Racial Discrimination and Unilateral Extinguishment of Native Title

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Recommended Citation

In *Mabo v. Queensland [No.2]* (hereinafter *Mabo No.2*),¹ the High Court rejected the application in Australia of the doctrine of *terra nullius* which had previously been used to deny land rights to the Aborigines and Torres Strait Islanders. In the leading judgment in the case, Brennan J (as he then was) described the application of the doctrine in this context as "unjust and discriminatory", and said that it is inconsistent with the contemporary values of Australians.² He asserted that "it is imperative in today's world that the common law should neither be nor be seen to be frozen in an age of racial discrimination".³ He accordingly overruled earlier decisions, such as the *Gove Land Rights* case,⁴ which had applied the doctrine because...
laws. The indigenous peoples became British subjects, and their land rights continued and are enforceable today as common law legal entitlements, in the absence of valid acts of extinguishment or loss of connection with the land by the indigenous titleholders.

According to the High Court, native title can be unilaterally extinguished by acts of sovereign power which can be either legislative or executive in nature. We will consider legislative acts of extinguishment briefly before turning to the main topic of this article, namely executive extinguishment of native title to land by inconsistent grant or appropriation for the use of the Crown. These issues will be analysed in the context of the Mabo No. 2 decision, without discussing the impact of the Native Title Act 1993 (Cth) on the power of the Executive to extinguish native title.

I. Legislative Extinguishment of Native Title

The legislative power of extinguishment is derived from British constitutional law, which in theory contains no protection against interference with rights by the British Parliament. Thus, where a legislative body has

8. Although the High Court acknowledged that land rights could have been taken away by act of state at the time of acquisition of sovereignty, in the Western Australia case in particular the Court decided that that did not happen: ibid., 6-23; see also Mabo No. 2, supra n. 1, per Brennan J at 55-7, Deane and Gaudron JJ at 95-9, Toohey J at 184.
9. Mabo No. 2, supra n. 1, per Brennan J at 38, Toohey J at 182. Note that this occurred as a result of the application of British colonial law, usually without the consent or even the knowledge of the indigenous people affected.
11. Note that extinguishment of native title can also occur by surrender of that title to the Crown in bilateral agreements, such as treaties or land claims settlements, which have been the main means of extinguishment in Canada: for an analysis and critique of extinguishment by this means, see Royal Commission on Aboriginal Peoples, Treaty Making in the Spirit of Co-Existence: An Alternative to Extinguishment, Ottawa, Minister of Supply and Services Canada (1995). For detailed discussion of this and other extinguishment issues in the Canadian context, see Paul Joffe and Mary Ellen Turpel, Extinguishment of the Rights of Aboriginal Peoples: Problems and Alternatives, A Study Prepared for the Royal Commission on Aboriginal Peoples (3 volumes, June 1995). In Australia, extinguishment by voluntary surrender has not generally occurred, though the possibility of extinguishment by that means was acknowledged in Mabo No. 2, supra n. 1, per Brennan J at 60, 70, Deane and Gaudron JJ at 110, and is now provided for by section 21 of the Native Title Act 1993 (Cth).
the requisite constitutional authority, it can confiscate property by legislative act and vest it in the Crown without any compensation if the intent to deny compensation is unequivocally expressed. In the Australian context, this legislative power to take property is limited by the written constitution, including the federal division of powers. Section 51(xxxi) of the Australian Constitution (hereinafter the Constitution), for example, provides that the Commonwealth Parliament has the power to make laws with respect to the "acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws." The "just terms" requirement, which does not apply to State Parliaments, places a constitutional obligation on the Commonwealth Parliament to pay compensation for the taking of property. In Mabo No.2, Deane and Gaudron JJ expressed the view that this requirement applies to legislative extinguishment of native title by the Commonwealth. Also, due to section 109 of the Constitution, State legislation which purports to take property is invalid to the extent that it is inconsistent with a law of the Commonwealth. In the Western Australia case, the High Court applied this provision to hold that the Land (Titles and Traditional Usage) Act 1993 (WA) was invalid because its attempt to extinguish native title and replace it with more vulnerable statutory rights was inconsistent with the Racial Discrimination Act 1975 (Cth) and Native Title Act 1993 (Cth).

In addition to these constitutional restrictions on the legislative power to take property, we have already mentioned that the intent to take without compensation must be unequivocally expressed. In the words of Griffith CJ and Rich J in The Commonwealth v. Hazeldell Ltd, Aboriginal Governments (1993) 19 Queen's Law Journal 95, esp. 114-19. Note too that claims by indigenous peoples to an inherent right of self-government challenge the very basis of parliamentary sovereignty in so far as jurisdiction over those peoples and their lands is concerned. In the context of those claims, land rights and the right of self-government overlap and reinforce one another: see Joffe and Turpel, supra n. 11, vol. 1, 202-03. While discussion of this connection is beyond the scope of the present article, it is an important aspect of the current legal and political discourse on indigenous rights in Canada.

13. See Western Counties Railway Co. v. Windsor and Annapolis Railway Co. (1882) 7 App. Cas. 178 (PC), at 188; Commissioner of Public Works (Cape Colony) v. Logan (1903) AC 355 (PC), at 363-4; Central Control Board (Liquor Traffic) v. Cannon Brewery Co. Ltd (1919) AC 744 (HL), per Lord Atkinson at 752. Note that, in colonial contexts, the question of whether a local legislature has the authority to confiscate the lands of indigenous peoples depends on the constitutional instruments creating the legislature and defining its powers, as well as on paramount Imperial legislation: for discussion of limitations on legislative powers in this context in Australia, see Henry Reynolds, "The Mabo Judgment in Light of Imperial Land Policy" (1993) 16 University of New South Wales Law Journal 27.

14. The Constitution is contained in s. 9 of the Commonwealth of Australia Constitution Act 1900, 63 & 64 Vic., c. 12 (UK).


16. Supra n. 1, at 111. For discussion, see Alceo Turello, "Extinguishment of Native Title and the Constitutional Requirement of Just Terms" (1993) 3(62) Aboriginal Law Bulletin 11

17. Supra n. 7.

18. See also Mabo v. Queensland [No.1] (1988) 166 CLR 186 (HC), where the High Court held that the purported extinguishment of native title in the Torres Strait Islands by the Queensland Coast Islands Declaratory Act 1985 (Qld) was inconsistent with the Racial Discrimination Act 1975 (Cth) and therefore invalid due to section 109 of the Constitution.

19. (1918) 25 CLR 552 (HC), at 563. See also Attorney-General v. Horner (1884) 14 QBD 245 (CA), esp. per Brett MR at 256-7; London and North Western Railway Co. v. Evans (1893) 1 Ch. 16 (CA), per Bowen LJ at 28; Attorney-General v. De Keyser's Royal Hotel [1920] AC 508 (HL), per Lord Aikman at 542, Lord Parmoor at 576, 579; Colonial Sugar Refining Co. v. Melbourne Harbour Trust Commissioners (1927) 38 CLR 547 (PC), at 559.
It is a settled rule of construction that such an intention cannot be imputed to the Legislature unless expressed in unequivocal terms incapable of any other meaning.

This rule of statutory interpretation is part of a more general presumption against legislative interference with vested rights, including rights of property.\(^{20}\)

In the context of native title, Brennan, Toohey and Gaudron JJ in *Mabo v. Queensland [No. 1]* (hereinafter *Mabo No. 1*)\(^{21}\) expressed the view of the majority in relation to the interpretation of the *Queensland Coast Islands Declaratory Act 1985* (Qld). They said:

The effect of the 1985 Act for which the State of Queensland contends is to extinguish the rights which the plaintiffs claim in their traditional homeland and to deny any right to compensation in respect of that extinction. So Draconian an effect can be attributed to the 1985 Act only if its terms do not reasonably admit of another.\(^{22}\)

They concluded, however, that had the Act been valid in this respect (which they decided it was not\(^{23}\)), it would have had that Draconian effect because the intention to extinguish the native title of the Torres Strait Islanders had been clearly and plainly expressed.\(^{24}\)

This "clear and plain" test for legislative extinguishment of native title was reaffirmed by the High Court in *Mabo No.2*.\(^{25}\) In their judgments, Deane, Gaudron and Toohey JJ related the test directly to the presumption against legislative taking of property rights without compensation.\(^{26}\) Brennan J, however, said that the requirement of clear and plain intent "flows from the seriousness of the consequences to indigenous inhabitants of extinguishing their traditional rights and interests in land."\(^{27}\) But regardless of its source, he had no doubt about the correctness of the requirement, stating that "[i]t is patently the right rule".\(^{28}\)

To sum up this brief discussion of legislative extinguishment, the High Court has held that a legislature can extinguish native title, as it can other property rights, if the power to do so is within the scope of its constitutional authority. However, as the intention to extinguish must be clear and plain, extinguishment of native title, as in the case of other property rights, will only occur if the legislation cannot be reasonably

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21. Supra n. 18.

22. Ibid., 213.

23. See supra n. 18.

24. Ibid., 213-4. See also per Wilson J at 201. Compare per Deane J at 223-7, applying the rule to arrive at a narrower interpretation of the statute.

25. Brennan and Toohey JJ both followed Canadian and American authority applying the same test: supra n. 1, per Brennan J at 64, Toohey J at 195-6 (note, however, that Toohey J, at 205, expressed the view that legislation extinguishing native title would breach the Crown's fiduciary obligations to the titleholders: see infra n. 233). See also *Pareroutilja v. Tickner* (1993) 117 ALR 206 (Fed. CA), at 218, where Lockhart J also applied the clear and plain test. For further discussion, see Dodson, supra n. 10, 82-9; Richard Bartlett, "The Aboriginal Land Which May Be Claimed at Common Law: Implications of Mabo" (1992) 22 *University of Western Australia Law Review* 272, at 276-86.

26. Supra n. 1, at 111, 195. See also Sullivan, supra n. 20, 373-6, where a number of Canadian cases are cited to support the conclusion that "[t]he presumption against interfering with rights applies to Aboriginal rights"; and see 379-81.

27. Mabo No.2, supra n. 1, 64.

28. Ibid.
interpreted in any other way. Moreover, in the case of clear and plain extinguishment of property rights generally, a right of compensation is presumed unless unequivocally denied by the legislation. In Mabo No.2, Deane, Gaudron and Toohey JJ all appear to have regarded this presumption in favour of compensation to be applicable to native title. Although Brennan J did not deal with this issue of compensation for legislative extinguishment in that case, we have seen that he co-authored the judgment in Mabo No.1 where he, Toohey and Gaudron JJ said that the Queensland statute in question could only have the Draconian effect of extinguishing the native title of the Torres Strait Islanders and denying any right to compensation if its terms did not reasonably admit of any other interpretation. He therefore appears to have accepted that the presumption in favour of compensation applies in the context of legislative extinguishment of native title.

II. Executive Extinguishment of Native Title
A. General Principles

Under parliamentary systems of government, including the Australian system, executive power is generally exercised by cabinet ministers and government officials (hereinafter the Executive) who act on behalf and in the name of the Crown. These executive powers are distinct from legislative powers which can only be exercised by the Executive to the extent that legislative authority has been delegated to it by statute. For example, a statute may provide that a minister may make regulations respecting certain matters in relation to the Crown or executive power in Australia, see generally Wynes, Executive Extinguishment of Native Title Constitutional Principles, esp. 245, Constitutional Law Viewed in Relation to Common Law, AV Dicey, Introduction to the Study of the Law of the Constitution, 9th ed., London, MacMillan and Co. (1939), 50-4. This principle of parliamentary sovereignty underpins the rule of law, protecting individuals from arbitrary acts of the Crown: see Entick v. Carrington (1765) 19 St. Tr. 1029 (CP); Roncarelli v. Duplessis [1959] SCR 121 (SCC). As Broom said at 245, "[t]he enjoyment of personal liberty and private property without interference by the Crown is guaranteed by this fundamental doctrine of our constitution, that the sovereign cannot alter the existing laws - can neither add to nor dispense with them"

29. In the case of Commonwealth legislation, however, we have seen that the right to compensation is constitutional, and so cannot be denied: see supra nn. 14-15 and text.
30. Supra n. 1, 111, 195.
31. See supra n. 22 and text.
32. I am aware of the passage from Mason CJ and McHugh J's short judgment in Mabo No.2, supra n. 1, 15, where they said that, "subject to the operation of the Racial Discrimination Act 1975 (Cth), neither of us nor Brennan J. agrees with the conclusion to be drawn from the judgments of Deane, Toohey and Gaudron JJ that, at least in the absence of clear and unambiguous statutory provision to the contrary, extinguishment of native title by the Crown by inconsistent grant is wrongful and gives rise to a claim for compensatory damages". As we are about to discuss, the issue of extinguishment by inconsistent grant is different from that of legislative extinguishment. The presumptive right to compensation for legislative extinguishment is a common law entitlement created by judges to provide property holders with some protection against legislative taking which courts are incapable of judging as wrongful. For a discussion of the High Court's treatment of the compensation issue in Mabo No.2, see Gary D Meyers and John Mugambwa, "The Mabo Decision: Australian Aboriginal Land Rights in Transition" (1993) 23 Environmental Law 1203, at 1228-38.
34. Since at least the 17th century, a basic constitutional principle has prevented the Crown from making or changing law or custom without the authority of Parliament: see The Proclamations Case (1610) 12 Co. R 74 (KB); Herbert Broom, Constitutional Law Viewed in Relation to Common Law, 2nd ed. by George L Denman, London, W Maxwell & Son (1885), esp. 245, 386-8; AV Dicey, Introduction to the Study of the Law of the Constitution, 9th ed., London, MacMillan and Co. (1939), 50-4. This principle of parliamentary sovereignty underpins the rule of law, protecting individuals from arbitrary acts by officers of the Crown: see Entick v. Carrington (1765) 19 St. Tr. 1029 (CP); Roncarelli v. Duplessis [1959] SCR 121 (SCC). As Broom said at 245, "[t]he enjoyment of personal liberty and private property without interference by the Crown is guaranteed by this fundamental doctrine of our constitution, that the sovereign cannot alter the existing laws - can neither add to nor dispense with them"
Executive powers arise from two sources. First, subject to legislative restrictions, the royal prerogative provides the Executive with certain powers which are defined by the common law. Secondly, statutes often authorise members of the Executive to exercise executive powers for the purposes of the legislation. While the distinction between the delegated legislative powers discussed in the preceding paragraph and executive powers is not always easy to discern, it would seem to amount to this: delegated legislative powers involve law-making functions, "instanced by rules, regulations, orders and other forms of subordinate legislation", whereas executive powers 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".

As a general rule, a legislature acting within the limits of its constitutional authority can delegate legislative power to the Executive to infringe private rights, including rights of property. Thus, in Attorney-General for Canada v. Hallet & Carey Ltd the Privy Council upheld the validity of an Order in Council vesting "all oats and barley in commercial positions in Canada ... in the Canadian Wheat Board", even though the respondents' property rights were thereby taken away. Their Lordships construed the broad powers conferred on the Governor in Council by the National Emergency Transitional Powers Act, 1945, as including the power to make the Order in question, even though expropriation of private property had not been expressly authorised by the Act. If, however, there had been any ambiguity in the delegating legislation in this respect (which their Lordships found there was not), the presumption in favour of preservation of vested rights would have applied to limit the scope of the delegated power.

Besides delegating legislative powers of this sort, a legislature can also authorise the Executive to infringe private rights by executive act. In R v. Halliday the House of Lords considered the legality of the detention of a naturalised British subject born in Germany who had been interned under an Order of the Home Secretary. The Order had been issued under the Defence of the Realm (Consolidation) Regulations, 1914, made by the King in Council by virtue of legislative authority delegated to him by the Defence of the Realm Consolidation Act, 1914. Their Lordships upheld the legality of the detention on the grounds that the Act, on its true construction, conferred power on the King in Council to make the Regulations, and that the Order had been validly made under the Regulations. So the personal liberty of the appellant was legally taken away by

39. Supra n. 20.
40. SC 1945, c. 60 (Can.).
41. See Newcastle Breweries Limited v. The King [1920] 1 KB 854 (KB), at 866, where Salter J held that the presumption against statutory taking of property without compensation "must apply a fortiori to the construction of a statute delegating legislative powers". Note that the Hallet and Newcastle Breweries cases both involved emergency legislation enacted to deal with the consequences of war. In wartime conditions, the courts have been more willing than during peacetime to interpret statutes as delegating legislative power to interfere with rights to the Executive. This is because "[p]resumptions in favour of the liberty or property of the subject become relatively weak in time of war, the safety of the realm being the supreme law": Halsbury's Laws of England, supra n. 33, vol. 44 (1983), para. 905, n. 1, citing Norman v. Mathews (1916) 32 TLR 303 (DC), at 304.
42. [1917] AC 260 (HL).
43. 5 Geo. V, c. 8 (UK).
an Order which would seem to be an executive act,\textsuperscript{4} validly made under Regulations which in turn had been validly made under delegated legislative authority. If private rights can be infringed by executive act authorised by Regulations made under delegated legislative power, then a fortiori they can be infringed by executive acts authorised directly by statute.

Unless authorised to do so by law, the Executive cannot take away or infringe the rights of British subjects.\textsuperscript{44} It cannot do so legislatively because the Executive has no legislative powers which have not been delegated to it by statute. Nor can it do so executive because, apart from statute, its executive powers are to be found in the royal prerogative, the scope of which is defined by law. It is a fundamental aspect of the rule of law that the Crown, and hence the Executive through which it acts, cannot interfere with the rights of its subjects without lawful authority.\textsuperscript{45} Put another way, the Crown and its officials are bound by the law, and so cannot take away the rights of British subjects by act of state, as the law does not permit the Crown to commit acts of state against its own subjects.\textsuperscript{46} In short, for the Executive to be able to take away the legal rights of subjects, whatever their nature, it must have either unambiguous statutory authority or prerogative power to do so.\textsuperscript{47}

This brings us to the issue of executive extinguishment of native title in Australia. If valid legislation in an Australian jurisdiction unambiguously conferred authority on the Executive to extinguish native title, whether legislatively or executive, then on the principles discussed above the Executive would have the legal power to carry out the extinguishment if it acted in accordance with the statutory authority. In the absence of unambiguous statutory authority, however, any power of the Executive to extinguish native title would have to be found in the royal prerogative.

In Mabo No.2, Brennan J began his discussion of the issue of extinguishment of native title with the statement that "[s]overeignty carries the power to create and to extinguish private rights and interests in land within the Sovereign's territory."\textsuperscript{48} As we have seen, in a parliamentary system this applies to all property rights, including those held by virtue of native title. But as Brennan J went on to point out,

... under the constitutional law of this country, the legality (and hence the validity) of an exercise of a sovereign power depends on the authority vested in the organ of government purporting to exercise it: municipal constitutional law determines the scope of authority to exercise a sovereign power over matters governed by municipal law, including rights and interests in land.\textsuperscript{49}

\textsuperscript{44} An Order of this sort, involving a decision of the Home Secretary relating to one individual, does not make law, and so should be qualified as executive rather than legislative in nature. It may be that such a decision also has a quasi-judicial element, but that is an additional issue which is not germane to our present discussion.


\textsuperscript{46} See authorities cited supra n. 34.


\textsuperscript{48} With respect to land, this constitutional protection goes back at least to Magna Carta (1215), 17 John, c. 29, which provides that "[n]o Freeman shall ... be disseised ... but by the lawful Judgment of his Peers, or by the law of the Land." See Attorney-General v. De Keyser's Royal Hotel, supra n. 19, per Lord Parmoor at 569: "Since Magna Carta the estate of a subject in lands or buildings has been protected against the prerogative of the Crown." See also Australian Communist Party v. The Commonwealth (1951) 83 CLR 1 (HC), per Williams J at 230-1; Clunies-Ross v. The Commonwealth (1984) 155 CLR 193 (HC), at 201. This Magna Carta provision, which is still in force (see Halsbury's Laws of England, supra n. 33, vol. 8 (1974), para. 908 n. 2), was cited by Deane J in Mabo No.1, supra n. 18, at 226, in support of the presumption against legislative extinguishment native title. For further affirmation that the right of property is a basic right of British subjects, see Blackstone, supra n. 37, vol. 1, 127-9, 138-40; Broom, supra n. 34, 225-45; Halsbury’s Laws of England, supra n. 33, vol. 8 (1974), para. 833.

\textsuperscript{49} Supra n. 1, 63.

\textsuperscript{50} Ibid. For discussion of constitutional limitations on legislative exercise of this power, see supra nn. 12-18 and text.
While a legislature acting within the bounds of its constitutional jurisdiction undoubtedly has the sovereign power to create and extinguish private rights and interests in land, we have also seen that the Executive can only do so if it has prerogative or statutory authority to that effect.

With regard to the creation of real property rights and interests, the common law conferred this power on the Crown in so far as Crown lands were concerned. The Crown could, for example, create a fee simple estate in possession by granting some of its own demesne lands to one of its subjects. In common law jurisdictions, however, this power has generally been superseded by equivalent statutory power. In Queensland, for example, where Mabo No.2 arose, Brennan J pointed out that "the Crown's power to grant an interest in land is, by force of ss. 30 and 40 of the Constitution Act 1867 (Q.), an exclusively statutory power and the validity of a particular grant depends upon conformity with the relevant statute". At common law, this power to grant was obviously executive, as the royal prerogative does not confer any legislative powers on the Crown. It would remain executive under the relevant legislation, as making it statutory would not transform it into a legislative power.

The Crown can also reserve or dedicate Crown lands for a public purpose. As in the case of Crown grants, the power to do so is now generally statutory. In Queensland, the relevant provisions at the time of Mabo No.2 were contained in the Land Act 1962 (Qld) and the predecessors to that legislation. There can be no doubt that this power is also executive in nature.

The Crown's power to create real property rights and interests only exists to the extent that the Crown actually has rights and interests in land, which the law permits it to convey to its subjects by grant. For this reason, it cannot validly grant rights to land in which it has no interest. Nor can it extinguish the property rights of its subjects by granting their lands to others, unless it has unambiguous statutory authority to do so.

This fundamental limitation on the Crown's power is the central theme of this paper, and will be discussed in more detail below.

By statute, however, the Crown generally can extinguish the land rights of its subjects by taking or resuming their lands for public purposes. Apart from seizure or destruction of private property in time of war, this

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52. Supra n. 1, 63, citing Cudgen Rutile (No.2) Ltd v. Chalk [1975] AC 520 (PC), at 533-4.

53. See supra n. 34.


55. See Mabo No.2, supra n. 1, per Brennan J at 65-6.

56. See Bristow v. Cormican (1878) 3 App. Cas. 641 (HL), discussed infra nn. 98-104 and text.

57. See Broom, supra n. 34, 231: “no man's property can legally be taken from him or invaded by the direct act or command of the sovereign, without the consent of the subject, given expressly or impliedly through parliament”. See also Dodson, supra n. 10, 86.


59. Although the Crown has this power in wartime, at common law it must pay compensation, except in the case of destruction which occurs as a direct result of battle: see Attorney-General v. De Keyser's Royal Hotel, supra n. 19, Commercial and Estates Co. of Egypt v. The Board of Trade [1925] 1 KB 271 (CA), esp. per Atkin LJ at 294-7; Burmah Oil Co. v. Lord Advocate [1965] AC 75 (HL); Halsbury's Laws of England, supra n. 33, vol. 8 (1974), para. 920.
power of compulsory acquisition did not exist at common law. It was created by legislation so that the public interest, for example, to have a highway built for which lands are required, can override the private interests of landholders in appropriate circumstances. So as a general rule, the taking must be for public purposes. Accordingly, the Crown cannot take or resume the lands of one of its subjects in order to grant them to another. Moreover, when private property is taken for public purposes, a right of compensation arises unless unequivocally denied by the relevant legislation.

The extent to which the courts have gone to ensure that private landholders are compensated for loss of their lands through compulsory acquisition is illustrated by the case of Perry v. Clissold. In accordance with the provisions of the Lands for Public Purposes Acquisition Act, 1880, the Governor of New South Wales in 1891 resumed certain land for a public school. At the time, Clissold was in adverse possession of the land, as he had entered onto it without title in 1881 and held exclusive possession up to the resumption. He had not yet, however, acquired a good title as against the true owner (who was unknown), as the statutory limitation period had not passed. On that ground, the Minister of Public Instruction refused to pay compensation to the executors of Clissold, who had died before the claim for compensation was made. The Privy Council nonetheless upheld the decision of the High Court of Australia ordering the Minister to make a valuation of the land for the purpose of paying compensation to Clissold's estate. In their Lordships' opinion, by virtue of his possession Clissold had "a perfectly good title against all the world but the rightful owner", and so was entitled to compensation when the land was resumed for public purposes.

Applying the principles outlined above to executive extinguishment of native title, the correct position in law should be as follows. The Executive acting on behalf of the Crown can extinguish native title by executive act if unambiguously authorised by valid legislation to do so and the intention to extinguish is clear and plain.

60. See Blackstone, supra n. 37, vol. 1, 139; Davies, supra n. 58, 9-10; Fricke, supra n. 58, 5-6, esp. 5 n. 3. Compare Philip Nichols, The Law of Eminent Domain, Albany, NY, Matthew Bender & Company (1917), vol. 1, 5-12. Nichols suggested that the obsolete writ ad quod damnum permitted the taking in England of private land for public use, especially for new highways, upon an inquiry by a jury. However, it appears that the purpose of an ad quod damnum inquisition was to determine whether anyone would suffer damage if, for example, a highway was diverted or a right to hold a fair or market was granted by the Crown. If the jury found that anyone would suffer damage, the diversion or grant could not be made. So the writ in fact protected private rights, rather than determining compensation for their infringement as Nichols thought. See WJ Byrne, A Dictionary of English Law, London, Sweet & Maxwell (1923), "Ad quod damnum" at 28; Holdsworth, supra n. 51, vol. 10 (1938), 320-2; Halsbury's Laws of England, supra n. 33, vol. 29 (1979), para. 606.

61. See Davies, supra n. 58, 11, Brown, supra n. 58, 28-30. In Clunies-Ross v. The Commonwealth, supra n. 48, at 202, the High Court held that "the power compulsory to acquire land for a public purpose which is conferred by the Act [the Lands Acquisition Act 1955 (Cth)] is limited to a power to acquire land for some purpose related to a need for or proposed use (be it passive or active) or application of the land to be acquired. It does not extend to the acquisition of land merely for the purpose of depriving the owner of it and thereby achieving some purpose in respect of which the Parliament has power to make laws.

62. Note, however, that specific legislation can take away and create private rights in land, as was done by the British Parliament when it enacted the Inclosure Acts in the eighteenth and nineteenth centuries: see Davies, supra n. 58, 10-13. See also London and North Western Railway Co. v. Evans, supra n. 19.

63. See supra nn. 19-20 and text.

64. [1907] AC 73 (PC).

65. 44 Vic., No. 16 (NSW).

66. Supra n. 64, 79.

67. In Mabo No.2, supra n. 1, 64, Brennan J applied the clear and plain intent test to executive as well as to legislative extinguishment. He was no doubt correct in doing so, as the constitutional justification (preservation of the rights of subjects) for the presumption against the taking away of rights is at least as applicable in the case of executive action as it is in the case of legislative action. See also Western Australia, supra n. 7, 12, where the High Court applied the clear and plain intent test to negate the taking of native title by act of state.
Statutes authorising the Crown compulsorily to acquire lands for public purposes, for example, might apply to lands held by native title, permitting that title to be extinguished in accordance with the legislation.68 However, if that is the case, compensation would have to be paid to the native titleholders unless the legislation clearly provided otherwise. As for statutes authorising the Crown to grant interests in lands, in the absence of unambiguous legislative intention to the contrary that authority, like the common law power to grant, extends only to interests which are the Crown's to give. The Crown cannot grant interests which it does not have, nor can it extinguish the property rights and interests of its subjects by granting their lands to someone else. For example, if the Crown has a fee simple estate in reversion subject to an existing leasehold estate, it can only grant the fee simple subject to the leasehold.69 Similarly, if the Crown's radical title is burdened by an existing native title, the Crown can only grant an interest subject to the native title. If the interest granted is inconsistent with the native title, the grant should be void and of no effect.70

The law just summarised is not the law as applied by the High Court in Mabo No.2. Although divergent views were expressed on the issue of compensation by Deane, Gaudron and Toohey JJ on the one hand and Mason CJ, McHugh, Brennan and Dawson JJ on the other, with the possible exception of Toohey J the judges were in general agreement that, subject to the constitutional limitations discussed above,71 native title can be extinguished by executive acts. In particular, apart from Toohey J they decided that it can be extinguished either by a grant of a freehold or lesser estate or by appropriation by the Crown, to the extent that the grant or appropriation is inconsistent with the continuing enjoyment of native title.72 Moreover, this aspect of the decision was affirmed by the Western Australia case, where Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ said that native title in Western Australia "has been extinguished by the valid exercise of power to grant interests in some ... parcels [of land] and to appropriate others ... for the use of the Crown inconsistently with the continuing right of Aborigines to enjoy native title." 73 It is therefore necessary to examine this aspect of the Mabo No.2 judgments in more detail and to assess the justifications for executive extinguishment which were given. As the judgments vary in this regard, they will be examined separately. Dawson J's dissenting judgment will not be considered because, unlike the other judges, he was of the view that native title had already been extinguished by the Crown's acquisition of sovereignty, with the result that the indigenous peoples became permissive occupiers of Crown land from that time on.

B. The Mabo No.2 Judgments

(1) Brennan J

We have seen that Brennan J acknowledged that the exercise of sovereign power to create and extinguish private rights and interests in land depends on the authority which the municipal constitutional law vests in the organ of government purporting to exercise that power.74 He went on to say this:

68. This, of course, is subject to the constitutional restrictions discussed supra nn. 12-18 and text. Also, the application of compulsory acquisition legislation to native title would depend on how the legislative provisions were phrased and interpreted. In Canada, the Supreme Court has held on many occasions that any ambiguities in statutes relating to the indigenous peoples must be resolved in their favour: e.g. see Nowegijick v. The Queen [1983] 1 SCR 29; Mitchell v. Pagens Indian Band [1990] 2 SCR 85.

69. Thus, in Alcock v. Cooke (1829) 5 Bing. 340 (CP), Best CJ decided that a grant of a fee simple by Charles I was altogether void because it purported to grant an estate in possession which the King did not have, as an unexpired lease of the same land had previously been granted by James I.

70. See Attorney-General for the Isle of Man v. Mylchreest (1879) 4 App. Cas. 294 (PC), discussed infra nn. 105-10 and text.

71. See supra nn. 12-18 and text.

72. Mabo No.2, supra n. 1, esp. per Brennan J at 68-70. Mason CJ and McHugh J concurring at 15; Deane and Gaudron JJ at 89-90, 94, 110.

73. Supra n. 7, 21.

74. See supra nn. 49-50 and text.
In Queensland, the Crown’s power to grant an interest in land is ... an exclusively statutory power and the validity of a particular grant depends upon conformity with the relevant statute. When validly made, a grant of an interest in land binds the Crown and the Sovereign’s successors.\textsuperscript{75}

But then Brennan J wrote that the “courts cannot refuse to give effect to a Crown grant ‘except perhaps in a proceeding by scire facias or otherwise, on the prosecution of the Crown itself’”\textsuperscript{76} What he neglected to mention is that the Crown is bound to permit any subject who has been injured by a Crown grant to use the Crown’s name to rescind the grant by scire facias?\textsuperscript{77} Moreover, scire facias is not the only remedy available, as injured subjects can bring any other appropriate action to establish their rights.\textsuperscript{78} For example, where the King wrongly seized the lands of a subject and granted them to another who then took possession, it has been held that the subject could recover the lands in a legal action against the grantee, as the grantee would have entered his own wrong and not by any title that the King gave him, as the King had no title to give.\textsuperscript{79} So if the Crown attempts to grant an interest in land which it does not have, the

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\bibitem{75} \textit{Mabo No.2}, supra n. 1, 63-4 (footnotes omitted).
\bibitem{76} \textit{Mabo No.2}, supra n. 1, 64. The authority Brennan J quoted in this passage is the discredited judgment of Pendergast CJ in \textit{Wi Parata v. Bishop of Wellington} (1877) 3 NZ Jur. (NS) 72 (NZSC); see Paul McHugh, \textit{The Maori Magna Carta: New Zealand Law and the Treaty of Waitangi}, Auckland, Oxford University Press (1991), at 113-19, pointing out the inconsistencies between \textit{Wi Parata} and the Privy Council decisions in \textit{Nireaha Tamaki v. Baker} [1901] AC 561, and \textit{Wallis v. Solicitor-General for New Zealand} [1903] AC 173. Brennan J’s reliance on \textit{Wi Parata} is surprising, given that his decision is diametrically opposed to Pendergast CJ’s views on the native title of the Maoris in that case. Pendergast CJ, at 3 NZ Jur. (NS) 79, denied that there was such a thing as Maori customary law, and held that “the Court could not take cognizance of mere native rights to land”. At 78 and 79, he categorised the Maoris as “savages” and “primitive barbarians” who were “without any kind of civil government, or any settled system of law” Given his racist views of Maori society, it is no wonder that Pendergast CJ decided that a Crown grant would extinguish their native title, as for him that title had no legal existence.
\bibitem{77} \textit{Sir Oliver Butler’s Case} (1681) 2 Ventr. 344 (Ch.), affirmed (1685) 3 Lev. 220 (HL); Blackstone, supra n. 37, vol. 3, 261; Chitty, supra n. 37, 331. Although a fiat of the Attorney General is required for injured persons to have this remedy, scire facias is a matter of right to all who have suffered prejudice by the grant; see \textit{The Queen v. Eastern Archipelago Company} (1853) 22 LJQB (NS) 196 (QB), per Lord Campbell CJ at 213. (1853) 23 LJQB (NS) 82 (Ex. Ch.), esp. per Martin B at 88-9, Jervis CJ at 106. See also \textit{The Queen v. Hughes} (1866) LR 1 PC 81 (PC), on appeal from the South Australia Supreme Court, where Lord Chelmsford said at 87-8: “All Charters or grants of the Crown may be repealed or revoked when they are contrary to law, or uncertain, or injurious to the rights and interests of third persons, and the appropriate process for the purpose is by \textit{scire facias}. And if the grant or Charter is to the prejudice of any person, he is entitled as of right to the protection of this prerogative remedy.” Although the Privy Council decided that \textit{scire facias} was not available in that case for the technical reason that leasehold grants in South Australia were not of record, their Lordships advised that the grant could be set aside on an information in Chancery or a writ of intrusion.
\bibitem{78} In \textit{Sir Oliver Butler’s Case}, supra n. 77, 2 Ventr. at 344, Finch LC said that a reason for proceeding by \textit{scire facias} is “to hinder multiplicity of actions upon the case; for such action will lie notwithstanding such void patent”. In affirming Finch LC’s judgment, the House of Lords, at 3 Lev. 222, rejected the argument that \textit{scire facias} would not lie where the subject had another remedy, on the grounds that “it is not unusual for the King to have his remedy, as well as the subject”. For an example of a case where a Crown grant of a fee simple estate was successfully challenged in a defence to an action of trover, see \textit{Alcock v. Cooke}, supra n. 69 (there was no suggestion in the decision that \textit{scire facias} was necessary to impeach the fee simple grant, as the grant was simply void).
\bibitem{79} This example appears in \textit{Sir William Staunford}, \textit{An Exposicion of the Kings Prerogative}, London, Richard Trottel (1567), 74a, citing \textit{YB} 4 Ed. IV, f. 25; 24 Ed. III, f. 34.
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grant is simply void. In those circumstances, the Crown can neither create enforceable rights nor derogate from existing rights to the land.

Brennan J did acknowledge that, in the absence of statutory authority, the Crown cannot derogate from existing rights and interests, but he limited the application of this fundamental common law rule to rights and interests derived from a valid Crown grant. As a result, he said that...

... a statute which confers a power on the Crown will be presumed (so far as consistent with the purpose for which the power is conferred) to stop short of authorizing any impairment of an interest in land granted by the Crown or dependent on a Crown grant. But, as native title is not granted by the Crown, there is no comparable presumption affecting the conferring of any executive power on the Crown the exercise of which is apt to extinguish native title.

Applying this view of the law to Queensland, he concluded that

[t]he power to reserve and dedicate land to a public purpose and the power to grant interests in land are conferred by statute on the Governor in Council of Queensland and an exercise of these powers is, subject to the Racial Discrimination Act, apt to extinguish native title.

In his summary of "the common law of Australia with reference to land titles", Brennan J expanded this into the following general rules of executive extinguishment of native title:

Where the Crown has validly alienated land by granting an interest that is wholly or partially inconsistent with a continuing right to enjoy native title, native title is extinguished to the extent of the inconsistency. Thus native title has been extinguished by grants of estates of freehold or of leases but not necessarily by the grant of lesser interests (e.g., authority to prospect for minerals).

Where the Crown has validly and effectively appropriated land to itself and the appropriation is wholly or partially inconsistent with a continuing right to enjoy native title, native title is extinguished to the extent of the inconsistency.

Brennan J therefore appears to have concluded that the Queensland legislation authorising Crown grants of land would not permit the Crown to derogate from rights or interests created by its own grants, but would permit it to derogate from native title. Moreover, he suggested that this would be the case in the other Australian States and Territories as well. Thus, the vulnerability of native title to executive extinguishment is due to the fact that it is not derived from Crown grant. In other words, it is the origin of native title rather than its nature which renders it vulnerable.

With all due respect, authority does not support Brennan J's limitation of the rule that the Crown cannot...

80. For a long list of authorities to this effect, see The Case of Alton Woods (1600) 1 Co. R 40b (KB), at 43b-46b. For example, "if the King be tenant for life, and the King grants the land to another and his heirs, that grant is void, for the King taketh upon him to grant a greater estate than he lawfully can grant" ibid., 44a. See also Earl of Rutland's Case (1608) 8 Co. R 55a (KB). Note that Brennan J did acknowledge that a purported grant under statutory authority would be "wholly ineffective" to pass any interest that the Crown did not have authority under the statute to create. Mabo No.2, supra n. 1, 72.

81. See Alcock v. Cooke, supra n. 69, and discussion of Bristow v. Cormican, infra nn. 98-104 and text.

82. Mabo No.2, supra n. 1, 64.

83. Ibid.

84. Ibid., 67.

85. Ibid., 69-70 (paragraph numbers omitted).
derogate from existing rights or interests to situations involving rights or interests derived from its own grants. The rule is much broader, and in fact applies to all rights and interests, regardless of their origin. For example, it is clear that the remedy of scire facias to revoke a Crown grant is available to any subject whose rights or interests have been prejudiced. In The Queen v. Eastern Archipelago Company, a private prosecutor obtained a fiat from the Attorney General to bring scire facias in the Queen's name, and succeeded in having the charter of incorporation of a private trading company revoked for non-compliance with conditions of the charter. On the issue of standing to prosecute the action, Pollock CB said:

The public has so much interest in the correct conduct of those who enjoy any charter rights, that it may well be contended that the power of the subject is general, to question in the manner here adopted by scire facias, whether or no the charter be legal, or whether it has been forfeited by a breach of a condition, and that it cannot be taken away even by the Crown.

Jervis CJ regarded the right of the subject to bring scire facias as a fundamental safeguard against abuse of the prerogative power to make grants. He stated:

To every Crown grant there is annexed by the common law an implied condition, that it may be repealed by scire facias by the Crown, or by a subject grieved using the prerogative of the Crown, upon fiat of the Attorney General ... This use of the prerogative by the subject is his protection against the abuse of the prerogative to his prejudice, and, in my judgment, cannot be abridged.

Where Crown grants of land are concerned, the protection of the common law clearly extends to all pre-existing rights and interests, whatever their source. This should be obvious because in England most land titles cannot be traced back to Crown grants, as in many cases no grant was actually made. Nor are all these

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86. Brennan J's position is contradicted by a long line of authority. In addition to the cases about to be discussed in the text, see In the matter of the Islington Market Bill (1835) 3 Cl. & F 513 (HL), where it was decided that a right of market acquired by prescription could not be infringed by Crown grant, and that any grant of a market "within the common law distance of an old market, primâ facie is injurious to the old market, and therefore void": per Park J, at 515. See also Mayor of Exeter v. Warren (1844) 5 QB 773 (QB), where it was held that the Crown could create a port by grant, "so long as there was no interference with the rights previously vested": per Lord Denman CJ, at 799-800; see also 779, 781. Similarly, in granting a charter to trade and hold territories, the Crown could not take away a subject's property: Nightingale v. Bridges (1669) 1 Show. KB 135 (KB). See also Noel Pearson, "204 Years of Invisible Title", in MA Stephenson and Suri Ratnapala (eds), Mabo: A Judicial Revolution, St Lucia, Queensland, University of Queensland Press (1993), 75, at 84.

87. See Herbert Broom, A Selection of Legal Maxims, 8th ed. by Joseph Gerald Pearce and Herbert Chitty, London, Sweet and Maxwell (1911), 41: "The Crown cannot dispense with anything in which the subject has an interest, nor make a grant in violation of the common law, or injurious to vested rights" (footnotes omitted).

88. See supra n. 77 and text.

89. Supra n. 77.

90. Ibid., 103.

91. Ibid., 106.

92. This stems from the rule that "the King could not, by an exercise of his prerogative, prejudice those rights of his subjects which were secured to them by the rules of the common law": Holdsworth, supra n. 51, vol. 10 (1938), 360. For examples of this, see Nichols v. Nichols (1677) 2 Plow. 477 (CP), at 487. See also Field v. Boethsby (1657) 1 Sid. 137 (KB), at 139: "The prerogative of the King will not destroy or prejudice the property of the subject" (my translation of the law French).

titles ancient modern instances occur when titles good against all the world, including the Crown, are acquired by adverse possession. In the latter case the adverse possessors’ titles result from their possession, not from statutory conveyance, as the effect of the statute of limitations is not to convey title but simply to extinguish all other claims to the lands. Notwithstanding their source, it could not be successfully contended that titles by adverse possession are any more vulnerable to abrogation by Crown grant than titles derived from prior Crown grants.

As a general rule, where the Crown claims a title to land it must prove its title like anyone else. It cannot fabricate a title by granting lands it does not own. This is clearly illustrated by the case of Brstow v. Cormican, a decision of the House of Lords on appeal from Ireland. That case involved an action brought against the respondents for alleged trespass on the appellants’ fishery and on the lands covered by the waters of Lough Neagh where that fishery was located, and for conversion of the appellants’ fish. The respondents defended by denying the appellants’ title to the fishery and the lough bed, and alleged a public right to fish there. As evidence of their title, the appellants produced a lease whereby Charles II in 1660 demised the whole lough, including the fishery and the bed, to Sir John Clotworthy for 99 years. They also produced, among other things, a grant from Charles II dated 1661 to Arthur Chichester, through whom the appellants claimed, of the fee simple reversion of the “fishings and fishing places” of the lough, which apparently included the bed. The trial judge withdrew the issue of the appellants’ title from the jury and directed a verdict for the appellants. On the question of whether this was a misdirection, the House of Lords decided that it was, as the appellants’ title involved questions of fact which should have been left with the jury. A new trial was ordered.

For our purposes, the importance of the Brstow case lies in the views of the House of Lords on the value

94. In Attorney-General for New South Wales v. Love [1898] AC 679, the Privy Council applied the Nullum Tempus Act, 9 Geo. 3, c. 16, to find that the defendant had acquired a good title by 60-years adverse possession of Crown lands. See also Attorney-General for British Honduras v. Bristowe (1880) 6 App. Cas. 143 (PC).

95. See Tichborne v. Weir (1892) 67 LT 735 (CA); Atkinson & Hersef’s Contract [1912] 2 Ch. 1 (CA); at 9, 17; Fairweather v. St Marylebone Property [1963] AC 510 (HL), esp. 535.

96. See discussion of Perry v. Clissold, supra nn. 64-6 and text. As we have seen, that case involved payment of compensation for compulsory acquisition of land for public purposes, but there can be no doubt that Clissold’s possessory title would also have been protected against Crown grant. In reference to the Lands for Public Purposes Acquisition Act, 1880 (NSW), Lord Macnaghten said at 80: “It could hardly have been intended or contemplated that the Act should have the effect of shaking titles which but for the Act would have been secure, and would in process of time have become absolute and indisputable, or that the Governor, or responsible Ministers acting under his instructions, should take advantage of the infirmity of anybody’s title in order to acquire his land for nothing” (my emphasis). If Clissold’s title was “secure” against compulsory acquisition without compensation, it must have been secure against Crown grant. A fortiori, a title which has become “absolute and indisputable” through statutory limitation must be at least as secure. See also Colonial Sugar Refining Co. v. Melbourne Harbour Trust Commissioners, supra n. 19, 559-62, where the Privy Council applied “the well-known principle that a statute should not be held to take away private rights of property without compensation unless the intention to do so is expressed in clear and unambiguous terms” to preserve a title to land acquired by adverse possession against a statutory vesting of title in the respondent Commissioners.

97. “In a constitutional country the assertion of title by the Attorney-General in a Court of Justice can be treated as pleading only, and requires to be supported by evidence”: Nirea Tamaki v. Baker, supra n. 76, per Lord Davey at 576, on appeal from the Court of Appeal of New Zealand. See also Wallis v. Solicitor-General for New Zealand, supra n. 76, 188.

98. Supra n. 56.

99. Note that this claim to a public right was dismissed by the trial judge: ibid., 646. As that part of the decision was not appealed, the issue was not dealt with by the House of Lords: ibid., per Lord Cairns LC at 651.

100. ibid., per Lord Blackburn at 662-3.
of Charles II's grants as evidence of the appellants' title. Lord Cairns LC observed that, as the appellants had not produced any evidence of possession of the fishery where the alleged trespass took place, they had to rely on their documentary or paper title. That title began with the Crown. However, for Lord Cairns the grants of the lease and of the reversion by the Crown were not sufficient by themselves to establish the titles of the grantees, through one of whom the appellants claimed, as the grants did not prove the Crown's title. In Lord Cairns' words, it was "incumbent on the Appellants, in order to make available their documentary title, to give some evidence of the ownership or possession of the Crown at the beginning of that title", and the effect of that evidence was a matter for the jury to decide.

Lord Blackburn agreed that it had not been conclusively shown that Charles II had title to the property he purported to grant in 1660 and 1661. Unlike the soil under tidal waters, the beds of non-tidal rivers and lakes do not belong to the Crown of common right. As a general rule, those beds belong to the riparian landholders, though no title through riparian proprietors had been shown in this case. But even if no one else could show a title to the lough bed, that does not mean the Crown would be entitled, as there is not "any authority for saying that, by the prerogative, the Crown was entitled to all lands to which no one else can shew a title". As the Crown could not have a title by common right or the prerogative, the appellants either had to prove the Crown's title by evidence or make out a possessory title to the place where the alleged trespass took place. This involved matters of fact which should have been left with the jury.

The Bristow case is significant because it is authority from the highest British court that a Crown grant cannot give a title which the Crown does not have, even as against persons who have no title themselves. Moreover, it arose in Ireland, a colony acquired by the Crown by conquest, respecting which it has been decided that the land rights of the inhabitants continued without any confirmatory grant from the Crown, and were held in accordance with the rules of law which the conqueror allowed or established, including local custom to the extent that it was not too uncertain or repugnant to English conceptions of justice. If Crown grants which were unsupported by Crown title were ineffectual as against persons who were also without title, they would be even more ineffectual against persons who could show title based on Irish custom which predated the conquest.

A direct example of the Crown's inability to derogate from the customary land rights of the indigenous inhabitants of its colonies can be found in Attorney-General for the Isle of Man v. Mylchreest, an appeal to the Privy Council from the Isle of Man. The case involved an information of intrusion, in which the Attorney-General alleged that the Crown was entitled to the clay and sand under certain lands on the Isle, and that the defendants had wrongfully interfered with the Crown's rights. The defendant Mylchreest was the owner of a customary estate in the same lands, and had granted a lease or licence to the other defendants to dig clay and sand there to make bricks, tiles and pottery. Significantly, the defendants to whom the lease or licence had been granted had previously been granted a lease from the Crown to the mines and minerals under the same land. When they began to extract clay and sand by virtue of that Crown lease, which had been granted in 1867, Mylchreest succeeded in obtaining an injunction against them and an accounting in the Chancery Court of the Isle. Those defendants then surrendered their lease to the Crown, and obtained the lease or licence from Mylchreest which caused the Attorney-General to file the information of intrusion.

101. Ibid., 655-6.
102. Ibid., 667. See also per Lord Hatherley at 658: "Clearly no one has a right to say that it [the lough bed] became vested in the Crown because it belonged to nobody else."
103. See also the shorter concurring judgments of Lords Hatherley and Gordon: ibid., 656-9, 671.
104. See Case of Tanistry (1608) Davis 28 (Ir. KB).
105. Supra n. 70.
106. Ibid., 299, referring to this decision, which does not appear to have been reported. It is noteworthy that the Privy Council did not question the validity of this decision.
The Crown's title to the Isle of Man as a whole went back to the reign of Edward III, during which it had been conquered by England. In 1405, the Isle had been granted by Henry IV to Sir John Stanley, in whose family it had remained most of the time until being surrendered back to the Crown in 1765. The defendants did not dispute that the Crown's title included certain mines and minerals. However, they alleged that by the laws and customs of the Isle the owners of customary estates had from time immemorial dug and used clay and sand for their own purposes and for conversion into bricks and tiles for sale. Extensive evidence of this custom was produced, on the basis of which their Lordships concluded that the custom had been established. The Crown, however, argued that the custom conflicted with the grant to Sir John Stanley, and with a subsequent grant in 1610, each of which was broad enough to include clay and sand, as well as "mines of lead and iron" ("mines of lead and iron and quarries" in the 1610 grant) which were specifically mentioned. Sir Montague Smith, who delivered the judgment, agreed that the general words of these grants would have been sufficient to pass clay and sand, "if there were no proof of custom" 109. He said:

The rest of the language of the grants is quite large enough to carry the full title to the soil of the Isle, including minerals (except perhaps precious minerals) so far as the Crown could grant them. But, on the other hand, the Lordship could only be granted subject to the rights which the customary tenants might then have acquired by custom or otherwise in their tenements, and this limited description of mines and minerals is so far material that it would be consistent with the custom of the Defendants, if it then existed."108 (my emphasis)

On the basis that the custom had been established by the evidence, the Privy Council dismissed the Crown's information of intrusion.

The Mylchreest case reveals that, in a situation of potential inconsistency between a Crown grant and pre-existing customary land rights, courts should interpret the grant narrowly so as not to conflict with the customary rights if that is possible. If the inconsistency cannot be avoided in this way, however, the customary rights prevail. In the case of the Isle of Man, the customary rights to clay and sand were therefore protected against Crown grant in 1405, 1610 and again in 1867.109 The fact that they were derived from custom rather than from a prior Crown grant was no reason to deny them protection under the broad rule that the Crown cannot derogate from existing rights by grant.110

It therefore appears that Brennan J's conclusion that native title can be extinguished by inconsistent Crown grant because that title does not itself originate from a Crown grant is in conflict with long-standing authority.111 At common law, the Crown simply does not have the power to extinguish any rights of its

107. Ibid., 302.
108. Ibid.
109. As the reasons for the Chancery Court's judgment regarding the 1867 grant are unknown, we cannot be certain of the grounds for protecting Mylchreest's customary rights in that case. It may be that the Court relied on the Act of Settlement of 1703, which declared and confirmed ancient customary estates of inheritance on the Isle of Man: ibid., 305. However, that seems unlikely, as the Attorney-General in Mylchreest attempted to use that Act to support his argument that the customary landholders were not entitled to clay and sand. In any case, that Act was not relevant to the Privy Council's decision that the grants of 1405 and 1610 had to be subject to pre-existing customary rights.
110. In another colonial context, there is no doubt that the land titles of the French Canadians under the French Coutume de Paris (Custom of Paris), which applied in New France prior to the British acquisition of that territory in 1763, not only continued but also prevailed against inconsistent Crown grants: see Drulard v. Welsh (1906) 11 OLR 647 (Ont. Div. Ct), at 656, reversed on other grounds (1907) 14 OLR 54 (Ont. CA).
111. Compare North Ganalanja Aboriginal Corporation and Bidanggu Aboriginal Corporation for and on behalf of the Waanyi People v. The State of Queensland and CRA Exploration Pty Ltd, Fed. CA, Judgment No. 869-95, 1 November 1995
subjects, whatever their source, by grant. Moreover, where a statute authorises the Crown to grant lands, that power generally relates only to the Crown's own lands. It would be extraordinary for a statute of that sort to confer power on the Crown to grant interests which the Crown does not have or to extinguish existing land rights, though that could be done if the legislative intention was clearly and unambiguously expressed. Brennan J did not suggest that such an intent could be found in the legislation authorising grants of Crown lands in Queensland. In his view, the vulnerability of native title to extinguishment by Crown grant arises not from the conferral of statutory power to grant, but from the fact that the native title does not itself originate from grant. In other words, the vulnerability arises at common law rather than as a result of statutory authority.

This interpretation of Brennan J's reasons for deciding that native title is susceptible to extinguishment by inconsistent grant is supported by the Western Australia case, where the High Court appears to have accepted his approach to this matter. Referring directly to Brennan J's judgment, Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ said that, so far as a title to land granted by the Crown "consists in ownership of a legal or equitable interest in land, it cannot be extinguished without statutory authority". But like Brennan J, they did not rely on statutory authority in concluding that native title is vulnerable to extinguishment by Crown grant. Instead, they cited an old English case as authority that "a grant cannot be superseded by a subsequent inconsistent grant made to another person", and then said this:

_At common law, however, native title can be extinguished or impaired by a valid exercise of sovereign power inconsistent with the continued enjoyment or unimpaired enjoyment of native title._

It therefore appears that the High Court accepted Brennan J's common law distinction between titles derived from grant and those that are not, and found native title to be vulnerable to extinguishment by grant for that reason. But as we have seen, for hundreds of years the common law has provided the same protection to land titles which are not derived from grant as it has to titles that are. The rule that native title can be extinguished by inconsistent grant is not supported by the common law, and in fact contradicts fundamental common law principles. Its source in Australia is none other than the Mabo case (hereafter the Waanyi case), where Hill J, with whom Jenkins J agreed (typescript, 25), acknowledged in the following passage (typescript, 65) that rights arising from native title should not be more vulnerable to extinguishment than other rights: "Even in the absence of direct authority [Hill J was apparently unaware of the Mylchreest decision], it would seem to be the case that rights recognized by the common law, even if not derived from that system of law, like other common law rights could only be extinguished by the express language of a statute or by necessary implication derived from the statute" (my emphasis). In support of this, he cited two cases involving the presumption against legislative interference with common law rights: Sorby v. The Commonwealth (1983) 152 CLR 281 (HC), per Gibbs CJ at 289, Mason, Wilson and Dawson JJ at 309 (right to refuse to answer incriminating questions); Re Compass Airlines (1992) 35 FCR 447 (Fed. CA), at 454 (legal professional privilege). Surprisingly, however, Hill J then said that "[t]his idea appears both in the judgment of Brennan J and that of Deane and Gaudron JJ" in Mabo No.2 (he quoted a passage where Brennan J, supra n. 1, at 64, applied the clear and plain intent test to both legislative and executive extinguishment of native title). By ignoring the vital distinction between legislative and executive extinguishment of rights, Hill J was able to adopt (typescript, 68) what he called the "dicta" in those judgments that native title would be extinguished by an inconsistent grant.

112. Supra n. 7, 25, citing Mabo No.2, supra n. 1, 64.
113. Earl of Rutland's Case, supra n. 80, 55b, 56b.
114. Supra n. 7, 25 (citing Mabo No.2, supra n. 1, per Brennan J at 64, Deane and Gaudron JJ at 110-11). See also 36: the "enjoyment of [native] title is precarious under the common law: it is defeasible by legislation or by the exercise of the Crown's (or a statutory authority's) power to grant inconsistent interests in the land or to appropriate the land and use it inconsistently with the enjoyment of native title".
No. 2 decision itself. 115

This brings us to Brennan J's second means of executive extinguishment, namely appropriation of land for Crown use which is inconsistent with the continuing right to enjoy native title. 116 In this regard, Brennan J might have been on firmer ground if he had relied on the Crown's statutory power compulsorily to acquire lands for public purposes. 117 However, instead of doing this, he found the power to extinguish by appropriation to be located in the Crown's power to reserve or dedicate its own lands for a public purpose. He seems to have accomplished this by classifying native title lands as "waste lands of the Crown" for the purposes of legislation authorising Crown land to be set aside for public purposes. In his general rules on extinguishment, he stated:

Thus native title has been extinguished to parcels of the waste lands of the Crown that have been validly appropriated for use (whether by dedication, setting aside, reservation or other valid means) and used for roads, railways, post offices, and other permanent public works which preclude the continuing concurrent enjoyment of native title. Native title continues where the waste lands of the Crown have not been so appropriated or used or where the appropriation and use is consistent with the continuing concurrent enjoyment of native title over the land (e.g. land set aside as a national park). 118 (my emphasis)

According to Barton CJ in Williams v. Attorney-General for New South Wales,

[w]aste lands of the Crown, where not otherwise defined, are simply, I think, such of the lands of which the Crown became the absolute owner on taking possession of this country as the Crown had not made the subject of any proprietary right on the part of any citizen. 119

But Brennan J specifically rejected the notion that, at the time of colonisation, the Crown became absolute owner of lands occupied by indigenous people under their own customary systems of law. Instead, he decided that, upon acquisition of sovereignty over a territory, the Crown acquired a radical or ultimate title to

115. As we have seen, the decision in Wi Parata to the same effect in New Zealand has been thoroughly discredited: see supra n. 76. Although the recent Canadian decision in Delgamuukw v. British Columbia (1993) 104 DLR (4th) 470 (BCCA) may add some support to this aspect of Brennan J's judgment, to the extent that it does so that decision is subject to the very same objections as his judgment. Moreover, American authority relating to unilateral extinguishment of Indian title is not applicable in common law jurisdictions which have retained parliamentary systems of government, given the very different constitutional distribution of legislative and executive powers in the United States, and the characterisation of Indian title by the courts in that country: see Kent McNeil, Common Law Aboriginal Title, Oxford, Clarendon Press (1969), 244-67; idem, "The Temagami Indian Land Claim: Loosening the Judicial Strait-Jacket", in Matt Bray and Ashley Thomson (eds), Temagami: A Debate on Wilderness, Toronto, Dundurn Press (1990), 185, at 205-7; Hamar Foster, "It Goes Without Saying: Precedent and the Doctrine of Extinguishment by Implication in Delgamuukw et al v. The Queen" (1991) 49 The Advocate 341, at 343-5, 349-51; compare Bartlett, supra n. 25, 287, 292-4.

116. See supra n. 85 and text.

117. See supra nn. 58-68 and text. The courts will, however, intervene to protect property rights where the appropriation is not for a genuine public purpose: see supra n. 61. In Clunies-Ross v. The Commonwealth, supra n. 48, at 199-200, Gibbs CJ, Mason, Wilson, Brennan, Deane and Dawson JJ observed: "If the power to acquire for a public purpose which the Act confers is construed as extending to purposes quite unconnected with any need for or future use of the land, the ministerial power thereby created would be surprisingly wide in that, subject only to monetary compensation, it would encompass the subjection of the citizen to the compulsory deprivation of his land, including his home, by executive fiat to achieve or advance any ulterior motive which was a purpose in respect of which the Parliament has power to make laws".

118. Mabo No.2, supra n. 1, 70.

119. (1913) 16 CLR 404 (HC), at 428; see also per Isaacs J at 440.
all lands, including lands held by the indigenous inhabitants. "The radical title", he said, "is a postulate of the doctrine of tenure and a concomitant of sovereignty." He continued as follows:

But it is not a corollary of the Crown's acquisition of a radical title to land in an occupied territory that the Crown acquired absolute beneficial ownership of that land to the exclusion of the indigenous inhabitants. If the land were desert and uninhabited, truly a terra nullius, the Crown would take an absolute beneficial title ... there would be no other proprietor. But if the land were occupied by the indigenous inhabitants and their rights and interests in the land are recognized by the common law, the radical title which is acquired with the acquisition of sovereignty cannot itself be taken to confer an absolute beneficial title to the occupied land.

Moreover, where the indigenous inhabitants were in exclusive occupation of land and were effectively able to assert a right to occupy exclusively, Brennan J said they would have...

... an interest in the land that must be proprietary in nature: there is no other proprietor ... The ownership of land within a territory in the exclusive occupation of a people must be vested in that people: land is susceptible of ownership, and there are no other owners.

In that situation, acquisition of sovereignty would still give the Crown radical title to the land, but the land rights to which that title would be subject would be proprietary in nature. In Brennan J's words,

[where a proprietary title capable of recognition by the common law is found to have been possessed by a community in occupation of a territory, there is no reason why that title should not be recognized as a burden on the Crown's radical title when the Crown acquires sovereignty over that territory.

Where the inhabitants have such a communal title to lands, the radical title may not confer any beneficial interest at all on the Crown. So how can those lands, or indeed any lands held by native title, be waste lands of the Crown? Without explanation, Brennan J appears to have expanded the definition of waste lands of the Crown beyond lands of which the Crown became "absolute owner" to include lands held by native title. His unarticulated justification for this may have been that, upon acquisition of sovereignty, all lands became waste lands of the Crown in the sense that, in Barton CJ's words, "the Crown had not made [them] the subject of any proprietary right on the part of any citizen". But this would appear to be a modified version of the doctrine of terra nullius, which Brennan J discarded as racially discriminatory. Moreover, we have seen that lands which have not been granted can become privately owned by adverse possession. Lands are not waste lands of the Crown simply because they have not been made the subject of private property rights by the Crown. In order to be so classified, lands have to be part of the Crown's demesne, which lands held by native title, as Brennan J acknowledged, are not.

120. Mabo No.2, supra n. 1, 48.
121. Ibid.
122. Ibid., 51.
123. Ibid.
124. See Amodu Tijani v. Secretary, Southern Nigeria [1921] 2 AC 399 (PC), at 409-10, cited with approval by Deane and Gaudron JJ, Mabo No.2, supra n. 1, 114.
125. See supra nn. 1-5 and text.
126. Supra nn. 94-6 and text.
127. See discussion of Bristow v. Cormican, supra nn. 98-104 and text.
Brennan J may have implicitly relied on statutory definitions to conclude that lands held by native title are waste lands of the Crown. He referred, for example, to the following definition of "Crown land" in section 4 of the Land Act 1910 (Qld):

All land in Queensland, except land which is, for the time being -
(a) Lawfully granted or contracted to be granted in fee-simple by the Crown; or
(b) Reserved for or dedicated to public purposes; or
(c) Subject to any lease or licence lawfully granted by the Crown: Provided that land held under an occupation licence shall be deemed to be Crown land.

Other provisions of the Act then empower the Governor in Council to grant interests in Crown land and to reserve Crown land for public purposes. If lands held by native title are encompassed by the above definition of Crown land, then Brennan J might have interpreted those provisions as empowering the Governor in Council to extinguish native title by grant or reservation for public purposes.

The problem with this approach is that it flies in the face of the clear and plain intent test for extinguishment of native title which the High Court accepted in both Mabo decisions. It relies on a definition section of a statute to confer power on the Governor in Council to extinguish vested rights by executive act. But for such power to be conferred, the legislative intent must be unambiguous. It cannot have been intended that this definition would expose anyone's rights to executive extinguishment. As Brennan J said, the term "Crown land" was no doubt defined in this Act in the belief "that the absolute ownership of all land in Queensland is vested in the Crown until it is alienated by Crown grant". Given that belief, it cannot have been intended that the statute would authorise extinguishment of native title because the legislators would have thought that the indigenous people of Queensland had no land rights. It would offend common law principles favouring protection of rights against government interference if a statute enacted on the erroneous belief that certain rights did not exist were interpreted

129. Quoted ibid., 65. Note that "waste lands of the Crown" were defined in An Act for regulating the Sale of Waste Lands belonging to the Crown in the Australian Colonies, 5 & 6 Vic., c. 36 (Imp.), s. 23, and An Act to amend an Act regulating the Sale of Waste Land belonging to the Crown in the Australian Colonies, and to make further Provision for the Management thereof, 9 & 10 Vic., c. 104 (Imp.), s. 9, but Brennan J did not refer to those statutory definitions.

130. E.g. ss. 6, 180-1.

131. I am indebted to Professor Paul Finn (as he then was) for pointing this argument out to me at a seminar I gave on "Extinguishment of Native Title" at the Australian National University in Canberra on April 13, 1995.

132. See supra nn. 21-8 and text.

133. This contradicts "the valuable rule never to enact under the guise of definition": SGG Edgar, Craies on Statute Law, 7th ed., London, Sweet & Maxwell (1971), 213. See also Jim Evans, Statutory Interpretation: Problems of Communication, Auckland, Oxford University Press (1988), 52, where it is written that definition sections "normally do not have any immediate legal effect at all. Instead the terms they define wait to be employed in other provisions that have a substantive legal effect."

134. See supra nn. 39-48 and text. See also Mabo No.2, supra n. 1, per Toohey J at 196: "It need hardly be said that where an executive act is relied upon to extinguish traditional [i.e. native] title, the intention of the legislature that executive power should extend this far must likewise appear plainly and with clarity."

135. Mabo No.2, supra n. 1, 66.

136. See the Western Australia case, supra n. 7, at 19-20, where the High Court decided that there could have been no intention on the part of the British Crown to extinguish native title by act of state when sovereignty over Western Australia was acquired because that would have been thought to be unnecessary, given the application of the doctrine of terra nullius and the "common opinion (which Mabo [No.2] holds to be erroneous) that the Aborigines had no legal interest in land".
as authorising executive extinguishment of those very rights.\textsuperscript{137}  
The contradiction inherent in using statutory definitions of Crown lands to confer authority on the Governor in Council to extinguish native title by inconsistent grant must have been apparent to Brennan J. Whether native title lands were encompassed by the statutory definition or not,\textsuperscript{138} he was not prepared to use the definition to imply extinguishment of the land rights of the Meriam people. After pointing out that section 91 of the \textit{Crown Lands Alienation Act} 1876 (Old) made it an offence for a person to be in occupation of Crown land "unless lawfully claiming under a subsisting lease or licence", he observed:

If this provision were construed as having denied to the Meriam people any right to remain in occupation of their land, there would have been an indication that their native title was extinguished. The Solicitor-General for Queensland conceded that, if s.91 applied - and he did not contend that it did - the Meriam people could lawfully have been driven into the sea at any time after annexation and that they have been illegally allowed to remain on the Murray Islands ever since. Such a conclusion would make nonsense of the law ... To construe s.91 or similar provisions as applying to the Meriam people in occupation of the Murray Islands would be truly barbarian. Such provisions should be construed as being directed to those who were or are in occupation under colour of a Crown grant or without any colour of right; they are not directed to indigenous inhabitants who were or are in occupation of land by right of their unextinguished native title.\textsuperscript{139}

Similarly, statutory provisions authorising the Governor in Council to grant Crown lands should not be construed as authorising the extinguishment of native title by inconsistent grant, as that could not have been intended. Since Brennan J's acceptance of the clear and plain intent test prevented him from finding statutory authority to that effect, he resorted instead to the supposition that native title is not protected against inconsistent grant at common law because it is not derived from grant. But as we have seen, that supposition is not supported by principle or precedent, and in fact conflicts directly with the high authority of the \textit{Bristow} and \textit{Mylchreest} decisions.\textsuperscript{140}

Moreover, our discussion has revealed that, in the case of legislative taking of property, either directly or through legislatively-authorised executive act, a right to compensation exists unless unequivocally denied by the relevant legislation.\textsuperscript{141} Brennan J appears to have accepted the application of that rule to native title in \textit{Mabo No.1}.\textsuperscript{142} As nothing in the \textit{Land Act 1910} expressly or implicitly authorised the Governor in Council to take native title lands without paying compensation, the presumption in favour of compensation would apply in the context of the Act. But according to Mason CJ and McHugh J, Brennan J agreed that no compensation was payable for extinguishment of native title by inconsistent Crown grant.\textsuperscript{143} It would therefore have been inconsistent for Brennan J to rely on the Act for executive authority to extinguish native title by grant, and at

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\textsuperscript{137} A similar situation arose in a constitutional context in \textit{Minister of State for the Army v. Dalziel}(1944) 68 CLR 261 (HC), where Latham CJ, at 275, in reference to a statute authorising compulsory acquisition of land by the Commonwealth, said that the Commonwealth Parliament could not give itself power by legislating upon a false assumption, namely that taking possession of land in certain circumstances did not involve an acquisition of property (note that Latham CJ ended up dissenting on the issue of whether there actually had been an acquisition of property in the case).

\textsuperscript{138} Although Brennan J was not entirely clear on this point, a cryptic observation at \textit{Mabo No.2}, supra n. 1, 66, suggests that he thought that they were: "the denotation of the term 'Crown land' in the \textit{Land Act 1910} and the \textit{Land Act 1962} is the same whether the common law attributes to the Crown the radical title or absolute ownership". If he thought they were, then maybe his conclusion that native title lands are "waste lands of the Crown" was based on the statutory definition.

\textsuperscript{139} \textit{Ibid.} See also per Deane and Gaudron JJ at 114.

\textsuperscript{140} See supra nn. 98-110 and text.

\textsuperscript{141} See supra nn. 13, 19-20, and text.

\textsuperscript{142} See supra nn. 22, 31-2, and text.

\textsuperscript{143} See supra n. 32.
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the same time to deny compensation for extinguishment by that means. This may be another reason why Brennan J tried to find this authority in the common law rather than in statute.144

In sum, Brennan J did not base his conclusion that native title can be extinguished by appropriation for Crown purposes on the self-contradictory notion that lands subject to native title are waste lands of the Crown. Nor did he rely on the Crown’s statutory power compulsorily to acquire land for public purposes. Instead, he spoke as though the Crown’s acquisition of radical title to land along with sovereignty somehow gave it the power to extinguish native title. He said:

By attributing to the Crown a radical title to all land within a territory over which the Crown has assumed sovereignty, the common law enabled the Crown, in the exercise of its sovereign power, to grant an interest in land to be held of the Crown or to acquire land for the Crown’s demesne.145

Later in his judgment, Brennan J referred to this as “a sovereign political power ... to dispose of land in disregard of native title”, which could be exercised “to expand the radical title of the Crown to absolute ownership.”146 But Brennan J acknowledged that, “under the constitutional law of this country, the legality (and hence the validity) of an exercise of a sovereign power depends on the authority vested in the organ of government purporting to exercise it”147 And as we have seen, under Australia’s parliamentary system the political power to take away rights is vested in the legislative rather than the executive branch of government.148

The Executive might, nonetheless, be able to extinguish native title to land by compulsorily acquiring the land for public purposes under statutory authority, as it could other lands. In that case, however, we have seen that compensation would have to be paid in the absence of unequivocal legislative provisions to the contrary.149 Significantly, Mason CJ and McHugh J did not refer to this issue of compensation for compulsory acquisition when they denied compensation for extinguishment by inconsistent grant.150 Nor did Brennan J deal with it. He did, however, quote a passage from Adeyinka Oyekan v. Musendiku Adele, where Lord Denning, speaking for the Privy Council, said that the courts would declare compensation to be payable to the indigenous inhabitants of a British colony if their lands were compulsorily acquired for

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144. This is not to say that Mason CJ, McHugh and Brennan JJ were correct in denying compensation on this basis. We have seen that, even in time of war for purposes of defence, the Crown does not have the power at common law to take the property of subjects without paying compensation: supra n. 59. Allowing the Crown to take land without compensation violates fundamental constitutional protections of the rights of subjects going back to Magna Carta: see supra n. 48. Moreover, Mason CJ and McHugh J gave no authority whatsoever for their bare statement, which they said Brennan J agreed with, that there is no right to compensation for extinguishment of native title by inconsistent grant. But in fact Brennan J did not even deal with the issue of compensation in his judgment. The absence of authority and stated reasons is disturbing, and seriously undermines this aspect of the decision, especially in light of the fact that the denial of compensation violates fundamental common law principles. For an insightful discussion of this aspect of the decision, see Pearson, supra n. 86, 83-6.

145. Mabo No.2, supra n. 1, 48; see also 50-1.

146. Ibid., 53.

147. Ibid., 63.

148. See supra nn. 12-48 and text.

149. See supra nn. 58-69 and text. Subject to the terms of the relevant statute, compensation might be non-monetary, such as the provision of replacement lands: for discussion of the form of compensation in the Canadian context, see Joffe and Turpel, supra n. 11, vol. 1, 68 n. 346, 247 n. 1390.

150. See supra nn. 32, 143-4, and text.
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public purposes.\textsuperscript{151} Brennan J merely observed that "[w]e are not concerned here with compensation for expropriation", leaving the issue open.\textsuperscript{152}

In contrast to compulsory acquisition for public purposes, there appears to be no Australian legislation authorising the Crown to extinguish native title by inconsistent grant, with or without compensation.\textsuperscript{153} Nor can statutes providing for grants of Crown lands authorise the Crown to extinguish native title, as lands held by native title are not the Crown's to give. Moreover, Brennan J's notion that the Crown, along with radical title, somehow acquired a "sovereign political power" to extinguish native title by grant in colonial contexts is constitutionally unsound, and conflicts with the Bristow and Mylchreest decisions.\textsuperscript{154} It is fundamental to the rule of law that the Crown has no such power to infringe existing rights without legislative authorisation.\textsuperscript{155} For these reasons, this aspect of Brennan J's judgment in Mabo No.2 is seriously flawed.

(2) Deane and Gaudron JJ

Like Brennan J, Deane and Gaudron JJ in their joint judgment decided that native title could be extinguished executive by inconsistent Crown grant or appropriation. Unlike Brennan J, however, they concluded that executive extinguishment by these means would be wrongful and could create a valid claim for compensatory damages in appropriate circumstances. It follows from this conclusion that they could not have relied on statutory authority for this executive power of extinguishment, as extinguishment pursuant to statute would not have been wrongful as a matter of law. This is confirmed by the following passage from their judgment:

... general waste lands (or Crown lands) legislation is not to be construed, in the absence of clear and unambiguous words, as intended to apply in a way which will extinguish or diminish rights under common law native title. If lands in relation to which such title exists are clearly included within the ambit of such legislation, the legislative provisions conferring executive powers will, in the absence of clear and unambiguous words, be construed so as not to increase the capacity of the Crown to extinguish or diminish the native title. That is to say, the power of the Crown wrongfully to...

151. [1957] 1 WLR 876 (PC), at 880. The full passage quoted by Brennan J, Mabo No.2, supra n. 1, 58, is as follows:

In inquiring ... what rights are recognized, there is one guiding principle. It is this: The courts will assume that the British Crown intends that the rights of property of the inhabitants are to be fully respected. Whilst, therefore, the British Crown, as Sovereign, can make laws enabling it compulsorily to acquire land for public purposes, it will see that proper compensation is awarded to every one of the inhabitants who has by native law an interest in it; and the courts will declare the inhabitants entitled to compensation according to their interests, even though those interests are of a kind unknown to English law.

It should be noted that the case involved lands in Southern Nigeria, a colony acquired by the Crown by cession. As a result, the Crown had legislative power there, which it did not have in Australia because Australia has been classified as a settlement: see Cooper v. Stuart (1889) 14 App. Cas. 286 (PC), at 291; Coe v. Commonwealth of Australia (1979) 53 ALJR 403 (HC); Mabo No.2, supra n. 1, per Deane and Gaudron JJ at 79, 82. There is nonetheless a general principle to be drawn from Lord Denning's judgment, namely that indigenous people are as entitled as other landholders to compensation when their lands are compulsorily acquired by the Crown under legislative authority. For examples of cases where compensation was awarded to customary landholders for compulsory acquisition of their lands in Southern Nigeria, see Amodu Tijani, supra n. 124; Sakanyawo Oshodi v. Moriamo Dakolo [1930] AC 667 (PC). For further discussion, see Pearson, supra n. 86, 83-86.

152. Mabo No.2, supra n. 1, 56.

153. The Native Title Act 1993 (Cth) extinguishes native title by validating (or allowing State or Territorial law to validate) certain past grants by the Crown, and provides for compensation for the extinguishment, but the Act does not permit new grants to extinguish native title.

154. See supra nn. 98-110 and text.

155. See supra nn. 34, 46-8, and text.
extinguish the native title by inconsistent grant will remain but any liability of the Crown to pay compensatory damages for such wrongful extinguishment will be unaffected.\(^{156}\)

So Queensland statutes, like the *Crown Lands Alienation Act* 1876 and the *Land Act* 1910, to the extent that they included native title lands within the ambit of “waste Lands” or “Crown lands”, neither extinguished native title nor enhanced the Crown’s pre-existing power to extinguish it.\(^{157}\)

For Deane and Gaudron JJ, the vulnerability of native title to executive extinguishment arose from common law limitations on that title. With respect to extinguishment by inconsistent grant, they said this:

... common law native title, being merely a personal right unsupported by any prior actual or presumed Crown grant of any estate or interest in the land, was susceptible of being extinguished by an unqualified grant by the Crown of an estate in fee or of some lesser estate which was inconsistent with the rights under the common law native title. In such a case, prior occupation or use under the common law native title is explained by the common law's recognition of prior entitlement under the earlier indigenous law or custom and is predicated upon the absence of any intervening grant from the Crown. Accordingly, it does not found an assumption of a prior lost grant and would be unavailing against those claiming under the inconsistent grant which would otherwise be beyond challenge except on the ground of invalidity on its face.\(^{158}\)

Deane and Gaudron JJ thus relied in part on the fact that native title is unsupported by Crown grant, which we have seen was the main reason Brennan J gave for deciding that it is susceptible to executive extinguishment.\(^{159}\) Since it is unsupported by grant, whether actual or presumed,\(^{160}\) they said it could be wrongfully extinguished by an inconsistent grant because that grant would “be beyond challenge except on the ground of invalidity on its face”.\(^{161}\) A Crown grant which is

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156. *Mabo No.2*, supra n. 1, 111.
157. *ibid.*, 114-15, 117-18. This accords with our analysis of Brennan J's judgment on this issue: see supra nn. 129-40 and text.
158. *ibid.*, 89; see also 93-5, 100-01, 110-11, 112-13.
159. See supra nn. 74-86 and text.
160. Deane and Gaudron JJ's dismissal of the possibility of presuming grants to native title holders is rather perfunctory. When necessary to protect non-native land titles, courts have been willing to resort to legal fiction and presume lost grants even in face of evidence that no grant was ever made: see *White v. McLean* (1890) 24 SALR 97 (SASC), at 101; *Tehidy Minerals v. Norman* [1971] 2 QB 528 (CA), at 552. As the Master of the Rolls observed in *Attorney-General v. Lord Hotham* (1823) Turn & R 209 (Ch.), at 218, “[v]ery high judges have said they would presume any thing in favour of a long enjoyment and uninterrupted possession”. See also *Rogers v. Brooks* (1783) 1 TR 431 n(a); *Roe d Johnson v. Ireland* (1809) 11 East 280 (KB), at 264.
161. See supra nn. 86-111 and text. The only authority Deane and Gaudron J cited was *Nireaha Tamaki v. Baker*, supra n. 76, at 579, where Lord Davey said that in *Wi Parata v. Bishop of Wellington*, supra n. 76, “the decision was that the Court has no jurisdiction by scire facias or other proceeding to annul a Crown grant for matter not appearing on the face of it” (*Wi Parata* is the same discredited authority that Brennan J relied on in this context: see supra n. 76). However, Lord Davey, who had already criticised aspects of that decision, went on to say at 579 that “the dicta in the case go beyond what was necessary for the decision”. Moreover, at 580 he expressly declined to decide “whether the native title could be extinguished by the exercise of the prerogative”, as distinguished from the exercise of statutory authority. As Deane and Gaudron JJ themselves pointed out (*Mabo No.2*, supra n. 1, 92), he nonetheless found the following passage from Chapman J's judgment in *The Queen v. Symonds* (1847) [1840-1932] NZPCC 387 (NZSC), at 390, to be "very pertinent": “Whatever may be the opinion of jurists as to the strength or weakness of the native title, it cannot be too solemnly asserted that it is entitled to be respected, that it cannot be extinguished (at least in times of peace) otherwise than by the free consent of the native occupiers” (579). Lord Davey also emphasised that native title could only be extinguished “in accordance with law” (580), and that courts are bound to recognise the existence of that title until so extinguished (578). This directly contradicts Deane and Gaudron JJ's view that native title could be extinguished wrongfully by inconsistent grant. So with all due respect, *Nireaha Tamaki* is not authority for their statement that native title would not avail against an inconsistent grant that was not invalid on its face.
inconsistent with an existing right to the granted land is just as invalid as a grant which is invalid on its face, and can be as readily set aside by scire facias or other action.\(^{162}\)

Deane and Gaudron JJ linked the Crown's power to extinguish native title to their description of that title as a "personal right." They said that this is a limitation on the title flowing from the firmly established rule that native title cannot be alienated outside of the native system of law or custom.\(^{163}\) It can only be surrendered to the Crown, a limitation which "is commonly expressed as a right of pre-emption in the Sovereign."\(^{164}\) Since native title is only a personal right, they said, "it does not constitute a legal or beneficial estate or interest in the actual land".\(^{165}\) As authority, they relied mainly on Attorney-General for Quebec v. Attorney-General for Canada,\(^{166}\) a case decided by the Privy Council in 1921.

In that case, Duff J held that the right of an Indian tribe to land which had been set aside as an Indian reserve under statutory authority in Quebec in 1853 was "a usufructuary right only and a personal right in the sense that it is in its nature inalienable except by surrender to the Crown."\(^{167}\) The Indian title to the reserve was therefore the same as the "personal and usufructuary right" which, according to Lord Watson in St Catherine's Milling and Lumber Company v. The Queen,\(^{168}\) the Indians had to their unsurrendered lands by virtue of the Royal Proclamation of 1763.\(^{169}\) So for the Privy Council, the "personal" description of Indian or native title was just another way of saying that it is inalienable other than by surrender to the Crown.\(^{170}\) This does not mean, as Deane and Gaudron JJ thought, that "it does not constitute a legal or beneficial estate or interest in the actual land."\(^{171}\) On the contrary, in

\(^{162}\) See supra nn. 76-81 and text.

\(^{163}\) Mabo No.2, supra n. 1, 88; compare per Brennan J at 51, 59, Toohey J at 194. For a critical perspective on this rule, see McNeil (1989), supra n. 115, 221-35.

\(^{164}\) Mabo No.2, supra n. 1, 88.

\(^{165}\) ibid., 88-9.

\(^{166}\) [1921] 1 AC 401 (PC).

\(^{167}\) ibid., 408.

\(^{168}\) (1888) 14 App. Cas. 46 (PC), at 54.

\(^{169}\) The Royal Proclamation is printed in RSC. 1985, App. II, No. 1. For a discussion of the complex issue of the relationship between the Royal Proclamation and Indian or native title, see McNeil (1989), supra n. 115, 270-4. Note that Lord Watson also said in St Catherine's that Indian title is "dependent upon the good will of the Sovereign": supra n. 168, 54. Deane and Gaudron JJ examined these words, and concluded that they could not mean that the title was mere permissive occupation that could be lawfully terminated at any time by the Crown: Mabo No.2, supra n. 1, 90-1. They thought "the phrase may be explicable as a reference to past procedural difficulties in enforcing non-contractual rights against the Crown": ibid., 91 (we will return to this issue infra nn. 192-215 and text). But when he uttered those words, Lord Watson was actually interpreting the Royal Proclamation, in particular the provision that the reservation of lands for the Indians was "for the present". His "good will of the Sovereign" dictum is simply inapplicable outside the context of the Proclamation, and should not be used to qualify common law native title in any way: see McNeil (1990), supra n. 115, 200-07. Moreover, it has been held that the Crown does not have the authority to grant lands reserved under the Royal Proclamation without first obtaining a surrender of them from the Indians: see R v. McMaster [1926] Ex. CR 68 (Ex. Ct), at 73. This is in keeping with the terms of the Proclamation itself, which expressly forbid the grant of unsurrendered Indian lands by colonial governors: see discussion in Brian Slattery, The Land Rights of Indigenous Canadian Peoples, Saskatoon, University of Saskatchewan Native Law Centre (1979), 303-10.

\(^{170}\) This was affirmed in Guerin v. The Queen [1984] 2 SCR 335 (SCC), per Dickson J at 382.

\(^{171}\) As additional authority, they relied on R v. Toohey: Ex parte Meneling Station Pty Ltd (1982) 158 CLR 327 (HC), per Mason J (as he then was) at 342. However, on that page of his judgment Mason J was distinguishing between property and personal rights in the context of a grazing licence - he was not referring to native title. Moreover, he said that "[a]lienability is not in all circumstances an essential characteristic of a right of property": ibid. With all due respect, this passage undermines rather than supports Deane and Gaudron JJ's view that native title does not constitute an estate or interest in land, as they based that view on the fact that native title is inalienable other than by surrender to the Crown: Mabo No.2, supra n. 1, 88-9.
the *St Catherine's* case Lord Watson, while referring to Indian or native title as “personal”, decided that it is an “interest” which burdens the Crown’s “present proprietary estate in the land.” Moreover, in its unanimous decision in *Canadian Pacific Limited v. Paul*, the Supreme Court of Canada commented as follows on Lord Watson’s description of Indian title as a “personal and usufructuary right”:

This has at times been interpreted as meaning that Indian title is merely a personal right which cannot be elevated to the status of a proprietary interest so as to compete on an equal footing with other proprietary interests. However, we are of the opinion that the right was characterized as purely personal for the sole purpose of emphasizing its generally inalienable nature; it could not be transferred, sold or surrendered to anyone other than the Crown. That this was so was recognized as early as 1921 in *Attorney-General for Quebec v. Attorney-General for Canada*, [1921] 1 A.C. 401 (P.C.), where Duff J., speaking for the Privy Council, said at p.408 “that the right recognized by the statute is a usufructuary right only and a personal right in the sense that it is in its nature inalienable except by surrender to the Crown.” (Emphasis added.) This feature of inalienability was adopted as a protective measure for the Indian population lest they be persuaded into improvident transactions.  

The *Canadian Pacific* decision made clear that the description of Indian or native title as “personal” in no way detracts from the protection it is entitled to under the common law. That description relates solely to the inalienability of the title, which was itself meant to protect the title, not to render it more vulnerable. It would be farcical if a measure designed to protect the title against “improvident transactions” with settlers somehow exposed it to extinction by Crown grant to the very same people.  

The position in Canada set out by Dickson J (as he then was) in *Guerin v. The Queen* is that Indian or native title does not fit common law conceptions of property, and therefore cannot be accurately described as either a beneficial interest or as a personal or usufructuary right - instead, it is a “sui generis interest”. This is consistent with the approach taken in *Amodu Tijani v. Secretary, Southern Nigeria*, where the Privy Council cautioned:

There is a tendency, operating at times unconsciously, to render [native] title conceptually in terms which are

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172. Supra n. 168, 58. Lord Watson decided that it is an interest in land within the meaning of the *British North America Act*, 30 & 31 Vic., c. 3 (Imp.) (now the *Constitution Act*, 1867), s. 109, which provides that all lands belonging to the original provinces of Canada would continue to belong to them after Confederation, “subject to any Trusts existing in respect thereof, and to any Interest other than that of the Province in the same”. See also *Attorney-General for Quebec v. Attorney-General for Canada*, supra n. 166, 409-10.


174. In *Guerin*, supra n. 170, 376, Dickson J said that the Crown first took on the responsibility of acting as an intermediary between the Indians and private purchasers in the Royal Proclamation of 1763; see also 383. Moreover, we have seen that the Proclamation not only prevented settlers from occupying or purchasing Indian lands - it also forbade colonial governors from granting those lands: see supra n. 169. Indian lands could only be acquired through surrender of the lands to the Crown at a public meeting of the Indians held for that purpose. The “protective measures” referred to in the Canadian Pacific case were thus aimed at both the settlers and the Crown’s officers in North America.

175. Supra n. 170, 382. In *Sparrow v. The Queen* [1990] 1 SCR 1075 (SCC), at 1112, Dickson CJ and La Forest J said in the context of Indian fishing rights: “Courts must be careful ... to avoid the application of traditional common law concepts of property as they develop their understanding of what the reasons for judgment in *Guerin* ... referred to as the ‘sui generis’ nature of aboriginal rights.” See also *Delgamuukw v. British Columbia* (1993) 104 DLR (4th) 470, where the British Columbia Court of Appeal unanimously decided, given the *sui generis* nature of Indian or native title, that it is unnecessary, and even futile, to try to classify it as personal or proprietary: see per Macfarlane J at 510-11, Wallace J at 572-3, Lambert J at 649-50, Hulchon J at 756.
appropriate only to systems which have grown up under English law. But this tendency has to be held in check closely.\footnote{176}{Supra n. 124, 403.}

In fact, Deane and Gaudron JJ adopted this approach themselves.\footnote{177}{Mabo No.2, supra n. 1, 89: "The preferable approach is that adopted in Amudu Tijani and by Dickson J. in the Supreme Court of Canada in Guerin v. The Queen, namely, to recognize the inappropriateness of forcing the native title to conform to traditional common law concepts and to accept it as sui generis or unique" (footnotes omitted).} But it does not follow from this that native title does not constitute a legal or beneficial interest in the land, as they said.\footnote{178}{See Canadian Pacific Limited v. Paul, supra n. 173, 678, where the Supreme Court of Canada said in reference to the Guerin case and other Supreme Court decisions: "The inescapable conclusion from the Court's analysis of Indian title up to this point is that the Indian interest in land is truly sui generis" (my emphasis).} It may not be a common law or equitable interest as such,\footnote{179}{Toohy J in Mabo No.2, supra n. 1, at 206-14.} but it is legal in the sense that it can be enforced in common law courts,\footnote{180}{Deane and Gaudron JJ appear to have relied on the fact that native title does not fit common law categories of property to deny that title protection against Crown grants.\footnote{181}{This is a violation of native title rights “constitute valuable property” for which compensation must be paid in the event of legislative taking. National racial discrimination and extinguishment of native title necessarily involves the Commonwealth in extinguishing native title.\footnote{182}{Notwithstanding their personal nature and their special vulnerability to wrongful extinguishment by the Crown, the rights of occupation or use under common law native title can themselves constitute valuable property.\footnote{183}{If native title rights “constitute valuable property” for which compensation must be paid in the event of legislative taking by the Commonwealth, what is meant by saying they are “personal”, other than that they are inalienable other than by surrender to the Crown? And we have seen that it does not follow from the fact they are inalienable that they do not constitute an interest in land: see supra nn. 170-4 and text; see also Pierce Bell Sales Pty Ltd v. Frazer (1973) 130 CLR 575 (HC), at 584, where Barwick CJ said that a statutory restraint on alienation of lands granted by the Crown does not reduce, or render conditional, the fee simple estate obtained by the grantee. Moreover, rights of property which include rights of possession, use and enjoyment of land must constitute an interest in land. The fact that the rights arise from indigenous laws and customs, and so are unfamiliar to the common law, in no way precludes them from amounting to an interest in land once the common law acknowledges them as legal rights.}}}}

\footnote{176}{Supra n. 124, 403.}

\footnote{177}{Mabo No.2, supra n. 1, 89: "The preferable approach is that adopted in Amudu Tijani and by Dickson J. in the Supreme Court of Canada in Guerin v. The Queen, namely, to recognize the inappropriateness of forcing the native title to conform to traditional common law concepts and to accept it as sui generis or unique" (footnotes omitted).}

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\footnote{178}{See Canadian Pacific Limited v. Paul, supra n. 173, 678, where the Supreme Court of Canada said in reference to the Guerin case and other Supreme Court decisions: "The inescapable conclusion from the Court's analysis of Indian title up to this point is that the Indian interest in land is truly sui generis" (my emphasis).}

\footnote{179}{For an argument that indigenous people could claim a common law fee simple on the basis of occupation of their lands at the time the Crown acquired sovereignty in a settled colony, see McNeil (1989), supra n. 115. This argument was considered by Toohey J in Mabo No.2, supra n. 1, at 206-14.}

\footnote{180}{The declaratory relief that Deane and Gaudron JJ would have granted included declarations that the Crown's radical title "was qualified and reduced by a communal native title of the Murray Islanders to the land of the Islands which was preserved and protected by the common law", and that "the rights under that common law native title are true legal rights which may be enforced and protected by legal action": Mabo No.2, supra n. 1, 119.}

\footnote{181}{In its declaration in Mabo No.2, the High Court declared "that the Meriam people are entitled as against the whole world to possession, occupation, use and enjoyment of the lands of the Murray Islands" (with the possible exception of certain leased and appropriated lands): ibid., 217.}

\footnote{182}{Their judgment contains a number of statements touching on this matter which are difficult to reconcile. For example, compare the following: The rights of an Aboriginal tribe or clan entitled to the benefit of a common law native title are personal only ... The personal rights conferred by common law native title do not constitute an estate or interest in the land itself. (ibid., 110) The personal rights of use and occupation conferred by common law native title are not, however, illusory. They are legal rights which are infringed if they are extinguished, against the wishes of the native title-holders, by inconsistent grant. (110) Our conclusion that rights under common law native title are true legal rights which are recognized and protected by the law would, we think, have the consequence that any legislative extinguishment of those rights [by the Commonwealth] would constitute an expropriation of property, to the benefit of the underlying estate, for the purposes of s. 51(xxx) [of the Constitution]. (111) Notwithstanding their personal nature and their special vulnerability to wrongful extinguishment by the Crown, the rights of occupation or use under common law native title can themselves constitute valuable property. (113) If native title rights “constitute valuable property” for which compensation must be paid in the event of legislative taking by the Commonwealth, what is meant by saying they are “personal”, other than that they are inalienable other than by surrender to the Crown? And we have seen that it does not follow from the fact they are inalienable that they do not constitute an interest in land: see supra nn. 170-4 and text; see also Pierce Bell Sales Pty Ltd v. Frazer (1973) 130 CLR 575 (HC), at 584, where Barwick CJ said that a statutory restraint on alienation of lands granted by the Crown does not reduce, or render conditional, the fee simple estate obtained by the grantee. Moreover, rights of property which include rights of possession, use and enjoyment of land must constitute an interest in land. The fact that the rights arise from indigenous laws and customs, and so are unfamiliar to the common law, in no way precludes them from amounting to an interest in land once the common law acknowledges them as legal rights.}
of fundamental principles which shield all rights against unlawful executive action, and is in direct conflict with the high authority of Attorney-General for the Isle of Man v. Mylchreest.\footnote{See supra nn. 105-10 and text.}

On the issue of appropriation of native title lands by the Crown, Deane and Gaudron JJ said this:

Common law native title could also be effectively extinguished by an inconsistent dealing by the Crown with the land, such as a reservation or dedication for an inconsistent use or purpose, in circumstances where third party rights intervened or where the actual occupation or use of the native title-holders was terminated. In the latter case, an ultimate lack of effective challenge would found either an assumption of acquiescence in the extinguishment of the title or a defence based on laches or some statute of limitations.\footnote{Ibid., 111.}

As in the case of extinguishment by Crown grant, they did not base this power to extinguish by inconsistent dealing on statutory authority.\footnote{See supra nn. 74-110 and text.} They did, however, appear to limit the power to situations where third party rights were created or where native occupation and use were terminated. Moreover, it seems that the native title would only be extinguished in the latter situation if acquiescence could be assumed or the defences of laches or statutory limitation would apply.

Third party rights would generally be created by Crown grant. This manner of extinguishment is therefore subject to the objections examined above in the context of Brennan J’s judgment.\footnote{Mabo No.2, supra n. 1, 104. See also the works of Henry Reynolds, e.g. The Other Side of the Frontier, Ringwood, Victoria, Penguin Books Australia (1982); Frontier, Sydney, Allen & Unwin (1987); Fate of a Free People, Ringwood, Victoria, Penguin Books Australia (1995).} As for Aboriginal acquiescence in the taking of native title lands, how could that be assumed, given the reality of the colonisation of Australia, which Deane and Gaudron JJ described as a “conflagration of oppression and conflict which was ... to spread across the continent to dispossess, degrade and devastate the Aboriginal peoples and leave a national legacy of unutterable shame”?\footnote{Mabo No.2, supra n. 1, 93.} Nor was there any realistic possibility at the time for the Aboriginal peoples to use legal proceedings to resist the dispossession. As Deane and Gaudron JJ said, “there is an element of the absurd about the suggestion that it would have even occurred to the native inhabitants of a new British Colony that they could bring proceedings in a British court against the British Crown to vindicate their rights under a common law of which they would be likely to know nothing.”\footnote{Halsbury’s Laws of England, supra n. 33, vol. 16 (1992), para. 927.} In those circumstances, acquiescence could hardly be found, as it “implies that the person acquiescing is aware of his rights and is in a position to complain of an infringement of them”.\footnote{Ibid., where it is also stated in n. 2 that, “[f]rom the difficulty of concerted action, laches is less readily applied to a class than to an individual”} Moreover, the equitable defence of laches would be unavailable for the same reason, as it depends on implied acquiescence.\footnote{Ibid., where it is also stated in n. 2 that, “[f]rom the difficulty of concerted action, laches is less readily applied to a class than to an individual”}

Statutes of limitation are another matter. If they apply in the context of native title, they could bar actions to recover lands which were wrongfully taken from the indigenous peoples by the Crown. In that case, however, the executive acts of taking would not themselves extinguish the native title. Instead, native title would be
extinguished by adverse possession for the statutory limitation period. In other words, extinguishment would occur through the operation of the statutes, not through any common law power of the Crown. It is questionable, however, whether statutes of limitation even apply to native title. Deane and Gaudron JJ's suggestion that they do is a bare statement, unsupported by authority or legal analysis. This matter is too complex and important to be treated superficially. It requires detailed consideration which unfortunately cannot be undertaken in the present article.191

A further issue arising from Deane and Gaudron JJ's judgment needs to be addressed, namely, Crown immunity from legal action for wrongful extinguishment of native title. Deane and Gaudron JJ said that, although extinguishment of native title by inconsistent grant or dealing would be wrongful,

[that the extent of Crown immunity from curial proceedings was ... such that, no breach of contract being involved, no action would have lain against the Crown to prevent the wrongful act being done or against the Crown or its agents for compensatory damages after it was done. Indeed, until a general remedy was granted by statute against the Crown, the Sovereign's courts would not even entertain the suggestion that the Sovereign would do or had done wrong.]

After this Crown immunity was curtailed by statute, they said,

... the ability of native title-holders to protect and vindicate the personal rights under common law native title significantly increased. If common law native title is wrongfully extinguished by the Crown, the effect of those legislative reforms is that compensatory damages can be recovered provided the proceedings for recovery are instituted within the period allowed by applicable limitations provisions. If the common law native title has not been extinguished, the fact that the rights under it are true legal rights means that they can be vindicated, protected and enforced by proceedings in the ordinary courts.193

So in a situation where the Crown "wrongly denies the existence or the extent of an existing common law native title or threatens to infringe the rights thereunder (e.g. by an inconsistent grant)", appropriate remedies would include declaratory relief, an injunction or the imposition of a constructive trust, depending on the circumstances.194 Where the Crown has already wrongfully infringed rights under native title, damages or

191. In this context, the Native Title Act 1993 has to be considered as well, as it validated past acts (or permitted a law of a State or Territory to validate past acts) that would have been invalid to any extent due to inconsistency with native title ("act" is broadly defined in s. 226(2) of the Act, and includes "the creation, variation, extension, renewal or extinguishment of any interest in relation to land or waters"). For persuasive arguments that statutes of limitation and the equitable defences of laches and acquiescence do not apply to indigenous land claims in Canada, see Joffe and Turpel, supra n. 11, vol. 2, 450-6.

192. Mabo No.2, supra n. 1, 94 (footnotes omitted); see also 100. But note that, while the courts could not judge the Sovereign, the maxim that the King could do no wrong does not excuse royal wrongdoing. Blackstone, supra n. 37, vol. 1, 246, said the maxim

... is not to be understood as if every thing transacted by the government was of course just and lawful, but means only two things. First, that whatever is exceptional in the conduct of public affairs is not to be imputed to the king, nor is he answerable for it personally to his people; for this doctrine would totally destroy that constitutional independence of the crown which is necessary for the balance of power in our free and active, and therefore compounded Constitution. And, secondly, it means that the prerogative of the crown extends not to do any injury; it is created for the benefit of the people, and therefore can not be exerted to their prejudice. (my emphasis)

See also Chitty, supra n. 37, 5; Broom, supra n. 87, 39-40, esp. 40 where Broom, in reference to Crown grants, wrote that, "while the sovereign himself is, in a personal sense, incapable of doing wrong, yet his acts may in themselves be contrary to law, and, on that account, be set aside by the law".

193. Mabo No.2, supra n. 1, 112.

194. Ibid., 112-13. Regarding constructive trusts, see also per Toohey J at 203-04.
constructive trust would be possible remedies.\textsuperscript{195} Deane and Gaudron JJ's remedies for threatened or actual interference with native title after Crown immunity was curtailed merit detailed discussion which cannot be undertaken here.\textsuperscript{196}

We do, however, need to question their conclusion that Crown immunity would have left native titleholders without relief for wrongful interference with their rights prior to the statutory reforms. With all due respect, this conclusion is incorrect.\textsuperscript{197} While legal proceedings could not have been taken directly against the Crown, there is no reason why the remedies of petition of right and \textit{scire facias} would not have been available to native titleholders whose rights had been infringed.\textsuperscript{198}

The usual context for a petition of right is described as follows:

> Petition is all the remedy the subject hath when the king seizeth his land or taketh away his goods from him having no title by order of his laws to do so, in which case the subject for his remedy is driven to sue unto his sovereign lord by way of petition only. \textsuperscript{199}

Because the subject was barred by the royal dignity and immunity from entering upon the King or suing the King in his own courts, a petition of right was the only way to recover possession. In it, the petitioner would have to set out his own title, as well as any title of the King. The matter would then be tried. In the event that the petitioner established a superior title, a judgment would be issued that "the hands of the Crown be removed, and possession restored to the petitioner." \textsuperscript{200}

While Deane and Gaudron JJ did not explain why a petition of right would not be available to native titleholders for wrongful taking of their lands by the Crown, their observation that "no breach of contract" would be involved,\textsuperscript{201} as well as the cases they cited,\textsuperscript{202} suggest that they relied on the limitation that a petition of right would not lie to

\textsuperscript{195} ibid., 113.

\textsuperscript{196} Constructive trusts could be particularly useful for protecting the substance of native title. On their potential use in the context of indigenous land claims in Canada, see Joffe and Turpel. supra n. 11, vol. 2, 456-63. For instances where the Privy Council found that Crown grants of land in Nigeria made the grantees trustees for the customary landholders, see Sakariyawo Oshodi, supra n. 151, at 670; Iyewu Inasa v. Sakariyawo Oshodi (1934) AC 99, at 101.

\textsuperscript{197} For detailed discussion of Crown liability for wrongs to the property of its subjects, see Broom, supra n. 34, 225-44.

\textsuperscript{198} See ibid., 238-9: "If the subject has cause of complaint against the Crown, he must proceed for redress by that pathway which the constitution has laid out for him. . . to obtain the revocation of a grant which injuriously affects him, he should proceed by \textit{scire facias}; for an illegal invasion of the right of property, he should proceed by Petition of Right" (footnotes omitted). See also Calder v. Attorney-General of British Columbia (1973) 34 DLR (3d) 145 (SCC), where the claim of the Nishga Indians for a declaration that their Indian or native title had never been extinguished was dismissed by the majority of the Supreme Court of Canada because the Nishgas had not obtained a fiat from the Lieutenant-Governor of British Columbia to proceed by petition of right: see per Pigeon J at 223-6; Judson J at 168, Hall J (dissenting) at 219-23. There was, however, no suggestion in the judgments that the Nishgas could not have proceeded by petition to have their title declared if they had obtained the requisite fiat.

\textsuperscript{199} Supra n. 79, 72a (spelling modernised). See also Chitty, supra n. 37, 341: "In every case ... in which the subject hath a right against the Crown, and yet no \textit{monstrans de droit} or traverse of office lies, a petition is the birth-right of the subject, and is sustainable at common law, and this not only in the case of real property, but of chattels real or personal" (footnotes omitted). On the distinction between petition of right on the one hand and the remedies of \textit{monstrans de droit} and traverse of office on the other, which need not concern us here, see Staunford at 59b-75b, Chitty at 341-58. See also Blackstone, supra n. 37, vol. 3, 256-7, 260.

\textsuperscript{200} Chitty, supra n. 37, 348.

\textsuperscript{201} See supra n. 192 and text.

\textsuperscript{202} Tobin v. The Queen (1864) 16 CB (NS) 310 (CP), at 353-6; Windsor & Annapolis Railway Co. v. The Queen and the Western Counties Railway Co. (1886) 11 App. Cas. 607 (PC), at 614; Farnell v. Bowman (1887) 12 App. Cas. 643 (PC), at 649, cited in Mabo No 2, supra n. 1, 94 n. 75.
recover damages for tortious acts. This is confirmed by their reference to the pages in Walter Clode's *Law and Practice of Petition of Right* where the following passage appears:

> All the legal injuries which one subject can inflict upon another are contained in two classes, they are either breaches of contract or torts ... The purpose for which this division of injuries has been given is to enable us to point out that no petition of right can be maintained against the Crown for any act of its own or its agents done to a subject which, had the same been done by one subject to another, would have been a tort for which an action could have been maintained ... 203

This passage is somewhat misleading because the main purpose of the petition of right was to redress wrongs in relation to land. Clode himself wrote that the "questions raised by [early] petitions, which were always for restitution of property, were always questions of the title to property" 204 In fact, it was not until the leading case of *Thomas v. R* 205 in 1874 that it was clearly decided that a petition could also be brought for breach of contract. 206 Moreover, Holdsworth pointed out that, while "the main use of the petition of right in the Middle Ages was to gain redress for wrongs which, if the case had been between subject and subject, would have been redressed by some one of the real actions", those actions involved "many wrongs which would now be redressible by an action in tort" 207 He said "it should be remembered that, in the Middle Ages, the law of property covered a far wider field than it covers in modern law; and that the modern distinctions between property, contract, and tort had hardly been arrived at" 208 So although a petition would not lie for "a pure tort", it clearly would lie for a wrong in relation to land that could be framed as a real action, particularly if a subject had been dispossessed by the Crown. 209

Deane and Gaudron JJ, relying on Holdsworth's treatment of petition of right, acknowledged in a footnote "that it may be theoretically arguable that a claim could have been framed as a real action" 210 Assuming that they were referring to a claim by native titleholders who had been dispossessed by a wrongful act of the Crown, it is difficult to understand why they relegated this important point to a footnote, and qualified it with the words "theoretically arguable" Wrongful dispossessions by the Crown, which they admitted native titleholders had suffered, is the classic situation for redress by petition of right. Moreover, we have also seen that, in spite of their description of native title as "personal", Deane and Gaudron JJ said it constituted "valuable property" 211 As the Crown would have infringed the native titleholders' legal rights of property when it dispossessed them, they should have been able to recover possession of their lands by petition of right, even before the statutory reforms extended Crown liability...
to pure torts.\textsuperscript{212}

Where the Crown granted an interest in land which was inconsistent with native title, the titleholders would have the right to have the grant revoked by \textit{scire facias}.\textsuperscript{213} Moreover, in that situation the titleholders could also take action directly against the grantee.\textsuperscript{214} In either case, the grantee would be unable to rely on the immunity of the Crown.\textsuperscript{215}

In summary, Deane and Gaudron JJ's view that native title was susceptible at common law to extinguishment by grant or other inconsistent dealing by the Crown does not stand up to scrutiny. Their main explanations for the vulnerability of native title are that it is "merely personal" and that Crown immunity barred native titleholders from action for wrongful infringement of their rights. But as we have seen, the "personal" description of native title simply means that it is inalienable other than by surrender to the Crown, which does not make it susceptible to executive extinguishment. Furthermore, Crown immunity cannot be used to uphold wrongful interference with native title, as the common law provided effective remedies against executive interference with legal rights.\textsuperscript{216} Were this not so,

\begin{itemize}
  \item Deane and Gaudron JJ may have thought that a petition of right might not have been available to native titleholders because, in their Honours' view, native title does not amount to an estate or interest in land. We have already discussed the problems with that view in some detail, and concluded that native title does amount to an interest in land, even if it is not a common law or equitable estate or interest: see supra nn. 166-184. But in any case, as a legal right of property, it would be protected by petition of right, as this remedy was generally available to protect legal rights in relation to land and other property. See Feather v. The Queen (1665) 6 B & S 257 (KB), at 294, quoted with approval by Lord Watson in Windsor and Annapolis Railway Co. v. The Queen and the Western Counties Railway Co., supra n. 202, 614-15: "the only cases in which the petition of right is open to the subject are, where the land, or goods or money of a subject have found their way into the possession of the Crown, and the purpose of the petition is to obtain restitution, or, if restitution cannot be given, compensation in money, or where the claim arises out of a contract, as for goods supplied to the Crown or to the public service". Holdsworth, supra n. 51, vol. 9 (3rd ed., 1944), 21-2, concluded his discussion of the evolution of the petition of right from the fourteenth to the middle of the seventeenth century with these observations:
    \begin{quote}
    No doubt the chief use made of the petition of right in the Middle Ages was the redress of grievances which, as between subject and subject, would have been redressed by some one of the real actions ... But it was never so limited. It was never forgotten that such a petition was a petition of right, that is a petition on which a subject was entitled to succeed if he could show a good legal claim. But obviously, the circumstances under which a subject can show a good legal claim change with changes in the law, so that, if this idea is adhered to, it will give an elasticity to the competence of a petition of right, which will make it a useful remedy at all periods in the history of the law.
    \end{quote}
  Moreover, the courts later adopted just this kind of flexible approach in extending the petition of right to contracts: \textit{ibid.}, 29-45. The same elasticity should apply to make the remedy available in the Crown's overseas dominions to redress infringements of legal rights to land by the Crown, even if those rights were unknown to the common law of England.
  \item See supra nn. 77-8, 88-91, and text.
  \item See supra nn. 78-9 and text.
  \item See Chitty, supra n. 37, 342-3, quoting from Staunford, supra n. 79, at 74a, where it is explained that if the Crown without right seizes a subject's land, the subject cannot enter, but can only petition the Crown to rectify the wrong. However, if the Crown grants the land, the subject can either retake possession by entry or bring a legal action against the grantee for recovery of the land. In Staunford's words, this is because
    \begin{quote}
    ... when his highness seizeth by his absolute power contrary to the order of his laws, although I have no remedy against him for it but by petition for the dignity's sake of his person, yet when that cause is removed and a common person hath the possession, then is my assize renewed, for now the patentee enthrith by his own wrong and intrusion, and not by any title that the king giveth him for the king had never title nor possession to [give] in that case.
    \end{quote}
    (spelling modernised)
  \item See Broom, supra n. 34, at 238-9: "The Crown submits, as is abundantly proved by the cases already cited, to have its prerogatives openly discussed and investigated in courts of justice, and allows a remedy against itself for any infringement of the subject's right, provided such remedy is sought where it can be had."
\end{itemize}
then prior to the provision of statutory remedies the courts would have been powerless to protect the rights of subjects against arbitrary executive action. Deane and Gaudron JJ's abdication of judicial authority in this context undermines the common law and denies justice to indigenous peoples in Australia.

(3) Toohey J

Unlike Brennan, Deane and Gaudron JJ, Toohey J apparently did not find it necessary to decide whether the Crown at common law could extinguish traditional title (as he called native title) by grant or appropriation.217 However, his judgment strongly suggests that this could not be done. In the absence of clear and plain legislative authority,218 he was critical of the proposition that traditional or native title could be extinguished by unilateral executive act without the consent of the native titleholders. In his view, the standard rationales for this proposition are unpersuasive, and do not stand up to analysis.

Toohey J examined three of these rationales. First, with respect to the suggestion that an executive power to extinguish traditional title unilaterally “may be a concomitant of an assertion of sovereignty”,219 he commented as follows:

But to say that, with the acquisition of sovereignty, the Crown has the power to extinguish traditional title does not necessarily mean that such a power is any different from that with respect to other interests in land. The Crown has the power, subject to constitutional, statutory or common law restrictions, to terminate any subject's title to property by compulsorily acquiring it.220

This passage reveals that Toohey J did not see any justification for treating traditional title differently from other land titles in this respect. Since the Crown has general statutory power compulsorily to acquire land and thereby extinguish titles,221 why should the common law provide an extraordinary power of extinguishment where traditional title is concerned? Where statutory provisions for compulsory acquisition of land are in place, the Crown cannot disregard those provisions and appropriate land through the exercise of prerogative power. As Lord Parmoor said in Attorney-General v. De Keyser’s Royal Hotel,

[1]the constitutional principle is that when the power of the Executive to interfere with the property or liberty of subjects has been placed under Parliamentary control, and directly regulated by statute, the Executive no longer derives its authority from the Royal Prerogative of the Crown but from Parliament, and that in exercising such authority the Executive is bound to observe the restrictions which Parliament has imposed in favour of the subject.222

217. Mabo No.2, supra n. 1, 202: "if it [traditional title] is extinguishable, then the existence of the power is also a matter of law, independent of legislation or the Crown's action" See also 203: "if the Crown in right of Queensland has the power to alienate land the subject of the Meriam people's traditional rights and interests and the result of that alienation is the loss of traditional title, and if the Meriam people's power to deal with their title is restricted in so far as it is inalienable, except to the Crown, then this power and corresponding vulnerability give rise to a fiduciary obligation on the part of the Crown" By his use of the word "if" in this context, Toohey J appears to have left the issue open.

218. See ibid., 196, 205. Note that the plaintiffs accepted that native title could be extinguished by, or pursuant to, clear and plain legislation: per AR Castan QC in argument at 15, per Toohey J at 192-3, 195. See discussion of this issue supra nn. 12-32 and text.

219. Ibid., 193 (footnote omitted).

220. Ibid., 193-4 (footnote omitted).

221. See supra nn. 58-66 and text.

222. Supra n. 19, 575; see also per Lord Atkinson at 539-40, Lord Moulton at 554, Lord Sumner at 561-2. In that case, the House of Lords was considering the prerogative power of the Crown to take private property in time of war for the defence of the realm, which appears to be the only context in which such a power to interfere with property rights generally existed at common law: see supra nn. 59-60 and text.
A second rationale, in Toohey J's words,

... appears to be that it is part of British colonial policy to protect the interests of indigenous inhabitants; that the Crown's power is the corollary of the general inalienability of title, which itself constituted a means of protecting aboriginal people from exploitation by settlers.223

On this, he observed:

That traditional title is generally inalienable may itself be open to debate. But, in any event, a principle of protection is hardly a basis for a unilateral power in the Crown, exercisable without consent. Moreover, inalienability of the title says nothing of the Crown's power or the nature of the title. Rather, it describes rights, or restrictions on rights, of settlers or other potential purchasers.224

These observations support our earlier conclusion that one cannot utilise a protective limitation on alienation to give the Crown the power to extinguish the very rights that the limitation was designed to protect.225

Finally, Toohey J addressed the rationale that the vulnerability of traditional title to executive extinguishment arises "from characterization of the title as 'a personal and usufructuary right' as opposed to a proprietary right" 226 He reiterated Viscount Haldane's caution against trying "to render [native] title conceptually in terms which are appropriate only to systems which have grown up under English law" 227 Since "the specific nature of such a title can be understood only by reference to the traditional system of rules", he said, "[a]n inquiry as to whether it is 'personal' or 'proprietary' ultimately is fruitless and certainly is unnecessarily complex".228 So in his opinion, "a conclusion that traditional title is in its nature 'personal' or 'proprietary' will not determine the power of the Crown to extinguish the title unilaterally" 229 Toohey J thus rejected Deane and Gaudron JJ's primary justification for the Crown's power of extinguishment, namely that native title is merely a personal right.

After levelling these criticisms at rationales for this power of extinguishment, Toohey J added a few words of caution:

Where there has been an alienation of land by the Crown inimical to the continuance of traditional title, any remedy against the Crown may have been lost by the operation of limitation statutes. And nothing in this judgment should be taken to suggest that the titles of those to whom land has been alienated by the Crown may now be disturbed.230

He concluded, however, that except in the context of a couple of leases which had been granted on the Murray Islands, "that is not a matter the Court was asked to consider" 231

223. Mabo No.2, supra n. 1, 194 (footnote omitted).
224. Ibid. (footnotes omitted).
225. See supra nn. 167-8 and text.
226. Mabo No.2, supra n. 1, 194 (footnote omitted).
227. Ibid., 195, quoting from Amodu Tijani v. Secretary, Southern Nigeria, supra n. 124, 403.
228. Ibid. As we have seen, all the British Columbia Court of Appeal judges in Delgamuukw v. British Columbia, supra n. 175, were of the same view.
229. Mabo No.2, supra n. 1, 195.
230. Ibid., 196.
231. Ibid.
So while avoiding final answers in this regard, Toohey J clearly had conflicting concerns. He was unconvinced by his colleagues' explanations for a unilateral executive power of extinguishment, and yet he was unwilling to undermine private titles to land derived from Crown grants. As a result, his position on the effect of inconsistent Crown grants on traditional or native title is uncertain. In the absence of clear and plain statutory authority to extinguish native title by grant, he apparently concluded that inconsistent grants would be wrongful. That conclusion could lead to various possible consequences: (1) an inconsistent grant would be valid, causing extinguishment of the traditional title, but resulting in Crown liability to pay compensation for the wrongful act; (2) the grant would be initially valid, but revocable by scire facias at the request of the native titleholders, in which event their title would be restored; or (3) the grant would be null and void from the outset, so the grantee's entry would be wrongful. Although Toohey J said his judgment "should not be taken to suggest that the titles of those to whom land has been alienated by the Crown may now be disturbed", he did not explain whether that is because the grants were initially valid (though wrongful), or because they have since become unchallengeable due to statutes...
of limitation or other cause.

We have already presented ample common law authority for our conclusion that, in the absence of unambiguous statutory provisions conferring the requisite power on the Executive (which none of the judges in Mabo No.2 found), native title could not be extinguished by inconsistent grant. As the Crown could not give what it did not have, grants would be null and void to the extent that they were inconsistent with that title. Grantees who entered under an inconsistent grant would be trespassers. The question which then arises is whether grantees who took exclusive possession of the lands granted to them could rely on statutes of limitation against the native titleholders who had been dispossessed. As stated above, this important question is too complex to be answered in the space of this article.

III. Racial Discrimination and the Mabo No.2 Decision

We have seen that the majority in Mabo No.2 decided that native title could be extinguished by unilateral executive action without any legal obligation to pay compensation. We have examined the explanations given for that decision, and found them to be wanting. Moreover, we have seen that the decision violates fundamental common law principles and conflicts with caselaw of high authority. Clear and plain statutory authority apart, the Crown simply does not have the power to extinguish legal rights to land, except for defence purposes in time of war, in which case compensation must be paid.239 Were the law otherwise, private rights would be exposed to arbitrary executive action. The Crown would be able to commit what would amount to acts of state against its own subjects, and the rule of law would cease to be effective to protect property rights.240

While these fundamental principles, which have been well established in the common law since at least the seventeenth century, are clearly part of Australian law,241 the majority in Mabo No.2 chose not to apply them to the Aborigines and Torres Strait Islanders. In so doing, the Court treated the indigenous peoples differently from other Australians. Where indigenous land rights are concerned, the Court created an exception to the rule that, statutory authority and wartime conditions apart, the Crown cannot derogate from existing rights by inconsistent grant or appropriation. As the decision of the High Court itself in Mabo No.1 reveals,242 such discrimination is racially based.

Mabo No.1 involved a matter which was preliminary to the principal decision in Mabo No.2, namely the validity of the Queensland Coast Islands Declaratory Act 1985 (Qld), which had been enacted to forestall the legal proceedings. The Act declared in section 3 that, upon their annexation to Queensland, the Torres Strait

239. See Burmah Oil Co. v. Lord Advocate, supra n. 59, esp. per Lord Reid at 102: “even at the zenith of the royal prerogative, no one thought that there was any general rule that the prerogative could be exercised, even in times of war or imminent danger, by taking property required for defence without making any payment for it”. The contrast between the Burmah Oil case, where the House of Lords decided that Scottish oil companies were entitled to compensation for the taking and destruction by the Crown of their installations in Burma that were about to fall into Japanese hands during World War II, and the majority decision in Mabo No.2 that no compensation was payable for extinguishment of native title by inconsistent grant - which could never be justified on the grounds of defence - is both striking and disturbing.

240. See Mabo No.2, supra n. 1, per Toohey J at 184: “seizure of private property by the Crown in a settled colony after annexation has occurred would amount to an illegitimate act of state against British subjects since in a settled colony, where English law applies, there is no power in the Crown to make laws, except pursuant to statute. Emergency powers aside, the common law required legislative authority for compulsory acquisition of property.”

241. English common law principles, including constitutional principles, were generally received in Australia at the time it became a British colony: see Halsbury’s Laws of Australia, Sydney, Butterworths, vol. 5 (1993), para. 90-1, 90-5. Regarding protection of property rights, see Minister of State for the Army v. Dalziel, supra n. 137; Australian Communist Party v. The Commonwealth, supra n. 48, per Williams J at 230-1; Clunies-Ross v. The Commonwealth, supra n. 48.

242. Supra n. 18.
Islands "were vested in the Crown in right of Queensland freed from all other rights, and became waste lands of the Crown." As we have seen, the High Court decided that the Act was invalid in so far as it purported to extinguish the land rights of the Islanders without compensation. This decision was based on the majority's conclusion that the Act was inconsistent with the *Racial Discrimination Act* 1975 (Cth), and was therefore invalid due to section 109 of the *Constitution*.

The leading judgment in *Mabo No. 1* was written by Brennan, Toohey and Gaudron JJ. They relied on the following provisions of the *Racial Discrimination Act*:

10. (1) If, by reason of, or of a provision of, a law of the Commonwealth or of a State or Territory, persons of a particular race, colour or national or ethnic origin do not enjoy a right that is enjoyed by persons of another race, colour or national or ethnic origin, or enjoy a right to a more limited extent than persons of another race, colour or national or ethnic origin, then, notwithstanding anything in that law, persons of the first-mentioned race, colour or national or ethnic origin shall, by force of this section, enjoy that right to the same extent as persons of that other race, colour or national or ethnic origin.

(2) A reference in subsection (1) to a right includes a reference to a right of a kind referred to in Article 5 of the Convention.

Relying on subsection (2), which refers to the International Convention on the Elimination of All Forms of Racial Discrimination, they concluded that the "right" referred to in subsection (1) is not necessarily a legal right. It is a human right, and includes the following rights which are expressly mentioned in Article 5 of the Convention:

5. (d)(v) The right to own property alone as well as in association with others;
   (vi) The right to inherit.

Brennan, Toohey and Gaudron JJ then framed the issue before them in the following terms:

The question which s.10 poses in the present case is whether, under our municipal law, the Meriam people enjoy the human right to own and inherit property - a right which includes an immunity from arbitrary deprivation of property - to a more limited extent than other members of the community.

They found that the effect of the *Queensland Coast Islands Declaratory Act* 1985 was to curtail the rights of the Meriam people to own and inherit property so that their enjoyment of those rights was indeed more limited than the enjoyment of property rights by persons of other races, colours or national or ethnic origins. They expressed it this way:

By extinguishing the traditional legal rights characteristically vested in the Meriam people, the 1985 Act abrogated the immunity of the Meriam peoples from arbitrary deprivation of their legal rights in and over the Murray Islands.

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243. *Supra* nn. 18, 21-4, and text.
244. Deane J wrote a concurring judgment, while Mason CJ, Wilson and Dawson JJ dissented.
245. *Mabo No. 1*, *supra* n. 18, 216; see also per Deane J at 229.
246. *International Convention on the Elimination of All Forms of Racial Discrimination*, as quoted *ibid.*, 216. They also referred to the *Universal Declaration of Human Rights* 1948, Art. 17, which they quoted as follows at 217:
   1. Everyone has the right to own property alone as well as in association with others.
   2. No one shall be arbitrarily deprived of his property.
247. *Mabo No. 1*, *supra* n. 18, 217. Deane J agreed at 229-30 that the right not to be arbitrarily dispossessed of property is implicit in the rights to own and inherit property.
The Act thus impaired their human rights while leaving unimpaired the corresponding human rights of those whose rights in and over the Murray Islands did not take their origin from the laws and customs of the Meriam people.  

Brennan, Toohey and Gaudron JJ concluded from this that the 1985 Act was invalid because it was inconsistent with section 10(1) of the Racial Discrimination Act, which “clothes the holders of traditional native title who are of the native ethnic group with the same immunity from legislative interference with their human right to own and inherit property as it clothes other persons in the community.”

The majority decision in Mabo No. 1 clearly shows that laws which make native title more liable than other land titles to extinguishment are racially discriminatory. Moreover, this discrimination cannot be justified on the basis that the source of native title is different from that of other land titles. In Mabo No. 1, Brennan, Toohey and Gaudron JJ distinguished between the traditional land rights of the Meriam people based on their laws and customs, and land rights granted pursuant to Crown lands legislation, and then said this:

However, it is not the source or history of legal rights which is material but their existence. It is the arbitrary deprivation of an existing legal right which constitutes an impairment of the human rights of a person in whom the existing legal right is vested. Leaving aside the 1985 Act [the Queensland Coast Islands Declaratory Act], the general law leaves unimpaired the immunity of each person in whom any legal right in and over the Murray Islands is vested from arbitrary deprivation of that person's legal right. The relevant human right is immunity from arbitrary deprivation of legal rights in and over the Murray Islands.

Applying these observations to the decision in Mabo No. 2 that native title can be extinguished by the Crown by inconsistent grant or appropriation, the rules of extinguishment propounded by the majority appear to violate the human right of the indigenous peoples in Australia not to be arbitrarily deprived of their legal rights to land. This is racially discriminatory, as the interests in land of other racial groups in Australia cannot be extinguished in these ways. This is a situation, in the words of section 10 of the Racial Discrimination Act, where “persons of a particular race, colour or national or ethnic origin do not enjoy a right that is enjoyed by persons of another race, colour or national or ethnic origin, or enjoy a right to a more limited extent.”

In its recent decision in the Western Australia case, the High Court recognised the racially discriminatory

248. Ibid., 218. See also 215: “The 1985 Act thus extinguishes all legal rights which take their origin from native law and custom while confirming all legal rights which take their origin from the relevant statutory law of Queensland, namely, Crown lands legislation.” Deane J expressed the same point at 231: “the operation and effect of the Act is ... to distinguish between proprietary rights and interests to and in the islands according to whether they are ultimately founded on pre-annexation traditional law and custom or post-annexation European law. It discriminates against the former by singling them out for impairment or extinction while leaving the latter unaffected or enhanced.”

249. Ibid., 218; see also per Deane J at 231-3.

250. In his concurring judgment, ibid., 231-2, Deane J put it this way: The practical operation and effect of the [1985] Act ... are to single out the Torres Strait Islanders (including the Meriam people) for discriminatory treatment in relation to traditional proprietary rights and interests to and in their homelands. The confiscation or extinction of such rights and interests without any compensation or any procedure for ascertaining or assessing the existence and extent of the claims of particular individuals is a denial of the entitlements to ownership and inheritance of property, including the implicit immunity from arbitrary dispossession, which are “rights” for the purposes of s.10(1) of the Commonwealth Act. That denial of rights is confined to the Torres Strait Islanders. It does not extend to persons of “another race, colour or national or ethnic origin”

251. Ibid., 218.

nature of the rules of extinguishment laid down in Mabo No.2. In their judgment, Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ said this:

At common law ... native title can be extinguished or impaired by a valid exercise of sovereign power inconsistent with the continued enjoyment or unimpaired enjoyment of native title. But the Racial Discrimination Act is superimposed on the common law and it enhances the enjoyment of those human rights [to own and inherit property] which affect native title so that Aboriginal holders are secure in the possession and enjoyment of native title to the same extent as the holders of other forms of title are secure in the possession and enjoyment of those titles.  

The Racial Discrimination Act therefore had the effect of enhancing the human rights of the indigenous peoples in Australia to own and inherit property so that native title would be protected to the same extent as other titles. So the “common law” rules of executive extinguishment stated by the majority in Mabo No.2 must violate the Act, and in that sense they are racially discriminatory. While this was already apparent from the combined judgments in Mabo No.1 and Mabo No.2, the Western Australia decision made the discrimination explicit. But as we have seen, the overwhelming authority of the common law is inconsistent with the High Court’s rules of executive extinguishment. The common law prior to Mabo No.2 does not support the proposition that native title could be extinguished by the Executive by inconsistent Crown grant or appropriation. That proposition violates incontestable and long-standing constitutional principles. Its source is none other than the Mabo No.2 decision itself.

IV. Conclusions

At the beginning of this article, we saw that the High Court explicitly rejected the application of doctrines, such as that of terra nullius, which involve racial discrimination. In so far as the existence of native title is concerned, Brennan J refused to follow earlier decisions, including the Gove Land Rights case, whose effect was to “destroy the equality of all Australian citizens before the law”. Applying this laudatory standard of racial equality, the majority of the Court chose instead to follow extensive authority from other common law jurisdictions in reaching its decision that the land rights of the Aborigines and Torres Strait Islanders continued after the colonisation of Australia by Britain. Yet when it came to the matter of extinguishment, the majority ignored the overwhelming weight of authority in favour of native titleholders and created rules of extinguishment which are racially discriminatory and which do destroy the equality of the indigenous peoples before Australian law. Can any explanation be found for these obvious inconsistencies in the High Court’s decision?

In my opinion, the explanation is that the Court adopted a pragmatic rather than a principled approach to extinguishment. Brennan J, in what is effectively the majority judgment, gave virtually no legal authority for his rules of extinguishment. This lacuna is all the more remarkable when one considers the enormous

253. Supra n. 7, 25 (footnote omitted).
254. Mabo No.2, supra n. 1, 58.
255. The majority’s rules of extinguishment are incompatible with the principle stated by Brennan J that, upon acquisition of Australia by the Crown, the indigenous people became British subjects and were “equally entitled”, along with other subjects, to the protection of the common law: ibid., 38.
256. Richard Bartlett has made the same point: see Bartlett, supra n. 25, 295.
257. In this respect, there is a striking difference between the Court’s analysis of the issue of the existence of native title after British colonisation of Australia, and its treatment of the issue of extinguishment of that title by executive act. Some commentators have suggested that the Court’s decision on the existence of native title was injudicious and politically motivated: e.g. see SEK Hulme, “Aspects of the High Court’s Handling of Mabo” (1993) No. 87 Victorian Bar News 29; Gabriel A Moens, “Mabo and Political Policy-Making by the High Court”, in Stephenson and Ratnapala, supra n. 86, 48; LJM Cooray, “The High Court in Mabo: Legalist or l’égotiste”, in Murray Goot and Tim Rowse (eds), Make Us a Better Offer: The Politics of Mabo, Leichhardt, New South Wales, Pluto Press Australia (1994), 82. But in fact the Court reached its decision on the existence of native title after lengthy discussion and careful consideration of the legal issues, and
implications of this aspect of his decision. By deciding that, subject to the Racial Discrimination Act, native title could be extinguished by the Executive by inconsistent grant or appropriation, Brennan J legalised the dispossession of the indigenous peoples by validating the taking of their lands by the Crown, and upheld titles derived from Crown grants. In this way, he limited native title to lands that had not been legalised the dispossession of the indigenous peoples native title could be extinguished implications of this aspect of his decision.

261. One would expect that the arguments against a departure from legal principles and precedents in favour of other kinds of considerations would be all the more compelling when, as in Mabo No.2, the doctrines propounded to accommodate those considerations are racially discriminatory. There is a further reason why the decision in Mabo No.2 should not be regarded as the last word on the issue of executive extinguishment: On the facts of the case, this issue was only relevant to a few parcels of

examination of a large number of authorities from many different jurisdictions; see Ron Castan and Bryan Keon-Cohen (counsel in both Mabo cases), "Mabo and the High Court: A Reply to S.E.K. Hulme, Q.C." (1993) No. 87 Victorian Bar News 47. As others have pointed out, on that issue the High Court simply brought Australia into line with the overwhelming weight of authority in the rest of the common law world; see Michael Kirby, "In Defence of Mabo", in Goot and Rowe, 67, at 77; Nettheim, supra n. 259; Richard Bartlett, "Mabo: Another Triumph for the Common Law", in Essays on the Mabo Decision, supra n. 10, 58; Barbara Hocking, "Aboriginal Law Does Now Run in Australia", ibid., 67.

258. See supra n. 32 and discussion at nn. 141-4, 149-52. Compare Burma Oil Co. v. Lord Advocate, supra n. 59, discussed supra n. 239. See also Minister of State for the Army v. Dalziel, supra n. 137.

259. Recall, however, that they did not exclude the possibility of compensation for native title lands which the Crown appropriated but did not grant: see supra nn. 150-2 and text.

260. Supra n. 48, 204, per Gibbs CJ, Mason, Wilson, Brennan, Deane and Dawson JJ. 261. Avoidance of racial discrimination is not just a matter of public policy in Australia. As we have seen, it is also mandated by the International Convention on the Elimination of All Forms of Racial Discrimination, which Australia has ratified. Moreover, the international law norms expressed in that Convention have been implemented in Australian law by the Racial Discrimination Act 1975 (Cth): see Mabo No.1. supra n. 18; McIntyre, supra n. 252, esp. 58-62; Garth Nettheim, "Judicial Revolution or Cautionous Correction? Mabo v. Queensland" (1993) 16 University of New South Wales Law Journal 1, at 16-18; idem, "Native Title and International Law", in MA Stephenson (ed.), Mabo: The Native Title Legislation, St Lucia, Queensland, University of Queensland Press (1995). See also Barbara Hocking, "Human Rights and Racial Discrimination After the Mabo Cases: No More Racist Theft?", in Essays on the Mabo Decision, supra n. 10, 178. Recall as well that the High Court acknowledged the racially-discriminatory nature of the executive extinguishment rules in the Western Australia case: see supra n. 253 and text.

262. For an indication that the issue is not settled, see the Waanyi case, supra n. 111, involving extinguishment of native title by the grant of a pastoral lease, where both Hill J (at 68, with whom Jenkinson J agreed at 25) and Lee J (dissenting, at 32) regarded the High Court's treatment of the issue of extinguishment, at least in the context of grants of leasehold interests, as obiter dicta.
land on the Murray Islands which had been either leased or appropriated by the Crown. As the Meriam people were still in possession of most of the lands on the Islands, their main concern was to establish the existence of their native title generally rather than to contest titles that may have been acquired by inconsistent Crown grant or appropriation. This is confirmed by the fact that counsel for the plaintiffs were willing to concede that, if made pursuant to statutory authority to grant Crown lands, “explicit grants in a manner inconsistent with the continuance of native title will extinguish it” 263 This concession was apparently made on the supposition that the Court might find (which ultimately it did not) that Crown lands legislation in Queensland effectively conferred authority on the Executive to extinguish native title by inconsistent grant. 264 But in any case, the point is that executive extinguishment was not a major concern for the plaintiffs in Mabo No.2, and so there was no reason for their counsel to argue generally against it. 265 As a result, in the context of this issue virtually none of the authorities referred to in this article were mentioned in the reported arguments of counsel or in the judgments.

In light of the lack of discussion of relevant authorities in Mabo No.2, the decision on executive extinguishment can be regarded as having been made per incuriam. 266 The High Court will no doubt have an opportunity to reconsider its decision on this matter in a case where the issues are fully argued. This is all the more appropriate because, unlike the Torres Strait Islanders, the Aboriginal peoples of mainland Australia have been dispossessed of most of their lands by inconsistent Crown grant or appropriation. These peoples will presumably seek to contest the legality of this dispossession in court by presenting the overwhelming authority against it, and by contending that their arguments should not be foreclosed by an earlier case where they were not represented and where virtually none of the relevant precedents were examined. Basic principles of justice require nothing less.

263. Mabo No.2, supra n. 1, 10, per AR Castan QC in argument (footnote omitted). Castan QC added: “Crown lands legislation which confers a power to make grants which are inconsistent with the continuance of the claimed interests does not affect the interests until the power is exercised in an inconsistent manner.” See also at 15, where he said in reply to arguments by the defendant: “Subject to s.109 of the Constitution and the question of compensation, it is accepted that native title can be extinguished by clear and plain legislation or by executive act taken under such legislation.”

264. See discussion of this issue supra nn. 129-40 and text.

265. This has been confirmed in a personal communication to me by Greg McIntyre, counsel for Eddie Mabo. Arguments were nonetheless made against the effectiveness of particular leases to extinguish the native title of the Meriam people: see Mabo No.2, supra n. 1, per Brennan J at 71-3. On these leases, see also per Deane and Gaudron JJ at 116-18, Toohey J at 196-7. For discussion, see Pearson, supra n. 86, 86-7.

266. The per incuriam doctrine can be invoked where a court inadvertently overlooked an applicable statute, judicial authority or legal principle. In The Queen v. Hughes, supra n. 77, the Privy Council declined to follow its own decision in The Queen v. Clarke (1851) 7 Moz. PC 77, on the availability of the remedy of scire facias to revoke a grant which was not a matter of record, because no argument or discussion had been addressed to the issue in the earlier case. Similarly, in Lancaster Motor Co. (London) v. Bremith Ltd [1941] 1 KB 675, the Court of Appeal rejected its earlier decision in Gerard v. Worth of Paris Ltd [1936] 2 All ER 905 because, in the words of Sir Wifrid Greene MR at 678,

[i]t was delivered without argument, without reference to the crucial words of the rule [of the Supreme Court], and without any citation of authority. Accordingly, I do not propose to follow these observations [of Slessor LJ in Gerard, even though they were necessary for the decision], because it seems to me that they are wrong in principle and are not justified when the language of the rule and the ordinary principles which govern the relationship of banker and customer are considered.

See also Young v. Bristol Aeroplane Co. [1974] 1 KB 719 (CA), at 728-30. For a list of authorities on the applicability of the per incuriam doctrine, see Halsbury's Laws of England, supra n. 33, vol. 26 (1979), para. 578 nn. 9-16. In Mabo No.2, the Court overlooked or ignored relevant statutes (e.g. Magna Carta, supra n. 48), judicial authority (e.g. Attorney-General for the Isle of Man v. Mylchreest, supra n. 105), and legal principle (e.g. constitutional principles against executive taking of the property of British subjects without unequivocal statutory authority).