty, without more, conferred upon the Crown only a radical title. Thus, 'land vested in the Crown' refers to those lands in which the Crown continues to enjoy radical title, which encompasses the power to control, manage and alienate land.

(b). Land Dedicated for a Public Purpose: Reservation, Dedication, and Assessment

As part of its package of quasi-ownership privileges and powers over waste and demesne lands, the Crown in each State and Territory enjoys the power to reserve or dedicate lands in one of two ways. First, it may do so for private,[46] public,[47] or community[48]

---

[46]Western Lands Act 1901 (NSW), s 28A.

[47]The term 'public purpose' or 'public reserve' is indigenous to Australia, and is evident from the earliest settlement: see eg Dispatch dated 1 January 1825 from Earl Bathurst, Secretary of State for the Colonies, to Governor Brisbane, *Historical Records of Australia* (1917) Series I, vol XI, 434-44.

There is substantial judicial analysis of the term: *Wheeler* v *Kelly* (1956) 94 CLR 206, 214 (Dixon CJ, Webb and Kitto JJ) (defining public purpose as any one which the Minister may fairly regard as such for country lands, such as the extension of a limited corporation carrying on the business of a war veterans home, provided there is a *bona fide* declaration of that purpose); *Williams* v *A-G NSW* [1915] AC 573, 579-82 (Lord Sumner) (Ministers of the Crown, without legislative authorisation, can make use of Crown property, meaning waste lands not dedicated for a public purpose, and such use alone does not constitute a binding dedication for a public purpose); *Williams* v *A-G NSW* (1913) 16 CLR 404, 443 and 449-53 (Isaacs J), 462-3 and 467 (Gavan Duffy and Rich JJ) (whether a binding dedication or appropriation for public purposes exists is a question of fact dependant on the circumstances; thus, the use of a home for the Governor General's residence does not constitute a binding dedication); *Randwick Corporation* v *Rutledge* (1959) 102 CLR 54, 64 (Menzies J) (public reserve land must be used for the general welfare, thus, it must be land open to common and general use for public health, recreation, enjoyment or the like), 77-8 (Windeyer J).

The judicial analysis of 'public purpose' applies only to Crown land statutes silent as to its meaning. Statutes which do contain a definition of this term offer additional guidance as to what constitutes a public purpose: see eg Land Act 1994 (Qld), s 3 and Schedule 6; Crown Lands Act 1976 (Tas), ss 8 and 12; Crown Lands Act 1929 (SA), sub-s 5(d); Land (Planning and Environment) Act 1991 (ACT), ss 192, 193. In Victoria, the Crown Land (Reserves) Act 1978 (Vic), sub-s 4(1), deals with reserves of waste and demesne lands and defines the various public purposes for which the Crown may reserve its lands.

[48]Land Act 1994 (Qld), Chapter 3, Part 1, s 3 and Schedules 1 and 6 'community purpose'.

purposes.[49] Although not an exhaustive list, such purposes may include commons, [50] pastoralism,[51] Aboriginal reserves,[52] forestry,[53] mining,[54] recreation,[55] conservation,[56] timber-collecting,[57] fishing,[58] travelling stock routes or camping places.[59] Second, a corollary of the first, when considered by the relevant Minister to be in the public interest, the Crown may

---

[49]See also Lang, above n 29, 6-7, 9 and 78-80. And see Sale of Waste Lands Act 1846 (Eng), 9 & 10 Vict, c 104; *Government Gazette* (NSW), Order in Council, 7 October 1847, s 6, cited in Castles, above n 38, 176, n 41, and Lang, above n 29, 6-7; Crown Lands Alienation Act 1861 (NSW), s 5; Crown Lands Occupation Act 1861 (NSW).

[50]Land Act 1958 (Vic), Part I, Division 12; Crown Lands Act 1929 (SA), s 251.

[51]*Hawkins* v *Minister for Lands (NSW)* (1949) 78 CLR 479, 492 and 494 (Dixon J), 496 (McTiernan J); *Re Millgate* (1911) 21 LCC 24, G Herbert Pike and HB Bignold, *Digest of Land Appeal Court Cases 1890 to 1911* (1895-1912), vol (1906-1911), 127 (travelling stock reserve). See also Gerry M Bates, *Environmental Law in Australia* (3rd ed, 1992), 192-3.

[52]See Bates, above n 51, 246-55 (listing State and Territory legislation governing the creation of Aboriginal reserves). See eg Crown Lands Act (NT), sub-s 37(2).

[53]See Crown Lands (Reserves) Act 1978 (Vic), s 20; Crown Lands Act 1929 (SA), s 263.

[54]*Re Hudson* (1903) 13 LCC 190, Pike and Bignold, above n 51, vol (1901-1905), 43, 147 and 172 (goldfield reserve); *BMG Resources Limited* v *Pine Rivers SC* (1989) 2 Qd R 1 (quarry). See also Western Lands Act 1901 (NSW), sub-s 24(4)(c) and (6).

[55]*Randwick Corporation* v *Rutledge* (1959) 102 CLR 54; *Re Thompson* (1911) 21 LCC 9, Pike and Bignold, above n 51, vol (1906-1911), 122 (land as common); *Re Swaysland* (1907) 17 LCC 246, Pike and Bignold, above n 51, vol (1906-1911), 120 (recreation reserve); *Cummins* v *Tenterfield Pastures Protection Board* (1931) 10 LVR 100 (camping reserve); *Brisbane CC* v *AG* [1979] AC 411 (recreation reserve).

[56]See Bates, above n 51, 173-91 (listing State and Territory legislation governing the creation of conservation and management reserves). See also Crown Lands Act 1929 (SA), s 263A (soil conservation).

[57]*Re Kirkland* (1909) 19 LCC 533, Pike and Bignold, above n 51, vol (1906-1911), 127 (timber and plantation reserve).

[58]Bates, above n 51, 30.

[59]Lang, above n 29, 87-8. *Re Travelling Stock Reserve No 33,614* (1906) 16 LCC 486.

include reservations in or qualifications upon the grant of fees simple.[60] This usually takes the form of reserving a part of the land granted in fee simple,[61] or adding a new reservation upon its transfer.[62]

The Crown land statutes exclude from the definition of waste and demesne lands any land which is dedicated for a public purpose. The question arises: what is the scope of this exclusion? Does it include reservations or other qualifications of grants, or merely dedications? This question has great significance when the Crown seeks to exercise the prerogative in order to grant a fee simple or leasehold over land subject to a reservation, dedication, or qualification. The short answer is that not every Crown reservation, dedication or qualification of a grant removes the reserved, dedicated or qualified land from the corpus of waste and demesne lands.[63] How do we decide?

Solving the difficulty created by the exclusion of dedicated lands from the definition of waste and demesne lands begins with drawing a distinction between 'reserve' and 'dedicate'.[64] Consider reserve, which has two possible meanings. In its first meaning, it refers to land reserved ***from*** certain uses or transactions, such as from sale or lease. In its second

---

[60]See eg Land Administration Act 1997 (WA), sub-ss 3(1) 'reservation' and 74(1)(g).

[61]Crown Lands Act 1989 (NSW), sub-s 171(2), Western Lands Act 1901 (NSW), Schedule A(q); Crown Lands Act (NT), ss 19 and 20 (these sections do not require demonstration of the public interest); Land Act 1994 (Qld), sub-ss 23(1), 24 and 26.

[62]See eg Western Lands Act 1901 (NSW), sub-s 33A(2B).

[63]*Hawkins* v *Minister for Lands (NSW)* (1949) 78 CLR 479, 492-4 (Dixon J), 496 (McTiernan J). See also Bradbrook, MacCallum and Moore, above n 5, 6-24-6-29.

For example, the Land Act 1933 (WA), sub-s 29(2), repealed by the Land Administration Act 1997 (WA), permitted lands reserved for public purposes to be subsequently granted in fee simple notwithstanding the reservation.

[64]*Randwick Corporation* v *Rutledge* (1959) 102 CLR 54, 69-79 (Windeyer J). See also Lang, above n 29, 78-9.

meaning, it describes land reserved ***for*** a specific purpose, such as a travelling stock reserve or a public park.[65] Dedication has a similar meaning to the second meaning of reserve, namely, the grant of land for a specific purpose.[66] Very often, legislation will use reserve in the second sense, in which case land dealt with thereunder is in truth dedicated and must be excluded from the definition of waste and demesne lands. Because the intent of the legislation is not always clear, therefore, one must analyse the language used by the relevant Crown land statute in order to determine whether the relevant land is the subject of a reservation or a dedication.

If, following an analysis of the legislation, the land is found to be subject to a dedication, it is excluded from the definition of waste and demesne lands and is therefore unavailable for dealing or disposal by the Crown.[67] So long as the lands are dedicated and unavailable for the purpose of a grant, they nonetheless remain waste and demesne lands, albeit unavailable for grant, reservation or dedication.[68] It is nonetheless clear that dedicated

---

[65]See Lang, above n 29, 83-92, and see eg Crown Lands Act 1989 (NSW), ss 87-91.

[66]Lang, above n 29, 77-8 and 83-4, and see eg Crown Lands Act 1989 (NSW), ss 80-86. See above n 47, for the meaning of 'public purpose'.

[67]Lang, above n 29, 78-83. Some legislation, however, expressly provides that land dedicated or reserved to certain public purposes ceases to form a part of the residue of waste and demesne lands either entirely or for certain purposes: see eg Crown Lands Act (NT), sub-ss 3 'Crown lands', 88(2) and 91(3); Land Act 1958 (Vic), sub-ss 134(2)(a) and (b), but see sub-ss 138(2) and 140A; Crown Lands Act 1929 (SA), s 244; Land (Planning and Environment) Act 1991 (ACT), sub-s 208(1)(a) and (b).

See especially the Crown Lands (Reserves) Act 1978 (Vic), s 8. However, this legislation allows the granting of leases or licences consistent with the reservation or which further the purpose of the reservation (sub-ss 15(g), 16, 17, 17A, 17B, 17C, 17D). To grant an inconsistent right over the reserved lands, the Crown must revoke the reservation in accordance with the express statutory machinery provided by the Act, which renders the land a part of the residue of waste and demesne lands available for future dealing or disposal (ss 9, 10 and 11). The Crown Lands Act 1976 (Tas) contains similar provisions (sub-ss 8(2)-(5)).

[68]*Williams* v *A-G NSW* (1913) 16 CLR 404, 440 (Isaacs J); *BMG Resources Limited* v *Pine Rivers SC* (1989) 2 Qd R 1, 3 (McPherson J).

lands can revert to the status of waste and demesne lands by, for example, a revesting of the land in the Crown following the revocation or recision of the dedication.[69]

In the absence of a contrary legislative intention, however, if lands are found to be reserved from certain uses--the first meaning of reserve--they generally remain within the definition of waste and demesne lands available for a future dealing or disposal.[70] Such lands can, for instance, if not reserved from such a use, be occupied pursuant to a mineral lease under mining legislation.[71]

The Crown may also 'assess' or 'classify' waste and demesne lands, and maintain an inventory thereof. Assessment results in the identification of appropriate uses of land for subsequent disposal as specified holdings--such as for community or public purposes, environmental protection, nature conservation, water conservation, forestry, recreation, tourism, grazing, agriculture, residential purposes, commerce, industry or mining.[72] While an

---

[69]For some of the common reasons why a dedication or reservation may be revoked, see Lang, above n 29, 26, 80-3 and 88-92. As to the power to revoke a dedication, this has existed prior to the Constitution Act 1855 (NSW), upon which the legislative authority of New South Wales rests: *Ex parte Phipps* (1892) 13 LR (NSW) 171. See now Crown Lands Act 1989 (NSW), ss 84 and 90. Reservations of Crown land may also be revoked or modified, although this is of less importance as these lands are already part of the waste and demesne lands subject to the power of dealing or disposal.

[70]*Re Turner* (1892) 2 LCC 47, Pike and Bignold, above n 51, vol (1890-1894), 180. This principle finds embodiment in some of the legislation: Western Lands Act 1901 (NSW), s 18E; Land Act 1958 (Vic), s 89 and 213, which expressly declares certain lands to remain a part of the residue of waste and demesne lands notwithstanding their reservation for public purposes. In South Australia, the Governor may grant fees simple to dedicated lands (the definition of which includes lands which most other legislation calls reserved): Crown Lands Act 1929 (SA), s 5AA(1)(b). See also Lang, above n 29, 84-5.

[71]*Ex parte Penniment* (1891) 12 LR (NSW) 68.

[72]Lang, above n 29, 78-9 and 92-5; see eg Crown Lands Act 1989 (NSW), ss 30-33; Land Act 1994 (Qld), s 16.

assessment may be amended, modified or revoked,[73] it does not amount to a dedication or a reservation and thus the land is merely set aside and remains waste and demesne lands subject to its specific assessment.[74]

(c). Land Lawfully Contracted to be Sold

The relevant Crown land statute in each State or Territory empowers the Crown to grant land in any form of tenure permitted by the legislation. Typically, this is by grant of fee simple, although there are also a range of leases and lesser tenures available.[75] When land is granted, the question arises whether it ceases to be waste and demesne land as defined by the legislation. As we have already seen with dedicated lands, an answer to this question requires an examination of the relevant legislative definition of waste and demesne lands. Most of the definitions contain language similar to that found in the New South Wales legislation, that waste and demesne lands do not include those which have not been 'sold or contracted to be sold'.[76] Does the exclusion refer only to contracts for the sale of fees simple or to those for leases or lesser tenures as well?

Earlier New South Wales legislation restricted the scope of the exclusion to land sold or contracted to be sold in fee simple.[77] The jurisprudence supports the view that this is still

---

[73]See Lang, above n 29, 94; Crown Lands Act 1989 (NSW), sub-s 33(2).

[74]Lang, above n 29, 78.

[75]See Section III.B.1.

[76]See also Lang, above n 29, 15-6; *Williams* v *A-G NSW* (1913) 16 CLR 404, 428 (Barton ACJ), 456 (Isaacs J); *Williams* v *A-G NSW* [1915] AC 573, 582 (Lord Sumner).

[77]Crown Lands Consolidation Act 1913 (NSW), sub-s 5(1) 'Crown Lands'. See also Crown Lands Act 1931 (NT), s 5.

the meaning to be given the exclusion.[78] In relation to the earlier New South Wales legislation, *Re Hawkins* interpreted the New South Wales legislation and held that the phrase 'lawfully contracted to be granted in fee simple' meant nothing other than contracted, by a contract which might be either absolute or conditional, to be sold in fee simple.[79]

The courts have developed an expansive definition of what constitutes a fee simple for the purposes of this element of the definition. For instance, if the Crown approves an application for a purchase tenure, such as the purchase of land held under a town land lease, the courts treat the land as subject to a contract for purchase in fee simple.[80] Similarly, on the confirmation of an application for an original or additional conditional purchase tenure, or a conversion into conditional purchase, the courts have treated the land as contacted to be purchased in fee simple because such tenures are a lawful contract to grant land in fee simple.[81] Even the inclusion of land in a deed of grant by the Crown has been held to fall

---

[78]These cases consider the phrase 'lawfully contracted to be granted': *Mate* v *Nugent* (1869) 8 SCR (NSW) 246; *AML&F Co Ltd* v *Vinecombe* (1890) 1 LCC 70, Pike and Bignold, above n 51, vol (1890-1894), 68; *Ricketson* v *Barbour* (1893) AC 194, 202 (Herschell LC) (an offer to purchase land accepted before the revocation of a resumption creates a complete and valid contract for the purposes of this phrase); *Lord* v *Clyne* (1881) 2 LR 36, 38 (Martin CJ and Manning J) (an application to purchase combined with notice in the Government *Gazette* form a contract to grant land).

[79]*Re Hawkins* (1948) 49 SR (NSW) 114, 122 (Davidson J), and see 118 (Jordan CJ). See also the following cases, which consider the phrase 'alienated from the Crown in fee simple': *Hawkins* v *Minister for Lands (NSW)* (1949) 78 CLR 479, 485 and 487-8 (Latham CJ), 492 and 494 (Dixon J); *Hegarty* v *Ellis* (1908) 6 CLR 264, 275 and 277 (Barton J) (the phrase does not include lands leased or licensed with a right to acquire the fee simple, nor is such a lessee or licensee an alienee in fee simple, even in equity), 279-80 (Isaacs J) (the phrase means more than mere alienation, which may include the grant of leases and licences), 281 and 283 (Higgins J); *Moore and Scroope* v *Western Australia* (1907) 5 CLR 326.

[80]Lang, above n 29, 25.

[81]*Walsh* v *Minister for Lands (NSW)* (1960) 103 CLR 240, 248 (Dixon CJ, McTiernan, Fullagar and Menzies JJ), 253 (Windeyer J).

within this exclusion.[82] In any of these instances, the land is treated as having been sold or contracted to be sold in fee simple, removed from the legislative definition, and therefore unavailable to be dealt with as waste and demesne land.

Any other class of sale or contract for sale concerning any other tenure leaves the land within the definition of waste and demesne lands. A Crown lease for a perpetual term which contains a statutory right of conversion, but which is subject to the terms of the relevant Crown land statute and confirmation of the application, for instance, may not operate to remove the lands in question from the corpus of waste and demesne lands. The weight of judicial authority confirms that such lands remain waste and demesne lands and only cease to be once the conversion application has been made and confirmed.[83] Similarly, a contract to grant a conditional purchase tenure, such as the statutory entitlement to convert sometimes annexed to a lease and made subject to specified conditions for its fulfilment, is not considered a contract to grant land in fee simple, notwithstanding that a conditional purchase tenure itself constitutes such a contract.[84] In the absence of any legislative definition of what such other sales might be, therefore, we are left with only the fee simple as a concrete, and intuitively obvious, example of the sort of sale that falls within this exclusion.

(d). The Physical Scope of the Definition: Surface, Sub-Surface, and Airspace

While it may appear that the definition of waste and demesne lands contained in the State and Territory Crown land statutes applies only to the surface area of land, that is not the

---

[82] *Aarons* v *Bank of Australasia* (1895) 5 LCC 7.

[83] *Re Hawkins* (1948) 49 SR (NSW) 114, 122 (Davidson J); *Hawkins* v *Minister for Lands* (1949) 78 CLR 479, 487-8 (Latham CJ); *Walsh* v *Minister for Lands* (1960) 103 CLR 240; *Re Delander* (1894) 4 LCC 246, 249.

[84] *Walsh* v *Minister for Lands* (1960) 103 CLR 240, 249 (per Dixon CJ, McTiernan, Fullagar and Menzies JJ).

case. The Land Act 1994 (Qld), the current Queensland legislation, codifies the physical scope of the legislative definition, and in doing so, demonstrates why our virtual definition of waste and demesne lands can be taken to apply to more than just the surface. The Queensland definition applies to all strata of waste and demesne land, both above and below the surface, including land below the high water mark.[85]

While other States and Territories have not adopted it, because the common law defines 'land' as not only surface, but, subject to any relevant common law or legislative property limitation rules, sub-surface and airspace,[86] it is reasonable to assume that all other legislative definitions share the broad physical scope found in the Queensland definition. The Queensland legislation has simply codified the physical scope otherwise assumed by the Crown land statutes of the other States and Territories.

(e). Legislative Silence and Judicial Interpretation

The legislative definition is obviously general in its terms; indeed, as we have seen, it is either ambiguous or silent in relation to what is and what is not waste and demesne land in a given case. Where the legislation is ambiguous or silent, the courts may step in to fill gaps; they do this by interpreting the legislative definition for the purpose of deciding whether land does or does not constitute waste and demesne land. This section assesses the principles used by the courts to interpret the legislative definition.

In interpreting the legislative definition, the courts must, above all else, consider the context in which the ambiguity of the definition arises. A well-developed line of authority

---

[85]Land Act 1994 (Qld), sub-s 5(1), (2), although, see note 2, which provides that the Governor in Council cannot grant a fee simple in layers and strata above and below the surface. See also Land Act 1958 (Vic), sub-s 3, 'stratum of Crown land'.

[86]See Chapter 7, Section II.

holds that in such circumstances the primary legislative definition applies unless the context necessarily requires a different meaning.[87] In such a case, the primary definition should be altered to take account of that difference.[88] In addition to interpreting the definition of waste and demesne land itself, two other examples illustrate the operation of this principle: first, lands held pursuant to a statutory tenure, and, second, matters relating to the boundaries of land.

We have already seen that the definition of waste and demesne lands excludes those lands which are sold or contracted to be sold. It was demonstrated that this exclusion applied only to the grant or sale of fees simple. Clearly, once lands are held in fee simple, they are no longer waste and demesne lands. But what is the status of lands that are granted, sold or held pursuant to a statutory lease or lesser tenure?[89] Are such lands waste and demesne lands? Most legislative definitions are silent on this point. This is a significant concern, especially when the Crown seeks to grant land subject to one tenure to a second person under some other tenure.

Courts in most States and Territories have treated the status of lands subject to a lease or lesser tenure to be a context which necessarily requires a different interpretation of the legislative definition. Judicial authority is consistent in this regard; unless there exists some express statutory provision to the contrary,[90] such lands are removed from the corpus of waste

---

[87] *Tearle* v *Edwards* (1888) 13 AC 183, 189 (Lord Fitzgerald); *Jacques* v *Stafford* (1890) 11 NSWLR 127; *Hawkins* v *Minister for Lands (NSW)* (1949) 78 CLR 479, 487 (Latham CJ). See also *Randwick Corporation* v *Rutledge* (1959) 102 CLR 54, 62 (Menzies J).

[88] See also Lang, above n 29, 27 and 184-5.

[89] See Chapter 8.

[90] See Lang, above n 29, 58. See *Re Stone* (1898) 8 LCC 127; *Ex parte Penniment* (1891) 12 LR (NSW) 68; *Re Greentree and Bennett* (1935) 14 LVR 68.

and demesne lands, and are unavailable either for classification as unoccupied waste and demesne land[91] or for grant to some other purpose.[92]

The other case in which the courts have been asked to interpret the legislative definition is that where a dispute arises regarding the boundary of the land. In some cases, the boundaries of a parcel of land may be unclear, which may in turn produce uncertainty as to whether a strip of land is waste and demesne. While some legislation provides express guidance for resolving such disputes,[93] in the absence of such assistance, the courts may interpret the statutory definition to take account of new circumstances not envisaged by the draftspeople. The location of roads,[94] state forests,[95] and alterations to the riparian frontage

---

[91]As regards 'vacant land' see *Chisholm* v *Cole* (1886) 7 NSWLR 410; Land Act 1958 (Vic), s 363 (defining that term as land unenclosed and unoccupied).

[92]*Jacques* v *Stafford* (1890) 11 NSWLR 127 (land subject to pastoral lease unavailable as waste and demesne land); *Hawkins* v *Minister for Lands (NSW)* (1949) 78 CLR 479, 492-4 (Dixon J), 496 (McTiernan J). But see *Dangar and Macdonald* v *Thornton* (1905) 15 LCC 342, Pike and Bignold, above n 51, vol (1901-1905), 23 and 172 (land held under annual lease remains waste and demesne land); *Re Hudson* (1903) 13 LCC 190, Pike and Bignold, above n 51, vol (1901-1905), 43, 147 and 172 (land held under occupation licence or within goldfield reserve remains waste and demesne land). See also *Wildash* v *Brosnan* (1870) 1 CLLR 17. Some legislation, such as the Land Act 1962-1994 (Qld), s 5, has made specific provision for a contextual application of the legislative definition. See also Lang, above n 29, 58; *Re Stone* (1898) 8 LCC 127; *Ex parte Penniment* (1891) 12 LR (NSW) 68; *Re Greentree and Bennett* (1935) 14 LVR 68.

[93]See eg Crown Lands Act 1976 (Tas), sub-ss 60(1) and (4).

[94]*Re Municipal Council of Hunter's Hill* (1894) 4 LCC 90, Pike and Bignold, above n 51, vol (1890-1894), 158; (1894) 4 LCC 94, Pike and Bignold, above n 51, vol (1890-1894), 158 and 181 (land at end or foot of street is waste and demesne land); *Re Oxenford* (1903) 13 LCC 172, Pike and Bignold, above n 51, vol (1901-1905), 172 (land dedicated as a road is not waste and demesne land); *Re New Zealand & Australian Land Co Ltd* (1916) 26 LCC 94 (strip of land designed as a road but not dedicated as a road is not waste and demesne land); *Tindal* v *Cameron* (1910) 4 CLLR 171 (dedication by long continued user is not waste and demesne land); *Elder, Smith & Co* v *Cavanough* (1901) 2 CLLR 14 (long continued user of a track across a statutory lessee's holding is not waste and demesne land). See also *Re McLellan* (1921) 31 LCC 45; *Turner* v *Walsh* (1881) 6 AC 636 ; *President etc of the Shire of Narracan* v *Leviston* (1966) 3 CLR 846; *Re Wills-Allen* (1894) 4 LCC 250; *Rapley* v *Martin* (1865) 4 SCR 173.

of lands caused by floods or erosion[96] represent such unforeseen circumstances. In such cases, it may be possible for a court to use charts in order to determine the boundary itself, before deciding whether the land in question otherwise falls within the legislative definition.[97]

(f). Conclusions

The Crown enjoys the fullest package of quasi-ownership privileges and powers in relation to the waste and demesne lands. In order to decide the lands to which this quasi-ownership interest applies, it is necessary to turn to the legislative definition, which can be summarised as follows: waste and demesne lands are (i) all lands--surface, sub-surface, and airspace, (ii) vested in the Crown pursuant to the radical title which it acquired to all Australian land at the acquisition of legal sovereignty, (iii) which have not been dedicated to a public purpose nor sold nor contracted to be sold for some tenure of which the privileges and powers conferred on the purchaser are either those contained in a fee simple or a tenure

---

As with many of the boundary questions involving waste and demesne lands, some statutory protection for the Crown now exists: See eg Crown Lands Act 1989 (NSW), sub-s 172(8), which provides that the title to roads remains vested in the Crown when the road forms the boundary of the land concerned. This legislatively abrogates the common law *ad medium filum* rule. See Lang, above n 29, 26-7, 35, 49-50, and 52-5.

[95]*Re Crabbe* (1920) 30 LCC 367 (land adjoining state forest).

[96]*Re Oxenford* (1903) 13 LCC 172, Pike and Bignold, above n 51, vol (1901-1905), 172 (land under a tidal river is waste and demesne land); *Re McNally* (1891) 1 LCC 446, Pike and Bignold, above n 51, vol (1890-1894), 175 (alteration in channel of river made by floods not waste and demesne land); *Tindal* v *Lollback* (1918) 28 LCC 5 (land bounded by shingle bed adjoining river); *A.-G.* v *White* (1925) 26 SR 216 (alteration of river frontage caused by erosion does not affect the grant and therefore is not waste and demesne land). See also *Re Waldron* (1894) 3 LCC 144, Pike and Bignold, above n 51, vol (1890-1894), 175; *Morris* v *Kilgour & Ralfe* (1898) 8 LCC 1, Pike and Bignold, above n 51, vol (1895-1900), 142.

The common law *ad medium filum* rule as it applies to boundary watercourses has been legislatively altered. See Chapter 7, Section III.A.

[97]*Heinz* v *Walker* (1885) 6 NSWLR 166, 170 (Martin CJ).

very much like a fee simple, such as a statutory lease.[98]

As was explained in Part One, however, a public property system cannot exist without a public property domain which includes trespassory protection for the quasi-ownership interest. Moreover, a public property domain always contains some appropriation rules which will benefit the holder of the property, and some property limitation and expropriation rules which infringe the exercise of the privileges and powers enjoyed. The next three sections provide an overview of the relevant public property domain which operates in relation to waste and demesne lands.

C. Significant Trespassory Rules which Protect the Crown's Privileges and Powers Over Waste and Demesne Lands

From the very earliest moment of the English settlement of Australia, trespassory rules served to protect the Crown's quasi-ownership interest in waste and demesne lands. The earliest of these were attempts to limit the area within which new settlers could acquire land. Several statutes passed between 1833 and 1840, for instance, bolstered these boundaries by prohibiting the intrusion, encroachment and trespass upon waste and demesne lands beyond the limits of settlement.[99] Today, two main trespassory rules protect the Crown's quasi-ownership interest in waste and demesne lands: first, the action for trespass, and, second, the action for intrusion and possession of land (ejectment).

---

[98]See Bates, above n 51, 30.

[99]Act of 1833 (NSW), 4 Wm IV, No 10; Act of 1834 (NSW), 5 Wm IV, No 12; Occupation of Crown Lands Act 1836 (NSW); Act of 1838 (NSW), 2 Vict, No 19; Act of 1839 (NSW), 2 Vict, No 27; Act of 1841 (NSW), 5 Vict, No 1. A detailed account of the entire body of the legislation enacted in the Colony and later State of New South Wales to control settlement is contained in CJ King, *An Outline of Closer Settlement in New South Wales: Part I The Sequence of the Land Laws 1788-1956* (1957).

1. Trespass

Once the boundaries of settlement were established, new settlers flouted them by occupying land beyond the limits of settlement in the absence of a Crown grant. This practice was known as squatting, and the earliest trespassory rules sought to prohibit it.[100] Once the Colonial governments began to issue annual licences to squatters,[101] however, it became impossible to impose a total prohibition on the practice. As such, new regulations imposed heavy fines on persons occupying waste and demesne land ***within*** the limits of settlement without holding a Crown lease, or ***beyond*** the limits of settlement without holding a valid licence.[102] Thus, while a squatter could legitimise an unlawful occupation of waste and demesne lands by obtaining a licence, this did not vitiate the fact that there were in place very stringent trespassory rules which prohibited the initial unlawful occupation.

Contemporary State and Territory Crown land statutes contain an action in trespass similar to that found in colonial times. The action is typically drafted in terms very similar to, and in some case more comprehensive than, those protections afforded a fee simple owner. The relevant protections provide the Crown with an action for trespass on waste and demesne lands, or land granted, reserved or dedicated for public purposes, and which make it a felony to wilfully destroy or damage improvements thereon. If these provisions are violated,

---

[100]Lang, above n 29, 3. See also Governor Gipps, *Historical Records of Australia* (1917) Series I, vol XXI, 127; K Buckley, 'Gipps and the Graziers of New South Wales, 1841-1846' in JJ Eastwood and FB Smith, eds, *Historical Studies: Selected Articles* (1964) First Series 57-102; DWA Baker, 'The Origins of Robertson's Land Acts' in JJ Eastwood and FB Smith, eds, *Historical Studies: Selected Articles* (1964) First Series 103-26.

[101]Lang, above n 29, 3-4.

[102]See *Government Gazette* (NSW), Order in Council, 22 May 1839, and *Government Gazette* (NSW), Order in Council, 24 August 1841, cited in Lang, above n 29, 3-4.

penalties and compensation protect the Crown.[103]

2. Intrusion and The Action for Possession of Land (Ejectment)

In some cases a grant issued by the Crown may be void or voidable; in such cases the Crown may seek to recover possession of the relevant land by way of an action for intrusion--an action resembling an action for trespass--which entitles recovery of possession and damages.[104] Conversely, the Crown may also bring an action for possession of land (formerly known as ejectment) pursuant to the relevant State or Territory legislation which provides for such action.[105]

D. Significant Appropriation Rules which Benefit the Crown

1. Withdrawal, Appropriation or Resumption and Reservation of Access

Two types of appropriation rules may operate in relation to waste and demesne lands. First, in order to add to the waste and demesne lands allocated to public purposes, the relevant

---

[103]Crown Lands Act 1989 (NSW), ss 159 and 170; Crown Lands Act (NT), ss 101 and 102; Land Act 1994 (Qld), sub-ss 404-420; Land Administration Act 1997 (WA), s 267; Land Act 1958 (Vic), Part I, Division 13; Crown Lands Act 1976 (Tas), ss 46-48; Crown Lands Act 1929 (SA), ss 272-275 and 278.

In relation to easements acquired by prescription, however, see *Connellan Nominees Pty Ltd* v *Camerer* (1988) 2 Qd R 248.

See also Lang, above n 29, 388; *Ex parte Collins* (1914) 14 SR (NSW) 31; *Munday* v *ACT* (1998) 146 FLR 17.

[104]*Attorney-General* v *Ryan (No 2)* (1852) 1 Legge 719. See also Lang, above n 29, 31.

[105]For many years, proceedings for ejectment in New South Wales were governed by the Common Law Procedure Act 1899 (NSW), Part XXI. Ejectment was abolished and replaced, however, by the Supreme Court Act 1970 (NSW), s 49, which provides for an action for possession of land: Butt, above n 10, 83. In *Commonwealth* v *Anderson* (1960) 105 CLR 303, the High Court confirmed the use of ejectment pursuant to the Common Law Procedure Act 1899 (NSW), Part XXI, by the Crown in relation to waste and demesne lands. Presumably, the same reasoning applies to the action for possession of land, and even if that is not the case, the Supreme Court Act 1970 (NSW), s 3, provides that the Crown is bound by and has the benefit of the entire statute. See also Lang, above n 29, 29-30.

Minister may withdraw lands held under a Crown lease or a licence[106] or appropriate or resume land held under fee simple.[107] Second, while some leases automatically contain reservations of a public right of access, the relevant Minister typically has the power to grant access rights over lease lands for access to Aboriginal lands, waterways, or features of public interest.[108] The actions in intrusion and possession of land assist the Crown in exercising these appropriation rules.

2. Rules Which Operate Without Action by the Crown to Increase its Waste and Demesne Lands

There exist two ways in which the Crown's waste and demesne lands may be increased without action on its part. First, they may increase simply by virtue of gift, intestacy, devise, lease, exchange or purchase.[109] Second, notwithstanding that the grant of fees simple or

---

[106]Crown Lands Act 1989 (NSW), s 136, Western Lands Act 1901 (NSW), ss 43B, 44(1) and Schedule A(p); Land Act 1958 (Vic), sub-ss 55(1)(h), 112 (leases subject to a condition of resumption for public purposes), 140F(3), and 205(1) and (6), 208 and 209; Land Act 1994 (Qld), s 208 and Chapter 5, Part 3 (which also provides for the revocation of a resumption); Crown Lands Act 1929 (SA), s 249; Crown Lands Act (NT), sub-ss 27(c), 37(1)(c) and 76(1) (which applies to the resumption of leases for various purposes unless the lease is one issued pursuant to the Mining Act (NT) or the Pastoral Land Act (NT); Land (Planning and Environment) Act 1991 (ACT), sub-s 188(1), (3), (5), 189.

[107]See eg Crown Lands Act 1989 (NSW), ss 134, 135 and 138; Land Act 1958 (Vic), sub-ss 4, 4A, 13, 23, 169, 172, 331 and 333; Land Administration Act 1997 (WA), Part 9, Divs 2 and 3; Crown Lands Act 1976 (Tas), sub-ss 2 (defines 'Crown land', in part, as including land granted in fee simple which has revested in the Crown by way of purchase or otherwise), 51, 55(1), and 63; Crown Lands Act 1929 (SA), sub-s 35(1) and Schedule 3, sub-ss 53(1), (2), 249, 260, 261, and Part X, Divisions I, II, IV. See *Roberts* v *Board of Land and Works* [1965] VR 265; *Bayview Properties Pty Ltd* v *AG* [1960] VR 214; *BMG Resources Limited* v *Pine Rivers SC* (1989) 2 Qd R 1, 4 (McPherson J); *Leppington Pastoral Co Pty Ltd* v *Department of Administration Services* (1990) 94 ALR 67.

Each of the Crown land statutes provides some means of compensating land-owners for the resumption of their lands. For a full examination of compensation see *The Australian Digest* (3rd ed, 1994, 1995), Title 70, Real Property, Chapter 6, Resumption or Acquisition of Land, Pt II Compensation. See also Land Administration Act 1997 (WA), Part 10.

[108]Pastoral Land Act (NT), ss 79, 81, 84, 86 and 113.

[109]Pursuant to the legislation outlined in Section III.E.1.

leases may remove the relevant land from the corpus of waste and demesne lands available for grant, those lands may revest in the Crown and become waste and demesne lands available for grant should a holder forfeit,[110] surrender or abandon[111] the lands or tenure concerned.

Forfeiture and surrender usually follow from a breach of condition by the holder of a tenure. While the grantee's breach of a valid condition placed upon a fee simple or some lesser tenure renders it voidable, if the legislation so entitles the Crown, the grant may be forfeited. Once the Crown establishes its quasi-ownership interest by showing that the land has reverted to it through the breach of a condition contained in the grant, the grantee may be ousted from possession, justifying the Crown's re-entry.[112]

E. Significant Property Limitation and Expropriation Rules which Limit the Crown's Privileges and Powers

1. Resuming Statutes

The Crown's quasi-ownership interest in waste and demesne lands is subject to expropriation rules found in a disparate group of Commonwealth, State, and Territory

---

[110]Land Act 1994 (Qld), sub-s 213(2) and Chapter 5, Part 4; Crown Lands Act 1989 (NSW), Part 6; Western Lands Act 1901 (NSW), ss 18, 18DA(12), 28BA, 35K(2), 35P(b) and 50; Crown Lands Act (NT), sub-ss 38(3), (4) and 49(8); Pastoral Land Act (NT), sub-ss 35(7) and (12), 38(1)(f) and (g), 40(3) and (4), 123(1); Land Administration Act 1997 (WA), ss 15, 16 and Part 7, Div 7; Land Act 1958 (Vic), ss 23, 55(1)(f), 98(1) and (2), 112, 114(6), 133C, 133E, 133F, 137G, 137H, 140F(1), 142(g), 147(f), 151J, 151L, 167, and 176; Crown Lands Act 1976 (Tas), sub-ss 9(1), 22(1), 23(1), 24(b), (c), 28(2), (4), 36, 37, 38, 39(1), 44, 45(1), 56(4); Crown Lands Act 1929 (SA), sub-ss 41(1), 59(1), (3), 78(c), 195, 196(1), (3), (4), and 249.

[111]Crown Lands Act 1989 (NSW), s 137; Western Lands Act 1901 (NSW), s 33A; Crown Lands Act (NT), s 45; Pastoral Land Act (NT), ss 60 and 61; Land Act 1994 (Qld), s 173 and Chapter 6, Part 4, Division 2; Land Administration Act 1997 (WA), Part 7, Div 7; Land Act 1958 (Vic), sub-ss 22A, 22C, 22D, 22E, 58, 112, and 116; Crown Lands Act 1976 (Tas), sub-ss 27(1), (2), 33(1), (2), 59(1), (3); Crown Lands Act 1929 (SA), ss 183-185, 199, 202A, 249, 265B, and Part 11; Land (Planning and Environment) Act 1991 (ACT), s 214.

[112]*R* v *Cooper* (1886) 7 LR (NSW) 15.

legislation collectively referred to as 'resuming statutes'.[113] These statutes empower the relevant Minister to acquire or resume land, including waste and demesne land, for the purposes specified in the relevant legislation; they also prescribe both the circumstances in which land may be acquired and the methods by which the acquisition is achieved, including the payment of compensation.[114]

The purposes for which land may be resumed or acquired include roads,[115] local government,[116] state forests,[117] public parks,[118] public utilities and authorities,[119] the provision of electricity,[120] fire stations,[121] government railways,[122] public housing,[123] the distribution of

---

[113]Lang, above n 29, 59-62.

[114]See eg Land Acquisition (Just Terms Compensation) Act 1991 (NSW), ss 8, 29 and generally, which prevails over all other New South Wales legislation which deals with the acquisition of land.

[115]See eg Roads Act 1993 (NSW), Part 12.

[116]See eg Local Government Act 1993 (NSW), Chapter 8, Part 1. See also Lang, above n 29, 59-62.

[117]See eg Forestry Act 1916 (NSW), sub-ss 5(1), 7(3), 9, 15, 18, 19A, 22, 23 and 24. See also Lang, above n 29, 62-8.

[118]See Lang, above n 29, 68, and the now repealed Public Parks Act 1912 (NSW), s 5.

[119]See eg Sydney Harbour Foreshore Authority Act 1998 (NSW), s 17; Fisheries Management Act 1994 (NSW). See also Lang, above n 29, 68-70.

[120]See eg Electricity Supply Act 1995 (NSW), s 44. See also Lang, above n 29, 61.

[121]See eg Fire Brigades Act 1989 (NSW), s 79. See also Lang, above n 29, 61.

[122]See Lang, above n 29, 61, and the now repealed Government Railways Act 1912 (NSW), ss 20B and 20BB.

[123]See eg Housing Act 1976 (NSW), s 11; Housing Act 1912 (NSW), sub-ss 17 and 18B(1). See also Lang, above n 29, 62.

milk,[124] public hospitals,[125] the protection of pastures and travelling stock reserves, camping reserves or public watering places,[126] the eradication of noxious weeds, such as prickly pear,[127] or the reclamation and improvement of submerged and low-lying lands.[128] The Crown land statutes themselves may allow for resumption of waste and demesne land for a public purpose[129] such as irrigation and canals or cuttings for that purpose.[130]

Unless the relevant Crown land statute expressly provides otherwise, land resumed or appropriated under any of the resuming statutes ceases to be waste and demesne land available for grant, dedication, reservation or classification under the Crown land statutes.[131] The quasi-ownership interest in the land resumed or appropriated vests in the resuming authority--which may be the Crown, an agency of the Crown, or some other authority--and the trespassory protection which the Crown normally enjoys in relation to its waste and demesne lands does not apply. If, however, the resumption is subsequently revoked, the land reverts

---

[124]See Lang, above n 29, 62, and the now repealed Milk Act 1913 (NSW), ss 64-72.

[125]See Lang, above n 29, 62, and the now repealed Public Hospitals Act 1929 (NSW), sub-ss 5, 15(1), 18, 19(1)(b) and 29A.

[126]See Lang, above n 29, 70-2, and the now repealed Pastures Protection Act 1934 (NSW), sub-ss 41(1), (2), (3), (3A), (5), 45, 46, 48(1), 68(1), 69(b), 70 and 197.

[127]See Lang, above n 29, 72-4, and the now repealed Prickly-pear Act 1924 (NSW), sub-ss 7(c), (d), (h), 9, 11, 12, 16, 17 and 18.

[128]See Lang, above n 29, 74, and the now repealed Reclamation Act 1930 (NSW), ss 9, 10, 16, 23 and 25.

[129]See eg Crown Lands Act 1989 (NSW), s 135.

[130]See Lang, above n 29, 96-7.

[131]*Randwick Municipal Council* v *Thompson* (1943) 15 LGR 85; *Re Meppem* (1915) 25 LCC 338; *Ex parte Collins* (1914) 14 SR (NSW) 31. See also Lang, above n 29, 59-62.

to its status as waste and demesne land and can be dealt with as such.[132]

State and Territory local government legislation provides a good example of how resumption operates in relation to waste and demesne lands. These statutes permit the Crown to vest land in municipal councils, some of which usually remains waste and demesne land, such as those held pursuant to Crown leases, licences or public reserves.[133] The legislation also typically empowers the municipal council, where it deems it expedient,[134] to resume the waste and demesne lands vested therein. Such resumptions have the effect of vesting the land in the municipal council in fee simple and of withdrawing the lease or licence or cancelling the reservation.[135]

2. Adverse Possession

The State and Territory limitation of actions statutes interact with the Crown land statutes to determine whether private persons may adversely possess the Crown of its quasi-ownership interest in waste and demesne lands. Some States and Territories provide that adverse possession will not affect the Crown's quasi-ownership interest,[136] while others provide that the Crown is barred from bringing an action to recover after a certain period of

---

[132]See Lang, above n 29, 59-78.

[133]See eg Crown Lands Act 1989 (NSW), ss 75-77. See also Lang, above n 29, 50-51.

[134]Land Acquisition (Just Terms Compensation) Act 1991 (NSW), s 29; Local Government Act 1993 (NSW), Chapter 8, Part 1.

[135]*Minister for Public Works* v *Duggan* (1951) 83 CLR 424; *Thompson* v *Randwick Corporation* (1950) 81 CLR 87; *Baiada* v *Baulkham Hills Shire Council & Anor* (1951) 83 CLR 344; *Howarth* v *McMahon* (1951) 82 CLR 442. And see Lang, above n 29, 51-2.

[136]Limitation Act 1969 (NSW), sub-s 27(1); Crown Lands Act 1989 (NSW), s 170; Limitation of Actions Act 1958 (Vic), s 7; Limitation of Actions Act 1974 (Qld), sub-s 6(4); Limitation Act 1935 (WA), sub-s 36. See also Lang, above n 29, 76.

time, either 30[137] or 60 years.[138]

---

[137]Limitation Act 1974 (Tas), sub-s 10(1).

[138]South Australia, see Crown Suits Act 1769 (Eng), 9 Geo III, c 16; *Attorney-General (NSW)* v *Love* [1898] AC 679; *Delohery* v *Permanent Trustee Co (NSW)* (1904) 1 CLR 283; *South Australian Co* v *Port Adelaide CC* [1914] SALR 16.

Chapter 7

THE UPPER RANGE OF THE CONTINUUM: NATURAL RESOURCES

I. INTRODUCTION

As we have seen in Chapter 6, at the foot of the continuum escheat and forfeiture give the Crown the smallest package of contingent future quasi-ownership privileges and powers in relation to fee simple lands. At the head of the continuum we find the waste and demesne lands, in which the Crown enjoys the largest package of present quasi-ownership privileges and powers. This chapter considers a third location, found in the upper range of the continuum, but not at its head, comprised of a very large package of quasi-ownership privileges and powers in relation to specific natural resources--such as mines and minerals, petroleum and natural gas, water, or timber--found in, on or above land, no matter who holds the surface ownership interest therein.[1] These privileges and powers are conferred pursuant to the Crown's prerogative over land and are exercised through the 'natural resources statutes'.

While in most cases the quasi-ownership interest enjoyed by the Crown in relation to

---

[1]The thesis does not deal with offshore natural resources. For an introduction to this area see Constance D Hunt, *The Offshore Petroleum Regimes of Canada and Australia* (1989).

natural resources is greater than that which it has over the waste and demesne lands, the former are located below the latter on the continuum. The reason for this is simple: the relevant privileges and powers relate ***only*** to the relevant natural resource and not to the totality of the land in, on or above which it is found. A brief reprisal of the common law definition of land clarifies this placement of natural resources on the continuum.

II. LAND

A. The Common Law Definition of Land

Physically, land is three dimensional; it includes not only the surface and things attached to it, but also the airspace above and the sub-surface below.[2] This three-dimensional totality of land--in which Anglo-Australian real property law countenances the possibility of private property[3]--is embodied in the common law maxim *cujus est solum ejus est usque ad coelum et ad inferos* (roughly, whoever owns the soil, owns all the way up to the heavens and down to the depths of the earth).[4] Thus, the holder of a fee simple to the surface of land, according to the maxim, enjoys ownership privileges and powers to the surface and to the three-dimensional totality.

The group of ownership privileges and powers enjoyed by the fee simple-holder also allow, in the absence of legislative provision to the contrary, the sub-division of elements of

---

[2]William Blackstone, *Commentaries on the Laws of England* (1765-1769, University of Chicago edition, 1979), vol 2, 18-9; Charles Harpum with Malcolm Grant and Stuart Bridge, *Megarry and Wade The Law of Real Property* (6th ed, 2000), 56-64; Kevin Gray, *Elements of Land Law* (2nd ed, 1993), 5-33; Peter Butt, *Land Law* (3rd ed, 1996), 10-49; Adrian J Bradbrook, Susan V MacCallum and Anthony P Moore, *Australian Real Property Law* (2nd ed, 1997), 15-1-15-43; Bruce H Ziff, *Principles of Property Law* (3rd ed, 2000), 85-118.

[3]See Chapter 5.

[4]*Bury* v *Pope* (1588) Cro Eliz 118, 78 ER 375, the earliest English reference to the maxim, in which it is said to have been known since the time of Edward I (1239-1307).

the three-dimensional totality--such as mines and minerals, petroleum, water, or timber--among different persons, conferring upon each a discrete ownership interest in a different natural resource. For instance, X might hold a fee simple in land subject to a fee simple held by Y in the mines and minerals lying thereunder. Although the two ownership interests relate to the same three-dimensional totality of land, they confer privileges and powers in relation to different physical elements of it. X enjoys use-privileges and control powers in relation to everything except mines and minerals, while Y enjoys such privileges and powers only in relation to mines and minerals.[5]

While the courts generally treat the maxim more as a useful starting point than a literal statement of what is meant by land when dealing with a fee simple,[6] it offers assistance in describing how it is that the Crown enjoys quasi-ownership privileges and powers in relation to discrete natural resources while not in the three-dimensional totality. The next section explains why.

B. The Crown and Natural Resources

Just as private persons may hold ownership interests in natural resources, the Crown may hold a quasi-ownership interest therein. In Chapter 6 we have seen that in the case of the waste and demesne lands, the Crown land statutes confer upon the Crown quasi-ownership privileges and powers in relation to the three-dimensional totality of land. But the waste and demesne lands are not the only lands over which the Crown enjoys a quasi-

---

[5]It has long been possible to create separate ownership interests in the surface and in minerals: *Cox* v *Glue* (1848) 5 CB 533, 136 ER 987; *Williamson* v *Wootton* (1855) 3 Drew 210, 61 ER 883; *Chirnside* v *Registrar of Titles* [1921] VLR 406.

[6]Ziff, above n 2, 86-94. Some have described the maxim as 'colourful' and 'fanciful': see *Wandsworth Board of Works* v *United Telephone Co* (1884) 13 QBD 904, 915 (Brett MR).

ownership interest in discrete natural resources. Every State and Territory has enacted various natural resources statutes which supplement and complement, but do not derogate from, the Crown land statutes.[7] These statutes vest the Crown with quasi-ownership interests in relation to discrete natural resources, such as mines and minerals, petroleum and natural gas, water or timber in, on or above any lands, waste and demesne, fee simple, or those subject to any other form of tenure whatsoever in which others hold private, public or communitarian property in the three-dimensional totality.

An example is instructive. Natural resources legislation in each State and Territory either reserves to the Crown quasi-ownership privileges and powers to coal lying below the surface of all land within its jurisdiction, or limits the extent to which a private tenure holder of any type may recover coal. The reservation or limitation applies to grants of private tenure of any form pursuant to the relevant Crown land statute. Thus, by virtue of the Crown's quasi-ownership interest therein, coal never becomes a part of the land over which private persons obtain an ownership interest. The cumulative effect of all such reservations or limitations achieves the result that all coal, whether on waste and demesne or any private tenure lands, such as, but not restricted to, the fee simple lands, is subject to the quasi-ownership privileges and powers of the Crown.

The Land Act 1994 (Qld) provides a concrete example of the Crown's quasi-ownership interest in natural resources such as mines and minerals or petroleum and natural gas. And while few States or Territories have followed its lead, the Queensland legislation

---

[7]Andrew G Lang, *Crown Land in New South Wales: The principles and practice relating to the disposal of and dealings with Crown land pursuant to the Crown Lands Consolidation Act, 1913; Western Lands Act, 1968; Returned Soldiers Settlement Act, 1916; War Service Land Settlement Act, 1914; Closer Settlement Acts and related legislation* (1973), 48, 55-9, 62-8.

demonstrates the complementary relationship which exists in every jurisdiction between the Crown land and natural resources statutes. This innovative legislation provides that any grant pursuant to its terms automatically attracts the reservations authorised or specified therein or by any other relevant Act, such as those effected by the Mineral Resources Act 1989 (Qld) and the Petroleum Act 1923 (Qld).[8] When private persons hold land under any form of tenure, therefore, the complementary operation of the Queensland Crown land and natural resources statutes vest the Crown with privileges and powers over discrete natural resources in, on or above the relevant lands.

The next section considers the operation of the most significant State and Territory natural resources statutes: those in relation to water, mines and minerals, petroleum and natural gas, and timber. In analysing these statutes, it is important to bear in mind that while this chapter focuses upon those lands held by private persons under any form of tenure, the application of the natural resources statutes extends to all Australian land, including the waste and demesne lands. Thus, any natural resources which fall within the scope of the natural resources statutes are Crown land and must be plotted on the continuum. More importantly, perhaps, this means that while natural resources may be waste and demesne lands, because the Crown's quasi-ownership interest therein may also affect any private tenure holder, the natural resources require their own location on the continuum.

---

[8]Land Act 1994 (Qld), s 21 and n 6 (identifying the Mineral Resources Act 1989 (Qld), s 8, and the Petroleum Act 1923 (Qld), s 10).

III. SIGNIFICANT NATURAL RESOURCES STATUTES[9]

A. Water[10]

This section addresses the Crown's quasi-ownership of: (i) flowing water, and (ii) land which abuts water, or which is built up or taken away by its flow.

1. The Crown's Quasi-Ownership of Water: Abrogating the Riparian Doctrine

The common law views the right to use water as an adjunct of the property held in the land over which it flows.[11] As such, over time, it constructed the riparian rights doctrine, which confers upon private property-holders of land abutting a watercourse certain privileges and powers over access to and use of water.[12] This doctrine, developed in England, was part of the received laws of Empire which arrived in Australia at the acquisition of sovereignty.

England is a water-rich land, while Australia is water-poor; this fact meant that, from the moment that legal sovereignty was acquired over it, the applicability of the riparian doctrine to Australia has been questioned. Indeed, the entire history of Australian water law

---

[9]See also Thomas Penberthy Fry, 'Land Tenures in Australian Law' (1947) 3 *Res Judicatae* 158, 160.

[10]See Bradbrook, MacCallum and Moore, *Australian Real Property Law*, above n 2, 15-27-15-35; RA Woodman, *The Law of Real Property in New South Wales* (1980), vol 1, 31-4.

[11]The common law viewed 'land' as including that which was covered by water, which means, at common law, land covered by the waters of lakes which lie wholly or partially within a land-owner's boundaries, or land covered by the waters of non-tidal rivers and watercourses which flow through a land-owner's boundaries, or land *ad medium filum* (to the centre line of the river) covered by the waters of non-tidal rivers or watercourses which form part of the boundary itself: EH Burn, *Cheshire and Burn's Modern Law of Real Property* (15th ed, 1994), 165-9; Harpum, *Megarry and Wade The Law of Real Property*, above n 2, 62-4; Gray, above n 2, 24-6; Blackstone, above n 2, vol 2, 18-9; Butt, above n 2, 40-49; Bradbrook, MacCallum and Moore, *Australian Real Property Law*, above n 2, 15-27-15-34; Ziff, above n 2, 99-103.

[12]For an Australian analysis see DE Fisher, *Laws of Australia*, 14.9 Water, paras 104-7; Alun A Preece, 'Water Rights of Land Owners in Queensland' (2000) 20 *Queensland Lawyer* 230, 230-3.

can be seen as a series of attempts to abolish riparianism in order to allow for the distribution of water to those who need it most but whose land does not abut a watercourse. The earliest attempts at abolition involved legislative declarations of the Crown's public property in water, which it could then distribute according to need.[13]

Contemporary State and Territory water legislation represents an extension of these early attempts to establish public property in water. Modern legislation alters, qualifies, or abrogates the riparian doctrine and declares the Crown, an instrumentality of the Crown, or the body politic itself to have either the right of primary access to or the quasi-ownership of all water. Various formulas are used to make this declaration, such as 'to take and use', 'to control', 'entitled to the flow', or 'property', each of which may be subject to restrictions and qualifications.[14] Whichever formula is used, the effect is the same: the Crown retains the quasi-ownership of all water subject to the declaration[15]--which may or may not include groundwater (that lying below the surface)[16]--and enjoys trespassory protection of its privileges and powers therein.[17]

---

[13]See Sandford D Clark and Ian A Renard, 'The Riparian Doctrine and Australian Legislation' (1970) 7 *Melbourne University Law Review* 475; JM Powell, *Environmental Management in Australia 1788-1914, Guardians, Improvers and Profit: An Introductory Survey* (1976), 131-3; *Lord* v *Commissioners (Sydney)* (1859) 12 Moo PC 473, 14 ER 991.

[14]Fisher, *Laws of Australia*, above n 12, para 109.

[15]Water Management Act 2000 (NSW); Water Act 1989 (Vic); Water Resources Act 1989 (Qld); Water Management Act 1999 (Tas); Water Act (NT); Lakes Act 1976 (ACT); Water Resources Act 1997 (SA); Native Title (South Australia) Act 1994 (SA); Rights in Water and Irrigation Act 1914 (WA). See also *Van Son* v *Forestry Commission (NSW)* (1995) 86 LGERA 108 (SC NSW).

[16]See Rights in Water and Irrigation Act 1914 (WA), sub-s 26, 26A(1), and 26B(3), and Pt III, Div 3, and Water Management Act 1999 (Tas), ss 3 'water resource' and 7, which vest the Crown absolutely with the quasi-ownership of groundwater.

[17]See eg Water Management Act 2000 (NSW), Chapter 7, Parts 1, 3, 4 and 5; Water Act 1989 (Vic), Part 14; Water Resources Act 1989 (Qld), Parts 4, Divs 1 and 4, and 11;

In Queensland, for instance, the Water Resources Act 1989 (Qld) vests the Crown with the right to the use, flow and control of water at any time in watercourses, lakes, springs, artesian or subartesian bores, or any other underground source of water, or water that is conserved by a weir, dam, or barrage.[18] This vesting formula, found in one form or another in each State and Territory,[19] constitutes the fullest package of quasi-ownership privileges and powers available in relation to the water resource. Still, it may not in every case prevail over a specified range of private ownership interests to public water supply,[20] which include the statutory rights of riparian landowners.[21] Thus, while the Crown has the quasi-ownership of the water supply of Queensland, its interest does not derogate from existing riparian or other

---

Water Resources Act 1997 (SA), ss 11 and 132; Rights in Water and Irrigation Act 1914 (WA), ss 17, 18 and 25; Water Act (NT), Part 10, Div 3.

[18]Water Resources Act 1989 (Qld), sub-ss 2 (1) and 3. See Preece, above n 12, 238-42.

[19]See eg Water Act 1989 (Vic), sub-ss 7(1)-(3); Rights in Water and Irrigation Act 1914 (WA), sub-ss 8, 15, 19(1), and Pt III, Divs 1 and 2; Water Management Act 1999 (Tas), s 7; Water Act (NT), sub-ss 9(1) and (2). See also *Van Son* v *Forestry Commission (NSW)* (1995) 86 LGERA 108. See also Preece, above n 12, 236-8.

South Australia uses an alternative approach to ensure a quasi-ownership interest in the water resource, and while it may be considered either weaker or stronger than the approach found in the other states and territories, its effect is the same. The Water Resources Act 1997 (SA), sub-ss 3(1) 'lake', 'underground water', 'watercourse', and 'well', 8 and 9, applies to all water resources in the State and enables the Minister to take water from any source notwithstanding that the vested right of any other person to take water from that source may be prejudicially affected. While this legislation fails to vest any general power of control in the Minister, the Native Title (South Australia) Act 1994 (SA), sub-ss 39(1)-(5), provides insight into the South Australian approach to the quasi-ownership of the water resource. It confirms the Crown's quasi-ownership of all South Australian natural resources, including the right to the use, control and flow of water.

[20]See eg Water Resources Act 1989 (Qld), sub-s 4(a).

[21]Water Resources Act 1989 (Qld), sub-ss 2(1), 4(b), 33, 34, and 36. See also Rights in Water and Irrigation Act 1914 (WA), sub-ss 9(1), (2), 10(1), (2), 16(1), 20(1) and 21(1); Water Management Act 1999 (Tas), ss 7, 48 and 51-53. See also *Pay* v *Miller* (1979) 3 BPR 9163.

enumerated ownership interests therein; for that reason, there may in the case of water be instances where the resource is subject to both public and private property. Still, the Crown's quasi-ownership interest in any such case vastly outweighs any ownership interests therein.

2. The Crown's Quasi-Ownership of Land Abutting Water

(a). Tidal Waters

The nature of the property (private or public) in land abutting tidal waters--the sea or a tidal river or lake (the common law deems these to be navigable while non-tidal rivers, even if navigable in fact, are deemed to be non-navigable[22])[23]--depends upon the boundary of the land.[24] In the absence of a contrary intention expressed in the instrument of grant, the common law deems the boundary of tidal lands to be the mean high water mark,[25] below which, pursuant to the common law and some of the Crown land statutes, the Crown holds a quasi-ownership interest,[26] while any grantees from the Crown hold the ownership in land above that mark.[27] In order to protect the Crown's quasi-ownership, some States and

---

[22]*Re Waldron* (1893) 3 LCC 144.

[23]See JE Moore, 'Land by the Water' (1968) 41 *Australian Law Journal* 532; Paul Jackson, 'Alluvio and the Common Law' (1983) 99 *Law Quarterly Review* 412.

[24]Preece, above n 12, 233-4. See generally *Halsbury's Laws of England* (4th ed reissue, 1998), Volume 12(1), 'Crown Property', para 242.

[25]*A-G* v *Earl of Lonsdale* (1868) LR 7 Eq 377.

[26]*Port MacDonnell Professional Fisherman's Association Inc* v *South Australia* (1989) 168 CLR 340 confirms that the Coastal Waters (State Title) Act 1980 (Cth), the Coastal Waters (State Powers) Act 1980 (Cth), and the Coastal Waters (Northern Territory Powers) Act 1980 (Cth) return to the States and the Northern Territory jurisdiction over and quasi-ownership of the territorial sea and underlying seabed below the low water mark within the three-mile limit. See also *Jones* v *Queensland* [1998] 2 Qd R 385; Preece, above n 12, 233.

[27]Peter Butt, *The Laws of Australia*, vol 28.15 Physical Limits of Land, Chapter 7 Boundaries, Part A Tidal Boundaries, para 47. Queensland, Western Australia and the Northern Territory have legislatively confirmed this rule: Land Act 1994 (Qld), sub-s 9(1) and

Territories have enacted legislation which requires an Act of Parliament for the lease, grant, occupation, sale, or transfer of land lying below the mean high water mark.[28]

(b). Non-Tidal Waters

The common law treats land which is bounded by non-tidal and tidal but non-navigable waters (whether a river, lake or pool[29]) as a species of land covered by water,[30] in relation to which the *ad medium filum aquae* rule establishes a rebuttable presumption that the ownership interest therein extends beyond the edge of the land up to the mid-point of the stream.[31] This presumption may be rebutted by evidence demonstrating that the Crown grant failed to exhibit an intention that the ownership interest to the mid-point passed to the grantee.[32]

---

(2); Crown Lands Act (NT), s 3 'Crown lands'; Land Administration Act 1997 (WA), sub-ss 3(1) 'Crown lands' and (2)-(5).

In Tasmania, the Crown Lands Act 1976 (Tas), sub-ss 57(a) and (b), while leaving intact the common law regarding tidal waters, empowers the Minister, if considered advisable, to reserve from any sale waste and demesne lands contiguous to the sea or an estuary. See also Bradbrook, MacCallum and Moore, *Australian Real Property Law*, above n 12, 15-27-15-33.

[28]See eg Land Act 1994 (Qld), s 13.

[29]*Gann* v *Whitstable Free Fishers* (1865) 11 HLC 192. Peculiar Australian conditions have produced alteration of the common law presumption relating to non-tidal waters; for example, it does not apply to land abutting a salt-water lagoon, even though the lagoon is cut off from the sea for long periods and so is not subject to the tides: *Williams* v *Booth* (1910) 10 CLR 341.

[30]Gray, above n 2, 25. See also Blackstone, above n 2, vol 2, 18; *A-G BC* v *A-G Canada* [1914] AC 153, 167 (Viscount Haldane LC).

[31]*Hesketh* v *Willis Cruisers Ltd* (1968) 19 P&CR 573; *Blount* v *Layard* [1891] 2 Ch 681n. See also HJW Coulson and UA Forbes, *The Law of Waters and Land Drainage* (6th ed, 1952), 124.

[32]*Marquis of Salisbury* v *Great Northern Railway Co* (1858) 5 CB (NS) 174, 210 (Williams J), 214-5 (Crowder J); *Berridge* v *Ward* (1861) 10 CB (NS) 400; *Beckett* v *Leeds Corporation* (1872) LR 7 Ch App 421; *Plumstead Board of Works* v *British Land Co* (1874) LR 10 QB 16, 26 (Blackburn J); *Williams* v *Booth* (1910) 10 CLR 341, 359 (Isaacs J);

While the *ad medium filum aquae* rule was received in Australia as part of the laws of Empire,[33] contemporary State and Territory legislation alters, qualifies, or abrogates it[34] by providing, both retrospectively and prospectively,[35] that upon any alienation of the adjoining lands, the Crown remains vested with quasi-ownership in the beds of non-tidal lakes or watercourses.[36] A sale, lease or other Crown disposition therefore carries no ownership in, right of access over, or right to the use of any part of the beds, banks or channels through which streams flow over the land alienated.

Yet while these reservations deprive the riparian owner of the practical enjoyment of rights over the river--especially the riparian rights of use up to the mid-point of the stream--and eliminate the automatic right either of access to or use of the bed,[37] they fail to abrogate

---

Micklethwait v *Newlay Bridge Co* (1886) 33 ChD 133; *London City Commissioners for Land Tax* v *Central London Railway Co* [1913] AC 364; *McLaren* v *A-G Quebec* [1914] AC 258.

[33]*Lord* v *Commissioners (Sydney)* (1859) 12 Moo PC 473, 14 ER 991; *A-G* v *White* (1925) 26 SR (NSW) 216.

[34]On the *ad medium filum aquae* rule generally see Lang, above n 7, 31-5. In relation to highways, which were also governed by the common law rule, there has been legislative abrogation in most State and Territory Crown lands statutes: see eg Crown Lands Act 1989 (NSW), sub-s 172(8), which provides that the title to roads remains vested in the Crown when the road forms the boundary of the land concerned. See also Lang, above n 7, 49-50 and 52-5.

[35]Crown Lands Act 1989 (NSW), sub-ss 172(3) and (7), but see sub-s 172(6) for some exceptions created for certain tenures granted pursuant to the Crown Lands (Continued Tenures) Act 1989 (NSW); Land Act 1958 (Vic), ss 384 and 385; Water Industry Act 1994 (Vic), sub-s 175A(1); Water Resources Act 1989 (Qld), sub-ss 2(1), 5 and 26; Rights in Water and Irrigation Act 1914 (WA), sub-ss 2(1) (which defines 'bed' as land over which water normally flows or which is normally covered by water either permanently or intermittently) and 15; Crown Lands Act 1976 (Tas), sub-ss 57(a) and (b); Crown Lands Act (NT), s 22 (which includes lakes, springs, or watercourses in or under the land in the estate or contained by or forming a part of its boundaries); Water Act (NT), s 12. See also Bradbrook, MacCallum and Moore, *Australian Real Property Law*, above n 2, 15-33.

[36]See Lang, above n 7, 35.

[37]Crown Lands Act 1989 (NSW), sub-s 172(2) and (5)-(7).

completely the *ad medium filum aquae* rule.[38] An owner of adjoining land who would otherwise enjoy the benefit of riparian rights, for instance, continues to enjoy some rights of access, such as the right to graze, which might otherwise exist if the Crown had no quasi-ownership interest in the bed, banks and channel.[39]

(c). Accretion

The Crown may also gain the quasi-ownership of land which abuts the sea or rivers, whether tidal or non-tidal, pursuant to the doctrine of accretion.[40] Using a tidal boundary as an example, the doctrine operates as follows: provided it occurs perceptibly, land formed by the natural deposit of silt and other soils in the zone between the high and low water marks becomes the Crown's and not that of a private owner whose land abuts the boundary.[41] If, on the other hand, the change is slow and imperceptible, but still natural, the reverse is true and the private land-owner benefits.[42] Any artificial reclamation, however, whether

---

[38]Crown Lands Act 1989 (NSW), sub-s 172(9). See also Hay Irrigation Act 1902 (NSW); Wentworth Irrigation Act 1890 (NSW); Water Act 1989 (Vic), ss 7 and 8.

[39]See Land Act 1958 (Vic), s 386; Native Title (South Australia) Act 1994 (SA), sub-ss 39(1)-(5) (which confirms, as at 31 December 1993, all existing public access rights to waterways, the beds and banks of foreshores and waterways, coastal waters, beaches, and public places); Rights in Water and Irrigation Act 1914 (WA), s 16.

[40]Lang, above n 7, 35. While most States and Territories have left intact the common law doctrine of accretion on tidal watercourses, some have abolished it and deemed it never to have applied to non-tidal lakes: see eg Crown Lands Act 1989 (NSW), sub-s 172(4).

[41]*Gifford* v *Lord Yarborough* (1828) 5 Bing 163, 130 ER 1023; *Doe d Seebkristo* v *East India Co* (1856) 10 Moo PC 140, 14 ER 445. See generally *Halsbury's Laws of England* (4th ed reissue, 1998), Volume 12(1), 'Crown Property', para 263. Queensland has legislatively codified the doctrine of accretion: Land Act 1994 (Qld), sub-s 9(1) and (2).

[42]*A-G Southern Nigeria* v *John Holt & Co (Liverpool) Ltd* [1915] AC 599; *Gifford* v *Lord Yarborough* (1828) 5 Bing 163, 130 ER 1023; *R* v *Lord Yarborough* (1828) 2 Bli NS 147, 4 ER 1087; *Humphrey* v *Burrell* [1951] NZLR 262.

perceptible or imperceptible, enures to the benefit of the Crown.[43]

(d). Erosion

The doctrine of erosion operates when a private land-owner loses land gradually and imperceptibly as a result of encroachment by the sea.[44] In such cases, quasi-ownership of the land covered by water is vested in the Crown while the adjoining landowner loses an ownership interest therein.[45] Similarly, islands formed by encroachment of the sea--other than by sudden means, such as volcanic activity--become the Crown's.[46]

B. The Sub-Surface

1. The Common Law and the Royal Prerogative

The common law has had great difficulty in definitively establishing the lower limits of a fee simple holder's ownership interest in land.[47] Do such ownership privileges and powers extend to anything that lies below the surface of the land, or does the Crown enjoy quasi-ownership in everything below the surface? The answer is that a distinction must be drawn between the ownership privileges and powers of the fee simple-holder over some

---

[43]*A-G Southern Nigeria* v *John Holt & Co (Liverpool) Ltd* [1915] AC 599, 615 (Lord Shaw of Dunfermline); *A-G* v *Reeve* (1885) 1 TLR 675. Queensland has codified this rule: Land Act 1994 (Qld), ss 10, 11 and 12, although works carried out by local government areas or by ports which raise land above the high water mark result in the vesting of the raised land in the local government area or the port respectively.

[44]See generally *Halsbury's Laws of England* (4th ed reissue, 1998), Volume 12(1), 'Crown Property', para 264.

[45]See JE Moore, 'Land by the Water', above n 23, 536; Lang, above n 7, 36.

[46]*Re Hull and Selby Rly* (1839) 5 M&W 327; *Humphrey* v *Burrell* [1951] NZLR 262; *Secretary of State (India)* v *Chelikani Rama Rao* (1916) 85 LJPC 222.

[47]See Adrian J Bradbrook, 'The relevance of the cujus est solum doctrine to the surface landowner's claims to natural resources located above and beneath the land' (1988) 11 *Adelaide Law Review* 462, 463; Ziff, above n 2, 89-94; LD Griggs and R Snell, 'Property Boundaries and Incidental Rights Attached to the Ownership of Land in Tasmania' (1991) 10 *University of Tasmania Law Review* 256.

aspects of the sub-surface and the Crown's quasi-ownership privileges and powers over specified natural resources. The distinction applies to two natural resources, both of which pose particular problems in this regard: mines and minerals and petroleum and natural gas (hydrocarbons). In the case of the former, at common law, a Crown grant in fee simple carried with it ownership privileges and powers in all mines and minerals except gold and silver, which, being the royal metals, remained a part of the Crown's quasi-ownership privileges and powers over land by virtue of the prerogative.[48] The prerogative also empowered the Crown specifically to reserve to itself other minerals.

The common law experienced greater difficulty with hydrocarbons. Because they are inherently mobile in their natural state, these substances are not easily accommodated by the *cujus est solum* maxim. Consider petroleum: in its solid form, asphalt, it remains stable when *in situ*. If an excavation exposes it to the heated atmosphere, however, it may begin to melt and ooze out.[49] In ascribing ownership privileges and powers in petroleum to the surface land-owner, therefore, the common law assumed that it always occurred as asphalt. And so long as this assumption was limited to solid asphalt, it was uncontroversial. But most hydrocarbons do not occur naturally in a solid state; rather, they are found in liquid or gaseous form. Can the *cujus est solum* maxim be applied to liquid or gaseous hydrocarbons? The

---

[48]*Case of Mines* (1567) 1 Plowd 310, 75 ER 472; *Wade* v *New South Wales Rutile Mining Co Pty Ltd* (1969) 121 CLR 177, 185 (Windeyer J); *Woolley* v *A-G Victoria* (1876) 2 App Cas 163; *A-G UK* v *Morgan* [1891] 1 Ch 432; *A-G* v *Great Cobar Copper Mining Co* (1900) 21 LR (NSW) 351. See generally *Halsbury's Laws of England* (4th ed reissue, 1998), Volume 12(1), 'Crown Property', paras 218-219.

For a general history of the Crown prerogative to minerals and its legislative extension in the Antipodes see Owen J Morgan, 'The Crown's Rights to Gold and Silver in New Zealand' (1995) 1 *Australian Journal of Legal History* 51.

[49]Although a matter of geology, some judges have adverted to this difficulty: *Trinidad Asphalt Co* v *Ambard* [1899] AC 594, 598 (Lord Macnaghten).

common law provides little assistance in clarifying this ambiguity; the few judicial authorities express doubt about the applicability of the *cujus est solum* maxim in this context.[50]

In contemporary Australia, however, legislation has been used to replace, and thus clarify, much of the uncertainty created by the common law in relation to mines and minerals and petroleum and natural gas. Nonetheless, the ideas expressed by the common law and its use of the *cujus est solum* maxim find their way into the relevant natural resources statutes. While it acts as a starting point, therefore, the modern view is that the *cujus est solum* maxim does not extend without qualification to the surface ownership privileges and powers enjoyed by surface land-owners to the entire sub-surface.[51] Rather, specified sub-surface natural resources are legislatively removed from the scope of the surface ownership interest. The relevant legislation vests the quasi-ownership of these natural resources in the Crown. The following two sections consider the legislative treatment of mines and minerals and petroleum and natural gas.

2. Mines and Minerals

Legislation in each State and Territory[52] glosses or replaces the common law with a regime which, (i) declares the Crown to have specified quasi-ownership privileges and powers in defined sub-surface mines and minerals,[53] and (ii) empowers the relevant Minister (not

---

[50]*Borys* v *Canadian Pacific Railway Co* [1953] AC 217.

[51]Ziff, above n 2, 89-90. But see *Edwards* v *Simms*, 24 SW 2d 619 (1929); *Marengo Cave Co* v *Ross*, 10 NE 2d 917 (1937).

[52]The structure of this legislation is examined by JRS Forbes and AG Lang, *Australian Mining and Petroleum Laws* (2nd ed, 1987), and Michael W Hunt and Michael A Lewis, *Mining Law in Western Australia* (2nd ed, 1993).

[53]The relevant legislation in each State and Territory defines 'mineral': see eg Mining Act 1992 (NSW), s 4 'mineral' and Schedule 6, Dictionary, which defines 'mineral' as '...any substance prescribed by the regulations as a mineral for the purposes of this definition, and includes coal and oil shale, but does not include uranium or petroleum.' And see Crown

usually the same Minister empowered by the Crown land statute) to control the use and exploitation of those substances.[54] Such legislation typically reserves from a grant of fee simple[55] or any lesser interest[56] not only gold and silver but also all other defined minerals lying below the surface of the relevant land. And some legislation expressly bolsters this declaration by limiting the depth to which Crown grants of fee simple[57] or lesser tenures[58]

Lands Act 1989 (NSW), s 3, 'mineral': in relation to land not in a special land district, any substance prescribed as a mineral and if it is in a special land district, it carries the meaning ascribed by the Mining Act 1992 (NSW). See also Western Lands Act 1901 (NSW), s 3 'mineral'.

[54]See Lang, above n 7, 30 and 55-9; Ziff, above n 2, 94.

[55]Forbes and Lang, above n 52, paras 204-220, discuss in detail the terms of the statutory reservation of minerals in each State. See also Lang, above n 7, 30; Woodman, above n 10, 23-37. For a general policy and constitutional consideration of the issue, see Michael Hunt, 'Government Policy and Legislation Regarding Mineral and Petroleum Resources' (1988) 62 *Australian Law Journal* 841.

Each State and Territory has its own formula for the reservation of minerals: see eg New South Wales, where, subject to the issue of retrospectivity, the policy of reserving all minerals to the Crown found in the Crown Lands Act 1989 (NSW) is bolstered by the Mining Act 1992 (NSW), sub-ss 6(1) and 379 (which provides that 'except as expressly provided by this Act, this Act does not affect any prerogative of the Crown in respect of gold mines and silver mines'); Land Act 1958 (Vic), s 340; Mineral Resources Development Act 1990 (Vic), sub-ss 4(1) 'mineral' and 'petroleum' (the latter being excluded from the definition of the former) and 9: Mineral Resources Act 1989 (Qld), s 8; Land Act 1994 (Qld), sub-ss 21 and 22(1); Mining Act 1971 (SA), sub-ss 6 'minerals' (which excludes petroleum) and 16; Native Title (South Australia) Act 1994 (SA), sub-ss 39(1)-(5); Land Administration Act 1997 (WA), s 24; Mining Act (NT), sub-s 4(1); Crown Lands Act (NT), sub-ss 21 and 37(1)(b).

But the relevant declaration does not apply to land which is held by the Commonwealth for a public purpose: *Commonwealth* v *Western Australia (Mining Act Case)* (1999) 196 CLR 392.

[56]Such as a lease: eg Crown Lands Act (NT), sub-ss 27(b) and 37(1)(b); Pastoral Land Act (NT), sub-s 38(1)(b) and (m).

In the Australian Capital Territory, where Crown leases represent the only form of landholding, the Land (Planning and Environment) Act 1991 (ACT), s 218, reserves minerals from all such grants.

[57]See eg Crown Lands (Continued Tenures) Act 1989 (NSW), Sched 7, Part 1, s 4; Western Lands Act 1901 (NSW), Sched D, s 5; Land Act 1958 (Vic), sub-ss 138A (authorising the grant of leases in strata of land), 339(1), (2), (4)-(6), and 339A and 339B (authorising the grant of fees simple in strata of land); Crown Lands Act 1976 (Tas), sub-ss

extend.

It is not always clear, though, whether the conferred privileges and powers vest the Crown with quasi-ownership or simply a power to control use.[59] The issue is not a difficult one for our working definition of public property. Either way, whether quasi-ownership or control-power, the result is the same: the fee simple-holder enjoys limited or no ownership privileges or powers over the defined mines and minerals, either to use or exploit them personally or to transfer any privileges and powers therein to others. Conversely, whether the legislation specifies it to be the case or not, the Crown enjoys quasi-ownership privileges and powers over the defined mines and minerals.[60]

There are, however, two significant difficulties that arise in relation to the legislative declaration of the Crown's quasi-ownership interest in mines and minerals, whatever form it might take. First, what if the legislation contains a declaration which is clear as to the conferral of privileges and powers over mines and minerals, but is silent as to a specific substance? In other words, while every statute defines the substances covered by 'mines and minerals', some substances will clearly fall outside that definition. The common law comes to the rescue in such cases. It governs the privileges and powers over those substances that fall outside the legislative definition of mines and minerals. Thus, a substance which is not

---

54(1) and (2).

[58]Crown Lands Act 1976 (Tas), sub-ss 54(1) and (2).

[59]For example, the Atomic Energy Act 1953 (Cth), ss 34, 41 and Pt III, reserves such powers to the Commonwealth over 'prescribed substances' found on or under any lands which may be used for or in connection with the production of atomic energy or research therein, including the right to mine. Prescribed substances include uranium, thorium, plutonium, neptunium or any of their respective compounds, and includes any other substance specified by the regulations.

[60]See Lang, above n 7, 56-7.

covered by the legislative definition is subject to the surface ownership interest.

Second, the temporal scope of the legislative declaration of the Crown's quasi-ownership of mines and minerals is normally prospective; nonetheless, some legislation retrospectively abolishes, from a specific date, any ownership interest which does or might ever have existed in the defined mines and minerals. Thus, in relation to a specific substance lying beneath any fee simple land in a given State or Territory, one must examine the relevant legislation in order to decide whether the relevant declaration or reservation applies retrospectively or merely prospectively.[61] If the former, determining the Crown's quasi-ownership interest turns on the date of the original Crown grant.[62] If the grant was made

---

[61]For example, the Mining Act 1978 (WA), s 9, which buttresses the reservation contained in the Land Administration Act 1997 (WA), s 24, provides that all gold, silver and other precious metals belong to the Crown, and that the Crown retains the property in other minerals not alienated in fee simple prior to 1 January 1899. However, while the Mining Act 1904 (WA) defined 'minerals' very narrowly, the 1978 Act contains a broad definition of this term. And given that both Acts contain an identically worded comprehensive reservation, the issue arises as to whether the 1978 Act operates a retrospective expropriation of those minerals not included in the 1904 definition. In other words, does the 1978 Act's combination of a comprehensive reservation with a broad definition of minerals evidence an intention by the Crown to expropriate the minerals which pre-1978 grantees and their successors in title have already acquired? The issue awaits judicial resolution: Bradbrook, MacCallum and Moore, *Australian Real Property Law*, above n 2, 15-20-15-26.

See also Crown Lands Act 1976 (Tas), sub-s 16(3); Mining (Amendment) Act 1911 (Tas), s 25; Mineral Resources Development Act 1995 (Tas), sub-s 3(1) 'mineral', 6 and 7.

[62]Adrian J Bradbrook, Susan V MacCallum and Anthony P Moore, *Australian Property Law: Cases and Materials* (1996), 14.28; Bradbrook, MacCallum and Moore, *Australian Real Property Law*, above n 2, 15-20. For example, in New South Wales, the Crown Lands Consolidation Act 1913 (NSW) limited to three the circumstances in which private ownership of minerals might exist: (i) grants of fee simple occurring before enactment of the Crown Lands Act 1884 (NSW), which was the first enactment expressly reserving all minerals to the Crown; (ii) grants of fee simple containing express language conferring the underlying minerals upon the grantee; and (iii) grants pursuant to the Crown Lands Alienation Act 1861 (NSW), which reserved to the Crown either gold alone or all minerals depending upon the fee paid for the grant. Indeed, the Crown Lands Act 1989 (NSW), sub-s 171(1) (which also applies to grants pursuant to the Crown Lands (Continued Tenures) Act 1989 (NSW) and to the Western Lands Act 1901 (NSW), sub-ss 2A(1), (4) and Schedule B), provides that even minerals discovered between the date the land is contracted to be sold and

prior to the effective date of a retrospective declaration, the surface ownership interest extends to all mines and minerals; if after the effective date, the Crown retains quasi-ownership in the mines and minerals.

3. Petroleum and Natural Gas

Each State and Territory has enacted legislation which comprehensively declares the Crown to have a quasi-ownership interest in all petroleum and natural gas *in situ*, whether solid, liquid or gaseous.[63] The New South Wales legislation is representative. The Petroleum (Onshore) Act 1991 (NSW), irrespective of any other Act or grant, lease, licence, or any instrument of title, tenure, or other document, whether or not it took place before or after the coming into force of the Act, (i) vests the Crown with quasi-ownership in all substances defined as petroleum and helium, (ii) deems all petroleum to be and to have been at all times the property of the Crown, and (iii) deems every grant to include such a reservation whether or not it issued before or after the coming into force of the Act.[64] This declaration has the practical result of empowering the Crown to authorise others to enter any land to explore for

---

the date of issue of title do not pass with the fee simple, although this applies only to grants made after the 1989 Act came into effect. In relation to both Acts, leases and licences receive treatment similar to that given fees simple. And in the Western division of New South Wales, pursuant to the Western Lands Act 1901 (NSW), sub-s 33A(2A), no transfer of a fee simple after 1980 conveys the title to minerals.

The South Australian legislation provides for the payment of compensation for the retrospective divesting of a property right in minerals: Mining Act 1971 (SA), sub-ss 6, 'minerals' and 16.

[63]DE Fisher, *Natural Resources Law in Australia* (1987), 59-60. See also Forbes and Lang, above n 52.

[64]Petroleum (Onshore) Act 1991 (NSW), sub-ss 3, 'petroleum', 6(1) and (2); Petroleum Act 1958 (Vic), ss 6 and 12-17; Petroleum Act 1923 (Qld), ss 3, 9 and 10; Land Act 1994 (Qld), s 21; Petroleum Act 2000 (SA), ss 4 and 5; Native Title (South Australia) Act 1994 (SA), sub-ss 39(1)-(5); Petroleum Act 1967 (WA), sub-ss 5(1), 9 and 10; Petroleum Act (NT), ss 5 and 6; Crown Lands Act (NT), sub-s 37(1)(b); Pastoral Land Act (NT), sub-s 38(1)(b). See also Bradbrook, MacCallum and Moore, *Australian Real Property Law*, above n 2, 15-25-15-26.

or otherwise recover and remove any substances defined as petroleum and helium.

C. Timber[65]

At common law, the *cujus est solum* maxim encompasses trees, shrubs, hedges, plants and flowers growing on the surface of the land, whether cultivated or wild, which are subject to the surface-holders ownership privileges and powers.[66] So long as any of these remain attached to the surface, therefore, they are land. For this reason, provided they are still attached to the surface, they can also be held as land independently of the surface or airspace ownership interests.[67] The States and Territories have not often abrogated this common law principle and as such, in contemporary Australia, the fee simple ownership interest extends to timber attached to the surface.

Timber growing on waste and demesne lands, however, falls under State and Territory legislative regimes. It was seen in Chapter 6 that when waste and demesne lands are granted to a private person pursuant to a pastoral lease, or when they are dedicated to a particular purpose, they may be removed from the body of such lands available for grant to a third party.

---

[65]The law relating to timber resources comprises a vast and amorphous body of State and Territory legislation and case law; this thesis deals only with the very basics. For a sample of the relevant legislation see Forestry Act 1916 (NSW); Forestry Act 1959 (Qld); Forestry Act 1920 (Tas); Forests Act 1958 (Vic); Forestry Rights Act 1996 (Vic). For a discussion of the issues involved in relation to Crown quasi-ownership of timber see Nigel Bankes, *Crown Timber Rights in Alberta* (1986).

[66]Blackstone, above n 2, vol 2, 18; *Stukeley* v *Butler* (1615) Hob 168, 170, 80 ER 316, 317.

[67]Gray, above n 2, 18. See *Liford's Case* (1614) 11 Co Rep 46b, 49a, 77 ER 1206, 1211; *Stukeley* v *Butler* (1615) Hob 168, 173, 80 ER 316, 320.

Gray, above n 2, 18, n 17, states that the characterisation of a forest as realty means that the fee simple in the trees may be owned by one person while the fee simple in the surface soil may be owned by someone else: see eg *Herlakenden's Case* (1589) 4 Co Rep 62a, 63b, 76 ER 1025, 1029f (KB); *Eastern Construction Co Ltd* v *National Trust Co Ltd* [1914] AC 197, 208 (Lord Atkinson); *Commonwealth* v *New South Wales* (1923) 33 CLR 1, 34 (Isaacs J).

Notwithstanding such removal, timber, as a discrete natural resource, remains Crown land, and as such, the holder of the pastoral lease or the body to which the land has been dedicated may not have any privileges and powers in relation to timber. Relevant State and Territory legislation provides that lessees, for example, may take timber for building purposes but may not otherwise make use of the timber,[68] and indeed must not prevent the activities of Crown timber licensees in harvesting it.[69]

---

[68]But see Western Lands Act 1901 (NSW), s 18DB; Crown Lands Act (NT), s 102; Pastoral Land Act (NT), sub-s 38(1)(m); Crown Lands Act 1929 (SA), s 187 (which limits the period of time in which a lessee may not harvest timber to five years from the date of the grant).

[69]Western Lands Act 1901 (NSW), sub-ss 18D(i), (ii) and Schedule A(d); Land Act 1958 (Vic), s 125 (deems any lands subject to leases for agricultural purposes also to be lands known as 'protected forests' pursuant to the Forests Act 1958(Vic), which means that timber may not be harvested on those lands); Land Act 1994 (Qld), ss 175 and 254; Forestry Act 1959 (Qld), s 45; Crown Lands Act (NT), sub-s 37(1)(d); Pastoral Land Act (NT), sub-s 38(1)(k) and (m).

Chapter 8

THE MIDDLE RANGE OF THE CONTINUUM I: PRIVATE VERSUS PUBLIC--STATUTORY LEASE OR LICENCE LANDS

I. INTRODUCTION

A. Statutory Tenures

As we have seen in Chapters 6 and 7, the Crown enjoys the power, conferred by the Crown land and natural resources statutes, to grant to private persons ownership interests in waste or demesne lands or natural resources in the form of tenures typically called 'licences' or 'leases'.[1] These statutory tenures have been common to Australia since earliest English settlement. Initially they appeared as licences issued to permit the otherwise illegal occupation of land for the depasturing of livestock over vast tracts of waste and demesne land.[2] Later,

---

[1]In relation to these tenures see Andrew G Lang, *Crown Land in New South Wales: The principles and practice relating to the disposal of and dealings with Crown land pursuant to the Crown Lands Consolidation Act, 1913; Western Lands Act, 1968; Returned Soldiers Settlement Act, 1916; War Service Land Settlement Act, 1914; Closer Settlement Acts and related legislation* (1973), 112-237.

[2]Richard H Bartlett, *Native Title in Australia* (2000), 273; Peter Butt, *The Laws of Australia*, 'Crown Lands', Title 28, Chapter 8, paras 184-95; Peter Butt, *Land Law* (3rd ed, 1996), 844-55; Adrian J Bradbrook, Susan V MacCallum and Anthony P Moore, *Australian Real Property Law* (2nd ed, 1997), 6-1-6-11 and 6-17-6-24.

in order to foster a cogent policy of making land serve as an instrument of national social policy,[3] these tenures flourished in every State and Territory in order to serve a range of disparate purposes.[4] The most marked development occurred and continues in New South Wales and Queensland,[5] where, by the middle of the 20th century, the relevant legislation provided for a 'complicated mass'[6] or 'jungle' of statutory tenures.[7] In recent years, however, there has been an effort in both jurisdictions, as well as in other States and Territories, to reduce the number of tenures and to simplify and streamline the relevant provisions of the Crown land statutes.[8]

We ought not let terminology, however, fool us into thinking that these tenures are simply their common law cousins in statutory garb. The statutory use of 'licence' or 'lease' does not always connote the common law meanings which have come to be associated with

---

[3]Thomas Penberthy Fry, 'Land Tenures in Australian Law' (1947) 3 *Res Judicatae* 158, 167. See also CD Field, *Landholding and the Relation of Landlord and Tenant in Various Countries* (1885), 390-1.

[4]See Fry, 'Land Tenures in Australian Law', above n 3, 160-70. See also Bartlett, above n 2, 274; Field, above n 3, 381-416.

[5]Fry, 'Land Tenures in Australian Law', above n 3, 163.

[6]AC Millard and GW Millard, *The Law of Real Property in New South Wales* (2nd ed, 1913), 95.

[7]See Lang, above n 1, 37. Significant comparisons to the English feudal-historical construct and the tenures available thereunder can be drawn here; Fry, 'Land Tenures in Australian Law', above n 3, 163, has argued that at least until the time that he wrote--1947--New South Wales and Queensland were in the middle of an historical period in which the complexity and multifarious nature of the laws relating to Crown tenures beggared comparison unless one went back to the medieval period in English land law. He said, at 167:

> It will probably not be until current Australian ideals [in relation to using land to serve national and social purposes] are abandoned by some future generation of Australians (and, it would seem, most political ideals are abandoned sooner or later) that the present systems of Crown leasehold tenures will, collapse, as the feudal system of land tenures did in England progressively from 1330 to 1600.

[8]See eg Crown Lands Act 1989 (NSW) and Land Act 1994 (Qld).

these terms. A statutory licence, for instance, may confer the type of exclusive possession sufficient for the common law to conclude that a lease has been granted; conversely, a statutory lease may not confer exclusive possession, which at common law would lead to the conclusion that a licence had been created. More troublesome, both the statutory licence and lease may be issued for the same sorts of purposes which the common law would normally reserve for the lease. Indeed, one may still obtain statutory licences and leases for similar pastoral, agricultural, mining, fishing, water-utilization or residential purposes.[9] Putting the difficulties of interpretation to one side for the moment, for our purposes, the most significant feature of the statutory licences and leases is the substantial quasi-ownership privileges and powers which the Crown retains in relation to such lands while the licensee or lessee obtains a robust ownership interest afforded significant trespassory protection. These creatures of statute, therefore, create at once private property in the licensee or lessee and public property in the Crown.

We have seen in Chapter 6 that the grant of some statutory tenures, usually the leases, removes the relevant land from the corpus of waste and demesne lands available for grant to a third party pursuant to a different tenure or to some other dedication or reservation. But while they cease to be waste and demesne lands, they are nonetheless Crown land. The reason is simple: the privileges and powers conferred by them are a schizophrenic mix of private ownership and Crown quasi-ownership. The Crown retains some quasi-ownership privileges and powers over them, and for this reason, they are Crown. It is therefore necessary to place them on the continuum, although the Crown's comparatively smaller quasi-ownership interest therein means that they find their location below the waste and demesne lands and the natural

---

[9]Fry, 'Land Tenures in Australian Law', above n 3, 162.

resources. This location is called the 'statutory lease or licence lands'.

This chapter does not present an exhaustive analysis of the various statutory tenures available over the waste and demesne lands. Rather, it is a selective account of one such tenure: the pastoral lease.[10] This creature of statute is used to demonstrate the general contours of the statutory lease or licence lands location on the Crown land continuum. Even then, this chapter is not intended to provide a full account of the intricacies of the pastoral lease; as with every location along the continuum, providing a comprehensive analysis would require an entire thesis. In particular, it is not intended as an analysis of the statutory tenure-holder's relationship to the Crown or to the land, other than is necessary to explain the Crown's position in relation to this location. Indeed, because the thesis is intended to map the Crown land continuum and not analyse in detail any one location along it, this chapter focuses on the main features of the pastoral lease and the implications that those features have for the statutory lease and licence lands location.

B. The Pastoral Lease

In contemporary Australia, the pastoral lease has become a significant method by which the Crown allocates waste and demesne lands so as to put them to use for grazing or agricultural purposes.[11] In recent years, they have received an enormous amount of academic,

---

[10]For a review of the range of potential leases and licences see Lang, above n 1, 37-9. See also Butt, *Land Law*, above n 2, 844-9.

[11]See Crown Lands (Amendment) Act 1912 (NSW), ss 18-22, which later became the Crown Lands Consolidation Act 1913 (NSW), s 134, and finally the Crown Lands Act 1989 (NSW) and the Crown Lands (Continued Tenures) Act 1989 (NSW), sub-s 5(1), which preserved any tenures, such as perpetual leases, in existence as at 1989. The 1989 reforms rationalised the existing leasehold system, ensuring a somewhat simpler system for the future: Butt, *Land Law*, above n 2, 845-8.

The Western Lands Act 1901 (NSW), sub-s 2A(4), which deals with land in the Western District of the State, was not repealed, although the Western Lands (Amendment) Act 1989 (NSW) and the Western Lands (Crown Lands) Amendment Act 1989 (NSW)

legal, and popular attention.[12] Indeed, the pastoral lease is perhaps the most important form of land tenure next to the fee simple: approximately one half of the area of mainland Australia has been subject to a pastoral lease at one time or another, and over forty percent of the mainland was so affected as of 1996.[13] Queensland is most affected: over fifty-four percent of its area is covered by pastoral leases,[14] and over seventy percent by some form of statutory lease.[15] Thus, the pastoral lease offers a topical and representative means by which to analyse the statutory lease and its schizophrenic allocation of private and public property.

This chapter is divided into three sections. The first clarifies a terminological matter. The second presents a vignette of the pastoral lease drawn from the early history of Australian real property law. This sets the scene and provides the context within which one finds the modern schizophrenic allocation of privileges and powers between private property (lessee) and public property (Crown land). The final section analyses the division or allocation of privileges and powers between lessee and Crown.

---

rationalise the 1901 legislation with the 1989 legislation, and expressly preserve the range of tenures available pursuant to the 1901 legislation.

Modern legislation in other States and Territories simplified the leasehold systems in those jurisdictions: eg Pastoral Land Act (NT); Land Act 1994 (Qld); Pastoral Land Management and Conservation Act 1989 (SA); Crown Lands Act 1976 (Tas).

[12]See eg *Wik Peoples* v *Queensland* (1996) 187 CLR 1 ('*Wik*'); Henry Reynolds and Jamie Dalziel, 'Aborigines and Pastoral Leases--Imperial and Colonial Land Policy 1826-1855' (1996) *University of New South Wales Law Journal* 315. See also Lang, above n 1, 112-507.

[13]Bartlett, *Native Title in Australia*, above n 2, 273. And see Lang, above n 1, 123; Butt, *Land Law*, above n 2, 845, n 39, citing New South Wales Department of Lands, *Reform of NSW Crown Land Laws - Effects on Existing Crown Tenures* (1989), 7.

[14]Bartlett, *Native Title in Australia*, above n 2, 273.

[15]Carmel MacDonald, Les McCrimmon and Anne Wallace, *Real Property Law in Queensland* (1998), 36.

II. TERMINOLOGY

Before embarking upon an analysis of the privileges and powers divided between the lessee and the Crown upon the issuance of a pastoral lease, it is necessary to clarify an important matter of terminology. While some States and Territories have enacted specific legislation for the purpose,[16] most pastoral leases owe their existence to the Crown land statutes.[17] Historically and today, the term pastoral lease is not found in the legislation, although it has widespread use among laypeople and lawyers alike. Rather, most of the statutes either today, or at one time did, refer only to Crown or State leases and to perpetual leases. Which, if either of these tenures, is a pastoral lease? The answer is that both are. To explain this answer, it is necessary to examine the meaning of the two terms. Consider first the duration of these tenures.

The Crown or State lease creates little difficulty for the common law mind. It is usually granted for a defined term and looks very much like the common law term of years. Thus, while it nonetheless requires analysis in order to determine its nature and content, it does not require a dramatic leap from those rules with which the common lawyer is already familiar.

A perpetual lease, however, is an entirely different matter. As far as the Crown land statutes are concerned, these do what their title suggests: confer upon the holder, successors, and assigns, a perpetual tenure,[18] one that lasts forever.[19] Such tenures are, of course,

---

[16]See eg Pastoral Land Act (NT); Pastoral Act 1936 (SA); Pastoral Land Management and Conservation Act 1989 (SA).

[17]See Chapter 6, Section III.

[18]Fry, 'Land Tenures in Australian Law', above n 3, 167.

[19]Christopher Boge, *State Leasehold in Queensland* (2000), 15-6.

unknown to the common law.[20] The fact that the States and Territories have combined in one tenure a perpetual term with the common law understanding of a lease is not controversial, however. The Crown, if it so chooses, is free to legislatively exercise its prerogative so as to create novel proprietary tenures which fail to conform to the common law.[21]

Still, while the Crown is free, through legislation, to create novel tenures like the perpetual lease, the combination of the two terms creates 'a troublesome legislative incongruity',[22] one which causes problems of description and analysis. The problems are exacerbated by the fact that the changing land distribution policies of successive governments over long periods of time have produced a plethora of tenures all of perpetual duration and for very similar purposes, but each having different names.[23]

In New South Wales, for instance, the Crown land statute at one time made provision for both Crown leases, which carried a defined term, and perpetual leases. Prior to 1932, a Crown lease carried a 45 year term; thus, it was not, by definition, a perpetual lease. In that year, the parliament replaced the term of years with a perpetual term and provided for the conversion, upon the satisfaction of specified conditions,[24] of existing 45 year Crown leases to leases in perpetuity.[25] With the passage of time, therefore, all such Crown leases became

---

[20]*Sevenoaks, Maidenstowe and Tunbridge Railway Co* v *London, Chatham and Dover Railway Co* (1879) 11 ChD 625, 635-6 (Jessel MR). See also Boge, above n 19, 15-6.

[21]*Taff Vale Railway Co* v *Amalgamated Society of Railway Servants* [1901] AC 426, 429 (Farwell J).

[22]V Ryall, 'Perpetual Leaseholds in New South Wales' (1937) 11 *Australian Law Journal* 223, 223.

[23]MacDonald, McCrimmon and Wallace, above n 15, 36; Bartlett, above n 2, 273.

[24]Crown Lands Consolidation Act 1913 (NSW), s 134B.

[25]Crown Lands (Amendment) Act 1932 (NSW). See also Crown Lands Consolidation Act 1913, s 134; Crown Lands Regulations, r 196AA.

perpetual leases.

But what about our original question: which is a pastoral lease, the State or Crown lease or the perpetual lease? We said that both were, and the reason is simple. It is the purpose of the lease, and not its term, that dictates its name. The term may be defined or it may be perpetual, but in either case the purpose for which it is granted may be pastoral. Every State and Territory Crown land statute provides for and defines pastoral purposes.[26] Thus, if the purpose for which a lease is conferred is pastoral, then it may be and typically is called a pastoral lease. Today, one finds leases held for pastoral purposes of either perpetual or defined duration.[27] For consistency's sake, this thesis calls all statutory leases granted for pastoral purposes--perpetual or defined duration--pastoral leases.

Clarifying this terminological point does not, however, explain how and why pastoral leases, with their schizophrenic allocation of privileges and powers between private and public property, came to dominate the way in which waste and demesne lands are allocated. A vignette of the schizophrenic relationship between pastoralists and the Crown is useful in understanding the origin of these tenures. The vignette also sets the scene for an examination of the schizophrenic allocation of privileges and powers between lessee and Crown.

III. A VIGNETTE OF SCHIZOPHRENIA: THE SQUATTER

The tension that characterises the relationship between pastoralists and the Crown, and which produces the schizophrenic allocation of privileges and powers in the pastoral lease, is

---

[26]State and Territory Crown legislation which governs the grant and conditions attached to pastoral leases includes definitions of pastoral land, pastoral lessees, and pastoral purposes: eg Pastoral Land Act (NT), s 3; Land Act 1994 (Qld), s 3 and Sched 6; Pastoral Land Management and Conservation Act 1989 (SA), s 3; Land Administration Act 1997 (WA), s 3.

[27]See eg Crown Lands Act 1989 (NSW), s 41; Land Act 1994 (Qld), s 15. See also Fry, 'Land Tenures in Australian Law', above n 3, 162; Boge, above n 19, 15-6.

nothing new. Here is not the place to recount the long and arduous route travelled by pastoralists in their quest for security of tenure, nor is it the place to recount fully the tensions between them and the Crown in the course of that journey; others have done that.[28] Here, a vignette drawn from that history suffices to demonstrate the tensions between the two. The vignette covers the period from 1831 until 1855, popularly known as 'the period of squatting'.[29]

In the early nineteenth century, the great influx of immigrants to New South Wales arrived to find land prices high and its availability in good farming or grazing areas low.[30] These factors converged to produce the practice of squatting.[31] This term, apparently imported from the United States to Van Dieman's Land (Tasmania) to describe persons who simply occupied land beyond the limits of settlement without colour of right,[32] came by the 1830s to refer to the affluent stockmen of New South Wales.[33] This wealthy 'squattocracy' occupied--in the absence of any title or pretence of title obtained from the Crown--very large

---

[28]K Buckley, 'Gipps and the Graziers of New South Wales, 1841-1846' and DWA Baker, 'The Origins of the Robertson's Land Acts' in JJ Eastwood and FB Smith, eds, *Historical Studies: Selected Articles* (1964) First Series 57-126; Henry Reynolds, *The Law of the Land* (2nd ed, 1992); Field, above n 3; Lang, above n 1; Thomas Penberthy Fry, *Freehold and Leasehold Tenancies of Queensland Land* (1946); Stephen H Roberts, *History of Australian Land Settlement 1788-1920* (1968), 163-223.

[29]For an examination of this period, running from 1831-1855, see Roberts, above n 28, 163-223.

[30]Roberts, above n 28, 131-40; Field, above n 3, 382; CJ King, *An Outline of Closer Settlement in New South Wales: Part I The Sequence of the Land laws 1788-1956* (1957), 45-60.

[31]Lang, above n 1, 3. The term 'squatting' appears to have come from the United States. It was used to describe persons who settled on lands belonging to Native Americans without having acquired title from them by purchase: Field, above n 3, 382 and 362.

[32]Field, above n 3, 362 and 382.

[33]Alex C Castles, *An Australian Legal History* (1982), 288.

tracts of land beyond the limits of settlement in irregular patterns, usually for pastoral purposes associated with large runs of merino sheep.[34] Squatters were, in short, trespassers on the Crown's waste and demesne lands.

In 1836, both as a recognition of the value of putting the land to use for pastoral purposes and as a response to the demands of the squattocracy for security of tenure, the Colonial Governors began to grant annual licences to occupiers of runs of indefinite extent outside the bounds of settlement at ten pounds per run.[35] In doing so, the Colonial government recognised the validity of the squatters' occupation and retroactively cured their trespass.[36] It failed, however, to quench their thirst for security of tenure.[37] The squattocracy would have to wait another ten years for that.

Not until 1846, with the passage of the Sale of Waste Lands Act 1846 (Eng),[38] which came into effect pursuant to an Order in Council of 1847,[39] did the Crown finally meet the demands of the squattocracy for security of tenure. The Order in Council (i) abolished the limits of settlement, (ii) conferred upon squatters the right to compensation for improvements, and (iii) established the long sought-after prize of a pre-emptive right allowing squatters to

---

[34]Field, above n 3, 382.

[35]See Occupation of Crown Lands Act 1836 (NSW); Act of 1839 (NSW), 2 Vict, No 27. See also *Historical Records of Australia* (1917), Series I, vol XXI, 127; Lang, above n 1, 3; Roberts, above n 28, 189-92.

[36]Lang, above n 1, 3-4.

[37]Castles, above n 33, 175-6.

[38]Sale of Waste Lands Act (Eng), 9 & 10 Vict, c 104.

[39]*Government Gazette* (NSW), Order in Council, 7 October 1847, cited in Castles, above n 33, 176, n 41, and Lang, above n 1, 6-7.

purchase lands they had occupied.[40] It also divided the Colony into three districts. In the first, the settled districts, purchasers of land could depasture on adjacent waste and demesne land under yearly leases, free of charge, subject to the Crown's right to dispose of the land by sale or lease. In the second and third, the unsettled and intermediate districts, a person could obtain a pastoral lease of up to 14 or 8 years respectively with a rent proportionate to the land's estimated carrying capacity of cattle or sheep.

In its entirety, the Order in Council of 1847 gave squatters the legal status and protection they craved: secure, undisturbed, fixed-term tenure with a preemptive right to purchase and almost independent valuation of rentals.[41] This rosy picture soon turned dark, as a period of unparalleled corruption and graft beset the colony, with squatters becoming speculators who purchased the best land of large runs while leaving the remaining land unused and useless.[42] Further tension between pastoralist and Crown, of course, ensued.

For our purposes, however, this vignette offers some insight into the multiplicity of unique tenures that can today be obtained over waste and demesne lands.[43] Moreover, it provides a method of explaining the split allocation of privileges and powers in relation to the lands covered by those tenures between private property and public property. Pastoral tenures were concessions, aimed at satisfying, simultaneously, the Colonial government's need to use land as a tool of social and economic policy on the one hand,[44] while, on the other, the

---

[40]*Government Gazette* (NSW), Order in Council, 7 October 1847, s 6, cited in Castles, above n 33, 176, n 41, and Lang, above n 1, 6-7.

[41]Lang, above n 1, 7.

[42]Lang, above n 1, 7.

[43]Castles, above n 33, 176.

[44]Fry, 'Land Tenures in Australian Law', above n 3, 167; MacDonald, McCrimmon and Wallace, above n 15, 36-7.

desire for security of tenure on the part of the squattocracy. This tension, which remains in contemporary Australia, produced the development of a range of tenures--including the pastoral lease--that exhibit a schizophrenic allocation of privileges and powers between lessee and Crown. The next section analyses that schizophrenia in relation to the pastoral lease.

IV. THE ALLOCATION OF PRIVILEGES AND POWERS

A. Nature and Content of the Pastoral Lease: The Lessee and Private Property

The relevant State and Territory Crown land statute or other relevant legislation governs the mutual rights and obligations of lessee and Crown pursuant to a pastoral lease.[45] Specific ownership privileges and powers conferred upon the lessee are either set out in schedules to the Crown land statutes,[46] or are included in the instrument of grant itself as the Minister thinks fit.[47] This division of privileges and powers therefore provides two images of the pastoral lease: on the one hand, it appears to be very much like a common law leasehold in statutory garb, while on the other, it appears to be a unique creature of statute. There are certainly similarities between the pastoral lease and the common law lease which assist in an analysis of its nature and content. But similarities cannot definitively settle that matter. The pastoral lease is a unique term and must be dealt with as such. The two sections which follow offer a broad analysis, using the available judicial and legislative materials, of its nature and content.

The relevant materials--case-law and legislation--can be divided into three distinct periods. The first two are governed by case-law, while the third is a recent legislative innovation. In the first period, which ended in 1996 with the High Court's decision in *Wik*

---

[45]*Davies* v *Littlejohn* (1924) 34 CLR 174, 188 (Isaacs J).

[46]See eg Crown Lands Act 1929 (SA), Sched 3.

[47]See eg Crown Lands Act 1929 (SA), s 35.

Peoples v *Queensland*,[48] the courts relied upon the language used in the legislation or the instrument of grant to draw conclusions about the nature and content of pastoral leases. This nomenclature approach was rejected, however, in the second period, post-*Wik*, in which the method of analysis favours the substance of the grant itself, especially the privileges and powers conferred upon the lessee. The final period is of recent legislative origin. Some States and Territories have defined, in their Crown land statute, the nature and content of all statutory leases, including those for pastoral purposes. The next three sections consider each period in more detail.

1. Pre-*Wik*: The Nomenclature Used in the Legislation or Instrument of Grant

As explained earlier, pastoral leases may have a perpetual duration. Can the combination of the terms 'perpetual' and 'lease' tell us about the nature and content of the pastoral lease? In other words, is such a lease analogous to a fee simple, or is it simply a common law leasehold in statutory garb?[49]

Prior to *Wik*, Australian courts relied upon the nomenclature used in the legislation or the grant in an attempt to discern the nature and content of statutory tenures such as the pastoral lease. In other words, they favoured form over substance. On the one hand, the concept of a perpetual lease was, and is, unknown and contrary to the Anglo-Australian common law rules for a leasehold, which, being a term of years, is a tenure of limited

---

[48]*Wik* (1996) 187 CLR 1.

[49]Lang, above n 1, 42-3; John Baalman, *The Torrens System in New South Wales Being a Commentary on the Real Property Act, 1900, as Amended and as Affected by Various Other Statutes* (1951), 35-6; Ryall, above n 22; BA Helmore, *The Law of Real Property in New South Wales* (2nd ed, 1966), 70; GJ McCarry, 'The Estate Conferred by Homestead Grants' (1967) 40 *Australian Law Journal* 396.

duration.[50] It is impossible at common law to confer a valid lease of perpetual duration,[51] although if validly created for a term of limited duration it can be made perpetually renewable.[52] A fee simple, on the other hand, confers upon the holder, successors and assigns a perpetual ownership interest. Many Australian courts placed great emphasis on the similarity between the fee simple and the perpetual lease.

Early judicial authority suggested that nomenclature alone may be determinative of content. Courts simply compared the words used to grant a fee simple with those used to grant a perpetual lease. In the former case, for instance, words such as '[t]he holder of an estate in fee-simple in possession in any lands held under a homestead grant' or 'confirmation of the application shall be deemed to be a sale of the...land' have been held to create fees simple because the legislation used the words 'fee simple' or 'sale'.[53] The grant of a perpetual lease was typically made with the words 'to the lessee his heirs and assigns for ever'. Such nomenclature differed from that used to grant a fee simple only in the use of the word 'lessee'. Based upon this sort of comparison, some Australian courts concluded that a perpetual lease was actually a grant of fee simple.[54]

---

[50]*Wik* (1996) 187 CLR 1, 110-1 (Toohey J), 219-20 (Kirby J), 175 (Gummow J). See also Millard and Millard, above n 6, 97 and 131-3.

[51]Lang, above n 1, 42; Fry, 'Land Tenures in Australian Law', above n 3, 167; William Blackstone, *Commentaries on the Laws of England* (1765-1769, University of Chicago edition, 1979), vol 2, 143; Charles Harpum with Malcolm Grant and Stuart Bridge, *Megarry and Wade The Law of Real Property* (6th ed, 2000), 754-5 and 769; EH Burn, *Cheshire and Burn's Modern Law of Real Property* (15th ed, 1994), 358-61; Butt, *Land Law*, above n 2, 270-2; Bradbrook, MacCallum and Moore, above n 2, 12-3-12-5 and 12-52; Bruce H Ziff, *Principles of Property Law* (3rd ed, 2000), 257.

[52]Fry, 'Land Tenures in Australian Law', above n 3, 167.

[53]Crown Lands Consolidation Act 1913 (NSW), sub-ss 89(1) and 93(7).

[54]*Macdonald* v *Tully* [1870] 2 QSCR 99, 106 (Cockle CJ and Lutwyche J); *Wildash* v *Brosnan* [1870] 1 CLLR 17, 18 (Cockle CJ and Lutwyche J); *Yandama Pastoral Co* v

But other cases reached different conclusions, holding that a perpetual lease was in its nature inherently distinct from, and was never intended to be a fee simple.[55] Such decisions found the perpetual lease more analogous to a leasehold than a freehold title.[56] Thus, as one commentator argued, the two words conjoined in the phrase 'perpetual leasehold' appeared to be mutually destructive and thus meaningless.[57] Nonetheless, other commentators argued that such a conclusion should not detract from the obvious fact that fees simple and perpetual leaseholds are alike in the sense that they both might theoretically last forever.[58]

The conflicting and inconclusive judicial and academic authority was, therefore, of little assistance in reaching any concluded view about the nature and content of the pastoral lease. Indeed, this approach, favouring form over substance, could never provide a normative answer as to the objective content of these novel tenures. Each lease had to be dealt with on a case by case basis. Recognising that nature and content can only be determined by an examination of the lease, and even then, of substance rather than form, the High Court in *Wik*, not surprisingly, rejected the pure nomenclature approach.

Mundi Mundi Pastoral Co Ltd (1925) 36 CLR 340, 349-50 and 353 (Isaacs J); *O'Keefe* v *Williams* (1910) 11 CLR 171, 190-3 (Griffith CJ), 208 and 212 (Isaacs J), 196 and 200-1 (Barton J); *Davies* v *Littlejohn* (1924) 34 CLR 174, 187-8 (Isaacs J); *R* v *Toohey; Ex parte Meneling Station Pty Ltd* (1982) 158 CLR 327, 344 (Mason J); *Minister for Lands and Forests* v *McPherson* (1991) 22 NSWLR 687, 696 (Kirby J); *O'Keefe* v *Malone* [1903] AC 365, 377 (Lord Davey). See also *Wik* (1996) 187 CLR 1, 120-2 (Toohey J), 149-50 (Gaudron J).

[55]*Fisher* v *Deputy Federal Commissioner of Land Tax (NSW)* (1915) 20 CLR 242, 248 (Isaacs and Gavan Duffy JJ). See also *Re Hawkins* (1948) 49 SR (NSW) 117, 123 (Davidson J); *Hawkins* v *Minister for Lands (NSW)* (1949) 78 CLR 479, 485 (Latham CJ), 492 (Dixon J).

[56]*Nolan* v *Willimbong Shire Council* (1939) 14 LGR 89.

[57]Ryall, above n 22, 223.

[58]Fry, 'Land Tenures in Australian Law', above n 3, 168.

2. Post-*Wik*: Substance or the Privileges and Powers Conferred Upon the Lessee

The traditional technique used at common law to determine whether a leasehold estate has been created is to examine the substance of the grant rather than the form in which it is expressed. The hallmark of a leasehold estate at common law is whether the grant confers exclusive possession upon the lessee.[59] Once that is determined, it is possible to draw conclusions about the legal nature of the grant; specific rights and obligations attach, as a matter of law, to the leasehold.

Following this technique, Australian courts have recently moved away from the nomenclature used in the grant as a means of determining nature and content in favour of a construction of the statutory language in conjunction with the privileges and powers conferred upon the lessee by the grant itself. In other words, substance must prevail over form.[60]

This development came to a head in *Wik*, where, in response to a claim to common law native title claim over land in the Cape York Peninsula lodged by the Wik and Thayorre peoples.[61] The land claimed by the Wik and Thayorre was also subject to the operation of two pastoral leases. The High Court was asked to decide whether the common law test also applied to statutory leases; among other things, it had to determine the nature and content of the pastoral leases and, in particular, whether they conferred exclusive possession similar to that which stands as the hallmark of the common law lease. The Queensland government argued that if exclusive possession had been granted, it would exclude the possibility of native

---

[59]*Radaich* v *Smith* (1959) 101 CLR 209.

[60]*Radaich* v *Smith* (1959) 101 CLR 209, 214, 217, 219-20 and 222 (Windeyer J); *Claude Neon Ltd* v *Melb & Metro Bd of Works* (1969) 43 ALJR 69, 71 (Kitto J); *Goldsworthy Mining Ltd* v *Fed Cmr of Taxation* (1973) 128 CLR 199, 212 (Mason J); *Chelsea Investments Pty Ltd* v *Fed Cmr of Taxation* (1966) 115 CLR 1, 7 (Windeyer J).

[61]See Chapter 9.

title burdening the relevant land.[62] Rather, the grant of exclusive possession, it was argued, would have extinguished any native title at the time of the grant.

The majority decided that neither of the pastoral leases contained an express grant of exclusive possession. As such, it was necessary to determine, by a process of statutory construction, whether the legislature intended such leases to confer exclusive possession. In doing so, they held, one must consider the historical and factual context of the Crown land statute, the reasons for enacting the statute, the reasons for granting the lease (for example, in *Wik* they were granted for pastoral purposes only), the vast areas of land which might be subject to such leases and, finally, the uses to which the land might be put. While it was found in *Wik* that the leases under review had not conferred exclusive possession and so were not common law leaseholds, it was found, as a matter of general principle, that the legal nature of any given perpetual pastoral lease must be determined on a case by case basis as a question of fact dependent upon the context and always relying upon substance over form when considering the language used.[63] Thus, while a pastoral lease is not, as a matter of law, necessarily a grant of exclusive possession, it easily can be. It all depends on the substance of the privileges and powers conferred.

What if, however, based upon statutory construction, the lease is found not to confer

---

[62] *Wik* (1996) 187 CLR 1, 150 (Gaudron J). Justice Gummow, at 184-6, wrote that the application of the declaratory theory of the common law in *Mabo* v *Queensland [No 2]* (1992) 175 CLR 1, carried consequences for the task of statutory construction; namely, courts must now construe statutes enacted at a time when the existing state of the law was perceived to be the opposite of what it has since been held then to have been. The Queensland Parliament, therefore, would have proceeded on a false understanding of the law.

[63] *Wik* (1996) 187 CLR 1, 108, 110, 115-6, 118-20, 122, 130-1 (Toohey J), 140-1, 149-54 (Gaudron J), 177, 197, 200-1, 203-4 (Gummow J), 227, 232-3, 243-7 (Kirby J), 74-6 (Brennan CJ, Dawson and McHugh JJ, dissenting). See also MacDonald, McCrimmon and Wallace, above n 15, 37-9; Bartlett, above n 2, 274-82.

exclusive possession? Is that in any way destructive of the interest otherwise conferred upon the lessee? Again, *Wik* provides the answer: such a conclusion, far from being destructive of the tenure enjoyed by the lessee, simply recognises that the privileges and powers of each grantee depend upon the terms of the grant of the pastoral lease and upon the terms of the statute which authorised it.[64] In other words, the tenure which the lessee obtains depends solely on the privileges and powers legislatively conferred. Whatever those may be they define the content and nature of the interest granted and, whatever its nature and content, we know that in the hands of the lessee it is private property, conferring either ownership privileges and powers or a non-ownership proprietary interest.[65]

3. The Future

It is interesting to note that while the question regarding the nature and content of a pastoral lease remains a live one in relation to any tenures which have already been granted by the States and Territories, at least one, New South Wales, has rendered it irrelevant to the future grant of such leases. Exercising its power to legislatively create new property interests, the New South Wales parliament has enacted that any new statutory leases may only carry a term which, including any option to renew, cannot exceed 100 years.[66] Thus, the Minister

---

[64]*Wik* (1996) 187 CLR 1, 132-3 (Toohey J), 190-204 (Gummow J), 217-8 (Kirby J). This conclusion is reconcilable with the other Australian authority concerning the nature of the rights and obligations conferred by the grant of statutory tenures: eg *Macdonald* v *Tully* [1870] 2 QSCR 99, 106 (Cockle CJ and Lutwyche J); *Wildash* v *Brosnan* [1870] 1 CLLR 17, 18 (Cockle CJ and Lutwyche J); *Yandama Pastoral Co* v *Mundi Mundi Pastoral Co Ltd* (1925) 36 CLR 340, 349-50 and 353 (Isaacs J); *Goldsworthy Mining Ltd* v *Fed Cmr of Taxation* (1973) 128 CLR 199; *Glenwood Lumber Co* v *Phillips* [1904] AC 405, 408 (Lord Davey); *American Dairy Queen (Qld) Pty Ltd* v *Blue Rio Pty Ltd* (1981) 147 CLR 677, 686 (Brennan J), 682-3 (Mason J).

[65]See eg *Jovista Pty Ltd* v *Pegasus Gold Australia Pty Ltd* (1999) 151 FLR 242 (property nature of a mineral lease).

[66]Crown Lands Act 1989 (NSW), s 41.

may no longer issue perpetual leases,[67] which eliminates the problem discussed earlier regarding the nature and content of such leases. But the legislation goes on to confirm this point, providing that a disposition of waste and demesne land expressed to be a lease is a lease, even if exclusive possession is not given.[68] The legislation creates the possibility that a statutory lease--which could not, as a matter of substance, satisfy the criteria of a common law lease--will be treated as lease. If the grant does not confer exclusive possession, but is nonetheless treated as one, it constitutes a new form of private property. The legislation therefore settles the nature and content of each statutory lease which may be granted after the enactment of the Crown Lands Act 1989 (NSW), including those for pastoral purposes.

B. Nature and Content of the Pastoral Lease: The Crown and Public Property

It has been argued that whatever the relevant legislation and the grant confer on the lessee, a statutory lease, in the hands of the lessee, is a form of private property. The Crown, however, retains quasi-ownership privileges and powers even in relation to perpetual leases. Thus, unlike the common law leasehold, where both parties hold private property in relation to the lease, the lessor a leasehold reversion and the lessee a leasehold estate, with a pastoral lease, the Crown holds public property while the lessee holds private property, whatever its content. Therein lies the schizophrenia of the statutory lease: it creates at once private property ***and*** public property. The Crown's interest can therefore be plotted along the continuum, the location being defined by two matters. First, the dual statutory and

---

[67]Although, with the exception of lands in the Western Division of New South Wales, the Crown Lands (Continued Tenures) Act 1989 (NSW) preserves existing tenures and allows the holders of such tenures to apply to purchase the land: Western Lands Act 1901 (NSW), sub-s 28A(3)(a); Crown Lands (Continued Tenures) Act 1989 (NSW), sub-s 5(1) and Sched 7.

[68]Crown Lands Act 1989 (NSW), s 42.

contractual nature of the grant itself. Second, by contrasting the pastoral lease with the fee simple.

1. Statutory and Contractual

In addition to its schizophrenic allocation of privileges and powers, there is a schizophrenia in the very legal foundations of pastoral leases. While they are neither legal nor equitable in the common law sense of those terms, they are legal in the sense that they are created by statute and that a lessee's rights and obligations are statutory.[69] Yet notwithstanding their statutory derivation, the relationship between the Crown and the holders of statutory leases is also contractual; it is a relationship of landlord and tenant governed by the relevant Crown land statute.[70] As such, statutory leases are from their very creation a schizophrenic hybrid of statute and contract. The schizophrenia is much more stark when one compares the Crown's privileges and powers under a fee simple with those enjoyed under a pastoral lease.

2. Comparing the Fee Simple to the Pastoral Lease

It is helpful, in defining the relationship of the Crown to the statutory lease and licence lands, to contrast the quasi-ownership interest it enjoys in relation to those lands with that which it holds in relation to fees simple. The main conclusion that can be drawn from this exercise is that in the former, the Crown retains the power to control the way in which land is used following a grant. Fry has argued that one of the Crown's primary reasons for

---

[69] *Davies* v *Littlejohn* (1924) 34 CLR 174, 183 (Knox CJ), 188 (Isaacs J).

[70] *O'Keefe* v *Williams* (1910) 11 CLR 171, 190-3 (Griffith CJ), 196-7, 200 (Barton J), 209 (Isaacs J). The contractual relationship of landlord and tenant extends to the annexation of implied rights normally enjoyed by common law leaseholders to the statutory tenant: see *Walsh* v *Minister for Lands* (1960) 103 CLR 240, 249 (Dixon CJ, McTiernan, Fullagar & Menzies JJ), 254-5 (Windeyer J); *A-G Victoria* v *Ettershank* (1875) LR 6 PC 354, 372 (Sir Montague E Smith). See also Lang, above n 1, 39-40.

inventing and granting leases of waste and demesne lands was its concern to retain substantial control over those lands when they were used for pastoral or other purposes.[71] The statutory creation of leases, therefore, tells us much about their hybrid private-public property nature and content.

At common law, the distinctive feature of the leasehold estate is the number and onerous nature of incidents, or covenants, which bind the tenant. The fee simple, by comparison, has almost a total absence of such incidents. Through everyday experience, this characteristic of common law leaseholds was well-known to the Colonial New South Welsh Parliamentarians. This experience led the Colonial legislators to call statutory tenures leases whenever they desired to indicate that the use and retention of land by the tenant was dependant upon the due performance of many incidents imposed to prevent the anti-social use of the land. By so doing, Fry concluded, the number of onerous incidents attached to statutory leaseholds ensured the greater risk of their premature fatality as opposed to fees simple.[72] Thus, the Crown was given much greater control over statutory lease lands than those which it gave up through the grant of a fee simple.

Whether one accepts this view of the historical reasons for applying the lease label to grants which might potentially mirror the duration of a fee simple, for our purposes it is helpful in describing the hybrid nature of statutory leases. On the one hand the tenant has many ownership privileges and powers over the relevant land which are similar to those enjoyed by a common law lessee but which can only be determined with any specificity by examining the legislation and the grant in question, while on the other, the Crown enjoys

---

[71]Fry, 'Land Tenures in Australian Law', above n 3, 168-9. See also Boge, above n 19, 16.

[72]Fry, 'Land Tenures in Australian Law', above n 3, 168-9.

significant control over the use of those lands through the retention of quasi-ownership privileges and powers. This schizophrenia explains why we may still call the statutory lease and licence lands Crown land; they can be plotted along the continuum because they are subject to the Crown's quasi-ownership privileges and powers.

The hybrid nature of the statutory lease is still evident today in (i) the process whereby it may be converted to a fee simple, and (ii) the wide range of incidents which can be attached to it.

(a). Conversion

Most of the State and Territory legislation which provides for the grant of statutory leases contains provisions which set them apart from fees simple[73] and which bolster our earlier conclusion that the former is a tenure unknown to the common law.[74] The most notable of these is the process of conversion, which refers to the process whereby a statutory, usually a perpetual, lease can be converted to a conditional purchase tenure which may ultimately result in the grant of a fee simple.[75] The Minister must, in considering whether to allow a conversion, consider the lessee's compliance with the incidents attached to the lease.[76]

Conversion therefore further confirms the schizophrenic nature of the perpetual lease. When it occurs, the perpetual lease only ceases to be a lease, as far as the Crown is concerned, once the conversion has been confirmed.[77] Prior to the completion of that process, the Crown

---

[73]See eg Crown Lands Act 1929 (SA), Part 5, Div 3.

[74]Boge, above n 19, 109.

[75]Lang, above n 1, 43-4. And see eg Land Act 1994 (Qld), Part 3, Div 3; Crown Lands (Continued Tenures) Act 1989 (NSW), s 7 and Sched 2.

[76]See eg land Act 1994 (Qld), sub-s 213(3).

[77]*Hawkins* v *Minister for Lands (NSW)* (1949) 78 CLR 479, 487-8 (Latham CJ), 496 (McTiernan J); *Walsh* v *Minister for Lands (NSW)* (1960) 103 CLR 240, 248 (Dixon CJ,

retains what might be called a quasi-ownership reversion[78] even in relation to perpetual leases. Thus, the very existence of the conversion process, the Minister's power in relation to allowing a conversion, and the existence of a quasi-ownership reversion demonstrate the schizophrenic split between public and private property in relation to statutory leases.

(b). Incidents Attached to the Pastoral Lease: The Crown's Quasi-Ownership Privileges and Powers

The Crown also enjoys a range of incidents--quasi-ownership privileges and powers--in relation to a statutory lease which it clearly lacks if it grants a fee simple. In relation to the latter, the Crown enjoys only the incidents of escheat and forfeiture as remnants of the doctrine of tenure, while in the case of the former, the range of incidents which it enjoys is much more extensive. This section examines only the most important.[79]

Incidents of tenure, as we have seen in Chapter 5, were of fundamental importance to English real property law during the feudal era; the English Parliament and the Crown imposed upon tenants many incidents calculated to advance policies thought to be appropriate for the purpose of ensuring the safety and prosperity of the realm.[80] Similarly, in modern Australia, various public purposes--the population of outlying areas, the establishment of residences,[81] and the management of the land, which may include such matters as the

---

McTiernan, Fullagar and Menzies JJ).

[78]Strictly speaking, the High Court in *Wik* (1996) 187 CLR 1, held the use of the reversion concept in relation to the Crown's interest in a statutory lease to be inappropriate; nonetheless, the notion accurately summarises the Crown's relationship to the lessee.

[79]Fry, 'Land Tenures in Australian Law', above n 3, 162.

[80]See AWB Simpson, *A History of the Land Law* (2nd ed, 1986), 1-24; Harpum, *Megarry and Wade The Law of Real Property*, above n 51, 12-27.

[81]See eg Crown Lands Consolidation Act 1913 (NSW), ss 142, 142D, 145B; Closer Settlement Act 1904 (NSW), sub-s 29(1)(b); Western Lands Act 1901 (NSW), sub-s 18F(1); Land Act 1962 (Qld), ss 50-52 and 114-122; Land Act 1994 (Qld), ss 206 and 207; Land Act

eradication of pests, the erection of fences,[82] the construction of buildings and machinery, the ringbarking of trees, the improvement of water supplies and other public works, and the effecting of necessary improvements within a fixed time and to a specified value[83]--are achieved by means of the various incidents imposed upon statutory lessees.[84] The most significant incident, of course, is the lessee's obligation to pay an annual rent.[85] Each State

---

1958 (Vic), s 55. But see Crown Lands Act 1929 (SA), s 249B (deeming a lease containing a covenant of personal residence not to include it).

[82]Crown Lands Consolidation Act 1913 (NSW), sub-s 101(1); Western Lands Act 1901 (NSW), s 18A; Pastoral Land Act (NT), s 39; Land Act 1962 (Qld), ss 50-52, 105-113, 322, 323 and 375; Land Act 1994 (Qld), ss 156 and 488; Crown Lands Act 1929 (SA), s 65 and Fourth Schedule, s 2(I); Pastoral Act 1936 (SA), ss 61b, 134a and Schedule 1, cl (f); Pastoral Land Management and Conservation Act 1989 (SA), s 22; Land Act 1958 (Vic), ss 55 and 125.

[83]Crown Lands Consolidation Act 1913 (NSW), sub-ss 59(1), 80(1), 116, 118(1), 124, 124A, 126A, 142(2), 142B(2), 144E(3); Closer Settlement Act 1904 (NSW), sub-s 29(1)(c); Western Lands Act 1901 (NSW), sub-s 18D(ix); Pastoral Land Act (NT), s 39; Land Act 1962 (Qld), ss 50-52 and 65; Land Act 1994 (Qld), ss 202 and 486; Crown Lands Act 1929 (SA), Fourth Schedule, s 2(II); Pastoral Act 1936 (SA), ss 61, 61a and 61b; Pastoral Land Management and Conservation Act 1989 (SA), ss 7, 22 and 43; Land Administration Act 1997 (WA), Part 7, Div 4; Crown Lands Act 1976 (Tas), ss 34-35; Land Act 1958 (Vic), ss 55 and 125.

[84]Fry, 'Land Tenures in Australian Law', above n 3, 169-70.

[85]The rental is typically nominal. For example, in New South Wales, the Crown Lands (Amendment) Act 1912 (NSW), sub-s 18(2), provided for an annual rent for the first fifteen years of the term, paid yearly in advance, of 1.25% of the capital value of the land, provided that the rent never fell below £1. The Crown Lands (Amendment) Act 1932 (NSW), sub-s 10(p), while leaving the calculation of the rent intact, raised the minimum annual rent from £1 to £2. The Crown Lands (Amendment) Act 1964 (NSW), sub-ss 3(1)(m) and (i), for leases granted after 1932, removed the requirement that the minimum annual rent not fall below £2 while leaving intact the original method of calculation; however, for leases granted after 1964, the Minister and local land boards set the annual rental, which contained no minimum. See Queensland Statutes, 1828-1962 (1967), Vol 9, 279-82 (providing a list of cases interpreting statutory rent principles). See also Crown Lands Act 1931 (NT), ss 14, 15 and 32; Crown Lands Act (NT), ss 28, 29 and 50; Pastoral Land Act (NT), Part 4, Division 2; Land Act 1962 (Qld), ss 61, 157, 242-249 and 305; Land Act 1994 (Qld), ss 181-198, 234 and 237; Crown Lands Act 1929 (SA), ss 33, 35, 37, 38, 47-49, 59, 62, 206, 210, 211 and 259; Pastoral Act 1936 (SA), ss 24, 52, 55, 56 and Schedule 1; Pastoral Land Management and Conservation Act 1989 (SA), ss 22 and 23; Land Administration Act 1997 (WA), Part

and Territory varies as to any additional incidents that may be imposed depending upon the legislation and the status of the land or the lessee.[86]

These incidents permit the Crown to exert control over the use of the land. Thus, a lessee must comply with all mandatory conditions, covenants and provisions or risk forfeiture of the lease.[87] Similarly, the lessee must obtain the consent of the Minister or other relevant authority for a dealing with or transfer of the lease.[88] And while it is possible to apply, in some cases, for a waiver,[89] any purported transaction in breach of Ministerial consent passes

---

7, Div 6; Crown Lands Act 1935 (Tas), ss 80, 81, 91, 92, 99, 113 and 122; Crown Lands Act 1976 (Tas), ss 29, 32, 36, 49 and 58; Land Act 1958 (Vic), ss 55, 56, 124, 125, 197 and 354-356.

[86]See Boge, above n 19, 162-5.

[87]Crown Lands Act 1989 (NSW), Part 6; Western Lands Act 1901 (NSW), ss 18 and 28A; Crown Lands Act 1931 (NT), ss 22, 22A, 23 and 59H; Crown Lands Act (NT), ss 27 and 38; Pastoral Land Act (NT), ss 38 and 40; Land Act 1962 (Qld), ss 14, 249 and 295-305; Land Act 1994 (Qld), ss 213, 234, 237, 241 and 242; Crown Lands Act 1929 (SA), ss 59 and 61; Pastoral Act 1936 (SA), s 142; Pastoral Land Management and Conservation Act 1989 (SA), ss 37, 38 and 43; Land Administration Act 1997 (WA), Part 7, Div 7; Crown Lands Act 1935 (Tas), ss 94, 122 and 124; Crown Lands Act 1976 (Tas), ss 36 and 58; Land Act 1958 (Vic), ss 2, 23, 55, 125 and 354. The Victorian legislation makes available the equitable right of relief from forfeiture: *Ettershank* v *A-G Victoria* (1875) 1 CLLR 35. Arguably, all Crown land statutes provide the same remedy to lessees. See Queensland Statutes, 1828-1962 (1967), vol 9, 320 and 323-4 (providing a list of cases interpreting fraud, acceptance of payment and waiver provisions).

[88]Crown Lands Consolidation Act 1913 (NSW), sub-ss 75A(12), 75B(11), 101(1)(f), 129(1), 129B(1)(k), 145A, 265, 272, 274, 274A and 274B; Closer Settlement Act 1904 (NSW), ss 30 and 31; Western Lands Act 1901 (NSW), s 18G; Crown Lands Act 1931 (NT), ss 25C, 26-30 and 59J; Crown Lands Act (NT), ss 42 and 46-48; Pastoral Land Act (NT), s 67; Land Act 1962 (Qld), ss 274-83, 286, 288; Land Act 1994 (Qld), ss 322, 323, 332, 333 and 351; Crown Lands Act 1929 (SA), s 225; Pastoral Land Act 1936 (SA), Schedule 1(e); Pastoral Land Management and Conservation Act 1989 (SA), ss 28 and 30; Land Administration Act 1997 (WA), Part 7, Div 8; Crown Lands Act 1976 (Tas), s 29; Land Act 1958 (Vic), ss 55, 125 and 355. But see Crown Lands Act 1935 (Tas), s 93. See also Queensland Statutes, 1828-1962 (1967), vol 9, 312-3 (providing a list of cases interpreting the transfer provisions).

[89]Crown Lands (Continued Tenures) Act 1989 (NSW), Sched 3, Part 1, s 8. See also Pastoral Land Act 1936 (SA), s 48a.

no interest in the land.[90]

---

[90]*Roach* v *Bickle* (1915) 20 CLR 663, 670-1 (Isaacs and Duffy JJ). See also Crown Lands Act 1931-1991 (NT), s 59T; Crown Lands Act 1929 (SA), s 227; Land Administration Act 1997 (WA), Part 7, Div 8.

Chapter 9

THE MIDDLE RANGE OF THE CONTINUUM II: COMMUNITARIAN VERSUS PUBLIC--NATIVE TITLE LANDS

I. INTRODUCTION

A. Native Title and the Middle Range of the Continuum

As we have seen in Chapter 8, the statutory lease and licence lands lie somewhere in the middle range of the Crown land continuum. There exists a second location in this middle range: lands over which there exists 'common law native title' or 'native title'.[1] This thesis

---

[1]As it is commonly used, the term native title may be misleading. In Chapter 3, Section II.A, it was argued that the word title is an imprecise means of referring to property or ownership; its use ought to be restricted to those instances where one is describing the slotting of an ownership or quasi-ownership interest into trespassory protection.

In *Mabo [No 2]* v *Queensland* (1992) 175 CLR 1 ('*Mabo [No 2]*'), 178-9, Toohey J pointed out that the rights claimed by the Meriam People did not correspond to the concept of ownership as understood by English land law, developed since feudal times, and more recently Australian real property law. For Toohey J, native title represented a convenient expression, having the advantage that, when recognised by the law of Australia, Canada, the United States and New Zealand, it fits more comfortably into the legal system of the colonizing power. Justice Toohey concluded that in the case of the Meriam people, and Aboriginal peoples generally, the term represents a special collective right vested in an Aboriginal group by virtue of the groups' long residence and communal use of land or its resources. This view is not inconsistent with the argument advanced in this thesis. See also Law Reform Commission, Australia, Report No 31, *The Recognition of Aboriginal Customary Laws* (1986), par 63; *Pareroultja* v *Tickner* (1993) 117 ALR 206, 214 (Lockhart J).

calls this location the 'native title lands'. Only recently recognised as forming a part of Australian real property law, native title is a form of communitarian property. As with the other locations in the middle range, however, the native title lands are also defined by a substantial group of quasi-ownership privileges and powers retained by the Crown. And it is for this reason that they can be plotted, along with the statutory lease and licence lands, somewhere in the middle range of the Crown land continuum. For the same reason, the native title lands also constitute a schizophrenic location, although, in this case, rather than being a form of private property combined with public property, it is simultaneously communitarian property and public property.

It is necessary to mention briefly the fact that it is difficult to locate with any precision the native title lands on the continuum. We know, due to the schizophrenic allocation of privileges and powers between Crown and native title holder, that it lies somewhere in the middle range. As we saw in Chapter 6, however, there may be similarities between this location and the fee simple lands in relation to the power of the Crown to extinguish native title or fees simple. While there are similarities, the Crown's quasi-ownership interest in relation to native title lands is probably greater than that over the fee simple lands. For that reason, while the native title lands may be near the fee simple lands, they must at the very least be placed above them on the continuum. At the same time, it seems that the communitarian interest enjoyed by native title holders provides an interest which is not as robust as that enjoyed by statutory lessees and licensees, which means that the native title lands must fall below the statutory lease and licence lands on the continuum. All that can really be said about the native title lands with any certainty is that they must fall below the statutory lease and licence lands and above the fee simple lands. Where precisely that location is found between those two points cannot be ascertained. Thus, while this thesis identifies the native title lands

location as falling in the middle range of the continuum, that placement recognises the fact that the middle range covers a broad band lying between the statutory lease and licence lands and the fee simple lands locations.

Having mentioned the location of the native title lands on the continuum, we must also consider the Crown's interest in those lands. It has already been said that this location is characterised by a schizophrenic allocation of privileges and powers between public and communitarian property, of which there are three aspects. First, as already noted, this location depends upon a split allocation of privileges and powers between Aboriginal peoples' communitarian property and the Crown's public property in relation to relevant lands. Second, native title relies upon the common law for its recognition and existence. Finally, lands claimed under a native title must also necessarily be Crown land, either waste and demesne or waste and demesne subject to certain statutory tenures or reservations. This third aspect is not dealt with in this chapter; it must wait until we have analysed the Crown's prerogative over land in the Chapter 10. The public property dimension of the native title lands is only fully seen by examining the Crown's power to extinguish it, which is an element of the Crown's prerogative power; that is the focus of Chapter 11. This chapter examines the first two aspects of schizophrenia by analysing the nature and content of native title. Before doing that, however, a brief re-cap of communitarian property is helpful.

B. Communitarian Property: A Recap

Communitarian property, distinguishable from private and public in that it belongs to an indigenous people, depends for its existence upon the recognition and protection of a dominant legal system. But while the dominant legal system recognises and protects it, communitarian property does not depend upon that external protection nor upon any conception of private property or public property for its content. That must come from the

unique rules, traditions and customs of the indigenous people in question, which always differentiate this type of property from private and public. Indeed, any external trespassory protection must stop short of ***internal*** regulation; interference by a dominant society and its legal system irreversibly alters the distinction between communitarian property and public and private property.

External trespassory protection, therefore, is not sufficient for the existence of communitarian property. There must also exist an internal content which derives from a mutual sense of community; that content is the subject of the protection offered by the dominant legal system. Where members of a community have mutual rights over land which they claim as theirs, referable exclusively to their own traditions and customs, but protected by external trespassory rules conferred by a dominant legal system, communitarian property exists.

Both the external and the internal elements of communitarian property are evident in Australian common law native title. On the one hand, the common law recognises, protects and defines the geographic scope of native title. On the other hand, the unique rules, traditions and customs of each indigenous group determine the content of its native title. This chapter analyses the common law recognition, protection and geographic scope of Australian common law native title. And in analysing the recognition of native title, it also examines the role played by the traditions, laws and customs in determining the native title that belongs to an Aboriginal group.

II. RECOGNITION

Communitarian property depends upon a dominant legal system for both its recognition and its protection. This section analyses the first of these elements: the extent to

which Australian law recognises native title, in which *Mabo [No 2]*[2] played a pivotal role.

Mabo [No 2] involved a claim by the Meriam people to native title in the Murray Islands, which lie in the Torres Strait. The Meriam, the descendants of those peoples described in the reports of early European explorers of the Torres Strait, had continuously occupied the three islands comprising the Murrays since long before first European contact. The Crown acquired sovereignty over the Murrays in 1879,[3] and in 1882 and 1912 reserved them to the Aboriginal inhabitants of the Colony and State respectively. The Crown also issued a series of statutory leases over parts of the islands to a Mission Society and to a sardine factory.[4]

Whether a 'judicial revolution'[5] or a 'cautious correction',[6] one thing is clear: the High Court's decision in *Mabo [No 2]* marked a turning point in Australian land law. Prior to that case, the fiction of *terra nullius*[7] had ensured that Australian real property law, from first

---

[2]A full chronology of the action is found in Richard H Bartlett, *The Mabo Decision* (1993), vi-ix.

[3]By the Queensland Coast Islands Act 1879 (Qld). See *Mabo [No 2]* (1992) 175 CLR 1, 20-5 (Brennan J), 113-5 (Deane and Gaudron JJ), 179-82 (Toohey J).

[4]For the full findings of fact, see *Mabo* v *Queensland* [1992] 1 Qd R 78; Bartlett, *The Mabo Decision*, above n 2, vi-ix.

[5]Margaret Stephenson and Suri Ratnapala, eds, *Mabo: A Judicial Revolution* (1993).

[6]Garth Nettheim, 'Judicial Revolution or Cautious Correction? *Mabo v Queensland*' (1993) 16 *University of New South Wales Law Journal* 1.

[7]See Chapter 5, Section III. The High Court began to question the correctness of this position, as established by *Milirrpum* v *Nabalco Pty Ltd* (1971) 17 FLR 141 ('*Milirrpum*') as early as *Coe* v *Commonwealth* (1979) 53 ALJR 403, 411 (Jacobs J), 412 (Murphy J). However, because *Coe* involved an application for leave to amend a statement of claim, the Court held itself unable to express a concluded view upon the merits of the appeal, namely the existence of native title as a part of Australian common law. The High Court did, though, express some doubt as to whether the English Crown's acquisition of sovereignty over Australia extinguished native title.

settlement until 1992, rejected the possibility of any communitarian property in land belonging to Aboriginal peoples. In its decision, however, a majority of the High Court[8] rejected the fiction of *terra nullius*,[9] established radical title as the true foundation upon which rests Australian real property law,[10] and recognised the doctrine of common law native title as a juristic concept within Australian common law. Radical title obviously played a central role in the recognition of native title.

A. Radical Title

In *Mabo [No 2]* the High Court concluded that while they fall beyond the doctrine of tenure, English law nonetheless had historically accommodated rights and interests which do not owe their existence to Crown grant once having acquired sovereignty by conquest.[11] If English law could accommodate novel rights and interests in those circumstances, Brennan

---

[8]Justice Brennan delivered what is now commonly accepted as the leading judgment in *Mabo [No 2]*. Chief Justice Mason and McHugh J (at 15), without adding more, concurred with Brennan J, making his the only judgment attracting the support of three members of the High Court majority. As such, this chapter focuses upon Brennan J's judgment, although, where appropriate, it provides references to the majority judgments of Deane and Gaudron JJ and Toohey J and to the dissenting judgment of Dawson J (although he later accepted the majority position in order to foster certainty: *Western Australia* v *The Commonwealth (Native Title Act Case)* (1995) 183 CLR 373, 491-5).

[9]See David Ritter, 'The 'Rejection of Terra Nullius' in Mabo: A Critical Analysis' (1996) 18 *Sydney Law Review* 5; Adrian Howe, 'A Poststructuralist Consideration of Property in Thin Air--Mabo, A Case Study' (1995) 2(1) *E Law - Murdoch University Electronic Journal of Law*.

[10]See Chapter 5, Section III. See also Nehal Bhuta, '*Mabo*, *Wik* and the Art of Paradigm Management' (1998) 22 *Melbourne University Law Review* 24; Shaunnagh Dorsett, 'Land Law and Dispossession: Indigenous Rights to Land in Australia' in Susan Bright and John Dewar, eds, *Land Law: Themes and Perspectives* (1998) 279-301; John Devereux and Shaunnagh Dorsett, 'Towards a Reconsideration of the Doctrines of Estates and Tenure' (1996) 4 *Australian Property Law Journal* 30.

[11]Justice Brennan cited *Case of Tanistry* (1608) Dav Ir 28; *Witrong* v *Blany* (1674) 3 Keb 401. And see Kent McNeil, *Common Law Aboriginal Title* (1989), 174; JH Baker, *An Introduction to English Legal History* (3rd ed, 1990), 36-9.

J reasoned that it could also recognise novel interests in land, which did not depend upon Crown grant, operating within systems unknown to the common law when the territory was acquired by settlement.[12] Radical title made this conclusion possible.

Radical title provides on the one hand the necessary logical postulate required to support the Crown's position within the doctrine of tenure (when it exercises its prerogative to grant an interest in land) while on the other it supports its plenary title (when it exercises its prerogative to appropriate to itself the ownership of discrete parcels of land within its waste and demesne lands). The High Court therefore concluded that unless the Crown exercises its prerogative either by granting an interest in land or by appropriating to itself the ownership of a parcel of land, no reason exists to prevent native title from burdening its radical title.

While this formulation of radical title might seem to suggest, as the High Court later did in relation to the prerogative,[13] that there is no property in the Crown in relation to waste and demesne lands, this is not so if one conceptualises its relationship to those lands using the quasi-ownership spectrum. Using the spectrum, radical title simply means that the Crown enjoys a group of quasi-ownership privileges and powers (embodied in the prerogative) which, due to the potential existence of native title in relation to the same land, is not as full as it might otherwise be. Thus, while there may not be a full-blooded ownership interest giving rise to private property, there is a quasi-ownership interest which lies at the heart of public property enjoyed by the Crown, subject to the potential existence of native title.

---

[12]Justice Brennan cited *Amodu Tijani* v *Secretary, Southern Nigeria* [1921] 2 AC 399, 403-4 (Viscount Haldane); *Administration of Papua and New Guinea* v *Daera Guba* (1972-3) 130 CLR 353, 397 (Barwick CJ). But see McNeil, *Common Law Aboriginal Title*, above n 11, 297, n 237.

[13]See Chapter 10.

In any event, for the High Court, the acquisition of sovereignty failed as a justification for the wholesale extinguishment of native title. Such a conclusion could only follow, it reasoned, from the fallacy of equating sovereignty with the full or absolute beneficial ownership of land.[14] The radical title obtained by the Crown upon its acquisition of sovereignty provides a beneficial (full-blooded) ownership capable of extinguishment only when the territory is ***in fact terra nullius*** (actually inhabited by no one). If the land was in fact subject to a form of property--whatever it might be--recognised by an indigenous people, the High Court concluded, native title represents a burden upon the Crown's radical title.[15]

While radical title cleared the way for the recognition of native title, it did not explain the form which that recognition might take. Specifically, the question arose: in order for the common law to recognise it, need native title conform to western conceptions of private property?

B. Conformity With Western Conceptions of Private Property

Mabo [No 2] considered whether, for its recognition by the common law, native title--an interest otherwise unknown to the common law--must conform to western conceptions of private property. For three reasons, the High Court held that native title need not so conform. First, a community having the exclusive possession of land already holds a type of property--what we have called communitarian property--in that land. Second, a community which asserts that none but its members has any right to occupy or use such land enjoys communitarian property because, simply put, no other owner exists. Finally, the requirement of alienability, drawn from municipal English property law, and founded upon European

---

[14]*Mabo [No 2]* (1992) 175 CLR 1, 48-51 (Brennan J).

[15]*Mabo [No 2]* (1992) 175 CLR 1, 48-9 (Brennan J), 109 (Deane and Gaudron JJ), 182-4 (Toohey J).

conceptions of property, wrongly denied the existence of communitarian property in an Aboriginal people. As such, the High Court concluded that Aboriginal interests in land constitute a form of communitarian property which need not conform to western conceptions of private property.[16]

The recognition of native title as a form of communitarian property rather than private property does not, however, confer upon it status as a western form of property. Rather, it cannot ever gain that status for the simple reason that it, unlike western notions of private property, varies depending upon the rules, traditions and customs of the Aboriginal people involved. For that reason, Australian law recognises native title as a unique or *sui generis* form of property.

C. A *Sui Generis* Form of Property

Native title need not conform to western conceptions of property. As such, it cannot be categorised according to any of the recognised Australian common law private property estates or interests in land.[17] Rather, the common law accepts, recognises, and protects native

---

[16]See *Mabo [No 2]* (1992) 175 CLR 1, 83-6 (Deane and Gaudron JJ). Dorsett, above n 10, 297-8, strongly critiques the High Court's position.

[17]*Mabo [No 2]* (1992) 175 CLR 1, 51-2 (Brennan J); *Wik Peoples* v *Queensland* (1996) 187 CLR 1 ('*Wik*'), 90, 91-2 (Brennan CJ). See also Dorsett, above n 10, 293-8, who provides a strong critique of any approach which attempts to force Aboriginal land rights into common law proprietary forms. She considers native title a *sui generis* interest, which in her view requires the rejection of any attempt to classify native title by placing the liberal western philosophical conception of property at the top of a scale of acceptable interests in land. She concludes that a preferable course of action might be to rethink what is meant by property in order to recognize its social, political, and cultural aspects. By questioning whether the western conception of property was ever relevant to Australian society, Dorsett questions whether it is even appropriate to locate native title within any notion of property, even an expanded and more fluid one. In asserting that no protection of native title exists in the face of Anglo-Australian interests such as pastoral leases, Brennan CJ in *Wik* falls into the problematic reasoning rejected by Dorsett. It is difficult to disagree with Dorsett; Brennan CJ's reasoning on this issue seems to denigrate the socio-cultural foundations of native title as a unique relationship with land and one which cannot and should not be equated in any way

title as a unique or *sui generis* form of property in land;[18] in other words, it is communitarian property. It manifests this *sui generis* quality in two ways: first, in its limited alienability, and, second, in the requirement that the Aboriginal group demonstrate a traditional connection to land and its dependence on that connection for its content. This connection is evidenced by the traditions, laws and customs of the group.

1. Limited Alienability

Aboriginal traditions, laws and customs dictate the content of native title, which may range somewhere between, on the one hand, notions of property in land where distinctions between ownership, possession and use are all but unknown and, on the other hand, a community interest practically equivalent to full-blooded ownership. In either case, the relevant native title, whether an individual-, family-, band- or community-based right to the exclusive possession, occupation, use and enjoyment of land,[19] comprises a mere personal usufructuary right.[20] This is the consequence of the High Court's notion, outlined in *Mabo [No 2]*, that alienability is a necessary attribute of property; thus, because it is inalienable

---

with the western philosophical conception of property.

[18]*Mabo [No 2]* (1992) 175 CLR 1, 86 and 89 (Deane and Gaudron JJ), 187 (Toohey J); *Wik* (1996) 187 CLR 1, 90-2 (Brennan CJ).

Two views exist as to the acceptability of the *sui generis* doctrine. John Borrows and Leonard I Rotman, 'The *Sui Generis* Nature of Aboriginal Rights: Does it Make a Difference? (1997) 36 *Alberta Law Review* 9, explain the use of the doctrine as one which balances common law conceptions of property with Aboriginal ones, and as one acting as an aid to the development of the common law in a manner which accommodates cultural differences and unique Aboriginal land rights. Dorsett, above n 10, 297-8, on the other hand, strongly criticises the Australian judiciary for stressing that native title need not conform to European property conceptions while at the same time assessing its content by reference to those conceptions. This thesis favours Borrows and Rotman's view.

[19]Richard H Bartlett, *Native Title in Australia* (2000), 157 (cases cited in nn 28-30) and 195-7.

[20]Bartlett, *Native Title in Australia,* above n 19, 195-7.

outside the relevant Aboriginal group, the interest embodied in a native title must be 'merely personal'.[21] While such personal rights may seem proprietary, according to the High Court they fail to constitute legal or beneficial estates or interests in land capable of alienation by common law means.[22] The common law cannot provide for the alienability of native title when the relevant Aboriginal laws and customs themselves fail to do so.

In the absence of pre-existing Aboriginal laws providing for the alienation of interests in land to strangers, therefore, such interests may be acquired in only one of two ways. First, the Aboriginal inhabitants themselves (and their descendants) may possess the rights and interests which constitute their own native title. Or, second, the Crown may acquire native title rights outside a group or clan's traditions, laws and customs by virtue of its prerogative over land. The Crown's prerogative gives it the capacity to accept a surrender of native title, either voluntarily or by purchase.[23]

2. Traditions, Laws and Customs and the Content of Native Title

(a). An Unresolved Issue: Communitarian Property versus Communitarian Rights

Before considering the importance of the traditions, laws and customs of an Aboriginal people to the establishment of a native title over land, it is necessary to briefly deal with an issue which the courts have yet to resolve. This issue centres on the difference between native title as constituting an entitlement as against the whole world to the possession, occupation, use and enjoyment of land ('exclusive possession') versus native title as a bundle of site-

---

[21]*Mabo [No 2]* (1992) 175 CLR 1, 58-9 (Brennan J), 88 and 110 (Deane and Gaudron J), 194 (Toohey J).

[22]*Mabo [No 2]* (1992) 175 CLR 1, 87-9, 109-10 (Deane and Gaudron JJ), 178-9 and 187 (Toohey J).

[23]*Mabo [No 2]* (1992) 175 CLR 1, 60 (Brennan J), 88 (Deane and Gaudron JJ); *Pareroultja* (1993) 117 ALR 206, 209-10 and 213-4 (Lockhart J).

specific usufructuary rights such as a right to use land only for hunting, fishing, gathering food, camping, or for ceremonial purposes such as the creation of artistic works[24] ('site-specific rights').[25]

In *Mabo [No 2]*, the High Court held that the traditions, laws and customs of an Aboriginal people, if proved, establish an exclusive possession native title. In *obiter*, however, it also seemed to indicate that those same traditions, laws and customs could establish site-specific native title rights.[26] The High Court has failed, therefore, to indicate whether native title comprises one or other or both forms of native title. Similarly, in *Wik*, the Court seemed to draw a distinction between the two sorts of native title without actually deciding definitively whether it comprises one or other or both.[27]

The failure of the High Court to settle this debate has produced understandable confusion in the lower Australian courts. In *Western Australia* v *Ward*, a recent decision of

---

[24]This argument was advanced in *Bulun Bulun* v *R & T Textiles Pty Ltd* (1998) 86 FCR 244, although the Federal Court did not deal with the issue due to the failure to lodge a native title claim pursuant to the Native Title Act 1993 (Cth).

[25]The Canadian jurisprudence clearly draws a distinction between Aboriginal title (which Australians call native title) as being the former and Aboriginal rights as the latter: *Delgamuukw* v *British Columbia* (1998) 153 DLR (4th) 193; *R* v *Van Der Peet* (1996) 137 DLR(4th) 289; *R* v *Adams* (1996) 138 DLR(4th) 657; *R* v *Côté* (1996) 138 DLR(4th) 385. See also Bruce H Ziff, *Principles of Property Law* (3rd ed, 2000), 64-6; Kent McNeil, 'Aboriginal Title and Aboriginal Rights: What's the Connection? (1997) 36 *Alberta Law Review* 117; Kent McNeil, 'Defining Aboriginal Title in the 90's: Has the Supreme Court Finally Got it Right?', Twelfth Annual Robarts Lecture, March 25, 1998, York University, Toronto, 3-10.

In the Australian context, Lisa Strelein, 'Conceptualising Native Title' (2001) 23 *Sydney Law Review* 95, provides a very thorough analysis of this issue and all of the ways in which the Australian courts have attempted to theorise native title. See also Peter Butt, Robert Eagleson & Patricia Lane, *Mabo, Wik & Native Title* (4th ed, 2001), 126-30.

[26]*Mabo [No 2]* (1992) 175 CLR 1, 61 (Brennan J), 110 (Deane and Gaudron JJ), 192 (Toohey J).

[27]*Wik* (1996) 187 CLR 1, 132-3 (Toohey J), 166-7 (Gaudron J), 169-71 (Gummow J), 250-1 (Kirby J).

the Federal Court, Full Court, two of three judges favoured an approach which characterised native title as a bundle of abstract site-specific rights, entitling the holders to undertake certain activities on the land associated with traditional practices.[28] The third judge took the alternative approach and would have held that native title, once established, constitutes exclusive possession.[29] This confusion, as we shall see in Chapter 11, has an important impact upon the operation of the Crown's power of extinguishment. The matter should, hopefully, be settled when the appeal of the Federal Court's decision in *Western Australia* v *Ward* is decided by the High Court.

For present purposes, the uncertainty surrounding the formulation of native title may have a further impact on the precise location of the native title lands on the Crown land continuum. It does not, however, affect at all the conclusion that the native title lands do constitute a location on the continuum. If native title is exclusive possession, then it clearly will constitute communitarian property, which in turn would necessitate a lower location on the continuum. The Crown's quasi-ownership interest, being relatively less robust in relation to the communitarian property of a native title holder, would mean that the location of native title is lower on the continuum. But if native title is characterised as a bundle of limited site-specific rights, then it can at most be what we might call 'communitarian rights', in which case the Crown's quasi-ownership, in comparison to the native title holders, would be more substantial. That would necessitate a shift in location higher up the continuum.

In either case, the Crown's quasi-ownership in relation to native title requires the placement of the native title lands on the continuum, which location can be no higher, as we

---

[28]*Western Australia* v *Ward* (2000) 170 ALR 159, 178-84 (Beaumont and von Doussa JJ). See also *Wandarang Peoples* v *Northern Territory* (2000) 177 ALR 512.

[29]*Western Australia* v *Ward* (2000) 170 ALR 159, 328 (North J).

have already seen, than the statutory lease and licence lands, which we find in the middle range of the continuum. In the absence of a definitive statement of the nature of native title by the High Court, however, this thesis takes the position that native title is communitarian property which may either be exclusive possession or a disparate bundle of communitarian rights.

We can now turn to an examination of the required connection to land, which is the way in which an Aboriginal group's traditions, laws and customs are established. This in turn defines the content of the group's unique native title.

(b). Connection to the Land

The second reason for describing native title as a *sui generis* form of property emerges from the fact that it is never the same in any two cases. Because it originates in and derives its content from the traditions, laws and customs acknowledged and observed by the Aboriginal inhabitants of a particular territory,[30] each native title is unique. But in order to establish that unique property, the Aboriginal inhabitants must demonstrate that their traditions, laws and customs are still, in fact, operative.

In order to demonstrate that its traditions, laws and customs are still operative, an

---

[30]*Mabo [No 2]* (1992) 175 CLR 1, 15 (Mason CJ and McHugh J). See also *Ward* v *Western Australia* (1998) 159 ALR 483, 499 (Lee J); *Yarmirr* v *Northern Territory* (1998) 156 ALR 370, 417-8, 422, 424-5, 426-7 and 439-40 (Olney J); *Commonwealth* v *Yarmirr* (1999) 168 ALR 426 (affirming Olney J); *Hayes* v *Northern Territory* [1999] FCA 1248 (Olney J), [47]-[51]; Bartlett, *Native Title in Australia*, above n 19, 153-69.

The Native Title Act 1993 (Cth), sub-s 223(1), codifies and enhances the common law definition of native title as outlined in *Mabo [No 2]* (1992) 175 CLR 1: see *The Native Title Act Case* (1995) 183 CLR 373, 452 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ). This codification is significant; for example, while the common law definition as yet makes no mention of fishing rights as an element of native title, the Native Title Act 1993 (Cth), sub-s 223(1), expressly includes them. *Mason* v *Tritton* (1994) 34 NSWLR 572 ('*Tritton*'), 598-600 (Priestly JA), now confirms that the common law recognises fishing rights as a component of native title. See Section II.C.2.(c).(iv).

Aboriginal group must show that it maintains some traditional connection with the land claimed.[31] Establishing such a connection to land goes to the heart of proving both the existence and content of a native title. While clearly established by physical occupancy, the connection need not be physical.[32] For example, an Aboriginal people substantially maintains its traditional connection to land if it continues to acknowledge its laws and, so far as practicable, continues to observe its customs based upon its traditions. Thus, in the absence of a physical presence, a native title claimant and any intermediate descendants must demonstrate, first, continued and uninterrupted observance of the relevant laws and customs and, second, that the claimed native title right constitutes an exercise of those laws and customs.[33]

---

[31]*Mabo [No 2]* (1992) 175 CLR 1, 15 (Mason CJ and McHugh J), 58 (Brennan J), 82, 84-8, 100, 110, 119 (Deane and Gaudron JJ), 178-9 (Toohey J). See also *Tritton* (1994) 34 NSWLR 572, 578, 582-3 (Kirby P), 598 and 602-5 (Priestly JA) (hunting and fishing rights or practices provide evidence of a wider proprietary interest which may be the subject of a native title claim. Such rights provide real evidence of a connection with the land); *Mabo* v *Queensland* [1992] 1 Qd R 78, 84 (Moynihan J); *Pareroultja* (1993) 117 ALR 206, 209-10 (Lockhart J).

[32]This is a significant advance over the view propounded in *Milirrpum* (1971) 17 FLR 141, 270-1 (Blackburn J), that while the Aboriginal people had an elaborate system of law, it did not provide individual members with proprietary interests in land. The necessity of a proprietary interest in land is problematic, as pointed out by Dorsett, above n 10, and is rejected by the High Court in *Mabo [No 2]*. By doing so, one may justifiably conclude that the connection with land may be either physical **or** spiritual. McNeil, *Common Law Aboriginal Title*, above n 11, 195, for instance, calls absurd the rule which requires indigenous people to demonstrate a connection with and use of land that conforms to liberal western philosophical notions, like Locke's, of an appropriate--usually agricultural--connection. Sacred sites can represent one of the most important aspects of an indigenous people's spiritual connection to land. By requiring a physical connection, a legal system would favour proprietary rather than spiritual relationships with land, and by that standard, the sacred sites most important to indigenous peoples would be the last to be accorded the protection of law. Thus, the High Court rightly rejects a physical connection as the only relevant connection to land.

[33]*Mabo [No 2]* (1992) 175 CLR 1, 15 (Mason CJ and McHugh J), 58-60, 70 (Brennan J), 82, 84-94, 100-10, 112-3 and 119 (Deane and Gaudron JJ), 178-9 (Toohey J). According to Deane and Gaudron JJ, occupation or use sufficiently establishes a locally recognised

Obviously the connection to land may be lost. In *Mabo [No 2]*, Brennan J recognised that '...when the tide of history has washed away any real acknowledgment of traditional law and any real observance of traditional customs, the foundation of native title has disappeared....' and may not be revived.[34] How much must the 'tide of history' 'wash away' acknowledgment of traditional laws and the observance of traditional customs before the traditional connection with land disappears? It seems that any subsequent developments or variations in the observance of traditional laws and customs fail to extinguish native title, provided those changes do not diminish or extinguish the relationship between the group and

---

special relationship between a particular community, group or individual and the land in question, which connection can be lost by abandonment or by the extinction of the relevant clan or group. See also *Tritton* (1994) 34 NSWLR 572, 574-5 (Gleeson CJ), 577-9, 582-6 (Kirby P), 597-8 (Priestly JA) (the necessity of proving laws and customs demonstrating the right to fish as a part of those laws and customs in a claim for a native title right to fish); *Derschaw* v *The Queen* (1996) 90 A Crim R 9 ('*Derschaw*'), 15-6 (Franklyn J); *Mabo* v *Queensland* [1992] 1 Qd R 78, 84 (Moynihan J); *Pareroultja* (1993) 117 ALR 206, 209-10 and 213-4 (Lockhart J); *Ward* v *Western Australia* (1995) 40 ALD 250; *Wik* (1996) 187 CLR 1, 91-2 (Brennan CJ).

Justice Toohey, while concurring with the other three members of the majority in *Mabo [No 2]* on the matter of alienability, provided a more precise method of determining the existence of a connection with the land. In order to establish native title, his position requires a presence amounting to occupancy or physical presence and, furthermore, that the use of the land be 'meaningful', which is to be understood from the point of view held by members of the society in question. Nonetheless, although he goes beyond the view held by the other three members of the majority, Toohey J's conception of physical presence may not differ greatly from Brennan J's 'traditional connection' or from Deane and Gaudron JJ's 'occupation or use establishing a special relationship'. He made it clear, though, that physical presence need not amount to the possession required by English law to found occupation, but rather must accord with the demands of the land and the society in question in accordance with the way of life, habits, customs, and usages of Aboriginal people. Thus, '...[i]t is clear...that a nomadic lifestyle is not inconsistent with occupancy'. Nor did he require exclusive occupancy; while his position excludes indiscriminate ranging over the land, that cannot preclude more than one group from utilising the land. By way of example, one group may be entitled to come onto the land for ceremonial purposes while all other rights in the land belong to another group: *Mabo [No 2]* (1992) 175 CLR 1, 178-9 and 188-92 (Toohey J).

[34]*Mabo [No 2]* (1992) 175 CLR 1, 60, and see 58-60 and 63-71 (Brennan J).

its land.[35] In other words, traditions, laws and customs are not 'frozen' in time.[36]

(c). Privileges and Powers Over Natural Resources

In addition to determining the extent to which traditions, laws and customs may evolve, it is also necessary to consider the physical scope of the land over which the common law will recognise a native title. For instance, is it possible that communitarian rights can include rights to mines and minerals, petroleum, timber, onshore and offshore waters, and the rights to hunt, fish or gather on land or water?[37] This section considers the extent to which the Australian common law is willing to recognise a native title which purportedly extends to such resources.

---

[35]From which we must assume, bearing in mind that Deane and Gaudron JJ discuss this under the heading 'The nature, incidents and limitations of the common law native title of Australian Aboriginals' and not under extinguishment, that they mean the loss of a special relationship with the land which might lead to an extinguishment of title and not the extinguishment of the title itself: *Mabo [No 2]* (1992) 175 CLR 1, 110 (Deane and Gaudron JJ), see also 70 (Brennan J), 192 (Toohey J). In *Tritton* (1994) 34 NSWLR 572, 583, Kirby P posited that evidence of a change in the traditions, laws and customs of an Aboriginal group is not of itself fatal to a native title claim. Rather, the native title subsists to the extent that the traditions, laws and customs are currently observed. Substantial change in the traditions, laws and customs, though, may result in the recognition afforded the native title being somewhat less than exclusive use, possession, and occupation.

[36]*Ward* v *Western Australia* (1998) 159 ALR 483, 502 (Lee J); *Yarmirr* v *Northern Territory (Croker Island)* (1998) 156 ALR 370, 405 (Olney J); *Commonwealth* v *Yarmirr* (1999) 168 ALR 426 (affirming Olney J). Very recently, the Federal Court, Full Court, in *Yorta Yorta Aboriginal Community* v *Victoria* [2001] FCA 45, paras 27-86 (Black CJ), paras 110-150 (Branson and Katz JJ), has begun mapping out the meaning of frozen in time as it relates to the maintenance of a connection with land as an element of the observance of traditions, laws and customs.

[37]On the relationship between the Crown and indigenous peoples as concerns resource management, see PG McHugh, 'The Legal and Constitutional Position of the Crown in Resource Management' in Richard Howitt with John Connell & Philip Hirsch, eds, *Resources, Nations and Indigenous Peoples: Case Studies from Australasia, Melanesia and Southeast Asia* (1996) 300-316.

(i). Mines and Minerals, Petroleum and Timber

If the evidence adduced by an Aboriginal people supports it,[38] and provided that it is not extinguished by the relevant natural resources statutes,[39] a claim to the exclusive use and enjoyment of land may include the commercial exploitation of mines and minerals, petroleum and timber,[40] good against all but the Crown.[41] The content of such a native title may even include the right to trade in and receive a portion of the resources.[42]

(ii). Onshore Waters

It seems clear that *Mabo [No 2]* confirmed the right of an Aboriginal people to claim as a part of their native title the right to water flowing over the relevant land and the right to use it for domestic purposes and transportation.[43] And if the relationship between the group and the land is one of exclusive possession, the native title may extend to all uses of water.[44]

---

[38]*Yarmirr* v *Northern Territory (Croker Island)* (1998) 156 ALR 370, 417-8 and 422 (Olney J); *Commonwealth* v *Yarmirr* (1999) 168 ALR 426 (affirming Olney J).

[39]Bartlett, *Native Title in Australia*, above n 19, 170.

[40]*Mabo [No 2]* (1992) 175 CLR 1, 58 (Brennan J), 110 (Deane and Gaudron JJ).

[41]*Ward* v *Western Australia* (1998) 159 ALR 483, 499 (Lee J); Bartlett, *Native Title in Australia*, above n 19, 170. Although, see now *Western Australia* v *Ward* (2000) 170 ALR 159.

[42]*Ward* v *Western Australia* (1998) 159 ALR 483, 499 (Lee J); Bartlett, *Native Title in Australia*, above n 19, 170. Although, see now *Western Australia* v *Ward* (2000) 170 ALR 159.

[43]*Mabo [No 2]* (1992) 175 CLR 1, 54 and 64 (Brennan J), 83 (Deane and Gaudron JJ). See also Bartlett, *Native Title in Australia*, above n 19, 170.

[44]*Ward* v *Western Australia* (1998) 159 ALR 483, 635 (Lee J); Native Title Act 1993 (Cth), s 223, 'native title', includes rights or interests in relation to land or waters possessed under the traditional laws and customs of the Aboriginal people, and s 253, 'waters', may include 'sea, a river, a lake, a tidal inlet, a bay, an estuary, a harbour or subterranean waters'. See also Bartlett, *Native Title in Australia*, above n 19, 171.

(iii) Offshore Waters

While *Mabo [No 2]* dealt with onshore waters, it did not deal with the question whether native title could exist over coastal seas and offshore areas. Nonetheless, offshore waters are as fundamental to Aboriginal peoples' way of life as are onshore waters.[45] A strong argument can be made for the proposition that because it is founded upon a connection with land at the time of the acquisition of sovereignty by the Crown, the principles and rationale of common law native title should also apply to offshore waters.[46]

This argument is problematic for two reasons. First, native title may only be recognisable over areas to which the Crown has asserted legal sovereignty, and it has only done so in relation to waters beyond the mean low water mark and within the present 12 nautical mile limit since 1990.[47] Second, even if the Crown has asserted sovereignty over offshore waters within the 12 nautical mile limit, in *Yarmirr* v *Northern Territory (Croker Island)*,[48] Olney J concluded that native title to offshore waters could not arise at common law because the common law does not extend to such waters.[49]

Notwithstanding these difficulties, Olney J went on to say that if native title was to exist over offshore waters at all, it would have to find its existence in statute. And it is possible, he concluded, that the Native Title Act 1993 (Cth) has the effect of extending native

---

[45]Bartlett, *Native Title in Australia*, above n 19, 172.

[46]Bartlett, *Native Title in Australia*, above n 19, 172-8; Raelene Webb, 'Native Title Offshore: At the Water's Edge or Beyond' [1998] *AMPLA Yearbook* 532.

[47]Under the Seas and Submerged Lands Act 1973 (Cth). See also Peter Butt, *Land Law* (4th ed, 2001), 802.

[48]*Yarmirr* v *Northern Territory (Croker Island)* (1998) 156 ALR 370, 386-9 (Olney J); *Commonwealth* v *Yarmirr* (1999) 168 ALR 426 (affirming Olney J).

[49]*Commonwealth* v *Yarmirr* (1999) 168 ALR 426 (affirming Olney J).

title to offshore waters.[50] But it is clear that the common law cannot recognise native title over offshore waters; any recognition must flow from statute.

(iv). The Right to Hunt, Fish or Gather on Land or Water

Because native title is based upon the traditional connection of an Aboriginal people to land or onshore waters, if the traditions, laws and customs of that people include the right to hunt, fish or gather, their native title may also include those rights.[51] Consider, for example, the development of the right to fish.[52] An examination of the jurisprudence in this area proves

---

[50]*Commonwealth* v *Yarmirr* (1999) 168 ALR 426, 439-45 (Beaumont and von Doussa JJ) upheld Olney J's decision that the conjunction of sub-ss 6 and 223(1) of the Native Title Act 1993 (Cth) was sufficient to extend the application of native to offshore waters. See also Butt, *Land Law* (4th ed, 2001), 802.

Since completion of this thesis, the High Court has delivered its decision in *Commonwealth* v *Yarmirr* [2001] HCA 56 (11 October 2001). The thesis does not, therefore, take account of that decision.

[51]See eg *Tritton* (1994) 34 NSWLR 572 (the right to fish); *Derschaw* (1996) 90 A Crim R 9 (the right to fish); *Yanner* v *Eaton* (1999) 166 ALR 258 (the right to hunt crocodiles); *Yarmirr* v *Northern Territory (Croker Island)* (1998) 156 ALR 370 (the right to free access to the sea and seabed for fishing and hunting purposes); *Ward* v *Western Australia* (1998) 159 ALR 483 (the right to use and enjoy, to control, to trade in, and to receive a portion of 'resources', including game and fish); *Wilkes* v *Johnsen* (1999) 21 WAR 269, 273 (White J), 285 (Wheeler J); *Dillon* v *Davies* (1998) 156 ALR 142, 144-7 (Underwood J). See also Michael Hunt, 'Native title changes don't solve all the problems', *The Australian*, 5 April 1999; Gary Meyers, 'Aboriginal Rights to the 'Profits of the Land': The Inclusion of Traditional Fishing and Hunting Rights in the Content of Native Title' in Richard H Bartlett and Gary D Meyers, eds, *Native Title Legislation in Australia* (1994) 213-30. In the New Zealand context see PG McHugh, 'Maori Fishing Rights and the North American Indian' (1985) 6 *Otago Law Review* 62.

[52]This analysis does not assess the extent to which a free standing right to fish or hunt may exist in the absence of a site-specific native title right to water (submerged land). Australian law itself is unclear about the issue: see Butt, Eagleson and Lane, above n 25, 126-7; *Western Australia* v *Ward* (2000) 170 ALR 159.

McNeil, 'Aboriginal Title and Aboriginal Rights', above n 25, 117, provides an answer drawn from the Canadian jurisprudence. Canadian law begins from the premise that Aboriginal (communitarian) rights, which receive protection from the Canadian Constitution Act 1982, ss 25 and 35(1), contain, as a subset of those rights, native title. This dichotomy makes it possible for free-standing communitarian rights such as hunting and fishing rights to exist independently of any broader native title over given land (or submerged land). Australian law, in the absence of this dichotomy, is unable to allow communitarian rights to

worthwhile because it elucidates the principles which the courts may apply in determining whether privileges and powers over other natural resources can comprise the content of common law native title.

Tritton[53] and *Derschaw*[54]--state appellate decisions of New South Wales and Western Australia respectively--are representative of the current law concerning whether an Aboriginal group might enjoy privileges and powers over fishing (fishing rights or a right to fish) as a part of the content of its native title. In both cases an Aboriginal person was charged with violating fishing regulations, and in both cases the accused raised a defence of a traditional right to fish as a part of the content of a native title.

President Kirby and Priestly JA delivered separate judgments in *Tritton*. The latter, the majority judgment, implicitly held that, by virtue of the Native Title Act 1993 (Cth), fishing rights constitute a part of the content of native title.[55] In his view, a native title

---

fish and hunt other than those that are tied to a broader exclusive possession native title to land.

[53]*Tritton* (1994) 34 NSWLR 572.

[54]*Derschaw* (1996) 90 A Crim R 9.

[55]By virtue of the Native Title Act 1993 (Cth), sub-ss 223(1) and (2). *The Native Title Act Case* (1995) 183 CLR 373, 452 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ), 495 (Dawson J), provides support for the view that the Native Title Act 1993 (Cth), sub-s 223(1), 'native title', represents a codification of the common law. If correct, fishing rights may comprise a component of common law native title.

In *Tritton* (1994) 34 NSWLR 572, 574-5, Chief Justice Gleeson appeared to differ with Priestly JA on the role of the Native Title Act 1993 (Cth), which the latter considered determinative of the content of common law native title, while the former appeared to leave the question for determination on a case by case basis to be controlled by the proof requirements of *Mabo [No 2]*. Nonetheless, Gleeson CJ appears to implicitly accept that fishing rights may form part of the content of common law native title.

By relying upon the Native Title Act 1993 (Cth) to reach this conclusion, Priestly JA, at 600, avoided a definitive statement that fishing rights form a part of common law native title, a statement that Kirby P was willing to make. Rather, Priestly JA held that the Native Title Act 1993 (Cth) put an end to any possible argument about this issue, although he oddly went on to say that that was the case at least so far as concerns claims brought under the 1993

applicant must prove two propositions in order to establish that a fishing right constitutes a part of the content of its native title: first, that the right forms a part of a recognisable system observed by the claimant group which existed before the application of the common law to the land claimed, and, second, that the land is waste and demesne land in regard to which a legislative or executive act has not extinguished native title.[56] Subject to future High Court pronouncements, Priestly JA's view is the law of New South Wales.

President Kirby's judgment in *Tritton*, although not the law of New South Wales, has found acceptance in Western Australia in *Derschaw*.[57] While he agreed that the right to fish could form a part of the content of native title, Kirby P disagreed with Priestly JA concerning the role of the Native Title Act 1993 (Cth). Rather, he found the right to fish squarely within the common law. Because an Aboriginal peoples' connection with claimed land is a question of fact, it followed that, provided a claimant establishes the necessary connection with land, a right to fish based upon traditions, laws and customs constitutes a recognisable form of common law native title.

For Kirby P, just as the common law considers land covered by water capable of

---

Commonwealth legislation. In all other respects, Priestly JA expressly confined his comments to the common law.

[56]*Tritton* (1994) 34 NSWLR 572, 600-5 (Priestly JA).

[57]*Derschaw* (1996) 90 A Crim R 9, 17 (Franklyn J), 32-6 (Wallwork J), 36 (Murray J). The majority in *Derschaw*, in a judgment written by Franklyn J, accepted that a right to fish may comprise a part of the content of common law native title on the basis of Kirby P's judgment in *Tritton*. Justice Wallwork, however, the third member of the panel in *Derschaw*, accepted that the right to fish may comprise a part of the content of native title although he did not elaborate upon the view he took of the nature of such a right nor whether he favoured Priestly JA or Kirby P's view. He is, though, the only judge of the six in New South Wales and Western Australia to consider this issue to find also that the claimants had made out a right to fish.

satisfying its juristic conception of land, so too can the jurisprudence of native title.[58] Provided that the claimed fishing right depends upon native title for the communal use, possession and occupation of submerged lands, there was no bar to its recognition. Indeed, in a very real sense, individual usufructuary hunting and fishing rights or practices provide evidence of the wider communal interest based on a connection with land, which may be the subject of a native title claim.[59]

Whether one accepts Priestly JA or Kirby P's view, the result is the same: as a matter of law, the content of native title may include a right to hunt or fish. *Tritton* and *Derschaw* also demonstrate that a native title claimant must satisfy a very exacting evidentiary burden that a particular native title right to hunt or fish exists as a matter of fact. As such, because any native title and its constituent rights--hunting, fishing, or gathering--derive their content from the traditional laws and customs of the Aboriginal group involved, the evidence adduced by that group bears not only upon the existence of their native title but also upon its content.

III. PROTECTION

While it is necessary, recognition by a dominant legal system is not sufficient for the existence of communitarian property. The dominant system must also provide some trespassory protection for the Aboriginal peoples' traditions, laws and customs, which comprise the content of the communitarian property.

In Australia, *Mabo [No 2]* outlined the limited trespassory protection which the common law might confer upon native title. The High Court held that the common law protects native title through the use of any legal or equitable remedies appropriate to the

---

[58] *Tritton* (1994) 34 NSWLR 572, 577-9, 582-90 and 594 (Kirby P).

[59] *Tritton* (1994) 34 NSWLR 572, 582 (Kirby P).

rights and interests established by the evidence. The nature of such protection flows whether the established rights and interests are proprietary or personal, and whether they are possessed by a community, a group or by an individual.[60] As such, legal or equitable remedies may be sought either on an individual basis or as part of a representative action brought by an individual or a sub-group on behalf of an Aboriginal people having possession or entitled to possession of land over which native title exists.[61]

IV. GEOGRAPHIC SCOPE

The declaratory order issued by the High Court in *Mabo [No 2]* dealt with offshore islands, which, as a matter of law, left unanswered the question whether common law native title might also extend to mainland Australia. This uncertainty was fuelled by Mason CJ and McHugh J's statement that the order did not apply to any land not the subject of the appeal.[62]

Nonetheless, most commentators had little doubt that *Mabo [No 2]* enunciated principles of law applicable to the *whole* of Australia.[63] At the very least, dicta found in the judgments of the *Mabo [No 2]* majority supported the view that the doctrine of native title applied to the whole of Queensland, mainland and offshore, if not to the whole of Australia.[64]

---

[60]*Mabo [No 2]* (1992) 175 CLR 1, 61 (Brennan J). Justices Deane and Gaudron, at 112-3, offer injunctive relief and the constructive trust as just two examples of equitable relief available for the protection of native title.

[61]*Mabo [No 2]* (1992) 175 CLR 1, 61-3 (Brennan J), 86-8 and 112-3 (Deane and Gaudron JJ). See also Bartlett, *Native Title in Australia*, above n 19, 193-4.

[62]*Mabo [No 2]* (1992) 175 CLR 1, 16 (Mason CJ and McHugh J); see also 20-5 and 75-6 (Brennan J), 113-9 (Deane and Gaudron JJ), 179-82, 190-2, 196-9, 205 and 216 (Toohey J).

[63]Bartlett, *The Mabo Decision*, above n 2, x.

[64]*Mabo [No 2]* (1992) 175 CLR 1, 57-8 (Brennan J), 77-112 (Deane and Gaudron JJ), 178-214 (Toohey J). Justice Toohey stated, at 179, that '...no basic distinction need be made, for the purposes of determining what interests exist in ancestral lands of Aboriginal peoples of Australia, between the Meriam people and those who occupied and occupy the Australian

Moreover, Mason CJ himself, in *Coe* v *The Commonwealth*,[65] provided further support for the proposition that the principles of law enunciated in *Mabo [No 2]* applied to the whole of Australia, a statement which has been cited with approval in subsequent cases.[66]

The High Court itself finally put the matter beyond doubt in *The Native Title Act Case*.[67] As such, it can now be taken that, provided the relevant requirements are made out by the claimant Aboriginal people, common law native title may exist anywhere in Australia, offshore and mainland.

---

mainland. The relevant principles are the same.'

[65]*Coe* v *The Commonwealth* (1993) 68 ALJR 110, 115 (Mason CJ).

[66]*North Ganalanja Aboriginal Corporation* v *Queensland* (1996) 185 CLR 595; *Wik* (1996) 187 CLR 1. See also *Tritton* (1994) 34 NSWLR 572, 578-9 (Kirby P); *Re Wadi Wadi People's Native Title Application* (1995) 129 ALR 167.

[67]*The Native Title Act Case* (1995) 183 CLR 373, 417-8 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ), 494 (Dawson J), which was confirmed by *Wik* (1996) 187 CLR 1, 175-6 (Gummow J), applied the *Mabo [No 2]* principles to the entire land mass of Western Australia. *Tritton* (1994) 34 NSWLR 572, 577-9 (Kirby P), 597-8 and 599-600 (Priestly JA) definitively applied *Mabo [No 2]* to the land mass of New South Wales, although the *Mabo [No 2]* and *Native Title Act Case* judgments had probably already effected such an outcome.

PART THREE

THE SOURCE OF THE CROWN'S PRIVILEGES AND POWERS: THE ROYAL PREROGATIVE OVER LAND

I. INTRODUCTION

This Part deals with two instrumental questions that concern not whether the Crown can do all of the things with all of the types of land found on the Crown land continuum--we have seen that it can--but rather, how it does them. First, what is the source of the Crown's quasi-ownership of Crown land? And, second, how does the Crown continue to exercise those privileges and powers in relation to land which it continues to enjoy following a grant, dedication or reservation? The answers to these questions, which lie in the Crown's prerogative over land, are relevant for more than what they can tell us about the source of the Crown's quasi-ownership. Their answers are also the primary means of distinguishing public property from private or communitarian property.

The prerogative over land, either in its unbounded form or, more typically as limited by the legislature through statute, lies at the heart of the Australian State and Territory Crowns' public property in land. And while it is virtually incapable of definition, it is possible to say that the prerogative over land includes a wide range of privileges and powers, of which

in Part Two we have seen only the most prevalent. This Part, rather than attempting an exhaustive definition of the prerogative over land, merely identifies the source of those privileges and powers and how it is that Australian legislatures have limited their exercise through enactments such as the Crown land and natural resources statutes. It examines, in broad form, the quasi-ownership--the public property heart--of Crown land.

Identifying the source of the Crown's privileges and powers inevitably reveals a further layer of schizophrenia in relation to Crown land in Australia. This schizophrenia lies in the fact that the instrumental questions identified above are really matters of constitutional law. While constitutional law is not, of course, the primary focus of this thesis, the fact that the royal prerogative is constitutional in its origins adds what is referred to here as a tug-of-war over the exercise of quasi-ownership privileges and powers between the Crown or executive and the legislative spheres of parliamentary government. As such, this Part is concerned with the prerogative, which lies at the core of executive power in Australia, and it is concerned with distinguishing that source of power from those other powers which the legislature enjoys and which might be used to impinge upon the former.

This tug-of-war or tension between the executive and legislative spheres of government power is a further reason why the public property system comprised by Crown land is of interest to the property theorist; there is evidence here of a further layer of schizophrenia not present in the realm of private property. We have already seen the non-self-seekingness limitation as one point of distinction between public and private property. With private property, an owner is free to act in a self-seeking way, subject only to the relevant property domain which the society in question has erected around the twin pillars of ownership and trespassory rules. But with public property, no actor is free to act in a self-seeking way, because, as we have already seen, there are a number of public policy controls

which constrain the quasi-owner from so doing. This limitation is evident in Crown land, although now we find that there is a further constraint which is engendered in the ongoing tug-of-war between two branches of government regarding the scope and exercise of the quasi-ownership privileges and powers over this type of public property. This tension therefore reveals a complex and dynamic relationship between two branches of government over the exercise of quasi-ownership privileges and powers in relation to Crown land.

H. STRUCTURE OF PART THREE

This Part comprises two chapters. Chapter 10 analyses the source of the Crown's quasi-ownership privileges and powers: the prerogative over land. This power arrived in Australia as a consequence of the doctrine of reception and the English acquisition of sovereignty; it was later transferred to the States and Territories when they acquired responsible government from the Imperial English Parliament.

As will be seen, however, in contemporary Australia the prerogative over land is no longer an unfettered power. The State and Territory parliaments now play a role in the exercise of the quasi-ownership privileges and powers found in the prerogative through the doctrine of abeyance. This power of the legislative branch has resulted in a bounded prerogative over land such that it can no longer be exercised by the executive without strict compliance with relevant legislation enacted by the State and Territory parliaments. This fact provides one of the obviously 'public' aspects of Crown land in Australia.

There are, therefore, two aspects to the schizophrenia which we have identified in relation to Crown land. First, unlike the private property holder, the Crown may not act unless it complies with legislative codes enacted to constrain the exercise of its quasi-ownership privileges and powers over land. It is therefore always necessary to determine, before the Crown may take any action in relation to land, whether relevant legislation has

constrained its otherwise unfettered prerogative. Second, as we have seen, acting in conjunction with abeyance is the non-self-seeking limitation, the hallmark of public property. So even if relevant legislation has not placed into abeyance a privilege or power found in the prerogative, the Crown may not exercise it in a self-seeking way.

Chapter 11 presents a case study of the Crown's prerogative over land. The emergence of common law native title in Australia has produced an addition to, or perhaps more accurately, an expansion of a well-known element of the Crown's prerogative over land; while it has always enjoyed the power to extinguish private property in land, today, as part of its prerogative, the Crown also enjoys the power to extinguish communitarian property in the form of common law native title. This power is one of the key reasons why native title can be plotted along the continuum: while it is communitarian property, its susceptibility to extinguishment means that the Crown retains significant quasi-ownership privileges and powers therein. This analysis further demonstrates the schizophrenia or duality of the native title lands location.

Chapter 10

THE CROWN'S PREROGATIVE OVER LAND

I. INTRODUCTION

In Anglo-Australian constitutional law there are three sources of executive power: powers delegated by statute, the royal prerogative, and common law powers or capacities deriving from the legal personality of the Crown and its ministers.[1] The first two are the most common sources of executive power, and the distinction between them seems to be that the first involves law-making functions instanced by rules, regulations, orders and other forms of subordinate legislation, whereas the second are either political or administrative in nature and range from the determination and implementation of matters of high policy to an extensive array of individual acts and decisions, such as placing government contracts, making grants, loans and compulsory purchase orders, and issuing permits and licences.[2] In this Part, we are concerned only with the second source of executive power, although the other two have an impact on it and will be dealt with to that extent. Before moving on, however, it is important

---

[1] *Halsbury's Laws of England* (4th ed reissue, 1996), Volume 8(2), 'Constitutional Law and Human Rights', para 366.

[2] Kent McNeil, 'Racial Discrimination and Unilateral Extinguishment of Native Title' (1996) 1 *Australian Indigenous Law Reporter* 181, 186. And see *Halsbury's Laws of England*, 'Constitutional Law and Human Rights', above n 1, para 367.

to give some definition to the concept of 'prerogative'.

Prerogative, from the latin *praerogo*,[3] refers to a prior, exclusive, or peculiar right or privilege.[4] Hence, in relation to the Crown, some commentators have described the prerogative, both historically and as a matter of fact, '...as nothing else than the residue of discretionary or arbitrary authority which at any given time is left in the hands of the Crown.'[5] Because the prerogative also includes rights and privileges, however, this view is not strictly accurate, and as such it is perhaps more accurate to say that it is impossible to give a comprehensive catalogue of the prerogative powers.[6] Still, conscious of the fact that the monarch can claim no prerogative powers except those that the common law allows,[7] an

---

[3]Charlton T Lewis, *An Elementary Latin Dictionary* (Impression of 1996), '*praerogativus*', *prae-rogo*, to ask first.

[4]*The Oxford English Dictionary* (2nd ed, 1989), 'prerogative'; *Black's Law Dictionary* (5th ed, 1979), 'prerogative'; *Halsbury's Laws of England*, 'Constitutional Law and Human Rights', above n 1, para 367. And see William Blackstone, *Commentaries on the Laws of England* (1765-1769, University of Chicago edition, 1979), vol 1, 239; William R Anson, *The Law and Custom of the Constitution* (3rd ed, 1907), vol 2, Part 1, 2-6.

[5]AV Dicey, *Introduction to the Study of the Law of the Constitution* (10th ed, 1959), 424.

[6]ECS Wade and AW Bradley, *Constitutional and Administrative Law* (11th ed, 1993), 264.

[7]*Halsbury's Laws of England*, 'Constitutional Law and Human Rights', above n 1, paras 367-8. And see *Proclamations' Case* (1611) 12 Co Rep 74, 75.

The courts take judicial notice of clearly established prerogative rights: *Elderton's Case* (1703) 2 Ld Raym 978, 980 (Holt CJ); *A-G to Prince of Wales* v *Crossman* (1866) LR 1 Exch 381, 386 (Channell B); *BBC* v *Johns (Inspector of Taxes)* [1965] Ch 32, 79 (Diplock LJ).

No prerogative can be recognised which is contrary to any constitutional principle which forms a part of the law of England, especially the four great statutes or charters, being: (i) Magna Carta 1297, 25 Edw 1, cc 1-7, (ii) Petition of Right 1627, 3 Car 1, c 1, (iii) Bill of Rights 1688, 1 Will & Mar, sess 2, c 2, confirmed by Crown and Parliament Recognition Act 1689, 2 Will & Mar, c 1, and (iv) The Act of Settlement 1700, 12 & 13 Will 3, c 2. See *Halsbury's Laws of England*, above n 1, paras 368, n 2 (citing 2 *Coke's Institutes* 36 and 54), 372, nn 1 and 2, and 373-378.

expanded definition might characterise the prerogative as that special pre-eminence which the monarch has over and above all other persons by virtue of the common law,[8] but out of its ordinary course, in right of the regal dignity, and includes all the special dignities, liberties, privileges, powers and royalties allowed by the common law to the Crown of the Commonwealth or a State or Territory which is, in theory, subject to no restriction or interference.[9]

Those prerogatives which are recognised by the common law are enjoyed by the Crown in the same way as any privileges and powers which the common law might confer upon a private person. Indeed, in default of a particular prerogative, the common law will confer such private rights upon the Crown.[10] Pollock and Maitland summarise the notion that the prerogative of the Crown gives it the same powers as those enjoyed by private persons:

> [T]he rights of the king are conceived as differing from the rights of other men rather in degree than in kind. At the beginning of Edward I's reign this is expressed by lawyers in their common saying, 'The King is prerogative'. As yet the term *prerogative* is hardly used except in this adjectival manner. It suggests to us that the king has the rights which are given to others by the ordinary law, but that we are likely to find that each particular right is intensified when it is the king's; the usual definition

---

[8] *Halsbury's Laws of England*, 'Constitutional Law and Human Rights', above n 1, para 368.

[9] *The Oxford English Dictionary* (2nd ed, 1989), 'prerogative'; *Halsbury's Laws of England*, 'Constitutional Law and Human Rights', above n 1, paras 367-8.

The royal prerogative can therefore be seen as comprising either (i) the unique powers, privileges, rights and immunities which the Crown (or Sovereign) enjoyed at common law separate and distinct from ordinary subjects, or (ii) the residue of legal rights and discretionary powers vested in the Crown which have not been transformed into statute law, the exceptions from common law rules rather than as substantive legal powers and privileges of the Crown. The differing theoretical approaches, the former best exemplified by Blackstone, above n 4, vol 1, ch 7, and the latter by Dicey, above n 5, 424-7, do not appear to have any substantive consequences at law. See Peter W Noonan, *The Crown and Constitutional Law in Canada* (1998), 75-6, and George Winterton, *Parliament, the Executive and the Governor-General: A Constitutional Analysis* (1983), 111-2, and the authorities he cites.

[10] *Halsbury's Laws of England* (4th ed reissue, 1998), Volume 12(1), 'Crown Property', para 202.

> of it is exceeded, 'for the king is prerogative.'...If the whole law were written down, we should not be sent to one great chapter of it to learn the law of the kingship; rather we should see at the end of every proposition of private law or procedural law some note to the effect that this proposition must be modified before it is applied to the king's case. 'Prerogativity' is exceptionality.[11]

But it is clear that whatever powers do fall within the royal prerogative, they are not exercised by the person of the Crown, the Queen or the King. Rather, with very few exceptions, they are exercised by servants, usually a Minister of the Crown. Even where the monarch acts in person, it is normally in accordance with the advice given by Ministers.[12]

Having considered the general nature of the prerogative and the person or persons authorised to exercise it, for present purposes we need only focus on one aspect of it. HV Evatt divided the prerogative into three categories: (i) executive prerogatives, (ii) immunities and preferences, and (iii) the proprietary prerogatives, such as the entitlement to the royal metals, royal fish, treasure trove, escheat, bona vacantia, ownership of the foreshore and of the seabed and subsoil, and perhaps even of the sea, within territorial limits, and of the land in newly acquired territories. Thus, the royal prerogative was and is the power under which the Crown could make grants of land to private parties.[13] We are here concerned with Evatt's third category, the proprietary prerogatives, and of that, we are only concerned with that element which permits the Crown to deal with or dispose of land. We can call this 'the

---

[11]Frederick Pollock & FW Maitland, *The History of English Law before the time of Edward I* (2nd ed 1898, SFC Milsom 1968), vol 1, 512.

[12]*Halsbury's Laws of England*, 'Constitutional Law and Human Rights', above n 1, para 367, n 4. And see Wade and Bradley, above n 5, 244-5; Stanley de Smith and Rodney Brazier, *Constitutional and Administrative Law* (7th ed, 1994), 139-42.

[13]HV Evatt, *Certain Aspects of the Royal Prerogative* (unpublished LLD thesis, University of Sydney, 1924), 39-41 and 72-3, cited in Winterton, above n 9, 48. Evatt's view has been judicially endorsed: *Federal Commissioner of Taxation* v *Official Liquidator of EO Farley Ltd* (1940) 63 CLR 278, 320-1 (Evatt J); *Attorney-General for New South Wales* v *Butterworth & Co (Australia) Ltd* (1938) 38 SR (NSW) 195, 246-7 (Long Innes CJ in Eq).

prerogative over public property in land' or simply 'the prerogative over land'.

II. THE PREROGATIVE OVER LAND

A. England

Because the common law rules of real property are clearly defined by other commentators,[14] and because it has already been demonstrated in Chapter 4 that public property is a synthesis of those rules and aspects of the social-political function attached to a particular governmental activity, we are here concerned only with those special rules of the royal prerogative which add to the general common law of real property. The origins of the prerogative over land derive from the power of the government which once belonged to the monarch. This power is of ancient origin, traceable to the earliest establishment of feudalism in England by the Norman kings, when they took over the English lands of the Anglo-Saxon rulers. Following the Norman conquest in 1066, it became established that all royal lands were of the same nature and at the disposal of the monarch. These royal lands formed part of the revenues of the Crown out of which the monarch was expected to carry on the normal administration of the country.[15] English constitutional law and the law of real property thus intersected, and intersect, in the prerogative power over land.

The sources of these revenues came to be divided into the 'ordinary revenues' and the 'extraordinary revenues'.[16] In relation to property in land, only the former class is relevant, in which one finds, first, the seigniorial revenues, mainly the feudal incidents of tenure, such as escheat and forfeiture, and, second, the rents and profits derived from the royal lands

---

[14]See Chapter 5, Section II.

[15]*Halsbury's Laws of England*, 'Crown Property', above n 10, para 202-3.

[16]Joseph D Chitty, *A Treatise on the Law of the Prerogatives of the Crown and the Relative Duties and Rights of the Subject* (1820), 200.

themselves.[17] While the royal lands could have been managed in hand, they were more often leased at rents, providing a regular and predictable source of revenue, although, when larger sums of money were needed, they were sold.[18] As such, these prerogative powers permitted the Crown to deal with land either in the same way that the common law allows a private person to do so or according to the special rules deriving from the power of the monarch. The next section briefly reviews how the prerogative over land was transplanted to Australia and how it has subsequently been used there.

B. Australia

There are two important aspects to the role of the prerogative over land in Australia: first, its transplantation by virtue of the acquisition of sovereignty over New South Wales, and, second, its subsequent statutory conditioning by the States and Territories.

1. Acquisition of Sovereignty

As we have seen in Chapter 5, the acquisition of sovereignty over New South Wales carried as an important consequence the reception of English law. This meant that the prerogative over land, the intersection of constitutional and real property law, arrived in Australia along with the English. As Stephen CJ noted, 'the title to land in [the colony of New South Wales] is in the Crown, equally on constitutional principles as by the adoption of feudal fiction'.[19] The prerogative dictated what the Crown might do with the newly acquired territory.

Because it was treated as a settled colony, it was assumed that, constitutionally, from

---

[17]Blackstone, above n 4, vol 1, ch 8.

[18]*Halsbury's Laws of England*, 'Crown Property', above n 10, para 203-5.

[19]*A-G* v *Brown* (1847) 1 Legge 312, 324 (Stephen CJ). See also Thomas Penberthy Fry, *Freehold and Leasehold Tenancies of Queensland Land* (1946), 2-3.

the moment that the English acquired sovereignty on 7 February 1788, the Crown had the prerogative over land pursuant to its ownership thereof.[20] In order to exercise the prerogative, every colonial Governor held a commission from the Sovereign which authorised, in the name and on behalf of the Crown, the conveyance of waste and demesne land to those who obtained grants under the rules in force at any particular time.[21] While this might have permitted the Crown, through its colonial Governors, to distribute land so as to shape and encourage the social and economic development of the colony, in the early days, the unbounded prerogative was not exercised in so focused a way. Indeed, the use of the prerogative over land in the early years of colonial administration fails to reveal a clear policy aimed at achieving long-term outcomes. No policy existed at the first settlement for the way in which land would be distributed and how it would be used.[22]

Early settlers' desire to expand small-scale farming efforts sometimes resulted in the use of the prerogative to shape social and economic objectives; it was not until the introduction of the first merino sheep in 1795, however, and the advent of the new form of land use and the vast economy brought on their backs, that the prerogative over land was finally used to shape a land-distribution policy.[23] It was during the period between 1800-1855

---

[20]Andrew G Lang, *Crown Land in New South Wales: The principles and practice relating to the disposal of and dealings with Crown land pursuant to the Crown Lands Consolidation Act, 1913; Western Lands Act, 1968; Returned Soldiers Settlement Act, 1916; War Service Land Settlement Act, 1914; Closer Settlement Acts & related legislation* (1973), 15. See *A-G* v *Brown* (1847) 1 Legge 312; *Commonwealth* v *NSW* (1923) 33 CLR 1, 19 (Knox CJ and Starke J).

[21]CD Field, *Landholding and the Relation of Landlord and Tenant in Various Countries* (1885), 382.

[22]Stephen H Roberts, *History of Australian Land Settlement 1788-1920* (1968), 3-7. See also Lang, above n 20, 1.

[23]Lang, above n 20, 2.

that the prerogative came to be exercised by the Governor according to principles established by legislatures, first the Imperial (English) Parliament and later the colonial legislative councils.[24] As each Colony gained independence, politically and legislatively, from England, it inherited the prerogative over land,[25] which, except to the extent that the Constitution of Australia transferred any aspects of that power to the Commonwealth,[26] remains vested in the States and Territories today.[27] And while the underlying assumption of absolute ownership would ultimately be swept aside by *Mabo [No 2]*, the prerogative would not.

2. Acquisition of Responsible Government

The Crown's naked or unbounded prerogative over land as a consequence of the acquisition of sovereignty did not last long in colonial Australia. It was difficult for the

---

[24]Act of 1833 (NSW), 4 Wm IV, No 10; Sale of Waste Lands Act 1842 (Eng), 5 & 6 Vict, c 36; Sale of Waste Lands Act 1846 (Eng), 9 & 10, Vict c 104; Crown Lands Alienation Act 1861 (NSW). See also Crown Lands Occupation Act 1861 (NSW); Crown Lands Act 1884 (NSW); Crown Lands Act 1889 (NSW); Crown Lands Act 1894 (NSW). And see *Government Gazette* (NSW), Order in Council, 24 December 1824, and *Government Gazette* (NSW), Order in Council, 22 May 1839 cited in Lang, above n 20, 2-4; AC Millard and GW Millard, *The Law of Real Property in New South Wales* (2nd ed, 1913), 95.

[25]Winterton, above n 9, 49.

[26]For instance, the High Court has held that a consequence of the creation of the Commonwealth pursuant to the Commonwealth of Australia Constitution Act, and in particular sub-ss 51 (xxix) and (xxxix), was to vest in the Commonwealth any proprietary rights and legislative power which the colonies might have had in or in relation to the territorial sea, seabed and airspace and continental shelf and incline. It held that the Constitution had intended that the proprietary rights and legislative powers in relation to these matters of international concern would coalesce and unite in the nation: *New South Wales* v *Commonwealth* (1975) 135 CLR 337, 373-5 (Barwick CJ), 382 (McTiernan J), 407-8 (Gibbs J), 443-4 (Stephen J), 469-72 (Mason J), 505-6 (Murphy J); *Barton* v *Commonwealth* (1974) 131 CLR 477, 498 (Mason J). See also Winterton, above n 9, 40-1. However, the Commonwealth re-vested those powers in the States and the Northern Territory pursuant to the Coastal Waters (State Powers) Act 1980 (Cth), Coastal Waters (Northern Territory) Act 1980 (Cth), and the Coastal Waters (State Title) Act 1980 (Cth).

[27]*Federal Commissioner of Taxation* v *Official Liquidator of EO Farley Ltd* (1940) 63 CLR 278, 322 (Evatt J). See also Winterton, above n 9, 49.

Crown, especially at the great distance between London and Sydney, to control land-distribution policy and its concomitant problems, particularly the squattocracy. As such, over time, the control of these matters was gradually given over to the Australian colonies. The acquisition of responsible government in 1855 marked the culmination of this transfer of control and represents perhaps the most significant moment in the process by which the prerogative over land was constrained. This acted not only as the vehicle through which the Australian colonies gained executive and legislative independence from England, but it also marked the demise of the unbounded prerogative over land.

While the acquisition of responsible government was a pivotal event in the constitutional development of the colony of New South Wales, it was not the first such transfer of power. The English Parliament had already begun to devolve power upon the colony of New South Wales well before 1855. For example, in 1823 a Legislative Council of New South Wales was established with eight members nominated by the Imperial Crown.[28] This body could deal only with legislation submitted to it by the Governor, who might in any event circumvent it by referring bills to the Imperial Parliament for approval. This latter power was removed in 1828,[29] and further democratic reforms came to the Council in 1842, when the colony was permitted to elect 24 of 36 members,[30] and in 1852, when full control of land policy was handed over to all Colonial legislatures in Australia.[31]

But the real turning point remains 1855 and the acquisition of responsible

---

[28]Charter of Justice Act 1823 (Eng), 4 Geo IV, c 96.

[29]Australian Courts Act 1828 (Eng), 9 Geo IV, c 83.

[30]Australian Constitution Act 1842 (Eng), 5 & 6 Vict, c 76.

[31]Australian Constitutions Act 1850 (Eng), 13 & 14 Vict, c 59. On the government of the Australian Colonies until 1851 see Edward Jenks, *A History of the Australasian Colonies (From Their Foundation to the Year 1911)* (1912), 139-65.

government.[32] We are concerned here with the impact of responsible government on the control of waste and demesne lands within the colony. The New South Wales Constitution Act 1855 (Eng),[33] was not a transfer of the quasi-ownership of land--that remained in the indivisible Crown--rather, it was a transfer of political power, which, as a concomitant of that transfer, passed the control and management of the waste and demesne lands in the colony to the colonial legislature and, subject to the Constitution, to the executive government.[34]

The Constitution Act 1855 (Eng) thus achieved three important objectives in relation to the waste and demesne lands: (i) it empowered the newly established Legislature of New South Wales to make laws for the peace, welfare, and good government of the Colony,[35] (ii) it vested the Legislature with 'the entire management and control of the Waste Lands belonging to the Crown in the said Colony and also the appropriation of the gross proceeds

---

[32]New South Wales Constitution Act 1855 (Eng), 18 & 19 Vict, c 54, s 2.

The process by which responsible government was obtained in the other Colonies of Australia was similar. In Queensland, for instance, responsible government was achieved through that obtained by New South Wales in 1855, although it was not until 1867 that its own legislature was vested with control over land policy. The Constitution Act 1867 (Qld), sub-s 40(1), vested the management and control of the Crown's waste lands and revenue from their sale in the Queensland legislature. Section 30 provided that it was lawful for the legislature to make laws regulating the sale, letting, disposal and occupation of the waste lands of the Crown: Winterton, above n 9, 74, 268 and nn 275-6 and the citations found there; Alex C Castles, *An Australian Legal History* (1982), 218-28; Jenks, above n 31, 228-51.

[33]New South Wales Constitution Act 1855 (Eng), 18 & 19 Vict, c 54.

[34]Prior to 1855, waste and demesne land could be alienated in one of four ways: (i) grant of letters patent under the Great Seal of the Colony; (ii) pursuant to Imperial legislation; (iii) by instructions from the Crown to its Governor; or (iv) pursuant to Colonial legislation approved by or enacted by authority of Imperial legislation: see eg Sale of Waste Lands Act 1842 (Eng), 5 & 6 Vict, c 36; Sale of Waste Lands Act 1846 (Eng), 9 & 10 Vict, c 104; *R* v *Steel* (1834) 1 Legge 65; Lang, above n 20, 15.

[35]New South Wales Constitution Act 1855 (Eng), 18 & 19 Vict, c 54, s 1. And see Lang, above n 20, 7-8; Australian Constitutions Act 1850 (Eng), 13 & 14 Vict, c 59.

of the sales of any such lands....',[36] and (iii) authorised the Legislature to make laws for the sale, letting, disposal and occupation of waste lands.[37] Because quasi-ownership of land remained in the indivisible Crown, the New South Wales Constitution Act 1855 (Eng) simply transferred the exercise of the prerogative from the Imperial to the Colonial Crown. More significantly, though, the legislation had the effect of bringing the exercise of the prerogative over land under the control of the colonial Legislature.[38] Where once it was naked, it was about to be clothed.

The acquisition of responsible government set the stage for the tension--the schizophrenia--which continues to play itself out between the legislative and the executive branches of government in the Australian States and Territories. The New South Wales Legislature soon exercised its new power to control the distribution of land, and between 1855 and 1989, it and later the Parliament of New South Wales continually chipped away, through successive legislative schemes, at the executive's unfettered prerogative power over land.[39] These schemes did not expand the prerogative over land, but rather, limited it; where

---

[36]New South Wales Constitution Act 1855 (Eng), 18 & 19 Vict, c 54, s 2. See also Lang, above n 20, 7-8; *A-G* v *Brown* (1847) 1 Legge 312; *A-G* v *Robinson* (1864) 3 SCR (NSW) (L) 23; *Williams* v *A-G NSW* (1913) 16 CLR 404, 423-30 (Barton ACJ), 436-56 (Isaacs J).

[37]New South Wales Constitution Act 1855 (Eng), 18 & 19 Vict, c 54, s 43. In Queensland, the Constitution Act 1867 (Qld), sub-ss 30 and 40(1), had the same effect. See also Carmel MacDonald, Les McCrimmon and Anne Wallace, *Real Property Law in Queensland* (1998), 16-7.

[38]*Williams* v *A-G NSW* (1913) 16 CLR 404, 428 (Barton ACJ), 456 (Isaacs J). The Privy Council upheld the High Court on other grounds: *Williams* v *A-G NSW* [1915] AC 573, 582 (PC).

[39]The main enactments were: Crown Lands Alienation Act 1861 (NSW); Crown Lands Occupation Act 1861 (NSW), as amended by Crown Lands Acts Amendment Act 1875 (NSW); Crown Lands Act 1884 (NSW); Western Lands Act 1901 (NSW); Crown Lands Consolidation Act 1913 (NSW); Crown Land Act 1989 (NSW). See also Lang, above n 20, 10-2.

once the Crown had an unfettered power, under the legislative schemes it was restricted to effecting only those sales, leases, dedications, reservations or dealings with land that were authorised by and pursuant to the provisions of the Crown land statutes.[40] The Legislature therefore gradually constrained the Crown's prerogative over land,[41] with the exception of its rights in respect of land reverting to it by way of escheat or forfeiture.[42] In *Walsh* v *Minister of Lands*, Windeyer J concluded that the object of the Crown land legislation from 1861 onwards was

> to control the Crown prerogative of disposing of the waste lands of the Colony [of New South Wales, which subsequently became the States of New South Wales, Victoria, Queensland, South Australia, and the Northern Territory] at will and to provide the subjects of the Crown with a statutory right, upon the performance of conditions, to have a grant of land from the Crown.[43]

How could the Legislature constrain the prerogative over land? How can the States and Territories continue to do so? Through a well-developed constitutional doctrine known as abeyance. This doctrine lies at the heart of the tension which exists between the State or Territory executive and legislative branches of government in relation to the exercise of the public property rights which the Crown enjoys over Australian land. The next two sections consider, in turn, the operation of this important doctrine, and the way in which it has affected the prerogative power over land in Australia.

---

[40]Lang, above n 20, 48, discussing the Crown Lands Consolidation Act 1913 (NSW).

[41]*Attorney-General* v *Cochrane* (1970) 91 WN (NSW) 861, 865 (Jacobs JA), referring to the Crown Lands Consolidation Act 1913 (NSW). See also Lang, above n 20, 48.

[42]Crown Lands Consolidation Act 1913 (NSW), s 4. And see Lang, above n 20, 48.

[43]*Walsh* v *Minister for Lands* (1960) 103 CLR 240, 254 (Windeyer J). See also Lang, above n 20, 15.

III. THE DOCTRINE OF ABEYANCE: TUG-OF-WAR BETWEEN THE EXECUTIVE AND THE LEGISLATURE

A. How it Works

While the acquisition of responsible government in Australia set the stage for tension between them, the doctrine of abeyance constitutes the weapon which the State and Territory parliaments used and use in their onslaught against the executive's power to control land through the exercise of the prerogative. This doctrine has a very long lineage, reaching far into the history of the English common law.[44] How does it work?

Just as it can with other common law powers enjoyed by the Crown, the legislative branch of government in a Westminster system can enact legislation which manifests an unequivocal intention, either expressly or by necessary implication, to displace or regulate the prerogative.[45] Thus, abeyance permits the regulation of a prerogative right without expressly

---

[44]As to its lineage in England see *Convocations' Case* (1611) 12 Co Rep 72 and Prerogativa Regis, 17 Edw 2, cc 13 and 17, which deals with wreck of the sea, royal fish, and the construction of royal grants; *Woolley* v *A-G Victoria* (1877) 2 App Cas 163; *Thomas* v *Pritchard* [1903] 1 KB 209; *BBC* v *Johns (Inspector of Taxes)* [1965] Ch 32, 59-60 (Willmer LJ); *The Odessa* [1916] 1 AC 145; *A-G* v *DeKeyser's Royal Hotel* [1920] AC 508; *Food Controller* v *Cork* [1923] AC 647; *Jamieson* v *Downie* [1923] AC 691; *Province of Bombay* v *Municipal Corporation of Bombay* [1947] AC 58; *A* v *Liverpool City Council* [1981] 2 All ER 385; *R* v *Secretary of State for the Home Department, ex parte Fire Brigades Union* [1995] 1 All ER 888.

As to Australia see *South Australia* v *Victoria* (1911) 12 CLR 667; *Griffin* v *South Australia* (1924) 35 CLR 200; *R* v *Bradley & Lee* (1935) 54 CLR 12; *A-G NSW* v *Butterworth & Co (Australia) Ltd* (1938) 38 SR (NSW) 195; *In re Richard Foreman & Sons Pty Ltd, Uther* v *Federal Commissioner of Taxation* (1946-47) 74 CLR 508; *Commonwealth* v *Cigmatic Pty Ltd (In Liquidation)* (1962) 108 CLR 372; *Barton* v *Commonwealth* (1974) 131 CLR 477; *Johnson* v *Kent* (1975) 132 CLR 164, 170 (Barwick CJ).

But the Crown is not bound by custom: *Anon* (1457) Jenk 83; *Westover* v *Perkins* (1859) 2 E & E 57; *A-G Ireland* v *Londonderry Bridge Comrs* [1903] 1 IR 389.

And see Peter W Noonan, *The Crown and Constitutional Law in Canada* (1998), 76-7; Winterton, above n 9, 112-5.

[45]*Commonwealth* v *Hazeldell Ltd* (1918) 25 CLR 552, 563 (Griffith CJ and Rich J); *Colonial Sugar Refining Co* v *Melbourne Harbor Trust Commissioners* (1927) 38 CLR 547, 559 (Lord Warrington of Clyffe); *A-G* v *Horner* (1884) 14 QBD 245, 256-7 (Brett MR);

abolishing it.[46] Where matters which are otherwise within the Crown's prerogative are contained in legislation, therefore, the former merges in and is subordinated to the latter.[47] In Australia, the first instance of abeyance occurred in the New South Wales Constitution Act 1855 (Eng), which itself made possible future abeyance by the colonial legislature and later the State Parliament. But how does one determine the extent of abeyance?

B. Covering the Field

The extent to which abeyance subordinates the prerogative involves determining whether legislation deals with the same subject matter as a prerogative right and, if so, whether it also evinces an intention to remove all or some of the scope for its unfettered exercise. Such an intention is known as 'covering the field', which can occur to a greater or lesser extent. The judicial branch has the jurisdiction to inquire not only into the existence or extent of any alleged prerogative right but also the extent to which legislation has covered the field in relation thereto.[48] This is no easy task and any conclusion depends upon the subject matter, the terms of the legislation, and the relevant prerogative right.[49]

London and North Western Railway Co v *Evans* [1893] 1 Ch 16, 28 (Bowen LJ); *A-G* v *De Keyser's Royal Hotel* [1920] AC 508, 542 (Lord Atkinson), 576 and 579 (Lord Parmoor). And see McNeil, 'Racial Discrimination and Unilateral Extinguishment of Native Title', above n 2, 183-4.

[46]*Halsbury's Laws of England*, 'Constitutional Law and Human Rights', above n 1, para 369, nn 7-8. See also *A-G* v *De Keyser's Royal Hotel* [1920] AC 508; *Re Azoff-Don Commercial Bank* [1954] Ch 315; *Re Mitchell, Hatton* v *Jones* [1954] Ch 525; *Laker Airways Ltd* v *Department of Trade* [1977] QB 643; *Sabally and N'Jie* v *A-G* [1965] 1 QB 273; *Book voor Handel en Scheepvart NV* v *Administrator of Hungarian Property* [1954] AC 584.

[47]*Commonwealth* v *NSW* (1923) 33 CLR 1, 38 (Isaacs J).

[48]*Halsbury's Laws of England*, 'Constitutional Law and Human Rights', above n 1, para 368. See *Case of Monopolies* (1602) 11 Co Rep 84b; *R* v *Secretary of State for the Home Department, Ex parte Northumbria Police Authority* [1989] QB 26.

[49]FW Maitland, *The Constitutional History of England* (1908), 418-21; Winterton, above n 9, 113.

On the one hand, courts typically require strong evidence of Parliamentary intention to displace a prerogative right when it is a significant power which has traditionally been the preserve of the executive, such as foreign affairs or the promotion of important public objectives, such as bringing criminals to justice. On the other hand, when the alleged abeyance affects civil rights and liberties, the courts will not require such strong evidence of the intention to displace, because the advancement of civil liberty has been accompanied and indeed promoted by the progressive replacement of prerogative powers by statutory powers.[50]

Once it is decided that a prerogative right has been put into abeyance, or displaced, by a legislative scheme, the Crown may only exercise the right in strict compliance with that scheme.

C. Strict Compliance With the Legislative Scheme

If Parliament, by covering the field, has put into abeyance a prerogative power and replaced it with similar statutory powers or a statutory code for accomplishing the relevant objective formerly covered by the prerogative, the question arises as to how that prerogative may be exercised, if at all, in the future. It is clear that the legislation supersedes the power and thereafter the executive may not simply employ the prerogative but must exercise the powers as conferred by the code.[51] Thus, while the prerogative still exists, its exercise requires strict compliance--legislative authorisation--with the relevant statutory code established by Parliament.[52] These principles apply to any legislative scheme which covers the field in relation to a prerogative right. The next section applies these principles to the Crown

---

[50]Winterton, above n 9, 113-5.

[51]*A-G* v *De Keyser's Royal Hotel* [1920] AC 508.

[52]*Davies* v *Littlejohn* (1924) 24 CLR 174, 183 (Knox CJ), 187-8 (Isaacs J); *De Britt* v *Carr* (1911) 13 CLR 114, 122 (Griffith CJ); *O'Keefe* v *Williams* (1910) 11 CLR 171, 190 (Griffith CJ). See also Lang above n 20, 16-7.

land statutes, a representative example of the statutory codes considered in Part Two.

IV. THE CONSEQUENCES OF ABEYANCE FOR THE PREROGATIVE OVER LAND IN AUSTRALIA: THE AUSTRALIAN CROWN LAND STATUTES

A. Introduction

This section deals with four matters specific to the prerogative over waste and demesne lands as affected by the State and Territory Crown land statutes: (i) the ongoing tug-of-war between the legislative and executive branches evident in those legislative schemes, (ii) the official or authority empowered to exercise the prerogative, (iii) the principle of strict compliance with the legislative scheme as it operates pursuant to the Crown land statutes, and (iv) the typical constraints imposed upon the prerogative by the legislative schemes. While these matters concern only the Crown land statutes, they apply to any legislation which affects the prerogative over land, such as the natural resources statutes.

B. An Ongoing Tug-of-War Between the Executive and the Legislative Branches

The tug-of-war between the State and Territory legislative and executive branches has direct implications for the characterisation of Crown Land--here the waste and demesne lands--as public property. As we have seen in Chapter 4, the primary method of distinguishing public property from private property is the lack of unfettered self-seekingness in the way in which quasi-ownership privileges and powers may be exercised.

When applied to the prerogative over land, the doctrine of abeyance acts as one of the primary means of limiting self-seekingness in the exercise of the Crown's quasi-ownership privileges and powers over Australian land. The abeyance effected by the Crown land statutes results in the inability of the Crown to deal with the waste and demesne lands in the same way that a private property-holder might. To the extent that the legislation circumscribes the power of the Crown to deal with or dispose of waste and demesne lands, it removes the

quality of self-seekingness normally associated with the exercise of ownership privileges and powers. Rather, subject only to those cases where an incident of tenure, such as escheat or forfeiture, continues to operate to the benefit of the Crown,[53] the legislation allows it to deal with such lands only if done so in strict compliance with its provisions.[54]

Thus, the tug-of-war between the legislative and executive branches over the prerogative continues to rage. This is no small matter; since the acquisition of responsible government 146 years ago, every State and Territory has enacted legislation which displaces or imposes conditions upon the exercise of the Crown's prerogative over waste and demesne lands. The contemporary incarnations of these enactments, the State and Territory Crown land statutes, constitute codes for the purpose of delimiting the quasi-ownership privileges and powers which the Crown enjoys over the waste and demesne lands, including, most significantly, the various tenures which the Crown may grant to private parties.[55]

Perhaps more significantly, the Crown land statutes preclude the personal exercise by the Monarch of the quasi-ownership privileges and powers over land. Rather, the legislation empowers an official or authority to act on the Crown's behalf. The official is usually the Minister responsible for the operation of the Crown land statute.

---

[53]*Attorney-General* v *Cochrane* (1970) 91 WN (NSW) 861, 865 (Jacobs JA).

[54]For a history of the legislative principle that the Crown may only deal with its lands pursuant to legislative authority see Lang, above n 20, 1-14; Fry, *Freehold and Leasehold Tenancies of Queensland Land*, above n 19; Thomas Penberthy Fry, 'Land Tenures in Australian Law' (1947) 3 *Res Judicatae* 158, 158-60.

[55]Lang, above n 20, 75; *Davies* v *Littlejohn* (1924) 34 CLR 174, 187 (Isaacs J), 194 (Higgins J).

The legislation in each State and Territory is: Land Act 1994 (Qld); Crown Lands Act 1989 (NSW); Western Lands Act 1901 (NSW); Crown Lands Act (NT); Land Administration Act 1997 (WA); Land Act 1958 (Vic); Crown Lands Act 1976 (Tas); Crown Lands Act 1929 (SA); Land (Planning and Environment) Act 1991 (ACT).

C. The Responsible Minister

The principle of responsible government in Australia dictates that all prerogative powers, including those displaced and replaced by a statutory code, are exercised through advisors, the relevant body of which is the Minister and the Ministry responsible (those officials--civil servants--who carry out the Minister's functions[56]) for the relevant code.[57] The Crown (as a corporation sole and not in the person of the Sovereign[58]) and its representatives (the Governor-General or Lieutenants-Governor) can act only by and with the advice of the Crown's constitutional advisers (the executive government as represented by the relevant Ministry) in almost all matters relating to prerogative powers.[59]

In the case of the waste and demesne lands, each State and Territory Crown land statute displaces the prerogative power over land and confers upon the responsible Minister, and not the Crown personally, the power to deal with or dispose of lands subject to the prescribed statutory code.[60] The principle of responsible government and the abeyance and

---

[56]Noonan, above n 44, 69.

[57]Winterton, above n 9, 14-7; Noonan, above n 44, 152; *O'Keefe* v *Williams* (1907) 5 CLR 217, 230-1 (Isaacs J). The Privy Council endorsed the High Court's decision in *O'Keefe* v *Williams* [1910] AC 186. See also *Dumaresq* v *Robertson (No 3)* (1860) 2 Legge 1291; *Dumaresq* v *Robertson (No 4)* (1861) 2 Legge 1387, which confirmed the power of the Colonial Governor to act on behalf of the Sovereign.

[58]Noonan, above n 44, 18-21; Ernst H Kantorowicz, *The King's Two Bodies: A Study in Mediaeval Political Theology* (1957), 3-6, 379, 383-4, 394, 405, 446-50 and 505.

[59]Noonan, above n 44, 69 and 77.

[60]The leading statement for this proposition is found in *Davies* v *Littlejohn* (1923) 34 CLR 174, 183 (Knox CJ). See also *Australian Alliance Assurance Co Ltd* v *Goodwin* [1916] St R Qd 225, 253-4 (Lukin J); *Re Kellet* (1896) 7 QLJ 10; *Blackburn* v *Flavelle* (1881) 6 AC 628; *Stewart* v *Williams* (1914) 18 CLR 381; *Williams* v *A-G NSW* (1913) 16 CLR 404; *O'Keefe* v *Williams* (1907) 5 CLR 217, 220 (Griffith CJ); *O'Keefe* v *Williams* (1910) 11 CLR 171, 190 (Griffith CJ); *De Britt* v *Carr* (1911) 13 CLR 114, 122 (Griffith CJ); *Walsh* v *Minister for Lands (NSW)* (1960) 103 CLR 240; *New South Wales Aboriginal Land Council* v *Minister for Natural Resources* (1986) 59 LGRA 318, 326-7 (Stein J); *Minister for Natural*

replacement of the prerogative over land with a statutory code therefore renders void and ineffective any attempt by the Crown personally or through its representatives to deal with or dispose of waste and demesne lands in the absence of Ministerial action pursuant to the code.[61] Does this mean that, provided it acts in accordance with the code, and subject to the non-self-seekingness limitation, the Crown, acting through the responsible Minister, has the same privileges and powers in relation to waste and demesne lands as an owner holding private property?

The High Court considered this question in *O'Keefe* v *Williams*,[62] a case involving an occupation licensee who failed to pay required licence fees. The High Court held to be valid an agreement reached between the Minister and a licensee that in consideration of the latter paying the outstanding fees, the former would withdraw a notification that the licence had not been renewed. The Court reasoned that the Crown, acting through the responsible Minister, could make an agreement with a licensee as a compromise of a bona fide dispute.

Justice Isaacs, who wrote for the majority, found that as a consequence of the power conferred by the Crown land statutes upon the Crown, acting through the responsible Minister, to dispose of its interest in waste and demesne lands, the agreement was not ultra vires or illegal. In such circumstances, he held, provided that there is compliance with the conditions imposed by the Crown land statutes, the Minister must have powers at least as

---

Resources v *New South Wales Aboriginal Land Council* (1987) 9 NSWLR 154 (reversing the decision of the Land and Environment Court on other grounds); *Wik Peoples* v *Queensland* (1996) 187 CLR 1, 140 (Gaudron J), 188-9 (Gummow J), 242-5 (Kirby J).
See also Noonan, above n 44, 76-7; Peter Butt, *Land Law* (3rd ed, 1996), 61.

[61] *R* v *Hughes* (1865) LR 1 PC 81; *Matthews* v *South-Eastern Drainage Board* [1965] SASR 328. See also Crown Lands Act 1976 (Tas), s 6.

[62] *O'Keefe* v *Williams* (1907) 5 CLR 217. See also *Clough* v *Leahy* (1904) 2 CLR 139, 156-7 (Griffith CJ); Winterton, above n 9, 121-2.

wide as those impliedly possessed by the business manager of some private individual in the conduct of business.[63] While some commentators have questioned Isaacs J's reasoning regarding how far it is possible to equate the executive and its actions to those of an individual given the inherent differences between governmental and private action,[64] the general proposition is unimpeached: *prima facie* the Crown has the same privileges and powers in relation to land as a private owner.[65]

Still, in exercising any of the powers which it confers, the Crown must act in strict compliance with the code. So even if the responsible Minister *prima facie* has the same privileges and powers as a private person in relation to land, the principle of strict compliance with the code places boundaries around their exercise. The Minister may not act beyond what is authorised by the code.

D. Strict Compliance With the Statutory Code

As we have seen, the legislative abeyance of a prerogative power typically replaces that power with a statutory code, with which all subsequent exercise of the power must comply. The operation of the Crown land statutes are no exception to this general pattern. To be valid, an exercise of the Crown's prerogative over waste and demesne land requires strict compliance with all requirements imposed by the State or Territory Crown land statutes.[66] It is well-established that any act or grant which fails to strictly comply with the

---

[63]*O'Keefe* v *Williams* (1907) 5 CLR 217, 230-1 (Isaacs J). Chief Justice Griffith also delivered a judgment in the case, which was based on the general powers of the executive government: *O'Keefe* v *Williams* (1907) 5 CLR 217, 226 (Griffith CJ).

[64]Winterton, above n 9, 121-2.

[65]Winterton, above n 9, 304, n 108. See *Johnson* v *Kent* (1975) 132 CLR 164, 170 (Barwick CJ), in which the High Court held that what the Crown does in relation to waste and demesne lands is through the prerogative and not ownership.

[66]*Cudgen Rutile (No 2) Ltd* v *Chalk* [1975] AC 520, 533-4 (Lord Wilberforce).

code is invalid and ineffective.[67] Indeed, in the case of a fee simple granted in violation of the provisions of the relevant Crown land statute, for example, proceedings by way of *scire facias* for the repeal of the grant may be brought at the instance of either the Crown or a private person.[68]

The High Court confirmed the principle of invalidity and ineffectiveness in *Lukey & Anor* v *Sydney Harbour Trust Commissioners.*[69] The plaintiff argued that because the Sydney Harbour Trust Act 1900 (NSW)[70] vested the defendant with a quasi-ownership interest in the bed and shores and other waste and demesne lands of the port, it acquired an interest in the wharves by virtue of the latter's demand and acceptance of a rent. The Crown Lands Act 1884 (NSW), however, made no provision for the creation of such an interest. Justice Owen, who wrote for the Court, held that the Crown is prohibited from leasing or dealing with Crown land except in accordance with the relevant Crown land statute. In this case it had no such authority and as such the demand or receipt of rent did not and could not confer any legal entitlement on the plaintiff.

Even when acting in strict compliance with the legislative scheme, however, in order to establish the validity of a grant, the Minister or an official acting thereunder must still act within the scope of the authority conferred by the legislation. The scope of authority is determined by the relevant Crown land statute and by the general law of agency. Acts of the

---

[67]An early example is found in *Re Greaves* (1891) 1 LCC 258, which held an occupation licence invalid because it was not authorised by statute.

[68]Peter E Nygh and Peter Butt, eds, *Butterworths Australian Property Law Dictionary* (1997), '*scire facias*'. At one time, most Crown land statutes contained a codification of this principle: see eg Crown Lands Consolidation Act 1913 (NSW), sub-s 234(2).

[69]*Lukey* v *Sydney Harbour Trust Commissioners* (1902) 2 SR (NSW)(Eq) 152.

[70]Sydney Harbour Trust Act 1900 (NSW), s 27.

Minister or some other agent may bind the Crown as principal if done within the actual authority conferred upon the agent, or if within the ostensible authority provided that the other contracting party reasonably believed that the acts were within the agent's actual authority or perhaps even the agent's usual authority. In the case of ostensible authority, however, where the authority of the Minister depends upon the terms of the relevant legislation, the agent cannot be imputed to have such authority if this would contravene the legislation, as neither the Crown nor its agents have the power to dispense with or vary the terms of the legislation.[71]

The next section considers some of the more significant ways in which the Crown, or the Minister acting on its behalf, is constrained in its exercise of the prerogative over the waste and demesne lands by the Crown land statutes.

E. Typical Constraints Which the Crown Land Statutes Place Upon the Exercise of the Prerogative Over the Waste and Demesne Lands[72]

1. Objects Provisions and Land Management Principles

Most of the State and Territory Crown land statutes have added a further dimension to the principle of strict compliance; they typically contain an objects provision and a separate but complimentary set of management principles for the relevant land.

The Crown Lands Act 1989 (NSW), for instance, contains an objects provision which requires that the Minister manage waste and demesne land for the benefit of the people of New South Wales.[73] The legislation also enumerates a complimentary set of management

---

[71]Lang, above n 20, 23. See also *A-G Ceylon* v *Silva* [1953] AC 461; Peter W Hogg, *Liability of the Crown* (2nd ed, 1989), 168-9; Enid Campbell, 'Commonwealth Contracts' (1970) 44 *Australian Law Journal* 14.

[72]See Kristin Howden, 'The Common Law Doctrine of Extinguishment - More than a pragmatic compromise' (2001) 8 *Australian Property Law Journal* 206, 208-9.

[73]Crown Lands Act 1989 (NSW), s 10. See also Land Act 1994 (Qld), s 4.

principles, which require the Minister, in taking any action in relation to the occupation, use, sale, lease, licence, or other dealing with waste and demesne land, to have regard to environmental protection, the conservation of natural resources, sustainable use, the encouragement of public use and enjoyment and, where appropriate, the multiple use of land. Most significantly, in taking any action whatsoever with waste and demesne land, the Minister must do so in the best interests of the State.[74]

Objects provisions and land management principles add nothing to the characterisation of Crown land as public property. Rather, these provisions merely serve to confirm the lack of self-seekingness enjoyed by the Crown in relation to the privileges and powers which it may exercise over relevant lands. The lack of self-seekingness makes clear that whatever privileges and powers the Crown does enjoy, they constitute no more than quasi-ownership and thus public property.

2. Inconsistent Grants

The Crown land statutes provide that most grants, other than fees simple, must contain reservations of pre-existing interests over the relevant land.[75] The Crown cannot grant a quasi-ownership or non-ownership proprietary interest in land in which it has no quasi-ownership interest itself, nor can it extinguish such interests by granting those lands to others.[76]

In the Northern Territory, for instance, a lease may not be granted over land subject

---

[74]Crown Lands Act 1989 (NSW), s 11.

[75]Crown Lands Act 1989 (NSW), s 55, Crown Lands (Continued Tenures) Act 1989 (NSW), Schedule 2, Part 2, and Schedule 6; Crown Lands Act (NT), sub-ss 88(1), 90 and 91; Land Act 1958 (Vic), sub-ss 148(2) and 151AA(5). See also *Macadam* v *Hardwick* (1954) 30 LVR 10 (judicial resolution of competing claims to the same waste and demesne land).

[76]Howden, above n 72, 208-9.

to an easement unless the grant reserves the benefit of the latter over the former.[77] Similarly, the Land Act 1994 (Qld) ensures that the rights held pursuant to mineral or petroleum tenures remain unaffected by subsequent grants.[78]

3. Future Legislation

The Crown may not enter into binding obligations based upon proposed future legislation.[79] The Supreme Court of New South Wales, in *Attorney-General* v *Municipal Council of Sydney*,[80] considered this question in the context of waste and demesne lands. It held that whatever might be the legal effect of any alleged agreement between the Crown and the Council concerning an intention to enact legislation vesting the latter with a fee simple to the site, that did not confer the right to remain in possession of the land unless the Crown had power to grant that right. Because the right of the responsible Minister to make such a grant was fettered by the legislative requirements of the Crown Lands Act 1884 (NSW), an equity could not be established to entitle the Council to remain in possession. The government therefore had no power to create the interest, even if it had promised to enact legislation to that effect, because the Crown Lands Act 1884 (NSW) contained no such power to do so at the relevant time. As we have seen in this chapter, any dealing with or disposal of land in the absence of such express statutory authorisation, based upon non-existent legislation, is invalid.

---

[77]Crown Lands Act (NT), sub-s 61(5). See also Land Act 1958 (Vic), sub-s 138(1); Crown Lands Act 1929 (SA), Part 14.

[78]Land Act 1994 (Qld), s 20. The Land Act 1958 (Vic), s 204, renders every Crown grant in fee simple, or of a licence or lease with the right to acquire the fee simple, or of a perpetual lease, subject to mineral rights pursuant to the Mineral Resources Development Act 1990 (Vic). The Crown Lands Act 1976 (Tas), sub-s 56(5), provides that, subject to express provision in the Mineral Resources Development Act 1995 (Tas), no lease or licence derogates from or permits interference or obstruction of any mining right.

[79]Lang, above n 20, 17.

[80]*A-G* v *Municipal Council of Sydney* (1920) 20 SR (NSW) 46.

Similarly, an undertaking made by the executive to enact legislation provides no assistance to those who obtain it concerning a dealing or disposal of waste or demesne land. The Crown cannot be compelled to enact the proposed legislation on the basis of undertakings given by the executive.[81]

The only exception to the future legislation constraint may arise in those cases where the Crown has some other legislative authority to act. Even then, however, the dealing or disposal must occur pursuant to another statute enacted with the intended effect that land may be dealt with in a manner inconsistent with the relevant Crown land statute, or where the other statute itself creates an interest in the relevant land.[82]

4. The Crown's Power to Bind Itself Contractually

There is no question that the Crown may enter a contract in the same way that a private person can.[83] There are three sources of the Crown's power to do so: (i) common law; (ii) statute; and (iii) the prerogative. It is unclear whether the Crown's common law power to enter contract was an element of the prerogative, and in any event, in contemporary Australia, that power has been eclipsed by legislation and replaced with statutory codes exercisable by the executive.[84] Thus, while there need not be any statutory authority to enter contracts,[85] once a State or Territory parliament has enacted legislation which confers a

---

[81]Lang, above n 20, 18.

[82]Lang, above n 20, 18. An example of this is the Commonwealth power to legislate under the Commonwealth of Australia Constitution Act, s 109. See eg Atomic Energy Act 1953 (Cth).

[83]Nicholas Seddon, *Government Contracts: Federal State and Local* (2nd ed, 1999), 39-41; Hogg, above n 71, 163-4; NC Seddon and MP Ellinghaus, *Cheshire & Fifoot's Law of Contract* (7th Australian ed, 1997), 674.

[84]Seddon, above n 83, 41-8.

[85]Seddon, above n 83, 45-6; *New South Wales* v *Bardolph* (1934) 52 CLR 455.

specific contract-making power on the Crown, the source of the power to contract is that statutory provision. A specific statutory provision, therefore, covers the field in relation to the prerogative power to contract.

In the case of the Crown land statutes, the prerogative power to make contracts is excluded, expressly or by implication, and any executive power to make contracts is limited to those which are made in accordance with the legislation.[86] But once the power exists and is complied with, the contract made thereunder binds the Crown in the same way that any private person is bound.[87]

This section considers two matters. First, the power found in the Crown land statutes which permits the Crown to bind itself by contracting to grant a fee simple. Second, it considers the ability of the Crown to fetter the future exercise of a legislatively conferred power by entering into a contract.

(a). Contracting to Grant Land in Fee Simple

We have seen in Chapter 6 that the State and Territory Crown land statutes exclude from the waste and demesne lands those which have been lawfully contracted to be granted in fee simple or some similar tenure. As such, when the Crown enters a contract to grant land in fee simple, it acts pursuant to a discretionary power in the legislation to bind itself in relation to the promise to grant the relevant land. There is no question that the Crown land statutes expressly confer upon the Crown, acting through the responsible Minister, the power to enter into a contract and so bind itself in relation to the relevant land. Nonetheless, the manner by which the Crown enters such contracts has been constrained by judicial

---

[86]Seddon, above n 83, 42-4; Hogg, above n 71, 166-7; *Cudgen Rutile (No 2) Pty Ltd* v *Commonwealth* (1974) 4 ALR 438.

[87]Hogg, above n 71, 164.

interpretation of the statutory power. These constraints typically concern the formal requirements of a common law contract, with which the Crown must comply in exercising the statutory power to bind itself contractually.

In most cases, there is little difficulty in establishing Crown compliance with the common law formalities to contract to grant land in fee simple. The existence of legislation or a proclamation renders a promise made by the Crown enforceable, so that those made by deed or supported by legislative sanction require no consideration. In such cases, a copy of the *Government Gazette* containing a notice approving an application for purchase is evidence enough of a contract to grant land in fee simple.[88] Thus, where there is a deed or legislative sanction, once the government gives permission for a purchase of land, it becomes lawfully contracted to be sold to the purchaser.[89]

But in the absence of a deed or other legislative sanction, it must be established that a promise to grant the land constituted a contract. As such, promises made gratuitously and without consideration, or which lack intention to enter a legally binding obligation, or which have uncertain terms, fail to bind the Crown.[90] These naked promises convey no legal or

---

[88] *Lord* v *Clyne* (1881) 2 NSW LR 36. See also Lang, above n 20, 21.

[89] *Mate* v *Nugent* (1869) 8 SCR 246, 247 (Stephen CJ). See Lang, above n 20, 22.

[90] *Blackwood & Anor* v *London Chartered Bank of Australia* (1871) 10 Sup Ct Rep 56, 82 (Stephen CJ); *Mate* v *Nugent* (1869) 8 SCR 246, 247 (Stephen CJ) (contract not established); *Chisholm & Anor* v *Cole* (1886) 7 NSW LR 410 (contract not established where occupant held land in substitution for land promised by way of lease but refused to pay rent or sign acknowledgement of the tenancy, thus, the tenant had failed to take steps which might have constituted a contract with the Crown); *Cooke* v *Commonwealth* (1922) 31 CLR 394 (uncertainty in the terms of the contract). See Lang, above n 20, 22-3.

See also the following decisions of the High Court which illustrate the difficulty generally of establishing contracts with the Crown founded upon reliance upon a promise: *Australian Woollen Mills Pty Ltd* v *Commonwealth* (1954) 92 CLR 424; *Australian Woollen Mills Pty Ltd* v *Commonwealth* (1955) 93 CLR 546 (announcement of wool subsidy scheme a statement of policy and not a promise giving rise to a contract); *Milne* v *A-G Tasmania* (1956) 95 CLR 460 (documents used in application for assistance from the Closer Settlement

equitable estate or interest to the promisee.[91]

Consideration, however, converts a naked promise into a legally binding obligation of the Crown.[92] What constitutes consideration is not easily defined, and while it can vary, it usually involves detriment to the promisee and benefit to the promisor (the Crown) of a grant of land in fee simple.[93] Detriment may take the form of an outlay of money,[94] settlement of land in a given area,[95] or the satisfaction of certain conditions by an occupier or lessee.[96]

In light of these stringent requirements, both legislative and judicial, the Crown typically avoids entering into promises or contracts for the grant of fees simple in the absence of consideration. Rather, it usually enters into a contract only after a sale by public auction or some other method of disposal, where the intention to enter into a binding contract, the consideration, the identity of the land, the identity of the purchaser and the binding nature of

---

Board not contractual documents and the decision on that application was government policy); *Administration of the Territory of Papua & New Guinea* v *Leahy* (1960) 105 CLR 6 (program of tick eradication in cattle industry not an intention to enter into legally binding contractual obligation even if a party acted upon what appeared to be a promise on the part of the Crown).

[91]See Enid Campbell, 'Promises of Land from the Crown: Some Questions of Equity in Colonial Australia' (1994) 13 *University of Tasmania Law Review* 1.

[92]Lang, above n 20, 21; Seddon and Ellinghaus, above n 83, 138-42; Hogg, above n 71, 59-67; Seddon, above n 83, 73-83.

[93]Seddon and Ellinghaus, above n 83, 140.

[94]*Cockcroft* v *Hancy* (1859) 9 SCR (NSW), Appendix 1, 4 and 11 (Stephen CJ).

[95]*Day & Others* v *Brunker* (1891) 12 NSW LR (Eq) 157 considered authorities such as *Dumaresq* v *Robertson (No 3)* (1860) 2 Legge 1291 which was subsequently upheld by the Privy Council in *Dumaresq* v *Robertson (No 4)* (1861) 2 Legge 1387, in which the Governor of New South Wales, who was entitled to grant land under the Great Seal of the Colony, had the right to negotiate promises on behalf of the Sovereign and such promises bound succeeding representatives of the Crown.

[96]*Terry* v *Wilson* (1849) 1 Legge 522, 524 (Manning J), 531 (Stephen CJ).

the undertaking--both by the Crown and the purchaser--are clear and unmistakable.[97]

(b). The Rule Against Fettering Future Executive Action

It is clear that the Crown can bind itself by entering a contract pursuant to the common law or prerogative power to enter contracts, or when it has the statutory authority to do so, such as in the case of a promise to grant land in fee simple pursuant to the Crown land statutes. But what if, pursuant to a statutory power, the Crown agrees to enact legislation to deal with or dispose of waste and demesne lands in a particular way, or it enters a contract pursuant to a statutory power, but in an unauthorised way? In both cases, the rule against fettering the future exercise of executive power operates to prevent such promises binding the Crown.[98] Thus, because each State and Territory has enacted a Crown land statute which controls all dealings with or disposals of waste and demesne lands, the Crown may only enter contracts in relation to such lands if the relevant legislation authorises it to do so.[99]

The High Court has, however, provided some leeway to the Crown in entering into agreements which may fetter future executive action pursuant to the Crown land statutes. In *O'Keefe* v *Williams*,[100] a case we have seen earlier in this chapter, it held that an agreement by the Crown for valuable consideration not to do any act in violation of the rights of a licensee was a valid exercise of the power conferred upon the executive by the Crown land

---

[97]Lang, above n 20, 23.

[98]Seddon, above n 83, 174-9; Hogg, above n 71, 170-2.

[99]*Watson's Bay and South Shore Ferry Co* v *Whitfield* (1919) 27 CLR 268 is the leading Australian statement of the rule against fettering the future exercise of executive power. See also Lang, above n 20, 19.

[100]*O'Keefe* v *Williams* (1907) 5 CLR 217.

statutes[101] to make contracts relating to waste and demesne lands. It went on to find that even if the Crown had been entitled to outstanding fees from the licensee,[102] and the licence had become liable to forfeiture for non-payment, the Crown's promise for consideration constituted an enforceable agreement as an exercise of the power of waiver by the Minister.[103] While the members of the High Court majority disagreed as to why, this case demonstrates that the Crown can fetter the future exercise of a power under the Crown land statutes in a limited range of circumstances. The Crown's ability to do so flows either from the general authority of officers of the executive to make ordinary contracts relating to the administration of public affairs,[104] or from implied powers under the Crown land statute, which may include those necessary to ensure the efficacy of a bargain entered into for consideration pursuant to a power found in the legislation.[105]

5. Conditions or Reservations Which the Crown May Include in a Grant

While the Crown, through its relevant Minister, may include in grants of fee simple or lesser interests certain conditions or reservations, there are limitations placed upon that power. For example, in the case of a discretionary power on the part of the Minister to include a reservation of all minerals or to include any other reservations and exceptions as the Governor

---

[101]Crown Lands Act 1884 (NSW); Crown Lands Act 1889 (NSW); Crown Lands Act 1894 (NSW).

[102]The Privy Council held in *O'Keefe* v *Malone* [1903] AC 365 that the Crown was not entitled to the fees in dispute and this was confirmed in *Williams* v *O'Keefe* [1910] AC 186.

[103]Authorised by the Crown Lands Consolidation Act 1913 (NSW), s 208, then found in the Crown Lands Act 1891 (NSW), s 6.

[104]*O'Keefe* v *Williams* (1907) 5 CLR 217, 226 (Griffith CJ).

[105]*O'Keefe* v *Williams* (1907) 5 CLR 217, 230-1 (Isaacs J).

deems to be expedient in the public interest,[106] any such reservations which lack statutory authority are void. Thus, for example, where the relevant legislation requires that such conditions or reservations be in the public interest, those which are made as defeasance conditions, which permit the cancellation of a grant if minerals are found, are void.[107]

---

[106]See eg Crown Lands Consolidation Act 1913 (NSW), sub-s 235(3). Today, however, most such reservations and exceptions are accomplished by the natural resources statutes: see Chapter 7.

[107]*Scottish Australian Investment Co Ltd* v *Williams* (1908) 8 SR (NSW) 520; *Ex parte McWilliam* (1947) 47 SR (NSW) 401; *A-G* v *Goldsborough* (1889) 15 VLR 638. See also Lang, above n 20, 30.

Chapter 11

EXTINGUISHING COMMON LAW NATIVE TITLE: A CASE STUDY OF THE CROWN'S PREROGATIVE OVER LAND

I. INTRODUCTION

This chapter analyses the most significant element of the Crown's contemporary prerogative over land after the power to grant estates and interests: the power to extinguish native title. Because this power resides in the Crown as a matter of prerogative, it is not shielded from the operation of the doctrine of abeyance; indeed, it has been legislatively conditioned as to the process by which it may be exercised in relation to future extinguishment. The substance of the principles which govern its exercise, however, have been left intact by the relevant legislation. Because those principles form the foundation of the power, this chapter focuses on them and not upon the roles played by the Native Title Act 1993 (Cth) and the Racial Discrimination Act 1975 (Cth).[1] For our purposes, it is sufficient to examine the substance of the power as a part of the prerogative over land, rather than the process for its future exercise which is imposed by the legislation. For this, we need only

---

[1]For an examination of the role played by these statutes in relation to the future extinguishment of common law native title see Richard H Bartlett, *Native Title in Australia* (2000), 201-446; Peter Butt, *Land Law* (4th ed, 2001), 831-49.

consider the common law which has identified and defined the power to extinguish native title.

The prerogative power to extinguish native title is important in the context of the Crown land continuum, because, as was alluded to in Chapter 9, it completes the picture of schizophrenia which characterises the allocation of privileges and powers over the native title lands. While the lands are held pursuant to native title, the package of privileges and powers that comprise that title is not the only such package that affects those lands. Rather, they are subject to at least one other very significant package of privileges and powers; indeed, if they are subject to a tenure granted by the Crown which does not itself extinguish native title, those lands may be subject to two other packages of privileges and powers. As such, in addition to those privileges and powers that make up a relevant native title--communitarian property--the lands (i) are also subject to the quasi-ownership privileges and powers retained by the Crown--public property, and (ii) may also be subject to the ownership privileges and powers enjoyed by a statutory lessee or licensee--private property. Native title lands are, at the very least therefore, simultaneously communitarian and public property--because the Crown retains the ultimate power, provided the Native Title Act 1993 (Cth) and the Racial Discrimination Act 1975 (Cth) are complied with, to extinguish the native title interest--and they may also be private property.

To demonstrate the relationship of the Crown to native title lands as it is mediated through the power of extinguishment, this chapter addresses three matters. First, it considers the common law rules or principles pursuant to which the Crown may extinguish native title. Second, based upon those principles, it assesses the effect upon native title of specific Crown acts which may extinguish native title. Finally, it considers the extent to which native title may be partially or wholly extinguished, and the impact which that has on the potential for its revival, or conversely, the extent to which it survives a purported extinguishment. The object

of this analysis is to demonstrate the schizophrenic allocation of quasi-ownership, ownership and communitarian privileges and powers over native title lands.

II. EXTINGUISHMENT AT COMMON LAW

A. Background Principles

Before turning specifically to the power to extinguish native title, one must first briefly examine two background principles: first, the application in the native title context of the Crown's general power, as a matter of the prerogative, to extinguish property interests in land, and, second, the requirement that for any exercise of the power to extinguish native title to be valid, the Crown must display a clear and plain intention to that effect.

1. Native Title and the Crown's Power to Extinguish Property in Land

By virtue of the acquisition of sovereignty over New South Wales, the English Crown carried with it the power--by executive or legislative act--to create and to extinguish ***private property*** in land within the new territory.[2] Following *Mabo [No 2]* the question arose as to whether this general power over private property extended also to the communitarian property found in native title. And recent Australian jurisprudence indicates that the general power enjoyed by the Crown to extinguish private property in land extends also to communitarian property, rendering common law native title liable to obliteration and its

---

[2]*Mabo* v *Queensland [No 2]* (1992) 175 CLR 1 ('*Mabo [No 2]*'), 63-76 (Brennan J) (citing *Joint Tribal Council of the Passamaquoddy Tribe* v *Morton* (1975) 528 Fed 2d 370, 376, n 6), 15 (Mason CJ and McHugh J concurred in Brennan J's reasons), 110-2, 116-8 (Deane and Gaudron JJ), 192-7 (Toohey J), 127, 138-45, 160-1 (Dawson J). See also *Wik Peoples* v *Queensland* (1996) 187 CLR 1 ('*Wik*'), 84-95 (Brennan CJ, Dawson and McHugh JJ), 119-20, 122-9, 130-1, 133 (Toohey J), 154-6, 166 (Gaudron J), 168-9, 175-7, 186-90, 190-5 (Gummow J), 213-8, 221-5, 233-41 and 247-50 (Kirby J); *Fejo* v *Northern Territory* (1998) 195 CLR 96 ('*Fejo*'); *Fejo* v *Northern Territory* (1998) 152 ALR 477 ('*Fejo (Fed Ct)*').

continued existence precarious at best.[3] Thus, while native title survived the English acquisition of sovereignty over Australia, that did not ensure its long-term health. Why?

The resolution of the issue involves looking first at the comparative strength of Crown grants when weighed against interests which do not derive from Crown grant, such as native title. In *Mabo [No 2]*, Brennan J wrote that when validly made a grant of an interest in land binds the Crown and the Sovereign's successors. The courts cannot refuse to give effect to a valid grant except, perhaps, in a proceeding for *scire facias* on the Crown's prosecution.[4] Moreover, because the prerogative in relation to the making of the grant has been conditioned by legislation, in the absence of statutory authority to the contrary, a valid Crown grant cannot be extinguished for the simple reason that *prima facie* the Crown lacks the competence to derogate from it once made. So a statute which vests the Crown with specific power to create interests in land stops short of impliedly authorizing any impairment of an interest in land granted by the Crown or dependant upon a Crown grant.[5] Any such extinguishment must also be authorised by statute.

This position is consistent with our understanding of private property, because, as we have seen, every jurisdiction which recognises private property also recognises the power of the state to extinguish it through the exercise of expropriation rules. In Australia, therefore, while it was once possible for the Crown to exercise the unbounded prerogative over land to extinguish private property, that power has now been put into abeyance by relevant State and Territory legislation. Why not, then, apply a similar analysis to native title in order to protect

---

[3]See *Wik* (1996) 187 CLR 1, 214 (Kirby J); *Pareroultja* v *Tickner* (1993) 117 ALR 206, 209 (Lockhart, O'Loughlin and Whitlam JJ); *Re Wadi Wadi People's Native Title Application* (1995) 129 ALR 167, 177-8 and 187-9 (French P).

[4]*Wi Parata* v *Bishop of Wellington* (1877) 3 NZ(Jur)NS 72.

[5]*Mabo [No 2]* (1992) 175 CLR 1, 63-4 (Brennan J).

it from extinguishment occasioned by the exercise of the Crown's prerogative over land?

A simple reason therefore exists for distinguishing between a Crown grant and native title in this regard: the latter, as we have seen, is communitarian property, characterised in the jurisprudence as *sui generis*, and as such, it is unlike any other form of Anglo-Australian property rights and interests in or over land. The main point of discontinuity between the private property and native title, at least for the purposes of extinguishment, is that the latter, unlike the former, is not founded upon Crown grant. For that reason, Brennan J in *Mabo [No 2]* concluded that the extinguishment of native title might follow from the Crown's exercise of its prerogative over land--either executive or legislative--while in the absence of statutory authority the same exercise would fail to extinguish rights and interests dependant upon Crown grant.[6] Because native title is not an interest created by the Crown, the exercise of its prerogative over land, through State or Territory legislative or executive action, may extinguish it.[7]

Nonetheless, there is an overriding internal limitation placed upon what appears, *prima facie*, to be an unfettered power to extinguish native title: its exercise, executive or legislative, must exhibit a clear and plain intention to extinguish native title.[8]

---

[6]*Mabo [No 2]* (1992) 175 CLR 1, 64 (Brennan J).

[7]*Mabo [No 2]* (1992) 175 CLR 1, 67 (Brennan J). But see Kent McNeil, 'Racial Discrimination and Unilateral Extinguishment of Native Title' (1996) 1 *Australian Indigenous Law Reporter* 181, 185-90.

[8]Justice Brennan found support for this proposition in the United States, Canadian and New Zealand authorities: *Calder* v *A-G British Columbia* (1973) 34 DLR(3d) 145; *Hamlet of Baker Lake* v *Minister of Indian Affairs and Northern Development* (1979) 107 DLR(3d) 513; *R* v *Sparrow* [1990] 1 SCR 1075; *US* v *Santa Fe Pacific Railway Co*, 314 US 339 (1941); *Lipman Apache Tribe* v *US*, 180 Ct Cl 487 (1967); *Te Weehi* v *Regional Fisheries Officer* [1986] 1 NZLR 680.

See also *Wik* (1996) 187 CLR 1, 85 (Brennan CJ, Dawson and McHugh JJ), 154-5, 155-6, 166 (Gaudron J), 168-9 (Gummow J), 247 (Kirby J); *Mabo [No 2]* (1992) 175 CLR 1, 111 (Deane and Gaudron JJ), 195-6 (Toohey J); *Mabo* v *Queensland [No 1]* (1988) 166

2. Clear and Plain Intention to Extinguish Common Law Native Title

Any executive or legislative act which purports to extinguish native title must evince a clear and plain intention to that effect.[9] Such intention need not, however, be express; extinguishment depends upon the effect of the legislative or executive act upon the right to enjoy native title and not upon the state of mind of the Crown (as expressed through its representatives, typically the Governor-in-Council[10]), legislators who passed the act, or of the Crown's officers or executive officers who did the act.[11] This is known as the 'necessary implication doctrine' and under it one need only infer the requisite intention in the words of the relevant law or the nature of the executive act and the power supporting it.[12] The test for determining the relevant clear and plain intention for extinguishment is therefore an objective one.[13]

The courts ought not, however, lightly infer the relevant intention. For instance, the Crown's acquisition of sovereignty over a territory fails to extinguish native title; no matter what it's subjective intention at the relevant time, the Crown acquired only a radical title and

---

CLR 186, 195 (Mason CJ), 200-1 (Wilson J), 211-4 (Brennan, Toohey and Gaudron JJ), 224-7 (Deane J), 241 (Dawson J); *Mason* v *Tritton* (1994) 34 NSWLR 572, 592 (Kirby P) (albeit in obiter).

[9]*Wik* (1996) 187 CLR 1, 85 (Brennan CJ, Dawson and McHugh JJ), 120 (Toohey J). See also *Western Australia* v *Ward* (2000) 170 ALR 159 ('*Ward*'), 190 (Beaumont and von Doussa JJ); Shaunnagh Dorsett, 'Clear and Plain Intention': Extinguishment of Native Title in Australia and Canada post-*Wik*' (1997) 6 *Griffith Law Review* 96, 110-8.

[10]*Mabo [No 2]* (1992) 175 CLR 1, 68 (Brennan J).

[11]*Western Australia* v *Commonwealth (Native Title Act Case)* (1995) 183 CLR 373, 422 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ) and 494-5 (Dawson J); *Wik* (1996) 187 CLR 1, 85 (Brennan CJ, Dawson and McHugh JJ).

[12]Dorsett, above n 9, 110-1.

[13]*Wik* (1996) 187 CLR 1, 85 (Brennan CJ, Dawson and McHugh JJ), 120 (Toohey J). See also *Ward* (2000) 170 ALR 159, 190 (Beaumont and von Doussa JJ).

not full-blooded ownership upon the acquisition of sovereignty. In order to extinguish native title, therefore, the Crown must give either legislative or executive expression to any such intention to do so.[14]

Nonetheless, as Toohey J wrote in *Mabo [No 2]*, the legislature need not '...identify with specificity particular interests to be extinguished if the legislative intention is otherwise clear.'[15] Thus, positive laws of general application are deemed to have the requisite intent provided the legislation is valid and its effect is not qualified by any other law which prevails over it or over the law which authorised it.[16] On the other hand, a law that merely regulates the alienation of Crown land or the enjoyment of native title fails to reveal a clear and plain intention to extinguish.[17] And similar laws which reserve or authorise the reservation of land from sale for the purposes of permitting Aboriginal peoples and their descendants to enjoy their native title also fail to extinguish.[18] But in the case of ***legislation*** which expressly appropriates to the Crown the quasi-ownership of land or a resource, the Crown need demonstrate no intention at all to extinguish.[19]

---

[14]*Native Title Act Case* (1995) 183 CLR 373, 422 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ), 494-5 (Dawson J); *Pareroultja* v *Tickner* (1993) 117 ALR 206, 218 (Lockhart, O'Loughlin and Whitlam JJ).

[15]*Mabo [No 2]* (1992) 175 CLR 1, 196 (Toohey J).

[16]*Native Title Act Case* (1995) 183 CLR 373, 422 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ), 494-5 (Dawson J) citing the now invalidated Land (Titles and Traditional Usages) Act 1993 (WA), s 7, as an example.

[17]*Mabo [No 2]* (1992) 175 CLR 1, 196 (Toohey J), citing *US* v *Santa Fe Pacific Railway Co* 314 US 339 (1941) and *R* v *Sparrow* [1990] 1 SCR 1075. *Mason* v *Tritton* (1994) 34 NSWLR 572, 592-3 (Kirby P) cited *Sparrow* in *obiter* to the same effect.

[18]*Mabo [No 2]* (1992) 175 CLR 1, 63-5 (Brennan J), 110-2 (Deane and Gaudron JJ), 192-6 (Toohey J).

[19]*Wik* (1996) 187 CLR 1, 85-6 (Brennan CJ, Dawson and McHugh JJ).

The Crown must, therefore, demonstrate a clear and plain intention to extinguish native title: (i) in the case of executive or legislative acts which expressly extinguish native title or which create rights in third parties inconsistent with the continued enjoyment of native title, or (ii) in the case of executive acts which allow the Crown to acquire the full quasi-ownership of land.

Having summarised the Crown's power, as a matter of prerogative and without any statutory authorisation, to extinguish native title provided it is done so pursuant to an objectively determined clear and plain intention--save for the case of legislation which appropriates full quasi-ownership to the Crown--we can turn to the specific common law principles upon which native title may be extinguished by the Crown. These principles demonstrate the significance of the power retained by the Crown in relation to native title lands, and, as such, the schizophrenic allocation of privileges and powers between communitarian property and public property in relation to those lands.

B. The Common Law Principles of Extinguishment of Native Title

Three principles, derived from the jurisprudence, provide the foundation upon which the Crown may exercise its prerogative power over land to extinguish native title.[20] This section briefly considers each.

We have seen in Chapters 5 and 9 that the English acquisition of sovereignty over Australia resulted in the Crown obtaining a radical title--quasi-ownership-- to the land rather than full-blooded ownership. The Crown's acquisition of quasi-ownership preserved any native title which might have existed. Nonetheless, while the communitarian privileges and

---

[20]*Mabo [No 2]* (1992) 175 CLR 1, 69-71 (Brennan J). See also *Pareroultja* v *Tickner* (1993) 117 ALR 206, 208-9, 217-20 (Lockhart, O'Loughlin and Whitlam JJ); *Re Gurubana-Gunggandji Peoples* (1995) 123 FLR 462, 473 (French P); *Fejo (Fed Ct)* (1998) 152 ALR 477; *Fejo* (1998) 195 CLR 96.

powers of native title were unaffected, sovereignty exposed them to extinguishment by a valid exercise of the prerogative to grant an estate or interest in land inconsistent with the continued enjoyment of native title. As such, when the Crown validly alienates land by granting an estate or interest wholly or partially inconsistent with the continuing right to enjoy native title, the first principle holds that the grant extinguishes the native title to the extent of the inconsistency.[21] 'Thus native title has been extinguished by grants of estates of freehold or of leases but not necessarily by the grant of lesser interests (eg authorities to prospect for minerals).'[22]

The second principle, similar to the first, states that a valid and effective appropriation of land to the Crown which is wholly or partially inconsistent with the continuing right to enjoy native title extinguishes the native title to the extent of the inconsistency. For example, to the extent that the actual use of waste and demesne lands validly appropriated by the Crown (whether by dedication, reservation or other valid means) for a stated purpose such as, but not limited to, a road, railway, or a post office precludes the enjoyment of native title, the appropriation extinguishes native title. Where waste and demesne lands are not so appropriated or where the appropriation and use are consistent with its continuing concurrent enjoyment (for example, the appropriation of waste and demesne lands for use as a National Park), native title retains its existence and vigour.[23]

---

[21]*Wik* (1996) 187 CLR 1, 133 (Toohey J). See also *Pareroultja* v *Tickner* (1993) 117 ALR 206.

[22]*Mabo [No 2]* (1992) 175 CLR 1, 69 (Brennan J).

[23]A reservation of land to the Crown for use as a National Park would allow the continued existence of native title subject to any diminution of the rights under that title necessitated by the use as a National Park. Such a reservation, which remains consistent with the continued enjoyment of native title in some form, may be called 'partial extinguishment': Susan Burton Phillips, 'Reconstructing the Rules for the Land Rights Contest' in *Essays on the Mabo Decision* (1993) 1-22, 9.

The third principle states an obvious, though overlooked, aspect of Australian land law: upon the extinguishment of native title over any lands, the Crown becomes the full quasi-owner of those lands free from native title, but subject to any other interests, such as pastoral leases, or any other claims. But because the Crown can have no more than quasi-ownership, once native title is extinguished and radical title is no longer subject to that communitarian property, the lands nonetheless remain waste and demesne lands and as such are still Crown land. The Crown does not become the owner of the lands, which would make them private property.

This fact, somewhat overlooked by the High Court in its native title jurisprudence, merely recognises the difference between waste and demesne lands found at the top of the continuum and those in the middle range. The former are not subject to native title nor to any other estate or interest, while the latter are. Both are Crown land because in relation to both the Crown retains quasi-ownership privileges and powers. Thus, the location on the continuum of the relevant land depends upon the nature of the act taken by the Crown under its prerogative. We will see that the grant of a pastoral lease may or may not extinguish native title, and that, of course, removes a specified group of privileges and powers from the Crown's quasi-ownership interest. As such, the lands would require re-location on the continuum. Although fundamental and obvious, no Australian State or Territory has yet legislatively embodied this fact, either in its Crown land statutes or any other legislation. Thus, whether extinguishment has occurred or not, the method by which the Crown must deal with those lands remains the same. The State and Territory Crown land statutes govern the entire management and control of the waste and demesne lands, whether native title is extinguished or not.

The next section considers how these principles have been utilised by the courts in

relation to specific purported acts of extinguishment.

III. THREE CATEGORIES OF EXTINGUISHMENT

This section considers the effect of Crown acts--executive and legislative--upon native title; the High Court in *Wik* enunciated three types of such act which carry the potential for extinguishing native title: (i) laws or acts which expressly extinguish native title; (ii) laws or acts which create rights in third parties inconsistent with the continued right to enjoy a relevant native title; and (iii) laws or acts which allow the Crown to acquire the full quasi-ownership of land subject to native title.[24] Because there are currently no examples of the first type of act,[25] this section considers only the latter two categories.

It would be impossible in this study to provide a comprehensive review of each of the possible circumstances in which a specific act of the Crown may or may not extinguish native title. As such, this section provides only a representative sampling of the existing case law that deals with the possible circumstances in which extinguishment may occur.

A. Legislative or Executive Acts which Create Rights in Third Parties Wholly or Partially Inconsistent with Native Title: Pastoral Leases[26]

At least five legislative or executive acts which create rights in third parties wholly or partially inconsistent with native title have been considered by the Australian courts. (i) Consistent authority supports the proposition that the grant of a fee simple extinguishes native title by virtue of a clear and plain intention to exclude any other proprietary interests in

---

[24]*Wik* (1996) 187 CLR 1, 85 (Brennan CJ, Dawson and McHugh JJ). See also *Ward* (2000) 170 ALR 159, 179-84 and 190 (Beaumont and von Doussa JJ).

[25]Although it is arguable that the Native Title Amendment Act 1998 (Cth) and complementary State and Territory legislation such as the Native Title (South Australia) (Validation and Confirmation) Amendment Act 2000 (SA), which confirmed the past extinguishment of native title by defined statutory tenures, may have had that effect.

[26]The power of the Crown to create such rights and is analysed in Chapters 6 and 10.

relation to the relevant land.[27] (ii) While most State and Territory Crown land statutes empower the Crown to issue deeds of grant in trust in respect of any waste and demesne land which, in the opinion of the Governor in Council, is or may be required for any public purpose,[28] including those for Aboriginal and Torres Strait Islanders,[29] it appears that such grants do not extinguish native title.[30] (iii) Aboriginal land rights legislation, enacted by States and Territories to give Aboriginal peoples a statutory form of ownership interest or non-ownership proprietary interest in lands which they claimed,[31] has been held not to extinguish

---

[27]*Fejo* (1998) 195 CLR 96, 126-31 (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ), 148-56 (Kirby J). See also *Mabo [No 2]* (1992) 175 CLR 1, 69 (Brennan J), 89, 110 (Deane and Gaudron JJ), 196 (Toohey J); *Native Title Act Case* (1995) 183 CLR 373, 422 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ); *Wik* (1996) 187 CLR 1, 176 (Gummow J); *Re Wadi Wadi People's Native Title Application* (1995) 129 ALR 167, 177-8 (French P); *Fejo (Fed Ct)* (1998) 152 ALR 477, 485-7 (O'Loughlin J); *Hayes* v *Northern Territory* (1999) 97 FCR 32, 97-8 (Olney J); *Denniss* v *Minister for Land & Water Conservation* (1999) 91 FCR 228; *Bodney* v *Westralia Airports* (2001) 180 ALR 91.

[28]*Hayes* v *Northern Territory* (1999) 97 FCR 32, 98-116 and 124-34 (Olney J).

[29]See eg Land Act 1962 (Qld), sub-ss 5, 334(1) and (4), 353, and 353A, which has since been repealed and replaced by the Land Act 1994 (Qld).

[30]*Pareroultja* v *Tickner* (1993) 117 ALR 206, 214-9 (Lockhart J), 223 (O'Loughlin and Whitlam JJ). The Court also held that no room existed for the operation of the Racial Discrimination Act 1975 (Cth); if any inconsistency existed, the Aboriginal Land Rights (Northern Territory) Act 1976 (Cth) prevailed. See also *Mabo [No 2]* (1992) 175 CLR 1, 111 (Deane and Gaudron JJ) and 196 (Toohey J). The same conclusion likely follows when one Crown alienates a deed of grant in trust to another Crown, even for non-Aboriginal purposes: *Re Gurubana-Gunggandji Peoples* (1995) 123 FLR 462, 474 (French P).

[31]Heather McCrae, Garth Nettheim and Laura Beacroft, *Aboriginal Legal Issues* (1991), 137. The first of these enactments, the Aboriginal Land Trusts Act 1966 (SA) was followed by: Pitjantjatjara Land Rights Act 1981 (SA); Maralinga Tjarutja Land Rights Act 1984 (SA); Aboriginal Land Act 1991 (Qld); Aboriginal Land Rights Act 1983 (NSW); Aboriginal Land Rights (Northern Territory) Act 1976 (Cth); Aboriginal Land Grant (Jervis Bay Territory) Act 1986 (Cth), Aboriginal Land (Lake Condah and Framlingham Forest) Act 1987 (Cth); Aboriginal Lands Act 1991 (Vic), Aboriginal Land (Manatunga Land) Act 1992 (Vic); Aboriginal Councils and Associations Act 1976 (Cth), Aboriginal Development Commission Act 1980 (Cth) (repealed), Aboriginal and Torres Strait Islander Commission Act 1989 (Cth), Aboriginal and Torres Strait Islanders (Queensland Discriminatory Laws) Act

native title.[32] (iv) Lesser interests, such as pipeline, grazing and occupation licences[33], or authorities to prospect for minerals, and perhaps even exploration or mining leases or oil and gas production licences available pursuant to State natural resources legislation,[34] appear not to extinguish native title.[35] (v) Special legislation enacted to authorise the executive to enter an agreement concerning land with a private person, which agreement has the force of law as though it were an enactment of the legislature, seems as though it will extinguish native title.[36]

While each of these interests has produced some legal controversy regarding their potential for extinguishment, as a class of act which creates inconsistent rights, statutory

---

1975 (Cth), Aboriginal and Torres Strait Islanders (Queensland Reserves and Communities Self Management) Act 1978 (Cth).

For a detailed history of the Aboriginal Land Rights movement and legislation see Heather McCrae, Garth Nettheim and Laura Beacroft, *Aboriginal Legal Issues* (1991), 137-201; Adrian J Bradbrook, Susan V MacCallum and Anthony P Moore, *Australian Real Property Law* (2nd ed, 1997), 7-10-7-14.

[32]*Pareroultja* v *Tickner* (1993) 117 ALR 206, 208-18 (Lockhart J).

[33]*Hayes* v *Northern Territory* (1999) 97 FCR 32, 116-23 (Olney J).

[34]See, for example, the Mineral Resources Development Act 1990 (Vic). See Chapter 7. See also Richard H Bartlett, *The Mabo Decision* (1993), xvi-xvii and xxii.

Although it may not be used as a guide to the common law, the Native Title Act 1993 (Cth) provides some guidance in determining what Brennan J might have meant by lesser interests: Category A and B Past Acts--freehold estates, commercial leases, agricultural leases, pastoral leases, residential leases or leases other than mining leases--extinguish native title while Category C and D Past Acts--mining leases and all other grants including licences and permits--do not: Native Title Act 1993 (Cth), ss 14-19, 229-232; Attorney-General's Legal Practice, *Native Title: Legislation with Commentary* (1994), C12-C14; Peter Butt, *Land Law* (4th ed, 2001), 826-9.

With respect to whether the Crown declaration of property in mines and minerals and petroleum contained in State natural resources legislation extinguishes native title, see Section III.B.2.(b).

[35]*Mabo [No 2]* (1992) 175 CLR 1, 69 (Brennan J); *Ward* (2000) 170 ALR 159, 293-305 (Beaumont and von Doussa JJ); *Mineralogy Pty Ltd* v *National Native Title Tribunal* (1997) 150 ALR 467, 484-6 (Carr J); *Hayes* v *Northern Territory* (1999) 97 FCR 32, 123-4 (Olney J).

[36]*Wik* (1996) 187 CLR 1, 132-3 (Toohey J), 251-61 (Kirby J).

leases, and especially the pastoral lease, has produced the most litigation.[37] These creatures of statute are representative of the issues which arise, and which will continue to arise, in response to a prior attempt by the Crown to extinguish native title by legislatively and executively creating inconsistent rights in third parties. For that reason, this section analyses the principles which the High Court has developed in order to determine the extinguishment of native title by statutory leases, especially the pastoral lease.

The Introduction to this chapter alluded to the fact that two, and perhaps three types of property--communitarian, public, and perhaps private--may be found in relation to native title lands. The analysis which follows most clearly demonstrates the convergence of these three types of property in the same land: public, in the Crown's power to extinguish by virtue of the grant of a pastoral lease, private, in the lease which is held by the lessee, and communitarian, in the native title which may or may not co-exist with the lessee's interest and the Crown's interest.

1. Background: *Wik Peoples* v *Queensland*

In Chapter 8 we examined the history and relationship of the Crown to pastoral lease lands. The question that must be addressed here is whether the Crown grant of a pastoral lease constitutes a legislative or executive act which creates rights in third parties inconsistent with native title. The answer to this question bears directly upon whether the land in question is subject to three forms of property--private, public and communitarian--or only two--private

---

[37]In relation to other statutory leases, see *Re Gurubana-Gunggandji Peoples* (1995) 123 FLR 462, 475-6 (French P) (leases for defence purposes held not to extinguish native title); *Re Wadi Wadi People's Native Title Application* (1995) 129 ALR 167, 187-9 (French P) ('special leases' held to extinguish native title). There is also judicial authority to support the proposition that a range of conditional purchase leases, special leases and leases of reserves extinguish native title: *Ward* (2000) 170 ALR 159, 305-19 (Beaumont and von Doussa JJ); *Hayes* v *Northern Territory* (1999) 97 FCR 32, 73-97 (Olney J); *Wandarang Peoples* v *Northern Territory* (2000) 177 ALR 512.

and public.

While *Mabo [No 2]* contains obiter comments concerning the effect upon native title of two leases granted by the Queensland Crown over the claimed native title lands, those comments related either specifically to those leases only or to the effect of a common law and not a statutory lease.[38] In his judgment in *Mabo [No 2]*, for instance, Brennan J considered the effect upon native title of common law leases which confer exclusive possession upon a lessee. He wrote that the effect of such a lease is to confer upon the lessee exclusive possession for a term and upon the Crown the reversion expectant upon the expiry of that term. The grant therefore expands the Crown's radical title and upon the expiry of the term it becomes what Brennan J called 'absolute beneficial owner'.[39]

Justice Brennan's reasoning seems flawed, not least because he fails to explain clearly when the title expands; he refers to an expansion of title upon grant and in the same sentence refers to the Crown's title becoming a *plenum dominium*--absolute beneficial ownership--upon the expiry of the term. While he fails to define what he means by absolute beneficial ownership, we have seen that it can mean no more than quasi-ownership unburdened by native title, what we have called full quasi-ownership. Still, one is left with a blurred image of the extent of the Crown's quasi-ownership between grant and expiry.[40] The most that can be

---

[38]*Mabo [No 2]* (1992) 175 CLR 1, 69, 73 (Brennan J), 116-7 (Deane and Gaudron JJ), 158 (Dawson J), 197 (Toohey J). The High Court later had opportunity to consider the pastoral lease question, but avoided it on procedural grounds relating to the Native Title Act 1993 (Cth): see *North Ganalanja Aboriginal Corporation* v *Queensland* (1995) 61 FCR 1; *North Ganalanja Aboriginal Corporation* v *Queensland* (1996) 185 CLR 595, 628 (Brennan CJ, Dawson, Toohey, Gaudron and Gummow JJ), 638, 640-2 and 643-5 (McHugh J), 645-8 and 660-9 (Kirby J).

[39]*Mabo [No 2]* (1992) 175 CLR 1, 68 and 69 (Brennan J). In *Wik* (1996) 187 CLR 1, 176, Gummow J endorsed Brennan J's reasoning in *Mabo [No 2]* concerning the effect upon native title of common law leases.

[40]*Mabo [No 2]* (1992) 175 CLR 1, 73 (Brennan J).

taken from Brennan J's judgment is that the grant of a common law lease extinguishes native title in relation to the same land. This of course did not state the effect upon native title of leases which derive their existence from legislative authority.

The High Court had opportunity to consider this question, however, in *Wik Peoples* v *Queensland*,[41] one of the most politically controversial decisions in the history of Australian real property law.[42] *Wik* involved two Queensland pastoral leases, neither of which made any provision for Aboriginal use of any part of the leased area,[43] issued pursuant to the Land Act 1910 (Qld).[44] As such, while this case dealt directly with the pastoral lease question without the difficulties of analysis posed by the existence of Aboriginal reservation clauses, the principles therein enunciated are of general application to any statutory lease.[45] Relying upon two grounds, a majority of the High Court held that the grant of a pastoral lease does not

---

[41]*Wik* (1996) 187 CLR 1. See also Simeon Beckett, 'The Impact of *Wik* on Pastoralists and Miners' (1997) 20 *University of New South Wales Law Journal* 502; Doug Young, '*Wik*: Implications for Statutory Lessees' (1997) 20 *University of New South Wales Law Journal* 512.

[42]See Graham Hiley, ed, *The Wik Case: Issues and Implications* (1997).

[43]The Federal Court, Full Court, has, however, addressed the issue of Aboriginal reservation clauses, holding that such clauses must mean that the pastoral leases did not extinguish native title: *Ward* (2000) 170 ALR 159. Significant debate nonetheless continues regarding the interpretation to be given such clauses and the likely approach that the High Court might take. The issue bears importance because many pastoral leases, particularly those found in Western Australia (Land Administration Act 1997 (WA)), South Australia (Pastoral Land Management Act 1989 (SA), sub-ss 47(1) and (2)), and the Northern Territory (Pastoral Land Act (NT), sub-ss 38(1)(n) and (2) and 113(1)), contain such reservations. See also Peter Butt, *Land Law* (3rd ed, 1996), 889, and the authorities cited at nn 61-2; Greg McIntyre, 'How Wik Applies to Western Australia' in Hiley, above n 42, 27-9; Graham Hiley, 'Introduction' in Hiley, above n 42, 1-5, 4; Raelene Webb and Kenneth Pettit, 'The Effect of Wik on Pastoral Leases with Provision for Access by Aboriginal People' in Hiley, above n 42, 30-34, 30.

[44]Land Act 1910 (Qld), sub-s 6(1). See now Land Act 1994 (Qld), Part 3.

[45]As far as pastoral leases are concerned, *Wik* (1996) 187 CLR 1 on this point has been largely overturned by the Native Title Amendment Act 1998 (Cth).

necessarily extinguish native title.[46]

(a). Substance Over Form

As we have seen in Chapter 8, the High Court rejected the argument that the use of the word 'lease' in relevant legislation meant that pastoral leases are the statutory equivalent of common law leases, which confer exclusive possession upon a grantee.[47] To reject the notion that the common law slavishly dictates their content, the court relied upon what might be referred to as the 'creature of statute' or the '*sui generis* interest'[48] view of pastoral leases.[49] Justice Toohey, for instance, conceded that while exclusive possession distinguishes

---

[46]Paul Anthony Smith, 'Pastoral Leases and Native Title' in Hiley, above n 42, 23-6, 25-6, points to one important difference between the judgments of Toohey and Kirby JJ and those of Gaudron and Gummow JJ. Smith argues that the majority split two-two on whether or not the rights of a pastoral lessee must be measured purely by reference to the terms of the grant itself or if consideration may also be given to whether the rights granted had actually been performed by the grantee. However, upon a reading of the passages cited by Smith, it appears that the conclusion is the same: one must consider the statutory language and the effect upon subsisting native title of that language and the grant authorised thereunder. See *Wik* (1996) 187 CLR 1, 126-7 (Toohey J), 238 (Kirby J), 164-6 (Gaudron J), 203 (Gummow J).

Because the judgments of the majority appear fundamentally similar and because Toohey J wrote a postscript (132-3) in which the other members of the majority concurred and which consolidates the rationales advanced by each, the thesis analyses only the judgment of Toohey J. Where necessary and appropriate reference is made to the judgments of Gaudron, Gummow and Kirby JJ.

[47]Chief Justice Brennan, in the minority, placed great reliance upon the importance of exclusive possession as essential to the existence of a lease at common law. Justice Gaudron also discussed the use of lease nomenclature in pastoral leases: *Wik* (1996) 187 CLR 1, 138 (Gaudron J). See also *Anderson* v *Wilson* (2000) 171 ALR 705, 725-7 (Black CJ and Sackville J).

[48]*Wik* (1996) 187 CLR 1, 242-3 (Kirby J). And see Henry Reynolds, 'Native Title and Pastoral Leases' in MA Stephenson and Suri Ratnapala, eds, *Mabo: A Judicial Revolution: The Aboriginal Land Rights Decision and Its Impact on Australian Law* (1993) 119-131; *Yandama Pastoral Co* v *Mundi Mundi Pastoral Co Ltd* (1925) 36 CLR 340, 353 (Isaacs J).

[49]Thereby distinguishing the three cases upon which Brennan CJ had relied to establish the proposition that exclusive possession was the key determinant: *Goldsworthy Mining Ltd* v *Fed Cmr of Taxation* (1973) 128 CLR 199; *Glenwood Lumber Co* v *Phillips* [1904] AC 405, 408 (Lord Davey); *American Dairy Queen (Qld) Pty Ltd* v *Blue Rio Pty Ltd* (1981) 147

a common law lease from a mere contractual licence,[50] the law relating to that distinction was inconclusive for the purpose of characterising the content of the rights and obligations conferred by pastoral leases granted pursuant to statutory authority.[51] For the majority, determining the content of pastoral leases required closer examination, which meant looking at the overall arrangement established by the legislation.

When the majority applied this principle to the facts before it in *Wik*, it concluded that the overall arrangement established by the Land Act 1910 (Qld)[52] and the system which it had superseded[53] demonstrated that the parliament contemplated the presence of Aboriginal peoples on licensed (the precursor to leased) lands. While the legislation provided some security to pastoralists in regard to their activities, the historical materials[54] also showed that

---

CLR 677, 686 (Brennan J), 682-3 (Mason J). Justice Toohey rejected these cases as controlling for three reasons: (i) they failed to postulate definitive rules with respect to all such legislation, but rather, relied upon lease language to demonstrate that exclusive possession existed in those specific contexts in light of the overall arrangement authorised by the legislation or in light of the particular context of the case; (ii) they failed to determine whether grants such as pastoral leases exclude rights such as common law native title; and (iii) they failed to exclude the possibility of an inquiry into whether in truth exclusive possession constitutes an incident of every statutory arrangement which bears the title of lease: *Wik* (1996) 187 CLR 1, 115-8 (Toohey J).

[50]Citing *Radaich* v *Smith* (1959) 101 CLR 209, 222 (Windeyer J), and *Street* v *Mountford* [1985] AC 809, 827 (Lord Templeman).

[51]*Wik* (1996) 187 CLR 1, 115-8 (Toohey J) (citing *O'Keefe* v *Malone* [1903] AC 365, 377 (Lord Davey)), see also 153-5 and 164-6 (Gaudron J), 177-84 (Gummow J), 226 (Kirby J).

[52]*Wik* (1996) 187 CLR 1, 144-9 and 159-64 (Gaudron J) (who provided a detailed account of the Land Act 1910 (Qld) and the Land Act 1962 (Qld) and of the pastoral lease instruments involved), 171-84 (Gummow J), 229-33 (Kirby J).

[53]*Wik* (1996) 187 CLR 1, 119-20 (Toohey J), 139-43 (Gaudron J), 171-84 (Gummow J), 227-9 (Kirby J).

[54]Jonathan Fulcher, 'Sui Generis History?: The Use of History in *Wik*' in Hiley, above n 42, 51-6, questions the *Wik* majority's use of the available historical materials. See RM Ross, 'Te Tiriti o Waitangi: Texts and Translations' (1972) 6 *New Zealand Journal of History*

both Australian and English authorities expressed almost constant concern that the grant of pastoral leases should not be used to prevent Aboriginals from using the land for subsistence purposes.[55] By thus discerning the legislative intention from the operation of the statute, the High Court concluded that it was unlikely that in authorising the grant of pastoral leases the legislature intended to confer possession on the lessees to the exclusion of Aboriginal people.[56]

(b). The Test: Legal Inconsistency

The High Court's second ground for deciding that the pastoral leases in *Wik* did not extinguish native title flowed from the first. Having decided that statutory construction was the only means by which content and thus extinguishment could be determined, it stated the obvious corollary: that a pastoral lease itself does not result in the necessary extinguishment of native title. Nor does factual inconsistency between the uses of the lessee and the native title holders determine the matter. Rather, the Court held that conclusions about extinguishment can only be reached by reference to the particular privileges and powers enjoyed by lessees and those which are asserted and established by the native title-holders. This is a test of legal inconsistency, or the 'inconsistency of incidents approach'.[57] If inconsistency exits between the established privileges and powers (incidents) conferred by

---

129, 147-8.

[55]Justice Toohey referred to Henry Reynolds: *The Law of the Land* (2nd ed, 1992); 'Mabo and Pastoral Leases' (1992) 2 *Aboriginal Law Bulletin* 8; 'The *Mabo* Judgment in the Light of Imperial Land Policy' (1993) 16 *University of New South Wales Law Journal* 27; with Jamie Dalziel, 'Aborigines and Pastoral Leases--Imperial and Colonial Policy 1826-1855' (1996) 19 *University of New South Wales Law Journal* 315.

[56]*Wik* (1996) 187 CLR 1, 119-20 (Toohey J), 154-5 (Gaudron J), 169 (Gummow J), 242-50 (Kirby J).

[57]See Dorsett, above n 9, 111-8.

native title and those conferred by statutory grants, the former must yield, to that extent, to the latter.[58] In *Wik* there were no findings of fact regarding the claimed native title. It could not be determined, therefore, whether any inconsistency existed between the pastoral leases asserted and any claimed native title. As such, the most that the High Court could do was to find that as a matter of law pastoral leases fail necessarily to extinguish native title.[59]

2. Pastoral Leases and the Expansion of the Crown's Radical Title

While the grant of a pastoral lease may not extinguish native title as a matter of law, the question remains whether, once total inconsistency and extinguishment has been established using the inconsistency of incidents test, such a grant effects a change in the Crown's radical title. In *Mabo [No 2]*, the High Court had held that any grant of a statutory tenure inconsistent with the continued enjoyment of native title extinguished the latter and expanded the Crown's radical title to a full *plenum dominium* or absolute beneficial ownership.[60] But if no inconsistency exists, no extinguishment can follow and, by parity of reasoning, no expansion of the Crown's radical title.

The question arises again: what did the High Court mean by *plenum dominium* or absolute beneficial ownership? Even if there was an expansion of radical title, we have seen that whatever interest that might be can amount to no more than quasi-ownership interest in

---

[58]*Wik* (1996) 187 CLR 1, 132-3 (Toohey J), 176-7 (Gummow J); *Ward* (2000) 170 ALR 159, 184-90 (Beaumont and von Doussa JJ), 336-42 (North J); *Anderson* v *Wilson* (2000) 171 ALR 705, 718 and 722-5 (Black CJ and Sackville J), 754-63 (Beaumont J); *Wandarang Peoples* v *Northern Territory* (2000) 177 ALR 512, 541-4 (Olney J). See also Jamie Dalziel, 'Pastoral Leases in the Northern Territory and the Reservation of Aboriginal Rights' (1999) 22 *University of New South Wales Law Journal* 462.

[59]At the time of hearing the appeal in the High Court, the Federal Court had presented no findings relating to the nature of the native title claimed: *Wik* (1996) 187 CLR 1, 122-7 (Toohey J).

[60]*Mabo [No 2]* (1992) 175 CLR 1, 51 and 68 (Brennan J).

the State or Territory due to the lack of self-seekingness inherent to the Crown's interest. As such, even if the Crown's interest in land was not burdened by radical title, it is still no more than what might be called a 'full-blooded quasi-ownership'.

In any event, this issue need not concern us in relation to pastoral leases. Indeed, it may not concern us in relation to any interest which the Crown may grant over the waste and demesne lands. While in *Mabo [No 2]* Brennan J noted that the concept of a reversion expectant upon the expiry of a lease supported the proposition that the Crown's radical title might expand to a full *plenum dominium* by virtue of a grant of an inconsistent leasehold interest,[61] the *Wik* majority rejected this proposition and the reasoning upon which it was founded. It held that to use the reversion concept in that way applied it to an unintended end; simply because the Crown can continue to exercise the prerogative over land once a statutory tenure comes to an end does not mean that there is an expansion of radical title. To use the reversion and *plenum dominium* concepts as Brennan J had in *Mabo [No 2]* rests uneasily with the Crown's position under the relevant legislation,[62] which permits the Crown to deal with the relevant lands both before a tenure is granted and after it comes to an end. The prerogative over land applies, as conditioned by any applicable legislation, in both cases.

B. Legislative or Executive Acts By Which the Crown Appropriates to Itself Full-Blooded Quasi-Ownership

The Crown may extinguish native title by legislative or executive act which appropriates to itself a full-blooded quasi-ownership interest in land. It cannot appropriate

---

[61]*Mabo [No 2]* (1992) 175 CLR 1, 50 (Brennan J), relying upon William Blackstone, *Commentaries on the Laws of England* (1765-1769, University of Chicago edition, 1979), vol 2, 175.

[62]*Wik* (1996) 187 CLR 1, 128-9 (Toohey J), 155-6 (Gaudron J), 186-90 (Gummow J).

to itself full-blooded ownership because any such interest is always characterised by the non-self-seekingness limitation. As such, while native title may be extinguished by such an act, the Crown's interest in such land may never be anything but public property. This section considers separately the executive and legislative acts by which this may be accomplished.

1. Executive Acts Which May Extinguish Native Title by Appropriating to the Crown Full-Blooded Quasi-Ownership

As we have seen in Chapter 6, the Crown land statutes empower the relevant Minister to reserve or dedicate waste and demesne land[63] for, among other things, the benefit of Aboriginal peoples, or for government or other public purposes. It is unlikely that such acts, without more, extinguish native title.[64] Still, reservations of land for public purposes which permit a manner of use or occupation that is inconsistent with the continued enjoyment of native title may result in extinguishment. Thus, the simple act of reservation of land for future use as a school, a courthouse or a public office, for example, may not by itself extinguish native title. Construction of the building, however, if inconsistent with the continued enjoyment of native title, may extinguish.[65] This latter effect is known as operational inconsistency.[66] Some anomalous cases regarding a partial inconsistency do exist, though.

---

[63]See for example Land Act 1962 (Qld), s 5, 'public purposes', which includes Aboriginal reserves, and sub-s 362(4), which provided that '[t]he ownership of land...in all roads opened or dedicated under this section or opened or dedicated under the repealed Acts shall be and remain vested in the Crown.' Now see Land Act 1994 (Qld), s 3 and Schedule 6, 'public purpose'.

[64]*Mabo [No 2]* (1992) 175 CLR 1, 66-7 and 70-3 (Brennan J), 117-8 (Deane and Gaudron JJ). See also *Corporation of the Director of Aboriginal and Islanders Advancement* v *Peinkinna* (1978) 52 ALJR 286.

[65]*Mabo [No 2]* (1992) 175 CLR 1, 68 (Brennan J). See also *Wik* (1996) 187 CLR 1, 86 (Brennan CJ); *Williams* v *A-G NSW* (1913) 16 CLR 404; *Williams* v *A-G NSW* (1915) 19 CLR 343; *Randwick Corporation* v *Rutledge* (1959) 102 CLR 54.

[66]*Ward* (2000) 170 ALR 159, 181 (Beaumont and von Doussa JJ).

Consider a public road which has never been constructed; once it is constituted as a public road, the Crown has taken action wholly inconsistent, in all save the exceptional case, with the continuing right to enjoy native title. Sufficient extinguishing intent may therefore exist because the action creates in third parties (members of the public) an enforceable right of free passage over lands which denies to all persons the right to use the land for any purpose other than for free passage or purposes incidental to free passage.[67] Thus, an executive act taken under statutory authority may have the effect, as a matter of operational inconsistency, of extinguishing native title. This raises the obvious question: what of the very legislation that authorises these executive acts?

2. Legislative Acts Which May Extinguish Native Title by Authorising the Executive to Appropriate to the Crown Full-Blooded Quasi-Ownership

Reservation or dedication of land is an act taken under the prerogative over land, which, as we have seen in Chapter 10, is today authorised and conditioned by legislation, typically the Crown land or natural resources statutes. For present purposes, a very significant question arises concerning the effect on native title of the enactment of legislation which either authorises or conditions the prerogative in relation to such acts. Consider the Crown land and natural resources statutes; are they legislative acts which may appropriate to the Crown a full-blooded quasi-ownership interest?[68]

---

[67]*Fourmile* v *Selpam* (1998) 152 ALR 294 ('*Selpam (Fed Ct)*'), 296-313 (Burchett, Drummond and Cooper JJ), affirming *Re Selpam Pty Ltd* (1994) 121 FLR 87 ('*Selpam (NNTT)*'), 94 (Member Chaney). See also *Ward* (2000) 170 ALR 159, 254-5 (Beaumont and von Doussa JJ).

[68]Legislation which merely regulates a natural resource, as opposed to declaring the Crown's quasi-ownership of it, seems not to extinguish native title: *Yanner* v *Eaton* (1999) 166 ALR 258 ('*Yanner*') (regulating fauna such as crocodiles); *Wilkes* v *Johnsen* (1999) 21 WAR 269 (regulating fisheries).

(a). Crown Land Statutes

The argument that the Crown land statutes may extinguish native title derives from the inclusion of provisions which authorise the removal of intruders from waste and demesne land. By including provisions which require not only the removal of those who may attempt to squat on waste and demesne land, but also, *prima facie*, those who might hold native title, it may be that the legislation exhibits a clear and plain intention to extinguish pre-existing communitarian property.[69]

Justice Brennan in *Mabo [No 2]*, however, concluded that when applied to Aboriginal peoples, such a conclusion would make nonsense of the law and be truly barbarian. Upon their proper construction, the removal provisions of the Crown land statutes are aimed at the removal of intruders as against those in occupation under colour of Crown grant or those who occupied waste and demesne land without any colour of right. They were not aimed at the removal of Aboriginals, nor were they aimed at the extinguishment of the native title of Aboriginal inhabitants in occupation of land by right of unextinguished native title.[70] Thus, the Crown land statutes are not legislation which themselves appropriate to the Crown the full-blooded quasi-ownership of waste and demesne land, nor do they contain the clear and plain intention necessary to extinguish native title in the case of legislation which seeks to regulate the alienation of such land.

(b). Natural Resources Statutes

As we have seen in Chapter 7, the natural resources statutes declare the Crown to be

---

[69]For example, *Mabo [No 2]* (1992) 175 CLR 1 dealt with the Crown Lands Alienation Act 1876 (Qld), s 91, which made it an offence to occupy Crown land otherwise than pursuant to a subsisting statutory lease or licence.

[70]*Mabo [No 2]* (1992) 175 CLR 1, 66 (Brennan J). See also *Wik* (1996) 187 CLR 1, 190-5 (Gummow J).

vested with the quasi-ownership of defined natural resources found on, in or under all State and Territory land, regardless of the legal position respecting the surface. Is it possible that such declarations demonstrate the clear and plain intention necessary to extinguish native title in relation to the relevant natural resources? The High Court has yet to settle this issue,[71] although *prima facie* it would seem that the natural resources statutes fall within the category of legislative act which may appropriate to the Crown a full-blooded quasi-ownership interest in land inconsistent with the continued enjoyment of native title.[72]

The Federal Court, however, addressed this issue at trial in *Wik Peoples* v *Queensland*, in which the Queensland minerals and petroleum legislation was at issue.[73]

---

[71]*Wik* (1996) 187 CLR 1, 84-6 (Brennan CJ), 213-8, 221-5, 233-41 and 247-50 (Kirby J).

[72]*Mabo [No 2]* (1992) 175 CLR 1, 50 (Brennan J), 110 (Deane and Gaudron JJ); See also *Wik* (1996) 187 CLR 1.

[73]The applicants amended their notice of appeal to the High Court by removing any challenge to the trial judge's decision on this issue: *Wik* (1996) 187 CLR 1, 134 (Gaudron J); *Wik Peoples* v *Queensland* (1996) 134 ALR 637 ('*Wik Peoples*'), 676-84 and 688 (Drummond J). See also *Fourmile* v *Selpam* (1998) 152 ALR 294, 296 and 303 (Burchett and Drummond JJ), which expressed support for Drummond J's view at trial in *Wik Peoples*.

In *Wik Peoples* Drummond J considered the Queensland mineral and petroleum legislation. See also Chapter 7. The minerals declaration is found in Mineral Lands Act 1882 (Qld), s 21 and Pt I; Gold Fields Act 1874 (Qld), s 25; Crown Lands Act 1884 (Qld), ss 8, 109 and 110; Mining Act 1898 (Qld), sub-ss 2, 3, 5, 9, 16(2), 40, 58, 154 and Pts V and VII; Mining on Private Land Act 1909 (Qld), sub-ss 1, 4, 6(1)(i), (ii), (iii), (iv), (v), (2), 16 and 21A(3) and (5); Land Act 1910 (Qld), sub-ss 6(3) and 145(2); Land Act 1962 (Qld), sub-s 6(3); Mining Act 1968 (Qld), ss 7, 109, 110, 112, 118 and Pts V and XII; Coal Mining Act 1925-1969 (Qld); Mining Act Amendment Act 1976 (Qld); Mining Act Amendment Act 1976 (No 3) (Qld); Mineral Resources Act 1989 (Qld), ss 9 and 10; Land Act 1994 (Qld), ss 14, 15 and 21. All of this legislation must be read in conjunction with the Mineral Resources Act 1989 (Qld), sub-s 9, and the Petroleum Act 1923 (Qld), ss 9 and 10. The petroleum declaration is found in Petroleum Act 1915 (Qld), ss 4 and 6, and the Petroleum Act 1923 (Qld), ss 9 and 10.

See also *Woolley* v *A-G Victoria* (1877) 2 App Cas 163; *Wildash* v *Brosnan* (1870) 1 QCLLR 17; *Wade* v *NSW Rutile Mining Co Pty Ltd* (1969) 121 CLR 177, 186-97 (Windeyer J); *Plant* v *Rollston* (1894) 6 QLJR 98, 102 (Griffith CJ); *Day Dawn Block & Wyndham GM Co Ltd* v *Plant* (1901) 11 QLJR 18; *Hutchinson* v *Scott* (1905) 3 CLR 359; *Ah Wye* v *Lock* (1872) 3 VR(Eq) 112; JRS Forbes and AG Lang, *Australian Mining and*

Justice Drummond held that the declarations of Crown quasi-ownership of minerals and petroleum found in the Mining on Private Land Act 1909 (Qld)[74] and the Petroleum Act 1923 (Qld),[75] extinguished any native title which extended to minerals or petroleum in any of the subject lands.[76] Moreover, he found that the repeal of a legislative declaration of ownership, as happened when the Mining Act 1968 (Qld)[77] repealed 1909 legislation, fails to revive native title.[78] Once made, the declaration of Crown public property or quasi-ownership is permanent in its extinguishing effect.[79]

We have seen earlier in this chapter that since the High Court's decision in *Wik*, a clear and plain intention to extinguish is no longer necessary in the case of legislation which appropriates to the Crown full-blooded quasi-ownership; nonetheless, Drummond J's judgment is instructive for what it says about the Crown's intention in enacting natural

---

Petroleum Laws (2nd ed, 1987), paras 201-223.

[74]Mining on Private Land Act 1909 (Qld), sub-s 6(1)(v) and (2).

[75]Petroleum Act 1923 (Qld), ss 9 and 10.

[76]It is telling that in a decision delivered after the High Court's decision in *Wik*, the Full Court of the Federal Court accepted without comment or criticism the finding in *Wik Peoples* that the Crown declaration of ownership of minerals and petroleum extinguished native title: *Fourmile* v *Selpam* (1998) 152 ALR 294 ('*Selpam (Fed Ct)*'), 296 (Burchett J), 303 (Drummond J). The opportunity to reconsider the finding in *Wik Peoples* in light of the extinguishment principles enumerated by Brennan CJ clearly existed in *Selpam (Fed Ct)*. Because the Full Court failed to take the opportunity presented by *Selpam (Fed Ct)* it is possible to conclude that Drummond J's reasoning in *Wik Peoples* conformed to the requirements subsequently established by *Wik*.

[77]Mining on Private Land Act 1909 (Qld), s 21A; Mining Act 1968-1971 (Qld), s 110; Mineral Resources Act 1989 (Qld), s 9.

[78]See Section IV.

[79]*Wik Peoples* (1996) 134 ALR 637, 684-5 and 688 (Drummond J). Justice Drummond's position has since been confirmed by the Federal Court, Full Court in *Ward* (2000) 170 ALR 159, 287-93 (Beaumont and von Doussa JJ), 362-7 (North J dissenting). But see *Hayes* v *Northern Territory* (1999) 97 FCR 32, 134-9 (Olney J).

resources legislation. It tells us a great deal about the substantial privileges and powers which the Crown retains in relation to lands or natural resources over which native title may exist and about the interaction of the public and communitarian property that may converge in relation to such lands. Justice Drummond held that while *Mabo [No 2]* exploded the myth that the Crown, by acquiring sovereignty over Australia also acquired a full-blooded ownership to its lands, this did not mean that the Crown might not subsequently intend to extinguish native title by declaring its ownership of minerals and petroleum. If native title never existed beyond the date that sovereignty was acquired no subsequent need could arise for its extinguishment. He found that the parliament, in the case of the Queensland Mining on Private Land Act 1909 (Qld) and Petroleum Act 1923-1993 (Qld), clearly intended to ensure, by declaring the Crown's ownership of all minerals and petroleum in all land in Queensland not then alienated in fee simple, that no person acquiring thereafter any interest in land from the Crown would acquire any title to or rights with respect to any of the minerals or petroleum in that land; full-blooded quasi-ownership in those minerals and petroleum vested in the Crown. The declarations were designed to operate as expropriations.

The legislative declarations of ownership demonstrated that the Queensland parliament intended something entirely different from merely confirming the belief (shown in *Mabo [No 2]* to be erroneous) that the radical title acquired as a corollary of sovereignty conferred upon the Crown the full-blooded ownership of land and all minerals and petroleum forming a part of the land. Rather, those declarations put beyond doubt that the Queensland Crown intended to acquire the full beneficial quasi-ownership of and public control over the entire mineral resources of the State, irrespective of who, if anyone, held an ownership or other interest

therein.[80] As such, the effect of the declarations was to extinguish not only private property in those resources, but also any pre-existing communitarian property.

IV. SUSPENSION OR REVIVAL AND PARTIAL OR TOTAL EXTINGUISHMENT OF NATIVE TITLE?

Extinguishment may either be total in that it leaves no scope for the future exercise of an Aboriginal group's traditions, laws, or customs, or it may be partial, in that it leaves some scope for the future exercise of those privileges and powers. It is unclear whether the extinguished communitarian property privileges and powers are suspended and capable of being revived at a later time, or whether they are permanently extinguished. It seems that the answer to this question depends upon the type of act which may have caused the extinguishment and upon the way in which native title is conceived. The very possibility that there may be suspension and revival demonstrates the interplay between the Crown's public property interest and the communitarian property embodied by native title. The first part of this section briefly canvasses the arguments made in favour of suspension and revival and the reasons offered by the High Court in rejecting them in the case of fees simple. An examination of those reasons offers a useful method of describing the substantial privileges and powers retained by the Crown in relation to native title lands. The second part of the section deals with examples of Crown acts that may either totally or partially extinguish native title, and the potential for suspension and future revival of the privileges and powers so extinguished.

---

[80] *Wik Peoples* (1996) 134 ALR 637, 685 and 688 (Drummond J) citing *Walden* v *Hensler* (1987) 163 CLR 561, 566-7 (Brennan J).

A. Suspension and Revival

The notions of suspension[81] and revival in relation to common law native title are interrelated. Both describe a form of communitarian property--native title--in a dormant state which subsequently springs back to life after having been non-exercisable in the face of some form of private property or non-ownership proprietary interest--such as a fee simple or a pastoral lease. In other words, the two terms describe different stages of the same process: suspension describes the phase in which the private property excludes the enjoyment of the communitarian property and the exercise of its privileges and powers while revival describes the phase in which the latter, which has been dormant for some time, becomes once again exercisable.

The Crown's incident of escheat and the notion of reversion are central to the possible revival of native title. When lands held in fee simple escheat or a lesser interest revert to the Crown, do they once again become waste and demesne land? And if they do, does native title, which burdens waste and demesne lands in which the Crown has a radical title, revive in relation to escheated or reverted lands? Answers to these questions require consideration of the extent to which native title may be suspended during the currency of the term of a grant. If it were capable of suspension, native title would be equally capable of revival upon the determination of the Crown grant. In the case of the fee simple, it is now settled that such a grant necessarily extinguishes native title, never to be revived.

B. Fees Simple

Fejo v *Northern Territory*[82] involved a fee simple revoked by the Crown pursuant to

---

[81]The Native Title Act 1993 (Cth), sub-ss 15(1)(d), 22B(d), 231, 232, 232D, 232E, 238, allows for the suspension of native title during the currency of some lesser grants.

[82]*Fejo* (1998) 195 CLR 96; *Fejo (Fed Ct)* (1998) 152 ALR 477.

a compulsory acquisition. While it seemed that dicta in *Mabo [No 2]*,[83] the *Native Title Act Case*,[84] and *Wik*[85] settled the matter, the native title applicants in *Fejo* argued that the Crown's compulsory acquisition of freehold land extinguished the estate therein, returning the land to the corpus of waste and demesne land and reviving any native title extinguished (or more accurately, suspended) by the original fee simple grant. The High Court rejected this argument, holding that the grant of a fee simple extinguishes native title and that no doctrine of revival or survival exists in relation thereto.[86] While true that not all grants of fee simple are inimical to the continuation of native title, more specifically, in the case before it there was no evidence that the ordinary unencumbered grant of a fee simple had any effect other than the total extinguishment of native title.[87] The notion of suspension was, therefore, untenable; the references to extinguishment contained in *Mabo [No 2]*, the *Native Title Act Case*, and *Wik* were not to be understood as incautious or inaccurate use of language to describe the effect of a grant of freehold title. The High Court held that a grant of fee simple does not have only some temporary effect on native title or some effect that is conditional upon the land not coming to be held by the Crown in the future. Any other argument, it held, would convert the fact of continued connection with land into a right to maintain that connection.[88]

---

[83]*Mabo [No 2]* (1992) 175 CLR 1, 68-70 (Brennan J), 110 (Deane and Gaudron JJ).

[84]*Native Title Act Case* (1995) 183 CLR 373, 439 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ).

[85]*Wik* (1996) 187 CLR 1, 125 (Toohey J), 176 (Gummow J), 250 (Kirby J).

[86]*Fejo* (1998) 195 CLR 96, 126-31 (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ), 148-56 (Kirby J).

[87]*Fejo* (1998) 195 CLR 96, 130 (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

[88]*Fejo* (1998) 195 CLR 96, 127 (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ). As to the maintenance of a connection to the land and the 'frozen in time

The High Court went on to say that extinguishment, rather than suspension, of native title follows from the Crown's prerogative over land, by which it can extinguish private rights and interests in land. While native title is communitarian and not private property, the Court nonetheless concluded that the Crown land statutes provide not only for the making of grants in fee simple of the waste and demesne lands, but also for the creation of privileges and powers in relation to such lands that are inconsistent with any continued right to native title. Thus, the rights that make up native title come to an end upon such a grant. There can be no question of them springing forth again when the land comes to be held by the Crown.[89]

The High Court's reasoning is troublesome for two reasons: first, it treats native title and private property as though they were the same; this contravenes it's own approach to native title, which is to treat it as a *sui generis* form of property--what we have called communitarian property. Second, it fails to address whether native title is communitarian property or communitarian rights,[90] although it seems to favour the rights approach. Nonetheless, while troublesome, this result is dictated by the totality of the native title jurisprudence: a grant of fee simple wholly extinguishes native title with no possibility of later revival.

The position regarding suspension and revival is not so clear, however, in the case of pastoral leases which partially extinguish native title. The question arises whether, upon the expiry of the lease, the previously extinguished privileges and powers revive, or are permanently extinguished, even beyond the duration of the lease that had that effect?

---

approach' see *Yorta Yorta Aboriginal Community* v *Victoria* [2001] FCA 45, paras 27-86 (Black CJ), paras 110-150 (Branson and Katz JJ).

[89]*Fejo* (1998) 195 CLR 96, 131 (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

[90]See Chapter 9, Section II.C.1.(a).

C. Pastoral Leases

A majority of the High Court in *Wik* concluded that no necessary total extinguishment of native title follows from the grant of a pastoral lease. Rather, the two may co-exist, a proposition which *prima facie* leaves open the possibility that some native title privileges and powers may be partially extinguished (suspended) and be capable of revival on the termination of the pastoral lease. When the privileges and powers conferred by a pastoral lease remain consistent with those proved under a claimed native title over the same land, the holders of the latter continue to enjoy whatever rights that they can establish thereunder and which are not extinguished, although the former may impose some limitations upon their exercise.[91] Thus, it is possible, in the case of a grant less than fee simple, and depending upon the substance of the grant, that native title may either be totally or partially extinguished.

While it did not definitively settle the matter, the High Court in *Wik* seemed to approve of the concept of partial extinguishment of native title, and this approach has found favour in the Federal Court.[92] The concept builds upon the *obiter* comments found in *Mabo [No 2]* that native title is made up of communitarian rights,[93] which is a convenient description of the privileges and powers embodied by an Aboriginal group's native title. These communitarian rights have been described as the 'incidents', 'nature', 'rights', 'traditions', 'customs', or 'entitlements' of native title.[94] While *Fejo* concluded that a grant in fee simple is inconsistent with the continued existence or exercise of any of the privileges and powers that comprise a

---

[91] *Wik* (1996) 187 CLR 1, 132-3 (Toohey J).

[92] *Ward* (2000) 170 ALR 159, 184-90 (Beaumont and von Doussa JJ). This approach has been affirmed in *Anderson* v *Wilson* (2000) 171 ALR 705, 724-5 (Black CJ and Sackville J), 767 (Beaumont J).

[93] See Chapter 9, Section II.C.1.(a).

[94] *Yanner* (1999) 166 ALR 258, 299 (Callinan J).

native title, the Federal Court, Full Court, in *Ward* said that it was possible for a pastoral lease, by virtue of comparing the privileges and powers conferred upon the lessee with those claimed by the Aboriginal group (the inconsistency of incidents approach), to conclude that the former had extinguished some of the latter, while leaving others unaffected and operative.

Such inconsistency, and the extinguishment that flows therefrom, may arise at the time of the grant itself, or it may give rise to an operational inconsistency when the grant confers or imposes on the grantee a power or a condition to be exercised or performed at some time in the future.[95] In either case, the inconsistency and extinguishment reduces the privileges and powers enjoyed by the Aboriginal group accordingly.[96] This may leave open the possibility that the extinguished privileges and powers may be revived once the pastoral lease comes to an end; in other words, the privileges and powers may not be extinguished at all, but rather, merely suspended. Still, the cumulative effect of a number of partial extinguishments may have the result of wholly extinguishing the relevant native title.[97] Even then, the courts have not definitively stated whether the extinguished native title may revive once the relevant pastoral lease comes to an end. And it is important to bear in mind that the question about the nature of native title remains to be settled by the High Court. Until that happens, the Federal Court's approach in *Ward* must be cautiously accepted as representing the law in relation to the question of partial extinguishment by pastoral leases.[98]

But what if the pastoral lease is not merely inconsistent with, but leaves no room

---

[95]*Ward* (2000) 170 ALR 159, 181 (Beaumont and von Doussa JJ).

[96]*Ward* (2000) 170 ALR 159, 184-5 (Beaumont and von Doussa JJ).

[97]*Ward* (2000) 170 ALR 159, 189-90 (Beaumont and von Doussa JJ).

[98]Peter Butt, Robert Eagleson & Patricia Lane, *Mabo, Wik & Native Title* (4th ed, 2001), 128.

whatsoever for the continued enjoyment of the relevant privileges and powers of the claimed native title? Again, the majority in *Wik* failed to address whether in this context native title may be suspended and capable of subsequent revival following the expiry of the pastoral lease. While one might conclude, on the basis of *Fejo*, that this would result in total extinguishment, this position has not been definitively settled. In *Wik*, only Brennan CJ addressed the issue in his dissenting judgment.[99] His position, rejected by the *Wik* majority, relied upon the Crown's reversion pursuant to the expiry of the term of the pastoral lease. Accepting that it may not represent good law, Brennan CJ's view nonetheless provides a useful guide to the revival issue in the case of a pastoral lease that wholly extinguishes native title. To do that, we must return briefly to Brennan J's judgment in *Mabo [No 2]*.

In *Mabo [No 2]* Brennan J wrote that the Crown obtains a reversion upon the grant of a pastoral lease expectant upon the expiry of the term.[100] If correct, that view removes any occasion for the revival of native title because the Crown's quasi-ownership interest upon the reversion would be inconsistent with the continued enjoyment of native title. In *Wik*, having reviewed the nature of a pastoral lease, Brennan CJ concluded that native title is recognised by the common law provided it has not been extinguished. And according to *Mabo [No 2]* and the *Native Title Act Case*, native title subsists only in respect of waste and demesne land. Native title is not, therefore, recognised as subsisting in or over land which has by alienation become subject to inconsistent ownership interests or which has by Crown use become unavailable for the continued enjoyment of native title. The fundamental doctrines of tenure and estates received from English feudal land law may only operate, Brennan CJ wrote, by

---

[99] *Wik* (1996) 187 CLR 1, 88-95 (Brennan CJ). See Section III.A.1.

[100] *Mabo [No 2]* (1992) 175 CLR 1, 68 (Brennan J).

treating the Crown, upon the exercise of the prerogative power to alienate an estate in land, as having the full legal reversionary interest in that land; what he called absolute beneficial ownership, but which has been described in this thesis as full-blooded quasi-ownership.[101]

Even if seen merely as an exercise of the prerogative over land and not as an alienation of property (a false distinction, as has been argued in Chapters 6 and 10), Brennan CJ rejected the proposition that freehold or leasehold grants may merely suspend rather than extinguish native title. To do so, he argued, would be to deny the possibility of any land ever escheating to the Crown. The grant of a pastoral lease must still result in a return of the land to the Crown upon its determination, if not as a matter of title then as a matter of seigniory.[102] And while the suspension proposition seems internally consistent, it fails to attribute to the doctrines of tenure and estates their function of maintaining the skeleton of the law of real property unless one concludes that native title is the equivalent of an estate in remainder, falling into possession on the determination of a prior estate. But Brennan CJ concluded that native title is not an estate and *a fortiori* to treat it as an estate in remainder creates problems of title not easily resolved. A leasehold grant such as a pastoral lease (and freehold grants as well) therefore renders the common law powerless to recognise the subsistence of native title in relation to the lands demised; thus, native title is not revived upon the determination of the lease.[103]

One ought be wary, however, to accept Brennan CJ's view as determinative of either the extent to which the fundamental principles of English real property law continue to govern Australian real property law or of the potential for the revival of extinguished or suspended

---

[101] *Wik* (1996) 187 CLR 1, 88-94 (Brennan CJ).

[102] *Wik* (1996) 187 CLR 1, 94 (Brennan CJ).

[103] *Wik* (1996) 187 CLR 1, 94-5 (Brennan CJ).

native title. While the majority in *Wik* failed to address the question of revival, it did differ significantly regarding the applicability of the English feudal-historical construct[104] to modern Australian conditions, particularly in the context of pastoral leases. And in the light of *Fejo*, it seems doubtful that the approach taken by Brennan CJ would gain acceptance by a majority of the High Court. This leaves open the question of possible revival following the grant and expiry of a pastoral lease which left no room for the operation of the relevant native title.

V. CONCLUSIONS

This chapter examined a working example of the Crown's prerogative power over land: the power to extinguish native title. This power is exercisable on certain judicially-defined conditions, the most important of which is that the Crown demonstrate, either expressly or implicitly, a clear and plain intention to extinguish. While from the perspective of those interested in the survival of a particular native title the principles upon which the Crown may exercise its power are important, we are only concerned with what this power tells us about the nature of Crown land.

In this thesis, Crown land has been defined as a range of locations along a quasi-ownership continuum, each such location embodying a certain group of privileges and powers in relation to land. In relation to those lands over which native title exists, the Crown's power to extinguish this type of communitarian property demonstrates the conflicting, or as described earlier, schizophrenic, allocation of privileges and powers in relation thereto. While the Aboriginal group may retain a group of communitarian property privileges and powers over the lands in question, the Crown too retains a significant public property power over those lands, namely the power to extinguish the property held as native title. Moreover, in

---

[104]See Chapter 5.

some cases, the lands may be subject to all three types of property described in this thesis. When a pastoral lease subsists over the land, private property may be added to the public and communitarian property interests.

The power of the Crown to extinguish native title, therefore, provides a working example of the prerogative, but more importantly, adds an integral piece to the puzzle of Crown land, demonstrating the schizophrenia of the allocation of ownership, quasi-ownership and communitarian privileges and powers in relation to the native title lands location on the continuum. For that reason, native title lands can be plotted somewhere in the middle range of the Crown land continuum.

Chapter 12

CONCLUSIONS

This thesis analyses Crown land in Australia. We have seen that there are two very significant, but common, misunderstandings about what Crown land is. First, both lawyers and laypeople see it as one type of land; this thesis calls the land which laypeople and lawyers typically call Crown land waste and demesne lands. Second, the courts, and especially the High Court, have said that the relationship of the Crown to the waste and demesne lands is not one of property at all.

This thesis rejects both of these misconceptions. First, it has said that Crown land ***is*** property, it is just not private property. Rather, it is public property. Second, it has said that Crown land is not ***just*** waste and demesne lands. True, those lands are Crown land, but they are not all that Crown land is. Rather, this thesis defines Crown land as a continuum which is made up of an infinite number of locations, each of which comprises a package of quasi-ownership (public property) privileges and powers over a specific type of land, of which the waste and demesne lands are only one such type. It calls this the Crown land continuum, which, in its totality, is Crown land, which is, in turn, public property. Such an analysis of Crown land requires, obviously: (i) a working definition of public property, and (ii) an outline of the Crown land continuum. The conjunction of the working definition and the outline of

the continuum make possible some conclusions regarding the main distinction between private property and Crown land (public property).

I. A WORKING DEFINITION OF PUBLIC PROPERTY

In Part One of the thesis, we adopted and adapted JW Harris' theory of property[1] in order to provide the terminology necessary to describe the Crown land continuum. This consisted mainly of developing working definitions of private, communitarian and public property.

Harris' theory develops a novel definition of private property, at the heart of which lies his twin pillars of any societal invocation of that concept: the ownership spectrum and trespassory rules. The ownership spectrum contains an infinite number of locations along its length, each comprising a socially and legally defined and open-ended group of use-privileges and control-powers. Each location is known as an ownership interest and is protected by reciprocal trespassory rules. The holder of any one of these ownership interests enjoys self-seekingness in the exercise of any of the ownership privileges and powers comprised by the interest; as such, any exercise of those privileges and powers can be answered by the response that 'the thing was mine to do with it what I liked'. The entire ownership spectrum constitutes private property.

In addition to the spectrum and its trespassory protection, a working private property system must contain a property domain, which includes property-limitation, expropriation and appropriation rules. These serve to constrain the *prima facie* unfettered exercise of ownership privileges and powers which the holder of private property would otherwise enjoy. Every ownership interest within a private property system is subject to its property domain. The

---

[1]JW Harris, *Property and Justice* (1996).

domain simply recognises the well-known fact that even the fullest package of ownership privileges and powers is not ***absolute*** ownership. Rather, because it is ownership, and because it is the fullest conception of ownership that a society recognises in a particular thing, and because it is subject to the property domain and as such is not absolute, Harris calls this full-blooded ownership. We have seen that even the Roman conception of land-ownership, which is the common example given by those who try to argue that there can be absolute ownership, was not really absolute, but full-blooded ownership. A full-blooded owner typically enjoys as part of the ownership interest the power to transmit the interest to others.

Having constructed a working definition of private property, the thesis turned to working definitions of public and communitarian property. These can be defined by contrast to the paradigm model of private property.

Public property, which is that type of property held by the state, is defined by a lack of self-seekingness in the exercise of any of the privileges and powers which are normally conferred upon the holder of an ownership interest. For that reason, the holder of public property is called a quasi-owner. The quasi-owner enjoys many of the same privileges and powers in relation to a resource that a private property holder does, but not the complete self-seekingness which the owner enjoys in the exercise of those powers. In practical terms, this means that the quasi-owner may not answer any and every use of public property with the response that the thing was theirs to do with as they pleased. There are, in other words, inherent limits on the exercise of quasi-ownership privileges and powers, which, do not in any way affect the holder of private property. These inherent limits are all aspects of the lack of self-seekingness. Typically, they involve a requirement that the quasi-owner act in the public good, and more importantly, in accord with statutory codes established for the exercise of the relevant quasi-ownership privileges and powers. The duty that the quasi-owner act in the

public good according to a relevant statutory code applies in every case involving public property; thus, while in some cases a private owner may be required to act for the benefit of some other person, as in the case of a trust, the requirement that the state act in the public good is not equivocal. There is no exception; in every case, the state has the duty to so act. It is an automatic right which the citizenry is entitled to expect of the state simply because they are citizens. And a breach of the code brings with it political, not legal consequences.

The lack of self-seekingness in relation to the exercise of quasi-ownership privileges and powers means that there exists a separate quasi-ownership spectrum at the heart of public property. An interest may only be found along this spectrum if it lacks the quality of self-seekingness. Every public property system also has its own trespassory protection and a public property domain.

Communitarian property is that type of property held by indigenous peoples. It does not derive any of its analytic or normative content from private or public property. Rather, its content is made up of the traditions, laws and customs of a group of people who share a mutual sense of community. While its content is derived from the internal laws of the group in question, the protection of communitarian property comes from outside. Typically, a dominant legal system which has recognised and permitted another system of resource distribution to survive will provide it with some protection against the intrusions of others. But it will not supplement the internal system so as to elevate it to a form of property which derives its existence from that dominant system.

Few theories of property have attempted to define the normative and analytical content of private, public and communitarian property based upon a unified theory. It is this potential to make smooth transitions between the three different types of property through the use of a common theoretical currency that commends Harris' theory to the task of analysing

the Crown land continuum.

II. THE CROWN AS QUASI-OWNER OF AUSTRALIAN LAND: THE CROWN LAND CONTINUUM

This thesis uses the Crown land continuum to describe and analyse the system of public property comprised by the phrase Crown land; the continuum captures the notion that Crown land is more than any one type of land. Rather, it is a system of public property or quasi-ownership privileges and powers enjoyed by the Crown in larger or smaller groupings or packages in relation to all Australian land. These packages can be plotted along the vertical continuum, at the head of which one finds the largest possible package in relation to Australian land, while at the foot one finds the smallest. In other words, just as with any form of property, public property, and the system of public property comprised by Crown land, encompasses rights and things. In this case, the things are land and the rights are the quasi-ownership privileges and powers in relation to that land.

The thesis plots five main locations along the continuum. At the foot, one finds the fee simple lands, in which the Crown enjoys the feudal incident of escheat. Despite its possible erosion and subjugation to *bona vacantia*, escheat continues to operate to the benefit of the Crown in relation to all freehold Australian land, although it may not provide any present right to possession of the land until the private owner dies without heir, at which time the Crown obtains the land by virtue of tenure. If that occurs, then the lands may become waste and demesne lands over which the Crown has full-blooded quasi-ownership. Until that time, however, the Crown has a contingent and small group of privileges and powers which can nonetheless be characterised as Crown land.

At the head of the continuum one finds the waste and demesne lands. The Crown has the fullest possible package of privileges and powers in relation to these lands and so in every

sense, save the ability to exercise those rights in a self-seeking way, it stands in a position very much like that of the full-blooded owner to land held as private property. The Crown, however, due to the lack of self-seekingness, is at most a full-blooded quasi-owner. These lands are primarily controlled pursuant to the Crown land statutes, which provide a basic definition of them, although that definition requires further judicial elaboration in some instances, such as in the case of the dedication of land to a public purpose or the grant of a statutory lease or licence over waste and demesne lands.

Near the head of the continuum, but lying below the waste and demesne lands, one finds the package of privileges and powers which the Crown retains in relation to discrete natural resources which may lie on, in or above any land whether privately held or not. Relevant natural resources may include mines and minerals, petroleum and natural gas, water, or timber. Any natural resources found on the continuum are dealt with through the various State and Territory natural resources statutes. As with all locations along the continuum, however, the Crown lacks complete self-seekingness in the exercise of its privileges and powers over natural resources. Any privileges and powers which the Crown does enjoy are exercisable only in compliance with the relevant natural resources statute. Still, the Crown is a full-blooded quasi-owner in relation to the relevant natural resource.

In the middle-range of the continuum--it is difficult to specify with any greater certainty an exact location along the continuum--we find two schizophrenic allocations of privileges and powers. The thesis has used 'schizophrenic' to describe these locations because they tend to divide not just the available privileges and powers in relation to the relevant land, but to divide them between different types of property. And this is where the flexibility of Harris' theory of property, which can smoothly make the transition between private, public and communitarian property, becomes most useful. His theory is well-suited to the task of

analysing these middle-range locations on the Crown land continuum.

The first of these schizophrenic locations is that occupied by the statutory lease and licence lands. These are waste and demesne lands occupied and used by private persons pursuant to statutory interests known as Crown leases or licences. These interests take a wide variety of forms, but they are united by one common element: they combine (i) private property--a set of privileges and powers held by a private lessee or licensee which allow the holder to do much the same things as might the holder of a common law lease, with (ii) public property--a set of privileges and powers held by the Crown as lessor or licensor. For this reason, in the hands of the statutory lessee or licensee these interests may be private property, while in the hands of the Crown, the lands are capable of location along the continuum due to the group of quasi-ownership privileges and powers which it retains therein.

The second schizophrenic location is a recent addition in Australia: common law native title. From the perspective of Australia's Aboriginal peoples, this location--native title lands--is communitarian property. In any given case where native title is claimed over Australian land, the interest gained is defined not by the common law which recognises and protects it, but rather by the internal traditions, laws and customs of the claimant group. Should the group be successful in demonstrating a connection to the relevant land over which those traditions, laws and customs are exercised, it gains communitarian property therein. But that, as with the statutory lease and licence lands, is only half of the story; the Crown enjoys a significant group of quasi-ownership privileges and powers over native title lands, the most significant of which is the ability to extinguish the very interest held by the Aboriginal group. The power of extinguishment derives from the Crown's prerogative over land--the source of its privileges and powers along the continuum--and serves to confirm the schizophrenia in the allocation of privileges and powers over native title lands.

The power of extinguishment retained by the Crown actually exacerbates the difficulty associated with defining, analytically, the nature and content of the privileges and powers which pertain to native title lands. Indeed, of all Australian land, those where native title has been proved and is enjoyed may evince the highest level of schizophrenia in the allocation of privileges and powers. For instance, we have seen that the Crown may exercise its prerogative over land in ways that may result in the extinguishment of native title; the options open to the Crown include the grant of statutory leases and licences over land. Given the current state of the common law, however, and in the absence of legislation which may settle the question,[2] it is by no means certain that all such acts extinguish native title. Nonetheless, the small group of quasi-ownership privileges and powers which give the Crown the ability to extinguish native title if it so chooses means that such lands are also Crown land. Still more importantly, where such a grant fails to extinguish native title, the existence of a statutory lease or licence means that the lands are also subject to private property. This, in addition to the native title interest, results in the existence of all three types of property in one piece of land.

This thesis set out to analytically define a major working system of public property by examining the nature and content of Crown land. It approached this task from the perspective of contrast with private property. It therefore seems appropriate to conclude by demonstrating the primary distinctions between Australian Crown land as an example of public property and the paradigm private property model.

---

[2]Although it is arguable that the Native Title Act Amendment Act 1998 (Cth) and companion State and Territory legislation--such as the Native Title (South Australia) (Validation and Confirmation) Amendment Act 2000 (SA)--operates to settle the extinguishing effect of many statutory leases and licences.

III. CROWN LAND IN AUSTRALIA: THE DISTINCTION BETWEEN PUBLIC PROPERTY AND PRIVATE PROPERTY

Public property in the form of Crown land in Australia differs, theoretically, constitutionally and practically, from private property. Theoretically, the difference resides in the lack of self-seekingness which the Crown has when exercising its otherwise plenary privileges and powers over Australian land. The Crown may in many instances--particularly in the case of the waste and demesne lands and the natural resources--enjoy quasi-ownership privileges and powers which closely mirror those enjoyed by an owner, even a full-blooded owner. But while the Crown may have similar privileges and powers, it is unable to exercise them in the same way that the full-blooded owner can. In other words, it may not justify a particular exercise of them with the response that it was free to do what it liked with the thing. There are inherent political and social constraints within which the Crown or its agents must act in the exercise of its quasi-ownership privileges and powers over Australian land. Many of these constraints are now found in the Crown land or natural resources statutes which condition the exercise of the prerogative over land, which we have seen is the source of many, if not all, of the Crown's quasi-ownership privileges and powers over land.

The theoretical difference flows directly into the constitutional difference. It has already been explained that the Crown does not enjoy self-seekingness in the exercise of its quasi-ownership privileges and powers, the source of which is the prerogative over land. While it is a major theoretical difference, the reason for the lack of self-seekingness is also a constitutional matter. The doctrine of abeyance in relation to the prerogative has led to a tug-of-war between the Australian State and Territory legislatures and their executives over the Crown's quasi-ownership privileges and powers and the manner and form of their exercise. This ongoing battle is something that simply does not affect either the ownership privileges

and powers nor the manner and form of their exercise by the holder of private property.

Finally, Crown land is distinguishable from private property in a practical sense. As explained earlier in this conclusion, the allocation of privileges and powers over some Australian land is schizophrenic. In the case of statutory lease and licence lands or native title lands, there is a schizophrenia of allocation between private and public property in the case of the former, and between public and communitarian, and perhaps even private, in the case of the latter. But schizophrenia of allocation is not limited to lands in the middle range. Other locations lower on the continuum can also be so characterised. Indeed, and this is the practical difference, in every piece of Australian land the Crown retains ***some*** quasi-ownership privileges and powers. This of course does not mean that the Crown has a present right to the possession of all Australian land.

Take the case of escheat: while the Crown has some very significant privileges and powers in relation to fee simple lands, those may remain theoretical in the sense that there may always be a private person who succeeds to the ownership privileges and powers contained in the fee simple. The land may never escheat to the Crown and thus may never physically be Crown land. But because property, private or public, may be rights ***and*** things, and because Crown land refers to a type of property--public--as well as to a type of land, the small but important package of quasi-ownership privileges and powers which the Crown retains over fee simple lands means that those lands at the foot of the continuum are just as much Crown land as are the waste and demesne lands at its head. Private property, on the other hand, does not always leave a residue of privileges and powers, however small, in the predecessor in title to the current holder. One need look no further than the fee simple for an example of the complete loss of all ownership privileges following its sale, gift or other *inter vivos* disposal.

No matter what the allocation of privileges and powers in relation to a piece of land,

therefore, in a practical sense, all Australian land is Crown land (public property). Once one reaches that conclusion, the only relevant distinction between types of Australian land becomes a practical one: where on the Crown land continuum does the package of quasi-ownership privileges and powers in a given piece of land fall? And location on the continuum is determined solely by discerning the content of the relevant package of quasi-ownership privileges and powers enjoyed by the Crown.

Bibliography

Ackerman, Bruce A. *Private Property and the Constitution* (1977).

Alexander, Gregory. 'Critical Land Law' in Susan Bright and John Dewar, eds, *Land Law: Themes and Perspectives* (1998) 52-78.

---- 'Property as Propriety' (1998) 77 *Nebraska Law Review* 667.

Allen, Tom. *The Right to Property in Commonwealth Constitutions* (2000).

Anderson, J Stuart. *Lawyers and the Making of English Land Law 1832-1940* (1992)

Anson, William R. *The Law and Custom of the Constitution* (3rd ed, 1907), vol 2, Part 1.

Aristotle, *The Politics* (trans TA Sinclair, revised Trevor J Saunders, 1981).

Armour, Edward Douglas. *A Treatise on the Law of Real Property, Founded on Leith & Smith's Edition of Blackstone's Commentaries on the Rights of Things* (2nd ed, 1916).

Asch, Michael. ed. *Aboriginal and Treaty Rights in Canada* (1997).

Atkinson, Alan. *The Europeans in Australia: A History Volume One The Beginning* (1997).

Attorney-General's Legal Practice, Australia. *Native Title: Legislation with Commentary* (1994).

Auster, Martin. 'The Regulation of Human Settlement: Public Ideas and Public Policy in New South Wales, 1788-1986' (1986) 3 *Environmental and Planning Law Journal* 40.

Austin, John. *Province of Jurisprudence Determined* (1832).

Baalman, John. *The Torrens System in New South Wales Being a Commentary on the Real Property Act, 1900, as Amended and as Affected by Various Other Statutes* (1951).

Babcock, Richard F and Feurer, Duane A. 'Land as a Commodity "Affected with a Public Interest"' (1977) 52 *Washington Law Review* 289.

Bailyn, Bernard. *The Ideological Origins of the American Revolution* (1967).

Baker, C Edwin. 'Property and its Relation to Constitutionally Protected Liberty' (1986) 134 *University of Pennsylvania Law Review* 741.

Baker, DWA. 'The Origins of Robertson's Land Acts' in JJ Eastwood and FB Smith, eds, *Historical Studies: Selected Articles* (1964) First Series 103-26.

Baker, JH. *An Introduction to English Legal History* (3rd ed, 1990).

Bankes, Nigel. *Crown Timber Rights in Alberta* (1986).

Banner, Stuart. 'Two Properties, One Land: Law and Space in Nineteenth Century New Zealand' (1999) 24 *Law and Social Inquiry* 807.

Barker, FR and Parry, NDM. 'Private property, public access and occupiers liability' (1995) 15 *Legal Studies* 335.

Barrett, Robert. 'History on an Equal Footing: Ownership of the Western Federal Lands' (1997) 68 *University of Colorado Law Review* 761.

Bartlett, Richard H. 'Aboriginal Land Claims at Common Law' (1983) *University of Western Australia Law Review* 16.

---- *Aboriginal Water Rights in Canada: A Study of Aboriginal Title to Water and Indian Water Rights* (1988).

---- 'Native Title: From Pragmatism to Equality Before the Law' (1995) 20 *Melbourne University Law Review* 282.

---- *Native Title in Australia* (2000).

---- 'Native Title in Australia: Denial, Recognition, and Dispossession' in Paul Havemann, ed, *Indigenous Peoples' Rights in Australia, Canada, & New Zealand* (1999) 408-27.

---- 'Political and Legislative Responses to Mabo' (1993) 23 *University of Western Australia Law Review* 352.

---- ed. *Resource Development and Aboriginal Land Rights in Australia* (1993).

---- *The Mabo Decision* (1993).

---- and Meyers, Gary D. eds. *Native Title Legislation in Australia* (1994).

Bates, Gerry M. *Environmental Law in Australia* (3rd ed, 1992).

Bathurst, Dispatch dated 1 January 1825 to Governor Brisbane, *Historical Records of Australia* (1917) Series I, vol XI, 434-44.

Becker, Lawrence C. *Property Rights: Philosophic Foundations* (1977).

Beckett, Simeon. 'The Impact of *Wik* on Pastoralists and Miners' (1997) 20 *University of New South Wales Law Journal* 502.

Bedwell, CEA. *Australasian Judicial Dictionary* (1920).

Bell, Catherine. 'Metis Constitutional Rights in Section 35(1)' (1997) 36 *Alberta Law Review* 180.

Bell, Kenneth N and Morrell, WP. eds. *Select Documents on British Colonial Policy 1830-1860* (1928).

Bentham, Jeremy. *An Introduction to the Principles of Morals and Legislation* (JH Burns and HLA Hart, eds, 1970).

---- *Of Laws in General* (HLA Hart, ed, 1970).

Bern, John. 'Administration' in David Horton, gen ed, *The Encyclopaedia of Aboriginal Australia* (1994), vol 1.

Berndt, Ronald M and Catherine H. *The World of the First Australians: Aboriginal Traditional Life: Past and Present* (1964).

Bhuta, Nehal. '*Mabo, Wik* and the Art of Paradigm Management' (1998) 22 *Melbourne University Law Review* 24.

Birks, Peter. *An Introduction to the Law of Restitution* (1985, repr 1993).

---- ed. *New Perspectives in the Roman Law of Property: Essays for Barry Nicholas* (1989).

---- 'The Roman Law Concept of Dominium and the Idea of Absolute Ownership' [1985] *Acta Juridica* 1.

Blackstone, William. *Commentaries on the Laws of England* (1765-9, University of Chicago Edition, 1979), vols 1 and 2.

Black's Law Dictionary (5th ed, 1979).

Blainey, Geoffrey. *A Shorter History of Australia* (1994).

---- *The Rush That Never Ended: A History of Australian Mining* (1993).

---- *The Triumph of the Nomads: A History of Ancient Australia* (1975).

Blomley, Nicholas. 'Landscapes of Property' (1998) 32 *Law & Society Review* 567.

Boge, Christopher. *State Leasehold in Queensland* (2000).

Bonyhady, Tim. *The Law of the Countryside: The Rights of the Public* (1987).

Borrows, John and Rotman, Leonard I. *Aboriginal Legal Issues: Cases, Materials & Commentary* (1998).

---- 'The *Sui Generis* Nature of Aboriginal Rights: Does it Make a Difference? (1997) 36 *Alberta Law Review* 9.

Bouckaert, Boudewijn. 'What is Property?' (1990) 13 *Harvard Journal of Law and Public Policy* 775.

Bradbrook, Adrian J. 'The relevance of the cujus est solum doctrine to the surface landowner's claims to natural resources located above and beneath the land' (1988) 11 *Adelaide Law Review* 462.

----, MacCallum, Susan V, and Moore, Anthony P. *Australian Real Property Law* (2nd ed, 1997).

---- *Australian Property Law: Cases and Materials* (1996).

Brewer, John and Staves, Susan. eds. *Early Modern Conceptions of Property* (1996).

---- 'Introduction' in John Brewer and Susan Staves, eds, *Early Modern Conceptions of Property* (1995) 1-18.

Bright, Susan and Dewar, John. eds. *Land Law: Themes and Perspectives* (1998).

Brownlie, Ian. *Principles of Public International Law* (4th ed, 1990).

---- edited by Brookfield, FM. *Treaties and Indigenous Peoples: The Robb Lectures 1991* (1992).

Bryan, Bradley. 'Property as Ontology: On Aboriginal and English Understandings of Ownership' (2000) 13 *Canadian Journal of Law and Jurisprudence* 3.

Buck, AR. '*Attorney General v Brown* and the Development of Property Law in Australia' (1994) 2 *Australian Property Law Journal* 128.

Buckland, WW. *Textbook of Roman Law* (Peter Stein, 3rd ed, 1963).

---- and McNair, Arnold D. *Roman Law and Common Law: A Comparison in Outline* (FH Lawson, 2nd ed, 1965).

Buckley, K. 'Gipps and the Graziers of New South Wales, 1841-1846' in JJ Eastwood and FB Smith, eds, *Historical Studies: Selected Articles* (1964) First Series 57-102.

Burn, EH. *Cheshire and Burn's Modern Law of Real Property* (15th ed, 1994).

Butt, Peter. *Land Law* (3rd ed, 1996).

---- *Land Law* (4th ed, 2001).

---- *The Laws of Australia*, 'Crown Lands', Title 28.

---- *The Laws of Australia*, 'Physical Limits of Land', Title 28.

----, Eagleson, Robert & Lane, Patricia. *Mabo, Wik & Native Title* (4th ed, 2001).

Calabresi, Guido and Mellamed, A Douglas. 'Property Rules, Liability Rules and Inalienability: One View of the Cathedral' (1972) 85 *Harvard Law Review* 1089.

Campbell, AH. 'Some Footnotes to Salmond's Jurisprudence' (1939-1941) 7 *Cambridge Law Journal* 206.

Campbell, Enid. 'Commonwealth Contracts' (1970) 44 *Australian Law Journal* 14.

---- 'Promises of Land from the Crown: Some Questions of Equity in Colonial Australia' (1994) 13 *University of Tasmania Law Review* 1.

Campbell, William. *The Crown Lands of Australia* (1855).

Carey Miller, DL. 'Property' in Ernest Metzger, ed, *A Companion to Justinian's Institutes* (1998) 42-79.

Castles, Alex C. *An Australian Legal History* (1982).

---- *Annotated Bibliography of Printed Materials on Australian Law 1788-1900* (1994).

Challis, HW. *Law of Real Property* (3rd ed, Charles Sweet, 1911).

Chambers, Robert. *An Introduction to Property Law in Australia* (2001).

Chitty, Joseph D. *A Treatise on the Law of the Prerogatives of the Crown and the Relative Duties and Rights of the Subject* (1820).

Christman, John. *The Myth of Property: Toward an Egalitarian Theory of Ownership* (1994).

Clark, CMH. ed. *Select Documents in Australian History 1851-1900* (1955).

---- ed. with the assistance of Pryor, LJ. *Select Documents in Australian History 1788-1850* (1950).

Clark, Sandford D and Renard, Ian A. 'The Riparian Doctrine and Australian Legislation' (1970) 7 *Melbourne University Law Review* 475.

Cohen, Felix S. 'Dialogue on Private Property' (1954) 9 *Rutgers Law Review* 357.

Cohen, Morris. 'Property and Sovereignty' (1927) 13 *Cornell Law Quarterly* 8.

Coke, Edward. *The First Part of the Institutes of the Laws of England; or, a Commentary upon Littleton: Not the Name of the Author Only, but of the Law itself* (15th ed, Francis Hargreave and Charles Butler, 1794) 3 vols.

---- *The Second Part of the Institutes of the Laws of England containing the Exposition of Many Ancient and Other Statutes* (1797) 2 vols.

Coulson, HJW and Forbes, UA. *The Law of Waters and Land Drainage* (6th ed, 1952).

Coulton, GG. *The Medieval Village* (1925, Dover ed, 1989).

Craig, Paul. *Public Law & Democracy in the United Kingdom and the United States of America* (1990).

Cribbet, JE and Johnson, CW. *Principles of the Law of Property* (3rd ed, 1989).

Dalziel, Jamie. 'Pastoral Leases in the Northern Territory and the Reservation of Aboriginal Rights' (1999) 22 *University of New South Wales Law Journal* 462.

Davison, Graeme, Hirst, John and MacIntyre, Stuart. eds. *The Oxford Companion to Australian History* (1998).

de Smith, Stanley and Brazier, Rodney. *Constitutional and Administrative Law* (7th ed, 1994).

de Vattel, Emerich. *The Law of Nations or the Principles of Natural Law* (Albert de Lapradelle, 1916), Bk I.

Demsetz, Harold. 'Toward a Theory of Property Rights' (1967) 57 *American Economic Review* 347.

Detmold, Michael J. 'Law and Difference: Reflections on Mabo's Case' (1993) 15 *Sydney Law Review* 159.

Devereux, John and Dorsett, Shaunnagh. 'Towards a Reconsideration of the Doctrines of Estates and Tenure' (1996) 4 *Australian Property Law Journal* 30.

Dicey, AV. *Introduction to the Study of the Law of the Constitution* (10th ed, 1959).

Digby, Kenelm Edward. *An Introduction to the History of the Law of Real Property With Original Authorities* (5th ed, 1897).

Dimento, Joseph F. 'Citizen Environmental Legislation in the States: An Overview' (1976) 53 *Journal of Urban Law* 413.

Donahue, Jr, Charles. '*Animalia Ferae Naturae*: Rome, Bologna, Leyden, Oxford and Queen's County, NY' in Roger S Bagnall and William V Harris. eds. *Studies in Roman Law in Memory of A Arthur Schiller* (1986) 39-63.

Dorsett, Shaunnagh. 'Clear and Plain Intention': Extinguishment of Native Title in Australia and Canada post-*Wik*' (1997) 6 *Griffith Law Review* 96.

---- 'Land Law and Dispossession: Indigenous Rights to Land in Australia' in Susan Bright and John Dewar, eds, *Land Law: Themes and Perspectives* (1998) 279-301.

Eastwood, JJ and Smith, FB. eds. *Historical Studies: Selected Articles* (1964) First Series.

Eekelaar, John, and Bell, John. eds. *Oxford Essays in Jurisprudence, Third Series* (1987).

Elgie, Stewart. 'Protected Spaces and Endangered Species' in Elaine L Hughes, Alistair R Lucas, and William A Tilleman, eds, *Environmental Law and Policy* (2nd ed, 1998) 437-85.

Ellickson, Robert C. 'Property in Land' (1993) 102 *The Yale Law Journal* 1315.

Epstein, Richard A. 'Property Rights Claims of Indigenous Populations: The View from the Common Law' (1999) 31 *University of Toledo Law Review* 1.

---- *Takings: Private Property and the Power of Eminent Domain* (1985).

Evans, Simon. 'From Private Property to Public Law' (2000) 28 *Federal Law Review* 155.

Evatt, Elizabeth. 'The Acquisition of Territory in Australia and New Zealand' (1968) 16 *Grotian Society Papers* 18.

Evatt, HV. *Certain Aspects of the Royal Prerogative* (unpublished LLD thesis, University of Sydney, 1924) cited in George Winterton, *Parliament, the Executive and the Governor-General: A Constitutional Analysis* (1983), 48.

---- *The Royal Prerogative* (1987).

Fairleigh, CF. 'Basic Questions on Native Lands' (1973) 46 *Australian Law Journal* 663.

Feenstra, Robert. '*Dominium* and *ius in re aliena*: The Origins of a Civil Law Distinction' in Peter Birks, ed, *New Perspectives in the Roman Law of Property: Essays for Barry Nicholas* (1989) 111-22.

Field, CD. *Landholding and the Relation of Landlord and Tenant in Various Countries* (1885).

Fisher, DE. *Laws of Australia*, 14.9 Water.

---- *Natural Resources Law in Australia* (1987).

Forbes, JRS and Lang, AG. *Australian Mining and Petroleum Laws* (2nd ed, 1987).

Freeman, Alan and Mensch, Elizabeth. 'Property' in Jack P Greene and JR Pole, eds, *The Blackwell Encyclopedia of the American Revolution* (1991) 620-28.

Freyfogle, Eric T. 'The Owning and Taking of Sensitive Lands' (1995) 43 *UCLA Law Review* 77.

---- 'The Particulars of Owning' (1999) 25 *Ecology Law Quarterly* 574.

Fry, Thomas Penberthy. *Freehold and Leasehold Tenancies of Queensland Land* (1946).

---- 'Land Tenures in Australian Law' (1947) 3 *Res Judicatae* 158.

Fulcher, Jonathan. 'Sui Generis History?: The Use of History in *Wik*' in Graham Hiley, ed, *The Wik Case: Issues and Implications* (1997) 51-6.

Garnett, George. 'The Origins of the Crown' in John Hudson, ed, *The History of English Law: Centenary Essays on 'Pollock and Maitland'* (1996) 171-214.

Gaus, Gerald F. 'Property, Rights, and Freedom' in Ellen Frankel Paul, Fred D Miller, Jr, and Jeffrey Paul, eds, *Property Rights* (1994) 209-40.

Geisler, Charles C. 'Estates of Mind: Culture's Many Paths to Land' (2000) 13 *Society and Natural Resources* 51.

Getzler, Joshua. 'Roman Ideas of Landownership' in Susan Bright and John Dewar, eds, *Land Law: Themes and Perspectives* (1998) 81-106.

---- 'Theories of Property and Economic Development' (1996) 26 *Journal of Interdisciplinary History* 639.

Gipps, *Historical Records of Australia* (1917) Series I, vol XXI, 127.

Godden, Lee. '*Wik*: Feudalism, Capitalism and the State. A Revision of Land Law in Australia?' (1997) 5 *Australian Property Law Journal* 162.

Gonner, ECK. *Common Land and Inclosure* (1912).

Goodall, Heather. 'Aboriginal Land Rights' in Graeme Davison, John Hirst and Stuart MacIntyre, eds, *The Oxford Companion to Australian History* (1998) 5-7.

Gordon, Robert W. 'Paradoxical Property' in John Brewer and Susan Staves, eds, *Early Modern Conceptions of Property* (1995) 95-110.

Gordon, WA. *The Law of Forestry* (1955).

Grant, Raymond. *The Royal Forests of England* (1991).

Graw, Stephen. *An Introduction to the Law of Contract* (1993).

Gray, Charles Montgomery. *Copyhold, Equity and the Common Law* (1963).

Gray, Kevin. *Elements of Land Law* (2nd ed, 1993).

---- and Gray, Susan Francis. 'Private Property and Public Property' in Janet McLean, ed. *Property and the Constitution* (1999) 11-39.

---- 'The Idea of Property in Land' in Susan Bright and John Dewar, eds, *Land Law: Themes and Perspectives* (1998) 15-51.

Greene, Jack P and Pole, JR. eds. *The Blackwell Encyclopedia of the American Revolution* (1991).

Grey, Thomas C. 'The Disintegration of Property' in J Rowland Pennock and John W Chapman, eds, *NOMOS XXII: Property* (1980) 69-85.

Griggs, LD and Snell, R. 'Property Boundaries and Incidental Rights Attached to the Ownership of Land in Tasmania' (1991) 10 *University of Tasmania Law Review* 256.

Grossi, Paolo. *An Alternative to Private Property: Collective Property in the Juridical Consciousness of the Nineteenth Century* (trans Lydia G Cochrane, 1981).

Grotius, Hugo. *The Law of War and Peace* (1646, Francis Kelsey, 1925), Bk II.

Hallam, Elizabeth M. *Domesday Book Through Nine Centuries* (1986).

Halsbury's Laws of England (4th ed reissue, 1996), Volume 8(2), 'Constitutional Law and Human Rights'.

---- (4th ed reissue, 1998), Volume 12(1), 'Crown Property'.

Hanks, Peter. *Constitutional Law in Australia* (2nd ed, 1996).

---- and Cass, Deborah. *Australian Constitutional Law: Materials and Commentary* (6th ed, 1999).

Hardin, Garrett. 'The Tragedy of the Commons' (1968) 162 *Science* 1243.

Hargreaves, AD. 'Modern Real Property' (1956) 19 *Modern Law Review* 14.

Harpum, Charles with Grant, Malcolm and Bridge, Stuart. *Megarry and Wade The Law of Real Property* (6th ed, 2000).

Harris, DR. 'The Concept of Possession in English Law' in AG Guest, ed, *Oxford Essays in Jurisprudence* (1961) 69-106.

Harris, JW. *Property and Justice* (1996).

Havemann, Paul. ed. *Indigenous Peoples' Rights in Australia, Canada, & New Zealand* (1999).

Hegel, GWF. *The Philosophy of Right* (trans TM Knox, 1967).

Heller, Michael A. 'The Boundaries of Private Property' (1999) 108 *The Yale Law Journal* 1163.

---- 'The Tragedy of the Anticommons: Property in the Transition from Marx to Markets' (1998) 111 *Harvard Law Review* 621.

---- & Krier, James E. 'Deterrence and Distribution in the Law of Takings' (1999) 112 *Harvard Law Review* 997.

Helmore, BA. *The Law of Real Property in New South Wales* (2nd ed, 1966).

Hiley, Graham. ed. *The Wik Case: Issues and Implications* (1997).

---- 'Introduction' in Graham Hiley, ed, *The Wik Case: Issues and Implications* (1997) 1-5.

Hocking, Barbara. 'Aboriginal Law Does Now Run in Australia: Reflections on the *Mabo* case: from *Cooper v Stuart* through *Milirrpum* to *Mabo*' (1993) 15 *Sydney Law Review* 187.

---- 'Does Aboriginal Law Now Run in Australia?' (1979) 10 *Federal Law Review* 161.

Hogg, Peter W. *Liability of the Crown* (2nd ed, 1989).

Hohfeld, Wesley Newcomb. *Fundamental Legal Conceptions as Applied in Judicial Reasoning, and other Legal Essays* (Walter Wheeler Cook, ed, 1923).

---- 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1913) 23 *The Yale Law Journal* 16.

---- 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1917) 26 *The Yale Law Journal* 710.

Holdsworth, William. *An Historical Introduction to the Land Law* (1927).

Holt, JC. *Magna Carta* (2nd ed, 1992).

Honoré, AM. *Making Law Bind: Essays Legal and Philosophical* (1987).

Hookey, John. 'Chief Justice Marshall and the English Oak: A Comment' (1974) 6 *Federal Law Review* 174.

---- 'The Gove Land Rights Case: A Judicial Dispensation for the Taking of Aboriginal Lands in Australia?' (1972) 5 *Federal Law Review* 85.

Horton, David. gen ed. *The Encyclopaedia of Aboriginal Australia* (1994).

Howden, Kristin. 'The Common Law Doctrine of Extinguishment - More than a pragmatic compromise' (2001) 8 *Australian Property Law Journal* 206.

Howe, Adrian. 'A Poststructuralist Consideration of Property in Thin Air--Mabo, A Case Study' (1995) 2(1) *E Law - Murdoch University Electronic Journal of Law*.

Howitt, Richard with Connell, John & Hirsch, Philip. eds. *Resources, Nations and Indigenous Peoples: Case Studies from Australasia, Melanesia and Southeast Asia* (1996)

Hudson, John. *Land, Law, and Lordship in Anglo-Norman England* (1994).

---- ed. *The History of English Law: Centenary Essays on 'Pollock and Maitland'* (1996).

Hudson, Nicholas. *Modern Australian Usage* (1993).

Huffman, James L. 'Land Ownership and Environmental Regulation' (1999) 25 *Ecology Law Quarterly* 591.

Hughes, Elaine L, Lucas, Alistair R, and Tilleman, William A. eds. *Environmental Law and Policy* (2nd ed, 1998).

Hughes, Robert. *The Fatal Shore: A History of the Transportation of Convicts to Australia, 1787-1868* (1987, 1st paperback ed, 1996).

Hunt, Constance D. *The Offshore Petroleum Regimes of Canada and Australia* (1989).

Hunt, Michael. 'Government Policy and Legislation Regarding Mineral and Petroleum Resources' (1988) 62 *Australian Law Journal* 841.

---- 'Native title changes don't solve all the problems', *The Australian*, 5 April 1999.

---- 'The Legal Implications of *Mabo* for Resource Development Introductory Statement' in Richard H Bartlett, ed, *Resource Development and Aboriginal Land Rights in Australia* (1993) 83-93.

---- and Lewis, Michael A. *Mining Law in Western Australia* (2nd ed, 1993).

Isaac, Thomas. *Aboriginal Law: Cases, Materials and Commentary* (1995).

Jackson, Paul. 'Alluvio and the Common Law' (1983) 99 *Law Quarterly Review* 412.

Jenks, Edward. *A History of the Australasian Colonies (From Their Foundation to the Year 1911)* (1912).

Jones, J Walter. 'Expropriation in Roman Law' (1929) 45 *Law Quarterly Review* 512.

---- 'Forms of Ownership' (1947) 22 *Tulane Law Review* 82.

Jose, Arthur. *Australia: Human and Economic* (1932).

Kantorowicz, Ernst H. *The King's Two Bodies: A Study in Medieval Political Theology* (1957, repr 1981).

Kauffman, Paul. *Wik, Mining and Aborigines* (1998).

Kawharu, IH. ed. *Waitangi: Māori and Pākehā Perspectives of the Treaty of Waitangi* (1989).

Keir, David Lindsay. *The Constitutional History of Modern Britain 1485-1951* (5th ed, revised, 1955).

Kennedy, Duncan. *A Critique of Adjudication {fin de siècle}* (1997).

Kent, James. *Commentaries on American Law* (1827, repr 1971) vol 2.

Kim, Keechang. '*Calvin's Case* (1608) and the Law of Alien Status' (1996) 17 *Legal History* 155.

King, CJ. *An Outline of Closer Settlement in New South Wales: Part I The Sequence of the Land Laws 1788-1956* (1957).

Kociumbas, Jan. *The Oxford History of Australia: Volume 2 1770-1860 Possessions* (1992).

Kwasniak, Arlene J. *Alberta Public Rangeland Law and Policy* (1993).

La Forest, Gerard. *Natural Resources and Public Property Under the Canadian Constitution* (1969).

Lametti, David. 'Property and (Perhaps) Justice. A Review Article of James W. Harris, *Property and Justice* and James E. Penner, *The Idea of Property in Law*' (1998) 43 *McGill Law Journal* 663.

Lane, PH. *The Australian Federal System* (2nd ed, 1979).

Lang, Andrew G. *Crown Land in New South Wales: The principles and practice relating to the disposal of and dealings with Crown land pursuant to the Crown Lands Consolidation Act, 1913; Western Lands Act, 1968; Returned Soldiers Settlement Act, 1916; War Service Land Settlement Act, 1914; Closer Settlement Acts & related legislation* (1973).

Law Reform Commission, Australia, Report No 31, *The Recognition of Aboriginal Customary Laws* (1986).

Lawson, FH. 'Rights and other relations in rem' in *Sonderdruck aus Festschrift für Martin Wolff* (1952) 103-22.

---- and Rudden, Bernard. *The Law of Property* (2nd ed, 1982).

Lewis, Charlton T. *An Elementary Latin Dictionary* (Impression of 1996).

Little, John. 'Aboriginal Land Rights' (1973) 47 *Australian Law Journal* 151.

Locke, John. *Two Treatises of Government* (Peter Laslett, 1988).

Lucas, Alastair R and Hunt, Constance D. *Oil and Gas Law in Canada* (1990).

---- *Security of Title in Canadian Water Rights* (1990).

MacDonald, Carmel, McCrimmon, Les and Wallace, Anne. *Real Property Law in Queensland* (1998).

Macklem, Patrick. 'Aboriginal Rights and State Obligations' (1997) 36 *Alberta Law Review* 97.

Macpherson, CB. 'The Meaning of Property' in CB Macpherson, ed, *Property: Mainstream and Critical Positions* (1978, repr 1989) 1-13.

Maddock, KJ. 'Tribal Organisation' in David Horton, gen ed, *The Encyclopaedia of Aboriginal Australia* (1994) vol 2.

Maine, Henry Sumner. *Ancient Law: Its Connection With the Early History of Society and its Relation to Modern Ideas* (1st ed, 1906, repr 1920).

---- *Early Law and Custom* (new ed, 1890).

Maitland, FW. *The Constitutional History of England* (1908).

McCarry, GJ. 'The Estate Conferred by Homestead Grants' (1967) 40 *Australian Law Journal* 396.

McHugh, Paul. 'Aboriginal rights and sovereignty: Commonwealth developments' [1986] *New Zealand Law Journal* 57.

---- 'Aboriginal Title in New Zealand Courts' (1984) 2 *Canterbury Law Review* 235.

---- 'Book Review: *Common Law Aboriginal Title*. By Kent McNeil' [1990] *The Cambridge Law Journal* 169.

---- 'Constitutional Theory and Māori Claims' in IH Kawharu, ed, *Waitangi: Māori and Pākehā Perspectives of the Treaty of Waitangi* (1989) 25-63.

---- 'From Sovereignty Talk to Settlement Time: The Constitutional Setting of Māori Claims in the 1990s' in Paul Havemann, ed, *Indigenous Peoples' Rights in Australia, Canada, & New Zealand* (1999) 447-67.

---- 'Maori Fishing Rights and the North American Indian' (1985) 6 *Otago Law Review* 62.

---- 'Sovereignty This Century--Maori and the Common Law Constitution' (2000) 31 *Victoria University of Wellington Law Review* 187.

---- 'The Common-Law Status of Colonies and Aboriginal "Rights": How Lawyers and Historians Treat the Past' (1998) 61 *Saskatchewan Law Review* 393.

---- 'The legal and constitutional position of the Crown in resource management' in Richard Howitt with John Connell & Philip Hirsch, eds, *Resources, Nations and Indigenous Peoples: Case Studies from Australasia, Melanesia and Southeast Asia* (1996) 300-16.

---- 'The legal basis for Maori claims against the Crown' (1988) 18 *Victoria University of Wellington Law Review* 1.

---- 'The Legal Status of Maori Fishing Rights in Tidal Waters' (1984) 14 *Victoria University of Wellington Law Review* 247.

---- *The Māori Magna Carta: New Zealand Law and the Treaty of Waitangi* (1991).

McIntyre, Greg. 'Aboriginal Title: Equal Rights and Racial Discrimination' (1993) 16 *University of New South Wales Law Journal* 57.

---- 'How Wik Applies to Western Australia' in Graham Hiley, ed, *The Wik Case: Issues and Implications* (1997) 27-9.

McLean, Janet. ed. *Property and the Constitution* (1999).

McNeil, Kent. 'Aboriginal Title and Aboriginal Rights: What's the Connection? (1997) 36 *Alberta Law Review* 117.

---- *Common Law Aboriginal Title* (1989).

---- 'Defining Aboriginal Title in the 90's: Has the Supreme Court Finally Got it Right?', Twelfth Annual Robarts Lecture, March 25, 1998, York University, Toronto.

---- 'Racial Discrimination and Unilateral Extinguishment of Native Title' (1996) 1 *Australian Indigenous Law Reporter* 181.

---- 'The Meaning of Aboriginal Title' in Michael Asch, ed, *Aboriginal and Treaty Rights in Canada* (1997) 135-154.

McRae, Heather, Nettheim, Garth and Beacroft, Laura. *Aboriginal Legal Issues* (1991).

---- *Indigenous Legal Issues* (2nd ed, 1997).

Megarry, Robert and Wade, HWR. *The Law of Real Property* (5th ed, 1984).

Mensch, Elizabeth V. 'The Colonial Origins of Liberal Property Rights' (1982) 31 *Buffalo Law Review* 635.

Merrill, Thomas W. 'Property and the Right to Exclude' (1998) 77 *Nebraska Law Review* 730.

---- 'Property Rules, Liability Rules, and Adverse Possession' (1984-1985) 79 *Northwestern University Law Review* 1122.

Metzger, Ernest. ed. *A Companion to Justinian's Institutes* (1998).

Meyers, Gary. 'Aboriginal Rights to the 'Profits of the Land': The Inclusion of Traditional Fishing and Hunting Rights in the Content of Native Title' in Richard H Bartlett and Gary D Meyers, eds, *Native Title Legislation in Australia* (1994) 213-30.

Michelman, Frank I. 'Ethics, Economics, and the Law of Property' in J Rowland Pennock and John W Chapman, eds, *NOMOS XXIV: Ethics, Economics and the Law* (1982) 3-40.

---- 'Property as a Constitutional Right' (1981) 38 *Washington & Lee Law Review* 1097.

Millard, AC and Millard, GW. *The Law of Real Property in New South Wales* (2nd ed, 1913).

Milsom, SFC. *Historical Foundations of the Common Law* (2nd ed, 1981, repr 1997).

Moore, JE. 'Land by the Water' (1968) 41 *Australian Law Journal* 532.

Morgan, Owen J. 'The Crown's Rights to Gold and Silver in New Zealand' (1995) 1 *Australian Journal of Legal History* 51.

Morison, WL. Legislation Note (1956-1958) 2 *Sydney Law Review* 129.

Motha, Stewart. 'Mabo: Encountering the Epistemic Limit of the Recognition of 'Difference'' (1998) 7 *Griffith Law Review* 79.

Mulvaney, John and Kamminga, Johan. *Prehistory of Australia* (1999).

Munzer, Stephen R. *A Theory of Property* (1990).

Nettheim, Garth. 'Judicial Revolution or Cautious Correction? *Mabo v Queensland*' (1993) 16 *University of New South Wales Law Journal* 1.

Nicholas, Barry. *An Introduction to Roman Law* (1962, repr 1990).

Noonan, Peter W. *The Crown and Constitutional Law in Canada* (1998).

Nygh, Peter E and Butt, Peter. eds. *Butterworths Australian Property Law Dictionary* (1997).

---- *Butterworths Concise Australian Legal Dictionary* (2nd ed, 1998).

Ostrom, Elinor. *Governing the Commons: The Evolution of Institutions for Collective Action* (1990).

O'Connell, DP. *The International Law of the Sea* (IA Shearer, 1982).

O'Connor, Pamella. 'Aboriginal Land Rights at Common Law: *Mabo* v *Queensland*' (1993) 18 *Monash Law Review* 251.

Oxley-Oxland, J and Stein, RTJ. *Understanding Land Law* (1985).

Parel, Anthony and Flanagan, Thomas. eds. *Theories of Property: Aristotle to the Present* (1979).

Paton, George Whitecross. *A Text-Book of Jurisprudence* (2nd ed, 1951).

Paul, Ellen Frankel, Miller, Jr, Fred D, and Paul, Jeffrey. eds. *Property Rights* (1994).

Penner, JE. 'The "Bundle of Rights" Picture of Property' (1996) 43 *UCLA Law Review* 711.

---- *The Idea of Property in Law* (1997).

Pennock, J Rowland and Chapman, John W. eds. *NOMOS XXII: Property* (1980).

---- *NOMOS XXIV: Ethics, Economics, and the Law* (1982).

Percy, David R. *The Framework of Water Rights Legislation in Canada* (1988).

---- *The Regulation of Ground Water in Alberta* (1987).

Peterson, Nicolas and Sanders, Will. eds. *Citizenship and Indigenous Australians: Changing Conceptions and Possibilities* (1998).

Pettit, Philip. *Republicanism: A Theory of Freedom and Government* (1997).

Phillips, Susan Burton. 'Reconstructing the Rules for the Land Rights Contest' in *Essays on the Mabo Decision* (1993) 1-22.

Pinchot, Gifford. *Breaking New Ground* (1947).

Pipes, Richard. *Property and Freedom* (1999).

Plato, *The Republic* (trans Desmond Lee, 2nd ed, 1974).

Pollock, Frederick and Maitland, FW. *The History of English Law before the time of Edward I* (2nd ed 1898, SFC Milsom 1968) vol 1.

Posner, Richard A. *Economic Analysis of Law* (4th ed, 1992).

Pottage, Alain. 'Instituting Property' (1997) 18 *Oxford Journal of Legal Studies* 331.

Powell, JM. *Environmental Management in Australia 1788-1914, Guardians, Improvers and Profit: An Introductory Survey* (1976).

---- *The Public Lands of Australia Felix: Settlement and Land Appraisal in Victoria 1834-91 with Special Reference to the Western Plains* (1970).

---- *Watering the Garden State: Water, land and community in Victoria 1834-1988* (1989).

Preece, Alun A. 'Water Rights of Land Owners in Queensland' (2000) 20 *Queensland Lawyer* 230.

Priestly, JL. 'Communal Native Title and the Common Law: Further Thoughts on the Gove Land Rights Case' (1974) 6 *Federal Law Review* 150.

Public Record Office, Victoria. *Historical Records of Victoria Foundation Series: Volume 6 The Crown, the Land and the Squatter 1835-1840* (1991).

Radin, Margaret Jane. *Contested Commodities* (1996).

---- 'Government Interests and Takings: Cultural Commitments of Property and the Role of Political Theory' in Margaret Jane Radin, ed, *Reinterpreting Property* (1993) 166-90.

---- ed. *Reinterpreting Property* (1993).

---- 'The Liberal Conception of Property: Crosscurrents in the Jurisprudence of Takings' in Margaret Jane Radin, ed, *Reinterpreting Property* (1993) 120-45.

Reeve, Andrew. 'Convention and Justification: Professor Harris on Property and Justice' (1999) 19 *Oxford Journal of Legal Studies* 323.

Reynolds, Henry. *Dispossession: Black Australians and White Invaders* (1989).

---- 'Mabo and Pastoral Leases' (1992) 2 *Aboriginal Law Bulletin* 8.

---- 'Native Title and Pastoral Leases' in MA Stephenson and Suri Ratnapala, eds, *Mabo: A Judicial Revolution: The Aboriginal Land Rights Decision and Its Impact on Australian Law* (1993) 119-131.

---- 'New Frontiers Australia' in Paul Havemann, ed, *Indigenous Peoples' Rights in Australia, Canada, & New Zealand* (1999) 129-40.

---- *The Law of the Land* (2nd ed, 1992).

---- 'The *Mabo* Judgment in the Light of Imperial Land Policy' (1993) 16 *University of New South Wales Law Journal* 27.

---- and Dalziel, Jamie. 'Aborigines and Pastoral Leases--Imperial and Colonial Land Policy 1826- 1855' (1996) *University of New South Wales Law Journal* 315.

Riddall, JG. *Land Law* (6th ed, 1997).

Ritter, David. 'The 'Rejection of Terra Nullius' in Mabo: A Critical Analysis' (1996) 18 *Sydney Law Review* 5.

Roberts, Stephen H. *History of Australian Land Settlement 1788-1920* (1968).

Roberts-Wray, Kenneth O. *Commonwealth & Colonial Law* (1966).

Rodger, Alan. *Owners and Neighbours in Roman Law* (1972).

Rogers, Nicolette. 'The Emerging Concept of "Radical Title" in Australia: Implications for Environmental Management' (1995) *Environmental and Planning Law Journal* 183.

Rose, Carol M. 'Canons of Property Talk, or, Blackstone's Anxiety' (1998) 108 *The Yale Law Journal* 601.

---- 'Possession as the Origin of Property' (1985) 52 *University of Chicago Law Review* 73.

---- *Property and Persuasion: Essays on the History, Theory, and Rhetoric of Ownership* (1994).

Rose-Ackerman, Susan. 'Inalienability and the Theory of Property Rights' (1985) 85 *Columbia Law Review* 931.

Ross, RM. 'Te Tiriti o Waitangi: Texts and Translations' (1972) 6 *New Zealand Journal of History* 129.

Rotherham, Craig. 'Restitution and Property Rites: Reason and Ritual in the Law of Proprietary Remedies' (2000) 1 *Theoretical Inquiries in Law* 205.

Rotman, Leonard I. 'Defining Parameters: Aboriginal Rights, Treaty Rights, and the Justificatory Test' (1997) 36 *Alberta Law Review* 149.

---- *Parallel Paths: Fiduciary Doctrine and the Crown-Native Relationship in Canada* (1996).

Rousseau, Jean-Jacques. *A Discourse on Inequality* (trans Maurice Cranston, 1984).

Rudden, Bernard. 'Economic Theory v. Property Law: The *Numerus Clausus* Problem' in John Eekelaar and John Bell, eds, *Oxford Essays in Jurisprudence, Third Series* (1987) 239-63.

Russell, Enid. *A History of the Law in Western Australia and Its Development From 1829 to 1979* (1980).

Ryall, V. 'Perpetual Leaseholds in New South Wales' (1937) 11 *Australian Law Journal* 223.

Ryan, Alan. *Property and Political Theory* (1984).

Salzman, James. 'Beyond the Smokestack: Environmental Protection in the Service Economy' (1999) 47 *UCLA Law Review* 411.

Sax, Joseph L. 'Do Communities Have Rights? The National Parks as a Laboratory of New Ideas' (1984) 45 *University of Pittsburgh Law Review* 499.

---- 'The Public Trust Doctrine in Natural Resources Law' (1970) 68 *Michigan Law Review* 471.

Scheffler, HW. 'Kinship' in David Horton, gen ed, *The Encyclopaedia of Aboriginal Australia* (1994) vol 1.

Schlatter, Richard. *Private Property: The History of an Idea* (1951).

Schroeder, Jeanne L. 'Never Jam To-day: On the Impossibility of Takings Jurisprudence' (1996) 84 *Georgetown Law Journal* 1531.

Schulz, Fritz. *Classical Roman Law* (1951).

---- *Principles of Roman Law* (Marguerite Wolff, 1936).

Scrutton, Thomas Edward. *Commons and Common Fields or The History and Policy of the Laws Relating to Commons and Enclosures in England* (1887).

Seddon, Nicholas. *Government Contracts: Federal State and Local* (2nd ed, 1999).

---- and Ellinghaus, MP. *Cheshire & Fifoot's Law of Contract* (7th Australian ed, 1997).

Simpson, AWB. *A History of the Land Law* (2nd ed, 1986).

Sinclair, Alan M. *Introduction to Real Property* (3rd ed, 1987).

Singer, Joseph William & Beermann, Jack M. 'The Social Origins of Property' (1993) 6 *Canadian Journal of Law and Jurisprudence* 217.

Skapinker, Diane. 'A Property Law Perspective on the Wik Peoples v Queensland' (1997) 8 *Public Law Review* 107.

Smith, Paul Anthony. 'Pastoral Leases and Native Title' in Graham Hiley, ed, *The Wik Case: Issues and Implications* (1997) 23-6.

Smith, Roger J. *Property Law* (2nd ed, 1998).

Snare, Frank. 'The Concept of Property' (1972) 9 *American Philosophical Quarterly* 200.

Stephenson, Margaret and Ratnapala, Suri. eds. *Mabo: A Judicial Revolution* (1993).

Stewart, Jean Cantlie. *History and Practice of the Law of Mines and Minerals* (1987).

Strelein, Lisa 'Conceptualising Native Title' (2001) 23 *Sydney Law Review* 95.

Stuckey, Michael. 'Feudalism and Australian Land Law: A Shadowy Ghostlike Survival?' (1994) *University of Tasmania Law Review* 102.

Sukhanov, Evgueny A. 'The Right of Ownership in the Contemporary Civil Law of Russia' (1999) 44 *McGill Law Journal* 301.

Sunstein, Cass R. 'Beyond the Republican Revival' (1988) 97 *Yale Law Journal* 1539.

---- 'Is the Clean Air Act Unconstitutional?' (1999) 98 *Michigan Law Review* 303.

The Australian Digest (3rd ed, 1994, 1995), Title 70, Real Property.

The Law Book Company Limited. ed. *Essays on the Mabo Decision* (1993).

Tonkinson, R. 'Social Organisation' in David Horton, gen ed, *The Encyclopaedia of Aboriginal Australia* (1994) vol 2.

Tooher, JG, Dwyer, BM and Teh, GL. *Introduction to Property Law* (3rd ed, 1997).

Van Hattem, PCS. 'The Extinguishment of Native Title (And Implications for Resource Development)' in Richard H Bartlett, ed, *Resource Development and Aboriginal Land Rights in Australia* (1993) 61-79.

Vendevelde, Kenneth J. 'The New Property of the Nineteenth Century: The Development of the Modern Concept of Property' (1980) 29 *Buffalo Law Review* 325.

Vinogradoff, Paul. *Outlines of Historical Jurisprudence: Introduction: Tribal Law* (1920) vol 1.

---- *The Growth of the Manor* (2nd ed, 1911).

Vogt, Roy. *Whose Property?: The Deepening Conflict between Private Property and Democracy in Canada* (1999).

Wade, ECS and Bradley, AW. *Constitutional and Administrative Law* (11th ed, 1993).

Waldron, Jeremy. 'Homelessness and the Issue of Freedom' (1991) 39 *UCLA Law Review* 295.

---- *Liberal Rights: Collected Papers 1981-1991* (1993).

---- *The Right to Private Property* (1988).

Walters, Mark D. 'The "Golden Thread" of Continuity: Aboriginal Customs at Common Law and Under the *Constitution Act, 1982*' (1999) 44 *McGill Law Journal* 711.

Webb, Raelene. 'Native Title Offshore: At the Water's Edge or Beyond' [1998] *AMPLA Yearbook* 532.

---- and Pettit, Kenneth. 'The Effect of Wik on Pastoral Leases with Provision for Access by Aboriginal People' in Graham Hiley, ed, *The Wik Case: Issues and Implications* (1997) 30-34.

Webber, Jeremy. 'The Jurisprudence of Regret: The Search for Standards of Justice in Mabo' (1995) 17 *Sydney Law Review* 5.

Weinrib, Arnold S. 'Property, Precedent, and Policy' (1985) 35 *University of Toronto Law Journal* 542.

Whincop, Michael J. 'Conflicts in the Cathedral: Towards a Theory of Property Rights in Private International Law' (2000) 50 *University of Toronto Law Journal* 41.

Williams, TC. 'The Fundamental Principles of the Present Law of Ownership of Land' (1931) 75 *Solicitor's Journal* 843.

Winterton, George. *Parliament, the Executive and the Governor-General: A Constitutional Analysis* (1983).

Wittgenstein, Ludwig. *Philosophical Investigations* (GEM Anscombe, 1953).

Wolff, Christian. *Jus Gentium Methodo Scientifica Pertractatum* (Joseph H Drake, 1934), vol 2.

Woodman, RA. *The Law of Real Property in New South Wales*, (1980), vol 1.

Wylie, JCW. *Irish Land Law* (2nd ed, 1986).

Wynes, W Anstey. *Legislative, Executive and Judicial Powers in Australia* (5th ed, 1976).

Young, Doug. '*Wik*: Implications for Statutory Lessees' (1997) 20 *University of New South Wales Law Journal* 512.

Ziff, Bruce H. 'Book Review, Carol M Rose, *Property and Persuasion: Essays on the History, Theory, and Rhetoric of Ownership* (Boulder, Westview Press, 1994)' (1996) 27 *Canadian Business Law Journal* 152.

---- *Principles of Property Law* (3rd ed, 2000).

Zimmerman, Reinhard. *The Law of Obligations: Roman Foundations of the Civilian Tradition* (1990 and 1996).